No. ___________

IN THE

Supreme Court of the United States

WILLIAM KIRKPATRICK, JR.,

Petitioner,

v.

KEVIN CHAPPELL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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<u>CAPITAL CASE</u>

QUESTIONS PRESENTED

Following *Whitmore v. Arkansas*, 495 U.S. 149 (1990), in all cases where courts have found a waiver of a capital inmate's right to proceed, there was a colloquy to ensure the waiver is knowing, intelligent, and voluntary. Except this one. The California Supreme Court found a knowing, intelligent, and voluntary waiver of Petitioner William Kirkpatrick, Jr.'s right to proceed in his state habeas proceedings, despite the appointed fact-finder's conclusion that the record was inadequate to determine whether the waiver was knowing and intelligent due to the absence of a colloquy with Kirkpatrick. The Ninth Circuit accorded the California Supreme Court's waiver finding a presumption of correctness under 28 U.S.C. § 2254(e)(1). The questions presented are:

Whether the Ninth Circuit contravened *Whitmore v. Arkansas* in upholding a capital inmate's waiver of the right to proceed absent a colloquy demonstrating the waiver was knowing, intelligent, and voluntary?

Where there are substantial defects in a state court's fact-finding process regarding whether a capital inmate waived the right to proceed, such as the absence of a colloquy to determine whether the waiver was knowing, intelligent, and voluntary, should a federal court apply 28 U.S.C. § 2254(e)(1)'s presumption of correctness to the state court's waiver finding?

STATE AND FEDERAL COURT PROCEEDINGS

William Kirkpatrick, Jr. was sentenced to death on August 14, 1984 in *People v. Kirkpatrick*, Los Angeles Superior Court Case No. A590144. The California Supreme Court denied his direct appeal on June 13, 1994 in *People v. Kirkpatrick*, Case No. S004642. This Court denied his petition for certiorari on March 20, 1995 in *Kirkpatrick v. California*, No. 94-1114.

The California Supreme Court denied Kirkpatrick's first pro se habeas petition on July 15, 1987 in *In re Kirkpatrick*, No. S001181, and his second pro se habeas petition on April 15, 1992 in *In re Kirkpatrick*, No. S024696.

The California Supreme Court denied Kirkpatrick's counseled habeas petition on September 29, 1988 in *In re Kirkpatrick*, No. S005410. This Court denied his certiorari petition on February 27, 1989 in *Kirkpatrick v. California*, No. 88-6383. The California Supreme Court dismissed his exhaustion habeas petition on September 19, 2001 in *In re Kirkpatrick*, No. S075679.

The United States District Court for the Central District of California denied Kirkpatrick's federal habeas petition on December 23, 2013 in *Kirkpatrick v. Chappell*, Case No. CV 96-0351-WDK. In *Kirkpatrick v. Chappell*, No. 14-99001, the Ninth Circuit Court of Appeals reversed and remanded on October 10, 2017; withdrew its opinion and entered a new opinion denying relief on June 13, 2019; and amended its opinion on February 13, 2020.

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INTRODUCTION

In *Whitmore v. Arkansas*, 495 U.S. 149, 165 (1990), this Court held that where an evidentiary hearing shows a capital inmate is competent and gives a knowing, intelligent, and voluntary waiver of his right to proceed, a person cannot obtain standing to proceed as the inmate's next friend. State and federal courts confronted with a capital inmate purporting to waive his right to proceed have relied on *Whitmore* to devise proceedings to ensure the waiver is valid. In every capital case in which a court has ultimately found a knowing, intelligent, and voluntary waiver of the right to proceed, it has done so only following a colloquy with the inmate. This case is the only exception.

From pre-trial proceedings through his federal habeas appeal in the Ninth Circuit, Petitioner William Kirkpatrick, Jr., expressed his desire to control the litigation by acting as his own attorney. While Kirkpatrick's state habeas exhaustion petition – which he had not read – was pending, Kirkpatrick mailed the California Supreme Court a handwritten "waiver form" purporting to waive the petition and have his death sentence carried out. The court appointed a referee to take evidence, *inter alia*, on whether Kirkpatrick made a knowing, intelligent, and voluntary waiver of his right to proceed. Kirkpatrick several times indicated he wanted to represent himself, but he ultimately refused to engage in a waiver colloquy. The referee thus found no valid waiver. Without taking additional evidence and without providing any

reasoning, the California Supreme Court ruled Kirkpatrick made a knowing, intelligent and voluntary waiver, and dismissed the petition. Despite "the peculiarities in the process" of the waiver finding in state court, the Ninth Circuit presumed the waiver finding to be correct under 28 U.S.C. § 2254(e)(1) and ruled that Kirkpatrick did not present clear and convincing evidence to rebut the state court's finding.

The Ninth Circuit opinion stands alone in upholding a waiver of the right to proceed in a capital case when there was never any colloquy, or other proceeding, at which any court was able to assure itself that the inmate satisfied the requirements of a knowing, intelligent, and voluntary waiver. As a result, Kirkpatrick faces execution without any court having adjudicated the merits of more than twenty federal constitutional claims, including the claim that counsel unreasonably failed to present any mitigating evidence at penalty.

This Court should grant certiorari and reverse the Ninth Circuit's departure from *Whitmore*. All courts, except for the Ninth Circuit in this case, that have found a waiver of the right to proceed in a capital case have done so only following an adequate colloquy.

The Ninth Circuit opinion also creates a split with the Third Circuit's opinion in *Fahy v. Horn*, 516 F.3d 169 (3d Cir. 2008).[1] *Fahy*, 516 F.3d at 183,

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[1] At oral argument, Judge Christen noted the court would create a circuit split if it did not follow *Fahy*. Oral Argument at 40:12-41:30, *Kirkpatrick v.*

presents facts materially indistinguishable from those here and concludes the state court's finding of waiver absent an adequate colloquy should not be presumed correct under § 2254(e)(1). Here, the record is insufficient to support the state court waiver finding and the Ninth Circuit acknowledged the lack of a colloquy, but nonetheless applied § 2254(e)(1)'s presumption of correctness to the state court's finding of a knowing, intelligent, and voluntary waiver.

The Ninth Circuit decision is an outlier and creates bad law. Although the court concludes that nothing in its opinion should be construed to minimize the constitutional requirements of a voluntary, knowing, and intelligent waiver, that is the legacy of the opinion. And it will have far-reaching consequences beyond this case and this context, since the requirement of a knowing, intelligent, and voluntary waiver of rights is ubiquitous.

Given the split with the Third Circuit, and that the Ninth Circuit stands alone in upholding a waiver of the right to proceed in a capital case absent an adequate colloquy, the Court should issue a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in *Kirkpatrick v. Chappell*, No. 14-99001.

Chappell, 950 F.3d 1118 (9th Cir. 2020) (No. 14-99001), *available at* https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014802 (visited July 10, 2020).

