No. _____

In the Supreme Court of the United States

MICHAEL F. MARTEL, WARDEN, *Petitioner,*

v.

REUBEN KENNETH LUJAN, *Respondent.*

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court has "clearly established," within the meaning of 28 U.S.C. § 2254(d)(1), that where a state appellate court concludes certain pretrial statements should have been excluded from the prosecution's case under *Miranda*, the court's harmless-error analysis must ignore the fact that the defendant also took the stand at trial and admitted the conduct involved in the offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

PETITION FOR A WRIT OF CERTIORARI

The Attorney General of California, on behalf of Warden Michael Martel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-35a) is reported at 734 F.3d 917. The opinion of the district court (App. 38a-85a) and related reports and recommendations of the magistrate judge (App. 86a-141a, 142a-197a) are not officially reported. The California Court of Appeal's opinion on direct review of the criminal judgment (App. 199a-248a) is partially reported at 92 Cal. App. 4th 1389.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2013. The court denied rehearing and rehearing en banc on April 4, 2014. App. 38a-39a. On June 26, 2014, Justice Kennedy extended the time for filing a petition for a writ of certiorari to and including August 4, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] Warden Martel has succeeded Sylvia Garcia as warden of the prison in which respondent is incarcerated. He is substituted as the named petitioner in accordance with Rule 35.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

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

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

1. In the early morning hours of August 16, 1998, respondent Lujan murdered his estranged wife, Monica, and an off-duty deputy sheriff, Gilbert Madrigal, by bludgeoning them to death with a

fifteen-pound concrete cap from a water meter enclosure outside Madrigal's home. See App. 3a-4a, 207a-208a. Respondent had been stalking, harassing, and threatening Monica for some time, and deputies arrested him at his home that same morning. See App. 3a, 204a-207a.

At the sheriff's station, a detective advised respondent that he had the right to remain silent and that anything he said could be used against him in a court of law. The detective then told respondent, "if you don't have money to hire an attorney, one's appointed to represent you free of charge." The detective asked respondent if he "understood all that" and respondent replied, "Yes, I do." See App. 4a-5a, 25a-26a, 253a.

Detectives spoke with respondent three times. App. 5a-6a, 211a-213a. During the first two interviews, respondent denied any knowledge of or participation in the attacks on his wife and the deputy sheriff. *Id.* During the third interview, respondent asked if he could "have an attorney present." App. 5a, 213a. The detective told him, "Okay. All right. If that's what you want to do, we'll do that." *Id.*

Respondent asked whether he could get an attorney "today." The detective told him that it was Sunday and he would have to wait "a couple of days" to get an appointed attorney when he went to court. The detective further told respondent that he could retain an attorney immediately if he had the funds to do so, but that the detective doubted a lawyer would permit respondent to make a statement. The detective told respondent that it was respondent's choice whether he wanted to talk without an attorney present. App. 5a-6a, 254a.

Respondent asked to make a phone call to his mother. Although the detective arranged the call, respondent was unable to reach any family members. Respondent then asked the jailor to take him back to the detective. The detective returned to the interview room and found that respondent had been crying. Respondent agreed to speak to the detective without an attorney present, and admitted that he had attacked Monica and Madrigal with the cement block. He claimed that he had been provoked by the sight of his wife with another man. App. 213a-214a, 255a, 258a, 259a.

2. The state charged respondent with two counts of first-degree murder and one count of stalking. Respondent moved to suppress his confession under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The trial court ruled that, although the detectives had not at first advised respondent adequately of his right to have counsel present during questioning, later statements concerning the availability of a private attorney had sufficiently informed respondent of his rights. The court found that respondent knew he had the right to an attorney during questioning and that his statement admitting to attacking the victims was voluntary and proper under *Miranda*. Based on that ruling, the prosecution used respondent's pre-trial confession in its case-in-chief.[2]

