No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSHUA CHIAZOR EZEKA,

Petitioner,

v.

STATE OF MINNESOTA

Respondent.

On Petition for Writ of Certiorari to the Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Fifth Amendment, in coordination with *Miranda v. Arizona*, requires police officers to notify suspects of their right to remain silent and their right to counsel at the outset of a custodial interrogation. Minnesota police officers subjected Petitioner to two separate custodial interrogations and failed, in both instances, to provide Petitioner with a *Miranda* warning at the outset of the interrogations. Should Petitioner's custodial statements be suppressed?

II. The Sixth Amendment protects a criminal defendant's right to have counsel present at all important stages of proceedings, and this right attaches upon the initiation of adversarial judicial proceedings against the defendant. Minnesota formally charged Petitioner with second-degree intentional murder and subsequently subjected Petitioner to custodial interrogation without counsel present and without obtaining a waiver of Petitioner's Sixth Amendment right to counsel. Should Petitioner's custodial statements be suppressed?

III. Minnesota uses *United States v. Olano*'s "clear or obvious" test to determine whether a trial court's issuance of an erroneous jury instruction constitutes "plain error" under state law. Minnesota acknowledged that, in Petitioner's case, the trial court issued an erroneous instruction, but determined the error was not "plain" because it was not "clear and obvious." Is Minnesota's use of a "clear and obvious" test repugnant to the Constitution or laws of the United States?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

1. Minnesota Supreme Court

Docket number: A18-0828

State of Minnesota
v.
Joshua Chiazor Ezeka

Judgment was entered on Petitioner's appeal on July 15, 2020.

2. Minnesota District Court

Docket number: 27-CR-17-1879

State of Minnesota
v.
Joshua Chiazor Ezeka

Judgment was entered on February 26, 2018.

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OPINIONS BELOW

The published memorandum opinion of the Minnesota Supreme Court (App. 1-52) is reported at *State v. Ezeka*, 946 N.W.2d 393 (Minn. 2020). The verdict of the jury, finding Petitioner guilty, is unreported. App. 53-77.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on July 15, 2020. The jurisdiction of this Court rests upon 28 U.S.C. § 1257(a) and 28 U.S.C. § 1331.

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Pertinent provisions, listed below, are provided below:

Fifth Amendment to the Constitution

> No person… 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…

Sixth Amendment to the Constitution

> In all criminal prosecutions, the accused shall enjoy the right… to have the Assistance of Counsel for his defence.

Minn. Stat. § 609.185. Murder in the first degree.

> **(a)** Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life:
>
> > **(1)** causes the death of a human being with premeditation and with intent to effect the death of the person or of another; …

Minn. Stat. § 609.19. Murder in the second degree.

> **Subdivision 1. Intentional murder; drive-by shootings.** Whoever does either of the following is guilty of murder in the second degree and may be sentenced to imprisonment for not more than 40 years:

> **(1)** causes the death of a human being with intent to effect the death of that person or another, but without premeditation; …

Minn. Stat. § 609.05. Liability for crimes of another.

> **Subdivision 1. Aiding, abetting; liability.** A person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime. …

Minn. Stat. § 609.17. Attempts.

> **Subdivision 1. Crime defined.** Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime, and may be punished as provided in subdivision 4. …

STATEMENT OF THE CASE

On June 2, 2016, Petitioner was subjected to custodial interrogation in relation to a homicide investigation. Petitioner immediately and unequivocally invoked his right to counsel. The police investigators ignored Petitioner's request for counsel and proceeded to interrogate Petitioner for more than half an hour in an extremely confrontational manner. Petitioner was released from custody on June 24, 2016.

On January 23, 2017, Petitioner was formally charged with second-degree intentional murder. Later that day, Petitioner was arrested by police at gunpoint and subjected to custodial interrogation without an attorney present. The police never obtained an oral or written waiver of Petitioner's right to counsel under the Sixth Amendment. During this interrogation, the police officers deliberately elicited information, in the form of a confession, from Petitioner. The police officers who

interrogated Petitioner on January 23, 2017 were the same officers who interrogated him and ignored his request for counsel on June 2, 2016.

The police did not notify Petitioner that he had the right to remain silent and the right to an attorney at the outset of the custodial interrogation, providing these warnings only after subjecting Petitioner to 13 minutes of intense adversarial questioning. After finally providing Petitioner a *Miranda* warning, the police cryptically asked Petitioner if he would waive his *Miranda* rights by way of a compound question, asking, "wanna talk to us, see some of these pictures and kind of get the, get through this thing today with us…?" App. 111 (Petitioner responded by saying "Yeah I wanna see"). The police did not obtain a *clear* waiver of Petitioner's *Miranda* rights and inhibited Petitioner's ability to voluntarily and knowingly waive his *Miranda* rights by asking whether Petitioner wanted to "talk" and "see some… pictures" instead of asking whether Petitioner was voluntarily waiving his *Miranda* rights. "[T]here was virtually no pause between the reading of *Miranda* and the post-*Miranda* interrogation," despite Petitioner having made an "inculpatory statement" to police during the custodial interrogation immediately before he was provided a *Miranda* warning. App. 88-89.

Almost immediately after Petitioner was provided a *Miranda* warning, he confessed to killing someone. At the time of this confession, Petitioner's will was overborne by the police's coercive tactics. Although the investigators indicated during the custodial interrogation that Petitioner's honesty would result in prosecutorial

leniency, Petitioner's confession was instead used by the prosecution to elevate Petitioner's charges from second-degree intentional murder (carrying a maximum sentence of 40 years) to first-degree premeditated murder (carrying a maximum sentence of life without the possibility of parole). The prosecution also sought aggravated sentencing.

Petitioner moved the trial court to suppress all of his custodial statements. The trial court suppressed all of Petitioner's June 2, 2016 custodial statements, but the trial court denied Petitioner's request to suppress his custodial statements from January 23, 2017, thereby rendering Petitioner's trial a nullity.[1] Petitioner was never offered a plea deal.

Petitioner was eventually tried by a jury and was convicted of first-degree premeditated murder, attempted first-degree premeditated murder, and second-degree assault.[2]

Petitioner was then sentenced to, *inter alia*, life without the possibility of parole. *Supra* at 4 n.1. Errors abounded during both the pretrial and trial stages of Petitioner's proceedings, but no mistrial was ever declared. The trial court failed to suppress evidence that should have been suppressed, relied on evidence it had no

[1] All statements in this petition to the effect of "Petitioner's custodial statements must be suppressed" are in reference to the custodial statements Petitioner made on January 23, 2017 since the June 2, 2016 statements were properly suppressed by the trial court.

[2] Petitioner was sentenced to 240 months for the attempted murder count and 36 months on the assault count, both to be served consecutively. Petitioner challenges the constitutionality of these convictions and sentences on the same grounds he challenges his premeditated murder conviction and sentence. If a new trial is ordered, Petitioner requests the order be applicable to all counts for which Petitioner was convicted, and not just for the premeditated murder count.

right to consider, issued plainly erroneous and prejudicial jury instructions, and otherwise allowed a miscarriage of justice to occur.

