No.

In the Supreme Court of the United States

C. A. TERHUNE, *Petitioner,*

v.

JEROME ALVIN ANDERSON, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

EDMUND G. BROWN JR.
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
MICHAEL P. FARRELL
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy State Solicitor General
RACHELLE A. NEWCOMB
Deputy Attorney General
STEPHEN G. HERNDON
Supervising Deputy Attorney General
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-0350
Fax: (916) 324-2960
Counsel for Petitioner

QUESTIONS PRESENTED

The state courts ruled that Anderson's remark during his interrogation about a murder—"I plead the Fifth"—did not invoke his *Miranda* v. *Arizona* right to silence; the state appellate court explained that, in context, Anderson might have meant only to cut off questioning about his own prior drug use. The state courts also ruled that, although Anderson later invoked his *Miranda* right to counsel, his subsequent confession remained admissible because the police stopped questioning him and resumed it only after Anderson re-initiated the conversation and again waived his rights. But the Ninth Circuit granted habeas corpus relief, holding that the state courts' decisions to admit the confession were "unreasonable" under 28 U.S.C. § 2254(d).

The Questions Presented are:

1. Whether it was "unreasonable" for the police and the state courts to conclude that, under the circumstances, saying "I plead the fifth" did not constitute an invocation of Anderson's right to remain silent.

2. Whether the state courts' decision to admit the confession was reasonable under *Oregon* v. *Elstad* and *Edwards* v. *Arizona*, even if the police had violated *Miranda* by continuing the interrogation after Anderson earlier invoked his right to silence, because the confession was obtained only after the police later stopped the interrogation when Anderson asked for counsel and resumed it only after Anderson reinitiated it and stated that he wanted to talk without counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PETITION FOR WRIT OF CERTIORARI

C. A. Terhune, Director of the California Department of Corrections, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENT BELOW

The en banc opinion of the Ninth Circuit Court of Appeals is reported at *Anderson* v. *Terhune*, 516 F.3d 781 (9th Cir. 2008), and is set out in Appendix A. The earlier Ninth Circuit panel opinion is unreported and is set out at App. B. The unreported order of the District Court is set out at App. C. The decision of the California Court of Appeal is unreported and set out at App. D. The unreported order of the Shasta County Superior Court is set out at App. E.

STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment granting habeas corpus relief on February 15, 2008. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fifth Amendment of the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself."

Section § 2254(d) of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides that federal habeas corpus relief "shall not be granted" on a claim adjudicated on the merits in state court unless that adjudication:

"(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 OF THE CASE

1. The Crime And Investigation

On July 9, 1997, the police discovered by the side of a road the body of Robert Clark, shot four times in the head. A methamphetamine pipe lay next to Clark's arm. On July 12, 1997, the police arrested Anderson, an acquaintance of Clark's involved in a confrontation with him on the day of the homicide, for a parole violation. During a tape-recorded interrogation of Anderson by Officer O'Connor, following Anderson's waiver of his *Miranda* rights, there occurred the following colloquy:

> [O'Connor:] "You act like you're cryin' like a baby, an', you can't cry for someone that was no good . . . an' you killed him for a good reason.
>
> [Anderson:] "No, way. I – You know what, I don't even wanna talk about this no more. We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong.
>
> [O'Connor:] "Right now, you show your remorse.
>
> [Anderson:] "[Voice raised] I have nothin' to worry about, nothin' to hide. That's why I show no remorse. Nothin' to worry about, nothin' to hide. He was my friend, an' there's no way I would do it. No way I would do it.
>
> [O'Connor:] "Were you high that day?
>
> [Anderson:] "No, sir. I – probably was later on. Yes.
>
> [O'Connor:] "Did you have any dope with you that . . .

that day?
[Anderson:] "No, sir.
[O'Connor:] "No, dope at all? What do you smoke with?
[Anderson:] "I smoke with my . . . my fingers.
[O'Connor:] "When you smoke your dope what do you do with that? How do you smoke that?
[Anderson:] "You smoke it with pipes and stuff like that.
[O'Connor:] "Okay. What kind of pipes?
[Anderson:] "Lines.
[O'Connor:] "What kind of pipes?
[Anderson:] "N'ah . . . I would – I –
[O'Connor:] "Well, what kind of pipes?
[Anderson:] "Uh! I'm through with this. I'm through. I wanna be taken in custody, with my parole . . . [.]
[O'Connor:] "Well, you already are. I wanna know what kinda pipes you have?
[Anderson:] "I plead the fifth.
[O'Connor:] "Plead the fifth. What's that?
[Anderson:] "No, you guys are wrong. You guys are wrong. You guys have—I've tried to tell you everything I know. As far as I know, you guys are lying, uh, making things up, extenuating and that's not right. It's not right. [Door opens/Closes]
[O'Connor:] "We're not makin' anything up.
[Anderson:] "Sir, sure you are.
[O'Connor:] "What are we makin' up?
[Anderson:] "You're tellin' me that I didn't have tears in my eyes.
[O'Connor:] "Yeah.
[Anderson:] "You're tellin' me, okay, that, uh, uh, Abe said I kilt (sic) him. That's a lie."

