

No. 04-17237

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON,

Petitioner and Appellant,

vs.

C.A. TERHUNE, Warden,

Respondent and Appellee.

**PETITION FOR PANEL REHEARING
AND FOR REHEARING EN BANC**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
The Honorable William B. Shubb, United States District Judge
Docket No. 00-002494 WBS

Panel Opinion Filed:	November 8, 2006
Author of Opinion:	Hogan, D.J. (United States District Judge for the District of Oregon, sitting by designation)
Concurring Judge:	Kozinski, J.
Dissenting Judge:	McKeown, J.

(Attorney Listing on Inside Cover)

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PETITION FOR REHEARING AND
REHEARING EN BANC

Petitioner-Appellant Anderson respectfully petitions this Court for panel rehearing and rehearing en banc.

Rehearing or rehearing en banc is warranted because the panel's November 8, 2006 published opinion, *Anderson v. Terhune*, No. 04-17237 (9th Cir. Nov. 8, 2006) (Exhibit A hereto), conflicts with precedents of the United States Supreme Court and this Court and involves an exceptionally important question: whether, notwithstanding an express invocation of the right to remain silent during custodial interrogation, a state court reasonably concluded that a subsequent statement is rendered admissible by supposed ambiguities created during ongoing questioning.

INTRODUCTION

Over a well-reasoned dissent, a majority of the panel affirmed the district court's denial of habeas corpus relief for Mr. Anderson, concluding that the state appellate court was not unreasonable in finding that Petitioner had not invoked his Fifth Amendment right to remain silent, and therefore his later statement was admissible. *See* Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"), 28 U.S.C. § 2254(d)(1)-(2); slip op. at 18398.

However, as dissenting Judge McKeown explained, under clearly established federal law as held by the United States Supreme Court, it was unreasonable to admit Petitioner's statement. Mr. Anderson repeatedly and unambiguously invoked his right to remain silent. The police were required to end the interrogation immediately, and any subsequent statements were inadmissible. The admission of the statements was not harmless error. Thus, as explained below, rehearing or rehearing en banc should be granted, and the case remanded with instructions to issue a writ of habeas corpus.

BACKGROUND

During custodial interrogation, Mr. Anderson indicated plainly and unequivocally that he wished to exercise his right to remain silent, as *Miranda v. Arizona*, 384 U.S. 436 (1966), entitles him to do. A detective interrogated Petitioner about a homicide in which drugs may have been used just before the shooting – a drug pipe was found next to the decedent's body. When questioned about his alleged motive for the killing, Mr. Anderson said "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." Slip op. at 18392. Rather than honor the Petitioner's invocation of his right to remain silent, the interrogating detective instead honed in on the incriminating drug pipes. Mr. Anderson said, "I'm through with this. I'm through. I wanna be taken into custody, with my parole" *Id.* at 18393

(omission in original). The interrogator cut off his invocation of his right to remain silent, saying, “[Y]ou already are. I wanna know what kind of pipes you have?” Mr. Anderson replied, “I plead the fifth.” Rather than curtail questioning, the officer challenged Mr. Anderson’s assertion of his constitutional privilege: “Plead the fifth. What’s that?” and the interrogation continued. *Id.* After further questioning, the officer obtained a statement that was used against Mr. Anderson at trial. In affirming Petitioner’s conviction, the state appellate court held that Mr. Anderson had not unequivocally invoked his right to remain silent, and his statement therefore was properly admitted. *Id.* at 18395.

Although Judge Hogan, of the United States District Court for the District of Oregon and writing for the Ninth Circuit panel majority, conceded that “[i]f this case were not before us on 28 U.S.C. § 2254 habeas review, we might be writing a very different opinion,” slip op. at 18396, the majority held that the state court’s interpretation of clearly established Supreme Court precedent was not unreasonable. In the view of the majority, even if the “interpretation might not be the most plausible one,” *id.*, the state court “reasonably determined that these statements by Mr. Anderson were ambiguous as to his invocation of the right to remain silent. The panel deemed reasonable the contention that the interrogating detective’s comment “Plead the fifth. What’s that?” was a clarifying question

under *Miranda* and its progeny, and therefore affirmed the denial of Mr.

Anderson's habeas petition. *Id.*

Judge McKeown would have granted the writ, observing that “[i]t is rare to see such a pristine invocation of the Fifth Amendment and extraordinary to see such flagrant disregard of the right to remain silent.” *Id.* at 18400. Judge McKeown rejected the majority's claim that “there was some ambiguity in Anderson's unequivocal invocation of the Fifth Amendment such that clarifying questions were permitted.” *Id.* Applying AEDPA standards, she deemed unreasonable the state court's conclusion that Petitioner's statements were “ambiguous in context.” *Id.* at 18404. She also disputed its finding that Mr. Anderson waived his right insofar as “the officers ignored Anderson's unequivocal invocation of the Fifth Amendment [and] their questioning caused him to keep talking.” *Id.* at 18408. Judge McKeown closed by noting that “[t]he prejudice from Anderson's confession cannot be soft pedaled, and the error was not harmless.” *Id.* at 18409.

REASONS FOR GRANTING THE PETITION

The panel's decision – countenancing officers' and the state court's wholesale disregard of numerous on-point Supreme Court decisions protecting the right to remain silent – hobbles the federal court's ability to regulate unreasonable state court denials of federal constitutional rights. It eviscerates the *Miranda*

protections afforded suspects in custody and will encourage interrogators to ignore an accused's requests that questioning stop or that counsel be provided.

Furthermore, it implicates the public reputation of this Court, for it squarely conflicts with decisions of the United States Supreme Court and this Court that aimed to rein in improperly aggressive police tactics like those at issue in this case.

See Missouri v. Seibert, 542 U.S. 600, 610 & n.2 (2004) (plurality); *Dickerson v. United States*, 530 U.S. 428, 444 (2000); *Miranda*, 384 U.S. at 455; *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1048 & n.11 (9th Cir. 1999), *rehearing en banc denied*, *cert. denied sub nom. Butts v. McNally*, 530 U.S. 1261 (2000). The state court decision was an unreasonable application of settled, "bright line," United States Supreme Court precedent, and it resulted in an unreasonable finding of fact, contrary to the state court evidentiary record. To cure these defects, and to reaffirm the vitality in this Circuit of the right to remain silent as developed in the four decades since *Miranda*, the petition should be granted.

**PETITIONER UNEQUIVOCALLY INVOKED THE RIGHT TO
REMAIN SILENT AND FAILURE TO SUPPRESS HIS SUBSEQUENT
STATEMENT VIOLATES CLEARLY ESTABLISHED LAW**

Petitioner invoked his right to remain silent at least three times during the questioning, principally in stating “I plead the fifth.”¹ Yet his interrogator never missed a beat in steamrolling through each invocation. In the process, the police – and the courts that validated such tactics – disregarded numerous fundamental principles of *Miranda* and its progeny. Even if these individual, unequivocal invocations were not enough, any reasonable officer hearing them all collectively in such rapid-fire succession would understand that Petitioner had unequivocally invoked his right to remain silent.

At each step of the crescendo of invocation – “I don’t want to talk about this no more.”; “I’m through with this. I’m through. I wanna be taken into custody, with my parole . . .”; “I plead the fifth.” – the interrogator systematically defied Supreme Court holdings requiring that “the interrogation must cease.”

