No._____

In the Supreme Court of the United States

October Term, 2017

JOHN WILLIAM KING,
Petitioner,
v.
LORIE DAVIS , Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

Once again, this Court is asked to correct the United States Court of Appeals for the Fifth Circuit's unique and idiosyncratic method of determining when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus. *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003)*; Buck v. Davis,* 137 S. Ct. 759 (2017). Once again, due to a continued mis-application of this Court's clear guidelines, unduly restrictive standards have been used. These standards pre-judge the merits and require too high a threshold for assessing whether reasonable judges might disagree. And once again, if left standing, the Fifth Circuit's decision in this case will perpetuate the practices of a Circuit that continues to apply too restrictive a filter to its consideration of capital habeas corpus cases— despite repeated guidance from this Court.

This case therefore presents the following questions:

Did the United States Court of Appeals for the Fifth Circuit impose an improper and unduly burdensome Certificate of Appealability (COA) standard that contravenes this Court's precedent?

Did the Fifth Circuit improperly justify its denial of a COA on the three issues presented herein based on its adjudication of the actual merits, instead of limiting its inquiry to a threshold inquiry into the underlying merits and deciding whether the issues were debatable?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, John William King, was the Petitioner before the United States District Court for the Eastern District of Texas, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit. Mr. King is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The Director and her predecessors were the Respondents before the United States District Court for the Eastern District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit.

Mr. King asks that the Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

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PETITION FOR WRIT OF CERTIORARI

John William King respectfully petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On February 22, 2018, the United States Court of Appeals for the Fifth Circuit issued an Opinion denying relief on King's claim of ineffective assistance of trial counsel ("IATC"). This Opinion, reported as *King v. Davis*, 883 F.3d 577 (5th Cir. 2018) is attached as Appendix A. The docket entry of the denial of a petition for panel rehearing on March 23, 2018 is attached at the end of Appendix A. The opinion of the Fifth Circuit granting a certificate of appealability ("COA") on the claim that trial counsel were ineffective in presenting Mr. King's case for actual innocence, but denying a COA on the three issues presented herein, *King v. Davis*, 703 F. App'x 320 (5th Cir. 2017) (*per curiam*), is attached as Appendix B. The unpublished decision of the

federal district court Mr. King sought to appeal, *King v. Director, TDCJ*, 2016 WL 3467097 (E.D. Tex., June 23, 2016), denying Mr. King's petition for writ of habeas corpus and a COA, is attached as Appendix C.

STATEMENT OF JURISDICTION

The district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 2253, the Fifth Circuit Court of Appeals had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability. This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1) over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The questions also implicate the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Procedural History.

Mr. King is currently unlawfully incarcerated by the Texas Department of Criminal Justice, Institutional Division, on death row at the Polunsky Unit in Livingston, Texas. King was indicted for capital murder in violation of TEX. PENAL CODE ANN. §19.03(a)(2) (Vernon Supp. 1986) on October 30, 1998. [USCA5.684].[1] He was convicted of capital murder [USCA5.686] and sentenced to death on February 25, 1999, in the 1st Judicial District Court of Jasper County, Cause No. 8869, Judge Joe Bob Golden presiding. [USCA5.687-691]. On direct appeal, the Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence on October 18, 2000. *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000). [USCA5.693-705].

Attorney John Heath was appointed to represent King in his state writ application and it was filed on July 5, 2000. [USCA5.748-774]. King then filed with the trial court numerous letters, motions and requests advising them of the inadequacy of his representation. [USCA5.802-842]. However, the trial court did nothing and simply adopted the State's proposed findings and conclusions without altering a comma. [USCA5.776-799]. This application was denied by the TCCA on June 20, 2001. *Ex Parte John William King,* No. 49,391-01 (unpublished opinion). [USCA5.707-708]. No evidentiary hearing was held in the state post-conviction proceedings.

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[1] The federal record on appeal in the Fifth Circuit Court of Appeals is referred to as "USCA5.[page]." The trial transcript (the "Reporter's Record") is referred to as "[volume number] RR [page]."

Mr. King's federal habeas petition was filed on September 9, 2002. [USCA5.241-675]. On March 29, 2006, the district court granted in part the State's motion for summary judgment, as to Claims I(i), III, XI, and XII(a) [USCA5.4098-4116] and also granted King's motion to hold the case in abeyance while he returned to state court to exhaust his remaining claims. [USCA5.4117-4118].

King timely filed his state subsequent petition on June 22, 2006. [USCA5.11260-11622]. Without explanation, the trial court denied two motions for King to proceed *in forma pauperis* and for appointment of counsel. [USCA5.11687-11700, 11704-11717, 11729]. No hearing was held on this application. After a delay of six years, the trial court forwarded the petition to the TCCA on June 25, 2012 and on September 12, 2012, that Court dismissed it, "without considering the merits of the claims." *Ex Parte John William King,* No. WR-49,391-02 (Tex. Crim. App. Sept. 12, 2012) (not designated for publication). [USCA5.11679-11680].

An amended petition was filed on January 6, 2013, when King returned to federal court. [USCA5.4161-4754]. Motions for discovery [USCA5.5584-5654] and an evidentiary hearing [USCA5.5662-5716] were denied [USCA5.5802] and the amended petition was denied on June 23, 2016, shortly after re-assignment to a new judge. That opinion, *King v. Director, TDCJ*, 2016 WL 3467097 (E.D. Tex., June 23, 2016), denying Mr. King's petition for writ of habeas corpus and a COA on all claims, is attached as Appendix C. [USCA5.5819-5913].

King timely filed a Notice of Appeal on July 21, 2016. [USCA5.5914-5916); 28 U.S.C. § 2107(a); FED. R. APP. P. 4(a)(1)(A). The Fifth Circuit Court of Appeals granted a COA on a claim that trial counsel were ineffective in presenting Mr. King's case for actual innocence, but denied a COA on the three issues presented herein. *King v. Davis*, 703 F. App'x 320 (5th Cir.

2017) (*per curiam*) (attached as Appendix B). After oral argument the prior month, on February 22, 2018, the Fifth Circuit issued an Opinion denying relief on King's claim of ineffective assistance of trial counsel ("IATC"). This Opinion, reported as *King v. Davis*, 883 F.3d 577 (5th Cir. 2018) is attached as Appendix A. The docket entry of the denial of a petition for panel rehearing on March 23, 2018 is attached at the end of Appendix A.

B. Statement of Facts and Summary of the Trial.

i. The State's case at the guilt phase.

On June 7, 1998, Jasper County Sheriffs found the head and torso of Mr. James Byrd on a logging road near Jasper, Texas. [USCA5.8185-86]. There was a massive amount of trauma and the authorities concluded that the victim had been dragged; it was determined to be a murder. [USCA.8190-93]. It was thought that the body was severed when it hit a culvert. [USCA5.8261].

Fragments of a cigarette butt were found at what was described as a "fight scene" nearby [USCA5.8289-90], along with a cigarette lighter [USCA5.8293] identified as belonging to King. [USCA5.8294]. The word "Berry" was found on a wrench, near the victim's billfold, beer bottles, cigarette butts, a cigarette lighter, a watch, a cap and other items. [USCA5.8198]. The cigarette lighter had the word "Possum" engraved on it along with a triangle with three K's. [USCA5.8201]. When investigators saw the K.K.K. emblem on the cigarette lighter, they thought they had identified a motive. [USCA5.8203-04]. The Jasper sheriff was "brand new" and "didn't even know the definition of a hate crime but I knew somebody had been murdered because he was black and it was a bad murder." [USCA5.8206].

A businessman in Jasper testified he saw Mr. Byrd on the evening he was killed. [USCA5.8329, 8337]. Another resident testified that on the night of June 7th, at about 2:15 or

2:30 a.m. he saw Byrd in the back of a truck with three people in the truck who were white. [USCA5.8346-47].

As a result of information received regarding a grey step-side truck with three people in it, Shawn Berry was thought to be involved. [USCA5.8204]. Berry was arrested and the sheriff found out that he was living in a Jasper apartment with John William King and Russell Brewer; Lewis Berry, Shawn's brother, also lived in the apartment and kept his clothes there. [USCA5.8205, 9066]. Someone mentioned that "Possum" was King's nickname in prison. [USCA5.8205, 8246, 8253].

King, Brewer, and the Berrys lived at the Timbers Apartments in Jasper, from which some items were seized, including sandals [USCA5.8367, 8397-98] and some racial writings. [USCA5.8206]. State's Exhibit 50 was an application to the Confederate Knights of America, signed by John W. King, captain of the Confederate Knights of America, Texas Rebel Soldiers. [USCA5.8407]. It states that the Texas Rebel Soldiers was started on July 4, 1998, but King was in jail at that time. [USCA5.8408]. No witnesses ever testified that King attempted to recruit them. [USCA5.8409].

