No. 21-5048

IN THE

Supreme Court of the United States

WESLEY LYNN RUIZ,
Petitioner,

v.

BOBBY LUMPKIN, 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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This is a capital case.

QUESTIONS PRESENTED

The federal district court stayed and abated federal habeas proceedings so that Petitioner Wesley Ruiz could return to state court to exhaust a claim alleging the knowing presentation of false testimony at the punishment phase of trial. The claim was grounded on an opinion by the Texas Court of Criminal Appeals (CCA)—involving the same erroneous testimony on prison classification and the same two witness, *Estrada v. State,* 313 S.W.3d 274, 287 (Tex. Crim. App. 2010)—published six months before the filing of Ruiz's first state writ. The CCA dismissed the claim as an abuse of the writ pursuant to Texas Code of Criminal Procedure article 11.071 § 5(a), without considering the merits of the claim. Upon return to federal court, the district court dismissed the claim as procedurally defaulted, also without considering the merits, on grounds that that the claim was discoverable at the time Ruiz filed his first state application because the published *Estrada* decision was decided six months before the filing of that state application.

Did the Fifth Circuit Court of Appeals err in denying a certificate of appealability (COA), finding the district court's ruling undebatable, where it rests on an adequate and independent state procedural bar and Ruiz could not demonstrate cause to overcome the default?

Did the Fifth Circuit misapply the "threshold inquiry" standard pursuant to *Buck v. Davis,* 137 S. Ct. 759 (2017), in refusing to grant COA where Ruiz could not show the debatability of the district court's procedural bar of the claim, and where he also failed to demonstrate a substantial claim for relief?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Wesley Lynn Ruiz was convicted and sentenced to death for the capital murder of Dallas Police Officer, Corporal Mark Nix. Ruiz unsuccessfully appealed his conviction and sentence in state and federal court. Ruiz now petitions this Court for a writ of certiorari from the Fifth Circuit's opinion denying a COA. He seeks review of his claim alleging a violation of his Due Process and Eighth Amendment rights from the State's unintentional presentation of false testimony from its expert witness on prison classification at the punishment phase of trial. But the Fifth Circuit correctly determined that reasonable jurists could not debate the district court's dismissal of this claim on procedural grounds—the claim was available but not raised when Ruiz filed first state habeas application—and Ruiz could not demonstrate cause to overcome the default. Because Ruiz offers no compelling reason to grant certiorari, his petition should be denied.

STATEMENT OF JURISDICTION

The Court has jurisdiction to consider a petition for a writ of certiorari seeking review of the judgment of a court of appeals. *See* 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts of the Crime

The Texas Court of Criminal Appeals (CCA) accurately summarized the evidence from the guilt-innocence phase of trial as follows:

> On March 21, 2007, the homicide division of the Dallas Police Department issued a bulletin to its officers to be on the lookout for a 1996 four-door Chevy Caprice with dark tinted windows and chrome wheels, red and gray in color, that was suspected to have some involvement in a capital murder. Two days later, on March 23rd, two plainclothes officers in an unmarked police vehicle spotted a car matching this description on Stemmons Freeway.[1] They summoned marked patrol cars to stop the suspect vehicle and followed it as it exited the freeway at Mockingbird Lane and drove into West Dallas. Corporal Mark Nix arrived, positioning his patrol car directly behind the Caprice and activating his overhead lights and video camera. The Caprice momentarily braked as if to pull over, but then suddenly raced off at high speed down the winding road, followed by Nix and at least one other patrol car in hot pursuit. The ensuing events were recorded by Nix's video camera and that of the patrol car directly behind him, both of which recordings are in evidence.
>
> Apparently taking a curve too fast, the Caprice hit the left-hand curb and spun out of control. It barreled backwards down a slight incline on the right side of the street and came to rest facing the roadway, its back-end apparently blocked by a fence. Nix followed the Caprice down the incline and pulled to a stop, directly hood to hood. The patrol car behind Nix also pulled off the road and came to a halt on the passenger side of the Caprice, a short way off but close enough to effectively hem it in. Corporal Nix jumped out of his patrol car and rushed to the front passenger side of the Caprice. There he began to swing his baton with his left

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1 Although it matched the description of the car sought in the March 21st bulletin, this particular Chevy Caprice did not turn out to be the one sought in the capital-murder investigation. [footnote in original but under different number].

> hand, smashing it against the tinted front passenger window.[2] He paused momentarily to place his pistol on the ground so that he could use both hands to wield the baton and continued striking the window, punching a small hole through it. A second later, a single gun shot shattered the rear passenger window, the bullet striking Nix's badge and splintering. A fragment entered Nix's chest at the level of his clavicle, severing his left common carotid artery. The other officers responded with a hail of gunfire, then dragged Nix to cover and summoned the SWAT team. [Ruiz] was eventually pulled from behind the wheel of the Caprice, wounded and unconscious, the pistol with which Nix had been shot found in his lap. Nobody else was in the car. Nix was pronounced dead at the hospital, but [Ruiz] was able to survive his multiple wounds.

Ruiz v. State, No. AP-75,968, 2011 WL 1168414, at *1 (Tex. Crim. App. March 2, 2011).

II. Evidence Relating to Punishment

A. State's evidence

While in high school in the 1990s, Ruiz was a member of the Midnight Dreamers, a violent criminal street gang. ROA.4999-5000, 5005, 5008-09, 5011, 5016, 5060. The Midnight Dreamers had a bad reputation in the Irving community, and engaged in assaults, aggravated assaults, drive-by shootings, drug activities, and murders. ROA.5005. Ruiz was likely a member of two other criminal gangs—the Westside Ledbetter 12 and Tango Blast. ROA.5046-47, 5051-53, 5064-65; *see also* ROA.3401-02, 3412-13, 3424-27. Westside Ledbetter 12 and the Midnight Dreamers were ally gangs engaging in drugs and other

[2] All of the windows were so darkly tinted that the officers could barely make out a "silhouette" behind the wheel of the Caprice. [footnote in original]

criminal activities. ROA.5052. Tango Blast originated inside the prison system. ROA.5060-66.

In June 1996, a sixteen-year-old Ruiz was convicted as a juvenile for theft. ROA.3301-08, 4991. In January 1997, Ruiz committed burglary of a vehicle, a misdemeanor offense, and was placed on deferred adjudication. ROA.3309-17, 4991. On March 8, 1997, Ruiz participated in the shooting of the home of rival gang member, Joe Ramos, after a member of Ramos's gang "shot up" the house of Midnight Dreamers member, Raul Toledo. ROA.5009-11. Ruiz, Toledo, and four others opened fire on Ramos's house, occupied by Ramos, his girlfriend, parents, and two young nephews. ROA.5009-11, 5013, 5017. The bullets came through the walls, but no one inside was hit. ROA.5013, 5016-17. Ruiz and Toledo were arrested for deadly conduct. ROA.5010, 5012.

In August 1997, Ruiz committed burglary of a vehicle. ROA.3324-29. He escaped custody but was ultimately convicted of burglary of a vehicle and misdemeanor escape. ROA.3324-35, 4991. In September 1997, Ruiz was convicted of misdemeanor theft, ROA.3318-23, and was adjudicated guilty of the January 1997 offense of burglary of a vehicle. The court revoked his probation and sentenced him to 100 days' confinement. ROA.3309-17.

