No. _____

In the Supreme Court of the United States

October Term 2023

TRAVIS DWIGHT GREEN,

Petitioner,

v.

BOBBY LUMPKIN, Director,
Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Are a district court's findings that a habeas corpus petitioner's attorney abandoned him "from the beginning" and "for the entirety of [his] state habeas application process" factual determinations that "must not be set aside unless clearly erroneous," Fed. R. Civ. P. 52(a)(6), like the findings supporting the "cause" determination in *Amadeo v. Zant*, 486 U.S. 214, 222-224 (1988), or, as the Fifth Circuit held in this case and others, may a court of appeals review *de novo* all matters related to a finding of "cause"?

2. Do the Fifth, Third, and Seventh Circuits correctly apply this Court's equitable "cause" doctrine when they hold, as a matter of law, that incompetence due to a brain impairment cannot excuse a procedural default because "mental incompetency … is not a cause external to the petitioner," *Gonzales v. Davis*, 924 F.3d 236, 244 (5th Cir. 2019) (*per curiam*), or do the Fourth, Sixth, Eighth, and Ninth Circuits apply the correct rule in holding that a habeas petitioner may excuse his default by showing it was caused by mental incompetence because the effects of a disease "'cannot fairly be attributed to' the prisoner," *Davila v. Davis*, 582 U.S. 521, 528 (2017) (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991))?

CORPORATE DISCLOSURE STATEMENT

Petitioner Travis Dwight Green, a death-sentenced Texas inmate, was the appellee in the United States Court of Appeals for the Fifth Circuit. The State of Texas, through the director of its Department of Criminal Justice, Correctional Institutions Division, was the appellant in that court.

LIST OF PROCEEDINGS WITH DATES OF JUDGMENT

Trial:	*State of Texas v. Travis Dwight Green*, No. 823856 (Tex. 209th Dist. Ct. Dec. 7, 2000)
Appeal:	*Travis Dwight Green v. State of Texas*, No. AP-74,036 (Tex. Crim. App. Jun. 26, 2022)
State Hab.:	*Ex parte Green*, WR-48,019-02 (Tex. Crim. App. Mar. 6, 2013)
	Ex parte Travis Dwight Green, No. 823865-A (Tex. 209th Dist. Ct. Aug. 31, 2012)
Fed. Hab.:	*Green v. Davis*, No. 4:13-cv-1899 (S.D. Tex. Aug. 18, 2020)
	Green v. Lumpkin, No. 20-70021 (5th Cir. Apr. 13, 2023), *reh'g denied* (Sep. 5, 2023), *judgment entered* (Sep. 13, 2023)

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> At bottom, this case is about a schizophrenic individual who, plagued with delusions that he was being framed, was persuaded by a fellow inmate in his jail dormitory to represent himself at trial. Yet, throughout trial proceedings, he failed to grasp basic facts about the process. He confused the role of the court, selected jurors that explicitly and strongly supported the death penalty, insisted on wearing his prison garb and disrobed in front of the jury, and, despite extensive coaching, could not grasp even the most basic concepts.

App. 84a-85a. Based on the state-court record and testimony presented during an evidentiary hearing, the district court found, by clear and convincing evidence, that Petitioner Travis Green was tried while incompetent. App. 85a. The Fifth Circuit reversed based on two rulings that place it on the wrong side of two widely acknowledged circuit splits: one over the application of the "clearly erroneous" standard of review, and the other over whether incompetence due to a brain impairment can excuse a procedural default.

Certiorari is appropriate when there is a "threat to the goal of uniformity of federal procedure posed by the decision below." *Hanna v. Plumer*, 380 U.S. 460, 463 (1965). The Fifth Circuit's decision in Petitioner's case presents more than a mere threat. It exemplifies an utter lack of uniformity in the standard of review that the courts of appeals apply to a district court's finding that a habeas petitioner has shown "cause" to excuse a procedural default. This Court has held that "application of the 'cause'-and-'prejudice' standard may turn on factual findings that should be made by a district court." *Jenkins v. Anderson*, 447 U.S. 231, 234-235 n.1 (1980). And it has reversed a circuit for "fail[ing] properly to apply" Rule 52(a)(6)'s "clearly erroneous" standard to a district court's findings on "cause." *Amadeo v. Zant*, 486 U.S. 214, 223

(1988). And yet, the Fifth Circuit and others hold that the question "[w]hether a petitioner has shown cause and prejudice to excuse a procedural default is reviewed *de novo*." *Prible v. Lumpkin*, 43 F.4th 501, 513 (5th Cir. 2022). But not always. As shown in the first "reasons" section, *infra*, in most circuits, the standard of review that will be applied in a given case is virtually a crap shoot.

The district court found that Green was incompetent under *Dusky v. United States*, 362 U.S. 402 (1960), when he represented himself in his capital murder trial. App. 76a-85a. It was undisputed that Green's *Dusky* was not exhausted and was procedurally barred under Texas law. App. 25a. Therefore, the district court was able to reach the merits only because it found that Green's state habeas counsel, Ken McLean, was not "serving as [Green's] agent 'in any meaningful sense of that word,'" *Maples v. Thomas*, 565 U.S. 266, 288 (2012) (quoting *Holland v. Florida*, 560 U.S. 631, 659 (2010) (Alito, J., concurring)), "from the beginning" and "for the entirety of [his] state habeas application process." App. 30a-35a.

Texas appealed and the Fifth Circuit reversed. Like the court of appeals' decision in *Amadeo*, the Fifth Circuit's eleven-page opinion "never identified the standard of review that it applied to the District Court's factual findings." *Amadeo*, 486 U.S. at 223. The court simply said, "We disagree" with the district court. While the Fifth Circuit was willing to "agree that attorney abandonment can, in some cases, constitute cause sufficient to overcome a procedural default," App. 2a, which is only what this Court held in *Maples*, the panel found that any abandonment in Green's case

occurred "too late under state law to seek habeas relief on his incompetency claim." *Ibid*.

The appellate court thus gave itself leave to determine *de novo* facts that were critical to the "cause" determination. It substituted its own finding that abandonment occurred "too late" for the district court's finding of abandonment "from the beginning" based on its supposition that "neither Green nor the district court offer[ed] any theory of timeliness to the contrary." App. 2a. Even if that supposition were true—and it is not—the absence of such a "theory" would not empower the court of appeals to make a *de novo* determination because "Rule 52(a) applies to findings of fact … described as 'ultimate facts' because they may determine the outcome of litigation." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984). Both the district court's findings about *when* McLean abandoned Green and its "ultimate" finding of abandonment were fully supported by the record.[1]

Green also sought a determination of "cause" based on his mental incompetence during the state habeas process. *See* App. 127a-131a. The district court agreed that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have a court determine his capacity to stand trial," *Pate v. Robinson*, 383 U.S. 375, 384 (1966). *See* App. 183a. But it declined to

[1] If the Fifth Circuit's use of "theory" implies the application of a legal theory, the court's decision creates a split with the Ninth Circuit's holding that "whether a petitioner has been abandoned by counsel" is "a factual finding … which we review for clear error." *Foley v. Biter*, 793 F.3d 998, 1003 (9th Cir. 2015).

"consider [Green's] alternative incompetency-based argument for cause and prejudice" in light of its findings under *Maples*. App. 35a.

