NO. 18-70018

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHARLES D. RABY,
Petitioner-Appellant,

v.

LORIE DAVIS, DIRECTOR
TEXAS DEPARTMENT FOR CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONAL DIVISION,
Respondent-Appellee.

On Appeal from the United States District Court
For the Southern District of Texas
Houston Division

APPLICATION FOR CERTIFICATE OF APPEALABILITY

THIS IS A DEATH PENALTY CASE

Tracey M. Robertson
Member, Fifth Circuit Bar
Texas Bar No. 00792805
Kevin D. Mohr
Member, Fifth Circuit Bar
Texas Bar No. 24002623
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 751-3200
(713) 751-3290 – Fax

Sarah M. Frazier
Member, Fifth Circuit Bar
Texas Bar No. 24027320
BERG & ANDROPHY
3704 Travis Street
Houston, Texas 77002
(713) 529-5622
(713) 529-3785 - Fax

COUNSEL FOR PETITIONER
CHARLES D. RABY

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Petitioner-Appellant: Charles D. Raby

2. Respondent-Appellee: Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutional Division.

3. Counsel for Petitioner: Christie Cardon, Tracey M. Robertson, and Kevin D. Mohr, KING & SPALDING LLP, 1100 Louisiana Street, Suite 4000, Houston, TX 77002. Sarah M. Frazier, BERG & ANDROPHY, 3704 Travis Street, Houston, TX 77002.

4. Counsel for Respondent: Fredericka Sargent, Assistant Attorney General, Criminal Appeals Division, State of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711.

/s/ Sarah M. Frazier

STATEMENT REGARDING ORAL ARGUMENT

Petitioner-Appellant Charles D. Raby respectfully requests that this Court grant oral argument regarding this Application for COA. Oral argument will assist in clarifying why reasonable jurists could debate the issues presented in Petitioner-Appellant's petition for writ of habeas corpus.

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APPLICATION FOR COA

Petitioner Charles D. Raby, believing that he has made a substantial showing of the denial of a constitutional right in his Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) in the United States District Court for the Southern District of Texas (the "District Court") and that reasonable jurists would find the District Court's assessment of his claims debatable, asks this Court to grant him a Certificate of Appealability ("COA") pursuant to 28 U.S.C. § 2253(c).

JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider this Application pursuant to 28 U.S.C. § 2253(c). The United States District Court for the Southern District of Texas had jurisdiction to consider the Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) because the relief sought was from a judgment in denial of Petitioner's original federal petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, *et seq.*, which was filed in the same court.

Petitioner-Appellant Charles D. Raby seeks a COA pursuant to 28 U.S.C. § 2253(c) based on the District Court's denial of his Motion for Relief from Judgment pursuant to Fed. R. Civ. Pro. 60(b)(6) from the District Court's denial of Raby's original federal petition for writ of habeas

corpus. That denial was by Memorandum and Order issued by the District Court on April 6, 2018, which denied Raby's Motion for Relief from Judgment. Raby filed a Notice of Appeal on May 3, 2018. The District Court had preemptively denied a request for a COA on April 6, 2018 in tandem with its denial of Raby's Motion for Relief from Judgment, and this Application follows. Therefore, this court has jurisdiction to hear Mr. Raby's request for a COA. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988) and *Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

This Application presents the following issue:

- Whether reasonable jurists could debate that the District Court's finding that Mr. Raby's ineffective assistance of counsel claims, in tandem with new decisional authority under *Martinez v. Ryan*, 566 U.S. 1 (2012), *Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (recognizing the excuse of ineffective assistance of state habeas counsel for procedural default), and *Buck v. Davis*, 137 S.Ct. 759 (2017), constitute extraordinary circumstances warranting relief under Fed. R. Civ. Pro. 60(b)(6).

STATEMENT OF THE CASE

A. The Crime

Edna Franklin was found dead in the living room of her Houston home at 617 Westford on the night of Thursday, October 15, 1992. Medical evidence indicated a defensive struggle, multiple stab wounds, and a fatal slashes to the neck, among other injuries. She lived with her two grandsons, Eric Benge and Lee Rose, who had left that afternoon. Mr. Benge testified at trial that upon his return at about 10:00 p.m., he found the front and back doors ajar, despite decedent's habit to lock them.

A purse in Mrs. Franklin's back bedroom was emptied, with credit cards nearby, but no blood appeared on these items, nor around the back door, which officers concluded had been the point of exit because it was unlocked from the inside and left standing open. An attempt to collect fingerprints was unsuccessful. No DNA analysis was done. No weapon was ever found. Mr. Raby was arrested a few days later, was quickly charged, and faced trial two years later. Mr. Raby had been friendly with Mrs. Franklin's grandsons and had recently moved back to the neighborhood. The basis for the arrest was proximity, reputation, and a recent visit that ended when Mrs. Franklin asked him to leave. As described below,

subsequent DNA tests as well as illegally suppressed blood type results have cast doubt on the actual identity of Mrs. Franklin's killer.

B. Trial, Capital Sentencing, and State Appeal

On June 9, 1994 in the 248th District Court of Harris County, Texas the trial concluded, with Mr. Raby's conviction for capital murder for the homicide of Mrs. Franklin. Mr. Raby was sentenced to death by a jury on June 17, 1994. Replete with trial counsel's errors, the record concerning the punishment phase of trial shows lack of preparation, fundamental misunderstanding of the law and facts, and fundamental incompetence. On the issue of future dangerousness, Mr. Raby's trial counsel presented Dr. Walter Quijano, a psychologist whose views on future dangerousness had helped the State persuade jurors to impose the death penalty in numerous past trials. Quijano became involved in the case only a week before he testified. His opinions, as stated in his trial testimony and in a report he produced to counsel only after trial was over, were methodologically unreliable and inflammatory. Indeed, Quijano's methods have since been discredited by many, including, in 2000, then Texas Attorney General John Cornyn.[1] Quijano opined that only death could render society safe from Mr. Raby. He further improperly labeled Mr. Raby alternately and

[1] ROA.831-32.

synonymously as a psychopath, a sociopath, and an individual with an antisocial personality disorder. Trial counsel either knew beforehand that Quijano had formulated these opinions or proceeded with no real understanding of what Quijano might say about Mr. Raby under questioning. In the punishment phase of a capital murder trial, this situation is incomprehensible. The prosecution seized on the opportunity to elicit testimony from Quijano, exaggerating the risk that Mr. Raby would commit future acts of violence, and invited the jury to rely on Quijano's testimony to answer the future dangerousness special issue in the State's favor. It did.

This problem was exacerbated by trial counsel's equally incomprehensible failure to develop even the most basic mitigation evidence, sealing the outcome. The jury heard virtually none of the willing and available witnesses who saw firsthand the profound abuse and neglect that Mr. Raby suffered and that inarguably reduced his moral culpability. No discernible strategy can be gleaned from their failure to perform a medical, educational, family, and social history for a death penalty client.

Over the dissent of three judges, the Texas Court of Criminal Appeals affirmed Mr. Raby's conviction and sentence on March 4, 1998.[2] A motion

[2] ROA.835-853 (*Raby v. Texas*, 970 S.W.2d 1 (Tex. Crim. App. 1998)).

for rehearing was denied on April 22, 1998.[3] Direct appellate counsel did not challenge the effectiveness of Mr. Raby's trial counsel in the punishment phase. In that regard, the U.S. Supreme Court has recognized that, "[t]he structure and design of the Texas system in actual operation . . . make it 'virtually impossible' for an ineffective assistance [of trial counsel] claim to be presented on direct review."[4] The United States Supreme Court denied Raby's petition for certiorari on November 16, 1998.[5]

New counsel was appointed to represent Mr. Raby in his initial state habeas proceedings. On July 16, 1998, Mr. Raby's counsel filed an application for a writ of habeas corpus containing *no* extra-record claims. Although "Texas courts in effect have directed defendants to raise claims of ineffective assistance of trial counsel on collateral, rather than on direct, review,"[6] Mr. Raby's state habeas counsel did not prepare for or challenge any aspect of trial counsel's presentation of objectionable and inflammatory testimony from Quijano in the punishment phase, or trial counsel's failure to perform the most basic mitigation investigation.

On November 14, 2000, without holding an evidentiary hearing, the trial court adopted the State's proposed findings of fact and conclusions of

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[3] *Id.*
[4] *Trevino v. Thaler*, 133 S. Ct. 1911, 1915 (2013).
[5] *Raby v. Texas*, 525 U.S. 1003 (1998).
[6] *Trevino*, 133 S. Ct. at 1919.

law, denying some of Mr. Raby's claims on the merits and others on procedural-default grounds.[7] The Texas Court of Criminal Appeals adopted the trial court's findings on January 31, 2001.[8]

C. Federal Habeas Petition

With new lawyers, Raby filed a federal habeas corpus petition in the Southern District of Texas on January 30, 2002, and amended it on May 8, 2002. The District Court granted the State's summary judgment motion and denied the petition on November 27, 2002 and denied entitlement to a COA.[9] Raby subsequently filed a Notice of Appeal and sought a COA from the District Court on January 29, 2003, which was construed as a motion for rehearing and denied. Mr. Raby then filed an application for a COA and brief in the United States Court of Appeals for the Fifth Circuit. On October 15, 2003, the Fifth Circuit denied Mr. Raby's request for a COA and dismissed Mr. Raby's application.[10] On May 7, 2004, Mr. Raby filed a petition for a writ of certiorari with the U.S. Supreme Court, which denied the petition on June 14, 2004.[11]

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[7] ROA.855-65 (*Ex parte Raby*, No. 9407130-A (248th Dist. Ct., Harris Cty., Tex., Nov. 14, 2000)).
[8] ROA.867-68 (*Ex Parte Raby*, No. 48131-01 (Tex. Crim. App. Jan. 31, 2001)).
[9] ROA.870-903 (*Raby v. Cockrell*, 4:02-cv-00349 (S.D. Tex. Nov. 27, 2002)).
[10] ROA.905-908 (*Raby v. Dretke*, 78 F. App'x 324 (5th Cir. 2003).
[11] ROA.911 (*Raby v. Dretke*, 542 U.S. 905 (2004)).

