No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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

Petitioner,

VS.

JONATHAN ANDREW DOODY,

Respondent.

On Petition for Writ of Certiorari to the Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Chief Counsel
Criminal Appeals/
Capital Litigation Division

JOSEPH T. MAZIARZ
Assistant Attorney General
(Counsel of Record)
Criminal Appeals/
Capital Litigation Division
1275 W. Washington
Phoenix, Arizona 85007–2997
jmaziarz@azag.gov
cadocket@azag.gov
Telephone: (602) 542–4686

QUESTIONS PRESENTED

Jonathan Doody killed eight Buddhist monks and a nun at a Buddhist temple near Phoenix, Arizona in 1991. During questioning by law enforcement officers, he admitted being at the Temple when the victims were shot.

The state trial court conducted a 10-day hearing on Doody's motion to suppress his statements. The court heard the officers testify, listened to the audio tapes of the interview, and found that Doody was advised of and waived his *Miranda* rights and that his subsequent statements were voluntary. The Arizona Court of Appeals carefully reviewed the record and upheld the *Miranda* and voluntariness findings. After a federal district court denied Doody's federal habeas petition, the Ninth Circuit Court of Appeals reversed. Over a vigorous dissent, a majority of an *en banc* panel of the Ninth Circuit held that the Arizona Court of Appeals' *Miranda* and voluntariness analysis amounted to "unreasonable" determinations of federal law and facts.

1. Did the Ninth Circuit disregard the AEDPA and this Court's relevant caselaw when it held that the *Miranda* warnings given to Doody were inadequate?

2. Did the Ninth Circuit disregard the AEDPA and this Court's relevant caselaw when—based on its mischaracterization of the state court record, redetermination of witness credibility, and drawing of inferences adverse to the states courts' legal and

factual determinations—it held that Doody's statements were involuntary?

3. Did any constitutional error have a substantial and injurious effect or influence on the jurors' verdicts?

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The Ninth Circuit Court of Appeals' *en banc* opinion is reported as *Doody v. Ryan,* 2011 WL 1663551 (9th Cir. May 4, 2011). (Petitioner's Appendix (App.) A.) That opinion reversed a decision by the United States District Court for the District of Arizona, adopting the Magistrate's Amended Report and Recommendation (App. B) denying Doody's petition for writ of habeas corpus. The Arizona Court of Appeals opinion is reported as *State v. Doody*, 930 P.2d 440 (Ariz. App. 1996). (App. C.)

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals had jurisdiction to review the federal district court order and judgment denying the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2253. This petition for writ of certiorari is timely filed within 90 days of the Ninth Circuit's *en banc* opinion, and this Court has jurisdiction pursuant to United States Constitution Article III, Section 2 and 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

. . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATUTES

28 U.S.C. § 2254 provides, in relevant part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
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> . . .
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination

of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

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STATEMENT OF THE CASE

A. Material Facts.

In 1991, Jonathan Doody (Doody) was living at Luke Air Force Base west of Phoenix, Arizona with his parents. His brother, David, was a novice monk at a nearby Buddhist Temple, and his mother cooked meals for the monks. Doody attended Agua Fria High School, where he was the commander of the R.O.T.C. Honor Guard and Color Guard, and also was active in the Civil Air Patrol.

In early June, Doody suggested to his friend, Alex Garcia, that they rob the Temple. During their visits with David at the Temple, they questioned him regarding details of the Temple. Doody wanted to wait until David left the Temple to commit the robbery, so David would not recognize him. Initially, the plan was "just robbery" but, in late July, Doody decided to "just basically go ahead and shoot them," "execution style" so there would be "[n]o witnesses."

Doody and Garcia agreed to commit the robbery on the night of August 9, 1991. On August 7, they borrowed a .22 caliber rifle from Rolando Caratachea. They decided that Garcia would take his father's 20-gauge shotgun and that Doody would have the .22 rifle.

A week prior to August 9, Doody was with Brandon Burner, a fellow student and member of the R.O.T.C. Color Guard. Doody told Burner that he could not be with him on Friday, August 9, because he and Garcia were going on an "intrusion alert" near the Buddhist Temple.

At about 9:00 p.m. on August 9, Doody and Garcia drove to a citrus grove and changed into camouflage clothing. They entered the Temple, told the occupants that they were the police, and moved them to a room. While Garcia stood guard over the monks, Doody went through the rooms looking for valuables. Doody then stood guard while Garcia went through the rooms looking for any valuables that Doody had missed. After a while, a nun, who apparently had been asleep, came out, and they made her stay in the room with the eight men. After Doody and Garcia had put all of their loot in the car, they shot the victims; Doody fired 17 .22 caliber bullets into the heads of the victims, and Garcia fired four shots from the shotgun.

The bodies were discovered the following morning. At 4:30 that afternoon, Doody saw his friend Angel Rowlett, and told him about the killings, saying that the monks had been killed with rifles. At 7:00 that evening, Doody was driving in his car with Brandon Burner, and "out of the blue" began talking about the Temple killings. Doody said the Buddhists were murdered for nothing, that there were a bunch of gunshots that went off, and that they were shot in the chest and head.

It was determined that the murder weapon was a .22 caliber rifle manufactured by the Marlin Company. On August 21, while with Doody on Luke Air Force Base, Rolando Caratachea consented to a search of his car, and a military police officer found a Marlin .22 caliber rifle in the car. The rifle remained in Caratachea's possession. The Air Force police subsequently told officers investigating the Temple

murders of the August 21 incident, and gave them Caratachea's name.

Shortly after the murders, Doody's father was transferred to an Air Force base in Colorado and Doody's parents moved. Doody wanted to stay in Arizona to complete his schooling, so he moved in with a friend, Moises Cruz, for a week or two, then rented an apartment with Rolando Caratachea and Mike Myers for a couple of months, and then moved in with Garcia.

