No. _____

In the Supreme Court of the United States

RANDY GROUNDS, ACTING WARDEN, *Petitioner,*

v.

TIO DINERO SESSOMS, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

Prior to a custodial interview, when the police detective had not yet read respondent his *Miranda* rights, respondent asked, "There wouldn't be any possible way that I could have a—a lawyer present while we do this?" The detective replied, "Well, uh, what I'll do is, um—"; and respondent interjected, "Yeah, that's what my dad asked me to ask you guys . . . uh, get me a lawyer." The detective subsequently read respondent his *Miranda* rights. Respondent then waived his rights and confessed.

The Questions Presented are:

1. Where the suspect in custody makes an ambiguous or equivocal reference to counsel before receiving *Miranda* warnings, does "clearly established Federal law" as determined by this Court forbid the police from advising the suspect of his Miranda rights and then conducting an interrogation after he waives them?

2. Under the "highly deferential" standard of review set out in 28 U.S.C. § 2254(d), was it objectively unreasonable for the state court to conclude that respondent did not unambiguously and unequivocally invoke his right to counsel before receiving *Miranda* warnings?

LIST OF PARTIES

1. Randy Grounds, Acting Warden of Salinas Valley State Prison, Petitioner
2. Tio Dinero Sessoms, Respondent

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PETITION FOR WRIT OF CERTIORARI

Randy Grounds,[1] Acting Warden of Salinas Valley State Prison, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's en banc opinion reversing the district court's judgment and requiring habeas corpus relief is reported at 691 F.3d 1054 (9th Cir. 2012). The Ninth Circuit's earlier three-judge panel opinion affirming the district court's judgment is reported at 650 F.3d 1276 (9th Cir. 2011). The district court's order denying habeas corpus relief and the magistrate judge's findings and recommendations are unpublished. The California Court of Appeal's opinion affirming respondent Sessoms' conviction and sentence is also unpublished. Each is reproduced in the Appendix to this petition (App.).

JURISDICTION

The Ninth Circuit's en banc opinion was filed on August 16, 2012. App. 1. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

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[1] After the habeas corpus proceedings began in federal court, respondent Sessoms was transferred to Salinas Valley State Prison, where Acting Warden Grounds is now his custodian.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . . ."

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself."

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides, in pertinent part:

(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.

STATEMENT OF THE CASE

A. State Court Proceedings

In 1999, respondent Sessoms committed a burglary and robbery, during which one of his cohorts killed the victim. Sessoms then fled from California to Oklahoma, where he ultimately turned himself in to the Oklahoma police. Several days later, California police detectives arrived to interview and extradite Sessoms. After the detectives entered the room, but before they had read Sessoms his *Miranda*[2] rights or had commenced an interrogation, Sessoms said, "There wouldn't be any possible way that I could have a—a lawyer present while we do this?" A detective replied, "Well, uh, what I'll do is, um—"; and Sessoms interjected, "Yeah, that's what my dad asked me to ask you guys . . . uh, get me a lawyer." App. 122-23, 125.

The detectives did not ask Sessoms any questions. Instead, one detective said it was his "philosophy" to be "up-front" and not "hide anything." Sessoms then said his "dad was worried about . . . a lot of officers end up switching your words afterwords [*sic*]." The detective said that they were not playing "switch games" and that, if Sessoms did not mind, the detective wanted to record their conversation so there would be proof that no "switch games" occurred. Sessoms said he did not mind. App. 91-92, 123.

After activating the recorder, the detective told Sessoms that he was being charged with homicide, robbery, and burglary, and that his cohorts had waived their rights. The detective commented that

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

he was surprised one of the cohorts had done so. The detective also said that, if Sessoms were to tell them he did not want to make a statement without an attorney, then they would not be able to talk and get his version of the events. The detective also pointed out that all attorneys will usually advise their clients not to make a statement. He further stated that they did not need Sessoms' statement to "make th[is] case." App. 95, 124.

The detective then told Sessoms that he was going to advise him of his rights and make sure he understood them, and that Sessoms could then decide whether he wanted to speak with the detectives. Sessoms asked if it would be possible for him to call his father. The detective said, "no," because nineteen-year-old Sessoms was an adult who had to make his own decision. The detective added that, when they were finished, arrangements for a call to his father could be made, regardless of whether Sessoms agreed to be interrogated. App. 96, 124.

The detective next read Sessoms his *Miranda* rights, each of which Sessoms said he understood. Sessoms waived his rights, saying, "Let's talk." Sessoms then admitted that he had participated in the burglary and robbery during which the victim had been killed. App. 96-97, 124.

At his trial in California for murder, robbery, and burglary, Sessoms sought to suppress his incriminating admissions on the ground that he had unequivocally requested counsel before he waived his *Miranda* rights. After hearing live testimony from both detectives and carefully reviewing a videotape, an audiotape, and a transcript of Sessoms' exchange with the detectives, the court denied the motion. App. 124, 147.

The trial court found that no questioning had occurred prior to Sessoms' references to counsel. The

court found that Sessoms' first reference—"There wouldn't be any possible way that I could have a -- a lawyer present while we do this?"—was a question, not an assertion of his right to counsel. The court also found that, when the detective started to respond, Sessoms interrupted, making a second reference—"Yeah, that's what my dad asked me to ask you guys . . . uh, get me a lawyer." The court held that the thrust of both statements was that Sessoms was asking if it was possible to have an attorney present, which would not appear to a reasonable officer to be a request for an attorney. App. 124-25, 141, 143-44.

The trial court further found that Sessoms' third comment—"my dad was worried about . . . a lot of officers end up switching your words afterwords [*sic*]"—clarified his father's reason for advising him to ask whether it was possible for an attorney to be present. The court additionally found that, in stating that it was up to Sessoms to make the decision, it was clear that the detectives' state of mind, as reasonable officers, was that Sessoms had not made a decision yet. The court observed that, when the detective asked, " 'Having those rights in mind, do you wish to talk to us,' " Sessoms slightly shrugged his shoulders and said, " 'Um' "; and that the detective then said that it is "solely up to you," to which Sessoms replied, " 'Let's talk.' " The court concluded that there was no violation, so the detectives were not required to terminate the "interrogation." App. 145-47.

The prosecution introduced Sessoms' incriminating admissions at trial. See App. 125. The jury found Sessoms guilty of burglary, robbery, and murder, and also found, as "special circumstances," that he had been engaged in a burglary and robbery at the time of the murder. The murder conviction

was based on a theory of felony murder. App. 43, 125.

Sessoms' made a motion for new trial, in which he similarly argued, in part, that his interrogation had been conducted after he invoked his right to counsel. The trial court, after carefully reviewing the videotape, portions of the transcript, and the transcript of its ruling on the suppression motion, incorporated its prior rulings and again ruled that the police did not obtain Sessoms' statement in violation of *Miranda*. App. 125, 132-34.

Specifically, the trial court again found that Sessoms' first reference to counsel at issue here "was a question . . . asking into what is possible. It was not a direct unequivocal request to be provided with an attorney on the spot." App. 125, 134. Additionally, the court again found that Sessoms' second reference to counsel, even if it was capable of being comprehended, [3] was "not an unequivocal request for counsel. Rather, Mr. Sessoms was just stating what his father's wishes were, not his own." *Id*.

The trial court sentenced Sessoms to life in prison without the possibility of parole. App. 125.

On direct appeal, the California Court of Appeal rejected Sessoms' claim that his incriminatory admissions should have been suppressed. The court held that the statements Sessoms had made before receiving *Miranda* advisements did not constitute an

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[3] The trial court reviewed the videotape of Sessoms' exchange with the detectives five to seven times before ruling on the new trial motion. After reviewing the videotape, the court expressed doubt that a reasonable officer would have heard Sessoms say, "get me a lawyer," because it was mumbled. The court, however, assumed for the sake of argument that a reasonable officer would have heard it. App. 134.

unequivocal or unambiguous request for counsel, and thus, the police did not violate *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which prohibits interrogation after the suspect " 'actually' " invokes his right to counsel. App. 126-28. In holding that an unequivocal or unambiguous request was required, the court relied on *Davis* v. *United States*, 512 U.S. 452 (1994). App. 126-28.

Specifically, the state court found that, though Sessoms twice had referred to a lawyer before receiving *Miranda* advisements, neither statement constituted an unequivocal or unambiguous request for counsel. Rather, Sessoms' initial utterance merely posed a question and was legally indistinguishable from the equivocal remarks in *Davis* ("Maybe I should talk to a lawyer") and in *People* v. *Crittenden*, 9 Cal. 4th 83, 123, 885 P.2d 887, 908 (1994) ("Did you say I could have a lawyer?"), which had not required the police to terminate interrogation. Further, the court explained, Sessoms' second utterance was, at best, a statement of his father's advice to him; and it was not sufficiently clear that a reasonable police officer, under the circumstances, would have construed it to be a request for an attorney. App. 127-28.

The California Supreme Court denied Sessoms' petition for further appellate review. App. 121.

B. Federal Court Proceedings

Sessoms filed a federal habeas corpus petition, in which he again claimed that the police had violated his *Miranda* rights by interrogating him after he invoked his right to counsel. He argued that the state court, in denying this claim, unreasonably determined that his request for counsel was equivocal. App. 87, 110, 115, 117-18. The magistrate judge concluded, under the deferential review

standards of 28 U.S.C. § 2254(d)(1), that the state court's decision did not contradict or unreasonably apply this Court's authority. App 119-20. The district court adopted the magistrate judge's findings and denied the petition. App. 85-86.

A Ninth Circuit panel, in a 2-to-1 split, affirmed the district court's decision in a published opinion. App. 36-84. The majority held that none of this Court's precedents precluded the state court from applying a clear-invocation requirement to statements that precede a *Miranda* warning. App. 51-52. The majority explained that *Davis* did not constitute "clearly established Federal law" controlling the pertinent question under § 2254(d)(1), because *Davis* addressed statements made after a *Miranda* waiver, while Sessoms' statements were made before his *Miranda* waiver. App. 50-51. Instead, the panel ruled, the case was controlled by *Edwards*, 451 U.S. 477, which only prohibits the police from interrogating a suspect if the suspect has " 'actually invoked his right to counsel.' " App. 53. On that issue, the panel concluded, Sessoms could not show that the state court's determination—that he had failed to make an unequivocal or unambiguous request for counsel—was unreasonable. App 60-62.

The Ninth Circuit granted Sessoms' petition for en banc review. In a 6-to-5 split, the en banc panel reversed the district court in a published opinion. Judge B. Fletcher—who had dissented from the original panel's opinion—authored the majority opinion. The majority held that the state court had both contradicted and unreasonably applied this Court's precedent. App. 10. In part, the majority held, the state court had misapplied this Court's precedent by analyzing Sessoms' claim "using the incorrect legal framework." *Id*. According to the

majority, *Miranda* provided the test for determining whether a suspect had invoked his right to counsel. Under this test, a suspect invokes that right if he " 'indicates in any manner . . . that he wishes to consult with an attorney . . . .' " App. 12 (quoting *Miranda*, 384 U.S. at 444). The majority held that the state court ran afoul of this rule by instead applying the clear-invocation test to Sessoms' statements. App. 15.

The majority also held that the state court had contradicted and unreasonably applied *Davis*. According to the majority, *Davis* held that the clear-invocation requirement applied only to statements that suspects make after waiving their *Miranda* rights, and that, by applying the clear-invocation requirement to statements that Sessoms made before receiving *Miranda* advisements, the state court "unreasonably extended" *Davis* to a new situation where it should not apply. App. 10, 15-18.

Because Sessoms had thus overcome § 2254(d)'s deferential review, the majority considered itself free to review his *Miranda* claim de novo. Analyzing Sessoms' remarks de novo under *Miranda* and *Edwards*, the majority found that he had invoked his right to counsel. App. 18-20. Because the detectives failed to immediately terminate all questioning, the majority further found that his subsequent incriminating statements were unlawfully obtained in violation of *Miranda* and *Edwards*, and that their admission at trial therefore deprived him of his rights under the Fifth and Fourteenth Amendments. App. 20-21.

In a concurring opinion, four of the judges in the majority stated that, even if *Davis'* clear-invocation requirement were applicable, the state court's decision would still have been unreasonable under § 2254(d)(1). In their view, Sessoms' statements,

considered together, had unambiguously conveyed his desire for counsel. App. 22.

Five judges, including Chief Judge Kozinski, dissented in an opinion authored by Judge Murguia. App. 22. The dissent expressed the view that a reasonable jurist could conclude that *Davis'* clear-invocation requirement also applies to a suspect's pre-*Miranda*-advisement statements. App. 22, 25-26. "[M]ost importantly," the dissent stated, no authority from this Court precluded the state court from applying *Davis'* clear-invocation requirement to statements that preceded *Miranda* advisements. App. 24, 29. Further, under § 2254(d)(1), a reasonable jurist could conclude that Sessoms' statements were ambiguous and equivocal. App. 22, 34-35. Accordingly, the dissent concluded, § 2254(d) barred relief. App. 30, 32-33, 35.

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit's decision failed to abide by § 2254(d)(1)—Congress' central habeas corpus reform in AEDPA—in two ways. First, it treated *Miranda* itself as setting out a rule, binding on the state courts, that a suspect's pre-warning statements need not be unequivocal to constitute an invocation of his rights—even though neither *Miranda* nor any other decision of this Court has ever squarely addressed the question and set out such a rule. Second, the Ninth Circuit erroneously concluded, in the absence of clearly-established law on the issue of equivocal pre-warning statements, that the § 2254(d)(1) deference standard was inapplicable because the state court in its view had unreasonably extended *Davis'* clear-invocation requirement to the pre-warning context. That view, apparently untethered from the question of whether the state court had

violated any federal constitutional rule that this Court itself had clearly established, would cast aside § 2254(d)'s fundamental limitation on the federal habeas court's power.

The Ninth Circuit's decision also conflicts with decisions by other circuit courts and several state courts of last resort that apply the clear-invocation requirement to statements suspects make before *Miranda* advisements.

Equally serious, the Ninth Circuit's decision decides an important question of federal law—whether the clear-invocation requirement applies to statements that suspects make before receiving *Miranda* advisements—that this Court has not settled but should settle. If this question is not settled and the Ninth Circuit's decision is allowed to stand, the decision will needlessly and unjustifiably impede legitimate police investigations.

I. THE NINTH CIRCUIT'S DECISION VIOLATED § 2254(D) AND THIS COURT'S REPEATED HOLDINGS THAT CONFINE FEDERAL HABEAS REVIEW TO THIS COURT'S CLEARLY ESTABLISHED LAW

A. No Holding of This Court Precluded the State Court from Applying a Clear-Invocation Requirement to Sessoms' Pre-Advisement Reference to Counsel

The keystone of AEDPA's reform of habeas corpus is § 2254(d)(1)'s requirement that state court decisions be judged deferentially by reference to the law only as "clearly established" by this Court's square holdings. To constitute "clearly established Federal law" under § 2254(d)(1), a Supreme Court precedent must set forth the "governing legal

principle or principles" that controlled the issue before the state court. *Yarborough* v. *Alvarado*, 541 U.S. 652, 660 (2004); *Lockyer* v. *Andrade*, 538 U.S. 63, 71-72 (2003). It must offer a holding—not merely dictum—that "squarely address[ed]" that issue and provided a "clear answer to the question presented." *Wright* v. *Van Patten*, 552 U.S. 120, 125-26 (2008) (per curiam); *Yarborough* v. *Alvarado*, 541 U.S. at 660-61. If none of this Court's authority squarely addressed the question and provided a clear answer to it when the state court adjudicated the petitioner's claim, then the state court's decision cannot contradict or unreasonably apply "clearly established federal law"—and § 2254(d)(1) bars habeas corpus relief on the claim. *Van Patten*, 552 U.S. at 126; *Carey* v. *Musladin*, 549 U.S. 70, 77 (2006); see *Greene* v. *Fisher*, 132 S. Ct. 38, 44 (2011) (§ 2254(d)(1)'s "backward-looking language" requires state-court decisions to be measured "against this Court's precedents *as of the time the state court renders its decision*." (internal quotation marks and citations omitted, emphasis in original)).

The issue before the state court here was how the police may proceed when a suspect in custody makes an ambiguous or equivocal reference to counsel before receiving *Miranda* warnings. In rejecting Sessoms' *Miranda* claim, the state court held that, to require the police to terminate an encounter before giving *Miranda* advisements, a suspect's alleged request for counsel must be clear and unequivocal. As authority for this holding, the state court relied on this Court's precedent in *Davis*, 512 U.S. at 455, 458-62. App. 126-28.

According to the Ninth Circuit, however, Sessoms overcame the § 2254(d)(1) because, by applying the clear-invocation requirement to Sessoms' statements, the state court "contradicted"

and "unreasonably applied" this Court's precedents. The Ninth Circuit held that *Miranda* requires cessation of police questioning where the suspect indicates " 'in any manner' " that he wants a lawyer. App. 12, 18 (quoting *Miranda*, 384 U.S. at 444). But, as the five dissenting judges correctly pointed out below, this Court has never addressed the effect of a suspect's ambiguous or equivocal reference to counsel before *Miranda* warnings. App. 24. In fact, this Court has never held that an ambiguous or equivocal reference to counsel is sufficient to stop an interrogation at *any* stage. App. 23, 26.[4]

Davis was this Court's first case to directly address ambiguous or equivocal references to counsel. Previously, in *Smith* v. *Illinois*, 469 U.S. 91 (1984), this Court acknowledged that a suspect's purported request for counsel, on occasion, might be "ambiguous or equivocal," and that courts around the country had "developed conflicting standards" on how to treat such statements. *Id*. at 95-96 & n.3. But *Smith* expressly declined to resolve the conflict. *Id*. at 96. So, as the dissent below observed, *Smith* "confirmed that the consequences of an ambiguous request for counsel was an unsettled question in *Miranda*'s wake, and that there was no established law on point." App. 24. Three years after *Smith*, in *Connecticut* v. *Barrett*, 479 U.S. 523, 529-30 n.3 (1987), this Court again remarked that the question remained unresolved.

Addressing ambiguous or equivocal references to counsel for the first time in *Davis*, this Court

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[4] Indeed, this Court has never held that even a *clear* request for counsel, made prior to *Miranda* advisements, precludes the police from giving the advisements, obtaining the suspect's response, and proceeding with interrogation if the suspect consents.

endorsed imposing a clear-invocation requirement on the suspect. Specifically, this Court held that, "if a suspect makes a reference to an attorney that is ambiguous or equivocal . . . our precedents do not require the cessation of questioning. Rather, the suspect must unambiguously request counsel." *Davis*, 512 U.S. at 459. This Court noted that its holding applied to suspects—like the defendant in *Davis*—who had already waived their *Miranda* rights. *Id*. at 461.

But this Court did not squarely address whether the clear-invocation requirement also applies to statements that precede a *Miranda* waiver. That question was not before the Court. Hence, *Davis* at most "left open the question of what rule applies to statements made before a suspect has waived his *Miranda* rights . . . ." David Rubenstein, *AEDPA's Ratchet: Invoking the Miranda Right to Counsel After the Antiterrorism and Effective Death Penalty Act*, 86 Wash. L. Rev 905, 935 n.238 (2011); see also *In re Christopher K.*, 217 Ill. 2d 348, 381, 841 N.E.2d 945, 964 (Ill. 2005) (the fact that *Davis* was limited to postwaiver statements "suggests the United States Supreme Court has left open the issue of whether the [clear-invocation] test applies in a prewaiver setting.").

It makes no difference that the Ninth Circuit interprets *Davis* as laying down only a postwaiver rule—i.e., that a suspect's assertion of the right to counsel "need not be 'unambiguous or unequivocal' " unless it follows a valid *Miranda* waiver. App. 15 (quoting *Davis*, 512 U.S. at 462). All that matters under § 2254(d) is what this Court has held. And this Court has never held that the clear-invocation requirement does not apply to statements that precede *Miranda* advisements. To the contrary, as observed in the dissenting opinion below, the Ninth

Circuit's interpretation "turns *Davis* on its head." App. 27. *Davis* did not articulate a separate standard for pre-*Miranda* statements—one that requires merely an utterance that can be interpreted as a request for counsel but need not be unambiguous and unequivocal. Instead, *Davis* explained that a "statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney" invokes the right to counsel *only* if it satisfies the clear-invocation requirement:

> Invocation of the *Miranda* right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil* v. *Wisconsin*, 501 U.S., at 178. But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning. . . . [¶] Rather, the suspect must unambiguously request counsel.

Davis, 512 U.S. at 459 (emphasis in original). Thus, contrary to the majority's view here, *Davis* does not articulate any standard less stringent than the clear-invocation requirement.

Berghuis v. *Thompkins*, 130 S. Ct. 2250 (2010)—this Court's only case since *Davis* to address the level of clarity required for *Miranda* invocations—further demonstrates that the Ninth Circuit majority misconstrued *Davis*. In *Thompkins*, which postdated the state court's decision here, this Court held that the clear-invocation requirement applied to a suspect who had received *Miranda*

advisements and understood them but had not yet waived them. *Id.* at 2260. The only standard that *Thompkins* mentioned was the clear-invocation requirement, and *Thompkins* did not suggest that this standard is sometimes inapplicable. As the dissent here observed, App. 25, *Thompkins* stated, *without qualification*: "If an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." *Thompkins*, 130 S. Ct. at 2259-60 (internal citation omitted, quoting *Davis*, 512 U.S. at 459, 461-62).

In short, contrary to the Ninth Circuit's decision, none of this Court's holdings served to "clearly establish" that a state court may not apply a clear-invocation requirement to a suspect's pre-*Miranda*-warning statements. Therefore, the state court's decision in this case cannot be "contrary to" or an "unreasonable application of" this Court's precedent. Under § 2254(d), that should have ended federal review of Sessoms' *Miranda* claim. Just as this Court has seen the need on many occasions to step in and remedy other failures by the Ninth Circuit and other circuits to conform to § 2254(d)'s restrictions on federal courts—including, in particular, repeated failures to limit review only to departures from "clearly established Federal law," see, *e.g.*, *Berghuis* v. *Smith*, 130 S. Ct. 1382, 1388, 1392-93, 1395-96 (2010); *Thaler* v. *Haynes*, 130 S. Ct. 1171, 1173-75 (2010); *Van Patten*, 552 U.S. at 125-26; *Schriro* v. *Landrigan*, 550 U.S. 465, 478 (2007); *Musladin*, 549 U.S. at 77—it should grant certiorari to remedy such a failure in this case too.

B. Because the State Court Decision Did Not Run Afoul of Clearly-Established Federal Law Controlling Sessoms' Claim, It Is Inconsequential under § 2254(d)(1) Whether the Ninth Circuit Believes that *Davis* Should Not Be "Extended" to a Pre-Advisement Context

Besides holding that the state court ran afoul of § 2254(d)(1) by failing to apply the correct and "clearly established" standard for determining whether Sessoms had invoked his right to counsel, the Ninth Circuit held that the state court had also run afoul of § 2254(d)(1) by "unreasonably extend[ing]" this Court's *Davis* precedent to the pre-*Miranda*-warning context. App. 10, 15, 18. But, as explained above, the Ninth Circuit was incorrect. If a state court's decision did not contradict or unreasonably apply this Court's *controlling* precedent—meaning precedent that determines the disposition of the particular claim before the state court—then a petitioner cannot surmount § 2254(d)(1) based on a finding that the state court unreasonably extended this Court's *noncontrolling* precedent.

This Court has recognized only three ways a state court can run afoul of § 2254(d)(1). First, if the state court "arrives at a conclusion opposite to that reached by this Court on a question of law," then the state court has contradicted clearly established federal law. *Williams* v. *Taylor*, 529 U.S. 362, 412-13 (2000). Second, if the state court "decides a case differently than this Court has on a set of materially indistinguishable facts," then the state court has likewise contradicted clearly established federal law. *Id*. at 413. And third, if the state court "identifies the correct governing legal principle from this Court's

decisions but unreasonably applies that principle to the facts of the prisoner's case," then the state court has unreasonably applied clearly established federal law. *Id*.

This Court has never held that a petitioner can overcome § 2254(d)(1) merely because the state court "unreasonably extended" this Court's precedent to a new situation. Instead, there must be "clearly established federal law" prohibiting the extension. And this Court's precedents constitute clearly established federal law only to the extent its holdings (1) *set forth the principles that govern the claim*; (2) "squarely" address that issue; and (3) provide a "clear answer to the question presented." *Van Patten*, 552 U.S. at 125-26; *Yarborough* v. *Alvarado*, 541 U.S. at 660-61; *Lockyer* v. *Andrade*, 538 U.S. at 71-72. If there is no such authority, then the state court's decision cannot run afoul of § 2254(d)(1). *Van Patten*, 552 U.S. at 126; *Musladin*, 549 U.S. at 77.

The Ninth Circuit's unreasonable-extension test casts aside this threshold requirement for *controlling* authority—again, meaning precedent that determines the disposition of the particular claim before the state court. Instead, its approach would treat any misstep in interpreting a Supreme Court precedent as if it were automatically sufficient to overcome § 2254(d) deference, regardless of whether the misstep contradicted any clearly established law that governs the ultimate question of whether the defendant was entitled to relief. The Ninth Circuit's holding here exemplifies this defect. The Ninth Circuit held that Sessoms had overcome § 2254(d)(1), in part, because the state court had unreasonably "extended" its view of *Davis*. But *Davis* did not issue any holding on the issue that was before the state court here: whether the clear-invocation

requirement applies to statements that precede *Miranda* advisements.

Of course, there may be cases where state courts cite inapplicable authority in analyzing an issue. But, in such cases, the state court's holding runs afoul of clearly established federal law only if the result was contrary to or an unreasonable application of this Court's *controlling* authority—otherwise, the state court's treatment of *noncontrolling* precedent is, for AEDPA purposes, irrelevant. Moreover, by holding that a state court contradicted or unreasonably applied *noncontrolling* precedent, the federal court would engage "a 'grading papers' approach that is outmoded in the post-AEDPA era." *Wright* v. *Moore*, 278 F.3d 1245, 1255 (11th Cir. 2002); see also *Lafler* v. *Cooper*, 132 S. Ct. 1376, 1396 (2012) (Scalia, J., dissenting) ("federal habeas corpus is . . . not a license to penalize a state court for its opinion-writing technique.").

The Ninth Circuit's reliance on an "unreasonable-extension" approach stems from its misreading of *Williams* v. *Taylor*, 529 U.S. at 362. App. 9. But *Williams* never adopted such a test. On the contrary, *Williams* expressly declined to do so, stating that "[t]oday's case does not require us to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)." *Williams,* 529 U.S. at 408-09. Moreover, this Court's later AEDPA decisions refute the notion that a state court's "unreasonable extension" of Supreme Court precedent, without more, serves to avoid the deference standard of § 2254(d). Those later cases, instead, show that the absence of controlling precedent from this Court insulates a state court's decision from review under § 2254(d)(1). *Van Patten*, 552 U.S. at 125-26; *Musladin*, 549 U.S. at 77.

The Ninth Circuit is not the only court that has mistakenly cited *Williams* as endorsing an "unreasonable extension" test. *E.g., Brown* v. *Bobby*, 656 F.3d 325, 333 (6th Cir. 2011); *Simmons* v. *Epps*, 654 F.3d 526, 534 (5th Cir. 2011); *Winston* v. *Boatwright*, 649 F.3d 618, 633 (7th Cir. 2011); *Danforth* v. *Crist*, 624 F.3d 915, 918 (8th Cir. 2010); *Kokal* v. *Secretary, Dept. of Corrections*, 623 F.3d 1331, 1344 (11th Cir. 2010); *Lewis* v. *Wheeler*, 609 F.3d 291, 300-01 (4th Cir. 2010); *Greene* v. *Palakovich*, 606 F.3d 85, 104 n.14 (3d Cir. 2010); *Bledsoe* v. *Bruce*, 569 F.3d 1223, 1231 (10th Cir. 2009); *Fratta* v. *Quarterman*, 536 F.3d 485, 504-05 (5th Cir. 2008); *Carson* v. *Fischer*, 421 F.3d 83, 89 (2d Cir. 2005); *Hill* v. *Hofbauer*, 337 F.3d 706, 717 (6th Cir. 2003); *James* v. *Marshall*, 322 F.3d 103, 106 (1st Cir. 2003).