Petitioner appealed to the Minnesota Supreme Court, challenging the trial court's refusal to suppress Petitioner's custodial statements. Petitioner also appealed the issuance of plainly erroneous jury instructions, the jury's guilty verdict, and portions of the trial court's sentence. *See* App. 90.

The Minnesota Supreme Court, though deeply divided, ultimately affirmed the jury verdict by the razor-thin margin of 4-to-3 with two dissenting justices writing separately and persuasively. *See Ezeka*, 946 N.W.2d at 410-423. The dissenting justices concluded that Petitioner's confession was "obtained using unconstitutional coercive custodial interrogation methods." *See* 946 N.W.2d at 410 (Anderson, J., dissenting); *id.* at 416 (Hudson, J., joining Justice Anderson's dissent); *id.* at 416 (Thissen, J., dissenting) ("I disagree with the majority of the court that Ezeka's confession was voluntary. I conclude that his confession was the result of improper and unconstitutional police coercion."). The dissenting justices are convinced Petitioner deserves a new trial.

Petitioner is not asking for a judgment of acquittal; he merely requests fundamental fairness.

I. June 2, 2016 – Interrogation #1

> On June 2, 2016, police investigators conducted a custodial interrogation of [Petitioner]. During the interrogation, [Petitioner] invoked his right to counsel under Article I, Section 7 of the Minnesota

> Constitution and the Fifth Amendment to the United States Constitution. **The investigators disregarded the invocation and continued to question [Petitioner]. Throughout the interrogation, [Petitioner] maintained that he was not involved in the shooting.** [Petitioner] was released from custody 22 days later, on June 24, 2016.

Ezeka, 946 N.W.2d at 398-99 (emphasis added). A video of this encounter clearly shows that both police officers read the letter in which Petitioner requested counsel. *See* App., *Video of Custodial Interview* (June 2, 2016) (11:13:44 AM to 11:14:33 AM and 11:18:40 AM to 11:19:14 AM). Despite this, the officers continued to interrogate Petitioner instead of immediately ending the interview. *E.g.*, App. 82-83, 85-86. Petitioner's written request for counsel was filed into evidence as Exhibit 6. App. 91. Petitioner was released from custody on June 24, 2016. *Ezeka*, 946 N.W.2d at 398.

The trial court properly determined that this letter constituted a "clear and unequivocal request for counsel" and consequentially suppressed all statements made by Petitioner during this initial interrogation. *E.g.*, *Ezeka,* 946 N.W.2d at 400 n.2; App. 85-86. The trial court also noted that any waiver of Petitioner's *Miranda* rights (regarding the homicide) could not have been knowing and voluntary, as Petitioner only indicated that he was willing to talk to the police officers about the probation violation that initially landed him in custody. App. 86.

II. January 23, 2017 – Interrogation #2

On January 23, 2017, the State e-filed a criminal complaint charging Petitioner with second-degree intentional murder. *See Ezeka*, 946 N.W.2d at 398; App. 164-67. A state judge then made a positive probable cause determination and

issued a warrant for Petitioner's arrest, thereby initiating adversarial judicial proceedings. App. 167; Minn. R. Crim. P. 2.01. On January 23, 2017, after adversarial judicial proceedings had commenced, "police arrested [Petitioner] at gunpoint and transported him to the Hennepin County Jail." *Ezeka*, 946 N.W.2d at 398. Petitioner was brought to the station and was "interrogated in the same room and by the same investigators as the June 2016 interrogation" without an attorney present. *Id.* This interrogation was aptly, but incompletely, summed up by the Minnesota Supreme Court:

> The investigators greeted Ezeka… then asked if Ezeka remembered the earlier interrogation. Ezeka said he did. The first investigator told Ezeka they had "some additional questions." He explained that they had talked "to a lot of people," they knew "what happened," and they believed it "wasn't an intentional act on [his] part." **In response to these statements, Ezeka said, "I didn't do it."**
>
> The investigators then discussed the evidence against Ezeka. They explained the charges and the fact that Ezeka was facing 60 years in prison. When Ezeka said, "It's a long time," the second investigator replied, "it's a long time, you're too young for this." **The first investigator then said, "Before we start showing you any of these pictures [from our file] and talking about that, um, we gotta read you your rights." But before the first investigator could proceed, the second investigator interjected that drive-by shootings directed at Ezeka's house might end if he talked.** Expressing disbelief, Ezeka asked how an admission would stop the shootings. The first investigator told Ezeka that … with some answers, maybe some explanations here, maybe that stuff will stop."
>
> After reminding Ezeka that he was facing 60 years in prison, the second investigator said, "The prosecutor, I think will entertain an explanation of what happened." **Ezeka then asked, "So, about this person that's in this gold car that I shooting at, what's his name, you said, Sto?" When the first investigator repeated the name "Sto," Ezeka replied, "[w]ho told you guys that?" After explaining that he could not disclose the names of witnesses, the**

> **first investigator read Ezeka the *Miranda* warning. The pre-*Miranda* portion of the January 2017 interrogation lasted 13 minutes.**

Ezeka, 946 N.W.2d at 399 (emphasis added); *see generally* App., *Video of Custodial Interview* (Jan. 23, 2017).

The trial court denied Petitioner's motion to suppress his January 23, 2017 custodial statements despite acknowledging that Petitioner "was apprehended under coercive circumstances" and made an "incriminating statement" during a custodial interrogation before being given a *Miranda* warning. App. 89. In denying Petitioner's motion to suppress these statements, the trial court impermissibly placed the burden of proving Petitioner's statements were involuntary on Petitioner instead of insisting the State prove Petitioner's statements were not involuntary. *See* App. 88; *see Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

III. Minnesota's Failure to Suppress Petitioner's Custodial Statements Violates the Constitution

A. Minnesota's Failure to Suppress Petitioner's Custodial Statements Violates Petitioner's Fifth Amendment Rights

The Fifth Amendment applies to the states by virtue of the Fourteenth Amendment and provides, "[n]o person ... shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V; *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Maryland v. Shatzer*, 559 U.S. 98, 103 (2010). "In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Court adopted a set of prophylactic measures to protect a suspect's Fifth Amendment right from the 'inherently compelling pressures' of custodial interrogation." *Shatzer*, 559 U.S. at 103 (quoting *Miranda*, 384 U.S. at 467).

"The Court observed that 'incommunicado interrogation' in an 'unfamiliar,' 'police-dominated atmosphere,' … involves psychological pressures 'which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' " *Id.* (citation omitted). "Consequently, … '[u]nless 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.* (citation omitted).

Miranda compelled police officers to warn a suspect, *prior* to questioning, that the accused has the right to remain silent, and the right to the presence of an attorney. *See Miranda*, 384 U.S. at 444. "After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease." *Shatzer*, 559 U.S. at 104 (citation omitted). If a suspect states that they want an attorney, "the interrogation must cease." *Id.* (citation omitted). A suspect's *Miranda* rights are waivable, but to establish that an accused validly waived such rights, "the State must show that the waiver was knowing, intelligent, and voluntary under the 'high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst*, 304 U.S. 458… (1938).' " *Shatzer*, 559 U.S. at 104 (citation omitted).