OPINIONS BELOW

Due to the death of one judge and the retirement of another, two Ninth Circuit panels conducted oral argument and issued opinions in this case. The final amended opinion affirming denial of relief is *Kirkpatrick v. Chappell*, 950 F.3d 1118 (9th Cir. 2020). App. 1-45.[2] The withdrawn order of the original panel reversing the district court's denial of relief and remanding the case is *Kirkpatrick v. Chappell*, 872 F.3d 1047 (9th Cir. 2017). App. 48-81.

The order of the district court upholding the state court waiver finding, and dismissing as waived and unexhausted the 20+ claims raised in the exhaustion petition is unreported. App. 122-36.

The California Supreme Court order dismissing the state exhaustion petition as waived is unreported. App. 137. The state referee's report and recommendation finding no valid waiver is unreported. App. 138-43.

JURISDICTION

The District Court for the Central District of California had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction under 28 U.S.C. §§ 1291 and 2253.

The Ninth Circuit issued an opinion reversing the district court judgment and remanding the case on October 10, 2017. App. 48-81. The State

[2] "App." refers to the appendix filed concurrently with this petition.

timely petitioned for rehearing. A newly-constituted panel granted rehearing on July 18, 2018. App. 47. The court withdrew the previous opinion (App. 46) and issued an opinion affirming the district court's denial of relief on June 13, 2019. Kirkpatrick timely petitioned for rehearing. On February 13, 2020, the court issued an amended opinion and denied rehearing. App. 1-45.

This petition was originally due May 13, 2020. Due to COVID-19, however, on March 19, 2020, this Court extended the deadline for certiorari petitions due on or after the order's date to 150 days from the date of the lower court judgment or order denying a timely petition for rehearing;[3] thus making this petition due by July 13, 2020.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. XIV, Sec. 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

[3] Order available at https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf (visited July 10, 2020).

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254(e)(1)

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

STATEMENT OF THE CASE

A. Trial

In September 1983, Kirkpatrick was arrested for crimes related to a burglary at a Taco Bell during which two employees were killed. App. 4. Kirkpatrick was sentenced to death on August 14, 1984. App. 10. Eddie Salazar, who fled the state after the Taco Bell crimes, was also convicted for participating in the crimes and was later sentenced to two concurrent terms of 25 years to life. App. 55 n.3.

On March 19, 1984, Kirkpatrick made his first request to be appointed as co-counsel, beginning his decades-long quest to control his litigation. The court denied his request. ER 1572-73.[4] Rayford Fountain and Albert DelGobbo

[4] "ER" refers to the Excerpts of Record filed in the Ninth Circuit. Ninth Circuit Dkt. No. 20.

represented Kirkpatrick at trial. On May 1, 1984, the court received a letter from Kirkpatrick in which he criticized his attorneys' performance. ER 1575-76. Defense counsel explained they experienced problems because Kirkpatrick's desires were contrary to what counsel believed to be the best course of action. ER 1577.

The prosecutor gave his opening on May 7, 1984. The prosecution's theory was that Kirkpatrick stole a .22 caliber gun from the Union 76 Station where he had once worked, recruited Salazar to help him rob the Taco Bell where he had once worked, murdered the Taco Bell employees using the stolen gun, and then told acquaintances about the crime. App. 52.

Forty-two prosecution witnesses testified. Some witnesses testified that, several days before the murders, they saw Kirkpatrick with a gun that resembled the murder weapon. App. 52. And some witnesses testified they saw Salazar with the gun the day after the Taco Bell murders. ER 1609-21, 1629, 1624-27.

The prosecutor entered as an exhibit a .22 caliber gun that was purportedly the murder weapon, but the firearms examiner could not positively say the gun fired the spent bullets retrieved from the crime scene. App. 52-53. In a pretrial proceeding, in return for immunity on charges of receiving stolen property, Joey Pedraza testified he received the gun involved in the Taco Bell shootings and sold it to the Burbank Police Department for

$125. ER 1519-22. Kirkpatrick would later focus intensely on this fact during state habeas exhaustion proceedings.

The defense waived opening statement (ER 1544) and presented three witnesses. The defense presented no evidence explaining Salazar's role in the crimes. Kirkpatrick testified, against counsel's advice, and denied committing the crimes. App. 53.

After the prosecutor's closing, the court denied Kirkpatrick's request to address the jury. ER 1698. In his closing, trial counsel stated Kirkpatrick's case was not very good and conceded that whoever committed the crimes committed first-degree murder. ER 1702-03.

During their five days of deliberations (App. 5), jurors asked for the testimony of four witnesses to be read back. ER 1728-40. Also during deliberations, the court received a letter from Kirkpatrick berating his counsel, and stating he no longer considered them his attorneys. ER 1547. The jury returned guilty verdicts on all counts and found true all special circumstance and firearm allegations. App. 5.

The day after the guilty verdicts, Kirkpatrick asked to represent himself at penalty. The court conducted a brief inquiry and learned Kirkpatrick only completed tenth grade. Trial counsel argued it was not in Kirkpatrick's best interest to represent himself. ER 1743-47. Kirkpatrick stated there had been instances where counsel "went completely against everything [he] requested,"

and explained he instructed them to subpoena witnesses, but counsel ignored him. ER 1753-54. Trial counsel did not dispute these statements. The court denied Kirkpatrick's request as untimely. ER 1759. When Kirkpatrick threatened not to attend the penalty phase, the court allowed him to act as co-counsel. ER 1761-63; *see* App. 9 n.1.

Counsel stated it would be helpful for Kirkpatrick to be psychiatrically evaluated, but Kirkpatrick did not want to speak with a psychiatrist. ER 1765. The court ruled it would "accept Mr. Kirkpatrick's position on that." ER 1767. Counsel also stated that, although he thought it would be helpful to present Kirkpatrick's mother, he acceded to Kirkpatrick's desire not to have family members contacted or brought to court. App. 6-7. Kirkpatrick confirmed he did not want family members brought to trial, but he did not state on the record that he did not want family members to be contacted. ER 1767. Despite the fact that counsel repeatedly ignored Kirkpatrick's attempts to control the litigation, they followed his purported instructions not to contact or present family members.

The prosecution's case in aggravation focused on three incidents of unadjudicated criminal conduct (App. 5-6); Kirkpatrick had no prior felony convictions (ER 1556-57). The mitigation presentation consisted solely of Kirkpatrick's seven pages of testimony. Kirkpatrick, who was 23 at the time of the crimes (App. 5), testified he was from New York and aspired to be a

published writer. App. 6. Defense counsel asked Kirkpatrick if he still maintained his innocence and stuck by his "version of the facts." Kirkpatrick asserted his innocence. ER 1828-37.

