No. 14-132

◆

IN THE

SUPREME COURT OF THE UNITED STATES

◆

MICHAEL F. MARTEL, WARDEN

PETITIONER

V.

REUBEN KENNETH LUJAN,

RESPONDENT

◆

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent asks leave to proceed *in forma pauperis*. Respondent is currently incarcerated at Ironwood State Prison in Blythe, California. Respondent proceeded *in forma pauperis* in the federal court of appeals and had counsel appointed pursuant to 18 U.S.C. §3006(a)(2)(B) for his federal habeas corpus appeal.

Tracy J. Dressner
Attorney for Respondent
Reuben Kenneth Lujan

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ON PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

◆

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RESPONDENT'S QUESTION PRESENTED

Whether the federal Court of Appeals and the federal District Court properly found that when the state trial court fails to suppress a confession obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), and that erroneous ruling compels a defendant to testify at trial, then, pursuant to *Harrison v. United States*, 392 U.S. 219 (1968), the reviewing court cannot consider the effect of the defendant's trial testimony in assessing whether the erroneous admission was harmless error because the defendant's trial testimony was tainted by the same illegality as his confession.

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Respondent Reuben Kenneth Lujan respectfully opposes the the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed on October 29, 2013. The opinion is reported as *Lujan v. Garcia*, 734 F.3d 917 (9th Cir. 2013) and is reproduced in Petitioner's Appendix ("App.").

STATEMENT OF THE CASE[1/]

Sgt. Reinaldo Rodriguez, the officer who interrogated respondent, Reuben Lujan, told Mr. Lujan at the outset of the first interrogation:

> Your rights are you have the right to remain silent. Whatever we talk about, and you say, can be used in a court of law, against you. And if you don't have money to hire an attorney, one's appointed to represent you free of charge. So those are your rights.
>
> If you have questions about the case, if you want to tell us about what happened tonight, we'll take your statement -take your statement from beginning to end. We'll give you an opportunity to explain your side of the story. And that's -- that's what we're looking for. We're looking for the truth. So do you understand all that? App. 253a. [2/]

Rodriguez never advised Mr. Lujan that he had the right to counsel before and during his interrogation.

Mr. Lujan's first interrogation began at 7:35 a.m. and ended at 9:05 a.m. ER

[1/] This section focuses only on the *Miranda* issue underlying this case.

[2/] All references to Appendix are to the appendix filed by Petitioner.

45, 114.[3/] Rodriguez repeatedly told Mr. Lujan that he was lying and that he should "get some balls" and "be a man" and tell the truth rather than accuse his family of lying. Rodriguez threatened to put Mr. Lujan's family on the stand and make them cry and put them through hell just because Mr. Lujan had no balls and was not a man. SER 56-64, 68, 73, 75, 77, 105-111, 113-114.[4/]

Mr. Lujan's second interrogation began within the hour and ended at 10:36 a.m. This interrogation was conducted by Rodriguez's partner, Craig Melvin, who was the "good cop" who implied that Mr. Lujan was lying and warned him that blood and other DNA evidence would prove he was the killer. ER 159-188.

Mr. Lujan's third interrogation began at 5:40 p.m. Mr. Lujan, who had no prior experience with being questioned by the police, signaled his lack of understanding about his right to counsel when he asked during this interrogation: "Can I have an attorney present?" App. 252a, 254a. Rodriguez clarified, "You want, you want an attorney present? You feel you need one?" Mr. Lujan responded, "***Yes, I do.***" App. 254a (emphasis added).[5/]

Rodriguez told Mr. Lujan that if that was what he wanted to do, "we'll do

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[3/] ER refers to the excerpts of record filed in the court of appeals.

[4/] SER refers to the supplemental excerpts of record filed in the court of appeals.

[5/] Petitioner's transcript excerpts in the Appendix at 249a-260a are potentially misleading. The pages at 251a-253a are from the beginning of Mr. Lujan's first interrogation. Pages 254a-260a are from Mr. Lujan's third interrogation about 9 hours later. Petitioner doesn't explain this and the Appendix implies that Mr. Lujan asked for counsel immediately after being given his incomplete *Miranda* rights.

that." Mr. Lujan asked, "Can I get one in here today?" App. 254a. Rodriguez said he doubted Mr. Lujan could get counsel then because it was Sunday evening. Rodriguez explained that the way the system was set up, Mr. Lujan would get counsel appointed in a couple of days when he went to court. Rodriguez added that if Mr. Lujan could afford a lawyer he could call one and hire one. App. 254a.