¹ Any confusion whether Mr. Anderson argued there were multiple invocations, *see slip op.* at 18396 n.1, could have been cleared up at oral argument, which was cancelled shortly before its scheduled date. Petitioner’s counsel also could have directed the Court to the binding Supreme Court authorities, discussed *infra*, which the panel majority failed to heed. For these reasons, this petition should be granted so that Petitioner may argue his case to this Court.

Moreover, the question of what statements constituted unequivocal invocations of the right to silence was before the Court as a result both of Petitioner’s briefing and
(continued...)

Miranda, 384 U.S. at 474. Instead, the detective shirked his duty to “scrupulously honor[]” Mr. Anderson’s “right to cut off questioning.” *Michigan v. Mosley*, 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 474, 479). Petitioner was denied his right, exercised through “his option to terminate questioning,” *id.* (emphasis added), of “control[ling] the time at which questioning occurs, the subjects discussed, and the duration of the interrogation.” *Id.* at 103-04.

Here the interrogators did not even pause for a moment to honor Mr. Anderson’s demand that his constitutional right to remain silent be heeded. Once Petitioner invoked this right, “the interrogation must cease.” *Id.* at 100 (quoting *Miranda*, 384 U.S. at 474). Instead, the officer dodged the invocation by pressing forward with questioning, cutting off Mr. Anderson’s demand that questioning cease, and playing dumb. This strategy defied Supreme Court precedent, and any state court holding to the contrary is unreasonable under the AEDPA standard. *See Miranda*, 384 U.S. at 461 (invocation of right to remain silent is construed liberally).

Any reasonable officer would have understood that Mr. Anderson was invoking his right to remain silent. *See Davis v. United States*, 512 U.S. 452, 459

(...continued)
of Judge McKeown’s dissent, which clearly considered multiple invocations. Slip op. at 18401.

(1994) (adopting objectively reasonable officer standard for evaluating *Miranda* invocations). In a scant two pages of the interrogation transcript, Petitioner invoked that right three times. *See* ER 13-14 (Exhibit C hereto). Each invocation was sufficient in and of itself to indicate to an objectively reasonable officer that Mr. Anderson wanted the interrogation to stop. And taken together, they show an accused who unequivocally sought to end the interrogation. *Quinn v. United States*, 349 U.S. 155, 162 (1955) (“It is agreed by all that a claim of the privilege does not require any special combination of words.”).

As the dissent correctly states, “[d]espite clear and repeated invocations of his right to remain silent, the officers continued to question Anderson about the murder.” Slip op. at 18401. After each of Mr. Anderson’s invocations, the detective challenged Mr. Anderson or simply shifted to another subject related to the homicide, defying settled law. After the first invocation, “I don’t want to talk about this no more,” the officer did not even purport to ask a clarifying question, but instead goaded Petitioner on, challenging the authenticity of his feelings about his friend’s death. ER 13.

After the second, “I’m through with this. I’m through. I wanna be taken in custody, with my parole . . . ,” the officer again did not pretend to seek clarification, but rather interrupted the invocation and irrelevantly challenged Mr. Anderson’s contention that he was not yet in custody, even though any reasonable

officer would have understood that Petitioner wanted to be taken to a holding cell and for the interrogation to end. *Id.* at 14.

Yet the officer persisted, again asking Mr. Anderson about methamphetamine pipes of the sort found beside the decedent. Without hesitation, Petitioner's next words were his third invocation, "I plead the fifth." *Id.* Once more, the officer feigned ignorance by rhetorically asking: "Plead the Fifth - what's that?" The state court's and panel's crediting of such purported, subjective ignorance and supposed request for "clarification" distorts *Miranda*. It disregards the limited circumstances in which the Supreme Court has endorsed the use of clarifying questions. *See Davis*, 512 U.S. at 461 (such questions proper where "suspect makes an ambiguous or equivocal statement"). Moreover, it defies the rule that an objective officer standard applies, *id.* at 459 – as no reasonable officer would have failed to recognize Petitioner's invocation of his Fifth Amendment rights. The term "plead the Fifth" is part of the American vernacular, and "it is difficult to imagine how much more clearly a layperson like [Petitioner] could have expressed his desire to remain silent." *Arnold v. Runnels*, 421 F.3d 859, 866 (9th Cir. 2005); *see Delaware v. Van Arsdall*, 475 U.S. 673, 706 n.13 (1986) (Stevens, J., dissenting) ("People do not claim rights against self-incrimination, they 'take the fifth'") (citations omitted); *Carter v. United States*, 417 F.2d 384, 385 n.1 (9th Cir. 1969) ("Plead the Fifth" well understood as an invocation of the

privilege against self-incrimination). It does not matter, as the panel majority erroneously suggested, what the interrogating detective may or may not have understood. Slip op. at 18395-96. For this reason, the state court's decision is directly contrary to the Supreme Court's holding in *Davis*.

Further, by its own plain terms, the detective's question was not designed to elicit clarification about what Petitioner did not want to talk about, as the state court concluded in deeming Mr. Anderson's statement ambiguous. Rather the question was simply intended to keep the accused talking so that he would say something incriminating, an approach that the Supreme Court repudiated in *Smith v. Illinois*, 469 U.S. 91, 98-99 (1984). See also *Rhode Island v. Innis*, 446 U.S. 291, 302-03 (1980) (suggesting that, after an accused has invoked his *Miranda* rights, police comments "reasonably likely" to elicit an incriminating response may constitute compulsion). Therefore responses to the valid invocation cannot be used retrospectively to imply that such invocation was ambiguous. In *Smith*, the Court held that "looking to [defendant's] *subsequent* responses to continued police questioning" in order to construe *Miranda* invocations as ambiguous is "unprecedented and untenable." 469 U.S. at 97 (emphasis in original). A court may look to the events "leading up to" the invocation but if nothing "leading up to" the invocation makes it ambiguous, "all questioning must cease." *Id.* at 98.

Mr. Anderson's third invocation – like the other two – was unequivocal and directed to the homicide, and the police were required to stop the questioning immediately. As observed by the dissent, the interrogating detective's subsequent question was not designed to clarify Mr. Anderson's desires to invoke his rights (*e.g.*, “are you telling us you wish to remain silent now?”); instead, “what's that?” can only be construed as a refusal to recognize and honor the invocation. Slip op. at 18405-06; *see also id.* at 18405 (“This effort to keep the conversation going was almost comical.”).

Moreover, even if the three invocations were individually insufficient, the rapid combination of all three made it clear so that any reasonable officer would understand that Anderson unequivocally invoked his right to remain silent. Indeed, the mere words “I have nothing to say” suffice to invoke the right to remain silent. *Arnold*, 421 F.3d at 865.² Thus, the analysis of both the state court and the panel majority, which cherry-picked “context” in order to place Mr. Anderson's invocations in doubt, “defies both common sense and established Supreme Court law.” Slip op. at 18404 (McKeown, J., dissenting).

² In *Arnold* – decided just a year ago – this Court held in an AEDPA case that, where an accused employed clear and unequivocal language to invoke his right to remain silent, subsequent responses during ongoing questioning could not be used to imply a waiver. 421 F.3d at 867. Admission at trial of the interrogation tape was not harmless, notwithstanding substantial other evidence against the defendant. Accordingly, the Court granted conditional habeas corpus relief.