Defense counsel could have presented powerful mitigating evidence of Kirkpatrick's impoverished and abusive upbringing and history of mental illness (even abiding by Kirkpatrick's imposed limitations), but failed to do so. Counsel did not attempt to interview friends or school teachers from Kirkpatrick's time in New York, where he grew up. Nor did counsel attempt to interview experts or request any school or medical records. As a result, the jury never heard Kirkpatrick started using drugs at a young age; was raised in a poor neighborhood overrun with drugs, violence, and gunfire, ER 1384-87; and was raised by a physically and verbally abusive single-mother who was described as creating a "chaotic and destructive household[]" and was "drunk, loud, belligerent and led a wild life," ER 1373-75. Nor did jurors learn that Kirkpatrick has exhibited symptoms of psychiatric illness since childhood. He often thought others were scheming and plotting against him. Kirkpatrick's delusions were so alarming that his school referred him to Coney Island Hospital Children's Services (ER 1375-76), which in turn referred him to the Brooklyn Center for Psychotherapy (ER 1322). Based on their interactions with him, counsel also suspected Kirkpatrick suffered from mental health problems and stated on the trial record they thought a psychiatric evaluation

would be helpful. ER 1765. Yet counsel did nothing to develop evidence of Kirkpatrick's background or mental health issues, and never learned that he suffers from life-long depression and Post-Traumatic Stress Disorder ("PTSD"). ER 1346-48.

Kirkpatrick and his attorneys were permitted to deliver a closing argument. Kirkpatrick told jurors he did not blame them for finding him guilty and he would have done the same. He stated he was not subjected to a fair trial. He criticized his attorneys for failing to call certain witnesses and failing to ask specific questions. He told jurors he was "frightened" and "mad" because they were sending an innocent man to jail. App. 9.

Trial counsel acknowledged jurors' concerns that Kirkpatrick be appropriately punished and the community be protected from him, and stated he shared those concerns. ER 1886-1904. Trial counsel urged jurors to keep Kirkpatrick alive because he would be valuable to study by those interested in antisocial behavior (ER 1909) and perhaps Kirkpatrick would start "fessing up" to his role in the crimes (ER 1913).

Jurors began deliberations on June 19, 1984. After several hours, they sent a note expressing confusion about the standards for determining penalty. The jury deliberated for two days before returning a death verdict on June 21, 1984. App. 10.

B. Initial State And Federal Habeas

The Office of the State Public Defender ("OSPD") was appointed to represent Kirkpatrick on appeal and state habeas. Kirkpatrick filed a pro se motion requesting that OSPD be relieved. The California Supreme Court denied the motion, as well as Kirkpatrick's first pro se habeas petition. ER 154. Kirkpatrick later filed a second pro se habeas petition, which the California Supreme Court also denied. ER 152.

On April 27, 1988, OSPD filed Kirkpatrick's opening brief on direct appeal and initial counseled state habeas petition alleging one claim: penalty-phase ineffective assistance of counsel ("IAC"). ER 1442-63. Relying on then-existing state precedent, the claim challenged the constitutionality of waiving a mitigation presentation; it was not the comprehensive penalty-phase IAC claim later developed and presented in the state exhaustion petition. On September 29, 1988, the court summarily denied the petition, but two justices voted to grant an order to show cause. ER 153. On June 13, 1994, the California Supreme Court affirmed the trial court judgment on appeal. *People v. Kirkpatrick*, 7 Cal. 4th 988 (1994).

Kirkpatrick came within nine days of execution before initiating habeas proceedings under 28 U.S.C. § 2254 in the United States District Court for the Central District of California in 1996. The district court appointed present counsel, the Office of the Federal Public Defender ("FPD"). ER 1932.

Repeating his pattern of seeking to control his case, Kirkpatrick filed a pro se request to relieve the FPD as counsel and stated his intention to file his own petition. ER 1409. The court required Kirkpatrick to participate in a mental health evaluation as a condition to considering his request. ER 104-06. Kirkpatrick repeatedly disregarded orders to indicate whether he would submit to a mental health evaluation, so the court held Kirkpatrick forfeited his right to represent himself. ER 102. Kirkpatrick stated, however, that he wished to continue with habeas proceedings. ER 98-99. In response to a further pro se letter to the court from Kirkpatrick, the State submitted a proposed order, which the court signed, stating that the court determined Kirkpatrick intends to proceed with filing a petition, he is not to communicate directly with the court, and if he wishes to waive his petition he is to sign the attached waiver form. App. 274-76. The attached waiver form stated: "I do not wish to proceed with my Petition for Writ of Habeas Corpus review in this matter. I wish the sentence and Judgment of Execution in *People v. William Kirkpatrick, Jr.*, A-590144, to be carried out at this time. App. 276.

The FPD filed a federal habeas petition asserting claims from the direct appeal and the penalty-phase IAC claim from the initial state petition; the court dismissed the penalty-phase IAC claim as unexhausted. ER 96-97. The FPD also filed a notice of unexhausted claims, which included a more robust

penalty-phase IAC claim. ER 1941. The district court stayed the proceedings pending exhaustion. ER 96-97.

C. State Exhaustion Proceedings

The FPD filed Kirkpatrick's exhaustion petition, containing twenty-two claims and fourteen subclaims attacking his convictions and sentence, in the California Supreme Court on December 30, 1998. Because Kirkpatrick refused or disposed of mail from the FPD (App. 210, 231, 266), and refused to communicate with his attorneys (*see* App. 187-89), he did not know what claims were in the petition. During informal briefing on the petition, he mailed a pro se letter to the court, to which he attached a handwritten "waiver form." App. 271-73. Copying the words the State provided in district court, the form stated: "I *do not* wish to proceed with my petition for writ of habeas corpus review in this matter. I wish the sentence and judgement [sic] of execution in *People v. William Kirkpatrick Jr.* A590144 to be carried out at this time." App. 271.

The state court appointed a referee to conduct a hearing to determine whether Kirkpatrick was competent to waive his petition and whether his waiver was knowing, intelligent, and voluntary, citing *Whitmore v. Arkansas*, 495 U.S. at 165. App. 269.

Prior to the hearing, Kirkpatrick appeared before the referee for four status conferences. *See* App. 152-267. During the status conferences, Kirkpatrick made statements to the referee indicating his desire to remove the

FPD from his case and the referee similarly made comments indicating the proceedings were about waiving the right to counsel. When Kirkpatrick was first brought before the referee, the referee stated:

> [T]he [California] Supreme Court is right now confronted with *your apparent request to relieve counsel*. . . . [I]t appears that if you and I conclude this process with a finding of competence and *a finding that you are making a knowing, voluntary, and intelligent waiver of the right to counsel* and they accept the findings, the Supreme Court then effectually *would relieve counsel and you would be representing yourself*, and I presume that they would go forward and honor your request to withdraw the petition . . . .

