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

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

CUAUHTEMOC ORTEGA
Interim Federal Public Defender
MARK R. DROZDOWSKI
PATRICIA A. YOUNG*
Deputy Federal Public Defenders
321 East 2nd Street
Los Angeles, California 90012
Telephone: (213) 894-7531
Facsimile: (213) 894-0310
Patricia_Young@fd.org

Attorneys for Petitioner
William Kirkpatrick, Jr.
**Counsel of Record*

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INTRODUCTION

Courts, including the California Supreme Court in this case (App. 269), have uniformly cited *Whitmore v. Arkansas* as providing the required procedure to ensure a capital inmate seeking to waive further proceedings does so knowingly, intelligently, and voluntarily. Pet. 29-30. But here, when the state court was unable to engage Kirkpatrick in a colloquy to assess whether his purported waiver was knowing, intelligent, and voluntary, it nevertheless concluded a valid waiver existed, and the Ninth Circuit accorded a presumption of correctness to that fundamentally flawed finding, depriving Kirkpatrick of fundamental rights in this most serious of cases. The Ninth Circuit's decision upholding the state court's finding of waiver cannot be permitted to stand.

ARGUMENT

A. This Court Should Summarily Reverse The Ninth Circuit Decision Because It Conflicts With *Whitmore*

This Court has held that when a capital inmate seeks to waive the right to proceed, (1) the inmate must be competent to waive, *Rees v. Peyton*, 384 U.S. 312, 313-14 (1966) (per curiam), and (2) the waiver must be knowing, intelligent, and voluntary, *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990). This Court's precedents demonstrate that a knowing, intelligent, and voluntary waiver is established through a colloquy. *See id.* (explaining that a valid waiver exists "where an evidentiary hearing shows that the defendant

has given a knowing, intelligent, and voluntary waiver of his right to proceed"); *see also Demosthenes v. Baal*, 495 U.S. 731, 733, 735 (1990) (per curiam) (explaining that the state court held an evidentiary hearing at which it resolved whether petitioner had intelligently waived his right to pursue habeas relief).

Despite the fact that the California Supreme Court cited to *Whitmore*'s colloquy requirement in ordering a hearing in Kirkpatrick's case (App. 269), the State argues *Whitmore* is inapplicable.

First, the State argues *Whitmore* did not require the state court to engage Kirkpatrick in a colloquy about the *knowing, intelligent, and voluntary* nature of his purported waiver because in *Whitmore*, this Court stated it was not faced with the question of whether a hearing on *mental competency* is constitutionally required whenever a capital defendant seeks to terminate further proceedings. Brief in Opposition ("BIO") 9-10 (citing *Whitmore*, 495 U.S. at 165 ("Although 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, such a hearing will obviously bear on whether the defendant is able to proceed on his own behalf.")).

But competency to waive and whether a waiver is knowing, intelligent, and voluntary are two separate inquiries: "The focus of a competency inquiry

is the defendant's mental capacity; the question is whether he has the ability to understand the proceedings. The purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 401 n.12 (1993) (citations omitted); *see St. Pierre v. Cowan*, 217 F.3d 939, 947 (7th Cir. 2000) ("[T]here is an important distinction between the question whether a defendant is competent to waive a right and the question whether a given waiver is knowing and voluntary."). While a competency hearing may not be necessary when a capital inmate seeks to waive further proceedings – for example, if there is no reason to doubt the defendant's competency[1] or a prior

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[1] The law is replete with examples of a defendant being constitutionally required to be competent, but for which a competency hearing is not required. For example, a defendant must be competent to stand trial, *Drope v. Missouri*, 420 U.S. 162, 171 (1975), but a competency hearing is only required if there is reason to doubt the defendant's competency, *id.* at 172-74. *Cf. Rees*, 384 U.S. at 313-14 (ordering a competency hearing where a capital petitioner sought to waive further proceedings after counsel declared a doubt as to Rees's mental competency). The same is true for defendants who plead guilty. *See generally Godinez*, 509 U.S. 389. But in pleading guilty, defendants are required to engage in a colloquy to ensure they understand the rights they are waiving and choose to waive them. *See Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969); Fed. R. Crim. P. 11(b); *see also Godinez*, 509 U.S. at 400 ("A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.").

competency evaluation has already been conducted[2] – it is difficult to envision how the constitutional requirement of a valid waiver can be established when a defendant has not been questioned about the knowing, intelligent, and voluntary nature of that waiver. *See Boykin*, 395 U.S. at 242 ("The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation.").

