No.________
(CAPITAL CASE)

IN THE
SUPREME COURT OF THE UNITED STATES

Arturo Daniel Aranda,
Petitioner,

v.

Bobby Lumpkin, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Congress modified 28 U.S.C. § 2254(d) when it passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and AEDPA substantially changed how federal courts determine facts in habeas cases. Because the federal district court took no action on his habeas petition for over a quarter century, Arturo Aranda has been on death row for forty-four years, and the pre-AEDPA version of § 2254(d) controls his case. That version of § 2254(d) identified eight scenarios in which no presumption of correctness attached to a state finding of fact. *Townsend v. Sain*, 372 U.S. 293 (1963), made fact development mandatory in six of them.

Before the Supreme Court decided *Jefferson v. Upton*, 560 U.S. 284 (2010), there was a circuit split as to the operation of the pre-AEDPA presumption of correctness. Some circuits (including the Fifth) held that a presumption attached whenever the state record fairly supported a state-court finding. Other circuits hewed to a more textualist reading under which any of eight statutorily specified conditions could disable the correctness presumption—whether the state record fairly supported the state-court finding or not. In *Jefferson*, this Court endorsed the textualist reading of the provision, siding against circuits that attached a presumption whenever the state record supported state-court findings.

Among other things, the Fifth Circuit revived that pre-*Jefferson* split when it summarily determined that Aranda's *Miranda* waiver was knowing and intelligent. This Certiorari Petition presents the following two questions:

1. On findings of fact, does a federal court (applying the pre-AEDPA statute) presume a finding's correctness whenever the state-court record supports the finding, as the Fifth Circuit continues to hold, or does a federal court consider each salient statutory exception, as all other circuits have done since *Jefferson*?

2. Does the Fifth Circuit's test for mandatory factfinding, which makes no reference to the sufficiency of state process, violate *Townsend*?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner is Arturo Daniel Aranda.

Respondent is Bobby Lumpkin, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No party is a corporation.

RELATED PROCEEDINGS

Direct appeal, *Aranda v. State*, 640 S.W.2d 766 (Tex. Crim. App. 1982), in which judgment was entered on September 23, 1987.

Texas postconviction proceedings, *Ex parte Arturo Daniel Aranda*, Writ No. 18,014-03, Texas Court of Criminal Appeals, in which judgment was entered on April 18, 1989.

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PETITION FOR WRIT OF CERTIORARI

Arturo Aranda respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's decision in this case is unreported and reprinted in the Appendix to the Petition ("App.") at App. 1a. The Fifth Circuit's decision on Petitioner's application for a Certificate of Appealability is unreported and reprinted at App. 7a. The district court's opinion denying petitioner's Motion under Rule 59(e) to Alter or Amend Judgment is unreported and reprinted at App. 23a. The district court's decision and Amended Memorandum dismissing Aranda's federal petition for a writ of habeas corpus is unreported and reprinted at App. 15a.

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 2241 and 2254. The court of appeals had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. The judgment of the court of appeals was entered on November 9, 2022. On February 2, 2023, Justice Alito extended the time to file this petition by thirty (30) days to and including March 9, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself. . . without due process of law . . .

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, . . . by an impartial jury . . . and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254(d) (1994 ed.) provided that:

> In [any habeas case initiated by a state prisoner], a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct unless the applicant shall establish or that it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a

> consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record[.]

* * * * *

STATEMENT OF THE CASE

A. Shooting and Putative Confession

On July 31, 1976, Arturo Aranda and his older brother Juan Aranda were stopped by two police officers while transporting marijuana in a car. The evidence at Arturo Aranda's trial established that Officers Candelario Viera and Pablo Albidrez boxed in the Arandas' vehicle, and an exchange of gunfire followed. During the exchange, Officer Albidrez was shot and died from his wounds. ROA[1] 3058-68; 3761-72. Aranda and his older brother were subsequently indicted for capital murder.

On the same day he was arrested, Aranda was hospitalized with gunshot wounds to his left hand and left shoulder, suffered during his arrest. ROA 1735-36; 3461; 4083-4104. While in the hospital, a nurse witnessed the police threatening him. ROA 3704. From his admission to the hospital through his release, Aranda was medicated every four to six hours for his pain and, on August 1, 1976, doctors performed surgery to remove the bullet from his back and they administered additional pain medication. ROA 4083-4104. The hospital gave him 100 milligrams of Demerol at 12:10 p.m. on the day he was discharged. ROA 4100. Hospital records indicate that Aranda would continue to be medicated at the prison. Aranda "was discharged under the care of the Police *to continue medical care under Dr. R. Gomez-*

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[1]"ROA" citations in this petition refer to the Record on Appeal in *Aranda v. Lumpkin*, No. 20-700008, 2022 WL16837062 (5th Cir., Nov. 9, 2022).

Lugo who is the attending physician of the state jail." ROA 4087 (emphasis added). No record evidence indicates that Dr. Gomez-Lugo discontinued the expected course of administered medication; the only evidence in the record is that the prison doctor continued to give Aranda pills. ROA 1749.

At 2:30 p.m. on the day of his surgery, without having counsel and while still medicated, Webb County District Attorney Charles Borchers took Aranda from the hospital in a wheelchair and transported him to the Webb County jail. ROA 1721-1725. Around 10:00 p.m. on that same day, law enforcement took Aranda into a room at the County Jail, and two Laredo policemen interrogated him with no counsel present, in front of Borchers. ROA 1722-23; 1738. On pain medication and recovering from surgery for gunshot wounds, Aranda was disoriented and could not stand during the interrogation. The interrogation ended around 11:15 p.m. when, in a wheelchair, medicated from the surgery that occurred only hours before, and still without counsel, Aranda signed the incriminating statement used against him at trial. ROA 4045-46; 1719-53. The police had to instruct Aranda what to write in the confession because he has only an eighth-grade education and his written and spoken English was severely limited, as evidenced by the subsequent need for trial interpreters and bilingual attorneys. Aranda filled out a pre-printed English language waiver that appeared on a page directly before the handwritten confession. ROA 4045-46.

At the time he signed this statement and the pre-printed waiver, mere hours after he finished back surgery, Aranda had been given 100 milligrams of Demerol on top of his other ample pain medications, was physically beaten by police throughout

that day, and had been shown (by law enforcement) pictures of his brother's beating before the interrogation. No attempt was made to take him before a magistrate prior to his interrogation and confession, ROA 1730-31, nor could law enforcement say that he had ever been told that he was to be charged with capital murder, ROA 1727-28.

Affidavits from Aranda's family members—attached to the state and federal habeas petitions—attest that they recall observing or hearing about Aranda and his brother with bruises and other marks of a beating when those family members visited the brothers in Laredo shortly after the brothers' arrest. ROA 248-49, 259-60, 246-48. Those affidavits also reveal that at the time of his arrest and interrogation in Laredo, Aranda's ability to read, speak or understand English was extremely limited. ROA 255-58, 235-45.

B. Trial and Direct Appeal

The Aranda brothers' joint capital trial began in Webb County, Texas, in 1978. After a mistrial, and during jury selection for a second trial, Arturo Aranda fell ill. District Attorney Borchers proceeded with the prosecution of Juan Aranda, who was convicted and sentenced to life imprisonment. Arturo Aranda's trial followed in 1979. Prior to the start of trial, trial judge Joe Kelly *sua sponte* ordered, over Aranda's objection, a change of venue to Victoria County. Jury selection took a total of three days, as did the guilt/innocence phase. The entire punishment phase lasted one day.