Despite Mr. Lujan's unequivocal request for counsel, Rodriguez not only told him that he doubted he would get counsel for a few days, but tried to persuade him to talk without counsel:

> [I]t's up to you. If you want to make a statement without an attorney that's up to you. I doubt if you hire an attorney they'll let you make a statement, they usually don't. That's the way it goes. So that's your prerogative, that's your choice. Now, if you do want to talk to me without an attorney, that's your choice. You can just tell the jailer, "Hey I'd like to talk to the detectives without an attorney present" Okay? That's your choice. App. 254a.

Mr. Lujan said he wanted to make a phone call and would talk after that. Rodriguez stopped the interrogation so Mr. Lujan could use a telephone. App. 258a-259a.

When Mr. Lujan returned to the interrogation room and reported his inability to reach anyone, Rodriguez still never explained that Mr. Lujan could have appointed counsel present before or during questioning. Indeed, Rodriguez never revealed that Mr. Lujan's attorney from an earlier arrest had contacted the station

prior to that interrogation and instructed the police not to interrogate Mr. Lujan. Likewise, the jail deputy never told Mr. Lujan that his attorney had sent another attorney to the station to speak to him.[6/] SER 158, 173-178, 188-189.

Instead, as soon as Mr. Lujan returned from using the phone, Rodriguez began questioning him and cajoling him to talk without counsel:

> Rodriguez: How'd the phone calls go? Did you make your calls?
>
> Mr. Lujan : I didn't get a hold of anybody.
>
> Rodriguez: No? Did you want, uh, you look like you've been crying. You want to tell me about everything? Okay. All right. Now, you've asked for an attorney, so if you want to talk about this, you'll have to tell me without an attorney present. Is that your desire? Speak up if you can, you have to speak up.

[6/] Sometime around 2:45-3:00 p.m., Mr. Lujan's attorney from a prior misdemeanor case had called the sheriff's station where Mr. Lujan was being questioned and told either Rodriguez or Melvin that he was representing Mr. Lujan and was asserting Mr. Lujan's rights. The attorney told the detectives they were not to speak to Mr. Lujan. SER 175-177, 188. An attorney colleague agreed to go to the station for Mr. Lujan's attorney who was ill. SER 176-177. A deputy working at the jail testified at a pretrial hearing that an attorney did come to the counter that day but he was not sure of the time. SER 158. Rodriguez denied knowing that an attorney had called or had come to the station about Mr. Lujan and was not sure if Melvin knew about the attorney. SER 191, 200.

Mr. Lujan: Can I have some tissue?

Rodriguez: Sure. Sure. It's tough Kenny. [Pause] I know, I know there's two sides to the story, my man, there's two sides to the story. [Pause] You understand, you know, you said that you, you wanted to tell me what happened. We've treated you fair, nobody's threatened you or anything of that nature...have we?

Mr. Lujan : No

Rodriguez: Okay. And you want to make a voluntary statement now without an attorney and tell me everything?

Mr. Lujan: Yes.

Rodriguez: Okay. Go ahead, tell me in your own words what happened. App. 259a-260a.

Mr. Lujan then made incriminating statements.

Mr. Lujan moved pretrial to suppress his statements arguing, in part, that Rodriguez had failed to provide complete *Miranda* advisements. After a hearing, the trial court denied the motion stating: "I am satisfied that although the initial advisement was not as complete as it should have been that the defendant did come to understand that he had a right to an attorney to be provided for him during questioning and that the defendant voluntarily waived that right." SER 212.

The state appellate court, upon reviewing these same facts, disagreed and concluded that Mr. Lujan was never informed, directly or indirectly, that he had a right to counsel before and during questioning. App. 220a. The court specifically noted that Rodriguez's comments about being appointed counsel later or hiring counsel at that time did not convey that Mr. Lujan had a right to counsel before and during questioning. App. 220a. The court ruled that Mr. Lujan's statements from all three interrogations should not have been admitted. App. 220a. The state court, however, concluded that the error in admitting the confession was harmless because Mr. Lujan testified at trial and repeated much of what he said in his confession. App. 221a. In reaching this conclusion, the state court decided that even if it assumed that Mr. Lujan testified only because his motion to suppress was denied, "the United States Supreme Court has held that ... derivative evidence rules do not apply in the *Miranda* context." App. 221a. The state court never mentioned, considered or applied *Harrison v. United States*, 392 U.S. 219 (1968).

Both the district court and the court of appeals concurred with the state court's factual finding that Mr. Lujan was never informed that he had the right to counsel before and during questioning. App. 25a-29a, 67a-68a. Petitioner has not challenged this finding in his petition for certiorari. Both federal courts also found: (1) *Harrison* clearly established that a defendant's trial testimony compelled by the erroneous admission of a confession obtained in violation of *Miranda* cannot be used against the defendant; and (2) the state court erred in failing to apply *Harrison*, thus satisfying 28 U.S.C. § 2254(d)(1). App. 7a, 13a, 23a, 49a, 52a, 115a, 126a.

