**(ORDER LIST: 597 U.S.)**

**THURSDAY, JUNE 30, 2022**

**CERTIORARI -- SUMMARY DISPOSITIONS**

21A222 (21-1609) BRNOVICH, MARK V. ISAACSON, PAUL, ET AL.

The application for stay presented to Justice Kagan and by her referred to the Court is treated as a petition for a writ of certiorari before judgment, and the petition is granted. The September 28, 2021 order of the United States District Court for the District of Arizona is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit with instructions to remand to the District Court for further consideration in light of *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___ (2022).

20-1375 BOX, KRISTINA, ET AL. V. PLANNED PARENTHOOD OF IN & KY

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___ (2022). Justice Barrett took no part in the consideration or decision of this petition.

20-1434 RUTLEDGE, ATT'Y GEN. OF AR V. LITTLE ROCK FAMILY PLANNING

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. ___ (2022).

20-1479 HOUSTON, EDDIE V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Concepcion* v. *United States*, 597 U. S. ___ (2022).

20-1480 NAUM, GEORGE P. V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Xiulu Ruan* v. *United States*, 597 U. S. ___ (2022).

20-1507 ASSN. OF NJ RIFLE, ET AL. V. BRUCK, ATT'Y GEN. OF NJ, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ___ (2022).

20-1639 YOUNG, GEORGE K. V. HAWAII, ET AL.

21-1194 DUNCAN, VIRGINIA, ET AL. V. BONTA, ATT'Y GEN. OF CA

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ___ (2022).

20-7934 COUCH, JOHN P. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Xiulu Ruan* v. *United States*, 597 U. S. ___ (2022).

21-265 OKLAHOMA V. WILLIAMS, ERIK S.

21-451 OKLAHOMA V. JONES, SHAWN T.

21-485 OKLAHOMA V. McDANIEL, SHAWN L.

21-643 OKLAHOMA V. MILLER, BRYCE

21-772 OKLAHOMA V. COFFMAN, STEWART W.

21-914 OKLAHOMA V. ROTH, RICHARD R.

21-959 OKLAHOMA V. PURDOM, JOSHUA L.

21-1058 OKLAHOMA V. WHITE, MARQUISE P.

The motions of respondents for leave to proceed *in forma pauperis* are granted. The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *Oklahoma* v. *Castro-Huerta*, 597 U. S. ___ (2022).

21-274 OKLAHOMA V. MIZE, JOHNNY E.

21-960 OKLAHOMA V. BAILEY, JESSY S.

21-1009 OKLAHOMA V. BRAGG, ROBERT T.

The petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the Court of Criminal Appeals of Oklahoma for further consideration in light of *Oklahoma* v. *Castro-Huerta*, 597 U. S. ___ (2022).

21-546 HARPER, MICHAEL G. V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United

States Court of Appeals for the Eleventh Circuit for further consideration in light of *Concepcion* v. *United States*, 597 U. S. ___ (2022).

21-884 FIELDS, BLAKE V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *Concepcion* v. *United States*, 597 U. S. ___ (2022).

21-902 BIANCHI, DOMINIC, ET AL. V. FROSH, ATT'Y GEN. OF MD, ET AL.

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U. S. ___ (2022).

21-1008 MENCIA, ANDRES V. UNITED STATES

The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Xiulu Ruan* v. *United States*, 597 U. S. ___ (2022).

21-5480 BRYANT, CHARLES V. UNITED STATES

21-6009 MOYHERNANDEZ, JOSE V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Second Circuit for

further consideration in light of *Concepcion* v. *United States*, 597 U. S. ___ (2022).

21-6144 SIMS, JOHNNIE V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Concepcion* v. *United States*, 597 U. S. ___ (2022). Justice Kagan took no part in the consideration or decision of this motion and this petition.

21-6376 GONZALEZ, ANTONIO S. V. UNITED STATES

21-6575 FIELDS, NATHANIEL V. UNITED STATES

21-6584 EATMON, GREGORY D. V. UNITED STATES

21-7368 BOYD, ANTWAN V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* and the petitions for writs of certiorari are granted. The judgments are vacated, and the cases are remanded to the United States Court of Appeals for the Eleventh Circuit for further consideration in light of *Concepcion* v. *United States*, 597 U. S. ___ (2022).

21-6736 HENSON, STEVEN R. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Xiulu Ruan* v. *United States*, 597 U. S. ___ (2022).

21-6739 HARRIS, ANTHONY V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Concepcion* v. *United States*, 597 U. S. ___ (2022). Justice Sotomayor took no part in the consideration or decision of this motion and this petition.

**CERTIORARI GRANTED**

21-1158 PERCOCO, JOSEPH V. UNITED STATES

21-1170 CIMINELLI, LOUIS V. UNITED STATES

21-1271 MOORE, TIMOTHY K., ET AL. V. HARPER, REBECCA, ET AL.

The petitions for writs of certiorari are granted.

**CERTIORARI DENIED**

20-891 AM. AXLE & MFG., INC. V. NEAPCO HOLDINGS LLC, ET AL.

20-1653 MAXWELL, LAZELLE V. UNITED STATES

20-7878 DAVIS, MACI D., ET AL. V. UNITED STATES

21-194 CA TRUCKING ASSN., ET AL. V. BONTA, ATT'Y GEN. OF CA, ET AL.

21-260 VIRGIN AMERICA, INC., ET AL. V. BERNSTEIN, JULIA, ET AL.

21-627 AIR TRANSP. ASSN. OF AM. V. WA DEPT. OF LABOR, ET AL.

21-1370 SPIREON, INC. V. PROCON ANALYTICS, LLC

The petitions for writs of certiorari are denied.

# SUPREME COURT OF THE UNITED STATES

ZENON GRZEGORCZYK *v.* UNITED STATES

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

No. 21–5967. Decided June 30, 2022

The petition for a writ of certiorari is denied.

Statement of JUSTICE KAVANAUGH, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, JUSTICE ALITO, and JUSTICE BARRETT join, respecting the denial of certiorari.

The defendant in this case wanted to murder six people whom he blamed for his divorce and for the loss of custody of his child. He hired and paid hitmen. And he told the hitmen to burn the six intended victims alive. So that he would have a good alibi, the defendant planned to be in Poland when the murders occurred. It turned out, however, that the would-be hitmen were undercover law enforcement officers. So the defendant was arrested and federally charged with murder for hire and a firearms violation.

The United States then negotiated a plea deal with the defendant. The plea agreement was unconditional. Among other things, the defendant waived any right to challenge his murder-for-hire and firearms convictions. Consistent with that plea agreement, the defendant was sentenced to almost 18 years of imprisonment.

A couple of years later, the defendant filed a motion under 28 U. S. C. §2255 collaterally challenging his firearms conviction. Because of the defendant's unconditional guilty plea, the District Court denied the motion, and the Seventh Circuit affirmed. Based on the Government's current view of certain cases decided after the defendant's guilty plea, the Government now asks this Court to vacate the Seventh Circuit's judgment and to order the Seventh Circuit to re-

consider the defendant's §2255 motion. Because the Seventh Circuit correctly concluded that the defendant's unconditional guilty plea precluded any argument based on the new caselaw, this Court has no appropriate legal basis to vacate the Seventh Circuit's judgment.

That said, the Constitution affords the Executive Branch authority to unilaterally provide relief to the defendant, if the Executive wishes to do so. The Framers of the Constitution contemplated that a federal criminal conviction or sentence might later be questioned by the Executive. And Article II of the Constitution grants the President broad unilateral authority to pardon federal defendants and to commute federal sentences. Art. II, §2, cl. 1. Presidents regularly exercise that power.

In order to provide relief to the defendant in this case, the Executive Branch therefore has no need to enlist the Judiciary, or to ask the Judiciary to depart from standard practices and procedures. To the extent that the Department of Justice has concluded that this defendant's conviction should be vacated or that his sentence should be reduced, the Attorney General may recommend a pardon or commutation to the President, and the President may pardon the defendant or commute the sentence.

# SUPREME COURT OF THE UNITED STATES

ZENON GRZEGORCZYK *v.* UNITED STATES

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

No. 21–5967. Decided June 30, 2022

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER, JUSTICE KAGAN, and JUSTICE GORSUCH join, dissenting from the denial of a grant, vacate, and remand order.

Neither the Federal Government nor federal courts are immune from making mistakes. Accordingly, on rare occasions, after the Government prevails in a case in a court of appeals, the Solicitor General asks this Court to grant a petition for certiorari, vacate the judgment below, and remand (GVR) in light of an error or an intervening development. Such requests occur in only a handful of the several thousand cases this Court considers every Term on its certiorari docket. When they are made, however, they are often of enormous consequence to the nongovernmental party. They may affect a petitioner's deportation, the length of a petitioner's prison sentence, or even a petitioner's eligibility for the death penalty.

Today marks the second instance this Term in which this Court has refused to issue a GVR order, notwithstanding the Solicitor General's confession of error, in a criminal case with great stakes for the individual petitioner. See *Coonce* v. *United States*, 595 U. S. ___ (2021) (SOTOMAYOR, J., dissenting). Through these cases, the Court appears to be quietly constricting its GVR practice. Here, it deprives petitioner Zenon Grzegorczyk of an opportunity to remedy an unlawful 7½-year component of his prison sentence, despite the Government's support. Nothing in precedent or history supports such a cramped conception of the Court's GVR practice, which forces individuals like Grzegorczyk to bear the brutal cost of others' errors and denies them the benefit

of a readily available, and potentially life-altering, procedural mechanism to correct those errors.