D. Subsequent Litigation over DNA Testing and Results

On November 19, 2002, Mr. Raby filed a motion for post-conviction DNA testing in state district court.[12] On January 29, 2004, the district court denied Mr. Raby's motion and adopted the State's findings verbatim.[13] Mr. Raby appealed. On June 29, 2005, in an unpublished opinion, the Texas Court of Criminal Appeals granted post-conviction DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure.[14] Evidence was sent to Serological Research Institute ("SERI"),[15] an accredited laboratory capable of performing Y-Chromosome Short Tandem Repeat DNA testing.

On September 28, 2006, the Institute reported that Y-chromosome DNA testing demonstrated that DNA material from at least two different men was present underneath the fingernails of Mrs. Franklin's left hand when the clippings were collected at autopsy. Significantly, the DNA testing established to a scientific certainty that none of the DNA from these unknown males belonged to the Applicant, Charles Raby. Mr. Raby presented evidence at a later evidentiary hearing that the DNA may instead

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[12] ROA.2155-83.

[13] ROA.2225-29(*State v. Raby*, No. 9407130 (248th Dist. Ct., Harris Cty., Tex. Jan. 29, 2004)).

[14] ROA.913-949 (*Raby v. State*, No. AP-74,930, slip op at 21 (Tex. Crim. App. June 29, 2005)).

[15] The nightshirt was collected at the decedent's autopsy and was first checked into the HPD property room on April 13, 1993. The nightshirt was checked out of the property room for trial on June 5, 1994, by the HPD Homicide Division, but there is no indication that it was ever checked back in. It has yet to be located. ROA.2231.

have come from just one male. No comparison of the DNA detected by SERI to CODIS profiles[16] of incarcerated inmates was possible because CODIS profiles are currently not taken from the Y chromosome, though plans are underway to add this testing.[17]

Later test results excluded Mrs. Franklin's grandsons, Eric Benge and Lee Rose, as possible contributors of the foreign DNA. That exclusion eliminated the only two males with whom the reclusive Mrs. Franklin had any regular physical contact, intimate or otherwise.

The district court held evidentiary hearings regarding the results of the DNA testing in January 2009.[18]

Following a supplemental offer of proof by undersigned counsel and a brief continuance requested by the court to review it, the State made the unusual request to postpone the next hearing, scheduled for April 2009, for several weeks in order to consult an expert serologist about the importance of evidence that had then arisen in the case about blood testing that Houston Police Department ("HPD") Crime Lab employee Joseph Chu had performed on the decedent's fingernail clippings in 1994, and his

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[16] CODIS is the FBI's Combined DNA Index System. CODIS is used to search DNA profiles obtained from crime scene evidence against DNA profiles from other crime scenes and from convicted offenders and arrestees.
[17] ROA.1013 (62:4-17); https://www.fbi.gov/services/laboratory/biometric-analysis/codis, last visited July 1, 2018.
[18] ROA.2232..

characterization of his findings as inconclusive under oath at trial.[19] The State eventually submitted to the court an expert report by Patricia Hamby, which supported Mr. Raby's claims regarding the probative nature of the blood typing result and the inaccuracy of Mr. Chu's testimony about it.[20]

At the second hearing, in August 2009, Ms. Hamby testified at length regarding the two facts concerning blood typing that were uncovered only after the previous federal habeas proceedings were concluded in 2004. First, prosecutors never disclosed to defense counsel at trial that the beleaguered HPD Crime Lab had detected blood group substance "A" underneath the decedent's fingernails that was incompatible with either Mrs. Franklin or Mr. Raby. Second, Mr. Chu, who had testified for the State about blood type results at trial, testified falsely when he characterized the results as "inconclusive." They were not inconclusive; they conclusively proved that another person's blood was under the fingernail of the decedent[21] in a location consistent with a defensive struggle. Moreover, abuse of the term "inconclusive" was the HPD Crime Lab's common tactic to avoid divulging

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[19] ROA.2232..
[20] *See* ROA.2242-43.
[21] ROA.1134-35 (28:23–29:5), ROA.1165-68 (59:22–62:1), ROA.1176 (70:14–23) (testimony of Patricia Hamby, State's serologist).

information favoring a defendant, in particular as to blood typing, as Bromwich Investigative Reports[22] had recently reported to the public.[23]

The district court heard closing arguments on November 10, 2009. years.[24] On December 19, 2012, on the eve of her retirement, the district court judge issued an order stating in the initial paragraph that the DNA testing was probative under article 64.04 of the Texas Code of Criminal Procedure but stating the opposite in the conclusion.[25] On January 19, 2013, the district court issued a new order altering the wording in the first paragraph to fit the conclusion in the December 19, 2012 order.[26] Mr. Raby appealed the district court's finding, arguing, *inter alia,* that the test results were favorable to him and that the district court improperly refused to

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[22] The Office for the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room released six reports, the last in 2007. The serology work performed by the HPD Crime Lab was a major subject of such reports, which continue to be maintained at this public website:
http://www.hpdlabinvestigation.org/reports.htm.

[23] Fourth Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room, Jan. 4, 2006, at ROA.1200, ROA.1245, *available at* http://www.hpdlabinvestigation.org/reports/060104report.pdf (excerpt).

[24] ROA.2232.

[25] ROA.1308-20 (*State v. Raby*, No. 9407130 (248th Dist. Ct., Harris Cty., Tex., Dec. 19, 2012)). Mr. Raby filed a motion to reconsider on January 17, 2013, while the State filed a motion to clarify the order. Mr. Raby filed his notice of appeal on January 18, 2013, pursuant to Tex. Crim. Proc. Code. art. 64.05 (Vernon 2003).

[26] ROA.1322-34 (*State v. Raby*, No. 9407130, Court Amended Findings at 1, 13 (248th Dist. Ct., Harris Cty., Tex., Jan. 11, 2013)). The Amended Findings deleted the word "not" from the phrase that formerly read "would *not* have been prosecuted or convicted" and added the word "not" to the phrase that formerly read "the results are favorable to Petitioner." The corrected document shows a signature date of January 11, 2013, but the file stamp gives a date of January 28, 2012 (not *2013*). ROA.1322, 1334. In any case, Mr. Raby's counsel received a copy of the document on January 29, 2013.

consider new evidence, including forensic evidence, apart from the DNA test results.[27]

During the pendency of the DNA proceedings, in May 2013, the U.S. Supreme Court issued its opinion in *Trevino v. Thaler,* 133 S. Ct. 1911 (2013). Building on the holding in *Martinez v. Ryan*, 566 U.S. 1 (2012), *Trevino* allowed federal review of claims of Texas trial counsel ineffectiveness that had not been properly raised due to the ineffectiveness of state habeas counsel.[28] Thus, *Trevino* raised for the first time possible grounds to excuse the procedural default that formed the basis of the federal District Court's decision not to review the merits of Mr. Raby's punishment phase claims in his initial federal habeas petition.

Before Mr. Raby could initiate federal proceedings based on the holding in *Trevino*, he had to exhaust his state remedies. Under Texas law, a habeas applicant generally waives any claims that are potentially available

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[27] ROA.1346, (*Raby v. State*, No. AP76970, Appellant's Brief on Appeal from District Court's Amended Findings of Facts (Tex. Crim. App. Apr. 22, 2013)).

[28] Under *Trevino*, a federal habeas court may find cause to excuse procedural default where there is a "substantial" claim of ineffective assistance of trial counsel; there was no or ineffective counsel during the initial state post conviction review; and the state system, as a practical matter, denies criminal defendants "a meaningful opportunity" to press ineffective assistance claims on direct appeal. 133 S. Ct. at 1918, 1921 (quoting *Martinez*, 566 U.S. at 14, 18).

but omitted from the application.[29] Had he filed a successive state habeas application in 2013 raising only *Martinez/Trevino* claims, Mr. Raby would have risked waiver of claims related to the new DNA evidence and associated police and prosecutorial misconduct. Filing an application attempting to litigate those issues without the evidence being developed in the DNA litigation posed the risk of an incomplete claim. Because it would have been premature to file the second state habeas application before the conclusion of the DNA proceedings, Mr. Raby's first chance to exhaust the *Martinez/Trevino* issue was in the second state habeas application that would inevitably follow the DNA proceedings.[30]

On April 22, 2015, the Court of Criminal Appeals affirmed the district court's finding in the DNA proceeding, noting, *inter alia*, that the district court properly considered no new evidence other than the DNA test results (e.g., evidence regarding the State's failure to disclose the lab report and Mr. Chu's false testimony), and that such new evidence should be presented

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[29] *See* Tex. Code of Crim. Proc. art. 11.071(5)(a); *see also Young v. Davis*, 835 F.3d 520, 525 (5th Cir. 2016) ("In Texas, [successive habeas] petitions are barred absent certain special circumstances.").

