NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ALLEN RUBIO,

Petitioner,

vs.

ERIC GUERRERO, Director, Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

The Fifth Circuit refused to certify John Allen Rubio's appeal on, among other things: (1) a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), that the State knew that testimony from its mental health expert was false; and (2) an ineffective-assistance-of-trial-counsel (IATC) claim that Rubio's defense lawyers deficiently investigated fetal alcohol exposure. This Petition presents the following two Questions, and Rubio suggests that a summary reversal is appropriate for both.

1. Did the Fifth Circuit err in refusing to certify the *Napue* claim, when it failed to reach punishment-phase harm and when it conflated the question of whether an expert testified falsely on a predicating fact issue with the question of whether a reasonable juror could vote for an insanity defense?

2. Did the Fifth Circuit err in refusing to certify the IATC claim, when the basis for doing so was that a finding against a claimant on § 2254(d)(1) relieves a district court of the obligation to reach § 2254(d)(2)—notwithstanding the fact that the exceptions to § 2254(d) are disjunctive?

PARTIES BELOW

All parties are listed on the cover page in the case caption. There are no corporate parties involved in this case.

LIST OF RELATED CASES

138th Judicial District Court, Cameron County, Texas

Texas v. John Allen Rubio, Cause No. 2003-CR-457 (2003 trial)

Texas v. John Allen Rubio, Cause No. 2003-CR-457-B (2010 retrial)

Texas Court of Criminal Appeals

Rubio v. Texas, No. AP-74,852, 241 S.W.3d 1 (Tex. Crim. App. 2007) (direct appeal from 2003 trial)

Ex parte Rubio, No. WR-65,784-01 (Tex. Crim. App. Jan. 16, 2008) (state habeas from 2003 trial)

Rubio v. Texas, No. AP-76,383, 2012 WL 4833809 (Tex. Crim. App. Oct. 10, 2012) (direct appeal from 2010 retrial)

Ex parte Rubio, No. WR-65,784-02, -04, 2018 WL 2329302 (Tex. Crim. App. May 23, 2018) (first subsequent state habeas from 2010 retrial)

Ex parte Rubio, No. WR-65,784-05, 2022 WL 221485 (Tex. Crim. App. Jan. 26, 2022) (second subsequent state habeas from 2010 retrial)

United States District Court for the Southern District of Texas

Rubio v. Lumpkin, No. 1:18-cv-088, 729 F. Supp. 3d 616 (S.D. Tex. Apr. 5, 2024)

United States Court of Appeals for the Fifth Circuit

Rubio v. Guerrero, No. 24-70004, 2025 WL 1455001 (5th Cir. 2025)

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PETITION FOR A WRIT OF CERTIORARI

John Allen Rubio petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's May 21, 2025 opinion is attached as Appendix A. The district court's April 5, 2024 order is attached as Appendix B.

JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 2241 & 2254. The Fifth Circuit had jurisdiction to entertain an application for a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c), and it entered its opinion on May 21, 2025. On July 28, 2025, Justice Alito granted a motion to extend by thirty days the period for filing this Petition, until September 18, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) to review denials of applications for a COA by a panel of a court of appeals. *See Hohn v. United States*, 524 U.S. 236, 253 (1998).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, which provide in relevant part:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. Const. amend. V.
>
> "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. Const. amend. VI.
>
> "No State … deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV.

* * * *

The case also involves 28 U.S.C. § 2253, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which provides in relevant part:

> (c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

* * * *

The case also involves 28 U.SC. § 2254(d), also enacted as part of AEDPA, which provides in relevant part:

> 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

This Petition presents two issues worthy of this Court's review, both associated with legal errors affecting John Allen Rubio's capital sentence. First, with respect to the merits of a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), the Fifth Circuit committed black-letter legal error by (1) confusing an allegation that a witness

testified falsely with an allegation that a jury finding was factually insufficient, and (2) by failing to reach the question of punishment-phase harm entirely. App. A. 16–18. Second, for an ineffective-assistance-of-trial-counsel (IATC) claim analyzed under 28 U.S.C. § 2254(d), the Fifth Circuit legally erred in determining that resolution against Rubio on § 2254(d)(1) eliminated the district court's obligation to reach § 2254(d)(2). App. A. 07–11. On both questions, the legal errors are clear and a summary reversal is therefore warranted. *See* SUP. CT. R. 16.1 ("The order may be a summary disposition on the merits.").

STATEMENT OF THE CASE

A. The crime.

On March 11, 2003, believing them to be possessed by his deceased grandmother, Rubio cut off the heads of his three young children: Julissa (age three); John Estefan (one); and Mary Jane (two months).[1] At the time of the offense, Rubio was living in an apartment with his common law wife, Angela Camacho. The family had previously lived on the street, then later in an abandoned home with no electricity or running water. ROA.33583.[2] Child Protective Services took the children away, but Rubio and Camacho got them back after Rubio took parenting classes, secured employment, stopped using drugs (for a period) and rented the apartment. ROA.33585–89. To pay for the apartment, Rubio washed cars and worked as a

[1] Julissa and John Estefan were not Rubio's biological children, although he treated them all as his own.

[2] ROA refers to the record on appeal in the United States Court of Appeals for the Fifth Circuit.

prostitute. ROA.33448. Rubio's mother, who was also a drug-addicted prostitute, lived in the apartment but paid little rent. ROA.33588–89.

Rubio has a lifelong history of severe, documented mental illness. He had schizophrenia and received an emotional disturbance diagnosis during childhood, and he was diagnosed with schizoaffective disorder while in prison. ROA.633, 707. In the days before the murder, Rubio was increasingly gripped by a delusion (seemingly present in some form or another since childhood) that he was the protagonist in a good-versus-evil struggle for the world. Long before that episode, he had frequently sought help from mental health professionals, reporting that he was the "chosen one." ROA.34124–27, 34203–04. His mother, who began prostituting Rubio when he was about eight years old, ROA.34278, explained that he heard voices, saw shadows, and reported that God was telling him to save the world. ROA.34130, 34145–46.

In the days before the murders, Rubio and Camacho had largely secluded the family to prepare for the ultimate good-versus-evil confrontation, periodically dousing the apartment with bleach to the point that it became difficult to breathe. ROA.34274–75. The day before the offense, Rubio and Camacho had gone to the hospital to retrieve records necessary to get food stamps, ROA.33478, and Rubio's behavior became especially erratic on the way home. Rubio told Camacho that the people on the bus with them were physical threats, that a woman waiting at a stop wanted to steal their money, and that a little girl was trying to poison John Estefan. ROA.33482–84. When they got off the bus, Rubio told Camacho that a woman with

"marks" on her forehead had made a devil's sign and that they needed to rush home. Camacho agreed and they ran back to the apartment. ROA.33484–85, 33507–08.

