No. __________

In the Supreme Court of the United States
October Term, 2018

RANDY ETHAN HALPRIN,
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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

In *Slack v. McDaniel*, 529 U.S. 473 (2000), this Court held, "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a [certificate of appealability under 28 U.S.C. § 2253(c)] should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 484.

In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), this Court held "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief," 537 U.S. at 337, and the Court of Appeals for the Fifth Circuit had done just that, "sidestep[ping] th[e] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits." *Id.* at 336-37.

In *Tennard v. Dretke*, 542 U.S. 274 (2004), this Court found the Fifth Circuit had been "paying lipservice to the principles guiding issuance of a COA" before "proceed[ing] along a distinctly different track," and "invoke[ing] its own restrictive gloss on" this Court's cases to justify finding an issue not debatable. *Id.* at 283.

In *Buck v. Davis*, 137 S. Ct. 759 (2017), this Court held that, again, the Fifth Circuit had "phrased its determination in proper terms … but it reached that conclusion only after essentially deciding the case on the merits," in contravention of *Miller-El*. *Id.* at 773.

In light of these decisions, the Fifth Circuit's denial of Randy Halprin's motion for a COA gives rise to the following questions:

1. Has the Fifth Circuit contravened *Buck*, *Miller-El*, and *Slack* by first deciding that Mr. Halprin's claim under *Enmund v. Florida*, 458 U.S. 782 (1982) and *Tison v. Arizona*, 481 U.S. 137 (1987), did not suffice to show he is innocent of the death penalty and "thus conclud[ing] that jurists of reason would not debate the district court's determination that Halprin's *Enmund/Tison* claim is procedurally barred"?

2. Has the Fifth Circuit contravened *Buck*, *Tennard*, *Miller-El*, and *Slack* by holding Mr. Halprin's claim under *Lockett v. Ohio*, 438 U.S. 586 (1978), is not debatable because the Fifth Circuit alone has interpreted the *Lockett* line of cases "to apply to the exclusion of specific *types* of evidence rather than specific *items* of evidence"?

3. Has the Fifth Circuit contravened *Buck*, *Tennard*, *Miller-El*, and *Slack* by holding that only "post-AEDPA precedent" may be considered when deciding whether a state court unreasonably determined the facts under 28 U.S.C. § 2254(d)(2), and the issue is not debatable although no other court has reached the same conclusion?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Randy Ethan Halprin respectfully prays that a writ of certiorari issue to review the December 17, 2018, judgment of the United States Court of Appeals for the Fifth Circuit denying Mr. Halprin a certificate of appealability for any claim in his petition for writ of habeas corpus.

OPINION BELOW

On September 27, 2017, the United States District Court for the Northern District of Texas (Lindsay, J.), denied relief and a certificate of appealability ("COA") on all claims in Mr. Halprin's petition for writ of habeas corpus. The memorandum opinion and order is unreported and attached as Appendix C. App. 20-62.[1] On December 17, 2018, the Fifth Circuit also denied a COA, 911 F.3d 247, attached as Appendix B. App. 4-19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 253 (1998).

This petition is timely filed. The final judgment of the Court of Appeals was entered on December 17, 2018. Petitioner timely moved for rehearing, which the Fifth Circuit denied on January 29, 2019. App. 1. This Court granted Petitioner two extensions of time to file, until June 12, 2019.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Eighth Amendment, U.S. Const. amend. VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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[1] Citations to App. ___ refer to the appendix submitted with this petition.

The Fourteenth Amendment, U.S. Const. amend. XIV, provides in relevant part:

> 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.

This case also involves the application of two statutory provisions governing federal habeas corpus. 28 U.S.C. § 2253(c)(2) provides:

> A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

Section 2254(d) of the Judicial Code states:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) 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
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

Only two years ago, in *Buck v. Davis*, 137 S. Ct. 759 (2017), this Court issued its latest in a long series[2] of interventions to correct the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA." *Tennard v. Dretke*, 542 U.S. 247, 283 (2004).

A habeas petitioner must obtain a COA before he may appeal. 28 U.S.C. § 2253. In *Buck*, the Fifth Circuit repeated the error this Court "flatly prohibit[ed]" fourteen years earlier in *Miller-El v. Cockrell*, 537 U.S. 322 (2003) ("*Miller-El I*"), by "plac[ing] too heavy a burden on the prisoner *at the COA stage*" and resolving the merits of the case when the COA determination only required a threshold inquiry. 137 S. Ct. at 774 (emphasis in original) (citing *Miller-El I*).

Mr. Halprin's case proves that, in the Fifth Circuit, bad habits die hard. Long after *Buck* had seemed to settle the matter, the Fifth Circuit has committed the same errors once again. The court again reached well beyond the threshold inquiry to decide the ultimate merits of Mr. Halprin's appellate issues. The court again put a "dismissive and strained interpretation," *Miller-El I*, 537 U.S. at 344, on Mr. Halprin's debatable facts and arguments. The court again "pa[id] lipservice" to the COA standard's magic words, *Tennard*, 542 U.S. at 283, but decided the merits

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[2] *Penry v. Johnson*, 532 U.S. 782, 792 (2001) (finding petitioner entitled to relief after Fifth Circuit denied a certificate of appealability); *Miller-El v. Cockrell*, 537 U.S. 322, 336, 344 (2003) (holding Fifth Circuit applied incorrect COA standard and based denial on "dismissive and strained interpretation" of evidence), *rev'g denial of relief after remand sub nom. Miller-El v. Dretke*, 545 U.S. 231 (2005); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004); *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004) (vacating denial of COA in light of *Tennard* and remanding for further proceedings), *rev'g denial of relief sub nom. Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Banks v. Dretke*, 540 U.S. 668 (2004) (reversing denial of COA on *Brady* claim); *cf. Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (vacating denial of COA and remanding because Fifth Circuit's reason for denying COA "was flawed," *id.* at 1088 n.1); *Jimenez v. Quarterman*, 555 U.S. 113, 121 & n.3 (2009) (vacating denial of COA on procedural grounds by unanimous opinion and remanding for COA determination on merits).

first. The court again did so after a merits-review process. *Buck*, 137 S. Ct. at 774 ("[W]hatever procedures employed at the COA stage should be consonant with the limited nature of the inquiry."). In sum, the Fifth Circuit once again denied an ordinary appellate process to a prisoner facing the irrevocable punishment of death.

The Fifth Circuit's decision short-circuiting an appeal is especially striking because Mr. Halprin is not eligible for a death sentence. He was a minor participant in the robbery that resulted in the tragic murder of Irving, Texas police officer Aubrey Hawkins. Mr. Halprin did not shoot the victim, nor did he intend to kill, nor did he act in a reckless disregard for the officer's life. Therefore, he has substantial grounds for relief, including that he is ineligible to be executed under the Eighth Amendment because he lacks the necessary mental state. And what is more, Mr. Halprin's appeal raises not just *debatable* issues—as the COA standard requires—but important, recurring questions regarding constitutional and federal habeas law that divide courts, and on which Mr. Halprin may well prevail.

This Court should exercise its power to grant certiorari and reverse the judgment below.

STATEMENT OF THE CASE

A. Capital Trial Proceedings

Randy Halprin is one of six individuals convicted of capital murder and sentenced to death for the murder of Irving, Texas police officer Aubrey Hawkins on Christmas Eve 2000. In April 2000, charismatic inmate George Rivas invited Mr. Halprin into his plan to escape from the Connally Unit, a Texas Department of Criminal Justice ("TDCJ") prison, in Kenedy, Texas, where Mr. Halprin was serving a 30-year sentence for serious bodily injury to a child. Officer Hawkins was shot in his car after responding to a robbery at an Oshman's sporting goods store in Irving. Mr.

Halprin and the others were arrested in Colorado weeks after the robbery. Mr. Halprin was the fifth of the six individuals to be tried.[3]

Texas charged Mr. Halprin under the State's "law of parties" which made him equally liable for the worst actions of his fellow conspirators. Tex. Penal Code § 7.02. The law of parties made Mr. Halprin guilty of capital murder regardless of his individual role in Office Hawkins's death. But the jury could not impose a death sentence unless it answered "yes" to a special issue (known as the "anti-parties issue") presented in the penalty phase by finding that Mr. Halprin either actually killed the victim police officer, intended to kill him, or "anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071, § 2(b)(2).

