No. 21-5907

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

In re Matthew James Leachman, Petitioner

ON PETITION FOR WRIT OF MANDAMUS TO

The Honorable Priscilla R. Owen, Chief Judge,
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF MANDAMUS

Matthew James Leachman
SPN 01525039
Harris County Jail
1200 Baker Street
Houston, TX 77002

(inmate--no phone)

ISSUE PRESENTED

The Honorable Priscilla R. Owen, Chief Judge of the United States Court of Appeals for the Fifth Circuit, failed to comply with the mandatory provisions governing judicial-conduct proceedings.

LIST OF PARTIES

[**XXX**] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

By rule, a petition for mandamus "shall follow, insofar as applicable, the form of a petition for a writ of certiorari prescribed by Rule 14." SUP. CT. R. 20.2.

The definition of "directly related" set forth in Rule 14.1(b)(iii) does not map easily onto a mandamus petition asserting failure to act on a judicial-conduct complaint. The following two cases are "related" because they inform the question of whether mandamus will be "in aid of the Court's appellate jurisdiction," SUP. CT. R. 20:

In the **United States District Court for the Southern District of Texas**: Civil Action No. 4:18-CV-544 (judgment entered March 23, 2020).

In the **United States Court of Appeals for the Fifth Circuit**: Appeal No. 20-20323 (certificate of appealability denied April 19, 2021; motion for reconsideration denied June 9, 2021).

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TABLE OF AUTHORITIES CITED

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF MANDAMUS

I, Matthew James Leachman, pro se petitioner in this case, respectfully pray that a writ of mandamus issue to the Honorable Priscilla R. Owen, Chief Judge of the United States Court of Appeals for the Fifth Circuit, directing her to process my judicial-conduct complaint against the Honorable Don R. Willett as required by statute and by rules duly adopted.

OPINIONS BELOW

The same conditions that led to this mandamus petition—Chief Justice Owen's failure to comply with 28 U.S.C. § 352(b)'s requirement of a written order—leave no "opinion below." The unofficial response, a **letter from Chief Deputy Clerk Thomas R. Plunkett**, appears at **Appendix A** to the petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Provisions *directly* related to the mandamus issue (*i.e.*, improper handling of judicial-conduct complaint):

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 351 — Set forth in **Appendix L**

28 U.S.C. § 352 — Set forth in **Appendix L**

R. JUD. CONDUCT & DISABILITY PROC. 6, 8, and 11— Set forth in **Appendix L**

Provisions related to *underlying events* (*i.e.*, the series of events that provide context for, and led to, the complaint of misconduct), which **all appear in Appendix L**:

FED. R. APP. P. 27(c); 35(a), (b), and (c); and 40(a)(1)

5TH CIR. R. & IOP 27.1, 27.2, 35.1, 35 IOP, 40.2, and 40.4

28 U.S.C. § 2254

TEX. CODE CRIM. PROC. art. 11.07

TEX. CODE CRIM. PROC. art. 42.08

TEX. PENAL CODE § 12.45

TEX. CONST. art. V, § 4

STATEMENT OF THE CASE

Introduction

This mandamus petition addresses Chief Judge Owen's failure to process my judicial-conduct complaint in accordance with the law. The complaint *arose*, however, from *procedural events* (not a merits ruling) in my underlying appeal, in which Circuit Judge Don R. Willett demonstrated bias against me or against pro se prisoners as a class. Therefore, my statement of the case for mandamus requires discussion of the underlying case. The merits of my 28 U.S.C. § 2254 claim are not the *source* of my judicial-conduct complaint, but they provide *context*. Context is essential to this petition for two reasons:

First, I cannot justify mandamus relief without explaining why mandamus aids this Court's appellate jurisdiction, why my circumstances warrant the Court's attention, and why I cannot obtain adequate relief by any other mechanism. *See* SUP. CT. R. 20.1.

Second, mandamus petitions from prisoners often result in denials of leave to proceed *in forma pauperis*. Presumably, the Court finds those petitions malicious or frivolous. *See* SUP. CT. R. 39.8. Frequent abuse of writ requests by others[1] enhances my obligation to show the merits of my judicial-conduct complaint and to explain my need for mandamus relief.

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[1] I have filed petitions in this Court on four occasions. *See Leachman v. Texas*, 554 U.S. 932 (2008) (petition for writ of certiorari); *Leachman v. Stephens*, 575 U.S. 1012 (2015) (same); *Leachman v. Stephens*, 138 S. Ct. 1550 (2018) (same); *Leachman v. Texas*, 139 S. Ct. 2727 (2019) (same). I have never been denied leave to proceed *in forma pauperis* in this Court, and I have never been sanctioned or issued a "strike" in this Court or any other.

Events that led to the judicial-conduct complaint

The proceedings that provide context for this petition require some detail:

First predicate event—state convictions and sentences

In 1996, the State of Texas brought indictments against me. This petition implicates two: numbers 786223 and 786224, in the 248th Judicial District Court of Harris County, Texas. I was tried and convicted in number 786224, and the trial judge sentenced me to 40 years in state prison ("TDCJ"). The court allowed me to represent myself on appeal.

Counsel negotiated a plea deal in the remaining cases. We agreed that I would plead guilty to three additional charges and accept 20-year sentences in each, with one sentence—number 786223—cumulated with, or "stacked on," the 40-year sentence in 786224. My § 2254 petition[2] described other provisions: we stipulated that the plea would not affect my appeal in 786224; the State reserved the right to seek a *new* cumulation order, should I succeed in overturning 786224; the State agreed to abandon further prosecutions; and I admitted uncharged offenses under Texas Penal Code § 12.45.[3] Because of the multiple elements, my attorney requested a plea hearing on the record, covered by a court reporter.[4]

I did not appeal from the bargain; number 786223 became final in 1999.

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[2] The petition appears at **Appendix K**.

[3] The full text of the statute appears at **Appendix L**.

[4] Counsel's affidavit is incorporated within Doc. No. 51, at **Exhibit J**, and is further discussed *infra* at 12.

Second predicate event—the outcome of 786224

My appeal in 786224 included remand to the trial court for an evidentiary hearing; revision, on motion for rehearing, of the first post-remand opinion; vacatur by the Texas Court of Criminal Appeals ("TCCA") of the revised decision; and—ultimately—affirmance of the judgment and sentence. *See Leachman v. State*, No. 01-98-01255-CR, 2006 Tex. App. LEXIS 7345 (Tex. App.—Houston [1st Dist.] Aug. 17, 2006, pet. ref'd), *cert. denied*, 554 U.S. 932 (2008). I had argued, *inter alia*, that the trial court denied my Sixth Amendment right to represent myself; the state appellate court deemed the error unpreserved because the judge's denial did not appear in the record. *See id.* at *8-9.

Next, the TCCA denied my state habeas application without written order. See *Ex parte Leachman*, No. WR-36,445-04 (Tex. Crim. App. Dec. 1, 2010). I turned to the federal courts.

Initially, the federal district court found my claim procedurally barred. *See Leachman v. Stephens*, 581 Fed. App'x 390, 392 (5th Cir. 2014) (listing grounds on which certificate of appealability ("COA") granted). The district court, however, had misapprehended—and thus, not addressed—my argument for application of the cause-and-prejudice exception. *See id.* at 396-97. The Fifth Circuit remanded the case for consideration of that argument.

