United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 11, 2025
Lyle W. Cayce
Clerk

No. 24-10124

JUAN LIZCANO,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CV-1008

Before KING, SMITH, and DOUGLAS, *Circuit Judges*.

PER CURIAM:[*]

A Texas jury convicted Juan Lizcano and sentenced him to death for the murder of a Dallas police officer. After unsuccessfully challenging his capital murder conviction and sentence on direct appeal and in state habeas corpus proceedings, Lizcano filed the instant federal habeas corpus action pursuant to 28 U.S.C. § 2254. The district court denied relief, and Lizcano

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

timely appealed. For the reasons that follow, we AFFIRM the district court's denial of Lizcano's habeas petition.

I

A

Juan Lizcano was convicted in Texas state court of capital murder and sentenced to death for the fatal shooting of Dallas Police Officer Brian Jackson. Lizcano had two court-appointed attorneys, Brook Busbee and Juan Carlos Sanchez, represent him during the trial. Both attorneys spoke Spanish, Lizcano's native language. Busbee served as lead counsel, but she delegated client relations primarily to Sanchez.

After voir dire but before the case proceeded to trial on the merits, defense counsel filed a motion suggesting that Lizcano was incompetent to stand trial and requesting a competency examination. Counsel attached to that motion the sworn affidavit of attorney Sanchez, who noted Lizcano's inability to provide meaningful input on the defense team's strategy despite counsel's efforts to engage him in the process. For instance, Sanchez stated that Lizcano barely spoke and was unable to assist during voir dire, which caused counsel to question whether Lizcano fully understood the nature and object of the proceedings against him. Based on these observations, Sanchez averred: "the defense team has a bona fide doubt of . . . Lizcano's competency to stand trial at this time."

Also attached to the motion was a neuropsychology evaluation summary from Dr. Antonio Puente, a clinical neuropsychologist who evaluated Lizcano in 2006. Dr. Puente's report noted that Lizcano had experienced a life of poverty, malnutrition, and family dysfunction, and that his level of adaptation to society was poor. Lizcano's neuropsychological test performance ranged from "mildly impaired to normal[,] with the typical

performance in the borderline range." Dr. Puente also administered three tests in Spanish to assess Lizcano's intelligence quotient ("IQ"), which resulted in scores of 48, 60, and 62—placing Lizcano "in the mild mental impairment range," according to Dr. Puente.

The trial court held an initial hearing on the competency motion on September 17, 2007, during which it conducted an "informal inquiry" into Lizcano's competence to stand trial. Busbee informed the court that defense counsel first began looking into Lizcano's competence after speaking with Dr. Puente about the results of his evaluation. She had reportedly seen some criminal cases where defendants with IQ scores in the range of Lizcano's had been held incompetent to stand trial and discussed those cases with Dr. Puente, who encouraged Busbee to research the Texas competency standard and hire a Spanish-speaking doctor to formally evaluate Lizcano. The court then inquired whether counsel believed Lizcano to be incompetent due to his alleged intellectual disability,[1] and Busbee agreed with that characterization.

The trial court then ordered a psychological examination of Lizcano, and it initially appointed Dr. Antoinette McGarrahan to conduct that

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[1] At the time of Lizcano's trial and state habeas proceedings, "mental retardation" was the preferred and widely accepted terminology assigned to the diagnosis. Today, "intellectual disability" is the preferred nomenclature. *See, e.g.*, Change in Terminology: "Mental Retardation" to "Intellectual Disability", 78 Fed. Reg. 46499 (Aug. 1, 2013) (recognizing that "[t]he term 'intellectual disability' is gradually replacing the term 'mental retardation' nationwide," and that "[a]dvocates for individuals with intellectual disability have rightfully asserted that the term 'mental retardation' has negative connotations, has become offensive to many people, and often results in misunderstandings about the nature of the disorder and those who have it"); *Hall v. Florida*, 572 U.S. 701, 704 (2014) (recognizing the change in terminology in federal statutes necessitated by the change in terminology in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition). The now-antiquated terminology appears throughout the record in this case; however, we use the terms "intellectually disabled" and "intellectual disability" for purposes of this opinion.

examination. Dr. McGarrahan determined that Lizcano was competent to stand trial, and she orally conveyed these findings to the trial court. However, upon learning of a potential conflict of interest between Dr. McGarrahan and one of the State's experts, the trial court replaced Dr. McGarrahan with Dr. William Flynn as its appointed expert.

Before Dr. Flynn's examination, the district court held another hearing, during which it asked defense counsel whether they wished to supplement their competency motion with additional evidence. Busbee indicated that she did not have with her an additional report she intended to file, so she would let the motion "stand as it is." At the close of that hearing, the trial court ruled that there was an insufficient basis to proceed with a formal incompetency trial and denied the motion.

Despite this ruling, defense counsel subsequently supplemented their motion by filing a letter from Dr. Gilbert Martinez, a licensed psychologist who conducted various tests to determine Lizcano's competency to stand trial. Dr. Martinez determined that Lizcano placed in the "Extremely Low range of intelligence" and that his cognitive and intellectual deficits met the diagnostic criteria for a mild intellectual disability. According to Dr. Martinez, Lizcano was likely to have pronounced difficulties understanding and responding to both written and spoken information, especially if that information was beyond the elementary school level in complexity. With respect to competency, he opined that Lizcano would "have significant difficulty developing a rational or factual understanding of information required to participate fully in legal proceedings," as well as "difficulty consulting with attorneys." Dr. Martinez also determined that Lizcano's intellectual deficiencies would "severely limit his ability to comprehend, and respond to, much of the information typically involved in legal proceedings." In Dr. Martinez's professional opinion, Lizcano lacked both "sufficient present ability to consult with his attorneys with a reasonable degree of

rational understanding" and "a rational or a factual understanding of the proceedings against him."