[30] "Exculpatory DNA testing results do not, by themselves, result in relief from a conviction or sentence. Chapter 64 is simply a procedural vehicle for obtaining certain evidence 'which might then be used in a state or federal habeas proceeding.'" *Ex parte Gutierrez*, 337 S.W.3d 883, 890 (Tex. Crim. App. 2011) (quoting *Thacker v. State*, 177 S.W.3d 926, 927 (Tex. Crim. App. 2005)).

through a second application for habeas corpus under Article 11.071.[31] Accordingly, undersigned pro bono counsel began work on a second state habeas petition presenting the *Brady*[32] claims and new DNA evidence and addressing the ruling in *Trevino*, all of which had developed since resolution of the last federal habeas petition.[33]

E. Mr. Raby's Successive State Habeas Proceedings

On January 21, 2016, Sarah Frazier, counsel for Mr. Raby, received correspondence in which Assistant District Attorney Lynn Hardaway represented to the General Counsel for the Texas Court of Criminal Appeals, Sian Schilhab, that she knew of no pending matters pertaining to Mr. Raby's case.[34] On February 5, 2016, Ms. Frazier learned from Ms. Hardaway that the letter was a response to a letter from Ms. Schilhab—one of many received at about the same time in other capital cases—that was sent to Mr. Raby's former habeas counsel of 15 years before.[35] Ms. Frazier told Ms. Hardaway that Mr. Raby intended to submit a second state habeas petition (as suggested by the Court of Criminal Appeals in its decision regarding the new DNA evidence), and Ms. Hardaway suggested that Ms. Frazier advise

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[31] ROA.1404-1414 (*Raby v. State*, No. AP-76,970, 2015 WL 1874540, at *8 (Tex. Crim. App. Apr. 22, 2015) (not designated for publication)).
[32] *Brady v. Maryland*, 373 U.S. 83 (1963).
[33] ROA.2232-33.
[34] ROA.2233.
[35] ROA.2233.

the 248th District Court of when she expected to file it.[36] Ms. Frazier advised Ms. Hardaway on February 15, 2016, that Mr. Raby's counsel expected to complete the application in three months. Ms. Hardaway raised no objection.[37]

On April 8, 2016, Ms. Hardaway inquired about the status of the application, and Ms. Frazier submitted a letter to the court, copying Ms. Hardaway, notifying the court that Mr. Raby's state habeas application would be filed June 10, 2016. Neither the court nor Ms. Hardaway raised any objection.[38] On June 10, 2016, Ms. Frazier wrote the court and copied Ms. Hardaway to advise that Mr. Raby's counsel expected to file on June 14, 2016, again, without objection.[39] In the end, finalization of the 272-page brief required a few additional days, and the filing was complete on June 16, 2016, with copies to both the district court and the Court of Criminal Appeals.[40] The Court of Criminal Appeals deemed the application successive and dismissed it on May 17, 2017, without analysis and over the dissent of Justice Alcala.[41]

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[36] ROA.2233.
[37] ROA.2233.
[38] ROA.2233.
[39] ROA.2233.
[40] ROA.2233.
[41] ROA.2245-47 (*Ex Parte Raby*, No. WR-48,131-02 (Tex. Crim. App. May 17, 2017)).

F. Mr. Raby's Federal Relief from Judgment Proceedings and Current Appeal

Following Mr. Raby's successive state habeas application, he filed a Motion for Relief from Judgment Pursuant to Federal Rule of Civil Procedure 60(b)(6) in the United States District Court for the Southern District of Texas Houston Division on August 4, 2017. This Motion sought relief from the District Court original denial of Mr. Raby's federal petition for writ of habeas corpus.[42] The District Court's original finding was that his claims of ineffective assistance of counsel at the punishment stage were procedurally unexhausted and therefore it declined to address the merits.[43]

Mr. Raby's Motion sought relief from this ruling based on the intervening U.S. Supreme Court cases, *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which recognized for the first time that ineffective assistance of counsel during the original state habeas applications can constitute excuse for failing to exhaust ineffective assistance of counsel claims. This was the exact argument made by undersigned counsel in Mr. Raby's first habeas petition, that Mr. Raby's procedural default should be excused because his prior state habeas corpus

[42] ROA.870-903, (*Raby v. Cockrell*, 4:02-cv-00349 (S.D. Tex. Nov. 27, 2002)).
[43] ROA.883.

proceeding was the only avenue through which he could have presented that claim, that proceeding was constitutionally ineffective.

After full briefing, on April 6, 2018, the District Court entered its Memorandum and Order, a short six page brief, on Mr. Raby's Motion for Relief, denying all relief on the basis that Mr. Raby's claims did not constitute extraordinary circumstances. The District Court noted that a change in decisional law alone is not ground for relief from a final judgment under Fed. R. Civ. Pro. 60(b)(6) since that standing alone does not present "extraordinary circumstances."[44] Further, the District Court ruled that *Buck v. Davis*, 137 S.Ct. 759 (2017) offers Mr. Raby no relief, despite the same discredited witness (Quijano) presenting inflammatory testimony both here and in *Buck*. The Court emphasized that Quijano's failings in *Buck* were primarily based on the racist component of his testimony, overlooking the clear similarities between the two cases.[45] Because Mr. Raby was white and Quijano's testimony did not concern Mr. Raby's race, the two cases were distinguishable.[46] Lastly, the District Court emphasized that Mr. Raby's case was "the kind of ineffective assistance of counsel claim that is raised in

[44] ROA.2338 (citing *Adams v. Thaler*, 679 F.3d 312, 319 (5th Cir. 2012).
[45] ROA.2339.
[46] ROA.2339.

many capital cases ... th[e] type of claim [that] is common, not extraordinary."[47] Mr. Raby now appeals the denial of the COA.

SUMMARY OF THE ARGUMENT

The District Court was wrong to summarize Mr. Raby's claim as "common."[48] Mr. Raby's request for relief from judgment is based on a rare and significant change in decisional law after the entry of judgment. Mr. Raby argued in his first federal habeas petition in 2002 that because his initial request for habeas relief in State court was constitutionally defective, he should be excused from the exhaustion requirement. The District Court found that *Coleman v. Thompson*, 505 U.S. 722 (1991) prohibited it from ruling on Mr. Raby's ineffectiveness argument based on trial counsel's introduction of the extremely prejudicial testimony of Quijano during the punishment phase. Under existing law at the time, the District Court's original denial may have been justified; now however, the U.S. Supreme Court has modified *Coleman* through *Martinez v. Ryan*, 566 U.S. 1 (2012) and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), by recognizing the very excuse for procedural default first advanced by Mr. Raby ten years before. Those two cases now definitively allow for federal review of "substantial" defaulted claims of trial counsel ineffectiveness.

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[47] ROA.2339.
[48] ROA.2340.

In addition to bringing claims under this well-founded new decisional law, Mr. Raby's case is anything but "common" because he was the victim of profound incompetence and ineffectiveness by both trial counsel and first state habeas counsel. During the punishment phase of a death penalty case, his trial counsel presented the methodologically unreliable expert testimony of Quijano. This witness unjustifiably labeled Mr. Raby alternately and synonymously as a psychopath, a sociopath, and an individual with an antisocial personality disorder. The State then intentionally prompted further testimony exaggerating the risk that Mr. Raby would commit future acts of violence and invited the jury to rely on Quijano's testimony to answer the future dangerousness special issue in the State's favor. Coming from the defense's own expert witness, the jury had little choice but to believe this testimony. State habeas counsel then inexcusably failed to challenge trial counsel's introduction of the unreliable and inflammatory testimony on future dangerousness, or the prosecution's reliance on that evidence, which doomed Mr. Raby's efforts to avoid the death penalty. Had the U.S. Supreme Court not recognized this action by initial state habeas counsel as excusable neglect, Mr. Raby would have no challenge for this abject failure.

Further, the testifying witness, Dr. Walter Quijano, has been recognized as a completely unreliable witness whose testimony has tainted punishment phases of at least six separate trials, including the petitioner's in *Buck v. Davis*, 137 S. Ct. 759 (2017). The District Court's differentiated *Buck* with Mr. Raby by placing too much emphasis on the racial component of Quijano's testimony.[49] This was error because Quijano's conclusion that race is probative in determining future dangerousness reveals that he relied, not on scientific methods for his findings, but on his own whim and biases. In Mr. Raby's case Quijano applied that same chicanery to taint the jury, because he had no sound methods upon which to rely. Instead of pointing to race, he used improper methods to label Mr. Raby with the most inflammatory of mental health diagnoses, exaggerating his risk of future dangerousness. Quijano's testimony, was in fact, false and prejudiced Mr. Raby's chances at a fair trial.

Because the District Court disregarded the extraordinary circumstances of Mr. Raby's case, it erred in its denial of relief from judgment under Rule 60(b)(6), and reasonable jurists would find the District Court's determination incorrect, or at the very least debatable. Therefore,

[49] ROA.2339-2340.

Mr. Raby begs this Court to grant a COA under these extraordinary circumstances and allow Mr. Raby to appeal this clear error.

