

No. 18-9645

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IN THE SUPREME COURT of the UNITED STATES

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VICTOR J. BLACK  
Petitioner

v.

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

Respondent

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ON PETITION FOR REHEARING  
Writ of Certiorari To the Supreme Court

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REHEARING BRIEF FOR PETITIONER

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Victor J. Black  
Appellant - Pro Se  
Pack Unit  
2400 Wallace Pack Rd.  
Navasota, Texas 77868

CERTIFICATE of INTERESTED PERSONS

Petitioner, appearing Pro Se, certifies that the following listed persons and entities as described in Rule 44 of the Rules of the Court have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible Rehearing.

Petitioner is unaware of any other persons with an interest in this brief.

PETITIONER-APPELLANT: Victor J. Black

RESPONDENT-APPELLEE : Lorie Davis, Director  
Texas Department of Criminal Justice  
Correctional Institutions Division

COUNSEL for Respondent-Appellee: Mr. Hawkins  
Assistant Attorney General

Respectfully Submitted,

Victor J. Black

Victor J. Black  
TDC#1686499

STATEMENT OF NECESSITY OF REHEARING

Petitioner believes that this proceeding involves the following questions of exceptional importance that must be considered by the Court to ensure uniformity and compliance with Supreme Court precedent:

1. Did the 5th Cir. Panel contravene Supreme Court precedent by vacating the COA. Dismissed Without Prejudice For Lack of Jurisdiction on appeal based on the Court's characterization of the district-court-first rule as jurisdictional?

The Panel's decision conflicts with the following decision of the Supreme Court precedent: *Gonzalez v. Thaler*, 565 U.S. 134(2012)

Considerations by the Court is necessary to resolve the exceptionally important questions and to secure and maintain the conformity of the Court's decisions nad compliance with controlling Supreme Court law.

STATEMENT OF ISSUES MERITING REHEARING

1. Did the 5th Cir. Panel contravene Supreme Court precedent by vatating the COA that a Circuit Judge granted and dismissed Petitioner's appeal based on the Court's characterization of the district-court-first rule as jurisdictional?

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STATEMENT OF PROCEEDINGS and DISPOSITION OF THE CASE

In 2010, Victor Black was sentenced to 60 years of confinement. ROA 1024-45. At the penalty phase, on the Record, Black accused trial counsel of having called him a "racist", "motherfucker", "a nigger", and "a crack head". Trial counsel did not deny these allegations. ROA, 924-26.

Black filed an application under 28 U.S.C. 2254 in January 2014. A month later he filed a motion to stay and amend his petition to exhaust and added the claims presented in his third State Habeas Application. The magistrate judge granted Black's motion to stay in October 2014. ROA 225-27. When the court lifted his stay in January 2015, Black, as a Pro Se litigant, devoted thirty (30) pages of his amended brief, raising a 6th Amendment Claim against trial counsel. ROA 252-282.

In October 2015, the magistrate judge recommended denying his claim as conclusory, meritless and procedurally-barred. ROA 404-427. She analyzed his ineffective-assistance-of-counsel claim under *Strickland* and *Cuyler*. Incorrect Standard of Review.

Black filed objections and made non-specific (general) request for a COA at the end of his objections. ROA, 435-48. The District Court adopted the magistrate's recommendations and issued a blanket denial of a COA.

Among Black's claims that were before the District Court was that trial counsel's racial bias and conflicting interests rendered counsel's representation unreasonable and deficient. He described that claims as being governed by *Strickland v. Washington*, 466 U.S. 668(1984) and alternatively, by *Cuyler v. Sullivan*, 466 U.S. 335(1980) which the District Court applied the incorrect standard. Black did not cite a key Supreme Court decision, *United States v. Cronic*, 466 U.S. 684(1984). In support of this claim, Black filed his own affidavit detailing how trial counsel threatened him that if he did not take the 10 year plea bargain and made him try the case, that he would "mess over" him. Black also asserted how trial counsel called him racial slur's such as "Nigger", see (DKT. No. 9, 41, 51-52, 59), filed in the district court. Black filed his notice of appeal in February of 2016. ROA, 278. In seeking COA from the 5th Cir. Black did not request one on an issue of whether his claim was governed by *Cronic*. Petitioner's Br. in support of COA, Black v. Stephens, No. 16-10159(5th Cir. March 24, 2016).