In September, Doody told his girlfriend Vicki Jones and his friends, Angel Rowlet and Ben Leininger, that he and Garcia had committed the Temple murders.

On September 10, Detective Sinsabaugh went to where Rolando Caratachea was working. Sinsabaugh told Garcia he was investigating a burglary and that he thought a rifle possessed by Caratachea might have been taken during the burglary. Sinsabaugh asked Caratachea if he would mind giving it to him so he could check it and Caratachea agreed. They went to the apartment Caratachea shared with Myers and Doody, and Caratachea gave Sinsabaugh the rifle.

Sinsabaugh interviewed Doody because his brother had lived in the Temple. Doody was not a suspect. Doody talked about his brother being a novice monk at the Temple and of visiting him there, sometimes with Alex Garcia and Angel Rowlett.

Also, on September 10, investigating officers learned from the Tucson Police Department that a person who claimed his name was "John" said he had

information regarding the Temple murders. Officers later learned that "John" was Mike McGraw, who was a patient at the Tucson Psychiatric Hospital. McGraw said that he and three others were involved, Leo Bruce, Mark Nunez, and Dante Parker (the "Tucson Four"). The officers arrested the four Tucson suspects on September 13 and 14, and the State later charged them with the Temple murders.

Although the officers believed they had the killers, they had not identified the murder weapon. By September 10, they had collected 96 Marlin rifles, all of which had to be tested. Caratachea's rifle was not submitted for testing until a month later.

On October 22, the task force officers learned that Caratachea's rifle was the murder weapon. Officers contacted Caratachea, and he agreed to come to the police station. Caratachea said he had loaned his .22 rifle to Garcia and Doody on August 8 or 9, 1991.

At about 8:00 p.m., Detective Patrick Riley and F.B.I. Special Agent Gary Woodling drove to the Agua Fria High School football game, where Doody was present in his role as commander of the R.O.T.C. Color Guard. When they arrived, they learned that Doody was in the parking lot, so they drove up to him, and while seated in the car, identified themselves.

Detective Riley told Doody that they had some additional questions about the rifle they had taken from Caratachea and asked Doody if he was willing to go to the police station; Doody agreed, opened the door of the police car himself, and got into the back seat. As the officers were leaving, they received word that

Garcia might be in the area, so Special Agent Woodling got out of the car to look for Garcia and Doody got into the front seat. Detective Riley and Doody arrived at headquarters at 9:10 p.m.

An interview began with Detectives Riley and Manley present. The interview, which lasted about 13 hours, was tape-recorded, without any breaks in the recording. Although Doody was not under arrest and was not a suspect, Riley read Doody his rights, employing the standard-issue juvenile *Miranda*[1] form (App E). Doody initialed the boxes on the juvenile *Miranda* form, acknowledging that he understood his rights.

When asked about Caratachea's rifle, Doody initially denied that he ever borrowed or possessed it. However, about 2½ hours into the interview, he admitted that he and Garcia had borrowed it. As the detectives' questions became more pointed, Doody began looking down, playing with his R.O.T.C. beret and a pop can, ceased eye contact, and became quiet. Doody said he was afraid because there had been threats toward his girlfriend and his family.

The only other officers in the room during portions of the interview were Captain White and Detective Sinsabaugh. When Sinsabaugh entered the room at about 2:45 a.m., he became the primary questioner. At that point, Detective Sinsabaugh noted that Doody was "very erect, had a military bearing, and he appeared alert." Doody indicated that he was afraid for his own

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

safety, and that of his girlfriend and family. Sinsabaugh asked, "Were you involved?" Doody replied, "Yes."

Doody said that he and Garcia drove and parked near the Temple, and that Rolando Caratachea, George Gonzalez, and at least one other person arrived in another car. Doody claimed that they only planned to probe the Temple security system, but things "just went downhill" and they entered the Temple. Doody said that eight monks and a nun were taken from their rooms and put in the living room and they "ransack[ed]" the rooms. Doody claimed that one of the captives yelled out Gonzalez' name and Doody was told to go outside to determine if the Temple was "soundproof." Doody said that, after he went outside, he heard a shot fired, walked into the Temple, then there were three shotgun blasts and several shots fired from the .22 rifle into the heads of the monks and nun. Doody denied shooting any of the victims. He claimed that they grabbed some items from the Temple and fled.

Doody claimed that Gonzalez and some of the others threatened to kill him, his girlfriend, and members of his family if he told anybody what happened. Doody said, "I didn't know it was supposed to happen," and, "I've never meant to get involved."

B. Procedural Background.

Doody and Garcia were charged with nine counts of first-degree murder, nine counts of armed robbery, one count of burglary, and one count of conspiracy to commit armed robbery. Both moved to suppress their

statements to law enforcement officers and the trial court held a 10-day evidentiary hearing on the motions. The trial court also listened to the entirety of Doody's and Garcia's taped interviews. The court denied both motions to suppress. Regarding Doody's motion to suppress, the trial court found that Doody was advised of and waived his *Miranda* rights, and that his subsequent statements were voluntary. (App. D.) Garcia then entered into a plea agreement with the State and testified at Doody's trial. Following a 2-month jury trial, Doody was convicted on all counts.

On direct appeal, the Arizona Court of Appeals addressed Doody's *Miranda* and voluntariness claims at length, finding that his statements were *Miranda* compliant and voluntary. (App. C.) On federal habeas review, the district court magistrate carefully, and in detail, reviewed the *Miranda* and voluntariness claims, concluding that the Arizona Court of Appeals' rejection of the claims was neither contrary to, nor an unreasonable application of, clearly established federal law. (App. B.) The district court adopted the magistrate's findings.

