No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ADAM LEE LOPEZ

Petitioner,

v.

G.J. JANDA, WARDEN,

Respondent.

**APPLICATION TO THE HON. ELENA KAGAN
FOR EXTENSION OF TIME TO FILE
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT**

To the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Petitioner Adam Lee Lopez respectfully requests that the time to file a Petition for Writ of Certiorari in this matter be extended for forty-five (45) days to and including January 10, 2019. The Court of Appeals issued its memorandum decision on July 17, 2018. App. A. On August 27, 2018, the Court of Appeals denied Mr. Lopez's timely petition for rehearing and

rehearing en banc. App. B. Absent an extension of time, the Petition would be due on November 26, 2018. Petitioner is filing this Application at least ten days before that date. S. Ct. R. 13.5. This Court has jurisdiction over the judgment under 28 U.S.C. § 1254(1).

Background

Confronted with Adam Lopez's expressed desire for the assistance of counsel, the interrogating detective unambiguously sought to dissuade Lopez from doing so. He "encourage[d]" Lopez to talk, advising him that, although "in a bad position" facing "serious" charges, falsely assured Lopez that there "wasn't much [he could] do to make this worse." The detective consoled Lopez "I don't think you thought you were shooting at the cops" and assured him "we want to hear your side of the story." When Lopez asked for time to think, Porter cautioned Lopez to "just remember that we'll never know what your side of this is unless you're the one to tell us," advice that was patently inaccurate.

The state court denied Lopez's claim that the detective cajoled a waiver out of Lopez, claiming that the detective did "nothing more than seek to clarify" Lopez's intentions. The federal habeas appellate panel apparently rejected the state court's finding when observing that the detective's

"statements encourage Lopez to answer his questions." Nonetheless, the federal habeas panel denied Lopez's claim that the detective cajoled a waiver because the detective "did not coerce [Lopez] to waive his rights."

The detective's campaign of minimizing Lopez's constitutional rights and encouraging him to waive those rights is fundamentally inconsistent with *Miranda*. Telling Lopez that there's "not much you can do to make this worse," that "I don't think you thought you were shooting at cops" but "we'll never know your side of this unless you're the one to tell us" (especially to a suspect who rightly believes that law enforcement may be unaware of exculpatory facts), and that "we want to hear your side of the story" and "encourage you" to withdraw or disavow waiting for counsel are improper methods, many of which are condemned by *Miranda* itself. Rather than make clear that the adversary process had initiated and that he was "not in the presence of persons acting solely in his interest," *Miranda*, 384 U.S. at 469, the officer's monologue undermined *Miranda*'s warnings by misleading him into believing the officers were seeking to protect his interests instead of cajoling a waiver out of him.

Moreover, advising an individual who has expressed an interest in consulting counsel that their situation won't deteriorate by going it alone constitutes an improper attempt to dissuade the individual from speaking

with counsel. *Collazo v. Estelle*, 940 F.2d 411, 417 (9th Cir. 1991) (en banc). Furthermore, suggesting to Lopez that he could not aggravate his situation by waiving his rights and talking with the officers directly contradicts and undermines the intentionally stark nature of the *Miranda* warnings that his statements can and will be used against him. *Hart v. Attorney General*, 323 F.3d 884, 894 (11th Cir. 1994); *United States v. Beale*, 921 F.2d 1412 (11th Cir. 1991); *Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir. 2011) (en banc).

Having found that "Detective Porter's statements encouraged Lopez to answer his questions," the federal habeas courts should have applied de novo review to Lopez's claims. 28 U.S.C. § 2254(d)(2); *Wiggins v. Smith*, 539 U.S. 510, 531 (2003) (state court determination rests on unreasonable factual determination, federal review is de novo); *Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) (same).

Miranda held that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v. Arizona*, 384 U.S. 436, 476 (1966). The state court's decision that a showing that the waiver was cajoled was insufficient because there was no evidence of coercion was contrary to *Miranda*. Because the state court applied a legal standard contrary to *Miranda*, the federal court should have reviewed Lopez's claim de novo. 28

U.S.C. § 2254(d)(1); *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) (state court decision is "contrary to" federal law when it "applies a rule that contradicts the governing law set forth in our cases").

The state court's decision was both an unreasonable determination of the facts and an unreasonable application of the law because it:

- applied an erroneous legal standard to evaluating whether a waiver was cajoled;
- failed to assess the totality of the circumstances and ignored whether the interrogator's techniques were "compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means." *Miller v. Fenton*, 474 U.S. 104, 116 (1985);
- ignored that Porter deployed many of the techniques of persuasion specifically criticized by *Miranda* as likely to overbear an individual's will to remain silent; and
- ignored Porter's myriad statements that were calculated to negate the intended effect of the Miranda warning.

