No. 19-6823 (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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Certiorari is warranted to resolve the question of the adequacy of the Texas Court of Criminal Appeals's procedural bar applied in this case.

A. The State does not dispute the circuit split on the question presented.

The State does not dispute—and so concedes—that there is a conflict among the circuits about the proper analysis for determining whether state habeas waivers are adequate to preclude federal habeas review. *See* Sup. Ct. R. 15.2. Instead, the State parses the circumstances of the Seventh Circuit and Third Circuit decisions for "factual[ ] distinct[ions]" and also cites the Ninth Circuit in passing for this purpose. BIO 21. (The State fails to even cite—let alone discuss—the Eighth Circuit's case law.) Other individuals were more equivocal in expressing purported waivers than Mr. Gonzales was, says the State. But the State wholly fails to discuss the rules those circuits applied, which plainly conflict with the Fifth Circuit's approach. *See* BIO 21-22. Those differences do not erase the division between the circuits. The rule applied by the Third, Seventh, Eighth, and Ninth Circuits asks whether the state habeas waiver was knowingly, intelligently, and voluntarily made by a competent individual. By refusing to engage in this inquiry below, the Fifth Circuit deviated from this rubric.

Similarly, the State has no response to Mr. Gonzales's contention that this Court's decisions support the majority of circuits' approach to adequacy. *See* Pet. 19-21; BIO 21. The State's only quibble is that *Rees v. Peyton*, 384 U.S. 312 (1966), set "no particular standard" for reviewing waivers of federal habeas. But even the State's attempt to pick off a single case (while saying nothing about the many other cases Mr. Gonzales discusses) fails. In fact, this Court has applied and interpreted the *Rees* standard on multiple occasions. *Whitmore v. Arkansas*, 495 U.S. 149, 166 (1990) (applying *Rees* standard to assess validity of state habeas waiver); *Godinez v.*

Moran, 509 U.S. 389, 398 n.9 (1993) (harmonizing the *Rees* standard with other competency standards); *see also* Pet. 19 (collecting circuit cases applying *Rees* standard).

Instead of contending with Petitioner's *cert*.-stage arguments, the State leaps ahead to announce its apparent position on the merits: "states have the discretion in these circumstances to employ procedures and procedural bars as they see fit." BIO 13. Mr. Gonzales expects the Court will resolve this merits argument, should it grant certiorari. But it suffices to note that the Due Process Clause, incorporated against the states, and the federal doctrine of "adequate and independent state grounds" impose real limits on a federal court's ability to enforce a state procedural bar to federal habeas review. *See* Pet. 15-16. Applying that federal law, four federal courts of appeals disagree with the State. *See* Pet. 16-18.

B. The Texas Court of Criminal Appeals explicitly applied a procedural bar based on Mr. Gonzales's purported waiver of habeas proceedings.

Next, the State attempts to cast doubt on the factual premise for the first question presented: did the Texas Court of Criminal Appeals (CCA) even apply a procedural bar based on Mr. Gonzales's purported waiver of habeas at the May 8, 2009, hearing? *See* BIO 13 (disputing "the facts of the waiver"), 20 (disputing "what transpired").

The answer is unequivocally "yes." Mr. Gonzales's question about the adequacy of state habeas waivers is squarely presented by the facts of the case, because the CCA explicitly relied on Mr. Gonzales's purported waiver of habeas review when he presented his claims in his first state habeas application: "Because of applicant's expressed desire to waive habeas, the lack of any vacillation of that waiver appearing in the record, and applicant's failure to timely file an application, we hold that applicant has waived his right to the review of an initial Article 11.071 habeas application." App. 69.

Both the State and the Fifth Circuit misunderstand the CCA's plain words. The Fifth Circuit found "the TCCA unambiguously held that Gonzales's claims were procedurally barred because [1] he had waived his right to habeas counsel and [2] did not file a habeas claim pro se before the deadline expired." App. 11. These findings were incorrect. The CCA expressly relied on Mr. Gonzales's "desire to waive *habeas*," not the waiver *of habeas counsel*, as a basis for finding Mr. Gonzales had "waived his right to the review of an initial Article 11.071 habeas application." App. 69. Moreover, the CCA did not rely on the passage of the time to file the application as the exclusive basis to assert the waiver. *Id.* To the extent that the court found the missed deadline relevant, it was only because the CCA refused to enforce a supposed waiver of state capital habeas proceedings at any earlier point in time. *See Ex parte Reynoso*, 257 S.W.3d 715, 720 n.2 (Tex. Crim. App. 2008); Pet. 21-22.

