No. 12-804

In the Supreme Court of the United States

RANDY GROUNDS, ACTING WARDEN, *Petitioner,*

v.

TIO DINERO SESSOMS, *Respondent.*

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

REPLY TO BRIEF IN OPPOSITION AND APPENDIX

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QUESTIONS PRESENTED

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

The Questions Presented are:

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

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

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REPLY BRIEF

The State seeks resolution of two important issues: (1) whether a suspect's ambiguous or equivocal reference to counsel requires police to terminate an encounter before giving *Miranda* [1] warnings and (2) whether, under 28 U.S.C. § 2254(d), habeas relief should have been barred because a fairminded jurist could conclude Sessoms had not clearly requested counsel. Sessoms obfuscates these issues with irrelevant arguments about whether he said "give" or "get" and with unavailable and meritless arguments that his eventual post-warnings *Miranda* waiver had been coerced. Further, he refuses to acknowledge conflicting authority.

1. The issue here is whether—and how—a suspect may invoke *Miranda* rights before police have advised him of those rights and interrogation has commenced. In his Opposition, Sessoms attempts to recast the issue by arguing that, after his purported request for counsel, the detectives coerced his subsequent *Miranda* waiver. Thus, he argues that the State "does not fairly portray the detectives' ensuing effort to convince respondent not to invoke" after his purported invocation (Opp'n at 1-2); that the challenged judgment arises from circumstances unlikely to recur because this Court has disapproved of the "interrogation techniques" that the detectives allegedly used after his purported invocation (Opp'n at 2, 13-17, 29); and that none of this Court's precedent suggests that the clear-invocation requirement of *Davis* v. *United States*, 512 U.S. 452 (1994) applies if police try to convince the suspect to rescind his request for counsel (Opp'n at 21).

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

As this Court has explained, however, the issues of "invocation and waiver are entirely distinct inquiries, and the two must not be blurred . . . ." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984). Sessoms blurs them here. The issue here concerns his alleged invocation and the failure to honor it under *Miranda* and *Edwards v. Arizona*, 451 U.S. 477 (1981), not whether his subsequent *Miranda* waiver was coerced, which involves a completely different course for finding error.

Moreover, Sessoms' arguments are unavailable because he never claimed in state trial court that his *Miranda* waiver was coerced and never fairly presented any coerced-waiver claim to the California Supreme Court.[2] Indeed, he never presented such a claim in his federal habeas corpus petition. See App. L & M. In these prior proceedings and pleadings, he instead claimed that evidence of his statements should have been suppressed, regardless of any efforts by police to persuade him to talk, because he specifically had invoked his *Miranda* right to counsel. It is too late for him to seek to inject a new coerced-waiver claim into this case now. 28 U.S.C. § 2254(b)(1)(A); *Picard* v. *Connor*, 404 U.S. 270, 275 (1971); see *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982).

Equally fatal to Sessoms' new coerced-waiver claim, none of the state or federal courts that

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[2] Sessoms' petition for review in the California Supreme Court alleged that Detective Woods "tries to persuade him to talk to them" and that the detectives "badgered him into giving them a statement." App. J at 157, 161. But he made those allegations in the context of arguing that they did not honor his purported invocation (*id.*), not that they coerced his *Miranda* waiver. Similarly, while one of his California Supreme Court habeas petitions raised a coercion claim (App. K at 167, 170-71), that was in the context of arguing that his *confession* was coerced (*id.*), not that his *Miranda waiver* was coerced.

reviewed his "invocation" claim ever determined that the police had coerced his eventual *Miranda* waiver. His suggestion that the Ninth Circuit found coercion does not withstand scrutiny. It is true the majority mentioned statements that Detective Woods made following Sessoms' alleged invocation. But it cited them only to bolster its conclusion that the detective had in fact interpreted Sessoms' initial remarks as an invocation. App. A at 21. It did not grant relief based on any conclusion that, quite apart from Sessoms' "invocation," the detectives later had also coerced him into waiving his *Miranda* rights. Instead, it held that, before the detectives read Sessoms his *Miranda* rights and he agreed to waive them, he already had invoked his right to counsel, so the detectives "were required to immediately terminate all questioning" but "failed to do so." *Id.* In the absence of consideration of that matter by the Court of Appeals, this Court should not consider it. *See Pennsylvania Dept. of Corrections* v. *Yeskey*, 524 U.S. 206, 212-13 (1998) (" 'Where issues [were not] considered by the Court of Appeals, this Court will not ordinarily consider them' " (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970)).

2. Sessoms also argues that the State is unjustifiably seeking certiorari merely to correct erroneous factual findings. Opp'n at 28-29; see Opp'n at 13. The stakes, however, are far higher. Here, the Ninth Circuit majority held that Sessoms overcame the § 2254(d) bar to relief because the state court had "unreasonably extended" *Davis*' "clear invocation rule"—requiring a suspect to request counsel clearly to invoke his right to counsel—"to a situation where it does not apply." App. A at 18. According to the majority, the clear-invocation requirement does not apply to statements that precede *Miranda* advisements. App. A at 3, 15, 18, 21. The State

seeks certiorari, in part, so this Court can resolve the important issue of whether that requirement applies to such statements. The State also seeks certiorari because the majority's holding violates this Court's repeated admonitions that "clearly established Federal law"—against which state-court judgments are to be reviewed under § 2254(d)(1)—is limited to this Court's holdings, and that such review must defer to the state-court decision where "fairminded jurists" could conclude the decision comported with clearly-established law.

3. Contrary to Sessoms' further assertion (Opp'n at 13), the Ninth Circuit majority's conclusion that he had invoked his right to counsel before receiving *Miranda* warnings does not constitute a finding of fact binding here. Instead, the question of invocation—and more particularly, the question of whether there was a "clear" invocation—entails "an objective inquiry" that examines what "a reasonable officer in light of the circumstances would have understood . . . ." *Davis*, 512 U.S. at 458-59. It is therefore a mixed question of law and fact. See *Ornelas* v. *United States*, 517 U.S. 690, 701 (1996) (defining "mixed question"); *Thompson* v. *Keohane*, 516 U.S. 99, 101, 111 (1995) (issue whether suspect is "in custody," and thus entitled to *Miranda* warnings, presents "mixed question" qualifying for independent review). Even if it merely involves a finding of fact, however, then the state court's finding is binding because it was at least reasonable under § 2254(d)(2) and has not been disproved by clear and convincing evidence under § 2254(e)(1).

Regardless of whether it involves a mixed or a strictly factual question, the close division of the 6-to-5 en banc panel, the split between the Ninth Circuit and other jurisdictions, and the significance of this issue for law enforcement all demonstrate the need

for clarification regarding whether, and how, a suspect can invoke his *Miranda* rights before police have advised him of those rights and interrogation has begun.

4. Sessoms argues that the circumstances of this case are unlikely to recur, because *Missouri* v. *Seibert*, 542 U.S. 600 (2004), has clarified that deceptive police interrogation tactics of "questioning 'outside' of *Miranda*" are not permissible. Opp'n at 2, 13, 16-17, 29. But this case is not about deceptive police tactics of the kind employed in *Seibert*, where officers deliberately withheld *Miranda* advisements, interrogated the suspect to obtain a confession, and then gave *Miranda* advisements and obtained a waiver before having the suspect reiterate her confession.[3]

Instead, it is about whether a suspect may invoke his right to counsel prior to *Miranda* advisements and interrogation and, if so, whether under § 2254(d)(1) the federal habeas corpus court may condemn the states for applying *Davis'* clear-invocation requirement. The recurring nature of this question is demonstrated by the split between the Ninth Circuit and other jurisdictions, see Petition at 21-22, and by the recent case of *State* v. *Edler*, No. 2011AP2916–CR, 2012 WL 5500520 (Wis. Ct. App. Nov. 14, 2012), which examined the majority and

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[3] Indeed, when Sessoms raised *Seibert* on state habeas, the superior court aptly observed that *Seibert* was inapplicable:

> According to the opinion on appeal in Petitioner's case, there was no un-*Mirandized* questioning followed by *Mirandized* questioning. Petitioner did not make any incriminating statements until after he was *Mirandized*. Therefore, the reasoning in *Seibert* does not affect Petitioner's case.

App. I at 148-49.

dissenting opinions below and observed, "This issue has split state and federal courts nationwide." *Id*., at *5 (certifying the issue to the Wisconsin Supreme Court), *certification granted*, *State* v. *Edler*, 827 N.W. 2d 376 (Wis. 2013).

In any event, Sessoms may not raise a claim based on *Seibert* here because he did not do so in the federal district court. See App. L & M. Further, the Ninth Circuit never considered such a claim either. Hence, this Court should not consider it. See *Yeskey*, 524 U.S. at 212-13; *Adickes*, 398 U.S. at 147 n.2. And *Seibert* does not inform the reasonableness of the California Court of Appeal's decision here under § 2254(d)(1) because *Seibert* post-dated that decision. *Greene* v. *Fisher*, 132 S. Ct. 38, 44 (2011). Also the documents he offers in support (App. 4 & 5) were never presented to the state courts and thus, cannot be considered. *Cullen* v. *Pinholster*, 131 S.Ct. 1388, 1398 (2011).

5. Sessoms also argues that the question of whether the clear-invocation test applies is irrelevant because, he says, he clearly requested counsel. Opp'n at 17-18. But the conflicting opinions in this case underscore the significance of this question. The Ninth Circuit's majority applied a standard weaker than the clear-invocation test and concluded that Sessoms had invoked his right to counsel. App. A at 18-20. In contrast, the state court applied the clear-invocation test and concluded that he had not. App. F at 126-28. And the Ninth Circuit's five-judge dissent found the state court's holding reasonable. App. A. at 31-35. Hence, this case itself demonstrates the need to clarify the controlling standard.[4]

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[4] In *Cliett* v. *Scribner,* 493 Fed.Appx. 846, 847-848 (9th Cir. Aug. 14, 2012) (unpublished), the Ninth Circuit held (continued…)

Indeed, where the suspect might possibly have expressed a desire for counsel, the Ninth Circuit's decision, if allowed to stand, would deter—if not forbid—the police from even advising a suspect of his *Miranda* rights and ascertaining whether he wishes to waive them. In other words, it would discourage the police from advising the suspect of his *Miranda* rights because the suspect *might* have expressed a desire to invoke them. This Court should not let such a nonsensical rule stand.

6. Sessoms says that the certiorari petition ignored repeated California Supreme Court holdings that the clear-invocation test applies only after *Miranda* waiver. Opp'n at 12-13, 16. But the California Supreme Court has never issued such a holding. In the cases he cites, the state court merely applied the clear-invocation test to the suspects' post-waiver statements, without considering whether it also applies to pre-*Miranda* statements. See *People* v. *Nelson*, 53 Cal. 4th 367, 372-73, 375-76, 379-85, 266 P.3d 1008, 1012-15, 1017-22 (2012); *People* v. *Stitely*, 35 Cal. 4th 514, 534-36, 108 P.3d 182, 195-96 (2005). In any event, even if that court had limited the clear-invocation requirement to post-waiver utterances, this would simply highlight the conflict

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(…continued)
unreasonable the state court's conclusion that detectives honored a suspect's ambiguous invocation by clarifying the suspect's intentions. There, after the suspect expressed a clear intention to talk to police and immediately received *Miranda* advisements, he made an invocation that, in context, was ambiguous. Confused by the suspect's conflicting statements, the detectives attempted to clarify, and the suspect immediately expressed a willingness to talk. A petition for writ of certiorari in that matter is currently before this Court. *Valenzuela* v. *Cliett*, petition for cert. filed (U.S. Dec. 20, 2012) (No. 12-773).

among various jurisdictions on this important federal question that this Court should resolve.

Sessoms, however, maintains that no court—other than the California courts in this case—has applied the clear-invocation test to pre-*Miranda* statements. Opp'n at 23-25. But other courts have indeed done so. As discussed in the certiorari petition, the First and Seventh Circuits, and the courts of last resort in Arkansas, Indiana, Kansas, and Minnesota, have applied the clear-invocation standard to pre-*Miranda* statements. *Grant-Chase* v. *Commissioner, N.H. Dept. of Corrections*, 145 F.3d 431, 433, 436-37 (1st Cir. 1998); *United States* v. *Wysinger*, 683 F.3d 784, 794-95 (7th Cir. 2012); *Moore* v. *State*, 903 S.W. 2d 154, 157-58 (Ark. 1995); *Carr* v. *State*, 934 N.E. 2d 1096, 1102-03, 1105-06 (Ind. 2010); *State* v. *Appleby*, 221 P.3d 525, 538, 542, 548 (Kan. 2009); *State* v. *Ortega*, 798 N.W.2d 59, 64, 70-72 (Minn. 2011); see Pet. at 21-22. In short, there is abundant authority that conflicts with the Ninth Circuit's decision here.

