No. 18-9645

IN THE

Supreme Court of the United States

VICTOR J. BLACK,

Petitioner,

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This Court has repeatedly held that procedural rules governing the lower federal courts qualify as jurisdictional only if Congress makes them so. And, in *Gonzalez v. Thaler*, 565 U.S. 134 (2012), this Court determined that Congress created a single jurisdictional prerequisite as part of the certificate of appealability (COA) process: the requirement in 28 U.S.C. § 2253(c)(1) that a "circuit justice or judge [must] issue[] a certificate of appealability" before an appeal is taken from a final district court order denying relief in a habeas case.

Petitioner Victor Black satisfied § 2253(c)(1)'s jurisdictional requirement. In April 2017, Judge Costa of the United States Court of Appeals for the Fifth Circuit granted Mr. Black a COA with respect to "whether Black's claim that trial counsel used abusive and racially-charged language against him and threatened to sabotage his case if he did not accept the State's 10-year plea bargain was governed by *United States v. Cronic*, 466 U.S. 648 (1984)," and if so, whether an evidentiary hearing was warranted to determine if the claim was substantial enough to excuse its procedural default under *Martinez v. Ryan*, 566 U.S. 1, 14 (2012). *See* Order, 4/5/17.

The Fifth Circuit merits panel nonetheless concluded it lacked jurisdiction and vacated the COA. *See Black v. Davis*, 902 F.3d 541 (2018). It did so by applying longstanding Fifth Circuit precedent establishing the "district-court-first rule." Under that rule, a circuit judge has "no jurisdiction to issue a COA on an issue on which the district court did not deny a COA." *Id.* at 545. In the Fifth Circuit's view, that rule applied here because Mr. Black did not raise his Sixth Amendment claim as a *Cronic* argument in the district court, and the district court therefore did not address that issue when it denied a COA. *See id.* at 547.

But the district-court-first rule is not part of the COA statute enacted by Congress, and therefore it cannot be jurisdictional. Thus, as explained in Mr. Black's pro se certiorari petition, the decision below conflicts with *Gonzalez*. *See* Petition for Certiorari ("Pet.") at 5.[1] Judge King made a similar point in her concurring opinion, noting that the Fifth Circuit has "not grappled with the impact of *Gonzalez* . . . on our characterization of the district-court-first rule as jurisdictional," and that

[1] Since filing the petition, Mr. Black has retained undersigned counsel to represent him pro bono.

"*Gonzalez* seriously calls that holding into question." 902 F.3d at 548. In addition, the Fifth Circuit's treatment of the district-court-first rule as jurisdictional conflicts with the D.C. Circuit's decision in *United States v. Mitchell*, 216 F.3d 1126 (2000). *See* Pet. 9.

In its opposition, Texas cannot point to any statute creating the district-court-first rule. Texas, like the merits panel below, instead relies on Rule 11(a) of the Rules Governing Section 2254 Cases ("Habeas Rule 11(a)"). But Habeas Rule 11(a) does not require a district court to first deny a COA with respect to a specific issue before a circuit judge grants a COA on that issue. In any event, the Habeas Rules were not enacted by Congress, which means Habeas Rule 11(a) cannot establish any jurisdictional limitation on appellate review.

Texas devotes much of its opposition to two unrelated issues. First, Texas contends that Mr. Black failed to raise a *Cronic* argument in the district court. But the Fifth Circuit's error in treating the district-court-first rule as jurisdictional has nothing to do with whether Mr. Black raised a *Cronic* argument in the district court (which in fact he did).

Second, Texas argues that there is a different jurisdictional defect here, which was not identified by the Fifth Circuit. According to Texas,

the COA granted by Judge Costa allowed Mr. Black to litigate a "new constitutional claim," which constituted an unauthorized second or successive habeas petition. Brief in Opposition ("Opp.") at 11. That is incorrect. In his habeas petition, Mr. Black claimed that he was denied his Sixth Amendment right to counsel when trial counsel used racial epithets against him and threatened to sabotage his case because he did not accept a plea. The COA granted by Judge Costa did not permit Mr. Black to add a new constitutional claim; it simply asked whether the claim he pleaded should be governed by *Cronic*.

