NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

FIDEL RIOS SOTO, Petitioner,

VS.

CALIFORNIA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SIXTH APPELLATE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At the beginning of a custodial interview with district attorney investigators a week after his arrest for murder, Petitioner unambiguously invoked his right to counsel. Investigators nevertheless proceeded with questioning related to Petitioner's arrest and the information he had received about the charged offense, leading to Petitioner's waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Petitioner thereafter made highly incriminating statements during the interview that were admitted at trial.

In *Smith v. Illinois*, 469 U.S. 91 (1984), this Court held that "*all* questioning must cease after an accused requests counsel" during a custodial interview. *Id.* at 98 (emphasis in original, citation omitted).

This case presents the following question:

> When a suspect invokes the right to counsel during a custodial interview, can law enforcement officers continue to question the suspect if their post-invocation inquiries are not reasonably likely to elicit an incriminatory response?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Constitutional Provisions

Petitioner Fidel Rios Soto ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal, Sixth Appellate District, in Case No. H042397.

OPINIONS BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District, affirming the judgment on appeal is attached as Appendix A. *See also People v. Soto* (Cal. Ct. App., June 13, 2018, No. H042397) 2018 WL 2949484. The unreported order of the California Supreme Court denying the petition for review is attached as Appendix B.

JURISDICTION

The judgment of the California Court of Appeal, Sixth Appellate District, was entered on June 13, 2018. A timely petition for review was denied by the California Supreme Court on September 26, 2018. This Court has jurisdiction pursuant to 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution (§ 1):

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Hilario Avila ("Avila"), an agricultural laborer living in Greenfield, California, was shot to death in his rental apartment on August 30, 1997. The evidence introduced at trial showed that Avila lived in the apartment with Petitioner, Emidio Cruz ("Cruz"), and Consuelo Garcia ("Chelo"). Petitioner, Cruz and Avila – young men from Mexico – worked in the fields for an agricultural company called Dominguez Farms. Petitioner slept in the same room as Chelo, a bartender and occasional prostitute.

Cruz testified that, on the day of the shooting, he was drinking heavily in the apartment with Petitioner, Avila, and an older man nicknamed Don Panchito. 4RT 252, 259, 262, 293. He stated that, while speaking in a corner with Don Panchito, he saw Petitioner emerge from his bedroom with a lever action rifle. 4RT 243, 293, 298. Cruz testified that Petitioner said "That's it, Hilario" ("Ahora sí, Hilario") and shot Avila – who was seated in a chair – three times in quick succession. 4RT 246, 250, 249-50, 289-90. Cruz stated that all shots were fired from the same location, which was 24 feet away from Avila. 4RT 245. Cruz testified that Petitioner then dropped the rifle and left the apartment. 4RT 244.

No fingerprints were found on the rifle, and none was found on the cartridges or casings. 5RT 327, 343. The shell casings were found spread out

in the apartment, and not in one place. 4RT 221; 5RT 313; People's Trial Exhibit 35, 37-38. The rifle was found near the apartment door, and not at the location indicated by Cruz. 5RT 313; People's Trial Exhibit 39; Defense Exhibit B; 4RT 257, 290, 302. There were no fingerprint matches anywhere in the apartment for Petitioner. 5RT 338-40.

Pedro Dominguez, a foreman at Dominguez Farms in 1997, testified that, in August 1997, he returned with his family to his house late one night. 3RT 111. Dominguez stated that Petitioner was outside his house and startled his wife. 3RT 312. Dominguez testified that Petitioner looked upset or disoriented. 3RT 114. According to Dominguez, Petitioner said he wanted a ride, and Dominguez agreed. 3RT 112-13. Dominguez testified that, after a short drive, Petitioner stated that he wanted to go to Fresno or Santa Maria. 3RT 114. Dominguez refused and dropped him off at a nearby store. 3RT 117. Dominguez never saw Petitioner again. 3RT 117-18. The evidence showed that the final check from Dominguez Farms to Petitioner was issued on September 5, 1997, for work performed from August 25 to 30. 4RT 156.

On September 10, 1997, Petitioner was charged by criminal complaint with murder in violation of California Penal Code section 187. 1CT 1. The complaint also alleged that Petitioner had used a firearm in the commission of the offense within the meaning of Penal Code section 12022.5, subdivision (a).

1CT 1-2.