The State presented no offenses, arrests, or convictions between 1997 and 2003, but on November 25, 2004, Ruiz was involved in a high-speed chase with the police while driving his vehicle with his then-girlfriend. ROA.5043-

44. The chase ended when Ruiz's car hit a light pole at an intersection, "T-boned" another vehicle at the intersection, spun around, and came to a stop. ROA.5043-44. Ruiz tried to run from the police but was eventually taken into custody. ROA.5044. The police found a .25-caliber gun containing seven rounds in the glove compartment of Ruiz's car, with one round chambered and ready to fire. ROA.5044-45. The arresting officer believed Ruiz was under the influence of drugs or alcohol. ROA.5044. Ruiz was convicted of the felony offenses of evading arrest/detention and unlawful carrying of a handgun. ROA.3345-52, 3361-66, 4991. Pursuant to a plea agreement, he received a reduced misdemeanor sentence in each cause. ROA.3345-52, 3361-66.

On April 3, 2005, Ruiz was arrested in Tarrant County for possession of methamphetamine and was subsequently placed on ten years' deferred adjudication probation for possession with intent to deliver. ROA.3367-75, 4991. On April 12, 2005, gang-unit officers arrested Ruiz at an apartment complex after receiving information of possible drug activity; drugs and guns were seized during this arrest. ROA.5046-47, 5049. Ruiz was convicted the following November of possession of methamphetamine but received a reduced misdemeanor sentence. ROA.3376-81, 4991.

Ruiz's friend, Hector Martinez, testified that in the period between Ruiz's release from jail in 2006 and Officer Nix's murder, Ruiz bragged about stealing from people, and told Martinez that he "got into some trouble" with

some guys at a club, and shot at them in the parking lot after they blocked him in. ROA.5060-61.

On May 23, 2006, Ruiz was convicted in Dallas County of possession with intent to deliver methamphetamine. ROA.3382-92, 4929, 4991. Ruiz was arrested under an alias. ROA.4994. Ruiz was given a ten-year suspended sentence with eight-years-probation, ROA.3382-92, 4929; but was still on probation in Tarrant County at that time, ROA.5055. Less than six months into the Dallas County probation, Ruiz failed to report as required. ROA.4929. By March 20, 2007—three days before the shooting of Officer Nix—Ruiz was in violation of his probation. ROA.4925, 5056.

On March 14, 2007—nine days before Officer Nix's murder—Hector Martinez discovered Ruiz's father's car in the alley behind his house. Ruiz told Martinez that he had fled from the police. ROA.5063

Ruiz's girlfriend testified that while they were together, Ruiz would say "he wasn't going to go down without a fight," and that he would not make it easy. ROA.4760. Also, that he was going to "go out like a G," meaning "gangster." ROA.4760, 4762. Hector Martinez testified that Ruiz told him that the only way he was ever going back to jail was "in a box." ROA.5061.

The State also presented evidence from A. P. Merillat, criminal investigator for the Special Prosecution Unit (SPU) in Huntsville. ROA.5024. Merillat testified regarding the prison classification system in the Texas

Department of Corrections (TDCJ), and the potential opportunities for violence within TDCJ. ROA.5026-36.

As a rebuttal witness, the State called Kenneth Crawford, forensic document examiner for the Texas Department of Public Safety Crime Laboratory in Austin. ROA.5155. Crawford read to the jury the content of several letters sent by Ruiz, in which he tried to obliterate threatening statements written in those letters, directed towards other inmates and guards. ROA.3540-42, 5160.

B. Defendant's evidence

Ruiz called Larry Fitzgerald, retired TDCJ public information officer. ROA.5090. Fitzgerald related that death row inmates used to work in a garment factory within TDCJ, but the program ceased when death row was moved to the Polunsky Unit in Livingston, Texas. ROA.5091. Anyone on death row now is in administrative segregation. ROA.5091. Also, capital inmates who received a life sentence rather than a death sentence are no longer eligible for parole. ROA.5092. Fitzgerald testified that life-without-parole (LWOP) offenders receive incentives to comply with rules—longer visitation, more money for commissary, more recreation time, and better work assignments. ROA.5092. Fitzgerald felt safe among the inmates, and neither he nor anyone from the tours he took through TDCJ was ever assaulted. ROA.5092.

Fitzgerald described the intake process when a defendant is sentenced

to TDCJ. ROA.5092-93. Fitzgerald reviewed Merillat's testimony but had no serious disagreement with it. ROA.5093, 5097. All capital murders who receive LWOP sentences will be presumed to be a G-3 when they begin the classification procedure but could receive a higher classification depending on record, past behavior, and possible gang associations. ROA.5093-94. Fitzgerald stated that, at the time of his testimony, TDCJ had recorded 439 serious offender assaults for the year; one homicide that year, and one escape; 24 disciplinary convictions for serious staff assaults, and 2,109 disciplinary convictions for nonserious staff assaults; and 5,817 disciplinary convictions for offender assaults. ROA.5094-95.

Ruiz's grandfather, Richard Ziegenhain, testified that Ruiz's mother and father divorced when Ruiz was a teenager. Ruiz and his brothers alternated their time between their father's home and Richard's home; their mother had a drug and alcohol problem, which led to the divorce, and she became a "street person," losing contact with her sons for a while. ROA.5106. Richard said Ruiz was a hard worker when he was a teenager; when he graduated high-school he became a truck driver. ROA.5106-07. He eventually quit so that he could be closer to his wife and children; Ruiz was a good father. ROA.5107. Richard testified Ruiz and his wife had a tumultuous relationship and she was physically aggressive towards Ruiz, but Ruiz always tried to keep things from escalating. ROA.5107.

Ruiz's grandmother, Sue Ziegenhain called him an intent worker, who as a teenager often mowed their lawn and cleaned up their house. ROA.5110. He was a very proud and patient father. ROA.5110. Sue testified that Ruiz and his wife had a difficult marriage, but his wife was the aggressor while Ruiz was non-confrontational. ROA.5110-11. She described Ruiz as "fun-loving, great sense of humor, almost passive," and asked the jury to be merciful. ROA.5111.

Ruiz's mother, Barbara Ruiz, testified that she and Ruiz's father did drugs together during their marriage, including methamphetamine and marijuana, and Barbara's drug-usage escalated. ROA.5116. Her drug-usage led to her divorce in 1992; Ruiz's father took the children with him. ROA.5116. Barbara testified that, when Ruiz was seventeen and his brother was eighteen or nineteen, their father left them living alone in a trailer, without adult supervision. ROA.5118. Barbara began abusing alcohol because she could not afford methamphetamine. ROA.5116-17. Barbara alternated between living on the streets and living with her parents. ROA.5117. In 1995, Barbara was diagnosed with syphilis, herpes, and was HIV positive. ROA.5117. At that time, Barbara entered a treatment program for her alcoholism. ROA.5117. When Barbara celebrated one year of sobriety, Ruiz gave a speech thanking the treatment facility for giving him his mom back. ROA.5118. Barbara said Ruiz was remorseful about the murder. ROA.5119.