Keisha Atkins testified that on the night of Byrd's murder, June 6, 1998, she arrived at King's apartment at about 10:30 PM, and Brewer was also there. [USCA5.8436]. Atkins did not remember if King left wearing sandals, although she earlier gave a statement to that effect. [USCA5.8452]. Lewis Berry also occasionally stayed at the apartment. [USCA5.8449]. Atkins talked with King later that morning, at about 5 or 5:30 a.m. by telephone. [USCA5.8451]. He was in a normal mood, and didn't seem excited. [USCA5.8452]. King called her the next night around midnight, and said he wanted to see her. [USCA5.8453]. Atkins had the impression that if she had stayed at the apartment, King would not have left with the others. [USCA5.8455].

An FBI agent recovered a pair of dark brown sandals from the apartment, size 9½, found in the bedroom, and marked as State's Exhibit 55 and 56. [USCA5.8476]. Similar sandals, size 10, were also found there. [USCA5.8477]. Another FBI agent, Tim Brewer, testified that King's shoe size was 9½ and Berry's was size 9. [USCA5.8527, 8543]. Brewer was size 7. [USCA5.8528]. Lewis Berry was size 10. [USCA5.8540, 8547].[2]

A forensic examiner in the DNA analysis unit of the FBI laboratory received three vials of blood labeled Bill King, Shawn Berry, and Russell Brewer. [USCA5.8957]. A stain on a Polo boot found in the suspect's apartment, belonging to Shawn Berry, matched the DNA profile of James Byrd and a test on a stain on the other boot was inconclusive. [USCA5.8959-60]. A stain on one of the Outback sandals, State's exhibit 45, matched that of James Byrd. [USCA5.8961]. Tests on the other sandal were inconclusive. [*Id.*]. Tests were also done on some Nike tennis shoes found in the apartment, and there was also a match for the victim's DNA. [USCA5.8962-63].

There were DNA patterns for more than one person on two of the cigarette butts found at the scene of the crime. [USCA5.8965]. As to one cigarette butt, the major contributor was Berry and the minor contributor was not Brewer, King or Byrd. [USCA5.8966]. As to the other cigarette butt, State's Exhibit 412, King was the major contributor, and Byrd could not be excluded as a minor contributor but could also not be so confirmed. [USCA5.8966]. One way

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[2] State's Exhibit 45 were size 10 sandals. [USCA5.8477]. However, it was determined that King's shoe size was 9½, and similar-brand size 9½ sandals were also found in the apartment (State's Exhibit 55 and 56). [USCA5.8477]. FBI agent Brewer testified that King's shoe size was 9½ and Berry's was a size 9. [USCA5.8527, 8543]. Brewer was a size 7. [USCA5.8528]. Lewis Berry, who frequented the apartment and had clothing there, was a size 10. [USCA5.8540, 8547]. The size 10 sandals with the victim's blood on them, the major incriminating evidence against KIng, were not his size, and this was never challenged by the defense.

this could have happened is if one person smoked the cigarette and another person took a puff off it. [USCA5.8982-83]. Another cigarette butt matched Brewer's DNA. [USCA5.8968].

In all, King's DNA was found on only two items of the evidence: a cigarette butt which contained King's primary and possibly Byrd's DNA, and a sandal, allegedly King's, which matched Byrd's blood. [USCA5.8993].[3] That amount of blood was a sixteenth of an inch wide. [USCA5.8994-95].

A reporter for the Dallas Morning News testified she received a letter from King dated November 12, 1998 in which King set out his version of the events. [USCA5.9057-63]. King wrote that Shawn Berry was driving erratically that night; Berry saw Byrd who had supplied him with steroids; he wanted to obtain more steroids from Byrd; and Barry left with Brewer, and King went back to the apartment to call his ex-girlfriend. [*Id.*]

Lewis Berry, age 25, the brother of Shawn Berry, testified that he also lived at the Timbers Apartments with King, Brewer, and his brother. [USCA5.9066]. At the time of the murder, Lewis, his brother Shawn, and King were living in the apartment, and Brewer was visiting. [USCA5.9067, 9072]. The bedroom was King's. [USCA5.9072]. Lewis kept some of his possessions in a closet in that room. [USCA5.9073]. The Polo boots were Shawn's and the sandals belonged to King and Shawn Berry. [*Id.*] They were alike but half a size different. [USCA5.9074]. The white shoes with "L.B." on them were Brewer's. [*Id.*]

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[3] The defense never told the jury that the sandal on which the blood stain was found was size ten (Exhibit 45) whereas King had a size nine and a half shoe size and the victim's DNA was not on those sandals. Nor was the cigarette with King's DNA on it ever conclusively found to have the victim's DNA on it, and it is undisputed that King rode in the truck, and thus could have left cigarettes in the ashtray that were later spilled at the so-called "fight scene." King was known to smoke in Berry's truck. [*See, e.g.,* USCA5.9102]. Thus, neither piece of evidence placed King at the scene of the crime.

Lewis Berry testified (falsely) that he owned only one pair of sandals, the ones he brought to trial. [*Id.*].[4] He testified that Exhibits 44 and 45, the size 10 sandals, would "probably" be King's. [USCA5.9074-75]. Exhibits 55 and 56, the size 9½ sandals, would be Shawn Berry's. [USCA5.9075]. These sandals were bought at the same time by Shawn Berry and Bill King. [*Id.*] The white shoes with "L.B." on them were not Lewis Berry's. [USCA5.9075]. Lewis Berry testified he wears between a 10½ and an 11 size shoe. [USCA5.9076].[5] He could not fit his foot into the white shoes. [*Id.*][6] Brewer wore those shoes, according to this witness. [*Id.*]

A jail administrator of the Jasper County Sheriff's Office, received notes sent by King to Brewer. [USCA5.9130]. In the letters, King wrote that "as far as the clothes I had on, I don't think any blood was on my pants or sweat shirt, but I think my sandals may have had some dark brown substance on the bottom of them." [USCA5.9138].[7] He also wrote that "regardless of the outcome of this, we have made history and shall die proudly remembered if need be." [USCA5.9139].

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[4] In an affidavit, Kylie Milburn stated that Lewis Berry had sandals similar to those of the other roommates [USCA5.1448]; and Berry lied about his having only one pair of sandals that he wore to court [USCA5.9074], and that his shoe size was 10 ½ to 11. [USCA5.9076]; he was actually a size 10 [USCA5.9062]. These false assertions were not challenged by the defense.

[5] But earlier, FBI agent Brewer had testified that "we took a picture of Mr. Berry's foot, Lewis Berry's foot. It was a size 10. This picture shows a size ten foot..." [USCA5.8540]. Incredibly, King's attorneys never brought out this discrepancy.

[6] Not surprisingly, since Brewer was a size seven. [USCA5.8528].

[7] Regarding the letter to Brewer in which King refers to a "dark brown substance" on his sandals, in an affidavit King's first attorney, J. Randall Walker, Esq., confirmed that he disclosed to King the evidence and police reports in the case, which described the evidence on one of the sandals as a "dark brown substance," which is what King was referencing. King also confirmed in an affidavit that it was this evidence in the police reports he was referring to when he wrote to Brewer that he thought there was a "dark brown substance" on the sandals. [USCA5.3514].

The coroner, Dr. Tommy J. Brown, testified that Mr. Byrd's injuries were consistent with a chain being placed on the victim's ankles and being dragged down the logging road to the paved road. [USCA5.9155]. Despite the condition of the body, it was his opinion that the victim was alive until he hit the culvert, when the lethal wounds occurred. [USCA5.9156]. The cause of death was multiple severe injuries with separation of the head and upper right extremity from the rest of the body. [*Id.*] Some of the injuries were post-mortem. [USCA5.9160]. The coroner thought that the victim was alive for 2½ miles until he hit the culvert. [USCA5.9171].

Rich Ford, a detective with the Jasper Police Department, testified as an expert on tattoos, although he was never qualified as such and his expertise was derived from books and the internet. [USCA5.8622]. He identified some of King's tattoos as signifying devil worship, Satanism, and one was identified as "an evil-looking figure," and another as a "[d]emonic-looking figure." [USCA5.8630-33]. On cross-examination, Ford admitted that "it's in the eye of the beholder" [USCA5.8662] and misidentified a Congressional Medal of Honor as a "baphomet." [USCA5.8669].