In contrast, other decisions from some of these courts—including the decision from the original Ninth Circuit panel here—have correctly recognized that *Williams* did not adopt the unreasonable-extension test. *E.g*., *Marcrum* v. *Luebbers*, 509 F.3d 489, 504 (8th Cir. 2007); *Marshall* v. *Hendricks*, 307 F.3d 36, 51 n.2 (3d Cir. 2002); *Williams* v. *Coyle*, 260 F.3d 684, 699 (6th Cir. 2001); *Francis S.* v. *Stone*, 221 F.3d 100, 109 (2d Cir. 2000); *Oken* v. *Corcoran*, 220 F.3d 259, 263-64 n.3 (4th Cir. 2000); *Phoenix* v. *Matesanz*, 233 F.3d 77, 80 (1st Cir. 2000); App. 46 n.6.

Although it does not appear that the federal courts in any of these cases in the end ever granted habeas corpus relief on the basis of a mere "unreasonable extension" of precedent in the absence of clearly-established law controlling the claim, the mis-citations of *Williams* suggest an additional reason for this Court to grant certiorari here and to put the "unreasonable extension" notion to rest.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS BY OTHER CIRCUIT COURTS AND STATE COURTS OF LAST RESORT ON *MIRANDA*'S REQUIREMENTS

A grant of certiorari is warranted, also, because the Ninth Circuit's opinion conflicts with decisions by other federal circuit courts and by state courts of last resort on the same important matter. Sup. Ct. R. 10(a).

To begin with, the Ninth Circuit's decision conflicts with decisions by the First and Seventh Circuits. Like California, those Circuits have applied the clear-invocation requirement to statements that suspects make before receiving *Miranda* warnings. *E.g.*, *United States* v. *Wysinger*, 683 F.3d 784, 794-95 (7th Cir. 2012); *United States* v. *Shabaz*, 579 F.3d 815, 816-19 (7th Cir. 2009); *Grant-Chase* v. *Commissioner*, *N.H. Dept. of Corrections*, 145 F.3d 431, 433, 436-37 (1st Cir. 1998); see also *United States* v. *Muhammad*, 120 F.3d 688, 697-98 (7th Cir. 1997) (applying clear-invocation requirement when suspect referred to "an attorney" while detective was still reading *Miranda* warnings).

The Ninth Circuit's decision also conflicts with decisions by the courts of last resort in Arkansas, Indiana, Kansas, and Minnesota. These courts have likewise applied the clear-invocation requirement to statements that preceded *Miranda* advisements. *Moore* v. *State*, 321 Ark. 249, 255-58, 903 S.W.2d 154, 157-58 (Ark. 1995); *Carr* v. *State*, 934 N.E.2d 1096, 1102-03, 1105 (Ind. 2010); *State* v. *Appleby*, 289 Kan. 1017, 1034-35, 1041-42, 1051-52, 221 P.3d 525, 538-39, 542, 548 (Kan. 2009); *State* v. *Ortega*, 798 N.W.2d 59, 64, 70-71 (Minn. 2011); see also *Crittenden*, 9 Cal. 4th at 129-31, 885 P.2d at 912-13 (applying clear-invocation requirement when suspect referred to

counsel while officer was still reading *Miranda* warnings); *People* v. *Lynn*, 278 P.3d 365, 367-69 (Colo. 2012) (same); *Roy* v. *State*, 152 P.3d 217, 221, 233 & n.69 (Okla. Crim. App. 2006) (same); contra *State* v. *Holloway*, 760 A.2d 223, 228 (Me. 2000) (declining to extend *Davis* "to require an unambiguous invocation of . . . the right to an attorney in the absence of a prior waiver").[5]

III. THE NINTH CIRCUIT'S RULE NEEDLESSLY IMPEDES LEGITIMATE POLICE INVESTIGATIONS

Certiorari is also necessary because the Ninth Circuit's decision, and the *Miranda* rule it adopts, will have profound and detrimental consequences for law enforcement: It impedes legitimate police investigations when the suspect makes a less-than-clear reference to counsel before receiving *Miranda* advisements, because it forbids the police from advising the suspect of his *Miranda* rights and ascertaining whether the suspect wishes to waive them. This restriction is senseless, because the *Miranda* advisements and the suspect's response would serve to clarify whether the suspect, in fact, wants counsel.

This Court's rationale for applying the clear-invocation requirement to statements that suspects

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[5] This conflict most recently came to light in Wisconsin, where the state court of appeals asked its supreme court to decide whether "it make[s] a difference whether the ambiguous statement [about counsel] was made before *Miranda* warnings were given as opposed to afterwards?" *State* v. *Edler*, No. 2011AP2916–CR, 2012 WL 5500520, at *1 (Wis. Ct. App. Nov. 14, 2012). In its order, the court examined the Ninth Circuit's opinion in the instant case and observed that "The majority and dissent opinions . . . present the competing arguments on this issue." *Id*. at *5.

make after receiving *Miranda* advisements also applies to statements that suspects make *before* receiving such advisements. As the *Davis* Court observed, forcing the police to terminate questioning based on a suspect's ambiguous reference to counsel would needlessly hinder legitimate police investigations:

> [W]hen the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," [citation omitted], because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.

Davis, 512 U.S. at 460 (quoting *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)).

Though *Davis* addressed a statement that the suspect made after waiving his *Miranda* rights, its reasoning is equally convincing with regard to pre-*Miranda* utterances. When the police reasonably do not know whether a suspect wants a lawyer, it would be senseless to prohibit them from giving Miranda advisements and thus *determining* whether the suspect is willing to speak to them without counsel. Indeed, the clear-invocation requirement is particularly fitting here, where the detective utilized the *Miranda* procedure, because that procedure inherently serves to clarify the ambiguity in the suspect's statement: As *Davis* explained, "A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." *Davis*, 512 U.S. at 460-61.

Moreover, as this Court explained in *Thompkins*, the clear-invocation requirement provides the police with a workable standard that honors the proper exercise of *Miranda* rights without needlessly foreclosing interrogations:

> There is good reason to require an accused who wants to invoke his or her [*Miranda* rights] to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoid[s] difficulties of proof and . . . provide[s] guidance to officers on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.

Thompkins, 130 S. Ct. at 2260 (internal citations and quotation marks omitted). By requiring the police to terminate such an encounter without ascertaining whether the suspect actually wants to invoke his *Miranda* rights, the Ninth Circuit's holding indeed transforms *Miranda's* safeguards " 'into wholly irrational obstacles to legitimate police investigative activity,' " which "needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present." *Davis*, 512 U.S. at 460 (quoting *Mosley*, 423 U.S. at 102).

In short, by holding that the clear-invocation requirement does not apply to pre-*Miranda* statements, the Ninth Circuit has imposed an

unwarranted restriction on law enforcement, and has thereby decided an important question of federal law that this Court should settle. See Sup. Ct. R. 10(c).

IV. RELIEF IS ALSO BARRED BECAUSE SESSOMS' REFERENCES TO COUNSEL WERE AMBIGUOUS AND EQUIVOCAL

Again, when a suspect in custody makes an ambiguous or equivocal reference to counsel before receiving *Miranda* warnings, no "clearly established Federal law" as determined by this Court forbids the police from advising the suspect of his *Miranda* rights and then conducting an interrogation after he waives them. And in fact, this Court has never held that even a *clear* request for counsel precludes the police from doing so. Thus, even if Sessoms made an unequivocal and unambiguous request for counsel before receiving *Miranda* advisements, § 2254(d)(1) would bar his claim.[6]

Moreover, even if clearly established federal law forbids the police from proceeding with *Miranda* advisements and waiver after an unambiguous and unequivocal request for counsel—which is how the state court analyzed Sessoms' claim—the state court's decision was reasonable under § 2254(d)(1). For claims adjudicated on the merits in state court, § 2254(d) bars relief unless "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 fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786-87 (2011). In other words, "A state court's determination that a

[6] In its briefing below, the State did not argue that the absence of controlling authority bars relief under § 2254(d)(1) even if Sessoms clearly had requested counsel.

claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id*. at 786 (quoting *Yarborough* v. *Alvarado*, 541 U.S. at 664).

Here, a fairminded jurist could agree with the state court that Sessoms had failed to make an unambiguous or unequivocal request for counsel. Sessoms' question, "There wouldn't be any possible way that I could have a -- a lawyer present while we do this?" (App. 123)—punctuated with hesitation and conditions and phrased in the negative—is subject to different interpretations and is comparable to other statements that various courts have found ambiguous. Compare *Davis*, 512 U.S. at 455 ("Maybe I should talk to a lawyer."), *United States* v. *Younger*, 398 F.3d 1179, 1187 (9th Cir. 2005) ("[B]ut, excuse me, if I am right, I can have a lawyer present through all this, right?"), *Clark* v. *Murphy*, 331 F.3d 1062, 1065 (9th Cir. 2003) ("I think I would like to talk to a lawyer."), *overruled on other grounds by Lockyer* v. *Andrade*, 538 U.S. at 71, *United States* v. *Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999) ("What time will I see a lawyer?"), *Diaz* v. *Senkowski*, 76 F.3d 61, 63-65 (2d Cir. 1996) ("I think I want a lawyer."), and *Lord* v. *Duckworth*, 29 F.3d 1216, 1218-21 (7th Cir. 1994) ("I can't afford a lawyer but is there any way I can get one?"), with *Anderson* v. *Terhune*, 516 F.3d 781, 783 (9th Cir. 2008) (en banc) ("I plead the fifth."), and *Edwards*, 451 U.S. at 479 ("I want an attorney before making this deal."). A fairminded jurist could reasonably find that Sessoms' negatively-phrased, conditional question indicated he was uncertain whether he had a right to counsel.

Sessoms' remark—"Yeah, that's what my dad asked me to ask you guys . . . uh, get me a lawyer" (App. 123)—further clouded the issue because it reasonably suggested that Sessoms was inquiring

based on his father's wishes rather than his own. As the state court explained in finding that this did not constitute an unequivocal request for an attorney: "At best, it was a statement of his father's advice to him." App. 128. The five dissenting Ninth Circuit judges reached a similar conclusion:

> It is unclear from this statement if Sessoms is merely expressing his father's opinion or if he is agreeing with his father and he himself wants an attorney. Either interpretation is plausible. A reasonable jurist could conclude that telling a detective "My dad told me to ask for a lawyer" is different than saying "I want an attorney."

App. 32-33; see *Hyatt* v. *Branker*, 569 F.3d 162, 170 (4th Cir. 2009) (state court did not unreasonably apply federal law by holding that suspect's statement—that his "daddy wanted him to call a lawyer"—did not constitute an unequivocal request for counsel).

Thus, fairminded jurists could conclude that Sessoms' statements, viewed individually or together, did not constitute an unambiguous or unequivocal request for counsel. Accordingly, even if clearly established federal law prohibits the police from proceeding with the *Miranda* procedure after a clear request for counsel, § 2254(d) still bars relief.

* * *

In sum, the Ninth Circuit again erred in granting habeas corpus relief despite the absence of any controlling precedent from this Court, and regardless of its view that the state court "unreasonably extended" a rule from a Supreme

Court opinion. Further, in holding that the clear-invocation requirement cannot apply to statements that precede *Miranda* advisements, the opinion conflicts with decisions by other federal circuit courts and several state courts of last resort, needlessly impedes legitimate police investigations, and decides an important question of federal law that this Court should settle. Finally, a fairminded jurist could conclude that Sessoms did not make an unambiguous or unequivocal request for counsel. For these reasons, the Ninth Circuit's decision warrants either summary or plenary review and reversal by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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December 12, 2012

APPENDIX

No. _____

In the Supreme Court of the United States

RANDY GROUNDS, Acting Warden of
Salinas Valley State Prison, *Petitioner*
v.

TIO DINERO SESSOMS, *Respondent*

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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INDEX TO APPENDICES

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Tio Dinero Sessoms *Petitioner-Appellant* v. D. L. Runnels, *Respondent-Appellee*	No. 08-17790 D.C. No. 2:05-cv-01221- JAM-GGH OPINION

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted
March 20, 2012—San Francisco, California

Filed August 16, 2012

Before: Alex Kozinski, Chief Judge, Mary M. Schroeder, Betty B. Fletcher, Barry G. Silverman, Kim McLane Wardlaw, Raymond C. Fisher, Richard A. Paez, Consuelo M. Callahan, Milan D. Smith, Jr., Sandra S. Ikuta, and Mary H. Murguia, Circuit Judges

Opinion by Judge B. Fletcher;
Concurrence by Judge Fisher;
Dissent by Judge Murguia

COUNSEL

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OPINION

B. FLETCHER, Circuit Judge, with whom SCHROEDER, WARDLAW, FISHER, PAEZ, and M. SMITH, Circuit Judges, join in full:

Tio Sessoms, a nineteen-year-old black man, sat alone in an eight-by-ten foot interrogation room. Five days earlier, on the advice of his father, Sessoms had turned himself in to the local police. Before doing so, Sessoms's father told his son: you must ask for a lawyer before talking to the police.

Sessoms followed his father's advice. When the two police officers entered the interrogation room, Sessoms sat slouched in his chair. He looked up and they exchanged brief pleasantries. Forty seconds after the officers entered the room and before they

read Sessoms his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), the following exchange occurred:

> Sessoms: There wouldn't be any possible way that I could have a —a lawyer present while we do this?
>
> [Detective]: Well, uh, what I'll do is, um —
>
> Sessoms: Yeah, that's what my dad asked Me to ask you guys …uh, give me a lawyer.[1]

Instead of immediately ceasing the interrogation, the officers persevered and convinced Sessoms that the only way to tell his side of the story was to speak to them without an attorney. Eventually, Sessoms agreed to talk and made incriminating statements.

We hold that the California Court of Appeal unreasonably applied clearly established Supreme Court precedent when it concluded that Sessoms was required under *Davis v. United States*, 512 U.S. 452, 459 (1994), to unambiguously invoke his right to counsel. We reverse the district court's judgment and remand with directions to grant a conditional writ of habeas corpus.

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[1] The transcript of the colloquy says "Give me a lawyer," but Detective Woods, after comparing the transcript to the videotape, testified that Sessoms said "Get me a lawyer." We find this distinction irrelevant to our analysis.

I. Facts and Procedural History

On October 20, 1999, Sessoms and two others burglarized Edward Sheriff's home. During the burglary, one of Sessoms's accomplices choked and repeatedly stabbed Sheriff.

Sessoms then fled from California to Oklahoma. There, at his father's urging, Sessoms surrendered to Oklahoma police on November 15, 1999. His father advised him to ask for a lawyer before talking to the police. Sessoms was in custody for four days before being interrogated. On November 19 or 20, two police officers, Detectives Woods and Keller, flew from California to Oklahoma to question Sessoms at the county jail where he was being held.

The entire interrogation was videotaped. The video shows Sessoms sitting alone, talking to himself and quietly saying, "I'm not a criminal, but I got [inaudible]. They didn't tell me if I have a lawyer. I know I want to talk to a lawyer.[2] When the detectives entered the room, the following exchange took place:

Det. Woods:	. . . Tio, I'm Dick.
Sessoms:	How you doing, all right. You already know me.
Det. Woods:	You say . . .
Det. Keller:	Tio, Pat Keller.

[2] Sessoms's statements to himself were made prior to the detectives entering the room and there is no evidence that any law enforcement officers heard these statements.

Det. Woods: You say Tio or Theo?

Sessoms: It — my name is pronounced Tio because it's Spanish.

Det. Woods: Tio. Okay.

Det. Keller: Why don't we swap corners here For a minute, you guys? Go ahead and sit here.

Sessoms: So glad you fellows had a safe flight.

Det. Woods: Huh?

Sessoms: I'm glad you fellows had a safe flight out here.

Det. Keller: So are we. Huh.

Det. Woods: Well, we want a safe one back too.

Sessoms: Oh, you know [inaudible].

Det. Woods: Yeah. Uh, we both, uh — both from, uh, Sacramento PD and, uh

Sessoms: There wouldn't be any possible way that I could have a —a lawyer present while we do this?

Det. Woods: Well, uh, what I'll do is, um —

> Sessoms: Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer.

Woods proceeded as though Sessoms said nothing. Instead of ending the interrogation, Woods persuaded Sessoms that having a lawyer was a bad idea. Sessoms explained that he was concerned that some police officers "end up switching your words afterwards," to which Woods responded that he had no intention of playing any "switch games" and would even tape record the conversation to allay Sessoms's fears. Woods then explained the situation: Sessoms and his two accomplices were all being "charged with the same thing." Woods said he already knew "what happened" because Sessoms's accomplices had waived their rights "and laid it out from A to Z." Woods reassured Sessoms that he believed that Sessoms "did not participate in the stabbing," but warned that if Sessoms didn't make a statement right then and there, Woods wasn't going to be able to "get his version of it" because "most all attorneys — in fact, all attorneys — will sometimes or usually advise you not to make a statement." He then said he didn't really "need [Sessoms's] statement to make [the] case" anyway because he "already [had] two and a half other complete statements," reiterating that he already "[knew] what happened."

Only then—after telling Sessoms that having a lawyer would only hurt him, and that invoking his right to counsel would be futile because the police already knew what happened—did the police even read Sessoms his rights under *Miranda*. Sessoms eventually said "Let's talk," and proceeded to implicate himself in the crime.

Prior to trial, Sessoms moved to suppress the incriminating statements, arguing that he had clearly invoked his right to counsel. The trial court denied the motion. Sessoms went to trial and was convicted of murder, robbery, and burglary, with the special circumstance that he was engaged in the commission or attempted commission of the crimes of robbery and burglary when the murder occurred. He was sentenced to life in prison without the possibility of parole.

Sessoms appealed to the California Court of Appeal. That court analyzed Sessoms's statements under the rule of Davis: a request for counsel must be unequivocal or unambiguous. The state court then determined that Sessoms's statements did not satisfy Davis's requirement. It found that "although [Sessoms] twice explicitly referred to an attorney, neither statement was an unequivocal or unambiguous request for counsel." *People v. Sessoms*, No. C041139, 2004 WL 49720, at *3 (Cal. Ct. App. Jan. 12, 2004). According to the state court, Sessoms's first statement was "legally indistinguishable" from the statements made in *Davis*, 512 U.S. at 455 ("Maybe I should talk to a lawyer") and *People v. Crittenden*, 9 Cal. 4th 83, 123-24 ("Did you say I could have a lawyer?"), which were not unequivocal requests for an attorney. *Sessoms*, 2004 WL 49720, at *3. Sessoms's second statement, the state court continued, was also not an unequivocal request for an attorney, but rather "[a]t best . . . a statement of his father's advice to him." *Id.* Ultimately, the California Court of Appeal concluded that Sessoms's statements were equivocal and not " 'sufficiently clear[ ] that a reasonable police officer in the circumstances would understand the

statement to be a request for an attorney.' " *Id*. (citing *Davis*, 512 U.S.at 459).

Sessoms then filed a federal habeas petition. The district court denied the petition but granted a certificate of appealability on his *Miranda* claim and his ineffective assistance of counsel claim. A divided three-judge panel upheld the district court's denial of Sessoms's habeas petition. The panel majority recognized that "[b]ecause Sessoms's statements were made *prior* to his *Miranda* waiver, *Davis* cannot apply as 'clearly established Federal law' in this case." *Sessoms v. Runnels*, 650 F.3d 1276, 1283 (9th Cir. 2011). But the panel majority held that it was not unreasonable for the state court to require an unambiguous request for counsel and concluded that Sessoms's request was ambiguous. *Id*. We granted rehearing en banc. We now conclude that the state court's decision was an unreasonable application of clearly established federal law. We therefore reverse the district court's denial of habeas relief.[3]

II. Standard of Review

We review de novo the district court's denial of a petition for a writ of habeas corpus brought under 28 U.S.C. § 2254. *Robinson v. Schriro,* 595 F.3d 1086, 1099 (9th Cir. 2010). Because Sessoms's habeas petition was filed after April 24, 1996, we apply AEDPA. Under AEDPA, Sessoms is entitled to federal habeas relief if he can show that the state court's adjudication of the merits of his claim was "contrary to" then-established Supreme Court

[3] Because we conclude that Sessoms is entitled to relief on his *Miranda* claim, we need not address his ineffective assistance of counsel claim.

precedent; was "an unreasonable application of" such law; or "was based on an unreasonable determination of the facts" in light of the state court record. 28 U.S.C. § 2254(d); *Harrington v. Richter*, 131 S. Ct. 770, 785 (2011).

A state court decision is "contrary to" clearly established Supreme Court precedent if it (1) "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases"; or (2) reaches a different result on a "materially indistinguishable" set of facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). A state-court decision involves an "unreasonable application" of clearly established federal law if the state court (1) "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the . . . case"; or (2) "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id*. at 407.

This case illustrates the difficulty in defining the precise contours of the "contrary to" and "unreasonable application" prongs of § 2254(d)(1). Indeed, *Williams* itself recognized that in many cases it will be "difficult to distinguish a decision involving an unreasonable extension of a legal principle," warranting relief under the "unreasonable application" clause "from a decision that arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law," warranting relief under the "contrary to" clause. *Id*. at 408 (internal quotation marks omitted). Deciding whether this case falls into the unreasonable extension of legal principle or incorrect choice of law category involves,

as the Supreme Court in *Williams* described, some "problems of precision." *Id*. Regardless, "it is clear that both [standards] are met when the state court has failed to follow the law as set forth by the Supreme Court." *Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000). The state court decision is both contrary to and involves an unreasonable application of Supreme Court precedent because it unreasonably extended the principle from *Davis* to a new context where it should not apply and because it analyzed Sessoms's case using the incorrect legal framework.

III. Discussion

We begin by identifying the Supreme Court's applicable legal principles. The landmark case of *Miranda v. Arizona* established certain safeguards that must be afforded to a suspect in custody, including the right to have counsel present during a custodial interrogation. 384 U.S. 436 (1966). The Supreme Court has refined its analysis of the *Miranda* right to counsel in a series of cases including, as relevant here, *Edwards v. Arizona,* 451 U.S. 477 (1981), and *United States v. Davis,* 512 U.S. 452 (1994).

A.

In *Miranda*, the Supreme Court established rules the police must follow to ensure certain "basic" and "precious" rights "enshrined in our Constitution." 384 U.S. at 442. These rights include the Fifth Amendment's guarantee that "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. One of the *Miranda* Court's primary concerns was the temptation for law enforcement, operating with little

or no supervision of their investigative actions, to overbear a defendant in an isolated interrogation setting. 384 U.S. at 461. The Fifth Amendment privilege, explained the Court, "protect[s] persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Id*. at 467.

Miranda recognized that overzealous police practices during a custodial interrogation create the potential for compulsion in violation of the Fifth Amendment. *Id*. at 455-58. Indeed, some of the tactics of which *Miranda* warns were employed by the interrogators in this case. After Sessoms asked for an attorney, Woods persisted in his questioning. He told Sessoms he already knew what happened, and that Sessoms's accomplices had already confessed and laid it out from A to Z, thereby "display[ing] an air of confidence in [Sessoms's] guilt" and appearing only to be "interest[ed] in confirming certain details." *Id*. at 450. Woods offered Sessoms a "legal excuse[ ]" and assured him that he knew Sessoms did not participate in the stabbing. See *id*. at 451-52. But then Woods immediately reversed course, telling Sessoms that he didn't really need his statement to make the case anyway, because Sessoms's accomplices had already talked, thereby placing Sessoms "in a psychological state where his story [was] but an elaboration of what the police purport[ed] to know already—that he [was] guilty." *Id*. at 450. Eventually, the officers, much like *Miranda* warns, overwhelmed Sessoms and persuaded him "out of exercising his constitutional rights." *Id*. at 455.

[1] In order to assure that the use of such psychological tactics to exploit a suspect's

vulnerabilities did not run afoul of the Fifth Amendment, *Miranda* set forth clear mandates: "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney." *Id*. at 444. If a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney," all questioning must cease.[4] *Id*. at 444-45. These protective devices are necessary to dispel the inherent compulsion of custodial interrogations and "to insure that what was proclaimed in the Constitution had not become but a form of words in the hands of government officials." *Id*. at 444 (internal citation and quotation marks omitted).

Fifteen years later, in *Edwards v. Arizona*, the Supreme Court reaffirmed the view that the "assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' " *Edwards*, 451 U.S. at 485 (quoting *Miranda*, 384 U.S. at 474). In *Edwards*, the suspect was arrested and taken to the police station. *Id*. at 478. He requested counsel, at which point all questioning ceased. *Id*. at 479. The next day, the police visited Edwards in jail, but he told the jail guard that he did not want to talk to anyone. *Id*. The guard told Edwards that "he had to" talk to the police, and Edwards eventually confessed. *Id*. The

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[4]The dissent cites this same passage, but then curiously, states that *Miranda* says nothing about what the police must do when a suspect's invocation is ambiguous. But *Miranda* explicitly addresses this issue—a suspect can request an attorney "in any manner." 384 U.S. at 444-45 (emphasis added).

Supreme Court held that Edwards's Fifth Amendment rights were violated and "reconfirm[ed]" that a suspect, "having expressed his desire to deal with the police only through counsel,"[5] must not be "subject to further interrogation by the authorities until counsel has been made available to him." *Id* at 484-85. The purpose of the *Edwards* rule is "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Michigan v. Harvey*, 494 U.S. 344, 350 (1990), and to ensure that police "will not take advantage of the mounting coercive pressures of prolonged police custody," *Maryland v. Shatzer*, 130 S. Ct. 1213, 1220 (2010) (internal citations and quotation marks omitted).

The Supreme Court revisited the scope of *Miranda* and *Edwards* in *Davis v. United States*. There, the Court confronted a scenario where Davis had executed a written waiver of his rights and expressly agreed to speak to the police. 512 U.S. at 454-55. Only after being questioned for ninety minutes did Davis utter the words "[m]aybe I should talk to a lawyer." *Id*. at 455. In deciding the case, the

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[5] The dissent correctly states that under AEDPA, the holdings and not the dicta constitutes clearly established federal law. Dissent at 9324. But then the dissent goes on to rely on dicta from *Edwards* to support its conclusion that even *Edwards* requires a suspect to "clearly" assert his rights to counsel. Dissent at 9327. Just as with the holding in *Davis*, *see infra* n.5 and accompanying text, what is the holding in *Edwards* is unmistakable: "We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 484. The Edwards's Court reference to the requirement that a suspect's invocation be "clear" is dicta and cannot be relied upon.

Supreme Court again reaffirmed the fundamental principle that "if a suspect requests counsel at any time during [a custodial] interview, he is not [to be] subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.* at 458 (citing *Edwards*, 451 U.S. at 484-85).

[2] The Court went on to clarify, however, that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* at 459. "Rather, the suspect must unambiguously request counsel." *Id.*[6]

The Court explained the reasoning behind this requirement as follows:

> A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

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[6] The dissent accuses us of misinterpreting *Davis* by "selectively lift[-ing]" language to support the majority's view. In light of the facts of the case (after being Mirandized and talking to the police for more than an hour, Davis made an unambiguous invocation) and *Davis*'s crystal clear holding (requiring an unambiguous invocation "after a knowing and voluntary waiver of the *Miranda* rights,"), the only logical interpretation of the passage quoted by the dissent is that an unambiguous statement is required after waiver

Id. at 460-61. The Court ultimately concluded that the statement "[m]aybe I should talk to a lawyer" was not an unambiguous or unequivocal request for counsel. *Id*. at 462.

