No. 12-804

IN THE SUPREME COURT OF THE UNITED STATES

RANDY GROUNDS, ACTING WARDEN, PETITIONER

VS.

TIO DINERO SESSOMS, RESPONDENT.

RESPONDENT'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. Where a custodial suspect has made a clear request for a lawyer prior to being informed of his *Miranda* rights, is it a violation of *Miranda* and its progeny for law enforcement to persuade the suspect to abandon his request for a lawyer.

II. Whether the state court in this case, unreasonably applied this Court's decision in *Davis v. United States*, 512 U.S. 452 (1994), which held that a defendant who has knowingly and intelligently waived his right to counsel must subsequently clearly re-invoke his right to counsel, to a suspect who has not been yet given his *Miranda* rights.

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APPENDICES

The opinions of the courts below are reproduced as appendices to the Petition for Writ of Certiorari, to which the Court is respectfully referred.

Appendix 1 to this Opposition is the transcript of the interrogation of respondent. Appendix 2 to this Opposition is the transcript of the suppression hearing held on April 20, 2001. Appendix 3, is an excerpt from the prosecutor's opposition to respondent' motion for a new trial. Appendix 4 to this Opposition is excerpts of *Reading Between the Lines: The Investigator's Guide to Successful Interviews and Interrogations*, Sacramento Sheriff's Sgt. Carl Stincelli, January 2000. Appendix 5 to this Opposition is *Laws of Arrest*, Sacramento Police Academy Course Outline, updated August 15, 1999, Donald Currier.

References in this opposition to alphabetic Appendices are to the Petition. References to numeric Appendices are to this Opposition.

INTRODUCTION

This case involves respondent's clear invocation of the right to counsel immediately after the detectives entered the holding cell. Petitioner maintains otherwise only by mischaracterizing the facts in two critical respects. First, petitioner does not accurately recite respondent's invocation. Both the state and federal courts agreed that respondent's words were "give me a lawyer," not (as petitioner suggests) "get me a lawyer." This invocation satisfies the well-established standard for a request for counsel set forth in *Miranda v. Arizona*, 384 U.S. 436 (1966).

Second, and critically, petitioner does not fairly portray the detectives' ensuing effort to convince respondent not to invoke his right to counsel. The record shows that the detectives

understood that respondent had asked for a lawyer. Rather than honor that request, they chose to engage him in an extended soliloquy using techniques that *Miranda* itself condemned. At the time, police officers in California were trained to use such techniques to question "outside" *Miranda*.

Given these facts, the *Miranda* violation is clear. As both *Dickerson v. United States,* 530 U.S. 428 (2000) and *Miranda* recognize, this was part of the problem *Miranda* was designed to remedy. The decision therefore, properly applies *Miranda* and *Edwards v. Arizona,* 451 U.S. 477 (1981). The many decisions of federal and state courts similarly applying *Miranda* and *Edwards* confirm that the state court's application of *Davis v. United States*, 512 U.S. 452, (1994) to the circumstances of this case was improper.

Finally, petitioner makes no compelling argument that this Court should review the full record here. There is no dispute among the circuits regarding the Court of Appeals' application of section 2254, subd. (d)(1) to the case. Likewise, petitioner's claim of a division of authority on the applicability of *Davis* to pre-*Miranda* warning situations doe not withstand scrutiny. The facts and holdings of the cases the petitioner cites reveal no such conflict. The overwhelming majority of cases find that *Davis* does not apply prior to the *Miranda* warnings. Petitioner's position would effectively overrule *Miranda.*

Moreover, petitioner overlooks the fact that any real conflict is unlikely to emerge in the future. This Court's decision in *Missouri v. Seibert,* 542 U.S. 600 (2004), which post-dates the police conduct at issue here by five years, makes it clear that deceptive police tactics such as those employed here are no longer permissible. In the aftermath of *Seibert*, comparable fact patterns are unlikely to recur.

The jurisdiction of the Supreme Court to review cases by way of certiorari 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). Essentially, petitioner is asking this Court to act as a second Court of Appeals.

For these and the other reasons below, the court should deny the petition.

STATEMENT OF THE CASE

Respondent Sessoms was charged with, and convicted of, (1) felony murder; (2) robbery; and (3) burglary. Append. F at 124-125. The jury found true two special circumstances subjecting respondent to a term of life without possibility of parole and he was sentenced to that term for his vicarious role in the murder. *Ibid.*

In his state appeal, respondent argued that his confession was inadmissible under *Miranda, supra*. On January 12, 2004, the California Court of Appeal, relying primarily on *Davis, supra*, affirmed his conviction and sentence. Append. F at 125-30.

Respondent filed a timely federal petition on June 20, 2005, raising the *Miranda* issue. The District Court entered a final order denying the petition on October 24, 2008. Append. C at 85-86.

On June 3, 2011, a three judge panel of the Ninth Circuit Court of Appeals affirmed the denial of respondent's habeas petition in a 2-1 opinion. Both the majority and the dissent concluded that *Davis v. United States, supra,* was inapplicable to the facts of this case because respondent's request for counsel was made before he was given the *Miranda* warnings. Append. B at 50-51, 81-84. Even though it found that *Davis* was inapplicable, the majority nevertheless found that the California decision was not unreasonable when it relied on *Davis'* requirement that

a request for counsel be unambiguous and concluded that deference was due to the state court decision. Append. B at 53-56.

On August 16, 2012, an en banc panel reversed the District Court's order denying the habeas petition in a 6-5 decision. Append. A at 1. The majority held that *Davis* is inapplicable to pre-*Miranda* requests for counsel and concluded that the California Court unreasonably extended *Davis* to the facts of this case. *Id.* at 15-18. The majority further concluded that the totality of the circumstances demonstrated that respondent unambiguously asked for an attorney and that the interrogating officer understood that respondent asked for an attorney and proceeded to talk him out of his request. Append. A at 19-21.