I

In 2014, Grzegorczyk pleaded guilty in federal court to one count of knowingly using a facility of interstate commerce with intent that a murder be committed, in violation of 18 U. S. C. §1958(a), and one count of possessing a firearm in furtherance of a "crime of violence," in violation of §924(c)(1)(a). Grzegorczyk's §924(c) conviction was expressly premised on his §1958(a) conviction as the predicate "crime of violence." Brief for United States 4. The District Court sentenced Grzegorczyk to a total of 17 years and 7 months' incarceration, 5 years of which were for the §924(c) charge. In his plea agreement, Grzegorczyk waived his right to appeal except as to the validity of his plea and the sentence imposed.

This Court subsequently held the residual clause of §924(e), defining "violent felony" for purposes of the Armed Career Criminal Act, unconstitutionally vague. See *Johnson* v. *United States*, 576 U. S. 591, 597 (2015). Grzegorczyk filed a motion under 28 U. S. C. §2255, arguing that the similarly worded residual clause defining "crime of violence" in 18 U. S. C. §924(c)(3)(B) was unconstitutionally vague, that his §1958(a) conviction did not independently qualify as a "crime of violence" under the elements clause of §924(c)(3)(A), and that his §924(c) conviction was therefore invalid. While the motion was pending, this Court struck down §924(c)(3)(B) as unconstitutionally vague. See *United States* v. *Davis*, 588 U. S. ___, ___ (2019) (slip op., at 24).

The District Court denied Grzegorczyk's motion based on his waiver of appellate rights. Grzegorczyk appealed, arguing that his claim was cognizable. The Government responded that although §924(c)(3)(B) was indeed unconstitutional, Grzegorczyk's §1958(a) conviction nevertheless

constituted a "crime of violence" under the elements clause of §924(c)(3)(A), so his §924(c) conviction remained valid. The Government also chose to invoke Grzegorczyk's appeal waiver as a procedural bar to his claims. The Seventh Circuit sided with the Government solely as to Grzegorczyk's waiver of rights.

Grzegorczyk petitioned for certiorari. The Government responded by asking this Court to issue a GVR order. See Brief for United States 7–8. The Government explains that "its usual practice is to waive any applicable procedural defenses on collateral review" where it "determines that a defendant's conviction under Section 924(c) is invalid and no other grounds support the defendant's overall sentence." *Id.*, at 10–11. Below, the Government did not follow this practice, and instead invoked Grzegorczyk's waiver, because it mistakenly believed §1958(a) to be a "crime of violence" under the elements clause of §924(c)(3)(A). Now, however, the Government has determined, in view of §1958(a)'s elements, that the offense does not satisfy the requirements of §924(c)(3)(A) and therefore does not constitute a "crime of violence." As a result, the Government "agrees . . . that [Grzegorczyk's] Section 924(c) conviction is . . . invalid," and it asks this Court to issue a GVR order to "allow the district court to reevaluate [Grzegorczyk's] sentence." *Id.*, at 10, 11.

The Government adds that GVR would permit correction of an additional error in Grzegorczyk's sentence: The parties had erroneously agreed that his §1958(a) conviction (for which the District Court imposed a sentence of 12 years and 7 months' incarceration) had a statutory maximum punishment of 20 years, when in fact the relevant statutory maximum was 10 years. Between the 2 years and 7 months of extrastatutory punishment imposed on the §1958(a) conviction and the 5 years imposed on the concededly invalid §924(c) conviction, then, over 7½ years of unlawful incarceration hang in the balance.

Nonetheless, this Court denies certiorari.

## II

Grzegorczyk's case falls comfortably within this Court's longstanding GVR practice, as codified in statute and applied in precedent. The authority for this practice stems from 28 U. S. C. §2106, which provides that "[t]he Supreme Court . . . may . . . vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and . . . require such further proceedings to be had as may be just under the circumstances."

This Court has historically exercised this broad grant of authority to issue GVR orders in many circumstances, including, as relevant here, "in light of the position asserted by the Solicitor General" (*e.g.*, where the Solicitor General confesses error). The Court has entered GVR orders on the Government's motion, without undertaking any express analysis of the merits, for well over a century. See, *e.g.*, *De Baca* v. *United States*, 189 U. S. 505 (1903) (*per curiam*) ("Error being confessed by the appellees, judgment reversed, and cause remanded with directions to proceed therein according to law"); *Ballin* v. *Magone*, 140 U. S. 670 (1891) (*per curiam*) ("Judgment reversed, with costs, by consent of [the Attorney General], who confessed error, and cause remanded to be proceeded in according to law and justice, on motion of *Mr Assistant Attorney General Maury* for defendant in error").[1]

In the modern era, the Court has explained that a GVR order may be appropriate even where the Solicitor General may not concede, or the Court may not perceive, an absolute certainty that the judgment would be different on remand:

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[1] Although these orders refer to reversal rather than vacatur, the difference in terminology appears to be an artifact of the era. See A. Bruhl, The Remand Power and the Supreme Court's Role, 96 Notre Dame L. Rev. 171, 195, n. 111, 231, n. 319 (2020) (Bruhl).

> "Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate. Whether a GVR order is ultimately appropriate depends further on the equities of the case . . . ." *Lawrence* v. *Chater*, 516 U. S. 163, 167–168 (1996) (*per curiam*).

The justifications for this "reasonable probability" standard are many. The Court has explained that a GVR order can, depending on the circumstances, "conserv[e] the scarce resources of this Court that might otherwise be expended on plenary consideration, assis[t] the court below by flagging a particular issue that it does not appear to have fully considered, assis[t] this Court by procuring the benefit of the lower court's insight before we rule on the merits, and alleviat[e] the '[p]otential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues." *Id.*, at 167. In the criminal context in particular, the Court has emphasized that "[w]hen a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated." *Stutson* v. *United States*, 516 U. S. 193, 196 (1996) (*per curiam*).

Applying this standard here, a GVR order is entirely appropriate. The Solicitor General's considered concession that 18 U. S. C. §1958(a) is not a "crime of violence" under the elements clause of §924(c)(3)(A) is an intervening development that has triggered the Government's agreement to

forgo assertion of the procedural bar that proved decisive below. Consequently, there is surely a reasonable probability of a different result on remand: With the Government waiving the procedural bar, Grzegorczyk's §924(c) conviction and 5-year sentence should be vacated, and his §1958(a) sentence reduced by at least 2 years and 7 months.[2] Moreover, given the stakes for Grzegorczyk, as well as the Government's express consent, this is a case where the marginal cost to judicial efficiency and finality from a remand should yield to solicitude for Grzegorczyk's rights. "[F]urther proceedings" are therefore "just under the circumstances," 28 U. S. C. §2106, and the Court should issue a GVR order.

## III

Notwithstanding the foregoing analysis, and contrary to *Lawrence* and *Stutson*, the Court denies certiorari. It thereby deprives Grzegorczyk of an opportunity to correct two patent errors in his convictions and sentences, despite the Government's urging. Current and former Members of this Court have raised arguments for constricting this Court's longstanding GVR practice, but none justify this harsh result.

Some Justices have opined, contrary to the aforementioned precedents, that GVR orders are inappropriate unless the Solicitor General confesses error in the outcome below, not just the reasoning, or the Court itself determines that the outcome was erroneous.[3] To begin with, however,

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[2] The courts below and the parties could also consider on remand whether any of the charges dismissed pursuant to Grzegorczyk's plea agreement should be revived, see Brief for United States 11, but any such consideration would not bear on the undisputed invalidity of Grzegorczyk's §924(c) conviction. The dismissed counts of Grzegorczyk's indictment also charged violations of §1958(a), which the Government now concedes are not "crime[s] of violence" for purposes of §924(c).

[3] See, *e.g.*, *Myers* v. *United States*, 587 U. S. ___, ___ (2019) (ROBERTS, C. J., dissenting) (slip op., at 1) (GVR order in a criminal case where the

this alternative view does not support the instant disposition. As the Solicitor General explains, the procedural bar on which the Court of Appeals premised its denial of relief to Grzegorczyk is waivable, and the Government would waive it on remand. See Brief for United States 11 (citing *Wood* v. *Milyard*, 566 U. S. 463, 472–473 (2012)). The Government's concession that Grzegorczyk's 18 U. S. C. §924(c) conviction is invalid, coupled with the Government's commitment to forgo reliance on the procedural bar, thus leaves little room for any result other than vacatur of (at least) that conviction and sentence.

Even setting aside the circumstances of this case, the alternative view fails on its own merits. It cannot be squared with the only textual limitation on the Court's statutory authority in such cases, which requires that a GVR order "be just under the circumstances." 28 U. S. C. §2106.[4] This Court's prior GVR practice recognizes that deprivations of process, particularly where the stakes for individual liti-

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Solicitor General "believe[d] the Eighth Circuit made some mistakes in its legal analysis, even if it ultimately reached the right result"); *Machado* v. *Holder*, 559 U. S. 966 (2010) (same) (GVR order in an immigration case where the Solicitor General "suggest[ed] that the Court of Appeals ignored petitioners' nonconstitutional claim of ineffective assistance of counsel" but "d[id] not . . . take the position that the judgment reached [below] was incorrect," and "this Court ha[d] not independently examined the merits of that judgment"); *Nunez* v. *United States*, 554 U. S. 911, 912 (2008) (Scalia, J., dissenting) ("In my view we have no power to set aside (vacate) another court's judgment unless we find it to be in error," or at least "when the Government, without conceding that a *judgment* is in error, merely suggests that the lower court's *basis* for the judgment is wrong").

