No. 11-175

IN THE

Supreme Court of the United States

CHARLES L. RYAN, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner,

vs.

JOHNATHAN ANDREW DOODY,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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B. Whether the Court of Appeals correctly applied settled principles when it ruled that *Miranda* warnings given to a legally inexperienced, foreign born juvenile did not clearly inform him of his *Miranda* rights where the detective repeatedly downplayed the significance of the warnings, and, in explaining the right to counsel's presence, told the juvenile that that right would apply *if the juvenile was involved in the crime.*

C. Whether the Court of Appeals correctly applied settled principles in ruling that the state court's determination that the warnings reasonably conveyed the *Miranda* rights was an unreasonable application of federal law, as determined by this Court, and/or rested on an unreasonable determination of the facts in light of the state court record.

II.

A. Whether the Court of Appeals correctly applied settled principles when it ruled that a confession was involuntary where it was obtained through the custodial interrogation of a legally inexperienced juvenile from Thailand that began at

night and lasted nearly 13 hours, and which was conducted by tag teams of Task Force officers, without significant breaks, while the juvenile sat in a straight backed chair, and received no food and just two soft drinks; where the tape recordings of the interrogation establish that the juvenile was subjected to relentless questioning, including over long periods of time when he was silent and non-responsive, and was told repeatedly that he had to answer his interrogators' questions, that the interrogation would continue until he did, and that his answers would not leave the room.

B. Whether the Court of Appeals correctly applied settled principles when it ruled that the state court's determination that the confession was voluntary was an unreasonable application of federal law, as determined by this Court, and/or rested on unreasonable determinations of the facts in light of the state court record.

III.

Whether admission of the defendant's confession was harmless error, where no federal or state judge has ever held or intimated that, if the confession was erroneously admitted, the error was harmless, and where, *inter alia*, the prosecution relied heavily on the confession in opening and closing arguments, the jury disbelieved the prosecution's key witness, and the remaining evidence against the defendant was challenged, weak and circumstantial.

INTRODUCTION

Respondent Johnathan Doody respectfully opposes the request by the Petitioner [hereinafter "State" or "Arizona"] that certiorari be granted in this highly fact specific case. The Petition itself shows the *absence* of any good, let alone compelling, reason for the granting of discretionary review. The Petition reflects only the State's dissatisfaction with the Ninth Circuit's disposition of the matter. Arizona's argument that the Court of Appeals "disregarded" the AEDPA rests on distortions of the record and misstatements about the basis of the Court of Appeals' ruling. In making its arguments, the State also misrepresents what the Arizona Court of Appeals did.

STATEMENT OF THE CASE

On Februrary 25, 2010, the Ninth Circuit Court of Appeals, *en banc*, after careful consideration, determined that Doody was entitled to habeas corpus relief under the AEDPA, on two separate Constitutional grounds, each one under both 28 U.S.C. § 2254(d)(1) and § 2254(d)(2). The Ninth Circuit *en banc* held that under the facts of this particular interrogation, Doody's confession was involuntary, as had the Ninth Circuit panel. Seven judges concluded that this sleep-deprived juvenile's will was overborne by his indefatigable interrogators during an interrogation that lasted nearly 13 hours without food or significant breaks. They concluded that the contrary determination by the Arizona Court of Appeals was both an unreasonable application of federal law, as determined by this Court, and rested on unreasonable determinations of the facts. *Doody v. Schriro*, 596 F.3d 620 (9th Cir. 2010).

The Ninth Circuit *en banc* majority also ruled that Doody was not properly *Mirandized* and that the State court's determination that the warnings were clear and understandable constituted both an unreasonable determination of the facts and an unreasonable application of clearly established federal law. Chief Judge Kozinski, concurring in part, wrote separately on why the *Miranda* warnings were invalid and why the State court's contrary determination was unreasonable, not just wrong. 596 F.3d at 655-59.

The Court reached these conclusions only after listening to audiotapes of the entire interrogation, which began at 9:25 pm on October 25, 1991 and ended at 10 am the next day. Those tapes captured the purported advisement of *Miranda* rights.

On October 12, 2010, this Court granted Arizona's petition for certiorari, vacated the *en banc* Court's decision, and remanded for reconsideration in light of *Florida v. Powell,* 130 S. Ct. 1195 (2010). *See Ryan v. Doody*, 131 S. Ct. 456 (2010).

On May 4, 2011, the Ninth Circuit, *en banc*, issued new written opinions in which the majority, Chief Judge Kozinski, and the dissenting judges reached the same conclusions they had previously reached. All of the judges agreed that *Powell* affected neither the outcome of the case nor the required analysis. (A-41-43; A-91-92; A-114-115) In addition, the majority and Chief Judge Kozinski discussed *Harrington v. Richter*, 131 S. Ct. 770 (2011), which had been decided following this Court's GVR order. *See* A-45-46, A-93.

