In the Supreme Court of the United States

PAUL POUPART, PETITIONER

v.

TIMOTHY HOOPER, WARDEN, ELYAN HUNT CORRECTIONAL CENTER, RESPONDENT

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

An application for a writ of habeas corpus should be granted with respect to any claim that was adjudicated on the merits in State court proceedings that "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." *Cullen v. Pinholster*, 131 S.Ct. 1388, 179 L. Ed. 2d 557, 563 U. S. 170 (2011); *citing* 28 U.S.C. § 2254(d)

Petitioner presents the following argument before this honorable Court:

1. The U.S. Fifth Circuit departed from the accepted and usual course of judicial proceedings and sanctioned the departure by the U.S. District Court in finding that:

    A. The decisions of the state courts were not unreasonable under the Antiterrorism and Effective Death Penalty Act of 1996 even though Petitioner's custodial interrogation persisted after Petitioner unequivocally invoked his right to counsel and declined to answer questions in violation of his rights secured under the Fifth Amendment of the U.S. Constitution as described in *Miranda v. Arizona*, 384 U.S. 436 (1966).

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PETITION FOR WRIT OF CERTIORARI

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The U.S. Fifth Circuit granted Petitioner's Application for a Certificate of Appealability on February 21, 2018 in case no. 17-30411. The U.S. District Court's order denying Petitioner's Petition for Habeas Corpus was affirmed by the Fifth Circuit on October 15, 2018. The Fifth Circuit's judgment is reported at No. 15-cv-01340 (E.D. La. Nov. 7, 2018) at Doc No. 39-1. The Louisiana Fifth Circuit's Opinion affirming Petitioner's conviction and sentence is reported at *State v. Poupart*, 88 So. 3d 1132 (La. App. 5 Cir. 2012), *writ denied* 98 So. 3d 867 (La. 2012).

STATEMENT OF JURISDICTION

The Court has jurisdiction under 28 U.S.C. § 1254. The decision under review from the United States Court of Appeals for the Fifth Circuit is an Order rendered on October 15, 2018 affirming the U.S. District Court's denial of Petitioner's Petition for Habeas Relief. The instant Petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> * * * *

The Fifth Amendment to the Constitution of the United States provides:

> 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 offence 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 Constitution of the United States provides, in pertinent part:

> 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

Petitioner is presently serving a 25-year sentence for his January 12, 2011 conviction of one

(1) count Public Intimidation[1]. Petitioner's conviction was upheld by the Louisiana Fifth Circuit Court of Appeal on February 28, 2012. The Louisiana Supreme Court denied writs on October 8, 2012. Petitioner filed a state Application for Post-Conviction Relief on or about August 30, 2013. Petitioner's Application described, among other violations, the denial of his Fifth Amendment rights as secured under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Petitioner alleged that statements given to Jefferson Parish authorities—which were used at Petitioner's trial—were elicited without regard to Petitioner's clear and unequivocal invocation of his right to remain silent and have his attorney present; without waiting a significant period time before questioning resumed; and without a fresh set of *Miranda* warnings as required by this Court's jurisprudence.

Petitioner's Application was exhausted by the Louisiana Supreme Court on March 27, 2015. *See State ex rel. Poupart v. State*, 162 So. 3d 383 (La. 2015).

On April 24, 2015, Petitioner sought Habeas relief. In recommending denial of Petitioner's Fifth Amendment claim, the Magistrate stated as follows:

> The undisputed facts of the instant case give the Court pause. After Petitioner expressly told Harrison that he wished to remain silent, Harrison nevertheless failed to drop

[1] Louisiana's Public Intimidation Law, found at La. R.S. 14:122, was held "unconstitutionally overbroad" by the U.S. Fifth Circuit on August 3, 2018 in *Seals v. McBee*, 898 F.3d 587 (5th Cir., 2018).

> the matter for any period of time, much less a "significant period of time." Although Harrison may not have further questioned Petitioner, he arguably "persist[ed] in repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 105-06. Specifically, without any break whatsoever, Harrison continued speaking to Petitioner about the same crime, admittedly in the hope that it would encourage Petitioner to change his mind and make a statement despite his prior express invocation of his right to remain silent regarding that crime. When Petitioner did in fact relent and decide to give a statement, there is no indication that a "fresh set of warnings" was provided.

While concluding that rational jurists could "reasonably question whether Petitioner's 'right to cut off questioning' was 'scrupulously honored,'" the Magistrate could not declare the state court's rulings were unreasonable as required by the "highly deferential" standard on Habeas review. The District Court adopted the Magistrate's reasoning without additional explication.

The U.S. Fifth Circuit concluded that the state courts "failed to apply the relevant factors used to determine the admissibility of a defendant's statements to law enforcement made after he has invoked his right to counsel and to remain silent," and granted Petitioner a Certificate of Appealability (COA). The Fifth Circuit further noted that "law enforcement failed to 'scrupulously honor'" Petitioner's "unequivocal invocation of his right to counsel at interrogation."

Petitioner's case proceeded to oral argument on October 2, 2018. On October 15, 2018, the Fifth Circuit affirmed the District Court's denial of Habeas relief without further explication.

SUMMARY OF THE ARGUMENT

When brought in for questioning, Petitioner demurred. He refused to sign the Rights of Arrestee form that was presented to him by JPSO Lieutenant Bruce Harrison. He was represented by counsel; he would wait to speak with his attorney; he would not sign. But Harrison persisted. Instead of "scrupulously honoring" Petitioner's clear assertion of his right to silence and right to counsel, Harrison asked if Petitioner elected to continue speaking with Petitioner to persuade him to answer the lieutenant's questions. Instead of providing Petitioner with a "significant period of time" before renewing his interrogation, Harrison immediately "explain[ed] to [Petitioner] that [he] wanted to discuss the case with him, [he] wanted to lay out what [he] thought was the simplicity of the case to him." No fresh set of *Miranda* warnings were issued.

A suspect must be apprised of his rights against compulsory self-incrimination and his right to consult with an attorney before authorities may conduct custodial interrogation. *See Miranda v. Arizona*, *supra*; *Dickerson v. United States*, 530 U.S. 428, 435; 120 S. Ct. 2326; 147 L. Ed. 2d 405 (2000). When an accused has invoked his right to counsel during custodial interrogation, he 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 v. Arizona*, 451 U.S. 477, 484; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981). Where the suspect chooses to cut off questioning until counsel can be obtained, his choice must be "scrupulously honored" by the police. *Rhode Island v. Innis*, 446 U.S. 291, 310; 100 S. Ct. 1682 (1980); *citing Michigan v. Mosley*, 423 U.S. 96, 104; 96 S. Ct. 321; 46 L. Ed. 2d 313 (1975). This includes "immediately ceas[ing] the interrogation, resum[ing] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[ing] the second interrogation to a crime that had not been a subject of the earlier interrogation." *Mosley*, 423 U.S. at 103.

In the instant case, the state court failed to apply the relevant factors used to determine the admissibility of his statements to law enforcement made after he clearly invoked his right to counsel and to remain silent. *Mosley*, 423 U.S. at 105–06. Moreover, given the scant evidence against Petitioner, his admissions, entered into evidence at trial, were essential to the State's case and not harmless.

Petitioner presents the following argument before this honorable Court:

1. The U.S. Fifth Circuit departed from the accepted and usual course of judicial proceedings and sanctioned the departure by the U.S. District Court in finding that:

    A. Petitioner's custodial interrogation, which persisted after Petitioner unequivocally invoked his right to

counsel and declined to answer questions, did not result in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by this Court; and that

B. The violation of Petitioner's rights secured under the Fifth Amendment of the U.S. Constitution as described in *Miranda v. Arizona*, 384 U.S. 436 (1966) was harmless.

REASONS FOR OVERRULING AND VACATING THE DECISION OF THE U.S. FIFTH CIRCUIT

A COA was issued upon Petitioner's substantial showing that reasonable jurists could debate whether the U.S. District Court erred in finding that Petitioner's Fifth Amendment Right to Counsel and Right to Remain Silent were not violated by repeated, insistent, and unrelenting interrogation immediately following Petitioner's clear and unequivocal invocation of his right to silence and his right to counsel.

State courts are presumptively competent to adjudicate claims arising under the laws of the United States. *Burt v. Titlow*, 134 S. Ct. 10, 82 U.S. 4007, 187 L. Ed. 2d 348 (2013). "Recognizing the duty and ability of our state-court colleagues to adjudicate claims of constitutional wrong, AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Ibid.* 134 S.Ct. at 19. "A state court's determination that a claim lacks merit

precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v. Richter*, 131 S.Ct. 770, 562 U.S. 86,178 L. Ed. 2d 624 (2011).

Habeas relief is appropriate where, as here, 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." 28 U.S.C. § 2254(d)(1); *Knowles v. Mirzayance*, 129 S. Ct. 1411, 173 L. Ed. 2d. 251, 556 U.S. 111 (2009). A decision is contrary to clearly established law if the state court "applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398, 566 U.S. 156 (2012); *Williams v. Taylor*, 529 U.S. 362, 405; 120 S.Ct. 1495; 146 L.Ed.2d 389 (2000). Certiorari is appropriate when "a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a); *see also Kalamazoo Cnty. Rd. Comm'n v. Deleon*, 135 S. Ct. 783, 190 L.Ed.2d 887 (2015) (J. Alito dissenting).