[4] Justice Scalia suggested that "implicit [constitutional] limitations imposed . . . by the nature of the appellate system" may deprive this Court of the power to vacate judgments not determined to be in error. *Lawrence* v. *Chater*, 516 U. S. 163, 178 (1996) (dissenting opinion); see also *id.*, at 189–190. The Court correctly rejected this view as lacking any textual basis and as inconsistent with historical practice. *Id.,* at 166–167 (*per curiam*).

gants are high, are unjust in and of themselves. Such deprivations harm not only litigants but also the legal system itself, confidence in which is eroded when known, consequential, and remediable errors are needlessly left uncorrected. Cf. *Rosales-Mireles* v. *United States*, 585 U. S. ___, ___ (2018) (slip op., at 10) ("In broad strokes, the public legitimacy of our justice system relies on procedures that are 'neutral, accurate, consistent, trustworthy, and fair,' and that 'provide opportunities for error correction'"). Respect for these concerns can justify the marginal cost to efficiency and finality occasioned by a GVR order, as this Court has recognized. See, *e.g.*, *Stutson*, 516 U. S., at 197 ("'[D]ry formalism should not sterilize procedural resources which Congress has made available to the federal courts,'" at least where "a GVR order guarantees to the petitioner full and fair consideration of his rights . . . and is also satisfactory to the Government").[5]

The alternative view does a grave disservice to these principles. By dismissing GVR orders as mere "tutelary remand[s], as to a schoolboy made to do his homework again," *Lawrence*, 516 U. S., at 185–186 (Scalia, J., dissenting), it gives little or no weight to concerns about injustice to litigants and damage to public confidence. No doubt, this Court must guard zealously against unwarranted impositions upon "the hard-working judges of the [Courts of Appeals]." *Myers* v. *United States*, 587 U. S. ___, ___ (2019) (ROBERTS, C. J., dissenting) (slip op., at 1). Clearly, however, no judges would privilege their workloads above all

[5] The Court once valued these concerns so deeply that in unusual cases, it issued GVR orders even where purportedly independent grounds, decided by the court below, supported the judgment. See *Wellons* v. *Hall*, 558 U. S. 220, 222, 224 (2010) (*per curiam*) (issuing a GVR order where a Court of Appeals erroneously applied a procedural bar and also stated it would independently deny relief on the merits, because the Court of Appeals gave, "at most, perfunctory consideration" to the merits without the benefit of an evidentiary hearing, leaving this Court unsure whether the merits determination "really was independent" of the error).

other considerations, particularly courts' interest in the fair administration of justice.

The suggestion that this Court should independently evaluate a confession of error on the merits before issuing a GVR order also falters. This Court has often remarked that it is "a court of review, not of first view." *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005). The Court's longstanding GVR practice is consistent with that conception: It does not engage this Court in routine error correction, but leaves it to the lower courts to revisit their judgments, including possible alternative grounds for those judgments, in the first instance. See *Lawrence*, 516 U. S., at 167; *Stutson*, 516 U. S., at 197.[6] In this way, GVR orders enable the Government and the lower courts to share in the work of ensuring that our legal system does not erroneously "deny someone his liberty longer than the law permits." See *Hicks* v. *United States*, 582 U. S. ___, ___ (2017) (GORSUCH, J., concurring) (slip op., at 3).

Because none of the aforementioned objections apply to Grzegorczyk's petition, see *supra*, at 6–7, the Court's denial of certiorari must be premised on a different justification, one still more novel. That rationale seems to be this: The Government's shift in position, though an intervening development, is not the kind of development that warrants a GVR order. The Court's apparent concern is that although the Government concedes that the premise of the decision

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[6] This Court's issuance of GVR orders without forecasting definite outcomes on remand also accords with other established appellate practices. For example, an appellate court may vacate and remand for consideration of mootness without determining that a case is moot. Similarly, this Court frequently reverses or vacates a lower court's judgment on one ground, but remands for consideration of alternative grounds, such as harmlessness, that may ultimately support the lower court's original judgment. See Bruhl 232–233. Moreover, my colleagues do not appear to question this Court's authority to issue a GVR order where an intervening decision of this Court bears on the reasoning below, again without determining whether the judgment itself is invalid.

below (the Government's assertion of a procedural bar) has changed, the Government does not object to the legal analysis that flowed from that premise (that the procedural bar, if asserted, foreclosed Grzegorczyk's claim). See *ante,* at 1–2 (statement of KAVANAUGH, J., respecting denial of certiorari).

This Court's GVR practice, however, has never been so inflexibly focused on correcting legal errors. Rather, as explained, this Court has long issued GVR orders to facilitate the fair and just resolution of individual cases in the lower courts. See, *e.g.*, *Lawrence*, 516 U. S., at 174–175 (issuing a GVR order to allow a lower court to "consider [a new] administrative interpretation that appears contrary to the Government's narrow self-interest" and "furthe[r] fairness by treating Lawrence like other future benefits applicants"). It is therefore no answer to observe that the Government "should have no difficulty presenting [a] matter to subsequent panels of the [Court of Appeals]" in other cases. *Myers*, 587 U. S., at ___ (ROBERTS, C. J., dissenting) (slip op., at 2). The Government's future litigation positions offer cold comfort to a petitioner who must face additional years in prison, if not deportation or execution, based solely on happenstance, and despite the ready availability of a remedy that the Government affirmatively advocates.[7]

Ultimately, underpinning many criticisms of the Court's

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[7] Nor can the Court's denial of a GVR order be justified by the remote possibility of a Presidential pardon or commutation. See *ante,* at 2 (statement of KAVANAUGH, J.). Plainly, the Article II pardon power, which applies in all federal criminal cases, does not obviate or impliedly displace available judicial processes and remedies. To the contrary, while Presidential pardons and commutations may be granted as acts of mercy, to address changes in society or personal circumstances, or for other reasons, they have never been understood as mechanisms for correcting errors, whether by courts or by the Government. Moreover, relying on the theoretical availability of a pardon overlooks the fact that the courts, not just the Government, initially erred by approving Grzegorczyk's unlawful sentence in excess of the statutory maximum.

GVR practice seems to be a desire to teach the Government that it must live with its own litigation choices. That logic persuades where, for example, the Government appears to seek a GVR order as "part of an unfair or manipulative litigation strategy," such as an effort to avoid this Court's review of an issue. *Lawrence*, 516 U. S., at 168; see also *Hicks*, 582 U. S., at ___ (GORSUCH, J., concurring) (slip op., at 3) (cautioning against issuing a GVR order "when the confession bears the marks of gamesmanship"). It is inapt here. I agree that it would have been preferable for the Government to correct its mistake during the proceedings below. But the Government will learn no lesson, because it will pay no price. By denying certiorari rather than issuing a GVR order, the Court allocates the full cost of the Government's error to Grzegorczyk, who faces over 7½ extra years of incarceration as a result.

* * *

All agree that a GVR order is inappropriate when the outcome plainly would not change on remand. Here, however, significant portions of Grzegorczyk's convictions and sentences are unfair and illegal, as Grzegorczyk's prosecuting and jailing authority concedes. In view of Grzegorczyk's liberty interests, and consistent with the Government's responsibility to ensure that the laws are applied fairly and accurately, the Solicitor General asks this Court to afford the Government and the courts below a chance to address this concern, as the Court has done for decades. Yet the Court declines to do so. The rules of law under which people are deprived of their liberty or their lives should be made of sturdier stuff. I respectfully dissent.

# SUPREME COURT OF THE UNITED STATES

PAUL DAVID STOREY *v.* BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 21–6674. Decided June 30, 2022

The petition for a writ of certiorari is denied.

Statement of JUSTICE SOTOMAYOR respecting the denial of certiorari.

The facts of this case offer a cautionary tale for those Courts of Appeals that have yet to define what constitutes a restricted "second or successive habeas corpus application," 28 U. S. C. §2244(b)(2), in the context of prosecutorial misconduct. I write to underscore how erroneous the Fifth Circuit's definition is and how it unfairly deprives individuals of an opportunity to raise serious claims of prosecutorial malfeasance in federal habeas proceedings.

After a jury convicted petitioner Paul David Storey of murdering Jonas Cherry in the course of a robbery, prosecutors argued for a death sentence. In the State's punishment-phase closing argument, a prosecutor told the jury: "[I]t should go without saying that all of Jonas's family and everyone who loved him believe the death penalty is appropriate." *Ex parte Storey*, 584 S. W. 3d 437, 447 (Tex. Crim. App. 2019) (Walker, J., dissenting). The jury sentenced Storey to death.

In December 2016, eight years after trial and months before Storey's scheduled execution, Storey's counsel learned that the prosecutor's assertion during the punishment-phase closing arguments was false. In truth, Cherry's parents vigorously and consistently opposed the State's choice

to seek the death penalty for Storey. Cherry's parents communicated their views to the State's prosecutors before trial, including the prosecutor who told the jury otherwise in closing. But the State never disclosed Cherry's parents' wishes to Storey or his counsel. Instead, the prosecutor knowingly and affirmatively misrepresented those wishes to the jury in order to secure a death sentence.

Based on this revelation, Storey sought postconviction relief in state court. He asserted that the State's misconduct during his prosecution violated the constitutional rules set forth in cases like *Brady* v. *Maryland*, 373 U. S. 83 (1963) (State's failure to turn over exculpatory evidence violates due process), and *Napue* v. *Illinois*, 360 U. S. 264 (1959) (State's elicitation of knowingly false testimony violates due process). Because Storey had previously filed an application for postconviction relief, Texas law required Storey to establish that the factual basis for his new claims was unavailable when he filed his first application. See Tex. Code Crim. Proc. Ann., Art. 11.071, §5(a)(1) (Vernon Supp. 2006). A state postconviction court found this standard satisfied, held that the prosecutor's knowingly false statement in closing argument violated the Constitution, and recommended that Storey receive a new punishment trial.

