No. _____

In the Supreme Court of the United States

MELISSA ELIZABETH LUCIO,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Melissa Lucio's culpability in the death of her two-year-old daughter turned on whether Mariah fell down a flight of stairs, as Lucio told medics and police, or was beaten, something Lucio took responsibility for at the end of a five-hour interrogation.

The Texas Ranger who interrogated Lucio testified that her demeanor showed she was "hiding the truth," but was "beat" and "giving up" before she took responsibility. The defense tried to present a social worker and psychologist who concluded Lucio's flat affect and acquiescence reflected her lifetime of being used by abusive men. Records showing abuse by Lucio's older children, but not her, and Lucio's mental condition indicated she took responsibility for failing to prevent abuse by her older children. The trial court excluded the social worker as unqualified and the psychologist as irrelevant.

Lucio claimed those rulings violated her right to present a complete defense because they "disabled [her] from answering the one question every rational juror needs answered: If the defendant is innocent, why did [she] previously admit [her] guilt?" *Crane v. Kentucky*, 476 U.S. 683, 689 (1986).

In a fractured en banc decision, ten of seventeen judges on the Fifth Circuit agreed the exclusion of the psychologist was "the key evidentiary ruling" at Lucio's trial because the testimony "might have cast doubt on her confession." App. 37a-38a (Southwick, J., concurring). The decisive three-judge concurrence held this Court's cases had not "established with sufficient clarity" a rule that permitted "justice to a defendant" such as Lucio. App. 40a. That ruling gives rise to the following question:

1. Whether, as the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held, this Court's cases clearly establish a complete-defense right that can be violated by the arbitrary and disproportionate application of a general evidentiary standard when it infringes a weighty interest of the accused such as explaining why she falsely confessed, or as the Fifth Circuit held in this case, there is no clearly established federal law applicable to such a ruling.

CORPORATE DISCLOSURE STATEMENT

Petitioner Melissa Lucio, a death-sentenced Texas inmate, was the appellant in the United States Court of Appeals for the Fifth Circuit. Respondent, Bobby Lumpkin, the Director of the Texas Department of Criminal Justice, Correctional Institutions Division, was the appellee in that court.

LIST OF PROCEEDINGS

State v. Lucio, No. 07-CR-885-B (138th District Court of Cameron County, July 30, 2008) (conviction of capital murder and sentence of death at trial)

Lucio v. State, 351 S.W.3d 878 (Tex. Crim. App. Sept. 14, 2011) (affirming conviction and sentence on direct appeal)

Lucio v. Texas, 566 U.S. 1036 (June 4, 2012) (mem.) (denial of petition for certiorari)

Ex parte Lucio, No. 72,702-02, 2013 WL 105179, (Tex. Crim. App. Jan. 9, 2013) (denying state post-conviction relief)

Lucio v. Davis, No. 13-cv-125 (S.D. Tex. Sept. 28, 2016) (federal district court memorandum and order denying habeas relief)

Lucio v. Davis, 751 F. App'x 484 (5th Cir. Oct. 17, 2018) (granting a certificate of appealability on the issue in question)

Lucio v. Davis, 783 F. App'x 313 (5th Cir. July 29, 2019) (reversing district court and granting habeas relief)

Lucio v. Davis, 947 F.3d 331 (5th Cir. Jan. 20, 2020) (en banc) (granting rehearing en banc)

Lucio v. Lumpkin, 987 F.3d 451 (5th Cir. Feb. 9, 2021) (en banc) (denying relief on rehearing en banc)

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PETITION FOR WRIT OF CERTIORARI

Petitioner Melissa Elizabeth Lucio respectfully prays that a writ of certiorari issue to review the decision of the U.S. Court of Appeals for the Fifth Circuit affirming the denial of her petition for a writ of habeas corpus.

INTRODUCTION

Our society recoils at the prospect of "'deliver[ing] any man up to die before the accused … has been given a chance to defend himself against the charges.'" *Coy v. Iowa*, 487 U.S. 1012, 1015-16 (1988) (quoting Acts of the Apostles 25:16). Thus, the Due Process Clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment guarantee a right to "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). A long line of decisions from this Court hold that the right to present one's own witnesses to establish a defense ranks as a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Crane*, 476 U.S. at 690; *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

The court below joined one other circuit in parsing this Court's cases into a rule they never announced, and that rests on an illusory distinction between "blanket," non-discretionary rules of evidence, which can violate the complete-defense right, and the "discretionary application of a general evidentiary standard," for which there is no clearly established law. App. 39a-40a. As the concurring *Lucio* judges said, that left Melissa Lucio with no access to justice. App. 40a.

The overwhelming majority of circuits disagrees with the Fifth Circuit's approach. Under the majority's view, cases like *Crane* and *Chambers* clearly gave Lucio the right to present testimony that she succumbed to aggressive interrogation tactics because a lifetime of sexual, physical, psychological, and verbal abuse by men left her vulnerable to those pressures.

As the seven dissenting *Lucio* judges recognized, just as in *Crane*, the exclusion of Lucio's witnesses meant she "was barred from offering evidence to explain why she would confess if she were innocent," App. 44a. That ruling "amounted to a complete rejection of her defense." App. 43a. "If the confession was false, the State's case crumbles," App. 46a-47a, because Lucio's "admissions" were "the State's primary evidence of her guilt" App. 65a. And the three-judge concurrence agreed, the exclusions were "key" because the testimony "might have cast doubt on the credibility of Luico's confession." App. 37a.

The wrongly excluded testimony was not psychological conjecture. It was reliably supported by thousands of pages of records from years of protective service observations of Lucio's children in her care and in foster care. Those records showed Lucio was a neglectful, ineffectual parent, but never abusive. Her older children, however, beat, bit, and otherwise abused each other and their younger siblings.

The question presented is at the heart of federal habeas review of complete-defense cases. Section 2254(d) of Title 28 imposes a "constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." *Williams v. Taylor*,

529 U.S. 362, 412 (2000) (O'Connor, J., op. for the Court). When a federal claim was "adjudicated on the merits in State court," the statute bars federal relief on the claim unless the state court's "adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The threshold question in applying § 2254(d)(1) is to determine the "clearly established Federal law, as determined by the Supreme Court of the United States." *See Carey v. Musladin*, 549 U.S. 70, 73 (2006).

This Court should grant the petition because resolution of the question presented here—unencumbered by procedural issues—is vital to ensuring the innocent are not wrongly convicted. As shown *infra*, false confessions are common in cases of women wrongly accused of killing their children.

LOWER COURT OPINIONS AND ORDERS

The Fifth Circuit opinion affirming the denial of relief on rehearing en banc is reported at *Lucio v. Lumpkin*, 987 F.3d 451 (5th Cir. 2021), and attached as Appendix A. The Fifth Circuit's order granting rehearing en banc is reported at 947 F.3d 331 and attached as Appendix B. The Fifth Circuit panel opinion reversing the district court and granting habeas relief is unpublished and attached as Appendix C. The Fifth Circuit opinion granting a certificate of appealability is unpublished and attached as Appendix D. The federal district court's memorandum and order denying habeas relief is attached as Appendix E. The Texas Court of Criminal Appeals' unpublished decision denying state habeas relief is attached as Appendix F. The state trial court's findings of fact and conclusions of law is attached as Appendix G.

JURISDICTION

The Fifth Circuit granted a certificate of appealability, App. 104a, and therefore had jurisdiction pursuant to 28 U.S.C. § 2253(c). The opinion of the Fifth Circuit en banc was entered on February 9, 2021. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment provides, in relevant part:

> 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 deprive any person of life, liberty, or property, without due process of law . . . .

