

No. 25-1246

*** CAPITAL CASE ***

IN THE
Supreme Court of the United States

RICHARD VASQUEZ,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS
DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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INTRODUCTION

The Opposition doubles down on the proposition that any reasonable lawyer would have easily identified the defect in the toxicological report. Opp.24-26. From that, the State argues there is “no compelling reason” for review. Opp.2. Yet, from that proposition two conclusions are inescapable: (1) Vasquez’s trial lawyers, having ignored the defect, provided ineffective representation (quintessential *Strickland* violation) and (2) Vasquez’s prosecutors must have been aware, when they offered the evidence, that it was unreliable (quintessential *Brady/Napue* violation). It should thus be obvious that there *is* a compelling need, before the State executes Vasquez, to ensure that AEDPA standards are properly and consistently applied. So, too, is there a need to ensure, before Vasquez’s execution, review by at least one court of his IATC claim.

ARGUMENT

I. The Fifth Circuit is on the Wrong Side of a Circuit Split

The Opposition bolsters Vasquez’s position that the Fifth Circuit sits on the wrong side of a circuit split. As the State acknowledges, most circuits apply a flexible, “fact-dependent” test under which information discoverable by a reasonable attorney is only “relevant,” *not* “always” determinative. Opp.15-16. The State thus concedes that any adoption by the Fifth Circuit of a rigid standard that imputes to an applicant, in a dispositive way, all information that could have been discovered by diligent lawyers would put the Fifth at odds with other circuits. *See* Pet.24-27.¹

1. At times, the State suggests that “flexibility” only arises for unrepresented applicants. Opp.15-16. That’s not how other

But, says the State, there is no actual conflict because the Fifth, in reality, does *not* apply the strict standard challenged by Vasquez and instead uses the same flexible test employed by other circuits. Opp.14-18.²

This new-found position cannot be squared with the arguments or opinions below.

First, consider district court filings. There, the State was adamant that precedent mandated application of a reasonable-attorney standard under which facts available to the applicant’s attorney would always dictate the result. ROA.726 (inquiry “turns on what reasonable defense counsel would have done based on the information available to them”); 727 (“question, then, is whether ‘a reasonable attorney would have been put on notice’”); 754 (facts put “a reasonable attorney . . . on notice”); 755 (“attorneys were on notice of the factual predicate”); 757 (“the question is simply whether a reasonable attorney was on notice”).

Next, the district court’s opinion. That court unquestionably identified a binary choice between a reasonable-attorney and a reasonable-applicant standard. App.57-61. And that court accepted the State’s argument that, under Fifth Circuit precedent, it was constrained to

circuits see it. *See Clark v. Warden*, 934 F.3d 483, 496 (6th Cir. 2019) (flexible test; applicant had counsel in first case).

2. The State is wrong to say that the Sixth Circuit, in *Moreland v. Robinson*, 813 F.3d 315 (6th Cir. 2015), followed the Fifth Circuit approach. That applicant lost, not based on his lawyer’s discoveries, but because he testified to his own actual knowledge of the factual predicate. *Id.*, 326.

apply the former. *See* App.57-58 (“Fifth Circuit has set out the . . . requirement as asking whether ‘a reasonable attorney would have been put on notice’”); App.58 (“Fifth Circuit established the reasonable-attorney standard”); App.59-60 (“Fifth Circuit has consistently used the reasonable-attorney standard”); App.61 (no “authority to reinterpret the Fifth Circuit’s use of a reasonable-attorney standard.”).

Then the arguments in the Fifth Circuit. There, the State was again adamant that, on the choice between two standards, the Fifth Circuit had chosen the reasonable-attorney test. ECF 39 at 33-34 (“district court applied this Court’s long-standing reasonable-attorney rule”); 34 (“Court should [not] veer from its reasonable-attorney standard”); 40 (inquiry “turn[s] on what reasonable defense counsel would have done based on the information available”); 40 (“question is whether a ‘reasonable attorney would have been put on notice’”); 42 (“reasonable-attorney standard is the correct standard”); 44 (“reasonable-attorney standard applies” given “numerous opinions enunciating and applying” it); 46 (“precedent establishes that diligence is measured by a reasonable attorney’s knowledge and actions”); 56 (“Court should [not] depart from its long-standing reasonable-attorney standard”).