On the contrary, although the detective's best efforts to defy Mr. Anderson's Fifth Amendment invocations necessarily fail, they do accomplish one thing: demonstrating just how far outside *Miranda* the officer was willing to operate, in the process disregarding clear authority from the Supreme Court and this Court designed to protect the accused and prevent such abuses.³ *See Seibert*, 542 U.S. at 611, 613-14, 617 (plurality); *Butts*, 195 F.3d at 1045, 1048. No reasonable state court would countenance such tactics – which manifest clear defiance of constitutional rights – by allowing the introduction of Mr. Anderson's interrogation during the government's case-in-chief.

The panel majority further erred in validating the state court's finding that, if anything, Mr. Anderson only invoked his Fifth Amendment rights selectively as to drug use, not the interrogation in general. Slip op. at 18395. First, assertions of waiver in the *Miranda* context must be given “a broad, rather than a narrow, interpretation” in defendant's favor, which the state appellate court, and the panel majority, failed to do in this case. *See Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

³ Petitioner joins in the arguments of *amicus curiae* National Association of Criminal Defense Attorneys and the Federal and Community Defenders in the Ninth Circuit, where these points are developed more fully.

Second, under Supreme Court law, selective invocation is possible only where the limited scope of such invocation is explicit. *Id.* at 530. Here, the reading of Mr. Anderson's statements as constituting only a limited invocation relies on the state court's finding that his statements were "ambiguous in context." Slip op. at 18395. Even assuming, solely for the sake of argument, some equivocation, the plain fact is that Petitioner did not *explicitly* invoke his right to remain silent only as to his drug use, which in all events was not the object of the interrogation. *See also Arnold*, 421 F.3d at 865 (invocation of the right to remain silent limited only by the terms explicitly stated by an accused).⁴ The state court's approach, embraced by the panel majority, turns *Barrett* on its head, and is directly at odds with the holding of the Supreme Court that only explicit statements can be read as selective waivers. 479 U.S. at 529-30.

Further, the state court's reading of the detective's testimony at the suppression hearing wholly mischaracterizes that testimony in an effort to create a different "context" for the invocation. Based on that testimony, the state court concluded that Mr. Anderson "could have been interpreted as not wanting officers

⁴ Although under AEDPA it is not constitutional error merely to deviate from a precedent of this Court, in contrast to Supreme Court precedent, Ninth Circuit cases "may be persuasive authority for purposes of determining whether a particular state court decision is an 'unreasonable application' of Supreme Court law, and also may help us determine what law is 'clearly established.'" *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000).

to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all.” Slip op. at 18404. However, this speculation was invented out of whole cloth: the state trial court never understood the detective’s testimony as asserting that Petitioner’s invocation was limited to his drug use (*see* transcript of testimony, Exhibit D hereto), and indeed the detective’s testimony itself does not support this conclusion. The detective testified that Mr. Anderson “didn’t want to talk to us about the pipes.” (Ex. D.) Since drug pipes were found adjacent to the murder victim, the officer’s repeated questions about drug pipes (*e.g.*, “I wanna know what kinda pipes you have,” ER 14) plainly sought to link the pipes found at the murder scene with the type of pipes Petitioner may have used.

Petitioner’s invocation, therefore, was clearly intended to encompass anything linked to the murder. Drug use was simply never the operative topic. *See* slip op. at 18402 (“[T]he murder victim was found with a pipe next to him. The entire conversation was about the murder.”) (McKeown, J., dissenting). Thus, the state court committed an unreasonable error of fact in misconstruing the detective’s testimony. As Judge McKeown stated in the dissent, “The state court’s characterization is a fanciful re imagining of the colloquy between Anderson and the police, and under AEDPA, certainly an unreasonable determination of the facts.” Slip op. at 18406. It also erred as a matter of law both by relying on *police* testimony to find a limited invocation of the right to remain silent (as opposed to

the only proper source, express language by the accused), *see Barrett*, 479 U.S. at 530, and by invoking the testimony of the interrogating detective as the basis for the court’s gloss on Mr. Anderson’s statement, rather than considering what an *objective* officer would have understood. *See Davis*, 512 U.S. at 459.

Additionally, the panel majority erred by endorsing the state court’s reliance on Mr. Anderson’s comments made after he “pled the Fifth” in order to conclude retrospectively that he never properly invoked his right to remain silent, *see slip op.* at 18395-96, or, as Judge McKeown characterized this view, that he allegedly waived it just after invoking it. *Id.* at 18408; *cf. Arnold*, 421 F.3d at 867 (“It beggars the imagination to suppose that these responses . . . show that [Petitioner] was waiving the right [to remain silent] he had just invoked.”).

The state appellate court improperly relied on the fruits of the interrogating detective’s badgering to eviscerate Mr. Anderson’s invocation of his right to remain silent or to imply a waiver thereof.⁵ By steamrolling each and every invocation of Mr. Anderson’s right to remain silent, the detective was indeed able “ultimately [to] engage[] [Mr. Anderson] in a debate” on a different topic.

⁵ This flawed analysis precisely reflects the problems identified by the Supreme Court with allowing post-invocation statements to affect the validity of an invocation or a waiver. The Court warned that an accused could be “badger[ed]” or “otherwise w[orn] down” through government “overreaching,” and thereby “be induced to say something casting retrospective doubt on his initial statement” invoking his *Miranda* rights. *Smith*, 469 U.S. at 98-99 & n.8 (citations omitted).

Slip op. at 18395. But the success of this police tactic designed to keep Petitioner talking cannot provide – through “context” or otherwise – a basis for retroactively turning an unambiguous invocation into an ambiguous one.

Thus the state court erred when, in rejecting Petitioner’s Fifth Amendment arguments, it explicitly relied on statements Mr. Anderson made while being goaded on by his interrogator *after* Petitioner’s invocation of his right to remain silent. *See id.* “No authority, and no logic, permits” courts to credit the results of such police defiance of the letter and spirit of *Edwards*’ bright line rule that questioning must cease upon the invocation of one’s Fifth Amendment rights. *See Smith*, 469 U.S. at 99 (citation omitted); *see also Edwards v. Arizona*, 451 U.S. 477, 484 (1981). On the contrary, the state court’s and the panel majority’s reliance on these post-invocation statements as a basis for disregarding Mr. Anderson’s invocation of his right to remain silent was contrary to clearly established Supreme Court law.

Beyond the grave effects on Mr. Anderson’s own trial, the danger of the panel’s ruling lies in how the post hoc latitude granted to these interrogation tactics will be interpreted by police when they engage in future interrogations, and by lower courts which will review the interrogations. *See Dickerson*, 530 U.S. at 443 (noting that “routine police practice” is heavily informed by appellate courts’

Fifth Amendment jurisprudence). *Miranda*'s utility – and success – relies on the existence of clear rules. *See, e.g., id.*; *Davis*, 512 U.S. at 461; *Edwards*, 451 U.S. at 484; *Miranda*, 384 U.S. at 442. The panel's decision, if allowed to stand, will seriously muddy Fifth Amendment law within this Circuit, and will invariably lead to more protracted constitutional litigation similar to this case. Even more importantly, the decision seriously conflicts with the Supreme Court precedents discussed above, as well as this Circuit's own rulings, such as *Arnold*. The case should be reheard to reinstate the relative clarity of procedures and rights that *Miranda* and its progeny were designed to achieve.

The AEDPA is not a bar to the relief Mr. Anderson seeks. “A state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case certainly would qualify as a decision ‘involv[ing] an unreasonable application of . . . clearly established Federal law.’” *Williams v. Taylor*, 529 U.S. 362, 407-08 (2000) (alteration and omission in original). Thus, whether the state court’s decision is viewed through the prism of 28 U.S.C. § 2254(d)(1) or (2), the result is the same: a writ of habeas corpus must issue not only because the state court decision is incorrect, but more importantly, because it is unreasonable, both on the law and the facts. Indeed, if this case does not satisfy the AEDPA standard, it is difficult to imagine one that would.

