CASE NO. 21-5048 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

WESLEY RUIZ,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Stuart Brian Lev*
Sonali Shahi
Andrew Childers
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

* *Counsel of Record*
Member of the Bar of the Supreme Court

THE DIRCTOR'S ARGUMENTS PRESENT NO BARRIER TO THE GRANT OF CERTIORARI

The Director acknowledges that the expert witness the prosecution called at the punishment phase of the trial provided false information about the treatment of life-sentenced prisoners under the Texas prison classification system. BIO at 16-17. The Director further concedes that the State made no effort to inform the state court of the error or to seek to correct the false testimony, either at trial or in appellate and state post-conviction proceedings. *Id.* This injection of false evidence into the jury's sentencing decision should, by itself, be sufficient to show that Petitioner's claims under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *Napue v. Illinois*, 360 U.S. 264, 269 (1959), have some merit and thus satisfy the standard for issuing a certificate of appealability (COA).

The Director tries to avoid this conclusion by shifting the blame for the prosecution's error to the defense, emphasizing Petitioner's state court default of his claim. *See, e.g.,* BIO at 14-16. The Director errs, however, by failing to recognize that the prosecution's suppression of the actual classification rules in effect at the time of the trial can demonstrate both cause and prejudice for Petitioner's default. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) (demonstration of cause is shown by establishing *Brady's* suppression prong, and prejudice is shown by establishing materiality).

The fact that Petitioner defaulted his claim in state court does not lessen the habeas court's duty to address the merits to determine if there is cause and prejudice. And the merits of the claims are debatable because there is factual

support in the record that false evidence was placed before the jury. This Court should review, and reverse, the Fifth Circuit's denial of a COA.

The bulk of the BIO argues that Petitioner's claim will ultimately fail. But these arguments miss the point at this stage of the case. The question the Fifth Circuit should have addressed is whether Petitioner's cause and prejudice arguments were debatable among reasonable jurists, not whether they would ultimately succeed. The Fifth Circuit sought to sidestep the COA's threshold determination in favor of two footnotes summarily determining that Petitioner's claims lack merit. *Ruiz v. Davis*, 819 Fed App'x 238, 243 n.4&5 (5th Cir. 2020). Yet, as this Court has repeatedly reminded the Fifth Circuit, the COA standard cannot be so easily bypassed. Petition at 17-18 (citing relevant cases).

In any event, analysis of the Director's arguments show that they are subject to reasonable debate. For example, the Fifth Circuit held that "[w]hen evidence is equally available to both the prosecution and defense, the defendant bears the responsibility of any failure to diligently investigate it." *Ruiz v. Davis*, 819 Fed. App'x at 243 n.4. The Director relies upon this reasoning to argue that, after the Texas Court of Criminal Appeals' opinion in *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010), was published, the State had no duty to inform or correct the false testimony because that information was equally available to the defense. BIO at 16, 21.

But whether the availability of previously suppressed evidence relieves the prosecution of its duty to disclose and correct is the subject of significant debate

among the Circuits. *See Dennis v. Sec'y, Pa. Dep't of Corr.*, 834 F.3d 263, 288-91 (3rd Cir. 2016) (noting this Court "has rejected the notion that defense counsel's diligence is relevant in assessing 'cause' for the failure to raise a *Brady* suppression issue in state court proceedings"); *Benson v. Chappell*, 958 F.3d 801, 837 n.28 (6th Cir. 2008) ("Moreover, while the information was contained in a public record, we have held that under some circumstances, this does not diminish the state's obligation to produce documents under *Brady*"); *Amado v. Gonzalez*, 758 F.3d 1119, 1137 (9th Cir. 2014) (finding "due diligence" requirement was contrary to clearly established federal law). As Petitioner has argued, Petition at 15, this case is an appropriate vehicle for this Court to resolve that conflict. At a minimum, however, the existence of a circuit split shows that the arguments are debatable, and that further development of the issues should be encouraged. The grant of a COA would allow the Fifth Circuit to confront its disagreements with its sister circuits head on, rather than pretend that those disagreements do not exist.

The Director's reliance on *District Attorney's Office for the Third Judicial District v. Osborne,* 557 U.S. 52 (2009), BIO at 22-23, is misplaced, as it is at least debatable whether *Osborne* applies here. Ruiz seeks relief through the established post-conviction process asserting that the prosecution failed to disclose favorable evidence in existence at the time of trial. The prosecution then compounded that error by failing to correct false testimony. In *Osborne*, by contrast, a defendant sought to bypass the post-conviction process and use 42 U.S.C. §1983 to obtain access to evidence in order to conduct new DNA testing. The petition in *Osborne*

specifically denied, and this Court agreed, that the *Brady* line of cases was not applicable to his request. 557 U.S. at 68. Mr. Ruiz's claims differ, as they fit within the *Brady/Napue* paradigm. *See Whitlock v. Brueggemann*, 682 F.3d 567, 587-88 (7th Cir. 2012) ("*Brady* continues to apply to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial").

