ORIGINAL

No. 23-____ (CAPITAL CASE)

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**IN THE SUPREME COURT OF THE UNITED STATES**

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Arturo Daniel Aranda,
*Applicant*,

v.

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

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# MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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James K. Kearney
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8350 Broad Street, Suite 1500
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James.kearney@wbd-us.com

*Counsel for Applicant*

The petitioner asks leave to file a Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis*. In this proceeding, petitioner was granted leave to proceed *in forma pauperis* in the 24th Judicial Court, Victoria County, Texas and in the United States District Court for the Southern District of Texas and the United States Court of Appeals for the Fifth Circuit. The petitioner has been represented by counsel on a pro bono volunteer basis.

March 9, 2023

Respectfully submitted,

/s/ James K. Kearney
James K. Kearney
Member of the Supreme Court Bar and Counsel of Record
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NO. 9539

THE STATE OF TEXAS — IN THE DISTRICT COURT

VS. — 24th JUDICIAL DISTRICT

ARTURO D ARANDA — VICTORIA COUNTY, TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes ARTURO D. ARANDA, defendant in the above styled and numbered cause, and respectfully petitions the Court to appoint counsel to represent him in said felony cause and would show to the Court that he is too poor to employ counsel.

____________________
DEFENDANT

Sworn to and subscribed before me on this, the 2 day of March, A. D. 1979.

ALTON SPOERL, DISTRICT CLERK

By ____________________
DEPUTY

ORDER APPOINTING COUNSEL

On this, the 2 day of MARCH, A. D., 1979, is appearing to the Court that the above named defendant has executed an affidavit stating that he is without counsel and is too poor to employ counsel, it is ordered that:

Honorable JUAN Velasquez is hereby appointed to represent the above named defendant in said cause.

Signed this 2 day of MARch, A. D., 1979

[signature]
Judge Presiding

..........................................................................

CERTIFICATE OF REPRESENTATION OF DEFENDANT AND REQUEST THAT COUNTY AUDITOR ISSUE PAYMENT WARRANT TO ATTORNEY

I certify that: Honorable JUAN Velasquez Attorney

Address 111 N. Glass St. VICTORIA, TEXAS

Represented __________ Defendant

In Cause No. __________

He spent __________

Date (s) __________

__________ in trial

and shall be paid $__________ from the County Funds of Victoria County, Texas

I further certify that said attorney has not been authorized to receive any compensation for other appointive services, in this court, on any date indicated above.

____________________
Judge Presiding

CERTIFICATE OF COUNTY AUDITOR

This is to certify [illegible]

United States District Court
Southern District of Texas
FILED

DEC 31 1991

Jesse E. Clark, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

DEC 31 1991

Jesse E. Clark, Clerk
By Deputy:
M. Gammon

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

| | | |
|---|---|---|
| ARTURO DANIEL ARANDA, Petitioner | § | CIVIL ACTION NUMBER |
| VS. | § | V-89-13 |
| JAMES A. COLLINS, DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION, Respondent | § | |

## ORDER

Having come on to be considered the Petitioner's Motion for Leave to Proceed *In Forma Pauperis*, the Court is of the opinion that said Motion should be granted. It is therefore,

ORDERED, ADJUDGED, and DECREED that Petitioner's Motion is hereby GRANTED, and the Petitioner shall be allowed to proceed *In Forma Pauperis* as he has already been allowed to do so.

The Clerk shall send a copy of this Order to the Petitioner, his counsel and to counsel for the Respondent.

Done this 31st day of December, 1991, at McAllen, Texas.

Ricardo H. Hinojosa
UNITED STATES DISTRICT JUDGE

ORIGINAL

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]

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[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.

* * *

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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ORIGINAL

No. 23-______(CAPITAL CASE)

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**IN THE SUPREME COURT OF THE UNITED STATES**

---

Arturo Daniel Aranda,
*Applicant*,

v.

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

---

## CERTIFICATE OF SERVICE

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I, James K. Kearney, a member of the bar of this Court, hereby certify that, on this 9th day of March, 2023, all parties required by the Rules of this Court to be served have been served. Three copies of the Petition for a Writ of Certiorari in the above-captioned case were sent via FedEx to counsel listed below. I also certify that an electronic version of the aforementioned document was transmitted by e-mail to counsel at the e-mail address listed below.

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March 9, 2023

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ORIGINAL

**No. 23-_____ (CAPITAL CASE)**

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**IN THE SUPREME COURT OF THE UNITED STATES**

---

Arturo Daniel Aranda,
*Applicant*,

v.

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

---

# PETITION APPENDIX

---

Respectfully submitted,

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March 9, 2023

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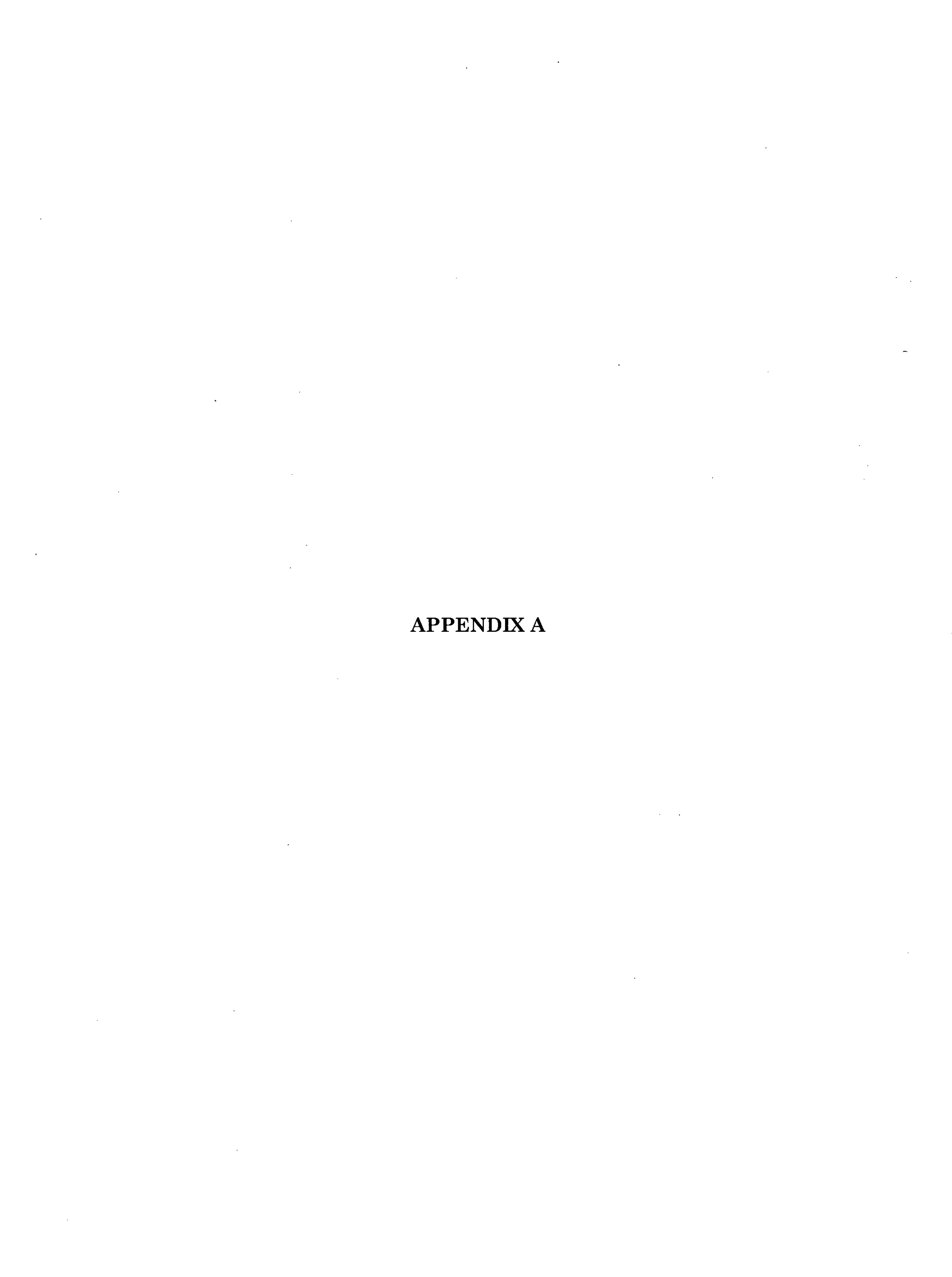

# APPENDIX A

2022 WL 16837062
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Arturo Daniel ARANDA, Petitioner—Appellant,
v.
Bobby LUMPKIN, Director, Texas
Department of Criminal Justice, Correctional
Institutions Division, Respondent—Appellee.

No. 20-70008
|
Summary Calendar
|
FILED November 9, 2022

Appeal from the United States District Court For the Southern District of Texas, USDC No. 6:89-CV-13, Kenneth M. Hoyt, U.S. District Judge

**Attorneys and Law Firms**

James Kevin Kearney, Esq., Womble Bond Dickinson, Tysons, VA, Bruce Locke, Esq., Moss & Locke, Sacramento, CA, for Petitioner—Appellant.

Matthew Dennis Ottoway, Assistant Attorney General, Natalie Deyo Thompson, Office of the Attorney General of Texas Office of the Solicitor General, Austin, TX, for Respondent—Appellee.

Before Haynes, Graves, and Engelhardt, Circuit Judges.

**Opinion**

Per Curiam: *

***1** Petitioner Arturo Aranda was convicted of the murder of a police officer and sentenced to death. Following state court proceedings, Aranda petitioned for a writ of habeas corpus in federal court, which the district court denied. Aranda then sought a certificate of appealability on various issues from this court. We granted the certificate of appealability on two issues: (1) Aranda's *Miranda* claim and (2) Aranda's ineffective-assistance-of counsel-claim. Having now considered those issues on the merits and having held oral argument, we affirm the district court.

**I**

Early in the morning hours of July 31, 1976, brothers Arturo and Juan Aranda were in the process of transporting a large quantity of marijuana from Laredo to San Antonio, Texas. The brothers were stopped by Officers Pablo Albidrez and Candelario Viera of the Laredo Police Department. A gunfight erupted, and Officer Albidrez was shot through the chest and killed. The Aranda brothers were apprehended and arrested near the scene.

During the gunfight, Arturo Aranda was hit in the shoulder and hand. He was transported to a hospital, where a .38 caliber handgun was found hidden in his pants. Ballistic testing later showed that this weapon could have fired the bullet that killed Officer Albidrez, and no other recovered weapon could have. Following a brief surgery, Aranda was transported to the Webb County Jail, where he confessed to killing Officer Albidrez. He also signed a written waiver of his *Miranda* rights. As relevant to this appeal, he argues his waiver of his *Miranda* rights was not knowing and intelligent.

Both brothers were charged for the murder of Officer Albidrez. Juan Aranda was tried first; he was found guilty and sentenced to life in prison. Arturo Aranda was tried next, and a jury found him guilty. In the punishment phase of the trial, the jury sentenced Aranda to death. Also relevant to this appeal, Aranda now contends that his trial counsel was ineffective for failing to investigate mitigating circumstances.

