No. 18-7326

IN THE

Supreme Court of the United States

MARK ANTHONY SOLIZ,
Petitioner,

v.

LORIE DAVIS, DIRECTOR TDCJ–CID,
Respondent.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Fifth Circuit

PROOF OF SERVICE

I hereby certify that on the 28th day of February, 2019, a copy of **Respondent's Brief in Opposition to Petition for a Writ of Certiorari** was sent by mail and electronic mail to: Seth Kretzer, 440 Louisiana Street, Suite 1440, Houston, Texas 77002, seth@kretzerfirm.com. All parties required to be served have been served. I am a member of the Bar of this Court.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Mark Soliz was convicted and sentenced to death for the murder of Nancy Weatherly. Prior to his trial, Soliz unsuccessfully attempted to suppress his videotaped and written statements he gave to the police. During trial, Soliz's counsel offered into evidence his videotaped statement to the police during cross-examination of a police officer. Soliz raised a claim on direct appeal alleging that the admission of his statements to the police violated his right to remain silent. The Texas Court of Criminal Appeals (CCA) rejected the claim without addressing its merit because Soliz waived any error by offering his statement into evidence. Soliz then raised the claim in his federal habeas proceedings. The Fifth Circuit rejected Soliz's claim, concluding that the claim was procedurally defaulted. Soliz asks this Court to grant certiorari because the Fifth Circuit misapplied this Court's "plain statement" rule, which requires a federal court to presume a state court's rejection of a federal constitutional claim was not based on a state procedural default absent a plain statement that its decision was so based. In doing so, Soliz ignores this Court's holding in *Coleman v. Thompson*, 501 U.S. 722, 733–35 (1991).

These facts raise the following question:

> Should the Court grant certiorari where the state court's rejection of Soliz's claim did not rest in any way on federal law and the Fifth Circuit properly applied this Court's long-standing precedent in *Coleman*?

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BRIEF IN OPPOSITION

On direct appeal, Soliz claimed that his statements to the police were admitted in violation of his right under *Miranda v. Arizona*[1] and *Michigan v. Mosley*[2] to remain silent because he requested to terminate his interview. The CCA rejected the claim because, "[b]y offering his oral statement into evidence, [Soliz] waived error concerning the trial court's ruling on his motion to suppress his statement." *Soliz v. State*, 432 S.W.3d 895, 903 (Tex. Crim. App. 2014). And the admission of his written statements did not "constitute reversible error" because those statements "were written summaries of the oral statement. *Id*.

In his federal habeas petition, Soliz challenged the admission of his statements. The district court concluded the claim was procedurally defaulted and, alternatively, meritless. Pet'r's App'x B at 20–25. The Fifth Circuit affirmed, holding that the claim was procedurally defaulted. Pet'r's App'x A at 17–22. The court held that, although the CCA was not explicit with regard to the procedural bar it applied to Soliz's *Miranda* claim, the CCA's opinion showed that it rejected the claim under the invited error doctrine. Pet'r's App'x A at 19–20. Importantly, the CCA did not cite to any federal law as the basis

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1 384 U.S. 436, 444 (1966).

2 423 U.S. 96, 100 (1975).

for refusing to consider the merits of Soliz's claim, nor did it reach the merits of the claim. Pet'r's App'x A at 20. The Fifth Circuit rejected Soliz's argument that the state court's denial of his claim was not based on a state-law procedural default because the state court did not make a plain statement that its decision was based on such a default. Pet'r's App'x A at 20–21 (citing *Harris v. Reed*, 489 U.S. 255, 263 (1989)). The Fifth Circuit noted that this Court's holding in *Coleman* made clear that the plain statement rule does not apply where the state court's decision does not fairly appear to rest primarily on federal law nor is interwoven with federal law. Pet'r's App'x A at 21 (citing *Coleman*, 501 U.S. at 735). And because the state court's rejection of Soliz's claim did not rest on federal law, the claim was defaulted. Pet'r's App'x A at 21.

Soliz argues that the Fifth Circuit misapplied the *Harris* plain statement rule in holding that his claim was defaulted because the state court addressed the merits of his claim. Pet. Cert. at 9–10. Soliz also argues that the Fifth Circuit's holding created a circuit split because his claim would have received merits review in the Second, Seventh, and Ninth circuits. Pet. Cert. at 12–13. Lastly, Soliz argues that his statements to the police were inadmissible because they were obtained after he requested to terminate the interview. Pet. Cert. at 10–12.

Soliz is not entitled to certiorari because his argument elides entirely this Court's holding in *Coleman* and the fact that the state court did not address the merits of his claim in finding that he waived any error at trial by offering his statement into evidence. Further, the circuit split Soliz suggests is illusory. Lastly, Soliz's statements to the police were admissible and he failed entirely to show harm as a result of the statements' admission. Therefore, the Court should deny Soliz's petition for a writ of certiorari.

