No. 21-499

# In the Supreme Court of the United States

CARLOS VEGA,
*Petitioner*,
v.
TERRENCE B. TEKOH,
*Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether remedies under 42 U.S.C. § 1983 are available for violations of the Fifth Amendment when a police officer takes un-*Mirandized* statements from a suspect during custodial interrogation and then causes those statements to be used against the suspect in a criminal trial.

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## INTRODUCTION

The Petition seeks to overturn the holding of *Dickerson v United States*, 530 U.S. 428 (2000), that the warnings mandated by *Miranda v Arizona*, 384 U.S. 436 (1966), are required by the Fifth Amendment and thus inextricably entwined with the right not to be compelled to be a witness against oneself in a criminal trial.

The circumstances presented by this case are rare. Un-*Mirandized* statements taken from Respondent during an allegedly custodial interrogation were used against him in his criminal trial, where Petitioner indisputably caused the prosecution and was responsible for the introduction of the evidence. Because the jury rejected the confession as unreliable and acquitted Respondent, the criminal court rulings admitting the statements were not subject to appellate review, and therefore are not preclusive.

Respondent brought this section 1983 action to establish that the statements were obtained and admitted against him at his criminal trial in violation of his Fifth Amendment rights and to obtain redress for those violations. Because his compelled statements were used against him in his criminal trial this case is not governed by *Chavez v. Martinez*, 538 U.S. 760 (2003).

There is no active, entrenched split in the Circuits on the availability of section 1983 remedies in these unusual circumstances. Fifteen years ago the Seventh Circuit affirmed the right to such a remedy in *Sornberger v. City of Knoxville*, 434 F. 3d. 1006 (7th

Cir. 2006), citing *Dickerson*. The same year the Eighth Circuit had a different view in *Hannon v. Sanner*, 441 F. 3d 635 (8th Cir. 2006), rejecting *Dickerson*'s holding that *Miranda* admonitions are based in the Fifth Amendment. No other Circuit squarely addressed the issue until the Court of Appeals did so in this case. During those fifteen years, the Court has not retreated from its holding in *Dickerson*.

The Seventh Circuit and the Court of Appeals below faithfully applied the constitutional rationale of *Dickerson*, holding that the warnings *required* by *Miranda* are constitutionally mandated and cannot be superseded by Congress. If Respondent's statements were taken during custodial interrogation without admonitions and used against him at a criminal trial, and Petitioner was responsible for both, under *Miranda*, *Dickerson* and their progeny Respondent's Fifth Amendment rights were violated. Congress provided for remedies for such violations by enacting section 1983. While Congress may restrict such remedies, it has not done so.

There are no compelling reasons to grant the Petition. Petitioner and his *amici* argue that it would be unfair to hold police officers accountable under section 1983 because other actors decide whether to use a statement taken in violation of *Miranda*. That is not what happened here. The statements were admitted through Petitioner's testimony. Regardless, Petitioner waived his causation argument by failing to raise it in this appeal. Petitioner's policy arguments are more appropriately addressed to Congress.

## STATEMENT OF THE CASE

This case is a paradigmatic example of the reason for *Miranda* warnings. This Court understood that a totality of circumstances test was an inadequate safeguard for Fifth Amendment rights. Compliance with *Miranda* eliminates this uncertainty and protects a suspect's Fifth Amendment rights from the inherently coercive reality of custodial interrogation.

Respondent was a twenty-five-year-old immigrant from Cameroon working as a Certified Nursing Assistant at County-USC Medical Center in Los Angeles, starting out on a medical career. He was performing routine patient transportation duties for a heavily sedated female patient, who had just experienced stroke-like symptoms. He took her from her brain scan to her hospital room after doctors had inserted a large needle in an artery in her groin to inject contrast for a CT scan. The patient later claimed that he touched her improperly during her transportation.

Petitioner Vega investigated this allegation at the hospital. He interrogated Respondent in a small windowless, soundproof room. According to Respondent and several co-workers, after about an hour in the room with the door shut, Respondent wrote a vague, apologetic confession. The accounts of what happened diverge entirely. While Petitioner insists that the statements Respondent gave were voluntary and immediate, Respondent testified to an interrogation replete with profanities and threats to have Respondent and his family deported, and refusing to allow Respondent to speak to a lawyer or one of his supervisors. There is no dispute that

Petitioner never gave Respondent *Miranda* warnings. The jury was not required to make a finding as to whether Respondent was "in custody" for *Miranda* purposes when he wrote out the statement.