Finally, the error here was not only unreasonable, it also was not harmless. “A confession is like no other evidence,” and has a ““profound impact”” upon a jury. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991). Accordingly, a “reviewing court [must] exercise extreme caution before determining that the admission of the confession at trial was harmless.” *Id.* Although there was other evidence connecting Petitioner to the homicide, it did not establish his role as a perpetrator or aider and abettor; only his confession did that. Thus, the state courts’ error in admitting Mr. Anderson’s statement had a ““substantial and injurious effect or influence in determining the jury’s verdict.”” *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (citation omitted). The majority erred because it did not order the issuance of a writ of habeas corpus granting that Mr. Anderson could at long last receive a fair trial in which the constitutionally-defective interrogation is not used against him.

No. 04-17237

Before the Honorable Alex Kozinski, M. Margaret McKeown, CJJ, and
Michael R. Hogan, DJ
Panel Opinion filed November 8, 2006

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JEROME ALVIN ANDERSON,)
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Petitioner-Appellant,) D.C. NO. Civ. S 00-002494 WBS
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v.)
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C.A. TERHUNE, Warden,)
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Respondent-Appellee.)
_____)

On Appeal from the United States District Court
for the Eastern District of California

**BRIEF AMICI CURIAE OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS
AND THE FEDERAL AND COMMUNITY DEFENDERS IN THE
NINTH CIRCUIT IN SUPPORT OF MR. ANDERSON'S PETITION
FOR REHEARING**

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel states:

1. The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional Bar Association for the criminal defense bar, with over ten thousand members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

2. The NACDL is not a publicly held company; does not have any parent corporation; does not issue or have any stock; and does not have any financial interest in the outcome of this litigation.

Dated: December 21, 2006

Respectfully submitted,


CHARLES D. WEISSELBERG

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109, 132-39 (1998) 6, 8

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Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 Minn. L. Rev. 397, 461-63 (1999) 6

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON,)	D.C. NO. Civ. S 00-002494 WBS
)	
Petitioner-Appellant,)	BRIEF <i>AMICI CURIAE</i> OF THE
)	NATIONAL ASSOCIATION OF CRIMINAL
v.)	DEFENSE ATTORNEYS AND THE FEDERAL
)	AND COMMUNITY DEFENDERS IN THE
C.A. TERHUNE, Warden,)	NINTH CIRCUIT IN SUPPORT OF MR.
)	ANDERSON'S PETITION FOR REHEARING
Respondent-Appellee.)	
_____)	

I. INTERESTS OF *AMICI CURIAE* AND AUTHORITY TO FILE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders, and law professors. Among NACDL's objectives are to ensure that a citizen's invocation of his privilege against self-incrimination is scrupulously honored.

The Ninth Circuit Federal and Community Public Defenders represent indigent litigants in federal court in the Ninth Circuit pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. These organizations have a unique perspective to offer the Court concerning their clients' invocation of the privilege against self incrimination as that issue is litigated in both habeas and

direct appeal contexts.¹

II. SUMMARY OF ARGUMENT

During custodial interrogation, Mr. Anderson repeatedly said that he wanted to remain silent, a right guaranteed to him under *Miranda v. Arizona*, 384 U.S. 436 (1966). He even said, "I plead the fifth." Rather than honor any of his invocations, the interrogator deftly shifted among topics and challenged Mr. Anderson's express invocation of the Fifth Amendment. Predictably, these tactics succeeded.

The petition for rehearing en banc should be granted. *First*, as set forth in Mr. Anderson's petition and Judge McKeown's dissent, the state court's decision is contrary to and an unreasonable application of several controlling decisions of the United States Supreme Court. *Second*, the officer's tactic was a textbook example of questioning "outside *Miranda*," a practice that flourished in California at the time Mr. Anderson was interrogated. *Third*, the panel's decision, written by a district judge sitting by designation, will encourage further sharp practices, especially when officers seek "implied" rather than "express" waivers of Fifth Amendment rights; thus, the case is exceptionally important.

¹ All parties have consented to the filing of this brief *amici curiae*. See Fed. R. App. P. 29(a).

III. REASONS TO GRANT REHEARING EN BANC

A. The state court's decision is contrary to and unreasonably applies Supreme Court precedent.

Amici agree with Mr. Anderson and Judge McKeown that the state court's decision is contrary to, and unreasonably applies, four Supreme Court opinions, in addition to *Miranda* itself: (a) *Davis v. United States*, 512 U.S. 452, 459 (1994) (whether a suspect has invoked his rights is "an objective inquiry," assessed from the standpoint of "a reasonable officer"); (b) *Michigan v. Mosley*, 423 U.S. 96, 102, 104 (1975) (request to remain silent must be "scrupulously honored," and "[t]o permit the continuation of custodial questioning after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the [suspect's] will"); (c) *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (finding a limited assertion of *Miranda* rights, but only where the suspect's own words provided those limits); and (d) *Smith v. Illinois*, 469 U.S. 91, 100 (1984) ("postrequest responses to further interrogation" cannot cast doubt on initial invocation). None of these cases was cited by the state appellate court, and only *Davis* was addressed by the panel majority in this Court.

Without repeating Petitioner's arguments, *amici* underscore one point. In the context of a custodial interrogation, no

minimally trained police officer could think of the statement, "I plead the fifth" as anything other than an unequivocal and unconditional assertion of the right to remain silent.

Officers in California receive basic training at academies certified by "POST," the California Commission on Peace Officer Standards and Training. The POST-approved curriculum includes workbooks organized around 41 "learning domains" or subjects.² POST's workbooks emphasize the connection between the Fifth Amendment privilege against self-incrimination and *Miranda's* procedures. See Basic Course Workbook Series, Learning Domain 15: Laws of Arrest (2001) ("LD-15") at 1-6 (quoting Fifth Amendment and stating, "Peace officers need to understand the relationship between a person's right against self-incrimination and the *Miranda* decision.")³

Officers are also taught about invocations and waivers of *Miranda* rights. POST's basic training materials acknowledge that "The right to remain silent may be invoked by any words or conduct which reflect an unwillingness to discuss the case." *Id.* at 5-12. In this case, although Mr. Anderson expressly asserted

² See Basic Course Instructional System, available at: <http://www.post.ca.gov/training/store/default.asp> (last visited Dec. 12, 2006).

³ See also *id.* at 5-3 (describing *Miranda's* warnings as relieving inherently compelling pressures, thus protecting the Fifth Amendment privilege); *id.*, Learning Domain 30: Preliminary Investigation (2001), at 3-13 (linking *Miranda* to Fifth Amendment privilege against self-incrimination).

his Fifth Amendment privilege, the state appellate court found that his assertion was limited, meaning that he was supposedly willing to speak about some topics but not others. ER 16. Put another way, Mr. Anderson purportedly waived his *Miranda* rights on the condition he not be asked about topics he did not wish to discuss. Yet POST's basic training materials define a conditional waiver as occurring when a suspect "acknowledges understanding the warnings and is willing to go forward, but places a limitation/qualification on answering questions." LD-15 at 5-10. Consistent with *Barrett*, POST's training materials provide that any limitation or qualification must be articulated by the suspect, rather than be inferred by the officer.

