NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ELWOOD LEWIS THOMAS,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF VIRGINIA

_____

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether a *Miranda* waiver was voluntary is a question that will always involve a mixture of fact and law on appellate review. All geographic Federal Circuits and at least forty-five states agree that the question of whether a *Miranda* waiver was voluntary should be reviewed as a mixed question on appeal, and that legal issues should be reviewed *de novo*. It appears that this Court agrees, as in 1990 the Court granted certiorari, reversed, and remanded a case to the Seventh Circuit requiring it to adopt this standard of review.

In 1982, the Supreme Court of Virginia held that the question of voluntariness of a *Miranda* waiver is a question of fact that is subject to a presumption of correctness on appeal. In that case, the Supreme Court of Virginia relied on precedent from the Seventh Circuit that was later corrected by this Court. Despite this correction, the Court of Appeals of Virginia has again decided that the standard of review on appeal on the issue of the voluntariness of a *Miranda* waiver is an issue of fact that is due deference to the trial court. It rejects the standard of review adopted by almost every other jurisdiction that it is a mixed question that requires legal issues be decided *de novo*. Virginia is in a substantial minority of jurisdictions that treat it as a pure factual analysis that seems to be at odds with this Court's jurisprudence.

This case presents the following question on appeal:

1. What is the correct standard of review on appeal for a court reviewing a finding that a *Miranda* waiver is voluntary?

PARTIES IN COURT BELOW

Other than the petitioner and the respondent, there were no other parties in the Supreme Court of Virginia or the Court of Appeals of Virginia.

STATEMENT OF RELATED PROCEEDINGS

The following proceeding is directly related to this case:

- *Elwood Lewis Thomas v. Commonwealth of Virginia*, 82 Va. App. 80, 905 S.E.2d 495 (Sept. 17, 2024). The Supreme Court of Virginia denied discretionary review on May 30, 2025; petition for rehearing denied on July 9, 2025.

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PETITION FOR WRIT OF CERIORARI

Petitioner Elwood L. Thomas respectfully petitions for a writ of *certiorari* to review the judgment of the Court of Appeals of Virginia.

OPINIONS BELOW

The opinion of the Court of Appeals of Virginia, sitting *en banc*, (App. 1) is reported at 82 Va. App. 80, 905 S.E.2d 495 (Sept. 17, 2024). The Record Number was 1429-22-4. The prior panel decision of the Court of Appeals of Virginia (App. 2) was unreported, but may be found at Rec. No 1429-22-4, 2024 Va. App. LEXIS 133 (March 12, 2024).

The Supreme Court of Virginia denied the discretionary Petition for Appeal in this case in an order of May 30, 2025. This order (App 3.) is not published. The Record Number was 240880. The Supreme Court of Virginia denied a timely filed Petition for Rehearing in an order on July 9, 2025. This Order (App. 4) is not published.

JURISDICTION

The Supreme Court of Virginia denied the discretionary Petition for Appeal on May 30, 2025, and denied a timely filed Petition for Rehearing on July 9, 2025. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rule 13.

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

> arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Factual Allegations

In 2012, Mr. Thomas was charged with two counts of aggravated sexual battery. The Commonwealth alleged that he had sexually assaulted several children but decided to only proceed with allegations against two children. R. 628. Mr. Thomas pled guilty to one charge of aggravated sexual battery, was sentenced to one year in prison, and then was released on probation. R. 628

When he started probation, Mr. Thomas signed rules of probation which required him to report to his probation officer, be truthful and cooperative, and follow his probation officer's instructions. R. 950. Mr. Thomas was supervised by his probation officer for six or seven years. R. 950. Sex offender probation further required Mr. Thomas to disclose where he goes, what media he consumes, what pornography he watches, and what romantic relationships he pursues, R. 950-51, and to disclose a detailed sexual history to include all sexual "victims."

