No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARK ANTHONY SOLIZ,
Petitioner,

-v-

LORIE DAVIS, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
Respondent.

On petition for writ of certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to remand this case to the Fifth Circuit because the Fifth Circuit misapplied this Court's "plain statement" rule to determine if a state court's procedural default determination did not clearly state that it was relying on specific state rules to predicate said default.

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas appeal to the Fifth Circuit Court of Appeals from the Northern District of Texas. Soliz was the defendant/appellant. Lorie Davis, Texas Department of Criminal Justice, was the respondent in the district court, and the appellee in the Fifth Circuit.

RULE 29.6 STATEMENT

Petitioner is not a corporate entity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES, RULES, AND GUIDELINES

SECONDARY SOURCES:

CITATIONS OF OPINIONS AND ORDERS ENTERED BELOW

The Fifth Circuit's January 9, 2018, opinion is attached as Appendix "A."

The District Court's Memorandum Opinion and Order is attached as Appendix "B."

STATEMENT OF JURISDICTION

The Fifth Circuit's Opinion was filed September 18, 2018. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a grand jury … nor be deprived of life, liberty, or property, without due process of law …. U.S. CONST, amend. VI.

In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defense. U.S. CONST, amend. VI.

28 U.S.C. § 2254(d) provides, in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits on State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE FACTS AND CASE

1. Motion to Suppress

On December 16, 2010, a grand jury indicted Soliz with capital murder for intentionally causing the death of Nancy Weatherly while committing the offenses of robbery or burglary.

Soliz filed a pretrial "Motion for Hearing on Admissibility of any Statement by Defendant Whether Written or Oral or Evidence Resulting from Same/Motion to Suppress" [C.R. 264] wherein he requested the court to suppress any statements given to agents of the Fort Worth Police Department on or about June 29, 2010, contending that the statements were custodial and in violation of *Miranda*. In sum, the statements were not voluntarily given and were obtained in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, Article I and the requirements of *Jackson* v. *Denno*, 378 U.S. 368 (1963).

Soliz's video-taped and written statements were admitted in the suppression hearing. The video-taped statement was admitted as State's Exhibit No. 1, and the transcript of the videotape was admitted as State's Exhibit No. 1A. The type-written statements were admitted as State's Exhibit Nos. 3 and 4. The trial court overruled Appellant's Motion to Suppress these items. [R.R. Vol. 6, pg. 122, CR 1746].

2. Soliz Introduced The Confession In His Recross-Examination of Detective Paine

> Q. Detective Paine, I'll show you what's been previously marked as State's Exhibit No. 1 and also marked Defense Exhibit No. 8, and ask you to identify that, please.
>
> A. It''s a DVD that I believe contains a recording of Mr. Soliz's interview.
>
> MR. HEISKELL: Okay. Your Honor, at this time, we would offer State's 1 and Defense Exhibit No. 8.
>
> MR. STRAHAN: No objection.

THE COURT: I want to just understand, you -- you offered State's Exhibit No. 1?

MR. HEISKELL: Yes, sir.

THE COURT: As your own document?

MR. HEISKELL: Yes, sir.

THE COURT: As your own pleading?

MR. HEISKELL: Yes, sir.

THE COURT: Without qualification?

MR. HEISKELL: Without qualification, Judge, yes, sir.

THE COURT: For all purposes?

MR. HEISKELL: For all purposes, Your Honor.

THE COURT: Admitted.

3. CCA's Resolution of The Suppression Claim

On direct appeal, the CCA resolved this point of error as follows:

> The record establishes that at trial, defense counsel offered the audiovisual recording of appellant's oral statement without qualification and for all purposes while cross-examining one of the detectives who interviewed appellant. The prosecutor did not object, and the recording was published to the jury. By offering his oral statement into evidence, appellant waived error concerning the trial court's ruling on his motion to suppress this statement. *See Decker v. State*, 717 S.W.2d 903, 908 (Tex. Crim. App. 1986) (stating that, when appellant offered his confession into evidence before the jury and the trial court admitted it as a defense exhibit, appellant waived his objection to the admission of his confessions); *see also Ex parte Moore*, 395 S.W.3d 152, 157 (Tex. Crim. App. 2013) (stating that when a defendant affirmatively asserts during trial that he has "no objection" to the admission of evidence, he waives any error in its admission despite a pre-trial ruling denying his motion to suppress).
>
> Appellant's written statements were offered by the prosecutor and admitted into evidence after appellant's oral statement had been admitted and published to the jury. These written statements were summaries of the oral statement. Because appellant waived error with respect to his oral statement, the admission of his written statements does not constitute reversible error. *See Coble v. State*, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010). Points of error three through six are overruled.