William Matthew Hoover was a fellow inmate of King's at the Beto I Unit when John King was there on a burglary charge. [USCA5.8711]. Hoover knew King in the penitentiary, and testified that his nickname was "Possum." [USCA5.8712]. Inmates would join the gangs for unity. [USCA5.8720]. Hoover testified that if a person came to prison not being particularly racist, he would probably adopt racist views while there. [USCA5.8721]. King's racial views were "not abnormally extreme for the situation...not seemingly more than anybody else." [*Id.*]

ii. The defense case at guilt/innocence.

John Grady Mosley testified he was an inmate of the Beto I unit, incarcerated for burglary and sexual assault. [USCA5.9184]. He was responsible for some of the tattoos on

King. [*Id.*] He testified that the designs came from tattoo magazines and inmates' drawings. [USCA5.9186]. Mosley had never heard King say he was going to kidnap an African-American when he was released from prison, and he never started fights. [USCA5.9191]. The FBI asked Mosely to testify against King, but he refused. [*Id.*] King had a reputation for standing up for his rights. [USCA5.9192].

iii. The State's case at the punishment phase.

Mack Frazier, of the Jasper Police Department, testified regarding King's 1992 burglary conviction. [USCA5.9289]. King was 17 at the time. [USCA5.9292]. He was later imprisoned in the penitentiary from June of 1995 to July of 1997. [USCA5.9307].

Kenneth Lee Denson, assistant director for training and special programs for Residential Services Unit of the Jefferson County Community Services and Corrections Department, supervised King at the restitution center. [USCA5.9315-16]. There were no acts of violence by King at the center. [USCA5.9329-30]. Royce Smithey, chief investigator for the Special Prosecutions Unit of the Texas Department of Corrections, testified that the safest place for King would be on death row due to prison violence and a higher degree of supervision. [USCA5.9349-84]. Dr. Edward Gripon testified that although he did not personally interview Mr. King, he could predict his future dangerousness. His testimony is summarized in the discussion of Claim One, *infra*.

iv. The defense case at the punishment phase.

Walter Quijano, Ph D, a clinical psychiatrist in private practice, testified for the defense regarding the special issue of future dangerousness. His testimony is also summarized in the discussion of Claim One, *infra*.

REASONS FOR GRANTING CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE FIFTH CIRCUIT AGAIN IGNORED THE STANDARDS FOR A CERTIFICATE OF APPEALABILITY UNDER *BUCK v. DAVIS* AND *MILLER-EL v. COCKRELL* BY NOT LIMITING THE INQUIRY TO THE THRESHOLD QUESTION OF WHETHER KING'S CLAIMS WERE DEBATABLE AMONG JURISTS OF REASON.

When the district court denied King a COA on all of his claims (Appendix C: *King v. Director, TDCJ*, 2016 WL 3467097 (E.D. Tex., June 23, 2016)) he was then required to obtain a COA from a circuit justice or judge. *Buck v. Davis*, —— U.S. ——, 137 S. Ct. 759, 773 (2017) (citing 28 U.S.C. § 2253(c)(1)). "A COA may issue 'only if the applicant has made a substantial showing of the denial of a constitutional right.'" *Id.* (quoting 28 U.S.C. § 2253(c)(2)). "Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." *Id.* (*citing Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003)). Consequently, a "COA is a jurisdictional prerequisite to our review of a petition for a writ of habeas corpus." *Miller–El*, 537 U.S. at 336); *see also, Gonzalez v. Thaler*, 565 U.S. 134, 142 (2012).

King applied for a COA on five claims in the Fifth Circuit:

> 1) Whether defense counsel were ineffective in the penalty phase regarding the "future dangerousness" special issue;
> 2) whether defense counsel were ineffective in moving for a change of venue;
> 3) whether trial counsel were effective at the guilt phase for failing to present King's case of actual innocence;
> 4) whether counsel were ineffective for failing to obtain and/or use a defense expert to present psychiatric evidence at the guilt and punishment phases of the trial; and
> 5) whether the district court's virtual paraphrase of the Director's Answer deprived King of due process and a fair hearing.

King was granted a COA on the third issue but denied it on the others. This petition shows how, in denying a COA as to issues 1, 2 and 4, the Fifth Circuit continues to ignore this Court's explicit holdings in *Miller-El* and *Buck*, and "justif[ied the] denial of a COA based on

[the] adjudication of the actual merits ... [which] is in essence deciding an appeal without jurisdiction." *Buck,* 137 S. Ct. at 773, quoting *Miller–El*, 537 U.S. at 336–337.

A. The COA Inquiry and the *Strickland* Standard.

"The COA inquiry," this Court has "emphasized, is not coextensive with a merits analysis [and] should be decided without full consideration of the factual or legal bases adduced in support of the claims." *Buck* at 773. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Id*. (quoting *Miller–El*, 537 U.S. at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Id.* (quoting *Miller–El*, 537 U.S. at 336).

The circuit court cannot "sidestep" that inquiry "by first deciding the merits of an appeal" before determining whether a COA should issue, because "justifying [the] denial of a COA based on [the] adjudication of the actual merits ... is in essence deciding an appeal without jurisdiction." *Id*. (quoting *Miller–El*, 537 U.S. at 336–337). When determining whether a COA should issue, the court of appeals therefore must "'limit [the] examination ... to a threshold inquiry into the underlying merit of [the] claims,'" under which the court "ask[s] only if the district court's 'decision was debatable.'" *Buck* at 774 (quoting *Miller–El*, 537 U.S. at 327, 348). The "threshold" inquiry required by 28 U.S.C. § 2253(c) "does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it." *Miller-El,* 537 U.S. at 337. A "claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id.* (quoting *Miller–El,* 537 U.S. at 338).

More specifically, the COA "standard is met when 'reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner.'" *Welch v. United States*, —— U.S. ——, 136 S. Ct. 1257, 1263 (2016) (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)). When "a district court has rejected the constitutional claims on the merits, the showing required to satisfy 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller–El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484).

The Sixth Amendment right to counsel "is the right to the effective assistance of counsel." *Buck*, 137 S. Ct. at 775, *quoting Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must meet a two-prong test by showing that (1) his counsel performed deficiently and (2) his counsel's deficient performance caused him prejudice. *Id.*

B. The Fifth Circuit's Continued Abuse of The COA Standard.

Numerous jurists—including several members of this Court —have expressed concern over the Fifth Circuit's continued abuse of the standard it applies when deciding whether to issue a COA. *See, e.g., Miller-El; Buck*; *Jordan v. Fisher*, 135 S. Ct. 2647, 2651-52 (2015); *Buck v. Stephens*, 630 F. App'x 251, 252 (5th Cir. 2015) (Dennis, J., dissenting from denial of rehearing *en banc*) ("[T]he panel in this case, perhaps unintentionally, followed that prohibited side-stepping process by justifying its denial of a COA based on its adjudication of the actual merits. This is not the first time that a panel of this court has flouted *Miller–El*'s clear command when denying a COA . . . ."). These concerns largely fall into two categories, both of them implicated here.

First, even after this Court's admonishment last year in *Buck*, the Fifth Circuit continues to step far beyond the required threshold, conducting a detailed analysis of the merits before concluding that an individual's constitutional claim failed. *See Miller-El*, 537 U.S. at 542. *See also, Jordan*, 135 S. Ct. at 2652 n.2 (collecting cases).

Second, the Fifth Circuit continues to apply too high a standard in assessing whether reasonable jurists could debate a district court's denial of a habeas petition. Members of this Court have acknowledged this concern in a case where two judges had found the petitioner's claims debatable, and there was a contradictory decision from another circuit "presented with a similar claim in a comparable procedural posture," but the Fifth Circuit nonetheless rejected Jordan's COA application. *Jordan*, at 2651-52; *see also id.* at 2652 n.2 (collecting cases). In *Buck*, even under the more rigorous standard of Fed. R. Civ. Proc. 60(b), this Court also found an impermissibly high threshold standard was applied.

Both of these errors are present here. There is no doubt that Mr. King demonstrated the kind of "substantial showing of a denial of a constitutional right" to satisfy the threshold inquiry that this Court's precedent indicates is appropriate. *Miller-El*, 537 U.S. at 327; *Buck*, 137 S. Ct. at 773 (quoting 28 U.S.C. § 2253(c)(2)). Similarly, at a minimum, "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks and citations omitted).

This Court should reverse the Fifth Circuit's decision to deny a COA on three issues, arrived at through that court's continuing practice of prematurely judging the issues, rather than allowing full appellate review of potentially meritorious claims. To uphold the Fifth Circuit's

decision could result in further unnecessary and unduly protracted litigation of issues, and failure to protect the individual rights of those sentenced to death.

