No. 19-_____ (CAPITAL CASE)

In the Supreme Court of the United States

MICHAEL DEAN GONZALES,

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Petitioner was sentenced to death at a trial at which he did not cooperate with counsel in preparing his defense, repeatedly disrupted proceedings, told counsel he would "rather be shot in the courtroom" than present witnesses in mitigation, and told the jury, "y'all can [expletive] kill me." The day after he received his death sentence, Petitioner refused appointment of state post-conviction counsel and said he "want[ed] to waive all my appeals and will have execution set as soon as possible."

The Texas Court of Criminal Appeals enforced Petitioner's waiver of state post-conviction proceedings without a determination that the waiver was knowing, intelligent, or voluntary, or was competently made, and without the assistance of counsel.

At the certificate of appealability (COA) stage, the Fifth Circuit reversed the district court's finding that the waiver bar was inadequate as an alternate ground for affirmance and denied a COA on Petitioner's claim that the trial court was required to conduct an inquiry into his competency to stand trial under *Pate v. Robinson*, 383 U.S. 375 (1966) and *Drope v. Missouri*, 420 U.S. 162 (1975).

These facts present the following questions:

1. Whether the Texas Court of Criminal Appeals's waiver bar is an independent and adequate state procedural ground that forecloses federal habeas review.

2. Whether a defendant's history of paranoia stemming from mental illness and brain dysfunction, together with his refusal to consult with counsel or assist in his defense, and self-destructive, suicidal, and disruptive behavior at trial apparently connected to his mental illness and brain dysfunction creates sufficient doubt about a defendant's competency to assist and consult with counsel, even if the defendant is capable of understanding the nature of the proceedings.

3. Whether the Fifth Circuit ignored the certificate of appealability requirement and exceeded its jurisdiction when it reversed the district court's conclusion that the waiver bar was not adequate to prevent federal merits review, affirmed the denial of relief on that ground, and denied a certificate of appealability on Petitioner's underlying *Pate* claim.

PARTIES TO THE PROCEEDING

Petitioner is Michael Dean Gonzales, a death-sentenced Texas inmate, appellant below. Respondent is Lorie Davis, Director, Texas Department of Criminal Justice, Correctional Institutions Division, appellee below.

LIST OF PROCEEDINGS

State v. Gonzales, No. D-23,370 (358th Judicial Dist. Ct., Ector Cty., Dec. 8, 1995) (conviction of capital murder and sentence of death at trial)

Gonzales v. State, No. AP-72,317 (Tex. Crim. App. June 3, 1998) (affirming conviction and sentence on direct appeal)

Ex parte Gonzales, No. WR-40,541-01 (Tex. Crim. App. Mar. 10, 1999) (denying state post-conviction relief)

Gonzales v. Cockrell, No. 7:99-cv-00073 (W.D. Tex. Dec. 19, 2002) (granting resentencing in federal habeas)

Gonzales v. Quarterman, No. 03-50021, 458 F.3d 384 (5th Cir. July 31, 2006) (affirming denial of relief on guilt-phase claims in federal habeas), *cert. denied*, 549 U.S. 1323 (2007)

State v. Gonzales, No. D-23,370 (358th Judicial Dist. Ct., Ector Cty., May 7, 2009) (sentencing trial)

Gonzales v. State, No. AP-76,176, 353 S.W.3d 826 (Tex. Crim. App. Sept. 28, 2011) (affirming new sentence)

Ex parte Gonzales, No. WR-40,541-04, 463 S.W.3d 508 (Tex. Crim. App. June 3, 2015) (dismissing state post-conviction application as procedurally barred)

Gonzales v. Davis, No. 7:12-cv-126-DAE (W.D. Tex. Apr. 13, 2018) (denying habeas)

Gonzales v. Davis, No.18-70026, 924 F.3d 236 (5th Cir. May 17, 2019) (decision below)

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Petitioner Michael Dean Gonzales respectfully petitions this Court to issue a writ of certiorari to review judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

On April 13, 2018, the United States District Court for the Western District of Texas, denied relief and a certificate of appealability (COA) on all claims in Mr. Gonzales's petition for a writ of habeas corpus. The memorandum opinion and order is unreported and attached as Appendix C. App. 19-68.[1] On May 17, 2018, the Fifth Circuit also denied a COA, 911 F.3d 247, attached as Appendix B. App. 3-18.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). *Hohn v. United States*, 524 U.S. 236, 253 (1998). This petition is timely filed. The final judgment of the Court of Appeals was entered on May 17, 2019. App. 3. Petitioner timely moved for rehearing, which the Fifth Circuit denied on July 2, 2019 (Appendix A). App. 1. This Court granted Petitioner two extensions of time to file until November 27, 2019.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

Relevant portions of the Texas capital post-conviction statute, Tex. Code Crim. Proc. art. 11.071, are attached in Appendix F.

[1] Citations to App. ___ refer to the appendix submitted with this petition.

INTRODUCTION

This case concerns the undignified capital sentencing trial of Petitioner Michael Dean Gonzales, which took place while he was likely incompetent. Because of his incompetency, a defenseless individual, with no meaningful assistance of counsel, made a mockery of the very proceeding that could save his life. Mr. Gonzales foreclosed the presentation of mitigation evidence on threat of reaching for a gun because he would "rather be shot in the courtroom than to have anybody ask for help for him." Then he took the stand and goaded the jury to "kill" him. At each stage of this case—at trial, in state post-conviction, and in federal habeas—courts failed to safeguard against the likelihood that Mr. Gonzales was tried while incompetent.

First, the trial court failed to make even the most informal inquiry into Mr. Gonzales's competency despite a significant body of evidence—growing larger as trial approached and then spiraled out of control—suggesting he may well have been incapable of consulting with his counsel or assisting in his defense. Second, the Texas Court of Criminal Appeals (CCA) enforced Mr. Gonzales's statement that he wanted to waive his state habeas proceedings despite any assurance the decision was competently made or knowing, voluntary, or intelligent. Finally, the Fifth Circuit upheld that flawed procedural bar as an adequate basis to foreclose federal review and denied Mr. Gonzales an ordinary appeal on his capital habeas claim regarding the trial court's failure to inquire into competency, based on its still-uncorrected understanding of the threshold inquiry to obtain an appeal. These errors are recurring and important, and call for this Court's review.

STATEMENT OF THE CASE

A. Trial

In 1995, Michael Gonzales was convicted by a Texas jury for killing his elderly neighbors. At the sentencing phase of trial, defense counsel presented evidence that Mr.

Gonzales suffered from neurocognitive disorders and a history of paranoid thinking. Psychologist Dr. Mark Cunningham, Ph.D., recounted that, by the age of 16, Mr. Gonzales had been committed to three state institutions, where he was diagnosed with severe depression with psychotic features and schizoaffective disorder, treated for damaging bouts of alcohol and drug abuse, and prescribed powerful anti-psychotic medication. 18 RR 119-20.[2]

Neuropsychologist Samuel Brinkman, Ph.D., testified that Mr. Gonzales suffered from dementia, which impaired "his thinking and problem solving skills, his language and communication skills, his memory and learning[,] attention[,] and executive processes." 18 RR 87. Dr. Brinkman also found that Mr. Gonzales had a "personality change" from his congenital neurological impairment; heavy ingestion of alcohol, drugs, and inhalants from an early age; and multiple head traumas. *Id*. Mr. Gonzales exhibited multiple symptoms of dementia, including a lack of inhibition, "highly rigid" thinking, and the inability to conform his behavior to social cues. 18 RR 78-79. Mr. Gonzales's brain damage also manifested itself in a highly paranoid personality. 18 RR 88-89. That paranoia led to "bizarre thought processes that have to do with interpreting people's motivations and . . . trustworthiness . . . such that he might think that someone would unjustifiably want to hurt him." *Id*. Mr. Gonzales tended to exaggerate his presentation as "a bad guy." 18 RR 89. In addition to dementia symptoms, Mr. Gonzales had an unadjusted IQ score just above the cutoff for intellectual disability, and exhibited significant impairments in verbal processing and deficits in attention.18 RR 86; ROA.2204-06.

The jury sentenced Mr. Gonzales to death.

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[2] "ROA.__" refers to the record on appeal. The state court record is not contained in the record on appeal. "RR" refers to the Reporter's Record, or transcript, of the initial trial proceedings. "RR-R" refers to the Reporter's Record for the resentencing trial. "CR" and "CR-R" refer to the Clerk's Record and Clerk's Record on resentencing, respectively. The volume number precedes and the page numbers follow.

A federal court later granted Mr. Gonzales habeas relief and ordered him resentenced because "the State's psychological expert witness testified, unconstitutionally, that race is an indicator of future dangerousness." *Gonzales v. Quarterman*, 458 F.3d 384, 389 (5th Cir. 2006); *see Buck v. Davis*, 137 S. Ct. 759, 770 (2017) (discussing State's confession of error).