7. Sessoms also argues that the State's position constitutes an attempt to eviscerate *Miranda* itself. Opp'n at 26-28. To the contrary, the State agrees that the police must scrupulously honor a clear invocation of rights made by a suspect. Similarly, police may not interrogate a custodial suspect unless he voluntarily, knowingly, and intelligently waives his *Miranda* rights. But, when the suspect makes only an ambiguous or equivocal reference to counsel, there is no reason to forbid the police from advising him of his *Miranda* rights.

8. Sessoms insists that "[t]his case involves respondent's *clear* invocation of the right to counsel *immediately* after the detectives entered the holding cell." Opp'n at 1 (emphasis added); *id.* at 17-18, 26. But his references to counsel did not occur

immediately. Instead, they were preceded by other dialogue, which included introductions, a question about the proper pronunciation of his first name, a change of seating positions, and some references to the detectives' flight from Sacramento. App. A at 4-5; App. 1 at 546-47.

Moreover, Sessoms' references to counsel were far from clear. He said, "There wouldn't be any possible way that I could have a--a lawyer present while we do this?" Detective Woods replied, "Well, uh, what I'll do is, um --"; and Sessoms interjected, "Yeah, that's what my dad asked me to ask you guys . . . uh, give [*sic*; get] me a lawyer." App. A at 3; App. 1 at 547; see App. 2 at 23, 36-37. The state trial court and the state appellate court concluded these utterances did not constitute a clear invocation of Sessoms' right to counsel; and the United States Magistrate Judge, the District Judge, the two-judge majority from the original Ninth Circuit panel, and the five dissenting judges from the en-banc panel all concluded the state decision was reasonable. App. A at 32-33; App. B at 59-60, App. C at 85; App. D at 119; App. E at 127-28; App. G at 133-34; App. H at 141, 143-45.

Sessoms additionally notes statements he had made as he sat alone talking to himself before any interview began. Opp'n 5. Those statements are irrelevant. Indeed, the Ninth Circuit majority observed: "Sessoms's statements to himself were made prior to the detectives entering the room and *there is no evidence that any law enforcement officers heard these statements*." App. A at 4 n.2 (emphasis added); see App. G at 133-34 (trial court finding, in denying the new trial motion, that those statements did not amount to an unequivocal invocation).

Sessoms also accuses the State of mischaracterizing his words to the detectives in an

irrelevant argument about whether he had said "give" or "get." He insists that the state courts and federal courts here agreed that he had said, "Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer"; and that he did not say, " 'get me a lawyer.' " Opp'n at 1, 11, 28. On this matter, the State concurs with the en-banc majority, which commented, "The transcript of the colloquy says 'Give me a lawyer,' but Detective Woods, after comparing the transcript to the videotape, testified that Sessoms said 'Get me a lawyer.' We find this distinction irrelevant . . . ." App. A at 3 n.1; see App. 1 at 547; App. H. at 140 (trial court found it insignificant whether Sessoms said "get" or "give").

9. The State's certiorari petition pointed out that the Ninth Circuit also had misconstrued § 2254(d)(1) by holding that a state court runs afoul of that deferential-review provision if it "unreasonably extends" an established rule into a new context where the habeas court thinks it ought not apply—regardless whether this Court had clearly established that such an extension is forbidden. The Ninth Circuit's "unreasonable extension" test wrongly assumes that a state court acts unreasonably under § 2254(d)(1) merely by misinterpreting one of this Court's precedents, regardless whether the misstep contradicted any precedent that dictates the state prisoner's entitlement to relief. Pet. at 17-20.

Sessoms responds that the circuits have "unanimously adopted" the unreasonable-extension test, and that those circuits that had previously disapproved of this test have more recently issued opinions endorsing it. Opp'n at 22; *cf.* Pet. at 22. But none of these newer decisions purport to overrule previous decisions disapproving of the test. Indeed,

the newer decisions do not even acknowledge the earlier ones.

In any event, there is no dispute that the unreasonable-extension test has been widely cited. See Pet. at 20. And, as the State has argued, the test is based on a misreading of *Williams* v. *Taylor*, 529 U.S. 362, 408-09 (2000), and conflicts with this Court's pronouncements that the absence of controlling precedent from this Court insulates a state court's decision from review under § 2254(d)(1). *Marshall* v. *Rodgers*, No. 12-382, 2013 WL 1285304, *1, *2 (U.S. April 1, 2013) (per curiam); *Wright* v. *Van Patten*, 552 U.S. 120, 125-26 (2008) (per curiam); *Carey* v. *Musladin*, 549 U.S. 70, 77 (2006).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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April 16, 2013

APPENDIX

No. 12-804

In the Supreme Court of the United States

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

TIO DINERO SESSOMS, *Respondent*

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

APPENDIX TO REPLY TO BRIEF IN OPPOSITION

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This Appendix continues with the alphabetical designation and page number sequence set forth in the Appendix to the Petition for Writ of Certiorari, which contains Appendices A through H at pages 1 through 147. Hence, this Appendix begins with Appendix I at page 148.

APPENDIX I

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE & TIME: OCTOBER 6, 2004 DEPT. NO: 9
JUDGE: STEVE WHITE CLERK: ERLENE KLEIN
REPORTER: NOT REPORTED BAILIFF: NONE

In Re: Tio Sessoms 04F06637

Petition for Writ of Habeas Corpus

NATURE OF PROCEEDINGS: **MOTION FOR RECONSIDERATION - ORDER**

Petitioner's letter dated August 16, 2004 has been received and considered by the Court. The Court has determined that the letter should be construed as a motion for reconsideration.

It is HEREBY ORDERED that the motion is DENIED.

The petition for writ of habeas corpus was denied on September 8, 2004 on the grounds that the petition was successive and the claim was barred by In re Waltreus (1965) 62 Cal.2d 218. Petitioner now seeks reconsideration of the denial based on a change in the law as stated in Missouri v. Seibert (2004) __ U.S. __, 124 S.Ct. 2601. Seibert held that a statement obtained after compliance with Miranda was inadmissible when the warnings were only given after un-Mirandized questioning and answering took place. According to the opinion on appeal in Petitioner's case, there was no un-Mirandized questioning followed by Mirandized questioning. Petitioner did not make any incriminating

statements until after he was Mirandized. Therefore, the reasoning in Seibert does not affect Petitioner's case.

DATED: 10/6/04 /s/ Steve White
Seal JUDGE
Superior Court of California STEVE WHITE
County of Sacramento

BOOK: 9
PAGE: SACRAMENTO SUPERIOR COURT
DATE: October 6, 2004
CASE NO. : 04F06637
CASE TITLE: In re Sessoms
DISTRIB: BY /s/ Erlene M. Klein Deputy

APPENDIX J

CASE NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TIO DINERO SESSOMS, et al. Defendant and Petitioner.	Case No. C041139 Sacramento Sup. Ct. Case No. 99F09138

PETITION FOR REVIEW

Petition from an Unpublished Decision of the Third District Court of Appeal After a Judgment of Conviction from the Sacramento Superior Court

Honorable Kenneth L. Hake, Judge Presiding

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TIO DINERO SESSOMS

By appointment of the Court
Of Appeal under the California
Appellate Project Independent
Case System

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CASE NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TIO DINERO SESSOMS, et al. Defendant and Petitioner.	Case No. C041139 Sacramento Sup. Ct. Case No. 99F09138

PETITION FOR REVIEW

TO THE HONORABLE RONALD GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner TIO SESSOMS hereby petitions this honorable Court for review pursuant to the California Rules of Court, Rules 28, 28.1, 28.2 and 29.

STATEMENT OF THE CASE

Following a jury trial, Petitioner was convicted of murder, robbery and burglary. (Pen. Code, §§ 187, subd. (a); 211, 459, 462, subd. (a).) The jury also

found robbery and burglary special circumstances alleged in connection to the murder charge to be true. (Pen. Code, § 190.2, subd. (a)(17).) As toe the robbery count, the jury found true the special allegation that Petitioner acted in concert with two or more persons. (Pen. Code, § 213, subd. (a)(1)(A).)

Petitioner was sentenced to a term of life without the possibility of parole. He appealed and on January 12, 2004, the Third District Court of Appeal issued an unpublished opinion in which it affirmed the judgment, but reversed a restitution fine imposed pursuant to 1202.4. (A copy of the court's opinion is appended to this petition as Exhibit "A" [hereafter Opinion at p.__.)

This Petition follows.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's statements to his police interrogators: "There wouldn't be any possible way that I could have a lawyer present while we do this?" and "[T]hat's what my dad asked me to ask you guys . . . uh, give [get] me a lawyer" amounted to an unequivocal request for counsel which precluded further interrogation until an attorney was present pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, 455-458, and *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.

2. Whether the erroneous admission of Petitioner's post-arrest statements was harmless beyond a reasonable doubt?

STATEMENT OF FACTS

The facts are generally set forth in the Opinion, at pp. 2-5. Additional facts necessary for consideration of the case are set forth within the argument below.

GROUNDS FOR REVIEW

The issues presented are important questions of law. (C.R.C., Rule 28, subdiv. (b)(1).)

I.

REVIEW MUST BE GRANTED TO RESOLVE THE ISSUES OF WHETHER PETITION MADE AN UNAMBIGUOUS REQUEST FOR COUNSEL AND IF SO, WHETHER THE ERRONEOUS ADMISSION OF HIS POST-ARREST STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT

A. Introduction.

Petitioner contends his murder conviction must be reversed because his post-arrest custodial statements were improperly admitted into evidence at trial. The statements were inadmissible because Petitioner invoked his right to counsel, but the investigating officers disregarded that invocation and ultimately badgered him into giving them a statement.

The relevant portions of the interview are as follows:

Det. Woods: . . . Tio, I'm Dick

Sessoms: How are you doing, all right. You already know me.

Det. Woods: You say Tio or Theo?

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

Det. Woods: Tio. Okay.

. . . . .

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

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

Sessoms: ***Well, uh, that's what my dad asked me to ask you guys . . . uh, give (get) 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.

. . . . .

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.

Petitioner's obvious request for counsel was ignored and during the subsequent interrogation, he told the detectives that he had gone to the victim's house with Frederick Clark and Adam Wilson in order to burglarize the place. Petitioner stated that during the burglary, Clark went into the bedroom and killed the victim.

These statements became the bulk of the evidence presented against Petitioner at trial. In fact, such statements were the only evidence that established Petitioner's presence at the victim's residence on the night of the incident. As a result, the trial court prejudicially erred in admitting his statements.

B. Petitioner's Statements Were Inadmissible Because He Invoked His Right to Counsel.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." (U.S. Const., Amend. V.) Accordingly, a person accused of a crime and taken into police custody has the right to remain silent and may refuse to answer questions posed by law enforcement. (*Miranda v. Arizona* (1966) 384 U.S. 436, 455-458.)

Once a suspect receives *Miranda* warnings, he "is free to exercise his own volition in deciding whether or not to make a statement to the authorities." (*Oregon v. Elstad* (1985) 470 U.S. 298, 308.) However, in what has become known as the *Edwards* rule, once a criminal defendant who is in custody invokes his right to counsel, ***all further custodial interrogations must cease.*** (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.)

In sum:

> . . . A suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney and to appointed counsel in the event the suspect is indigent. Once having invoked these rights, the accused is 'not subject to further interrogation by the authorities unless the accused himself initiates further communication, exchanges or conversations with the police.
>
> (*Id.*)

1. Petitioner's Invocation Was Unequivocal.

In *Davis v. United States* (1994) 512 U.S. 453, the United States Supreme Court held the prophylactic *Edwards* rule requires courts to determine whether a defendant "actually invoked" his right to counsel. (*Id.*, at 458.) The Court went on to state: ". . . the suspect must unambiguously request counsel . . . . A suspect must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Id.*, at 459.)

When Petitioner in the present case asked if there was "any possible way I could have a lawyer present while we do this?" followed by "Well, uh, get me a lawyer," he was making an unequivocal request for counsel. Any reasonable police officer would have understood the aforementioned statements to be a request for an attorney.

Not only that, but the interrogating officers in this case *actually understood* Petitioner's statements to be a request for the presence of an attorney during questioning. This is made abundantly clear when Detective Woods acknowledges Petitioner's request for an attorney, but tries to persuade him to talk to them anyway by pointing out that an attorney would not let Petitioner tell them his "version" of events.

The *Miranda* rule is specifically "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." (*Davis v. United States*, *supra*, 512 U.S. at 458.) This is exactly what happened here: Detective Woods ultimately badgered Petitioner into waiving his previously asserted *Miranda* rights.

The Third District Court of Appeal found Petitioner's requests for counsel were ambiguous and "legally indistinguishable from the equivocal remarks in *Davis*, 'Maybe I should talk to a lawyer' (*Id.*, at 455), and in *People v. Crittendon* (1994) 9 Cal.4th 83, 123 (*Crittendon*), 'Did you say I could have a lawyer?'" In those cases, the court of appeal notes, such remarks were found not to trigger the *Edwards* rule. (Opinion, at pp. 7-8.)

Respectfully, Petitioner submits the appellate court was wrong. Petitioner's requests for counsel in this case were unambiguous and, in fact, strikingly similar to those in the case of *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995. In *Alvarez*, the following

discourse took place between the defendant and his interrogators:

Alvarez: **Can I get an attorney right now, man?**

Miller: Pardon me?