The State repeats the mistakes of the court below. Like the court below, the State confuses the waiver of *habeas counsel* with the distinct waiver of *habeas proceedings*. BIO 18-19 (defending adequacy of waiver of state habeas counsel), 20 (arguing state was not obligated to ensure "uniform procedure" for waiver of habeas counsel), 22 (insisting "the finding was Gonzales waived habeas counsel, not habeas review altogether").[1] Elsewhere, the State misrepresents the plain language of the CCA order as merely "stating that Gonzales had not filed

[1] Even this supposed waiver of state habeas counsel clearly deviated from state law and rendered the procedural bar applied by the CCA inadequate. *See* Pet. 23-25. The trial court's failure to comply with the plain language of the Texas capital habeas statute, Tex. Code Crim. Proc. art. 11.071, § 2(a), made it impossible to ascertain the deadline to file. The lack of appointed counsel made it impossibly unclear whether Mr. Gonzales had statutory remedies for untimely filing under Tex. Code Crim. Proc. art. 11.071, § 4A. And the lack of counsel deprived Mr. Gonzales of the capacity to make an informed waiver of habeas, as required by Texas law. The dissenting judges of the CCA also found this waiver of counsel improper. App. 72 n.3 (Yeary, J., dissenting).

a habeas application and, consequently, any subsequent application would be reviewed under" Tex. Code Crim. Proc. art. 11.071, § 5—with no mention of the CCA's express reliance on Mr. Gonzales's desire to waive or lack of vacillation. BIO 11.

The State raises only two pertinent responses to the waiver-of-habeas-proceedings bar that the CCA applied. The State admits that, under Texas law,[2] the "waiver of the right to file a state habeas application is enforceable if it 'was knowingly, intelligently, and voluntarily given.'" BIO 23 (quoting *Ex parte Reedy*, 282 S.W.3d 492, 495 (Tex. Crim. App. 2009)). But the State confusingly says that "those circumstances" are not present, because the trial court found the distinct waiver of habeas counsel was knowing and voluntary. *Id.* This is an obvious *non-sequitur*.

The "facts pertinent to the decision to waive" habeas, *Reedy*, 282 S.W.3d at 503-04, are far different from the facts necessary to make a knowing waiver of counsel. Yet Mr. Gonzales received no colloquy that ensured his knowing, intelligent, and voluntary waiver of habeas. He also received no admonishment on the effect of his waiver or the time to file, App. 76-77, even though the CCA has said that an applicant could retract his waiver at any time before the deadline to file passed. *See Reynoso*, 257 S.W.3d at 720 n.2. 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] Texas law imposes this knowing, intelligent, and voluntary requirement, just like the law of at least thirteen other States, *see* Pet. 27 n.13. As Mr. Gonzales explains (and the State concedes), this is also a component of the law applied by four circuits when reviewing the adequacy of state habeas waivers. Pet. 16-19. The State correctly explains that "what is missing from" published Texas law (but not these other regimes) "is a requirement that a defendant be competent to waive habeas proceedings." BIO 23. Mr. Gonzales notes the actual practice of the CCA is to enforce a waiver only after the court is assured of the applicant's competency. Pet. 22 & n.11.

The State's last-ditch response is to re-characterize Texas law as imposing a "discretionary" waiver bar in the hopes of immunizing the CCA's irregular application of its own rules. BIO 24. But *Reedy* makes clear that the knowing, intelligent, and voluntary inquiry is mandatory, not discretionary. *Reedy*, 282 S.W.3d at 495.

The state court held that Mr. Gonzales could not present his claims in his initial state habeas application because he had waived his right to habeas review. App. 69. The Fifth Circuit failed to apply any meaningful "adequacy" review before treating Gonzales's federal claims as procedurally barred. This Court should review the Fifth Circuit's decision and resolve the circuit conflict over the proper analysis when considering alleged waivers of habeas review.

II. Certiorari is warranted to clarify the independent significance of the "ability to consult" prong of *Dusky*, *Pate*, and *Drope*.