Finally, the Fifth Circuit’s opinion, read fairly, reflects application of the reasonable-attorney standard the State urged. App.12 (“we have consistently applied this standard”: is there “evidence in the record that would have put a reasonable attorney on notice?”); App.12 (“Vasquez cannot avoid the application of this standard,” referring to whether “reasonable attorney” was on “notice”); App.13-14 (“Vasquez has not demonstrated that the district court

erred by looking to what a reasonable attorney would have been aware of.”); App.16 (“Vasquez is responsible for his counsel’s failure to raise claims available at the time of his first federal habeas petition.”).

The State nevertheless seizes upon two places where the Fifth Circuit characterizes information discoverable by a reasonable lawyer as “relevant,” without saying, *in those precise passages*, that it is also dispositive. App.14-15. These fleeting references cannot alter what the court actually did: automatically impute to Vasquez the information ascertainable by his habeas lawyers.

This automatic imputation, and its dispositive impact, are made clear in the opinion’s application section. App.14-17. There, in applying the standard, the court focused *entirely* on the information knowable to Vasquez’s prior counsel, without *any* mention of Vasquez’s personal circumstances or any other potentially relevant factors. This exclusive focus on just one factor confirms that, in the Fifth Circuit, that factor is not just “relevant.” As the *only* factor considered, it is dispositive.³

II. Vasquez Seeks No “Exception” Foreclosed by Precedent

In Section I.B, the State claims that Vasquez is seeking an “extension” of *Martinez v. Ryan*, 566 U.S. 1 (2012), or an “exception” to the rule that there is no constitutional right to counsel in post-conviction proceedings. Since both

3. In barely mentioning “personal diligence,” Opp.25, n. 6, the State relies only on Vasquez’s testimony that “*he* had no cocaine,” a point that the Fifth Circuit did not mention and that is irrelevant, given the testimony of Vasquez’s girlfriend that she may have left cocaine in the house. ROA.11161.

are foreclosed by *Shinn v. Ramirez*, 596 U.S. 366 (2022), review, says the State, should be denied.

The State takes the discussion of “exceptions” in Vasquez’s Petition way out of context.

The main purpose of that discussion was *not* to justify some equitable exception to AEDPA mandates, nor to support any proposed extension of the right to counsel. Rather, the discussion was included largely to support Vasquez’s proffered construction of § 2244(b)(2)(B)(i)—a matter of statutory interpretation, *not* constitutional analysis.

Vasquez’s proffered construction is straightforward: (a) the statute does not expressly address the role of information discoverable by a reasonable attorney; (2) information discernable by counsel only enters the picture by reading the text to incorporate “well-settled principles of agency law,” *see* Opp.19; (3) the general rule of agency law charges a principal with information his agent could have known; (4) that general rule is subject to the corollary that a principal is *not* appropriately charged with the knowledge or omissions of a rogue agent who exceeds his authority or acts against the principal’s interests; and (5) any incorporation of agency principles into the statutory text should include both the general rule and its corollary.⁴

The State’s response—there is generally no post-conviction right to counsel—sails far wide of the mark. The statutory construction urged by Vasquez requires

4. *See* Restatement of Agency, sections 1.01, 2.01, 3.01, 5.03, & 5.04.

only that “principles of agency law,” conceded by the State to govern, be applied in full, without excising the common-sense corollary that a principal is *not* bound by the misconduct of an unfaithful agent, at least where that misconduct goes beyond “garden-variety” negligence.

To prevail in this statutory construction, Vasquez needs no exception to any mandate expressed in the AEDPA. No such exception is required because the AEDPA does not even mention the relevance of information discoverable by a diligent attorney, let alone make it dispositive. Nor does Vasquez need any exception to the rule that post-conviction petitioners have no right to counsel. The exception Vasquez urges is to a general rule from the common law of agency, not to any principle of constitutional law.

III. The “Innocence” Issue Imposes no Impediment to Review

The State also says that review should be denied because the Fifth Circuit made an alternative finding that Vasquez had not satisfied the statute’s (B)(ii) “innocence” test.

As an initial matter, even if this point had legs, it would only apply to the first of Vasquez’s Questions. Questions 2-4 present issues meriting review that do *not* depend on Vasquez’s ability to meet the statutory test and in fact assume that he cannot.