Over the years, the Fifth Circuit has struggled in several instances to come to grips with the teaching of this Court in capital habeas corpus cases. The Circuit continues to develop its own unwarrantedly restrictive practices in its initial consideration of whether or not to grant a COA. As a result, this Court is called on again to ensure that the proper grant of a COA, the gateway step to full federal appellate review of a death penalty case arising out of a state court, is not hindered by the Fifth Circuit's practices that fail to follow this Court's precedents.

C. The Fifth Circuit Has Again Failed To Follow This Court's Precedent Concerning Issuance of a COA.

This Court has at least three times corrected the Fifth Circuit's uncommonly restrictive approach to granting COAs. *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003), *Tennard v. Dretke*, 542 U.S. 274, 283-84 (2004), and, most recently, *Buck v. Davis*, 137 S. Ct. 759 (2017).

This Court's precedents explain that a petitioner must "'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (some internal quotation marks omitted)). The prisoner is not "require[d to make] a showing that the appeal will succeed." *Miller-El*, 537 U.S. at 337. Instead, the prisoner need only "prove 'something more than the absence of frivolity' or the existence of mere 'good faith' on his or her part." *Id.* at 338 (quoting *Barefoot*, 463 U.S. at 893). This Court has clarified that the COA determination is a "threshold inquiry" that "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.* at 336.

Nonetheless, absent a COA, "an appeal may not be taken to the court of appeals." 28 U.S.C. § 2253(c)(1). Consequently, until a COA has issued, the federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners. *Miller-El*, 537 U.S. at 336.

D. This Court Was Required to Reiterate the Standards for Issuance of a COA in *Miller-El* and *Tennard*.

In *Miller-El*, the Fifth Circuit had denied a certificate of appealability on a claim that the state at Miller-El's trial had exercised peremptory strikes on the basis of race in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). This Court had "no difficulty concluding that a COA should have issued," and reversed. 537 U.S. at 341, 344. "[Q]uestion[ing]" the Fifth Circuit's "dismissive and strained interpretation of petitioner's evidence," this Court "once again examine[d]" when a state prisoner may appeal the denial or dismissal of his petition for writ of habeas corpus, and it "decide[d] again" that a COA only required a threshold inquiry into the underlying merit of the prisoner's claims. *Id.* at 326-27. Instead, the Fifth Circuit had "decid[ed] the substance of [the] appeal." *Id.* at 342. This Court found that doing this not only "undermine[d] the concept of a COA," but meant the Fifth Circuit was, "in essence, deciding an appeal without jurisdiction." *Id.* at 337, 342.

The Court "reiterate[d]" that "[c]onsistent with our prior precedent and the text of the habeas corpus statute . . . a prisoner seeking a COA need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Id.* at 327 (quoting 28 U.S.C. § 2253(c)(2)). This meant that a prisoner only needed to establish that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Id.*

This Court stated that it would have had "no difficulty concluding that a COA should have issued," remarking that both the district court and the Fifth Circuit "did not give full consideration to the substantial evidence petitioner put forth." *Id.* at 341. This Court specifically questioned that court's "dismissive and strained interpretation of petitioner's evidence of [racially] disparate questioning," *id.* at 344, as well as noting that the statistical evidence of racially motivated strikes alone raised an inference of discrimination, *id.* at 342.[8]

The year after *Miller-El*, this Court was forced to again address the Fifth Circuit's COA standard in *Tennard v. Dretke*, 542 U.S. 274, 283 (2004). While the Court noted that the Fifth Circuit paid "lipservice" to the principles articulated in *Miller-El*, it found that the Fifth Circuit "invoked its own restrictive gloss" on this Court's precedents. *Id*. Thus, in addition to previously having had to correct the Fifth Circuit's unusually burdensome approach to granting COAs, this Court has had to repeatedly re-explain substantive aspects of its already clear jurisprudence in cases arising out of that Circuit.

E. Once Again, This Court Had To Reiterate the COA Standards in *Buck*.

This Court again revisited the Fifth Circuit's wayward COA practices last year in *Buck v. Davis*, 137 S. Ct. 759 (2017). Yet the same errors the Fifth Circuit committed in *Miller-El* and *Buck* were repeated here. In *Buck,* as here,

> The court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief, 623 *Fed.Appx*., at 674—but it reached that conclusion only after essentially deciding the case on the merits. As the court put it in the second sentence of its opinion: "Because [Buck] has not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6), we deny the application for a COA." *Id.,* at 669. The balance of the Fifth Circuit's opinion reflects the same approach. The change in

[8] This Court also noted the Fifth Circuit's adoption of an incorrect standard which improperly merged the requirements of two statutory subsections, 28 U.S.C. § 2254(d)(2) and (e)(1). *Id.* at 341.

> law...the panel wrote, was "not an extraordinary circumstance." 623 Fed.Appx., at 674. Even if Texas initially indicated to Buck that he would be resentenced, its "decision not to follow through" was "not extraordinary." *Ibid.* Buck "ha[d] not shown why" the State's alleged broken promise "would justify relief from the judgment." *Ibid.*
> *Buck* at 773-774.

Once again, the errors were clearly spelled out:

> But the question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" or "shown why [Texas's broken promise] would justify relief from the judgment." *Id.,* at 669, 674. Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Miller–El,* 537 U.S., at 327, 348, 123 S.Ct. 1029.
> *Buck* at 774.

This Court pointed out how the merits determination should not precede the debatability determination:

> Of course when a court of appeals properly applies the COA standard and determines that a prisoner's claim is not even debatable, that necessarily means the prisoner has failed to show that his claim is meritorious. But the converse is not true. That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable. Thus, when a reviewing court (like the Fifth Circuit here) inverts the statutory order of operations and "first decid[es] the merits of an appeal, ... then justif[ies] its denial of a COA based on its adjudication of the actual merits," it has placed too heavy a burden on the prisoner *at the COA stage*. *Miller–El,* 537 U.S., at 336–337, 123 S.Ct. 1029. *Miller–El* flatly prohibits such a departure from the procedure prescribed by § 2253. *Ibid.*
> *Buck* at 774 (emphasis in original).

F. The Errors Identified in *Miller-El* and *Buck* Are Present In King's Case.

The Fifth Circuit's flawed analysis of the evidence in *Miller-El I* and *Buck* continue in King's case. As in *Buck*, the panel here analyzed the merits of the claims and decided they were not meritorious before deciding the threshold question of whether they were debatable and in that analysis set an unduly high standard for the issuance of a COA. *Buck*, 623 F. App'x at

672-74. And, as in *Miller-El*, the Fifth Circuit's misguided approach also calls for correction because it came in the context of a COA application, resulting in the lower court "deciding [the] appeal without jurisdiction." *Miller-El I*, 537 U.S. at 336-37.

G. Mr. King's Case Is an Appropriate One for This Court to Once Again Reinforce the Correct Application of Its COA Standards in the Fifth Circuit.

As discussed *supra*, this Court has repeatedly been required to correct the Fifth Circuit's jurisprudence and set it back on course when it has failed to correctly apply this Court's COA standards, clearly articulated in *Miller-El* and *Buck,* which both arose out of the Fifth Circuit itself.[9]

King's case is one where the Fifth Circuit has, once again, clearly failed to implement this Court's teaching concerning the issuance of a COA. Instead, it leapfrogged to a conclusion on an issue rather than taking the required procedural step of simply deciding whether a "substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), had been made, and then ordering full appellate briefing. Thus, the defense's negligible challenge to Dr. Gripon and the catastrophic unpreparedness of Dr. Quijano; the failure to competently challenge the holding of King's trial in Jasper; and the utter failure to present psychiatric evidence when

[9] A further instance of the Fifth Circuit going its own way in habeas corpus proceedings, while also failing to comply with this Court's guidance on the grant of a COA, has occurred in cases where *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) (permitting petitioners to invoke ineffective assistance of collateral counsel as "cause" to excuse a procedurally default claim of ineffective assistance of trial counsel), has been invoked by petitioners who have also been denied funding in federal court to develop claims previously defaulted by state habeas counsel. Not only has the Fifth Circuit maintained its practice of deciding the merits of such cases rather than simply applying the threshold COA analysis, but it adds its own "restrictive gloss" to the funding statute, 18 U.S.C. § 3599. That statute requires only a demonstration that funding is "reasonably necessary," whereas the Fifth Circuit applies a self-created "substantial need" test, which the petitioner typically fails. *See, e.g.*, *Wilkins v. Stephens*, 560 F. App'x 299, 314 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1397 (2015); *Crutsinger v. Stephens*, 576 F. App'x 422, 429-30 (5th Cir. 2014), *cert. denied* 135 S. Ct. 1401 (2015). This Court recently struck down this practice in *Ayestas v. Davis*, 138 S. Ct. 1080 (2018).

