No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CESAR SANTANA,
Petitioner,

v.

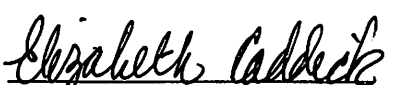
BRAD COWEN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Cesar Santana, pursuant to Federal Rule of Appellate Procedure 39 and 18 U.S.C. § 3006(a)(2)(B), asks leave to file the accompanying Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit without prepayment of costs and to proceed *in forma pauperis*. Petitioner was represented by counsel appointed under the Criminal Justice Act, 18 U.S.C. § 3006(a)(2)(B) in the District Court and on appeal to the Court of Appeals for the First Circuit.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on September 20, 2021.

Respectfully submitted,



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Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Whether the Fifth Amendment is violated, and a defendant's statements are involuntary, when police assure a suspect that his statements will not be used in court, he is read Miranda warnings, they then assure him they will help him, and the statements are thereafter used against him. Are *pro forma* Miranda warnings enough to negate the assurances, given a few minutes before, that the statements will not be used against him?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals, affirming the denial of petitioners' habeas petition, appears in Appendix A and is an unpublished decision reported *César Santana, Petitioner, v. Brad Cowen, Superintendent, MCI Norfolk, Respondent,* No. 19-1270, (1st Cir. July 7, 2021). The District Court decision denying the habeas petition is *Santana, Petitioner, v. Cowen, Respondent*, 361 F. Supp. 3d 115 (2019).

JURISDICTION

This is an appeal from the denial of a petition for writ of habeas corpus brought by a Massachusetts state inmate. The First Circuit Court of Appeals decided the case on July 7, 2021. A copy of the decision is in Appendix A. This petition is filed within 90 days after the date of the First Circuit Court of Appeals decision and this Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution states in relevant part: "No person shall be. . . compelled in any criminal case to be a witness against himself . . ."

The Fourteenth Amendment to the United States Constitution states in relevant part: "No State shall … deprive any person of life, liberty, or property, without due process of law…

Title 28 U.S.C. § 2254(a) provides in relevant part "[A federal] district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." "An application for a writ of habeas corpus . . . shall not be granted . . . unless the 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), or was based on an unreasonable determination of the facts in light of the evidence presented, 28 U.S.C. §2254(d)(2).

STATEMENT OF THE CASE

This is an appeal from the denial of a petition for writ of habeas corpus brought by a Massachusetts state inmate, entered by the United States District Court for the District of Massachusetts on February 14, 2019. The First Circuit Court of Appeals affirmed the denial of habeas corpus on July 7, 2021. The Court of Appeals stated the relevant procedural background of the case: In August 25, 2004, the victim and his stepdaughter were attacked by four men upon their return to the victim's apartment. The victim was killed by a gunshot wound to his head. On March 4, 2005, after twice telling authorities he had information about the shooting, Santana was questioned by two Massachusetts state troopers, one of whom was bilingual as Spanish was Santana's native language. *Santana, Petitioner, v. Cowen, Respondent,* No. 19-1270, (1st Cir. July 7, 2021) (hereinafter "1st Cir. Dec.") Santana consented to the recording of the interview "as long as it is not used in court." Following a brief discussion of Santana's educational level, English and Spanish language proficiency, and the like, the troopers gave Santana Miranda warnings in Spanish, which he said he understood. (1st Cir. Dec./pg. 3) After questioning for a short time, Santana said he was willing to help but wanted to talk with the trooper without the pressure of the tape recorder. He agreed to continue with the interview with the troopers taking notes, but refused to sign the notes when the questioning ended. (1st Cir. Dec./pgs 3-4)

After indictment he moved three times to suppress his statements; all were denied.

After the Massachusetts Supreme Judicial Court affirmed the denial of his motion to suppress and affirmed his convictions and sentence, he filed for habeas relief in federal district court. See 28 U.S.C. § 2254. He argued that the Massachusetts Supreme Judicial Court not only unreasonably determined that he had voluntarily made incriminating statements to the troopers but also unreasonably applied clearly established federal law in finding those statements voluntary. He stressed his initial insistence that his statements "not [be] used in court." (1st Cir. Dec./pg. 4) In a rescript, the District Court denied the petition, concluding that the Massachusetts court did not misapply clearly established federal law and that the its determination that any promise of confidentiality had been wiped away by Santana's consent to the Miranda protocol withstood review under the deferential habeas standard. (Id./4-5) The 1st Circuit found that the District Court supportably found the facts, applied the appropriate legal standards, articulated its reasoning clearly, and reached a correct result. (Id./5)

REASON FOR GRANTING THE PETITION

The decision below conflicts with this Court's long-established totality of the circumstances standard. Even considering the great deference owed to a state court decision, the First Circuit erroneously concluded that, "the SJC's determination was in conformity with clearly established federal law pertaining to voluntariness." (1st Cir. Dec./pg. 9) On the contrary, the decision was contrary to the totality of the circumstances tests established in *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-226 (1973) and *Dickerson v. United States*, 530 U.S. 428, 434 (2000).

FACTS RELEVANT TO FIFTH AMENDMENT ISSUE

On January 31, 2014, Cesar Santana was found guilty, based on joint venture theory, of first-degree murder, home invasion, armed assault during a burglary, and kidnapping while armed with a firearm. On the murder charge he was sentenced to life without parole

Suppression Hearing Evidence. Trooper LeBarge went to see Petitioner after another detective told him that he had used Petitioner as a confidential informant before, and he had been reliable. With LeBarge was Detective Cueva, whom LeBarge used to translate when suspects spoke Spanish. Santana told the detectives they could record his statement as long as what he says is not used in court. Cueva assured him, "No. Do not worry." "Don't worry. It's not going to be used in court." Santana continued, "That whatever I say to you be confidential."

Santana read and signed the Miranda warning written in Spanish. In response to Cueva's question, "do you understand that stuff" [referring to Miranda warnings], Santana responded "more or less." Santana also said, "The problem is he [LeBarge] speaks too fast" and "I can't keep talking like this," I don't understand. He's going too fast".

After the Miranda warnings, LeBarge said in English, "I'll report to the District Attorney and tell him that you were cooperative and you helped us . . . we're giving you an opportunity now to help us out." "My goal is not to, to save you and to help you out. My goal is to find the truth". However, Cueva

instead told Santana in Spanish "Any information you give us now, he'd go to the court and then talk with the judge and the lawyer and to say that, 'Look, Cesar came, talked to me, gave me that.' And we're going to try to help you."

Santana refused to sign the six pages of notes LeBarge wrote in English of Santana's statements. He did not know "where he stood in the case" and had concerns about (codefendant) Joonel Garcia, who had shot several people.

Dr. Michael O'Laughlin evaluated Santana's English proficiency and translated the recording of the police questioning. Santana was rated a two on a scale of one to ten on the Basic English Skills Test. He would have been placed in a beginner's class in school. He could have a simple conversation such as, "Ready to go?" "Yes, I'm ready." But he could not get beyond those simple, everyday expressions. He read Spanish at the seventh-grade level. Listening to the recorded questioning, Dr. O'Laughlin concluded that Detective Cueva was unable to give an accurate translation of LeBarge's longer questions, and omitted a good number of Santana's Spanish responses. He also conducted side questions unheard by LeBarge.

At the suppression hearing counsel argued Santana's statement was not voluntary because it was not intelligent and knowing where he was assured his statements would be confidential. The judge denied the motion. Although the judge found concerning that when Santana said he would talk "as long as it is not used in court" and was "confidential", and the police said,

"no, do not worry", this promise was "completely dissipated" by his waiver of Miranda rights.

The Supreme Judicial Court affirmed the denial of the suppression motion. *Commonwealth v. Santana*, 477 Mass. 610, 614-620, 82 N.E.3d 986, 992-996 (2017). The Supreme Judicial Court's determination that Petitioner's statements were not involuntary constituted an unreasonable application of clearly established Federal law as determined by the Supreme Court, 28 U.S.C. § 2254(d)(1), and was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(2).

A. THE STATE COURT'S DECISION THAT PETITIONER'S STATEMENTS WERE VOLUNTARY WAS BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE

Before giving its basis for affirming the trial court's denial of the motion to suppress, the SJC conceded that: Cueva's translations were "neither word for word nor always accurate"; Cueva "communicated information in Spanish to the defendant without translating it into English for LaBarge; Cueva did not translate to LaBarge that Santana said he consented to recording as long as it was not used in court and would be confidential, and; Cueva mistranslated LaBarge's statement that his goal was not to help Santana as, "we're going to try to help you". *Santana*, 477 Mass. at 615. Nonetheless, it found, unreasonably, that Petitioner did not think his statements would be confidential. *Santana*, 477 Mass. at 618-619.

Error. **A.1.** The SJC ruled, "We conclude, as did the motion judge, that the assurance of confidentiality in the particular circumstances of this case was dissipated by the timing of the Miranda warnings and other factors tending to show that the defendant did not rely on that assurance in making his statement to the police." *Id.* at 617. Without any basis, the trial court found, and the SJC cited approvingly, that Petitioner "plainly can speak and understand a fair amount of English" and despite the poor translation, Petitioner nevertheless "fully understood what was going on." *Id.* at 615-616. The SJC found no error in the judge's finding that LaBarge [speaking in English] dispelled the notion that his words would not be used against Petitioner and he was not making promises, because Petitioner "obviously understood some English." *Id*. at 616, 617. The SJC stated, "LaBarge's caution [spoken in English] that the defendant's statement would be conveyed to the prosecutor and the court sufficiently dispelled any assurances that the defendant's statements would not be used against him." *Id*. at 618. This unreasonable factual finding that Petitioner understood English so well that he understood everything LaBarge said in English finds no place in the record, as listed below.