Alvarez: **You can have an attorney right now?**

Miller: Ah, you can have one appointed for you, yes.

Alvarez: **Well, right now you got one?**

Miller: We don't have one here, no. There's not one present now.

Lange: There will be one appointed for you at the arraignment, ah, whether you can afford on. If you can't one will be appointed to you by the court.

Alvarez: All right.

Miller: (unintelligible)

Alvarez: I'll -- I'll talk to you guys.

Miller: Okay. You wanna talk to us without a lawyer here, right?

Alvarez: Yeah.

(*Id.*, at 996-997.)

The Ninth Circuit Court of Appeal held that Alvarez' statements constituted an unequivocal request for an attorney. Further, the Court noted Petitioner's statements required no further clarification. "The correct answer to each of Alvarez' three questions, after all, was a simple, unambiguous 'yes.'" (*Id.*)

Here too, similar to *Alvarez*, Petitioner's statements were unambiguous. When Petitioner asked if there was any way he could have a lawyer present during questioning, there was no need for further clarification. The simple answer to his question was, "Yes." Further, Petitioner's second statement, "Get me a lawyer" only reinforced the

necessity for the officers to cease all questioning until he could consult with an attorney.

Citing *Oregon v. Elstad*, *supra*, 470 U.S. 298, the Court of Appeal indicates that, even if the statements in this case were "somehow construed to be actual invocations of defendant's right to counsel", his subsequent confession was not tainted such that it should have been excluded. (Opinion, at pp. 8-9.) However, the appellate court's reliance on *Oregon v. Elstad*, *supra*, 470 U.S. 298, is misplaced.

Oregon v. Elstad is not controlling in this case because it does not deal with an actual invocation of one's right to counsel which was disregarded by the authorities. The fact that the detectives here advised Petition of his *Miranda* rights after he invoked his right to counsel does not render the subsequent statement admissible. To the contrary, as was set forth in *Davis v. United States*, *supra*, 512 U.S. 453, "if a suspect requests counsel ***at any time during the interview,*** he is not subject to further questioning . . . ." (*Id.*, at 458.) Officers are simply not thereafter permitted to badger the defendant into waiving his previously asserted rights, as they did in this case. (*Id.*) The interview should have been terminated until such time as an attorney was present or Petitioner reinitiated discussions. (*Id.*) Neither one of those things happened in this case.

It appears the Court of Appeal confused the issue of whether a confession is "tainted" by "coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" (*See*, Opinion, at p. 8.), with the issue of whether a suspect's invocation renders all further statements inadmissible if obtained through a police-initiated interview without counsel present. As was clearly held in *Edwards v. Arizona*, *supra*, 451 U.S. 477:

> [W]hen 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. We further hold that an accused . . . 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.
> (*Id.*, at 484-485.)

Thus, contrary to the Court of Appeal's Opinion, if Petitioner's statements constitute an unequivocal request for counsel, his subsequent confession would not have been admissible in the prosecution's case-in-chief.

For the foregoing reasons, Petitioner requests that this Court grant review to resolve this important question of law.

C. The Erroneous Admission of the Post=Arrest Statements Was Not Harmless.

The judgment in this case must be reversed unless the error in admitting Petitioner's post-arrest statements is found to be "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.)

In this case, the admission of Petitioner's involuntary confession was not harmless beyond a reasonable doubt. In fact, the statements were the only evidence which directly connected Petitioner to the crimes alleged in this case. Although Petitioner

was seen in the victim's car after the incident, and was also later seen counting money with another one of the alleged perpetrators, Frederick Clark, such evidence alone would not have independently established, beyond a reasonable doubt, that Petitioner personally participated in either the actual burglary/robbery or the killing. Even the State of California, in its briefing below, conceded that, if there was error, it would not have been harmless at least with respect to the special circumstance allegations. (Respondent's Brief, filed in the Court of Appeal below, at p. 21, n.17.)

Consequently, it is apparent the error in admitting Petitioner's statements was not harmless. On this basis, too, Petitioner respectfully requests that this Court grant review.

II.
CONCLUSION

For all the aforementioned reasons, Petitioner TIO SESSOMS respectfully requests that this honorable Court grant review.

DATED: _____ Respectfully submitted,

By: _____
Stephen Temko, Esq.
Attorney for Petitioner
TIO SESSOMS

[California Rules of Court Rule 28.1 (d)(1) Certification as to word count, Exhibit "A" Opinion of the Third District Court of Appeal filed January 12, 2004 (No. C041139), and Declaration of Service by Mail omitted]

APPENDIX K

NAME Tio Dinero Sessoms
ADDRESS P.O. Box 3030
Susanville, CA 96127
CDC or ID NUMBER T-54046

ORIGINAL

SUPREME COURT
FILED

SEP 20 2004

Frederick K 0hlrich
/s/
DEPUTY

Supreme Court of
California

PETITION FOR WRIT OF HABEAS CORPUS

Tio Dinero Sessoms PETITIONER vs. D. L. Runnels, RESPONDENT	No. S127877 (TO BE SUPPLIED BY THE CLERK OF THE COURT)

. . . .
6. GROUNDS FOR RELIEF
Ground 1. ...
My grounds for relief are based on a Miranda violation of failing to investigate I was read my Miranda ignoring I asked for an attorney & coercing my confession by the homicide detective

a. Supporting facts:
. . . .
(See attachment)
. . . .
b. Supporting cases rules or other authority (optional):
. . . .

Conviction must rest upon firmer ground than uncorroborated admission or confession of the accused (U.S. v. Smallwood 188 F3d 905 7th Cir. 99') When agent does more than just listen, but also initiate discussion of case which leads to incriminating statements from accused after right to counsel has attached Sixth Amendment violation occurs (Blackmon -v- Johnson 145 F.3d 205 5th Cir. 98') Cook v- Missouri (2004') U.S. Supreme Court upheld reversal

(SEE ATTACHMENT GROUND 1)

On November 15th, 1999 the defendant found out of the warrant for his arrest & turned himself in to Langston, Oklahoma Police officials. After the warrant was confirmed, the defendant was taken into custody & read his Miranda rights. The defendant chose not to make a statement to Oklahoma officials, the defendant chose to sign the expedition papers & be transfered to Sacramento, California to await criminal charges on Murder in the 1st degree, robbery & burglary.

While waiting for the expediting officers the defendant ended up being re-interrogated by homicide detectives, John Patrick Keller & Dick Woods, of the Sacramento Police Department. The defendant specifically told the detectives 'Is there any possible way I can have an attorney while we do this?" & went on to explain "Well, uh, thats what my dad asked me to ask you guys . . . . uh, give (get) me a lawyer." Instead of the detectives respecting the defendants request, Det. Woods response was "What were going to do is, um - I have one philosophy and that's, uh, be 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?" The

defendant response was "Okay, Sir. I'd like to have a lawyer about - about - like …" & was immediately cut off by Det. Woods to be told that "If you said you didn't want to make any statement without an attorney, we're not going to really 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." Some further persuading was done to the defendant before his Miranda rights were even read! In fact the defendant sat in the interrogating room over twenty minutes before he even saw a detective & talked to the Sacramento detectives for another twenty minutes before being read his Miranda rights & deciding to give a statement, after Det. Woods talked him into giving a statement.

The interviewing officer deliberately ignored the defendants request for an attorney by continuing to interrogate the defendant. The defendant asked for counsel being present while the interview continued but the detective changes the subject. He doesn't want to go into the subject about getting a lawyer. He starts to say, well, "let me tell you about my philosophy, and I'm not going to hide anything from you." The defendant responds to it & talks about tricks & games the police play with words. Detective Woods changed the subject from having a lawyer to something else, and then the defendant responds to the detective. Then the detective talks about the defendant understanding his rights; while he read the defendant his rights after talking about philosophies, being honest, & what the defendant's codefendants said regarding to the charges. The defendant gives in & confesses to the charge of robbery.

During the statement given by the defendant, the officer's did more than

(SEE ATTACHMENT GROUND 1)

just listen. The detective started to coerce the defendant bringing up stuff that was told to them by witnesses & the other defendants involved in the case. The detective felt that the defendant wasn't telling the whole story because the detective brought up specifics he was well aware of & the defendant either agreed –or- disagreed to the details brought up. Reading the defendants statement of his version of it," its very clear that he was not aware of a lot of detailed specifics the detective was well aware of.

The detective coerces the statement so much to a point where its no longer in a story frame. One question will be something that took place at the end of the robbery incident then the next question will be referring to something that took place at the very beginning of the incident. The detective tries to involve certain names to get the defendant to agree to involving extra parties but the defendant doesn't agree to the names & extra events.

During a pre-trial motion to suppress the statement the prosecutor argues that the defendant's statement in his case-in-chief because without the defendant's statement there isn't any evidence to put him at the crime scene besides his own words! The defendant is a witness against himself, there is no other admissible evidence to prove different. The eye witnesses the prosecutor used were witnesses that said they saw the defendant driving the victim's vehicle, not to say they saw him at the crime scene. Not one witness identified the defendant, nonetheless, gave a description of the defendant. The only description given was one by the victim's neighbor that fit both of the other codefendants, standing at 5'6" - 5'8" & being a heavy build. The defendant is 6'1" & has a muscular build. Those descriptions can not be mistaken for one another.

The next door neighbor's stated they saw two cars drive off at a high speed but neither admitted seeing a passenger in either of the victim's vehicles.

In trial, everything foes as written with the prosecution's witnesses & come time for the defense to show their evidence the attorney makes the unwise decision to rely on the states case. The defendant is found guilty of all three charges & later sent to a 25 year to life term sentence without the possibility to parole. All behind three major Miranda violations 1) reinterrogating the defendant after he was read his Miranda 2) completing the story for the defendant coercing his statement & 3) ignoring that the defendant asked politely for an attorney to be present while the interview took place. The defendant asks of the court to reverse the conviction & give the defendant a new trial. The Supreme Court upheld the reversal of a Missouri woman that was in the interrogation room for twenty minutes being persuaded & coerced to confess to her home being set on fire to cover up her son's death. That case was decided June 2004, it's a change in law re Dixon (1953) 41 Cal. 2d 756, 759.

….

Date: Sept. 14, 2004 /s/ Tio Dinero Sessoms
(Signature of Petitioner)

[Attachments including Langston Police Department Officer Statement dated 12-07-03 by Officer David Hinds Jr., portion of Motion to Suppress Statement of Defendant Sessoms, and excerpt from Sessoms' interview omitted]

APPENDIX L

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Attorney for Petitioner
TIO DINERO SESSOMS

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

TIO DINERO SESSOMS, Petitioner, v. D. L. RUNNELS, Warden, et al., Respondents.	No. CIV S-05-1221-DFL-GGH-P **AMENDED PETITION FOR WRIT OF HABEAS CORPUS.**

TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA:

TIO DINERO SESSOMS, by and through his attorney, Eric Weaver, petitions for a writ of habeas corpus, and by this verified amended petition states as follows:

I.

Petitioner is unlawfully incarcerated at the High Desert State Prison, Susanville, California, by D. L. Runnels, Warden.

II.

Pursuant to a judgment of the Sacramento County Superior Court in Case No. 99F09238, petitioner was convicted of (1) murder in violation of Cal. Penal Code Section 187, subdivision (a) (Count 1); (2) robbery in violation of Penal Code Section 211 (Count 2); and (3) burglary in violation of Penal Code Sections 459/462, subd. (a). The jury also found two special circumstances with respect to the murder charged in Count 1 to be true: (1) petitioner was engaged in the commission or attempted commission of the crime of robbery, in violation of Section 211 (Pen. Code § 190.2, subd. (a) (17)); and (2) petitioner was engaged in the commission or attempted commission of the crime of burglary, in violation of Section 459 (Pen. Code § 190.2, subd. (a) (17)).

On May 7, 2002, petitioner was sentenced to an aggregate term of life without the possibility of parole and additional determinate terms totaling 15 years.

III.

Petitioner filed his timely notice of appeal on May 13, 2002. On June 11, 2003, petitioner filed his opening brief on appeal (Third District Court of Appeal No. C041139). Exh. 1.[1] Of relevance to this petition, petitioner argued that Sacramento Police Detectives Patrick Keller and Richard Woods violated his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 455-458 (1966) by ignoring his unequivocal request for counsel. Exh. 1.

On January 12, 2004, the Court of Appeal issue its opinion affirming his conviction and sentence. Of relevance to this petition, the Court of Appeal concluded that petitioner's request for counsel was equivocal and that the detectives had a right to clarify petitioner's intentions relying on *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). Exh. 3.

On February 17, 2004, petitioner raised this issue in a petition for review in the California Supreme Court (Case No. S122747). Exh. 4. On March 24, 2004, the Supreme Court denied the petition without comment. Exh. 5.

IV.