Arturo Aranda appealed, his conviction was affirmed, and the Supreme Court denied certiorari. *Aranda v. State*, 736 S.W.2d 702 (Tex. Crim. App. 1987) (en banc), *cert. denied*, 487 U.S. 1241 (1988). He filed a state post-conviction application, which was denied. Aranda then sought federal habeas relief. On April 20, 1989, Aranda filed his federal habeas petition. Following briefing, the district court granted summary judgment in favor of the State. Aranda moved for reconsideration, which the State opposed.

For reasons which are unclear from the record, Aranda's motion for reconsideration was not ruled on for nearly three decades. Eventually, the matter was reassigned, and the newly assigned district judge denied Aranda's motion. The district court declined to grant a certificate of appealability ("COA") as to any claims. On appeal, we granted a COA to consider two of Aranda's claims: (1) his *Miranda* claim and (2) his

ineffective-assistance-of-counsel claim, both of which we address now.

## II

*2 Because Aranda filed his initial federal habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), his claims are governed by the law as it existed before AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). "Under pre-AEDPA standards of review, this court will review the legal conclusions of the district court de novo and the state court's findings of fact for clear error." *Kunkle v. Dretke*, 352 F.3d 980, 985 (5th Cir. 2003). "This court must accord a presumption of correctness to all findings of fact if they are supported by the record." *Id.* However, "[t]he pre-AEDPA standards do not require a federal court to defer to the state court's legal conclusions." *Id.*

## III

We granted Aranda a COA on two claims: (1) a *Miranda* claim, and (2) an ineffective-assistance-of-counsel claim. We examine each claim in turn.

### A. The *Miranda* Claim

Aranda argues that his waiver of his *Miranda* rights was not knowing-and-voluntary, and therefore his confession was introduced in violation of his *Miranda* rights. Specifically, he argues that his waiver could not have been knowing-and-voluntary because (1) he "did not understand" the English-language waiver form, (2) he had not recovered from surgery earlier in the day to knowingly and intelligently understand the consequences of his waiver, and (3) he did not know he was facing a capital murder charge.

Aranda's *Miranda* violation claim falls flat. Aranda challenged his confession before the trial court and was offered a full and fair hearing by the court. Although that hearing focused primarily on the voluntariness of the waiver, Aranda raised some of the same issues he does here, including his purported difficulties speaking English and his condition after surgery at the time of his interrogation. 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. *See* *Townsend v. Sain*, 372 U.S. 293, 314 (1963) (explaining that "if the state court has decided the merits of the claim but has made no express findings," a court may still "reconstruct the findings of the state trier of fact, either because his view of the facts is plain from his opinion or because of other indicia"). The findings necessarily implied in the ruling are entitled to our deference. *See* 28 U.S.C. § 2254(d) (1988); *see also* *Wainwright v. Witt*, 469 U.S. 412, 430–31 (1985) (explaining that a transcript can satisfy the requirement of an "adequate written indicia" by a state court entitled to deference under § 2254(d)).

Nor can we say that such findings were unreasonable. The record is replete with evidence that Aranda had a working grasp of English and that he was explained his rights in Spanish. And although Aranda emphasizes the nature of his wounds at some length, there was significant testimony indicating that by the time of his interrogation he had sufficiently recovered and had a full understanding of the circumstances surrounding his interrogation. Finally, because the hospital records only demonstrate that Aranda was given pain medication around noon, reason dictates Aranda would likely no longer be under the influence of the drug by the time of his interrogation in the evening.

*3 Finally, Aranda cites no authority for his proposition that a failure to advise him that he faced the death penalty prior to his confession constitutes a *Miranda* violation, and we decline to create such a novel rule here. Indeed, at oral argument, Aranda conceded that *Miranda* does not require that prior to issuing a waiver, the defendant be advised of the potential worst outcome. And both the Supreme Court and this court have intimated that no such rule exists. *See* *Colorado v. Spring*, 479 U.S. 564, 576 (1987) ("We have held that a valid waiver does not require that an individual be informed of all information 'useful' in making his decision or all information that might affect his decision to confess." (cleaned up)); *Vanderbilt v. Collins*, 994 F.2d 189, 197 (5th Cir. 1993) (explaining that "a knowing and voluntary waiver of *Miranda* rights does not require that

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the defendant understand every possible consequence of the decision to waive the right"). And as the State points out, such a rule would prospectively bind prosecutors' hands based on representations made (or omitted) by investigators, who lack the discretion to determine whether to seek the death penalty.

Moreover, the record indicates that Aranda was told that he was suspected of the murder of a police officer. He was thus —at a minimum—aware that he was suspected of a serious crime, and a reasonable individual, regardless of education, would have understood that the penalty for such a crime would be severe. In these circumstances, the failure to explain to Aranda precisely the consequences he may face for the crime he is accused of does not create a *Miranda* violation.

But even assuming that there was a *Miranda* violation, Aranda must demonstrate that it resulted in "actual prejudice" and "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Aranda fails to do so here, as the record demonstrates that any purported *Miranda* error was harmless. The State produced overwhelming evidence of Aranda's guilt. This evidence included the testimony of Officer Viera, who identified Petitioner in open court. It included significant ballistic evidence that Arturo Aranda's gun killed Officer Albidrez. And it included the testimony of Aranda's brother Juan Aranda, who described the gunfight with the officers.

Perhaps recognizing the voluminous evidence against him, Aranda strives to undermine the other evidence of his guilt. He first argues that Officer Viera's eyewitness account of the shooting should be completely disregarded because the "immense stress" caused by the gunfight renders Officer's Viera's account "inherently unreliable." But Officer Viera's testimony was unequivocal. Officer Viera was able to offer a detailed description of the events that unfolded on the morning of July 31, 1976. Officer Viera's testimony held up under cross-examination, and he was adamant that Aranda shot first. And Viera identified Arturo Aranda in open court. This eyewitness testimony cannot be discounted based on after-the-fact speculation that stress renders it unreliable. [1]

Aranda's attempts to impugn the ballistics evidence against him are also faulty. At trial, a ballistics expert testified that Aranda's weapon could have fired the bullet that killed Officer Albidrez, and no other recovered weapon could have. Aranda first argues that there was "conflicting" evidence as to who possessed a .38 caliber handgun—which was identified as the murder weapon at trial—on the night of the shooting. But he points to no such conflicting testimony in the record. Moreover, the .38 caliber handgun was found on Aranda's person at the hospital. [2] Aranda asks us to disregard that evidence, too, with a conclusory argument that it is a "rather incredible scenario." But again, Aranda cites no evidence to draw that testimony into doubt. Finally, Aranda contends that the firearm toolmark evaluation used to analyze the gun found on Aranda's person was "not conclusive." But Aranda still fails to direct us to any record evidence demonstrating that the firearm toolmark evaluation was inconclusive. In short, Aranda's arguments regarding the ballistics evidence are conclusory, speculative, and run against the weight of the record.

***4** Finally, Aranda argues that his confession must have had a substantial influence on the jury's verdict because the prosecutor mentioned it in his closing. But Aranda's argument misses the mark, as the prosecutor actually minimized the importance of Aranda's confession in his closing argument. First, the prosecutor gave his initial closing argument in which he did not even mention the confession. Rather, it was Aranda's attorney who focused on the confession in his closing argument, in which he asked the jury to disregard the confession as he argued it was involuntary. When the prosecutor rose to rebut Aranda's closing, he stated that "[w]e didn't need that statement of Arturo's." The prosecutor then only briefly addressed Arturo's confession later, as his discussion of the confession comprises only about one page of eighteen pages of transcript of the prosecutor's rebuttal. Moreover, the prosecutor did not focus on the probative value of Aranda's confession; rather, he only briefly described why the confession was voluntary. [3] When viewed in context, the prosecutor's closing argument makes clear how *little* the prosecution relied on the confession relative to other evidence, including the ballistic evidence and witness testimony.

We remain cognizant that "confessions have profound impact on the jury." *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting). But the erroneous admission of a confession does not, in every case, constitute harmful error. Our precedents illustrate as much. *See Jones v. Davis*, 927 F.3d 365, 370–71 (5th Cir. 2019). Given the profuse amount of evidence presented against Petitioner at trial, we are convinced that the admission of the confession did not have "a substantial and injurious effect or influence" in the context of the trial as a whole. *Brecht*, 507 U.S. at 637.

**B. The *Strickland* Claim**

Aranda also argues that he was denied effective assistance of counsel in violation of the Sixth Amendment under *Strickland v. Washington*, 466 U.S. 668 (1984) and *Wiggins v. Smith*, 539 U.S. 510 (2003). Ineffective assistance of counsel claims are reviewed under *Strickland*'s two-prong test. First, Aranda must demonstrate that his counsel's performance was deficient. *Strickland*, 466 U.S. at 687. To establish deficient performance, Aranda must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. This is an uphill battle, as we apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. As to the second prong, Aranda must demonstrate that that the deficient performance prejudiced the defense. *Id.* at 687. In a death penalty case, "the question is whether there was a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigation circumstances did not warrant death." *Id.* at 695. "Prejudice exists when the likelihood of a different result is 'substantial, not just conceivable.' " *Trottie v. Stephens*, 720 F.3d 231, 241 (5th Cir. 2013) (quoting *Harrington v. Richter*, 526 U.S. 86, 112 (2011)). We are also mindful that "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

Aranda argues that his trial counsel was deficient for failing to adequately investigate evidence of mitigation to be used at the sentencing stage, including evidence that Aranda had a difficult upbringing or a possible brain injury.[4] When examining a failure to investigate, we are mindful that the Supreme Court has emphasized that "strategic choices made after less than complete investigation are reasonable precisely to the extent that professional judgments support the limitations on the investigation." *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 690–91). And "we continue to extend highly deferential treatment to counsel's sentencing strategy and tactical decisions." *Pape v. Thaler*, 645 F.3d 281, 292 (5th Cir. 2011).

***5** With respect to investigating Aranda's personal background more generally, Aranda fails to show that his trial attorney failed to conduct an adequate investigation into Aranda's past. Aranda argues that "had trial counsel conducted *any* investigation, Mr. Aranda's wife could have testified that Mr. Aranda always treated her and their children well, and that Mr. Aranda maintained that relationship with his children when he was imprisoned." Aranda also argues that had trial counsel learned about Aranda's employment history, he could have put forth evidence that would "have further undermined, for example, the proposition that Aranda posed any danger within structured environments."

But the affidavit of Aranda's trial attorney, Larry Dowling, contradicts Aranda's argument that his counsel failed to make an adequate investigation into Aranda's background. Rather, Dowling's affidavit makes clear that he had extensive familiarity with Aranda's history and circumstances. Dowling's attested that he "knew that Mr. Aranda grew up in a poor family of many children in the barrios of San Antonio." Dowling also attested that his investigation had revealed that "[t]here was substantial evidence, notwithstanding his background, that Mr. Aranda was a nonviolent person," and that "there was available evidence that ... [Aranda] demonstrated his ability and willingness to be a peaceable and cooperative prisoner." Although Aranda points to two categories of evidence from his background that he wishes his attorney had put forth at sentencing, the record as a whole, especially in light of Dowling's affidavit, does not evince a failure to investigate Aranda's background generally.

