No. _____

IN THE

Supreme Court of the United States

CARLOS DAGOBERTO RIVAS,

Petitioner,

v.

SHERMAN SPEARMAN, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Does the State meet its burdens of showing that it clearly informed a criminal defendant of his *Miranda* rights and that a defendant validly waived them when the interrogating officer never uses the words "remain silent," never gets an affirmation that defendant understood that anything he said could be used against him in court, and the transcript of the interrogation is replete with non sequiturs, silence, and express declarations by defendant that he did not understand the advisements?

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I. OPINIONS BELOW

Rivas petitions for a writ of certiorari to review the judgment of the Ninth Circuit. The Ninth Circuit's opinion denying habeas corpus relief is unreported. Petitioner's Appendix ("Pet. App.") 1-4. The magistrate judge's report recommending the denial of relief and the district court's orders accepting the report and entering judgment against Petitioner are unreported. Pet. App. 5-53.

The California Court of Appeal's opinion affirming the state court judgment on appeal and its order modifying its opinion are unreported. Pet. App. 55-76. The California Supreme Court's order denying Rivas's petition for review of the Court of Appeal's opinion is unreported. Pet. App. 54.

II. JURISDICTION

The Ninth Circuit's opinion affirming the denial of habeas relief was filed on August 30, 2018. Pet. App. 1. The district court had jurisdiction under 28 U.S.C. §§ 2241 and 2254. The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is timely filed under Supreme Court Rule 13.1.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. XIV, § 1

"No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Title 28 U.S.C. § 2254(a)

"The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Title 28 U.S.C. § 2254(d)

"An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(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."

IV. STATEMENT OF THE CASE

A. The Interrogation of Rivas and the Trial Court's Ruling Admitting Rivas's Statements Into Evidence

On April 12, 2012, Santa Ana, California police officers interrogated Carlos Rivas ("Rivas" or "Petitioner") at his house, and arrested and handcuffed him and drove him to the jail, where they interrogated him again. Before trial, the prosecution moved to admit into evidence Rivas's statements to the police and Rivas moved to exclude them. Clerk's transcript of trial ("CT") 102-112.[1] The prosecution asserted that police officer Daniel Carrillo explained all of the *Miranda*[2] rights to Rivas in the first interview before asking him questions about the facts of the case, that Rivas knowingly and intelligently waived his *Miranda* rights, and that no *Miranda* re-advisement was necessary before or during Carrillo's second interview with Rivas at the jail. CT 106-111. Rivas sought to exclude all his statements on the ground they were obtained in violation of his *Miranda* rights. He argued that Carillo's advisement was not clear enough to inform him of all of his rights or of the consequences of waiving them, and that he did not knowingly and intelligently waive his *Miranda* rights. Pet. App. 65-71.

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[1] Respondent lodged the CT in district court at district court docket no. 9, lodgment no. 1.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

The court held a hearing on the motions concerning Rivas's statements to police on January 22, 2013. Reporter's transcript of trial ("RT") at 10.[3] At the hearing, Carrillo testified that, on April 15, 2012, he was working as a patrol officer, was wearing a police uniform, and was armed with a handgun, a taser, and two handcuffs. RT 10-12. At about 10:40 p.m., he went to a home at 1329 West Second Street in Santa Ana. Officer Heitmann, also wearing a police uniform, came with him; each officer had his own marked police car. RT 12-14. An Explorer named Robert Peralta was riding along with Carrillo; Peralta also wore a uniform. RT 16-17.[4]

When the officers arrived at the house, Carrillo knocked on the door, with Heitmann standing next to him; Rivas answered. Carrillo testified that they had gone to the location in order to speak with Rivas, who was a suspect. RT 14. When Rivas opened the door, Carrillo identified himself and told Rivas that he was looking to speak with him about an investigation he was conducting. RT 15. Carrillo did not explain to Rivas who Heitmann and Peralta were. RT 17. Carrillo, who was 26-years-old and had been speaking Spanish for about 23 years, spoke to Rivas, a Guatemalan national, in Spanish. RT 15, 27-29.

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[3] Respondent lodged the RT in district court. *See* district court docket no 9, lodgment no. 2.

[4] Carrillo testified at trial that an "Explorer" is someone from the ages of 14 to 20 who is interested in a career in law enforcement and "comes out on weekly ride-alongs with us to see how it is to be a police officer." RT 181.

Carrillo testified that he asked permission to come into the house. When he entered, he searched Rivas for weapons by placing Rivas's hands behind his back and searching his waistband. Rivas then sat down on a couch in the living room. RT 17, 31. Carrillo stood directly in front of Rivas; Heitmann stood to Carrillo's left, and Peralta stood between Carrillo and Heitmann, a little farther back. So far as Carrillo knew, no one was in the house other than Rivas and the three law enforcement officers. RT 17.