(1) LaBarge testified that he used a Spanish speaking officer whenever he encountered a witness who did not speak sufficient English to allow him to conduct a conversation with them. Evidencing that he found such a situation in this case, he used Detective Cueva.

(2) The SJC ignored the expert evidence that that Petitioner spoke at a beginner's level of English and was only capable of conversing in English on a superficial level, such as a standard greeting.

(3) In addition, the translated interview does not support the SJC's factual findings. When LaBarge asks Petitioner to translate into English a section of the Miranda rights written in Spanish, Petitioner responds, "I-c c-can't, I can't – That If-I-if I want to talk to you – and I say yes . . ." This halting translation was from the *written* word, after Petitioner clearly took some time to translate. Understanding what someone speaks in English would have been more difficult, and Santana confirmed this in the interview, saying to Cuevo (in Spanish): "The problem is he [LeBarge] speaks too fast" and "I don't understand. He's going too fast".

(4) Also, when LaBarge said in English that he was not going to make any promises but he will "report to the District Attorney. . . Do you know what the District Attorney is?", Petitioner did not respond to that question. Ceuva then asked in Spanish "do you know who that is?", Petitioner responded "quien?" in Spanish which is "who" in English. This evidenced he did not understand LaBarge's sentence, in English, that included the word "District Attorney."

(5) Finally, after LeBarge's very long speech about the investigation and how his concern was not to help Santana, Santana asked Cueva, "What

is he saying?" This is when Cueva, after speaking a number of disjointed sentences, said, "we're going to try to help you."

Therefore, it was an unreasonable determination of the facts in light of the evidence presented in the State court proceeding to find that Petitioner could "obviously" understand what LaBarge was saying in English and "fully understood what was going on."

This is not a case where the credibility of the police versus Santana are at issue in this case. The transcript of the relevant portions of the interview, conducted at a time when Santana had no motive or reason to pretend he could not understand English well, shows that he in fact did not understand English well enough to understand what LeBarge said to Cueva in English, or what Cueva said to LeBarge in English. This is not a case where the petitioner requests that we simply adopt his version of events and subsequently read all the evidence consistently with it. See *John v. Russo*, 561 F.3d 88, 95 (1st Cir. 2009). Unlike in *John*, the trial court was *not* "presented with two competing accounts of events and conversations that took place between [the petitioner] and [the authorities]." *Id*. The accuracy of the transcript of the police assurances, both before and after Miranda warnings, has not been at issue.

Error A.2. The SJC found that petitioner "understood the statement could be used against him" because he asked to cease recording of his statement and refused to sign LaBarge's interview notes at the end of the

interview. *Santana*, 477 Mass. at 619. (Add/35) There is no basis in the factual record for this finding, and it is "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

The evidence was that Petitioner spoke of his fear of someone (his co-defendant, Joonel Garcia), who he said had killed people, and it was when police asked for that person's name ("what's the guy's name") that Petitioner asked to turn off the recording ("Can he turn off the recording machine, so I can tell him?"). The same would be true about signing LaBarge's notes—it would be putting his signature to an accusation against Garcia, a man he feared. The factual record does not show he feared courtroom use, and this is not surprising—he had just been told his statements would not be used in the courtroom. His actions and state of mind were also in keeping with his previous work as a confidential informant, where his name would not be associated with his information about others. These were the facts that supported his request to turn off the recording and not to sign the notes. There were no facts to support the SJC's reasoning.

Error A. 3. The SJC's last unreasonable determination of the facts was its finding that Santana was not concerned with talking to the police and only did so out of self-interest and his fear of Garcia. *Santana*, 477 Mass. at 619. It was unreasonable to find that self-interest was proof that he was not concerned that his statements would to be used against him in court. Self-

interest does not preclude a finding of an involuntary statement. Also, it does not follow that just because Petitioner feared Garcia would hear of his police statements, it means he did not also fear a jury would hear his statements in a first degree murder trial.[1] Any rational person would fear that his statements would be used in court to convict him of first-degree murder.

What is more, any reader of the transcript knows that Santana did not want his words to be used in court—he specifically asked for (and received) assurances that they would not be so used. At the very beginning of the interview, after LeBarge gave his introductory remarks to Santana and asked him if he minded the interview being recorded, Santana responded he did not mind *as long as it was not used in court*. There is no need to try to read Santana's mind to decipher what or who he was afraid of—it is clear from the record that he was at least afraid that his statements would be used in court, and he was assured, "No, do not worry." That he was also afraid that Joonel Garcia would learn of his statements does not negate his clear request (and Cueva's assurance) that his statements would not be used in court.

Standard of Review. On habeas review, findings of fact made by a state court are presumed to be correct unless the petitioner rebuts this "presumption of correctness" with "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Teti v. Bender*, 507 F.3d 50, 57-58 (1st Cir. 2007). This

[1] The District Court found it was a "somewhat strained inference" for the SJC to infer that Santana knew that his statements might be relayed to a court for use against him, because his main concern was for his safety if Garcia were to discover that he spoke to law enforcement. (District Court Order/25)

presumption extends to findings made on appeal. *Id.* at 58. The promises to Petitioner and his reasonable reliance on them are shown by clear and convincing evidence. Where the state courts plainly misapprehend or misstate the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner's claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable. *Pizzuto v. Yordy*, 492 F.3d 61, 68 (9th Cir. 2019).

B. THE STATE COURT'S DECISION WAS CONTRARY TO AND INVOLVED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW

The Fifth Amendment provides that no person shall be compelled to be a witness against, or furnish evidence against, himself. A suspect's waiver of the Fifth Amendment privilege against self-incrimination is valid only if it is made voluntarily, knowingly, and intelligently. *Miranda v. Arizona*, 384 U. S. 436, 444 (1966). A defendant is deprived of due process if his conviction is based on an involuntary statement, even if there is other evidence to support the conviction. *Jackson v. Denno*, 378 U.S. 368, 376 (1964). A confession is involuntary if the suspect's "will has been overborne and his capacity for self-determination critically impaired." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973). Courts must consider the "totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Id.* at 226; *Dickerson v. United States*, 530 U.S. 428, 434

(2000). Included in its nonexhaustive list of factors for assessing the voluntariness of a statement is whether the suspect was advised of his constitutional rights. *Schneckloth*, 412 U.S. at 226, Whether his Miranda rights were given him is just one of many factors. The totality of the circumstances test does not favor any one of these factors over the others—it is a case-specific inquiry where the importance of any given factor can vary in each situation. *Id*, 412 U.S. at 226-7.

There are two inquiries to determine whether an accused has voluntarily and knowingly waived his Fifth Amendment privilege against self-incrimination. *Moran v. Burbine,* 475 U.S. 412, 421 (1986): (1) the waiver of the right must be voluntary and not the product of intimidation, coercion, or deception, and (2) the relinquishment must be made with a full awareness of the nature of the right being waived. *Id,* at 421. Conduct by the police may not pass the line into the sort of misrepresentation that deprives a defendant "of the knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Id.* at 424. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. *Id*. at 421.

This Court "has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege." See *Colorado v. Spring*, 479 U.S. 564, 576 n. 8 (1987) and *Spano v. New York*,

360 U. S. 315 (1959). As is relevant here, the motive underlying the interrogator's conduct, whether intentional or inadvertent, is in itself irrelevant when evaluating "the intelligence and voluntariness of [the suspect's] election to abandon his rights" under Miranda. *Moran*, 475 U.S. at 423. Rather, "such conduct" by the police "is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran*, 475 U.S. at 424. For a waiver to be valid, the suspect must be "aware of the State's intention to use his statements to secure a conviction" *Moran*, 475 U.S. at 422–23.

Error B.1. All courts gave too much weight to the fact that police gave Petitioner Miranda warnings after they promised his statement would not be used in court and would be confidential. Considering that they had just assured him his statements would not be used in court, and that there was nothing other than the *pro forma* Miranda form to alert Petitioner that what he had just been assured was now being rescinded, the Miranda warnings were not a circumstance that should have held great weight in the voluntariness analysis.

In the voluntariness analysis, it does not matter if Miranda rights are read after the assurance of confidentiality. In *United States v. Rogers*, 906 F.2d 189 (5th Cir. 1990), the defendant, a felon, was investigated for illegal sales of firearms. County officials assured him he would not be charged if he

cooperated. *Id*. at 190. About two days later, federal authorities questioned him in the county building. Although they read him his Miranda warnings and he waived them, it appeared to be a continuation of the questioning "related to the original investigation and promise [of confidentiality] by the Sheriff's Office." *Id*. at 190-191. "Though the Miranda warning was given, Rogers indeed "misunderstood the consequences of speaking freely to the law enforcement officials." *Id*. at 192. Because the sheriff's office had assured him he would not be prosecuted for purchasing stolen guns, his later statement (after Miranda) was not voluntary under the totality of the circumstances. *Id*. at 192. The same is true here: the later Miranda warning did not dissipate the promise.