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[2] The prosecution also presented evidence that in the months between the Lujans' separation and the killings respondent repeatedly showed up unannounced at Monica Lujan's workplace and home, and in one instance was arrested after chasing her in his car; that respondent repeatedly threatened to kill Monica; that Monica had served respondent with divorce papers just days before the attack; and that, after the attack, respondent told his brother that he had gotten into a "fight" with Monica and thought he had "hurt" her. App. 4a; see

(continued…)

In his own case, respondent took the stand and admitted attacking Monica and Deputy Madrigal. He testified that he felt provoked by the sight of them together, and his counsel argued that the prosecution had failed to prove beyond a reasonable doubt guilt of either first or second degree murder. App. 237a-238a.

The jury at respondent's first trial convicted him of stalking, but reported to the trial court it had deadlocked between first- and second-degree murder. At a second trial, the prosecution again introduced respondent's pre-trial confession along with its other evidence, and respondent again admitted from the stand that he had attacked Monica and Deputy Madrigal, arguing only that he had been provoked by the sight of them together. The second jury rejected that claim and found respondent guilty of first-degree murder. The trial court sentenced respondent to life imprisonment without the possibility of parole. App. 203a.

3. a. The California Court of Appeal affirmed. App. 199a-248a. The court agreed with respondent that his pretrial confession should have been excluded from evidence under *Miranda*, on the ground that respondent was not adequately advised of his right to have an attorney present "before or during questioning." App 220a; see App. 215a-220a. It concluded, however, that the trial court's error in admitting respondent's uncoerced pretrial statements was harmless beyond a reasonable doubt under *Chapman* v. *California*, 386 U.S. 18, 21-22 (1967), and *Arizona* v. *Fulminante*, 499 U.S. 279, 292 (1991), in light of respondent's decision to admit in court,

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(…continued)
also App. 204a-207a.

from the witness stand, that he had attacked Monica and Madrigal. "Nothing defendant said in his [pretrial] confession added to the quantum of guilt on any issue beyond that contained in his in-court testimony before the jury." App. 221a; see App. 221a-231a.

In reaching that conclusion, the state court accepted for the sake of argument respondent's assertion that he decided to testify at trial only in response to the trial court's ruling allowing the prosecution to introduce his pretrial confession. App. 221a. It also acknowledged that "in the case of Fourth Amendment violations, derivative evidence resulting from an unlawful search or seizure may be inadmissible." App. 221a (citing, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471, 484-486 (1963)). The court concluded, however, that "the United States Supreme Court has held that similar derivative evidence rules do not apply in the *Miranda* context." *Id.*

The state court based that conclusion on a careful review of three decisions of this Court addressing "[t]he possible application of the so-called 'fruit of the poisonous tree' rule in the *Miranda* context[.]" App. 221a; see App. 221a-230a. After discussing *Michigan* v. *Tucker*, 417 U.S. 433 (1974), *Oregon* v. *Elstad*, 470 U.S. 298 (1985), and *Dickerson* v. *United States*, 530 U.S. 428 (2000), the court considered it "clear that the fruit of the poisonous tree doctrine does not apply in the *Miranda* context when the subsequent statement follows a proper warning and waiver and is voluntary[,] given the holding in *Elstad*." App. 230a.

Applying that rule to this case, the state court explained that there was "no contention nor evidence" that respondent's pretrial "confession was

involuntary; it merely resulted from a *Miranda* violation." App. 230a. Likewise, the court observed that respondent "was represented by counsel … during the trial and retrial," and there was "no evidence [that] defendant's decision to testify at the retrial was involuntary." App. 230a. Accordingly, respondent's

> voluntary testimony … while represented by a highly regarded, experienced, and competent criminal defense lawyer is part of the "remainder of the evidence[,]" to use the words of the *Fulminante* majority[,] that we must consider in evaluating the prejudicial impact of the erroneous admission into evidence of the [pretrial] confession. While freely testifying, as was his right, defendant admitted he committed the brutal killings in this case; he said he did it. Under *Fulminante*, the erroneous ruling on the motion to suppress [respondent's pretrial] confession was, beyond a reasonable doubt, entirely harmless.

