No. _____

IN THE

Supreme Court of the United States

JUAN ORELLANA,

Petitioner,

v.

RAYMOND MADDEN,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

AMY M. KARLIN
Interim Federal Public Defender
TRACY CASADIO*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-5375
Facsimile: (213) 894-0081
Tracy_Casadio@fd.org

Attorneys for Petitioner
* *Counsel of Record*

QUESTION PRESENTED

Whether Orellana's Fifth Amendment right to counsel was violated when, in the course of custodial interrogation, the detective obstructed Orellana's unambiguous attempts to request counsel and his ensuing custodial statement was admitted against him at his criminal trial?

PARTIES AND LIST OF PRIOR PROCEEDINGS

The parties to this proceeding are Petitioner Juan Orellana and Respondent Raymond Madden, Warden of California Correctional Institution in Tehachapi, California. The California Attorney General Represents Respondent.

Orellana was convicted in Los Angeles County Superior Court in *People v. Orellana*, case no. BA403082, Judge Lisa B. Lench, presiding, in 2014. The reporter's transcript of trial can be found at district court docket no. 10, lodgment 7.

The California Court of Appeal affirmed the judgment on appeal in *People v. Orellana*, No. B255892, on April 30, 2015 in an unpublished opinion. Petitioner's Appendix F attached hereto ("Pet. App.").

The California Court of Appeal denied the petition for habeas corpus in *In re Juan Orellana*, case no. B264504 on July 1, 2015 in an unpublished order. Pet. App. G.

The California Supreme Court denied the petition for habeas corpus in *In re Juan Orellana*, case no. S226907 on September 9, 2015 in an unpublished order. Pet. App. H.

The California Supreme Court denied a second petition for habeas corpus in *In re Juan Orellana*, case no. S230078 on February 3, 2016 in an unpublished order. Pet. App. I.

The United States District Court for the Central District of California, Judge Fernando M. Olguin, presiding, denied the petition for habeas corpus in *Orellana v. Madden*, case no. 16-2316, on February 15, 2017. Pet. App. D.

The Ninth Circuit Court of Appeals affirmed the denial of habeas corpus relief in an unpublished memorandum in *Orellana v. Madden*, case no. 17-56717, on December 24, 2019. Pet. App. A.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORTIES

Page(s)

Federal Cases

TABLE OF AUTHORTIES

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Juan Orellana ("Orellana" or "Petitioner") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Orellana v. Madden*, No. 17-56717.

I. OPINIONS BELOW

The memorandum opinion of the Ninth Circuit Court of Appeals in *Orellana v. Madden*, No. 17-56717 (Dec. 24, 2019), was not published. Petitioner's Appendix ("Pet. App.") A. The order of the United States District Court denying relief is also unreported. Pet. App. D. The California Court of Appeal's reasoned decision on direct appeal, No. B255892 (Apr. 30, 2015) is unpublished. Pet. App. F.

II. JURISDICTION

The Ninth Circuit affirmed the district court's dismissal of Orellana's habeas corpus petition filed pursuant to 28 U.S.C. § 2254 challenging his judgment of conviction by the California state court on December 24, 2019. Pet. App. A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the U.S. Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same 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.

Section 1 of the Fourteenth Amendment to the U.S. Constitution

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.

28 U.S.C. § 2254(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.

IV. STATEMENT OF THE CASE

A. Basis for Federal Jurisdiction

Petitioner is in state custody at California Correctional Institution in Tehachapi, California. He filed a habeas corpus petition under 28 U.S.C. § 2254 challenging the constitutionality of his convictions and sentence. The district court dismissed the petition on the merits with prejudice. Pet. App. D. The Ninth Circuit reviewed pursuant to 28 U.S.C. § 2253 and affirmed. Pet. App. A.

B. Facts Material to the Consideration of the Question Presented

Orellana was charged in a two-count information with oral copulation of a child under ten (Penal Code section 288.7(b)) and with having committed a lewd act on a child (Penal Code section 288(a)). Pet. App. F 59.

