No.

In the Supreme Court of the United States

ELVIN VALENZUELA, ACTING WARDEN OF THE CALIFORNIA MEN'S COLONY, *Petitioner,*

v.

IAN CLIETT, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a custodial suspect upon *Miranda* advice literally states that he chooses to remain silent, does "clearly established Federal law" both (1) prohibit a state court from considering objective circumstances suggesting that the suspect did not intend to invoke his right and (2) preclude the police from briefly asking the suspect to confirm his intent, so long as they commence any interrogation only after the suspect then explicitly agrees to talk?

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PETITION FOR WRIT OF CERTIORARI

Elvin Valenzuela, Acting Warden of the California Men's Colony[1] (the State), 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 memorandum disposition affirming the district court's judgment is unreported. The Ninth Circuit's order denying rehearing en banc is unreported. The United States District Court's decision and judgment granting habeas corpus relief are unreported. The California Court of Appeal's decision affirming the state-court judgment on direct review, and the California Supreme Court's order denying direct review, are unreported. Each is reproduced in the appendix to this petition (App.).

JURISDICTION

The Ninth Circuit denied rehearing en banc on September 21, 2012. App. 91a. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

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

2. The Sixth Amendment provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

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[1] Acting Warden Valenzuela is respondent Ian Cliett's custodian at the California Men's Colony, where respondent is currently incarcerated. See Sup. Ct. R. 35.

3. The Fourteenth Amendment, Section 1, provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

4. 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.

INTRODUCTION

Respondent Cliett, after being arrested and brought to a police station, told the arresting detectives that he was willing to talk to them about what he knew about the murder of Keith Stewart. So a detective read him his rights pursuant to *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and asked whether he wished to give them up. Respondent replied, however, "Ahhh, you gonna let me stop talking when I want to stop talking, right? Ahhh [approximately 11 seconds of silence]. Uhhh [3 seconds of silence]. I, I choose to remain silent." The detectives reacted by asking, "O.K., you don't want to talk to us? You don't want to talk to me?" But respondent instead replied, without hesitation, "I'll talk." Respondent then signed a *Miranda* waiver. At that point, the police

began their interrogation about Stewart's murder.

The state trial and appellate courts ruled that, in light of all the circumstances, respondent had validly waived his rights, so that evidence of his incriminating statements was admissible. But a three-judge panel of the Ninth Circuit, applying the circuit precedent of *Anderson* v. *Terhune*, 516 F.3d 781 (9th Cir. 2008) (en banc), cert. denied, *Cate* v. *Anderson*, 555 U.S. 818 (2008), held that the police had violated respondent's *Miranda* rights and granted him habeas corpus relief against the state-court judgment. The panel explained that, under *Anderson*, the state court could not consider the context of respondent's statement or respondent's expressed willingness to talk immediately following the statement. App. 2a. The panel further ruled that, by asking confirming or clarifying questions, the detectives had failed to scrupulously honor respondent's invocation. App. 3a.

Nonetheless, all three judges of the panel separately stated their belief that the California Court of Appeal had "reasonably concluded that, taken in context, [respondent] failed to unambiguously and unequivocally invoke his right to remain silent." Further, they "disagree[d] not only with [*Anderson*'s] reading of *Miranda* and its progeny, but also with the utter lack of deference it accords to state courts' reasoned decisions." But, they explained, they were bound by the circuit's precedent in *Anderson*.

There are compelling reasons for this Court to grant certiorari. The award of habeas corpus relief to respondent under the Ninth Circuit's *Anderson* precedent violates the mandate of 28 U.S.C. § 2254(d), which barred relief in this case unless a strict holding of this Court had "clearly established" that context and clarification may not be considered in determining whether a suspect's statement amounts to the requisite "unambiguous" invocation of his rights. No holding in this Court's precedents does that. Indeed, this Court's precedents suggest that context and a confirmatory inquiry by the police are proper under *Miranda*. The Ninth Circuit's contrary

view, moreover, conflicts with that of both the Eleventh Circuit and the California Supreme Court. And, as reflected in the untenable result below, it would impose an unnecessary impediment to legitimate efforts of the police to question suspects in criminal investigations.

STATEMENT OF THE CASE

A. The State Criminal Proceedings

1. In 1998, respondent Cliett and an accomplice, both gang members, shot and killed rival gang member Keith Stewart. The State charged respondent with first-degree murder and conspiracy to commit murder. Before trial, respondent's defense counsel moved to exclude, under *Miranda*, respondent's post-arrest statements made to two detectives.

At the hearing on the motion, Detective Daryn Dupree testified that he and Detective Robert Felix, who both knew respondent from prior dealings, arrested respondent on charges unrelated to the murder. One of the detectives read respondent his *Miranda* rights, and respondent said he was willing to speak with them. The detectives and respondent engaged in "small talk." Respondent made no indication that he did not want to talk to the detectives or interact with them; nor did respondent say he wanted an attorney.

After arriving at the police station, the detectives told respondent for the first time that they wanted to speak to him about Stewart's murder. Respondent said he was willing to provide his story and tell them what he knew. The detectives and respondent then went into an interview room, where once again respondent was advised of his *Miranda* rights:

> DET.: Do you understand these rights I have explained to you?
>
> RESPONDENT: Yeah.

> DET.: O.K., do you wish to give up your right to remain silent, in other words do you want to talk to me now about what we talked to you about?
>
> RESPONDENT: Ahhh, you gonna let me stop talking when I want to stop talking, right? Ahhh [approximately 11 seconds of silence]. Uhhh [3 seconds of silence]. I, I choose to remain silent.
>
> DET.: O.K., you don't want to talk to us? You don't want to talk to me?
>
> RESPONDENT: I'll talk.

Detective Dupree testified that he had asked "You don't want to talk to me?" because he was surprised at respondent's statement given his prior relationship with respondent and given that respondent had previously stated that he wanted to talk to the detectives. After respondent replied, "I'll talk," he signed and dated an admonishment and waiver-of-rights form. The detectives then proceeded to interview him for approximately half an hour. Respondent denied committing the murder and blamed a fellow gang member for it; but he admitted that he had been at the scene.

Respondent and his friend, Charles Flowers, also testified at the hearing, giving contradictory accounts of what happened when respondent was arrested. Respondent maintained that he never told the detectives he was willing to talk to them about Stewart's murder. At the conclusion of the hearing, the trial court made credibility findings adverse to Flowers and respondent, and found Detectives Dupree and Felix to be credible. The trial court ruled that respondent's incriminating statements to the detectives were admissible under *Miranda*. The court explained that respondent had not unambiguously invoked his right to remain silent

and that the detectives had been surprised and had simply asked respondent for clarification.[2]

The prosecution introduced respondent's statements about the shooting into evidence at trial. It also introduced testimony from an eyewitness who identified respondent as one of the two men who had shot Stewart, and evidence that a childhood friend of respondent had told detectives in a pretrial recorded statement that respondent had admitted shooting Stewart. In addition, the prosecution produced evidence that ammunition found where respondent was arrested matched the ammunition found at the crime scene. A jury found respondent guilty as charged. The court sentenced him to prison for a term of fifty-one years to life.

2. On appeal, respondent argued that the trial court had wrongfully denied his motion to exclude his statements under *Miranda*. The California Court of Appeal rejected the claim. It held that the detectives' questions were "spontaneous expressions of surprise rather than direct requests for clarification." Relying on *Davis* v. *United States*, 512 U.S. 452 (1994), and *People* v. *Johnson*, 859 P.2d 673, 685 (Cal. 1993), overruled on another ground in *People* v. *Rogers*, 141 P.3d 135, 174-75 (Cal. 2006), the court further held that, even if they were requests for clarification, the detectives

> did not act unreasonably given the circumstances of their interaction with [respondent] up to that point. [Respondent] had told the officers before entering the interview room that he was willing to tell the detectives what he knew about the murder of Keith Stewart.

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[2] The trial court also ruled that incriminating statements respondent later made after he said, "That's why I wanted to talk to an attorney," were inadmissible.

App. 78a. The Court of Appeal affirmed respondent's conviction. App. 90a. The California Supreme Court denied further appellate review. App. 55a.

B. Federal Habeas Corpus Proceedings

1. Respondent filed a federal habeas corpus petition, again raising the same *Miranda* claim, in the United States District Court for the Central District of California in 2005. The magistrate judge filed a report recommending that relief be granted "[i]n light of the facts of this case and binding Ninth Circuit authority [*Anderson* v. *Terhune*, 516 F.3d 781] that *Miranda* clearly established that reliance on context to render an otherwise *unambiguous* invocation of the right to remain silent ambiguous is inappropriate[.]" App. 29a. (emphasis added). The magistrate judge found that the error was prejudicial "in light of the less than overwhelming other evidence in the case that implicated [respondent] in the shooting . . . ." App. 48a-49a. The district court adopted the magistrate judge's report and recommendation. App. 9a. The district court issued a judgment conditionally granting relief on respondent's *Miranda* claim. App. 7a.

2. In an unpublished memorandum disposition, a Ninth Circuit three-judge panel affirmed the district court's judgment. The panel held that "[t]he California Court of Appeal's decision finding ambiguity in [respondent's] invocation based on his prior cooperation with the detectives was an unreasonable application of clearly established federal law as recognized by our precedents. *See* 28 U.S.C. § 2254(d)(1)." App. 2a. Although the panel acknowledged that only United States Supreme Court precedent qualified as "clearly established" under § 2254(d), it explained that it was bound by Ninth Circuit cases "that have determined what law is clearly established." App. 2a (internal quotations omitted). Then, relying on the Ninth Circuit's

decision in *Anderson*, the panel ruled that respondent "unambiguously and unequivocally invoked his right to remain silent[,]" and thus that "[t]he detectives failed to scrupulously honor [respondent's] clear invocation by continuing to question him about whether he was willing to talk." App. 2a-3a. The panel held that the admission of respondent's statements was erroneous and prejudicial. App. 3a.

Nevertheless, Judge Tallman authored a concurring opinion, in which the other two judges on the panel joined, protesting their own disposition. App. 4a. Judge Tallman said that the California Court of Appeal had made reasonable factual determinations in finding that the detectives were genuinely surprised at respondent's purported invocation of his right to remain silent and that the detectives did not coerce respondent into talking. He concluded: "Based on these factual determinations, I would hold that the Court of Appeal reasonably concluded that, taken in context, [respondent] failed to unambiguously and unequivocally invoke his right to remain silent." App. 4a.

Judge Tallman explained, however, that he was forced to rule that the California Court of Appeal's decision was unreasonable based on the Ninth Circuit's precedent in *Anderson*. App. 4a. He explained, "As I have expressed in the past, I disagree not only with this reading of *Miranda* and its progeny, but also with the utter lack of deference it accords to state courts' reasoned decisions." App. 4a-5a. Accordingly, Judge Tallman and the other two judges on the panel "reluctantly" concurred in the grant of relief. App. 5a.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION PRESENTS IMPORTANT QUESTIONS ABOUT PROPER ENFORCEMENT OF AEDPA AND *MIRANDA*

Many reasons compel a grant of certiorari in this case. First, as this Court has demonstrated by repeated grants of certiorari in cases from the Ninth Circuit and other circuits misapplying 28 U.S.C. § 2254(d)'s "clearly established Federal law" requirement, it is important to ensure that federal habeas courts adhere to the limits on their authority imposed by Congress in AEDPA and by this Court's AEDPA precedents. Second, the decision below turns on an important but unsettled federal constitutional question involving the requirements of *Miranda*: whether courts must blind themselves to surrounding circumstances bearing on the suspect's intention to waive and whether police may at least ask a brief confirmatory question to clear up any perceived ambiguity. The Ninth Circuit's resolution of this question, further, conflicts with that of the Eleventh Circuit and the California Supreme Court. And it unjustifiably hampers legitimate police investigation of serious crimes. In no event should *Miranda* be interpreted as condemning the reasonable police conduct exhibited by the detectives in the instant case.

A. The Ninth Circuit's Decision Presents an Important Habeas Corpus Question

This case presents, first, a prime example of a failure by the federal court to conform to the strict limits this Court and Congress have imposed on federal habeas corpus under AEDPA. Under 28 U.S.C. § 2254(d)(1), the federal court may not grant

relief unless the state-court's rejection of the petitioner's claim was "contrary to" or unreasonably applied "clearly established Federal law." As this Court has repeatedly explained, that "clearly established Federal law" consists solely of the strict holdings of Supreme Court precedents that "squarely" addressed the issue before the state court and provided a "clear answer to the question presented." *Wright* v. *Van Patten*, 552 U.S. 120, 125-126 (2008) (per curiam); see *Knowles* v. *Mirzayance*, 556 U.S. 111, 122 (2009). So, if there is no such controlling Supreme Court authority governing a claim, then the state court's decision cannot be condemned as contradicting or unreasonably applying "clearly established" law under § 2254(d)(1). *Van Patten*, 552 U.S. at 126; *Mirzayance*, 556 U.S. at 122 ("[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 [the Supreme] Court."); *Carey* v. *Musladin*, 549 U.S. 70, 74 (2006). Relief, therefore, "shall not be granted." § 2254(d).

Here, the Ninth Circuit panel, constrained by the Circuit's precedent in *Anderson*, held that the California Court of Appeal's decision finding ambiguity in respondent's invocation based on his prior cooperation with the detectives was an unreasonable application of clearly established federal law. App. 2a. But there is no "clearly established" law—i.e., no Supreme Court precedent squarely addressing and resolving the question—precluding the police or the court from considering relevant circumstances to determine whether a suspect's statement, albeit literally unambiguous standing alone, nonetheless was ambiguous. Indeed, this Court left that question open in *Smith* v. *Illinois*, 469 U.S. 91, 95 (1984) (per curiam) ("We do not decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events

preceding the request or of nuances inherent in the request itself, nor do we decide the consequences of such ambiguity or equivocation.") (emphasis added). The three judges on the Ninth Circuit panel were correct, then, in their concurring opinion. Because this Court's cases give no clear answer to that question, it cannot be said that the state court decision, which relied on the circumstances surrounding the purported invocation, was "contrary" to "clearly established Federal law." *Knowles* v. *Mirzayance*, 556 U.S. at 122; *Wright* v. *Van Patten*, 552 U.S. at 126; *Carey* v. *Musladin*, 549 U.S. at 74. "Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized." *Van Patten*, 552 U.S. at 126.

Similarly, the state court decision passes muster under § 2254(d) because it ran afoul of no clearly established law prohibiting the police from asking a brief confirmatory or clarifying question about the suspect's intent. While this Court has stated that "postrequest responses to further *interrogation* may not be used to cast retrospective doubt on the clarity of the initial request itself[,]" see *Smith*, 461 U.S. at 100 (emphasis altered), it has not spoken directly on whether it is permissible to look at an explicit waiver following brief police questions seeking only to *confirm* the suspect's intent. Such clarifying questions or spontaneous expressions of surprise do not amount to interrogation and thus fall outside of *Miranda*. See *id.*; see also *Rhode Island* v. *Innis*, 446 U.S. 291, 302 (1980) ("the definition of interrogation can extend only to words or actions on the part of police officers that they *should* have known were reasonably likely to elicit an incriminating response.") (emphasis in original, footnote omitted). As the Eleventh Circuit has reasoned, "To prohibit a clarifying question under the circumstances . . . would 'transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Medina* v. *Singletary*, 59 F.3d 1095, 1105 (11th Cir. 1995)

(quoting *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975)).

In ruling otherwise, the panel considered itself bound by the previous Ninth Circuit decision in *Anderson* v. *Terhune*, 516 F.3d 781. There, it is true, the Ninth Circuit asserted that *Smith* and *Connecticut* v. *Barrett*, 479 U.S. 523 (1987), provided the Supreme Court precedent that mandated relief as clearly established law. Nothing in *Smith* or *Barrett*, however, prohibited examining context preceding even a facially unambiguous invocation to determine whether that invocation was really ambiguous instead. If anything, language in *Smith* implied that a court should look to the preceding circumstances of an assertedly unambiguous request. *Smith*, 469 U.S. 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). Anyway, as explained above, *Smith* ultimately was a "narrow decision" where this Court expressly declined to "decide the circumstances in which an accused's request for counsel may be characterized as ambiguous or equivocal as a result of events preceding the request or of nuances inherent in the request itself . . . ." *Id*., 469 U.S. at 99.

Nor did *Barrett* squarely address and resolve the question presented here. There, this Court found that Barrett had invoked his right to counsel as to any written statements but had not invoked it with respect to verbal statements. *Id*., 479 U.S. at 527-28. In so finding, this Court at one point stated that "[i]nterpretation [of a defendant's request for counsel] is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Id*. at 529. But that pronouncement was made as to a very narrow issue—whether Barrett's partial invocation of his right to counsel should be interpreted broadly to be an invocation "for all purposes." *Id*. at 527-30. It did

not address and settle the rule for the case where ordinary people would question the meaning of the defendant's ostensibly plain words in light of other circumstances reasonably suggesting he had merely misspoke or had been uncertain.