Psychologist Dr. Gilda Kessner testified that the first five years of Ruiz's

life were somewhat normal, but his mother was impaired by substance abuse and his parents' marriage was on the decline. ROA.5124. His mother began using methamphetamine when Ruiz was around five. She also began drinking, and his father began selling drugs. ROA.5125. Ruiz and his brothers observed this drug activity and saw their parents impaired. ROA.5125. As Ruiz got older, his grades declined; he was retained in the sixth and seventh grade. ROA.5125. When Ruiz was thirteen, his parents separated; the boys lived between their father and their grandparents' house while their mother lived on the streets. ROA.5125-26. Ruiz and his brothers had limited supervision while living with his father; Ruiz had his first child a month before he turned seventeen and dropped out of high school a month later. ROA.5126. Ruiz began driving trucks from eighteen to twenty, and during this period he had no arrests. ROA.5126. Difficulty in his marriage resulted in a domestic violence arrest. ROA.5126. Dr. Kessner associated the string of arrests beginning in 2004 with Ruiz's relationship with his wife, Erica. ROA.5126-27.

Katherine Drake testified that Barbara Ruiz was a tenant in the apartment complex she managed, and Ruiz and Erica, lived with her on three separate occasions. ROA.5131. On the first occasion, Drake described Ruiz and Erica as ideal tenants, but the second and third time they moved in they were having marital problems. ROA.5131. Drake described Ruiz as a "mannerable young man," and very nice and respectful to everyone. ROA.5131-32. She said

he was passive and nonaggressive with Erica. ROA.5132. Drake could not believe Ruiz had been arrested for this crime. ROA.5132.

David Rivera, Erica's father, testified that he considers Ruiz his son. ROA.5133. Rivera gave Ruiz a job in his construction business; Rivera found him to be intelligent and a fast learner, and placed him in charge of a crew. ROA.5133. Ruiz was a hard worker who took care of his family. ROA.5134. Rivera testified that Erica was the instigator of the fights with Ruiz, and that she had a short temper, but he never saw Ruiz behave violently. ROA.5134.

Finally, the defense presented evidence that Ruiz was charged with two felonies—possession of methamphetamine and evading arrest—which were both state jail felonies, but Ruiz served a punishment in county jail equivalent to only a Class A misdemeanor. ROA.5150-51. Ruiz's disciplinary records from the last time he was in county jail reflect no disciplinary incidents. ROA.5152.

III. The State-Court and Federal Appellate Proceedings.

Ruiz was convicted and sentenced to death in July 2008. ROA.1162, 1280-81, 5183. On March 2, 2011, the CCA affirmed Ruiz's conviction and sentence on direct appeal, *Ruiz v. State,* 2011 WL 1168414, and this Court denied certiorari review, *Ruiz v. Texas,* 565 U.S. 946 (2011). While his direct appeal was pending, on December 6, 2010, Ruiz filed an application for writ of habeas corpus in the state court. ROA.5220-76. Four days later, on December 10, 2010, and two days after the date his petition was due, Ruiz filed a

supplement to his application. ROA.5277-80. The trial court held an evidentiary hearing, after which the court entered findings of fact and conclusions of law recommending denial of relief. ROA.5587-668. The CCA adopted the trial court's findings and conclusions and denied relief. ROA.5192-93 (*Ex parte Ruiz,* No. WR-78,129-01, WR-78,129-02 (Tex. Crim. App. Sept. 26, 2012)). The CCA found the untimely supplement to be a subsequent application, concluded that Ruiz failed to meet any exception under Article 11.071, § 5, and dismissed the supplement as an abuse of the writ. ROA.5193. This Court denied certiorari review. *Ruiz v. Texas,* 569 U.S. 906 (2013).

On September 23, 2013, Ruiz timely filed a petition for writ of habeas corpus in federal district court, ROA.37-81, and an unopposed motion to stay and abate federal habeas proceedings so that he could return to the state court to exhaust his Merillat-related claims, ROA.82-113. The district court granted his motion, ROA.114-17, but the CCA concluded he failed to satisfy the requirements of Article 11.071, § 5(a), and dismissed the application as an abuse of the writ without considering the merits of the claims. ROA.5188-89 (*Ex parte Ruiz,* No. WR-78,129-03 (Tex. Crim. App. Nov. 19, 2014)); *see also* ROA.6144-63 (Subsequent Application); ROA.6136-43 (State's Response).

Ruiz returned to federal court and filed an amended petition for writ of habeas corpus on January 17, 2015. ROA.120-26, 132-87. The district court denied relief and a COA on December 14, 2018. *Ruiz v. Davis,* No. 3:12-cv-5112,

2018 WL 6591687 (N.D. Tex. 2018) (Petitioner's Appendix C). The Fifth Circuit Court of Appeals also denied COA, *Ruiz v. Davis,* 819 F. App'x 238 (5th Cir. 2020) (Petitioner's Appendix A), and panel rehearing, *Ruiz v. Lumpkin,* No. 19-70003 (5th Cir. Jan. 22, 2021) (Petitioner's Appendix B).

REASONS FOR DENYING THE WRIT

Ruiz presents no compelling reason for granting review. *See* Sup. Ct. R. 10. Ruiz must obtain a COA as a jurisdictional prerequisite to obtaining appellate review by the Fifth Circuit. 28 U.S.C. § 2253 (c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The COA statute requires the circuit court to make only a "threshold inquiry into whether the circuit court may entertain the appeal," and permits issuance of a COA only where petitioner "has made a substantial showing of the denial of a constitutional right." *Miller-El* , 537 U.S. at 336 (citing *Slack,* 529 U.S. at 482-83; 28 U.S.C. § 2253 (c)(2)); *see also Buck v. Davis,* 137 S. Ct. 759, 773-74 (2017). This standard "includes showing that reasonable jurists could debate (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*, 529 U.S. at 484 (internal quotation marks and citation omitted). And where the district court has denied claims on procedural grounds, a COA should issue only if it is demonstrated that "jurists of reason would find it debatable whether the petition states a

valid claim of a 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 (emphasis added).

The Fifth Circuit made a proper "threshold inquiry" into the district court's procedural rulings, finding the district court's application of the procedural bar to the false testimony claim undebatable. The claim could have been raised in his first state habeas application, and Ruiz could not demonstrate "cause" to overcome the default. Neither court reached the merits of the underlying claim beyond determining a lack of cause to excuse the default. Ruiz nevertheless urges the Court to ignore the procedural determination and reach the merits of his claim, arguing that, because the testimony at issue was indisputably false, his claim "deserve[s] encouragement to proceed further" under *Buck*. But Ruiz fails to establish how the Fifth Circuit erred or why any such error is so compelling that this Court's intervention is called for. Certiorari review should therefore be denied.

ARGUMENT

I. The Fifth Circuit Correctly Denied COA After Concluding the Procedural Bar of Ruiz's False-Testimony Claim was not Debatable.

The district court denied relief on Ruiz's claim that the State's presentation of false testimony, and subsequent failure to disclose or correct that testimony violated his constitutional rights pursuant to *Brady v.*

Maryland, 373 U.S. 83 (1963) and *Napue v. Illinois*, 360 U.S. 264 (1959), finding the claim procedurally barred for his failure to timely raise it before the state court. The Fifth Circuit denied COA, concluding the application of the procedural bar was not debatable because the claim was available, and Ruiz could not excuse the default. Ruiz asks this Court to grant certiorari to determine whether the prosecution is "responsible when it presents false expert testimony at a capital sentencing hearing and makes no effort to correct it," arguing that, because the testimony was indisputably false, the issue is at least debatable and deserved encouragement to proceed further. Petition at 8. Ruiz contends that the merits of the claim are ripe for review, in spite of the procedural bar, because the merits could demonstrate cause and prejudice sufficient to overcome the bar. Petition at 9; *see Banks v. Dretke,* 540 U.S. 668, 690 (2004). But Ruiz fails to demonstrate any compelling reason to grant certiorari review or remand.

