NOT FOR PUBLICATION

FILED

AUG 30 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARLOS DAGOBERTO RIVAS, Petitioner-Appellant, v. SHERMAN SPEARMAN, Warden, Respondent-Appellee.	No. 17-55182 D.C. No. 8:16-cv-00307-JVS-JPR MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
James V. Selna, District Judge, Presiding

Argued and Submitted August 6, 2018
Pasadena, California

Before: CLIFTON and CALLAHAN, Circuit Judges, and HOYT,** District Judge.

Officer Daniel Carrillo (Carrillo) interviewed Carlos Dagoberto Rivas (Rivas) at his home, arrested him, and then interviewed him again at the jail. Rivas confessed to the allegations the victim had leveled against him. An Orange County Superior Court (Superior Court) jury convicted Rivas of three counts of

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas, sitting by designation.

committing lewd acts on a child under age 14, one of those counts involving force. The California Court of Appeal, Fourth Appellate District (Court of Appeal), affirmed his conviction. After his direct appeals failed, Rivas petitioned the district court for habeas corpus relief claiming, among other things, a violation of his Fifth Amendment privilege against self-incrimination. *See Miranda v. Arizona*, 384 U.S. 436 (1966). Evaluating Rivas' *Miranda* claim under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), the district court denied his petition. We affirm.[1]

AEDPA provides that a federal court may not grant a petitioner's habeas corpus application "with respect to any claim that was adjudicated on the merits in State court proceedings," unless the state 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," or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

The *Miranda* warnings must reasonably convey to a suspect his rights, including the right to remain silent and the consequences of relinquishing it. *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989). They must also be "sufficiently

[1] As the parties are familiar with the facts and procedural history, we restate them only as necessary to explain our decision.

comprehensive and comprehensible when given a commonsense reading." *Florida v. Powell*, 559 U.S. 50, 63 (2010). "If the State establishes that [the] *Miranda* warning[s] [were] given" and were "understood by the accused," then the "accused's uncoerced statement," so long as it was voluntary, knowing, and intelligent, "establishes an implied waiver." *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010).

To obtain relief, Rivas must show that his waiver was not knowing, voluntary, and intelligent. He contends that Carrillo's warnings were incomprehensible to him and that the Court of Appeal's contrary determination was unreasonable. We, however, find sufficient evidence in the record supporting the Court of Appeal's decision because: (1) Rivas did not have substantial difficulty understanding Carrillo; (2) Carrillo's informing Rivas of "the right not to say anything" was the equivalent of informing him of his right to remain silent; (3) Carrillo had also instructed Rivas that he should seek a clarification if he was confused about any aspect of the warnings; (4) Rivas has failed to establish that Carrillo's Spanish was incomprehensible to him; and (5) Rivas suffered from no apparent impediment that would have put a reasonable officer on notice that Rivas did not understand the *Miranda* warnings. In sum, Carrillo informed Rivas of his *Miranda* rights, and Rivas freely and deliberately chose to speak to Carrillo. Rivas

knew that in speaking, he was relinquishing certain rights, with important consequences.

Viewed through AEDPA's deferential prism, *see Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), the Court of Appeal's decision was consistent with, and not unreasonable as to its application of, United States Supreme Court precedent. Similarly, the Court of Appeal's factual findings were reasonable. Accordingly, the district court's judgment denying habeas relief to Rivas is **AFFIRMED**.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS DAGOBERTO RIVAS, Petitioner, v. SHAWN HATTON, Warden, Respondent.	Case No. SACV 16-0307-JVS (JPR) **J U D G M E N T**

Pursuant to the Order Accepting Findings and Recommendations of U.S. Magistrate Judge,

IT IS HEREBY ADJUDGED that the Petition is denied and this action is dismissed with prejudice.

DATED: January 9, 2017

JAMES V. SELNA
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS DAGOBERTO RIVAS, Petitioner, v. SHAWN HATTON, Warden, Respondent.	Case No. SACV 16-0307-JVS (JPR) ORDER ACCEPTING FINDINGS AND RECOMMENDATIONS OF U.S. MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all the records and files of this case, and the Report and Recommendation of U.S. Magistrate Judge.

On December 12, 2016, Petitioner filed objections to the R. & R., in which for the most part he simply repeats arguments in the Petition and Traverse. Only two objections warrant discussion. First, he repeats his claim that translation "discrepancies" in his interview transcripts rendered the state courts' denial of his Miranda claim "flawed and erroneously reached." (Objs. at 5-6; see also Pet., Attach. Mem. at 18 n.3 (noting same transcript discrepancies).) Second, as to his consular-notification claim, Petitioner cites out-of-circuit authority purportedly demonstrating that some federal courts have

held that Article 36 of the Vienna Convention confers individually enforceable rights. (Objs. at 8-9.)

Both objections lack merit. The fact that the prosecution used English translations of Petitioner's interview transcripts at the Miranda hearing that were slightly different from those given to the jury at his trial two days later was well noted and explored by defense counsel. (See, e.g., Lodged Doc. 3 at 33-41 & n.23 (citing both translations in detail but conceding that they were "identical in content" except for minor stylistic differences); Lodged Doc. 10 at 4 n.3 (noting same issue in petition for review, that "[t]he two sets of transcripts are not identical").) In his appellate brief, Petitioner expressly acknowledged that the different versions were essentially "identical in content":

> Court Exhibit 2, which appears in the record (2 CT 349-397), is identical in content (with a slight pagination difference) to People's Exhibit 6A (2 CT 254-302), which was admitted into evidence at trial . . . . Court Exhibit 3, which also appears in the record (2 CT 398-443), is identical in content (with a different footer) to People's Exhibit 6B (2 CT 303-348), which was admitted into evidence at trial . . . .[1]

(See Lodged Doc. 3 at 33 n.23 (some record citations omitted).)

[1] As Petitioner correctly noted, the transcripts admitted at the pretrial Miranda hearing were marked as court exhibits 2 and 3, and the transcripts given to the jury at trial were marked as People's exhibits 6A and 6B. (See Objs. at 5.)

In any event, as the R. & R. makes clear, "[b]ecause Miranda involves a totality-of-circumstances inquiry," whether Petitioner knowingly and voluntarily waived his Miranda rights does not depend on any specific words or utterances in isolation (see R. & R. at 11, 27-30) – including, for example, whether he said "Uh-huh, yes, if [indecipherable] I can't say anything?" or "Uh-huh, yes, if [indecipherable] now I can't tell you anything?" in confirming his understanding of his right to remain silent (see Objs. at 5-6). (See also R. & R. at 30 (finding no law requiring suspect to "affirmatively indicate after each of the four warnings his understanding of it").)

Further, the Magistrate Judge did not say that no court has ever held that Article 36 of the Vienna Convention confers individual rights; rather, she correctly noted that "the Supreme Court has never clearly established that the Vienna Convention creates judicially enforceable private rights," citing, among others, various Supreme Court cases in support. (See R. & R. at 33-34.) Thus, because federal habeas review looks only to clearly established Supreme Court decisions for guidance, Petitioner's second objection has no merit.

Accordingly, having made a de novo determination of those portions of the Report and Recommendation to which objections have been made, the Court concurs with and accepts the Magistrate Judge's recommendation that the Petition be denied. IT THEREFORE

IS ORDERED that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: January 9, 2017

JAMES V. SELNA
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARLOS DAGOBERTO RIVAS, Petitioner, v. SHAWN HATTON, Warden,[1] Respondent.	Case No. SACV 16-0307-JVS (JPR) REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable James V. Selna, U.S. District Judge, under 28 U.S.C. § 636 and General Order 05-07 of the U.S. District Court for the Central District of California.

PROCEEDINGS

On February 22, 2016, Petitioner, a Guatemalan national currently incarcerated at Correctional Training Facility in Soledad, filed a Petition for Writ of Habeas Corpus by a Person in State Custody. On May 6, 2016, Respondent filed an Answer.

[1] Shawn Hatton, warden of the Correctional Training Facility in Soledad, where Petitioner is housed, is substituted in under Federal Rule of Civil Procedure 25(d) as the respondent. See R. 2, Rs. Governing § 2254 Cases in U.S. Dist. Cts.

On June 9, 2016, Petitioner filed a Traverse.

For the reasons discussed below, the Court recommends denying the Petition as well as Petitioner's concurrent requests for an evidentiary hearing and appointment of counsel and entering judgment dismissing this action with prejudice.

PETITIONER'S CLAIMS[2]

I. The trial court erroneously admitted into evidence Petitioner's statements, which were obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966). (Pet. at 6, Attach. Mem. at 15-49.)

II. The state failed to notify Petitioner of his rights as a Guatemalan national to contact and seek assistance from the Guatemalan consulate, in violation of Article 36 of the Vienna Convention on Consular Relations and California Penal Code section 834c. (Pet. at 5, Attach. Mem. at 1-11.)

III. Petitioner's trial and appellate counsel were ineffective for failing to raise his consular-notification claim. (Pet. at 5-6, Attach. Mem. at 12-14.)

BACKGROUND

On January 29, 2013, Petitioner was convicted by an Orange County Superior Court jury of three counts of committing lewd acts on a child under age 14, one of which involved force. (See Lodged Doc. 1, 1 Clerk's Tr. at 248.) He was originally sentenced to 18 years in prison (id.), which was subsequently reduced to 12 years (Lodged Doc. 9).

[2] The Court has rearranged the order in which it addresses Petitioner's claims from that followed by the parties, to avoid repetition and for other reasons.

Petitioner raised his Miranda claim on appeal to the California Court of Appeal (Lodged Doc. 3 at 32-60), which affirmed the judgment in relevant part but remanded for resentencing (see Lodged Doc. 6, amended by Lodged Doc. 8 (Oct. 15, 2014)). He then filed a petition for review in the California Supreme Court (Lodged Doc. 10), which summarily denied review on December 10, 2014 (Lodged Doc. 11). He filed a petition for writ of certiorari, which was denied by the U.S. Supreme Court on May 18, 2015. (Lodged Docs. 18, 19.) Petitioner raised his consular-notification and ineffective-assistance-of-counsel claims in a habeas petition to all levels of the state court. (See Lodged Docs. 12, 14, 16.) On May 4, 2015, the superior court denied them in a reasoned decision, for failing to "set forth meritorious grounds warranting . . . relief" (Lodged Doc. 13 at 2), and the court of appeal and supreme court summarily denied the claims (Lodged Docs. 15, 17).

SUMMARY OF THE EVIDENCE

The factual summary in a state appellate-court opinion is entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1). See Crittenden v. Chappell, 804 F.3d 998, 1010-11 (9th Cir. 2015). But see Murray v. Schriro, 745 F.3d 984, 1001 (9th Cir. 2014) (discussing "state of confusion" in circuit's law concerning interplay of § 2254(d)(2) and (e)(1)). Because Petitioner does not challenge the sufficiency of the evidence, the Court adopts the following statement of facts from the California Court of Appeal decision on appeal as a fair and

accurate summary of the evidence presented at trial.[3] The Court has nonetheless independently reviewed the state-court record.

> Maria O. testified [Petitioner] began a romantic relationship with her mother and moved into the family's Santa Ana home when Maria was approximately six years old. On a morning when Maria was nine or 10, she was at home with [Petitioner] watching television and wearing "a pajama, like a dress." She wore underwear but no bra. [Petitioner] "dragged" her to the edge of the bed so that her legs were hanging off, and straddled her pressing his groin against her private area while moving up and down. Maria attempted to push him away. She did not "know if he raped [her], but [she] felt something around [her] private part" and felt a little pain "like around [her] stomach" as he moved back and forth. She cried during the abuse and screamed for help several times. [Petitioner] finished and then left the room. Maria's underwear in the area of her vagina was wet. Maria did not tell anyone about the incident because she felt frightened and embarrassed.
>
> [Petitioner] touched Maria sexually on other occasions. She estimated these incidents began about two or three years after the initial incident, when she was 12 years old. He would do it "like once," then stop for a few months, then start doing it again. Maria usually

[3] In fact, Petitioner adopted the same statement of facts in his state-court briefs. (See, e.g., Pet., Attach. Mem. at 16.)

slept on the floor near the bed where her mother and [Petitioner] slept. [Petitioner] would crawl over to her on his hands and knees and then rub Maria's breasts and thighs. Maria testified he did this "when we were asleep, when everybody was asleep. He will touch me over the clothing, my breasts and then my legs, my thighs." Maria would tell him to stop and threaten to tell her mother or the police.