In April 2017, a circuit judge of the 5th Cir. denied Black a COA on seven claims, however, in that same order Black was granted a COA on two issues:

(1) whether 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 **Cronic**, and if so, (2) whether he was entitled to an evidentiary hearing on this claim to determine whether it was substantial enough to excuse the procedural default under **Martinez v. Ryan**, 566 U.S. 1, 14(2012) (Order): see 28 U.S.C. 2253, which is known to the Supreme Court.

Black briefed the two issues of the COA. The State responded by briefing the two issues of the COA and challenging the validity of the COA, Black attempted to reply to every argument the State raised that was outside the scope of the COA, within the 15 page limit he was allowed. On September 5, 2018, the Fifth Circuit Panel announced its decision vacating the COA and dismissing Black's appeal, without prejudice, for lack of appellate jurisdiction. Should have remanded back to the District Court to apply the correct standard and have trial counsel do an affidavit to allegations.

#### STATEMENT OF FACTS

In 2010, Black proceeded to a jury trial with a court appointed attorney whom Black stated on the record, had called him a "Racist...Motherfucker, nigger, [and] crackhead". ROA, 924-26. Black filed multiple motions and letters to the trial court. Black asserted that trial counsel was very abusive, he lies, "no communicating with me". ROA, 474-83. Black was convicted as charged in the indictment and sentenced by the trial court to (60) years [TDC].

"Racial Bias" Trial Attorney

#### ARGUMENT

One Senior Circuit Judge of the 5th Cir. and the Panel in Black's case although concurring in the judgement, stated, "Our case law has not grappled with the impact of **Gonzalez v. Thaler**, 565 U.S. 134(2012). Our characterization of the district-court-first rule as jurisdictional. In my view, the Supreme Court's opinion in **Gonzalez** seriously call that holding into question. Nonetheless, we are bound by the rulings of previous post **Gonzalez** panels to continue to apply our existing case law". King, Circuit Judge, concurring on Pg. 11. If the fact that a circuit judge determined that a COA is warranted in Black's case and resources were deployed in briefing and argument and the Supreme Court has held that under these set of facts, "the COA has fulfilled its gate keeping function".

function", and yet this Court vacates the COA and dismisses the appeal under a non-jurisdictional rule, then **Gonzalez** and 28 U.S.C. 2253(c)(1) have no meaning. 5th Cir. Panel's decision is patently incorrect and was reached through a wholesale failure to engage with the fact that 2253(c)(1) contains jurisdictional terms.

The Panel vacated the COA the COA and dismissed the appeal, reasoning that "granting a" COA in the 5th Cir. on issues not previously denied COA in the District Court is beyond our jurisdiction". Panel Op. at 6. Also, "this court has no jurisdiction to issue a COA on an issue on which the district court did not deny a COA by error. The Court has the power now to "bring some discipline" to the use of the term "jurisdictional" as the Supreme court has. **Gonzalez**, 656 U.S. 134(2012), which governs a court's adjudicatory authority "and nonjurisdictional" claim processing rules" which do not.

This Court has previously ruled that "No authority need to be cited for the rule that we, not the parties, select the appropriate standard of review including whether an issue will even be addressed if not raised in "District Court". The 5th Cir. Panel's opinion noted that Black had been granted a COA on whether his claim "was governed by Cronic". Rehearing is appropriate in light of the circumstances of facts in Black's case.

### I. The Impact of **Gonzalez v. Thaler**

In **Gonzalez** the Supreme Court 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". **Gonzalez**, 565 U.S. at 141. In **Gonzalez** the court of appeal's judge granted a COA that identified a debatable procedural ruling, but did not indicate the issue on which **Gonzalez** had made a substantial showing, as required by 28 U.S.C. 2253(c)(1).

The question was whether that defect deprived the court of appeals of the power to adjudicate **Gonzalez**'s appeal. The Court concluded that it did not.

28 U.S.C. 2253(c), which provides: (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals.

The Court stated the "only clear jurisdictional language in 2253(c) appears in 2253(c)(1) In **Miller-EL v. Cockrell**, 123 S.Ct. 1029(2003), plain terms "Unless a circuit justice or judge issues a certificate of appealability an appeal may not be taken to the Court of Appeals. The parties in **Gonzalez** agreed

that 2253(c)(1) is jurisdictional.

