No. 21-

IN THE
Supreme Court of the United States

TYRONE WORTHAM,
Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the State of New York

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a law enforcement officer's purportedly biographical question to a suspect is reasonably likely to elicit an incriminating response, does it fall under *Miranda*'s booking exception?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Tyrone Wortham. Respondent is the State of New York. No party is a corporation.

RULE 14.1(b)(iii) STATEMENT

This case arises from the following proceedings in the New York Court of Appeals, the New York Appellate Division, and the New York Supreme Court:

The People of the State v. *Tyrone Wortham*, No. 63 (N.Y. Nov. 23, 2021)

The People of the State v. *Tyrone Wortham*, 3148N/11 (N.Y. App. Div. Apr. 5, 2018)

The People of the State v. *Tyrone Wortham*, Ind. No. 3148N/11 (N.Y. Sup. Ct. Feb. 15, 2013)

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tyrone Wortham respectfully petitions for a writ of certiorari to review the judgment and opinion of the New York Court of Appeals.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 180 N.E.3d 516 (N.Y. 2021) and is reproduced in the appendix to this petition. Pet. App. 1a–36a. The decision of the New York Appellate Division is reported at 160 A.D.3d 431 (N.Y. App. Div. 2018) and reproduced at 37a–39a. The decision of the New York Supreme Court is unreported and reproduced at Pet. App. 40a–52a.

JURISDICTION

The New York Court of Appeals entered judgment on November 23, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

LEGAL FRAMEWORK

The Fifth Amendment to the United States Constitution states in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

STATEMENT OF THE CASE

A. Introduction

Under *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966), prosecutors "may not use statements . . . from custodial interrogation" of a defendant, absent certain "procedural safeguards." In *Pennsylvania* v. *Muniz*, a plurality of the Court recognized a narrow exception to *Miranda*, for "booking question[s]" that seek "biographical data necessary to complete booking or pretrial services." 496 U.S. 582, 601 (1990) (opinion of Brennan, J.) (cleaned up). *Muniz*, though, said very little about the nature of this exception—*i.e.*, when it applies, how it applies, and any other circumstances a lower court should consider when invoking the exception.

The Court has not once, in the more than thirty years since *Muniz*, clarified the scope of the booking exception. That lack of guidance has, predictably, created a shifting landscape of rules and standards, blurring the line between questions that require a *Miranda* warning and those that do not.

Some courts have established that the subjective intent of the officer is dispositive. See*, e.g.*, *Gilbert* v. *State*, 951 P.2d 98, 112 (Okla. Crim. App. 1997). Other courts have emphasized the objective circumstances, observing that an arresting officer's "actual[] know[ledge] . . . does not affect [the] analysis" or is, at most, only a "relevant" plus factor. *United States* v. *Pacheco-Lopez*, 531 F.3d 420, 424 (6th Cir. 2008); see also *State* v. *Bryant*, 624 N.W.2d 865, 870 (Wis. Ct. App. 2001). Some courts have focused on whether "the question reasonably relates to a legitimate administrative concern." *State* v. *Cruz*, 461 S.W.3d 531, 540 (Tex. Crim. App. 2015).

New York here took yet another approach, by putting a subjective spin on a purportedly objective inquiry. The Court of Appeals held that booking—or, in its terminology, pedigree—questions must not be a "disguised attempt" by the officer "at investigatory interrogation," a nod to the officer's intent. Pet. App. 5a. But to divine that intent, the Court of Appeals instructed lower courts to undertake an "objective" analysis. *Id.*

Given this legal kaleidoscope, it is little wonder that "booking exception cases around the country are confusing and conflicting." *Alford* v. *State*, 358 S.W.3d 647, 656 (Tex. Crim. App. 2012); see also *Hughes* v. *State*, 695 A.2d 132, 138–39 (Md. 1997); *Timbers* v. *State*, 503 S.E.2d 233, 237 (Va. Ct. App. 1998).