In June 2011, Maria moved in with her paternal aunt and uncle. She eventually disclosed the abuse to her aunt, who phoned the police in April 2012.

After speaking with Maria, Officer Daniel Carrillo and a partner interviewed [Petitioner] at his residence on the evening of April 15, 2012. [Petitioner] admitted during the recorded interview he "would touch her legs but I don't remember about the breasts." He also admitted he "did touch her [private] parts but I didn't have sex with her." After the interview, officers placed [Petitioner] under arrest. Carrillo conducted a second recorded interview at the jail. [Petitioner] recalled an incident where Maria wore pajamas resembling a dress. [Petitioner] stated, "I believe she did show me her [parts]" and she took off her underwear after he got on top of her. At one point, [Petitioner] conceded he "did pass by" her vagina with his erect penis, and later he conceded he touched the sides of her vagina with his penis. He knew "it was wrong because I didn't tell her to do that, I don't remember like I'm telling you but

yeah nothing happen well." [Petitioner] repeatedly insisted he did not penetrate Maria or ejaculate. (Lodged Doc. 6 at 2-3.)[4]

STANDARD OF REVIEW

Under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996:

> 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.

Under AEDPA, the "clearly established Federal law" that controls federal habeas review consists of holdings of Supreme Court cases "as of the time of the relevant state-court decision." Williams v. Taylor, 529 U.S. 362, 412 (2000). As the Supreme Court has "repeatedly emphasized, . . . circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" Glebe v. Frost, 135 S. Ct.

---

[4] In quoting the court of appeal's opinion in this summary of the evidence as well as in subsequent sections, the Court incorporates the changes modifying the original opinion (Lodged Doc. 6) from the court of appeal's denial of rehearing on October 15, 2014 (Lodged Doc. 8).

429, 431 (2014) (per curiam) (quoting § 2254(d)(1)).

Although a particular state-court decision may be both "contrary to" and "an unreasonable application of" controlling Supreme Court law, the two phrases have distinct meanings. Williams, 529 U.S. at 391, 412-13. A state-court decision is "contrary to" clearly established federal law if it either applies a rule that contradicts governing Supreme Court law or reaches a result that differs from the result the Supreme Court reached on "materially indistinguishable" facts. Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (citation omitted). A state court need not cite or even be aware of the controlling Supreme Court cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them." Id.

State-court decisions that are not "contrary to" Supreme Court law may be set aside on federal habeas review only "if they are not merely erroneous, but 'an unreasonable application' of clearly established federal law, or based on 'an unreasonable determination of the facts' (emphasis added)." Id. at 11 (quoting § 2254(d)). A state-court decision that correctly identifies the governing legal rule may be rejected if it unreasonably applies the rule to the facts of a particular case. Williams, 529 U.S. at 407-08. To obtain federal habeas relief for such an "unreasonable application," however, a petitioner must show that the state court's application of Supreme Court law was "objectively unreasonable." Id. at 409-10. In other words, habeas relief is warranted only if the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any

possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011).

Because Petitioner challenges the state courts' factual findings regarding his Miranda waiver, the Court reviews those findings under § 2254(d)(2). See Humphrey v. Grounds, 651 F. App'x 661, 662 (9th Cir. 2016) (reviewing state-court finding that petitioner knowingly waived Miranda rights primarily under § 2254(d)(2), including whether he "understood that he was waiving his rights"), cert. denied, ___ S. Ct. ___, 2016 WL 4575066 (U.S. Oct. 31, 2016); see also United States v. Liera, 585 F.3d 1237, 1246 (9th Cir. 2009) (whether Miranda waiver was knowingly and intelligently made is question of fact). A petitioner is entitled to relief under § 2254(d)(2) only if the court, after reviewing the state-court record, determines that the state court was not merely wrong but actually unreasonable in its fact-finding, which is a "substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007); Hibbler v. Benedetti, 693 F.3d 1140, 1146 (9th Cir. 2012). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." Wood v. Allen, 558 U.S. 290, 301 (2010).

Petitioner raised his Miranda claim on direct appeal (Lodged Doc. 3), the court of appeal rejected it in a reasoned decision (see Lodged Docs. 6, 8), and the state supreme court summarily denied review (Lodged Doc. 11). Petitioner then raised his consular-notification and ineffective-assistance-of-counsel claims in a habeas petition to all levels of the state court. (Lodged Docs. 12, 14, 16.) The superior court rejected the

claims in a reasoned decision (Lodged Doc. 13), and the court of appeal and supreme court summarily denied them (Lodged Docs. 15, 17).

The Court "looks through" the state court's summary denials on direct appeal and habeas to the last reasoned decision on the merits – respectively, the court of appeal's as to the Miranda claim and the superior court's as to the consular-notification and ineffective-assistance claims – as the basis for the state court's judgment. See Ylst v. Nunnemaker, 501 U.S. 797, 803-04 (1991). Because the state court adjudicated all claims on the merits, the Court's review is limited by AEDPA deference.[5] See Richter, 562 U.S. at 99-100.

DISCUSSION

I. Habeas Relief Is Not Warranted on Petitioner's *Miranda* Claim

Petitioner argues that the admission at trial of his inculpatory statements from two interviews conducted by Officer Daniel Carrillo violated Miranda. (Pet. at 6, Attach. Mem. at 36-45.) Specifically, he claims that Officer Carrillo's purported failure to effectively communicate certain of the Miranda advisements meant that he did not knowingly and intelligently waive his right to remain silent.[6] (Pet., Attach.

---

[5] Petitioner's conclusory assertion that his consular-notification claim should be reviewed "de novo" (see Pet., Attach. Mem. at 1) therefore fails.

[6] Petitioner does not challenge Officer Carrillo's administering of Miranda warnings regarding his right to counsel. Petitioner also does not challenge whether he should have been readvised before his second interview, which took place at the detention facility shortly after his initial, home interview.

(continued...)

Mem. at 45.)

A. Applicable Law

The Fifth and 14th amendments' prohibition against compelled self-incrimination requires police to warn a suspect before custodial interrogation that he has the right to remain silent, that any statement he makes may be used against him in court, that he has the right to consult with counsel and have him present during the interrogation, and that if he cannot afford an attorney one will be appointed for him free of charge. Miranda, 384 U.S. at 479. If he indicates that he wishes to remain silent, "the interrogation must cease"; if he requests counsel, "the interrogation must cease until an attorney is present." Id. at 474.

The four warnings need not be in any particular order, and the Supreme Court has not dictated the words that must be used to convey the essential information. Florida v. Powell, 559 U.S. 50, 60 (2010). In determining whether an officer adequately gave the warnings, the inquiry is "whether the warnings reasonably 'convey to a suspect his rights as required by Miranda.'" Id. (alterations omitted) (quoting Duckworth v. Eagan, 492 U.S. 195, 203 (1989) (permitting extraneous statements to be given with advisements if officer "inadvertently depart[s] from routine practice")).

---

[6] (...continued)
See Guam v. Dela Pena, 72 F.3d 767, 770 (9th Cir. 1995) (Miranda warnings given before suspect taken into custody need not be readministered in subsequent custodial interrogation despite 15-hour interval between interviews); see also Berghuis v. Thompkins, 560 U.S. 380, 386 (2010) ("Police are not required to rewarn suspects from time to time.").

Any waiver of Miranda rights must be voluntary, knowing, and intelligent. Miranda, 384 U.S. at 478-79. A waiver has "two distinct dimensions": it must be "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." Berghuis v. Thompkins, 560 U.S. 380, 382-83 (2010) (citing Moran v. Burbine, 475 U.S. 412, 421 (1986)). "Only if the totality of the circumstances surrounding the interrogation reveal [sic] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived." Burbine, 475 U.S. at 421 (citations omitted).

Miranda rights can be waived expressly or impliedly through the words and conduct of the suspect. See Berghuis, 560 U.S. at 384 (waiver may be implied through "defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver") (citing North Carolina v. Butler, 441 U.S. 369, 374-75 (1979) ("[T]he question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" (citations omitted))); Paulino v. Castro, 371 F.3d 1083, 1086 (9th Cir. 2004). "Where the prosecution shows that a Miranda warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." Berghuis, 560 U.S. at 384.

Because "the standard applied to Miranda claims is a very

general one, the range of possible reasonable applications of that standard is substantial, and thus significant deference is given to state court adjudications of such claims." See Benites v. Gipson, No. CV-13-4362 JVS(JC), 2015 WL 4207431, at *8 (C.D. Cal. July 10, 2015) (citing Yarborough v. Alvarado, 541 U.S. 652, 664-66 (2004) (noting significant deference due state-court adjudications of Miranda claims)). Lastly, even if a state court improperly admitted statements in violation of Miranda, a court cannot grant habeas relief unless the petitioner shows prejudice under Brecht v. Abrahamson, 507 U.S. 619, 623 (1993). See Williams v. Stewart, 441 F.3d 1030, 1051 (9th Cir. 2006) (as amended) (per curiam) (applying Brecht on federal habeas review of Miranda claim).

B. Relevant Background

Petitioner was first interviewed at home by Officer Carrillo and his partner on April 15, 2012. (Lodged Doc. 2, 1 Rep.'s Tr. at 182, 188.) Officer Carrillo spoke with Petitioner in Spanish during the entirety of the tape-recorded interview. (Id. at 191.) Officer Carrillo was not a native Spanish speaker but had been speaking it since he was three, for 23 years, and was a certified Spanish interpreter at his department. (Id. at 191-92.)

After informing Petitioner that they were investigating a crime that happened about nine or 10 years ago, Officer Carrillo advised Petitioner of his Miranda rights by reading the written Spanish version from his field officer's notebook (id. at 28-30,

195-97; Lodged Doc. 1, 2 Clerk's Tr. at 256-61) as follows:[7]

[Carrillo]: Okay, uh, at this time, uh, I have to —read your rights.

[Petitioner]: ...[8]

[Carrillo]: Okay, you do ... you do understand?

[Petitioner]: ...

[Carrillo]: Yes?

[Petitioner]: Well, I have never had these problems.

[Carrillo]: 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.

[Petitioner]: Okay.

[Carrillo]: This case is about ... almost, almost about 10 years that this happened ... this, uh, this case, okay.

[Petitioner]: ...

---

[7] The transcript of the interview has the original Spanish transcription and the English translation side by side. (See generally Lodged Doc. 1, 2 Clerk's Tr.)

[8] According to the legend accompanying the interview transcripts, "***" denotes unintelligible conversation and "..." denotes pauses, incomplete sentences, or stammering but not missing words. (See Lodged Doc. 1, 2 Clerk's Tr. at 255, 304.)

[Carrillo]: You do understand?
[Petitioner]: ...
[Carrillo]: You do understand?
[Petitioner]: Uh-huh.
[Carrillo]: Yes? Yes?
[Petitioner]: Yes.