A. Contrary to the State's arguments, the issue is not one of weight accorded to evidence, but the Fifth Circuit's contravention of this Court's case law.

The State contends Mr. Gonzales's question presented is reducible to a dispute about the facts. BIO 14, 31. Not so. There is little dispute about the facts in this case. Indeed, Mr. Gonzales's statement of those facts closely tracks the district court's. *See* App. C (district court op.); App. 29-31 (recounting trial court proceedings on multiple motions for counsel's withdrawal due to lack of working attorney-client relationship); App. 31-35 (describing Mr. Gonzales's self-destructive behavior at trial); App. 37 (recounting trial court's familiarity with Mr. Gonzales's mental health issues). The issue dividing the parties in this case is not the facts, but is instead the Fifth Circuit's refusal to use the correct legal standard to decide whether these facts raised sufficient doubt about Mr. Gonzales's present, rational ability to consult with counsel in 2009.

The Fifth Circuit's improper standard is evident in its substitution of the *Pate*[3] and *Drope*[4] test, which focuses on "sufficient doubt" based on evidence known to the trial court, with an inquiry into whether there was "behavior" that "a competent person" "manifestly" "would not engage." App. 13-14. The State claims that the Fifth Circuit used this standard only once, as a "brief summary" and might not have meant what it said. BIO 30. Instead, the State suggests, Mr. Gonzales is making "essentially . . . an argument over semantics." *Id.* A court's words must be taken seriously, especially when they identify the standard of review the court is employing. That standard provides the lens through which the court views the facts. To assess the court's legal conclusions, this Court must presume the Fifth Circuit applied the standard it announced in its published, written opinion.

If there is any doubt, however, about whether the court of appeals applied the erroneous standard it announced, one need look no further than its analysis. Tellingly, the Fifth Circuit refused to evaluate evidence this Court has held is essential to resolving a *Pate*/*Drope* claim. In *Drope,* this Court provided a non-exclusive list of evidence—including the "defendant's demeanor at trial"—that courts must consider in determining whether there is a bona fide doubt of defendant's competency. 420 U.S. at 180. The Fifth Circuit declared it did not have to weigh evidence of Mr. Gonzales's trial demeanor, because "[t]o 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 State attempts to wish this declaration away, by arguing the Fifth Circuit did not really refuse to weigh that evidence. But this Court must review the record before it, not the record the State wishes it had.

[3] *Pate v. Robinson*, 383 U.S. 375 (1966).
[4] *Drope v. Missouri*, 420 U.S. 162 (1975).

The State points to no statement that walks back the court's unequivocal refusal to weigh the very evidence this Court has instructed must be weighed. BIO 31.

The Fifth Circuit also improperly weighed one prong of *Dusky*[5] (Mr. Gonzales's rational understanding of the proceedings, which Mr. Gonzales has never contested) *against* the other prong of *Dusky* (whether Mr. Gonzales had the present, rational ability to consult with counsel) in determining whether there was sufficient evidence to doubt competency. Pet. 31, 35. The State simply fails to dispute this point, mistaking it as a complaint that the Fifth Circuit "basically ignored" the ability-to-consult prong. BIO 31-32.

Finally, the Fifth Circuit refused to consider the variability of mental illness. According to the Fifth Circuit, only a "change" in "mental health diagnosis" could justify revisiting a defendant's previously unquestioned competency at his 1995 trial. App. 16. This flies in the face of this Court's teachings that competency can vary over time. *See* Pet. 32-33 (collecting cases). This Court has also rejected the idea that a mental-health diagnosis alone must be the cause for incompetency. As this Court said just last Term of the similar competency-to-be-executed standard, the "standard has no interest in establishing any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same . . . so long as they produce the requisite lack of comprehension." *Madison v. Alabama*, 139 S. Ct. 718, 728 (2019). Although this has long been the view of this Court, the Fifth Circuit's analysis failed to account for it.

The State argues that *Pate* makes the trial judge the "expert," especially where the judge had no "expert testimony" on Mr. Gonzales's mental illness and brain functioning. BIO 34. The State's argument is flatly contradicted by the record in this case. As the district court found, the trial judge was well-acquainted with extensive expert testimony on Mr. Gonzales's mental illness

[5] *Dusky v. United States*, 362 U.S. 402 (1960).

and brain dysfunction from the 1995 trial. App. 37. He was also provided the affidavit of a neurologist on the potentially serious mental-health effects of Mr. Gonzales's uncontrolled diabetes. *Id.*; *see* Pet. 6 (citing 4 CR-R 816-18; *id.* at 832-36).