First, Ruiz failed to demonstrate that the district court's procedural bar of this claim was debatable. For this reason, the Fifth Circuit did not reach the merits of this claim, beyond determining that Ruiz could not establish "cause" to overcome the default. *See* Petitioner Appendix A at 4 ("[B]ecause jurists of reason cannot debate whether the district court properly ruled that Ruiz's claim was procedurally barred—*Slack* prong two—our inquiry ends there."); Petitioner Appendix B at 2 (Because the *Brady* claim "falls short," it "does not

serve as cause to excuse the procedural default.") Because the claim is procedurally barred, and no court has reached the merits of the claim beyond determining there was no cause to excuse the procedural bar, it would be inappropriate for this Court to grant certiorari to resolve the merits.

This Court should also deny Ruiz's request to remand to the Fifth Circuit with instructions to grant COA, Petition at 9, because Ruiz cannot demonstrate that the district court's dismissal on procedural grounds was debatable or incorrect, and that he has made a substantial showing of the denial of a constitutional right under either *Napue* or *Brady*. *See Slack*, 529 U.S. at 484-85. The State did not *knowingly* present materially false testimony at trial, nor did the State violate its duty to disclose the existence of materially inaccurate testimony when it became known. The record reflects that (1) the State was unaware of the falsity of A.P. Merillat's testimony; (2) knowledge of this falsity was equally discoverable to the defense—both at the time of trial by his own expert, and on appeal following the release of *Estrada v. State,* 313 S.W.3d 274, 287 (Tex. Crim. App. 2010); and (3) the unintentional error in Merillat's testimony was not material under either *Brady* or *Napue*.

A. Facts related to claim, and disposition by the lower federal courts.

A. P. Merillat, criminal investigator for the Special Prosecution Unit, ROA.5024, testified for the State in Ruiz's July 2008 punishment phase, that

an inmate serving a sentence of fifty years or more, including a capital murderer who received an LWOP sentence, would automatically be classified as G-3 but, after serving ten years, would become eligible for promotion to a less restrictive classification, depending on his behavior. ROA.5026-27, 5031. Ruiz's expert, Larry Fitzgerald, did not contest Merillat's testimony on this point. ROA.5093, 5097-98. This limited portion of Merillat's testimony was later determined to be inaccurate—after a 2005 TDCJ policy change, an LWOP capital murderer will never be classified less than G-3. *See Estrada,* 313 S.W.3d at 287.

On February 16, 2010, Ruiz filed his brief on direct appeal. *See* ROA.339-42. On June 16, 2010, before the State filed its response, the CCA issued the *Estrada* opinion, setting aside the petitioner's death sentence and remanding for a new punishment hearing because of similarly inaccurate testimony by Merillat, and uncontested by Fitzgerald.

On December 6, 2010, Ruiz filed his first application for writ of habeas corpus in state court, and a supplement to this application on December 10, 2010. ROA.5277-80, 6201-288. Neither application raised any Merillat-related claims. The CCA denied relief. ROA.5192-93.

On October 1, 2013, the district court stayed and abated federal habeas proceedings so that Ruiz could return to state court and exhaust three Merillat-

related claims[3] raised in his federal petition. *See* ROA.37-121; ECF No's. 14, 15 and 16. The CCA dismissed the subsequent application, which relied on *Estrada*, *see* ROA.6148-67, as an abuse of the writ without considering the merits of the claims. ROA.123-24; *Ex parte Ruiz*, 2014 WL 6462553, at *1.

Upon return, the district court concluded that the Merillat-related claims were procedurally barred and did not reach the merits. Petitioner's Appendix C, at 9-19. The district court rejected Ruiz's claim that the State's failure to disclose or correct Merillat's testimony served as "cause" to excuse his procedural default of the claim because, after June 16, 2010—the publication date of *Estrada* on precisely the same point of error and involving the same two witnesses at trial—"Ruiz cannot plausibly claim that the State's failure to disclose or correct Merillat's testimony caused him to omit this claim from his original state habeas petition[.]" Petitioner's Appendix C, at 13-14.

The Fifth Circuit found the district court's procedural ruling undebatable. Petitioner's Appendix A, at 3-5. The appellate court cited Ruiz's lack of preservation of the issue in state court, despite availability, and the CCA's dismissal of his subsequent habeas petition under Article 11.071 § 5(a). *Id.* at 4-5. And because the state court's ruling was an independent and

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[3] Ruiz also complained that trial and appellate counsel were ineffective for failing to preserve the issues at trial and on appeal. These issues are not before this Court.

adequate basis to support the district court's procedural ruling, the Fifth Circuit held that it was not debatable. *Id.*

The Fifth Circuit also rejected any argument that Ruiz qualified for an exception to the 11.071 § 5(a) bar because his claim could have been raised in an earlier state habeas application, *see* § 5(a)(1), and because the "requisite 'constitutional violation' falters at the outset," *see* § 5(a)(2) and (3). *Id.* at 5. The court explained that Ruiz's *Brady* claim fell short for the same reason cited by the district court—*Estrada* was published six months before Ruiz filed his habeas petition and could have been discovered with due diligence. *Id.* at 5, 8 n.4. In terms of *Brady,* the Fifth Circuit found that the State is not required "to disclose inaccurate testimony months after trial when a subsequent case publicly establishes that similar testimony is inaccurate," and there is no evidence that the State knew of the inaccuracy at trial. *Id.* In terms of *Napue,* the court found Ruiz presented no evidence that the prosecution knew Merillat's testimony was false. *Id.* at 5, 8 n.5.

B. The district court and Fifth Circuit correctly concluded that the factual and legal basis of Ruiz's false-testimony claim was discoverable at the filing of his first state writ.

The CCA's 2010 *Estrada* decision brought to light the inaccuracy of expert witness Merilatt's testimony regarding prison classification following a 2005 change in TDCJ classification procedure. In that case, Merillat testified in rebuttal to Fitzgerald's testimony that the least restrictive classification an

LWOP capital murderer could receive was G-3, but stated, without objection, that the classification could be reduced below G-3 after ten years. *Estrada,* 313 S.W.3d at 286. During the punishment phase deliberations, Estrada's jury sent out two separate notes, the first indicating they had difficulty reaching a decision on the future danger special issue, and the second asking: "Based on the testimony of Fitzgerald and Merillat is there a possibility that the defendant would be eligible for a less restrictive status after 10 years (or some other period of time)." *Id.* Estrada was sentenced to death.