Mr. Halprin's relative, individual culpability is a central issue in the case. From its opening statement at trial to the Fifth Circuit, the State has strived to erase any distinction between Mr. Halprin and the other escapees. *E.g.*, USCA5.6614; 6616.[4]

Mr. Halprin's involvement in the escape began when the escapees' leader, Rivas, offered Halprin a better job in the Connally maintenance department. Halprin welcomed the offer and was soon working in the maintenance department. Rivas approached Mr. Halprin with his plan to escape, and asked Mr. Halprin if he wanted to be a part of it. Mr. Halprin told Rivas he needed to think about it. USCA5.7606-09.

Mr. Halprin ultimately decided to accept Rivas's invitation. While he knew Rivas well, he did not really know the other individuals involved. USCA5.7609-12. Rivas was responsible for

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[3] A seventh individual also escaped from the Connally Unit, and later took his own life prior to capture.

[4] This Petition refers to the federal record on appeal as "USCA5.[page]." The record on appeal contains all state court records, as transmitted to the district court.

the majority of the planning and Mr. Halprin had virtually no role in orchestrating the escape. USCA5.7621-22. On December 13, 2000, the seven men escaped from the Connally Unit. Although escapees took guards and civilians hostage during the escape, only one, Alejandro Marrogquin, specifically identified Mr. Halprin as a violent assailant, but he was impeached for his inconsistent statements on that point. USCA5.7923-27, 7931-32.

Following the escape, the men traveled together to Houston, and at Rivas's suggestion, they robbed a Radio Shack. Mr. Halprin participated in the robbery, but he did not carry a gun, and his role was "to go in and grab stuff." USCA5.7626. Members of the group went on to rob a second location following the escape, a Western Auto store. Prior to the robbery, Mr. Halprin told the men that he was not going to rob anymore, and he did not participate in that robbery. USCA5.7627-28. After the Western Auto robbery, the group travelled to the Dallas area. Rivas had an idea to rob an Oshman's sporting goods store in the area. USCA5.7628.

The Oshman's Robbery. Randy Halprin's assigned role in the Oshman's robbery was that of a gofer, to enter the store and look as if he were a customer and fill up a shopping cart. USCA5.7629. Mr. Halprin did carry a gun during the robbery, but he maintained that he never drew the weapon or fired it at any time. Before the robbery, he told the others that he was not going to enter the store with a gun. There was an argument, and the others in the group "made it very clear" that it was "their way or the highway." USCA5.7632. Mr. Halprin told the group that he was not going to pull his gun out, to which he was told, "fine, just gather clothes." *Id*.

Once Rivas initiated the robbery, Mr. Halprin fulfilled his role of gatherer. He had been specifically instructed to gather jackets, T-shirts, and long sleeved shirts. While Mr. Halprin was gathering goods, Rivas marched the employees and anyone else in the store down an aisle, past Mr. Halprin, to the back of the store with their hands in front of each other. Mr. Halprin was then

instructed by Rivas to go to the back of the store, where Rivas gave him an employee T-shirt and told him to "put it on and go to the front and act like you are cleaning up." USCA5.7634. Mr. Halprin followed Rivas's instruction. Rivas then appeared at the front of the store with the store manager and after entering and exiting the security room, Rivas dropped a gym bag on the floor and told Mr. Halprin to keep his eye on it. While Mr. Halprin was at the front of the store, a store telephone rang. Rather than pick it up, or simply ignore it, Mr. Halprin sought directions from Rivas, who told him to answer it. Mr. Halprin answered the phone and when he heard nothing, he hung up. The next thing Mr. Halprin heard was a voice on the radio saying "Get out, get out. Go, leave, leave now." USCA5.7635. Mr. Halprin grabbed some bags, including the one Rivas had directed him to watch over, and ran to the fire exit in the back of the store. Once Mr. Halprin exited the store through the fire exit, one member of the group, Larry Harper, ordered him back into the store to "go grab the long sleeping bag." USCA5.7636. He did as ordered and grabbed a long sleeping bag that was lying in the middle of an aisle and that someone had filled with rifles. *Ibid*. Mr. Halprin dragged the sleeping bag to the back of the store and out the fire exit. USCA5.7637. Outside the store, he dragged the sleeping bag down some stairs and over to a vehicle that was parked behind the store. *Ibid*. He was attempting to shove the sleeping bag into the vehicle when a police patrol car pulled up. USCA5.7638-39. Rivas told Mr. Halprin to stay put. USCA5.7639. Rivas then proceed to walk toward the patrol car, said something about being a security guard, and then fired into the patrol car. USCA5.7640. When he heard the gun shots, Mr. Halprin "freaked out," and ran around the vehicle and away from the store. USCA5.7641. As he ran, he heard some-one call his name, and when he turned around, he felt his foot go numb. He had been shot. *Ibid*.

Mr. Halprin was told to get in the car, and he did—jumping into the front passenger seat and sitting on the lap of another escapee. USCA5.7642. Rivas drove the vehicle away from the

store and to an apartment complex where Rivas ordered the passengers, including Mr. Halprin, out of the car and where they waited until another escapee came to pick them up. USCA5.7644-45. The group of men met back at a motel where Rivas revealed that he too had been shot. USCA5.7645-47. Rivas first accused Mr. Halprin of being the one that shot him, but Mr. Halprin assured them that he never fired his weapon. USCA5.7647. An inspection of Mr. Halprin's weapon showed it had not been fired. *Ibid*. The group left Texas and traveled to Colorado where they remained until their capture. USCA5.7649.

The Ranking Document. Prior to Mr. Halprin's trial, the trial court entered a discovery order, directing the State to furnish, *inter alia*, "All exculpatory evidence pursuant to Code of Criminal Procedure, *Brady v. Maryland* and related cases." USCA5.1265. The State provided defense counsel with several boxes of discovery, comprising over 6,000 pages. USCA5.13211. Within the boxes of documents was an investigative report from the TDCJ Connally Unit titled "Ranking of Offenders by Leadership/Personality Characteristics." USCA5.12270. The "Ranking Document," as it came to be known, identified Rivas as the leader, and Mr. Halprin as the "weakest" escapee. *Ibid.* It said Mr. Halprin

> was quiet and never exhibited leadership qualities. Was consistently worried about whether his work was acceptable to the civilian workers. Very submissive characteristic. This worrisome attitude was seen to escalate a month before the escape. One civilian worker speculated whether HALPRIN was undergoing some type of depression.

Ibid.

At trial, defense counsel twice attempted to introduce the TDCJ Ranking Document through prosecution witnesses. Both times, the document was excluded when the judge sustained the prosecution's hearsay objections. The jury found Mr. Halprin guilty of capital murder on the basis of a general verdict. USCA5.1221.

In the punishment phase of trial, the defense again attempted to introduce the ranking document in support of its contention that Halprin was less culpable. Defense counsel called Elizabeth Mullin, the custodian of records for the Texas Board of Criminal Justice Office of Inspector General, who acknowledged that the document appeared to have been generated by the TDCJ Connally Unit. USCA5.8360-61, 8370. But, as with the prior attempts, the court found the document inadmissible on the basis of hearsay. USCA5.8268-69. Before calling its last witness, the defense tried again to introduce the document. The trial court ruled there was "[n]o question about its authenticity," it was a TDCJ document, and it was "a business record," but, due to the unknown identity of the author, the court determined it was "simply not admissible because of hearsay." USCA5.8443-47.

The document did not identify its author but indicated that the information was obtained "[a]fter conducting interviews with civilian workers, correctional officers, and several inmates who worked closely with the escapees." USCA.5.12270. The prosecution told the trial court that it did not know who had authored the document. USCA5.8446. Defense counsel sought and obtained a court order compelling TDCJ to provide access to other documents. USCA5.16795. Defense counsel's investigator reviewed two collections of documents at two different locations. USCA5.17345-47. But the investigator did not find anything indicating who authored the ranking document. USCA5.13195-96. Years later, during post-conviction proceedings, and again pursuant to a court order, USCA5.16799, the defense investigator returned to one location and found a fax cover sheet that, at one time, had accompanied the ranking document. That cover sheet still did not identify the author of the ranking document. USCA5.16592. It identified the author of a set of summaries of witness statements that appeared to be the source material for the ranking document.