(App. D, at 9-11.)

After a brief exchange, the officer asked Anderson if he

wanted to see a videotape of his friend Abe Santos, another suspect, who said that Anderson had shot Clark. Anderson said yes and asked, "Can we do it right now?" They went into an adjoining interview room where eventually the tape was played.

After viewing the videotape of Santos's confession implicating him in the murder, Anderson stated, "I'd like to have an attorney present." There followed a discussion between Anderson and Officers O'Connor, Bishop, and McDannold:

[Bishop:] "Okey [sic].
[Clemens:] "OK fine.
[Anderson:] "Sorry, man.
[Bishop:] "No, don't apologize.
[O'Connor:] "Okay, 7-12-97, about 22:45, ten forty-five, uh, p.m. on Saturday. This is it. [Tape goes off/on]
[Anderson:] "Lied . . .
[McDannold:] "Yeah, yeah . . .
[Anderson:] "Abe did it.
[McDannold:] "Because we don't what the fuck happened. (sic) 'Cause you didn't tell us.
[Anderson:] "Abe, too?
[McDannold:] Probably both of ya. We don't . . . y-you know, you're askin' us questions, that we really can't answer. Because we don't know the answers to 'em. So far, Romey, you know as well as I do, these guys have not lied to you, not one bit. They've told ya the truth, right from the get-go. Now, you're askin' questions that we can't answer. We're not judges, and we're not jurors. We cannot answer that. An' there's a couple of reasons that we can't answer that. Murder, damn sure, his life. But there's a bunch of degrees of murder.
[Anderson:] "Right.

[McDannold:] "An' we don't know your side of the story. And now, we can't talk to you.
[Anderson:] "Oh, man, I want to talk to you. I need, I need to talk to you Harry [Bishop].
[McDannold:] Listen, we can't . . .
[Anderson:] "I do man.
[McDannold:] . . . talk to you because you said you wanted an attorney. We can't talk to you.
[Anderson:] "Well, I can talk. Yeah, I mean, can't I?
[McDannold:] "What do you have to . . .
[Bishop:] "Do you want to talk [to] us?
[Anderson:] "I want to talk to you man why I just [Sigh]
[Clemens:] "What'd ya wanna do?
[Anderson:] "I'm scared, man. I'm scared.
[McDannold:] "You should be. You're lookin, right down the barrel of the rest of your life. An' you should be scared. That's what it's all about Romey. But we're tryin' to give you the chance to talk to us. An' tell us your side of the story an' you say, you want an attorney. We can't talk to you.
[Clemens:] "He said, he wants to talk to Harry. So can Harry and [Inaudible . . .] talk? . . .
[McDannold:] "No. Not until he says, I want to talk to him without an attorney. The law says we can't talk to you. Until you say, 'Okay, I was just kiddin, I don't want an attorney.' That's the only way it can happen, Romey. You're the one that said, that you wanted an attorney. An' the law tells us we can't talk to you from that point on. We cannot ask you any questions. We're gonna play by the rules.
[Anderson:] "Okay, I – I was just jokin'. I don't wanna talk – or I want to talk to Harry, the bishop. You know the thing about the attorney, is . . . is wrong or whatever, I don't need an attorney. Is that fair to

say so guys [sic] don't get busted outta your jobs.
[McDannold:] "Okay. Let me ask you . . . i-is the tape runnin'?
[O'Connor:] "Yes.
[McDannold:] "Turn the tape on and say into the tape, that you've changed you're [sic] mind.
[Anderson:] "I've changed my mine [sic]. It's . . . it's . . .
[McDannold:] "Say into the tape, you don't want an attorney.
[Anderson] "I don't want an attorney, I've changed my mind.
[McDannold:] "Okay, have . . . have you been promised anything?
[Anderson:] "No, I'd just like to get a cigarette.
[McDannold:] "Okay.
[Anderson:] "Can I get a cigarette though?
[McDannold:] "Wait a minute, okay? We're gonna clean this thing up, I'm . . . You want – You're tellin, us you want to do somethin'. An' I'm tryin' to make it legal for you to do it. Okay?
[Anderson:] "Okay.
[McDannold:] "Has anybody in this room . . .
[Anderson:] "No one's promised me . . . paid me . . . uh
[McDannold:] "Listen . . . listen, listen to me, okay? Let me do this and do it right okay?
[Anderson:] "All right, I apologize.
[McDannold:] "Okay. Has anybody in this room promised you anything?
[Anderson:] "No, sir.
[McDannold:] "Has anybody in this room threatened you for anything at all?
[Anderson:] "No, sir.
[McDannold:] "Do you feel intimidated by anybody in this room?