The decision below conflicts with the precedent of this Court and that of another circuit on an important issue of federal law. This case presents an excellent vehicle for resolving those conflicts, and this Court should therefore grant certiorari. *See* Sup. Ct. R. 10(a), (c).

ARGUMENT

I. This Court Should Grant Certiorari to Address the Fifth Circuit's Continued Treatment of the District-Court-First Rule as Jurisdictional.

In recent years, this Court has "endeavored . . . 'to bring some discipline' to the use of the term 'jurisdictional.'" *Gonzalez*, 565 U.S. at 141 (quoting *Henderson v. Shineski*, 562 U.S. 428, 435 (2011)).

Previously, this Court and lower courts had been "less than meticulous," *Kontrick v. Ryan*, 504 U.S. 443, 454 (2004), and even "profligate" in using that term, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006). But in a series of decisions since *Kontrick*, this Court has "pressed a stricter distinction between truly jurisdictional rules, which govern 'a court's adjudicatory authority,' and nonjurisdictional 'claim-processing rules,' which do not.'" *Gonzalez*, 565 U.S. at 141 (quoting *Kontrick*, 540 U.S. at 454-55).

Specifically, the Court has created a "rule of decision . . . [that] is both clear and easy to apply": a procedural rule governing lower courts' adjudicatory authority counts as jurisdictional only if it is enacted by Congress. *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20 (2017). For rules other than time limitations, the Court has "additionally applied a clear-statement rule: 'A rule is jurisdictional if the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Id.* at 20 n.9 (quoting *Gonzalez*, 565 U.S. at 141) (additional citation, quotation marks, and alteration omitted).

In *Gonzalez*, the Court applied these principles to the COA requirement in habeas cases. *Gonzalez* held that Congress enacted only

one jurisdictional requirement as part of the COA statute: the requirement in § 2253(c)(1) that a judge issue a certificate of appealability for a petitioner to appeal a final order denying habeas relief. *See* 565 U.S. at 142-43. The Court explained that this is the only provision of the COA statute including clear language showing Congress's intent to restrict a court's jurisdiction. *See id.* By contrast, § 2253(c)(2), which requires a petitioner to make a "substantial showing of the denial of a constitutional right," and § 2253(c)(3), which requires a COA to "indicate [the] specific [constitutional] issue or issues" on which the COA is being granted, are not jurisdictional. 565 U.S. at 143.

Gonzalez is controlling here. Mr. Black satisfied the sole jurisdictional requirement in § 2253(c), i.e., the requirement in § 2253(c)(1) that a federal judge issue a COA. Once Judge Costa issued a COA, there was no basis for the Fifth Circuit panel to decide that it lacked jurisdiction under the COA statute. *See Gonzalez*, 565 U.S. at 144 (emphasizing that, in § 2253(c)(1), "Congress specifically empowered one court of appeals judge to grant" a COA).

In the decision below, the Fifth Circuit majority did not address *Gonzalez*. Nor did it suggest there is any statutory basis for

characterizing the district-court-first rule as jurisdictional. Instead, the Fifth Circuit—relying on circuit case law dating back to the period when courts were "less than meticulous" in using the term jurisdictional—found support for its rule in the language of Habeas Rule 11(a). *See* 902 F.3d at 544-45. In its opposition, Texas echoes that approach, asserting that the district-court-first rule finds a "textual anchor[] in Habeas Rule 11(a)." Opp. 14.

But requirements established by federal court rules—including by rules adopted under the Rules Enabling Act such as the Habeas Rules—are not jurisdictional unless the requirement is also found in a statute enacted by Congress. *See, e.g., Hamer*, 138 S. Ct. at 17, 21; *Bowles v. Russell*, 551 U.S. 205, 211 (2007). Texas fails to acknowledge this fundamental principle, arguing it applies only to rules involving time limitations. *See* Opp. 16-19. *Hamer*, however, holds precisely the opposite, explaining that procedural rules other than time limitations must satisfy an additional "clear-statement rule" to be deemed jurisdictional. 138 S. Ct. at 20 n.9.

Nor does Texas address the basic separation-of-powers principle at issue here: "'Only Congress may determine a lower federal court's

subject-matter jurisdiction.'" *Hamer*, 138 S. Ct. at 17 (quoting *Kontrick*, 540 U.S. at 452). Because of this principle, a court may not "'by rule . . . extend or restrict the jurisdiction conferred by a statute.'" *Id.* (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941)); *see also id.* ("'It is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction.'") (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365 (1978)) (alteration omitted).

