No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____

ADAM LEE LOPEZ,

Petitioner,

v.

WARREN L. MONTGOMERY, WARDEN,

Respondent.

_____

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

_____

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether officers may, when a suspect mentions a desire to wait for an attorney, follow up a reading of the *Miranda* warnings with soft persuasion and encouragement that the suspect explicitly waive those rights so long as their encouragement does not rise to the level of coercion.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Adam Lopez respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit, App. 1a, is unpublished but available at *Lopez v. Janda*, 742 Fed. Appx. 211 (9th Cir. 2018). The Magistrate Judge's Report and Recommendation, App. 9a, and the United States District Court's order adopting the Report and Recommendation, App. 7a, are unpublished, but available at 2015 WL 3736997 (C.D. Cal. 2015). The opinion of the California Court of Appeal, App. 35a, is unpublished but available at *People v. Lopez*, 2012 WL 1900937 (Cal. Ct. App. 2012) (No. E052294). The California Supreme Court's order denying Lopez's petition for writ of habeas corpus is unpublished. App. 55a.

JURISDICTION

The judgment of the Court of Appeals was entered July 17, 2018. App. 1a. A timely petition for rehearing was denied August 27, 2018. App. 34a. On November 30, 2018, Justice Kagan extended the time for filing a petition

for certiorari until January 10, 2019. No. 18A545. This Court has jurisdiction. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

Section 2254(d) of Title 28, U.S.C., provides:

> 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.

STATEMENT OF THE CASE

After Adam Lopez balked at waiving his rights, preferring to "wait for an attorney," Detective Porter embarked on a campaign of soft persuasion, expressly telling Lopez that he wanted to "encourage" him to waive his rights. App. 58a-59a. Porter confirmed what Lopez obviously feared: that he was "in a bad position" facing "serious" charges, but then falsely assured Lopez that there "wasn't much [Lopez could] do to make this worse." App. 58a. Lopez was suspected of firing a shotgun in a remote desert area, late at night, which hit a police car. Porter consoled Lopez "I don't think you thought you were shooting at the cops" and assured him "we want to hear your side of the story." App. 58a. When Lopez asked for time to think, Porter cautioned Lopez to "just remember that we'll never know what your side of this is unless you're the one to tell us," advice that was patently inaccurate. App. 59a.

Claiming Porter did "nothing more than seek to clarify" whether Lopez genuinely sought the assistance of counsel, the state court opined that Porter was free to encourage Lopez to waive his *Miranda* rights so long as he "did not coerce defendant to waive his rights." App. 45a-46a. Although recognizing that Porter obviously did much "more than seek to clarify" Lopez's desires when he "encourage[d] Lopez to answer his questions," the federal habeas court reviewed Lopez's claim under the narrow strictures of §

2254(d) and denied relief. App. 5a. The Court should grant review to confirm, as the lower courts to confront the situation have generally agreed, that law enforcement officers cannot dilute *Miranda*'s required warnings by giving one-sided, misleading arguments encouraging a suspect to waive those rights.

1. Adam Lopez lived in an area of the desert so remote that mail was not delivered to the residence. R.T. 138. He had been confronted, earlier in the evening, by a man who'd previously shot out the windows of his car and who threatened to come back and "kick his ass." R.T. 96, 108. Lopez had broken his ankle in a work-related injury and was hobbling around on crutches. R.T. 95. Later that evening, long after the moon set, he observed a car driving wildly through the desert that appeared to be chasing his girlfriend Tonya Campbell. C.T. 519 [Ex. 119, at 16]; R.T. 140-41. He fired three warning shots as the car approached his house.

The car that appeared to be chasing Campbell was not being driven by the man who'd threatened him earlier, but by a deputy sheriff on patrol. The first two shots were fired as the car was coming towards Lopez and his girlfriend.[1] The third shot was fired as the vehicle passed Lopez and struck

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[1.] The officer affirmed he had his headlights on. R.T. 149. Other prosecution witnesses, however, distinctly recalled the patrol car's headlights were *not* illuminated. R.T. 82-83, 101. The patrol car was a newer model with a lower profile designed to minimize visibility of the roof's lightbar which had not been activated. R.T. 141-42, 192.

the car's rear window. R.T. 156, 160, 275-76, 289, 347-51.[2] All three shots "happened within a few seconds." R.T. 143.

Earlier in the evening, Campbell had been cocking and racking the slide of shotguns several times, talking about the need to oil them and calling them "her babies." R.T. 117-18, 137. There was no evidence Lopez had anything to do with firearms before the shooting. R.T. 137. Without the statements Detective Porter obtained from Lopez, the prosecution would have had difficulty proving beyond a reasonable doubt that Lopez was the person who fired the shotgun.