A suspect's invocation is assessed objectively, from the standpoint of a reasonable officer. *Davis*, 512 U.S. at 458-59; see also *United States v. Younger*, 398 F.3d 1179, 1187 (9th Cir. 2005). While he was interrogated in custody, Mr. Anderson said, without limitation or qualification, "I plead the fifth." No reasonable officer who ever pinned on a badge or strapped on a gun could mistake the meaning of that phrase.

B. The officer's conduct in this case should be considered in the context of widespread training of police in California to question suspects after they have invoked their Fifth Amendment rights.

Amici agree with all of the points expressed in Judge McKeown's dissent, save one: regrettably, in our experience, it

is not "extraordinary to see such flagrant disregard of the right to remain silent." Slip op. at 18400.

Mr. Anderson was interrogated in July 1997. At the time, POST, the State Attorney General's Office, various District Attorneys' offices, police departments and other agencies distributed training materials that encouraged officers to continue to question suspects who invoked their Fifth Amendment rights. Police were told that it is permissible (and tactically advantageous) to ignore an invocation to take advantage of the impeachment exception to Miranda's exclusionary rule, and to obtain the fruits of an otherwise inadmissible statement. This practice, widely known as questioning "outside *Miranda*," has been the focus of decisions of this Court and the California Supreme Court,⁴ and has been documented by researchers.⁵ In 2004, the United States Supreme Court took note of this practice and quoted

⁴ See, e.g., *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049-50 (9th Cir. 2000) (officers trained to question "outside *Miranda*" were not entitled to qualified immunity in civil rights action); *People v. Peevy*, 17 Cal. 4th 1184, 1202-05 (1998) (statement taken in deliberate violation of *Miranda*, while admissible for impeachment, results from "illegal" practice and "police misconduct"); *People v. Neal*, 31 Cal. 4th 63, 78-85 (2003) (statement involuntary where an officer deliberately ignored repeated invocations, as he was trained to do).

⁵ See, e.g., Richard A. Leo & Welsh S. White, *Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda*, 84 Minn. L. Rev. 397, 461-63 (1999); Charles D. Weisselberg, *Saving Miranda*, 84 Cornell L. Rev. 109, 132-39 (1998); Charles D. Weisselberg, *In the Stationhouse After Dickerson*, 99 Mich. L. Rev. 1121, 1123-54 (2001).

from an advanced training videotape distributed by POST in 1996 (one year before the interrogation in this case). See *Missouri v. Seibert*, 542 U.S. 600, 611 n.2 (2004) (plurality opinion).

The training videotape quoted in *Seibert* is particularly revealing:

Today we're going to talk again about one of our favorite controversial topics on this program and that is the issue of continuing to question a suspect after they've invoked their *Miranda* rights. . . .

[Since 1988], we . . . on this program, or some of us in this program, have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights . . . to lock them into their story now . . .

Despite the fact that that is the law, despite the fact we've been encouraging you to do this for the last eight years, some judges . . . have taken exception to that and everybody's entitled to their opinion, and certainly judges are entitled to think that "You know, that's just not a good idea." But some judges . . . have gone so far as to . . . prohibit those kinds of statements from coming in even for impeachment purposes. . . .

So what does all this mean? What it means is, our job is getting harder with respect to obtaining information from a suspect after they've invoked their *Miranda* rights. I'm not telling you, "Stop questioning him after that." The law under *Harris v. New York* . . . is what it is . . . and we want to take advantage of that to the extent that we can . . . Somehow, if it can be done, you need to have the suspect to acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights.

So for example, you read him his *Miranda rights*, and he invokes his right to silence. What can you do? You can ask him something like this: "Would it be O.K. if I continue to ask you a few questions about something related or even peripheral to the case?" Get him to acknowledge that it would be O.K. for you to continue

to ask him those questions, or if he invokes his right to silence, you could say, "Lookit, would it be O.K. if I turn the tape recorder off?" . . . If after setting the criteria, he acknowledges a willingness to talk . . ., at least that puts something on the record . . . acknowledging that these additional statements . . . are voluntarily made.⁶

Mr. Anderson was questioned "outside *Miranda*." The officer ignored repeated invocations of the right to remain silent, shifting topics to keep Mr. Anderson talking. Although the trial judge curtailed cross-examination about training, one of the interrogating officers acknowledged that he had received advanced POST training, and that there had been "discussion" of post-invocation questioning.⁷ The panel majority's decision would further encourage this practice. This is an additional reason why the case is exceptionally important, and should be reheard en banc.

⁶ POST, Case Law Today, *Miranda*: Post-Invocation Questioning (broadcast July 11, 1996). A complete transcript is available at: <http://www.cacjweb.org/about/ps12.asp> (last visited Dec. 17, 2006). A catalogue of POST videos about the law, including this one, is available at: http://www.post.ca.gov/training/cptn/pdf/CLT_List.pdf (last visited Dec. 17, 2006).

⁷ RT (pre-trial motions) 218-21. The officer denied "receiving training" on this technique. RT 219. However, he admitted receiving POST training and attending presentations by Devallis Rutledge. RT 218. Mr. Rutledge was a leading "outside *Miranda*" trainer. RT 221. See *Saving Miranda*, 84 Cornell L. Rev. at 133, 135-36, 189-92 (training materials prepared by Mr. Rutledge).

C. Given current practices with respect to implied waivers of Fifth Amendment rights, rehearing en banc is particularly important.

The officers who interrogated Mr. Anderson purportedly obtained an "implied waiver." That is, the officers advised Mr. Anderson of his *Miranda* rights and had him say that he understood them. Then, instead of expressly asking if he agreed to give up his rights and speak with police, they simply asked questions about the homicide. ER 13; see also Interrogation Transcript at 1-2. A suspect who answers such questions may, courts hold, have "impliedly" waived his rights. See, e.g., *Younger*, 398 F.3d at 1185-86; *People v. Whitson*, 17 Cal. 4th 229, 250 (1998). With the frequency of "implied" waivers, it is particularly important to grant en banc review.

By allowing officers to infer a subject-matter limitation on an assertion of the right to remain silent, the state court decision permits police to treat an unequivocal, unqualified invocation as a conditional waiver. This tactic is contrary to *Barrett*. It also encourages officers to continue to question after an invocation, but to shift subject areas, which is contrary to *Mosley*. This approach becomes even more pernicious as police increasingly seek "implied" rather than "express" waivers. If a suspect is never expressly asked whether he wishes to speak with police, and police can treat any invocation to a specific question as a limited invocation or a conditional

waiver, it will be very difficult for a suspect to invoke his Fifth Amendment rights effectively. In a world of "implied" waivers, this case is exceptionally important.

IV. CONCLUSION

The petition for rehearing en banc should be granted.

Dated: December 21, 2006

Respectfully submitted,


CHARLES D. WEISSELBERG

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

JEROME ALVIN ANDERSON,

Petitioner and Appellant,

v.

C.A. TERHUNE, Warden,

Respondent and Appellee.

On Appeal from the United States District Court
for the Eastern District of California
No. 00-00-2494-WBS
The Honorable William B. Shubb, Judge

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

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04-17237

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON,

Petitioner and Appellant,

v.

C.A. TERHUNE, Warden,

Respondent and Appellee.

INTRODUCTION

This Court directed Respondent-Appellee to file a response to Petitioner-Appellant Anderson's Petition For Rehearing and Rehearing En Banc (hereafter "Reh'g Pet."), in which Anderson requests rehearing of this Court's published opinion of November 8, 2006.