In the instant case, the U.S. Court of Appeals for the Fifth Circuit concluded that Petitioner made a substantial showing of a violation of a constitutional right and granted review. However, the Court sanctioned the state court's error, finding that the continued questioning of Petitioner after he invoked both his Right to Remain Silent and his Right to Counsel, did not violate clearly established federal law as determined by this Court's jurisprudence. In

affirming the District Court's ruling, the U.S. Fifth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

I. The U.S. Fifth Circuit departed from the accepted and usual course of judicial proceedings by failing to find that the state court rulings resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law

On September 8, 2009, Petitioner gave a statement to Jefferson Parish authorities, which was subsequently used at Appellant's trial. The contents of that statement and the context of its delivery were described by Lieutenant Harrison at trial as follows:

> **Q**. And explain to me what happened in this case.
>
> **A**. Once I was notified that he was in custody, in preparation of doing an interview I took out one of these [advisement of rights] forms, filled it out. When he arrived, I went into the interrogation room, and I read the rights and asked if he understood and he said yes. I explained I would like him to acknowledge his understanding by initialing and signing. He said he would rather not sign. He said he had representation, he had an attorney, and he would prefer not to sign anything.

Q. So did you question him at that point?

A. He said he didn't want to answer any questions.

Q. So did you ask him any questions?

A. No, what I did was just explain to him that I wanted to discuss the case with him, I wanted to lay out what I thought was the simplicity of the case to him, and then ask him again if he wanted me to ask any questions.

Q. At that point did you ask him any questions?

A. No. No, he said that would be fine. I could tell him whatever I wanted.

….

Q. … After you told him how you perceived the case the case, did he make any statements?

A. Yes.

Q. What did he say?

A. He admitted having taken the pictures but denied having posted them on the website. It was at that point that I again reiterated that I didn't think that was part of the crime, that the crime had been committed prior to that, and at that point he

> again denied posting the pictures but admitted that he had been at Mike's Bar the week that he was tried for second degree battery.

On direct appeal, the Louisiana Fifth Circuit Court of Appeal concluded:

> The record in this case shows that defendant initially indicated that he did not want to waive his rights and make a statement. Lieutenant Harrison then told defendant that he wanted to explain the case to him and defendant agreed to listen. Defendant then changed his mind and made a voluntary statement. Accordingly, we find that defendant's statement was not made in violation of Miranda, and thus, the trial court did not err in denying defendant's motion to suppress.

Poupart, 88 So. 3d at 1142. The Fifth Circuit's ruling was the last reasoned state court opinion on the issue and represents a clear departure from well-recognized and well-settled federal constitutional law.

A suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. *Miranda v. Arizona*, *supra*; *Dickerson v. United States*, *supra*. When an accused has invoked his right to counsel during custodial interrogation, he 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 v. Arizona*, *supra*. Where the suspect-defendant chooses to cut off questioning until counsel can be obtained, his choice must be "scrupulously honored" by the police. *Rhode Island v. Innis*, 446 U.S. at 310. This includes "not only…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" *Ibid*. 446 U.S. at 301.

Where the voluntariness of a confession admitted at trial and in compliance with *Miranda* is raised in Habeas proceedings, Habeas courts are charged with an "independent federal determination of the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985). Here, the Fifth Circuit departed from the accepted and usual course of judicial proceedings and sanctioned the departure by the U.S. District Court.

After Petitioner expressly and unequivocally invoked his right to remain silent, Lieutenant Harrison failed to drop the matter. He persisted "in repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 105-06. Harrison asked if he could continue speaking with Petitioner about the crime in the hope that it would encourage Petitioner to relent. When Lieutenant Harrison's stratagem prevailed, Harrison failed to provide Petitioner with the "fresh set of warnings" as required under the Fifth Amendment. *See Arizona*

v. Roberson, 486 U.S. 675, 108 S. Ct. 2093, 100 L.Ed.2d 704 (1988).

The state courts' rulings represent a clear departure from well-recognized and well-settled federal constitutional law. While Petitioner was initially *Mirandized* he refused to acknowledge or waive his rights and, on the contrary, invoked his right to silence and to counsel. There was no significant break in the questioning. Rather, Lieutenant Harrison continued to question and speak with Petitioner in what can only be described as single, unbroken harangue. Lieutenant Harrison continued to speak, setting forth the State's view of the evidence against Petitioner until Petitioner was browbeat into believing that State's case was ironclad, and cooperation was the only means he had of lessening his guilt.

Although the Magistrate noted that Appellant did not object to hearing what Harrison had to say about the matter, this is a distinction without a difference. This Court has clearly held that not only custodial questioning but "any words or actions on the part of the police…that the police should know are reasonably likely to elicit an incriminating response" must cease. *Rhode Island v. Innis*, 446 U.S. at 301.

There are few precepts in modern American constitutional law more clearly established than the right of a citizen to call to a stop a custodial interrogation. Custodial environments are inherently coercive, and the vast power of the State must be counterbalanced by the citizen's absolute right to refuse further questioning. Once clearly invoked, no questioning or conduct reasonably likely to elicit a response is permitted. Lieutenant

Harrison's continued questioning violated Petitioner's clear demand for silence and counsel. And the Fifth Circuit erred in permitting so unjust a state court ruling to remain intact.

II. The U.S. Fifth Circuit departed from the accepted and usual course of judicial proceedings by failing to find that the Violation of Appellant's Fifth Amendment Rights Was Not Harmless

Fifth Amendment violations arising from custodial interrogation are subject to harmless error analysis. *Brecht v. Abrahamson*, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993). There can be no dispute that an error occurred in the instant case. The question before this Court is whether the state courts and the U.S. District Court erred in concluding that the error was harmless. The test for harmless error is whether the error had "substantial and injurious effect or influence in determining the jury verdict." *Ibid.*

In the instant case, Petitioner's statement to Lieutenant Harrison included two (2) salient details that were otherwise uncorroborated: that Petitioner took the ribald photos that would later make their appearance online at *The Dirty.com* and that Petitioner was at the Mike's Place at a time coinciding with the State witnesses' testimony alleging that Petitioner made threatening remarks regarding Detective Higgerson. Without the admission of Petitioner's extrajudicial statements these facts remained disputed at trial. By introducing evidence tending to corroborate that Petitioner was responsible for the photographs and was at the bar at the time the

alleged threats were made, the jury was given the opportunity to make the natural logical inference that Petitioner was likewise responsible for the uploading of the pictures online in an attempt to make good on his alleged threats.

"[A] voluntary confession the most damaging form of evidence." *Bruton v. United States*, 391 U.S. 123, 140, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). It "is not like other evidence" and has been called "the most probative and damaging evidence that can be admitted against a defendant." *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). When a confession is deemed to be voluntary and untainted by coercive police procedures, it is doubly probative as "it is presumed to flow from the strongest sense of guilt." *Hopt v. Utah*, 110 U.S. 574, 584-85; 28 L. Ed. 262; 4 S. Ct. 202 (1884). "[T]he risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." *Fulminante*, 499 U.S. at 296.

Petitioner's purported confession established Petitioner as the photographer of the images which appeared on *The Dirty.com*. While the photographs themselves were not elements of Petitioner's alleged offense, they form the lynchpin of the State's narrative arc at trial in much the same way the actual smoking gun may not be necessary for a murder conviction but can be a crucial piece of evidence crystallizing the jurors' perception of the facts alleged at trial. Moreover, Petitioner places himself at the Fat City bar at the date and time where the alleged intimidation

supposedly occurred. Consequently, the admission of Petitioner's statements to Lieutenant Harrison was not harmless.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 17-30411

PAUL POUPART,

Petitioner - Appellant

v.

HOWARD PRINCE, WARDEN, ELAYN HUNT CORRECTIONAL CENTER,

Respondent - Appellee

Appeal from the United States District Court for the Eastern District of Louisiana New Orleans, Louisiana (U.S.D.C. No. 2:15-cv-01340-SM)

APPELLANT'S BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

APPELLANT/APPELLANT:
Mr. Paul M. Poupart, DOC 357073
Elyan Hunt Correctional Center St. Gabriel, Louisiana 70776

RESPONDENT/APPELLEE:
Warden Elyan Hunt Correctional Center St. Gabriel, Louisiana 70776

/s/ Justin Caine Harrell
JUSTIN CAINE HARRELL, ESQ.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant requests oral argument, believing that oral argument would be useful to the Court in resolving the issues raised in this appeal. Appellant's arguments involve application of well-settled precedent to unique factual circumstances, and some explication through oral argument would undoubtedly aid this Court in its resolution of the issues.

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STATEMENTS OF JURISDICTION AND STANDARD OF REVIEW

This court has jurisdiction over this appeal pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c). This is an appeal of the District Court's April 27, 2017, Order and Reasons denying Appellant, Paul Poupart's (hereinafter "Appellant"), Habeas petition brought pursuant to 28 U.S.C. § 2254. ROA.564.

February 21, 2018, this honorable Court granted Appellant a Certificate of Appealability, finding that the state court failed to apply the relevant factors used to determine the admissibility of a defendant's statements to law enforcement made after he has invoked his right to counsel and to remain silent.". Accordingly, this Court concluded that reasonable jurists could debate whether the district court correctly determined that the state court's dismissal of this claim was not unreasonable."

"In an appeal of the district court's denial of habeas relief, 'this court reviews the district court's findings of fact for clear error and its conclusions of law de novo, applying the same standard of review that the district court applied to the state court decision.'" *Austin v. Cain*, 660 F.3d 880, 884 (5th Cir. 2011); *citing Jones v. Cain*, 600 F.3d 527, 535 (5th Cir. 2010).

STATEMENT OF RELATED CASES

Appellant is aware of no further cases, in state or federal court, that are in any way related to or touching upon the present appeal.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the U.S. District Court of the Eastern District of Louisiana, Hon. Judge Susie Morgan, presiding, erred in adopting the Report and Recommendations of Hon. Magistrate Judge Sally Shushan, dated April 25, 2016, finding that Appellant's Fifth Amendment Right to Counsel and Right to Remain Silent were not violated by repeated, insistent, and unrelenting interrogation immediately following Appellant's clear and unequivocal invocation of his right to silence and his right to counsel.

