No. 20-5089

In the Supreme Court of the United States

WILLIAM KIRKPATRICK, JR.,

Petitioner,

v.

KEVIN CHAPPELL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTION PRESENTED

Whether the federal court correctly dismissed petitioner's habeas claims for failure to exhaust state-court remedies where petitioner had asked to withdraw his state court petition containing those claims, the state court held an evidentiary hearing concerning that request, petitioner submitted to an interview by a psychiatrist but refused to speak to the judge at the hearing, and the state supreme court then granted petitioner's request to withdraw the petition upon finding that the withdrawal was knowing, intelligent, and voluntary.

DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Ninth Circuit:

Kirkpatrick v. Chappell, No. 14-99001, judgment entered February 13, 2020, petition for rehearing and rehearing en banc denied February 13, 2020 (this case below).

United States District Court for the Central District of California:

Kirkpatrick v. Martel, No. CV 96-351-WDK, judgment entered December 23, 2013 (this case below).

California Supreme Court:

In re Kirkpatrick, No. S075679, petition dismissed September 19, 2001 (state collateral review).

People v. Kirkpatrick, No. S004642, affirmed August 11, 1994 (state direct appeal).

In re Kirkpatrick, No. S024696, petition denied April 15, 1992 (state collateral review).

In re Kirkpatrick, No. S005410, petition denied September 29, 1988 (state collateral review).

In re Kirkpatrick, No. S001181, petition denied July 15, 1987 (state collateral review).

California Superior Court, Los Angeles County:

People v. Kirkpatrick, No. A590144, judgment entered August 17, 1984.

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STATEMENT

1. On September 17, 1983, two employees were discovered in a closet inside a Taco Bell restaurant in Burbank. *People v. Kirkpatrick*, 7 Cal. 4th 988, 999-1000 (1994). Each had been shot "execution style," in the head at close range. *Id.* at 1021; Pet. App. 5. One died at the scene and the other died in the hospital eleven days later. *Kirkpatrick,* 7 Cal. 4th at 998, 1000. About $625 was missing from the restaurant, and the police found an expended .22 caliber bullet at the scene. *Id*. at 1000.

Petitioner Kirkpatrick, a former employee at that restaurant, previously had said that he wanted to kill one of the two victims as revenge for petitioner having been transferred to a different Taco Bell. *People v. Kirkpatrick*, 7 Cal. 4th at 999. Earlier on the day the victims were discovered, petitioner unsuccessfully had sought the help of Manuel Rand in robbing the restaurant. *Id*. at 998-999. A short time after the shooting, petitioner was seen at an apartment complex with money and a gun in his waistband. *Id*. at 1000. Petitioner afterward drove to Rand's house and told Rand's mother that he had just killed two people. *Id*. Petitioner was arrested five days later. *Id.* The police found three .22 caliber cartridges—like the one at the crime scene—in petitioner's car. *Id*.

2. A jury convicted petitioner on two counts of first-degree murder with special circumstances. *People v. Kirkpatrick*, 7 Cal. 4th at 1024. Following a separate penalty trial, the jury returned a verdict of death. *Id*. The California

Supreme Court affirmed the of conviction and sentence on automatic direct appeal. *Id.* at 1024. This Court denied certiorari. *Kirkpatrick v. California*, 514 U.S. 1015 (1995).

3. In 1987, petitioner filed a habeas petition in the California Supreme Court, apparently seeking to discharge his appellate counsel. *In re Kirkpatrick*, Case No. S001181. The court denied that petition.[1] In 1988, while petitioner's automatic appeal was pending, the State Public Defender filed a second habeas petition in the state supreme court on petitioner's behalf, claiming that petitioner's trial lawyer had rendered ineffective assistance in failing to present available mitigation evidence at the penalty phase of petitioner's trial. *In re Kirkpatrick*, Case No. S005410. The court denied that petition on the merits.[2] In 1992, petitioner on his own filed a third habeas petition in the state supreme court. *In re Kirkpatrick*, Case No. S024696. The court denied that petition as well.[3]

4. In June 1998, petitioner filed a federal habeas corpus petition containing new claims he had never presented to the state court. Pet. App. 12.

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[1] https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1733052&doc_no=S001181&request_token=NiIwLSEmXkw4W1BdSCMtVE1IIEA0UDxbIyJOQzJTICAgCg%3D%3D.

[2] https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1737273&doc_no=S005410&request_token=NiIwLSEmXkw3W1BdSCNNVE9IMFA0UDxbIyNOVztTMCAgCg%3D%3D

[3] https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1756478&doc_no=S024696&request_token=NiIwLSEmXkw4W1BdSCMtUEpIQFQ0UDxbISNeXzNSUCAgCg%3D%3D.