Id. The investigator deduced that the author of those summaries also authored the ranking document. USCA5.17345-47.

The State's evidence in the punishment phase, which included testimony from three witnesses, focused exclusively on Mr. Halprin's prior conviction.

Mr. Halprin also called Dr. Kelly Goodness as a mitigation witness, and sought to introduce the doctor's report, and to permit her to testify as to information she relied on to form the opinions she provided in the report. The State objected on hearsay grounds, and the trial court ruled that Dr. Goodness could testify to her opinion and the sources she relied on to form the opinion, but could not testify to any specific information contained within those sources.

Over the course of its six-hour penalty deliberations, the jury indicated through a note that its answer to the second, anti-parties special issue, turned on the difference between whether Mr. Halprin "anticipated that a human life would be taken" and "should have anticipated." USCA5.1230. The jury eventually answered the special issues in such a way that resulted in a death sentence.

B. Direct Appeal

On direct appeal, Mr. Halprin argued, *inter alia*, that the trial court's exclusion off the ranking document violated the Eighth Amendment. In 2005, the Texas Court of Criminal Appeals ("TCCA") affirmed the conviction and sentence. *Halprin v. State*, 170 S.W.3d 111 (Tex. Crim. App. 2005). The TCCA found "that the trial court did not abuse its discretion to decide the document did not meet the business records exception to the hearsay rule." *Id*. at 116. The court also found that Mr. Halprin had presented "from other sources" mitigating evidence that was "cumulative of the mitigating evidence contained in the [ranking] document." *Ibid*.

C. State Habeas Proceedings

Mr. Halprin timely filed his state post-conviction application in April 2006. USCA5.15206. At the time, the trial judge, Vickers Cunningham,[5] was presiding over the 283rd District Court, but he stepped down before ruling on the application. A second judge took over and presided over multiple evidentiary hearings that included live testimony from numerous witnesses. After all the evidence related to Mr. Halprin's claims had been received by the second judge, he was recused, USCA5.17580, and a third judge was assigned. USCA5.17581. The third judge, Judge Snipes, did not preside over any of the testimony—either at trial or the post-conviction evidentiary hearings. Nonetheless, Judge Snipes adopted (with immaterial alterations) the State's proposed factual findings and legal conclusions, including contradictory credibility determinations related to the testimony of trial and post-conviction witnesses. On March 20, 2013, the Texas Court of Criminal Appeals adopted "Judge Snipes's" findings of fact and conclusions and denied relief.[6] *Ex parte Halprin*, Nos. WR-77,175–01, 2013 WL 1150018 (Tex. Crim. App. Mar. 20, 2013).

D. Federal Habeas Proceedings

Mr. Halprin presented nine grounds for relief in an amended habeas petition filed in district court in June 2014. USCA5.46-57. Relevant to this Petition, Mr. Halprin raised two claims related to the jury's inability to consider the ranking document in mitigation: (1) that the exclusion violated *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny; and (2) that the State's suppression of the

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[5] Vickers Cunningham is the subject of a judicial bias claim based on newly discovered evidence which Mr. Halprin has presented to the United States District Court for the Northern District of Texas in a second-in-time habeas petition. Pet'n Writ Habeas Corpus, *Halprin v. Davis*, No. 03:19-cv-01203-L (N.D. Tex.); 03:13-cv-01535-L (N.D. Tex.).

[6] The TCCA rejected nine of Judge Snipes's findings and conclusion that determined two of Mr. Halprin's filings were subsequent writs under state law.

document's author violated *Brady v. Maryland*, 373 U.S. 83 (1963). In a separate, but thematically related claim, Mr. Halprin showed that he is not eligible for a death sentence under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987).

The district court denied all claims for lack of merit, and one on the additional ground that the *Enmund/Tison* claim was procedurally barred. USCA5.922. The court applied 28 U.S.C § 2254(d) to all claims. The court also denied a certificate of appealability.

On May 7, 2018, Mr. Halprin filed an application for a certificate of appealability ("COA") with the Fifth Circuit. In July 2018, the State filed an Opposition to Mr. Halprin's COA application. Based on the contents of the Opposition, Mr. Halprin sought leave to file an extra-length reply due to numerous distortions of the record in the State's Opposition. Specifically, the State presented as "facts" contained in the record, inaccurate assertions the State fed to the post-conviction court which the court rubber-stamped. While the State did not "oppose" the request to file an extra-length reply, it did file a "Response" to the motion explaining that it was merely stating the facts as found by the state habeas court, with its purported record cites.

E. DECISION BELOW

After full briefing on Mr. Halprin's COA application, including an extra-length reply and sur-reply "response," the Fifth Circuit denied the application in a published opinion. App. 4 (*Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018)).

The Fifth Circuit recited the COA standard and noted that "[b]ecause this is a death penalty case, we resolve any doubts about granting a COA in favor of a grant." App. 10 (citing *Escamilla v. Stephens*, 749 F.3d 380, 387 (5th Cir. 2014)).

Mr. Halprin sought rehearing of the Fifth Circuit's decision, which was denied on January 29, 2019. App. 1.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S DECISION FLOUTS THIS COURT'S CLEAR GUIDANCE ON THE THRESHOLD INQUIRY FOR CERTIFICATE OF APPEALABILITY DETERMINATIONS AND WARRANTS REVERSAL.

A. WHAT *BUCK*, *MILLER-EL*, AND *SLACK* ALL REQUIRE: A THRESHOLD INQUIRY INTO THE DEBATABILITY OF A DISTRICT COURT'S RESOLUTION OF PROCEDURAL AND SUBSTANTIVE ISSUES.

Under the AEDPA, a prisoner seeking a COA must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

In 2000, this Court issued a clear decree on the meaning of § 2253(c)(2), holding it essentially "codifi[ed]" the pre-AEDPA "certificate of probable cause" standard for appeals on federal habeas. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).[7]

Just like the pre-AEDPA regime, § 2253(c)(2) required a mere "threshold inquiry." *Id.* at 485. A petitioner need only demonstrate that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted). When a petitioner seeks a COA on a district court's procedural ruling, the reviewing court must determine whether reasonable jurists would debate both the procedural ruling and the underlying constitutional claim. *Slack*, 529 U.S. at 484-85.

Since *Slack*, lower courts have applied the COA standard—with one exception. This Court has had to "reiterate" the COA standard, exclusively on certiorari to the Fifth Circuit. *Miller-El v.*

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[7] In one narrow respect, the COA standard differed from its predecessor: substituting the word "constitutional" for "federal." *See Slack*, 529 U.S. at 483.

Cockrell, 537 U.S. 322, 327 (2003) ("Consistent with our precedent and the text of the habeas corpus statute, we *reiterate* . . . "); *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) ("We *reiterate* what we have said before. . . ." then quoting *Miller-El*).

In *Buck*, this Court sharply criticized the Fifth Circuit's relapse into forbidden COA practices. The Court emphasized again the COA determination is a "threshold" inquiry and "is not coextensive with a merits analysis." *Id.* at 773. Courts undertaking a COA inquiry should "ask only if the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 348) (internal quotation marks omitted). The bar is a low one: "[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 petitioner will not prevail." *Id*. (alteration in original) (quoting *Miller-El*, 537 U.S. at 338) (internal quotation marks omitted).

This Court found the Fifth Circuit had "sidestep[ped]" the threshold inquiry even though the court had "phrased its determination in proper terms," because "it reached that conclusion only after essentially deciding the case on the merits." *Id.* at 773. *Buck* was not the first time this Court had called attention to the Fifth Circuit's ersatz adherence to the COA standard. In *Tennard v. Dretke*, 542 U.S. 274 (2004), this Court rebuked the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA," but "proceed[ing] along a distinctly different track"—"invok[ing] its own restrictive gloss" on the merits of the petitioner's constitutional claim at the COA stage. *Id.* at 283.

Buck also cast doubt on the Fifth Circuit's elaborate procedures for determining whether a COA should issue. Those practices include lengthy, adversarial briefing and oral argument before a three-judge panel. *Buck* suggested these were not "consonant with the limited nature of the inquiry." 137 S. Ct. at 775.