Indeed, the record reveals that Dowling in fact *did* do an investigation into Aranda's past circumstances, but he made the strategic choice not to put forth this evidence "because [he] believed the jury would not be able to consider such evidence as mitigating circumstances." And, as the Texas law stood at the time, he was correct. It would be another decade until the Supreme Court clarified that Texas courts must allow jurors to express a "reasoned moral response" to such evidence. *See* *Penry v. Lynaugh*, 492 U.S. 302 (1989). Aranda's counsel was not constitutionally required to predict a significant change in the law. *Maryland v. Kulbicki*, 577 U.S. 1, 4 (2015). Indeed, we must be sure to consider a "context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time," *Wiggins*, 539 U.S. at 523 (cleaned up), and make "every effort" to "eliminate the distorting effects of hindsight." *Strickland*, 446 U.S. at 689. Viewed properly, Dowling's decision not to introduce evidence of Aranda's background was a strategic choice which was "virtually unchallengeable." *Strickland*, 446 U.S. at 690. This claim therefore fails.

The record does, however, demonstrate one narrow area where Dowling made a less-than-complete investigation: evidence of Aranda's head injury resulting from a police confrontation when he was sixteen. Dowling states that he "did not conduct any extensive investigation of Mr. Aranda's background for the purpose of developing specific evidence of disorders caused by his background." This decision is a "strategic choice[ ] made after less than complete investigation," which is "reasonable precisely to the extent that professional judgments support the limitations on the investigation." *Wiggins*, 539 U.S. at 528 (quoting *Strickland*, 466 U.S. at 690). We therefore must consider whether Dowling's decision to forgo a more complete investigation into Aranda's head injury is supported by professional judgment.

In his affidavit, Dowling explained his strategic decision to forgo an investigation into any disorder that Aranda may have. Specifically, Dowling was concerned that developing and presenting evidence of a disorder would open the door for the State to use psychiatrists to show that the disorder would make Aranda dangerous in the future, which was a consideration a Texas jury must have considered in imposing the death penalty. Dowling was also concerned that the risk of presenting evidence of a disorder was not worthwhile without a mitigating instruction, unless it was so significant that it could demonstrate that Aranda's crime was not "deliberate"—a very high bar. In sum, Dowling stated that "[i]n my opinion a responsible, competent trial lawyer would not take the risk of presenting such evidence without the assurance of a mitigation instruction." He further attested that "[b]ecause of the foregoing problems with developing and discovering evidence which mitigates 'blameworthiness' and because of the failure of Texas courts to instruct a jury on 'mitigation,' I would not, and in this case did not, develop evidence as to neurological, psychological, psychiatric or sociological reasons pertinent to the Defendant's ability to control his own behavior."

***6** Dowling's well-reasoned explanation for his decision to forgo an investigation here is fatal to Aranda's *Strickland* claim. Based on the law as it stood at the time of Aranda's sentencing, Aranda's counsel was reasonable to think that such evidence could well have backfired. These sentencing strategies and tactical decisions are beyond the reach of a *Strickland* claim.

We note that this case is different in kind from *Wiggins.* To be sure, in *Wiggins*, the Supreme Court held that an attorney rendered ineffective assistance of counsel by failing to investigate and present mitigating evidence of a capital defendant's background at the sentencing stage. 539 U.S. at 524. But the Court emphasized that counsel had not reasoned that a mitigation case "would have been counterproductive." *Id.* at 525. Here, because of the unique death penalty sentencing scheme Texas had in place at the time of Aranda's sentencing—a factor not present in *Wiggins*—Aranda's counsel expressed a reasonable concern that any additional investigation into Aranda's mental disorder could lead to evidence that would be counterproductive. In light of that serious concern, it was reasonable for Dowling to forgo additional investigation into the issue, because as the *Wiggins* court noted, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Id.* at 533.

Finally, Aranda argues that the district court made a legal error by imposing too high of a standard for his *Strickland* claim. Aranda contends that the district court required him to show that his trial counsel was "not functioning as counsel," rather than that his performance fell "below an objective standard of reasonableness." This argument is easily disposed of. First, the "not functioning as counsel" language was pulled directly from *Strickland*, which used that language to describe what constituted a deficient performance. 466 U.S. at 687 ("[T]he defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."). Indeed, we have repeated the exact language that Aranda objects to, *Brooks v. Kelly*, 579 F.3d 521, 523 (5th Cir. 2009), and affirmed district courts that also applied this standard. *See Rabe v. Thaler*, 649 F.3d 305, 307 (5th Cir. 2011) (affirming a district court's finding that a trial attorney did not make "errors so serious that he was not functioning as counsel"). Second, a review of the trial judge's order denying Aranda's *Strickland* claim makes clear he was applying the proper standard. The trial court quoted *Strickland* at length, including the requirement that any deficiency be judged by an "objective standard." Third, even were there some gap between performance which "below an objective standard of reasonableness" and performance which demonstrated that an attorney was "not functioning as counsel," we are convinced that, for the reasons discussed at length above, the

performance of Aranda's trial counsel did not fall below an objective standard of reasonableness.

IV

For the foregoing reasons, we AFFIRM the district court's denial of habeas relief and an evidentiary hearing.[5]

**All Citations**

Not Reported in Fed. Rptr., 2022 WL 16837062

## Footnotes

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

1 Indeed, the primary support Aranda musters to support this argument consists of two nonbinding state-court cases. But these cases do not aid Aranda. In *People v. Lerma*, 47 N.E.3d 985, 993 (Il. 2016), the court listed stress as only one of several factors that can influence the reliability of eyewitness testimony. Other factors included "the wearing of partial disguises" and "cross-racial identification." *Id.* And in *State v. Guilbert*, 49 A.3d 705, 722–23 (Conn. 2012), the court only allowed for expert testimony regarding the unreliability of eyewitness testimony; it did not hold that all eyewitness testimony is inherently unreliable.

2 That the handgun was found on Aranda's person at the hospital as opposed to at the scene of the crime is of no moment. As explained at oral argument, because the state prioritized getting Aranda into the ambulance and to the hospital, no thorough search of his person at the scene was conducted. Instead, the officers discovered Aranda laying on his stomach and conducted a cursory pat down of his back and sides. Only at the hospital did they conduct a more thorough search that revealed the location of the gun, Aranda's front waistband.

3 In addition, the court's jury charge regarding Aranda's confession directed the jury to examine the confession, determine its voluntariness, and reject the confession if it was not voluntary.

4 At various points in his opening brief, Aranda seeks to make other arguments, including that Aranda's attorney was deficient for failing to "conduct voir dire in light of hostility towards Mexican Americans in Victoria" and that counsel "made no effort to look into the validity of [Aranda's rape] conviction." We did not grant a COA on these claims and in fact explicitly denied a COA for many of these claims. *See Aranda v. Lumpkin*, No. 20-70008, 2021 WL 5627080 (5th Cir. Nov. 30, 2021). Accordingly, we will not consider these claims, and limit out analysis to the single *Strickland* claim on which we granted a COA.

5 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.

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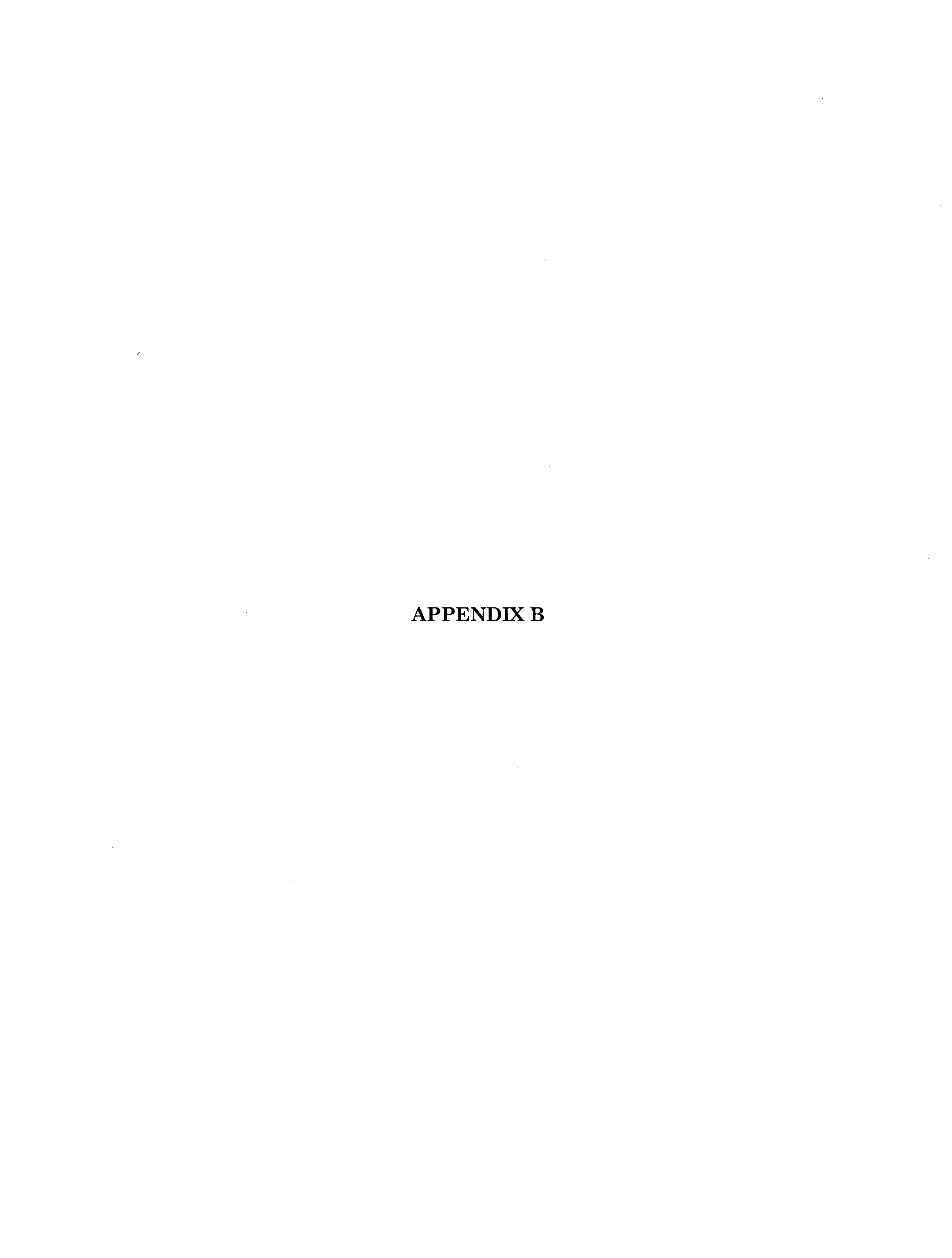

# APPENDIX B

2021 WL 5627080
Only the Westlaw citation is currently available.
United States Court of Appeals, Fifth Circuit.

Arturo Daniel ARANDA, Petitioner—Appellant,
v.
Bobby LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent—Appellee.

No. 20-70008
|
FILED 11/30/2021

Appeal from the United States District Court for the Southern District of Texas, USDC No. 6:89-CV-13, Kenneth M. Hoyt, U.S. District Judge

**Attorneys and Law Firms**

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Matthew Dennis Ottoway, Assistant Attorney General, Office of the Attorney General, Austin, TX, for Respondent—Appellee.

Before Haynes, Graves, and Engelhardt, Circuit Judges.