Here, Petitioner was subjected to custodial interrogation on June 2, 2016 and again on January 23, 2017. Petitioner requested counsel during the first interrogation, but not during the second interrogation. Petitioner's initial request for counsel was flatly ignored. *E.g.*, App. 91; *see also* App. 85. Petitioner's statements

during the first, but not second, interrogation were suppressed. Minnesota failed to establish that Petitioner made a knowing, intelligent, and voluntary waiver of Petitioner's *Miranda* rights under the high standard of proof outlined in *Johnson v. Zerbst*, 304 U.S. at 464-65, and the State erred by determining that Petitioner bore the burden of proving his waiver was involuntary. *See* App. 87 (refusing to consider whether the alleged *Miranda* waiver from January 23, 2017 was made knowingly and voluntarily because "Defendant has not argued that the waiver of his rights was invalid."). After reviewing the video and transcript of the January 23, 2017 interrogation, no reasonable jurist can conclude that Petitioner made a knowing and voluntary waiver of his *Miranda* rights or of his Fifth Amendment right to counsel. As such, the trial court erred by failing to determine that Petitioner waived his *Miranda* rights, and the appellate court erred by refusing to correct the trial court's error. *See Ezeka*, 946 N.W.2d at 405 n.4. *Miranda* requires the suppression of Petitioner's January 23, 2017 custodial statements.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court held, "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." 451 U.S. at 484. In *Edwards*, "the Court determined that *Zerbst*'s traditional standard for waiver was not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel;

'additional safeguards' were necessary" and "therefore superimposed a 'second layer of prophylaxis,' " holding that "an accused, … 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." *Shatzer*, 559 U.S. at 104 (citations omitted); *Edwards*, 451 U.S. at 484-85. In *Maryland v. Shatzer*, 559 U.S. 98 (2010), this Court crafted a bright-line rule, clarifying that *Edwards*' umbrella of protection, relating to the availability of the accused for further interrogation and the presumption of involuntariness relating to the waiver of *Miranda* rights, expires after a "14-day… break-in-custody." 559 U.S. at 110.

Here, Petitioner invoked his right to have counsel present during a custodial interrogation on June 2, 2016. App. 85-86. Although Petitioner responded to further police-initiated custodial interrogation on that date, his custodial statements were nonetheless suppressed by the trial court because Petitioner's "clear and unequivocal invocation of his right to counsel… was not honored by the detectives." App. 86. The trial court also determined that any waiver of Petitioner's *Miranda* rights allegedly occurring on June 2, 2016 "was not a knowing waiver of his right to counsel with regard to the shooting." App. 86. On January 23, 2017, during Petitioner's second custodial interrogation, Petitioner did not immediately and without prompting request counsel as he did during the first custodial interrogation. Instead, Petitioner

fell into his interrogators' trap and began conversing with them until his will was overborne; Petitioner quickly confessed to killing an individual.

Although Petitioner's second custodial interrogation took place more than 14 days after he was released from custody, following the first custodial interrogation, Petitioner was not provided with a fresh *Miranda* warning until after he had made inculpatory statements to police. *See* App. 84, 89 (the trial court determined Petitioner made an "incriminating" or "inculpatory" statement before he was given a *Miranda* warning). As such, although the police were allowed to subject Petitioner to custodial interrogation, a valid waiver of Petitioner's *Miranda* rights during the second interrogation cannot be inferred from Petitioner's responses to police-initiated questioning, and this remains true for the post-*Miranda* portion of the interrogation. Petitioner was never allowed to confer with counsel, despite having previously requested counsel, and *Edwards*, therefore, holds that Petitioner's custodial statements from the second interrogation must be suppressed. *Edwards* further counsels in favor of finding that Petitioner's custodial statements were involuntary.

Relatedly, *Shatzer*'s 14-day break-in-custody rule, which normally acts to limit *Edwards*' scope to the 14-day post-custodial period, is inapplicable in the present context because *Shatzer* presumes that police officers will issue a *Miranda* warning at the outset of a custodial interrogation. *See Shatzer*, 559 U.S. at 109 ("The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police

interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects."). When this does not occur, as was the case here, applying *Shatzer* to limit *Edwards* has the unintended effect of defeating the underlying rationale of *Shatzer* by immunizing coercive police conduct in the absence of prophylactic measures intended to combat the deleterious effects of coercive police conduct. *Shatzer*'s judicially crafted modification of the *Edwards* rule "is justified only by reference to its prophylactic purpose, … and applies only where its benefits outweigh its costs." *Shatzer*, 559 U.S. at 106 (citations and internal quotations omitted). Because *Shatzer* is inapplicable in the present case, *Edwards* compels the suppression of Petitioner's custodial statements.

In *Minnick v. Mississippi*, 498 U.S. 146 (1990), this Court held "that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Minnick*, 498 U.S. at 153. *Minnick* qualified this holding, stating that a waiver of a suspect's Fifth Amendment protections can still be waived after counsel has been requested "provided the accused has initiated the conversation or discussion with the authorities." *Id.* at 156.

Here, Petitioner requested counsel on June 2, 2016. *Accord* App. 85-86, 91. The interrogation did not cease immediately, but Petitioner was eventually released. *See id.* On January 23, 2017, police reinitiated interrogation and questioned Petitioner

without counsel present for more than 13 minutes, thereby violating *Minnick*. *Ezeka*, 946 N.W.2d at 399. Petitioner did not initiate this conversation or discussion. *See* App. 106; *see also Ezeka*, 946 N.W.2d at 418-19 (Thissen, J. dissenting) (concluding the district court clearly erred by determining that "it was [Petitioner] who kept asking questions which delayed the reading of *Miranda*"). Instead, Petitioner responded to aggressive and accusatory pre-*Miranda* questioning until he admitted to "shooting at" an individual. *See id.* at 399; App. 84, 89; App. 110. *Minnick* counsels that Petitioner was deprived of his right to counsel under the Fifth Amendment, and indicates that Petitioner did not make an intelligent and voluntary waiver of his right to counsel, thereby casting further doubt on the voluntariness of Petitioner's custodial statements. Under *Minnick*, Petitioner's custodial statements must be suppressed.

In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), this Court noted that it has "allowed the *Miranda* right to counsel, once asserted, to be effective with respect to future custodial interrogation." *McNeil*, 501 U.S. at 182 n.3. Here, Petitioner's written invocation of his right to counsel was given to police during a custodial interrogation on June 2, 2016. Petitioner's invocation of counsel was asserted at a time and place that allowed it "to be effective with respect to future custodial interrogation." *See id.* Minnesota's failure to honor Petitioner's Fifth Amendment right to counsel on June 2, 2016, and again on January 23, 2017, justifies suppressing Petitioner's January 23, 2017 custodial statements. These dual Fifth Amendment right to counsel

violations also indicate that Petitioner's January 23, 2017 custodial statements were involuntary.

