No. _____

IN THE
SUPREME COURT OF
THE UNITED STATES OF AMERICA
October Term, 2018

VICTOR HUGO SALDAÑO,
Petitioner

v.

LORIE DAVIS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION
Respondent

UNOPPOSED MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR A WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW, Victor Hugo Saldaño, Petitioner, files this his Unopposed Motion for a sixty day extenstion of time to file his Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit, pursuant to Supreme Court Rule 13.5, and would show the Court as follows:

1. On January 8, 2019, the Fifth Circuit Court of Appeals issued an opinion denying relief to Mr. Saldaño. A motion for rehearing was filed and denied on February 11, 2019. A copy of this opinion and the order denying rehearing are attached hereto. Mr. Saldaño's Petition for Writ of Certiorari will be due on or before May 13, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

2. Mr. Saldaño seeks a sixty day extension of time to file his Petition for Writ of Certiorari, which would be July 11, 2019. The reason the extension is sought

because this is a capital case with a complex history, significant legal questions, and significant national and international attention.

3. Mr. Saldaño is in custody for murdering Paul King on November 20, 1995. He was sentenced to death on July 15, 1996. A generation of legal gymnastics followed, tainted by the State's fundamental error in using race to get a verdict of death.

4. Mr. Saldaño's first trial, in 1996, was marred by racially biased testimony from the State's expert, ultimately resulting in a confession of error by the Texas Attorney General. Before the dust settled, Mr. Saldaño spent nearly eight years on Death Row before his sentence was finally reversed. Particularly after over four years in the isolation of the Polunsky Unit, that began in early 2000, he was mentally ill and no longer fit for the re-sentencing proceedings in 2004.

5. At his retrial, Mr. Saldaño appeared before the jury disheveled and unfocused. He masturbated distractedly while the jury was in the room and ultimately had to be restrained. The trial court did not consider Mr. Saldaño's conduct to be offensive or disruptive, but tried to explain to him that his behavior was against his own legal interests. Mr. Saldaño's conversations with the court in this regard were incoherent and irrational.

5. Counsel argued pretrial that the Mr. Saldaño's mental illness, provoked by severe isolation, had left him so psychiatrically degraded that he faced far greater risk than eight years before of being found a future danger, and was much less able to participate in his own defense and present himself to a jury. Further, counsel argued that Mr. Saldaño's prison misconduct was the product of mental illness from

years of isolation caused by the State's race-tainted sentence and should be excluded. However Mr. Saldaño's counsel failed to seek a competency hearing. Despite ample evidence, the trial court also did not seek a competency determination.[1]

6. Both the trial judge and Mr. Saldaño's defense counsel mistakenly thought that if the Court held a competency hearing the State would be able to use an examination it could conduct for competency purposes to present an expert to the jury for the unrelated issue of future dangerousness. That mistake of law, raised but unaddressed by the lower courts, led them to do everything possible to avoid a legally inexistent risk they thought a competency hearing would present to the defense.

7. The issues at the core of Mr. Saldaño's case are significant. His severe mental illness and tenuous relationship with reality, combined with counsel and the trial court's failure to make adequate inquiries into his competence to proceed to trial violated his Fifth, Sixth and Fourteenth Amendment rights.

8. Mr. Saldaño is a citizen of Argentina, a country that does not have the death penalty. For that reason, his case is of tremendous national interest to Argentina, and that government has been deeply involved in the defense of its citizen. The Government of Argentina has engaged the support of Professor Jonathan Miller of Southwestern Law School, and filed an Amicus Brief with the 5th Circuit. Professor Miller has also been invaluable in assisting the undersigned with the representation of Mr. Saldaño. So too, the Texas Catholic Conference of Bishops has been involved with protecting Mr. Saldaño, and it also filed an Amicas Brief with the

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[1] Two of the eight requests for a certificate of appealabilty were granted: whether Saldaño was denied due process because he was not competent to stand trial and because the trial court failed to hold a competency hearing, and whether trial counsel was ineffective in failing to request a competency hearing. *Saldaño v. Davis*, 701 F.App'x 302 (5th Cir. 2017).

Fifth Circuit. Because of the legal significance of the issues in this case, the undersigned has been assisted with consultation with lawyers from the Texas Habeas Assistance and Training Program. It is believed that with an additional sixty days, and through consultation and advice of these additional resources, Mr. Saldaño can present a more professional and cogent application.

9. On February 19, 2019, the undersigned conferred with John Sullivan, the Assistant District Attorney for the State of Texas, concerning the relief requested by this motion. Mr. Sullivan stated that he was unopposed to the relief requested herein.

WHEREFORE, PREMISES CONSIDERED, Victor Hugo Saldaño, Petitioner, prays that the Court grant this Motion and extend by sixty days the period of time to file his Petition for Writ of Certiorari and all other proceedings before this Honorable Court.