STATEMENT OF THE CASE

Appellant is presently serving a 25-year sentence for his January 12, 2011 conviction of one (1) count Public Intimidation. Appellant's conviction was upheld by the Louisiana Fifth Circuit Court of Appeal on February 28, 2012. *State v. Poupart*, 88 So. 3d 1132 (La. App. 5 Cir. 2012). The Louisiana Supreme Court denied writs on October 8, 2012. *State v. Poupart*, 98 So. 3d 867 (La. 2012).

Appellant filed a state Application for Post-Conviction Relief on or about August 30, 2013. Appellant's Application described, among other violations, the denial of his Fifth Amendment rights as secured under *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Appellant alleged that statements given to Jefferson Parish authorities—which were used at Appellant's trial—were elicited without regard to Appellant's clear and unequivocal invocation of his right to remain silent and have his attorney present; without waiting a significant period time before questioning resumed; and without a fresh set of *Miranda* warnings as required by U.S. Supreme Court jurisprudence.

Appellant's Application was exhausted by the Louisiana Supreme Court on March 27, 2015. *See State ex rel. Poupart v. State*, 162 So. 3d 383 (La. 2015).

On April 24, 2015, Appellant sought Habeas relief. In recommending denial of Appellant's Fifth Amendment claim, the Magistrate stated as follows:

> The undisputed facts of the instant case give the Court pause. After Appellant expressly told Harrison that he wished to remain silent, Harrison nevertheless failed to drop the matter for any period of time, much less a "significant period of time." Although Harrison may not have further questioned Appellant, he arguably "persist[ed] in repeated efforts to wear down his resistance and make him change his mind." Mosley, 423 U.S. at 105-06. Specifically, without any break whatsoever, Harrison continued speaking to Appellant about the same crime, admittedly in the hope that it would encourage Appellant to change his mind and make a statement despite his prior express invocation of his right to remain silent regarding that crime. When Appellant did in fact relent and decide to give a statement, there is no indication that a "fresh set of warnings" was provided.

ROA.291-328. While concluding that rational jurists could "reasonably question whether Appellant's 'right to cut off questioning' was 'scrupulously honored,' the Magistrate could not declare the state court's rulings were unreasonable as required by the "highly deferential" standard on Habeas review. *Ibid*.

The District Court adopted the Magistrate's reasoning without additional explication. ROA.564-565. This Court, however, concluded that Appellant made a substantial showing that his statements were inadmissible because law

enforcement failed to "scrupulously honor" his unequivocal invocation of his right to counsel at interrogation.

SUMMARY OF ARGUMENT

When brought in for questioning, Appellant demurred. He refused to sign the Rights of Arrestee form that was presented to him by JPSO Lieutenant Bruce Harrison. He was represented by counsel; he would wait to speak with his attorney; he would not sign. But Harrison persisted. Instead of "scrupulously honoring" Appellant's clear assertion of his right to silence and right to counsel, Harrison elected to continue speaking with Appellant to persuade him to answer the lieutenant's questions. Instead of providing Appellant with a "significant period of time" before renewing his interrogation, Harrison immediately "explain[ed] to [Appellant] that [he] wanted to discuss the case with him, [he] wanted to lay out what [he] thought was the simplicity of the case to him." ROA.291-328. No fresh set of *Miranda* warnings were issued.

A suspect must be apprised of his rights against compulsory self-incrimination and his right to consult with an attorney before authorities may conduct custodial interrogation. *See Miranda v. Arizona, supra*; *Dickerson v. United States*, 530 U.S. 428, 435; 120 S. Ct. 2326; 147 L. Ed. 2d 405 (2000). When an accused has invoked his right to counsel during custodial interrogation, he 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 v. Arizona*, 451 U.S. 477, 484; 101 S.Ct. 1880; 68 L.Ed.2d 378 (1981). Where the suspect chooses to cut off questioning until counsel

can be obtained, his choice must be "scrupulously honored" by the police. *Rhode Island v. Innis*, 446 U.S. 291, 310; 100 S. Ct. 1682 (1980); *citing Michigan v. Mosley*, 423 U.S. 96, 104; 96 S. Ct. 321; 46 L. Ed. 2d 313 (1975). This includes "immediately ceas[ing] the interrogation, resum[ing] questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restrict[ing] the second interrogation to a crime that had not been a subject of the earlier interrogation." *Mosley*, 423 U.S. at 103.

In the instant case, Appellant is entitled to issuance of the Writ of Habeas Corpus as the state court failed to apply the relevant factors used to determine the admissibility of his statements to law enforcement made after he clearly invoked his right to counsel and to remain silent. *See United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir. 1995); *citing Mosley*, 423 U.S. at 105–06. Moreover, given the scant evidence against Appellant, his admissions, entered into evidence at trial, were essential to the State's case and not harmless.

ARGUMENT

1. Appellant was Denied the Fifth Amendment Protections Described in *Miranda v. Arizona*

On September 8, 2009, Appellant gave a statement to Jefferson Parish authorities, which was subsequently used at Appellant's trial. The contents of that statement and the context of its delivery were described by Lieutenant Harrison at trial as follows:

> **Q.** And explain to me what happened in this case.
> **A.** Once I was notified that he was in custody, in preparation of doing an interview I took out one of these [advisement of rights] forms, filled it out. When he arrived I went into the interrogation room, and I read the rights and asked if he understood and he said yes. I explained I would like him to acknowledge his understanding by initialing and signing. He said he would rather not sign. He said he had representation, he had an attorney, and he would prefer not to sign anything.
> **Q.** So did you question him at that point?
> **A.** He said he didn't want to answer any questions.
> **Q.** So did you ask him any questions?
> **A.** No, what I did was just explain to him that I wanted to discuss the case with him, I wanted to lay out what I thought was the simplicity of the case to him, and then ask him again if he wanted me to ask any questions.

> **Q.** At that point did you ask him any questions?
> **A.** No. No, he said that would be fine. I could tell him whatever I wanted. ….
> **Q.** … After you told him how you perceived the case the case, did he make any statements?
> **A.** Yes.
> **Q.** What did he say?
> **A.** He admitted having taken the pictures, but denied having posted them on the website. It was at that point that I again reiterated that I didn't think that was part of the crime, that the crime had been committed prior to that, and at that point he again denied posting the pictures, but admitted that he had been at Mike's Bar the week that he was tried for second degree battery.

ROA.291-328.

Citing a non-precedential Louisiana Fourth Circuit case and a distinguishable Louisiana Supreme Court case—wherein the defendant gave only an "indecisive negative response" to the officer's questioning—the Fifth Circuit concluded thusly, on direct appeal:

> The record in this case shows that defendant initially indicated that he did not want to waive his rights and make a statement. Lieutenant Harrison then told defendant that he wanted to explain the case to him and defendant agreed to listen. Defendant then changed his mind and made a voluntary statement.

> Accordingly, we find that defendant's statement was not made in violation of Miranda, and thus, the trial court did not err in denying defendant's motion to suppress.

Poupart, 88 So. 3d at 1142. The Fifth Circuit's ruling was the last reasoned state court opinion on the issue and represents a clear departure from well-recognized and well-settled federal constitutional law.

A suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. *See Miranda v. Arizona, supra*; *Dickerson v. United States, supra*. When an accused has invoked his right to counsel during custodial interrogation, he 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 v. Arizona, supra*. Where the suspect-defendant chooses to cut off questioning until counsel can be obtained, his choice must be "scrupulously honored" by the police. *Rhode Island v. Innis*, 446 U.S. at 310. In determining whether a suspect-defendant's decision to remain silent was "scrupulously honored" courts must consider:

> (1) whether the suspect was advised prior to initial interrogation that he was under no obligation to answer question [sic]; (2) whether the suspect was advised of his right to remain silent prior to the reinterrogation; (3) the length of time

> between the two interrogations; (4) whether the second interrogation was restricted to a crime that had not been the subject of earlier interrogation; and (5) whether the suspect's first invocation of rights was honored.

United States v. Alvarado-Saldivar, 62 F.3d at 699.

Where the voluntariness of a confession admitted at trial and in compliance with Miranda is raised in Habeas proceedings the "issues of underlying or historic facts [and] the state court findings, if fairly supported in the record, are conclusive." *Gutierrez v. Stephens*, 590 F. App'x 371, 375 (5th Cir. 2014); *citing West v. Johnson*, 92 F.3d 1385, 1402 (5th Cir. 1996). However, Habeas courts are charged with an "independent federal determination of the ultimate question whether, under the totality of the circumstances, the challenged confession was obtained in a manner compatible with the requirements of the Constitution." *Ibid*.

Here, the Magistrate registered strong dismay with the state courts' rulings on this issue. The Magistrate Court noted that after Appellant expressly and unequivocally invoked his right to remain silent, Lieutenant Harrison failed to drop the matter. He persisted "in repeated efforts to wear down his resistance and make him change his mind." *Mosley*, 423 U.S. at 105-06. Harrison continued speaking with Appellant about the same crime in the hope that it would encourage Appellant relent. Moreover, when Lieutenant Harrison's stratagem prevailed, Harrison failed to provide Appellant with the "fresh set of warnings"

as required under the Fifth Amendment. *See Arizona v. Roberson*, 486 U.S. 675, 108 S. Ct. 2093, 100 L.Ed.2d 704 (1988). Although the Magistrate concluded that "reasonable jurists could perhaps disagree on the correctness of the state court's conclusion," the Court nevertheless upheld the state courts' flagrant disregard for federal authority, finding peculiarly that the state courts' conclusions were "not objectively unreasonable." ROA.291-328.

The Magistrates Report and the District Court's judgment based thereupon are in error.