See also, *Hopkins v. Cockrell*, 325 F.3d 579, 584 (5th Cir. 2003), where the court found the statements involuntary despite a prior Miranda waiver, where the officer told the defendant that his statement was confidential and, "This is for me and you. This is for me. Okay. This ain't for nobody else". "An officer cannot read the defendant his *Miranda* warnings and then turn around and tell him that despite those warnings, what the defendant tells the officer will be confidential and still use the resultant confession against the defendant." *Hopkins*, 325 F.3d at 584-585. See also, *United States v. Walton*, 10 F.3d 1024, 1027 (3d Cir. 1993), where the court found the confession involuntary even though the defendant had waived Miranda the previous day and the defendant was not in custody. What was relevant was that the

agents told the defendant, “If you want, you can tell us what happened off the cuff". "[G]iven the uniquely influential nature of a promise from a law enforcement official not to use a suspect's inculpatory statement, such a promise may be the most significant factor in assessing the voluntariness of an accused's confession in light of the totality of the circumstances." *Id.* at 1030. See also *Hart v. Attorney Gen. of Fla.*, 323 F.3d 884, 893–894, 896 (11th Cir. 2003) (telling suspect that “honesty wouldn't hurt him” contradicted the Miranda warning that "anything you say can be used against you in court", and rendered his waiver "not voluntary, knowing, and intelligent as required by Miranda"); *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991) (Miranda waiver was invalid because by telling suspect that signing waiver form would not hurt him, agents contradicted Miranda warning that suspect's statements can be used against him in court, and mislead him about consequences of relinquishing right to remain silent); *United States v. Young*, 964 F.3d 938, 944-946 (10th Cir. 2020), (although the fact that an officer promises to make a defendant’s cooperation known to prosecutors will not produce a coerced confession, FBI agent did more—he said (after Miranda warnings) he would tell judge of suspect’s cooperation and cooperation will buy down prison time; awareness suspect could stop interrogation did little to mitigate coercive nature of FBI agent’s actions; under totality of circumstances, capacity for self-determination critically impaired and rendered confession involuntary).

In addition to being assured confidentiality before he signed the Miranda rights, Santana he was also told *after* Miranda that the police would tell the judge he gave them information and "we're going to try to help you".

Error B.2. The SJC unreasonably characterized Cueva's assurance to Santana that the officers would speak of his cooperation with the court and try to help him, as an officer's suggestion that a person's cooperation would be brought to the attention of officials. *Santana*, 477 at 619. That is not what happened; the assurance to help him was not the run-of-the-mill encouragement given by police to suspects. What is more, the statement that they would try to help him was made after the assurance of confidentiality and after Miranda warnings. The Miranda warning was sandwiched between these two assurances, and the Miranda warning therefore did not dissipate the assurances.

By mischaracterizing the intent and effect of Cueva's statements, the SJC unreasonably applied federal law. An "unreasonable application" of federal law occurs when the state court identifies the correct legal principle, but applies those principles to the facts of the case in an objectively unreasonable manner. *Malone v. Clarke*, 536 F.3d 54, 63 (1st Cir. 2008). Here, the SJC acknowledged the required totality of circumstances analysis, but then it relied almost exclusively on the fact that Miranda warnings [only one factor in the totality of circumstances analysis] were given in its involuntariness analysis. Therefore, it failed to apply the totality of

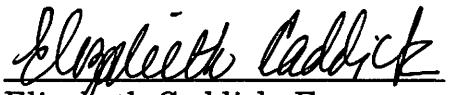
circumstances analysis this Court required in *Moran*, 475 U.S. at 423 and *Dickerson*, 530 U.S. at 434.

Standard of Review & Prejudice. Even if a state court's error rises to the level of being "unreasonable," a petitioner should show that the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). Here, the error of admitting an involuntary confession had a substantial and injurious effect or influence on the jury's verdict. In § 2254 proceedings a court must assess the prejudicial impact of constitutional error under the substantial and injurious effect standard. *Brecht*, 507 U.S. at 631; *Fry v. Pliler*, 551 U.S. 112, 116, 121 (2007). In this case, the Commonwealth acknowledged, "The statement is very important to the Commonwealth's case." The Commonwealth argued the statement as the primary evidence against Petitioner, and discussed it in detail. As this Court has stated, "A defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

CONCLUSION

For the above reasons, the decision below conflicts with this Court's long-established totality of the circumstances standard for determining the voluntariness of statements. As a result, the petition for a writ of certiorari should be granted.

Respectfully submitted,
Cesar Santana,
by his attorney,



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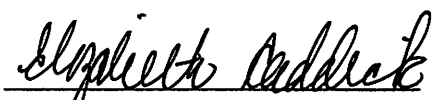
CERTIFICATION OF WORD LIMITATIONS

I certify that this petition for certiorari complies with the word limitations (9000) in Rule 33.1 of the Rules of the United States Supreme Court: the petition is composed of 4750 words.



Elizabeth Caddick

APPENDIX A

César Santana, Petitioner, v. Brad Cowen, Superintendent, MCI Norfolk, Respondent, No. 19-1270, (1st Cir. July 7, 2021)

United States Court of Appeals
For the First Circuit

No. 19-1270

CÉSAR SANTANA,

Petitioner,

v.

BRAD COWEN, Superintendent, MCI Norfolk,

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Howard, Chief Judge,
Selya and Thompson, Circuit Judges.

Elizabeth Caddick on brief for petitioner.
Maura Healey, Attorney General of Massachusetts, and Susanne G. Reardon, Assistant Attorney General, on brief for respondent.

July 7, 2021

SELYA, Circuit Judge. This case, which pits a state prisoner seeking federal habeas relief against the superintendent of the state correctional institution in which he is confined, turns on the narrow contours of federal habeas review and the deference due to the state court's findings of fact. Staying within those guardrails and reviewing the district court's denial of the habeas petition de novo, we affirm.

The essential facts may be succinctly summarized. The reader who thirsts for a more detailed description of the facts should consult the opinion of the court below, see Santana v. Cowen (Santana II), 361 F. Supp. 3d 115, 119-23 (D. Mass. 2019), and the opinion of the Massachusetts Supreme Judicial Court (SJC) rejecting Santana's direct appeal, see Commonwealth v. Santana (Santana I), 82 N.E.3d 986, 990-91 (Mass. 2017).

On August 25, 2004, Rafael Castro (Castro) and his stepdaughter, Norma Cedeno, were attacked by four men upon their return to Castro's apartment in Lawrence, Massachusetts. Castro was killed by a gunshot wound to his head. During the following week, petitioner-appellant César Santana (Santana), who was on probation in connection with an unrelated offense, contacted his probation officer and said that he was willing to disclose information about a shooting in Lawrence in exchange for money. The probation officer reported this contact to the Boston police.

The record sheds no light on what response (if any) the call elicited.

Seven months later, Santana — then incarcerated on unrelated charges — again contacted his probation officer about the shooting in Lawrence. Nothing happened. Eventually, however, the authorities decided to question Santana about the shooting.

On March 4, 2005, a Massachusetts state trooper, Robert LaBarge (LaBarge), interviewed Santana. LaBarge was accompanied by a bilingual member of the Lawrence police force, Detective Carlos Cueva (Cueva). Although Santana stated that he spoke and understood English, Detective Cueva was meant to serve as a translator, if needed, because Santana's primary language was Spanish. Santana consented to the recording of the interview "as long as it is not used in court."

Following a brief discussion of Santana's educational level, English and Spanish language proficiency, and the like, Trooper LaBarge, with Detective Cueva's assistance, gave Santana Miranda warnings. See Miranda v. Arizona, 384 U.S. 436, 444 (1966). At Trooper LaBarge's request, Santana read each warning out loud in Spanish and confirmed that he understood it. He then signed a copy of the written warnings.

When Trooper LaBarge began questioning Santana about the Lawrence shooting, Santana stated, early on, that he was "willing to help" but "want[ed] to talk with [Trooper LaBarge] without the

pressure of the tape recorder." Santana agreed to continue the interview with the officers taking notes. When the session concluded, though, Santana refused to sign the notes.

On December 12, 2008, an Essex County grand jury returned an indictment charging Santana with first-degree murder, home invasion, two counts of armed assault during a burglary, and two counts of kidnapping while armed with a firearm. Santana thrice moved to suppress the statements that he had made to Trooper LaBarge, but all three motions were denied. Following an eight-day trial, a jury found Santana guilty on all six counts, and the presiding judge sentenced him to life imprisonment. On August 17, 2017, the SJC affirmed the denial of Santana's third motion to suppress and affirmed his convictions and sentence. See Santana I, 82 N.E.3d at 992-95, 1002.

Santana repaired to the federal district court, seeking habeas relief. See 28 U.S.C. § 2254. He argued — as relevant here — that the SJC not only unreasonably determined that he had voluntarily made incriminating statements to Trooper LaBarge but also unreasonably applied clearly established federal law in finding those statements voluntary. He stressed his initial insistence that his statements "not [be] used in court."

In a thoughtful rescript, the district court denied Santana's habeas petition. See Santana II, 361 F. Supp. 3d at 131. It concluded that the SJC had not misapplied clearly

established federal law and that the SJC's determination that any promise of confidentiality had been wiped away by Santana's consent to the Miranda protocol withstood review under the deferential habeas standard. See id. This timely appeal followed.

