No. 23-6451

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

REPLY TO BRIEF IN OPPOSITION TO 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))?

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GROUNDS FOR REJECTING TEXAS'S ARGUMENTS AND GRANTING THE PETITION

I. Texas relies on misrepresentations of fact and law and assertions that contradict the District Court's undisturbed findings.

The Brief in Opposition ("BIO") begins and relies heavily on misrepresentations of the record and this Court's cases. In support of its averments, Texas cites, but does not quote, portions of the record that are not in the appendix and that are not attached to its brief. *E.g.*, BIO 5-7. Many of those key averments directly contradict the District Court's findings even though Texas does not attempt to show clear error as Fed. R. Civ. P. 52(a)(6) and this Court's cases require. *See Easley v. Cromartie*, 532 U.S. 234, 243 (2001). At the same time, Texas has pending before this Court a brief calling for reversal in *Thornell v. Jones*, No. 22-982, on grounds that the Ninth Circuit failed to adhere to that same standard.[1] Texas contends here that the lower courts agree the clear-error standard does not apply to determinations of attorney abandonment, but ignores the Ninth Circuit's contrary holding in *Foley v. Biter*, 793 F.3d 998, 1003 (9th Cir. 2015), quoted in Cert. Pet'n. at 29. Although page constraints prevent Petitioner from identifying and correcting every misrepresentation in the BIO, the following examples suffice to show that Texas's assertions should not be accepted at face value.

[1] Br. of S. Dakota and 20 Other States as *Amici Curiae* at 13-16, *Thornell v. Jones*, No. 22-982, 2024 WL 495636 (Feb. 5, 2024).

Texas begins by falsely asserting that "Travis Green does not dispute that he raped, beat, and strangled Kristin Loesch." BIO i. In fact, Green has consistently disputed his guilt, albeit in the manner one would expect of a person experiencing psychosis caused by schizophrenia. What Texas characterizes as "Green actively defend[ing] himself" at trial, BIO 6, the District Court found to be Green acting under the "delusion that his fingerprints were falsely planted on the victim's neck to frame him," App. 74a, "even though a witness testified that no fingerprints were ever taken from the victim's neck." App. 54a.

Texas next misrepresents the record by claiming "Green does not dispute that the question of his competency was thoroughly explored twice before his trial," BIO 1; *id.* at i, and that he "had been found competent twice" before trial, *id.* at 7 & n.3. The District Court specifically found that the trial "court never held a hearing to assess whether there was evidence of Green's incompetence to stand trial," App. 26a, that "the record is devoid of any written or oral ruling on the issue," *ibid.*, and that the trial court "did not … otherwise evaluate in any way Dr. Rubenzer's conclusions as to Green's competency to stand trial," App. 18a. Texas makes no effort to reconcile its tacit demand for de novo review in this case with its diametrically opposite position in *Jones*.

Texas also misstates this Court's precedent when it suggests that an inquiry under *Faretta v. California*, 422 U.S. 806 (1995), necessarily entails a competency determination because "the competency needed to stand trial is the same competency needed to waive counsel. *Godinez v. Moran*, 509 U.S. 389, 396-401 (1993)." BIO 7 n.3.

The very next page of *Godinez* states that a *Faretta* inquiry does not necessarily answer the question of competence because "a competency determination is necessary only when a court has reason to doubt the defendant's competence." 509 U.S. at 402 n.13; *DeVille v. Whitley*, 21 F.3d 654, 657 (5th Cir. 1994). Texas repeatedly conceded below that the trial court never indicated a doubt as to Green's competence. ROA.732, 735, 743. And the District Court found that Texas did "not attempt to argue that an implied finding of fact as to Green's competency can be inferred from the trial court's … *Faretta* determinations." App. 37a. On the contrary, Texas argued in its post-hearing brief that Texas law, like this Court's cases, "presumes that a criminal defendant was competent to stand trial."[2] ROA.2337.