On remand, the district court held that the state clerk, by failing to provide a correct appellate record, caused the procedural default and prejudiced my ability to vindicate my rights in state proceedings. *See Leachman v. Stephens*, No. 4:11-CV-212, 2015 U.S. Dist. LEXIS 133186, at *7-8, 11-12 (S.D. Tex. Sept. 30, 2015). The judge granted conditional relief, giving the State 90 days to move for a new trial in number 786224. *See id.* at *14.

Third predicate event—TDCJ's response to the new-trial order

On November 4, 2015, the State procured a hearing in the trial court and moved orally for new trial, citing the federal ruling; the state judge granted the motion in open court. A week later, I wrote TDCJ regarding the new-trial ruling and the corresponding need to recalculate my stacked sentence in 786223. I pointed out that longstanding precedent governed recalculation of sentences invalidated in habeas proceedings: *Gentry v. State*, 464 S.W.2d 848, 850 (Tex. Crim. App. 1971) (holding federal due process requires consecutive sentence to run independently, from date of imposition, when underlying sentence held invalid). Thus, I wrote, the 786223 sentence should end on April 15, 2016.[5]

TDCJ never responded, so on December 15, 2015, I asked a friend to check TDCJ's website for my commitment status. On that date, the website reflected deletion of number 786224, but the time calculation for number 786223 revealed that TDCJ viewed November 19, 2015, as the start-date for my 20-year sentence.

After exhausting administrative remedies, I filed the first of two state habeas corpus petitions. *See* TEX. CODE CRIM. PROC. art. 11.07.

Predicate court proceedings—state court

In my first state habeas proceeding, prosecutors filed a TDCJ employee's affidavit. It acknowledged receipt of the new-trial order on November 19, 2015, and insisted that the

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[5] The 2016 date reflects a 20-year sentence running from the date of imposition (November 1, 1999) when the pretrial-incarceration credit set out in the judgment is included.

stacked sentence in number 786223 "began" when the new trial was ordered—a date identified as November ***11***, 2015, rather than the correct date of November ***4***, 2015.[6] The affidavit invoked *Ex parte Nickerson*, 893 S.W.2d 867 (Tex. Crim. App. 1995), which had construed the meaning of "ceased to operate" in the state cumulation statute.[7] In response, I pointed out:

- that *Nickerson*'s construction of "ceased to operate" was repudiated by *Ex parte Vela*, 460 S.W.3d 610, 614 (Tex. Crim. App. 2015) (calling *Nickerson* "misleading" because statute does not govern sentences invalidated by courts);
- that *Nickerson* did not discuss the effect of federal due process on sentences deemed constitutionally invalid in federal court, as *Gentry* had;
- that the TCCA had reaffirmed *Gentry* ***after*** *Nickerson*, in *Ex parte Waggoner*, 61 S.W.3d 429 (Tex. Crim. App. 2001); and,
- that *even under TDCJ's interpretation*, the erroneous use of November ***11***, 2015, as the new-trial-order date extended my sentence by seven days.[8]

The trial court, as habeas factfinder, adopted the State's proposed findings and conclusions (which endorsed TDCJ's approach). The TCCA denied my habeas application

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[6] TDCJ's website reflected the change. It appears that TDCJ originally calculated the sentence to "begin" when it *received* the new-trial order (November 19, 2015) but reconsidered during habeas proceedings.

[7] The statute—TEX. CODE CRIM. PROC. art. 42.08—appears at **Appendix L**.

[8] TDCJ never explained how it arrived at November ***11***, 2015. The proper date (November ***4***, 2015) appears on every document *I* have seen; *the State*, too, has used the correct date in its pleadings elsewhere (*e.g.*, in retrying number 786224).

"without written order on findings of trial court without hearing." *Ex parte Leachman*, No. WR-36,445-06 (Tex. Crim. App. Feb. 22, 2017) (not available from Lexis).[9]

I asked the TCCA to reconsider, writing:

> [B]oth ***Nickerson*** and ***Vela*** deal with the nuts and bolts of construing state procedural statutes. ***Waggoner*** and ***Gentry*** address the federal due-process issues that explain *why* a sentence once stacked upon a now-invalidated sentence must become independent. My application specifically invoked due process, and due-process concerns are especially important because my plea bargain relied on the understanding that sentencing laws would be followed. If TDCJ will not follow them, and the courts do not safeguard due process and enforce the conditions that made the plea bargain possible, the entire validity of the conviction at issue is called into question.

Id. (Suggestion for Reconsideration filed Mar. 15, 2017, and denied without comment Mar. 29, 2017) (bold and italic emphases in original).

I filed a second state petition, restating my due process claim and adding that denial of my first application created three additional federal constitutional violations:

[1] Extending *Nickerson*'s construction, for the first time ever, to situations like mine (*i.e.*, where the first sentence in a stack was invalidated in federal habeas proceedings) was an unexpected judicial alteration of settled precedent that extended my sentence, in violation of *Bouie v. City of Columbia*, 378 U.S. 347 (1964);

[2] Endorsement of TDCJ's approach breached the plea agreement because the parties bargained from a joint understanding that if the 40-year sentence in 786224 were

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[9] I described the state proceedings and included exhibits from them in the statement of facts for my federal petition, which appears at **Exhibit K**.

held unconstitutional, the cumulation order would become invalid (hence the State's reservation of the right to seek a new cumulation order);[10] and,

[3] Alternatively, the plea was involuntary because it relied on counsel's explicit assurances—endorsed by the prosecutor in the bargaining process and by the trial court during the plea hearing—about the effect of invalidation in number *786224* upon the stacked sentence in number *786223*.

I also filed motions [1] to have the court reporter transcribe the record from my 1999 plea hearing, which had not been done previously because I did not appeal from the plea bargain, and [2] to recuse the trial-court judge.[11] The judge took no action, and the application went to the TCCA by operation of law. *See* TEX. CODE CRIM. PROC. art. 11.07, § 3(c).[12] The TCCA denied the application without written order, hearing, or comment, notwithstanding my renewal in that court of my request for a plea-hearing transcript. *See Ex parte Leachman*, WR-36.445-11 (Tex. Crim. App. Jan. 23, 2019) (not available from Lexis).

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[10] The State filed pretrial motions in the *new-trial proceedings*, seeking to cumulate any new sentence with the existing 786223 sentence—consistent with its 1999 reservation of rights. But, *at the same time*, the State was defending TDCJ's approach to the *old* cumulation order, in violation of the plea agreement. My second state and my federal petitions noted this inequity.

[11] The basis for recusal: in the reprosecution of number 786224, I learned that the judge met with prosecutors and solicited *ex parte* comments and argument on one of my pending motions. I moved for recusal, and the judge transferred *the reprosecution* to a visiting judge's docket without formally recusing—but that still left her as the initial factfinder in habeas cases.

[12] A copy of the statute appears at **Appendix L**.

Predicate court proceedings—federal district court

I filed a § 2254 petition, asserting that my confinement in number 786223 violates the Constitution because: [1] my sentence, calculated as the Due Process Clause requires, has expired; [2] the TCCA extended my sentence by ex post facto judicial alteration of settled precedent, in violation of *Bouie*; [3] the TCCA's endorsement of TDCJ's actions breached the plea agreement; and, alternatively, [4] my conviction resulted from an involuntary plea.

The State's request for summary judgment

The State—via TDCJ Director Davis— attacked the merits of my claim by motion for summary judgment ("MSJ"). The magistrate summarized the State's position:

> Respondent argues that Petitioner's claims are state law claims that are not cognizable in a § 2254 proceeding, are barred from consideration by *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989), and are not supported by the record.