When they returned home, Rubio "tested" Julissa by sweeping an egg over her and cracking it into a glass of water. ROA.33538–39. Rubio concluded that someone had done something evil to her, and neither Rubio nor Camacho could sleep that night. ROA.33476, 33539. Rubio believed his mother to be a witch, and, after she came home at about 2:00 a.m., she refused his request to help him ward off evil spirits. ROA.33539–41. Rubio's paranoia continued to spiral throughout the night and early morning. To defend against evil spirits, he nailed the back door shut, ROA.33525, 33561–62, and threw a blanket over the bedroom mirror. ROA.33525–26. Believing his mother to have cast a spell on the family's three pet hamsters, Rubio killed the animals with a hammer and bleach. ROA.33527, 33562–63.

At some point, Rubio decided that, as part of this struggle, he needed to kill the children because they were spiritually possessed by his deceased grandmother, whom he also believed to be a witch. Rubio, with assistance from Camacho, decapitated the three children and put their heads in plastic bags. ROA.33454–55, 33457, 33464–65, 33468.

The murders were discovered hours later when Rubio's brother and Camacho's friend came over for a visit and then left to locate police. ROA.34676–83. A police officer went with them back to the apartment, and Rubio simply said, "[T]he kids are in the backroom." ROA.32627–28, 34683. When the officer saw one of the headless bodies, Rubio put his hands together and said, "[A]rrest me." ROA.32589–90. On his

way to the police station, Rubio told an officer: "I cut my daughter's head off. She was looking at me like she was possessed . . . . I remember seeing a bunch of cats through my window." ROA.32650–51.

B. Trials and direct review.

Rubio and Camacho were both indicted for capital murder. Rubio was first convicted and sentenced to death in 2003, but the Texas Court of Criminal Appeals ("TCCA") ordered a retrial because Camacho's out-of-court statements were unconstitutionally introduced against Rubio. *Rubio v. State*, 241 S.W.3d 1 (Tex. Crim. App. 2007).

In July 2010, Rubio was again tried for capital murder. Rubio alleged that he was not competent to stand trial, ROA.6260–62, and he also pleaded not guilty by reason of insanity ("NGRI"), ROA.20650. The jury found Rubio competent to stand trial. ROA.16002.

A major focus of the trial's guilt phase was whether Rubio was insane at the time of the offense. The defense presented Dr. William Valverde, a board-certified psychiatrist. ROA.22365. While examining Rubio for competency ahead of his 2003 trial, Dr. Valverde concluded that Rubio "had symptoms consistent with paranoid schizophrenia," ROA.22383, and that Rubio was insane at the time of the offense. ROA.22355.

The other defense expert presented at the guilt phase of the trial was Dr. Raphael Morris, a forensic psychiatrist. ROA.22454. Dr. Morris testified that Rubio had paranoid schizophrenia and substance abuse dependence. ROA.22481–82. As to

the insanity defense, Dr. Morris testified that Rubio had a "severe mental disease or defect" and that "at the exact moment that he [committed the offense] he did not know it was wrong." ROA.22491–92.

One of the State's insanity witnesses, and the only mental health expert it presented at the guilt or sentencing phase of the trial, was forensic psychiatrist Dr. Michael Welner. ROA.23129. His testimony loomed over both phases, and he dramatically emphasized that Rubio did not have schizophrenia. ROA.23255. Dr. Welner explained that "any history . . . of [Rubio] experiencing peculiar phenomena [has been] pinpointed . . . to times that he was intoxicated." ROA.23256. Crucially, Dr. Welner told the jury that, *even though Rubio was not taking anti-psychotic medication in the time since the offense*, Rubio had not experienced the decline typically associated with the first (prodromal) stage of schizophrenia. ROA.23257–59. ("But we are talking seven years, and the great majority of the time he has not been on anti-psychotic medications. . . . [A]n unmedicated chronic schizophrenic would not be able to maintain that intact presentation for a sustained period of time.").

On July 26, 2010, the jury convicted Rubio on four counts of capital murder. ROA.35338. The jury answered the three Texas special capital sentencing issues in a way that required the court to impose a death sentence. ROA.36091–92, 36096. The TCCA later affirmed the conviction and sentence. *Rubio v. State*, No. AP-76,383, 2012 WL 4833809 (Tex. Crim. App. Oct. 10, 2012).

C. State post-conviction proceedings.

Rubio's initial state post-conviction application was filed on October 11, 2013. Among other claims, that application asserted that trial counsel was constitutionally ineffective for failing to investigate fetal alcohol spectrum disorder (FASD). ROA.43502–30.

At a hearing on that application, trial counsel Ed Stapleton and Nat Perez both stated that they provided ineffective trial assistance. ROA.41512. Stapleton testified that he was ineffective under oath, and Perez yelled, from the jury box: "We provided ineffective assistance of counsel." *Id.* Stapleton had been in charge of the mental health evidence, and he explained that Rubio's death penalty trial was actually his first. ROA.41513. Stapleton also explained that he had failed to adequately handle mental health components of Rubio's case. ROA.41494–95, 41503. Notably, Stapleton testified that he abandoned an FASD investigation based on the mistaken belief that FASD required facial dysmorphia, which (he believed) Rubio did not have. ROA.3539–40.

In an exchange with Stapleton, who was on the witness stand, the state post-conviction judge, who was also the trial judge, agreed with the proposition that the case was close. Specifically, the trial judge agreed that, had life-without-parole been the sentencing alternative, Rubio would not have received the death penalty. ROA.41516.

The state post-conviction judge nonetheless adopted findings recommending that all relief be denied. ROA.44835–48. As for the IATC-FASD claim, the state court

determined that counsel's abandonment of an FASD investigation was reasonable given the finding that Rubio lacked facial dysmorphia. ROA.44839–41. The TCCA thereafter denied all relief. *Ex parte Rubio*, No. WR-65,784-02, 2018 WL 2329302, at *1 (Tex. Crim. App. May 23, 2018). It denied the IATC-FASD claim on the merits. *Id.* at *3.