[Anderson:] "No, sir.
[McDannold:] "Do you feel that – Has anybody in this room, told you that if you didn't talk with us, or you did talk to us, that somethin' good was gonna happen?
[Anderson:] "No, sir.
[McDannold:] "Okay, so you've made the decision, that you want to talk to us and you do not want an attorney, is that correct?
[Anderson:] "[Pause] Yes, sir.
[McDannold:] "That's absolutely correct, now you kinda hesitated a little bit . . .
[Anderson:] "Well . . .
[McDannold:] "You don't want an attorney . . .
[Anderson:] "Yes, sir.
[McDannold:] ". . . right here in this room . . .
[Anderson:] "Yes, sir.
[McDannold:] ". . . right now, is that correct?
[Anderson:] "Yes, sir."

(App. D, at 14-19.)

After expressly waiving his rights to silence and counsel, Anderson confessed that he had killed Clark.

2. State Court Proceedings

The state charged Anderson with first-degree murder. Prior to his trial, Anderson objected to the admission of the evidence of his confession on various grounds, including that the police had violated *Miranda* by continuing to question him after he assertedly had invoked his right to silence by stating, "I plead the Fifth," and by continuing to question him after he later invoked his right to counsel.

The state trial judge listened to the audiotape of the interrogation, reviewed the transcript, and heard the testimony of the two interrogating officers about what had occurred when the tape recorder was turned off. Detective O'Connor testified that the recorder was turned off very

briefly, that the police did not speak to Anderson while it was off, but that Anderson instead questioned the officers about what Abe Santos had said when he confessed. Lieutenant McDannold testified that he could not recall what Anderson asked, but that he believed Anderson might have asked about the punishment he could expect to receive. According the lieutenant, the first word from Anderson's mouth, when the tape recorder was turned on again, was "lied." Detective O'Connor testified that he believed Anderson had said Abe had "lied."

The judge denied the motion to suppress the confession. On the question of whether Anderson had invoked his right to silence by saying that he "plead the fifth," the judge explained:

> Given the totality of the circumstances in this matter, the court concludes that while the defendant articulated words that could, in the isolation [sic], be viewed as an invocation of his right to remain silent, the defendant did not intend to terminate the interview. The interrogating officer did not continue or reinitiate the interview by posing the question: "Plead the fifth. What's that?" The question can reasonably be characterized as a request for clarification or confirmation that the defendant wished to assert his right to remain silent, and nothing more. What followed is important to a determination of the question. Specifically, the defendant launched off on a discourse and, ultimately, engaged in a debate without making any reference to an invocation of the right to remain silent. It was the defendant, not the interrogators, who continued the discussion. Accordingly, while words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived the right to remain silent by what followed.

(App. E, at 17-18.)

On the ultimate question of whether evidence of Anderson's confession was admissible despite the fact that at one point in the interrogation he had invoked his right to counsel, the trial court found as follows:

> In this instance, from the transcript, the tapes, and the testimony of witnesses McDannold and O'Connor, the court concludes that there was an express invocation, the invocation was honored and the defendant, himself, immediately continued voluntarily to discuss the matter and engaged the officers in conversation. The defendant made it clear that he wanted to speak with the interviewers despite his invocation of the right to counsel and on following pages of the transcript it was explained to him that if he wished to do so, he would have to expressly state on the tape that he did not want an attorney, which he did. There appeared from the audio tape and the transcript nothing coercive about the dialog associated with a clear waiver of counsel following the invocation. He was not threatened with harm or promised a benefit. (These entries are contained generally on [CT 599-602].) Accordingly, and pursuant to the referenced authority, the court concludes that the confession is not inadmissible in the light of the invocation because an immediate knowing and intelligent waiver followed based upon an initiation of further communication by the defendant.

(App. E, at 14.)

A jury found Anderson guilty as charged. The judge sentenced him to prison for life without parole. (App. D, at 1.)

On appeal, Anderson renewed his *Miranda* claim and also complained that his confession should have been suppressed as involuntary under the Fourteenth

Amendment. The California Court of Appeal affirmed the conviction. It reasoned that Anderson's "I plead the fifth" comment was ambiguous in context because it could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all, and that the officer had then asked Anderson a legitimate clarifying question. The appellate court further determined that the police had honored Anderson's later request for counsel, and had then properly resumed questioning only after Anderson had reinitiated the conversation with the officers, expressed his desire to discuss the criminal investigation, and unambiguously waived his rights to silence and counsel again. The court also found his confession was made voluntarily. (App. D, at 8-26.) The California Supreme Court denied Anderson's request for further review.