Dr. Flynn thereafter evaluated Lizcano on September 24 with the help of a Spanish-speaking court-appointed translator. Based upon that evaluation, he concluded that Lizcano was competent to stand trial. Although Dr. Flynn recognized that Lizcano fell within the extremely low range of intelligence, he nevertheless determined that Lizcano did not qualify for the intellectual disability diagnosis because Lizcano did not also face "significant limitations in adaptive functioning/skills of daily living," an essential component of that diagnosis. Dr. Flynn further determined that Lizcano was "able to understand the proceedings of the courtroom," including "the possible consequences of penalties, legal defenses, and possible outcomes." He found that Lizcano understood the severity of the charges against him, was able to communicate with counsel, and had the capacity to plan a legal strategy. He documented that Lizcano took "long pauses before [he] answer[ed] questions" and that Lizcano stated that he did "not understand everything," but Dr. Flynn noted that Lizcano would engage in questions and answers if the interviewer was patient and used simple language. Based on Lizcano's responses to a competency assessment, Dr. Flynn determined that Lizcano understood "basic legal concepts," had "the skills to assist defense," and was fit to proceed to trial.

The following day, on September 25, the parties met with the court in chambers to discuss how to proceed with the competency issue. During that meeting, Dr. Flynn called and orally reported his findings to the court and the parties. The court then advised defense counsel that if they proceeded with an incompetency trial and planned to offer the testimony of Dr. Martinez, they would have to turn over all reports and data Dr. Martinez relied on in reaching his conclusions. This, the court recognized, would

necessarily include Dr. Puente's evaluation and several reports prepared by a mitigation specialist retained by defense counsel.

Following the meeting in chambers, the parties went into the courtroom and conducted proceedings on the record. The court began by reversing its previous ruling on the competency motion in light of the additional evidence submitted by the defense, which the court found to provide a sufficient evidentiary basis to proceed with an incompetency trial. In response, Busbee stated that after learning of Dr. Flynn's findings earlier that morning and conferring with both her client and their experts, the defense now believed Lizcano was competent to stand trial. Defense counsel then formally withdrew the competency motion, and the case proceeded to trial. The jury unanimously found Lizcano guilty of capital murder, and the state trial court sentenced him to death.

B

After unsuccessfully lodging a direct appeal of his conviction and sentence, Lizcano filed his initial application for a writ of habeas corpus in the Texas trial court (hereinafter, the "state habeas court") in December 2009,[2] alleging, *inter alia*, that his trial counsel rendered ineffective assistance in violation of his Sixth Amendment right to counsel by failing to pursue competency proceedings. Lizcano specifically argued that trial counsel performed deficiently in withdrawing the competency motion and failing to discover available information that would have further supported a finding of incompetency.

Lizcano maintained that Dr. Flynn's findings were "superficial, at best," and "should not be given the same deference as those of Dr.

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[2] The same Texas trial judge presided over both Lizcano's capital murder trial and his initial habeas proceedings.

Martinez." In support of this argument, he submitted a report from neuropsychologist Antolin M. Llorente who examined Dr. Flynn's 2007 report and underlying data and found "many methodological and inferential problems, and blatant factual errors associated with that evaluation that should render those results invalid." According to Dr. Llorente, "Dr. Flynn erroneously concluded that [Lizcano] was competent to stand trial in spite of the fact that his own data and information obtained during his assessment" did not qualify Lizcano as competent under either the Texas or the federal standard for competency. Based upon Dr. Llorente's own "retrospective approach" and review of the record, he determined that Lizcano "was not competent to stand trial back in 2007."

Lizcano also proffered two affidavits from persons whom he argued possessed relevant information as to his competency. The first was from Luis Lara, who led the consular protection department at the Mexican Consulate in Dallas between 2005 and 2007. In this role, Lara visited Mexican nationals detained in Dallas to explain to them certain legal concepts relevant to their cases. Lara first visited Lizcano several days after Lizcano's arrest in 2005, and he continued to visit Lizcano every other month through August 2007. Lara averred that he found communicating with Lizcano very difficult, noting that Lizcano "never understood any of the legal concepts" he attempted to explain. It was Lara's impression that Lizcano's failure to grasp those concepts was not due to a lack of interest in his own legal proceedings but, rather, an inability to understand the information. Lara also asserted that he would have willingly shared this information with defense counsel and testified at Lizcano's capital trial or other proceeding had he been asked to do so.

The second affidavit came from Debbie Nathan, the mitigation specialist hired by defense counsel. Based on her conversations with Lizcano before trial, Nathan averred that Lizcano "did not seem to understand what

was happening in his case." Nathan further stated that she frequently felt as though she lacked a clear direction from defense counsel with respect to the mitigation strategy, and that she "frequently had to 'play interference' between [Lizcano] and his attorneys." She noted that after having worked on Lizcano's case for nearly four months, she learned that defense counsel were finished with her services and were planning to take the case to trial. This troubled Nathan, who said that she felt discouraged that Lizcano's attorneys considered her work complete despite her having "put in only about a fourth of the work that [the defense] needed."