The panel's decision reflects the significance of applying the Antiterrorism and Effective Death Penalty Act of 1996 (hereafter "AEDPA"). The state court conclusion was not objectively unreasonable because Anderson's ambiguous comments, when considered in context, were not an unequivocal

invocation of his right to remain silent. Contrary to the arguments of Anderson and Amici Curaie, the panel's decision properly determined that the state court's conclusion was neither contrary to nor an unreasonable application of United States Supreme Court precedent, such as *Miranda v. Arizona*, 384 U.S. 436 (1966) (*Miranda*) or *Davis v. United States*, 512 U.S. 452 (1994). Moreover, the panel's decision does not conflict with the precedent of this Court (*Arnold v. Runnels*, 421 F.3d 859 (9th Cir. 2005)), and the case does not involve an exceptionally important question.

Although Anderson does not draw a distinction between his request for panel rehearing and his request for rehearing en banc, Respondent analyzes them separately under the appropriate standards. For the reasons set forth, Respondent requests that this Court deny Anderson's request for panel rehearing as no point of law or fact was overlooked or misapprehended in the opinion. Fed. R. App. P. 40(a)(2). Furthermore, Respondent requests that this Court deny Anderson's request for rehearing en banc as the panel decision does not conflict with any decision of this Court, and the case does not raise questions of exceptional importance. Fed. R. App. P. 35(a).

ARGUMENT

I.

THE COURT'S OPINION DID NOT OVERLOOK OR MISAPPREHEND ANY POINT OF LAW OR FACT

A petition for panel rehearing "must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2). The purpose of a petition for rehearing is very limited; it is "to ensure that the panel properly considered all relevant information in rendering its decision." *Armster v. United States District Court*, 806 F.2d 1347, 1356 (9th Cir. 1986). A petition for rehearing is not designed to afford a party the opportunity to reargue its case. *Anderson v. Knox*, 300 F.2d 296, 297 (9th Cir. 1962).

The panel herein appropriately reached its conclusion under AEDPA. Reversal under AEDPA requires that the state-court conclusion be "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). State-court factual findings must be "presumed to be correct," and petitioner "must rebut[] the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Similarly, the state court's legal judgments must be given considerable deference. A federal court may not reverse unless the state's court's decision "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). Under this "straightforward" inquiry (*Lockyer v. Andrade*, 538 U.S. 63, 74-75 (2003)), it is not enough for the state court to incorrectly apply federal law. *Williams v. Taylor*, 529 U.S. 362, 409 (2000). Rather, the application "must also be unreasonable." *Id.* at 411.

For a state court decision to be unreasonable, it must lie "well outside the boundaries of permissible differences of opinion" *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) or produce an answer not "'within the range of defensible positions.'" *Taylor v. Bradley*, 448 F.3d 942, 948 (7th Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S.Ct. 327, 166 L.Ed.2d 244 (2006); *Maynard v. Boone*, 468 F.3d 665, 671 (10th Cir. 2006), *petition for cert. filed* (U.S. Jan 3, 2007) (No. 06-8731). "[A] state court decision is objectively unreasonable under AEDPA only if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes.'" *Kibbe v. DuBois*, 269 F.3d 26, 36 (1st Cir. 2001) (citations omitted); *see also Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997).

As noted by the panel herein, this is a close case where the AEDPA standard matters. *Anderson v. Terhune*, 467 F.3d 1208, 1212 (9th Cir. 2006)

(hereafter *Anderson*). However, the panel appropriately applied this standard in upholding the state court's decision, which was neither "contrary to" nor involved an "unreasonable application" of Supreme Court law.

Preliminarily, it must be clear which statements by Anderson are at issue herein. During his interrogation, Anderson made three statements: (1) "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."; (2) "I'm through with this. I'm through. I wanna be taken into custody, with my parole . . ."; and (3) "I plead the fifth." (Ex. B at 9-10.) Anderson argues now that each statement was an unequivocal invocation of his right to remain silent. (Reh'g Pet. at 6, 8, 11.) However, in his Opening Brief in this Court, Anderson never even mentioned the second statement, much less argued it constituted an invocation. (Ex. C at 26-31.) Moreover, he expressly conceded that his first statement was equivocal (Ex. C at 28, n.6), a concession accepted by the panel majority (*Anderson*, 467 F.3d at 1212, n.1). Accordingly, whether the first and second statements constituted separate invocations should be waived. (See Reh'g Pet. at 6, 8, 11.) In any event, since this Court will consider the entire context of Anderson's interview in determining whether Anderson's third statement was an invocation, Respondent's arguments

concern all three statements in so far as they, as a group, shed light on that issue.^{1/}

Anderson's primary claim is that the panel erred in upholding the state court's ruling because it is contrary to and an unreasonable application of *Miranda*, 384 U.S. 436, and related Supreme Court cases, such as *Michigan v. Mosley*, 423 U.S. 96 (1975). (Reh'g Pet. at 7, 9; Amici Reh'g Pet. at 3; *see also Anderson*, 467 F.3d at 1214, 1216, 1218 (McKeown, J, dissenting).) Specifically, he argues that Detective O'Connor did not "scrupulously honor[]" his clear invocation of his right to remain silent. (*Miranda*, 384 U.S. at 479.) However, there is no doubt that the panel majority neither "overlooked [n]or misapprehended" *Miranda* and its progeny. Fed. R. App. P. 40(a)(2). While the majority respected the state court's plausible and credible interpretation of the

1. Respondent does not concede that Anderson properly preserved the argument that either of his first two statements were unequivocal invocations. Respondent merely argues that rehearing is unwarranted regardless of whether all three are considered.

In any event, the first two statements were ambiguous invocations. At best, Anderson's first statement indicated that he was limiting the subject matter ("this") and the timing of the discussion ("later"). But even this conclusion is questionable since Anderson's statements were sandwiched between answers to the officer's accusations instead of something more consistent with an invocation. (See Ex. B at 9.) His second statement was even less clear, indicating only his disgust with the line of questioning. Nevertheless, whether considered separately or alone, Anderson's statements were ambiguous invocations at best for the reasons explained, *post*.

facts, Anderson merely seeks to reargue his case.^{2/}

As explained by the panel majority (*Anderson*, 467 F.3d at 1211), *Miranda*, 384 U.S. at 473-74, requires an officer to immediately cease interrogation of a suspect in custody if he indicates during questioning his desire to remain silent. However, "when a suspect makes an ambiguous or equivocal statement," it is proper for interviewing officers to clarify whether the suspect wants to invoke the privilege. *Davis v. United States*, 512 U.S. at 461; *Anderson*, 467 F.3d at 1211. "If the suspect's statement is not unambiguous or unequivocal. . .the officers have no obligation to stop questioning." *Davis*, 512 U.S. at 461-62.