The state courts' rulings represent a clear departure from well-recognized and well-settled federal constitutional law. Practically none of the *Alvarado-Saldivar* factors justify the use of Appellant's statements at trial. While Appellant was initially Mirandized he refused to acknowledge or waive his rights and, on the contrary, invoked his right to silence and to counsel. There was no significant break in the questioning. Rather, Lieutenant Harrison continued to speak with Appellant in what can only be described as single, unbroken harangue. The second interrogation—if it can even properly be called "second"—did not involve a different offense. Quite the reverse, after Appellate made a clear invocation of his right to silence, Lieutenant Harrison continued to speak, setting forth the State's view of the evidence against Appellant. The import of this strategy is evident: Appellant was browbeat into believing that State's case was ironclad, and cooperation was the only means he had of lessening his guilt. Lastly, Appellant's first invocation of his rights was not honored and after Lieutenant Harrison's recitation of the facts

questioning resumed without a fresh set of *Miranda* warnings.

Appellant's "confession" was the product of a single, lengthy custodial interrogation, one wherein Appellant made a clear and unequivocal invocation of his right to counsel and his right to remain silent. Although the Magistrate noted that Appellant did not object to hearing what Harrison had to say about the matter, this is a distinction without a difference. The U.S. Supreme Court has issued no separate or distinct guidance for suspects who wish to silence their interrogators. The law provides for a stop in questioning upon a suspect's announcement that he or she wishes not to participate in questioning; no magical language or request, however, silences the law enforcement officers. Rather, all interrogation and any words or actions on the part of law enforcement that are intended or reasonably likely to invoke an incriminating response must cease immediately. *United States v. Chavira*, 614 F.3d 127 (5th Cir. 2010); *citing Rhode Island v. Innis, supra*. Accordingly, there can be no onus on Appellant for failing-to-refuse-to-listen to Lieutenant Harrison's pontifications; once Appellant made a clear invocation of his right to silence any "interrogation," including Lieutenant Harrison's dissertation on the "simplicity" of the case against Appellant, must cease.

The only thing scrupulous about Lieutenant Harrison's questioning was the way he avoided abiding by Petitioner's clear demand for silence and counsel. After all, it was Detective Steve Higgerson, a fellow JPSO officer, whose conduct and reputation were called into question by the online publication of a scantily clad women on the

hood of the detective's police cruiser outside of Mike's Place in Fat City with the smiling detective standing nearby. Jefferson Parish authorities believed Appellant was responsible for the disclosure of the photographs and, although this case did not involve a violent felony or a major crime, Lieutenant Harrison showed no compunction in dispensing with Appellant's Due Process rights. Lieutenant Harrison continued to interrogate Appellant, failed to wait a significant time before re-urging his questioning, and refused to re-Mirandizing Appellant once questioning resumed—assuming, arguendo, that it ever ceased in the first place. Accordingly, given the blatant denial of Appellant's Fifth Amendment rights, Appellant is entitled to relief.

2. The Violation of Appellant's Fifth Amendment Rights Was Not Harmless

Fifth Amendment violations arising from custodial interrogation are subject to harmless error analysis. *Burgess v. Dretke*, 350 F.3d 461, 471 (5th Cir. 2003); *citing Brecht v. Abrahamson*, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993). There can be no dispute that an error occurred in the instant case. The question before this Court is whether the state courts and the U.S. District Court erred in concluding that the error was harmless. "The test for harmless error is whether the error had substantial and injurious effect or influence in determining the jury verdict." *Jordan v. Hargett*, 34 F.3d 310, 315 (5th Cir. 1994).

In the instant case, Appellant statement to Lieutenant Harrison included two (2) salient details that were otherwise uncorroborated: that

Appellant took the ribald photos that would later make their appearance online at The Dirty.com and that Appellant was at the Mike's Place at a time coinciding with the State witnesses' testimony alleging that Appellant made threatening remarks regarding Detective Higgerson. Without the admission of Appellant's extrajudicial statements these facts remained disputed at trial. By introducing evidence tending to corroborate that Appellant was responsible for the photographs and was at the bar at the time the alleged threats were made, the jury was given the opportunity to make the natural logical inference that Appellant was likewise responsible for the uploading of the pictures online in an attempt to make good on his alleged threats.

A confession "is among the most effectual proofs in the law and constitutes the strongest evidence against the party making it…." *Sparf v. United States*, 156 U.S. 51, 52; 15 S. Ct. 273; 39 L.Ed. 343 (1895). There can be no harmless error when Appellant's Fifth Amendment Rights were violated in order to present to the jury noncumulative testimony that substantiated the State's case.

Appellant's purported confession established Appellant as the photographer of the images which appeared on The Dirty.com. While the photographs themselves were not elements of Appellant's alleged offense, they form the lynchpin of the State's narrative arc at trial in much the same way the actual smoking gun may not be necessary for a murder conviction but can be a crucial piece of evidence crystallizing the jurors' perception of the facts alleged at trial. Moreover, Appellant places himself at the Fat City bar at the

date and time where the alleged intimidation supposedly occurred. Consequently, the admission of Appellant's statements to Lieutenant Harrison was not harmless. Appellant is entitled to relief.

CONCLUSION

Appellant clearly and unequivocally asserted his right to silence and Fifth Amendment Right to counsel. Lieutenant Harrison was not dissuaded and continued to speak with Appellant in a manner he knew or should have known was designed to weaken Appellant's resolve and reverse Appellant's demand for silence. Lieutenant Harrison did not scrupulously honor Appellant's invocation of his rights nor provide Appellant with a significant length of time before resuming his questioning. Lieutenant Harrison did not re-Mirandize Appellant. On the contrary, Lieutenant Harrison scarcely paused to take a breath before continuing to speak with Appellant in an effort to elicit his statement.

Moreover, the admission of Appellant's statements was not harmless. The statement served to corroborate key portions of the State's otherwise disputed and unsubstantiated evidence, including that Appellant was the photographer of the lewd images taken outside the bar and was present at the bar at the time others alleged him to have made so-called threatening remarks. Appellant's "confession" to these crucial details had a substantial and injurious effect on the jury verdict that cannot be overlooked.

Appellant is therefore entitled to the issuance of the writ of Habeas Corpus.

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CERTIFICATE OF SERVICE

I certify that that on April 19, 2018, a copy of the above and foregoing was filed electronically with the Clerk of Court using the CM/ECF system. A paper copy of the foregoing was also served upon Secretary James LeBlanc, Louisiana Department of Corrections, by placing a true and correct copy of the same with the U.S. Postal Service, postage-prepaid, addressed to P.O. Box 94304, Baton Rouge, LA 70804-9304.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Appellant's Brief is in compliance with the limitations imposed by Fed.R.App.Pro. 32(a)(7) and 5th Cir. R. 32.2. The instant brief consists of 18 pages and 3,343 words, exclusive of the table of contents, table of authorities, statement regarding oral argument, and certificates of interested parties, service and compliance.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 17-30411

PAUL POUPART,
PETITIONER – APPELLANT

VERSUS

TIMOTHY HOOPER, WARDEN,
RESPONDENT - APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA, NO. 2:15-CV-01340, THE HONORABLE SUSIE MORGAN, JUDGE.

BRIEF ON BEHALF OF RESPONDENT - APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. Petitioner-Appellant, Paul Poupart, has a personal interest in the outcome of this case. Respondent-Appellee, Timothy Hooper, appears herein in his official capacity only.

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STATEMENT REGARDING ORAL ARGUMENT

The appellant requests oral argument in this case. While the facts and legal arguments are presented in brief and in the record, the decisional process would be aided by oral argument. Accordingly, the appellant respectfully requests oral argument pursuant to Fed. R. App. P. 34 prior to the case being submitted for decision

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BRIEF ON BEHALF OF RESPONDENT - APPELLEE

STATEMENT OF JURISDICTION

This appeal arises out of proceedings conducted in the Eastern District of Louisiana. This court has jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF THE ISSUE

Whether the district court correctly determined that the state court did not unreasonably dismiss Poupart's claim that his statements were inadmissible because they were obtained in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

STATEMENT OF THE CASE

Appellant, Paul Poupart, is a state court prisoner currently incarcerated at the Elayn Hunt Correctional Center, St. Gabriel, Louisiana. On October 13, 2009, Poupart was charged by Bill of Information with public intimidation, a violation of LSA-R.S. 14:122. On October 22, 2009, Poupart pled not guilty. Poupart was found guilty as charged by a six person jury on January 12, 2011. On February 4, 2001, Poupart's Motion for New Trial and Motion for Post Verdict Judgment of Acquittal were heard and denied. On February 11, 2011, Poupart was sentenced to five years at hard labor, with credit for time served.

An habitual offender bill of information was filed on January 13, 2011, and a supplemental habitual offender bill of information was filed on March 9, 2011. On March 18, 2011, Poupart was arraigned and entered a plea of not guilty to the amended habitual offender bill of information, which alleged him to be a fourth felony offender. On April 29, 2011, the trial court found Poupart to be a fourth felony offender and denied his Motion to Depart from Mandatory Minimum Sentence Under LSA-R.S. 15:529.1 Pursuant to *State v. Dorthey*, Motion to Reconsider the Sentence of Five

Years, Motion to Quash the Multiple Bill and Motion for Appeal Bond. The trial court sentenced Poupart as a fourth felony offender to twenty years imprisonment at hard labor, without the benefit of probation or suspension of sentence. Also on April 29, 2011, the trial court denied Poupart's oral motion to reconsider sentence, and subsequently denied a written Motion to Reconsider the Sentence filed on May 9, 2011.

On direct appeal, the Louisiana Fifth Circuit Court of Appeal affirmed Poupart's conviction and sentence. *State v. Poupart*, 11-KA-710 (2/28/12), 88 So.3d 1132. Poupart filed an application for supervisory writs in the Louisiana Supreme Court on March 28, 2012. It was denied on October 8, 2012. *State v. Poupart*, 12-K-0705 (10/8/12) 88 So.3d 1132.