1. The Arrest and Interrogation

Orellana is from Honduras. At 46 years old, he had only 2 years of schooling. Pet. App. L 186. He is illiterate. His reading and writing abilities are limited to writing his name. Pet. App. L 188. His brother was killed by police in Honduras. U.S.D.C. Docket No. 10, Lodgment 7 at 4. When he learned the police wanted to interview him, he retained counsel to assist him in the interview. Pet. App. L 188.

Orellana was arrested on September 26, 2012. Pet. App. F 56. Detective Hernandez began the custodial interview around 8:00 p.m. Although Orellana's counsel had contacted Detective Hernandez prior to the interview, counsel was not present. Pet. App. L 177-78. The interview was conducted in Spanish and videotaped. Pet. App. L 177-78; Pet. App. J 77. Detective Hernandez read the *Miranda* warnings in Spanish from a pre-printed form in approximately thirty

seconds. Pet. App. J 86-87; Pet. App. K 155; U.S.D.C. Docket No. 4, Ex. C (3:58-4:25). Orellana stated he understood the rights read to him. Pet. App. F 57. Orellana was never asked if he waived his rights. Pet. App. J 86-88.

After reading the *Miranda* warnings and without eliciting a waiver, Detective Hernandez confronted Orellana with his failure to respond to her attempt to make an appointment to speak with him. Orellana acknowledged she had called him and told her he had contacted an attorney:

> Orellana : and then I talked to the attorney 'cause I had already paid her, and she told me, 'You can't go because first,' she said . . . .
>
> Hernandez: [INT] But it's not, . . . it's not the attorney's decision. Like I just told you, those are your rights. If you want to talk to me about the case, I can discuss it with you.
>
> Orellana: Well, yeah. That's what I wanted to talk about, but ---
>
> Hernandez: YEAH. Bef- Okay. 'Well, yeah?' Is that the answer? 'Well, yeah.'

Pet. App. J 88-89. Hernandez did not wait for Orellana to confirm his answer. Instead, she drew a line on the waiver form and presented it to Orellana for his signature. Orellana complied. U.S.D.C. Docket No. 4, Ex. C (4:50-5:06). Hernandez never informed Orellana that by signing he was waiving his *Miranda* rights.

Turning to the substantive portion of the interview, Detective Hernandez focused the interrogation on minimizing the seriousness of the charges Orellana was facing. She assured him, "You didn't rape her, okay?" Pet. App. J 95; *see also*

Pet. App. J 97. She assured him, "I'm not gonna sink you, okay?" Pet. App. J 93. Looking at his prior criminal record, she assured him, "you're not a liar. That's what I see." Pet. App. J 94. Orellana denied wrongdoing when confronted with the actual charged.

> Hernandez: [INT] You did touch her. You did give her e- oral sex, okay?
>
> Orellana: No, no.
>
> Hernandez: Yes, Okay? Because there's saliva. Even though they bathed her and washed her clothes, there's saliva. That's the . . . the DNA. So that thing is there, okay?

Pet. App. J 97.

> Hernandez: [OV] Okay. And you-- and, and you did . . . and you gave her, uh-- s-- uh . . . how do you say ORAL SEX? You gave her--
>
> Orellana: No. That, I didn't.
>
> Hernandez: It is true. And what about the saliva? I already told you that you're not a liar, okay?
>
> Orellana: Yes.
>
> Hernandez: But if you turn into a liar I'm gonna raise the charge. Right now you don't p- n- n. Right now, if you stick to . . . to your story about the-- that you don't repeat it and you're not a liar--okay?--we can work with that, but if you start lying I'm gonna talk to the D.A. Okay? Because the D.A. already has-- w-we-- we did a DNA test on her. I don't know if you understand if whe-- if when [sic] you bathe someone, it doesn't come off completely, okay? She did have your saliva down there. From--
>
> Orellana: [INT] ln her private part?
>
> Hernandez: Yes. That's un-unquestionable, okay?