(Lodged Doc. 1, 2 Clerk's Tr. at 257-58.) Officer Carrillo then advised Petitioner of his right to remain silent as follows:

[Carrillo]: Okay. Okay, so, you have the right to not say anything, you do understand?
[Petitioner]: ...
[Carrillo]: Yes or no?
[Petitioner]: Uh-huh, yes, if *** now I can't tell you anything?
[Carrillo]: 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?
[Petitioner]: You will be telling me?
[Carrillo]: Yes.
[Petitioner]: Okay.
[Carrillo]: Yes or no? You do understand?
[Petitioner]: ...
[Carrillo]: Yes. Yes or no? You have to say 'yes' or 'no.'

[Petitioner]: Yes.

(Id. at 258-59.) As to the potentially adverse consequences of making any statements, Officer Carrillo stated the following:

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

[Petitioner]: No.

[Carrillo]: 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. You do understand?

[Petitioner]: Uh-huh.

[Carrillo]: Yes or no?

[Petitioner]: ...

(Id. at 259-60.) Lastly, Officer Carrillo stated the following as to Petitioner's right to counsel:

[Carrillo]: 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?

[Petitioner]: ...

[Carrillo]: Yes?

[Petitioner]: Yes.

(Id. at 260-61.) Petitioner then made incriminating statements regarding his stepdaughter, admitting that he had touched her inappropriately when she was nine or 10 years old but insisting that he never had intercourse with her. (See, e.g., id. at 263-64, 267 ("Maybe we played . . . horsie[.]"), 270 ("I would touch her but not . . . with bad intention[.]"), 275 ("I would touch her legs but I don't remember about the breasts[.]"), 295 ("I would touch her private parts but I didn't have sex with her.").) The interview lasted about 45 minutes, after which Officer Carrillo arrested Petitioner and drove him to the Santa Ana Detention Facility, which was about three minutes away. (Lodged Doc. 2, 1 Rep.'s Tr. at 198-99.)

During the drive, Officer Carrillo encouraged Petitioner to tell the truth but told him to wait until after their arrival. (Id. at 22-23.) At the detention facility, Officer Carrillo placed Petitioner in an interview room and conducted a second interview without giving him any additional Miranda warnings, as the initial Miranda warnings had been given shortly before. (Id. at 24-26, 201.) Petitioner admitted to a separate incident, in which the victim climbed on top of him while he was in bed and their private parts touched without penetration; he acknowledged that he knew the conduct was wrong. (Lodged Doc. 1, 2 Clerk's Tr. at 323-36.) The second interview lasted about 25 minutes. (Lodged Doc. 2, 1 Rep.'s Tr. at 26.)

Before trial, the defense moved to exclude Petitioner's statements. (Lodged Doc. 1, 1 Clerk's Tr. at 114-24.) The trial

court held an evidentiary hearing, during which Officer Carrillo and Petitioner testified. (See generally Lodged Doc. 2, 1 Rep.'s Tr. at 10-39.) Officer Carrillo testified that at no point during either interview was he under the impression that Petitioner had difficulty communicating with him. (Id. at 24-25.) He also confirmed that based on his recollection of the discussions, the interview transcripts contained no inaccuracies. (Id. at 21.) Petitioner testified that he did not remember much about the interviews except that he had difficulty understanding Officer Carrillo, who "d[id]n't speak very much Spanish."[9] (Id. at 34-36.)

The court denied the motion, finding that Petitioner was "properly advised of his rights, he understood those rights, and while he did not make an express waiver, . . . it is not necessary to elicit one, I believe that he knew what he was doing, and these statements are both admissible." (Id. at 49.) The court noted that although the questioning was "inartful," Petitioner apparently understood what was asked, and his responses were all "appropriate for the questions." (Id. at 41-43.) The court noted that his nonverbal responses, such as "um" or "uh-huh," were common and don't "indicate a lack of understanding on the part of the person being questioned." (Id.)

C. The Court of Appeal Decision

The court of appeal summarized the relevant facts as follows:

> Before trial, the prosecution moved to admit

[9] Petitioner did not testify at trial.

[Petitioner]'s statements to Carrillo when interviewed at his residence and later when in custody at the jail. The prosecution asserted Carrillo advised [Petitioner] of his Miranda rights during the interview at [Petitioner]'s residence before asking him any questions about the facts of the case, [Petitioner] knowingly, voluntarily, and intelligently waived his Miranda rights, and no Miranda re-advisement was necessary before or during Carrillo's second interview at the jail less than two hours later.

[Petitioner] moved to exclude all his statements, arguing the officers violated his Miranda rights. He asserted Carrillo's Miranda advisement was poorly worded, he was not sufficiently made aware of the consequences of waiving his rights, and he did not understand the advisement.

At a pretrial hearing on the admissibility of [Petitioner]'s statements, Carrillo testified that on April 15, 2012, he and Officer Heitmann arrived at [Petitioner]'s residence around 10:40 p.m. Carrillo spoke to [Petitioner] in Spanish when [Petitioner] opened the door, explaining he wanted to speak with him about "an investigation [he] was performing." Carrillo was a "five percent" certified Spanish interpreter for the Santa Ana Police Department, which meant the police department paid him more money than other interpreters because of his fluency in Spanish.

[Petitioner] invited the officers into the residence after Carrillo asked to speak with him about an

investigation. Carrillo spoke to [Petitioner] in Spanish throughout the interview. He explained he was investigating a crime that occurred almost 10 years earlier and turned on an audio recorder he placed on the table. Carrillo advised [Petitioner] of his Miranda rights by reading verbatim from his field officer's notebook. Carrillo did not have difficulty communicating with [Petitioner] and he believed [Petitioner] understood him, although he had to go over some of the rights more than one time. The interview lasted about 40 minutes.

The transcript of the initial interview reflects [Petitioner] at the outset provided his name, date of birth, and physical characteristics. Carrillo advised [Petitioner] he was investigating a case that was about nine years old and explained he was required to read [Petitioner] his rights. Carrillo asked if he understood, and [Petitioner] replied, "Well, I have never had these problems." Carrillo responded he was going to read [Petitioner] his rights about "talking with me" and would tell [Petitioner] "you do understand what ... what I'm telling you and you will tell me 'yes' or 'no' and if you don't . . . understand me I will explain further, okay?" [Petitioner] responded, "Okay."

Carrillo again informed [Petitioner] the case under investigation was about 10 years old. When Carrillo asked [Petitioner] if he understood, [Petitioner] responded, "Uh-huh." Carrillo asked if this meant yes, and [Petitioner] responded, "yes."

Carrillo then informed [Petitioner] he had "the right to not say anything, you do understand?" [Petitioner] either provided an incomplete sentence, or stammered. Carrillo said "yes or no?" [Petitioner] replied, "Uh-huh, yes, if *** I can't tell you anything." Carrillo stated, "Si, 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?" [Petitioner] replied, "You will be telling me?" Carrillo said, "Yes." [Petitioner] said, "Okay." Carrillo said, "Yes or no? You do understand?" [Petitioner] either paused, provided an incomplete sentence, or stammered. Carrillo stated, "Yes. Yes or no? You have to say 'yes' or 'no.'" [Petitioner] responded, "Yes." Carrillo then advised, "Okay. What you say today can be used on – against you in ... in a court, do you understand?" [Petitioner] replied, "No." Carrillo responded, "Okay. You have ... what you say today with us with ... with me, uhm, can be used in ... in ... against a court, in ... in the court, okay, so, each ... each time you say something that can be used in court, okay. You do understand?" [Petitioner] said, "Uh-huh." Carrillo said, "Yes or no?" [Petitioner] either paused, provided an incomplete sentence, or stammered. Carrillo said, "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?" [Petitioner] either paused, provided an incomplete sentence, or stammered. Carrillo asked, "Yes?" and [Petitioner] replied, "Yes."

Carrillo admonished [Petitioner], "it's going to be very important that you tell the truth of what happened." When Carrillo asked if [Petitioner] understood, [Petitioner] responded, "Uh-huh. Yes." Carrillo proceeded to question [Petitioner] about the case. [Petitioner] appeared to understand Carrillo and responded to his questions appropriately.

At the conclusion of the interview, Carrillo arrested [Petitioner], handcuffed him, placed him in the patrol car, and drove to the jail, which took a couple of minutes. They continued to talk in the car. Carrillo told [Petitioner] "to be honest, be honest with himself." [Petitioner] stated he wanted to speak about what happened, but Carrillo told him to wait. At the jail, Carrillo took [Petitioner] into an interview room, closed the door, and turned on his recorder. Carrillo did not re-advise [Petitioner] of his Miranda rights because they were given to him less than an hour earlier. At no time during the two interviews did Carrillo feel that [Petitioner] did not understand or communicate with him, and [Petitioner] responded appropriately to Carrillo's questions. [Petitioner] made further admissions during

> the 25–minute jail interview.
>
> [Petitioner] testified he was 37 years old at the time of the interviews, the highest grade he completed in school was sixth grade in his native Guatemala, and he entered the United States when he was 12 or 13 years old. He could not read English. [Petitioner] claimed he had difficulty understanding Carrillo's Spanish, declaring Carrillo "doesn't speak very much Spanish." [Petitioner] did not remember Carrillo telling him he did not have to say anything and did not "really remember [Carrillo] reading [him his] rights." Nor did he recall other questions Carrillo asked, such as the color of [Petitioner]'s hair. Looking back, [Petitioner] asserted he did not understand the officer's explanation of his rights.
>
> The trial court concluded [Petitioner] knowingly and intelligently waived his Miranda rights. The court disbelieved [Petitioner]'s claim he did not understand Carrillo's explanation of his Miranda rights, observing, "I just don't believe that the defendant did not understand what Officer Carrillo was saying at any point in time in these two interviews. I mean maybe there was a little bit of a language difference or an accent by one or the other, but it was all explained, and all of the responses do appear to be appropriate. . . . I believe he was properly advised of his rights [and] he understood those rights. . . ."

(Lodged Doc. 6 at 4-7 (footnote omitted).)

The court of appeal denied the claim:

> [Petitioner] contends the trial court erred in not finding a Miranda violation because the record shows [Petitioner] did not understand he had the right to remain silent and that anything he said could be used against him at trial.
>
> The Attorney General argues no Miranda warnings were required because [Petitioner] was not in custody during the first interview. We must assume the contrary, however, because the prosecution below failed to dispute [Petitioner]'s claim he was in custody during the initial interview. . . . The Attorney General may not rely on [Petitioner]'s noncustodial status because the prosecution forfeited the issue by not raising it in the trial court.
>
> We therefore turn to [Petitioner]'s claims that Carrillo violated his Miranda rights in the initial interview at his residence. [Petitioner] argues the prosecution failed to demonstrate he understood his right to remain silent and that his statements could be used against him in court.
>
> As noted, Carrillo advised [Petitioner], "Okay, so, you have the right not to say anything, you do understand?" When [Petitioner] initially did not answer the question, Carrillo followed up by asking, "Yes or no?" [Petitioner] replied, "Uh-huh, yes, if * * * I can't say anything?" Carrillo then told [Petitioner] again he was going to explain his rights, and asked,

"Okay, you have the right not to say anything, do you understand?" [Petitioner] replied, "You will be telling me?" Carrillo said "Yes" and asked [Petitioner] whether he understood. After a couple of inquiries on whether he understood, [Petitioner] responded "Yes."

[Petitioner] argues the above exchange reflects he understood Carrillo would be telling him his rights, not that he already had informed him of his right to remain silent. We disagree. Although labored and awkward, this exchange nevertheless reflects Carrillo advised [Petitioner] he did not have to say anything, which was the equivalent of advising him he had the right to remain silent. [Petitioner] ultimately stated he understood when he answered "yes" to Carrillo's inquiry.