The state habeas court held an evidentiary hearing on Lizcano's application during which it heard extensive testimony from Lizcano's trial counsel, one of Lizcano's older brothers, multiple mental health experts, and the mitigation specialist. For example, Sanchez testified that defense counsel made the strategic decision to withdraw the competency motion after they learned that both Dr. McGarrahan and Dr. Flynn had found Lizcano competent, and after they spoke with their own expert, Dr. Martinez, who Sanchez said was "kind of shaky as to his opinion of [Lizcano's] competency." Considering that "the State could call two witnesses that the [c]ourt had appointed to say [Lizcano] was competent versus [the defense's] one witness," Sanchez felt as though "there was a good chance [they] [would] not win" on the competency issue. As Sanchez explained, once defense counsel weighed their options, they thought it "was more dangerous to give up [their] data" and mitigating evidence to the prosecution before the start of trial because the State would use this information to their advantage in cross-examining the defense's experts.

For her part, Busbee testified that Dr. Martinez communicated to her that his opinion regarding Lizcano's competency was based on his clinical observations rather than the Texas statutory competency examination and, as such, he did not feel comfortable testifying regarding Lizcano's

competency. Busbee also stated that she did not believe an incompetency trial would have been successful, particularly given Texas's minimal competency requirements. She acknowledged that before withdrawing the competency motion during the September 25 hearing, she had not seen or otherwise reviewed Dr. Flynn's report. Busbee further testified that the day after counsel withdrew the motion, she spoke with Dr. Flynn, who told her that he "did not have the full picture of . . . Lizcano's" intellectual disability and "wasn't confident in his [intellectual disability] diagnosis." Busbee explained that defense counsel did not reassert their competency motion despite Dr. Flynn's admissions because counsel did not want to turn over their mitigation evidence to the State, particularly "with an expert witness like Dr. Martinez, who hadn't done a real competency evaluation."

Dr. Llorente testified regarding his critiques of Dr. Flynn's 2007 report and opinion on competency, as well as his own finding that Lizcano had not been competent to stand trial. In their testimonies, Dr. Puente and Dr. Martinez both affirmed that they entertained serious doubts regarding Lizcano's competency at the time of trial. Dr. Martinez also stated that he did not recall ever telling defense counsel that he was not comfortable testifying regarding competency or that he was unsure of the results of his evaluation. Indeed, Dr. Martinez testified that he was "completely confident" in his evaluation and that he would have testified about Lizcano's competency if defense counsel had asked him to do so.

The state habeas court issued its findings of fact and conclusions of law in July 2016, recommending the denial of habeas corpus relief. The court concluded, *inter alia*, that Lizcano had not been denied his Sixth Amendment right to counsel based upon trial counsel's failure to pursue competency proceedings. The court first rejected Lizcano's contention that his trial counsel were deficient for withdrawing their request for an incompetency

trial. It found that counsel reasonably made a strategic decision to withdraw their motion based on "many factors" that justified counsel's "professional opinion that a competency hearing would not be successful." For instance, the court explained that "[b]ecause the motion suggesting incompetency was based partly on co-counsel's assertions that [Lizcano] was in competent [sic], it was not unreasonable for them to withdraw the request when that opinion changed." The court further credited Sanchez's testimony that Dr. Martinez's conclusion on competency was "shaky," noting that Dr. Martinez's own testimony corroborated this characterization. It therefore determined that, "even if Dr. Martinez would have testified, it was reasonable for counsel to decide to [forgo] a competency trial in order to preclude the State from obtaining all of the underlying data essential to" proving Lizcano's intellectual disability. The court also found that there was "no indication that Dr. Martinez would have been a more persuasive expert than Dr. Flynn" and that "it was reasonably probable that the jury would have viewed Dr. Flynn as more credible than Dr. Martinez." Accordingly, the state habeas court determined that, "considering the totality of the circumstances, [Lizcano]'s trial counsel's strategic decision to withdraw the motion suggesting incompetency did not fall outside the wide range of reasonable professional assistance."

The state habeas court next rejected Lizcano's argument that trial counsel were deficient for failing to discover additional information regarding Lizcano's competency to stand trial. In so doing, the court determined that Lara's and Nathan's affidavits were not credible, as neither person took action until the habeas proceeding nor offered an explanation for their delay. It further found that Lara's affidavit was not probative of Lizcano's incompetency given its lack of specificity as to which concepts Lizcano purportedly failed to grasp. The court likewise found that Nathan's affidavit was insufficient evidence of incompetency in part because it was cumulative

of the information contained in Sanchez's affidavit. Thus, the court concluded that counsel's alleged failure to discover Lara's and Nathan's statements about and impressions of Lizcano's competency did not render counsel's investigation into the issue constitutionally inadequate.

The state habeas court went on to find that, assuming arguendo Lizcano's trial counsel were deficient in their investigation or pursuit of an incompetency trial, Lizcano suffered no actual prejudice as a result. The court reasoned "that, even if counsel had not withdrawn their motion, it was not reasonably likely [Lizcano] would have been found incompetent to stand trial." It found that "there was no evidence demonstrating that [Lizcano] did not understand the proceedings or could not rationally confer with his counsel," as demonstrated by Dr. Flynn's findings and counsel's own statements on the record. And "[b]ecause the defense had no evidence to offer to rebut Dr. Flynn's findings," the court concluded that it was unlikely a competency trial would have been successful.

Moreover, the court found that, "even with the testimony of Dr. Martinez, it [was] still unlikely [Lizcano] would have been found incompetent to stand trial." It explained that "Dr. Martinez was a retained and presumably biased defense expert whose opinion was based on his clinical findings that [Lizcano] was mildly [intellectually disabled] and had low intellectual capability, not based on the Texas statutory requirements for evaluating competency." "In contrast," the court noted, "Dr. Flynn was a neutral court expert," "his exam was conducted in accordance with Texas law," and he reached his conclusions "based on specific findings regarding what [Lizcano] knew about the trial and events in the courtroom." Lastly, the court found "there was no evidence that [Lizcano] had a recent severe mental illness, was at least moderately [intellectually disabled], or had committed truly bizarre acts" and, thus, Lizcano "did not have evidence . . . that would have led a rational jury to have found him incompetent." Based

on these findings, the court concluded that Lizcano was not prejudiced by counsel's decision to withdraw the motion suggesting incompetency.