In concluding that habeas relief was warranted

on Doody's *Miranda* and voluntariness claims, the Ninth Circuit did not "disregard" the AEDPA, but carefully applied it. Its determination that the *Miranda* warnings given were improper and inadequate – and that the State court's contrary decision was unreasonable – was entirely consistent with this Court's seminal *Miranda* ruling; with this Court's recent decision in *Florida v. Powell*, 130 S.Ct. 1195 (2010); and with *California v. Prysock*, 453 U.S. 355 (1981); and *Duckworth v. Eagan*, 492 U.S. 195 (1989), which require that the warnings given reasonably convey the defendant's rights as required by *Miranda*, including the all-important right to counsel's presence.

Likewise, the Ninth Circuit did not disregard the AEDPA in ruling that Doody's statements were involuntary, and that the State court's contrary determination was unreasonable, both as a matter of law and fact. It did not "mischaracter[ize] the state court record, redetermin[e] witness credibility, [or] draw[ ] inferences adverse to the states [sic] courts' legal and factual determinations." Petition at i-ii. As demonstrated below, the Petition's contrary claims misstate and mischaracterize the record on these scores.

Arizona's disingenuousness undermines its entire argument. In its opening salvo – the very first sentence of its "Questions Presented" – Arizona boldly asserts as a fact that "Johnathan Doody killed eight Buddhist monks and a nun at a Buddhist temple near Phoenix, Arizona in 1991." Petition at i. But this case involves the *validity* of the jury's guilty verdict and the State's use of an unconstitutionally obtained juvenile confession to get it. To be sure, the prosecution's position at trial was that Doody killed the Temple residents, which is what the prosecution's cooperating witness, Alex

Garcia, claimed. Garcia testified that Doody hatched a plan to kill the monks and that Doody himself fired every fatal shot. But the jury *disbelieved* Garcia and did not convict Doody of the intentional murders he described and the State now relies on.

The jury convicted Doody of *felony murder,* and almost certainly did so based on a confession in which Doody said he was present at the Temple that night. In his rebuttal summation, the prosecutor argued that Doody's confession *alone* was sufficient to establish felony murder. (A-80-82) Other than that confession, and the discredited Garcia testimony, as the original Ninth Circuit panel wrote:

> The evidence against Doody was weak. Doody's incriminating statements to friends were, according to the witnesses' own testimony, understood as jokes. The evidence linking him to items stolen from the temple depended almost entirely on the testimony of friends of Caratachea's who testified with immunity and not without self-interest, as the stolen items had been linked to them. Stolen items found in Garcia's bedroom – which Doody shared at the time it was searched – were not connected specifically to Doody.

Doody v. Schriro, 548 F.3d 847, 870 (9th Cir. 2008). Not surprisingly, the State relied heavily on Doody's confession, playing all 17 tapes for the jury.

But, this case was rife with false confessions. At the time of Doody's interrogation, the State had already indicted four grown men – "the Tucson Four" – for the

very same Temple murders based on *their* confessions to the crimes obtained by the same Task Force officers who questioned Doody. Though Doody's interrogators succeeded in getting Doody to tell them that the Tucson men *were* involved, the State thereafter dropped the charges against those adults, taking the position that, notwithstanding their own confessions, the men from Tucson were not there. The State's position at heart, then, turns on the notion that some of what Doody told his interrogators was both voluntary and reliable, even though his statements inculpating the Tucson men were coerced and false.

This is not a case where defendant concedes his guilt but seeks reversal based on the prophylactic role of an exclusionary rule. This is a case where actual innocence is at issue.

And, though Arizona studiously avoids the subject, one reason why coerced confessions are excluded is their *unreliability*. Juveniles, like Doody, are *particularly* vulnerable to coercion, and *particularly* likely to make statements that are not true.

Arizona does not cite *Graham v. Florida*, 130 S.Ct. 2011 (2010), in which this Court re-affirmed what it had recognized in *Roper v. Simmons*, 543 U.S. 551 (2005): minors are "more vulnerable" than adults to "outside pressures." *Graham*, *supra,* 130 S.Ct. at 2026. "[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." *Id.*

Arizona does not even cite this Court's even more recent decision in *J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011):

> Even for an adult, the physical and psychological isolation of custodial interrogation can "undermine the individual's will to resist and ... compel him to speak where he would not otherwise do so freely." [*Miranda v. Arizona,* 384 U.S. 436, 467 (1966).] Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States,* 556 U.S. __, __ (2009) (slip op., at 16) (citing Drizin & Leo, The Problem of False Confessions in the Post-DNA World, 82 N.C. L. Rev. 891, 906-07 (2004); see also *Miranda*, 384 U.S., at 455, n. 23. That risk is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* 21-22 (collecting empirical studies that "illustrate the heightened risk of false confessions from youth").