Soliz v. State, 432 S.W.3d 895, 902 (Tex. Crim. App. 2014).

4. Federal District Court's Resolution of the Suppression Claim

a. Procedural Bar

With regard to procedural bar, the Memorandum Opinion first explains that even though Respondent Davis urges the "contemporaneous-objection rule" as its trump-card, the CCA's opinion never mentions "the contemporaneous-objection rule" or its rule-based origin, Tex. R. App. P. 33.1.

> The contemporaneous objection rule, if that is what the CCA applied, is adequate to preclude federal review. *See Allen v. Stephens*, 805 F.3d 617, 635 (5th Cir. 2015), cert. denied, 136 S. Ct. 2382, 195 L. Ed. 2d 269 (2016). The CCA did not, however, cite Texas Rule of Appellate Procedure 33.1, which is the contemporaneous objection rule for preservation of error on appeal. *See Grado v. Stat*e, 445 S.W.3d 736, 738-39 (Tex. Crim. App. 2014).

Next, the District Court hypothesized an alternative rule on which the CCA might have based its holding, "invited error":

> Based on the trial record and the CCA reasoning, it appears that the CCA might have applied the invited-error doctrine. *See Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) ("the law of invited error provides that a party cannot take advantage of an error that it invited or caused, even if such error is fundamental"). *But see Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999) (explaining that invited error is a type of "estoppel" not "waiver"). Like the contemporary objection rule, the invited-error doctrine qualifies as a state procedural bar which may preclude federal review. *See Druery v. Thaler*, 647 F.3d 535, 545-46 (5th Cir. 2011).
>
> [T]he invited-error doctrine applies on federal habeas review as well. *Id*. at 545 (citing *United States v. Green*, 272 F.3d 748 (5th Cir. 2001); *Fields v. Bagley*, 275 F.3d 478 (6th Cir. 2001); *Parker v. Champion*, 148 F.3d 1219 (10th Cir. 1998); *Wilson v. Lindler*, 8 F.3d 173 (4th Cir. 1993). Regardless of any state-court ruling, this claim is procedurally barred in this Court under *Druery* because trial counsel invited any error by introducing the oral confession at trial.

b. Merits Analysis Under *Miranda*

Soliz next contends that his confession was involuntary because the police ignored his request to terminate the interview when he said, "I wish I could get up and leave . . . but I can't . . . guys got me shackled here." 58 RR 21. As Soliz asserts, the accused's right to cut off questioning must be scrupulously honored or his statement will be inadmissible. *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975) (citing *Miranda*). The invocation of the right to remain silent must, however, be unambiguous. *Thompkins*, 560 U.S. at 381-82.

The recording shows that Soliz misheard the detective say that he, Soliz, could get up and leave. Soliz's response that he wished he could get up and leave — with an emphasis on "could"-was not a request to terminate the interview. It was a statement regretfully acknowledging that he was shackled and under arrest. Soliz did not say that he wanted to stop talking. The fact that he immediately continued his conversation with the detective supports the interpretation that he simply misheard the detective say he could get up and leave if he was not sorry. *See Davis v. United States*, 512 U.S. 452, 462, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (holding that the statement, "Maybe I should talk to a lawyer" was not a request for counsel); *Hopper v. Dretke*, 106 F. App'x 221, 231-32 (5th Cir. 2004) (holding that question, "[c]an I go back and think about it?" was ambiguous invocation of right to remain silent and did not require cessation of questioning).
Because the underlying factual assertions are not supported by the record, claim 20 is denied.

5. Fifth Circuit's Holding

The Fifth Circuit made clear that it was utilizing it's 'best-guess' as to what the Texas state court had in mind: "We have previously held that "[t]he invited-error doctrine qualifies as a state procedural bar." *Druery v. Thaler*, 647 F.3d 535, 545 (5th Cir. 2011).

ARGUMENT: REASONS FOR GRANTING RELIEF

I. THE CCA NEVER STATED ITS BASIS FOR APPLING A PROCEDURAL BAR

Professor Means states the point starkly: "absent a clear and express statement that the ruling was on procedural grounds, the claim is not procedurally defaulted." Brian R. Means, *Postconvction Remedies*, §24.5 (West, June 2017).

