Respondent, Ian Cliett, respectfully submits this Brief in Opposition to the State's Petition for a Writ of *Certiorari*.

INTRODUCTION

The State presents no good reason to grant *certiorari* review in this case. The facts here do not give rise to any issue of general or recurring significance, and there is no conflict among the state or federal courts on the questions presented. Indeed, the court of appeals's decision gave effect to this Court's precedent.

This is simply because there is no ambiguity in Cliett's statement, "I choose to remain silent." The statement itself constituted Cliett's clear and blunt invocation of his Fifth Amendment right to remain silent, and nothing signaled otherwise. His wishes could not have been any plainer. *See Berghuis v. Thompkins*, 130 S. Ct. 2250, 2260 (2010) ("Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his 'right to cut off questioning.'"). In fact, the interrogating detective testified that he heard and perfectly understood what Cliett meant when he said "I choose to remain silent." (*See* Rsp. App. 51a, 52a.[1])

Thus, this is *not* a case where the custodial suspect was equivocal as to his wish to remain silent. Rather, this case presents a blatant violation of Cliett's

[1] Respondent Cliett's accompanying Appendix will be referred to as "Rsp. App." The State's Appendix will be referred as "App." Citations to Excerpts of Record and the Supplemental Excerpts of Record filed in the Ninth Circuit will be referred to as "ER" and "SER" respectively.

expressed choosing to remain silent and a direct assault on *Miranda* requirements declared to be so "embedded in routine police practice" that they "have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000).

This Court's clearly established precedent demonstrate that the police had no business persisting in their questioning of Cliett after his clear and unambiguous invocation – irrespective of their desire to clarify the nature of the interrogation and obtain a waiver of his constitutional rights.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court made clear that "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease" *id.* at 473 and the individual's "exercise of the right" must be "scrupulously honored" *id.* at 479. Thus, *Miranda* established "concrete constitutional guidelines for law enforcement agencies and courts to follow." *Id.* at 442.

Nor is *Miranda* the Court's last word on the matter. In *Michigan v. Mosley*, 423 U.S. 96 (1975), the Court explained that "[a] reasonable and faithful interpretation of . . . *Miranda* . . . must rest on the intention of the Court . . . to adopt fully effective means . . . to assure that the exercise of the right will be scrupulously honored." *Id.* at 103. *Mosley* made clear that "[t]hrough the exercise of his option to terminate questioning [the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation."

Id. at 103-04. "To permit the continuation of custodial interrogation after a momentary cessation" the Court stressed "would clearly frustrate the purpose of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned." *Id.* at 102. *Mosley* "therefore conclude[d] that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Id.* at 104.

This Court reemphasized these teachings in *Smith v. Illinois*, 469 U.S. 91 (1984). There, this Court made clear that "under the clear logical force of settled precedent, an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Id.* at 100 (emphasis original); *see also id.* at 97 (rejecting that a suspect's invocation can be deemed "'ambiguous' only by looking to [the suspect's] subsequent responses to continued police questioning and by concluding that, 'considered in total,' [the suspect's] 'statements' were equivocal.").

The applicable law faithfully (if reluctantly) applied by the Ninth Circuit is thus clearly established, and the State's petition is based on the fatally flawed premise that *Miranda* and its progeny were never decided. Applying the cramped prism of this Court's established law, the State then provides a similarly skewed presentation of facts to assert that Cliett's direct and plain invocation of silence was somehow equivocal in the face of the detectives' subsequent questioning.

Specifically, the State asserts that Cliett's prior willingness to speak to the detectives about the murder investigation *before* he received the *Miranda* warnings in the interrogation room, and his previous small talks with one of the detectives, somehow undermined his facially unambiguous invocation. This is nonsense. The State ignores both the importance of receiving the *Miranda* warnings and suspect's right to then stand on his constitutional rights. However cordial Cliett may have acted with the detective during a casual conversation says nothing about his right and ability to invoke his rights once that relationship became adversarial in the custodial setting of an interrogation room.

Similarly, the state courts' attempt to cleanse the *Miranda* violation here stands "contrary to," and an "unreasonable application of" *Miranda*, *Mosley* and *Smith*. *See* 28 U.S.C. § 2254(d)(1). The state courts' labeling of Cliett's invocation as ambiguous, while characterizing the detectives' statements as a legitimate clarifying inquiry or expression of surprise, also run afoul of *Davis v. United States*, 512 U.S. 452 (1994) and constitute an unreasonable determination of the facts, *see* 28 U.S.C. § 2254(d)(2).

In sum, the State's request for review of the Ninth Circuit's sound decision arises from a miscast dispute that would not affect any other case, and should be turned aside. The Court's *certiorari* "jurisdiction . . . was not conferred . . . merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923).

STATEMENT OF THE CASE

A. Introduction

The facts here are complex and detailed. In summary, in early morning hours, seasoned Los Angeles Detectives Daryn Dupree and Robert Felix arrested Cliett in Long Beach for a parole violation and transported him to a police station.

There is some dispute as to whether Cliett was advised of his *Miranda* rights in Long Beach and/or whether he waived those rights. But, it is undisputed that Cliett had *not* been arrested for murder, and his rights were read to him, if at all, with respect to questioning about the parole violation.

Then, minutes before bringing Cliett into the station house interrogation room, the detectives informed Cliett that they were going to question him about Keith Stewart's murder. There exists another dispute as to whether Cliett agreed to speak to the detectives about the murder before entering the room. In any case, the events in the interrogation room were recorded and are not in dispute:

> Det: OK, do you wish to give up you 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***.

At the suppression hearing, Detective Dupree testified that he understood that Cliett meant he did not want to talk to the detectives. Nevertheless, both detectives, one after the other, questioned Cliett about his obvious and unambiguous invocation.

According to Detective Dupree, that he was surprised at Cliett's invocation because he viewed their prior interactions as establishing a "good relationship" and because prior to entering the interrogation room, Cliett said he would cooperate with the investigation. Whatever value may be ascribed to Detective Dupree's assessment of his "relationship" with Cliett, that "relationship" had never been tested at a custodial setting regarding a murder investigation. Moreover, as noted, Cliett denied that he ever expressed any desire to cooperate with the murder investigation. Indeed, the record supports that Cliett invoked his right to counsel before entering the interrogation room, and that the detectives refused to give effect to that invocation.

Cliett's interrogation followed both inside and outside of the room. Inside of the room, the interrogation was taped and video recorded. Outside of the room Detective Dupree had a concealed tape recorder. Following the detectives' refusal to accept Cliett's multiple invocations – both of his right to counsel and his right to remain silent – Cliett made statements that were admitted in the prosecution's case-in-chief, and were used to secure his conviction for Stewart's murder. But, the jury determined that Cliett did not personally use or fire a gun, and that he did not personally shoot Stewart. (Rsp. App. 110a-111a.)