Section 2254(d), Title 28 of the U.S. Code, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides in relevant part:

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

STATEMENT OF THE CASE

I. The Facts

A. Melissa Lucio's Background

Melissa Lucio's father abandoned his wife and six children, leaving Melissa's mother to provide for the family. ROA.5010.[1] Although she "was working 24/7," ROA.5010, Melissa's mother struggled, and care for Melissa and her siblings often devolved to their mother's lovers. ROA.5010-11. When Melissa was six years old, one of her mother's live-in lovers began to sexually abuse her. ROA.5011. This sexual abuse continued for two years. ROA.5012. Melissa told her mother, but her mother did not intervene. ROA.5006. *See also* App. 40a-41a.

Melissa's younger sister, Sonia, was "very physically aggressive with her," but also protected her when she was bullied at school. ROA.5007. Her brothers were emotionally distant but also punched and bit her. *Ibid.* Adolescent Melissa witnessed her mother being abused by two men. ROA.5012.

At sixteen, her mother and her mother's boyfriend consented to Melissa dropping out of high school to marry 20-year-old Guadalupe Lucio with whom she was already in a sexual relationship. ROA.5012. At the same age, Guadalupe's sister introduced Melissa to cocaine. ROA.5008. That was the start of years of addiction.

Melissa had five children by Guadalupe by the time she was 24. ROA.4989; 5013. Guadalupe was "a physically and emotionally abusive alcoholic," who abandoned Melissa and the children in 1994, when Melissa was 26. App. 41a; ROA.4990,

[1] "ROA.___" refers to the electronic record on appeal in the Fifth Circuit.

5008. During the last four years of the relationship Guadalupe's abuse was "rampant." ROA.5013. Melissa had no clue Guadalupe was preparing to leave. She reported to the police that he was missing. *Ibid*.

Melissa's second husband, Robert Alvarez, was father to seven more of Melissa's children, including Mariah. Alvarez demonstrated character traits similar to Guadalupe. He was "emotionally and verbally abusive," and was seen to "punch Mrs. Lucio in the park" where the family lived because they were homeless. ROA.5009; App. 41a.

Shortly after Guadalupe left Melissa and their children, Child Protective Services ("CPS") stepped in. CPS's "involvement" in Melissa's life continued up to and beyond her arrest.[2] In September 2004, two-week-old Mariah Alvarez, Melissa's twelfth child, and six of her minor siblings were placed in foster care following reports of parental neglect—not abuse. ROA.5570-72; ROA.4888-89.

B. Mariah Alvarez's Life & Death

Mariah had a mild physical disability that made her unstable when walking. ROA.5591-92. In foster care, she fell down and lost consciousness. ROA.5608. She required close supervision because she wanted to climb. ROA.5631. Mariah would also hit her head on the floor when having "tantrums," ROA.5503, and would bite her peers. ROA.5588.

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[2] The role CPS played in Melissa's life (and possibly in Mariah's death) is depicted in Judge Higginbotham's dissent below. *See* App. 40a-43a. CPS "recognized that Melissa's troubles centered on her inability to escape a succession of relationships with dominating and abusive men who to their own ends, encouraged her use of cocaine, a stimulant." *Id*. at 43a.

Mariah's older siblings were "aggressive to the point of becoming violent." ROA.5694. Her brothers wrestled, hit, punched, and bit each other leaving marks and bruises. ROA.4667, 4675-76. Her cousins were also "very aggressive," pushing, shoving and hitting Mariah, ROA.4658-59, and physically abusing one another. ROA.4675.

On November 21, 2006, Mariah and eight siblings were returned to the care of Lucio and Robert Alvarez. ROA.4465. Lucio and Alvarez lived in a second-story apartment accessed by a steep exterior staircase.[3] ROA.4315-16, 4543.

On February 15, 2007, while Lucio and Alvarez were moving out of their apartment, one of Lucio's children saw Mariah fall down the stairs. ROA.6019-21.

Two days later, paramedics were called to Lucio's new apartment where Mariah was found dead. ROA.4378. Lucio told the responders that Mariah had fallen down the stairs at the other apartment. ROA.4372.

Mariah had "bruises all over her body," ROA.4506, a weeks-old fracture in her left arm, ROA.4524, some of her hair had been pulled out, and there were bite marks on her back, ROA.4509-10. The medical examiner concluded she had been severely abused,[4] ROA.4506, and died of a head injury that occurred within 24 hours of death. ROA.4531,4553.

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[3] The facts related in the foregoing three paragraphs were documented in the CPS records that Lucio's excluded witnesses—Villanueva and Pinkerman—reviewed when forming their opinions prior to trial.

[4] In state post-conviction proceedings, Lucio proffered expert testimony that disputed the medical examiner's opinions regarding Mariah's arm injury, the supposed bite, bruises, and missing hair. ROA.8806-8820.

C. Melissa Takes Responsibility Under Interrogation

The night Mariah died, investigators questioned Lucio for over five hours. When the interrogation began, Lucio had been awake for roughly fourteen hours. ROA.8111. Interrogators provided her nothing to eat and allowed her no sleep. ROA.4333. Some of the interrogation was recorded on three videos that were played to the jury on the first day of trial.[5] ROA.4254-56, 4266-68, 4290.

The police told Lucio they needed to know "how [Mariah] died—the way she died." ROA.8101. Lucio told police she didn't know; her "oldest daughter was there." ROA.8188. Lucio told the interrogators that Mariah fell down the stairs outside of their apartment two days before she died. ROA.8102-06. She admitted that she sometimes spanked her daughters "on the butt," ROA.8108, but she repeatedly denied hitting or abusing Mariah. ROA.8118, 8137, 8165. Lucio consistently told the police her kids were rough with Mariah, but she did not know who caused Mariah's specific injuries. ROA.8159.

Three hours into the interrogation, after 1:00 a.m., Texas Ranger Victor Escalon entered the interview room and counseled Lucio that the interrogators were there to "help [her] along," ROA.8177, that she was "gonna explain everything … [a]dmit to this," and "God's gonna forgive you." ROA.8177-78. After Escalon repeatedly reassured Lucio, ROA.8177-82, she said she wanted to talk to her husband "and nobody else." ROA.8182. This request was acknowledged, but ignored. *Ibid*.

[5] The petition cites to the transcript of the recording created by state habeas counsel.

After Escalon showed Lucio Mariah's injuries and urged her on, Lucio said that the spanking was "all over [Mariah's] body." ROA.8184. Prompted for more details, Lucio responded, "I don't know what you want me to say. I'm responsible for it." ROA.8184. She said that she bit Mariah one day while tickling her. ROA.8185. Lucio didn't know why she did that; it wasn't because she was mad or frustrated. *Ibid*. When Escalon suggested that the bite marks did not happen "because you were playing around," Lucio responded, "*They* weren't playing around." ROA.8185 (emphasis added).

Lucio maintained that she had not hit Mariah in the head and only spanked her with her hand. ROA.8187, 8189; *see also* ROA.8191 ("I would not beat her I would spank her.").

Escalon asked Lucio how specific bruises were made. ROA.8190. Lucio said she caused some of them, ROA.8207-08, but she did not know about others because she didn't hit Mariah in particular places. ROA.8202-04. Escalon insisted Lucio was responsible for specific bruises, to which Lucio responded, "I guess I did it. I guess I did it." ROA.8204. She suggested that some of the other injuries, like scratches, could have been caused by her other daughters. ROA.8205-06.

At 1:22 a.m., Escalon left the interrogation "for now." ROA.8212. When he returned, the camera was turned away from Lucio, and Escalon told her that he wanted to "let [her] hair down cause I'm gonna put it … put in a pony tail." ROA.8215-16. Then the camera was turned off. ROA.8216.

At 3:00 a.m., Escalon resumed recording. He brought in a doll to have Lucio show him how she bit and spanked Mariah. ROA.8220-21. He told Lucio to "do it real hard," like she had done it, and gave his own demonstration. ROA.8224. Escalon pointed to several sets of bruises and had Lucio spank the doll in those areas to demonstrate how she would have caused them. ROA.8224-25. He also had Lucio affirm that she was the only one who spanked Mariah—not her husband, not the other kids—and ended the interrogation at 3:15 a.m. ROA.8229-30.