On appeal, the Fifth Circuit held that Green's assertion of incompetence during the state habeas process was "foreclosed by our precedent," App. 9a, in which another panel said "mental incompetency … is not a cause external to the petitioner." *Gonzales v. Davis*, 924 F.3d 236, 244 (5th Cir. 2019) (*per curiam*).[2]

A well-defined split in the circuits over whether mental incompetence can excuse a procedural default hinges on the lower courts' application of the requirement that the petitioner's compliance with her State's procedural rules was impeded by an "objective factor *external* to the defense." *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (emphasis added). The Third, Sixth, and Seventh Circuits hold that factors like "illiteracy and mental retardation are not 'external' to [the] defense within the meaning of *Carrier*." *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993); *Johnson v. Wilson*, 187 F. App'x 455, 458 (6th Cir. 2006); *Harris v. McAdory*, 334 F.3d 665, 669 (7th Cir. 2003). The Fifth Circuit agrees, but in Green's case it distinguished itself by repeatedly acknowledging that this Court has defined "external" as "'something that cannot fairly be attributed to [the petitioner].'" App. 6a (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (in turn quoting *Carrier*, 477 U.S. at 488)); *id*. at 7a (quoting *Davila v. Davis*, 582 U.S. 521, 528 (2017)). The other circuits have not defined mental deficiency as an "internal" cause by referring to the "fair-attribution" standard. Thus,

[2] Among other typos in the opinion, the panel misspelled the name of the petitioner, Michael Gonzales, as "Gonzalez."

this case squarely presents the question whether this Court's precedent requires that lower courts deem the incapacitating symptoms of schizophrenia to be "fairly attributable" to the sufferer. *Cf. Ford v. Wainwright*, 477 U.S. 399, 407-408 (1986) (Powell, J., concurring) (citing Blackstone for the common law maxim "madness is its own punishment: *furiosus solo furore punitur*").

On the other side of the split, the courts of appeals for the Eighth and Ninth Circuits have held that a petitioner could excuse a default with "a conclusive showing that mental illness interfered with a petitioner's ability to appreciate his or her position and make rational decisions regarding his or her case," *Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999), or by showing that "a mental condition rendered the petitioner completely unable to comply with a state's procedures and he had no assistance." *Schneider v. McDaniel*, 674 F.3d 1144, 1154 (9th Cir. 2012). The Fourth and Eleventh Circuits have likewise assumed that "profound mental illness," *Farabee v. Johnson*, 129 Fed. App'x 799, 802 (4th Cir. 2005) (unpublished decision citing published cases), or the absence of "the mental capacity to understand the nature and object of habeas proceedings and to present his case for habeas relief" could serve as cause, at least for a pro se petitioner. *Smith v. Newsome*, 876 F.2d 1461, 1465 (11th Cir. 1989).

As the Supreme Court of Connecticut has observed, the Fifth Circuit and others that categorically preclude a showing of cause due to mental impairment fail to acknowledge that the excludable factors have been "defined as 'something fairly attributable to the petitioner.'" *Saunders v. Comm'r of Correction*, 272 A.3d 169, 185

(Conn. 2022) (quoting *Carrier*, *supra*). They also fail to recognize that procedural default and its exceptions are prudential and equitable doctrines, respectively, and not statutory laws that must be strictly adhered to. With their eyes fixed on the word "external" those courts, including the Fifth Circuit, have lost sight of the principle that "[w]hat is fairly attributable is a matter of normative judgment." *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n.*, 531 U.S. 288, 295 (2001).

This Court should grant *certiorari* to establish a uniform rule in which habeas petitioners are not judged responsible for the incapacitating symptoms of mental diseases or other brain impairments that are beyond their control. There is little reason to doubt that such a rule would be favorable to Green and dispositive. The district court found he was incompetent throughout the trial process, and Texas did not even attempt to persuade the Fifth Circuit that the finding was clearly erroneous. The State's own expert, Dr. Timothy Proctor, "acknowledged … that Green may have been in the prodromal phase of schizophrenia during trial," App. 106a; *id.* at 72a, and testified that Green's mental condition suddenly and rapidly worsened after he was sent to death row. *See* App. 72a. A doctor who treated Texas inmates diagnosed Green with schizophrenia in 2003 based on a conspiratorial delusion "'dating back to 2000.'" App. 83a. And "Dr. Proctor testified that there is no dispute that Green now has schizophrenia." App. 66a. Ultimately, the district court found the evidence showed "'consistency in [Green's] presentation of symptoms over time,'" including during post-conviction review. App. 57a.

OPINIONS BELOW

The April 13, 2023, per curium opinion of the United States Court of Appeals for the Fifth Circuit is attached at Appendix 1a-11a.

The District Court's June 26, 2022, memorandum and opinion granting habeas corpus relief is attached at Appendix 13a-120a. The District Court's order granting rehearing on May 10, 2017, is attached at Appendix 146a-168a. The District Court's memorandum and order dismissing with prejudice all claims in Green's amended petition except Claim 4 is attached at Appendix 169a-194a.

The Texas Court of Criminal Appeals' order denying state habeas corpus relief is attached at Appendix 195a-196a. The Court of Criminal Appeals' decision affirming the judgments of conviction and sentence is attached at Appendix 197a-221a.

JURISDICTION

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 2241, 2243, and 2254(a). The Court of Appeals had jurisdiction under 28 U.S.C. § 1291.

The judgment of the Court of Appeals was entered on April 13, 2023. That court denied Green's timely petition for rehearing on September 5, 2023, and re-entered judgment on September 13, 2023. App. 12a. On November 28, 2023, Justice Alito granted Green's motion for an extension of time for filing this petition up to January 8, 2024.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In relevant part, Section 1 of the Constitution's Fourteenth Amendment provides, "No State shall deprive any person of life, liberty, or property, without due process of law …."

In relevant part, Section 2254(a) of the Judicial Code provides that

> a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court … on the ground that he is in custody in violation of the Constitution … of the United States.

Section 2243 of the Judicial Code provides that "[t]he court" "entertaining an application for a writ of habeas corpus *** shall summarily hear and determine the facts …."

STATEMENT OF THE CASE[3]

I. Facts of the Underlying State Case

Late in the night of September 2, 1999, Kristin Loesch was sexually assaulted, strangled, and stomped on as she lay in the bedroom of her apartment in Houston, Texas. She died of her injuries there on the floor sometime before 11:00 a.m. Several pieces of evidence linked Green to her murder. DNA from vaginal swabs and fingernail scrapings matched Green. App. 15a. He had been with Loesch and her boyfriend, Robert Stewart, earlier in the evening of September 1. "Green agreed to help the couple get marijuana. The three spent the rest of the evening together, rollerblading,

[3] Unless otherwise indicated, all of Green's citations to the Appendix in this section are to the district court's findings.

drinking beer, and hanging out." App. 14a.[4] "Loesch and Green smoked" the pot that Loesch bought. *Ibid*.

> The couple then gave Green a ride to a nearby apartment complex, at which Green claimed he lived with his brother. Before departing, the couple mentioned plans for a barbeque, but stated that they needed a barbeque pit. Loesch and Stewart returned to their apartment. Loesch fell asleep in the bedroom; Stewart fell asleep on the couch while watching television.
>
> Stewart testified that he woke up … and found Loesch dead on the floor of the bedroom. *** A neighbor told police that she had seen a black man wearing a cap enter the apartment at 7:30 a.m. Another neighbor told police that at 7:30 a.m., she had seen a barbeque pit outside the patio gate of the apartment, and that the pit had not been there the day before. [App. 14a]

Based on information from Stewart, "[p]olice found Green through a records check. Stewart then identified Green from a photo array. Police arrested Green and took hair and blood samples" that matched the samples taken from the body of Loesch. App. 15a.

II. Facts Material to the Questions Presented

A. Bases for the District Court's Finding of Incompetence

(The district court made 47 pages of findings related to Green's incompetence at the time of trial. App. 38a-85a. What follows are selections from those findings that are most germane to the questions presented.)

On September 19, 1999, a grand jury in Harris County, Texas, indicted Green for capital murder. The trial court appointed two local attorneys to represent him. A jailhouse lawyer, John Patrick Forward, was being held in the same jail dormitory as

[4] The district court's decision contains extensive citations to the state court record. Green omits those throughout this section for brevity and ease of reading.