Texas seeks to analogize this case to *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), which treated as jurisdictional the requirement in Federal Rule of Appellate Procedure 3(c) that a notice of appeal name the party or parties taking the appeal. But *Torres* was premised on the Court's understanding that this rule was "'imposed by the legislature,'" because excusing the failure to name the party appealing would be equivalent to extending the time for filing a notice of appeal. *Gonzalez*, 565 U.S. at 147 (quoting *Torres*, 487 U.S. at 318). And the time for filing a notice of appeal is jurisdictional when the "relevant time prescription" appears in "the U.S. Code." *Hamer*, 138 S. Ct. at 21.

Unlike the rule at issue in *Torres*, the district-court-first rule is not "imposed by the legislature." Nothing in the COA statute requires, or

even suggests, that a district court judge must first deny a COA with respect to a specific issue before a circuit court judge grants a COA on that issue. Nor is the district-court-first rule necessary for the "transfer of adjudicatory authority to the circuit court," as Texas contends. Opp. 15. Instead, all that is required for the transfer of such adjudicatory authority is what § 2253(c)(1) actually says: a final order of the district court and the grant of a COA by a circuit justice or judge.

Finally, even if Habeas Rule 11(a) were part of the U.S. Code, the decision below would still be inconsistent with *Gonzalez*. *Gonzalez* held that § 2253(c)(3) was not jurisdictional because, even though it mandates that a judge indicate a specific issue or issues on which a COA is granted, Congress did not clearly state that it intended for this "threshold condition" to be jurisdictional. 565 U.S. at 143. That ruling applies *a fortiori* here. Habeas Rule 11(a) states that "a district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant," *not* that a district court must deny a COA on a specific issue before a court of appeals judge can grant a COA on that issue. It certainly does not "'clearly state[]'" any such rule, much less does it do so in jurisdictional terms. *Gonzalez*, 565 U.S. at 141 (citation omitted).

The decision below is not only inconsistent with this Court's precedent, it is also inconsistent with *United States v. Mitchell*, 216 F.3d 1126 (D.C. Cir. 2000). In *Mitchell*, the district court did not rule on whether a COA should be granted at all before the habeas petitioner appealed. *See id.* at 1129. Yet, even though the lack of any district court COA ruling clearly violated the relevant federal rule (then Federal Rule of Appellate Procedure 22(a), now Habeas Rule 11(a)), the D.C. Circuit held that the defect was *not* jurisdictional and proceeded to grant a COA itself. *See id.* at 1130. Mr. Black pointed to *Mitchell* in his petition, *see* Pet. 9, but Texas does not address it.

This Court should review the decision below because it conflicts with this Court's precedent and with the precedent of another circuit with respect to an important issue of federal law. *See* Sup. Ct. R. 10(a), (c). Reflecting the importance of this issue, this Court has repeatedly granted certiorari in cases since *Kontrick* to correct lower courts' "less than meticulous" treatment of non-jurisdictional requirements as jurisdictional. *See, e.g., Hamer*, 138 S. Ct. at 17 & 20 n.9 (identifying numerous cases). And certiorari is particularly important here because this case represents another example, albeit it in a different context, of

the Fifth Circuit applying an unduly restrictive approach to the COA inquiry. *See Buck v. Davis*, 137 S. Ct. 759, 774 (2017); *Miller-El v. Cockrell*, 537 U.S. 322, 336-37 (2003). In so doing, the Fifth Circuit continues to transform what is designed as a threshold screening device into a much more complicated inquiry, thereby causing unnecessary delay and preventing full consideration of potentially meritorious habeas appeals. *See Gonzalez*, 565 U.S. at 145.

II. This Case Presents the Right Vehicle for Addressing the Fifth Circuit's District-Court-First Rule.

Texas contends this case is a poor vehicle to address the Fifth Circuit's district-court-first rule because there is an additional jurisdictional defect here. In its view, the COA granted by Judge Costa would allow Mr. Black to raise a "new constitutional claim" after the district court denied his habeas petition. Opp. 11. And, according to Texas, such a new constitutional claim would be jurisdictionally barred because Mr. Black did not first obtain permission from the Court of Appeals to file a second or successive habeas petition. *See id.*

The short answer to Texas's argument is that the COA granted by Judge Costa did not permit Mr. Black to raise a new constitutional claim. The only constitutional claim at issue here is one that Mr. Black raised

in his habeas petition and supported with specific allegations, i.e., Mr. Black's claim that his Sixth Amendment right to counsel was violated because trial counsel directed racial slurs against him and threatened to sabotage his case if he did not accept a plea. ROA339; ROA198-201, 259.

