No. 13-592

In the Supreme Court of the United States

WILLIAM STEPHENS, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION, PETITIONER

v.

NELSON GONGORA

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

REPLY BRIEF FOR PETITIONER

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The brief in opposition betrays Gongora's sound understanding that 28 U.S.C. 2254(d) will foreclose federal habeas relief as long as it covers his *Griffin* claim. He does not seriously engage the Director's argument that Section 2254(d) bars relief if the CCA could have reasonably rejected that claim on harmless-error grounds. Instead, Gongora contends that Section 2254(d)'s relitigation bar does not apply in the first place because his *Griffin* claim was not "adjudicated on the merits in State court proceedings" within the meaning of the statute. See, *e.g.*, Br. in Opp. 1, 3, 7, 8-11, 23, 26, 30.

Gongora sang a different tune in the court below, where he argued only that "the constitutional infringement is clear and violates both the 'contrary to' and the 'unreasonable application of' standards of [Section 2254(d)]." Br. for Appellant at 26, *Gongora*

v. *Thaler*, No. 07-70031 (5th Cir. Dec. 5, 2008). The Fifth Circuit ultimately held that Section 2254(d) applied, thus accepting Gongora's implicit concession that the *Griffin* claim was adjudicated on the merits by the CCA. See Pet. App. 12a ("Our evaluation of a Fifth Amendment claim like Gongora's proceeds in two steps. First, we must decide under 28 U.S.C. § 2254(d)(1) whether fairminded jurists could disagree that a *Griffin* error occurred."); *id.* at 9a-11a (setting forth the requirements of Section 2254(d)); *id.* at 21a ("To the extent that the CCA reached a contrary conclusion, it unreasonably applied the clearly established federal law of *Griffin* and its progeny." (citing Section 2254(d)(1))). Gongora misrepresents the opinion below in declaring that "the Fifth Circuit found there was no adjudication on the merits." Br. in Opp. 3 (citing no source).

It is hardly surprising that Section 2254(d)'s applicability was heretofore uncontested by the parties and the courts, because the CCA did adjudicate the merits of Gongora's *Griffin* claim. In its opinion, the CCA set forth a test for evaluating such claims that it derived from this Court's precedent. See *Gongora* v. *State*, 2006 WL 234987, at *10 (Tex. Crim. App. Feb. 1, 2006) (citing *Wead* v. *State*, 129 S.W.3d 126, 130 (Tex. Crim. App. 2004) (citing *Bustamante* v. *State*, 48 S.W.3d 761, 765 (Tex. Crim. App. 2001) (citing *Griffin* v. *California*, 380 U.S. 609 (1965)))); see also *Harrington* v. *Richter*, 131 S. Ct. 770, 784 (2011) ("[A] state court need not cite or even be aware of our cases under § 2254(d)." (citing *Early* v. *Packer*, 537 U.S. 3, 8 (2002) (per curiam))). Gongora concedes that, in so doing, the CCA "stated the correct standard of review under

both the State and Federal Constitutions for determining if a prosecutor's arguments amount to a comment on the defendant's failure to testify." Br. in Opp. 10.

Given that the CCA appreciated the federal-law underpinnings of the *Griffin* claim and devoted several pages to addressing the issue, Gongora cannot plausibly maintain that the "federal claim was inadvertently overlooked in state court." *Johnson* v. *Williams*, 133 S. Ct. 1088, 1097 (2013). To the contrary, the CCA adjudicated that claim on the merits by rejecting it on harmless-error grounds. See *Gongora*, 2006 WL 234987, at *10 (holding that "the instructions to disregard effectively removed any prejudice caused by the prosecutor's comments"); cf. *Mitchell* v. *Esparza*, 540 U.S. 12, 18 (2003) (per curiam) ("We may not grant [a] habeas petition, however, if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate [under Section 2254(d)] only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner.").

This Court's *Johnson* opinion, upon which Gongora heavily relies, actually cuts against his argument that there was no merits adjudication in the CCA. *Johnson* extended the merits-adjudication presumption of *Harrington* to a case in which the state court wrote an opinion, and made clear that this "presumption is a strong one that may be rebutted only in unusual circumstances." *Johnson*, 133 S. Ct. at 1096. Let us assume, for argument's sake, that the Director must resort to this presumption—even though the CCA expressly addressed the relevant claim, as noted above. See

Gongora, 2006 WL 234987, at *7-*10; see also *Johnson*, 133 S. Ct. at 1096 ("To be sure, if the state-law rule subsumes the federal standard—that is, if it is at least as protective as the federal standard—then the federal claim may be regarded as having been adjudicated on the merits.").

Gongora's unsuccessful attempt at rebutting the merits-adjudication presumption boils down to an argument that to behold his *Griffin* claim is necessarily to grant it. See Br. in Opp. 10 ("Had the [CCA] addressed the issue under the second standard of review, then the State court would have found the comments on Mr. Gongora's silence during trial constitutionally infirm."); see also *id.* at 3, 26. Such an overconfident assertion cannot "lead[] very clearly to the conclusion that a federal claim was inadvertently overlooked in state court." *Johnson*, 133 S. Ct. at 1097. Were it otherwise, every state prisoner who seeks federal habeas relief would dodge the relitigation bar of Section 2254(d) by submitting the state court's rejection of his federal claim as evidence of an inadvertent oversight.

Gongora's newfound belief in the lack of a merits adjudication finds no support in the record or the law. Section 2254(d) therefore governs his *Griffin* claim, making summary reversal appropriate because "[h]ere the AEDPA inquiry [under Section 2254(d)] is easy." Pet. App. 121a (Smith, J., dissenting from denial of rehearing en banc).

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed. In the alternative, the petition for a writ of certiorari should be held pending this Court's decision in *White* v. *Woodall*, 133 S. Ct. 2886 (2013) (No. 12-794), and then disposed of accordingly.

Respectfully submitted.

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