The State would hold this case up as an example – and indeed it is the only example – but it can point to nowhere in the record where Kirkpatrick was questioned about his choice to accept the death sentence, that his answers demonstrate he appreciated the consequences of that decision, that he indicated he understood several possible grounds for relief that had been explained to him and he did not wish to pursue them, or that he had even read the petition he purported to waive. *See Whitmore*, 495 U.S. at 165; *see also Dennis*, 378 F.3d at 889 (explaining that an evidentiary hearing shows that the capital defendant has knowingly, intelligently, and voluntarily waived his right to proceed "where, as in *Whitmore*, the prisoner's statements to the court

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[2] At least one court addressing a capital inmate's waiver of the right to proceed has conducted its own competency evaluation, but also relied on a prior competency evaluation. *See Dennis v. Budge*, 378 F.3d 880, 891 (9th Cir. 2004) (noting the state judge based her competency finding on an expert report and on "her extensive canvass of Dennis, and the fact that she had encountered Dennis numerous times in prior hearings and found no difference in competency from his plea hearing in 1999 to the hearing in 2004").

demonstrate that he appreciates the consequences of his decision, that he understands the possible grounds for appeal but does not wish to pursue them, and that he has a reason for not delaying execution").

Second, the State argues a colloquy, like the one that occurred in *Whitmore*, was unnecessary here because the record contains evidence of a valid waiver. This is not a case of elevating form over substance. Kirkpatrick was never questioned – in court or out of court, on the record or off the record, by his attorney or by a judge, orally or in written form – about the knowing, intelligent, and voluntary nature of his purported waiver. *See St. Pierre*, 217 F.3d at 947 (rejecting the state court's finding of waiver of the right to proceed in a capital case where "[t]here was never any kind of proceeding, formal or informal, at which any court was able to assure itself that St. Pierre's waiver in the May 2 letter satisfied the requirements for a knowing and voluntary waiver and that St. Pierre intended it to be a waiver"); *cf. Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962) ("Presuming waiver [of right to counsel] from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.").

Instead, like the Ninth Circuit did below, the State again conflates the competency inquiry with the knowing, intelligent, and voluntary inquiry and cites to evidence of Kirkpatrick's *competency* as evidence that his waiver was

knowing, intelligent, and voluntary. The State notes the Ninth Circuit found "substantial evidence" that Kirkpatrick validly waived his exhaustion petition, including: (1) the referee remarked that Kirkpatrick appeared to not have any mental limitations that would prevent him from participating in the litigation process; (2) Dr. McEwen testified that Kirkpatrick had the capacity to appreciate his position and make a rational choice; (3) Dr. McEwen testified that Kirkpatrick was not suffering from any mental ailment that would impact his ability to make a decision; (4) Dr. McEwen testified that Kirkpatrick's decisions were deliberate; and (5) Dr. McEwen testified that if Kirkpatrick decided to represent himself,[3] such a decision would be knowing, intelligent, and voluntary. BIO 7-8. These points speak to Kirkpatrick's competency to waive his petition; they do not demonstrate a knowing, intelligent, and voluntary waiver.[4]

Third, the State argues *Whitmore* is inapplicable because in that case state law required a hearing. BIO 9. But, as discussed, the California Supreme Court cited to *Whitmore*'s colloquy requirement in ordering a hearing in this

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[3] The record is full of evidence indicating Kirkpatrick's intent was to litigate his petition pro se, and not to waive his petition. Pet. 14-17, 33.

[4] The California Supreme Court and the Ninth Circuit ignored all evidence demonstrating the absence of a knowing, intelligent, and voluntary waiver. Pet. 31-34.

case. App. 269. Moreover, if a state offers a postconviction remedy, it must afford a petitioner certain safeguards. When an inmate asks to waive a state petition, federal due process compels a state court to determine whether that waiver is knowing, intelligent, and voluntary:

> Obviously, the state has no obligation to provide appellate or post-conviction remedies, but if it has chosen to do so, due process principles apply to the terms on which these remedies must be furnished or lost. *Gilmore* [*v. Utah*, 429 U.S. 1012 (1976)] itself involved similar post-conviction remedies, and the Supreme Court had no hesitation in holding the state to these fundamental standards.