King's background cried out for it, stand un-remedied because of the Fifth Circuit's failure to observe this Court's prior instruction. Providing the Fifth Circuit once more with further clear direction for the conduct of habeas corpus proceedings, and particularly appellate review of those proceedings, will not only serve the interests of individual litigants, but reduce the likelihood that this Court will continue to be called on repeatedly to resolve aberrant interpretations of its precedent.

ARGUMENT

King Was At Least Entitled To A COA On Three Of His Ineffective Assistance Of Trial Counsel Claims.

Applying those standards, King was at least entitled to a COA on his claims of (1) ineffective assistance of counsel at the penalty phase regarding the "future dangerousness" special issue; (2) ineffective assistance of counsel in moving for a change of venue; and (3) ineffective assistance of counsel for failing to obtain and/or use a defense expert to present psychiatric evidence at the guilt and punishment phases of the trial.

These three claims were not brought on state habeas because King's state habeas attorney, John Heath, "failed to understand that arguments and evidence could be presented in the collateral proceeding...Heath's belief that King's habeas petition could rely solely on the record was incorrect." *King v. Davis*, 703 F. App'x at 328. King relied on the exception to procedural default under *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 569 U.S. 413 (2013), that held that an IATC claim that would otherwise be barred can be raised if he can show that (1) state habeas counsel was ineffective, and (2) the claim is substantial, "meaning that it has some merit." *King* at 328. As to all three claims, the Fifth Circuit held that King met *Martinez/Trevino*'s first prong, of ineffective assistance of state habeas counsel, but failed to show that these three claims were "substantial." *King*, 703 F. App'x at 328-329.

The following holdings of the Fifth Circuit are contrary to *Miller/El* and *Buck* in that they do not limit the COA question to the threshold inquiry, decide the claims on the basis of a premature merits analysis, and/or do not recognize that the question is debatable.

I. King Was Entitled To A COA On His Claim Of Ineffective Assistance Of Counsel For Failure To Adequately Present The Future Dangerousness Issue.

King's first claim had two aspects: at the penalty phase, trial counsel failed to effectively counter State's witness Dr. Edward Gripon; and secondly, the defense was ineffective for presenting a harmful witness, Dr. Quijano, who agreed with the State's witness Gripon that King would be dangerous in the future.

A. The Claim and the Fifth Circuit's Holdings.

At the penalty phase of King's trial, he had a double disadvantage against his chances for a life sentence: the State's expert Dr. Gripon and his own expert Dr. Quijano.

i. Dr. Gripon.

Dr. Gripon was a prosecution expert witness on the first special issue, of "future dangerousness." [USCA5.9389-9404]. He never personally interviewed King, as he himself admitted, but just viewed the facts of the case, the degree of injury to the body, and read the reports. [USCA5.9394-9395]. He stated that reviewing King's letters give him a pretty good window on the individual, but not as good as a face-to-face interview. [USCA5.9396].

Dr. Gripon based his opinion that King will "be a danger in the future" [USCA5.9396][10] on his past history and "the sheer magnitude of some offenses are so extreme and so dramatic that they sort of remove all doubt as to what a person is capable of." [USCA5.9397]. "And if they're capable of something on one given instant or one given date, it would tend to be logical and reasonable and just plain common sense that that's not just going to go away." [*Id.*] According to Dr. Gripon, King's writings clearly demonstrated that he was attempting to form or

[10] This distorts this special issue, which does not ask the jury to decide if the defendant will be a "danger in the future," which would apply to all persons convicted of capital murder, but rather whether the "defendant would commit future acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc art. 37.071 § 2(b)(1). [USCA5.687].

become part of an organization outside the prison once he was released [USCA5.9398], "to institute a grassroots organization that appeared to be predominately racist." [USCA5.9399]. His racist feelings would not go away, and if locked up, he would continue them in prison. [*Id.*]

The cross-examination of Dr. Gripon was less than three pages of trial transcript, or less than three minutes. [USCA5.9399-9402]. Even those few minutes were notably ineffective, as they amounted to a statement by defense attorney Cribbs that "we've done this drill before" [USCA5.9400] followed by general questions that did not specifically address Dr. Gripon's testimony. Yet the Fifth Circuit held that

> a review of the record revealed that his counsel's performance was not deficient in cross-examining Dr. Gripon...in cross-examination, King's trial counsel sought to undermine the predictive capabilities of Dr. Gripon by, for example, getting Dr. Gripon to admit that the American Psychiatric Society's position is that a psychiatrist is no better at predicting future dangerousness than any other individual of equal intelligence. King's trial counsel spent the remainder of his cross-examination drawing out testimony about how Dr. Gripon received information about King only from the prosecution (or the federal government) and how Dr. Gripon did not personally interview King (which Dr. Gripon admitted was the best way to form a prediction on future dangerousness.)
> *King,* 703 F. App'x at 329-330. (Appendix B).

Yet one would be hard pressed to fathom that this cross-examination occupied less than three pages of transcript.

ii. Dr. Quijano.

As for defense expert Dr. Quijano, far from being helpful, his opinion was that in the free world, King *would* in the future commit acts of violence that would constitute a danger to society, the crucial question at issue [USCA5.9452], and even in prison, King would be "a risk to others." [USCA5.9466]. As for the second special issue, after searching for mitigation, Quijano found only one factor: that when King was sent to prison, he was assaulted the first day, and was traumatized. [USCA5.9453].

On cross-examination, Quijano claimed the probability of re-arrest for someone with five or more arrests approaches certainty and he testified King has this number of arrests. [USCA5.9455]. He also testified that King, as a male, is a higher risk; he did not have a stable job situation, another higher risk; his peer environment was negative and would possibly be negative in prison, another higher risk; his deep involvement in a racist white gang would be another higher risk; and he would be amongst black inmates in jail, another higher risk. [USCA5.9458-9460]. King's alleged lack of remorse would be another heightened risk [USCA5.9461-9462], as would his alleged lack of a conscience. [USCA5.9463]. The fact that his victim pool might be African-Americans would also weigh in favor of future dangerousness, according to Quijano. [USCA5.9460].

Quijano testified that there is a real and viable potentiality for future dangerousness because of King's personality and the crime. [*Id.*] He added that there is one way of ensuring that an innocent person will not be harmed again, and that is by putting King to death. [USCA5.9461]. King's character weighed on the side of future dangerousness, according to Quijano, and his crime is as brutal as one can ever imagine. [USCA5.9464]. He testified that *all* of the variables he mentioned weigh in favor of future dangerousness. [USCA5.9465]. Quijano also admitted that with the rationale he presented on direct [that people can be controlled in prison], no one would ever be executed. [*Id.*] And for his grand finale, Quijano stated that King would be a danger to others, even in prison, and the only way the jury had to ensure King is not a future danger is for him to be executed. [USCA5.9466].

This would be harmful enough coming from a prosecution witness, but it is hard to fathom that it came from a *defense* expert. The meager positives cited by the Fifth Circuit, *King*

v. Davis, 703 F. App'x at 330, were meaningless compared with Quijano's disastrous testimony.

The Fifth Circuit held that

> As King points out, Dr. Quijano stated that some factors weighed in favor of finding King to be a future danger. That being said, the clear inference from Dr. Quijano's testimony is that King's trial counsel was attempting to show that King would not be a future danger within the confines and regulations of prison. King, however, argues that this strategy was inadequate and included flawed reasoning by Dr. Quijano. In support of this argument, King points to an affidavit included with his federal habeas petition from Dr. Mark Cunningham, a psychologist, purportedly showing that more accurate and stronger arguments about future dangerousness were available. Yet, this is simply an argument for a different strategy, and jurists of reason could not debate whether King's trial counsel's strategy of presenting Dr. Quijano's testimony fell outside of the wide range of reasonable professional assistance.
> *King*, 703 F. App'x at 330. (Appendix B).

Quijano not only buttressed the State's case, but vastly expanded the indicia of a heightened risk of future dangerous acts. Either defense counsel knew that their witness Quijano was going to testify in this manner or they did not. In either case, they were grossly ineffective.

iii. Dr. Cunningham's affidavit and the defense "strategy."