Cliett's conviction was affirmed on direct appeal with the California Court of Appeal adjudicating and denying his *Miranda* claim. On federal habeas review, the Magistrate Judge recommended habeas relief, and the District Judge adopted that recommendation. The district court denied the State's motion for stay of judgment

because it could not make a strong showing of a likelihood of success on the merits. On appeal, the Ninth Circuit affirmed.

B. The State-Court's Suppression Hearing

Detective Dupree, Charles Flowers, and Cliett testified at the hearing. Detective Felix did not testify; instead, the court relied on his preliminary hearing testimony.

Two transcripts of Cliett's interrogation identified as Exhibits 1 and 2 were introduced. (Rsp. App. 1a, 20a.) Exhibit 1 represented the interrogation in the room; Exhibit 2 represented the interrogation outside of the room. (*Id.* 35a, 36a.) The prosecution sought to admit pages 1 through 47 of Exhibit 1 and all of Exhibit 2. The prosecutor conceded that Cliett had invoked on page 47, wherein Cliett says "I want to talk to an attorney, I want to talk to an attorney" and the detectives still persisted in their questioning. (*Id.* 34a, 36a, 37a.)

Detective Dupree testified that he arrested Cliett on July 1, 1999 at an apartment in Long Beach. (Rsp. App. 38a.) A search was conducted while Cliett and Flowers were detained outside. (*Id.* 39a.) Detective Dupree did not *Mirandize* Cliett; nor did anyone else in his presence. (*Id.* 40a.) Cliett was only questioned about the two firearms recovered at the apartment, and "just small talk"; Cliett was not questioned about Stewart's murder. (*Id.* 40a, 42a.)

Detectives Dupree and Felix transported Cliett to the police station. (Rsp. App. 40a-41a.) At the station, for the very first time, Detective Dupree told Cliett that he wanted to talk to him about Stewart's August 1998 murder. (*Id.* 40a, 42a-

44a, 66a, 88a.) Cliett was read his rights and invoked:

> Det: OK, do you wish to give up you 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***.

(*Id.* 2a (emphasis added).) The detectives did not cease questioning:

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

(*Id.*) It was Detective Dupree who said "You don't want to talk to me?" and Detective Felix who said "You don't want to talk to us?" (*Id.* 46a.)

Detective Dupree testified that he understood what Cliett meant when he said "I choose to remain silent." (Rsp. App. 51a, 52a.) But, he "was surprised because . . . me and [Cliett] had a, you know, pretty good relationship, and I thought he wanted to talk to me." (*Id.* 45a.)

Defense counsel directed Detective Dupree to a portion of the transcript wherein Cliett says "That's why I wanted to talk to an attorney. That's why I didn't wanna' say nothin' . . . ." But, Detective Dupree claimed that he had forgotten these statements by Cliett. (Rsp. App. 49a-50a.) Nevertheless, there is no dispute that Detective Dupree responded to Cliett: "Well, listen – I'm tellin' you – and this is reality talkin' I'm just tellin' you what I'm thinkin'. I ain't saying I don't believe you, but Baby Looney's name never came up once from anybody . . . ." (*Id.* 33a 53a, 55a.) After being shown that transcription, Detective Dupree recalled Cliett's statement but could not put in context Cliett's expressed desire to "talk with an

attorney." (*Id.* 52a-59a.)

Flowers testified that he was at home with his family when Detectives Felix and Dupree showed up with guns drawn. Flowers heard Cliett say: "I want my lawyer." (Rsp. App. 58a-65a, 67a.)

Cliett testified that Detective Felix advised him of his rights and asked whether Cliett wanted to waive them. (Rsp. App. 68a-70a.) Cliett responded: "No, I want an attorney" (*id.* 70a, 76a) and referred to his trial counsel "Kaplan" (*id.* 77a-78a). Cliett also referred to Kaplan during his interrogation at the station. (*Id.* 82a-83a.)

Before entering the interrogation room, Detective Felix told Cliett that he had witnesses who had said Cliett killed Stewart. (Rsp. App. 71a.) Cliett responded that he did not want to talk and repeatedly requested an attorney. (*Id.* 71a-72a, 77a, 79a, 80a.) In the room, Cliett invoked his right to remain silent ("I choose to remain silent") because he "didn't want to talk to [Dupree and Felix]." (*Id.* 73a.) The detectives refused to accept Cliett's invocation. (*Id.* 75a.)

When Cliett invoked, both detectives made intimidating gestures. (Rsp. App. 73a-74a.) As Cliett explained:

> Felix – I dealt with Felix. And he has this thing with his stomach, you know, his gut feelings, the look in his eyes. And then Dupree, he seemed pretty upset by me not wanting to talk to him, not – and I have dealt with him before when he worked C.R.A.S.H, and he was a pretty intimidating guy.
>
> So I was pretty intimidated by both of them because I have dealt with them before. I know what they are capable of, and I know what they have done before to other people. So I was intimidated by Dupree and Felix. That is

why I agreed to talk to him.

[Detective Felix] kind of rubbed and patted his stomach, like he was Santa Clause or something. Since I talked to him before, I can't say an inside joke, but I basically knew what he meant from talking to him before.

He was telling me he knows I did it, he has a gut feeling, and he goes with his gut feeling, that he knows I did.

And from the conversation outside the interview room, he was saying he has 11 witnesses, and the whole thing is intimidating. He says I had 11 witnesses that says you d[id] it.

(*Id.*) Cliett further explained why he said "I'll talk" and signed a waiver:

I was intimidated by two officers. I felt intimidated by two officers. No matter what I said to the officers. The questions did not stop from Long Beach outside the interview room. No matter what I said, the interview did not stop. I want to talk to you. I don't have anything to say. I don't know anything. No matter what I said, the interview would not stop.

(*Id.* 81a.)

At the preliminary hearing, Detective Felix testified that in Long Beach and en route to the station, he did not tell Cliett that he wanted to talk about the murder. (Rsp. App. 84a.) The first time the topic was raised was at the station. (*Id.* 85a.) Inside the interrogation room after Cliett had invoked and the detectives continued questioning, Cliett wrote on paper that McMillan "had done the murder." Cliett then "became angry because [Detective Felix] would not give him back this piece of paper" and "asked to go outside the station and talk." (*Id.*) Outside, Cliett told Detective Felix that he did not want to talk anymore and "insisted he wanted an attorney." (*Id.* 86a-87a.) Detective Felix could not remember if he stopped questioning Cliett. (*Id.* 87a.) Detective Felix later received a call from Cliett's trial

counsel, Kaplan, directing him not to talk to Cliett any further. (*Id.* 89a.)

C. Trial Court's Ruling On the Motion to Suppress

The trial court noted that Cliett's statement at page 13 of Exhibit 2 ("That's why I wanted to talk to an attorney. That's why I didn't wanna say nothin") required the detectives to at least clarify his intention, which never happened. (Rsp. App. 90a-91a.) The prosecution argued Cliett's statements were "not an invocation at that point." (*Id.* 91a-92a.) But, the prosecutor conceded that when Cliett made those statements, he was, in fact, referring to his initial invocation: "I choose to remain silent." (*Id.* 92a-93a.)