Stamped as filed August 30, 2013, Poupart, through post-conviction counsel, submitted an Application for Post Conviction Relief. Stamped as filed September 30, 2013, Poupart also filed a Pro Se Application for Post Conviction Relief. On March 10, 2014, the state district court denied both the counseled and pro se applications in a single written order with reasons. The Louisiana Fifth Circuit Court of Appeal denied Poupart's timely filed application for supervisory relief on June 24, 2014. *State v. Poupart*, 14-KH-375 (La. App. 5 Cir. 6/24/14)(unpublished writ disposition). Poupart sought review of the Louisiana Fifth Circuit's denial of Writ No. 14-KH-375 by filing two writ applications (Writ Nos. 14-KH-1621 and 14-KP-1566) before the Louisiana Supreme Court. Writ Nos. 14-KH-1621 and 14-KP-1566 were denied by the Louisiana Supreme Court on March 27, 2015. *State v. Poupart*, 14-1566 (La. 3/27/15) 162 So.3d

382; *State ex rel. Poupart v. State*, 14-1621 (La. 3/27/15) 162 So.3d 383 (3/27/15).

On April 24, 2015, Poupart filed a counseled federal habeas corpus petition in the United States District Court, Eastern District of Louisiana.1 On June 10, 2015, the Magistrate Judge issued an order granting Poupart's counsel's motion to withdraw, permitting Poupart t to supplement his habeas petition on or before August 14, 2015, and allowing the State of Louisiana to respond to any supplemental filing on or before September 14, 2015.

Poupart's supplemental filing was stamped as filed July 16, 2015. In it, as relevant to the instant appeal, Poupart presented a claim that the state court erred in denying the motion to suppress his statements as a violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). On April 25, 2016, the Magistrate Judge issued a Report and Recommendation recommending that the petition be dismissed with prejudice. Dated June 8, 2016, Poupart filed objections to the Report and Recommendation.

On April 27, 2017, the United States District Court Judge issued an order adopting the Report and Recommendation. Judgment was entered in favor of Robert Tanner, Warden, and against Poupart on that date. On April 27, 2017, the district court also issued an order denying, sua sponte, a Certificate of Appealability. Poupart subsequently sought a certificate of appealability from this Honorable court, which granted it in part and denied it in part.

STATEMENT OF THE FACTS

At trial, Michael Baratinni testified that he is the owner of a bar located in Metairie. He stated that Detective Steve Higgerson worked at his bar as a detail officer. He explained that a few years before defendant was arrested in this case, Detective Higgerson arrested defendant for an incident that occurred outside of the bar and charged him with battery. Mr. Baratinni testified that approximately two days before his trial on the battery charge, defendant went to the bar and spoke to him about Detective Higgerson. Defendant told Mr. Baratinni to tell Detective Higgerson that if he showed up in court, defendant had pictures of a "girl" that he would "go public with." The next day, an assistant district attorney came to the bar to take pictures for the trial on defendant's battery charge. At that time, Mr. Baratinni informed the assistant district attorney that defendant had been in the bar the day before and had threatened Detective Higgerson. Thereafter, Mr. Baratinni was interviewed by Lieutenant Cantrell and Lieutenant Bruce Harrison regarding the threat.

On cross-examination, Mr. Baratinni testified that the interviews with the police took place at his bar after the pictures were posted on The Dirty.com website. Mr. Baratinni stated that Detective Higgerson had worked for him for about ten years and that they were friends. Mr. Baratinni replied negatively when asked whether defendant showed him any pictures or described the pictures on the day defendant made the threats. He stated that he had no idea at that time that defendant was referring to a picture of a girl

with her legs open on the hood of Detective Higgerson's marked police vehicle and a picture of a girl on Detective Higgerson's vehicle with her "behind in the air" while Detective Higgerson was standing next to the vehicle. Mr. Baratinni further testified that he was present the night the pictures were taken. He had no recollection, however, of a girl on the hood of Detective Higgerson's vehicle. Further, he told the police that he did not think Detective Higgerson would allow a girl to get on the hood of his vehicle. Defense counsel then asked, "So when you supposedly called [Detective Higgerson] to tell him about what [defendant] told you, what did you tell him? What was the big threat, if you didn't know what was even in the pictures?" Mr. Baratinni responded, "Well, I relayed the message. It was that if [Detective Higgerson] was to go to court, [defendant] was going to go public with some pictures he had."

On redirect examination, Mr. Baratinni reiterated that defendant came by his bar and told him to pass the threat on to Detective Higgerson, and to tell Detective Higgerson that it would be in his best interest not to go to court. Mr. Baratinni repeated that he passed this information on to Detective Higgerson.

The State then called Arthur Massel, who stated that he has known Mr. Baratinni for about fifteen years and had previously been employed at Mr. Baratinni's bar. Mr. Massel testified that he was present when defendant spoke with Mr. Baratinni at the bar, overhearing a conversation in which defendant "said a policeman way back [sic]—he made a threat to him with some pictures that he had that he was going to go public with." Mr. Massel explained that defendant stated that

he would go public with the pictures if Detective Higgerson appeared in court.

On cross-examination, Mr. Massel testified that he has known Detective Higgerson for about three or four years. He stated that the day he overheard the conversation between defendant and Mr. Baratinni was the first and only time he had ever seen defendant. Thereafter, he gave a statement in which he told the police that as defendant was walking out of the bar, he heard him tell Mr. Baratinni to "[l]et [Detective Higgerson] know if he shows up in court I can go public with this."

Detective Steve Higgerson testified that he has been employed with the Jefferson Parish Sheriff's Office for thirteen years, and he also worked a private detail at Mr. Baratinni's bar for about eight or nine years. At trial, he identified defendant as the same individual he arrested for second degree battery due to a fight in the street in front of the bar.

The night before defendant's trial for battery, Detective Higgerson received a phone call from Mr. Baratinni informing him that defendant "had some pictures [he] might not want to get out," and it would be in his best interest if he did not testify at trial. Detective Higgerson stated that he took that as a threat. Despite this information, he testified at defendant's trial on the battery charge in August 2009. Within a month after the trial, two photographs were posted on the internet depicting a woman posing on a Sheriff's Office patrol car.

At trial, Detective Higgerson described the circumstances at the time the photographs were taken. He testified that he had his back to his patrol car and was speaking with Mr. Baratinni,

who had pulled up in his truck, when Mr. Baratinni brought his attention to the fact that there was a person on the hood of his vehicle. Detective Higgerson testified that when he turned to look, he saw the image captured in State exhibit two, which depicts a woman on the hood of his vehicle with her legs open. He noticed people standing outside, but he did not see the photographer.

On cross-examination, Detective Higgerson testified that he no longer works detail at the bar. He did not recall being in these photographs and did not remember a girl being on his vehicle before the photographs were posted on the internet. When Mr. Baratinni called him regarding the photographs, he had no idea what was depicted in the photographs. He acknowledged that defendant never contacted him directly. He testified that after he received the phone call from Mr. Baratinni, the next day at trial, he informed the assistant district attorney what Mr. Baratinni had told him.

Lieutenant Bruce Harrison testified that he has been employed with the Jefferson Parish Sheriff's Office since 1995. In August 2009, he was assigned an investigation involving public intimidation where the victim was Detective Higgerson. As part of that investigation, he interviewed Mr. Baratinni, Mr. Massel and Detective Higgerson and saw the two photographs of the woman on the car that were posted on The Dirty.com website.

Numerous items were seized from defendant's residence, pursuant to a search warrant, including a disc containing the two photographs relevant to the case. Lieutenant

Harrison testified that a piece of paper with defendant's arrest register in the battery case was folded inside two pieces of paper on which the pictures of the girl on the car were printed. Additionally, a ledger was found near the computer table. This ledger listed the name and address of the victim from the original battery incident on one page; Detective Higgerson's name, badge number, off duty number and payroll number were listed on the next page.

Defendant was subsequently arrested on September 8, 2009. Lieutenant Harrison read defendant his Miranda rights. Thereafter, defendant admitted that he took the photographs, but denied posting them on the website. He further admitted that he was present at Mr. Baratinni's bar the week of his trial for second degree battery, the same week he allegedly made the threats.

STANDARD OF REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat. 1214. The standard of review is set forth in 28 U.S.C. § 2254(d) and (e). The AEDPA mandates that claims adjudicated on the merits in state court proceedings are subject to the following standards of review:

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

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that —

(A) the claim relies on—

(I) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or (ii) a factual predicate that could not have been previously

> discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(d) and (e).

Under 28 U.S.C. § 2254(d)(1), a federal habeas court may not grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court unless the state-court adjudication resulted in a decision that (1) was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court; 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. See, 28 U.S.C. § 2254(d).

The Supreme Court has clarified that a decision is "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 412-413, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000); *accord Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert denied*, 121 S.Ct. 2001, 149 L.Ed.2d 1004 (2001).

As the United States Supreme Court noted in *White v. Woodall*, U.S. , 134 S.Ct. 1697,1702, 188 L.Ed.2d 698 (2014):

> " '[C]learly established Federal law' " for purposes of § 2254(d)(1) includes only " 'the holdings, as opposed to the dicta, of this Court's decisions.' " Howes v. Fields, 565 U.S. ——, ——, 132 S.Ct. 1181, 1187, 182 L.Ed.2d 17 (2012) (quoting Williams v. Taylor, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)). And an "unreasonable application of" those holdings must be " 'objectively unreasonable,' " not merely wrong; even "clear error" will not suffice. Lockyer v. Andrade, 538 U.S. 63, 75–76, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003). Rather, "[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court 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. ——, ——, 131 S.Ct. 770, 786–787, 178 L.Ed.2d 624 (2011).