A fractured Texas Court of Criminal Appeals reversed. The majority held that Storey could not bring his misconduct claims because he had failed to show that those claims' factual basis was not previously available through the exercise of reasonable diligence. The majority reached this conclusion in part because although Storey's prior postconviction counsel (who by then was deceased) had a strong reputation for diligence, Storey had been unable to present specific evidence proving that this deceased attorney had exercised diligence in his particular case. *Ex parte Storey*, 584 S. W. 3d, at 439. Judge Yeary and Judge Walker filed dissents, both joined by Judge Slaughter.

Storey then sought relief in federal court, which the Fifth

Circuit ultimately denied on federal procedural grounds. See 8 F. 4th 382 (2021). The State argued that Storey's request for relief constituted a "second or successive habeas corpus application" under 28 U. S. C. §2244(b), which bars federal courts from considering such applications except in limited circumstances not present here. Storey maintained that his request was not "'an abuse of the writ'" under this Court's case law and therefore not successive, given that he was not aware of the State's misconduct until late 2016. *Banister* v. *Davis*, 590 U. S. ___, ___ (2020) (slip op., at 7); see *ibid.* (explaining that if a "later-in-time filing would have 'constituted an abuse of the writ'" under "'our prior habeas corpus cases,'" "it is successive; if not, likely not"). The Fifth Circuit concluded otherwise, finding itself bound by Circuit precedent holding that "'*Brady* claims raised in second-in-time habeas petitions are successive regardless of whether the petitioner knew about the alleged suppression when he filed his first habeas petition.'" 8 F. 4th, at 392 (quoting *In re Will*, 970 F. 3d 536, 540 (CA5 2020)).

As I have previously explained, the Fifth Circuit's "illogical rule" defining "second or successive" in this fashion "rewards prosecutors who successfully conceal their *Brady* and *Napue* violations until after an inmate has sought relief from his convictions on other grounds." *Bernard* v. *United States*, 592 U. S. ___, ___ (2020) (dissenting opinion) (slip op., at 4). "Under this rule, prosecutors can run out the clock and escape any responsibility for all but the most extreme violations." *Id.*, at ___ (slip op., at 5).

The Fifth Circuit's rule contravenes this Court's precedent. *Panetti* v. *Quarterman*, 551 U. S. 930 (2007), holds that a petition bringing a claim that was not ripe when the petitioner filed his first-in-time petition is not "second or successive." That reasoning "applies with full force to *Brady* claims" like Storey's, where the issue is that the State unlawfully failed to disclose evidence favorable to the

defense, and the petitioner is not aware of that evidence until after the first-in-time petition. *Bernard*, 592 U. S., at ___–___ (SOTOMAYOR, J., dissenting) (slip op., at 4–5). By ignoring *Panetti*'s logic, the Fifth Circuit's rule improperly "produce[s] troublesome results, create[s] procedural anomalies, and close[s] our doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Panetti*, 551 U. S., at 946 (internal quotation marks omitted).*

The posture of Storey's case renders it a poor fit for this Court's review. His case, however, illustrates the injustice that can flow from an overbroad view, unsupported by precedent, of what constitutes a "second or successive" habeas petition. Prosecutors not only failed to disclose Cherry's parents' unwavering desire that Storey not be sentenced to death, but also misled the jury in summation to successfully secure a death sentence. The State then ran out the clock by failing to disclose its malfeasance throughout Storey's initial postconviction proceedings. When Storey later sought postconviction relief based on the facts the State had misrepresented, the sole court to decide the merits of his misconduct claims found him entitled to receive a new punishment trial. But under the Fifth Circuit's irrational rule, it was too late: Storey should have raised these claims in his first federal habeas petition, regardless of the extent of the State's malfeasance or whether he could have known of it at that time. As a result, Storey now faces the possibility of execution without resolution of his claims. I trust that

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*At least three other Courts of Appeals have adopted the same erroneous interpretation as the Fifth Circuit. See *In re Wogenstahl*, 902 F. 3d 621, 626–628 (CA6 2018) (*per curiam*); *Brown* v. *Muniz*, 889 F. 3d 661, 668–671 (CA9 2018); *Tompkins* v. *Secretary, Dept. of Corrections*, 557 F. 3d 1257, 1259–1260 (CA11 2009) (*per curiam*). But see *Scott* v. *United States*, 890 F. 3d 1239, 1254–1258 (CA11 2018) (disagreeing with *Tompkins* at length but following it as binding); *In re Jackson*, 12 F. 4th 604, 611–616 (CA6 2021) (Moore, J., concurring) (opining that *Wogenstahl* was wrongly decided).

other federal courts will pay closer heed to *Panetti* and *Banister* when they confront this important issue.

# SUPREME COURT OF THE UNITED STATES

## ANIBAL CANALES, JR. *v.* BOBBY LUMPKIN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

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

No. 20–7065. Decided June 30, 2022

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, dissenting from the denial of certiorari.

A jury sentenced Anibal Canales, Jr., to death without hearing any meaningful evidence about why life in prison might be punishment enough. The mitigating evidence put on by Canales' counsel was so thin that the prosecutor remarked in closing that it was "'an incredibly sad tribute that when a man's life is on the line, about the only good thing we can say about him is he's a good artist.'" *Canales* v. *Davis*, 966 F. 3d 409, 417 (CA5 2020) (Higginbotham, J., dissenting) (*Canales II*). In reality, whether to sentence Canales to death was a far more complicated question. Competent counsel would have told the jury of "a tragic childhood rife with violence, sexual abuse, poverty, neglect, and homelessness"; of Canales' kindness to his mother and sisters; and "of a man beset by PTSD, a failing heart, and the dangers of prison life" when he committed the crime for which he was sentenced to die. *Ibid.* The jury had no chance to balance this humanizing evidence against the State's case.

A divided panel of the Court of Appeals for the Fifth Circuit nonetheless held that defense counsel's deficient performance did not prejudice Canales. In the majority's view, the State's case was so weighty that this mitigating evidence would have made no difference. That was wrong, as

Judge Higginbotham fully explained in his dissent, *id.,* at 417–418, 420–428, and as our precedents make clear, see *Porter* v. *McCollum*, 558 U. S. 30, 41–42 (2009) (*per curiam*); *Rompilla* v. *Beard*, 545 U. S. 374, 390–393 (2005); *Wiggins* v. *Smith*, 539 U. S. 510, 536–537 (2003); *Williams* v. *Taylor*, 529 U. S. 362, 397–398 (2000).

The Constitution guarantees fundamental rights even to those who commit terrible crimes. Whether to impose the ultimate punishment of death is a complex judgment that requires viewing the defendant as a full and unique individual. Such careful consideration is impossible when incompetent defense counsel prevents the jury from hearing substantial mitigating evidence, leaving nothing to consider but the defendant's crimes. Here, there is more than a reasonable probability that the undisclosed mitigating evidence would have led at least one juror to choose life in prison rather than death. The legal errors of the majority below, involving life-or-death stakes, are so clear that I would summarily reverse.

## I

### A

The evidence uncovered during the federal habeas proceedings below shows the following. Anibal "Andy" Canales, Jr., was born in Waukegan, Illinois, on December 1, 1964. Electronic Case Filing in *Canales* v. *Director, Texas Dept. of Corrections*, No. 2:03–cv–00069 (ED Tex., Dec. 1, 2016) (ECF), Doc. 220–1, p. 3. His sister, Elizabeth, was born just over a year later. Canales' parents were alcoholics and his father was violent. After his parents split up, Canales' mother married Carlos Espinoza, who spent the next six years physically and sexually abusing Canales and Elizabeth. As Elizabeth stated, "'Andy had to strip sometimes to be beaten. . . . I remember seeing Andy lying naked, curled up in a ball, and Carlos hitting him as hard as he could with the buckle end of the belt. Carlos would beat

Andy until he had welts and bruises all over his body.'" *Id.,* at 26. When Canales was just six years old, Espinoza sexually assaulted him. Canales twice witnessed his stepfather rape his little sister and tried to intervene, only to receive further beatings.

Canales' mother, meanwhile, was largely absent. Canales' cousin, a child herself, babysat in exchange for beer and cigarettes. Canales began drinking when he was about 10. His family lived in dire poverty in neighborhoods where gang membership was common. Canales witnessed a man get shot to death in the street when he was only six. Around age eight or nine, Canales was forced to join the Latin Kings. He had been shot at and stabbed by the time he was 12.

Canales' mother eventually left Espinoza and moved to San Antonio with Elizabeth and Canales' half-sister, Gabriela. Canales, however, was sent to Houston to live with his father. Later that year, his father relocated to Laredo and the family made clear to Canales that he could not come. Completely abandoned by his parents, Canales fell deeper into crime and substance abuse. He was arrested for car theft at 13, and by 14 was an alcoholic.

Canales ultimately made his way to San Antonio, where he alternated between juvenile detention facilities, homelessness, and living with his mother in other families' homes. The family found more stable housing when his mother moved in with John Ramirez, but Ramirez was just another in a string of cruel father figures. Ramirez beat Canales' mother and Elizabeth when Canales, now in his late teens, was not around to stop him. In Elizabeth's words, "'Andy was too big to beat so I was safe whenever Andy was around.'" *Id.,* at 28. "'He was always brave when I needed him to be. I will forever be grateful for that. . . . We love him.'" *Id.,* at 16. Gabriela likewise observed that "'Andy had a kind heart and he loved my mom, me and Elizabeth a lot.'" *Id.*, at 37.

In 1983, when he was 18, Canales stole an income tax check from Ramirez. Ramirez insisted on prosecution. In Elizabeth's words, "'Ramirez wanted Andy out of the way and that is why he pursued Andy's prosecution for the stolen check. He wanted access to my mom and Gabriela and me. Andy was protective of all of us.'" *Id.,* at 31. That stolen check sent Canales to federal prison. Later that same year, he was convicted of theft and sexual assault, and received a 15-year sentence, during which he joined the Texas Syndicate prison gang.