STANDARD OF REVIEW

To establish entitlement to a COA, a petitioner must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further."[50] A litigant who sought relief under Rule 60(b)(6) "seeking a COA must demonstrate that a procedural ruling barring relief is itself debatable among jurists of reason."[51] A Rule 60(b)(6) holding to reopen litigation would be reviewed for abuse of discretion and therefore "the COA question is therefore whether a reasonable jurist could conclude that the District Court abused its discretion in declining to reopen the judgment."[52] A Rule 60(b)(6) motion permits relief from a judgment for "any other reason that

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[50] *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 988 (2000); *see also Miller–El v. Cockrell*, 537 U.S. 322, 336 (2003).
[51] *Buck*, 137 S.Ct. at 777 (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).
[52] *Id.*

justifies relief" which is available to a litigant under "extraordinary circumstances."[53]

In *Buck v. Davis*, 137 S. Ct. 759 (2017), the Supreme Court determined that proof of entitlement to a COA is not "coextensive with a merits analysis."[54] "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."[55] The Court's opinion was that COA analysis is not an opportunity to reflect on the adequacy or merits of an applicant's underlying claims; it should instead focus on the applicant's entitlement to a COA.[56] "A court of appeals should limit its examination at the COA stage to a threshold inquiry into the underlying merit of the claims, and *ask only if the District Court's decision was debatable.*"[57]

Therefore, the burden at this stage is not so heavy as to require a showing of actual merit.[58] A claim is "debatable even though every jurist of reason might agree, after the COA has been granted and the case has

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[53] *Id.* (citing *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005)).
[54] *Id.* at 773.
[55] *Id.* (citation and quotation marks omitted).
[56] *Id.* at 773-75.
[57] *Id.* at 774 (emphasis added)(brackets and quotation marks omitted) (quoting *Miller–El*, 537 U.S., at 327, 348); *Id.* ("That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable.").
[58] *Id.*

received full consideration, that petitioner will not prevail."[59] As the Supreme Court has explained, the debatability standard does not require a petitioner to show that some jurists would grant the petition for writ of habeas corpus.[60] The severity and finality of a death sentence are relevant in determining whether to authorize an appeal.[61] Accordingly, in a death penalty case, any doubts are to be resolved in favor of granting a COA.[62]

Mr. Raby did not request a COA from the District Court. Instead, the District Court *sua sponte* decided Mr. Raby was not entitled to a COA because it believed no reasonable jurist would find its decision debatable.[63] The District Court implied the reasoning for this extra-ruling determination was to allow Mr. Raby to directly request a COA from this Court, assuming that—although a COA may be obtained from either a district court or an appellate court—the appellate court will not consider a petitioner's request without first being denied one in the lower court.[64][65] Here, this Court will

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[59] *Id.* at (quoting *Miller–El*, 537 U.S., at 338).
[60] *Miller-El,* 123 S.Ct. at 1040 (citing *Slack*).
[61] *Barefoot v. Estelle,* 463 U.S. 880, 892 (1983).
[62] *Buxton v. Collins*, 925 F.2d 816, 819 (5th Cir. 1991).
[63] ROA.2341-42.
[64] *Id.* (citing *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988) and *Hill v. Johnson*, 114 F. 3d 78, 82 (5th Cir. 1997).
[65] The U.S. Supreme Court has noted it is an open question as to whether a COA is required in the context of a Rule 60(b) motion. *See Buck v. Davis*, 137 S. Ct. 759, 787 n. * (2017) (citing *Gonzalez v. Crosby*, 545 U.S. 524, 535, and n. 7, (2005)). This Circuit has held otherwise.

find that Mr. Raby's claims were debatable and that Mr. Raby is therefore eligible to appeal its decision.

ARGUMENT

In its Memorandum and Order the District Court emphasized that Mr. Raby's case was not extraordinary and his claim of ineffective assistance of counsel was "the kind ... raised in many capital cases – that his trial counsel failed to investigate and develop mitigating evidence, and called a mental health expert who said something harmful to the defense."[66] The District Court also found that the change in decisional law under *Martinez* and *Trevino* did not justify, on its own, relief from judgment.[67] Finally, the District Court determined that Mr. Raby's reliance on *Buck v. Davis*, 137 S. Ct. 759 (2017) was misplaced due to the racial component attached to the testimony at issue in *Buck*.[68]

Reasonable jurists could easily debate the meritorious nature of Mr. Raby's entitlement to relief under the extraordinary circumstances of his case. The District Court's determination that Mr. Raby's case was not extraordinary was error because it contained almost no analysis beyond an uncited generalization of the "common" nature of his claims among habeas

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[66] ROA.2340.
[67] ROA.2338 (citing *Adams v. Thaler*, 6789 F.3d 312, 319 (5th Cir. 2012)).
[68] ROA.2339.

petitioners.[69] Indeed, Mr. Raby's claims are no more "common" than those of the petitioner's in *Buck*. They are extraordinary, like Buck's, because both men were condemned by the same charlatan relying on the same assumptions and bad science, of which *race as a factor* was just one spurious part. Worse, in Mr. Raby's case, it was his own counsel's catastrophic choice to call Quijano – without conducting any investigation of his opinions beforehand. They are also extraordinary because that failure was so exacerbated by trial counsel's accompanying failure to investigate or put on any reasonable mitigation evidence in Mr. Raby's favor, of which there was so much. Mr. Raby's claims embody the very nature of the defect in *Martinez* and *Trevino*, and, as in those cases, he should be excused from the default of his claims due to disastrous assistance of state habeas counsel who failed to investigate or assert a single issue extraneous to the record, a requirement before default. Because Mr. Raby's claims of ineffective assistance of counsel are so extraordinary, the District Court's decision that Mr. Raby was not entitled to relief abused its discretion. At the very least, reasonable jurists could conclude the District Court's ruling was debatable that Mr. Raby was not entitled to relief from judgment to have his claims of ineffective assistance of counsel heard for the very first time. .

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[69] ROA.2340.

A. Reasonable Jurists Could Debate Whether The District Court Was Correct In Ruling Mr. Raby's Case Presents Extraordinary Circumstances Warranting Relief

1. The District Court deemed Mr. Raby's claims not "extraordinary" on the grounds that they were "common" grievances and not about race bias, without considering the particular circumstances of his case, their rarity, and the injustice at stake

The District Court ignored the fact-intensive nature of the Rule 60(b) inquiry when deciding whether relief was warranted.[70] Courts have continuously sought to undertake a holistic analysis of the facts and circumstances in regards to Rule 60(b)(6) motions under *Martinez*. Indeed, the "consideration of extraordinary circumstances under Rule 60(b)(6) relies on several factors, not just a determination as to whether the nature of the intervening law in *Martinez* is extraordinary."[71] Several factors are considered when a Rule 60(b)(6) motion is under consideration, including:

- the state's "interest in finality;"
- the "capital nature of the case combined with a claim never considered on its merits;"
- the petitioner's diligence;
- the connection between *Martinez* and the claim raised by the petitioner; and

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[70] *Gonzalez v. Crosby*, 545 U.S. at 537; *see also id.* at 540 (Stevens, J., dissenting) (explaining that a district court considering a Rule 60(b)(6) motion will "often take into account a variety of factors . . . includ[ing] the diligence of the movant, the probable merit of the movant's underlying claims, the opposing party's reliance interests in the finality of the judgment, and other equitable considerations").

[71] *Barnett v. Roper*, 941 F. Supp. 2d 1099, 1118 (E.D. Mo. 2013).

- the strength of the petitioner's ineffective assistance of counsel claim in its analysis.[72]

The *Buck* Court pointed out a similar "wide range of factors" including, but not limited to: "**the risk of injustice to the parties and the risk of undermining the public's confidence in the judicial process.**"[73] The District Court noted the reliance of the *Buck* Court on these factors, and noted that this case, like *Buck,* centers on discredited psychologist Walter Quijano. But it found that race bias, and race bias alone, made the Quijano facts in the *Buck* case extraordinary. It declined to entertain the idea that an injustice other than race bias could ever be extraordinary, except to say that the injustice of meritorious claims that are never heard due to ineffective assistance of counsel, is *not* extraordinary, because it is too common.

If the District Court is right, then there can be no debate among jurists that if an injustice is widespread enough, however egregious, it must categorically fail under Rule 60(b). But *Buck* did not turn on the rarity of the circumstances; indeed it noted the Fifth Circuit's remarks suggesting the claim *was* common, and rejected that analysis.[74] *Buck* turned instead on

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[72] *Id.* at 1118, 1120-21.

[73] *Buck*, 137 S.Ct. at 778 (citation and quotation marks removed).

[74] Still further, the District Court's brief analysis here that Mr. Raby's claims amount to "his trial counsel failed to investigate and develop mitigating evidence, and called a mental health expert who said something harmful to the defense" are generalizations that can be made about multiple meritorious petitioners that have come before Mr. Raby, including Mr. Buck. *See Buck v. Davis*, 137 S.Ct. at 767; *see also Williams v. Taylor*,

notions of what is acceptable to our sense of justice as citizens of democracy.[75] Thus, under *Buck,* the distinguishing characteristics of each particular habeas petitioner's claims are what make the claims "extraordinary," not the number of times a claim is brought.

2. The Fifth Circuit, in contrast to the District Court but in accord with Buck, requires a fact intensive inquiry and gives special importance to ineffective assistance claims

The District Court is sufficiently struck by the pure frequency with which it hears habeas corpus claims premised on ineffective assistance of counsel that it overlooks the Fifth Circuit's consistent message that cases in which a trial has occurred and a petitioner's claims have never been heard deserve special scrutiny.

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529 U.S. 362 (2000) (finding that Williams was prejudiced by defense counsel's deficient investigation of mitigating evidence at his capital murder trial, including failures to prepare for sentencing until a week beforehand, to uncover extensive records describing Williams's dysfunctional childhood, to introduce available evidence that Williams was "borderline mentally retarded," to seek prison records recording Williams's commendations, and to discover the testimony of prison officials who described Williams as among the inmates least likely to act violently or dangerously); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding merit in a deficient investigation of mitigation evidence claim); *Rompilla v. Beard*, 545 U.S. 374 (2005) (trial counsel was objectively unreasonable in not pursing a wide range of mitigation evidence); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam) (finding that trial counsel did not satisfy then prevailing professional norms dictating that a thorough investigation of the defendant's background be undertaken, particularly in those cases in which the "kind of troubled history we have declared relevant to assessing a defendant's moral culpability"); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam) (same, citing disturbing background).