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals found that the Arizona Court of Appeals' determination that Doody was advised of and waived his *Miranda* rights did *not* constitute an unreasonable application of clearly established federal law under 28 U.S.C. § 2254(d)(1). *Doody v. Schriro*, 548 F.3d 847, 862–66 (9th Cir. 2008). However, the panel concluded the Arizona Court of Appeals' determination that Doody's subsequent statements were "voluntary" under the Fourteenth Amendment

was an "objectively unreasonable" application of clearly established federal law. *Id.* at 866–69.

Petitioner's motion for rehearing *en banc* was granted. *Doody v. Schriro*, 566 F.3d 839 (9th Cir. 2009). On February 25, 2010, a sharply divided 11-judge *en banc* panel issued its opinions. *Doody v. Schriro*, 596 F.3d 620 (9th Cir. 2010), *vacated by Ryan v. Doody*, 131 S. Ct. 456 (2010). The seven-judge majority held that the Arizona Court of Appeals' determinations that Doody was adequately advised of and waived his *Miranda* rights and that Doody's statements were voluntary constituted unreasonable determinations of fact and unreasonable applications of clearly established federal law. 596 F.3d at 653.

Chief Judge Kozinski concurred in the result, disagreeing with the majority's conclusion that the Arizona Court of Appeals' finding that Doody's statements were voluntary amounted to an unreasonable determination of facts or an unreasonable application of clearly established federal law. 596 F.3d at 654–55 (Kozinski, C.J., concurring in the result). However, Chief Judge Kozinski found that the Arizona Court of Appeals' finding that Doody was "adequately warned" of his *Miranda* rights constituted an unreasonable determination of clearly established federal law. *Id.* at 655–59.

Judge Tallman, joined by Judges Rymer and Kleinfeld, dissented, chastising the majority for viewing the state court record in a Doody-friendly manner and failing to heed this Court's repeated admonition that Ninth Circuit judges comply with the dictates of 28 U.S.C. § 2254(d) and grant appropriate

deference to state court determinations of fact and law and not substitute their judgments for that of the state courts. 596 F.3d at 659–76.

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

On May 4, 2011, the *en banc* panel issued virtually the same written opinions. (App. A.) Again, the seven-judge majority held that the Arizona Court of Appeals' determinations that Doody was adequately advised of and waived his *Miranda* rights and that his statements were voluntary amounted to unreasonable determinations of fact and unreasonable applications of clearly established federal law. (*Id.* at 82–83.)

Once again, Chief Judge Kozinski concurred in the result, finding that the Arizona Court of Appeals' determination that Doody's statements were voluntary did not amount to an unreasonable determination of fact or clearly established federal law. (*Id.* at 86.) However, despite this Court's recent opinion in *Powell*, Chief Judge Kozinski held that the Arizona Court of Appeals' determination that Doody was adequately advised of and waived his *Miranda* rights constituted an unreasonable application of *Miranda*. (*Id.* at 86–96.)

Judge Tallman, writing for himself, Judge Rymer, and Judge Kleinfeld, criticized the majority and concurrence for "continu[ing] to treat this case as if it were on direct appeal to be reviewed de novo", failing "to yield to the shot across our bow fired by the

Supreme Court," and failing to heed this Court's admonition in *Harrington v. Richter*, 131 S. Ct. 770 (2011) that the Ninth Circuit abide by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). (*Id.* at 96–99.) The dissent found that "[t]he Arizona courts did everything we can demand of state courts," and the Arizona Court of Appeals' "holding on the facts presented fell squarely within the bounds of Supreme Court precedent on voluntariness." (*Id.* at 142.) It also noted that the majority sent a chilling, arrogant message to state courts:

> The majority's message to our state courts is clear: no matter how carefully you decide constitutional issues in criminal cases, no matter how well you justify your opinions with evidence of record, we will cast your work aside simply because we disagree.

(*Id.* at 143.)

REASONS FOR GRANTING THE WRIT

THE *EN BANC* COURT'S FAILURE TO DEFER TO THE ARIZONA COURT OF APPEALS' DETERMINATIONS THAT DOODY WAS ADEQUATELY ADVISED OF AND WAIVED HIS *MIRANDA* RIGHTS AND THAT HIS SUBSEQUENT STATEMENTS WERE VOLUNTARY CONFLICTS WITH ESTABLISHED PRECEDENT OF THIS COURT.

Once again, the Ninth Circuit has failed to comply with this Court's jurisprudence, the express provisions

of the AEDPA, and basic principles of federalism and comity, in holding that the Arizona Court of Appeals' determinations that Doody's statements were *Miranda*-compliant and voluntary constituted unreasonable determinations of fact and unreasonable applications of clearly established federal law. The *en banc* majority did so by parsing the record, disregarding portions of the record that support the state court's findings and legal conclusions, drawing its own Doody-friendly inferences, and making credibility assessments in contravention of the AEDPA.

Under the "unreasonable application" clause of 28 U.S.C. § 2254(d), a federal court is prohibited from issuing a writ "simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)). "A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 133, 141 (2005). A state court's determination of a federal claim is *not* unreasonable "so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Richter*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). This Court has recently made clear that the deference due state courts is *exceedingly* great:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show

> that the state court's ruling on the claim being presented in federal court was *so lacking in justification* that there was an error well understood and comprehended in existing law *beyond any possibility for fair-minded disagreement*.

Id. at 786–87 (emphasis added). This standard is difficult for a state prisoner to meet "because it was meant to be." *Id.* at 786.

"Factual determinations by state courts are presumed correct absent clear and convincing evidence to the contrary, 28 U.S.C. § 2254(e)(1), and a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding, § 2254(d)(2)." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003).