[3] But *Davis* clearly limits its holding to statements made *after* a suspect has waived his *Miranda* rights: "We therefore hold that, *after* a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." [7] *Id*. at 461 (emphasis added); *see also United States v. Rodriguez*, 518 F.3d 1072, 1079 (9th Cir. 2008) ("*Davis* addressed what the suspect must do to *restore* his *Miranda* rights after having already knowingly and voluntarily waived them."); 2 Wayne R. LaFave, et al., Criminal Procedure § 6.9(g), n. 185 (3d ed. 2007 & Supp. 2012) ("*Davis* is . . . limited [to the post-waiver context]." (internal citations omitted)). When there has not been a knowing and voluntary waiver, "[i]nvocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney,' " *Davis*, 512 U.S. at 459 (quoting *McNeil v. Wisconsin,* 501 U.S. 171, 178 (1991)), but the assertion need not be "unambiguous or unequivocal," *id*. at 462. Thus, where the suspect has not waived his rights, Davis's rule is inapplicable. We therefore agree with Sessoms that the California Court of Appeal unreasonably extended *Davis* to requests for counsel that, like his, were made before a valid waiver of *Miranda* rights. *See Williams*, 529 U.S. at 407.

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[7] We rely on the Supreme Court's holdings and we cannot imagine a more clear holding than the one made here.

The state argues, however, that the Supreme Court's recent decision in *Berghuis v. Thompkins* suggests that *Davis* applies to all requests for counsel, whether pre- or post-waiver. 130 S. Ct. 2250 (2010). After being informed of his *Miranda* rights, the suspect in *Berghuis* refused to sign a waiver form and simply remained silent through almost three hours of interrogation before making an incriminating statement. *See id.* at 2255-27. The Supreme Court concluded that the suspect never invoked his right to silence. *Id.* at 2260. Relying on *Davis*, the Court held that an invocation of the right to remain silent, like the right to counsel, must be unambiguous. *Id.* In reaching that decision, the Court provided this description of its holding in *Davis*:

> In the context of invoking the *Miranda* right to counsel, the Court in *Davis v. United States* held that a suspect must do so "unambiguously." If an accused makes a statement concerning the right to counsel "that is ambiguous or equivocal" or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights.

Id. at 2259-60 (internal citations omitted). As the state points out, this description of *Davis* draws no distinction between ambiguous statements made before or after *Miranda* rights were waived.

Nonetheless, a critical factual distinction between Sessoms's statements and those evaluated by the Court in both *Davis* and *Berghuis* remains: Sessoms made his statements before he was informed of his rights under *Miranda*. The *Miranda* Court held that the coercive atmosphere of interrogation

makes it essential for a suspect to be "given a full and effective warning of his rights at the outset of the interrogation process." 384 U.S. at 445. As the Court stressed, when "the police [have] not advised the defendant of his constitutional privilege . . . at the outset of the interrogation," the suspect's "abdication of [that] constitutional privilege—the choice on his part to speak to the police—[is] not made knowingly or competently because of the failure to apprise him of his rights." *Id*. at 465 (citing *Escobedo v. Illinois*, 378 U.S. 478 (1964)).

Both *Davis* and *Berghuis* recognize that the suspect must be given *Miranda* warnings before any interrogation. In *Berghuis*, the Court wrote that it need not "add marginally" to *Miranda's* prophylactic protections by "[t]reating an ambiguous . . . statement as an invocation of *Miranda* rights," because "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." 130 S. Ct. at 2260. Similarly, in *Davis*, the court emphasized that the "primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves" and that, "*after* having [those] right[s] explained to him," a suspect must invoke his rights "affirmatively." 512 U.S. at 460-61 (emphasis added).

[**4**] In light of these instructions from the Supreme Court, it is clear that *Berghuis* does not alter *Davis's* requirement that an unambiguous invocation can apply only after a suspect has been informed of his *Miranda* rights. Not only are the Supreme Court cases on this point pellucid, their rationale makes eminent sense. A person not aware of his rights cannot be expected to clearly invoke

them. Once, however, a suspect has been read his *Miranda* rights, it is reasonable to ascribe to him knowledge of those rights. If at some later point during the custodial interrogation he decides that he wants an attorney, he should be held to a higher standard of clarity to invoke that right. That is precisely what *Davis* concluded. Thus, if a suspect invokes his rights before the *Miranda* warnings are given, the invocation must be analyzed under the rule of *Miranda* and *Edwards*, not that of *Davis*. We therefore conclude that the California Court of Appeal unreasonably extended *Davis's* clear invocation rule to a situation where it does not apply. Sessoms requested an attorney before receiving a clear and complete statement of his rights and, therefore, knowledge of his rights cannot be ascribed to him. In this circumstance, the clear invocation rule simply should not have been applied.

[5] Because the California Court of Appeal unreasonably applied clearly established Supreme Court precedent, AEDPA's restrictions do not apply. *Panetti v. Quarterman*, 551 U.S. 930 (2007) (stating that when "the requirement set forth in § 2254(d)(1) is satisfied[, a] federal court must then resolve the [constitutional] claim without the deference AEDPA otherwise requires"); *Frantz v. Hazey,* 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc) ("where the analysis on federal habeas . . . results in the conclusion that § 2254(d)(1) is satisfied, then federal habeas courts must review the substantive constitutionality of the state custody de novo"). Therefore, using the correct legal framework we consider de novo whether Sessoms invoked his right to counsel. Under *Miranda* and *Edwards*, Sessoms could "indicate[ ] in any manner and at any stage of the process that he wishe[d] to consult with an attorney," *Miranda*, 384

U.S. at 444-45, so long as he "expressed his desire to deal with the police only through counsel," *Edwards*, 451 U.S. at 484; *see also McNeil*, 501 U.S. at 178 ("It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police."). Sessoms's statements easily meet this standard.

B.

Police officers spend their days interacting with ordinary people in our cities and neighborhoods and are surely well acquainted with how ordinary people speak. Recognizing this, the Supreme Court has directed that a defendant's words should be "understood as ordinary people would understand them." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

[6] Here, any reasonable police officer (as indeed did these officers) would understand that Sessoms expressed his desire to have a lawyer present at his interrogation. Forty seconds into the conversation, before any meaningful exchange took place, Sessoms requested counsel twice in rapid succession. First, Sessoms said "There wouldn't be any possible way that I could have a — a lawyer present while we do this?" Although it was couched in a polite and diffident manner, the meaning of Sessoms's request was clear: he wanted a lawyer then and there.

If there were any doubt (which there should not have been), Sessoms immediately made a *second* statement: "Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer." Simply put,

the words "give me a lawyer" mean just that: "give me a lawyer."

Each of Sessoms's statements, taken on its own, clearly expresses his desire for an attorney. But when the two statements are taken together, that conclusion is indisputable.[8]

Of course, the best test of how a reasonable police officer would understand Sessoms's request is how the actual police officer in this case responded. That reaction is telling. Detective Woods's response to Sessoms's statements—informing Sessoms that a lawyer would only prevent him from giving his side of the story and that, in any event, invocation was futile because the police already knew what happened—shows that he knew Sessoms was requesting a lawyer, and he wanted to do his best to talk Sessoms out of it. This desire is understandable. Detective Woods had flown halfway across the country to speak to Sessoms about a murder case, and it was surely frustrating when Sessoms requested a lawyer only forty seconds into the interrogation. But the "rigid prophylactic rule of *Edwards*" requires the police to cease questioning immediately when a suspect requests counsel and forbids any attempt to badger a suspect into waiving his previously asserted rights. *Davis*, 512 U.S. at 458 (internal quotation marks omitted); *Harvey*, 494 U.S. at 350.

The California Court of Appeal's decision could only be defended by "disregard[ing] . . . the ordinary meaning" of Sessoms's statements. *Barrett*, 479 U.S.

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[8] Both the state court and the dissent analyze Sessoms's statements in isolation but do not consider the meaning of the two statements together.

at 530. This is forbidden by clearly established federal law. All that is required is some expression of a desire for the assistance of an attorney and Sessoms made his wishes sufficiently clear.

IV. CONCLUSION

Davis's requirement that a request for counsel be unambiguous does not apply to this case. The state court acted unreasonably by requiring Sessoms to unequivocally or unambiguously invoke his right to counsel. Under *Miranda* and *Edwards*, Sessoms invoked his right to counsel. Law enforcement—those responsible for enforcing the rule of law —may not disregard the constitutional safeguards imposed by *Miranda*, which ensure the protection of the Fifth Amendment's right against self-incrimination.

[7] Upon hearing Sessoms's request for an attorney, Detectives Woods and Keller were required to immediately terminate all questioning. *See Miranda*, 384 U.S. at 444-45. They failed to do so. Therefore, Sessoms's incriminating statements were obtained in violation of *Miranda* and their admission at Sessoms's trial violated his clearly established rights under the Fifth and Fourteenth Amendments. *See Edwards*, 451 U.S. at 486-87.

[8] We reverse the district court's denial of habeas relief and remand with instructions to grant a conditional writ of habeas corpus with directions that the state retry Sessoms within a reasonable period, or release him.

REVERSED and REMANDED.

FISHER, Circuit Judge, with whom B. FLETCHER, WARDLAW, and PAEZ, Circuit Judges, join, concurring:

I fully concur in the majority opinion. I also conclude, contrary to the dissent, that even if it were reasonable to apply the more stringent standard of *Davis v. United States*, 512 U.S. 452 (1994), the California Court of Appeal unreasonably applied that standard. For the reasons stated in the majority opinion, the only reasonable conclusion was that Sessoms' statements, taken together, unambiguously conveyed his desire to have counsel present.

MURGUIA, Circuit Judge, with whom KOZINSKI, Chief Judge, and SILVERMAN, CALLAHAN, and IKUTA, Circuit Judges, join, dissenting:

I respectfully dissent. The majority invalidates a conviction on the ground that the state court reached a decision that was contrary to and an unreasonable application of clearly established federal law. According to the majority, the California Court of Appeal unreasonably applied *Davis v. United States*, 512 U.S. 452, 459 (1994), to the pre-waiver context. But the majority eschews the high level of deference we owe a state court under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254. A federal habeas court may not grant relief unless no reasonable jurist could agree with the state court's determination. *See Harrington v. Richter*, 131 S. Ct. 770, 786 (2011). On the record before us, a reasonable jurist could conclude not only that the *Davis* standard applies to pre-*Miranda* statements, but also that Sessoms's request was ambiguous and equivocal. I would,

therefore, affirm the district court's judgment denying relief.

I

Before the police read him his *Miranda* rights, Sessoms said, "There wouldn't be any possible way that I could have a — a lawyer present while we do this? . . . Yeah, that's what my dad told me to ask you guys . . . uh, give me a lawyer." The majority holds the state court reached a decision that was contrary to and an unreasonable application of clearly established federal law in concluding that if Sessoms wanted the officers to stop the interrogation, he had to make a clear request for counsel as required by *Davis*. Under AEDPA, Sessoms is only entitled to relief if the state court unreasonably applied "clearly established federal law." 28 U.S.C. § 2254(d)(1). "Clearly established Federal law" refers to the holdings, not the dicta, of the Supreme Court as of the time of the relevant state court's decision. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003). The Supreme Court has never held that an ambiguous request for counsel was enough to stop an interrogation. When the Supreme Court has had occasion to consider the issue, it has either expressly declined to reach it, *Smith v. Illinois*, 469 U.S. 91 (1984), or held that only an unambiguous invocation requires police to terminate the interrogation. *Davis*, 512 U.S. at 460-61; *Berghuis v. Thompkins*, 130 S. Ct.2250, 2260 (2010).

In *Smith*, the Supreme Court did not address the consequences of an ambiguous inquiry about counsel, because the invocation in that case was clear. 469 U.S. at 99-100 ("We do not decide the circumstances in which an accused's request for

counsel may be characterized as ambiguous or equivocal . . . ."). The Court found it unnecessary to resolve the conflict in the lower courts on this point. Thus, *Smith* confirmed that the consequences of an ambiguous request for counsel was an unsettled question in *Miranda's* wake, and that there was no established law on point.

When the Supreme Court did reach the question in Davis, it held that "if a suspect makes a reference to an attorney that is ambiguous or equivocal . . . *our precedents do not require the cessation of questioning*. Rather, the suspect must unambiguously request counsel." 512 U.S. at 459 (emphasis added). In expounding this rule, the Court in *Davis* reasoned that "when the officers conducting the questioning reasonably do not know whether the suspect wants a lawyer, a rule requiring the immediate cessation of questioning 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.' " *Id*. at 460 (quoting *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)). In applying this reasoning to the facts of the case, the *Davis* court held that "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Id*. at 461. While the Court noted that this rule (requiring a suspect to clearly request an attorney) applied to situations where the suspect had waived *Miranda* rights, the Court did not specifically address whether or not the rule's applicability was confined to that period. Thus, it was not contrary to established law or unreasonable for the California Court of Appeal to apply the *Davis* rule to Sessoms's case.

In fact, the Supreme Court has recently confirmed that Davis's reasoning applies equally in the pre-waiver context. *Berghuis*, 130 S. Ct. at 2260; *see also United States v. Plugh*, 648 F.3d 118, 124-25 (2d. Cir. 2011) (applying *Davis* to the pre-waiver context in light of *Berghuis*); *United States v. Doe*, 170 F.3d 1162, 1166 (9th Cir. 1999) (applying *Davis* where defendant asked about an attorney "before being read his *Miranda* rights, before being interrogated and even before biographical questioning"). The *Berghuis* Court, without qualification, held: "If an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights." 130 S. Ct. at 2259-60 (quoting *Davis*, 512 U.S. at 461-62). The Court reiterated the practical considerations underlying the rule:

> There is good reason to require an accused who wants to invoke his or her [*Miranda* rights] to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoid[s] difficulties of proof and . . . provide[s] guidance to officers on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression if they guess wrong. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.

Id. at 2260 (citations and internal quotation marks omitted). Although *Berghuis* had not been decided at the time the state court ruled on Sessoms's claims, the holding confirms that it was not unreasonable for the California Court of Appeal to apply *Davis* in this case.

The majority relies upon excerpted sentences from *Miranda*-related precedent to suggest there is a Supreme Court rule that says: Any statement by a suspect that could be interpreted as a request for a lawyer is an invocation of the right to counsel. The majority then suggests that the rulings in *Davis* and *Berghuis* carved out narrow exceptions to this "rule." But the Supreme Court has never held that an ambiguous statement or question regarding counsel is enough to stop an interrogation. While *Miranda* established that a suspect could stop the questioning by "indicat[ing] in any manner and at any stage of the process that he wishes to consult with an attorney before speaking," *Miranda v. Arizona,* 384 U.S. 436, 444-45 (1966), the decision did not address what the police were supposed to do when the suspect's "indication" was ambiguous.

Similarly, *Edwards v. Arizona*, which held that a suspect cannot be subjected to further questioning once he has "expressed his desire to deal with the police only through counsel," says nothing about what constitutes a sufficient expression of that desire. 451 U.S. 477, 484 (1981). Rather, *Edwards* said that authorities may not continue to interrogate a suspect who "has *clearly* asserted his right to counsel." *Id*. at 485 (emphasis added). This language suggests that an unambiguous statement is required. *See Davis*, 512 U.S. at 460 (citing to this portion of *Edwards* to support point that assertion must be

clear and unambiguous). *Edwards*, of course, does not provide much guidance on the issue of ambiguity, because the suspect in that case plainly stated, "I want an attorney before making a deal." *Id*. at 479.

When the Supreme Court in *McNeil v. Wisconsin* said that an invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police,*" 501 U.S. 171, 178 (1991), it was explaining why requesting legal representation for a bail hearing would not preclude a subsequent police interrogation. *McNeil* did not set out the standard for assessing a suspect's ambiguous inquiry about counsel at the start of a custodial interrogation, as the majority implies.

The majority also suggests that its reliance on *McNeil* is supported by *Davis*, stating:

> When there has not been a knowing and voluntary waiver, "[i]nvocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney,' " *Davis*, 512 U.S. at 459 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)), but the assertion need not be "unambiguous or unequivocal," *id*. at 462.

Maj. Op. at 9318. In addition to misconstruing *McNeil*, this passage turns *Davis* on its head. Nowhere in *Davis* is there any statement suggesting that "the assertion need not be 'unambiguous or

unequivocal.' " Indeed, this is made clear by the very next line in *Davis*:

> Invocation of the Miranda right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, 501 U.S., at 178. *But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning*.

Davis, 512 U.S. at 459 (emphasis added). The problem with the majority's analysis becomes even more apparent looking at the entire sentence from which it selectively lifts "unambiguous or unequivocal": "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." *Id*. at 461-62. This sentence in no way supports the majority's statement that "the assertion need not be 'unambiguous or unequivocal.' " The Supreme Court has *never* held, in *Davis* or in any case, that an ambiguous or equivocal statement regarding an attorney is sufficient to invoke a suspect's right to counsel.

The majority criticizes the state court for applying *Davis* in this case because Sessoms had not been read his *Miranda* rights before he referenced a lawyer. *Cf. United States v. Doe,* 170 F.3d at 1166 (holding that "a statement concerning an attorney made before interrogation begins is far less likely to be a request for attorney assistance during

interrogation than a similar statement made during custodial interrogation"). The majority points to the emphasis in *Davis* and *Berghuis* on the protection provided by the *Miranda* warnings, as grounds for requiring a lower standard of clarity in the pre-*Miranda* context. *Davis*, 512 U.S. at 460-61; *Berghuis*, 130 S. Ct. at 2260; *but see United States v. Doe*, 170 F.3d at 1166. But here, after Sessoms referenced a lawyer, the detective read Sessoms his *Miranda* rights. Thus, Sessoms was Mirandized after he asked about a lawyer, and, as such, was expressly advised of his right to counsel. It was only after that advisement and Sessoms's waiver that the police questioned him.

The majority asserts that the waiver only occurred because the seasoned detective, aware that Sessoms might want a lawyer, used the brief time before he read Sessoms his *Miranda* rights to pressure him into waiving them. Sessoms, however, does not claim he was improperly coaxed into waiving his *Miranda* rights; instead, he claims that he invoked his right to counsel. And because the policy considerations emphasized by the Supreme Court in *Davis* and *Berghuis* apply equally before and after the *Miranda* rights have been read, it was not unreasonable for the state court to require an unambiguous request for counsel in this case.

Finally, and most importantly, the Supreme Court has never held that a different standard applies prior to the reading of the *Miranda* rights. " '[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.' " *Harrington*, 131 S. Ct. at

786 (quoting *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009)).

In these circumstances, I cannot conclude that the California Court of Appeal reached a decision that was contrary to or an unreasonable application of clearly established federal law in ruling that only an unambiguous invocation of the right to counsel would have required the detectives to stop Sessoms's interrogation. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, let alone one in [petitioner's] favor, it cannot be said that the state court unreasonably applied clearly established Federal law." (citations and internal quotation marks omitted)); *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court . . . it cannot be said that the state court unreasonably applied clearly established Federal law.") (alterations and internal quotation marks omitted); *Yarborough v. Alvarado*, 541 U.S. 652, 666-67 (2004) (holding that court was nowhere close to the mark in ruling that the state court had unreasonably applied established federal law by failing to consider a suspect's age when determining custodial status, where "[the Supreme Court's] opinions applying the *Miranda* custody test have not mentioned the suspect's age, much less mandated its consideration"); *DeWeaver v. Runnels*, 556 F.3d 995, 1002 (9th Cir. 2009) ("We . . . could not conclude that application of the *Davis* rule to an invocation of the right to remain silent is contrary to or an unreasonable application of Supreme Court precedent where the Supreme Court has neither squarely addressed when an ambiguous statement amounts to an invocation of the right to remain silent nor refused to extend the *Davis* rule to an invocation

of the right to remain silent." (alterations and internal quotation marks omitted)).

II

Having determined that it was not unreasonable to apply *Davis* in this case, I also consider whether the state court was objectively unreasonable in concluding that Sessoms's statement was not an unambiguous request for counsel. Even if I would have decided differently had I been on the California Court of Appeal, the law is clear that "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [the law] incorrectly." *Woodford v. Visciotti*, 537 U.S. 19, 24-25 (2002). Our review is constrained, sometimes painfully so, by AEDPA, which "preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents. It goes no farther." *Harrington*, 131 S. Ct. at 786.

Davis provides: "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." 512 U.S. at 459. In this case, Sessoms first asked, "There wouldn't be any possible way that I could have a, a lawyer present while we do this?" The California Court of Appeal concluded that a reasonable police officer could have interpreted Sessoms's first question as asking only whether he was allowed to have a lawyer present, rather than actually

requesting a lawyer. When reviewing a habeas petition from a state court, this Court "must determine what arguments or theories supported, or . . . could have supported, the state court's decision; and then [we] must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of [the Supreme Court]." *Harrington*, 131 S. Ct. at 786.

The state court decision was not an objectively unreasonable application of *Davis*. Sessoms's question, punctuated with hesitation, conditions, and phrased in the negative, is subject to different interpretations and comparable to statements that this Court and other courts have found ambiguous. *Compare Davis*, 512 U.S. at 455 ("Maybe I should talk to a lawyer."); *United States v. Younger*, 398 F.3d 1179, 1187 (9th Cir. 2005) ("[B]ut, excuse me, if I am right, I can have a lawyer present through all this, right?"); *Clark v. Murphy*, 331 F.3d 1062, 1065 (9th Cir. 2003) ("I think I would like to talk to a lawyer."), *overruled on other grounds by Lockyer*, 538 U.S. 63; *United States v. Doe*, 170 F.3d at 1166 ("What time will I see a lawyer?"); *Diaz v. Senkowski*, 76 F.3d 61, 63-65 (2d Cir. 1996) ("I think I want a lawyer."); *Lord v. Duckworth*, 29 F.3d 1216, 1218-21 (7th Cir. 1994) ("I can't afford a lawyer but is there any way I can get one?"); *with Anderson v. Terhune*, 516 F.3d 781, 783 (9th Cir. 2008) (en banc) ("I plead the fifth."); *Edwards*, 451 U.S. at 479 ("I want an attorney before making this deal.").

Sessoms also followed up his question with this statement: "That's what my dad told me to ask you guys. . . uh, give me a lawyer." It is unclear from this statement if Sessoms is merely expressing his

father's opinion or if he is agreeing with his father and he himself wants an attorney. Either interpretation is plausible. A reasonable jurist could conclude that telling a detective "My dad told me to ask for a lawyer" is different than saying "I want an attorney." Because it cannot be said that no reasonable jurist would find either of Sessoms's statements, viewed individually or together, to be ambiguous and equivocal, relief is barred by AEDPA.

The majority points to the detective's reaction to Sessoms's question as evidence that the detective believed Sessoms invoked his right to counsel. The officer stammered and, the majority claims, proceeded to persuade Sessoms to waive his right to counsel. The detective's reaction, however, could easily have been that of an officer faced with a suspect who only *might* have invoked his right to counsel and relayed his father's advice at the start of an interrogation. The detective's answer supports this theory:

> Uh, I want to back up to your question you asked about an attorney. Um, first, before you ask questions, uh, I'm going to tell you why we're here, just lay it out and be up front. And then — then I'm going to advise you of your rights. And then it's up— for you to decide if you want the attorney or not.

The majority believes the officers should have answered Sessoms's question by simply saying "yes" and terminating the interrogation. The majority claims that in the brief exchange before Sessoms was read his *Miranda* rights, the detective manipulated Sessoms into waiving his right to counsel. Again, however, Sessoms is not claiming that he was

pressured into an involuntary waiver, but only that he asked for counsel, which should have terminated the interrogation. "[T]he *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards.*" *McNeil*, 501 U.S. at 178. Unless Sessoms clearly invoked his right to counsel, the police officers were not required to take any particular course of action in response to his statements or questions. *See Davis*, 512 U.S. at 460. As such, the majority's focus on the detective's reaction at that stage is misplaced.

I acknowledge that this reasoning results in a harsh outcome for a nineteen-year-old who turned himself in, expressly told the officers that his father wanted him to have a lawyer, and may have been trying to be respectful when asking for counsel. However, when it set out the rule in *Davis*, the Supreme Court understood and accepted that a strict rule would disadvantage certain individuals who wanted counsel:

> We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who — because of fear, intimidation, lack of linguistic skills, or a variety of other reasons — will not clearly articulate their right to counsel although they actually want to have a lawyer present.

Davis, 512 at 460-61. The law is clear.

Could the police officers have assumed that Sessoms was in fact asking for a lawyer? Yes. Was it objectively unreasonable for the California Court of Appeal to hold that a police officer could have interpreted Sessoms's statement as a possible

request for a lawyer rather than an actual request for a lawyer, which would not require the officer to stop the interrogation? I cannot say that it was. Because this Court is constrained by the deference mandated by AEDPA, even when faced with a close case where it may have ruled differently than the state court, I respectfully dissent.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Tio Dinero Sessoms, *Petitioner-Appellant*, v. D. L. Runnels, *Respondent-Appellee*.	No. 08-17790 D.C. No. 2:05-cv-01221- JAM-GGH OPINION

Appeal from the United States District Court
for the Eastern District of California
John A. Mendez, District Judge, Presiding

Argued and Submitted
September 1, 2010—San Francisco, California

Filed June 3, 2011

Before: Betty B. Fletcher, Richard C. Tallman,
and
Johnnie B. Rawlinson, Circuit Judges.

Opinion by Judge Tallman;
Dissent by Judge B. Fletcher

COUNSEL

Eric Weaver (argued), Albany, California, for petitioner-appellant Tio Dinero Sessoms.

Edmund G. Brown, Attorney General of California, Michael P. Farrell, Senior Assistant Attorney General, Charles A. French, Supervising Deputy Attorney General, Jeffrey D. Firestone (argued), Deputy Attorney General, Sacramento, California, for respondent-appellee D. L. Runnels.

OPINION

TALLMAN, Circuit Judge:

Petitioner-Appellant Tio Dinero Sessoms, a California prisoner, appeals the district court's denial of his habeas corpus petition challenging his California felony murder conviction. He argues predominately that he unequivocally asserted his right to counsel when he asked Sacramento homicide detectives whether he had a right to an attorney and subsequently told those detectives that his father had asked him to inquire about an attorney. He also argues that even if his requests were ambiguous the detectives had an obligation to ask him clarifying questions prior to continuing with their interrogation. Finally, he argues that the detectives violated his right to remain silent when they interviewed him without objection five days after he invoked his right to remain silent to different officers from a different police department after he was arrested. He contends that he is entitled to federal habeas relief because any of these claimed violations required the California state courts to suppress the

incriminating statement he made after he expressly waived his *Miranda* rights.

Mindful that we must review this petition through the deferential lens of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, we disagree. Though some of Sessoms's claims admittedly raise a close question as to how we may have ruled were we reviewing his conviction without AEDPA deference, we cannot conclude that the decisions of the California state courts [1] were "contrary to, or an unreasonable application of," established United States Supreme Court precedent—the showing AEDPA requires to permit relief. § 2254(d)(1). Because Sessoms cannot "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 fairminded disagreement," *Harrington v. Richter*, 131 S. Ct. 770, 786-87 (2011), we affirm the district court's denial of habeas relief.

[1] The parties agree that the decision of the California Court of Appeal on January 12, 2004, was the last reasoned decision in regard to Sessoms's first two claims. Because the state courts denied Sessoms's third claim without formal opinion or comment, we review that claim independently under AEDPA. *See Delgado v. Lewis*, 223 F.3d 976, 981-82 (9th Cir. 2000) (independently reviewing the record to determine whether a state court's unexplained decision fell within the bounds of AEDPA).

I

On October 20, 1999, Sessoms and two other men entered the Sacramento, California, residence of Edward Sherriff to commit a burglary. During the burglary, Sherriff was choked and stabbed to death by one of Sessoms's accomplices. The men then fled the scene, taking cash, jewelry, and Sherriff's two vehicles with them.