Respondent was prosecuted for an alleged sexual assault based principally on the written confession obtained during his interrogation. Petitioner presented this confession to prosecutors to induce them to file criminal charges against Respondent. Petitioner testified in Respondent's Preliminary Hearing about the voluntary nature of the statements so that Respondent would be held over for trial. Petitioner was successful in obtaining that result, notwithstanding the complainant identified someone other than Respondent as her assailant.

After Respondent's first criminal trial ended in a mistrial because of the prosecution's failure to turn over DNA evidence that derived from someone other than Respondent, Petitioner testified again at Respondent's second criminal trial about the supposed confession and other alleged statements made by Respondent in the course of his interrogation. In short, Petitioner was actively involved at every stage of Respondent's prosecution seeking to use his own words against him in the criminal trial to convict him.

Dr. Blandón-Gitlin, PhD, an expert on coerced confessions, testified in Respondent's criminal trial that the techniques used by Petitioner during the interrogation rendered Respondent's "confession" unreliable.

The criminal jury rejected the confession and acquitted Respondent. Respondent then brought this civil rights action against Petitioner,[1] *inter alia*, for the violation of his Fifth Amendment rights based on the use of his un-*Mirandized* statements against him in his criminal trial. During the first civil trial the District Judge declined to instruct the jury on Respondent's Fifth Amendment claim. After the jury rendered a verdict for Petitioner the District Judge granted Respondent's motion for a new trial based on this failure to instruct on Respondent's primary theory of liability. However, in the second trial the District Judge rejected Respondent's jury instruction based on the theory that the failure to give *Miranda* warnings during custodial interrogation was sufficient to establish a section 1983 violation when those statements are subsequently admitted against the declarant in a criminal trial. Instead, the Court gave an instruction using the totality of circumstances test to determine whether Respondent's alleged statements were voluntary. Unlike in the criminal trial, the District Judge excluded Dr. Blandón-Gitlin as an expert witness about Petitioner's coercive interrogation techniques and the unreliability of the ensuing statements.[2] The jury rendered a verdict for Petitioner without determining whether Respondent had been subjected to custodial interrogation.

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[1] Respondent sued other defendants and asserted other claims but this is the only claim relevant to the pending Petition.

[2] The Court of Appeals remanded this issue to the District Court for reconsideration in light of the reversal of the judgment. Pet. 25a-26a. This claim is a separate argument for reversal even if the district court's Fifth Amendment jury instruction were not reversible error.

The Court of Appeals reversed on the ground that a government actor who obtains un-*Mirandized* statements and causes them to be introduced in the prosecution's case in chief was sufficient evidence of a Fifth Amendment violation if a jury found that Respondent was subjected to custodial interrogation. Pet. App.23a, 25a. In doing so, the Court of Appeals followed the Seventh Circuit in reaching the same conclusion after this Court's *Dickerson* decision. Petitioner did not raise in his briefs in the Court of Appeals the causation argument he now raises, that Petitioner was not sufficiently responsible for introducing in Plaintiff's criminal trial a statement taken in violation of *Miranda*.

Petitioner filed a Petition for Rehearing and Rehearing En Banc. He raised the issue of qualified immunity on appeal for the first time in that Petition. He also raised for the first time on appeal the argument that the state court's decisions allowing Respondent's statements into evidence collaterally estopped Respondent's civil claims. They did not because the rulings were not final and merged into a judgment adverse to Respondent that he could have appealed.

Petitioner did not, however, raise the proximate causation issue he now asserts in that petition for reconsideration, or on appeal. Pet. 31. Indeed, Petitioner did not raise this issue in the trial court as a defense.

Petitioner did argue that the Court of Appeals' decision was in conflict with the Eighth Circuit's

decision in *Hannon v. Sanner*, 441 F. 3d 635 (8th Cir. 2006). The Rehearing Petition was denied with seven judges filing a dissenting opinion. Pet. App. 71a.