Constrained by Lopez's uncounseled admission that he was the one who fired the shotgun, trial counsel argued that Lopez only intended to frighten and scare the driver, not kill him, and that Lopez had been unaware until after the car passed that it was being driven by a deputy sheriff. Despite Lopez's insistence that he did not realize it was a patrol car until it passed him, the prosecutor cherry-picked portions of the uncounseled statements to undermine Lopez's explanation that he was just trying to scare off the person who'd threatened to "kick his ass" and appeared to be chasing his girlfriend in a car.

2. Lopez was arrested the following day and escorted into a small,

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[2] About five birdshot pellets hit the deputy's hand and leg; he was treated and released the same night. R.T. 157-58.

windowless interrogation room illuminated only by artificial light. Ex. 1, at 00:00-00:11. He was directed to sit, handcuffed, in a chair in the back corner of the room farthest from the door and then left abandoned in the room by himself. Ex. 1, at 00:11-01:19. Detective Porter and another officer eventually entered the room with their sidearms clearly visible, placed themselves a few feet from Lopez, between him and the door as Lopez remained handcuffed in the chair in the corner. Ex. 1, at 01:08-01:29.

After reading the *Miranda* warnings, Det. Porter testified Lopez replied that "he thought he better wait for an attorney." R.T. 9.[3] Treating Lopez's

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3. The audio track reveals that, after a three-second pause, Lopez said "I'm just saying I'll wait until an attorney is present." Ex. 1, at 1:53-2:00. Det. Porter, who was not taking contemporaneous notes, wrote in his report

statement as ambiguous, Det. Porter followed up by acknowledging Lopez's right to do so, prompting Lopez to re-affirm "Yea, because I don't know what you're talking about." App. 57a. As if Lopez's reaffirmation weren't clear enough, Det. Porter then informed Lopez that "you've got to be clear about this" and although Lopez might "want to wait for an attorney" or "not want to wait for an attorney," Det. Porter confirmed "We obviously want to hear your side of the story." App. 59a.

After reminding Lopez that he was "in a bad position" involving "serious stuff" because, as his partner noted, "it's attempted murder of a police officer," Det. Porter advised Lopez that, "knowing what I know right now, I don't think you, I don't think you thought you were shooting at the cops." App. 58a. Acknowledging that Lopez probably felt like he was "screwed no matter what," Det. Porter assured Lopez that "there's not much you can do to make this worse for yourself." App. 58a. While acknowledging his willingness to allow Lopez to "wait for an attorney," Det. Porter followed up by saying he wanted to "encourage you that we obviously want to hear the other half of this." App. 59a.

After agreeing to allow Lopez a few minutes to mull it over, Det. Porter told Lopez, in a parting shot, to "just remember that we'll never know what

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that Lopez said "I guess I'll wait until an attorney's present." R.T. 11. The trial court found that Lopez said "I guess I'll wait for an attorney or something." R.T. 21.

your side of this is unless, unless you're the one to tell us." App. 59a.

After abandoning Lopez, isolated, in the windowless interrogation room for several minutes still handcuffed to reflect upon his fate.

When Det. Porter returned and reinitiated the interrogation, Lopez agreed to waive his rights. C.T. 244.

Lopez told Det. Porter what the latter said he'd wanted to hear: that Lopez fired the shotgun but didn't realize he was shooting at a patrol car. Lopez said that he noticed, as the car drove by, the emblem and immediately stopped firing. C.T. 508-09, 513 [Ex. 119, at 5-6, 10]. In summation, the prosecutor emphasized that "by his own admission," Lopez recognized the car as a police vehicle and was even closer to the car than police had estimated. R.T. 427-33. He closed by encouraging the jury to "look at his statement

again" and rebuffed the defense closing argument as "great," "a wonderful argument but for the fact [what] the defendant told us." R.T. 439, 473.

3. The prosecution charged Lopez with the deliberate premeditated attempted murder of a police officer. C.T. 1.

The trial court denied Lopez's pretrial motion to suppress statements made to Det. Porter, finding that Lopez's expressed willingness to wait for an attorney was ambiguous and that, in the course of "clarifying" whether Lopez desired to waive his rights, Det. Porter's spiel encouraging Lopez to waiver his rights "did not come across as pushy and certainly not coercive" so that the elicitation of the waiver was "not coerced." R.T. 21-22.

The state court of appeal held that "the trial court did not err in determining that defendant's statement [referencing counsel] was ambiguous" and that, "After [Lopez] made an ambiguous statement, Detective Porter did nothing more than seek to clarify whether defendant indeed wished to invoke his right to counsel." App. 45a. Based thereon, the appellate court "conclude[d] the detective did not coerce [Lopez] to waive his rights." App. 46a.