Because the state court's decision failed to satisfy both 28 U.S.C. § 2254(d)(1) and § 2254(d)(2), the federal habeas courts should have reviewed Lopez's claims de novo.

Reasons for Granting an Extension of Time

The time to file a petition for writ of certiorari should be extended for forty-five days for the following reasons.

Since the Court of Appeal denied Mr. Lopez's petition for rehearing and

rehearing en banc on August 27, 2018, petitioner's appointed counsel has been occupied with other significant case obligations. Petitioner's counsel filed a state habeas petition that was due at the end of August, followed by another state habeas petition in the second week of September, and a third state habeas petition due the last week of September.

Petitioner's counsel had to turn his attention to preparing for an oral argument before the Court of Appeals on October 10, and thereafter had two reply briefs due on October 15 – one for a habeas case pending in the state court of appeal and another for a habeas case pending in district court.

In addition to performing nationwide research relevant to the issues in this case, counsel prepared and filed a petition for rehearing in the Court of Appeals on November 5 and has been researching and drafting an opening appellate brief that is also due the Monday after Thanksgiving, the same day as the certiorari petition would be due in this case.

Petitioner is requesting an additional 45 days due to other case obligations and pre-paid vacation plans at the end of the year. In the three weeks after returning from the Thanksgiving holiday, petitioner's counsel has a habeas reply due in state court, an appellate reply brief due a week later, and another habeas reply due the week thereafter. Counsel will be out of the office (and out of State) starting December 15 until the end of the calendar

year.

Counsel has been working diligently on these and other tasks, along with the certiorari petition in this case. Counsel proposes to file the petition for certiorari on January 9, 2019, one week after returning to the office to start the new year. To prepare an appropriate petition for consideration by this Court, Petitioner's counsel requires the additional requested time to more thoroughly research the legal issues.

This case presents important and unsettled issues warranting a carefully prepared Petition including whether (1) the state court's ruling that the detective had not cajoled a waiver out of Lopez by giving him biased, one-sided and inaccurate legal advice in violation of *Miranda* because the statements did not amount to coercion, or (2) in declaring that the detective did "nothing more than seek to clarify" Lopez's intentions when it was clear that the detective's statements sought to encourage Lopez to waive his rights, the state court's ruling rested on an unreasonable determination of fact, such that the federal courts should have reviewed Lopez's habeas claims de novo.

Petitioner has been serving his sentence of 33 years to life imposed by the state court since December 2010. Consequently, an extension of time would not delay service of his sentence or otherwise prejudice respondent. No meaningful prejudice would arise from the granting of this extension.

Wherefore, petitioner respectfully requests that an order be entered extending the time to petition for certiorari to and including Thursday, January 10, 2019.

Respectfully Submitted,

LAW OFFICES OF TARIK S. ADLAI

NOVEMBER 16, 2018.

/s/
Tarik S. Adlai
Counsel of Record
Attorney for Petitioner

Appendix A

FILED

JUL 17 2018

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM LEE LOPEZ, Petitioner-Appellant, v. JANDA, Respondent-Appellee.	No. 15-56068 D.C. No. 5:13-cv-01196-DOC-MAN MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted July 13, 2018**
Pasadena, California

Before: IKUTA and N.R. SMITH, Circuit Judges, and MCNAMEE,*** Senior District Judge.

---

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

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Stephen M. McNamee, Senior United States District Judge for the District of Arizona, sitting by designation.

Petitioner Adam Lopez appeals the district court's denial of his habeas corpus petition. Lopez was convicted of attempted murder of a law enforcement officer. However, he contends that he is entitled to habeas relief, because the state court unreasonably applied *Miranda v. Arizona*, 384 U.S. 436 (1966). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.[1]

"We review de novo the district court's decision to grant or deny a petition for a writ of habeas corpus." *Lambert v. Blodgett*, 393 F.3d 943, 964 (9th Cir. 2004). "Because [Lopez] filed his federal habeas petition after April 24, 1996, his petition is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA'), 28 U.S.C. § 2254." *Cheney v. Washington*, 614 F.3d 987, 993 (9th Cir. 2010). Under AEDPA, we must deny habeas relief with respect to any claim adjudicated on the merits in a state court proceeding unless the proceeding "(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." 28 U.S.C. § 2254(d).

"[A] suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning." *Davis v. United*

[1] Lopez's renewed motion to file a late reply brief, Dkt. 62, is DENIED.