As pointed out by the dissent, the Ninth Circuit has repeatedly failed to abide by the provisions of the AEDPA and pay state court factual and legal determinations the deference they are due. (App. A at 97–98) (citing cases). It has done so once again.

A. MIRANDA WAIVER.

1. *Applicable Law.*

When a person is both "in custody" and subjected to interrogation, he must be advised of his Fifth Amendment rights to remain silent and to counsel. *Thompson v. Keohane*, 516 U.S. 99, 102 (1995). Specifically, a person in custody and subjected to

interrogation must be advised "that he has a right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Miranda*, 384 U.S. at 479. However, *Miranda* does not require a "talismanic incantation to satisfy its strictures." *California v. Prysock*, 453 U.S. 355, 360 (1981). "The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be conveyed." *Powell*, 130 S. Ct. at 1204. "Reviewing courts, therefore, need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quoting *Prysock*, 453 U.S. at 361).

2. ***Relevant Facts.***

Although when the interview began Doody was not "in custody" or a suspect in the Temple murders, Detective Riley, in an abundance of caution, elected to advise Doody of his juvenile *Miranda* rights. (App. F at 2–4.) Detective Riley asked Doody if he had heard of a "Miranda Warning" and Doody answered "No." (*Id.* at 3.) Detective Riley then stated:

> They call it Rights on t.v., okay. What, what that is and basically all that is Jonathan is, it's not necessarily something that is, like on t.v. where they portray it when somebody's ah guilty of doing something, ah, we read these things to

> people on somewhat of a regular basis, whether they're responsible for doing something or not, okay. So I don't want you to feel that because I'm reading this to you that we necessarily think that you're responsible for anything, it's for your benefit, it's for your protection and for our's as well, okay?

(*Id.*) Doody answered "Okay," then Riley asked him some questions to gauge Doody's maturity and ability to comprehend. (*Id.* at 3–8.) Doody related that he was 17, in eleventh grade, and had "[a]bout a B A" average. (*Id.* 6, 8.) He also informed Riley that he had been in the R.O.T.C. at Agua Fria High School for 3 years and added, "I just happen to be in charge of the Honor Guard and Color Guard." (*Id.* at 5–6.) Doody said he was living with Alex Garcia. (*Id.* at 7–8.)

Detective Riley then read, and explained to Doody, his *Miranda* rights. (*Id.* at 8–11.) Riley then advised Doody of his state right to have a parent present during questioning and the possibility that Doody could be prosecuted in "adult court." (*Id.* at 12.) Doody initialed each *Miranda* right after it was read by Riley, acknowledging that he understood that particular right. (*Id.* at 9–13; App. E.)

At no point during the ensuing interview did Doody indicate that he wished to discontinue questioning, remain silent, or obtain the presence of counsel or a parent.

3. *The Arizona Court of Appeals' Determination That Doody Was Adequately Advised Of and Waived His Miranda Rights Was Not Unreasonable.*

In affirming the trial court's finding that Doody was adequately advised of and waived his *Miranda* rights, the Arizona Court of Appeals wrote:

> [C]onsidering the circumstances in their totality, we conclude that the trial court did not err in determining that the officers advised Doody of his *Miranda* rights in a clear and understandable manner and that Doody made a knowing and intelligent waiver. At the outset of the interrogation, the officers advised Doody of his rights under *Miranda* and of his right to have a parent or guardian present during questioning. The officer also advised Doody of the possibility he later could be transferred to adult court. The officers read each warning from a standard juvenile form and provided additional explanations as appropriate. After reading each warning, the officer asked Doody if he understood the right involved and obtained his initials on the form. Although Doody had no prior experience with the criminal justice system, the officers explained the rights in a manner appropriate for his age and apparent intelligence.
>
> The officers testified at the suppression hearing that Doody appeared to understand the warnings and exhibited no signs of doubt or confusion. Based on that testimony and the

> court's review of the taped interrogation, the trial court concluded that the officers adequately advised Doody of his rights and obtained an appropriate waiver before continuing. In so holding, the trial court expressly considered Doody's age, intelligence, and lack of prior exposure to the criminal justice system. Our review of the record, including the audiotape of the warnings, supports the trial court's finding that Doody knowingly and intelligently waived his rights, and therefore we will not disturb the court's ruling.

(App. C at 17–18.) The Arizona Court of Appeals' resolution of the *Miranda* claim is certainly a reasonable application of *Miranda*, *Prysock*, *Duckworth,* and *Powell* to the facts of this case.

The *en banc* majority held that the Arizona Court of Appeals' determination was "both an unreasonable determination of the facts and an unreasonable application of clearly established federal law" because, according to the majority: (1) Riley "downplayed the warnings' significance" by telling Doody that the police did not necessarily suspect him of having committed a crime, and, (2) Riley did not read verbatim off the form the parenthetical describing the right to have counsel present prior to and during questioning. (App. A at 35–36.)

Regarding the majority's first conclusion, Detective Riley did no more than tell Doody the truth: he was *not* a suspect and was being advised of his rights prophylactically, to "protect" both Doody as well as the integrity of any statements he made during

questioning. (App. F at 2–3.) This Court has never held that a law enforcement officer must sternly advise a person of his *Miranda* rights, or that the officer may not tell the person the "truth" regarding the circumstances surrounding the questioning. *See, e.g., Powell*, 130 S. Ct. at 1204; *Duckworth*, 492 U.S. at 201–03. Indeed, advising a person in a friendly, non-confrontational manner of his *Miranda* rights and the circumstances under which law enforcement officers seek to question him would clearly provide the person with a more informed basis upon which to decide whether to invoke or waive his *Miranda* rights.