In *Oregon v. Elstad*, 470 U.S. 298 (1985), this Court held, "[f]ailure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*." *Elstad*, 470 U.S. at 307. The Court continued, stating, "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.*

During both of Petitioner's custodial interrogations, police refused to administer a *Miranda* warning promptly. *See* App. 106-11, 137-42. In each instance, the same two officers attempted to coerce a confession from Petitioner before making any attempt to inform Petitioner that he had the right to remain silent and the right to have an attorney present. *Id.* Considering that the same two police officers conducted both interrogations, the officers' conduct during the second interrogation creates an especially strong presumption of compulsion because the officers knew: (1) they could get under Petitioner's skin and coerce him into speaking more freely than he would with counsel present, and (2) Petitioner would be less likely to invoke his rights to counsel and to remain silent since his prior invocations were ignored by the same officers now questioning him again. *See Elstad*, 470 U.S. at 307; App., *Video of*

Custodial Interview (June 2, 2016) (11:13:44 AM to 11:19:14 AM; ignoring *Miranda* rights); *id.* (11:50:30 AM to 11:56:40 AM; ordering Petitioner to "stand in the corner" and harassing Petitioner by forcing him to take pictures against his will while handcuffed); *Ezeka*, 946 N.W.2d at 420-21 (Thissen, J., dissenting).

Under *Elstad*, it is necessary to exclude the entire first 13 minutes of Petitioner's second custodial statement *even if* this portion of the custodial statement was voluntary, which Petitioner disputes. *See Elstad*, 470 U.S. at 307; App., *Video of Custodial Interview* (Jan. 23, 2017) (1:51:52 PM to 2:05:33 PM; pre-*Miranda* portion of interrogation). Similarly, the entirety of Petitioner's post-*Miranda* admissions must also be suppressed under *Elstad* because such statements flowed from Petitioner's pre-*Miranda* statements, without any break or lull in questioning, and these facts, in combination with the coercive circumstances under which Petitioner was apprehended and questioned, render Petitioner's statement involuntary under this Court's Fifth Amendment jurisprudence. *See* App. 88 (holding Petitioner was apprehended under coercive circumstances and "there was virtually no pause between the reading of *Miranda* and the post-*Miranda* interrogation"); App., *Video of Custodial Interview* (Jan. 23, 2017) (2:05:33 PM to 2:05:45 PM).

In *Davis v. North Carolina*, 384 U.S. 737 (1966), this Court provided, "that a defendant was not advised of his right to remain silent or of his right respecting counsel at the outset of interrogation, as is now required by *Miranda*, is a significant factor in considering the voluntariness of statements later made. This factor has been

recognized in several of our prior decisions dealing with standards of voluntariness." *Davis*, 384 U.S. at 740-41 (citations omitted).

Here, police investigators did not advise Petitioner of his right to remain silent or of his right to counsel at the outset of either custodial interrogation, as is required by *Miranda*. Under *Davis*, this failure on the part of the police, not once but twice, constitutes two significant factors (or perhaps one extremely significant factor) in considering the voluntariness of Petitioner's later statements, in which he confessed to accidentally killing someone. The trial court's failure to analyze this extremely significant factor is repugnant to the Constitution and the laws of the United States. *See* App. 87-89. The Minnesota Supreme Court compounded this error by relying on *Davis* to hold that the second custodial interrogation was permitted because Petitioner failed to unambiguously and unequivocally request counsel while simultaneously ignoring the coercive effects, elucidated by *Davis*, of failing to provide a *Miranda* warning at the outset of interrogation. *See Ezeka*, 946 N.W.2d at 402-07. *Davis* counsels in favor of finding that Petitioner's custodial statements were involuntary. As such, Petitioner's custodial statements must be suppressed.

In *Missouri v. Seibert*, this Court acknowledged that "when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.' " *Missouri v. Seibert*, 542 U.S. 600, 613-14 (2004) (quoting *Moran v. Burbine*, 475 U.S.

412, 424 (1986)). This is precisely what occurred during Petitioner's second custodial interrogation. *See* App. 88 ("he was arrested at gunpoint by six officers in his girlfriend's bedroom… there was virtually no pause between the reading of *Miranda* and the post-*Miranda* interrogation"); App. 111 (evidencing that Petitioner gave absolutely no thought to the nature of his *Miranda* rights or the consequences of abandoning them after being given a *Miranda* warning amid a coordinated and continuing interrogation, and showing that the detectives asked whether Petitioner wanted to waive his *Miranda* rights in a manner likely to mislead the defendant).

The *Seibert* Court noted, "it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle." *Seibert*, 542 U.S. at 614.

The *Seibert* Court also acknowledged the existence of "[t]he technique of interrogating in successive, unwarned and warned phases." *Id.* at 609. Specifically, the Court stated:

> Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that **the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked.** … Consistently with the officer's testimony, **the Police Law Institute, for example, instructs that "officers may conduct a two-stage interrogation.... At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to**

> **repeat any *subsequent* incriminating statements later in court."** Police Law Institute, Illinois Police Law Manual 83 (Jan. 2001–Dec. 2003) (available in Clerk of Court's case file) (hereinafter Police Law Manual) (emphasis in original). The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.

Id. at 609-11 (citation to appendix omitted) (bold emphasis added); *see also id.* at 611 n.3 (collecting cases showing the question-first policy in action). The *Seibert* Court found that "[t]he object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 611.

In Petitioner's case, the investigating officers utilized the question-first technique " 'to disable [Petitioner] from making a free and rational choice' about speaking." *See id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 464-65 (1966)). Once Petitioner was speaking, the officers repeatedly teased him with evidence, and then tied their intended question—*i.e.*, whether Petitioner would voluntarily waive his *Miranda* rights—to the question of whether Petitioner wanted to review the evidence against him. *See* App. 106-35; *see also* App. 83 ("Sgt. Thomsen read Defendant his *Miranda* rights after several minutes of conversation."). The officers did this by asking whether Petitioner would waive his *Miranda* rights via a verbal compound question. App. 111; *see United States v. Littlejohn*, 489 F.3d 1335 (D.C. Cir. 2007) (discussing the dangers of compound questions at length and ultimately concluding

that, under the circumstances of the case, the district court's compound question during voir dire "violated the Sixth Amendment").

Had the officers initially advised Petitioner of his right to counsel, Petitioner may have realized his attorney could get him all of the evidence the officers could possibly show him during the custodial interrogation. This is especially true since Petitioner had already been formally charged, thereby initiating an adversarial judicial process, and triggering the State's duties to disclose its evidence to Petitioner. Had the officers advised Petitioner of his right to remain silent, he may have invoked his right to remain silent instead of conversing with the officers and falling into their coercively laid trap. Had the officers asked Petitioner to sign a written waiver of his *Miranda* rights instead of asking a compound and casual question about whether Petitioner would "talk," Petitioner may have invoked his rights instead of waiving them (assuming *arguendo* a valid waiver actually occurred). *See Littlejohn*, 489 F.3d at 1337, 1340-48 (discussing compound questions). Any of these outcomes would have prevented Petitioner's involuntary confession.