3. Federal Proceedings

In November 2000, Anderson filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California. He again alleged that he had been denied his constitutional right to remain silent when interrogating officers ignored both his request to remain silent and his demand for an attorney and instead kept interrogating him. He further claimed that he was denied due process by the introduction of his involuntary confession into evidence.

The federal district court reviewed these claims under AEDPA. It ruled that Anderson's statement, "I plead the fifth," spoken in the context of a discussion about drug use, was not a clear indication that he wanted to terminate the interview. That phrase, the district court explained, usually refers to the refusal to respond to a question on the witness stand, not to the desire to terminate an interrogation. The court found reasonable the state courts'

determinations that Anderson's statement was unclear and that the officer's subsequent remarks were intended to clarify. The district court also determined that Anderson's subsequent conduct belied any intent to terminate the interview. Furthermore, the court found Anderson's confession was voluntary. Consequently, the state court decisions were neither "contrary to" nor an "unreasonable" application of "clearly established federal law" under AEDPA. (App. C, at 11-48.)

In a 2-to-1 published decision, a Ninth Circuit panel affirmed. The majority concluded that the state courts' findings, that the invocation was ambiguous and that the officer legitimately sought to clarify, were reasonable determinations of fact. It further concluded that the state courts had not unreasonably applied clearly established federal law. The majority explained that this Court has not held that "certain magic words automatically bring all questioning to a halt—regardless of the circumstances...." The majority also agreed that Anderson had reinitiated the conversation after requesting a lawyer and then had validly waived his rights before confessing. Finally, the court found that the record did not support a finding of an involuntary confession under the Fourteenth Amendment. (App. B.)

At Anderson's request, the Ninth Circuit reheard the matter en banc and reversed. (App. A.) The majority held that the state courts' conclusion, that the "I plead the fifth" statement was ambiguous, was an "unreasonable" application of *Miranda* under 28 U.S.C. § 2254(d)(1). The majority also concluded that, in deeming Anderson's statement ambiguous and in characterizing the officer's response as a legitimate clarifying question, the state courts had engaged in "unreasonable" determinations of the facts under § 2254(d)(2). In the majority's opinion, the officer was mocking and provoking Anderson. The

majority also found that the state court decisions were "contrary to" this Court's precedent of *Smith* v. *Illinois*, 469 U.S. 91 (1984); this conclusion was based on the majority's view that the state courts had relied on Anderson's *subsequent* statements to find ambiguity or a waiver. Last, the majority stated that, although this Court has not declared how long a break in questioning must last before a suspect might be said to reinitiate the conversation and waive his rights, here there was no break. Accordingly, the majority stated that it need not reach the issue of whether Anderson validly waived his rights to silence and counsel before confessing by later reinitiating conversation after requesting a lawyer.

In a concurring opinion, Judges Silverman and Rawlinson explained that it was not unreasonable to find the invocation ambiguous. But they nonetheless concluded that it was unreasonable for the state courts to find that the officer in fact was trying to clarify. (App. A, at 27-30.)

Judge Bea, in a concurring and dissenting opinion, agreed that Anderson had unambiguously invoked his right to silence and that the officer's attempt at clarification was disingenuous. However, he concluded that there was no error in admitting Anderson's confession because, when Anderson later asked for an attorney, the questioning stopped and did not resume until Anderson had reinitiated the conversation and waived his rights. (App. A, at 30-39.)

In dissent, Judges Tallman and Callahan concluded that it was not an unreasonable application of Supreme Court precedent for the state court to find the "plead the fifth" statement ambiguous in context, nor an unreasonable determination of the facts to find that the officer had sought to clarify. In their view, there was no clearly established Supreme Court precedent on how the right to silence is to be invoked. (App. A, at 39-48.)

REASONS FOR GRANTING THE WRIT

This Court's resolution of the questions presented in this case is important, both to vindicate the habeas corpus reforms Congress enacted in AEDPA and to provide practical guidance to law-enforcement officers.