**Opinion**

Per Curiam *

***1** Having failed to obtain federal habeas relief, Petitioner Arturo Aranda seeks a certificate of appealability and challenges the denial of evidentiary hearings on some of his claims. We issue a certificate of appealability as to some of his claims but deny it as to others.

**I.**

Early in the morning hours of July 31, 1976, Officers Pablo Albidrez and Candelario Viera of the Laredo Police Department stopped a suspicious vehicle. It would be Officer Albidrez's last traffic stop. Gunfire erupted and the officers returned fire, engaging in a shootout with two men fleeing the vehicle. Officer Albidrez was hit. Shot through the service badge on his chest, he died from his injury.

The fleeing occupants of the vehicle were brothers: Arturo and Juan Aranda. They had been transporting a large quantity of marijuana when stopped by the officers. Shortly after the shooting, they were apprehended and arrested about a block from the scene.

Arturo Aranda did not escape unscathed. Hit in the shoulder and hand, he was transported to a hospital, where a .38 caliber handgun was found hidden in his pants. Ballistic testing later showed that this weapon could have fired the bullet that killed Officer Albidrez, and no other recovered weapon could have. After interrogation, Aranda confessed to killing Officer Albidrez. He later challenged that confession.

Both brothers were charged for the murder of Officer Albidrez. Juan Aranda was tried first; he was found guilty and sentenced to life in prison. Arturo Aranda was tried next. His trial began in Webb County, though the judge later moved the trial to Victoria County over Aranda's objection. At the conclusion of the trial, a jury found Aranda guilty. In the punishment phase of the trial, the jury sentenced Aranda to death under the Texas death penalty scheme as it existed then.

Arturo Aranda appealed, and his conviction was affirmed. *Aranda v. State*, 736 S.W.2d 702 (Tex. Crim. App. 1987) (en banc). He filed a state post-conviction application, which was denied. He then turned his sights to federal court. On April 20, 1989, Aranda filed a federal habeas petition. The State moved for summary judgment, and the district court granted the State's motion. Two weeks later, on January 15, 1992, Aranda moved to alter and amend the judgment. The State filed a timely response.

That remained the posture of the case for nearly three decades. It was not until 2018 that this case was jolted out of its inertia. The matter was reassigned, and the newly assigned district judge denied Aranda's motion. The district court declined to grant a certificate of appealability ("COA") as to any claims. Aranda appeals the district court's order, seeking a COA as to only four of his claims.

**II.**

Because Aranda filed his initial federal habeas petition before the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA), his claims are governed by the law

as it existed before AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 481 (2000). However, 28 U.S.C. § 2253(c) governs Aranda's entitlement to appellate review. *Id.* That statute provides that an appeal may not be taken "unless a circuit justice or judge issues a certificate of appealability." 28 U.S.C. § 2253(c)(1). To determine whether to issue a petitioner a certificate of appealability, a "court of appeals should limit its examination to a threshold inquiry into the underlying merit of his claims." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). A certificate of appealability shall be granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). In order to make such a showing, an applicant must show that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El*, 537 U.S. at 327. "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. Nonetheless, the issuance of a certificate of appealability "must not be *pro forma* or a matter of course." *Id.* at 337. "Because the present case involves the death penalty, any doubts as to whether a COA should issue must be resolved in [Petitioner's] favor." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). Finally, as in any federal habeas case, we review "the district court's findings of fact for clear error and its conclusions of law de novo." *Sanchez v. Davis*, 936 F.3d 300, 304 (5th Cir. 2019).

## III.

***2** Aranda seeks a certificate of appealability for four claims: (1) a *Miranda* claim; (2) a fair cross-section claim; (3) a *Strickland* claim; and (4) a *Penry* claim. We examine each claim in turn.

### A. The *Miranda* Claim

#### 1. *Waiver*

We first address Aranda's *Miranda* claim. Before turning to our COA analysis, we confront the threshold issue of whether Aranda waived this claim by failing to properly raise it before the district court. Because failure to raise a claim before the district court deprives us of jurisdiction to grant a COA on the issue, *see Brewer v. Quarterman*, 475 F.3d 253, 255 (5th Cir. 2006) (per curiam), we must consider whether Aranda properly raised a claim that his waiver was not knowing and intelligent below. As both parties acknowledge, an inquiry into whether a defendant has validly waived his or her *Miranda* rights has two components. First, we ask whether the waiver was voluntary; second, we ask whether the waiver was knowing and intelligent. *See United States v. Cardenas*, 410 F.3d 287, 293 (5th Cir. 2005) (citing *United States v. Andrews*, 22 F.3d 1328, 1337 (5th Cir. 1994)). Although Aranda undoubtedly raised a claim that his confession was involuntary to the district court, it is undisputed that he raises no such claim here. Rather, in seeking a COA from this court, Aranda argues that his confession was not knowing and intelligent. The district court did not understand Aranda to raise such a claim before it. It found that "Petitioner makes no claim that his confession was not intelligently made, or that he did not understand the *Miranda* warnings when given." We find the district court erred, and Aranda's knowing-and-intelligent *Miranda* claim has not been waived.

The second claim listed in Aranda's petition stated that his "uncounseled, custodial 'confession' was improperly admitted." In paragraph forty of his petition, Aranda alleged: "The [Texas] trial court made no inquiry into, nor findings on, whether Petitioner knowingly and intelligently waived his Fifth Amendment rights. The State has the heavy burden of proving both voluntariness and a knowing and intelligent waiver of Fifth Amendment rights before an alleged confession may be admitted." In the next paragraph, Aranda noted that the state court "left unassessed" evidence that "he did not understand the waiver form printed in English; that he was not aware that he was being interrogated in connection with a capital murder charge; and that he was not sufficiently recovered from the surgery of earlier that day to assess intelligently the consequences of a waiver presented him late that night." Aranda concluded the claim by arguing that he "did not voluntarily give the statement touted as a 'confession' nor did he make an independent and informed decision to waive his right to counsel and his right not to provide testimony against himself."

Aranda's other briefing emphasized a *Miranda* claim based on a lack of knowing-and-intelligent waiver. In his opposition to the State's motion for summary judgment he stated, "Most notably, Respondent's motion ... does not address the issue of whether Petitioner made a knowing and intelligent waiver of his Fifth Amendment rights upon making his alleged

'confession' while in custody." And in his motion to alter or amend the judgment, Aranda again stressed that he had raised this claim.

*3 In short, Aranda made the basis of his *Miranda* claim adequately clear in his petition and in his subsequent briefing. The State quarrels that Aranda's petition was insufficiently lucid on this point, or that Aranda's allegations are only conclusory, or that this claim was addressed only briefly compared to Aranda's involuntary waiver claim. But as described above, Aranda's petition (and subsequent briefing) adequately stated a claim that he did not waive his *Miranda* rights knowingly and voluntarily. And this case is unlike other cases where we have found waiver, which often include stark examples of conclusory or altogether nonexistent briefing on claims. *See, e.g., Ross v. Estelle*, 694 F.2d 1008, 1011–12 (5th Cir. 1983) (per curiam) (holding that "mere conclusory allegations" which were unsupported by any record evidence in a pro se defendant's petition did not raise a constitutional issue); *Ortiz v. Quarterman*, 509 F.3d 214, 215 (5th Cir. 2007) (per curiam) (holding that a petitioner waived an ineffective assistance of counsel claim when he failed to raise the claim in his brief in support of a COA).

Here, the district judge *sua sponte* denied a COA to Aranda, stating it "will not certify any issue for review by the Fifth Circuit." "[W]hen a district court *sua sponte* denies a COA without indicating the specific issues, we have treated each of the issues raised in the habeas petition as included within the denial." *Black v. Davis*, 902 F.3d 541, 546 (5th Cir. 2018). Accordingly, because we find that Aranda sufficiently raised this claim before the district court, we find that the district court's denial of a COA covered this claim and that we have jurisdiction to address whether we should grant a COA.

2. *Miranda Claim COA*

We now address whether we should grant a COA on Petitioner's *Miranda* claim that his waiver was not knowing and intelligent.

The State first argues that there is no "believable evidence" in the record that undermines Petitioner's written waiver and which demonstrates a *Miranda* violation. But the record contains evidence to support Aranda's claims, including evidence that he did not realize that he was being charged with capital murder, evidence that he had limited ability to speak and understand English, and evidence of his injuries from surgery earlier in the day. In light of this evidence, jurists of reasons could debate whether Petitioner's *Miranda* claim has merit. In this "threshold inquiry," we cannot deny Aranda a COA on this ground. *Miller-El*, 537 U.S. at 327.

The State next argues that the state court's findings regarding Petitioner's *Miranda* claim are entitled to a presumption of correctness and should be dispositive here. The version of 28 U.S.C. § 2254 that was in place at the time Aranda filed his petition stated that in federal habeas cases, "a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding [and] evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct" subject to certain exceptions. 28 U.S.C. § 2254(d) (1988). But the sole written opinion that the State points us to addresses only whether Aranda's claim was voluntary. And although the trial court held a hearing addressing many of Aranda's arguments here and orally ruled in favor of the State by allowing the confession into the record, "reasonable jurists [could] find [that] the district court's assessment of the constitutional claims [is] debatable or even wrong." *Miller-El*, 537 U.S. at 338 (quotation omitted).

Finally, the State argues that even if there was *Miranda* error, it was harmless because the State produced overwhelming evidence of Aranda's guilt other than the confession. But assessing whether any *Miranda* error was harmless would require us to assume a constitutional error and delve into the merits of Aranda's claim, which is beyond the "threshold inquiry" we engage in at this stage. *Miller-El*, 537 U.S. at 327. In any event, jurists of reason could debate whether any constitutional error was harmless, particularly because "confessions have a profound impact on the jury." *Bruton v. United States*, 391 U.S. 123, 140 (1968) (White, J., dissenting).

*4 In sum, at this stage Aranda has demonstrated that jurists of reason could disagree with the district court's resolution of his *Miranda* claim. We therefore grant a COA as to this claim.

**B. The Fair Cross-Section Claim**

We turn next to Aranda's fair cross-section claim. Before addressing this claim, we specifically note what we need *not* address: any supposed claim that Aranda made—under

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the Vicinage Clause or otherwise—that a defendant has a right to be tried in the jurisdiction where the crime occurred or a jurisdiction with an identical racial makeup. Aranda renounced seeking a COA on such a claim in his reply. Rather, we need only consider Aranda's claim insomuch as he argues that Victoria County systematically excluded Hispanics in its jury selection process and at his trial.

As the parties agree, Aranda's fair cross-section claim arises under *Duren v. Missouri*, 439 U.S. 357 (1975). Under the test the Supreme Court announced in *Duren*, to establish a fair cross-section claim, a petitioner must demonstrate: "(1) that the group alleged to be excluded is a 'distinctive' group in the community, (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process." *Id.* at 364.

Here, the question is whether jurists of reason could debate that Aranda is able to demonstrate that the percentage of the community made up of Hispanics was underrepresented on his jury venire and that this underrepresentation was the general practice on other venires. *United States v. Williams*, 264 F.3d 561, 568 (5th Cir. 2001). The sole affidavit on which Aranda bases his cross-section claim focuses on underrepresentation of Hispanics on *his* venire, but does not demonstrate that any such underrepresentation was the general practice on other venires in Victoria County. *See United States v. Brummitt*, 665 F.2d 521, 529 (5th Cir. 1981).