[Petitioner] also contends Carrillo never informed [Petitioner] his statements during the interview could be used against him in court, instead explaining that "each time you say something that can be used in court, okay." Before this exchange, however, Carrillo informed [Petitioner] his statements "can be used in ... in ... against you in ... in court, do you understand?" When [Petitioner] replied he did not understand, Carrillo engaged in the exchange that [Petitioner] faults an [sic] inadequate. But Miranda warnings need not be presented in any "precise formulation" or "talismanic incantation." (California v. Prysock (1981) 453 U.S. 355, 359.) As our Supreme Court observed, "a reviewing court need not examine a Miranda warning for accuracy as if construing

a legal document, but rather simply must determine whether the warnings reasonably would convey to a suspect his or her rights required by Miranda." (Samayoa, supra, 15 Cal.4th at p. 830.) We conclude Carrillo's explanation adequately explained the consequences if [Petitioner] agreed to answer the officer's questions.

To support his argument, [Petitioner] points to his response to Carrillo's question asking [Petitioner] if he understood he had the right not to say anything. [Petitioner] argues his reply, "Uh-huh, yes, if ... I can't say anything" shows he did not understand his right to remain silent. But Carrillo responded by explaining [Petitioner] had "the right not to say anything" and that he was telling [Petitioner] his rights, and [Petitioner] acknowledged he understood. [Petitioner] proceeded to answer the officer's questions and had no difficulty understanding Carrillo. [Petitioner] contends the record shows he informed Carrillo he did not understand Carrillo's explanation that anything [Petitioner] said could be used in court. When Carrillo asked if [Petitioner] understood this, [Petitioner] responded, "Uh-huh," which [Petitioner] argues meant "no." Viewed in isolation, however, [Petitioner]'s response is ambiguous. The trial court resolved this factual dispute by finding [Petitioner]'s response constituted an acknowledgment he understood Carrillo's explanation.

Substantial evidence supports the trial court's determination. The transcript shows [Petitioner]

employed the expression, "Uh-huh," as an affirmative response during the interview. For example, when Carrillo asked [Petitioner] if he understood the case under investigation was about 10 years old, [Petitioner] responded, "Uh-huh." Carrillo asked if that meant "yes," and [Petitioner] responded, "yes." When Carrillo asked [Petitioner] if he understood he had the right not to say anything, [Petitioner] responded, "Uh-huh, yes . . . ." At another point in the interview, Carrillo informed [Petitioner] it was important to tell the truth, warned [Petitioner] that Carrillo had spoken with the victim and [Petitioner]'s wife, and asked if he understood. [Petitioner] replied, "Uh-huh, yes." Later, Carrillo accused [Petitioner] of touching the victim's chest and asked [Petitioner] if he understood this reference. [Petitioner] responded, "Uh-huh, yes." The trial court reasonably could conclude [Petitioner] used the expression "Uh-huh" as an affirmative response based on his affirmative use of that term in other parts of the interview.

The trial court's rejection of [Petitioner]'s testimony claiming he did not understand his rights further supports the court's factual determination. As noted above, the trial court stated, "I just don't believe that the defendant did not understand" Carrillo's explanation of his rights, finding [Petitioner] "was properly advised of his rights [and] he understood those rights." To reach this conclusion, the court implicitly

> must have rejected [Petitioner]'s testimony he did not understand in retrospect the officer's explanation of his rights.
>
> At oral argument [Petitioner] argued the court's finding it disbelieved his account of the interview did not relieve the prosecution of its burden to prove [Petitioner] understood his rights, which it failed to do because the transcript shows he did not understand his rights. We disagree. Whatever hesitation [Petitioner] initially voiced, the record supports the trial court's conclusion [Petitioner] ultimately understood his rights. The transcript of the interview required the trial court to resolve whether [Petitioner]'s use of the term "Uh-huh" was an affirmative response. In doing so, the court could weigh in the balance [Petitioner]'s lack of credibility in denying he understood Carrillo's explanation of his rights, and that Carrillo did not speak "very much" Spanish. Had [Petitioner] not testified the court may have faced a closer issue, but [Petitioner] did testify, and the court therefore could take account of his testimony in resolving [Petitioner]'s claim. Because substantial evidence supports the court's determination, [Petitioner]'s challenge to the admission of his statements fails.

(Lodged Doc. 6 at 9-13 (some citations omitted).)

D. Analysis

The state court's denial of Petitioner's Miranda claim was not objectively unreasonable under § 2254(d)(1) and (2). As the

court of appeal found, the totality of the circumstances surrounding the interviews confirmed that Petitioner was adequately advised of and sufficiently understood the Miranda warnings and knowingly relinquished them. See Terrovona v. Kincheloe, 912 F.2d 1176, 1179-80 (9th Cir. 1990) (suspect's answering or responding to questions after receiving Miranda warning constituted implied waiver).[10]

The circumstances surrounding Petitioner's initial interview showed that he knowingly and intelligently waived his right to remain silent under Miranda. Officer Carrillo provided Petitioner with the requisite Miranda warnings in Spanish, repeating and explaining some until he received Petitioner's affirmative acknowledgment – either "yes" or "uh-huh" – that he understood. (See, e.g., Lodged Doc. 1, 2 Clerk's Tr. at 259-61); see Powell, 559 U.S. at 63 ("Although the warnings were not the clearest possible formulation of Miranda's . . . advisements, they were sufficiently comprehensive and comprehensible when given a commonsense reading." (emphasis in original)). Officer Carrillo was fluent in Spanish, having been speaking it for 23

[10] Petitioner's claim challenging the state court's alleged incorrect application of the standard of review (see Pet., Attach. Mem. at 31-36) is not cognizable on federal habeas review, see Bonin v. Calderon, 59 F.3d 815, 842 (9th Cir. 1995) (deprivation of state-created procedural right by itself is not cognizable on habeas review); see also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991). To the extent Petitioner challenges the court of appeal's factual finding that the trial court "disbelieved" Petitioner's suppression-hearing testimony, that finding was not objectively unreasonable and in fact correctly characterized the trial court's adverse credibility finding. (See Lodged Doc. 2, 1 Rep.'s Tr. at 49 ("I just don't believe that the defendant did not understand what Officer Carrillo was saying at any point in time in these two interviews.").)

years and earning extra pay as a certified Spanish translator at his department. (Lodged Doc. 2, 1 Rep.'s Tr. at 15, 27, 192.) Even if his Spanish skills were less than proficient or if he had a non-Guatemalan accent, Officer Carrillo read the warnings directly from his field notebook, which the trial court confirmed had been accurately conveyed by "compar[ing]" "the words used by Officer Carrillo" in advising Petitioner to the written version in the handbook. (See id. at 48-49); see also United States v. Gonzales, 749 F.2d 1329, 1336 (9th Cir. 1984) ("Even if [officer] spoke very poor Spanish and appellant spoke very poor English, the written Spanish [advisements] would have conveyed to appellant a sufficient understanding of his rights."). Officer Carrillo also confirmed that at no point during either interview did he feel that Petitioner had difficulty understanding or communicating with him. (See Lodged Doc. 2, 1 Rep.'s Tr. at 24-25); United States v. Martinez, 588 F.2d 1227, 1234-35 (9th Cir. 1978) (upholding validity of Miranda waiver when defendant challenged advisements given in Mexican-accented Spanish instead of his native Cuban-accented Spanish, in part because he "continued to converse in Spanish with the officer who had read him the warnings").

Petitioner demonstrated a willingness to talk and continued to do so freely throughout his interviews. In the comfort of his own home (see Lodged Doc. 2, 1 Rep.'s Tr. at 41), Petitioner acknowledged each Miranda advisement as read and explained to him, was responsive to Officer Carrillo's instructions, and answered all questions appropriately – mostly defending himself by accusing the victim of lying or having an agenda against him.

(See, e.g., Lodged Doc. 1, 2 Clerk's Tr. at 257 (claiming he "never had these problems"), 262 (early in the interview, bringing up incident at victim's school where she had apparently lied), 271 ("she wasn't in agreement" with Petitioner's "g[e]t[ting] together with her mom")); see Terrovona, 912 F.2d at 1180 (suspect's custodial statement "offer[ing] an alibi to explain his whereabouts on the evening in question[] indicate[d] a willingness to talk"); Martinez, 588 F.2d at 1235-36.

Petitioner counters by pointing to specific portions of the transcript purportedly showing his failure to affirmatively acknowledge the Miranda advisements. (See, e.g., Pet., Attach. Mem. at 40-44.) Because Miranda involves a totality-of-circumstances inquiry, however, no federal court – let alone the Supreme Court – has imposed a per se requirement that a suspect must affirmatively indicate after each of the four warnings his understanding of it. See, e.g., Paulino, 371 F.3d at 1087 (finding valid waiver despite "ambiguity of [petitioner's] subsequent written confirmation of his waiver" because "when considered in context," his "verbal and written responses" indicated understanding of his rights). In fact, the Supreme Court has held the opposite, that an implied waiver can be found absent any actual statement of understanding from the suspect when the totality of the circumstances indicates such an understanding through his words and actions. See, e.g., Berghuis, 560 U.S. at 388-89.

In any event, 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). (See Lodged Doc. 6 at 9-11.) As the court of appeal noted, Petitioner repeatedly used "uh-huh" elsewhere in the interviews expressly to indicate yes (see, e.g., Lodged Doc. 1, 2 Clerk's Tr. at 258, 265-66), and nowhere did he use it to mean no. Such factual determinations, when they find some support in the record, may not be second-guessed by this Court on habeas review. See Wood, 558 U.S. at 301-02.

Thus, 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. See Berghuis, 560 U.S. at 384 (implied waiver of right to remain silent established when petitioner understood Miranda warning and made uncoerced statements despite refusal to sign written waiver).[11]

Accordingly, Petitioner is not entitled to habeas relief.

---

[11] Moreover, having understood the Miranda warnings, Petitioner's decision to continue speaking with Officer Carrillo without expressly invoking his right to remain silent forecloses habeas relief. See Berghuis, 560 U.S. at 388-89 ("In sum, a suspect who has received and understood the Miranda warnings, and has not invoked his Miranda rights, waives the right to remain silent by making an uncoerced statement to the police."); DeWeaver v. Runnels, 556 F.3d 995, 1002 (9th Cir. 2009) (holding that state court's denial was reasonable under AEDPA when suspect did not unambiguously invoke right to remain silent); Sturm v. Cate, ___ F. App'x ___, No. 14-55118, 2016 WL 4821121, at *1 (9th Cir. 2016) ("In the absence of an affirmative and unambiguous invocation of the right to remain silent, the [state court]'s denial of [petitioner's] claim was not contrary to or an unreasonable application of clearly established federal law, nor was it an unreasonable determination of the facts.").

II. Habeas Relief Is Not Warranted on Petitioner's Consular-Notification Claim

Petitioner argues that his arresting officers failed to inform him of his right to consular notification and access as a Guatemalan national, in violation of Article 36 of the Vienna Convention and Penal Code section 834c. (Pet. at 5, Attach. Mem. at 1-11.) He claims that if he had been able to meet with a Guatemalan consulate officer before his custodial interviews with Officer Carrillo, the officer would have advised him to remain silent until undergoing a formal interview by the Guatemalan consulate. (Traverse P. & A. at 7-9.)

A. Applicable Law

The Vienna Convention on Consular Relations primarily concerns a consulate's access to its nationals detained by authorities in a foreign country. Sanchez-Llamas v. Oregon, 548 U.S. 331, 338 (2006). Article 36, titled "Communication and contact with nationals of the sending State," requires local authorities to notify "without delay" a foreign detainee of his right to request consular assistance and, upon the detainee's request, inform his consulate of his arrest or detention. Vienna Convention on Consular Relations, art. 36(1)(b), Apr. 24, 1963, 21 U.S.T. 77, 1969 WL 97928. Consular officers may visit and correspond with any national who is in prison or custody or who is being detained and arrange for his legal representation. Id., art. 36(1)(c).