The totality of the circumstances in this case indicate that Anderson's statements to the officers were ambiguous. While Anderson articulated words that could, in isolation, be possibly viewed as an invocation, the context preceding his statements clarifies that Anderson did not intend to terminate the interview. (Ex. B at 9-10.) Anderson's "plead the fifth" comment was during a discussion about his drug use, a topic officers had switched to after Anderson's earlier ambiguous comment in response to questions about the murder. In context, while "plead the fifth" indicated that Anderson probably did not want to talk about something, it

2. Indeed, Anderson improperly argues that rehearing should be granted simply to give him an opportunity to orally argue the case and to direct the Court to caselaw he did or could have included in his original briefing in this Court. (Reh'g Pet. at 6, n.1.)

was not clear what he did not want to talk about (his drug use or the murder or both), or even whether he seriously wanted to stop talking to the police or was simply frustrated. See *People v. Jennings*, 46 Cal.3d 963, 977-78 (1988) (Suspect's comment "I'm not saying shit to you no more, man. . . . That's it. I shut up" reflected "only momentary frustration and animosity" toward one officer and was not an invocation of his right to silence). Additionally, since both the right to silence and the right to counsel are contained in the Fifth Amendment (*Carter v. United States*, 417 F.2d 384, 385, n.1 (9th Cir. 1969) (Fifth Amendment contains at least five rights and privileges), it was also unclear which right Anderson might be invoking by "plead[ing] the fifth." While lawyers and officers would know that "plead the fifth" was a reference to the Constitution, a reasonable officer would not necessarily know what Anderson, a non-lawyer, was seeking to do by his statement. As the District Court noted, "the phrase 'take the fifth' usually refers to the refusal to respond to a question on the witness stand, not to the desire to terminate an entire police interrogation." CR 19 at 20-21. Accordingly, the state court ruling, upheld by the majority, was "within the range of defensible positions" (*Taylor v. Bradley*, 448 F.3d at 948) and was neither contrary to nor an unreasonable application of the United States Supreme Court cases cited by Anderson. All of Anderson's cases included an invocation that was unambiguous

(see *Miranda*, 384 U.S. 436; *Smith v. Illinois*, 469 U.S. 91 (1984), *Michigan v. Mosley*, 423 U.S. 96) and sometimes also limited (*Connecticut v. Barrett*, 479 U.S. 523 (1987)), circumstances which required officers in those cases to cease their interrogations.

Additionally, the range of what is considered "unreasonable" depends, in part, on the nature of the relevant Supreme Court rule. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

Id. Since Anderson's cases applied a "general standard," this Court must allow "more leeway" to the state court conclusion herein because of the "substantial element of judgment" involved. *Id.*

Moreover, the majority neither overlooked nor misapprehended *Davis v. United States*, 512 U.S. 452 in concluding that Detective O'Connor properly questioned Anderson to determine the meaning of his statements.^{3/} As explained,

3. Indeed, it is questionable whether the majority had to apply *Davis* since it involved the defendant's ambiguous invocation of his right to counsel, not his right to silence. *Arnold v. Runnels*, 421 F.3d at 866, n.8.

the context of Anderson's statement is what made it ambiguous. Anderson focuses only on the words themselves and ignores the context in finding his invocation unambiguous. (Reh'g Pet. at 7-8; Amici Reh'g Pet. at 3-4; *see also Anderson*, 467 F.3d at 1214, 1216 (McKeown, J, dissenting).) But *Davis* requires a consideration of context and not just words, i.e., what a "reasonable officer *in light of the circumstances* would have understood" (*Davis*, 512 U.S. at 459, emphasis added). Unlike Anderson's cases (Reh'g Pet. at 9-10), Detective O'Connor had more than just the words "plead the fifth" to consider.^{4/} Furthermore, by recognizing Detective O'Connor's confusion about Anderson's statement, the state appellate court did not supplant the reasonable officer standard (Reh'g Pet. at 10, 15); it merely recognized that Detective O'Connor's interpretation was reasonable.

For the first time, Anderson now claims that the majority's decision is contrary to *Smith v. Illinois*, 469 U.S. at 92, which held that "an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial [unambiguous] request for counsel." (Reh'g Pet. at 10, 15; Amici Reh'g Pet. at 3; *see also Anderson*, 467 F.3d at 1216, 1218 (McKeown, J, dissenting).) However, the majority and the state court found Anderson's words of alleged invocation to be equivocal because of the context that *preceded* them.

4. Respondent does not suggest that Anderson's words, in a different context, would be insufficient to claim one's privilege against self-incrimination.

Accordingly, *Smith* is inapposite.^{5/}

Anderson misinterprets the conclusion reached by the majority and the state court. Unlike *Smith*, Anderson's alleged invocation was ambiguous because of the context preceding it. It was precisely because it was equivocal that Detective O'Connor sought clarification. The state court considered Anderson's post-clarification question responses only to confirm that Detective O'Connor had not failed *subsequently* to honor Anderson's *possible* invocation of rights. In other words, because Anderson did not respond to Detective O'Connor's question by clarifying that his prior ambiguous statement was meant to invoke his right to silence, the state court concluded that Anderson really had not sought to end the interview. The state court did not use Anderson's responses to find his "plead the fifth" statement ambiguous.^{6/}

Next, claiming the panel's holding is contrary to *Connecticut v. Barrett*,

5. Therefore, neither the majority nor the state court had reason to discuss the case. (*See Amici Reh'g Pet.* at 3.) *Smith*, 469 U.S. at 99-100, explicitly clarified that it did not apply to cases where the request itself is ambiguous.

6. To the extent that the state trial court's reasoning, erroneously quoted by the dissent as the state appellate court's reasoning (*compare Anderson*, 467 F.3d at 1218 (McKeown J., dissenting) with Ex. B at 14 (appellate court's reasoning) and at 11-12 (trial court's reasoning)), suggested otherwise, the majority appropriately considered the last reasoned decision -- the appellate court's -- because the appellate court did not simply adopt the trial court's reasoning. *Barker v. Fleming*, 423 F.3d 1085, 1092-93 (9th Cir. 2005), *cert. denied*, ___ U.S. ___, 126 S.Ct. 2041, 164 L.Ed.2d 796 (2006).

479 U.S. 523, Anderson complains that the panel wrongfully validated the state court's unreasonable factual finding that he was invoking his right to silence only as to the drug use and not as to the interrogation as a whole when he stated "I plead the fifth." (Reh'g Pet. at 12-14; *Anderson*, 467 F.3d at 1214, 1218 (McKeown, J., dissenting)). The state court neither made an unreasonable factual finding nor violated the holding of *Barrett* in concluding that Detective O'Connor could clarify any limitations Anderson may have placed on his alleged invocation.

The state court's factual finding – that Anderson's "comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue questioning at all" – was a reasonable interpretation of the record. (Ex. B at 13.) After Anderson equivocally suggested that he didn't want to talk about his reason for killing Robert Clark, Detective O'Connor began questioning Anderson about his drug use, including a discussion of pipes. (Ex. B at 9-10.) It was to questions about what type of pipes he used that Anderson "plead[ed] the fifth." There were several "plausible" and "credible" (*Kibbe v. DuBois*, 269 F.3d at 36) ways of interpreting this statement – Anderson wanted to cease the interrogation entirely or on selected topics, or wanted something else (e.g., to not testify or to have counsel). Thus, in context, Anderson's statement was

ambiguous.

However, Anderson argues that, because a pipe was found near the murder victim, his statement "was clearly intended to encompass anything linked to the murder." (Reh'g Pet. at 14; *see also Anderson*, 467 F.3d at 1215, 1217 (McKeown, J., dissenting.)) As noted by the District Court (CR 19 at 21, n.8), this argument is based on speculation and does not render the state appellate court's alternate conclusion unreasonable.⁷

Nor is the state court's ruling contrary to *Connecticut v. Barrett*, 479 U.S. 523. Barrett agreed to speak with officers, and ultimately confessed, but refused to give any written statements unless an attorney was present. *Id.* at 525. The Court held that, although Barrett made an unambiguous limited invocation regarding counsel, he also expressed a willingness to speak to officers and, therefore, the officers properly obtained Barrett's oral confession. *Id.* at 529-30. Unlike the instant case, *Barrett* included a clear, and clearly limited, invocation.