Petitioner was arrested in Glenn County, California, on March 19, 2013. 1CT 212. On March 26, 2013 – the day before his arraignment on the 1997 criminal complaint – DA investigators Antonio Rodriguez and Maribel Torres interviewed Petitioner at the Monterey County Jail. 4RT 176, 179, 182. Rodriguez was later designated as the prosecution's lead investigator at trial. 3RT 68. The interrogation was conducted in Spanish, with Torres serving as an interpreter. 4RT 210; 1CT 97-98.

Before reading Petitioner his *Miranda*[1] rights, Torres asked Petitioner "[w]here are you from?" 1CT 98. Petitioner responded "Michoacan." 1CT 98. Torres said, "Oh, look, from Michoacan. Have you been there?" 1CT 98. Petitioner stated, "Yes, three years ago, I was there seeing my father and everything." 1CT 98. Petitioner and the investigators then had a back-and-forth about Petitioner's cell phone, which had been seized during his arrest and contained his mother's phone number in Mexico. 1CT 98-99. After Petitioner mentioned money that he had earned while living in Seattle, Torres interrupted and admonished Petitioner under *Miranda*.

After the *Miranda* warning, Torres asked Petitioner: "Having these rights in mind, do you wish to speak with us?" 1CT 100. Petitioner

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

responded, "I would like to have an attorney, because you're accusing me of something that I did not do." 1CT 100; *see also* Ct. of App. Order of Mar. 23, 2016 (augmenting the appellate record with the audio recording); 3/26/13 Audio Recording, 3:58-4:01. Without acknowledging Petitioner's invocation, Torres continued as follows:

> Torres: Ok, so, they already told you...
> Petitioner: Yeah, they already told me that, that. . .when they arrested me they told me it was because of homicide.
> *Torres:* *Ok, so, they notified you ?* [4:10]
> Petitioner: They told me over there, when the police, even...
> . . .
> Torres: Let's see, the papers? It's that I don't have any paperwork. They arrested you in Glenn County. *Glenn County?* [4:26] [Shuffling papers].
> Rodriguez: Yeah, he's already been notified.
> Torres: Ok, that's what he's telling me.
> Rodriguez: Yeah, and there's the warrant that they gave him.
> Torres: *Ok, so, they gave you a copy of your arrest warrant. Ok? That's what I'm looking at, the papers they gave you.*
> Soto: Yeah.
> Torres: All this came with you. [Shuffling papers]. Ok, so they are already explained to you why you're here. [Shuffling papers]. You know why. Umm, is that all?
> Rodriguez: Si.
> Torres: It says nothing about phone [sic] or anything.
> Rodriguez: No.
> Torres: Ok. [Shuffling papers].
> Rodriguez: Well, there's a phone listed here along with the money, but I didn't see any phone along with his property.

[5:03]
Petitioner: I had almost twenty-three-thousand dollars in cash.
Torres: Ok. [Shuffling papers].
Petitioner: There, when I was arrested, they said to me, "Murder". Can you clearly explain to me what's happened or why . . .? [5:24 to 5:33]
Torres: Ok, but, [shuffling papers] that's why I read you your rights, if you wanted to speak with me or not. So, you have that right at the momento [sic], if you want to keep speaking, however you wish and I can answer your questions, but having in mind your rights. Do you want to speak with me or not?
Petitioner: Yes.

1CT 100-01; *see also* 3/26/13 Audio Recording, 3:58-5:54. Petitioner thereafter executed a written *Miranda* waiver and made a series of incriminating statements during the remainder of the interview. 1CT 101-28; A9.

Before trial, the defense moved to exclude Petitioner's custodial statement to DA investigators under *Miranda* and *Edwards*.[2] 1CT 92-93. The trial court denied the motion, holding that Torres' post-invocation inquiries did not call "for an incriminating response." 3RT 66; *see also* 3RT 64.

The trial court admitted Petitioner's statements during the custodial interview, which played a central role in the prosecution's case before the jury. *See* 4RT 173-95, 200-04, 225, 230-31 (testimony by Investigator Rodriguez

[2] *Edwards v. Arizona*, 451 U.S. 477 (1981).

regarding his interview of Petitioner); 6RT 403-04, 416-21, 424-25, 470-71 (closing and rebuttal arguments); *see also infra* at 26-29.