That inquiry would be largely duplicative of the merits questions before the Court. In *Gonzalez*, the Court explained that it followed 2253(c)(1), (c)(2). It does "not speak in jurisdictional terms or refer in any way to the jurisdictional the appeal court". *Arbaugh v. Y H Corp.*, 546 U.S. 500, 515(2006).

The Court went on to explain that a "defective COA is not equivalent to the lack of any COA". Congress places the power to issue COA's in the hands of a "circuit justice or judge". It would seem somewhat counterintuitive to render a panel of Court of Appeal's judges powerless to act on appeals based on COA's that Congress specifically empowered one court of appeals judge to grant.

Once a judge has made the determination that a COA is warranted and resources are deployed in briefing and argument, however, the COA has fulfilled that gate keeping function". *Gonzalez*, 565 U.S. 134(2012).

a. The rules where the Court derives it's existing caselaw of the district court-first-rule as jurisdictional are nonjurisdictional rules.

Whether the prior district court "consideration" requirement is jurisdictional is not the open-and-shut case the Panel makes it out to be. The Supreme Court requires that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the Applicant. The language of jurisdiction, however, did quickly find it's way into the Court's jurisprudence on this issue, district court dismissed the prisoner's application for failure to exhaust state remedies and denied his request for a COA. The Court reversed the holding that he failed to exhaust his state claim, and the Court remanded for consideration on the merits, observing that the Court had Appellate Jurisdiction.

The Panel reads these cases as unequivocal declarations that prior district court COA determination is a jurisdictional requirement. But, it makes the COA requirement of 28 U.S.C. 2253(c) that is jurisdictional. 2253(c)(1) is a jurisdictional statute that speaks to the power of the court rather than to the rights or obligations of the parties. It is this Court's responsibility to say what a statute means and once the Court has spoken, it is the duty of other courts to respect that understanding of the rule of law.

b. The Supreme Court's opinion in *Gonzalez* seriously calls into question the ruling of the post *Gonzalez* panel in Black's case that applied the Court's existing case law.

The Court asks question of "whether it matters that the district court denied a COA without identifying any issues". The Court assumes and holds "that the court denied a COA for each issue Black presented in his application. The Court states "when District Court sua sponte denies a COA without indicating the specific issues, we have treated each of the issues raised in the petition as included within the denial.

Because the district court denied Black a COA in general terms, "If we conclude that the District Court denial did not encompass the specific issues on which a COA was granted by the 5th Cir. Judge, ABEL ACOSTA, are the Supreme Court also without jurisdiction to grant a COA on such issues? NO.

Black, "having successfully obtained a COA, has no control over how the judge drafts a COA". The circuit judge screenout "issues unworthy of judicial time and attention" to ensure "that frivolous claims" were not assigned to the merit panel. See Gonzalez.

When Black was granted a COA, the judge's issuance of a COA reflected his judgement that the appeal should proceed and supplied "the State with notice that the habeas litigation will continue". Gonzalez, 565 U.S. at 148. The State did not show interest or concern towards the validity of the COA until it had time to review Black's brief in support of his issues granted COA by the Circuit Judge. The State then responded, and in return, Black replied.

#### CONCLUSION

Mr. Black respectfully asks and prays that this Court remand back with instructions to the 5th Cir. adjudicate the Appeal on the merits in the form of Rehearing.

Respectfully Submitted,  
Victor J. Black  
Victor J. Black

#### DECLARATION & CERTIFICATE OF SERVICE

I, Victor J. Black, TDCJ#1686499, am presently in custody at the Pack Unit, 2400 Wallace Pack Rd., Navasota, Texas 77868, in Grimes County, Texas, do swear under penalty of perjury that the facts stated in this petition are both true and correct to the best of my knowledge and that I mailed a copy of the foregoing Petition for Rehearing to Supreme Court By U.S. Mail, first-class postage prepaid to Washington D.C. on the 14<sup>th</sup> day of February, 2020.

Victor Black

Victor J. Black  
TDC#1686499  
Pack Unit  
2400 Wallace Pack Rd.  
Navasota, Texas 77868

CERTIFICATE OF COMPLIANCE

I, Victor J. Black, TDC#1686499, do swear under penalty of perjury that the petition is in compliance with Rule 44 of this Court and to the best of my knowledge and ability if the Court so allows, in the event that he has slightly erred.

EXECUTED ON THIS 14<sup>th</sup> DAY OF February, 2020.

Victor J. Black  
Victor J. Black