App. 159 (emphasis added). Kirkpatrick informed the referee he was not prepared for the hearing and if he had been, he would have provided advanced notice "of everything that obstructed [his] efforts in 1996 to *pursue this self-representation*." App. 160 (emphasis added).

Kirkpatrick also complained to the referee about the presence of FPD attorneys, saying they had no right to be there. App. 187-89. The referee stated the California Supreme Court may conclude that Kirkpatrick is "entirely correct and that [the FPD] has no place here." App. 189. The referee's statements indicate that if Kirkpatrick's waiver were valid, then the FPD would be removed from the case.

When Kirkpatrick stated he did not believe the California Supreme Court was concerned about his competency and he believed the court intended to give him "full control" of his case, the referee agreed:

> [Kirkpatrick]: I don't think the Court is gravely concerned about my competence at all.
>
> [Referee]: Based upon anything I have seen here, I don't think they're gravely concerned either. I think as a matter of what they consider to be due process, they want to be sure that before they allow you to effectually *relieve your attorney*, who is currently appointed and in place, they want to be sure that you are competent and that you understand what's going on.
>
> [Kirkpatrick]: *I believe it is the Court's intent to give me full control of my case.* Every time I have done this in the past, first words out of attorney of record's mouth is "competence, competence." [¶] I believe when I get that out of the way and I can get the case away from them – I think if they're fair and honest, they will agree with me that I am entitled to my day in court. Lawyers are dragging and dragging. Sooner or later somebody got to snap. [¶] But the State Court and the U.S. Supreme Court – I believe it is their intention to give me that control of the case.
>
> [Referee]: That would be my suspicion. If we end up concluding and they're satisfied with the factual conclusion that you are competent and that you understand what's going on and that you are making a knowing and voluntary waiver, *then I suspect that they probably will give you your wish and relieve counsel and let you go on your way*.

App. 190-91 (emphasis added). Kirkpatrick also stated the competency proceedings were occurring just because he wanted to represent himself. App. 193.

Finally, Kirkpatrick asked the referee whether he had a constitutional right to self-representation, which the referee answered in the affirmative. App. 205-06. Kirkpatrick then asked whether he had a constitutional right to seek self-representation in the appellate process, to which the referee responded: "I believe the Supreme Court is asking me to make findings because they acknowledge that you have a right to make important decisions." App. 205-06.

At the first status conference, the referee acknowledged it was not the time to determine whether the waiver was knowing, intelligent, and voluntary (App. 167), but the following exchange occurred, which the Ninth Circuit relied upon to find the waiver was knowing, intelligent, and voluntary:

> [Referee]: I have one other question for you. Just as a matter of context for me, and this, of course, helps me make an evaluation of all of the issues pending, but I am curious to know what it is you are trying to accomplish. I think your petition alluded to it. [¶] What is it you would like to accomplish at the bottom line in this process?
>
> [Kirkpatrick]: Competency and vacating of the appeal.
>
> [Referee]: If that's done, what is it that you are hoping will happen as a result?

[Kirkpatrick]: I am not going to litigate that, divulge that at this time.

[Referee]: It is not litigation. Anything I determine here wouldn't limit –

[Kirkpatrick]: I want to keep the strategy to myself.

[Referee]: I need to at least be aware along the way of what you think is likely – a likely result of your prevailing in your efforts to withdraw the petition.

[Kirkpatrick]: I am not going to be divulging any kind of strategies I might be making at this time.

[Referee]: Well, you do understand that the petition for Writ of Habeas Corpus contains some possibility – I am not going to speak on the probability – but some possibility of ultimately preventing your execution[.] [¶] Do you understand that?

[Kirkpatrick]: To vacate –

[Referee]: The writ that's pending in the Supreme Court, if it prevails and they were to issue a Writ of Habeas Corpus, it is quite possible that that could prevent you being put to death. [¶] Do you understand that?

[Kirkpatrick]: My intention is to stay alive as long as possible, Judge.

. . . .

[Deputy Attorney General]: Your Honor, may I ask the Court to direct one more question? [¶] That he understands what happens in the State Court may have impact on the Federal Court proceedings. If the State Court were to dismiss it, that might have the impact of limiting what he could raise in Federal Court. He might think his best chance is in Federal Court. I don't know, but there will be consequences.

> If the petition were to be dismissed in State Court, that might limit what he can raise in Federal Court.
>
> [Referee]: Can you give us a for instance?
>
> [Deputy Attorney General]: If he is raising an issue in the State Court that's not previously been exhausted, and you go to Federal Court and try to raise it, we can make a claim and the Federal Court buys that and says, "You can't litigate that issue as good as you may think it is." It might limit your possibilities of what you can raise in Federal Court.
>
> [Kirkpatrick]: I understand that my writ for exhaustion is already filed by the PD's office.
>
> [Deputy Attorney General]: If you withdraw that, then it won't have the impact of doing the exhaustion because it will be withdrawn. [¶] There is a potential that when we go back to Judge Keller's courtroom, and you withdraw it, you can't raise it there again. There is a possibility he might do that.
>
> [Kirkpatrick]: I can appreciate that.
>
> [Deputy Attorney General]: So that means if you say, "Gee, I changed my mind," he may say, "Mr. Kirkpatrick, sorry, you can't raise it."
>
> [Kirkpatrick]: You are looking out there, Robert. Thanks.
>
> [Deputy Attorney General]: I am here to do justice. . . . [B]ut do you understand what I am trying to communicate?
>
> [Kirkpatrick]: Yeah, you are covering your ass.

App. 169-72.

Before the hearing, court-appointed psychiatrist Diane McEwen evaluated Kirkpatrick for two and a half hours to determine whether he was

competent to waive the petition. Although it was not her role to evaluate whether the waiver was knowing, intelligent, and voluntary (ER 741-43, 782-92), Kirkpatrick's statements to Dr. McEwen similarly demonstrate he thought he was seeking self-representation. When Dr. McEwen interviewed Kirkpatrick, she believed one of the issues to be decided by the reference hearing was whether Kirkpatrick was "making [a] knowing, voluntary and intelligent decision in seeking to withdraw [the] petition *or* to represent self." ER 737-40 (emphasis added). Kirkpatrick's statements to her indicated a desire to waive the right to counsel, not to waive his petition, stop litigation, and accept execution. Dr. McEwen reported to the referee that Kirkpatrick told her he had "no intention of discontinuing litigation," that he planned to represent himself, that he planned to "hire Black lawyers," and that he intended to win a re-trial based on information in police records that police had purchased the murder weapon from a witness. App. 148-49. He made clear that he wanted to "get rid" of his public defenders (ER 670-74) and "run his own case, to be in charge of his own defense, to represent himself" (App. 148). When Dr. McEwen questioned Kirkpatrick about how his waiver request would help him achieve the goal of representing himself or hiring Black lawyers, Kirkpatrick had no logical explanation, but was adamant it would happen. Dr. McEwen asked how he could represent himself in state proceedings if he was asking to be executed; Kirkpatrick responded that he

was not asking to be executed. ER 690-97. Because Kirkpatrick stated he would refuse to meet with any other mental health experts, the referee did not require it.