The jury found Petitioner guilty of first-degree murder and found the firearm enhancement to be true. 1CT 201. The trial court thereafter sentenced Petitioner to a prison term of 35 years to life. 1CT 261.

Petitioner timely appealed, contending, *inter alia*, that the trial court had erred under *Miranda*/*Edwards* in denying the motion exclude Petitioner's custodial statement to DA investigators. The Court of Appeal rejected Petitioner's claim. While acknowledging a line of cases stating that *all* questioning must cease after an accused requests counsel, the appellate court concluded that the cases – including *Smith*, 469 U.S. 91 – were dicta on the issue. A13-A14. The Court of Appeal held that this Court's decision in *Rhode Island v. Innis*, 446 U.S. 291 (1980), meant that officers were only prohibited from asking questions that "are 'reasonably likely to elicit an incriminating response from the suspect'" after the clear invocation of the right to counsel. A13, quoting *Innis*, 446 U.S. at 301; *see also id.* at A19. The appellate court concluded that the *Innis* interrogation standard had not been met, because the DA investigators "[a]t most . . . hoped to pique [Petitioner's] curiosity by alluding to the existence of charges against him, albeit always in the context of the legitimate inquiry whether he had been apprised of those charges." A19. The Court of Appeal also ruled that Petitioner had reinitiated contact with law

enforcement by asking a question about the warrant. A18-23. After adjusting Petitioner's presentence conduct credit, the Court of Appeal affirmed the judgment. A51.

On July 23, 2018, Petitioner raised his *Miranda/Edwards* claim in a timely petition for review filed in the California Supreme Court. The California Supreme Court denied the petition on September 26, 2018. A54.

REASONS FOR GRANTING THE WRIT

This case raises a critical issue of constitutional criminal procedure: whether law enforcement officers can continue questioning a suspect *after* he or she has clearly invoked the right to counsel, as long as the questions are not reasonably likely to elicit an incriminatory response. Because the California appellate court's decision reflects a split in authorities that profoundly undermines the right to counsel during a custodial interrogation, the Court should grant certiorari.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court held that if a suspect invokes the right to counsel, the police must immediately cease questioning until an attorney is present. Despite the bright-line rule set forth in *Edwards*, the Court of Appeal in the case at bar held that the DA investigators were permitted to question a suspect who has unambiguously invoked his right to counsel, including "to pique his curiosity by alluding to the existence of charges against him." A19. Applying *Innis*, the appellate court

held that the investigators were only precluded from asking questions that "are 'reasonably likely to elicit an incriminating response from the suspect.'" A13, quoting *Innis*, 446 U.S. at 301.

The appellate court's conclusion, which reflects a persistent split in authorities, is directly contrary to *Smith v. Illinois*, 469 U.S. 91 (1984), where the Court held under materially indistinguishable circumstances that "*all* questioning must cease after an accused requests counsel." *Id.* at 98, *citing Solem v. Stumes*, 465 U.S. 638, 646 (1984) (emphasis in original). It also rests on a misunderstanding of *Innis*, a case that did not involve express questioning of a suspect.

The appellate court's holding – which reflects the approach taken by the Fourth Circuit – undermines the bright-line rule set forth in *Miranda* and *Edwards* ("*Miranda*/*Edwards* rule"). Under the Court of Appeal's analysis, officers may continue to question a suspect following his or her invocation, so long as the questions are deemed not reasonably likely to elicit incriminatory information. Such an approach invites precisely the type of uncertainty and ambiguity that the *Miranda/Edwards* rule was intended to prevent. It also inexorably leads to the type of improper conduct that occurred here: where officers ignore a suspect's clear invocation and continue to "fish" with questioning, in the hopes that the suspect will take the bait. As recognized by

the majority in *Smith*, such a result makes a mockery of the bright-line *Miranda*/*Edwards* rule.