Nor, despite what the Ninth Circuit said in *Anderson*, did *Smith* hold that seeking mere confirmation of a suspect's literally unambiguous statement was impermissible to demonstrate actual ambiguity or equivocation. As noted above, this Court in *Smith* merely prohibited further *interrogation* after a suspect has invoked his right to counsel. *Id.*, 469 U.S. at 100. It announced no holding prohibiting brief clarifying or confirming questions.

As demonstrated above, and contrary to the Ninth Circuit's *Anderson* view, there is yet no "clearly established Federal law" in the form of square holdings in this Court's precedents dictating relief in this case. Section 2254(d), therefore, bars habeas corpus relief. As evidenced by the many recent instances in which this Court has granted certiorari to redress the same kind of violations of § 2254(d),[3] it remains important for this Court to

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[3] See, *e.g.*, *Parker* v. *Matthews*, 132 S. Ct. 2148, 2155-56 (2012) (per curiam) (reversing Sixth Circuit's decision under § 2254(d)(1) for improperly relying on circuit court's embellishment of this Court's generalized test for unconstitutional prosecutorial misconduct); *Howes* v. *Fields*, 132 S. Ct. 1181 (2012) (reversing Sixth Circuit's decision that granted habeas relief based on a categorical rule that this Court has never clearly established); *Renico* v. *Lett*, 130 S. Ct. 1855, 1865-66 (2010) (reversing Sixth Circuit's decision that granted habeas relief in part based on circuit precedent, and not clearly established Supreme Court precedent, as required by AEDPA); *Knowles* v. *Mirzayance*, 556 U.S. at 121-22 (reversing Ninth Circuit's decision that granted habeas relief on an ineffective assistance of counsel claim based on a "nothing to lose" standard for evaluating such claims that was never announced

(continued…)

intervene in this case to guarantee fidelity to Congress' AEDPA reforms and this Court's precedents making clear how they must be enforced. See Sup. Ct. R. 10(c).

B. This Case Presents an Important *Miranda* Question

Embraced within the AEDPA "clearly established law" question lies an open and important *Miranda* issue that independently warrants this Court's review: whether the police and the courts must view only in isolation a suspect's statement literally invoking his right to remain silent and must avert their eyes from clarifying statements and other surrounding circumstances showing that the suspect intended to waive. The panel decision and *Anderson*'s mistaken view of this important *Miranda* question conflict with the more reasonable and balanced interpretation of both the Eleventh Circuit and the California Supreme Court. See Sup. Ct. R. 10(c). And, as reflected in the erroneous result below, they unjustifiably impair legitimate law enforcement with little or no benefit in deterring police misconduct or in achieving protection against coercion.

(…continued)
by this Court); *Carey* v. *Musladin*, 549 U.S. at 76-77 (reversing Ninth Circuit's decision that granted habeas relief because "[n]o holding of this Court required the California Court of Appeal" to grant relief on the petitioner's claim).

1. The Ninth Circuit's Interpretation of *Miranda* Conflicts with Those of the Eleventh Circuit and the California Supreme Court

a. The Ninth Circuit rule conflicts with that of the Eleventh Circuit in *Medina* v. *Singletary*, 59 F.3d 1095. In *Medina*—a case with facts materially similar to those in respondent's case—the Eleventh Circuit held that the circumstances leading up to a facially unambiguous response may render the response ambiguous and equivocal.

Medina was brought into custody on suspicion of murder and was interviewed by a detective. *Id.,* at 1099, 1101. After a preliminary, unrecorded interview in which Medina was advised of his *Miranda* rights, Medina "indicated that he understood his rights and that he was willing to talk with the detectives." *Id*. at 1101-02. "Following [a] lengthy preliminary conversation with Medina," the officers started a tape recorder and re-advised Medina of his *Miranda* rights, and this colloquy followed:

> DET. NAZARCHUK: You'll have to say yes or no because – for the tape recorder. Did you understand all the rights I read to you, Pedro?
>
> P. MEDINA: (Indiscernible words).
>
> DET. NAZARCHUK: Yes?
>
> P. MEDINA: (No audible response).
>
> DET. NAZARCHUK: Okay. Do you wish to talk to us at this time?
>
> P. MEDINA: Huh?
>
> DET. NAZARCHUK: Do you wish to talk to us at this time?

> P. MEDINA: No.
>
> DET. NAZARCHUK: You don't want to talk to us or you do want to talk to us?
>
> P. MEDINA: Okay, let me tell you what I'm think [*sic*].
>
> DET. NAZARCHUK: Sure.

Id. at 1102. "Nazarchuk testified . . . that it was not clear to him whether Medina did or did not want to talk." *Id*. at 1103.

The Eleventh Circuit in *Medina* concluded:

> Taking into consideration the events preceding Medina's response, Medina's 'No' was ambiguous and did not clearly indicate his desire to remain silent. Nazarchuk, uncertain as to what Medina meant, immediately asked a single, clarifying question: 'You don't want to talk to us or you do want to talk to us?' Medina's response to that question indicated that Medina had not invoked his right to remain silent, and the interview properly continued.

Id. at 1105. *Medina* further explained that, "[t]o prohibit a clarifying question under [Medina's] circumstances . . . would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity." *Id*. (citations and internal quotations omitted); see also *United States* v. *Johnson*, 56 F.3d 947, 955 (8th Cir. 1995) ("We consider the defendant's statements as a whole to determine whether they indicate an unequivocal decision to invoke the right to remain silent.") (citation omitted).

b. Like the Eleventh Circuit in *Medina,* the California Supreme Court has also expressed a view opposite to that of the Ninth Circuit. In *People* v.

Williams, 233 P.3d 1000, 1017-21 (Cal. 2010), cert. denied, *Williams* v. *California*, 131 S. Ct. 1602 (2011)—a case involving a question of invocation of the right to counsel that is treated identically as the right to remain silent, see *Berghuis* v. *Thompkins*, 130 S. Ct. 2250, 2260 (2010) ("there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*")—detectives arrested Williams for murder, "advised [Williams] of his rights pursuant to *Miranda* and at two points during the interview asked clarifying questions with respect to possible invocation of [his] rights." *Id*. at 1012-13, 1015-16. The following exchange then occurred:

> DET. KNEBEL: Do you wish to give up your right to remain silent?
>
> WILLIAMS: Yeah.
>
> DET. KNEBEL: Do you wish to give up the right to speak to an attorney and have him present during questioning?
>
> WILLIAMS: You talking about now?
>
> DET. KNEBEL: Do you want an attorney here while you talk to us?
>
> WILLIAMS: Yeah.
>
> DET. KNEBEL: Yes you do.
>
> WILLIAMS: Uh huh.
>
> DET. KNEBEL: Are you sure?
>
> WILLIAMS: Yes.
>
> DET. SALGADO: You don't want to talk to us right now.
>
> WILLIAMS: Yeah, I'll talk to you right now.
>
> DET. KNEBEL: Without an attorney.

WILLIAMS: Yeah.

Id. at 1018. Given the context and subsequent confirmation, the California Supreme Court found ambiguity under the circumstances, despite Williams's statement, literally plain when viewed in isolation, that he wanted an attorney present during questioning. *Id*. at 1017-21. And, as the California Supreme Court explained in holding that there was no violation of *Miranda,*

> [i]n certain situations, *words that would be plain if taken literally actually may be equivocal under an objective standard*, in the sense that *in context* it would not be clear to the reasonable listener what the defendant intends. In those instances, the protective purpose of the *Miranda* rule is not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant.

Williams, 233 P.3d at 1017-21 (emphasis added.)

But the Ninth Circuit's rule in *Anderson*, as applied by this panel, is that clarifying questions are impermissible when "'the initial request to stop the questioning is clear[.]'" App. 3a (quoting *Anderson*, 516 F.3d at 790). As it does with the Eleventh Circuit's *Medina* decision, then, the Ninth Circuit's rule also conflicts with the California rule in *Williams*. See Sup. Ct. R. 10(a).

2. The Ninth Circuit's Erroneous View of *Miranda* Unreasonably Impairs Police Investigation

Equally important, the Ninth Circuit's *Miranda* rule and its decision in the instant case unreasonably impede legitimate police investigation, as its

interpretation of *Miranda* creates a rigid and impractical rule that condemns even non-coercive and reasonable police conduct.

This Court has made it clear in applying *Miranda* that it is permissible to examine context to decide whether an *ambiguous* request for counsel or silence is truly ambiguous. *E.g., Davis* v. *United States*, 512 U.S. at 459 (where suspect had waived his *Miranda* rights and freely spoken to the police about the murder with which he was charged, his eventual statement, "Maybe I should talk to a lawyer[,]" was not an unequivocal and unambiguous invocation of his right to counsel requiring the police to "stop questioning the suspect"); *Berghuis* v. *Thompkins*, 130 S. Ct. at 2260 (suspect who had waived his *Miranda* rights and stayed largely silent for duration of three-hour interview failed to unambiguously invoke his right to remain silent). It should be equally permissible for the police and courts to consider the fuller actual circumstances leading up to an *ostensibly* unambiguous statement in determining whether such a statement is truly unambiguous. See *Smith* v. *Illinois*, 469 U.S. at 95 (leaving question open regarding the consequences of an ambiguous invocation and whether preceding circumstances can be considered in evaluating whether the invocation was truly ambiguous).

Indeed, allowing police to examine context would be fully consistent with *Miranda*'s policy of deterring police coercion. This Court in *Smith*, for example, expressed concern with preventing admission of statements by a suspect that were obtained as a result of police coercion. *Smith*, 469 U.S. at 94-95. Since *Smith*, however, this Court has repeatedly emphasized that the primary goals of *Miranda*—deterring repeated police efforts to badger and coerce a suspect into incriminating himself—are not served by prohibiting immediate confirmation or clarification. See *Berghuis* v. *Thompkins*, 130 S. Ct. at 2260 (when a suspect's intent to invoke his rights

is unclear, requiring police to either end interrogation or face the consequences of suppression of a voluntary confession "would place a significant burden on society's interest in prosecuting criminal activity") (quoting *Davis* and *Moran* v. *Burbine*, 475 U.S. 412, 427 (1986)); *Davis,* 512 U.S. at 460 (when questioning officers are reasonably confused about a suspect's request for counsel, requiring police to immediately end interrogation "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity") (quoting *Michigan* v. *Mosley*, 423 U.S. at 102); see also *Miranda* v. *Arizona*, 384 U.S. at 485 (if a suspect is "indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel[,]" and police do not need to always cease questioning).

Here, it was manifest that the police did not coerce respondent into speaking with them. Respondent had told the detectives *before entering the interview room* that he was willing to discuss what he knew about Stewart's murder. And, after having been *Mirandized* earlier, he had said he would speak to the detectives. Thus, his eventual hesitant statement, "Ahhh, you gonna let me stop talking when I want to stop talking, right? Ahhh [approximately 11 seconds of silence]. Uhhh [3 seconds of silence]. I, I choose to remain silent[,]" reasonably could be perceived as unclear.

Further, given what had already transpired, both detectives were justifiably surprised when respondent made a contradicting statement about his willingness to talk to them, and simply asked, "Ok, you don't want to talk to us?" Consequently, unlike the officer in *Anderson*, who was found to be "mocking and provoking" the detainee, the detectives in this case were, as the state court of appeal found, genuinely asking confirming questions. Cf. *Nash* v. *Estelle*, 597 F.2d 513, 517-18 (5th Cir. 1979) ("This is

not to say that an interrogating officer may utilize the guise of clarification as a subterfuge for coercion or intimidation."). Finally, the fact that respondent immediately responded, "I'll talk," and signed a written *Miranda* waiver, further dispelled any notion that he had been coerced into speaking with the detectives.

* * *

The Ninth Circuit decision was wrong in many important ways. As in the past, the Ninth Circuit impermissibly departed from this Court's clearly established law in granting habeas corpus relief. In doing so, it applied an erroneous and problematic *Miranda* rule that conflicts with the decisions of other courts and needlessly impairs legitimate criminal investigation.

On the facts of this case, it should not be said that the police and the state court violated *Miranda.* And, certainly, "fairminded jurists" could agree, see *Harrington* v. *Richter*, 131 S. Ct. 770, 786-87 (2011), with the state court's decision that respondent's *Miranda* rights were not violated.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted

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Dated: December 20, 2012

APPENDIX

FILED
AUG 14 2012
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IAN CLIETT, Petitioner - Appellee, v. L.E. SCRIBNER, WARDEN Respondent - Appellant.	No. 12-55146 D.C. NO. 2:05-CV-06616-SJO-JC MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted July 11, 2012
Pasadena, California

Before: TALLMAN and N.R. SMITH, Circuit Judges, and BURGESS, District Judge.**

Respondent-appellant L.E. Scribner appeals the district court's conditional grant of petitioner-

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The Honorable Timothy Mark Burgess, United States District Judge for the District of Alaska, sitting by designation.

appellee Ian Cliett's petition for a writ of habeas corpus under 28 U.S.C. § 2254 based on his claim that incriminating statements he made during a custodial interrogation were admitted at his trial in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). We have jurisdiction under 28 U.S.C. § 2253, and we affirm.

The California Court of Appeal's decision finding ambiguity in Cliett's invocation based on his prior cooperation with the detectives was an unreasonable application of clearly established federal law as recognized by our precedents. *See* 28 U.S.C. § 2254(d)(1). Supreme Court cases are the *only* definitive source of "clearly established" federal law under the Antiterrorism and Effective Death Penalty Act; however, "we must follow our cases that have determined what law is clearly established." *Byrd v. Lewis*, 566 F.3d 855, 860 n.5 (9th Cir. 2009) (citations omitted).

A person in custody has the right to cut off questioning at any time, and an invocation of that right must be "scrupulously honored." *Miranda*, 384 U.S. at 479. When Cliett stated, "I choose to remain silent," in direct response to the detective's inquiry about whether he was willing to talk, he unambiguously and unequivocally invoked his right to remain silent. *See Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir.) (en banc) ("Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law."), *cert. denied, Cate v. Anderson*, 555 U.S. 818 (2008); *see also Miranda,* 384 U.S. at 445 ("The mere fact that [the suspect] may have answered some questions or volunteered

some statements on his own does not deprive him of the right to refrain from answering any further inquiries . . . ."). The detectives failed to scrupulously honor Cliett's clear invocation by continuing to question him about whether he was willing to talk. *See Anderson*, 516 F.3d at 790 ("Where the initial request to stop the questioning is clear, 'the police may not create ambiguity in a defendant's desire by continuing to question him or her about it.'" (citation omitted)).

The district court correctly held that the admission of Cliett's post-arrest statements "had substantial and injurious effect or influence in determining the jury's verdict," *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (internal quotation marks and citation omitted). Cliett confessed that he was at the scene of the murder and, more specifically, had entered rival gang territory at night with a fellow gang member who he knew was seeking revenge. The prosecutor relied heavily on Cliett's admissions during opening and closing, and, as the district court noted, the other evidence was "less than overwhelming."

AFFIRMED.

FILED
AUG 14 2012
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

Cliett v. Scribner, No. 12-55146

TALLMAN, Circuit Judge, with whom N.R. SMITH, Circuit Judge, and BURGESS, District Judge, join, concurring:

The California Court of Appeal, viewing the entire record in context, reasonably determined that the detectives made no effort to coerce, intimidate, or harass Cliett into talking; the detectives were surprised when Cliett allegedly invoked his right to remain silent in light of his prior cooperation and initial indication that he was willing to talk; the detectives' responses to the purported invocation were "exclamations of surprise"; and, immediately after those exclamations, Cliett stated, "I'll talk," and signed a written *Miranda* waiver. Based on these factual determinations, I would hold that the Court of Appeal reasonably concluded that, taken in context, Cliett failed to unambiguously and unequivocally invoke his right to remain silent.

However, our prior precedents, dealing with a state court's conclusion that surrounding circumstances similar to those presented here make an invocation ambiguous, hold that such a conclusion was contrary to and an unreasonable application of clearly established Supreme Court authority. *See Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir.) (en

banc), *cert. denied, Cate v. Anderson*, 555 U.S. 818 (2008). As I have expressed in the past, I disagree not only with this reading of *Miranda* and its progeny, but also with the utter lack of deference it accords to state courts' reasoned decisions. *See, e.g., id*. at 797–801 (Tallman, J., dissenting); *Doody v. Ryan*, 649 F.3d 986, 1029–30 (9th Cir.) (en banc) (Tallman, J., dissenting), *cert. denied*, 132 S. Ct. 414 (2011). Nevertheless, I am bound by our precedents to the extent that they have declared what constitutes clearly established law. *See, e.g., Byrd v. Lewis*, 566 F.3d 855, 860 n.5 (9th Cir. 2009).