1. Guilt Phase

The defense did not present a single witness; in contrast, the state's presentation of witnesses comprised forty (40) pages of the trial transcript. Juan

Aranda was called to testify at Arturo's trial by the State. Juan, who was driving the car, testified that Arturo was unaware that Juan had agreed to pick up marijuana in Laredo for transport to San Antonio. ROA 3736; 3738; 3743; 3839. Juan testified that neither he nor his brother was armed until they picked up the marijuana approximately one-half hour before the shooting occurred, at which time they were given two guns for use against hijackers by the men who loaded the marijuana into the car. ROA 3753-54; 3758. This testimony was uncontroverted at trial.

The guilt-phase evidence against Aranda relied almost exclusively on the testimony of Officer Viera, and the confessions of Aranda and his brother. Both confessions were challenged as coerced, in part through physical beatings, and as having been given unknowingly and unintelligently. No witness at trial testified to seeing Arturo Aranda fire the shot that killed the police officer. There was conflicting testimony as to whether either of the Aranda brothers possessed, at the time of the shooting, the .38 caliber handgun that the State introduced into evidence as the murder weapon. ROA 3214-18; 3255-58; 3264-66; 3305-06; 3404-08; 3413-14; 3753-55. The evidence was so unclear that, at his own trial, Juan Aranda was "identified in court as having fired the fatal bullet." *Aranda v. State*, 640 S.W.2d 766, 769 (1982).

At the guilt-phase closing, the prosecution emphasized the signed statement, including the degree to which it corroborated details unknowable to somebody who was not at the scene. ROA.4181-4182. The guilt-phase charge to the jury was about ten pages long, and about *fifteen percent of it* was about the statement. ROA.4386-4396. The jury ultimately found Aranda guilty of capital murder.

2. Punishment Phase

Under Texas law, a "non-shooter" can be prosecuted capitally as a party to a felony in which a capital murder occurs. In such cases, however, an "anti-parties" charge is given to ensure any death penalty imposed reflects only the culpability of the non-shooter. *See* Texas Penal Code s.19.01 et seq; Texas Code Crim. Proc. Art. 7.01 *et seq*. Aranda was not tried under a "parties" theory of accomplice liability at the guilt phase, nor was an "anti-parties" charge given at the punishment phase.

Trial counsel signed an affidavit confessing to having performed virtually no sentencing-phase investigation of mitigating circumstances. Thus, by defense counsel's own admission, "no evidence was presented by the defense in the penalty phase of the trial with respect to Aranda's personal and family background, and the circumstances of the crime." ROA 240-41 at ¶14. Indeed, defense counsel presented nothing at all at the penalty phase.

Aranda's conviction and death sentence were affirmed by the TCCA on direct appeal on September 23, 1987. ROA 4482-4496. Two months later, on November 27, 1987, despite that Aranda was then without counsel and had not even begun his state habeas proceedings, the trial court scheduled him to be executed on February 25, 1988. That was the earliest date possible, as the law that prevailed at the time required that the first execution date be set a minimum of 90 days hence.

C. State Post-Conviction Proceedings

Following the setting of the first execution date, undersigned counsel began representing Aranda. The TCCA and this Court stayed the execution set for February

25, 1988 to permit the filing of a certiorari petition off of direct appeal. The petition was denied on June 30, 1988. Just over a month later, after the stay orders expired, the trial court set another execution date, for November 9, 1988.

Aranda proceeded through his state habeas proceedings during a time when (1) Texas forced capital cases through the habeas process by repeatedly setting execution dates to drive the case through the state and federal courts as quickly as possible; and (2) condemned prisoners were not entitled to appointed counsel in state habeas proceedings. Because execution dates were the standard device for moving litigation towards completion, the state would repeatedly set execution dates that it would expect to be stayed.

Under the shadow of an execution date set for November 9, 1988, with under three months to prepare, investigate, and file his state habeas pleading, Aranda filed his state habeas pleading with the trial court on October 25, 1988. Specifically, he filed a state post-conviction application, along with ancillary motions for a stay of execution, an evidentiary hearing, and discovery. Among the claims included in the state post-conviction application was the claim at issue here: a *Miranda* claim that waiver was not knowing and intelligent. ROA 9196-9235. The state decided that it needed more time to prepare and file its answer, so the trial court modified the November execution date, re-setting it for January 25, 1989. ROA 179-85. On January 18, 1989, the state requested a second modification because it again decided that it needed additional time to prepare a response, and the court moved the scheduled execution to April 25, 1989. *Id*.

On April 13, 1989, twelve days shy of Aranda's scheduled execution, the state filed its response to his application. The *same day*, the trial court entered a one paragraph Order finding "no controverted, previously unresolved issues of fact material to the legality of the Applicant's confinement," thereby recommending denial of state application. Undersigned counsel did not receive a copy of that order until four days later, on April 17. That same day, Aranda filed a Notice of Appeal in the trial court, and an Emergency Application for a Stay of Execution in the TCCA. The *next day*, the TCCA denied relief in a one-page order, committing two sentences to the 29 claims that Aranda raised in his application: "[t]his Court has reviewed the record with respect to the allegations now made by applicant. We find the allegations have no merit." App. 126a. The TCCA did not rule on Aranda's request for a stay of execution. In total, the adjudication of Aranda's state habeas application took five days.

D. Federal Habeas Proceedings

1. District Court Proceedings

On April 20, 1989, two days after the TCCA denied relief, Aranda filed in the U.S. District Court for the Southern District of Texas his federal habeas petition and ancillary motions for appointment of counsel, investigative and expert services, an evidentiary hearing, discovery, and a stay of execution (looming five days later). ROA 12-289. The federal petition included the claim at issue here: a *Miranda* claim alleging waiver that was invalid both because it was involuntary and because it was not knowing and intelligent. *Id*. Although the state opposed the request for a stay of

execution (ROA 290), the district court granted it on April 21, 1989. ROA 295-97. Shortly thereafter, federal district court Judge Kazen recused himself, and the matter was reassigned to Judge Hinojosa. ROA 303 (recusal); ROA 309 (reassignment).

The state filed an answer and motion for summary judgment on August 9, 1990. ROA 321. Aranda responded within three weeks. ROA 674. On October 15, 1991, Judge Hinojosa entered an order denying Aranda's Motions for Discovery and for an Evidentiary Hearing and granting the state's motion for summary judgment. ROA 850-939. An amended order and final judgment issued on December 31, 1991, without any evidentiary hearings or factual development. App. 23a.

On January 15, 1992, Aranda timely filed a Petition to Alter or Amend Judgment, and a memorandum in support. ROA 1039-1098. On September 30, 1992, the district court noted by minute entry that the state had not filed a response to the Petition to Alter or Amend Judgment and ordered the state to do so. ROA 1099-1100. The state's opposition was finally filed on October 26, 1992 (ROA 1105-94), and Aranda replied two weeks later. ROA 1195-1276.

There were ministerial filings, but the matter remained pending on Aranda's post-judgment motion for the next twenty-five years—from November 9, 1992 until September 28, 2018. On September 25, 2018, Aranda's case was reassigned to Judge Kenneth Hoyt who, on September 28, 2018, stayed adjudication of all pending motions and administratively closed the case. On January 14, 2019, the court ordered supplemental briefing concerning Aranda's pending motion to alter or amend. ROA 1329. On May 4, 2020, after supplemental briefing of the issues, the district court

denied Aranda's Rule 59(e) motion and all other requests for habeas relief, and it declined to certify any issue for appellate consideration. App. 15a.