Shortly thereafter, Sessoms traveled to Langston, Oklahoma, where, at the urging of his father, he surrendered to local police on November 15, 1999. Upon arrest, Langston police officers read Sessoms his *Miranda* rights and asked whether he wanted to "make a statement." He declined. The Langston police did not press Sessoms any further and transported him to a jail in Oklahoma City to await extradition to California.

Five days later, on November 20, 1999, two Sacramento city homicide detectives, Dick Woods and Pat Keller, arrived in Oklahoma City to question and extradite Sessoms. Sessoms was brought to an interview room where he waited to meet with the detectives for the first time. He was not aware that everything in the room was being video recorded. When the detectives entered the room, Sessoms was pleasant and polite. He told the detectives that he was glad they had arrived safely. The detectives were likewise pleasant and polite. Detective Woods joked that he hoped the return flight would be just as good.

Woods then introduced himself and Detective Keller. When Woods paused to read his notes, Sessoms made the first of the two statements at issue, asking Woods whether he had the right to have

an attorney present during the interview. Specifically, he asked, "There wouldn't be any possible way that I could have a — a lawyer present while we do this?" He then explained to the detectives that his father was concerned that some officers might attempt to switch his words around after the fact and that his father had therefore "asked me to ask you guys — uh, get me a lawyer." The detectives responded by telling Sessoms that they could record the interview to allay those concerns. Sessoms agreed. More importantly, though, after setting up a recording device on the table, Woods directly addressed Sessoms's question regarding whether he had a right to counsel. He told Sessoms that he did have the right to have counsel present during the interview, but— demonstrating his understanding as to what Sessoms was asking— emphasized that Sessoms would need to decide whether he wanted to claim that right.[2]

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[2] The black and white record stands in stark contrast to the dissent's attempts to color the detectives as tricksters bent on subverting at every turn the polite overtures of Sessoms, who our colleague paints as "a naive and relatively uneducated 19-year-old boy." *Dissent* at 7369. Contrary to the dissent's convenient conclusion that the detectives understood Sessoms's statements to be an invocation of the right to counsel, at 7369-70, the record demonstrates the very opposite: immediately after Sessoms made his statements—and without the benefit of intervening years to craft a post hoc reconstruction—Detective Woods honestly answered Sessoms's question, telling him that he did in fact have the right to an attorney but "it's up — for you to decide if you want the attorney or not." *Cf. United States v. Pheaster*, 544 F.2d 353, 368 (9th Cir. 1976) ("It is also important to note that Pheaster's statements came as a result of an objective, undistorted presentation of the extensive evidence against him, particularly the positive identification of his fingerprint on the ninth note. . . . [T]he questioning did not really begin until Pheaster had clearly indicated his willingness

(continued…)

> Uh, I want to back up to your question you asked about an attorney. Um, first, before you ask questions, uh, I'm going to tell you why we're here, just lay it out and be up-front. And then — then I'm going to advise you of your rights. And then it's up— for you to decide if you want the attorney or not.

Thereafter, the detectives explained to Sessoms what information they had and what the other two suspects had told them. Notably, Woods told Sessoms that he was surprised by the fact that neither of the other suspects had chosen to invoke their rights. He told Sessoms that they would not take his statement without an attorney if Sessoms wanted an attorney and added that "all attorneys . . . will sometimes or usually advise you not to make a statement."[3] He also reiterated to Sessoms that it was Sessoms's choice whether he wanted counsel or not:

> I'm not trying to take any rights away from you or anything else. What I want to do, Tio, is advise you of your rights, make sure

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(…continued)
to cooperate."). The dissent's statement that "[Detective Woods] reassured Sessoms that counsel was unnecessary," *Dissent* at 7369, also finds no support in the actual videotaped record, which fully captured Woods's conversation with Sessoms

[3] Notwithstanding the recording of what Woods actually said, the dissent argues that Woods was in fact telling Sessoms that a lawyer would only hurt his interests and that "it was in his best interest not to obtain counsel." *Dissent* at 7370. Because it relies on that insinuation, it is therefore unsurprising that the dissent fails to even acknowledge, let alone address, the fact that Woods told Sessoms no less than three times in the span of a few minutes that Sessoms had a right to counsel and that, before the detectives would speak to Sessoms further, he had to choose whether to claim that right or waive it.

> you understand them. Then you make the decision if you want to talk to us or not. — It's not for me to make, not for [Detective Keller] to make; it's — it's for you to make. Um, have you ever been advised of your rights before?

Detective Woods then read Sessoms his *Miranda* rights verbatim from a form, while Sessoms read along silently from an additional copy of the text.[4] Woods asked Sessoms if he understood each distinct right. Sessoms stated that he did. Woods then asked, "Okay. Having these rights in mind, do you wish to talk to us now?" Sessoms shrugged. "That's solely up to you," Woods added. After pausing to think, Sessoms replied simply, "Let's talk." He then fully confessed to his involvement in the crime.

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[4] In light of this undisputable record fact, the dissent's attempt, *Dissent* at 7368-69, 7373 n.5, to engraft *Doody v. Ryan*, ___ F.3d ___, 2011 WL 1663551 (9th Cir. May 4, 2011), into its reasoning is puzzling. How Detective Woods's actions in any way conflict with Chief Judge Kozinski's admonition in *Doody* that "[i]t's not too much to ask that police recite [*Miranda* warnings] as prescribed by the Supreme Court, and not augment them in a way that will obscure their meaning and undermine their effect," *Dissent* at 7373 n.5. (quoting *Doody*, 2011 WL 1663551, at *39 (Kozinski, J., concurring)), is not evident and plainly demonstrates why the dissent stands completely alone—not even joined by Sessoms— in its position. Simply put, the detectives did not "take a butcher knife to *Miranda*." *Id.* at 7369. Rather, they provided Sessoms his *Miranda* rights *prior to any questioning*, just as our precedent requires. *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2259 (2010) ("A suspect in custody must be . . . 'warned *prior to any questioning* that he has the 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.' " (quoting *Miranda*, 384 U.S. at 479 (emphasis added))); *Pheaster*, 544 F.2d at 368.

Prior to his trial, Sessoms sought to have his confession suppressed, claiming he had "clearly and unequivocally requested the assistance of an attorney." The Sacramento County Superior Court conducted an evidentiary hearing, heard argument, and watched the videotape of the interview. It concluded that Sessoms's initial statement was not an assertion of his rights but a question as to whether he even had such a right. The court noted that following Sessoms's question, the officers did not ask about the incident until after Sessoms had received his complete *Miranda* warnings and had waived his constitutional rights.

Eventually, a Sacramento County Superior Court jury found Sessoms guilty of first degree murder,[5] robbery, and burglary. Prior to sentencing, Sessoms moved for a new trial, alleging the trial court had erred in failing to suppress his statement. The court again heard arguments and spent hours reviewing the videotape and transcript before concluding that Sessoms's initial statement was a question, not a "direct unequivocal request to be provided with an attorney on the spot." After denying the motion, the Superior Court sentenced Sessoms to life in prison without the possibility of parole.

Sessoms appealed his conviction to the California Court of Appeal, claiming that the trial court erred by failing to suppress his confession in light of his request for counsel. The Court of Appeal affirmed the trial court, finding that neither of

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[5] The jury found that Sessoms acted as a major participant in the robbery and burglary that resulted in Sherriff's death and thus found him guilty under a felony murder theory. *See* Cal. Penal Code § 190.2(a), (d).

Sessoms's statements were sufficiently clear that a reasonable police officer in the circumstances would have understood the statement to be a request for counsel. *People v. Sessoms*, No. C041139, 2004 WL 49720, at *3 (Cal. Ct. App. Jan. 12, 2004) (citing *Davis v. United States*, 512 U.S. 452, 459 (1994), *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), and *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)). Sessoms then filed multiple state habeas petitions, claiming he had been deprived of the effective assistance of counsel. Each was denied. He then filed the instant federal habeas petition, which the district court denied. Following the district court's issuance of a certificate of appealability for his claims, Sessoms timely appealed. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we now affirm.

II

We review de novo a district court's denial of a state prisoner's petition for a writ of habeas corpus. *Murdoch v. Castro*, 609 F.3d 983, 989 (9th Cir. 2010) (en banc). Like the district court, however, we recognize that because Sessoms's petition for habeas corpus was filed after the enactment of AEDPA, our review is limited by 28 U.S.C. § 2254(d), which applies to each of Sessoms's claims. *See Anderson v. Terhune*, 516 F.3d 781, 786-87 (9th Cir. 2008) (en banc) (analyzing pursuant to § 2254(d) the state court's determination that the defendant did not unequivocally invoke his right to remain silent); *Earp v. Ornoski*, 431 F.3d 1158, 1182 (9th Cir. 2005) (applying § 2254(d) to accused's claim that he was denied effective assistance of counsel).

Section 2254(d) provides that an application for a writ of habeas corpus shall not be granted based on

a claim adjudicated on the merits in state court unless the adjudication either (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."

The Supreme Court has explained that clearly established Federal law "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 412 (2000)). Additionally, the Court has emphasized that the "contrary to" and "unreasonable application" clauses have distinct meanings. *Williams*, 529 U.S. at 405. A "state-court decision can be 'contrary to' th[e] Court's clearly established precedent . . . if the state court arrives at a conclusion opposite to that reached by th[e] Court on a question of law." *Id*. A state-court decision would also be contrary to the "Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of th[e] Court and nevertheless arrives at a result different from [that] precedent." *Id*. at 406.

In regard to the "unreasonable application" prong, the Court specified that "[a] state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing] an unreasonable application of

. . . clearly established Federal law.' "[6] *Id.* at 407-08 (alteration in original). The Court has cautioned, however, that the " 'unreasonable application' clause requires the state-court decision to be more than incorrect or erroneous." *Lockyer*, 538 U.S. at 75 (rejecting the Ninth Circuit's application of the clear error standard); *Williams*, 529 U.S. at 410.

> It is not enough that a federal habeas court, in its "independent review of the legal question," is left with a " 'firm conviction' " that the state court was " 'erroneous.' " We have held precisely the opposite: "Under § 2254(d)(1)'s 'unreasonable application' clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." Rather, that application must be objectively unreasonable.

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[6] The Court also stated that a state court decision could be unreasonable "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Williams*, 529 U.S. at 407. However, the Court declined "to decide how such 'extension of legal principle' cases should be treated under § 2254(d)(1)," *id.* at 408-09, and has since made clear that the absence of controlling Supreme Court precedent effectively insulates a state court decision from federal review under AEDPA, *Wright v. Van Patten,* 552 U.S. 120, 126 (2008) (per curiam) ("Because our cases give no clear answer to the question presented, let alone one in [the accused's] favor, it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law." (citation and internal quotation marks omitted)).

Lockyer, 538 U.S. at 75-76 (citations omitted); *see also Woodford v. Visciotti*, 537 U.S. 19, 27 (2002) (per curiam); *Bell v. Cone*, 535 U.S. 685, 698-99 (2002). And, most recently in *Richter*, the Court took great pains to fully underscore the magnitude of the deference required:

> As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings. *Cf. Felker v. Turpin*, 518 U.S. 651, 664 (1996) (discussing AEDPA's "modified res judicata rule" under § 2244). *It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no farther.* Section 2254(d) reflects the view that habeas corpus is a "guard against extreme malfunctions in the state criminal justice systems," not a substitute for ordinary error correction through appeal. *Jackson v. Virginia*, 443 U.S. 307, 332, n.5 (1979) (Stevens, J., concurring in judgment). 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 fairminded disagreement.

131 S. Ct. at 786-87 (emphasis added); *see also Lockyer*, 538 U.S. at 75-76.

III

Having ascertained the standards by which we must review the last reasoned decision of the state

courts, *see Avila v. Galaza*, 297 F.3d 911, 918 (9th Cir. 2002), we turn to the merits of Sessoms's three habeas claims. Because we conclude that none of the state courts' decisions rose to the level required by AEDPA to overturn them, we deny his claims for federal habeas relief.

A

We first consider whether the determination of the California Court of Appeal that Sessoms did not unequivocally invoke his right to counsel "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 131 S. Ct. at 786-87.

[1] The question is a crucial one. If an accused invokes his right to have counsel present during a custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85. This rigid prophylactic rule comes with a caveat, however. Before it applies, a court "must determine whether the accused actually invoked his right to counsel." *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam) (citing *Edwards*, 451 U.S. at 484-85, and *Miranda*, 384 U.S. at 444-45); *see also Davis*, 512 U.S. at 459 ("Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood

only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." (internal citations omitted) (quoting and citing *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991) ("[T]he *likelihood* that a suspect would wish counsel to be present is not the test for applicability of *Edwards*." (emphasis in original)))).[7]

The California Court of Appeal determined that Sessoms's statements fell within the caveat—not the rule. Sessoms believes otherwise. He argues that his statements raise a "close question" as to whether he legally invoked his right to counsel and that the state court erred in resolving that question against him. On that basis, he asks us to grant him habeas relief. To resolve whether we should accept his invitation, we first, as a necessary prerequisite, identify the "clearly established Federal law" governing his claim. We then examine whether the decision of the California Court of Appeal was "contrary to, or involved an unreasonable interpretation of," that Supreme Court precedent or "was based on an unreasonable determination of the facts." Ultimately,

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[7] Because our opinion rests on the firm jurisprudential ground that only an unequivocal invocation will do—a settled principle the Supreme Court as reiterated time-and-time again—we are at a loss to understand what "magic words" test troubles the dissent. *Compare Smith,* 469 U.S. at 95-96 (concluding that *ambiguous or equivocal* statements do not suffice), *and Edwards*, 451 U.S. at 486 (same), *with Dissent* at 7371. Rather than presenting a problem of "wands" and "disappearing acts," *cf. Dissent* at 7381, we think our disagreement results solely from a less enchanting reality: the dissent's failure to acknowledge that the Court in *Davis* did not end its discussion of *Miranda* after its "at a minimum" statement but, as demonstrated, went on to describe that it has *always required* an unambiguous or unequivocal statement. *Davis*, 512 U.S. at 459.

in light of the eminently "difficult" bar posed by AEDPA, we cannot conclude that it was. *E.g., Richter*, 131 S. Ct. at 786-87; *Yarborough v. Alvarado*, 541 U.S. 652, 663-66 (2004) (concluding AEDPA precluded relief because arguments existed to support the state court's conclusion). We therefore decline to grant Sessoms habeas relief.

1

[2] In the case at hand, neither party challenges the state court's reliance on specific language from Davis to fix the appropriate legal standard by which to measure the equivocality of Sessoms's statement:[8]

> Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

Sessoms, 2004 WL 49720, at *3 (quoting *Davis*, 512 U.S. at 459 (citation omitted)). We recognize, however, that *Davis*'s reach was explicitly limited by the Court to statements made *post-waiver*. *Davis*, 512 U.S. at 460-61; *accord United States v. Rodriguez*, 518 F.3d 1072, 1080 (9th Cir. 2008) (limiting

[8] To determine the need for an unequivocal statement, the state court turned to Supreme Court precedent, applying *Davis*, 512 U.S. at 459-62, *Edwards*, 451 U.S. at 484-87, and *Miranda*, 384 U.S. at 474. *Sessoms*, 2004 WL 49720, at *2-3.

application of *Davis* to equivocal statements made post-waiver). Because Sessoms's statements were made *prior* to his *Miranda* waiver, *Davis* cannot apply as "clearly established Federal law" in this case.

Of course, our conclusion that *Davis* cannot serve as "clearly established Federal law" does not *ipso facto* entitle Sessoms to relief. *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court . . . it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.' " (alterations in original)); *see also DeWeaver v. Runnels*, 556 F.3d 995, 1002 (9th Cir. 2009) ("We . . . could not conclude that application of the *Davis* rule to an invocation of the right to remain silent is contrary to or an unreasonable application of Supreme Court precedent where the Supreme Court has neither 'squarely addresse[d]' when an ambiguous statement amounts to an invocation of the right to remain silent nor refused to extend the *Davis* rule to an invocation of the right to remain silent." (second alteration in original) (citing *Van Patten*, 552 U.S. at 124-25)). To the contrary, our system of justice *depends* on the ability of state courts to serve as "laboratories for testing solutions to novel legal problems." *Smith v. Robbins*, 528 U.S. 259, 275 (2000) (AEDPA case) (citation omitted).

> In short, it is more in keeping with our status as a court, and particularly with our status as a court in a federal system, to avoid imposing a single solution on the States from the top down. We should, and do, evaluate [S]tate procedures one at a time, as they come before us, while leaving 'the more challenging task of crafting

> appropriate procedures . . . to the laboratory of the States in the first instance.' We will not cavalierly 'imped[e] the States' ability to serve as laboratories for testing solutions to novel legal problems.'

Id. (internal citations omitted). As the Supreme Court has never held against application of the *Davis* standard to a situation like Sessoms's, the state court's application of that standard cannot violate the bounds of either the "contrary to" or "unreasonable application" inquiries. *See id.; Schriro v. Landrigan*, 550 U.S. 465, 478 (2007) (concluding that a state court's decision was not objectively unreasonable because the Supreme Court had yet to speak on the issue). Simply put, one cannot demonstrate that a decision is "contrary to, or an unreasonable application of," precedent that does not yet exist.

Moreover, without *Davis*, we are unable to find any Supreme Court precedent where the Court provided a legal test for distinguishing equivocal from unequivocal pre-waiver statements or even directly addressed the effect of an ambiguous pre-waiver statement—a reality that is not surprising given that pre-waiver statements are usually inadmissible and individuals who desire counsel do not normally thereafter waive their *Miranda* right to counsel. *See Davis,* 512 U.S. at 460-61 ("We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. *But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves*. . . . A suspect who

knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." (emphasis added)). *But cf. Dissent* at 7381 (arguing that the Court's invocation standard "is not a rigorous one" and that our reliance on *Edwards* creates a "particular injustice" for the poor and less educated).

[3] Sessoms's claim therefore hinges upon our determination that the decision of the California Court of Appeal was "contrary to, or an unreasonable application of," the general *Edwards* standard that an accused must have "actually invoked his right to counsel." *Smith*, 469 U.S. at 95; *see also Edwards*, 451 U.S. at 485. "[A]s th[e] Court has explained," this only makes Sessoms's task that much more difficult: " '[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. *The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.*' " *Richter*, 131 S. Ct. at 786 (second alteration in original) (emphasis added) (quoting *Yarborough*, 541 U.S. at 664).

2

Having identified the general *Edwards* "equivocality" standard as our North Star of "clearly established Federal law," we now review the state court's course against the compass of AEDPA.

We first consider whether the state court arrived at a conclusion opposite to that reached by the Court on a question of law. *See Williams*, 529 U.S. at 405; *see also Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (noting that a state-court decision

is not contrary to Supreme Court precedent for failure to cite that precedent "so long as neither the reasoning nor the result of the state-court decision contradicts [it]"). We hold that it did not.

[4] Quite appropriately, the state court concluded that an unequivocal invocation was required. *Compare Sessoms*, 2004 WL 49720, at *2, *with Smith*, 469 U.S. at 95-97 ("This case concerns the threshold inquiry: whether Smith invoked his right to counsel in the first instance. On occasion, an accused's asserted request for counsel may be *ambiguous or equivocal*. . . . [But n]either the State nor the courts below, for example, have pointed to anything Smith previously had said that might have cast doubt on the meaning of his statement 'I'd like to do that' upon learning that he had the right to his counsel's presence. Nor have they pointed to anything *inherent in the nature of Smith's actual request for counsel that reasonably would have suggested equivocation*." (emphasis added)), *id.* at 98 ("Where nothing about the request for counsel or the circumstances leading up to the request would render it *ambiguous*, all questioning must cease." (emphasis added)), and *Edwards*, 451 U.S. at 485 ("[I]t is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has *clearly asserted* his right to counsel." (emphasis added)).

[5] In addition, the state court did not confront a set of facts materially indistinguishable from a decision of the Court and nevertheless arrive at a different result. *Williams*, 529 U.S. at 405. Logically, a legal determination as to whether an attempted invocation was equivocal or not is plainly driven by the particular facts of a case. *See Robinson v. Borg*,

918 F.2d 1387, 1390 (9th Cir. 1990). Sessoms has not provided, and we cannot find, any example in Supreme Court precedent where an individual uttered a materially indistinguishable statement and the Court concluded that he or she had unequivocally invoked his or her right to counsel.[9] *Cf. Sessoms*,

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[9] The fact that only Supreme Court precedent binds state courts under AEDPA also disposes of the dissent's suggestion that *Alvarez v. Gomez*, 185 F.3d 995, 998 (9th Cir. 1999), binds our reasoning. *Richter*, 131 S. Ct. at 786; *Lockyer,* 538 U.S. at 71. At best, circuit precedent may serve as persuasive authority. *Clark v. Murphy*, 331 F.3d 1062, 1071 (9th Cir. (2003). *But see Cullen v. Pinholster*, 131 S. Ct. 1388, 1411 (2011) ("Those cases [decided without regard for AEDPA] therefore offer no guidance with respect to whether a state court has unreasonably determined that prejudice is lacking."). However, the persuasive merit of any particular case can only be determined through comparison to the entire body of circuit case law—both ours and that of our sister circuits. *Kessee v. Mendoza-Powers*, 574 F.3d 675, 677 (9th Cir. 2009) ("For purposes of AEDPA review, however, a state court's determination that is consistent with many sister circuits' interpretations of Supreme Court precedent, even if inconsistent with our own view, is unlikely to be 'contrary to, or involve an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.' "); *Clark*, 331 F.3d at 1071 ("The very fact that circuit courts have reached differing results on similar facts leads inevitably to the conclusion that the Arizona court's rejection of *Clark's* claim was not objectively unreasonable."). As a quick of review of just our own precedent demonstrates a disparity of outcomes under similar facts, *Alvarez* does not aid our inquiry as to AEDPA unreasonableness. *Kessee*, 574 F.3d at 677; *compare Alvarez,* 185 F.3d at 998, with *United States v. Younger*, 398 F.3d 1179, 1184, 1187-88 (9th Cir. 2005) (concluding that the defendant's pre-Miranda statement, "But, excuse me, if I am right, I can have a lawyer present through all this, right?," was not an unambiguous request for counsel), *and Clark*, 331 F.3d at 1065, 1071-72 (concluding that neither the statement, "I think I would like to talk to a lawyer," nor "should I be telling you or should I

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2004 WL 49720 at *3 (concluding that Sessoms's statements were "legally indistinguishable" from the statement in *Davis*[10] that the Supreme Court found ambiguous). Instead, the state court's decision appears, at worst, to fall directly within that class of cases that the Supreme Court specifically excepted from running afoul of the "contrary to" inquiry:

> On the other hand, a run-of-the-mill state-court decision applying the correct legal rule from our cases to the facts of a prisoner's case would not fit comfortably with § 2254(d)(1)'s "contrary to" clause. Assume, for example, that a state-court decision on a prisoner's ineffective-assistance claim correctly identifies *Strickland* as the controlling legal authority and, applying that framework, rejects the prisoner's claim. Quite clearly, the state-court decision would be in accord with our decision in *Strickland* as to the legal prerequisites for establishing an ineffective-assistance claim, even assuming the federal court considering the prisoner's habeas application might reach a different result applying the *Strickland* framework itself. It is difficult, however, to describe such a run-of-the-mill state-court

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talk to a lawyer?," constituted an unequivocal request for counsel).

[10] In *Davis*, the petitioner stated, "Maybe I should talk to a lawyer." 512 U.S. at 455. Like the Sacramento detectives here, the interviewing agents in *Davis* were unsure if Davis was asking for a lawyer or merely making a comment about a lawyer. *Id*. The agents told *Davis* that they did not want to violate his rights, so if he was asking for a lawyer, they would stop questioning him and get him a lawyer. *Id*. The Sacramento detectives did exactly the same with Sessoms, and, like Davis, Sessoms chose to talk.

> decision as "diametrically different" from, "opposite in character or nature" from, or "mutually opposed" to *Strickland*, our clearly established precedent. *Although the state-court decision may be contrary to the federal court's conception of how* Strickland *ought to be applied in that particular* case, *the decision is not "mutually opposed" to* Strickland *itself*.

Williams, 529 U.S. at 406 (emphasis added).

[6] We next consider whether the state court's decision unreasonably applied Supreme Court precedent. The conclusion of the California Court of Appeal was that "although defendant twice explicitly referred to an attorney, neither statement was an unequivocal or unambiguous request for counsel." *Sessoms*, 2004 WL 49720, at *3. It considered Sessoms's first statement to be merely a question regarding whether he was entitled to a lawyer—if he desired one. *Id*. (comparing Sessoms's statement to those of the defendant in *Davis*, 512 U.S. at 455 ("Maybe I should talk to a lawyer"), and *People v. Crittenden,* 885 P.2d 887, 908 (Cal. Ct. App. 1994) ("Did you say I could have a lawyer?"), which were held ambiguous). It found his second statement even less sufficient, considering it merely "a statement of [Sessoms's] father's advice to him." *Id*.

[7] Upon first impression, these determinations may seem harsh—a bare reading of the black-and-white transcript does raise a close question as to whether Sessoms legally invoked his right to counsel. *But see Yarborough*, 541 U.S. at 664-65. However, we recognize that, under AEDPA, we cannot simply "treat[ ] the unreasonableness question as a test of [our] confidence in the result [we] would reach under de novo review" or even a question of whether we

have "little doubt" that Sessoms has a valid claim. *Richter*, 131 S. Ct. at 786; *Woodford*, 537 U.S. at 24-25 ("An 'unreasonable application of federal law is different from an incorrect application of federal law.' " (quoting *Williams*, 529 U.S. at 410)). Rather, under AEDPA, we may only grant relief if we determine "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 fairminded disagreement." *Richter*, 131 S. Ct. at 786-87; *see Lockyer*, 538 U.S. at 75-76. In making that inquiry, we are bound to give due regard for the specificity of the relevant standard set by the Court, *Yarborough*, 541 U.S. at 664, and cannot overlook arguments that would otherwise justify the state court's result, *Richter*, 131 S. Ct. at 786 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."); *Yarborough*, 541 U.S. at 664-65 (detailing the facts supporting the state court's decision and concluding that these "differing indications" demonstrated "that the state court's application of [the Court's] custody standard was reasonable" because "it can be said that fairminded jurists could disagree over whether [the petitioner] was in custody"). Under this eminently "difficult" standard,[11] *Richter*, 131 S. Ct. at 786, Sessoms

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[11] We fully agree with our dissenting colleague that "AEDPA's 'standard is demanding but not insatiable' and 'deference does not by definition preclude relief.' " *Dissent* at 7368-69 (some internal quotations omitted) (quoting *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005)). Where we differ

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simply cannot demonstrate the requisite AEDPA unreasonableness—especially when the conversation between Sessoms and the detectives is colored with tone, inflection, body language, and the infinite other minute qualities of demeanor and affect that cannot be ascertained from words alone, but are plainly apparent on the videotape evidence of what transpired.

[8] When Sessoms asks if he is entitled to an attorney, his inflection, body language, and manner support the state court's conclusion that he was completely unaware if he even had a right to counsel under the circumstances and was only asking if he *could* request counsel. Sessoms's second statement is even further from the mark. While he makes clear to the detectives that his father had advised him to ask for counsel, he never indicates any desire to transform his father's advice into his own desire to have a lawyer present. Even taken cumulatively, the statements could reasonably be interpreted to convey a question followed by an expression of Sessoms's father's advice to him—statements that do not evidence an unequivocal desire for counsel. *Cf. Yarborough*, 541 U.S. at 664-66 (analyzing whether

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is in *our* recognition that the Court has, since *Miller-El*, taken great care to fully articulate the requirements necessary to satisfy AEDPA. *E.g., Richter*, 131 S. Ct. at 785-86 ("As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings."); *Yarborough*, 541 U.S. at 660-66. Simply put, whereas the dissent relies on the Court's broad strokes, we apply its specific examples. *Cf. United States v. Brewster*, 408 U.S. 501, 516 (1972) ("Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.").

any facts supported the state court's decision). Moreover, at no other point did Sessoms, once informed he could, indicate that he wanted to claim his right to counsel.[12] Rather, Sessoms ignored Woods's hints—that Woods was surprised that none of Sessoms's accomplices had asked for an attorney and that most attorneys would tell a suspect to invoke his or her rights—and *Miranda's* protections. He waived his rights and elected to speak to the detectives.