The Texas Court of Criminal Appeals adopted the trial court's findings of fact and conclusions of law with respect to Lizcano's competency-related claim and denied Lizcano's habeas application. *Ex parte Lizcano*, WR-68,348-03, 2015 WL 2085190 (Tex. Crim. App. Apr. 15, 2015).

C

Lizcano then filed the instant federal habeas petition. The district court subsequently stayed and abated the proceedings so that he could relitigate a previously asserted claim that he was intellectually disabled and exempt from the death penalty. *Lizcano v. Davis*, No. 3:16-cv-1008-B, 2017 WL 4456706 (N.D. Tex. Oct. 6, 2017). Upon the findings and conclusions reached by the convicting court on remand, the Texas Court of Criminal Appeals determined that Lizcano was intellectually disabled and granted Lizcano habeas relief, reforming his sentence of death to life imprisonment without the possibility of parole. *Ex parte Lizcano*, No. WR-68,348-03, 2020 WL 5540165 (Tex. Crim. App. Sept. 16, 2020) (per curiam). Contemporaneously, the court summarily dismissed under state writ-abuse principles a host of claims Lizcano presented in a subsequent state habeas corpus application. *Ex parte Lizcano*, WR-63,348-04, 2020 WL 5568625 (Tex. Crim. App. Sept. 16, 2020) (per curiam).

Lizcano returned to the district court and, after the court lifted the stay, filed a second amended federal habeas petition in which he raised five claims. Among those claims, Lizcano alleged that he was denied effective assistance of trial counsel because counsel failed to adequately investigate and litigate his competency to stand trial. He argued that he satisfied the requirements of § 2254(d) with respect to this claim because the state habeas

court's decision was an unreasonable determination of the facts and an unreasonable application of clearly established federal law.

The district court denied Lizcano's habeas application and declined to issue a certificate of appealability ("COA"). As to Lizcano's claim of ineffective assistance regarding the incompetency trial, the district court concluded that the factual findings reached by the state habeas court and adopted by the Texas Court of Criminal Appeals "were fully supported by the evidence." *Lizcano v. Lumpkin*, 695 F. Supp. 3d 815, 839 (N.D. Tex. 2023). It further held that the state courts' rejection of the ineffective assistance claim was not an unreasonable application of clearly established federal law, nor did it result in a decision based on an unreasonable determination of the facts given the evidence presented in Lizcano's trial and initial state habeas corpus proceedings. *Id.* at 849. The district court therefore denied relief on this claim under the deferential standard of review set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *Id.* at 849. Additionally, "out of an abundance of caution," the district court undertook de novo review of Lizcano's claim and concluded, for the same reasons, that he failed to establish a claim of ineffective assistance of trial counsel. *Id.* at 849–50.

Lizcano appealed, and we granted him a COA on the issue of "[w]hether [he] received ineffective assistance of counsel in violation of his Sixth Amendment right to counsel when his attorneys failed to continue to pursue competency proceedings prior to his murder trial."[3]

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[3] In his opening brief, Lizcano contends that trial counsel performed deficiently when it (1) withdrew the motion suggesting incompetency and (2) failed to conduct a minimally adequate investigation into his competency. According to the State, Lizcano's second argument concerning counsel's failure to investigate exceeds the scope of the COA and should not be considered by the court. Because we do not reach the issue of whether counsel rendered constitutionally deficient performance, we need not resolve the State's

II

A

AEDPA sets forth "several limits on the power of a federal court to grant an application for a writ of habeas corpus on behalf of a state prisoner." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Among them is 28 U.S.C. § 2254(d)—a provision often referred to as the "relitigation bar," *Harrington v. Richter*, 562 U.S. 86, 100 (2011). Under that statutory bar, a habeas petitioner is not entitled to relief unless the state court's adjudication of the merits of a claim resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). "This is a difficult to meet and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt." *Pinholster*, 563 U.S. at 181 (citation modified). If, however, a petitioner successfully overcomes AEDPA's relitigation bar, they are entitled to de novo review of their claim. Absent such a showing, the court must deny the petition. *See Senn v. Lumpkin*, 116 F.4th 334, 339 (5th Cir. 2024).

Lizcano asserts that he successfully overcomes AEDPA's relitigation bar and, thus, is entitled to de novo review of this argument because the state habeas court[4] relied on an unreasonable determination of the facts and

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argument. Nevertheless, the COA's use of the phrase "competency proceedings" reasonably encompasses both counsel's in-court pursuits as well as their investigative efforts.

[4] Our AEDPA review is focused on the state habeas court's findings of fact and conclusions of law, as that was "the last reasoned state court decision." *Russell v. Denmark*,

unreasonably applied clearly established federal law. *See* 28 U.S.C. § 2254(d)(1)–(2). For purposes of § 2254(d)(1), a state court decision is an unreasonable application of clearly established federal law if "the court unreasonably applied 'the holdings, as opposed to the dicta, of [the Supreme] Court's decisions.'" *Andrew v. White*, 604 U.S. ---, 145 S. Ct. 75, 80 (2025) (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)). "An unreasonable application, in turn, is one with which no fairminded jurist would agree." *Id.*; *see also Richter*, 562 U.S. at 103 (holding that a state court's application of clearly established law is not unreasonable unless it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement"). This requires that a petitioner "show far more than that the state court's decision was merely wrong or even clear error." *Shinn v. Kayer*, 592 U.S. 111, 118 (2020) (per curiam); *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.").