B. Resentencing

Mr. Gonzales was granted a new sentencing hearing, and, in June 2007, was transferred from Texas's death row to the Ector County jail. Mr. Gonzales's case was remanded to Judge Bill McCoy, his 1995 trial judge. In the decade since his conviction, Mr. Gonzales spent seven years in solitary confinement at the Texas Department of Criminal Justice (TDCJ) Polunsky Unit. In prison, he was not treated for his mental illnesses and he was diagnosed with Type II diabetes (adult onset), which was poorly controlled by prison staff.[3]

Judge McCoy appointed attorneys Woody Leverett and Jason Leach as defense counsel that June. 1 CR-R 3-4. Soon, however, Mr. Gonzales relationship with counsel irreparably fell apart. Mr. Gonzales wrote to counsel and requested they secure the services of Charles Lanier, a mitigation specialist from New York, to assist on his case. Leverett responded by informing Mr. Gonzales that, after looking into the request, the attorneys found Lanier had no experience as a mitigation specialist but was instead a mental health expert who advocated against the death penalty. In fact, Leverett was wrong. When Mr. Gonzales learned directly from Lanier that counsel had never actually sought his services and had misstated Lanier's credentials, Mr. Gonzales sought to have Leverett removed as counsel. After a hearing in October 2007 on the issue, the trial court refused to remove Leverett as counsel based, in part, on Leverett's

[3] In the period between his diagnosis at TDCJ in 2003, and his return to Ector County in 2007, only 16% of his glucose readings were within the normal range. By contrast, 58% were between 111 and 200, and 26% were from 201 to over 400. *See* ROA.2425-30 (testimony of neuroendocrinologist regarding Mr. Gonzales's elevated insulin during incarceration).

qualifications, his explanation that he did not intentionally lie to Mr. Gonzales, and the court's skepticism of Lanier's motives. *See* 3 RR-R 15-17.

From that point forward, Mr. Gonzales refused to acknowledge his defense team. App. 29. In his view, once an attorney let him down, he could never trust them. He also told his friends and family members to stop cooperating with any members of his defense team, including the investigator and mitigation specialist, and attempted to "fire" trial counsel by letter. App. 29-30. Prompted by his client's refusal to cooperate, counsel filed a motion asking to be replaced as counsel for Mr. Gonzales. Petitioner explained his reasons to the court at a May 2008 hearing:

> COURT: Well, we are going to have a trial and we are going to proceed. Now, are you going to cooperate with your lawyers?
>
> DEFENDANT: I don't acknowledge these attorneys that you represented me.
>
> COURT: All right.
>
> DEFENDANT: I addressed this Court last time of my concerns. I don't trust them, plain and simple. When an attorney lies to you one time, he is going to lie to you every time, so my point, they aren't worth shit.
>
> COURT: Okay.
>
> DEFENDANT: Either they are for you or against you. In this case, they have already shown me they aren't for me. Why don't you just issue an execution date right now.

4 RR-R 4-5.

In response, counsel renewed their motion to withdraw, citing "absolutely no working relationship" with Mr. Gonzales. 3 CR-R 549-61. Counsel had conferred with Mr. Gonzales just three times. Despite numerous attempts by counsel and their investigator, Nancy Piette, to

consult with him, Mr. Gonzales refused to consult with or assist the defense team with his case.[4] The court denied the motion in a short hearing at which Mr. Gonzales was not present. 5 RR-R 3. The defense team developed no working relationship with Mr. Gonzales in the ten months from the hearing to the trial.

During pretrial proceedings, Judge McCoy was reminded of Mr. Gonzales's long history of mental illness and brain damage, and alerted to the new concern that Mr. Gonzales's poorly controlled diabetes may have worsened his brain impairments since the first trial. *See* 9 RR-R 3-17 (testimony of mitigation specialist Danalynn Recer on history of mental illness and brain damage); 4 CR-R 816-18 (briefing on uncontrolled diabetes); *id.* at 832-36 (affidavit of neurologist) ("[A] thorough analysis of the course of Mr. Gonzales' diabetes must be done to determine whether and how his disease has affected previous mental health evaluations.").[5]

During the resentencing trial—and unlike the 1995 trial—Mr. Gonzales often interrupted the proceedings with inappropriate gestures and outbursts and continued his antagonistic behavior toward counsel. On the first day of testimony, the prosecution called his wife, Martha Reyes, to testify. Prosecutor Wesley Mau warned her she could possibly be implicated as an

[4] To be sure, Mr. Gonzales would occasionally speak with counsel about matters other than his defense, often seeking assistance with problems that arose at the county jail, facilitating family contacts, or obtaining items he could not obtain on his own. However, he adamantly refused to provide counsel any of the assistance they needed for his defense.

[5] Ms. Recer repeatedly raised the issue of Mr. Gonzales's incompetence in discussions with counsel about the case. *See, e.g.*, ROA.2953. Based on her long experience as an attorney and a mitigation specialist, Recer had doubts about Mr. Gonzales's competence. But Recer could not persuade counsel to accept that their client might be incompetent. Counsel did nothing.

Counsel later testified about their practice regarding incompetency: Mr. Leach focused on whether Mr. Gonzales was "oriented times three: person place or time," ROA.3233, and Mr. Leverett said he looked for evidence of delusions or hallucinations or inappropriate speech before requesting an evaluation. ROA.3120-61.

accomplice if she testified in accordance with her previous statement to police. After she exhibited some confusion, Mr. Gonzales spoke out:

> DEFENDANT: If she don't want to testify, leave her alone, man. That's my wife. She has the right to plead the Fifth Amendment. She don't got to testify against nobody. You are harping her, man. You are fucking with her mind. Leave her alone. She don't want to testify.
>
> COURT: Retire the jury.
>
> (Jury retired from courtroom).
>
> DEFENDANT: See how you got her all emotional. You ain't got to testify, Martha. Don't let them get in your head. You have got the right to keep the Fifth Amendment. You should be ashamed of yourself, man.
>
> COURT: Now, where are we?
>
> MR. MAU: Ms. Reyes has told me that she is frightened, that she is scared of the defendant, and I think she—
>
> DEFENDANT: Goddamn right she is scared because y'all put her in that fucking position, man. Just leave her alone. She don't want to testify.

27 RR-R 55-56.

After a short recess, Petitioner attempted to explain his outburst to the court outside the presence of the jury:

> DEFENDANT: Your Honor, I only have one thing to say. Being that I haven't acknowledged my attorneys, there is no communication with them and I have told them already I didn't want her to get on the stand. Now, my wife doesn't know she can invoke the Fifth Amendment rights. That is all I was doing was letting her know. These mother fuckers right there, they are getting in her mind telling her she has to do that. She don't got to. She's got that right. She don't got to get on the stand. Don't nobody got to get on that stand. That is what the Fifth Amendment right is for. I was only letting her know that.

Id. at 56-57.

Following another recess, Reyes testified that Mr. Gonzales was responsible for murdering their neighbors. On cross-examination, Reyes was asked if she knew the whereabouts of several other people who used to associate with Mr. Gonzales when he suddenly exclaimed:

"Same thing's gonna happen to you, bitch. I'm gonna fucking have somebody kill your ass." The judge immediately retired the jury, but Gonzales continued: "You fucking shit on your own, dumb-ass. Watch. 102 apartment, watch . . . No sense in crying now." *Id.* at 83-84. Once the jury was out of the courtroom, the following colloquy took place:

> COURT: You have continually interrupted the proceedings of the Court.
>
> DEFENDANT: Yes, I have.
>
> COURT: And I am going to once again ask you—
>
> DEFENDANT: You warned me a while ago if there were any outbreaks, I would be removed from the courtroom and you were going to gag me. I already said what I had to say so you have one or two things you can do, remove me from the courtroom or gag me.
>
> COURT: You are absolutely right, you have a grasp on it. So the only way that you are going to get to remain in here is that if you promise the Court that you are going to sit there and quietly conduct yourself in that manner. Are you willing to tell me you are going to do that?
>
> DEFENDANT: I would lie to you if I tell you no.
>
> COURT: Okay. So you're going to tell me you are going to continue to create problems and—
>
> DEFENDANT: No, I am not saying that either. I am just saying that whenever my blood rises I speak my mind.
>
> COURT: Okay.
>
> DEFENDANT: Now, I cannot say I am going to be quiet, I cannot say I ain't going to be quiet.

Id. at 87-88. The trial continued with Mr. Gonzales still present in the courtroom.

On the last day of trial, defense counsel announced that they intended to call several more witnesses to the stand, including Mr. Gonzales's half-sister, his daughter, and an expert. Yet defense counsel told the court that Mr. Gonzales was adamant these witnesses not testify and had threatened to create a disturbance in court if they were called. Mr. Gonzales had been in an "emotional state" unlike any counsel had seen before. 30 RR-R 5. He told counsel he would "go

for a firearm" to create a disturbance and would "rather be shot in the courtroom than to have anybody ask for help for him." *Id.* 4-5. Based on this suicidal threat (and with no colloquy on the waiver of mitigation evidence), the defense only called one more witness—Mr. Gonzales, who had repeatedly expressed his desire to testify. Petitioner then testified:

> DEFENDANT: I won't say so much as address the jury but I wanted to get on the stand and give the prosecution a shot at me.
>
> MR. LEVERETT: Is there anything you want to tell this jury?
>
> DEFENDANT: Yeah. Y'all can fucking kill me. Makes me no fucking difference. Pass the witness.
>
> MR. MAU: No questions, Your Honor.
>
> COURT: Okay, Mr. Leverett.
>
> DEFENDANT: No, man, I told you yesterday why do I want your fucking assistance, man? You won't listen to me.
>
> MR. LEVERETT: Your Honor, the defense rests at this time.

Id. at 9. ROA.1901-07.