## REASONS FOR DENYING THE WRIT

The Petition should be denied for at least three reasons. First, the long-standing conflict between the Eighth Circuit's decision in *Hannon* and the Seventh Circuit decision in *Sornberger*, which was followed by the Court of Appeals below, arises from the Eighth Circuit's failure to apply the constitutional reasoning in *Dickerson* to the availability of civil remedies under section 1983. In the fifteen years since *Hannon* was decided no other Circuit has applied that decision or cited it with approval. The Ninth Circuit decision below reflects the widespread view that *Dickerson* resolves the issue in this case. There is no urgent need to resolve a fifteen-year-old conflict.

Second, and perhaps more important, like *Sornberger*, the Court of Appeals decision faithfully applies the constitutional analysis of the *Dickerson* decision. *Miranda* warnings are required by the Fifth Amendment because custodial interrogations are inherently coercive and this Court found such warnings to be constitutionally required to preserve Fifth Amendment rights. *Dickerson* holds that Congress cannot impose a totality of circumstances test to determine whether there has been a Fifth Amendment violation in the context of a custodial interrogation. The District Court's decision to substitute a totality of circumstances test for the bright line requirements of *Miranda* is incompatible with the constitutional rationale in *Dickerson*.

Third, there is no dispute that Fifth Amendment violations may form the basis for civil remedies under section 1983 once an unwarned statement is introduced against a criminal defendant at trial. In addition to requiring a claim based on the use of un-*Mirandized* statements alone, the Plaintiff must have been acquitted in the criminal trial, otherwise the rule of *Heck v. Humphreys*, 512 U.S. 477, 487 (1994) (success on section 1983 claim cannot imply invalidity of conviction), would bar the claim. The circumstances here rarely occur, which explains why fifteen years have passed without the Circuit conflict being raised.

Because it so unusual for the Fifth Amendment claim to arise solely on the failure to give *Miranda* warnings and the use of those un-*Mirandized* statements in a subsequent criminal trial that nevertheless results in an acquittal, Petitioner and his *amici* are more interested in overturning the constitutional foundation of *Dickerson*, and *Miranda* itself, than in resolving a conflict among Circuit courts.

## I. THE CIRCUIT SPLIT IS NEITHER DEEP NOR ENTRENCHED.

As Petitioner acknowledges, the Ninth Circuit followed the application of *Dickerson* employed by the Court of Appeals in *Sornberger v. City of Knoxville*, 434 F. 3d. 1006, 1027 (7th Cir. 2006).

The decision in *Hannon* is the only Circuit decision squarely in conflict with this analysis. However, even *Hannon* arises in circumstances more like those in *Chavez* than the facts of this case. As in *Chavez*, in

*Hannon* the statements were not actually used in a criminal trial. In *Hannon*, a state court suppressed the un-*Mirandized* statements so they were not actually introduced at trial. It appears that the Eighth Circuit has not revisited this issue since 2006.

Petitioner's reliance on *McKinley v. City of Mansfield*, 404 F. 3d 418 (6th Cir. 2005), is misplaced in that the Sixth Circuit's decision strongly supports the availability of a section 1983 remedy for the violation of Fifth Amendment rights. As the Sixth Circuit emphasized, "[t]he cases do not question that the police may be held liable under §1983 for violating someone's Fifth Amendment rights." *Id.* at 437. (Citing cases from the Second, Third, Fourth and Sixth Circuits, all involving section 1983 actions against police officers for violating Fifth Amendment rights in various ways.)

As in *Chavez*, in *McKinley* the statements were not actually used in a criminal trial, and this was the basis for denying the section 1983 claim. *See, e.g.*, *Hancock v. Miller*, 852 F. App'x 914, 924 (6th Cir. 2021) ("The government violates the Fifth Amendment when it uses incriminating statements that it obtained illegally. So when the government does not use the statements in a criminal proceeding, 'the plaintiff may not sue because he has not suffered the injury against which the Fifth Amendment protects.'") (citing *McKinley,* 404 F.3d at 438); *United States v. Calvetti*, 836 F.3d 654, 662 (6th Cir. 2016).