Defense counsel argued that Cliett's initial invocation – "I choose to remain silent" – was clear and unequivocal and required the detectives to scrupulously "take steps not violate those rights." (Rsp. App. 94a.) Counsel explained that "Detective Dupree admit[ted] that he fought for seconds after asking if he wanted to remain silent, and it was clear to him that [Cliett] chose to remain silent . . . because [Detective Dupree] said it wasn't that he didn't understand those words; that he was surprised by those words, but he understood that [Cliett] had at that point invoked his rights." (*Id.* 95a.)

Counsel noted that both detectives immediately raised their voices and became agitated at Cliett's invocation, and that the detectives' assertions "You don't want to talk to us?" "You don't want to talk to me?" were threats and efforts to dissuade Cliett from his invocation. (Rsp. App. 95a.) Cliett's statements ("That's why I wanted to talk to an attorney. That's why I didn't wanna say nothin"),

confirmed his invocation was just that. (*Id.* 96a, 98a-101a.) Instead of trying to "clarify" Cliett's invocation, Detective Felix simply turned the conversation back to his own line of inquiry about the murder thus once again ignoring and dismissing Cliett's invocations. (*Id.* 96a-97a.)

The court rejected Flowers's testimony – that Cliett requested counsel in Long Beach – because Flowers was "biased" and "friends with [Cliett]," and his "memory [was] very selective" and "suspicious." (Rsp. App. 102a.) The court also rejected Cliett's testimony but gave no specific reasons. (*Id.*)

Regarding Cliett's initial and clear invocation, "I choose to remain silent," the court found that "in the entire context of the interaction between the detectives and the defendant on July 1st, that was an unclear statement of [Cliett's] intent." The court noted that the detectives "were surprised at what [Cliett] said and they were simply asking for clarification it" and found it "equally significant that [Cliett] 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." (*Id.* 103a-104a.)

As to Cliett's statement – "That's why I wanted to talk to an attorney. That's why I didn't wanna say nothin"– the court found that even such statement did not constitute "an effective request for counsel." (Rsp. App. 105a.) But because Detective Felix had testified "in clear words that [Cliett] did ask for an attorney" and "interpreted" those words "as a request for a lawyer" (*id.*) the court concluded that Cliett's "language did constitute an effective request for counsel and an

effective request to stop the interrogation at that point" (*id.* 106a).

Thus, the court admitted pages 1 through 19 of Exhibit 1 up to "Tape 2, Side 1," and pages 1-13 of Exhibit 2 up to where Cliett says "That's why I wanted to talk to an attorney. That's why I didn't wanna say nothin." (Rsp. App. 106a; *see also id.* 1a-33a.)

D. Cliett's Trial

Cliett alone was tried for Stewart's murder. Marcus Brown, Cliett's alleged accomplice, had been murdered before trial. But, days before his murder, Brown had admitted to shooting Stewart to his mother. (Rsp. App. 107a-109a.)

At trial, Detective Dupree testified verbatim to Cliett's inside statements (ER 690-93) and the audio of the outside interrogation was played for the jury (ER 694-96). Inside the room, Cliett admitted to owning the two firearms found pursuant to the parole search. (ER 690-691.) But Cliett denied being present at the crime scene or otherwise knowing about the murder. (ER 691-93.)

Outside the room, Cliett admitted being at the crime scene and made the following statements:

Marcus Brown ("Looney") had come by Cliett's house saying "these Niggers is out here" (Rsp. App. 23a-24a) while the two planned to go to the hospital where Anthony McMillan's ("Baby Dog") girlfriend was having a baby (*id.* 29a-30a). Instead, Brown drove toward the crime scene area; Cliett tried to talk Brown out of whatever he was going to do. (*Id.* 22a 24a, 30a.)

Brown parked nearby and the two walked over to rival gang territory. (Rsp.

App. 24a, 30a.) Stewart appeared and pulled a pistol. Cliett was unarmed. While fleeing, Cliett heard gun shots. Brown was firing a gun. (Rsp. App. 22a-26a, 29a-30a, 32a.)

Cliett repeatedly denied McMillan being present or that McMillan was the shooter. (Rsp. App. 27a-29a, 31a, 32a.) McMillan had tried to negotiate a truce with Stewart's gang, but Brown did not want any of it. Any hope for a truce was lost when Stewart had shot at McMillan a week earlier. (*Id.* 28a.)

No physical or forensic evidence connected Cliett to the crime. And, the State's case was marred with unreliable and conflicting testimony. Cliett's statements were far and away the most damaging evidence against him. As the prosecutor admitted Cliett's statement constituted one of the four "biggest pieces of evidence that [the prosecution] [had] here[,]" with the other three being the testimony of Cole, Moses and Batts. (ER 837.)

Batts could not identify any suspect in the shooting. (ER 768.) He also could not recall critical events because "it happened so long ago." (*Id.*) "All" he could "say is [seeing] two guys running down the street" (ER 769) and, before that, seeing two unidentified men disappearing into an alley. (ER 765-68, 771.)

Cole testified that street-rumor had placed Cliett at the crime scene. Although she acknowledged telling detectives that Cliett had confessed to shooting Stewart, at trial, she adamantly denied it. (ER 485-88, 490-494, 526-530, 540, 544-45.) Detective Dupree acknowledged that rumors do in fact spread through the neighborhoods (ER 705-07) and that he had never pinpointed the date, time and

location of Cliett's purported confession to Cole (ER 709-10). Even the prosecutor was not convinced that Cliett was the shooter. (ER 916.)

Cole's credibility problems was further highlighted by the jury's verdict. The verdict contained special jury findings that Cliett did *not* personally use a gun, did *not* personally fire a gun, and did *not* personally shoot Stewart. (*See* Rsp. App. 110a-111a.)

Moses ("Bingo"), a rival Marvin Gangster Crip, was the only one to place Cliett at the crime scene; Moses identified Cliett as the taller of the two men he saw shooting at Stewart. (ER 546-49, 556-559, 566, 569, 571, 591, 593, 621, 793.) But, Moses's descriptions were uncertain and made under stressful conditions.

Indeed, Moses, who was "smoking weed . . . earlier that night" (ER 593) admittedly could not identify the shooter and otherwise had a poor opportunity to view the perpetrators (*see* ER 569: "I couldn't tell if more than one person was shooting."; ER 570: "I don't know which one was shooting, you know, or if both of them was shooting or what."); ER 588: "I'm not sure who the shorter one was."); ER 601: "I looked where the shots came from, and then I looked away."); Q: "So you popped up for an instant and looked whether the shots came from; is that correct?" A. Yes."; ER 632: "Q: Was your porch light on? A. No."; "Q: So there's no street light where the car was, was there? A. No.").