D. Texas Prosecutors: "She Admitted It"

Texas charged Lucio with capital murder, *see* Tex. Penal Code §§ 19.02(b)(1), 19.03(a)(8), for "intentionally and knowingly" causing Mariah's death "by striking, shaking or throwing Maria[h] Alvarez with [her] hand, or foot, or other object." ROA.7664.

Knowing there would be conflicting expert testimony about the cause of Mariah's fatal head injury, the prosecution's case centered on Lucio's statements. The first day of trial, prosecutors played the recorded portions of Lucio's custodial statement to establish that only she was responsible for Mariah's injuries. Paramedics and police described and interpreted Lucio's demeanor on the night Mariah died. ROA.4364-65; ROA.4367-68; ROA.4372; ROA.4386-87; ROA.4397; *see also* ROA.4227 (police officer testifying Lucio had "no emotion" and appeared "relieved"). Escalon opined that Lucio's demeanor during interrogation meant she was "beat," "giving up," and "hiding the truth" when she said others harmed Mariah. ROA.4409-10.

During its closing argument, the State replayed portions of the interrogation video, and characterized Lucio's statement as a "confession," which proved beyond a

"reasonable doubt that [Lucio] killed that little girl." ROA.4782. *See also* ROA.4783, 4802-03, 4811, 4816-18. Regarding Lucio's denials of responsibility, the State argued the jury could find "the true and correct statement at the end. She admitted it. She admitted that she caused all of the injuries to that child, ladies and gentlemen." ROA.4803; ROA.4805-06 (inference from pattern of abuse was that Lucio caused Mariah's death).

The prosecutor also highlighted Lucio's demeanor during the interrogation, ROA.4803, rhetorically asking why she would look or act a certain way if all she did "was physically beat the child, but didn't cause the death." ROA.4811. The prosecutor also amplified what he called Escalon's opinion that Lucio was "really guilty" and hiding the truth because of her body language. ROA.4816.

E. Lucio's Preempted Defense

Lucio's defense was innocence. ROA.4220. Defense counsel's opening statement promised to show that "Lucio … has all of the classic symptoms of a battered woman" including that "she'll say things to please people" even if they aren't true, and that is what she did under interrogation. ROA.4221.

Lucio attempted to present two expert witnesses to testify that her "confession" was not trustworthy: social worker Norma Villanueva and psychologist Jonathan Pinkerman. The prosecution objected to Villanueva on several grounds including expertise. ROA.4687. The court wanted to "hear the *Daubert*." ROA.4691. Voir dire established that Villanueva was a licensed social worker with graduate-level education and possessed "the highest national clinical license to allow [her] to do diagnosis and treatment of mental health disorders." ROA.4692-93. Her training in mental health

diagnosis included study of what people are "trying to convey by the way they act, by the way they hold their body, by the way they move their arms and hands." ROA.4693. The ability to incorporate non-verbal communication in assessments was "included in our clinical licenses."[6] ROA.4697-98.

Based on an assessment using standard methods in her field (which were undisputed, *see* ROA.4698-99), including review of the client's history, Villanueva identified "[s]everal patterns of behavior" Lucio exhibited when dealing with people in authority, especially CPS. ROA.4694. Based on Lucio's history of being abused by men with authority over her—her stepfather and husbands—and the record of Lucio's interactions with CPS over more than a dozen years, ROA.4685-86, Villanueva found Lucio acquiesced to male authority figures. ROA.4706-07. The defense offered her to explain "why [Lucio] would have given police officer's [*sic.*] information … that was not correct," ROA.4691, and is someone who "admits to things that she didn't do." ROA.4687. Villanueva testified she would not opine on whether or not Lucio's statements were true based on her body language. ROA.4696.

The trial court excluded Villanueva's testimony on the ground that she was not qualified on the issue of "whether or not the statement was true or not true." ROA.4700.

[6] Villanueva's curriculum vitae evidences a lengthy history of specialized training. ROA.5433-39.

After the court told defense counsel that "a psychologist … may or may not be appropriate," ROA.4691, the defense presented Dr. Pinkerman, a Ph.D. in psychology, retained to examine the validity of Lucio's confession. ROA.8975. Dr. Pinkerman "reviewed all of the available records" from CPS, the videotapes, autopsy photos, and other evidence. ROA.8975; ROA.4759-60. Pinkerman met with Lucio four times "to obtain her social history and conduct psychological tests." ROA.8975. He also reviewed the literature on Battered Woman Syndrome and false confessions. ROA.5168-69, 8975.

Pinkerman's review of the evidence produced "serious questions about the nature of Mrs. Lucio's interrogation and confession." ROA.8975. In regards to Lucio's custodial statements, he would have testified that Lucio was a "battered woman," ROA.4751, that her appearance during the "video statement … shows all the signs … of being a battered woman," ROA.4752, who "takes blame for everything that goes on in the family." ROA.4751. Her "demeanor, both immediately after the incident and during the interrogation," could be understood by taking into account those "psychological elements and previous history and background that she has lived through." ROA.4759.

The trial court deemed Pinkerman's testimony "irrelevant." The court said it had "a hard time figuring out how" testimony that cast doubt on Lucio's incriminating statement "goes to the issue of guilt or innocence" because "in the statement [Lucio] did not admit killing the child" but to "actions that she took that could have resulted

in the death."[7] ROA.4752. The trial judge left the bench before defense counsel put Pinkerman's proffer on the record. App. 51a; ROA.4757-58.

Before the jury, the defense called only three witnesses. A neurosurgeon who operated on children, ROA.4610-11, and specialized in head injuries, ROA.4589, and testified that blunt force trauma from a fall down stairs could have caused Mariah's death, ROA.4588-89, ROA.4598. Lucio's sister, Sonia Chavez, testified that Lucio "never disciplined her children." ROA.4658. CPS worker Joanne Estrada, a recalled prosecution witness, testified that Mariah had tantrums while in foster care and had hit her head on the floor. ROA.4724. Estrada testified that she had not come across anything in Lucio's file that showed she was "physically abusive to any of the children." ROA.4746.

Defense counsel's closing argument attempted to explain Lucio's statements as an admission of abuse and neglect but not murder. ROA.4789. The defense also explained Lucio's statements as products of a coercive and un-counseled interrogation. ROA.4798.

During deliberations, the jury asked to see the interrogation video "in its entirety," ROA.4823, before finding Lucio guilty of capital murder.

Following a trial as to punishment, at which Pinkerman and Villanueva testified to the "special issues" in Tex. Code Crim. Proc. art. 37.071, § 2(b), Lucio was sentenced to death. *See* ROA.8093, 8097-98.

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[7] The question the jury would have to answer was whether Lucio intentionally or knowingly killed Mariah and did so by striking her. *See Louis v. State*, 393 S.W.3d 246, 251 (Tex. Crim. App. 2012).

II. Procedural History

A. Direct Appeal

On appeal, Lucio argued "the trial court erroneously excluded Villanueva's proposed testimony at the guilt phase" because the jury could have relied upon "appellant's being a battered woman" to find her "statement to the police was involuntary as a matter of state law." *Lucio v. State*, 351 S.W.3d 878, 898 (Tex. Crim. App. 2011), *cert. denied*, 566 U.S. 1036 (2012). *See* ROA.10840-43. The Texas Court of Criminal Appeals ("CCA") found Lucio "failed to preserve the claim;" failed to show "the trial court abused its discretion;" and "any error … was harmless" because, the evidence "at best, may have been marginally relevant to the issue of the voluntariness." *Lucio,* 351 S.W.3d at 900-01 (citing Tex. R. App. P. 44.2(b) (appellate courts must disregard non-constitutional errors that do not affect substantial rights)).

Lucio's next claim made the same arguments regarding Pinkerman, *id*. at 901 (quoting ROA.10843), and the CCA reached the same conclusions, *id*. at 902.