Respectfully submitted,

/s/ Thomas Scott Smith

By:_____

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
January 8, 2019
Lyle W. Cayce
Clerk

No. 16-70025

VICTOR HUGO SALDANO,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 4:08-CV-193

Before CLEMENT, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:*

Victor Saldaño appeals the district court's denial of his petition for habeas relief. This court previously granted Saldaño a certificate of appealability (COA) on three issues, all related to his competency at his punishment retrial. *Saldano v. Davis*, 701 F. App'x 302 (5th Cir. 2017). We affirm the district court's ruling.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

FACTS AND PROCEEDINGS

In July 1996, Saldaño was convicted of capital murder and sentenced to death. That sentence was ultimately overturned, and Saldaño was granted a new punishment trial. *See Saldano v. Roach*, 363 F.3d 545 (5th Cir. 2004); *Saldano v. Cockrell*, 267 F.Supp.2d 635 (E.D. Tex. 2003).

The punishment retrial occurred in November 2004, and Saldaño's apparent mental deterioration was an issue throughout. Saldaño engaged in various incongruous behaviors throughout the trial: insisting on wearing jail clothes, reading magazines, repeatedly standing up in front of the jury while shackled, soiling himself, laughing during testimony, and masturbating at least four times. In light of this behavior, Saldaño's counsel had him examined by experts three times, and reported to the trial judge that he had been found competent each time. The judge had numerous in-court dialogues with Saldaño and stated near the end of the proceedings that he had no reason to question Saldaño's competency. Saldaño's attorneys never requested, and the trial judge never ordered, a competency hearing. As at his first trial, Saldaño was sentenced to death.

Saldaño filed a motion for a new trial, which was denied. That denial was upheld on direct appeal. *Saldano v. State*, 232 S.W.3d 77, 82 (Tex. Crim. App. 2007). Saldaño then filed for a writ of habeas corpus in state court, raising a number of grounds for relief. The state court issued 511 findings of fact and conclusions of law and recommended denying relief on all of Saldaño's claims. The Texas Court of Criminal Appeals adopted all the relevant state court findings. *Ex Parte Saldano*, No. WR-41,313-04, 2008 WL 4727540 (Tex. Crim. App. Oct. 29, 2008).

Saldaño then filed his federal habeas petition, raising fifteen claims. The district court denied relief on all of the claims but dismissed without prejudice

Saldaño's claim that he was incompetent to be executed because it was premature. The district court also declined to issue a COA on any of Saldaño's claims. Saldaño appealed, and this court granted a COA as to three claims: (1) whether Saldaño was incompetent to stand trial; (2) whether the trial court should have held a competency hearing; and (3) whether Saldaño's attorneys' failure to request a competency hearing constituted ineffective assistance of counsel. *Saldano*, 701 F. App'x at 316.[1]

STANDARD OF REVIEW

The district court's factual findings are reviewed for clear error and its legal conclusions are reviewed de novo. *Roberts v. Dretke*, 381 F.3d 491, 497 (5th Cir. 2004). Saldaño's federal habeas petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which provides in relevant part that:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

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[1] Saldaño has abandoned his first claim regarding actual incompetency. He contends that the now nearly 15-year gap between the trial and any decision on his petition "is too long for a retrospective competency determination" and so "the only issue in the present appeal [aside from the ineffective assistance of counsel claim] is whether the trial court failed in its obligation to *sua sponte* hold a competency hearing." Therefore, this claim will not be addressed. *See Matchett v. Dretke*, 380 F.3d 844, 848 (5th Cir. 2004) (claims not pursued are deemed abandoned).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). A state court's "factual findings are 'presumed to be correct' unless the habeas petitioner rebuts the presumption through 'clear and convincing evidence.'" *Nelson v. Quarterman*, 472 F.3d 287, 292 (5th Cir. 2006) (quoting 28 U.S.C. § 2254(e)(1)). Even if reasonable minds "reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's . . . determination." *Wood v. Allen*, 558 U.S. 290, 301 (2010) (alteration in original) (quotation omitted).

DISCUSSION

I. Due Process

Saldaño contends that he was denied due process when the trial court judge did not *sua sponte* conduct a competency hearing. He argues that the state habeas court's denial of this claim was based on an unreasonable determination of the facts and that the objective evidence presented to the trial court was sufficient to raise a bona fide doubt as to his competency.

It is unconstitutional to try a mentally incompetent individual.[2] *See Indiana v. Edwards*, 554 U.S. 164, 170 (2008). A defendant is incompetent if "he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

[2] We note that Saldaño also brought a habeas claim that he could not be executed because he was incompetent. *See* TEX. CODE CRIM. PROC. ANN. art. 46.05; *Ford v. Wainwright*, 477 U.S. 399, 410 (1986). Both the state habeas and district courts held that this claim was premature because no execution date has been set.

