No. 22-7301
(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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Congress modified 28 U.S.C. § 2254(d) when it passed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), and substantially changed how federal courts determine facts in habeas cases. The pre-AEDPA version of § 2254(d) controls Arturo Aranda's 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.

Aranda's Petition for Certiorari presents two narrow but important issues regarding the application of pre-AEDPA law. First, 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*? Second, does the Fifth Circuit's test for mandatory factfinding used in Aranda's case, which makes no reference to the sufficiency of state process, violate *Townsend*?

The Director, in his Brief in Opposition ("Br.Opp."), elevates above any attempt to respond directly to these issues unwarranted attacks marginalizing the importance of capital cases brought under pre-AEDPA law, both generally and with respect to Aranda's long-pending case. Far from being an "example of a fact-bound request for error correction" as asserted by the Director (Br.Opp.2), Aranda's case raises issues of pre-AEDPA rights that remain cogent and important to capital habeas litigants still litigating constitutional challenges to their state convictions and sentences

brought pre-AEDPA, and as well to clarifying the parameters of federal remedies controlling federal habeas cases brought after AEDPA.

In 1996, AEPDA limited federal habeas process, making radical changes to rules – including factfinding and merits review – controlling 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 provided fact-development to prisoners who had received full and fair 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 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 Aranda's 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*. In doing so, the Fifth Circuit revived a pre-2010 split about the rule for presumption of correctness of state court findings. 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. In *Jefferson*, this Court aligned with the circuits that held that any of eight statutorily specified conditions could disable the correctness presumption—whether the state record fairly supported the state-

court finding or not. The Fifth Circuit was not one of those circuits, having attached a presumption whenever the state record supported state-court findings.

In this case, the Fifth Circuit revived the pre-*Jefferson* split when it summarily determined that Aranda's *Miranda* waiver was knowing and intelligent. ROA[1] 3058-68; 3761-72. The Fifth Circuit 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. The Fifth Circuit did so without examining any of the statutorily specified conditions for which no presumption of correctness attached to a state finding of fact. In addition, the Fifth Circuit upheld the district court's refusal to provide fact development to Aranda, without first addressing the sufficiency of state process, in apparent contravention of this Court's ruling in *Townsend*, which was the pre-AEDPA standard for mandatory fact development applicable to the Aranda case.

Rather than addressing the narrow issues of the proper application of pre-AEDPA law and this Court's rulings in the *Jefferson* and *Townsend* cases, the Director chooses to follow the path set by the Fifth Circuit and argue how the state court record can be said to support the state's findings, with only glancing attention paid to the narrow issues for which Aranda seeks *certiorari* review by this Court. Where he chooses to address the core issues, the Director posits arguments that would be appropriately considered only if the state had provided Aranda with a full

[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).

and fair hearing on his constitutional challenges. But the state did not do so, and the Director, like the Fifth Circuit in its decision, is left to argue inferences drawn from facts that are in some cases disputed and in others incomplete.

Moreover, the Director seems to believe that a meritorious constitutional claim should be denied Aranda because he "allowed his own habeas petition to languish for a quarter of a century." Br.Opp.1. The Director – who over the course of this quarter of a century has been represented by multiple lawyers from the Office of the Attorney General, none of whom made any attempt to move this case forward – believes he is the victim here. When the Director made this argument in the district court below, he drew this response:

> [The Director] lays blame at Aranda's feet for that delay but fails to acknowledge the State's own interest in an expedient defense of its judgments. Years ago, the State repeatedly tried to execute Aranda's death sentence while courts considered his constitutional claims, but then has made no effort to move this litigation forward for almost three decades. . . Yet the State of Texas has shown no interest in effectuating Aranda's valid criminal sentence nor expressed concern at the pending federal litigation. Respondent's own inaction discourages any reliance on laches or other procedural defenses.

ROA.1478.

The Director's tone is particularly inappropriate given the state process at the time Aranda's state and federal habeas petitions were filed, which forced him to litigate at breakneck speed through a sham state post-conviction and initial federal habeas process, constantly under the shadow of an execution date that prevented him from developing his claims factually. Equities tilt toward Aranda, not the Director.

I. THE UNIQUE CIRCUMSTANCES OF THIS CASE WEIGH STRONGLY IN FAVOR OF GRANTING CERTIORARI TO DETERMINE WHETHER, APPLYING PRE-AEDPA LAW, A FACT MAY BE PRESUMED IN THE STATE'S FAVOR WHENEVER IT IS "SUPPORTED BY THE RECORD."