Texas misleads this Court when it says Green does not dispute that his state habeas counsel timely filed a petition "raising numerous claims." BIO i; *id.* at 18 (McLean "raised seven claims"). As the District Court found and Green's state habeas counsel implicitly conceded, *see* App. 19a, "*none* of the claims [the petition] contained were cognizable." App. 33a (emphasis in original). Actually, Texas is the party that has never disputed the District Court's key factual findings—i.e., that Green's counsel merely copied two "claims" and one claim heading from Green's already-rejected

[2] *See also* Texas's Opening Br. in Fifth Circuit at 23 (quoting *McDaniel v. State*, 98 S.W.3d 704, 711 n.23 (Tex. Crim. App. 2003), for proposition that trial court's order for an evaluation by Dr. Rubenzer "'does not constitute a determination that an issue as to the defendant's competency exist[ed]'").

appellate brief and added four more "claims" that were "mere headings without supporting statements of fact and law." App. 31a. The Fifth Circuit also did not dispute those findings, App. 5a, although it accorded them no significance, App. 9a.

In both the Fifth Circuit's reasoning and the State's, though, McLean's presentation of non-cognizable "claims" presents a non sequitur, at best. As the Fifth Circuit observed, the alleged default occurred later, when McLean informed the state court that he would amend Green's "petition" but didn't. App. 7a. The District Court was lightyears from committing clear error when it found that McLean's initial failure to file any cognizable claims and his contemporaneous false promise to "'develop the facts … with all deliberate speed,'" App. 19a, "created improper incentives [for him] to represent to the court in 2008 that Green had no viable claims," App. 34a. It was at least a reasonable inference, and therefore not clearly erroneous, for the District Court to conclude from those facts that McLean abandoned Green "from the beginning" and "for the entirety of [his] state habeas application process." App. 34a-35a. *See, e.g.*, *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 580 (1985) (no clear error where findings regarding events supported inferential finding of intent of actors in those events).

That inference also was consistent with *Maples v. Thomas*, 565 U.S. 266 (2012), and *Holland v. Florida*, 560 U.S. 631 (2010), in which this Court found that habeas petitioners' attorneys were "'not operating as … agent[s] in any meaningful sense of that word,'" *Maples*, 565 U.S. at 288 (quoting *Holland*, 560 U.S. at 659 (Alito, J., concurring)). This Court reached that conclusion in *Maples* even though, at the time of

the alleged defaults, "Maples had … three attorneys of record" and more working on his behalf at a large law firm, 565 U.S. at 285. This Court found there were grounds for the district court to find that Holland's lawyer had abandoned him based in part on the lawyer's erroneous conclusion that the statute of limitations had run against Holland "'before my appointment.'"[3] 560 U.S. at 641.

Finally, the BIO evidences a belief that this Court should and would make its decision "at least in part, on the basis of information which [Green] had no opportunity to deny or explain." *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Texas goes outside the record and asks this Court to base its decision, at least in part, on a news report of circumstantial evidence that has never been subjected to any form of adversarial testing or adjudicatory process. BIO 7 n.2. It is (sadly) understandable that Texas would stress the brutality of the crime Green was convicted of, BIO i; *id.* at 1; *id.* at 7 n.2, even though, as the District Court found and this Court's cases support, that result was unreliable because Green represented himself while he lacked the competence "'upon [which] depends the main part of those rights deemed essential to a fair trial.'" *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139 (1992) (Kennedy, J., concurring)). But it is less defensible for

[3] Texas contends the lower courts' review of equitable tolling decisions is "irrelevant" because "Green does not suggest that the statute of limitations is at issue in this case." BIO 15. Of course, that is another non sequitur because the very essence of *equitable* tolling is that it is not a statutory issue. The argument suggests Texas believes this Court will miss the distinction or forget or ignore that procedural default is governed by "'equitable principles,'" BIO 10 (quoting *Dretke v. Haley*, 541 U.S. 386, 392 (2004)), and that *Maples* took its formulation for abandonment for purposes of "cause" from Justice Alito's concurring opinion in *Holland*, an equitable tolling case.

Texas to express the belief through its BIO that this Court would base its decision about whether to bring uniformity to the decisions of the lower courts based on Kristin Loesch's many positive traits. BIO 3-4. And Texas strays far beyond this Court's due process standards when it places such heavy reliance on falsehoods, *de novo* fact-finding by this Court, and innuendo based on extra-record, non-judicial sources.

II. There is a clear split in the circuits on the State's first rephrased question.

Texas denies the circuits are split over the specific question that Texas itself presents: "whether (and thus when) attorney abandonment … [is] a legal conclusion subject to de novo review." BIO i, BIO 10-14. As Green showed above, Texas simply ignores the Ninth Circuit's holding 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*, *supra*, 793 F.3d at 1003 (quoted in Cert. Pet'n. at 29).

