No. 18-9676

In the Supreme Court of the United States
October Term, 2018

RANDY ETHAN HALPRIN,
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

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REPLY BRIEF OF PETITIONER

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REASONS FOR GRANTING THE WRIT

Petitioner Randy Halprin has been denied the ability to challenge his capital murder conviction and death sentence in an ordinary appeal before a federal court vested with appellate jurisdiction. The reason is simple: the Fifth Circuit applied a plainly incorrect interpretation of the certificate of appealability standard (COA) to Mr. Halprin's claims.

Respondent's brief in opposition (BIO) does not provide good reasons to deny the writ; in fact, it furnishes further proof that this Court's review is necessary to eradicate persistent misapplications of the COA standard in the circuit with the greatest number of executions.[1]

Two important updates merit attention. First, on July 3, a Dallas County district court ordered that Petitioner's execution be set for October 10, 2019—just nine days after this Court conferences the petition. Respondent, who responded 12 days after the date-setting order, neglected to mention this significant development.

Second, on July 19, Petitioner moved for authorization to file a successive application with the Texas Court of Criminal Appeals to present two claims, including a judicial bias claim regarding trial judge Vickers Cunningham based on newly discovered evidence. *See* Docket, *Ex parte Halprin*, No. WR-77,175-05 (Tex. Crim. App. July 19, 2019), http://www.search.txcourts.gov/Case.aspx?cn=WR-77,175-05&coa=coscca. The judicial bias

[1] Since 1976, Texas alone has executed 564 of the 1503 prisoners executed nationwide. With Mississippi and Louisiana, the total rises to 613. Between January 2015 and August 27, 2019, Texas has been responsible for over 40% (44/109) of executions in the United States. *See* Death Penalty Information Center, *Execution Database*, https://deathpenaltyinfo.org/executions/execution-database (last visited August 27, 2019) (filtering by state and year). *See also* Carol S. Steiker & Jordan M. Steiker, *Courting Death: The Supreme Court and Capital Punishment* 138 (2016) (attributing Texas's comparatively high rate of execution to, *inter alia*, differences in scope of federal court review, including fact that "courts within the Fifth Circuit are less likely than courts in most other circuits to authorize full appeals of capital claims denied in federal district court").

claim is essentially the same as the one Petitioner raised in federal court in a petition for writ of habeas corpus on May 17, 2019. *See* Pet. 11 n.5.

A. REVIEW IS NECESSARY TO CORRECT THE FIFTH CIRCUIT'S SEVERE MISAPPLICATION OF THE COA STANDARD.

Petitioner has shown that his case exhibits the same problems this Court had previously identified and rejected in the Fifth Circuit's COA practice. Petition for Writ of Certiorari (Pet.) 15, 21-22, 28. Respondent does not dispute the "Fifth Circuit's past errors" or even the circuit's *current* anomalous procedures following *Buck v. Davis*, 137 S. Ct. 759 (2017). BIO 14. Respondent contends, instead, that the "too thorough" COA review, for which this Court has criticized the Fifth Circuit in the past, has nothing to do with the "not thorough enough" analysis in the decision below. BIO 12.

The distinction is specious. This Court has repeatedly identified both problems running together. For example, in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), the Fifth Circuit simultaneously "put a dismissive and strained interpretation" on key evidence ("not thorough enough") and reached a merits-like decision out of keeping with the COA standard ("too thorough"). *Id.* at 344, 348; Pet. 35. In *Buck*, the Fifth Circuit ignored the most compelling fact in Buck's case—defense-elicited race-based testimony—in rendering a merits-based COA denial. 137 S. Ct. at 778; Pet. 36. The decision below exhibits the same problems. The court of appeals reached well beyond its threshold inquiry, issued a lengthy published opinion ("too thorough"), but overlooked key arguments and facts presented to the court ("not thorough enough").