That confusion matters. Every day, police officers across the country pose biographical questions to people in custody for court and custodial administration. Consequently, when it comes to the booking exception, applying different rules leads to different outcomes for different defendants depending on where they are arrested. That result cannot be what the Court envisioned when it decided *Muniz*. This case presents an ideal opportunity to provide direction on the breadth of the exception and clarify what statements courts may or may not admit into evidence.

B. The Search

On May 26, 2011, twelve police officers executed a no-knock search warrant at an apartment building on Alabama Avenue in Brooklyn, New York. Pet. App. 54a–55a. The apartment belonged to Shawana Harrison, who lived there with her two children and other family members. *Id.* at 75a, 77a. Tyrone Wortham is the father of Ms. Harrison's children, and often cared for his children at Ms. Harrison's apartment while Ms.

Harrison worked or ran errands. *Id.* at 75a–76a. On the day of the search, Mr. Wortham was doing just that. When police officers forced open the door, he was watching over the children while Ms. Harrison was at the supermarket. *Id.* at 56a, 58a, 76a.

Upon entering, these officers handcuffed Mr. Wortham. *Id.* at 57a. Detective Brian Wood then had a "conversation" with Mr. Wortham. *Id.* No *Miranda* warnings were given. Asked at the scene where he lived, Mr. Wortham answered that his "baby's mother lets him stay there," and that he "sleeps [on] a bed in the living room," while motioning towards a bed visible inside the living room. *Id.* at 56a–57a. Detective Wood collected this information for prosecution. *Id.* Mr. Wortham was later taken to the precinct.

The police ultimately recovered two firearms and bullets inside boxes in a closet in a separate bedroom, along with crack cocaine and drug paraphernalia in a container in the same bedroom. *Id.* at 63a–69a. Mr. Wortham and Ms. Harrison were indicted on charges related to possession of the firearms and drugs.

C. Pre-Trial Proceedings and Trial

Before trial, Mr. Wortham moved to exclude any statements given at the scene about where he lived. He argued that, although law enforcement asserted that such information was usually taken from all adults found within a search warrant's location, such questions were, for an individual in Mr. Wortham's shoes, likely to elicit an incriminating response. *Id.* at 59a–61a. Thus, any booking exception was inapplicable, and his statements should be inadmissible. *Id.*

The trial court denied suppression. It found that "the questions in this case were not designed to elicit an incriminating response" from Mr. Wortham. *Id.* at 48a. Furthermore, no "ulterior motive" could be attributed

to the detective because "he wasn't even aware at the time he spoke to [Mr. Wortham] whether there was any contraband in the apartment." *Id.*

The prosecution also sought to introduce at trial DNA evidence recovered using novel Forensic Statistic Tool ("FST") analysis. Mr. Wortham sought to prohibit introduction of DNA evidence and expert testimony about FST since its methods and software were not generally accepted as reliable by the relevant scientific community. Alternatively, he requested a *Frye* hearing. The trial court denied both requests.

At trial, Mr. Wortham offered evidence that he did not live in the apartment where the firearms and drugs were found and, in fact, never went into the bedroom where the police recovered the contraband. The prosecution relied heavily on Mr. Wortham's statement to the police that he sometimes stayed in the apartment. *Id.* at 71a, 73a–74a. Specifically, when on the stand at trial, Detective Wood recounted his multiple, pointed questions regarding Mr. Wortham's living situation:

A: When I asked him where he lived, he stated "here."

Q: Excuse me?

A: He stated, "Here."

Q: Did he say anything else in regards to where he lived?

A: When I asked him exactly where, he said his baby's mother lets him stay in a bed – in the living room and he motioned with his head towards the living room.

Id. at 71a. Such statements would have been excluded had Mr. Wortham prevailed at the suppression

hearing. Mr. Wortham was convicted of all counts, and sentenced to an aggregate sentence of nine years of imprisonment and five years of post-release supervision. Pet. App. 37a.