The *McKinley* court also rejected the argument that a police officer could escape liability because the

decision to use a compelled statement at trial was in the hands of prosecutors. *McKinley*, 404 F.3d at 437-38. Finally, the *McKinley* court rejected the officers' qualified immunity claims. Thus, *McKinley* aligns with the Court of Appeals' decision, not Petitioner's contentions.[3]

Petitioner refers to a footnote which appears to repeat this Court's plurality ruling in *Chavez* that the failure to give *Miranda* warnings alone was not sufficient to establish section 1983 liability. Pet. 16. Respondent does not contend that the failure to give *Miranda* warnings alone is sufficient for section 1983 liability. *Chavez* resolved that issue. The statement must be used in the criminal case. Here, however, the statements were used both in the preliminary hearing and the criminal trial itself. The failure to give *Miranda* warnings thus caused the violation of Respondent's Fifth Amendment rights here if a jury finds, on remand, that he was subjected to a custodial interrogation, a determination not yet made. The Sixth Circuit is not in conflict with the decision below. It appears that the Sixth Circuit has not revisited this issue since *McKinley*.

The other cases cited by Petitioner do not establish a conflict. *Bennett v. Passic*, 545 F. 2d 1260 (10th Cir. 1976) predates *Dickerson* by twenty-four years and relies on a pre-*Dickerson* analysis explicitly rejected by seven members of this Court, that *Miranda* warnings are not constitutional in nature. The

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[3] The Sixth Circuit has, moreover acknowledged "the 'constitutional' right to a *Miranda* warning . . . ." *United States v. Talley*, 275 F.3d 560, 564-65 (6th Cir. 2001) (citing *Dickerson*, 120 S.Ct. at 2335).

unpublished order in a *pro se* case in *Haulman v. Jefferson County*, 15 F. App'x 720, 721 (10th Cir. 2001), simply cited *Bennett* without any analysis of *Dickerson* in disposing of the case. Thus, the Tenth Circuit may certainly follow the post-*Dickerson* analysis employed by the Seventh and Ninth Circuits, were it to revisit this issue after having not done so for twenty years.[4]

In *Jones v. Cannon*, 173 F. 3d 1271, 1290-91 (11th Cir. 1999), the Eleventh Circuit rejected a section 1983 claim based on the failure to give *Miranda* warnings, prior to *Dickerson.* Its analysis is superseded by this Court's analysis in *Dickerson*. In cases since *Jones* the Eleventh Circuit has followed *Jones* without extended analysis or consideration of *Dickerson*.[5] It is not clear from these cases whether the un-*Mirandized* statements at issue were actually used at trial.

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[4] The Tenth Circuit does not appear to have done so yet. *See, e.g.*, *Edison v. Owens*, 515 F.3d 1139, 1149 (10th Cir. 2008) (noting that "[w]e need not express our agreement or disagreement with the Seventh Circuit [in *Sornberger*, 434 F3d. at 1026-27]" given the plaintiff in the case never incriminated herself during a custodial interrogation).

[5] *Horton v. Martin*, No. 18-15331-D, 2019 U.S. App. LEXIS 10310, at *2 (11th Cir. Apr. 5, 2019); *Lloyd v. Marshall*, 525 F. App'x 889, 892 (11th Cir. 2013); *Dollar v. Coweta Cty. Sheriff Office*, 446 F. App'x 248, 251 (11th Cir. 2011); *Wright v. Dodd*, 438 F. App'x 805, 807 (11th Cir. 2011); *Parris v. Taft,* 630 F. App'x 895, 897 (11th Cir. 2015); *Knight through Kerr v. Miami-Dade Cty.*, 856 F.3d 795 (11th Cir. 2017).

As Petitioner acknowledges, the Fifth Circuit's decision in *Murray v. Earle*, 405 F. 3d 278, 293 (5th Cir. 2005), was based on a proximate causation analysis that does not address the issues presented in the Petition and which was also waived here. Pet. 31.[6] The *Murray* Court expressed no view, one way or the other, on whether section 1983 was available when statements taken in violation of *Miranda* were used in a criminal proceeding.[7] Apparently, the Fifth Circuit has not addressed the issue presented in the Petition. The positions of other Circuits have not been established.[8]

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[6] The Fifth Circuit's causation analysis also appears to be an outlier. Other Circuits find that police officers may be sued pursuant to section 1983 when they violate a suspect's Fifth Amendment rights because it is foreseeable that the statements will be used in any subsequent criminal case. *See Sornberger v. City of Knoxville*, 434 F. 3d. 1006 (7th Cir. 2006); *McKinley v. City of Mansfield*, 404 F.3d 418, 436-37 (6th Cir. 2005) (collecting cases from circuits, noting none of which disputed that officers could be held liable for Fifth Amendments); *id.* at 437-38 (holding it is "hard to see how officials whose conduct ultimately impaired a citizen's Fifth Amendment rights could nonetheless escape civil liability merely because a different state official put the statements into trial.").