2. Fifth Circuit Appeal

Aranda filed a timely notice of appeal in the United States Court of Appeals for the Fifth Circuit on June 2, 2020. ROA 1493-1495. The appeals court granted a certificate of appealability (COA) on two issues: (1) the *Miranda*.[2] claim and (2) an ineffective-assistance-of-counsel claim. *See Aranda v. Lumpkin*, No. 20-70008, 2021 WL 5627080, at *1 (5th Cir. Nov. 30, 2021) (App. 7a)Specifically, with respect to the *Miranda* claim, the Fifth Circuit certified appeal on the question whether Aranda knowingly and intelligently waived his right to counsel. *Id.* at*2-4. Following oral argument, the Fifth Circuit denied Aranda's appeal. *See Aranda v. Lumpkin*, No. 20-70008, 2022 WL 16837062 (5th Cir. Nov. 9, 2022). App. 1a.

The Fifth Circuit rejected the *Miranda* claim first. Conceding in one breath that the state court had not in fact ruled on the knowingness and intelligence of the *Miranda* waiver, the Court invoked its power to "reconstruct findings" and inferred (from the state court's voluntariness finding) the factual predicates it believed necessary to grant summary judgment on the question of knowing-and-intelligent waiver. *Id.* at *3-4. The Fifth Circuit deferred to the "reconstructed" finding on the ground that it was supported by the state record and not unreasonable—seeming to

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[2] The certification of these issues under 28 U.S.C. §§ 1291 & 2253(a) reached also the subsidiary issues involving hearing requests and discovery. *See United States v. Davis*, 971 F.3d 524, 534 (5th Cir. 2020) ("And we've held the issuance of a COA on a constitutional claim gives us the correlative power to consider the prisoner's statutory claim to an evidentiary hearing.").

invoke the *post-1996* version of § 2254(d) rather than the standard applicable to habeas cases initiated before AEDPA. *Id*. Finally, the appeals court held that erroneous admission of the confession would have been harmless anyways, primarily citing testimony of the other officer at the scene. *Id*.

Because the Fifth Circuit resolved factually contested issues in a pre-AEDPA case, it had to explain why it refused fact development. It provided that explanation in a footnote, where it held:

> An evidentiary hearing would not prove beneficial where: (1) the parties have not proffered any evidence that is disputed; (2) the evidence was appropriately presented during the state-court proceedings' and (3) Aranda has not identified any new evidence that could be developed if he were granted an evidentiary hearing at this juncture.

Id. at *6 n.5. It therefore refused a remand necessary to develop facts absent from the state record, or to make factual findings when content was contested.

The mandate issued on November 9, 2022. This Certiorari Petition follows.

REASONS FOR GRANTING CERTIORARI

In 1996, AEPDA limited federal habeas process—including factfinding and merits review—because Congress believed those things were too readily available to federal habeas claimants who received enough process in state court. *See Shoop v. Twyford*, 142 S.Ct. 2037, 2043-45 (2022). It follows from the 1996 limitation that pre-1996 claimants, litigating under the prior version of the federal habeas statute, are entitled to habeas process and relief on very different terms. In this case, the *federal courts* refused factfinding to resolve factually contested issues that the *state courts* resolved without factfinding and under the wrong legal standards. Specifically, the

courts below awarded judgment on the pleadings, refusing the factfinding necessary to prove a constitutional violation under *Miranda*.

As set forth in Parts I and II, the Fifth Circuit committed two legal errors in affirming the district court's summary judgment, and those errors present two issues worthy of certiorari. The first, which revives a pre-2010 circuit split and violates *Jefferson v. Upton*, 560 U.S. 284 (2010), involves how the so-called presumption of correctness operates under the pre-AEDPA statute. The Fifth Circuit held that a federal court may infer a fact and presume its truth anytime it is supported by the state record. *Jefferson* resolved a circuit split in the other direction, by deciding that federal courts must refuse a presumption in many cases when such support exists. 560 U.S at 291. The second error of law involves the Fifth Circuit's failure to apply *Townsend*, which was the pre-AEDPA standard for mandatory fact development.

As set forth in Part III, *infra*, the *Miranda* claim at issue has merit, and summary judgment would not be justified but for the Fifth Circuit's legal errors. Aranda adduced substantial evidence indicating that he signed the boilerplate, English-language waiver even though his English was limited—and that he did so in the wake of police beatings and under the influence of his post-surgery narcotics. *See* Section III.A, *infra*. Given that a federal court would be deciding this claim *de novo*, summary judgment against Aranda was made possible only by creating invalid evidentiary presumptions and refusing fact development.

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER, IN PRE-AEDPA CASES, A FACT MAY BE PRESUMED IN

THE STATE'S FAVOR WHENEVER IT IS "SUPPORTED BY THE RECORD."

AEDPA made radical changes to rules about when state prisoners could unlock federal habeas process, and when they could obtain relief. Congress made those changes in part because it believed that the federal statute unnecessarily lavished fact-development on prisoners who had received full and fair process in state court. As a corollary of such changes, however, legislative supremacy and binding case law dictate that *pre*-AEDPA claimants be permitted to develop facts on the terms that Congress left in place until 1996. Specifically, the pre-AEDPA rules about when federal courts presume facts are much more tolerant of new fact development. In this case, the Fifth Circuit revived a pre-2010 split about the rule for presumption.

A. The Fifth Circuit Held That A Fact Is Presumed In The State's Favor Whenever It Is "Supported By The [State] Record."

The pre-AEDPA rules about the effect of state factual determinations are, in some respects, similar to the rules under AEDPA. There are conditions under which a presumption of correctness attaches, and then a state prisoner making a federal habeas claim must overcome the presumption by some specified quantum of evidence. The conditions under which a presumption of correctness attaches appear in the pre-AEDPA version of 28 U.S.C. § 2254(d), which provides in pertinent part:

> [A] determination after a hearing on the merits of a factual issue, made by a State court . . . shall be presumed correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

> (3) that the material facts were not adequately developed at the State court hearing; . . .
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record[.]

If the pre-AEDPA presumption attaches, then the pre-AEDPA version of § 2254(d) places the burden "upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."[3]

In reasoning through the presumption of correctness, the Fifth Circuit did not cite to the pre-AEDPA version of § 2254(d), but instead held that a federal court "must accord a presumption of correctness to all findings of fact if they are supported by the record." 2022 WL 16837062 at *2. In reciting that standard, it accurately quoted and cited *Kunkle v. Dretke*, 352 F.3d 980, 985 (5th Cir. 2003), which itself (accurately) cited the jurisdiction's leading case on the question, an *en banc* opinion from 2002. *See Soffar v. Cockrell*, 300 F.3d 588, 592 (5th Cir. 2002) (*en banc*). The Fifth Circuit's understanding of the § 2254(d) presumption—which led the panel to invoke it in this case—dramatically affected analysis of the *Miranda* claim.

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[3] The rules for when a federal claimant is *entitled to a hearing* are related but distinct, and are set forth in *Townsend*, 372 U.S. at 312-19 (discussed in Section II.B, *infra*).