Green. App. 48a. Forward came to believe that Green's appointed counsel "were not trustworthy." App. 49a. In February 2000, he began drafting motions for Green to file *pro se*. App. 15a; *id*. at 49a. One of those motions asked the court "to allow Green to proceed pro se." App. 49a.

Forward did legal research and "found out that, if the court discovered Green was 'mentally unstable,' it would not grant Green's motion to proceed pro se." App. 49a. Forward's observations of Green led him to believe he would have "to prepare Green for his appearance before the court." *Ibid*. Forward had "spent around 12 hours a day with Green." App. 48a. Green's behavior reminded Forward of his older brother "who was diagnosed with a serious mental illness." App. 49a.

> Forward recalled that Green "had a bad masturbation problem and talked to hisself a lot, laughed to hisself a lot, sometime make himself mad." *** Green's habit of masturbating in front of the other inmates made the other inmates mad. However, Green would continue to do it. Forward testified that it "got to the point to where … even inmates that was considered weak started calling him names," and, for safety concerns, Green had to move to another cell.
>
> *** Forward had to tell Green "to shower and brush his teeth and wash his clothes." This behavior also created problems for Green with the other inmates, but Green continued to behave in this way regardless.
>
> Forward also noticed that Green could not stay focused while speaking. *** Green "would start off talking about something; and he would jump to other subjects; and he never would finish what he started." *** Green would often speak nonstop, without abiding by the flow of a dialogue. Forward described Green's behavior: "Sometimes, like we'd say something, be speaking; and he'd laugh, you know; and he'd keep going. Or you'll be speaking, then, all of a sudden, he'll have, like, an angry look on his face like something bad was said or something; and he would just keep going throughout the conversation." App. 48-49a.

To prepare Green for a hearing on his self-representation, Forward rehearsed with him "over and over again … for a period of three weeks …. During this preparation, Forward had to teach Green concepts on a 'child-like level' to try to make Green understand." App. 49a-50a.

Forward testified that throughout their time together

> Green did not have a rational understanding of his legal situation. *** [W]hen Green was first arrested, he thought "every day he was going home. He would call his people, his brother [and say] 'Come pick me up tomorrow. I'm going to be released. They're going to find out that it wasn't me, and I'm going to be released.'" [App 49a]

On March 21, 2000, the trial court held a *Faretta*[5] hearing in response to Green/Forward's self-representation motion. Although Forward coached Green "'all the way up to the day he went to court on that motion,'" App. 49a-50a, he went off-script and "requested that the court appoint two new attorneys to act as his 'assistants.'" App. 16a. Green said only that "he had his 'own confidential reasons'" for wanting the court to remove his two attorneys. *Ibid*. Without conducting a competency hearing or even appointing an expert to evaluate Green, *see* App. 26a-27a, the court accepted his waiver of counsel, but it left the two attorneys on as stand-by counsel. App. 16a.

Two weeks later, the court discharged one of the attorneys and replaced him with attorney Tyrone Moncriffe. Some three months later, the court permitted the other initially appointed lawyer to withdraw "because Green refused to communicate" with him. App. 16a.

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[5] *Faretta v. California*, 422 U.S. 806 (1975).

In August 2000, Green filed a motion to discharge "the entire defense team." App. 16a. Although that motion was denied, the trial court held a second *Faretta* hearing on August 17, 2000. In response to the judge's repeated attempts to get Green to say he understood that "waiver of his right to counsel would remove all assistance during trial, Green stated 'I asked for two new assistant counsels.'" App. 78a. Green repeatedly expressed misunderstanding about whether granting "his" motion would result in the court "'offer[ing] me two assistants,'" *ibid.*, and even expressed alarm when the court allowed him to fire his counsel: "'What, you're not giving me attorneys?'" *Id.* at 79a.

Before and during the trial, "Green was unable to grasp who the Court was, who the State was, and the role of each." App. 77a. According to a psychologist who saw him briefly during voir dire, Green "believed that the 'District Attorney is in charge of the courtroom rather than the judge.'" *Ibid.* "Green refused to wear civilian clothing to trial and insisted on wearing his jail garb," except during the "numerous incidents in which Green tried to disrobe in court." App. 78a. Although he was given wide latitude in his self-representation, during the penalty phase, which started the day after closing statements, Green "interrupted the proceedings to declare that he was 'not treated as an attorney … [and] not allowed to give a statement." *Ibid.*

Moncriffe testified he was unable to get Green to understand "basic legal concepts" like "the burden of proof … what it meant for a party to 'close' its case or what closing arguments were." App. 81a.

Moncriffe took over as counsel for the penalty phase of Green's trial, App. 38a, and "made Green's mental condition the central theme of his closing argument." App. 91a. Moncriffe pleaded with the jurors to agree that Americans are "'not a society that kill [*sic.*] sick people. We don't kill sick people.'" App. 91a. He testified that he hoped "'one person on the jury saw that this young man was suffering from some mental illness'" based on his "'demeanor throughout the trial, his questions, the way he would ask questions.'" App. 44a.

The district court held a four-day evidentiary hearing that included testimony of two psychologists, and their views on an incomplete competency evaluation conducted during voir dire. Dr. Diane Mosnik testified for Green. Dr. Timothy Proctor testified for Texas. "[B]oth experts agreed that Green was undoubtedly schizophrenic at the time of their evaluations." App. 72a. Their primary difference of opinion was over when Green's schizophrenia became incapacitating.

After the hearing, the district court found that "the evidence adduced from the state record" and the evidentiary hearing "would compel" a finding by under the "clear and convincing" standard Travis Green was incompetent to stand trial. App. 85a.

B. Bases for the District Court's Finding of Abandonment from the Beginning and Throughout the State Habeas Application Process

The parties agreed that Green's *Dusky* claim was procedurally defaulted because it was not raised, and could be raised no longer, in state court. App. 25a. Therefore, before the district court could find Green was incompetent to stand trial, it had to determine whether his competency claim was reviewable, i.e. whether Green

demonstrated "cause" for the default and prejudice. App 30a. Green asserted two grounds for the district court to find that no default could be attributed to him: (1) that he was incompetent at the time and an incompetent person cannot waive his right to be competent and (2) that "his state habeas counsel, Ken J. McLean, abandoned him." App. 30a. The court noted that the circuits are split over the question whether a default can be attributed to an incompetent person and declined to decide the issue because the court found McLean's abandonment served as cause. App. 26a-27a; *id*. at 35a, n.13).

The district court agreed with Green "that he was unable to plead his competency claim in initial-review state collateral proceedings because," under this Court's decision in *Maples v. Thomas*, 565 U.S. 266 (2012), McLean abandoned him. App. 32a. The district court based its finding on several factors.

First, the district court agreed with Green that McLean severed the attorney-client relationship when he failed to comply with a "Texas law [that] 'requires habeas counsel to investigate *expeditiously* the factual and legal grounds for an application.' *Ex parte Mines*, 26 S.W.3d 910, 912 (Tex. Crim. App. 2000) (citing Tex. Code Crim. Proc. art. 11.071, § 3(a)) (emphasis added) (cleaned up)." App. 132a (Green's Post-Hr'g Br.). The district court found that McLean, "[a]fter requesting an extension of time … filed a state habeas petition containing three claims that had already been raised and rejected on direct appeal, as well as four other claims that consisted of mere headings without supporting statements of fact and law." App. 31a (footnotes omitted). McLean told the state trial court that he "'intend[ed] to develop the facts

and law of these extra-record grounds for habeas relief with all deliberate speed.'" App. 31a. The state court gave McLean until November 12, 2001, to supplement the application.