D. Appellate Proceedings

Before the New York Appellate Division, Mr. Wortham reiterated that his un-*Mirandized* statements did not fall within the pedigree exception. The Appellate Division affirmed his conviction. Pet. App. 3a. Mr. Wortham was granted leave to appeal to the New York Court of Appeals.

Before the Court of Appeals, Mr. Wortham noted a split as to whether the booking exception requires courts to evaluate the subjective intent of the questioning officer or focus upon the objective circumstances of questioning. Mr. Wortham urged the Court to adopt an objective analysis. Such an analysis would underscore that Mr. Wortham was: (1) questioned at the scene; (2) about where he lived; (3) during the execution of the search warrant; and (4) in support of which there was probable cause that contraband would be found. Given such circumstances, any response elicited about where he lived would reasonably likely produce an incriminating response.

The Court of Appeals held instead that "the proper inquiry . . . is whether the police used pedigree questions as a guise for improperly conducting an investigative inquiry without first providing *Miranda* warnings." *Id.* at 7a. "[T]he pedigree questions [here] were not a disguised attempt at investigatory interrogation" because the police asked Mr. Wortham certain questions "immediately" after entry into the apartment and before any contraband had been found. *Id.* at 8a. It was "standard practice" to ask such questions. *Id.*

In dissent, Judge Rivera held that asking Mr. Wortham where he lived during the execution of a search warrant did not fall "within a 'routine booking question exception.'" *Id.* at 14a (Rivera, J., dissenting in part). "Any person found in the apartment—whether the owner or someone with dominion and control over the area where the contraband was found—would be subject to prosecution for illegal possession." *Id.* Asking Mr. Wortham where he lived was the functional equivalent of an investigatory question and so any answer should have been suppressed.

Setting aside disagreement over the *Miranda* question, the full Court agreed that it was error to admit DNA evidence without a *Frye* hearing. *Id.* at 12a. It remitted the case to the trial court to conduct such a hearing. A successful *Frye* challenge would entitle Mr. Wortham to a new trial, but would not affect the admissibility of his un-*Mirandized* statements. The lower court has stayed the *Frye* hearing pending the resolution of this petition.

REASONS FOR GRANTING THE PETITION

I. AN ENTRENCHED SPLIT DIVIDES COURTS ON THE BOOKING EXCEPTION

In *Muniz*, a four-Justice plurality recognized a booking question exception to *Miranda*. But the plurality left unresolved several important issues. On the one hand, for instance, it held that *Miranda* protects against questions that are "*reasonably likely* to elicit an incriminating response," *id.* (emphasis added), echoing the Court's prior holding in *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980). On the other hand, it cautioned, in a footnote, that "the police may not ask questions . . . that are *designed to elicit* incriminatory admissions," which appears to inject the officer's intent

into the analysis. *Muniz*, 496 U.S. at 602 n.14 (emphasis added).

Little surprise, given this conflicting guidance, that "cases from the last two decades" have applied the booking question exception in an "inconsistent [and] confusing" manner. Paul Marcus, *When is Police Interrogation Really Police Interrogation? A Look at the Application of the Miranda Mandate*, 69 Cath. U. L. Rev. 445, 468 (2020).

Some courts have ruled that the officer's intent is dispositive. See*, e.g.*, *Gilbert*, 951 P.2d at 112. Others have found objective circumstances dispositive, because an arresting officer's "actual[] know[ledge] . . . does not affect [the] analysis." *Pacheco-Lopez*, 531 F.3d at 424. Still others focus on whether "the question reasonably relates to a legitimate administrative concern." *Cruz*, 461 S.W.3d at 540. And New York applied yet another gloss on these tests: asserting that "the inquiry itself must be objective" yet deciding the case on subjective factors. Pet. App. 5a.