D. Federal Habeas Proceedings

1. Before the District Court.

Rubio timely filed a federal habeas petition on September 4, 2019, raising ten claims—most of which are not relevant to this Certiorari Petition. ROA.54–165. With approval from the district court, he filed an amended habeas petition on February 18, 2020. ROA.279–454. After exercising leave to exhaust claims in state court, ROA.1755–58, Rubio filed a subsequent state application with the TCCA on July 23, 2021. ROA.1759. The TCCA dismissed the claims in that subsequent application "without considering the claims' merits." *Ex parte Rubio*, 2022 WL 221485, *3 (Tex. Crim. App. Jan. 26, 2022). Rubio then filed his second amended federal habeas petition ("Second Amended Petition"), ROA.1813-992, which contains the claims at issue here.

The Napue Claim. Among the claims litigated to judgement before the district court was a false testimony claim under *Napue v. Illinois*, 360 U.S. 264 (1959). *See* ROA.1957–67. The *Napue* claim alleged that the Dr. Welner falsely testified that Rubio did not take anti-psychotic medications or exhibit psychotic symptoms before his trial—and that the prosecution knew the testimony to be false. *See* ROA.1957–

65. The upshot of the *Napue* allegations was that Dr. Welner left the jury with the false impression that Rubio was psychiatrically stable before trial, that such psychiatric stability had nothing to do with medication, and that his history of psychiatric problems was therefore feigned. *See* ROA.1957–63. The Second Amended Petition alleged that the false testimony had a material effect on both the guilt-(insanity) and punishment-phase determinations. *See* ROA.1965–67.

The district court denied the *Napue* claim. It resolved the question of whether Dr. Welner's testimony was false by reference to whether there was sufficient evidence to permit a jury finding. *See* App. B. 77–78 (finding that Dr. Welner's testimony was not false because there was "controverting evidence"). It determined that the guilt-phase allegations would not "have led every reasonable juror to conclude that Rubio was insane."[3] App. B. 78. With respect to punishment-phase allegations, it held that Rubio did not satisfy the miscarriage-of-justice exception to procedural default. App. B. 78.

The IATC-FASD Claim. The Second Amended Petition also included the IATC-FASD claim the state court had adjudicated on the merits. ROA.1882–915. With respect to the merits, the Second Amended Petition explained that fetal alcohol syndrome (FAS) is only one of several conditions under the umbrella of fetal alcohol

[3] The selection of language makes it difficult to know whether the district court was making a materiality finding or making a finding as to whether a procedural default was excused under the miscarriage-of-justice exception. The every-reasonable-juror standard is simply not the standard for *Napue* materiality, which uses a "reasonable likelihood" test equivalent to the standard for harmless error under *Chapman v. California*, 386 U.S. 18, 24 (1967). *See Glossip v. Oklahoma*, 604 U.S. 226, 246 (2025). The every-reasonable-juror standard is the standard for satisfying the miscarriage-of-justice gateway through the procedural default bar. *See House v. Bell*, 547 U.S. 518, 538 (2006).

spectrum disorder (FASD). ROA.1887. Although all conditions under the umbrella have the same mitigating effects, each condition has its own diagnostic criteria. ROA.1887.

The pleadings explained how trial counsel, operating without the appropriate expert assistance, believed that FASD required facial dysmorphia even though a dysmorphic face is necessary only for an FAS diagnosis. They detailed how trial counsel, unreasonably conflating FAS and FASD, prejudicially terminated an investigation into the effects of prenatal alcohol exposure. Rubio argued that the inadequate FASD investigation prejudiced *both phases* of his capital trial, and the Second Amended Petition included extensive punishment-phase allegations. ROA.1890–99. It also emphasized the trial judge's statement, on the record, that the punishment-phase determination sat on a razor's edge. ROA.1898 (quoting ROA.43418).

Rubio also argued that relief on the IATC-FASD claim was unrestricted by the relitigation bar, 28 U.S.C. § 2254(d), because the state court made the same error as trial counsel: it unreasonably confused FAS with FASD. ROA.1904–15. Specifically, the state court insisted that FASD required facial dysmorphia even though dysmorphic faces are associated only with FAS. The Second Amended Petition explained that that the state court's FASD findings disabled § 2254(d) because they unreasonably applied Supreme Court law under § 2254(d)(1) and were based on unreasonable determinations of fact under § 2254(d)(2). ROA.1904–15. Finally, he argued that § 2254(d) did not restrict relief because he was denied a meaningful

opportunity to be heard in state post-conviction proceedings. ROA.1900–04. In the Second Amended Petition (and supportive reply), Rubio's arguments under § 2254(d)(1) and § 2254(d)(2) were distinct from each other, and from arguments regarding the unconstitutionality of the state post-conviction process. ROA.1900–15.

Even though Rubio had asserted that he avoided the relitigation bar under 28 U.S.C. § 2254(d)(1) *and § 2254(d)(2)*, the district court simply failed to reach the factual unreasonability exception:

> Ultimately, Rubio has not established that the TCCA, when concluding that Rubio's counsel did not provide ineffective assistance of counsel with respect to a possible FASD defense, reached a conclusion that conflicts with applicable Supreme Court precedents. At the very least, Rubio fails to show that fairminded jurists could disagree on that point. As a result, he falls short of meeting his burden under AEDPA and is entitled to no relief on this claim.

App. B. 38; *see also* App. B. 26 (quoting § 2254(d)(1)); App. A. 11–12 (acknowledging that district court failed to reach § 2254(d)(2)). It ultimately denied relief on the claim because, having analyzed only the § 2254(d)(1) exception, it held that the state merits adjudication was legally reasonable. App. B. 38.

* *

On April 5, 2024, the district court entered the order denying Rubio's federal habeas petition and refusing a COA. App. B. 01–97. The district court also denied discovery. ROA.2497. Rubio timely filed a Motion to Alter or Amend Judgment under Rule 59(e), ROA.2596, which the district court also denied. ROA.2630.

2. Before the Fifth Circuit.

The Napue Claim. Rubio sought a COA on among other things, the IATC-FASD and *Napue* claims. On the *Napue* claim, the Fifth Circuit denied COA on the ground that the underlying merits were insubstantial.[4] The Fifth Circuit held that Dr. Welner truthfully testified that Rubio wasn't taking anti-psychotic medication before his trial because there were times when Rubio "refus[ed] to take prescribed medication" and because he "feigned symptoms of mental illness." App. A. 17. On the *Napue* materiality prong, which requires a "reasonable likelihood" that the false testimony affected the verdict, the Fifth Circuit simply recited that "the district court found that the statements were not material[.]" App. A. 17. The only explanation supporting affirmance of the district court decision appeared in a footnote, where the Fifth Circuit analyzed only prejudice to the *guilt* phase verdict, ignoring entirely the prejudice inquiry as to sentencing. *See* App. A. 17 (reasoning that Dr. Welner's testimony was immaterial because lay witnesses testified that Rubio was *not insane*).