[9] Upon this record, we have to agree with the district court that the state court's decision cannot be characterized as objectively unreasonable. As we stated previously, any number of "fairminded" jurists may have answered the question differently had it come before them outside the confines of AEDPA review. Certainly, this issue, stripped of its habeas posture, raises a "close question" under the general *Edwards* standard. However, unlike Sessoms and our dissenting colleague,[13] we recognize that AEDPA

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[12] We are cognizant of the Supreme Court's holding in *Smith*, 469 U.S. at 100, and reach our conclusions regarding Sessoms's two statements based solely on the clarity of the statements themselves. We emphasize only that Sessoms never made any additional comments referencing counsel after the detectives began recording the interview.

[13] We respectfully reject our dissenting colleague's accusation that we only "pay lip service" to the Court's directives. Unlike the dissent, we do not "overlook[ ] arguments that would otherwise justify the state court's result . . . ." *Richter*, 131 S. Ct. at 786; *Yarborough*, 541 U.S. at 664-66. *But see Dissent* at 7373-80 (failing to even consider arguments that support the California court's decision). We do not evaluate the state's result under standards set by courts other than the Supreme Court. *Richter*, 131 S. Ct. at 786; *see Pinholster*, 131 S. Ct. at 1411. *But see Dissent* 7375-76 n.6; *id.* at 7380 n.10. And, we do not forget that the *Edwards* standard is a general

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requires more: "an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*." *Richter*, 131 S. Ct. at 786-87 (emphasis added) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." (citing *Yarborough*, 541 U.S. at 664)). Here, that standard has not been met. Fairminded arguments exist *to support* the state court's determination—a conclusion evidenced by the fact that Sessoms himself labels the question "a close one." *Cf. Yarborough*, 541 U.S. at 664-66. The state court's conclusion is thus secure behind the broad shield of AEDPA deference. *Id.*; *see also* § 2254(d).

As neither party disputes the state court's factual determination as to what was said during the interview, we have no cause to address § 2254(d)(2). *See Borg*, 918 F.2d at 1390 ("Whether the suspect's words constitute a request for counsel is a legal determination . . . .") (citing *Smith v. Endell*, 860 F.2d 1528, 1532 n.3 (9th Cir. 1988) ("[T]he state court's characterization of Smith's words is hardly a finding of fact. . . . The constitutional effect of the dialogue is a legal question . . . .")).

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one. *Compare Yarborough*, 541 U.S. at 664 ("[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations."), *with Edwards*, 451 U.S. at 484-85. *But see Dissent* at 7371-72.

[10] Because none of the § 2254(d) standards are met, we cannot grant Sessoms federal habeas relief on this claim.

B

[11] Sessoms next argues that even if his statements were ambiguous, the Sacramento detectives were limited to asking clarifying questions prior to continuing with their interrogation.[14]

This claim is dependent upon two assertions. First, it requires that *Davis* be held inapplicable to this pre-waiver context. Second, it depends on our agreement that the state court was bound by our conclusion in *Rodriguez* that, as Sessoms asserts, police are "limited to questions seeking to clarify the defendant's intent" when confronted with ambiguous requests for counsel made *prior* to the administration of *Miranda* warnings and a defendant's waiver of those rights. Because we find no basis under AEDPA for requiring state courts to adhere to precedent not established by the Supreme Court, we cannot agree.

Plainly, if *Davis* applies to the record before us, Sessoms's claim fails.[15] So, Sessoms reverses course, arguing that *Davis* is inapplicable in this pre-waiver

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[14] Because we conclude that the police were not under an obligation to ask clarifying questions, we do not consider whether the subsequent furnishment to Sessoms of his *Miranda* warnings and his express waiver satisfy *Rodriguez*.

[15] Under the circumstances present in *Davis*, the Supreme Court clearly rejected the proposition that police are required to ask clarifying questions when a suspect makes an ambiguous statement. 512 U.S. at 462 ("[W]e are unwilling *to create* a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer." (first emphasis added)).

context. For the reasons already discussed, we agree. *Davis*, 512 U.S. at 460-61; *accord Rodriguez*, 518 F.3d at 1080. Contrary to Sessoms's assertions, however, the absence of *Davis* does not change the outcome.

[12] Sessoms makes no attempt to clothe his argument under the guise of Supreme Court authority. Rather, he cites only our holding in *Rodriguez* to support his claim. *Rodriguez* itself makes clear, though, that its holding is based solely on Ninth Circuit precedent. *Id.* ("To the extent *Nelson* [*v. McCarthy*, 637 F.2d 1291, 1296-97 (9th Cir. 1980),] requires pre-waiver clarification of a suspect's wishes concerning his *Miranda* rights, it has not been superseded by *Davis* and remains binding precedent."). Because state courts are not bound under AEDPA by precedent other than that established by the Supreme Court, *Rodriguez* is immaterial to our review of the state court's decision to the extent Sessoms relies on it to argue that clarifying questions were required.[16] *Compare*

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[16] Our dissenting colleague seizes upon our use of the word "immaterial" to argue that we do not recognize *Rodriguez's* persuasive value. *Cf. Dissent* at 7380 n.10. We believe our colleague misunderstands us. *Rodriguez* is only "immaterial" to the extent Sessoms relies on it to contend that the Sacramento detectives were required to ask him clarifying questions. *Rodriguez*, 518 F.3d at 1080 (noting that the requirement is founded in circuit precedent, not Court precedent); *see, e.g., Pinholster*, 131 S. Ct. at 1411; *Richter*, 131 S. Ct. at 786-87; *Lockyer*, 538 U.S. at 75-76. To the extent *Rodriguez* might otherwise persuade us of the limited applicability of *Davis*'s standard for measuring equivocality, it suffers from the same shortcomings previously described *supra* at note 9. *Cf. DeWeaver*, 556 F.3d at 1002; *Anderson*, 516 F.3d at 787 n.3 (en banc) ("We acknowledge that *Davis* is an invocation of counsel case under *Miranda*, not a Fifth Amendment right to silence (continued…)

Alberni v. McDaniel, 458 F.3d 860, 866 (9th Cir. 2006) (holding that where the Supreme Court has expressly left an "open question," circuit precedent is immaterial and there is no clearly established law for the state court to have unreasonably applied), with *Davis*, 512 U.S. at 461 (holding that an objectively ambiguous request, made post waiver, does not require police to ask clarifying questions), *and Smith*, 469 U.S. at 96 (reserving as an open question the issue of the effect of an ambiguous statement preceding invocation or an ambiguous request *itself*).

[13] As we find ourselves without any basis in "clearly established Federal law" for Sessoms's claim, we again decline to grant Sessoms relief. *See Knowles*, 129 S. Ct. at 1419; *Van Patten*, 552 U.S. at 126.

C

[14] Sessoms's final claim is that his trial counsel performed ineffectively by choosing not to pursue a motion to suppress Sessoms's admission on the grounds that detectives *Woods* and *Keller*[17] failed to "scrupulously honor" his November 15 invocation of his right to remain silent when they interviewed him on November 20.[18] *See Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975).

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case . . . . Nonetheless, the general principles from cases involving the clarity of invocation of rights during custodial interrogation are instructive as to common sense interpretation of language.").

[17] Sessoms does not allege any impropriety on the part of the Langston Police Department.

[18] We acknowledge that in his briefs to us, Sessoms expands the basis of his claim to incorporate his purported
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In ordinary cases, a defendant bears the burden of convincing the reviewing court that his counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by such deficient performance. *Strickland v. Washington*, 66 U.S. 668, 687 (1984). However, as this claim comes before us under AEDPA review, Sessoms faces the additional hurdle of § 2254(d). *Pinholster*, 131 S. Ct. at 1411; *Richter*, 131 S. Ct. at 788; *Premo v. Moore*, 131 S. Ct. 733, 739-41 (2011); *Earp*, 431 F.3d at 1185; *see also Delgado*, 223 F.3d at 981-82. Because we find no basis in the record from which to conclude that a *Mosley* motion could have succeeded, we conclude that Sessoms's trial counsel did not perform ineffectively in choosing not to pursue it. We therefore do not consider Sessoms's claims regarding prejudice, as we agree with the district court that § 2254(d) does not permit issuance of the federal writ.

[15] In *Mosley*, the Supreme Court concluded that the "admissibility of statements obtained after the person in custody has decided to remain silent" depends on whether that person's "right to cut off questioning" was "scrupulously honored." 423 U.S. at 104. The Court explained that this critical "right to cut off questioning" is met when the person in custody "can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Id.* at 103-04. The Court

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invocation of his right to counsel on November 20. We note, however, that the record is replete with examples of Sessoms's trial counsel seeking to exclude Sessoms's confession on the basis of his claimed invocation of his right to counsel on that date. We thus limit our review to Sessoms's claims regarding whether his November 15 invocation of his right to remain silent was "scrupulously honored."

thereafter distinguished the second interrogation of *Mosley* from the circumstances of *Westover v. United States*, 384 U.S. 436 (1966) (companion case to *Miranda*), and found no violation. *Mosley*, 423 U.S. at 106-07 ("Here, by contrast, the police gave full '*Miranda* warnings' to Mosley at the very outset of each interrogation, subjected him to only a brief period of initial questioning, and suspended questioning entirely for a significant period before beginning the interrogation that led to his incriminating statement.").

[16] We conclude that the record in this case favors a similar result. Certainly, the mere fact that Sessoms had once invoked his right to remain silent would not categorically bar detectives Woods and Keller from trying to speak with him five days later. *Id*. at 104-06. To the contrary, *Mosley* itself permitted re-interview of the suspect a mere two hours after he initially refused to speak to police. *Id*. In addition, Sessoms's claim does not benefit from the Court's description of the elements of the right itself. Rather, the record plainly demonstrates that Sessoms not only raised no objection to the time, subject, or duration of the second interview that the detectives failed to scrupulously honor, but appeared to initiate and freely participate in the conversation.[19] Given the record in this case, we are hard pressed to see how *Mosley* is even implicated.

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[19] When Woods began the interview, Sessoms interjected to ask about the investigation and question whether he was entitled to a lawyer. While Woods was setting up the recorder, Sessoms again initiated conversation, asking whether it was necessary for police to have identified him through the media. Finally, after Woods told Sessoms that prior to any questioning regarding the crime, Sessoms would need to receive and waive his *Miranda* rights, Sessoms chose to talk.

[17] Perhaps recognizing the infirmity of his claim, Sessoms contends that his willingness to speak to the detectives was immaterial because it was tainted by the detective's failure to refresh his *Miranda* warnings at the immediate onset of the second interview and their efforts to "cleverly, with tactics borne of experience, . . . overcome his invocation of his right to silence . . . ." We are not persuaded. Though Sessoms's *Miranda* warnings were not refreshed at the immediate temporal onset of the second interview, we do not see how this transforms the interview into a *Mosley* violation. *Berghuis*, 130 S. Ct. at 2259; *Pheaster*, 544 F.2d at 368. The right articulated in *Mosley* was to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." 423 U.S. at 103-04. The record clearly indicates that Sessoms had, and exercised, such control. Furthermore, the record demonstrates that, as in *Mosley*, the police completely furnished the prophylactic safeguard of *Miranda* warnings before questioning Sessoms about the circumstances surrounding Sherriff's death. *Cf. id.* at 98 ("Before questioning *Mosley* about this homicide, Detective Hill carefully advised him of his '*Miranda* rights.' "); *see also Berghuis*, 130 S. Ct. at 2259.

[18] In regard to Sessoms's claim that the detectives coerced him into retreating from his position of silence, we also cannot agree. Simply put, there is no support in the record for his claim that he was coerced into retracting an invocation he made to different officers from a different department in a different city five days earlier. As has been discussed, the record demonstrates that from the temporal onset of the second interview Sessoms expressed no hint of a desire to remain silent. To the contrary, he

initiated much of the pre-*Miranda* discourse. In addition, while Sessoms certainly possessed the ability to re-invoke his right to remain silent after initiating his conversation with the detectives, *Miranda*, 384 U.S. at 444-45, he never elected to do so. Instead, upon receiving his *Miranda* warnings for a second time prior to questioning, Sessoms chose to waive his rights, stating, "Let's talk."

[19] In short, Sessoms's counsel was not ineffective because he was right. On November 15, Sessoms declined to speak with the Langston police. He was not questioned again until November 20. On that day, he elected not to invoke his right to remain silent and instead made incriminating admissions to Sacramento Detectives Woods and Keller. The fact that he now regrets that choice does not transform his second interview into something it was not—a *Mosley* violation. We discern no evidence to support Sessoms's claim that a *Mosley* violation even occurred, let alone that he was deprived of effective assistance of counsel when his trial counsel declined to pursue it. As such, we certainly cannot conclude that the decision of the state courts was contrary to, or an unreasonable application of, established federal law. *Premo*, 131 S. Ct. at 743; see § 2254(d). Sessoms is not entitled to the relief he seeks.

IV

On the record before us, the district court properly concluded that the denial of Sessoms's claims by the state courts of California did not warrant issuance of a writ of habeas corpus under 28 U.S.C. § 2254.

AFFIRMED.

B. FLETCHER, Circuit Judge, dissenting:

I respectfully dissent.

The Supreme Court has made clear that our review of a petition for a writ of habeas corpus filed post-AEDPA is significantly limited by 28 U.S.C. § 2254(d), *see Harrington v. Richter*, 131 S. Ct. 770 (2011). Such review, however, is not toothless. *Harrington* neither strips this court of the power to review state court decisions grounded in federal constitutional law, nor does it require that we "rubber stamp" such dispositions. Indeed, the Court has expressly acknowledged that AEDPA's "standard is demanding but not insatiable" and " 'deference does not by definition preclude relief.' " *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (alteration omitted) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2002)). A federal court's role in reviewing writs of habeas corpus implicating the fundamental rights of American citizens is a longstanding and crucially important one, and rarely has there been a case in which our obligation in discharging that role was more clear than in this one. When the government "take[s] a butcher knife to *Miranda* . . . a federal court can't sit idly by." *Doody v. Ryan*,___ F.3d ___, 2011 WL 1663551, at *38 (9th Cir. May 4, 2011) (Kozinski, C.J., concurring).

I.

Sessoms, a naive and relatively uneducated 19-year-old boy, went, accompanied by his father, to turn himself in to the police for a serious crime. Sessoms's father left his son with one clear admonition: he must ask for a lawyer before talking to the police. At the police station, Sessoms was visited by two Sacramento city homicide detectives. Before any meaningful exchange took place, Sessoms followed his father's instructions and asked the detectives for an attorney. He first asked, "There wouldn't be any possible way that I could have a — a lawyer present while we do this?" As Detective Woods paused and stammered, Sessoms immediately reiterated his desire for counsel, explaining "that's what my dad asked me to ask you guys — uh, give me a lawyer." After requesting a lawyer with these two statements, Sessoms explained his concern that his words might be misrepresented if he did not have an attorney present.

Instead of complying with Sessoms's clear request for a lawyer, Detective Woods, evidently realizing that such a request had been made, dissuaded Sessoms from exercising his right. The detective reassured Sessoms that counsel was unnecessary because he was an "upfront and honest" guy who would not try to play any "switch games" with Sessoms, because he would record the conversation. [1] After starting the recording device,

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[1] Detective Woods's immediate response to Sessoms's two statements was "What — what we're going to go is, um — I have one philosophy and that's, uh, be right up-front and be honest . . . and not . . . try to hide anything from you, okay?" Sessoms then expressed the concerns that motivated his desire

(continued…)

Detective Woods informed Sessoms that two other suspects had "waived [their] rights" and given statements incriminating Sessoms, but that he understood that there are "two sides to every story." The detective advised that a lawyer would probably prevent Sessoms from making a statement and being able to tell the police his "version of it."[2] He then refused Sessoms's request to call his father before speaking to him, telling Sessoms that he was an "adult." After undermining the instructions that Sessoms had received from his father and suggesting that it was in his best interest not to obtain counsel in response to his clear request to do so, the detective, for the first time, informed Sessoms of his *Miranda* rights. Then, without being allowed to consult with his father, Sessoms talked.

The state court's decision not to suppress the confession obtained under these circumstances does not withstand AEDPA review. I disagree with the majority's analysis of whether the state court's conclusion that Sessoms did not invoke his right to counsel was unreasonable. Sessoms's statements constitute an invocation of the right to counsel under *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the applicable precedent, and *Davis v. United States*, 512 U.S. 452, 459-60 (1994), the case applied by the state court. Because the decision of the state court "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by

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(…continued)
for counsel, to which Detective Woods responded, "No, we're not playing no switch games or nothing else."

[2] This "advice" was given to Sessoms before the detective informed him that he had a *right* to an attorney.

the Supreme Court of the United States," Sessoms is entitled to habeas relief. 28 U.S.C. § 2254(d).

II.

I rest my dissent on the state court's indefensible conclusion that Sessoms's statements did not constitute an invocation of the right to counsel. His two statements, which together constitute an unambiguous request for a lawyer, meet both the notably lenient *Edwards* standard and the post-waiver standard set forth in *Davis*. The contrary holding, endorsed by the majority, is an unreasonable application of federal law. It eviscerates the Fifth Amendment and the meaningful protections that *Miranda* affords.

A.

The holding in *Edwards v. Arizona* makes clear the unreasonableness of the state court decision. As required by that case, Sessoms "expressed his desire" for the assistance of counsel, and was therefore "not subject to further interrogation by the authorities until counsel [had] been made available to him." *Edwards*, 451 U.S. at 484-85. "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' " *Davis*, 512 U.S. at 459 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)); *see also Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966) (holding that, if a suspect "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking[,] there can be no questioning"). These decisions, which constitute clearly established *Miranda* law, make clear that the

standard for invocation of the right to counsel is not a rigorous one. A suspect's words are considered ambiguous only if "ordinary people would understand them" to be so. *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987). Notably, none of these cases sets forth a standard that even remotely resembles a "magic words" test. *Edwards*, *Miranda*, and *McNeil* instruct the court to determine whether an accused's statements, under a reasonable construction, convey the desire to have counsel present; that is exactly what Sessoms's statements do. Despite the attempts of the state court and the majority opinion to dissect Sessoms's statements to find any other possible meaning to his words, no ordinary person would interpret his words as anything other than a request for a lawyer. In fact, the detective plainly understood that Sessoms had expressed a desire for counsel, which is precisely why he responded by persuading him that having a lawyer was a bad idea.[3]

Indeed, Sessoms's statements also meet *Davis*'s post-waiver requirement that a request for counsel be "unambiguous." [4] The *Davis* standard requires neither grammatical correctness nor fluid phrasing.

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[3] As the majority points out, the facts of this case are unique in that "individuals who desire counsel do not normally thereafter waive their *Miranda* right to counsel." This unlikely scenario presents itself here precisely because, after Sessoms expressed his desire for counsel, the request was ignored and he was instead persuaded to forgo this right.

[4] The suspect's statement in *Davis* that was insufficient to *restore* the right to counsel *after* it had been waived was "Maybe I should talk to a lawyer." 512 U.S. at 462. This statement, reflecting a measure of equivocation on the part of the speaker, is entirely different in kind from Sessoms's pre-waiver inquiry as to whether he could have a lawyer, followed by the explanatory words "give me a lawyer."

Davis acknowledges that "a suspect need not speak with the discrimination of an Oxford don," 512 U.S. at 459, and, like its predecessors, makes no mention of any particular "magic words." Rather, *Davis* requires only sufficient clarity so that "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id*.

Unquestionably, a reasonable police officer would, as the detective did here, understand Sessoms's statements to be a request for counsel. He first politely requested to confer with counsel — "There wouldn't be any possible way that I could have a – a lawyer present while we do this?" — and then immediately clarified and reinforced his intention by stating "give me a lawyer." Neither Sessoms's words nor his intention are in any way ambiguous. Indeed, the officer's telling response to Sessoms's request bolsters the conclusion that it meets the *Davis* standard. Upon being presented with the request, Detective Woods stammered and then launched into an explanation of why a lawyer was neither necessary nor advisable. He did this because he understood that a lawyer is exactly what Sessoms wanted.[5] When Sessoms asked the detective

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[5] Notably, in addition to his failure to honor Sessoms's clearly stated request for counsel, the detective's subsequent attempt to dissuade Sessoms from consulting a lawyer raises a question as to whether Sessoms was adequately advised of his *Miranda* rights. In a recent en banc decision, *Doody v. Ryan*, we emphasized that *Miranda* requires a defendant be informed of his rights in a "clear and understandable" manner. *Doody v. Ryan*, ___ F.3d ___, 2011 WL 1663551, at *13-14 (9th Cir. May 4, 2011). As Chief Judge Kozinski notes in his concurrence, "[i]t's not too much to ask that police recite [*Miranda* warnings] as prescribed by the Supreme Court, and not . . . obscure their meaning and undermine their effect." *Id*. at *38 (Kozinski, C.J., (continued…)

whether it would be possible for him to have an attorney present during questioning, the only correct response under *Miranda* was "yes." *Cf. United States v. Younger*, 398 F.3d 1179, 1184 (9th Cir. 2005) (when a suspect asked "But, excuse me, if I am right, I can have a lawyer present through all this, right?," the officers immediately responded "Yeah," and then read him his *Miranda* rights).

B.

In analyzing why habeas relief should be granted, I do not simply rest on the conclusion that the state court reached the incorrect result. I readily accept the majority's repeated challenge to demonstrate "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 fairminded disagreement." *Harrington*, 131 S. Ct. at 786-87. "Fairminded" disagreement is disagreement that is "unprejudiced, just, judicial, [and] honest." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 816 (2002). The state court's conclusion, and the majority's endorsement of

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(…continued)
concurring).

As in *Doody*, the detective in this case deliberately downplayed the importance of the right to counsel in persuading Sessoms that a lawyer was not necessary. Clearly, the primary issue in this case is the adequacy of Sessoms's initial invocation, rather than the adequacy of the detective's subsequent advisement; Sessoms does not challenge the propriety of the warnings. Nonetheless, that the detectives actively undermined Sessoms's understanding of his right only further indicates that their failure to provide him with counsel upon his initial request was deliberate, strategic, and unlawful.

it, are entirely without justification, and therefore fail to withstand AEDPA review.

First, both the state court and the majority attempt to obscure the clear nature of Sessoms's request by breaking apart his successive statements and attacking each one individually. This analysis, however, ignores the fact that, as reflected in the transcript and the video, these statements work together as an expression of one complete thought. Sessoms asked "There wouldn't be any possible way that I could have a — a lawyer present while we do this?" and then immediately explained "*that's* what my dad asked me to ask you guys — uh, *give me a lawyer*." (emphasis added). "Give me a lawyer," therefore, refers back to and makes absolutely clear what was expressed in the first, more polite, inquiry. When the successive requests are read together and in light of one another, there remains no reasonable argument to support the state court's conclusion. As spoken, Sessoms's words are subject to only one rational interpretation — he was asking to consult with a lawyer.

The state court entirely failed to consider what the statements mean when read together, or precisely how Sessoms conveyed them. This failure is fatal to the state court's application of *Davis* and *Edwards*, that is, to its assessment of how a reasonable police officer would have understood Sessoms's statements, because the detectives did in fact hear *both* statements, one immediately following the other. Nothing in *Miranda*, *Edwards*, *Davis*, or any other case can be read to support the contention that an invocation of the right to counsel must be made in a single sentence, rather than in two successive statements. The state court failed to

appreciate the clarity of the request *in its entirety*, instead breaking it apart and unreasonably concluding that the pieces are inadequate.

If this failure is not itself reason enough to grant relief, the attempts to undermine Sessoms's individual statements are also without merit. As to his first statement, "There wouldn't be any possible way that I could have a — a lawyer present while we do this?", the contention that Sessoms was inquiring only as to whether he could request counsel is nothing more than an irrelevant lesson in grammar. Both the state court and the majority opinion pay mere lip service to the rule that a criminal defendant need not speak with "the discrimination of an Oxford don" and then proceed to attack the grammatical structure of Sessoms's sentence to conclude that he was asking a clarifying question rather than invoking his right.[6]

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[6] This reasoning runs directly afoul of *Alvarez v. Gomez,* 185 F.3d 995, 998 (9th Cir. 1999), where we construed the suspect's statements ("[c]an I get an attorney right now, man?", "[y]ou can have an attorney right now?", and "[w]ell like right now you got one?") to be unambiguous requests for counsel rather than clarifying questions regarding the right to counsel. *Accord Clark v. Murphy*, 331 F.3d 1062, 1070-72 (9th Cir. 2003) (holding that the state court's conclusion that a suspect did not unambiguously request counsel was not unreasonable when, during a post-*Miranda* interview, the suspect stated, "I think I would like to talk to a lawyer," after which the police stopped questioning him, left the room, and did not resume questioning until the suspect explicitly said he did not want a lawyer and wanted to continue talking). Although *Alvarez* does not serve as "clearly established law" for purposes of AEDPA, it remains the law of this circuit and serves as persuasive authority in evaluating on habeas review the reasonableness of the state court's application of federal law. *See Mejia v. Garcia*, 534 F.3d 1036, 1042 (9th Cir. 2008); *Clark*, 331 F.3d at 1071 (identifying,

(continued…)

Though he may, understandably, have phrased the request timidly, Sessoms nonetheless made clear to any reasonable listener his desire to have counsel present during his conversation with the police.

Apparently, the state court simply thought that Sessoms's wording was too polite. Because he inquired whether he could ask for a lawyer, rather than demanding one, the court concluded that he is not entitled to his Fifth Amendment right.[7] If this or any other court demands such specificity and precision in invoking the right to counsel,

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(…continued)
under AEDPA review, *Alvarez* and other circuit cases as possible persuasive authority).

The majority attempts to undermine the relevance of *Alvarez* by stating in a footnote that "[a]t best, circuit precedent may serve as persuasive authority," and then citing *Cullen v. Pinholster*, 131 S. Ct. 1388, 1410-11 (2011) with a "But see" signal. *Pinholster* reasons only that the Supreme Court cases that the lower court had relied upon offered limited guidance as direct authority because they lacked the "doubly deferential" standard of *Strickland v. Washington*, 466 U.S. 668 (1984), and AEDPA; it neither addresses nor undermines the established principle that this circuit's law, whether decided under AEDPA or not, serves as persuasive authority as to the reasonableness of a state court's application of existing Supreme Court precedent. *Pinholster*, 131 S. Ct. at 1410-11; *see, e.g., Kessee v. Mendoza-Powers,* 574 F.3d 675, 677-78 (9th Cir. 2009); *Clark*, 331 F.3d at 1071-72; *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000); *MacFarlane v. Walter*, 179 F.3d 1131, 1138-39 (9th Cir. 1999).

[7] To reiterate, Sessoms went on to explain his request when he immediately said, "*that's* what my dad asked me to ask you guys — uh, *give me a lawyer*." (emphasis added). The rationale of the state court and the majority is therefore meritless, as Sessoms did in fact make a more forceful request for counsel that referred back to and explained his initial polite inquiry.

particularly before it has been knowingly waived, the right will operate for only those educated individuals who have at their disposal the vocabulary and self-assuredness of my colleagues in the majority. This is precisely the standard for invocation that *Davis* expressly forbids. 512 U.S. at 459. The state court's error, therefore, was "well understood and comprehended in existing law." *Richter*, 131 S. Ct. at 786-87.

The second statement made by Sessoms was "that's what my dad asked me to ask you guys — uh, give me a lawyer." As explained above, this statement is plainly a clarification of the request made in Sessoms's first inquiry, i.e. to consult with counsel. The assertion that, in so stating, Sessoms was conveying the will of his father rather than his own is simply incorrect when the statement is read with his first inquiry. Furthermore, even in isolating Sessoms's second statement from his first, the state court was still faced with the magician's task of convincing us that "give me a lawyer" does not really mean "give me a lawyer." The court failed, however, to pull the rabbit out of its hat.