In granting habeas corpus relief, the Ninth Circuit found that Anderson's statement was an unambiguous invocation of his right to silence that required no clarification. But this Court has never declared that any set phrase necessarily constitutes an invocation of the right to silence, regardless of the circumstances. Nor is there "clearly established" law from this Court concerning what officers may do when faced with a suspect's ambiguous statement about whether he desires to assert his right to silence. Although this Court in *Miranda* v. *Arizona*, 384 U.S. 436, 473-74 (1966), recognized that questioning must stop if a suspect indicates "in any manner" that he wants to cut off questioning, this Court has not further clarified what is required. Further, this Court has recognized that a comparable invocation of the right to counsel must be "unambiguous," and that, in cases of ambiguous responses, the police may ask the suspect questions to clarify his position. See *Davis* v. *United States*, 512 U.S. 452, 461 (1994). AEDPA broadly leaves the resolution of such a question, inextricably linked to the context of an interrogation, to the state court rather than to the federal habeas court. The Ninth Circuit failed to give the state court the benefit of the doubt under AEDPA – the kind of failure that this Court has recognized as presenting an important question meriting certiorari review. *Rice* v. *Collins*, 546 U.S. 333, 339 (2006); *Yarborough* v. *Alvarado*, 541 U.S. 652, 664 (2004); *Yarborough* v. *Gentry*, 540 U.S. 1, 6 (2003).

The second question presented in this case—what an officer should do when a suspect repeatedly begs to

continue the interview, even though there might have been an antecedent *Miranda* violation—also implicates AEDPA concerns and the practical concerns of police officers nationwide. This Court has held that a failure-to-advise *Miranda* violation resulting in an incriminating statement does not taint a subsequent un-coerced admission made by a defendant after proper *Miranda* waivers. *Oregon* v. *Elstad*, 470 U.S. 298, 309 (1985). And it has held that, even after a suspect invokes his right to counsel, the police may renew questioning if the suspect later re-initiates it and waives his rights. *Edwards* v. *Arizona*, 451 U.S. 477, 484-85 (1981). But this Court has not squarely addressed whether, if the police violate a suspect's right to silence by continuing an interrogation, but later stop the interview when he invokes his right to counsel, the suspect's subsequent confession may then be admissible if he reinitiates the conversation and waives his rights. In the absence of "clearly established Federal law" from this Court dictating that the confession must be suppressed, the grant of habeas relief by the Ninth Circuit was improper under AEDPA. And, absent a bright-line rule characteristic of this Court's *Miranda* jurisprudence, the police officer will be left to wonder whether he yet may be precluded from interrogating a suspect who stands before him insisting on discussing the crime.

I. THE NINTH CIRCUIT DECISION, REJECTING THE STATE-COURTS' CONCLUSION ON WHETHER ANDERSON HAD INVOKED HIS RIGHT TO SILENCE, FAILED TO ABIDE BY AEDPA'S DEFERENCE STANDARD

In this case, the state courts reasonably determined that there was more than one way to understand Anderson's "I plead the fifth" statement. After Anderson suggested that he did not want to talk about the killing, Detective

O'Connor began questioning him about his drug use, including the use of pipes. It was in response to these questions about drug pipes that Anderson stated, "I plead the fifth." He might have meant that he wanted to terminate the interrogation completely, or he might have only wanted to stop talking about his drug use. Indeed, because both the right to counsel and the right to silence are encompassed in a suspect's *Miranda* rights, Anderson conceivably might have meant to invoke one but not the other.[1/]

The police officer needed to know what Anderson meant. The context —that is, the circumstances leading up to Anderson's statement, *Smith* v. *Illinois*, 469 U.S. 91 (1984)—made the statement uncertain and open to the officer's attempt to clarify. See *Perez* v. *State*, 283 Ga. 196, 657 S.E.2d 846, 849 (Ga. 2008) (equivocal-invocation finding supported by officer's testimony that "the way that our discussion was going, I didn't take it as he wanted to stop the interrogat[ion]. He just made a statement, ["]I guess

---

1. The Ninth Circuit en banc majority glossed over the change in topic, focusing instead on what it said were two earlier attempts by Anderson to stop the police questioning. (App. A, at 17.) However, Anderson did not argue in the California Court of Appeal, the California Supreme Court, or in the lower federal courts that these statements were independent invocations of his rights. It is too late for him to do so now. See 28 U.S.C. § 2254(b); *Gray* v. *Netherland*, 518 U.S. 152, 161-162, 165 (1996); *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982). Moreover, in briefing he explicitly conceded the first statement ("We can talk about it later or whatever. I don't want to talk about this no more. That's wrong. That's wrong[,]") was ambiguous. Anderson was not generally invoking his right to silence—he was attempting to limit the subject matter ("this") and the timing of the discussion ("later"). See *People* v. *Musselwhite*, 17 Cal.4th 1216, 1240, 954 P.2d 475 (1998). And his second statement ("I'm through with this. I'm through. I wanna be taken into custody, with my parole. . . ") was not an express invocation either; rather, Anderson was expressing disgust with the line of questioning. See *Haviland* v. *State*, 677 N.E.2d 509 (Ind. 1997).