Texas mistakenly asserts that *Amadeo v. Zant*, 486 US. 214, 222 (1988), established that the "existence of cause is a 'legal conclusion'" that is always "properly reviewed de novo." BIO 11. But Texas quotes *Amadeo* out of context. This Court said only that "[t]he Court of Appeals did not contest, nor could it, that the facts found by the District Court in this case permitted the District Court's legal conclusion that petitioner had established cause for his procedural default." 486 U.S. at 222. The rest of that paragraph, indeed the rest of the decision in *Amadeo*, cuts against the State's position. *Amadeo* illustrates how miniscule and contingent a legal conclusion can be

in a cause determination. The next thing this Court said in *Amadeo* was that if the disputed evidence in that case

> was not reasonably discoverable because it was concealed by … officials, and if that concealment, rather than tactical considerations, was the reason for the failure of petitioner's lawyers to raise the jury challenge in the trial court, then petitioner established ample cause to excuse his procedural default under this Court's precedents.

Ibid. Because *Amadeo* was the first case in which this Court held that State concealment of evidence constitutes cause, the district court needed to make a legal conclusion as to whether the facts established the "existence of cause." BIO 11.

In its arguments about *Amadeo* and cause more generally, Texas elide the difference between a district court's determination whether the habeas petitioner's cause allegations are true and the determination whether, if the allegations are true, they support a finding of cause. BIO 11-14. The question of incompetence presented by Green's case illustrates the State's error. Texas acknowledges the circuits are split on the *legal* question whether incompetence can constitute cause to excuse a default under this Court's cases. BIO 23. Although Texas does not acknowledge it, this Court and the Fifth Circuit have repeatedly held that incompetence *vel non* is a question of *fact*. *Demosthenes v. Baal*, 495 U.S. 731, 735 (1990); *Maggio v. Fulford*, 462 U.S. 111, 117 (1983); *United States v. Hayes*, 589 F.2d 811, 822 (5th Cir. 1979) ("A district court's determination of competency to stand trial may not be set aside on review unless it is clearly arbitrary or unwarranted.").

Conversely, in *Maples*, this Court settled the legal question whether an attorney's severance of his agency relationship with his client constitutes cause. It should now resolve the split of authority over whether abandonment *vel non* is a question of

fact, as the Ninth Circuit held in *Foley*, or a question of law, as the Fifth Circuit assumed in this case.

Citing nothing, Texas contends that "*Maples* established a narrow basis for cause where a habeas petitioner is actually left without a lawyer without notice." BIO 19. That contention is incompatible with Texas's observation that *Maples* stopped "[f]ar from overturning *Coleman* [*v. Thompson*, 501 U.S. 722 (1991).]" *Ibid*. Indeed, both *Maples* and *Coleman* state that "well-settled principles of agency law" govern whether counsel's conduct permits an attribution of fault to the petitioner. *Coleman*, 501 U.S. at 754. Nothing in *Maples* suggests it is limited to its facts. On the contrary, *Maples* stands for the proposition that whenever an attorney's conduct "severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative," and "[h]is acts or omissions therefore 'cannot fairly be attributed to the client.'" *Maples*, 565 U.S. at 281 (quoting with omitted alteration *Coleman*, 501 U.S. at 753).

Texas claims that applying those principles to find that "'a lawyer abandons his client despite filing a brief on his behalf'" would "expand *Maples* in such a way as to swallow the basic rule that attorney negligence is not cause." BIO 20 (quoting *Young v. Westbrooks*, 702 F. App'x 255, 265 (6th Cir. 2017)). That might be the case if McLean's "brief" had contained any cognizable claims, as Texas falsely implies it

did. Instead, the "petition" McLean filed *precisely* fits the Sixth Circuit's understanding of *Maples* and *Holland* in *Young*.[4] "In both cases," the court noted,

> the attorneys' failure to file *anything* on the petitioners' behalf prevented them from seeking relief from their death sentences: Holland missed the deadline to file a petition for federal habeas relief, *Holland*, 560 U.S. at 638, and Maples missed the deadline to file a notice of appeal from the state trial court's denial of his state habeas petition, *Maples*, 565 U.S. at 271.