Further, the last time Moses had seen Cliett was 5 or 6 years ago (ER 581) and his accounts of the two suspects' movements varied (ER 606). Moses's credibility was also severely compromised. His testimony was riddled with

inconsistencies and lies.

Moses was a convicted felon and was in federal custody on drug distribution charges. (ER 546, 590, 609-610, 625-26.) Moses claimed to have initially lied to police when he told them he could not identify either of the suspects. (ER 570-71, 589, 603.) He also told Detective Dupree that he did not know who shot Stewart. (ER 704.) It wasn't until his third interview that Moses stated: "I couldn't see the guy, but may be possible it's Ian Cliett." (ER 607-08.) And, it was only after Moses had been arrested on a drug offense that he told investigators that Cliett was one of the two men shooting. (ER 611.)

Cliett's statements, therefore, became the centerpiece of the State's case. The prosecutor relied heavily on Cliett's statements in both opening and closing statements. The prosecutor first pointed out how Cliett initially denied being at the crime scene. (SER 46.) The prosecutor then systematically recounted Cliett's subsequent contrary admissions to driving, parking, and then walking over to rival gang territory with a fellow gang member, who ultimately shot the victim; the prosecutor then told the jury to compare those statements with Cliett's inconsistent purported confession to Cole – that Cliett in fact shot the victim – and Moses's anticipated testimony placing Cliett at the crime scene. (SER 47-51.)

Cliett's denials, the prosecutor argued to the jury, showed his consciousness of guilt, an important part of the State's case (*see* ER 925, 928: prosecutor arguing to the jury that "when you take [Cliett's denials] in conjunction with everything else, the case becomes solid"), and the jury was instructed as such. (SER 60-61 ("If

you find that before this trial the defendant made a willfully false . . . statement concerning the crimes . . . you may consider that statement as a circumstance tending to prove a consciousness of guilt.")

During closing arguments, the prosecutor showed the jury thirteen enlarged and highlighted pages of Cliett's statements, and extensively quoted it. (*See* ER 861-874; *see also* ER 859: "You look at the defendant's statements."; ER 860: "I am going to go through the entirely of [Cliett's] statement, break down page by page with regard to how the jury should analyze his statement.") The jury was also given both the tape and the transcript of Cliett's statements and was encouraged by the prosecutor "to listen to the tape" and "look at the transcript." (ER 927.)

Cliett confessed to owning guns that were identical to the gun used to shoot Stewart, thus linking Cliett to the murder weapon when no other evidence could have. (*See* ER 861: prosecutor arguing to the jury "[Cliett] was in possession of two guns. The .22 had ammunition which was of the same manufacture and caliber as was used in this case."; *see also* ER 862: "Coincidently, [Cliett] has a .22 caliber weapon with the same exact caliber, the same manufacture as was used in six of the seven castings in this case."). It also allowed the prosecution to portray Cliett as "the king of guy that is [not] going into . . . rival gang territory at night and engage in this conduct without full understanding, instigation and promotion for the conduct that [was] going to be going on[.]" (ER 885.)

Cliett also confessed to going into rival territory late at night with an armed fellow gang member. And the prosecutor presented a gang expert, who testified

that gang members do not go into rival territory unless to commit violent and often deadly crimes. (*See* ER 787, 792.)[2]

Every aspect of the prosecutor's description of the facts to the jury came straight from Cliett's admitted statements. All critical facts were preceded with the prosecutor saying "Cliett said" or "did he not say." (*See, e.g.,* ER 848.) The prosecution repeatedly urged the jury to rely on Cliett's statements to resolve any conflict or doubt concerning Moses's testimony:

> And then, the last point here; was his identification of Cliett wrong? Plain and simple, get right down to the real basic issue here. Was it wrong? There is corroboration. The point being this: the defendant's on tape saying he was one of the two guys. There's no question that Lawrence Moses is accurate in his I.D. The defendant says he's one of the two guys.
>
> So is Lawrence Moses is his testimony really in doubt? It doesn't appear to be that way.

(ER 856; *see also* ER 857: "Okay. Was Lawrence Moses wrong? In terms of assessing the credibility, was he wrong? Ian said he's there. Lawrence is right on."; ER 859.)

On the other hand, the admission of Cliett's statements eliminated his alibi and mistaken identity defenses. As Cliett's counsel put it:

> [J]ust for the record, the reason that we're not requesting an alibi defense that had the statement been kept out completely, we may have gone with an alibi defense. Because strategically I felt that would be wrong to go with alibi defense, having that part of the statement indicating he was present

---

[2] According to gang expert Shands McCoy, Cliett wanted to avenge Stewart's shooting at McMillan, in part, because McMillan had dated Cliett's sister. (ER 791, 803-04.) The defense called Cliett's mother – Pamela Jenkins – who testified that she had no daughters and that Cliett had no sisters. (SER 52-53.)

> there, what I'm suggesting is that I don't want the Court of Appeals to indicate that there was – if it' wrong, that there was no – that it was harmless error because he said he wasn't there.
>
> It has changed my entire trial strategy, and I just want to put that on the record.

(SER 59.)

Ironically, Cliett's potential alibi – his girlfriend and mother of his child, Stephanie Evans – was called as a prosecution witness. Evans testified that she was with Cliett all day and night when the murder occurred. (ER 727-29.) But, Cliett's confession was fatally inconsistent with this alibi defense and the prosecution made that clear. (SER 56: "At any point in time, whether inside or outside, did [Cliett] tell you that in the evening hours of August 15th, 1998, that he was with his baby's momma or the mother of his child, Stephanie Evans, at her or his apartment? A. No."); ER 856: "I don't know if [defense counsel] is going to go with alibi. I don't know if he is going to go with Stephanie Evans. . . . when we get down to it, Mr. Cliett is on tape saying I was there."); *see also* ER 863, 869: ("Stephanie says that they are together the entire night. Here [Cliett] is saying he goes out there.")

Cliett's statements also foreclosed his mistaken identity defense. McMillan was approximately 5'11", about the same height as Cliett (SER 43-45, 57, 58) and had a true motive to kill Stewart for shooting at him just a week earlier (ER 776). There is also no question that out of the two shooters, one was tall and one was short. (ER 771, 774.) In fact, like the alibi defense, the prosecution seized on this.

(*See* ER 848: prosecutor arguing to the jury that "the defendant's own word in his on own statement. Dog wasn't there. Dog wasn't there. Dog wasn't there. Tall guy, short guy."; *see also* ER 857: "Lawrence says tall guy is Ian Cliett. Ian Cliett says I was one of the guys.")

In sum, Cliett's admitted statements were the most powerful evidence against him, with the other evidence proving insufficient. Cliett's statements also eliminated his plausible and potentially exonerating defenses.