On the *Miranda* claim, the state court had made no finding on knowing-and-intelligent waiver. In fact, the direct appeal had to be abated because the trial court made no findings on the admissibility of the confession *at all*; and after it made post-abatement findings, those findings were limited to the question of voluntariness. ROA.4489. The Fifth Circuit therefore determined (correctly) both (1) that the Texas courts failed to adjudicate the knowing-and-intelligent waiver requirement and (2) that the federal district court had confused the state-court determination of voluntary waiver with the state-court determination of knowing-and-intelligent waiver. App. 1a ("But the sole written opinion that the State points us to addresses only whether Aranda's claim was voluntary.").[4]

The Fifth Circuit, however, elected to infer certain state-court findings, presume the correctness of those findings, and then held that the presumed facts required summary judgment against Aranda on his *Miranda* claim. 2022 WL 16837062 at *3-4. More specifically, the Fifth Circuit decided that the state court would have found the waiver knowing and intelligent because the state court credited the government witnesses on the questions about voluntariness. *Id*. The Fifth Circuit

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[4] Before the Fifth Circuit, the Director reversed his initial course and confessed in his briefing on appeal that the federal district court had not in fact decided whether waiver was knowing and intelligent. *See* Appellee's Br.at 13 n.2 Dckt. ECF 80 ("Aranda simply argues that the district court omitted analysis of the knowing and intelligent prong, deciding only the voluntariness prong. The Court has already noted that failure, and Respondent does not now contest it."). It is unclear whether the Director was also conceding that the *state courts* had failed to decide the question of knowing-and-intelligent waiver, although there can be no argument that the state-court and federal-district-court grounds for rejecting the waiver challenge were different. A concession as to one logically operates as a concession as to the other.

reasoned that, when the state court admitted the confession as voluntary, it necessarily "found both that Aranda either explained the form and his rights in Spanish or had sufficient grasp of English to waive his rights, and that Aranda's condition was not so poor after his surgery that he was incapable of waiving his rights." *Id.* at *2. Having held that the presumption applied whenever the state record supported the inferred findings, the Fifth Circuit stated that it could not "say that such findings were unreasonable." Id. at 5.[5]

B. The Fifth Circuit Presumption Revives A Pre-2010 Split, But It Violates *Jefferson* And The Pre-AEDPA Version Of 28 U.S.C. § 2254(d).

The statute's plain text excludes the Fifth Circuit's rule for applying the pre-AEDPA presumption. The pre-AEDPA version of § 2254(d) expressly set forth *eight* circumstances under which no presumption attached. A scenario in which the state record fairly supported a state-court finding was but one of them. The Fifth Circuit rule does not permit federal courts to consider the seven others.

That holding revives a circuit split that existed before the Supreme Court decided *Jefferson v. Upton*, 560 U.S. 284 (2010). The Fifth Circuit cites its own pre-

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[5] There is no mention of the word "reasonable" in the pre-AEDPA version of § 2254(d). If what the Fifth Circuit meant was simply that the state record supported the finding, then it raises the same problem identified in Section I.B., *infra*: that the record supports a finding is sufficient to refuse a correctness presumption, but it is not necessary to do so. *Cf. Jefferson*, 560 U.S. at 293 (interpreting appellate determination that state finding was "fairly supported by the record" as a direct reference to the extant version of § 2254(d)(8)). If what the Fifth instead intended was to use "unreasonableness" as a paraphrase of the clear-and-convincing-evidence threshold for defeating a presumed finding, then it is wrong for another reason. That evaluation comes *after* fact development, not *in the process* of determining whether fact development should be permitted.

Jefferson case law—including *Soffar*, its *en banc* case—in support of its § 2254(d) presumption. The Eleventh Circuit had also used that same standard before 2010. *See Jefferson v. Hall*, 570 F.3d 1283, 1303 (11th Cir. 2009), *cert. granted, judgment vacated sub nom. Jefferson v. Upton*, 560 U.S. 284 ("It is also worth noting that [the claimant] has not argued that any of the state courts' factual findings were not fairly supported by the record, and thus, they are likewise entitled to a presumption of correctness.") (internal quotation omitted and citing *Jackson v. Herring*, 42 F.3d 1350, 1366 (11th Cir. 1995)).

This Court's decision in *Jefferson*, however, established that the Fifth and Eleventh Circuits were wrong. In *Jefferson*, the Eleventh Circuit had read prior Supreme Court decisions to require focus only on whether a state finding was fairly supported by the record. *See Jefferson*, 560 U.S. at 293 (discussing lower-court misinterpretation of Supreme Court precedent). *Jefferson* was a decision rooted squarely in statutory text:

> In our view, the Court of Appeals did not properly consider the legal status of the state court's factual findings. . . [A] federal court is not "duty-bound" to accept any and all state-court findings that are "fairly supported by the record." Those words come from § 2254(d)(8), which is only one of eight enumerated exceptions to the presumption of correctness. . . In treating § 2254(d)(8) as the exclusive statutory exception, and by failing to address Jefferson's argument that the state court's procedures deprived its findings of deference, the Court of Appeals applied the statute and our precedents incorrectly.

Id. at 293. *Jefferson*, then, unambiguously rejects the Fifth Circuit rule, both in letter and spirit. A federal court cannot apply a presumption of correctness without first considering defects in state process alleged under § 2254(d)(1) through (d)(7).

C. Under The Correct Standard, There Is No Presumption Of Correctness On The Factual Predicates For Knowing And Intelligent Waiver.

Under the pre-AEDPA version of § 2254(d), it is true that a finding cannot be presumed correct when it is *not* supported by the record; that is Subsection (d)(8). But Subsections (d)(1) through (d)(7) specify *seven other* scenarios in which there a state finding gets no presumption of correctness. As explained above, the failure of the Fifth Circuit to inquire as to factors (d)(1) through (d)(7) is black-letter error. *See Jefferson*, 560 U.S. at 285 ("Under the governing federal statute, that factual finding is presumed correct unless any one of eight exceptions applies[,]" and it is error when a federal court fails to "fully consider . . . potentially applicable exceptions."). Aranda satisfies the pre-AEDPA versions of § 2254(d)(1), (d)(2), (d)(3), (d)(6), and (d)(7).

1. There is no presumption because of the circumstances specified in § 2254(d)(1).

The pre-AEDPA version of 28 U.S.C. § 2254(d)(1) barred a correctness presumption if "the merits of the factual dispute were not resolved in the State court hearing[.]" As explained above, there was no finding on the question of-knowing-and-intelligent waiver, which the Fifth Circuit recognized. Instead, it "reconstructed" the state findings and held that several judicial comments "necessarily implied" a finding against Aranda on knowing-and-intelligent waiver. 2022 WL 16837062 at *2-4. The explanation for the inference, however, doesn't make much sense, and it wrenches transcript snippets out of context.

To infer facts in favor of knowing-and-intelligent waiver, the Fifth Circuit cited a snippet of transcript from a pre-trial hearing on the admissibility of the confession:

> But the trial court rejected these arguments, saying that it was "inclined to believe the peace officers and the District Attorney" and that "the statement will be admissible on the trial of the merits." Although the trial court made few explicit findings of fact, its ruling (and comment that it believed the prosecution's witnesses rather than Aranda) necessarily implies that it found both that Aranda was either explained the form and his rights in Spanish or had sufficient grasp of English to waive his rights, and that Aranda's condition was not so poor after his surgery that he was incapable of waiving his rights.