AEDPA also affords significant deference to a state court's factual findings, reviewed under § 2254(d)(2). That the federal habeas court "would have reached a different conclusion in the first instance" is insufficient to warrant relief. *Brumfield v. Cain*, 576 U.S. 305, 313–14 (2015). As the Supreme Court has explained, "[i]f reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the [state] court's determination." *Id.* at 314 (citation modified). Put differently, "AEDPA asks whether *every* fairminded jurist would agree" that the state court's decision was based on

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68 F.4th 252, 263 (5th Cir. 2023) (quoting *Woodfox v. Cain*, 772 F.3d 358, 369 (5th Cir. 2014)).

an unreasonable determination of the facts; only then does a petitioner overcome the § 2254(d)(2) standard. *Brown v. Davenport*, 596 U.S. 118, 136 (2022).

Under § 2254(e)(1), a state court's factual findings are also entitled to a presumption of correctness, but a petitioner can rebut this presumption by "clear and convincing evidence" that the state court's findings were erroneous. 28 U.S.C. § 2254(e)(1); *accord Landrigan*, 550 U.S. at 473–74; *Rice v. Collins*, 546 U.S. 333, 338–39 (2006). Clear and convincing evidence is a "difficult burden," *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 564 (5th Cir. 1997), and requires proof that is "highly probable," *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984); *see also Nejad v. Att'y Gen., State of Ga.*, 830 F.3d 1280, 1289 (11th Cir. 2016) ("Clear and convincing evidence is a demanding but not insatiable standard, requiring proof that a claim is highly probable.").

In explaining the interplay of § 2254(d)(2) and (e)(1), our court has noted that "[w]hereas § 2254(d)(2) sets out a general standard by which the [federal habeas] court evaluates a state court's specific findings of fact, § 2254(e)(1) states what an applicant will have to show for the district court to reject a state court's determination of factual issues." *Valdez v. Cockrell*, 274 F.3d 941, 951 n.17 (5th Cir. 2001); *see also Blue v. Thaler*, 665 F.3d 647, 654 (5th Cir. 2011) ("The clear-and-convincing evidence standard of § 2254(e)(1)—which is arguably more deferential to the state court than is the unreasonable-determination standard of § 2254(d)(2)—pertains only to a state court's determinations of particular factual issues, while § 2254(d)(2) pertains to the state court's decision as a whole." (citation modified)). So, we accord a rebuttable presumption of correctness to each disputed factual finding under subsection (e)(1), and then, in reviewing the state court's ultimate factual determination, we utilize the reasonableness standard under subsection (d)(2). *See Miller-El v. Cockrell*, 537 U.S. 322, 348 (2003). While

this is a highly deferential standard, it by no means "'impl[ies] abandonment or abdication of judicial review,' and 'does not by definition preclude relief.'" *Brumfield*, 576 U.S. at 314 (quoting *Miller-El*, 537 U.S. at 340).

B

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This right "entails that defendants are entitled to be represented by an attorney who meets at least a minimal standard of competence." *Hinton v. Alabama*, 571 U.S. 263, 272 (2014) (per curiam). To establish a Sixth Amendment ineffective assistance of counsel claim in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show that (1) counsel's performance was deficient and (2) he was prejudiced as a result. *Id.* at 687. The *Strickland* standard is both demanding and deferential. *Kayer*, 592 U.S. at 118; *Strickland*, 466 U.S. at 689.

Thus, given the overlay of AEDPA review in federal habeas proceedings such as this, the court must apply a doubly deferential standard of review. *Richter*, 562 U.S. at 105. "[T]he question is not whether counsel's actions were reasonable," but "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*; *see also id.* at 101 (noting that "[t]he pivotal question" federal habeas courts must ask "is whether the state court's application of the *Strickland* standard was unreasonable"). This inquiry is distinct from "asking whether defense counsel's performance fell below *Strickland*'s standard"—that question was asked and answered by the state habeas court. *Id.* at 101. Rather, AEDPA "demands more" of federal courts, *id.* at 102, and the courts "may not issue the writ simply because that court concludes in its independent judgment

that the state-court decision applied *Strickland* incorrectly," *Woodford v. Visciotti*, 537 U.S. 19, 24–25 (2002) (per curiam).

The district court here concluded that the state habeas court's decision was based on a reasonable determination of the facts and that it reasonably applied the two-pronged *Strickland* standard. *See Lizcano*, 695 F. Supp. 3d at 839–49. We review "the district court's findings of fact for clear error and . . . its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court." *Ortiz v. Quarterman*, 504 F.3d 492, 496 (5th Cir. 2007) (italics omitted). Because we agree that Lizcano's AEDPA challenge fails at the prejudice prong, we need not review the state habeas court's determination that Lizcano's counsel did not perform deficiently. *See Strickland*, 466 U.S. at 697.

C

To demonstrate prejudice, the party asserting ineffective assistance must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Adekeye v. Davis*, 938 F.3d 678, 682 (5th Cir. 2019) (citation modified). Where competency is at issue, it must be reasonably likely that the defendant was incompetent to stand trial, "sufficient to undermine confidence in the outcome." *Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990) (citing *Strickland*, 466 U.S. at 694); *accord Huricks v. Thaler*, 416 F. App'x 423, 427 (5th Cir. 2011) (per curiam). A reasonable probability or likelihood "means a 'substantial, not just conceivable, likelihood of a different result.'" *Kayer*, 592 U.S. at 118 (quoting *Pinholster*, 563 U.S. at 189); *accord Richter*, 562 U.S. at 112.