A. A Minority of Courts Employ a Subjective Test.

A few jurisdictions apply a subjective test: determining admissibility based on the officer's purpose for asking booking questions. In Oklahoma, courts examine whether the "*purpose* of the questions was merely to obtain background information and not to elicit incriminating responses." *Gilbert*, 951 P.2d at 112 (emphasis added). New Hampshire has likewise held that "police may not ask questions, even during booking, that are *designed* to elicit incriminatory admissions." *State* v. *Chrisicos*, 813 A.2d 513, 515–16 (N.H. 2002) (internal quotations omitted) (emphasis added). The Eleventh Circuit also applies a subjective inquiry, emphasizing that routine background questions are those

that are not *intended* to elicit an incriminating response. The court thus focuses on whether the officer's "reason for asking [booking questions] was other than to secure routine booking information." *United States* v. *Sweeting*, 933 F.2d 962, 965 (11th Cir. 1991).

Critically, in each of these jurisdictions—New Hampshire, Oklahoma, and the Eleventh Circuit—choice of prosecution in state or federal court for the same conduct can change the applicable constitutional standard.

For example, while New Hampshire uses a subjective test, the First Circuit follows an objective one. Likewise, Oklahoma diverges from Tenth Circuit precedent by employing a subjective test rather than an objective one. And the Eleventh Circuit's subjective inquiry conflicts with the state of Georgia's objective test, which asks if the question was "likely to elicit an incriminating response." *Franks* v. *State*, 486 S.E.2d 594, 597 (Ga. 1997).[1] "When this occurs, individual rights and the scope of government power are left to happenstance, calling into question basic expectations of governmental consistency and even-handedness." Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 Notre Dame L. Rev. 235, 240 (2014).

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[1] The Eleventh Circuit's approach is particularly troubling because the Georgia Supreme Court has held that "decisions of the Eleventh Circuit" are "persuasive authority." *Perez* v. *State*, 657 S.E.2d 846, 848 (Ga. 2008). Consequently, when determining the circumstances for when a suspect has "invo[ked] . . . the right to cut off questioning"—a cousin to the fact pattern here—the Georgia Supreme Court looked to federal law before holding that there was "no reason to apply a different rule" than that of the Eleventh Circuit. *Id.*

B. Most Courts Apply an Objective Test.

Most courts hold that police must *Mirandize* a suspect before asking questions that, objectively speaking, are "reasonably likely to elicit an incriminating response." *Muniz*, 496 U.S. at 601; *Innis*, 446 U.S. at 301.

Courts using this objective test have sometimes looked at the elements of the crime as part of their analysis. For example, questions about nationality or citizenship, when asked by officers who suspect immigration violations, are considered reasonably likely to elicit incriminating responses, thus requiring *Miranda* warnings. See *United States* v. *Williams*, 842 F.3d 1143, 1147 (9th Cir. 2016) ("[W]hen there is reason to suspect that a defendant is in the country illegally, questions regarding citizenship do not fall under the booking exception—even if they are biographical—because a response is reasonably likely to be incriminating").

In articulating the relevant rule, some courts expressly note that the arresting officer's "actual[] know[ledge] . . . does not affect [the] analysis." *Pacheco-Lopez*, 531 F.3d at 424; see also *United States* v. *Reyes*, 225 F.3d 71, 76–77 (1st Cir. 2000) ("[T]he inquiry into whether the booking exception is . . . an objective one: whether the questions and circumstances were such that the officer should reasonably have expected the question to elicit an incriminating response.").