Neither the state trial court nor the state court of appeal acknowledged or addressed *Miranda*'s directive that "any evidence that the accused was threatened, tricked, *or cajoled* into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," *Miranda*, 384 U.S. at 476

(emphasis added).

The California Supreme Court summarily denied Lopez's subsequent review by way of habeas corpus. App. 55a.

Lopez filed a *pro se* petition for writ of habeas corpus in the United States District Court for the Central District of California. The district judge adopted the magistrate's recommendation reviewing the issues under § 2254(d) and finding that the state court "reasonably determined that there was neither an unequivocal request for counsel by Petitioner nor coercion by the police." App. 23a.

The Ninth Circuit Court of Appeals affirmed in an unpublished memorandum. App. 1a-6a. Without addressing the state court's mischaracterization of the factual record, failure to address cajoling, or insistence on a showing of coercion contrary to this Court's express holding in *Miranda*, the panel held that "the state court did not unreasonably apply Supreme Court precedent in determining that Detective Porter's statements did not rise to the level of coercion or cajoling." App. 5a-6a.

REASONS FOR GRANTING THE WRIT

I. The State Court Committed Clear and Unreasonable Errors of Fact and Law in Permitting Law Enforcement Interrogators To, Short of Coercion, Encourage and Persuade Suspects into Waiving Their *Miranda* Rights

A. The Insupportable Assertion Det. Porter Did "Nothing More" than "Clarify" Lopez's Attempted Invocation, When Det. Porter Repeatedly and Unambiguously Sought to Persuade Lopez to Waive His Rights Was an Unreasonable Factual Determination

In the face of undisputed evidence that, before obtaining a waiver of Lopez's *Miranda* rights, the officers told Lopez that they

- "want to hear your side of the story,"
- bemoaned that they "only have that one side of the story so far,"
- "encourage[d him] that we obviously want to hear the other half of this,"
- reminded him that they had heard from Campbell and the deputy,
- emphasized the severity of the charges,
- suggest that claiming ignorance that the individual shot at was a police officer was a reason to speak and waive counsel,
- falsely suggested they would "never know" the exculpatory facts he knew "unless you're the one to tell us" and
- falsely assured him that "there's not much you can do to make this worse for yourself," App. 58a-59a,

the state appellate court's assertion that "Detective Porter did nothing more than seek to clarify whether defendant indeed wished to invoke his right to counsel," App. 45a, cannot be other than "an unreasonable determination of the facts in light of the evidence." 28 U.S.C. § 2254(d)(2); *Brumfield v. Cain*, 135 S.Ct. 2269, 2281-82 (2015); *Wiggins v. Smith*, 539 U.S. 510, 528 (2003).

Rather than doing "nothing more than seek to clarify" Lopez's response,

once Lopez alluded to his desire to wait for counsel, Det. Porter quickly resorted to many of the tactics *Miranda* specifically condemned as likely to overbear a person's will to choose silence. Moreover, he did so in ways that directly undermined the warnings he had just given.

Informing Lopez he "heard what the deputy has to say" and reminding Lopez "you're in a bad position" but he "want[ed] to hear your side of the story," C.T. 243, reflected the "air of confidence in the suspect's guilt" while "maintain[ing] only an interest in confirming certain details" encouraged by the interrogation manuals *Miranda* condemned. *Miranda*, 384 U.S. at 450. Telling Lopez "I don't think you thought you were shooting at the cops," C.T. 243, similarly reflected an attempt to "minimize the moral seriousness of the offense" and "offer legal excuses for his actions in order to obtain an initial admission of guilt." *Miranda*, 384 U.S. at 450-51.

Rather than just "seek to clarify" Lopez's desires, Det. Porter repeatedly, emphatically, and unambiguously told Lopez that he *wanted* Lopez to waive his rights. Informing Lopez to "just remember, that we'll never know what your side of this is unless you're the one to tell us" and "encourage you" to speak were transparent attempts to cajole Lopez into waiving his rights. Det. Porter's parting statement was also false and misleading. Even if Lopez did not speak to officers, his attorney would most certainly inform the prosecution of mitigating and exculpatory circumstances

during the give-and-take of pre-trial negotiations. And, of course, there was always the opportunity for Lopez to testify at trial about what really happened. U.S. CONST. AMEND. V.

Det. Porter did not just encourage Lopez to speak. He made clear that the "seriousness of the charges" made it *important* for Lopez to talk to them because they "only have that one side of the story so far." C.T. 243; R.T. 9. After expressing his purported belief that "I don't think you thought you were shooting at the cops," Det. Porter also falsely implied Lopez faced a higher risk of conviction on the most serious offenses because they would "never know" the exculpatory facts "unless you're the one to tell us." App. 58a-59a. *Miranda* expressly disapproved "deceptive stratagems such as giving false legal advice," precisely because such statements could not help but assuage suspects into waiving their rights. *Miranda*, 384 U.S. at 455.