REASONS FOR DENYING THE PETITION

I.

THIS COURT SHOULD DENY CERTIORARI BECAUSE PETITIONER'S QUESTION PRESENTED DOES NOT ENCOMPASS THE ACTUAL ISSUE RAISED AND ADDRESSED IN THIS CASE

Petitioner asks this Court to determine whether this Court has "clearly established" that in conducting a harmless error analysis after a finding that a confession should not have been admitted, a reviewing court ***"must*** ignore the fact that the defendant also took the stand at trial and admitted the conduct." Petition at i (emphasis added). That question is overbroad and takes a position never advanced by Mr. Lujan, the district court, the court of appeals, or *Harrison v. United States*, 392 U.S. 219 (1968). Rather, as *Harrison* unequivocally states, the pivotal issue in determining whether the defendant's trial testimony can be used against him in these circumstances is whether the defendant's trial testimony was induced or impelled by the unlawful admission of the confession. *Harrison*, 392 U.S. at 223. "The question is not whether the petitioner made a knowing decision to testify, but why. If he did so 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*.

Thus, under *Harrison*, a reviewing court must disregard the defendant's trial

testimony ***only when*** the defendant's testimony was impelled by the admission of the confession. Mr. Lujan has never asserted that this Court has established that a reviewing court must always "ignore" a defendant's trial testimony in performing a harmless error analysis after a confession was found to have been wrongly admitted.

This distinction is critical. The state court assumed and both the district court and the court of appeals found that Mr. Lujan's trial testimony was impelled by the erroneous admission of his confession. App. 16a, 52a n.10, 121a. Petitioner has not challenged this finding in his petition for certiorari. In his direct appeal, Mr. Lujan argued that his testimony was the product of his inadmissible confession. App. 221a. Accordingly, the state court assumed that Mr. Lujan testified in response to the denial of his motion to suppress in deciding whether to consider his trial testimony in its harmless error analysis. App. 221a. Mr. Lujan subsequently submitted declarations in his state habeas proceeding and in the federal district court supporting his assertion. In those declarations, Mr. Lujan's trial attorney and his trial attorney's law clerk stated that Mr. Lujan was advised by counsel and had agreed that he would not testify at his trial if his statements were suppressed because, without the confession, the prosecution had no evidence of premeditation and deliberation and no evidence of lying-in-wait. They explained that when the trial court denied the motion to suppress, Mr. Lujan felt he had to testify to explain the details of the offense and the circumstances of his confession. SER 213-214.

Petitioner did not challenge those declarations in the state court or in the district court. App. 52a n.10, 121a. The court of appeals noted that Petitioner never

provided any evidence disputing that Mr. Lujan testified only because his confession was not suppressed. Accordingly, that court presumed "that the unlawful admission of [Mr. Lujan's] out of court confession impelled his trial testimony." App. 16a n.4.

Petitioner ignores this factual finding of compulsion even though it is the critical reason why *Harrison* controls this case. Instead, Petitioner states that Mr. Lujan "chose to take the stand and repeat his confession to the jury" (petition at 13), and describes Mr. Lujan's decision to testify as "voluntary" and "fully counseled" (petition at 17, 18, 19). By obscuring the fact that Mr. Lujan's testimony was impelled, compelled, induced or necessitated by the wrongful admission of his illegally obtained confession, Petitioner wrongly implies that the court of appeals expanded *Harrison* beyond its limited scope.[7/] That is simply not so.

Thus, the issue presented and addressed in the district court and court of appeals was whether clearly established federal law required that the state court disregard Mr. Lujan's trial testimony in conducting its harmless error analysis *because it was impelled by the erroneous admission of his confession.* As Mr. Lujan explains in Argument II, the answer is yes, as both federal courts correctly found.

[7/] Petitioner suggests that the use of the word "impelled" in *Harrison* somehow conveys that *Harrison* has no constitutional force. Petition at 14-15. Its reasoning is not apparent. Merriam-Webster defines impel as "to urge or drive forward as if by the exertion of strong moral pressure." www.m-w.com. That same dictionary defines compel as "to drive or urge forcefully or irresistibly" and lists the two words as synonyms of each other. *Id.*

II.

THIS COURT SHOULD DENY CERTIORARI BECAUSE *HARRISON V. UNITED STATES*, 392 U.S. 219 (1968), CONSTITUTES CLEARLY ESTABLISHED FEDERAL LAW

A. *Harrison* Controls This Case

As Mr. Lujan explained above, Petitioner is asking this Court to address a question that is too broad and does not apply to the actual issue presented in this case. When phrased correctly, Petitioner's question asks whether this Court has previously addressed whether a court reviewing the harm from the erroneous admission of a confession obtained in violation of *Miranda* can consider the defendant's trial testimony when the defendant testified only because of the erroneous admission of the confession. Certiorari is not necessary because this Court has already answered that question in *Harrison v. United States*, 392 U.S. 219 (1968), where it established an exclusionary rule that bars the use of a defendant's trial testimony as evidence against him if that testimony was offered solely because the prosecution erroneously admitted his illegal confession.