Dr. Mark Cunningham's affidavit exposed the weaknesses and flaws of both witnesses:

> The violence risk assessment testimony offered by Edward Brown Gripon, M.D. and Walter Quijano, Ph.D. and the associated arguments asserted by the State were seriously flawed in methodology, data base, logical analysis, and conclusions. Despite gross deviation from sound risk assessment methodology and research data, Dr. Gripon's testimony went essentially unrebutted. Testimony offered by Walter Quijano, Ph.D....reflected substantial methodological error and was quite incomplete in statistical data presented...
> Affidavit of Dr. Mark Cunningham, at 5 [USCA5.855].

The Fifth Circuit merely held that

> King points to an affidavit included with his federal habeas petition from Dr. Mark Cunningham, a psychologist, purportedly showing that more accurate and stronger arguments about future dangerousness were available. Yet, this is simply an argument for a different strategy, and jurists of reason could not debate whether King's trial counsel's strategy of presenting Dr. Quijano's testimony fell outside of the wide range of reasonable professional assistance

King, 703 F. App'x at 330. (Appendix B).

This assumes that showing the flaws in the defense theory amounts to nothing more than inadequate "second-guessing" or an argument for a "different strategy." Under this rationale, no IATC claim could ever prevail, as habeas petitioners are normally required to show an effective alternative to what was presented at trial, preferably through an expert, and that presentation will always be "different" than the trial presentation.

The Fifth Circuit's description of a full-fledged debacle as merely arguing for a "different strategy" is, at the very least, debatable among jurists of reason and worthy of a COA.

iv. Prejudice was been abundantly shown.

As to the *Strickland* prejudice component and the *Martinez/Trevino* "substantiality" requirement, as Dr. Cunningham pointed out, "there were many research studies in the psychological and criminal justice scientific literature available in 1999 regarding violence risk assessment that could have been retrieved and testified to, or used in cross-examination of the State expert at the penalty phase." [USCA5.855]. As Dr. Cunningham stated, a competent expert in 1999 could have:

> 1) effectively discredited Gripon's faulty risk assessment and shown the low risk of death row and former death row inmates [USCA5.856-864];
> 2) shown how the context of a prison setting and prison classification systems would vastly decrease the likelihood of violence; and shown how "almost all of his [Gripon's] factors are irrelevant" [USCA5. 865-868],[11] instead of agreeing with them as Quijano did;
> 3) shown numerous erroneous and illusory correlations, for instance that past community violence, race, substance abuse, unemployment, breath of victim pool, remorse or post-offense activity, all cited in Gripon's testimony as heightening the risk, and reenforced by Quijano, are in actuality not accurate predictors of future violence [USCA5.868-870];

[11] "The testimony of Dr. Gripon was glaringly deficient in its reliance on his subjective appraisal of Mr. King's offense of conviction and racist attitudes, without considerations of how a context of prison would fundamentally alter the level of risk." [USCA5.868].

4) eliminated the prejudice from Gripon's and Quijano's failure to present the actual low incidence of inmate-on-inmate violence [USCA5.871-872];
5) shown the fallacy of Gripon's reliance on King's tattoos, correspondence, and the capital offense itself as accurate predictors of future violence [USCA5.872-873];
6) informed the jury in "specific and empirically based terms" of the effect of aging-out as decreasing the risk" [USCA5.873];[12]
7) pointed out that Gripon's (and Quijano's) focus on the single horrific act and "does not qualify as a pattern" of behavior and that behavior in the context of the community is not predictive of behavior in prison. [USCA5.875];
8) shown that inmate assault rates were actually exceedingly small [USCA5.878]; and
9) shown that Gripon's (and Quijano's) assessments were based on woefully inadequate data. [USCA5.878-879].[13]

Prejudice was overwhelmingly shown by comparing the harm done by Gripon and Quijano with what could have been presented. Defense counsels' performance does not comport with even minimal standards of competency under the *Strickland* test and it is therefore "substantial" under *Martinez/Trevino*.

B. The Fifth Circuit's Holdings Violate *Miller-El* and *Buck*.

Despite noting *Buck* and *Miller-El*'s holding that "[t]he Supreme Court has recently emphasized that the COA inquiry "is not coextensive with a merits analysis" and "should be decided without 'full consideration of the factual or legal bases adduced in support of the claims.'" *Buck*, 137 S. Ct. at 773 (quoting *Miller-El*, 537 U.S. at 336, 123 S. Ct. 1029), *King*, 703 F. App'x at 325, the Fifth Circuit proceeded to do just that. "[F]irst deciding the merits of an appeal" before determining whether a COA should issue, because "justifying [the] denial of a

[12] "Quijano did discuss the effects of aging, but without pointing to any empirical studies that would have given this factor weight and credibility." [USCA5.873].

[13] Dr. Quijano also prejudiced the other special issue regarding overall mitigation, as he found only one such factor, King's prison assault and traumatization. [USCA5.9453]. Numerous witnesses, including King's natural father, and family members such as Carol Spedaccini and Samantha Bacon could have provided a history of King's troubled childhood leading to his adoption.

COA based on [an] adjudication of the actual merits ... is in essence deciding an appeal without jurisdiction." *Buck* at 773, (quoting *Miller–El*, 537 U.S. at 336–337).

As discussed *supra*, the Fifth Circuit prematurely reached the merits of this claim in several ways:

(1) The Fifth Circuit held that, as to all three IATC claims, that King had to show that his claims met the second *Martinez/Trevino* prong of "whether those claims are substantial." King, 703 F. App'x at 328. This was a premature merits determination and King's actual burden was only to show that the claim was debatable, as this Court held in *Buck*:

> But the question for the Fifth Circuit was not whether Buck had "shown extraordinary circumstances" or "shown why [Texas's broken promise] would justify relief from the judgment"...Those are ultimate merits determinations the panel should not have reached. We reiterate what we have said before: A "court of appeals should limit its examination [at the COA stage] to a threshold inquiry into the underlying merit of [the] claims," and ask "only if the District Court's decision was debatable." *Miller–El,* 537 U.S., at 327, 348, 123 S.Ct. 1029.
> *Buck,* at 774.

(2) Holding that "a review of the record revealed that his trial counsel's performance was not deficient in cross-examining Dr. Gripon" and that "King's trial counsel sought to undermine the predictive capabilities of Dr. Gripon" *(King* at 329), was an explicit merits determination.

(3) Agreeing with the district court that the claim "lacked merit" while repeating many of the district court's factual errors, such as the extensiveness of the cross-examination (*Id.*); and

(4) Holding that King's showing of the flaws of Dr. Quijano's testimony was merely "an argument for a different strategy" (*King* at 330) was also a premature merits determination.

None of these fact-based conclusions could have been made without what exactly *Miller-El* and *Buck* prohibit: "first deciding the merits of an appeal" before determining whether a COA should issue." *Buck* at 773, quoting *Miller–El*, 537 U.S. at 336–337).[14]

II. King Was Entitled To A COA On His Claim Of Ineffective Assistance Of Counsel In Arguing For A Change Of Venue.

The second claim upon which King sought a COA was his claim that trial counsel were ineffective in arguing for a change of venue. Here too, the Fifth Circuit denied the claim using a merits-based analysis that only purported to limited the inquiry to the claim's debatability.

A. The Claim and the Fifth Circuit's Holdings.

Despite well-documented animus against King in Jasper, Texas,[15] in a highly-publicized case that brought much unwanted negative attention to the town, the trial court denied the defense's motion for a change of venue. The district court held that this claim was procedurally defaulted and not sufficiently substantial to satisfy the *Martinez/Trevino* exception to procedural default. [USCA5.5839-5842]. The Fifth Circuit largely repeated that holding:

> Regarding King's trial counsel's performance, the district court noted that his trial counsel had filed a motion to change venue, which included as exhibits the local and statewide newspaper coverage of the case, and called two witnesses who testified that King could not receive a fair trial in Jasper. The district court further reasoned that King had not pointed to any additional witnesses who were available to testify at the hearing. Regarding prejudice, the district court found that King had failed to show that the outcome would have been different,

[14] The district court incorrectly termed this claim as a complaint "of uncalled witnesses," [USCA5.5835], presumably Dr. Cunningham. This issue is not IATC for failure to call Cunningham specifically, but a failure to present an effective rebuttal of Gripon's testimony and the massive failure of Quijano testifying that King would be a future danger. Cunningham points out that there were many academic studies available at the time of King's trial that would have shown the errors of both Gripon and Quijano. [USCA5.855]. The Fifth Circuit did not adopt the district court's flawed rationale, but, in rejecting it, showed that the claim was, at the least, debatable.