This case represents an ideal vehicle for review. The issue was fully preserved, both in the trial court and on appeal. There is an audiotape of the custodial interview, and it is undisputed that Petitioner unambiguously invoked the right to counsel. It is also beyond cavil that the *Miranda/Edwards* violation played a huge role in the prosecution's case. The lead DA investigator testified at length regarding the custodial interview during trial, and the prosecutor used Petitioner's statements to devastating effect during closing and rebuttal arguments. Relying on the interview, the prosecution showed that Petitioner had admitted possessing the murder weapon at the time and place of the killing sixteen years before. The prosecution introduced Petitioner's drawing during the interview of a lever-action rifle, which reflected – in the prosecutor's words – "an exact replica" of the weapon found at the crime scene. The investigator testified that Petitioner had laughed during the interrogation when asked if he had killed anyone with the rifle, which the prosecutor told the jury showed "the mind of a murderer." And, based upon Petitioner's custodial admission to investigators that he had gone to Mexico immediately after the murder, the prosecutor argued to the jury that Petitioner was guilty because *"[k]illers always flee to Mexico*." Given that

Petitioner's statements to the DA investigators were central to the prosecution's case, the State cannot prove beyond a reasonable doubt that the verdict was unattributable to the error. *Chapman v. California*, 386 U.S. 18, 24 (1967).

The appellate court's decision reflects an ongoing conflict regarding an exceptionally important issue of constitutional criminal procedure. The Court should grant certiorari.

I. Under this Court's Holdings in *Edwards* and *Smith*, All Questioning Must Cease Following a Suspect's Invocation of the Right to Counsel During a Custodial Interview

Under the Court's precedent in *Edwards* and *Smith*, all questioning must cease when a suspect invokes the right to counsel during a custodial interview.

A. The *Edwards* Rule

The Fifth Amendment commands that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. 5; *see also id.*, Amend. 14. "'[T]o reduce the risk of a coerced confession and to implement the Self–Incrimination Clause,' this Court in *Miranda* concluded that 'the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.'" *Missouri v. Seibert*, 542 U.S. 600, 608 (2004), *quoting Chavez v. Martinez*, 538 U.S. 760, 790 (2003)

(Kennedy, J., concurring in part and dissenting in part) and *Miranda*, 384 U.S. at 467. A suspect's "'right to cut off questioning'" is the "critical safeguard" in *Miranda*'s framework because "[t]he requirement that law enforcement authorities must respect a person's exercise of that option" is what effectively serves to "counteract[] the coercive pressures of the custodial setting." *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975).

In *Edwards*, 451 U.S. 477, this Court added "a second layer of prophylaxis for the *Miranda* right to counsel." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). The Court held that, once a suspect has asserted his right to counsel during custodial interview, the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85. Under the *Edwards* corollary, "if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988), *quoting Miranda*, 384 U.S. at 467.

The Court has repeatedly emphasized the "bright-line, prophylactic"

nature of the *Edwards* rule. *Roberson*, 486 U.S. at 682; *see also Montejo v. Louisiana*, 556 U.S. 778, 797 (2009). "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990). The Court has explained that the bright-line rule "has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979); *see also Minnick*, 498 U.S. at 151 ("*Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms.").

The bright-line rule also reflects "the unique role the lawyer plays in the adversary system of criminal justice in this country." *Fare*, 442 U.S. at 719. Because "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of [the accused] in his dealings with the police and the courts . . . . the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease." *Ibid.* "Without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime

contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *North Carolina v. Butler*, 441 U.S. 369, 374 (1979). The "gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis." *Fare*, 442 U.S. at 718.

The *Edwards* prophylactic rule requires two distinct inquiries. First, a court must determine whether the accused actually invoked his right to counsel. *Edwards*, 451 U.S. at 484-85. The *Edwards* rule applies when the accused has made "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *McNeil*, 501 U.S. at 178.

Second, "if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." *Smith*, 469 U.S. at 95. An accused does not re-initiate dialogue with the authorities simply by responding to "further police-initiated

custodial interrogation." *Edwards*, 451 U.S. at 484. Instead, suspect-initiation "occurs when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case." *United States v. Whaley*, 13 F.3d 963, 967 (6th Cir. 1994); *see also Solem*, 465 U.S. at 646 (stating that, under *Edwards*, the suspect "ha[s] to initiate subsequent communication"); *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983) (plur. opn.). In addition, it is well-settled that even a valid waiver does not remedy a prior *Edwards* violation. *Michigan v. Harvey*, 494 U.S. 344, 345 (1990).

B. In *Smith*, this Court Held that the *Edwards* Rule Prohibits All Questioning Following an Accused's Invocation of the Right to Counsel

As the Court clearly held in *Smith*, the *Edwards* rule prohibits *any* questioning – even that not reasonably calculated to elicit an incriminatory response – after a suspect invokes the right to counsel.