Kirkpatrick refused to attend the four-day evidentiary hearing in March 2001. Four witnesses testified. Dr. McEwen testified Kirkpatrick was not suffering from any mental disease, disorder, or defect, and was competent to waive his petition. FPD-retained experts Drs. Robert Weinstock, Xavier Amador, and Roderick Pettis had each been unable to interview Kirkpatrick, but based on their review of the materials and Dr. McEwen's report, each testified Dr. McEwen's conclusions were not adequately supported and she did not properly test Kirkpatrick to determine whether he was competent. App. 140-42.

The referee intended to, but was never able to conduct, an on-the-record, under-oath colloquy about the waiver because Kirkpatrick refused to participate. *See* ER 741-43 (referee states on March 6, 2001 that he needs to voir dire Kirkpatrick on whether the waiver is knowing, intelligent, and voluntary).

The referee knew he could not find a valid waiver without a colloquy. He explained: "[E]ven if I were to determine that he is competent, I can't deal with the scienter aspect of the questions or the whole issue and certainly not with the knowing, voluntary and intelligent criteria unless I have further

opportunity to speak with him." ER 977. He therefore sent two letters to Kirkpatrick telling him it was critical that he attend court if he wanted to waive his petition. In a March 13, 2001 letter to Kirkpatrick the referee stated:

> We expect to conclude the evidentiary hearing on March 19, 2001, with . . . your own answers to some questions concerning your understanding of your present legal circumstances and the possible consequences of your request to withdraw the petition for writ of *habeas corpus* pending in the California Supreme Court. . . . [I]t may be impossible for us to conclude the inquiry requested by the Supreme Court without your further attendance in court for an hour or so. We cannot, of course, speak for the Supreme Court but based upon their request and our understanding of the law, *we strongly suspect that if you will not answer some important questions* concerning your knowledge of your legal status and the possible consequences of your pending request to withdraw the *habeas corpus* petition *the Supreme Court will not further consider your request* regardless of what we may find with respect to your basic competence.
>
> If you do not attend court on March 19, 2001, for at least part of the afternoon, we will take that as your refusal to participate in *the required discussion* of your legal circumstances and the potential results of your legal choices and we will make what report we can to the Supreme Court without your further participation. *If you actually wish to withdraw the habeas corpus petition, it seems critical that you attend court on March 19* for the reasons described above.

App. 145-46 (emphasis added). Similarly, in a June 18, 2001 letter to Kirkpatrick, the referee stated: "If it is actually your wish to withdraw the

pending petition you may find it to your advantage to attend and participate on June 21." App. 144.

Kirkpatrick refused to appear. App. 140. Following briefing by the parties, the referee determined Kirkpatrick was competent to waive his petition and that Kirkpatrick voluntarily waived it. App. 138-39. The referee concluded, however, he could not determine whether the waiver was knowing and intelligent:

> Mr. Kirkpatrick has . . . refused to engage in sufficient discussion with the Referee to permit the Referee to determine whether his request to withdraw the pending *habeas corpus* petition is made knowingly and intelligently. The Referee does find that the request to withdraw the pending petition was made voluntarily but is not able to assess, with the limitations imposed by Mr. Kirkpatrick, whether the act is done in the context of sufficient information and understanding of present circumstances and potential consequences to be found to be knowing and intelligent.

App. 138-39.

In a two-sentence order, the California Supreme Court adopted the referee's finding that Kirkpatrick was competent and, without any explanation or taking additional evidence, reversed the referee and held that Kirkpatrick "made a knowing, intelligent, and voluntary waiver of his right to proceed"; the court dismissed the petition. App. 137.

D. District Court Denial

Kirkpatrick filed an amended petition in district court, which included the claims from his exhaustion petition. Kirkpatrick submitted a handwritten letter purporting to waive his petition, again copying the waiver language the State had previously provided. ER 1945. The court ordered a hearing, at which Kirkpatrick would be questioned, to determine whether Kirkpatrick's waiver was knowing, intelligent, and voluntary. ER 82-83. The State took the "position that the only way to determine if [Kirkpatrick]'s waiver was knowing, intelligent, and voluntary, is to engage him in a colloquy designed to address that issue specifically." ER 314. The State offered to arrange for videoconferencing with San Quentin to facilitate the colloquy. ER 314 n.2. The hearing never occurred and Kirkpatrick's waiver request remained pending four years later. In 2006, the district court requested an update on Kirkpatrick's competency and, as a precondition to considering his waiver, required Kirkpatrick's cooperation with an appointed psychiatrist. When Kirkpatrick twice refused to meet with the psychiatrist, the court denied the waiver request. ER 66-67.

The State moved to dismiss the exhaustion petition claims, arguing they had been waived and were therefore unexhausted. Kirkpatrick argued his claims were exhausted because he fairly presented them to the highest state court, he was not competent to waive the petition, his waiver was not

voluntary, knowing, and intelligent, and therefore the California Supreme Court improperly dismissed the petition.

The district court erroneously applied deference under 28 U.S.C. § 2254(d) and upheld the state court's conclusion that Kirkpatrick's waiver was voluntary, knowing, and intelligent. App. 129. The district court also upheld the state court's conclusion that Kirkpatrick was competent to waive his exhaustion petition. Based on its determination that Kirkpatrick waived his exhaustion petition, the court dismissed as unexhausted all claims presented in that petition. App. 136.

Kirkpatrick filed a revised amended petition asserting only the six claims that had been presented on direct appeal. ER 223-311. The district court denied the petition and granted a certificate of appealability ("COA") on one claim, not presented here.

E. Ninth Circuit

The Ninth Circuit granted Kirkpatrick's request to expand the COA to include the issue of whether the district court erred in concluding that Kirkpatrick validly waived his state exhaustion petition, and in dismissing 20+ claims as unexhausted.

The original panel found the waiver invalid because it was not knowing, intelligent, and voluntary. App. 68-73. The State filed a petition for rehearing. A new panel was created while the rehearing petition was pending due to the

death of one judge and the retirement of another from the original panel. App. 46. The newly-constituted panel granted rehearing (App. 47) and withdrew the prior opinion (App. 46).