But even had Aranda properly called into question whether there was underrepresentation of Hispanics on Victoria Country venires generally, jurists of reason could not debate his fair cross-section claim for a separate, independent reason. This Circuit has repeatedly held that an absolute disparity of less than ten percent is not sufficient to demonstrate underrepresentation. *See United States v. Maskeny*, 609 F.2d 183, 190 (5th Cir. 1980); *see also United States v. Age*, No. 16-cr-32, 2021 WL 2227244, at *10–11 (E.D. La. June 2, 2021) (collecting cases). "Absolute disparity measures the difference between the proportion of the distinctive groups in the population from which the jurors are drawn and the proportion of the groups on the jury list." *United States v. Yanez*, 136 F.3d 1329, 1998 WL 4454, at *2 n.4 (5th Cir. 1998). The absolute disparity that Aranda alleges here is less than ten percent. He resists this conclusion by citing to *Berghuis v. Smith*, 559 U.S. 314 (2010), which he argues stands for the proposition that the absolute disparity test should not be used. But *Berghuis* said no such thing; rather, the Court only recognized multiple ways to measure the representation of distinctive groups in jury pools and acknowledged that "[e]ach test is imperfect." *Id.* at 329.

*5 Jurists of reason could not find that Aranda's fair cross-section claim is debatable. We do not issue a COA for this claim.

### C. The *Strickland* Claims

In his next claim, Aranda argues that he was denied effective assistance of counsel in violation of the Sixth Amendment under *Strickland v. Washington*, 466 U.S. 668 (1984). Ineffective assistance of counsel claims are reviewed under *Strickland*'s two-prong test. First, Aranda must demonstrate that his counsel's performance was deficient. *Id.* at 687. To establish deficient performance, Aranda must show "that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. This is an uphill battle, as we apply a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. As to the second prong, Aranda must demonstrate that that the deficient performance prejudiced the defense. *Id.* at 687. In a death penalty case, "the question is whether there was a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigation circumstances did not warrant death." *Id.* at 695. "Prejudice exists when the likelihood of a different result is 'substantial, not just conceivable.' " *Trottie v. Stephens*, 720 F.3d 231, 241 (5th Cir. 2013) (quoting *Harrington v. Richter*, 526 U.S. 86, 112 (2011)). We are also mindful that "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). But as Aranda faces the death penalty, we continue to resolve any doubts as to whether a COA should issue in his favor. *Rhoades v. Davis*, 852 F.3d 422, 427 (5th Cir. 2017).

On appeal, Aranda alleges deficient performance of his counsel in three ways. First, he contends that his counsel failed to adequately investigate available defenses, primarily by failing to investigate and present evidence that was admitted at his brother Juan Aranda's trial. Second, he argues that his counsel failed to adequately investigate evidence

of mitigation, such as evidence that Aranda had a difficult upbringing or a possible brain injury. Third, he presses that his counsel failed to investigate an extraneous offense. We address each argument in turn.

Aranda's argument that his counsel failed to adequately investigate defenses largely turns on the fact that his counsel did not introduce evidence that was used at Juan Aranda's trial. "To prevail on an ineffective assistance of counsel claim based upon uncalled witnesses, an applicant must name the witness, demonstrate that the witness would have testified, set out the content of the witness's proposed testimony, and show that the testimony would have been favorable." *Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010). These claims are disfavored. *Id.*

Aranda contends that if his counsel had adequately investigated possible defenses, he would have called Jorge Martinez, C. D. Toler, and R. Benavides. But Aranda fails to set out exactly what those witnesses would have testified to, beyond a vague reference to "Officer Viera's propensity for violence." Although Aranda argues that counsel should have introduced a series of facts about Viera's propensity for violence, it is completely unclear from Defendant's briefing which of the three witnesses should have testified about those facts. And Aranda's sole citation to the record is the witness list from Juan Aranda's trial, which is insufficient. *See, e.g., Miller v. Johnson*, 200 F.3d 274, 282 (5th Cir. 2000). Because Aranda has not demonstrated that the witnesses would have testified, set out witnesses' proposed testimony, or shown that it would have been favorable, reasonable jurists could not debate that this claim fails. *See Gregory*, 601 F.3d at 352.

***6** There are other issues with this claim. First, counsel did attempt to call Martinez, but the trial court would not allow him to testify. Second, in Juan Aranda's trial, the judge refused to allow Benavides or Toler to testify, and Petitioner offers no reason to think there would be a different result in his trial. Third, and most important, Aranda's counsel made a strategic decision not to present this evidence. In his affidavit, Aranda's counsel states that he chose not to introduce some available evidence from Juan Aranda's trial because he wanted to emphasize the defense of self-defense. "Generally, counsel's strategic decisions are afforded deference so long as they are based on counsel's 'professional judgment.' " *Escamilla v. Stephens*, 749 F.3d 380, 392 (5th Cir. 2014) (quoting *Strickland*, 446 U.S. at 680). Although Aranda argues we should not defer to his attorney's decision because his claim involves a failure to investigate, *see id.*, the record illustrates that his attorney was sufficiently informed of the circumstances of Juan Aranda's trial. In light of these serious infirmities in this claim, reasonable jurists could not debate that it fails.

Next, Aranda argues that his counsel failed to investigate and present mitigation evidence at the sentencing stage of trial. He presses that had counsel adequately investigated Aranda's past, he would have presented evidence of Aranda's troubled upbringing and his past violent experience with law enforcement, which resulted in a head injury. The Supreme Court has held that failure to adequately investigate available mitigating evidence may amount to ineffective assistance of counsel. *See* *Wiggins v. Smith,* 539 U.S. 510, 524–25, 537–38 (2003) (holding that a defense counsel's failure to investigate a capital defendant's social history and traumatic childhood constituted ineffective assistance of counsel); *see also* *Williams v. Taylor*, 529 US. 362, 395–98 (2000) (holding that defense counsel's performance fell below an objective standard of reasonableness where counsel failed to present mitigating evidence related to a defendant's troubled upbringing and intellectual disability). Here, Aranda's counsel was forthright that he "did not conduct any extensive investigation of Mr. Aranda's background for the purpose of developing specific evidence of disorders caused by his background." Because this evidence is like that discussed by the Supreme Court in *Wiggins* and *Williams*, reasonable jurists could debate the district court's conclusion that counsel was effective.

Reasonable jurists could also conclude that the district court's prejudice assessment was debatable or incorrect. If Aranda's counsel had reasonably investigated Aranda's background, the jury may have learned of Aranda's deeply troubled upbringing, his early, violent experience with law enforcement, and the life-altering effects of his head injury. A jury presented with such evidence may not have determined that Aranda was a future danger to society or that he acted deliberately, two of the factors Texas juries had to consider at the sentencing stage. Reasonable jurists could therefore debate whether the district court's prejudice determination was correct. At a minimum, this claim "deserves encouragement to proceed further." *Escamilla*, 749 F.3d 393–94. Accordingly, we will grant a COA as to this *Strickland* claim.

Finally, we turn to Aranda's argument that his counsel failed to research infirmities in his aggravated rape conviction, which

was an aggravating offense at his murder trial. Aranda's briefing on this topic is perfunctory, and he cites solely to the affidavit of his trial counsel, which states that he knew about the conviction but was unaware of purported legal infirmities with the conviction. Even assuming that counsel's performance was deficient for not investigating any legal infirmities in Aranda's aggravated rape conviction, Aranda is unable to establish that jurists of reason would debate this issue, given the lack of any indication in the briefing that the more fulsome objection would have been any more valid than the one raised. Texas law permits broad introduction of extraneous prior convictions at the sentencing phase, and our court has sustained even consideration of non-final convictions and "extraneous offenses." *See* Tex. Code of Crim. Proc. § 37.07; *Hogue v. Johnson*, 131 F.3d 466, 478 n.9 (5th Cir. 1997) ("[n]othing in Article 37.071 ... requires that there be a final conviction for an extraneous offense to be admissible at the punishment phase."); *Hammett v. State*, 578 S.W.2d 699, 709 (Tex. Crim. App. 1979) (same), *cert. withdrawn*, 448 U.S. 725 (1980)); *see also Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987), *cert denied.*, 484 U.S. 935 (1987) (holding that "the admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate" the Constitution because "[e]vidence of these unadjudicated crimes is clearly relevant to the jury's task of determining whether there is a probability that [the defendant] would continue to commit acts of violence as required by" special questions); *see also Harris v. Johnson*, 81 F.3d 535, 541 (5th Cir. 1996) ("use of evidence of unadjudicated extraneous offenses, at the sentencing phase of Texas capital murder trials, does not implicate constitutional concerns"). Accordingly, we deny a COA as to this portion of the ineffective assistance of counsel claim.

*7 We find that Aranda has carried his burden to demonstrate that reasonable jurists would debate whether his counsel's performance was ineffective in failing to investigate and introduce evidence of mitigating circumstances and such a failure was prejudicial. We therefore grant a COA as to this *Strickland* claim. Because Aranda has failed to demonstrate reasonable jurists could debate the viability of his other *Strickland* claims, we deny a COA on those claims.

### D. The *Penry* Claim

Finally, we address Aranda's claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989). At the time of Aranda's sentencing, the Texas jury was required to determine a defendant's capital sentence by answering three special issue questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

*Penry*, 492 U.S. at 310 (citing Tex. Code Crim. Proc. art. 37.071(b) (Vernon 1981 and Supp. 1989)). If the jury answered "yes" to these questions, the trial court would impose the death penalty.

Although the facial validity of the statute was upheld by the Supreme Court, *see Jurek v. Texas*, 428 U.S. 262 (1976), the Court later held that in certain circumstances a jury may be unable to fully consider and give effect to mitigating evidence in answering the special issue questions. *Penry*, 492 U.S. at 328. If the jury was provided "no vehicle for expressing its 'reasoned moral response' to [mitigating] evidence" then the sentencing is incompatible with the Eighth Amendment. *Id.* (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 185 (1988) (O'Connor, J., concurring)).

In *Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007), this circuit fashioned a useful two-step process for considering *Penry* claims. First, we must determine whether the mitigating evidence presented by Petitioner "satisfied the 'low threshold for relevance' articulated by the Supreme Court." *Id.* at 444 (quoting *Tennard v. Dretke*, 542 U.S. 274 (2004)). "The Court defined relevant mitigating evidence as 'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.' " *Id.* (quoting *Tennard*, 542 U.S. at 284). The Court later cautioned that a *Penry* claim is not applicable "when mitigating evidence has only a tenuous connection—'*some* arguable relevance'—to defendant's moral culpability." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, at 252–53 n.14 (quoting

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Penry, 492 U.S. at 322–23). If the evidence passes this relevancy threshold, we must next "determine whether there was a reasonable likelihood that the jury applied the special issues in a manner that precluded it from giving meaningful consideration and effect to all of [Petitioner's] mitigating evidence." *Coble*, 496 F.3d at 444.

Aranda identifies four categories of mitigating evidence which he contends could not have been given meaningful consideration by the jury: (1) evidence of Aranda's intoxication at the time of the shooting, (2) evidence that Aranda had no foreknowledge about transporting drugs, (3) evidence that Aranda remained unarmed until he retrieved the drugs, and (4) evidence that the victim had a hand on his own gun when Aranda shot him. We address each category in turn.