E. State Court of Appeal's Reasoning

Citing *Davis*, 512 U.S. 452, the court interpreted the detectives' questioning of Cliett's after he invoked as "spontaneous expressions of surprise." The court stated that "[e]ven if we were to consider the questions as requests for clarification, the officers did not act unreasonably given the circumstances of their interaction with [Cliett] up to that point. [Cliett] 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." (App. 77a-78a.) The state court did not engage in a prejudice or harmless error analysis. (*Id.*)

F. Federal Habeas Proceedings

After exhausting state remedies, Cliett filed a federal habeas petition. Magistrate Judge Jacqueline Chooljan recommended that Cliett be granted relief on his *Miranda* claim. (App. 29a, 54a.) District Judge S. James Otera adopted the recommendation, and entered judgment accordingly. (*Id.* 9a-14a.)

The court held that Cliett's "statement, 'I choose to remain silent,' was itself unambiguous and unequivocal." (App 46a.) Cliett "may have expressed a willingness to cooperate with the detectives at one or more points . . ., 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." (*Id.*)

The court also found that "the constitutionally erroneous admission of the statements" had a "'substantial and injurious effect or influence' on the jury's verdict." (App. 47a.) The court noted that the "prosecutor acknowledged that [Cliett'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," which "were less than overwhelming." (*Id.* 48a.)

The court found that:

> Although prior to trial Cole told the police that [Cliett] had advised her that he, along with McMillian, had been present at the crime scene and that [Cliett] had shot the victim, at trial, she denied that [Cliett] made any admissions to her. Moses, a witness with prior convictions, then pending federal charges, and multiple prior inconsistent statements, testified at trial that [Cliett] was one of two men at the crime scene, but could not identify whether [Cliett] and/or the second person, who was not McMillian, had fired shots. Batts, although a witness to two men being involved in the shooting, did not identify [Cliett] as being a participant.

(App. 48a.) The court concluded that "[p]articularly in light of the less than overwhelming other evidence . . . that implicated [Cliett] in the shooting, [his] 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." (*Id.*) The court also found it significant that "the prosecutor showed the jury thirteen enlarged and highlighted pages of the transcript of [Cliett's] statements, and extensively quoted and argued therefrom in closing argument." (*Id.*)

In denying the State's request to stay the judgment, the court concluded that the State had not "made a 'strong showing' of a likelihood of success on the merits" or "established a 'substantial case on the merits." (SER 3-4.) The court rejected the State's contention that "it is likely that [Cliett] will be retried, convicted, and sentenced to the same term . . . ." (SER 5.) The court "observed, the evidence in [Cliett's] case implicating [him] in the shooting, apart from [Cliett's] statements placing [Cliett] at the scene, was not particularly strong. Should the State choose to retry [Cliett], it is not clear that a conviction will follow if [Cliett's] statements are excluded from trial." (*Id.*)

On appeal, the Ninth Circuit affirmed. (App. 3a.) The court held that "[t]he 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)." (*Id.* 2a.) Under *Miranda*, the Ninth Circuit explained, "[a] person in custody has the right to cut off questioning at any time, and an invocation of that right must be 'scrupulously honored.'" (*Id.* (citation omitted).)

"When Cliett stated, 'I choose to remain silent,' in direct response to the

detective's inquiry about whether he was willing to talk," the Ninth Circuit noted, "he unambiguously and unequivocally invoked his right to remain silent." (App. 2a (citations omitted).) The Ninth Circuit explained that "[t]he detectives failed to scrupulously honor Cliett's clear invocation by continuing to question him about whether he was willing to talk." (*Id.*) The Ninth Circuit also found that "[t]he prosecutor relied heavily on Cliett's admissions during opening and closing, and, as the district court noted, the other evidence was 'less than overwhelming.'" (*Id.*)

REASONS TO DENY THE PETITION

I. THERE IS NO CONSTITUTIONAL ISSUE CONCERNING WHETHER THE DETECTIVES VIOLATED CLIETT'S FIFTH AMENDMENT RIGHT TO SILENCE.

The conclusion – that the detectives violated Cliett's *Miranda* and Fifth Amendment rights – is unremarkable and does not merit further review.

"The rule the Court established in *Miranda* is clear." *Fare v. Michael C.*, 442 U.S. 707, 717 (1979). Under *Miranda*:

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

384 U.S. at 473-74. "*Miranda* announced a constitutional rule" *Dickerson*, 530 U.S. at 444, and its "language is clear and mandatory[]" *Solem v. Stumes*, 465 U.S. 638, 657 (1984).

"The critical safeguard identified in the passage at issue is a person's 'right to

cut off questioning.'" *Mosley*, 423 U.S. at 103 (citation omitted). This Court adopted warnings not only to "notify the person of his right of silence" but also "to assure that the right will be scrupulously honored." *Miranda*, 384 U.S. at 479.

In short, "*Miranda* gives the defendant a right to choose between speech and silence," *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987), and Cliett chose to remain to silent. "Nothing in [this Court's] decisions, . . . or in the rationale of *Miranda*," allows "authorities to ignore the tenor or sense of a defendant's response to these warnings." *Id.* at 528. "[T]he Self-incrimination Clause 'must be accorded liberal construction in favor of the right it was intended to secure[,]'" *Ouinn v. United States*, 349 U.S. 155, 162 (1955), and any "[d]oubts must be resolved in favor of protecting the constitutional claim" *Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

"Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Barrett*, 479 U.S. at 529. Here, nothing was ambiguous about Cliett's invocation, "I choose to remain silent." The invocation was quite clear and coherent. In fact, Detective Dupree understood what Cliett meant when he said "I choose to remain silent." (ER 360, 361.)

Further, "[t]he requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting" and "the admissibility of statements obtained after the person in custody has decided to remain silent depends . . . on whether his 'right to cut off questioning' was 'scrupulously honored.'" *Mosley*, 423 U. S. at 104-05.

To be sure, this Court has not forbidden all police interrogations, forever and on any subject, following a valid *Miranda* assertion. But the interrogation must cease. *See Mosley*, 423 U.S. at 103; *see also United States v. Rambo*, 365 F.3d 906, 911 (10th Cir. 2004) ("Whatever else *Mosley* might require, it is clear that some break in the interrogation must occur."). "At the very least a suspect's request to cut off questioning serves as a complete bar to any questioning related to the subject of the initial interrogation for a 'significant period of time' after the request." *Christopher v. Florida*, 824 F.2d 836, 844 (11th Cir. 1987).

Such bright-line rules have "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogations." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988); *Fare*, 442 U.S. at 718 ("[G]ain in specificity, which benefits the accused and the State alike . . . outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts.").

Nonetheless, the state trial court concluded that Cliett's statement "was not a sufficient assertion of the [his] right to remain silent." The court relied on "the entire context of the interaction between the detectives and [Cliett] on July 1st" and Detective Dupree's claim that Cliett "had been entirely cooperative up to" his invocation. The court found "equally significant that [Cliett] immediately responded by saying I'll talk" and "signed a written statement which expressed that intent." (Rsp. App. 103a-104a.)