I can stop the interrogat[ion."] I told him, well, you need to listen to everything I'm telling you, and then he went, ["]uh-huh["] . . . He made a statement. He wasn't asking me a question, . . . "). See also *United States* v. *Acosta*, 363 F.3d 1141, 1154-55 (11th Cir. 2004) (denying *Miranda* claim because multiple, "'reasonable, competing interpretations'" are "'the very definition of ambiguity'") (internal citations omitted). To find out what Anderson meant, the officer asked "Plead the fifth. What's that?" Anderson did not answer the question; instead, he began to accuse the officers of being wrong and of lying. But the officer should be given the opportunity to ask.

Only by ignoring the topic-shifting context of the questioning could the Ninth Circuit hold that Anderson's statement was an unequivocal invocation of his right to remain silent. The en banc majority's conclusion failed to engage the state courts' reasonable rulings—that, although such words in isolation could be viewed as an invocation, the fact that the topic of the interrogation had shifted to Anderson's drug use made those words ambiguous enough to allow the officer to seek clarification.

The state courts' rulings did not unreasonably apply clearly established Supreme Court precedent; nor did they involve unreasonable determinations of fact. At bottom, the Ninth Circuit en banc majority found that "I plead the fifth" is a magical phrase that always in any context means a person is invoking his right to remain silent. But this Court's jurisprudence rejects such a "ritualistic formula or talismanic phrase" approach. See *Emspak* v. *United States*, 349 U.S. 190, 194 (1955). An invocation is clear and unambiguous if it is "free from doubt" concerning the suspect's intent to invoke his right to remain silent. See *Quinn* v. *United States*, 349 U.S. 155, 164 (1955) (defendant's references to the Fifth Amendment in testifying before a Congressional subcommittee were

sufficient to invoke self-incrimination privilege). Anderson's statement was not a clear invocation of his right to remain silent under *Miranda* because it did not clearly indicate that he wanted to stop talking about everything.

It is true that this Court in *Miranda* stated that, if a suspect indicates in any manner during questioning that he wishes to remain silent, the interrogation must cease. *Miranda*, 384 U.S. at 473-74. But *Miranda* did not further explicate what is required from the suspect. Since then, this Court in *Davis*, 512 U.S. at 459, ruled that a comparable invocation of the *Miranda* right to counsel is effective only if unambiguous. Under *Davis*, officers have no obligation to stop questioning a suspect who makes an ambiguous or equivocal invocation of his right to counsel. 512 U.S. at 461. *Davis* recognized, further, that "when a suspect makes an ambiguous statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants [to invoke the privilege]." *Id.* at 461-62. See also *Connecticut* v. *Barrett*, 479 U.S. 523, 529 (1987) (right to counsel invocation requires interpretation only when words as understood by ordinary people are ambiguous). Lower federal courts, *e.g.*, *Bui* v. *DiPaolo*, 170 F.3d 232, 239 (1st Cir. 1999), though not the Ninth Circuit, *Evans* v. *Demosthenes*, 98 F.3d 1174, 1176 (9th Cir. 1996), have applied *Davis* principles to ambiguous invocations of the right to silence.

Given this legal landscape, the state courts' ruling that Anderson's statement was ambiguous in context and not an invocation of his right to silence was not an unreasonable application of "clearly established Federal law" under AEDPA. Even if incorrect, it did not run afoul of § 2254(d); therefore, habeas corpus relief remains unavailable to Anderson. See *Brown* v. *Payton*, 544 U.S. 133, 143 (2005) (denying AEDPA relief because "[e]ven on the assumption that [the state court's] conclusion was incorrect, it was not

unreasonable"); *Williams* v. *Taylor*, 529 U.S. 362, 410 (2000). This Court has not held its *Davis* principles inapplicable to right-to-silence cases, and it was not "unreasonable" or "contrary to" clearly-established law for the state courts to do so. See *Carey* v. *Musladin*, 549 U.S. 70, 75 (2006).

Further, the state courts' findings on ambiguity and on the testifying officers' credibility were reasonable determinations of fact in light of the evidence presented in the state court proceeding. See 28 U.S.C. § 2254(d)(2). The state trial court reviewed both the transcript and audiotape of the interrogation. The trial court heard, and could observe the demeanor of, one of the interrogating officers when he testified that "he believed that in saying, 'I plead the fifth[,]' [Anderson] was simply indicating an unwillingness to discuss the details of his drug use, and not a desire to terminate the interrogation." (App. D, at 13.) See *Perez*, 657 S.E.2d at 849. In contrast, Anderson never testified that he meant to assert his right to silence or to counsel by stating "I plead the fifth." Reasonable minds might disagree about these factual findings; but that does not allow the federal habeas corpus court to supersede the state trial court's determination. *Rice*, 546 U.S. at 341.