Id. at *2. As is evident from the full transcript, however, the trial court was crediting law enforcement provisionally, *and only on the question whether Aranda had requested a lawyer*:

> The Court finds the two peace officers and the District Attorney state that there was no effort to *request an attorney*, and the fact that the court cannot help [observing that the trial court had not credited a parallel claim that Aranda's brother had *asked for a lawyer*.] . . . . For the time being, the court is going to rule that the statement is admissible on the trial on the merits. . . . [T]he Court has nothing other than the allegation of the Defendant that he *wanted an attorney* and it's only reasonable that the Defendant would make such an allegation at this time. And I would have to say that I'm inclined to believe the peace officers and the District Attorney. So that will be the ruling of the Court for the time being.

ROA 1761-62 (emphasis added). This passage is reasonably read as a trial court provisionally crediting law enforcement witnesses on whether Aranda *invoked* his *Miranda* rights by asking for a lawyer. The passage does not create the factual inferences necessary to conclude that waiver was knowing and intelligent.

The fact that the Fifth Circuit would point to this language as sufficient to trigger an implied finding on knowing-and-intelligent waiver is especially odd because the TCCA did not even think the language was enough to sustain the admissibility of the confession at all. Instead, the TCCA had to abate the direct appeal

and send the case back down to the trial court for the trial court to make more concrete findings on the admissibility of the confession. ROA 4482. The TCCA literally held, in abating the appeal, that the trial transcript did not furnish "findings of fact or conclusions of law supporting the court's decision to admit the confession" or findings necessary to resolve "disputed factual issues." ROA 4482. When the case returned to the trial court for findings, the district court explicitly made findings as to the *voluntariness* of the *confession*. ROA 489. The trial court found facts auxiliary to its legal conclusion, but the findings of historical fact—that there were no "promises made" and no "physical abuse in any manner to induce [Aranda] to make his . . . written statement"—do not factually predicate a knowing-and-intelligent waiver. ROA 489-91. In fact, the word "waiver" does not appear in the findings, and the trial court did not discuss that concept using other terms. ROA 489-91. In short, and under the pre-AEDPA version of § 2254(d)(1), a federal court does not assume the correctness of facts that establish knowing-and-intelligent waiver because those facts were never found.

2. There is no presumption because of the "state court's process was deficient."

In *Jefferson*, this Court grouped several subsections of § 2254(d) together, reasoning that they all represented circumstances under which "the state court's *process* was deficient." 560 U.S. at 292 (emphasis in original). In *Jefferson*, the Court was thereby grouping Subsections (d)(2), (d)(6), and (d)(7), although that category logically also includes Subsection (d)(3) as well—which precluded a presumption of correctness when the material facts were not adequately developed. Just as in

Jefferson, the process here was wildly deficient. So, even if a federal court *could infer* fact finding to predicate knowing-and-intelligent waiver, those facts would *still* enjoy no presumption of correctness.

With respect to the claim at issue, state process was not just "deficient," it was abysmal. At trial, the court never made findings on knowing-and-intelligent waiver. The trial record was so unclear even as to the *voluntariness* of the *confession* that the TCCA had to abate the appeal just to have the trial court explain its decision to admit the confession. ROA 4489-91. Then the trial court entered findings about Aranda and his brother jointly—even though they had been tried in different cases—and the court found only that the *confession* was *voluntary*. ROA 488-491. There was no finding pertaining to *waiver*, let alone that wavier was knowing-and-intelligent. When the case returned to the TCCA, that court again focused only on the voluntariness of the confession, rather than anything about the waiver. ROA. 4489-91.

The legal process fell apart on state post-conviction review. When Aranda proceeded through his state habeas proceedings, condemned prisoners were not entitled to appointed counsel. To move the cases through courts, the State would serially set execution dates that it would expect to be stayed. Thus, on October 25, 1988 (still facing a November 9 execution date), volunteer counsel filed a state application and motions for stay of execution, an evidentiary hearing, and discovery.

In the Texas post-conviction application filed on October 25, 1988, the second "Claim for Relief" was that "Petitioner's uncounseled, custodial 'confession' was improperly admitted." ROA 4601-4608. Paragraph 35 indeed alleges that the

"confession was involuntary." *Id.* at 4605 (internal quotation marks omitted). But the very next paragraph alleged a distinct *Miranda* violation: "Moreover, this confession was extracted without properly informing Petitioner of his [Miranda] rights and *without Petitioner's valid waiver of those rights*." (Emphasis added.) Then, in ¶ 36, Aranda alleged the absence of knowing and intelligent waiver—that the trial court failed to "make any findings that the Petitioner knowingly and intelligently waived his rights" and that it thereby "misapplied established constitutional law which requires that the state meet its burden of proving a *knowing and intelligent waiver* of Fifth Amendment rights before an alleged confession may be admitted." *Id.* at 4606 (emphasis added). Paragraph 36 concludes with the observation that *Miranda* "requires exclusion of uncounseled, custodial confessions unless the state proves not only that the confession was voluntarily given, *but also that the defendant knowingly and intelligently waived his [Miranda rights*]." *Id.* (emphasis added).

The state post-conviction application included corresponding factual content. Specifically, Aranda alleged that: the statement came just after he had been hospitalized with gunshot wounds to his head and shoulder; that a nurse observed police threats when Aranda was in the hospital; that Aranda was taking powerful pain killers when he gave the statement; that the statement came mere hours after he finished back surgery; that he was given 100 milligrams of Demerol on top of the other pain medications; that he was taken to meet with the district attorney taking the statement in a wheelchair, while still on pain medication and recovering from surgery; that Aranda was disoriented and could not stand during the interrogation;

that the police had to instruct him what to write in his statement; that he signed an English-language Miranda waiver form; that he had only an eighth grade education; that his written and spoken English was severely limited; that he was physically beaten by police throughout the day (allegations corroborated by other people); that law enforcement showed him pictures of his brother's beating before the interrogation; and that prosecutors showed pictures of Mr. Aranda's own beating at his brother's trial. ROA 4601-04.

What little time Aranda spent in state post-conviction proceedings was attributable entirely to the state's need to answer. At the request of the State, the trial court modified the November execution date to January 25, 1989. ROA.179-185. On January 18, 1989, the State requested a second modification, and the trial court moved the scheduled execution to April 25, 1989. ROA.186- 190. On April 13, 1989, the State filed its response to Mr. Aranda's application.

There was no factfinding because there was no subsequent process at all. The *day after the State answered*, the trial court entered an Order recommending denial of Mr. Aranda's Petition—without permitting any fact development. ROA 4995. Mr. Aranda's counsel did not receive a copy of that order until four days later, on April 17, 1989. On April 18 (the next day), the TCCA adopted the trial court's recommendation, thereby denying relief and Mr. Aranda's request for a stay of the April 25 execution. Thus, there were only five days from the time of the filing of the State's post-conviction response to final adjudication in the TCCA.

Under *Jefferson*, there is no presumption of correctness because the state fact-finding process was deficient. Or, in the more precise statutory language of pre-AEDPA § 2254(d), Aranda can plausibly show that: "the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing" (Subsection (d)(2)); "the material facts were not adequately developed at the State court hearing" (Subsection (d)(3)); he "did not receive a full, fair, and adequate hearing in the State court proceeding" (Subsection (d)(6)); and his "application was otherwise denied due process of law in the State court proceeding" (Subsection (d)(7)).