> Orellana: Mmm.
>
> Hernandez: So to--You wanna lie to me here? That's fine. I close the book but we're going to arrest you, okay? Don't lie to me. Be honest with me. . . .

Pet. App. J 102-03. Hernandez's tactic was to tell Orellana what happened in order to prevent any denials, as in this monologue:

> I already know that it hap-- know that this happened, okay? So d--don't start denying it, please. Because the fact that-- What did I tell you? We're not here to ask you, "Did you or didn't do?" [sic] You did it, and the question I'm asking you [is], why? Why?

Pet. App. J 105; see also Pet. App. J 106 ("But you did touch her with your finger in her vagina, and you did g-- you gav-- you gave her, uh,. oral sex, okay? That really happened. I can work with that."); Pet. App. J 106-07 ("[T]here was some of your saliva there. Okay? So I know that you did it."). Orellana continued to deny Hernandez's allegations. Pet. App. J 106.

Nineteen minutes into the interview, Orellana agreed he had made a mistake. Pet. App. J 109; MTPE, Ex. A (19:17-19:31). He described experiencing an "impulse" that was "maybe erotic." Pet. App. J 112. Orellana attempted to explain what he meant: "I just saw her like a girl, you know, but I never -- I had never done it before nor am I gonna do it. Just like an impulse." Pet. App. J 113. He denied touching the girl with his tongue. He denied having contact under the girl's panties, but Detective Hernandez insisted, "It wasn't . . . it wasn't over her panties. Sir! . . . . Don't insult me." Pet. App. J 122.

Orellana eventually admitted apologizing to the girl's father "for this incident that has happened." Pet. App. J 119-20.

2. The Hearing on the Motion to exclude Orellana's Custodial Statement

Defense counsel challenged the admission of Orellana's custodial statement in a pre-trial hearing. The trial court heard testimony from both Hernandez and Orellana.

Hernandez testified that prior to Orellana's arrest, she was aware that he had retained counsel. She had received a message from the law firm he retained. Pet. App. L 177-78. Orellana testified that he was unable to call his attorney before the interrogation because, although he kept the attorney's card in his wallet, his wallet was taken from him upon his arrest. Pet. App. L 189. Orellana testified that he was unable to read the advisement form. Pet. App. L 188. He did not understand many of Hernandez's questions and felt when he tried to speak, "she would interrupt." Pet. App. L 198. When he mentioned the attorney he had retained, his intention was to ask for the attorney's presence during the interview, but Hernandez cut him off. Pet. App. L 203. He did not perceive another opportunity to request counsel. Pet. App. L 206.

The trial court ruled the statement was admissible. Pet. App. L 219. Because the court was "not sure that the People have met their burden that Mr. Orellana understood what he was signing, given the fact that there's no refutation of his statement that he doesn't read Spanish. That his level of education is insufficient to . . . allow him to be able to read Spanish," the court did not give "much credence to the signature on the form." Pet. App. L 217. Nevertheless, the trial court concluded that Orellana was "advised of each of his rights in a way that

was understandable and . . . he indicated he understood them." Pet. App. L 218. Although the court viewed it as "problematic" that Hernandez "interrupt[ed] him on more than one occasion concerning his attorney," it nevertheless concluded "[t]here was some ambiguity" to Orellana's request for counsel. Pet. App. L 217-18.

3. The State Court Trial

Vanessa M. testified that Orellana's hand touched her genital area. Reporter's Transcript ("RT") 958-59.[1] She further testified that Orellana lowered the zipper of his pants and put it on her genital area, but she did not see anything coming out of the zipper. RT 983-84. Vanessa's mother testified that Orellana and his girlfriend had spent the weekend with Vanessa, but dropped her off early when she started crying. RT 1206-08. Vanessa reported the touching to her mother shortly after arriving home. *Id.* at 1211. Vanessa was taken to the hospital, where a sexual assault exam was conducted. *Id.* at 1215, 1217.

