IN THE SUPREME COURT OF THE UNITED STATES

October Term 2020

David S. Renteria,

Petitioner,

v.

Bobby Lumpkin, Director, Texas Department of Criminal Justice,
Correctional Institution Division,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

CAPITAL CASE
No Execution Date Set

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Decisions

Statutes

ARGUMENT

Texas's brief in opposition presents the Fifth Circuit's treatment of funding appeals in capital habeas cases as one of the springes of local practice this Court has long condemned when used to defeat the enforcement of federal rights. *E.g.*, *Brown v. Western Ry. Alabama*, 338 U.S. 294, 298 (1950); *Davis v. Wechsler*, 263 U.S. 22, 24 (1924); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Three things distinguish this case. First, here, a federal court instead of a state court is blocking the vindication of federal law. Second, Texas argues Mr. Renteria was at fault for *following* the Fifth Circuit's order, not violating it. Third, the Fifth Circuit combines substantive error with procedural evasion.

Texas mentions, but refuses to quote, what it describes as "the Fifth Circuit's briefing orders." BIO 8. Briefing orders order briefing. The Fifth Circuit issues no-briefing orders that say, "Before this appeal can proceed you must apply for a certificate of appealability (COA) to comply with 28 U.S.C. § 2253." App. 72. This order saying a petitioner cannot appeal before applying for a COA, Texas contends, is the Fifth Circuit "permitting federal habeas petitioners to seek a COA and appeal a motion for which no COA is required in a single brief." BIO 12. Thus, Mr. Renteria's mistake, according to Texas, was that he followed the Fifth Circuit's order not to brief his appeal before applying for a certificate of appealability.

Mr. Renteria timely filed a motion for a COA. He included his funding issue in that motion while noting that this Court and the Fifth Circuit had said no COA was required. *See* Pet. 17-18; App. 59-60. In compliance with the Fifth Circuit's no-appeal-before-application order, on the same day Mr. Renteria filed his COA application, he moved for leave to file a merits brief on his funding appeal. Texas aptly channels the Fifth Circuit when it calls these timely, compliant filings "dilatory," BIO 10, although the Fifth Circuit itself never suggested Mr. Renteria was less than diligent. The same court allowed briefing under identical circumstances in another case, *Halprin v. Dretke*, No. 17-70026, cited in the Petition at 18. Thus, this case closely resembles many others in which this Court held that a state court's application of a procedural bar was inadequate to bar consideration of a federal right because the bar was based on an alleged failure to follow formal briefing rules. *E.g.*, *Lee v. Kemna*, 534 U.S. 362, 381-83 (2002) (refusing to honor procedural rule that neither the trial court in the case at bar, nor appellate courts regularly relied upon); *James v. Kentucky*, 466 U.S. 341 (1984) (rejecting application of state procedural rule that placed form over substance of petitioner's federal law claim based on *Carter v. Kentucky*, 450 U.S. 288 (1981); *Barr v. City of Columbia*, 378 U.S. 146 (1964) (rejecting apparently discriminatory application of state procedural rule to defeat federal claim); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (same); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449

(1958) (rejecting application of state procedural rule applied in manner to frustrate review of federal claim).

Substantively, Texas relies on the Fifth Circuit's long history of refusing to follow this Court's cases holding the COA requirement is not coextensive with the merits by faulting Mr. Renteria for not treating his COA motion as a merits brief, or conversely, characterizing Mr. Renteria's COA application as "his brief in the Fifth Circuit [that] included an appeal of the district court's denial of his funding motion." BIO 11-13. Texas snidely agrees with Mr. Renteria that a habeas petitioner in the Fifth Circuit who treats the COA motion as the threshold inquiry described in this Court's holding, is naïve and risks loses his opportunity for briefing on the merits. *See* Pet. 19-20.