We need not linger. We often have said that when a district court has "supportably found the facts, applied the appropriate legal standards, articulated [its] reasoning clearly, and reached a correct result, a reviewing court ought not to write at length merely to hear its own words resonate." deBenedictis v. Brady-Zell (In re Brady-Zell), 756 F.3d 69, 71 (1st Cir. 2014); accord De La Cruz-Candela v. JetBlue Airways Corp., 829 F. App'x 531, 532 (1st Cir. 2020); United States v. Wetmore, 812 F.3d 245, 248 (1st Cir. 2016); Moses v. Mele, 711 F.3d 213, 215-16 (1st Cir. 2013); Eaton v. Penn-Am. Ins. Co., 626 F.3d 113, 114 (1st Cir. 2010); Vargas-Ruiz v. Golden Arch Dev., Inc., 368 F.3d 1, 2 (1st Cir. 2004); Seaco Ins. Co. v. Davis-Irish, 300 F.3d 84, 86 (1st Cir. 2002); Ayala v. Union de Tronquistas de P.R., Local 901, 74 F.3d 344, 345 (1st Cir. 1996); Holders Cap. Corp. v. Cal. Union Ins. Co. (In re San Juan Dupont Plaza Hotel Fire Litig.), 989 F.2d 36, 38 (1st Cir. 1993). So it is here. We add only three sets of comments.

1. To begin, it is important to recognize that the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), see Pub. L. No. 104-132, 110 Stat. 1214, provides the beacon by which

we must steer, see Cronin v. Comm'r of Prob., 783 F.3d 47, 50 (1st Cir. 2015). AEDPA only "permits federal courts to grant habeas relief after a final state-court adjudication of a federal constitutional claim if that adjudication can be shown to be 'contrary to,' or to have involved, 'an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States' or in the alternative, to have been 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.'" Foxworth v. St. Amand, 570 F.3d 414, 424 (1st Cir. 2009) (quoting 28 U.S.C. § 2254(d)). A state-court "decision is contrary to clearly established federal law either if it announces a rule of law that directly contradicts existing Supreme Court precedent or if the state court has reached a different result than the Supreme Court on materially indistinguishable facts." Cronin, 783 F.3d at 50. In conducting this tamisage, "the state court's factual findings are presumed to be correct, and they can be overcome only by clear and convincing evidence." Foxworth, 570 F.3d at 424 (citing 28 U.S.C. § 2254(e)(1)). Here, the district court faithfully applied these standards to conclude that Santana was not entitled to habeas relief.

2. In this court — as in the court below — Santana proffers a trio of factual determinations that he asserts were unreasonably made by the SJC. We review the district court's

evaluation of those proffers de novo, see id. at 425, and like that court, we conclude that each determination is amply supported by the record.

a. Santana asserts that the SJC unreasonably determined that he could "speak and understand a fair amount of English" and that he "fully understood what was going on" in the interview with Trooper LaBarge. Santana I, 82 N.E.3d at 992-93. But the recorded portion of the interview clearly demonstrated that Santana did understand some English, and the SJC's determination that Santana "understood what was going on" was supported by facts such as his seeking out of the police, his receipt of Miranda warnings in his native language, his avowed understanding of those warnings, and his knowledge that Trooper LaBarge planned to report the information Santana provided to the prosecutor.[1] See id. at 994-95.

[1] Santana makes much of his claim that "[t]he SJC ignored the expert evidence that [Santana] spoke at a beginner's level of English and was only capable of conversing in English on a superficial level, such as a standard greeting." But even though the SJC did not specifically mention this expert testimony, we cannot conclude that the SJC — which took pains to note that it had "conducted a complete review of the record," Santana I, 82 N.E.3d at 1002 — did not consider it. After all, the SJC, relying heavily on the motion judge's decision (issued three days after presiding over a suppression hearing at which Santana's expert testified), drew the conclusion that Santana could speak and understand a "fair amount of English." On this record, it seems quite likely that the SJC simply found the evidence unpersuasive.

b. Santana asserts that the SJC unreasonably determined that he understood that his statements to Trooper LaBarge could be used against him because he asked the police to stop the recording. See id. at 995. The SJC, however, put the shoe on the other foot: it reasonably concluded that Santana's request was an additional circumstance supporting its determination that Santana knew that his statements could be used against him. See id. Where, as here, the record permits two plausible but competing interpretations of the significance of a fact, the state court's choice between those competing interpretations cannot be set aside on habeas review. See Torres v. Dennehy, 615 F.3d 1, 5 (1st Cir. 2010); Desrosier v. Bissonnette, 502 F.3d 38, 43 (1st Cir. 2007).

c. Santana asserts that the SJC unreasonably determined that he spoke with the officers based upon self-interest and fear of another. See Santana I, 82 N.E.3d at 995. The SJC's determination, though, was solidly supported by the transcript of the interview, in which Santana stated, "I'm not worried for telling [Trooper LaBarge] and the police what I got to say, understand?, the thing is . . . that young nineteen-year-old guy, that little guy has about four deaths under his belt. That young guy has me . . . under a lot of pressure and terrified." Santana II, 361 F. Supp. 3d at 123.

3. Santana also claims that "the SJC's decision was contrary to and involved an unreasonable application of clearly

established federal law." That claim lacks force. As the district court correctly concluded, the SJC's determination was in conformity with clearly established federal law pertaining to voluntariness. See id. at 131. "In Miranda, the Supreme Court determined that the Fifth Amendment privilege against self-incrimination requires law enforcement personnel to warn a person subjected to custodial interrogation of certain constitutional rights." Id. at 129 (citing Miranda, 384 U.S. at 444). "The individual undergoing interrogation may elect to waive his rights, but such waiver must be 'made voluntarily, knowingly, and intelligently.'" Id. at 129-30 (quoting Miranda, 384 U.S. at 444). The district court recognized that the waiver "must be 'the product of free and deliberate choice'" to be "voluntary." Id. at 130 (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). It similarly recognized that to assess voluntariness, "courts may consider factors such as the defendant's age, education level, intelligence, whether they were informed of their constitutional rights, detention duration, whether questioning was lengthy and repetitious, and any use of corporal punishment." Id. (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)). The district court then supportably concluded that the SJC appreciated this clearly established federal law and applied it in a reasonable way. No more was exigible.

We need go no further. Santana has failed to carry his burden of showing, by clear and convincing evidence, that the SJC's factfinding was unreasonable. Similarly, he has failed to carry his burden of showing that the SJC either misapplied or failed to follow clearly established federal law. Hence, we summarily affirm the district court's denial of habeas relief for substantially the reasons elucidated in the district court's thoughtful rescript.

Affirmed. See 1st Cir. R. 27.0(c).

APPENDIX B

César Santana, Petitioner, v. Brad Cowen, Superintendent, MCI Norfolk, Respondent, 361 F. Supp. 3d 115 (2019)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CÉSAR SANTANA, Petitioner, v. BRAD COWEN, Superintendent, MCI Norfolk, Respondent.	)	CIVIL ACTION NO. 18-11761-WGY

YOUNG, D.J. February 14, 2019

MEMORANDUM AND ORDER

I. INTRODUCTION

César Santana ("Santana") petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pet. Writ Habeas Corpus ("Pet."), ECF No. 1. Brad Cowen ("Cowen"), Superintendent of Massachusetts Correctional Institution ("MCI") Norfolk, opposes Santana's petition for habeas relief. Resp't's Mem. Law Opp'n Pet. Writ Habeas Corpus ("Opp'n Mem."), ECF No. 18.

In his petition, Santana insists that the Massachusetts Supreme Judicial Court, based upon the evidence before it, unreasonably determined that he voluntarily made incriminating statements to police officers. Pet. 6; Mem. Points & Authorities Supp. Pet. Writ Habeas Corpus ("Pet. Mem.") 8-13,

ECF No. 2. Santana further asserts that the Supreme Judicial Court unreasonably applied clearly established federal law in ruling that he voluntarily gave incriminating statements to the police. Pet. 6; Pet. Mem. 13-18 (citing U.S. Const. amends. V, XIV). Santana argues that the Supreme Judicial Court erred when it determined that because the police provided him with Miranda warnings, after assuring him that his incriminating statements would be confidential, his statements were voluntary. Pet. Mem. 13-16. Santana also suggests that the Supreme Judicial Court failed to weigh the police officer's promise to put in a good word for him with state officials. Id. at 16-18. Santana thus maintains that the Massachusetts Superior Court erred when it refused to suppress his incriminating statements and that the Supreme Judicial Court erred when it did not overturn the Superior Court's decision. Id. at 8-18. Therefore, Santana asks this Court to grant his petition for habeas corpus and order his release or a new trial. Id. at 20.

Cowen, in response, counters that the Supreme Judicial Court rightfully, from both a factual and legal standpoint, refused to overturn the trial court's denial of Santana's motion to suppress. Opp'n Mem. 9-17. Thus, Cowen asks this Court to deny Santana's request for relief. Id. at 17.

After hearing argument from both parties, and careful consideration, this Court DENIES Santana's petition for habeas relief.