As the court of appeal found, "No proteins or secretions appeared on Vanessa's body, nor did she have any cuts, scratches, marks, or other injuries." Pet. App. F 56. The court of appeal further found that the "examination of Vanessa's genital and anal areas revealed nothing out of the ordinary" and the examining forensic nurse "concluded that she could not either 'confirm or negate sexual abuse.'" *Id.*

Orellana's custodial interview was played for the jury nearly in its entirety. RT 1531. Hernandez testified that she continued to press Orellana after his denials

[1] The RT is available at U.S.D.C. Docket No. 10, Lodgment 2.

of wrongdoing because of his "deceiving mannerisms." RT 1532-33. Hernandez admitted to using ruses and threats to elicit Orellana's statements. RT 1523, 1564, 1566. She described cutting a suspect off during questioning as a "confrontational investigative tool" she employed in interviewing Orellana. RT 1577. Orellana testified in his own defense and denied the allegations. Pet. App. M 268-69. He further testified that he made inculpatory statements only to avoid Hernandez's threat of raising the charges. Pet. App. M 258-60, 268, 270.

4. State Post-Conviction Proceedings

On direct appeal, Orellana challenged the use of his custodial statements against him. On April 30, 2015, the California Court of Appeal affirmed his conviction, holding that his right to counsel was not violated during the interrogation and that his statements were voluntary. Pet. App. F.

After appellate counsel failed to file a petition for review in the California Supreme Court, Orellana re-raised his claims via habeas corpus before the California Court of Appeal, where his petition was denied on July 1, 2015. Pet. App. G. He later exhausted his federal claims by twice petitioning the California Supreme Court for habeas corpus relief, both of which were denied. Pet. App. H, I.

5. Federal Court Proceedings

Orellana filed a timely petition in United States District Court on March 31, 2016. Pet. App. E 12. The magistrate judge issued a report and recommendation denying the claims. Pet. App. E 52. The report was accepted on February 15, 2017 and the petition was denied with prejudice. Pet. App. D.

The district court granted a certificate of appealability on the claim raised in this petition. Pet. App. C.

V. REASONS FOR GRANTING THE WRIT

The California Court of Appeal unreasonably concluded that Orellana did not unambiguously invoke his right to counsel, despite the fact that any reasonable law enforcement officer would have understood Orellana desired counsel's presence in the interrogation under the circumstances.

The admission of Orellana's custodial statement as evidence to prove his guilt was not harmless. Indeed, given the lack of physical evidence to corroborate the victim's allegations, it was the key evidence adduced against him. Orellana is therefore entitled to relief.

A. Certiorari review is necessary because the admission of Orellana's custodial statement resulted in a miscarriage of justice by violating his right to counsel

"[T]he very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals." *Miranda v. Arizona*, 384 U.S. 436, 455 (1966). "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Id.* at 457. The denial of a defendant's request for counsel undermines his ability to exercise the privilege to remain silent. *Id.* at 466. "We cannot penalize the defendant who, not understanding his constitutional rights, does not make the formal request and by such failure demonstrates his helplessness." *Id.* at 471. "Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to

overcome free choice in producing a statement after the privilege has once been invoked." *Id.* at 474.

The criminally accused have a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981).

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, 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, 484-85 (1981).

The rule set forth in *Edwards* is intended to guard against the "coercive pressures" inherent in repeated, successive contact by the police. *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (the *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights"); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (noting "the authorities through 'badgering' or 'overreaching'—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance.").

"The applicability of the rigid prophylactic rule of *Edwards* requires courts to determine whether the accused actually invoked his right to counsel." *Davis v. United States*, 512 U.S. 452, 458 (1994) (internal citation and quotation marks omitted). "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 (quoting *Smith*, 469 U.S. at 95). The inquiry is objective: invocation of the right to counsel must be made "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* at 459. Nevertheless, the inquiry requires courts "to give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987).