***8** Jurists of reason could not debate that Aranda's intoxication does not pass even the low threshold for relevance. The record is clear that Aranda had a single beer at the first bar he patronized. That is the only record evidence Aranda points to that he was drinking on the night in question. Although Juan Aranda left his brother alone for some period of time, he testified that when he returned he believed Petitioner "had a glass of water or Seven-Up." This evidence of intoxication is so slight that it is "tenuous" at best. And because jurists of reason would not debate that this evidence does not "satisf[y] the 'low threshold for relevance' articulated by the Supreme Court," *Coble*, 496 F.3d at 444, it cannot be the basis for a *Penry* claim.

Likewise, because Aranda relies on inference piled on inference, jurists of reason could not debate the two categories of evidence proffered by Aranda, which we consider together. Aranda argues that his lack of knowledge regarding the drug transaction and the fact he remained unarmed until picking up the drugs support a *Penry* claim. But these claims both rely on a series of inferences that the jury would have to make to reach considerations other than residual doubt that are not incorporated into the special issues questions. For example, from the fact Aranda did not know about the drug transaction before engaging in it, Aranda would have a juror infer that his brother was the mastermind behind his drug transaction; from this, Aranda would have the jury infer that his brother was always the mastermind when the two brothers were together; from this, Aranda would have the jury infer that he had a docile personality and took orders from this brother; and from this fact, Aranda would have the jury determine that he deserved a sentence less than death. Petitioner's argument regarding the evidence that he was unarmed until he secured the drugs likewise relies on an extensive and dubious inferential chain. Even viewed in the light most favorable to Petitioner, these arguments amount to rank speculation. Jurists of reason could not debate that these arguments—which are based on layer upon layer of inferences (many of which include suggested logical leaps)—do not even have a "tenuous" connection to moral culpability.

Finally, Petitioner argues that evidence that Officer Albidrez's hand was placed on his weapon when he approached Aranda's car could not be given meaningful consideration by the jury at the punishment phase. But this evidence is primarily relevant to residual doubt about Aranda's self-defense claim, which cannot be the basis of a *Penry* claim. *See* *Abdul-Kabir*, 550 U.S. at 251. And to the extent this evidence has any relevance beyond residual doubt, it could be fully considered within the special issue questions presented to the Texas jury. Indeed, the third special question specifically required the jury to consider "[w]hether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." *Penry*, 492 U.S. at 310. Accordingly, jurists of reason could not find that this claim succeeds.

In sum, reasonable jurists could not debate that Aranda has failed to demonstrate a *Penry* claim. We decline to issue a COA as to this claim.

## IV.

For the foregoing reasons, Petitioner's request for a certificate of appealability as to his *Miranda* claim and as to his *Strickland* claim regarding his counsel's failure to investigate and introduce evidence of mitigating circumstances is GRANTED. Petitioner's request for a certificate of appealability is otherwise DENIED.

**All Citations**

Not Reported in Fed. Rptr., 2021 WL 5627080

## Footnotes

* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

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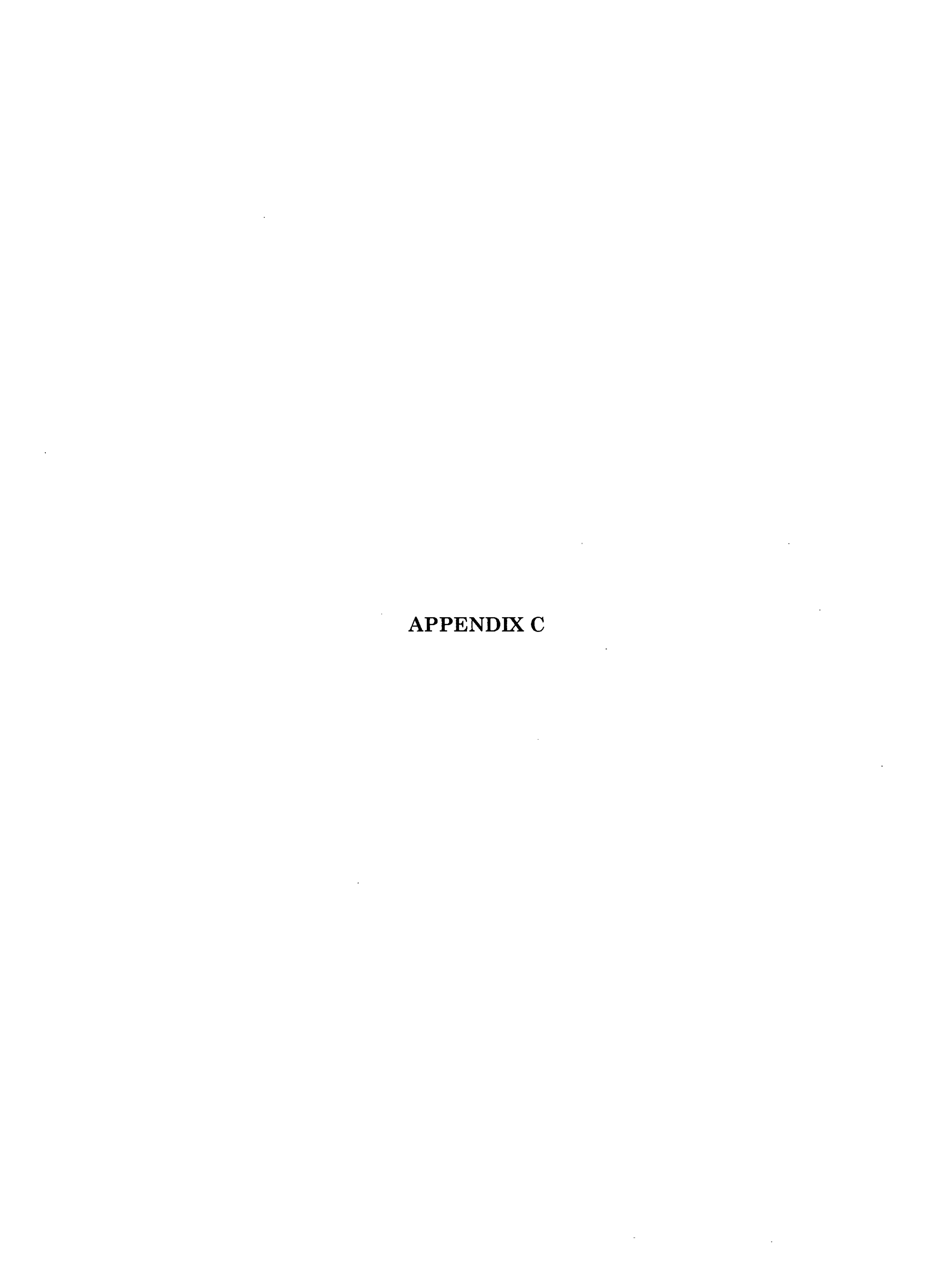

# APPENDIX C

2020 WL 2113640
Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Victoria Division.

Arturo Daniel ARANDA, Petitioner,
v.
Lorie DAVIS, Respondent.

Civil Action No. 6:89-CV-13
|
Signed 05/04/2020

**ORDER**

Kenneth M. Hoyt, United States District Judge

*1 In 1979, Arturo Daniel Aranda was sentenced to death for his role in killing a Laredo police officer. Aranda submitted a federal petition for a writ of habeas corpus in 1989. (Docket Entry No. 2). After Aranda's petition was denied in 1991, (Docket Entry Nos. 26, 27), he filed a Motion under Rule 59(e) to Alter and Amend Judgment. (Docket Entry Nos. 33, 34). Respondent filed an opposition, (Docket Entry No. 38), and Aranda filed a reply (Docket Entry No. 39). Aranda's Rule 59(e) motion has been pending since that time.

On September 25, 2018, this case was reassigned to the undersigned judge. After receiving briefing from the parties, the Court will deny Aranda's Rule 59(e) motion. The Court will not certify any issue for appellate review.

## I. Background

On direct appeal, the Texas Court of Criminals Appeals succinctly described the crime for which Aranda received a capital conviction and death sentence:

> The indictment jointly charged [Aranda] and his brother, Juan J. Aranda, with knowingly and intentionally causing the death of Pablo E. Albidrez, a peace officer by shooting him with a gun knowing that Albidrez was a police officer for the city of Laredo acting in the lawful discharge of an official duty.... [T]he evidence shows that [Aranda] and his brother drove to Laredo from San Antonio. The purpose was to pick up a load of marihuana and take it to San Antonio. After the station wagon was loaded and the two men were leaving Laredo they were confronted by police officers who stopped them. In the ensuing gun battle the deceased police officer, who was in uniform and who was in a marked police vehicle with its lights flashing, was killed by [Aranda] who was shooting with a pistol.

*Aranda v. State*, 736 S.W.2d 702, 703-04 (Tex. Crim. App. 1987).

On September 23, 1987, the Court of Criminal Appeals affirmed Aranda's conviction and sentence on automatic direct appeal. The State of Texas then set an execution date for February 25, 1988. Both the Court of Criminal Appeals and the United States Supreme Court stayed Aranda's execution while he filed a writ of certiorari. When the Supreme Court denied certiorari review on June 30, 1988, the trial court set another execution date for November 9, 1988. Through pro bono counsel, Aranda then sought state habeas review. One week before his scheduled execution date, the Court of Criminal Appeals denied state habeas relief.

Aranda then proceeded to federal court. The court stayed Aranda's execution date. On April 20, 1989, Aranda filed a federal petition for a writ of habeas corpus raising twenty-nine grounds for relief. (Docket Entry No. 2). On October 15, 1991, the Honorable Ricardo H. Hinojosa denied federal habeas relief without holding an evidentiary hearing or allowing additional factual development. (Docket Entry No. 26). An amended memorandum and order was issued on December 31, 1991. (Docket Entry No. 27). A final judgment was issued that same date. (Docket Entry No. 30).

On January 15, 1992, Aranda filed a timely motion to alter or amend judgment. Respondent opposed the motion (Docket Entry No. 38), and Aranda filed a reply (Docket Entry No. 39). Since Aranda filed his reply, the parties have not submitted any substantive motions or filings. [1]

*2 On September 25, 2018, this case was reassigned to the undersigned judge. This Court ordered the parties to confer and provide a joint update discussing "the status of this litigation, any relevant changes in the law since the denial of relief, and what proper steps should be taken to renew federal habeas review." (Docket Entry No. 47). The parties provided an update and explained that the issues remaining in this case required adversarial briefing. (Docket Entry No. 59). The parties have provided significant briefing that discusses the merits of Aranda's Rule 59 motion. In particular, the parties have addressed changes that have occurred in the law over the last few decades.

**II. Rule 59 Standard**

This matter comes before the Court on the limited question of whether Aranda has shown that this Court should alter or amend the judgment in this case. Federal procedure limits post-judgment review. "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). A district court reviewing a Rule 59(e) motion must balance "two important judicial imperatives relating to such a motion: 1) the need to bring litigation to an end; and 2) the need to render just decisions on the basis of all the facts." *Templet*, 367 F.3d at 479. "Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. It is the judge's right, and indeed his [or her] duty, to order a new trial if he [or she] deems it in the interest of justice to do so." 11 Wright, Miller & Kane, Federal Practice & Procedure Civil, § 2803 (2d ed. 1995) (citing *Juneau Square Corp. v. First Wis. Nat. Bank*, 624 F.2d 798, 807 (7th Cir. 1980)). However, due to the extraordinary nature of this remedy the Fifth Circuit has found that the Rule 59(e) standard "favors denial of motions to alter or amend a judgment." *Southern Constructors Group, Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 (5th Cir. 1993); *see also* *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 174 (5th Cir. 1990).