St. Pierre, 217 F.3d at 949. The state court was required to determine whether Kirkpatrick's waiver was knowing, intelligent, and voluntary, and to afford Kirkpatrick adequate due process in making this inquiry. *Id.* at 948 ("[I]t is indisputable that the Constitution does require a waiver that literally carries with it life-or-death consequences to be made knowingly and intelligently.").

Fourth, the State argues that neither *Whitmore* nor *Demosthenes* says anything about how a court is to proceed when a petitioner refuses to engage in a colloquy. BIO 10-11. The answer is straightforward: the inmate does not get to waive his right to proceed. *Cf. Comer v. Stewart*, 230 F. Supp. 2d 1016, 1025 (D. Ariz. 2002) (stating that when the petitioner threatened not to cooperate with defense counsel's mental health experts, the court "made it clear that it could not legally determine his competency and the voluntariness

of his decisions without consideration of habeas counsel's expert's opinions"); Pet. 24, 38 (district court denied Kirkpatrick's request to waive his federal petition when he twice refused to meet with a psychiatrist). It is a capital inmate's right to decide whether to waive further proceedings; it is unnecessary for a court to force waiver proceedings upon an inmate. When a petitioner no longer wants to proceed with the waiver process, there is no need to proceed. In this case, Kirkpatrick was twice informed that if he still desired to waive his petition, then he needed to appear for a colloquy to answer questions about the knowing, intelligent, and voluntary nature of that decision. His refusal to appear is itself evidence he did not knowingly, intelligently, and voluntarily waive his petition. Pet. 21-23, 37-38 & n.6. That should have ended the waiver inquiry.

The State's attempts to dispense with *Whitmore*'s colloquy requirement when a capital inmate seeks to waive further proceedings are unpersuasive. "[F]or a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right or privilege." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (internal quotation marks omitted). This is established through a colloquy. The colloquy requirement protects recalcitrant defendants from themselves and ensures that any findings of waiver are reliable and constitutionally acceptable. The referee was right to require a colloquy and conclude that Kirkpatrick's failure to engage in one

meant he could not find a valid waiver of the state exhaustion petition. Pet. 21-23. The referee's approach and ruling reflect the long-understood requirement of a colloquy as a condition precedent to accepting a capital defendant's waiver of the right to proceed. The California Supreme Court's rejection of the referee's ruling, and the Ninth Circuit's decision upholding a waiver finding absent a colloquy, conflict with *Whitmore* and depart "from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a), (c). The Court should grant Kirkpatrick's petition for certiorari and summarily reverse the Ninth Circuit's decision.[5]

B. *Fahy* Is Materially Indistinguishable

In a clear split with the Third Circuit's decision in *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008), the Ninth Circuit in this case applied 28 U.S.C. § 2254(e)(1)'s presumption of correctness to the state court's waiver finding, despite absence of a colloquy. *See* App. 25-26 n.3. The State does not dispute that, as in *Fahy*, there was no adequate waiver colloquy in this case. The State

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[5] The State weaves a strawman argument on exhaustion throughout its brief and argues that neither *Whitmore* nor *Demosthenes* addressed whether a petitioner who waived his claims in state court may be said to have exhausted those claims. BIO 10, 11, 14-15. This argument can quickly be dispensed with. Kirkpatrick's argument is that his claims were properly exhausted because he gave the state court a fair opportunity to address them and the state court erred in failing to do so and dismissing them as waived instead. Pet. 24-25. Kirkpatrick has never argued that properly waived claims should be considered exhausted.

does, however, try to distinguish *Fahy* on the ground that, unlike in *Fahy*, the lack of an adequate colloquy was due to Kirkpatrick's refusal to participate. BIO 12-13. To the extent this distinction is important, it is because it demonstrates that Kirkpatrick no longer wished to waive his petition. Pet. 37-38 & n.6. The State's position advocates a rule that when a petitioner refuses to answer questions about waiver, a court may presume the waiver is knowing, intelligent, and voluntary. The State's position directly contradicts this Court's long-held rule that "courts indulge in every reasonable presumption against waiver." *Brewer v. Williams*, 430 U.S. 387, 404 (1977). It also relieves the State of its burden of proving valid waiver. Pet. 37-39.