I therefore reluctantly concur.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IAN CLIETT, Petitioner, v. L.E. SCRIBNER, Warden, Respondent.	Case No. CV-05-6616 SJO (JC) **(PROPOSED) JUDGMENT**

Pursuant to this Court's Order Accepting Findings, Conclusions and Recommendations of United States Magistrate Judge,

IT IS ADJUDGED that the operative Third Amended Petition for Writ of Habeas Corpus is conditionally granted to the extent it seeks relief based upon the admission at trial of statements made by petitioner after his unambiguous invocation of his right to remain silent. Respondent shall discharge petitioner from all adverse consequences of the judgment in Los Angeles County Superior Court Case No. BA208312, unless petitioner is brought to retrial within ninety (90) days of the entry of the Judgment herein,

plus any additional delay authorized under State law.

DATED: 12/22/11

/s/
HONORABLE S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IAN CLIETT, Petitioner, v. L.E. SCRIBNER, Warden, Respondent.	Case No. CV 05-6616 SJO (JC) **ORDER ACCEPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE**

Pursuant to 28 U.S.C. § 636, the Court has reviewed the operative Third Amended Petition for Writ of Habeas Corpus by a Person in State Custody (the "Petition"), all of the records herein, the attached Report and Recommendation of United States Magistrate Judge ("Report and Recommendation"), and respondent's objections to the Report and Recommendation ("Objections"). The Court has further made a *de novo* determination of those portions of the Report and Recommendation to which objection is made.

The Court concurs with and accepts the findings, conclusions, and recommendations of the United States Magistrate Judge and overrules the Objections. Although the Court overrules all of the Objections, the Court specifically addresses certain objections below.

First, respondent objects to the recommendation that the state courts' determination that petitioner's statement, "I choose to remain silent," was ambiguous in light of context was contrary to Miranda v. Arizona 384 U.S. 436 (1966), and was an unreasonable determination of fact. See Objections at 3-7; see also 28 U.S.C. § 2254(d); Report and Recommendation at 25-27 (citing Anderson v. Terhune, 516 F.3d 781, 787 (9th Cir.) (en banc), cert. denied, 555 U.S. 818 (2008)). Respondent argues that no Supreme Court authority clearly establishes that context is an inappropriate factor in deciding whether a suspect's "remain silent" invocation was sufficiently ambiguous to permit clarifying questions. See Objections at 3.

Contrary to respondent's objection, as Anderson directs, the Court's conclusion is that using context to render an otherwise unambiguous invocation ambiguous is an unreasonable application of Miranda. Anderson, 516 F.3d at 787-89; Miranda, 384 U.S. at 73-74 ("if [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease"); see also Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010) (acknowledging that if the suspect had said he wanted to remain silent or did not want to talk to police, such "simple, unambiguous statements" would have invoked the right to cut off questioning under Miranda); Bates v. Clark, 365 Fed.Appx. 840, 841 (9th Cir. Feb. 17, 2010) (unpublished) (Ninth Circuit again holding that "[i]t is an unreasonable application of Miranda and Davis v. United States, 512 U.S. 452 (1994), to use context 'to transform an unambiguous invocation into an open-ended ambiguity.'") (quoting Anderson). Absent

contrary Supreme Court authority or superseding Ninth Circuit authority, Anderson is binding on this Court. Hart v. Massanari, 266 F.3d 1155, 1170 (9th Cir. 2001) (stating that district court may not "disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue"). The deference accorded to state court decisions on federal habeas review does not direct a different conclusion. As the Ninth Circuit recently explained, "[w]e defer when state courts reasonably adjudicate claims of federal right, even if we think they're wrong. But where, as here, a state court doesn't act reasonably, deference comes to an end." Doody v. Ryan, 649 F.3d 986, 1028 (9th Cir.) (Kozinski, J., concurring) (citing Harrington v. Richter, 131 S. Ct. 770, 786 (2011)), cert. denied, 132 S. Ct. 414 (2011). This Court is bound by Anderson.

Second, in arguing that the trial court's admission of Cliett's statements in violation of Miranda was harmless error, respondent has quoted from the portion of the Report and Recommendation which addresses sufficiency of the evidence. See Objections at 10 ("[T]he Report recommends, 'there was sufficient evidence to support the jury's conviction of petitioner on both the conspiracy to commit murder and the first degree murder counts' if a reasonable reviewer excludes Petitioner's statements under Miranda. Hence, while Petitioner's statements likely influenced the jury's verdict, that finding is insufficient justification to grant federal relief under Brecht [v. Abrahamson, 507 U.S. 619, 637 (1993)]."). Respondent incorrectly conflates the deferential sufficiency of the evidence standard of review under Jackson v. Virginia, 443 U.S. 307, 319 (1979), with the appropriate Brecht harmless error

standard for reviewing the impact of the Miranda violation. See Arnold v. Runnels, 421 F.3d 859, 869 (9th Cir. 2005) ("The question posed for us is not whether the evidence was sufficient. . . . The question is whether the error influenced the jury.").

Under Brecht, an error is not harmless if it has a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 637 (quotations omitted). The State, rather than petitioner, bears the "risk of doubt" in a Brecht harmless error analysis. Valerio v. Crawford, 306 F.3d 742, 762 (9th Cir. 2002) (citing O'Neal v. McAninch, 513 U.S. 432, 439 (1995)), cert. denied, 538 U.S. 994 (2003). As the Report and Recommendation explains, the error in admitting petitioner's statements after he invoked his right to remain silent was not harmless "in light of the less than overwhelming other evidence in the case that implicated [petitioner] in the shooting." Report and Recommendation at 28. That there was sufficient other evidence to retry petitioner does not alter the Court's conclusion. Compare United States v. Moses, 137 F.3d 894, 905 (6th Cir. 1998) (Ryan, J., concurring) (noting that even if admissible testimony was sufficient to support a conviction under the Jackson standard, it was "highly probable" that inadmissible testimony tipped the scales in favor of conviction and therefore the error in admitting such testimony was not harmless error).

IT IS ORDERED that the Petition is conditionally granted based upon the constitutionally erroneous admission at trial of statements made by petitioner after his unambiguous assertion of his right to remain silent. Respondent shall discharge

petitioner from all adverse consequences of the judgment in Los Angeles County Superior Court Case No. BA208312, unless petitioner is brought to retrial within ninety (90) days of the entry of the Judgment herein, plus any additional delay authorized under State law.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Report and Recommendation, and the Judgment herein on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: December 22, 2011.

/s/ S. James Otero
HONORABLE S. JAMES OTERO
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IAN CLIETT, Petitioner, v. L.E. SCRIBNER, Warden, Respondent.	Case No. CV-05-6616 SJO (JC) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable S. James Otero, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. SUMMARY

On September 20, 2006, Ian Cliett ("petitioner"), a state prisoner proceeding *pro se*, filed the operative Third Amended Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254. Petitioner challenges a conviction in Los Angeles County Superior Court claiming, among things, that the trial court constitutionally erred by admitting petitioner's statements to the police because such statements were obtained in violation of petitioner's Miranda[1]

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

rights, after petitioner unequivocally invoked his right to remain silent.

On March 16, 2007, respondent filed an Answer and a supporting memorandum ("Answer").[2] On August 13, 2007, petitioner filed a Traverse ("Traverse").

As further discussed below, the Petition should be granted to the extent it seeks a conditional writ of habeas corpus based upon the constitutionally erroneous admission at trial of statements made by petitioner after his unambiguous assertion of his right to remain silent.

II. PROCEDURAL BACKGROUND

On June 22, 2001, a jury found petitioner guilty of the first degree murder of Keith Stewart and conspiracy to commit murder. (RT 3003-04). The jury further found true allegations that a principal was armed with a firearm in the commission of the foregoing offenses. (RT 3003-04).[3]

On August 27, 2001, after petitioner waived his right to a jury trial on a prior conviction allegation, the trial court found true an allegation that petitioner had suffered a prior serious and violent felony which qualified as a strike under California's Three Strikes Law. (RT 3605-06). On the same date, the trial court sentenced petitioner to

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[2] Respondent also relies on documents lodged on on January 24, 2006, and March 16, 2007 ("Lodged Doc.") including the first volume of the Clerk's Transcript ("CT") and eight volumes of the Reporter's Transcript ("RT").

[3] The jury found not true allegations that petitioner personally used and discharged a firearm which proximately caused the victim's death. (RT 3003-05).

a total of 51 years to life in state prison. (RT 3607-08).

On January 24, 2003, the California Court of Appeal ordered the abstract of judgment corrected to reflect petitioner's presentence credits, and otherwise affirmed the judgment in a reasoned decision. (Lodged Doc. 1). On April 9, 2003, the California Supreme Court denied review without comment. (Lodged Doc. 3).

Petitioner thereafter sought, and was denied habeas relief in the Los Angeles County Superior Court, the California Court of Appeal, and the California Supreme Court. (Lodged Docs. 4-7, 10-11).

III. FACTS[4]

A. Prosecution

The members of the Mansfield Gangster Crips gang and the Marvin Gangster Crips gang had a history of being friendly with one another. In April 1996, however, a member of the Marvin Gangster Crips shot and killed a member of the Mansfield Gangster Crips. Since that time, the Mansfield Gangster Crips and Marvin Gangster Crips have been rivals. The Mansfield Gangster Crips claimed the territory north of Venice Boulevard, and the Marvin Gangster Crips claimed the territory south of Venice Boulevard. In August 1998, both gangs had about 200 members. At that time, the victim Keith Stewart (also known as Lazy and Lazy Boy) and Lawrence Moses (also known as Bingo) were members of the Marvin Gangster Crips. Petitioner,

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[4] The facts set forth are drawn from the California Court of Appeal's decision on direct appeal. (Lodged Doc. 1 at 3-9). Such factual findings are presumed correct. 28 U.S.C. §2254(e)(1).

Anthony McMillian (also known as Ant Dog and Baby Dog) and Marcus Brown (also known as Looney and Baby Looney) were members of the Mansfield Gangster Crips.

Randall Batts lives at 1927 Thurman Avenue in Los Angeles. Batts had seen the victim Keith Stewart on Thurman Avenue from time to time, apparently going into a house across the street from Batts' home. Stewart did not live on Thurman Avenue. About a week prior to August 15, 1998, the day Stewart was shot, Batts saw Stewart shoot at Anthony McMillian. Batts was unable to tell if McMillian was hit by the shot Stewart fired at him. Batts was not a gang member.

Lawrence Moses joined the Marvin Gangster Crips criminal street gang in 1993 or 1994. In August 1998, Moses' son was receiving day care at Batts' home Moses had known Stewart, the victim, since 1989 but did not know his real name. Moses knew Stewart to be a member of the Marvin Gangster Crips as well. However, after Stewart suffered an accident, he was not really "gang banging."

At approximately 11:00 to 11:45 p.m. on August 15, 1998, Moses and Batts were on the front porch of Batts' home on Thurman Avenue when Moses saw Stewart driving a blue Camaro up and down the street. Stewart eventually parked his car on the west side of the street, where Batts' home is located. He got out of his car and walked across the street in a diagonal direction toward a house at 1842 Thurman Avenue. About five to ten minutes after Stewart walked across the street, Moses saw two men walking southbound on the sidewalk on the east side of Thurman Avenue. Moses later identified one

of the men as petitioner, who was accompanied by someone shorter than he was. The two men walked across to the west side of the street. Moses had known petitioner since 1991, when petitioner and Moses had been members of the Homeboy Criminals gang.

Approximately ten to twenty minutes after Stewart had walked over to the east side of Thurman Avenue, Moses saw Stewart begin walking back across the street toward his car. Moses then heard two shots fired, and he turned around and saw petitioner and the shorter man on the grass beside the spot where Stewart's car was parked. Moses then heard more shots fired, and he saw Stewart down on the ground. Moses saw petitioner and the shorter man running almost side-by-side toward Venice Boulevard. Batts also looked out to the street after the shots were fired, and he saw Stewart lying in the street and two men running off together toward Venice Boulevard. One of the men was tall and the other was short. Moses told Batts to call 911 and went over to Stewart. Moses saw that Stewart was kicking his feet and bleeding from the back of his head. Moses recalled that Stewart did not have a gun on his person, and there was no gun lying anywhere around him.

Batts called 911 and then ran outside and went to the spot where Stewart was lying on the ground and coughing up blood. He saw no gun lying near Stewart. Some police officers and an ambulance arrived. The ambulance took Stewart away.

Moses did not know whether it was petitioner, the shorter man, or both who had shot at Stewart. At the time of the shooting, Moses did not see Stewart throw or point anything at petitioner and

the shorter man. The man or men shot at Stewart over the top of Stewart's car. When the shooting occurred, streetlights, porch lights, and light coming through windows of houses illuminated Thurman Avenue.

On the following day, Moses spoke with police and told them he was unable to see who the shooters were. Moses said this because he did not want to get involved. His son was attending day care in the area, and he had other family nearby and was frequently there himself. Moses did not want anything "coming back" on him or his family. At a later date, police showed Moses some photographs that included a photograph of petitioner. Moses identified petitioner's photograph and wrote on the back of it that petitioner was the taller of the two men who shot at Stewart. Moses was shown a photograph of McMillian, and he wrote on it that he was not the one who shot Stewart.[5]

In January 2001, Moses was transported from Las Vegas to Los Angeles to testify at petitioner's trial. Moses was held in custody at Los Angeles County jail. While there, he saw petitioner, who also was in custody at the jail. Petitioner asked Moses if he was going to "tell on him." Moses said he would not. The day before Moses testified at trial, petitioner again asked Moses if he would tell on him. Moses again denied he would. Moses was not offered special consideration or a plea bargain for testifying at petitioner's trial. Moses was facing federal drug charges in Nevada and had two felony convictions.

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[5] Moses testified that McMillian (also known as Ant Dog and Baby Dog) had a ponytail and that neither participant in the shooting had a ponytail. (RT 1287-88).

Los Angeles Police Office James Hwang responded to Thurman Avenue at approximately 11:45 or 11:50 p.m. on August 15 and set up a crime scene perimeter in the area where Keith Stewart had been shot. Hwang found Stewart lying face down on the pavement with a pool of blood around his head. Stewart was having difficulty breathing. Hwang observed seven expended bullet casings near Stewart's blue Camaro.

Detectives Tracey Benjamin and Robert Felix of the Los Angeles Police Department ("LAPD") were assigned to investigate the shooting of Keith Stewart. They arrived at the shooting scene on the early morning of August 16. While Detective Benjamin was at the scene, seven expended bullet casings were collected. Five of the casings were found in the grass and sidewalk areas to the west of Stewart's car, and two of the shell casings were found in the street near Stewart's car. Near where Stewart had lain, Benjamin saw a white substance resembling rock cocaine, some marijuana, $84.14, and a pager. The paramedics apparently had removed these items from Stewart's clothing while treating him. Benjamin saw that three bullets were embedded in Stewart's Camaro. There were also two bullet strike marks on the exterior of the vehicle. Benjamin later learned that Stewart was involved in narcotics sales.

Stewart's autopsy revealed that the cause of death was a single gunshot wound to the back of the head. Five bullet fragments were removed from Stewart's head. Gunshot residue testing was performed on Stewart's hands, and the test revealed no gunshot residue.

Pamara Cole had known petitioner since she and petitioner were in kindergarten. They were good

friends who "hung out" with each other. After Stewart's murder, an acquaintance of Cole's named Troy told her he had seen petitioner's picture on the internet. When Cole saw petitioner, she asked him about his picture on the internet and about information there that stated he was wanted for murder. Cole testified that petitioner told her it was a lie.

Detective Daryn Dupree of the LAPD was one of the investigating officers in the Stewart shooting. On June 25, 1999, Detective Dupree and Detective Felix interviewed Cole at her home. On June 29, Cole went to the police station at the request of Detectives Dupree and Felix, and underwent another interview with the detectives. Cole was not aware that the interview was being tape-recorded. The tape recording was played to the jury. During the tape-recorded interview, Cole told Dupree and Felix that she had known petitioner for twelve years, and she was familiar with the area on Thurman Avenue where Stewart was killed. She had seen Stewart driving around the neighborhood in a black car. A boy named Troy had told her that he had seen on the internet that petitioner was wanted for a murder.

Cole told the detectives she asked petitioner "about it." She told petitioner that his picture was on the internet for a murder. Petitioner then told her that he and Anthony McMillian had been "over there," and Stewart pulled a gun on them McMillian had a gun but was taking too long to pull the trigger. Petitioner took the gun away from McMillian and shot Stewart. Petitioner noticed that Batts and Moses were there, and "[t]hey kn[e]w who he was." According to Cole, petitioner was talking about turning himself in.