The Ninth Circuit entered a new opinion, which it amended (App. 1-45), finding the waiver valid. It explained § 2254(d) applies to claims for relief, and the question of whether Kirkpatrick waived his petition is not a claim for relief. App. 23-24. But it held that a state court's finding of a whether a waiver is knowing, intelligent, and voluntary is subject to § 2254(e)(1)'s presumption of correctness. App. 24-28. The panel concluded that, although it had been the State's burden to prove valid waiver in state court and despite the lack of a colloquy regarding Kirkpatrick's understanding of the claims he was waiving, the state court's finding of waiver should be presumed correct under § 2254(e)(1) and that Kirkpatrick had not rebutted that finding by clear and convincing evidence. App. 39. In doing so, the panel created a clear split with the Third Circuit's decision in *Fahy*, 516 F.3d at 183, which declined to apply § 2254(e)(1)'s presumption of correctness to a state court's waiver finding that was not supported by an adequate colloquy. *But see* App. 34-37 (distinguishing *Fahy*).

Kirkpatrick filed a petition for panel rehearing and rehearing en banc. The panel amended the opinion on a claim not presented here and denied rehearing.[5]

This petition followed.

REASONS FOR GRANTING THE WRIT

F. The Ninth Circuit Opinion Is An Outlier In Sanctioning Waiver Of The Right To Proceed In A Capital Case Absent A Colloquy To Determine The Waiver Is Knowing, Intelligent, And Voluntary

The published Ninth Circuit opinion stands alone in upholding a waiver of the right to proceed in a capital case when there was never any colloquy, or other proceeding, at which any court was able to assure itself that the inmate satisfied the requirements of a knowing, intelligent, and voluntary waiver. *See* App. 25-26 n.3, 33-34 n.7. This Court should grant certiorari because the Ninth Circuit's holding that there is "no binding authority that a colloquy is required" when a death-sentenced inmate seeks to waive further litigation, App. 33, conflicts with *Whitmore* v. *Arkansas*. *See* Sup. Ct. R. 10(c). Additionally, in upholding the California Supreme Court's waiver finding absent a colloquy,

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[5] Throughout Ninth Circuit proceedings, Kirkpatrick filed pro se letters noting grievances about his living conditions, treatment by the guards, and present counsel, as well as requests to waive his petition and forgo his appeal based on those grievances. *See, e.g.*, Ninth Circuit Dkt. Nos. 30, 135, 145. The court declined to entertain any pro se submissions. *See, e.g.*, Ninth Circuit Dkt. Nos. 75, 134, 136, 164.

the Ninth Circuit has sanctioned a departure "from the accepted and usual course of judicial proceedings." Sup. Ct. R. 10(a).

In *Whitmore v. Arkansas*, 495 U.S. 149, this Court addressed a case in which Jonas Whitmore attempted to act as "next friend" on behalf of Ronald Simmons to challenge Simmons's death sentence, where Simmons had waived his right to appeal to the state supreme court. The Court held that one prerequisite for "next friend" standing is to show that the real party in interest is unable to litigate on his own due to mental incapacity or other disability. *Id.* at 164-65. The Court concluded that because "an evidentiary hearing shows that [Simmons] has given a knowing, intelligent, and voluntary waiver of his right to proceed," Whitmore could not obtain standing to proceed as "next friend." *Id.* at 165. The Court specifically noted that when Simmons waived his right to appeal, he did so under oath in court, was questioned by both counsel and the trial court about his waiver, and counsel thoroughly discussed seven possible grounds for appeal that Simmons acknowledged and rejected. *Id.* at 152-53, 165.

In the same term, the Court applied this standard in a "next friend" case where a capital inmate waived his right to seek state postconviction relief. *See Demosthenes v. Baal*, 495 U.S. 731 (1990) (per curiam). The Court denied "next friend" status because the inmate was found to be competent and the state

court concluded, after questioning the inmate, that the waiver was intelligent. *Id.* at 733-35.

State and federal courts have relied on the Court's analysis in *Whitmore* when confronted with a capital inmate who purportedly seeks to waive his right to proceed, requiring the inmate be competent to waive and the waiver be knowing, intelligent, and voluntary. As the Ninth Circuit acknowledged in this case, every court to have found a knowing, intelligent, and voluntary waiver of the right to proceed in a capital case has done so only following a colloquy:

> We note, however, that where courts have previously found such waivers to be knowing, voluntary, and intelligent, they have done so after the court questions the petitioner on the record regarding his intentions and whether he understands the consequences of the waiver. *See Demosthenes v. Baal*, 495 U.S. 731, 732-35 (1990) (state postconviction court found a valid waiver after an evidentiary hearing at which the petitioner testified that he understood his waiver would result in his death); *Whitmore*, 495 U.S. at 165 (finding valid waiver based on colloquy between counsel and trial court with the petitioner, including a discussion of the "possible grounds for appeal" he was waiving); *Comer v. Schriro*, 480 F.3d 960, 965-66 (9th Cir. 2007) (en banc) (per curiam); *id.* at 966 (Paez, J. concurring) (describing the district court's "thorough findings, including its finding that Comer understood his legal claims" that he was waiving after hearing Comer's testimony that he "underst[ood] that the merits of his habeas appeal are legally strong . . . but that he wished to halt his legal challenges even so"); *Dennis* [*v. Budge*], 378 F.3d [880] at 891 [(9th Cir. 2004)]; *Massie* [*v. Woodford*], 244 F.3d [1192] at 1196-

> 97 [(9th Cir. 2001)]; *see also Fahy v. Horn*, 516 F.3d 169, 183-85 (3d Cir. 2008); *Sanchez-Velasco v. Sec'y of Dep't of Corr.*, 287 F.3d 1015, 1032-33 (11th Cir. 2002); *St. Pierre v. Cowan*, 217 F.3d 939, 947-48 (7th Cir. 2000) (noting the lack of "any kind of proceeding, formal or informal, at which any court was able to assure itself that [the] waiver . . . satisfied the requirements for a knowing and voluntary waiver and that [the petitioner] intended it to be a waiver"). The State has not identified any cases in which a court determined that there was a valid waiver in the absence of such a colloquy.

App. 33-34 n.7; *see also Mata v. Johnson*, 210 F.3d 324, 331 (5th Cir. 2000) (holding adequate due process includes "on the record and in open court[] questioning [of] the [capital] petitioner concerning the knowing and voluntary nature of his decision to waive further proceedings").

Given this Court's decision in *Whitmore*, noting that "an *evidentiary hearing* show[ed] that [Simmons] ha[d] given a knowing, intelligent, and voluntary waiver of his right to proceed," 495 U.S. at 165 (emphasis added), it is no coincidence that all courts, aside from the Ninth Circuit in this case, have found a waiver of the right to proceed only following a colloquy; nor that every court that has found no valid waiver has pointed to the lack of, or an inadequate, colloquy. *See, e.g.*, *Fahy*, 516 F.3d at 183-84; *St. Pierre*, 217 F.3d at 947. Given the stakes at issue when a capital inmate seeks to waive the right to proceed, courts should be wary of upholding waivers not fairly supported by the record. *Fahy*, 516 F.3d at 186. A recorded colloquy is the

only way to ensure a valid waiver and that the State has met its burden of showing an intentional relinquishment of a known right, in this most serious of legal contexts where a petitioner purportedly seeks execution. *See Moran v. Burbine*, 475 U.S. 412, 450 (1986) ("[T]he burden of proving the validity of a waiver of constitutional rights is always on the *government*."); *see Brewer v. Williams*, 430 U.S. 387, 404 (1977) ("[I]t was incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.'" (citation omitted)); *see* App. 36-37 n.8.