A. Factual Background

On August 25, 2004, Rafael Castro ("Castro"), the victim, and his stepdaughter, Norma Cedeno ("Cedeno"), were entering Castro's apartment in Lawrence when four men attacked them. Commonwealth v. Santana, 477 Mass. 610, 611-12 (2017). While Castro attempted to help Cedeno, one of the home invaders shot Castro. Id. at 612. The men moved Cedeno into a bedroom and placed a pillowcase over her head. Id. From there, Cedeno heard the men yelling and striking Castro, insisting that he place a phone call. Id. The men further threatened to burn Cedeno if Castro did not comply. Id. Subsequently, the men left the apartment, promising to return if Cedeno attempted to call the police. Id. After the men had left, Cedeno discovered Castro bound, unresponsive, and bleeding from a gunshot head wound. Id. Cedeno removed the duct tape restraining Castro and dialed 911. Id. When paramedics arrived, they determined that Castro had died. Id.

During the criminal investigation, police recovered DNA that matched Santana's from the duct tape used during the home invasion. Id. at 612-13. Before the end of August 2004, Santana contacted his probation officer, who was monitoring

Santana due to another matter, and informed him that he was willing to disclose information about a Lawrence shooting for a fee. Id. at 613 & n.2. He told the probation officer that he knew that Joonel (Joonie) Garcia had shot an individual in the head and where the gun used in the murder was located. Id. at 612-13. The probation officer relayed the tip to the Boston Police Department. Id. at 613. Santana contacted his probation officer again in March 2005. Id. Santana, who was incarcerated at the time, told the probation officer that he had "significant legal concerns" and that the murder to which he had previously referred was "drug-related." Id.

State Police Trooper Robert LaBarge ("LaBarge") and Lawrence Police Detective Carlos Cueva ("Cueva") then interviewed Santana about Castro's murder. Id. Cueva, who grew up speaking both Spanish and English, but lacked formal Spanish translation training, acted as a translator during the interview. Id. at 613 & n.4. The portions of the interview at issue in this action are as follows:[1]

[1] Communications translated from Spanish are noted by asterisk. Words spoken in English, within an asterisked passage, are underlined. Spelling and grammatical errors, present in the original transcript, have been retained. See generally Pet. Mem., Ex. 2, Translated Tr. Police Question ("Police Tr."), ECF No. 4-2. Some non-substantive transcript notations have been omitted for the purposes of readability. See generally id.

LaBarge: [Santana] has said that he has consented to us audio taping our talk with him. [Santana], do you have any problems with us talking on the tape recorder?

Santana: [N]o, no problem, no

LaBarge: [O]kay, can you just, can you just translate that? Ask him, ask him --

*Cueva: (garbled) machine to record the –- what we're doing now. You don't have a problem with that?

*Santana: Okay, no problem . . .

LaBarge: Okay

*Santana: [A]s long as it is not used in court, better if not used in court

*Cueva: No, do not worry

*Santana: [T]hat whatever I say to you be confidential

LaBarge: [A]nd as I told you, you said your English is okay but somewhat –-

Santana: Sometimes . . . I don't understand

LaBarge: [S]ometimes not so good, but how long have you've [sic] been in the United States?

Santana: [E]le . . . ten years.

LaBarge: [T]en years.

Santana: [Y]eah, . . . almo eleven

LaBarge: [Y]ou can understand me pretty much, but we've got [Cueva] here in case you run into any problems, right?

Santana: [A]hum.

. . .

LaBarge: [H]ow far did you get in school?

Santana: Eight grade

LaBarge: Eight grade where?

Santana: Puerto Rico

. . .

LaBarge: And can you read and write?

Santana: Spanish?

LaBarge: Spanish.

Santana: Yeah, perfect.

. . .

LaBarge: Uh, I'm going to have you read this form out loud, and just say number one, read it, and then tell me if you understand it or not. Okay?

*Santana: [D]o I have to read it like that . . .

*Cueva: [Y]es

*Santana: [F]or me or . . . ?

*Cueva: [N]o, for everyone

*Santana: [B]efore any question is asked, it is necessary that you understand your rights

*Cueva: Do you understand? After each line, he wants you to yes or no you understand that line, do you understand me? [sic]

*Santana: What?

*Cueva: [A]fter, re, to read, reading the first line he wants you that you say that yes or no, that you understand what [missing/wrong particle] say [sic].

*Santana: Okay. You have the right to remain silent

*Cueva: Do you understand that?

*Santana: [Y]es

LaBarge: Do you understand number one?

*Santana: [Y]es, anything you say can be employed against you

LaBarge: Do you understand number two?

Santana: Yes. That's, that's number three.

LaBarge: What's number two? Did you understand two, number two?

*Santana: Yeah, -- number four is that you have the right to speak with an attorney so that he can advise you before we ask you some question and to have with you during the interrogation. Number five --

LaBarge: Where is . . . number four, did you understand it?

*Santana: Yes. If you, if you don't have anything with what [sic] to pay an attorney, one will be assigned to you before the interrogation, if you want.

*Cueva: [D]o you understand that?

*Santana: Yes. If you decide to answer some questions -- now, with no attorney –- present –- however you'll have the right to, to, cease the interrogation at any moment until you can call an attorney.

LaBarge: What was that one?

Cueva: He said number five

Santana: Number six

LaBarge: Okay.

Santana: Yes.

LaBarge: Number seven.

*Santana: [D]o you understand what I have read to you? Knowing all of these rights, do you want to speak with me now? Yes

LaBarge: So what's number eight say in English? [C]an you translate that for me? What's that mean?

Santana: I-c c-c-an't, I can't --

LaBarge: What's that mean? What's that mean?

Santana: That If –- I – if I want to talk to you

LaBarge: Okay –-

Santana: And I say yes

LaBarge: And you, yes, you will talk to . . .?

Santana: Yes.

LaBarge: Okay, I need you –- to sign the form, and do you have any questions about that form?

Santana: No.

LaBarge: No questions?

Santana: No.

LaBarge: You've been read this form before, right? you know what all this stuff mean [sic] and . . . I need you to put your signature there. Sign there, and the time now is uh . . . sixteen thirty one, or four thirty one, and the date is four, or excuse me, March fourth two thousand five. So, put, on the 'X', sign and then print your name. Do you know what means 'print'?

*Cueva: [N]o, do not sign your name, write your name

*Santana: I put the name that I have here in the jail

LaBarge: [P]robably looks the same, right?

Santana: I put the nickname.

Cueva: He put the name that he was locked up with.

Santana: I'm sorry.

LaBarge: What's your real name?

Santana: Santiel Concepción Malpica

LaBarge: [W]ell sign it there.

Santana: [B]ut this, this is a . . .

LaBarge: [J]ust sign your real name. If that's, that's fine –- What is it? What's your real name?

Santana: Santiel Concepción Malpica

LaBarge: Ok, I'm witnessing it. [Cueva] will witness it, aaand –- Tommy will witness. Alright.

. . .

LaBarge: [A]nd I'm not going to make you any promises or any threats but what I will tell you is, is I will report to the District Attorney . . . Do you know what the District Attorney is?

*Cueva: [D]o you know who that [sic] is?

*Santana: [W]ho?

*Cueva: [T]he court attorney of [sic] for us

Santana: [N]o

LaBarge: [T]he prosecutor, the lawyer.

*Cueva: [T]he attorney that is going to be against you when you go to court

*Santana: [T]he one who's going to be with me or against me?

*Cueva: [A]gainst you, [wrong Spanish word], us, he's going to go with the information you tell me, if you help us --

*Santana: [C]an I ask him a question [on a different topic]?

. . .

LaBarge: [I]f, if you, if you help us out in this case I'm going to, I –- can't make any promises but I'll report to the District Attorney and tell him that you were cooperative and you helped us figure out what happened inside that apartment, and how it went down, and how, we're missing a few pieces to put it together, totally. It's like putting a puzzle together and we're missing some pieces, and I think you can help us put the puzzle together, and we're giving you a, we're, we're giving you an opportunity now to help us out, and uh, see how it goes, do you understand that?

*Cueva: Do you understand what he's saying?

LaBarge: Cuz you are the; you are the key. You are one of the keys.

*Santana: I understand that, but the problem is that I've been used, I've been used

. . .

LaBarge: I have to be, I have to be honest. We are going to use the information. We, that is our goal . . . and our goal, my goal, I have to be honest, my goal is not to, to save, to save you and to help you out. My goal is to find the truth. That's my goal, to find the truth, but at the same time I don't want to burn you. Do you understand what I'm saying? I don't want to burn you from the information you gave me but my goal, my goal isn't, isn't to help [Santana] out. My goal is to solve this out, solve this crime, and figure out what happened, but at the same time I can, I can bring up the fact that you were very cooperative and you were a, you played a big part in helping us figure out the little pieces that need to put together [sic]. . . . You understand what I'm saying?

*Santana: What is he saying?

*Cueva: [H]e's saying that he's not here to promise you that if you tell me that I want to go I want to go

that we are doing to let you go, [sic] understand, that your case is going to come out well without problems, do you understand me? [sic] Any information that you give us now, he'd go to the court and they'd talk with the judge and the lawyer and to say that "look, [Santana] came, talked to me, gave me that and, we're going to try to help you, but he wouldn't give you er . . . er, you know –- [sic]

*Santana: Can I ask him a question? Then I'm going to, tell him that I'm going to cooperate with him one hundred percent on everything he wants. I have all the information that you need, all the pieces that you need for your puzzle I have it in my hands

LaBarge: What's he saying?