And under 28 U.S.C. § 2254(e)(1), the state court's findings of fact are entitled to a presumption of correctness, rebuttable only by clear and convincing evidence.

With regard to the applicable appellate standard of review in federal habeas proceedings,

this Court is to review the district court's findings of fact for clear error and review its conclusions of law *de novo*:

> " 'In a habeas corpus appeal, we review the district court's findings of fact for clear error and review its conclusions of law de novo, applying the same standard of review to the state court's decision as the district court.' " *Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir.2001) (*quoting Thompson v. Cain*, 161 F.3d 802, 805 (5th Cir.1998)). If the issue is a mixed question of law and fact, such as the assessment of harmless error, we review the district court's determination *de novo. Robertson v. Cain*, 324 F.3d 297, 301 (5th Cir.2003) (*citing Jones v. Cain*, 227 F.3d 228, 230 (5th Cir.2000)).
>
> ....Under AEDPA, "[a] federal court's collateral review of a state-court decision must be consistent with the respect due state courts in our federal system." *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). Moreover, our circuit precedent provides that " 'a federal habeas court is authorized by Section 2254(d) to review only a state court's 'decision,' and not the written opinion explaining that decision.' " Pondexter v. Dretke, 346 F.3d 142, 148 (5th Cir.2003) (quoting Neal v. Puckett, 286 F.3d 230, 246 (5th Cir.2002) (en banc)). See also Santellan v. Cockrell, 271 F.3d 190, 193 (5th Cir.2001) ("The

> statute compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning.").

Garcia v. Quarterman, 454 F.3d 441, 444 (5th Cir. 2006).

SUMMARY OF THE ARGUMENT

The United States District Court properly concluded that the state court's decision denying the motion to suppress Poupart's statement as a violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), was not contrary to, or an unreasonable application of, clearly established federal law. Moreover, the United States District Court properly concluded that, even if Poupart's constitutional rights were violated with respect to the statement, its admission was clearly harmless because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *See Brecht v. Abrahamsom*, 507 U.S. 619, 623, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993).

LAW AND ARGUMENT

On appeal, Poupart challenges the admission of his statements to Lt. Harrison. He argues that "he was denied the Fifth Amendment protections described in *Miranda v. Arizona*" with respect to the statements and asserts that the subsequent admission of the statements was not harmless.

A review of the record demonstrates that the United States District Court properly concluded

that the state court's decision denying the motion to suppress Poupart's statement as a violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), was not contrary to, or an unreasonable application of, clearly established federal law and that, even if an error existed with respect to the statement was committed, it was harmless under the standard set forth in *Brecht v. Abrahamson*, 506 U.S. 619, 623, 113 S.Ct. 1710, 1714, 123 L.Ed.2d 353 (1993).

A. The state court's decision denying the motion to suppress Poupart's statement as a violation of Miranda v. Arizona, 384 U.S. 436 (1966), was not contrary to, or an unreasonable application of, clearly established federal law.

The circumstances surrounding Poupart's statement to Det. Harrison were described during the Lt. Harrison's testimony on direct examination by the prosecutor as follows:

> **Q:** And explain to me what happened in this case.
>
> **A:** Once I was notified that he was in custody, in preparation of doing an interview I took out one of these [advisement of rights] forms, filled it out. When he arrived I went into the interrogation room, and I read the rights and asked if he understood and he said yes. I explained I would like him to acknowledge his understanding by initialing and signing. He said he would rather not sigh. He said he had

representation, he had an attorney, and he would prefer not to sign anything.
Q: So did you question him at that point?
A: He said he didn't want to answer any questions.
Q: So did you ask him any questions?
A: No, what I did was just explain to him that I wanted to discuss the case with him, I wanted to lay out what I thought was the simplicity of the case to him, and then ask him again if he wanted me to ask any questions.
Q: At that point did you ask him any questions?
A: No. No, he said that would be fine. I could tell him whatever I wanted. . . .
Q: Was it necessary for you to tell him anything about the C.D. or the pictures or anything at that point?
A: No.
Q: Why not?
A: The way I saw it, that was basically irrelevant. The crime had been committed, whether he possessed the pictures or not.
Q: And did he make any statements? After you told him - - I'm not asking you everything that he - - that you told him, because there has been an objection. After you told him how you perceived the case, did he make any statements?
A: Yes.
Q: What did he say?
A: He admitted having taken the pictures, but denied having posted them on the website. It was at that point that

> I again reiterated that I didn't think that was part of the crime, that the crime had been committed prior to that, and at that point he again denied posting the pictures, but admitted that he had been at Mike's bar the week that he ws tried for the second degree battery.

(St. Ct. Rec. Vol. 2, pp. 254-257).

On direct appeal, Louisiana Fifth Circuit Court of Appeal addressed petitioner's claim that the trial court had erred in denying the motion to suppress statement as follows:

> Defendant argues that after his arrest, he asserted his right to remain silent. Nevertheless, Lieutenant Harrison "continued to entice and cajole [him] into providing information and a statement." Therefore, defendant contends his statement was made in violation of Miranda and should not have been admissible at trial.
>
> The State asserts that defendant voluntarily and intelligently changed his mind. Thus, defendant's statement was not in violation of Miranda and was properly admitted at trial.
>
> The trial court's decision to deny a motion to suppress is afforded great weight and will not be set aside unless the preponderance of the evidence clearly favors suppression. *State v. Burns*, 04–175, p. 5 (La.App. 5 Cir. 6/29/04), 877 So.2d 1073, 1075. A trial court is afforded great discretion when

ruling on a motion to suppress, and its ruling will not be disturbed absent an abuse of that discretion. *State v. Favors*, 09–1034, p. 9 (La.App. 5 Cir. 6/29/10), 43 So.3d 253, 259, writ denied, 10–1761 (La.2/4/11), 57 So.3d 309 (citations omitted). In determining whether the trial court's ruling on a motion to suppress is correct, an appellate court is not limited to the evidence presented at the motion to suppress hearing but also may consider pertinent evidence presented at trial. *Favors*, 09–1034 at 9, 43 So.3d at 259.

Before an inculpatory statement made during a custodial interrogation may be introduced into evidence,[FN1] the State must prove beyond a reasonable doubt that the defendant was first advised of his *Miranda* rights, that he voluntarily and intelligently waived his *Miranda* rights, and that the statement was made freely and voluntarily and not under the influence of fear, intimidation, menaces, threats, inducement, or promises. *State v. Franklin*, 03–287, p. 4 (La.App. 5 Cir. 9/16/03), 858 So.2d 68, 70, *writ denied*, 03–3062 (La.3/12/04), 869 So.2d 817. A statement obtained from the defendant by direct or implied promises, or by the exertion of improper influence must be considered involuntary, and therefore, inadmissible. *State v. Batiste*, 06–824, p. 10 (La.App. 5 Cir. 3/13/07), 956 So.2d 626, 634, *writ denied*, 07–892 (La.1/25/08), 973 So.2d 751. Whether a

defendant's purported waiver of his Miranda rights was voluntary is determined by the totality of the circumstances. *Batiste*, 06–824, 956 So.2d at 633. The critical factor in a knowing and intelligent waiver is whether the defendant was able to understand the rights explained to him and voluntarily gave the statement. *Batiste*, 06–824, 956 So.2d at 634. Testimony of the interviewing police officer alone may be sufficient proof that a defendant's statements were freely and voluntarily given. *State v. Mackens*, 35,350, p. 13 (La.App. 2 Cir. 12/28/01), 803 So.2d 454, 463, *writ denied*, 02–0413 (La.1/24/03), 836 So.2d 37.

> FN1 The United States Supreme Court defined "custodial interrogation" as the "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. at 444, 86 S.Ct. At 1612.

In this case, defendant filed various pre-trial motions, including a "Motion to Suppress the Confession." At the suppression hearing, Lieutenant Bruce Harrison testified that on September 8, 2009, defendant was arrested and taken into custody. Upon his arrival at the

detective's bureau, Lieutenant Harrison advised defendant of his Miranda rights. Lieutenant Harrison stated that defendant refused to waive his rights. Lieutenant Harrison then told defendant that he wanted to explain the simplicity of the case to him, and asked him if he would be willing to listen. Defendant agreed to listen. He then told defendant what the investigation had determined, and defendant then gave a statement acknowledging that he took the pictures and was at the bar at the time the threat was allegedly made, but denying that he posted the pictures on the internet. Lieutenant Harrison testified that he did not ask defendant any questions or coerce, intimidate or promise him anything. Further, since his statement was not made in connection with any questioning, the statement was not recorded.

In support of the motion to suppress, defense counsel argued that defendant did not waive his rights, as indicated by the Rights of Arrestee form that was not filled out. Further, he specifically told Lieutenant Harrison that he had a lawyer, and that he did not want to give a statement. Nevertheless, Lieutenant Harrison pressed him and got a statement out of him. Defense counsel maintained that if defendant did not waive his rights, the statement was unconstitutionally obtained and should be suppressed.

The State argued that defendant made the statement voluntarily and not in response to any questioning by the police. After a hearing on the motion, the trial court denied defendant's motion to suppress the statement.

In *State v. Taylor*, 490 So.2d 459, 461 (La.App. 4 Cir.1986), writ denied, 496 So.2d 344 (La.1986), the Fourth Circuit held that statements made by the defendant after he expressed his desire to remain silent were not taken in violation of *Miranda*, as the statements were the result of the defendant voluntarily and intelligently changing his mind. In *Taylor*, after the defendant had been read his *Miranda* rights, he indicated that he did not want to make a statement. The detective then explained to the defendant what the investigation was going to entail and the defendant subsequently made a statement. *Id.*, 490 So.2d at 460. The Fourth Circuit stated:

The record shows that defendant understood his right to remain silent, that [the detective] did not brow beat him, and that no undue pressure was applied. A few minutes after he declined to talk about the robberies defendant voluntarily and intelligently changed his mind and decided he would talk.