II. ANDERSON'S CONFESSION WAS ADMISSIBLE, DESPITE ANY EARLIER *MIRANDA* VIOLATION, BECAUSE THE POLICE OBTAINED THE CONFESSION ONLY AFTER HONORING HIS REQUEST FOR COUNSEL AND ONLY AFTER HE REINITIATED THE INTERVIEW AND WAIVED HIS RIGHTS

Regardless whether the police violated Anderson's *Miranda* rights by continuing their interrogation of him after he said "I plead the fifth," the Ninth Circuit erred in

granting relief on the assumption that the earlier error rendered the later confession inadmissible.

Anderson did not confess after he said "I plead the fifth." Instead, the interview continued for some time until Anderson was shown the videotape of his accomplice Santos. At that point, he requested counsel. The officers honored this request. They stopped the interrogation and turned off the tape recorder. Anderson, though, quickly changed his mind and restarted the conversation. Detective McDannold, however, underscored that the officers were honoring his invocation by ceasing the interrogation. He stated the officers could no longer talk to Anderson "because you said you wanted an attorney. We can't talk to you." Several times Anderson begged to speak with the officers, saying, "Oh man, I want to talk with you. I need, I need to talk to you . . . ." Four times the officers advised him that they could not talk with him, and five times Anderson insisted that he wanted to talk. The officers asked clarifying questions to determine if Anderson was making an intelligent and voluntary waiver of his rights to silence and counsel. Anderson affirmed that he had changed his mind and did not want an attorney, that he had not been promised anything, and that he did not feel threatened or intimidated. Anderson explicitly acknowledged that he wished to continue speaking with the officers about the crime and that he wished to do so without counsel. Only later did he confess to killing Clark.

The Ninth Circuit, however, skipped over the question of Anderson's second waiver, concluding merely that everything subsequent to what the en banc court considered to be the initial "plead the fifth" *Miranda* violation was therefore inadmissible. The Ninth Circuit's scrupulosity is excessive. And it raises an important question this Court has not addressed: If officers fail to honor a suspect's right to silence and continue

interrogating him, but later stop the interview when he requests counsel, may the interrogation resume if the suspect reinitiates it and validly waives his *Miranda* rights again? Nothing in this Court's *Miranda* jurisprudence "clearly establishes," for purposes of deferential habeas corpus review under § 2254(d), that an earlier violation taints such a post-resumption confession. To the contrary, this Court's *Miranda* jurisprudence indicates that, under a totality of the circumstances test, the later confession remains admissible.

It is true that courts must exclude any confession elicited by questioning conducted, without interruption, after the suspect has indicated a desire to stand on his right to remain silent. *Michigan* v. *Mosley*, 423 U.S. 96, 104-06 (1975) (admissibility of statements obtained after suspect decides to remain silent depends on whether his "right to cut off questioning" was "scrupulously honored"). Courts must also exclude a confession elicited by questioning initiated by the police after a suspect has expressed his desire to have counsel present. *Edwards*, 451 U.S. at 484-85; cf., *Mosley*, 423 U.S. at 105-06 (If a suspect invokes his right to remain silent, as opposed to his right to counsel, there is no absolute prohibition against officers reinitiating the interrogation under certain circumstances).

A suspect, though, may reinitiate questioning and validly waive his rights following his invocation of his right to counsel. *Edwards*, 451 U.S. at 484-85. In *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1045-46 (1983), this Court held that the statement, "Well, what is going to happen to me now?"—made by the suspect after the interrogation had stopped because he had requested counsel—"evinced a willingness and a desire for a generalized discussion about the investigation." Since there had been no violation of the *Edwards* rule, the question was whether the suspect then made a knowing and intelligent waiver of his right to

counsel. *Id.* at 1046 (citations omitted). This determination depended on the totality of the circumstances, "'including the background, experience, and conduct of the accused.'" *Id.* at 1046 (citation omitted). Under this test—which the state courts reasonably applied and which the Ninth Circuit eschewed—Anderson's confession was admissible despite his invocation of the right to counsel.

The result remains the same even if the police earlier *Miranda* by continuing to interrogate Anderson after he said he "plead the fifth." In *Oregon* v. *Elstad*, 470 U.S. at 300, this Court addressed whether an initial failure to give *Miranda* warnings tainted a later confession made after a suspect had been fully advised of and had waived his *Miranda* rights. The Court held that the Fifth Amendment did not require suppression of the confession, made after *Miranda* warnings and a valid waiver, just because police had earlier obtained a voluntary but unwarned admission from the suspect. The Court allowed admission of suspect's properly waived statement even though it had been preceded, and arguably induced, by an earlier inculpatory statement taken without *Miranda* warnings. As Justice O'Connor wrote for the Court:

> If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned

> admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

Oregon v. Elstad, 470 U.S. at 309.