The dissent concluded that *Davis* does apply to pre-*Miranda* requests for counsel, Append. A at 22, 24-26, and found that respondent' request for counsel was ambiguous. *Id.* at 31-32.

STATEMENT OF FACTS

Facts of the Offense.

The bulk of the evidence against respondent at trial consisted of the statement he gave to Sacramento County police Detectives Woods and Keller while in Oklahoma in which he admitted to participating in the burglary and robbery. All the witnesses and investigating officers agreed that respondent did not participate in the actual killing. Respondents' liability for a term of life without possibility of parole was vicarious based on his participation in the burglary and robbery.

The Interrogation.

Respondent turned himself in to authorities in Oklahoma on November 15, 1999.

Append. D at 91. Four days later, on November 20, 1999, respondent was interviewed in Oklahoma City by Sacramento Police Detectives Woods and Keller. *Ibid.* Before the interview began, respondent sat by himself in the interview room for some period of time. As he waited, talking to himself, respondent said "I'm not a criminal, but I got (inaudible). They didn't tell me if I have a lawyer. I know I want to talk to a lawyer." Append. A at 4. Then the officers entered the interview room. *Ibid.* Relevant to respondent's *Miranda* motion, the pertinent part of the interview is as follows:

Det. Woods:	. . . Tio, I'm Dick.
Sessoms:	How you doing, all right. You already know me.
Det. Woods:	You say . . .
Det. Keller:	Tio, Pat Keller.
Det. Woods:	You say Tio or Theo?
Sessoms:	It - my name is pronounced Tio because it's Spanish.
Det. Woods:	Tio. Okay.
Det. Keller:	Why don't we swap corners here for a minute, you guys? Go ahead and sit here.
Sessoms:	So glad you fellows had a safe flight?
Det. Woods:	Huh?
Sessoms:	I'm glad you fellows had a safe flight out here.
Det. Keller:	So are we. Huh.
Det. Woods:	Well, we want a safe one back too.
Sessoms:	Oh, you know (inaudible.)

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

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

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

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

Det. Woods: What -- what we're going to do is, um -- I have one philosophy and that's, uh, be right up-front and be honest, the same way we were with Frederick and Adam, and not bullshit you or try to hide anything from you, okay?

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

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

Sessoms: So there --

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

Sessoms: No.

Append. 1 at 546-48.[1]

[Officers obtain a tape for their tape recorder.]

Append. 1 at 548-49.

Det. Woods: . . . Um, want to back up. This way there - - - is a recording, and

[1] Appendices 1, 2 and 3 are taken from the state transcript on appeal. Respondent refers to the bold official pagination to avoid confusion.

you know we can't play no switch games or nothing else. Uh, I want to back up to your question, you asked about an attorney. Um, first, before you ask questions, uh, I'm going to tell you why we're here, just lay it out and be up-front. And then — then I'm going to advise you of your rights. And then it's up – for you to decide if you want an attorney or not.

Sessoms: All right.

Det. Woods: Um, we obviously you know that the -- the warrant is -- is charging you with homicide and robbery and burglary.

Sessoms: Uh-huh.

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

Sessoms: What's that?

Det. Woods: Money. Uh, we still don't have a lot of the coins or the bills back, but we've got jewelry and jewelry boxes back, the Bible, and so forth. And you are a suspect in it, and we are -- you -- obviously,

you were arrested in this and –

Sessoms: I turned myself in.

Det. Woods: I know. Which -- which I think is good, okay? But, uh, what I want to do is, um -- I'm not trying to take any rights away from you or anything else. What I want to do, Tio, is advise you of your rights, make sure you understand them. Then, you make the decision if you want to talk to us or not.

Sessoms: Uh-huh.

Det. Woods: It's not for me to make, not for him to make; it's – its for you to make. Um, have you ever been advised of your rights before?

Sessoms: [No audible response.]

Det. Woods: Okay. How old are you?

Sessoms: I'm nineteen years old.

Det. Woods: Okay.

Sessoms: [Inaudible.]

Det. Woods: You look older than that.

Sessoms: Huh.

Det. Woods: [Inaudible.]

Det. Keller: I think it's the glasses that make him look older.

Det. Woods: I don't know.

Det. Keller: Uh, well, speaking of glasses --

Sessoms: Would it be a possible chance that I can call my dad --

Det. Woods: Uh --

Sessoms: - - ask him.

Det. Woods: I'm sure that – well, no, because your da – you've got to make your decision. You're an adult. We can make arrangements for – after we're done talking to you, whether you talk to us or not, I'm sure that - - these guys are pretty cordial. I'm sure that they would allow a phone call. But what –I want to do with you is I want to read these to you, see if you understand them, then you make the decision. D – do you understand what I'm saying?

Sessoms: I understand what you're saying.

Append. 1 at 549-53.

[Detective Woods goes through the *Miranda* form with Sessoms.]

Append. 1 at 553-54.

. . . . .

Det. Woods: . . . . Do you understand each of these rights I've explained to you?

Sessoms: Yes I do.

Det. Woods: Okay. Having these rights in mind, do you wish to talk to us now?

Sessoms: Um – [Shrugs shoulders.]

Det. Woods: That's solely up to you.

[Pause by Sessoms.]

Sessoms: Let's talk.

[The interview then proceeded from that point.].

Append. 1 at 554.

On April 19, 2001, a hearing was held on respondent's motion to suppress pursuant to *Miranda.* Detective Keller testified at the hearing. He testified that when respondent was arrested, he was in custody on charges arising out of the death of Mr. Sherriff. Append. 2 at 15.