App. 231a.

b. The California Supreme Court denied further review. App. 198a.

4. a. In 2004, respondent renewed his *Miranda* claim in a federal petition for a writ of habeas corpus. See App. 176a. He argued that the California Court of Appeal's adjudication of the harmless error question was contrary to "clearly established Federal law," within the meaning of 28 U. S. C. § 2254(d)(1), based on this Court's decision in *Harrison* v. *United States*, 392 U.S. 219 (1968)—a decision not presented to or considered by the state court (see App. 2a). The

district court agreed, reasoning that *Harrison* adopted a federal remedial rule requiring suppression of any testimony given by a defendant that was "'compelled by the need to counter evidence that was illegally obtained and improperly admitted.'" App. 47a (quoting *United States* v. *Mortensen*, 860 F.2d 948, 951 (9th Cir. 1988)).

Notably, the district court viewed the effect of its ruling as limited, because it believed that petitioner's convictions could be preserved so long as they were modified to reflect a reduction from first- to second-degree murder. App. 80a-84a. It ordered the issuance of a conditional writ reflecting that potential resolution. App. 84a-85a.

b. The court of appeals affirmed, but with instructions to modify the writ. App. 1a-35a.

Like the district court, the court of appeals held that *Harrison* created "a clear exclusionary rule that applies to the States." App. 17a.[3] It explained that, in *Harrison*, this Court considered a prosecution arising from the District of Columbia, in which three pretrial confessions were held to have been illegally procured "according to rules applicable only to federal prosecutions." App. 13a; see App. 10a-12a. In a new trial the prosecution, now unable to introduce the out-of-court confessions, sought to rely instead on similar testimony that the defendant gave at the previous trial. App. 11a-12a. The court of appeals explained that, in that context, this Court:

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[3] The court of appeals agreed with the district court and the state Court of Appeal that respondent's pretrial confession should have been excluded from the prosecution's case under *Miranda*. App. 23a-29a.

> held that "the same principle that prohibits the use of confessions so procured also prohibit[ed] the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor." *Harrison*, 392 U.S. at 222 . . . . The Court held that if Harrison had testified "in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible." *Id*. at 223.

App. 12a.

The court of appeals rejected the State's argument that *Harrison* "d[id] not interpret any provision of federal law applicable to the States[.]" App. 13a. Rather, in the court's view, "*Harrison* [was] a Fifth Amendment case[.]" App. 13a. Indeed, the court read *Harrison* to hold that "a criminal defendant's Fifth Amendment constitutional protection against compulsory self-incrimination is violated by the use of that defendant's inadmissible confession in the prosecutor's case-in-chief," and to require the further exclusion of "any inculpatory trial testimony" by the defendant that was "induced by the unlawfully admitted confession." App. 15a-16a. As support for that reading, the court pointed to a sentence referring to *Harrison* in this Court's later decision in *Oregon* v. *Elstad*:

> If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* . .

> . precludes the use of that testimony on retrial.

App. 14a (quoting *Elstad*, 470 U.S. at 316-317).

In that regard, the Ninth Circuit also rejected the State's argument that the state Court of Appeal had permissibly interpreted federal law by focusing on decisions of this Court such as *Elstad*, which refused to apply the "fruit of the poisonous tree" principle in the *Miranda* context. App. 19a-22a; see also App. 18a-19a (rejecting reliance on the non-exclusion ruling in *Motes* v. *United States*, 178 U.S. 458 (1900)). Viewing *Elstad* as distinguishable and not "undermin[ing]" *Harrison*, the court concluded that:

> Under the *Harrison* exclusionary rule, when a criminal defendant's trial testimony is induced by the erroneous admission of his out-of-court confession into evidence as part of the government's case-in-chief, that trial testimony cannot be introduced in a subsequent prosecution, nor can it be used to support the initial conviction on harmless error review, because to do so would perpetuate the underlying constitutional error. In the case at bar, the California Court of Appeal's harmless error analysis violated this rule and, thus, was contrary to clearly established federal law.