On January 23, 2017, police officers interrogated Petitioner for 13 minutes before finally reading Petitioner a *Miranda* warning. *E.g.*, *Ezeka*, 946 N.W.2d at 399. Before the reading of a *Miranda* warning, police officers badgered Petitioner, telling him, *inter alia*:

> [I]f you could explain to us what happened and give us some explanation about what happened… **[it] is gonna go a long way for you**… We're giving you opportunity Josh. **This might be your only opportunity**

> **to talk about this because… they might not put you on the stand because, they can bring up a bunch of old shit, so this might be your only opportunity to get your story out.**

App. 107 (emphasis added). The police officers insinuated that Petitioner was behaving as if he was guilty, stating, "I can sense you, I can sense you're being remorseful right now. I can sense that Josh…." App. 109. The police officers mentioned the names of the people who Petitioner was allegedly shooting at. *See* App. 108 (mentioning "Sto").

The detectives gave Petitioner bad legal advice by insinuating that this was the only chance he would have to tell his story, and by indicating a confession may lead to prosecutorial leniency. *Ezeka*, 946 N.W.2d at 411 (Anderson, J., dissenting) ("The investigators provided Ezeka with the false legal advice that speaking with them might be Ezeka's 'only opportunity to get [his] story out' because he might be barred from testifying at trial. This conduct by the investigators is troubling because 'giving false legal advice' is one of the deceptive stratagems that contributes to the coercive nature of custodial interrogations.") (citing *Miranda*, 384 U.S. at 455) (footnote omitted); *Ezeka*, 946 N.W.2d at 412 (Anderson, J., dissenting) ("the investigators also suggested that an admission could lead to leniency from the prosecutor"); App. 106-111.

Justice Thissen also noted and took issue with the coercive conduct of the police officers, stating:

> **The same investigators who interrogated Ezeka in January 2017 blatantly ignored a plain request to remain silent and**

> **speak to a lawyer during the June 2016 interrogation**; … immediately prior to the January 2017 interrogation, Ezeka was apprehended after six officers with guns drawn entered his girlfriend's bedroom where he and his girlfriend were together; the police failed to immediately give Ezeka a *Miranda* warning at the beginning of the January 2017 interrogation; and **multiple times during the January 2017 interrogation one investigator refused to allow the other investigator to read Ezeka his *Miranda* rights, including at least one instance where the investigator expressly waived off the *Miranda* rights.** Notably, the district court expressly found that one investigator "appeared anxious to keep [Ezeka] from saying anything substantive about the case until the *Miranda* warning had been read." But the warning kept being delayed. **That is simply impermissible conduct.**

Ezeka, 946 N.W.2d at 420 (Thissen, J., dissenting) (emphasis added) (footnote omitted). Justice Thissen continues, stating:

> Based on those experiences, Ezeka argues, he had no reason to believe that the investigators would honor a future request to speak with a lawyer or a refusal to talk to police. Stated another way, **Ezeka argues that he perceived the promise that the investigators would allow him to remain silent to be meaningless because, based on his relevant and immediate experience, the investigators simply would not honor that right and would continue to interrogate him until he confessed. If true**, **that is unquestionably a coercive interrogation; indeed, it is the definition of one.**

Id. (emphasis added). In light of these coercive pressures, Justice Thissen concluded "that the State did not carry its burden of proving that, under the circumstances just described, Ezeka was not deprived of his ability to make an unconstrained and *wholly autonomous* decision to speak." *Id.* (alteration in original) (citation omitted). Justice Thissen supported this conclusion, stating:

> In this case, during those 13 [pre-*Miranda*] minutes, the investigators—the same investigators who had completely ignored Ezeka's right to remain silent and to counsel just months before—

> refused multiple times to provide a *Miranda* warning, ignoring the underlying constitutional promises that an individual will not be forced by the State to testify against himself. In that broader context of his prior experiences, Ezeka likely would feel isolated and hopeless; a fact the investigator played upon by delaying and waving off efforts to inform Ezeka of his constitutional rights.
>
> The investigators easily could have read Ezeka his *Miranda* rights at the start of the custodial interrogation. Had the officers done so, the course and experience of the interrogation would have been different. The State offers no explanation as to why the detectives failed to immediately give the warning. **Notably, in our long series of cases dealing with questions of coercion and the voluntariness of a confession, there are very few examples of a custodial interrogation where the police did not provide a *Miranda* warning before the interrogation.** Indeed, in several cases, we noted that the suspect was advised multiple times of his *Miranda* rights during an interrogation.

Ezeka, 946 N.W.2d at 421 (Thissen, J., dissenting) (emphasis added); *see also id.* at 422 ("The State presented—and the district court found—no evidence, either specific to Ezeka or based on broader social science research, to demonstrate that Ezeka was more likely to withstand coercive police techniques because of his history with law enforcement than another suspect without the same history.") (footnote omitted).

In response to the police officers' interrogation, and prior to the police giving Petitioner a *Miranda* warning, Petitioner involuntarily blurted out: "So about this person that's in this gold car that I shooting at, what's his name, you said, Sto?" App. 110; *see* App. 89. Petitioner's statement was an involuntary confession. App. 89 (the trial court acknowledges this statement was a "pre-*Miranda* inculpatory statement"); App. 110 (The investigators did not inform Petitioner that his pre-*Miranda* confession could not be used against him, and Petitioner had no reason to believe that this

confession would not later be admissible). Because Petitioner's initial confession occurred before the issuance of a *Miranda* warning, the trial court and Minnesota Supreme Court violated this Court's precedent by failing to suppress Petitioner's unwarned admission. *See Elstad*, 470 U.S. at 307; *see also* App. 88-89.

Similarly, because the police officers who interrogated Petitioner did not advise Petitioner of his right to remain silent or of his right to counsel at the *outset* of the custodial interrogation on January 23, 2017, the trial court's statement—that it "is not persuaded that any of the detectives' statements to [Petitioner] prior to the giving of the *Miranda* warning were so coercive that [Petitioner]'s will was overborne at the time he made his confession"— is repugnant to this Court's precedent set forth in *Miranda*, *Davis*, *Edwards*, *Elstad*, and *Seibert*. *See* 28 U.S.C. § 1257.

The trial court paid no regard to *Davis* or *Elstad*, and this is demonstrated by the trial court's failure to acknowledge that a *Miranda* violation is a significant factor pointing towards Petitioner's confession being involuntary. Likewise, a majority of the Minnesota Supreme Court failed to recognize the meaningful parallels between the facts of *Seibert* and Petitioner's case. *See Ezeka*, 946 N.W.2d at 422-23 (Thissen, J., dissenting) (juxtaposing the facts of *Seibert* with those of Petitioner's case). Consequently, Minnesota's decision in Petitioner's case is contrary to this Court's clearly established precedent; Minnesota was confronted with a set of facts in Petitioner's case that is materially indistinguishable from this Court's *Seibert* decision, but Minnesota nevertheless arrived at a different result than this Court's

precedent. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000) ("A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.").

For all these reasons, Minnesota's legal conclusions regarding the suppression or voluntariness of Petitioner's incriminating custodial statements are repugnant to the Constitution or the laws of the United States. The State's judicial decisions must be vacated, and the State must be ordered to provide Petitioner a new trial that accords with Petitioner's constitutional rights.

