NO. 25-5706 (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

JOHN ALLEN RUBIO,

Petitioner,

vs.

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 IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Jeremy Schepers*
Supervisor, Capital Habeas Unit

Federal Public Defender's Office
Northern District of Texas
525 South Griffin Street, Ste. 629
Dallas, Texas 75202
214.767.2746
jeremy_schepers@fd.org

Lee Kovarsky
Special Counsel

Phillips Black, Inc.
A Non-Profit Law Practice
727 E. Dean Keeton Street
Austin, Texas 78705
434.466.8257
l.kovarsky@phillipsblack.org

Counsel for Petitioner
**Counsel of record*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Federal Statutes

Constitutional Provisions

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW OR SUMMARILY REVERSE THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY APPEAL OF THE *NAPUE* CLAIM.

Rubio's conviction and sentence violated *Napue v. Illinois*, 360 U.S. 264 (1959), when Dr. Michael Welner testified falsely that, between his first and second trials, (1) Rubio was unmedicated for the "great majority" of the time and (2) he maintained "intact presentation" throughout. *See* Cert. Pet. at 17-25. In refusing a certificate of appealability ("COA"), the Fifth Circuit focused only on the question of falsity and the testimony's effect on the *guilt-phase* verdict. It did not reach *sentencing-phase* materiality or the question of procedural default.[1] Its falsity holding was debatable because it was wrong: Rubio did take medication between his first and second trials, a period during which he had well-documented mental health struggles. The salient issue is whether Welner's testimony was true, not whether there was factually sufficient testimony to reject an insanity defense.

A. Dr. Welner Testified Falsely in Two Respects.

The Director does not (and could not) dispute that it is charged with knowledge of records that it possesses. *See* Cert. Pet. at 18 (citing *Glossip v. Oklahoma*, 604 U.S. 226, 247 (2025)). The only question, then, is whether those records, along with other information known to the prosecution, demonstrate that the contested aspects of Dr.

[1] The BIO invites the Court to consider procedural default as a barrier to consideration, but the Fifth Circuit expressly refused to reach that issue. *See* App. A. 16 (refusing to reach procedural default); BIO at 11-13 (arguing issue nonetheless). The Court can award complete certiorari relief and vacate the COA disposition without deciding default, so that issue presents no vehicle problem. Rubio therefore declines to include that content here, as it is unsuited for a certiorari reply.

Welner's testimony were false. *See Glossip*, 604 U.S. at 246. But the Director continues to misrepresent testimonial content and to confuse the elements of the *Napue* inquiry. *See id.* (listing elements of a *Napue* claim). Welner was trying to tell the jury that an authentic schizophrenic would struggle without medication, and Welner testified that Rubio was (1) unmedicated and (2) intact. Falsity along either dimension is enough for *Napue* relief, since both propositions were material to the sentencing-phase verdict—both to the credibility of Welner (the prosecution's star mental health expert) and to the impression that he was trying to give the jury that Rubio was a faker. *See Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (equating false testimony with testimony that "gave the jury [a] false impression").

1. Dr. Welner falsely testified that Rubio "has not been on medication" between his first and second trials.

When Dr. Welner testified that Rubio had "not been on medication … [for] the great majority of the time" before his second trial, ECF No. 51-33 at 135–38. The State knew the testimony was false. As recited in the Certiorari Petition (at 19-21), Rubio was extensively medicated with anti-psychotics and anti-depressants during that period. The Director quotes district court findings that should themselves be sufficient to reverse on the question of falsity, including the concession that "doctors prescribed Rubio medications when he was incarcerated." BIO at 8 (quoting App. B. 77). The Director goes on to quote the district court's observation that the "record also contains controverting evidence, including that Rubio refused to take medications." BIO at 8 (quoting App. B. 77).