McLean's promise showed he was aware of his duty under Texas law to expeditiously investigate and that Texas law rendered record-based claims non-cognizable on habeas review. *See* App. 33a-34a. The district court found the skeletal application McLean filed was "improper" under Texas law, App. 34a, because "*none* of the claims it contained were cognizable." App. 33a (emphasis in original). The court found that "fact alone provides strong evidence that McLean abandoned Green *from the beginning*." App. 34a (emphasis added).

The district court then considered McLean's conduct after the initial application, and found,

> McLean's subsequent actions … make his abandonment even clearer. After filing the improper state habeas application, McLean completely failed to investigate and supplement the factual and legal grounds for Green's petition, or even to communicate with Green, for roughly seven years. Only when prodded by the court did McLean finally subpoena Green's most recent psychological evaluation. However, McLean then acted directly adverse to Green's interests, and in violation of his duty of candor to the court, by misrepresenting the contents of that evaluation to the court. The cause of McLean's misrepresentation is not entirely clear, but his years-long failure to investigate certainly created improper incentives to represent to the court in 2008 that Green had no viable claims. *Cf. Maples*, 565 U.S. at 285 n.8 (noting the grave conflict of interest created when attorneys from the same firm attempted to represent Maples after its former associates missed the crucial deadline). [App. 34a.]

The court was referring to a "Statement of Counsel," App. 239a-241a, that McLean filed in April 2008, in which he "affirmatively misrepresented Green's medi-

cal records to the state court." App. 32a. The circumstances surrounding the statement were these: At the time, McLean was dying from "what the State described as 'a lengthy illness.'" App. 33a. The Texas Court of Criminal Appeals was pressuring the trial court to submit findings of fact and conclusions of law for its review. Although Texas "filed proposed findings" in August 2005, "McLean … did not respond." In November 2007, Texas moved the trial court to dispose of Green's petition. "The state court ordered that 'both parties submit any additional filings on or before December 19, 2007.'" App. 32a. McLean's next actions show the order indicated to him that he had one more opportunity to advance Green's interests.

He successfully moved the trial court to authorize a subpoena for Green's prison medical records. App. 32a. McLean obtained what he described as "'Green's most recent mental health examination dated May 17, 2007, at the Jester IV unit.'"[6] McLean's affirmative misrepresentation consisted in saying, "'There is no indication in those records that Green is mentally ill or incompetent.'" App. 32a. In fact, as the district court found, the

> first page of the record … states that Green has schizoaffective disorder. The report details Green's psychotic symptoms, including his "elaborate delusional system" and paranoia. In particular, the report quotes Green as saying that he needed "someone to take this locator out of my head. The FBI put it in my brain sometime [sic] ago." It also describes Green's history of suicide attempts and self-mutilation, as well as the fact that he was taking an antipsychotic drug at the time. App. 32a-33a]

[6] Jester IV is "the psychiatric treatment facility associated with TDCJ." App. 57a.

In sum, McLean lied about Green's records to support his contention that he could not "in good faith file Proposed Findings of Fact and Conclusions of Law … that relief be granted.'" App. 32a. The district court found that the "cause of McLean's misrepresentation is not entirely clear, but his years-long failure to investigate certainly created improper incentives to represent … that Green had no viable claims." App. 34a. This was a reference to Green's contention that McLean lied because he had spent years billing the state court for work he was not doing. App. 128a-130a (Green's Post-Hr'g Br.).

The district court found McLean's misrepresentations about Green's mental problems and his investigation of them foreclosed the only remedy state law left open to Green after McLean allowed the supplementation date to lapse seven years earlier. If McLean had "not misrepresented Green's mental health problems, new counsel could have been appointed to file a proper petition." App. 35a (citing *Ex parte Medina*, 361 S.W.3d 633, 640 (Tex. Crim. App. 2011). *Medina* concerned the application of § 4A of the Texas statute governing capital habeas applications, Tex. Code Crim. Proc. art. 11.071.[7]

Taking all the evidence into consideration, the district court found that

> by first failing to investigate any claims for seven years, and then misrepresenting the one mental health record he did investigate, McLean committed a serious breach of his duty of loyalty to Green, thereby severing any last thread that might have been holding their principal-agent relationship together. [App. 34a].

[7] The quotation above belies the Fifth Circuit's finding that the district court did not "mention § 4A, and for good reason." App. 8a-9a.

Finally, the district court found Green had "shown actual prejudice because … his incompetence claim is meritorious." App. 35a.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve the circuit split over the correct standard of review to be applied to district court determinations of "abandonment."

A. The courts of appeals inconsistently apply the law.

By law, the "court … entertaining an application for a writ of habeas corpus *** shall summarily hear and determine the facts …." 28 U.S.C. § 2243. When a habeas petitioner asks a district court to excuse a procedural default, "application of the 'cause'-and-'prejudice' standard may turn on factual findings that should be made by a district court." *Jenkins v. Anderson*, 447 U.S. 231, 234-235 n.1 (1980). When a district court makes factual findings related to "cause" and "prejudice," and the losing party appeals, the district court's findings "must not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a)(6), because Rule 52(a)(6) applies to habeas cases. *E.g.*, *Glossip v. Gross*, 576 U.S. 863, 881 (2015); *Knowles v. Mirzayance*, 556 U.S. 111, 126 (2009); *Mickens v. Taylor*, 535 U.S. 162, 177 (2002).

In *Amadeo v. Zant*, 486 U.S. 214 (1988), this Court held that a court of appeals commits reversible error when it "fail[s] properly to apply" Rule 52(a)(6)'s "clearly erroneous" standard to a district court's findings on "cause."[8] 486 U.S. at 223. *Amadeo*

[8] *See also McCleskey v. Zant*, 499 U.S. 467, 498 n.* (1991) ("We accept as not clearly erroneous the District Court finding that the document itself was neither known nor reasonably discoverable at the time of the first federal petition.").

reversed the Eleventh Circuit because the court "offered factual rather than legal grounds for its reversal of the District Court's order …." 486 U.S. at 223.

Despite this clear precedent, the Fifth Circuit and other courts of appeals hold that the question "[w]hether a petitioner has shown cause and prejudice to excuse a procedural default is reviewed *de novo*." *Prible v. Lumpkin*, 43 F.4th 501, 513 (5th Cir. 2022) (citing *Gonzalez v. Thaler*, 623 F.3d 222, 224 (5th Cir. 2010).[9] The Fifth Circuit explicitly distinguishes its *de novo* review of cause and prejudice from how it reviews "a grant of habeas relief" in which the court "review[s] issues of law *de novo* and findings of fact for clear error." *Ibid*. (citing *Hughes v. Vannoy*, 7 F.4th 380, 386 (5th Cir. 2021)). In Green's case, as shown more fully in Part B, below, the Fifth Circuit failed to identify any standard of review. Where the district court found Green's state habeas counsel abandoned him "from the beginning" of his representation, App.

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[9] *See also Roberts v. Cockrell*, 319 F.3d 690, 693 & n.7 (5th Cir. 2003) ("We review *de novo* the denial of a federal habeas petition on procedural grounds.") (cited in *Gonzalez*, *supra*, and citing other examples including *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000) ("'we review *de novo* this appeal which challenges ... the district court's determination that [Johnson's] claim was not barred procedurally....'") (quoting *Boyd v. Scott*, 45 F.3d 876, 879 (5th Cir. 1994))).

In the past, the Fifth Circuit identified the correct standard in some cases. *E.g.*, *Glover v. Cain*, 128 F.3d 900, 904 (5th Cir. 1997) ("We review a district court's denial of federal habeas review based on state procedural grounds de novo and its findings of fact for clear error.") (citing *Amos v. Scott*, 61 F.3d 333, 338 (5th Cir. 1995)); *Cole v. Dretke*, 99 F. App'x 523, 527 (5th Cir. 2004) ("To the extent that the district court's conclusion … included an implicit finding that the state court made affirmative misrepresentations to Cole concerning whether he would receive new habeas counsel, this finding is clearly erroneous.").