In 2019, the Fairfax County Police Department reopened its investigation of allegations that occurred during the time frame of the original charges—before Mr. Thomas began probation. *See* R. 628, 921. In doing so, the detectives reviewed documents relating to the first investigation which described Mr. Thomas as "intellectually disabled" and "mentally retarded." R. 928. They decided to charge Mr. Thomas.

To arrange Mr. Thomas's arrest, the detectives asked his probation officer to arrange a probation meeting between him and Mr. Thomas. R. 923-24, 929, 940. When Mr. Thomas arrived at the probation office, the detectives arrested him, handcuffed him, and transported him to police headquarters to be interviewed. R. 923-24.

Prior to the interview, the detectives agreed that the probation officer would be present at the interview so that he could introduce them to Mr. Thomas. R. 932, 940, 943. Prior to the interview starting, the probation officer entered the interrogation room and told Mr. Thomas "this is Detective Carter and Detective Gadell, I am going to be here for a little bit, just go ahead and chat with them for a little bit today." Mr. Thomas told his probation officer, "Ok." R. 919-920.

A few minutes later, Detective Carter read the *Miranda* form incredibly quickly. Mr. Thomas only gave a verbal response to two of the warnings. He shook his head to some warnings and did not respond to other warnings. Mr. Thomas did not initial after each of the warnings on the form. After reading the form, Detective Carter stated "Do you mind signing right here for me?" Mr. Thomas responded

"Yeah." When a detective directed Mr. Thomas to sign the form, Mr. Thomas signed the form and proceeded as instructed by his probation officer. R. 919-920.

Trial court proceedings

Prior to trial, Mr. Thomas filed a motion to suppress the statements made to police on the basis that his waiver of rights was not voluntary. In that motion he raised the issues arising under the Fifth and Fourteenth Amendments to the Constitution of the United States.

This issue was preserved at trial by the motion to suppress statements, R. 54; argument at the motions hearing, R. 1963-91, 1005-13; the trial court's ruling, R. 1013-17; the Order dated September 10, 2021, R. 334; the defendant's objection to the interview at the trial, R. 1547-48; and the trial court's ruling, R. 1548.

The Court of Appeals of Virginia

On direct appeal to the Court of Appeals of Virginia, Mr. Thomas again raised the issue of the denial of his motion to suppress under the Fifth and Fourteenth Amendments to the Constitution of the United States. This issue was preserved in the Court of Appeals by Appellant's Opening Brief, p. 1, 41-46, and by the Reply Brief, p. 10-13.

Mr. Thomas initially prevailed in the panel decision. *Thomas v. Commonwealth*, Rec. No. 1429-22-4, 2024 Va. App. LEXIS 133 (Va. Ct. App., March 12, 2024). The Court of Appeals granted the Commonwealth's request for *en banc*

review. This issue was also preserved in Appellant's Opening Brief *En Banc*, p. 29-41; by the Reply Brief *En Banc*, at p. 1-6.

The Court of Appeals, sitting *en banc*, disagreed with the panel and affirmed the trial court. *Thomas v. Commonwealth*, 82 Va. App. 80, 101-19 (Va. Ct. App., September 17, 2024). In that opinion, the Court of Appeals adopted a deferential standard of review for the question of whether a *Miranda* waiver was voluntary. It held that a *Miranda* waiver is a finding 'of fact' that carries a 'presumption of correctness.'" *Id.* at 102. The dissenting opinion pointed out that the Court of Appeals of Virginia had previously adopted the *de novo* standard of review, which was now being rejected by the majority. *Id.* at 132. The dissent also noted that *Harrison v. Commonwealth,* 244 Va. 576 (1992), relied upon by the majority, only addressed whether a waiver was knowing and intelligent, not the question of voluntariness. *Id.*

The Supreme Court of Virginia

Mr. Thomas again raised the issue of the standard of review and the violation of his rights under the Fifth and Fourteenth Amendments to the Constitution of the United States in his petition for appeal to the Supreme Court of Virginia. In the briefing, Mr. Thomas specifically addressed the issue of the standard of review. After the initial denial by order on May 30, 2025, he again raised the issue of both the standard of review and the substantive violation of his constitutional rights in a petition for rehearing, which was denied by order on July 9, 2025. The petition for rehearing again addressed the issue of the standard of review.