On direct appeal, in response to Estrada's false evidence claim, the State informed the court that Merillat's testimony was incorrect, albeit unintentionally so. *Id.* at 287. The CCA took judicial notice of a July 2005 TDCJ regulation indicating, "Effective 9/1/05, offenders convicted of Capital Murder and sentenced to 'life without parole' will not be classified to a custody less restrictive than G–3 throughout their incarceration." *Id.* The State admitted that the "jury's questions suggest that Merillat's mistaken testimony may have contributed to the jury's decision on punishment," and recommended "that, in the interest of justice, [Estrada] should receive a new trial on punishment." *Id.*

The CCA found that Estrada had no reason to know the testimony was false at the time it was made. *Id.* at 288. The court concluded that, by conceding error when it came to their attention—on appeal—the State had fulfilled its

duty to correct Merillat's false testimony, which may have contributed to Estrada's sentence, and granted him a new punishment hearing. *Id.*

Both the district court and the Fifth Circuit correctly determined that, once *Estrada* was published on June 16, 2010—six months before Ruiz filed his first state habeas application—this issue was discoverable and available for presentation in that application. Ruiz's insistence that the merits of his *Brady* claim should serve as "cause" to excuse the default necessarily fails. As noted by the district court, even assuming the State's failure to disclose or correct Merillat's inaccurate testimony was the cause of Ruiz's failure to raise this issue *before* June 16, 2010, "it factually could not be a cause after June 16, 2010—*Estrada* is a published opinion of the [CCA] on precisely the same point, even with the same two witnesses." Petitioner's Appendix C, at 13. Thus, Ruiz cannot plausibly blame the State for his omission of this claim from his original habeas petition. *Id.* Because the precise claim he raised in his subsequent writ was indeed available, both legally and factually, at the time he filed his earlier writ, the Fifth Circuit did not err in denying COA on these grounds. *See Slack*, 529 U.S. at 484 (Where the district court denied claim on procedural grounds, petitioner must show jurists of reason could debate whether petition states a valid claim of a denial of a constitutional right *and* the district court was correct in its procedural ruling.)

Regardless, the appellate court correctly concluded that the *Brady* allegation does not excuse this default. Under *Brady*, a petitioner must prove that favorable and material evidence was suppressed by the State, either willfully or inadvertently. *Banks*, 540 U.S. at 691. And to prove a due process violation for the presentation of false testimony, the petitioner must demonstrate that the prosecution knowingly presented false testimony that was material. *Canales v. Stephens,* 765 F.3d 551, 573 (5th Cir. 2014). This Court has held that for procedurally defaulted *Brady* allegations, "cause" parallels the suppression component while "prejudice" parallels "materiality." *Banks,* 540 U.S. at 691. Ruiz relies upon the *Banks* "cause" exception to support his argument that this Court should overlook an adequate and independent procedural bar. But his unfounded accusations against the State prosecutor do not excuse his failure to timely raise his claim.

Ruiz first contends that the State had a duty under *Brady* to discover and disclose Merillat's testimony post trial, after *Estrada*. Petition at 8. The Fifth Circuit rejected this suppression argument, holding that *Estrada* was discoverable with any reasonable diligence, and the State did not have a *Brady* obligation to disclose inaccurate testimony months after trial, following the publication of *Estrada*. Petitioner's Appendix A, at 5, 8 n.4. Indeed, this Court has confirmed that *Brady* does not extend to the postconviction context. *See District Attorney's Office for the Third Judicial District v. Osborne,* 557 U.S.

52, 68-69 (2009); *see also Estrada v. Healey,* 647 F. App'x 335, 338 (5th Cir. 2016) (noting that *Brady*'s pre-trial protections do not apply to the postconviction context).

Following the *Estrada* decision, Ruiz was equally on notice that Merillat's testimony in his trial might be similarly erroneous. Because *Estrada* was a published opinion, issued six months before Ruiz filed his state writ, and because Ruiz could have discovered any similarity between his case and *Estrada* through the exercise of reasonable diligence, Ruiz fails to demonstrate that an external, objective factor that could not be attributed to Ruiz prevented him from learning the factual basis for this claim and raising it on appeal. *See Murray v. Carrier,* 477 U. S. 478, 488 (1986); *Smith v. Quarterman,* 515 F.3d 392, 403 (5th Cir. 2008).

Estrada provided both the State and Ruiz with knowledge of potential inaccuracy. Under *Brady*, the suppression of favorable evidence violates due process, "irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. But "[e]vidence is not 'suppressed' if the defendant 'knows or should know of the essential facts that would enable him to take advantage of it. . . . The Government is not required . . . to facilitate the compilation of exculpatory material that, with some industry, defense counsel could marshal on their own.'" *United States v. Runyan*, 290 F.3d 223, 246 (5th Cir. 2002) (citing *United State v. Shoher*, 555 F.Supp. 346, 352 (S.D.N.Y. 1983)). *Estrada*—a published

CCA opinion—put both the State and the defense on notice of a potential claim at the same time. Therefore, the State did not suppress this evidence.

For this reason, Ruiz turns his argument to what the State knew at the time of trial, arguing that the State knew or should have known of the inaccuracy in Merillat's testimony, Petition at 10-12; the State should be imputed with the same knowledge that its expert knew or should have known, Petition at 11-13; and the state prosecutor should be imputed with the knowledge of the procedural policies of a state run entity like TDCJ, Petition at 12-13. No contention warrants reconsideration of the procedural default determination.

Under *Napue,* "due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured[.]" *Kutzner v. Cockrell,* 303 F.3d 333, 337 (5th Cir. 2002). But no evidence suggests that the State or even Merillat knew he was testifying inaccurately, let alone doing so intentionally. As the CCA noted in *Estrada*, "both parties seem to agree that Merillat's incorrect testimony was not intentional." 313 S.W.3d at 287; *see also Gobert v. State,* No. AP-76,345, 2011 WL 5881601, at *6 (Tex. Crim. App. 2011) (referring to Merillat's testimony in *Estrada* as "unintentionally inaccurate"). Even Ruiz's expert, a retired TDCJ employee, appeared unaware of any inaccuracy in Merillat's testimony, in at least two trials.

Ruiz argues that the courts should not presume that the State had no knowledge, and that development of this issue should have been permitted. Petition at 10. But the State addressed its own lack of knowledge in the brief in response to Ruiz's second subsequent application, asserting that it did not learn of the inaccuracy in Merillat's testimony in Ruiz's trial until "long after all state litigation in his case had concluded," and was "in the process of contemplating the nature of its duty, if any, under these circumstances when it received [Ruiz's second] subsequent application." ROA.6141-42. As noted, *Estrada* did not find that the testimony was intentionally false or that the state had knowledge at trial. *See Estrada,* 313 S.W.3d at 287-88. There is simply no proof, and no reason to believe, that either the State or the witnesses were aware that Merillat's testimony was false at the time of trial, and no further exploration of this issue is warranted.[4]

Ruiz nevertheless cites to a 2009 motion for a new trial where Dallas County prosecutors notified the defendant of the TDCJ classification change and inaccurate testimony of an entirely different witness. *See* Petition at 11

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[4] Because the district court dismissed the claims on the prior availability of *Estrada*—a fact not in dispute, *see* Appendix C at 14-15 n.6—the court did not abuse its discretion in denying a hearing. *See Norman v. Stephens,* 817 F.3d 226, 233-34 (5th Cir. 2016). And because the claim was procedurally defaulted, a hearing was foreclosed by 28 U.S.C. § 2254 (e)(2). Even if not foreclosed, Ruiz failed to demonstrate a "factual dispute which, if resolved in [his] favor would entitle him to relief." *Norman,* 817 F.3d at 235 (citing *Clark v. Johnson*, 202 F.3d 760, 765-66 (5th Cir.2000)). As will be discussed, even if Ruiz could prove knowledge of or a failure to divulge knowledge of false testimony post-trial, this evidence was not material.