A tape recording of Detective Dupree's and Detective Felix's conversation with petitioner outside the interview room at the police station was played to the jury at petitioner's trial. Petitioner said "they" were supposed to go to the hospital where McMillian's girlfriend was having a baby. While they were driving, Looney (Marcus Brown) said, "These niggers is out here." Looney then drove to the area where Stewart was shot. Petitioner did not known Looney was going to go there. Petitioner told Looney to stop the car. Looney did so, and he and petitioner got out of the car and started walking. Petitioner tried to talk Looney out of whatever he was going to do. They were walking back toward Looney's car when Stewart walked out of the house. Stewart pulled out a pistol. Petitioner was scared and began running toward Pico Boulevard. He heard shots being fired. Looney shot Stewart. Later that evening, petitioner, McMillian, and Looney went to the hospital in the San Fernando Valley where McMillian's girlfriend had a baby. McMillian did not shoot Stewart. McMillian tried to negotiate a truce with Stewart's gang, but Looney did not want a truce. After Stewart fired a shot at McMillian, there was no hope for a truce.

Detective Felix knew that Marcus Brown (Looney) had been killed on April 20 1999. Detective Felix had spoken with Brown's mother, Candyace Brown, several times since petitioner's arrest in the instant case. During these contacts, Candyace Brown had never told Felix that her son Marcus had confessed to her that he was involved in the murder of Stewart.

Stephanie Evans is petitioner's girlfriend, and they have a child together. Evans testified that she

was with petitioner all day and all night on August 15, 1998 (i.e., during the period in which the crimes in issue were committed). She and petitioner attended a birthday party for Candyace Brown's daughter during the day, and at night they were at Evans' home in Hyde Park. Detective Dupree testified that petitioner never mentioned during his interview on July 1 that he was with Stephanie Evans on the night Stewart was killed.

Starr Sachs, a firearms examiner with the LAPD examined the seven expended bullet casings that were found at the scene. Sachs determined that the casings were all fired from the same firearm. Six of the expended bullet casings were manufactured by the CCI Company and the seventh was made by the Remington Company. All of the expended casings were from either .22 caliber long or .22 caliber long rifle ammunition.

Sachs said that the live ammunition found in the apartment where petitioner was arrested on July 1, 1999, was .22-caliber long rifle ammunition manufactured by CCI Company. Although the cartridge casings near Stewart's body were consistent with the live ammunition found in the apartment, the seven cartridge casings found by Stewart's body were not fired from the .22-caliber rifle that was found in the apartment. Ammunition that is .22-caliber long rifle can be fired from a .22-caliber semiautomatic handgun or a revolver. Sachs also examined a fragmented bullet that was removed from Stewart's body. The fragments were consistent with .22-caliber long rifle ammunition.

Daniel Woo, a fingerprint analysis expert with the LAPD, examined the expended shell casings as well. He did not find any identifiable fingerprints on

the casings. During his career, Woo has analyzed more than 40,000 sets of fingerprints for comparison purposes and has never found an identifiable fingerprint on a .22-caliber shell casing because of the small size of such casings. He was not aware of any case in which an identifying fingerprint had been obtained from a .22-caliber shell casing.

Officer Shands McCoy testified as a gang expert at petitioner's trial. He informed the jury that when members of one street gang go into a rival street gang's territory, especially at night, they go there for the purpose of doing harm, engaging in criminal activity, shooting someone, and more than likely killing someone, such as a rival gang member. If a gang member goes into a rival gang's territory, he would not go there unarmed. A gang member who goes into a rival gang's territory in a car would not get out of the car in the rival gang's territory if he was unarmed.

B. Defense

One or two days before Marcus Brown (Looney) died, he told his mother, Candyace, that he shot Stewart after Stewart had reached for his gun and tried to kill him. Brown did not tell his mother whether he was alone or with someone else when he shot Stewart.

Petitioner's mother testified that she had no daughters, and petitioner had no sisters. Therefore, Officer McCoy, the prosecution's gang expert, was incorrect in saying that petitioner and McMillian knew each other because McMillian had dated petitioner's sister.

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus on "behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). A federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody 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." 28 U.S.C. § 2254(d).[6]

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[6] The California Supreme Court's rejection of claims without comment is generally presumed to constitute an adjudication on the merits of any federal claims, thereby subjecting such claims to review in federal habeas proceedings. See Harrington v. Richter, 131 S. Ct. 770, 784-85 (2011) ("When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary."); Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992) (California Supreme Court's unexplained denial of habeas petition constitutes decision on the merits of federal claims subjecting such claims to review in federal habeas proceedings), cert. denied, 510 U.S. 887 (1993); but see Williams v. Cavazos, 646 F.3d 626 (9th Cir. 2011) (California high court's decision to deny petition for review not decision on merits, but rather signifies decision not to consider case on the merits, and necessitates "looking through" such court's denial to last

"[C]learly established Federal law" refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). In the absence of a Supreme Court decision that "squarely addresses the issue" in the case before the state court, Wright v. Van Patten ("Van Patten"), 552 U.S. 120, 125 (2008), or establishes an applicable general principle that "clearly extend[s]" to the case before a federal habeas court to the extent required by the Supreme Court in its recent decisions, Van Patten, 552 U.S. at 123; see also Panetti v. Quarterman, 551 U.S. 930, 953 (2007); Carey v. Musladin ("Musladin"), 549 U.S. 70, 76 (2006), a federal habeas court cannot conclude that a state court's adjudication of that issue resulted in a decision contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Moses v. Payne, 555 F.3d 742, 760 (9th Cir. 2009) (citing Van Patten, 552 U.S. at 126).

"Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or 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." Harrington v. Richter ("Richter"), 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. at

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reasoned state court decision).

786–87 ("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.").

In applying the foregoing standards, federal courts look to the last reasoned state court decision. See Davis v. Grigas, 443 F.3d 1155, 1158 (9th Cir. 2006) (citation and quotations omitted). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991); see also Gill v. Ayers, 342 F.3d 911, 917 n.5 (9th Cir. 2003) (federal courts "look through" unexplained rulings of higher state courts to the last reasoned decision). However, to the extent no such reasoned opinion exists, courts must conduct an independent review of the record to determine whether the state court clearly erred in its application of controlling federal law, and consequently, whether the state court's decision was objectively unreasonable. Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir. 2000); see also Richter, 131 S. Ct. at 784 ("Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief."); Cullen v. Pinholster, 131 S. Ct. 1388, 1402 (2011) ("Section 2254(d) applies even where there has been a summary denial.") (citation omitted).

When it is clear, however, that the state court has not decided an issue, review of such issue is *de novo*. Reynoso v. Giurbino, 462 F.3d 1099, 1109 (9th Cir. 2006).

V. DISCUSSION

A. Petitioner Is Entitled to Federal Habeas Relief on His Miranda Claim

Petitioner argues that the trial court constitutionally erred in admitting incriminating statements made by petitioner during his interview with detectives because petitioner clearly and unequivocally invoked his right to remain silent at the beginning of the interview.[7] (Petition at 5, 6). The California Court of Appeal – the last state court to issue a reasoned decision regarding the matter – rejected this claim on its merits, finding that petitioner's expression of his choice to remain silent was not unambiguous. (Lodged Doc. 1 at 12-17). In light of the facts of this case and binding Ninth Circuit authority that Miranda clearly established that reliance on context to render an otherwise unambiguous invocation of the right to remain silent ambiguous is inappropriate, this Court concludes that the California courts' determination that petitioner's invocation of his right to remain silent was unambiguous was an unreasonable determination of fact and was contrary to, and an unreasonable application of clearly established federal law, namely Miranda. Moreover, as this

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[7] Petitioner also asserts that such statements were involuntary. However, in light of this Court's conclusion that such statements were inadmissible under Miranda, it need not reach petitioner's contentions regarding the involuntariness of the statements.

Court cannot conclude that the admission of petitioner's statements was harmless, issuance of a conditional writ of habeas corpus is appropriate.

1. Additional Pertinent Facts[8]

a. Defense Evidence at Suppression Hearing

Charles Flowers lives at 8914 Rose Avenue in Long Beach. He was present when petitioner was arrested there by Detectives Dupree and Felix. Flowers was at home with his children, his father, his girlfriend, and petitioner when the police knocked on the door. The police told Flowers to go outside, where Detective Dupree stayed with him. The police said they were looking for petitioner, whom they eventually brought outside. Detective Felix was talking to petitioner, reading him his rights "or whatever" while Flowers was standing about twelve feet away. When Flowers asked if he could go back in the house, the officers told him that he could. As Flowers started walking back toward his apartment, he heard petitioner say that he wanted his lawyer. Flowers watched the officers search the apartment. Police found guns inside Flowers' apartment. Flowers observed that petitioner was handcuffed when he was outside the apartment with the officers.

Petitioner took the witness stand at the suppression hearing. He testified that he had seen Detective Dupree approximately five to ten times before petitioner's July 1 arrest. He had also spoken with Detective Felix previously. Both detectives

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[8] Unless otherwise indicated, the facts set forth are drawn from the California Court of Appeal's decision on direct appeal. (Lodged Doc. 1 at 9-17). The factual findings of the Court of Appeal are presumed correct. 28 U.S.C. § 2254(e)(1).

previously had interviewed petitioner about things that were going on in the neighborhood. As petitioner stood outside Flowers' apartment next to Detective Felix, Felix asked petitioner about the Stewart homicide. Petitioner did not say anything about it because he did not know anything at that time. He and Felix engaged in "small talk." Felix advised petitioner of his "Miranda rights," including his right to remain silent and his right to have an attorney. When Detective Felix asked petitioner if he wanted to give up his rights, petitioner replied, "No, I want an attorney." Felix talked briefly about why petitioner did not want to talk to him. Detective Felix also said that he already knew the truth.

On the way to the police station, petitioner and the officers again engaged in small talk. The detectives did not bring up the Stewart shooting, but petitioner brought it up. He told the detectives he "didn't want him to go above and beyond any duty to try to stick [petitioner] with something [he] didn't do." While they were waiting for the interview room to be prepared, Detective Felix said that he knew petitioner had done it, and he had eleven witnesses. Petitioner told Detective Felix he did not want to talk to him and he wanted an attorney. Petitioner said this more than once.

In the interview room, the detectives read him his rights, and petitioner understood them. Detective Dupree asked petitioner if he wanted to talk to him and Detective Dupree. Petitioner chose to remain silent. Detective Felix then said, "You don't want to talk to us?"; and Detective Dupree said, "Okay, you don't want to talk to me?" Petitioner was intimidated by Detectives Felix and Dupree because he had dealt with them before and knew what they were capable

of doing and what they had done to other people. Detective Felix seemed pretty upset about petitioner saying he did not want to talk. He sat back in his chair and patted his stomach, "like he was Santa Clause or something." Petitioner interpreted this as meaning that Felix had a "gut feeling" that petitioner had done it.

Petitioner agreed to talk to the officers because he was intimidated. Petitioner subsequently asked the detectives for an attorney. The officers did not stop questioning petitioner after he said this. They did not stop questioning him no matter what he said. Petitioner felt intimidated by Detective Dupree and Felix when he signed the advisement and waiver of rights form. From the time petitioner was in contact with the detectives in Long Beach until he entered the interview room, petitioner asked for an attorney more than ten times, and petitioner told the detectives that his attorney was Mr. Kaplan. During the interview, petitioner also said that he wanted Mr. Kaplan. Petitioner acknowledged he had never spoken with Mr. Kaplan before, and Mr. Kaplan had never been his attorney on another case.

b. Prosecution Evidence at Suppression Hearing

Detective Dupree testified that he engaged in small talk with petitioner outside the apartment building while the Flowers residence was being searched. Dupree said he had come into contact with petitioner on approximately ten prior occasions. He said he and petitioner had mutual respect for each other. While Dupree and petitioner were outside the apartment building, petitioner did not indicate he did not want to speak with Dupree, and he did not say he wanted an attorney. After the two guns were found,

Dupree, Felix, and another officer drove petitioner to the police station. During the drive they continued to engage in small talk. Dupree did not ask petitioner about Keith Stewart's murder during the drive.

Dupree said he asked his partner, Felix, if he had advised petitioner of his rights in Long Beach, and Felix said he had. Felix told Dupree that petitioner said he was willing to speak with them. At the Wilshire station, Dupree told petitioner for the first time that he and Felix wanted to talk about the Stewart murder. Petitioner said he was willing to tell the detective what he knew. The three then went into the interview room.

The detectives tape-recorded the interview with petitioner. At the beginning of the interview, Felix advised petitioner of his Miranda rights.[9]

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[9] The record reflects that the interview room discussion among petitioner and detectives Felix and Dupree proceeded as follows:

Det:	You've had this read before now, right?
Petitioner:	Um-hmm.
Det:	The rights *** before. Now listen up here. You have the right to remain silent.
Petitioner:	Um-hmm.
Det:	If you give up the right to remain silent anything you say can and will be used against you in a court of law.
Petitioner:	Um-hmm.
Det:	You have a right to speak with an attorney and to have an attorney present during questioning.
Petitioner:	Um-hmm.
Det:	If you so desire and cannot afford one an attorney will be appointed for you without charge before questioning. Do you understand that?
Petitioner:	Um-hmm. ***

Det:	*** If you understand, write *** in front of you.
Petitioner:	Personal waiver. On one of them, is it an attorney *** or a public defender?
Det:	Ok, let me put it this way. We are going to ask you some questions about a situation that happened out there. You have a right to have an attorney present.
Petitioner:	Is it going to be an attorney or –
Det:	An attorney's an attorney.
Petitioner:	All I'm saying is, is it going to be an attorney or a damn plain public defender?
Det:	I don't who it'll be. It'll probably be a public defender. I don't know.
Petitioner:	O.K.
Det:	Do you understand these rights I have explained to you?
Petitioner:	Yeah.
Det:	O.K., do you wish to give up your right to remain silent, in other words do you want to talk to me now about what we talked to you about?
Petitioner:	Ahhh, you gonna let me stop talking when I want to stop talking, right? Ahh [approximately 11 seconds of silence] Uhh [3 seconds of silence] **I, I choose to remain silent.**
Det:	OK, you don't want to talk to us? You don't want to talk to me?
Petitioner:	I'll talk.
Det:	Do you wish to give up the right to speak to an attorney and have an attorney present during questioning, so in other words you want to talk to us, huh?
Petitioner:	Right.

. . . .

(Lodged Doc. 1 at 13-14; CT 182-83) (emphasis added). At the hearing, Detective Dupree testified that the reason he asked petitioner, "You don't want to talk to me?" was because Detective Dupree was surprised when petitioner said he chose to remain silent. This was because of their relationship and

Based on the interaction in Long Beach, in the car, and at the police station before the interview, Dupree had formed the opinion that petitioner wanted to talk with the detectives. Before the interview, petitioner did not tell Dupree he did not want to talk to him, and petitioner did not ask for an attorney.[10]

After interviewing petitioner for approximately half an hour inside the room, the detectives and petitioner went outside the interview room. There, petitioner made more statements.[11] Afterwards, petitioner and the detectives entered the interview room again, where petitioner made more statements.

At the request of the prosecution, the trial court reviewed transcripts of Detective Felix's testimony at preliminary hearings on March 2, 2002 and October 3, 2002.

One of the interviewing detectives, Detective Dupree, testified during a pretrial admissibility hearing that he had known petitioner for three or four years, had come into contact with him approximately ten times, and characterized their relationship as one of mutual respect. (RT 9, 15).

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because petitioner "didn't ask for an attorney or anything like that prior to that. He acted like he wanted to talk." (Lodged Doc. 1 at 15).

[10] The detectives then proceeded to question petitioner. Petitioner denied his involvement in the shooting. This portion of petitioner's interview was admitted into evidence and presented to the jury by means of questions posed by the prosecutor to Detective Dupree.

[11] As indicated above, petitioner made statements indicating he was at the scene of the shooting, but he ran when Stewart pulled out a gun. He said Looney (Marcus Brown) did the shooting, and Baby Dog (McMillian) was not at the shooting.

Detective Dupree said that at the time of petitioner's arrest in Long Beach on July 1, 1999, petitioner indicated a willingness to talk to the detectives and that petitioner and the detective engaged in "small talk." (RT 14-15, 16). Detective Dupree also said that upon arrival at the police station he informed petitioner of the detectives' desire to talk about the August 15, 1998 murder, and that petitioner again indicated a willingness to talk. (RT 17-18).

c. Trial Court Decision

The trial court made adverse credibility determinations as to Charles Flowers and petitioner. The trial court accepted the testimony of Detective Dupree at the suppression hearing and the preliminary hearing testimony of Detective Felix, which was offered by the People. The trial court admitted the first interview room statements and the outside statements up to a certain point where the trial court believed petitioner invoked his right to an attorney.[12]

In making its ruling, the trial court stated:

> The principal area of the defense argument deals with what was said at the beginning of the interview in the interview room, and that is pages 2 through 3 of the transcript marked as court exhibit 1.
>
> I conclude that was not a sufficient assertion of the [petitioner's] right to remain silent, and the entire context of it has been reviewed.