As important, even when limited to Question 1, the point has no validity. The case chronology, when compared to the AEDPA’s statutory scheme, amply

demonstrates this. Initially, when the Fifth Circuit granted authorization to file a successive petition, it found (on first-gate review) that Vasquez had made a *prima facie* showing that (B)(ii) was satisfied. Then, on second-gate review, the district court held, given its (B)(i) finding, that it need not reach (B)(ii). App.76. Following that, on appeal from the district court’s (B)(i) finding, the Fifth Circuit decided on its own to assess (B)(ii), without the benefit of any second-gate review by the district court. App.17-19.

This approach is unauthorized. The statute limits the Fifth Circuit to *prima facie* review on first-gate assessment and then review in a subsequent appeal of any second-gate determination by the district court. Here, the Fifth Circuit skipped the required middle step—second-gate review—and thus turned the process upside down.

This is no technical issue. By setting up the process ignored by the Fifth Circuit, Congress obviously intended to commit the final determination of issues like how a “reasonable factfinder” would have reacted to new evidence to trial courts best suited to address them. The omission of step two is particularly problematic here because (B)(ii) is an issue on which the deference owed to local prosecutors, *see* Question 4, would have been especially appropriate.

What’s more, the Fifth Circuit’s “innocence” analysis is largely based on junk science regarding the degree of pediatric head trauma necessary to cause fatal injuries. App.18. By including Claims 1 and 2 in his successive petition, Vasquez sought permission to challenge that junk science. The Fifth Circuit, by authorizing Claims 1 and 2, granted that permission. *See* App.83-84, n. 2. Thus,

had the district court reached (B)(ii), its “innocence” assessment would have included consideration of today’s scientific consensus that children can die from forces far too slight to support any inference of mens rea. ROA.5897-5971. Yet, after the district court passed on the (B)(ii) question, the Fifth Circuit made an “innocence” finding of its own that credited the junk science introduced at Vasquez’s trial and ignored altogether the undisputed evidence Vasquez offered to support Claims 1 and 2.

That deeply flawed approach—holding initially that Vasquez had the right to review by the district court of the junk-science impact on his “innocence” claim but then denying him relief without *any* court assessing that impact—should not be allowed to stand.

There is, moreover, no waiver. Vasquez’s attack on the (B)(ii) finding is “fairly included” in the Questions Presented. *See* Rule 14.1(a). Even were it not, Rule 14.1(a) does not limit this Court’s power to consider questions of this importance. *Izumi v. U.S. Philips Corp*, 510 U.S. 27, 32 (1993). And, since the Fifth Circuit’s abrogation of the statutory scheme was plain error, the Court can either ignore or correct it. *See* Rule 24.1; *Izumi*, 510 U.S. at 33

IV. There is no Impediment to Review of Question 2

If certiorari is denied, Vasquez may well go to his grave without any court having reviewed his IATC claim. In Question 2, Vasquez seeks review of whether the Constitution prohibits that result.

The State barely engages on this issue. Instead, it tries to will it out of existence by recasting the four

questions Vasquez presents as if there were only three and then burying Question 2 as if it were a throwaway issue subsumed in Question 1.

Question 2 is no throwaway. It is a substantial stand-alone claim that builds on this Court’s prior holdings that: “[t]he criminal trial enjoys pride of place” in our justice system,” *Davila v. Davis*, 582 U.S. 521, 530 (2017); IATC claims are of “unique importance,” *id.* at 530; and “the right to counsel is the foundation of” and a “bedrock” of our system, *Martinez v. Ryan*, 566 U.S. at 12.

Question 2 also builds on this Court’s prior recognition that there remains today an “open” question whether the Constitution requires review by at least one court of an IATC claim before an execution can be carried out. *See Martinez*, 566 U.S. at 9.

It is thus strange that the State would try to dismiss Question 2 in a conclusory paragraph with no meaningful analysis. *See* Opp.23. Contrary to what the State says there, Vasquez is *not* seeking to vindicate some imagined right of access to the courts. Rather, he seeks to vindicate his underlying and bedrock right under the Sixth Amendment to the effective assistance of counsel. *See* Pet.29-32.