J.D.B., supra, 131 S.Ct. at 2401.

Thus the bold assertion with which the State begins its Petition to this Court is flawed. So, too, is the remainder of the State's argument for certiorari.

REASONS FOR DENYING THE WRIT

In this unusual case, the federal Court of Appeals properly concluded that the State court's ruling that the *Miranda* warnings were proper and that the juvenile confession was voluntary rested on unreasonable determinations of the facts and constituted unreasonable applications of the law. Review by this Court is not necessary to address the well-settled law governing *Miranda* warnings and the voluntariness of juvenile confessions, nor the AEDPA standards that apply when a defendant seeks habeas relief from a state court conviction based on a *Miranda* violation or a coerced juvenile confession.

Though the State tries to lump this case with other cases in which this Court reversed Ninth Circuit grants of habeas, in this case, the Ninth Circuit neither misunderstood nor ignored its responsibilities under AEDPA. It did not re-weigh evidence or improperly make its own factual determinations where it was obligated to defer to the State's.

On the contrary, fully appreciating and respecting the deference that must be paid to state court determinations and the limited circumstances in which habeas relief is appropriate under the AEDPA, the Court of Appeals determined that, in this unusual case, in two separate ways, the State had violated Doody's clearly established Constitutional rights, and that the State court's contrary legal and factual determinations were not only wrong, but unreasonable. Chief Judge Kozinski, writing separately and providing his own analysis, determined that habeas relief was required on the *Miranda* issue alone.

Implicit in Arizona's argument is the view that any determination by a federal court that a legal or factual conclusion by a State court is unreasonable constitutes a forbidden re-weighing of the facts, a proscribed re-evaluation of the State court record, an inappropriate encroachment on the State's prerogatives, and an insult to the dignity of State courts. That view of the AEDPA is incorrect.

The *en banc* majority accurately set forth § 2254(d)'s requirements (A-32-33), and fully appreciated this Court's rulings on habeas under the AEDPA. It meticulously applied those rules, consistent with the judges' sworn and solemn obligations. (A-36-37; A-43-47; A-55-79) See also A-84; A-92-96 (Kozinski, C.J., concurring in the result). Federal judges *follow* the AEDPA mandate, *uphold* the Constitution they are sworn to uphold, and *serve* the interests of federalism when they grant relief in those cases where the State's resolution of a federal Constitutional claim is unreasonable. Under those circumstances, the AEDPA standards are met.

As we demonstrate below, in this case, the majority's analytical approach and its conclusions were fully respectful of the State court, and appropriately implemented this Court's Constitutional and AEDPA jurisprudence. A grant of certiorari in this unusual case would not address any new or unresolved issues and would be a misuse of this Court's valuable and limited resources.

I. The Federal Court Properly Applied Well-Settled AEDPA Standards in Granting Relief; Proper *Miranda* Warnings Were Not Given

This case presents no new issues with respect to *Miranda*, nor with respect to the application of the AEDPA with respect to cases raising *Miranda* claims. Accordingly, review by this Court is not warranted.

The *Miranda* warnings Doody was given were not the crisp, straightforward warnings this Court recently quoted in *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2256 (2010). *See* F-1-14.

Although Doody was a Thai-born, legally inexperienced juvenile who said he had never even heard of *Miranda* warnings, Detective Riley's words downplayed their seriousness and obscured their importance. *Four times*, Detective Riley misrepresented the purpose of the warnings, telling Doody that this was something "to save time," "to save you some time," "to get you back to doing what you need to do," and to "get things squared away." *Twice* Detective Riley told Doody not to "take it out of context," which, in this context, could only have meant that Doody should not take the warnings too seriously. Riley told Doody, "it's not quite like t.v. portrays it, ah, it's a little more, little less ah technical and a little less heavy if your want to put it ah that way...." (F-3)

With respect to the right to the presence of counsel, purporting to explain the printed warning on the State's juvenile *Miranda* form (A-144-145; E-2), Detective Riley told Doody:

> [A]n attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we think that you or somebody else is involved in, *if you were involved in it, okay.* Again, it [sic] not necessarily mean that you are involved*, but if you were, then that's what that would apply to okay.* (F-10)

Arizona did not even defend these warnings on the merits in the State court.[1] However, the state trial judge, after ruling that Doody was not in custody, added that, in any event, Doody was advised of his rights in language that "could, and, in fact, was clearly understood."