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Facts from Trial

A. The capital murder

The CCA summarized the facts of Nancy Weatherly's murder, as well as Soliz's crime spree that preceded Ms. Weatherly's murder and the police investigation into those crimes:

> The instant offense was one of numerous offenses that [Soliz] and his accomplice, Jose Ramos, committed during an eight-day crime spree that ended when [Soliz] and Ramos were arrested. . . . This offense was discovered when Ramos mentioned it in response to a Fort Worth police detective's question about another offense that [Soliz] and Ramos had committed.
>
> [Soliz's] and Ramos's crime spree began with a June 22, 2010 burglary in which they took several long guns and a Hi-Point 9-millimeter semiautomatic handgun, among other items. Later that evening, [Soliz] showed the stolen weapons to a potential buyer,

Ramon Morales. Morales wanted to buy all five weapons, but [Soliz] was not willing to part with a rifle and the handgun. [Soliz] told Morales that he had plans for them.

. . .

On the morning of June 24, 2010, [Soliz] approached a stranger, Justin Morris, in the parking lot of a shopping mall, pointed a gun at him, and demanded his wallet. . . . [Soliz] was later videotaped by a convenience-store security camera as he attempted to use Morris's debit card at an ATM.

Later that morning, after witnessing an argument between Luis Luna and a female friend of [Soliz's], Soliz asked his friend if she wanted him to "get [Luna] wet," which was street talk for drawing Luna's blood or killing him. [Soliz] fired the gun in the direction of Luna's head, but the bullet passed through Luna's ear lobe without seriously injuring him.

That afternoon, [Soliz] and Ramos held Jorge Contreras at gunpoint in a store parking lot while they stole his green Dodge pickup truck. Later the same day, [Soliz] approached Sammy Abu-Lughod in a different store parking lot as Abu-Lughod was getting into his green Dodge Stratus. [Soliz] pointed a black handgun at Abu-Lughod and demanded his wallet, cell phone, and car.

. . .

Around 2:00 a.m. on June 28, 2010, Soliz and Ramos approached four people who were leaving a bar and demanded their money and wallets.

. . .

At 3:30 a.m. on June 29, 2010, Ramos and [Soliz] committed a "drive-by" shooting. Ramos drove the car while [Soliz] fired shots into a house where they thought a rival gang member might be staying. At about 5:00 a.m., [Soliz] and Ramos approached Enrique Samaniego as he was walking to his pickup truck to leave for work. Either [Soliz] or Ramos shot Samaniego four or five times in the

stomach. Samaniego sustained life-threatening injuries, but he survived.

Around 5:30 a.m., [Soliz] and Ramos approached Ruben Martinez, a delivery truck driver who had just completed a beer delivery at a Texaco gas station, as Martinez was walking back to his truck. [Soliz] pointed the gun at Martinez and demanded his wallet. Martinez complied, offering his cell phone as well. Disappointed that Martinez's wallet contained only ten dollars, [Soliz] shot him in the neck. Martinez later died from complications of this injury.

Less than an hour after shooting Martinez, [Soliz] approached Kenny Dodgin as Dodgin was exiting his car in the parking lot of a Lowe's store. [Soliz] pointed a gun wrapped in a blue bandanna at Dodgin. Upon seeing [Soliz], Dodgin locked his car and ran toward the store. He heard three gun shots behind him.

Around 7:00 a.m., [Soliz] burglarized two homes in Benbrook. . . . Later that morning, [Soliz] and Ramos drove to Weatherly's home and committed the instant offense.

. . .

Eventually [officers] observed [Abu-Lughod's] Stratus . . . closely following a Jeep Liberty. The two vehicles appeared to be traveling together. Officers identified the Stratus by its license plate as the vehicle they were searching for and radioed for a marked patrol unit to initiate a stop. With lights and siren activated, a marked unit began following the Stratus. Instead of stopping, however, the Stratus accelerated and passed the Liberty. After a brief pursuit, the Stratus crashed into a parked eighteen-wheeler.

[Soliz] exited through the passenger side window and ran through parking lots and across a freeway before officers stopped and arrested him.

. . .

[W]hen detectives questioned Ramos about the aggravated robbery in which Contreras's green pickup truck had been stolen, Ramos provided information that was inconsistent with the information

detectives had already obtained about that offense. Specifically, Ramos indicated that the offense had ended badly and stated that it did not have to "end that way." This statement puzzled detectives because no one had been hurt and no shots had been fired during the offense. Ramos also referred to a female victim rather than a male victim. After some initial confusion, detectives ascertained that Ramos was describing a previously unknown offense committed in Johnson County. Ramos indicated that a female victim had been shot during a burglary or robbery and her green Toyota Tundra pickup truck had been stolen.

Ramos provided directions to the stolen Tundra. . . . Detectives checked the truck's registration and obtained the name and address of its owner, Nancy Weatherly. They then contacted the Johnson County Sheriff's Office and drove to Weatherly's house. A sheriff's deputy joined them at the house. They observed that the gate and garage door were open, and the back door of the house was partially open. The interior had been ransacked. Weatherly's body was lying in the kitchen area next to a table and chair. She had been shot once in the back of the head.

The investigation of this offense was ongoing when Fort Worth Detectives William "Danny" Paine and Thomas Boetcher began questioning [Soliz] at the police station. The interview was recorded. Boetcher advised [Soliz] of his rights and [Soliz] stated that he understood them. When asked if he was willing to talk about the offenses, [Soliz] answered, "All right." . . . Later, as they received information about the Johnson County investigation, they questioned [Soliz] about that offense as well.