This Court reasoned in *Harrison* that when a defendant testifies only after the prosecution has illegally introduced a wrongfully obtained confession, "the same principle that prohibits the use of confessions so procured also prohibits the use of any testimony impelled thereby—the fruit of the poisonous tree, to invoke a time-worn metaphor." *Id.* at p. 222. The Court referenced a Fourth Amendment

exclusion of evidence case to reiterate: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.*, quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

In recognizing this exclusionary rule, the *Harrison* court cited and favorably discussed *People v. Spencer*, 66 Cal.2d 158 (1967), a case holding that when a defendant takes the stand to mitigate the impact of an extrajudicial confession that was wrongly admitted against him, his testimony cannot be used to render harmless the erroneous admission of the confession. *Harrison*, 392 U.S. at 222 n.7; 223-224 & n.10; 225 n.12 & n.13. Indeed, *Harrison* quoted *Spencer* for exactly this proposition:

> If the improper use of [a] defendant's extrajudicial confession impelled his testimonial admission of guilt, ... we could not, in order to shield the resulting conviction from reversal, separate what he told the jury on the witness stand from what he confessed to the police during interrogation.

Id. at 223-224, quoting *Spencer*, 66 Cal.2d at 164 (ellipses in *Harrison*).

Harrison carved out this exception for impelled testimony because such testimony is still tainted by the initial illegality. In Mr. Lujan's case, the record establishes that the police failed to advise Mr. Lujan that he had a right to appointed counsel before and during his questioning. Because of this omission, Mr.

Lujan's subsequent confession should not have been admitted. The record also establishes --and Petitioner does not contest-- that Mr. Lujan would not have testified had the trial court ruled correctly on his motion to suppress his confession. Thus, Mr. Lujan's impelled relinquishment of his Fifth Amendment right not to incriminate himself was directly attributable to and tainted by the illegally obtained confession and could not, under *Harrison*, be used against him by the state court in its harmless error analysis. The state court, however, in finding the *Miranda* error harmless because Mr. Lujan testified about the same matters covered in his confession, did not mention *Harrison* by name or acknowledge in any manner the holding and reasoning of *Harrison*. As the district court and the court of appeals found, the state court's failure to apply the clearly established law of *Harrison* warranted habeas relief under 28 U.S.C. § 2254 (d). App. 23a, 125a-126a.

B. Petitioner's Arguments About Why *Harrison* Does Not Apply are Unfounded

Petitioner contends that *Harrison* does not apply in this case because *Harrison* "involved only a federal proceeding and established only a supervisory rule." Petition at 11, 14. In this vein, Petitioner further faults the court of appeals for treating *Harrison* as a "broad constitutional holding." Petition at 11-12. Petitioner's arguments are factually and legally incorrect.

First, contrary to Petitioner's argument (petition at 13-14), the *Harrison* decision was rooted in Fifth Amendment principles. Two of the three confessions obtained illegally in *Harrison* had violated *Mallory v. United States*, 354 U.S. 449

(1957), a case recognizing that it was improper to admit a confession obtained after a defendant was not properly arraigned. 392 U.S. at 220, n.2. In *Miranda*, this Court observed that the same Fifth Amendment concerns facing the states in the *Miranda* case were the underpinning of the Federal Rule of Criminal Procedure at issue in *Mallory*. *Miranda v. Arizona*, 384 U.S. 436, 463 (1966). App. 117a-118a n. 13.

As the court of appeals explained:

> *Harrison* looked to constitutional principles and case law to structure an exclusionary rule that would safeguard the Fifth Amendment privilege against compulsory self-incrimination. App. 14a.

The Court's language in *Harrison* was broad: "The question is not whether the petitioner made a knowing decision to testify, but why. If he did so 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." *Harrison*, 392 U.S .at 223. The district court recognized how nonsensical it would be if *Harrison* applied only to confessions not tainted by unconstitutionality:

> It would be anomalous if this exclusionary rule were to apply [to] confessions obtained in violation of federal rules or statutes, but not to confessions obtained in violation of the federal Constitution or prophylactic rules adopted by

the Supreme Court to safeguard constitutional rights. App. 48a-49a.