7. Anderson suggests that the state appellate court's interpretation is contradicted by the trial court. (Reh'g Pet. at 14.) Assuming, arguendo, that the reasoning of the two courts conflict, this Court looks to the *last* reasoned state court decision. *Barker v. Fleming*, 423 F.3d at 1092-93.

Furthermore, despite Anderson's repeated averments that Detective O'Connor's testimony is irrelevant (Reh'g Pet. at 10, 14-15), he inconsistently argues that Detective O'Connor's testimony contradicts the appellate court's conclusion. (Reh'g Pet. at 14.) On the contrary, Detective O'Connor testified that he was confused by Anderson's statement. (Ex. F.)

Here, it was unclear both whether Anderson's statement was an invocation and what limitation, if any, it contained. Thus, *Barrett* is distinguishable.

Anderson argues that *Barrett* further held that the suspect himself must explicitly and expressly limit the terms of his alleged invocation, or else the invocation is without limitation.^{8/} (Reh'g Pet. at 13-15; Amici Reh'g Pet. at 5.) This is beyond the holding of *Barrett*. Since Barrett unambiguously expressed the limits of his invocation, *Barrett*, 479 U.S. at 529-30, the Court never considered what to do with an invocation which was ambiguous in its limits. Additionally, *Barrett* did not consider a situation where officers were attempting to clarify an ambiguous invocation. However, *Barrett* recognized that interpretation, which includes a consideration of context, is required where the suspect's words are ambiguous. *Id.* at 529. If Anderson's interpretation of *Barrett* were the correct one, then officers could never clarify an invocation that was ambiguous in its scope. However, *Davis v. United States*, 512 U.S. 452, allows such clarification.

In sum, the panel majority properly found that the state court ruling was neither contrary to nor an unreasonable application of the United States Supreme Court precedent. Indeed, in order to find otherwise, judges of this Court would

8. Anderson also relies upon *Arnold v. Runnels*, 421 F.3d 859 for this argument. Assuming *Arnold* has some relevance (see n.5, *ante*), *Arnold* fails to support Anderson's claim for the same reasons *Barrett* fails to do so.

have to find that the more than half a dozen judges who reviewed this decision in the lower court and the state courts were all objectively unreasonable in their conclusions to the contrary.

II.

ANDERSON HAS FAILED TO DEMONSTRATE THAT THE PANEL'S DECISION CONFLICTS WITH OTHER DECISIONS OF THIS COURT OR OTHERWISE INVOLVES AN ISSUE OF EXCEPTIONAL IMPORTANCE

Rule 35 of the Federal Rules of Appellate Procedure provides: "An en banc hearing or rehearing is not favored and ordinarily will not be granted unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a); *see also United States v. Wylie*, 625 F.2d 1371, 1378 n.10 (9th Cir. 1980) ("en banc hearings are disfavored"). The "function of en banc hearings is not to review alleged errors for the benefit of losing litigants." *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (en banc) (citing *Western Pacific R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 256-59 (1953)). Judge Reinhardt has written:

To rehear a case en banc simply on the basis that it involves an important issue would undermine the three-judge panel system and create an impractical and crushing burden on what otherwise should be, as Rule

35(a) suggests, an exceptional occurrence. . . . Unless they decide issues of exceptional importance erroneously, create a direct intra-circuit split, or unless the interests of justice require that the decision be corrected, the opinions of three-judge panels should constitute the final action of this court.

Newdow v. United States Congress, 328 F.3d 466, 470 (9th Cir. 2003) (Reinhardt, J., concurring), reversed on other grounds in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004).

Anderson argues that en banc consideration is necessary because the panel's decision conflicts with this Court's opinion in *Arnold v. Runnels*, 421 F.3d 859. (Reh'g Pet. at 11, 17.) *Arnold*, however, is factually distinguishable. First, unlike Anderson, Arnold invoked his rights unequivocally and placed clear limitations on his decision to talk by stating that he did not want to talk on tape. *Id.* at 862-63. There was no ambiguity about whether Arnold wanted to talk or under what conditions. Second, the state courts completely ignored Arnold's invocation and instead addressed only Arnold's statements subsequent to his invocation. *Id.* at 864 & n.5. Here, the state court specifically addressed Anderson's alleged invocation and found it equivocal, and the panel found that conclusion to be reasonable. Thus, there is no conflict between *Arnold* and the panel's decision.

Alternatively, Anderson and Amici Curiae argue that the case involves

a question of exceptional importance because the panel's decision will encourage aggressive police tactics, specifically a practice known as "questioning outside *Miranda*" discussed in *Missouri v. Seibert*, 542 U.S. 600 (2004) and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049-50 (9th Cir. 1999). (Reh'g Pet. at 5, 12; Amici Reh'g Pet. at 5-8.) This argument fails on many grounds. First, since it was never before presented to any court in this case, it should not be considered. *U.S. v. Patzer*, 284 F.3d 1043, 1045 (9th Cir. 2002) (parties generally may not assert new arguments in a petition for rehearing). Second, Amici not only fail to demonstrate that the officers herein were trained in such tactics (Amici Reh'g Pet. at 8, n.7), Detective MacDonald testified that he had been trained to cease questioning when a suspect invokes and that he does not question outside *Miranda* or allow others to do so (Ex. E at 219-220, 222-223). Moreover, neither the state nor federal courts who have considered this case suggested that *Seibert* tactics would be acceptable. As a result, nothing about the majority's decision could possibly encourage this practice or be contrary to *Seibert*.⁹ Third, the state appellate court accepted the trial court's implicit factual

9. Amici Curie also assert that rehearing en banc is warranted because the use of implied waivers risk increased prevalence of improper tactics by officers. (Amici Reh'g Pet. at 9-10.) Given that *no* improper tactics were endorsed by the panel here, there cannot be any *increased* risk of the use of improper tactics as a result of the panel's decision.

finding that Detective O'Connor was credible in that he believed Anderson was only "indicating an unwillingness to discuss the details of his drug use, and not a desire to terminate the interrogation." (Ex. B at 12.) This factual finding negates any possibility that Detective O'Connor was acting intentionally outside *Miranda*. Fourth, even if it did apply, only *Seibert* is a United States Supreme Court case, for purposes of determining what is clearly established under AEDPA (28 U.S.C. § 2254(d)(1)),^{10/} and it was decided in 2004. Since Anderson's case was final in 2000 under either *Williams* test, it was not clearly established Supreme Court precedent during the relevant time period. *Williams v. Taylor*, 529 U.S. at 390 ; *see also id.* at 412 (O'Connor, J., concurring.).

Anderson's case does not present an issue of exceptional importance, an erroneous decision by the panel, nor a conflict within the circuit. Rather, the panel herein merely decided that the state court's decision was reasonable under the AEDPA.

10. While Ninth Circuit cases may assist this Court in determining what is clearly established under the AEDPA, they may not be the basis for overturning a state court decision on habeas review. *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 2000).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Petition for Rehearing and Rehearing En Banc.

Dated: February 28, 2007

Respectfully submitted,

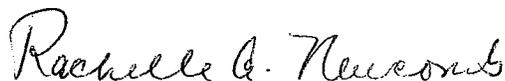
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04-17237

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON,

Petitioner and Appellant,

v.

C.A. TERHUNE, Warden,

Respondent and Appellee.

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no related cases.

Dated: February 28, 2007

Respectfully submitted,

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