App. 23a (footnote omitted).

As to remedy, the court of appeals vacated the portion of the district court's order and judgment concluding that it would be an appropriate remedy to modify respondent's convictions to second-degree murder. App. 33a-34a; see App. 29a-33a. The court indicated that the writ could "include the option that

the state court make an independent determination as to whether the convictions can be modified under state law." App. 33a.

REASONS FOR GRANTING CERTIORARI

On direct review in this case, the California Court of Appeal confronted an issue that this Court has never addressed: When an appellate court decides that a trial court erred in admitting a defendant's uncoerced pretrial statements under *Miranda*, may its harmless-error analysis take into account the defendant's testimony admitting the conduct at issue? After carefully reviewing a number of decisions in which this Court considered the relationship between *Miranda* and the exclusionary rule, the state court concluded that "the fruit of the poisonous tree doctrine does not apply in the *Miranda* context when the subsequent statement"—here, the defendant's in-court testimony—"follows a proper warning and waiver and is voluntary[.]" App. 230a. Regardless of whether this Court would reach the same conclusion if presented with the question on direct review, for purposes of federal habeas review under 28 U.S.C. § 2254(d) the state court's analysis and application of federal law was surely not "objectively unreasonable," or "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement." See, *e.g.*, *White* v. *Woodall*, 134 S. Ct. 1697, 1702 (2014) (internal quotation marks omitted); *id*. at 1702-1703, 1707.

The court of appeals reached a contrary conclusion by taking language from *Harrison*, out of the context of the case in which it was used—a context that involved only a federal proceeding and established only a supervisory rule. The court's

treatment of the "*Harrison* exclusionary rule" (App. 23a) as a broad constitutional holding, applicable in all situations and in state as well as federal proceedings, also relied heavily on a passing characterization of *Harrison* in *Elstad*, 470 U.S. at 316-317. On these grounds, the court set aside the state convictions of a defendant who took the stand and confessed to the jury that he committed a double murder. That result was not compelled by any decision of this Court—and thus was not authorized under § 2254(d). This Court should grant review to clarify once again the proper limits of federal habeas relief. See, *e.g.*, *Woodall*, 134 S. Ct. at 1706 (federal law "does not require state courts to *extend* [this Court's] precedent or license federal courts to treat the failure to do so as error").

1. A federal court may not set aside a state conviction based on a claim adjudicated on the merits by the state courts unless that adjudication "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." 28 U.S.C. § 2254(d)(1). In a series of cases, this Court has made clear that this limitation is to be strictly construed.

Just last Term, for example, the Court reiterated that "'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of this Court's decisions." *Woodall*, 134 S. Ct. at 1702 (some internal quotation marks and alteration omitted). The rules to be applied are those "'squarely established' by this Court's holdings." *Id.* at 1706; see *Knowles* v. *Mirzayance*, 556 U.S. 111, 122 (2009). An "unreasonable application" of a holding "must be 'objectively unreasonable,' not merely wrong; even 'clear error' will not suffice." *Id.*

at 1702 (some internal quotation marks omitted). And relief may be awarded only where "it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question[.]" *Id.* at 1706-1707 (quoting *Harrington* v. *Richter*, 131 S. Ct. 770, 787 (2011)); see *id.* at 1702.

In particular, "if a habeas court must extend a rationale before it can apply to the facts at hand, then by definition the rationale was not clearly established at the time of the state court decision." *Woodall*, 134 S. Ct. at 1706 (internal quotation marks omitted). That is true even if a lower federal court may think that it would be unreasonable not to extend the rule. See *id.* at 1705-1706. And it is necessarily true when this Court's precedents "leave[] open the possibility" of a contrary rule. *Id.* at 1703. "In these circumstances, where the precise contours of the [rule] remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *Id.* at 1705 (internal quotation marks omitted).