B. State Habeas

Lucio's state habeas application alleged the "trial court deprived Melissa of the constitutional right to present a complete defense when it excluded the testimony of defense experts during the guilt/innocence phase of trial." ROA.8029. *See also* ROA.8034 ("[T]he trial court violated Melissa's right to present a complete defense when it disallowed her expert's testimony during guilt/innocence as irrelevant.").

Lucio proffered evidence Villanueva and Pinkerman would have presented "to attack the credibility of the State's case." The factual proffer included "CPS documentary records regarding Melissa's social history and [her] psychological profile to

demonstrate that she was submissive and abused—not an aggressive abuser." ROA.8033. As it did in the penalty phase, Villanueva's presentation would have culminated in two juxtaposed images of Melissa sitting with her head cocked to one side, her shoulders slumped, and her hands crossed in her lap. One picture was taken when Melissa was six, when the sexual abuse started, and the other when she was being interrogated by Escalon. ROA.9017-18.

Dr. Pinkerman would have testified to Lucio's history of being abused, ROA.8031, her tendency to disassociate, and her "dependent and acquiescent personality," ROA.8976. Based on his review of "research related to false confessions," Pinkerman was prepared to testify that Lucio's "psychological characteristics" combined with the prolonged interrogation in isolation made it likely that she would provide "a false confession in order to avoid investigation of her children." ROA.8976. He explained that "disassociation … defined as the isolation of thought from feelings" would explain why she "appear[ed] empty or passive." *Ibid*. Rather than taking responsibility for the head injury that caused Mariah's death, Pinkerman would have testified that she could have been "taking responsibility for the whole configuration of the abuse and medical neglect by the family." ROA.8977.

Lucio's witnesses would have backed up their analyses with "the sibling-to-sibling physical abuse documented in the CPS files," ROA.9022 (Villanueva); ROA.8976 (Pinkerman), that "suggest[ed] that there were bite marks on the children while the children were in foster care before Mariah's death." *Ibid*. Pinkerman would

have added that his assessment showed Lucio did not fit any of the psychological literature's "identified subtypes of child murder mothers." ROA.8977.

Texas answered Lucio's claim without mentioning the complete defense right, or any related cases. Texas asserted that Lucio's claim was "nearly identical to issues nine and ten raised on appeal." ROA.10027. It argued "[t]he trial court did not err," ROA.10027, relying exclusively on state law. ROA.10028-31.

Adopting the State's proposed findings and conclusions *verbatim*, the state habeas court recommended that the CCA deny relief. The court found:

> 39. Applicant's complaint about this Court's exclusion of her mitigation experts from the guilt-innocence portion of the trial is nearly identical to issues nine and ten raised on direct appeal. Matters raised on direct appeal should not be re-litigated on habeas unless the judgment is subsequently rendered void or a subsequent change in the law is made retroactive. While additional evidence may warrant relief even when the issue was raised on direct appeal, Applicant has not demonstrated that she is entitled to relief herein because of any additional evidence herein.
>
> 40. Moreover, this Court did not abuse its discretion in excluding the testimony of Norma Villanueva and Dr. John Pinkerman from the guilt-innocence portion of the trial. Ms. Villanueva proffered nothing to indicate that she had any sort of specialized experience, knowledge or training in the area of interpreting body language and patterns of behavior during police interviews. Dr. Pinkerman's proffered testimony as to Applicant's psychological functioning, including how there was little supp ort in the "historical record" for the idea that Applicant physically abused her children, that she suffered from battered woman syndrome, and the meaning of her demeanor after the incident and during questioning had no relevance to the question of Applicant's guilt or innocence.

App. 184a (ROA.10091 ¶¶ 39-40). *See also* App. 188a.

After noting that the "trial court adopted the State's proposed findings of fact and conclusions," the CCA expressly "adopt[ed] the trial judge's findings and conclusions." App. 172a.

C. District Court Decision

Lucio sought relief in the federal district court, repeating the allegations raised in her state habeas application. ROA.157-61.

Texas moved for summary judgment. As to Lucio's complete-defense claim, Texas conceded that "Lucio raised this claim in state habeas proceedings," ROA.374, but continued to argue the claim was "really a complaint that the trial court erred in applying a state evidentiary rule" and thus is not cognizable on federal habeas review." ROA.373 (modified heading).

Texas argued that the constitutional complete-defense right "is constrained by evidentiary rules," ROA.375, and "the Supreme Court has only found a violation of the defendant's right to present a complete defense where an arbitrary *evidentiary rule* kept the evidence out." ROA.376 (emphasis in original). The State contended that when Lucio "challenges … not the rule, but the trial court's application of it," she is presenting a state-law claim in the "guise" of a federal constitutional claim. ROA.377.

The district court accepted the State's view and found "Lucio's attempt to dress up this state evidence claim as a constitutional claim is unconvincing," and her "claim is without merit." App. 150a. It concluded that Lucio had not shown that the trial court's "exclusion of Villanueva's testimony on the basis of Villanueva's lack of expert qualifications was incorrect" and there were no indications that Lucio's statements

were involuntary. App. 150a. As to Pinkerman, it considered his testimony to be "only tangentially related to the question of Lucio's guilt or innocence." App. 150a.

D. Fifth Circuit Decisions

A unanimous panel of the Fifth Circuit reversed the district court and remanded for the district court to grant Lucio relief. App. 71. It concluded that "no state court ever adjudicated the claim," and therefore, reviewed the claim de novo. App. 71. On the merits, the panel concluded that "the trial court deprived Lucio of her constitutional right to present a meaningful defense." App. 71. The court found the exclusion of Dr. Pinkerman's testimony as irrelevant "was inconsistent with the reality of this trial." App. 84a. The panel explained that "Lucio's admissions of abuse within her interrogation statement were the most significant evidence in the case" and there was "no physical evidence or witness testimony directly establishing that Lucio abused Mariah or any of her children, let alone killed Mariah." App. 85a. Thus, the panel held, the exclusion of Dr. Pinkerman's testimony "bears the hallmark sign of arbitrariness: complete irrationality." App. 86a. "To undercut the State's premise (i.e., Lucio abused Mariah) is to undercut its conclusion (i.e., Lucio killed Mariah)."[8] App. 86a.

Texas petitioned for rehearing en banc on three grounds not at issue here.[9] The Fifth Circuit granted rehearing and vacated the panel opinion. App. 69a.

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[8] The panel did not reach the question whether the exclusion of Norma Villanueva violated Lucio's right to present a complete defense but noted that Villanueva's exclusion also "raises concerns about the fairness of the trial." App. __ (n.1).

[9] Although the 7-judge plurality opinion addressed one of the issues the State raised in its petition, the 3-judge concurrence addressed none of them.

The 17-judge en banc court produced a sharply divided decision. Seven judges joined a plurality opinion and announced the judgment affirming the district court. App. 6a-37a. Three judges joined a concurring opinion authored by Judge Southwick that did not join the plurality opinion, but concurred on narrower grounds. App. 37a-40a. Seven judges dissented and would have held the state court unreasonably applied this Court's complete-defense cases. App. 48a-68a. While a majority of judges (10) agreed with the result and agreed that 28 U.S.C. § 2254(d) barred relief, no majority agreed on the reasoning for denying relief.

The plurality concluded that Lucio "disclaimed *any reliance on Crane* [*v. Kentucky*, 476 U.S. 683 (1986)]," in her state habeas claim, and therefore refused to evaluate the reasonableness of Lucio's claim under *Crane*. App. 16a (emphasis in original). Judge Southwick's decisive concurring opinion considered the application of *Crane* and other potentially relevant cases, App. 38a-40a, and held that "clearly established Supreme Court authority falls short of permitting us to reject the state *habeas* court's consideration of th[e] issue." App. 37a; *ibid.* ("[W]hat is at issue … is whether [*Crane*] permits us to conclude that the state court erred … and then to correct the error").