The Fourth Circuit concluded that the defendant's statements were not taken in violation of Miranda and were properly admitted into evidence, citing

State v. Daniel, 378 So.2d 1361 (La.1979). *Taylor*, 490 So.2d at 461.

In *Daniel*, *supra*, the Louisiana Supreme Court found the defendant's statement was not made in violation of *Miranda*. In that case, after the defendant was informed of his *Miranda* rights, he gave an indecisive negative response when asked if he wanted to make a statement. The officer then told the defendant, "[B]efore you make up your mind one way or the other as to whether or not you want to talk to us, let me tell you what we've got." After the officer gave defendant this information, defendant made a statement. The Louisiana Supreme Court stated:

> On these facts[,] we believe the trial judge should have denied the motion to suppress. Nothing in Miranda prevents an accused party from changing his mind and giving a statement after he has previously declined to do so, so long as the statement is voluntary and intelligently made.

Daniel, 378 So.2d at 1366.

The facts of both *Taylor* and *Daniel* are similar to this case. The record in this case shows that defendant initially indicated that he did not want to waive his rights and make a statement. Lieutenant Harrison then told defendant that he wanted to explain the case to him

> and defendant agreed to listen. Defendant then changed his mind and made a voluntary statement. Accordingly, we find that defendant's statement was not made in violation of *Miranda*, and thus, the trial court did not err in denying defendant's motion to suppress.

State v. Poupart, 11-710 (La. App. 5 Cir. 2/28/12) 88 So.3d 1132, 1140-1142.

As recognized in the Report and Recommendation adopted by the United States District Court Judge, the state court correctly determined that the clearly established federal law with respect to the claim is *Miranda*. In Miranda, the United States Supreme Court held:

> [T]he 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. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are

> required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be not questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

Miranda, 384 U.S. 444-45 (footnote omitted).

In *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)(footnote omitted), the United States Supreme Court subsequently concluded:

> A reasonable and faithful interpretation of the Miranda opinion must rest on the intention of the Court in that case to adopt "fully effective means . . . to notify

> the person of his right of silence and to assure that the exercise of the right will be scrupulously honored . . . " 384 U.S., at 479, 86 S.Ct., at 1630. The critical safeguard identified in the passage at issue is a person's "right to cut off questioning." Id., at 474, 86 S.Ct., at 1627. Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."

As this Court has explained, in *Mosley*, the United States Supreme Court found four factors present in the case to be probative in determining if the defendant's right to remain silent was scrupulously honored: (1) whether the suspect was advised prior to initial interrogation that he was under no obligation to answer question; (2) whether the suspect was advised of his right to remain silent prior to the reinterrogation; (3) the length of time between the two interrogations; (4) whether the second interrogation was restricted to a crime that had not been the subject of earlier

interrogation; and (5) whether the suspect's first invocation of rights was honored. *U.S. v. Alvarado-Saldivar*, 62 F.3d 697 (1995). However, United States Supreme Court has not issued a bright-line test for determining when police were scrupulous in honoring suspects' rights, and courts must evaluate the facts of each case to determine if the resumption of police interrogation ws consistent with scrupulous observance of the right to cut off questioning. *U.S. v. Alvarado-Saldivar*, 62 F.3d 697, 699 (1995); *citing Wilcher v. Hargett*, 978 F.2d 872, 877 (5th Cir. 1992).

In the instant case, Report and Recommendation adopted by the United States District Court Judge reflects an analysis of the state court's decision pursuant to a the highly deferential standard of review mandated by the AEDPA:

> The admissibility of a confession is a mixed question of law and fact. Miller v. Fenton, 474 U.S. 104, 112 (1985); *ShisInday v. Quarterman*, 511 F.3d 514, 522 (5th Cir. 2007). Therefore, under the AEDPA, a federal habeas court must defer to the state court's decision on such a claim, unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1); *Barnes v. Johnson*, 160 F.3d 218, 222 (5th Cir. 1998). And, as previously explained, "an unreasonable application is different from an incorrect one." *Bell v. Cone*, 535 U.S. 685, 694 (2002).

Accordingly, the mere fact that the state court may have misapplied Supreme Court precedent would not warrant habeas relief. Puckett v. Epps, 641 F.3d 657, 663 (5th Cir. 2011) ("Importantly, 'unreasonable' is not the same as 'erroneous' or 'incorrect'; an incorrect application of the law by a state court will nonetheless be affirmed if it is not simultaneously unreasonable.").

Although the issue is arguably close, the undersigned concludes that the state court's decision was not unreasonable. Here, the Miranda warnings were in fact given. Although petitioner stated that he did not wish to make a statement after being advised of his rights, he nevertheless agreed to hear what Harrison had to say about the case. After listening to Harrison, petitioner opted to make the statements in question, and there is no suggestion that he was in any way coerced or forced to do so. Although the Miranda warnings were not repeated after petitioner changed this mind, that event was apparently close in time to when the warnings were initially given. This set of facts is sufficiently distinguishable from either Miranda or Mosely so as to afford the state court a measure of discretion in weighing the various factors and in assessing the voluntariness of the statements. Simply put: Although reasonable jurists could perhaps disagree on the correctness of the state court's ultimate conclusion,

> that conclusion was not objectively unreasonable and, therefore, this Court should defer to the finding that there was no constitutional violation.

ROA.17-30411.310.

The respondent-appellee respectfully submits that the United States District Court Judge did not err in determining that the state district court's judge was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.

B. Even assuming arguendo an error existed with respect to the admission of the statement it was harmless

The admission of an involuntary statement is a trial error subject to harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). In the instant case, any error in the admission of the defendant's brief, oral statement was harmless as it did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Poupart was actually charged with and convicted of public intimidation, a violation of LSA-R.S. 14:22. This offense consisted in the use of force or threats upon Detective Higgerson with the specific intent to influence his conduct as a public officer or as a witness. Poupart communicated to Mr. Baratini that it was in Detective Higgerson's interest not to go to court (to testify in the Poupart's battery trial)

because Poupart "had pictures of a girl that he was going to go public with" and told Mr. Baratini to "pass the information on to" Detective Higgerson. *State v. Poup*art, 11-KA-710, pp. 9-11 (La. App. 5 Cir. 2/28/12) 88 So.3d 1132. Mr. Baratini conveyed Poupart's message and Detective Higgerson testified that he took this as a threat. *Id.* These facts established the commission of the offense.

According to Detective Harrison's trial testimony, the defendant "admitted having taken the pictures, but denied having posted them on the website . . . and admitted that he had been at Mike's Bar the week that he was tried for the second degree battery." Poupart's admission that he took the photographs was harmless as the state was not required to prove that Poupart took the photographs. Moreover, the State independently established possessed the photographs - a disc containing the two relevant photographs and printed copies of the photographs (inside of which were folded a copy of the defendant's arrest register in the battery case) were recovered from Poupart's residence during the execution of a search warrant. *State v. Poupart*, 11-KA-710, p. 6 (La. App. 5 Cir. 2/28/12) 88 So.3d 1132. Additionally with regard to Poupart's presence at Mike's Bar the week before he was tried for the second degree battery, this information was cumulative of the testimony of Mr. Barattini and Mr. Massel. Moreover, it should be noted that the fact that Poupart went to Mike's Bar in the days before the trial on the second degree battery charge was not disputed at trial. Defense counsel conceded in opening statement that Poupart had done so with the purpose of buying D.J. lights from Mr. Barattini. (St. Ct. Rec. Vol. 1, pp. 183, 187).

Based on the foregoing, the respondent-appellee respectfully submits that, assuming the admission of the statements was erroneous, any error was harmless under the *Brecht* standard.

CONCLUSION

Based upon the foregoing, the Respondent-Appellee prays that this Honorable Court affirm the denial of federal habeas corpus relief in this case.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I do hereby certify that on May 18, 2018, I electronically filed the foregoing complete and legible brief with the Clerk of Court by using the CM/ECF system, which shall result in service through electronic means upon the following counsel forthe Petitioner-Appellant:

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by delivery via the CM/ECF system to counsel's registered e-mail address. Two copies of the brief are also being served upon aforementioned counsel by placing same in the United States Mail, postage pre-paid, on this date.

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/s/ Juliet L. Clark
Juliet L. Clark
Attorney for: Timothy Hooper, Warden
Dated: May 18, 2018

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Case No. 17-30411

PAUL POUPART,

Petitioner - Appellant

v.

HOWARD PRINCE, WARDEN, ELAYN HUNT CORRECTIONAL CENTER,

Respondent - Appellee

Appeal from the United States District Court for the Eastern District of Louisiana New Orleans, Louisiana (U.S.D.C. No. 2:15-cv-01340-SM)

REPLY BRIEF

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INTRODUCTION

In granting Appellant's Application for Certificate of Appealability, this honorable Court concluded that the state court "failed to apply the relevant factors used to determine the admissibility of a defendant's statements to law enforcement made after he has invoked his right to counsel and to remain silent." Specifically, this Court noted that "law enforcement failed to 'scrupulously honor'" Appellant's "unequivocal invocation of his right to counsel at interrogation." Additionally, this Court determined that Petitioner "demonstrate[d] that…reasonable jurists could debate whether presenting the jury with his own admission of facts critical to the prosecution's case was not harmless."