The Director presumes, and asserts as a fact, that the trial prosecutors did not know that Merillat's testimony was false and thus had no duty to correct it. BIO at 26. This reasoning is flawed for at least two reasons. First, there has never been any factfinding about the extent of the trial prosecutor's knowledge or when the State learned that the testimony it presented as true was actually false. No evidentiary hearing has ever been held and the denial of a COA limited the Fifth Circuit's consideration of whether a hearing was appropriate.

It is undisputed that information about the classification was readily available to the State well before *Estrada* was decided. The State admits that as early as 2009, it notified defense counsel in two capital cases of the classification change. ROA 80-81 (Motion for New Trial, *State v. Mark Robertson*, No. AP-71, 224 (Aug. 28, 2009)). The only explanation the State now offers, that "the information started to come to light around the same time—when the CCA was considering *Estrada,*" is incorrect, as the notifications were made nearly one year before *Estrada* was published. BIO at 26. The State has no explanation for why its office did not similarly notify Ruiz in 2009, which prevented him from timely raising the

Brady-related claims on direct appeal. The State's awareness of the falsity of Merillat's testimony prior to *Estrada* is at least debatable among jurists of reason.

Second, the Director's focus on the prosecutor's actual knowledge misses the important legal question. Constitutional error occurs when the prosecution fails to disclose favorable evidence, or fails to correct false testimony, that it "should have known" was false. *United States v. Agurs*, 427 U.S. 97, 103 (1976). Here, by deciding to present evidence about the classification of a life-sentenced prisoner, the prosecution has a duty to ensure that such testimony is at a minimum, arguably true. It is at least debatable that the prosecutors should have been aware of the current classifications and should have known that Merillat's testimony was false. *See Velez v. State*, No. AP-76,051, 2012 2130890, at *32 (Tex. Crim. App. 2012) ("Both Merillat and the State knew or should have known . . . that Merillat's testimony about the G classification of inmates who were sentenced to life without parole was false."). A party who presents expert testimony should not be allowed to hide in ignorance when the expert provides testimony that is unquestionably, and beyond dispute, false. Again, these issues are worthy of full appellate consideration and review.

The Director's reliance on *Estrada v. Healey*, 647 F. App'x 335, 338 (5th Cir. 2016), BIO at 21, is likewise debatable. In *Estrada*, which the State cites for the same proposition as *Osborne*, the prosecutor's office actually notified the defense of a decision by the Texas Court of Criminal Appeals within eight days of its publication, notwithstanding that defendant's prosecution occurred five years

earlier. *Id.* at 337. The defense filed a petition for habeas relief within the year, the prosecutor's office indicated it would not oppose relief, and the CCA granted habeas relief and overturned his conviction. *Id.* at 338. Here, by contrast, the prosecution did not notify the defense of the *Estrada* decision and did not give the defense the opportunity to timely raise a claim based on that new decision.

The Director emphasizes that "*Estrada* was a published opinion," consistent with the Fifth Circuit's reasoning for denying COA, but cites to no relevant precedent holding that state habeas counsel should have known about the decision published months before the filing. BIO at 21. Under *Strickler*, 527 U.S. at 283, and *Thompson v. Davis*, 916 F.3d 444, 457 (5th Cir. 2019), it is at least debatable that the publication of an opinion does not excuse the State's concealment of evidence. In *Strickler*, where newspapers had published a trial witness's conflicting accounts, this Court rejected the argument that state habeas counsel should have known of the existence of undisclosed interviews by the police, and found that cause was adequately shown. 527 U.S. at 283. *See also Banks v. Dretke*, 540 U.S. 668, 695 (2004) (rejecting argument that state habeas counsel's alleged lack of diligence undermined finding of cause). In *Thompson v. Davis*, 916 F.3d 444, 457 (5th Cir. 2019), the Fifth Circuit granted a COA on a *Brady* claim where the issue of cause was a "close" question, and found it debatable that the default resulted from the State's concealment of a contract with a witness, despite ample evidence that was publicly available. State habeas counsel knew from the trial record that the witness was an informant, and moreover, "[a]spects of Rhodes's history with the State were

discoverable in public records, specifically the Texas Court of Appeals' published decision in *Stephens v. State*," and the published opinion in *Stephens* "describes Rhodes as an employee of the Organized Crime Task Force and 'confidential informant in over 50 cases.'" *Id.* at 456. Regardless, cause was nonetheless debatable for purposes of a COA. *Id.* at 457. The same should have been true here.

