

AUG 11 2009

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ELIAS MANUEL CUSTODIO,

Petitioner - Appellant,

v.

GREG FISHER, Warden, IMSI,

Respondent - Appellee.

No. 08-35446

D.C. No. 1:04-CV-00589-EJL

MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted August 4, 2009
Seattle, Washington

Before: PREGERSON, BEA and M. SMITH, Circuit Judges.

Elias Manuel Custodio appeals the district court's order denying his petition for a writ of habeas corpus. We affirm. On the basis of the record before us, we cannot say that the Idaho Court of Appeals' determination that Custodio voluntarily, knowingly, and intelligently waived his *Miranda* rights, *see Miranda*

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

v. Arizona, 384 U.S. 436, 444 (1966), was objectively unreasonable. *See* 28 U.S.C. § 2254(d). There is no evidence that police overbore Custodio’s will during the interrogation. *See Colorado v. Connelly*, 479 U.S. 157, 165 (1986). After he was involved in a confrontation, Custodio turned himself in and voluntarily participated in a police interrogation. He did not ask officers to stop questioning him or otherwise state he wanted to end the interview. When he requested a lawyer, officers respected his request.

That Custodio was intoxicated, fatigued, and in pain does not change the result. The Idaho Court of Appeals determined that, despite these handicaps, Custodio was coherent, responsive, alert, and fully oriented. This factual determination was not unreasonable. *See* 28 U.S.C. § 2254(d)(2). Accordingly, Custodio’s waiver of his *Miranda* rights was effective. *See United States v. Doe*, 155 F.3d 1070, 1075 (9th Cir. 1998) (en banc); *United States v. Martin*, 781 F.2d 671, 673–74 (9th Cir. 1986).

AFFIRMED.