[15] In his federal petition, King presented over 400 pages of local media accounts of the crime and its aftermath. [USCA5.895-1303].

> especially considering the fact that Brewer (whose trial was moved) received a death sentence and Shawn Berry (whose trial was not moved) received only a life sentence. Accordingly, the district court found that this claim was procedurally defaulted because the claim lacked any merit and, thus, was not substantial under the second prong of the *Martinez/Trevino* exception.
> *King*, 703 F. App'x at 330-331. (Appendix B).

The record does not support this holding. On December 14, 1998, the trial court heard the motion. [USCA5.6686]. It a perfunctory affair where only two witnesses testified very briefly, and merely stated that they did not think that King could receive a fair trial in Jasper. [USCA5.6695-6710]. The defense had an entirely misguided and doomed fixation on a trivial rise in Jasper property taxes as their main rationale for a change of venue, which only affected each taxpayer to the extent of about five dollars. [USCA5.6696] (quoted in *King* at 330).[16] Contrary to the Fifth Circuit's holding that defense counsel's fixation on the tax increase was inconsequential because "the tax theory made only brief appearances in his trial counsel's questioning, *King*, 703 F. App'x at 331, this theory was mentioned throughout the hearing. [USCA5.6695, 6696, 6728, 6751, 6752, 6753], particularly in questioning the State's witnesses.

In response, the prosecution put on much more extensive testimony, calling five witnesses. [USCA5.6714-6754]. At the conclusion of the evidence, the defense did not offer any argument on the motion, thus virtually conceding it. [USCA5.6754].

Had the defense offered testimony from witnesses regarding the glare of publicity that had engulfed Jasper, the town's need to secure a guilty verdict in order to avoid the "racist" label, and the need to avoid racial strife in Jasper, then there was a real chance this motion would

[16] Randy Walker, King's first court-appointed attorney, testified that there was a "real anger here in this community about this crime" [USCA5.6710], but this was not the focus of the motion.

have been granted and King's trial held in a venue where a fair trial would have been possible. If ever a case cried out for a change of venue, this was it.

In contrast, attorneys for co-defendant Russell Brewer emphasized that "extensive media reports show the slaying tarnished Jasper's image and the only way to clear the community's reputation is to find those accused guilty." [USCA5.1265 (*Beaumont Enterprise,* April 27, 1999, at 6A)]. Newspaper accounts confirm that Jasper had a "vested interest" in finding the three accused guilty, and the county was "hoping for a guilty verdict to 'vindicate' the perceived black eye given to the community by Byrd's murder." [USCA5.1266 (*Jasper Newsboy,* April 28, 1999 at 8A)]. This was the central reason why a fair trial could not be obtained in Jasper, yet it was downplayed by King's attorneys in favor of an inconsequential five-dollar tax hike.

B. The Fifth Circuit's Holdings Violate *Miller-El* and *Buck*.

The Fifth Circuit held, in denying the claim that

> The state trial court denied King's motion to change venue, and his second ineffective assistance claim is that his trial counsel was ineffective in presenting that motion. Specifically, King contends that, although a hearing was held on his motion to change venue, it was a "perfunctory affair" and his trial counsel "had an entirely misguided and doomed fixation on a trivial rise in Jasper property taxes as their main rationale for a change of venue, which only affected each taxpayer to the extent of about five dollars." King also compares his trial counsel's performance with that of Brewer's trial counsel, who was able to obtain a change of venue. King argues that he was prejudiced because the people in Jasper needed to secure a guilty verdict to avoid racial strife and that the trial atmosphere was utterly corrupted by the extensive coverage of the case. The district court, however, denied this claim, finding both that King's trial counsel's performance was not deficient and that King had failed to demonstrate prejudice.
>
> We decline to issue a COA on this claim because jurists of reason could not debate the district court's conclusion that King's trial counsel's performance was not deficient in presenting the motion to change venue. In support of the motion, King's trial counsel introduced numerous examples of newspaper articles, highlighting the extensive press coverage that the case had received. Moreover, King's trial counsel called two witnesses who testified that King could not receive a fair and impartial trial in Jasper. Although it is true that the prosecution called a greater number of witnesses who testified that King could receive a fair trial, the

> number of witnesses alone does not signal a trial counsel's deficient performance. Finally, although King recognizes that his trial counsel elicited some testimony about his ability to receive a fair trial, he counters that his trial counsel focused improperly on a theory that Jasper residents were unhappy with a property tax increase that supported trial costs. But this argument is simply not an accurate characterization. Far from being the focus of King's trial counsel, the tax theory made only brief appearances in his trial counsel's questioning,
>
> In sum, jurists of reason could not debate the district court's conclusion that King's trial counsel's performance did not fall outside the wide range of reasonable professional assistance. Accordingly, we decline to issue a COA on this claim because jurists of reason could not debate the district court's conclusion that the claim is procedurally defaulted given that King has failed to meet the second prong of the *Martinez/Trevino* exception.
>
> *King*, 703 F. App'x at 330- 331. (Appendix B).

Here again, the Fifth Circuit violated *Miller-El* and *Buck* by engaging in a full-fledged merits review to deny a COA:

(1) The Fifth Circuit held that, as to all three IATC claims, that King had to show that his claims met the second *Martinez/Trevino* prong of "whether those claims are substantial." *King*, 703 F. App'x at 328. As discussed *supra,* this was a merits determination and King's actual burden at this stage was only to show that the claim was debatable.

(2) The Fifth Circuit rejected the district court's mis-characterization of this as a "claim based on counsel's failure to call a witness" [USCA5.5840-5841], as it did with the prior claim [USCA5.5835]. Standing alone, the district court's misconstruction of Issues One and Two should have warranted a grant of COAs, as reasonable jurists would not conclude that they concerned an "uncalled witness" and the Fifth Circuit's rejection of that rationale showed that the district court's holdings were at least "debatable."

(3) The Fifth Circuit made explicit (and erroneous) fact-findings on the merits of the claim in holding that the tax increase theory was barely mentioned at the venue hearing; in

rejecting the evident anti-King bias in Jasper; in holding that King had failed to show prejudice; and in holding that the denial of the motion was justified despite the massive publicity.

(4) Regarding prejudice, the Fifth Circuit held, as did the district court, that because Brewer, who received a change of venue and received a death sentence and Berry, whose trial was not moved, received a life sentence, "the district court found that this claim was procedurally defaulted because the claim lacked any merit and, thus was not substantial under second prong of the *Martinez/Trevino* exception." *King*, 703 F. App'x at 331.

Here again, the Fifth Circuit explicitly did a merits review to hold that the "substantial" threshold of *Martinez/Trevino* was not met. That was not the applicable standard; King's only burden at this stage was to show that the claim was debatable. It was also erroneous, as we are measuring King's prejudice, not Brewer's or Berry's. Many factors totally extraneous to King's case—the competence of Brewer's attorneys, their skill at *voir dire*, a different judge and jury, the venue of his trial—all contributed to Brewer's verdict although his venue was changed.

There was no way the Fifth Circuit could have reached these conclusions without doing exactly what *Miller-El* and *Buck* forbid. "[T]he COA inquiry," the Supreme Court has "emphasized, is not coextensive with a merits analysis." *Buck* at 773. The Fifth Circuit "sidestep[ed]" that inquiry "by first deciding the merits of an appeal" before determining whether a COA should issue. "[J]ustifying [the] denial of a COA based on [the] adjudication of the actual merits ... is in essence deciding an appeal without jurisdiction." *Id*. (*quoting Miller–El*, 537 U.S. at 336–37). When determining whether a COA should issue, the court of appeal therefore must " 'limit [their] examination ... to a threshold inquiry into the underlying merit of [the] claims,' " under which we "ask 'only if the' " district court's " 'decision was debatable.' " *Id*. at 774 (*quoting Miller–El*, 537 U.S. at 327). A "claim can be debatable even though every

jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [the] petitioner will not prevail." *Id.* (*quoting Miller–El*, 537 U.S. at 338).

III. King Was Also Entitled To A COA On His Claim That Trial Counsel Were Ineffective In Failing To Present Psychiatric Evidence At Both The Guilt And Punishment Phases Of His Trial.

King also sought a COA on his claim that trial counsel were ineffective in failing to present any psychiatric evidence at both the guilt and punishment phases of his trial. The district court held that this claim was procedurally barred for failure to raise it in the initial state habeas application and because it was dismissed as an abuse of the writ in the successor petition. [USCA5.5896].