In *Smith*, a police detective told the suspect that "'[y]ou have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?'" *Smith*, 469 U.S. at 93. The accused responded "Uh, yeah. I'd like to do that." *Ibid.* The following exchange then occurred:

> Q. ... If you want a lawyer and you're unable to pay for one a lawyer will be appointed to represent you free of cost, do you understand that?
> A. Okay.

> Q. Do you wish to talk to me at this time without a lawyer being present?
> A. Yeah and no, uh, I don't know what's what, really.
> Q. Well. You either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present you can stop at any time you want to.
> A. All right. I'll talk to you then.

Ibid.

The issue before the Court in *Smith* was whether the trial court's refusal to suppress the confession violated *Miranda* and *Edwards*. *Smith*, 469 U.S. at 91-92; *see also People v. Smith*, 466 N.E.2d 236, 241 (Ill. 1984). In determining whether there was an *Edwards* violation, the Court first examined whether the suspect unambiguously invoked his right to counsel. *Smith*, 469 U.S. at 95-97. Given the state court record, the *Smith* Court concluded that the answer to that question was clear. *See id.* at 97 & n. 5. However, the Court did not stop there; instead, the Court *then* reached the constitutional issue of whether the officer's continued questioning violated the bright-line rule set forth in *Edwards*:

> *Edwards* set forth a bright-line rule that *all questioning must cease* after an accused requests counsel. In the absence of such a bright-line prohibition, the authorities through badger[ing] or overreaching—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. . . . No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as

> if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney or not at all.

Id. at 98-99 (citations and quotations omitted, emphasis added); *see also id.* at 98 & n. 6. In so holding, the majority of Justices *rejected* the position that post-invocation questioning must seek incriminatory information to violate *Edwards. Id*. at 98-99; *see also id.* at 100-01 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting) (stating that there was no *Edwards* violation because "here no 'interrogation' was being conducted by the police").[3]

Accordingly, under this Court's decision in *Smith*, 469 U.S. 91, *all* questioning must cease following a suspect's unambiguous invocation of the right to counsel, irrespective of whether or not the questions are reasonably calculated to elicit an incriminatory response.

C. *Smith* is Factually Indistinguishable from Petitioner's Case

Smith is materially identical to Petitioner's case. In each case, law enforcement officers administered the *Miranda* warning; in *Smith*, the suspect invoked his right to counsel during the warning itself, whereas in the case at bar Petitioner did so immediately afterwards. *Compare Smith*, 469 U.S. at 93

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[3] As set forth above, the officer's questions and statements in *Smith* related to the accused's rights; none was reasonably calculated to elicit an incriminatory response. *Smith*, 469 U.S. at 93.

with 1CT 100.[4] In both cases, the suspect's clear invocation was followed by additional questions – in *Smith*, the question constituted the remainder of the *Miranda* warning, while in Petitioner's case the questions related to his arrest and his knowledge of the murder charge. *Compare Smith*, 469 U.S. at 93 *with* 1CT 100. Each suspect then made a statement indicating that he may now be willing to talk. *Compare Smith*, 469 U.S. at 93 with 1CT 100-01. In each case, the officer answered with a poorly-phrased and incomplete statement of the suspect's rights, in response to which the suspect agreed to speak. *Compare Smith*, 469 U.S. at 93 *with* 1CT 101. Under *Smith*, the post-invocation questioning by the DA investigators in the case at bar violated *Edwards.*[5]

II. Despite the Holding of *Smith*, There is a Persistent Conflict with Regard to Whether Post-Invocation Questioning is Permitted as Long as It is Not Reasonably Likely to Elicit an Incriminatory Response

Notwithstanding this Court's clear holding in *Smith*, the courts are split with regard to whether post-invocation questioning is permitted as long as it

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[4] As the Court explained, the fact that the suspect in *Smith* invoked during (as opposed to after) the *Miranda* warning had no constitutional significance. *See Smith*, 469 U.S. at 98, n. 6.

[5] Since the criminal complaint had been filed against Petitioner nearly sixteen years earlier, Petitioner also "had a Sixth Amendment right to counsel as well as the Fifth Amendment right arising under *Miranda*." A24; *see also*, *e.g.*, *Massiah v. United States*, 377 U.S. 201 (1964). However, defense counsel failed to preserve that issue at trial.

is not reasonably likely to elicit an incriminatory response. The conflict deeply undermines the bright-line rule set forth in *Edwards*.