The situation presented is straightforward. A 19-year-old, upon the advice and with the assistance of his father, turned himself in to the police. His father instructed that, prior to talking to the police, he should ask for counsel. In executing these instructions to the best of his ability, the young man told the police that his request was on the advice of his father. This fact in no way affects the validity of the underlying request. Indeed, Sessoms's preface about his father's advice, if anything, reinforced and clarified that he was requesting counsel pursuant to the instructions he had received. *See Smith v.*

Illinois,469 U.S. 91, 96-97 (1984) (reversing a state court decision that failed to point to anything "inherent in the nature of [the suspect's] actual request for counsel that reasonably would have suggested equivocation" other than the use of "uh", and noting that the suspect's assertions that "she" warned him that the police would "railroad" him and advised him to get a lawyer before submitting to interrogation *reinforced* the clarity of the suspect's invocation). The state court's reasoning cannot be squared with clearly established law on this very issue.

Simply stated, when Sessoms said "give me a lawyer " he meant give me a lawyer, regardless of whether the request was on the advice of his father, his priest, or his law school professor. If any words could invoke the right to counsel guaranteed by the Fifth Amendment, these are they — there is no room for disagreement on this point. At the moment Sessoms uttered these words, the police should have ceased questioning and counsel should have been provided.[8]

The majority's affirmation of what it calls a "harsh" application of the law is an attempt to justify the state court's indefensible conclusion that this young man did not request counsel before he was read his *Miranda* rights. The suggestion that Sessoms's "inflection, body language, and manner"

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[8] That Sessoms continued to respond to the detectives' questions after requesting counsel has no bearing upon the validity of his initial invocation. "Under *Miranda* and *Edwards* . . . an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." *Smith*, 469 U.S. at 92.

support the state court's conclusion, despite what the transcript reflects, is perplexing. As I review the video, Sessoms's body language, demeanor, and tone of voice do nothing to alter the clear thrust of his language. If anything, his posture and the position of his arms indicate that perhaps he feels scared — or just cold. It is as if the majority is curiously attempting to resurrect the once-familiar maxim that "your words said no but your body language said yes."

Habeas relief should be granted not merely because the state court's application of *Miranda* law is incorrect. Rather, relief should be granted because the state court's reasoning is contrary to the Supreme Court's clear mandate that when a suspect "expresses his desire" to have counsel present, questioning must cease. *See Edwards*, 451 U.S. at 484-85. Its reasoning cannot be reconciled with the instruction that a suspect need not speak with the "discrimination of an Oxford don" when making his request. *See Davis,* 512 U.S. at 459. Its reasoning is directly at odds with the Court's direction that an expression of reliance on the advice of a third party does not create ambiguity, but rather reinforces the clarity of an invocation. *See Smith,* 469 U.S. at 96 n.4. And its conclusion is directly opposed to the Fifth Amendment itself, because an irrational holding that "give me a lawyer" does not mean give me a lawyer eviscerates the right to counsel completely.

III.

I also disagree with the state court's decision to apply the standard announced in *Davis* to the facts of this case. A state-court decision is an unreasonable application of federal law under AEDPA when it

"unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply." *Williams v. Taylor*, 529 U.S. 362, 407 (2000).[9] The state court's application of *Davis* to the pre-waiver context is just such an unreasonable extension.

Davis held that, *after* a suspect has chosen to *waive* his right to counsel, his *subsequent* request for counsel must be unambiguous. 512 U.S. at 459. The Court was not silent on the issue of whether its holding should apply in the pre-waiver context. The articulated *Davis* holding is as follows: *"*[*A*]*fter a knowing and voluntary waiver of the* Miranda *rights*, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney." *Id.* (emphasis added). The language and analysis of *Davis* itself, therefore, compels the conclusion that its application is inappropriate in the pre-waiver context. It addresses only what a suspect must do to *restore* the right to counsel after it has been knowingly disavowed, not the degree of clarity with which a suspect must invoke the right in the

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[9] *Williams*, therefore, expressly acknowledges that AEDPA allows us to evaluate whether the state court has unreasonably extended Supreme Court precedent to a new context. This disposes of the majority's suggestion that, merely because the Supreme Court has never held against the application of a particular legal principle to a specific factual circumstance, AEDPA review is foreclosed. *Williams* leaves open only the question of whether an unreasonable extension of Supreme Court law falls under the "unreasonable application" or the "contrary to" clause of § 2254(d)(1), noting that the analysis can, depending on the case, be treated under both. 529 U.S. at 408. Regardless, *Williams*'s clear instruction that a state court may not *unreasonably* extend Supreme Court precedent to a new context where it should not apply remains good law.

first instance. Indeed, it is well settled that "[i]nvocation and waiver [of *Miranda* rights] are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith*, 469 U.S. at 98. In simply reciting and applying the *Davis* test, the state court ignored the reasoning and underlying facts that justified the rigor of *Davis's* approach. The manner in which the state court applied *Davis* runs directly afoul of both *Smith* and *Davis*.[10]

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[10] This circuit has clearly held that *Davis*'s test is limited to the post-waiver context. In *United States v. Rodriguez*, 518 F.3d 1072, 1078-79 (9th Cir. 2008), we examined the language in *Davis* and concluded that the "clear statement" rule in *Davis* "addresses only the scope of invocations of *Miranda* rights in a post-waiver context." We further explained that "*Davis* addressed what the suspect must do to restore his *Miranda* rights after having already knowingly and voluntarily waived them. It did not address what the police must obtain, in the initial waiver context, to begin questioning." *Id.* at 1079. Indeed, "[t]he existence of a prior waiver explains how *Davis* can be reconciled with the Supreme Court's historic presumption against finding waiver of constitutional rights." *Id.* We have explicitly recognized, therefore, that *Davis* does depart in some measure from precedent, and is therefore appropriately applied only in a limited context.

The state court, nevertheless, applied Davis to the pre-waiver context. Although I fully recognize that the law of this circuit does not bind state courts, I reiterate the well-settled principle that our decisions may be used as persuasive authority to determine if a state court's decision is an "unreasonable application" of clearly established federal law, or whether the law is "clearly established." *Mejia*, 534 F.3d at 1042; *Duhaime*, 200 F.3d at 600-01. *Rodriguez* fully explains why extending *Davis* to the post-waiver context is unreasonable, and it is consistent with the decisions of other jurisdictions. 518 F.3d at 1079 n.6. *Rodriguez* is not, as the majority contends, "immaterial," but rather serves as relevant, persuasive authority on the issue of how *Davis* reasonably can be applied.

Because Sessoms's statements nonetheless satisfy the *Davis* requirement for a post-waiver request, there is no need to decide the question of whether *Davis* should have applied at all. Therefore, though I believe the issue worth noting, I do not rest my dissent on the state court's decision to apply *Davis* to the pre-waiver context.

IV.

Though review under AEDPA is limited, it is not, as the majority would have it, a nullity. "[W]here, as here, a state court doesn't act reasonably, deference comes to an end." *Doody*, 2011 WL 1663551, at *38 (Kozinski, C.J., concurring). *Edwards* and *Miranda* establish that, once a suspect has indicated a desire to consult with counsel, all questioning must cease. Sessoms's statements meet this standard, which is not a rigorous one, as they do the post-waiver standard set out in *Davis*. The state court and majority's empty attacks on Sessoms's grammar, tone, and body language create unreasonable and grossly prejudicial barriers to the invocation of the right to an attorney that contravene clearly established law.

Moreover, the majority's holding creates particular injustice for the poor and less educated, who often regard law enforcement with uncertainty or timidity but for whom counsel and representation are most critical. By waving its wand and declaring the words "give me a lawyer" insufficient to request a lawyer, the state court, with the help of the majority, has made *Miranda* rights disappear. Sessoms's habeas petition should be granted.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIO DINERO SESSOMS, Petitioner, No. CIV S-05-1221-JAM-GGH P

vs.

D.L. RUNNELS, Warden, Respondent. ORDER

_____/

Petitioner, a state prisoner proceeding pro se, has filed this application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local General Order No. 262.

On September 8, 2008, the magistrate judge filed findings and recommendations herein which were served on all parties and which contained notice to all parties that any objections to the findings and recommendations were to be filed within twenty days. Petitioner, who was granted an extension of time in which to do so, has filed objections to the findings and recommendations.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C) and Local Rule 72-304, this court has conducted a de novo review of this case. Having carefully reviewed the entire file, the court finds the findings and recommendations to be supported by the record and by proper analysis.

Accordingly, IT IS HEREBY ORDERED that:

1. The findings and recommendations (Docket #47) filed September 8, 2008, are adopted in full; and

2. The application for a writ of habeas corpus is denied.

DATED: October 23, 2008

/s/ John A. Mendez
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UNITED STATES DISTRICT JUDGE

/sess1221.805hc

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIO DINERO SESSOMS, Petitioner, No. CIV S-05-1221 JAM GGH P

vs.

D. L. RUNNELS, Warden, et al., Respondent's. FINDINGS & RECOMMENDATIONS

/

I. Introduction and Summary

Petitioner is a state prisoner proceeding through counsel with a petition for a writ of habeas corpus. Petitioner challenges his 2001 conviction for murder (Cal. Penal Code § 187(a)), robbery (Cal. Penal Code § 211), and burglary (Cal. Penal Code § 459), with the special circumstance that petitioner was engaged in the commission or attempted commission of the crimes of robbery and burglary when the murder took place. Petitioner is serving a sentence of life in prison without the possibility of parole and additional determinate terms totaling fifteen years.

This action is proceeding on the amended petition filed on May 5, 2006. Petitioner raises the following claims: (1) his trial counsel rendered ineffective assistance by failing to investigate and present evidence that his rights pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), were violated by police officers during his interrogation; and (2) his rights under the Fifth, Sixth, and Fourteenth Amendments were violated when interrogating police officers ignored his unequivocal request for counsel.

In analyzing this close case, the undersigned emphasizes its closeness under the correct AEDPA standard of review – unreasonableness in application of Supreme Court authority. The state court decision

must be "jaw- dropping wrong" (i.e., even more than clear error) – that after looking at all possible angles, the federal court asks rhetorically, what could the state courts possibly have been thinking in that no legitimate argument supports the state court finding when laid aside established Supreme Court authority. The undersigned knows that a petitioner will only rarely prevail under this standard as the state courts are as able to interpret binding precedent as well as the undersigned.

In their well written presentations, petitioner's counsel and respondent's counsel demonstrate that there are arguably legitimate, different legal resolutions to the issues presented. One can validly argue that the Court of Appeal got it wrong, and it might well have, but the undersigned cannot find that it was AEDPA unreasonable. While the issues presented task the brain, the jaw has not dropped.

With that said, the undersigned recommends that the petition be denied.

II. Anti-Terrorism and Effective Death Penalty Act (AEDPA)

The AEDPA "worked substantial changes to the law of habeas corpus," establishing more deferential standards of review to be used by a federal habeas court in assessing a state court's adjudication of a criminal defendant's claims of constitutional error. Moore v. Calderon, 108 F.3d 261, 263 (9th Cir. 1997).

In Williams (Terry) v. Taylor, 529 U.S. 362, 120 S. Ct. 1495 (2000), the Supreme Court defined the operative review standard set forth in § 2254(d). Justice O'Connor's opinion for Section II of the opinion constitutes the majority opinion of the court. There is a dichotomy between "contrary to" clearly established law as enunciated by the Supreme Court, and an "unreasonable application of" that law. Id. at 1519. "Contrary to" clearly established law applies

to two situations: (1) where the state court legal conclusion is opposite that of the Supreme Court on a point of law, or (2) if the state court case is materially indistinguishable from a Supreme Court case, i.e., on point factually, yet the legal result is opposite.

"Unreasonable application" of established law, on the other hand, applies to mixed questions of law and fact, that is, the application of law to fact where there are no factually on point Supreme Court cases which mandate the result for the precise factual scenario at issue. Williams (Terry), 529 U.S. at 407-08, 120 S. Ct. at 1520-1521 (2000). It is this prong of the AEDPA standard of review which directs deference to be paid to state court decisions. While the deference is not blindly automatic, "the most important point is that an *unreasonable* application of federal law is different from an incorrect application of law….[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams (Terry), 529 U.S. at 410-11, 120 S. Ct. at 1522 (emphasis in original). The habeas corpus petitioner bears the burden of demonstrating the objectively unreasonable nature of the state court decision in light of controlling Supreme Court authority. Woodford v. Viscotti, 537 U.S. 19, 123 S. Ct. 357 (2002).

The state courts need not have cited to federal authority, or even have indicated awareness of federal authority in arriving at their decision. Early v. Packer, 537 U.S. 3, 123 S. Ct. 362 (2002). Nevertheless, the state decision cannot be rejected unless the decision itself is contrary to, or an unreasonable application of, established Supreme Court authority. Id. An unreasonable error is one in excess of even a reviewing court's perception that "clear error" has occurred. Lockyer v. Andrade, 538 U.S. 63, 75-76, 123 S. Ct. 1166, 1175 (2003).

Moreover, the established Supreme Court authority reviewed must be a pronouncement on constitutional principles, or other controlling federal law, as opposed to a pronouncement of statutes or rules binding only on federal courts. Early v. Packer, 123 S. Ct. at 366.

However, where the state courts have not addressed the constitutional issue in dispute in any reasoned opinion, the federal court will independently review the record in adjudication of that issue. "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). In reviewing a state court's summary denial of a habeas petition, the court "looks through" the summary disposition to the last reasoned decision. Shackleford v. Hubbard, 234 F.3d 1072, 1079 n. 2 (9th Cir. 2000) (citing Ylst v. Nunnemaker, 501 U.S. 797, 803-04, 111 S.Ct. 2590 (1991)).

III. Background

The opinion of the California Court of Appeal contains a factual summary. After independently reviewing the record and supplementing it with bracketed material for context, the court finds this summary to be accurate and adopts it below.

> Given the nature of the claims on appeal, a detailed recitation of the facts underlying defendant's convictions is not necessary. In short, defendant and two cohorts decided to rob Edward Sherriff. During the course of the robbery, one of the men choked Sherriff and then repeatedly stabbed him. In all, Sherriff was stabbed and slashed 24 times. The men stole cash, jewelry, and the victim's two vehicles.

> Shortly thereafter, defendant left California for Oklahoma, where he ultimately turned himself in. [Petitioner was Mirandized by Oklahoma police after he turned himself into authorities on November 15, 1999; he refused to speak with the Oklahoma police at that time.] On November 19 or 20, 1999, [Sacramento] detectives interviewed defendant at a county jail in Oklahoma. The interview was videotaped. [fn] - Unbeknownst to petitioner, he was under video/audio surveillance from the time he entered the interrogation room. As the interview indicates, he was also separately audio recorded by the interrogating officers a short time into the actual introduction/questioning. The undersigned has personally viewed and listened to the pertinent parts of the video/audio tape.
>
> Early in the interview, prior to being "Mirandized," the following conversation occurred:
>
> "[DEFENDANT]: There wouldn't be any possible way that I could have a – a lawyer present while we do this?
>
> "DET. WOODS: Well, uh, what I'll do is, um-
>
> "[DEFENDANT]: Yeah, that's what my dad asked me to ask you guys … uh, give me a lawyer.[1]
>
> "DET. WOODS: What - what we're going to do is, um - I have one philosophy and that's, uh, be right up - front and be

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[1] When Detective Woods subsequently listened to the videotape of petitioner's police interrogation and compared it to the written transcript, he testified that petitioner actually said "get me a lawyer," and not "give me a lawyer." (Reporter's Transcript on Appeal (RT) at 23, 36-37.)

honest, the same way we were with [two other suspects], and not bullshit you or try to hide anything from you, okay?

"[DEFENDANT]: Okay, sir my dad was worried about, about like, I'm not going to say how some detectives do it but like a lot of officers end up switching your words afterwords [sic].

"DET. WOODS: No, we're not playing no switch games or nothing else. In fact, if - if you wouldn't mind, I'd like to -

"[DEFENDANT]: So there-

"DET. WOODS: - record whatever conversation we have and that way there will be no-you know, it's recorded and there-there's proof that we ain't playing no switch games or nothing else. Now, would you mind if I pulled out a recorder?

"[DEFENDANT]: No."

Officers did not stop the interview. However, they did not ask defendant any questions. Detective Woods told defendant he was being charged with homicide, robbery, and burglary, and that his cohorts had waived their rights and given statements to the police. The detective also indicated that if defendant told them he would not speak to officers without an attorney present, they would not be able to talk and get defendant's version of the events.

Detective Woods then told defendant he was going to advise him of his rights and make sure he understood those rights and then defendant could decide whether he wanted to speak with the detectives. Defendant asked if it would be possible for him to call his father; since he was over 18 years old, Detective Woods said no but that

they could make arrangements when they were finished talking.

Detective Woods next advised defendant of his rights under Miranda. After having been fully advised of those rights, defendant indicated he understood them. Detective Woods then asked whether defendant wanted to talk to them now, and defendant said, "Let's talk." Defendant gave a lengthy statement to the police, in which he admitted his involvement in the robbery and murder.

Prior to trial, defendant sought to have his statement to the detectives suppressed, claiming he had "clearly and unequivocally requested the assistance of an attorney." The court conducted an evidentiary hearing on the motion, heard argument, and watched the videotape of the interview. The court denied the motion, finding that defendant's initial statement was not an assertion of his rights but a question. The court noted that following defendant's question, the officers did not ask him any questions until after defendant was Mirandized and waived those rights. Accordingly, the court concluded that "there was no [Miranda] violation, [and] that the officers were not required to terminate the interrogation."

The jury found defendant guilty of first degree murder and found the special circumstances allegations true; they also found him guilty of first degree robbery and first degree burglary.

Prior to sentencing, defendant filed a motion for a new trial, alleging the trial court had erred in failing to suppress his statements. The court again reviewed arguments from both sides, spent hours reviewing the videotape, and reviewed the

> transcript of the tape. The court reiterated its finding that defendant's initial statement to the officers about a lawyer was a question, not a "direct unequivocal request to be provided with an attorney on the spot." The court did not find that a reasonable officer would have heard defendant say get me a lawyer. It noted that even if a reasonable officer would have heard that, it was not an unequivocal request for counsel. "Rather, [defendant] was just stating what his father's wishes were, not his own." Accordingly, the court denied the motion for a new trial on this ground.
>
> The court sentenced defendant to life without possibility of parole. The court also imposed a restitution fine of $10,000 (§ 1202.4, subd. (b)) and suspended an additional restitution fine in the same amount pending successful completion of parole (§ 1202.45).

(Exhibit 3 to Declaration of Eric Weaver No. 1 (hereinafter Opinion), filed on May 5, 2006.)

The record also reflects the following undisputed facts. After Detective Woods turned on the tape recorder at petitioner's interrogation, the following colloquy took place:

> DET. WOODS: Oh. It's nine twenty – twenty-six, and we're in a, uh – a interview room at the Oklahoma County Sheriff's Office Detention Center in Oklahoma City with Tio and Pat (Keller) Dick (Woods). Um, want to back up. This way there – is a recording, and you know we can't play no switch games or nothing else. Uh, I want to back up to your question you asked about an attorney. Um, first, before you ask questions, uh, I'm going to tell you why we're here, just lay it out and be up - front.

And then –then I'm going to advise you of your rights. And then it's up – for you to decide if you want the attorney or not.

T. SESSOMS: All right.

DET. WOODS: Um, we obviously you know that the – the warrant is – is charging you with homicide and robbery and burglary.

T. SESSOMS: Uh-huh.

DET. WOODS: And, um, all three of you are charged with the same thing. There's no difference, uh, in Adam's charges or Frederick's charges or – and we're working on the other part of it. But there's no difference in anybody's charges. Um, I don't know how long you've known Frederick, how long you've known Adam, how long you've known Joseph or any – anybody. Uh, but we do know what happened, and I'm not going to lie or buffalo or bullshit you. Uh, Frederick waived his rights, which surprised me, and laid it out from A to Z. Adam also waved [sic] his rights and laid it out from A to Z. And we believe, due to what Adam and Frederick both told us, that you yourself did not participate in the stabbing. And I have no reason not to believe that. Now, there's two sides to every story, or three sides or four sides. But the situation is you brought up attorney. We – if you said you didn't want to make any statement without an attorney, we're not really going to be able to talk to you and get your version of it. Uh, most all attorneys – in fact, all attorneys will – will sometimes or usually advise you not to make a statement. But – and – and we don't need to have your statement to make this case because we've already got two and a half other complete statements. And we know

> what happened, and it's accurate with the evidence at the scene. So we know it's not being made up, what Adam and Fred said. Uh, we've got quite a bit of some of the property back except for currency.
>
> SESSOMS: What's that?
>
> DET. WOODS: Money. Uh, we still don't have a lot of the coins or the bills back, but we've got jewelry and jewelry boxes back, the Bible, and so forth. And you are a suspect in it, and we are – you – obviously, you were arrested in this and --
>
> T. SESSIONS: I turned myself in.
>
> DET. WOODS: I know. Which – which I think is good, okay? But, uh, what I want to do is, um – I'm not trying to take any rights away from you or anything else. What I want to do, Tio, is advise you of your rights, make sure you understand them. Then you make the decision if you want to talk to us or not.
>
> T. SESSOMS: Uh-huh.

(Clerk's Transcript (CT) at 549-52.) The detectives asked petitioner how old he was, and petitioner responded that he was nineteen. (Id. at 552.) Petitioner asked, "Would it be a possible chance that I can call my dad?" (Id.) Detective Woods responded, "well, no, because . . . you've got to make your decision." (Id. at 553.). Woods told petitioner that he could not speak to his father until after they were "done talking to you," and that he had to make his own decision because he was "an adult." (Id.) Petitioner was then advised of his constitutional rights, including his rights to remain silent and to have the presence of an attorney during questioning. (Id. at 553-54.) The following colloquy then occurred:

> DET. WOODS: Okay. Having these rights in mind, do you wish to talk to us now?

T. SESSOMS: Um --[2]

DET. WOODS: That's solely up to you.

T. SESSOMS: Let's talk.

(Id. at 554.)

The record reflects that petitioner turned himself in to Oklahoma authorities with the knowledge and assistance of his father. (Declaration of David Hinds Jr. (Hinds declaration), filed on May 5, 2006, at 2.) Petitioner's father arranged for petitioner to surrender to Oklahoma police officer David Hinds. (Id. at 2.) Officer Hinds transported petitioner to the Langston Police Department. (Id.) At the police station, Police Chief Gregory Bufford read petitioner his Miranda rights. (Id.; Declaration of Gregory Bufford (Bufford declaration), filed on May 5, 2006, at 1.) Chief Bufford asked petitioner whether he wanted to "make a statement" and petitioner responded, "No." (Hinds declaration at 2; Bufford declaration at 2.) As a result of petitioner's invocation of his right to remain silent, he was not questioned by Oklahoma authorities. (Id.) Petitioner was subsequently transferred to Oklahoma City to await extradition to California. (Hinds declaration at 3.) A few days later, California police officers Woods and Keller arrived to question petitioner and extradite him to California. (Hinds declaration at 3; Bufford declaration at 2.) At that point, the interrogation described above took place.

Roseann Cerrito, a private investigator licensed in California who was retained by petitioner's trial counsel to investigate the charges against petitioner, told petitioner's trial counsel on at least three occasions that petitioner had invoked his Miranda rights when he was taken into custody in Oklahoma. (Declaration of Roseann Cerrito (Cerrito

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[2] This court's review of the videotape of petitioner's interrogation reflects that petitioner shrugged his shoulders at this point and made a short pause before responding.

declaration), filed on May 5, 2005, at 2.) Trial counsel told Ms. Cerrito that "it did not matter that Mr. McEwan [sic] invoked his Miranda rights to the officers in Oklahoma because Mr. Sessoms had given his statement to Sacramento Police Officers." (Id.) Trial counsel did not ask Ms. Cerrito to contact Oklahoma police officers Hinds and Bufford, and Cerrito did not do so. (Id.) Petitioner also informed his trial counsel "a minimum of three times" that he had invoked his constitutional rights when he was questioned by Oklahoma police officers Bufford and Hinds. (Declaration of Tio Dinero Sessoms (Sessoms declaration), filed on May 5, 2005, at 2.) Petitioner's trial counsel declares that he has "no current recollection of being informed by Mr. Sessoms or Ms. Cerrito that Mr. Sessoms invoked his *Miranda* rights to the officers who took Mr. Sessoms into custody in Oklahoma." (Declaration of Howard McEwan (McEwan declaration), filed on May 5, 2006, at 2.) Counsel states that he did not call anyone in Oklahoma to inquire about these claims and did not have a tactical reason for not doing so. (Id.)

IV. Petitioner's Claims

A. Ineffective Assistance of Counsel

Petitioner's first claim is that his trial counsel rendered ineffective assistance by failing to investigate and present evidence that his constitutional rights were violated by Sacramento Detectives Woods and Keller during his interrogation. He argues that because of counsel's deficient investigation, he failed to discover that petitioner had invoked his Miranda rights when he was first questioned by Oklahoma Detectives Hinds and Bufford. Petitioner claims that if counsel had conducted a full investigation into the circumstances of the interrogation, he could have filed a successful suppression motion arguing that his questioning by Sacramento deputies Woods and Keller violated his rights pursuant to Michigan v. Mosley, 423 U.S. 96, 97-98 (1975). (Petitioner's Memorandum of Points

and Authorities in Support of Amended Petition (P&A) at 18-26; Traverse at 4-5.)[3]

Petitioner raised this claim for the first time in a petition for writ of habeas corpus filed in the Sacramento County Superior Court on April 16, 2004. (page 9 of Exhibit 6 to "Declaration of Eric Weaver No. 1," filed on May 5, 2006.) On May 20, 2004, the Superior Court denied the petition without specifically mentioning this claim. (Ex. 7 to "Declaration of Eric Weaver No. 1.") On May 27, 2004, petitioner wrote a letter to the California Superior Court, in which he reiterated his claim that his trial counsel rendered ineffective assistance when he failed to conduct sufficient investigation of his interrogation by Oklahoma police. (Ex. 8 to "Declaration of Eric Weaver No. 1.") The Superior Court treated this letter as a request for reconsideration and denied petitioner's claim of ineffective assistance of counsel, citing In re Dixon, 41 Cal.2d 756, 759 (1953). (Ex. 9 to "Declaration of Eric Weaver No. 1.") On May 27, 2004, petitioner filed a petition for writ of habeas corpus in the California Supreme Court, in which he argued that his trial counsel rendered ineffective assistance by failing to discover that petitioner invoked his Miranda rights when questioned by Oklahoma authorities. (page 9 of Exhibit 3 to "Declaration of Eric Weaver No. 2," filed on May 5, 2006.) That petition was summarily denied. (Exhibit 4 to

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[3] In the amended petition, petitioner argues that Sacramento Detectives Keller and Woods violated his constitutional rights as articulated in Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (describing the procedures police must follow when a suspect requests a lawyer) when they questioned him after he had invoked his Miranda rights. (Am. Pet. at 4-5; P&A at 21- 24.) In the traverse, petitioner abandons his reliance on Edwards because he did not expressly invoke his right to counsel when he spoke to Detectives Hinds and Bufford. (Traverse at 4.) Petitioner now relies on Michigan v. Mosley in support of this claim. (Traverse at 4-10.)

Declaration of Eric Weaver No. 2.) On September 20, 2004, petitioner filed another petition for a writ of habeas corpus, in which he raised the same claim. (Ex. 5 to Declaration of Eric Weaver No. 2.) That petition was denied with a citation to In re Waltreus, 62 Cal.2d 218 (1965). (Ex. 6 to Declaration of Eric Weaver No. 2.)