Canales was paroled in 1990 and started building a new life. He did not drink excessively or use drugs, and instead was "'affectionate'" with his girlfriend and "'help[ed] out at home.'" *Id.,* at 38. The two discussed getting married. But two years into Canales' parole, his mother suffered a brain aneurysm, losing her motor function and ability to speak. Canales was devastated. He turned back to drugs and alcohol and his relationship ended. By 1993, he had been convicted of a second sexual assault, his parole was revoked, and he returned to prison.

Canales suffered a heart attack in prison and was placed on blood thinners, which caused him to bruise easily and bleed for hours if he sustained a cut. He could not defend himself, and other inmates knew it. When they discovered that Canales had prior sex offense convictions and had been a member of the Latin Kings, the Texas Syndicate ordered him killed. Canales' cellmate, Bruce Richards, was a leader in another prison gang, the Texas Mafia. Richards agreed to admit Canales to the Texas Mafia and made a deal with the Syndicate for his protection. Canales thus owed Richards his life.

Shortly thereafter, and on Richards' instruction, Canales helped kill an inmate named Gary Dickerson, who was blackmailing the gang. Richards also instructed Canales to write a note to another inmate exaggerating Canales' role in the murder. As Richards later explained, "'If [Canales]

refused to do what I told him[,] I would have sent him back to the Texas Syndicate, and he would be killed.'" *Canales II*, 966 F. 3d, at 418 (Higginbotham, J., dissenting).

B

Canales was convicted of the killing, and the State sought the death penalty. At the sentencing phase, the State submitted documentary evidence of Canales' conviction for theft and multiple convictions for sexual assault. One of Canales' sexual assault victims testified that Canales approached her in a parking lot, told her he was a police officer and that she was under arrest, drove her to the woods, and raped her. *Id.,* at 413, 416. The State entered into evidence two letters from Canales, one asking the Texas Mafia to murder an inmate whom Canales believed was cooperating with the prosecution, and another that more vaguely threatened cooperators. *Canales* v. *Stephens*, 765 F. 3d 551, 560–561 (CA5 2014) (*per curiam*) (*Canales I*).

Defense counsel barely responded. By their own admission, "they did not conduct *any* mitigation investigation." *Id.,* at 569. They put on no evidence that the Texas Syndicate would have killed Canales had he not participated in the murder. Nor did the jury hear about the unspeakable, unrelenting cruelties Canales witnessed and suffered at the hands of those closest to him, or hear Canales' sisters testify that he protected them in their darkest hours. Instead, defense counsel called several inmates and officers who testified that Canales "did not cause trouble, had an aptitude for art, and received few visits from family, and that he had tried to stop inmates from fighting." *Canales II*, 966 F. 3d, at 413–414.

The entire sentencing proceeding lasted just a day. The jury returned a recommendation of death the next morning.

II

After his conviction and sentence became final, Canales

sought state postconviction relief. Canales' state postconviction attorney failed to argue that Canales' trial counsel had provided ineffective assistance at the sentencing phase.

In federal habeas proceedings, Canales (now represented by competent counsel) argued that his trial counsel had provided ineffective assistance. The District Court dismissed that claim as procedurally defaulted. While Canales' appeal was pending, this Court decided *Trevino* v. *Thaler*, 569 U. S. 413 (2013), holding that a federal court may consider a substantial claim of ineffective assistance of trial counsel, even if not presented in state court, if the petitioner was effectively barred from asserting that claim until state postconviction proceedings, and the petitioner's counsel in those proceedings was also ineffective.

In light of *Trevino*, the Fifth Circuit found that there was cause to excuse the procedural default of Canales' claim that trial counsel was ineffective during the sentencing phase. The Fifth Circuit further held that Canales' trial counsel had rendered deficient performance during the sentencing phase, that Canales' claim that this deficient performance prejudiced him had "some merit," and that state postconviction counsel had been deficient for failing to raise this "substantial" trial-ineffectiveness claim. *Canales I*, 765 F. 3d, at 570–571.[1] The Fifth Circuit remanded to allow Canales a "chance to develop the factual basis" of his trial-ineffectiveness claim, as well as for the District Court to decide prejudice in the first instance. *Ibid.*

On remand, Canales' counsel sought funding to hire mitigation experts. Texas did not dispute that the District Court could consider expert mitigation evidence, but opposed the motion on the grounds that no amount of mitigat-

[1] The Fifth Circuit found that Canales had not "established cause for the procedural default of his claim of ineffective assistance of trial counsel during the guilt phase," as opposed to the sentencing phase, "because the claim is not substantial." *Canales I*, 765 F. 3d, at 568.

ing evidence could overcome the aggravating evidence already in the record. The District Court granted the motion for funding, and Canales' counsel retained three mitigation experts who reviewed medical, legal, and prison records and examined Canales. As exhibits to his brief regarding prejudice, Canales attached three expert reports accompanied by affidavits that revealed, for the first time, the significant evidence of mitigation previously recounted. See *supra,* at 2–5.

Texas filed its own brief denying that Canales suffered any prejudice. In doing so, Texas did not argue that the District Court could not consider the mitigation evidence. Indeed, Texas recognized that it "would be difficult to refute Canales's assertion that the mitigation evidence counsel failed to present at trial paints a gripping picture of Canales's tragic, troubled childhood." ECF Doc. 228, at 17. Taking that evidence as a given, Texas nevertheless argued that the mitigation evidence "must be considered in conjunction with, and weighed against, the evidence in aggravation," and that the gripping picture painted by the mitigation evidence was outweighed by the aggravating evidence. *Ibid.*

The District Court agreed with Texas, characterizing Canales' evidence of "gang violence, alcohol, drugs, and physical and sexual abuse" as "double-edged" because it could "'be read by the jury to support, rather than detract, from his future dangerousness claim.'" ECF Doc. 237, at 19. The District Court concluded that the aggravating evidence "far outweigh[ed]" the mitigating evidence. *Id.,* at 17.

Canales sought a certificate of appealability from the Fifth Circuit. In opposition, Texas again did not argue that the District Court erred by considering Canales' evidence of mitigation. To the contrary, Texas argued that a district court "must consider whether, and to what extent, the unpresented evidence may be double-edged," and urged the Fifth Circuit not to "ignore the potential aggravating effect"

of Canales' new evidence. Respondent-Appellee's Opposition to Motion for Certificate of Appealability in *Canales* v. *Davis*, No. 18–70009 (CA5), p. 29. The Fifth Circuit granted a certificate of appealability.

Texas then argued in its appeal brief on the merits, for the first time, that the District Court erred by considering the three expert mitigation reports. The Fifth Circuit did not decide this argument and recognized that Texas had previously "failed to object to the new evidence under 28 U. S. C. §2254(e)(2)." *Canales II*, 966 F. 3d, at 412, n. 1; see also *id.*, at 419 (Higginbotham, J., dissenting) ("The State offers no explanation for its election to fully participate in the district court in the development of evidence"). The Fifth Circuit instead affirmed on the grounds on which the District Court relied, namely, that Canales' "new mitigating evidence . . . does not outweigh the aggravating evidence" in the record. *Id.,* at 414.

## III

### A

To establish prejudice, Canales must show a reasonable probability that the jury would have returned a different sentence but for his counsel's ineffectiveness. See *Wiggins*, 539 U. S., at 536. In judging whether he has done so, the court must consider "the totality of the available mitigation evidence" and "reweig[h] it against the evidence in aggravation." *Williams*, 529 U. S., at 397–398. Because his death sentence required a unanimous jury, Tex. Code Crim. Proc. Ann., Art. 37.071 (Vernon 2000), Canales must demonstrate only "a reasonable probability that at least one juror would have struck a different balance" with the benefit of this mitigating evidence, *Wiggins*, 539 U. S., at 537. He has done so.

Here, jurors heard essentially nothing from Canales' trial counsel that would enable them to gauge accurately his moral culpability, as Texas law requires. Now, thanks to

the efforts of Canales' federal habeas counsel (efforts that trial counsel, or at least state postconviction counsel, should have undertaken in the first instance), it is clear that the presentation before the jury was woefully deficient. Put simply, "there exists too much mitigating evidence that was not presented" to be ignored now. *Porter*, 558 U. S., at 44 (internal quotation marks omitted).[2]

This Court has repeatedly recognized that failing to put exactly this type of evidence before the jury casts irreparable doubt on the integrity of its recommendation of death. See *id.*, at 41 ("Had Porter's counsel been effective, the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability,'" including a "childhood history of physical abuse"); *Rompilla*, 545 U. S., 391–392 ("'Rompilla's parents were both severe alcoholics who drank constantly. . . . He was abused by his father who beat him when he was young with his hands, fists, leather straps,

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[2] Contrary to Texas' belated argument, see Brief in Opposition 16–20, 28 U. S. C. §2254(e)(2) poses no barrier to consideration of Canales' mitigation evidence. This Court recently held in *Shinn* v. *Martinez Ramirez*, 596 U. S. ___, ___ (2022) (slip op., at 13), that §2254(e)(2) precludes a district court from "consider[ing] evidence beyond the state-court record based on ineffective assistance of state postconviction counsel." Texas, however, waived (or at the very least forfeited) any §2254(e)(2) argument by "fail[ing] to object to the new evidence under 28 U. S. C. §2254(e)(2), only arguing it was unnecessary, not improper" before the District Court, as well as before the Fifth Circuit at the certificate-of-appealability stage. *Canales* v. *Davis*, 966 F. 3d 409, 412, n. 1 (2020).