Lizcano argues that the state habeas court unreasonably determined that there was not a substantial likelihood he would have been found incompetent to stand trial and, thus, suffered no prejudice from trial counsel

withdrawing the competency motion. Whether Lizcano established prejudice under *Strickland* is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. Accordingly, we begin with the state court's factual determinations, reviewed under § 2254(d)(2) and (e), before reviewing its ultimate legal conclusion under § 2254(d)(1). *See Williams v. Taylor*, 529 U.S. 362, 386 (2000); *Neal v. Vannoy*, 78 F.4th 775, 783 (5th Cir. 2023).

1

The district court summarized the state habeas court's findings of fact with respect to prejudice as follows:

> - Lizcano failed to show there was a reasonable probability that, but for the decision of his trial counsel to withdraw their request for a competency trial, the outcome of Lizcano's trial would have been different.
> - There was no evidence Lizcano did not understand the proceedings against him or could not rationally confer with his counsel. The statements of Lizcano's counsel on the record[,] as well as the opinion of Dr. Flynn[,] confirm[] this conclusion.
> - Even if Lizcano's trial counsel had proceeded with a competency trial, there is no reasonable probability that Lizcano would have been found incompetent to stand trial. Dr. Martinez could not offer a firm opinion on Lizcano's incompetency when called to testify at trial during a Rule 705 hearing. Thus[,] Dr. Martinez could not rebut the opinion of Dr. Flynn. There was no evidence [that] Lizcano was moderately intellectually disabled, suffered from a recent mental illness, or engaged in bizarre behavior.

Lizcano, 695 F. Supp. 3d at 838–39. Having independently examined the record, the district court concluded that these findings "were fully supported by the evidence before the [state habeas] court." *Id.* at 839.

Lizcano takes issue with two of the aforementioned factual findings. The first is that there was no evidence demonstrating that Lizcano did not understand the proceedings or could not rationally confer with his counsel. Lizcano contends that this finding is an unreasonable determination of, and clearly and convincingly belied by, the state court record. For support, he points to the trial court's determination that there was sufficient evidence to justify an incompetency trial—a determination that, under Texas law, required that there be evidence . . . sufficient to [have] create[d] a 'bona fide doubt' in the trial judge's mind whether [Lizcano] me[t] the test of legal competence." *Moore v. State*, 999 S.W.2d 385, 393 (1999). Although Lizcano recognizes that the trial court's determination alone does not establish prejudice, he asserts that it does show that the state habeas court's finding of "no evidence" was unreasonable under § 2254(d)(2) and erroneous under § 2254(e)(1).

Lizcano's argument has some merit: it is too sweeping a contention to say that he presented no evidence of his incompetence. The record includes Dr. Martinez's report that found Lizcano incompetent to stand trial, as well as Dr. Puente's neuropsychology report that deemed Lizcano to be in the "mild mental impairment range" based on his IQ scores. Sanchez testified that Lizcano was unable to contribute to the defense during voir dire, and Lara and Nathan both averred that Lizcano had difficulty communicating and grasping legal concepts. Finally, Lizcano offered the report from Dr. Llorente, who retrospectively determined that Lizcano was not competent to stand trial at the time of his conviction.

Perhaps, then, the state habeas court, at least impliedly, found no *credible* evidence of Lizcano's incompetence. For example, the court noted that Dr. Martinez, "a retained and presumably biased defense expert," gave conflicting statements about his competency findings and conducted only a clinical examination based not on the Texas statutory requirements for

evaluating competency. The court also found that Lara's and Nathan's affidavits lacked credibility given their delayed disclosure of this information and failure to explain why they did not offer their opinions before Lizcano sought postconviction relief. As for Dr. Llorente, the state habeas court determined, albeit in a different context, that his findings lacked credibility because the adaptive behavior tool used to evaluate Lizcano was not designed to be used retroactively.

As the Supreme Court has instructed, "special deference [is to] be given to a trial judge's credibility determinations." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 (1984). When, as here, the issue of the validity of the state court's reasoning depends on credibility, federal courts should not substitute their determination of such issues for that of the state court. *Rice*, 546 U.S. at 340–42; *see also Baldree v. Johnson*, 99 F.3d 659, 663 (5th Cir. 1996) ("[W]hen a state trial judge is also the judge hearing the state habeas claim, that judge is in an optimal position to assess the credibility of the affidavits . . . [and has] the benefit of observing the witnesses and attorneys and hearing testimony . . . ."); *Valdez*, 274 F.3d at 948 n.11 ("The presumption of correctness not only applies to explicit findings of fact, but it also applies to those unarticulated findings which are necessary to the state court's conclusions of mixed law and fact.").

But even if Lizcano can rebut the presumption of correctness afforded to the state habeas court's "no evidence" finding, *see* 28 U.S.C. § 2254(e)(1), he fails to demonstrate, under § 2254(d)(2), that the state habeas court's "corresponding factual determination was 'objectively unreasonable' in light of the record before the court." *Miller-El*, 537 U.S. at 348; *see also Valdez*, 274 F.3d at 951 n.17 ("[I]t is possible that, while the state court erred with respect to one factual finding under § 2254(e)(1), its determination of facts resulting in its decision in the case was reasonable under § 2254(d)(2)."); *Pye v. Warden, Ga. Diagnostic Prison*, 50 F.4th 1025, 1035 (11th Cir. 2022) (en