In the years after *Harrison* was decided, both state courts and federal courts of appeals read *Harrison* as applying in a Fifth Amendment context and applying to the states. *See e.g. United States v. Downing*, 665 F.2d 404, 409 (1st Cir. 1981), citing *Harrison*, 392 U.S. at 219 ("The Court has held that a confession induced by the introduction into evidence of prior confessions obtained in violation of the Fifth Amendment must be suppressed under the exclusionary rule"); *State v. Ayers*, 433 A.2d 356, 362 (Me. 1981) ("Under *Harrison* [ ], [the defendant's] in-court testimony may not be taken into account against her if it was in fact "fruit of the poisonous tree," as having been testimony she was "impelled" to give because of the erroneous admission in evidence of the out-of-court confession by her that had been illegally procured"); *Smith v. Estelle*, 527 F.2d 430, 433 (5th Cir. 1976), citing *Harrison*, 392 U.S. at 222-223 ("If [a defendant] would not have taken the stand but for the admission of his unlawful pre-trial confession, ... then his trial testimony was tainted thereby and cannot be considered as independent evidence of guilt for purposes of applying the harmless error rule"); *Randall v. Estelle*, 492 F.2d 118, 121 (5th Cir. 1974) ("There is no indication that *Harrison* was merely an exercise of the Court's supervisory powers, rather than a constitutionally based holding").

If there was any doubt that *Harrison* meant what it said, this Court reaffirmed the exclusionary rule holding of *Harrison* in *Oregon v. Elstad*, 470 U.S.

298, 316-317 (1985):

> 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 v. United States* 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed.2d 1047 (1968), precludes use of that testimony on retrial.

This quote from *Elstad* is a clear statement from a majority of this Court about the holding of *Harrison*, a view wholly consistent with the language of *Harrison* itself and with the rulings of both the magistrate judge, the district court judge, and the court of appeals in Mr. Lujan's case. Petitioner attempts to avoid *Elstad's* reaffirmation of *Harrison* by describing the quote as "dicta" and arguing that it is, therefore, not "clearly established Federal law." Petition at 17. Petitioner has missed the point. *Harrison* is the clearly established law that the state court failed to apply in this case. *Elstad* simply confirms this. Surely this Court did not include the discussion of *Harrison* in *Elstad* with the intent that it be ignored by future courts.[8/]

[8/] Petitioner also suggests that *Elstad* demonstrates that *Harrison* does not apply to Mr. Lujan's situation. Petition at 17-19. A review of *Elstad* shows that it actually supports that *Harrison* controls this case. Elstad made an incriminating statement after he was arrested and briefly questioned in his living room without having been given *Miranda* advisements. 470 U.S. at 300-301. At the police station about an hour later, Elstad was mirandized, waived his rights, and provided a full oral and written confession. *Id.* at 301. Elstad later moved to suppress his confession because of his earlier statement. This Court opined that a suspect's ignorance about whether

Not surprisingly, after *Elstad*, both the state and federal courts have continued to view *Harrison* as setting forth a Fifth Amendment exclusionary rule applicable only in the specific situation found in this case --where the admission of the illegal confession impelled the defendant's trial testimony:

- *Littlejohn v. Trammell* , 704 F.3d 817, 849 (10th Cir. 2013) ("By its terms, *Harrison* is applicable only where a defendant's testimony is impelled by the improper use of his own unconstitutionally obtained confessions in violation of the Fifth Amendment");
- *State v. Lemoine*, 827 N.W.2d 589, 599 (Wisc. 2013) ("In *Harrison* [ ] , the United States Supreme Court found that when statements later determined to be inadmissible are used at trial and the defendant takes the stand and testifies, there must be a determination of whether the defendant's testimony at trial was impelled by the admission of the illegally obtained statements in violation of the Fifth Amendment");
- *Rogers v. State*, 844 So.2d 728, 734 (Fla. 2003) ("*Harrison* has limited application to the unique circumstances wherein a defendant is forced

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his earlier statement would be used against him did not render a subsequent confession involuntary. 470 U.S. at 316. Thus, Elstad's lack of knowledge about whether his statement in his living room would be used against him did not render his subsequent police station confession involuntary. Mr. Lujan, on the other hand, knew at the time he elected to testify that his confession had already been heard by the jury. That element of certainty created the compulsion for him to testify and is the reason why *Harrison* is applicable to Mr. Lujan's case and was not applicable to Elstad. Thus, the ultimate ruling in *Elstad* --that Elstad's police station confession was admissible– has no bearing on Mr. Lujan's case.

to waive his privilege to rebut a confession that is improperly admitted");