Similarly, the state appellate court relied on "the circumstances" of the

detectives' "interaction with [Cliett]," and the detective's claim that Cliett "had told the officers before entering the interview room that he was willing to tell detectives what he knew about the murder . . . ." (App. 78a.) The court of appeal interpreted the detectives' statements following Cliet's invocation as "spontaneous expressions of surprise rather than direct requests for clarification." (*Id.*)

In other words, the state-courts found no *Miranda* violation by relying on Cliett's pre-invocation desire to cooperate (which desire was disputed and initially limited to the parole violation questioning) and his subsequent response to the unasked-for, police-initiated interrogation, and waiver.

The state courts' reliance on Cliett's pre and post invocation interplay with the interrogators as a reason to whitewash the detectives' total disregard of Cliett's clear invocation was "contrary to," and an "unreasonable application of" this Court's clearly established precedent. *See* 28 U.S.C. § 2254(d)(1). The state court's labeling of Cliett's invocation as ambiguous while characterizing the detectives' assertions as a legitimate clarifying inquiry under *Davis*, 512 U.S. 452, or expression of surprise (*see* App. 77a-78a), also constituted an unreasonable application of *Davis*, and determination of the facts. *See* 28 U.S.C. § 2254(d)(2).

First, whether the detectives had a prior, perhaps cordial, relationship with Cliett is irrelevant. Similarly, that Cliett may not have "up to that moment" requested to an attorney or invoked his right to be silent (Rsp. App. 45a-48a) has no bearing on the clear words that he later expressed. As this Court has made clear, a

custodial suspect "can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Mosley*, 423 U.S. at 104. Thus, even fully accepting the state-court's assessment that Cliett had not, prior to arriving at the station, invoked his rights to silence or counsel (*see id.* 102a-103a), the undisputed fact remains that once informed about the topic of the interrogation at the station Cliett unhesitatingly asserted his rights without equivocation.

Cliett's unambiguous, unequivocal invocation should have brought an immediate end to questioning. Again, this Court's precedent could not be any clearer: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease*." *Miranda*, 384 U.S. at 473-74 (emphasis added); *see also Kolender v. Lawson*, 461 U.S. 352, 368 n. 6 (1983) (Brennan, J., concurring) ("[I]f [a suspect] indicates a desire to remain silent, the police should cease questioning him altogether.").

This did not happen. Instead, and directly contrary to *Mosley* and *Miranda*, the detectives never "fully respected" Cliett's invocation, "I choose to remain silent," an assertion that Detective Dupree admittedly heard and understood. (*See* Rsp. App. 51a-52a.) On the contrary, the detectives did not relent; not just one, but both tried to get Cliett to talk. Specifically, Detective Felix said "OK, you don't want to talk to us?" while Detective Dupree said "You don't want to talk to me?" (*Id.* 2a.)

Thus, "the police here [did not] immediately ceased the interrogation" *Mosley*, 423 U.S. at 106, and, no time, let alone "a significant period of time," *id.*, had

elapsed, before the same detectives "resumed questioning," *id.* in the same place about the same crime Cliett had asserted just moments before he did not want to talk about *see id.* at 106 (finding it significant that the police "restricted the second interrogation to a crime that had not been a subject of the earlier interrogation[]"). Simply put, *Miranda* prohibits "the immediate cessation of questioning, and . . . a resumption of interrogation after a momentary respite." *Id.*

Moreover, the detectives asked those questions even though this Court has made clear that "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Barrett*, 479 U.S. at 529. Indeed, where, as here, the initial invocation is clear, "the police may not create ambiguity in a defendant's desire by continuing to question him or her about it." *Id.* at 535 n. 5 (Brennan, J., concurring).

The detectives' questions, therefore, were "not aimed at resolving any ambiguity in [Cliett's] statement," *Campaneria v. Reid*, 891 F.2d 1014, 1021 (2nd Cir. 1989), because there was none, "but rather at changing his mind. This is precisely the sort of conduct the prophylactic rule seeks to prevent[]" *id.*; *see also Desire v. Attorney General of California*, 969 F.2d 802, 804 (9th Cir. 1992) ("Desire's invocation of his Fifth Amendment . . . right to silence precluded a later waiver of those rights by further police-initiated questioning."); *see also id.* ("Belmontes asked Desire if 'he wanted to talk about anything.' That questioning was a direct violation of Desire's rights.").

In truth, the detectives "hoped [Cliett] would explain more about the murder, the exact topic [Cliett] did not want to talk about[]" and "thought that continuing the interrogation was 'reasonably likely to elicit an incriminating response' from [Cliett]." *Anderson v. Terhune*, 516 F.3d 781, 789 (9th Cir.) (en banc), *cert. denied*, 555 U.S. 818 (2008). Such efforts plainly are inconsistent with police's duty under *Mosley* to "scrupulously honor" a suspect's invocation to remain silent.

That Cliett took the bait does not in any way vitiate his invocation. "Under *Miranda*, the onus was not on [Cliett] to be persistent in h[is] demand to remain silent. Rather, the responsibility fell to the law enforcement officers to scrupulously respect h[is] demand." *United States v. Lafferty*, 503 F.3d 293, 304 (3d Cir. 2007).

By focusing on Detective Dupree's intent or claimed "surprise," rather than Cliett's perception of intimidation or coercion, *see Illinois v. Perkins*, 496 U.S. 292, 296 (1990) ("[c]oercion is determined from the perspective of the suspect[]"), the state court also unreasonably turned a blind eye to the custodial setting in which these events transpired. "*Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). "That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*; *see also Arizona v. Mauro*, 481 U.S. 520, 532 (1987) ("Police conduct may constitute

'interrogation' even if the officers do not pose direct questions to the suspect."). *Miranda* itself acknowledges the potential for "subtle" coercion. 384 U.S. 473-474.

This so called "*Innis* test focuses primarily upon 'the perspective of the suspect.'" *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990); *see also Mauro*, 481 U.S. at 527 (finding that the likelihood-of-response question "'focuses primarily upon the perceptions of the suspect, rather than the intent of the police.'" (citation omitted)). "This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." *Innis*, 446 U.S. at 301.

Thus, when properly understood, two experienced detectives persisted after Cliett had invoked by questioning his invocation, which was also a way of telling him he had not correctly exercised his rights. This was cajolery and overreaching. Cliett did not change his mind of his own accord; it was the result of the seemingly subtle, but unwarranted, police perseverance and refusal to honor his invocation.