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[12] The jury heard the audio tape of the admissible portion of the conversation that took place outside the interview room.

* * *

The principal argument is the interchange at the bottom of page 2 of the transcript when the [petitioner] did use the words, "I cho[o]se to remain silent."

I think in the entire context of the interaction between the detectives and the [petitioner] on July 1st, that was an unclear statement of the [petitioner's] intent.

Detective Dupree indicated that the [petitioner] had been entirely cooperative up to that point. He had said that he was willing to talk to the detective about the shooting. He had never indicated anything to the contrary.

The detectives both asked questions after the [petitioner] made his statement, and I don't find them to have been coercive.

I don't find that they raised their voices in any kind of intimidating manner. I received those statements and evaluated them as what Detective Dupree said, a statement of surprise. They were surprised at what he said and they were simply asking for clarification.

I think it's very important that these were simple and direct questions. They were asked immediately after the [petitioner] made his statement. There was not some prolonged period in which the [petitioner] was exposed to state prison, other kinds of statements or threats or anything of that kind. It was a simple, direct statement of his intent to clarify his intention.

> I think it's equally significant that he immediately responded by saying I'll talk. It was not a long period of delay where he was thinking about it. He simply said, yes, I'll talk. Then he immediately signed a written statement which expressed that intent.

d. Court of Appeal Opinion

On direct appeal, petitioner argued that there was not one iota of equivocation or ambiguity in his expressed choice to invoke his right to remain silent, and therefore maintained there was no need for Detective Dupree to "clarify" petitioner's express statement of purpose. The Court of Appeal disagreed and concluded that the trial court's ruling was correct.

The Court of Appeal noted that under Davis v. United States, 512 U.S. 452, 458-59 (1994), the inquiry into whether a suspect has unambiguously requested counsel is an objective one. It then effectively applied such Supreme Court holding to its analysis of whether a suspect has unambiguously invoked his right to remain silent:

> The issue is what a reasonable officer in light of the circumstances would have understood. [Davis, 512 U.S. at 459]. Detective Dupree, whom the court found a credible witness, testified that both he and Detective Felix spontaneously uttered expressions of surprise when [petitioner] said he chose to remain silent. The tape recording, the transcript, and the testimony of the detective confirm this to be the case. The detectives' questions can reasonably be interpreted as spontaneous expressions of surprise rather than direct

> requests for clarification. Even if we were to consider the questions as requests for clarification, the officers did not act unreasonably given the circumstances of their interaction with [petitioner] up to that point. [Petitioner] had told the officers before entering the interview room that he was willing to tell detectives what he knew about the murder of Keith Stewart. We conclude the trial court did not err. . . .

2. Legal Authority[13]

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court held that pursuant to the Fifth and Fourteenth Amendment privilege against self-incrimination, 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, 384 U.S. at 444; Rhode Island v. Innis, 446 U.S. 291, 297 (1980); see also Dickerson v. United States, 530 U.S. 428, 431 (2000) (Miranda announced constitutional rule governing admissibility of statements made during custodial interrogation in both state and federal courts). These "procedural safeguards" require that a person in custody "first be informed in clear and unequivocal terms that he has the right to

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[13] The Court in this Section cites to Supreme Court authority (e.g., Maryland v. Shatzer, 130 S. Ct. 1213, 1219 (2010), Berghuis v. Thompkins, 130 S. Ct. 2250, 2259-60 (2010)), which post-dates the time in issue in order to provide an accurate statement of the current law. However, as such Supreme Court authority was not "clearly established" at the time in issue, the Court does not rely upon such authority in assessing whether petitioner is entitled to federal habeas relief.

remain silent," "that anything said can and will be used against the individual in court," that he has "a right to consult with a lawyer and to have the lawyer with him during interrogation," and that "if he is indigent a lawyer will be appointed to represent him." Miranda, 384 U.S. at 467-73, 479.

Before a court may introduce statements made by a suspect in custody and under interrogation, the government has the burden of proving, by a preponderance of the evidence, that the defendant has voluntarily, knowingly, and intelligently waived his Miranda rights. See Colorado v. Spring, 479 U.S. 564, 573 (1987); Colorado v. Connelly, 479 U.S. 157, 168 (1986). The government satisfies its burden if it makes two prerequisite showings: First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412, 421 (1986) (citation omitted).

A state court's determination that a defendant knowingly and intelligently waived his Miranda rights is entitled to a presumption of correctness. Amaya-Ruiz v. Stewart, 121 F.3d 486, 495 (9th Cir. 1997), cert. denied, 522 U.S. 1130 (1998). While voluntariness is a legal question meriting independent consideration on federal habeas review, a state court's subsidiary factual conclusions are

likewise entitled to the presumption of correctness. See Rupe v. Wood, 93 F.3d 1434, 1444 (9th Cir. 1996).

If a suspect waives his Miranda rights, his statements made during the interrogation may be used against him. However, if, after the warnings are given, "the suspect indicates that he wishes to remain silent, the interrogation must cease. Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present." Maryland v. Shatzer, 130 S. Ct. 1213, 1219 (2010) (internal citations to Miranda omitted). Such invocations of the right to remain silent and to counsel must be unambiguous and unequivocal. Berghuis v. Thompkins, 130 S. Ct. 2250, 2259-60 (2010) (invocation of right to remain silent must be unambiguous and unequivocal); Davis, 512 U.S. at 459 (invocation of right to counsel must be unambiguous and unequivocal).

If a suspect invokes a constitutional right in a manner 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 [a] right," precedent does not require the cessation of questioning. Davis, 512 U.S. at 459 (citation omitted). However, "[u]sing 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law." Anderson v. Terhune, 516 F.3d 781, 787 (9th Cir.) (en banc), cert. denied, 555 U.S. 818 (2008). "It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence." Id. Instead, Miranda only

requires that a suspect "indicate[] in any manner . . . that he wishes to remain silent." Miranda, 384 U.S. at 473-74; see also Anderson, 516 F.3d at 787.

In invoking a constitutional right, "a suspect need not 'speak with the discrimination of an Oxford don.'" Davis, 512 U.S. at 459 (citation omitted). The words of a request should be "'understood as ordinary people would understand them.'" Arnold v. Runnels, 421 F.3d 859, 865 (9th Cir. 2005) (quoting Connecticut v. Barrett, 479 U.S. 523, 530 (1987) (case involving invocation of right to counsel)). The Ninth Circuit has observed that "neither the Supreme Court nor this court has required that a suspect seeking to invoke his right to silence provide any statement more explicit or more technically-worded than 'I have nothing to say,'" and that "it is difficult to imagine how much more clearly a layperson . . . could have expressed his desire to remain silent." Anderson, 516 F.3d at 788 (quoting Arnold, 421 F.3d at 865-66).

Where a suspect has invoked his right to have counsel present during an interrogation, Edwards v. Arizona, 451 U.S. 477 (1981), provides an additional Fifth Amendment safeguard:

> [A] valid waiver of that right cannot be established by showing only that [the suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights . . . . [He] 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, 451 U.S. at 484-85 (emphasis added). Edwards presumes that such a suspect's Miranda waiver by simply responding to further questioning is involuntary, to ensure "that police will not take advantage of the mounting coercive pressures of prolonged police custody, by repeatedly attempting to question a suspect who previously requested counsel until the suspect is badgered into submission." Maryland v. Shatzer, 130 S.Ct. at 1220 (internal citations and quotations omitted).[14]

The Supreme Court has expressly declined to extend Edwards to situations in which an ambiguous or equivocal reference to an attorney is made, noting that "[i]f the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." Davis, 512 U.S. at 459-62. The Court nonetheless noted, that it would "often be good police practice for the interviewing officers to clarify whether or not he

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[14] In Montejo v. Louisiana, 129 S. Ct. 2079 (2009), the Supreme Court explained:

> The Edwards rule is designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights. It does this by presuming his postassertion statements to be involuntary, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This prophylactic rule thus protects a suspect's voluntary choice not to speak outside his lawyer's presence.

Montejo, 129 S. Ct. at 2085-86 (internal citations and quotations omitted). This rule, however, does not apply where the defendant initiates the contact. Id. at 2085 (citing Edwards, 451 U.S. at 28 484-85).

actually wants an attorney." Davis, 512 U.S. at 461 (1994).

Even absent a Miranda violation, a confession must be suppressed when the totality of the circumstances demonstrates that the confession was involuntary, as the use of an otherwise involuntary confession violates a criminal defendant's right to due process under the Fourteenth Amendment. Blackburn v. Alabama, 361 U.S. 199, 205 (1960); DeWeaver v. Runnels, 556 F.3d 995, 1002-03 (9th Cir.), cert. denied, 130 S. Ct. 183 (2009). Before a criminal defendant's statement can be used against him, the government must prove its voluntariness by a preponderance of the evidence. Lego v. Twomey, 404 U.S. 477, 489 (1972). The test for determining whether a confession is involuntary is whether, considering the totality of the circumstances, the confession was obtained by means of physical or psychological coercion or improper inducement such that the suspect's will was overborne. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973); United States v. Shi, 525 F.3d 709, 730 (9th Cir.), cert. denied, 129 S. Ct. 324 (2008). The assessment of the totality of the circumstances may include consideration of the length and location of the interrogation; evaluation of the maturity, education, physical and mental condition of the defendant; and determination of whether the defendant was properly advised of his Miranda rights. Withrow v. Williams, 507 U.S. 680, 693-94 (1993). "[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." Colorado v. Connelly, 479 U.S. at 167 (1986).

Where a trial court erroneously admits an involuntary statement or a statement obtained in violation of Miranda, the error is subject to harmless error analysis. See Arizona v. Fulminante, 499 U.S. 279, 292, 295-96 (1991) (admission of coerced confession subject to harmless error analysis; recognizing that Courts of Appeals have held the introduction of incriminating statements taken in violation of Miranda subject to harmless error analysis); United States v. Williams, 435 F.3d 1148, 1151 (9th Cir. 2006) (admission of statements made in violation of Miranda reviewed for harmless error).

3. Analysis

Given the facts in this case and the Ninth Circuit's decision in Anderson, this Court must conclude that the California courts' determination that petitioner's statement, "I choose to remain silent," was ambiguous in light of the surrounding circumstances was contrary to Miranda, the governing clearly established Supreme Court authority, and was an unreasonable determination of fact. See Anderson, 521 F.3d at 784, 787 n.3 & 791 (Miranda established a bright-line rule: "Once a person invokes the right to remain silent, all questioning must cease[.]"; state court's labeling of petitioner's statement as ambiguous was unreasonable determination of fact and decision to ignore unambiguous declaration of right to remain silent was unreasonable application of Miranda).

In Anderson, the Ninth Circuit held that the California Court of Appeal's determination that a petitioner's statement, "I plead the Fifth," was ambiguous was an unreasonable application of clearly established Supreme Court authority under Miranda. 516 F.3d at 786-87. In that case, the

petitioner was interviewed by police regarding a murder and petitioner's use of drugs on the day of the murder. Id. at 785. At one point during the interview the petitioner said, "I plead the [F]ifth," to which an officer replied, "Plead the [F]ifth. What's that?" Id. at 786. Based on the two lines of questioning (one related to the murder, the other related to the use of drugs), the California Court of Appeal found that the petitioner's comments "were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all" and that by asking the petitioner what he meant by pleading the fifth, the officer "asked a legitimate clarifying question." Id. at 787. The Ninth Circuit disagreed, finding nothing ambiguous about petitioner's invocation of his right to remain silent. It noted that the petitioner "did not equivocate in his invocation by using words such as 'maybe' or 'might' or 'I think,'" and there was nothing ambiguous in the petitioner's declaration, "I plead the Fifth." Id. at 788. It held that the Court of Appeal's decision was "unreasonable in concluding that the invocation was ambiguous in context." Id.

Here, similarly, petitioner's statement, "I choose to remain silent," was itself unambiguous and unequivocal. As in Anderson, the California courts' resort to surrounding circumstances to deem such an otherwise unambiguous statement ambiguous was unreasonable. Petitioner may have expressed a willingness to cooperate with the detectives at one or more points during the day in issue, but when he was placed in an interview room, informed of his Miranda rights by the detectives, and said, "I choose to remain silent," he clearly invoked his right to remain silent. Though the context surrounding petitioner's

invocation is important, it alone cannot "transform [petitioner's] unambiguous invocation" into an ambiguous statement, and to do so "defies both common sense and established Supreme Court law." Anderson, 516 F.3d at 787.

Nor can this Court conclude that the constitutionally erroneous admission of the statements made by petitioner after he unambiguously invoked his right to remain silent was harmless. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (constitutional state court error harmless unless it "had substantial and injurious effect or influence in determining the jury's verdict."). The prosecutor acknowledged that petitioner's statements constituted one of the four "biggest pieces of evidence that [the prosecution] [had] here[,]" with the other three being the statements/testimony of Cole, Moses and Batts. (RT 2480). Audio tapes of the detectives' interview with petitioner were played for the jury and typed transcripts were provided. (RT 1551-52). Both the audio tapes and transcripts were entered into evidence and made available to the jury during deliberations. (RT 2158; CT 181-199, 251-264). The prosecutor showed the jury thirteen enlarged and highlighted pages of the transcript of petitioner's statements, and extensively quoted and argued therefrom in closing argument. (RT 2504-2517). The prosecutor emphasized that petitioner stated that he was present at the shooting, that Baby Looney (Marcus Brown) did the shooting, and that he took of running from the crime scene. (RT 2507, 2511). A "defendant's own confession is probably the most . . . damaging evidence that can be admitted against him." Anderson, 516 F.3d at 792 (quoting Arizona v. Fulminante, 499 U.S. at 296 (internal quotation marks omitted)). Moreover, here, although

sufficient to support petitioner's convictions as discussed below,[15] the other three "biggest pieces of evidence" – the prior statements of Cole and the testimony of Moses and Batts – were less than overwhelming. Although prior to trial Cole told the police that petitioner had advised her that he, along with McMillian, had been present at the crime scene and that petitioner had shot the victim, at trial, she denied that petitioner made any admissions to her. Moses, a witness with prior convictions, then pending federal charges, and multiple prior inconsistent statements, testified at trial that petitioner was one of two men at the crime scene, but could not identify whether petitioner and/or the second person, who was *not* McMillian (see supra note 5), had fired shots. Batts, although a witness to two men being involved in the shooting, did not identify petitioner as being a participant. Particularly in light of the less than overwhelming other evidence in the case that implicated him in the shooting, petitioner's own admission that he was present with a fellow gang member was important both because it placed him at the crime scene and because it corroborated the testimony of Moses and the statements of Cole.[16] In short, this Court cannot conclude that the admission

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[15] The question posed by the harmless error standard is one distinct from the question of whether the jury would have decided the same way even in the absence of error. For purposes of harmless error analysis, the question is whether the error influenced the jury. Arnold, 421 F.3d at 868-69 (citations omitted).

[16] The admission of petitioner's statements also understandably impacted petitioner's trial counsel's strategy. See RT 2404 (trial counsel indicating that but for the admission of petitioner's statement that he was at the crime scene, counsel may have elected to present an alibi defense).

of statements made by petitioner after his unambiguous invocation of his right to remain silent did not have a "substantial and injurious effect or influence" on the jury's verdict. Brecht, 507 U.S. at 637; see also Anderson, 516 F.3d at 792 ("The prejudice from [the petitioner]'s confession cannot be soft pedaled, and the error was not harmless."); Arnold, 421 F.3d at 868 ("given the prosecutor's emphasis on the tape in both his opening statement and his closing argument, we cannot say with fair assurance that the tape recording did not have a substantial injurious effect on the jury's decision-making process").