banc) ("Depending on the importance of the factual error to the state court's ultimate decision, that decision might still be reasonable even if some of the state court's individual factual findings were erroneous—so long as the decision, taken as a whole, doesn't constitute an unreasonable determination of the facts and isn't based on any such determination." (citation modified)). Assuming, *arguendo*, Lizcano proffered at least some credible evidence that he did not understand the proceedings or could not rationally confer with his counsel, this does not suggest a "reasonable probability that he was incompetent." *Bouchillon*, 907 F.2d at 595. As the state habeas court itself observed, "even with Dr. Martinez's potential testimony, it is unlikely that Lizcano would have been found incompetent to stand trial." Whereas Dr. Martinez was retained by defense counsel and conducted an evaluation not in compliance with Texas statutory requirements, Dr. Flynn was a neutral court-appointed expert whose exam was conducted in accordance with Texas law. And Dr. Flynn based his competency conclusion on specific findings regarding what Lizcano knew about the trial and events in the courtroom. In contrast, none of the defense's experts—whether that be Dr. Martinez, Dr. Puente, or Dr. Llorente—had personally conducted a forensic evaluation of Lizcano's competence to stand trial. *See Lizcano*, 695 F. Supp. 3d at 846.

At the very least, reasonable minds reviewing the record might disagree about the state habeas court's finding that it was not reasonably likely that Lizcano was incompetent to stand trial and, thus, that he suffered no prejudice. *Brumfield*, 576 U.S. at 314; *Bouchillon*, 907 F.2d at 595. Thus, even if Lizcano rebuts the state habeas court's individual factual determination that he presented no evidence of his incompetence under § 2254(e)(1), the remaining factual findings support the state court's ultimate decision. *See Valdez*, 274 F.3d at 951 n.17; *see also Lambert v. Blackwell*, 387 F.3d 210, 235–36 (3d Cir. 2004) ("[E]ven if a state court's individual factual determinations are overturned, what factual findings

remain to support the state court decision must still be weighed under the overarching standard of [§] 2254(d)(2).”). We therefore cannot say that the state habeas court’s “decision” was “based on an “unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding.” 28 U.S.C. § 2254(d)(1).

The second factual finding Lizcano contests is that “Dr. Flynn and [Lizcano]’s counsel believed that [Lizcano] was competent.” He argues this finding is erroneous in view of Dr. Flynn’s own admission that his conclusions failed to consider the “full picture,” the numerous flaws identified in Dr. Flynn’s methods and findings, and counsel’s own statements supporting the competency motion. Neither the state habeas court nor the district court directly addressed Dr. Flynn’s purported contradictory statements regarding Lizcano’s competency. Nevertheless, Busbee testified only that Dr. Flynn told her that he “did not have the full picture of” Lizcano’s intellectual disability and “wasn’t confident in his . . . diagnosis.” As seen in Dr. Flynn’s report, he determined first that Lizcano did not qualify for an intellectual disability diagnosis, and then, separately, that Lizcano was fit to proceed to trial. Dr. Flynn based his competency determination on additional findings, including Lizcano’s responses to a “Fitness Interview Test” suggesting that he was able to understand the proceedings of the courtroom and the possible consequences of penalties, legal defenses, and possible outcomes. Lizcano points to nothing in the record suggesting that, even if Dr. Flynn expressed doubts as to his finding that Lizcano “d[id] not qualify for a[n] [intellectual disability] diagnosis,” he likewise doubted his competency finding.[5]

[5] Indeed, the Supreme Court has recognized that those with intellectual disabilities “frequently . . . are competent to stand trial.” *Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

The state habeas court also cited to Busbee's statement during the September 25 hearing, where she informed the court:

> Well, Your Honor, as the Court's well aware, competency is a fluid issue. And you had instructed us to advise our client to the best of our ability about matters that would be covered in the competency examination. And the Court appointed an independent expert, Dr. William Flynn, who interviewed our client yesterday with an interpreter. And we were not made aware until this morning of Dr. Flynn's findings. And based on what the Court has relayed to us, Dr. Flynn has informed you that his opinion is that [Lizcano] is competent.
>
> We had a discussion with our experts and our client here and have determined that at this point we feel that he is competent and do wish to abandon our motion for a competency hearing at this time.

Notably, Busbee qualified counsel's belief in Lizcano's competency to stand trial with statements like, "at this point" and "at this time." That Lizcano can point to evidence in the record indicating that, at some point earlier in the proceedings, counsel suspected that Lizcano may have been incompetent does not undermine the validity of the state habeas court's finding that counsel later believed he had "sufficient present ability to consult with his lawyer" or an "understanding of the proceedings against him." *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a).

Busbee testified that she initially pursued the competency proceedings because she knew Lizcano's IQ scores were low and she saw a footnote in a federal decision that said a low IQ might render a defendant per se incompetent to stand trial. She also confirmed that her suspicion as to Lizcano's incompetency stemmed from his alleged intellectual disability. But Busbee subsequently learned of Dr. Flynn's findings, including his determination that Lizcano "d[id] not qualify for a[n] [intellectual disability]

diagnosis." These findings called into question the very basis for Busbee's filing of the motion suggesting Lizcano's incompetency. Again, Busbee herself reiterated that she "never [definitively] said [Lizcano] was incompetent," only that she thought it possible based on his IQ scores and the caselaw. And during the September 25 hearing, after receiving input from a qualified and neutrally-appointed mental health expert, Busbee expressed her then-belief that Lizcano was competent to stand trial. In Busbee's own words, "competency is a fluid issue," and the record fully supports her change in belief.