Transcripts of both interrogations – the one at Rivas's house and the later one at the jail – were marked as Court Exhibits 2 and 3, respectively. CT 254-443. Carrillo testified that he began to record the interrogation at Rivas's home about five minutes after he, Heitmann and Peralta arrived there. RT 19-20. According to the transcript, the recorded interview at Rivas's house began with Carrillo asking for Rivas's name, date of birth, and physical characteristics; Rivas gave the information. Pet. App. 78-79.

The following exchange then occurred[5]:

OFCR: Okay. Okay, so, we are invest- investigating a case, okay, uh, it's been like, uh, 9 years that it happened. Okay, uh, at this time, uh, I have to -read your rights.

RIVAS: ...[6]

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[5] The quotations in the text include only the English translation, not the original Spanish, which also appears in the trial exhibits, and also omits the bold font which the transcript used for the English portion.

[6].The interview transcripts included a legend indicating that "***" denotes unintelligible conversation and that "..." denotes pauses, incomplete sentences, stammering, etc., but not missing words. Pet. App. 78.

OFCR: Okay, you do ... you do understand?

RIVAS: ...

OFCR: Yes?

RIVAS: Well, I have never had these problems.

OFCR: Okay, so, I'm going to read you the rights about ... about ... about the rights you have now, okay, about talking with me and all that. Okay, and I'm going to tell you ... you do ... you do understand what ... what I'm telling you and you will tell me 'yes' or 'no' and if you don't under-if you don't understand me I will explain further, okay.

RIVAS: Okay.

OFCR: This case is about ... almost, almost about 10 years that this happened ... this, uh, this case, okay.

RIVAS: ...

OFCR: You do understand?

RIVAS: ...

OFCR: You do understand?

RIVAS: Uh-huh.

OFCR: Yes? Yes?

RIVAS: Yes.

OFCR: Okay. Okay, so, you have the right not to say anything, you do understand?

RIVAS: ...

OFCR: Yes or no?

RIVAS: Uh-huh, yes, if *** I can't say anything?

OFCR: Si [sic], no, okay, you have – you have the ... you have rights, okay. ... I'm I'm going to explain you the rights you have. Okay, so, when I ... I ask you, "Hey you have the right not to say anything." Okay, you have the right not to say anything, do you understand?

RIVAS: You will be telling me?

OFCR: Yes.

RIVAS: Okay.

OFCR: Yes or no? You do understand?

RIVAS: ...

OFCR: Yes. Yes or no? You have to say 'yes' or 'no.'

RIVAS: Yes.

OFCR: Okay. What you say today can be used on – against you in ... in a court, do you understand?

RIVAS: No.

OFCR: Okay. You have ... what you say today with us with ... with me, uhm, can be used in ... in ... against ... against a court, in ... in the court, okay, so, each ... each time you say something that can be used in court, okay. Do you understand?

RIVAS: Uh-huh.

OFCR: Yes or no?

RIVAS: ...

OFCR: Okay. You have the right to an attorney before and during any questioning, if ... if you desire it.

Okay, so, if you want a ... an attorney, you can call one, okay. Hhm, if you don't have to ... money to pay for an attorney, one will be appointed before any questioning if you desire it, you do understand?

RIVAS: ...

OFCR: Yes?

RIVAS: Yes.

OFCR: Okay, uhm, in this ... this case was about 10 years, almost, okay.

Pet. App. 79-84.

There was no further discussion of any *Miranda* rights. The interrogation lasted 40 or 45 minutes. RT 21, 25. After the purported *Miranda* advisement, Carrillo did not ask Rivas whether he wanted to waive his rights and talk to Carrillo. Rather, as Carrillo testified at the motion hearing, he "just went into questions, my questions, interview." RT 26.

At one point, before Rivas admitted to any sexual conduct with Maria (the alleged victim) or to touching any part of her body other than her legs, Carrillo told Rivas that, "Sir, we are here and we're not ... not ... not ... going to leave, okay, until you think about what I'm telling you and tell me the truth or, uh, just ... just the Man is going know that." CT 382. When Carrillo told Rivas that "if you want to think that ... that nothing happened, I don't know what you're gonna do, you have

to call somebody" and asked, "Do you understand me?," Rivas answered, "Not very well." *Id.*[7]

At the motion hearing, Carrillo testified that he advised Rivas of his *Miranda* rights by reading them verbatim from his field officer's notebook. RT 29-30. Asked whether it appeared to him that perhaps Rivas was not understanding the advisement, Carrillo testified, "No." RT 30. On further questioning, he conceded that he had to go over some of the rights more than once because "at one time Mr. Rivas paused, and I kind of saw that he didn't understand the advisement. So I asked him if he understood and he didn't, he said he didn't understand it." *Id.*[8]

Carrillo testified that at the end of the interrogation, he arrested Rivas. He put handcuffs on Rivas inside the house, then walked him out to Carrillo's police car and put him in the back of the car. Carrillo drove Rivas to the jail; Peralta also was in the car. RT 21-22. According to Carrillo, the drive took a couple of minutes, during which time he told Rivas to be honest with himself, Rivas expressed the desire to talk further about what happened, and Carrillo said that he could do so once they got to the jail. RT 22-23.