The COA simply asks whether this claim should be governed by *Cronic*. Even if Mr. Black had not raised a *Cronic* argument in the district court, the legal question of whether *Cronic* governs does not involve a "new constitutional claim," and Mr. Black would not have to amend his habeas petition to raise this argument. *See generally Bell v. Cone*, 535 U.S. 685, 688 (2002) (addressing whether a habeas petitioner's "*claim* was governed by" *Cronic* or *Strickland v. Washington*, 466 U.S. 668 (1984)) (emphasis added); *accord id.* at 697 n.4, 698. Indeed, under ordinary Fifth Circuit precedent, "'[a]n issue raised for the first time on appeal'" is properly considered when, as here, "'it involves a purely legal question'" (or when the "'failure to consider it would result in a miscarriage of justice'"). *Ekhlassi v. Nat'l Lloyds Ins. Co.*, 926 F.3d 130, 138 (5th Cir. 2019) (citation omitted).[2]

[2] Further, unlike the petitioner in *Phillips v. United States*, 668 F.3d 433, 434 (7th Cir. 2012), Mr. Black is not seeking to present new evidence after the district court denied habeas relief.

But, if Petitioner's *Cronic* argument did raise a new constitutional claim (and it does not), that would provide an additional reason for granting certiorari. As Texas acknowledges, there is a clear circuit split as to whether the filing of a new claim in a habeas case pending appeal constitutes a second or successive petition. *See* Opp. 9-10 & n.7; *see also, e.g., United States v. Santarelli*, 929 F.3d 95, 104-05 (3d Cir. 2019) (filing a new claim pending appeal does not constitute a second or successive petition because it occurs before the petitioner exhausted one full round of federal collateral review). The question presented in Mr. Black's certiorari petition, i.e., whether the "Fifth Circuit had jurisdiction to adjudicate Petitioner's appeal," would allow this Court to resolve this additional circuit split as well.

Finally, Texas's argument that Mr. Black did not raise a *Cronic* argument in the District Court, *see* Opp. 5-6, is both irrelevant and incorrect. The Fifth Circuit erred in treating the district-court-first rule as jurisdictional because Congress did not create any such jurisdictional rule. This has nothing to do with whether Mr. Black raised a *Cronic* argument in the district court.

In any event, Mr. Black did raise that argument. Although Mr. Black did not cite *Cronic* in the district court, he relied heavily upon the Ninth Circuit's decision in *United States v. Frazer*, 18 F.3d 778 (9th Cir. 1994). ROA 259, 278-79. In *Frazer*, the Ninth Circuit addressed a case involving materially identical facts as this one, i.e., a lawyer who directed racial slurs toward his client and threatened to sabotage his case if he did not accept a plea. *See* 18 F.3d at 780. The Ninth Circuit held that, on such facts, *Cronic* applied. *See id*. at 785.

In the decision below, the Fifth Circuit dismissed Mr. Black's reliance on *Frazer* by stating that "Black cited *Frazer* to support his claim that counsel performed with a conflict of interest." 902 F.3d at 547. But *Frazer* was decided under *Cronic*, and Mr. Black simply quoted one portion of *Frazer* describing the particularly egregious "conflict of interest" that occurs when defense counsel effectively acts on behalf of the prosecution. ROA278. Mr. Black also quoted extensively from other portions *Frazer*, which explain why the Sixth Amendment is violated when trial counsel "'explicitly assaults his client with racial slurs and makes threatening and improper statements to the client.'" ROA279. In an earlier portion of the same pleading, Mr. Black relied on *Frazer* to

argue that such conduct requires relief because it leads to a total breakdown in attorney-client communication precluding a constitutionally adequate defense, without making any reference to a conflict of interest. ROA259. Particularly given the liberal construction accorded pro se filings, Mr. Black adequately raised a *Cronic* argument in the district court.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted,

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