And, of course, the State’s suggestion that it has been Vasquez’s “own actions” that have resulted in his IATC claim remaining unreviewed, Opp.21, could only be true under the legal fiction that Vasquez knows everything that could have been discovered by lawyers who ignored his instructions, lied to him, violated the requirements of their appointment, defied a “vast corpus of federal

jurisprudence,” and repeatedly breached professional responsibilities. App.73; ROA.442-51, 457-536, 544-47, 674-88.

Indulging that fiction is neither required nor appropriate. It provides no basis for the State’s apparent position that it is only important to ensure review of an IATC claim by at least one court when the applicant has raised the claim in a first-in-time application. The Sixth Amendment right to effective trial counsel does not lose its unique, fundamental importance simply because a disloyal and deceitful habeas lawyer has inexplicably declined to pursue the issue.

V. There is No Impediment to Review of Question 3

By Question 3, Vasquez seeks review of whether his *Brady* and *Napue/Giglio* claims are properly considered “successive.”

The State claims that Vasquez did not preserve this issue because he did not initially file a *Brady* and *Napue/Giglio* petition without advance authorization and then “appeal[] its successiveness characterization.” Opp.30, n. 8. But, as the State acknowledges, Vasquez has since done exactly that and has a pending appeal, Case No. 26-70008, that will soon be ripe for consolidation with this case. See Opp.12, n. 3.

On the merits of Question 3, the State offers nothing of substance. The State cites Rule 10(c) for the proposition that Vasquez has not identified a reviewable “conflict.” Opp.32. But Rule 10(c) is not limited to conflicts. It also addresses review of important, unresolved questions that

should be settled by this Court. On that, the “single-justice dissent” cited by Vasquez is highly relevant, especially since there are in addition a number of circuit-court opinions that effectively urge review by this Court of the Fifth Circuit’s “illogical” approach. *Baugh v. Nagy*, 2022 WL 4589117 at *6 (6th Cir. Sep. 20, 2022); *Scott v. United States*, 890 F.3d 1239, 1247-58 (11th Cir. 2018); *Gage v. Chappell*, 793 F.3d 1159, 1165 (9th Cir. 2015).

Finally, the State’s last-gasp argument on Question 3 fails. The State says that “Vasquez has never proven that the evidence that Miranda had cocaine in her blood was truly false.” Opp.33. This is so, says the State, because no one can discern today whether the inaccuracy is in the positive result or the negative result. Because the positive result could be accurate, Vasquez (says the State) is merely “quibbling.” Opp.33.

True enough that Vasquez cannot say with certainty whether the problem is with the negative or the positive result. That, however, is beside the point. Either way, and since the same blood sample cannot simultaneously be positive *and* negative for cocaine, it is 100 percent certain that the toxicological report is not reliable proof of anything.

Dr. Backer’s testimony—his lab found cocaine “to a reasonable degree of scientific certainty”—was thus false. ROA.1744. No amount of speculation that the positive result could be accurate can change that fact.

Dr. Backer said the cocaine testing was accurate. In truth, it was wholly unreliable. That is no quibble.

VI. Question 4 Recurs Frequently and Merits Review

The State downplays the significance of Question 4, but a similar issue arose yet again just a few weeks ago. *See Newberry v. Texas*, No. 25-862, June 22, 2026 (GVR to consider the DA's position that relief is warranted). As *Newberry* confirms, the issue—what deference is owed to the State's position and how should that position be discerned when State officials disagree—is important and arises with sufficient frequency to merit review.

And, while the State points out that the Nueces County DAs presented their views in position statements (not formal pleadings), the State fails to explain why that matters. Since both DAs authorized Vasquez to file their statements in court, it is of no consequence that Vasquez's counsel handled the ministerial act of filing.

The State's other point—the position statements never became part of the record—is partly wrong and ultimately irrelevant. It is wrong as to DA Gonzalez. The Fifth Circuit allowed that statement to be filed and gave it great weight in authorizing Vasquez's successive petition. ROA.792

As to Granberry, the argument is circular. The Fifth Circuit denied leave to file his statement, but not because of any procedural misstep or waiver. Rather, leave was denied based on the substantive view that Granberry is entitled to no deference. The denial is hardly a procedural basis for denying Vasquez's Petition. It is part and parcel of the error that merits review.

CONCLUSION

Vasquez's petition should be granted.

Respectfully submitted

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