2. *Harrison* v. *United States*, on which the court below relied, does not "clearly establish[]" that a state appellate court considering whether a *Miranda* error was harmless must ignore the fact that the defendant chose to take the stand and repeat his confession to the jury. Indeed, the rule articulated in *Harrison* does not "clearly" apply to state proceedings at all.

Harrison was a case on direct appeal, arising out of the District of Columbia. In an earlier proceeding, two pretrial confessions were ruled inadmissible under the non-constitutional prompt-arraignment rule of *Mallory* v. *United States*, 354 U.S. 449 (1957), and a third was held inadmissible under a federal

rule designed to protect the jurisdiction of the District of Columbia juvenile court. See *Harrison*, 392 U.S. at 220 n.2. At a new trial, the prosecution introduced testimony the defendant had given at the first trial, allegedly in response to the trial court's erroneous decision to admit his pretrial statements. This Court ruled that, if that allegation was correct, then "the same principle that prohibits the use of confessions [wrongfully] procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor." *Id*. at 222.

The holding of *Harrison* does not control this case. *Harrison* was not a *Miranda* case, or a Fifth Amendment case, or even a case involving any constitutional rule. The "principle[s] that prohibit[ed] the use of [the pretrial] confessions" at issue in *Harrison* were special rules applicable only to federal prosecutions. See 392 U.S. at 220 n.2. It follows that the Court's decision to adopt a "fruit of the poisonous tree" rule, as a remedy deemed appropriate to protect that "same principle," was likewise not a constitutional ruling but rather an exercise of the Court's supervisory power over the federal courts. And such rulings "are off the table as far as § 2254(d) is concerned[.]" *Early* v. *Packer*, 537 U.S. 3, 10 (2003).

The *Harrison* Court's careful choice of words and analogies reinforces the conclusion that its actual holding was based only on supervisory, non-constitutional grounds. First, the Court referred to the defendant's former testimony only as having been "impelled" by the erroneous admission of his pretrial statements. 392 U.S. at 222. And it did so just after noting that a defendant who chooses to testify waives his privilege against self-incrimination with respect to that testimony, even if "motivated to take the

witness stand in the first place only by reason of the strength of the lawful evidence adduced against him." *Id.* As Justice White observed in dissent, the Court did not "hold that Harrison was compelled to take the stand and incriminate himself contrary to his privilege under the Fifth Amendment." 392 U.S. at 229-230 (White, J., dissenting). Similarly, the Court's opinion quoted general language concerning the rationale for exclusionary rules from *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392 (1920), and cited other Fourth Amendment and similar cases, see 392 U.S. at 222 & n.7. Those references did not transform *Harrison* into a Fourth Amendment or other constitutional case. Cf. *Goeke* v. *Branch*, 514 U.S. 115, 119 (1995) (per curiam) (reinforcing conclusion that prior decision was based on supervisory grounds by noting comment by dissent in the case that there could be no constitutional violation).

At a minimum, any possible constitutional grounding for the "*Harrison* exclusionary rule" invoked by the federal courts in this case (App. 22a) is far too obscure for that rule to constitute "clearly established Federal law," binding on the States and available as a ground for overturning state judgments under Section 2254(d)(1). Indeed, in the forty-four years since *Harrison*, this Court has never relied upon that decision to find error in any other case—much less to set aside a state court ruling that a *Miranda* error was harmless in light of the defendant's decision to take the stand and admit his criminal conduct.

3. The court of appeals thought that its contrary reading of *Harrison* as constitutionally-based was confirmed by a sentence referring to that case in this Court's later decision in *Oregon* v. *Elstad*:

> If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* . . . precludes the use of that testimony on retrial.

Elstad, 470 U.S. at 316-317; see App. 14a-15a. That sentence does not, however, turn the "*Harrison* exclusionary rule" (App. 24a) into "clearly established Federal law" controlling the context of this case.