The reference to "controverting evidence" is the tell; the district court was not analyzing the truth or falsity of Dr. Welner's testimony—that Rubio was unmedicated throughout the period between his first and second trials. The district court misunderstood *Napue*, and it was analyzing the factual sufficiency of the insanity defense. The quoted paragraph from the district court opinion concludes: "Rubio's counsel possessed some evidence to challenge Dr. Welner's testimony, but that evidence represented common impeachment evidence, with the jury left to determine what weight to ascribe to Dr. Welner's statements." App. B. 77-78 (quoted in BIO at 9-10). But *Napue*'s falsity element does not require Rubio to show there was insufficient evidence for a jury verdict on insanity; the issue it is simply whether Welner told the truth when he testified that, for the "great majority" of the seven years between his first and second trials, Rubio "has not been on medication." ECF No. 51-33 at 135–38.

On the *Napue* question—whether Dr. Welner was truthful when he testified that Rubio was unmedicated for the "great majority" of the time between trials—the answer is no. The State had records showing Rubio's substantial compliance with a robust anti-psychotic regimen between November 2003 and October 2008, almost always with notations documenting compliance that was "good" or better throughout the period.[2] The Director's responses are make-weight. Dr. Morris indeed testified in July 2010 that Rubio had gone several years without anti-psychotic medication, *see*

[2] *See, e.g.*, ECF No. 17-1 at 78, 87; ECF No. 41-4 at 25, 44, 47; ECF No. 41-5 at 4, 9, 10, 19, 26, 47; ECF No. 41-6 at 18, 25, 27; ECF No. 41-7 at 2, 5, 8, 17, 30, 35, 39; ECF No. 41-8 at 4, 5, 7, 11, 16–18, 21, 26, 35; ECF No. 41-9 at 1, 8, 12, 21, 26, 34, 41, 44; ECF No. 41-10 at 3, 7, 8, 13, 19, 21, 40.

BIO at 9, but the Director omits Morris's testimony just before that—that, "while [Rubio] was incarcerated, … he was treated for and diagnosed with a psychotic disorder and treated with medications and antidepressants," including "Risperdal and Thorazine." ECF No. 74-16 at 129.[3] The Director harps on the fact that Wellbutrin is an anti-depressant and Vistaril an anti-histamine. *See* BIO at 9. But Rubio mentioned those drugs because they are used adjunctively for schizophrenia's comorbid depression.[4] More importantly, the Director (and courts below) ignored the mountainous prescription record of anti-psychotics, including the Risperdal (risperidone) and Thorazine (chlorpromazine), *see* ECF No. 74-16 at 129, as well as drugs (like benztropine) prescribed and taken specifically to manage their side effects, *see* ECF No. 41-7 at 35. Finally, that Rubio refused medication at some point in 2008, *see* BIO at 9, does not show that he was unmedicated for the "great majority" of the period between trials.

2. Dr. Welner falsely testified that Rubio "maintain[ed] … intact presentation" throughout the period between his first and second trials.

Dr. Welner also testified falsely that Rubio was "able to maintain that intact presentation" throughout the period between his first and second trials, meaning that Rubio was not authentically experiencing schizophrenia. The State elicited Welner's testimony even though it had TDCJ records with "over 100 entries documenting

[3] Dr. Morris testified that the reason Rubio had stopped taking the anti-psychotics for several years was because "they didn't help that much," "they were very sedating and made him dizzy," and they caused "orthostatic hypertension." ECF No. 74-16 at 130.

[4] Rubio was also prescribed other anti-depressants at various points, including Trazodone and Prozac, which are also used adjunctively to treat depression experienced by schizophrenics. ECF 17-1 at 47 (Prozac); ECF No. 41-10 at 5 (prescribing Trazodone).

symptoms of severe mental illness," including references to "numerous visual and auditory hallucinations." Cert. Pet. at 22 (collecting citations). And on this issue, the BIO says almost nothing—quoting the district court's statement that "the record also contains controverting evidence, including … that Rubio feigned symptoms of mental illness." BIO at 9 (quoting App. B. 77). The district court opinion itself contains no citation, so Rubio cannot meaningfully respond, or even know whether the feigning alleged relates to schizophrenia. Even if the district court accurately reported instances where Rubio feigned mental health symptoms, that does not wipe out the years and years of records documenting authentic mental illness, which appear throughout the TDCJ records that the State possessed. *See* ECF No. 41-1—41-7.