Shorn of this distinction, Respondent cannot dispute Mr. Halprin's case bears the imprint of the Fifth Circuit's historical failure to comply with COA rules and is representative of the Fifth Circuit's present COA practice, too. *See* Pet. 30-32. Respondent does not dispute that the

Fifth Circuit grants COAs to capital § 2254 petitioners at far lower rates than any other circuit—as the federal judiciary's own statistics show. *See* Pet. 34-35; App. F.

Respondent calls this Court's attention to "all that briefing" at the COA stage in order to distinguish this case from "the Fifth Circuit's past errors and procedures in cases not [Petitioner's] own." BIO 13-14. But the argument does just the opposite. In *Buck*, the "State defend[ed] the Fifth Circuit's approach by arguing that the court's consideration of an application for a COA is often quite thorough," and pointed to the hundreds of pages of briefing the court received in a COA case. 137 S. Ct. at 774. This Court found the argument "hurts rather than helps the State's case." *Ibid*. Respondent's resurrection of that rejected argument illustrates that merits-cum-COA-review is an entrenched problem and continues to demand parties follow practices and procedures that deviate from the clear text of the statute, Congress's intent, and this Court's holdings. *See* Pet. 32-33.

Respondent perpetuates already-rejected arguments not just before this Court. For example, in a recent filing in a federal district court in Texas, Respondent insisted that even when the Fifth Circuit denies a COA, an "alternative holding" issued "in *support* of the district court's decision to *deny* … habeas relief" is binding precedent. Reply to Pet'r's Resp. Suppl. Auth., *Green v. Davis*, No. 4:13-cv-1899, ECF No. 168 (S.D. Tex. Aug. 8, 2019) (emphasis in original) (citing *Gonzales v. Davis*, 924 F.3d 226 (5th Cir. 2019)). Rather than allow district courts to accept the limitations on appellate jurisdiction recognized in *Miller-El* and *Buck*, Respondent insists that once "the Fifth Circuit's mandate has issued … there is … but one court that" can clarify the scope of a decision "and it is *the Supreme* Court." *Id.* at 2 (emphasis in original). Respondent's repetition here and elsewhere of arguments repudiated in *Buck* demonstrate the need for this Court's further intervention.

B. THERE ARE NO VEHICLE PROBLEMS WITH PETITIONER'S MISCARRIAGE-OF-JUSTICE QUESTION PRESENTED.

This Court can and should review the first question presented. Respondent argues that the Fifth Circuit's COA denial of Mr. Halprin's *Enmund/Tison*[2] claim on procedural grounds was correct, because Petitioner waived his innocence of the death penalty argument by failing to raise it in the district court. BIO 14-15. There are at least two fatal problems with this waiver argument.

First, the Fifth Circuit's own rules allow the appellate court to review even a waived question of law if failing to do so would amount to a "miscarriage of justice." *See, e.g.*, *In re Goff*, 812 F.2d 931, 933 (5th Cir. 1987); *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1364 (5th Cir. 1983). Self-evidently, failing to review a potentially meritorious "miscarriage of justice" exception to the procedural default doctrine could be a miscarriage of justice. Thus, it would have been consistent with Fifth Circuit precedent to have granted the COA on Petitioner's substantial constitutional issue because the procedural default ruling "deserved encouragement to proceed further." *See Miller-El*, 537 U.S. at 335.

Second, although Respondent made the same waiver argument below, Resp't's Opp. to COA at 43, the Fifth Circuit did in fact reach the miscarriage-of-justice argument Petitioner made in his COA motion. Together, the Fifth Circuit rule and Respondent's argument show the Fifth Circuit was well aware that it could reach the issue on appeal (even if it improperly made that ruling at the threshold COA stage). Because Petitioner squarely presented this legal issue to the Fifth Circuit and the Fifth Circuit squarely answered it on the merits, the court's decision is a good vehicle for this Court to correct the Fifth Circuit.

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[2] *Enmund v. Florida*, 458 U.S. 782 (1982); *Tison v. Arizona*, 481 U.S. 137 (1987).