To begin with, the paragraph in which the sentence appeared is an odd place to seek support for application of the "fruit of the poisonous tree" principle. *Elstad* involved a defendant who made initial statements that were not coerced but were later determined to have taken under circumstances that "breached *Miranda* procedures," and who then made a later confession after full warnings. 470 U.S. at 314-316. The question before the Court was whether the later, fully-warned confession had to be suppressed as a poisoned "fruit." See *id.* at 303-304.

The paragraph that refers to *Harrison* comes toward the end of the Court's opinion, in a passage rejecting the defendant's argument "that he was unable to give a fully *informed* waiver of his [*Miranda*] rights" with respect to the later confession "because he was unaware that his prior statement could not be used against him." 470 U.S. at 316. And most of the paragraph makes the point that uncertainty about exactly what prior statements or other evidence may be available or legally admissible in a particular case does *not* prevent a defendant from making "a knowing and voluntary waiver of the right to remain silent." *Id.* at 317. Even juxtaposed with a potential counter-example drawn from

Harrison, the Court's discussion as a whole provides scant support for the Ninth Circuit's conclusion that a *Miranda* harmless-error analysis must ignore a defendant's voluntary, fully-counseled decision to take the stand and confess.

In any event, for present purposes the most important point about the reference to *Harrison* in *Elstad* is that it is not essential to any holding in the case. Nor is it a detailed discussion of the sort that might carry particular weight for the lower courts, or for this Court in a later case, even if not technically necessary to explain or justify the Court's decision in the case before it. It is a passing characterization, noting a prior decision that might be thought to support a party's argument, but in fact rejecting that argument and moving on. In short, it is classic dictum of the sort that should never be given undue weight in a later case that, unlike the one in which the dictum occurs, squarely presents the question. Cf., *e.g.*, *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993) ("[S]ince we have never squarely addressed the issue, and have at most assumed [a particular proposition], we are free to address the issue on the merits."); *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 463 n.11 (1993) (Remarks in prior cases that "do not present the question" are "not controlling" and "contain a valuable reminder about the need to distinguish an opinion's holding from its dicta."). And in the particular context of federal habeas review of state court judgments, this Court has made it very clear that even this Court's dicta do not create "clearly established Federal law." *E.g.*, *Woodall*, 134 S. Ct. at 1702.

In contrast to the *Harrison* dictum, the actual reasoning and holding in *Elstad* support the state

court's decision in this case. While the Court in *Elstad* did not consider the specific situation at issue here, it recognized that the issues raised by *Miranda* errors are significantly different from those that have driven application of the "fruits" doctrine in the Fourth Amendment context. See 470 U.S. at 305-309. Likewise, it explained that a technical *Miranda* error does not present the reliability concerns that would arise if a confession were actually coerced, in violation of the Fifth Amendment itself. *Id*. at 307-309. Finally, as noted above, *Elstad* squarely rejected the argument that a suspect cannot make a knowing and voluntary waiver of his right to remain silent simply because he incorrectly thinks that (or is unsure whether) a prior incriminating statement could be used against him. 470 U.S. at 316-317; see, *e.g*., *McMann* v. *Richardson*, 397 U. S. 759, 767-771 (1970) (guilty plea not involuntary where motivated by uncertainty concerning whether courts would ultimately rule prior confession inadmissible) (cited in *Elstad*, 470 U.S. at 316-317). By parity of reasoning, a defendant represented by trial counsel may surely make a knowing and voluntary decision to take the stand and admit unlawful conduct, even if he is not sure whether prior partially-unwarned statements will ultimately be held admissible or inadmissible against him.