- *State v. McGinnis*, 64 P.3d 1123, 1128 (Or. 2003) ("*Elstad* makes clear that the rule of *Harrison* is limited to those circumstances in which a defendant is compelled to testify at trial as a result of the Fifth Amendment violation that occurs when an illegally obtained confession is used against that defendant at trial");
- *United States v. Pelullo*, 173 F.3d 131, 136 (3rd Cir. 1999) ("We believe the Court in *Harrison* mandated what is essentially an exclusionary rule inquiry where there appears to be a link between a constitutional violation and a defendant's subsequent decision to take the stand");
- *State v. Hoeplinger,* 537 A.2d 1010, 1018 (Conn. 1988) ("The dictates of *Harrison* [ ], as approved in *Oregon v. Elstad*, [ ], provide that both the defendant's statement obtained in violation of *Miranda* and his impelled trial testimony should have been suppressed");
- *United States v. Baker*, 850 F.2d 1365, 1370 (9th Cir. 1988) ("[I]n *Harrison*, the Court recognized an exception to the general rule; when the prosecution introduces an inadmissible confession at trial and thereby compels the defendant to testify in rebuttal, use of the defendant's testimony at a later proceeding is barred").

This sampling of cases lays to rest Petitioner's argument that a constitutional

grounding for the "*Harrison* exclusionary rule" is "too obscure" to constitute "clearly established Federal law" binding on the states. Petition at 15. Indeed, against the weight of this evidence, Petitioner cites only two cases in support of its position.[9/] Petition at 21, discussing *Motes v. United States*, 178 U.S. 458 (1900) and *State v. McDaniel*, 164 S.E.2d 469 (N.C. 1968). A review of those two cases, however, demonstrates that those cases fall outside the scope of *Harrison* and are markedly different than Mr. Lujan's case. First, in *Motes*, a case predating *Harrison* by 68 years, this Court found that the trial court erred in admitting the preliminary hearing testimony of an absent witness (a former co-defendant) who had provided incriminating evidence against the other defendants in a multi-defendant trial involving a conspiracy to commit murder. 178 U.S. at 467. Because the witness' absence from trial was a result of prosecution negligence, the Court found a Sixth Amendment violation and reversed the convictions of all the defendants except for one defendant who had testified at trial. *Id.* at 471-474. The testifying defendant had admitted his involvement in the murder but said that only he and the absent witness were involved, not the other defendants. *Id.* at 474-475. The Court found that defendant was not harmed by the improperly admitted testimony of the absent witness because the defendant's own testimony was enough to convict him. *Id.* at

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[9/] Petitioner notes that this Court has not relied upon *Harrison* to find error in any other case. Petition at 15. That is not surprising. *Harrison* has a limited and straightforward application. In fact, Petitioner has not cited a case where this Court has considered a defendant's trial testimony in a harmless error analysis following a finding of *Miranda* error.

475-476.

Significantly, the *Motes* opinion does not say that the testifying defendant testified only because the former co-defendant's preliminary hearing testimony was erroneously admitted. To the contrary, the opinion suggests that the defendant testified to exculpate the other defendants, one of whom shared the witness' last name and was, undoubtably, a relative. Because there was no suggestion that the erroneous admission of the witness' preliminary hearing testimony compelled the defendant to testify, the *Motes* case did not implicate the fruit of the poisonous tree doctrine. Thus, there is no tension between *Motes*, which does not discuss why the defendant testified, and *Harrison*, which stressed the importance of ***why*** the defendant testified. Mr. Lujan, like Harrison, testified ***because*** his confession was wrongly admitted. *Harrison* controls Mr. Lujan's case, and *Motes* is irrelevant.

In *McDaniel*, the other case upon which Petitioner relies, the Supreme Court of North Carolina reexamined the case on remand from this Court after an earlier opinion in the case. Following the filing of a petition for certiorari from the earlier *McDaniel* decision, this Court vacated the judgment and remanded the case for further consideration in light of *Harrison. McDaniel v. North Carolina*, 392 U.S. 665 (1968). This remand in a state case seriously undercuts Petitioner's contention that *Harrison* was simply an exercise of this Court's supervisory power over the federal courts and had no broader reach, including no application to state court proceedings. Certainly if this Court meant *Harrison* to have such limited application, it would not

have remanded *McDaniel*, a state case, for reconsideration in light of *Harrison* that very same term.

Moreover, the facts of *McDaniel* dictated a different result than in *Harrison*. In the earlier *McDaniel* opinion, the court had found three errors --admitting hearsay from the victim that the defendant had stabbed him, admitting the defendant's inculpatory statements made to the police because the proper procedures were not filed, and admitting the knife found as a result of the defendant's interrogation without *Miranda* warnings having been given. *McDaniel*, 164 S.E.2d at 470. The court, however, found the errors harmless because the defendant testified that he intentionally stabbed the victim with the knife in question and then later told the police where the knife was located. *Id*. On remand, after noting it was bound by *Harrison*, the court explained why its case was different than *Harrison*. In *McDaniel*, the defendant testified to "precisely the same facts" conveyed by the erroneous evidence, the properly admitted evidence was sufficient for the jury to find the defendant guilty even without his testimony, and neither the defendant nor his counsel ever intimated that the defendant testified only because he was induced to do so by the improperly admitted evidence. *Id.* at 471-475.