B. The Admission of Petitioner's Confession Violates Petitioner's Right to Counsel Under the Sixth Amendment

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. Const., amend. VI. This Court's cases "have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984). Importantly, "the right to counsel [under the Sixth Amendment] does not depend upon a request by the defendant." *Brewer v. Williams*, 430 U.S. 387, 404 (1977) (citations omitted).

In *Gouveia*, the Court also acknowledged:

> Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, … we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the

> procedural system, or by his expert adversary, or by both," … in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality."

Gouveia, 467 U.S. at 189 (citations omitted).

Here, Petitioner was interrogated by police on the same day that charges were filed against him by the prosecution, thereby *initiating* adversary judicial proceedings. *See Ezeka*, 946 N.W.2d at 399. The time stamps on the initial complaint and the video of Petitioner's custodial interrogation confirm that proceedings commenced before Petitioner's custodial interrogation. *Cf.* App. at 167 (judge found probable cause and issued an arrest warrant at 9:43 AM on Jan. 23, 2017) *with* App., *Video* (Jan. 23, 2017) (custodial interrogation begins at 1:46 PM on Jan. 23, 2017); Minn. R. Crim. P. 2.01 (criminal proceedings commence upon a judge's determination that sufficient probable cause exists, following the filing of a complaint, to charge a defendant with an offense). On January 23, 2017, Petitioner was confronted, just as he would be at trial, by his expert adversary, who used the procedural system against him to coerce an involuntary confession.[3] *See* App. 109, 110. Petitioner confessed immediately after this confrontation, thereby rendering the trial itself a mere formality. *See id.* at 110-15.

[3] Q: "… This is something we could've just had you arrested and booked you in jail on your warrant and then you have your first appearance and all that stuff. This is kind of your opportunity to tell your side because right now it's everybody else telling what, what happened to them but they're also telling what Josh did or saying why Josh did it. But this is something you wanna speak on your own behalf. This is your opportunity. … The prosecutor, I think will entertain an explanation of what happened…"

Under these circumstances, the Sixth Amendment's right to counsel, as interpreted by *Gouveia* and its predecessors, compels the suppression of Petitioner's custodial statements made on January 23, 2017. *Accord United States v. Wade*, 388 U.S. 218, 224 (1967); *United States v. Ash*, 413 U.S. 300, 310 (1973); *Fellers v. United States*, 540 U.S. 519 (2004) (holding that "the Court of Appeals erred in holding that the officers' actions did not violate the Sixth Amendment standards established in *Massiah*… and its progeny" because "the officers in this case 'deliberately elicited' information from petitioner… after petitioner had been indicted, outside the presence of counsel, and in the absence of any waiver of petitioner's Sixth Amendment rights") (citing *Massiah v. United States*, 377 U.S. 201, 206 (1964)). By failing to suppress Petitioner's custodial statements, Minnesota violated Petitioner's Sixth Amendment right to counsel. *See generally Brewer*, 430 U.S. at 401 ("once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.") (citation and footnote omitted).

Minnesota made no effort to prove that Petitioner "intentional[ly] relinquish[ed] or abandon[ed] [his] known" Sixth Amendment right to have counsel present at all critical stages of proceedings, including his post-charging interrogation, and Petitioner never voluntarily relinquished or abandoned his Sixth Amendment rights. *See id.* at 404 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

i. Exhaustion and Plain Error Review

Unfortunately, the Sixth Amendment violation in Petitioner's case was never spotted by Petitioner's trial or appellate counsel, ostensibly due to the myriad other constitutional problems Petitioner's case presented. It may therefore be argued that Petitioner procedurally defaulted his Sixth Amendment claims by failing to bring them to the attention of the state trial or appellate courts. However, such a holding would offend every notion of fundamental fairness, especially in a case such as this one which involves a sentence of life without the possibility of parole.

Minnesota's failure to suppress Petitioner's custodial statement in accordance with the mandates of the Sixth Amendment is reviewable for plain error notwithstanding Petitioner's counsels' failure to bring the issue to the attention of the state courts. *E.g.*, *United States v. Olano*, 507 U.S. 725, 734 (1993); Fed. R. Crim. P. 52(b); Fed. R. Crim. P. 1(a) (Fed. R. Crim. P. 52(b) applies "in all criminal proceedings in the… Supreme Court of the United States."); *see also Terminiello v. Chicago*, 337 U.S. 1 (1949) (the Court reversed a state criminal conviction on a ground not urged in state court, nor even in this Court); *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3 (1974) (the Court summarily reversed a state criminal conviction on the ground, not raised in state court, or here, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment and noted that it possessed the discretion to ignore the failure to raise in state court the question on which it decided the case before the Court).

This issue is appropriate for plain error review because it raises a purely federal question entirely dependent on the Sixth Amendment of the Constitution. Review by this Court, for plain error, is proper because the issue presented relates to a federal constitutional error and does not implicate any error of state law.

Additionally, Petitioner's Sixth Amendment right to counsel claim is simply an enlargement of Petitioner's arguments lodged in the state courts regarding Petitioner's right to counsel under the Fifth Amendment and the necessity of suppressing Petitioner's custodial statements. As such, an adequate record exists to allow for meaningful review. *See Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). Because the circumstances surrounding Petitioner's right to counsel have been adequately fleshed out in the lower courts, and because Petitioner does not seek to expand any constitutional rights, review by this Court is appropriate. *See id.* at 438-39; *see also United States v. Atkinson*, 297 U.S. 157, 160 (1936) ("In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors…"). Similarly, Petitioner has argued throughout that he was deprived of his constitutional right to counsel; counsels' failure to specify the Sixth Amendment version of this right does not render review by this Court impracticable.

ii. The State's Failure to Suppress Petitioner's Custodial Statements Constitutes Reversible Error

Because Petitioner was subjected to custodial interrogation after being formally charged, and because he never waived his Sixth Amendment right to

counsel, and because the January 23, 2017 custodial interrogation during which police officers deliberately elicited information from Petitioner was a critical stage of proceedings, the State's failure to suppress Petitioner's statements from that custodial interview was an error. *See Olano*, 507 U.S. at 734.

This Court's jurisprudence regarding the Sixth Amendment's right to counsel provides strong support for the conclusion that this error was clear or obvious. *See id.*; *e.g.*, *Fellers*, 540 U.S. at 523-24.

This clear or obvious error affected Petitioner's substantial rights. But for the State's failure to suppress Petitioner's January 23, 2017 custodial statements, the charges lodged against Petitioner would never have been elevated from intentional (second-degree) murder to premeditated (first-degree) murder; but for Petitioner being charged with premeditated murder, he could not have possibly been sentenced to more than 40 years of imprisonment for the murder. *E.g.*, Minn. Stat. § 609.19. Tangentially, had the State properly suppressed Petitioner's custodial statements, it is more likely than not the State would have offered Petitioner a fair plea deal for second-degree murder instead of insisting on a trial (the State never offered a plea deal). The severe consequences that flowed from the error of admitting Petitioner's custodial statements in violation of Petitioner's Sixth Amendment rights prove beyond a shadow of a doubt that Petitioner's substantial rights were affected.