B. The Evidence Was Sufficient to Support Petitioner's Convictions

Although petitioner is entitled to habeas relief on his claim that the trial court constitutionally erred in admitting statements made by him after his unambiguous invocation of his right to remain silent, the Court nevertheless must evaluate the sufficiency of the trial evidence, "as the Double Jeopardy Clause would preclude retrial if the evidence were insufficient." See Bean v. Calderon, 163 F.3d 1073, 1086 (9th Cir. 1998), cert. denied, 528 U.S. 922 (1999) (citation omitted). "The double jeopardy clause does not bar retrial after a reversal based on the erroneous admission of evidence if the evidence erroneously admitted supported the conviction." United States v. Chu Kong Lin, 935 F.2d 990, 1001 (9th Cir. 1991) (citation omitted). Thus, even if a court determines that the evidence is insufficient to support a conviction without the improperly admitted evidence, if the evidence is sufficient when the improperly admitted evidence is considered, the Double Jeopardy Clause allows retrial. See Lockhart

v. Nelson, 488 U.S. 33, 40-42 (1988). "[A] reviewing court must consider all of the evidence admitted by the trial court in deciding whether retrial is permissible under the Double Jeopardy Clause. . . ." Lockhart v. Nelson, 488 U.S. at 41. McDaniel v. Brown, 130 S. Ct. 665, 672 (2010) (a court reviewing a claim of insufficiency of the evidence must consider all evidence admitted at trial, regardless of whether the evidence should have been admitted). The California Court of Appeal – the last state court to issue a reasoned decision on petitioner's challenges to the sufficiency of the evidence – rejected such claims on their merits on direct review. (Lodged Doc. 1 at 17-18). This Court concludes, based upon an independent review of the record, that petitioner's challenges to the sufficiency of the evidence are without merit.[17]

On habeas corpus, the court's inquiry into the sufficiency of evidence is limited. Evidence is sufficient unless the charge was "so totally devoid of evidentiary support as to render [petitioner's] conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." Fish v. Cardwell, 523 F.2d 976, 978 (9th Cir. 1975), cert. denied, 423 U.S. 1062 (1976) (citations and quotations omitted). The standard of review on a sufficiency of the evidence claim has long been whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v.

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[17] The Court must conduct an independent review of the record when a habeas petitioner challenges the sufficiency of the evidence. See Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997).

Virginia, 443 U.S. 307, 319 (1979) (emphasis in original); see also Wright v. West, 505 U.S. 277, 284 (1992); Gonzalez v. Knowles, 515 F.3d 1006, 1011 (9th Cir. 2008); Schell v. Witek, 218 F.3d 1017, 1023 (9th Cir. 2000) (en banc) (each discussing Jackson standard for sufficiency of evidence claims).

On federal habeas review, relief may be afforded on a sufficiency of the evidence claim only if the state court's adjudication of such claim involved an unreasonable application of Jackson to the facts of the case. Juan H. v. Allen, 408 F.3d 1262, 1274-75 (9th Cir. 2005) (as amended), cert. denied, 546 U.S. 1137 (2006). The California standard for determining the sufficiency of evidence to support a conviction is identical to the federal standard enunciated by the United States Supreme Court in Jackson. People v. Johnson, 26 Cal. 3d 557, 576 (1980).

Courts must respect the province of the trier of fact to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the trier of fact resolved all conflicts in a manner that supports the finding of guilt. Jones v. Wood, 114 F.3d 1002, 1008 (9th Cir. 1997) (citation and quotations omitted); see also United States v. Stanton, 501 F.3d 1093, 1099 (9th Cir. 2007) (discussing deference owed to jury determinations).

Sufficiency of the evidence claims are judged by the elements defined by state law. Jackson, 443 U.S. at 324 n.16. Under California law, conspiracy requires two or more persons agreeing to commit a crime, along with the commission of an overt act in furtherance of that conspiracy. People v. Bogan, 152 Cal. App. 4th 1070, 1074 (2007). The prosecution

must show an intent to agree and the intent to commit the underlying substantive offense. Bogan, 152 Cal. App. 4th at 1074. California law defines first degree murder as unlawful killing with malice aforethought, premeditation, and deliberation and includes murder perpetrated by lying in wait. People v. Hernandez, 183 Cal. App. 4th 1327, 1332 (2010); Cal. Penal Code § 189. "Malice may be express (intent to kill) or implied (intentional commission of life-threatening act with conscious disregard for life)." People v. Hernandez, 183 Cal. App. 4th at 1332 (citation omitted).

Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to support the jury's conviction of petitioner on both the conspiracy to commit murder and the first degree murder counts.

The evidence presented at trial established that there was an ongoing conflict between the Mansfield Gangster Crips and the Marvin Gangster Crips. Keith Stewart was a Marvin Gangser Crip and was in the Marvin Gangster Crips' territory when he was shot. Petitioner and Brown (as well as McMillian) were Mansfield Gangster Crips in their rival's territory. Petitioner and a fellow Mansfield gang member were prowling around enemy territory at night and on foot. The gang expert explained that gang members do not enter a rival's territory, especially at night and when armed, unless they have a criminal purpose in mind – usually to attack a rival gang member. According to Batts, approximately a week before Keith Stewart was killed, he fired a shot at Mansfied Gangster Crips member Anthony McMillian. Moses identified petitioner as one of the two men who attacked Stewart. Cole told the police

that petitioner told her that he and McMillian had been there when Stewart pulled a gun on them. Petitioner told Cole that he shot Stewart and that he knew Batts and Moses had seen him. The testimony of a single witness, if believed, is sufficient to prove the identity of a perpetrator of a crime. United States v. Smith, 563 F.2d 1361, 1363 (9th Cir. 1977) (testimony of one witness, if solidly believed, sufficient to prove identity of perpetrator of crime), cert. denied, 434 U.S. 1021 (1978); United States v. Jones, 425 F.2d 1048, 1055 (9th Cir.) (testimony of one witness, if believed, sufficient to prove a fact), cert. denied, 400 U.S. 823 (1970) (citation omitted). Here, even without petitioner's admission to being present at the crime scene with a fellow gang member, the testimony of Moses and the statements of Cole to the police which were admitted into evidence were sufficient to establish that petitioner was a participant in the crime. In light of rivalry between the two gangs in issue, the fact that petitioner and a fellow gang member went to a rival gang's territory at night, with at least one of the two being armed, and the fact that they approached the victim together and that one of them shot and killed the victim, the evidence was sufficient to establish, at a minimum, that petitioner aided and abetted the intentional killing of the victim with malice aforethought, premeditation and deliberation.

The evidence was likewise sufficient to support petitioner's conviction for conspiracy to commit murder even without petitioner's admissions. The evidence from Moses, Cole and Batts established that Stewart was shot to death and that two men participated in the crime. The entry of petitioner and a fellow gang member armed with a gun, into enemy gang territory was sufficient circumstantial evidence

to show that the two men, one of whom was identified as petitioner, had the required agreement and specific intent for the crime of conspiracy to commit murder and that a participant in the conspiracy committed at least one of the charged overt acts in furtherance thereof.[18]

In light of the foregoing, this Court concludes that petitioner's challenges to the sufficiency of the evidence are without merit and that Double Jeopardy principles do not preclude his retrial on the underlying charges.

VI. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and adopting this Report and Recommendation; and (2) directing that Judgment be entered conditionally granting habeas relief based upon the constitutionally erroneous admission at trial of statements made by petitioner after his unambiguous assertion of his right to remain silent.[19]

DATED: September 8, 2011

/s/

Honorable Jacqueline Chooljian
UNITED STATES MAGISTRATE JUDGE

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[18] Among other overt acts, the operative Amended Information alleged that petitioner and his co-conspirators went into a rival gang neighborhood (overt act no. 3) and observed and shot the victim causing his death (overt act no. 4). (CT 70).

[19] As petitioner is entitled to federal habeas relief on his Miranda claim, the Court need not and has not addressed petitioner's remaining non-sufficiency of the evidence claims, but notes, in any event, that such other claims do not merit federal habeas relief.

Supreme Court
FILED
Apr - 9 2003
Fredrick K. Ohlrich Clerk
_____
Deputy

Court of Appeal, Second Appellate District,
Division Two – No. B152878
S113859

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

IAN CLIETT, Defendant and Appellant.

Petition for review DENIED.

GEORGE
Chief Justice

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Court of Appeal – Second Dist.
FILED
Jan. 24, 2003
Joseph A. Lane Clerk
Deputy Clerk

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. IAN CLIETT, Defendant and Appellant.	B152878 (Los Angeles County Super. Ct. No. BA208312)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael M. Johnson, Judge. Affirmed with directions.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Robert F. Katz and Roy C. Preminger, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Ian Cliett of conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1))[1] (count 1) and first degree murder (§ 187, subd. (a)) (count 2). The jury found true the allegations in both counts that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). The trial court found true the allegation that appellant had been convicted of a robbery, a serious or violent felony within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i) (the Three Strikes Law).

The trial court sentenced appellant to a base term of 25 years to life on count 2, doubled to 50 years because of the prior strike. The court added one year for the arming enhancement and stayed the sentence on count 1 pursuant to section 654. Appellant's total prison sentence is 51 years to life.

On appeal appellant contends: (1) the trial court erred in concluding appellant had not unequivocally invoked his rights to silence and counsel under *Miranda v. Arizona*,[2] and the admission of any of appellant's postarrest statements cannot be deemed harmless beyond a reasonable doubt; (2) absent appellant's statements the evidence was legally insufficient to establish appellant's conduct as a coconspirator or an aider and abettor to the murder, which requires that the judgment be dismissed and all charges dismissed under principles of double jeopardy; (3) assuming the testimony of witnesses Cole, Moses, and Batts is otherwise credible for sustaining a guilty verdict on the murder charge, their testimony clearly was insufficient to establish

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

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

the crime of conspiracy, and the jury's verdict on that count must be vacated; (4) the trial court's refusal to order disclosure of the state's confidential informant prejudiced appellant's right to a fair trial and due process of law; and (5) the trial court erred in refusing to award appellant any presentence custody credit for actual time spent in confinement from his date of arrest through sentencing.

STATEMENT OF FACTS

I. Trial Evidence

A. Prosecution

The members of the Mansfield Gangster Crips gang and the Marvin Gangster Crips gang had a history of being friendly with one another. In April 1996, however, a member of the Marvin Gangster Crips shot and killed a member of the Mansfield Gangster Crips. Since that time, the Mansfield Gangster Crips and Marvin Gangster Crips have been rivals. The Mansfield Gangster Crips claimed the territory north of Venice Boulevard, and the Marvin Gangster Crips claimed the territory south of Venice Boulevard. In August 1998 both gangs had about 200 members. At that time, Keith Stewart (also known as Lazy and Lazy Boy) and Lawrence Moses (also known as Bingo) were members of the Marvin Gangster Crips. Appellant, Anthony McMillian (also known as Ant Dog and Baby Dog) and Marcus Brown (also known as Looney and Baby Looney) were members of the Mansfield Gangster Crips.

Rendell Batts lives at 1927 Thurman Avenue in Los Angeles. Batts had seen Keith Stewart, the victim in this case, on Thurman Avenue from time to time, apparently going into a house across the street

from Batts's home. Stewart did not live on Thurman Avenue. About a week prior to August 15, 1998, the day Stewart was shot, Batts saw Stewart shoot at Anthony McMillian. Batts was unable to tell if McMillian was hit by the shot Stewart fired at him. Batts was not a gang member.

Lawrence Moses joined the Marvin Gangster Crips criminal street gang in 1993 or 1994. In August 1998, Moses's son was receiving day care at the Batts's home. Moses had known Stewart, or Lazy, since 1989 but did not know his real name. Moses knew Stewart to be a member of the Marvin Gangster Crips as well. However, after Stewart suffered an accident, he was not really "gang banging."

At approximately 11:00 to 11:45 p.m. on August 15, 1998, Moses and Batts were on the front porch of the Batts home on Thurman Avenue when Moses saw Stewart driving a blue Camaro up and down the street. He eventually parked his car on the west side of the street, where the Batts home is located. Stewart got out of his car and walked across the street in a diagonal direction toward a house at 1842 Thurman Avenue. About five to 10 minutes after Stewart walked across the street, Moses saw two men walking southbound on the sidewalk on the east side of Thurman Avenue. Moses later identified one of the men as appellant, who was accompanied by someone shorter than he was. The two men walked across to the west side of the street. Moses had known appellant since 1991, when appellant and Moses were members of the Homeboy Criminals gang.

Approximately 10 to 20 minutes after Stewart had walked over to the east side of Thurman Avenue,

Moses saw Stewart begin walking back across the street toward his car. Moses then heard two shots fired, and he turned around and saw appellant and the shorter man on the grass beside the spot where Stewart's car was parked. Moses then heard more shots fired, and he saw Stewart down on the ground. Moses saw appellant and the shorter man running almost side-by-side toward Venice Boulevard. Batts also looked out to the street after the shots were fired, and he saw Stewart lying in the street and two men running off together toward Venice Boulevard. One of the men was tall and the other was short. Moses told Batts to call 911 and went over to Stewart. Moses saw that he was kicking his feet and bleeding from the back of his head. Moses recalled that Stewart did not have a gun on his person, and there was no gun lying anywhere around him.

Batts called 911 and then ran outside and went to the spot where Stewart was lying on the ground and coughing up blood. He saw no gun lying near Stewart. Some police officers and an ambulance arrived. The ambulance took Stewart away.

Moses did not know whether it was appellant, the shorter man, or both who had shot at Stewart. At the time of the shooting, Moses did not see Stewart throw or point anything at appellant and the shorter man. The man or men shot at Stewart over the top of Stewart's car. When the shooting occurred, streetlights, porch lights, and light coming through windows of houses illuminated Thurman Avenue.

On the following day, Moses spoke with police and told them he was unable to see who the shooters were. Moses said this because he did not want to get involved. His son was attending day care in the area, and he had other family nearby and was frequently

there himself. Moses did not want anything "coming back" on him or his family. At a later date, police showed Moses some photographs that included a photograph of appellant. Moses identified appellant's photograph and wrote on the back of it that appellant was the taller of the two men who shot at Stewart. Moses was shown a photograph of McMillian, and he wrote on it that he was not the one who shot Stewart.

In January 2001, Moses was transported from Las Vegas to Los Angeles to testify at appellant's trial. Moses was held in custody at Los Angeles County jail. While there, he saw appellant, who also was in custody at the jail. Appellant asked Moses if he was going to "tell on him." Moses said he would not. The day before Moses testified at trial, appellant again asked Moses if he would tell on him. Moses again denied he would. Moses was not offered special consideration or a plea bargain for testifying at appellant's trial. Moses was facing federal drug charges in Nevada and had two felony convictions.

Los Angeles Police Officer James Hwang responded to Thurman Avenue at approximately 11:45 or 11:50 p.m. on August 15 and set up a crime scene perimeter in the area where Keith Stewart had been shot. Hwang found Stewart lying face down on the pavement with a pool of blood around his head. Stewart was having difficulty breathing. Hwang observed seven expended bullet casings near Stewart's blue Camaro.

Detectives Tracey Benjamin and Robert Felix of the Los Angeles Police Department were assigned to investigate the shooting of Keith Stewart. They arrived at the shooting scene on the early morning of August 16. While Detective Benjamin was at the scene, seven expended bullet casings were collected.

Five of the casings were found in the grass and sidewalk areas to the west of Stewart's car, and two of the shell casings were found in the street near Stewart's car. Near where Stewart had lain, Benjamin saw a white substance resembling rock cocaine, some marijuana, $84.14, and a pager. The paramedics apparently had removed these items from Stewart's clothing while treating him. Benjamin saw that three bullets were embedded in Stewart's Camaro. There were also two bullet strike marks on the exterior of the vehicle. Benjamin later learned that Stewart was involved in narcotics sales.

Stewart's autopsy revealed that the cause of death was a single gunshot wound to the back of the head. Five bullet fragments were removed from Stewart's head. Gunshot residue testing was performed on Stewart's hands, and the test revealed no gunshot residue.

Pamara Cole had known appellant since she and appellant were in kindergarten. They were good friends who "hung out" with each other. After Stewart's murder, an acquaintance of Cole's named Troy told her he had seen appellant's picture on the Internet. When Cole saw appellant, she asked him about his picture on the Internet and about information there that stated he was wanted for murder. Cole testified that appellant told her it was a lie.

Detective Daryn Dupree of the Los Angeles Police Department was one of the investigating officers in the Stewart shooting. On June 25, 1999, Detective Dupree and Detective Felix interviewed Cole at her home. On June 29, Cole went to the police station at the request of Detectives Dupree and Felix, and underwent another interview with the detectives.

Cole was not aware that the interview was being tape-recorded. The tape recording was played to the jury. During the tape-recorded interview, Cole told Dupree and Felix that she had known appellant for 12 years, and she was familiar with the area on Thurman Avenue where Stewart was killed. She had seen Stewart driving around the neighborhood in a black car. A boy named Troy had told her that he had seen on the Internet that appellant was wanted for a murder.

Cole told the detectives she asked appellant "about it." She told appellant that his picture was on the Internet for a murder. Appellant then told her that he and Anthony McMillian had been "over there," and Stewart pulled a gun on them. McMillian had a gun but was taking too long to pull the trigger. Appellant took the gun away from McMillian and shot Stewart. Appellant noticed that Batts and Moses were there, and "[t]hey kn[e]w who he was." According to Cole, appellant was talking about turning himself in.