Additionally, the majority infers a nefarious intent on behalf of Detective Riley, finding that "the fact that Detective Riley's explanation of a one-page *Miranda* warning form consumed twelve pages of text is testament to the confusion generated by the detective's obfuscation." (App. A at 35.) First, the majority is simply wrong. Detective Riley's reading and explanation of the Juvenile *Miranda* form (which included Doody's right to the presence of a parent during questioning as well as the admonition that he could be prosecuted in "adult court") encompassed less than *five* pages. (App. F at 9–13.) The preceding five pages involved Riley obtaining background information from Doody to gauge his maturity and comprehension. (*Id.* at 4–8.) A total of less than five pages to read a juvenile his *Miranda* and state rights, the explanatory parentheticals of each, and inquire whether he understands each right, is hardly "excessive." Proving the old adage that no good deed goes unpunished, the majority criticizes Detective Riley for taking the time to actually explain the rights rather than simply conducting a rote reading of the form. This Court has

never held that rote reading of *Miranda* rights is constitutionally required, or that law enforcement officers may not take some additional time to explain those rights before obtaining a waiver. *See, e.g., Powell*, 130 S. Ct. at 1204; *Duckworth*, 492 U.S. at 201–03. The majority's analysis flies in the face of this Court's caselaw, making *it* an unreasonable application of clearly established federal law.

The majority's conclusion (as well as that of Chief Judge Kozinski in his concurrence) that Detective Riley's "deviat[ion]" from the Juvenile Waiver form in explaining Doody's right to counsel prior to and during questioning amounted to advising Doody that he "had the right to counsel if Doody was involved in a crime" (App. A at 35, 88–90), amounts to a strained and myopic reading of a cold transcript, devoid of the context in which the statement was made. Rather, Riley was simply telling Doody, once again, that the police did not necessarily believe that Doody had committed a crime but, nevertheless, he had the right to have counsel present prior to and during questioning. The Juvenile *Miranda* form reads as follows regarding that right:

> 3. **You have the right to have an attorney present prior to and during questioning**. (This means, if you want one, you are allowed to have a lawyer here before and during my questions to you. An attorney is a lawyer who will speak for you and help you *concerning the crime which we think you have done*.) Do you understand this right?

(App. E at 2, emphasis added.)

Before reading Doody his *Miranda* rights and the explanatory parentheticals, Detective Riley had told Doody that the police did not feel that he was "necessarily" "responsible for anything." (App. F at 3.) It was in this context that*, after reading the right verbatim from the form*, Detective Riley varied from the parenthetical to convey that Doody had the right to counsel *regardless* of whether he was involved in the crime:

> [W]hat that means is that if you want one, *you're allowed to have a lawyer here before and during you know my questions to you*, okay. And then an attorney is a lawyer who will speak for you and help you concerning the crime or any kind of offense that ah *we might 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, than that's what that would apply to [sic] okay. And do you understand that?

(*Id.* at 10, emphasis added.)

Based upon the above colloquy, the majority and concurrence concluded that Detective Riley had effectively advised Doody that he had the right to have counsel present prior to and during questioning *only* if he was "involved" in a crime. (App. A at 35, 88.) In doing so, they myopically focused upon the statement, "Again, it [sic] not necessarily mean that you are involved, but if you were, then that's what would apply to [sic] okay," disregarding the context in which the statement was made, the fact that Riley had *just read*

the right to counsel verbatim off the form in front of Doody, and that Doody had initialed it.

This Court has made clear that "reviewing courts are not required to examine the words employed 'as if construing a will or defining the terms of an easement.'" *Powell*, 130 S. Ct. at 1204 (quoting *Duckworth*, 492 U.S. at 203). Yet, that is precisely what the majority and concurrence have done.

On the other hand, the Arizona Court of Appeals faithfully followed this Court's precedent, considering the entire colloquy in context and upholding the trial court's finding that Detective Riley "advised Doody of his *Miranda* rights in a clear and understandable manner and that Doody made a knowing and intelligent waiver." (App. C at 17–18.) "The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by *Miranda*." *Powell*, 130 S. Ct. at 1204 (quoting *Duckworth*, 492 U.S. at 203). As pointed out by the dissent, Detective Riley's oral admonition, "especially when considered together with the written warnings form" "touch[ed] all of *Miranda's* bases: the four essential components are easily identifiable, and nearly all of the additional material clarifies, rather than obfuscates." (App. A., at 119.)

Both the majority and concurrence concluded that this Court's recent opinion in *Powell* did not change the result in this case because the "facts" differ. (App. A. at 41–43, 91–92.) What they failed to appreciate is this Court's reiteration that, "The four warnings *Miranda* requires are invariable, but this Court has not dictated the words in which the essential information must be

conveyed." 130 S. Ct. at 1204. Moreover, though the facts in *Powell* certainly differ, the analysis and holding clearly apply here.

In *Powell*, the defendant was read the following from the Tampa Police Department *Miranda* form:

> "You have the right to remain silent. If you give up the right to remain silent, anything you say can be used against you in court. *You have the right to talk to a lawyer before answering any of our questions*. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights at any time you want during this interview."

Id. at 1200 (emphasis added). The Florida Supreme Court held that "the advice Powell received was misleading because it suggested that Powell could 'only consult with an attorney before questioning' and *did not convey Powell's entitlement to counsel's presence throughout the interrogation." Id.* at 1201 (quoting 998 So.2d 531, 532 (2008)) (emphasis added). The court held that the "catchall warning ("You have the right to use any of these rights at any time you want during this interview.") did not convey to Powell that he had the right to counsel *during questioning* because 'a right that has never been expressed cannot be reiterated'." *Id.* On certiorari review, this Court applied *Prysock* and *Duckworth* and concluded that the police officers did not "'entirely omi[t]' any information *Miranda* required them to impart," but reasonably conveyed the *Miranda* warnings. *Id.* at 1204–05 (quoting dissent at 1210–11).