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[7] As discussed further below, this fact, which is relevant to the question whether Rivas understood the purported *Miranda* warnings, was not mentioned in the Court of Appeal's opinion. Rivas pointed out the omission in his petition for rehearing and petition for review.

[8] Despite that testimony, the Court of Appeal stated: "At no time during the two interviews did Carrillo feel that Rivas did not understand or communicate with him, and Rivas responded appropriately to Carrillo's questions." Pet. App. 65. As Rivas pointed out in his petition for rehearing, both Carrillo's testimony, quoted in the text, and the objective evidence (i.e., the transcripts) contradict that assertion.

At the jail, Carrillo took Rivas into a room, closed the door, turned on his recorder, and spoke to Rivas; Peralta was also present. RT 23. Carrillo testified that he did not re-advise Rivas of any *Miranda* rights. RT 24. The transcript of the jailhouse interview confirms that there was no mention of *Miranda* rights. CT 398-443.

Officer Carrillo testified that, when speaking with Rivas at the police facility, he did not get what the prosecutor called "the impression that he didn't understand you," and Rivas's responses were appropriate to the questions Carrillo asked. RT 25. The conversation at the jail lasted approximately 25 minutes. RT 26.

During the jail interrogation, Rivas initially, and repeatedly, denied touching his stepdaughter. CT 412-16. He then admitted to touching her with his hands but denied going any further. Upon further questioning, he said that she climbed on top of him and showed him her private parts but he denied that he took his penis out. CT 416-21. Upon further questioning, he said he took his penis out of his pants but did not touch Maria O. with it. CT 421-29. He eventually said that he touched the sides of her vagina with his penis but did not penetrate her. CT 430-31.

At the motion hearing, Rivas testified that he was 37 years old in April 2012 (when the interviews occurred). The highest grade he completed in school was the sixth grade, which he completed in his home country, Guatemala. He came to the United States at age 12 or 13. RT 34. He testified that he cannot read English and had difficulty understanding the Spanish words Carrillo spoke because Carrillo "doesn't speak very much Spanish." RT 34-37.

Rivas was nervous when the officer came to his house and spoke to him. RT 36. He did not recall the officer's reading him his rights or reading to him from a handbook. RT 35-36. He read an interview transcript given to him by his attorney and did not understand the advisement of rights in the transcript. RT 35.

After a recess at the hearing, the trial court stated that it read the transcripts of both interrogations and the "Miranda advisement from the officer's book." RT 40.[9] Before hearing counsel's arguments, the court said that "even though it could be argued that the interview at the defendant's home was non-custodial, nonetheless the officer gave Miranda warnings." *Id.* The court said that "by the second interview the defendant was in custody clearly, and this was an interrogation, because the officer began the questions again." *Id.* The court noted that "the officer initiated the questions without advising the defendant again of his Miranda rights." RT 41. The court said that "certainly the way these interviews were conducted was inartful, based on my experience. I don't think that any experienced sexual assault or child sexual assault detective would have conducted either of these interviews or interrogations in the same way." *Id.* The court "attribute[d] a lot of the problems that [it saw] to the officer's inexperience." *Id.*

The court "note[d] with interest" that at Rivas's house "the officer had to prod him to get him to say yes when he nodded, when he went um or uh-huh, and it wasn't a clear yes response." *Id.* The court continued: "there is a part of page 33 of

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[9] A copy of a page from Officer Carrillo's book was marked as Court Exhibit 1. *Id.* That exhibit does not appear in the clerk's transcript.

Court Number 2 where the officer says, do you understand me? And the response is, not very well. And yet it was at a period of time when a particular area of inquiry was being asked over and over again to pressure the defendant to make an admission." RT 42. The court asked: "The bottom line from where I sit is was the Miranda advisement reasonably understood and sufficient enough to allow for the statements, both at the home and at the station to come in? Because, as I said, I don't think an experienced investigator would begin an interrogation at the station without a re-advisement of Miranda." *Id.* The court emphasized again that it did not "believe that an experienced interrogator would ask questions over and over again and tend not to allow the defendant to make a confession, without that kind of restatement over and over again." *Id.*

The court then heard arguments from the prosecutor and defense counsel, interspersed with the court's own questions and remarks. RT 42-48. The judge said that "this could have been handled much more professionally by the officer" but that she was "just not offended by the way the Miranda advisement was given." RT 48. The court concluded: "Like I said, it could have been so much better, but it wasn't, and yet I think that it was legally sufficient to preclude exclusion from trial." RT 49.