* * *

There was a circuit split before *Jefferson*, and *Jefferson* resolved it. But the Fifth Circuit has revived that split, holding that the pre-AEDPA version of 28 U.S.C. § 2254(d) requires a federal court to presume the truth of any fact that is supported by the state record. That rule contravenes the plain text of the statute, and *Jefferson* rejected it explicitly. Under an appropriate interpretation of the statute, no presumption of correctness would attach to facts that might predicate a knowing-and-intelligent waiver finding. After all, there was no time to develop the claims factually, and there was no meaningful process to resolve factual disputes.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER, IN PRE-AEDPA CASES, A COURT MAY DETERMINE A CLAIMANT'S ENTITLEMENT TO A HEARING WITHOUT REFERENCE TO *TOWNSEND V. SAIN*.

The criteria for presuming the correctness of a fact found by a state court is often confused with the criteria for requiring an evidentiary hearing in federal court. 28 U.S.C. § 2254 set forth the pre-AEDPA presumption, and *Townsend* set forth the

pre-AEDPA rule for mandatory hearings. *See Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10 n. 5 (1992) ("The two issues are distinct, and the statute indicates no assumption that the presence or absence of any of the statutory exceptions will determine whether a hearing is held.") Nevertheless, the circumstances that disabled the presumption and the circumstances that required hearings overlapped considerably. *See* Randy Hertz & Lames S. Liebman*, Federal Habeas Corpus Practice and Procedure* § 20.3[a] (7th ed. 2015) ("*Townsend's* six criteria for a mandatory hearing substantially overlapped the eight factors [identified in the pre-AEDPA version of § 2254(d)] as bases for withholding a presumption of correctness from a state court factfinding").

In this case, the same defects in state procedure that should have precluded any presumption of correctness *also* should have required, under *Townsend*, a fact development on the contested *Miranda* question. Namely: (1) there was no state-court finding on any fact predicating a knowing-and-intelligent waiver finding, and (2) the state process for determining facts was woefully deficient. Instead of applying *Townsend*, however—the Fifth Circuit does not even cite it in reciting the standard for fact development—the appeals court barred fact development using a footnoted, uncited rule that bears no resemblance to *Townsend*.

A. The Fifth Circuit Applied A New And Uncited Test For Deciding Whether Aranda Was Entitled To A Hearing.

In this case, Aranda moved for discovery and a hearing. ROA 12-289. The district court denied it without explanation beyond what it provided in the course of awarding summary judgment, and Aranda appealed. Citing to nothing at all, the Fifth Circuit denied a hearing and other fact development in a footnote, reasoning

that "evidentiary hearing would not prove beneficial" because "(1) the parties have not proffered any evidence that is disputed; (2) the evidence was appropriately presented during the state-court proceedings[] and (3) Aranda has not identified any new evidence that could be developed if he were granted an evidentiary hearing at this juncture." 2022 WL 16837062 at *14 n.5. In contrast to the rule on the presumption of correctness, which is drawn from pre-*Jefferson* precedent, this "proves beneficial" standard for a federal habeas hearing has no doctrinal pedigree.

B. The Proves-Beneficial Standard Violates *Townsend v. Sain.*

The pre-AEDPA rules for fact development cannot be improvised; they are from *Townsend*. A federal court *must* permit fact development when:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313. *Townsend* admittedly reflects a worldview very different from the one that dominates the law of fact development in federal habeas proceedings. To construe the pre-AEDPA hearing requirement to limit federal fact development, *Townsend* held, "would totally subvert Congress' specific aim in passing the Act of February 5, 1967 of affording state prisoners a forum in federal trial courts for the determination of claims of detention in violation of the Constitution." 372 U.S. at 312.

The Supreme Court has repeatedly confirmed the applicability of the *Townsend* criteria in pre-AEDPA cases, even though 28 U.S.C. § 2254(e)(2) controls the inquiry in cases that claimants initiated after 1996. *See*, *e.g.*, *Tamayo-Reyes*, 504

U.S. at 10 n.5 ("*Townsend* described categories of cases in which evidentiary hearings would be *required*.") (emphasis added); *Jefferson*, 560 U.S. at 290 (noting that *Townsend* "enumerate[ed] six circumstances in which such an evidentiary hearing would be *required*") (emphasis added); *Ford v. Wainwright*, 477 U.S. 399, 410–11, (1986) ("Thus, quite simply, *Townsend* and § 2254 *require* the District Court to grant a hearing de novo on that question.") (emphasis added).

The footnoted test used by the Fifth Circuit ignores criteria for mandatory hearings that center on the adequacy of state process. Paraphrasing the opinion, the Fifth Circuit denied a hearing because, it stated, (1) there was no disputed evidence, (2) the evidence was appropriately *presented* in state court, and (3) there was no new evidence. The prove-beneficial test fails to cover multiple *Townsend* scenarios: scenario (1), where "the merits of the factual dispute were not resolved in the state hearing"; scenario (3), where "the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing"; scenario (5), where "the material facts were not adequately developed at the state-court hearing"; and scenario (6), where it otherwise "appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." 372 U.S. at 313. The Fifth Circuit rule is the most straightforward legal error imaginable.[6]

[6] Although the focus here is the Fifth Circuit's error of law, Aranda preserves his objection to its application of its own test. For example, the Fifth Circuit holding that no disputed evidence exists is bizarre. This entire litigation centers around several factual disputes, including disputes over whether Aranda was under the influence of narcotics, whether he had sufficient understanding of English to waive knowingly and intelligently, whether there were Spanish translations, and so forth.

C. Under *Townsend*, Aranda Was Entitled To A Hearing

1. Aranda is entitled to a hearing under *Townsend* factor (1) because "the merits of the factual dispute were not resolved in the state hearing."

As explained above, the state courts never made a finding as to knowing-and-intelligent waiver. The Fifth Circuit "reconstructed" that holding when it inferred predicate facts from the state-court holding that the confession was voluntary. App. 1a. But no federal court could reconstruct a knowing-and-intelligent waiver finding on the existing record—at least not using *Townsend*'s limits on such reconstructed findings.[7]

First, under *Townsend*, a fact cannot be inferred unless it is clear that the state court applied the correct legal standard in resolving an issue against a defendant. *See* 372 U.S. at 314 ("Reconstruction is not possible if it is unclear whether the state finder applied correct constitutional standards in disposing of the claim. Under such circumstances the District Court cannot ascertain whether the state court found the law or the facts adversely to the petitioner's contentions."). In this case, there can be no findings about the facts that might predicate knowing and intelligent waiver—such as Aranda's English fluency and the degree to which he remained under the influence of drugs—because the state court applied no legal standard at all. It simply confused the issue with the *voluntariness* of the waiver.

Second, *Townsend* also makes clear that there can be no reconstruction when "the so-called facts and their constitutional significance (are) so blended that they

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[7] Although Aranda focuses on other *Townsend* factors, he hereby preserves the factor (2) argument that the state record does not fairly support any finding.

cannot be severed in consideration." 372 U.S. 315 (internal citations and quotation marks omitted). Here, the Fifth Circuit tried to infer predicate facts about knowing-and-intelligent waiver from a state-court finding on voluntariness, which is a textbook example of a mixed legal-factual question. App. 1a. The abstract state-court findings that Aranda "gave his statement voluntarily of his own free will" and that Aranda was not subject to "undue interrogation" do not imply the types of historical facts that preclude a hearing. *See* ROA.490-91 (trial court findings); *see also* *Thompson v. Keohane*, 516 U.S. 99, 107-12 (1995) (explaining that hearings are available on a state-court finding of voluntariness unless the finding definitively resolves "facts" that fall in the "what happened" category).