Detective Woods also testified. Append. 2 at 15. He testified that he had been a

Sacramento Police Officer for 32 years. Append. 2 at 16. Woods said that he was not trying to trick respondent or prevent him from exercising his rights during the interview. Append. 2 at 30. Respondent's trial counsel tried to question Detective Woods about the twenty minutes that respondent sat in the cold holding cell before the interrogation started. Append. 2 at 35-36. The trial court sustained objections to most of the questions. *Ibid.* The only question counsel was allowed to pose was whether Woods knew how long respondent sat in the interrogation room prior to the beginning of the interrogation. Append. 2 at 36. Woods replied evasively "I don't have any personal knowledge. If I did have it, I don't recall it at this point." *Ibid.*

In its opposition to respondent' motion for a new trial, the prosecutor conceded that the introduction of respondent' statement was highly prejudicial if it was inadmissible.

> The prosecution concedes that the defendant's statement was a major part of its argument to the jury on the issue of the special circumstance allegations, to demonstrate to the jury that the defendant, while not the actual killer, acted with reckless indifference to human life and as a major participant in the underlying crimes. (Citations.) The prosecution would concede that if it was error to admit the defendants' statement, the error would not be harmless beyond a reasonable doubt on the issue of the jury's special circumstance verdicts.
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> Append. 3 at 541.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS PREMISED ON AN INACCURATE PRESENTATION OF THE FACTS AND OF THE CURRENT STATE OF THE LAW IN CALIFORNIA.

"The failure of a petitioner to present with accuracy, brevity, and clarity whatever is essential to ready and adequate understanding of the points requiring consideration is sufficient reason for the Court to deny a petition." Supreme Court Rule 14, subd. (4). Petitioner''s claim relies on an inaccurate presentation of the facts and of the law in California.

Petitioner claims that respondent said "*get* me an attorney" rather than "*give* me an attorney" as reflected in the official transcript. Append. 1 at 547. See, Petition at 3. Petitioner does not disclose that it is relying on the testimony of Detective Woods to contradict the official transcript. See, Append. 2 at 23. However, the California Court of Appeal found that Respondent said "give me a lawyer." Append. F at 123. The Court of Appeals, as required, accepted the finding. Append. A at 6. Petitioner cannot change the facts now. Respondent's words are a clear invocation of his right to counsel.

Second, petitioner does not acknowledge that the Court of Appeals found that Detective Woods' soliloquy constituted an application of the psychological interrogation tactics, condemned in *Miranda*, *supra,* 384 U.S. at 455-58, that are used to discourage suspects from invoking their rights. Detective Woods' resort to those techniques demonstrates that he was not at all confused by respondent's request.

The Court of Appeals described Woods' stratagem as follows:

> *Miranda* recognized that overzealous police practices during a custodial interrogation create the potential for compulsion in violation of the Fifth Amendment. *Id.* at 455-58. Indeed, some of the tactics of which *Miranda* warns

> were employed by the interrogators in this case. After Sessoms asked for an attorney, Woods persisted in his questioning. He told Sessoms he already knew what happened, and that Sessoms's accomplices had already confessed and laid it out from A to Z, thereby "display[ing] an air of confidence in [Sessoms's] guilt" and appearing only to be "interest[ed] in confirming certain details." *Id.* at 450. Woods offered Sessoms a "legal excuse[ ]" and assured him that he knew Sessoms did not participate in the stabbing. See *id.* at 451-52.[2] But then Woods immediately reversed course, telling Sessoms that he didn't really need his statement to make the case anyway, because Sessoms's accomplices had already talked, thereby placing Sessoms "in a psychological state where his story [was] but an elaboration of what the police purport[ed] to know already—that he [was] guilty." *Id.* at 450. Eventually, the officers, much like *Miranda* warns, overwhelmed Sessoms and persuaded him "out of exercising his constitutional rights." *Id.* at 455.
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> Append. A at 11.

Third petitioner states that "[T]he detectives did not ask Sessoms any questions." Petition at 3. In fact, Woods asked a number of subtle questions designed to accustom respondent to answering questions. E.g., "Now would you mind if I pulled out a recorder?" Append. 1 at 548; "Okay. How old are you? *Id.* at 552.

Petitioner also failed to accurately state the law in California regarding the application of *Davis* to pre-*Miranda* requests for counsel. Petitioner cites *People v. Crittenden*, 9 Cal.4th 83, 129-31 (1994) for the proposition that the clear invocation rule was invoked for a statement made while the *Miranda* warnings were being read implying that *Crittenden* established the rule in California. Petition at 21-22. However, subsequent to the unpublished decision here, the California Supreme Court directly addressed the question and found *Davis* applies solely in the post-*Miranda* waiver situation. *People v. Stitely*, 35 Cal. 4th 514, 535 (2005) and *People v.*

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[2] Woods' assurance that he knew that respondent "did not participate in the stabbing" deliberately conveyed the false implication that this fact somehow reduced respondent' liability for murder. Woods knew that an admission of participation in the burglary or robbery by respondent would subject respondent to a term of life without possibility of parole. Cal. Pen. Code §§ 191, subd. (a) & 190.2, subd. (a)(17)(A) & (G).

Nelson, 53 Cal.4th 367, 376 (2012).

The fact that the California Supreme Court has repeatedly reached the same legal conclusion about the application of *Davis* to pre-*Miranda* invocations reached by Court of Appeals here, strongly supports the Court of Appeals' conclusion that the 2004 unpublished decision unreasonably extended *Davis* to the facts of this case.

II. THE DECISION BELOW ARISES FROM A SET OF FROM CIRCUMSTANCES NOT LIKELY TO BE REPEATED IN LIGHT OF *MISSOURI V. SEIBERT*, *SUPRA,* AND *PEOPLE V. NEAL,* 31 CAL.4TH 63, 68 (2003).