Texas does not argue that §2254(e)(2) is immune to waiver or forfeiture, nor could it. This Court has concluded that another provision of the Antiterrorism and Effective Death Penalty Act, its statute of limitations, is not jurisdictional and therefore may be waived or forfeited. See *Day* v. *McDonough*, 547 U. S. 198, 205 (2006) (interpreting §2244(d)(1)). Like that provision, §2254(e)(2) does not "speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Zipes* v. *Trans World Airlines, Inc.*, 455 U. S. 385, 394 (1982).

belts and sticks. All of the children lived in terror'"); *Wiggins*, 539 U. S., at 534–535 (noting the "powerful" mitigating effect of evidence of "severe privation and abuse in the first six years of [the defendant's] life while in the custody of his alcoholic, absentee mother," "physical torment, sexual molestation," and time "spent homeless"); *Williams*, 529 U. S., at 398 ("[T]he graphic description of Williams' childhood, filled with abuse and privation, . . . might well have influenced the jury's appraisal of his moral culpability").

To be sure, Canales committed several violent sexual assaults and "a cold and calculated gang-related murder, and he ha[d] a history of threatening and seeking murder." *Canales II*, 966 F. 3d, at 417. It is therefore "possible that [many jurors] could have heard" all the mitigating evidence obtained after trial "and still have decided on the death penalty." *Rompilla*, 545 U. S., at 393. Many judges reviewing Canales' petition may be sure that they would recommend death, were they sitting on a hypothetical jury that heard all this evidence.

But "that is not the test." *Ibid.* Even if the mitigating evidence "may not have overcome a finding of future dangerousness," it "might well have influenced the jury's appraisal of [Canales'] moral culpability." *Williams*, 529 U. S., at 398. Measured against "the totality of the available mitigation evidence," *id.*, at 397, which even the State characterized as painting a gripping picture of a tragic childhood, the State's evidence would have appeared dramatically different. "[T]here is a reasonable probability that at least one juror would have struck a different balance." *Wiggins*, 539 U. S., at 537.

B

The Fifth Circuit reached a contrary conclusion largely by "fram[ing] the prejudice inquiry as a comparison of the facts here to the facts" in *Wiggins*, *Williams*, *Rompilla*, and *Porter*, and "faulting Canales's mitigating evidence for not

neatly aligning with the evidence in those cases." *Canales II*, 966 F. 3d, at 423 (Higginbotham, J., dissenting); see also *id.,* at 415–416, and nn. 2, 5 (majority opinion).

In *Andrus* v. *Texas*, 590 U. S. ___ (2020) (*per curiam*), this Court warned against exactly that approach, noting "that we have never before equated what was sufficient in *Wiggins* with what is necessary to establish prejudice." *Id.,* at ___, n. 6 (slip op., at 18, n. 6). Indeed, in *Wiggins* itself, the Court stressed that the defendant had shown more than enough to establish prejudice. See 539 U. S., at 537–538 (explaining that "the mitigating evidence in [that] case [was] stronger, and the State's evidence in support of the death penalty far weaker, than in *Williams*," where the Court also found prejudice). The same was true in *Rompilla*, where the defendant had "shown beyond any doubt that counsel's lapse was prejudicial." 545 U. S., at 390. It went "without saying that the undiscovered mitigating evidence . . . might well have influenced the jury's appraisal of Rompilla's culpability." *Id.,* at 393 (internal quotation marks and brackets omitted).

Nor do *Williams* and *Porter* set a lower bound for establishing prejudice. Each came to this Court on collateral review of a state court's decision on the merits, meaning that the mitigating evidence was so strong that no "fairminded juris[t] could disagree" that the relevant state courts erred by finding a lack of prejudice. *Harrington* v. *Richter*, 562 U. S. 86, 101 (2011) (internal quotation marks omitted); see *Williams*, 529 U. S., at 399; *Porter*, 558 U. S., at 40–44. Canales' claim, by contrast, warrants *de novo* review. See 966 F. 3d, at 420–421 (Higginbotham, J., dissenting). In any event, as Judge Higginbotham ably explained, the omitted evidence in this case is quite comparable to (and in some ways stronger than) the evidence in those prior cases. See *id.,* at 424–425.

No two capital defendants will ever be the same. "[T]hat

is precisely why" reviewing courts must "'reweigh' the evidence" themselves, focusing on the full picture of the individual before them, "to avoid the drift of precedent into a paint-by-numbers guide to prejudice." *Id.*, at 425.

* * *

Canales' crimes were brutal, and he deserves just punishment. Under our Constitution, however, no person's crime is so terrible that he loses his right to the effective assistance of counsel. That is especially true when he faces execution. If the right to counsel means anything, it means that the State should not take someone's life when incompetent counsel failed to offer a meaningful mitigation defense.

The jury did not see the full picture of Anibal Canales when they sentenced him to die. The jury never heard "the voluminous mitigating evidence now before this Court," so it "could only assume that there was none." *Id.*, at 427. His life story was more than the "'sad tribute'" that he was a "'good artist.'" See *supra,* at 1. If the jurors had a richer understanding of the man before them, there is a more than reasonable probability that at least one would have found a lifetime in prison to suffice. Canales has been denied his right to put that evidence before the jury, first by ineffective counsel and now by the courts. I would summarily reverse.

# SUPREME COURT OF THE UNITED STATES

SELINA MARIE RAMIREZ, ET AL. *v.* JEREMIAS GUADARRAMA, ET AL.

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

No. 21–778. Decided June 30, 2022

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, dissenting from the denial of certiorari.

Petitioners, Selina Marie Ramirez and her two children, called 911 when Gabriel Eduardo Olivas (their husband and father, respectively) threatened to commit suicide and burn down the house. Ramirez and her children allege that, when the police arrived, two officers discharged their tasers at Olivas after he doused himself in gasoline in their presence, despite knowing from their training that tasers employ electrical charges that ignite gasoline, and despite a third officer's warning just moments earlier that "'[i]f we tase him, he is going to light on fire.'" 3 F. 4th 129, 132 (CA5 2021). As Ramirez and her son watched, Olivas indeed "burst into flames." *Ibid.* Ramirez and her children were safely evacuated, but Olivas died of his injuries, and the family's house burned to the ground.

When petitioners sued under 42 U. S. C. §1983, alleging in relevant part that the officers used excessive force in violation of the Fourth Amendment when they tased Olivas and lit him on fire, the officers moved to dismiss the complaint before discovery, claiming that qualified immunity shielded them from liability. The District Court denied the motions without prejudice, concluding that factual development was required before it could determine whether qual-

ified immunity was appropriate. The Fifth Circuit reversed, granting qualified immunity to the officers as a matter of law. The court acknowledged that "use of a taser in unwarranted circumstances can be unconstitutional." 3 F. 4th, at 135. It concluded, however, that petitioners had not shown that Olivas had any "clearly established" "constitutional right not to be tased" and "caus[ed] . . . to burst into flames." *Id.,* at 132, 134.

The Fifth Circuit denied rehearing en banc. Judge Willett joined by two other judges dissented, explaining that the Fourth Amendment violation was obvious if the "'particularly egregious facts'" were accepted as alleged in the complaint. 2 F. 4th 506, 514 (2021) (quoting *Taylor* v. *Riojas*, 592 U. S. ___, ___ (2020) (*per curiam*) (slip op., at 3)). As Judge Willett explained, the panel held to the contrary only by erroneously "blurr[ing]" the motion-to-dismiss standard with "something resembling summary-judgment review." 2 F. 4th, at 517–518. For instance, the panel concluded that the officers' use of deadly force was reasonable because Olivas "posed a substantial and immediate risk of death or serious bodily injury to himself and everyone in the house" and "the officers had no apparent options" other than to tase Ramirez. 3 F. 4th, at 135–136. The complaint, however, alleged that petitioners and the officers were not at immediate risk but at a safe distance away from Olivas, standing in a doorway such that they could immediately exit the room if Olivas lit himself on fire. Petitioners alleged that officers were able to immobilize Olivas with pepper spray and could have subdued him in that manner, but failed to do so. More to the point, the complaint alleged that the officers were aware that tasing Olivas would light him on fire and thereby "tur[n] risk into reality." 2 F. 4th, at 519.

For the reasons ably set forth by Judge Willett, I would summarily reverse the Fifth Circuit's grant of qualified im-

munity at the motion-to-dismiss stage, a stage at which petitioners' well-pleaded allegations must be accepted as true. According to those allegations, the officers elected to use force knowing that it would directly cause the very outcome they claim to have sought to avoid. That is, to prevent Olivas from lighting himself on fire and burning down the house, the officers tased Olivas just after they were warned that it would light him on fire. This Court's precedent establishes that "the 'reasonableness' of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out." *Graham* v. *Connor*, 490 U. S. 386, 395 (1989). See *Tennessee* v. *Garner*, 471 U. S. 1, 7–8 (1985). Using deadly force that does no more than knowingly effectuate the exact danger to be forestalled is clearly unreasonable under this standard.

While "this Court is not equipped to correct every perceived error coming from the lower federal courts," it has deemed intervention appropriate where a Court of Appeals decision reflects a misapprehension of the standard for assessing excessive force claims at the stage of the litigation concerned. *Tolan* v. *Cotton*, 572 U. S. 650, 659 (2014) (*per curiam*) (internal quotation marks omitted) (summarily reversing grant of qualified immunity in a Fourth Amendment excessive force case to correct "a clear misapprehension of summary judgment standards in light of our precedents"). Factual development may reveal a different story, but, as relevant now, Ramirez and her family have plausibly alleged that the officers they called to prevent their husband and father's death instead used excessive force that predictably caused his death and the loss of their home. Under this Court's precedents, that claim is entitled to proceed to discovery to determine whether the family is entitled to some recompense for their unnecessary losses. I respectfully dissent.

# SUPREME COURT OF THE UNITED STATES

PATSY K. COPE, ET AL. *v.* LESLIE W. COGDILL, ET AL.