Further, distinguishing between negligent and intentional *Miranda* violations would run counter to this Court's long line of cases rejecting distinctions based on the subjective intent of the police officer conducting the interrogation. *See, e.g., Innis*, 446 U.S. at 300-02 ("underlying intent of the police" is irrelevant to determination of whether "interrogation" occurred); *Moran v. Burbine*, 475 U.S. 412, 423 (1986) ("[W]hether intentional or inadvertent, the state of mind of the

police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights."); *Organ v. Elstad*, 470 U.S. 298, 317 (1985) ("We do not imply that good faith excuses a failure to administer *Miranda* warnings . . . .").

The state court's reliance on *Davis* was also misplaced. First, the court ignored one simple, but critical, distinguishing fact: Cliett's invocation was *not* ambiguous. Nothing in *Davis* suggests that if a suspect makes a clear and unequivocal invocation, the State can later dissect and challenge it. In *Davis*, all agreed – including the authorities – that there was nothing ambiguous about: "I think I want a lawyer before I say anything else." *Davis*, 512 U.S. at 466. The word "think" in context, did not create ambiguity. *See id.* at 475 n. 7.

Indeed, *Davis* has no relevance here whatsoever. *Davis* is about what a suspect must do to resurrect and invoke previously waived rights. Under *Davis*, *after* a suspect chooses to waive his right to counsel, his subsequent request for counsel must be unambiguous. 512 U.S. at 459. *Davis*, therefore, only provides guidance when a suspect *subsequently* and *ambiguously* invokes *previously waived* Fifth Amendment rights. *See id.* at 461-62.

In *Davis*, the suspect (Davis) initially "waived his rights to remain silent and to counsel, both orally and in writing." 512 U.S. at 455. "About an hour and a half into the interview," Davis said, "Maybe I should talk to a lawyer." *Id.* at 454. The agents asked whether he was asking for a lawyer, to which Davis replied, "No, I

don't want a lawyer." *Id.* The agents reminded Davis of his rights and then resumed questioning. An hour later, Davis said, "I think I want a lawyer before I say anything else," and the interrogation immediately ceased. *Id.*

This Court held that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." 512 U.S. at 459. But, this Court made clear that its holding applied only to a suspect's attempt to reinvoke "*after* a knowing and voluntary waiver." *Id.* at 461 (emphasis added). "In other words, the 'clear statement' rule of *Davis* addresses only the scope of invocations of *Miranda* rights in a post-waiver context." *United States v. Rodriguez*, 518 F.3d 1072, 1078-79 (9th Cir. 2008). Unlike Davis, Cliett clearly invoked his rights in the absence of any waiver. *See Smith*, 469 U.S. at 98 ("Invocation and waiver [of *Miranda* rights] are entirely distinct inquiries, and the two must not be blurred by merging them together.").

Moreover, the state courts' reliance on Cliett's subsequent waiver, and the circumstances leading up to that waiver, to manufacture ambiguity in Cliett's clear invocation directly contravened *Smith*. As in *Smith*, "[t]he [state] courts below were able to construe" Cliett's invocation "as 'ambiguous' only by looking to [Cliett's] *subsequent* responses to continued police questioning and by concluding that, 'considered in total,' [Cliett's] '*statement*[]' w[as] equivocal." 469 U.S. at 97

(emphasis original). "This line of analysis is unprecedented and untenable." *Id.*; *see also id.* at 92 ("[A]n accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel.").[3]

In *Smith*, this Court found that the suspect's response "*Uh, yeah. I'd like to do that*[]" 469 U.S. at 93 to a police question "You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?" *id.* constituted a sufficient invocation of a right to counsel, requiring the police to stop questioning all together *see id.* Agreeing with the "dissent below" this Court explained that "with the possible exception of the word 'uh' the defendant's statement was neither indecisive nor ambiguous: 'Uh, yeah, I'd like to do that.' " *Id.* at 97 (quotation marks in original).

Smith found it troubling that "[i]nstead of terminating the questioning at this point, the interrogating officers proceeded to finish reading Smith his *Miranda* rights and then pressed him again to answer their questions[.]" *Smith*, 469 U.S. at 93. It relied on the following colloquy between the officers and Smith:

> Q. If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?
>
> A. Okay.
>
> Q. Do you wish to talk to me at this time without a lawyer being present?
>
> A. Yeah and no, uh, I don't know what's what, really.

---

[3] While *Smith* addressed *Miranda*'s right to counsel,"there is no principled reason to adopt different standards . . . ." *Berghuis*, 130 S. Ct. at 2260.

> Q. Well. You either have to agree to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.
>
> Q. All right. I'll talk to you then.

Id. Thus, *Smith* concluded that "the detectives did not" but should have "*initially* terminate their questioning." *Id.* at 98 n. 7. The majority (seven Justices) expressly rejected the dissent's suggestion that "[i]n such circumstances, . . . it is proper to consider 'the entire flavor of the colloquy.'" *Id.* The majority instead emphasized that "[w]hether in the same interrogating session or in subsequent sessions, the so-called 'flavor' of an accused's [invocation] cannot be dissipated by continued police questioning." *Id.* To the contrary, the majority explained, "the actual course of the subsequent interrogation . . . reinforces our concern that, absent a bright-line rule requiring an immediate cessation of questioning, an accused may be 'badgered' to speak as a result of police 'overreaching.'" *Id.* at 99 n. 8.

"Using an accused's subsequent responses to cast doubt on the adequacy of the initial request *itself*' *Smith* stressed "is even more intolerable." *Smith*, 469 U.S. at 99 (emphasis in original). "No authority, and no logic, permits the interrogator to proceed on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all." *Id.* (citation omitted).

In sum, the detectives did not allow Cliett to "control the time at which

questioning occurs, the subjects discussed, and the duration of the interrogation." *Mosley*, 423 U.S. at 103-04. There was no need to clarify what Cliett wanted; what he wanted was clear: he wanted to remain silent. And, there was no need for the detectives to try to determine what Cliett *really* wanted; he had just told them what he wanted to do. Rather than scrupulously honoring his right to cut off questioning, the detectives continued to question Cliett's will in order to obtain a more favorable answer. Because Cliett's right to cut off questioning was not "scrupulously honored," *id.* at 104, his statements, given under the pressure and influence of two experienced detectives, "cannot be other than the product of compulsion, subtle or otherwise" *Miranda*, 384 U.S. at 474.

II. THERE IS NO CONFLICT AMONG THE STATE OR FEDERAL COURTS.

The State claims "[t]he Ninth Circuit's interpretation of *Miranda* conflicts with those of the Eleventh Circuit and the California Supreme Court." (Pet. 15.) The State relies on *Medina v. Singletary*, 59 F.3d 1095 (11th Cir. 1995) and *People v. Williams*, 233 P.3d 1000 (Cal. 2010), (*see* Pet. 15-17) both of which present circumstances, which are completely different than here, including that, unlike Cliett, the suspects in those cases initially waived their rights regarding the very topic of the interrogation and even their later invocations were ambiguous.