Texas also contends that it is because Mr. Renteria requested briefing if the Fifth Circuit granted a COA that the circuit denied him briefing, BIO 9-10, avoiding, again, the Fifth Circuit's no-briefing order. It is difficult to see how the Fifth Circuit's denial could have flowed "[c]onsequently," BIO 9, from Mr. Renteria's motion given that the court denied briefing *before* it ruled on a COA, unless, of course, the court prejudged both the COA and briefing motions.

The Fifth Circuit's processing of appeals in capital habeas cases justifies the State's mocking cynicism. Unless litigants and the public should accept Texas's view that the rope-a-dope process described in the BIO is "the accepted and usual course

of judicial proceedings," Sup. Ct. R. 10(a), this Court should exercise its supervisory power to correct that process. *Ibid.*

Texas's defense of the Fifth Circuit's denial of funding sounds in the same weary, self-satisfied tone. Just as the Fifth Circuit need not have allowed Mr. Renteria to prosecute his appeal with something as indulgent as a brief, it need not have authorized him to investigate evidence supporting a duress defense because the State and court decided in advance that nothing would be found in that investigation. Texas argues that because the witness said in the disclosed 2018 statement that she "didn't come forward back then," App. 065, i.e. at the time of trial, "she did not inform *anyone* regarding her suspicion of her ex-husband before providing a statement to the police." BIO 19 (emphasis added).[1] That may, or may not, turn out to be true, but the statement does not support it and only a funded investigation would have answered this critical question.

The witness's statement includes information—dates of events, locations, descriptions of a family, a prior crime committed by the ex-husband, statements to the police related to that offense—that a criminal investigator could use to identify the ex-husband, his past offenses, and his associates. Such investigations are routine. If the

[1] Counsel for Texas probably chose to say "a statement," rather than "the statement," because after Mr. Renteria filed his petition in this Court, the State disclosed another statement that the same witness made in 2017 -- before the statement disclosed by the State in the midst of the habeas proceedings.

ex-husband's name appears in the files of law enforcement or the defense in relation to this case, the witness's statement could give rise to a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), or *Strickland v. Washington*, 466 U.S. 668 (1984), that was previously overlooked because no one knew why the ex-husband was mentioned. In any event, whether the witness's statement gives rise to a claim cognizable in this habeas proceeding is irrelevant. As this Court has previously held, in enacting 18 U.S.C. § 3599, Congress recognized that "the work of competent counsel during habeas corpus representation may provide the basis for a persuasive clemency application." *Harbison v. Bell*, 556 U.S. 180, 193 (2009).

This Court's decision in *Harbison* also undermines the State's reliance upon *Herrera v. Collins*, 506 U.S. 390 (1993). BIO 200. This Court drew on *Herrera*'s description of the role of clemency in our system to explain why Congress ensured funding for state clemency representation in § 3599. Recognizing that "'[c]lemency is deeply rooted in our Anglo–American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted,'" *Harbison*, 556 U.S. at 192 (quoting *Herrera*, 506 U.S. at 411-412), Congress provided funding for clemency counsel in order to "ensure[] that no prisoner would be put to death without meaningful access to the 'fail-safe' of our justice system." *Id.* at 194 (quoting *Herrera*, 506 U.S. at 415). By focusing exclusively on whether Mr. Renteria could present cognizable claims—and doing so without the benefit of briefing—the Fifth

Circuit failed to consider how proof of duress would play a role in any clemency application.[2]

Any reasonable attorney would regard the possibility of substantiating his client's assertion of duress to be "sufficiently important" in clemency proceedings to warrant investigation. *Ayestas*, 138 S. Ct. 1080, 1084 (2018).

CONCLUSION

For all of the above reasons, and those contained in the *Petition for Certiorari*, Petitioner respectfully requests that the Court grant the Writ.

[2] The State's reliance upon *Herrera* is misplaced for another reason. *Herrera* did say, on the page Texas cites, that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." 506 U.S. at 400. But later in the same opinion, this Court assumed "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." *Id.* at 417.

Respectfully submitted,

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