Leachman v. Davis, No. H-18-0544, 2020 U.S. Dist. LEXIS 51170, at *1 (S.D. Tex. Feb. 12, 2020),[13] *adopted in part and modified in part by Leachman v. Davis*, No. H-18-0544, 2020 U.S. Dist. LEXIS 50217 (S.D. Tex. Mar. 23, 2020).[14] Specifically:

- The State asserted a right to deferential review of the state-court judgment with respect to my first and second grounds for relief. *See* Doc. No. 42 at 1 (invoking

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[13] A copy of the Magistrate's Report and Recommendation (preceded by my objections) appears at **Appendix I**.

[14] A copy of the judgment appears at **Appendix H**.

AEDPA's "relitigation bar"); *id.* at 5-7 (arguing for deferential standard of review); *id.* at 10 ("Leachman's first two claims . . . must be denied because they fail to satisfy § 2254(d)(1)[.]"). Significantly, however, the State wanted deference to a judgment based on *state*—not federal—law:

> Leachman's "due process" and "ex post facto" claims boil down to a complaint that TDCJ is misreading the CCA's precedent . . . . But ***since Leachman's allegations are rooted in state law***, his claims ***do not constitute cognizable federal habeas corpus claims***. . . .
>
> In his brief, Leachman argues that TDCJ misapplied *Ex parte Nickerson* . . . . It is well-established that federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also present.

Doc. No. 42 at 7-8 (emphases added).

- The State argued that those claims were also *Teague*-barred. *See id.*
- The State asserted that facts pled in support of my third claim suffered from "lack of evidentiary support" and were "conclusory and meritless," Doc. No. 42 at 11.
- The State reasserted the AEDPA's relitigation bar against my fourth claim, relying upon the presumption of a voluntary plea. *See* Doc. No. 42 at 14-16.

My request for summary judgment

In response, I combined my objections to the State's MSJ with a cross-motion for summary judgment (Doc. No. 51, filed Dec. 3, 2019).[15]

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[15] A copy of the objections and cross-motion appears at **Appendix J**.

First, I separated *disputed* from *undisputed* facts, *see* Doc. No. 51 at 4-7, and I offered summary-judgment evidence, including counsel's affidavit regarding plea terms and his request for a court reporter. *See id.* at 7 (offering appendix as evidence); *id.* at Appendix.

Second, I objected *again* to the State's running failure to correct the erroneous new-trial-order date —a date endorsed by the State *only in the habeas proceedings*[16]— and explained why establishing the correct date matters. *See* Doc. No. 51 at 10-13 (requesting ruling on objection or finding of correct date under 28 U.S.C. § 2254(e)).

Third, I undertook to rebut the presumption that a state court ruled on the merits of my federal constitutional claims. *See* Doc. No. 51 at 15-49.

Fourth, I disputed the alleged *Teague* bar to my first and second claims because:

- *Teague* does not apply to claims *admitting a sentence's validity* but challenging the fairness of its execution; rather, it applies to claims that a conviction cannot be valid without some procedural refinement. *See* Doc. No. 51 at 50-51.

- The rules I cite—*i.e.*, due process in calculation of cumulative state sentences when one is constitutionally invalid and prohibition on judicial alterations of settled law ex post facto—are not "new rules." The former was established in the Fifth and Tenth Circuits even before Texas adopted that approach in *Gentry*.[17] The latter was established in *Bouie* decades before my claims arose. *See* Doc. No. 51 at 51-53.

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[16] See *supra* at 7 n.8.

[17] *See Gentry*, 464 S.W.2d at 850 (citing *Goodwin v. Page*, 418 F.2d 867 (10th Cir. 1969), and *Meadows v. Blackwell*, 433 F.2d 1298 (5th Cir. 1970)).

Fifth, I asserted that critical facts about the plea bargain and the voluntariness of my plea were disputed and that the undisputed facts—weighed properly, with inferences in my favor—could not support summary judgment for the State. *See* Doc. No. 51 at 54-66.

Sixth, I argued that the State's "collateral consequences" citations were inapposite because the collateral-consequences standard applies to cases in which *the defendant was not advised of a fact*. My case involved *affirmative misinformation* from counsel, prosecutors, and the trial court—a separate line of caselaw. *See* Doc. No. 51 at 66-70.

Seventh, I concluded that, in light of all the above, the State could not show an entitlement to summary judgment as a matter of law. *See* Doc. No. 51 at 70-73.

Finally, I reanalyzed each issue from a *movant*'s perspective to support my cross-motion. I argued that on the district court record—even without the plea-hearing transcript—I was entitled to summary judgment as a matter of law. *See* Doc. No. 51 at 75-96.

The question of deference

Whether state courts ruled on the merits of my federal claims was a primary question. It controlled [1] whether review of the state-court judgment would be deferential—*see Harrington v. Richter*, 562 U.S. 86, 97-98 (2011) (discussing 28 U.S.C. § 2254(d))— and [2] whether the court could accept my new summary-judgment evidence. *See Cullen v. Pinholster*, 563 U.S. 170, 182 (2011) (holding AEDPA deference limits federal courts to record that was before state courts).

I argued that the state-court rulings ***did not address the merits*** of my federal claims. My argument comprised 35 of the 97 pages in my summary-judgment motion—or, as counted by Microsoft Word, 9953 from 24,718 words. I examined more than 30 TCCA precedents, plus Fifth Circuit precedents on Texas law, and closely scrutinized the specifics of my case—all to satisfy *Richter*'s rebuttal standard, "reason to think some other explanation for the state court's decision is more likely." *Richter*, 562 U.S. at 99-100. I identified *multiple* "other explanations"—*each* more likely than a merits ruling:

On one hand, my case requires a presumption that state courts relied on *Nickerson.*

- Neither petition garnered a written order from the TCCA, but in the first, the trial court issued findings and conclusions. Federal courts "look through" unexplained decisions from a higher court to the "last related state-court decision that does provide a relevant rationale." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption can be rebutted, *see id.*, but here, the State—as shown in the quotations *supra* at pp. 10 and 11—*embraced* the notion of a state-law basis.

- For my first federal claim—*i.e.*, due process requires a sentence stacked upon a constitutionally invalid sentence to run independently— the TCCA's explicit reference to trial-court findings reinforces *Wilson*'s presumption. The *unexplained* denial of the same claim in my *second* petition falls squarely within the presumption.

- For my remaining federal claims, raised only in the second state habeas petition, each claim "relates to" the decision from the first. Under *Wilson*, the trial court's holdings remain "the last related state-court decision [to] provide a relevant rationale." *Id.*

See Doc. No. 51 at 36-37 (analyzing *Wilson*). Furthermore, a *Nickerson*-based decision means that my state claims were rejected on state-law procedural grounds:

- *Johnson v. Williams*, 568 U.S. 289, 298-301 (2013), requires a rebuttable *Richter* presumption for written opinions that do not mention federal claims. But the Court found two reasons that rebuttal failed in *Williams*. First, while the state-court opinion under consideration cited no federal precedents, it cited a state supreme court decision that *had* analyzed federal constitutional issues. *See id.* at 304-05. Second, Williams never distinguished her state from her federal claims or argued in state courts that her federal claims had not been addressed. *See id.* at 306.

- Here, however, *Nickerson* limited itself to a ***procedural*** *statute without inherent substantive concerns*. And, it cited no cases involving federal due process. *See* 893 S.W.2d at 548. Moreover, unlike Williams, I objected in state court that resolution under *Nickerson* left my federal claim unaddressed. See quoted text, *supra* p. 8.