Det. Porter's most egregious misrepresentation ,though, was probably his assurance that, in contrast to the benefits of waiving his rights, the costs of doing so were almost non-existent because "there's not much you can do to make this worse for yourself." C.T. 243; R.T. 16-17. The required warning that "anything said can and will be used against the individual in court" was intended to "make him not only aware of the privilege, but also of the

consequences of foregoing it." *Miranda*, 384 U.S. at 469.[4]

Rather than not making things worse for him, by speaking to Det. Porter and embracing Porter's seemingly exculpatory explanation, Lopez did in fact make his situation much worse for himself by providing the prosecution with statements it could use to send him to prison for the rest of his life.[5]

The state court's patent factual error compelled the federal court to review Lopez's claim de novo. *Brumfield*, 135 S.Ct. at 2281-82; *Wiggins*, 539 U.S. at 528.

B. By Ignoring Cajoling and Failing to Consider the Totality of Circumstances, the State Court's Decision Applied the Wrong Legal Standard, Contrary to Law

In light of this Court's holding in *Miranda* that "any evidence that the

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4. Unsurprisingly, Det. Porter did not clarify that although the prosecution could use Lopez's statements against him, whatever he told Det. Porter could *not* be introduced by his lawyer to support his defense. *Cf.* CAL. EVID. CODE §§ 1200, 1220; *People v. Clay*, 153 Cal.App.3d 433, 457 (1984) ("Self-serving extrajudicial declarations by criminal defendants are inadmissible to prove the truth of what was said").

5. Lopez was sentenced to 33 years to life. C.T. 500. Instead of a 2 to 4 year term for assault, CAL. PEN. CODE § 245(a), or 5 to 9 years for an attempted murder, *id.*, § 664(a), the attempted murder of a peace officer carries a mandatory life sentence, *id.*, § 664(e). Indeed, without the benefit of Lopez's statements, the prosecution might have been unable to prove Lopez fired a gun at all or, at worst, was simply guilty of misdemeanor brandishing, *id.*, § 417(a), (c).

accused was threatened, tricked, *or cajoled* into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," *Miranda*, 384 U.S. at 476 (emphasis added), the state court applied a rule "contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), when ignoring Det. Porter's cajoling and ruling only that "the detective did not *coerce* defendant to waive his rights." App. 46a.

This Court has also held that the validity of a *Miranda* waiver "is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent." *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). Yet the state court's analysis acknowledged *none* of the circumstances save its factually erroneous assertion that Det. Porter did "nothing more" than "clarify" Lopez's statement. Here, too, "when the circumstances also required the state courts to apply *Moran*'s totality of the circumstances inquiry to the issue of whether the waiver was voluntary, they failed to identify the 'correct legal rule,' and their decisions were thus contrary to clearly established law, as determined by the Supreme Court." *Hart v. Attorney Gen. of State of Fla.*, 323 F.3d 884, 893 (11th Cir. 2003).

II. Even Under § 2254(d), The State Court's Insistence of Coercion to Demonstrate Cajoling Was Unreasonable

Miranda sought to curtail the overreaching that occurred "when normal procedures fail to produce" a confession. *Miranda*, 384 U.S. at 455. In such situations, *Miranda* observed, "police may resort to deceptive stratagems such as giving false legal advice" or, alternatively, "The police [may] then persuade, trick, or cajole him out of exercising his constitutional rights." *Miranda*, 384 U.S. at 455 (footnote omitted).

Having declared the need to expressly advise suspects of their constitutional rights, *Miranda* clarified that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," *Miranda*, 384 U.S. at 476.

"Cajole" is defined as "to persuade with deliberate flattery, esp. in the face of reasonable objection or reluctance" and cajolery as the "use of delusive enticements." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 313 (Philip Babcock Gove ed., Merriam-Webster 1981). "Under the most common definition of cajolery, [*Miranda*'s] language would seem to prohibit the police from exerting any kind of pressure, including persuasion, that would lead the suspect to waive his rights. Thus, the police would be required to give the warnings in a neutral manner and not use any inducements that might have the effect of precipitating a waiver." Richard

Leo & Welsh White, *Adapting to Miranda*, 84 MINN. L. REV. 397, 416 (1999) (footnote omitted).