B. Dr. Welner's Testimony was Debatably Material to the Sentencing Verdict because the Testimony was not Harmless Beyond a Reasonable Doubt.

When the State knowingly elicits or knowingly fails to correct false testimony, it is material unless the state can show that it was harmless beyond a reasonable doubt. *See Glossip*, 604 U.S. at 246. The district court made no sentencing-phase materiality finding at all. *See* App B. 78. It found only that procedural default was unexcused because Rubio failed to present "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found him eligible for the death penalty." App. B. 78 (internal alterations omitted and quoting *Busby v. Davis*, 925 F.3d 699, 710 (5th Cir. 2019)).

With no district court holding on sentencing-phase materiality, the Fifth Circuit also limited itself to a short footnote about the guilt phase. In footnote 13, the

Fifth Circuit tersely stated that Rubio did not meet the materiality standard from *Glossip*. App. A. 17-18 & n.13. Its footnote discussion is entirely about the guilt-phase issue of insanity. *See id.* at 18 n.13. Indeed, the Fifth Circuit could not base an order denying COA on sentencing-phase materiality because the district court never decided sentencing-phase materiality in the first instance. The Fifth Circuit's footnote makes no mention of sentencing or mitigation; the BIO's reference to punishment-phase materiality (at 11) is not something that appears in a holding of either court below.

Even though there is no operative materiality holding to dispute, the Certiorari Petition sets forth the general grounds for a sentencing-phase materiality finding when courts do reach that issue. Dr. Welner was the State's "star witness" on the mental health evidence used to argue mitigation at the punishment phase. *Napue* materiality analysis requires a reviewing court to imagine that the prosecutor corrected Welner's false testimony in front of the jury, on an issue critical both to his expert credibility and to the underlying mitigation issue. *See Glossip*, 604 U.S. at 248-49. The State cannot prove beyond a reasonable doubt that, had the prosecution corrected Welner's false testimony about Rubio's medication and intact presentation, the jury would have returned a death sentence.

II. THIS COURT SHOULD GRANT CERTIORARI TO REVIEW OR SUMMARILY REVERSE THE FIFTH CIRCUIT'S REFUSAL TO CERTIFY APPEAL OF THE IATC-FASD CLAIM.

With respect to the claim that trial counsel ineffectively litigated the issue of fetal alcohol spectrum disorder—the "IATC-FASD" claim—the district court simply skipped Rubio's argument that the state decision was factually unreasonable under

28 U.S.C. § 2254(d)(2). *See* App. B. 26, 38. The Fifth Circuit nonetheless denied a COA, holding that all reasonable jurists would agree with the district court's omission because the state decision was not legally unreasonable under § 2254(d)(1). *See* App. B. 38. The Fifth Circuit's holding is straightforward error because the district court's omission was debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (imposing "debatable" or "wrong" rule). Sections 2254(d)(1) & 2254(d)(2) are *disjunctive* exceptions to the relitigation bar. A COA should have issued and this Court should either grant certiorari or summarily reverse.

One point of clarification is in order. The Director sometimes writes as though the district court denied the IATC-FASD claim on the underlying merits. *See, e.g.*, BIO at 14 ("The district court emphatically and categorically denied this IATC claim on both deficiency and prejudice grounds."). Whatever the Director's intended meaning, the district court did *not* reach the merits. The district court explicitly imposed the relitigation bar, holding that Rubio "falls short of meeting his burden under AEDPA." App. B. 38. In other words, the district court did not evaluate the evidence outside of the § 2254(d)(1) framework—to decide whether all evidence preponderantly showed a Sixth Amendment violation. *See also* App. A. 7 (Fifth Circuit applying AEDPA framework to district court decision).

A. There Was No "Implicit" § 2254(d)(2) Finding.

Throughout his briefing, the Director gestures at the idea that the district court made some implicit § 2254(d)(2) determination. For instance, the Director states that the district court did not "explicitly" find against Rubio on § 2254(d)(2). BIO at 14. On the next page, he continues: "[T]he clear denial of his claim did not

require the district court to *explicitly* state what is *implicit* in the ruling." BIO at 15 (emphasis added). The Director accentuates the Fifth Circuit's phrasing, that "there is no indication that [the district court] erred in failing to *proclaim* the same determination under § 2254(d)(2)." BIO at 16 (emphasis added). Basically, the Director asserts that the district court's § 2254(d)(1) holding necessarily entailed an adverse § 2254(d)(2) determination.