The Arizona Court of Appeals concluded that the *Miranda* warnings were adequate, stating only that "[t]he officers read each warning from a standard juvenile form and provided additional explanations as

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[1] Arizona's position in the trial court was that the interrogation was not custodial. In the Arizona Court of Appeals, Arizona argued in addition that the fact that warnings *were* given did not permit a challenge to their adequacy, and that Doody had, in any event, waived his *Miranda* claims, positions which the State Appeals Court rejected. See Appellee's Answering Brief in the Arizona Court of Appeals at 14-15, Point I, "Because the trial court found that appellant was not in custody, no *Miranda* warnings were required." ("In the present case, the trial court found that Appellant was not in custody when the officers questioned him. (citation omitted) Appellant does not challenge this finding on appeal, thus he has waived any claim that the officers needed to comply with the requirements of *Miranda*. Appellant may contend that, because the officers chose to give *Miranda* warnings, they then had to follow the requirements of *Miranda*, thus the question of compliance with *Miranda* is properly before this Court. The Arizona Supreme Court has decided against Appellant on this point ... *State v. Stanley,* 167 Ariz. 519, 523 ...."); C-17.

appropriate." (C-18) The State Appeals Court made no mention of Doody's clearly-presented claim that Riley's "additional explanation" with respect to the right to have counsel present told Doody that the right applied only to the guilty, to those "involved" in crimes.

At oral argument before the *en banc* Court, Arizona's attorney *thric*e acknowledged that these if-you-were-involved words to Doody were confusing. Audio recording, 6/23/09 (available on 9th Cir. website: http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003648) (*See* at 53:05: "the confusion is because he's trying to explain this parenthetical ... There is some confusion ..."; 55:20: "Admittedly, toward the end of that explanation, it's a little confusing ...")

Seeking certiorari review, Arizona first tries to steer the Court away from Riley's words, by flatly misstating what the federal Court of Appeals' ruled. Arizona claims, erroneously, that the *en banc* majority found the *Miranda* warnings improper because "Riley did not read verbatim off the form the parenthetical describing the right to have counsel present prior to and during questioning." Petition at 19. That is *not* what the *en banc* majority found, nor was it Doody's claim. The problem was not that the parenthetical on the juvenile *Miranda* form was not read accurately, but that what the officer substituted for the parenthetical's language was wrong in telling Doody that the right to counsel at the interrogation existed if Doody had committed the crime.[2]

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[2] Riley falsely told Doody that he *was* reading the form to him, verbatim (1/14/94:133-34), making it highly unlikely that Doody himself read or absorbed the different words printed on the form. Doody read, at best, at a fourth grade (nine year old) level. (S 1/18/94:177-212, S 1/21/94:28-29)

To be sure, the "confusing" explanation arose because Detective Riley, trying to minimize the seriousness of this custodial interrogation, was maneuving away from the explanation on the juvenile *Miranda* form which stated that "An attorney is a lawyer who will speak for you and help you concerning the crime which we think you have done." Whether or not the officers thought Doody had "done" "the crime" – or had good reason not to let Doody know *what* they where thinking – does not affect the analysis as to whether what they actually told Doody satisfied *Miranda*.

Ultimately, because it cannot completely ignore Riley's language, Arizona argues that the Ninth Circuit majority and concurrence "myopically focused" upon the language that Arizona's attorney conceded was "confusing" "disregarding the context in which the statement was made." Cert Pet. at 22. Arizona's "myopia" argument is incorrect too.

The question is whether Detective Riley correctly and "reasonably convey[ed] to [a suspect] his rights as required by *Miranda,*" for "the essential information *must be conveyed*." *Powell*, 130 S.Ct. at 1204 (emphasis added).

These warnings did not. Arizona's contention to the contrary notwithstanding, the Court of Appeals did not conduct a "strained and myopic reading of a cold transcript, devoid of the context in which the statement was made." Petition at 21. There is a *tape recording* of the *Miranda* advisement and, as Judge Kozinski put it in concurring, because those tapes exist, one can actually hear "the officer's *Miranda* warnings fly off the rails." (A-88)

This derailment occurred with respect to the *critical* right to counsel warning, though "the right to have counsel present at the interrogation is indispensable to the Fifth Amendment privilege under the system we delineate today." *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

A clear and accurate warning about the right to have counsel present is *particularly* important where minors are concerned. Juveniles "have limited understandings of the criminal justice system and the roles of the institutional actors within it." *Graham v. Florida*, *supra*, 130 S.Ct. at 2032. Thus, it is *Arizona,* not the Ninth Circuit *en banc* majority, that ignores the *context* of these warnings: a custodial police interrogation which "by its very nature, isolates and pressures the individual." *Dickerson v. United States*, 530 U.S. 428, 435 (2000).

As all of the Ninth Circuit judges recognized, though *Florida v. Powell, supra,* was not addressed in the court's initial *en banc* decision, that case did "not materially change the analysis" (A-114), nor did it change the result. (A-41-43; A-91-92; A-114-15) *Powell* confirmed this Court's adherence to the *Miranda* rule, and re-affirmed that "[t]he inquiry is ... whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda."* 130 S.Ct. at 1204. The specific question in *Powell* was whether the warnings adequately communicated that Powell had the right to counsel present *during questioning*, which is not the issue in the case at bar. Doody *was* given advice about the right to counsel during questioning: the problem was that he was told the right applied only if he was involved

in the crime.[3]

In attacking the Ninth Circuit's decision, the Petition relies heavily on the dissent written by Judge Tallman, but Judge Kozinski's concurrence demonstrates why Judge Tallman was wrong.