In addition to these outbursts, several other incidents at trial contributed to the question about Mr. Gonzales's competence. At the beginning of jury selection, defense counsel announced for the record that Gonzales refused to wear the civilian clothes counsel had bought him and would wear jail clothing instead. 13 RR-R 4-5. During jury selection, Gonzales blurted out to counsel, "Fuck you, you punk ass mother fucker. What kind of attorney are you, man?" *Id.* at 95. This outburst was caused by Mr. Gonzales's anger that trial counsel had not requested a "jury shuffle." *Id.* at 98; Tex. Code Crim. Proc. art. 35.11 (shuffle procedure). During the testimony of an officer from state prison, Gonzales gave the witness the finger. 28 RR-R 94. And during the prosecutor's closing argument, when the prosecutor referred to Gonzales's earlier outburst during Reyes's testimony:

> DEFENDANT: Goddamn right. It is a goddamn shame when you got her up there.
>
> MR. MAU: With that, ladies and gentlemen—
>
> DEFENDANT: You know goddamn well if she would have fucking incriminated herself, y'all would have charged her ass.
>
> MR. MAU: Your Honor, I would like the defendant admonished, please.
>
> DEFENDANT: That is more fucked up about it. How y'all are going to get a woman up there and incriminate herself like that and y'all don't charge her, that is a goddamn lie. Y'all know it, man. Y'all know the law. Look it up.
>
> COURT: Go ahead.
>
> DEFENDANT: It is more fucked up when y'all tell the jury that.
>
> MR. MAU: Ladies and gentlemen, you tell Martha Reyes that him having a cell phone in the jail is no big deal. You tell Martha Reyes that the defendant who has told her he is going to have somebody kill her, you saw him, you were present when he committed that crime. You tell her that having a cell phone in the—having a cell phone in the jail is nothing we should be worried about.
>
> DEFENDANT: Buy it off of commissary.

30 RR-R 43-44.

Judge McCoy later testified at the federal evidentiary hearing that none of this raised the issue of competency in his mind. He believed, in his words, "you would know [incompetency] when you saw it." ROA.3359. He could not say what factors, or evidence, he would consider in deciding whether to order a competency hearing on his own initiative: "I don't know that I can actually tell you one, two, three what I would be looking for." ROA.3358-59; *see also* ROA.3345. Because he relied on the defense attorneys, prosecutors, and medical professionals to raise competency concerns, Judge McCoy had never *sua sponte* raised a defendant's possible

incompetency or inquired further into it during the almost 30 years that he presided over criminal proceedings. ROA.3359.[6]

C. State post-conviction

On May 8, 2009, the day after the trial court sentenced Mr. Gonzales to death, the trial court held an abbreviated hearing (transcript length: two pages) to appoint both direct appeal and state habeas counsel for Mr. Gonzales. Appendix E.

When asked if he would "hire a lawyer," Mr. Gonzales responded, "No. I would like the record to reflect I want to waive all my appeals and will [sic] have execution set as soon as possible." App. 76. The trial court responded, "Well, that is fine," *id*., then explained that he was appointing a lawyer for the mandatory direct appeal. *Id*. The following colloquy ensued:

> THE COURT: .... The other thing I need to inquire into about is also from what you have just said, it indicates that, I think – I guess I know what the answer is, but you are entitled for an attorney to file a Writ of Habeas Corpus in addition to the attorney for the appeal. Now, do you wish that to be done? Do you want an attorney?
>
> THE DEFENDANT: I don't want no appeals filed on my behalf.
>
> THE COURT: All right. So you do not want an attorney?
>
> THE DEFENDANT: No.
>
> THE COURT: For the habeas corpus hearing?
>
> THE DEFENDANT: I don't want no attorney, period.
>
> THE COURT: Well, as I say, the appeal is mandatory. The law requires it. On the habeas corpus, you may proceed pro se if you decide to or I will appoint you an attorney, whatever you tell me you want to do.
>
> So do you want an attorney for the Writ of Habeas Corpus?

[6] Although the judge recognized the possibility that disruption could indicate incompetency, ROA.3355, he did not handle disruptive defendants by assessing their competency. He recounted that, in one instance, he quieted a defendant by "duct-tap[ing]" his mouth closed. *Id*.

THE DEFENDANT: I don't want no attorney, period.

App. 76-77.

At the hearing, Mr. Gonzales was no longer represented by trial counsel, nor was he assisted by other counsel. Despite the court reporter having noted in the transcript of this proceeding that trial counsel appeared for Mr. Gonzales, App. 75, they did not. Neither the trial court nor the prosecutor raised any question about whether he was competent to make the waivers he attempted to make, and the trial court did not inquire into his competence. In addition, the trial court did not make the record finding required under Tex. Code Crim. Proc. art. 11.071, § 2(a). The CCA ordered the trial court to make findings after receiving none. Without any further hearing, indeed several days after Mr. Gonzales was already back in TDCJ custody, the trial court entered findings: "[t]he defendant's election not to accept an appointed attorney and proceed pro se was intelligent and voluntary." 5 CR-R 1144 (June 22, 2009).

On November 10, 2010, the CCA issued an order finding that, had Mr. Gonzales chosen to file an application for habeas relief, his application would have been due on October 4, 2010, and as of October 15, 2010, no application had been filed. The CCA then held that because Mr. Gonzales had previously "expressed desire to waive his appeals, the lack of any vacillation of that waiver appearing in the record, [and his] failure to timely file an application," he had waived his right to initial review of an Article 11.071 habeas application, and that any future application filed by him or on his behalf would be subject to the restrictive "abuse of writ" provisions and treated as a "subsequent application" under Article 11.071, § 5. *Ex parte Gonzales*, No. WR-40,541-03 (Tex. Crim. App. Nov. 10, 2010) (unpublished).

Over nine months later, the CCA affirmed the judgment, in a 7-2 decision. *Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. Sept. 28, 2011). In November 2012, the trial court set an execution date for Mr. Gonzales. Resource counsel monitoring Texas capital habeas cases

discovered Mr. Gonzales was on the verge of execution, unrepresented, and nearing his federal habeas statute of limitations. Counsel visited Mr. Gonzales to advise him about his imminent federal filing deadline. During that meeting, Mr. Gonzales told resource counsel he would like to pursue federal habeas remedies. *See* ROA.22-23.

D. Federal habeas

Mr. Gonzales filed a timely federal habeas petition raising three claims relevant here: (1) trial counsel had failed to raise the issue of Mr. Gonzales's competence to stand trial to the court; (2) the trial court had failed to inquire into Mr. Gonzales's competency despite evidence that would cause an objective observer to have a good faith doubt about his competence to assist counsel; and (3) Mr. Gonzales was incompetent to stand trial at the time of his 2009 resentencing.

The district court stayed proceedings to allow Mr. Gonzales to present his claims in state court. Treating Mr. Gonzales's first state habeas application as a subsequent application under Tex. Code Crim. Proc. art. 11.071, § 5, the CCA dismissed his habeas application as an abuse of the writ. *Ex parte Gonzales*, 463 S.W.3d 508 (2015). Judges Yeary and Alcala dissented, questioning the validity of the procedural bar the CCA had applied and stating Mr. Gonzales had "allege[d] substantial facts to establish a bona fide doubt with respect to his competency to waive state habeas proceedings" at his May 2009 hearing. *Id.* at 512.

The district court concluded that the state procedural bar did not foreclose federal habeas review, because Texas had "accepted the waiver of state habeas counsel and review without making an adequate inquiry into the voluntary, intelligent, and knowing nature of the condemned defendant's waiver of those rights." ROA.1409. The court set an evidentiary hearing on petitioner's ineffectiveness and retrospective competency claims.

Following a seven-day hearing, the district court denied relief as to all claims. App. 67-68. The district court heard testimony from, *inter alia*, Judge McCoy, counsel Leverett and Leach, and mitigation specialist Recer, and expert testimony from 1995 trial psychologist Dr. Cunningham, neuroendocrinologist Dr. Alan Jacobs, and psychologist Dr. Timothy J. Proctor.

E. Decision below

Mr. Gonzales sought a certificate of appealability (COA) to appeal two claims—only one at issue here. The Fifth Circuit issued a published decision denying the right to appeal on any claim. App. B.

Before determining whether Mr. Gonzales's claims were debatable among reasonable jurists, the court first reversed the district court's conclusion that the state procedural bar was inadequate. App. 10-13. The court held that it "appli[ed]" state procedural bars if those bars are "based on a clearly-explained application of procedural rules," even if there was "no precedent analogous" in which the bar had been applied. App. 11. The court rejected Mr. Gonzales's arguments that the bar was inadequate to foreclose federal review in a single footnote. App. 11-12 n.2. The court described these arguments as an "attempted end run around the TCCA's finding . . . that Gonzales was competent and decisive in his rejection of appointed counsel." *Id.*

As to the *Pate* claim, the court framed the issue of reasonable doubt about competency as whether Mr. Gonzales's "sustained refusal to cooperate with his attorneys while facing the death penalty" "was manifestly behavior in which a competent person would not engage in." App. 13-14. The court found Mr. Gonzales had failed to "demonstrate a *longstanding* history of irrational behavior." App. 15. In its calculus, the court weighed the fact that Mr. Gonzales was "aware of his circumstances," *id.*, "was aware of the consequences of his behavior," *id.*, and showed "surprisingly sophisticated understanding of the legal proceedings," App.10. The court refused to treat Mr. Gonzales's disruptive behavior at trial as "evidence in favor of a *Pate* claim" on policy

grounds: "To hold that recalcitrant and anti-social behavior at trial constitutes, by itself, evidence in favor of a *Pate* claim would create perverse incentives for future defendants to disrupt court proceedings." App. 16. Finally, the court found that the district court could discount previous mental health diagnoses made at his 1995 trial because Mr. Gonzales was not incompetent at that trial. App. 16.