Courts around the country unhesitatingly recognize this as a simple and essential application of *Miranda*. Save the panels in this case, lower courts have routinely held *Miranda* waivers involuntary when procured by cajoling or trickery, without regard to whether coercion was involved. The Pennsylvania Supreme Court, for example, held a *Miranda* waiver involuntary where an officer "undercut the effect of the warning(s) by offering an inducement (for Peters to waive his rights and) to speak," even while crediting the trial court's finding that the officer's statements "were not coercive." *Commonwealth v. Peters*, 473 Pa. 72, 84, 87, 373 A.2d 1055, 1061, 1063 (1977).

Embracing the Third Circuit's standard, the Washington Supreme Court similarly found it sufficient that an officer's gloss was unfairly manipulative, even if not coercive. *State v. Unga*, 165 Wash.2d 95, 102, 196 P.3d 645, 649 (2008) ("The question . . . is whether the interrogating officer's statements were so manipulative or coercive that they deprived the suspect of his ability to make an unconstrained, autonomous decision to confess.") (brackets omitted), quoting *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986).

The New York Court of Appeals also recognizes that impermissible cajoling may occur without rising to the level of coercion. In *People v.*

Thomas, 22 N.Y.3d 629, 8 N.E.3d 308, 985 N.Y.S.2d 193 (2014), although the child had already died, police informed the child's father that the child was still alive and that ascertaining the cause of his injuries was crucial to enable medical professionals to save the child. Although also finding the police conduct coercive, the Court of Appeals also explained:

> It is plain that defendant was cajoled into his inculpatory demonstration by these assurances – that they were essential to neutralizing his often expressed fear that what he was being asked to acknowledge and demonstrate was conduct bespeaking a wrongful intent. Defendant unquestionably relied upon these assurances, repeating with each admission that what he had done was an accident.

Thomas, 22 N.Y.3d at 645, 8 N.E.3d at 316, 985 N.Y.S.2d at 201.

Similarly, in circumstances surprisingly similar to those here, the Supreme Court of Virginia held a *Miranda* waiver involuntarily cajoled out of a suspect even though there was no allegation of coercion. *Commonwealth v. Ferguson*, 278 Va. 118, 677 S.E.2d 45 (2009). Similar to Det. Porter's tactic of acknowledging the defendant's rights and then encouraging a waiver, the interrogator advised Ferguson "If you want to go ahead and talk to me about this fine, if you don't, you know you're in trouble right now. Uh, I'm not, I'm not playing with you. . . . The only hope you've got right now is to come as clean as you can get." *Ferguson*, 278 Va. at 125, 677 S.E.2d at 48. Unlike the courts below, the Virginia Supreme Court recognized that this was plainly an "attempt[] to get Ferguson to talk to him." *Id.*, 278 Va. at 122, 677 S.E.2d at

47. The *Ferguson* officers similarly recognized the benefits of leaving the suspect isolated after softening him up; after encouraging the suspect to waive his rights, the officers abandoned the defendant in interrogation room "to let you sit here for a few minutes." *Ferguson*, 278 Va. at 125, 677 S.E.2d at 48. Although the Virginia Supreme Court found certain elements of the interrogator's techniques coercive, the court's overall focus was on the concerted attempt to persuade the suspect to change his mind and talk to the police. Unlike the courts below in this case, coercion was not a sine qua non for an officer's monologue about *Miranda* to render a subsequent waiver involuntary.

Other courts that have assessed whether trickery or deceit rendered a waiver involuntary have done so without requiring the defendant to additionally prove that police tactics were coercive. *E.g. State v. Quinones*, 105 Ariz. 380, 465 P.2d 360 (1970) (although trickery may vitiate a waiver, factual allegations refuted by record); *People v. Fish*, 660 P.2d 505, 509 (Colo. 1983) (waiver not voluntary where suspect assured he did not need a lawyer), abrogated on other grounds *People v. Hopkins*, 774 P.2d 849, 851-52 (Colo. 1989); *State v. Cullison*, 227 N.W.2d 121 (Iowa 1975) (deception by concealing reason for arrest constituted impermissible trickery undermining waiver along with other factors); *Commonwealth v. Jackson,* 377 Mass. 319, 327, 386 N.E.2d 15, 20 (1979) (waiver induced by trickery held involuntary without

regard to coercion); *State v. Sheineman*, 77 S.W.3d 810 (Tex. Crim. App. 2002) (en banc) (finding clandestine recording of inmate's conversation did not involve trickery or deception without requiring additional showing of coercion); *Balszke v. State*, 69 Wis.2d 81, 89, 230 N.W.2d 133, 138 (1975) (held that police statements to suspect did not amount to impermissible cajoling before separately rejecting claim challenging allegedly coercive circumstances).