Judge Southwick found the exclusion of Lucio's experts was "the key evidentiary ruling at trial," and agreed with the dissent that it was "imperative that jurors hear this testimony." App. 37a. "[W]orking within the constraints of AEDPA," the concurrence found that the issue was "whether a Supreme Court decision with language helpful to Lucio's claim . . . permits us to conclude that the state court erred in

rejecting this claim and then correct the error." App. 38a. Judge Southwick concluded that "*Crane* overrides any blanket evidentiary rule that prevented the introduction in the particular case of reliable, competent evidence central to the defense," and for Lucio to prevail, "*Crane* must do more." App. 40a. Because "the interpretation of *Crane* that is necessary for relief in this case is not clearly established," App. 38a, the analysis ended there. Judge Southwick concluded Lucio's case "is a clear example that justice to a defendant may necessitate a more comprehensive review of state-court evidentiary rulings than is presently permissible under law that is established with sufficient clarity." App. 40a.

The principal dissent concluded that "the state habeas court's rejection of Lucio's complete defense claim as irrelevant was irrational and an unreasonable application of *Crane* and *Chambers*." App. 65a.[10]

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve the Question Whether Clearly Established Federal Law Applies the Right to Present a Complete Defense to Arbitrary and Disproportionate Exclusions of Defense Evidence Made Pursuant to Generally Valid Rules of Evidence

It is well established that the Due Process Clause of the Fourteenth Amendment and the Compulsory Process Clause of the Sixth Amendment guarantee a right to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

[10] And, while the dissenting opinion analyzed the claim under § 2254(d), it noted that "several judges joining in this dissenting opinion concur in the now-vacated panel's viewpoint that the state habeas court failed to adjudicate Lucio's complete defense claim on the merits." App. 58a.

A long line of decisions from this Court hold that the right to present one's own witnesses to establish a defense ranks as a "fundamental element of due process of law."[11] *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Crane*, 476 U.S. at 690 (1986); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

Generally, this constitutional right is in accord with state rules of evidence which channel the presentation of a defense. But, as this Court has held—and a majority of circuits have recognized— a trial court violates this right when the exclusion of reliable evidence "infringe[s] upon a weighty interest of the accused" and is "arbitrary or disproportionate to the purposes [the rules of evidence] are designed to serve." *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock*, 483 U.S. at 56); *see also Holmes*, 547 U.S. at 324; *Kubsch v. Neal*, 838 F.3d 845, 862 (7th Cir. 2016) (en banc). Or, as *Chambers* held, the exclusion of "critical," "trustworthy" evidence "directly affecting the ascertainment of guilt" based on "mechanistic[]" application of an otherwise valid rule of evidence violates a defendant's due process rights. 410 U.S. at 302.

The Fifth Circuit's deeply divided decision below creates a two-circuity minority that holds this Court's cases only apply when "a rule govern[s] some evidentiary

[11] "[T]he right to compulsory process was included in the Bill of Rights in reaction to the notorious common-law rule that in cases of treason or felony the accused was not allowed to introduce witnesses in his defense at all." *Washington*, 388 U.S. at 19 (citing 3 Story, *Commentaries on the Constitution of the United States* §§ 1786-88 (1st ed. 1833)). *See also* 4 William Blackstone, *Commentaries on the Laws of England* *345, *351-53 (critiquing common-law prohibition as "oppressive" and "unreasonable").

category," and imposes a non-discretionary, "blanket" rule preventing the introduction of evidence in that category. App. 40a. On that view, this Court's cases are not sufficiently clear as to whether a "discretionary application of a general evidentiary standard" can support habeas relief. App. 39a-40a. These two circuits fundamentally misread this Court's precedents, depend on an illusory, inconsequential distinction, and prevent federal courts from remedying fundamental injustices in cases where defendants have been prevented from presenting evidence of their innocence.

A. The En Banc Fifth Circuit's Fractured Decision Deepens the Conflict Among the Circuits About What *Chambers v. Mississippi* and Its Progeny Established.

1. The majority approach

The vast majority of circuits—the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh—have held that *Chambers*, *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam), *Rock*, *Crane*, and *Holmes* clearly establish a complete-defense right that applies when a state trial court excludes evidence based on a generally applicable and valid rule such as relevance, hearsay, or that the evidence is more confusing than probative.

Echoing this Court, these circuits recognize the "broad latitude" afforded "state and federal rulemakers" to prescribe evidentiary standards. *Kubsch*, 838 F.3d at 857 (quoting *Holmes*, 547 U.S. at 324). But they also recognize that "[t]his latitude . . . has limits." *Ibid.* (quoting *Holmes*, 547 U.S. at 324). Accordingly, these circuits narrowly hold that "the exclusion of evidence in a criminal trial 'abridge[s] an accused's right to present a defense' only where the exclusion is "'arbitrary'" or "'disproportionate to the purpose[ ] [it is] designed to serve.'"" *Ferensic v. Birkett*, 501 F.3d 469, 475

(6th Cir. 2007) (quoting *Scheffer*, 523 U.S. at 308, in turn quoting *Rock*, 483 U.S. at 56). In addition, these courts recognize that due process can override the application of a state rule only in "extreme cases," such that "a state law justification for exclusion will prevail unless it is 'arbitrary or disproportionate' and 'infringe[s] upon a weighty interest of the accused.'"[12] *Fortini v. Murphy*, 257 F.3d 39, 46 (1st Cir. 2001) (citing *Crane*, 476 U.S. at 690, and quoting *Scheffer*, 523 U.S. at 308). Finally, these circuits apply this Court's requirement that the accused demonstrate that the excluded testimony was "unusually reliable."[13] *Kubsch*, 838 F.3d at 860.

The en banc Seventh Circuit's decision in *Kubsch* illustrates the approach taken by the majority of circuits to determine what law this Court has clearly established. The Seventh Circuit observed that "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." 838 F.3d at 859 (quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)). Therefore, the court, like others, carefully reviewed the facts and reasoning of this

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[12] *See also Scrimo v. Lee*, 935 F.3d 103, 112 (2d Cir. 2019) (reasoning that the right to present evidence cannot be limited by arbitrary or disproportionate rules); *Brown v. Luebbers*, 371 F.3d 458, 467-68 (8th Cir. 2004) (en banc) (state court reasonably applied *Green* when it determined "stale evidence of a convicted murderer's character … well before the murder was committed [] not "highly relevant" to a "critical issue" and cumulative of other evidence).

[13] *See also Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1248 (11th Cir. 2017) (upholding exclusion where defendant failed to show "hearsay statement was sufficiently trustworthy and reliable"); *Brown*, 371 F.3d at 467-68 (upholding state court's exclusion of hearsay where state court implicitly found defendant failed to satisfy *Green*'s requirement to show "substantial reasons exist to assume … reliability"); *cf. Chia*, 360 F.3d at 1006 (finding sufficient indicia of reliability under *Chambers*).

Courts cases beginning with *Chambers* to ascertain what "the *Chambers* line of Supreme Court precedent" requires. *Id.* at 862. That review led the court to conclude that "the Supreme Court in *Chambers* and the cases following it has said that when hearsay is otherwise reliable, is critical to the theory of the defense, and the case involves a murder prosecution, due process requires its admission." *Ibid.*

After applying a stringent five-part test, *Kubsch* held that the Indiana Supreme Court's conclusion that *Chambers* did not require the admission of an exculpatory video that was excluded on hearsay grounds was contrary to or an unreasonable application of this Court's clearly established complete-defense law. *Ibid.* The Seventh Circuit has applied this approach in reviewing exclusions of evidence pursuant to other generally valid state rules of evidence. *E.g.*, *Fieldman v. Brannon,* 969 F.3d 792, 800 (7th Cir. 2020) (holding state court's ruling that excluded as irrelevant defendant's testimony attempting to discredit incriminating video was contrary to clearly established federal law).