The State next tries to distinguish *Fahy*, which addressed waiver of a petitioner's third state habeas petition, as a case involving only waiver of *federal* habeas rights, and erroneously characterizes Kirkpatrick's case as only concerning waiver of a *state* habeas right. BIO 13. This is a false distinction. In *Gilmore v. Utah*, 429 U.S. 1012 (1976), this Court recognized that waiver of state process in a capital case encompassed waiver of federal rights. *Gilmore* was the first of three "next friend" cases[6] in which the Court evaluated the state court proceedings to confirm the inmate validly waived the right to proceed, so it could rule on the standing of the "next friend." In *Gilmore*, the

[6] The other two cases are *Whitmore* and *Demosthenes*.

Court determined there was no standing for Gilmore's mother to act as "next friend" on behalf of her son because Gilmore was competent to waive further state proceedings following his conviction and sentence, and did so knowingly, intelligently, and voluntarily. *Id.* at 1012-13. Significantly, the Court recognized that in waiving his right to further state proceedings, Gilmore waived any federal rights he may have been able to assert through those proceedings, and applied the knowing and intelligent standard to that waiver. As demonstrated by the district court's dismissal of Kirkpatrick's claims as unexhausted, his purported waiver of his state habeas petition encompassed waiver of federal habeas rights as well.

Finally, the State argues that, like the Third Circuit did in *Fahy*, the Ninth Circuit examined the adequacy of the state court's fact-finding process regarding waiver before applying § 2254(e)(1)'s presumption of correctness. BIO 13-14. The Ninth Circuit did little more than rubberstamp the state court's finding of a knowing, intelligent, and voluntary waiver. The Ninth Circuit noted there was no in-depth questioning on these subjects because Kirkpatrick refused to participate, and satisfied itself that a valid waiver could be found despite this significant shortcoming. App. 25-26 n.3. Kirkpatrick's refusal to participate in a colloquy "does not, however, relieve any court of the duty to ensure that a definitive waiver has occurred before it deprives the

petitioner of remedies that are available under state law." *St. Pierre*, 217 F.3d at 948-49.

Because the absence of an adequate colloquy was a substantial defect in the state court's fact-finding process regarding whether Kirkpatrick waived the right to proceed, the Ninth Circuit should not have applied § 2254(e)(1)'s presumption of correctness to the state court's waiver finding. Pet. 36-39. In doing so, it created a clear split with *Fahy* that this Court should address. *See* Sup. Ct. R. 10(a).

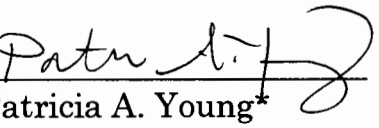
CONCLUSION

For the foregoing reasons the Court should grant Kirkpatrick's petition for writ for certiorari and summarily reverse the Ninth Circuit's decision. Alternatively, the Court should grant certiorari and order merits briefing.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: September 21, 2020

By: 
Patricia A. Young*
Deputy Federal Public Defender

Attorneys for Petitioner
William Kirkpatrick, Jr.
**Counsel of Record*

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CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I certify this reply is 12 pages and was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: September 21, 2020

By: Patricia A. Young
PATRICIA A. YOUNG*
Deputy Federal Public Defender

Attorneys for Petitioner
William Kirkpatrick, Jr.
**Counsel of Record*

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CERTIFICATE OF SERVICE

I, Patricia A. Young, a Deputy Federal Public Defender in the Office of the Federal Public Defender for the Central District of California, who was appointed as counsel for Petitioner under the Criminal Justice Act, 18 U.S.C. §§ 3006(A)(b), 3599, certify that on September 21, 2020, a copy of Petitioner's Reply to the Brief in Opposition was sent electronically and mailed postage prepaid to:

A. Scott Hayward, Deputy Attorney General
300 S. Spring Street
Suite 1700
Los Angeles, CA 90013
Scott.Hayward@doj.ca.gov
(213) 269-6190

All parties required to be served have been served. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on September 21, 2020 in Los Angeles, California.

Patricia A. Young*
Deputy Federal Public Defender

Attorney for Petitioner
William Kirkpatrick, Jr.
**Counsel of Record*