> The dissent tells us that the state court's characterization of the officer's words was not unreasonable because the officer made Doody aware that he was "faced with a phase of the adversary system." Dissent at 5872 (quoting Miranda, 384 U.S. at 469). I don't see anything so benign lurking in the officer's words. Here they are again: [A]n attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah we think that you or somebody else is involved in, if you were

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[3] The Court's analysis in *Powell* supports the *en banc* decision. In holding the warnings adequate, the *Powell* Court reasoned that the warnings given had to be considered *"in combination." Powell,* 130 S.Ct. at 1205 (emphasis added). Because Powell, an adult, was told he had the right to talk to a lawyer before answering any questions, and the right to exercise his rights at any time during the interview, the warnings – *in combination* – reasonably conveyed his right to an attorney present, not only at the outset of the interrogation, but at all times. *Id.*

Consideration of *Doody's* warnings, *in combination,* establishes that *those* warnings were no good. The detective's erroneous "explanation" that the right to counsel only applied to those involved in the crime tainted the other *Miranda* advice Doody was given, even if, *arguendo*, the *other* advice standing alone might have been correct. *Powell's* recognition that warnings must be looked at *in combination* also supports the *en banc* Court's conclusion that the officer's downplaying of the *Miranda* rights as mere formalities itself ran afoul of *Miranda.*

> involved in it, okay. Again, it not necessarily mean that you are involved, but if you were, then that's what that would apply to okay.
>
> The officer did say something about the adversary system: That a lawyer will help you "if you were involved" in criminal activity, and that the right to an attorney only applies to you if "you were involved." This, of course, is not true: The innocent, no less than the guilty, are entitled to a lawyer. Or, in Officer Riley's peculiar argot: "Whether you were involved or not, then that's what that would apply to okay." (A-88-89)

As Judge Kozinski noted, even his dissenting colleagues admitted that the officer's words "could be construed" to say you only get a lawyer if you're guilty, which is flat out wrong. (A-89). Thus, on this basis alone, the warnings given to Doody did not "reasonably convey" Doody's rights as required by *Miranda*.

And, as Judge Kozinski stated:

> The dissent offers a number of other arguments for denying relief, even if the warnings weren't "clear," "understandable" or "appropriate." See Dissent at 5868-73. For example, the dissent points to evidence the state court considered that "Doody exhibited no signs of doubt or confusion." Dissent at 5871 (internal quotation marks omitted). Maybe Doody wasn't listening to what the officer said, or maybe he didn't

> believe it. But that's entirely irrelevant. *Miranda* establishes an objective test. We can't uphold defective warnings because they might have been inadvertently successful, just as we can't disregard a properly administered warning because a particular suspect might have misunderstood. (A-93-94)

Judge Kozinski's opinion also made clear why the dissent's view of AEDPA's application *to this case* was wrong.

> We defer when state courts reasonably adjudicate claims of federal right, even if we think they're wrong. *Richter,* 131 S. Ct. at 786. But where, as here, a state court doesn't act reasonably, deference comes to an end. After all, we retain "authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with" Supreme Court precedent. *Id.* Yes, the standard is a "difficult" one to meet, *id.,* but difficult doesn't mean impossible. When police take a butcher knife to *Miranda,* a decision "so embedded in routine police practice to the point where the warnings have become part of our national culture," a federal court can't sit idly by. *Dickerson,* 530 U.S. at 443.

(A-93) See also A-45-46 ("The majority does not quarrel with [the high standard governing habeas review set forth in *Harrington v. Richter,* 131 S. Ct. 770 (2011)...

However, when police officers interrogating a juvenile transform *Miranda's* warnings into a twelve-page rambling commentary that is in alternating part misleading and unintelligible, we believe that 'there is no possibility fair-minded jurists could disagree,' *Richter,* 131 S. Ct. at 786, that the suspect was not informed of his rights in clear terms, as *Miranda*'s holding requires.").