The Fifth Circuit's resolution of Mr. Halprin's case also "essentially decided the merits" at the COA stage, sometimes without even concealing its contravention of *Slack*, while also "paying lipservice" to the correct COA standard. As a result, Mr. Halprin has been denied the opportunity to present three important and debatable issues in the manner that Congress and this Court have intended: in an ordinary appeal. These serious *non*-applications of the COA standard—in a death-penalty case that at a minimum deserves an ordinary appeal—warrant this Court's review.

B. The Fifth Circuit's ultimate resolution at the COA stage of the merits of Mr. Halprin's procedural default arguments on his death ineligibility claim contravenes *Buck.*

Mr. Halprin's federal habeas petition asserted that he is ineligible for a death sentence under *Enmund v. Florida*, 458 U.S. 782 (1982), and *Tison v. Arizona*, 481 U.S. 137 (1987), because he was a minor participant in the Oshman's robbery, did not kill the officer, and did not exhibit reckless disregard for human life. The state court held Mr. Halprin had procedurally defaulted the claim. In federal court, *inter alia*, Mr. Halprin asserted that his innocence of the death penalty excused the default. *See Sawyer v. Whitley*, 505 U.S. 333, 350 (1992). The district court rejected the argument. The Fifth Circuit disposed of the issue in precisely the manner this Court held improper in *Buck*, by reaching the merits first, then finding the issue not debatable:

> Halprin has not shown … that a failure to address his claim will result in a miscarriage of justice. … We thus conclude that jurists of reason would not debate the district court's determination that Halprin's *Enmund/Tison* claim is procedurally barred.

App. 17.

The Fifth Circuit's unabashed resistance to applying the correct COA standard warrants reversal.

1. Mr. Halprin could meet the fundamental miscarriage of justice exception because he could show he was "innocent of the death penalty."

Mr. Halprin was indicted and convicted under Texas's "law of parties" which makes non-killers capitally liable as accomplices. Tex. Pen. Code. § 7.02. Before a death sentence could be imposed, however, Texas law required the jury to answer the so-called "anti-parties" special issue and determine whether Mr. Halprin "actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken." Tex. Code Crim. Proc. art. 37.071, § 2(b)(2). The instruction was submitted to the jury over Mr. Halprin's objection that the instruction did not comply with the Eighth Amendment as applied to his case. USCA5.1342-55; USCA5.8504 (renewing motion at close of evidence). A question from jurors during penalty deliberations shows their affirmative answer to the second special issue turned on whether Mr. Halprin "anticipated that human life would be taken." USCA5.1230; *id.* at 18048 (quoting Tex. Code. Crim. Proc. art. 37.071, § 2(b)(2)). The jurors answered the issue in the affirmative.

Mr. Halprin asserted in state habeas proceedings that under *Enmund* and *Tison* he lacked the minimum culpability for imposition of the death penalty under the Eighth Amendment. Under *Tison*, Mr. Halprin could be eligible for a death sentence only if he was a major participant in the robbery and had exhibited a "reckless indifference to human life." *See Tison*, 481 U.S. at 158. He could not be eligible to be sentenced to death merely because he "anticipated that lethal force would or might be used or that life would or might be taken in accomplishing the underlying felony." *Id.* at 150.

The state habeas court—adopting the prosecution's findings and conclusions—found that the claim (1) was procedurally barred because it should have been raised at trial and on direct appeal; and (2) in the alternative, was without merit. USCA5.896-900.

In federal habeas, assuming the state court applied an independent and adequate state procedural bar, the federal habeas court could only review Mr. Halprin's claim on the merits if an exception to the procedural default doctrine applied. *See Coleman v. Thompson*, 522 U.S. 722, 750 (1991). The district court denied the claim.

Mr. Halprin argued that the "fundamental miscarriage of justice" exception applied, which allows for federal court review of claims where the petitioner demonstrates by clear and convincing evidence that, but for the defaulted constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty. *Sawyer*, *supra*, 505 U.S. at 350. In particular, Mr. Halprin argued that his *Enmund*/*Tison* allegations showed that he was innocent of the death penalty. *See* Petitioner's Mot. COA at 47, *Halprin v. Davis*, No. 17-70026 (5th Cir. May 7, 2018).

He argued no reasonable juror could have found that Halprin actually killed Officer Hawkins or intended to kill him. Neither the jury nor any state court determined that Halprin was a major participant in the robbery or murder, or that he exhibited reckless disregard for human life. In fact, the jury appeared to rely on a culpable state that *Tison* held fell short of the constitutional standard—a mere foreseeability of harm. *See Tison*, 481 U.S. at 150.

The question under *Sawyer*, then, is "whether, given *proper* instructions about" the minimum level of culpability to sentence to death under Eighth Amendment, "a reasonable jury could have decided that" Mr. Halprin had the required mental state. *Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017).

In one conclusory sentence, the Fifth Circuit held that Mr. Halprin "*has not . . . demonstrated* that a failure to address his claim will result in a fundamental miscarriage of justice." App. 17.

As addressed below, the Fifth Circuit also held the claim was adjudicated on the merits and Mr. Halprin could not show that he satisfied 28 U.S.C. § 2254(d). *Id.* at n.4.[8]

2. The district court's application of the procedural bar was, at a minimum, debatable and deserving of further encouragement.

The Fifth Circuit's conclusory dismissal of Mr. Halprin's procedural arguments is plainly wrong. The law and facts Mr. Halprin offered in support of his *Sawyer* claim likely entitled him to overcome the application of the procedural default doctrine. But at the very least, Mr. Halprin's legal and factual arguments were *debatable* among jurists of reason—even if the Fifth Circuit panel would conclude that Mr. Halprin should ultimately lose.

For the reasons above, the facts supporting Mr. Halprin's *Enmund/Tison* death-ineligibility claim debatably met *Sawyer*'s standard for demonstrating "innocence of the death penalty." *Sawyer*, 505 U.S. at 350. Mr. Halprin did not plan or provide any necessary material for the robbery. He participated only after the other escapees, the leaders, demanded that he do so and after Mr.

[8] This Court in *Miller-El I* and *Brumfield v. Cain*, 135 S. Ct. 2269 (2015), also reversed the Fifth Circuit while admonishing that AEDPA's requirement of "'deference [to state courts] does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield*, 135 S. Ct. at 2277 (quoting *Miller-El I*, 537 U.S. at 340). The Fifth Circuit also contravened those principles when it held Mr. Halprin's Eighth Amendment challenge to Texas's anticipation standard was not debatable solely because "[t]he Texas Court of Criminal Appeals has stated that … 'anticipating that a human life will be taken is … at least as culpable as the one involved in *Tison* ….'" App. 17 n.4 (quoting *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999)).

Halprin had absented himself from the second robbery. Mr. Halprin told the others he did not want to carry a gun, and although they compelled him to, they confirmed he never fired it.

Moreover, the law was certainly debatable. If the Fifth Circuit found Mr. Halprin's evidence of death-ineligibility under *Enmund*/*Tison* was irrelevant to the *Sawyer* determination, that would place the Fifth in conflict with the Fourth and Eighth Circuits which have found that a claim for relief under *Enmund* and *Tison* may also provide the factual and legal basis for overcoming the procedural default of that claim under *Sawyer*. *See Fairchild v. Norris*, 21 F.3d 799, 801-02 (8th Cir. 1994) ("We consider Fairchild's claim under the actual-innocence exception, because Fairchild argues that he lacked the required mental state to be sentenced to death."); *Buckner v. Polk*, 453 F.3d 195, 200-01 (4th Cir. 2006) (entertaining petitioner's argument for *Sawyer* exception but rejecting its application because *Enmund*/*Tison* claim failed on facts of case).

The fact that other federal circuit judges had taken "differing positions" itself demonstrates that the question is debatable among jurists of reason. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990) (explaining, for *Teague v. Lane* purposes, that the existence of "differing positions taken by" federal circuit judges itself demonstrated that an issue is "susceptible to debate among reasonable minds"); *see also Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari) (indicating that a disagreement among judges as to the debatability of a habeas claim "alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution" of the claim) (emphasis in original). What is more, having been briefed by Mr. Halprin on the Fourth Circuit's analysis, the Fifth Circuit was well advised that the issue was debatable.