The federal courts are not far afield. The First Circuit affirmed the suppression of statements elicited through a combination of threats and cajoling even while accepting the district court's finding that the waiver was not coerced. *United States v. Barone*, 968 F.2d 1378, 1382, 1384 n.7 (1st Cir. 1992). Affirming the common sense principle that, if *Miranda* is to mean anything, police may not simply administer the warnings before proceeding to extol the benefits and virtues of speaking to police, the circuit found it sufficiently problematic that "the officers repeatedly spoke to [the suspect] for the purpose of changing his mind." *Id.*, at 1384.

The Second Circuit similarly found it sufficient to warrant suppression that a defendant had been "threatened, tricked, or cajoled into a waiver," even if the waiver had not been coerced. *United States v. Duvall*, 537 F.2d 15, 24-

25 (2d Cir. 1976).[6]

In *United States v. Hamlin*, 432 F.2d 905 (8th Cir. 1970), the court applied the same standard when rejecting a defendant's claim that documents had been produced through cajoling or trickery. After already waiving his rights, a fraud suspect produced a list of investors upon assurance that the list would not be disclosed to or used by other persons. The circuit found that the condition "stemmed from a desire that it should not fall into the hands of his competitors," not that it wouldn't be available to criminal investigators or prosecutors. *Hamlin*, 432 F.2d at 908-09. Although observing that there was no fraud or coercion, the court rejected the claim based on the factual record without requiring a showing of coercion. *Id.*, at 909 & n.5.

The Eleventh Circuit has repeatedly found that officer statements designed to persuade an individual to waive his rights were manifestly forbidden by *Miranda* without a further showing of coercion. In *Hart v. Attorney Gen. of State of Fla.*, 323 F.3d 884 (11th Cir. 2003), the Eleventh Circuit found a *Miranda* waiver invalid when, although a detective "went to great lengths to apprise Hart of his rights," another detective assured him that "honesty wouldn't hurt him" (not dissimilar from Det. Porter's assurance

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6. Although finding error in the failure to suppress some of the defendant's statements, they were cumulative of other, properly-received admissions and other evidence establishing the error to be harmless beyond a reasonable doubt. *Duvall*, 537 F.2d at 26.

that "there's not much you can do to make this worse for yourself"). *Hart*, 323 F.3d at 894. The panel found the second detective's assurance to be "simply not compatible with the phrase 'anything you say can be used against you in court.'" *Id.* No additional showing or inquiry of coerciveness was required.

Similarly, in *United States v. Beale*, 921 F.2d 1412 (11th Cir.1991), the Eleventh Circuit held a *Miranda* waiver invalid when given "after the Agents told him that it would not hurt him." *Beale*, 921 F.2d at 1435. No different than Det. Porter's assurance that "there's not much you can do to make this worse for yourself," the Eleventh Circuit panel held that the agents' statement misled the defendant concerning the consequences of relinquishing his rights, invalidating the waiver. *Id.* Again, no additional showing of coercion was required.

The Fourth Circuit has stated, in dicta, that "Coercive police activity is a necessary finding for a confession or a *Miranda* waiver to be considered involuntary." *United States v. Giddins*, 858 F.3d 870, 881 (4th Cir. 2017). Yet, although labeled as "coercive," the court found it sufficient that police misled the suspect that they wanted to ask him routine questions as a condition of releasing his impounded car and denied that he was in trouble (when they'd already obtained an arrest warrant). *Id.*, at 881-84. While the deception about the investigation might qualify as the trickery denounced by *Miranda*, the precatory request that he answer "routine" questions plainly

constitute a form of cajoling. Where cajoling is simply equated with "coercion," it is fully consistent with this Court's focus on "police overreaching, not on 'free choice.'" *Colorado v. Connelly*, 479 U.S. 157, 170 (1986).

Similarly, although the Fifth Circuit requires a showing of "coercive police conduct," it has simultaneously affirmed that any evidence of trickery or cajolery will suffice. *Hopkins v. Cockrell*, 325 F.3d 579, 584 (5th Cir. 2003), quoting *Miranda*, 384 U.S. at 476.[7]

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7. The Seventh Circuit stands in a curious position. Directly contrary to *Miranda*'s dictate that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege," the Seventh Circuit has oft repeated that "the law permits the police to pressure and cajole, conceal material facts, and actively mislead." *United States v. Rutledge*, 900 F.2d 1127, 1131 (7th Cir. 1990). It has done so, however, only in the context of challenges to the voluntariness of a defendant's entire statement and not in assessing the validity of a *Miranda* waiver. *E.g.*, *Rutledge*, 900 F.2d at 1131; *United States v. Kotny*, 238 F.3d 815, 817 (7th Cir. 2001); *Hadley v. Williams*, 368 F.3d 747, 749 (7th Cir. 2004).