Under *Miranda*, before the government may introduce evidence of an incriminating statement by a criminal defendant, it must prove a voluntary, knowing, intelligent waiver of the defendant's Fifth Amendment rights to silence and to an attorney. *Miranda*, 384 U.S. at 475; *Colorado v. Connelly*, 479 U.S. 157, 168 (1986) (proof of waiver must be by a preponderance of the evidence). "Voluntariness" and "knowing and intelligent" are two distinct considerations to be analyzed separately in determining whether a *Miranda* waiver was valid. *Colorado v. Spring*, 479 U.S. 564 (1987). While the "voluntariness" question involves the same inquiry as that employed to determine whether a confession was involuntary, *Connelly*, 479 U.S. at 169-170, a waiver can only be considered "knowing" if it was "made with a full awareness both of the nature of the right being abandoned and

the consequences of the decision to abandon it." *Spring*, 479 U.S. at 574 (internal citation and quotation marks omitted). There is a presumption against waiver, and the burden of showing a valid waiver is on the government. *North Carolina v. Butler*, 441 U.S. 369, 372-73 (1979).

1. Orellana's request for counsel was unambiguous and required Hernandez to cease interrogation until counsel was provided

Immediately after reading Orellana his Miranda rights and obtaining his signature on the written waiver—which Orellana was incapable of reading—Detective Hernandez aggressively confronted Orellana:

> Hernandez: Okay. Didn't I call you yesterday for . . . for an appointment?
>
> Orellana: Yes, p- Yes it has ---
>
> Hernandez: [INT] And did I say that you had no problems?
>
> Orellana: Yes, p- Yes it has ---
>
> Orellana: Yes, and then I talked to the attorney 'cause I had already paid her, and she told me, 'You can't go because first,' she said . . . .
>
> Hernandez: [INT] But it's not, . . . it's not the attorney's decision. Like I just told you, those are your rights. If you want to talk to me about the case, I can discuss it with you.
>
> Orellana: Well, yeah. That's what I wanted to talk about, but ---
>
> Hernandez: YEAH. Bef- Okay. 'Well, yeah?' Is that the answer? 'Well, yeah.'

Pet. App. J 88-89.

Three times, Orellana tried to communicate to Hernandez that he wanted the attorney he had already paid for. Pet. App. L 188, 203-04. Twice, he was prevented by Hernandez's interruptions. Pet. App. J 87 ("[INT] And did I say that you had no problems?"); *id.* ("[INT] But it's not, . . . it's not the attorney's decision."). Hernandez, having been contacted directly by the attorney, should have reasonably known Orellana wanted his counsel's presence during the interrogation. Pet. App. L 179.

Hernandez's manner and words communicated to Orellana that he did not need an attorney and that Orellana should speak to her without one. Pet. App. L 191. This undermined the clarity of the *Miranda* warnings and interfered with Orellana's understanding of his Fifth Amendment right, in violation of *Miranda*. The combination of the lawyer's communication and Orellana's words during the custodial interrogation were sufficient for a reasonable police officer to understand Orellana wanted his attorney present during questioning. *See United States v. Santistevan*, 701 F.3d 1289, 1293 (10th Cir. 2012). As the Ninth Circuit has previously concluded, "Why would [Hernandez] need to talk to [Orellana] out of an attorney if [s]he hadn't understood that [Orellana] wanted an attorney?" *Sessoms v. Grounds*, 776 F.3d 615, 629 (9th Cir. 2015). It was an unreasonable application of *Miranda* and *Edwards* for the California Court of Appeal to conclude otherwise. *See id.*

2. The admission of Orellana's custodial statement was not harmless

The court of appeal did not reach the issue of harmlessness. Accordingly, this Court may determine the question with a straight-forward application of the harmless error standard under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

Under *Brecht*, an error is not harmless if it has a "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The State, not Orellana, bears the "risk of doubt" in harmless-error analysis. *Valerio v. Crawford*, 306 F.3d 742, 762 (9th Cir. 2002) (en banc); *see O'Neal v. McAninch*, 513 U.S. 432, 435 (1995) (If "the matter is so evenly balanced that [the judge] feels himself in virtual equipoise as to the harmlessness of the error" the judge "should treat the error . . . as if it affected the verdict."). To meet this burden, the State must provide this Court with a "fair assurance" that there was no substantial and injurious effect on the verdict. *Valerio*, 306 F.3d at 762.