Young, 702 F. App'x at 264-265. The same is true for Green: McLean's failure to timely file *anything* cognizable in the "petition" Texas touts, and his subsequent failure to file *anything* at all to supplement that non-cognizable petition before time expired, prevented Green from seeking habeas relief from his death sentence.

III. There is a clear split in the circuits over the State's second rephrased question.

Texas attempts to rationalize away the scope and impact of the circuit split on whether incompetence can serve as cause by arguing that "this case does not implicate the narrow range of circumstances where the circuits have arguably diverged," BIO 23, by which Texas means cases in which the habeas petitioner was or was not represented by counsel, *ibid.*; *id.* at 25-26. That attempt fails because, as Texas seems to acknowledge, whether a petitioner was represented by counsel played no role whatsoever in the reasoning of the Fifth Circuit in this case or in the decisions of the Third

[4] In *Young*, the Sixth Circuit rejected Texas's reading of *Maples* as limited to the facts of departure without notice. The *Young* court observed that in *Holland* and *Maples*, this "Court credited a whole host of attorney misconduct—only one element of which was some form of deficient communication—that gave rise to a severance of the agency relationship and the ultimate finding of abandonment." 702 F. App'x at 264-65.

and Seventh Circuit cases that are in accord. *See* BIO 24. As Green demonstrated in his petition, and Texas does not dispute, those decisions turn on this Court's use of the word "external" in *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

Rather than provide a basis for denying review in this case, Texas presents a preview of its position on the merits, arguing that courts should take into account whether the petitioner had counsel in state court when considering whether incompetence can serve as cause. BIO 25-31. But that factor is irrelevant to the Fifth Circuit's reasoning in this case. Texas offers no defense of the Fifth, Third, and Seventh Circuits' overarching reliance on the word "external."

Even more problematically for Texas, the State argues for the first time here that Green's incompetence during state habeas proceedings is irrelevant because, as the State reframes Green's second question, he was represented by counsel "*and* any factual basis for the underlying claim is apparent from the face of the trial record." BIO i (emphasis added); *id*. at 23; *id*. at 27-28. Throughout the hearing in the District Court, Texas maintained that the trial record showed little or no evidence of incompetence. *See* App. 66a (District Court noting State's expert "testified that after reviewing the records and transcripts, he did not see sufficient evidence to diagnose Green with schizophrenia at the time of trial"); *id*. at 74a (District Court observing that the State's expert found "insufficient corroborating evidence from the trial" of Green's disorganized behavior). The District Court rejected the State's previous read-

ing of the record and found clear and convincing evidence that Green was incompetent, based not on the record itself, but on the lay and expert testimony that put the transcripts into context. App. 76a-85a.

The claim that McLean could discern evidence of Green's incompetence from the face of the trial record is in tension with the State's repeated (and false) assertions that the trial court twice found Green was competent to stand trial, BIO i, 1, 7, and with the State's suggestion that the petition McLean filed stands as evidence that he actually read the trial record. The State's argument also conflicts with the BIO's glowing description of Green's self-representation, *id.* at 6, which appears to propose a *de novo* determination that Green was competent at the time of trial.

Under the agency principles that govern whether a lawyer's omissions are attributable to his client, Texas's reliance on McLean's purely nominal representation to negate the effects of Green's schizophrenia is a non-starter, literally and figuratively. The very formation of a client-lawyer relationship requires that the putative client "possess the legal capacity to agree to the relationship." Tex. R. Prof. Conduct 1.02, Cmt. 12 (quoted in *Ex parte Riles*, 620 S.W.3d 830, 831 (Tex. Crim. App. 2021) (mem.) (Slaughter, J., dissenting)). Rational capacity plays is fundamental throughout the representation. "The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters." American Bar Association, Model R. Prof. Conduct 1.14 ("Client with Diminished Capacity"), cmt. 1.