On April 16, 2004, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court Case No. 04F03770. Exh. 6. Of relevance to this petition, petitioner argued that he had been afforded ineffective assistance of counsel within the meaning of *Strickland v. Washington* 466 U.S. 668, 686, 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984) because his trial counsel failed to investigate and present evidence that his *Miranda* rights, as articulated in

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2. All Exhibits are attached to Declarations 1 and 2 of Eric Weaver filed with this Court.

Edwards v. Arizona, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981) had been violated by Detectives Keller and Woods. Specifically, petitioner claimed that he invoked his *Miranda* rights when he was taken into custody by Oklahoma Police Officers Gregory Bufford and David Hinds. Thereafter, Detectives Keller and Woods reinitiated the interrogation of petitioner and obtained a statement from him in violation of *Edwards v. Arizona*, *supra*. The petition was denied on May 20, 2004. Exh. 7. On May 27, 2004, petitioner wrote a letter to the Superior Court that was treated as a motion for reconsideration. Exh. 8. The motion for reconsideration was denied on June 22, 2004. Exh. 9.

V.

On July 22, 2004, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court (No. 04F06637). Exh. 10. In that petition, he further elaborated his *Edwards* claim. The petition was denied on September 10, 2004. Exh. 11. On August 16, 2004, petitioner wrote a letter to the Superior Court that was treated as a motion for reconsideration. Exh. 12. The motion for reconsideration was denied on October 6, 2004. Exh. 13.

VI.

On September 22, 2004, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court (No. 04F08465). Exh. 14. The petition was denied on November 3, 2004. Exh. 15.

VII

On May 27, 2004, petitioner filed a petition for writ of habeas corpus in the California Supreme Court (Case No. S125163). Exh. 16. Of relevance to this petition, petitioner set forth his *Edwards* claim. The petition was denied on April 20, 2005. Exh. 17.

VIII

On September 20, 2004, petitioner filed what he intended to be a supplement to the petition he filed in Case No. S125163. However the California Supreme Court treated it as a new petition and assigned it Case No. S127877). Exh. 18. The petition was denied on April 20, 2005. Exh. 19.

IX

Petitioner filed his timely pro se federal habeas petition on June 20, 2005. This Amended Petition is filed as of right because no responsive pleading has been filed by respondent.

X.

Petitioner was represented by counsel in his direct appeal of his conviction in the state court.

XI.

Other than the above described appeals and petitions, petitioner has not filed any petition, application or motion with respect to this conviction in any court, state or federal.

XII.

The facts of this case are stated in the Memorandum of Points and Authorities in Support of Amended Petition for Writ of Habeas Corpus, filed with this Amended Petition, and are incorporated by reference as if fully set forth here.

IX.

Petitioner's rights under the 5th, 6th and 14th amendments were violated because petitioner was prejudicially afforded ineffective assistance of counsel within the meaning of *Strickland v. Washington*, *supra*, because his trial counsel failed to investigate and present evidence that his *Miranda* rights, as articulated in *Edwards v. Arizona*, *supra*, had been violated by Sacramento Police Officers Patrick Keller and Richard Woods. Specifically, petitioner invoked his *Miranda* rights when he was taken into custody by Oklahoma Police Officers Gregory Bufford and David Hinds. Thereafter, Officers Keller and Woods reinitiated the interrogation of petitioner and obtained a statement from him in violation of *Edwards v. Arizona.*

The state proceedings resulted in a decision that was contrary to clearly established precedent of the United States Supreme Court and was based on a determination of the facts that is directly contradicted by the evidence presented in the state court proceeding. 28 U.S.C., § 2254, subds. (d)(1) and (d)(2). The legal grounds for issuance of a writ in this case are discussed in detail in the Memorandum of Points and Authorities in Support of Petition for Writ

of Habeas Corpus, filed with this Petition, and are incorporated by reference as if fully set forth here.

X.

Petitioner's rights under the 5th, 6th and 14th amendments were prejudicially violated because petitioner's rights pursuant to *Miranda v. Arizona*, were violated when Detectives Keller and Woods ignored petitioner's unequivocal request for counsel at the beginning of their interview of him.

The state proceedings resulted in a decision that was contrary to clearly established precedent of the United States Supreme Court and was based on a determination of the facts that is directly contradicted by the evidence presented in the state court proceeding. 28 U.S.C., § 2254, subds. (d)(1) and (d)(2). The legal grounds for issuance of a writ in this case are discussed in detail in the Memorandum of Points and Authorities in Support of Petition for Writ of Habeas Corpus, filed with this Petition, and are incorporated by reference as if fully set forth here.

XI.

Petitioner has exhausted all remedies provided him under the laws of the State of California. There are no other legal proceedings pending with respect to petitioner's judgment or sentence. The instant petition is the only means available for petitioner to obtain legal redress.

WHEREFORE, petitioner respectfully requests that this Court:

1. Issue to the respondents an order to show cause to inquire into the legality of petitioner's incarceration;

2. After full consideration of the issues raised herein, to vacate the judgment of conviction and the sentence imposed upon petitioner in Sacramento County Superior Court in Case No. 99F09238 and to order his immediate release; and

3. Grant petitioner such further relief as is appropriate and in the interests of justice.

Dated: May 4, 2006 Respectfully Submitted,

/s/ Eric Weaver
Eric Weaver

Attorney Appearing by
Appointment of the Court
for Petitioner
TIO DINERO SESSOMS

VERIFICATION

I, Eric Weaver, declare that I am the attorney appointed to represent petitioner Tio Dinero Sessoms. I make this verification for petitioner because he is absent from the county where my office is located. I have read the attached petition and believe the matters stated therein to be true. On that basis, I allege that they are true.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and was executed this May 4, 2006, at Albany, California.

/s/ Eric Weaver
Eric Weaver

[Declaration of Service omitted]

APPENDIX M

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Attorney for Petitioner
TIO DINERO SESSOMS

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

TIO DINERO SESSOMS, Petitioner, v. D. L. RUNNELS, Warden, et al., Respondents.	No. CIV S-05- 1221-DFL-GGH-P

PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS.

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Attorney for Petitioner
TIO DINERO SESSOMS

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

TIO DINERO SESSOMS, Petitioner, v. D. L. RUNNELS, Warden, et al., Respondents.	No. CIV S-05-1221-DFL-GGH-P **PETITIONER'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS.**

STATEMENT OF THE CASE

On November 6, 2000, petitioner was charged by information with (1) murder in violation of Cal. Penal Code Section[1] 187, subdivision (a) (Count 1); (2) robbery in violation of Penal Code Section 211 (Count 2); and (3) burglary in violation of Penal Code

Sections 459/462, subd. (a) in Sacramento County Superior Court Case No. 99F09238. CT 67-69.

The information further alleged two special circumstances with respect to the murder charged in Count 1: (1) petitioner was engaged in the commission or attempted commission of the crime of robbery, in violation of Section 211 (Pen. Code § 190.2, subd. (a) (17)); and (2) petitioner was engaged in the commission or attempted commission of the crime of burglary, in violation of Section 459 (Pen. Code § 190.2, subd. (a) (17)). CT 68.

As to the robbery (Count 2), the information alleged that petitioner voluntarily acted in

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1. All subsequent references to "Code" refer to the corresponding California Code unless otherwise specified.

concert and entered a structure (Pen. Code § 213, subd. (a)(1)(A)). Finally, it was alleged that Counts 1, 2, and 3 were each serious felonies (Pen. Code § 1192.7, subd. (c) (23)). CT 67-69.

Following a jury trial, petitioner was convicted of all counts and all the special enhancements were found to be true. CT 419-421. The trial court denied probation and sentenced petitioner to life without the possibility of parole and additional determinate terms totaling 15 years. CT 608-609; RT 837-839.

Petitioner filed his timely notice of appeal on May 13, 2002. CT 616-617. On June 11, 2003, petitioner filed his opening brief on appeal (Third District Court of Appeal No. C041139). Exh. 1.[2] On August 27, 2003, respondent filed its brief. Exh. 2. On January 12, 2004, the Court of Appeal issue its opinion affirming his conviction and sentence and

modifying his restitution requirement. Exh. 3. On February 17, 2004, petitioner filed a petition for review in the California Supreme Court (Case No. S122747). Exh. 4. On March 24, 2004, the Supreme Court denied the petition without comment. Exh. 5.

On April 16, 2004, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court (No. 04F03770). Exh. 6. The petition was denied on May 20, 2004. Exh. 7. On May 27, 2004, petitioner wrote a letter to the Superior Court that was treated as a motion for reconsideration. Exh. 8. The motion for reconsideration was denied on June 22, 2004. Exh. 9.

On July 22, 2004, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court (No. 04F06637). Exh. 10. The petition was denied on September 10, 2004. Exh. 11. On August 16, 2004, petitioner wrote a letter to the Superior Court that was treated as a motion for reconsideration. Exh. 12. The motion for reconsideration was denied on October 6, 2004. Exh. 13.

On September 22, 2004, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court (No. 04F08465). Exh. 14. The petition was denied on

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2. All Exhibits are attached to Declarations 1 and 2 of Eric Weaver filed with this Court.

November 3, 2004. Exh. 15.

On May 27, 2004, petitioner filed a petition for writ of habeas corpus in the California Supreme Court (Case No. S125163). Exh. 16. The petition was denied on April 20, 2005. Exh. 17. On

September 20, 2004, petitioner filed a petition for writ of habeas corpus in the California Supreme Court (Case No. S127877). Exh. 18. The petition was denied on April 20, 2005. Exh. 19.

Petitioner filed the instant timely petition on June 20, 2005.

STATEMENT OF FACTS

PROSECUTION OF EVIDENCE

Petitioner's Statement to the Police In Oklahoma.

The bulk of the evidence against petitioner presented at trial was taken from his statement to the police in Oklahoma which, as set forth below in subparts II and III, was taken in violation of his *Miranda* rights. See, CT 252-324.

On Tuesday, October 19, 1999, at around 12:00 or 1:00 in the afternoon, petitioner called his friend Adam Wilson. CT 255. During their telephone conversation, Wilson asked petitioner to join in a "house robbery" at the victim Ed Sherriff's house. CT 253-255, 302. Sherriff was not supposed to be at home during this "robbery." CT 256, 302. Wilson informed petitioner that a Frederick Clark had told him he knew where the money was kept in Sherriff's home. CT 256. Although petitioner had never met Clark or Sherriff (CT 265, 300), he agreed to participate in the "house robbery." CT 256. Petitioner believed no one would be home and that he was engaging in a simple larceny. CT 256.

Petitioner arrived at Clark's residence at around 9:25 p.m. CT 257-258. Immediately upon his arrival, petitioner and Clark departed. CT 259. Clark drove with petitioner in a yellow Ford to pick up Wilson. CT 260. After they picked up Wilson, petitioner expressed reservations about the plan. CT 261.

When they arrived at the gate enclosing the mobile home park where Sherriff lived, Clark tried to gain entrance by using an entry code. CT 262. When the code failed, they parked the car across the street from the fence near Sherriff's residence. CT 263. Clark was first to jump the fence. CT 264. At that point, petitioner again expressed doubts to Wilson about going through with their plans. CT 264. He told Wilson he believed Clark was "off in his head" and was hiding something from them. CT 264-265. After hesitating for a few moments, petitioner jumped the fence and Wilson followed. CT 264, 266.

Clark, Wilson and petitioner approached Sherriff's residence where the lights were out. CT 266. Clark went to the front door and tried to open it to no avail. CT 266. They went around to a side entrance where Clark gained entry through a sliding glass door. CT 267. Wilson and petitioner followed Clark inside.

To petitioner's surprise, Sherriff was present in the house. CT 267. Petitioner told Wilson "Goddamn." "This motherfucker ain't supposed to be here." CT 267-268. Petitioner also noted that it seemed as though Clark and Sherriff knew each other. CT 268.

Sherriff said that his throat was dry and petitioner brought him a cup of water. CT 268, 304. Sherriff asked petitioner if he or the others were going to kill him. CT 273. Petitioner emphatically and repeatedly responded that no one would hurt him. CT 273, 304. At that time, petitioner believed they would leave Sherriff unharmed after the robbery was completed. CT 274.

Clark gave petitioner a set of car keys to a Lincoln Town Car belonging to Sherriff. CT 269. Clark stated he wanted to take both of Sherriff's cars because he had the paperwork on them. CT 269.

However, Clark never expressed ultimate plans involving the cars. CT 269.

At Clark's direction, petitioner began moving furniture and items to the living room in preparation for their removal. CT 286. Petitioner was scared due to the fact that everything had gone wrong from the moment of arrival at the residence and particularly because Sherriff was home when Clark said he would not be. CT 286.

Clark then ordered petitioner to bind Sherriff's hands and feet while he sat on his bed. CT 287. Petitioner protested by claiming he did not know how to do the task. CT 287. Clark pointed to a telephone cord and instructed petitioner to bind Sherriff's feet. CT 287. Petitioner then laid the cord on top of Sherriff's feet. CT 287. Clark proceeded to bind Sherriff's feet. CT 287. Clark proceeded to bind Sherriff's hands. CT 288.

Once Sherriff was restrained, Clark began asking him where he kept his money. CT 289. During this time, petitioner repeatedly reassured Sherriff that no one would hurt him. CT 289, 304.