Paine and Boetcher also obtained two typed and signed statements from [Soliz] that summarized his oral statement. The first typed statement concerned the Fort Worth offenses. In it, [Soliz] admitted his involvement in the Abu-Lughod, Contreras, Morris, Martinez, Dodgin, and bar patron robberies, as well as the Luna shooting. He also acknowledged that Ramos did not participate in all of these offenses.

[Soliz's] second typed statement concerned the instant offense. In it, [Soliz] admitted that he and Ramos had driven to Godley, where [Soliz] had threatened Weatherly with a gun and had burglarized

her house. [Soliz] denied shooting Weatherly, stating that after he and Ramos had loaded what they wanted into the Tundra, [Soliz] left the gun inside with Ramos and went outside to start the car. He then heard a shot and saw Ramos walking out of the house.

. . .

After [Soliz] signed the second typed statement, detectives questioned him further. [Soliz] wavered about whether he or Ramos was the person who shot Weatherly. Eventually, [Soliz] stated that he would confess to the shooting just to "get this over with," and admitted that he shot Weatherly. He also wrote and initialed a sentence at the end of his second typed statement: "It was me that shot that wom[a]n!!!"

[Soliz's] statements were not the only evidence that [Soliz] committed the instant offense. Estrada, who was riding in the Stratus with [Soliz] when it crashed, testified that [Soliz] bragged to her about killing an "old lady" in a house in Godley. [Soliz] told Estrada that he knocked on the door, and when the lady opened it, he pointed the gun at her. The lady backed up, and [Soliz] made her sit down. . . . She begged for her life and prayed. When [Soliz] showed the lady that he was stealing her jewelry box, she asked him not to take it because it had been a gift from her mother, who was now deceased. [Soliz] then told her to go with her mother and shot her in the head. He demonstrated for Estrada how he held out the gun and fired. He laughed about the incident and ridiculed the lady's "country" accent. He said that later, while taking methamphetamine, he had flashbacks about killing the lady and "seeing her brains go everywhere."

. . .

[A] law-enforcement officer testified that, while he was transporting [Soliz] and Ramos from Fort Worth to Johnson County for pretrial proceedings, he overheard [Soliz] telling Ramos that all they needed to do was "play dumb," and authorities would "get" the man who pawned the guns (presumably a reference to Morales) on capital murder.

> Forensic evidence also connected [Soliz] to the instant offense. Jennifer Nollkamper, a forensic scientist with the Fort Worth Police Department crime laboratory, determined that the shell casing recovered from Weatherly's home had been fired through the Hi-Point 9-millimeter semi-automatic handgun recovered from the Stratus. Nollkamper testified that the bullet recovered from Weatherly's home was too damaged for her to state affirmatively that it was fired from the recovered weapon, but she could state affirmatively that it was fired from a Hi-Point 9-millimeter semi-automatic handgun. Lannie Emanuel, a tool mark and firearm examiner for a private forensic laboratory, agreed with Nollkamper's determination that the shell casing had been fired through the recovered weapon. Emanuel, however, did not think that the bullet was too damaged for a positive comparison. He testified affirmatively that the bullet recovered from Weatherly's home was fired from the recovered weapon.
>
> William Walker, a fingerprint examiner with the Tarrant County Medical Examiner, positively identified a latent fingerprint on an audiocassette case in Weatherly's spare bedroom as [Soliz's] fingerprint. A trace analyst from the Tarrant County Medical Examiner's Office identified gunshot residue on [Soliz's] clothing and hands.

Soliz v. State, 432 S.W.3d at 896–900.

B. The State's punishment case

The CCA summarized the State's case for future dangerousness:

> [T]he evidence in this case shows that [Soliz] had a long history of violent conduct that began during his childhood and continued after his arrest and during his trial for the instant offense. At the age of ten, [Soliz] acted as an armed lookout for drug dealers in his apartment complex. When he entered the juvenile-justice system, [Soliz] was committed to the inpatient psychiatric unit of John Peter Smith hospital because of his out-of-control behaviors, which included fighting and carrying guns. [Soliz] also abused spray paint, cocaine, and alcohol. [Soliz's] treating psychiatrist at the hospital reported that [Soliz] had antisocial traits: he deflected

blame, had difficulty accepting responsibility, and was aggressive, unremorseful, and unempathetic.

. . .

Records of the Tarrant County Juvenile Probation Department reflect that, when [Soliz] was eleven years old, he self-reported his gang affiliation. The records of a group home where [Soliz] resided for approximately two years showed that he destroyed property, assaulted children and staff, and sexually assaulted younger boys. At times, [Soliz] had to be placed in restraints because he posed a danger to himself and others.

When [Soliz] committed the instant offense, he had at least ten prior felony convictions for offenses including theft, burglary, evading arrest in a vehicle, unlawful restraint, and possession of a prohibited weapon. . . . He had been out of prison for less than a month when he acquired a handgun during a burglary on June 22, 2010. From June 24[th] to June 29[th], [Soliz] used the stolen handgun in numerous aggravated robberies and shootings, including the instant offense.