But *Prible* represents the current state of the law in the circuit. *See*, *e.g.*, *Guidry v. Lumpkin*, 2 F.4th 472, 486-487 (5th Cir. 2021) (conducting de novo review of record regarding whether evidence was suppressed for purposes of establishing cause to excuse default, despite no certificate of appealability).

34a, and "for the entirety of Green's state habeas application process," App. 35a, the Fifth Circuit simply said, "We disagree," and found any abandonment occurred "too late under state law." App. 2a.

The Fifth Circuit is not alone in committing this error. A frequently used federal habeas treatise collected cases in which four other circuits said "[p]rocedural default rulings are reviewed de novo on appeal." Brian R. Means, *Federal Habeas Manual*, § 9B:105 (citing *Schawitsch v. Burt*, 491 F.3d 798, 802 (8th Cir. 2007);[10] *Anderson v. Attorney General of State of Kansas*, 342 F.3d 1140, 1143 (10th Cir. 2003); *Fortenberry v. Haley*, 297 F.3d 1213, 1219 (11th Cir. 2002); *La Crosse v. Kernan*, 244 F.3d 702, 704 (9th Cir. 2001)). And the Sixth Circuit has held, "'we review the district court's decision applying the "cause and prejudice" rules to the "procedural bar" issues de novo.'" *Cvijetinovic v. Eberlin*, 617 F.3d 833, 836 (6th Cir. 2010) (quoting *Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999), and citing *Lusk v. Singletary*, 112 F.3d 1103, 1105 (11th Cir. 1997)); *see also Burroughs v. Makowski*, 411 F.3d 665, 667 (6th Cir. 2005) ("Cause and prejudice … are questions of law, which we review *de novo*."). The Seventh Circuit also "review[s] the cause and prejudice questions *de novo*." *Richardson v. Lemke*, 745 F.3d 258, 272 (7th Cir. 2014) (citing *Holmes v. Hardy*, 608 F.3d 963, 967 (7th Cir. 2010) ("We review *de novo* each of the district court's rulings that Holmes procedurally defaulted … that he could show no cause … and that he is not otherwise excused from the procedural default"))).

[10] *See also Dorsey v. Vandergriff*, 30 F.4th 752, 755 (10th Cir. 2022) ("We review de novo whether a claim of ineffective assistance of trial counsel is substantial under *Martinez*.") (citing *Deck v. Jennings*, 978 F.3d 578, 881 (10th Cir. 2020)).

Not every circuit has succumbed to this error. Even when reviewing *de novo* a mixed question of law and fact like actual innocence to excuse default, the Second Circuit "review[s] the district court's underlying findings of fact under the more deferential clearly erroneous standard." *Doe v. Menefee*, 391 F.3d 147, 163 (2nd Cir. 2004).[11] At least in cases arising under 28 U.S.C. § 2255, where a petitioner argues he should be relieved of a procedural default, the Fourth Circuit correctly "review[s] legal issues de novo and factual findings under a clear error standard." *United States v. Pettiford*, 612 F.3d 270, 275 (4th Cir. 2010) (citing *United States v. Roane*, 378 F.3d 382, 395 (4th Cir. 2004)).

There also is a lack of intra-circuit consistency. For example, the Sixth Circuit also has held, contrary to the cases cited above, that "[i]n an appeal of a district court's finding of procedural default, 'we review the district court's legal conclusions de novo and its findings of fact for clear error.'" *Hall v. Mays*, 7 F.4th 433, 443 (6th Cir. 2021) (quoting *Scott v. Houk*, 760 F.3d 497, 503 (6th Cir. 2014)); *id*. at 444 (saying as to petitioner's cause and prejudice argument, "we may set aside a district court's factual findings only if they are clearly erroneous").[12] Similarly, the Eighth Circuit has said, "We review 'the factual findings of the district court for clear error' and 'a finding of procedural default de novo.'" *Anderson v. Kelley*, 938 F.3d 949, 954 (8th Cir. 2019)

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[11] *But see Harrington v. United States*, 689 F.3d 124, 129 (2nd Cir. 2012) ("We review de novo the question whether procedural default of a claim raised for the first time on collateral review may be excused.").

[12] *See also Stojetz v. Ishee*, 892 F.3d 175, 190 (6th Cir. 2018) (in case involving application of *Maples*, 893 F.3d 206-207 court said, "When reviewing a district court's grant or denial of a petition for a writ of habeas corpus, we review its factual findings for clear error and its legal conclusions de novo.").

(quoting *Oglesby v. Bowersox*, 592 F.3d 922, 924 (8th Cir. 2010)). The Ninth Circuit also has applied clear error review to a district court's findings on cause. *See Schneider v. McDaniel*, 674 F.3d 1144, 1154 (9th Cir. 2012) (rejecting mental impairment as cause because district court found petitioner's condition not sufficiently serious and "[t]his factual finding was not clearly erroneous"). *See also Clayton v. Thomas*, 700 F.3d 435, 443 (10th Cir. 2012) (applying *Amadeo* and concluding "district court's determination that Mr. Clayton asked his attorney to file an appeal on his behalf … cannot be clearly erroneous"); *Ross v. Ward*, 165 F.3d 793, 798 (10th Cir. 1999) addressing petitioner's claim "that the 'cause' for his failure to raise the issue was ineffective assistance of appellate counsel" and stating "[w]e review the district court's legal conclusions de novo and its factual findings under the clearly erroneous standard"); *Ward v. Hall*, 592 F.3d 1144, 1160 (11th Cir. 2010) ("we conclude that the district court's finding that Ward was not diligent was not clearly erroneous").

The courts of appeals also are inconsistent across closely related equitable doctrines. The cause/prejudice doctrine is "an equitable exception to the bar" of federal review that applies when a petitioner procedurally defaulted a claim in state court. *Dretke v. Haley*, 541 U.S. 386, 393 (2004). A petitioner can obtain equitable relief from that bar, as Green did in the district court, by showing his state habeas counsel effectively abandoned him. *Maples*, 565 U.S. at 281. *Maples* adopted for cause/prejudice purposes the reasoning of Justice Alito's concurring opinion in *Holland v. Florida*,

560 U.S. 631 (2010),[13] in which this Court held that the habeas corpus statute of limitations, 28 U.S.C. § 2244(d)(1), "is subject to equitable tolling in appropriate cases." *Holland*, 560 U.S. at 645. Although *Maples* and *Holland* involve the same question—whether counsel severed the principal/agent relationship—the courts of appeals review them differently, applying de novo review in the cause/prejudice context and the clearly erroneous standard in the equitable tolling context.

For example, the Eleventh Circuit "review[s] de novo the district court's 'application of equitable tolling law to the facts,'" *Thomas v. Attorney General*, 992 F.3d 1162, 1179 (11th Cir. 2021) (quoting *Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1221 (11th Cir. 2017)), *but* holds that in the equitable tolling context, a "district court's factual findings are reviewed for clear error." *Ibid*.

Likewise, when assessing whether certain factual circumstances justify equitable tolling, the Seventh Circuit's review of a district court is "deferential." *Perry v. Brown*, 950 F.3d 410, 414 (7th Cir. 2020). *See also Schmid v. McCauley*, 825 F.3d 348, 350 (7th Cir. 2016) ("Decisions about equitable tolling under § 2244(d) are reviewed deferentially, whether the district court finds tolling warranted or unwarranted.").

And the Sixth Circuit has recognized that equitable tolling under *Holland* involves "questions of fact" that lead appellate courts to "frequently remand for further factual development and legal argument." *Nassiri v. Mackie*, 967 F.3d 544, 548 (6th

[13] *Maples*, 565 U.S. at 288 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)).