In contrast, the record in this case establishes that Mr. Lujan testified at trial solely because he lost his motion to suppress his confession and felt he had to testify to explain what he said. *See* Argument I, above. In addition, unlike in *McDaniel*, the properly admitted evidence in Mr. Lujan's case was not sufficient to support a first

degree murder conviction or the special circumstance of lying-in-wait. App. 13a, 70a-80a, 126a-133a. The evidence against Mr. Lujan apart from his confession and trial testimony was slim. Although Mr. Lujan had been pursuing his estranged wife and threatening her in the weeks leading up to her death, there was no forensic evidence and no eyewitness evidence tying Mr. Lujan to the deaths. The only other evidence linking Mr. Lujan to the murders was Mr. Lujan's statement to his brother that he thought he had gotten into a fight with his wife and hurt her. Given the paucity of other evidence, there is no doubt that the erroneous admission of Mr. Lujan's confession and its subsequent compelling of Mr. Lujan's testimony had a substantial and injurious effect or influence on the jury's first degree murder with special circumstances convictions. *Brecht v. Abrahamson*, 507 U.S. 619, 637–638 (1993).

C. By Failing to Apply the *Harrison* Exclusionary Rule in a Situation Where *Harrison* Applied, The State Court's Ruling was Contrary To Clearly Established Federal Law From This Court

Petitioner cites liberally to this Court's recent decision in *White v. Woodall*, 134 S.Ct. 1697 (2014), to argue that the judgment of the court of appeals in this case is so out of step with the law under 28 U.S.C. § 2254(d) that this Court must grant certiorari and correct the lower court. Petition at 11, 12, 13, 17, 20, 21. Petitioner ignores, however, that Mr. Lujan's case represents a straightforward application of the holding of *Harrison*: When a defendant is impelled to testify at trial because of the erroneous admission of an illegally obtained confession, then that impelled testimony cannot be used against the defendant.

This is not a case where the state court identified the correct rule but applied it in an objectively unreasonable manner. Nor is this a case where the federal court inappropriately extended a holding of this Court to a new situation. Rather, this is a case where the state court failed to identify and apply the correct rule. App. 7a, 13a, 23a, 49a, 52a, 115a, 126a. This Court has said: "A state court's decision is "contrary to" our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'" *Mitchell v. Esparza*, 540 U.S. 12, 15 (2003), quoting *Williams v. Taylor*, 529 U.S. 362, 405–406 (2000).

Here, the rule established in *Harrison* dictated a different result than the one reached by the state court. In addition, *Harrison* specifically addressed the circumstances present in Mr. Lujan's case --a defendant's testimony that was impelled by the wrongful admission of a confession was improperly used to determine if the admission of the confession was prejudicial. *Harrison*, 392 U.S. at 223-224, discussing *Spencer*, 66 Cal.2d at 164. Even though analysis under 28 U.S.C. § 2254(d)(1) does not require an "identical factual pattern before a legal rule must apply," the situations in Mr. Lujan's case, *Harrison*, and *Spencer* are analogous. *Woodall*, 134 S.Ct. at 1706, quoting *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007).

The state court ran afoul of 28 U.S.C. § 2254(d)(1) by failing to apply a rule "squarely established" by this Court's holding in *Harrison* to the facts of this case. *Id.*, citing *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009). Any "fair-minded jurist"

who considers *Harrison* would understand its application to the facts of this case. *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 786 (2011). The state court failed to consider and apply *Harrison* which led to it reaching the wrong result. The district court and the court of appeals considered *Harrison* and reached the correct result. There is nothing further for this Court to review.

III.

THIS COURT SHOULD DENY CERTIORARI BECAUSE BOTH THE DISTRICT COURT AND THE COURT OF APPEAL DEFERRED RULING ON ONE ISSUE UPON WHICH PETITIONER RELIES --THAT MR. LUJAN'S CONFESSION WAS OTHERWISE VOLUNTARY AND UNCOERCED

Petitioner states several times in his petition that Mr. Lujan's confession was "uncoerced" (petition at 11, 19), "voluntary (petition at 20), and a "technical *Miranda* error" (petition at 20). Those characterizations are not only not supported by the record, but Mr. Lujan argued in both state and federal court that in addition to not being given all of his *Miranda* rights, his confession was involuntary. No court has yet ruled on that issue.