REASONS FOR GRANTING THE WRIT

I. This Case Raises the Important Question Whether a State Procedural Bar that Allows Petitioners to Waive State Capital Post-Conviction Proceedings Without a Determination that the Waiver Is Competently Made and Is Knowing, Intelligent, and Voluntary May Serve as an Independent and Adequate Procedural Bar to Federal Habeas Review.

Federal habeas review is ordinarily barred for constitutional claims that prisoners have defaulted pursuant to an independent and adequate state procedural rule. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

"[A]dequacy is itself a federal question" that a federal court has sole responsibility to decide. *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quotation omitted). To be "adequate" to preclude federal merits review, the state court bar must have been "clear" and "firmly established and regularly followed" in relation to the constitutional claim at issue when the petitioner purportedly violated the rule. *James v. Kentucky*, 466 U.S. 341, 348 (1984); *Ulster County Ct. v. Allen*, 442 U.S. 140, 150-51 & nn.8-9 (1979). This rule avoids arbitrariness and discrimination in the vindication of federal rights. "The requirement of regular application ensures that review is foreclosed by what may honestly be called 'rules'—directions of general applicability—rather than by whim or prejudice against a claim or claimant." *Bronshtein v. Horn*, 404 F.3d 700, 708 (3d Cir. 2005) (Alito, J.).

A state procedural rule may also be inadequate if "that basis violates the United States Constitution." *Clifton v. Carpenter*, 775 F.3d 760, 764 (6th Cir. 2014); *accord Young v. Herring*,

938 F.2d 543, 548 n.5 (5th Cir. 1991) (en banc) ("[F]or a state procedural bar to prevent federal habeas review, it must be . . . 'adequate' in the sense of *not being unconstitutional*, or arbitrary, or pretextual." (citing *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (emphasis added)); *see Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 679-82 (1930) (finding state court's inconsistent ruling violated due process).

Here, the state procedural bar under review is important: a waiver bar for individuals who expressly relinquish their right to state habeas proceedings. The Texas Court of Criminal Appeals barred Mr. Gonzales's claims, except under its stringent abuse of writ rules, by enforcing his uncounseled waiver of state habeas proceedings made at a hearing the day after his death sentence. App. 69.

But, as the dissenting judges of the CCA noted, "[n]either the convicting court nor this Court has made any attempt to determine whether [Mr. Gonzales] possessed the requisite capacity to make a rational, non-delusional choice whether to continue post-conviction litigation proceedings." App. 71. And "the convicting court made no express attempt to ascertain on the record whether [Mr. Gonzales] decision to entirely waive his post-conviction habeas corpus *proceedings* was intelligent and voluntary." App. 73 n.5 (emphasis in original). The absence of counsel compounded the problem: if Mr. Gonzales had counsel during this purported waiver, his attorney could have asked for the requisite findings.

A. The Fifth Circuit's determination that Texas's application of its state habeas waiver was adequate conflicts with four other circuits' assessment of the adequacy of waivers of state post-conviction process.

In the decision below, the Fifth Circuit concluded[7] that the waiver bar was adequate, even where there was no express colloquy on whether an individual's decision to waive is knowing,

[7] As addressed in Part III below, the Fifth Circuit reached this question only by exceeding its limited jurisdiction to decide whether a COA should issue. Because the Fifth Circuit reached

intelligent, and voluntary, and no requirement that a court determine a petitioner's competence to waive. App. 11-12 n.2.[8] The Fifth Circuit's approach to the validity of Mr. Gonzales's state habeas waiver conflicts with the approach of every other circuit to address this issue.

The Eighth Circuit uses the same standard to determine the validity of a defendant's waiver of both federal and state post-conviction proceedings, "because both actions bar further federal court review." *Nooner v. Norris*, 402 F.3d 801, 804 (8th Cir. 2005). In both circumstances, the court examines "whether the defendant has the rational ability to understand the proceedings" and "whether the defendant's waiver was knowing and voluntary." *Id*.; *see also O'Rourke v. Endell*, 153 F.3d 560, 568 (8th Cir. 1998) (holding that a state habeas waiver is knowing and voluntary only if the defendant understands "the significance of [their] decision to waive [their] postconviction appeal.").

Likewise, the Seventh Circuit demands that a state court make separate determinations that a waiver was both competently made and knowing and voluntary. *St. Pierre v. Cowan*, 217 F.3d 939, 947 (7th Cir. 2000). In *St. Pierre*, the Illinois court concluded a waiver was valid after conducting an extensive hearing with testimony from experts. *St. Pierre*, 217 F.3d at 943-44. The Seventh Circuit reversed because, although "at any given moment, St. Pierre could be an intelligent, well informed individual," *id*. at 946, the state court failed to ensure that the waiver itself was knowing and voluntary. *Id*. at 947. The state court had not conducted "any kind of

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the question in a published decision, it is proper to review and reverse this determination. The State of Texas has already offered *Gonzales* as precedential authority in other cases. Notice of Suppl. Authority, ECF No. 164, *Green v. Davis*, No. 4:13-cv-01899 (S.D. Tex. June 5, 2019).

[8] "The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings." *Godinez v. Moran*, 509 U.S. 389, 401 (1993). In contrast, "[t]he purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id*.

proceeding, formal or informal, at which any court was able to assure itself that [the] waiver . . . satisfied the requirements for a knowing and voluntary waiver and that [the petitioner] intended it to be a waiver." *Id.*

Finally, the Ninth Circuit similarly requires that "[t]o waive a petitioner's right to further habeas proceedings, the petitioner must be competent and his waiver must be voluntary, knowing, and intelligent." *Kirkpatrick v. Chappell*, 926 F.3d 1157, 1172 (9th Cir. 2019) (citing *Rees v. Peyton*, 384 U.S. 312, 313-14 (1966); *Dennis v. Budge*, 378 F.3d 880, 889 (9th Cir. 2004)). In *Kirkpatrick*, the Ninth Circuit enforced the petitioner's waiver of California post-conviction proceedings. The court concluded the California Supreme Court had specifically determined that Kirkpatrick was competent and had knowingly and voluntarily waived after reviewing extensive evidence to support its conclusion—including a competency evaluation and other records. The petitioner could not overcome those findings under 28 U.S.C. § 2254(e)(1). *See id.* at 1172-74. The court noted that, in every other case, a court had found waivers to be knowing, voluntary, and intelligent only "after the court question[ed] the petitioner on the record regarding his intentions and whether he understands the consequences of the waiver." *Id.* at 1175 n.7.

The Third Circuit does not demand a competency determination in every case where a defendant attempts to waive their appeals. *Fahy v. Horn*, 516 F.3d 169, 181 (3d Cir. 2008). However, unlike the Fifth Circuit, the Third Circuit will treat a waiver of state post-conviction as adequate only when the state court makes an adequate inquiry into whether a defendant has knowingly and voluntarily waived their appeals. *Id*. at 186. Thus, in *Fahy*, the Pennsylvania court's "inadequate colloquy" failed to "reveal that he had any knowledge whatsoever of the purpose of federal habeas corpus or its procedures." *Id.* at 186.

Mr. Gonzales's purported waiver would have been invalid in these circuits.

B. This Court's precedents support finding a waiver of state habeas proceedings adequate and independent only when the waiver is knowing, voluntary, and intelligent and competently made.

Four strands of this Court's precedent confirm the validity of the majority-circuit rule.

First, this Court has been "unyielding in [its] insistence that a defendant's waiver of his trial rights cannot be given effect unless it is 'knowing' and 'intelligent.'" *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (citing *Johnson v. Zerbst*, 304 U.S. 458 (1938)). In that context, courts must "indulge every presumption against waiver" and conduct a hearing on the record. *Zerbst*, 304 U.S. at 464, 465.

Second, this Court has required that a waiver inquiry include the question of the defendant's competency. *Rees v. Peyton*, 384 U.S. 312 (1966). In *Rees*, this Court confronted a petitioner's request to withdraw his petition for certiorari arising from his federal habeas petition. This Court required a district court to determine "whether [Rees] has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 314. Circuits have uniformly read *Rees* to impose a requirement that waivers of at least *federal* habeas proceedings be made by a mentally competent person. The Fifth Circuit has said that *Rees* "announced the standard to be used in deciding whether a person is mentally competent to choose to forgo further appeals and collateral attack upon his conviction and sentence" and formulated the leading test for applying *Rees*. *Rumbaugh v. Procunier*, 753 F.2d 395, 398-99 (5th Cir. 1985); *accord Comer v. Schriro*, 480 F.3d 960, 970 (9th Cir. 2007) (en banc); *Lonchar v. Zant*, 978 F.2d 637, 641-42 (11th Cir. 1992); *Ford v. Haley*, 195 F.3d 603, 615 (11th Cir. 1999); *Smith v. Armontrout*, 812 F.2d 1050, 1057 (8th Cir. 1987).

Third, this Court has not hesitated to review *state* post-conviction waivers according to the same rubric it would apply to federal habeas waivers, *Rees*, and waivers of constitutional trial rights, *see Zerbst*, 304 U.S. 458; *Godinez*, 509 U.S. 389. In three "next friend" cases, this Court has evaluated state court proceedings to confirm that the inmate validly waived the right to proceed, so it could rule on the standing of the "next friend." In *Gilmore v. Utah*, 429 U.S. 1012 (1976), this Court recognized that waiver of state process in a capital case encompassed waiver of "any and all federal rights Gilmore might have asserted." *Id.* at 1013. The Court held that Utah's conclusion that Gilmore had "competence knowingly and intelligently to waive any and all such rights were firmly grounded." *Id.; see also Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990) (concluding that state court evidentiary hearing on Whitmore's capacity to waive was dispositive of the next friend petition); *accord Demosthenes v. Baal*, 495 U.S. 731 (1990).