The federal appeal court ruled, additionally, that the *Miranda* warnings were defective because the officer giving them obscured and minimized the warnings' significance. Here, in arguing that the Ninth Circuit erred, the Petitioner again misstates what the *en banc* majority held. The Ninth Circuit did not determine that the State court's determination was unreasonable because Riley downplayed the warnings' significance "*by telling Doody that the police did not necessarily suspect him of having committed a crime.*" Petition at 19 (emphasis added). Rather, the State court's determination was unreasonable because the warnings' importance was improperly concealed when, as the tape-recording and transcript establish, "During the administration of the warnings, Detective Riley emphasized that Doody should not take them out of context, and implied to a juvenile, who had never heard of *Miranda,* that the warnings were just formalities." (A-34-35)

As Doody has argued in connection with his claim that his confession was involuntary, this was not the only time when Doody's interrogators conveyed a message at odds with *Miranda* and the Constitutional rights it safeguards. In the course of the interrogation, contradicting the warning that what Doody said could and would be used against him, the officers falsely told

the youth that what he said would stay in that room. ("What you tell us right now *is gonna stay right here.*" "Johnathan, we're not even gonna go out and be telling everyone what you're saying that's not the way we do business." "We're *in a room, you're not in court*, you need to come clean with us on this." "We're gonna protect this, this stuff.")

In addition, contradicting the warning that Doody had an absolute right to remain silent which he could exercise at any time, his interrogators repeatedly said and implied that Doody had to talk to them. ("You just have to open up," "had to open up," "have to clear yourself," "have to do it.") The thrust of the entire interrogation was that Doody had to tell the officers what they wanted to know and that the questioning would continue until he did. ("I'm gonna stay here until I get an answer." "We're gonna sit here and have to go through this thing ... your (sic) not telling the truth ...")

These statements to Doody by his interrogators were made hours into the interrogation, long after the original *Miranda* warnings were given. Because people – and teenagers in particular – are likely to be affected most by that which they most recently heard, whether or not the officers' subsequent statements are relevant to whether Doody was properly Mirandized, they are relevant to the voluntariness or involuntariness of his confession, the subject to which we now turn.

II. The Federal Court Properly Applied Well-Settled AEDPA Standards in Granting Relief; Respondent's Confession Was Involuntary

The Ninth Circuit's disposition of Doody's involuntariness claim was likewise correct, and raises no

cert-worthy issue. The *en banc* majority, and the panel which had unanimously reached the same conclusion, carefully considered the AEDPA standards before concluding that Arizona's voluntariness determination was not just wrong under the applicable Constitutional standard, but unreasonable.

Arizona asserts that the *en banc* majority "seized upon three alleged 'unreasonable determination' (sic) of the 'facts' mentioned by the Arizona Court of Appeals in its voluntariness analysis." Petition at 31. By placing the word "facts" in quotation marks, Arizona suggests that these are not factual determinations at all. It further asserts that these "facts" – Arizona's quotation marks – are "not of significant consequence to the Arizona Court of Appeals' overall determination of voluntariness." Petition at 32. Arizona's argument is specious.

Though Arizona has called this "nit-picking" and contrary to the AEDPA, the Ninth Circuit's analysis – and its focus upon the particular State court findings upon which the State court based its decision – is precisely what Section 2254(d)(2) requires. The facts the Ninth Circuit determined were unreasonably found were not random or insignificant; they were the foundation of the State court's ruling that Doody's confession was voluntary.

The Arizona Court of Appeals acknowledged the "troublesome length" of Doody's 12-hour plus overnight interrogation, but stated: "Each of the officers involved ... testified at the suppression hearing that Doody remained alert and responsive throughout the interrogation and did not appear overtired or distraught. Our review of the audio tapes confirms the officers'

testimony." (C-10) In the State court's view, this neutralized the "troublesome" fact that Doody's interrogation lasted so long. But making up a "fact" – in this case "testimony" that was never given – does not satisfy the AEDPA.

The state record shows that not a single one of Doody's interrogators testified that Doody remained alert throughout the interrogation. The State has never pointed to a shred of testimony that shows otherwise.[4]

Riley testified that, *during the drive to the Task Force* – that is before the interrogation began – Doody appeared "very alert," "polite, attentive, and just overall pleasant." (V10/27/92:68-69) Riley also testified that, when the interview *began*, Doody's posture was good and that he maintained eye contact. *Id.* Significantly, but not surprisingly, over time, that changed; he became "less attentive." *Id.* "His responses were much more quiet and non-direct ... [E]ye contact was not there." *Id.* at 101-02. Asked whether Doody appeared tired during any of the time Riley was in the interrogation room, Riley's answer was *heavily qualified*: "I'd have to say *for the most part* no. He *didn't really* display any *real overt* sign of being fatigued or tired." (V10/27/92:89, emphasis added)[5]

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[4] It would be remarkable if a teenager – or any other individual – remained "alert" throughout the course of a near 13-hour interrogation which began at 9:25 p.m. and continued, without food or any significant break, until late the next morning. In fact, even though the officers' testimony was self-serving, not one of the men who conducted the interrogation testified that Doody did remain alert or focused.