Following *Smith*, many courts hold that *all* questioning must cease following a suspect's invocation of the right to counsel, even when the questions do not seek to elicit an incriminatory response. *See*, *e.g.*, *Garcia v. Long*, 808 F.3d 771, 778 (9th Cir. 2015) (holding that the Supreme Court has "clearly established" that "an unambiguous and unequivocal *Miranda* invocation 'cuts off' questioning—even questioning intended to clarify that the accused is invoking his *Miranda* rights"); *United States v. Hunter*, 708 F.3d 938, 947 (7th Cir. 2013) (stating that *Edwards* prohibits "allowing police officers to continue asking questions—no matter how 'benign' or 'open-ended'—after a suspect unambiguously requests an attorney"); *Anderson v. Terhune*, 516 F.3d 781, 791 (9th Cir. 2008) ("*Smith* mandates that all questioning must immediately cease once the right to remain silent is invoked, and that any subsequent statements by the defendant in response to continued interrogation cannot be used to find a waiver or cast ambiguity on the earlier invocation."); *Christopher v. State of Fla*., 824 F.2d 836, 840, 842-43 (11th Cir. 1987) (in case where questions and statements were not reasonably likely to elicit an incriminatory response, holding that "continued

questioning" following an unequivocal invocation violates *Miranda*).[6]

The Fourth Circuit disagrees. In *United States v. Blake*, 571 F.3d 331 (4th Cir. 2009), the Fourth Circuit held that the post-invocation question "'I bet you want to talk now, huh?'" did not violate *Edwards* rule because it was not reasonably likely to elicit an incriminatory response. *Id.* at 336, 338-40; *see also United States v. Abdallah*, — F.3d —, No. 17-4230, 2018 WL 6613333, at *8 (4th Cir. Dec. 18, 2018) (examining whether the specific post-invocation question was "reasonably likely to elicit an incriminating response"). That is the same approach followed by the appellate court below. A19.[7]

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[6] While the Court of Appeal again dismissed these decisions as mere dicta (A13-14), the Seventh, Ninth and Eleventh Circuits in fact squarely held that even benign post-invocation questioning violates *Miranda/Edwards*. *Garcia*, 808 F.3d at 777-78; *Hunter*, 708 F.3d at 940, 947; *Christopher*, 824 F.2d at 840, 842-43.

[7] The appellate court below also erroneously relied on the booking exception to the *Edwards* rule. A13, 16-17; *see also Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990). This is not a booking exception case, since Petitioner was arrested on March 19, 2013 – a week *before* the interview in Monterey County. 1CT 100, 212-13; 4RT 175. His jailhouse interview was conducted by *DA Investigators*, not sheriff's deputies, and occurred after his Sixth Amendment right to counsel had attached and the day before his arraignment. 4RT 176, 179, 182. This was a custodial interview arranged by the prosecutor's lead investigator to obtain incriminating statements from Petitioner, and not an "innocent query" about biographical data during booking after an arrest. A15.

III. Given the Importance of the Constitutional Issue, the Court Should Resolve the Conflict

The Court should grant certiorari to resolve the conflict for three reasons.

First, the minority rule – as exemplified by the appellate court's opinion below – is directly contrary to this Court's holding in *Smith*. To ensure national uniformity with respect to a critical rule of constitutional criminal procedure, the Court should grant certiorari.

Second, certiorari should be granted to resolve lingering confusion regarding this Court's decision in *Innis*. As stated above, the Court of Appeal in the case at bar – and the Fourth Circuit in *Blake* – concluded that *Innis* meant that only post-invocation questioning that is reasonably likely to elicit an incriminatory response runs afoul of *Edwards*. A19; *Blake*, 571 F.3d 331, 339-40. However, *Innis* did *not* involve *questioning of the suspect*. *Innis*, 446 U.S. at 294-95. Because *Innis* did not address whether post-invocation *questioning* violated the *Miranda* rule, the decision is not precedent for the situation presented in the case at bar. *See Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."). In addition, the *Innis* Court made clear that "the *Miranda* safeguards come into play whenever a person in custody is subjected

to *either express questioning* or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers *not only to express questioning*, but *also* to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 300-01 (footnotes omitted) (emphasis added); *see also id.* at 299 & n. 3. In other words, contrary to the appellate court's conclusion, the *Innis* Court stated that *Miranda* already prohibits any "express questioning" after a suspect's invocation. *See also Miranda*, 384 U.S. at 444-45.