Fourth, this Court has mandated that states afford adequate post-conviction procedures for determining a prisoner's competency to be executed. *Ford v. Wainwright*, 477 U.S. 399, 413-18 (1986); *id.* at 427 (Powell, J., concurring in the judgment). Building on the procedural due process protections for competency to stand trial (*Pate*) and be executed (*Ford*), the Fifth Circuit has imposed minimum procedural requirements for determinations of a petitioner's waiver of federal habeas proceedings. *See Mata v. Johnson*, 210 F.3d 324, 329-32 (5th Cir. 2000).[9] But in Mr. Gonzales's case, the Fifth Circuit refused to consider whether those same requirements have relevance in reviewing the adequacy of a state court waiver of habeas proceedings.

[9] *Mata* provides: "if the evidence before the district court raises a bona fide issue of petitioner's competency to waive collateral review of a capital conviction and death sentence, the court can afford such petitioner adequate due process by ordering and reviewing a current examination by a qualified medical or mental health expert, allowing the parties to present any other evidence relevant to the question of competency and, on the record and in open court, questioning the petitioner concerning the knowing and voluntary nature of his decision to waive further proceedings." 210 F.3d at 331.

Together, these four strands of precedent establish both (1) a substantive requirement that waivers of state habeas proceedings be knowing, intelligent, and voluntary, and competently made, and (2) a right to adequate procedures designed to determine with reasonable accuracy whether a defendant's waivers of state habeas proceedings and counsel were competently made and knowing, intelligent, and voluntary.

C. The waiver bar applied here was not a firmly established or regular application of Texas law.

Independent of any federal-law requirement regarding waivers of habeas proceedings, the Texas procedure applied was neither firmly established nor regularly applied.

1. Knowing, intelligent, and voluntary waiver of state habeas. The Texas Court of Criminal Appeals imposed no established rule for waiver of state habeas proceedings until 2007. In *Ex parte Insall*, 224 S.W.3d 213 (Tex. Crim. App. 2007), the CCA held that a waiver is "enforceable against a defendant when the waiver was knowingly, intelligently, and voluntarily given." *Id.* at 214. In *Ex parte Reedy*, 282 S.W.3d 492 (Tex. Crim. App. 2009), the CCA reaffirmed this requirement and explained that a habeas applicant could only knowingly "waive any claim that is based upon facts that, by diligence and with the assistance of trial counsel, he was aware of, or should have been aware of, at the time of the waiver." *Id.* at 503-04; *see* 43B George Dix & John Schmolesky, *Texas Practice: Criminal Practice & Procedure* § 58:9 (3d ed. 2019 update).[10]

In 2008, the CCA held—for the first and last time—the concept of waiver applied to capital habeas applicants under Tex. Code Crim. Proc. art. 11.071. *Ex parte Reynoso*, 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008). *Reynoso* explained that the CCA would give effect

[10] By contrast, the CCA has prohibited waivers of appellate review from death sentences, because the statute provides for "automatic review." Tex. Code Crim. Proc. art. 37.071(h).

to the waiver only after the time to file had passed "because an applicant can waffle in his decision until the day the application is due." *Id*. *Reynoso* did not cite or address *Insall*'s requirement of a knowing, intelligent, and voluntary waiver.

Mr. Gonzales received no colloquy that ensured his knowing, intelligent, and voluntary waiver. He also received no admonishment on the effect of his waiver or the time to file. *See* App. 76-77. This deviation from established practice makes the waiver bar unenforceable as a matter of federal law. *See Ford v. Georgia*, 498 U.S. 411, 424 (1991).

2. Competency to waive. The Texas Court of Criminal Appeals has an inconsistent practice regarding the requirement of competency to waive state habeas. In *Ex parte Mines*, 26 S.W.3d 910 (2000), the CCA held there is no requirement that petitioners be competent to proceed in state capital habeas proceedings. *Id.* at 915; *see also id.* at 916 n.33 (noting split among state high courts on requirement of competency to proceed). The CCA has never stated whether competency is required to *waive* capital habeas proceedings. As the dissenting CCA judges noted here, in the only other reported case involving a waiver of capital habeas proceedings, the CCA relied on the fact that the "[a]pplicant was evaluated by doctors, who found that he was competent to choose to forego his habeas proceeding." *Ex parte Reynoso*, 228 S.W.3d 163, 164 (Tex. Crim. App. 2007), *vacated on reh'g on other grounds*, 257 S.W.3d 715 (2008), *quoted in* App. 72 n.1. In a body of unpublished decisions, however, the CCA has more often than not accepted an applicant's waiver of capital habeas review only after a trial court hearing and evaluation for competency.[11]

[11] *See, e.g., Ex parte Mullis*, No. WR-76,632-01 (Tex. Crim. App. Dec. 12, 2012) ("At defense counsel's request, the trial court appointed an expert to evaluate applicant, and the expert found applicant to be competent to waive his habeas review."); *Ex parte Hall*, No. WR-70,834-01, 2009 WL 1617087, at *1 (Tex. Crim. App. June 10, 2009) (same); *Ex parte Richard Tabler*, No. WR-72,350-01 (Tex. Crim. App. Sept. 16, 2009) (court ordered hearing and finding of

3. Waiver of habeas counsel without adequate colloquy. Unlike waiver of habeas review, which is "implicit" in the capital habeas statute, waiver of appointment of counsel is explicitly permitted when "the applicant has elected to proceed pro se and the convicting court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary." Tex. Code Crim. Proc. art. 11.071, § 2(a). Yet the trial court failed to make even this required colloquy and explicit determination.

In the hearing, Mr. Gonzales merely told the court that he did not want a lawyer; he did not want to appeal; and he wanted to be executed. 31 RR-R 4-5. The court made no finding at the conclusion of the hearing that Mr. Gonzales elected to proceed pro se or that any election was intelligent and voluntary. Weeks after the hearing, only when the CCA questioned the trial court about why state habeas counsel had not been appointed, the trial court—without any further hearing or contact with Mr. Gonzales—entered an order that Mr. Gonzales had "elected" to proceed pro se and had done so "intelligent[ly] and voluntar[ily]." 5 CR-R 1144.

This record demonstrates unequivocally that Mr. Gonzales neither elected to proceed pro se nor elected to do so intelligently and voluntarily. The court failed to conduct the standard Texas law inquiry required whenever a criminal defendant or appellant seeks to waive counsel and proceed pro se. *Hubbard v. State*, 739 S.W.2d 341, 345 (Tex. Crim. App. 1987) (referring to *Faretta v. California* standard); *see Ex parte Austin*, No. WR-59,527-01, 2004 WL 7330939, at *1 (Tex. Crim. App. July 6, 2004) (noting applicant received admonishment on the danger of self-representation on appeal and habeas before waiving counsel). Thus, the trial court could not

competency); *see also Wardlow v. Davis*, 750 F. App'x 374, 375 (5th Cir. 2018) (discussing state trial court competency hearing prior to waiver). *But see Ex parte Lopez*, No. WR-77,157-01 & -02, 2015 WL 4644657 (Tex. Crim. App. Aug. 4, 2015) (no noted competency evaluation or hearing).

find what the statute required: that Mr. Gonzales's "election" to proceed pro se was "intelligent and voluntary."

The court's failure to conduct an inquiry had three direct consequences under the statute. First, Mr. Gonzales could not know when to file his habeas application if he changed his mind. The statutory trigger for timely filing a state habeas application in a capital case is the later of: 180 days after the trial court "appoints counsel under Section 2" or 45 days after the State files its brief on direct appeal in the CCA. Tex. Code Crim. Proc. art. 11.071, § 4(a). But Mr. Gonzales was not appointed habeas counsel. Because of this, as a matter of law, the triggering event that would determine the due date for filing Mr. Gonzales's state habeas application under Article 11.071, § 4—the date state habeas counsel was appointed or that Mr. Gonzales elected, intelligently and voluntarily, to proceed pro se—*never occurred.*[12]

Second, the failure to appoint counsel made it unclear whether Mr. Gonzales could invoke the statutory remedy for "untimely" filing under Article 11.071, § 4A. Under § 4A an applicant need only show "good cause" for failing to file instead of being required to meet the more stringent abuse-of-writ restrictions of § 5. That is because § 4A is limited to extensions of time to file requested by "counsel." Third, without counsel and while doubts existed about his competency to proceed, Mr. Gonzales could not make the knowing waiver of his post-conviction rights that *Reedy* mandated.

The CCA's determination that Gonzales waived his initial state habeas proceeding when he failed to file before October 4, 2010 deviates from the few rules Texas has established in this

[12] The CCA has never established a rule on how to interpret the limitations period under these circumstances. In the only case in which the CCA addressed this issue (in an unpublished decision), *see Ex parte Austin*, 2004 WL 7330939, a federal court found the bar inadequate and the State conceded the irregularity on appeal. *See Austin v. Davis*, 876 F.3d 757, 777 (5th Cir. 2017).

context. *See Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.").

D. The question is important and recurring.

The question of the adequacy of the waiver is of central importance to the fair operation of federal habeas corpus, especially in death penalty cases.