[5] Detective Sinsabaugh testified that, *when he first entered the interrogation room*, Doody "appeared alert." (V10/29/92: 101) Captain White joined the interrogation at approximately 5:55 in the

Moreover, not a single officer testified that Doody remained *responsive* throughout the interview, and the tapes themselves conclusively show that he did not. They establish that Doody was completely *unresponsive* for many, long periods of time. (A-55-58) Accordingly, as the Ninth Circuit majority concluded, it was unreasonable for the Arizona Court of Appeals to conclude that there "is no evidence that calls into question the testimony that Doody remained alert and responsive." (A-55-56) Not only was there no such testimony to begin with, but the tapes themselves are evidence that shows – as would be expected – that Doody was *neither* alert nor responsive throughout the long night of interrogation.

The Arizona Court, in discounting the "troublesome" length of the interrogation, also relied on the "fact"[6] that, although the interview lasted nearly thirteen hours, after about two and a half hours of questioning, "Doody admitted he had borrowed Caratachea's rifle [the murder weapon] at the time of the temple murders." But this, too, as the Ninth Circuit majority concluded, was an unreasonable factual finding for it was at odds with what the undisputed record shows. Two and a half hours into the interrogation, Doody acknowledged that he had borrowed the rifle a month *before* the Temple crimes, not at the time of those events. (See A-61-62) Doody's first

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morning and testified, "Johnathan was sitting upright in a chair ... almost at attention *when I first came in."* (V11/10/92:83)(emphasis added). White did not testify that Doody appeared alert, only that he gave no indication "that he was *too tired or sleepy to talk*." (V11/10/92:84)

[6] *We* use quotation marks here because the supposed "fact" is contrary to the record.

admission to any involvement occurred after more than *six* hours of intense questioning.

Similarly, the Arizona Court of Appeals' conclusion that the lengthy interview was not coercive rests on the supposed "courteous, almost pleading style of questioning [employed] during most of the interview." In fact, though, the tapes memorialize hours of questioning that is insistent and commanding, and not "pleading" or "courteous" at all. As the Ninth Circuit stated:

> [T]he audiotapes demonstrate that the detectives' relentless and uninterrupted interrogation of an unresponsive juvenile was far from "courteous". Instead the detectives continuously demanded, over and over without a response from Doody, answers to their questions. ... Although the detectives sometimes couched their questions in "pleading" language, their tones were far from pleasant, varying from pleading to scolding to sarcastic to demeaning to demanding. Regardless of tone, over twelve hours of insistent questioning of a juvenile by tag teams of two, three and four detectives became menacing and coercive rather than "courteous"... Any doubt regarding the unreasonableness of the state court's factual determination is easily resolved by listening to the audiotapes. Indeed, at times, the tones of the detectives are downright chilling. (A-59)

At one point, the officers were yelling so loudly that their voices were picked up on the tape recording of the interrogation of *Garcia*, which was being conducted in another room.

Significantly, to get their confession, and notwithstanding his Constitutional right to silence, Doody's interrogators' pleas, whether politely made or not, stated and implied, again and again, that Doody had to answer his questioners' questions. See *supra* at 18.

As the Court of Appeals majority concluded, in addition to resting on an unreasonable determination of facts, the State court's conclusion that Doody's confession was voluntary constituted an incorrect and unreasonable application of this Court's jurisprudence on the subject. *See Dickerson v. United States*, 530 U.S. 428, 434 (2000)(in determining voluntariness, court "examines whether a defendant's will was overborne by the circumstances surrounding the giving of a confession.... The due process test takes into consideration 'the totality of the surrounding circumstances – both the characteristics of the accused and the details of the interrogation'"); *Reck v. Pate*, 367 U.S. 433, 440 (1961)("all the circumstances attendant upon the confession must be taken into account"); *Gallegos v. Colorado*, 370 U.S. 49, 52 (1962)("application of these principles involves close scrutiny of the facts of individual cases"); *Withrow v. Williams*, 507 U.S. 680, 693-94 (1993)("length of the interrogation ... its location ... its continuity"); *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)("[I]f his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process."); *In re Gault*, 387 U.S. 1, 45 (1967)("admissions and

confessions of juveniles require special caution"); *Haley v. Ohio*, 332 U.S. 596, 599-600 (1948)("Mature men possibly might stand the ordeal from midnight to 5 a.m. But we cannot believe that a lad of tender years is a match for the police in such a contest.").