- Thus, based on *Williams*'s examples, I rebutted any presumption of a federal merits judgment. The state courts relied explicitly, and *entirely*, on state-law procedural grounds. Thus, the proper course in § 2254 proceedings was to analyze *whether those state grounds were adequate and independent*—and, if not, conduct a de novo review.

See Doc. No. 51 at 35-36 & n.25, 49, 81-84 (analyzing this point).

On the other hand, I noted one reason to question the look-through presumption: it's quite hard to argue *that the TCCA intended to endorse* trial-court reliance on *Nickerson*'s "ceased to operate" construction when the TCCA so recently had disavowed that

construction in *Vela*, 460 S.W.3d at 614. *See* Doc. No 51 at 37-38 (addressing this point). But long-established precedent also suggests that the TCCA did not issue a merits judgment on grounds *other than* the trial-court findings:

- Failure to correct plain error in TDCJ's affidavit *that I explicitly raised* and that extends my incarceration by a week —*i.e.*, use of November ***11*** instead of November ***4***, 2015—makes it hard to argue that the TCCA reviewed the merits of my first claim. *Merits* review involves independent review of trial-court findings against the record. *E.g.*, *Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). Here, *all* official records, including the trial court's own docket report, reflect the correct date; *only TDCJ's affidavit varies* (apparently pulling a date from a magic hat, as no other source exists).

- Likewise, the TCCA's silence on my motion to obtain the reporter's record from my plea hearing makes it hard to argue that the TCCA grappled with the merits of my third and fourth claims. No procedural reason justified ignoring the motion; I timely filed it in the trial court, and I renewed it in the TCCA based on trial court inaction. The TCCA has emphasized that breach-of-bargain and involuntary-plea claims **require examination *of the entire record***. *E.g.*, *Thomas v. State*, 516 S.W.3d 498, 502 (Tex. Crim. App. 2017) (breach of bargain); *Ex parte Barnaby*, 475 S.W.3d 316, 323 (Tex. Crim. App. 2015) (per curiam) (involuntary plea).

See Doc. No. 51 at 37-38, 45-46 (identifying these precedents). I argued that, *assuming the look-through presumption did not apply*, the question was ***whether features of Texas procedural or decisional law reconciled the TCCA's actions***. *See Richter*, 562 U.S. at 100

(noting explanations from state courts and legislatures can illuminate rebuttal questions); *see also Kernan v. Hinojosa*, 136 S. Ct. 1603 (2016) (per curiam) (holding that state's venue rules rebutted look-through presumption). And Texas precedent provides an answer. In *Ex parte Dawson*, 509 S.W.3d 294 (Tex. Crim. App. 2016) (mem. op.), via dueling concurrences,[18] the TCCA explained its internal standards:

- Historically, the TCCA has rendered unexplained denials on procedural details. *E.g.*, *Hartfield v. Thaler*, 403 S.W.3d 234, 239-40 (Tex. Crim. App. 2013) (answering Fifth Circuit's certified question); *see* Doc. No. 51 at 18-22 (analyzing *Hartfield*). *Dawson* explains **why**: if the initial TCCA judge determines that habeas is not an appropriate vehicle for relief, the claim is denied, with no opinion, in a non-conference disposition. *See Dawson*, 509 S.W.3d at 295.

- The "vast majority" of such dispositions occur when the TCCA's staff attorney and the initial judge agree that the pleading: is insufficiently "specific"; "assert[s] claims that may not be brought on habeas corpus"; or asserts claims that "are statutorily or procedurally barred." *Id.*; *see* Doc. No. 51 at 38-40 (noting that these are *procedural* grounds).

- Furthermore, the narrow class of cases permitting non-conference denial *on the merits* must involve issues that are beyond all debate because the governing law is so

[18] Judge Keasler's principal concurrence described the court's procedures; five others joined his explanation, making it conclusive. *Cf.* TEX. CONST. art. 5, § 4(b) ("[T]he concurrence of five Judges shall be necessary for a decision."). Judge Alcala's opposing concurrence did not debate Judge Keasler's *description* of the court's procedures—only their constitutional advisability.

well settled. *See Dawson*. 509 S.W.3d at 295-96 (describing circumstances not allowing non-conference disposition). I argued that no reasonable jurist could find that my circumstances fall within those confines. *See* Doc. No. 51 at 45-46.

Consistent with *Dawson*, I identified procedural grounds for denial of my claims:

- *In the TCCA's eyes*, the 40-year conviction *still may exist* because the trial court had no jurisdiction to grant a new trial. *See* TEX. CODE CRIM. PROC. art. 11.07, § 5 ("After conviction the procedure outlined in this Act shall be exclusive and any other proceeding shall be void and of no force and effect in discharging the prisoner."). Thus, the trial-court *findings*—by identifying the procedural status of the case—would be sufficient to deem my habeas petition premature, explaining why the TCCA did not adopt the trial-court *conclusions*. *See* Doc. No. 51 at 39 (discussing this possibility).

- At the same time it was considering my case, the TCCA held that habeas corpus would no longer be a proper vehicle for addressing improper cumulation orders.[19] *See id.* (discussing this possibility).

- The TCCA may not have applied the liberal construction that attends federal habeas applications, demanding more artful pleading than I provided. *See id.* at 39-40 (discussing possibility through lens of other TCCA cases).

- For my second application, only one TCCA judge has suggested that such subsequent petitions are proper; others have found the proposition unsound. *See id.* at 47-

[19] *Ex parte Carter*, 521 S.W.3d 344 (Tex. Crim. App. 2017).

48 (quoting *Ex parte Valdez*, 489 S.W.3d 462, 469 (Tex. Crim. App. 2016) (Keller, P.J., concurring)).[20]

In sum, I argued that *either* the look-through presumption applied, and the case was resolved exclusively on state procedural grounds, *or* the unique circumstances of my procedurally and factually complicated case led to a non-merits judgment, à la *Dawson*. *See* Doc. No. 51 at 33-49. I went well beyond *Richter*'s requirement of a "more likely" path than a merits disposition. In my case, ***no*** reasonable path leads to judgment on the federal merits.

Results in federal district court

A magistrate judge acceded to the State's arguments, but concluded that no *Teague* analysis was required.[21] Both parties filed objections.

I objected that the magistrate's analysis consented to the State's *misframing* of issues without even acknowledging my well-pleaded counterarguments. *See generally* Doc. No. 60. For example, the analysis did not mention my careful delineation of facts in dispute or my explicit request for § 2254(e) factfinding on the correct date for the new-trial order. *See id.* at 6-8. Nor did it distinguish between pleas in which a defendant *lacks information* (which are reviewed under the collateral-consequences test) and those in which a defendant *receives*

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[20] Significantly, Judge Yeary—the very judge who denied my second state habeas petition in a non-conference disposition—joined Presiding Judge Keller's concurrence.

[21] A copy of the report and recommendation (Doc. No. 54), preceded by my objections to it (Doc. No. 60), can be found at **Appendix I**.

mis*information* (which examine the *commitments* made to the defendant by the wrong information). *See id.* at 25-26.

More significantly, the recommendation disregarded my effort to rebut *Richter*'s merits presumption, announcing the presumption as a *fait accompli*, without even fleeting reference to my detailed rebuttal. I objected to the lack of analysis and to the facially absurd result: the magistrate ***agreed*** (with both parties!) that the state court resolved my first claim on state-law grounds, then ***acknowledged*** that my *federal* claim involved *due process concerns* in that law, but nevertheless found that the relitigation bar applied—a per se contradiction, because state-law resolution necessarily removed the case from AEDPA deference. *See id.* at 8-12, 22-24.