(citing ROA.80-81, August 28, 2009 Motion for New Trial, *State v. Mark Robertson,* No. AP-71,224). But this instance does not prove the State had knowledge of the classification change at the time of Ruiz's trial, or Merillat's inaccurate testimony. Rather the case suggests the information started to come to light around the same time—when the CCA was considering *Estrada.*

In fact, *Estrada, Robertson,* and *Velez v. State,* No. AP-76,051, 2012 WL 2130890 (Tex. Crim. App. June 13, 2012)—a third case cited by Ruiz, *see* Petition at 6, 11—only serve to bolster the argument that the State was unaware of the classification change at the time of Ruiz's trial, the State was unaware that Merillat was testifying inaccurately, and that Merillat's testimony was unintentionally false. Indeed, three expert witnesses testified in at least three trials, completely unaware of the TDCJ classification change.

Ruiz argues that the State nevertheless bears the responsibility for the failure to correct Merillat's testimony because Merillat and thus the State should have known of the change in classification procedures at the time of trial. Petition at 11.[5] But, the State hired Merillat—an experienced expert

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[5] Ruiz asserts, without citation, that Merillat was in possession of the classification change at trial. Petition at 11. Presumably he is referring to an argument he made for the first time in his motion for rehearing in the Fifth Circuit, in which he cited to Merillat's testimony indicating, "I have the classification plan with me in this courtroom and it will show in black and white—" but trial counsel cut him off and did not pursue Merillat's offer to present the document. ROA.5033. Ruiz presumed this was the updated TDCJ classification policy, but it was likely the older version that comported with Merillat's outdated testimony. Nevertheless, Merillat offered the document, but trial counsel did not accept. The State is not required to

witness[6]—precisely for his expertise on TDCJ matters. Further, Ruiz's own expert could have reviewed TDCJ procedures and uncovered this inaccuracy on his own at trial. *See Kutzner,* 303 F.3d at 336 ("When evidence is equally available to both the defense and the prosecution, the defendant must bear the responsibility of failing to conduct a diligent investigation.") But neither the State nor defense counsel should be expected to research information that credible experts were hired to present. *See cf.* Petitioner's Appendix A at 5-6 (Trial counsel had a "right to rely on his expert witnesses when developing labyrinthine subject matter such as the voluminous and convoluted Texas prisoner-classification system."); *Murphy v. Davis,* 901 F.3d 578, 592-93 (5th Cir. 2018) ("[C]ounsel should be able to rely on [an expert] to alert counsel to additional needed information . . . .").

Regardless, Merillat's knowledge—or lack-thereof—should not be imputed to the State. First, Merillat was not a member of the prosecution team in that he did not have an investigative or prosecutorial role. *Avila v. Quarterman,* 560 F.3d 299, 307-10 (5th Cir. 2009). The relevant question is

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force counsel to look at the freely-offered evidence, especially when the State was unaware of any inaccuracy the document may—or may not—reveal. Once again, such evidence was equally available to both sides.

[6] *See Velez,* 2012 WL 2130890, at *32 (discussing Merillat's expertise on prison violence and regulations, noting he is "frequent speaker on prison violence, criminal investigations, and crime in Texas prisons"); *Coble v. State,* 330 S.W.3d 253, 287 (Tex. Crim. App. 2010) (finding Merillat's testimony admissible as rebuttal "educator expert" testimony).

whether the expert played a role in the prosecution. *Avila,* 560 F.3d at 308. Merely testifying as an expert for the State does not transform a witness into an "arm of the state," such that any knowledge or document in his possession is imputed to the State. *Id.* (citing *Hill v. Johnson,* 210 F.3d 481, 488-89 (5th Cir. 2000)). Because Merillat was not a "fully functioning member of the prosecution team," his knowledge should not be imputed to the State. *Id.* at 308-09 (citing *United States v. Stewart,* 433 F.3d 273, 297-99 (2nd Cir. 2006)).[7]

Furthermore, *United States v. Auten,* 632 F.2d 478 (5th Cir. 1980), does not impose a burden upon the State to second-guess an experienced expert witness's testimony or sources—especially when the defendant's own expert is in agreement. Petition at 12. Rather, *Auten* involved the State's failure to seek out and disclose information within its purview that would normally be disclosed. Specifically, the prosecution failed to disclose a witness's criminal record, which the prosecution later denied knowledge of, because they did not *seek* a criminal history—the decision to call the witness was made at a late date, thus the prosecution chose not to run an FBI or NCIC check on the witness's background. *Auten,* 632 F.3d at 480-81. This witness admitted under

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[7] Notably, the *Estrada* court did not find Merillat was a member of the prosecution team such that knowledge of his inaccurate testimony was imputed to the State. Rather, the CCA determined the State fulfilled its duty to correct Merillat's false testimony by conceding the error when it came to the State's attention on appeal. 313 S.W.3d at 288.

oath to a forgery conviction and jail sentence but denied any other convictions. *Id.* at 480. The court found that the prosecutor had knowledge for the purpose of disclosure, of potential other convictions, because it had access to resources necessary to obtain such information. *Id.* at 481-82. *Auten* involves the obligation to produce evidence "actually or constructively in [the State's] possession . . . in the interests of fairness," *Id.* at 481 (citing *Calley v. Callaway,* 519 F.2d 184, 223 (5th Cir. 1975)),[8] versus the State's ability to rely on the accuracy of testimony from a trusted expert in the field, especially where the defendant calls his own expert to test that accuracy.

Ruiz similarly fails to demonstrate why the State prosecutors should be imputed with the knowledge of TDCJ administrators, simply by virtue of the fact that they are all state employees. Petition at 13. Much like Merillat, TDCJ administrators are not members of the prosecution team and played no investigatory role in Ruiz's prosecution. Knowledge of TDCJ classification policies and procedures should not be imputed to the State in the prosecution of a capital murderer simply because the prosecutors are also employees of the State. *Cf. Fierro v. Johnson*, 197 F.3d 147, 155–56 (5th Cir. 1999) ("The attorneys for the Texas Department of Corrections in a federal habeas case do

[8] Indeed, the government has exclusive access to the NCIC records at issue in *Auten,* whereas the TDCJ protocols at issue in this case were discoverable to both experts.

not act as prosecutors of the crime investigated by law enforcement officers[] . . . [and] neither work with the police in a common enterprise, nor are they in the business of prosecuting crime."). No case cited by Ruiz supports such a broad imputation of knowledge. Rather, the cited cases involved witnesses who were clearly part of the investigatory team. *See* Petition at 13; *McCormick v. Parker,* 821 F.3d 1240, 1247-48 (10th Cir. 2016) (Under the specific circumstances of this case, SANE nurse who performed sexual assault examination at behest of law enforcement, and kept records for purposes of testifying against the defendant was member of the prosecution team, whose knowledge was imputed to the prosecution.); *United States v. Buchanan,* 891 F.2d 1436, 1442-43 (10th Cir. 1989) (knowledge of ATF agent who "worked in close proximity with the prosecution in the preparation of the government's case" imputed to state).