A tape recording of Detective Dupree's and Detective Felix's conversation with appellant outside the interview room at the police station was played to the jury at appellant's trial. Appellant said "they" were supposed to go to the hospital where McMillian's girlfriend was having a baby. While they were driving, Looney said, "These niggers is out here." Looney then drove to the area where Stewart was shot. Appellant did not know Looney was going to go there. Appellant told Looney to stop the car. Looney did so, and he and appellant got out of the car and started walking. Appellant tried to talk Looney out of whatever he was going to do. They were walking back toward Looney's car when Stewart

walked out of the house. Stewart pulled out a pistol. Appellant was scared and began running toward Pico Boulevard. He heard shots being fired. Looney shot Stewart. Later that evening, appellant, McMillian, and Looney went to the hospital in the San Fernando Valley where McMillian's girlfriend had a baby. McMillian did not shoot Stewart. McMillian tried to negotiate a truce with Stewart's gang, but Looney did not want a truce. After Stewart fired a shot at McMillian, there was no hope for a truce.

Detective Felix knew that Marcus Brown (Looney) had been killed on April 20, 1999. Detective Felix had spoken with Brown's mother, Candyace Brown, several times since appellant's arrest in the instant case. During these contacts, Candyace Brown had never told Felix that her son Marcus had confessed to her that he was involved in the murder of Stewart.

Stephanie Evans is appellant's girlfriend, and they have a child together. Evans testified that she was with appellant all day and all night on August 15, 1998. She and appellant attended a birthday party for Candyace Brown's daughter during the day, and at night they were at Evans's home in Hyde Park. Detective Dupree testified that appellant never mentioned during his interview on July 1 that he was with Stephanie Evans on the night Stewart was killed.

Starr Sachs, a firearms examiner with the Los Angeles Police Department, examined the seven expended bullet casings that were found at the scene. Sachs determined that the casings were all fired from the same firearm. Six of the expended bullet cases were manufactured by the CCI Company and the seventh was made by the Remington Company. All

of the expended casings were from either .22-caliber long or .22-caliber long rifle ammunition.

Sachs said that the live ammunition found in the apartment where appellant was arrested on July 1, 1999, was .22-caliber long rifle ammunition manufactured by CCI Company. Although the cartridge casings near Stewart's body were consistent with the live ammunition found in the apartment, the seven cartridge casings found by Stewart's body were not fired from the .22-caliber rifle that was found in the apartment. Ammunition that is .22-caliber long rifle can be fired from a .22-caliber semiautomatic handgun or a revolver. Sachs also examined a fragmented bullet that was removed from Stewart's body. The fragments were consistent with .22-caliber long rifle ammunition.

Daniel Woo, a fingerprint analysis expert with the Los Angeles Police Department, examined the expended shell casings as well. He did not find any identifiable fingerprints on the casings. During his career, Woo has analyzed more than 40,000 sets of fingerprints for comparison purposes and has never found an identifiable fingerprint on a .22-caliber shell casing because of the small size of such casings. He was not aware of any case in which an identifying fingerprint had been obtained from a .22-caliber shell casing.

Officer Shands McCoy testified as a gang expert at appellant's trial. He informed the jury that when members of one street gang go into a rival street gang's territory, especially at night, they go there for the purpose of doing harm, engaging in criminal activity, shooting someone, and more than likely killing someone, such as a rival gang member. If a gang member goes into a rival gang's territory, he

would not go there unarmed. A gang member who goes into a rival gang's territory in a car would not get out of the car in the rival gang's territory if he was unarmed.

B. Defense

One or two days before Marcus Brown (Looney) died, he told his mother, Candyace, that he shot Stewart after Stewart had reached for his gun and tried to kill him. Brown did not tell his mother whether he was alone or with someone else when he shot Stewart.

Appellant's mother testified that she had no daughters, and appellant had no sisters. Therefore, Officer McCoy, the prosecution's gang expert, was incorrect in saying that appellant and McMillian knew each other because McMillian had dated appellant's sister.

II. Evidence Presented at the Suppression Hearing

A. Defense Evidence

Charles Flowers lives at 8914 Rose Avenue in Long Beach. He was present when appellant was arrested there by Detectives Dupree and Felix. Flowers was at home with his children, his father, his girlfriend, and appellant when the police knocked on the door. The police told Flowers to go outside, where Detective Dupree stayed with him. The police said they were looking for appellant, whom they eventually brought outside. Detective Felix was talking to appellant, reading him his rights "or whatever" while Flowers was standing about 12 feet away. When Flowers asked if he could go back in the house, the officers told him that he could. As Flowers

started walking back toward his apartment, he heard appellant say that he wanted his lawyer. Flowers watched the officers search the apartment. Police found guns inside Flowers's apartment. Flowers observed that appellant was handcuffed when he was outside of the apartment with the officers.

Appellant took the witness stand at the suppression hearing. He testified that he had seen Detective Dupree approximately five to 10 times before appellant's July 1 arrest. He had also spoken with Detective Felix previously. Both detectives previously had interviewed appellant about things that were going on in the neighborhood. As appellant stood outside Flowers's apartment next to Detective Felix, Felix asked appellant about the Stewart homicide. Appellant did not say anything about it because he did not know anything at that time. He and Felix engaged in "small talk." Felix advised appellant of his " Miranda rights," including his right to remain silent and his right to have an attorney. When Detective Felix asked appellant if he wanted to give up his rights, appellant replied, "No, I want an attorney." Felix talked briefly about why appellant did not want to talk to him. Detective Felix also said that he already knew the truth.

On the way to the police station, appellant and the officers again engaged in small talk. The detectives did not bring up the Stewart shooting, but appellant brought it up. He told the detectives he "didn't want him to go above and beyond any duty to try to stick me with something I didn't do." While they were waiting for the interview room to be prepared, Detective Felix said that he knew appellant had done it, and he had 11 witnesses. Appellant told Detective Felix he did not want to talk

to him and he wanted an attorney. Appellant said this more than once.

In the interview room, the detectives read him his rights, and appellant understood them. Detective Dupree asked appellant if he wanted to talk to him and Detective Dupree. Appellant chose to remain silent. Detective Felix then said, "You don't want to talk to us?"; and Detective Dupree said, "Okay, you don't want to talk to me?" Appellant was intimidated by Detectives Felix and Dupree because he had dealt with them before and knew what they were capable of doing and what they had done to other people. Detective Felix seemed pretty upset about appellant saying he did not want to talk. He sat back in his chair and patted his stomach, "like he was Santa Claus or something." Appellant interpreted this as meaning that Felix had a "gut feeling" that appellant had done it.

Appellant agreed to talk to the officers because he was intimidated. Appellant subsequently asked the detectives for an attorney. The officers did not stop questioning appellant after he said this. They did not stop questioning him no matter what he said. Appellant felt intimidated by Detectives Dupree and Felix when he signed the advisement and waiver of rights form. From the time appellant was in contact with the detectives in Long Beach until he entered the interview room, appellant asked for an attorney more than 10 times, and appellant told the detectives that his attorney was Mr. Kaplan. During the interview appellant also said that he wanted Mr. Kaplan. Appellant acknowledged he had never spoken with Mr. Kaplan before, and Mr. Kaplan had never been his attorney on another case.

B. Prosecution Evidence

Detective Dupree testified that he engaged in small talk with appellant outside the apartment building while the Flowers residence was being searched. Dupree said he had come into contact with appellant on approximately 10 prior occasions. He said he and appellant had mutual respect for each other. While Dupree and appellant were outside the apartment building, appellant did not indicate he did not want to speak with Dupree, and he did not say he wanted an attorney. After the two guns were found, Dupree, Felix, and another officer drove appellant to the police station. During the drive they continued to engage in small talk. Dupree did not ask appellant about Keith Stewart's murder during the drive.

Dupree said he asked his partner, Felix, if he had advised appellant of his rights in Long Beach, and Felix said he had. Felix told Dupree that appellant said he was willing to speak with them. At the Wilshire station, Dupree told appellant for the first time that he and Felix wanted to talk about the Stewart murder. Appellant said he was willing to tell the detectives what he knew. The three then went into the interview room.

The detectives tape-recorded the interview with appellant. At the beginning of the interview, Felix advised appellant of his *Miranda* rights. Based on the interaction in Long Beach, in the car, and at the police station before the interview, Dupree had formed the opinion that appellant wanted to talk with the detectives. Before the interview, appellant did not tell Dupree he did not want to talk to him, and appellant did not ask for an attorney.

After interviewing appellant for approximately half an hour inside the room, the detectives and appellant went outside the interview room. There, appellant made more statements. Afterwards, appellant and the detectives entered the interview room again, where appellant made more statements.

At the request of the prosecution, the trial court reviewed transcripts of Detective Felix's testimony at preliminary hearings on March 2, 2002, and October 3, 2002.

DISCUSSION

I. Admission of Appellant's Statements to Police

Appellant argues that the trial court erred when it concluded that appellant had not unequivocally invoked his right to silence and right to counsel under *Miranda*. According to appellant, the admission of appellant's postarrest statements cannot be deemed harmless beyond a reasonable doubt.

In determining whether a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's *Miranda* rights, the reviewing court "'"must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] [But it] must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained."' [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1194.)

If the accused indicates that he wishes counsel, "the interrogation must cease until an attorney is

present." (*Miranda v. Arizona, supra*, 384 U.S. at p. 474.) The invocation of the right to counsel is "per se an invocation of . . . Fifth Amendment rights," and bars any further interrogation by police. (*Fare v. Michael C.* (1979) 442 U.S. 707, 719.) Further questioning without counsel is possible only if the suspect himself initiates further communication. (*People v. Waidla* (2000) 22 Cal.4th 690, 727-728)

If the suspect's ambiguous remarks fall short of a clear invocation of his right to counsel, the police may continue talking with the suspect "for the limited purpose of clarifying whether he is waiving or invoking those rights. [Citations.]" (*People v. Johnson* (1993) 6 Cal.4th 1, 27.) The inquiry into whether the suspect has unambiguously requested counsel is an objective one. (*Davis v. United States* (1994) 512 U.S. 452, 458-459.) The test is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Id.* at p. 459.)

As noted, appellant presented evidence that he had invoked his right to counsel at the apartment of Charles Flowers in Long Beach, and Flowers himself testified that he heard appellant ask for a lawyer. Appellant also testified that he had repeatedly requested a lawyer. The trial court made adverse credibility determinations as to these two witnesses. The trial court accepted the testimony of Detective Dupree at the suppression hearing and the preliminary hearing testimony of Detective Felix, which was offered at the hearing by the People. On appeal, appellant addresses only the issue of whether the colloquy among him and the detectives at the police station showed that the detectives legitimately

asked for clarification when appellant said, "I choose to remain silent."

The record shows that, after appellant was taken from the arrest site in Long Beach to the Wilshire Division police station, the interview room discussion among appellant and detectives Felix and Dupree proceeded as follows:

"Det.: You've had this read before now, right?

"Cliett: Um-hmm.

"Det.: The rights * * * before. Now listen up here. You have the right to remain silent.[3]

"Cliett: Um-hmm.

"Det.: If you give up the right to remain silent anything you say can and will be used against you in a court of law.

"Cliett: Um-hmm.

"Det.: You have a right to speak with an attorney and to have an attorney present during questioning.

"Cliett: Um-hmm.

"Det.: If you so desire and cannot afford one an attorney will be appointed for you without charge before questioning. Do you understand that?

"Cliett: Um-hmm. * * *

"Det.: * * * If you understand, write * * * in front of you.

"Cliett: Personal waiver. On one of them, is it an attorney * * * or a public defender?

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[3] Asterisks represent unintelligible words.

"Det.: Ok, let me put it this way. We are going to ask you some questions about a situation that happened out there. You have a right to have an attorney present.

"Cliett: Is it going to be an attorney or --

"Det.: An attorney's an attorney.

"Cliett: All I'm saying is, is it going to be an attorney or a damn plain public defender?

"Det.: I don't know who it'll be. It'll probably be a public defender. I don't know.

"Cliett: O.K.

"Det.: Do you understand these rights I have explained to you?

"Cliett: Yeah.

"Det.: O.K., do you wish to give up your right to remain silent, in other words do you want to talk to me now about what we talked to you about?

"Cliett: Ahhh, you gonna let me stop talking when I want to stop talking, right? Ahhh [approximately 11 seconds of silence] Uhhh [3 seconds of silence] I, I choose to remain silent.

"Det: OK, you don't want to talk to us? You don't want to talk to me?

"Cliett: I'll talk.

"Det. Do you wish to give up the right to speak to an attorney and have an attorney present during questioning, so in other words you want to talk to us, huh?

"Cliett: Right.

"Det: Okay, okay, now this thing right here, this form here, you sign, right here, your true name, okay?

"Cliett: * * *

"Det: * * *

"Det: It's about 10 o'clock now."

The detectives then proceeded to question appellant. Appellant denied his involvement in the shooting. This portion of appellant's interview was admitted into evidence and presented to the jury by means of questions posed by the prosecutor to Detective Dupree. The discussion later moved outside the interview room, and appellant was unaware that this portion was being recorded. As stated previously, appellant made statements indicating he was at the scene of the shooting, but he ran when Stewart pulled out a gun. He said Looney did the shooting, and Baby Dog (McMillian) was not at the shooting. The trial court admitted the first interview room statements and the outside statements up to a certain point where the court believed appellant invoked his right to an attorney. The jury heard the audio tape of the admissible portion of the conversation that took place outside the interview room.

At the hearing, Detective Dupree testified that the reason he asked appellant, "You don't want to talk to me?" was because Detective Dupree was surprised when appellant said he chose to remain silent. This was because of their relationship and because appellant "didn't ask for an attorney or anything like that prior to that. He acted like he wanted to talk."

In making its ruling, the trial court stated: "The principal area of the defense argument deals with what was said at the beginning of the interview in the interview room, and that is pages 2 through 3 of the transcript marked as court exhibit 1. [¶] I conclude that was not a sufficient assertion of the defendant's right to remain silent, and the entire context of it has been reviewed. [¶] First, the defendant did make a statement about an attorney. He asked about an attorney that would be provided to him. I do not find that is a demand for counsel. It was simply a question as to whether he would be provided with a public defender or some other lawyer. It's not an assertion of his right to counsel [¶] The principal argument is the interchange at the bottom of page 2 of the transcript when the defendant did use the words, 'I cho[o]se to remain silent.' [¶] I think in the entire context of the interaction between the detectives and the defendant on July 1st, that was an unclear statement of the defendant's intent. [¶] Detective Dupree indicated that the defendant had been entirely cooperative up to that point. He had said that he was willing to talk to the detectives about the shooting. He had never indicated anything to the contrary. [¶] The detectives both asked questions after the defendant made his statement, and I don't find them to have been coercive. [¶] I don't find that they raised their voices in any kind of intimidating manner. I received those statements and evaluated them as what Detective Dupree said, a statement of surprise. They were surprised at what he said and they were simply asking for clarification. [¶] I think it's very important that these were simple and direct questions. They were asked immediately after the defendant made his statement. There was not some

prolonged period in which the defendant was exposed to state prison, other kinds of statements or threats or anything of that kind. It was a simple, direct statement of his intent to clarify his intention. [¶] I think it's equally significant that he immediately responded by saying I'll talk. It was not a long period of delay where he was thinking about it. He simply said, yes, I'll talk. Then he immediately signed a written statement which expressed that intent. [¶] Under cases such as *People versus Box*, . . . 23 Cal[.]4th at 1194; *People versus Johnson*, 6 Cal[.]4th at 27, and *People versus Ri[c]e* [(1971) 16 Cal.App.3d 337,] at 343, the police are entitled to ask questions to clarify the defendant's words. They did so here, and I find those questions were appropriate. [¶] There was no waiver or no assertion of the defendant's right to counsel that was stated at that time."

Appellant argues that there was not one iota of equivocation or ambiguity in his expressed choice to invoke his right to remain silent. Therefore, he maintains, there was no need for Detective Dupree to "clarify" appellant's express statement of purpose.

We disagree with appellant and conclude the trial court's ruling was correct. As stated previously, the inquiry into whether the suspect has unambiguously requested counsel is an objective one. (*Davis v. United States, supra*, 512 U.S. 452, 458-459.) The issue is what a reasonable officer in light of the circumstances would have understood. (*Id*. at p. 459.) Detective Dupree, whom the court found a credible witness, testified that both he and Detective Felix spontaneously uttered expressions of surprise when appellant said he chose to remain silent. The tape recording, the transcript, and the testimony of

the detective confirm this to be the case. The detectives' questions can reasonably be interpreted as spontaneous expressions of surprise rather than direct requests for clarification. Even if we were to consider the questions as requests for clarification, the officers did not act unreasonably given the circumstances of their interaction with appellant up to that point. Appellant had told the officers before entering the interview room that he was willing to tell the detectives what he knew about the murder of Keith Stewart. We conclude the trial court did not err. (See *People v. McGreen* (1980) 107 Cal.App.3d 504, 520-523, overruled on another point in *People v. Wolcott* (1983) 34 Cal.3d 92, 101.)