And, bizarrely, the magistrate "resolved" my second claim—*i.e.*, that ***if*** the TCCA applied *Nickerson* to my procedural posture, it necessarily (but *sub silentio*) overruled *Gentry*, altering precedent via ex post facto judicial construction—without ***once*** referring to *Bouie*, the ***source of my federal claim***. *See id.* at 24. The discussion of my second claim shows that, despite my explicit citation to *Bouie*, the magistrate misapprehended the claim's true nature. *See id.* (objecting on this basis).

The district judge sustained the State's *Teague* objection with detailed analysis but overruled my objections without documenting them, much less analyzing them.[22] He denied a COA on my claims.

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[22] A copy of the district judge's opinion appears at **Appendix H**.

Predicate court proceedings—Fifth Circuit

I appealed the district court's judgment.

Request for COA

My COA brief, which appears as an attachment to **Appendix F**, noted a problem of recursion: in the Fifth Circuit, the "debatability" standard for a COA is tied to whether deference applies. *E.g.*, *Shore v. Davis*, 845 F.3d 627, 631 (5th Cir. 2017) ("The court evaluates the debatability of Shore's constitutional claims through the lens of AEDPA's highly deferential standard[.]"). Thus, deciding *which lens to use when evaluating* ***debatability*** *of whether AEDPA deference applied* required the Fifth Circuit first to resolve the merits of that issue, contrary to the threshold nature of COA determinations. *See* COA Brief at 6-7 (noting paradox and proposing solution). Therefore, I began by showing that my four issues had valid constitutional bases under 28 U.S.C. § 2254(a). *See* COA Brief at 8-11.

Next, on the issue of deference, I noted that the district court's failure even to mention my meticulous rebuttal efforts left nothing for the Circuit to review, derogating from my right to attempt rebuttal of the merits presumption. *See id.* at 12-13. I also noted two complications: first, precedent offered no framework for analyzing a COA request that asserts deference errors—*see id* . at 14-17 (proposing workable framework)—and second, for lack of a district-court *analysis* whose debatability could be argued, my only option was to jam an overview of the argument the district court *should have analyzed* into the length limits for a COA brief. *See id.* at 18-24.

Finally, I argued that the district court's *Teague* finding was *at least* debatable because the requested relief did not create a new *or* a procedural rule, *see id.* at 25-28, and that *even if AEDPA deference applied*, this Court's precedents supported each of my four asserted grounds under the "clearly established Federal law" standard, *see id.* at 29-38.

Circuit Judge Don R. Willett reviewed my request and denied COA in one sentence.[23]

Request for reconsideration

Under Fifth Circuit rules, a single judge's ruling is "subject to review by a panel upon a motion for reconsideration[.]" 5TH CIR. R. 27.2; *see McIntosh v. Partridge*, 540 F.3d 315, 327 n.17 (5th Cir. 2008) (noting that party is "entitled" to panel reconsideration). I filed one (the "27.2 Motion"),[24] noting:

> Because [Judge Willett's] Order consisted only of a single sentence . . . limiting this motion to the specific error(s) of law or of logic that led to the denial is an impossible task.

27.2 Motion at 2. Thus, I only could guess at reasons for denial of COA, *see id.* at 2-6, and summarize my arguments for granting COA, *see id.* at 6-9. I argued:

> [A]s recently as two years ago, this Court stood by the principle that petitioners *can* present "indications" or state-law procedural principles to rebut the presumption of merits adjudication. *The district court denied me that opportunity* . . . . For the Court to deny COA in the face of my extensive showing is effectively to disregard the promise made by the *Thompson* [*v. Davis*, 916 F.3d 444 (5th Cir. 2019)] court.

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23 A copy of Circuit Judge Willett's order appears at **Appendix G**.

24 The motion appears at **Appendix F** (with COA Brief appended).

Id. at 9 (emphases in original).

A panel denied my motion for reconsideration in a per curiam order.[25] The *panel* order included judicial reasoning; it characterized my argument for rebuttal as one relying upon three issues: procedural complexity, pendency of motions in the second state petition, and inferences from *Dawson*. Panel op. at 2. The panel said the "first two grounds are too speculative to overcome the presumption" and that I was "overreading" *Dawson*. *Id.*

The three grounds *characterized by the panel* come from my COA Brief[26] at 21-23. But, the panel did not acknowledge that the absence of district-court analysis had constrained me to a "brief overview" of my more detailed 35-page rebuttal below. *Id.* at 18.

Furthermore, the panel opinion mentioned only my overview of the *second* state proceeding. It ignored my overview of the *first*, which [1] yielded the "last related state-court decision" and [2] was the source of contradictory conclusions (that deference applied *and* that the state courts relied on state procedural law). Significantly, it also ignored my additional argument that COA was warranted *even if deference applied*, based on clearly established federal law—including *Bouie*. *See* COA Brief at 29-38.

Finally, the panel opinion—while limiting itself to a mere sketch of arguments on the *second* state proceeding—still mischaracterized them. In particular, the panel described my "overreading" of *Dawson* thusly: "[N]othing in that case suggests that a single judge is

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[25] I appended the panel's order to my motions for rehearing, which appear at **Appendix E**. *See* 5TH CIR. R. 35.2.10 (requiring copy of order to be bound with motion for rehearing en banc).

[26] Appended to the 27.2 Motion at **Appendix F**.

unauthorized to dispose of a petition on the merits." Panel op. at 2. But, as described above, my *full* analysis specifically took notice that a single judge *can* dispose of a case on the merits *in narrowly defined circumstances*. *See* discussion *supra* pp. 17-18. The panel opinion did not acknowledge that **rebuttal of the merits presumption looks to *what is "more likely,"* not *what is beyond doubt.***

Two weeks after the panel opinion, as I was preparing motions for rehearing, the Fifth Circuit Clerk issued the mandate. I wrote a letter to the Clerk, explaining the situation and seeking the mandate's recall.

Motions for panel and en banc rehearing

Having obtained a panel opinion, and one that gave *reasons* for denial—but failed to address all of my COA issues and arguments, and demanded a higher standard of proof than *Richter* requires—I filed motions for panel rehearing and rehearing en banc ("Mot.Panel.Reh" and "Mot.En.Banc").[27]

Standards in the national and local rules suggested that three issues had sufficient gravity to call for the Circuit's full attention. *See* FED. R. APP. P. 35(a); 5TH CIR. R. 35.1; 5TH CIR. R. 35 IOP. First, I argued that the panel decision disregarded both *Richter* and Circuit precedent by demanding a rebuttal standard more akin to "beyond reasonable doubt" than to *likelihood* based on reasonable assessment of state precedents and rules. *See* Mot.En.Banc at 7. Second, I argued that instead of looking for a "substantial showing" that

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[27] Again, both motions appear at **Appendix E**.

the district court's decision (devoid of analysis) was debatable, the panel added its more restrictive gloss upon *Richter* and jumped to first-instance analysis of the underlying, never-briefed-in-full issues—repeating the mistake condemned by this Court in *Tennard v. Dretke*, 542 U.S. 274, 283 (2004). *See* Mot.En.Banc at 7. Third, I argued that the case had exceptional importance, given the lack of precedent for how to review a COA application challenging AEDPA deference when a district has ignored a well-pleaded effort to rebut the merits presumption. *See id.* at 7.