B. Evidence at Trial

Rivas's trial began on January 24, 2013, years after the alleged crimes occurred. RT 88; CT 99-101. The prosecution's case centered on the testimony of the alleged victim, Rivas's stepdaughter, Maria O., and on Rivas's statements to the police.

Maria O. was nineteen years old at the time of trial. RT 90. She testified that she was nine or ten years old when Rivas touched her private part with his private part. RT 107-10, 113-14. Maria O. remembered being home alone with Rivas that day, but acknowledged that it would have been unusual for her to be home without her mother, aunt, uncle, or brother being there. RT 132-34. She could not remember whether her underwear was on or off during the incident. RT 139. She testified that a few years later, Rivas touched her breasts, legs, and thigh over her clothes, while everyone else in the house was asleep. RT 122-25. She testified that she thought this happened more than ten times over the next several years. RT 127. However, she could not be sure that any of the nighttime touching occurred while she was under the age of fourteen. RT 147. Maria O. testified that Carrillo's police report was inaccurate and contained a lot of things she had never told him. RT 170.

During Carrillo's testimony, the prosecution played audio recordings of Rivas's interrogation at his house and at the jail. RT 201-05. Transcripts of both interrogations were entered into evidence as Exhibit 6A and 6B (*see* CT 254-348) and provided to the jurors as they listened to the recordings at trial and to keep through deliberations. RT 203-05. The transcripts are not identical to the ones relied upon at the pre-trial hearing on whether to admit Rivas's statements. Pet. App. 6-8; CT 349-443 (pre-trial transcripts).

C. Closing Arguments

In her closing argument, the prosecutor emphasized Rivas's statements to the police as evidence that he had touched his stepdaughter in a sexual way and was

guilty of all the charges. Specifically, for the two counts charging a lewd act on a child under fourteen, the prosecutor pointed to Maria O.'s testimony that Rivas would touch her while everyone was sleeping and the fact that "the defendant admitted to touching her." RT 286. The prosecutor continued:

> In his interview at the beginning he is trying to minimize. He is trying to deny and he says, well, you know, maybe I touched her, but that was probably when we were playing horse. That's on page 13 [of the transcript].
>
> And then as they keep going the cop keeps asking him, yeah, you know, you touched her. And he says, yea, I touched her, on page 16. I would touch her again on page 21. He says her legs. He remembered touching her legs. He tries to deny the breasts, which are more overtly sexual as a sexual organ, but he does say, yeah, I touched her legs. That's on page 22. And he says, I have touched her parts on page 39. He admits to it.

Id.

For the third count, charging a forcible lewd act on a child under fourteen, the prosecutor again emphasized Rivas's statements. RT 289. After recounting Maria O.'s testimony, the prosecutor argued that "[t]he important thing to know, and *the really good evidence for count 3 is that the defendant himself corroborates Maria's story.*" RT 290 (emphasis added). She continued:

> [W]hat is most important is the details. He says she was wearing a dress like pajama. If this never happened and he is admitting to something that never happened, how is he knowing she is wearing a dress like pajama. He knows that because he has a specific memory of it happening. You can read through the transcript all you want, and the officer never tells him she was wearing a dress like pajama. He said it because he remembers it happening.
>
> In addition to that, he corroborates by saying, no one else was home. If you want to, you can go back and

> read the transcript. He also says it was during the day, it wasn't at nighttime, because he has a specific memory of this happening. He said she was around 10 years old. And then he goes in with the self-serving stuff. She jumped on me. And he says his penis was near her vagina. But I didn't penetrate. Somehow if he didn't penetrate, then it is not a crime, not bad. But he says it was out and it was in the area.
>
> *Everything he said about that incident corroborates what Maria said to you in court.*

RT 290 (emphasis added).

The prosecutor argued that Maria O.'s testimony could potentially provide the basis for a conviction but that "the best part in this case is we have more. I have more than just Maria O." RT 293. "I have the defendant's own statements. And what he admitted to." *Id.*

In her closing, defense counsel focused on count 3, alleging the use of force, stating "that is the count that is really in contention here." RT 296. She argued that Maria O.'s testimony did not prove that Rivas used force beyond a reasonable doubt, and "that there simply wasn't the type of force described or required by law for this to be a forcible lewd act on a child." RT 298-99. She concluded: "I am not telling you to give him a walk on that [count 3], I am telling you what he is really to be held responsible for is that lesser charge of lewd act on a child under 14." RT 300.

The jury found Rivas guilty on all counts.