The IATC-FASD Claim. On the IATC-FASD claim, the Fifth Circuit held that 28 U.S.C. § 2254(d) barred relitigation of the claim. App. A. 07–11. Because it held that § 2254(d) barred relitigation, it did not reach the underlying merits, and it did not consider supportive evidence offered for the first time in federal court. App. A. 10. As to the underlying problem with the prior adjudication—that both trial counsel and the state courts erroneously thought facial dysmorphia was necessary for FASD—the

[4] The Fifth Circuit did not reach the question of procedural default. *See* App. A. 16 ("Once again, because he fails to make a substantial claim, we do not reach the procedural default issue.").

Fifth Circuit stated: "[W]hile they may have been misled by over-emphasis on the importance of facial dysmorphia, they considered the defense to the extent they could." App. A. 10. The Fifth Circuit narration of critical state-court findings was without citation, and the Court appeared to say that trial counsel based its decision to discontinue investigation on FASD findings, rather than FAS findings. *See*, *e.g.*, App. A. 9 ("Second, trial counsel thoroughly investigated Rubio's behavior, and relied on medical experts' findings that it was inspired by something other than *FASD*.") (emphasis added).

The Fifth Circuit addressed the district court's failure to reach § 2254(d)(2) in a footnote. The Fifth Circuit held that it was not error for the district court to ignore the (fully pleaded and briefed) § 2254(d)(2) issue: "While the district court ultimately stated its conclusion under § 2254(d)(1), there is no indication that it erred in failing to proclaim the same determination under § 2254(d)(2)." The Fifth Circuit's footnote then went on to conduct the § 2254(d)(2) inquiry for the first time, mis-stating the record in several critical respects.[5]

The Fifth Circuit decided the case on May 21, 2025. Rubio did not seek rehearing. On July 28, 2025, Justice Alito granted a motion to extend by thirty days the period for filing this Petition, until September 18, 2025.

[5] Most importantly, the footnote states that trial counsel "investigated FASD until he 'got Dr. Owens's report on Fetal Alcohol Syndrome or lack of Fetal Alcohol Syndrome.'" App. A. 12 n.7. The reference to "FASD" is outside the quotation marks because trial counsel never said that he investigated FASD; he indicated that he had investigated FAS, which is why the content inside the quotation marks twice references FAS, and not FASD. The fact that FAS requires a dysmorphic face and FASD does not is the core mistake asserted as the basis for the § 2254(d)(2) exception.

REASONS FOR GRANTING CERTIORARI

This Court should grant certiorari and, if possible, reverse summarily. *See* SUP. CT. R. 16.1 ("The order may be a summary disposition on the merits."). The Fifth Circuit committed straightforward legal errors in refusing a certificate of appealability (COA). Its opinion thereby continues a trend in which the Fifth Circuit violates the standards for appellate certification, even in capital cases. Here, the Fifth Circuit misapplied *Napue* when it (1) treated a question about whether testimony was false as a question of factual sufficiency and (2) failed to even reach the question of harm to the sentencing verdict. And it misapplied 28 U.S.C. § 2254(d) to the IATC claim when it held that, because the district court analyzed § 2254(d)(1), it properly omitted § 2254(d)(2) inquiry.

I. IN ADJUDICATING A COA APPLICATION, THE CIRCUIT COURT ASSESSES ONLY WHETHER THE DISTRICT COURT'S RULING WAS DEBATABLE.

Upon seeking a COA, applicants need only make "a substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Applicants satisfy this requirement by showing that jurists of reason could find the district court's determinations debatable or that the issues presented are adequate to deserve encouragement to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000). Circuit courts are required to limit review to a threshold inquiry. *Id.* at 482. "This threshold inquiry does not require full consideration of the factual or legal bases

adduced in support of the claims. In fact, the statute forbids it." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).[6]

The decision of whether to grant a COA depends *only* on the federal district court's resolution of a claim. *Slack*, 529 U.S. at 483–84. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims[.]'" *Buck*, 540 U.S. at 115 (quoting *Miller-El*, 537 U.S. at 327). Where the issue is "the underlying constitutional claim," the critical question is its "debatability." *Miller-El*, 537 U.S. at 342 (2003). Where the contested ground for denying relief is procedural—such as the relitigation bar from 28 U.S.C. § 2254(d)—applicants must also show the debatability of the procedural ruling. *See Slack v. McDaniel*, 529 U.S. at 485. A district court holding "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." *Miller-El*, 537 U.S. at 338.

[6] The Fifth Circuit has repeatedly misapplied the COA standard set forth by this Court. *See*, *e.g.*, *Buck v. Davis,* 580 U.S. 100, 114–16 (2017) (finding fault with the Fifth Circuit for denying a COA after conducting a merits analysis); *Tennard v. Dretke*, 542 U.S. 274, 284–285 (2004) (criticizing the Fifth Circuit for "paying lipservice to the principles guiding issuance of a COA" and noting that the standard the Fifth Circuit used "has no foundation in the decisions of this Court" and was "inconsistent" with the Supreme Court precedent); *Miller-El*, 537 U.S. 322, 324–25 (2003) (explaining that the Fifth Circuit used a "too demanding" standard when denying a petitioner's COA application for lacking merit). Instead of conducting a threshold inquiry, the Fifth Circuit has continuously run afoul this Court's precedent and conducted merits analysis where it should not have. *Buck*, 580 U.S. at 114–116. This Court has found the same when the Fifth Circuit used the correct COA terminology in its conclusions to shield its COA denial for meritorious reasons. *Id.* at 115–16 (explaining that "[t]he court below phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits.").

II. WITH RESPECT TO THE *NAPUE* CLAIM, THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE ORDER DENYING COA BECAUSE OF BLACK-LETTER LEGAL ERRORS ON MULTIPLE ELEMENTS.

This Court should grant certiorari and instruct the Fifth Circuit to certify the appeal of the *Napue* claim. In *Glossip v. Oklahoma*, 604 U.S. 226 (2025), this Court recently affirmed the basic prongs of a *Napue* analysis: (1) the presence of false testimony; (2) the prosecution's knowing elicitation of or failure to correct it; and (3) a "reasonable likelihood" of an effect on the verdict. *Id.* at 246. On falsity and knowledge thereof, the Fifth Circuit failed to test for falsity the testimonial propositions that Rubio was unmedicated and showed no psychotic symptoms—instead testing whether a jury could reasonably reject an insanity defense. *See* Section I.A, *infra.* On materiality, the Fifth Circuit *did not even reach* the punishment-phase question.[7] *See* Section I.B, *infra.* The Fifth Circuit effectively left the claim, in the form it was pleaded, un-adjudicated. The proper course is for this Court to vacate the adverse decision and remand for review of the appropriate claim content.