The *ratio decindini* of the CCA's opinion is this: "[b]ecause appellant waived error with respect to his oral statement, the admission of his written statements does not constitute reversible error."

Soliz certainly agrees that, "[t]he 'Texas contemporaneous objection rule constitutes an adequate and independent state ground that procedurally bars federal habeas review of a petitioner's claims.'" *Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir.1999). However, the problem remains that the CCA's opinion says nothing about procedural bar; neither the words "contemporaneous objection" or "TEX. R. APP. P. 33.1" are to be found. *See Pike v. Guarino*, 492 F.3d 61, 74 (1st Cir. 2007) ("a federal court always must be chary about reaching a conclusion, based on speculative analysis of what a state court might do, that a particular claim is

procedurally foreclosed"); *Barnett v. Hargett*, 174 F.3d 1128, 1135 (10th Cir. 1999) (declining to hold unexhausted claim procedurally defaulted where "it is not at all clear" that the state court would hold the claim procedurally barred).

By contrast, Supreme Court caselaw requires that application of the state procedural bar must be uncertain if it is to pretermit federal review. "[T]he mere fact that a federal claimant failed to abide by a state procedural rule does not, in and of itself, prevent this Court from reaching the federal claim." *Harris v. Reed*, 489 U.S. 255, 261 (1989) ("The mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must ***actually have relied*** **on the procedural bar** as an independent basis for its disposition of the case.") (emphasis added).

While Soliz certainly agrees that AEDPA "compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning", *Santellan v. Cockrell*, 271 F.3d 190, 194 (5th Cir. 2001), the district court's "invited error" rationale is both 1) something the CCA never referenced in the its opinion and 2) completely inapposite to the facts of Soliz's case.

It is a legal parameter that an "invited error" is not reviewable on appeal. *United States v. Sarras*, 571 F.3d 1111, 1137 (11th Cir. 2009) ("Sarras concedes that he did not object to Ortiz's response. Normally, we would review such a claim for plain error. But because Sarras's claimed error is 'invited error,' it is thus

unreviewable."); *Willeford v. State*, 72 S.W.3d 820, 824 (Tex. App.—Fort Worth 2002) ("[W]e hold that the invited error doctrine applies and will not consider whether the trial court erroneously included the instruction about which Appellant now complains."); *Holmes v. State*, 140 Tex. Crim. 619, 146 S.W.2d 400, 403 (1940) (defendant objected to the wording of the charge, the wording was taken out, then defendant complained the wording was not in the charge, appellate court held defendant invited error and could not complain).

By contrast, the CCA never said Soliz's suppression arguments were insulated from review, but to the contrary addressed them specifically.

II. SOLIZ'S CONFESSION WAS INADMISSIBLE UNDER *MIRANDA*

A defendant's invocation of the right to remain silent must be unambiguous and unequivocal. *Berghuis v. Thompkins*, 560 U.S. 370 (2010).

> This is a two-part inquiry, considered under the 'totality of the circumstances surrounding the interrogation.' First, the waiver must have been 'the product of free and deliberate choice rather than intimidation, coercion, or deception.' Second, 'the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'

Garcia v. Stephens, 793 F.3d 513, 521 (5th Cir. 2014) (citations omitted).

The Memorandum Opinion recognizes that 1) Soliz was in custody at the time he was interrogated by the Fort Worth police officers and 2) failure to cut off custodial questioning after a suspect invokes his right to remain silent violates his

rights and renders any subsequently obtained statements inadmissible. *See, e.g.*, *Michigan v. Mosely*, 423 U.S. 96, 100 (1975).

The following statement is a stark reality of the interrogation of Soliz: "I wish I could get up and leave ... but I can't ... guys got me shackled here..." [SX 1;1A, pg. 14].

As a speculative matter, Soliz might have wanted to terminate the interview because it was very late at night or early in the morning; he was very tired, and was slumped over in his chair and asleep at one point during the interview. [R.R. Vol. 6, pg. 42]. But as a positive matter, Soliz wanted to terminate the interview because, as he stated, he would leave except that he was "shackled here.".