C. The Fifth Circuit's ultimate resolution at the COA stage of AEDPA's relitigation bar to Mr. Halprin's claims contravenes *Buck.*

The Fifth Circuit contravened the COA standard on another important procedural question. The Fifth Circuit held Mr. Halprin's grounds for finding the state court's factual determinations unreasonable under 28 U.S.C. § 2254(d)(2) were not debatable because courts were bound to apply only "post-AEDPA precedents," App. 18 n.4, and he relied upon a principle laid down in *United States v. Raddatz*, 447 U.S. 667 (1980).

Mr. Halprin's unreasonable-determination argument focused on the state court's process. The second state post-conviction judge rubber-stamped the prosecutor's proposed finding that the Ranking Document was not material under *Brady* because the information it contained was "cumulative" of a "plethora of other, similar evidence." USCA5.18069. Specifically, the state court found Mr. Halprin's own testimony "that he was a follower and that his participation in the escape and the victims murder was minimal" made the additional Ranking Document evidence cumulative. USCA5.18069. The state court also pointed to glancing testimony of TDCJ civilian employees that Mr. Halprin's *intelligence* would be ranked "at the very bottom" of the escapees, and that Mr. Halprin was not the "leader type." *See* USCA5.18068.

Conversely, the state court rubber-stamped the prosecutor's proposed finding that Mr. Halprin failed to establish that he lacked *Enmund/Tison* culpability because his testimony was "severely impeached on cross-examination." USCA5.18051.

The judge who decided to give persuasive force to the testimony about culpability in reference to the *Brady* claim, and to give no value to the same testimony when considering the *Enmund/Tison* claim—the third judge on the case—never saw any witness testify at trial or in post-conviction. USCA5.17581-85.

The district court applied 28 U.S.C. § 2254(d) to bar relief on both Mr. Halprin's *Enmund*/*Tison* claim and his *Brady* claim, and gave deference to the state court's fact-findings. App. 33 (*Brady*), 40 (*Enmund*/*Tison*). Mr. Halprin argued that the state judge's wholesale adoption of contradictory credibility determinations, made without hearing any live testimony, was analogous to the universally condemned practice of a district judge contradicting a magistrate judge's credibility findings without hearing from the witnesses. USCA5.364-66 (citing, *inter alia*, *Raddatz*, 447 U.S. at 681 n.7).

Again in his COA application, Mr. Halprin cited, *inter alia*, *Raddatz* and Fifth Circuit law following it, and this Court's decisions in *Cabana v. Bullock*, 474 U.S. 376, 388 n.5 (1986), and *Wainwright v. Witt*, 469 U.S. 412, 429 (1985), for the proposition that the reasonableness of the state court's wholesale adoption of contradictory credibility determinations on a paper record was at least debatable. On an equally wholesale basis, the Fifth Circuit rejected the argument on the ground that Halprin's argument was "unsupported by post-AEDPA precedent." App. 18 n.4.

The Fifth Circuit's decision is bizarre given AEDPA's insistence that state court decisions be reviewed for consistency with Supreme Court law that ***pre****dates* the state court's decision. 28 U.S.C. § 2254(d)(1). But it also is inaccurate because Mr. Halprin relied on *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) (Kozinski, J.), *cert. denied*, 543 U.S. 1038 (2004), which is in conflict with the Fifth Circuit's decision in *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001). It stands to reason that a disagreement between circuits about how to apply § 2254(d)(2), and an unreasonable-determination argument that is tethered to a legal principle that was clearly established before the state court made its decision would at least be debatable.

The Fifth Circuit's pretermission of the question at the COA stage repeats the *same* improper judicial injury that plagued the petitioners in *Buck* and *Miller-El*—"in essence deciding an

appeal without jurisdiction," *Miller-El*, 537 U.S. at 336-37, abandons and abdicates review, *id.* at 340, and thereby frustrates this Court's ability to bring uniformity and clarity to the interpretation of a distinctly challenging statutory scheme.

1. Mr. Halprin raised at least debatable claims on the merits.

Setting aside the debatable application of § 2254(d)(2) to Mr. Halprin's claims, the merits of Mr. Halprin's *Enmund*/*Tison* claim and *Brady* claim were strong, and at least entitled Mr. Halprin to review in an ordinary appeal.

As explained in Part I.B above, Mr. Halprin raised a strong argument on the merits of his *Enmund*/*Tison* claim. Without hearing or seeing Mr. Halprin testify, the state court rubber-stamped the prosecution's proposed finding that discredited his testimony about his mental state and role at the time of the killing. *See* USCA5.18051 (state court finding that "[Mr. Halprin's] assertions" regarding culpability "are not credible. They are predicated in large part on his own trial testimony the credibility of which was severely impeached on cross-examination . . . ."). If the state court had credited the same testimony, as it did for purposes of the *Brady* claim, Mr. Halprin would have been entitled to relief.

Mr. Halprin's *Brady* claim was also debatable. It centered on the State's suppression of the author of the Ranking Document which resulted in that document being excluded at trial, and the exclusion being upheld on appeal.[9] The document would have provided powerful corroboration

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[9] *See Halprin*, 170 S.W.3d at 116 ("We find that the trial court did not abuse its discretion to decide that the document did not meet the business records exception to the hearsay rule. There is no evidence showing who prepared the document or whether it is a record of regularly conducted activity.").

for Halprin's defense that he was a reluctant participant in the robbery who had no reckless disregard for human life. It aggregated the observations of professional and lay witnesses who described Halprin as "weakest," "quiet and never exhibited leadership qualities," "consistently worried" about pleasing others, and "undergoing some type of depression" before the escape. Separately, Mr. Halprin raised a claim that the trial court's exclusion of the Ranking Document violated his right to present mitigation evidence under *Lockett v. Ohio*, 438 U.S. 586 (1978), and its progeny.

The Fifth Circuit resolved these two claims solely through the lens of § 2254(d), without ever analyzing the underlying merits. *See* App. 14. ("Reasonable jurists could not debate the district court's determination that Halprin had not made the showing required under 28 U.S.C. § 2254(d) with respect to his *Brady* claim."); App. 17 ("[E]ven if Halprin had not procedurally defaulted on his *Enmund*/*Tison* claim, reasonable jurists could not debate that the district court appropriately deferred to the state court's alternative conclusion that Halprin's claim was meritless.").

2. The Fifth Circuit's denial of an appeal on these claims because 28 U.S.C. § 2254(d)(2) can only be satisfied by "post-AEDPA precedent" is plainly wrong.

The Fifth Circuit sidestepped important—and debatable—legal questions regarding § 2254(d) with the effect of insulating its decision from this Court's review. The Fifth Circuit's ambiguous invocation of "post-AEDPA precedent" imposing an arbitrary cut-off for relevant precedent further signaled this intent.

The court may have intended to invoke its well-established (and oft-disputed) rule categorically barring process considerations from the § 2254(d)(2) analysis. *Valdez*, *supra*, 274 F.3d at 944. In *Valdez*, the Fifth Circuit was confronted with a troubling record from the state post-conviction court that reviewed the capital petitioner's claim of ineffective assistance of counsel. The

state court had lost exhibits that were critical to factual determinations, failed to review them, and refused to examine the trial record. *Id.* at 944-45. The Fifth Circuit held that these considerations were irrelevant to "the application of 28 U.S.C. § 2254's deferential scheme." *Valdez*, 274 F.3d at 949.

To the extent the Fifth Circuit applied this categorical rule it engaged in a sharply-divided debate among circuit courts on the relevance of state process to § 2254(d)(2). *See* Brian Means, *Federal Habeas Manual* § 3:94 (2019); 2 Randy Hertz & James Liebman, *Federal Habeas Corpus Practice and Procedure*, § 32.4 n.10 (2018) (discussing cases disagreeing with *Valdez*). Indeed, already *in 2001*, the Fifth Circuit knew it was participating in a circuit split. *See Valdez*, 274 F.3d at 949 (rejecting Tenth Circuit's approach in *Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998). *See also Robidoux v. O'Brien*, 643 F.3d 334, 340 (1st Cir. 2011) (finding "[c]ase law is divided on whether, when, and to what extent lack of an evidentiary hearing in the state court might under undercut the deference to state fact-finding that is due under the habeas statute" and collecting cases); *Wilson v. Workman*, 577 F.3d 1284, 1315 (10th Cir. 2009) (en banc) (Gorsuch, J., dissenting) ("When a state court renders a decision on the merits of a federal claim without considering all material evidence, it is surely more likely that its decision will be an unreasonable application of federal law, and thus reversible under § 2254(d)."). *Cf. Sharpe v. Bell*, 593 F.3d 372, 378 (4th Cir. 2010) ("character of the process upon which the state court based its conclusion may have some bearing on whether a petitioner's showing amounts to 'clear and convincing' evidence that the state court erred").