D. Sentencing

Rivas faced a sentence of between eight and eighteen years. RT 327. The prosecutor's sentencing report stated that the victim felt that a sentence of "'a

couple of years' would be long enough." CT 227; *see also* RT 329 (judge states at sentencing hearing that the victim did not want Rivas "incarcerated for a long period of time"). The report explained that Rivas was raised in a rural area in Guatemala; completed the sixth grade; and came to the United States "due to the war." CT 232. The report noted three letters explaining that Rivas was a dedicated worker and good and helpful person. CT 228. The report noted that Rivas had "no prior record of criminal conduct as an adult or a juvenile" and concluded that he was "in the Low Risk Category for being convicted of another sexual offense." CT 230, 234. The judge nevertheless sentenced Rivas to 18 years. RT 330-31.

E. Rivas's Appeal

As noted above, the Court of Appeal denied relief on the *Miranda* claim on direct appeal and remanded for re-sentencing, resulting in Rivas's sentence being reduced to 12 years in state prison. The Court of Appeal rejected the Attorney General's argument that Rivas was not in custody during the first police interview in his house, holding that the prosecution forfeited the issue by not raising it at trial. Pet. App. 67.[10] The court rejected Rivas's arguments that the *Miranda* warnings were insufficient and held that substantial evidence supported the trial court's ruling that Rivas understood and waived his rights. Pet. App. 67-71. Rivas discusses the opinion in more detail below.

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[10] The State cannot challenge this conclusion in federal habeas. *Browning v. Baker*, 875 F.3d 444 (9th Cir. 2017), *cert. denied sub nom. Filson v. Browning* (2018).

V. REASONS FOR GRANTING THE WRIT

A. The State Court Decision Is Contrary to and an Unreasonable Application of *Miranda*, and Is Also Based on an Unreasonable Determination of the Facts; Therefore, 28 U.S.C. § 2254(d) Does Not Bar Relief

The Court of Appeal's opinion is the last reasoned state-court decision to address Rivas's *Miranda* claim and therefore is the relevant state-court decision for purposes of federal habeas review. *Johnson v. Williams*, 133 S. Ct. 1088, 1094 n.1 (2013). As shown below, the Court of Appeal's decision runs afoul of both 28 U.S.C. § 2254(d)(1) and (d)(2), and therefore AEDPA does not bar relief.

1. Legal Principles

The Fifth Amendment to the United States Constitution states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." *Miranda* dealt "with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation" and required law enforcement to give a four-part warning to "assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." 384 U.S. at 439.

It is clearly established federal law that a *Miranda* warning "must be given to suspects before they can be subjected to custodial interrogation." *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (28 U.S.C. § 2254 case subject to AEDPA). "A suspect in custody must be advised as follows:

> He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford

> an attorney one will be appointed for him prior to any questioning if he so desires.

Id. (quoting *Miranda*, 384 U.S. at 479).

The second warning – that anything the suspect says can be used against him in court – is to ensure that the suspect is "aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of the consequences that there can be any assurance of real understanding and intelligent exercise of the privilege." *Miranda*, 384 U.S. at 479. The warning alerts suspects to the fact that they are "faced with a phase of the adversary system" and are "not in the presence of persons acting solely in [their] interest." *Id.*

"The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel." *Berghuis*, 560 U.S. at 383. "When the police fail to give the required warnings, 'the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant.'" *Garcia v. Long*, 808 F.3d 771, 777 (9th Cir. 2015) (citing *Miranda*, 384 U.S. at 444, and affirming grant of relief on *Miranda* claim in habeas case governed by AEDPA); *United States v. San Juan-Cruz*, 314 F.3d 384, 389 (9th Cir. 2002) ("the *Miranda* warning must be read and conveyed to all persons clearly and in a manner that is unambiguous").

"Even absent the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused 'in fact knowingly and voluntarily waived *Miranda* rights' when making the statement." *Berghuis*, 560 U.S. at 382.

"The waiver inquiry has two distinct dimensions: waiver must be 'voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and it must be "'made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" *Id.* at 382-83.

Even "[i]f the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate 'a valid waiver' of *Miranda* rights." *Id.* at 384. "The prosecution still must make the additional showing that the accused understood these rights." *Id.*

"There is a presumption against waiver, and the government bears the heavy burden of showing that a waiver was valid." *Rodriguez v. McDonald*, 872 F.3d 908, 922 (9th Cir. 2017). "The validity of a waiver depends in each case 'upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.'" *Id.* (quoting *Edwards v. California*, 451 U.S. 477, 482 (1981), and granting relief on *Miranda* claim in habeas case governed by AEDPA).

Courts consider "any language difficulties encountered by the defendant during custodial interrogation"[11] and the defendant's level of education. *United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir. 2003) (explaining that "thoroughness and clarity are especially important when communicating with

[11] *United States v. Garibay*, 143 F.3d 534, 537 (9th Cir. 1998) (granting relief on *Miranda* claim because government did not meet its burden of showing valid waiver).

uneducated defendants" and granting relief because *Miranda* warning did not convey government's obligation to appoint an attorney for an indigent accused). Further, "an officer must clarify the meaning of an ambiguous or equivocal response to the *Miranda* warning before proceeding with general interrogation." *United States v. Rodriguez*, 518 F.3d 1072, 1074 (9th Cir. 2008).