"A state court must conduct an inquiry into the defendant's mental capacity *sua sponte* if the evidence raises a bona fide doubt as to competency." *Mata v. Johnson*, 210 F.3d 324, 329 (5th Cir. 2000); *see also Pate v. Robinson*, 383 U.S. 375, 385 (1966). "In determining whether there is a 'bona fide doubt' as to the defendant's competence, the court considers: (1) any history of irrational behavior, (2) the defendant's demeanor at trial, and (3) any prior medical opinion on competency." *Mata*, 210 F.3d at 329; *see also Drope*, 420 U.S. at 180. If the court received objective evidence that should have raised a bona fide doubt and failed to make further inquiry, "the defendant has been denied a fair trial." *Mata*, 210 F.3d at 329. The inquiry must only be "adequate . . . to resolve" the question of competency. *Curry v. Estelle*, 531 F.2d 766, 768 (5th Cir. 1976) (per curiam).

Saldaño asserts that there should have been a bona fide doubt as to his competency because of: (1) evidence of his prior irrational behavior while incarcerated; (2) evidence of hospitalizations in the prison psychiatric hospital; (3) his in-court demeanor and behavior; and (4) affidavits from trial observers who were convinced of his incompetence.

Saldaño has failed to offer clear and convincing evidence to rebut the state habeas court's factual determination that there was insufficient evidence to raise a bona fide doubt as to competency. The doctor's affidavit Saldaño relies on as evidence of prior irrational behavior also specifically states that "his mental state did not deteriorate to the level of incompetency." And his behavior on death row before the retrial—including throwing his feces and publicly masturbating—is not conclusive evidence of his ability to understand his trial rationally and factually. Saldaño's hospitalizations are similarly not clear or convincing. He was hospitalized for four months in 2001 following a suicide attempt and was diagnosed with depressive and schizoaffective disorders. Following a second hospitalization in 2003, however, he was

discharged with only a diagnosis of antisocial personality disorder. Even if the hospitalizations are evidence of possible mental illness, a "defendant can be both mentally ill and competent to stand trial." *Mays v. Stephens*, 757 F.3d 211, 216 (5th Cir. 2014).

Further, evidence of Saldaño's in-court behavior does not rebut the presumption of the correctness of the state court's finding that, after seven weeks of observing and interacting with Saldaño, the trial judge had no reason to question his competency. Importantly, in response to his disruptive and bizarre behavior during the retrial, Saldaño's attorneys had him examined for competency three times; each time he was deemed competent. And defense counsel repeatedly represented to the trial judge that Saldaño was competent. Finally, Saldaño has not rebutted the state court's finding that the after-the-fact affidavits did not provide evidence that would have required a hearing.

The state habeas court's factual determination that there was not sufficient evidence to raise a bona fide doubt as to Saldaño's competency was not unreasonable in light of the evidence presented.

II. Ineffective Assistance of Counsel

Saldaño contends that his trial attorneys were constitutionally ineffective because they failed to request a competency hearing. To establish ineffective assistance of counsel, Saldaño must show both that his "counsel's performance was deficient" and that this "deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, counsel's performance was deficient only if it "fell below an objective standard of reasonableness." *Id.* at 688. Under the second prong, to show prejudice there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Trial counsel has a duty to investigate "when he has reason to believe that the defendant suffers from mental health problems." *Roberts*, 381 F.3d at 498. A failure to request a competency hearing constitutes deficient performance where "there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency." *Jermyn v. Horn*, 266 F.3d 257, 283 (3d Cir. 2001). To show prejudice, Saldaño must show a reasonable probability that the trial court would have found him incompetent had counsel requested a competency hearing. *Felde v. Butler*, 817 F.2d 281, 282 (5th Cir. 1987).

The state habeas court found that Saldaño was competent to stand trial and that Saldaño's own counsel had conducted contemporaneous expert competency evaluations showing the same, and so any request for a competency hearing would have been futile. Therefore, the attorneys' performance was not deficient. Saldaño argues that, based on the same evidence he relies on for his due process claim, there were sufficient indicia of incompetence to give objectively reasonable counsel doubt as to his competency. We have already held that this evidence is insufficient to rebut the state habeas court's findings concerning the trial judge. It is similarly insufficient with respect to Saldaño's counsel. Saldaño has not shown that the state habeas court's determination that his attorneys' performance was not deficient was unreasonable in light of the evidence presented.

CONCLUSION

The district court correctly concluded that Saldaño was not entitled to habeas relief. Accordingly, the district court's ruling is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70025

VICTOR HUGO SALDANO,

Petitioner - Appellant

v.

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

Respondent - Appellee

Appeal from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING

Before CLEMENT, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ EDITH B. CLEMENT
UNITED STATES CIRCUIT JUDGE