[75] *Buck.* at 778.

The Fifth Circuit, in accord with *Buck*, examines a wide range of factors. In fact, a list of eight principles should inform a district court's consideration of a movant's eligibility for relief under Rule 60(b)(6):

> (1) That final judgments should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) whether—if the judgment was a default or a dismissal in which there was no consideration of the merits—the interest in deciding cases on the merits outweighs, in the particular case, the interest in the finality of judgments, and there is merit in the movant's claim or defense; (6) whether—if the judgment was rendered after a trial on the merits—the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.[76]

While several of these factors require an analysis of the facts and likely all favor review of Mr. Raby's claims, particularly important here are number five and six, which deal with the default of claims in which there was no consideration of the merits, such as with Mr. Raby's claims. Mr. Raby has never had an opportunity to have his claims adjudicated due to ineffective assistance of state habeas counsel, and this Circuit has explained that Rule 60(b) applies "most liberally to judgments in default . . . [because] . . . truncated proceedings of this sort are not favored . . . . Thus, unless it appears that no injustice was done by the judgment, the equities in such

[76] *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981).

cases will militate strongly in favor of relief."[77] The Supreme Court has recognized that because effective assistance of trial counsel is a "bedrock principle in our justice system,"[78] and justice warrants relief from procedurally defaulted claims when such default results from ineffective assistance of state habeas counsel. In addition, factor number three is favorable to Mr. Raby, in that liberal construing of the rule would allow Mr. Raby to bring claims that are now justifiably recognized.

And this Court has consistently assessed Rule 60(b) motions using case specific and fact intensive inquiry.[79] The "main application" of Rule 60(b) "is to those cases in which the true merits of a case might never be considered" and this Court has "reversed where denial of relief precludes examination of the full merits of the cause."[80] In such cases, "even a slight abuse may justify reversal."[81]

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[77] *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1459 (5th Cir. 1992).
[78] *Davila v. Davis*, 137 S. Ct. 2058, 2067 (2017).
[79] *See, e.g.*, *Ruiz v. Quarterman*, 504 F.3d 523, 528–32 (5th Cir. 2007) (engaging in fact-specific analysis of a Rule 60(b)(6) motion); *Steverson v. GlobalSantaFe Corp.*, 508 F.3d 300, 305–06 (5th Cir. 2007) (citing *Seven Elves* factors and conducting fact-specific analysis); *see also U.S. ex rel. Garibaldi v. Orleans Par. Sch. Bd.*, 397 F.3d 334, 337 (5th Cir. 2005) ("We must decide whether the Supreme Court's decision [resulting in a change in the law] combined with the facts of this case gave rise to 'extraordinary circumstances' warranting the district court's exercise of its discretion under Rule 60(b)(6) to grant relief from our final judgment . . . .").
[80] *Ruiz v. Quarterman*, 504 F.3d 523, 532 (5th Cir. 2007) (internal citations and quotations omitted).
[81] *Id.* at 532; *see also Phelps v. Alameida*, 569 F.3d 1120, 1140 (9th Cir. 2009) ("[A] central purpose of Rule 60(b) is to correct erroneous legal judgments that, if left uncorrected, would prevent the true merits of a petitioner's constitutional claims from

3. Mr. Raby's Rule 60(b) claims are actually extraordinary, both as to rarity and as to the injustice at stake, as well as other factors

While certainly race bias was important to the *Buck* Court, a closer examination of that case reveals that Mr. Raby's case raises intertwined and equally important concerns so significant that as citizens we cannot allow Quijano's testimony to stand in this case, any more than in *Buck*.

In *Buck*, Quijano testified as an expert witness for the defense at the punishment phase of Mr. Buck's capital murder trial.[82] There, Quijano gave an opinion that the defendant had some factors that increased his propensity for violence.[83] One of these "statistical factors" included race, and Quijano opined that because of Mr. Buck's race, he was statistically more likely to commit crimes.[84]

Similarly to Mr. Raby, Mr. Buck's case circulated through multiple stages of litigation in both federal and state courts for nearly two decades. When he originally sought federal review of his trial counsel's introduction of Quijano's testimony, the claim was barred because it was not raised initially.[85] Mr. Buck eventually sought to reopen his federal petition based

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ever being heard.").
[82] *Buck v. Davis*, 137 S. Ct. 759, 768 (2017).
[83] *Id.* at 767–69.
[84] *Id.* at 769.
[85] *Id.* at 770.

on *Trevino*, but was declined at both the district court and this Circuit.[86] The Supreme Court reversed, holding that the district court abused its discretion in denying the Rule 60(b)(6) motion, permitting Mr. Buck to raise his claim of ineffective assistance.[87]

Although *Buck* primarily concerned the supposed predictive race factor in Quijano's testimony, the Court focused on race as an "immutable characteristic" and noted that we punish "people for what they do, not who they are."[88] This type of testimony, the Court noted, was "potent evidence",[89] the effect of which "was heightened due to the source of the testimony",[90] a medical expert who had "conducted evaluations in some 70 capital murder cases."[91] The total effect being that "[r]easonable jurors might well have valued his opinion concerning the central question before them."[92] Coupled with the fact that the testimony came from the defense's own witness, which the Court noted had the effect of being similar to an admission, meant that the testimony of Quijano took on an exaggerated importance.[93] This effect is especially amplified when the testimony was

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[86] *Id.* at 778.
[87] *Id.*
[88] *Id.* at 778.
[89] *Id.*
[90] *Id.* at 776.
[91] *Id.*
[92] *Id.* (citing *Satterwhite v. Texas*, 486 U.S. 249, 259 (1988))
[93] *Id.*

introduced at the "future dangerousness" phase of a Texas capital murder trial, a question, which the Court noted, as "an unusual inquiry" where the jurors are "not asked to determine a historical fact concerning [a defendant's] conduct, but to render a predictive judgment inevitably entailing a degree of speculation."[94]

Although Mr. Raby is white, Quijano gave testimony regarding an immutable characteristic: that Mr. Raby suffered from a personality disorder that rendered him a future danger, and would always render him a future danger. All of these amplifiers were in place in Mr. Raby's case to exacerbate the prejudicial testimony of Quijano.

Moreover, accepting Quijano's testimony in Mr. Raby's case, but not in Mr. Buck's case, where he raised race as a factor, ignores the more profound concerns implicit in his testimony. In advocating that non-white race is a risk factor for future dangerousness, Quijano revealed himself as a charlatan, not a man of science. He had no scientific method to support his findings; he developed them using only (1) a data set; (2) a deficient understanding of statistical analysis; (3) personal biases; (4) hubris sufficient to trust his own conclusions and ignore that no other expert was making such claims; and (5) a profit motive for offering the State opinions others would

[94] *Id.* at 776.

not. To testify that being non-white makes a person more dangerous is not just morally abhorrent, but scientifically unsound. This Court understood that in deciding *Buck.*

In the nineteenth century, phrenology was accepted by many scientists who were willing to believe that the precise shape and size of the skull provided insight even about inherent traits of women versus men and of whites versus other races.[95] Allowing Quijano's pseudoscientific testimony to stand is equivalent to allowing a phrenologist to testify as to what a person's skull shape says about his character so long as he does not include his opinions on the narrow subject of race. Bearing in mind *Daubert*[96] principles familiar to all jurists and public acceptance of the judicial system, a reasonable jurist may conclude that the phrenologist should not testify at all.

It is just as extraordinary for a person to be condemned to death because of a pseudoscientist with unscientific ideas about future dangerousness because of misdiagnosed mental diseases and unsound ideas about how they impact future dangerousness as it was to be condemned because of that pseudoscientist's notions of race. The District Court erred in

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[95] For a history of phrenology, *see, e.g.,* https://en.wikipedia.org/wiki/Phrenology, visited on June 30, 2018, citing, *inter alia,* Staum, Martin S. (2003). *Labeling People: French Scholars on Society, Race and Empire, 1815-1848*. Montreal: McGill-Queen's University Press. ISBN 978-0773525801.

[96] *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

deeming Mr. Raby's claims too "broad" to merit relief; the circumstances here are both rare and morally abhorrent.

The following sections describe further details of Mr. Raby's factual circumstances, none of which were distinguished by the District Court, which also make Mr. Raby's case and claim extraordinary.

a. Extraordinary nature of Mr. Raby's claim of ineffective assistance of counsel as to future dangerousness

i. Prejudicial nature of Quijano's testimony on Mr. Raby's supposed mental health disorders

Under Texas law, the jury could impose a death sentence only if it found beyond a reasonable doubt that there was a probability that Mr. Raby would commit criminal acts of violence in the future that would constitute a continuing threat to society.[97] Mr. Raby's trial counsel retained Quijano[98] solely to opine on this central question.

Quijano described a "personality cluster" supposedly emerging from Mr. Raby's personality test results, including borderline personality disorder,

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[97] Tex. Crim. Proc. Code art. 37.071(2)(b)(1).