Other courts take a more flexible approach, holding that the subjective intent of the police officer in asking the question *may* in some *cases* be a possible plus factor. In *State* v. *Bryant*, for example, the Wisconsin Supreme Court observed that "subjective intent of the [police officer] is relevant but not conclusive," and that the key inquiry is whether, "in light of all the

circumstances, the police should have known that a question was reasonably likely to elicit an incriminating response." 624 N.W.2d at 870 (alteration in original). Other state and federal courts have echoed this same language. See *People* v. *Barnett*, 913 N.E.2d 1221, 1223–24 (Ill. App. Ct. 2009); *State* v. *Moeller*, 211 P.3d 364, 367 (Or. Ct. App. 2009); *State* v. *Griffin*, 814 A.2d 1003, 1005 (Me. 2003); *State* v. *Walton*, 41 S.W.3d 75, 84 n.6 (Tenn. 2001); *Franks* v. *State*, 486 S.E.2d 594, 597 (Ga. 1997); *Hughes* v. *State*, 695 A.2d 132, 137–38 (Md. 1997); *State* v. *Banks*, 370 S.E.2d 398, 403 (N.C. 1988); *United States* v. *Arellano-Banuelos*, 912 F.3d 862 (5th Cir. 2019); *United States* v. *Williams*, 842 F.3d 1143 (9th Cir. 2016); *Rosa* v. *McCray*, 396 F.3d 210 (2d Cir. 2005); *United States* v. *Smith*, 3 F.3d 1088, 1097–99 (7th Cir. 1993).

C. Other Courts Focus on Administrative Concerns.

Still other courts focus on whether the "question reasonably relates to an administrative concern." *Cruz*, 461 S.W.3d at 542; see also *Alford*, 358 S.W.3d at 659–60; *State* v. *Sallis*, 574 N.W.2d 15, 18 (Iowa 1998) (explaining that because "questions normally attendant to arrest and custody" are an exception to *Miranda*, information requested "for administrative purposes unrelated to criminal investigation" is admissible); *United States* v. *Gaston*, 357 F.3d 77, 82 (D.C. Cir. 2004). This difference is more than semantic. Focusing on administrative concerns (1) shifts the focus away from the person whose right against self-incrimination is at stake toward the concerns of law enforcement, and (2) is often invariably circular, as it equates booking questions with administrative concerns, and vice versa.

D. New York Applies Yet Another Set of Criteria to the Booking Question.

Finally, New York applies a purportedly "objective" rule, but only as a way to divine an officer's *intent*, thus muddling the subjective and objective analyses.

In the present case, New York held that "the pedigree exception will not apply . . . where . . . an *objective* analysis [reveals] that the pedigree question was a *disguised attempt* at investigatory interrogation." Pet. App. 7a (emphasis added) (internal quotations omitted).

Though nominally an "objective" test, New York's rule hinges in practice on the officer's purpose: whether the officer was *attempting* to elicit an incriminating response. In this way, New York's rule would fail to exclude a question that was *reasonably likely* to elicit an incriminating response, unless that question was also designed to elicit such a response. By requiring courts to inquire into an officer's mindset and ask whether booking questions are a "disguised attempt at investigatory interrogation," New York's test resembles the "pure subjective" jurisdictions that look to the officer's intent in asking the question. Pet. App. 8a.

II. THE NEW YORK COURT OF APPEALS ERRED.

The New York Court of Appeals misapplied the booking exception in three ways.

First, the exception is meant to "exempt[] from *Miranda*'s coverage questions to secure the biographical data necessary *to complete booking or pretrial services*." *Muniz*, 496 U.S. at 584 (emphasis added) (internal quotations omitted). Hence, such information is traditionally taken at the precinct or stationhouse. See *id.* at 585–86. That did not happen here. Officers

questioned Mr. Wortham at the scene, while executing a search warrant, because they had probable cause of (and later uncovered evidence of) an underlying crime.

The New York Court of Appeals nonetheless held that the officers were asking "[p]edigree questions," which are "sometimes referred to as 'booking questions.'" Pet. App. 4a. That change betrays a move away from questioning at a precinct and towards interrogation in the field. Neither *Muniz* nor any other case from this Court sanctions such interchangeability. If *Muniz* allowed booking questions to be asked devoid of *Miranda* safeguards only at the precinct when *booking* an individual, it is bizarre to categorize questions asked to individuals out in the field as "booking questions".