In *Medina*, after Medina had been read his *Miranda* rights, he "indicated that he understood his rights and that he was willing to talk with the detectives." 59 F.3d at 1102. Then, "during the preliminary, unrecorded interview, Medina

made statements and never asserted his right to remain silent" and "talked freely and without hesitation . . . for a period of approximately thirty to forty-five minutes[.]" *Id.* at 1103.

"Following the lengthy preliminary conversation with Medina," the officers "started a tape recorder," "asked Medina if it was all right to have the tape recorder on" and "again advised Medina of his rights." *Medina*, 59 F.3d at 1102. Then, "[w]hen asked whether he wanted to talk to an attorney, Medina clearly replied 'No.' When asked whether he had been threatened or encouraged to make a statement, Medina clearly replied 'Nah.'" *Id.* at 1104. At the suppression hearing, "Medina also testified that, before the tape recorder was turned on, they had a 'long conversation' and 'I did say that I didn't want to talk to [the police].'" *Id.* at 1103. But, "[w]hen asked whether he wanted to talk to the detectives, Medina's reply was neither the clear 'No' nor the clear 'Nah' that he had used in response to the previous question." *Id.* at 1104. Nevertheless, the Eleventh Circuit found that "Medina replied 'No' when asked whether he wanted to talk to the detectives at that time." *Id.*

"Taking into consideration the events preceding Medina's response," the Eleventh Circuit held that "Medina's 'No' was ambiguous and did not clearly indicate his desire to remain silent." *Medina*, 59 F.3d at 1105. By contrast, the Eleventh Circuit has held that a defendant's statement that "I got nothing else to say" is unequivocal and bars further interrogation, *Christopher*, 824 F.2d at 840,

and, in that Circuit, "[i]t is well settled that even an equivocal invocation by the suspect of the right to cut off questioning requires that the interrogation cease," *Delap v. Dugger*, 890 F.2d 285, 290 (11th Cir. 1989).

The State's reliance on *Williams*, 233 P.3d 1000 is also misplaced. There, when the police initially "asked: "'Do you wish to give up your right to remain silent?" Defendant answered: "Yeah.'" *Id.* at 1018. The California Supreme Court found it most significant that "[a]t the outset of the interrogation, defendant properly was admonished, answered in the affirmative when asked whether he understood his rights, and evinced willingness to waive his right to remain silent." *Id.*; *see also id.* at 1020 ("In the present case, defendant had indicated to the officers that he understood his rights and would relinquish his right to remain silent."); *id.* ("In light of defendant's evident intent to answer questions . . . ."). Indeed, the court went on to distinguish several state and federal cases on this very factor. *See id.* ("In *Desire*, it was *undisputed* that the accused responded to the *Miranda* advisement with a clear invocation of his rights to counsel and to remain silent."); *id.* at 1021 (in *People v. Neal* [] the defendant plainly invoked his right to counsel on nine occasions").

In sum, in *Williams*, after validly waiving his right to remain silent, the officer asked defendant if he wanted to give up "the right to speak to an attorney and have him present during questioning." Defendant answered with a question. The officer responded in an attempt to eliminate defendant's apparent confusion

concerning the availability of counsel. No such facts are here.

On the contrary, Cliett unambiguously invoked his right to silence at the very outset and within seconds after being read his *Miranda* rights. He did not make any accompanying ambiguous or contradictory statements. His statement occurred in immediate response to the reading of his rights by the custodial interrogators seeking to ascertain his involvement in a murder. Made at a critical and early point in the interrogation, the detectives were placed on notice that Cliett had exercised his constitutional rights. The decision here is not in conflict with *Medina* and *Williams*.

III. THE NINTH CIRCUIT'S DECISION PROPERLY MAINTAINS THE BALANCE BETWEEN PROTECTING AN ACCUSED'S RIGHTS AND POLICE INVESTIGATION.

The State argues claims that "Ninth Circuit's *Miranda* rule and its decision in the instant case unreasonably impede legitimate police investigation . . . ." (Pet. 19.) "[Q]uestioning is undoubtedly an essential tool in effective law enforcement," *Hayes v. Washington*, 373 U.S. 503, 519 (1963), but is "legitimate" only when it complies with *Miranda*. While this is not a case of confessions coerced "by fear of hurt, torture or exhaustion," *Adamson v. California*, 332 U.S. 46, 54 (1903), it is also not a case of a "free choice to admit, to deny, or to refuse to answer" *Lisenba v. California*, 314 U.S. 219, 241 (1942).

On the contrary, the State's position that would allow courts to arbitrarily excuse *Miranda* violations if they ultimately force a waiver and confession. The

state courts' approach – using context to render a facially unambiguous invocation to an ambiguous one – would create a terrible rule. It would be an extraordinary step backward. Focusing on "context" would obscure violation of Fifth Amendment rights and eliminate the certainty which has accrued to the *Miranda* rule over decades.

Indeed, the state courts' reasoning would not only undermine long established legal protections, it would foster disrespect for the law by endorsing a stratagem to avoid the legitimate assertion of a constitutional right. It would encourage bullying tactics by the police, and its only certain effect would be to encourage lawless experimentation by the very forces that are sworn to uphold the law. Basic guarantees of counsel and freedom from testimonial compulsion should not be left to the states for laboratory experiment.

An interrogator would be tempted (if not encouraged) to continue questioning even after a valid invocation. "Under the state court's application of *Miranda* and its progeny, every time a suspect unequivocally invokes the right to remain silent, the police can ask follow-up questions to clarify whether he really, *really* wants to invoke the right . . . . Such a practice is tantamount to endless re-interrogation." *Anderson*, 516 F.3d at 790 (emphasis original). As evident here, the potential for abuse and overreaching is too great if officers are permitted to "clarify" a facially unambiguous invocation.

In short, the State's proposal to radically revise *Miranda* would fail to protect the Fifth Amendment privilege and would let officers extract – and courts admit –

involuntary statements in violation of *Miranda*. This is "precisely what the demands of our legal order forbid: make the suspect the unwilling collaborator in establishing his guilt." *Culombe v. Connecticut*, 367 U.S. 568, 575 (1961).

Miranda jurisprudence reflects th Court's abiding concern to effectuate the "underlying purposes of the *Miranda* rules," and maintain "the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights." *Moran*, 475 U.S. at 424. Departing from them, as the detectives did here, disturbed "a carefully crafted balance designed to fully protect both the defendant's and society's interests." *Id.* at 433 n. 4.

In a scale composed of unsupported assertions of police necessity on one side and the effectuation and protection of a person's constitutional right not to be compelled to incriminate himself on the other, the balance must be struck on the side of the Constitutional right. *See Jackson*, 475 U.S. at 633 ("Doubts must be resolved in favor of protecting the constitutional claim.").

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the State's petition for writ of *certiorari*.

Dated: March 25, 2013

Respectfully submitted,
FARMANI, APLC

By_____
TONY FARYAR FARMANI
Counsel for IAN CLIETT