[98] Dr. Quijano has a doctorate in clinical psychology. ROA.1563 (Original Trial Transcripts, *State v. Raby*, No. 9407130 (June 14, 1994)). An unforeseen consequence of adopting the future dangerousness question has been that the sentencing now hinges on the testimony of an expert psychologist, usually the state's. James Grigson, also known as "Dr. Death" is the most notorious of such experts. *See, e.g.*, Abbie Vansickle, *A Deadly Question: Have Juries Sentenced Hundreds of People to Death by Trying to Predict the Unpredictable*, The Atlantic, Nov. 19, 2016, *available at* https://www.theatlantic.com/politics/archive/2016/11/a-deadly-question/508232/.

passive aggression, over-disclosure, and low self-esteem.[99] Quijano opined that Mr. Raby did not have a conscience and that "he is an anti-social type of person" or that he could not behave because of a psychological disorder.[100] When asked how Mr. Raby could be "controlled" in prison, Quijano's answers seemed to assume that Mr. Raby was among the most dangerous of potential prisoners, unable to obey authority. He suggested options such as "super-segregation" and sedating anti-psychotic medications. Direct examination from trial counsel acquired no clear opinion on the question of whether Mr. Raby more likely than not would commit criminal acts of violence in the future that would constitute a continuing threat to society. His discussion of different levels of security available within Texas prisons fell short of that opinion and instead left the false impression that Mr. Raby could not adjust well to jail.[101] Further, trial counsel incited Quijano to give inflammatory opinions that Mr. Raby would require a maximum security prison in combination with drugs acting as chemical restraint.

On cross-examination by the State, Quijano diagnosed Mr. Raby with additional personality disorders based on test results merely suggesting possible anti-social personality disorder. He called Mr. Raby a psychopath

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[99] ROA.1567-68.
[100] ROA.1572-74.
[101] ROA.1673-77.

and a sociopath, differentiating the two terms with the State's elicitation that "sociopath" was the new term for "psychopath."[102] On the State's suggestion, Quijano suggested psychologists had become "mellow and we use the term anti-social" while agreeing with the prosecution that Mr. Raby had no conscience and he did "not care about anybody but himself."[103] The State then prompted Quijano to characterize Mr. Raby as manipulative and that "in the end, the person he would despise the most would have been th[e] very person that showed him the greatest act of kindness."[104] Finally, Quijano agreed with the prosecution that the only guarantee that Mr. Raby would not hurt another person would be the death penalty.[105] The State also elicited Quijano's infamous "personal formula" for determining who is likely to continue to perform violent criminal acts. Quijano discussed these specific factors, all of which apparently applied to Mr. Raby at the time: (1) youth; (2) male gender; (3) unstable work histories; (4) history of using weapons; (5) drug and alcohol abuse; and (6) repeat offenders.[106]

Quijano hardly could have benefitted the State more had the State been the party to call him. A more disastrous performance at the future

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[102] ROA.1578-79.
[103] ROA.1578-79.
[104] ROA.1578-79.
[105] ROA.1582.
[106] Quijano left out his most infamous factor: being of a minority race. Apparently, his scientific process permitted him to add or omit factors from discussion where he determined that they did not apply to a defendant.

dangerousness stage can hardly be conceived. These facts are far more unusual and more prejudicial than the District Court's description of: "a mental health expert who said something harmful."

ii. Inexcusability of trial counsel's performance on "trial strategy" grounds

(a) Trial counsel lacked any justification for calling Quijano

It cannot be denied Quijano's testimony was catastrophic to Mr. Raby's defense. Either trial counsel did not know Quijano held the opinions he uttered at trial, or they did know but chose to call him to the stand anyway. In either situation, trial counsel failed to appreciate any risk associated with calling Quijano and likely failed to do any meaningful research into Quijano's opinions that would have prepared them for his testimony. Every indication suggests trial counsel did not know Quijano's opinion.[107]

Trial counsel then inexcusably compounded their error by failing to object, seeking no limiting or curative instructions, and making no attempt in closing arguments to limit, rebut, or contextualize Quijano's testimony. No

[107] Quijano met once with Mr. Raby for ninety minutes, only four days prior to testifying in the punishment phase of Mr. Raby's trial. ROA.1583. Counsel had no written report on which to rely; Quijano did not produce one until months after the trial had ended. ROA.1632. Incredibly, the report incorrectly noted that Mr. Raby had been charged with aggravated robbery and omitted his capital murder charge. ROA.1749.

competent defense attorney would have allowed this to happen. The prosecutor capitalized on that testimony and failure in his closing arguments.[108] The prosecution urged the jury to view the problematic aspects of Mr. Raby's personality as reflective of the probability that he would commit acts of violence in prison. It would be understating the disaster of his testimony to simply say that his opinions on future dangerousness were not worth opening the door to his labeling Mr. Raby as a psychopath.

(b)Quijano's testimony prejudiced Mr. Raby

Quijano essentially stated that Mr. Raby was a psychopath without a conscience, and only death could guarantee that he would not be a future danger. There is no possibility this did not prejudice the jury. The Texas Court of Criminal Appeals has described the powerful effect that psychiatric testimony can have on jurors' consideration of the future dangerous issue in capital cases.[109] The *Buck* court noted this effect as well.[110]

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[108] ROA.1623-25 ("you have a sociopath, and that doctor did testify about all the things they could do with the Defendant and that they might be able to do with the Defendant, but on cross-examination, he conceded ... Someone who in all likelihood would be a continuing threat to society."); *see also* ROA.1672.

[109] "[W]here there is such psychiatric testimony, it is more likely that we will come to the conclusion that a rational jury could find that the defendant will constitute such a threat." *Flores v. State*, 871 S.W.2d 714, 718 n.4 (Tex. Crim. App. 1993).

[110] *Buck*, 137 S. Ct. at 776; *see also Barefoot v. Estelle*, 463 U.S. 880, 916 (1983) (Blackmun, J., dissenting)("In a capital case, the specious testimony of a psychiatrist, colored in the eyes of an impressionable jury by the inevitable untouchability of a medical specialist's words, equates with death itself.").

In addition, the label of psychopath or sociopath "carr[ies] very negative connotations among lay people that are different from their distinct meanings in the psychological community"; and even are problematic when clinically applied.[111] As pejoratively applied as they were here by Quijano "diagnoses tend to have a profoundly aggravating effect on a jury's sentencing considerations because they suggest that no *rehabilitation is possible and that future criminal violence is inevitable.*"[112] This is the "immutable characteristic" Quijano applied to Mr. Raby that *made* him a permanent future danger compounded by the fact defense put on the doctor's testimony, making it akin to an admission.[113] It is reasonable to conclude that the jurors sentencing Mr. Raby would have viewed Quijano's psychopath and sociopath diagnoses as hard evidence that should be decisive of the issue of future dangerousness.

(c) Trial counsel failure to present any other evidence that Mr. Raby posed no future danger

No expert testimony on future dangerousness would have been better than to allow Quijano's testimony. However, prejudice continued during this phase by defense counsel's failure to demonstrate that Mr. Raby was

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[111] ROA.1633, 1667.
[112] ROA.1633 (emphasis added).
[113] *Buck*, 137 S. Ct. at 776–77 ("[w]hen a defendant's own lawyer puts in the offending evidence, it is in the nature of an admission against interest, more likely to be taken at face value.") (alteration in original) (internal citations omitted).

unlikely to pose a future danger. Exhibit 1 to Raby's First Amended Petition for Writ of Habeas Corpus was a 66-page affidavit from Dr. Mark Cunningham, a forensic psychologist in practice in Texas since 1981, in which he deconstructed Quijano's testimony using only the scholarship available at the time of trial in 1994 and reached very different conclusions.

Dr. Cunningham noted that based on the facts available in Quijano's report, jail and prison records, juvenile disciplinary records, and other evidence, he assessed Mr. Raby's risk as "far below the standard of 'more likely than not'" a future danger. He identified several factors that would reduce Mr. Raby's risk of future dangerousness including: "history of no serious violence in multiple, extended confinements in juvenile facilities; an absence of serious violence during two years of previous incarceration in TDCJ; and the substance dependence/intoxication context of the capital offense."[114] TDCJ categorized Mr. Raby's time in jail preceding trial as "good," and indeed promoted him to "State Approved Trustee-4w" in September 1991.[115]

Most importantly, Dr. Cunningham disagreed with Quijano's inflammatory testimony that Mr. Raby was a sociopath, psychopath, and had anti-social personality disorder, and indeed was troubled by Quijano's

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[114] ROA.1680.
[115] ROA.1676-77.

fundamental misunderstanding of these disorders.[116] In contrast to the prototypic psychopath, who is charming and socially skilled, the MCMI personality test performed on Mr. Raby showed that he was socially withdrawn, passive-aggressive, and showed symptoms of a borderline personality disorder. Passive aggressive individuals express hostility indirectly, because they fear the rejection that would accompany more open displays. Extensive concern with rejection is obviously quite inconsistent with an individual who cares for no one but himself. Further, borderline personality disorder and sociopath/psychopath/antisocial personality disorder are conceptually mutually exclusive. While both represent disorders of attachment, they are at opposite ends of that continuum. A borderline personality disorder makes intense attachments to others, but these are fragile, volatile, and unstable. By contrast, the more severe psychopath does not make attachments at all.[117] Mr. Raby cannot be both.[118]

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[116] ROA.1632, 1667-72. Further, these diagnoses are in no way synonymous, and indeed do not share common symptoms in the DSM versions at issue. ROA.1632, 1669. Dr. Quijano apparently did not administer the authoritative protocol for evaluating psychopathy, the PCL-R. ROA.1632.

[117] ROA.1632-33, 1666.

[118] Moreover, a psychopath lacks the emotional attachment necessary to "despise the most . . . that very person that showed him the greatest act of kindness." ROA.1579. "The essence of not making attachments to others, central to this continuum of disorders [sociopath/psychopath/ APD-individual], is not experiencing enduring emotional reactions that would give rise to loving or despising." ROA.1632-33, 1667.