A *Miranda* violation does not entitle federal habeas petitioners to relief if the error was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Garcia*, 808 F.3d at 781. Under *Brecht*, an error is not harmless "if the constitutional error had a 'substantial and injurious effect or influence' on the verdict." *Id.* "This standard is satisfied if the record raises 'grave doubts' about whether the error influenced the jury's decision." *Id.* (citing *Davis v. Ayala*, 135 S. Ct. 2187, 2203 (2015)). The State bears the burden of demonstrating harmlessness. *Ayala*, 135 S. Ct. at 2197; *Mays v. Clark*, 807 F.3d 968, 980 (9th Cir. 2015).

2. 28 U.S.C. § 2254(d)(1) and (d)(2) Are Satisfied

Officer Carillo's advisement failed to comply with *Miranda*, and the prosecution failed to meet its burden of showing that Rivas knowingly and intelligently waived his *Miranda* rights. The state court's denial of Rivas's claims is contrary to and an unreasonable application of federal law and is based on an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1), (2). Accordingly, 2254(d) does not bar relief.

The first warning which *Miranda* requires police to give is that the interviewee has a right to remain silent. Officer Carrillo did not use the word

"silent" or any derivative or analogous word. Although the police are not require to employ the exact words used in the *Miranda* decision, they must give warnings that convey to a suspect his or her rights as required by *Miranda*.

Rivas initially gave no answer to Carrillo's question as to whether he understood. When Carrillo followed up by asking, "Yes or no?," Rivas replied, "Uh-huh, yes, if *** I can't say anything?" This not only failed to reflect an understanding of the right but also demonstrated a lack of understanding. Carrillo apparently thought so as well, for he told Rivas again that he was going to explain his rights, and he asked again, "Okay, you have the right not to say anything, do you understand?" Rivas replied, "You will be telling me?" Carrillo said "Yes" and asked Rivas whether he understood. After repeated attempts, Carrillo got Rivas to say "Yes."

The Court of Appeal's interpretation of this exchange was that although it was "labored and awkward," Rivas "ultimately stated he understood when he answered 'yes' to Carrillo's inquiry." Pet. App. 68. However, the inquiry addressed not whether Rivas understood that he had the right not to say anything, but whether he understood that Carrillo "will be telling" him his rights. In context, "yes" meant that Rivas understood that Carrillo *would* be telling him his rights, not that he had already told him one of them. The Court of Appeal's interpretation is not supported by the record and is based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). *Doody v. Ryan*, 649 F.3d 986, 1002-03 (9th Cir. 2011) (en banc) (state court's conclusion that *Miranda* warnings were "clear and

understandable" constituted an unreasonable determination of facts where detective significantly deviated from printed *Miranda* form and petitioner "was never clearly and reasonably informed that he had the right to counsel").

The trial court opined that Carrillo's version of the second *Miranda* warning "clarifies what has been said up to that point." RT 45. The second warning to be communicated by police is that anything the interviewee says can and will be used against him in court. *Miranda*, 384 U.S. at 469.

Carrillo's first statement on the second *Miranda* warning included the admonition that what Rivas said that day could be used against him in a court. The trial court's statement that "the defendant seems to understand that" (RT 45) is flatly contradicted by the record. When Carrillo asked Rivas whether he understood, Rivas replied, "No." Carrillo then told Rivas that what he said that day could be "used in ... in .., against ... against a court" and could "be used in court." He did not inform Rivas that what he said could be used against him in court. As this Court stated in *Miranda*:

> This warning is needed in order to make [the interviewee] aware not only of the privilege [against self-incrimination], but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system -- that he is not in the presence of persons acting solely, in his interest.

Miranda, 384 U.S. at 469. The Court of Appeal's conclusion that substantial evidence supported the finding that Carrillo's advisement complied with *Miranda* is

thus contrary to and an unreasonable application of *Miranda* and an unreasonable determination of the facts. *Doody*, 649 F.3d at 1003-04 (finding 2254(d)(1) and (d)(2) satisfied where "the transcript reveals the use of *Miranda* warnings that were the very antithesis of clear" and did not reasonably convey to petitioner his *Miranda* rights).

Even assuming, contrary to fact, that Carrillo clearly conveyed to Rivas that his statements to Carrillo could be used against him in court, the prosecution failed to meet its burden of showing that Rivas understood the second *Miranda* warning. When Carrillo asked, "Do you understand?" Rivas's reply was "Uh-huh." Carrillo apparently did not take this to mean "yes," for he persisted, "Yes or no?" Rivas gave no answer. The state courts never answered the question whether Rivas understood the flawed second version of the second *Miranda* warning, and thus failed to determine a necessary fact. *Taylor v. Maddox*, 366 F.3d 992, 1000-01 (9th Cir. 2004) (stating that "[n]o doubt the simplest situation" in assessing a challenge under § 2254(d)(2) is "where the state court should have made a finding of fact but neglected to do so. In that situation, the state-court factual determination is perforce unreasonable . . . .").