In any event, the *Smith* Court was certainly aware of *Innis*, which it cited as a reaffirmation of the *Edwards* rule. *Smith*, 469 U.S. at 95, n. 2, *citing Innis*, 446 U.S. at 298. Since *Smith* held that all questioning violated the *Edwards* rule, *Innis* cannot be interpreted to require the opposite result. *See Rodriguez de Quijas v. Shearson/American Exp., Inc*., 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). To clarify that there is no need to apply the *Innis* "reasonable likelihood" standard in a case involving express questioning, the Court should grant certiorari.

Third, certiorari should be granted because the minority rule profoundly

undermines the bright-line rule set forth in *Edwards*. Under the appellate court's analysis, officers may continue to question a suspect following his or her invocation of the right to counsel, so long as the questions are not reasonably likely to elicit an incriminatory response. Such an approach invites precisely the type of uncertainty and ambiguity that the *Edwards* rule was intended to prevent, in a manner that ultimately undermines the interests of law enforcement, the courts, and defendants. *See*, *e.g.*, *Roberson*, 486 U.S. at 680 (internal quotations and citations omitted, brackets in original) ("As we have stressed on numerous occasions, [o]ne of the principal advantages of *Miranda* is the ease and clarity of its application.").[8] It also invites exactly the type of conduct that occurred here: where law enforcement officers ignore the invocation and simply continue to "fish" with questions, as if nothing of significance has occurred. The Court of Appeal indicated that it was even permissible for DA investigators to ask questions to "pique the curiosity" of a suspect, including with regard to Petitioner's arrest a week before. The line drawn by the appellate court is not bright; it's invisible.

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[8] *See also United States v. Johnson*, 812 F.2d 1329, 1331 (11th Cir. 1986) ("No interest would be served by attempting to list matters that may or may not be discussed by law enforcement officers with an accused in custody after the accused has indicated that a lawyer is desired before further interrogation. It best serves all interests, especially law enforcement, to remain close to the 'bright line': interrogation must cease when an accused in custody requests the presence of a lawyer before further interrogation.").

The situation is even *less* clear from the perspective of the suspect. Under the Court of Appeal's opinion, a suspect who has clearly invoked the right to counsel faces additional questioning, the scope and type of which is solely in the discretion of law enforcement. The suspect must navigate this inquisitional minefield alone and without the counsel he has already requested. Again, that is precisely the type of situation that the *Edwards* rule was intended to prevent.[9]

Given the importance of the bright-line rule set forth in *Edwards*, this Court should grant certiorari to re-affirm the holding of *Smith* and make clear that *any* post-invocation questioning is prohibited, whether or not it is reasonably likely to elicit an incriminatory response.

IV. This Case Presents the Ideal Vehicle for the Court to Resolve the Conflict and Reaffirm that Officers May Not Question a Suspect Following the Unambiguous Invocation of the Right to Counsel

This case is the ideal vehicle for the Court to resolve the split and

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[9] The appellate court's conclusion that Petitioner had "reinitiated" contact with law enforcement exemplifies how far the minority's approach strays from the bright-line rule in *Edwards*. As explained by this Court in *Smith*, the fact that a suspect opens the door to further discussion *after* the investigators' continued post-invocation questioning does not remedy a prior *Edwards* violation. *Smith*, 469 U.S. at 98, n. 7; *see also*, *e.g.*, *Garcia*, 808 F.3d at 778-79, citations and quotations omitted (holding that the "California Court of Appeal's use of [the defendant's] postrequest statements to call his initial 'no' into question was contrary to" the "bright-line rule" in *Smith*); *Christopher*, 824 F.2d at 845 (stating that "just as one cannot start an engine that is already running, a suspect cannot 'initiate' an on-going interrogation").

reaffirm that officers cannot question a suspect following a clear invocation of the right to counsel.

First, the *Miranda/Edwards* claim was fully preserved, both at trial and on appeal. There is consequently no issue of forfeiture or waiver.

Second, the facts underlying the *Miranda/Edwards* claim are undisputed. A6-9. There is an audio recording and transcript of the custodial interview. A6, A11. In addition, like *Smith* but unlike many cases involving an *Edwards* claim, there is no dispute that Petitioner clearly invoked his right to counsel after the *Miranda* warning. A11.