At some point, Clark tried to choke Sherriff. CT 310-311. Petitioner briefly left the room and, before returning, he told Wilson he believed Clark was crazy and intended to kill Sherriff. CT 316. Clark then went to the front of the residence in order to obtain money. CT 290.

Clark called petitioner and Wilson to the front room and asked them to keep watch out the windows because he thought the neighbors were watching the home. CT 290-291, 320. Petitioner then went into the kitchen where he told Wilson that he believed Clark had lied to them. CT 269. As they were talking, petitioner heard stabbing sounds coming from Sherriff's bedroom. CT 269-270. Sherriff screamed and gasped for air. CT 270. Petitioner

looked through the doorway of the bedroom and discovered Clark stabbing Sherriff with a long knife. CT 269, 292. During the stabbing, petitioner heard Clark say, "Why did you do it to me?" CT 309.

After stabbing Sherriff, Clark left the bedroom as if nothing had happened. CT 272. Petitioner asked Clark if Sherriff was dead and Clark responded affirmatively. CT 272. Petitioner believed Clark was psychologically unstable and confided in Wilson his fear that Clark might try to kill them to prevent them from telling others about the stabbing. CT 272. Clark then gave Wilson and petitioner at least one pillowcase and instructed them to fill it with money, jewelry and paperwork. CT 294.

When the men left Sherriff's residence, petitioner drove away in Sherriff's truck and Wilson drove the car the men used to get to Sherriff's home. CT 275-276. After returning briefly to Clark's residence, petitioner dropped Wilson off at his place of employment. CT 277. Petitioner later returned the Lincoln Town Car to Clark's residence. CT 277-278. There, he picked up his share of the money taken from Sherriff. CT 277-278; RT 419.

Petitioner drove the Lincoln Town Car to the place where he had been residing. CT 278. Petitioner had intended to leave the car at Clark's residence but he was fearful Clark would find out and then try to kill him. CT 276-277. Later that night, petitioner drove to a location in Greenhaven where he left the vehicle on the side of the road with the keys in the door in hopes that someone would come along and drive away with it. CT 280. Petitioner then walked back to his residence. CT 282.

Petitioner spent a fitful night thinking about the events of the evening. CT 279. During the night, petitioner's next-door neighbors became embroiled in

a fight to which the police were summoned. CT 279. Petitioner struggled with the urge to go to the police and tell them what Clark had done to Sherriff. CT 279. Approximately one week after Sherriff's stabbing, petitioner left California for Oklahoma. CT 283.

Testimony of Third Party Witnesses.

At around 10:00 p.m., Sherriff's next door neighbors, Chadwick Pifer and his fiancee Darlene, returned to their home. RT 269. Darlene attempted to telephone Sherriff in order to tell him she could not pick up pastries for him the following morning. RT 270. When Sherriff did not answer, she left a message on his answering machine. RT 270.

After Darlene was unable to reach Sherriff, Pifer noticed that the motion sensor light attached to his residence had come on and he heard the sound of crushing leaves outside near his back door. RT 270. Pifer opened his back door and discovered one of Sherriff's dogs at the front of the stairs. RT 271. When Pifer tried to call the dog, the dog retreated toward Sherriff's residence. RT 271. Pifer followed the dog down the stairs and nearly bumped into someone who identified himself as "Michael." RT 272. The man was black, stocky and not very tall, standing at about five feet eight inches or less. RT 277, 282. Pifer observed that the man was sweating profusely and breathing heavily. RT 281.

The man showed Pifer a key and stated that he was there to get Sherriff's truck so that he could make the pastry run for Sherriff in the morning. RT 273. Pifer informed "Michael" that Darlene had attempted to contact Sherriff regarding the pastries. RT 274. The man acknowledged that he had heard her phone call on "the box." RT 274.

Pifer returned to his residence. RT 275. Pifer then observed Sherriff's truck and Lincoln Town Car both pull out and park about fifty (50) to seventy-five (75) feet from the residence. RT 275. He also saw at least two people get out of the cars and then briefly stand outside the cars talking. RT 276. Pifer became concerned that something was wrong and so he walked outside the front of his residence where he observed three cars, including Sherriff's Lincoln Town Car and truck, drive away with tires squealing. RT 276-277.

After he got home, Clark asked his thirteen-year-old sister-in-law, Leah Bradley, to help him count the money taken from Sherriff. RT 361. Clark also gave Bradley a jewelry box and Bible. RT 363, 378. He told her to "get rid of the stuff." RT 363, 378. However, Bradley retained possession of these items because she did not know what to do with them. RT 364, 379, 382. Leah said that she saw the truck and the Lincoln Town Car pull up at her house. RT 355. She saw petitioner get out of the driver's side of the Lincoln. RT 357. She denied first telling the police that the person "looked like Tio." RT 366-367. However, Officer Keller testified that Bradley first told him that the man "looked like Tio." RT 480. She also said that she was positive that the passenger was petitioner's brother but he was actually in jail at the time. RT 480.

When the Lincoln Town Car was later recovered by police, petitioner's fingerprints were identified on contents found within the glove box compartment. RT 454-457.

Dr. Robert Anthony, the forensic pathologist, testified that Sherriff suffered 24 stab wounds to the chest, back, arm and neck. RT 314. A number were defensive wounds. RT 314. Three different wounds could have been the fatal wound. RT 315-316.

On November 19, 1999, petitioner turned himself in to Oklahoma authorities when he found out there was an outstanding warrant for his arrest. RT 468. Detective Keller traveled to Oklahoma City where he met with petitioner. RT 468. Petitioner proceeded to give a statement implicating himself, Clark and Wilson in the robbery of Sherriff's residence and the stabbing death of Sherriff. CT 252-324; RT 469 - 473.

DEFENSE EVIDENCE

In October 1999, Frederick Clark visited Sherriff several times per week. RT 383. Approximately one or two weeks prior to the stabbing incident, Clark announced to his family that Sherriff had given him a Mitsubishi car as a wedding present to himself and his new wife, Sandra Singleton. RT 391, 440. However, Clark later indicated he returned the car to Sherriff because he "didn't like the deal." RT 392, 441. Clark appeared to be angry about the situation. RT 441.

ARGUMENT

I. STANDARD OF REVIEW.

A writ of habeas corpus may be issued when a prisoner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2254 a. A request for federal habeas corpus relief must be based on a violation of federal law. See *Moore v. Calderon*, 108 F.3d 261, 264 9th Cir. 1997.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 "AEDPA", the reviewing court must determine whether the state court proceedings ". . . (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2)

resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding as to any claim adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254d; *Williams v. Taylor*, 529 U.S. 362, 376, 120 S. Ct. 1495, 1504, 146 L. Ed. 2d 389 (2000).

Justice O'Connor, writing for the Supreme Court, clarified the meaning of this standard:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's cases. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.
>
> *Id.*, 120 S. Ct. at p.1520.
>
> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.
>
> *Id.*, 120 S. Ct. at p.1522.

See also, *Lockyer v. Andrade*, 538 U.S. 63, 75, 123 S. Ct. 1166, 155 L. Ed. 2d 144, (2003).

Decisions of the federal courts of appeal are relevant in habeas proceedings under AEDPA to determine whether a state court ruling is unreasonable and whether the federal principles are clearly established. *Id.*, at p. 1154. In a habeas proceeding, the federal courts "have an independent obligation to say what the law is." *Wright v. West*, 505 U.S. 277, 305 112 S. Ct. 2482, 120 L. Ed. 2d 225, (1992). If considered only trial error, federal habeas relief will be granted for a state conviction where the errors "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S.Ct. 1710, 123 L.Ed.2d 353, (1993); *Bains v. Gomez*, 204 F.3d 964, 976, 977 (9th Cir. 2000).

"We review the determination of what is 'clearly established Federal law, as determined by the Supreme Court of the United States,' under 28 U.S.C. @ 2254(d)(1), as a question of law which we must decide de novo." *Canales v. Roe*, 151 F.3d 1226, 1228-29 (9th Cir. 1998). It is the habeas applicant's burden to show that the state court applied the law in an objectively unreasonable manner. *Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002.)

II. TRIAL COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO CONTACT AND INTERVIEW THE OFFICERS WHO TOOK PETITIONER INTO CUSTODY IN OKLAHOMA AND LEARN THAT PETITIONER HAD INVOKED HIS MIRANDA RIGHTS TO THE OKLAHOMA OFFICERS PRIOR TO BEING INTERVIEWED BY THE CALIFORNIA POLICE OFFICERS.

A. The Facts and the Trial Court's Decision.

Petitioner turned himself into to Langston, Oklahoma Police Officer David Hinds on the evening of November 15, 1999. Declaration of David Hinds Jr., "Hinds Dec." p. 2; Sessoms Dec., p. 1. When Officer Hinds and petitioner arrived at the Langston Police Station, Langston Police Chief Gregory Bufford, read petitioner his *Miranda*[3] rights. Hinds Dec., p. 2; Bufford Dec., p. 1; Sessoms Dec., p. 2. After hearing his rights, petitioner informed Hinds and Bufford that he did not wish to speak with them. *Ibid.* Chief Bufford and Officer Hinds transported Mr. Sessoms to the Oklahoma County Jail in Oklahoma City. Hinds Dec., pp. 2-3; Bufford Dec., p. 2, Sessoms Dec. P. 2. There, on November 20, 1999, he was interviewed by two Sacramento Police Detectives - Pat Keller and Dick Woods. CT 546.

Before the interview began, petitioner sat by himself in the interview room for some period of time. As he waited, talking to himself, petitioner 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." CT 153, RT 819. Then the officers entered the interview room. *Ibid.* Relevant to petitioner'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 fellow had a safe flight out here.

Det. Keller: So are we. Huh.

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

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3. *Miranda v. Arizona*, 384 U.S. 436, 455-458 (1966).

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 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 (get)[4] 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.

CT 546-548.

. . . . . [Officers obtain a tape for their tape recorder.] CT 548-549.

Det. Woods: . . . Um, want to back up. This way there - - - is a recording, and you know we can't play no switch games or nothing else. Uh, I want to back up to your question, you asked for [sic; about] an attorney. Um, first, 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.

---

4. See, Detective Wood's comments at RT 22.

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 attorneys -- in fact, all attorneys will -- will sometimes or usually advise you not to make a statement. But -- 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 [sic; ~~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 possible 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 and 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 – [what] I want to do with you is I want to read these to [sic; with] 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.

CT 549-553.

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

CT 553-554.

. . . . .

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 Petitioner.]

Sessoms: Let's talk.

[The interview then proceeded from that point.].

CT 554.

On April 19, 2001, a hearing was held on petitioner's motion to suppress pursuant *Miranda v. Arizona*. Detective Keller testified at the hearing. He had been a homicide detective for two years and with the Sacramento Police Department for 15 years.

RT 12. Keller had already interviewed co-defendants Clark and Wilson prior to interviewing petitioner. RT 13. Both Clark and Wilson had been arrested for the murder of Sheriff after their interviews. RT 13. When petitioner was arrested, he was in custody on charges arising out of the death of Mr. Sherriff. RT 15.

Detective Woods also testified. RT 15. He had been a Sacramento Police Officer for 32 years. RT 16. He identified the video tape of the police interview. RT 19. The video, - People's Exhibit 1 - was played to the Court. RT 21. (The attorneys stipulated that People's Exhibit 1-A was an accurate transcript of the video. RT 22-23; see CT 546-555.) Woods said that he was not trying to trick petitioner or prevent him from exercising his rights during the interview. RT 30.

The parties stipulated that petitioner had a prior juvenile arrest for vehicle theft. Vehicle Code section 10851; RT 40. No evidence was presented by trial counsel to establish that petitioner had already invoked his *Miranda* rights to Chief Bufford and Officer Hinds before he ever spoke to Woods and Keller. Moreover, even though petitioner and investigator Roseann Cerrito had informed trial counsel that Sessoms had invoked his *Miranda* rights of Bufford and Hinds before he spoke to Woods and Keller, trial counsel never contacted Bufford and Hinds about this matter. Sessoms Dec, p. 2, Hinds Dec., p. 3; Bufford Dec., p. 2; Cerrito Dec., p. 2; McEwan Dec., pp. 1-2.

On April 20, 2001, the Court heard arguments. RT 51. The court indicated that it was focusing its attention on the following passage from the interview. See, RT 51-53; CT 547.

> Sessoms: There wouldn't be any possible way that I could have 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 (get) me a lawyer.

CT 547.

Petitioner argued that the foregoing comments indicated a clear request for an attorney that the officers ignored. RT 53-55. The prosecutor argued that when all of petitioner's comments were taken into context, his primary concern was that the police officers would twist his words and that once he was satisfied that the interview would be recorded he did not really want an attorney. RT 56-58. The prosecutor conceded that the issue presented a "close question. I'm not going to try to tell the court that it's not, . . . " RT 59.