All this is not to say the Court needs to answer a question that has vexed circuits for a generation. It merely establishes that Mr. Halprin asked the Fifth Circuit to examine his claims in a manner that the statute arguably permits and that jurists of reason *have debated* and will continue

debating. Mr. Halprin may only have a puncher's chance to win his *Brady* or *Enmund/Tison* claim, but it is at a *minimum* debatable that the state court fact-finding process impacted the courts' decisions as to the admissibility and exclusion of the evidence and that this process may have been unreasonable. The Fifth Circuit's resolution of this issue on COA is troubling and inconsistent with this Court's decisions in *Buck* and *Miller-El* both because the court misapplied the COA standard and because the court abandoned or abdicated its role.

D. THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY AN APPEAL OF MR. HALPRIN'S *LOCKETT/EDDINGS* CLAIM BASED ON ITS OWN NOVEL AND LIMITING INTERPRETATION OF THIS COURT'S PRECEDENT WARRANTS REVIEW.

The Fifth Circuit has decided an important question of federal law that has not been, but should be, settled by this Court: whether the requirements of the Eighth and Fourteenth Amendments that the sentencer in a capital case "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances surrounding the offense that the defendant proffers as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604 (emphasis in original), quoted in *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982), can be interpreted by a circuit court to exclude relevant mitigation evidence based on a self-created distinction between "types" of evidence and "items" of evidence. And, whether the same court can use its own novel and constricting interpretation of these principles to foreclose appellate review of a capital petitioner's claim of constitutional error. The Fifth Circuit has answered these important question in the affirmative. This Court should be the judicial body to answer the questions. *Cf. Smith v. Lopez*, 135 S. Ct. 1, 4 (2014) (in the context of clearly established Federal law as determined by this Court, "Circuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced'") (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013)). And, the answers should be "no."

When relevant mitigation evidence is excluded from a capital jury's consideration, there is a decrease in "the likelihood that the sentence will possess and appreciate the information necessary to make a moral decision deserving of society's confidence." Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. Crim. L. & Criminology 283, 288 (1991).

The Fifth Circuit's gloss on *Lockett* and *Eddings*, as reflected in this case, is another episode in that court's long-running, historical revisionist series about this Court's Eighth Amendment cases. *See Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*); *Penry v. Johnson*, 532 U.S. 782, 803-804 (2001) (*Penry II*); *Tennard v. Dretke*, 542 U.S. 274 (2004); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Brewer v. Quarterman*, 550 U.S. 286 (2007). As in past episodes, the Fifth Circuit's limiting interpretation of *Lockett* has no foundation in the holding of this Court, and distinguishes itself from the other Circuits.

In his direct appeal, Mr. Halprin argued the trial court violated *Lockett* and *Eddings* by precluding the jury from considering the Ranking Document, and its assessment of Mr. Halprin, as mitigation evidence. The state court concluded that the trial court did not abuse its discretion in excluding the document (likely a decision based exclusively on state evidentiary law), and that the document was cumulative of other evidence presented. *Halprin*, 170 S.W.3d at 116.

In response to Mr. Halprin's reassertion of the claim on federal habeas review, the district court concluded that the state court's decision was not unreasonable because the Fifth Circuit "has construed [*Lockett/Eddings*] to apply to categories rather than items of evidence." App. 35 (citing *Simmons v. Epps*, 654 F.3d 526, 544 (5th Cir. 2011). The Fifth Circuit denied a COA on the same

grounds, citing its own limiting gloss on this Court's precedent which has "interpreted the *Lockett/Eddings* line of cases to apply to 'the exclusion of specific *types* of evidence rather than specific *items* in evidence.'" App. 12 (quoting *Simmons,* 654 F.3d at 544) (emphasis in original).

"Lockett endures because it deserves to endure."[10]

Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion), introduced the idea that "the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." 428 U.S. at 304 (citation omitted). This Court has repeatedly affirmed the principle. *E.g.*, *Tennard*, 542 U.S. at 285 ("State cannot bar 'the consideration of . . . evidence if the sentence could reasonably find that it warrants a sentence less than death'") (quoting *McKoy v. North Carolina*, 494 U.S. 433, 441 (1990)); *Penry I,* 492 U.S. at 319; *Sumner v. Shuman,* 483 U.S. 66, 85 (1987); *Eddings,* 455 U.S. at 110-12. *See also McCleskey v. Kemp,* 481 U.S. 279, 315 n. 37 (1987).

Penry I, *Penry II*, *Tennard*, *Abdul-Kabir*, and *Brewer* teach that Texas, its courts, and ultimately the Fifth Circuit, have consistently moved to limit or foreclose entirely jurors' ability to consider and give meaningful effect to mitigation evidence. The types/items gloss is a variation on the theme. And, as this case illustrates, the type/item distinction is arbitrary. The state appellate court, in contradiction to the state post-conviction court's *Enmund/Tison* reasoning, credited Mr. Halprin's testimony "that he was a follower and not a leader and that his participation in the victim's murder was minimal," in finding the Ranking Document "cumulative." *Halprin*, 170 S.W.3d

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[10] Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. Crim. L. & Criminology 283, 288 (1991).

at 116. The Fifth Circuit has no principled basis for holding that the relevant "type" of evidence is evidence touching on a subject as opposed to opinion testimony about the defendant's relative responsibility for the decisions and actions leading to the murder. There is no foundation in this Court's cases for holding that a defendant can, as here, present what the prosecution will inevitably characterize as his self-serving testimony, but the defendant cannot present disinterested third-party observations corroborating his testimony. Foreclosing an appeal based on its self-imposed rule narrowing this Court's principles, precludes a proper review of the issue entirely.

Just as it did in *Tennard*, here the Fifth Circuit "invoked its own restrictive gloss" on the *Lockett* and *Eddings* line of cases. *See Tennard*, 542 U.S. at 283. In *Tennard*, another COA denial case, "[d]espite paying lipservice to the principles guiding issuance of a COA, the Fifth Circuit's analysis proceeded along a distinctly different track." 542 U.S. at 283 (citation omitted). Here, the Fifth Circuit did evaluate the district court's analysis of the Texas court decision, but the district court's analysis was driven and determined by the Fifth Circuit's limiting interpretation of *Lockett* and *Eddings*. App. 35 (citing *Simmons*, 654 F.3d at 544).

The mitigating relevance of the Ranking Document has never been in dispute. As such, the "Eighth Amendment requires that the jury be able to consider and give effect to" the evidence. *Boyde v. California*, 494 U.S. 370, 377-378, (1990) (citing *Lockett*, 438 U.S. at 98; *Eddings*, 455 U.S. at 102; *Penry I*); *see also Payne v. Tennessee*, 501 U.S. 808, 822 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death.... [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings*, *supra*, at 114)).

The Fifth Circuit's explicit announcement of its exclusionary reading of *Lockett/Eddings* is also unique among the federal circuits.[11]

II. It is important for this Court to intervene again to correct the Fifth Circuit's COA practice.

This Court has encouraged lawyers and the public to believe that "[b]y insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle." *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010). Two Terms ago, in *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018), this Court overturned the Fifth Circuit's test for applying the fourth prong of *United States v. Olano*, 507 U.S. 725 (1993), whether an unobjected to "'error seriously affects the fairness, integrity or public reputation of judicial proceedings." 138 S. Ct. at 1905 (quoting with alterations *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016)). This Court found the "Fifth Circuit's articulation of *Olano*'s fourth prong is out of step with the practice of other Circuits." *Id.*, 138 S. Ct. at 1906. It was entirely appropriate for this Court to have noted that "the public legitimacy of our justice system relies on procedures that . . . provide for error correction," *Rosales-Mireles*, 138 S. Ct. at 1908, because the public legitimacy of criminal justice in Texas is precisely what was at stake then. It remains at stake today.