Penal Code section 834c implements the Vienna Convention, requiring a peace officer who arrests, or who detains for more than two hours, a known or suspected foreign national to advise

the foreign national of his right to communicate with his consulate. If the national chooses to exercise that right, the arresting officer must forward the request to the respective consulate. Cal. Penal Code § 834c(a)(1).

"A state prisoner such as [petitioner] faces an array of obstacles to obtaining federal habeas relief for a state's failure to give consular notice in violation of the Vienna Convention." Ayala v. Davis, 813 F.3d 880, 881 (9th Cir. 2016) (per curiam); see Medellin v. Dretke, 544 U.S. 660, 664 (2005) (per curiam) (noting "several threshold issues that could independently preclude federal habeas relief" on habeas petitioner's Vienna Convention claim). For an international treaty to be enforceable domestically, it must confer private individual rights and be self-executing, neither of which the Supreme Court has clearly held as to the Vienna Convention. See Medellin v. Texas, 552 U.S. 491, 505 (2008); see also id. at 506 n.4 ("[I]t is unnecessary to resolve whether the Vienna Convention is itself 'self-executing' or whether it grants [petitioner] individually enforceable rights.").

Specifically, the Supreme Court has never clearly established that the Vienna Convention creates judicially enforceable private rights as opposed to public rights enforceable by signatory nations to the treaty. See Sanchez-Llamas, 548 U.S. at 343 ("[W]e find it unnecessary to resolve the question whether the Vienna Convention grants individuals enforceable rights."); Leal Garcia v. Quarterman, 573 F.3d 214, 218 n.19 (5th Cir. 2009) ("The Supreme Court has never answered whether the [Vienna] Convention creates rights

enforceable by individual residents of the signatory nations."); Jimenez v. Paramo, No. 12-CV-607-BEN (RBB), 2012 WL 6893386, at *6 (S.D. Cal. Oct. 16, 2012) (same), accepted by 2013 WL 204766 (S.D. Cal. Jan. 16, 2013). Likewise, whether the Vienna Convention is self-executing remains an open question after Medellin v. Texas. See 552 U.S. at 505-06 & n.4 (holding that International Court of Justice's judgment in Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 2004 WL 2450913 (I.C.J. 2004), was not self-executing but declining to address underlying issue of whether Vienna Convention creates judicially enforceable individual right).

Even assuming the Vienna Convention is clearly established as judicially enforceable, a petitioner must show prejudice from its violation, which is a high burden. Ayala, 813 F.3d at 881. As the Supreme Court observed in Breard v. Greene, 523 U.S. 371, 377 (1998) (per curiam), prejudice as a result of a violation of the Vienna Convention is difficult to even argue. Id. (rejecting petitioner's claim that he would have accepted guilty plea to avoid death penalty had he been advised by consulate as "far more speculative than the claims of prejudice courts routinely reject" in ineffective-assistance-of-counsel cases).

Lastly, unlike Miranda, a violation of the treaty's consular-notification provisions does not implicate the exclusionary rule and will not result in the suppression of otherwise admissible statements. See Sanchez-Llamas, 548 U.S. at 337 (rejecting contention that Article 36 contains suppression remedy); see also id. at 349 (explaining that "Article 36 has nothing whatsoever to do with searches or interrogations" and

"does not guarantee defendants any assistance at all" other than "hav[ing] their consulate informed of their arrest or detention — not [having] their consulate intervene" (emphases in original)). Indeed, "[i]n most circumstances, there is likely to be little connection between an Article 36 violation and evidence or statements obtained by police" during investigation. Id.

B. Relevant Background

Petitioner is an undocumented alien from Guatemala who has resided in California since 1993. (Lodged Doc. 1, 1 Clerk's Tr. at 221, 223.) He left Guatemala and entered the United States "illegally," "reportedly due to the war" and to escape "poverty," leaving his family behind because they "did not want to come to America." (Id. at 232.) The U.S. Immigration and Customs Enforcement issued an immigration "hold" on April 12, 2012, alleging that Petitioner violated 8 U.S.C. § 1325, illegal entry by an alien. (Id. at 221, 231.) When arresting Petitioner, Officer Carrillo apparently failed to inform him of his consular-notification rights, nor did he or another officer contact the Guatemalan consulate. (See generally Lodged Doc. 1, 2 Clerk's Tr.)

The superior court rejected Petitioner's claim on habeas review:

> The petition does not set forth meritorious grounds warranting habeas corpus relief. Contrary to petitioner's belief, the terms of the Vienna Convention and the International Court of Justice's judgment in Case Concerning Avena and Other Mexican Nationals (Mex. [v]. U.S.), 2004 I.C.J. 12 (Judgment of Mar. 31) alone do not

constitute enforceable federal law and are not binding on federal and state courts. (Medellin v. Texas (2008) 552 U.S. 491, 506-511; In re Martinez (2009) 46 Cal.4th 945, 963.) The laws and regulations of a forum state govern implementation of a treaty in that state. (Breard v. Greene (1998) 523 U.S. 371, 375.)

Petitioner makes no concerted effort to establish prejudice flowing from a violation of the terms of the Vienna Convention and/or Penal Code § 834c. Petitioner was afforded Miranda warnings by law enforcement and he knowingly, intelligently, and voluntarily waived his rights. (See, People v. Rivas (Sept. 16, 2014, G048320) [nonpub. opn.].) The victim testified at trial about the multiple instances of molestation carried out by petitioner. Petitioner does not dispute the victim's testimony nor maintain his innocence. Absent a showing of prejudice, there is no basis upon which habeas corpus relief can be granted based on alleged violations of the terms of the Vienna Convention and/or Penal Code § 834c. (Lodged Doc. 13 at 2-3.)

C. Analysis

Petitioner is not entitled to habeas relief on his consular-notification claim. First, to the extent he challenges the state court's denial of his challenge under section 834c, his state-law claim is not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."). Next, because the Supreme Court has

never clearly held that the Vienna Convention creates individually enforceable rights or is self-executing, the superior court could not have unreasonably applied clearly established federal law when it rejected Petitioner's consular-notification claim. (See Lodged Doc. 13 at 2-3); Knowles v. Mirzayance, 556 U.S. 111, 122 (2009) ("[T]his Court has held on numerous occasions that it is not '"an unreasonable application of clearly established Federal law"' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court." (citations omitted)); Wright v. Van Patten, 552 U.S. 120, 126 (2008) (per curiam) ("Because our cases give no clear answer to the question presented, let alone one in [petitioner's] favor, 'it cannot be said that the state court "unreasonabl[y] appli[ed] clearly established Federal law."'" (citation omitted)); Jimenez, 2012 WL 6893386, at *6 (rejecting petitioner's Vienna Convention claim because "the Supreme Court has not clearly established that the Vienna Convention creates individually enforceable rights").

The superior court also correctly denied Petitioner's consular-notification claim based on lack of prejudice. (See Lodged Doc. 13 at 2-3.) Petitioner argues that had he been notified of his treaty rights by Officer Carrillo, he would have stopped talking or Guatemalan consular officers would have prevented his waiver of his right to remain silent. (See Traverse P. &. A. at 7-9.) As the superior court found, however, Petitioner "makes no concerted effort" to establish any tangible, nonspeculative prejudice. (See Lodged Doc. 13 at 2-3.) He has produced no evidence to show how his claim of prejudice is

true. Indeed, he has not even presented his own sworn declaration stating that he would have stopped talking or otherwise exercised his right to consular notification had he been so notified. See, e.g., Ayala, 813 F.3d at 881 (denying Vienna Convention claim based on lack of prejudice in part because petitioner failed to "present any evidence . . . in this case" that Mexican consulate would have succeeded in convincing district attorney to reconsider death penalty (emphasis in original)); see also id. (no prejudice shown when petitioner suggested that consulate would have secured "critical guilt-phase witness" without naming witness or describing potential testimony); Garcia v. Evans, No. CIV S-06-1404 FCD KJM P, 2009 WL 1657464, at *9 (E.D. Cal. June 12, 2009) (denying Vienna Convention claim seeking suppression of custodial statements because "[t]here is no evidence petitioner would have contacted the consulate had he been aware of his Vienna Convention rights [or] that he needed assistance from the consulate").

Moreover, even assuming Petitioner had provided evidentiary support for his claim, any prejudice would have been minimal. Unlike with Miranda, Officer Carrillo was not required to advise Petitioner of his consular-notification rights before interrogating him. See Cal. Penal Code 834c(a)(1) (requiring consular notification only upon foreign national's "arrest and booking or detention for more than two hours"). Because Petitioner waived his Miranda rights at the onset of the initial interview and made inculpatory statements for the next 45 minutes, until Officer Carrillo placed him under arrest, no consular-notification requirement was triggered.

Petitioner's second interview, before which he apparently should have been informed of his rights under the Vienna Convention, was considerably shorter and somewhat duplicative of the first interview. In any event, Petitioner had earlier been advised of his Miranda rights by a Spanish-speaking officer and validly waived them; thus, "there is no reason to believe he would have acted differently if advised of his right to contact a consulate." See Keomanivong v. Jacquez, No. 2:07-cv-02409-JWS, 2010 WL 843755, at *15 (E.D. Cal. Mar. 9, 2010) (finding no prejudice stemming from failure to comply with Vienna Convention in part because foreign detainee "had spent time in the United States" and had been "fully advised of his constitutional rights under Miranda . . . before the police took his statement").

Similar conclusory arguments to Petitioner's were squarely rejected by the Supreme Court in Sanchez-Llamas, 548 U.S. at 349, holding that the Vienna Convention is a notification right and does not "guarantee . . . any assistance" or intervention by the consulate "at all," nor does it impose any obligation on "law enforcement authorities [to] cease their investigation pending any such notice or intervention" by consulate officers. In fact, Article 36 specifically instructs that the consular-notification rights "shall be exercised in conformity with the laws and regulations of the receiving State." Vienna Convention, art. 36(2). Indeed, even assuming error, because violation of consular-notification rights under the Vienna Convention does not require suppression of illegally obtained evidence, the trial court would not have suppressed any of his incriminating statements as a result of the violation. See Sanchez-Llamas, 548

U.S. at 337.

Habeas relief is therefore foreclosed under AEDPA.

III. Habeas Relief Is Not Warranted on Petitioner's Ineffective-Assistance-of-Counsel Claims

Petitioner argues that his trial and appellate counsel were ineffective for failing to "pursue[]" or "address" the purported consulate-notification violation in ground two. (Pet. at 5-6, Attach. Mem. at 12-14.)

Under Strickland v. Washington, 466 U.S. 668, 687 (1984), a petitioner claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced his defense. "Deficient performance" means unreasonable representation falling below professional norms prevailing at the time of trial. Id. at 688-89. To show deficient performance, the petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. at 689-90. Further, the petitioner "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Id. at 690.

To meet his burden of showing the distinctive kind of "prejudice" required by Strickland, the petitioner must affirmatively

> show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome.

Id. at 694.

In Richter, the Supreme Court reiterated that AEDPA review requires an additional level of deference to a state-court decision rejecting an ineffective-assistance-of-counsel claim:

> The standards created by Strickland and § 2254(d) are both "highly deferential," and when the two apply in tandem, review is "doubly" so. . . . Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard.

562 U.S. at 105 (citations omitted).

The superior court rejected Petitioner's claim on habeas review:

> Having failed to demonstrate prejudice from alleged violations of petitioner's rights under the Vienna Convention and/or Penal Code § 834c, petitioner's claim of ineffective assistance by both trial and appellate counsel likewise fails. Under these circumstances, petitioner does not adequately and persuasively show how counsels' [sic] alleged failure to raise the issue at trial and on appeal was prejudicial to his defense in view of the evidence adduced at trial.
>
> . . . .
>
> No prima facie case for relief is established. An

order to show cause will issue only if petitioner has established a prima facie case for relief on habeas corpus. (People v. Duvall, supra, 9 Cal.4th at 475.) (Lodged Doc. 13 at 3-4.)