This case highlights the problem with the lack of a colloquy. Unlike other cases in which a court accepts a capital inmate's waiver of the right to proceed where the inmate has a reason for speeding up the process toward execution, *see, e.g.*, *Dennis*, 378 F.3d at 887 (noting capital inmate wanted to waive because "death is preferable to another 15 or 20 years in prison"), here it is undisputed that Kirkpatrick repeatedly expressed his desire to live. When the referee informed Kirkpatrick the pending state petition could prevent his execution, Kirkpatrick responded he intended "to stay alive as long as possible." App. 170. Kirkpatrick's statements to Dr. McEwen also indicated his desire to live, directly contradicting his pro se waiver form, which he copied from a filing by the State. Kirkpatrick told her he wanted to get back to federal court and ultimately win a retrial. App. 149. He also told her he had "no intention of discontinuing litigation," but wanted to either represent himself

or "hire Black lawyers." App. 148-49. Kirkpatrick told both the referee and Dr. McEwen he was not asking to be executed. These statements cast doubt on the validity of Kirkpatrick's written waiver and highlight the need for a court colloquy to ensure he understood the rights he was purportedly waiving.

Additionally, in other cases where courts have found a valid waiver, there is a colloquy making clear that either the court or counsel discussed the claims with the petitioner and the petitioner chose not to pursue them. *See, e.g.*, *Whitmore*, 495 U.S. at 153; *Dennis*, 378 F.3d at 884. Here, there is no evidence of the court informing Kirkpatrick of the claims in his petition, nor any evidence Kirkpatrick's counsel discussed the claims with him because Kirkpatrick refused to communicate with his attorneys (*see* App. 187-89), and refused or disposed of mail from them (App. 210, 231, 266). The record shows Kirkpatrick was unaware of the claims in his state petition. He told the referee he was aware of a police report about the police's purchase of the murder weapon and asked the referee if it was in his "appeal." App. 237-38. Kirkpatrick was especially interested in winning retrial based on this evidence. App. 148 ("a re-trial [was] his ultimate goal"). There were six claims in the state petition based on this fact, which had not previously been presented in state court. There is no evidence Kirkpatrick recognized waiving his state petition would end all litigation on them. Without knowing the substance of the claims in his state petition, Kirkpatrick could not validly waive his petition

and there could be no credible finding that Kirkpatrick wished not to pursue those claims.

What Kirkpatrick's statements do evidence is a desire to proceed pro se; he: informed the referee he was pursuing self-representation (App. 160); stated to the referee that competency proceedings were taking place simply because he wanted to represent himself (App. 193); asked the referee whether he had a constitutional right to self-representation in the appellate process (App. 205-06); told Dr. McEwen he planned to represent himself (App. 148-49); and made plain to Dr. McEwen that "he want[ed] to run his own case, to be in charge of his own defense, to represent himself" (App. 148-49).

Kirkpatrick's repeated attempts to represent himself at every stage of his capital proceedings contextualize what he was seeking to accomplish with his waiver form. *See* ER 1572-73 (request to act as co-counsel at guilt phase of trial); ER 1762-63 (request to proceed pro se at penalty phase); ER 154 (request to relieve OSPD as state appellate and habeas counsel); ER 1409 (request to relieve the FPD as federal habeas counsel and stated intent to file pro se federal habeas petition); *see also* App. 9 n.1. Kirkpatrick's documented history of attempting to represent himself, coupled with his statements during the reference hearing proceedings that he was seeking to represent himself, underscore the importance of a colloquy at which a judge could determine whether Kirkpatrick knowingly and intelligently waived his right to proceed.

Finally, for a waiver to be voluntary, the totality of the circumstances must demonstrate it was the product of a free and deliberate choice, and not the result of duress, including conditions of confinement. *Comer v. Stewart*, 215 F.3d 910, 917 (9th Cir. 2000). Kirkpatrick was never questioned about what prompted him to submit his "waiver form," which included a request to speed up his execution. Kirkpatrick's pro se filings evince he suffered duress from the conditions of confinement at the time he submitted his "waiver form." *See* App. 272 (stating that guards were trying to kill him); ER 1114-15 (stating that the prison denied him medical attention, medication, legal documents, and access to yard and libraries). Absent a colloquy designed to ensure that Kirkpatrick's waiver was knowing, intelligent, *and* voluntary, no court can be sure that Kirkpatrick's "waiver form" did not result from duress due to the conditions of confinement, rendering his waiver invalid.

This Court should grant certiorari and reverse the Ninth Circuit's departure from *Whitmore*, which, with the exception of this case, has been uniformly applied to require a colloquy to assess whether a capital inmate's waiver of the right to proceed is knowing, intelligent, and voluntary.

G. The Ninth Circuit Has Created A Split With The Third Circuit By Applying 28 U.S.C. § 2254(e)(1)'s Presumption Of Correctness To A State Court's Finding Of A Knowing, Intelligent, And Voluntary Waiver Absent An Adequate Colloquy

In a split with the Third Circuit, the panel accorded deference under 28 U.S.C. § 2254(e)(1) to the state court's finding of a knowing, intelligent, and voluntary waiver of a capital petitioner's right to proceed despite the lack of an adequate colloquy. This Court should grant certiorari to address the circuit split. Sup. Ct. R. 10(a).

In *Fahy*, 516 F.3d 169, a capital inmate submitted a handwritten motion to the state supreme court waiving his third state habeas petition. The court remanded the case "for a colloquy to determine whether petitioner fully understands the consequences of his request to withdraw his appeal and to waive all collateral proceedings." *Id.* at 177. The judge attempted to conduct a hearing, but Fahy requested additional time to consider his request. Fahy then signed an affidavit stating he no longer wanted to waive. But when Fahy again appeared before the judge, he said he wanted to waive his appeals. The judge questioned Fahy, then declared Fahy knowingly waived his rights. *Id.* at 178.

The Third Circuit concluded the waiver colloquy was insufficient and therefore there was no evidence Fahy's written waiver was knowing, intelligent, and voluntary. The court noted the state court refused to allow

Fahy's counsel to ask Fahy questions about the waiver, refused to allow Fahy to explain why the conditions of confinement prompted his waiver, and failed to adequately probe Fahy's knowledge of the rights he was waiving. *Id.* at 183-85. The Third Circuit found this last omission "especially egregious given that Fahy told the court he had not spoken about federal appeals with his attorneys." *Id.* at 185. The court concluded that, "[w]hile the colloquy does reveal that Fahy may have understood that the decision to waive his federal habeas rights could ultimately lead to his execution, it does not reveal that he had any knowledge whatsoever of the purpose of federal habeas corpus or its procedures." *Id.* at 186. The Third Circuit held the state court's finding of a knowing, intelligent, and voluntary waiver should not be presumed correct: "when a state court's waiver colloquy fails to reveal whether the requirements of a valid waiver have been met due to procedural infirmities, substantive deficiencies, and an insufficient probing into a defendant's knowledge of the rights he is waiving, the findings by that court concerning the waiver are too unreliable to be considered 'factual determinations.'" *Id.* at 183.