Mr. Halprin's case presents compelling evidence that the Fifth Circuit does not employ neutral procedures for error correction in capital habeas corpus cases. Mr. Halprin shows here that

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[11] The Sixth Circuit has upheld the exclusion of mitigation evidence when the trial court "allowed the defendant to present the information in question to the jury in a slightly different format than the one he sought to employ." *Alley v. Bell*, 392 F.3d 822, 832 (6th Cir. 2004). However, the exclusion was not based on a "type/item" distinction. The particular evidence was excluded after the trial judge determined that it was irrelevant and unreliable.

two years after *Buck* the Fifth Circuit's procedures for deciding whether to allow an appeal in capital habeas cases is indistinguishable from normal the appellate process. Substantively, the opinion in Mr. Halprin's case illustrates that since *Buck* the Fifth Circuit has become more circumspect about its merits-cum-COA review, but the façade is too thin to conceal the makeshift legal structure behind it. While purporting to resolve all doubts in favor of the capital habeas petitioner, the Fifth Circuit continues to invoke its own unique interpretation of this Court's Eighth Amendment cases to hold that claims reliant on those cases are not debatable. The evidence shows the errors the Fifth Circuit cannot correct are those this Court has pointed out in the Fifth Circuit's own processes and standards.

A. THE FIFTH CIRCUIT'S PRACTICE CONTINUES TO DEFY CONGRESS'S PURPOSE AND THIS COURT'S CLEAR GUIDANCE.

"Th[is] Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth*, 558 U.S. at 196. *Buck* found the Fifth Circuit's practices of calling for full adversarial briefing and oral argument on COA motions helped show the Circuit was eschewing the "two-step process" Congress mandated in § 2253(c). 137 S. Ct. at 774. Little has changed since *Buck*.

The Fifth Circuit continues to treat COA motions like merits appeals. COA motions are assigned to specially selected three-judge panels. Fifth Cir. R. 8.2 & 27.2.3. The court directs counsel for capital habeas petitioners to file briefs within the standard 40 days, and the briefs must conform to the requirements of Fed. R. App. P. 32(a). Since *Buck*, the Fifth Circuit has granted a COA in thirteen cases. Review of the procedures in those cases shows virtually no change after *Buck*:

- In every single case in which the Fifth Circuit granted a COA after *Buck*, the parties submitted full adversarial briefing, including a reply brief.
- In every case, the State opposed the COA motion, and, in all but one, asked for an extension of time to file its lengthy opposition.
- In four cases, the petitioner filed over-length briefs in support of COA.
- In nine cases, the Court has perversely limited merits briefing either by ordering or advising counsel to limit briefing on the actual appeal, because of the lengthy COA briefing, suggesting the appellate briefing was "supplemental," limiting briefing to evidence and authorities not cited in the COA briefs, shortening the time for briefing, setting severe time and page limits on the briefs.[12] In the past, the court's advice has led some counsel to forego filing an appellate brief *at all*.[13]

Appendix D.

Three-judge panels of the Fifth Circuit continue to hold oral argument on COA motions. Since January 1, 2015, the Fifth Circuit has heard 29 oral arguments in capital habeas cases from Texas prisoners. Appendix E. Nearly one half (13 of 31) were exclusively concerned with whether to grant a COA. *Ibid.* In nine of those oral argument cases, the court denied COA on any issue.

[12] *See Dennes v. Davis*, No. 17-70010, 2019 WL 2305030 (5th Cir. May 29, 2019) (unpublished) ("The court notes that extensive briefing about these issues has already been provided. Therefore, any further briefing must be limited to supplemental evidence and authorities. The parties' supplemental briefs are limited to 20 pages each. Further, petitioner must furnish this briefing within thirty days hereof, and the state must respond within twenty-one days.").

[13] *Gates v. Davis*, 660 F. App'x 270, 271 (5th Cir. 2016) ("We authorized Gates to file a supplemental brief addressing the merits of this claim, to the extent not already addressed in the COA briefing, but he declined.").

Ibid. Six of the nine oral arguments were calendared after this Court's decision in *Buck*, and the COA motions were denied in three of those five cases. *Ibid.*

Other anomalies abound. In at least two cases—one while *Buck* was before this Court[14] and one after *Buck* was decided[15]—the Fifth Circuit made *alternative* holdings for affirming the judgment in order to deny a COA. Requests for supplemental briefing at the COA stage also appear in the records.[16]

These merits-cum-COA practices produce diseconomies and undermine Congress's goal of economizing appellate review in habeas corpus cases. In the analogous context of this Court's criteria for reviewing a case on certiorari, Justice Frankfurter observed that "laxity by the Court in respecting its own rules is bound to stimulate petitions for certiorari with which the Court should never be burdened." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 460 (1959) (Frankfurter, J., dissenting). The Fifth Circuit is proving the obverse true, as well: a pattern of merits review procedures that produces denials at a rate higher than would be expected encourages the full briefing that the Fifth Circuit has mentioned in its orders. Petitioners justifiably believe that there is no two-step process in the Fifth Circuit, but only one chance at relief.

Another diseconomy concerns appointed counsel. "Congress has recognized that federal habeas corpus has a particularly important role to play in promoting fundamental fairness in the

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[14] *See Matthews v. Davis*, 665 F. App'x 315, 322 (5th Cir. 2016) (deciding state habeas counsel's performance was not unreasonable under *Martinez v. Ryan*, 566 U.S. 1 (2012) despite district court not reaching issue and parties not briefing it); *see id.* at 318-19 (discussing district court opinion).

[15] *Gonzales v. Davis*, 924 F.3d 236 (5th Cir. 2019) (finding district court's conclusion that state procedural bar was inadequate "was in error" and denying COA on merits of claim).

[16] *See, e.g.*, *Fratta v. Davis*, 889 F.3d 225, 230 (5th Cir. 2018) discussing "panel's request for supplemental briefing on 'whether Texas state courts have regularly applied the hybrid-representation bar to claims identical or similar' to Fratta's").

imposition of the death penalty," and to that end has mandated court-appointed counsel in capital habeas cases. *McFarland v. Scott*, 512 U.S. 849, 859 (1994). The Fifth Circuit's refusal to follow a two-step process and limit COA review to a threshold inquiry conveys to the public that money is being squandered on futile proceedings. Oral arguments are costly proceedings that require the lawyers to travel from Texas to New Orleans. When, as shown *infra*, half of the Fifth Circuit's oral arguments in Texas capital habeas cases concern COA motions, and in 69 percent of those cases (13/9), the court refuses to certify an appeal after oral argument, the public is justified in believing resources are being squandered.

B. THE FIFTH CIRCUIT'S RULINGS REFLECT A LACK OF NEUTRALITY AND INFIDELITY TO GOVERNING PRINCIPLES

In this case, as in many other capital cases for more than 20 years, the Fifth Circuit adjudicated the merits and denied an appeal after assuring the public that "[b]ecause this is a death penalty case, we resolve any doubts about granting a COA in favor of a grant."[17] App. 8. In this respect, Mr. Halprin's case is representative of a "troubling" "pattern."[18] *Jordan*, 135 S. Ct. at 2652 n.2.

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[17] *E.g.*, *Lamb v. Johnson*, 179 F.3d 352, 356 (5th Cir.), *cert. denied*, 583 U.S. 1013 (1999); *Penry v. Johnson*, 215 F.3d 504, 507 (5th Cir. 2000), ***rev'd***, 532 U.S. 782 (2001); *Miller-El v. Johnson*, 261 F.3d 445, 449 (5th Cir. 2001), ***rev'd sub nom.***, *Miller-El v. Cockrell*, 535 U.S. 903 (2002); *Tennard v. Dretke*, 284 F.3d 591, 594 (5th Cir.), ***vacated by***, 537 U.S. 802 (2002), *op'n on remand*, 317 F.3d 476 (5th Cir. 2003), ***rev'd sub nom.***, *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (finding Fifth Cir. "paying lipservice to the principles guiding issuance of a COA"); *Newton v. Dretke*, 371 F.3d 250, 254 (5th Cir.), *cert. denied*, 543 U.S. 964 (2004); *Pippin v. Dretke*, 434 F.3d 782, 787 (5th Cir. 2005); *Martinez v. Davis*, 653 Fed.App'x. 308, 315 (5th Cir. 2016), ***vacated and remanded***, 137 S. Ct. 1432 (2017); *Soliz v. Davis*, 750 Fed. App'x. 752, 789 (5th Cir. 2018), 139 S. Ct. 1447 (2019); *Ayestas v. Thaler*, 462 Fed. App'x. 474, 477 (5th Cir. 2012), ***rev'd***, 133 S. Ct. 2764 (2013) (mem.).