II. Sufficiency of the Evidence

Appellant argues that, absent his statements, the evidence was legally insufficient to establish his guilt as either a coconspirator or an aider and abettor to the murder of Keith Stewart. He contends the judgment must be reversed and all charges must be dismissed under principles of double jeopardy.

Because we have found that the trial court properly admitted appellant's statements, we need not address this claim. Nevertheless, we conclude that the other evidence presented at trial would have been sufficient to establish appellant's guilt as an aider and abettor or coconspirator. The evidence established that there was an ongoing conflict between the Mansfield Gangster Crips and the Marvin Gangster Crips. Keith Stewart was a Marvin Gangster Crip and was in the Marvin Gangster Crips's territory when shot. Appellant and Marcus Brown were Mansfield Gangster Crips in their rival's territory. The two were prowling around enemy territory at night and on foot. Evidence showed that

gang members do not enter a rival's territory, especially at night and when armed, unless they have a criminal purpose in mind -- usually to attack a rival gang member. Approximately a week before Keith Stewart was killed, he fired a shot at Mansfield Gangster Crips member Anthony McMillian.

Moses identified appellant as one of the two men who attacked Stewart. He had recognized appellant when he saw the two walking around before the attack. Cole testified that appellant told her that he and Anthony McMillian had been there when Stewart pulled a gun on them. Appellant told Cole he shot Stewart and that he knew Batts and Moses had seen him. It is well established that the uncorroborated testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to sustain a criminal conviction. (*People v. Scott* (1978) 21 Cal.3d 284, 296.) It is clear beyond a reasonable doubt that the jury would have convicted appellant of counts 1 and 2 even if the trial court had excluded the statements made to the detectives. (*People v. Cahill* (1993) 5 Cal.4th 478, 509–510.)

Appellant also contends in a third argument that, even assuming the testimony of Cole, Moses, and Batts is credible for sustaining a guilty verdict on the charge of murder, the testimony of these witnesses is clearly insufficient to establish the crime of conspiracy. Appellant argues that the existence of a conspiracy must be established by proof independent of a defendant's extrajudicial statements. Therefore, the verdict on that count must be vacated.

We conclude that the evidence was sufficient to establish the corpus delicti of the crime of conspiracy to murder Stewart independent of appellant's judicial statements. The corpus delicti of a crime consists of

the fact of the injury or harm and the fact that a criminal agency caused the harm. (*People v. Jennings* (1991) 53 Cal.3d 334, 364.) Proof of the corpus delicti of a crime, apart from defendant's statements, may consist of circumstantial evidence. Only a slight or prima facie showing permitting a reasonable inference that a crime was committed is necessary. (*Ibid.*) The required mental state can be inferred from the circumstances. (*Ibid.*)

The evidence outlined in the preceding paragraphs was sufficient to establish the existence of a conspiracy to commit murder. The evidence showed Stewart was shot to death and that two men committed the crime. The entry of appellant and Marcus Brown, armed with a gun, into enemy gang territory was sufficient circumstantial evidence to make a prima facie showing that the two had the required agreement and specific intent for the crime of conspiracy to commit murder. Therefore, there was sufficient evidence to establish the corpus delicti of the crime, and appellant's argument fails.

III. Trial Court's Denial of Appellant's Motion to Identify Confidential Informant

Defense counsel filed a pretrial motion seeking disclosure of a confidential police informant who had provided police with information about the perpetrators of the murder of Stewart. The prosecution filed written opposition to the motion. After a hearing, the trial court denied the defense motion.

Along with his written motion, defense counsel submitted the declaration of Los Angeles Police Department Officer Lionel Lindquist. In his declaration, Lindquist stated that he had worked in

the gang division at the Wilshire Police Station for the previous three to four years and had worked with the Mansfield Gangster Crips, appellant's gang. Lindquist stated he had participated in the investigation of Keith Stewart's murder and, in the course of that investigation, he had spoken with a Mansfield Gangster Crips gang member who was a confidential informant. The informant had asked to remain anonymous because he feared for his safety. This informant told Lindquist that the persons responsible for the shooting were "Baby Dog" (McMillian) and "Looney" (Marcus Brown). The informant had learned this information from other persons whom the informant would not name. The informant had not been a percipient witness to the shooting. Lindquist stated that, because of the informant's affiliation with the Mansfield Gangster Crips, and based on Lindquist's own knowledge of the gang and McMillian, disclosure of the informant would place the informant and his family in danger.

Defense counsel acknowledged that the informant had not been a percipient witness to the shooting. He argued, however, that the informant was a material witness on the issue of appellant's guilt in that he "possesses the names of the individuals who provided him with the information that he passed on to Officer Lindquist."

The prosecution stated in opposition that Lindquist had agreed to keep the informant's identity secret, and the informant was certain his life would be in danger if his gang found out about his cooperation with Lindquist. The informant had not witnessed the shooting and had not spoken to anyone who admitted committing the crime. The informant was merely relating hearsay about who might be

responsible for the shooting. The informant did not tell Lindquist the identity of the person who had given him the information. Furthermore, appellant told Felix and Dupree that he had gone to Thurman Avenue with McMillian and Marcus Brown, although he denied he had participated in the shooting. Therefore, appellant had identified the same two persons as the confidential informant. Also, appellant told Pamara Cole that he was at the scene and that he shot Keith Stewart. As the first judge who denied appellant's motion stated, nothing in the informant's statement excluded appellant from culpability for Stewart's murder, and the informant had only heard the two individuals' names through the grapevine.

During oral argument, the prosecutor pointed out that Lindquist had not even disclosed the informant's identity to the People. He added that, since the firearms evidence demonstrated there was only one shooter, the rumors repeated by the informant were inconsistent with the known facts and would not lead to anything exculpatory for appellant.

In denying the defense motion, the trial court stated: "I don't need to speak with Officer Lindquist. I don't think there's been an adequate showing to compel this informant to come into court. I think it would be foolhardy to believe that we can protect the safety of this gentleman. I think it's risky when we make these people come to court. I don't know if we could find him. It's risky. It's not like we live in -- not like we live in a shroud. This is a public building. And . . . [¶] . . . [¶] . . . I don't have any reason to disbelieve the statement of Officer Lindquist. [¶] . . . [¶] . . . He does say it was some anonymous witness heard from others whom he did not name. [¶] . . . [

¶] In other words, there is no reason to believe that this is credible, reliable or can lead to the discovery of exculpatory evidence. And motion to disclose the identity of the confidential informant is denied."

Appellant argues that the trial court's refusal to order disclosure of the informant's identity prejudiced his right to a fair trial and due process of law. He maintains there can be no doubt that the informant was a material witness on the issue of appellant's guilt. Since the crucial question for the jury to resolve was the identity of who was present and who participated in the shooting of Stewart, the informant's ability to name eyewitnesses who could confirm that McMillian and Brown were the two men present was crucial to appellant's defense. Appellant contends the court's error was not harmless beyond a reasonable doubt and the jury's verdicts must be vacated. Alternatively, he maintains that this court should remand the case to the trial court with directions to hold an in camera hearing on the issue.

Courts have long recognized the common law privilege to refuse disclosure of the identity of a confidential informant who has furnished information to a law enforcement officer. As our Supreme Court explained in *People v. Hobbs* (1994) 7 Cal.4th 948, 960: "The common law privilege to refuse disclosure of the identity of a confidential informant has been codified in Evidence Code section 1041, which provides in relevant part: '[A] public entity has a privilege to refuse to disclose the identity of a person who has furnished information [in confidence to a law enforcement officer] . . . purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state . . . if . . . (2) Disclosure of the identity of

the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice. . . ." (Fn. omitted.)[4]

"[Evidence Code] [s]ection 1042 sets forth the consequences to the People of successfully invoking the informant's privilege.[5] Subdivision (a) of that

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[4] Evidence Code section 1041 provides: "(a) Except as provided in this section, a public entity has a privilege to refuse to disclose the identity of a person who has furnished information as provided in subdivision (b) purporting to disclose a violation of a law of the United States or of this state or a public entity in this state, and to prevent another from disclosing such identity, if the privilege is claimed by a person authorized by the public entity to do so and: [¶] (1) Disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or [¶] (2) Disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his identity that outweighs the necessity for disclosure in the interest of justice; but no privilege may be claimed under this paragraph if any person authorized to do so has consented that the identity of the informer be disclosed in the proceeding. In determining whether disclosure of the identity of the informer is against the public interest, the interest of the public entity as a party in the outcome of the proceeding may not be considered. [¶] (b) This section applies only if the information is furnished in confidence by the informer to: [¶] (1) A law enforcement officer; [¶] (2) A representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated; or [¶] (3) Any person for the purpose of transmittal to a person listed in paragraph (1) or (2). [¶] (c) There is no privilege under this section to prevent the informer from disclosing his identity."

[5] Evidence Code section 1042 provides: "(a) Except where disclosure is forbidden by an act of the Congress of the United States, if a claim of privilege under this article by the state or a public entity in this state is sustained in a criminal proceeding, the presiding officer shall make such order or

finding of fact adverse to the public entity bringing the proceeding as is required by law upon any issue in the proceeding to which the privileged information is material. [¶] (b) Notwithstanding subdivision (a), where a search is made pursuant to a warrant valid on its face, the public entity bringing a criminal proceeding is not required to reveal to the defendant official information or the identity of an informer in order to establish the legality of the search or the admissibility of any evidence obtained as a result of it. [¶] (c) Notwithstanding subdivision (a), in any preliminary hearing, criminal trial, or other criminal proceeding, any otherwise admissible evidence of information communicated to a peace officer by a confidential informant, who is not a material witness to the guilt or innocence of the accused of the offense charged, is admissible on the issue of reasonable cause to make an arrest or search without requiring that the name or identity of the informant be disclosed if the judge or magistrate is satisfied, based upon evidence produced in open court, out of the presence of the jury, that such information was received from a reliable informant and in his discretion does not require such disclosure. [¶] (d) When, in any such criminal proceeding, a party demands disclosure of the identity of the informant on the ground the informant is a material witness on the issue of guilt, the court shall conduct a hearing at which all parties may present evidence on the issue of disclosure. Such hearing shall be conducted outside the presence of the jury, if any. During the hearing, if the privilege provided for in Section 1041 is claimed by a person authorized to do so or if a person who is authorized to claim such privilege refuses to answer any question on the ground that the answer would tend to disclose the identity of the informant, the prosecuting attorney may request that the court hold an in camera hearing. If such a request is made, the court shall hold such a hearing outside the presence of the defendant and his counsel. At the in camera hearing, the prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial. A reporter shall be present at the in camera hearing. Any transcription of the proceedings at the in camera hearing, as well as any physical evidence presented at the hearing, shall be ordered sealed by the court, and only a court may have access to

section states the general rule requiring the court to 'make such order or finding of fact adverse to the public entity bringing the proceeding as is required by law . . .' when the privilege is sustained." (*People v. Hobbs*, *supra*, 7 Cal.4th at pp. 960-961.) However, this rule is subject to exceptions. (See *id*. at p. 961.) Evidence Code section 1042, subdivision (d) provides that, when the defendant demands disclosure of an informant's identity on the ground that the informant is a material witness on the issue of guilt, a hearing must be held. If the prosecutor requests, the hearing must be held in camera. (*Hobbs*, at p. 961.) After the hearing, the trial court need not order disclosure unless "there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial." (§ 1042, subd. (d).)

"An informant is a material witness under Evidence Code section 1041 if it appears there is a reasonable possibility the informant could give evidence on the issue of guilt which might result in a defendant's exoneration. [Citation.] 'However, defendant's showing to obtain disclosure of an informant's identity must rise above the level of *sheer* or *unreasonable* speculation, and reach at least the

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its contents. The court shall not order disclosure, nor strike the testimony of the witness who invokes the privilege, nor dismiss the criminal proceeding, if the party offering the witness refuses to disclose the identity of the informant, unless, based upon the evidence presented at the hearing held in the presence of the defendant and his counsel and the evidence presented at the in camera hearing, the court concludes that there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial."

low plateau of reasonable possibility.' [Citation.]" (*People v. Luera* (2001) 86 Cal.App.4th 513, 525-526.)

"'The standard of "reasonable possibility" has "vague and almost limitless perimeters which must be determined on a case-by-case basis." The courts have indicated that the measure of the "reasonable possibility" standard to be utilized in individual cases is predicated upon the relative proximity of the informant to the offense charged. "[T]he evidentiary showing required by those decisions is . . . as to the quality of the vantage point from which the informer viewed either the *commission or the immediate antecedents* of the alleged crime." The existence of a reasonable possibility that testimony given by an unnamed informant could be relevant to the issue of defendant's guilt becomes less probable as "the degree of attenuation which marked the informer's nexus with the crime" decreases. If the informer is not a percipient witness to the events which are the basis of the arrest, it is highly unlikely that he can provide information relevant to the guilt or innocence of a charge or information which rises from the arrest. Thus, "when the informer is shown to have been neither a participant in nor a non-participant eyewitness to the charged offense, the possibility that he could give evidence which might exonerate the defendant is even more speculative and, hence, may become an unreasonable possibility.'" [Citation.]" (*In re Benny S.* (1991) 230 Cal.App.3d 102, 108.)

It is true that, although a defendant has the burden of producing some evidence on this issue, he or she need not prove that the informer was a participant in, nor an eyewitness to, the crime. (*People v. Garcia* (1967) 67 Cal.2d 830, 837.) In the instant case, however, there was no reasonable

possibility that appellant could reasonably expect to glean from the informant any evidence that tended to exonerate him of the crime for which he was convicted. Therefore, the trial court correctly denied the defense motion. (*People v. Luera, supra*, 86 Cal.App.4th at pp. 525–526.)

The record shows that appellant admitted to police officers that he was present when the shooting took place. He also admitted to Pamara Cole that he was present, stating that he actually shot Stewart. The confidential informant was not a percipient witness to the crime, and the information he had that Baby Dog and Looney were "responsible" for the shooting was "something [he] heard from others, whom he did not name." This information, even if it could be shown to be reliable, does not tend to exonerate appellant of the crimes for which he was convicted as an aider and abettor and coconspirator. We discern no error in the trial court's decision on appellant's motion. Nothing in the record indicates any reasonable possibility that the informant might have provided exculpatory evidence on the issue of appellant's guilt.

IV. Credits

Appellant contends the trial court erred when it denied him any presentence custody credits -- even those relating to actual time spent in presentence detention. Appellant claims the court misread section 2933.2.[6]

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[6] Section 2933.2 provides in pertinent part that "(a) Notwithstanding Section 2933.1 or any other law, any person who is convicted of murder, as defined in Section 187, shall not accrue any credit, as specified in Section 2933. [¶] . . . [¶] (c) Notwithstanding Section 4019 or any other provision of law, no

Respondent concedes that section 2933.2 prohibits a grant of only presentence conduct credits to persons convicted of murder. The unambiguous language of section 2900.5, subdivision (a), grants credit for actual time spent in presentence custody to defendants in all felony and misdemeanor cases.

As stated in *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366, "[n]othing in section 190, subdivision (e)[7] denies presentence credits for time actually served to a post-June 2, 1998, first degree murderer." Therefore appellant is entitled to credits for time he served from the date of his arrest until the day of his sentencing. The record indicates appellant was arrested on July 1, 1999, and that he was sentenced on August 27, 2001. Accordingly, as appellant requests, the abstract of judgment must be amended to reflect a total of 788 days of presentence custody credits to reflect this time period.

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credit pursuant to Section 4010 may be earned against a period of confinement in, or commitment to, a county jail, industrial farm, or road camp, or a city jail, industrial farm, or road camp, following arrest for any person specified in subdivision (a)." Section 2933 describes worktime credit. Section 4019 describes credit for work and good behavior.

[7] Section 190 prescribes the punishment for murder. Section 190, subdivision (e) states that "Article 2.5 (commencing with Section 2930) of Chapter 7 of Title 1 of Part 3 shall not apply to reduce any minimum term of a sentence imposed pursuant to this section. . . ."

DISPOSITION

The superior court is ordered to correct the abstract of judgment to reflect an award of 788 days of presentence credits to appellant and to forward the corrected abstract of judgment to the Department of Corrections. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

/s/ Nott, Acting P.J.
NOTT

We concur:

/s/ Doi Todd, J

DOI TODD

/s/ Ashman-Gerst, J.

ASHMANN–GERST

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IAN CLIETT, Petitioner - Appellee, v. L.E. SCRIBNER, Warden, Respondent - Appellant.	No. 12-55146 D.C. No. 2:05-cv-06616-SJO-JC Central District of California, Los Angeles **ORDER**

Before: TALLMAN and N.R. SMITH, Circuit Judges, and BURGESS, District Judge.*

Judges Tallman and N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Burgess so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

* The Honorable Timothy M. Burgess, United States District Judge for the District of Alaska, sitting by designation.

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28 U.S.C. § 2254(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.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.