The State's proposal is also perplexing because judges—who don black robes, not white lab coats—are not presumed capable of offering expert opinion testimony on competency. Indeed, the whole point of *Pate* and *Drope* is to induce a judge, defense counsel, or prosecutor to inquire about competency based on unclear evidence and gather information from experts. *See Pate*, 383 U.S. at 386 (judges' suspicion that "demeanor at trial might be relevant to the ultimate decision as to his insanity . . . cannot be relied upon to dispense with a hearing on that very issue"). "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists"—and other mental health experts—"can identify the 'elusive and often deceptive' symptoms of insanity, and tell the jury why their observations are relevant." *Ake v. Oklahoma*, 470 U.S. 68, 80 (1985) (citation omitted).

The State argues that Mr. Gonzales improperly relies on the federal evidentiary hearing because that hearing includes expert findings made after 2009. BIO 34. Mr. Gonzales merely uses the expert evidence at the federal evidentiary hearing to show that, had a competency hearing been held, mental health experts—even the State's own expert—would not embrace the lower court's Manichean view that anti-social behavior and previous competence is incompatible with a possible finding of incompetency. Pet. 33.

B. Mr. Gonzales's case presents an excellent vehicle to clarify the meaning of *Dusky*'s "ability to consult with counsel."

The State wrongly asserts that Mr. Gonzales cannot request review to clarify *Dusky*'s "ability to consult" prong because he does not raise a substantive competency issue in this Court. BIO 34. The State is mistaken: The *Dusky* "ability to consult with counsel" prong is foundational

to the standards that govern a *Pate*/*Drope* claim. A court cannot determine whether there is sufficient doubt about competency until it has a settled definition of incompetency in the first place. Thus, this Court has employed *Dusky* to resolve the procedural due process question whether there was sufficient doubt to justify a competency inquiry. *See Pate*, 383 U.S. at 385 (applying *Dusky* to determine whether there was "some evidence of [the petitioner's] ability to assist in his own defense"); *Drope*, 420 U.S. at 181 (applying *Dusky* to determine whether petitioner's absence from trial due to his suicide attempt bore on whether he was able to cooperate with his attorney).[6]

III. Certiorari is warranted to review the Fifth Circuit's misapplication of the COA standard requires review.

The petition argues that the Fifth Circuit's COA practice in this case disregards the threshold inquiry established by this Court and Congress. The State's defense of the Fifth Circuit's decision is not only unavailing; it serves to reinforce the appropriateness of certiorari.

The State defends the power of a COA-stage panel to reverse procedural holdings resolved favorably to the petitioner in the district court, on the urging of the State. BIO 38. The State also believes the practice is commonplace but cites no example of this practice outside the

[6] Mr. Gonzales does not take the State (at 34-35) to be arguing that the retrospective competency hearing "cured" the *Pate* violation. Even if that were the State's argument, it would be unavailing. As an initial matter, the Fifth Circuit did not examine the merits of this aspect of the *Pate* claim, because as the State concedes (at 35), the Fifth Circuit refused to address the so-called "claim" on its merits and deemed it barred. App. 17-18; *see* Pet. 39 n.21.

Even if the Fifth Circuit had examined the issue, the federal competency hearing could not have cured the harm from the trial court's failure to inquire. Although the district court and the parties put forth a good-faith effort in pursuing a retrospective competency inquiry, which concluded that Mr. Gonzales was competent to be resentenced, the result was inherently unreliable. *See* COA Reply at 26 (discussing lack of raw data supporting 1995 report of Dr. Brinkman on brain dysfunction); ROA.2642, 2644 (expert testimony on lack of adequate assessment of brain damage). Indeed, this Court has never found such an inquiry to be adequate. *See Pate*, 383 U.S. at 387 (observing that experts would have to testify solely on record evidence years after the fact); *see also Drope*, 420 U.S. at 183 (retrospective evaluation would be inadequate); *Dusky*, 362 U.S. at 403 (recognizing difficulties of retrospective determinations).