The district court stayed the proceedings to allow petitioner to present those claims in state court. *Id.* Accordingly, in December 1998, petitioner's counsel filed his fourth habeas corpus petition in the California Supreme Court. *Id.*

In July 2000, while the fourth state petition was pending, petitioner sent a letter to the California Supreme Court, accompanied by a handwritten "Waiver Form" on which he had written, "I do not wish to proceed with my petition for writ of habeas corpus review in this matter. I wish the sentence and the judgement [sic] of execution in *People v. William Kirkpatrick Jr.*, 14-590144 to be carried out at this time." Pet. App. 17 (internal quotation marks omitted), 271. The state supreme court appointed a superior court judge as a referee to determine whether petitioner was competent and whether his request to withdraw the petition was knowing, intelligent, and voluntary. *Id.* at 17, 268.

Petitioner participated in some initial pre-hearing conferences. Pet. App. 139. At one of those conferences, the referee asked petitioner what he was seeking to accomplish; petitioner responded, "Competency and vacating of the appeal." *Id.* at 29 (internal quotation marks omitted). The attorney for the State explained to petitioner that ending the state proceeding could "limit your possibilities of what you can raise in Federal Court." *Id.* at 30. Petitioner responded that he understood that the public defender had filed his exhaustion petition. *Id.* The State's attorney further explained that withdrawing the state petition would amount to a failure to exhaust, and that the failure could result

in the claims later being ineligible for federal court review. *Id*. Petitioner said, "I can appreciate that." *Id*. The State's attorney repeated that, if petitioner later changed his mind and wanted to pursue federal habeas relief on the claims in the withdrawn state petition, the district court might prohibit it. *Id*. Petitioner responded, "You are looking out there, Robert. Thanks."[4] *Id*.

Prior to the evidentiary hearing, petitioner was examined by court-appointed psychiatrist Diane McEwen. Pet. App. 147-151. At the hearing, Dr. McEwen testified that petitioner had no "mental disease, disorder or defect" and that he was competent to waive his petition. *Id*. at 13. She also opined that, if petitioner decided to represent himself, such a decision would be knowing, intelligent, and voluntary. *Id*. As she explained, petitioner's decision to withdraw the petition was made in a "conscious, goal-directed manner, free of any intervening mental illness," and his efforts to confound the "powers that be" were based on his desire for control over his case and his life. *Id*. at 132-133, 150.

Petitioner then stopped participating in the process. Pet. App. 13. He refused to be examined by any of the three mental health professionals retained by his attorneys, and he did not appear at any further court sessions. *Id*. The referee—who had stated a desire to question petitioner about whether his request to withdraw his petition was knowing, intelligent, and voluntary—

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[4] Robert Schneider was the deputy attorney general representing the State at that time. Pet. App. 153.

sent two letters to petitioner explaining the importance of petitioner attending the hearing to "answer some important questions concerning your knowledge of your legal status and the possible consequences of your pending request to withdraw the habeas corpus petition." Pet. 21-23. Petitioner refused to appear. Pet. App. 140.

Based on his own in-court interactions with petitioner and Dr. McEwen's testimony, the referee concluded that Kirkpatrick's decision to withdraw his state habeas petition was voluntary. Pet. App. 13, 138-139. Because petitioner had "refused to engage in sufficient discussion with the Referee," however, the referee was unable to assess whether the decision was also knowing and intelligent. *Id*. at 13-14, 57, 124.

In an order filed in September 2001, the California Supreme Court accepted the referee's finding that petitioner was "not suffering from any mental disease, disorder, or defect that might substantially affect his capacity to appreciate his position and to make a rational choice with respect to withdrawing the petition . . . ." Pet. App. 137. Exercising its power to determine the facts de novo, the state supreme court then independently found that petitioner's waiver had been knowing, intelligent, and voluntary, and granted his request to withdraw his fourth state habeas petition. *Id*. at 25-26 & n. 3, 137.