A district court has considerable discretion to grant or deny a motion under Rule 59(e); however, "such discretion is not limitless." *Templet*, 367 F.3d at 479. Rule 59 only allows a court "to alter or amend a judgment to (1) accommodate an intervening change in controlling law, (2) account for newly discovered evidence, or (3) correct a manifest error of law or fact." *Trevino v. City of Fort Worth*, 944 F.3d 567, 570 (5th Cir. 2019).

**III. Analysis**

Aranda's Rule 59 motion raised several arguments which fell into two categories: (1) intervening changes in the law relating to his claim under *Penry v. Lynaugh*, 492 U.S. 302 (1989) prove that his jury could not fully consider his mitigating evidence and (2) the amended memorandum and order applied the wrong legal standard, reached an incorrect result, and was factually incomplete absent an evidentiary hearing. Aranda's recent briefing has refined his arguments to challenge the adjudication of three claims based on new legal developments regarding: (1) his ineffective-assistance-of-counsel claim; (2) his *Penry* claim; and (3) his claim challenging his confession.

The Court has reviewed the claims raised in Aranda's initial Rule 59 pleadings and summarily finds that the earlier filings did not show any error requiring the alteration or amendment of judgment. This Court's discussion, therefore, will focus on the arguments raised in the recent briefing. The Court's analysis will center on whether Aranda has shown intervening law or manifest error that calls into question the judgment in this case.

Much has changed since the denial of Aranda's federal petition. Still, post-judgment review of Aranda's arguments is limited. Legal developments will only require altering or amending the judgment if they would have changed the result that should have been reached. Also, "[t]he manifest injustice standard presents ... a high hurdle" for the movant. *Westerfield v. United States*, 366 F. App'x 614, 619 (6th Cir. 2010). The Fifth Circuit has explained that a "manifest error" as one that is "plain and indisputable, and that amounts to a complete disregard of the controlling law." *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004). With that understanding, the Court will consider Aranda's post-judgment arguments.

**A. Ineffective-Assistance-of-Counsel Standard**

*3 Aranda argues that this Court should reconsider the judgment regarding his ineffective-assistance-of-counsel claim "because it did not correctly apply the standards for deficiency and prejudice established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), as clarified

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by subsequent decisional law." (Docket Entry No 63 at 3). Relying on more-recent Supreme Court precedent, Aranda argues that the amended memorandum and order applied an incomplete legal standard to his ineffective-assistance claim and thus reached the wrong result. Aranda, however, has not shown a basis for Rule 59 relief on his ineffective-assistance claim.

In 1984, the Supreme Court established the constitutional baseline for effective legal representation and delineated the parameters for assessing resultant prejudice. The past two decades have seen deeper exposition by the Supreme Court on the *Strickland* standard. In 2000, the Supreme Court first overturned a death sentence using the *Strickland* analysis in *Williams v. Taylor*, 529 U.S. 362 (2000). In subsequent years, the Supreme Court has emphasized the constitutional obligations of defense counsel in capital cases. *See Porter v. McCollum*, 558 U.S. 30 (2009); *Rompilla v. Beard*, 545 U. S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003). However, "none of these cases established retroactive constitutional rules." *Ayestas v. Davis*, 933 F.3d 384, 390 (5th Cir. 2019).

The amended memorandum and order unquestionably applied the correct legal standard to Aranda's ineffective-assistance-of-counsel claim. The decision relied on *Strickland* and repeatedly quoted from that decision and related precedent. While Aranda may quibble about the specific wording used in the decision, it applied the correct legal principles to his ineffective-assistance claim. Aranda's complaints amount to little more than disagreement with the result and are more properly raised on appeal. The Court finds that Aranda has not shown any new law or manifest error requiring altering or amending the final judgment.

### B. A Texas Jury's Consideration of Mitigating Evidence

Aranda's federal petition raised claims challenging how a Texas capital jury considers an inmate's mitigating evidence. Specifically, Aranda claimed that Texas law failed to provide an adequate vehicle for jury consideration of mitigating factors relevant to his sentence. Aranda's post-judgment arguments require significant discussion.

Texas' capital-punishment scheme involves a bifurcated trial in which a jury considers an inmate's sentence after convicting him of capital murder. In the penalty phase, the parties present aggravating and mitigating factors for the jury's consideration in answering specific questions. At the time of trial, Article 37.071(b) of the Texas Code of Criminal Procedure required a jury to determine a capital defendant's sentence by answering three special issue questions:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

The trial court delivered all three special issues to the jury. The question before this Court is whether those questions provided an adequate vehicle for the consideration of mitigating evidence.

***4** Aranda did not call any penalty phase witnesses or present any evidence. Aranda's case to mitigate against a death sentence came from counsel's closing arguments. As recognized in the amended memorandum and order,

> [Aranda] presented no mitigating evidence at the penalty phase of his trial. In his closing argument, however, [Aranda's] counsel did remind the jury that [Aranda] had been an inmate of the prison system in the past and that the State had not presented any evidence of [his] violent behavior in prison. Furthermore, [Aranda] argues that at the guilt-innocence phase of his trial evidence indicated (1) that [he] had no knowledge of his brother's plans to pick up marihuana in Laredo, (2) that he was not armed until he and his brother picked up the marihuana, (3) that he had been drinking that night (4) that immediately prior to the shooting a police officer was walking towards the car with his hand on his service revolver, and (5) that the bullet

> that killed officer Alvarez may not have come from the gun [Aranda] fired.

(Docket Entry No. 27 at 69-70).

The law in 1979 did not require a separate special instruction for jurors to consider mitigating evidence. At that point, the Supreme Court had held that a state capital sentencing system must satisfy two requirements to be constitutionally acceptable: it must "rationally narrow the class of death-eligible defendants" and "permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime." *Kansas v. Marsh*, 548 U.S. 163, 174 (2006) (relying on *Furman v. Georgia*, 408 U.S. 238 (1972)). Three years before Aranda's trial, the Supreme Court upheld the constitutionality of Texas' capital sentencing statute in *Jurek v. Texas*, 428 U.S. 262 (1976). Finding that the constitutionality of the Texas scheme "turns on whether the enumerated [special issue] questions allow consideration of particularized mitigating factors," the Supreme Court found that the Texas Court of Criminal Appeals interpreted the statute in a way that let a jury consider mitigating circumstances. *See id.* at 272-73; *see also* *Franklin v. Lynaugh*, 487 U.S. 164 (1988).

A few months after Aranda filed his federal petition, however, the Supreme Court decided that, even though the deliberateness and future dangerousness special issues allowed a jury to give partial consideration to evidence of mental retardation and childhood abuse, some mitigating evidence still had "relevance to [a defendant's] moral culpability beyond the scope of the special issues" to which a jury could not "express its reasoned moral response...in determining whether death was the appropriate punishment." *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989).

Aranda's petition raised several claims involving *Penry*-like arguments. Specifically, in claim twenty-one Aranda argued that "the Texas Death Sentencing Statute, on its face and as applied in this case, provides inadequate guidance to the jury on its ability to consider and act upon mitigating evidence proffered by the defense as the basis for a sentence less than death."[2]

*5 Aranda's facial challenge was rejected because "*Jurek v. Texas* upheld the constitutional validity of the Texas capital murder scheme" and "nothing in this Petition which would require a change in the *Jurek* holding." (Docket Entry No. 27 at 67. With respect to his as-applied challenge, counsel's punishment-phase arguments implicated two categories of mitigating evidence: (1) an absence of evidence that he had been violent in prison and (2) evidence that "the shooting lacked sufficient 'deliberateness' to require an affirmative answer to the first special statutory question." (Docket No. 27 at 67). The second category of mitigation was considered to involve "residual doubt" as addressed in the Supreme Court's recent decision in *Franklin v. Lynaugh*, 487 U.S. 164 (1988). In *Franklin*, a plurality found no constitutional error in whether Texas' special issues allowed a jury to consider residual doubt concerning a defendant's guilt or intent. The *Franklin* decision was "unremarkable" because the Supreme Court has "never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing...." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 250-51 (2007) (citing *Oregon v. Guzek*, 546 U.S. 517, 523-27 (2006)). The amended memorandum and order held that "[t]here is nothing in the record to indicate that he requested special instructions regarding the jury's consideration of residual doubt, and as *Franklin* holds nothing in the Texas capital sentencing scheme prevents the jury from considering residual doubt with regards to a defendant's deliberateness." (Docket Entry 27 at 71). "As for the jury's ability to give mitigating weight to [Aranda's] prison record," the *Franklin* decision meant that "the jury was free to evaluate the [Aranda's] disciplinary record as evidence of his character in response to the second special statutory question." (Docket Entry No. 27 at 71) (citing *Franklin*, 487 U.S. at 177).

The decades that have passed have brought about numerous decisions from federal and state courts that have expanded on the *Penry* holding. Other decisions have elaborately traced the "long and contentious line of cases" in which *Penry* law has evolved. *Pierce v. Thaler*, 604 F.3d 197, 204 (5th Cir. 2010); *see also McGowen v. Thaler*, 675 F.3d 482, 490-91 (5th Cir. 2012); *Blue v. Thaler*, 665 F.3d 647, 664 (5th Cir. 2011). As a result of the *Penry* decision, the Texas Legislature in 1991 amended the statute to include a new specific mitigation special issue. TEX. CODE CRIM. PRO. art. 37.0711, § 2(e)(1). For the nearly three decades since, federal

courts have grappled with Texas' pre-1992 sentencing scheme that lacked a specific mitigation instruction or question. The law has coalesced into a constitutional expectation that "sentencing juries must be able to give *meaningful* consideration and effect to *all* mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir*, 550 U.S. at 246 (emphasis added).

In recent years, the Fifth Circuit has granted relief in nearly all cases in which the petitioner raised a procedurally adequate *Penry* claim.[3] Relief, however, is not automatic. In application, the Supreme Court's *Penry* jurisprudence involves a two-part inquiry tied to the specific evidence presented at trial. *SeeMines v. Quarterman*, 267 F. App'x 356, 361 (5th Cir. 2008) (describing the process by which a court assesses a *Penry* claim); *Coble v. Quarterman*, 496 F.3d 430, 444 (5th Cir. 2007) (same). A reviewing court first asks whether the complained-of evidence meets a low relevance standard. *See Tennard v. Dretke*, 542 U.S. 274, 283 (2004). Second, a court must decide whether the defendant's evidence had "mitigating dimension beyond" the special issue questions actually posed to the jury. *Id.* at 288; *see also Smith v. Texas*, 543 U.S. 37, 43-45 (2004) (reaching the same result in a case on certiorari review from the Texas Court of Criminal Appeals). "[W]hen the defendant's evidence may have meaningful relevance to the defendant's moral culpability 'beyond the scope of the special issues,' " omitting a specific mitigation question amounts to constitutional error. *Abdul-Kabir*, 550 U.S. at 254 n.14.