The superior court was not objectively unreasonable in summarily denying Petitioner's ineffective-assistance-of-counsel claims for failing to state a prima facie case for relief. The Court has already concluded that his consular-notification claim in ground two fails, notably due to his failure to show prejudice. Thus, because raising that claim would not have helped the outcome of Petitioner's trial or appeal, his trial and appellate counsel were not ineffective for failing to do so. Specifically, trial counsel would have had no reason to argue any Vienna Convention violation in seeking pretrial suppression of Petitioner's incriminating statements and properly grounded his suppression efforts on Miranda instead. See Vazquez v. Spearman, No. ED CV 15-02599 CAS (AFM), 2016 WL 4545330, at *7 (C.D. Cal. July 1, 2016) (finding trial counsel not ineffective for failing to raise consular-notification claim under Vienna Convention because counsel "could not have had petitioner's police interview suppressed merely because it had been conducted in violation of Article 36"), accepted by 2016 WL 4545329 (C.D. Cal. Aug. 30, 2016). Similarly, appellate counsel could not have been ineffective for failing to raise a meritless claim on appeal. See Turner v. Calderon, 281 F.3d 851, 872 (9th Cir. 2002);

Vazquez, 2016 WL 4545330, at *7.[12]

Accordingly, Petitioner is not entitled to habeas relief on his ineffective-assistance-of-counsel claims.

IV. Petitioner's requests for an evidentiary hearing and appointment of counsel should be denied

Petitioner seeks an evidentiary hearing and appointment of counsel. (See Pet., Attach. Mem. at 11, 14; Traverse P. &. A. at 12.) But an evidentiary hearing is not required on issues that can be resolved by reference to the state-court record under § 2254(d), as all of Petitioner's claims can be. Cullen v. Pinholster, 563 U.S. 170, 183 (2011) ("[W]hen the state-court record 'precludes habeas relief' under the limitations of § 2254(d), a district court is 'not required to hold an evidentiary hearing.'" (quoting Schriro v. Landrigan, 550 U.S. 465, 474 (2007))). Thus, his request for an evidentiary hearing should be denied.

His request for appointment of habeas counsel should also be denied, given that his supporting reasons – to "properly address" his "complex[]" issues (Traverse P. &. A. at 12) – are common circumstances applicable to all pro se litigants. Moreover, the

---

[12] Both trial and appellate counsel appear to have competently represented Petitioner. Notably, despite the strength of the prosecution's case, trial counsel secured a three-year plea offer – a "lower than . . . minimum" sentence – which Petitioner turned down. (Lodged Doc. 2, 1 Rep.'s Tr. at 5-10.) Trial counsel received praise from the trial judge at the end of the case (as did the prosecutor) for her hard work in defending Petitioner. (Lodged Doc. 2, 2 Rep.'s Tr. at 337.) Appellate counsel successfully secured a remand for resentencing, which resulted in Petitioner's sentence being reduced from 18 to 12 years. (Lodged Doc. 9.)

interests of justice do not require appointment of counsel at this late stage of the proceedings, when briefing has been completed and the case is under submission. See Weygandt v. Look, 718 F.2d 952, 954 (9th Cir. 1983) (per curiam).

RECOMMENDATION

IT THEREFORE IS RECOMMENDED that the District Judge accept this Report and Recommendation and direct that Judgment be entered denying the Petition and dismissing this action with prejudice.

DATED: November 18, 2016

JEAN ROSENBLUTH
U.S. MAGISTRATE JUDGE

Court of Appeal, Fourth Appellate District, Division Three - No. G048320

S222253

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

CARLOS DAGOBERTO RIVAS, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS DAGOBERTO RIVAS, Defendant and Appellant.	G048320 (Super. Ct. No. 12CF1124) ORDER MODIFYING OPINION; DENYING PETITION FOR REHEARING; NO CHANGE IN JUDGMENT

Carlos Dagoberto Rivas's petition for rehearing filed on October 6, 2014 (constructively filed Oct. 1, 2014) is DENIED.

The unpublished opinion filed September 16, 2014, is modified as follows:

1. In the last sentence of the paragraph beginning on page 7 and continuing onto page 8, insert a period after "627" so the last sentence now reads:

(*Berghuis*, at pp.380, 384, 388; *People v. Gomez* (2011) 192 Cal.App.4th 609, 627.)

2. On page 12, delete the last two sentences of the first full paragraph, starting with "At oral argument" and ending with "for two reasons." The paragraph now reads:

> The trial court's rejection of Rivas's testimony claiming he did not understand his rights further supports the court's factual determination. As noted above, the trial court stated, "I just don't believe that the defendant did not understand" Carrillo's explanation of his rights, finding Rivas "was properly advised of his rights [and] he understood those rights." To reach this conclusion, the court implicitly must have rejected Rivas's testimony he did not understand in retrospect the officer's explanation of his rights.

3. On page 12, delete the first two sentences of the second full paragraph, starting with "First, the burden" and ending with "(*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.)" The paragraph now reads:

> At oral argument Rivas argued the court's finding it disbelieved his account of the interview did not relieve the prosecution of its burden to prove Rivas understood his rights, which it failed to do because the transcript shows he did not understand his rights. We disagree. Whatever hesitation Rivas initially voiced, the record supports the trial court's conclusion Rivas ultimately understood his rights. The transcript of the interview required the trial court to resolve whether Rivas's use of the term "Uh-huh" was an affirmative response. In doing so, the court could weigh in the balance Rivas's lack of credibility in denying he understood Carrillo's explanation of his rights, and that Carrillo did not speak "very much" Spanish. Had Rivas not testified the court may have faced a closer issue, but Rivas did testify, and the court therefore could take account of his testimony in resolving Rivas's claim. Because substantial evidence supports the court's determination, Rivas's challenge to the admission of his statements fails.

4. On page 14, first line of the second full paragraph, the word "lewed" is replaced with "lewd."

5. On page 15, last line of the first full paragraph, the word "unauthorized" is replaced with "authorized."

These modifications do not effect a change in the judgment.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.

G048320
The People v. Rivas

Superior Court of Orange County

Appellate Defenders, Inc.
District Attorney
Department of Corrections

Martin Kassman
1032 Irving St PMB 704
San Francisco, CA 94122

Brendon W. Marshall
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

COURT OF APPEAL - 4TH DIST DIV 3

FILED

Sep 16, 2014

Deputy Clerk: D. Johnson

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS DAGOBERTO RIVAS, Defendant and Appellant.	G048320 (Super. Ct. No. 12CF1124) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer. Affirmed in part, reversed in part, and remanded for resentencing.

Martin Kassman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, A. Natasha Cortina, Brendon W. Marshall and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Carlos Dagoberto Rivas of three lewd acts on a child under age 14, one of which involved force (Pen. Code, § 288, subd. (a); counts 1 and 2; all statutory citations are to the Penal Code; § 288, subd. (b)(1); count 3), and found he was ineligible for probation (§ 1203.066, subd. (a)(1)). Rivas contends the trial court violated his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) by admitting his postarrest statements to police. He argues the prosecution failed to prove he knowingly and intelligently waived his rights. For the reasons expressed below, we reverse the sentence, remand for resentencing, and affirm the judgment in all other respects.

I

FACTS AND PROCEDURAL BACKGROUND

Maria O. testified Rivas began a romantic relationship with her mother and moved into the family's Santa Ana home when Maria was approximately six years old. On a morning when Maria was nine or 10, she was at home with Rivas watching television and wearing "a pajama, like a dress." She wore underwear but no bra. Rivas "dragged" her to the edge of the bed so that her legs were hanging off, and straddled her pressing his groin against her private area while moving up and down. Maria attempted to push him away. She did not "know if he raped [her], but [she] felt something around [her] private part" and felt a little pain "like around [her] stomach" as he moved back and forth. She cried during the abuse and screamed for help several times. Rivas finished and then left the room. Maria's underwear in the area of her vagina was wet. Maria did not tell anyone about the incident because she felt frightened and embarrassed.

Rivas touched Maria sexually on other occasions. She estimated these incidents began about two or three years after the initial incident, when she was 12 years old. He would do it "like once," then stop for a few months, then start doing it again. Maria usually slept on the floor near the bed where her mother and Rivas slept. Rivas would crawl over to her on his hands and knees and then rub Maria's breasts and thighs. Maria testified he did this "when we were asleep, when everybody was asleep. He will touch me over the clothing, my breasts and then my legs, my thighs." Maria would tell him to stop and threaten to tell her mother or the police.

In June 2011, Maria moved in with her paternal aunt and uncle. She eventually disclosed the abuse to her aunt, who phoned the police in April 2012.

After speaking with Maria, Officer Daniel Carrillo and a partner interviewed Rivas at his residence on the evening of April 15, 2012. Rivas admitted during the recorded interview he "would touch her legs but I don't remember about the breasts." He also admitted he "did touch her [private] parts but I didn't have sex with her." After the interview, officers placed Rivas under arrest. Carrillo conducted a second recorded interview at the jail. Rivas recalled an incident where Maria wore pajamas resembling a dress. Rivas stated, "I believe she did show me her [parts]" and she took off her underwear after he got on top of her. At one point, Rivas conceded he "did pass by" her vagina with his erect penis, and later he conceded he touched the sides of her vagina with his penis. He knew "it was wrong because I didn't tell her to do that, I don't remember like I'm telling you but yeah nothing happen well." Rivas repeatedly insisted he did not penetrate Maria or ejaculate.

Following trial in January 2013, the jury convicted Rivas as noted above. In April 2013, the trial court sentenced him to an 18-year prison term.

II

DISCUSSION

A. *Substantial Evidence Supports the Trial Court's Conclusion Rivas Understood His Rights*

Before trial, the prosecution moved to admit Rivas's statements to Carrillo when interviewed at his residence and later when in custody at the jail. The prosecution asserted Carrillo advised Rivas of his *Miranda* rights during the interview at Rivas's residence before asking him any questions about the facts of the case, Rivas knowingly, voluntarily, and intelligently waived his *Miranda* rights, and no *Miranda* re-advisement was necessary before or during Carrillo's second interview at the jail less than two hours later.

Rivas moved to exclude all his statements, arguing the officers violated his *Miranda* rights. He asserted Carrillo's *Miranda* advisement was poorly worded, he was not sufficiently made aware of the consequences of waiving his rights, and he did not understand the advisement.

At a pretrial hearing on the admissibility of Rivas's statements, Carrillo testified that on April 15, 2012, he and Officer Heitmann arrived at Rivas's residence around 10:40 p.m. Carrillo spoke to Rivas in Spanish when Rivas opened the door, explaining he wanted to speak with him about "an investigation [he] was performing." Carrillo was a "five percent" certified Spanish interpreter for the Santa Ana Police Department, which meant the police department paid him more money than other interpreters because of his fluency in Spanish.

Rivas invited the officers into the residence after Carrillo asked to speak with him about an investigation. Carrillo spoke to Rivas in Spanish throughout the

interview. He explained he was investigating a crime that occurred almost 10 years earlier and turned on an audio recorder he placed on the table. Carrillo advised Rivas of his *Miranda* rights by reading verbatim from his field officer's notebook. Carrillo did not have difficulty communicating with Rivas and he believed Rivas understood him, although he had to go over some of the rights more than one time. The interview lasted about 40 minutes.

The transcript of the initial interview reflects Rivas at the outset provided his name, date of birth, and physical characteristics. Carrillo advised Rivas he was investigating a case that was about nine years old and explained he was required to read Rivas his rights. Carrillo asked if he understood, and Rivas replied, "Well, I have never had these problems." Carrillo responded he was going to read Rivas his rights about "talking with me" and would tell Rivas "you do understand what . . . what I'm telling you and you will tell me 'yes' or 'no' and if you don't . . . understand me I will explain further, okay?" Rivas responded, "Okay."