One may question whether the Seventh Circuit's decisions are a relic of a by-gone era when it was assumed that innocent people would never confess to a crime they did not commit. That assumption has been up-ended by advances in DNA profiling, which has led to the realization that false confessions (defined as cases in which indisputably innocent individuals confessed to crimes they did not commit) occur in approximately 25% of homicide cases. Samuel Gross, et al., EXONERATION IN THE UNITED STATES, 1989–2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS, 40, 58-60, available at *http://www.law.umich.edu/special/exoneration/Documents/-exonerations_us_1989_2012_full_report.pdf*.

As the Seventh Circuit's endorsement of cajoling has never been applied to *Miranda* waivers, it cannot be viewed as providing guidance on the interpretation of the language in *Miranda* it explicitly contradicts. More likely, however, it simply reflects the more expansive activities officers have

Indeed, even California recognizes that a waiver that "results from a clever softening-up of a defendant . . . must be deemed to be involuntary." *People v. Honeycutt*, 20 Cal.3d 150, 160, 570 P.2d 1050, 1055, 141 Cal.Rptr. 698, 703 (1977).

The California Court of Appeal here did not cite or discuss *Honeycutt* nor attempt to rationalize Det. Porter's actual "softening-up" of Lopez. Although it quoted the words spoken during the interaction in a factual background section, the state court made no attempt to come to grips with Det. Porter's soft encouragement to waive. Its analysis did not acknowledge *any* of the facts and simply, and erroneously, claimed Det. Porter did "nothing more" than clarify Lopez's desires while ignoring all the encouragement he gave Lopez to eventually waive his rights.

No reasonable jurist would doubt that Det. Porter transgressed *Miranda*'s commands and engaged in forbidden casual persuasion, taking a clear and biased position on the desirability of waiver. This flows not only from a simple appreciation of what "cajoling" means, but also the *Miranda* Court's cautionary advice that "The requirement of warnings and waiver of rights is . . . fundamental with respect to the Fifth Amendment privilege and

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been allowed to engage in *after* they have elicited a valid waiver. *E.g. Aleman v. Village of Hanover Park*, 662 F.3d 897, 906 (7th Cir. 2011).

not simply a preliminary ritual to existing methods of interrogation." *Miranda*, 384 U.S. at 476.

III. Lopez's Case Is an Ideal Vehicle for Correcting and Confirming the Lower Courts' Clear Error of Law

The detectives' actions fell squarely within the concept of cajoling that *Miranda* expressed concern about without engaging in what is typically considered coercion. There is no question of physical abuse or discomfort. Nor did the detective need to engage in extended interrogation in order to persuade Lopez to see it his way. While Det. Porter's post-warning advice was misleading and incomplete, it was a product of the dangers arising from a non-lawyer attempting to offer off-the-cuff legal advice rather than a deliberate campaign of outright deception. He simply read the *Miranda* warnings and then, when Lopez balked at waiving, provided him reasons why he should agree to speak with the detectives.

In re-affirming the constitutional nature of *Miranda*, this Court also explained why the "coerciveness" test is ill-suited to the question of *Miranda* waivers. "Prior to *Miranda,* [this Court] evaluated the admissibility of a suspect's confession under a voluntariness test." *Dickerson v. United States*, 530 U.S. 428, 432-33 (2000). This Court has "never abandoned this due process jurisprudence, and thus continue[s] to exclude confessions that were

obtained involuntarily." *Dickerson*, 530 U.S. at 434.

Although concerned that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements," *Dickerson*, 530 U.S. at 435, Chief Justice Rehnquist explained that *Miranda* eschewed exclusive reliance on the ethereal voluntariness inquiry and additionally "laid down 'concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Dickerson*, 530 U.S. at 435, quoting *Miranda*, 384 U.S. at 442. While a suspect's statements may be constitutionally inadmissible if they are involuntary when considering the "totality of the circumstances," *Miranda* recognized that "reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt." *Dickerson*, 530 U.S. at 442, citing *Miranda*, 384 U.S. at 457.

The state court's aberrational decision here to require a showing of "coercion" in addition to "cajoling" or one-sided persuasion, would effectively reinstate the predecessor voluntariness test that *Miranda* found ineffective in regulating police practices in the first place. Mark Berger, *Compromise and Continuity: Miranda Waivers, Confession Admissibility, and the Retention of*

Interrogation Protections, 49 U PITT. L. REV. 1007, 1053 (1988).[8]

Second, the admission of the statements Porter elicited had a "substantial and injurious effect or influence in determining the jury's verdict." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

Without Lopez's statements, the prosecution's evidence that Lopez fired the gun was weak, bordering on speculative. No one saw Lopez with a weapon or heard him talk about getting a weapon before the shooting. Only Campbell was seen or heard handling shotguns and talking about her affinity with firearms. Campbell, not Lopez was making statements about potentially dangerous events that might happen. R.T. 115, 119-20.