REASONS FOR GRANTING THE WRIT

I. The Standard of Review used by the Court of Appeals of Virginia directly conflicts with prior decisions of this Court that have resulted in reversal of a Federal Circuit Court of Appeals.

The standard of review used by the Virginia Court of Appeals in its *en banc* decision contradicts the view of this Court as to the correct standard of review of the voluntariness of a *Miranda* waiver. Granting certiorari will allow this Court to correct the error of the Court of Appeals of Virginia and ensure that the correct standard of review is used for this Federal Constitutional right. In fact, this Court previously granted certiorari, reversed and remanded the Seventh Circuit for employing this same erroneous standard of review in *Mills v. United States*, 519 U.S. 990 (1996). The Court should do the same here.

In its opinion, the Court of Appeals of Virginia relies on the Supreme Court of Virginia's opinion in *Harrison v. Commonwealth,* 244 Va. 576 (1992), to hold that whether a *Miranda* waiver is voluntary "is a finding 'of fact' that carries 'a presumption of correctness.'" *Thomas v. Commonwealth*, 82 Va. App. 80, 102 (Va. Ct. App., September 17, 2024). In *Harrison*, the Supreme Court of Virginia relied on the opinion of the United States Court of Appeals for the Seventh Circuit in *Bryan v. Warden, Indiana State Reformatory*, 820 F.2d 217 (7th Cir. 1987). At the time *Bryan* was decided, there was a split in the Federal Circuit Courts of Appeal as to the correct standard of review for a *Miranda* waiver, and the Supreme Court of Virginia adopted the position of the Seventh Circuit. That split no longer exists.

A few years after *Harrison*, the Seventh Circuit decided *United States v. Banks*, 78 F.3d 1190 (7th Cir. 1996), which applied a clear error standard of review to address the voluntariness of a *Miranda* waiver. The Supreme Court of the United States granted certiorari on appeal, *sub nom. Mills v. United States*, 519 U.S. 990 (1996), but vacated the decision and remanded the case for further consideration in light of *Ornelas v. United States,* 517 U.S. 690 (1996). *Ornelas* addressed the standard of review for a warrantless search of an automobile. *Id.* at 699. Despite arising in a different context, the Supreme Court of the United States summarily reversed the Seventh Circuit in *Mills* and remanded for the Court to correct the standard of review.

The Seventh Circuit did just that, holding: "*Ornelas* makes it clear that we ought to join the rest of the Country in holding that the ultimate issue of the voluntariness of a waiver of *Miranda* rights ought to be reviewed *de novo* by an appellate court." *United States v. Mills*, 122 F.3d 346, 350 (7th Cir. 1997). While this Court appears to have never directly addressed the standard of review for a *Miranda* waiver case, the Seventh Circuit's summary reversal and subsequent adoption of a *de novo* standard of review after *Ornelas* is strong evidence that the *de novo* standard is correct and required by this Court's precedent. To the extent that there is still uncertainty over this standard, granting *certiorari* in this case will make this point expressly clear.

Ornelas has been cited as recently as this year by this Court in a case that supports the contention that the *de novo* standard of review is required in this case.

In *Bufkin v. Collins*, 145 S. Ct. 728 (2025), this Court addressed the standard of review for certain decisions of the Veteran's Administration. *Id.* at 733. This Court distinguished statutory review in that case from the analysis in *Ornelas* because the issue did not arise under the Constitution and because there was no "legal work" to be done by the reviewing court. *Id.* at 740. The Court noted that reviewing a constitutional standard creates a "strong presumption that determinations under that standard are subject to *de novo* review." *Id.* In terms of legal work, the probable cause review in *Ornelas* required "an objective, legally grounded inquiry as to what a hypothetical person could have found" and therefore necessitated a *de novo* standard of review whereas the statutory review did not. *See id.*