In *Ferensic*, the Sixth Circuit found the "entirety of the evidence against Ferensic was based upon eyewitness identifications." 501 F.3d at 470. Therefore, the trial court's exclusion of lay and expert testimony casting doubt on those identifications infringed the defendant's "weighty interests". *Id.* at 475-76 (citing *Scheffer*, 523 U.S. at 308). The state court unreasonably applied the complete-defense rule when it applied an "outcome-based prejudice standard," rather than evaluate whether the exclusion of the expert's testimony was disproportionate to the purpose of the rule requiring timely expert disclosures, as this Court's cases clearly required. *Ibid.*

The Second Circuit similarly concluded this Court's cases clearly establish a limited complete-defense inquiry even when an "evidentiary ruling was correct pursuant to a state evidentiary rule." *Scrimo v. Lee*, 935 F.3d 103, 115 (2d Cir. 2019) (quoting *Hawkins v. Costello*, 460 F.3d 238, 244 (2d Cir. 2006)). Under those circumstances, the Court "'consider[s] whether the evidentiary rule is arbitrary or disproportionate to the purposes it is designed to serve.'" *Ibid.*

The Eleventh Circuit recognizes that *Chambers* held "that the generally valid prohibition on hearsay was overcome because the hearsay evidence 'bore persuasive assurances of trustworthiness'" and so, even when an evidentiary rule is generally "not arbitrary," a petitioner may still "be entitled to a constitutional override" of the rule if the petitioner "ha[s] offered evidence that [the excluded evidence] was sufficiently trustworthy and reliable." *Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1248 (11th Cir. 2017) (citing *Chambers*, 410 U.S. at 302).

The First Circuit has likewise deduced from this Court's cases that "[e]ven a generally defensible rule of evidence may be applied so as to produce an unconstitutional infringement." *Brown v. Ruane*, 630 F.3d 62, 72 (1st Cir. 2011) (citing *White v. Coplan,* 399 F.3d 18, 24 (1st Cir. 2005)). Thus, the First Circuit has recognized that clearly established law permits a petitioner to attack "the application of the rule by the state court to the present facts—essentially, an 'as applied' challenge to the fit between the generalization and the circumstances." *Santiago v. O'Brien*, 628 F.3d 30, 34-35 (1st Cir. 2010).

The Tenth Circuit also has held that "Supreme Court precedents like *Rock* and *Chambers* 'make[ ] clear that a state court may not apply a state rule of evidence in a per se or mechanistic manner so as to infringe upon a defendant's constitutional right to a fundamentally fair trial.'" *Dodd v. Trammell*, 753 F.3d 971, 988 (10th Cir. 2013) (quoting *Paxton v. Ward*, 199 F.3d 1197, 1214 (10th Cir. 1999)).

In an unpublished case, the Third Circuit has similarly recognized that this Court's clearly established precedent holds that "state evidentiary rules cannot be inflexibly applied in such a way as to violate fundamental fairness." *Savage v. Dist. Att'y of Cty. of Philadelphia*, 116 F. App'x 332, 338 (3d Cir. 2004) (citing *Chambers*, 410 U.S. 299-302). The clearly established right protects a defendant from a government restriction on the opportunity to be heard, "be it in the form of an unnecessary evidentiary rule . . . or an arbitrary ruling from the trial judge." *Id.* at 339 (quoting *Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 445 (3d Cir. 1992)).

Consistent with this approach, the Fourth Circuit has implicitly found applications of generally valid rules of evidence fell within the clearly established ambit of the complete-defense cases, and found state court applications of this rule unreasonable. *Barbe v. McBride*, 521 F.3d 443, 460 (4th Cir. 2008) (concluding "that application of the West Virginia rape shield law at Barbe's trial was disproportionate to the State's interests in having the law applied").

The Eighth Circuit has also identified *Chambers* as "articulat[ing] the legal principles applicable to" a petitioner's complete-defense claim. *Guinn v. Kemna*, 489 F.3d 351, 354 (8th Cir. 2007). Relying on the shared views about *Chambers* in the

plurality and dissenting opinions in *Montana v. Egelhoff*, 518 U.S. 37 (1996) (neither of which were precedential), *Guinn* stated that *Chambers* stood for the proposition that an "erroneous evidentiary ruling' can, of course, be one made 'without sufficient justification." *See* 489 F.3d at 354.

2. The minority approach

The position adopted by the Fifth Circuit stands in stark contrast to this broadly held view about *Chambers* and its progeny. The Fifth Circuit joins just one other circuit in holding that this Court's cases only clearly apply when the validity of a state evidentiary rule excluding an entire category of defense evidence is at issue.[14]

Along with the Fifth, the Ninth Circuit has sharply narrowed the reach of this Court's complete-defense cases to determining the validity *vel non* of the rules applied in trial courts. *Moses v. Payne*, 555 F.3d 742, 758 (9th Cir. 2009). According to the Ninth Circuit, this Court's cases "have focused only on whether an evidentiary rule, by its own terms, violated a defendant's right to present evidence." *Ibid.* Hence, Supreme Court law "do[es] not squarely address whether a court's exercise of discretion to exclude expert testimony violates a criminal defendant's constitutional right to present relevant evidence," *id.* at 758 (citing *Wright v. Van Patten*, 552 U.S. 120, 124

[14] The plurality purported to find four circuits that shared its approach. *See* App. 20a-21a (citing *Rucker v. Norris*, 563 F.3d 766, 770 (8th Cir. 2009); *Grant v. Royal*, 886 F.3d 874, 957, 960 (10th Cir. 2018); *Troy v. Sec'y, Fla. Dep't of Corr.*, 763 F.3d 1305, 1316 (11th Cir. 2014); *Gagne v. Booker*, 680 F.3d 493, 516 (6th Cir. 2012) (en banc), but as the principal dissent below pointed out, only the Ninth Circuit in *Moses* has actually made such a determination. App. 64a.

(2006)), and doesn't "clearly establish 'a controlling legal standard' for evaluating discretionary decisions to exclude the kind of evidence at issue here." *Id.* at 758-59 (citing *Panetti*, 551 U.S. at 955).[15]

Given that the minority circuits' view breaks with the longstanding application of this Court's cases, it is unsurprising that they tend to create intra-circuit conflicts.[16] For example, the Ninth Circuit in *Moses* did not distinguish or overrule earlier precedent applying this Court's cases differently, *see Chia v. Cambra*, 360 F.3d 997 (holding exclusion of a declarant's out-of-court statements violated his due process rights under *Crane*); *Perry v. Rushen*, 713 F.2d 1447 (9th Cir. 1983). The en banc decision below similarly did not mention *Kittelson v. Dretke*, 426 F.3d 306, (5th Cir. 2005) (per curiam), a case in which the Fifth Circuit held, contrary to the majority in *Lucio*, that the state trial court's discretionary limitation on cross-examination was

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[15] The Sixth Circuit nearly embraced this minority view on at least one occasion. *But cf. Ferensic*. In *Gagne*, 680 F.3d 493, another en banc court fractured badly in interpreting the scope of *Chambers*, *Crane*, and other complete-defense cases. A plurality of judges rejected any as-applied attack on the application of Michigan's rape shield law, finding that no clearly established case had held that an exclusion could ever trump the state's legitimate interest in the law. While one judge who concurred in the judgment seemed to agree with this result for the same reasons as the Ninth Circuit in *Moses*, *see id.* at 526 (Clay, J.), three other concurring judges deprived that view of precedential force and interpreted *Chambers* et al. differently. *See id.* at 521 (Moore, J.); *id.* at 526-27 (White, J.).