[Soliz's] violent conduct continued after the instant offense. Estrada testified that shortly before they left Gonzales's house, [Soliz] stated that he needed to obtain more ammunition so that he could kill a girl who had seen him shoot Luna because [Soliz] had heard that she had talked to a detective. After Estrada and [Soliz] left Gonzales's house in the Stratus and [Soliz] saw the police car behind them, he sped up, telling Estrada that he would kill one of the "laws" or die trying. He aimed his handgun at the pursuing police car, but Estrada hit his hand and the gun fell onto the floor of the Stratus just before the crash. While waiting to be questioned at the police station, Estrada overheard [Soliz] . . . reiterating that he would rather "ride or die," meaning he would rather die fighting than go to jail.

After his arrest, [Soliz] was placed in administrative segregation. . . . Notwithstanding the heightened security of administrative segregation, [Soliz's] disciplinary offenses while in jail included possessing weapons and contraband and damaging property. On several occasions he flooded his cell, covered his windows, refused

> to let himself be handcuffed, and refused to follow orders. He once threatened a jail supervisor who would not let him into the general population, saying, "You know who I am. You know what I can do. I will get you." . . . On one occasion, [Soliz] wrestled with an officer who was escorting him from the courthouse until other officers intervened and physically restrained him.

Id. at 901–02.

C. The defense's case

The defense presented testimony of Soliz's family members, individuals who had treated or cared for Soliz when he was young, and experts who described to the jury Soliz's upbringing and fetal alcohol spectrum disorder (FASD). Krisha Flores, Soliz's cousin, testified that when Soliz was young, his mother, aunts, and uncles lived together in one house along with their children. 50 RR 138, 142.[3] The adults frequently sniffed paint in front of the children and did drugs inside the home. 50 RR 143, 163, 192. Soliz's mother prostituted herself in order to buy drugs. 50 RR 194–96. Soliz began sniffing paint at about age ten. 50 RR 183. Leticia Herrera, another cousin of Soliz, testified that when Soliz was seven or eight years old, he would "run[ ] the streets," and was not disciplined by his parents. 50 RR 245, 254–55. Soliz's family moved to the

[3] "RR" refers to the "Reporter's Record," the state record of transcribed trial and punishment proceedings, preceded by the volume number and followed by the internal page number(s). "CR" refers to the "Clerk's Record," the transcript of pleadings and documents filed in the trial court, preceded by the volume number and followed by the internal page number(s). The State's exhibits will be cited to as "SX" and the Defense's exhibits will be cited to as "DX."

Butler Housing Projects when Soliz was between six and nine-years old where a significant amount of violence and drug dealing occurred in their neighborhood. 50 RR 164, 167, 175, 217. One of Soliz's aunts was stabbed to death by her boyfriend in Soliz's presence when Soliz was young. 50 RR 194–96.

Dr. Prema Manjunath testified regarding FASD. She testified that a fetus's exposure to alcohol may cause a number of neurological abnormalities including impulsive behavior, social ineptness, and difficulty learning from experience. 51 RR 118. FASD is a "broad" group of disorders that includes "full blown" fetal alcohol syndrome (FAS) as well as other diagnoses that may be made when the individual was exposed to alcohol in utero and presents with the same behavioral deficits as an individual with FAS but does not possess the physical characteristics required for a diagnosis of FAS.[4] 51 RR 116–17.

Kevin Walling was a caseworker with the Tarrant County Mental Health and Mental Retardation (MHMR) organization. 51 RR 130. Soliz was referred to Tarrant County MHMR when he was ten-years old due to his living in the "projects" where drugs and prostitution were prevalent. 51 RR 133–34. Mr.

[4] In order to diagnose an individual with FAS, the individual must possess three characteristic facial abnormalities: (1) a smooth philtrum (the vertical ridges between the upper lip and nose); (2) a flat upper lip; and (3) a palpebral fissure (the opening between the eyelids) that is shortened horizontally by two or more standard deviations from the norm. 53 RR 46, 61, 142, 144–45.

Walling worked with Soliz from 1992 until 1994, at which time Soliz lived in the Buckner Children's Home. 51 RR 151. Mr. Walling visited Soliz's family's house and saw Soliz's mother with paint on her hands and around her mouth. 51 RR 146. He was told that the family's house had only one bedroom and that both Soliz and his mother slept in the bedroom. 51 RR 135. Soliz's mother also prostituted herself in that bedroom, which was witnessed by Soliz. 51 RR 135.

Soliz also presented testimony from three experts regarding FASD. As a result of their assessment, Soliz was diagnosed with Partial Fetal Alcohol Syndrome. Pet'r's App'x B at 76–81.

II. Procedural History

Soliz was convicted and sentenced to death in 2012 for the murder of Nancy Weatherly. 47 RR 77; 57 RR 94; 1 CR 38; 11 CR 2086, 2130–32, 2195–98. The CCA upheld Soliz's conviction and death sentence on direct appeal. *Soliz v. State*, 432 S.W.3d at 905, *cert. denied*, 135 S. Ct. 1154 (2015). Soliz filed a state application for a writ of habeas corpus. *Ex parte Soliz*, No. 82,429-01. The CCA denied Soliz's state habeas application based on the trial court's findings of fact and conclusions of law and based on its own review. *Ex parte Soliz*, No. 82,429-01 (Tex. Crim. App. 2015) (unpublished order).