[7] In fact, the juvenile suspect in *Murray* was given *Miranda* warnings. 405 F. 3d at 283-84. The Court found that her confessions were coerced in the circumstances of that case.

[8] It is unclear what analysis the Third Circuit follows. In *Renda v. King*, 347 F. 3d 550, 552 (3d Cir. 2003), the Court rejected a Fifth Amendment claim because the statements were suppressed and therefore were not used in a criminal trial. For this reason, this Court's *Chavez* decision controlled. The Fourth Circuit rejected a Fifth Amendment claim for similar reasons in *Burrell v. Virginia*, 395 F. 3d 508, 513-14 (4th Cir. 2005). Neither the Third or Fourth Circuit have specifically addressed the circumstances presented here.

In summary, there is no entrenched split among the Circuits on the issue presented by this case requiring intervention by this Court. The Court of Appeals' analysis is grounded on the constitutional logic of *Dickerson*. The Eighth Circuit's 2006 *Hannon* decision rejects that logic and is a dated outlier. *Hannon* has not been followed by any other Circuit in the last fifteen years. It seems unlikely that this issue will recur with any frequency given the paucity of decisions in the last fifteen years and the well-established basis for Section 1983 remedies for Fifth Amendment violations.

## II. THE DECISION BELOW IS COMPELLED BY *DICKERSON*.

### A. THE DECISION BELOW FOLLOWS *DICKERSON*.

This Court's decision in *Dickerson* resolved the central issue in this case. Whether *Miranda* warnings have been termed "prophylactic rules" in many of this Court's earlier decisions does not alter their constitutional basis after *Dickerson.* Indeed, virtually all of Petitioner's arguments were considered and rejected in *Dickerson*.[9] Failing to give *Miranda* warnings where required and introducing them in a criminal trial establish a Fifth Amendment violation. Congress has provided civil remedies for such violations in section 1983. Congress can restrict this remedy in any way it wishes but it has not done so.

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[9] Petitioner's arguments here reflect those made by the court-appointed *amici* in *Dickerson* and rejected by the *Dickerson* Court. *See* Brief of Court-Appointed Amicus Curiae Urging Affirmance of the Judgment Below, *Dickerson v. United States*, 530 U.S. 428 (2000) (No. 99-5525).

The constitutional requirement of *Miranda* warnings is based on the inherently coercive nature of custodial interrogation. *Dickerson*, 530 U.S. 435, 440 (citing *Miranda*, 384 U.S. at 455, 465). This case is a perfect example of why this Court found that such warnings were inextricably bound to the protection of Fifth Amendment rights and why it was unnecessary to prove coercion where *Miranda* warnings were not given to prove a Fifth Amendment violation. Custodial interrogation is presumptively coercive, and admonitions are required to overcome that presumption. *See, e.g.*, *Miranda*, 384 U.S. at 467; *United States v. Washington*, 431 U.S. 181, 188 (1977). The District Court's jury instructions eliminated that presumption altogether and treated Petitioner's failure to give *Miranda* warnings as merely one factor of many to be considered by the jury in determining whether Respondent's statements were coerced. The error was compounded when Respondent's expert witness was excluded.

Before *Dickerson*, the same arguments advanced by Petitioner and the dissent in the Court of Appeals were made in support of a statute which replaced *Miranda* warnings with a totality of circumstances test for coercion, as did the jury instructions given by the District Court. *Dickerson* held that statute unconstitutional. Moreover, as this Court has no constitutional authority to impose non-constitutional court-made "prophylactic rules" on the States, unless *Miranda* warnings were required by the Fifth Amendment there is no basis for overturning state criminal convictions based on the failure to give such warnings during custodial interrogation. *Dickerson* makes clear that *Miranda* warnings were

constitutionally required and pre-empts any attempts by Congress or the States to circumvent them.

A party's failing to give *Miranda* warnings and introducing an un-*Mirandized* statement at trial, as occurred in this case, violates the Fifth Amendment. This Court has considered the consequences of such violations in the context of a criminal trial. *See, e.g.*, *Fare v. Michael C.,* 442 U.S. 707, 718 (1979). In these circumstances, though, Congress has provided the civil remedies for such violations so there is no need for this Court to consider whether a damages remedy is appropriate. Congress has provided for such remedies in section 1983.