As set forth in the brief, the first claim, the Mosley ineffective assistance claim, was decided in a welter of post-direct review habeas petitions. Because the various courts either missed the issue or it was not presented clearly, the decisions include no rulings, procedural denials, reconsideration denials on the merits and silent denials. The undersigned will review the Mosley issue independently under the proper AEDPA standard.

1. Applicable Law

a. Ineffective Assistance of Counsel

The Sixth Amendment guarantees the effective assistance of counsel. To support a claim of ineffective assistance of counsel, a petitioner must first show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). After a petitioner identifies the acts or omissions that are alleged not to have been the result of reasonable professional judgment, the court must determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. Id. at 690; Wiggins v. Smith, 539 U.S. 510, 521 (2003). In assessing an ineffective assistance of counsel claim "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance.'" Kimmelman v. Morrison, 477 U.S. 365, 381 (1986) (quoting Strickland, 466 U.S. at 689). There is in addition a strong presumption that counsel "exercised acceptable

professional judgment in all significant decisions made." Hughes v. Borg, 898 F.2d 695, 702 (9th Cir. 1990) (citing Strickland, 466 U.S. at 689). However, "'a single, serious error may support a claim of ineffective assistance of counsel' – including counsel's failure to file a motion to suppress." Moore v. Czerniak, ___ F.3d ___, 2008 WL 2875453 (9th Cir. (Cal.)) at *8 (quoting Kimmelman, 477 U.S. at 383 (1986).

Second, a petitioner must establish that he was prejudiced by counsel's deficient performance. Strickland, 466 U.S. at 693-94. Prejudice is found where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. See also Williams, 529 U.S. at 391-92; Laboa v. Calderon, 224 F.3d 972, 981 (9th Cir. 2000). In cases involving counsel's failure to file a suppression motion, the question of prejudice is governed by Arizona v. Fulminante, 499 U.S. 279, 308 (1991). Czerniak, 2008 WL 2875453 at *7. In order to establish prejudice, petitioner must demonstrate that a motion to suppress would have been meritorious and that counsel's failure to file such a motion fell below an objective standard of reasonableness. Id. at *8. The analysis must be conducted with an awareness that "a confession is like no other evidence," and that "a full confession may have a 'profound impact' on the jury." Fulminante, 499 U.S. at 296. This court must "exercise extreme caution" before determining that counsel's failure to file a motion to suppress petitioner's confession was non-prejudicial. Id.

In determining an ineffective assistance claim on an assertion that an attorney performed deficiently on potential legal issue in the trial court, the two prongs, for the most part, overlap. That is, to the extent that the outcome of the legal issue would clearly have been in favor of petitioner had it been raised, it is likely that the attorney had no

reasonable tactical decision in not raising the issue. The court will thus tackle the prejudice issue, i.e., the legal issue in question, first.

b. Merits of a Motion to Supress Petitioner's Confession

"The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. at 444. To this end, custodial interrogation must be preceded by advice to the potential defendant that he has the right to consult with a lawyer, the right to remain silent and that anything stated can be used in evidence against him. Id. at 473-74. Miranda warnings are "'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'" Oregon v. Elstad, 470 U.S. at 305 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

Once Miranda warnings have been given, if a suspect makes an unambiguous statement invoking his constitutional rights, "all questioning must cease." Smith v. Illinois, 469 U.S. 91, 98 (1984). See also Miranda, 384 U.S. at 473-74; Michigan v. Mosley, 423 U.S. at 100. Any subsequent statements are relevant only to the question whether the accused waived the right he had previously invoked. Smith, 469 U.S. at 98. "Invocation and waiver are entirely distinct inquiries, and the two must not be blurred by merging them together." Id.

As explained above, petitioner relies on Michigan v. Mosley in support of his claim of ineffective assistance of counsel. Mosley involved the following fact pattern:

> Before his initial interrogation, Mosley was carefully advised that he was under no

> obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the Miranda warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete Miranda warnings at the outset of the second interrogation. He was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options.

423 U.S. at 104-05. The issue raised in Mosley was whether "the conduct of the [second set of police interrogators] that led to Mosley's incriminating statement did in fact violate the Miranda 'guidelines,' so as to render the statement inadmissible in evidence against Mosley at his trial." Id. at 100. Resolution of that issue involved the interpretation of the following passage set forth in the Miranda decision:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

> Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

384 U.S. at 473-474.

The Supreme Court rejected a per se proscription of any further interrogation once the person questioned has indicated a desire to remain silent, holding instead "that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" Mosley, 423 U.S. at 104. As the Supreme Court explained, "[a] reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . ." Id. at 103-04 (quoting Miranda, 384 U.S. at 479). "The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id. (quoting Miranda, 384 U.S. at 474.)

A reviewing court must look to all of the circumstances to determine if a person's right to remain silent has been violated. Mosely, 423 U.S. at 96. The court in Mosley considered the amount of time that had elapsed between the two interrogations, the provision of fresh Miranda warnings, the scope of the second interrogation, and the zealousness of officers in pursuing questioning after the suspect had asserted his right to remain silent. See Id., 423 U.S. 104-6; United States v. Hsu, 852 F.2d 407, 410 (9th Cir. 1988). However, "[a]t no time … did the Court [in Mosley] suggest that these factors were exhaustive, nor did it imply that a finding as to one of the enumerated factors--such as, for example, a finding that only a short period of time had elapsed--would forestall the more general inquiry into whether, in view of all relevant circumstances,

the police 'scrupulously honored' the right to cut off questioning." Hsu, 852 F.2d at 410. In reaching the conclusion that Mosley's confession was valid, the Supreme Court specifically noted that there was no evidence the police "failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." Mosley, 423 U.S. at 105-106. Indeed, the police did not "in any way [attempt] to persuade Mosley to reconsider his position." Id. at 104.[4]

In Hsu, the suspect entered a Sears store and was arrested inside by Agents Kuehl and Valentine. 852 F.2d at 409.[5] The agents brought Hsu outside the store. (Id.) Valentine read Hsu his Miranda rights and he agreed to waive them. (Id.) After answering a few questions, Hsu asked if he could remain silent. (Id.) Agent Valentine said that he could and stopped the interview. (Id.) Another agent then placed Hsu in her car and drove him to the a house where a search was being conducted. After participating in the search, a different agent (Hill) approached the car where Hsu was waiting. (Id.) Hill did not know that Hsu had previously invoked his right to silence. (Id.) Hill advised Hsu of his Miranda rights, he waived them, and confessed. (Id.) At issue was whether "the

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[4] Although the second round of questioning in Mosley concerned a different crime than the first round, several circuits, including the Ninth Circuit, have concluded that the fact that two interrogations involve the same subject matter is insufficient to render the second interrogation unconstitutional. See e.g., Hsu, 852 F.2d at 410; United States v. House, 939 F.2d 659, 662 (8th Cir. 1991).

[5] Although Supreme Court holdings are the only source of clearly established law under the habeas corpus statute, circuit court holdings are persuasive authority for determining whether a state court decision is an unreasonable application of Supreme Court law. Clark v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

interrogation by Agent Hill violated Hsu's fifth amendment right not to incriminate himself." (Id.)

The Ninth Circuit concluded that petitioner's right to remain silent was scrupulously honored because the agents immediately ceased questioning when Hsu expressed a desire to remain silent, changed location, and provided fresh Miranda warnings. The court appeared to particularly focus on whether the police used pressure on the suspect to extract information and whether a fresh set of Miranda warnings was given. (Id. at 410.) The court specifically noted that Hsu did not "contend that DEA agents harassed him, or even that they pressured him in any way to revoke his assertion of the right to remain silent." (Id.) On the contrary, the record demonstrated that Agent Hill "exerted no pressure upon Hsu whatsoever," but merely "read Hsu his rights a second time, and Hsu responded with a valid waiver." (Id. at 412.)

In United States v. Barone, 968 F.2d 1378 (1st Cir. 1992), the First Circuit concluded that a confession was obtained in violation of Mosley where the defendant resisted questioning, was held for over 24 hours, was interrogated four times before he began to discuss the crime, and was twice intimidated by suggestions that he "would be in substantial [physical] danger if he returned to Boston without cooperating." Id. at 1385. The First Circuit concluded that "the focus on danger, the failure to repeat warnings, the increasing length of incarceration, the officers' efforts to ingratiate themselves, and the number of encounters deliberately aimed at eliciting cooperation on the same crime are sufficient to support a finding that this was a case 'where the police failed to honor a decision of a person in custody to cut off questioning, … by persisting in repeated efforts to wear down his resistance and make him change his mind.'" Id. at 1386 (quoting Mosley, 423 U.S. at 105-06).

2. Analysis

a. Would A Motion to Suppress Have Been Meritorious?

In this case, as described above, petitioner invoked his right to silence and declined to speak to Oklahoma deputies Hinds and Bufford when he turned himself in on November 15, 1999. Petitioner was then transported to the Oklahoma County jail in Oklahoma City. Five days later, he was interviewed by Sacramento deputies Woods and Keller. First of all, it was not wrong *per se* for the Sacramento detectives to attempt to interrogate petitioner. After all, petitioner had turned himself into authorities (implying a possible desire to cooperate), and it had been four days since any questioning had taken place. The Sacramento authorities did not "keep petitioner in custody;" there was no way petitioner was going to be released on murder charges pending extradition proceedings or a waiver thereof. However, the Sacramento detectives had to be careful about the way they commenced the interview lest it be found straight away that they were not sensitive to the fact that he had previously refused to speak, and if petitioner continued his desire not to speak, to "scrupulously honor" the continued desire to remain silent.

It is quite apparent that the detectives were taken back by petitioner's statement about an attorney right out of the box. More will be said about that in the following section. However, the Mosley implication was that petitioner did not desire to cut off questioning, he was simply asking about an attorney before the substantive questions were to commence. Petitioner followed that initial statement up with a statement about his Dad thinking that petitioner should ask for an attorney because of a perceived fear that the detectives would "switch words" if an attorney was not present. Again, petitioner is not asking to be left alone or to be silent – he is making statements about being counseled

during the questioning. The detectives marched right up to the line of coercive conduct under the circumstances by initially ignoring petitioner's attorney question, and then "counseling" petitioner that the other two suspects had given complete statements. Then the detectives told petitioner that if he wanted the police to hear his side of the story (of course, there was no benefit to petitioner from the police hearing his side of the story), he needed to tell them then. The police offered their opinion that an attorney would advise petitioner to make no statement; however, this advice cuts both ways in that this comment might well convince petitioner that if lawyers would not allow a statement, then maybe he should not make one.

However, the Sacramento detectives drew back from the line. They fairly quickly came back to petitioner's question about an attorney. They informed petitioner that he would be advised about his rights "[a]nd then it's up – for you to decide if you want an attorney or not." Petitioner was also told: "I'm not trying to take any rights away from you or anything else. What I want to do, Tio, is advise you of your rights, make sure you understand them. Then you make the decision if you want to talk to us or not." When after being advised of his Miranda rights and being asked if he wished to waive his Miranda rights before substantive questioning, he was advised: "That's solely up to you." And this re-advice of rights, according to Hsu, is the most important factor in finding the absence of a Mosley violation.

All in all, petitioner had every opportunity to persist in remaining silent, or getting a lawyer, but he chose to say, and rather quickly: "Let's talk." Here as in Mosley, a significant amount of time elapsed between the first and second interrogations. There is no evidence that petitioner suffered from harsh treatment while in custody. The Sacramento police officer's statements were not unduly coercive, and the preface to advice of rights did not last for a long time. Petitioner was not threatened with more years in

prison if he did not talk; the officers did not relate that petitioner would be given any specific benefit if he gave his statement. Petitioner was not given the "parade of prison horribles" with the implicit representation that such might not occur if he gave a statement. Of course, the Sacramento detectives were desirous of getting a statement having traveled from California to Oklahoma. But it cannot be said from an AEDPA standpoint that the preface to questioning amounted to wearing down petitioner's initial steadfast resolve not to talk; as previously noted, petitioner did not once indicate that he desired to remain silent.

This is not to say that petitioner's arguments find no support in case law applying Supreme Court authority. It is to say that respondent's arguments find enough support in case authority that a district court would be hard pressed to say that a motion to suppress would surely have been granted.[6] And it appears that the cases which did find a Mosley problem described situations more severe than that presented here. See United States v. Olof, 527 F.2d 752, 753 (9th Cir. 1975) (suspect's right to cut off questioning was not scrupulously honored where police used psychological pressure to induce the suspect to confess, telling him "that prison was a 'dark place,' where they 'pumped air' to the prisoners"); Barone, 968 F.2d at 1385 n.10 ("the use of accurate information [when talking to the suspect] does not weigh in [the government's] favor if done for

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[6] The undersigned uses the word "surely" advisedly. The undersigned must find not only that the probable outcome would have been different, or that his confidence in the outcome is undermined, but that it would be unreasonable for the state courts, in their silent denials, to have applied Supreme Court authority and not have had their confidence undermined based on Mosely. See Sessoms v. Runnels, 2006 WL 3734131 (ED. Cal. 2006) citing Bell v. Cross, 534 U.S. 685, 698-699, 122 S.Ct. 1843, 1852 (2002).

the purpose of pressuring the defendant to abandon his right to remain silence"); United States v. Schwensow, 151 F.3d 650, 659 (7th Cir. 1998) ("the constitutionality of a subsequent police interview depends not on its subject matter but rather on whether the police, in conducting the interview, sought to undermine the suspect's resolve to remain silent"). But cf. United States v. Pheaster, 544 F.2d 353, 366, 368 (9th Cir. 1976) (court concluded that defendant voluntarily waived his right to silence when assertions by the police consisted of "objective, undistorted presentation[s]," stressing the "key distinction between questioning the suspect and presenting the evidence available against him.").

The court therefore finds insufficient prejudice for petitioner's first claim – the Mosley ineffective assistance of counsel claim. For all the reasons set forth above, after an independent review of the record, the undersigned does not find that the California courts were unreasonable in determining that counsel was not ineffective for not raising a Mosley issue on account of insufficient prejudice. There is no need to determine whether reasonable counsel would have made a Mosley suppression motion in any event.

B. Miranda Warnings/Request for Counsel

Petitioner's next claim is that California detectives Woods and Keller improperly ignored his unequivocal request for counsel and, instead of terminating the interview, actively sought to convince him to speak to them without an attorney. (P&A at 28-30.) The California Court of Appeal denied this claim, reasoning as follows:

> Defendant contends the police obtained his confession only after disregarding his unequivocal request for an attorney. He thus asserts the confession is inadmissible and all counts must be reversed. (Edwards v. Arizona (1981) 451 U.S. 477, 485-487 [68

L.Ed.2d 378] (Edwards); Miranda, supra, 384 U.S. at p. 474.) In reviewing this claim, we defer to the trial court on questions of fact and decide the Miranda/Edwards issue de novo. (People v. Bradford (1997) 14 Cal.4th 1005, 1032-1033.)

"Under the familiar standards of Miranda, … a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. [Citations.]" (People v. Sims (1993) 5 Cal.4th 405, 440 (Sims).) "Once having invoked these rights, the accused 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' (Edwards [,supra,] 451 U.S. [at pp. 484-485].)" (Sims, supra, 5 Cal.4th at p. 440.)

For the Miranda/Edwards prohibitions against further questioning to apply, a suspect's invocation of the right to counsel must be clear and unequivocal. (Davis v. United States (1994) 512 U.S. 452, 460-462 [129 L.Ed.2d 362] (Davis).) The application of Edward's ""rigid" prophylactic rule' " requires the court to determine whether the suspect "'actually invoked' " his right to counsel. (Id. at p. 458.) "To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry." (Id. at pp. 458-459.)

"Invocation of the Miranda right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of

an attorney.' [Citation .] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, [it does] not require the cessation of questioning." (Davis, supra, 512 U.S. at p. 459.) "Rather, the suspect must unambiguously request counsel." (Ibid.)

"'[A] statement either is such an assertion of the right to counsel or it is not.' [Citation.] Although a suspect need not 'speak with the discrimination of an Oxford don,' [citation], he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect. [Citation.]" (Davis, supra, 512 U.S. at p. 459.)

In the present case, although defendant twice explicitly referred to an attorney, neither statement was an unequivocal or unambiguous request for counsel. On the first occasion, defendant asked, "There wouldn't be any possible way that I could have a … lawyer present while we do this?" As the court found, this was a question, not an unambiguous request. Defendant's second reference to an attorney was "Yeah, that's what my dad asked me to ask you guys … uh, give me a lawyer."

We find defendant's first statement is legally indistinguishable from the equivocal remarks in Davis, "'Maybe I should talk to a lawyer'" (Davis, supra, 512

U.S. at p. 455), and in People v. Crittenden (1994) 9 Cal.4th 83, 123 (Crittenden), "'Did you say I could have a lawyer?'" These equivocal remarks in Davis and Crittenden were not requests for counsel triggering the Edwards rule. (Davis, supra, 512 U.S. at p. 462.) Similarly, "[i]n the present case, defendant did not unequivocally state that he wanted an attorney, but simply asked a question." (Crittenden, supra, 9 Cal.4th at p. 130.)

Nor was defendant's second reference to an attorney an unequivocal request for an attorney. At best, it was a statement of his father's advice to him. We cannot find such a statement to be "sufficiently clear[ ] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (Davis, supra, 512 U.S. at p. 459.)

However, even if these statements were somehow construed to be actual invocations of defendant's right to counsel such that defendant's Miranda rights were violated, under the particular circumstances of this case, any such violation did not taint the subsequent confession that was obtained in accordance with Miranda .

In Oregon v. Elstad (1985) 470 U.S. 298 [84 L.Ed.2d 222] (Elstad), the United States Supreme Court held that failure to give a young adult defendant his Miranda warnings prior to his confession to burglary did not taint that defendant's subsequent confession, given after officers read his Miranda rights and he agreed to speak with them. Although "Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm" (id. at p. 307), "[i]t is an unwarranted extension of

Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (Id. at p. 309.)

This case is even more compelling than Elstad in that here, defendant did not make any incriminating statements until after having been advised of and waiving his Miranda rights. At the time defendant made his remarks about an attorney he had not been Mirandized. At that time, defendant had also not made any statements about the robbery and murder of Sherriff, and the officers had not asked any questions about the night of the crimes. Following defendant's two references to an attorney, the officers did not ask him any questions at all. Instead, they fully advised him of his Miranda rights. After being fully advised of his Miranda rights and indicating he understood those rights, Detective Woods asked if defendant wanted to talk to them and he replied, "Let's talk." Defendant makes no argument, and there is no evidence, that there was any defect in the advisement of rights or the waiver, or that it was not voluntary and informed. Accordingly, there was no Miranda violation.

> Because defendant's incriminating statements were not the product of a Miranda violation, the trial court correctly declined to exclude them on that ground.

(Opinion at 5-9.)

In support of his claim in this regard, petitioner argues that his choice of words was meant to convey his request for counsel "in a respectful fashion" and that the fact his invocation was in the form of a question should not be construed as "equivocation on his part." (P&A at 29.) Petitioner notes that his polite way of asking questions was apparent throughout the interview. (Id.) He explains that his remark about his father simply clarified why he wanted an attorney and was not meant to convey his father's wishes as separate from his own. (Id. at 30.) Petitioner also contends that after he made his request, the police improperly "badgered" him into waiving his right to counsel. (Id. at 29-30.)

1. Applicable Law

In Edwards v. Arizona, the United States Supreme Court held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation. 451 U.S. at 484-85. A suspect must "unambiguously request counsel," which means that he "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." Davis v. United States, 512 U.S. 452, 459 (1994). "[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." Edwards, 451 U.S. at 484-85. The Supreme Court has stated that Edwards establishes a "'rigid' prophylactic rule." Smith v. Illinois, 469 U.S. at 95 (citing Fare v. Michael C., 442 U.S. 707, 719 (1979)). This requirement is "designed to prevent police from

badgering a defendant into waiving his previously asserted Miranda rights." Davis, 512 U.S. at 458 (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)).

The United States Supreme Court has recognized that "[o]n occasion, an accused's asserted request for counsel may be ambiguous or equivocal." Smith v. Illinois, 469 U.S. at 95. For instance, in Davis, defendant's statement, "Maybe I should talk to a lawyer" was insufficient to constitute an invocation of the right to counsel. Similarly, the Ninth Circuit Court of Appeals has concluded that utterances which include the words "might," "maybe," or "perhaps" should generally be deemed ambiguous. Robinson v. Borg, 918 F.2d 1387, 1393-94 (9th Cir. 1990) (citing cases). See also Arnold v. Runnels, 421 F.3d 859, 865 (9th Cir. 2005) ("where a suspect's request for counsel is qualified with words such as 'maybe' or 'might,' we have concluded that the suspect did not unambiguously invoke his right to counsel"); Clark v. Murphy, 331 F.3d at 1066 (defendant's statement "I think I would like to talk to a lawyer" was ambiguous, and therefore the police were not required to cease questioning); Robtoy v. Kincheloe, 871 F.2d 1478, 1482 (9th Cir. 1989) ("maybe I should call my attorney" deemed an equivocal request for counsel). The Ninth Circuit has also found requests for counsel to be equivocal when the defendant asks the police whether they think he should get a lawyer. See e.g., United States v. Ogbuehi, 18 F.3d 807, 813 (9th Cir. 1994) (defendant's question, "Do I need a lawyer" or "Do you think I need a lawyer" does not "rise to the level of even an equivocal request for an attorney"). Questions that raise uncertainty about whether the suspect actually wants a lawyer are also equivocal assertions of the right to counsel. See e.g., United States v. Younger, 398 F.3d 1179, 1187 (9th Cir. 2005) (defendant's statement "[b]ut, excuse me, if I am right, I can have a lawyer present … through all this, right?" does not constitute unambiguous invocation of right to counsel). Notwithstanding the

above examples, the Ninth Circuit has recognized that "[o]ur own precedent is not much help since it is somewhat inconsistent on what constitutes an equivocal request for a lawyer." Clark v. Murphy, 331 F.3d at 1070. However, if a suspect "makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," the police are not required to stop the interrogation. Davis, 512 U.S. at 459 (emphasis added).

Where an involuntary confession is improperly admitted into evidence at trial, a reviewing court must apply a harmless error analysis, assessing the error "in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." Fulminante, 499 U.S. at 308. In the context of habeas review, the standard is whether the error had substantial and injurious effect or influence in determining the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993); Beatty v. Stewart, 303 F.3d 975, 994 (9th Cir. 2002); Henry v. Kernan, 197 F.3d 1021, 1029 (9th Cir. 1999).

2. Discussion

Petitioner argues that he invoked his right to counsel at the beginning of the interview with Detectives Woods and Keller and that the admission of his subsequent statements against him at trial violated his rights under Miranda v. Arizona. (Am. Pet. at 5.) The resolution of this issue turns on whether petitioner's statements: "There wouldn't be any possible way that I could have a – lawyer present while we do this?" and "Yeah, that's what my dad asked me to ask you guys . . . uh, give [get] me a lawyer," constitute an unequivocal request for counsel. The California courts concluded that petitioner's statements did not constitute an unequivocal request for counsel. The question before this court is whether the state courts' conclusion in

this regard is an unreasonable application of clearly established United States Supreme Court authority and/or an unreasonable determination of the facts of this case.[7]

Petitioner argues that his request for counsel is "strikingly similar" to the request made by the defendant in Alvarez v. Gomez, 185 F.3d 995, 998 (9th Cir. 1999). In that case, the Ninth Circuit concluded that, when considered together, a suspect's

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[7] The California Court of Appeal also concluded that, even if petitioner made an unequivocal request for counsel, his statements were admissible pursuant to Oregon v. Elstad, 270 U.S. 298 (1985). Petitioner argues that the holding in Elstad is "completely inapposite" to the issue presented here. (P&A at 33.) In response, respondent argues that even if the state appellate court incorrectly relied on Elstad, the court correctly determined that petitioner did not make an unequivocal request for counsel. (Answer at 32.) In Elstad, the defendant made a voluntary incriminating statement without first being given the requisite Miranda warnings. One hour later, he was advised of and waived his Miranda rights and executed a written confession. The Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." 470 U.S. at 318. Pursuant to the holding in Elstad, a defendant's voluntary statement which is inadmissible solely on the ground of a Miranda violation does not taint a subsequent voluntary statement. Id. at 298, 306, 309. The issue presented here, on the other hand, is whether petitioner made an unequivocal request for counsel. If he did, "a valid waiver of [the right to counsel] cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Edwards, 451 U.S. at 484-85. Petitioner is correct that the holding in Elstad has no applicability to the issues raised in the instant habeas petition. Respondent essentially concedes this point. Accordingly, that part of the state court decision which relies on Elstad is contrary to United States Supreme Court authority and cannot provide the basis for denying petitioner's Miranda claim.

three questions: "(1) Can I get an attorney right now, man?; (2) You can have attorney right now?; and (3) Well, like right now you got one?" constituted an unambiguous request for counsel. Although phrased as questions, it was clear that the suspect in Alvarez wanted an attorney "right now." Similarly, in Smith v. Endell, 860 F.2d 1528 (9th Cir. 1988), the Ninth Circuit deemed "Can I talk to a lawyer?" a clear invocation of the right to counsel. Id. In Robinson, "I have to get me a good lawyer, man" and "Can I make a phone call?" were deemed a clear invocation of the right to counsel. 918 F.2d at 1389.

In the situation presented here, although close, the undersigned cannot find that the Court of Appeal was AEDPA unreasonable in its determination that no unequivocal request for counsel had been made. Petitioner's first statement was an oddly stated "negative possibility" question: "There wouldn't be any possible way….." If petitioner had asked affirmatively, "would it be possible...," petitioner's argument that a reasonable person would have understood such as a direct request for counsel would be on much stronger ground. It may be that the interrogating detective knew full well that he was now on tenuous grounds because he made no immediate attempt to answer the question. Perhaps, the detective was trying to buy time to figure out whether an unequivocal request had been made. However, the test here is not what the detective subjectively understood; it is an objective test which inquires whether a reasonable police questioner would have understood this negative possibility question as an unequivocal request for counsel. And in this AEDPA context, in order to rule for petitioner, the undersigned must find that no reasonable court would find that the request was equivocal.

Of course, petitioner's follow-up statement that his Dad had asked him to ask about an attorney adds to petitioner's case. But again, this is an odd way to ask for counsel oneself – putting that request in words making it appear to be the request of an

absent person. The police are not responsible for the unique way in which petitioner was seeking counsel. The undersigned is not being critical of petitioner; but if his way of directly asking for counsel is to approach the request in an obscure manner, the law will not recognize such as an unequivocal request. The Edwards claim cannot be sustained.

Conclusion

Accordingly, for the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

Dated: 09/08/08

/s/ Gregory G. Hollows

United States Magistrate Judge

ggh:8
sessoms1221.hc

APPENDIX E

Court of Appeal, Third Appellate District - No. C041139

S122747

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

TIO DINERO SESSOMS, Defendant and Appellant.

Petition for review DENIED.

SUPREME COURT
FILED
MAR 24. 2004
Frederick K 0hlrich Clerk
DEPUTY

GEORGE

Chief Justice

APPENDIX F

NOT TO BE PUBLISHED

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TIO DINERO SESSOMS, Defendant and Appellant.	C041139 (Super. Ct. No. 99F09138 FILED Jan 12 2004 COURT OF APPEAL – THIRD DISTRICT DEENA C. FAWCETT BY_____ Deputy

Defendant Tio Dinero Sessoms appeals his convictions for murder (Pen. Code, § 187, subd. (a)),[1] robbery (§ 211), and burglary (§ 459). He contends his statement to officers was inadmissible under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*). We disagree. He also contends a $10,000 restitution fine pursuant to section 1202.45 was improperly imposed. On this, we agree.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Given the nature of the on appeal, a detailed recitation of the facts underlying defendant's convictions is not necessary. In short, defendant and two cohorts decided to rob Edward Sherriff. During

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

the course of the robbery, one of the men choked Sherriff and then repeatedly stabbed him. In all, Sherriff was stabbed and slashed 24 times. The men stole cash, jewelry, and the victim's two vehicles.