Soliz then filed a federal habeas petition. The district court denied the petition but granted a certificate of appealability (COA) as to Soliz's *Miranda* claim. *See generally* Pet'r's App'x B. Soliz appealed the district court's decision

to the Fifth Circuit and requested an additional COA. The Fifth Circuit affirmed the district court and denied an additional COA. *See generally* Pet'r's App'x A. Soliz then filed in this Court a petition for a writ of certiorari. The instant Brief in Opposition follows.

ARGUMENT

I. The Court Should Deny Soliz's Petition Because He Does Not Identify a Compelling Reason that Warrants this Court's Attention.

Soliz argues that the Fifth Circuit misapplied this Court's "plain statement" rule as articulated in *Harris*. Pet. Cert. at 9. The plain statement rule, Soliz argues, requires that to preclude federal merits review of a constitutional claim a state court clearly and expressly state that its judgment rests on a state procedural bar. Pet. Cert. at 9. He argues that the CCA did not clearly and expressly state that its rejection of his *Miranda* claim was based on a state-law procedural default and, consequently, the procedural default was inapplicable in federal court. Pet. Cert. at 9. He also argues that the procedural default was ineffective because the CCA addressed the merits of his *Miranda* claim. Pet. Cert. at 9–10. Soliz's argument fails because it elides this Court's holding in *Coleman* and the fact that the CCA did not address the merits of his *Miranda* claim. Therefore, Soliz's petition should be denied.[5]

[5] It should be noted that Soliz's petition rests almost entirely on his argument that the Fifth Circuit misapplied this Court's holdings in *Harris* and *Coleman*. Soliz's

A. The plain statement rule applies only when the state court's adjudication of a claim fairly appears to rest primarily on federal law or is interwoven with federal law.

The Court in *Michigan v. Long* discussed the importance of respecting state courts' adjudications that are based on state law. 463 U.S. 1032, 1040–43 (1983). Recognizing that the Court's precedent did not satisfactorily articulate a workable standard for determining whether a state court's adjudication of a federal constitutional claim was based on state law so as to preclude federal review of the claim, the Court clarified the standard. *Id.* at 1040. The Court held that "when . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law," a federal court "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 1040–41. Consequently, a federal court would not review a state court's decision where the state court made a "plain statement" that its decision was not compelled by federal law and where the decision indicates "clearly and expressly" that it is based on an independent and adequate state-law ground. *Id.* at 1041.

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petition, by virtue of that fact alone, does not warrant certiorari review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

Reviewing the state court's decision in that case, the Court held the decision was not insulated from federal review. *Id*. at 1042–43. While the state court referenced the state constitution in rejecting the inmate's claim, it "otherwise relied exclusively on federal law." *Id*. at 1037; *see id*. at 1043–44. Indeed, the state court relied "*exclusively*" on its understanding of this Court's precedent and did not cite "a single state case" to support its holding. *Id*. at 1043 (emphasis in original). Therefore, it fairly appeared that the state court's decision rested primarily on federal law. *Id*. at 1044.

In *Harris*, this Court held that the "adequate and independent state ground doctrine" articulated in *Long* also applies in the federal habeas context. 489 U.S. at 262. The Court held that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." *Id*. at 263 (internal quotation marks omitted). The Court concluded that the state court's decision in that case did not clearly and expressly rest on a state-law ground where the decision was ambiguous on the matter and went on to address the merits of the federal claim. *Id*. at 265, 265 n.13.

Later, in *Coleman*, this Court reaffirmed the rule that a federal court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal

question and adequate to support the judgment." 501 U.S. at 729. However, a federal court presumes "that there is no independent and adequate state ground for a state court decision when the 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.'" *Id*. at 735 (quoting *Long*, 463 U.S. at 1040–41). In so holding, the Court expressly rejected the argument that the "plain statement" rule of *Long* and *Harris* applies to all cases in which a habeas petitioner presented his federal claim to the state court. *Id*. at 736. The Court made clear that such a reading of *Long* and *Harris* is too broad. *Id*. at 735. Rather, the presumption under *Long* and *Harris* that a state court's decision was not based on an independent and adequate state-law ground applies only when "it fairly appears that the state court rested its decision primarily on federal law." *Id*. at 736. The Court declined to require state courts to use particular language to insulate its judgment from federal review. *Id*. at 739–40.

Consequently, the standard is two-fold. A federal court asks first whether it fairly appears that that the state court judgment rested primarily on federal law or was interwoven with federal law. *Id*. at 739. If so, then the federal court presumes that the state court's decision was not based on an

independent and adequate state-law ground absent a "plain statement" to the contrary. *Id*.

The Court in *Coleman* held that the *Harris* presumption did not apply in that case because the state court dismissed the inmate's petition without mentioning federal law. *Id*. at 740 Therefore, the state court's judgment fairly appeared to rest primarily on state law and the petitioner's claims were not subject to federal review. *Id*.