As the Ninth Circuit majority wrote:

> The audiotapes of Doody's interrogation are dispositive in this case, as we are not consigned to an evaluation of a cold record, or limited to reliance on the detectives' testimony. We can readily discern from the audiotapes an extraordinarily lengthy interrogation of a sleep-deprived and unresponsive juvenile under relentless questioning for nearly thirteen hours by a tag team of detectives, without the presence of an attorney, and without the protections of proper *Miranda* warnings. The intensive and lengthy questioning was compounded by Doody's lack of prior involvement in the criminal justice system, his lack of familiarity with the concept of *Miranda* warnings, and the staging of his questioning in a straight-back chair, without even a table to lean on. None of these considerations were even mentioned by the Arizona Court of Appeals. (A-49-50)

The state trial court – which began *its* analysis of the voluntariness of the confession from the erroneous premise that no custodial interrogation was being conducted – called the voluntariness question a "close" one, and invited careful appellate review. The

Arizona Court of Appeals declined that request, ruling that the lower court's voluntariness determination would not be disturbed "without clear and manifest error." (C-6) Later on, it announced an "abuse of discretion" standard of review, justifying that standard on the ground that the jury made the final determination on voluntariness. (C-15) This occurred, notwithstanding the rule, clear since *In re Gault,* 387 U.S. 1, 55 (1967), that

> The greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

Like the *Miranda* issue in this case, the voluntariness question was correctly decided, under the Court's precedents and the AEDPA. It does not warrant review on certiorari.

III. Arizona Has Waived Its Harmless Error Claim; The Claim Is Frivolous, Not Cert-worthy

There is no cert-worthy issue with respect to whether the Constitutional errors could be deemed harmless. Both sides agree that the standard is that set forth in *Brecht v. Abrahamson*, 507 U.S. 619- 637-38 (1993): the State would have to show that the constitutional error clearly did not have a "substantial and injurious effect or influence in determining the jury's verdict[s]." Petition at 36. When a reviewing court has "grave doubt about whether a trial error ... had 'substantial and injurious effect or influence in determining the jury's verdict,' that error is not

harmless. And the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Not a single state or federal judge has ruled or intimated that the admission of Doody's confession, if erroneous, was harmless error. The State did not even proffer a harmless error argument when it petitioned this Court for certiorari the first time around, and thus has waived the claim. See Petition for Writ of Certiorari, No. 09-1443, filed May 25, 2010.

Waiver aside, the argument it now makes is frivolous, given the weight the prosecution placed on Doody's confession in both opening and closing arguments, and the weakness of the State's case as a whole. See opening, 5/19/93: 138-50 and closing: 7/8/93: 155-56, 157-58, 159 ("You will hear every minute of that interview. It will take us probably two and a half days to play it for you." (5/19/93:137) "Johnathan Doody gave a full and complete confession folks, except for one thing. He denied doing the shooting, but he admits being in there and doing everything else." (7/8/93:161-162). In closing arguments, the prosecutor referred to the audiotaped statements repeatedly, and, in rebuttal, he argued that Doody's statement *alone* was enough to establish felony murder. See A-80-81. See *Satterwhite v. Texas*, 486 U.S. 249, 260 (1988)(focusing, in part, on "significant weight" prosecution's summation placed on wrongfully admitted testimony in determining harmlessness).

Absent the confession, the prosecution's case against Doody was extremely weak. The only direct evidence was supplied by the cooperating witness, Garcia, who had pled guilty to the murder of the nine Temple victims *and* to a subsequent unrelated cold-

blooded murder of a lone, defenseless woman, Alice Cameron, in the relatively brief period after the Temple homicides but prior to Garcia's arrest.[7] In exchange for his testimony against Doody, Garcia got a guarantee that he would not received the death penalty for the Temple killings or for his subsequent murder of Cameron. The jury did not believe Garcia and his testimony about Doody's involvement for it rejected Garcia's testimony that Doody planned to and personally executed the victims, and convicted on a felony murder theory instead.

The other evidence on which Arizona's Petition places great weight – Doody's supposed admissions to his friends – constituted teenage posturing, not evidence "much more incriminating than Doody's statements to the police" (Petition at 37) Vicky Jones, Doody's girlfriend, testified that he told her that he used to kill people for money and that the Office of Special Investigations was responsible for the temple killings. (6/18/93:21-22) Ben Leininger, a particularly gullible classmate of Doody's, testified that Doody said he worked for the OSI and that the monks were not real monks, but threats to national security. Doody told Leininger he had assassinated others. (6/18/93:34-37). Angel Rowlett thought Doody was joking. (6/18/93:21-22) See also *supra* at 4.

Harmless error has never been and is not now a genuine issue, let alone an issue deserving of or appropriate for consideration on certiorari.

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[7] One George Peterson had confessed to the Cameron murder and was incarcerated for a long period on the basis of that false confession – another stark reminder of the ease and frequency with which the authorities obtain and act upon false confessions.

CONCLUSION

In this unusual case involving multiple false confessions and a tape-recorded interrogation of an inexperienced, foreign born juvenile that began at night and continued through the next morning, the grant of federal habeas corpus relief on both *Miranda* and involuntariness grounds was not only permitted by the AEDPA, but compelled by it.

The case raises no unsettled questions of federal Constitutional or statutory law. The Court of Appeals did exactly what it was asked to do when this Court remanded for further consideration in light of *Florida v. Powell;* upon reconsideration, all of the judges – including the three dissenters – determined that *Powell* changed neither the result nor the analysis.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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