Cir. 2020). In addition to citing examples from the Eleventh, Tenth, and Fifth Circuits,[14] the Sixth Circuit noted that this Court remanded *Holland* to the Eleventh Circuit "'to determine whether the facts in this record entitle [the petitioner] to equitable tolling, or whether further proceedings, including an evidentiary hearing, might indicate that respondent should prevail.'" *Ibid.* (quoting *Holland*, 560 U.S. at 653-54).

In sum, whether a State or habeas petitioner gets the benefit of Rule 52(a) in the "cause and prejudice" context, and whether the work of district courts is wasted, is little more than a crap shoot. Because the error in Green's case is both glaring and dispositive, exhibiting the same failures this Court found in *Amadeo* and *Mirzayance*, the Court should use this case to bring uniformity to the lower courts' decisions.

B. The Fifth Circuit's clear and dispositive error presents an excellent opportunity for this Court to bring uniformity to the circuits.

The district court in Green's case found that state habeas counsel Ken McLean ignored a state law that required him to expeditiously investigate extra-record claims that would be cognizable only if supported by facts and law. App. 33a-34a. When the trial court granted McLean's request for leave to supplement based on McLean's promise "'to develop the facts and law of these extra-record grounds for habeas relief with all deliberate speed,'" App. 19a, another "[s]ix years passed with no word from McLean." *Ibid.* The district court found "[t]his fact alone provides strong evidence

[14] *Downs v. McNeil*, 520 F.3d 1311, 1325 (11th Cir. 2008); *Fleming v. Evans*, 481 F.3d 1249, 1256–57 (10th Cir. 2007); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002).

that McLean abandoned Green *from the beginning*."[15] App. 34a (emphasis added). The district court then examined "McLean's subsequent actions" and found they "make his abandonment even clearer," *ibid*., including his misrepresentation of Green's psychiatric condition. Applying this Court's reasoning in *Maples*, the district court found that McLean's pre-filing abandonment gave McLean "improper incentives to represent to the court in 2008 that Green had no viable claims." *Ibid*. Based on all the evidence, the district court found "McLean abandoned Green for the entirety of Green's state habeas application process." App. 35a.

This Court has consistently held that such findings are subject only to deferential review. In *Mickens*, *supra*, the issue was whether trial counsel for a capital defendant was burdened with a conflict of interest. 535 U.S. at 164. This Court disclaimed any role in determining "counsel's motives or … the plausibility of alternative litigation strategies," because the role of a court of review "is to defer to the District Court's factual findings unless we can conclude they are clearly erroneous." 535 U.S. at 177. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), another case involving an attorney's potential conflict of interest, this Court held that a state court's findings "about the roles … played in the defenses of [the habeas petitioner] and his codefendants are facts" to which the presumption of correctness applied. 446 U.S. at 342.

[15] Contrary to the Fifth Circuit's statement that Green and the district court "simply ignore … entirely" the issue of when McLean abandoned him, App. 8a, Green's post-hearing brief argued that the evidence showed McLean's lie about the medical records was intentional and made to cover his malfeasance from the beginning of the case. App. 131a-138a.

"Here, the Court of Appeals failed even to mention the clearly-erroneous standard, let alone apply it, before effectively overturning the lower court's factual findings related to counsel's behavior." *Mirzayance*, 556 U.S. at 126. As in *Amadeo*, the Fifth Circuit in Green's case "never identified the standard of review that it applied to the District Court's factual findings," *Amadeo*, 486 U.S. at 223, on cause. Just as the Ninth Circuit in *Mirzayance* said only that "[w]e disagree that counsel's decision was carefully weighed and not made harshly," *Mirzayance v. Knowles*, 174 Fed. App'x 142, 144 (9th Cir. 2006) (quoted with disapproval in *Mirzayance*, 556 U.S. at 126), the Fifth Circuit in this case rejected the district court's factual finding that McLean abandoned Green "from the beginning" and "for the entirety of Green's state habeas application process," App. 34a-35a, saying simply, "We disagree." It then found *de novo* that the abandonment happened "too late." App. 2a.

The Fifth Circuit noted the "parties['] dispute over whether McLean's conduct rose to the level of abandonment" under *Maples* but held it "need not ultimately decide this question."[16] App. 7a. Instead, the court found that "to the extent his attorney abandoned him, it did not result in Green's forfeiture of his claim … because it was too late under state law to seek habeas relief on his incompetence claim." App. 2a. The Court of Appeals simply disregarded the district court's explicit finding that McLean abandoned Green "by first failing to investigate any claims for seven years," App. 34a, and substituted its own non sequitur that "even a diligent counsel who did

[16] In the district court, Texas did not dispute Green's contention that McLean never served as his counsel in any meaningful sense. On appeal, Green argued that Texas forfeited its right to dispute that issue by failing to raise it below.

not abandon his client could not have affected the proceedings, because any action by counsel would have been untimely." App. 7a. The court rationalized its decision with the finding—clearly refuted by the record quoted above—that "neither Green nor the district court has even bothered, let alone substantiate, a theory of timeliness. They simply ignore the issue entirely." App. 8a.

To the extent the Fifth Circuit suggested through its use of the term "theory" that the question of *when* abandonment occurred is not a question of fact, that contention is unavailing. The question is whether McLean severed his agency relationship to Green before it became "too late" for Green to raise a *Dusky* claim, either by supplementing the application McLean filed, or through competent counsel under § 4A of Article 11.071 of Texas's Code of Criminal Procedure. As to the latter, the district court found McLean's "Statement of Counsel" in which he lied about Green's psychiatric records and the availability of evidence supporting any claims, foreclosed the appointment of new counsel. App. 34a-35a. The court found McLean had "improper incentives" to misrepresent what he knew. App. 34a. That is, the issue concerns McLean's state of mind. As this Court has noted, "that an issue involves an inquiry into state of mind is not at all inconsistent with treating it as a question of fact." *Miller v. Fenton*, 474 U.S. 104, 113 (1985). Indeed, in the often "elusive" pursuit of "distinguishing questions of fact from questions of law," this is one of the "few principles … [that] are by now well established." *Ibid.*

Even if abandonment is a mixed question, the Fifth Circuit expressly declined to decide it in this case, App. 7a, and the underlying facts would remain subject to

the "clearly erroneous" standard. *See Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501-502 (1984). The lower courts, including the Fifth Circuit, regularly apply "clearly erroneous" review to "the existence and scope of an agency or fiduciary relationship." 9C Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, Federal Practice and Procedure § 2589 n.19 (3d ed. 1998) (collecting cases, including *Reich v. Lancaster*, 55 F.3d 1034, 1045 (5th Cir. 1995) (stating, in case involving alleged breach of fiduciary duty, "[w]e will review the factual components of the district court's determination … for clear error").

In finding that McLean abandoned Green "from the beginning," the district court drew on undisputed evidence of McLean's acts and omissions before and after the supplementation deadline. Subsequent acts or omissions have a bearing on how fact-finders view earlier events. Here, the record amply supports the inference that McLean's subsequent misrepresentations about Green's mental health records was a conscious effort to coverup for his complete failure to do any work on Green's behalf throughout the case. McLean's self-interest, if not outright self-dealing, is relevant to understanding his inaction throughout the proceedings; it is therefore material to whether Green can be held constructively responsible for McLean's inaction. *See Maples,* 565 U.S. at 284, quoting 1 Restatement (Second) of Agency §394 ("[T]he authority of an agent terminates if, without knowledge of the principal, he acquires adverse interests or if he is otherwise guilty of a serious breach of loyalty to the principal.").