Carrillo again informed Rivas the case under investigation was about 10 years old. When Carrillo asked Rivas if he understood, Rivas responded, "Uh-huh." Carrillo asked if this meant yes, and Rivas responded, "yes."

Carrillo then informed Rivas he had "the right to not say anything, you do understand?" Rivas either provided an incomplete sentence, or stammered.[1] Carrillo said "yes or no?" Rivas replied, "Uh-huh, yes, if *** I can't tell you anything." Carrillo stated, "Si, 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

[1] The legend accompanying the interview transcripts reflects "***" denotes unintelligible conversation and "..." denotes pauses, incomplete sentences, and stammering but *not* missing words.

the right not to say anything.' Okay, you have the right not to say anything, do you understand?" Rivas replied, "You will be telling me?" Carrillo said, "Yes." Rivas said, "Okay." Carrillo said, "Yes or no? You do understand"? Rivas either paused, provided an incomplete sentence, or stammered. Carrillo stated, "Yes. Yes or no? You have to say 'yes' or 'no.'" Rivas responded, "Yes." Carrillo then advised, "Okay. What you say today can be used on – against you in . . . in a court, do you understand?" Rivas replied, "No." Carrillo responded, "Okay. You have . . . what you say today with us with . . . with me, uhm, can be used in . . . in . . . against a court, in . . . in the court, okay, so, each . . . each time you say something that can be used in court, okay. You do understand?" Rivas said, "Uh-huh." Carrillo said, "Yes or no?" Rivas either paused, provided an incomplete sentence, or stammered. Carrillo said, "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 either paused, provided an incomplete sentence, or stammered. Carrillo asked, "Yes?" and Rivas replied, "Yes."

Carrillo admonished Rivas, "it's going to be very important that you tell the truth of what happened." When Carrillo asked if Rivas understood, Rivas responded, "Uh-huh. Yes." Carrillo proceeded to question Rivas about the case. Rivas appeared to understand Carrillo and responded to his questions appropriately.

At the conclusion of the interview, Carrillo arrested Rivas, handcuffed him, placed him in the patrol car, and drove to the jail, which took a couple of minutes. They continued to talk in the car. Carrillo told Rivas "to be honest, be honest with himself." Rivas stated he wanted to speak about what happened, but Carrillo told him to wait. At

the jail, Carrillo took Rivas into an interview room, closed the door, and turned on his recorder. Carrillo did not re-advise Rivas of his *Miranda* rights because they were given to him less than an hour earlier. 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. Rivas made further admissions during the 25-minute jail interview.

Rivas testified he was 37 years old at the time of the interviews, the highest grade he completed in school was sixth grade in his native Guatemala, and he entered the United States when he was 12 or 13 years old. He could not read English. Rivas claimed he had difficulty understanding Carrillo's Spanish, declaring Carrillo "doesn't speak very much Spanish." Rivas did not remember Carrillo telling him he did not have to say anything and did not "really remember [Carrillo] reading [him his] rights." Nor did he recall other questions Carrillo asked, such as the color of Rivas's hair. Looking back, Rivas asserted he did not understand the officer's explanation of his rights.

The trial court concluded Rivas knowingly and intelligently waived his *Miranda* rights. The court disbelieved Rivas's claim he did not understand Carrillo's explanation of his Miranda rights, observing, "I just don't believe that the defendant did not understand what Officer Carrillo was saying at any point in time in these two interviews. I mean maybe there was a little bit of a language difference or an accent by one or the other, but it was all explained, and all of the responses do appear to be appropriate. . . . I believe he was properly advised of his rights [and] he understood those rights . . . ."

In a criminal trial, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant

unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda*, *supra*, 384 U.S. at p. 444.) The suspect must be warned before 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 if he cannot afford an attorney one will be appointed for him before any questioning if he so desires. (*Miranda*, at pp. 478-479; *People v. Polk* (2010) 190 Cal.App.4th 1183, 1192 [failure to give *Miranda* warnings precludes introduction of the defendant's statements in the prosecution's case-in-chief].) After warnings have been given, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. A suspect may expressly or impliedly waive these rights. A waiver of the right to remain silent and the right to counsel "may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384 (*Berghuis*); see *People v. Cruz* (2008) 44 Cal.4th 636, 667 ["A suspect's expressed willingness to answer questions after acknowledging an understanding of his or her *Miranda* rights has itself been held sufficient to constitute an implied waiver of such rights"].) The prosecution bears the burden of proving a waiver by a preponderance of the evidence. (*Berghuis,* at pp. 380, 384, 388; *People v. Gomez* (2011) 192 Cal.App.4th 609, 627)

In reviewing the trial court's ruling on a *Miranda* issue, we must accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*. (*People v. Davis* (2009) 46 Cal.4th 539, 586.) In making this determination, we """give great weight to the considered conclusion" of a lower court that has

previously reviewed the same evidence.' [Citations.]" (*People v. Wash* (1993) 6 Cal.4th 215, 236.)

Rivas contends the trial court erred in not finding a *Miranda* violation because the record shows Rivas did not understand he had the right to remain silent and that anything he said could be used against him at trial.

The Attorney General argues no *Miranda* warnings were required because Rivas was not in custody during the first interview. We must assume the contrary, however, because the prosecution below failed to dispute Rivas's claim he was in custody during the initial interview. (See *People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404 [custody determinations require trial courts to examine facts surrounding the interrogation before applying the controlling legal standard].) The prosecutions's failure to raise the issue deprived Rivas of the opportunity to introduce facts showing he was in custody when interrogated at his residence, and therefore it would be unfair to make that determination on this record, as the Attorney General now urges us to do. Whether the suspect was subjected to custodial interrogation is a fact-intensive inquiry and depends on the surrounding circumstances. The Attorney General may not rely on Rivas's noncustodial status because the prosecution forfeited the issue by not raising it in the trial court. (See *People v. Polk, supra,* 190 Cal.App.4th at pp. 1191-1195 [defendant forfeited claim of inadequate *Miranda* warnings by failure to raise issue in the trial court].)

We therefore turn to Rivas's claims that Carrillo violated his *Miranda* rights in the initial interview at his residence. Rivas argues the prosecution failed to demonstrate he understood his right to remain silent and that his statements could be used against him in court. (*Miranda*, *supra*, 384 U.S. at pp. 444, 467 [person must "be informed in clear and unequivocal terms that he has the right to remain silent"]; *People v.*

Samayoa (1997) 15 Cal.4th 795, 830 (*Samayoa*) [police officers are not required to employ the exact words used in the *Miranda* decision but must provide warnings that reasonably convey to a suspect his or her rights]; *Berghuis*, *supra*, 560 U.S. at p. 384 [*Miranda* warning and an uncoerced statement does not establish a valid waiver; prosecution also must show the accused understood his rights].)

As noted, Carrillo advised Rivas, "Okay, so, you have the right not to say anything, you do understand?" When Rivas initially did not answer the question, Carrillo followed up by asking, "Yes or no?" Rivas replied, "Uh-huh, yes, if *** I can't say anything?" Carrillo then told Rivas again he was going to explain his rights, and asked, "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 a couple of inquiries on whether he understood, Rivas responded "Yes."

Rivas argues the above exchange reflects he understood Carrillo *would* be telling him his rights, not that he already had informed him of his right to remain silent. We disagree. Although labored and awkward, this exchange nevertheless reflects Carrillo advised Rivas he did not have to say anything, which was the equivalent of advising him he had the right to remain silent. Rivas ultimately stated he understood when he answered "yes" to Carrillo's inquiry.

Rivas also contends Carrillo never informed Rivas his statements during the interview could be used *against him* in court, instead explaining that "each time you say something that can be used in court, okay." Before this exchange, however, Carrillo informed Rivas his statements "can be used in . . . in . . . against you in . . . in court, do you understand?" When Rivas replied he did not understand, Carrillo engaged in the exchange that Rivas faults an inadequate. But *Miranda* warnings need not be presented

in any "precise formulation" or "talismanic incantation." (*California v. Prysock* (1981) 453 U.S. 355, 359.) As our Supreme Court observed, "a reviewing court need not examine a *Miranda* warning for accuracy as if construing a legal document, but rather simply must determine whether the warnings reasonably would convey to a suspect his or her rights required by *Miranda*." (*Samayoa, supra,* 15 Cal.4th at p. 830.) We conclude Carrillo's explanation adequately explained the consequences if Rivas agreed to answer the officer's questions.

To support his argument, Rivas points to his response to Carrillo's question asking Rivas if he understood he had the right not to say anything. Rivas argues his reply, "Uh-huh, yes, if . . . I can't say anything" shows he did not understand his right to remain silent. But Carrillo responded by explaining Rivas had "the right not to say anything" and that he was telling Rivas his rights, and Rivas acknowledged he understood. Rivas proceeded to answer the officer's questions and had no difficulty understanding Carrillo. Rivas contends the record shows he informed Carrillo he did not understand Carrillo's explanation that anything Rivas said could be used in court. When Carrillo asked if Rivas understood this, Rivas responded, "Uh-huh," which Rivas argues meant "no." Viewed in isolation, however, Rivas's response is ambiguous. The trial court resolved this factual dispute by finding Rivas's response constituted an acknowledgement he understood Carrillo's explanation.

Substantial evidence supports the trial court's determination. The transcript shows Rivas employed the expression, "Uh-huh," as an affirmative response during the interview. For example, when Carrillo asked Rivas if he understood the case under investigation was about 10 years old, Rivas responded, "Uh-huh." Carrillo asked if that meant "yes," and Rivas responded, "yes." When Carrillo asked Rivas if he understood he

had the right not to say anything, Rivas responded, "Uh-huh, yes . . . ." At another point in the interview, Carrillo informed Rivas it was important to tell the truth, warned Rivas that Carrillo had spoken with the victim and Rivas's wife, and asked if he understood. Rivas replied, "Uh-huh, yes." Later, Carrillo accused Rivas of touching the victim's chest and asked Rivas if he understood this reference. Rivas responded, "Uh-huh, yes." The trial court reasonably could conclude Rivas used the expression "Uh-huh" as an affirmative response based on his affirmative use of that term in other parts of the interview.

The trial court's rejection of Rivas's testimony claiming he did not understand his rights further supports the court's factual determination. At oral argument Rivas argued the court's finding it disbelieved his account of the interview did not relieve the prosecution of its burden to prove Rivas understood his rights, which it failed to do because the transcript shows he did not understand his rights. We disagree for two reasons.

First, the burden of proof applies in the trial court, not on appeal. As our Supreme Court explained, the burden of proof "'is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.'" (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) Second, the transcript does not show Rivas ultimately did not understand his rights. The transcript of the interview required the trial court to resolve whether Rivas's use of the term "Uh-huh" was an affirmative response. In doing so, the court could weigh in the balance Rivas's lack of credibility in denying he understood Carrillo's explanation of his rights, and that Carrillo did not speak "very much" Spanish. Had Rivas not testified the court may have faced a closer issue, but Rivas did testify, and the court therefore could

take account of his testimony in resolving Rivas's claim. Because substantial evidence supports the court's determination, Rivas's challenge to the admission of his statements fails.

B. *The Trial Court's Imposition of a Consecutive Full Term on Count 3 Was Not Authorized by Statute*

As noted, the jury found Rivas guilty of three lewd acts, one of which was forcible. The first nonforcible lewd act (§ 288, subd. (a)) occurred between March 30, 2004 and March 29, 2006 (count 1), and the second occurred between March 30, 2006 and March 29, 2007 (count 2). The forcible lewd act (§ 288, subd. (b)(1)) occurred between March 30, 2002 and March 30, 2005 (count 3). At the time Rivas committed the lewd acts, the punishment for each violation was three, six, or eight years in prison.