In contrast, in *Missouri* v. *Seibert*, 542 U.S. 600 (2004), the officer deliberately failed to give the *Miranda* warnings, interrogated Seibert and obtained a confession, and then provided the *Miranda* warnings and used Seibert's prior statement to urge her to repeat her prior confession. A plurality of the Court affirmed the validity of *Elstad's* "no taint" rule and rejected the application of the "fruit of the poisonous tree" doctrine to Seibert's second, *Miranda*-compliant statement. *Id.* at 612. (Plur. opn. of Souter, J.). However, the plurality opinion concluded that the *Miranda* warnings were ineffective and, therefore, the statements were inadmissible. *Id.* at 616-17.

Here, the Ninth Circuit en banc majority asserted that Anderson's confession was inadmissible because there had been no "cessation" in the questioning after he invoked his *Miranda* rights. "Because the interrogation was continuous to that point," the en banc court stated, "we need not determine whether Anderson waived his right to counsel after viewing a videotape of his alleged accomplice nor do we need to address his coercion claim." (App. A, at 26.) To say that there was "no cessation" and that the interrogation "was continuous" misreads the record. The interrogation—the questioning by the officers—stopped the second Anderson said he would like to have an attorney present. Both officers acknowledged Anderson's request. Anderson then apologized, and an officer said, "No, don't apologize." An officer noted the time and date and said, "This is it." The tape recorder was then turned off. At this point, Anderson understood he was entitled to a lawyer and that he was entitled not to answer further questions.

But then Anderson spoke. Or, as the *Miranda* Court put it, Anderson chose "between silence and speech." *Miranda*, 384 U.S. at 469. The state courts reasonably determined, as in *Bradshaw*, that Anderson "initiated a communication with the interrogators indicating a willingness to discuss the criminal investigation." Furthermore, the state courts reasonably determined that Anderson "clearly waived his *Miranda* rights before making any admission or confession." *Colorado* v. *Spring*, 479 U.S. 564, 573 (1987) (voluntary *Miranda* waiver requires uncoerced choice plus requisite level of understanding). As in *Elstad*, any prior *Miranda* violation in this case did not taint Anderson's eventual un-coerced confession.

As Judge Bea noted, this Court has never specified how long any break in interrogation must last before a suspect can validly waive a properly-invoked *Miranda* right. (App. A, at 39.) It certainly has not done so in a context like this one, where the officers tell the suspect that they are indeed halting the interrogation because the suspect had invoked his right to counsel. The break was not long in *Bradshaw* because there the suspect reinitiated the conversation while he was being transported from the police station to the jail soon after he had requested an attorney. *Oregon* v. *Bradshaw*, 462 U.S. at 1042. Here, Judge Bea correctly concluded:

> There is no clearly established federal law mandating a particular amount of time the break in the interrogation must last. We have recently been reminded that where there is no such clearly established federal law, as determined by the Supreme Court of the United States, we are not allowed to invent such law. See *Carey* v. *Musladin*, 127 S. Ct. 649, 653 (2006)[.] Hence, the relevant fact here is that Anderson re-initiated the conversation,

not the duration of the break in the conversation. (App. A, at 39.)

In sum, even if the officers failed to honor Anderson's right to silence earlier in the interview, they properly halted the interrogation later when he requested counsel. Since Anderson's right to counsel was honored and the interrogation stopped, albeit briefly, there was a break in the stream of events. Anderson's subsequent choice to waive his rights was a free one; it was not produced by any earlier violation of his right to remain silent. Indeed, he was again reminded of his right to remain silent and he waived it.

The state court decision was not contrary to, nor an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1). Indeed, it was correct. Certiorari is warranted to redress the AEDPA violation as well as to provide law enforcement and courts nationwide with clear guidance on whether the police in circumstance such as this must turn down a suspect's request to speak with them.

CONCLUSION

The petition for certiorari should be granted.

Dated: May 15, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of California

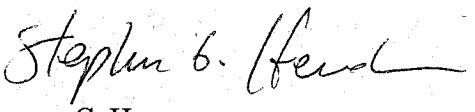
DANE R. GILLETTE
Chief Assistant Attorney General

MANUEL M. MEDEIROS
State Solicitor General

MICHAEL P. FARRELL
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

RACHELLE A. NEWCOMB
Deputy Attorney General



STEPHEN G. HERNDON
Supervising Deputy Attorney General
Counsel for Petitioner

30458092
SA2004FA0057