A. The Petition Does Not Address the Factual Findings of the Court of Appeals That are Amply Supported by the Record.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . ." Supreme Court Rule 10. Whether the legal claims petitioner raises are even presented by this case "is a fact-bound issue of little importance since similar situations are unlikely to arise with any regularity." *Mass. v. Sheppard*, 468 U.S. 981, 988, n. 5 (1984).

First, the Court of Appeals concluded: "Simply put, the words 'give me a lawyer' mean just that: 'give me a lawyer.'" Append. A at 19-20. "Although it was couched in a polite and diffident manner, the meaning of Sessoms's request was clear: he wanted a lawyer then and there." Append. A at 19.[3] The four concurring judges found that ". . . the only reasonable conclusion was that Sessoms' statements, taken together, unambiguously conveyed his desire to have counsel present." Append. A at 22.

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[3] "Social science confirms what common sense would suggest, that individuals who feel intimidated or powerless are more likely to speak in equivocal or nonstandard terms when no ambiguity or equivocation is meant." *Davis v. United States, supra,* 512 U.S. at 470, n. 4, (Souter, J., concurring.)

Given that respondent's request was clear, the Court of Appeals correctly applied *Miranda v. Arizona*, *supra,* 384 U.S. at 444-45 which provides that if a suspect "indicates in any manner and at any stage of the process that he wished to consult an attorney," all questioning must cease. Append. A at 12. The Court of Appeals also correctly applied *Edwards v. Arizona, supra,* 451 U.S. at 485, which held that the "assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.'" *Ibid.* A determination that the Court of Appeals' incorrectly applied the plain rules of *Miranda* and *Edwards* would require the conclusion that "give me a lawyer" does not mean "give me a lawyer."

Second, the Court of Appeals found that Detective Woods' soliloquy employed many of the psychological interrogation techniques which were criticized by *Miranda, supra,* 384 U.S. at 455-58, that are used to discourage suspects from invoking their rights. Append. A at 11. To conclude that the Court of Appeals' misapplied *Miranda* to the facts of this case, would required the conclusion that (1) Detective Woods, a 32 year police veteran, was unaware of the textbook interrogation tactics identified by this Court in *Miranda*; and (2) that it was simply a coincidence that Woods followed the tactics *Miranda* condemned to talk respondent out of his request for an attorney. The transcript of the interrogation does not support either conclusion.

B. Police Officers in Sacramento Were Trained to Question "Outside" *Miranda* at the Time as Detective Woods Did Here.

The interrogation techniques described in *Miranda* formed the core of police officer interrogation training in California at the time of the interrogation. Weisselberg, C. D., *Mourning Miranda*, 96 Cal. Law Review Vol. 1519, 1529-1536 (2008). Detective Woods and

his fellow officers were specifically trained to take the narrowest view of *Miranda* possible. Append. 4 at 65-68. They were instructed "If you are sure they are going to invoke, don't *Mirandize* unless legally required to do so." Append. 4 at 67. If *Miranda* is violated, the statement can be "used for impeachment purposes and usually keeps the defendant from testifying." Append. 4 at 68.

A factual finding that Woods' stratagem was just a coincidence would also have to disregard the fact that at the time the interrogation took place in 1999, California police officers were trained to question "outside" *Miranda*, a practice that was only discontinued after this Court's decision in *Missouri v. Seibert*, *supra,* 542 U.S. 600[4] and the California Supreme Court's decision in *People v. Neal, supra,* 31 Cal.4th at 68.[5] See, *Weisselberg, supra,* 96 Cal. Law Review at 1552-53.

Woods' stratagem was not an accident. He was simply relying on his years of experience and training. Moreover, the incentive to use the sophisticated coercion techniques described in *Miranda* was very high in this case. The prosecutor conceded at the hearing on respondent's motion for new trial that "if it was error to admit the defendant's statement, the error would not be harmless beyond a reasonable doubt on the issue of the jury's special circumstance verdicts." Append. 3 at 541. *Miranda* itself concluded that "[F]ew will persist in their initial refusal to talk, it is said, if this monologue is employed correctly." *Miranda, supra,* 384 U.S. at 454.

The Court of Appeals also found that Detective Woods' implementation of the time-

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[4] This Court has described the strategies to avoid *Miranda* that police in California were trained to use at the time *Seibert. Missouri v. Seibert, supra,* 542 U.S. at 611, n. 2.

[5] The California Supreme Court observed that "unfortunately" training in techniques to avoid *Miranda* "has not been without widespread official encouragement." (Quoting Weisselberg, *In the Stationhouse After Dickerson* (2001) 99 Mich. L.Rev. 1121, 1136–38.)" *People v. Neal*, *supra,* 31 Cal. 4th at 81, n. 5.

tested interrogation techniques was strong evidence that, as a reasonable police officer, he clearly understood that respondent was asking for an attorney.

> Of course, the best test of how a reasonable police officer would understand Sessoms's request is how the actual police officer in this case responded. That reaction is telling. Detective Woods's response to Sessoms's statements—informing Sessoms that a lawyer would only prevent him from giving his side of the story and that, in any event, invocation was futile because the police already knew what happened— shows that he knew Sessoms was requesting a lawyer, and he wanted to do his best to talk Sessoms out of it.
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> Append. A at 20.

To take this case out of the clear *Miranda/Edwards* standards, requires a conclusion finding that (1) Detective Woods did not understand respondent's request; (2) was genuinely unsure, as opposed to tactically unsure, about whether respondent was asking for an attorney; and (3) resorted to proven strategies to dissuade respondent from invoking his right to counsel for no particular reason. None of these findings, however, find any support in the record before this Court.