5. a. Returning to federal court in December 2001, petitioner filed an amended habeas petition that included all the claims from the withdrawn

fourth state petition. Pet. App. 14. The district court granted the state's motion to dismiss those claims as unexhausted. *Id.* at 14, 125, 136. The district court agreed with the factual findings made by the California Supreme Court, and further ruled, under 28 U.S.C. § 2254(d), that the California Supreme Court's decision had not been unreasonable. *Id.* at 135. Eventually, the district court denied relief on all remaining claims, granting a certificate of appealability on a single evidentiary claim relating to the penalty phase. *Id.* at 15-16.

b. Petitioner appealed. Pet. App. 48-81. In addition to the certified claim, petitioner raised the uncertified claim that the district court's dismissal of the new claims as unexhausted was erroneous because the California Supreme Court should not have granted petitioner's motion to withdraw his state petition. *Id.* at 22. The originally assigned panel of the court of appeals agreed, over a dissent by Judge Kozinski. *Id.* at. 48-81. It reversed and remanded, ordering the district court to review de novo all of the claims from the withdrawn fourth state habeas petition. *Id.* at 73.

Respondent then filed a petition for rehearing and rehearing en banc. Pet. App. 46. While that petition was pending, Judge Kozinski retired and a second judge on the original panel (Judge Reinhardt) passed away. *Id.* Two other judges were draw by lot to replace them. *Id.* The newly constituted panel granted the petition for panel rehearing. *Id.* After the case was argued a second time, the new panel withdrew the original opinion and replaced it with

a new one. *Id*. at 1-45. This time, the panel unanimously affirmed the district court judgment. *Id*. at 39.

The panel explained that the state supreme court's findings that petitioner's waiver was knowing and intelligent were factual in nature, and therefore were eligible to be accorded a presumption of correctness under 28 U.S.C. § 2254(e)(1). Pet. App. 25-27. It explained that the state court's voluntariness ruling embraced factual findings that also were eligible for that presumption. *Id*. at 26-27. Satisfying itself that the state's fact-finding process was not objectively unreasonable, the panel applied the presumption. *Id*. at 24-28 & n. 3.

The panel further concluded that petitioner had failed to present the clear and convincing evidence needed to rebut the presumption. Pet. App. 29. To the contrary, the panel observed that the record contained "substantial evidence that Kirkpatrick desired to waive his state habeas exhaustion petition." *Id*. It pointed to petitioner's statement to the referee that his goal was to establish his competency and to vacate the proceedings. *Id*. Petitioner had said that he "appreciate[d]" that his decision could result in his claims becoming ineligible for federal review and that he understood that the State's attorney was "looking out" to make sure petitioner understood those potential consequences. *Id*. The panel also quoted the referee's statement that, "based upon what I have seen here today, I don't see that you have any mental or emotional limitations that would get in the way of your being a perfectly

rational and intelligent participant in the litigation process." *Id.* at 30-31. In addition, the panel cited Dr. McEwen's testimony that petitioner had the capacity to appreciate his position and to make a rational choice to terminate the state habeas proceedings; that petitioner was not suffering from any mental ailment that would substantially impact his ability to make a rational decision; that petitioner's decisions were conscious and deliberate; and that, if petitioner decided to represent himself, such a decision would be knowing, intelligent and voluntary. *Id.* at 31-33.

The panel rejected petitioner's contention that a formal colloquy between him and the referee was required before any waiver could be effective. Pet. App. 33. It explained that there was no binding authority supporting such a proposition, "particularly where the defendant refused to participate in court proceedings where a colloquy would have occurred." *Id.* at 33. On this point, the panel concluded that *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008)—a case in which the Third Circuit had rejected a state court's finding that the petitioner had validly waived his state habeas corpus appeal—was distinguishable in "several significant respects." *Id.* at 34-37. Further, as the panel explained, "any 'procedural infirmity' that occurred in [petitioner's] case was of his own making," for he had "refused to engage with the court and his lawyers." *Id.* at 36-37.

Finally, the panel rejected petitioner's argument that his waiver was executed under duress and was therefore involuntary. Pet. App. 38. It noted

that petitioner had failed to explain how his complaints about guards mistreating him influenced his decision to waive his state habeas corpus proceedings. *Id.*

ARGUMENT

Petitioner declined the state referee's repeated requests to engage him in a personal colloquy about his motion to withdraw his state habeas corpus petition. He nonetheless seeks review on the question whether the panel below erred in treating his withdrawal of that petition as knowing and intelligent in the absence of such a colloquy. Pet. i, 1-3, 27-40. His principal argument is that the panel's decision conflicts with *Whitmore v. Arkansas,* 495 U.S. 149 (1990), and with *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008). Those arguments are incorrect. The district court properly dismissed petitioner's claims as unexhausted.