Thus, like the majority in the present case, the Florida Supreme Court had myopically focused upon a portion of the *Miranda* colloquy, to the exclusion of the remainder of the warning. In the present case, the *Miranda* admonition and waiver were even clearer. Detective Riley read the *Miranda* warnings verbatim off the form (App. E). (App. F at 9–11.) It was in attempting to explain the parenthetical regarding the right to have "an attorney present prior to and during questioning" that Detective Riley stumbled in attempting to explain to Doody that the police did not necessarily believe that Doody had committed a crime, but that he *still* had the right to counsel. (*Id.* at 10; see also App. E at 2.) It is only through a myopic and tortured reading of that portion of the colloquy—to the exclusion of the remainder of the colloquy as well as the written waiver form—that the majority and concurrence found the Arizona Court of Appeals' finding "unreasonable." This Court has made clear that, even on *de novo* review, that is *not* how a court reviews a *Miranda* waiver. "Although the warnings were not the *clearest possible* formulation of *Miranda's* right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a common sense reading." *Powell*, 130 S. Ct. at 1205. Of course, the Arizona Court of Appeals' finding is entitled to far *greater* deference under the AEDPA and must stand "so long as 'fairminded jurists could disagree' on the correctness of the State court's decision." *Richter*, 131 S. Ct. at 786 (quoting *Alvarado*, 541 U.S. at 664).

The Arizona Court of Appeals faithfully and reasonably applied this Court's precedent in upholding the trial court's finding that Doody was adequately

advised of and waived his *Miranda* rights. By concluding that the state court's determination was "unreasonable," the *en banc* majority failed to afford that determination the deference it is due under the AEDPA, and has defied this Court's repeated admonitions to comply with the AEDPA.

B. VOLUNTARINESS FINDING.

1. *Applicable Law.*

Involuntary statements are inadmissible in evidence under the Due Process Clause of the Fourteenth Amendment. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 433–34 (2000); *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973). In determining whether statements are involuntary under the Fourteenth Amendment a court considers the "totality of all of the circumstances—both the characteristics of the accused and the details of the interrogation" to determine "whether a defendant's will was overborne." *Dickerson*, 530 U.S. at 434 (quoting *Bustamonte*, 412 U.S. at 226). That same standard applies to statements of juveniles, *Fare v. Michael C.*, 442 U.S. 707, 725 (1979), with the caveat that "admissions and confessions of juveniles require special caution." *In re: Gault*, 387 U.S. 1, 45 (1967). Additionally, this Court has held that "coercive police activity is a predicate to finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

Although this Court has not held that "compliance with *Miranda* conclusively establishes the

voluntariness of a subsequent confession," it has noted that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984); *see also Dickerson*, 530 U.S. at 444. More recently, a plurality of this Court wrote, "giving the [*Miranda*] warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver." *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004) (plurality opinion). When juxtaposed with the AEDPA's highly deferential standard of review, it is exceedingly difficult for a federal court to logically conclude that a state court's finding of voluntariness of *Miranda*-compliant statements is objectively unreasonable.

2. *The Arizona Court of Appeals' Determination That Doody's Statements Were Voluntary Was Not Unreasonable.*

In addressing Doody's voluntariness claim, the Arizona Court of Appeals stated that confessions are presumed involuntary, and that the State must establish that the defendant confessed "voluntarily and freely". (App. C at 7.) It noted that, in assessing the issues, it looked to the totality of the circumstances and determines if the defendant's will was overborne. (*Id.*) It further stated that, with respect to juvenile confessions, the "greatest care must be taken to insure

that the admission was voluntary." (*Id.* at 8, quoting *State v. Jimenez*, 799 P.2d 785, 790 (1990)).

The court rejected Doody's claim that the mere length of the interrogation required a finding that his statements were involuntary: "Other factors indicate that, despite the length of the interrogation, Doody confessed voluntarily." (*Id.* at 9.) It noted that Doody acknowledged, 2½ hours into the interrogation, that he had borrowed Caratachea's rifle. (*Id.* at 10.) It found that he admitted involvement in the Temple robbery about 6½ hours into the interrogation, and that the remainder of the time was devoted to Doody relating what he claimed happened, and discussing any possible involvement of the "Tucson Four." (*Id.*)

The court found that the tone of the interrogation was in "a courteous, almost pleading style of questioning during most of the interview." (*Id.*) It noted that the officers testified that Doody remained alert and responsive throughout. (*Id.*) It wrote, "Our review of the audio tapes confirms the officers' testimony." (*Id.*) The appellate court noted that, because Doody did *not* testify at the suppression hearing, there was "no basis for assuming that he would have contradicted the officers' testimony." (*Id.*) The court found no evidence, even in the record of the trial, that called into question Doody's alertness. (*Id.*) It noted the officers' offers of food, drink, and restroom privileges. (*Id.*)

The court then found that Doody had been asked if he wanted a parent present, and agreed to speak to officers without a parent, and that, in light of Doody's age and consent, the absence of a parent did not make

his statements involuntary. (*Id.* at 11.)

The court rejected Doody's argument that there had been any sort of improper promise upon which Doody had relied, specifically finding that the "variety of approaches" and "tactics" the police used in interviewing Doody did not "overcome Doody's will." (*Id.* at 12–14.)

Additionally, as previously discussed, the court of appeals also found that "the officers advised Doody of his *Miranda* rights in a clear and understandable manner and that Doody made a knowing and intelligent waiver," including waiving the right to the presence of a parent. (*Id.* at 17–18.)