In denying the motion to suppress, the trial court relied primarily on *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). RT 64. It noted that the invocation of the right to counsel must be a reasonable statement that an ordinary police officer would understand, according to an objective standard. RT 64. The court further noted that it had not identified a case on point. RT 64. After a lengthy discussion of its interpretation of the meaning of petitioner's comments set forth above (RT 68-70), the court concluded in pertinent part as follows:

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

RT 70.

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

RT 72.

After petitioner's conviction, a new attorney, Rodrigo Mayorga, was appointed to represent petitioner with respect to a new trial motion. At the hearing on the new trial motion, Mr. Mayorga informed the court that petitioner had informed the Police in Oklahoma "that he didn't want to speak to the police. That he wanted an attorney. I presume that Mr. McEwan knew that. And why didn't he bring that out in his motion to suppress my client's statements?" RT 797. Recognizing the threat this information posed to the legal introduction of the statement, the prosecutor promptly objected "[T]hat's the first time those words have ever been said in this case." RT 797. The matter was dropped and not raised further. Mr. Mayorga did not contact Bufford or Hinds either.

B. The Decision of the Court of Appeal.

On direct appeal, petitioner argued that the trial court erred in concluding that the officers did not improperly ignore his request for an attorney (Case No. C041139.) Exh. 1, pp. 16-28. He further argued that the officers not only ignored his request, they actively sought to convince petitioner to waive his request for an attorney and speak to them. *Ibid.*

The Court of Appeal rejected the arguments for two reasons.

> In the present case, although defendant twice explicitly referred to an attorney, neither statement was an unequivocal or unambiguous request for counsel. On the first occasion, defendant asked, "There wouldn't be any possible way that I could have a . . . lawyer present while we do this?" As the court found, this was a question not an unambiguous request. Defendant's second reference to an attorney was "Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer."
>
> We find defendant's first statement is legally indistinguishable from the equivocal remarks in *Davis*, "'Maybe I should talk to a lawyer'" (*Davis*, *supra*, 512 U.S. at p. 455), and in *People v. Crittenden* (1994) 9 Cal.4th 83, 123 (*Crittenden*), "'Did you say I could have a lawyer?'" These equivocal remarks in *Davis* and *Crittenden* were not requests for counsel triggering the *Edwards* rule. (*Davis*, *supra*, 512 U.S. at p. 462.) Similarly, "in the present case, defendant did not unequivocally state that he wanted an attorney, but simply asked a question." (*Crittenden*, *supra*, 9 Cal.4th at p. 130.)
>
> Nor was defendant's second reference to an attorney an unequivocal request for an attorney. At best, it was a statement of his father's advice to him. We cannot find such a statement to be "sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis*, *supra*, 512 U.S. at p. 459.)
>
> Exh. 3, p. 3.

As an additional basis for its decision, the Court of Appeal found that because petitioner did not make any incriminating remarks until after he was *Mirandized*, any error resulting from ignoring petitioner's requests for an attorney was cured relying on *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985). Exh. 3, p. 7. Petitioner raised this issue in a Petition for Review to the California Supreme Court. Exh. 4. The petition was denied by the Supreme Court without comment on March 24, 2004 (Case No. S122747.) Exh. 5.

C. Petitioner's Petition(s) for Writ of Habeas Corpus.

On April 16, 2004, petitioner filed a petition for writ of habeas corpus in the Sacramento County Superior Court (Case No. 94F03770). Exh. 6. Among other claims, he alleged that his trial counsel was ineffective "because if he would have called Langston, Oklahoma, & talked to the arresting officer he would have found out that the defendant was read his *Miranda* rights & refused to talk. Howard McEwan did not do anything to represent me properly." Exh. 6, p. 9.

Attached as Exhibit "E" was a supplemental police report from Officer Hinds confirming petitioner's factual allegations. Exh. 6, p. 20. On May 20, 2004, the petition was denied in an order that addressed the other issues that petitioner raised but did not actually mention the *Miranda* issue petitioner raised. Exh. 7.

On May 27, 2004, petitioner wrote a letter to the court which the court treated as a motion for reconsideration. Exh. 8. In that letter, petitioner spelled the substance of his claim in substantial detail. Exh. 8. In its order denying the motion for reconsideration, the trial court found that petitioner

was re-arguing and issue that could have been raised on appeal citing *In re Dixon* (1953) 41 Cal.2d 756, 759.[5] Exh. 9. As set forth below, this decision is entirely erroneous because the issue petitioner raised in his habeas petition was legally distinct and based on facts that trial counsel never developed at trial.

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5. The Ninth Circuit has held that *In re Dixon* does not constitute an adequate procedural bar of federal constitutional claims because imposition of the *Dixon* bar implies that the California Court considered and rejected the petitioner's underlying federal constitutional claims. Therefore, the *Dixon* bar does not state an "independent" state ground. "Therefore, if 'fundamental constitutional rights' include federal-law issues, the denial of Park's petition citing to *Dixon* was not independent of federal law and does not preclude federal habeas review." *Park v. California*, 202 F.3d 1146, 1152 (9th Cir. 2000); see also *Cooper v. Calderon*, 255 F.3d 1104, 1111 (9th Cir. 2001).

On May 27, 2004, petitioner filed a petition for writ of habeas corpus in the California Supreme Court (Case No. S125163.) Exh. 16. In that petition, he argued that his trial counsel was ineffective for, among other reasons, failing to call the police officers in Langston to determine that petitioner had already invoked his *Miranda* rights and refused to talk prior to the time when Detectives Woods and Keller initiated their interrogation of him. Exh. 16, p. 8.

On September 20, 2004, petitioner filed what he intended to be a supplement to his pending habeas petition. The Supreme Court treated it as a new petition and assigned it a new case number (Case No.

S1278770). Exh. 18. In that document, he supplied the court with the supplemental Langston Police Department police report dated December 7, 2003, in which Officer Hinds affirmed that petitioner had invoked his *Miranda* rights prior to being transported to the Oklahoma County Jail. Petitioner also alleged that appellate counsel had been ineffective because petitioner had supplied him with that document, among others, establishing the *Miranda* violation but that appellate counsel had failed to investigate the claims. Exh. 18.

Both petitions were denied on April 20, 2005. Exhs. 17, 19. The first filed petition was denied without comment. Exh. 17. The supplement which was treated as a second petition, was denied citing *In re Waltreus*, 62 Cal.2d 218 (1965).[6] Exh. 19.

D. The Petitioner's Burden to Establish Ineffective Assistance of Counsel in a Federal Habeas Proceeding.

"The right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984). Petitioner has a Sixth Amendment right to effective assistance trial counsel and a right with respect to counsel on the first appeal as of right. *Ibid.*, *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). Counsel can deprive a defendant of the right to effective assistance "simply by failing to render adequate legal assistance." *Strickland v. Washington*, *supra*, 466 U.S. at p. 686. Counsel

6. Citation to *Waltreus* does not constitute a procedural bar. *Hill v. Roe*, 321 F.3d 787, 789 (9th Cir. 2002).

"has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland v. Washington*, *supra*, 466 U.S. at p. 688. "The proper standard for attorney performance is that of reasonably effective assistance" under "prevailing professional norms." *Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-88. Analysis of ineffective assistance claims on appeal requires scrutiny of the trial counsel's specific acts or omissions challenged by the petitioner. See, *Id.*, at p. 690.

Although appellate review of counsel's performance is "deferential," (see, *Strickland v. Washington*, *supra*, 466 U.S. at p. 689), the California Supreme Court has emphasized (in applying the *Strickland* standard):

> Deferential scrutiny of counsel's performance is limited in extent and indeed in certain cases may be altogether unjustified. Deference is not abdication; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance.

In re Jones, 13 Cal.4th 552, 561-562 (1996).

A claim for ineffective assistance of counsel consists of two elements. First, the defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel'

guaranteed the defendant by the Sixth Amendment." *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994) (en banc) (quoting *Strickland v. Washington*, *supra*, 466 U.S. at p. 687. Second, even if counsel's actions" 'fell below an objective standard of reasonableness,'" the defendant must show that "'the deficient performance prejudiced the defense.'" *Ibid.* To demonstrate prejudice, the defendant has the burden of proving that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Wade v. Calderon*, 29 F.3d 1312, 1323 (9th Cir. 1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, *supra*, 466 U.S. at p. 694. Thus, in order to determine whether counsel's errors prejudiced the outcome of the trial, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." *Bonin v. Calderon*, 59 F.3d 815, 834 (9th Cir. 1995).

Finally, a habeas petitioner alleging ineffective assistance of counsel under §§ 2254, subd. (d)'s "unreasonable application" clause must show that "the state court applied Strickland to the facts of his case in an objectively unreasonable manner." *Woodford v. Visciotti*, *supra*, 537 U.S. 24-25. "A federal court of appeals considering a petition for a writ of habeas corpus does not review state court decisions pursuant to state law like a state appellate court. We have authority to grant the writ if and only if the last reasoned state court opinion (note omitted) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Grotemeyer v. Hickman*, 393 F.3d 871, 877 (9th Cir. 2004). The

decision of the Sacramento County Superior Court is the last reasoned decision analyzing petitioner's claim.

Here, the Sacramento County Superior Court correctly articulated the *Strickland* standard. Exhibit 6, p. 3. However, as set forth below in subpart E, the Superior Court twice applied the wrong legal standard to its evaluation of the substantive error petitioner identified in his petition. The Superior Court treated petitioner's claim as a reiteration of the claim that petitioner had previously raised in the Superior Court and on direct appeal. However, petitioner raised a new and fundamentally more compelling claim based on facts that trial counsel failed to develop at trial. Either the Superior Court did not pay attention to the facts petitioner submitted or simply misunderstood his claim. In either case, it relied on the wrong standard regarding petitioner's substantive claims and its conclusion that trial counsel was not ineffective was unreasonable. Cf., *Williams v. Taylor*, *supra*, 120 S.Ct. at p. 1520.

E. The Applicable Law Applied to the Facts of This Case.

Under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d), a petitioner must demonstrate that the state court's decision to deny his *Miranda* claims on the merits was contrary to, or involved an unreasonable application of, clearly established federal law under United States Supreme Court precedent, or that the decision was based on an unreasonable determination of the facts. *Arnold v. Runnels*, 421 F.3d 859, 862 (9th Cir. 2005). State court findings of fact are presumed to be correct unless the petitioner rebuts the presumption with clear and convincing evidence. *Ibid.*

A suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to consult with an attorney and to have an attorney present during questioning, and the police must explain this right to the suspect before questioning. *Miranda v. Arizona*, *supra*, 384 U.S. at pp. 469-473. When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-485, 101 S.Ct. 1880, 1885, 68 L.Ed.2d 378 (1981). This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350, 108 L. Ed. 2d 293, 110 S. Ct. 1176 (1990).

This case presents a textbook violation of *Miranda*, *Edwards*, and their progeny. Petitioner, a 19 year old young man, who voluntarily turned himself into the authorities who had no idea where he was, invoked his *Miranda* rights when he was first taken into custody. Hinds, Dec., p. 2; Bufford Dec., p. 1; Sessoms Dec., p. 1. At that point, Officers Hinds and Bufford properly ceased their efforts to obtain a statement from petitioner and even intervened to prevent a Logan County Deputy from pressuring petitioner to give a statement. *Ibid.* Four days later, Detectives Woods and Keller reinitiated interrogation of petitioner. As petitioner waited for Woods and Keller, he stated to himself that he knew he wanted an attorney indicating that he was still firm in his invocation of his *Miranda* rights. CT 153, RT 819. However, when the Detectives entered the room, Woods and Keller managed to convince petitioner that he did not really want an attorney. By reinitiating the interrogation themselves after

petitioner invoked his *Miranda* rights, the officers violated the bright line rule laid down in *Edwards*, *supra*:

> . . . 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.* 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.

Edwards, *supra*, 451 U.S. at pp. 484-485. Emphasis added.

It may well be that Keller and Woods were unaware that petitioner had already invoked his *Miranda* rights to Hinds and Bufford. However, that does not excuse Keller and Woods' re-initiation of the interrogation.

> Finally, we attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel. . . The police department's failure to honor that request cannot be justified by the lack of diligence of a particular officer. (Citation.)
>
> *Arizona v. Roberson*, 486 U.S. 675, 687- 688, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

See also, *Taylor v. Maddox*, 366 F.3d 992, 1014-1015 (9th Cir. 2004).

The burden is placed on the police to have procedures in place that assure that officers are made aware when a suspect invokes his *Miranda* rights to another officer.

> "Custodial interrogation must be conducted pursuant to established procedures, and those procedures in turn must enable an officer who proposes to initiate an interrogation to determine whether the suspect has previously requested counsel." (Citation.) Thus, officers who interrogate a suspect after the suspect has invoked his right to counsel are charged with the knowledge of the prior invocation. See, e.g., *United States v. Scalf*, 708 F.2d 1540, 1544 (10th Cir. 1983) (holding that knowledge of request for counsel "is imputed to all law enforcement officers who subsequently deal with the suspect").
>
> *Alston v. Redman*, 34 F.3d 1237, 1243 (3rd Cir. 1994).