2. Aranda is entitled to a hearing under *Townsend* factors (3), (5), and (6) because the state process for finding facts was deficient.

Townsend factors (3), (5), and (6) go generally to the adequacy of the state process for finding facts—specifically, whether the state-court process, including factfinding, amounted to a full and fair adjudication of the factual dispute. "If federal factfinding is to be avoided, then, in addition to providing a court judgment on the constitutional question, the State must also ensure that its procedures are adequate for the purpose of finding the facts." *Ford v. Wainwright*, 477 U.S. 399, 411 (1986). For the reasons set forth in Section I.C., *supra*, the state court proceedings were not full and fair, and do not exhibit the indicia of reliable procedure necessary to preclude factfinding in a federal court.

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The Fifth Circuit appears to have improvised its "prove-beneficial" standard, and it is flatly inconsistent with *Townsend*. Aranda recognizes that he might not be entitled to a full-blown hearing in which the court takes live testimony, but he is entitled to fact development. Summary judgment is inappropriate for that reason. And setting aside whether there was process sufficient to preclude federal reconsideration of a state-court finding of fact, there is not even a state-court finding of fact to reconsider. No amount of inference can manufacture the phantom factual findings necessary to bar federal fact development.

III. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE QUESTIONS PRESENTED BECAUASE, BUT FOR THE FIFTH CIRCUIT'S LEGAL ERRORS, IT COULD NOT HAVE GRANTED SUMMARY JUDGMENT IN THE DIRECTOR'S FAVOR.

The Fifth Circuit affirmed a summary judgment on an issue that neither the district nor state courts actually resolved: whether Aranda waived his *Miranda* rights knowingly and intelligently. When the Fifth Circuit entered summary judgment, moreover, it did so without permitting fact development to which Aranda was plainly entitled under the pre-AEDPA statute. After all, the Director was not entitled to summary judgment on the *Miranda* claim unless "there is no genuine dispute as to any material fact[.]" Fed. R. Civ. P. 56(a).

The leading pre-AEDPA case on the availability of summary judgment and fact development is *Blackledge v. Allison*, 431 U.S. 63 (1977). In *Allison*, the Court reaffirmed that summary judgment in pre-AEDPA cases worked the same way that it did in all civil cases. The district court can "employ a variety of measures in an effort to avoid the need for an evidentiary hearing," including discovery, but a federal

claimant is "entitled to … full opportunity for presentation of the relevant facts." *Allison*, 431 U.S. at 82-83 (quoting *Harris v. Nelson*, 394 U.S. 286, 298 (1969)). According to the leading habeas corpus treatise, summary judgment in pre-AEDPA cases requires that "the factual record actually before the court must *absolutely preclude* the court from finding facts, including ones not yet explored at a hearing, that would support the claim." *See* Randy Hertz & Lames S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 15.2[c][i] (7th ed. 2015).[8]

Absent the Fifth Circuit's holdings on the correctness presumption and on the evidentiary hearing, there could have been no summary judgment in the Director's favor—because there were disputed issues of material fact. The federal habeas petition attached and identified evidence that, viewed in a light most favorable to Aranda, created a factual dispute over whether *Miranda* waiver was knowing and intelligent. That attached material included evidence that the State secured the waiver just after Aranda had been discharged from surgery, and the record shows that the jail to custody of him under doctor's orders to continue his heavy course of painkilling drugs. Section I.A., *supra*. The federal habeas petition also attached evidence that Aranda did not speak sufficient English, and that he and his brother

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[8] The denial of summary judgment would follow naturally under Fifth Circuit law, but for the legal errors involving the presumption of correctness and the hearing. That is because, "[w]hen there is a factual dispute, that, if resolved in the petitioner's favor, would entitle her to relief and the state has not afforded the petitioner a full and fair evidentiary hearing, a federal habeas corpus petitioner is entitled to discovery and an evidentiary hearing." *Petrillo v. Johnson*, 79 F.3d 441, 444 (5th Cir. 1996) (internal quotation marks and alterations omitted); *see also Clark v. Johnson*, 202 F.3d 760, 766 (5th Cir. 2000) (characterizing this principle as a "consistently held" rule).

had been beaten before the waiver. The invalidly waived statement, in turn, was a pivotal piece of the prosecution.

A. *Miranda* Waiver Was Not Knowing And Intelligent.

Under *Miranda*, a person subject to custodial interrogation must be notified of certain rights, and a statement is usually admissible only after that person has waived them. *Miranda* itself emphasized the criteria for finding waiver, holding that a post-warning statement given a in a custodial setting is a constitutional violation unless "[t]he defendant … waive[d] effectuation of these rights … voluntarily, knowingly and intelligently." 384 U.S. at 444. This Court's precedent establishes that the requirements of voluntary waiver, on the one hand, and knowing-and-intelligent-waiver, on the other, are distinct—a court must find both before deciding that a waiver is valid. *See Edwards v. Arizona*, 451 U.S. 477, 484 (1981). Given the constitutional stakes, the "prosecution's burden [to show waiver] is great." *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). In *Moran v. Burbine*, 475 U.S. 412 (1986), the Supreme Court again held—even more clearly—that *Miranda* requires a waiver that is voluntary *and* one that is knowing and intelligent:

> The [waiver] inquiry has *two distinct dimensions*. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. 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.

Burbine, 475 U.S. at 421 (emphasis added).

Evidence attached to and identified in the federal habeas petition creates a genuine issue of material fact as to whether Aranda's putative waiver of his Fifth Amendment rights—in the form of his handwriting on an English-language, pre-printed waiver form—was not knowing and intelligent. The federal habeas petition cited substantial, yet-to-be-adjudicated evidence "that Petitioner was not capable of executing a valid waiver" of his *Miranda* rights, that "he did not understand" the English-language waiver form, that he lacked predicates for valid waiver because he did not know he was facing a capital murder charge, and that "he was not sufficiently recovered from the surgery early that day to assess intelligently the consequences of a waiver presented to him that night." ROA.54-55.

In *Burbine*'s terms, Aranda did not have "*full awareness* of both the nature of the right being abandoned and the consequences of the decision to abandon it." 475 U.S. at 21 (emphasis added). Evidence attached to the federal petition showed that: present at Aranda's custodial interrogation were two police officers and District Attorney Borchers, but no counsel; Aranda signed the statement just after he had been hospitalized with multiple gunshot wounds; a nurse observed police threats when Aranda was in the hospital; Aranda was taking powerful pain killers when he gave the statement; the statement itself came mere hours after he finished back surgery; he was given 100 milligrams of Demerol on top of the other pain medications; he was taken to meet with District Attorney Borchers in a wheelchair, while still on pain medication and recovering from surgery; Aranda was disoriented and could not stand during the interrogation; the police had to instruct him what to write in his

statement; he signed a preprinted, English-language *Miranda* waiver form; he had only an eighth grade education; and his written and spoken English was severely limited, as evidenced by the subsequent need for trial interpreters and bilingual attorneys. ROA.235-45, 248-49, 255-60, 246-48, 1719-53, 3461, 3704, 4045-46, 4083-4104.