B. The Fifth Circuit correctly concluded Soliz's *Miranda* claim was procedurally defaulted because the CCA's rejection of Soliz's *Miranda* claim rested entirely on state law.

The CCA rejected Soliz's *Miranda* claim strictly on the basis that he waived any error regarding the admission of his videotaped statement by offering the statement into evidence. *Soliz v. State*, 432 S.W.3d at 903. The CCA's holding is stated plainly: "[b]y offering his oral statement into evidence, [Soliz] waived error concerning the trial court's ruling on his motion to suppress this statement." *Id*. In so holding, the CCA cited only to state law that explained an appellant waives error regarding the admission of his statement by offering the statement into evidence, himself, or by stating he has no objection to the statement's admission. *Id*. The CCA's opinion did not cite federal law in reaching its decision, nor did the state-court precedent it cited rely on federal law. *Id*. (citing *Decker v. State*, 717 S.W.2d 903, 908 (Tex. Crim.

App. 1986)). Indeed, the CCA cited only state-law grounds for rejecting Soliz's *Miranda* claim. *Id*. And because Soliz waived error with regard to the admission of his videotaped statement, the admission of his written statements that summarized the videotaped statement could not constitute reversible error. *Id*. The CCA did not rely on federal law in reaching that conclusion.[6] *Id*.

Acknowledging that the state court "was not explicit" regarding its application of a procedural default, the Fifth Circuit held that the state court's rejection of Soliz's *Miranda* claim appeared to be based on the independent and adequate state-law ground of invited error.[7] Pet'r's App'x A at 18–19. Otherwise, the claim was subject to dismissal under the state court's contemporaneous objection rule.[8] Critically, the Fifth Circuit noted that the CCA "did not cite any federal law as the basis for its refusal to consider Soliz's claim," nor did it "reach the merits of" the claim. Pet'r's App'x A at 20. Consequently, any ambiguity in the CCA's decision only related to *which* state

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[6] The CCA cited *Coble v. State*, 330 S.W.3d 253, 282 (Tex. Crim. App. 2010), as the basis for its holding that, because Soliz waived error regarding the admission of his videotaped statement, the admission of his written statements that contained the same information could not constitute reversible error. *Soliz v. State*, 432 S.W.3d at 903. In turn, the CCA in *Coble* cited to its earlier holding in *Leday v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998), which described that rule as "[o]ur rule," i.e., the state court's rule.

[7] *Druery v. Thaler*, 647 F.3d 535, 545 (5th Cir. 2011) (holding that "[t]he invited-error doctrine qualifies as a state procedural bar").

[8] *Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999) (noting that Texas's contemporaneous objection rule is an independent and adequate procedural bar).

procedural ground the state court relied upon in rejecting Soliz's claim, not *whether* its decision was based on state or federal law. Pet'r's App'x A at 20.

Soliz raised in the court below the very argument this Court rejected in *Coleman*, i.e., that in *any* case a state court rejects a federal claim, the state court must make a plain statement that its decision was based on independent and adequate state grounds to preclude review of the decision by a federal court. 501 U.S. at 735–36; *see* Pet'r's App'x A at 20–21. The Fifth Circuit properly rejected the argument and applied the correct standard under *Coleman*, which held the *Harris* presumption that the state court did not rely on a state-law ground absent a plain statement it was doing so applies *only* when the state court's decision fairly appears to rest primarily on federal law or is interwoven with federal law. Pet'r's App'x A at 21. Consequently, the Fifth Circuit applied the appropriate controlling law.

Moreover, the Fifth Circuit correctly applied the controlling law. The Fifth Circuit first determined that "the record [did] not support that the state court rested its decision based upon federal law" because the state court did not cite federal law nor reach the merits of Soliz's claim. Pet'r's App'x A at 21. As a result, the court properly concluded the CCA's decision fairly appeared to rest primarily on state law. Pet'r's App'x Aat 21 (citing *Coleman*, 501 U.S. at

740).[9] Indeed, the Fifth Circuit's holding was compelled by *Coleman*. In that case, this Court held the *Harris* presumption did not apply where the state court made "no mention of federal law" in its decision. *Coleman*, 501 U.S. at 740. As in *Coleman*, the CCA made no mention of federal law in rejecting Soliz's *Miranda* claim. *Soliz v. State*, 432 S.W.3d at 903.

Soliz makes the conclusory assertion that the CCA "specifically" addressed his "suppression arguments." Pet. Cert. at 10. Soliz does not cite to where the CCA did so, nor could he, because the CCA did not "reach the merits of the claim." Pet'r's App'x A at 21. Therefore, the Fifth Circuit identified the controlling precedent from this Court and properly applied it to conclude Soliz's *Miranda* claim was procedurally defaulted. Pet'r's App'x A at 20–22. For the same reason, Soliz's assertion that the Fifth Circuit's holding conflicts with this Court's decisions in *Long*, *Harris*, and *Coleman* is incorrect. Pet. Cert. at 12. Consequently, Soliz's petition should be denied.

C. Soliz's petition is not worthy of attention because he asserts an illusory circuit split.

Soliz next argues that he is entitled to certiorari review because the Fifth Circuit's holding created a circuit split. Pet. Cert. at 12–13. But there is no such split and, consequently, Soliz's petition should be denied.