This Court's plurality decision in *Chavez v Martinez*, 538 U.S. 760 (2003), is consistent with this analysis. The Court held that the failure to give *Miranda* warnings without the use of a suspect's statements in a criminal proceeding cannot be the basis for a section 1983 claim. *Id.* at 767. A majority of the Court also found that the plaintiff's Fourteenth Amendment Due Process claim could be considered on remand. *Id.* at 773. Justice Souter observed "[t]he question whether the absence of *Miranda* warnings may be a basis for a section 1983 action under any circumstances is not before the Court." *Id.* at 779, n.+ (Souter, J., Concurring).

*United States v. Patane*, 542 U.S. 630 (2004), also did not alter this analysis. A three-justice plurality held that in a criminal case the suppression of physical evidence "presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial." *Id.* at 643. While

three justices also used broader language in dicta, the majority opinion, joined by two other justices, held that suppression of physical evidence was not required because it "does not run the risk of admitting into trial an accused's incriminating statements against himself." *Id.* at 645 (Kennedy, J., and O'Connor, J., concurring). In any case, it is undisputed that Petitioner caused that here. *See* § II(B), *infra*. This Court's precedent establishes that causing the admission of un-*Mirandized* statements violates the Constitution.

Fifth Amendment violations require a remedy under section 1983, as the statute's text, history, purpose, and caselaw establishes. Section 1983 establishes liability for any person who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. The statute is meant to remedy and aid "the preservation of human liberty and human rights" and as such is liberally and broadly construed. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 684 (1978). As the Court and the bill's opponents at its passage have acknowledged, there "is no limitation whatsoever upon the terms that are employed [in the bill] and they are as comprehensive as can be used." *Id.* at 685 n. 45. Thus, this Court has repeatedly "rejected attempts to limit the types of constitutional rights that are encompassed within the phrase 'rights, privileges, or immunities.'" *Dennis v. Higgins*, 498 U.S. 439, 445 (1991); *see also, e.g.*, Cong. Globe, 42d Cong., 1st Sess., App. 476 (1871) (Rep. Dawes) (The person who "invades, trenches upon, or impairs one

iota or tittle of the least of ["constitutional guarantees"] to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor").

*Dickerson*'s recognition that a constitutional guarantee prohibits causing the admission of un-*Mirandized* statements thus creates a section 1983 claim unless Congress legislates otherwise.

Similarly, habeas corpus proceedings confirm that causing a person to have his un-*Mirandized* statements admitted against him violates a right, privilege, or immunity secured by the Constitution or laws. Habeas corpus proceedings are only permissible for claims that a person "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). This Court has repeatedly permitted habeas claims based on the admission of un-*Mirandized* statements, which thus necessarily violates the U.S. Constitution or laws, even before *Dickerson*. *See Thompson v. Keohane*, 516 U.S. 99 (1995); *Withrow v. Williams*, 507 U.S. 680, 690-95 (1993); *see also, e.g.*, *Berghuis v. Thompkins*, 560 U.S. 370, 395 (2010).

*Miranda*, as reaffirmed by *Dickerson,* is perhaps the best-known feature of Fifth Amendment jurisprudence. This case would be a poor vehicle to

revisit such a foundational decision and settled principles. [10]

### B. PETITIONER'S CAUSATION ARGUMENT WAS NOT PRESERVED AND IS NOT AN APPROPRIATE ISSUE FOR REVIEW IN THIS COURT.

Petitioner did not raise the proximate causation issue he now raises in the Petition in the Court of Appeals. There is no mention either in his Answering Brief or in his Petition for Rehearing and Rehearing En Banc.[11] *See, e.g.*, *Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980) ("Ordinarily, we will not consider a claim that was not presented to the courts below."); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) (holding an issue "not raised in the Court of Appeals . is not properly before us.").

Nor did he seek a jury instruction on this issue in the District Court. For this reason, this issue is not properly preserved for review in this Court.

In addition to Petitioner's failure to preserve this issue, Petitioner offers no reason for this Court to decide this issue. There is no apparent ongoing split in the Circuits requiring this Court's intervention. Nor is this an issue of national importance requiring this Court's intervention at this time.