A. The Fifth Circuit's Holding on Knowledge of Falsity Contravenes *Glossip*.

As pleaded and litigated below, the *Napue* claim alleged two pieces of false testimony. First, Dr. Welner testified that Rubio was unmedicated before his second trial. COA App. at 59–60 (reciting testimony at ROA.23257–60). Second, Dr. Welner testified that Rubio did not exhibit psychotic symptoms before his second trial. COA

[7] The Fifth Circuit did not reach the question of procedural default: "[B]ecause he fails to make a substantial claim, we do not reach the procedural default issue." App. A. 16.

App. at 59–60 (reciting testimony at ROA.23257–60). The most plainly offending testimony is here:

> *He has not been on medication.* There is a brief period in which he was on anti-psychotic medications which Doctor Valverde prescribed. But we are talking seven years, and the great majority of the time he has not been on anti-psychotic medications .... And for schizophrenia, chronic schizophrenia, an unmedicated chronic schizophrenic would not be able to maintain that intact presentation for such a sustained period of time .... In other words, if they are brittle, that's a setting in which *they crumble unless they are medicated. He has been unmedicated in these settings and he hasn't crumbled.*

ROA.23257–60 (emphasis added). The clear implication of the testimony was that Rubio was fine, and that earlier psychosis was feigned.

Both planks of this sanitizing testimony were false—as Rubio's extensive pre-trial prison records document—and the State knew that when the testimony was offered. *See* ROA. 1958–61 (detailing false testimony regarding lack of medication through comparison to over one hundred entries in prison records); ROA.1961–63 (same regarding absence of presentation). Per *Glossip*, the State is charged with knowledge of records in its possession. *See* 604 U.S. at 247 (attributing knowledge of psychiatric records content to state for purpose of *Napue* analysis). The Director has never contested that prosecutors had the records that Dr. Welner falsely characterized. Dr. Welner expressly stated that he reviewed all records provided by the State, which include the records at issue here. ROA.23176–77. The Fifth Circuit avoided the knowledge-of-falsity finding only through severe mischaracterization of the underlying testimony, recounted below.

1. The State knew Dr. Welner falsely testified that Rubio had "not been on medication" before his second trial.

Start with Rubio having "not been on medication" before his second trial, ROA.23257–60, which is testimony that the State knew to be false when given. Rubio was heavily dosed with anti-psychotic medications during the seven years before his 2010 trial. He went on medication about a month after the crime, and he remained medicated while he awaited his first trial. As early as April 2003, Rubio was prescribed anti-psychotic medication and other antidepressants. ROA.808; *see also* ROA.212 (Rubio reporting that Dr. Valverde prescribed him Prozac). Rubio continued receiving antipsychotic medications in 2004, when he was sent from Polunsky Unit to TDCJ's inpatient psychiatric facility, referred to as "Jester-IV." ROA.219.

Rubio continued to take anti-psychotic medications throughout 2006 and 2007, upon his return to Polunsky. TDCJ records from 2006 highlight not only that Rubio was prescribed chlorpromazine (Thorazine) and bupropion (Wellbutrin), but also that he took most of his medicine. ROA.243, 252; *see also* ROA.687 (listing Rubio's "strong med. compliance" as one of his strengths). After Rubio's first conviction was reversed, he continued to take anti-psychotic medication. Jail records indicate that, leading up to his 2010 trial, Rubio was again taking Wellbutrin and Vistaril. *See* ROA.663; *see also* ROA.243, 252 (showing Rubio taking both anti-depressant and anti-psychotic medication while incarcerated). Rubio's records reflect that the jail discontinued these medications on the same day that Dr. Welner met with Rubio. ROA.663.

The Fifth Circuit's analysis of the issue is worth reciting in full, as it stacks one odd observation on top of another:

> Indeed, Dr. Welner testified about several reasonable explanations for Rubio's reported hallucinations other than insanity, and described how some of his behaviors were inconsistent with insanity. To the extent that Rubio challenges that conclusion, he does not provide any evidence that shows that it was improper. Instead, much of the evidence is self-serving or inconclusive. One record to which he points us notes "[patient]reports medication compliance." Another notes that "[h]e stated that he has been on meds for 'years.'" Yet another merely notes the various medications that he was prescribed, none of which appear to actively treat schizophrenia or psychosis.

App. A. 17. This passage contains no citations, so the ability to analyze it is severely limited. But it is nonetheless inaccurate in many respects.

First and foremost, the issue of false testimony goes to a specific factual proposition—whether Rubio "had not been on medication" for the whole "seven years" before his second trial. ROA.23257–60. The Fifth Circuit instead framed its inquiry around the question whether Rubio ever "failed to take his anti-psychotic medication," and whether there was evidence capable of supporting a guilt-phase jury finding on an affirmative defense (insanity). App. A. 16–17. But the *Napue* issue is about whether Dr. Welner falsely stated that Rubio was entirely unmedicated—not whether Rubio ever failed to take medication, and not whether there was sufficient evidence to reject an insanity defense.

Second, the Fifth Circuit's uncited analysis of medication compliance is confused, having little to do with the truth of the proposition at issue. The Fifth Circuit states that "much of the evidence is self-serving or inconclusive," App. A. 17, and quotes two instances where a medication compliance notation included some patient reporting. It largely ignores voluminous evidence about compliance that wasn't self-reported, and it never explains what is "self-serving" about Rubio having

told his doctors that he was taking his medicine. *Cf.* ROA.212, 219, 243,252, 663, 687, 808 (records regarding anti-psychotic regimen and compliance); *see also id.* at 687 (listing Rubio's "strong med. compliance" as a strength). And the Fifth Circuit conceded, as it must, that, "in fifty-four out of sixty relevant instances," a 2006 record reports "strong meds. compliance." App. A. 17. The Fifth Circuit simply re-framed a *Napue* claim challenging testimony that Rubio never took medication as an inquiry into whether Rubio exhibited perfect medication compliance.

Third, what the Fifth Circuit meant when it held that no medications "appear" to "actively" treat "schizophrenia or psychosis" is unclear. App. A. 17. The Fifth Circuit might have been attempting to distinguish schizophrenia from other mental health problems. Rubio had been treated with a mix of anti-depressants and anti-psychotics—at least Prozac, Thorazine (chlorpromazine), Wellbutrin (bupropion), and Vistaril. *See* ROA.212, 243, 252, 663. His depression and psychosis were *both* relevant to major guilt- and punishment-phase issues in his case, so the fact that some of these drugs might be used to treat non-psychotic symptoms doesn't diminish the claim. Most importantly, Rubio was taking chlorpromazine, which is (without reasonable dispute) an anti-psychotic medication. *See* ROA.243, 254; *see also* ROA.687 (noting compliance).