First, state habeas is a petitioner's first and—often—last opportunity to develop and present extra-record claims. *See Trevino v. Thaler*, 569 U.S. 413, 428 (2013) ("[P]ractical considerations, such as the need for a new lawyer, the need to expand the trial court record, and the need for sufficient time to develop the claim, argue strongly for initial consideration of the claim during collateral, rather than on direct, review."); *Insall*, 224 S.W.3d at 216 (Johnson, J., dissenting) ("The writ of habeas corpus is designed to deal with newly discovered evidence of all kinds—evidence that by definition is discovered after trial and outside of the record.").

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) ensures that state court is the "main event" for adjudication of a defendant's trial rights. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (AEDPA intended to "channel prisoners' claims first to the state courts"); *see also Rhines v. Weber*, 544 U.S. 269, 273 (2005) ("[T]he interests of comity and federalism dictate that state courts must have the first opportunity to decide a petitioner's claims."). Federal habeas law enforces the primacy of state habeas through, *inter alia*, stringent procedural default rules and the doctrine of exhaustion. Therefore, it is especially important that a waiver of these critical state proceedings be accompanied by due assurances that a waiver is knowingly, intelligently, and voluntarily made by a competent individual. *Cf. Ryan v. Gonzales*, 568 U.S. 57,

76 (2013) (finding that federal habeas petitioners may require competency to assist counsel in preparation of extra-record claims).

A significant number of capital defendants waive their legal process. A tenth of all prisoners executed in the modern death-penalty era have been so-called "volunteers." *See* Death Penalty Information Center, *Execution Volunteers*, https://deathpenaltyinfo.org/executions/executions-overview/execution-volunteers (last visited on Nov. 21, 2019) (identifying 149 "individuals who waived at least part of their ordinary appeals or who terminated proceedings that would have entitled them to additional process prior to their execution."). Many others who initially waive later change their mind, like Mr. Gonzales. Meredith Martin Rountree, *Volunteers for Execution: Directions for Further Research into Grief, Culpability, and Legal Structures*, 82 UMKC L. Rev. 295, 320 (2014). Failing to ensure structural safeguards to ensure the validity of waivers will result in a greater number of condemned men who "decide to continue living" but are legally foreclosed from taking action to challenge their judgment. *Id.* This problem is especially pronounced given the high rates of mental illness among those who waive. *See* John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 Mich. L. Rev. 939, apps. A-B (2005) (finding 87% of the "volunteers" who were executed between 1973 and 2003 had known mental illnesses and/or substance abuse disorders).

The risk of incompetent or unknowing waivers adds to the overall risk of unreviewed error in the application of the death penalty. *See Gilmore*, 429 U.S. at 1018 (White, J., dissenting) ("[T]he consent of a convicted defendant in a criminal case [to be executed] does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment."). That risk is especially pronounced where objective evidence shows Mr. Gonzales was behaving self-

destructively, had a long history of mental illness, and expressed paranoid conspiracies about counsel working against him. *See* Part II below.

A uniform federal standard for waivers of post-conviction process would impose no great burden on states or lower federal courts. As stated above, this Court imposed such rules for federal habeas in *Rees*, and every circuit except the Fifth already applies a uniform standard in evaluating the adequacy of state post-conviction waivers. State courts by and large already explicitly provide for the due process safeguards Mr. Gonzales was denied before enforcing a waiver of state habeas process.[13]

II. This Court Should Clarify the Application of the "Ability to Consult with Counsel" Prong Under *Dusky v. United States, Pate v. Robinson,* and *Drope v. Missouri*

In our constitutional system, a fair trial depends on the "assistance of counsel for [an individual's] defence." U.S. Const. amend. VI. It is well settled that the "present ability to consult with [one's] lawyer with a reasonable degree of rational understanding" is an essential feature of competency. *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). Thus, due process prohibits a court from trying a defendant unless he has *both* "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" *and* "a rational as well as factual understanding of the proceedings against him." *Id.*; *see also Drope v.*

[13] *See, e.g.*, *Henderson v. State*, 733 So. 2d 484, 489 (Ala. Crim. App. 1998) (Alabama); *Roberts v. State*, 426 S.W.3d 372, 378 (Ark. 2013) (Arkansas); *State v. Ross*, 873 A.2d 131, 142 (2005) (Connecticut); *Durocher v. Singletary*, 623 So. 2d 482, 485 (Fla. 1993) (Florida); *Rawles v. Holt*, 822 S.E.2d 259, 262 (Ga. 2018) (Georgia); *Hampton v. State*, 10 S.W.3d 515, 517 (Mo. 2000) (en banc) (Missouri); *State v. Dawson*, 133 P.3d 236, 243 (Mont. 2006) (Montana); *Mack v. State*, 75 P.3d 803, 804 (Nev. 2003) (per curiam) (Nevada); *State v. Berry*, 686 N.E.2d 1097, 1100 (Ohio 1997) (Ohio); *State v. Haugen*, 266 P.3d 68, 74 (Or. 2011) (en banc) (Oregon); *Commonwealth v. Wright*, 78 A.3d 1070, 1079 (Pa. 2013) (Pennsylvania); *State v. Downs*, 631 S.E.2d 79, 85 (S.C. 2006) (South Carolina); *Reid v. State*, 396 S.W.3d 478, 511 (Tenn. 2013); Tenn. Sup.Ct. R. 28, § 11(a)(4) (Tennessee).

Missouri, 420 U.S. 162, 171 (1975) (describing *Dusky* test as whether the defendant possesses the capacity "to consult with counsel, and to assist in preparing his defense").

The prohibition on trying incompetent defendants protects the fundamental fairness of trial by ensuring that a defendant may access the assistance of counsel. If a defendant "lacks the ability to communicate effectively with counsel, he may be unable to exercise other 'rights deemed essential to a fair trial.'" *Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, concurring in judgment)). A competent defendant must be able to make meaningful choices about whether to plead guilty, testify at trial, and waive trial. *Id.* (quoting *Godinez*, 509 U.S. at 398). The defendant must competently advise counsel whether to admit his guilt or maintain his innocence. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018). In a capital trial, the competent defendant may waive the presentation of mitigation evidence. *See Schriro v. Landrigan*, 550 U.S. 465, 477 (2007). In addition, "with the assistance of counsel, the defendant also is called upon to make myriad smaller decisions concerning the course of his defense." *Cooper*, 517 U.S. at 364.

The Constitution further ensures that trial courts make adequate inquiry into competency when objective evidence causes sufficient doubt about a defendant's competence. *Drope*, 420 U.S. at 172 (A trial court's "failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966))).

Yet courts and practitioners struggle to implement the terms of the "ability to consult" prong. Worse still, as happened here, courts may negate the independent significance of the "consultation" prong" by failing to inquire into objective evidence that some mental impairment renders a defendant incapable of "consult[ing] with counsel." *Drope*, 420 U.S. at 171. The Fifth

Circuit's decision rejects the basic premises of this Court's decisions in *Dusky*, *Pate*, and *Drope* and fails to find constitutional error in the trial court's failure to inquire into Mr. Gonzales's competency on an arresting set of facts. This Court should grant certiorari to correct this error and consider the important question the decision below raises.

A. The decision below is wrong and conflicts directly with *Pate* and *Drope.*

1. Applying a "manifest" obviousness standard. The Fifth Circuit referred to the sufficient-doubt standard this Court endorsed in *Pate* and *Drope* twice in its opinion. But the Fifth Circuit applied a much higher standard, demanding that behavior be "manifestly"[14] irrational and "demonstrate"[15] incompetency. This directly contradicts *Drope*'s adoption of a "sufficient doubt" rule. *See* 420 U.S. at 180.[16]

The Fifth Circuit's heightened standard for raising sufficient doubt to initiate *some* procedure intolerably raises the risk that defendants will be subject to criminal process while incompetent. Like the "clear and convincing" standard overturned in *Cooper*, which governed the standard of proof *after* the court had provided a competency proceeding, a heightened standard *before* receiving even some process will impermissibly raise the risk of incompetency. *See* 517 U.S. at 366 (finding "no sound basis for allocating to the criminal defendant the large share of the risk [of being tried while incompetent] which accompanies a [heightened] standard").

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[14] App. 13-14 (stating *Pate* claim "boils down to" whether Mr. Gonzales's "sustained refusal to cooperate with his attorneys while facing the death penalty" was "manifestly behavior in which a competent person would not engage in").

[15] App. 15 ("Gonzales was explosive, threatening, and uncooperative, but he did not demonstrate an inability to understand the proceedings or to assist in his own defense.").

[16] While "[n]o single, formulaic phrase has been set down by the Supreme Court to describe the quantum of doubt that compels an evidentiary hearing," *Griffin v. Lockhart*, 935 F.2d 926, 929 n.2 (8th Cir. 1991) (noting range of descriptors), the threshold inquiry must reflect "doubt," not the certitude suggested by *demonstrable* or *manifest* evidence of incompetency.

The Fifth Circuit's "manifest" irrationality test does not reflect the "flexible" due-process standard that allows a court to design procedures short of a formal inquiry based on objectively "reasonable doubt" about competency. *Ford*, 477 U.S. at 425 (Powell, J.); *see Drope*, 420 U.S. at 173 (no "general standard").