The Fifth Circuit's *de novo* finding that Green had no theory of abandonment before the default also was clearly erroneous. App. 8a. Green placed all the foregoing

facts before the district court. App. 131a-137a. Green's counsel also asserted that he was mentally incompetent at the time of the default. App. 128a-131a. Because an incompetent person cannot appoint an agent, H. Reuschlein & W. Gregory, Handbook on the Law of Agency and Partnership § 9A (1979), Green's incompetence supported the district court's determination that McLean had never been Green's agent in any meaningful sense. But the Fifth Circuit held incompetence is irrelevant to the cause inquiry. App. 8a.

To the extent the Fifth Circuit intimated that it considered any aspect of the abandonment in this case an issue of law, that points to yet another circuit split for this Court to resolve. In a case involving a habeas petitioner's motion to reopen the judgment under Rule 60(b), the Ninth Circuit held that "abandonment is not a question of law. Determining whether a petitioner has been abandoned by counsel requires the district court to make a factual finding … which we review for clear error." *Foley v. Biter*, 793 F.3d 998, 1003 (9th Cir. 2015).

Because the district court's findings were fully supported by the record, there was no way for the Court of Appeals to reject them as clearly erroneous. Although the Fifth Circuit found that the district court held McLean's abandonment served as cause to excuse only Green's incompetence claim, App. 6a, the district court held *Maples* applied to all of Green's defaulted claims. App. 86a, n.20. Thus, redirecting the Fifth Circuit and the other errant courts of appeals to the correct standard of review for a district court's findings of historical fact after an evidentiary hearing will resolve this case and many others.

II. This Court should resolve the circuit split over whether incompetence due to a brain disease is "fairly attributable to the petitioner."

A. The circuits have long been deeply divided over whether this Court's requirement of an "external" cause to excuse a default categorically precludes incompetence.

"The Circuits are split on the issue of whether mental illness of a habeas petitioner can constitute cause to excuse a procedural default…." *Laurence v. Wall*, No. CA 13-128L, 2013 WL 5755089, at *10 (D.R.I. Oct. 23, 2013). The Fifth Circuit's decision in Green's case represents the extreme reach of one side of that split. The court recognized that "[c]ause is established when 'something *external* to the petitioner, something that cannot fairly be attributed to him … "impeded his efforts to comply with the State's procedural rule."'" App. 6a (quoting *Coleman v. Thompson*, 501 U.S. 722, 753 (1991), in turn quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). The Fifth Circuit repeated this Court's pronouncement that "'[a] factor is external to the defense if it cannot fairly be attributed to the prisoner.'" App. 7a (quoting with alteration *Davila v. Davis*, 582 U.S. 521, 528 (2017)). Then the court held that Green's assertion of incompetence was "foreclosed by our precedent" in *Gonzales v. Davis*, 924 F.3d 236, 244 (5th Cir. 2019) (*per curiam*), App. 9a, where the Fifth Circuit said, "mental incompetency … is not a cause external to the petitioner," 924 F.3d at 244.

The Fifth Circuit's categorical exclusion of mental illness as a factor external to the petitioner aligns with holdings of the Third, Sixth, and Seventh Circuits. *Hull v. Freeman*, 991 F.2d 86, 91 (3d Cir. 1993) ("Hull's illiteracy and mental retardation are not 'external' to his defense within the meaning of *Carrier*."); *Johnson v. Wilson*, 187 F. App'x 455, 458 (6th Cir. 2006) (agreeing "that a borderline mental impairment

is not a factor external to a defense and, therefore, is not cause for excusing procedural default"); *Harris v. McAdory*, 334 F.3d 665, 669 (7th Cir. 2003) (finding reasoning of *Hull* and other cases persuasive because they "highlight the emphasis placed on the 'external' nature of the impediment. Something that comes from a source within the petitioner is unlikely to qualify as an external impediment."). Confusingly, however, the Seventh Circuit's approach to mental deficiencies as an internal cause matches the Fifth Circuit's *only* in procedural default cases. The Seventh Circuit diverges in analyzing external versus internal causes in equitable tolling cases, taking the view that "an applicant's mental limitations can support equitable tolling" as an external cause or obstacle because "an 'external obstacle' is a barrier beyond a litigant's control." *Perry*, 950 F.3d at 412 (Easterbrook, J.).

Indeed, the courts that reject the idea that mental incompetency is internal to the petitioner and therefore cognizable as cause to excuse a default "do not read the case law to consider pertinent to a determination of external versus internal cause whether that cause comes from 'within the petitioner' (e.g., within his mind or body). Rather, 'internal' is defined as 'something fairly attributable to the petitioner[.]'" *Saunders v. Comm'r of Correction*, 272 A.3d 169, 185 (Conn. 2022). (quoting *Carrier*, *supra*).

The federal courts with this correct reading of this Court's precedent hold that mental impairment can serve as cause under narrow circumstances. The Eighth Circuit has held that mental illness can establish "cause," but there must be "a conclusive showing that mental illness interfered with a petitioner's ability to appreciate

his or her position and make rational decisions regarding his or her case at the time during which he or she should have pursued post-conviction relief." *Holt v. Bowersox*, 191 F.3d 970, 974 (8th Cir. 1999). The Ninth Circuit has left open the possibility "that a pro se petitioner might demonstrate cause in a situation where a mental condition rendered the petitioner completely unable to comply with a state's procedures and he had no assistance." *Schneider v. McDaniel*, 674 F.3d 1144, 1154 (9th Cir. 2012). Similarly, the Eleventh Circuit has "assume[d] that a pro se habeas petitioner who lacked the mental capacity to understand the nature and object of habeas proceedings and to present his case for habeas relief in a rational manner would have cause …." *Smith v. Newsome*, 876 F.2d 1461, 1465 (11th Cir. 1989). The Fourth Circuit has "[a]ssum[ed] that profound mental illness may constitute cause to excuse a procedural default in certain circumstances." *Farabee v. Johnson*, 129 Fed. App'x 799, 802 (4th Cir. 2005) (unpublished decision citing published cases).

The Fifth Circuit's decision in Green's case deepened the split in several ways. First, the court's reliance on its precedent in *Gonzales*, a case in which the Fifth Circuit denied a certificate of appealability, effectively holds that no reasonable jurist could agree with the position of the Fourth, Eighth, Ninth, and Eleventh Circuits, and the Supreme Court of Connecticut. The *Gonzales* court, if it had jurisdiction over the issue of competence-as-cause at all, was limited to the question whether "the petitioner's position on the merits of the issue is not debatable among reasonable jurists." *Griffin v. Secretary, Florida Dept. of Corrections*, 787 F.3d 1086, 1095 n.7 (11th Cir. 2015). That is because, as this Court has repeatedly held, when the Fifth Circuit

"'first decid[es] the merits of an appeal, and then justif[ies] its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'"[17] *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 336-337 (2003)).

Second, most of the cases from the other circuits involve pro se petitioners or petitioners who presented very little evidence of impairment. For example, as noted above, the district court in *Schneider*, the Ninth Circuit case, found the petitioner's "'conditions imposed far less of a restriction upon his ability to seek state court relief timely than did the illiteracy of the petitioner'" in another case. *Schneider*, 674 F.3d at 1154. In Green's case, the district court found Green was incompetent to stand trial in 2000, and the State's expert conceded Green was psychotic as early as 2001. The expert whose opinions the district court credited found Green has consistently been incompetent since before his trial began, and through the filing period in state court. App. 37a. Although Green urged the district court to find, based on the evidence adduced at the evidentiary hearing, that he was incompetent during the state post-con-

[17] Of course, the "absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties," *Gonzalez v. Crosby*, 545 U.S. 524, 534 (2005), and the judgment of "a court without jurisdiction is void." *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938). But the Fifth Circuit effectively un-voided the panel decision in *Gonzales* when it held in Green's case that *Gonzales* is binding precedent.