2. The State knew Dr. Welner falsely testified that Rubio had exhibited no symptoms of psychosis before his second trial.

With respect to the allegation that Dr. Welner falsely testified that Rubio exhibited no psychotic symptoms—that he "maintained" an "intact presentation"—the Fifth Circuit said virtually nothing. ROA.23257–60; *See* App. A. 17–18. It noted

that there were "several reasonable explanations" for hallucinations "other than insanity," and that "some of his behaviors were inconsistent with insanity." App. A. 17. As with the Opinion's other parts, Rubio is unsure what the Court was referencing or describing, because there is no record citation.

Even if whatever record content the Fifth Circuit had in mind supported the Opinion's *Napue* content, that content would still contravene *Glossip* and be insufficient to deny relief. That's because the *Napue* issue is not whether the jury was permitted to reject the insanity defense, whether there was some behavior inconsistent with insanity, or even whether Rubio was in fact insane. The issue is whether Dr. Welner falsely testified when he stated that Rubio "maintain[ed] intact presentation" throughout the period between his first and second trials. ROA.23257–60.

And there can be no refuting that Rubio's presentation was not "intact" throughout that period. The TDCJ Health Records include over 100 entries documenting symptoms of severe mental illness. For example, even though he had been "on meds for 'years,'" and even though he was in ongoing compliance with his doctor's instructions, Rubio continued to experience numerous visual and auditory hallucinations. ROA.211, 243. The prescribed medications alleviated his hallucinations but did not eliminate them. *See* ROA.665, 667, 736.

* *

In short, Dr. Welner testified falsely when he told the jury that Rubio had "not been on medication" and that he "maintain[ed] intact presentation" throughout the

periods between the first and second trials. That testimony flatly contradicts the predicating medical records, and it contravenes *Glossip*. Under *Glossip*, the State is charged with knowledge of records that it possesses and the test for falsity is not whether there is evidence capable of supporting the testimony; the test is whether the preponderance of evidence shows that the testimony was false.[8]

B. The Fifth Circuit Did Not Reach the Materiality Prong As To Punishment.

The Fifth Circuit's above-the-line holding on materiality was not a holding; it was simply the observation that "the district court found that the statements were not material and that Rubio failed to show that the State knew it elicited false testimony." App. A. 17–18. The Fifth Circuit mentioned in a footnote the reasonable-likelihood standard for *Napue* prejudice, *see* App. A. 18 n.13, but it did not acknowledge that the reasonable likelihood standard required that the State prove harmlessness beyond a reasonable doubt. *See Glossip*, 604 U.S. at 246 ("In effect, this materiality standard requires the beneficiary of the constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.") (internal alterations and quotation marks omitted).

[8] *See* 604 U.S. at 227 (charging state with knowledge of record content); *Parke v. Raley*, 506 U.S. 20, 34, (1992) (citing "preponderance of the evidence standard applicable to constitutional claims raised on federal habeas"); *United States v. Atkins*, 834 F.2d 426, 435 (5th Cir. 1987) ("As is usually the case in habeas proceedings, therefore, a petitioner … has the burden of proving by a preponderance of the evidence that his constitutional rights have been violated."); RANDY HERTZ & JAMES LIEBMAN, 2 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 30.2 (2025) ("when not otherwise provided by statute, the burden of proof is the usual civil 'preponderance of the evidence' standard, allocated to the moving party").

In that footnote, the Fifth Circuit explained that it believed that any false testimony was immaterial: "This statement merely provided the jury one of several reasons that Dr. Welner did not believe Rubio suffered from psychosis. Nor was Dr. Welner a 'star witness' for the prosecution, as was the case in *Glossip*, because other sources introduced substantial evidence of Rubio's sanity." App. A. 18 n.13.[9] The Fifth Circuit discussed materiality exclusively in guilt-phase terms, failing to reach entirely the question of whether Dr. Welner's testimony prejudiced the punishment-phase determination.[10] And it made this error notwithstanding the explicit appellate presentation of the punishment-phase issue.

The Fifth Circuit egregiously misapplied *Napue* and *Glossip* when it refused a materiality finding on the ground that Dr. Welner wasn't a "star witness." App. A. 18 n.13. As a legal matter, *Glossip* does not impose a "star witness" requirement, as false testimony can be material under *Napue* in many other scenarios. More to the point, however, is that Dr. Welner *was* the star witness. It is true that he testified at the guilt phase, but his was the expert testimony upon which the State relied to dispute mitigation at punishment.[11] And Dr. Welner's false testimony devastated the mitigating effect of Rubio's mental health evidence. It also predicated the State's

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[9] Again, the absence of citation makes the holding difficult to evaluate. For example, the referent of "this statement" is not clear.

[10] The very first sentence under the argumentative heading, "Reasonable jurists could debate whether Dr. Weiner's false testimony was material," COA App. at 63, emphasized punishment: "The prosecution relied heavily on Dr. Weiner's false testimony to secure Rubio's conviction *and sentence*." *Id.* (emphasis added). And then on the next page, Rubio again underscored that "Dr. Welner's testimony directly affected both the jury's guilt-phase [insanity] finding *and its sentencing-phase mitigation finding*." *Id.* at 64 (emphasis added).

[11] There were other experts that testified as to the question of competency, to a different jury, before the trial began.

suggestion that all other observational data about Rubio's impairments were unreliable, because Rubio was an effective faker. The damage was extraordinary, considering that the trial judge believed that the case was sufficiently close that the jury might have returned a life verdict had life-without-parole been an available sentence. ROA.43418.

III. WITH RESPECT TO THE IATC-FASD CLAIM, THIS COURT SHOULD GRANT CERTIORARI AND SUMMARILY REVERSE THE ORDER DENYING COA BECAUSE 28 U.S.C. §§ 2254(d)(1) & (d)(2) ARE DISTINCT EXCEPTIONS TO THE RELITIGATION BAR.