Notably, even had any of these disorders been indicated by personality testing, neither psychopathy nor sociopathy nor APD is predictive of future violent behavior in prison.[119] "A generally accepted estimate is that seventy-five percent of state prison inmates can be diagnosed as exhibiting an antisocial personality disorder."[120] There is no reliable correlation between APD and violence in prison.[121] Even inmates properly classified as psychopaths according to the PCLR have "not been reliably demonstrated to be more likely to commit acts of serious violence in prison than non-psychopaths."[122] Because of the pervasiveness of these personality disorders among prison inmates, their presence in an individual inmate indicates little about his prison behavior and prison violence potential.[123] "It predicts only that the individual is similar to most prison inmates, including the many inmates who adjust well to the prison setting."[124]

Under the circumstances, Quijano's testimony was undoubtedly prejudicial to Mr. Raby. When the future dangerousness issue is handled effectively by trial counsel and a defendant's good disciplinary record is presented within the correct legal standard, juries are swayed, even before

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[119] ROA.1633, 1667-68.
[120] ROA.1633.
[121] ROA.1633.
[122] ROA.1633, 1670.
[123] ROA.1633, 1667-68.
[124] ROA.1633.

hearing mitigation evidence, even when the capital crime is especially shocking. These underlying facts of Mr. Raby's ineffective assistance of counsel claims during the future dangerousness portion of the punishment phase of his trial, which the District Court did not address, make the District Court's denial debatable among reasonable jurists.

b. Extraordinary nature of trial counsel's failure to develop and present compelling mitigating evidence in assessing Mr. Raby's moral culpability.

The District Court did not address this claim of ineffectiveness at the mitigation portion of Mr. Raby's punishment phase of his trial. These facts show the extraordinary nature of his claim that makes the District Court's denial an abuse of discretion.

i. Counsel's deficient performance: failure to research and offer mitigation evidence

Texas's capital sentencing scheme requires a jury to consider all evidence of a defendant's background or character that "mitigates" against the imposition of the death penalty.[125] The U.S. Supreme Court has recognized that the prevailing professional standards in the version of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases in effect at the time Mr. Raby was

[125] *See* Tex. Crim. Proc. Code art. 37.071(d)(l).

sentenced provided that investigation into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[126] Under those Guidelines, medical, educational, family, social, and prior adult and juvenile correctional history are types of mitigation evidence that should be explored.[127]

Even what the Supreme Court has determined was deficient performance, such as in *Wiggins v. Smith*,[128] was far better than the performance by Mr. Raby's trial counsel. Records reflect no significant assessment of the medical, educational, family, and social history of Mr. Raby that would have formed the basis for a competent mitigation case. The forms that trial counsel submitted for reimbursement show no time or expenses attributed to out-of-court investigation, which is largely consistent with what undersigned counsel discovered in investigating this claim.[129] Trial counsel's efforts appear to have been confined to obtaining some CPS records and speaking to a few family members, each on no more than one or

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[126] *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, 11.4.1(C), p. 93 (1989)).

[127] *Id.*

[128] *Wiggins*, 539 U.S. at 524-28 (the Court found the trial counsel's investigation to be deficient because they both failed to go beyond those limited sources and also failed to pursue obvious leads in the limited information gathered).

[129] ROA.1752-1758, Attorney Fees Expense Claims for Felix Cantu (first chair) and Michael Fosher (second chair).

two brief occasions before they testified.[130] In the case of a few witnesses, Mr. Raby's trial counsel did not meet with them at all beforehand or did so only minutes before they took the witness stand.[131] These witnesses have uniformly asserted that there is a host of mitigating factors in Mr. Raby's history that trial counsel never explored with them in interviews or in their testimony.[132] Many other immediate family members and close childhood friends were never contacted by Mr. Raby's trial counsel or his investigator. They have come forward with substantial information about Mr. Raby's background to which they would have been willing to testify had they been contacted.[133]

Further, Mr. Raby's trial counsel failed to pursue critical leads suggested in the limited mitigation information assembled. For example, Quijano elicited essential facts about Mr. Raby's history from a brief clinical interview, including that Mr. Raby was a high-school dropout with probable learning disabilities and psychological disorders, and a confirmed substance abuse problem.[134] In addition, Quijano's evaluation included evidence of

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[130] *E.g.*, ROA.1760; ROA.1764; ROA.1771.
[131] *E.g.*, ROA.1780; ROA.1784.
[132] ROA.1786; ROA.1764; ROA.1760; ROA.1782; ROA.1777.
[133] ROA.1789 (half-brother); ROA.1793 (aunt); ROA.1799 (stepgrandmother); ROA.1804 (aunt); ROA.1811 (stepmother); ROA.1815 (uncle); ROA.1819 (friend); ROA.1822 (former girlfriend); ROA.1825 (friend); ROA.1829 (friend).
[134] ROA.1748-49.

familial psychological disorders and mental illness.[135] A reasonably competent attorney would have realized that further investigation of each of these aspects of Mr. Raby's history was necessary to make informed choices about presentation of the mitigation case.

ii. Prejudice to Mr. Raby: Mitigation Evidence the Jury Never Heard

In the District Court, Mr. Raby presented a summary of the mitigation evidence which "taken as a whole, 'might well have influenced the jury's appraisal' of [] moral culpability."[136] The nature of this mitigation evidence shows that Mr. Raby's claim involves extraordinary circumstances, or at the very least, that reasonable jurists would find his claims debatably extraordinary. This mitigation falls into nineteen separate categories of mitigation evidence the jury never heard, each of which was described in greater detail to the District Court but ultimately ignored: [137]

1. Multi-generational incest, domestic abuse, and family violence,[138][139]
2. Genetic predisposition to severe, chronic substance abuse and dependence
3. Genetic predisposition to mental illness

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[135] ROA.1749.
[136] *Wiggins*, 539 U.S. at 538.
[137] Please *see* Section Argument.B.1.b.ii of Mr. Raby's Motion for Relief (found at ROA.794-814), which will not be repeated here.
[138] *See generally* ROA.796-97 (describing events portrayed in ROA.1764-69 (Wearstler Aff.); ROA.1760-62 (Lanclos Aff.); ROA.1802-05 (Richards Aff.)).
[139] ROA.1832, CPS Memo from Odessa Sayles, Oct. 31, 1983.

4. Teenage mother

5. Parental alcohol and drug abuse

6. Abandonment by father

7. Mother's mental illness and personality inadequacy

8. Chaotic household and serial placement outside the home

9. Physical and emotional abuse, especially physical abuse by stepfather

10. Child neglect by mother

11. Observed family violence by step-father, maternal step-grandfather, and maternal uncle

12. Personal violent victimization by maternal uncle

13. Sexually traumatic exposure, including possible sexual abuse by mother and placement in the care of a sex offender

14. Untreated Attention Deficit Hyperactivity Disorder:

15. Childhood psychological disorders

16. Academic failure and learning disabilities

17. Corruptive surrogate family and peers and adolescent onset alcohol and drug abuse

18. Institutional Neglect and inadequate interventions

19. Positive Character evidence by friends, fiancee

The jury never heard the vast majority of this evidence because defense counsel did not take reasonable steps to develop it, much less present it in a cogent manner. Mr. Raby's trial counsel made no attempt to conceptualize for the jury "mitigation" and "moral culpability." Moreover,

an expert could have explained that what is easy for many of us might have been harder for Mr. Raby and that it was therefore appropriate to take this reduced moral culpability into account in assessing his punishment. Devoid of this context, Mr. Raby's jury was left to assume that the purpose of the slight mitigation evidence presented was to invoke sympathy and excuse Mr. Raby from responsibility. The difference between moral culpability and criminal responsibility was particularly important given the State's emphasis on the "choices" that Mr. Raby made.[140]

Reasonable jurists could determine these underlying facts of Mr. Raby's ineffective assistance of counsel claims constitute extraordinary circumstances entitling him to relief from judgment and therefore a COA should issue.

c. Extraordinary nature of state habeas counsel's ineffectiveness for failing to raise these claims in Mr. Raby's initial state habeas application.

The District Court did not address the state habeas counsel's ineffectiveness. Reasonable jurists could debate whether these facts together with (1) the facts discussed above; (2) Mr. Raby's appeal to jurists to spur habeas counsel to do his job; and (3) Mr. Raby's attempt to raise this

[140] ROA.1560, 1562.

ineffectiveness claim since 2002, long before case law paved the way for it to be heard, comprise an extraordinary set of circumstances.

Mr. Raby's state habeas attorney, James F. Keegan, appointed by the Court of Criminal Appeals in January 1998, was not competent to handle a capital habeas corpus proceeding. Among other things, Mr. Raby's counsel did not investigate the grounds for Mr. Raby's extra-record claims. He ultimately filed a writ application that raised not a single issue extraneous to the record of Mr. Raby's trial.[141] Mr. Raby's state habeas counsel also failed to raise a constitutional challenge to trial counsel's proffer of Quijano, who labeled Mr. Raby alternately and synonymously as a psychopath, sociopath, and APD-individual and became an excellent witness for the state.

i. Failure to investigate before filing state habeas brief

Under Article 11.071 § 4(a) of the Texas Code of Criminal Procedure, Mr. Keegan had 180 days to investigate, prepare, and file the one-and-only state habeas application Mr. Raby was allowed as a matter of right under Texas law. However, Mr. Keegan's first contact with Mr. Raby was nearly a month after he was appointed, which Mr. Raby replied to within days asking him to visit in light of the short timeframe.[142] Mr. Keegan visited Mr. Raby

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[141] Mr. Raby's state habeas counsel's billed for $0 on an investigator or investigator travel, ROA.2015, and none of the narrative description of counsel's time indicates investigation of extra record claims, ROA.2017-23.