1. The issue in *Whitmore v. Arkansas* was whether a third party had next-friend "standing to challenge the validity of a death sentence imposed on a capital defendant who . . . elected to forgo his right of appeal to the State Supreme Court." 495 U.S. at 151. This Court held that Whitmore lacked next-friend standing because a waiver hearing mandated by state law had shown that the capital defendant did not lack ability to litigate his own cause himself. *Id*. at 161-166. Because state law had required a hearing on that subject, this Court noted that "we are not here faced with the question whether a hearing on mental competency is required by the United States Constitution whenever

a capital defendant desires to terminate further proceedings . . . ." *Id.* at 165. In other words, *Whitmore* did not hold that the Constitution compels a colloquy before a state inmate may withdraw a state habeas petition. Nor did *Whitmore* involve a petitioner—like Kirkpatrick—who was offered opportunities to engage in a colloquy with the judge but who declined to participate in one. Finally, *Whitmore* did not confront or address the question of whether a petitioner who has induced the state court to allow him to withdraw his habeas corpus petition may still be said to have exhausted his state-court remedies on his claims.

Petitioner's reliance on *Demosthenes v. Baal*, 495 U.S. 731 (1990) (per curiam) (Pet. 28-29), is similarly misplaced. In *Baal*, the inmate sought to terminate state collateral review proceedings, and the state court held that he was competent to do so. 495 U.S. at 732-733. Baal's parents sought next-friend standing in federal court so a petition could be filed on Baal's behalf. *Id.* at 733. This Court decided that, where the state court had held a hearing to determine the petitioner's competency to waive further review, and the state court's factual finding of competence was supported by the record, the federal courts lacked power to intervene in state affairs. *Id.* at 735-737. It therefore vacated the federal court's stay of Baal's execution. *Id.* at 737. Like *Whitmore*, *Baal* says nothing about how state courts must process a state inmate's request to terminate state habeas corpus proceedings. And *Baal* never addressed how a state court should proceed where the petitioner refuses to engage the court

in a discussion about his request to waive further state habeas corpus review. Finally, *Baal* did not confront or address the question of whether a petitioner who withdrew his claims from state court can be said to have exhausted his state-court remedies on those claims.

Petitioner also cites a number of federal court opinions upholding waivers where the state court had engaged the petitioner in a colloquy. Pet. 29-30. None of those cases, however, held that such a colloquy was constitutionally required in order to waive state habeas corpus proceedings, or involved petitioners who had declined to engage in colloquies.

2. Petitioner next asserts that the panel's application of 28 U.S.C. § 2254(e)(1) created a conflict with the Third Circuit's decision in *Fahy v. Horn,* 516 F.3d 169. Pet. 35-39. There is no conflict. *Fahy* never held that a colloquy is essential; and it did not deal with a petitioner, like petitioner here, who had refused to engage in a colloquy. Indeed, the two cases are so dissimilar that it is not at all clear that petitioner would have fared any better on these facts if his case had arisen in the Third Circuit.

In *Fahy*, a capital-murder defendant sought to terminate his state appeal from the denial of his third state habeas corpus petition and to proceed to execution. 516 F.3d at 176-177. The state supreme court remanded the matter to the trial court "for a colloquy to determine whether petitioner fully understands the consequences of his request to withdraw his appeal and to waive all collateral proceedings." *Id.* at 177. At the hearing, Fahy repeatedly

changed his mind about his withdrawal request. *Id.* at 178. The judge asked Fahy several questions and then found the waiver knowing. *Id.* at 177-178. The state supreme court dismissed Fahy's appeal. *Id.* at 178. The federal district court found that, although Fahy was competent to waive further state court relief, he had been induced to do so. *Id.* at 178. The district court then granted relief to Fahy on a claim challenging his sentence. *Id.*

On appeal, the state argued that the state court's fact-finding was binding under 28 U.S.C. § 2254(e)(1). *Fahy*, 516 F.3d at 180-181. The Third Circuit ruled that it was entitled to consider, to some extent, the reliability of the state fact-finding process in determining whether the statutory presumption of correctness applied. *Id.* at 182-183. The court proceeded to hold that the state waiver was invalid. *Id.* at 186-187. It deemed the colloquy between Fahy and the state trial judge "procedurally infirm" because Fahy's attorney was not permitted to develop a factual record of potential coercion, which "constructively denied Fahy the assistance of his counsel." *Id.* at 184-185. It said that the colloquy "failed to adequately probe into Fahy's knowledge of the rights . . . he was waiving." *Id.* at 185-186. And it noted that Fahy had equivocated on whether to waive further relief. *Id.* at 186-187. The court therefore concluded that the federal court had jurisdiction to consider the merits of Fahy's claims. *Id.* at 187.