C. The Circumstances of this Case Are Unlikely to Be Repeated Because this Court and the California Supreme Court Have Put a Stop to Questioning "Outside" *Miranda.*

A grant of certiorari is not warranted in this case because the law is now settled with respect to the improper interrogation techniques employed by law enforcement in this case. *Missouri v. Seibert, supra,* and *People v. Neal, supra,* ended the use of deliberate strategies of questioning "outside" of *Miranda*. Moreover, *People v. Stitely, supra,* 35 Cal. 4th at 535 establishes that in California the *Davis* "clear invocation" test only applies after the *Miranda* warnings have been given and properly waived. Thus, the improper interrogation techniques used by law enforcement in this case have been ruled upon by both this Court and the California

Supreme Court and there is no need to address them anew. Under the clear law now applicable in California, the facts of this case are very unlikely to be repeated.

III. THE COURT OF APPEALS CORRECTLY APPLIED THE CLEARLY ESTABLISHED PRECEDENTS OF *DAVIS*, *MIRANDA* AND *EDWARDS*.

Petitioner correctly notes that its claim must be evaluated based on the state of the law at the time the state court rendered its decision. Petition at 12 (citing *Greene v. Fisher*, 132 S. Ct. 38, 44 (2011).) Petitioner further correctly notes that the "clearly established law" "refers to the holdings, as opposed to the dicta, of this Court's decisions . . ." Petition at 12 (citing *Yarborough v. Alvarado,* 541 U.S. 652, 660 (2004).) Petitioner then contends that there was no clearly established precedent from this Court applicable to this case at the time that the state court issued its decision. This claim is erroneous.

The factual premise underlying petitioner 's entire legal argument is that the words "give me a lawyer" are ambiguous.[6] Petition at 13. Respondent's words are clear. In the absence of a factual finding of ambiguity, petitioner's legal claim collapses. *Miranda* and *Edwards* provide the clearly applicable legal standards. These standards are not mysterious or new. Prior to questioning, a defendant must be informed of his rights. *Miranda, supra,* 384 U.S. at 444.

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.
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> *Id.* at 444-45.

This holding is neither unclear nor ambiguous. Literally thousands of cases, both state

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[6] In *Anderson v. Terhune*, 516 F.3d 781, 789 (9th Cir. 2008), cert. den. sub nom. *Cate v. Anderson*, 555 U.S. 818 (2008), California claimed that "I plead the Fifth" was ambiguous.

and federal, have applied this standard both for and against defendants. See, e.g, *United States v. Lafferty*, 503 F.3d 293, 300 (3rd Cir. 2007); *McKinney v. Ludwick,* 649 F.3d 484, 489 (6th Cir. 2011); *Gore v. Sec'y for the Dep't of Corr.*, 492 F.3d 1273, 1296 (11th Cir. 2007); *People v. Neal, supra,* 31 Cal. 4th at 82.

Nor is the *Edwards* standard unclear. In no uncertain terms, *Edwards* provides even stronger protection to a request for counsel than applies to an invocation of the right to silence.

> . . . we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. (Note omitted.) We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.
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> *Edwards, supra,* 451 U.S. at 484-85.

The so-called "*Edwards* bar" has also been applied by thousands of cases over the years. Most important, this Court reaffirmed the "*Edwards* bar" in *Maryland v. Shatzer*, 559 U.S. 98, 130 (2010). Given the clarity of *Miranda* and *Edwards* with respect to clear invocations such as respondent's, the Court of Appeals, in ruling that respondent's *Miranda* rights were violated, correctly applied this Court's legal precedent to the facts in respondent's case.

It is only if this Court concludes that respondent's invocation of his right to counsel was ambiguous that *Davis* even comes into consideration. But, even if respondent's invocation were ambiguous, the issue still remains whether the California Court "unreasonably extended" *Davis* to the facts of this case. Append. A at 17-19.

In *Davis*, the defendant was informed of his rights to silence and to counsel and waived

them both orally and in writing.[7] *Davis, supra*, 512 U.S. at 454-55. Mid-way through the interview, the defendant said "Maybe I should talk to a lawyer." *Id.* at 455. *Davis* found that this was an ambiguous request for counsel. *Id.* at 462.

Davis held that "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis, supra,* 512 U.S. at 460-61. The holding of *Davis* could not be more clearly stated. "We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Davis, supra,* 512 U.S. at 461. In his concurring opinion, Justices Souter, joined by Justices Blackmun, Stevens and Ginsberg, in affirming Davis' convictions, understood *Davis* to apply to post-warning situations. *Davis, supra,* 452 U.S. at 470-71. The Court of Appeals' decision in respondent's case was clearly correct when it reached the same conclusion.

Contrary to petitioner's contention, *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010) also clearly supports the conclusion that *Davis* does not apply prior to the *Miranda* warnings. *Berghuis* does not, as petitioner claims, endorse "imposing a clear-invocation requirement on the suspect." Petition at 13-14. The fact that *Berghuis* is addressing the post-warning context is quite clear. "As a general proposition, the law can presume that an individual who, *with a full understanding of his or her rights*, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." *Berghuis, supra,* 130 S. Ct. at

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[7] Contrary to the police policies that prevailed in Sacramento at the time, the Uniform Code of Military Justice requires that a suspect be read his rights before any questioning begins. 10 U.S.C. § 831, subd. (b). Even before *Miranda*, the FBI routinely read suspects their rights "at the very outset of the interview." *Miranda, supra,* 384 U.S. at 485.

2262, emphasis supplied. If there were any doubt that respondent's understanding of *Berghuis*, is correct, the holding in that case dispels it. "In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." *Berghuis, supra,* 130 S. Ct. at 2264.

The dissenting opinion of Justice Sotomayor further demonstrates that respondent's reading of *Berghuis* is correct. "Today's dilution of the prosecution's burden of proof to the bare fact that a suspect made inculpatory statements *after Miranda warnings were given and understood* takes an unprecedented step away from the 'high standards of proof for the waiver of constitutional rights' this Court has long demanded." *Berghuis, supra,* 130 S. Ct. at 2272, emphasis supplied.

