NO. 07-1436

In the Supreme Court of the United States

JAMES A. TILTON, SECRETARY, CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, *Petitioner*,

v.

JEROME ALVIN ANDERSON, *Respondent.*

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

REPLY BRIEF

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

CERTIORARI IS WARRANTED TO VINDICATE THE HABEAS CORPUS REFORMS CONGRESS ENACTED IN AEDPA AND TO PROVIDE PRACTICAL GUIDANCE TO LAW ENFORCEMENT

Anderson first argues that review is unwarranted because, he says, this case presents nothing new of constitutional significance (Opp. pp. 1, 3-7). But this Court has recognized in past grants of certiorari that questions of the proper application of AEDPA are important. And this case involves not only that but also a question of this Court's *Miranda* jurisprudence.

1. Here, two state courts expressly found Anderson's "I plead the fifth" statement ambiguous in context and the officers' attempt to clarify proper. The federal district court, applying the AEDPA deference standard, found these state court determinations reasonable. Two judges on the initial Ninth Circuit panel determined that the state courts' findings on ambiguity and clarification were reasonable determinations of fact and that the state courts had not unreasonably applied clearly established federal law. On the *en banc* panel, two judges (Judges Tallman and Callahan) agreed, and two other judges (Judges Silverman and Rawlinson) agreed on the ambiguity question. This case is not unremarkable: it represents a significant violation of AEDPA.

The *Miranda* point, moreover, is of immense concern to law enforcement. Although this Court in *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966), recognized that police must stop questioning if a suspect indicates "in any manner" that he wants to cut off questioning, this

Court has not delineated what is further required. Moreover, there is no clearly established precedent from this Court addressing what officers may do when faced with an arguably ambiguous invocation of the right to silence. In *Davis v. United States*, 512 U.S. 452, 461-62 (1994), concerning an equivocal invocation of the right to *counsel*, this Court stated that clarifying questions can be good police work. In holding that Anderson's statement was ambiguous and that the officers' follow-up question could reasonably be interpreted as a legitimate clarifying question, the state courts reasonably applied *Davis*. 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).

Anderson acknowledges that context is critical. However, he claims that the context here shows not only that his "I plead the fifth" statement was unequivocal, but that it was "only the culmination of a series of efforts to terminate the interrogation." (Opp. p. 5.) Here, he follows the lead of the Ninth Circuit *en banc* majority ("Anderson had already *twice* attempted to stop the police questioning . . . ."). App. A, p. 17. But he has never previously argued that his statements about "going upstairs" to the general jail population constituted invocations or attempts to end the interrogation (though an *amicus curiae* for Anderson did so).

While the larger context of the interrogation concerned the murder, the immediate context of Anderson's disputed statement was his use of drug pipes to smoke methamphetamine. Anderson misreads the record at this point, claiming that "the interrogation focused on the methamphetamine pipe that was found at the crime scene." (Opp. p. 6, n. 4.)

Actually, the topic had shifted from Anderson's drug use the day of the murder to his drug use in general; when Anderson said "I plead the fifth," the questioning was *not* focused on the pipe found at the crime scene. Consequently, Anderson was not invoking his right to silence if he was just refusing to discuss the particulars of his drug use. See *People v. Rundle*, 43 Cal.4th 76, 115 (2008); *People v. Stitely*, 35 Cal.4th 514, 535 (2005). Only by ignoring this topic-shifting context of the questioning could the Ninth Circuit override the state courts and hold that Anderson's statement was an unequivocal invocation of his right to remain silent.

2. Regardless whether the police violated Anderson's *Miranda* rights by continuing their interrogation after he said "I plead the fifth," the Ninth Circuit wrongly granted relief on the assumption that the earlier error rendered the later confession inadmissible. Anderson points out that this argument was first raised by Judge Bea in the Ninth Circuit. (Opp. p. 7.) That is true only because no court until the Ninth Circuit *en banc* majority opinion had found Anderson's invocation to be unambiguous or the officers' attempt to clarify disingenuous. Hence, there had never been any need to address this scenario before. Having been raised by the Ninth Circuit, this issue is properly before this Court. See *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099, n. 8 (1991); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Anderson complains that, had this issue been raised in the state superior court, he "would certainly have asked pointed questions to the interrogating officers," including whether they were trying to "subvert *Miranda*." (Opp. pp. 7-8.) But Anderson did so: Detective MacDonnald 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. The concerns

expressed by this Court in *Missouri v. Seibert*, 542 U.S. 600 (2004), are not present here. (Opp. p. 10, n. 5.) The State's argument could not possibly encourage any police practice of subverting *Miranda*.

Anderson asserts that "[w]hat occurred an hour later . . . is beside the point." (Opp. p. 9.) His opposition brief conspicuously sidesteps any discussion of *Oregon v. Elstad*, 470 U.S. 298, 309 (1985), which held that a failure-to-warn *Miranda* violation does *not* taint a subsequent uncoerced admission made after proper *Miranda* waivers. A failure to give the *Miranda* advisements when clearly required is more egregious than a failure to correctly discern whether a suspect wishes to completely stop an interrogation. As in *Elstad*, the admissibility of Anderson's confession, made after his honored invocation and immediate waiver, should turn solely on whether it was knowingly and voluntarily made. *Oregon v. Elstad*, 470 U.S. at 309.

Anderson posits that the State's "proposed rule" would invite continued questioning even after a valid invocation. (Opp. p. 10.) Not so. The State is concerned with interrogations where an officer misinterprets an ambiguous invocation and is later faced with a suspect who begs to talk after any clearly-invoked rights of his were indeed honored. This is not a case where police extended an illegal interrogation in hopes that a suspect will later change his mind and want to talk. Nor is it whitewashing an earlier violation. Certiorari is warranted so that this Court can give some needed, real-world guidance to officers interrogating suspects who, like Anderson, ambiguously invoke their right to silence, but—after a later clear invocation of the right is honored—then insist on talking.

For the foregoing reasons and for the reasons set forth in the petition for writ of certiorari, the petition

for writ of certiorari should be granted.

Dated: September 4, 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

SA2004FA0057
30538987.wpd

TABLE OF CONTENTS

TABLE OF AUTHORITIES