2. Refusing to weigh behavior at trial as relevant evidence. Contrary to *Drope*, the Fifth Circuit refused to weigh a defendant's disruptive courtroom behavior as a part of the *Pate*/*Drope* inquiry into a defendant's competency: "To hold that recalcitrant and anti-social behavior at trial constitutes, by itself, evidence in favor of a *Pate* claim would create perverse incentives for future defendants to disrupt court proceedings." App. 16.

The Fifth Circuit is not empowered to decide on policy grounds which parts of *Pate* and *Drope* ought to be applied. Permitting this rule to stand would not only condone lower court disobedience to this Court's constitutional precedent. It would also create an irreconcilable tension with Texas law. *See* Tex. Code Crim. Proc. art. 46B.004 ("Evidence suggesting the need for an informal inquiry may be based on observations made in relation to . . . factors described by Article 46B.024"); *Id.* art. 46B.024(1)(E) (factors include whether defendant exhibits "appropriate courtroom behavior"). Defendants brought before Texas federal courts should not receive fewer due process assurances than those in Texas state courts.

And the Fifth Circuit's policy prediction is not remotely borne out by reality. *Drope* has been the law for over 40 years, and courts nationwide have applied its mandate without a noted surge in strategic disruption at trial. This Court already weighed this risk and rejected it: the risk of giving hearings to malingerers imposes only a modest cost on the state compared to the "dire" risk of forcing an incompetent to stand trial without any hearing. *See Cooper*, 517 U.S. at 365.

3. Weighing "rational understanding of proceedings" *against* "ability to consult."

Dusky sets out two independent requirements before a defendant may be found competent—"rational understanding" and "ability to assist." This Court has never suggested that a trial court's perception of a defendant's rational understanding of the proceedings discharges the court's duty to inquire where objectively reasonable doubt exists about the defendant's ability to consult with his counsel.

Pate and *Drope* hold just the opposite. *Pate* rejected the state court's notion that "some evidence of [defendant's] ability to assist in his defense" was "dispositive on the issue of [his] competence." *Pate*, 383 U.S. at 386. *Drope* held that the state courts had likely erred by pointing to facts in a pretrial report suggesting competence, such as that Drope was "well oriented in all spheres" and could answer questions, but ignoring "contrary data" that Drope suffered from problems such as "borderline mental deficiency" and "chronic anxiety reaction with depression." The Court suggested that these diagnoses created sufficient doubt to prompt inquiry into competence. *Drope*, 420 U.S. at 175-76; *see also id.* at 179 (finding state courts had failed "to give proper weight to the information suggesting incompetence" in demeanor at trial, especially in light of Drope's mental health evaluation.).

Yet the Fifth Circuit repeatedly emphasized evidence that Mr. Gonzales had a rational understanding of the proceedings—a matter the parties did not dispute—against a finding of *Pate* error. *See, e.g.*, App. 15 ("In fact, . . . Gonzales's explanations to the court of his reasons for not cooperating evinced a clear understanding of the proceedings and of the significance of his trial counsel's participation."). This contradicts *Dusky*, *Pate*, and *Drope*. As discussed below, this case presents an excellent vehicle to clarify the "consultation" prong of *Dusky*.

4. Precluding competency inquiry using lay stereotypes of mental illness. Yet another feature of the Fifth Circuit's analysis departs from precedent and calls for this Court's review. The Fifth Circuit's opinion engages in—and condones—lay stereotypes of mental illness to foreclose requiring an inquiry by a mental health professional trained in assessing competency. *Cf. Moore v. Texas*, 137 S. Ct. 1039, 1052 (2017) (finding Texas's use of lay "stereotypes, much more than medical and clinical appraisals, should spark skepticism"); *id.* at 1053 (Roberts, C.J., dissenting) (agreeing "those factors are an unacceptable method of enforcing" prohibition on execution of intellectually disabled). The effect is to allow "judges [to] put the proverbial cart before the horse in the competency setting." *State v. Einfeldt*, 914 N.W.2d 773, 782 (Iowa 2018).

The Fifth Circuit assumed that mental illness would manifest itself in stereotypical ways. Yet this Court has said there are no "fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed." *Indiana v. Edwards*, 554 U.S. 164, 180 (2008). The incompetent defendant need not be "catatonic, raving, or frothing." *Lokos v. Capps*, 625 F.2d 1258, 1267 (5th Cir. 1980). "[A] defendant suffering from [a paranoid delusional system] may outwardly act logically and consistently but nonetheless be unable to make decisions on the basis of a realistic evaluation of his own best interests." *Lafferty v. Cook*, 949 F.2d 1546, 1555 (10th Cir. 1991).

The Fifth Circuit believed the trial judge could assume Mr. Gonzales's mental illness was in a static relationship with his competency. If he had the same mental illnesses in 1995 and was competent then, the same must be true in 2008 and 2009. App. 16. But this Court has long recognized that competency is variable. *Drope*, 420 U.S. at 181 ("[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); *Edwards*, 554 U.S. at 175 (mental illness "can vary

over time" and interfere "with an individual's functioning at different times in different ways"); *Whitmore*, 495 U.S. at 177 n.5 (competence is not "static").

To the extent that any explanation was necessary for the differences between Gonzales's behavior in 1995 and his behavior in 2009, defense counsel offered it. Counsel informed the court that Mr. Gonzales's intervening, untreated diabetes affected his brain functioning, which might have explained how he could have been both competent in 1995 and incompetent in 2009. Dr. Cunningham explained that Gonzales's extensive deficiencies left him with insufficient "reserves" on hand to cope with stressful situations. ROA.2184-85. Indeed, the State's expert, Dr. Timothy Proctor, agreed that brain impairments can reduce the reserves on hand. ROA.2673. Moreover, Mr. Gonzales was older and less healthy, traumatized by what he perceived to be the betrayal of family members, uprooted from his routine after years of solitary confinement,[17] and facing a hearing on which his life depended. These facts, combined with deficits he had struggled with all his life, could have rendered Gonzales unable to assist his attorneys in their efforts to present a case for life.

Second, the Fifth Circuit resorted to another stereotype in foreclosing a competency inquiry: because Mr. Gonzales is a bad man with an "extremely anti-social attitude," a serious mental illness could not have been controlling his irrational actions. App. 14. But mental health professionals offer a different view: A diagnosis of anti-social personality disorder—let alone a court's lay suspicion of manipulative behavior—does not foreclose the reasonable likelihood that

[17] *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." (citing Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol'y 325 (2006) (common side-effects of solitary confinement include anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors))).

already-diagnosed mental illness or brain damage may have caused the defendant's irrational behavior. As the State's expert acknowledged at the federal evidentiary hearing, the diagnosis of a personality disorder does not end the competency inquiry. ROA.2663 (testimony of Dr. Proctor). Rather, whatever textbook diagnosis a clinician arrives at, the question whether a person was able to control his actions is separate. ROA.2663; *see also* ROA.2777 (State expert Dr. Arambula's testimony agreeing that, while ASPD involves impulsivity, so does brain damage); *see* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 25 ("Cautionary Statement for Forensic Use of DSM-5") (5th ed. 2013).

"Whatever the relationship between mental illness and incompetence to stand trial, in this case the bearing of the former on the latter was sufficiently likely that, in light of the evidence [above], the correct course was to suspend the trial until such an evaluation could be made." *Drope*, 420 U.S. at 181.

B. This case presents an ideal vehicle to clarify the significance of the consultation prong of *Dusky*.

This Court's intervention is needed to clarify the significance of *Dusky*'s first prong: whether a defendant has the sufficient present ability to consult with a lawyer with a reasonable degree of rational understanding. 362 U.S. at 402. The key stakeholders in assessing competency—lawyers,[18] judges, and mental health professionals—have had "little agreement as to what abilities ought to be required, how to assess them[,] or even who bears responsibility for making the assessment." David Freedman, *When is a capitally charged defendant incompetent to stand trial?* 32 Int'l J.L. & Psychiatry 127, 128 (2009).

[18] That includes prosecutors. *See Sell v. United States*, 539 U.S. 166, 180 (2003) ("[T]he Government has a concomitant, constitutionally essential interest in assuring that the defendant's trial is a fair one").

For example, defense counsel and the trial judge in this case gave little attention to the consultation prong in assessing Mr. Gonzales's competency. Judge McCoy testified, "you would know [incompetency] when you saw it", ROA.3359, but could not articulate a single factor relevant for this determination. ROA.3358-59; *see also* ROA.3345. Judge McCoy erroneously substituted his eyeball test for the requisite mental health evaluation underscored in *Dusky*, *Pate*, and *Drope*. *See Lafferty*, 949 F.2d at 1554-55 ("state trial court's evaluation of . . . competency was infected by a misperception of [*Dusky*'s] legal requirements."). This confusion extended to Mr. Gonzales's defense counsel, as they could not agree on the relevant factors for assessing his competence. One attorney was focused on whether Mr. Gonzales was "oriented times three: person place or time," ROA.3233 (Leach), while the other looked for evidence of delusions or hallucinations or inappropriate speech before requesting an evaluation. ROA.3120-61 (Leverett).

This approach—not unique among bench and bar—led counsel and the court to treat Mr. Gonzales's symptoms as irrelevant to the competency question. Yet Mr. Gonzales exhibited a paranoid reaction to counsel's misperceived action at the start of the case, which, due to his brain damage, prevented him from interpreting counsel's actions as nonthreatening. His delusions with respect to his attorneys and impairments caused him to block any attempt by his counsel to develop and present his defense.