[16] The gloss the court below gives to this Court's cases also is inconsistent with *Nevada v. Jackson*, 569 U.S. 505 (2013). There, this Court addressed a state court's reasonable application of the clearly established complete-defense right. This Court treated "the constitutional propriety of [the evidence] rule" as the starting point—not the end point—for its analysis, *id.* at 510, and then examined the "enforcement of the Nevada rule," *id.* at 510-11. If all that was clearly required was a state court's compliance with a constitutionally valid rule of evidence, *Jackson* engaged in needless analysis.

an unreasonable application of this Court's complete-defense precedents. *Id.* at 310, 319-21.[17]

B. The Decision Below Fundamentally Misreads This Court's Precedent.

1. The Fifth Circuit and other minority circuits misread this Court's complete-defense cases

The decisions of the Lucio plurality and concurrence are predicated on a basic misreading of this Court's precedent, beginning with an incomplete account of the holding in *Chambers*. The *Lucio* concurrence is typical in saying that *Chambers* "concerned a bar to any evidence that ran afoul of the common-law voucher rule." App. 40a; *see also* App. 23a (plurality) (discussing only the voucher rule aspect of *Chambers*). While *Chambers* held that the "'voucher' rule, *as applied* in this case, plainly interfered with Chambers' right to defend against the State's charges," 410 U.S. at 298 (emphasis added), that was not the only, or even a sufficient, basis for the holding. *Chambers* said it "need not decide … whether this [voucher] error alone would occasion reversal" because there was other evidence excluded as hearsay that, together with the "voucher" evidence violated Chambers' rights. *Id.* at 298-300.

As the en banc Seventh Circuit noted, although *Chambers* was critical of the voucher rule, this Court "did not rest its holding on any criticism of Mississippi's rules of evidence, either the voucher rule or the hearsay rule." *Kubsch*, 838 F.3d at 855. Rather, it looked to the reliability of the evidence Chambers was proffering and found

[17] *Kittelson* was discussed at length by the vacated panel opinion and dissent, App. 65a (Haynes, J., dissenting), 84a, 87a (panel) but not even mentioned by either the plurality or concurrence.

that it bore "persuasive assurances of trustworthiness." *Ibid.* (quoting *Chambers*, 410 U.S. at 302). Justice Scalia's dictum about *Chambers* is much closer to the mark: *Chambers* shows that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." *Egelhoff*, 518 U.S. at 53 (plurality op.); *cf. Fry v. Pliler*, 551 U.S. 112, 126 (2007) (Breyer, J., concurring in part & dissenting in part) ("A garden-variety nonharmless misapplication of evidentiary principles normally will not rise to the level of a constitutional, Chambers, mistake." (citing *Scheffer*, 523 U.S. at 308)).

Indeed, the minority view cannot be reconciled with this Court's application of *Chambers* in *Green v. Georgia*. In *Green*, this Court vacated the petitioner's death sentence because the trial court denied his request to present a State's witness's testimony, at the punishment stage, that the co-defendant confessed to them. The testimony was excluded under Georgia's hearsay rule. *Id.* at 96. Noting that *Chambers* held that "the hearsay rule may not be applied mechanistically," *Green* found these facts violated due process. *Id.* at 97. (quoting *Chambers*, 410 U.S. at 302.) *See also Sears v. Upton*, 561 U.S. 945, 950 & n.6 (2010) ("[W]e have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule.") (referencing *Green*, 442 U.S. at 97).

The categorical prohibition rule that the Fifth and Ninth Circuits apply is contrary to precedent and based on a specious distinction.

Instead of identifying the principles clearly established in this Court's holdings, the Fifth and Ninth Circuits derive a limiting principle from their erroneous readings—that only a "blanket" evidentiary rule that categorically prohibits a class of evidence can violate a defendant's complete defense right. E.g., App. 40a (*Crane* "overrides any blanket evidentiary rule that prevented the introduction in the particular case of reliable, competent evidence for the defense."); App. 20a-21a (plurality).

Holmes v. South Carolina reveals how illusory the purported distinction is between categorical rules (i.e. cases where this Court invalidated a State's rule), and discretionary-application cases. In *Holmes*, this Court reviewed a particular interpretation of a common—and presumptively valid—"third-party guilt rule," "regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." 547 U.S. at 327. In Bobby Holmes's case, the South Carolina Supreme Court "radically changed" that valid rule by holding in effect that, "[i]f the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues." *Id.* at 329. That rule would seem to categorically prohibit any third-party evidence when the prosecution's case was strong enough. But it also entrusted to the reviewing court a highly discretionary judgment—how strong the prosecution's case was. Thus, this Court noted that "as applied in this case" the state supreme court had overlooked defense objections to the prosecution's evidence

in evaluating the strength of the case. *Ibid.* So, *Holmes* involved the type of "discretionary application of a general evidentiary standard" that the *Lucio* court believed was excluded from this Court's case law. App. 39a-40a.

By the same token, the rules in Lucio's case do not fit neatly into the categorical/discretionary dichotomy. As the principal dissent below rightly recognized, Texas's rule of relevance entrusts the determination of relevancy to the discretion of the trial court, but "provides trial courts no discretion to admit or exclude irrelevant evidence." App. 64a (Haynes, J., dissenting). Consequently, like in *Holmes*, the trial court here "categorically denied [Lucio] the ability to scientifically explain about how Battered Woman Syndrome played a role in her supposed confession." App. 47a (Elrod J., dissenting); *see Holmes*, 547 U.S. at 329.

Federal habeas courts' application of the complete-defense right cannot be made to turn on such a novel and specious distinction.

Relatedly, the minority, blanket-ban-only view also reaches an absurd conclusion—that this Court requires defendants to pursue exclusively "facial" invalidation of state evidence rules. *See Nash v. Russell*, 807 F.3d 892, 898 (8th Cir. 2015) (finding *Holmes* represents a species of "facial challenge" to state evidence rules and holding petitioner's "as-applied" challenge to state evidentiary ruling was not fairly presented in state court); *Santiago*, 628 F.3d at 34-35 (describing "as applied" challenge to state rule). That turns principles of constitutional litigation on their head: for this right alone, facial challenges are required when in all other circumstances they "are disfavored." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450-51

(2008). This Court has never said the complete-defense rule carries the power invalidate entire evidentiary rules. Since "respect" for state rule-makers is the touchstone, *see Crane*, 476 U.S. at 690, it makes sense that this Court has always narrowly tailored its remedy to exclusions in specific cases, *id.* at 691; *see also Chambers*, 410 U.S. at 298 ("The 'voucher' rule, as applied in this case, plainly interfered with Chambers' right to defend against the State's charges.").

2. The Fifth Circuit flouted this Court's precedent on what counts as "clearly established Federal law."

The *Lucio* concurrence and Ninth Circuit in *Moses* also badly misapply this Court's cases on what constitutes "clearly established federal law," 28 U.S.C. § 2254(d)(1). Clearly established federal law refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

This Court has shown numerous times that "clearly established federal law" need not originate in a single case, the way the concurrence treated *Crane*, or a case involving a victorious defendant, or apply to cases on all-fours. This Court's seminal case on the application of § 2254(d), *Williams v. Taylor*, 529 U.S. 362 (2000), held that *Strickland v. Washington*, 466 U.S. 668 (1984), was clearly established law governing an ineffective-assistance-of-counsel claim even though this Court had not ever ruled for a defendant under *Strickland* before. 529 U.S. at 391. In *Andrade*, this Court held that although its cases had "not established a clear or consistent path for courts to follow," 538 U.S. at 72, and it had never invalidated a non-capital sentence, it had clearly established a principle of "gross disproportionality" that was subject to review

under § 2254(d). *Ibid*. *See also Abdul Kabir v. Quarterman*, 550 U.S. 233, 260 (2007) (clearly established law derived from a line of cases). Finally, in *Panetti*, this Court held that Justice Powell's concurring opinion in *Ford v. Wainwright*, 477 U.S. 399 (1986), was clearly established law even though it "did not set forth 'the precise limits that due process imposes in this area.'" 551 U.S. at 949. The "AEDPA does not 'require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied,'" *Id*. at 953.