Ruiz argues that the circuits are split on the issue of whether the prosecution can shift responsibility to the defendant to discover false testimony when the information is equally available. Petition at 13-14. Ruiz's efforts to create a circuit split have no bearing on the issue before this Court because the cited cases involve the prosecution's obligations to provide potentially discoverable *Brady* material prior to or at trial. *See Dennis v. Sec'y, Pa. Dep't of Corr.,* 834 F.3d 263, 288-91 (3rd. Cir. 2016); *Benson v. Chappell,* 958 F.3d

801, 837 n.28 (9th Cir. 2020); *Bell v. Bell,* 512 F.3d 223, 235-36 (6th Cir. 2008); *United States v. Roy,* 781 F.3d 416, 421 (8th Cir. 2015).

At issue in this case was whether Ruiz could show cause for his failure to raise an *Estrada*-based *Brady* claim during postconviction. The Fifth Circuit denied COA noting that no authority requires that "the state disclose inaccurate testimony months after trial when a subsequent case publicly establishes that similar testimony is inaccurate." Petitioner's Appendix at A, at 8 n.4. And, regardless, because Ruiz could have discovered *Estrada* with reasonable diligence, he "bears the responsibility of any failure to diligently investigate it." *Id.* No case cited by Ruiz addresses the *post*-trial *Brady* disclosure requirement at issue here. And, as noted, this Court has held that *Brady* does not extend to the postconviction context. *See Osborne,* 557 U.S. at 68-69. This is not the case to resolve the alleged circuit split cited by Ruiz.

Ruiz also complains that it is arbitrary and irrational to treat him differently than the petitioner in *Estrada*. Petition at 11-15. But, as the Fifth Circuit noted, "Ruiz wants a similar outcome despite being a dissimilar appellant." Petitioner's Appendix A, at 4. Any inconsistency in the way the CCA addressed Merillat's testimony is the result of whether the issue was timely raised, and whether the inaccuracy likely had an impact on the jury's determination. As noted, in *Estrada,* the issue was timely raised on direct appeal, and the record documenting "the 'jury's questions suggest that

Merillat's mistaken testimony may have contributed to the jury's decision on punishment.'" 313 SW.3d at 279-80, 286-88. In contrast, Ruiz waited until federal habeas to pursue exhaustion of this claim, despite availability pursuant to *Estrada*. And, as will be discussed below, Ruiz cannot demonstrate that Merillat's testimony had any impact on the jury's verdict.

Similarly, in *Velez,* the petitioner timely raised a claim on direct appeal, pursuant to *Johnson v. Mississippi,* 486 U.S. 578, 590 (1988), arguing that materially inaccurate testimony violated his Eighth Amendment rights. The CCA concluded, based upon the State's circumstantial case, Velez's unrebutted psychiatric testimony that he would not be a future danger, Velez's non-violent criminal record, and his clean disciplinary record while in jail awaiting trial, that it could "not find beyond a reasonable doubt that Merillat's false testimony 'did not contribute to the conviction or punishment.'" 2012 WL 2130890, at *31-33 (citing Tex. R. App. Proc. 44.2(a)). As will be discussed in the next section, Ruiz's cannot make the same showing, under any standard of harm. The CCA has not been inconsistent in its handling of these individual and distinct cases.

C. Ruiz cannot demonstrate the materiality of this evidence, even if he could demonstrate suppression or knowledge of the false testimony.

Because Ruiz cannot overcome the procedural bar of his claim, no court has reached the merits of this claim beyond a cursory determination that he could not show cause. Nevertheless, this Court need not remand for

reconsideration of his application for COA because Ruiz cannot demonstrate a substantial underlying constitutional claim. *Slack,* 529 U.S. at 484.

As noted above, Ruiz cannot demonstrate that the State suppressed any favorable evidence, as required under *Brady,* but he also fails to demonstrate that such evidence was material. *Banks*, 540 U.S. at 691. That is, he cannot show "a reasonable probability of a different result" at the punishment phase of his trial. *Id.* at 699 (quoting *Kyles v. Whitely*, 514 U.S. 419, 434-35 (1995)). Regarding his false testimony claim, apart from failing to prove the State knew of any falsity, he also fails to demonstrate materiality by showing a reasonable likelihood that the false testimony could have affected the outcome of trial. *United States v. Agurs,* 427 U.S. 97, 103 (1976). The materiality standard for a false-evidence claim is less onerous than that of a *Brady* claim, but is equivalent to the *Chapman v. California,* 386 U.S. 18 (1967) harmless-error standard. *United States v. Bagley,* 473 U.S. 667, 678-82 (1985). Ruiz cannot demonstrate the materiality of the evidence under any standard.

First, although the defense could have used notice of the TDCJ classification change to impeach a small part of Merillat's testimony, *see Banks*, 540 U.S. at 691, the State did not heavily rely on the inaccurate portion, nor did Merillat's testimony focus on the potential for violence while in a classification lower than G-3. Merillat incorrectly testified that an LWOP capital murderer could be reclassified to a less-restrictive status after ten-

years and good behavior, but Merillat's testimony regarding day-to-day life and opportunities for inmates within prison was confined to that of a G-3 classified inmate. *See* ROA.5027-28. Merillat discussed the instances of G-3 inmates making and using weapons, and numerous opportunities for G-3 inmates to commit violent crimes in prison against inmates, guards, staff, and visitors. ROA.5028. This testimony regarding G-3 classification accurately describes Ruiz's potential life in prison and did not focus on a classification less than G-3. Therefore, had Ruiz learned of the inaccuracy, he could have impeached only a small portion of Merillat's testimony. Merillat's remaining testimony accurately focused on a G-3 inmate and demonstrated that such an inmate still posed a significant future danger to society. And the State could have rehabilitated Merillat with evidence that, prior to September 1, 2005, his testimony was accurate. Merillat's testimony involved an outdated TDCJ provision but was not deliberately deceptive. *See Estrada*, 313 S.W.3d at 287.

Furthermore, the State's punishment case demonstrated an ongoing criminal history, which exhibited not only violence but Ruiz's complete disregard for authority, the legal system, and his many opportunities for rehabilitation. As noted by the CCA in denying a sufficiency-of-the-evidence challenge, "'the evidence [relevant to the future danger special issue] showed [Ruiz] was a veteran criminal and gang member fully immersed in a life of drugs, guns, and violence.'" ROA.496-97. As a teen-ager, Ruiz was a member

of three violent street gangs, known to engage in assaults, drive-by shootings, drug activities, and murders. *See* ROA.5005, 5052. Ruiz was arrested for deadly conduct for his participation in the drive-by shooting of a rival gang member's home. ROA.5009-13, 5017.

Ruiz was involved in three high-speed car chases with the police, each time attempting to evade arrest. The first chase resulted in a crash involving another vehicle; Ruiz ran from the police after the crash, abandoning his girlfriend. ROA.5044. The police discovered a loaded gun in his glove compartment, cocked and ready to be fired. ROA.5043-45. Ruiz was convicted of two felony offenses for evading arrest and unlawful carrying of a handgun but received a reduced sentence pursuant to a plea agreement. ROA.3345-52, 3361-66. Ruiz successfully fled from the police a second time after being pulled over. ROA.5063. Nine days later, Ruiz was involved in high-speed car chase resulting in Officer Nix's death; Ruiz fled because he was in violation of his probation and had drugs and a gun in his car. ROA.4925, 4929-30, 5056.