Just as the Fifth Circuit has abandoned the clearly erroneous standard for factual findings related to cause without deciding the issue *en banc*, the panel in Green's case abandoned circuit precedent holding that a panel in another case "cannot be bound by a merits holding in a COA decision." *Trevino v. Davis*, 861 F.3d 545, 548 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1793 (2018).

viction review process, the court found it was unnecessary to make that determination in light of its finding that McLean had abandoned Green. Thus, the Fifth Circuit's categorical exclusion of incompetency as cause pretermitted a factual determination that almost certainly would have been favorable to Green. *See Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (competency is a question of fact); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (same).

B. The Fifth Circuit's holding that equity requires that court attribute the effects of mental illness to the sufferer is wrong.

This Court has said "[t]he procedural default doctrine … 'refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.'" *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (quoting *McCleskey v. Zant,* 499 U.S. 467, 489 (1991)). But as a judicial doctrine, procedural default is not law. "Only the people's elected representatives in Congress have the power to write … laws." *United States v. Davis*, 588 U.S. ___, 139 S. Ct. 2319, 2323 (2019); *Felker v. Turpin*, 518 U.S. 651, 664 (1996) (noting "judgments about the proper scope of the writ are normally for Congress to make") (quotation omitted); *Beras v. Johnson*, 978 F.3d 246, 254–55 (5th Cir. 2020) (Oldham, J., concurring) ("only Congress can write law"). And, whereas Congress since Reconstruction has required that federal courts "shall consider" claims that a state prisoner's confinement violates the Constitution, 28 U.S.C. § 2254(a), Congress has not codified the procedural default doctrine, at least not for cases like Green's. *Cf.* 28 U.S.C. § 2264(a).

Procedural default is an equitable doctrine, then, and "provides only a strong prudential reason, grounded in 'considerations of comity and concerns for the orderly

administration of criminal justice,' not to pass upon a defaulted constitutional claim presented for federal habeas review." *Haley*, *supra*, 541 U.S. at 392-393. This Court accordingly has "recognized an equitable exception to the bar when a habeas applicant can demonstrate cause and prejudice for the procedural default." *Id*. at 393. "The cause and prejudice requirement shows due regard for States' finality and comity interests while ensuring that 'fundamental fairness [remains] the central concern of the writ of habeas corpus.'" *Ibid*. (quoting *Strickland v. Washington,* 466 U.S. 668, 697 (1984)).

So, the question presented by the circuit split is precisely whether it is fundamentally fair to attribute responsibility for incompetence to the person suffering from a disease. The only reasonable answer is "no." "What is fairly attributable is a matter of normative judgment," *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n.*, 531 U.S. 288, 295 (2001), and no one is normatively responsible for the effects of a disease, particularly one like schizophrenia, which has a strong genetic component. App. 38a. When this Court considers whether it is fair to attribute to a State responsibility for a private party's actions, it looks for evidence of "the State's coercive power" over the private actor, and whether the "private actor operates as a willful participant in joint activity with the State or its agents." *Brentwood Academy*, 531 U.S. at 296 (internal quotation marks and citations omitted). This Court can do no less for a prisoner with a brain disease that causes him to believe—and to feel as a somatic reality—that he has had devices implanted into his body. App. 37a. Because

fair attribution requires control, it is fundamentally unfair to attribute to a schizophrenic prisoner responsibility for his psychotic thinking.

At a minimum, the Fifth Circuit's categorical rule that incompetence is never external to the petitioner is incompatible with this Court's longstanding rule that any "exercise of a court's equity powers.... must be made on a case-by-case basis." *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964).

In its 2016 decision, the district court exercised its discretion to hold an evidentiary hearing after concluding that "courts are split as to whether a substantive competency claim is subject to the procedural default doctrine." App. 183a; App. 166a; App. 21a. The principal dispute between the experts who testified at the hearing was over when, not whether, Green's schizophrenia rendered him incompetent. After a four-day evidentiary hearing, the district court found that Green was incompetent to stand trial under this Court's decision in *Dusky*. Experts for both parties agreed that Green has schizophrenia. App. 66a. The principal dispute between the experts who testified at the hearing was over when the disease rendered Green incompetent. The district court credited a 2003 diagnosis by a doctor who saw Green at Jester IV and a 2003 diagnosis and Dr. Mosnik's determination that the diagnoses "from 2003 onwards with either paranoid schizophrenia or delusional disorder, or some type of psychotic symptoms … were significant … because they 'support consistency in the presentation of symptoms over time, which we know in schizophrenia'" is common. App. 67a.

Thus, there was ample evidence to support a finding that Green was incompetent at the time his counsel failed to raise a *Dusky* claim by November 12, 2001. The district court found prison medical records contained "substantial evidence that [Green] was seriously mentally ill within a short time after arriving at TDCJ." App. 185a. The district court explained at length why it credited Dr. Mosnik's opinion that Green's incompetence started before the trial and continued through the hearing in 2018. App. 70a-85a. Indeed, there was little dispute about Green's condition during state post-conviction proceedings.

The district court could have and should have relied upon the principle that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently 'waive' his right to have the court determine his competency." *Pate v. Robinson*, 383 U.S. 375, 384 (1966). That reasoning and tests such as the Eighth Circuit's are entirely consistent with this Court's cause and prejudice holdings. That court has held that a petitioner's mental illness excuses his failure to raise a claim in state court "if it interferes with or impedes his or her ability to comply with state procedural requirements, such as pursuing post-conviction relief within a specific time period." *Holt*, *supra*, 191 F.3d at 971. This Court holds that a default is excused when a factor that is not fairly attributable to the petitioner "impeded counsel's efforts to comply with the State's procedural rule." *Carrier*, 477 U.S. at 488.

The cause inquiry focuses on "objective factors external to the defense" in order to distinguish the circumstances that can constitute cause from "a 'tactical' or 'intentional' decision to forgo a procedural opportunity" to raise a federal claim because

such a decision "normally cannot constitute cause." *Amadeo*, 486 U.S. at 221-222 (quoting *Reed v. Ross*, 468 U.S. 1, 14 (1984)).

When this Court decides whether circumstances constitute cause, it considers where the equities lie. *Davila*, *supra*, 582 U.S. at 529 (explaining that *Martinez v. Ryan*, 566 U.S. 1 (2013) "announced a narrow[] 'equitable … qualification' of the rule in *Coleman*); *id.* at 2068 ("*Martinez* … was responding to an equitable consideration" raised by state law). As in *Martinez*, the equities plainly favor Green's position. Texas law recognizes neither a right to be competent during state post-conviction review nor a remedy if the petitioner, or his lawyer, is incompetent. *Ex parte Mines*, 26 S.W.3d 910, 912 (Tex. Crim. App. 2000). Similarly, Texas should not be heard to complain when an incompetent applicant for state collateral review fails to raise a claim asserting that he also was incompetent to stand trial. *See Davila*, 582 U.S. at 534 (State's deliberate choice regarding manner of review of federal claim "'not without consequences for the State's ability to assert a procedural default' in subsequent federal habeas proceedings") (quoting *Martinez*, 566 U.S. at 13).

C. This is an important national issue.

The American Psychological Association estimates that "about 10 percent to 25 percent of U.S. prisoners suffer from serious mental illnesses, such as major affective disorders or schizophrenia."[18] Of course, not all seriously ill prisoners will be so impaired that their illnesses will impede their ability to file claims, and not all those

[18] Incarceration Nation, available at https://www.apa.org/monitor/2014/10/incarceration.

who are so impaired will have claims to file. But the attribution of responsibility for the disabilities of those who are so impaired is a stain on the federal judiciary that this Court should remove.

CONCLUSION

For the foregoing reasons, this Court should review the decision of the Fifth Circuit on the merits and reverse.

Respectfully submitted,

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