Incredulously, the Ninth Circuit majority wrote, "[T]he Arizona Court of Appeals' voluntariness ruling unreasonably applied clearly established federal law because it analyzed the individual circumstances of the interrogation without weighing the totality of the circumstances." (App. A at 63.) To the contrary, the Arizona Court of Appeals expressly wrote, "In assessing the voluntariness of a confession we 'look to the totality of the circumstances surrounding the confession and determine whether the will of the defendant has been overborne'." (Pet. App. C at 7 (quoting *State v. Lopez*, 847 P.2d 1078, 1084 (1992)). As noted by the dissent:

> Given that federal law requires state courts to examine a long list of particular factors, this criticism is utterly confounding. Had the state court merely alluded to a vast morass of evidence and stated a summary conclusion, we

> might arguably reverse for failure to explicitly consider all the relevant circumstances. The majority now implies that individual consideration of each important factor is error. A state court earnestly trying to follow our conflicting dictates might as well throw in the towel.

(App. A at 141.) The majority simply refused to take the state court at its word.

The majority also attempted to portray Doody as a hapless waif, discounting the fact that he was a 17½ year old emancipated minor, living an adult lifestyle at the time he was interviewed. (See App. A at 49–50, 63–64.) As pointed out by the dissent:

> [T]he majority attempts to paint Doody as a tender youth, lacking intellect or sophistication, younger than his chronological age of seventeen-and-one-half years. But the facts as found here by the Arizona judges do not support such a characterization. The Arizona Court of Appeals reviewed the evidence presented at the ten-day evidentiary hearing, including all thirteen hours of the audio-taped interrogation. It made, or adopted from the trial court, a number of express factual findings supporting its legal analysis. These findings recite Doody's age, education, and school activities, including that he was six months from the age of majority, maintained a B grade average, held the position of commander of the ROTC Honor Guard and Color Guard, was employed on the military base, and that he

> spoke English fluently and displayed no signs of mental disability. *Doody*, 930 P.2d at 445–46.

(App. A at 125.) (footnote omitted.)

In an attempt to undermine the Arizona Court of Appeals' eminently reasonable determination that Doody's statements were voluntary, the majority redetermined the credibility of the law enforcement officers who testified at the suppression hearing, drew inferences adverse to the state courts' findings, parsed the state court record, viewed it through a Doody-colored prism, and seized upon three alleged "unreasonable determination" of "facts" mentioned by the Arizona Court of Appeals in its voluntariness analysis. (App. A at 55–62.) As pointed out by the dissent, "In light of the Arizona courts' extensive findings and careful application of federal law, the best the majority can do is to mischaracterize the state court findings and re-evaluate the record." (*Id.* at 137.)

The majority premised its decision on the alleged "unreasonable determination" of what it claimed were three "pivotal facts": (1) that the audio tapes of the interrogation confirmed the officers' testimony at the suppression hearing that Doody "remained alert and responsive throughout the interrogation and did not appear overtired or distraught"; (2) "the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview"; and (3) "Doody admitted he had borrowed Caratchea's rifle at the time of the temple murders after approximately two and one-half hours of questioning." (*Id.* at 55, 58, 61.) Though these

"facts" are not of significant consequence to the Arizona Court of Appeals' overall determination of voluntariness (and certainly not "pivotal"), the majority mischaracterized the record and the substance of the Arizona Court of Appeals' recitation of those "facts."

As the dissent noted, contrary to the majority's parsed recitation of portions of the audio tapes, the Arizona Court of Appeals' finding regarding Doody's demeanor during the interview *is* supported by the tapes:

> The majority wants to interpret Doody's failure to answer certain questions as "unresponsive." The Arizona Court of Appeals obviously viewed his failure to immediately answer in a more sinister light; Doody could have been thinking up a tale explaining his admission that he was at the murder scene in a non-incriminatory fashion. Doody ultimately stated that he was at the temple but outside when the murders occurred.
>
> The finding that he was "alert and responsive" was not unreasonable, even in light of Doody's silence, for there is more to alertness than perpetual chatter. Doody could certainly have been pondering the consequences of truthfully answering the detectives' questions. Of course, silence may be indicative of inattention or unresponsiveness, but visual clues and physical demeanor must also be considered.

(*Id.* at 137.) That is *precisely* what happened in this

case. Doody tried to throw the officers off his track with seeming cooperation and guile. When that was not working, the wheels in his head began to spin while he conjured up a story that distanced him from the robberies and murders. Eventually, he came up with the ridiculous story he told the officers. Of course, because the *en banc* majority opted to view the record in a light most favorable to Doody, it simply ignored this probability.

Next, the majority rejected the Arizona Court of Appeals' statements that "the audio tapes reveal a courteous, almost pleading style of questioning during *most* of the interview." (*Id.* at 58) (emphasis added.) Again, the majority mischaracterized the record, ignoring the qualifier "most" in concluding that the officers were "far from courteous":

> The majority next deems unreasonable the finding that "the audio tapes reveal a courteous, almost pleading style of questioning during most of the interview." *Doody*, 930 P.2d at 446; see Maj. Opinion at 5821–22. The majority reviews the tapes and scolds that the officers' tones were "far from pleasant." Maj. Opinion at 5822. This was no tea party. The state court did not treat it like one. The officers were unquestionably persistent in seeking, and sometimes demanding, information. That is what we pay them to do. But it is entirely accurate to say the officers were "courteous, almost pleading" for "*most* of the interview." *Doody*, 930 P.2d at 446 (emphasis added). Finding a courteous tone for *most* of the interview does not conflict with the

> fact that the officers were *sometimes* sarcastic, demeaning, and unpleasant.

(*Id.* at 139.) Again, rather than deferring to reasonable inferences to be drawn from the record, the majority simply construed the audio tapes and the state court record in a light most favorable to Doody.