C. RESPONDENT'S MERITS-BASED RESPONSE ON THE MISCARRIAGE-OF-JUSTICE QUESTION PRESENTED ONLY UNDERSCORES THE NEED FOR REVIEW AND A COA.

In addition, Respondent disputes the merit of the *Sawyer*[3] miscarriage-of-justice issue and the underlying merit of Petitioner's *Enmund*/*Tison* claim. But Respondent's BIO raises more questions than it answers.

Concerning *Sawyer*, Respondent defends the Fifth Circuit's conclusory *procedural* holding that Petitioner "has not demonstrated that a failure to address his claim will result in a fundamental miscarriage of justice." BIO 15-17. Respondent's BIO hypothesizes that the *Sawyer* innocence-of-the-death-penalty exception is limited to constitutional errors that "preclude[] the development of true facts" or "result[] in the admission of false ones." BIO 17 (quoting *Smith v. Murray*, 477 U.S. 527, 538 (1986)). That rule would "*typically*" exclude *Enmund/Tison* eligibility from *Sawyer*'s ambit. *Ibid.* If that theory is correct, then the Fourth and Eighth Circuits, which review *Enmund/Tison* ineligibility to be executed claims under the miscarriage of justice exception, must be wrong. *See* Pet. 19. Yet the BIO simultaneously defends the Eighth and Fourth Circuit's approaches. BIO 16. The BIO's internally contradictory method of analyzing *Sawyer* tends to show why the issue is debatable and an ordinary appeal is required.

Respondent also makes a lengthy argument on the merits concerning Petitioner's underlying *Enmund/Tison* claim. BIO 18-23.

As an initial matter, Petitioner did not "overlook[]" his burden to address the merits under the COA standard, as Respondent accuses. BIO 18. Petitioner addressed the matter at length in the Fifth Circuit. *See* Mot. for COA 45-54. And Petitioner's third question presented before this Court raises the debatability of the Fifth Circuit's merits-focused analysis of the *Enmund/Tison*

[3] *Sawyer v. Whitley*, 505 U.S. 333 (1992).

claim under 28 U.S.C. § 2254(d). *See* Pet. 20-25. In any case, as a court of review, not first view, this Court has the power to vacate the denial of a COA and remand for further consideration on the first question presented, even if it does not address the third question. *See Tharpe v. Sellers*, 138 S. Ct. 545, 546-47 (2018) (GVR'ing court of appeals' denial of COA "for further consideration of the question whether Tharpe is entitled to a COA").

On the merits, Petitioner has shown debatable grounds for relief, and, under the standard set by this Court, it warrants an appeal. *See Miller-El*, 537 U.S. at 348. Respondent's debatable account of the crime reinforces the need for an ordinary appeal. It is absurd to contend that Mr. Halprin was either a major participant *in the robbery* or recklessly indifferent to human life because he "watched and mopped blood" during *the prison escape*. BIO 20. It is equally absurd to draw that conclusion from his actions during the robbery. The fact he "cased the store" and put guns in a sleeping bag during the robbery, BIO 20-21, shows an intention to avoid violent confrontation, not reckless indifference. Even by Respondent's own account, the prosecution could at most show Petitioner "possib[ly]" fired a weapon, BIO 21, and that Petitioner took a lookout role during the robbery designed to "deter suspicion," BIO 3.

Respondent is correct that Petitioner erred in stating that no state court had found that Mr. Halprin met the two criteria for death eligibility in felony-murder cases: that he was a "major participant" in the felony and had exhibited "reckless indifference to human life." Petitioner's counsel regrets the error. Nevertheless, Respondent's reliance on these post-conviction findings raises more constitutional doubt than it clears. After *Ring v. Arizona*, 536 U.S. 584 (2002), it is far from clear that a state habeas court could find the facts necessary to overrule an *Enmund/Tison* challenge, where Texas law requires the jury to find facts sufficient to establish requisite culpability as a pre-requisite to imposing a death sentence. *See* Tex. Code Crim. Proc.

art. 37.071 § 2(b)(2) (in felony-murder cases, asking jury to answer "whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.").