[142] ROA.2026, February 17, 1998 Letter from J. Keegan to C. Raby; ROA.2028-29,

a few weeks later and then sporadically, with the final meeting three days before the application was filed.[143] In total, Mr. Keegan's records show he visited Mr. Raby for *only* 3.3 hours.[144]

Mr. Keegan spent zero time investigating any extraneous issues, even after Mr. Raby informed him of numerous specific issues. Counsel's own records show no hours talking to witnesses or experts, and only about four hours talking to trial counsel or reviewing files.[145] Mr. Keegan refused to apply for an extension for a full factual investigation, even after Mr. Raby's friend's prompted him to do so with list of potential witnesses in hand.[146] At least twice Mr. Keegan expressed his opinion that a factual investigation was unnecessary because he believed Mr. Raby was guilty.[147]

ii. Inadequacy of the Writ Application

In spite of Mr. Raby's protests, Mr. Keegan filed a wholly inadequate state habeas application on July 16, 1998.[148] Of all 31 claims presented in

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February 20, 1998 Letter from C. Raby to J. Keegan.

[143] ROA.2015, 2018-19.

[144] ROA.2017-23.

[145] ROA.2017-23.

[146] ROA.2031-32.

[147] ROA.2034. Mr. Keegan later repeated the assertion to Mr. Raby's federal habeas counsel. ROA.1915, Response to Motion for Summary Judgment.

[148] ROA.2036-2095, Application for Writ of Habeas Corpus, Ex Parte Raby, No. 9407130 (248th Dist. Ct., Harris Cty., Tex. July 16, 1998).

the application,[149] none were cognizable in state habeas proceedings because they were or should have been raised on direct appeal or were not yet ripe.[150]

Disastrously, Mr. Keegan didn't reference *any* facts outside the trial record. The fundamental purpose of state habeas proceedings is to conduct an independent investigation of the offense and the trial process and to raise claims extrinsic to the record.[151] Since Mr. Keegan conducted *no* independent investigation he could not raise any extra-record claims. Nor did he move the court to take discovery, otherwise investigate, or even challenge the state's request for an order that Mr. Raby's trial and appellate counsel submit affidavits on the adequacy of their own representations. Even Mr. Keegan's reply to the state's response was likewise a paltry five pages confined to record issues, which he did not discuss with Mr. Raby.[152]

iii. Mr. Raby's Attempts to Obtain Competent Representation

Mr. Raby tried diligently, but ultimately futilely, to direct Mr. Keegan toward the numerous claims regarding ineffective assistance of counsel. When it became apparent that Mr. Keegan was not going to conduct any investigation, Mr. Raby persistently attempted to remove Mr. Keegan by complaining to his counsel, both directly and through a friend, and by

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[150] *See* ROA.1916, Response to Motion for Summary Judgment.
[151] ROA.2110.
[152] ROA.2114-15, November 15, 1999 Letter from J. Keegan to C. Raby.

complaining to the Court of Criminal Appeals.[153] Mr. Raby's complaints were ignored.

Mr. Keegan failed to forward both state filings and Mr. Keegan's own filings to Mr. Raby before filing,[154] and on several occasions refused to accept Mr. Raby's correspondence.[155] Mr. Raby communicated his difficulties with Mr. Keegan to officers of the court, including by copying the Harris County District Attorney's office on a certified letter to Mr. Keegan pleading with him to investigate—a letter which Mr. Keegan returned unopened.[156] Mr. Raby invited Mr. Keegan to withdraw if he would not investigate[157] and wrote to the Court of Criminal Appeals seeking appointment of new counsel.[158] Mr. Raby even sought to drop his appeals and receive an execution date for the sole purpose of obtaining an appearance in court so that he could voice his objections to his state habeas representation.[159] He never obtained that hearing.

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[153] ROA.1918-26, Response to Motion for Summary Judgment; ROA.2031-32.
[154] ROA.2114-15, November 15, 1999 Letter from Keegan to Raby. Mr. Raby responded to Mr. Keegan, noting numerous factual inaccuracies and false information in the state's answer that Mr. Raby wished to be addressed. ROA.2117-21, November 23, 1999 Letter from Raby to Keegan.
[155] ROA.1918-22, Response to Motion for Summary Judgment; *see also* ROA.2123, May 20, 2000 W. Robinson Notes.
[156] ROA.2125-29, April 5, 2000 Letter from C. Raby to J. Keegan, with copy to Harris County DA.
[157] ROA.2131-32, August 18, 2000 Letter from C. Raby to J. Keegan.
[158] ROA.2134-36, September 13, 2000 Letter from C. Raby to Judge McCormack.
[159] ROA.1925-26, Response to Motion for Summary Judgment; ROA.2138, October 22, 2000 Letter from C. Raby to J. Keegan; ROA.2140-43, November 4, 2000 Letter from

Mr. Keegan acknowledged the request to drop appeals and requested an independent competency examination,[160] but at that point, on January 31, 2000, the Court of Criminal Appeals denied Mr. Raby's writ application and adopted the trial court's statement of facts and conclusions of law, drafted by the state.[161]

Mr. Keegan's last act was to refuse to draft a petition for a writ of certiorari with the United States Supreme Court.[162] In the end, Mr. Keegan thwarted Mr. Raby's efforts to bring before the District Court the ineffective assistance of counsel claims presented here.

iv. Results of Counsel's Failures

Mr. Keegan failed to fulfill even his most basic duties to Mr. Raby—abiding by a client's decision concerning the objectives and general methods of investigation; keeping his client reasonably informed; and withdrawing when discharged with or without good cause.[163] Nor did Mr. Keegan fulfill his oblation to "investigate expeditiously ... the factual and legal grounds for the filing of" an Article 11.071 state application for Mr. Raby[164] since he failed to perform even a basic investigation of any significance. Most

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Raby to B. Benjet; ROA.2145, December 15, 2000 Letter from C. Raby to J. Keegan; ROA.2147-49, December 20, 2000 Letter from C. Raby to J. Keegan.
[160] ROA.2147-49, December 31, 2000 Letter from J. Keegan to C. Raby.
[161] ROA.867-68 (*Ex parte Raby*, No. 48131-01 (Tex. Crim. App. Jan. 31, 2001)).
[162] ROA.2153, February 12, 2001 Letter from Keegan to Raby.
[163] *See* Tex. Disciplinary R. Prof'l Conduct 1.02(a)(1); *id.* 1.03(a); *id.* 1.15(a)(3).
[164] Tex. Crim. Proc. Code art. 11.071, § 3(a).

significantly, he failed to raise the constitutional defect of Mr. Raby's own trial counsel's offer of Quijano as a witness and subsequent failure to limit, rebut, or contextualize his methodologically unsound, inflammatory testimony.

Mr. Keegan also should have known that "the Texas procedural system—as a matter of its structure, design, and operation—does not offer most defendants a meaningful opportunity to present a claim of ineffective assistance of trial counsel on direct appeal."[165] As a result, "[w]hen an attorney errs [by failing to include such a claim] in initial review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim."[166] This is exactly what transpired with Mr. Keegan's actions.

There was no tactical or strategic reason for state habeas counsel to refuse to investigate or to exclude these claims from Mr. Raby's initial state habeas application. His failure to do so rendered Mr. Raby's counsel in his state habeas proceedings—the only proceedings in which Mr. Raby's claims for ineffective assistance at the trial and sentencing phases could be heard following a Texas conviction— constitutionally deficient.

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[165] *Trevino*, 133 S. Ct. at 1921.
[166] *Martinez*, 566 U.S. at 10.

CONCLUSION

The District Court's opinion examined none of the facts detailed above in its opinion, and offered nothing but a two sentence "analysis" of its ruling that Mr. Raby's claims were not extraordinary. That court missed the significance of condemning a man to death because of the spurious theories of a charlatan. It found unremarkable the near total failure to develop and present mitigation evidence regarding a dire childhood, but also genuine attempts to begin life again with responsibility, sobriety, and love. Finally, it missed Mr. Raby's twenty-year long attempt to be heard on his trial counsel's effectiveness, in the face of habeas counsel who refused to raise his extra-legal claims and case law that, until very recently, provided no remedy for that refusal. Reasonable jurists would find that the District Court abused its discretion in failing to reopen judgment. The District Court should have allowed Mr. Raby to bring his claims for ineffective assistance of counsel at the punishment phase of his trial. Therefore, this Court should grant Mr. Raby a COA to appeal the District Court's denial of relief.

Respectfully submitted, this 2nd day of July, 2018.

Respectfully submitted,

/s/ Sarah M. Frazier

Kevin D. Mohr
State Bar No. 24002623
Federal I.D. No. 28140
Tracey M. Robertson
State Bar No. 00792805
Federal I.D. No. 26094
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 751-3200
(713) 751-3290 – Fax

Sarah M. Frazier
Texas Bar No. 24027320
Federal I.D. No. 27980
Berg & Androphy
3704 Travis Street
Houston, Texas 77002
Telephone: (713) 529-5622
Facsimile: (713) 529-3785
Attorneys for Petitioner Charles D. Raby

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of July, 2018, a true and correct copy of the foregoing pleading was served via PACER:

Fredericka Sargent
Assistant Attorney General
Criminal Appeals Division
P.O. Box 12548, Capitol Station
Austin, Texas 78711

/s/ Sarah M. Frazier
Attorney for Charles D. Raby

CERTIFICATE OF COMPLIANCE

Pursuant to the Fifth Cir. R. 32.2.7(c), the undersigned counsel certifies that this Motion for Certificate of Appealability complies with the type-volume limitations of 5th Cir. R. 32.2.7(b).

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/s/ Sarah M. Frazier