When the police initiate interrogation after a defendant has invoked his Miranda rights, "it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect." *Arizona v. Roberson*, *supra*, 486 U.S. at p. 681.

Both the facts and the law of this case are unusually clear. Petitioner unequivocally invoked his *Miranda* rights to Officers Bufford and Hinds. Detectives Keller and Woods reinitiated the interrogation, not petitioner. In doing so, they violated the bright line set in *Edwards*. Quite apart

from the question of whether petitioner's invocation of his rights to Woods and Keller was equivocal (see subpart III below), the introduction of the interrogation into evidence was clearly illegal because the Sacramento Police Officers, and not petitioner himself, reinitiated the interrogation. The Sacramento County Superior Court's failure to address the applicable law and the facts presented to it were patently unreasonable. In addition, its failure to consider the evidence and apply the correct legal standard means that its decision is not entitled to deference from this court which must review the issue de novo. *Wade v. Terhune*, 202 F.3d 1190, 1195 (9th Cir. 2000).

F. Trial Counsel Was Ineffective When he Failed to Investigate the circumstances of Petitioner's Interrogation and Present the Evidence to the Court.

The duty to investigate the factual basis of a particular defense is one of the basic duties of a defense attorney. ". . . [s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691.

In the present case, petitioner informed his trial counsel at least three times that he had invoked his *Miranda* rights to Officer Hinds before the beginning of trial. Sessoms Dec., p. 2. In addition, Roseann Cerrito, the court-appointed investigator investigating petitioner's case also conveyed the same information to trial counsel at least three

times. Cerrito Dec., p. 2. Prior to the filing of the motion for a new trial, petitioner also informed Attorney Rodrigo Mayorga, a fact that is memorialized in the record. RT 797. This is strong circumstantial evidence to support appellant and Cerrito's statements that they informed trial counsel of this crucial information.

Trial counsel has submitted a declaration indicating that he can no longer recall whether he was informed by petitioner or Ms. Cerrito that petitioner had invoked his *Miranda* rights to Hinds and Bufford. However, he has confirmed that he never called them to verify petitioner's claims, a fact also confirmed by Hinds and Bufford. McEwan Dec., pp. 1-2; Hinds, Dec. p. 2; Bufford Dec., p. 2. However, trial counsel has confirmed that he had no tactical reason for failing to contact Bufford and Hinds. McEwan Dec., p. 2.

As set forth above, the law is absolutely clear that petitioner's *Miranda* rights were violated in this case when Woods and Keller reinitiated the interrogation of petitioner in Oklahoma. Trial counsel was aware that suppression of petitioners statement was crucial to petitioner's defense because he litigated the issue, albeit on much less clear cut theory. In the post-trial hearing into his effectiveness, he tacitly conceded that the whole success of his defense of petitioner hinged on his ability to suppress the statement. RT 700-701. He knew that the defense would be "very difficult" if the statement was not suppressed. RT 701. However, he litigated it from the perspective that the officers ignored a clear and unequivocal invocation of petitioner's right to counsel at the outset of the interview in Oklahoma. Exh. 1, pp. 16-28.

Although that argument was legally sound (see below), it was of necessity not as strong as the

Edwards rule. The argument counsel made called upon the trial judge to make a factual determination concerning the nature of petitioner's invocation of his right to an attorney. The outcome of the motion to suppress as litigated was not sure and subject to the trial court's subjective evaluation of the evidence sitting as the trier of fact.

By contrast, had trial counsel spoken with Officer Hinds and Chief Bufford and called them as witnesses, there is no doubt that petitioner's statement would have been suppressed. *Edwards* establishes a bright line rule. The law is clear and the facts are not in doubt in light of the statements by Bufford and Hinds. The prosecutor was clearly aware of the implications of the statements of Bufford and Hinds and became alarmed when Attorney Mayorga alluded to it during the hearing on petitioner's motion for a new trial. RT 797. No reasonably competent attorney would have failed to contact Officers Hinds and Bufford once the information was provided to him. There is no plausible tactical reason for failing to call Hinds and Bufford as witnesses. Moreover, trial counsel has acknowledged that he had no tactical reason for failing to call Hinds and Bufford.

A "tactical decision" in a criminal trial involves weighing the potential benefits of a potential legal strategy against the potential prejudice to the defendant that may arise from following that strategy. Thus, for example, in *In re Jackson* (1992) 3 Cal.4th 578, 603-604 (disapproved on another point in *In re Sassounian* (1995) 9 Cal.4th 535), the issue was whether the trial counsel made a valid tactical decision when he did not introduce mitigating background information during the penalty phase because he erroneously believed that doing so would have permitted the prosecutor to introduce evidence

of prior violent conduct by the defendant. *Id.*, at pp. 611-612.

There was no potential gain to petitioner from failing to call Hinds and Bufford. The case for suppression which the prosecutor conceded was close, became virtually unassailable once the testimony of Hinds and Bufford was placed into evidence. The failure to even contact Hinds and Bufford, let alone present their testimony, was clearly constitutionally ineffective.

G. But for Trial Counsel's Ineffective Assistance, It is Reasonably Probable That Petitioner's Statement Would Have Been Suppressed and The Prosecution's Case Against Him Would Have Collapsed.

Petitioner ". . . does not have to show by a preponderance of the evidence that the result in his case would have been different but for counsel's errors. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Brown v. Myers*, 137 F.3d 1154, 1157-1158. Under *Strickland*, this means that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, *supra*, 466 U.S. at p. 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* Here, the evidence of prejudice is more than ample.

As the statement of facts set forth above makes clear, the statement constituted virtually the entire case against petitioner. Apart from his statements, the evidence consisted of the neighbor Chadwick Pifer's observation that three cars left Sheriff's residence in a hurry and that at least two people got out of the cars momentarily to talk. RT 275-277.

Additionally, Leah Bradley said that she saw the truck and the Lincoln Town Car pull up at her house and that petitioner got out of the driver's side of the Lincoln. RT 355, 357. Petitioner's fingerprints were identified on contents found within the glove compartment. RT 454-457. In addition, petitioner was later seen counting the money taken in the robbery.

In the absence of petitioner's statement, none of the evidence links petitioner to the actual killing. No evidence establishes that he was inside the trailer or that he participated in the robbery or burglary. There is certainly no evidence that a killing was reasonably foreseeable to petitioner, who was not the actual killer of Mr. Sherriff. At the most, the evidence establishes at the most that petitioner was guilty of vehicle theft (Vehicle Code section 10851), accessory after the fact (Penal Code section 32) and receiving stolen property (Penal Code section 476.) It is only with his statements that the police were able to link him to the robbery and the burglary that were taking place while Clark was killing Sherriff.

Finally, both the prosecutor at trial, and the Deputy Attorney General on appeal have already conceded that in the absence of petitioner's statement, the evidence is insufficient to establish the special circumstances that resulted in petitioner receiving a sentence of life without possibility of parole for a crime committed at the age of 19. CT 541; Exh. 2, p. 21, fn. 17.

> 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. (CALJIC 8.80.1; *People v. Proby* (1998) 60 Cal.App.4th 922. 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.
>
> CT 541.

Thus, it is clear, that in the absence of the illegally obtained statement, petitioner would not have been convicted of murder and sentenced to life without possibility of parole. It is clear beyond a reasonable doubt that in the absence of trial counsel's ineffective assistance, petitioner would have obtained a more favorable result in this case. Accordingly, petitioner had met his burden under Strickland and this petition should be granted and the state should be ordered to retry petitioner within a reasonable time or release him.

III. THE CALIFORNIA COURT OF APPEAL UNREASONABLY CONCLUDED THAT PETITIONER'S REQUEST FOR COUNSEL TO WOODS AND KELLER WAS EQUIVOCAL.

A. The Factual and Procedural History.

Petitioner incorporates by reference as though fully set forth herein subpart A & B of the previous argument.

B. The Applicable Law.

As set forth in the previous section, a suspect subject to custodial interrogation has a Fifth and Fourteenth Amendment right to consult with an attorney and to have an attorney present during questioning, and the police must explain this right to the suspect before questioning. *Miranda v. Arizona*,

supra, 384 U.S. at pp. 469-473. When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981). This rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, *supra*, 494 U.S. at p. 350.

The "rigid prophylactic rule" of *Edwards* requires a court to "determine whether the accused actually invoked his right to counsel." *Smith v. Illinois*, 469 U.S. 91, 95, 83 L. Ed. 2d 488, 105 S. Ct. 490 (1984) (quoting *Fare v. Michael C.*, 442 U.S. 707, 719, 61 L. Ed. 2d 197, 99 S. Ct. 2560 (1979); *Davis v. United States*, *supra*, 512 U.S. at p. 458 . The inquiry is objective. *Id.* at p. 459.

> 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 . . . do[es] not require the cessation of questioning.
>
> *Davis v. United States*, *supra*, 512 U.S. at p. 459.

At a minimum, invocation of the right to counsel requires "some statement that reasonably can be construed to be an expression of a desire for the assistance of an attorney." *Paulino v. Castro*, 371 F.3d 1083, 1087 (9th Cir. 2004) internal quotations and citation omitted). A suspect's words must be taken "as ordinary people would understand them. *United States v. de la Jara*, 973 F.2d 746, 750 (9th Cir. 1992).

In *Davis v. United States*, *supra*, the Supreme Court held that "[A]lthough a suspect need not speak

with the discrimination of an Oxford don, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.*, at p. 459. If a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.*, at p. 458. "Waiver cannot be found from a suspect's continued response to questions, even if he is again advised of his rights." *Smith v. Endell*, 860 F.2d 1528, 1529 (9th Cir. 1988) (citing *Edwards*, 451 U.S. at pp. 484-485).

As this petition is governed by the AEDPA, this Court must determine whether the California Court of Appeal's determine that petitioner' request for counsel ambiguous was an unreasonable application of established United States Supreme Court precedent. *Clark v. Murphy*, 331 F.3d 1062, 1072 (9th Cir. 2003). As set forth below, the Court of Appeal's decision was clearly unreasonable.

C. The Trial Court Erroneously Determined That Petitioner's Invocation of His Miranda Rights was Equivocal.

On habeas review of a state court judgment, the federal court looks to the "'last reasoned decision of the state court.'" *Insyxiengmay v. Morgan*, 403 F.3d 657, 665 (9th Cir. 2005)(quoting *Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002)). The decision of the Court of Appeal on direct appeal is the last reasoned decision of a state court. As set forth below, that decision employed the wrong standard to deny petitioner's direct appeal.

When Petitioner in the present case asked if there was "any possible way I could have a lawyer present while we do this?" followed by "Well, uh, that's what my dad asked me to ask you guys . . . uh, get me a lawyer," he was making an unequivocal request for counsel. Any reasonable police officer would have understood the statements to be a request for an attorney. This is particularly true when petitioner's state of mind at the time he made the statements is considered. Before the officer entered the room where petitioner was waiting, he was heard mumbling to himself that he wanted a lawyer. CT 153, RT 819. When the officers walked in, petitioner asked for a lawyer as soon as the three men finished introducing themselves. CT 547.

Moreover, the fact that petitioner did not simply demand an attorney does not reflect any equivocation on his part. Rather, it is clear that he was attempting to make his request in a respectful fashion. At the outset of the interview, petitioner surprised the officers by telling them that he was glad that they had enjoyed a safe flight. Woods replied "huh?" and petitioner repeated his statement. CT 546. Petitioner then immediately asked for an attorney, again using the same polite tone. The officers immediately began their efforts to talk him out of his request. CT 546-548. Concluding that petitioner was simply being polite is consistent with petitioner's behavior at all times after he was arrested. Officer Hinds declared that petitioner was polite when he was taken into custody. Hinds Dec., p. 2. His demeanor toward the officers throughout the interview was consistently respectful.

Moreover, the police may not use "clarification questions" as a ruse for talking a defendant out of his request for counsel.

As the State observes, following an equivocal indication of the desire to remain silent, officers may ask questions designed to clarify whether the suspect intended to invoke his right to remain silent. *Martin*, 770 F.2d at 924; *Anderson*, 751 F.2d at 103; see *Lopez-Diaz*, 630 F.2d at 665. The rule, however, permits "clarification," not questions that, though clothed in the guise of "clarification," are designed to, or operate to, delay, confuse, or burden the suspect in his assertion of his rights. Because such questions serve to keep the suspect talking, not to uphold his right to remain silent, they constitute unlawful "interrogation," not permissible clarification. See *Mosley*, 423 U.S. at 105-06, 96 S. Ct. at 327 (following an invocation of the right to silence the investigators may not attempt to wear down the suspect's resistance and make him change his mind); *Martin*, 770 F.2d at 924 (further questioning must be limited to clarifying the equivocal request); *Anderson*, 751 F.2d at 103, 105 (inquiry as to why suspect wishes to remain silent is impermissible interrogation, not lawful clarification); *Lopez-Diaz*, 630 F.2d at 665; see also *United States v. Johnson*, 812 F.2d 1329, 1331 (11th Cir. 1986) (following an invocation of right to counsel the police may not even implicitly indicate to the suspect that cooperating with the police would be beneficial to him); *Nash v. Estelle*, 597 F.2d 513, 517-18 (5th Cir.) (en banc) (the interrogator may not attempt to persuade the suspect to retract a previously-voiced request for counsel), cert. denied, 444 U.S. 981, 100 S. Ct. 485, 62 L. Ed. 2d 409 (1979).