Cueva: He's saying that he's willing to help you out a hundred percent, all the pieces you're looking for in your puzzle, he, he's willing to give you those pieces.

LaBarge: Okay, and also I just got to, I just, I've got to let you know. You are the one who has to decide whether you, you, you think it's best for you, your, your goal is to take care of [Santana]. [Santana] is number one for you right?

*Santana: What?

*Cueva: [T]hat he's telling you that you want that you care for yourself. [sic] That's your first thing. That y-y-y . . . er . . . er you want to come out well from all of what's happening [sic]

*Santana: [O]f course, the problem is, I'm not worried for, I'm not worried for telling him and the police what I got to say, understand?, the thing is . . .

LaBarge: If you were, if you were --

*Santana: [T]he one up there, understand? that young nineteen-year-old guy, that little guy has about four deaths under his belt. That young guy has me, he has me, you know, he has me under a lot of pressure and terrified

Pet. Mem., Ex. 2, Translated Tr. Police Question ("Police Tr.") 1-12, 15-22, ECF No. 4-2; see Pet. Mem. 4-5. Additionally, at Santana's insistence, the officers turned off the recorder, Police Tr. 23-28, and continued questioning Santana with LaBarge writing down Santana's responses as Cueva translated, Pet. Mem. 5. At the conclusion of the interview, however, Santana refused to sign the document because "[h]e did not know where he stood in the case" and "had concerns about Joonel Garcia, who had shot several people, including Rafael Castro." Pet. Mem. 5 (internal citations and quotations omitted).

A court interpreter, Dr. Michael O'Laughlin ("O'Laughlin"), evaluated Santana's proficiency in both English and Spanish. Id. at 5 & n.4. He found that Santana scored a two out of ten on a Basic English Skills Test and had a seventh-grade Spanish reading comprehension level. Id. at 5. O'Laughlin determined from the interview recording that Cueva failed to provide Santana with accurate translations of LaBarge's lengthier questions, did not translate several of Santana's responses, and asked side questions of Santana which LeBarge did not hear. Id. at 5-6.

B. Procedural History

On December 12, 2008, an Essex County grand jury indicted Santana on six counts: "first degree murder (count 1), home invasion (count 2), armed assault during a burglary (counts 3

and 4), and kidnapping while armed with a firearm (counts 5 and 6)." Pet. Mem. 1; see also Opp'n Mem. 3. On January 31, 2017, a jury found Santana guilty on all counts. Pet. Mem. 1-2. On February 12, 2014, Justice Lowy, then of the Massachusetts Superior Court, sentenced Santana to life in prison without parole.[2] Id.

During trial, Santana moved three times to have the statements he made in his police interview excluded or suppressed. Id. at 3. All of Santana's motions were denied. Id. The Supreme Judicial Court reviewed and affirmed the denial of his third motion to suppress, which raised the issue of whether his statements were made voluntarily. Santana, 477 Mass. at 614, 620. The Supreme Judicial Court's denial is the basis of his current petition. See Pet. Mem. 8.

The Supreme Judicial Court denied his appeal on August 17, 2017. Santana, 477 Mass. at 629. Santana is currently serving his sentence in state custody at MCI Norfolk. Pet. Mem. 2. He filed the present habeas petition with this Court on August 17,

[2] The sentences imposed on each count are as follows: "Count 1, life without parole; Counts 2 and 3, 35-60 years concurrent with Count 1; Count 4, 18-20 years concurrent with Count 3; Count 5, 9-10 years, concurrent with Count 1; Count 6, 9-10 years from and after Count 5. [Santana] was given 1889 days sentence credit." Pet. Mem. 2. When calculating this sentence, "[t]he felony convictions were not merged with the felony murder finding, because the court sentenced on the extreme atrocity and cruelty finding." Id. at 2 n.2.

2018. Id. at 20; Pet. 16. This Court heard argument on January 10, 2019 and took the matter under advisement. Electronic Clerk's Notes, ECF No. 20.

II. ANALYSIS

Santana argues that the police officers conducting his interview told him that his statements would not be used against him in court; and thus: 1) the Supreme Judicial Court's determination that his statements were voluntary resulted from its unreasonable determination of the facts, and 2) the Supreme Judicial Court unreasonably applied federal law (specifically, the Fifth and Fourteenth Amendments of the United States Constitution) when it determined that his statements were voluntary. Pet. Mem. 8. Santana further contends that these constitutional errors had a prejudicial impact on the jury's decision in his case. Id. at 18-20.

A. Standard of Review

Santana submitted his application for habeas corpus pursuant to section 2254 of chapter 28 of the United States Code. Id. at 2, 8, 13. Section 2254(e) provides the standard by which federal courts must evaluate a petitioner's challenge of a state court's factual determinations:

> **(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.

28 U.S.C. § 2254(e)(1) (emphasis added); see also Teti v. Bender, 507 F.3d 50, 57 (1st Cir. 2007); Stewart v. DiPaolo, 74 F. App'x 65, 65 (1st Cir. 2003). A "factual issue" may consist of "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." Coombs v. Maine, 202 F.3d 14, 18 (1st Cir. 2000) (internal citations and quotations omitted). The presumption of correctness applies to factual determinations reached by state trial and appellate courts alike. Gaskins v. Duval, 640 F.3d 443, 452 (1st Cir. 2011). To rebut this presumption, a petitioner must assert something more than a mere "contrary inference." See Desrosier v. Bissonnette, 502 F.3d 38, 43 (1st Cir. 2007).

In addition to establishing a presumption of correctness, section 2254 provides guidance as to how federal courts ought evaluate whether a state court's legal or factual determination was so unreasonable that habeas relief must be granted:

> **(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.

28 U.S.C. § 2254(d); see also Jordan v. Reilly, No. 06-1321, 2006 WL 3290953, at *3 (1st Cir. Nov. 14, 2006) (quoting 28 U.S.C. § 2254(d)(1)-(2)); Coombs, 202 F.3d at 18. Section 2254(d) applies both to "pure issues of law" as well as issues of law and fact where "legal principals are applied to historical facts." Coombs, 202 F.3d at 18. Federal courts must be "'highly deferential' to state court decisions." Correa v. Ryan, 216 F. Supp. 3d 193, 197 (D. Mass. 2016) (quoting Woodford v. Visciotti, 537 U.S. 19, 24 (2003)).

Under section 2254(d)(1), a decision is "contrary" where it conflicts with Supreme Court case law or diverges in holding from a factually similar Supreme Court decision. Gaskins, 640 F.3d at 451-52. A state court "unreasonably applies" federal law where it "applies Supreme Court precedent to the facts of [a] case in an objectively unreasonable manner such as reaching a result that is devoid of record support for its conclusion." Id. at 452 (internal citations and quotations omitted). For a decision to be "objectively unreasonable," a state court's mistake must "be more than incorrect or erroneous." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003). "Clearly established federal law" refers specifically to "holdings, as opposed to the

dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Yarborough v. Alvarado, 541 U.S. 652, 660-61 (2004) (quoting Williams v. Taylor, 529 U.S. 362, 412 (2000)).

A reviewing federal court must read section 2554(d)(2) in tandem with section 2254(e). Sanna v. DiPaolo, 265 F.3d 1, 7 (1st Cir. 2001). Specifically, this means that section 2254(e) should be used to evaluate "determinations of factual issues rather than decisions," and section 2254(d)(2) "'applies to the granting of habeas relief' itself." Teti, 507 F.3d at 57-58 (quoting Miller-El v. Cockrell, 537 U.S. 322, 341-42 (2003)) (noting that there is confusion amongst federal courts as to how sections 2254(d)(2) and 2254(e) interact, but ultimately electing to follow Supreme Court's direction in Miller-El); see also Fletcher v. O'Brien, Civ. No. 06-40280-FDS, 2011 WL 3295319, at *6-7 (D. Mass. July 29, 2011) (Saylor, J.). This means that:

> [U]nder this approach, section 2254(d)(2)'s reasonableness standard would apply to the final decision reached by the state court on a determinative factual question, while § 2254(e)(1)'s presumption of correctness would apply to the individual factfindings, which might underlie the state court's final decision or which might be determinative of new legal issues considered by the habeas court.

Teti, 507 F.3d at 58; Fletcher, 2011 WL 3295319, at *7.

Further, a determination is not "unreasonable" under this section merely because "'reasonable minds reviewing the record might disagree' about the finding in question." Brumfield v. Cain, 135 S. Ct. 2269, 2277 (2015) (quoting Wood v. Allen, 558 U.S. 290, 301 (2010)); see also Akara v. Ryan, 270 F. Supp. 3d 423, 431 (D. Mass. 2017) (Hillman, J.); certificate of appealability denied, No. 17-1992 (1st Cir. Nov. 8, 2018). There instead must be clear and convincing evidence that the state court's decision is factually incorrect. Akara, 270 F. Supp. 3d at 431 (citing Miller-El, 537 U.S. at 340). Additionally, "facts" in this subsection are defined in the same manner as section 2254(e). Compare Sanna, 265 F.3d at 7 with Coombs, 202 F.3d at 18.