Moreover, assuming *arguendo* the state habeas court could make the constitutionally necessary finding for death eligibility, it is debatable whether deference is due to that court's deeply flawed inquiry under § 2254(d)—both for the procedural reasons stated in support of the third question presented and the substantive reasons given in the motion for a COA below. *See* Mot. for COA 47-53 (discussing unreasonable determinations by state court on *Enmund*/*Tison* claim). To take just one example, the state court could not have reasonably found that the jury could conclude Petitioner killed or intended to kill Officer Hawkins and at the same time find that there was less than definitive evidence he fired a weapon. *See* USCA5.18050, 18053; *see also* BIO 21 (arguing at most there is a "strong possibility" Halprin shot at Officer Hawkins).

These fact-sensitive inquiries and constitutional arguments are best addressed in an ordinary appeal.

D. RESPONDENT DOES NOT DISPUTE THE GROUNDS FOR CERTIORARI ON PETITIONER'S 28 U.S.C. § 2254(D) QUESTION PRESENTED.

Respondent's objection on the merits of Petitioner's third question presented fails. Respondent does not—and could not—dispute that there is a circuit split on the question whether procedural defects in the state-court adjudication of a claim may ever be relevant in judging the reasonableness of the state court's factual determinations under § 2254(d)(2). *See* Pet. 24; BIO 25. At a minimum, then, the conflicting positions among the circuits was proof that the district court's application of Petitioner's constitutional issue was debatable and deserved an ordinary appeal. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990). Instead, Respondent doubles down on the Fifth Circuit's debatable *per se* bar to considering procedural adequacy on § 2254(d) review

per *Valdez v. Cockrell*, 274 F.3d 941, 949 (5th Cir. 2001). BIO 25. But that simply does not disprove the debatability of the question.

As a distraction, Respondent draws a fanciful caricature of Petitioner's position. First, Respondent misrepresents what Petitioner argued below. BIO 23. Petitioner did not flatly argue that 28 U.S.C. §2254(d) "does not apply to a state court's findings where the judge who signed them was not present for the evidentiary hearings held in state habeas proceedings." BIO 23 (citing Mot. for COA 39-40). Petitioner argued that whether § 2254(d) was *satisfied* is at least debatable where the state post-conviction court's decision was the product of multiple defects, including the following: (1) the court credited Petitioner's testimony about his limited role in the escape and robbery when deciding prejudice under *Brady* and found the same testimony not credible when deciding the *Enmund/Tison* claim; (2) the conflicting credibility determinations always favored the State; (3) the post-conviction judge adopted verbatim the credibility determinations submitted by the State's lawyer; (4) the post-conviction judge never saw a single witness testify.

Respondent next says Petitioner seeks a rule that "petitioners are constitutionally entitled to [state-court] hearings and to continuity in [] judges." BIO 25-26. But that certainly does not follow from Petitioner's argument that *sometimes* procedural irregularities in state-court adjudication matter under § 2254(d)(2). The Petition makes no mention of a *constitutional* requirement for minimum procedures in post-conviction proceedings. *See* Pet. 20-25. Additionally, Respondent falsely claims Petitioner's argument would "require[]" courts "to make wholesale credibility determinations." BIO 29. This is simply incorrect. It is enough for this Court to review whether a petitioner has at least a debatable entitlement to show that the

procedural defects of his state-court adjudication—short of Due Process violations—may affect the reasonableness of a contradictory credibility determination.

Respondent's last redoubt is to argue that the procedures applied by the state court to Petitioner's *Brady* and *Enmund*/*Tison* claims were perfectly proper. BIO 26-30. This is another feint: the Fifth Circuit never reached this question, because the Fifth Circuit precluded consideration of the procedural circumstances because doing so would be illicit in the absence of "post-AEDPA precedents." *See* App. 18 n.4. But even if it had, Petitioner had shown a debatable entitlement to set aside the relitigation bar based on the combination of procedural defects in the state court fact-finding—and at the very least to argue this point in a proper appeal.