Petitioner also argues that *Smith v. Illinois*, 469 U.S. 91, 95-96 & n. 3, (1984) and *Connecticut v. Barrett*, 479 U.S. 523, 529-530 n. 3 (1987) left open the question of how to treat ambiguous invocations. Petition at 15. In both cases, however, the allegedly ambiguous invocations came *after* the suspect had been read his *Miranda* rights. *Smith, supra,* 469 U.S. at 92-3; *Barrett, supra,* 479 U.S. at 525. There is no case from this Court that holds, or even suggests, that the clear invocation requirement applies *before* the giving of the *Miranda* warnings.

Given that the determination of whether deference is due to a state court decision pursuant to § 2254, subd. (d)(1) is a "backward-looking" analysis, it is clear that the California Court of Appeals unreasonably extended *Davis* to the facts of this case. This Court's decisions at the time of respondent' appeal - *Davis, Smith* and *Barrett* - are all based on the assumption that the suspect has already received the *Miranda* warnings and thus is making a knowing and

intelligent decision. *Berghuis,* which was decided after the California court reached its decision in respondent's case, reaffirms this same assumption. There was no ground in the Court's decisions at the time that justified extending *Davis* to this facts of this case.

Here, Detective Woods delayed giving respondent his rights after he requested a lawyer. Woods immediately resorted to the tactics, condemned in *Miranda,* to talk respondent out of insisting on his request for an attorney. There is no precedent of this Court that has ever suggested that the *Davis* "clarity" requirement applies to facts such as those of this case.

IV. THE CIRCUITS HAVE UNANIMOUSLY CONCLUDED, RELYING ON *WILLIAMS V. TAYLOR*, 529 U.S. 362 (2000), THAT § 2254, SUBD. (D)(1) IS VIOLATED WHEN A STATE COURT UNREASONABLY EXTENDS THIS COURT'S PRECEDENT TO A NEW CONTEXT.

Pursuant to Rule 10, subd. (a), a conflict among the circuits on an important matter is grounds for granting a petition for writ of certiorari. Petitioner has tried to manufacture a conflict among the circuits and between the circuits and this Court with its claim that this Court "has never held that a petitioner can over come § 2254, subd. (d)(1) because the state court has 'unreasonably extended' this Court's precedent to a new situation." Petition at 18.

In *Williams* this Court recognized the unreasonable extension ground. *Williams, supra,* 529 U.S. at 407-08. It merely noted that the principle has "some problems of precision" and left for another day the refinement of how "such 'extension of legal principle' cases should be treated under § 2254(d)(1)." *Williams, supra,* 529 U.S. at 408. In *Panetti v. Quarterman*, 551 U.S. 930, 953 this Court implicitly endorsed this principle. "Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts 'different from those of the case in which the principle was announced'" citing *Lockyer v. Andrade*, 538

U.S. 63, 76 (2003).

In his petition at 20, petitioner provides a list of cases, all but one of which were decided within one year of *Williams, supra,* that posit that this Court has not adopted the "unreasonably extended ground."[8] [9] Petitioner endeavors to create a conflict where non-exists.

Respondent's research reveals that the unreasonable extension exception to § 2254, subd. (d)(1) has now been unanimously adopted by every circuit. E.g. *Abram v. Gerry*, 672 F.3d 45, 51 (1st Cir. 2012); *Ernst J. v. Stone,* 452 F.3d 186, 193 (2nd. Cir. 2006); *Breakiron v. Horn,* 642 F.3d 126, 131 (3rd Cir. 2011); *DeCastro v. Branker,* 642 F.3d 442, 449 (4th Cir. 2011); *Goodrum v. Quarterman,* 547 F.3d 249, 256 (5th Cir. 2008); *Moore v. Berghuis*, 700 F.3d 882, 886 (6th Cir. 2012); *Winston v. Boatwright*, 649 F.3d 618, 633 (7th Cir. 2011); *Danforth v. Crist,* 624 F.3d 915, 918 (8th Cir. 2010); *Murdoch v. Castro,* 609 F.3d 983, 1003-1004 (9th Cir. 2010); *Bledsoe v. Bruce,* 569 F.3d 1223, 1231 (10th Cir. 2009); *Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286 (11th Cir. 2012).

While there may still be room for "refinement" of the unreasonable extension principle, there is no conflict among the circuits or between the circuits and this Court regarding whether § 2254, subd. (d)(1) is violated by an unreasonable extension of a settled principle to a new factual situation.

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[8] The exception is *Marcum v. Luebbers,* 509 F.3d 489, 504 (8th Cir. 2007) which finds only that an unreasonable extension "could" violate section 2254, subd. (d)(1).

[9] Petitioner also notes that the original three judge panel reached this conclusion as well referring to Append. B, at 46, n. 6. Petition at 20. It is significant that the en banc dissent adopted nothing from the original panel's opinion beyond the factual conclusion that respondent' invocation was ambiguous. Compare Append. A, at 22- 35 with Append. B, at 37-68.

V. VIRTUALLY ALL REPORTED CASES CONCLUDE THAT THE *DAVIS* CLEAR INVOCATION RULE DOES NOT APPLY BEFORE THE DEFENDANT HAS BEEN GIVEN THE *MIRANDA* WARNINGS.

Petitioner claims that two circuits and several states apply the *Davis* clear-invocation rule to requests made by suspects before they received the *Miranda* warnings. Petition 21-22. None of the cases apply *Davis* in the complete absence of *Miranda* warnings as did the California Court here. At most, the cases apply *Davis* to the situation where, while the warnings are being read, the officer asks the suspect clarifying questions to determine the meaning of the allegedly ambiguous request. No case that respondent is aware of authorizes seizing upon an allegedly ambiguous request as a justification for talking the suspect out of exercising his *Miranda* rights as occurred here. In fact, the case law cited by petitioner is to the contrary.