Likewise, the decision below fuses the factual understanding and consultation prongs into a single standard, allowing the court to use a defendant's factual understanding of the proceedings to defeat an attempt to show even a reasonable doubt of incompetency. But many courts have found "that, even if a criminal defendant has an intellectual understanding of the charges against him, he may be incompetent if his impaired sense of reality substantially undermines his judgment and prevents him from cooperating rationally with his lawyer."

Wilcoxson v. State, 22 S.W.3d 289, 305 (Tenn. Crim. App. 1999). *See, e.g.*, *United States v. Ghane*, 490 F.3d 1036, 1040 (8th Cir. 2007) (holding finding of incompetency supported where defendant had factual understanding of the proceedings against him, but delusional beliefs impaired ability to assist defense); *Lafferty*, 949 F.2d at 1556; *Turner v. State*, 422 S.W.3d 676, 695 & n.23 (Tex. Crim. App. 2013) (collecting cases); *Aldridge v. Thaler*, No. H-05-608, 2010 WL 1050335, at *33 (S.D.Tex. Mar. 17, 2010).

Giving attention to this prong would also allow this Court to clarify the "functional" nature of competency. *Edwards*, 554 U.S. at 176 (discussing competency to perform the specific tasks of a defendant proceeding *pro se*). "[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense." *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001). A defendant's capacity to assist in the defense is a question lawyers and judges must direct with assistance from mental health professionals. *See United States v. Duhon*, 104 F. Supp. 2d 663, 669 (W.D. La. 2000) ("[A] multi-disciplinary approach is often critical in resolving competency issues, particularly where, as here, the focus is on a defendant's ability to assist counsel.").

This case provides a perfect opportunity to resolve confusion about what *Dusky* requires: Mr. Gonzales does not contend that he lacked a factual understanding of the proceedings. The only ground for incompetency is that he lacked the capacity to consult with his counsel and assist in his defense with rational understanding. Certiorari is warranted on this question.

III. This Court Should Review the Fifth Circuit's Misapplication of the Certificate of Appealability Inquiry, Which Thwarted Ordinary Appellate Review of a Death-Penalty Habeas Case.

This case also presents an important and recurring question: whether the Fifth Circuit continues to ignore the certificate of appealability requirement that governs whether a court of appeals has jurisdiction to review a district court's denial of habeas relief.

A. The Fifth Circuit has repeatedly defied Congress's purpose and this Court's mandate on the threshold standard to issue a COA.

Under AEDPA, a prisoner seeking a COA must demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In 2000, this Court issued a clear decree on the meaning of § 2253(c)(2), holding it essentially "codifi[ed]" the pre-AEDPA "certificate of probable cause" standard for appeals on federal habeas. *Slack v. McDaniel*, 529 U.S. 473, 483 (2000).[19] Just like the pre-AEDPA regime, § 2253(c)(2) requires a mere "threshold inquiry." *Id.* at 485. A petitioner need only show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Id.* at 484 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983)) (internal quotation marks omitted). When a petitioner seeks a COA on a district court's procedural ruling, the reviewing court must determine whether reasonable jurists would debate both the procedural ruling and the underlying constitutional claim. *Id.* at 484-85.

Since *Slack*, lower courts have duly applied the COA standard—with one exception. This Court has had to "reiterate" the COA standard, almost exclusively on certiorari to the Fifth Circuit in capital cases. *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) ("Consistent with our

[19] In one narrow respect, the COA standard differed from its predecessor: substituting the word "constitutional" for "federal." *See Slack*, 529 U.S. at 483.

precedent and the text of the habeas corpus statute, we *reiterate* . . . "); *Buck v. Davis*, 137 S. Ct. 759, 774 (2017) ("We *reiterate* what we have said before. . . ." in *Miller-El*).[20]

B. The Fifth Circuit once again misapplied the COA standard in Mr. Gonzales's case.

Here, the Fifth Circuit did not even pay lip service to this Court's COA requirements. As it has done repeatedly over the last sixteen years since *Miller-El*, the Fifth Circuit did not undertake the COA analysis required by this Court's decisions. It "phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief—but it reached that conclusion only after essentially deciding the case on the merits." *Buck*, 137 S. Ct. at 773 (internal citation omitted). All the while, the court put a "dismissive and strained interpretation," *Miller-El*, 537 U.S. at 344, on Mr. Gonzales's debatable facts and arguments. *See* Parts I & II above.

Moreover, the Fifth Circuit injected a further problem to its already troubling practice. Instead of limiting the COA inquiry to the debatability of the district court's resolution of the merits, the Court *reversed* the district court and relied on an "alternative" procedural basis for

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[20] *See Penry v. Johnson*, 532 U.S. 782, 792 (2001) (finding petitioner entitled to relief after Fifth Circuit denied a certificate of appealability); *Miller-El*, 537 U.S. at 336, 344 (2003) (holding Fifth Circuit applied incorrect COA standard and based denial on "dismissive and strained interpretation" of evidence), *rev'ing denial of relief after remand sub nom. Miller-El v. Dretke*, 545 U.S. 231 (2005); *Tennard v. Dretke*, 542 U.S. 274, 283 (2004) (reversing COA denial where this Court had only "pa[id] lip service to the principles guiding issuance of a COA" and overruling this Court's interpretation of the Eighth Amendment as inconsistent with clearly established federal law); *Banks v. Dretke*, 540 U.S. 668, 703-05 (2004) (reversing COA denial because the application "surely fits" the COA standard); *Abdul-Kabir v. Dretke*, 543 U.S. 985 (2004) (vacating COA denial on basis of *Tennard*); *Buck*, 137 S. Ct. at 774 (reversing COA denial and deciding merits of issue underlying Rule 60(b)(6) motion); *see also Trevino v. Thaler*, 569 U.S. 413 (2013) (overruling legal principle announced in *Ibarra v. Thaler*, 687 F.3d 222 (5th Cir. 2012), a Fifth Circuit case in which a COA was denied). *Cf. Ayestas v. Davis*, 138 S. Ct. 1080 (2018) (vacating denial of COA and remanding because Fifth Circuit's reason for denying COA "was flawed," *id.* at 1088 n.1); *Jimenez v. Quarterman*, 555 U.S. 113, 121 & n.3 (2009) (vacating denial of COA on procedural grounds by unanimous opinion and remanding for COA determination on merits).

denying relief. *See* App. 10 ("The district court's ruling was in error."). An *appellee* in a court vested with appellate jurisdiction may offer an alternative basis for affirmance. *United States v. Am. Ry. Exp. Co.*, 265 U.S. 425, 435 (1924). But it is not within the compass of AEDPA's certification decision. To the contrary, resolving a petition "in a different manner" is a reason a COA should issue. *Slack*, 529 U.S. at 484 (COA should issue if "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.").[21]

Finally, the Fifth Circuit's finding of no debatability blinks reality—specifically, actual debate among reasonable jurists. Two judges of the CCA questioned the validity of the procedural bar their court had applied and believed Mr. Gonzales had "allege[d] substantial facts to establish a bona fide doubt with respect to his competency to waive state habeas proceedings" at his May 2009 hearing—based on the same facts that were in front of the trial court a day earlier. *Ex parte Gonzales*, 463 S.W.3d at 512. Even the district court, which denied relief and a COA on Mr. Gonzales's claim, opined that the *substantive* competency question was "a very tough [,] . . . very close case" and that:

> Had this been in the federal system from day one, somebody would have sent him for a competency exam. I mean I certainly would have sent him and we would have gotten [one].

ROA.3047. *See Butler v. McKellar*, 494 U.S. 407, 415 (1990) (existence of "differing positions taken by" circuit judges showed an issue is "susceptible to debate among reasonable minds").[22]

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[21] The only indication that the Fifth Circuit observed jurisdictional limits to its COA inquiry was in its erroneous sanction of a third "claim" on which Mr. Gonzales had purportedly failed to first seek COA in the district court. *See* App. 18. In fact, that "claim" merely consisted of an argument—not a separate ground for relief—in support of Mr. Gonzales's *Pate* claim: namely, that the retrospective competency determination attempted by the district court was not adequate to "cure" the harm from the *Pate* violation.

[22] *See also Jordan v. Fisher*, 135 S. Ct. 2647, 2651 (2015) (Sotomayor, J., joined by Ginsburg & Kagan, JJ., dissenting from the denial of certiorari) (indicating that disagreement

When an inferior court repeatedly fails to apply the law as AEDPA demands, this Court has forcefully corrected that court's errors. "The only way this Court can ensure observance of [AEDPA] is to perform the unaccustomed task of reviewing utterly factbound decisions that present no disputed issues of law." *Cash v. Maxwell*, 132 S. Ct. 611, 616 (2012) (Scalia, J., dissenting from denial of certiorari) (citing eight reversals of Ninth Circuit's grant of habeas relief in contravention of 28 U.S.C. § 2254(d)(1)). The same holds true here. The Fifth Circuit "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10.

To be sure, Mr. Gonzales's petition presents two other important questions, despite the procedure employed below. This Court certainly has the power to resolve the merits of those questions, even on certiorari from the improper denial of a COA. *See, e.g.*, *Buck*, 137 S. Ct. at 774-75. But in the alternative, this Court may simply review the Fifth Circuit's patent misapplication of the COA requirement and issue a COA. *Miller-El*, 537 U.S. at 327; *see also 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"). Mr. Gonzales at a minimum seeks the vindication of his right to an ordinary appeal when he has shown the district court's resolution of a claim is debatable and deserves encouragement to proceed further.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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among judges as to the debatability "alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution" of the claim) (emphasis in original).

Respectfully submitted,

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