Fifth Circuit. *See id.* ("[T]hen every appellate court would err in denying a COA if the denial included a reversal on an issue"); *cf. Matthews v. Davis*, 665 F. App'x 315, 322 (5th Cir. 2016) (deciding state habeas counsel's performance was not unreasonable under *Martinez v. Ryan*, 566 U.S. 1 (2012), despite district court not reaching issue, 665 F. App'x at 318-19, and parties not briefing it). If that is an appropriate use of appellate powers at a non-appellate stage, this Court may wish to expressly approve the practice.

The State further argues that the Fifth Circuit decision correctly applied *appellate standards of review*—including review of factual findings for clear error—at the COA stage, even though the court of appeals lacked appellate jurisdiction. BIO 36-37 (stating that "the Fifth Circuit did not waiver [sic] from . . . standard" for appellate review of federal habeas issues), 36 (defending Fifth Circuit's "holding" that Gonzales had not shown district court findings were clearly erroneous). This confirms that the State misconceives of the COA inquiry as just another form of appellate review.

The problem is that these practices erase the necessary distinction between appellate jurisdiction and the limited COA inquiry. *See Buck v. Davis*, 137 S. Ct. 759, 774 (2017) ("[W]hatever procedures employed at the COA stage should be consonant with the limited nature of the inquiry."). Even the Texas Solicitor General suggested the Fifth Circuit modify its practice of giving full-blown appellate review at the COA stage because it defeats the time-saving purpose of the COA inquiry:

> The State of Texas, with utmost respect, wants to suggest to the Court that the amount of briefing and oral argument and judicial time that sometimes goes into deciding a Certificate of Appealability may be defeating the purpose of Section 2253(c).…
>
> The State wants to just respectfully suggest that it's important to avoid allowing the Certificate of Appealability process to effectively serve as an appeal, and that almost can happen when we have hundred-page briefs submitted on each side,

> oral argument that's being held, and a great length of time that elapses between the District Court decision and the ultimate decision to issue the COA.

Oral Argument of Texas Solicitor General Jonathan Mitchell at 36:23-36:41, 37:44-38:11, *Sells v. Stephens*, No. 12-70028, 536 F. App'x 483 (5th Cir. 2013) (denying COA after oral argument), http://www.ca5.uscourts.gov/OralArgRecordings/12/12-70028_6-4-2013.wma. Despite this Court's clear direction in *Buck*, and the State of Texas's suggestion, the Fifth Circuit continues to misapply the threshold inquiry.

Indeed, the Fifth Circuit continues to deny capital habeas petitioners ordinary appellate review at a much higher rate than any other circuit. *See* Appendix F to Petition for Writ of Certiorari, *Halprin v. Davis*, No. 18-9676 (U.S. 2019), https://www.supremecourt.gov/DocketPDF/18/18-9676/102857/20190612195053772_19-06-12_%20Final%20%20Cert_Appendx.pdf. The federal judiciary's own data show that 40 percent (67/167) of capital habeas cases in the Fifth Circuit disposed between January 2015 and June 2019 received no ordinary appellate review whatsoever. For all other circuits during that period, that number is just 11.9 percent (56/468). *Id.*[7] This result is especially disturbing where, as here, the COA denial forecloses the only appellate review of constitutional claims in a capital case, because of serious malfunctions in the state courts.

[7] The Federal Judicial Center Integrated Database from which counsel drew this information in fact undercounts the total number of COA denials. Only some COA denials are appropriately coded in the database as "Outcome" code 9 (disposition based on COA denial); others are coded as "Outcome" code 1 (affirmation of lower court decision). *See* Field Descriptions 9-10, Federal Judicial Center, Integrated Data Base Appeals Documentation FY 2008-Present, https://www.fjc.gov/sites/default/files/idb/codebooks/Appeals%20Codebook%202008%20Forward_0.pdf. These seeming "affirmance" outcomes include cases in which the court of appeals denies a COA on all issues and affirms a district court disposition on a collateral order for which COA was not necessary (e.g., denial of an evidentiary hearing). *E.g.*, *Halprin v. Davis*, 911 F.3d 247 (5th Cir. 2018).

Review remains necessary to eradicate these deeply incorrect views about the role of the certificate of appealability.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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