It is no wonder, then, that this Court reversed the Seventh Circuit in *Mills*. Just like in *Ornelas*, the voluntariness of a *Miranda* waiver is a constitutional issue that requires a legally grounded inquiry into what a hypothetical person would have done. This would require a *de novo* standard of review under the constitutional precedent of this Court. This Court has agreed in several cases that in the constitutional realm, "the role of appellate courts in marking out the limits of a standard through the process of case-by-case adjudication favors *de novo* review even when answering a mixed question primarily involves plunging into a factual record." *U.S. Bank N.A. v. Vill. At Lakeridge, LLC*, 583 U.S. 387, 396 fn. 4 (2018) (citing *Bose Corp v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1994)). Applying a *de novo* standard here would also put a review of the voluntariness of a *Miranda* waiver on equal footing with other constitutional

standards of review. *See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 567 (1995) (expression under the First Amendment), *Miller v. Fenton*, 474 U.S. 104, 115-16 (1985) (voluntariness of a confession under the Due Process Clause of the Fourteenth Amendment).

Just as this Court granted *certiorari*, reversed, and remanded when the Seventh Circuit committed this same error in *Mills v. United States*, 519 U.S. 990 (1996), the Court should do so here as well. Otherwise, the Court should grant *certiorari* to definitively address the standard of review to be employed in a case of appellate review of the voluntariness of a *Miranda* waiver.

II. The Standard of Review used by the Court of Appeals of Virginia conflicts with the Standard of Review employed by all of the Federal Circuit Courts of Appeal and at least Forty-Three states plus the District of Columbia.

The Court should grant *certiorari* to resolve a conflict between the Commonwealth of Virginia and all of the Federal Circuits and almost every other state concerning the standard of review used by an appellate court in a case involving the voluntariness of a *Miranda* waiver. Left unresolved, criminal defendants in Virginia will be on substantially worse footing than their counterparts in virtually every other state and federal jurisdiction given the importance of a standard of review to a case on appeal. As this is a Federal Constitutional issue, having the same standard of review ensures that state courts and the Federal Circuits all review these claims on equal footing.

Nearly every Federal Circuit and State employs a mixed standard of law and fact to appellate review of a denial of a suppression motion based on an invalid

Miranda waiver. For example, after this Court granted *certiorari*, vacated the judgement, and reversed, the Seventh Circuit wrote that "*Ornelas* makes it clear that we ought to join the rest of the Country in holding that the ultimate issue of the voluntariness of a waiver of *Miranda* rights ought to be reviewed *de novo* by an appellate court." *United States v. Mills*, 122 F.3d 346, 350 (7th Cir. 1997). All federal circuits still adhere to this standard of review.[1] Nearly every other state has followed suit since that time. At least forty-three states and the District of Columbia apply the familiar mixed question of law and fact standards, including *de novo* review of legal questions to motions to suppress based on *Miranda* violations.[2]

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[1] *United States v. Guzman*, 603 F.3d 99, 106 (1st Cir., 2010) (*de novo*); *United States v. Capers*, 627 F.3d 470, 474 (2nd Cir., 2010) (*de novo*); *United States v. Velasquez*, 885 F.2d 1076, 1086 (3rd Cir., 1989) (plenary); *United States v. Giddins*, 858 F.3d 870, 878-79 (4th Cir., 2017) (*de novo*); *United States v. Abrego*, 141 F.3d 142, 171 (5th Cir., 1998) (*de novo*); *United States v. Lawrence*, 735 F.3d 385, 436 (6th Cir. 2013) (*de novo*); *United States v. Upton*, 512 F.3d 394, 399 (7th Cir., 2008) (*de novo*); *United States v. Noonan*, 745 F.3d 934, 935 (8th Cir., 2014)(*de novo*); *United States v. Amano*, 229 F.3d 801, 803 (9th Cir. 2000)(*de novo*); *United States v. Burson*, 531 F.3d 1254, 1256 (10th Cir., 2008) (de *novo*); *United States v. Louis*, 602 Fed. Appx. 728, 731 (11th Cir., 2015) (*de novo*); *United States v. Yunis*, 859 F.2d 953, 957-58 (D.C. Cir., 1988) (*de novo*).