The trial court imposed an 18-year prison sentence, comprised of the upper term of eight years for the nonforcible lewd act charged in count 1, a consecutive two-year term (one-third of the midterm) for the nonforcible lewd act charged in count 2, and a full consecutive upper term of eight years for the forcible lewd act charged in count 3. The court stated: "Accordingly, at this time, the court does select the upper term of confinement of eight years in the state prison as to count 1. The acts were separate. They were distinct. They occurred over a long period of time. Each time the defendant touched this child, he had an opportunity to reflect on what he was doing and what he was doing to her, and still he chose to continue his abuse year after year after year. And, consequently, I think that there was clarity for the jury that this count was a separate act of a similar variety as the count in-as the charge in count 1. Consequently, the court will sentence defendant to one-third the middle term, two years [on count two], consecutive to the sentence heretofore imposed in count 1. I believe that we're using the sentencing

triad that was in effect at the time the crime was committed as to count 3. The court selects the upper term of eight years for the reasons heretofore stated and the fact that the defendant had an opportunity to stop before he got this far and apparently chose not to." The court also remarked Rivas "has not accepted any responsibility. He has not expressed any remorse for his role in what our victim has suffered for such a long period of time. And that was a consideration for me in selecting the upper term."

Section 667.6, subdivision (d), provides: "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. . . . [¶] . . . The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison."

A trial court must impose a consecutive sentence for forcible lewed acts as specified in section 667.6, subdivision (e)(5). The Attorney General agrees with Rivas that he was not subject to the *mandatory* full consecutive term requirement of subdivision (d) because he was not convicted of more than one specified offense. (*People v. Jones* (1988) 46 Cal.3d 585, 594-595 & fn. 5; *People v. Goodliffe* (2009) 177 Cal.App.4th 723, 727, fn. 10 (*Goodliffe*) [mandatory sentencing scheme applied only when a defendant stands convicted of more than one offense specified in subdivision (e)].)

Although a consecutive sentence on the forcible lewd act was not mandatory, the Attorney General argues the trial court exercised its informed discretion to impose a consecutive term. Rivas views the record differently, arguing the trial court

erroneously believed a full consecutive term was mandatory. He cites the parties' sentencing briefs, which the Attorney General agrees reflect *the parties* mistakenly assumed the court had to impose a full consecutive term for the count 3 forcible lewd acts offense. Rivas also relies on the trial court's statement at sentencing that Rivas had received an offer before trial of three years if he pleaded guilty, the court had advised him if he went to trial he faced a minimum term of eight years and a maximum term of 18 years, and the offer was lower than the minimum sentence for three violations. Rivas emphasizes the trial court could calculate an eight-year minimum sentence only if it believed it had to impose consecutive sentences on all three counts, including two full terms (i.e., at least the mitigated term of three years, not a one-third midterm of two years; 3 + 2 + 3 = 8). The court also recalled that during the pretrial discussion everyone agreed "the defendant is facing two full consecutive terms, and one consecutive term at one-third the midterm for these three violations if he is convicted." Rivas notes "[t]he only authority mentioned by anyone in connection with the imposition of a full consecutive term on count 3 was Penal Code section 667.6, subdivision (d), which the prosecution cited in its sentencing brief."

Rivas also argues the trial court did not have *discretion* to impose a full, consecutive term under section 667.6, subdivision (c), which provides in relevant part: "In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) *if the crimes involve the same victim on the same occasion.* A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." (Italics added.) Rivas asserts the crimes here do not involve the same

victim on the same occasion, rather the prosecution alleged mutually exclusive time periods.

Based on our review of the record, it appears the trial court erroneously believed section 667.6, subdivision (d), applied and therefore required the court to impose a mandatory full consecutive sentence on count 3. The records show, and the Attorney General concedes, the parties informed the court Rivas was subject to a consecutive sentence under section 667.6, subdivision (d). Indeed, the court announced before trial and at the sentencing hearing Rivas's minimum sentence was 8 years. The minimum, however, was three years. The court could arrive at the eight-year calculation only if it assumed a mandatory sentence of at least three years consecutively imposed on two of the counts and two years (one-third midterm) consecutive to the remaining count. We need not resolve whether the trial court erroneously believed a full term consecutive sentence under the former version of section 667.6, subdivision (c), was unauthorized.

The prosecution alleged Rivas committed the lewd act charged in count 3 between 2002 and 2005. The version of section 667.6, subdivision (c), existing during this period gave trial courts the discretion to impose "'a full, separate, and consecutive term . . . for each violation of [an enumerated sex offense] *whether or not the crimes were committed during a single transaction.*'" (*Goodliffe, supra,* 177 Cal.App.4th at pp. 726-728.) The current version of section 667.6, subdivision (c), allows the trial court discretion to impose a full term consecutive sentence only if "the crimes involve the same victim on the same occasion." (§ 667.6, subd. (c).) The Attorney General concedes the crimes here did not occur on the same occasion, but argues the trial court was required to apply the version of subdivision (c) in effect at the time the offense was committed

because an enacted statute does not apply retroactively unless the Legislature expressly states otherwise.

Under *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the section 3 presumption against legislative retroactivity does not apply when the Legislature's amendment reducing the statutory punishment occurs between the time a defendant commits a crime and before the judgment of conviction becomes final. When this occurs, "the punishment provided by the amendatory act should be imposed." (*Id.* at p. 742.) This is what occurred here. Rivas therefore is entitled under *Estrada* to the benefit of the 2006 amendment to section 667.6, subdivision (c), which the Attorney General concedes eliminated a trial court's former discretion to impose a full consecutive term for an enumerated crime where the defendant also committed one or more nonenumerated crimes against the same victim on different occasions. Imposition of a full term on count 3, consecutive to a full term on count 1, was unauthorized.

III

DISPOSITION

The sentence is reversed and the cause is remanded for resentencing. In all other respects, the judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

THOMPSON, J.

EXHIBIT NO. 2

☒ ID only JAN 22 2013

☒ IN EVIDENCE JAN 22 2013

☐ Plaintiff/People ☐ Defendant ☐ Joint
☐ Petitioner ☐ Respondent ☒ Court
☐ (Other)

SIGNATURE: Attorney Introducing Sensitive Exhibit

Case No. 12CF1124

PEOPLE

Vs.

DEFENDANT
RIVAS, CARLOS DAGOBERTO

ALAN CARLSON, Executive Officer

Court Clerk: A. Garcia

NOTE: THIS ITEM IS A PERMANENT COURT RECORD.
DO NOT REMOVE FROM THE COURTROOM

RE: RIVAS, CARLOS D.A.#12F14021

INTERVIEW OF: RIVAS, CARLOS

BY: OFCR. CARRILLO/SAPD

PRESENT:

DATE: 4-16-2012

LEGEND: ... Denotes pauses between words or phrases, incomplete sentences, Stammering, etc. (Does not indicate missing words).
*** Denotes unintelligible conversation.
(Sic)Denotes precisely reproduced word.

OFCR: Que es tu apellido?

What is your last name?

RIVAS: RIVAS.

OFCR: RIVAS. Primer nombre?

RIVAS. First name?

RIVAS: CARLOS

OFCR: CARLOS. Tienes medio nombre?

CARLOS. Do you have a middle name?

RIVAS: ...

OFCR: ROBERTO?

RIVAS: DAGOBERTO.

OFCR: DAGOBERTO. Y tu fecha de nacimiento?

DAGOBERTO. And your date of birth?

RIVAS: Es la 1-15-74.

It's the 1-15-74.

OFCR: Tu estatura?

Your height?

RIVAS: Uhm, son ...

Uhm, it's ...

OFCR: En pie?

In feet?

RIVAS: ***4 ½.

OFCR: Okay, y cuanto pesas ahorita?

Okay, and how much do your weight right now?

RIVAS: Como 180 mas o menos.

Like 180 more or less.

OFCR: Okay. Pelo negro, ojos café?

Okay. Black hair, brown eyes?

RIVAS: Negro.

Black.

OFCR: Y café?

And brown?

RIVAS: ...

OFCR: Okay. Okay, so, estamos invest- investigando un caso, okay, uh, hace como unos, uh, unos 9 anos que paso. Okay, uh, en este momento, eh, tengo que de- leer tus derechos.

Okay. Okay, so, we are invest- investigating a case, okay, uh, it's been

like, uh, like 9 years that it happened. Okay, uh, at this time, uh, I have to –read your rights.

RIVAS: ...

OFCR: Okay, si ... si entiendes?

Okay, you do ... you do understand?

RIVAS: ...

OFCR: Si?

Yes?

RIVAS: Pues, yo nunca a tenido yo estos problemas.

Well, I have never had these problems.

OFCR: Okay, so, te voy a leer los derechos de que ... de ... de los derechos que tienes ahorita, okay, de hablar conmigo y todo eso. Okay, y te voy a decir ... si ... si entiendes que ... que te estoy diciendo y me vas a decir 'si' y 'no' y si no me entien- si no me entiendes te voy a explicar mas, okay.

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: Este caso es de unos ... casi, casi unos 10 anos que paso este ... este, uh, este caso, okay.

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

RIVAS: ...

OFCR: Si entiendes?

You do understand?

RIVAS: ...

OFCR: Si entiendes?

You do understand?

RIVAS: Uh-huh.

OFCR: Si? Si?

Yes? Yes?

RIVAS: Si.

Yes.

OFCR: Okay. Okay, so, usted tiene el derecho de no decir nada, si entiendes?

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

RIVAS: ...

OFCR: Si o no?

Yes or no?

RIVAS: Uh-huh, si, como *** ya no le puedo decir nada?

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

OFCR: Si, no, okay, tien- tienes el ... tienes derechos, okay. Te ... te voy a explicar los derechos que tienes. Okay, so, cuando yo ... yo te

pregunto, "Ay usted tiene el derecho de no decir nada." Okay, tienes derecho a no decir nada, si entiendes?

Si, 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: Usted me va ir diciendo?

You will be telling me?

OFCR: Si.

Yes.

RIVAS: Okay.

OFCR: Si o no? Si entiendes?

Yes or no? You do understand?

RIVAS: ...

OFCR: Si. Si o no? Tienes que decir 'si' o 'no.'

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

RIVAS: Si.

Yes.

OFCR: Okay. Lo que usted diga ahora se puede usar en un- en su contra en un- en un tribunal, si entiendes?

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

RIVAS: No.

OFCR: Okay. Usted tiene ... lo que usted diga ahora con nostros con ... con yo, uhm, se puede usar en ... en su- en contra ... contra un corte, en ... en el corte, okay, so, cada ... cada vez que dices algo eso puede ser usado en el corte, okay. Si tentiendes?

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: Si o no?

Yes or no?

RIVAS: ...

OFCR: Okay. Usted tiene derecho de un abogado ante y durante cualquier interrogatorio, si ... si usted lo decea. Okay, so, si quieres un ... un abogado, puedes hablar a uno, okay. Hhm, si usted no tiene par- dinero para pagar por un abogado, uno va hacer nombrado antes cualquier interrogatorio si usted lo decea, si entiendes?

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: Si?

Yes?

RIVAS: Si.

Yes.

OFCR: Okay, uhm, en este ... este caso fue como unos diez anos, casi, okay.

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

RIVAS: ...

OFCR: Uhm, con ... con MARIA? Tu ... tu esposa's hija, verdad?

Uhm, with ... with MARIA? Your ... your wife's daughter, right?

RIVAS: Se llama MARIA CARMEN, mi esposa.

My wife's name is MARIA CARMEN.

OFCR: Okay, tu ... la hija de ella?

Okay, your ... her daughter?

RIVAS: Se llama MARIA.

Her name is MARIA.

OFCR: MARIA, verdad?

MARIA, right?

RIVAS: MARIA GUADALUPE.

OFCR: MARIA GUADALUPE.

RIVAS: Si.

Yes.