The shooting took place in Dawna King's presence. She saw Lopez minutes before the shooting; he did not have a shotgun with him. By the time of the shooting, King said Lopez was gone. The only person King saw or

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8. The *Miranda* Court clearly did not intend to replace the voluntariness test under the fourteenth amendment with the compulsion standard of the fifth amendment, without any substantive change in the analysis. This would only have made voluntariness and compulsion the flip sides of the same coin. Voluntary confessions would be those obtained without compulsion, while compelled statements would be considered involuntary.

Instead, *Miranda* rejected this rather meaningless exchange of constitutional language in favor of a substantive reworking of admissibility criteria . . . Under *Miranda*, waivers must be voluntary, intelligent and knowing, not just obtained in an atmosphere free of compulsion.

Berger, *Compromise and Continuity*, 49 U PITT. L. REV. at 1053.

heard was Campbell.

The only evidence tending to directly implicate Lopez was the deputy on the scene whose purported identification was implausible and inconsistent. The deputy acknowledged not seeing the firing of the first or third shots.[9] He admitted being unaware that any gunshots were being fired until the second shot. Although claiming to be able to identify Lopez from seeing him in the muzzle flash, the deputy simultaneously admitted that he did not even realize shots were being fired until his patrol car was hit from the second shot. He had no idea where the shots came from, "No. I just heard it." R.T. 153-56, 189. Moreover, he also acknowledged that, the moment he realized there was gunfire, when the passenger side door and window were struck, he instinctually turned his head *away* from the gunfire and "quickly accelerated out of the area." R.T. 125-26, 128, 154-56, 189, 193.

The deputy's admission that he hadn't known of the second shot until his car was hit (and didn't see the first or third shots fired) would have caused reasonable jurors to doubt the reliability of the deputy's claim to have seen Lopez illuminated by any of the muzzle flashes. Lopez's statement to Det. Porter filled that gap and could not help but have influenced defense counsel's decision not to question whether the gun was fired by Lopez.

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9. The number and sequence of the shots was determined by the width of the pellet spray. R.T. 274.

The uncounseled statements also impacted on the degree of guilt. Instead of charging Lopez with brandishing a firearm or assault, the prosecution leveraged Lopez's statements to secure a conviction for the attempted murder of a police officer carrying a mandatory life sentence. Even with Lopez's statement, the prosecution's proof that Lopez realized he was firing at an officer was thin. Everyone affirmed the blackness of the night and the lack of a moon or artificial light. R.T. 110, 116, 139, 147, 174, 280-81. The deputy admitted that, as he was looking for people and places, he saw only silhouettes and shadows. R.T. 154, 177, 183. He admittedly didn't see Dawna King's truck even though he whizzed right past it. R.T. 192, 194-95. He didn't see another man who had been trying to flag him down. R.T. 83, 150. King noticed Lopez only when he was immediately upon her truck and neither recognized the other until they spoke. R.T. 125-26. It was so dark out, Lopez simply appeared and disappeared into the blackness. R.T. 125.

In a trial without the uncounseled statement, evidence of Lopez's near blindness would not only have been unrebutted but also unrebuttable. Indeed, evidence that Campbell was heard suddenly exclaiming "Fuck! Fuck!" right after the shots were fired would most likely be understood as conveying that she, who did not have Lopez's visual impairments, was expressing shock at discovering the vehicle being shot at was not the target she'd expected. Reasonable jurors would likely have questioned whether the

person shooting in the darkness would have realized the car in the area was a patrol vehicle.

The prosecution, however, leveraged the fact that the third shot hit the rear of the patrol car as suggesting Lopez could have realized he was shooting at police before firing the third shot. R.T. 431, 433. Moreover, aided by Lopez's uncounseled statement, the prosecution was also able to argue (notwithstanding Lopez's contrary assertion) that he may have had an even better view of the patrol vehicle. Although a criminalist opined that the pellet spread meant Lopez fired from at least 45 feet away, and possibly 60 feet, R.T. 274, 429, in his uncounseled statement, Lopez guessed there was only a quarter of that distance between them, C.T. 508, making it all the more likely Lopez might have recognized the vehicle as a police car, as the prosecutor forcefully argued. R.T. 429.

While prejudice is bolstered by the prosecutor's extensive references to Lopez's statement in closing, R.T. 427, 429-31, and concession that the defense had presented "a wonderful argument, but for the fact the defendant told us [what] he saw," R.T. 473, ultimately, the circuit did not address prejudice, enabling this Court to either decide the prejudice issue afresh or vacate the decision and remand to the Ninth Circuit for a ruling on the prejudicial effect of the constitutional violation.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully Submitted,

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/s/

JANUARY 9, 2019.

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