As the court of appeals below noted, *see* Pet. App. 36-37, there are critical differences between *Fahy* and this case. Most obvious, petitioner in this case

refused to participate in the colloquy offered by the state referee. Equally important, *Fahy* did not hold that a colloquy is always the only acceptable method for inquiring whether a waiver is knowing, intelligent, and voluntary. It instead held, based on the particular record in that case, that the state court's fact-finding was infirm because the colloquy there was flawed, the petitioner had been denied assistance of counsel, and the petitioner had equivocated at the hearing. *Fahy*, 516 F.3d at 184-187. Without any explanation, the *Fahy* opinion treated the waiver question as one involving waiver of Fahy's "federal habeas rights." *Id.* at 186. It thus did not squarely address the waiver of a *state* habeas right, which is the interest at issue in this case.

Nor does the opinion below conflict with *Fahy* on the question whether a federal court may inquire into the adequacy of state fact-finding procedures before applying the 28 U.S.C. § 2254(e)(1) presumption of correctness to the state court's finding of fact. *See* Pet. 37-39. Unlike its statutory predecessor, Section 2254(e)(1) by its terms imposes no conditions on the application of the presumption. In any event, both the panel below and the *Fahy* Court indeed inquired into the state's fact-finding process before applying the presumption. *See* Pet. App. at 25 n. 3; *Fahy*, 516 F.3d at 183-187. The panel below asked whether an appellate court would be unreasonable in crediting the state process, Pet. App. 25; *Fahy* apparently looked to "general notions of procedural

regularity and substantive accuracy," 516 F.3d at 183. These two general approaches do not seem inconsistent.

3. Under the particular circumstances of this case, the district court correctly dismissed petitioner's habeas claims for failure to exhaust available state-court remedies.

Exhaustion of available state remedies is a prerequisite to federal habeas relief. *See* 28 U.S.C. § 2254(b); *Picard v. Connor*, 404 U.S. at 275. To exhaust, a petitioner must "fairly present" his federal claims to the state's highest court. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *Picard v. Connor*, 404 U.S. at 275. Fair presentation promotes the comity interest in ensuring that "the States should have the first opportunity to address and correct alleged violations of [a] state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991).

Here, petitioner induced a short-circuit of the state court proceedings before the California Supreme Court could consider or resolve his claims. After his lawyers had filed a 485-page, multi-claim petition for collateral review with fifteen volumes of exhibits, and after the State had filed a court-ordered response to the petition in June 2000, petitioner wrote to the California Supreme Court and asked to withdraw the petition. Pet. App. 12, 271.[5] Rather

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[5] https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1807410&doc_no=S075679&request_token=NiIwLSEmXkw3W1BZSSI9XEJIQEw0UDxbJCNOXz1RICAgCg%3D%3D

than immediately granting the request, the state supreme court appointed a referee to hold an evidentiary hearing on whether the request was knowing, intelligent, and voluntary. *Id.* at 12. When the referee repeatedly sought a colloquy with petitioner on that issue, petitioner refused to take part. *Id.* at 13, 144, 145. In the end, the supreme court concluded—on a record that also contained evidence about petitioner's interview with a court-appointed psychiatrist—that petitioner's request to withdraw his petition was knowing, intelligent, and voluntary. *Id.* at 14. Accordingly, the supreme court acquiesced in petitioner's request to terminate proceedings on his successive petition. *Id.* Under the circumstances, petitioner's repeated efforts to terminate the state process cannot reasonably be viewed as satisfying his obligation to "fairly present" his claims to the state tribunal. The federal court was correct in dismissing petitioner's claims as unexhausted under 28 U.S.C. § 2254(b)(1)(A).

And, despite petitioner's critique of it, *see* Pet. 30-34, the process through which the California Supreme Court decided to grant petitioner's request to withdraw his petition complied with constitutional guarantees. This Court has explained that "States have no obligation to provide [postconviction] relief." *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987). Petitioner's interest in state habeas relief is thus a state-created one. Where the Constitution requires procedures for depriving a person of a state-created interest, "due process is flexible and calls for such procedural protections as the particular situation

demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In this case, he California Supreme Court appointed counsel for petitioner and accepted his successive petition for relief for consideration. When petitioner sought to withdraw that petition, the state court assigned a superior court judge to serve as an impartial referee, ordered a full-blown evidentiary hearing, allowed petitioner access to experts, provided him the opportunity to present evidence and to confront and cross-examine adverse witnesses, and undertook a further review of the referee's report following adversarial briefing. That extensive process was sufficient to satisfy the Due Process Clause.

CONCLUSION

The petition for a writ of certiorari should be denied.

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