This Court should also grant certiorari and summarily reverse on the IATC-FASD claim because the Fifth Circuit made a straightforward error in its interpretation of § 2254(d). With respect to the IATC-FASD claim, the Second Amended Petition alleged that Rubio satisfied both § 2254(d)(1) and § 2254(d)(2) exceptions to the § 2254(d) relitigation bar. Those exceptions to § 2254(d) are stated in the disjunctive, meaning that Rubio disables the relitigation bar if he meets either one. The district court nevertheless failed to decide the argument for *factual* unreasonability under § 2254(d)(2), discussing only the argument for *legal* unreasonability under § 2254(d)(1). The Fifth Circuit still refused a COA, explicitly holding that the district court had not erred in skipping § 2254(d)(2). It then decided, for the first time and without certifying the appeal, that Rubio did not satisfy § 2254(d)(2). The Fifth Circuit should have certified the IATC-FASD claim for appeal because the district court's § 2254(d) disposition was not just debatable; it was wrong.

1. The Fifth Circuit erred by conflating the separate arguments made under § 2254(d)(1) and (d)(2).

When a habeas claim has been adjudicated on the merits in state court (as this one has), the federal court may not grant relief on that claim unless the petitioner can meet the requirements of *either* § 2254(d)(1) *or* § 2254(d)(2). The relitigation bar is disabled under § 2254(d)(1) when the state merits decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The relitigation bar is disabled under § 2254(d)(2) if the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

In the Second Amended Petition, Rubio argued that the state court adjudication of the IATC-FASD claim met both (d)(1) and (d)(2), for separate reasons. *See* ROA.1900–15. With regard to (d)(1), Rubio argued that the state-court decision unreasonably applied *Strickland v. Washington*, 466 U.S. 668 (1984), by, among other things, excusing trial counsel of the duty to investigate red flags and applying an overly burdensome prejudice standard. ROA.1904–11. With regard to (d)(2), Rubio argued that the state court decision confused FAS with FASD (reproducing trial counsel's error) and further misapprehended whether the competency experts at trial were asked to assess FASD. ROA.1911–15.

Although Rubio extensively argued under § 2254(d)(2) in his federal habeas petition, the district court at no point reached § 2254(d)(2), even indirectly. ROA.1911–15, App. B. 34–38. The district court included no language that tracks the

statutory provision and no conclusions engaging with specific arguments Rubio made under § 2254(d)(2). The Fifth Circuit attempted to excuse this omission: "While the district court ultimately stated its conclusion under § 2254(d)(1), there is no indication that it erred in failing to proclaim the same determination under § 2254(d)(2)." App. A. 11–12 n.7. Despite the Fifth Circuit's assertion that the district court did not err in its omission because it conducted a § 2254(d)(1) analysis, §§ 2254(d)(1) and (d)(2) are two distinct standards that require individual analysis to satisfy their inquiries. *See Rice v. Collins*, 546 U.S. 333, 342 (2006) ("The question whether a state court errs in determining the facts is a different question from whether it errs in applying the law.").

Many of Rubio's § 2254(d)(2) arguments were different from arguments he made under § 2254(d)(1). For example, Rubio's § 2254(d)(2) argument that the state court made an unreasonable factual determination that facial dysmorphia was a common feature in FAS or FASD differed from his § 2254(d)(1) argument that the TCCA's prejudice standard was contrary to clearly established Supreme Court precedent. ROA.1904–15. And he disputed granular state-court fact findings that mischaracterized the techniques and conclusions of several experts. ROA.1912–15.

Given that the statute is written in the disjunctive, the district court needed to conduct separate analyses of subsections § 2254(d)(1) and § 2254(d)(2). However, the district court conducted only a § 2254(d)(1) analysis, stating that "[u]ltimately, Rubio has not established that the TCCA, when concluding that Rubio's counsel did not provide ineffective assistance of counsel with respect to a possible FASD defense,

reached a conclusion that conflicts with applicable Supreme Court precedents." App. B. 38. The district court did not purport and did not in fact reach the § 2254(d)(2) question; and the Fifth Circuit didn't try to suggest that it had. Instead, the Fifth Circuit held, incorrectly, that district court committed no error when it "fail[ed]to proclaim [a] determination under § 2254(d)(2)." App. A. 11–12 n.7.

The Fifth Circuit then decided § 2254(d)(2) against Rubio for the first time, but without certifying the appeal. App. A. 11–12 n.7. Specifically, it held that "Rubio makes no showing that the state court, in light of all of the evidence in its proceedings, made an unreasonable determination of facts." App. A. 11-12 n.7. In reaching the § 2254(d)(2) issue without certifying the appeal, the Fifth Circuit flouted this Court's repeated insistence that COA's must issue if a *threshold* inquiry shows the district court's decision to have been debatable or if the issue deserved encouragement to proceed further. *See Slack*, 529 U.S. 473, 483–84.

2. Reasonable jurists could debate whether § 2254(d) is disabled because Rubio satisfies § 2254(d)(2).

Rubio would ultimately satisfy § 2254(d)(2). From the start, the TCCA made the same error as trial counsel: it unreasonably confused FAS with FASD.[12] (FAS

[12] FASD is an umbrella category that includes FAS, Partial FAS ("pFAS"), and Alcohol Related Neurodevelopmental Disorder ("ARND"). FASDs are therefore a family of diagnoses marked by "the presence of significant damage caused by prenatal consumption of alcohol." ROA.494 (Report of Paul D. Connor, Ph.D., psychological evaluation). Determining whether an individual suffers from a condition under the FASD umbrella involves physical examination by a medical doctor. *See* ROA.493–505 (Connor Report); ROA.515–17 (Report of Kenneth Lyons Jones, M.D., neurological evaluation); ROA.565–643 (Declaration of Natalie Novick Brown, Ph.D.). The DSM-5 2 uses the term Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure ("ND-PAE") to refer to FASDs, and Rubio has used the two terms interchangeably in this litigation. ROA.495. The most important feature of FASD, for these purposes: the FASD diagnosis does not entail the facial dysmorphia that some

requires facial dysmorphia; FASD does not.) Specifically, the TCCA unreasonably determined that trial counsel reasonably discontinued their FASD investigation in part because their competency expert, Dr. Rafael Morris, had noted an FASD risk without actually diagnosing Rubio with FAS. ROA.44839–40. The TCCA also unreasonably determined that trial counsel reasonably ceased investigation into all conditions under the FASD umbrella. ROA.44839–41. The court reasoned that, because a neurologist consulted by the defense team (Dr. Jim Owens) did not notice extreme facial dysmorphia associated with FAS while answering an unrelated referral question, trial counsel reasonably ceased investigation into all conditions under the FASD umbrella. ROA.44839–41.