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

No. 21–783. Decided June 30, 2022

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, dissenting from the denial of certiorari.

Jail officials placed Derrek Monroe, a pretrial detainee whom they knew to have twice recently attempted suicide by strangulation, in a cell with a 30-inch telephone cord, an obvious ligature, contrary to statewide guidance and at least one official's training. The lone jailer on duty then watched for approximately 10 minutes as Monroe wrapped the cord tightly around his neck and grew motionless. The jailer had neglected to call 911, despite having been specifically trained to do so. Monroe died the next day. The Fifth Circuit concluded that the jail officials were entitled to qualified immunity. I disagree and would summarily reverse.

## I

The facts and circumstances surrounding Monroe's suicide are not in dispute. Monroe was arrested on a suspected drug offense and booked at a county jail. During intake, he stated on a screening form that he "'wished [he] had a way to'" kill himself that day. 3 F. 4th 198, 202 (CA5 2021). The form also reported that he had attempted suicide two weeks earlier, had received psychiatric services, had been diagnosed with "'some sort of schizophrenia,'" and displayed other signs of mental illness and emotional disturbance. *Ibid.* This information was relayed to Sheriff Leslie Cogdill and jail administrator Mary Jo Brixey. Brixey placed Monroe on a temporary suicide watch.

The following day, Monroe had a medical incident that required treatment at a local hospital. After receiving treatment, he was returned to the jail and placed in a cell with other inmates. Almost immediately, he twice attempted suicide by strangulation. He first tried wrapping a blanket around his neck, and after that did not work, he climbed atop the cell's toilet, tied a cloth to a fixture, and tried to hang himself by jumping off. Jailer Jessie Laws witnessed both attempts.

Respondents Cogdill and Brixey decided to relocate Monroe to an isolation cell, contrary to Cogdill's training as a sheriff, which instructed that isolating a suicidal detainee was dangerous and disfavored. Worse, Monroe's isolation cell contained an obvious risk for suicide by strangulation: a telephone mounted to the wall with a 30-inch telephone cord. The decision to place him in a cell with a ligature of that length contravened guidance issued two years earlier by the Texas Commission on Jail Standards in a memorandum addressed to all sheriffs and jail administrators. The memorandum specifically addressed telephone cords, recounting that four suicides involving telephone cords had occurred in Texas jails in the span of 11 months and advising that all telephone cords should be 12 inches or shorter in length.

Jail surveillance video captured what happened the next morning. Laws escorted Monroe to the shower and back to his cell. Once confined in his cell, Monroe began acting erratically and was visibly upset: He overflowed the toilet in his cell, began beating the toilet with a plunger, and slammed the telephone receiver against the wall. He then wrapped the telephone cord tightly around his neck several times, all while Laws watched through the bars of the cell.

Jail policy prohibited jailers from entering a cell when backup personnel were not present. Although Laws was specifically trained to call emergency medical services immediately in such circumstances, and jail policy required

him to do so, he did not call 911. When later asked why, he responded, "'Honestly, I don't know.'" *Id.*, at 214 (Dennis, J., dissenting). Instead, Laws called his supervisors, Cogdill and Brixey, who were off duty and off premises and therefore unable to respond quickly.

A minute or two after Monroe began strangling himself, his body stopped moving. For the next five minutes, Laws stood outside Monroe's cell, peering into the cell several times and checking his watch. Brixey arrived at the jail about 10 minutes after Monroe began strangling himself, and Laws unlocked the cell and unwrapped the cord from Monroe's neck. Neither Laws nor Brixey attempted to resuscitate Monroe. Brixey eventually left to call emergency medical services, which arrived approximately five minutes after Brixey called (and approximately 16 minutes after Monroe first wrapped the cord around his neck). Monroe still had a pulse and emergency medical services began performing chest compressions on their arrival. Monroe died in the hospital the following day.

Petitioner Patsy Cope, Monroe's mother, sued respondents in Federal District Court, alleging that they violated the Due Process Clause of the Fourteenth Amendment by acting objectively unreasonably in their treatment of Monroe and denying him appropriate medical care, despite being aware of the risk that he would commit suicide in an isolation cell with a 30-inch telephone cord. The officers moved for summary judgment, arguing that they were entitled to qualified immunity; the District Court disagreed and held that disputes of material fact precluded summary judgment.

Over a vigorous dissent by Judge Dennis, the Fifth Circuit reversed. As to respondent Laws, the Fifth Circuit concluded that "at the very least," petitioner presented sufficient evidence to create a genuine dispute of material fact as to whether Laws had subjective knowledge of the risk of

serious harm, given that Laws had witnessed Monroe attempt suicide by strangulation the previous day. *Id.*, at 207–208. The court also concluded that watching an inmate attempt suicide while failing to call emergency medical services was "both unreasonable and an effective disregard for the risk to Monroe's life," especially where jail policy did not permit Laws to enter the cell to assist until backup personnel arrived. *Id.,* at 209. The court held, however, that the law was not clearly established and that Laws' failure to act was not "so extreme" as the allegations this Court reviewed in *Taylor* v. *Riojas*, 592 U. S. ___ (2020) (*per curiam*). 3 F. 4th, at 209–210.

The Fifth Circuit also held that respondents Cogdill and Brixey were entitled to qualified immunity on petitioner's claim that they were deliberately indifferent by housing Monroe in a cell containing a lengthy telephone cord that a suicidal detainee easily could use to strangle himself. The court acknowledged that Brixey had placed Monroe on a temporary suicide watch and that Cogdill was aware that Monroe had attempted suicide by hanging the day before. But the court concluded that there was no evidence that any inmate at the facility had previously attempted suicide by strangulation with a telephone cord, nor that Brixey and Cogdill were aware of this danger. The court acknowledged that it had previously held that officers were not entitled to qualified immunity when they gave suicidal inmates bedding or blankets. *Id.*, at 210–211 (citing *Jacobs* v. *West Feliciana Sheriff's Dept.*, 228 F. 3d 388, 390, 396 (CA5 2000), and *Converse* v. *Kemah*, 961 F. 3d 771, 773–774 (CA5 2020)). In the court's view, however, the dangers posed by a telephone cord were "not as obvious as the dangers posed by bedding." 3 F. 4th, at 210–211. The court therefore concluded that holding Monroe in a cell containing a 30-inch telephone cord, unlike holding him in a cell containing a blanket, did not violate a clearly established constitutional right.

## II

I would summarily reverse the Fifth Circuit's qualified-immunity determinations as to all three respondents. It is well established that "[q]ualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brosseau* v. *Haugen*, 543 U. S. 194, 198 (2004) (*per curiam*). This Court has repeatedly held, nevertheless, that "'a general constitutional rule . . . may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.'" *Hope* v. *Pelzer*, 536 U. S. 730, 741 (2002) (quoting *United States* v. *Lanier*, 520 U. S. 259, 271 (1997); brackets and some internal quotation marks omitted); see also *Taylor*, 592 U. S., at ___ (slip op., at 2).

Here, respondent Laws offered no explanation for his failure to call 911 immediately, or at any other point as he watched Monroe strangle himself and become motionless. Had Laws called for medical help immediately, emergency medical services might have arrived with enough time to save Monroe's life; indeed, they arrived only five minutes after they were finally summoned.* Instead, Laws waited until an off-duty and off-premises supervisor arrived, wasting precious minutes that might have been the difference between life and death. No reasonable officer would have stood and watched as a detainee strangled himself to death

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*Brain death generally occurs four to five minutes after strangulation begins. See California District Attorneys Association and Training Institute on Strangulation Prevention, C. Gwinn & G. Strack, The Investigation and Prosecution of Strangulation Cases 1 (2013), https://evawintl.org/wp-content/uploads/California-Strangulation-Manual_web3.pdf; NYC Mayor's Office to Combat Domestic Violence, Strangulation Reference Guide 1, https://www.courts.ca.gov/documents/BTB25-PreConDV-05.pdf. Remarkably, however, Monroe survived 16 minutes of strangulation, only to die the next day at the hospital.

when a simple, safe, and patently obvious response was available and in fact required by jail policy and Laws' specific training. Laws' failure to call emergency medical services was an inexplicable and unreasonable decision that, under any standard, clearly constituted deliberate indifference to Monroe's life-or-death medical needs. Accordingly, Laws was not entitled to qualified immunity.

The Fifth Circuit's conclusion that respondents Cogdill and Brixey were entitled to qualified immunity is equally erroneous. It is undisputed that these respondents were aware of Monroe's risk of suicide. Brixey and Cogdill knew Monroe had twice attempted suicide by strangulation just the day before, that he had expressed a desire to kill himself when he was admitted to the jail, and that he had attempted suicide on another occasion two weeks earlier. Placing him alone in a cell containing a readily accessible ligature, a 30-inch telephone cord, violated the Constitution in a manner that would have been "obvious" to any reasonable officer. *Hope*, 536 U. S., at 740–741. That decision violated Cogdill's training as to the risks of placing suicidal detainees in isolation cells. It also broke with the Texas Commission on Jail Standards' guidance, which specifically warned of the dangers telephone cords posed to suicidal inmates and advised that telephone cords should be 12 inches or shorter. Respondents Brixey and Cogdill were not entitled to qualified immunity for their deliberate indifference to the risks to which they subjected Monroe.

* * *

This Court cannot and should not correct every error that comes before it. But "summary dispositions remain appropriate in truly extraordinary cases involving categories of errors that strike at the heart of our legal system." *Andrus* v. *Texas*, 596 U. S. ___, ___ (2022) (SOTOMAYOR, J., dissenting from denial of certiorari) (slip op., at 24). This is such a

case. It involves a mother seeking some measure of recompense for the tragic and unnecessary death of her son. On the uniquely troubling facts of this case, a jury should decide whether Cogdill and Brixey acted with deliberate indifference for housing Monroe in a cell with an instrument that predictably facilitated his suicide, and whether Laws likewise was deliberately indifferent for watching Monroe strangle himself but failing to contact emergency services promptly. I respectfully dissent from the Court's refusal to summarily reverse.