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[9] Notably, Soliz does not attempt to excuse the default of his *Miranda* claim by demonstrating cause and prejudice for the default or that the failure to review the merits of his claim resulted in a miscarriage of justice.

Soliz cites to the Second Circuit's holding that "either/or adjudications" by state courts are presumed to rest on federal law rather than state law. Pet. Cert. at 13 (citing *Jimenez v. Walker*, 458 F.3d 130, 140 (2d Cir. 2006), and *Fama v. Comm'r of Corr. Servs.*, 235 F.3d 804, 810–11 (2d Cir. 2000)). In *Jimenez*, the Second Circuit reviewed whether a state court's denial of a claim as "either unpreserved for appellate review or without merit" was subject to the *Harris* presumption. *Jimenez*, 458 F.3d at 139. The court held that the state court's decision was subject to the presumption because such language does not adequately indicate that its judgment rests on a state procedural bar. *Id.* at 139–40 (citing *Fama*, 235 F.3d at 811). There is nothing inconsistent between Second Circuit's precedent and the Fifth Circuit's holding in this case. As discussed above, the CCA's decision was based *entirely* on state law, and the CCA did not reach the merits of Soliz's claim. The CCA's decision was not an "either/or" adjudication.

Soliz next cites to the Seventh Circuit's holding that the *Harris* presumption applied where the state court did not articulate the basis of its decision. Pet. Cert. at 13 (citing *Newell v. Hanks*, 283 F.3d 827, 836 (7th Cir. 2002)). In *Newell*, the Seventh Circuit concluded the *Harris* presumption applied because there was "good reason to question whether there [was] an independent and adequate state ground for the decision." 283 F.3d at 836 (quoting *Coleman*, 501 U.S. at 739). The state court rejected the petition by

concluding the petitioner was "entitled to no relief." *Id*. The Seventh Circuit based its conclusion largely on the fact that the state trial court had allowed the petitioner "to proceed to an evidentiary hearing," which suggested the court did not view the petitioner's claim as procedurally barred. *Id*. By contrast, the CCA's opinion provides no reason to question whether its decision was based on an independent and adequate state ground. And unlike *Newell*, the CCA's opinion clearly expressed the basis of its decision by relying solely on state law.

Lastly, Soliz cites to the Ninth Circuit's holding 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." Pet. Cert. at 13 (citing *Koerner v. Gregas*, 328 F.3d 1039, 1052 (9th Cir. 2003)). The Ninth Circuit in *Koerner* explained that if it is *impossible* for a "federal court to ascertain whether [state-law grounds] have been relied upon, the state court decision cannot bar federal review." 328 F.3d at 1052. Again, the CCA's decision in this case is clear. The CCA relied solely on state law in rejecting Soliz's *Miranda* claim. There is no ambiguity in the CCA's opinion as to whether it relied on federal or state law, much less is it "impossible" for a federal court to determine whether the CCA relied on state law.

The opinions on which Soliz relies to assert a circuit split are consistent with the Fifth Circuit's opinion. The circuit split Soliz asserts is, therefore,

illusory. For the same reason, Soliz's assertion that his *Miranda* claim would have received federal merits review in other circuits is baseless. Pet. Cert. at 13. And as discussed above, the Fifth Circuit's opinion is entirely consistent with this Court's precedent. Consequently, Soliz's petition should be denied.

II. The Court Should Deny Soliz's Petition Because His *Miranda* Claim Is Unworthy of this Court's Attention.

Lastly, Soliz argues that his constitutional rights were violated by the admission of his statements to the police.[10] Pet. Cert. at 10–12. Specifically, Soliz argues that the statements were inadmissible because his confession was obtained after he invoked his right to remain silent. Pet. Cert. at 10–12. The claim is without merit and unworthy of this Court's attention.

An individual subjected to custodial investigation has the right to remain silent. *Miranda*, 384 U.S. at 444. An accused's right to cut off questioning must be scrupulously honored, otherwise his statement may be inadmissible. *Mosley*, 423 U.S. at 104. The right to remain silent, however, must be invoked "unambiguously." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010).

The Court in *Thompkins* stated that, in the context of invoking the right to counsel, a statement that is ambiguous or equivocal does not require officers

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[10] Trial counsel introduced into evidence a videotape of Soliz's interview with police. 41 RR 135; DX 8. Afterwards, the State introduced into evidence Soliz's first written confession and Soliz's second written confession onto which Soliz handwrote "[i]t was me that shot that wom[a]n." 41 RR 148–49; SX 2, 3. Trial counsel did not object to the admission of Soliz's written confessions. 41 RR 150.

to cease questioning and "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel." *Id*. The Court also stated that there are practical reasons for not requiring the cessation of questioning upon an ambiguous invocation of the *Miranda* rights. *Id*. For example, the Court stated that police would be required to cease an interrogation even if the suspect's intent was "unclear" and nonetheless "face the consequence of suppression 'if they guess wrong.'" *Id*. at 382 (quoting *Davis v. United States*, 512 U.S. 452, 461 (1994)). Suppression in such a case would significantly burden "society's interest in prosecuting criminal activity." *Id*.