*6 While the development of *Penry* jurisprudence has upset numerous pre-1992 capital sentences in Texas, the law has not undercut relevant portions of the *Franklin* holding. Whether or not the special issues comprehend evidence of residual doubt is not a question of constitutional dimension. The Supreme Court has "never held that capital defendants have an Eighth Amendment right to present 'residual doubt' evidence at sentencing [.]" *Abdul-Kabir*, 550 U.S. at 251.[4] Residual doubt—such as whether the circumstances of the offense demonstrate a lack of intent—"is not relevant to a jury's deliberations in the punishment phase." *Williams v. Davis*, 192 F.Supp.3d 732, 766-67 (S.D. Tex. 2016); *see also United States v. Jackson*, 549 F.3d 963, 981 (5th Cir. 2008) (finding that a criminal defendant has no right to a sentencing instruction on residual doubt). Accordingly, *Penry* jurisprudence since judgment has not changed the result as to whether the special issues unconstitutionally prevented jurors from considering evidence raising residual doubt.

Aranda disputes whether the deliberateness special issue provided an adequate vehicle for the jury to consider his "residual doubt" evidence, particularly related to his consumption of alcohol before the murder. Aranda, however, has not convincingly shown that the jury as not able to give full effect his mitigating evidence and express their reasoned moral response through the deliberateness special issues. If jurors determined that the circumstances surrounding the offense, such as Aranda's drinking or involvement in the drug transaction, somehow mitigated his decision to kill, they could have answered the deliberateness special issue in the negative. Aranda has not shown that the dramatic change in *Penry* law since the court entered judgment would require a different conclusion.

Likewise, case law has not changed *Franklin*'s holding that the future-dangerousness special issue encompassed a jury's consideration of good-behavior evidence. *See Franklin*, 487 U.S. at 178. The Supreme Court's more-recent *Penry* jurisprudence has not altered *Franklin*'s understanding that "most cases evidence of good behavior in prison is primarily, if not exclusively, relevant to the issue of future dangerousness." *Abdul-Kabir*, 550 U.S. at 250-51.

Much has changed in *Penry* jurisprudence since the court denied Aranda's petition. This Court, however, finds that those developments do not change the result in this case.

**C. Aranda's Confession**

In his second ground for relief, Aranda claimed that "his confession [to police officers] was coerced, and that the trial and appellate courts erroneously concluded the [his] confession was voluntary." (Docket Entry No. 27 at 16). The essence of Aranda's arguments on Rule 59 review is that the amended memorandum and order failed to discuss adequately the relevant analysis. *Moran v. Burbine*, 475 U.S. 412 (1986) set forth a two-prong test for a *Miranda* waiver: (1) whether the waiver was the product of a free and deliberate choice rather than intimidation, coercion, or deception; and (2) whether the waiver was made with a full awareness of both the nature of the right being abandoned and

consequences of the decision to abandon it. Aranda claims that new law emphasizes the importance of a confession being both knowing and voluntary and the amended memorandum and order erred by only discussing one of them.[5]

*7 While Aranda argues that new law requires Rule 59 relief, he does not identify any precedent that materially changed how courts assess the constitutionality of a confession. Cases reiterating the need to discuss both prongs are not an intervening change in controlling law.

Aranda also argues manifest error in the denial of his claim. Aranda claims that the amended memorandum and order stopped short by not examining whether he made a knowing and intelligent waiver of his rights. In a footnote, the decision observed that Aranda "makes no claim that his confession was not intelligently made, or that he did not understand the *Miranda* warnings when given." (Docket Entry No. 27 at 24). Aranda's habeas petition argued almost exclusively that his confession was "involuntarily coerced as the result of a police beating." (Docket Entry No. 2 at 18). Respondent correctly observes that "[t]he bulk of Aranda's *Miranda* briefing dealt with whether law enforcement coerced Aranda into confessing." (Docket Entry No. 63 at 36). Aranda only passingly argued that the trial court erred in finding that he understood the waiver of his rights. To the extent that the briefing discussed the knowing and intelligent waiver of his rights, Aranda's "argument fixated on how the *state court's analysis* was wrong by only concerning itself with voluntariness." (Docket Entry No. 63 at 37). Aranda objects to this interpretation of his briefing and the resultant legal analysis but does not show a manifest error of law or fact. Aranda has not shown that he merits Rule 59 relief on his confession claim.

**IV. Appeal**

When an inmate seeks appellate review after the effective date of AEDPA, its standards govern whether an appeal should go forward. *See Slack v. McDaniel*, 529 U.S. 473, 482 (2000); *Kunkle v. Dretke*, 352 F.3d 980, 984 (5th Cir. 2003); *Goodwin v. Johnson*, 224 F.3d 450, 458 (5th Cir. 2000). AEDPA prevents appellate review of a habeas petition unless the district or circuit courts certify specific issues for appeal. *See* 28 U.S.C. § 2253(c); Fed. R. App. Pro. Rule 22(b). Aranda has not yet requested that this Court grant him a Certificate of Appealability ("COA"), though this Court can consider the issue *sua sponte*. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000). A court may only issue a COA when "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also Slack*, 529 U.S. at 484. Under the appropriate standard, this Court will not certify any issue for review by the Fifth Circuit.

**V. Conclusion**

The Court denies Aranda's motion under Rule 59 of the Federal Rules of Civil Procedure. All other requests for relief are denied. The Court will not certify any issue for appellate consideration.

It is so ORDERED.

**All Citations**

Not Reported in Fed. Supp., 2020 WL 2113640

## Footnotes

1 Respondent makes various procedural arguments to preclude judicial consideration of Aranda's supplement to his Rule 59 motion: Aranda's supplement amounts to an untimely amendment of his Rule 59 motion, his supplement is the functional equivalent of an untimely Rule 60(b) motion, a court cannot consider new precedent that occurs after the period between judgment and the filing of a Rule 59 motion, there has been no significant change in precedent since 1991, the doctrine of laches precludes relief, and Aranda is undeserving of relief because he has not actively litigated this case in years. Without extensively addressing each of the arguments, the Court makes the following observations. Aranda's recent briefing addresses new law and discusses the facts in a different light, but he has filed that briefing only at the invitation of the Court. Aranda has been on death row for four decades, almost thirty of which have been without meaningful judicial

review. There has been inexcusable delay in this case. Respondent 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. Habeas relief was denied; delay in this case would prejudice the State of Texas, not Aranda. 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. Additionally, Respondent has not cited any precedent that convincingly discourages consideration of law created during the pendency of a Rule 59 motion. In the context of the unique procedural posture of the matters before the Court, and given the significant legal developments over the years, the interest of justice discourages reliance on specious procedural theories and encourages serious inquiry into the integrity of Aranda's capital conviction and sentence.

2 In claim twenty-three, Aranda argued that "his counsel could have presented evidence of the Petitioner's family history, juvenile delinquency, past experiences with police brutality, and past instances of head injury, had the Texas sentencing statute allowed the jury to give such evidence independent mitigating weight." (Docket Entry No. 27 at 73). The Fifth Circuit "has repeatedly rejected the claim that the 'Texas statutory capital sentencing scheme is invalid as preventing or chilling defense counsel's development of mitigating evidence.' " *Miniel v. Cockrell*, 339 F.3d 331, 338 (5th Cir. 2003) (quoting *Briddle v. Scott*, 63 F.3d 364, 378 (5th Cir. 1995)). Accordingly, " 'a petitioner cannot base a *Penry* claim on evidence that could have been but was not proffered at trial.' " *Miniel*, 339 F.3d at 338 (quoting *Pierce v. Thaler*, 604 F.3d 197, 202 (5th Cir. 2010)).

3 *SeeNorris v. Davis*, 826 F.3d 821, 830 (5th Cir. 2016); *Jones v. Stephens*, 541 F. App'x 399, 406 (5th Cir. 2013); *McGowen v. Thaler*, 675 F.3d 482, 495-96 (5th Cir. 2012); *Pierce v. Thaler*, 604 F.3d 197, 211-12 (5th Cir.

2010); *Rivers v. Thaler*, 389 F. App'x 360, 361 (5th Cir. 2010); *Mines v. Quarterman*, 267 F. App'x 356, 362 (5th Cir. 2008); *Chambers v. Quarterman*, 260 F. App'x 706, 707 (5th Cir. 2007); *Garcia v. Quarterman*, 257 F. App'x 717, 723 (5th Cir. 2007); *Coble v. Quarterman*, 496 F.3d 430, 433 (5th Cir. 2007); *but see* *Smith v. Quarterman*, 515 F.3d 392, 414 (5th Cir. 2008).

4 Two primary reasons underlie the Supreme Court's refusal to find a constitutional right to present sentencing evidence of residual doubt. First, "sentencing traditionally concerns how, not whether, a defendant committed the crime." *Oregon v. Guzek*, 546 U.S. 517, 526 (2006). Accordingly, residual doubt inserts irrelevant details into the proceedings: "whether, not how, he did so." *Id.* at 526. Second, "the parties previously litigated the issue to which the evidence is relevant-whether the defendant committed the basic crime. The evidence thereby attacks a previously determined matter in a proceeding at which, in principle, that matter is not at issue. The law typically discourages collateral attacks of this kind." *Id.* (citing *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). The Supreme Court has recognized that allowing a jury to condition its sentencing decision on residual doubt is "arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence-but not the underlying conviction-is struck down on appeal." *Franklin*, 487 U.S. at 173, n. 6; *see also* *Holland*, 583 F.3d at 283.

5 On direct appeal, the Court of Criminal Appeals denied Aranda's *Miranda* claim as follows:

[Aranda] recites part of his testimony at the *Jackson v. Denno* hearing that he had just been released from the hospital and placed in jail prior to the confession. His testimony revealed that he left the hospital in a wheelchair and a doctor had given him "some pills" and that he "couldn't even walk. Because I still had pain." When asked if he was "still hurting" when he talked to the officers he replied they "forced him to come out" of the cell. When asked if he was bleeding at the time of the statement, he responded, "I just had an operation. They took a bullet and it hurt." When asked how he felt, he stated, "I couldn't talk to nobody. But they took me over there to the cell. They carried me over." He never directly answered any of his counsel's questions. The district attorney, who was present, testified that [Aranda] was suffering from a couple of gunshot wounds—"one to the middle finger of his left hand and a semi-superficial wound to the shoulder, upper left shoulder." It was shown that [Aranda] was given his warnings, etc., that he was permitted to confer with his brother and that he wrote out his own confession. Other than the meager testimony of the [Aranda] all the evidence was to the contrary. The [Aranda] contended he asked for "my lawyer" four times. The fact that the [Aranda] ever asked for a lawyer at any time was denied by the district attorney, the deputy sheriff and a police officer who was present. The trial court found that [Aranda] did not ask for a lawyer. The [Aranda] argues in conclusion under the point of error "Since the State failed to produce any competent evidence to rebut the fact that [Aranda] was under the influence of some sort of medication given him due to his bullet wounds, and was weak and unable to clearly think, the confession given by [Aranda] was clearly inadmissible." The difficulty with [Aranda]'s approach is that there is no evidence to show that [Aranda] was under the influence of medication to the extent he could not clearly think or voluntarily give a confession. His testimony did not establish that. The State showed he walked to the interrogation room, appeared to be mentally alert, understood the warnings, conferred with his brother, etc., before giving the confession.

*Aranda*, 736 S.W.2d at 706.

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