The record fails to establish that Rivas was fully aware of the nature of his rights and the consequences of abandoning them. Carrillo's testimony at the motion hearing that he had no indication that Rivas failed to understand him is belied by the interview transcripts, which – as the excerpts quoted herein have demonstrated – are replete with non-sequiturs and silence in response to questions, as well as

instances in which Rivas unambiguously stated that he did not understand Carrillo. If Carrillo believed that he was communicating adequately to Rivas, there would not be so many instances in the transcripts of Carrillo asking Rivas whether or not he understood what Carrillo was saying. The transcripts show that that the prosecution failed to meet its burden of establishing that Rivas understood his rights and validly waived them, and the Court of Appeal's conclusion to the contrary runs afoul of § 2254(d)(1) and (d)(2). *Rodriguez*, 872 F.3d at 919 (finding unreasonable determination of facts and granting relief on *Miranda* claim where transcript of interrogation shows detectives did not honor petitioner's invocation of right to counsel); *Garcia v. Long*, 808 F.3d 771, 781 (9th Cir. 2015) (affirming relief on *Miranda* claim in case governed by AEDPA where "the state court's view of the record is belied by the interrogating officer's own statements during the interview"); *Doody*, 649 F.3d at 1003 (finding (d)(1) and (d)(2) satisfied and granting relief on *Miranda* claim); *Anderson v. Terhune*, 516 F.3d 781, 786-87 (9th Cir. 2008) (en banc) (same).

Further, the totality-of-the-circumstances approach requires inquiry into all the circumstances surrounding the interrogation, including the defendant's age, experience, education, background, and intelligence, as well as his capacity (or lack of capacity) to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. The evidence as to those personal characteristics of Rivas points to the conclusion that he did not knowingly and intelligently waive his *Miranda* rights. Thirty-seven years of age at

the time of the interviews, he had only a sixth grade education, which he received in his native Guatemala. Although he had come to the United States at age 12 or 13, he could not read English. There was no evidence that he had ever received *Miranda* warnings in the past, and the record shows that he had no prior criminal history. *Doody*, 649 F.3d at 1004 ("Compounding the lack of clarity was Doody's express statement to the detective that he had never heard of *Miranda* warnings.").

In sum, Officer Carrillo did not clearly and effectively communicate the first and second *Miranda* warnings to Rivas and Rivas did not knowingly and intelligently waive his *Miranda* rights. The trial court was required to exclude the police interviews with Rivas from evidence. The Court of Appeal's rejection of Rivas's claim on appeal "collides with AEDPA on all grounds," *Anderson*, 516 F.3d at 786, and therefore 28 U.S.C. § 2254(d) does not bar relief. Because the state court did not reach the question of prejudice, the Court assesses that issue *de novo* under *Brecht*. *Rompilla v. Beard*, 545 U.S. 374, 390 (2005).

The report and recommendation accepted by the district court concluded that the state court decision passed muster under AEDPA. The court ruled that the Court of Appeal's "factual determinations that Petitioner affirmatively acknowledged the first two *Miranda* advisements – having answered 'yes to whether he understood his right to remain silent and 'uh huh' to whether he understood the consequences of failing to remain silent - were not objectively unreasonable under § 2254(d)(2)." Pet. App. 39-40. The report also concluded that "in light of Petitioner's background, experience, and conduct during the interviews,

the court of appeal was not objectively unreasonable in finding that he knowingly and intelligently waived his right to remain silent." Pet. App. 40. Rivas demonstrated above that a reasonable state court could not reach these conclusions under controlling *Miranda* law and the record in this case. A court cannot reasonably read the transcripts of the interrogations and conclude that they reflect a clear advisement or that the State met its burden of showing a valid waiver. The report provides no persuasive reason to deny relief.

B. On *De Novo* Review, the Court Should Grant Relief

1. Rivas's *Miranda* Rights Were Violated

For the same reasons that 28 U.S.C. § 2254(d) is satisfied, the Court should grant relief on *de novo* review. *Frantz v. Hazey*, 533 F.3d 724, 736 (9th Cir. 2008) (en banc) ("a holding on habeas review that a state court error meets the § 2254(d) standard will often simultaneously constitute a holding that the § 2254(a)/§ 2241 requirement is satisfied as well, so no second inquiry will be necessary"). The transcripts show that Carrillo's interrogation was not just "inartful" or "unprofessional," but failed to convey the required *Miranda* warnings in a clear and unambiguous way, especially given Rivas's responses to Carrillo, his level of education, and his language difficulties. The record also shows that the prosecution failed to meet its burden of showing that Rivas validly waived his *Miranda* rights. The only remaining question is whether Rivas was prejudiced by the *Miranda* violation. As shown in the following section, he was.