A. The Claim.

Before trial, on December 14, 1998, the defense stated that it had no present plans to have King interviewed by a psychiatrist. [USCA5.6757]. That same day, the prosecution stated that they intended to call Dr. Gripon at the punishment phase of the trial. [*Id*.] The defense, therefore, knew of the State's intention to use "psychiatric" testimony from Dr. Gripon, yet they did nothing to try to counter it with their own expert. Only the deficient and harmful testimony of Dr. Quijano was offered at the punishment phase.

As discussed in Issue One, *supra*, this testimony was disastrous. Dr. Quijano opined that, in the free world, King would commit acts of violence constituting a danger to society [USCA5.9452], agreeing with and exacerbating Dr. Gripon's indicia of future dangerousness. Dr. Gripon ignored the many potential mental health issues discussed in this claim.

Given the circumstances of the crime, King's mental state was obviously a critical issue at trial. The defense knew or should have known that an insanity or diminished mental capacity defense was certainly a very viable option. But the defense attorneys apparently made very little

or no attempt to have King evaluated on a confidential basis, as they were entitled under *Ake v. Oklahoma,* 470 U.S. 71 (1985).

Trial counsel Cribbs' affidavit in support of the State's response to the state writ application states that he "was able to obtain the services of Dr. Curtis Wills...to interview Mr. King and render an opinion regarding his mental condition." [quoted at USCA5.5892]. Whatever the degree of Dr. Wills' involvement, no psychiatric testimony was offered on behalf of King.

As the affidavit of Dr. Richard Peck makes clear, mental health information was readily available that would have had mitigating value at the punishment phase.[17] There was abundant evidence that would and should have raised this concern to trial counsel:

- King had been diagnosed as manic depressive and bi-polar in prison, and just before his arrest, he was taking anti-depressive medicine.[18]

- On March 4, 1995, King was evaluated by Dr. Desai, who stated in his diagnosis that King "presented himself with chronic depression" with symptoms of "withdrawal, loss of sleep, loss of appetite, suicidal ideation." [USCA5.1349]. King reported several suicide attempts but no current suicidal ideation. [USCA5.1377]. King stated that "these attempts were due to family problems, not living at home and not having a job." [*Id.*].

- Later, at the time of his parole case summary, written on May 28, 1997, King reported five suicide attempts. [USCA5.1383]. King indicates that "he attempted suicide during 1990-95 because he was suffering from depression after his mother died of cancer." [*Id.*]

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[17] *See* USCA5.1345-1347, Psychological Evaluation Summary by Dr. Richard Peck, Ph.D.

[18] *See* USCA5.1349-1373, medical records of John King from Jefferson County Residential Services and Dr. Rajen Desai.

- The report also states that "his future employability may be adversely affected by his past psychological problems." [USCA5.1383].

- Dr. Peck in his affidavit also shows evidence that King is not a "ringleader" and "there are numerous indicators that he is one who avoids social and interpersonal relationships...and has numerous other indicators of introversion, alienation, isolation and depressed mood which would not motivate or allow him the ambition to lead others into such causes." [USCA5.1345-1347].

- Dr. Peck adds that there are many factors that could have been responsible for his polarizing attitudes toward others: "infrequent attempts to explore or expound pent up emotion or identity issues that are a part of the loss of his mother or his immaturity problems or bipolar condition or..the prison culture..." [*Id.*] Dr. Peck concludes that King has long suffered from thought disorders and paranoia. [*Id.*]

- Prison records confirm a young man suffering from major depression. [USCA5.3573-3585]. A TDCJ case summary, dated August 23, 1995 shows a bi-polar I disorder, borderline personality disorder, three suicide attempts, including drug overdoses and attempting to hang himself, and cutting his wrists with a razor. [*Id.*] None of this was presented to the jury.

The state court held that "there is no evidence before the Court from the trial record or other sources that [King] had or has any significant mental disorder which, if true, would have raised the issue of his sanity." [quoted at USCA5.5893]. King's bi-polar condition, suicide attempts and major depression were all significant mental disorders which disprove the district court's holding that "any effort to have a psychiatrist appointed would have done nothing to assist in King's defense." [USCA5.5895]. King's conditions were also mitigating factors that the jury should have heard about in the punishment phase. Yet the cursory "evaluation" apparently performed by Dr. Wills showed only the absence of anti-social traits but did not

uncover any of the extensive history related above, which are all well-documented in these records: i) bi-polar I disorder; ii) borderline personality disorder; iii) multiple suicide attempts, including drug overdoses and attempting to hang himself, and cutting his wrists with a razor; and iv) major depression and use of anti-depressives close to the time of the crime.

B. The Fifth Circuit's Holdings Once Again Violate *Miller-El* and *Buck*.

Here again, the Fifth Circuit engaged in exactly the kind of horse-before-the-cart merits analysis this Court has admonished against in *Miller-El* and *Buck*:

(1) The Fifth Circuit held that, as to all three IATC claims, King had to show that his claims met the second *Martinez/Trevino* prong of "whether those claims are substantial." *King*, 703 F. App'x at 328. This was necessarily a merits determination and King's actual burden was only to show that the claim was debatable at this pre-COA stage.

(2) The Fifth Circuit explicitly denied this claim on the inapplicable 2254(d) standard, a merits determination, not on whether the claim was debatable:

> The district court reasoned that King's claim lacked merit because there was no evidence that King had any mental disorders that would have supported an insanity defense or that he was incompetent to stand trial, which was highlighted by the fact that Dr. Quijano testified that King would pose less of a future danger because he did not have any mental disorders that could cause irrational reactions. Accordingly, given that the state habeas court considered and rejected this argument, the district court rejected this claim because "King ha[d] not shown, as required by 28 U.S.C. § 2254(d), that the State court findings resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.
> *King,* 703 F. App'x at 333. (Appendix B).

(3) The Fifth Circuit held that "the district court found that King's trial counsel's performance with respect to this aspect of the claim was not deficient because his trial counsel

had conducted a reasonable investigation into his mental health and the decision not to seek a further psychiatric evaluation was an informed, strategic decision. Accordingly, the district court found that the punishment phase aspect of this claim was procedurally defaulted." *King* at 333. This again was a merits determination.

(4) The Fifth Circuit once again used the improper 2254(d) merits-based standard: "For the guilt phase aspect of this claim, the district court correctly recognized that, given that the state habeas court did address the merits of this aspect of the claim, King could only succeed if he meets the heightened standard of review under 2254(d)." *Id.*

(5) Regarding King's history of mental ailments, the Fifth Circuit once again used the improper 2254(d) standard while giving lip-service recognition to the "debatable" standard:

> King, however, only speculates about what might have been discovered had his trial counsel attempted to have him evaluated by a psychiatrist. King points to his alleged history of depression, bipolar disorder, and suicide attempts, but he does not explain further how this history could have justified (or led to) an insanity defense or an opinion that he was incompetent to stand trial. King's trial counsel's affidavit explained that he had consulted two psychologists, and neither psychologist found evidence that King had any mental illnesses. Accordingly, jurists of reason could not debate the district court's denial of this aspect of the claim under § 2254(d), and thus, we deny a COA on this claim with respect to the guilt phase of trial.
> *King*, 703 F. App'x at 333-334. (Appendix B).

(6) For the punishment phase of this claim, the Fifth Circuit once again used the merits-based "substantial" test:

> For the punishment phase aspect of this claim, King again focuses on his history of depression, bipolar disorder, and suicide attempts, which he argues was easily discoverable and should have been presented to the jury. Jurists of reason, however, could not debate the district court's conclusion that King's trial counsel's performance was not deficient. In his affidavit in the first state habeas proceedings, King's trial counsel explained that King had denied having any mental disability that could support mitigation and that two psychologists had examined King and found no mental illnesses...Indeed, Dr. Quijano examined King, found no evidence of mental illness, and testified that King would pose less

> of a future danger because he did not have any mental illnesses that could cause irrational reactions. Accordingly, jurists of reason could not debate whether King's trial counsel's performance fell outside of the wide range of reasonable professional assistance. Thus, we deny a COA on this claim because King has failed to meet the second prong of the *Martinez/Trevino* exception.
> *King*, 703 F. App'x at 334.

(7) Lastly, the Fifth Circuit summarily opined on the merits of attorney Cribbs' affidavit: "We also reject King's conclusory arguments that the district court erred in relying on King's trial counsel's affidavit on this point because other portions of that affidavit are purportedly false." *Id.*

This is nothing more than "lipservice," *Tennard v. Dretke*, 542 U.S. at 283, to this Court's COA standards, which has been repeatedly disapproved by this Court.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari to consider the important question presented by this petition or remand it in light of *Buck*.

Respectfully Submitted,

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