E. RESPONDENT'S STRAW-MAN ARGUMENT AGAINST PETITIONER'S *LOCKETT* QUESTION PRESENTED FAILS.

Respondent claims incorrectly that Petitioner seeks a "*per se*" rule that all mitigation evidence must be admissible. BIO 30. Then, Respondent purports to refute that never-raised argument by asserting that this Court has never limited application of ordinary evidentiary rules that exclude mitigating evidence. BIO 36, 38. Respondent not only fails to contend with Petitioner's actual question presented; Respondent's attack on its straw man is based on a faulty account of this Court's law on mitigation evidence.

Petitioner's second question presented focuses on a Fifth Circuit rule that condones exclusion of "items" of mitigating evidence, because *Lockett*[4] and its progeny supposedly concern exclusion of "categories" of mitigating evidence. App. 11-12 (citing *Simmons v. Epps*, 654 F.3d 526, 544 (5th Cir. 2011)). *See* Pet. 25. That is a far cry from Respondent's restatement of the Question Presented: "Halprin's theory . . . is that *Lockett* holds . . . that evidence proffered

[4] *Lockett v. Ohio*, 438 U.S. 586 (1978).

by a defendant in mitigation is *per se* admissible in sentencing proceedings, and, thus, not subject to evidentiary rules." BIO 30.

At the outset, Respondent alleges that Petitioner failed to consider this claim under § 2254(d). BIO 30. This betrays Respondent's profound misunderstanding of how COAs work. Petitioner must show that the district court's resolution was debatable. *See Miller-El*, 537 U.S. at 335. Here, the district court bypassed § 2254(d) and ruled on the merits of Mr. Halprin's *Lockett* claim. *See* App. 36; *see also Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (entrusting to federal courts discretion whether to address § 2254(d) or merits first). So, at the COA stage, in order to obtain an ordinary appeal, Petitioner had to show the district court's merits resolution was debatable; he did not need to address whether he had satisfied § 2254(d) with respect to the claim. (To be sure, in an actual appeal, the court of appeals could entertain alternate bases for affirmance supported by the record.)

On the *Lockett* doctrine, Respondent rashly submits that the Eighth Amendment imposes no limit on the exclusion of evidence pursuant to ordinary evidentiary rules. BIO 36 ("[T]his Court has never held that trial courts are prohibited from [applying a standard evidentiary rule to limit mitigating evidence]."); *see also* BIO 38. Yet *Green v. Georgia*, 442 U.S. 95 (1979), held there are such limits: a trial court could not exclude mitigating evidence under an otherwise valid state hearsay rule. *Id.* at 97.[5]

Green also answers Respondent's charge that Petitioner lacks a limiting principle for the Eighth Amendment rule. BIO 39 ("Under his proposed set of rules, . . . a defendant's proposed mitigation evidence would always be admissible."). The Constitution would only override an

[5] Respondent misrepresents *Lockett*'s holding. BIO 31. *Lockett* never held that the State may impose a mandatory death sentence for prison escapees who commit murder. *Lockett* merely noted that the Court was not expressing an opinion on that question. *See* 438 U.S. at 604 n.11.

otherwise valid evidentiary rule when the proffered evidence was "highly relevant" to the mitigation inquiry and "substantial reasons existed to assume its reliability." *Green*, 442 U.S. at 97. The district court and Fifth Circuit never performed this inquiry and instead relied on their distinctive "types"/"items" distinction. That rule is in direct conflict with the clearly established teaching of *Lockett* and its progeny, and this Court should grant certiorari to correct its fundamental departure from this Court's law, allowing Petitioner to receive his ordinary appeal.

CONCLUSION

For the foregoing reasons, and those stated in the petition, this Court should grant the petition and reverse the decision of the court below.

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