The Director concurs that the pre-AEDPA version of 28 U.S.C. § 2254(d) controls the conditions under which a presumption of correctness attaches to state factual determinations in Aranda's case. Under pre-AEDPA law, a federal district court *must* hold a hearing if "the merits of the factual dispute were not resolved in the State court hearing" (pre-AEDPA version of 28 U.S.C. § 2254(d)(1)); "the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing" (§ 2254(d)(2)); "the material facts were not adequately developed at the State court hearing" (§ 2254(d)(3)); "the applicant did not receive a full, fair, and adequate hearing in the State court proceeding"(§ 2254(d)(5)); or " the applicant was otherwise denied due process of law in the State court" (§ 2254(d)(6)). The district court *may* hold a hearing in all other cases. *See Townsend*, 372 U.S. at 318.

Knowing and Intelligent Waiver Findings

It appears that the Director agrees that, with respect to the *Miranda* claim, the state court did not make an explicit finding that Aranda's *Miranda* waiver was knowing-and-intelligent. Rather, the Director chooses to argue that a pre-trial suppression hearing at which the then trial judge reached "preliminary" conclusions regarding the voluntariness of Aranda's confession suffices as a full and fair hearing on Aranda's *Miranda* claim for purposes of satisfying pre-AEDPA law. However, neither that hearing nor anything that later transpired at the trial court produced

findings regarding the knowing-and-intelligent waiver requirement on which a valid *Miranda* waiver could be based.

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 explicit finding on the question of knowing-and-intelligent waiver, which the Fifth Circuit recognized. Instead, it "reconstructed" state findings, finding that certain judicial comments "necessarily implied" a finding of knowing-and-intelligent waiver. 2022 WL 16837062 at *2-4. The inference of such a waiver, however, rests on transcript snippets taken out of context. For example, to infer facts in favor of knowing-and-intelligent waiver, the Fifth Circuit cited a snippet of transcript from the pre-trial hearing on the admissibility of the confession. *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*. This passage does not create the factual inferences necessary to conclude that waiver was knowing and intelligent, nor has the Director pointed to any other.

In fact, the direct appeal in Aranda's case had to be abated because the Texas Court of Criminal Appeals ("TCCA") determined that the trial court had made no findings on the admissibility of the confession *at all*. The TCCA 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. Even after the trial court made post-

abatement findings, those findings were limited to the question of voluntariness, and they were findings about Aranda and his brother jointly—even though they had been tried in different cases. ROA 4488-4491. 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. There was no finding pertaining to *waiver*, let alone that wavier was knowing-and-intelligent. 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. When the case returned to the TCCA, that court focused only on the voluntariness of the confession, rather than anything about the waiver. ROA 4489-91.

Petitioner has Preserved his Miranda Claim

Apparently leveraging a statement made by the district court below that "Petitioner makes no claim that his confession was not intelligently made, or that he did not understand the Miranda warnings when given," ROA.873, the Director claims that Aranda has not properly preserved his *Miranda* claim. But, as the Fifth Circuit explained in its Certificate of Appealability ("COA") Order, Aranda extensively alleged in his habeas petitions that the *Miranda* waiver was not knowing and intelligent. In its COA Order, the Fifth Circuit expressly rejected the proposition the Director now puts forward: "In short, Aranda made the basis of his Miranda claim adequately clear in his petition and in his subsequent briefing." COA Order at *6.

Substantial and Injurious Effect or Influence

The Director also argues that Aranda cannot obtain habeas relief because he cannot show prejudice related to the admission of his uncounseled confession, citing to *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). However, the record establishes that the introduction of his confession "had substantial and injurious effect or influence" on the jury's verdict, meeting the threshold injury standard of *Brecht*. This is clear from 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.

The prosecution's case against Aranda depended on its ability to persuade the jury that Aranda 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, and the physical evidence was equivocal at best. Aranda's confession rendered those gaps and contradictions irrelevant and easily overlooked. Indeed, the non-confession evidence on those crucial facts was so muddled that in Juan Aranda's separate trial, the State maintained that Juan had fired the fatal bullet; Juan was in fact *"identified in court as having fired the fatal bullet*." *See Juan Aranda v. State*, 640 S.W.2d 766, 769 (1982). That Juan shot the victim is consistent with Officer Viera's testimony in Arturo's case that the first shot came from inside the vehicle. ROA.3174-3175.