Third, this case is an excellent candidate for review because the State cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24. While the appellate court did not directly address the prejudice issue, the court acknowledged the devastating nature of the evidence arising from Petitioner's custodial interview. A10. DA Investigator Rodriguez, who testified at length to his interrogation of Petitioner, told the jury that Petitioner had admitted possessing the murder weapon at the time in question, and that Petitioner had indeed drawn an accurate picture of the rifle used in the killing. 4RT 202-04; *see also* People's Trial Exhibit 70 (drawing of lever-action rifle). The prosecutor later argued that Petitioner had drawn "an exact replica" of the

murder weapon (6RT 416), and stated that Petitioner's knowledge of the rifle showed that he had pulled the trigger on the day of the murder. *See*, *e.g.*, 6RT 420. Rodriguez also explained that Petitioner "laughed" when asked if he ever killed anyone with the rifle, which the prosecutor contended revealed the "mind of a murderer." 6RT 420.

In addition, Rodriguez testified that Petitioner had admitted leaving Greenfield to go to Mexico during the timeframe of Avila's killing, and had acknowledged calling his boss "Pedro" from Mexico to try and get his last check. 4RT 200-01. The prosecutor argued in closing that Petitioner's flight showed that he was guilty, because "[k]illers always flee to Mexico." 6RT 403-04; *see also* 6RT 424-25.

Rodriguez also testified to a range of false statements that Petitioner had made during the interview, which the prosecutor used – to great effect – to show consciousness of guilt. 4RT 182-83, 185-86, 196-97, 206; *see also*, *e.g.*, 4RT 421 (prosecutor arguing that the Petitioner's statements were "false and misleading, there's no way around that" and that the jury can "consider it in determining his guilt"). The jury was told that it could convict based upon Petitioner's statements to DA investigators alone, or upon the statements with only a "slight" amount of other evidence. 1CT 287; 6RT 470. Moreover, the interview's admission resulted in the jury learning a number of highly-

inflammatory facts, including that: (a) two non-testifying witnesses had told police that Petitioner was at the scene of the murder, (b) Petitioner repeatedly invoked the right to counsel during the interview, and (c) Petitioner engaged in bizarre behavior at a prior murder-suicide scene. 4RT 189, 230 (statements of non-testifying witnesses); 4RT 181, 229-31 (Petitioner's invocation); 4RT 182, 184-85, 191-93 (murder-suicide). It is, in short, difficult to overstate the prejudicial impact of the admission of the custodial statement.

Apart from Petitioner's statement, the prosecution's case relied on the testimony of Cruz – one of only two other potential suspects in the shooting of Avila. The evidence showed that Cruz had been drinking heavily on the day of the shooting. 4RT 252, 259, 261-62; 5RT 326, 328, 330. The physical evidence – including the location of the shell casings – did not match Cruz's description of the shooting, and none of Petitioner's fingerprints was found anywhere in the apartment, including on the rifle, the cartridges or the casings. *See supra* at 3-4. And Cruz failed to provide any motive for the shooting; instead, he stated that Petitioner and Avila were friends, and testified that there had been no altercation between the two. 4RT 293. From the jurors' questions, it is clear that the jury was troubled *both* by the lack of physical evidence corroborating Cruz's testimony *and* by the lack of any apparent motive for the shooting. *See*, *e.g.*, 2CT 313, 315 (jurors questioning whether

"the left over live round be [sic] tested for prints?" and whether "any of the bullets/casings checked for fingerprints?"); 2CT 317 (jury asking the court during deliberation "[w]as there any human residue on the gun?"); 2CT 306 (juror note asking "Did 'Chelo' and Hilario ever date? Or was 'Chelo' Julio's girlfriend only?"); 2CT 307 (juror note asking "Did the deceased had [sic] a relationship with the defendant? Did the deceased had [sic] an argument with the defendant prior to the incident? If so, when?").

Where, as here, the custodial interrogation played a central role in the prosecution's case-in-chief and arguments to the jury, the State cannot prove beyond a reasonable doubt that the error was harmless. The prejudicial impact of the error below renders this case an ideal vehicle to resolve the conflict and reaffirm the holding of *Smith*.

Based upon the foregoing, this Court should grant certiorari.

CONCLUSION

Based upon the foregoing, a writ of certiorari should issue to review the judgment of the California Court of Appeal, Sixth Appellate District.

Dated: December 26, 2018

Respectfully submitted,

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