Here, Soliz did not invoke his right to remain silent. At most Soliz made an ambiguous statement that he wished to terminate the interview. SX 1-A at 14 ("I wish I could get up and leave . . . but I can't . . . guys got me shackled here."). But the context of Soliz's remark indicates that he did not intend to invoke his right to remain silent. Immediately prior to that remark, a police officer stated he would "just as soon get up and leave" the interview because he would not "waste time" with people who do not have remorse. SX 1-A at 14. After Soliz remarked "I wish I could get up and leave,"[11] the officer stated "I said I." SX 1-A at 14. Soliz stated, "[o]h." SX 1-A at 15. The officer continued,

[11] The district court noted that Soliz emphasized the word "could" in the videotaped recording of the interview. Pet'r's App'x B at 24.

"[I] am gonna get up 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-A at 15. About twenty minutes later, Soliz agreed to sign a written statement. Pet'r's App'x B at 24. After another forty minutes of interview, Soliz agreed to make another written statement regarding Ms. Weatherly's murder. Pet'r's App'x B at 24.

As the exchange indicates, Soliz's remark reflected a misunderstanding of the officer's statement that the officer would leave the interview. Pet'r's App'x B at 25. Soliz's statement was not a request to terminate the interview. *See Davis*, 512 U.S. at 462 (holding that suspect's statement "[m]aybe I should talk to a lawyer" was insufficient to invoke the right to counsel).

But even reading Soliz's remark in isolation, the remark that he wished he "could get up and leave" was insufficient to invoke his right to remain silent. *See id*. at 462; *Hopper v. Dretke*, 106 F. App'x 221, 231–32 (5th Cir. 2004) (unpublished) (holding that suspect's asking "[c]an I go back and think about it" was an ambiguous statement that did not require cessation of questioning); *Burket v. Angelone*, 208 F.3d 172, 200 (4th Cir. 2000) (holding that suspect's statements "I just don't think I should say anything" and "I need somebody that I can talk to" were insufficient to invoke the right to remain silent); *Caldwell v. Bell*, 9 F. App'x 472, 480 (6th Cir. 2001) (unpublished) (holding that suspect's stating he would "rather not" speak to the police was ambiguous).

Soliz's remark was not sufficiently clear "that a reasonable police officer in the circumstances would understand the statement to be" an invocation of the right to remain silent. *Davis*, 512 U.S. at 459. Consequently, this claim is without merit.

Further, the Court has stated that police are not *required* to ask questions to clarify whether the suspect wants to invoke his *Miranda* rights when the suspect makes an ambiguous request. *Thompkins*, 560 U.S. at 381. But the police officer here clarified Soliz's remark by explaining the officer was referring to himself leaving the interview if Soliz was not remorseful. SX 1-A at 14–15. As the Court recognized in *Thompkins*, clarifying an ambiguous invocation of the right to remain silent would add only marginally to dispelling the compulsion inherent in custodial interrogation, but full comprehension of the rights to remain silent and to counsel is, itself, sufficient. 560 U.S. at 382. Soliz was warned of his right and fully comprehended them. *See* Pet'r's App'x B at 23 (the district court's opinion noting that Soliz conceded he understood his *Miranda* rights and wanted to talk). For these reasons, Soliz did not invoke his right to remain silent. Consequently, Soliz's claim is without merit.

Further, Soliz's *Miranda* claim is subject to harmless error analysis. *See Arizona v. Fulminante*, 499 U.S. 279, 309 (1991). Even assuming the admission of Soliz's statements was error, the error was harmless.

Soliz cannot show harm because the State presented extensive evidence implicating him in the murder of Ms. Weatherly.[12] Physical evidence placed Soliz inside Ms. Weatherly's home. 43 RR 120 (police officer's testimony that he collected fingerprint from cassette tape case found in Ms. Weatherly's home); 44 RR 126 (medical examiner's testimony that Soliz's fingerprint was found on the cassette tape case). The gun that was used to kill Ms. Weatherly was found inside the stolen car in which Soliz fled from police prior to his arrest. 42 RR 121; 45 RR 150. Gunshot residue was found on Soliz's hands and clothing as well as inside the stolen Dodge Stratus Soliz was driving when he fled from police and on the blue bandana recovered from inside that car. 45 RR 73–88. Ms. Weatherly's neighbor testified that a green Dodge Stratus was parked at Ms. Weatherly's home on the day her body was discovered. 44 RR 91–92. Elizabeth Estrada testified that Soliz had admitted to her that he killed Ms. Weatherly, describing his flashbacks about the killing and "seeing her brains go everywhere." 44 RR 190, 195–97, 276–77. Soliz's statements were cumulative of the extensive evidence showing he murdered Ms. Weatherly. Consequently, any error in the admission of the statements was harmless. *See Fulminante*, 499 U.S. at 295–96. Therefore, Soliz's claim is meritless. For the

[12] Soliz was charged with Ms. Weatherly's murder both as a principal and a party. 11 CR 2061–64.

same reason, Soliz does not present a compelling reason warranting this Court's attention and his petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

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