But there was no § 2254(d)(2) determination, implicit or otherwise. The Director attempts to isolate language that he believes to suggest a § 2254(d)(2) finding. But even that language clearly shows that the district court was focused on § 2254(d)(1):

> Ultimately, Rubio has not established that the TCCA, when concluding that Rubio's counsel did not provide ineffective assistance of counsel with respect to a possible FASD defense, reached a conclusion that *conflicts with applicable Supreme Court precedents*. At the very least, Rubio fails to show that fairminded jurists could disagree on that point. As a result, he falls short of meeting his burden under AEDPA and is entitled to no relief on this claim.

BIO at 15 (emphasis added and citing DCT Op. at 38). The italicized reference to Supreme Court precedent makes the subject of the passage obvious, as such precedent matters only to a § 2254(d)(1) determination. *Compare* 28 U.S.C. § 2254(d)(1) (permitting relitigation where state decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States") *with* § 2254(d)(2) (permitting relitigation where the state decision "was based on an unreasonable determination of facts"). Indeed, the Certiorari Petition quotes this same district court passage *twice* because it

perfectly captures the error—not some "implicit" § 2254(d)(2) determination. *See* Cert. Pet. at 12, 27-28.

The Director also seems to contend that, because the district court discussed both deficiency and prejudice, it necessarily addressed § 2254(d)(2) when it addressed § 2254(d)(1). *See* BIO at 14 ("The district court emphatically and categorically denied this IATC claim on both deficiency and prejudice grounds.").[5] But it does not matter how "emphatic[]" and "categorical[]" the district court was in rejecting § 2254(d)(1) arguments; Section 2254(d)(2) presents a different set of questions. And the fact that the deficiency and prejudice prongs both involve "mixed questions of law and fact," BIO at 15 (quoting *Strickland v. Washington*, 466 U.S. 668, 698 (1984)), does not mean that a district court necessarily resolves § 2254(d)(2) when it resolves § 2254(d)(1). A state-court disposition can be factually unreasonable even if legally reasonable, and vice versa.[6]

B. Reasonable Jurists Could Debate Rubio's § 2254(d)(2) Position.

Rubio does not argue that there should be a COA simply because the district court ignored an issue. But there must be a COA if the district court's error was harmful—if the error impairs merits consideration of a colorable claim. *See Gonzalez*

[5] The Fifth Circuit did not base its order on a prejudice analysis; it expressly refused to reach that issue. *See* App. A. 11 ("Rubio has failed to show that his attorneys fell below the *Strickland* standard, we need not consider the prejudice prong.").

[6] As an easy example, consider a claim that a prisoner's intellectual disability (ID) renders him death ineligible under *Atkins v. Virginia*, 536 U.S. 304 (2002). An *Atkins* claimant must show: significantly subaverage intellectual functioning (low IQ), adaptive deficits, and developmental onset. *See Hall v. Florida.*, 572 U.S. 701, 710 (2014). A state decision would be factually unreasonable but not legally unreasonable if it used the right legal framework but used the wrong IQ scores to evaluate the first element. And a state decision would be legally unreasonable but not factually unreasonable if it used the right IQ scores but imposed an impermissible IQ cutoff to evaluate the first element.

v. Thaler, 565 U.S. 134, 145 (2012) ("The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels."). In this case, the state courts confused FAS with FASD—just like trial counsel did. That mistake was itself factually unreasonable, and it caused other factual errors recited in the Certiorari Petition (at 28-33). The state decision was therefore "based on" unreasonable factual determinations, per § 2254(d)(2).