Second, and relatedly, any *objective* analysis of the circumstances here would have led to a contrary result. Associating Mr. Wortham with residence or ownership of the apartment was critical to the police's ability to connect Mr. Wortham with contraband inside the apartment, as control and dominion is an element of the substantive crime. Indeed, given the search warrant's scope, asking *any* person at the apartment where they lived could readily connect the person with the contraband that the police already had probable cause to believe was on the premises. Consequently, regardless of the officer's intent in asking the question, posing the question was objectively likely to establish *the* key link between Mr. Wortham and the crime being investigated.

To underscore the point, the facts in *Wortham* are much like cases that have reached an opposite conclusion. In *Pacheco-Lopez*, police had a search warrant for a house connected to a drug deal. They found defendant at that house and asked where he lived and how

he had come to the house. See 531 F.3d at 422. The Sixth Circuit held that, given the circumstances, these questions fell outside the booking exception: Asking an individual about his connection to a household "linked to a drug sale" is relevant to an investigation and thus requires a *Miranda* warning. *Id.* at 424.

Similarly, in *United States* v. *Peterson*, the court excluded an officer's interrogation, during the execution of a warrant, of a suspect regarding which bedroom belonged to them. 506 F. Supp. 2d 21, 24 (D.D.C. 2007) ("The exception for routine booking questions . . . does not apply to [the] question as to which bedroom was defendant's."). These cases show that when the suspect is (as Mr. Wortham was) asked questions to which the response provides a critical connection to an aspect of the investigation, *Miranda* warnings are required. Had Mr. Wortham been charged in the Sixth Circuit or the District of Columbia, there is a good chance he would not have been convicted.

Third, in analogous circumstances, this Court has emphasized an objective, not subjective, analysis. In *Stansbury* v. *California,* the Court held that "the initial determination of custody depends on the objective circumstances of the interrogation." 511 U.S. 318, 323 (1994). That is because "one cannot expect the person under interrogation to probe the officer's innermost thoughts." *Id.* at 324.

Muniz itself, moreover, points to an objective view. In deploying a subjective frame, lower courts have focused on a single line in a footnote in *Muniz*, where the plurality held that police "may not ask questions . . . *designed to elicit* incriminatory admissions." 396 U.S. at 602 n.14 (emphasis added). But *Muniz*'s "designed to elicit" language in fact cited, in support, several cases that expressly undertook an objective analysis to the facts presented. *Id.* (citing *United States* v. *Avery*,

717 F.2d 1020, 1024–1025 (6th Cir. 1983); *United States* v. *Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983)).

III. THIS CASE IS AN APPROPRIATE VEHICLE TO ADDRESS THE QUESTION.

Confusion surrounding *Muniz* has existed since the case was decided. That confusion carries significant implications. Nearly 50 million people live in Texas and New York—two states with very different tests for the booking question exception. In New York alone, police arrest tens of thousands of people each year.[2] Questioning on facially biographical matters shapes many of these interactions. And how the booking exception is interpreted makes one's charging jurisdiction outcome-determinative in cases like this one.

The issue here has been properly preserved below, having been raised before the trial court, the Appellate Division, and the Court of Appeals. And the pendency of a *Frye* hearing does not preclude review.

As this Court has explained, review is appropriate "where [a] federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 481 (1975); *accord Kansas* v. *Marsh*, 548 U.S. 163, 167–69 (2006). The New York Court of Appeals' decision on admissibility of the un-*Mirandized* statements is final and binding. And there is no sign that review of such a question would be available later.

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[2] NYPD Arrests Data (Historic), NYC Open Data (last updated May 3, 2021), https://data.cityofnewyork.us/Public-Safety/NYPD-Arrests-Data-Historic-/8h9b-rp9u.

Moreover, even if Mr. Wortham won relief on the *Frye* claim, the importance of his un-*Mirandized* statements becomes all the more significant. If there is no DNA evidence, then these statements will be particularly critical, as they become the lynchpin for the prosecution's case.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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April 22, 2022

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