The factual unreasonableness of the IATC-FASD disposition reflects a basic misunderstanding of the relationship between Fetal Alcohol Spectrum Disorder (FASD), a family of disorders, and Fetal Alcohol Syndrome (FAS), one member of that family. As mentioned above, that mistake was the same one that trial counsel made: the state court thought that FASD required facial dysmorphia. That mistake infected the state courts' findings as to both defense experts—doctors Jim Owens and Raphael

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laypeople mistakenly believe to be the disorder's primary marker. See ROA.495 ("ND-PAE ... does not rely on the facial features associated with FAS and PFAS in making the diagnosis."); ROA.609 ("FASD tends to be a hidden condition because most people in this population have ... no obvious physical abnormalities."). No matter the diagnosis within the umbrella—whether there is facial dysmorphia or not—the mitigating impairments are constant across all three FASDs. ROA.608. FAS is marked by "a specific criteria of facial features ... growth deficiency ... [and] evidence of [CNS] abnormalities." ROA.494. PFAS is marked by some but not all growth deficiencies and facial features of FAS, and ARND is marked by CNS abnormalities but often presents without physical features. *See* ROA.495. Whatever the facial features of the FASD, all three of them—including the two not associated with extreme facial irregularities—have the same effects on central nervous system physiology and impairment. "[R]egardless of diagnosis under the FASD umbrella, the brain damage is the same. That is, the brain damage in ARND tends to be just as severe as that in FAS." ROA.608.

Morris, to whom the district court cited as adequate reasons for the discontinued FASD investigation. *See* App. B. 35. The state-court findings, adopted in pertinent part by the TCCA, emphasize the experts' failure to diagnose FASD, even though such diagnosis was outside the scope of their referral questions. ROA.44839–40. Doctors Owens and Morris each received narrow referral questions that excluded FASD evaluation, and they lacked crucial diagnostic information that would have indicated FASD. Trial counsel's unreasonable failure to investigate FASD was upstream of the downstream diagnoses, and the effect of the inadequate investigation on each diagnosis is discussed below.

Start with Dr. Owens, retained in 2009 to consider whether Rubio had epilepsy. In evaluating Rubio, Dr. Owens visually observed no evidence of facial dysmorphia. ROA.44839. The state court findings, however, flatly confuse FAS with FASD, making the familiar mistake involving dysmorphic faces: "[Dr. Owens] informed [defense counsel] that he has found no facial dysmorphia, a classic feature of those who suffer from FAS *or FASD*." ROA.44840 (emphasis added). This finding is just wrong, and it triggers § 2254(d)(2). As explained repeatedly, two conditions within the FASD family do not require facial dysmorphia.

The Texas courts also overstated Dr. Owens' findings in other respects. First, Dr. Owens in fact took no position on any FASD, in part because defense counsel never informed him that Rubio's mother drank while she was pregnant. *See* ROA.39131–36 (diagnostic information omitting any reference to utero insult); ROA.39136 (underscoring that his diagnosis was constrained by information recited

in report). Nor did Dr. Owens' neurological testing rule out brain damage from prenatal alcohol exposure. Per Dr. Owens' own report: "There is some atrophy which appears out of proportion to the patient's age over the parietal convexity. . . . This finding is very non-specific and does not indicate any particular pathological process. Static regional atrophy may be seen in patients with a prolonged history of substance abuse or *other toxic exposures* . . . ." ROA.39134 (emphasis added). Another problem is that Dr. Morris spoke with Dr. Owens before Dr. Morris testified, and Dr. Morris testified that Dr. Owens *had not* ruled out organic brain disorder. ROA.14841. Finally, the cursory visual observation that led Dr. Owens to conclude that Rubio had no facial abnormalities was ultimately proven incorrect by a digital assessment of Rubio's face. ROA.44030 (Adler Aff.).

Now consider Dr. Morris, who was told only to evaluate whether Rubio had psychosis sufficient to establish an insanity defense. ROA.42116. Contrary to the TCCA's findings, Dr. Morris *never* said he excluded FAS and he certainly was not retained "with an eye towards exploring FASD," as the district court asserted without citation. App. B. 28. Dr. Morris merely noted that he had not *diagnosed* FAS, ROA.14834 ("I have not diagnosed Fetal Alcohol Syndrome"), and his inventory of diagnostic inputs make clear that trial counsel did not provide him with information necessary to make any FASD diagnosis. *See* ROA.42121–22. The district court correctly observed that Dr. Morris reviewed Dr. Owens' report, *see* App. B. 28, but quite overstated its effect on Dr. Morris's conclusions. Dr. Morris actually objected when the State tried to imply that Dr. Owens had excluded organic brain damage,

and Dr. Morris testified instead that Dr. Owens' MRI was insufficient for broad conclusions about organicity. *See* ROA.14841 ("The MRI did not give any evidence that would support a psychiatric diagnosis. It showed some atrophy, but not specific. [Dr. Owens] wasn't able to come up with any significant conclusions, although that's not uncommon."); ROA.14841 ("[Dr. Owens] didn't think it supported a mental health diagnosis, the MRI.").

The TCCA reinterpreted Dr. Morris's statement that he had not *diagnosed* FAS as a statement that he had *ruled out* "FAS or FASD." ROA.44840. Dr. Morris quite expressly *refused* to exclude FASD, testifying that he lacked sufficient information about Rubio's in utero alcohol insult:

> MORRIS: … And so I interviewed his mother, who I noted to have some mental health history, *although I haven't been able to see the full extent of it*. I know that she had a significant substance abuse history and couldn't stay sober.
>
> Q: Why is that significant … ?
>
> MORRIS: … [I]t contributed to his own problems with substances. It also goes to the possibility that there may have been some contribution of substances while she was pregnant with him, which can also -- there is a lot of theories of how people develop psychotic symptoms that would be relevant.
> …
> Q: What are -- what are the risks of alcohol or other drug abuse in utero?
>
> MORRIS: *Fetal alcohol syndrome* and low birth weight.

ROA.14726. (emphasis added). Moreover, even if Dr. Morris's testimony could be (mis)construed as ruling out FAS, it cannot be construed as ruling out all *FASDs*.

There were other unreasonable factual elements of the state court findings, too. The record, for example, does not reasonably support the state court findings that

counsel were aware of the red flags and that they "conducted an investigation to determine whether there was a causal link between [Rubio's mother's alcohol abuse and his observed impairments]," ROA.44838. Recall that defense counsel Stapleton testified under oath that the reason they abandoned an FASD investigation was because he thought FASDs required facial dysmorphia and Rubio had none. *See* ROA.3539–40.

If COA was granted, a proper § 2254(d)(2) analysis would demonstrate that the TCCA made an objectively unreasonable determination on the ineffective assistance of counsel claim in light of the FASD evidence presented.

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