Shortly thereafter, defendant left California for Oklahoma, where he ultimately turned himself in. On November 19 or 20, 1999, detectives interviewed defendant at a county jail in Oklahoma. The interview was videotaped.

Early in the interview, prior to being "Mirandized," the following conversation occurred:

> "[DEFENDANT]: There wouldn't be any possible way that I could have a -- a lawyer present while we do this?
>
> "DET. WOODS: Well, uh, what I'll do is, um --
>
> "[DEFENDANT: Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer.
>
> "DET. WOODS: What -- what we're going to do is, um -- I have one philosophy and that's, uh, be right up-front and be honest, the same way we were with [two other suspects], and not bullshit you or try to hide anything from you, okay?
>
> "[DEFENDANT]: Okay, sir my dad was worried about, about like, I'm not going to say how some detectives do it but like a lot officers end up switching your words afterwords [*sic*].
>
> "[DET. WOODS: No, we're not playing no switch games or nothing else. In fact, if--if you wouldn't mind, I'd like to --
>
> "[DEFENDANT]: So there --
>
> "DET. WOODS: -- record whatever conversation we have and that way there

> will be no -- you know, it's recorded and there -- there's proof that we ain't playing no switch games or nothing else. Now, would you mind if I pulled out a recorder? "
>
> "[DEFENDANT]: No. "

Officers did not stop the interview. However, they did not ask defendant any questions. Detective Woods told defendant he was being charged with homicide, robbery, and burglary, and that his cohorts had waived their rights and given statements to the police. The detective also indicated that if defendant told them he would not speak to officers without an attorney present, they would not be able to talk and get defendant's version of the events.

Detective Woods then told defendant he was going to advise him of his rights and make sure he understood those rights and then defendant could decide whether he wanted to speak with the detectives. Defendant asked if it would be possible for him to call his father; since he was over 18 years old, Detective Woods said no but that they could make arrangements when they were finished talking.

Detective Woods next advised defendant of his rights under *Miranda*. After having been fully advised of those rights, defendant indicated he understood them. Detective Woods then asked whether defendant wanted to talk to them now, and defendant said, "Let's talk." Defendant gave a lengthy statement to the police, in which he admitted his involvement in the robbery and murder.

Prior to trial, defendant sought to have his statement to detectives suppressed, claiming he had "clearly and unequivocally requested the assistance of an attorney." The court conducted an evidentiary hearing on motion, heard argument, and watched the videotape of the interview. The court denied motion, finding that defendant's initial statement was not an assertion of his rights but a question. The court noted that following defendant's question, the officers did

not ask him any questions until after defendant was Mirandized and waived those rights. Accordingly, the court concluded that "there was no [*Miranda*] violation, [and] that the officers were not required to terminate the interrogation."

The jury found defendant guilty of first degree murder and found the special circumstances allegations true; they also found him guilty of first degree robbery and first degree burglary.

Prior to sentencing, defendant filed a motion for a new trial, alleging the trial court had erred in failing to suppress his statements. The court again reviewed arguments from both sides, spent hours reviewing the videotape, and reviewed the transcript of the tape. The court reiterated its finding that defendant's initial statement to the officers about a lawyer was a question, not a "direct unequivocal request to be provided with an attorney on the spot." The court did not find that a reasonable officer would have heard defendant say get me a lawyer. It noted that even if a reasonable officer would have heard that, it was not an unequivocal request for counsel. "Rather, [defendant] was just stating what his father's wishes were, not his own." Accordingly, the court denied the motion for a new trial on this ground.

The court sentenced defendant to life without possibility of parole. The court also imposed a restitution fine of $10,000 (§ 1202.4, subd. (b)) and suspended an additional restitution fine in the same amount pending successful completion of parole (§ 1202.45).

DISCUSSION

I

Defendant contends the police obtained his confession only after disregarding his unequivocal request for an attorney. He thus asserts the

confession is inadmissible and all counts must be reversed. (*Edwards v Arizona* (1981) 451 U.S. 477, 485-487 [68 L.Ed.2d 378] (*Edwards*); *Miranda*, *supra*, 384 U.S. at p. 474.) In reviewing this claim, we defer to the trial court on questions of fact and decide the *Miranda/Edwards* issue de novo. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033.)

"Under the familiar standards of *Miranda*, . . . a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent. [Citations.]" (*People v. Sims* (1993) 5 Cal.4th 405, 440 (*Sims*).) "Once having invoked these rights, the accused 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' (*Edwards* [*supra,*] 451 U. S. [at pp. 484-485].)" *Sims*, *supra*, 5 Cal.4th at p. 440.)

For the *Miranda/Edwards* prohibitions against further questioning to apply, a suspect's invocation of the right to counsel must be clear and unequivocal. (*Davis v. United States* (1994) 512 U.S. 452, 460-462 [129 L.Ed.2d 362) (*Davis*).) The application of *Edwards's* " ' "rigid" prophylactic rule' " requires the court to determine whether the suspect ' "actually invoked' " his right to counsel. (*Id*. at p. 458.) "To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an object inquiry." (*Id*. at pp. 458-459.)

"Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for assistance of an attorney.' [Citation.] But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to

counsel," [it does] not require the cessation of questioning." (*Davis, supra*, 512 U.S. at p. 459.) "Rather, the suspect must unambiguously request counsel. " (*Ibid*.)

" '[A] statement either is such an assertion of the right to counsel or it is not.' [Citation.] Although a suspect need not 'speak with the discrimination of an Oxford don,' [citation), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. [Citation.]" *Davis, supra*, 512 U. S. at p. 459.)

In the present case, although defendant twice explicitly referred to an attorney, neither statement was an unequivocal or unambiguous request for counsel. On the first occasion, defendant asked, "There wouldn't be any possible way that I could have a lawyer present while we do this?" As the court found, this was a question, not an unambiguous request. Defendant's second reference to an attorney was "Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer."

We find defendant's first statement is legally indistinguishable from the equivocal remarks in Davis, " 'Maybe I should talk to a lawyer' " (*Davis, supra*, 512 U.S. at p. 455), and in *People v. Crittenden* (1994) 9 Cal.4th 83, 123 (*Crittenden*), " 'Did you say I could have a lawyer?' " These equivocal remarks in *Davis* and *Crittenden* were not requests for counsel triggering the *Edwards* rule. (*Davis, supra*, 512 U.S. at p. 462.) Similarly, [i]n the present case, defendant did not unequivocally state that he wanted an attorney, but simply asked a question." (*Crittenden*, *supra*, 9 Cal.4th at p. 130.)

Nor was defendant's second reference to an attorney an unequivocal request for an attorney. At

best, it was a statement of his father's advice to him. We cannot find such a statement to be "sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis, supra*, 512 U.S. at p.459.)

However, even if these statements were somehow construed to be actual invocations of defendant's right to counsel such that defendant's *Miranda* rights were violated, under the particular circumstances of this case, any such violation did not taint the subsequent confession that was obtained in accordance with *Miranda*.

In *Oregon v. Elstad* (1985) 470 U.S. 298 [84 L.Ed.2d 222] (*Elstad*), the United States Supreme Court held that failure to give a young adult defendant his *Miranda* warnings prior to his confession to burglary did not taint that defendant's subsequent confession, given after officers read his *Miranda* rights and he agreed to speak with them. Although "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm" (*id*. at p. 307), "[i]t is an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though Miranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." (*Id*. at p. 309.)

This case is even more compelling than *Elstad* in that here, defendant did not make any incriminating statements until after having been advised of and waiving his *Miranda* rights. At the time defendant made his remarks about an attorney

he had not been Mirandized. At that time, defendant had also not made any statements about the robbery and murder of Sherriff, and the officers had not asked any questions about the night of the crimes. Following defendant's two references to an attorney, the officers did not ask him any questions at all. Instead, they fully advised him of his *Miranda* rights. After being fully advised of his *Miranda* rights and indicating he understood those rights, Detective Woods asked if defendant wanted to talk to them and he replied, "Let's talk." Defendant makes no argument, and there is no evidence, that there was any defect in the advisement of rights or the waiver, or that it was not voluntary and informed. Accordingly, there was no *Miranda* violation.

Because defendant's incriminating statements were not the product of a *Miranda* violation, the trial court correctly declined to exclude them on that ground.

II

In sentencing defendant, the trial court imposed a $10,000 restitution fine pursuant to 1202.4, subdivision (b) and imposed but suspended an additional $10,000 fine under section 1204.45. Defendant contends that since his sentence, life without possibility of parole, does not include a period of parole, the parole fine must vacated. The Attorney General properly concedes the error. (*People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185.)

DISPOSITION

The suspended restitution fine imposed section 1202.45 is vacated. The court is directed to prepare a corrected abstract of judgment deleting the fine and to forward a certified copy of said abstract to the Department of Corrections. In all other respects, the judgment is affirmed.

RAYE, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.

APPENDIX G

*IN THE COURT OF APPEAL OF THE STATE OF CALIF**O**RNIA*

IN AND FOR THE THIRD APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA Respondent, *-vs-* *TIO DINERO SESSOMS, Appellant.*	**COPY** *Number C041139*

VOLUME THREE
Pages 601 through 843

REPORTERS' TRANSCRIPT ON APPEAL

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY 0F SACRAMENTO

HONORABLE KENNETH L. HAKE, JUDGE

APPEARANCES:

For the Respondent:

BILL LOCKYER, Attorney General of the State of California,
1301 "I" Street,
Sacramento, California 95814

For the Appellant:

TIO DINERO SESSOMS
IN PROPRIA PERSONA

SACRAMENTO OFFICIAL COURT REPORTERS

TUESDAY, MAY 7, 2002

The matter of the People of the state of California versus Tio Dinero Sessoms, Defendant, Case No. 99F09138, came on regularly this day before Hon. Kenneth L. Hake, Judge of the Superior Court of California, for the County of Sacramento, Department #42 thereof.

The People were represented by Frank Meyer, Deputy District Attorney in and for the County of Sacramento, State of California.

The Defendant was present and represented by Rod Mayorga and Howard McEwan, Attorneys at Law.

The following proceedings were then had, to wit:

THE COURT: Calling the matter of the People of the State of California versus Tio Dinero Sessoms, 99F09138. The record will reflect Mr. Meyer is present on behalf of the District Attorney's Office. And Mr. Mayorga is present on behalf of Mr. Sessoms and his motion for new trial. Mr. Sessoms is present. And also present is Mr. McEwan, Mr. Sessoms' attorney, who was the attorney throughout the trial and who also has filed a motion for new trial.

. . . .

. . . I've also reviewed the additional motion for new trial based upon the alleged prejudicial Miranda error filed May 1st by you, Mr. Mayorga, and response to that filed by Mr. Meyer on May 1st.

. . . .

THE COURT: . . . I have also taken great pains to review, and I mean great pains, because I spent probably two hours reviewing the taped interview taped November 20th, 1999 in Oklahoma

where Mr. Sessoms was interviewed by Sacramento Police Department Detective Dick Woods and Pat Keller. And I reviewed portions of the transcript of that tape. I've also reviewed the transcript of my ruling wherein which I have -- where I rule that that tape was admissible and that there was no violation of Mr. Sessoms' Miranda rights ruling on that in limine motions.

. . . .

Now, let's look to the main thrust, the Miranda issue. As I've indicated I reviewed my rulings and I'm going on that issue I'm going to incorporate in this motion also the rulings that I made on allowing in that Mr. Sessoms' statement as not being in violation of Miranda. But in viewing the tape for this motion purpose or purpose of this motion, I reviewed the tape. And page one which has been submitted and, yes, it was submitted. I think it was submitted, Mr. Mayorga, in your supplemental brief. I viewed that tape for nearly approximately 20 minutes and I listened to it carefully. That is where Mr. Sessoms states I know I want to talk to my lawyer now. But that's Mr. Sessoms talking to himself by himself. And assertion of one's rights have to be unequivocal to the officers who are going to interrogate.

I have listened to that tape at least five times with the two officers present. And finally, finally on the last time, I could hear something but as I've stated in reviewing my original motion, I have the transcript, I reviewed the original motion in my rulings, I find that in terms of this transcript that's been submitted page one where he states, I know I want a lawyer now, this was not stated directly to any law enforcement officer. Rather, Mr. Sessoms was in isolation at the time. He was muttering many things to himself. Some things were understandable. You could hear some things were totally unable to be understood. He muttered this line to himself with no officer physically present at the time and that did not amount to an unequivocal request for a lawyer.

Rather, he appears to have been practicing what he was going to say when the officers did enter the room and conduct the interview. Practicing is not a request made directly to law enforcement and does not produce an invocation of Miranda rights.

It's only after the officers are in the cell does he say, quote, any possibility that I could have a lawyer present right now? This clearly was a question to the officers asking into what is possible. It is not a direct unequivocal request to be provided with an attorney on the spot. It was not an unequivocal request for counsel. Then he states, quote, that's what my dad wanted me to ask. Now the words that follow, if there are any, and this is why I had to listen about five times to it were mumbled and incomprehensible. And I'm still not sure that he really did mumble get me a lawyer.

Now, under these circumstances this Court finds -- let me rephrase that. I spent a lot of time drafting all this by the way. I was ready Friday. Under these circumstances I do not find that a reasonable officer would have heard Mr. Sessoms say get me a lawyer. It took me at least five times, and actually thinking more about it probably took six or seven times, as such the officers preset [*sic*] were not required to cease questioning. And even if the officer, a reasonable officer, would have heard the defendant Mr. Sessoms say that's what my dad wanted me to ask get my lawyer, that's not an unequivocal request for counsel. Rather, Mr. Sessoms was just stating what his father's wishes were, not his own. And if it took me five, six or seven times to understand it, playing it back, listening carefully for words that I knew were coming, it would be absolutely impossible to find that an officer hearing it once and then the words go off into the eastern hemisphere so to speak could ever possibly have heard that, nor could it ever have been considered an unequivocal request for an attorney. Accordingly, the motion on all grounds for new trial is denied.

. . . .

APPENDIX H

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE THIRD APPELLATE DISTRICT'

THE PEOPLE OF THE STATE OF CALIFORNIA *Respondent*,

-vs-

TIO DINERO SESSOMS, *Appellant.*

COPY
Number C041139

VOLUME ONE
Pages 1 through 300

REPORTERS' TRANSCRIPT ON APPEAL

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SACRAMENTO

HONORABLE KENNETH L. HAKE, JUDGE

APPEARANCES:

For the Respondent:

BILL LOCKYER, Attorney General of the State of California,
1301 "I" Street,
Sacramento, California 95814

For the Appellant:

TIO DINERO SESSOMS
IN PROPRIA PERSONA

FRIDAY, APRIL 20, 2001

AFTERNOON SESSION

The matter of the People of the State of California versus TIO DINERO SESSOMS, Defendant, Court Number 99F09138, came on this day before the Honorable Kenneth L. Hake, Judge of the Superior Court of California, sitting in Department 42.

The People were represented by Frank C. Meyer, Deputy District Attorney.

The Defendant, Tio Dinero Sessoms, was personally present and represented by Howard McEwan, Attorney at Law.

The following proceedings were then had:

THE BAILIFF: Please remain seated, and come to. Order,

THE COURT: Let the record reflect that counsel are present, Mr. Sessoms is present.

Before we do anything else, I want to see a very small portion of the videotape that was made during the interrogation in the Oklahoma City County Jail.

And I specifically want to see a very, very limited amount, and what I want to see is what's contained on page 2 of the transcript, lines 2 through 7. That's all. And because that's so short, I may have to see it several times.

Mr. Meyer, can you -- could you get the machine to that --

MR. MEYER: I will need the tape.

THE CLERK: 0h, I guess you would.

THE COURT: Oh, okay.

(Pause.)

THE COURT: You can start a couple lines early. And madame reporter, you don't have to transcribe this.

(Pause.)

MR. MEYER: I think we're there.

THE COURT: Okay.

MR. MEYER: Ready.

THE COURT: Ready.

(Audiotape, People's Exhibit Number 1, was then played for the court.)

THE COURT: Okay, Just give me the -- basically, lines 6 and 7 again.

MR. MEYER: Okay.

THE COURT: Can you turn it up just a little bit? Wasn't quite as loud as the first part.

(Audiotape, People's Exhibit Number 1, again played for the court.)

THE COURT: Turn it up.

MR. MEYER: I've got it as loud as it will go, judge.

THE COURT: Okay. We will play that -- I can't hear what's in the transcript that says -- the

transcript says, "Give me a lawyer." The other says "get".

(Audiotape, People's Exhibit Number 1, again played the court.

THE COURT: Okay. I got it that time.

All right. Okay. Let the record reflect that the portions of the tape which are reflected on page 2 of the transcript, lines 2 through 7, and additional material, but specifically lines 2 through 7, were played back for the court on, three occasions.

. . . .

THE COURT: All right. The court has reviewed the motion and the accompanying points and authorities submitted by defense counsel. I have also reviewed the response to the motion to suppress, points and authorities as submitted by the district attorney's office. I have, of course, considered the videotape and the following cases: The Alvarez versus Gomez -- I have so many copies of these various things. I've submitted the one --

That's the one that you submitted yesterday, Mr. Meyer; isn't that right?

MR. MEYER: Right. That's Mr. McEwan's case.

MR. MCEWAN: It's my case. He provided the court --

THE COURT: But he handed it to me.

MR. MCEWAN: Right.

MR. MEYER: Right.

THE COURT: And I've also reviewed it as reported in the 1999 Daily Journal DAR, 7651, which is obviously the same.

I've reviewed the Henry versus Kernan case, which also was provided -- I read two different -- one I could hardly make out. The one that I found is from some legal service. It's loaded with various nonsensical references, like split MTS – I have no idea what this language means.

MR. MEYER: Those -- I provided those copies.

THE COURT: Not this one. This one came over my e-mail this morning.

MR. MEYER: Sorry. The ones I gave you came off the West Law series.

THE COURT: I struggled with it.

And then I did read the one that you submitted in the packet, as well as the case that you submitted, Harris versus New York, Michigan versus Harvey. And I'm not going to cite these -- I could, but there's no particular reason to. I'm sure any reviewing court will be aware of the cites -- and McNeil versus Wisconsin and the California case from the Fourth District, People versus Munoz. I've reviewed them.

Outside of the reference in your brief, Mr. Meyer, the People versus Peevy, 1998, 17 Cal. 4th, 1184, California Supreme Court case, I've reviewed a few more. They mayor may not be relevant to this decision, but I'm going to put them on the record: People versus Bey -- that's B-E-Y -- 1994 case, 21 Cal. App. 4th, 1623. That's. out of the Second District Court of Appeal. And lastly, People versus Duncan, a 1988 case, 204 Cal. App. 3d., 613, which may or may not be re1evant, out of the Fifth District Court of Appeal.

MR. MEYER: Did you review Davis?

THE COURT: I'm saving the best for last.

MR. MEYER: Oh.

THE COURT: And last, because I've marked up Davis considerably, and I have reviewed the case of Davis versus United States, cited at 512 US 452 and 114 Supreme Court 2350.

Now, in reviewing all these cases I've noted, just offhand, that there were no cases that were exactly or directly on point and -- at least on a specific investigation as to specific factors contained within the facts of this case as indicated in the videotape. And that is why I have had this tape, that small portion, played back three different occasions.

And, quite frankly, it was not to determine whether the word "get" was there or the word "give," because I don't find that to be dispositive, but as the Davis case points out, the Edwards case requires courts to determine whether the accused actually invoked his right to counsel. And as it points out, this is an objective inquiry -- not subjective, but objective. And as the Davis case states, invocation of the Miranda right to counsel requires at a minimum some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.

Now, reasonable has to mean, by implication, that the statement must be a reasonable statement, but it has to be such reasonable statement that can be understood to be such a meaningful statement to the ordinary reasonable police officer, not to a Supreme Court Justice, not to a prosecutor or even -- or a criminal defense attorney.

Davis goes on to state if a suspect makes a reference to an attorney that is ambiguous or equivocal and that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel precedence does not require the cessation of questioning, rather the suspect must unambiguously

request counsel.

And as we've observed, quote, a statement is either such an assertion of the right to counsel or is not. He must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning.

Now, I'm going to interpret that broadly because, obviously, in our case there was no questioning at that point. It wasn't as though there was no Miranda or there was a Miranda with a waiver and then an assertion of rights. There simply was no questioning because the entire conversation, as recorded on page 1 of the exhibit, really only talks about --

It's an introduction. The defendant explains that his first name is pronounced in one fashion because it's a Spanish name. They talk about switching chairs in the interview room, and they talk about having a safe flight home back to Sacramento from Oklahoma. So that's certainly not anything. And then Mr. Sessoms states, "There wouldn't be any possible way that I could have a lawyer present while we do this?" Now, that has to be construed as a question. It can't be construed as a statement. It would make no sense because he would then be asserting a fact that it's impossible to have a lawyer. So it's a question.

Now, granted, there is no answer to that question. "Yes," No" is not there. It's, "Well, ah, what I'll do is, um," and then that is interrupted by Mr. Sessoms again -- or not again, but it's interrupted.

Okay. Now, going back to the Davis case, the interrogation must cease until an attorney is present only if the individual states that he wants an

attorney, but when -- going on -- when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity. And they cite Michigan versus Mosley, 423 US 96, 96 Supreme Court 321, because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a counsel present.

Going on, we recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who because of fear, intimidation, lack of linguistic skills, or a variety of other reasons, will not clearly articulate their right to counsel, although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the Miranda warnings themselves. Full compensation of the rights to remain silent and request an attorney is sufficient to dispel whatever coercion is inherent in the interrogation process.

The Edwards' rule of questioning must cease if the suspects ask for a lawyer provides a bright line that call be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we require questioning to cease if the suspect makes a statement that might be a request for an attorney -- and my emphasis is the emphasis that's placed in the printed word -- this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect, in fact, wants a lawyer even though he has not said so with the threat of suppression if they guess wrong.

We, therefore, hold that after a knowing and voluntary waiver of the Miranda rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

But we decline to adopt a rule requiring officers to ask clarifying questions if the suspect's statement is not an unambiguous or unequivocal request for counsel.

They then recapitulate and they rephrase the holding out Miranda regarding the assistance of the right -- of the right to the assistance of counsel during custodial interrogation. They reiterate in Edwards that once the suspect invokes the right to counsel at any time, questioning by the police must cease until an attorney is present.

But they go on, we are unwilling to create a third level of prophylaxis to prevent police questioning when the suspect might want a lawyer. Unless the suspect actually requests an attorney, questioning may continue. Maybe I should talk to a lawyer, is not a request for counsel, and they saw no reason to disturb that conclusion.

And that was the holding in the Davis court -- the Supreme Court in the Davis case.

Now, turning back to the tape and the transcript, it reveals that Mr. Sessoms --

How do you pronounce his -- is it Session or Sessoms ?

DEFENDANT SESSOMS: Sessoms.

THE COURT: Sessoms.

-- that Mr. Sessoms is asking the question there, "Wouldn't be any possible way that I could have a lawyer present while we do this?" that's clearly a question. That is not an assertion of one's rights. It's a question.

Now, granted, in the -- in the Alvarez case there are these series of questions, "Can I get an attorney right now, ma'am?" "You can have an attorney right now," and, "Well, like right now you got one." And in

looking at that you have a series of three questions, all of them which are designed and geared to asking the question about having an attorney present.

There is a question that sounds similar to that, "There wouldn't be any possible way that I could have a lawyer present while we do this?" There's no answer. Perhaps there should have been an answer. Perhaps under the Davis case, as it suggests, there could have been, but it does not seem to require such an answer "Yes" or "No," but that is interrupted immediately by Mr. Sessoms again, "Yeah, that's what my dad asked me to ask you guys. Ah, get me a lawyer."

The reason I wanted to hear that tape over and over until I could establish it, it seems that there could be two interpretations to this; not necessarily to the question at the first part, but it seems to be, irrespective of the interruption that's there by the officer -- not an interruption in that somebody's interrupted, but it's a different person speaking -- it seems that the thrust of this is that Mr. Sessoms is asking if it's possible to have an attorney. He's not saying, "I want an attorney." And what he then says is, "That's what my dad asked me to ask you guys." In other words, is it possible to have an attorney present?

I wanted to hear this, because if indeed, as those three marks indicate, after the word "Guys," there's a pause, and then there's that, Ah." There's a comma. If there's a pause there with the comma, it could be simply, "Is there a possible way to get -- is their any possible way," for instance, "I can have a lawyer right now -- or while we do this? My dad asked me to ask you that." If there was a pause or some indication that that was the end of that particular statement, then it said, "Get me a lawyer," there would be no question that Mr. Sessoms was asking for an attorney. But the way it appears on the video, it's not that way. It's a question that is being asked the officer pursuant to what Mr. Sessoms' father told him to ask.

And when one looks at the Davis case, that, to

the reasonable officer -- or to the reasonable person, does not appear to be a reasonable request for an attorney.

Keeping in mind that there haven't even been any questions asked. There's been nothing asked. Is all they finished talking about is flying back to Sacramento. This pops up, and then there's the other talk, and then it's clarified, "My dad was worried about, " which refers back to what his dad asked him to do -- or the basis of it, because some detectives do it, meaning they switch words after you've given your statement.

So when one reads -- one almost has to, read those three portions of Mr. Sessoms' statement together to give any meaningful understanding, because this whole conversation took place in just a matter of seconds, at least, and that's what is presented to the officer, upon which he must make his reasonable determination. Does he stop, or does he go on?

And this court is satisfied that in that matter of seconds the content does not, to the reasonable person, present a reasonable request to assert one's rights to have a 1awyer present.

And then there's this long,' long colloquy -- long, long colloquy; no questions at all; no questions asked, period; nothing about the offense other than how they do their procedures; and then they apparently go on the tape.

Now, I'm cognizant of the fact that what I have is a videotape which is running all the time with audio, but then they go on the specific audiotape that was transcribed on a tape recorder, and from that point forward we do see that -- again, give them some more information, tell them they're going to advise him of his rights. They tell him it's up to him to decide if he wants the attorney or not, then they go through all this colloquy about what the other

potential two defendants -- two codefendants have stated, and then they go -- if you brought up -- let me go back to page 5.

The situation is, "You brought up attorney. Yes. If you said you didn't want to make any statement without an attorney, were not going to really be able to talk to you and get your version of it." That does not appear to be intimidating or coercive or anything at all like that. It's simply a statement saying, that if we don't, we won't know what your version is.

And finally, they get around to, "What I want to do" -- this is on page 7 -- "is advise you of your rights, make sure you understand them, then you make the decision if you want to talk to us or not." So it's clear from that statement of the officer, who certainly is not thinking ahead to April 20th, 2001, at 2:30 in the afternoon, that he's going to have to justify their procedure.

As reasonable officers, under the circumstances, they're simply saying, "Then you make the decision." It's clear at that time their state of mind isn't that he's made a decision.

And then Mr. Sessoms says, "Would it be possible that I" -- "Would it be a possible chance that I can call my dad?" and, of course, there they say, no, they're not going to. He's an adult. And then once again, I want to read these with you, the rights. See if you understand them. Then you make the decision. You understand what I'm saying? I understand what you're saying. Goes through the litany of the rights.

And the other point, in so far as at that juncture, when his rights are being advised, I note that the video shows the defendant shrug his shoulders when the officer says, "Having those rights in mind, do you wish to talk to us?" There is a slight shrug of his shoulders. He says, "Um," something to that effect. Detective Woods says, it's solely up to you. Mr. Sessoms says, "Let's talk."

I don't think this case is -- I don't think the cases that have been cited and I've reviewed necessarily give a bright-line identification to this case, but I do believe that in reading these cases and getting a grasp for the thrust of all those cases, I'm satisfied that in this case there was no violation, that the officers were not required to terminate the interrogation, and, accordingly the motion is denied.

. . . .