Because Petitioner has established that a plain error has occurred, this Court has the discretion to consider the aforementioned Sixth Amendment violation if it

determines that the failure to do so would result in a miscarriage of justice. *E.g.*, *Olano*, 507 U.S. at 736. An exercise of discretion under Rule 52(b) is warranted if the plain error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Id.* (citation omitted). "An error may 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* at 736-37.

Petitioner is actually innocent of premeditated murder, and his custodial statements indicate he may also be innocent of *intentional* second-degree murder. *See* App. 113 ("I didn't intend to kill nobody, I intend to scare this person…"). Petitioner denies intending to shoot anyone; he told police that he was only trying to scare someone who he thought was going to shoot up his house. *Id.* Allowing Petitioner's conviction and sentence for premeditated murder to stand would be a miscarriage of justice; this is particularly true in light of the Sixth Amendment violation that led to Petitioner's charges being upgraded from second-degree intentional murder to first-degree premeditated murder. *Cf.* App. 164-67 *with* App. 173-75. The State's failure to suppress Petitioner's custodial statements seriously affected the fairness and integrity of Petitioner's judicial proceedings. This error casts immense doubt as to whether Minnesota can prove beyond a reasonable doubt that Petitioner *intentionally* murdered anyone, much less with premeditation. If this error is allowed to stand uncorrected, the integrity and public reputation of judicial proceedings will suffer.

The Court should exercise its discretion under Rule 52(b) to review and reverse the State's erroneous failure to suppress Petitioner's custodial statements.

IV. Minnesota's "Clear and Obvious" Plain Error Test is Repugnant to the Constitution or the Laws of the United States

Under Minnesota law, "[a] defendant forfeits appellate review of a jury-instruction issue when he fails to object to the instruction in the district court." *Ezeka*, 946 N.W.2d at 407 (citation omitted). However, appellate courts "have the discretion to consider a forfeited issue if the defendant establishes (1) an error, (2) that is plain, and (3) that affects his substantial rights." *Id.* (citation omitted). "The error requirement is satisfied when the jury instructions confuse, mislead, or materially misstate the law." *Id.* An error is plain if it is "clear" or "obvious." *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002) (quoting *United States v. Olano*, 507 U.S. 724, 734 (1993)). "A defendant's substantial rights are affected when there is a reasonable likelihood that the giving of the instruction in question had a significant effect on the jury verdict." *Ezeka*, 946 N.W.2d at 407 (citation and internal quotations omitted). If all three elements are established, state appellate courts "may correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *State v. Mouelle*, 922 N.W.2d 706, 718 (Minn. 2019).

Minnesota's standard for plain error review under Minn. R. Crim. P. 31.02 is "materially indistinguishable" from Fed. R. Crim. P. 52(b)'s standards for plain error review, and Minnesota incorporates this Court's jurisprudence regarding Fed. R. Crim. P. 52(b) into every State analysis under Minn. R. Crim. P. 31.02. *See State v.*

Beaulieu, 859 N.W.2d 275, 279 (Minn. 2015) ("Rule 31.02 is based on Fed. R. Crim. P. 52(b)") (citing, via n.4, Minn. R. Crim. P. 31 cmt.–1990). As such, if this Court determines that plain error occurred, it follows that Minnesota, upon reviewing the same set of facts, should have reached the identical result. *See Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). As such, if this Court determines that the jury instruction challenged by Petitioner is plainly erroneous, Minnesota's failure to do so below is necessarily repugnant to the laws of the United States.

At issue is the trial court's jury instruction as to the elements of premeditated murder. This instruction combined aiding and abetting liability and the underlying elements of premeditated murder, but trial counsel failed to object to the instruction. *See Ezeka*, 946 N.W.2d at 408; *Olano*, 507 U.S. at 734. On review, the Minnesota Supreme Court determined that the challenged jury instruction was erroneous and was likely to mislead or confuse the jury. *Ezeka*, 946 N.W.2d at 407-08.[4] However, it determined the error was not plain. *See id.*

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[4] After reviewing the jury instructions as a whole, **we conclude that the district court erred when it instructed the jury on aiding and abetting liability.** There was no evidence that Ezeka acted as an accomplice, and the State's theory at trial was that Ezeka was the shooter and, therefore, directly liable for his actions as a principal. Consequently, there was no need for the district court to instruct the jurors on an aiding and abetting theory of criminal liability.

In addition, the district court used confusing and misleading language to describe this unnecessary theory of criminal liability. For example, in instructing the jurors that the State needed to prove "[Ezeka], or someone he intentionally aided and abetted, acted with premeditation," the district court's use of the word "acted" allowed the jury to find Ezeka guilty of premeditated murder if the State proved either that Ezeka fired the shots with premeditation or that Scott ordered the hit with premeditation. To be clear, if Ezeka fired the shots with premeditation, his liability as the principal could have been extended to Scott under an aiding-and-

Minnesota violated its own precedents and this Court's precedents by pondering whether the erroneous jury instruction's erroneousness "was clear and obvious." *Id.* (emphasis added).

This Court has repeatedly held that an error is plain if the error is "clear" or "obvious." *See, e.g.*, *Olano*, 507 U.S. at 734. Minnesota's plain error analysis has explicitly incorporated *Olano* into its own precedent. *E.g.*, *State v. Burg*, 648 N.W.2d 673, 677 (Minn. 2002); *Ezeka*, 946 N.W.2d at 407 ("An error is plain if it is 'clear' or 'obvious.' ") (citation omitted).

Minnesota's plain error standard of review "rest[s] on federal law." *E.g.*, *Kansas v. Marsh*, 548 U.S. 163, 169 (2006). This is made forcefully clear by the observation that two of Minnesota's seminal cases regarding plain error review both cite this Court's *Olano* decision to establish that " 'plain' is synonymous with 'clear' or… 'obvious.' " *See State v. Ihle*, 640 N.W.2d 910, 917 (Minn. 2002); *Burg*, 648 N.W.2d at 677; *see also State v. Kelly*, 855 N.W.2d 269, 273 (Minn. 2014) ("The three requirements that an appellant must satisfy under the plain-error doctrine were first articulated in… *Olano*, … and later clarified in *Johnson v. United States*, 520 U.S. 461, 466–67 … (1997). We adopted those requirements in *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).") (citing *Johnson*, 520 U.S. at 467). Because Minnesota's plain

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abetting theory of criminal liability because Scott procured Ezeka to commit the crime. *See* Minn. Stat. § 609.05, subd. 1. But Scott's premeditation in ordering the hit cannot be used to satisfy a necessary element of the principal crime, namely Ezeka's premeditation in firing the shots.

Ezeka, 946 N.W.2d at 408 (emphasis added).

error standard of review rests upon federal law, Minnesota's interpretation of Minn. R. Crim. P. 31.02 does not constitute an independent state ground barring this Court's review under 28 U.S.C. § 1257. Minnesota's interpretation of Minn. R. Crim. P. 31.02 is circumscribed by this Court's jurisprudence of Fed. R. Crim. P. 52, and will remain so until Minnesota unmoors itself from *Olano* and *Johnson*.