The facts of Soliz's case contrast with those at issue in *Garcia*: "Even assuming that Garcia was young, exhausted, and without his glasses, Garcia cannot show that he failed to understand the warnings or that he attempted to invoke his rights in any way." *Garcia*, 793 F.3d at 522. Perhaps Garcia was 'young, exhausted, and of bad eyesight' for reasons intrinsic to his own physicality; however, Soliz was "shackled here" because of (extrinsic) police conduct.

Soliz's request to leave and thereby terminate the interview was not granted by the Detectives. In fact, Detective Boetcher talked Soliz out of terminating the interview by ignoring his request and continuing to question him. This occurred when the Detective stated to Appellant: "Am gonna get up here and leave ... because

I don't waste time on people that don't feel sorry ... so ...we'll start with ...the house on Pearl." [SX 1;1A, pg. 15]. Detective Boetcher did not even acknowledge that Soliz requested to terminate the interview. This violated Soliz's right to terminate the interview at any time.

In sum, the interrogation was a custodial interrogation and that his rights under *Miranda* were violated

III. THE FIFTH CIRCUIT'S HOLDING CREATES A CONFLICT WITH DECISIONS IN OTHER CIRCUITS LEADING TO DIFFERENT RESULTS WITH RESPECT TO WHETHER FEDERAL REVIEW IN HABEAS CORPUS IS OBTAINABLE

The Fifth Circuit's conclusion as to procedural default resulted in a decision that conflicts with this Court's decisions in both *Long*[1] and *Coleman*[2] and other cases in which the *Long* presumption has been applied. It also explains why the Fifth Circuit arrived at a result opposite from other circuit courts that have confronted

[1] In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court announced the rule for determining whether a state court's ambiguous reference to state law constitutes an adequate and independent ground for its decision: "[W]hen … a state court decision fairly appears to rest primarily on federal law, *or to be interwoven with the federal law,* and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041 (emphasis added). In *Harris v. Reed,* this Court extended to habeas review *Long*'s rule for determining whether a state court has relied on an independent state ground. *Harris v. Reed,* 489 U.S. 244,265 (1989). As *Harris* makes clear, the "plain statement" rule applies "regardless of whether the disputed state-law ground is substantive (as it was in *Long*) or procedural, as in *Caldwell v. Mississippi*, 472 U.S. 320, 327 … (1985)." *Id.* at 263.

[2] *See, Coleman v. Thompson,* 501 U.S. 722 (1991) (noting that after *Long,* a state court that wishes to look to federal law for guidance or as an alternative holding while still relying on an independent and adequate state ground can avoid the presumption by stating "clearly and expressly that [its decision] is … based on bona fide separate, adequate, and independent grounds."

similar situations. For example, the Second Circuit held in *Fama* v. *Comm'r of Corr. Servs.,* 235 F.3d 804 (2d Cir. 2000), and reiterated in *Jimenez v. Walker*, 458 F.3d 130 (2d Cir. 2006), that so-called "either/or adjudications" by state courts do not preclude federal review under the *Long* presumption. *See also Newell v. Hanks,* 283 F.3d 827 (7th Cir. 2002) (presumption applied where state court failed to articulate basis of denial and it was unclear from the record and nature of the claim whether the state court relied on an independent state ground or federal grounds in disposing claim); *Koerner v. Gregas,* 328 F.3d 1039, 1052 (9th Cir. 2003) (describing Ninth Circuit case law as standing for the proposition that "where a state court decision affords no basis for choosing between a state law ground that would bar federal review, and one that would not, that decision cannot bar federal review"). Under these decisions, if a federal court cannot tell whether the state court held that an applicant failed to meet the state law prong or the federal law prong of *Campbell*, then the *Long* presumption would apply. In short, under the rules of these other jurisdictions, Mr. Soliz's IAC claim would have received federal review.

CONCLUSION

Soliz prays this Court to grant certiorari.

Respectfully submitted this 9th day of January 2019.

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COURT-APPOINTED ATTORNEYS FOR PETITIONER SOLIZ

CERTIFICATE OF MAILING

I hereby certify that, on the 9th day of January 2019, this pleading was served on the Court via FEDEX.

Seth Kretzer

CERTIFICATE OF SERVICE

I hereby certify that, on the 9th day of January, 2018, a true and correct copy of this petition and appendices was sent to:

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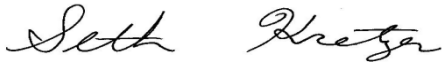

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