States, 512 U.S. 452, 457 (1994). "[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." *Id.* at 458. "Invocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.* at 459 (quotation marks and citation omitted). "But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, [Supreme Court] precedents do not require the cessation of questioning."[2] *Id.*

Lopez argues that the state court unreasonably applied this precedent when it determined that he did not unambiguously request counsel. However, our court

---

[2] In *Sessoms v. Runnels*, the en banc panel initially determined that the "unambiguous invocation" rule in *Davis* applied "only after a suspect has been informed of his *Miranda* rights." 691 F.3d 1054, 1062 (9th Cir. 2012), *cert. granted, judgment vacated sub nom. Grounds v. Sessoms*, 570 U.S. 928 (2013). The Supreme Court granted certiorari, vacated, and remanded in light of *Salinas v. Texas*, 570 U.S. 178, 186-87 (2013) (holding that in order to benefit from the Fifth Amendment right to remain silent, a suspect must expressly invoke the constitutional privilege). Based on *Salinas*, the en banc panel in *Sessoms* "assum[ed] that the clear invocation requirement of *Davis* applie[d] to" pre-*Miranda* warning cases. *Sessoms v. Grounds*, 776 F.3d 615, 621 (9th Cir. 2015) (en banc). Thus, the state court did not err in applying the unambiguous invocation rule in a pre-*Miranda* waiver (but post-*Miranda* warning) context.

has already rejected a similar argument under similar circumstances, namely, in determining on habeas review whether a state court's decision on whether a defendant had made an unambiguous request for counsel was an unreasonable application of Supreme Court precedent. In *Clark v. Murphy*, 331 F.3d 1062, 1065 (9th Cir. 2003), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 71 (2003), the suspect stated "I think I would like to talk to a lawyer." The panel determined that it was not unreasonable for the state court to conclude that the inclusion of the phrase "I think" made the suspect's statement ambiguous. *Id.* at 1071-72. "While *only* the Supreme Court's precedents are binding on the [state] court, and only those precedents need be reasonably applied, we may look for guidance to circuit precedents." *Id.* at 1070. There is very little daylight between the suspect's statement in *Clark* and Lopez's statement to Detective Porter. Instead of saying "I think I would like to talk to a lawyer," Lopez said "I guess I'll wait until an attorney's present or something." A principled and articulable difference between the phrases "I think" and "I guess" escapes us. Further, Lopez added the qualifier "or something" to the end of his statement. What that "something" would have been is unclear, but that unclarity lends additional support to the state court's determination that Lopez's statement was ambiguous. Perhaps Lopez is right; he may have been trying to invoke his right to counsel in a very deferential manner.

Unfortunately for Lopez, it is not his intent that matters; it is whether his statement would have been unambiguous to a reasonable officer. *Davis*, 512 U.S. at 459. Thus, guided by *Clark*, the state court's determination that Lopez's statement contained ambiguity was not an unreasonable application of any Supreme Court precedent.

Lopez argues that the statements made by Detective Porter amounted to coercion, but the Supreme Court has made clear that even a lengthy interrogation (by itself) is not coercive. *Berghuis v. Thompkins*, 560 U.S. 370, 386-87 (2010). Something more is required. For example, it is not coercive when a suspect is placed in a straight-backed chair and repeatedly questioned for three hours before eventually answering the interrogators questions. *Id.* Rather, "facts indicating coercion [include] an incapacitated and sedated suspect, sleep and food deprivation, and threats." *Id.* at 387. Here, Detective Porter's statements do not rise to the level of "coercion." Detective Porter made no threat and repeatedly reminded Lopez that he had "the absolute right" to not answer his questions. ER 116-18. We likewise reject Lopez's argument that Detective Porter cajoled him into waiving his rights. Although Detective Porter's statements encouraged Lopez to answer his questions, the state court did not unreasonably apply Supreme Court precedent in

determining that Detective Porter's statements did not rise to the level of coercion or cajoling.

AFFIRMED.

Appendix B

FILED

AUG 27 2018

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM LEE LOPEZ, Petitioner-Appellant, v. JANDA, Respondent-Appellee.	No. 15-56068 D.C. No. 5:13-cv-01196-DOC-MAN Central District of California, Riverside Order

Before: IKUTA, Circuit Judge, N.R. SMITH, Senior Circuit Judge, and MCNAMEE,* Senior District Judge.

The panel has voted to deny the petition for panel rehearing. Judge Ikuta has voted to deny the petition for panel rehearing en banc, and Judge N.R. Smith and Judge McNamee have so recommended.

The full court was advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are DENIED.

---

* The Honorable Stephen M. McNamee, Senior United States District Judge for the District of Arizona, sitting by designation.