Additionally, Ruiz had numerous arrests for drug offenses, robbery, burglary of a vehicle, and theft, beginning when he was a juvenile. ROA.3301-35, 3367-81, 4991, 5046-47, 5049. While in custody for a burglary of a vehicle charge, Ruiz escaped. ROA.3330-35.

Ruiz received many opportunities for rehabilitation, which he ignored. At sixteen, Ruiz was placed on probation until his eighteenth birthday for

theft. ROA.3301-08. He was placed on deferred adjudication for a burglary of a vehicle charge as a juvenile, but probation was revoked and he served 100 days confinement; he was also convicted at the same time of misdemeanor theft. ROA.3309-23, 4991. Ruiz was arrested in Tarrant County for possession of methamphetamine but received only ten years deferred adjudication and probation. ROA.3367-75, 4991. A few weeks later, he was arrested in Dallas County on a second drug charge but received a reduced misdemeanor sentence. ROA.3376-92, 4991, 5046-47, 5049. Ruiz was on probation in both Tarrant and Dallas County for these drug offenses. ROA.5055. Ruiz failed to report less than six months into his probationary period and was in violation of his probation at the time he shot Officer Nix. ROA.4925, 4929. He also had drugs in his car and was drinking codeine to get high at the time he fled the police and shot Officer Nix. ROA.4925, 4930-31. And, as noted, Ruiz received a reduced sentence for his first car chase.

Ruiz bragged to a friend about stealing from people and shooting at others. ROA.5060-61. He bragged to a girlfriend that if he had a run-in with the police, "he wasn't going to go down without a fight," that he would not make it easy, and that he was going to "go out like a [gangster]," ROA.4760, 4762, and told a friend, the only way he was ever going back to jail was "in a box," ROA.5061. Finally, the State presented several letters sent by Ruiz while in jail in which he tried to cover up threatening statements written in those

letters that were directed towards other inmates and guards. ROA.3540-42, 5160. Ruiz also killed a police officer acting in his official duty; there was no reason for a jury to believe he would not be a threat to a prison guard.

Furthermore, unlike *Estrada*, 313 S.W.3d at 286-87, there is no evidence that the jury was conflicted about the future dangerousness special issue, or that the jury relied on this false testimony in reaching their decision. The State recommended that *Estrada* receive a new punishment hearing because "the jury's questions suggest that Merillat's mistaken testimony may have contributed to the jury's decision on punishment." *Id.* at 287. Estrada had no prior criminal convictions but had engaged in indecency with several minor teenage girls that he met as a youth pastor, including his victim. *See id.* at 279-80. Because Estrada's crimes involved the manipulation and intimidation of underage girls, punishment phase evidence focused on Estrada's opportunities for violence, potential exposure to women while in prison, and his opportunity to commit rape or have consensual sex while in prison. *Id.* at 280. Thus, evidence of his potential for increased freedom and interaction with women while in prison was relevant to his potential for future dangerousness. The jury was clearly conflicted about the future danger issue and the incorrect reduced-classification evidence prejudicially weighed into their decision.

In contrast, Ruiz cites to the jury's question, "Is a prisoner classified before entering prison to serve their term? If not, how long does it take to be

classified by the board?" ROA.1284, attributing this inquiry to Merillat's testimony. Petition at 4. However, this inquiry suggests confusion about *when* a prisoner would be subjected to initial classification. The incorrect testimony addressed what could happen after Ruiz served ten years in prison on an LWOP sentence, but accurately and consistently conveyed that initial classification would be G-3. Furthermore, this inquiry appears to reference Larry Fitzgerald's testimony describing the intake process when a defendant is sentenced to TDCJ. ROA.5092-93. Fitzgerald testified that all capital murders who receive LWOP sentences will be presumed G-3 when they begin the classification procedure but could be moved up to a higher classification depending on his record, past behavior, and possible gang associations. ROA.5093-94. Regardless, the Court responded to the inquiry that "[t]he jury must indicate that there is a dispute and the specific area of the dispute regarding said requested testimony." ROA.1285. The jury asked no further questions, indicating there was no confusion over this unrelated point. The jury gave no indication that they were conflicted about the special issues or that they considered Merillat's testimony significant. Unlike *Estrada*, there is no reasonable likelihood that this testimony affected the outcome of Ruiz's trial. *Agurs*, 427 U.S. at 103.

Ruiz contends that the State emphasized Merillat's erroneous testimony in closing argument, when the State argued that "only way to make sure that

you can guarantee and protect everybody down there at that prison system for as long as this man is alive is to put him on death row like [Merillat"] told you, the most restrictive, closely guarded situation in the penitentiary." Petition at 4 (citing ROA.5176). But just prior to this statement, the State discussed the danger of putting Ruiz "in the general population, G-3" with his fellow gang members. ROA.5176. As noted, this classification testimony was accurate.

Because the materiality standard for a *Napue* claim is less onerous than that of a *Brady* claim, *see Bagley*, 473 U.S. at 678-82, Ruiz's failure to prove any reasonable likelihood that the false testimony affected the jury's verdict, *see Agurs*, 427 U.S. at 103, necessarily results in a failure to meet the higher *Brady* standard. There is no "reasonable probability of a different result" had this testimony been excluded or corrected at trial. *Banks*, 527 U.S. at 699. Given the testimony of Ruiz's potential for violence while in prison, the facts of the crime, and Ruiz's long criminal record and disregard for authority, the jury's determination that Ruiz would present a future danger to society was well-supported and unaffected by Merillat's unintentionally false testimony.

II. The Fifth Circuit Did Not Misapply the Threshold Inquiry Required by *Buck*.

Ruiz contends that the Fifth Circuit's denial of COA in this case is inconsistent with this the requirements of *Buck*. Petition at 16-18. Ruiz argues that he made a "substantial showing of the denial of a constitutional right"

where the testimony in question was "indisputably incorrect," and that the issue deserved encouragement to proceed further but the Fifth Circuit ignored *Buck* and misapplied the "threshold" inquiry by denying COA. Petition at 17. To the contrary, in concluding that the district court's procedural ruling was not debatable and thus, the "inquiry ends there," Petitioner's Appendix A at 4, the Fifth Circuit adhered to the strict "threshold inquiry" required at the COA stage. *Buck,* 137 S. Ct. at 773-74.

Indeed, where the district court did not reach the merits, it would certainly exceed the threshold inquiry for a COA determination for the Fifth Circuit to determine that, although the procedural bar was not debatable, the claim itself deserved encouragement to proceed further. Ruiz cannot escape the fact that the case upon which he relied for relief—*Estrada*—was available at the time he filed his initial writ, as was the evidence to support it. Regardless, as discussed above, the underlying issue was not a substantial one—Ruiz cannot demonstrate that the inaccurate testimony was material.

CONCLUSION

The Fifth Circuit correctly denied Ruiz's application for COA and affirmed the district court's procedural bar of his false testimony claims. For all the reasons discussed above, the Court should deny Ruiz's petition for a writ of certiorari.

Respectfully submitted,

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