Issues the panel simply overlooked, however, seemed insufficient to justify rehearing en banc; accordingly, I argued them in a motion for panel rehearing. First, I argued that the panel failed to apply *Wilson*'s look-through presumption to my state proceedings. *See* Mot.Panel.Reh at 9. Second, I argued that, by finding I had "not cited controlling Supreme Court authority" for *any* of my claims, the panel obviously had overlooked my citation to precedents from this Court—both directly and from law-of-the-Circuit rulings on what this Court has "clearly established." *See id.*

Because the mandate had issued, and because the Circuit's local rules do not discuss motions for rehearing *after a panel opinion issues under local rule 27.2*, I included a statement on the propriety of my rehearing requests. *See id.* at 7-8.

The Clerk's response

The Clerk's response was slow; my experience with legal mail to the Fifth Circuit from the Harris County Jail makes me certain that the Clerk received both my letter about the

mandate and my rehearing motions by June 29, 2021. The response, when it came, was a letter (dated July 14, 2021) from Deputy Clerk Donna L. Mendez:

> As an initial matter, the review of a single judge administrative* order, is accomplished in the filing of a motion* for* reconsideration. ***A petition for panel rehearing would not* be* allowed***.

Letter at 1 (emphasis added).[28]

In response, I filed a motion for reconsideration by a judge of the clerk's decision to take no action (the "27.1 Motion"). *See* 5TH CIR. R. 27.1. My motion reasserted, for a judge's benefit, precedent that contradicted Deputy Mendez's explanation. *See* 27.1 Motion at 5-6 (citing *Ochoa Canales v. Quarterman*, 507 F.3d 884 (5th Cir. 2007)).

Like my rehearing motions, my Rule 27.1 motion was not presented to the Circuit. Instead, I received another letter (dated July 30, 2021), stating that the Clerk again was "taking no action." Letter at 1.[29] This letter, signed by Deputy Clerk Monica R. Washington, had a different rationale; it did not suggest that rehearing was forbidden after Rule 27.2 panel reconsideration:

> The case is closed any petition for rehearing en banc was due at the time of the filing of the motion for reconsideration, we are taking no action on this motion.

Letter at 1 (all punctuation verbatim).

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[28] A copy of the letter is attached as an exhibit to my motion for reconsideration of the clerk's action, which appears at **Appendix D**. In the quoted text, asterisks appear by the words that I've guessed from context; each was cut off, partially or completely, in the original.

[29] A copy of the letter appears at **Exhibit C**.

The judicial-conduct complaint

Suspecting judicial obstruction of my motions, I filed a judicial-conduct complaint.[30] *See* 28 U.S.C. § 351. My complaint asserted that Circuit Judge Willett exhibited bias toward my pro se petition because [1] nothing in the national or local rules of appellate procedure *forbade* motions for rehearing after rule 27.2 panel action; [2] moreover, the rules' literal text *implied* such motions were proper; [3] even more tellingly, unambiguous Fifth Circuit precedent *had considered* such motions ***from an inmate with a lawyer***; but, [4] *my* motions were blocked. Statement of Facts at 2-4. I acknowledged a lack of affirmative *proof* that Circuit Judge Willett had directed the Clerk's action, but I alleged his involvement by inference from known facts. First, the text of 5TH CIR. R. 27.1 does not permit the Clerk to act alone on either motions for rehearing or requests for judicial review of clerical action. Second, the two-week-plus delay before Deputy Mendez's no-action notice suggests that she sought judicial guidance (and possibly even filed the motion) before writing the letter. Third, under 5TH CIR. R. 35 IOP, Judge Willett—for the panel—had control of the case on rehearing requests. *See* Statement of Facts at 4-5. Although I *suspect* that the text I quoted from Deputy Mendez's letter, see *supra* p. 26, was cut-and-pasted from Circuit Judge Willett's instructions to her—incidentally causing the problem of lost words at the margin—I judged this suspicion too tenuous to declare based on information and belief, and I did not assert it in my complaint.

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[30] A copy of the complaint (cover form and statement of facts) appears at **Appendix B**.

The ***only*** response was a letter (dated August 23, 2021) from Chief Deputy Clerk Thomas B. Plunkett, stating that Chief Judge Owen had directed him to review my complaint. He asserted that procedures were followed, writing in part:

> On June 9, 2021, the court denied your motion for reconsideration from the April 19, 2021 denial of a certificate of appealability. Appropriately, the mandate then issued on June 16, 2021 closing this matter. As you were informed, ***no action will be taken*** *on any later submissions* ***as they are untimely.***

Letter at 1 (all punctuation verbatim) (emphasis added).[31] He ***did not deny*** that Circuit Judge Willett had advised the Clerk to "take no action" on my motions.

ARGUMENT

It is a serious—perhaps even a grave—matter to seek mandamus:

> [Mandamus] is a drastic and extraordinary remedy reserved for really extraordinary causes. The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine the court against which mandamus is sought to a lawful exercise of its prescribed jurisdiction. Although courts have not confined themselves to an arbitrary and technical definition of "jurisdiction," only exceptional circumstances amounting to a judicial usurpation of power, or a clear abuse of discretion, will justify the invocation of this extraordinary remedy.

Cheney v. United States Dist. Court, 542 U.S. 367, 380 (2004) (citations, internal quotations, and internal brackets omitted). One seeking mandamus relief must satisfy a three-pronged

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[31] The letter appears at **Appendix A**.

test: [1] the right to relief must be indisputable; [2] mandamus must be the only adequate means for relief; and [3] the issuing court must be convinced that use of its discretion to issue the writ is appropriate under the circumstances. *Id.* at 380-81.

Indisputable right to relief

Any person has a statutory right to complain about a judge under 28 U.S.C. § 351; chief judges have corresponding duties under 28 U.S.C. § 352. The Judicial Conference of the United States has exercised its authority to promulgate rules governing complaints. *See* R. JUD. CON. & DISAB. PROC. pref. Here, Chief Judge Owen failed to follow the mandatory provisions imposed by statute and rule.

My statement of facts identified a specific judge, alleged specific action, and asserted that improper bias against pro se filings motivated the action. The complaint's facial validity was unmistakable. *See* R. JUD. CON. & DISAB. PROC. 4 cmt. (explaining that allegations of action motivated by bias are proper subject of complaint procedure); R. JUD. CON. & DISAB. PROC. 6 (describing essential contents of complaint). Thus, the Clerk had to "open a file, assign a docket number according to a uniform numbering scheme promulgated by the Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt." R. JUD. CON. & DISAB. PROC. 8(a).

Here, the Clerk did ***not*** acknowledge receipt, open a file, or assign a docket number—the letter from Chief Deputy Clerk Plunkett showed only the docket number for my appeal. Conversely, Chief Plunkett's letter *did* reflect the forwarding of my complaint to Chief Judge

Owen. *See* R. JUD. CON. & DISAB. PROC. 8(b) (requiring transmission of complaint "to the chief judge").

At that point, Chief Judge Owen had authority to conduct an informal, limited inquiry. *See* 28 U.S.C. § 352(a); R. JUD. CON. & DISAB. PROC. 11. And she had authority to designate Chief Plunkett to investigate underlying facts, "transcripts[,] and other relevant documents." 28 U.S.C. § 352(a)(2); R. JUD. CON. & DISAB. PROC. 11(b). But she *did not have authority* to resolve "any reasonably disputed issue." 28 U.S.C. § 352(a)(2); R. JUD. CON. & DISAB. PROC. 11(b). More importantly, she *did not have authority* to close the book on proceedings *without a* ***written order***. *See* 28 U.S.C. § 352(b). Only four valid outcomes exist for a chief judge's inquiry: dismissal, conclusion that voluntary corrective action has been taken, conclusion that intervening events have mooted the complaint, or referral to a special committee. *See* R. JUD. CON. & DISAB. PROC. 11(a).