Finally, for a federal court to grant a petitioner's application for habeas corpus under section 2254, a federal court not only must hold that the state court committed constitutional error, but also find that the petitioner experienced "actual prejudice" as a result of the error. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Faulk v. Medeiros, 321 F. Supp. 3d 189, 195-97 (D. Mass. 2018). To determine whether actual prejudice exists, a court must decide "whether the error 'had substantial and injurious effect or influence in determining the jury verdict.'" Brecht, 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946));

see also Cronin v. Commissioner of Probation, 783 F.3d 47, 51 (1st Cir. 2015); Dominguez v. Duval, 851 F. Supp. 2d 261, 269 (D. Mass. 2012).

A. The Supreme Judicial Court's Decision Did Not Result from an Unreasonable Determination of the Facts in Light of the Evidence

Santana alleges that, based on the evidence in the record, the Supreme Judicial Court made three unreasonable determinations of fact. Pet. Mem. 9-13. The first error, Santana argues, is the court's determination that Santana could "speak and understand a fair amount of English" and "fully understood what was going on" in the interview. Id. at 9 (internal citations and quotations omitted). There was no evidence in the record to support this determination, Santana insists. Id. Santana asserts that the Supreme Judicial Court did not take into account expert testimony that he "spoke at a beginner's level of English and was only capable of conversing in English on a superficial level, such as a standard greeting, and spoke the beginner's level of English." Id. at 10. Based on Santana's inability fully to translate his Miranda rights into English when asked and his seeming confusion over the functions of the District Attorney, which LaBarge referenced during questioning, Santana argues that "[t]here can be no reasonable finding that [he] could 'obviously' understand what LaBarge was saying in English or 'fully understood what was

going on,'" despite the Supreme Judicial Court's contrary determination. Id. at 9-10.

The Supreme Judicial Court's second error, Santana argues, was concluding that he understood that his statements could be used by law enforcement against him based on the fact that he subsequently requested to speak to the officers without being recorded and declined to provide his signature for the officer's interview notes. Id. at 11 (citing Santana, 477 Mass. at 619). Such a conclusion, Santana insists, was "unreasonable" when taking into account the evidence in the record. Id. Santana asserts that the real reason he asked the officers to turn off the recording and did not provide his signature on their interview notes was that he feared retaliation by Garcia, not because he feared use of the information he provided in court. Id. Santana argues that his requests for confidentiality mirrored the protocol he had as a confidential informant. Id.

The Supreme Judicial Court's third error, Santana proffers, was its determination that Santana spoke with law enforcement based upon "self-interest" and fear of Garcia and that he was not worried about talking to law enforcement. Id. at 12. Santana insists that just because a statement is made in self-interest does not mean that it cannot also be involuntary. Id. Further, Santana argues that an interviewee can simultaneously fear retaliation and the use of his statements in court. Id.

The record, Santana claims, evidences that "he did not want his words to be used in court [and] specifically asked for (and received) assurances that they would not be so used." Id. Therefore, Santana contends that the Supreme Judicial Court violated his Fifth and Fourteenth Amendment rights when it included these factual determinations in its totality-of-the-circumstances analysis of whether his statement was voluntary. Id.

The Supreme Judicial Court's decision here did not result from an "unreasonable determination of the facts in light of the evidence presented." See 28 U.S.C. §§ 2254(d)(2)-(e). While Santana's argument regarding the "individual factfinding" of the second alleged error does give the Court pause, the Court's ultimate determination that his statement was voluntary was not "unreasonable." See 28 U.S.C. § 2254(d)(2); Teti, 507 F.3d at 58.

First, Santana did not rebut the factual determination that he understood "a fair amount of English" and "fully understood what was going on" in the interview with clear and convincing evidence. See Pet. Mem. 9. It is prudent here to first place these statements in their full context as they appear in the Supreme Judicial Court's opinion:

> Relying on the transcript of the recorded portion of the interview, the motion judge also found that the tone of the interview was "conversational," [Santana]

> was "relaxed throughout," and "appeared to be chuckling or laughing" on occasion. Regarding [Santana's] language skills, the [motion] judge found that [Santana] "plainly can speak and understand a fair amount of English," although Spanish is "obviously" his "primary language." The judge further found that "[Santana] plainly understood each [Miranda] right," provided to him in Spanish, and "at times [he] corrected LaBarge as to the numbering of these rights." Last, the judge determined that although "Cueva's translation, obviously, could have been much better," [Santana] nevertheless "fully understood what was going on."

Santana, 477 Mass. at 615-16 (emphasis added). To say that the Supreme Judicial Court "cited approvingly" these statements, is taking them somewhat out of context. Compare id. with Pet. Mem. 9.

Even assuming that the court did cite these determinations approvingly, however, Santana has not rebutted the presumption of their correctness. On the issue of whether Santana can speak a "fair amount of English," despite Santana's assertion to the contrary, the police transcript indicates that he could. Police Tr. 3:2-3, 3:13-4:14, 5:27-6:48, 11:94-102, 17:139-40, 18:146-47. The Supreme Judicial Court did not determine in its opinion that Santana spoke English fluently, but rather concurred with the motion judge's determination that he could speak "some English." Santana, 477 Mass. at 616. Santana has not substantiated his argument that the Supreme Judicial Court erred by not discussing the testimony of the expert witness that found

Santana spoke a "beginner's level of English." See Pet. Mem. 10.

Further, the court's citation to the fact that LaBarge and Cueva provided Santana with Miranda warnings, both verbally and in writing in Spanish, "communicat[ing] in unambiguous terms that [his] statement[s] would not be confidential," supports the determination that Santana "fully understood what was going on" despite an earlier assurance of confidentiality. Santana, 477 Mass. at 616, 618. Santana confirmed that he understood each warning, and the Supreme Judicial Court found "no suggestion in this record that [Santana] did not understand the warnings, which plainly informed the defendant that his statements could not be held confidential." Id. at 617-18. Additionally, the court cited to LaBarge's post-Miranda warnings to Santana, which Cueva translated, that the police "would report the information to 'the [prosecuting] attorney that is going to be against [him] when [he] goes to court.'" Id. at 618 (alterations in original). Based on this information, Santana has not demonstrated by clear and convincing evidence that the Supreme Judicial Court erred in its determinations regarding his comprehension that his statements could be used in court.

The second alleged error, the determination that Santana's request for the police to stop recording his interview demonstrated that he understood his Miranda warnings, Pet. Mem.

11, was also ultimately not unreasonable. Of this determination, the Supreme Judicial Court briefly states in its opinion:

> Moreover, as the Commonwealth points out, [Santana's] request to cease audio recording shortly after being provided his Miranda rights and his refusal to sign Trooper LaBarge's contemporaneous transcription at the conclusion of the interview because he "didn't know where he stood in the case," suggest that [Santana] understood the statement could be used against him.

Santana, 477 Mass. at 619; see also Suppl. Answer 252-53.[3] In its brief to the Supreme Judicial Court, the Commonwealth argued Santana recognized that talking to the police could have criminal consequences for him, but that he was concerned only about creating a record that Garcia might discover because he said that he was "not worried" about giving the police those statements. See Suppl. Answer 252-53. The court thus followed the Commonwealth's reasoning that Santana's statement that he "didn't know where he stood in the case" related to Santana's primary fear that his statement might be used as evidence against Garcia. Santana, 477 Mass. at 619; Suppl. Answer 252-53.

[3] As contemplated by Local Rule 5.4(g)(1)(E), Cowen filed a Supplemental Answer containing the Massachusetts court records in hard copy only with the Court. Per that same rule, the Supplemental Record has not been scanned into the Electronic Case Files system.

Although the transcript reveals that Santana's main concern was his safety from Garcia if Garcia were to discover that Santana spoke to law enforcement, see Police Tr. 22-28, the Supreme Judicial Court did not unreasonably infer that Santana also knew that his statements might be relayed to a court for use against him. See Santana, 477 Mass. at 619. While this is a somewhat strained inference, a federal court must be "'highly deferential' to state court decisions" when conducting a section 2254(d) analysis. Correa, 216 F. Supp. 3d at 197 (citing Woodford, 537 U.S. at 24). Santana has not shown with clear and convincing evidence that he was not in fact concerned with issues of confidentiality when he requested that the police terminate the recording and refused to sign the officers' report. For this reason, Santana has not sufficiently demonstrated this second alleged factual error.

Finally, Santana's third alleged error, that the Supreme Judicial Court wrongly determined that Santana spoke with the police "out of self-interest and the fear of retaliation from Garcia, but was not concerned with talking to the police," is also unpersuasive. Pet. Mem. 12. Here, as with Santana's first contention of error, it is helpful to examine the Supreme Judicial Court's statement in the full context of the opinion:

> Last, [Santana] was motivated by self-interest and the fear of repercussions from Garcia when he approached his probation officer offering to provide information

> about the murder. As the judge found, [Santana] was not concerned about providing information to the police, he was particularly concerned with retaliation from "that young [nineteen year old] guy, that little guy has about [four] deaths under his belt." [Santana] added, "that young guy has me, he has me, you know, he has me under a lot of pressure and terrified.