The applicability of other cases cited by the Director is similarly debatable. *Smith v. Quarterman*, 515 F.3d 392, 403 (5th Cir. 2008), BIO at 23, did not concern a *Brady* claim, but an ineffective-assistance-of-counsel claim. In *Kutzner*, "essentially all of the 'suppressed' evidence was discussed at trial" so the petitioner's failure to discover it at least by the time of trial was patently inexcusable. *Kutzner v. Cockrell*, 303 F.3d 333, 336 (5th Cir. 2002). In *United States v. Runyan*, 290 F.3d 223, 245-46 (5th Cir. 2002), the computer sought by the defense was initially in their possession for four months, and the Government represented that it was available for inspection to the defense at the time of trial. Here, there is no suggestion that the 2005 classification change was provided to Ruiz at the time of trial, nor that he could have learned about the 2005 classification change from trial testimony.

Finally, the Director tries to avoid responsibility for the prosecution's presentation of false testimony by disputing its materiality. The Director is wrong, but once again, at minimum his assertions are subject to reasonable debate.

The materiality analysis for a *Brady* claim "is not a sufficiency of the evidence test." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995). In *Estrada*, the Texas

court recognized that the evidence of future dangerousness was easily sufficient to support the jury's finding given the brutality of the murders—the defendant was a youth pastor who preyed on underage girls in his youth group including the victim, whom he stabbed 13 times when she was pregnant and killed their unborn child. The classification change nonetheless was material because there was a "fair probability" that the "death sentence was based upon Merillat's incorrect testimony as evidenced by the jury's notes." *Id.* at 287. Here, the State urges that "there was no confusion" by the jury regarding Merillat's incorrect testimony, simply because he "accurately and consistently conveyed that the initial classification would be G-3," and because the jury asked no further questions. BIO at 38. However, the Ruiz jury did inquire about the classification system and the prosecutor called the jury's attention to Merillat's testimony in his closing argument. Petition at 4. The jury's question shows they were concerned about Ruiz's classification when they were deciding whether to sentence him to death or life without parole. Because the question was unanswered by the court, it was clear that further questions would be futile.

At the end of the day, this case presents important constitutional questions concerning the introduction of false expert testimony at a capital sentencing trial. Should the prosecution be held responsible for its presentation of the false expert testimony? Does the failure to disclose the evidence demonstrating that falsity, and failure to correct the testimony it knew or should have known was false constitute cause and prejudice to overcome defense counsel's failure to properly object and

raise these claims in state court? Should the prosecutor be able to shift blame to the defense for the State's presentation of false expert testimony?

This Court should address these questions because they impact the reliability of a jury's determination of life or death. These errors damage the public's perception of the integrity of the criminal justice system – if the prosecution is allowed to introduce false testimony, how can the public feel confident in the fairness and correctness of the result? This Court should affirm that our system of justice, particularly in a matter as important as the death penalty, must be based on truth.

At a minimum, this Court should not allow the Courts of Appeals, and the Fifth Circuit in particular, to improperly truncate the appellate process in capital cases. The Fifth Circuit below paid lip service to the minimal standards required for a COA, but then, in summary fashion, determined the ultimate merit of the claims. Mr. Ruiz raised questions of substantial merit and importance, which were grounded in the record and, as shown here and in his Petition, are subject to debate by reasonable jurists. The Fifth Circuit must be reminded once again of its duty to properly administer and fulfill its appellate responsibility to prisoners sentenced to die. It is only when those standards are faithfully applied that there can be confidence in the result.

CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari and place this case on its merits docket. In the alternative, this Court should grant certiorari, vacate the decision below, and remand this case to the Fifth Circuit with instructions to grant a Certificate of Appealability.

Respectfully submitted,

/s/ Stuart Brian Lev_____
Stuart Brian Lev*
Sonali Shahi
Andrew Childers
Assistant Federal Defenders
Federal Community Defender Office
for the Eastern District of Pennsylvania
601 Walnut Street, Suite 545 West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner Wesley Ruiz

* *Counsel of Record*
Member of the Bar of the Supreme Court

Dated: September 20, 2021

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5(b) of the Rules of this Court, I, Stuart Brian Lev, a member of the Bar of the United States Supreme Court, hereby affirm under penalty of perjury that on this twentieth day of September, 2021, I placed one copy of the Reply in Support of Petition for Writ of Certiorari in the above-captioned case, to counsel for Respondents, Tomee M. Heining, Assistant Attorney General, PO Box 12548, Capital Station, Austin TX 78711. The mailing was by first class United States Mail postage prepaid.

/s/ Stuart Brian Lev
STUART BRIAN LEV*
Assistant Federal Defender
Federal Community Defender Office
for the Eastern District of Pennsylvania
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520
stuart_lev@fd.org

*Counsel for Petitioner, Wesley Ruiz

Dated: September 20, 2021