The Ninth Circuit acknowledges there was no in-depth questioning regarding whether Kirkpatrick knowingly, intelligently, and voluntarily waived his petition. App. 25-26 n.3. But the Ninth Circuit nevertheless applied § 2254(e)(1)'s presumption of correctness to the state court's waiver finding on the ground that the lack of a colloquy was due to Kirkpatrick's

refusal to participate and "not because of any failing on the state court's part," as was the case in *Fahy*. App. 25-26 n.3. The Ninth Circuit concludes from this that the state court fact-finding process was not deficient. App. 36-37. *But see Doody v. Ryan*, 649 F.3d 986, 1002 (9th Cir. 2011) (en banc) ("[S]tate court findings of fact are presumed correct unless rebutted by clear and convincing evidence *or unless based on an unreasonable evidentiary foundation*." (emphasis added, internal quotation marks omitted)); *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (explaining that § 2254(e)(1)'s presumption of correctness and clear-and-convincing standard only apply if state court fact findings are reasonable).

The Ninth Circuit's conclusion that the state court's finding of a knowing, intelligent, and voluntary waiver is presumed correct under § 2254(e)(1) because the state court was not at fault for failing to develop the record cannot stand. Typically, on habeas review, it is the petitioner's burden to present facts supporting relief. But here the issue is waiver of the right to proceed in a capital case, and the State bore the burden in state court of demonstrating Kirkpatrick's waiver was knowing, intelligent, and voluntary. *See Moran*, 475 U.S. at 450. The absence of a colloquy means the State lacked the necessary facts to carry its burden of demonstrating a valid waiver; and rightly so. Kirkpatrick refused to appear for a colloquy after the referee twice informed him that if he wanted to waive his petition he needed to appear.

Kirkpatrick's refusal to appear indicated he no longer wished to waive his petition.[6] And his refusal to further engage should have resulted in the denial of his purported request to dismiss the petition,[7] as was the case in district court. ER 66-67; *see St. Pierre*, 217 F.3d at 948-49 ("We are not unsympathetic to the predicament in which [the county and state supreme courts] found themselves, in the face of St. Pierre's ceaseless changes of heart. This does not, however, relieve any court of the duty to ensure that a definitive waiver has occurred before it deprives the petitioner of remedies that are available under state law."). Despite Kirkpatrick's refusal to appear for a waiver colloquy, the California Supreme Court found waiver and the Ninth Circuit cloaked this unsupported finding in a presumption of correctness, allowing the State to avoid carrying its burden of proof on the waiver issue in state court. While the

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[6] The panel notes Kirkpatrick's failure to attend "could equally be evidence of Kirkpatrick's unwillingness to cooperate with the court as part of a strategy to delay his court proceedings and execution." App. 37 n.9. The opinion does not explain how this "strategy" of delay is consistent with Kirkpatrick's request to waive his petition and have his execution "carried out at this time" (App. 12), the request the opinion greenlights absent a colloquy about Kirkpatrick's goals or his understanding of the consequences of waiver. Interpreted either way, Kirkpatrick's failure to attend is evidence he wanted to delay execution. But a finding that Kirkpatrick had a reason *not* to delay execution is a necessary component of a knowing, intelligent, and voluntary waiver. *See Dennis*, 378 F.3d at 889.

[7] The parties had completed informal briefing and nothing prevented the California Supreme Court from proceeding to consider the merits of the claims.

panel disavows doing precisely this (App. 36-37 n.8), its opinion shows otherwise.

There is no material difference between this case and *Fahy*. As in *Fahy*, there was no adequate waiver colloquy; there was "an insufficient probing into [Kirkpatrick's] knowledge of the rights he [was] waiving" and therefore the state court's findings of a knowing, intelligent, and voluntary waiver "are too unreliable to be considered 'factual determinations.'" *Fahy*, 516 F.3d at 183. Both the Ninth Circuit and the Third Circuit had to determine whether to accord deference to a state court's waiver finding when the state court record did not contain an adequate colloquy. But the courts reached opposite conclusions, which is outcome determinative. *Cf.* App. 26-27 n.4. The Third Circuit declined to accord deference to the state court's finding, explaining that "[i]n a capital case, where the consequences are so grave, we are particularly wary of accepting a waiver of federal habeas rights when we are not convinced that the defendant was aware of the nature and scope of those rights." *Fahy*, 516 F.3d at 186. The court rejected the state court's finding of waiver and addressed the merits of Fahy's claims. *Id.* at 187. By contrast, here, the Ninth Circuit accorded deference to the state court's "unconventional" findings (App. 38) despite "the peculiarities in the process" (App. 25-26 n.3). The Ninth Circuit upheld the state court's finding of waiver, precluding merits review of 20+ federal constitutional claims.

The Court should grant certiorari and hold that a state court's finding that a capital petitioner's waiver of the right to proceed is knowing, intelligent, and voluntary cannot be presumed correct under § 2254(e)(1) absent an adequate colloquy.

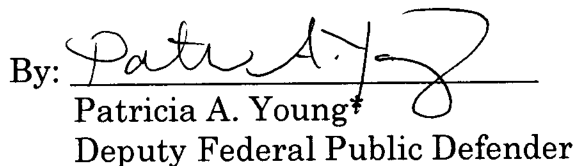
CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

CUAUHTEMOC ORETEGA
Interim Federal Public Defender

DATED: July 13, 2020

By: 
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**Counsel of Record*

No. __________

IN THE

Supreme Court of the United States

WILLIAM KIRKPATRICK, JR.,

Petitioner,

v.

KEVIN CHAPPELL,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

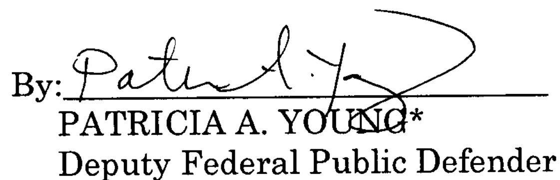
CERTIFICATE PURSUANT TO RULE 33

Pursuant to Rule 33.2, I hereby certify this petition is 40 pages and was prepared in 13-point Century Schoolbook font.

Respectfully submitted,

CUAUHTEMOC ORTEGA
Interim Federal Public Defender

DATED: July 13, 2020

By: 
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