The fact that it was Aranda's trial counsel who first mentioned the confession is irrelevant. In light of the problems with the other evidence, the confession was key

regardless of who first mentioned it. Although District Attorney 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, and then relies on the confession to support the State's version of events. ROA. 4181-4182. 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 4391-4398.

As this Court has recognized, reference to 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). "A confession is like no other evidence," *Arizona v. Fulminante*, 488 U.S. 279, 295 (1991). 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.

Notably, this Court has explained that the *Brecht* standard did not shift a "burden of proof" to the claimant. *O'Neal v. McAninch*, 513 U.S. 432, 437 (1995). *O'Neal* held that when the two sides fight to a draw, and where "grave doubt" about whether the prisoner-claimant satisfies the harmless error standard, the "uncertain judge" should find in the prisoner's favor. *Id.* at 435.

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 Director does not appear to disagree that the pre-AEDPA version of § 2254(d) (1) disables any evidentiary presumptions and *mandates* a federal hearing when the merits of the factual dispute – in this case whether the Miranda waiver was knowing-and-intelligent – were not resolved in the state court hearing.

Moreover, the Director does not dispute that under the law applicable to Aranda's petition at the time it was filed, the deliberate-bypass standard of *Townsend* controlled the hearing question.[2] Under that standard, any claimant otherwise qualified for a hearing may be barred only if they "deliberately bypass" fact development in state court. There is no such bypass unless claimant "after consultation with competent counsel or otherwise, *understandingly and knowingly* forewent the privilege of seeking to vindicate his federal claims in the state courts[.]" *Fay v. Noia*, 372 U.S. 391, 439 (1963), *overturned by Coleman v. Thompson*, 501 U.S. 722 (1991) (emphasis added).[3]

In this case, the same defects in state procedure that should have precluded any presumption of correctness *also* should have required, under *Townsend*, fact

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[2] The Supreme Court replaced the deliberate-bypass standard with a cause-and-prejudice rule in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992).

[3] There can be no serious argument that Aranda deliberately bypassed fact development in state court. On October 25, 1988, he asked for discovery and a hearing, and in the accompanying state post-conviction application he pleaded a challenge based on the absence of knowing-and-intelligent waiver. ROA 9196-9235.

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 deficient.

Instead of applying *Townsend*, which the Fifth Circuit does not even cite in reciting the standard for fact development, it barred fact development using its own "prove-beneficial" standard, which is flatly inconsistent with *Townsend*. The standard used by the Fifth Circuit ignores criteria for mandatory hearings that center on the adequacy of state process. 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. But, this 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. To construe the pre-AEDPA hearing requirement to limit federal fact development, *Townsend* held, "would totally subvert Congress' specific aim . . . 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 Director argues that the State provided a full and fair hearing, thereby justifying the federal courts' denial of fact-finding and a hearing under *Townsend*.

Specifically, the Director points to the Fifth Circuit's "reconstructed" finding of knowing-and-intelligent waiver based on inferences drawn from the State's hearing and ruling regarding the voluntariness of Aranda's confession. App. 1a.

But, the Fifth Circuit's "reconstructed" finding was clearly improper, as it was based on an existing record that had not applied the correct legal standard to determine a knowing-and-intelligent waiver. The existing record was filtered thru a standard based solely on the voluntariness of the confession; the state court did not articulate and apply a legal standard for knowing-and-intelligent waiver. The Director never disputes this issue.

Under *Townsend*, a fact cannot be inferred unless the state court clearly 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."). The state courts here did not apply the correct constitutional standard, confining references to voluntariness of the confession. There can be no finding of knowing and intelligent waiver based on predicate facts such as Aranda's English fluency and the degree to which he remained under the influence of drugs when these facts were assessed only with relation to the *voluntariness* of the waiver.

Townsend makes clear that there can be no reconstruction when "the so-called facts and their constitutional significance (are) so blended that they cannot be severed

in consideration." 372 U.S. at 315 (internal citations and quotation marks omitted). Here, the Fifth Circuit improperly inferred predicate facts about knowing-and-intelligent waiver from a state-court finding of voluntariness, *i.e.* that Aranda "gave his statement voluntarily of his own free will" and that Aranda was not subject to "undue interrogation." *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).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Dated: June 30, 2023

Respectfully submitted,

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