[2] *Shanklin v. State*, 187 So.3d 734, 756 (Ala., 2014) (*de novo* standard of review when facts from hearing are not in dispute, as was the case here); *Kalmakoff v. State*, 257 P.3d 108, 118-19 (Alaska, 2011) (independently determine whether factual findings support legal conclusions); *State v. Newell*, 132 P.3d 833, 841 (Ariz., 2006) (*de novo*); *Grillot v. State*, 353 Ark. 294, 309-11 (Ark., 2003) (independent determination, defined as *de novo* in *Clark v. State*, 374 Ark. 292, 298 (Ark., 2008)); *People v. Kopatz*, 347 P.3d 952, 965 (Cal., 2015) (mixed question of law and fact is subject to independent review); *People v. Humphrey*, 132 P.3d 352, 356 (Colo., 2006); *State v. Arias*, 140 A.3d 200, 204 (Conn., 2016) (plenary); *Garvey v. State*, 873 A.2d 291, 298 (Del., 2005) (*de novo*); *In re S.W.*, 124 A.3d 89, 95 (D.C., 2015) (*de novo*); *Ross v. State*, 45 So. 3d 403, 414 (Fla., 2010) (de novo); *Young v. State*, 309 Ga. 529, 534 (Ga., 2020) (*de novo*); *State v. Wallace*, 105 Haw. 131, 137 (2004) (Haw., *de novo*); *State v. Kent*, 475 P.3d 1211, 1214 (Idaho, 2020) (court "freely reviews the application of constitutional principles to the facts as found); *People v. Salamon,* 202 N.E.2d 283, 298 (Ill., 2022) (*de novo*); *State v. Ortiz*, 766 N.W.2d 244, 249 (Iowa, 2009) (*de novo*); *State v. Harris*, 562 P.3d 1001, 1006 (Kan., 2025); *Cox v. Commonwealth*, 641 S.W.3d 101, 113 (Ky., 2022) (de *novo*); *State v. Figueroa*, 146 A.3d 427, 430 (Me., 2016); *Lee v. State*, 12 A.3d 1238, 1246 (Md., 2011) (court makes its own independent constitutional appraisal); *Commonwealth v. Tremblay*, 107 N.E.3d 1121, 1128 (Mass., 2018) ("conduct an independent review of [the trial court's] ultimate findings and conclusions of law"); *People v. Gipson*, 287 Mich. App. 261, 264 (Mich. Ct. App., 2010) (*de novo*); *State v. Farrah*, 735 N.W.2d 336, 341 (Minn. 2007) (*de novo*); *State v. Rousan*, 961 S.W.2d 831, 845 (Mo., 1998) (*de novo*); *State v. Gittens*, 178 P.3d 91, 94 (Mont., 2008) (plenary); *State v. Miah S.*, 861 N.W.2d 406, 411 (Neb., 2015) ("Whether those facts suffice to meet the constitutional standards,

Four additional states may also employ this standard, although it is less clear in their case law.[3]

Virginia appears to be one of only three states that do not use a *de novo* standard to review a portion of the trial court's determination of a *Miranda* violation.[4] Given that a split amongst the states remains, but weighs heavily in support of standard promoted by this Court, this Court should grant *certiorari* to ensure that the correct standard of review is employed by the Virginia appellate