The admission of an inculpatory custodial statement is rarely harmless. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("[T]he defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."). Here, the statements attributed to Orellana in the English translation of his custodial statement were highly prejudicial.

His first admission, "it's not gonna happen again," Pet. App. F 68-69; Pet. App. J 91, was likely viewed by the jury as an admission that the behavior had occurred in the past. But Orellana never used the word Spanish term for "again"—

"otra vez." Pet. App. J 91. The translation of the custodial interview puts that word in Orellana's mouth, rendering its admission all the more harmful to the fairness of his criminal trial.

Later in the custodial interrogation, Orellana agreed with Hernandez that he "made a mistake." Pet. App. J 109. He three times described "an impulse." Pet. App. J 112-13. Although these statements lack clarity, their vagueness allowed the jury to believe Orellana was admitting allegations as Hernandez explained them to him—including her statement that it was "unquestionable" Orellana's saliva was found on the victim—a statement not supported by the evidence. Pet. App. F 56; Pet. App. J 102.

Orellana's statement, "maybe erotic," Pet. App. J 142, is also highly prejudicial. Hernandez interrupted him before he could explain his point in adopting that word—originally suggested by Hernandez. *Id.* The prosecution emphasized Orellana's use of the terms "impulse" and "erotic" to emphasize Orellana's guilt during closing argument, further undermining any claim the admission of the statement was harmless. Pet. App. N 298-99, 303. *See Doody v. Ryan*, 649 F.3d 986, 1022 (9th Cir. 2011) (holding that the prosecution's emphasis of the statements in closing and rebuttal arguments reflected the importance of the statements to the conviction); *Arnold v. Runnels*, 421 F.3d 859, 869 (9th Cir. 2005) ("Where the prosecutor specifically emphasizes in his opening statement and his closing argument evidence admitted in violation of a defendant's Fifth Amendment rights, we cannot say that evidence had no substantial influence upon the jury.").

Here, no physical evidence corroborated the charges, Pet. App. F 56, rendering Orellana's statements during interrogation particularly important for the State to meet its burden to prove the charges beyond a reasonable doubt. Despite the ambiguity of Orellana's custodial statements, the prosecutor also argued that Orellana's testimony denying wrongdoing involved "a deliberate lie" because it was not consistent with his custodial statements. Pet. App. N 301.

The error cannot be deemed harmless. *Rodriguez v. McDonald*, 827 F.3d 908, 926 (9th Cir. 2017) (holding the admission of a custodial statement was not harmless where there was no physical evidence inculpating the defendant, the statement was emphasized in argument, and the jury expressed doubt about the validity of the confession); *Jones v. Harrington*, 829 F.3d 1128, 1142 (9th Cir. 2016) (holding that the "prejudice from a defendant's confession 'cannot be soft-pedaled'" where the prosecutor argued the jury could convict on the confession alone (quoting *Anderson v. Terhune*, 516 F.3d 781, 792 (9th Cir. 2008))); *Garcia v. Long*, 808 F.3d 771, 782 (9th Cir. 2015) (holding admission of a custodial statement was not harmless, despite the victim's "detailed and powerful" testimony, where the entire statement was played to the jury, emphasized in argument, and the charges uncorroborated by physical evidence).

VI. CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

DATED: February 18, 2020

By: _____
Tracy Casadio*
Deputy Federal Public Defender
Attorneys for Petitioner
JUAN ORELLANA
**Counsel of Record*

INDEX TO APPENDICES