Santana, 477 Mass. at 619 (emphasis added). Placing the statement in context, the court determined here that Santana's fear of Garcia harming him was the only reason he sought to speak with law enforcement. See id. This conclusion is supported by the interview transcript. Police Tr. 22:166, 168, 26:197 (recording Santana stating: "I'm not worried for telling him and the police what I got to say, understand?[] [T]he thing is . . . the one up there, understand? [T]hat young nineteen-year-old guy . . . he has me under a lot of pressure and terrified" and "[t]ell [LaBarge] that it was me who had him come over, it wasn't him who looked for me –- it was me who asked for him to come over"). The court's conclusion that Santana was not concerned about providing information to police thus appears factually sound, and Santana has not provided clear and convincing evidence to the contrary.

Therefore, Santana failed to carry his burden of showing that the Supreme Judicial Court unreasonably determined the facts when it deemed his statements to law enforcement voluntary. See 28 U.S.C. § 2254(d)(2).

B. The Supreme Judicial Court's Decision Does Not Run Contrary to Federal Law and Does Not Constitute an Unreasonable Application of Federal Law

Santana argues that the Supreme Judicial Court made two errors in its application of federal law. Pet. Mem. 15-18. First, Santana insists that both the Essex Superior Court and the Supreme Judicial Court erred when they gave significant weight to the fact that the interviewing officers provided Miranda warnings after they assured Santana that his statements would not be used against him. Id. at 15-16 (citing Santana, 477 Mass. at 617). Santana maintains that because the officers so assured him directly before administering the Miranda warnings, and because they did nothing beyond giving the Miranda warnings to indicate to Santana that this assurance was not valid, the Miranda warnings ought lack substantial weight in the voluntariness analysis. Id.

Second, Santana argues that the Supreme Judicial Court failed to consider Cueva's assurances that he would tell the court of Santana's cooperation as part of the totality-of-the-circumstances analysis. Id. at 16-17 (citing United States v. Rogers, 906 F.2d 189, 190-91 (5th Cir. 1990)). While the Supreme Judicial Court emphasized that "an officer is not prohibited from suggesting broadly that it would be better for a suspect to tell the truth," Santana, 477 Mass. at 619 (internal citations and quotations omitted), Santana argues this analysis

considers the assurances "in a vacuum." Pet. Mem. 17. He insists that the Supreme Judicial Court unreasonably applied federal law by acknowledging that the totality-of-the-circumstances analysis applied in this case, but then determining voluntariness based substantially on the fact that the officer administered Miranda warnings. Id.

Santana suggests that the circumstances either render his waiver of his Miranda rights invalid or his entire statement involuntary under the Due Process Clause. Id. at 13 (citing Miranda v. Arizona, 384 U.S. 436, 444 (1966); Jackson v. Denno, 378 U.S. 368, 376 (1964)). In Miranda, the Supreme Court determined that the Fifth Amendment privilege against self-incrimination requires law enforcement personnel to warn a person subjected to custodial interrogation of certain constitutional rights. 384 U.S. at 444. Specifically, before law enforcement questions a person, "the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Id. The individual undergoing interrogation may elect to waive his rights, but such waiver must be "made voluntarily, knowingly, and intelligently." Id.; United States v. Guzman, 603 F.3d 99, 106 (1st Cir. 2010). The individual

may, at any point, refuse to answer further questions and assert the rights he formerly waived. Miranda, 436 U.S. at 444-45.

For a Miranda waiver to be "voluntary," it must be "the product of free and deliberate choice," not "intimidation, coercion, or deception." United States v. Bezanson-Perkins, 390 F.3d 34, 39 (1st Cir. 2004) (quoting Moran v. Burbine, 475 U.S. 412, 421 (1986)). For an individual to waive in a "knowing and intelligent" manner, his waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Id. (quoting Moran, 475 U.S. at 421). Waiver, however, need not be express. Guzman, 603 F.3d at 106 (citing North Carolina v. Butler, 441 U.S. 369, 373 (1979)).

Similar legal principles govern the Court's analysis of whether Santana voluntarily waived his Miranda rights and whether his statement itself was voluntary. See Bezanson-Perkins, 390 F.3d at 39-40 (discussing Miranda waiver); United States v. Hughes, 640 F.3d 428, 438 (1st Cir. 2011) (examining voluntary statements). Specifically, courts may consider factors such as the defendant's age, education level, intelligence, whether they were informed of their constitutional rights, detention duration, whether questioning was lengthy and repetitious, and any use of corporal punishment, but there is "no talismanic definition of 'voluntariness' mechanically

applicable to the host of situations where the question has arisen." Schneckloth v. Bustamonte, 412 U.S. 218, 224, 226 (1973).

Here, Santana's argument that the Supreme Judicial Court committed legal error when it determined his waiver was voluntary by apportioning excessive weight to the fact that police administered his Miranda rights after he was told the interview was confidential is ultimately unpersuasive. Pet. Mem. 15-16. His second argument that the court considered this statement "in [a] vacuum" rather than "as just part of the totality of circumstances analysis," see id. at 16-17, is also unpersuasive.[4]

Santana did not provide any controlling case law to support his assertion that the court placed too much weight on the Miranda warning.[5] Pet. Mem. 15-16. In fact, Santana cited to

[4] Santana appears to have admitted in his briefing that the officers informed him, after issuing the Miranda warning, that they might go to "the judge" with any information that he provided them during the interview. See Pet. Mem. 15-16; Police Tr. 21:159 (translating Cueva's Spanish-language statement that "[a]ny information that you give us now, [LaBarge would] go to the court and they'd talk with the judge and the lawyer and to say that 'look, [Santana] came, talked to me, gave me that and, we're going to try to help you, but he wouldn't give you er . . . er, you know –- [sic]"). This fact further indicates that Santana was aware that the interview was not confidential.

[5] Santana cites a Supreme Court footnote to suggest that the law enforcement officers' statements should invalidate his waiver of Miranda rights. See Pet. Mem. 14 (citing Colorado v. Spring, 479 U.S. 564, 576 n.8 (1987)) ("[T]he Court has found

Schneckloth in support of his proposition that a Miranda warning is one factor that a court may consider when evaluating voluntary waiver and that "[t]he totality of the circumstances test does not favor any one of these factors over the others –- it is a case-specific inquiry where the importance of any given factor can vary in each situation." Pet. Mem. 14 (citing Schneckloth, 412 U.S. at 226-27). Correct -- courts have a fair amount of discretion in conducting their totality-of-the-circumstances analysis. See id.

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affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege."). The problem with Santana's citation is twofold. First, Santana cites a footnote that contains dicta and is "not clearly established federal law" under 28 U.S.C. § 2254(d)(1). See Yarborough, 541 U.S. at 660-61. Second, the cases cited in support of the footnote, which Santana also cites in a parenthetical, involve extreme circumstances of misrepresentation that do not appear apropos to the case at bar:

> In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege. See, e.g., Lynumn v. Illinois, 372 U.S. 528 (1963) (misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary); Spano v. New York, 360 U.S. 315 (1959) (misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary).

Spring, 479 U.S. at 576 n.8. Santana neglects to explain how the cited cases are analogous to the present action so as to indicate a violation under 28 U.S.C. § 2254(d)(1). See Pet. Mem. 14-16.

Further, the Supreme Judicial Court did consider both the police's pre-Miranda confidentiality promise as well as Cueva's post-Miranda statement about speaking to the court if Santana provided information. Santana, 477 Mass. at 617-19. Despite Santana's assertion to the contrary, the court did contemplate Cueva's statement in conjunction with the police's pre-Miranda confidentiality promise and the Miranda warning. See id. at 618-19. After considering the totality of the circumstances, the court determined that Santana's waiver was voluntary. Id. at 620.

Here, Santana shows neither that the Supreme Judicial Court's allotment of weight to the Miranda warning nor its analysis of Cueva's statement was "contrary" to federal law. See 28 U.S.C. § 2254(d)(1). Santana has not demonstrated that the court's mode of analysis conflicts with Supreme Court case law or diverges in holding from a factually similar decision. See Gaskins, 640 F.3d at 451-52. Additionally, Santana has not established that the court unreasonably applied Supreme Court precedent "in an objectively unreasonable manner . . . devoid of record support for its conclusion." See Gaskins, 640 F.3d at 452 (internal citation and quotation marks omitted).

Therefore, this Court does not grant a writ of habeas corpus under 28 U.S.C. § 2254(d)(1).[6]

III. CONCLUSION

For the foregoing reasons,[7] this Court DENIES Santana's petition for a writ of habeas corpus, ECF No. 1.

SO ORDERED.

/s/ William G. Young
WILLIAM G. YOUNG
DISTRICT JUDGE

[6] While this Court holds that the Supreme Judicial Court was neither factually nor legally unreasonable when determining that Santana's statements were voluntary, the Court also agrees with the Supreme Judicial Court's sentiment that: "[t]his case makes plain the need for law enforcement to use capable, trained translators who will report verbatim the question asked and the response given." Santana, 477 Mass. at 618 n.6.

[7] In light of the analysis above, there is no need to address the issue of actual prejudice.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CESAR SANTANA,
Petitioner,

v.

BRAD COWEN, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK,
Respondent

PROOF OF SERVICE

I, Elizabeth Caddick, do swear or declare under the penalty of perjury that on this date, September 20, 2021, as required by Supreme Court Rule 29, I have served the enclosed Motion for Leave to Proceed in Forma Pauperis and Petition for a Writ Of Certiorari on each party's counsel and each party required to be served, by electronically mailing and by mailing via the United States first-class postage prepaid, to

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