Indeed, *Elstad* is significant here primarily because of the support it provides for the state court's reasoned assessment of the federal law applicable to the harmless-error issue that court confronted. See App. 222a-228a (discussing *Elstad* and other cases). In resolving that issue, the state court carefully reviewed the development of this Court's cases considering application of the exclusionary rule in the *Miranda* context. As it explained (*id*. at 222a-224a), in *Michigan* v. *Tucker*, 417 U.S. 433, the Court

refused to apply the "fruits" doctrine to the testimony of a witness whose identity was ascertained through questioning conducted by the police in good faith, although the interrogation occurred before *Miranda* was decided and was later determined not to have complied with the *Miranda* safeguards. Next, in *Elstad*, the Court refused to apply the "fruits" principle to a second, fully-warned confession, where initial statements were taken without any safeguards and the defendant claimed that his decision to make the later statement was fatally tainted by his knowledge that he had already made the initial unwarned statements. See App. 224a-227a (discussing reasoning and holding in *Elstad*). Finally, in *Dickerson* v. *United States*, 530 U.S. 428, the Court, observing that *Elstad* had refused to apply the traditional fruits doctrine developed in Fourth Amendment cases, confirmed that "unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment." See App. 230a (quoting this language).

After analyzing these decisions, the state court concluded that, under federal law as explicated by this Court, "the fruit of the poisonous tree doctrine does not apply in the *Miranda* context when the subsequent statement follows a proper warning and waiver and is voluntary[.]" App. 230a; see also App. 231a. It then applied that conclusion to the facts of this case by refusing to ignore respondent's voluntary, on-the-stand confession in assessing whether admission of respondent's uncoerced pretrial statements, which the appellate court had determined were voluntary but taken without full *Miranda* warnings, was harmless error. App. 231a. Whether the court's analysis and application of federal law were ultimately right or wrong, they were certainly reasonable. See also *United States* v.

Patane, 542 U.S. 630, 634 (2004) (failure to provide *Miranda* warnings did not require "suppression of the physical fruits of the suspect's unwarned but voluntary statements"). And, because they were reasonable, the federal courts on habeas review had no authority to set aside the state court's judgment. *Woodall*, 134 S. Ct. at 1704.

4. The court of appeals' departure from proper principles of federal habeas review warrants correction by this Court in part because of the importance of those principles, and in part because of the particular context of this case.

In prior decisions,

> th[is] Court has been faithful to the belief that the harmless-error doctrine is essential to preserve the principle that the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence, and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.

Fulminante, 499 U.S. at 308 (internal quotation marks omitted). It is hard to imagine a context that implicates both of those principles—the centrality of factual guilt or innocence, and promoting public respect for the judicial process—more clearly than the one confronted by the state Court of Appeal in this case: Whether, in assessing the legal consequences of a technical *Miranda* error, it was required to ignore the fact that, after the trial court made that error, the defendant voluntarily took the

stand and admitted in open court to bludgeoning to death his wife and an off-duty deputy sheriff.

On the merits of that question, the state court got the answer right. See, e.g., App. 228a-239a; *Motes*, 178 U.S. at 475-476 (holding Confrontation Clause violation harmless because defendant's own trial testimony established his guilt); *State* v. *McDaniel*, 164 S.E.2d 469, 475 (N.C. 1968) (concluding, on remand after *Harrison*, that "[t]o hold that a defendant in a criminal action, once evidence has been erroneously admitted over his objection, may then take the stand, testify to exactly the same facts shown by the erroneously admitted evidence, and from that point embark upon whatever testimonial excursion he may choose to offer as justification for his conduct, without thereby curing the earlier error, gives to the defendant an advantage not contemplated by the constitutional provisions forbidding the State to compel him to testify against himself."). Here, of course, the question is not whether the court's conclusion was right, but only whether it was so clearly *wrong* that "there could be no 'fairminded disagreement' on the question[.]" *Woodall*, 134 S. Ct. at 1706-1707 (quoting *Richter*, 131 S. Ct. at 787). But the special resonance of the underlying factual setting and legal issues, along with the care with which the state court considered this Court's precedents and reached a reasoned conclusion on those issue, make this case one in which it would be particularly appropriate for the Court to make clear once again the proper limits of federal habeas review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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