In Texas's view, rational capacity—meaning the opposite of a psychotic understanding—is not necessary for agency. That theory conflicts with this Court's understanding that the Sixth Amendment right to counsel does not imply the surrender of the defendant's autonomy, it secures autonomy. *E.g.*, *McCoy v. Louisiana*, 584 U.S. 414, 427 (2018) (holding attorney's "[v]iolation of a defendant's Sixth-Amendment secured autonomy ranks as" structural error). And this Court's due process cases hold that "[a] defendant may not be put to trial unless he 'has sufficient present ability to *consult with his lawyer with* a reasonable degree of *rational understanding* ... [and] a rational as well as factual understanding of the proceedings against him.'" *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam)) (emphasis added). Rather than obviating concerns about agency, this Court's cases hold that a defendant who lacks a rational understanding of his situation but has counsel cannot be tried because he "would be unable to assist counsel in identifying witnesses and deciding on a trial strategy." *Ryan v. Gonzales*, 568 U.S. 57, 65 (2013). These cases and the laws governing any attorney-client relationship establish a syllogism that Texas's argument rejects: there is no autonomy without agency, and there is no agency without a rational understanding of the situation that created the need for an attorney/agent in the first place.

In the specific context of a capital habeas proceeding, Texas courts will dismiss a petition filed by an attorney without the informed consent of the putative petitioner. *Ex parte Gallo*, 448 S.W.3d 1, 4 (Tex. Crim. App. 2014) (dismissing application filed by attorney without client's informed consent). In this case, but for the "improper

incentives" McLean created for himself—*i.e.* his continuing, *compensated* representation despite doing no work and failing even to communicate with Green for seven years, followed by his lie about Green's mental state, App. 34a—Green would have been entitled to a new attorney and a real habeas petition. Tex. Code Crim. App. art. 11.071 § 4A (cited by Fifth Circuit at App. 8a).

IV. The State's position on the merits accentuates this case as an ideal vehicle for settling longstanding differences in the lower courts.

Texas contends this case presents a "poor vehicle to determine whether mental incompetence may excuse procedural default" because the District Court found that the default was caused by McLean's abandonment and therefore not "any mental illness from which Green may or may not have suffered."[5] BIO 27-28. In fact, the opposite is true.

This case is a uniquely good vehicle because the parties present inter-related questions on which there are clear circuit splits. This case gives the Court an opportunity to kill not two but three birds with one stone by (1) clarifying the rule in *Maples*, including whether it is limited to its facts; (2) resolving the split over whether abandonment under *Maples* or *Holland* is an issue of fact or law or a mixed question;

[5] Here again, Texas both misleads this Court by suggesting the question of Green's illness was not decided in the District Court and abandons the adherence to Fed. R. 52(a)(6) that it advocates in *Thornell*. The District Court found that Green had schizophrenia at the time of trial. App. 70a-76a. The District Court also found that even the State's expert "testified that there is no dispute that Green now has schizophrenia." App. 66a. Texas posits no grounds for finding clear error in any of those findings.

(3) resolving the circuit split over whether this Court's cases permit mental incompetence to serve as cause in any or only some circumstances. The doctrinal and factual relationship between the two questions make this case an ideal vehicle for resolving those splits.

The parties agree that Green's appointed state-habeas attorney failed to present the incompetency claim on which Green prevailed in the District Court. The parties also agree that under this Court's cases, whether McLean's failure is attributable to Green turns, at least in the alternative, on whether McLean was acting as Green's agent at the time of the default. That question can be answered two ways.

First, Texas does not suggest clear error in the district court's finding that McLean breached his fiduciary duties to Green "from the beginning" and "for the entirety of [his] state habeas application process." App. 34a-35a. Therefore, if this Court resolves in Green's favor the clear circuit split between the Fifth and Ninth Circuits over whether attorney abandonment is a question of fact, the District Court's findings that McLean was not Green's agent will stand, as will its finding that Green was tried while incompetent. At a minimum, this case should be held pending *Thornell v. Jones*, No. 22-982, in which Texas joins other amici in supporting Arizona's plea for enforcement of Fed. R. Civ. P. 52(a)(6), which echoes Green's position.

Second, if this Court resolves in Green's favor the clear circuit split over whether incompetence is legally relevant to the "cause" determination, Green is entitled to relief even as Texas frames the questions in its BIO. The parties agree that whether McLean's failure is attributable to Green turns on the application of agency

law. Texas does not dispute that an incompetent person cannot appoint an agent. Texas also does not dispute that incompetence is an issue of fact. Therefore, if Green was incompetent during his state-habeas proceedings, McLean cannot be said to have been acting as Green's agent in any meaningful sense because Green was unable to enter into an attorney-client relationship.

CONCLUSION

This Court should grant the petition and set this case for argument.

Respectfully submitted,

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