Moreover, the proximate causation issue is inherently fact-based and more appropriate for resolution by a jury rather than this Court in the first

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[10] Even if this Court were inclined to revisit the constitutionality of *Miranda* warnings, this case does not present such a challenge. *E.g.* Pet. at 3.

[11] Indeed, below Petitioner argued that his actions and the prosecution were "one and the same." Pet. for Rehearing at 12.

instance. Petitioner was *the* central actor in the Fifth Amendment violation in this case. In addition to the taking of the un-*Mirandized* statements from Respondent in the first instance, and initiating the criminal prosecution based on those statements, Petitioner testified about those statements at the Preliminary Hearing and in Respondent's criminal trial. Without Petitioner's active engagement at every stage of the criminal proceedings there would have been no criminal proceedings and no Fifth Amendment violation. Regardless, the matter is also waived.

There is no basis for Petitioner's claim of complete immunity from civil liability for his role in violating Respondent's Fifth Amendment rights. In any event, it would be inappropriate for this Court to consider this issue and resolve these factual issues in the first instance.

## III. THERE ARE NO COMPELLING POLICY REASONS TO REVISIT *DICKERSON*.

There is no empirical basis for Petitioner's policy arguments to overturn *Dickerson* or the decision below. While Petitioner eschews any intent to disturb *Miranda*, Pet. at 3, he does set out to undermine this Court's decision in *Dickerson*. The main thrust of Petitioner's argument is that it would be unfair to hold police officers accountable under section 1983 because other actors decide whether to use a statement taken in violation of *Miranda*.

The facts of this case demonstrate the fallacy of this argument. Petitioner initiated this Fifth Amendment violation, not any prosecutor. Petitioner failed to respect Respondent's right during a custodial

interrogation, extracting statements that he caused to be used against him. Petitioner filed a probable cause declaration based solely on the alleged confession, initiating the arrest and criminal prosecution against Respondent. Petitioner testified about the confession at the preliminary hearing, two suppression hearings, and to the jury at the criminal trial, which returned a verdict of acquittal after hearing from Respondent, his co-workers and an expert on unreliable confessions.

In this civil action, were a jury to agree that Respondent was in "custody" during his interrogation Petitioner violated the central mandates of *Miranda*. This situation demonstrates why *Miranda* warnings are inextricably bound with the constitutional requirements of the Fifth Amendment. There would have been no criminal prosecution absent Petitioner's conduct during his interrogation of Respondent; and in any event, Respondent did not dispute that he was responsible for introducing the statement, and affirmatively argued that he did as a basis for collateral estoppel. In any case, it would not be unfair to hold police officers accountable under section 1983 when, foreseeably, other actors use statements taken in violation of *Miranda*.

Petitioner's hypothesized protestations about the potential impact of civil liability on police officers based on similar factual settings are unsupported by any evidence. Few legal principles are as established, accepted and defined as the requirement to give *Miranda* warnings at the outset of in the context of a custodial interrogation. *See Dickerson*, 430 U.S. at 443 ("*Miranda* has become embedded in routine police practice to the point where the warnings have become

part of our national culture."). Every police officer in America knows exactly what is required before statements taken in a custodial setting may be admitted into evidence in criminal cases. *See Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, J., concurring) ("The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures"). If police officers are confronted with unusual circumstances -- not present here -- the doctrine of qualified immunity protects them from civil liability. However, if Respondent's account, as corroborated by his co-workers, is accepted by a jury there is no possibility of qualified immunity on these facts, this was an obvious *Miranda* violation that ripened into a Fifth Amendment violation once the statements were used against Respondent in his criminal trial.

Petitioner's policy arguments and those of his amici are more appropriately addressed to Congress. Congress may restrict the remedies available under section 1983 for violations of the Fifth Amendment. The paucity of cases raising these issues indicates that there is no pressing policy reason for providing such relief in those rare instances where police officers have been subject to section 1983 actions for such violations. Indeed, Congress has provided for habeas relief from convictions based on the same violations. 28 U.S.C. § 2254(a). Congress could limit habeas relied in these circumstances as well but it has never done so. *Miranda* violations, including the use of un-*Mirandized* statements may be the basis for habeas relief without any additional showing of coercion. *See*, *e.g.*, *Withrow v. Williams*, 507 U.S. 680, 690-95 (1993).

Under Petitioner's view this relief would have to be reconsidered as well.

## CONCLUSION

For all these reasons, the Petition should be denied.

Respectfully submitted,

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