In its Brief, Respondent simply reiterates the Magistrate and District Court's rulings, averring that the "District Court did not err in determining that the state district court's judg[ment] was neither contrary to, nor involved an unreasonable application of clearly established Federal law…." Respondent's argument on this issue failed to expand beyond the clearly erroneous findings of the District Court and cannot refute this Court's previous pronouncement that Petitioner's "statements were inadmissible." As it concerns the harmless error prong of Appellant's claim, Respondent maintains that the wrongful admission of Appellant's custodial statements—admitting that he took the subject photographs and was at Mike's Place the week prior to trial in his Second-Degree Battery case—was harmless as the State was not required to prove who took the

photographs and Petitioner's admission to being present at Mike's Place was merely cumulative.

Respondent's arguments are unpersuasive. There can be no salient doubt that Appellant properly and unequivocally invoked his right to remain silent and to counsel, that his invocation was flagrantly and immediately ignored, and that his will to remain silent was overborne by JPSO Lieutenant Bruce Harrison's loquacious description of the wealth of the evidence against him. Furthermore, Appellant's involuntary admission to taking the prurient photographs—while not strictly speaking an element of the State's case—was nevertheless powerful evidence of motive, intent, planning, and preparation while Appellant's statement to being at the bar severely circumscribed and unduly handicapped the defenses available at trial, having an injurious effect on the jury.

ARGUMENT

The law respecting a criminal suspect's right to remain silent has been settled for over 50 years. Prior to any custodial questioning, a suspect "must be warned that he has a right to remain silent…" *Miranda v. Arizona*, 384 U.S. 436, 444; 86 S. Ct. 1602; 16 L. Ed. 2d 694 (1966). A defendant "may waive effectuation of these rights," if he or she subsequently "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be not questioning." *Ibid.* at 444-445. A suspect's "right to cut off questioning" has been called a "critical safeguard" allowed for a suspect in custody to "control the time at which questioning occurs, the

subjects discussed, and the duration of the interrogation." *Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975). This unequivocal right is necessary to "counteract[ ] the coercive pressures of the custodial setting." Ibid. at 104. Once warnings are given, if a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Soffar v. Cockrell*, 300 F.3d 588, 593 (5th Cir. 2002); *citing Miranda*, 384 U.S. at 473-74.

This Court has recognized several factors necessary in the analysis of reinterrogation cases: whether police immediately ceased initial interrogation upon the suspect's request; whether questioning was resumed after a "significant period of time" usually defined as "an interval of more than two hours"; whether a "fresh set of warnings" was provided; and whether the topic of the second interrogation was a different crime; whether the suspect's first invocation of rights was honored; and whether "the suspect was advised prior to initial interrogation that he was under no obligation to answer questions." *United States v. Alvarado-Saldivar*, 62 F.3d 697, 699 (5th Cir. 1995); *see also e.g., Hebert v. Cain*, 121 Fed. Appx. 43 (5th Cir. 2005) (unpublished).

As noted in Appellant's Brief, shockingly only one of these factors weights in Respondent's favor: thankfully, Appellant was initially advised of his rights. However, after his clear and unequivocal invocation of his right to silence and right to counsel at questioning, Lt. Harrison wasted exactly no time in continuing to interrogate Appellant by describing the mountains of evidence accumulated by law enforcement and the grim

predicament faced by Appellant at trial. Lt. Harrison's recitation of the State's version of the facts was so specifically and unquestionably targeted at overwhelming Appellant's invocation of silence and coercing Appellant's statement that it any distinction between Lt. Harrison's "questioning" and his "speaking" is purely illusory. Moreover, when Appellant was amply persuaded to withdraw his previous request, he was not provided a fresh set of warnings nor was questioning limited to topics not previously elicited during the first aborted questioning. Appellant's first invocation of rights was not honored and Appellant was never advised prior to his initial interrogation that he was under no obligation to answer questions.

Respectfully, this Court's February 21, 2018 Order granting Appellant a Certificate of Appealability appears to admit of no cogent debate on this issue: Pursuant to this Court, the factors outlined in *Alvarado-Saldivar* and its progeny "weigh in [Appellant's] favor" and his statements to Lt. Harrison "were inadmissible because law enforcement failed to 'scrupulously honor' his unequivocal invocation of his right to counsel at interrogation, instead continuing to talk to him about the case against him until he provided incriminating statements." Consequently, Appellant respectfully avers that this Court has appropriately concluded that Petitioner's Fifth Amendment rights were violated during his custodial interrogation and nothing in Respondent's rote recital of the District Court's ruling should persuade this Court otherwise.

"[A] voluntary confession the most damaging form of evidence." *Murray v. Earle*, 405

F.3d 278, 295 (5th Cir. 2005); citing Bruton v. United States, 391 U.S. 123, 140, 20 L. Ed. 2d 476, 88 S. Ct. 1620 (1968). It "is not like other evidence" and has been called "the most probative and damaging evidence that can be admitted against a defendant." *Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991). When a confession is deemed to be voluntary and untainted by coercive police procedures, it is doubly probative as "it is presumed to flow from the strongest sense of guilt." *Hopt v. Utah*, 110 U.S. 574, 584-85; 28 L. Ed. 262; 4 S. Ct. 202 (1884). A confession can be "so biasing that juries will convict on the basis of confession alone." *Murray*, 405 F.3d at 295. Accordingly, "the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." *Fulminante*, 499 U.S. at 296.

The harmful nature of Appellant's confession can, in the first instance, be inferred simply by its use at trial. Unless Respondent is willing to concede to the deliberate admission of superfluous or otherwise "cumulative" evidence, then the introduction of Appellant's confession must have served a significant probative purpose. It corroborated critical portions of the State's narrative, namely that Appellant took the bawdy photographs at issue and presented himself at Mike's Place at a time consistent with the State's chronology and the alleged threat. Moreover, it placed, coming directly from Appellant's own mouth, elements of the offense charged against him. It helped to establish opportunity, intent,

preparation, plan, knowledge, and the absence of coincidence. It made the link between Appellant and the lewd photographs more pointed. It made Appellant unwillingly serve as a prosecution witness. It decimated Appellant's unequivocal right to remain silent.

That Appellant's trial attorney provisionally placed Appellant at Mike's Place during counsel's opening argument in no way negates the damage caused by the admission of Appellant's involuntary statement. For starters, it is axiomatic that opening statements are not evidence. Thus, the only "concession" that Appellant visited Mike's Place prior to his battery trial came not from counsel's allocutions but from the admission into evidence of Appellant's statement to Lt. Harrison. Second, counsel was no doubt compelled to explain his client's presence at Mike's Place precisely because the State had in its possession the coerced confession of Appellant placing himself at the bar, making this a tail-that-wags-the-dog scenario. The testimony of Michael Baratinni and Arthur Massel placing Appellant at the bar could not fairly be disputed nor the State held to their burden of proof where the State had in its arsenal the provoked, coerced, and involuntary statements of Appellant. Counsel's comments in opening were rather more a parry than an uppercut.

Consequently, the admission of Appellant's coerced statements to Lt. Harrison were not harmless and the District Court's judgment denying Habeas relief should be reversed.

CONCLUSION

Petitioner did exactly what he was supposed to, what any citizen should do if wary or reluctant to speak with law enforcement during a custodial interrogation: he clearly and succinctly invoked his Fifth Amendment Right to silence. But Appellant's inquisitor was not to be dissuaded. Contrary to all law and decency, Lt. Harrison proceeded, trying a different tact to wear down Appellant's silence: He baited Appellant; he goaded Appellant. He gave a dissertation on the evidence against Appellant from the State's perspective and drew Appellant into a discussion of the facts of the case against Appellant's will. The violation of Appellant's rights is clear, it's consequence unavoidable.

The violation of Appellant's right is also harmful. The evidence involuntarily elicited and admitted at trial placed Appellant at Mike's Place at a time consistent with witnesses' account of Appellant's alleged threat. It thwarted any defense that Appellant was not there, that the witnesses were mistaken, or that the State's witnesses colluded with law enforcement in a concerted effort to besmirch Appellant's character in retaliation for his exercise of free speech. It rendered Appellant an unwitting witness for the State. It robbed him of his right to remain silent and force the State to prove each element of the offense beyond a reasonable doubt. In conjunction with Appellant's confession to taking the photographs, Appellant's involuntary statements helped to establish intent, opportunity, preparation, and plan. It had a substantial and injurious influence on the jury's deliberations and verdict. It was the death knell of Appellant's defense and his right to a fair trial.

Consequently, the District Court erred in adopting the Magistrate's Report and

Recommending and denying Appellant Habeas relief.

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CERTIFICATE OF SERVICE

I certify that that on Sunday, December 30, 2018, a copy of the above and foregoing was filed electronically with the Clerk of Court using the CM/ECF system. A paper copy of the foregoing was also served upon the District Attorney's Office, Juliet L. Clark, District Attorney's Office, Parish of Jefferson, 200 Derbigny St., Gretna, LA 70053, jclark@jpda.us.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Appellant's Brief is in compliance with the limitations imposed by Federal Rules of Appellant Procedure and the Local Rules of this Court. The instant brief consists of 9 pages and 1,787 words, exclusive of the table of contents and certificates of service and compliance.

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-30411

PAUL POUPART,
Petitioner–Appellant,

versus

TIMOTHY HOOPER, Warden; ELAYN HUNT CORRECTIONAL CENTER,
Respondent–Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana No. 2:15-CV-1340

Before HIGGINBOTHAM, SMITH, and GRAVES, Circuit Judges. PER CURIAM:

Paul Poupart appeals the dismissal of his habeas corpus petition brought under 28 U.S.C. § 2254. He seeks post-conviction relief from a state conviction for public intimidation. Poupart claims he was interrogated in violation of Miranda v. Arizona, 384 U.S. 436 (1966), asserting that interrogation persisted after he had invoked his right to counsel and had declined to answer questions. The federal district court denied habeas

relief, finding that the decisions of the state courts were not unreasonable under the Antiterrorism and Effective Death Penalty Act of 1996 and that any error was harmless.

AFFIRMED.