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however, is a question of law, which we review independently of the trial court's determination"); *Lamb v. State*, 251 P.3d 700, 703 (Nev., 2011) (*de novo*); *State v. Cowles*, 877 A.2d 219, 220 (N.H., 2005) (*de novo*); *State v. Bullock*, 292 A.3d 503, 515 (N.J., 2023) (*de novo*); *State v. Nieto*, 12 P.3d 442, 448 (N.M., 2000) (*de novo*); *State v. Hardy*, 451 S.E.2d 600, 608 (N.C., 1994); *State v. Hunter*, 914 N.W.2d 527, 531-32 (N.D., 2018) ("Questions of law are fully reviewable on appeal, and whether a finding of fact meets a legal standard is a question of law"); *State v. Belton*, 74 N.E.3d 319, 343 (Ohio, 2016) (*de novo*); State v. Ward, 475 P.3d 420, 426 (Ore., 2020) (voluntariness is questions of law reviewed without deference to the trial court, but reviewed also under the Oregon Constitution); *Commonwealth v. Briggs*, 12 A.3d 291, 320-21 (Pa., 2011) (*de novo*); *State v. Girard*, 799 A.2d 238, 250 (R.I., 2002) (*de novo*); *State v. Willingham*, 933 N.W.2d 619, 625 (S.D., 2019)(*de novo)*; *State v. Northern*, 262 S.W.3d 741, 747 (Tenn., 2008); *Pecina v. State*, 361 S.W.3d 68, 79 (Tex., 2012) (*de novo); State v. Gutierrez*, 864 P.2d 894, 898 (Utah, 1993) ("correction of error standard"); *State v. Christmas*, 980 A.2d 790, 792 (Vt., 2009) (*de novo*); *State v. Mayer*, 362 P.3d 745, 749 (Wash., 2015) (*de novo*); *State v. M.W.*, 908 S.E.2d 444, 452 (W.Va., 2024) (*de novo*); *State v. Turner*, 401 N.W.2d 827, 832 (Wis.,1987) (questions and law and constitutional questions reviewed *de novo*); *Lopez v. State*, 86 P.3d 851, 862 (Wyo., 2004) (*de novo*).

[3] *State v. Payne*, 833 So.2d 927, 933 (La., 2002) (stating that "the legal findings of the trial court are subject to review without the great deference standard we attach to credibility determinations"); *Moore v. State*, 287 So.3d 905, 911 (Miss., 2019) (stating that "'[w]here an appeal raises a question of law, the applicable standard of review is *de novo,'*" but goes on to state "[w]e will only reverse a trial court's denial of a motion to suppress 'if the ruling is manifest error or contrary to the overwhelming weight of the evidence'")(internal citations omitted); *Matter of Jimmy D.,* 15 N.Y.3d 417, 423 (N.Y. 2010) (stating that "whether a confession was, beyond a reasonable doubt, voluntary is a mixed question of law and fact, and is to be determined from the 'totality of circumstances.' Because voluntariness is a mixed question of law and fact, our review is limited to deciding whether the Appellate Division's finding is supported by evidence in the record.") (internal citations omitted); *Mason v. State*, 433 P.3d 1264, 1270 (Ok. Ct. Crim. App., 2018) (stating "We review the trial court's ruling on a motion to suppress for abuse of discretion" but also that the court "reviews the trial court's legal conclusions derived from those facts *de novo*.")

[4] *Clark v. State*, 808 N.E.2d 1183, 1190 (Ind., 2004) ("The record must disclose substantial evidence of probative value that supports the trial court's decision… We do not reweigh the evidence and we consider conflicting evidence most favorably to the trial court's ruling"); *State v. Wilson*, 545 S.E.2d 827, 829 (S.C., 2001) (abuse of discretion standard)

courts, as well as courts in the few remaining states that continue to use the incorrect standard of review.

CONCLUSION

The Court of Appeals of Virginia continues to employ a standard of review that is in direct conflict with this Court's precedent and that conflicts with the standard used by all Federal Circuits and almost every other state. This Court should correct this incorrect standard of review to ensure uniformity of the review of the Fifth Amendment rights and not permit the results on appeal to differ in Virginia from the rest of the nation.

Mr. Thomas requests that the court grant the petition for *certiorari*, and consider reversing and remanding this case without further argument as the Court did when the Seventh Circuit committed this same error in *Mills v. United States*, 519 U.S. 990 (1996).

Respectfully submitted this 7th day of October, 2025

Respectfully submitted,
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By Counsel

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