[18] In some cases, the Fifth Circuit has failed even to mention the COA standard. *See*, *e.g.*, *Cole v. Dretke*, 99 F. App'x 523 (5th Cir. 2004), *vacated and remanded sub nom.*, *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004).

Both the public and capital habeas petitioners attempting to "vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle," *Hollingsworth*, 558 U.S. at 196, find the Fifth Circuit's repeated claims to resolve doubts in petitioners' favor to be a judicial form of gas-lighting: the conflict between the historical record and the judicial assurance is so glaring that the public and lawyers appearing on behalf of petitioners must question their own sanity in order to accept the court's decisions at face value.

Duane Buck's Petition for Writ of Certiorari presented data showing that the Fifth Circuit granted a COA on any issue in only 17 of 93 capital § 2254 cases decided between January 2011 and January 2016. Cert. Pet. at 26 & App'x F, *Buck v. Davis*, No. 15-8049, 2016 WL 3162257 (U.S. Feb. 4, 2016). Mr. Buck found two other circuits with significant capital habeas dockets—the Eleventh and Fourth Circuits—had far higher grant rates. *Ibid.*

The gulf between the Fifth Circuit and its sister circuits remains today. Applying the same search criteria as Mr. Buck, Mr. Halprin has determined that, after *Buck*, the Fifth Circuit has decided 40 cases at the COA stage. *See* Appendix D. It has denied COA to 27 of those 40 petitioners making a denial rate of 68 percent. *Ibid.* To be sure, this represents a small improvement compared to past practice. But, even taking a conservative measure that misses cases like Mr. Halprin's, figures collected by the Federal Judicial Center show the Fifth Circuit's denial rate still has no peer. *See* Appendix F. Comparing the FJC's figures for each circuit—which, again, does not capture all cases like Mr. Halprin's—a capital habeas petitioner in Texas, Louisiana, or Mississippi

only has a 60 percent chance of receiving an appeal on any issue. *Ibid.*[19] A petitioner from the next most stingy Circuits, the Eighth, Seventh, and Eleventh, has a 71, 77, and 78 percent chance at an appeal, respectively. *Ibid.*

In addition to the statistical evidence, the sense of judicial gas-lighting is supported by the stark refutations found in this Court's decisions. In *Miller-El I*, this Court more than "question[ed] the Court of Appeals' … dismissive and strained interpretation of petitioner's evidence of disparate questioning." 537 U.S. at 344. Where the Fifth Circuit found the state court's finding of "'no disparate questioning of the *Batson* jurors … fully supported by the record,'" this Court emphatically found "[d]isparate questioning did occur." *Ibid.* (quoting *Miller-El*, 261 F.3d at 452).

Miller-El was a case this Court had to hear twice because, on remand from this Court, a majority the Fifth Circuit panel adopted the dissenting opinion from this Court. That did not go unnoticed in the popular press. Linda Greenhouse, *Supreme Court Rules for Texas on Death Row*, N.Y. TIMES (June 14, 2005).[20] In reversing the Fifth Circuit for the second time, this Court noted that allowing racial bias in jury selection to go unchecked jeopardizes "the very integrity of the courts … and undermines public confidence in adjudication." *Miller-El II*, 545 U.S. at 238.

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[19] The Federal Judicial Center Integrated Database from which Mr. Halprin draws this information severely undercounts the total number of COA denials by the circuits. Only some of the COA denials are appropriately coded in the database; other denials are coded as "Outcome" code 1 (affirmation of lower court decision). *See* Field Descriptions 9-10, Federal Judicial Center Integrated Data Base Appeals Documentation FY 2008-Present, *https://www.fjc.gov/sites/default/files/idb/codebooks/Appeals%20Codebook%202008%20Forward_0.pdf.* These seeming "affirmance" outcomes include cases in which the court of appeals denies a COA on all issues and affirms a district court disposition on a collateral order. Indeed, that is how Mr. Halprin's case is coded. Therefore, there are potentially far more COA denials by the Fifth Circuit than are captured by these data.

[20] Available at https://www.nytimes.com/2005/06/14/politics/supreme-court-rules-for-texan-on-death-row.html. Last checked June 11, 2019.

Similarly, after this Court's decision in *Penry I*, the Fifth Circuit "invoked its own restrictive gloss" for the class of petitioners affected by that decision, *Tennard*, 542 U.S. at 283; it created law that had "no foundation in the decisions of this Court," *id*. at 284, while telling the public that it was following this Court's precedent and resolving all doubts in favor of petitioners. The Fifth Circuit did the same thing to undermine the effects of this Court's decision in *Penry II*. *Brewer v. Quarterman*, 550 U.S. 286, 295-96 (2007) (holding Fifth Circuit's "'sufficient effect' standard has 'no foundation in the decisions of this Court.'").

In *Buck*, the Fifth Circuit told the public it was considering an "unremarkable" ineffective-assistance claim, concealing what this Court found to be "a disturbing departure from a basic premise of our criminal justice system," 137 S. Ct. at 778, the explicit consideration of a racial stereotype in sentencing a man to death.

Two years before *Buck*, this Court, in overturning the Fifth Circuit's reversal of an order granting habeas relief, reminded the Fifth Circuit, again, that "'[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield v. Cain*, 135 S. Ct. 2269, 2277 (2015) (quoting *Miller-El*, 537 U.S. at 340). As shown *supra*, this case, like so many others, justifies this Court's sense that the Fifth Circuit routinely abandons the exercise of judgment in the mistaken belief that AEDPA precludes review, let alone relief.

A lower court may err, even repeatedly, when applying this Court's cases without repeatedly invoking in this Court concerns about the integrity of and public confidence in the courts and the criminal justice system as a whole. But it was no accident that *Rosales-Mireles* involved a test for judging the fairness, integrity, and public reputation of judicial proceedings that was out of step

with other courts. And, as the authors of the paper this Court cited state, that is not just a matter of reputation, it is a matter of efficacy.

> Legitimacy may be measured by the quality of decision making or the quality of treatment of defendants. More specifically, procedures are legitimate when they are neutral, accurate, consistent, trustworthy, and fair—when they provide opportunities for error correction and for interested parties to be heard. Legal authorities are legitimate when they act impartially, honestly, transparently, respectfully, ethically, and equitably. The criminal justice system that optimally expresses these values is not only morally defensible but also quite probably stable and effective.

Bowers & Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 215-216 (2012), cited in *Rosales-Mireles*, 138 S. Ct. at 1908.

With all due respect to the dissenting Justices in *Rosales-Mireles*, these observations are not unique to social scientists. This Court has observed that "[i]f courts are to require that others follow regular procedures, courts must do so as well." *Hollingsworth*, 558 U.S. at 199. The Fifth Circuit has consistently flouted the standard for COA motions and, despite this Court's finding that the Circuit's procedures are not commensurate with the scope of the COA determination, the Circuit has changed nothing.

Rosales-Mireles noted that courts must demonstrate that errors will be corrected. 138 S. Ct. at 1908. The Fifth Circuit's COA practices and procedures evade error correction while publicly claiming to resolve all doubts in favor of capital petitioners. Where a court has created a decades long record of saying one thing and doing something else—always to the disadvantage of one class of litigants—that court has "manifested a strong bias for or against a particular class of litigants," *Dick*, 359 U.S. at 462 n.34 (Frankfurter, J., dissenting), and it is appropriate for this Court to exercise its supervisory powers to correct that departure from the accepted and usual course of judicial proceedings.

CONCLUSION

FOR THESE REASONS, this Court should grant the petition and reverse the decision of the court below.

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