2. The *Miranda* Violation Prejudiced Rivas

Although the State has contended that § 2254(d) bars relief, it conceded at oral argument in the Ninth Circuit that if that hurdle is met, the constitutional violation was not harmless, i.e., Rivas would then be entitled to relief. *See* www.CA9.uscourts.gov/media (Aug. 7, 2018). Although the State's admission is binding, Rivas nevertheless briefly discusses why the State's concession is correct.

This Court explained in *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991), that "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." That was true here, and the prosecutor exploited Rivas's improperly admitted statements in her closing argument to secure a conviction.

Only Maria O. and Rivas could give firsthand accounts of what happened, or did not happen, when they were alone together. Maria's accusation that Rivas forced himself on her when she was 9 or 10 years old and they were home alone together formed the basis for count 3, the charge of violating California Penal Code section 288, subdivision (b)(1). Although a number of details differed, Carrillo wrenched from Rivas a confession that he had a sexual encounter with Maria when they were home alone together and she was 10 or 11 years old, a confession that provided additional, damning facts beyond any other evidence presented by the prosecution.

Not surprisingly, the prosecutor argued to the jury that the confession proved the truth of Maria's accusations and the charges. The prosecutor emphasized that "[t]he important thing to know, and the really good evidence for count 3 is that the

defendant himself corroborates Maria's story." The prosecutor pointed out ways in which the incident described by Maria and the one described by Rivas in the second police interview were similar, including that "she was wearing a dress like pajama," that "no one else was home," that "it was during the day," and that "his penis was near her vagina. Everything he said about that incident corroborates what Maria said to you in court." *See*, *supra*, at 14-15.

The prosecutor also argued to the jury that Rivas's statements to the police corroborated Maria's accusation that Rivas engaged in nighttime touching of her legs and breasts, the basis for counts 1 and 2, the charges of violating California Penal Code section 288, subdivision (a). The prosecutor stressed that Rivas "admitted to touching her" and to touching her "parts." RT 286.

Without Rivas's statements to the police, Maria's testimony would have been uncorroborated, and her memory lapses and confusion about dates would have given the jury ample reason to entertain a reasonable doubt. That is especially true as to counts 1 and 2, because Maria testified that most of the nighttime touching occurred when she was over 14 and that, in fact, she was not sure that *any* of that touching occurred when she was under 14. RT 147. Maria also repeatedly testified that she did not remember when the first nighttime touching occurred or how much time passed before it happened again. RT 146-47, 151-52. Maria's being under age 14 when the touching occurred was, of course, an element of the charges in counts 1 and 2. RT 247, 251-53 (jury instructions.)

Moreover, it is far from certain how much of the testimony Maria gave at Rivas's trial would also have been given in a trial, in which defense counsel knew that Rivas's statements to police would be excluded rather than admitted. A correct ruling on the *Miranda* issue would have given defense counsel much stronger reasons to object to the blatantly leading questions which the prosecutor frequently put to Maria. As it was, defense counsel did not object to any of them, likely because Rivas's confession had been ruled admissible.

Given the prosecutor's emphasis on Rivas's statements in her closing, and the weakness of the rest of the evidence against Rivas – no physical evidence linked him to the crimes – the State cannot meet its burden of showing that the *Miranda* violation was harmless under *Brecht*. *See, e.g.*, *Doody*, 649 F.3d at 1023 (*Miranda* violation prejudicial where petitioner confessed to participating in nine murders; his confession was "integral to the prosecution's case" "[a]s evidenced by the prosecution's arguments"); *Rodriguez*, 872 F.3d at 926 (*Miranda* violation prejudicial "where there was no physical evidence linking [petitioner] to the crime" and the government highlighted petitioner's confession in closing argument); *Garcia*, 808 F.3d at 783 (*Miranda* violation prejudicial where petitioner's "interrogation statements were the focal point of the prosecution's closing argument").

In sum, because Rivas's statements to the police were "central to the conviction," the prejudice from the admission of his statements "cannot be soft pedaled." *Anderson*, 516 F.3d at 792. The prejudice was heightened because the

admission of the statements prevented the defense from further impeaching or challenging Maria O.'s testimony (the only other evidence against Rivas) or objecting to the leading questions used by the prosecutor to elicit her testimony. *Garcia*, 808 F.3d at 784 ("[D]efense counsel's closing argument shows that the tape was indeed damning. . . . The admission of Garcia's confession plainly affected counsel's strategy – he could not deny that Garcia had molested Jane but could only dispute the rape charge by arguing that Garcia never used force or fear."). The confession thus prejudiced Rivas on all the charges.

VI. CONCLUSION

For the foregoing reasons, the court should grant Rivas's petition.

Respectfully submitted,

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DATED: November 20, 2018

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