People v. Crittenden, *supra,* 9 Cal.4th at 129-31 does not establish the rule in California. See, e.g, *People v. Stitely*, *supra,* 35 Cal. 4th at 535 ("In order to invoke the Fifth Amendment privilege after it has been waived, . . . the suspect "must unambiguously" assert his right to silence or counsel"); *United States v. Wysinger*, 683 F.3d 784, 794 (7th Cir. 2012) (suspect asked "Do I need a lawyer before we start talking?" and agent responded by reading the suspect his *Miranda* rights and obtaining a waiver); *United States v. Shabaz*, 579 F.3d 815, 817 (7th Cir. 1997) (suspect asked "Am I going to be able to get an attorney?" Agent directed him to the interrogation room, made a few introductory remarks, read the suspect his rights and obtained a written waiver); *Grant-Chase v. Commissioner, N.H. Dept. Of Corrections*, 145 F.3d 431, 433 (suspect permitted five to ten minute phone to call her lawyer for advice. Officer then asked if it was okay to ask her some questions and suspect replied that her attorney had advised her to cooperate with the investigation. Officer gave the *Miranda* warnings and obtained a written

waiver); *United States v. Muhammad*, 120 F.3d 688, 697 (7th Cir. 1997) (agent read the suspect his rights then asked the suspect to read the form to himself. Ambiguous comment made while suspect reading to himself).

Respondent acknowledges that the facts in *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154 (Ark. 1995) are not clear. But a fair reading is that ambiguous request for a phone call occurred after the defendant waived his rights. *Id.* at 254-56. Moreover, the police did not try to talk him out of a phone call, they offered it to him. Thus, *Moore* is not a clear endorsement of a rule that *Davis* applies before the *Miranda* warnings are given.[10]

In *Carr v. State*, 934 N.E.2d 1096, 1102-1103, 1105 (Ind. 2101), the court actually found that the suspect had clearly invoked his right to counsel. The officer responded by assuring him that he had the right to an attorney and then proceed to improperly talked him out if exercising his right. *Id.* at 1105-06.

State v. Appleby, 289 Kan. 1017, 221 P.3d 525 (Kan. 2009) is actually a case applying the rule of *McNeil v. Wisconsin*, 501 U.S. 171 (1991). *Appleby* found that the suspect could not anticipatorily invoke *Miranda* as to Kansas offenses to Connecticut detectives prior to even talking to the Kansas detectives. *Id.* at 1051-52.

In *State v. Ortega*, 798 N.W.2d 59, 64, 70-71 (Minn. 2011), the suspect asked "am I supposed to have a lawyer present?" at the outset of the interrogation. *Id.* at 64. The detective

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[10] Two subsequent Arkansas cases cite *Moore* on this question, and suggest that *Moore's* reach is limited. In *Sykes v. State*, 2009 Ark. 522, *2, 357 S.W.3d 882 (2009) the invocation was after the *Miranda* rights had been read and waived. In *Holsombach v. State*, 368 Ark. 415, 421-422, (2007) the suspect asked "You'll furnish me a public defender" while his rights were being read and the officer responded by confirming that he would be furnished a lawyer, confirming that the suspect understood the right and obtaining a waiver. *Id.* at 423. Thus, it appears that the Arkansas Courts apply *Davis* after the *Miranda* warnings have been given.

responded by saying he was "going to give you your rights, okay." The court held that responding to an ambiguous request for counsel by providing the *Miranda* warnings satisfies the state's "stop and clarify" policy. *Id.* at 72. The court went on to note that "Although these facts present a close case because Agent Wold did not immediately inform appellant of his *Miranda* rights, we conclude that Agent Wold's conversation with appellant did not exceed the 'narrow questioning' prescribed in *Robinson." Id.* at 73. Wold's questionable conduct was not comparable to Woods' soliloquy in this case. *Id.* at 64.

In *People v. Lynn*, 278 P.3d 365, (Colo. 2012) the court noted that Colorado also follows a "stop and clarify" policy. *Id.* at 368. The court further found that "When can I talk to a lawyer" was a clear invocation and suppressed the statements. *Id.* at 370. In *Roy v. State*, 152 P.3d 217, 221, 233 (Oak. 2006), the suspect asked "Do I need a lawyer" after being told he had the right to an attorney. The detective did not answer the question and finished reading the suspect his rights. The suspect signed a written waiver form, never asked about a lawyer again and answered questions. The court concluded that a request must be clear after receiving the *Miranda* warnings. *Id.* at 233, n. 69.

The majority of state courts of last resort, in addition to California's, find that *Davis* only applies to post-knowing-and-intelligent-waiver-situations. See, *State v. Tuttle*, 2002 SD 94, *14, 650 N.W.2d 20, 28 (S.D. 2002); *State v. Holloway*, 2000 ME 172, *12, 760 A.2d 223, 228 (Me. 2000); *State v. Leyva*, 951 P.2d 738, 743 (Utah 1997). *People v. Christopher K. (In re Christopher K.)*, 841 N.E.2d 945, 964-965 (Ill. 2005) ("We believe the objective test set forth in *Davis* can be applied to situations where, as here, the suspect makes a reference to counsel immediately after he has been advised of his *Miranda* rights.")