Finally, the majority took the court of appeals' statement that Doody admitted that he borrowed Caratchea's rifle "at the time of the temple murders" after 2½ hours of questioning entirely out of context and mischaracterized its significance. (*Id.* at 61–62.) The majority equated Doody's admission that he borrowed the rifle with an admission of "involvement" in the crimes. (*Id.*) The Arizona Court of Appeals, however, drew a distinction between Doody's mere admission that he had borrowed the rifle and his *subsequent* admission that he was present during the robberies and murders:

> Although the entire interrogation lasted approximately thirteen hours, Doody admitted he had borrowed Caratachea's rifle at the time of the temple murders after approximately two and one-half hours of questioning. *Doody admitted he had participated in the temple robbery after approximately six and one-half hours of questioning*, and his description of the events at the temple spanned nearly two hours. During the remaining hours, the detectives reviewed Doody's testimony and probed for a connection to the Tucson Four.

(App. C at 9–10, emphasis added.)

Thus, the Arizona Court of Appeals recognized that Doody did not admit any "involvement" in the crimes until 6½ hours into the interview. Moreover, the significance of Doody's admission that he "borrowed" the rifle was that he had spent 2 hours adamantly denying that he *ever* borrowed it, not whether he borrowed it a month or so before the crimes were committed or on the day they were committed. Again, the majority's parsing of the record and mischaracterization of the Arizona Court of Appeals' statements evidences the lengths to which it went to undermine the state courts' determinations.

Having nit-picked through the voluminous state court record and the Arizona Court of Appeals' well-reasoned opinion, the majority culled snippets out of context, redetermined the credibility of the law enforcement officers, and drew inferences adverse to those drawn by the state courts. Such a practice flies in the face of the provisions of the AEDPA and the underlying principles of federalism and comity. However, even accepting the majority's biased view of the record, it *still* fails to demonstrate that the state courts' resolution of the voluntariness issue was objectively unreasonable:

> The majority spins a good yarn, but the state court also told a good story. Even federal judges can't read Doody's mind or travel back in time. And, as the Supreme Court has told us, "The more general the rule, the more leeway courts have in reaching outcomes." *Yarborough v. Alvarado*, 541 U.S. 635, 664 (2004). This is

> precisely the kind of debatable application of a "general standard" where finality and respect for the independent judgment of the state courts counsels the highest deference on federal habeas review. *See Knowles v. Mirzayance*, 129 S. Ct. 1411, 1420 (2009); *see also Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). I would therefore let stand the state court's finding that the confession was voluntary.

(*Id.* at 86, Kozinski, C.J., concurring.)

The *en banc* majority clearly failed to follow this Court's repeated admonition that federal courts (particularly the Ninth Circuit) abide by the provisions of the AEDPA and accord state court legal and factual determinations the deference they are due.

C. HARMLESS ERROR.

Even if the Arizona Court of Appeals' *Miranda* or voluntariness finding amounted to an unreasonable determination of fact or clearly established federal law, the resulting constitutional error clearly did not have a "substantial and injurious effect or influence in determining the jury's verdict[s]." *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993). The majority paid short shrift to Petitioner's harmless error argument. (See App. A at 79–82.)

Doody's statements to the police were, by and large, self-serving and exculpatory, claiming that he was merely present but was not involved in the planning or commission of the robberies or murders. (See App. A at 26–27.) Moreover, the jurors were

instructed that they could not even "consider" Doody's statements unless they found "beyond a reasonable doubt" they were voluntary:

> You *must not consider* any statements made by the defendant to a law enforcement officer unless you determine *beyond a reasonable doubt* that the defendant made the statements voluntarily. A defendant's statement was not voluntary if it resulted from the defendant's will being overcome by a law enforcement officer's use of any sort of violence, coercion, or threats, or by any direct or implied promise, however slight. You must give such weight to the defendant's statement as you feel it deserves under all of the circumstances.

(App. G, at 2, emphasis added.) The jurors are *presumed* to have followed this instruction. *See Weeks v. Angelone,* 528 U.S. 225, 234 (2000).

Furthermore, Doody admitted to his friends Vicki Jones, Angel Rowlett, and Ben Leininger that he and Garcia committed the murders. These statements to friends and acquaintances, without any of the pressures of a police interview, are *much more* incriminating than Doody's statements to the police. *See, e.g., Howard v. Pung*, 862 F.2d 1348, 1351 (8th Cir. 1988) (taped statements to a person defendant tried to hire to kill his wife merely *implying* that he hired another person who killed her rendered confession to law enforcement officers harmless); *United States v. Pittman*, 36 M.J. 404, 408 (C.M.A. 1993) (error in admission to civilian military employee harmless where same statements were made to a

friend because the latter has much more probative effect than a statement to a complete stranger).

Doody's fingerprints were found on three items taken from the Temple. Additionally, items taken from the Temple were found in the bedroom Doody was sharing with Garcia. And, Garcia's trial testimony was virtually unimpeached as it related to the planning and execution of the Temple crimes.

In short, admission of Doody's statements to the police had no effect whatsoever on the jurors' verdicts, let alone a "substantial and injurious effect or influence." *Brecht*, 507 U.S. at 637–38.

CONCLUSION

For the reasons set forth above, Petitioner requests that this Court grant certiorari and reverse the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

THOMAS C. HORNE
Attorney General

DAVID R. COLE
Solicitor General

KENT E. CATTANI
Chief Counsel
Criminal Appeals/
Capital Litigation Division

JOSEPH T. MAZIARZ
(Counsel of Record)
Assistant Attorney General
Criminal Appeals/
Capital Litigation Division
1275 W. Washington
Phoenix, Arizona 85007–2997
jmaziarz@azag.gov
cadocket@azag.gov
Telephone: (602) 542–4686

1867347