Here, however, when Chief Judge Owen assigned Chief Plunkett to investigate, Chief Plunkett concluded the complaint procedure *informally*, with his own letter, blithely assuring me that everything was A-OK.

I rather suspect that a complaint from a lawyer, or from *anyone but a pro se prisoner*, would have been handled strictly according to statute. The under-the-table handling of this matter, from the moment the Clerk did not acknowledge receipt and assign a file number, illustrates the problem of disparate treatment—the same problem that gave rise to the complaint. The abrogation of my statutory right to have my judicial-conduct complaint considered is indisputable.

No other remedy

Ordinarily, a complainant "aggrieved by a final order of the chief judge" can seek review by the judicial council. 28 U.S.C. § 352(c); *accord*, R. JUD. CON. & DISAB. PROC. 11(g)(3). In fact, that is the *only* form of review. Denial of review by the judicial council "shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 352(c).

To petition for review of a chief judge's order, however, one must *have* an order. *E.g.*, R. JUD. CON. & DISAB. PROC. 18(a) ("*After the chief judge issues an order* . . . the complainant . . . may petition the judicial council of the circuit to review the order.") (emphasis added). Neither the judicial-complaint statutes nor the rules effecting them include a remedy when a chief judge fails to render a written order.

Hence, only mandamus can provide a remedy for a failure to follow the statute. And because Congress chose the Circuit courts as a venue for filing a complaint, only this Court has authority to issue the writ.

The issue warrants the Court's attention

Earlier, I noted that in my quarter century of litigating, I have never been denied permission to proceed *in forma pauperis* by this Court, nor been sanctioned or issued a "strike" by any court. Now I add: this is not the first time I've felt that my status as a pro se prisoner makes for an uphill slog against judicial disdain. In that entire quarter century,

however, and all of its various proceedings, I have never taken the extraordinary step of filing a complaint under 28 U.S.C. § 351.

This time is different because the effects are so pernicious.

Direct harm—uncorrected discrimination

A baseless judicial-conduct complaint, or even a reasonably doubtful one, might not warrant the exercise of this Court's mandamus jurisdiction—no matter how far a chief judge below departed from statutory obligations. I emphasize, however, that my complaint has a firm foundation. No good explanation exists for what occurred in the procedural handling of my appellate motions.

Chief Deputy Plunkett's letter offers mere justification by conclusory fiat. It is wrong—demonstrably, and from multiple sources, beginning with inference from the appellate rules. A motion for rehearing en banc requires a predicate *panel* decision (*see* FED. R. APP. P. 35(b)(1)(A) (using phrase "the panel decision conflicts"))—a predicate decision with analysis, not merely a single sentence (*see* FED. R. APP. P. 35(a), (b) (discussing decisions that *conflict with precedent*)). Fifth Circuit rules present stark warnings against cavalier requests for rehearing en banc. *See* 5TH CIR. R. 35.1 & R. 35 IOP. So, any notion that my petition for rehearing was due *at the same time I sought reconsideration* of Circuit Judge Willett's one-sentence order under 5TH CIR. R. 27.2 is absurd—it would require me to *spurn* the rules, not obey them.

Furthermore, the Fifth Circuit *distinguishes*, not equates, motions for ***reconsideration*** *of a single-judge order* under rule 27.2 and motions for *panel* ***rehearing*** under FED. R. APP. P. 40. *E.g.*, *United States v. Cardona*, No. 11-50562, 2012 U.S. App. LEXIS 27178, at *1 (5th Cir. May 17, 2012) (considering petition for *rehearing* from single-judge denial as motion for *reconsideration*). More significantly, the situations presented by my case *have occurred in the past*. In *Ochoa Canales*, 507 F.3d at 885-86, a prisoner ***represented by an attorney*** filed his petition for rehearing en banc ***after denial*** *by a single judge* of his COA request, ***and after further denial*** *by a panel* upon rule 27.2 reconsideration. The court not only accepted his petition for rehearing, but also circulated it to the entire court and then issued a new panel opinion. *See id.* And in *United States v. Nolen*, 523 F.3d 331 (5th Cir. 2008), when a clerk "took no action" on a government motion deemed untimely, the AUSA received judicial reconsideration under local rule 27.1 on request. *See id.* at 332.

Statements here by Deputy Washington and Chief Plunkett (motions for rehearing due at the *same time* as motions for rule 27.2 reconsideration), and by Deputy Mendez (no panel rehearing "allowed" *after* rule 27.2 reconsideration), stand in stark contrast to *Ochoa Canales*—but the only difference in our procedural postures is that **his claims were filed by a lawyer**. And in *Nolen*, the clerk's decision to take no action on the government's "untimely" motion received **judicial** review when **the AUSA** sought rule 27.1 reconsideration—but in my case, seeking reconsideration of Deputy Clerk Mendez's decision to "take no action," **I** received only letters from **other deputy clerks** (Deputy Washington and Chief Plunkett), dismissing my concerns with the wave of a hand.

Ochoa Canales gives the lie to Chief Plunkett's claim that my motions for rehearing were "untimely." And *Nolen* gives the lie to his claim that the Clerk properly took no action when I sought *judicial review of the clerical decision* that the motions were untimely. Courts have power to make local rules, barring conflict with the national rules, and their judges have power to construe those rules—but in this case, the Fifth Circuit ***has done so***, in *Ochoa Canales* and *Nolen*. No clerical employee—not the Chief Deputy, not the even the Clerk—has authority to construe a rule differently than a panel of the court has done or to change a rule's application. Chief Plunkett did not even essay an attempt to distinguish my situation from those in *Ochoa Canales* and *Nolen*. How could he?

The larger problem, however, is the moving hand behind the Clerk: Circuit Judge Willett. Allegations in my judicial-conduct complaint, previously based only on information and belief, are made certain now by Chief Plunkett's careful non-denial of my allegations. Consequently, the plain facts are: in the past, as documented in published cases, motions from litigants in procedural postures identical to mine have been heard and resolved by the court, while mine have been cast into a procedural black hole by the Clerk *at Circuit Judge Willett's direction*, never to receive the judicial scrutiny required by the rules. What ***sole*** difference distinguishes me from those litigants? They *are not* ***pro se*** *prisoners*.

By allowing Chief Plunkett to "resolve" my claim on his mere say-so, Chief Judge Owen has thwarted both the intent and the command of Congress. Like any other party who can demonstrate bias in the procedural handling of a case, I am entitled to have my complaint heard, investigated, and resolved under the terms of the statute.

Broader harm—deprivation of appellate review

It bears repeating that the specific act of disparate treatment rerouted my appeal into a procedural void. The *result* of the bias against my pro se pleadings is that the represented prisoner in *Ochoa Canales*, and the AUSA in *Nolen*, received the full benefit of appellate review—one had his petition for rehearing en banc reviewed by the entire Circuit and the other had the clerk's decision reviewed by a judge (who reversed the Clerk's decision that the original motion had been "untimely")—while my pro se petition did not receive that benefit *and never can receive it*. The Clerk's "take no action" resolutions bring to a halt the procedural mechanisms that invoke official judicial scrutiny. By unofficially directing the Clerk *not to act*, Circuit Judge Willett singlehandedly pretermitted my appeal.

The entire point of petitions for panel rehearing and rehearing en banc is that judges sometimes make mistakes. The federal appellate rules grant parties a *right* to protest those mistakes by moving for rehearing and even, in a case where a judge or panel has departed from precedent, by bringing a protest to an entire court of appeals. Here, Circuit Judge Willett's actions have deprived me of that right by acting *through the Clerk* to block any review of the *first reasoned decision on my request for COA*.