In 2010, the Tennessee Supreme Court surveyed the state court decisions after 1997 and found that "every state appellate court to consider the pre-waiver and post-waiver distinction, with only one exception,"[11] has found that *Davis* applies to the post-waiver scenario. *State v. Turner*, 305 S.W.3d 508, 518 (Tenn. 2010) (citing *State v. Collins*, 937 So. 2d 86, 93 (Ala. Crim. App. 2005); *Noyakuk v. State*, 127 P.3d 856, 869 (Alaska Ct. App. 2006); *Alvarez v. State,* 15 So. 3d 738, 745 (Fla. Dist. Ct. App. 2009); *State v. Holloway*, 2000 ME 172, 760 A.2d 223, 228 (Me. 2000); *Freeman v. State*, 158 Md. App. 402, 857 A.2d 557, 573 (Md. Ct. Spec. App. 2004); and *State v. Tuttle*, 2002 SD 94, 650 N.W.2d 20, 28 (S.D. 2002).)

In sum, the overwhelming majority of courts, both federal and state, hold that the earliest point at which *Davis* can be applied is after the *Miranda* warnings are given. The cases that suggest the contrary are outliers. No case holds that a law enforcement officer can ignore a request for counsel, ambiguous or otherwise, and proceed to talk the suspect out of his request as happened here. There is no conflict of authority on this issue among the state or federal courts that requires this Court's resolution.

VI. THE COURT OF APPEAL'S DECISION WILL NOT IMPEDE ANY LEGITIMATE POLICE INVESTIGATIONS.

Petitioner's claim that the Court of Appeal's decision impedes legitimate police investigations is premised on the erroneous factual claim that respondent's request for counsel was ambiguous. See, Petition at 22-24. As noted above, the record establishes otherwise.

Petitioner claims that legitimate police investigations are advanced by permitting the police to ignore a pre-*Miranda* request for counsel whenever the clarity of the request does not

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[11] The one exception was, *In re Christopher K., supra,* 841 N.E.2d at at 964-965.

satisfy the officer. Petitioner simply recycles an argument that this Court has repeatedly rejected. "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously." *Miranda, supra*, 384 U.S. at 479-80. This Court has carefully construed *Miranda* to limit "the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson v. United States, supra,* 530 U.S. at 443-44.

This Court has also recognized that "[T]here are those, of course, who preferred the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance." *Missouri v. Seibert, supra,* 542 U.S. at 609. That is, in effect, what petitioner advocates here. Petitioner proposes to return to the pre-*Miranda* status quo. Petitioner's proposed rule will result in a return to the substantial amount of "voluntariness" litigation that preceded *Miranda.* See, *Dickerson, supra,* 530 U.S. at 433-34 ("We applied the due process voluntariness test in "some 30 different cases decided during the era that intervened between *Brown* [1936] and *Escobedo v. Illinois,* [1964] . . ."). To streamline this issue, *Miranda* created a presumption of admissibility if the warnings have been given. *Dickerson, supra,* 530 U.S. at 435.

Petitioner's proposed rule would also invite the development of a new round of interrogation strategies designed to train law enforcement officers to treat every pre-*Miranda* invocation as ambiguous and litigate the issue in every instance. *Seibert* rejected this approach. "Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training

instructions what *Dickerson* held Congress could not do by statute." *Seibert, supra,* 542 U.S. at 617. As Justice Kennedy noted in his concurring opinion in *Seibert*, developing deliberate strategies to distort "the meaning of *Miranda* . . furthers no legitimate countervailing interest." *Id.* at 621.

The Court of Appeals' decision is a straightforward application of *Miranda* and *Edwards* to the facts of this case. There is no reason to accept petitioner's invitation to effectively overrule *Miranda* in the name of police expediency.

VII. PETITIONER DOES NOT ARGUE THAT THE COURT OF APPEALS FAILED TO APPLY THE *DAVIS* "REASONABLE PERSON STANDARD" AND EVALUATION OF THE APPLICATION OF THE CORRECT STANDARD TO THE FACTS IN A SINGLE CASE IS AN APPROPRIATE USE OF THIS COURT'S RESOURCES.

Petitioner again claims respondent said "get me a lawyer" when the California Court of Appeal concluded that Respondent said "give me a lawyer." Petitioner also omits the fact that Detective Woods used time-tested techniques to talk respondent out of requesting an attorney before he gave respondent his *Miranda* rights. Append. A at 11, 20.

Petitioner provides the Court with a lengthy list of cases in which different versions of requests for counsel were evaluated for clarity. Petition at 26. In *Davis,* this Court determined that the clarity of a request should be evaluated on a case by case basis according to a reasonable person standard. *Davis, supra,* 512 U.S. at 459. The Court of Appeals applied that standard here. Append. A at 19. It is not surprising that the application of the reasonable person standard would result in a large number of diverse cases involving a large number of diverse factual determinations. Petitioner does not claim that the wrong standard was applied in those cases or here. It is simply not satisfied with the Court of Appeals' application of that standard.

Petitioner, wants this Court to review the facts of this case. However, a single case that hinges on disputed questions of fact is not normally reviewed by this Court. Supreme Court Rule 10.

> It would be a very tedious as well as a very unprofitable task to again examine and compare the conflicting statements of the witnesses in this volume of depositions. And, even if we could make our opinion intelligible, the case could never be a precedent for any other case, or worth the trouble of understanding.
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> *Newell v. Norton*, 70 U.S. 257, 267 (1866).

Petitioner's disappointment with the resolution of the facts of this case by the Courts below does not justify the consumption of this Court's limited resources.

CONCLUSION

Although this case presents a unique set of facts not likely to recur, petitioner is seeking to use it as a vehicle to overturn *Miranda* and *Edwards.* In support of its petition, it has misstated the operative facts in this case, manufactured a conflict among the circuits that does not exist, and stretched precedents beyond what they hold. This approach indicates that on both factual and legal grounds, this is not a proper case to examine the question petitioner presents.

For all the reasons set forth herein, the petition fails to state a sufficient ground for review. Respondent Sessoms respectfully requests that the Court deny the petition.

Dated: April 2, 2013

Respectfully submitted,

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