Under these conditions, and absent the legal mistakes involving the presumption of correctness and the hearing, a federal appeals court would not be able to render summary judgment on the question of knowing-and-intelligent waiver. And it certainly could not enter such judgment *on appeal*, without first permitting the district court to apply the law of factfinding correctly. After all, *the state* has the burden of proof on this issue, and so *the state* must demonstrate both that the waiver was voluntary and, separately, that it was made knowingly and intelligently.

B. The Improperly Admitted Confession Was Harmful.

The contradictory physical evidence, the state's reliance on Aranda's statement, the trial court's emphasis in the jury instructions, and the unique persuasive power of confessions make clear that the admission of Aranda's illegally obtained confession "had substantial and injurious effect or influence" on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). The *Brecht* standard for harm is lower than the standard for *Brady* materiality or *Strickland* prejudice. *See Kyles v. Whitley*, 514 U.S. 419, 435 (1995) (holding that "reasonable probability" standard is higher than *Brecht* standard).

The prosecution's ability to convince the jury to convict Aranda of capital murder was dependent on its ability to persuade the jury that it was Aranda who

deliberately fired the fatal shot, and that he fired that shot *before* either police officer fired their weapons. But there were no independent witnesses to testify as to Aranda's intent or the sequence of gunshots, the surrounding testimony was contradictory, and the physical evidence was equivocal at best. Moreover, the crucial events took place in the span of frenzied seconds, where all parties involved were under tremendous pressure. Aranda's confession rendered those gaps and contradictions irrelevant and easily overlooked. The non-confession evidence about who fired which shots and in what order was so profoundly inconclusive that, in prosecuting *Juan Aranda*, the state maintained that Juan was *"identified in court as having fired the fatal bullet*." *Juan Aranda v. State*, 640 S.W.2d 766, 769 (1982) (emphasis added).

The State's evidence against Aranda relied heavily on the testimony of Officer Viera, who was the only surviving policer officer who was present at the scene of the shooting. In the offense report, Officer Viera stated that "Patrolman Albidrez stopped his unit some six feet in front of suspects vehicle while Officer Viera in his vehicle was on back of suspects vehicle." ROA.4073. Officer Viera's testimony and drawings parallel this description of the scene. ROA.3067-68; SX8. In other words, all evidence suggests that Officer Viera was behind the Arandas' car, Patrolman Albidrez was in front of it, and the Aranda brothers were between the two law enforcement personnel, in the car itself. Officer Viera eventually testified that Officer Albidrez was shot by a gun "blast" from the passenger side of the Arandas' car. ROA.3074-77. The testimony of an eyewitness in this position—a witness who was under immense stress, viewing events in the middle of the night, engaged in a lethal gunfight alongside a patrolman

he knew and trained, and purporting to describe an exact sequence of gunshots that occurred in a matter of seconds—is inherently unreliable. *Cf.*, *e.g.*, *People v. Lerma*, 2016 IL 118496, ¶ 26, 47 N.E.3d 985, 993 (listing "stress of the event itself, the use and presence of a weapon, . . . [and] nighttime viewing" among factors that "contribut[e] to the unreliability of eyewitness testimony"); *State v. Guilbert*, 306 Conn. 218, 237–38 (2012) (noting that "[c]ourts across the country now accept that . . . "high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events"). Under such circumstances, that Officer Viera could confidently declare the sequence of shots, and know who fired the fatal bullet, is implausible.

While ballistics sometimes clarify events, there was no clarification here. First, there was conflicting testimony as to whether either of the Aranda brothers possessed, at the time of the shooting, the .38 caliber handgun that the State introduced into evidence as the murder weapon. To believe the assertion that the handgun was not "found" until Aranda was in the hospital would require believing the rather incredible scenario that Aranda successfully concealed the weapon throughout his arrest and transportation to the hospital. To make matters worse, the firearm toolmark evaluation purporting to match the .38 caliber handgun found on Aranda's person at the hospital was not conclusive.

In light of all the problems with the other evidence, the confession was key. Although District Attorneys Borchers began his final argument by saying he "didn't

need that statement of Arturo's," he then spent a page-and-a-half discussing it. Borchers begins by arguing that Aranda's confession was not coerced, stating:

> No one laid a hand on that man . . . He walked under his own power. . . Sure, he was given pain killers, Demerol, at 1:00 o'clock in the afternoon, or earlier, according to this. But is there any testimony from this witness stand as to his condition …. It's in his own handwriting, his own spelling. Everything is here, you can see that. Does it look like somebody grabbed his hand or forced him into it? If it was forced, then somebody would have had to write this and then get him to sign it.

ROA. 4181-82.

Having addressed the question of the circumstances of the confession, Borchers then relies on the confession to support the state's version of events:

> And had we not introduced this into evidence, then that's probably the first thing defense Counsel would then be yelling about, "Where is that statement? What do they have to hide?" Here it is. "I was sitting on the passenger side." There are so many things here that no one of us knew that were present. Only he knew. For example, everything on the first page, he says, "I was sitting on the passenger side. The policeman was coming. I had the gun in my hand, so I fired." *He fired first*, because they had 320 pounds, because he knew his brother was on parole. He knew he'd have to go back right away. He didn't want to do that.

ROA.4182 (emphasis added). As this Court has recognized, reference and reliance on tainted evidence during a prosecutor's closing carries particular weight and is therefore particularly harmful. *See*, *e.g.*, *Banks v. Dretke*, 540 U.S. 668, 701 (2004) (explaining that harm inquiry is particularly sensitive to whether the prosecution refers to tainted evidence at closing); *United States v. Barham*, 595 F.2d 231, 242 (5th Cir. 1979) (emphasizing that tainted evidence is particularly harmful when the state "actually capitalized on it by referring to it in closing argument to the jury").

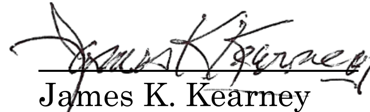
Aranda's confession was central to the state's case, allowing the State to gloss over the numerous gaps and inconsistencies in the other evidence. Indeed, that is what confessions usually do, and why unconstitutionally admitted confessions are so harmful. "A confession is like no other evidence," *Arizona v. Fulminante*, 488 U.S. 279, 295 (1991), and so "[c]onfessions are the most incriminating and persuasive false evidence of guilt that the state can bring against an innocent defendant." Richard A. Leo, *Police Interrogation And American Justice* 247, 248 (2008). Even in cases with abundant other evidence showing guilt, an erroneously admitted confession is extraordinarily damaging. "The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him . . . Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting). Although an unlawfully admitted confession still requires a showing of harm, that showing of harm is much easier to make because the confession "may have a more dramatic effect on the course of a trial than other trial errors" and "it may be devastating to a defendant." *Fulminante*, 488 U.S. at 312.

Finally, the jury instructions compounded the harm. They contained one-and-a-half pages—about fifteen percent of the whole charge—devoted to the statement. ROA 4391-98. Any reasonable juror receiving those instructions would come away with the impression that the statement was the pivotal evidence in the case.

CONCLUSION

The Fifth Circuit awarded summary judgment on a *Miranda* claim that had not been adjudicated in state or federal district court. In so doing, it presumed the truth of phantom factfinding, it ignored the manifest deficiencies in state process, and it misapplied controlling law for evidentiary presumptions and federal fact development. And two other factors elevate the cert-worthiness of the case further. First, the Fifth Circuit's rule for the correctness presumption revives an otherwise defunct circuit split. Second, its error exposes a person nearing a half-century on death row to the risk of an unlawful execution.

Respectfully submitted,



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