Similarly, while it is true that Sanchez testified that he began to understand Lizcano had cognitive limitations when the two men spoke about Lizcano's family and Lizcano "could[] [not] keep it straight," and that Lizcano struggled to engage during voir dire, this alone does not negate counsel's later belief in Lizcano's competency. Dr. Flynn himself acknowledged Lizcano's difficulties in understanding and answering questions and referenced Sanchez's report that Lizcano struggled to engage in strategy discussions. Yet, Dr. Flynn's own independent evaluation led him to conclude that Lizcano understood the legal proceedings, understood the possible consequences, and had the capacity to communicate with counsel and, thus, was "fit to proceed to trial." Additionally, as the state habeas court and district court aptly observed, competency is not defined in terms of one's ability to fully comprehend the process of jury selection in a capital trial. *Lizcano*, 695 F. Supp. 3d at 842. Sanchez's observations of Lizcano prior to trial and during voir dire therefore do not conflict with his later belief, hinged upon further information and evaluation, that Lizcano was competent to stand trial.

Lizcano has not met his burden under 28 U.S.C. § 2254(d)(2) and (e). Accordingly, the district court did not err in concluding that the record "fully supported" the state habeas court's findings of fact with respect to prejudice.

Lizcano next contends that the state habeas court's application of the *Strickland* prejudice prong was objectively unreasonable. *See* 28 U.S.C. § 2254(d)(1). As the state habeas court observed, prejudice requires a reasonable probability that Lizcano would have been found incompetent to stand trial but for his trial counsel's failure to pursue competency proceedings. *See Bouchillon*, 907 F.2d at 595. Lizcano asserts that he demonstrated prejudice because trial counsel had provided the trial court with sufficient evidence to warrant an incompetency trial, and the errors in Dr. Flynn's report would have cast significant doubt on his conclusions during any such jury trial. This, coupled with the retrospective opinion of Dr. Llorente confirming Lizcano's incompetency at the time of trial, he argues, shows a reasonable probability he would have been found incompetent to stand trial.

As an initial matter, the evidence required to proceed to an incompetency trial is less than that required to conclusively prove incompetency. Under Texas law, if the trial court concludes that the defendant's incompetency to stand trial is supported by "some evidence, a quantity more than none or a scintilla," then "a jury is to be impaneled to determine the defendant's competency to stand trial." *Moore*, 999 S.W.2d at 393; *see also* TEX. CODE CRIM. PROC. ANN. art. 46B.051 (providing for jury trial to determine whether defendant is incompetent to stand trial). "[T]he trial court is to consider only the evidence tending to show incompetency, and not evidence showing competency," and an incompetency trial is warranted if that evidence is sufficient to create a "bona fide doubt" in the trial judge's mind whether the defendant meets the test of legal competence. *Moore*, 999 S.W.2d at 393. If the court proceeds with the incompetency trial, the burden is on the defendant to prove his incompetency by a preponderance of the evidence. TEX. CODE CRIM. PROC. ANN. art.

46B.003(b). This necessitates the defendant to show that he lacks "(1) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding[,] or (2) a rational as well as factual understanding of the proceedings against him." *Id.* art. 46B.003(a); *accord Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

Lizcano therefore faced a greater burden of proof to establish his incompetency during an incompetency trial as opposed to his initial burden of putting forth "some evidence" to proceed with that trial. That he presented more than a scintilla of evidence sufficient to create a bona fide doubt in the trial judge's mind as to his incompetency does not suggest whether he had a reasonable probability of ultimately being found incompetent to stand trial.

As to Dr. Llorente, the state habeas court found that his retrospective findings lacked credibility. Dr. Llorente himself acknowledged that the adaptive behavior tool used to evaluate Lizcano's competency to stand trial was not designed to be used retroactively. Again, "special deference [is to] be given to" this credibility determination. *Bose Corp.*, 466 U.S. at 500. And even considering the purported errors in Dr. Flynn's report, as identified by Dr. Llorente, Lizcano failed to demonstrate a reasonable probability that he would have been found incompetent to stand trial but for his trial counsel's failure to pursue competency proceedings. *See Bouchillon*, 907 F.2d at 595. Indeed, the state habeas court had credible evidence suggesting that Lizcano was only mildly intellectually disabled, was capable of learning a wide range of skills, and understood that the jury would determine whether he lived or died, the prosecution was opposed to him, and his fate depended in significant part upon the mental health experts convincing the jury that he was intellectually disabled.

Lizcano also argues that the state court unreasonably applied *Strickland* in determining that he did not prove prejudice because there was "no evidence that [Lizcano] had a recent severe mental illness, was at least moderately [intellectually disabled], or had committed truly bizarre acts." He contends that these factors are not dispositive of the prejudice prong; rather, he needed only establish a reasonable probability that a jury would have found he lacked a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or a rational and factual understanding of the proceeding against him.

Lizcano is correct in his recitation of the Texas standard for incompetency. *See* TEX. CODE CRIM. PROC. ANN. art. 46B.003(a). But Texas courts have recognized that evidence of "recent severe mental illness, moderate [intellectual disability], or truly bizarre acts by the defendant" is indicative of a defendant's legal competence. *Moore*, 999 S.W.2d at 393. As the Texas Court of Criminal Appeals explained, such evidence of past mental health history "correlate[s] with [a defendant's] ability to communicate with counsel or his ability to understand the proceedings against him." *Id.* Here, in finding that there was no evidence that Lizcano lacked these three indicia of incompetence, the state habeas court concluded that Lizcano had failed to put forth "evidence that would have led a rational jury to have found him incompetent." Lizcano has failed to show how this was an unreasonable application of law, let alone clearly established federal law.

Lizcano does not overcome AEDPA's relitigation bar under 28 U.S.C. § 2254(d)(1).

III

Accordingly, we AFFIRM the district court's denial of Lizcano's § 2254 habeas petition.