The Director does not address most of the unreasonable findings that Certiorari Petition identifies—and the BIO says almost nothing about how the state court misrepresented the testimony of Doctors Owens and Morris. *See* Cert. Pet. at 29-33 (discussing both doctors). Most of the BIO content instead consists of bromides about effective assistance: that counsel need not "investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing"; that "Rubio's trial counsel was entitled to formulate a strategy that was reasonable at the time"; and that some evidence might not be suitable for jury presentation because it is "double edged." BIO at 13-14 (internal quotation marks and citations omitted). Rubio has no quarrels with any of these abstractions, but they have nothing to do with the state court's unreasonable factual determinations.

When the Director does try to engage on the FAS versus FASD issue, he simply reproduces the same mistakes that the lower courts made—typically by modifying record content to make propositions about FASD sound like they are about FAS, and vice versa. Take a particularly egregious example. The Director quotes a footnote

from the Fifth Circuit opinion: "[T]rial counsel Ed Stapleton investigated FASD until he 'got Dr. Owens's report on Fetal Alcohol Syndrome or lack of Fetal Alcohol Syndrome.'" BIO at 17 (quoting App. A. 12 n.7). As explained in the Certiorari Petition, however, the Fifth Circuit left the reference to FASD outside the quotation marks because "trial counsel never said that he investigated FASD; he indicated that he had investigated FAS." Cert. Pet. at 14 n.5. And that "is why the content inside the quotation marks twice references FAS, and not FASD." *Id.* In short, the Director is just quoting an instance of the Fifth Circuit making the offending mistake.

Finally, the Director states that "Rubio failed to obtain an expert FASD diagnosis even at state habeas proceedings." BIO at 16. Four responses. First, the district court included this language during a § 2254(d)(1) discussion of prejudice—something that the Fifth Circuit expressly refused to reach. *See* note 5, *supra.*[7] Second, and as reflected in the very excerpt that the Director cites, the state courts acknowledged that Rubio put forth an expert's pFAS diagnosis, albeit a preliminary one. *See* BIO at 16 (citing App. B. 36). Third, the failure to obtain a confirmatory diagnosis was downstream of unreasonable state adjudication that Rubio asserted as grounds for disabling the relitigation bar and that the district court also ignored.[8] And fourth, the record below includes extensive evidence, beyond that presented in

[7] The last sentence of the quoted excerpt discloses the relationship to prejudice: "In the end, the evidence on which Rubio relied before the state habeas court does not prove that Rubio could have presented a strong FASD defense." App. B. at 36 (quoted in BIO at 16). Indeed, it is not clear what bearing the post-conviction FASD evidence could possibly have on analysis of trial counsel's deficiency.
[8] The amended petition in the district court included a lengthy argument that the state court's refusal to rule on motions for services necessary to pay experts disabled the relitigation bar. *See* Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, *Rubio v. Davis*, No. 1:18-cv-00088, at *73-77 (ECF No. 24). As it did with respect to the § 2254(d)(2) arguments, the district court simply failed to rule on the argument about the failure to fund experts.

the first state post-conviction proceeding, on the existence of FASD. Among that evidence is a straightforward and comprehensive FASD diagnosis. *See* Amended Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254, *Rubio v. Davis*, No. 1:18-cv-00088, at 64-70 (ECF No. 24). That evidence is admissible as prejudice if Rubio satisfies § 2254(d)(1). *See* 28 U.S.C. § 2254(e)(2) (permitting new evidence as long as claimant "develop[ed] the factual basis of a claim in State court").

III. CONCLUSION

This Court should either summarily reverse the decision of the Fifth Circuit or grant Rubio's petition for writ of certiorari and set Rubio's case on the merits docket.

Respectfully submitted,

JASON D. HAWKINS
Federal Public Defender

Jeremy Schepers*
Supervisor, Capital Habeas Unit

Federal Public Defender's Office
Northern District of Texas
525 S. Griffin St., Ste. 629
Dallas, TX 75202
214-767-2746
214-767-2286 (fax)
jeremy_schepers@fd.org

Lee Kovarsky
Special Counsel

Phillips Black, Inc.
A Non-Profit Law Practice
727 E. Dean Keeton
Austin, Texas 78705
434.466.8257
l.kovarsky@phillipsblack.org

**Counsel of Record*