# SUPREME COURT OF THE UNITED STATES

DR. A., ET AL. *v.* KATHY HOCHUL, GOVERNOR OF NEW YORK, ET AL.

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

No. 21–1143. Decided June 30, 2022

The petition for a writ of certiorari is denied.

JUSTICE THOMAS, with whom JUSTICE ALITO and JUSTICE GORSUCH join, dissenting from the denial of certiorari.

In August 2021, New York mandated that all healthcare workers receive a COVID–19 vaccine. See 10 N. Y. Admin. Code §2.61 (2021). It did so to "stop the spread" of the then-prevailing Delta variant of the COVID–19 virus. New York State Governor's Office, Governor Cuomo Announces COVID–19 Vaccination Mandate for Healthcare Workers (Aug. 16, 2021), https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-vaccination-mandate-healthcare-workers. The State exempted employees from the mandate if vaccination would be "detrimental to [their] health." §2.61(d)(1). However, the State denied a similar exemption to those with religious objections. See *Dr. A.* v. *Hochul*, 595 U. S. ___, ___ (2021) (GORSUCH, J., dissenting from denial of application for injunctive relief) (slip op., at 3). Consequently, those who qualified for the broad medical exemption simply had to employ standard protective measures and could keep their jobs. But those who objected for religious reasons would be fired, even if they took the same protective measures. See *id.*, at ___–___ (slip op., at 3–5).

Petitioners are 16 healthcare workers who served New York communities throughout the COVID–19 pandemic. They object on religious grounds to all available COVID–19

vaccines because they were developed using cell lines derived from aborted children. Pet. for Cert. 8. Ordered to choose between their jobs and their faith, petitioners sued in the U. S. District Court for the Northern District of New York, claiming that the State's vaccine mandate violated the Free Exercise Clause. The District Court agreed and issued a preliminary injunction. ___ F. Supp. 3d ___, ___, 2021 WL 4734404, *8 (Oct. 12, 2021). The Court of Appeals reversed. *We the Patriots USA, Inc.* v. *Hochul*, 17 F. 4th 266 (CA2 2021) (*per curiam*); *We the Patriots USA, Inc*. v. *Hochul*, 17 F. 4th 368 (CA2 2021) *(per curiam*). This Court then denied petitioners' emergency application to reinstate the injunction, which three of us would have granted. See *Dr. A.*, 595 U. S., at ___ (slip op., at 1). Since then, "every Petitioner except one has been fired, forced to resign, lost admitting privileges, or been coerced into a vaccination." Pet. for Cert. 13–14, and n. 10.

Petitioners now ask us to review the Court of Appeals' decision vacating the District Court's preliminary injunction. I would grant the petition. We have held that a "law . . . lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton* v. *Philadelphia*, 593 U. S. ___, ___ (2021) (slip op., at 6). Yet there remains considerable confusion over whether a mandate, like New York's, that does not exempt religious conduct can ever be neutral and generally applicable if it exempts secular conduct that similarly frustrates the specific interest that the mandate serves. Three Courts of Appeals and one State Supreme Court agree that such requirements are not neutral or generally applicable and therefore trigger strict scrutiny.[1] Meanwhile, the Second

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[1] See *Monclova Christian Academy* v. *Toledo-Lucas Cty. Health Dept.*, 984 F. 3d 477, 482 (CA6 2020); *Midrash Sephardi, Inc.* v. *Surfside*, 366

Circuit has joined three other Courts of Appeals refusing to apply strict scrutiny.[2] This split is widespread, entrenched, and worth addressing.

This case is an obvious vehicle for resolving that conflict. The New York mandate includes a medical exemption but no religious exemption, even though "allowing a healthcare worker to remain unvaccinated undermines the State's asserted public health goals equally whether that worker happens to remain unvaccinated for religious reasons or medical ones." *Dr. A.*, 595 U. S., at ___ (opinion of GORSUCH, J.) (slip op., at 8). The Court could give much-needed guidance by simply deciding whether that single secular exemption renders the state law not neutral and generally applicable.

Moreover, I would not miss the chance to answer this recurring question in the normal course on our merits docket. Over the last few years, the Federal Government and the States have enacted a host of emergency measures to address the COVID–19 pandemic. Many were not neutral toward religious exercise or generally applicable. See, *e.g., Tandon* v. *Newsom*, 593 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 4) (listing four other cases from the Ninth Circuit alone); *Roman Catholic Diocese of Brooklyn* v. *Cuomo*, 592 U. S. ___ (2020). Circumstances forced us to confront challenges to those measures in an emergency posture, a practice that Members of this Court have criticized. See, *e.g., Merrill* v. *Milligan*, 595 U. S. ___, ___ (2022) (KAGAN, J., dissenting from grant of application for stay) (slip op., at 11) (lamenting use of the so-called "shadow docket to signal

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F. 3d 1214, 1234–1235 (CA11 2004); *Fraternal Order of Police* v. *Newark*, 170 F. 3d 359, 365–366 (CA3 1999); *Mitchell Cty.* v. *Zimmerman*, 810 N. W. 2d 1, 15–16 (Iowa 2012).

[2] See *We the Patriots USA, Inc.* v. *Hochul*, 17 F. 4th 266, 284–290 (CA2 2021) (*per curiam*); *Doe* v. *San Diego Unified School Dist.*, 19 F. 4th 1173, 1177–1178 (CA9 2021); *Doe 1–6* v. *Mills*, 16 F. 4th 20, 29–31 (CA1 2021); *303 Creative LLC* v. *Elenis*, 6 F. 4th 1160, 1186 (CA10 2021), cert. granted, 595 U. S. ___ (2022) (granting certiorari to review a Free Speech Clause claim).

or make changes in the law, without anything approaching full briefing and argument"). Here, the Court could grant a petition that squarely presents the disputed question and consider it after full briefing, argument, and deliberation.

Unfortunately, the Court declines to take this prudent course. Because I would address this issue now in the ordinary course, before the next crisis forces us again to decide complex legal issues in an emergency posture, I respectfully dissent.

# SUPREME COURT OF THE UNITED STATES

DANNY LEE HILL *v.* TIM SHOOP, WARDEN

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

No. 21–6428. Decided June 30, 2022

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER and JUSTICE KAGAN join, dissenting from the denial of certiorari.

Petitioner Danny Hill was convicted of murder and sentenced to death before this Court's decision in *Atkins* v. *Virginia*, 536 U. S. 304 (2002), which held that it is unconstitutional to execute people with intellectual disabilities. In response to *Atkins*, Hill filed a petition for state postconviction relief. Despite a mountain of record evidence to the contrary, the state courts held that Hill was not intellectually disabled. On federal habeas review under the Antiterrorism and Effective Death Penalty Act (AEDPA), a unanimous panel of the Sixth Circuit concluded that the state courts unreasonably determined the facts, and ordered relief as to Hill's death sentence. Specifically, the Sixth Circuit ruled that the state courts "failed seriously to contend with the extensive past evidence of Hill's intellectual disability" by "exclud[ing] or discount[ing] past evidence of intellectual disability" and engaged in "cafeteria-style selection of some evidence" over other evidence. *Hill* v. *Anderson*, 960 F. 3d 260, 270 (2020) (*per curiam*). The Sixth Circuit took the case en banc, vacated the panel decision, and in a deeply divided decision, affirmed the District Court's denial of habeas relief.

As the seven dissenting judges observed, "[n]o person looking at this record could reasonably deny that Hill is intellectually disabled under *Atkins*." 11 F. 4th 373, 400 (CA6

2021) (opinion of Moore, J.). Before Hill filed his state petition for postconviction relief, he had been diagnosed with intellectual disabilities approximately 10 times, beginning at age six. He scored 70 or below on every IQ test he took during his school years. The record before the state courts also revealed significant limitations in Hill's functional academics, self-care, social skills, and self-direction. He could not sign his own name, never lived independently, was "'functionally illiterate'" at school and in prison, could not read or write above a third-grade level, and could not perform a job without substantial guidance from supervisors. *Id.*, at 407. He has never been able to take care of his own hygiene independently; even in the rigidly organized environment of prison, he will not shower without reminders. All three medical professionals who testified at the mitigation phase of Hill's trial concluded that he was within the range of intellectual disability, see *State* v. *Hill*, 177 Ohio App. 3d 171, 177, 2008-Ohio-3509, ¶¶ 8–11, 894 N. E. 2d 108, 112, and the trial court found the record indicated that Hill was "'mildly to moderately retarded.'" 11 F. 4th, at 381 (majority opinion).

For the reasons urged by Judge Moore in her dissent below, I would summarily reverse the en banc court's denial of habeas relief. There is overwhelming record support for the fact that Hill has intellectual disabilities, as the state courts recognized at his trial and on direct appeal. It was only by discounting extensive past evidence of intellectual disability and focusing myopically on Hill's highly structured interactions with law enforcement, prison officials, and the courts that the state postconviction courts came to a different conclusion. At a minimum, future courts and, if the time comes, the Ohio Parole Board, should remember that a federal court's conclusion that a state court's decision was not "unreasonable" under AEDPA does not mean it was correct. As the en banc Sixth Circuit itself acknowledged, there is no question that jurists "could have reasonably

reached the opposite conclusion" as the Ohio courts with respect to Hill's intellectual disability, and therefore whether he is constitutionally eligible for the death penalty. *Id.*, at 395.