Minnesota correctly stated that the "clear or obvious" test was applicable, *see* 946 N.W.2d at 407, but it expressly utilized a more deferential "clear and obvious" test in Petitioner's case. *Id.* at 408. The State failed to properly apply its own law, thereby rendering inadequate any independent state grounds for affirming the sufficiency of the jury instruction, *even if* the State possesses the inherent authority to craft a more deferential standard of review for "plain error" than was expounded by this Court in *Olano*. *See* 507 U.S. at 734. Because Minnesota failed to apply the correct legal test mandated under its own law, and because this failure prejudiced Petitioner, the State's conduct deprived Petitioner of his right to due process. This conclusion is buttressed by the observation that the Minnesota Supreme Court provided no justification or reasoning for switching from the "clear or obvious" test to the "clear and obvious" test, which indicates the court failed to understand the existence or importance of its own mistake.

Setting aside the State's failure to properly apply its own law under Minn. R. Crim. P. 31.02, the State's decision effectively overruled this Court's *Olano* precedent in Minnesota by transmuting *Olano*'s "clear" or "obvious" test into a "clear and

obvious" test. *Ezeka*, 946 N.W.2d at 408 ("we consider whether the error was clear and obvious."); *see Williams*, 529 U.S. at 405 ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."). "Like the miscarriage-of-justice rule that the Court rejected in *Olano*, [Minnesota]'s [clear and obvious] standard is unduly restrictive." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). Because Minnesota's newfangled "clear and obvious" test for plain error contradicts the governing law outlined in *Olano* and incorporated into Minnesota law by *State v. Griller*, the State's decision in Petitioner's case is contrary to this Court's clearly established precedent and is thereby repugnant to the laws of the United States. *See Williams*, 529 U.S. at 405-06. Additionally, by turning this Court's disjunctive "or" test into a conjunctive "and" test, Minnesota impermissibly narrowed *Olano* in violation of the Constitution's Supremacy Clause. *See* U.S. Const., Art. VI, cl. 2.

Because it is clear or obvious that the trial court's jury instructions regarding the elements of premeditated murder were erroneous under this Court's jurisprudence, and because Minnesota's analysis of this issue is governed by the same standards as this Court, it follows that this Court should vacate and reverse the State to the extent the State held that the challenged jury instruction was not plainly erroneous. Additionally, if the Court determines that no reasonable jurist could conclude that this error did not affect Petitioner's substantial rights, the Court should make this clear in a holding and remand to the State with instructions to engage in

the discretionary analysis that follows the finding of a plain error that affected a defendant's substantial rights.

REASONS FOR GRANTING THE PETITION

A. The Questions Presented Are Manifestly Important

"[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," but this Court has also "recognized that the interrogation process is 'inherently coercive' and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion." *McNeil*, 501 U.S. at 181; *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (citation omitted).

Every state criminalizes murder, and penalties for premeditated murder are of unparalleled severity. Police officers are known to pursue suspected murderers aggressively, as they should, but officers often go too far, trampling on the constitutional rights of the accused in the process of their investigation. The regular use of overzealous coercive interrogation techniques by police officers investigating serious crimes has unintended consequences (*e.g.*, the suppression of important custodial statements), and tends to increase the difficulty of obtaining a conviction.

Police officers must be made to understand the importance of providing persons suspected or accused of crimes with a fresh *Miranda* warning at the *outset* of the interrogation *every* time they subject a person to custodial interrogation. Officers must be made to understand that the so-called "question-first" technique excoriated

in *Seibert* is completely inconsistent with *Miranda* and is *never* a permissible strategy for eliciting a confession in the absence of counsel. More than 50 years have elapsed since *Miranda*; there is no longer any reason to excuse the failure of police officers to follow this Court's unambiguous mandate. By clearly signaling to police officers that the interrogation techniques used on Petitioner are unacceptable, this Court will remind police to be more careful and thoughtful in the future to ensure that, when confessions are obtained, they are usable. This will increase the efficacy and admissibility of custodial interrogations while simultaneously decreasing the waste associated with custodial interrogations that are later suppressed. It is of tantamount importance for police to balance zealous investigation with the constitutional rights of the accused.

Likewise, police must not be allowed to violate a criminal defendant's Sixth Amendment rights with impunity if the Sixth Amendment is to mean anything. Police officers must be made to understand that a criminal defendant, once formally charged, has the right to have an attorney present at all custodial interrogations which occur after the filing of a complaint. Police must be made to understand that they should let the prosecution direct the pace and timing of custodial investigations once a complaint or indictment has issued.

Petitioner's case typifies serious policing problems common to every state in the Union. The policing problems identified in this petition are national problems that require a national solution.

B. This Is an Optimal Vehicle for Review

This case presents a uniquely suitable vehicle for resolving the questions presented. The outcome of this appeal—and the validity of Petitioner's conviction and subsequent sentence to life without the possibility of parole—turns cleanly on the questions presented.

The trial court already determined that Petitioner unambiguously invoked his right to counsel during the first custodial interrogation. The same officers who interrogated Petitioner in June 2016 also interrogated Petitioner in January 2017, meaning that the officers had actual notice of Petitioner's prior invocation of his right to counsel. During both interrogations, the police officers failed to provide a *Miranda* warning at the outset of the custodial interrogation. During both interrogations, the police applied unduly coercive pressure. During the second interrogation, the officers admitted that they could have simply booked Petitioner into jail and allowed him to attend his arraignment, but the officers refused to follow this sensible course of action. During both interrogations, the officers attempted to elicit a waiver of Petitioner's *Miranda* rights through subtle and misleading questioning techniques instead of simply asking Petitioner whether he was willing to waive his *Miranda* rights. The officers knew that formal charges had already been filed against Petitioner prior to the officers' second interrogation. These multitudinous avoidable errors by the police provide this Court with ample material for a pedagogical exposition of the minimally acceptable standards governing custodial interrogations.

This case also has the benefit of a complete record. Every issue has been adequately developed, and Petitioner's case culminated in a jury trial. Minnesota's highest court weighed in and was deeply divided, which shows that the questions presented by this case are narrow and well-suited for review by this Court. *Three* of the seven justices on the Minnesota Supreme Court, or 42.857% of the court, concluded that Petitioner's confession was the product of unlawful police coercion. *Ezeka*, 946 N.W.2d at 410-23. These dissenting opinions, along with their rationale, are worthy of rumination.

No independent and adequate state ground presents an insuperable obstacle to reversal. The issues presented will not become moot. Petitioner has exhausted his claim. There are no impediments to this Court's review in this case.

C. The State Courts' Rulings Are Wrong

The State's judicial decisions are wrong. All of Petitioner's custodial statements should have been suppressed. Petitioner should have been granted a new trial. Petitioner incorporates by reference the arguments made by Justice Anderson and Justice Thissen in their well-reasoned dissents, in addition to the arguments made above. *See Ezeka*, 946 N.W.2d at 410-23.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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