There is no substitute for the right to seek judicial review in the Fifth Circuit, via requests for rehearing, of flaws in the panel's reasoning. No appeal of right lies from the final decision of a court of appeals; the only potential remedy is discretionary review, in this Court, via certiorari—but even for a meritorious case, the odds of attaining review are quite low:

> The primary concern of the Supreme Court is not to correct errors in lower court decisions, but to decide cases presenting issues of importance beyond the particular facts and parties involved. The Court grants and hears argument in only about 1% of the cases that are filed each Term. The vast majority of petitions are simply denied by the Court without comment or explanation.

OFFICE OF THE CLERK, GUIDE FOR PROSPECTIVE INDIGENT PETITIONERS FOR WRITS OF CERTIORARI (July 2019). So, the opportunity to correct five manifest errors in the first *reasoned* decision (on panel reconsideration of the single-judge order under 5TH CIR. R. 27.2) by pointing them out via requests for rehearing—to the panel or the Circuit, depending on the nature of the error—was the *only* opportunity to argue for correction *as a matter of right*, rather than hoping for certiorari.

Had Chief Judge Owen investigated my judicial-conduct complaint *as required by statute*, she would have determined that no plausible justification exists for treating my pro se motions for rehearing, and for reconsideration of the Clerk's "take no action" letter, differently than identical motions in *Ochoa Canales* and *Nolen*. Notwithstanding Chief Deputy Plunkett's *apologia*, the relevant text of the local rules has not changed; no announcement of a new interpretation has issued; no published case (or unpublished one, for that matter) has altered the interpretation of the rules in those two cases. No *judge* could articulate a lawful basis for blocking the *same procedural steps*, in my pro se case, that represented parties took in their appeals. Hence, had Chief Judge Owen followed the procedures of 28 U.S.C. § 352, she would have sought an explanation for the disparate treatment.

Significantly, even if her investigation determined that Circuit Judge Willett's improper directions to the Clerk had a more innocent explanation than bias against pro se pleadings, the judicial misconduct rules allow for correction of mistakes that lead to the appearance of bias. *See* 28 U.S.C. § 352(b)(2) (allowing judicial-conduct complaints to be concluded with "appropriate corrective action" or finding of mootness from "intervening events"); R. JUD. CON. & DISAB. PROC. 11(d) ("Corrective Action"), (e) ("Intervening Events"). In my case, that means that my complaint could have been resolved by withdrawal of Circuit Judge Willett's instructions to the Clerk, which would have allowed my motions for rehearing to be considered on their merits by the panel or the Circuit. And, if they then were denied *on their merits*, rather than cast into a procedural void that left no chance for judicial consideration, I could *then* request certiorari from this Court.

Thus, issuing mandamus to Chief Judge Owen is in aid of this Court's appellate jurisdiction. The effect of proper handling for my judicial-conduct complaint would be a finding, on investigation by Chief Judge Owen, that my procedural *right to petition for rehearing* was prejudiced by judicial action, on my pro se pleadings, that is inconsistent with the historical, precedential handling of *identical* pleadings by represented and governmental parties. The resulting corrective action would have placed my case back on track for a result *on the merits*—the proper result for any appellate action, whatever those merits might be. From that point, either the State or I, if dissatisfied with the merits ruling, could seek certiorari in this Court from a *case fully heard in the Fifth Circuit.*

Pervasive harm—lack of federal review

Ultimately, this case is worth the Court's limited time because mandamus provides the most direct, efficient remedy for a case study in how habeas proceedings can go wrong.

A mandamus proceeding is not the forum to *resolve* my federal habeas complaint. Thus, I have not dwelt upon my underlying habeas claim's merits or made an in-depth argument of the type I made in the district court. The context I have provided, however, should convince the Court that my claims are substantial, serious, and in need of meaningful federal review.

Here, the anti-pro se bias revealed by Circuit Judge Willet's procedural handling of my rehearing requests, and my subsequent request for a judge to review, *officially*, the Clerk's "take no action" ruling, seems to pervade all levels of the case. If the TCCA ruled on the merits of my state claim *at all*, then its ruling was unmistakably based entirely on state procedural law. The federal district court simultaneously held that the case indeed had been resolved on state procedural law *and* that deference applied—a contradiction so fundamental that I never have heard of, or seen, a case with a similar holding. Nor is that the only inexplicable holding: I have a *Bouie* claim that was resolved without discussion of *Bouie* and a plea-bargain claim that failed to recognize guiding precedent.

Most significantly, I presented a thorough, meticulous case for rebutting the presumption of a decision on the federal merits in state court, only to have it *ignored completely*. This Court has said that "it is important to determine whether a federal claim was 'adjudicated on the merits in State court,' " *Williams*, 568 U.S. at 292. And *Richter* itself, that titan of AEDPA enforcement, took the time to remind federal courts that "[j]udges must

be vigilant and independent in reviewing petitions for the writ," 562 U.S. at 91. Neither the district court's snubbing of my detailed argument for rebuttal nor the per curiam denial of a COA in appellate court satisfy the Court's command.

The pattern here is one of judges who do not take seriously pro se petitions—who give them scant, if any, regard, and seem inclined to accept the government's view as a matter of course. That pattern extended into both Circuit Judge Willett's covert instructions to the Clerk to treat my pleadings differently than those of represented inmates and Chief Judge Owen's shunting aside of my judicial-conduct complaint to Deputy Plunkett.

Perhaps there are remedies other than writ of *mandamus*, but all of them require writs *in this Court*. I can abandon efforts to have the Fifth Circuit correct, on rehearing, manifest errors in the per curiam denial of a COA, and instead seek certiorari from that denial, arguing that if *my* issues are deemed "undebatable," then debatability is an illusion. Or, if all efforts to obtain a COA fail, I can bring habeas arguments directly to this Court, in the form of an original habeas petition as extraordinary writ.[32]

What makes those remedies less efficient is that they look to proceedings in which judges have discretion in resolving the ultimate merits of a complaint. Chief Judge Owen's duties with respect to my judicial-conduct complaint, however, involve no such discretion. She had mandatory duties under 28 U.S.C. § 352, and she laid aside those duties in favor of

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[32] I am aware that the Court could construe *this* petition as either of those, or at least note a possible issue and invite filing of either of those, which would require service on the State via current TDCJ Director Lumpkin. I stand ready to do so, but if the Court is inclined to exercise such construction or to issue such invitation, I request appointment of counsel.

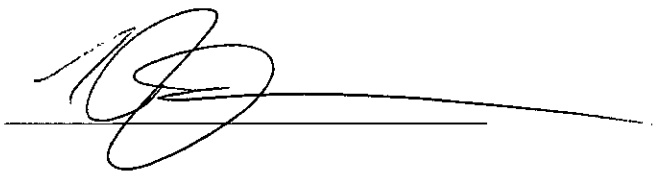
allowing a deputy clerk to resolve my complaint. That is not allowed. Unmistakably, inarguably, and beyond all doubt, excuse, or justification, that is not allowed.

Therefore, by taking the case on mandamus, the Court can enforce the will of Congress *and* remind judges at all levels that pro se documents—whether pleadings or judicial-conduct complaints—must be taken as seriously as those filed by attorneys. It has been quite some time since this Court addressed courts' duties to give effect to pro se pleadings, and my case shows that a reminder is, perhaps, due.

CONCLUSION

The petition for writ of mandamus should be granted.

Respectfully submitted,



Date: September 22, 2021.