The Fifth Circuit's misunderstanding of these basic rules for identifying the clearly established law heightens the need for this Court's review. Contrary to *Andrade* and *Panetti*, the concurrence demanded that *Crane* be on all-fours with Lucio's case. App. 39a-40a. Despite *Williams*, the plurality professed ignorance of any "authority for turning the Supreme Court's rejection of one prisoner's claim into clearly established law that supports a second prisoner's claim." App. 35a. And notwithstanding the fact "clearly established" law often derives from multiple cases, the concurrence looked to other cases only to interpret *Crane*'s clearly established rule. *See* App. 40a.[18]

As a result, the Fifth Circuit failed to recognize that the *Chambers* line of cases establish a set of principles that "are fundamental enough that when new factual

[18] Applying a highly idiosyncratic interpretation of § 2254(d) and the record, the plurality purported to review two different state-court claims (one of which had not been presented to the federal court) and assessed their reasonableness according to *Crane* or *Chambers*, but not both, based on whether Lucio had expressly cited (or disavowed) the particular case. App. 17a-27a.

permutations arise, the necessity to apply the earlier rule will be beyond doubt." *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

C. This Question Concerns an Issue of Paramount Importance: The Ability of a Defendant To Make a Defense of Her Innocence.

As the dissenting judges found, the trial court's exclusion of Dr. Pinkerman's testimony undermining confidence in Lucio's confession did not merely exclude a piece of evidence, it precluded her defense almost entirely. App. 60a-61a. While the issue is a matter of life or death for Lucio, it reaches far beyond her. Data and research show that two factors—false confessions and child victims—are recurring elements in cases where innocent women have been convicted and sentenced to death or life without parole. False confessions and the presence of a child victim are "more prevalent in cases of women exonerees convicted of murder who were sentenced to death or life without parole than those who received life or less than life sentences." Connor F. Lang, *The Intersection of Wrongful Convictions and Gender in Cases Where Women Were Sentenced to Death or Life in Prison Without Parole*, 27 Mich. J. Gender & L. 403, 408 (2020).[19] Those two factors were prominent in the cases of the eight women who, as of August 2020, were convicted of murder, received sentences of death or life without parole, and were later exonerated. *Id.* at 410.

[19] Women, while they make up a smaller number of overall exonerees for murders, have a larger proportion of false confession and child victims as factors than men. Of the sixty-seven women listed on the National Registry of Exonerations who were exonerated after a murder conviction, over one quarter (17/67) involved false confessions, and nearly one third involved (20/67) involved child victims. *See Detailed View, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx.*

Gender roles are a factor: "women are the likely victims of false convictions for violent crimes that are believed to have been committed by care-takers in roles that are overwhelmingly filled by women." *Id.* at 410 n.33 (quoting Kaitlin Jackson & Samuel Gross, *Female Exonerees: Trends and Patterns*, Nat'l Registry of Exonerations (Sept. 27, 2014)).

As in Lucio's interrogation, investigators use gender roles and physical contact when obtaining false confessions in cases involving women charged with murder. In the case of Sabrina Butler, whose murder conviction and death sentence were overturned by the Mississippi Supreme Court, *Butler v. State*, 608 So.2d 314, 315 (Miss. 1992),[20] Ms. Butler was questioned for hours late at night and into the early morning after she found her nine-month-old son not breathing and took him to the hospital. *See* Lang, *supra,* at 414 (citing Maurice Possley, *Sabrina Butler*, Nat'l Registry of Exonerations). Ms. Butler described her interrogation and confession where, "Ambitious men questioned, demoralized and intimidated me. In that state of mind, I signed the lies they wrote on a piece of paper. I signed my name in tiny letters in the margins to show some form of resistance to the power they had over me." *Id.* at 415 (quoting Maurice Possley, *Sabrina Butler*, Nat'l Registry of Exonerations).

Similar to the way Ranger Escalon let down Lucio's hair, when exoneree Debra Milke told her male interrogator that she did not understand the *Miranda* warnings,

[20] At a second trial, Ms. Butler was acquitted. *See* Lang, *supra*, at 415.

the interrogator responded by putting his hand on her knee and continuing to interrogate her. *See Milke v. Ryan*, 711 F.3d 998, 1002 (9th Cir. 2013).[21] In the case of Michelle Murphy, who allegedly confessed after eight hours of interrogation, the detective who interrogated her admitted to touching her head and examining her thighs during the interrogation, which he claimed was only to search for evidence.[22] Lang, *supra*, at 420.

D. Lucio's Case Is the Ideal Vehicle for Resolving the Circuit Split

Not only is this a compelling case to review because of the miscarriage of justice at Melissa Lucio's trial. Several features make Lucio's case an ideal vehicle for resolving the split described above.

First, the blanket-ban-only position has been consistently aired at all stages of this case. The State has urged its radical view of the complete-defense right from state habeas onward. Second, the decision below tees up a purely legal question about clearly established law, not a narrower, fact-bound inquiry into whether the state court unreasonably applied the clearly established law under the circumstances. *See McWilliams v. Dunn,* 137 S. Ct. 1790, 1802 (2017) (Alito, J., dissenting). Third, the State conceded this claim was fairly presented to the state court. ROA.374. Fourth, and most significantly, the question here is almost certainly outcome-determinative.

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[21] After the Ninth Circuit granted Ms. Milke's habeas petition and vacated her conviction, charges against her were dismissed in 2015, over twenty-four years after she was convicted and sentenced to death. *See* Lang, *supra*, at 417.

[22] Ms. Murphy was exonerated in 2015 after DNA testing showed there was DNA matching the profile of an unknown individual found at the scene that did not match Ms. Murphy or her child. Lang, *supra*, at 420.

Under the majority-circuit approach, Lucio would prevail on remand. There is no question the exclusion infringed Lucio's weighty interests by excluding material evidence. The three concurring and seven dissenting judges of the Fifth Circuit agreed the exclusion of Dr. Pinkerman was "the key evidentiary ruling at trial" because it was a "factual imperative that jurors hear" the testimony casting doubt on the supposed confession. App. 37a. The concurring judges also shared the dissent's view that "if jurors had only heard" the excluded testimony, it "could have impacted the verdict" App. 38a.

The judges' descriptions of the evidence leaves little doubt that the exclusion of Dr. Pinkerman, at least, was arbitrary and disproportionate to the purposes of the relevancy rule. Relevance is a rule of efficiency, designed to streamline evidence and to focus the jury on evidence that makes the question of guilt more or less probable. *See* John W. Strong, *McCormick on Evidence* § 185 (4th ed.). The State's decision to elicit testimony about Lucio's flat affect from paramedics and Ranger Escalon undermines any claim the State could make that how Lucio reacted lacked probative value. Moreover, as the Seventh Circuit has said, arbitrariness "might be shown by a lack of parity between the prosecution and defense; the state cannot regard evidence as reliable enough for the prosecution, but not for the defense." *Kubsch*, 838 F.3d 845 at 858. The concurrence's reluctance to deny relief (noting this case was "a clear example that justice to a defendant may necessitate a more comprehensive review of state-court evidentiary rulings than [it believed] is presently permissible," App. 40a shares

much with the dissent's view that the state court's ruling arbitrarily prevented Lucio from presenting a defense. App. 43a.

There is no reason to doubt the reliability of Lucio's evidence. Dr. Pinkerman and Ms. Villanueva each reviewed thousands of pages of CPS records that showed: (1) Mariah had an awkward gate that caused her to fall a lot; (2) there was no evidence Lucio was ever physically abusive to any of her children; (3) there were reports of Lucio's older children being physically abusive to their siblings. Both Villaneva and Pinkerman were reliable enough to be competent witnesses in the penalty phase. And Texas never questioned Dr. Pinkerman's clinical observations of Lucio, his research into Battered Women Syndrome, or his opinion that Lucio does not fit any of the psychological profiles of women who killed their children.

Once the Fifth Circuit's crabbed understanding of clearly established law is corrected, all that is left is analyzing the nonsensical state court holdings that Pinkerman's testimony was irrelevant and Villanueva unqualified. No coherent rationale could support that assessment.

CONCLUSION

This Court should grant certiorari to resolve this important question.

Respectfully submitted,

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