The state court of appeal erroneously stated in its opinion that there was "no contention nor evidence" that Mr. Lujan's confession was involuntary. App. 230a. In the district court's Final Report and Recommendation, the court described the state court's factual error:

The court of appeal's conclusion that [Mr. Lujan] had not challenged the voluntariness of the confession is not supported by the record. [Mr. Lujan] did, in fact, raise this issue on direct appeal. [Citation.] He also raised the voluntariness issue in a concurrently filed petition for writ of habeas corpus before the court of appeal. [Citation.] Moreover, he litigated the voluntariness of the confession during pretrial proceedings, and elicited testimony from Detective Rodriguez on this issue during an evidentiary hearing. [Citation.] [Mr. Lujan] also raised the voluntariness issue in his petition for review, and specifically noted that the court of appeal had ignored his argument that the confession was involuntary. [Citation.]

Respondent concedes the issue was raised before the California Court of Appeal, and was fully exhausted on direct appeal. [Citation.] She suggests the court of appeal's statement should be interpreted as a finding that the argument presented on appeal was insubstantial. [Citation.] Such an interpretation, however, is not consistent with the clear language in the court of appeal's opinion, indicating that in its view, the issue was not raised at all.

> The court of appeal's conclusion that it could consider [Mr. Lujan's] trial testimony rested on an objectively unreasonable determination that [Mr. Lujan] had failed to challenge the voluntariness of the confession. Nevertheless, this does not appear to provide an alternate basis for federal habeas relief under § 2254(d). App. 116a-117a.[10/]

The district court acknowledged that Mr. Lujan separately argued in that court that his confession was not voluntary because he invoked his right to counsel yet was subjected to further interrogation, he was sleep deprived, and he was subjected to abusive, degrading, and threatening interrogation tactics. App. 133a. Nevertheless, the district court declined to rule on Mr. Lujan's voluntariness claim because it had already decided that Mr. Lujan's confession was improperly admitted because of the *Miranda* violation. App. 133a-134a.

After Petitioner appealed the district court's grant of habeas relief, the federal court of appeals granted Mr. Lujan's request for a certificate of appealability on cross-appeal on two issues, including whether Mr. Lujan's confession was involuntary. Mr. Lujan argued in the court of appeals that his confession was involuntary and requested that the court either rule on the merits or remand to the district court for a ruling. Instead, the court of appeals agreed with the district court

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[10/] Petitioner quotes the state court's findings that Mr. Lujan never argued his confession was involuntary but fails to mention that the federal court found the state court's conclusion was not supported by the record. Petition at 6-7.

that it need not resolve that issue: "Having provided Petitioner with federal habeas relief pursuant to 28 § U.S.C. 2254(d) that removes the taint of the improperly admitted confession and the testimony thereby impelled, an inquiry into the voluntariness of Petitioner's confession is neither appropriate nor necessary at this point." App. 33a.

Thus, to the extent the state court made a finding as to voluntariness, that finding was factually incorrect and, as the district court recounted, is rebutted by the state record. App. 116a-117a. Further, and more importantly, to the extent that any of Petitioner's arguments are premised on Mr. Lujan's confession actually having been voluntary or uncoerced, this Court cannot consider that premise because that issue has yet to be ruled on by the lower federal courts. For example, Petitioner argues that *Elstad* controls this case and explains that *Elstad* distinguished between a "technical *Miranda* error" and "coerced confessions." Petition at 18. The still unresolved issue of whether Mr. Lujan's confession was coerced in addition to having being obtained in violation of *Miranda* renders this Court unable to fully analyze Petitioner's argument because potential critical factual and legal findings have yet to be made.

CONCLUSION

Petitioner has not cited any compelling reason why this Court should grant certiorari. Petitioner has not demonstrated a circuit split or a split with a highest state court. Likewise, Petitioner has not shown that the thorough and well-reasoned court of appeals decision, which cites liberally to the thorough and well-reasoned

district court decision, is a grave departure "from the accepted and usual course of judicial proceedings." In the final analysis, Petitioner has presented this Court with a broad "question presented" that does not address the narrow focus of this case and has urged this Court to grant certiorari merely because it is unhappy with the results below. App. 20-21. Petitioner's concerns, of course, will be addressed through the criminal justice system. The court of appeals decision affords the State an opportunity either to resentence Mr. Lujan or to retry him at a trial that comports with the Constitution.

In sum, this case falls squarely within the proper bounds of analysis under 28 U.S.C. § 2254(d)(1) and does not present any compelling basis for this Court's consideration. For all of these reasons, this Court should deny certiorari.

Dated: September _____, 2014

Respectfully submitted,

_____
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action.

My business address is 3115 Foothill Blvd., # M-172, La Crescenta, CA 91214.

On September ____, 2014, I served the foregoing documents described as:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS
and
BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on all interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Keith H. Borjon
Deputy Attorney General
300 S Spring St
Los Angeles CA 90013-1230

with first-class postage thereon fully prepaid to be placed in the United States mail at Nyack, New York.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September _____, 2014, at Nyack, New York.

_____
TRACY J. DRESSNER