Christopher v. Florida, 824 F.2d 836, 841-842 (11th Cir. 1987).

Thus, the *Miranda* rule is specifically "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Davis v. United States*, *supra*, 512 U.S. at p. 458. Yet, that is exactly what happened here. Detective Woods ultimately badgered Petitioner into waiving his previously asserted *Miranda* rights.

The Third District Court of Appeal found Petitioner's requests for counsel were ambiguous and "legally indistinguishable from the equivocal remarks in *Davis*, 'Maybe I should talk to a lawyer' (*Id.*, at 455), and in *People v. Crittendon* (1994) 9 Cal.4th 83, 123 (*Crittendon*), 'Did you say I could have a lawyer?'" In those cases, the court of appeal concluded, such remarks were found not to trigger the *Edwards* rule. Exh. 3 at pp. 7-8. Those remarks are clearly distinguishable. The first statement was a rhetorical question that clearly indicated that the defendant was trying to decide whether he should get an attorney. The second question was clarifying whether, under *Miranda*, he could in fact get an attorney.

Here by contrast, petitioner asked if he could get an attorney while "we do this." When Detective Woods began hemming and hawing, petitioner clarified that his father had recommended that he get an attorney, an effort to explain why he wanted an attorney. The Court of Appeal's conclusion to the contrary is clearly unreasonable.

Petitioner's requests for counsel in this case were unambiguous and, in fact, strikingly similar to those in the case of *Alvarez v. Gomez*, *supra*, 185 F.3d 995. In *Alvarez*, the following exchange took place between the defendant and his interrogators:

> Alvarez: Can I get an attorney right now, man?
>
> Miller: Pardon me?

> Alvarez: You can have an attorney right now?
>
> Miller: Ah, you can have one appointed for you, yes.
>
> Alvarez: Well, right now you got one?
>
> Miller: We don't have one here, no. There's not one present now.
>
> Lange: There will be one appointed for you at the arraignment, ah, whether you can afford on. If you can't one will be appointed to you by the court.
>
> Alvarez: All right.
>
> Miller: (unintelligible)
>
> Alvarez: I'll -- I'll talk to you guys.
>
> Miller: Okay. You wanna talk to us without a lawyer here, right?
>
> Alvarez: Yeah.
>
> *Id.*, at 996-997.

The Ninth Circuit Court of Appeal held that Alvarez' statements constituted an unequivocal request for an attorney.

> Alvarez asked three questions: (1) "Can I get an attorney right now, man?" (2) "You can have attorney right now?" and (3) "Well, like right now you got one?" A review of the relevant authority reveals that Alvarez's thrice-repeated questions, when considered together, constituted an unequivocal request for an attorney. See e.g., *Smith v. Illinois*, 469 U.S. 91, 97, 83 L. Ed. 2d 488, 105 S. Ct. 490 (1984) (deeming a suspect's statement, "Uh, yeah, I'd like to do that," upon hearing of his right to counsel a clear invocation); *de la*

> *Jara*, 973 F.2d at 750 (deeming "Can I call my attorney?" or "I should call my lawyer" (note omitted) clear invocation of the right to counsel); *Robinson v. Borg*, 918 F.2d 1387, 1389 (9th Cir. 1990) (deeming "I have to get me a good lawyer, man. Can I make a phone call?" a clear invocation of the right to counsel); *Shedelbower v. Estelle*, 885 F.2d 570, 571-73 (9th Cir. 1989) (deeming "You know, I'm scared now. I think I should call an attorney" a clear invocation of the right to counsel); *Smith*, 860 F.2d at 1529-31 (deeming "Can I talk to a lawyer?" a clear invocation of the right to counsel). Moreover, we disagree with the district court's conclusion that the officers "clearly believed that Petitioner was merely asking clarifying questions regarding his right to counsel," and answered those questions in "good faith." The correct answer to each of Alvarez's three questions, after all, was a simple unambiguous "yes."
>
> *Alvarez v. Gomez*, *supra*, 185 F.3d at p. 998.

Here too, similar to *Alvarez*, Petitioner's statements were unambiguous. Petitioner respectfully submits that there is no meaningful difference between the question “Can I get an attorney right now, man?” (Alvarez) and "any possible way I could have a lawyer present while we do this?" (Petitioner). When Petitioner asked if there was any way he could have a lawyer present during questioning, there was no need for further clarification. The simple answer to his question was, "Yes." Further, Petitioner's second statement, "Get me a lawyer" only reinforced the necessity for the officers to cease all questioning until he could consult with an attorney. Finally, when petitioner indicated that he wanted to make a call to consult further with

his father, the officers told him that it was not possible for petitioner to make a call until *after* they conducted the interrogation. This was a clearly was an effort to prevent petitioner from being reinforced in his request for an attorney by his father.

Moreover, the interrogating officers in this case actually understood Petitioner's statements to be a request for the presence of an attorney during questioning. This was made abundantly clear when Detective Woods acknowledged Petitioner's request for an attorney, but tried to persuade him to talk to them anyway by pointing out that an attorney would not let Petitioner tell them his "version" of events.

> *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 -- 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.

CT 552. Emphasis added.

Woods words clearly conveyed two points to petitioner. First, if he invoked his right to counsel petitioner would lose his opportunity to give his version of the events. Second, Woods clearly indicated that it would be pointless and futile for petitioner to exercise his right to consult with an attorney because the police already had sufficient evidence to convict him based on the statements of his two co-defendants.

Not content with these comments, Woods furthered the badgering with the following comments.

> "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, [sic; ,] you make the decision if you want to talk to us or not.
>
> CT 552.

These words constitute badgering because petitioner had already invoked his right to counsel as set forth above. As set forth above, badgering in the guise of "clarification" of the invocation of the right to counsel violates a defendants constitutional rights. Indeed, *Davis* itself recognizes that the *Miranda* rule is specifically "designed to prevent the police from badgering a defendant into waiving his previously asserted *Miranda* rights. *Davis v. United States*, *supra*, 512 U.S. at p. 458. The problem is that Woods treated the warnings as procedural requirements rather than substantive rights. He sought only to insure that Petitioner understood the rights. When petitioner sought to claim one of the rights, Woods ignored him by insisting on knowing whether petitioner "understood" the right rather than whether petitioner wanted to invoke the right. The *Miranda* rights are not merely a mantra to be given and ignored. They convey substantive rights that have been denied in this case.

The California Court of Appeal's decision was also unreasonable because it took an overly restrictive view of petitioner's request for counsel.

> In deciding whether a request for counsel is sufficiently clear to constitute an invocation of the right to counsel, we must consider "the totality of the

> circumstances," and we must also remain mindful of the teachings of *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 1409, 89 L. Ed. 2d 631 (1986), wherein the Supreme Court, cognizant of the settled principles of indulging every presumption against waiver and resolving all doubts in favor of protecting constitutional claims, stated that the courts must "give a broad, rather than a narrow, interpretation to a [suspect's] request for counsel."
>
> *Soffar v. Johnson*, 237 F.3d 411, 455 (5th Cir. 2000).

Here, rather than view petitioner's request broadly to protect petitioner's constitutional rights, the California Court of Appeal construed his request as narrowly as possible. Rather than err on the side of protecting petitioner's rights, the Court of Appeal erred on the side of denying his rights. This approach is unreasonable as well.

Finally, the fact that petitioner subsequently agreed to talk to the officers does not affect this conclusion. Petitioner's "post request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. *Smith v. Illinois*, 469 U.S. 91, 100, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984)" *Robinson v. Borg*, 918 F.2d 1387, 1391 (9th Cir.1990).

In sum, petitioner clearly invoked his Miranda rights. The officers' own words demonstrate that they understood that he had invoked his rights. The Court of Appeal's conclusion to the contrary is simply unreasonable.

E. The Court of Appeal's Citation to *Oregon v. Elstad* is Completely Inapposite.

Citing *Oregon v. Elstad*, *supra*, 470 U.S. 298, the Court of Appeal concluded that, even if the statements in this case were "somehow construed to be actual invocations of defendant's right to counsel," his subsequent confession was not tainted such that it should have been excluded. Exh. 3 at pp. 8-9. However, the appellate court's reliance on *Oregon v. Elstad*, *supra*, 470 U.S. 298, is misplaced.

In *Oregon v. Elstad*, *supra*, the defendant made a voluntary pre-Miranda inculpatory in response to custodial interrogation when he was arrested at his home. After being taken to the police station, he was read his *Miranda* rights and knowingly and voluntarily waived them. Everyone, including the Supreme Court, agreed that the initial statement was not admissible. *Id.*, at pp. 315-316. The issue presented was whether the statements made subsequent to the *Miranda* waiver were also inadmissible. The Court concluded that they were admissible. But its reasoning in reaching this conclusion is highly relevant to this case.

> When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. *See New York v. Quarles*, 467 U.S., at 655-656. The Court today in no way retreats from the bright-line rule of *Miranda*. We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary

> and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts have, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made.
>
> *Oregon v. Elstad*, *supra*, 470 U.S. at pp. 317-318.

In *Elstad*, the Court concluded that the initial statement was voluntary, the subsequent statements were voluntary, and that the subsequent statements were therefore admissible.

A completely different issue is presented here. The question posed by this case is whether when an unequivocal request for counsel is made, a subsequent statement can be sanitized by obtaining a *Miranda* waiver. The Supreme Court has repeatedly stated that the answer is no. As was set forth in *Davis v. United States*, *supra*, 512 U.S. 453, "if a suspect requests counsel at any time during the interview, he is not subject to further questioning . . . ." *Id.*, at 458. Officers are simply not thereafter permitted to badger the defendant into waiving his previously asserted rights, as they did in this case. *Ibid.* The interview should have been terminated until such time as an attorney was present or Petitioner reinitiated discussions. *Ibid.* Neither one of those things happened in this case.

It appears the Court of Appeal confused the issue of whether a confession is "tainted" by "coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will" (See, Exh. 3, at p. 8), with the issue of whether a suspect's invocation renders all further statements inadmissible if obtained through a police-initiated interview without counsel present. As was clearly held in *Edwards v. Arizona*, *supra*, 451 U.S. 477:

> [W]hen 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. We further hold that an accused . . . 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.
>
> *Id.*, pp. at 484-485. Emphasis added.

Thus, contrary to the Court of Appeal's Opinion, if (as was the case) Petitioner's statements constitute an unequivocal request for counsel, his subsequent confession was simply inadmissible in the prosecution's case-in-chief. The Court of Appeal's alternate rationale for upholding petitioner's conviction was based on a clear misstatement of the law and is entitled to no deference whatsoever. *Wade v. Terhune*, *supra*, 202 F.3d at p. 1195.

F. The Erroneous Admission of the Post-Arrest Statements Had a Substantial and Injurious Affect on Petitioner's Right to a Fair Trial.

Because this is collateral review, petitioner's conviction may be reversed if the improper admission of his statements had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) (quotation omitted). The prejudice of the erroneous admission of petitioner's statements is clear. If a de novo review of the record finds the facts in "equipoise," a habeas court should "treat the error . . . as if it affected the verdict" and grant the petition. *O'Neal v. McAninch*, 513 U.S. 432, 435, 130 L. Ed. 2d 947, 115 S. Ct. 992 (1995).

As noted above in subpart II (G), virtually all of the evidence linking petitioner to the crimes was derived from his own statement. Even the State of California, in its briefing in the Court of Appeal, conceded that, if there was error, it would not have been harmless at least with respect to the special circumstance allegations. (Exh. 2, p. 21, n.17.) Petitioner will not repeat his argument here and respectfully refers this Court to the argument set forth above. For all the reasons set forth there, the erroneous admission of petitioner's statement taken in violation of his request for counsel had a substantial and injurious affect on his right to a fair trial and this petition must be granted.

CONCLUSION

Petitioner, a 19 year old thief dragged in over his head by a plainly psychotic Frederick Clark, asserted his *Miranda* rights to Officers Gregory and Hinds when he was first taken into custody in

Oklahoma. He asserted them again to Woods and Keller who ignored his request and badgered him into talking. As trial counsel conceded at trial, petitioner's entire defense centered around the effort to suppress petitioner's statement because it was taken in violation of *Miranda*.

The law applicable to this case is unusually clear and establishes applicable bright line rules. Due to the ineffectiveness of his trial counsel, and the unreasonable decisions of the California courts, petitioner's fundamental rights have been violated by the State of California. For all the foregoing reasons, this petition must be granted, the statement must be suppressed and the State of California must either provide appellant with a new trial within a reasonable period of time or release him.

Date: May 4, 2006 Respectfully submitted,

/s/ Eric Weaver
Eric Weaver

Attorney for Petitioner
TIO DINERO SESSOMS

[Declaration of Service omitted]

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