

No. 20-8125

IN THE

SUPREME COURT OF THE UNITED STATES

RAYMUNDO EUSEBIO-NORIEGA

ORIGINAL

Petitioner

VS.

BRAD CAIN, Superintendent,
Snake River Correctional Institution

Respondent

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petition for a writ of certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented:

1. Where petitioner was denied Court appointed counsel by the District Court of Oregon, where such petitioner denied his Due Process of law, 1. where petitioner have language barrier filed at least Six different motions for appointment of counsel letting the courts know that under his circumstances appointment of counsel was necessary to prevent due process violations. The District Court was aware of petitioner's language barrier, he does not speak, read or write English, does not have any legal knowledge and does not have a good understanding of the issues and the ability to present forcefully and coherently his contentions.
2. Where petitioner was denied his Fifth Amendment right to be free from self-determination and was denied motion to suppress, the statements he made to the detectives, where such petitioner denied his Sixth Amendment right to effective assistance of counsel, (1) where trial counsel failed to properly litigate motion to suppress. (2) Where the detectives used threats and fear to induce petitioner to make statements. Petitioner's statements were harmful. The state used them to convict him of serious felonies. Under the totality of the circumstances, the state failed to prove by a preponderance of the evidence that petitioner's statements to the detectives were voluntarily under the Fifth and fourteenth Amendments to the United States Constitution.
3. Should petitioner had been granted court appoint counsel and allowed the evidentiary hearing he requested of the District court on this habeas proceeding for the purpose of attempting to determined whether petitioner's statements to Detective Kirlin were made voluntarily or was the product of duress, coercion, express or implied. (4) Should petitioner have been allowed the evidentiary hearing he requested of the District court on this habeas proceeding for the purpose of attempting to determined whether an effectively litigated motion to suppress could have affected the outcome of the case, and whether petitioner's trial testimony is tainted by the erroneously admitted pretrial statements.

Did the state prove that defendant's subsequent statements were voluntary when questioning officer first read defendant's Miranda rights, told defendant that he believed the victim, stated that the victim might harm herself if defendant didn't confess, and stated that the prosecutor would be "angry" if defendant continued to deny the allegations?

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Raymundo Eusebio Noriega v. Mark Nooth case No.2:18-cv-00491-MO

No: _____

IN THE
SUPREME COURT OF THE UNITED STATES

RAYMUNDO EUSEBIO-NORIEGA

Petitioner

VS.

**BRAD CAIN, Superintendent,
Snake River Correctional Institution**

Respondent

**Petition for a writ of certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

Raymundo Noriega the petitioner, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, rendered in his appeal, which judgment affirmed the denial by the district court of his Federal Habeas Corpus petition pursuant to 28 U.S. C. § 2253 (c) (2).

OPINIONS BELOW

The opinions of the Court of appeals and the District Court (are not below).

JURISDICTION

The judgment of the Court of appeals was entered on August 6th 2020. The Jurisdiction of this Court is invoked under 28 U.S. C. § 1254 (1) This petition is timely filed pursuant to 28 U.S.C. § 2101 (c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In criminal prosecutions, the accused shall...have assistance of counsel for his defense."

Right to Due Process of Law Under the Fourteenth Amendment to the U.S. Constitution.

STATEMENT

The Direct Appeal court, the Post conviction Court and PCR appeal Court as well as the US District Court for the District of Oregon in this case held that petitioner's rights to effective assistance of counsel were not denied when trial counsel failed to trial counsel's failure to properly litigate the motion to suppress his statements, affirming the below Court's decision at the State.

STATEMENT OF THE CASE

A. State trial Court Proceedings.

In 2009, petitioner had a Jury trial and on September 24th 2010 was found guilty by Jury verdicts and sentence on charges of Six counts of rape in the first degree One count of sexual penetration in the first degree, and one count of sexual abuse in the first degree. He was acquitted of 9 and 10. On each of counts 1 and 7, the court order defendant to served 100 months in prison, with 20 years of post-prison supervision, less time served. On count 2, the court used grid block 10-D to order a presumptive sentence of 110 months. On count 3, court used grid-block 10-B to

order a presumptive sentence of 120 months. On each of counts 4, 5, and 6, the court used grid-block 10-A to order presumptive sentences of 130 months. On count 8, the court ordered 75 months. The court ordered the 100-month sentence on count 7, and 30 months of the sentence on count 4, be consecutive to each other and the the 120 month sentence on count 3. The total was 250 months. There was no physical evidence of any abuse. Instead, the trial "boiled down" to a credibility contest between the alleged victim, who testified she had been abused, and petitioner, who denied any abuse . The State knowledge that there were inconsistencies in the alleged victim's accusations. Petitioner's initial counsel Mr. Huseby filed a pretrial motion to suppress the statements petitioner made during his police interview, claiming that he had not made the statements voluntarily due to the coercive nature of the interview. The trial court granted the motion in part as to statements petitioner made toward the end of the interview after one of the officers indicated the charges could be reduced if he confessed. Id at Tr-24-43.

As to the reminder of petitioner's statements, however, the trial court found them all to be admissible. It concluded that the average person would would not have been overborne by the interview, and that nothing in the record revealed anything unique about petitioner that led him to be overborne by the officer's statements.

B. Direct Appeal, Oregon Appellate Court case number: A148236.

Petitioner took a direct appeal wherein he challenged the partial denial of his motion to suppress, arguing that the Fifth Amendment to the U.S. Constitution provides in relevant part that: "No person***shall be compelled in any criminal case to be a witness against himself [.]" constitutional rights enumerated above, a criminal petitioner's statements are admissible against him only if they were made voluntary, and were not made as result of police coercion. *Jackson v. Denno*, 378 U.S. 368, 387, 84 S Ct 1774, 12 L Ed 2d 908 (1964). Statements

involuntary as the result of police coercion are inherently untrustworthy and unlawfully obtained. As such, they must be suppressed, Jackson 378 at 385-86.

ORS 136.425 ("A confession or admission of a def./petitioner whether in the course of Judicial proceedings or otherwise, cannot be given in evidence against the defe/ petitioner when it was made under the influence of fear product by threats.").

The Oregon Court of appeals affirmed the trial court's decision without a written opinion. State v. Raymundo-Noriega, 255 Or. App. 635, 298 p.ed 1250 (2013).

C. Petition for review to the Oregon Supreme Court

Petitioner's appeal counsel filed a petition for review with the Oregon Supreme court. The Oregon Supreme court DENIED review without a written opinion. In State v. Raymundo-Noriega, 354 Or. 62, 308 P.3d 206 (Or. 2013)

E. State Post-conviction Relief Proceedings.

Following the Supreme Court's denial of review; petitioner filed for post-conviction Relief ("PCR") in Malheur County were the PCR Court denied relief on a variety of ineffective assistance of counsel claims, including

1. trial counsel's failure to properly litigate the motion to suppress his statements to the police, failing to call Dr. Norvin Cooley, as an expert witness in support of the suppression motion.

Post Conviction counsel argued that petitioner's statements to police were involuntary; And that petitioner was prejudiced by trial counsel's ineffectiveness under the Sixth Amendment to the United States Constitution as well as Strickland v. Washington, 466 U.S. At 694.

F. Post Conviction Appeal proceedings

Following the Post Conviction's court's denial, petitioner filed a PCR appeal. The Oregon Court of appeals affirmed the Post Conviction trial court's decision without a written opinion.

G. Federal Habeas Corpus Proceedings, Case # 2:18CV-00491-MO

Petitioner filed petition for writ of federal habeas raising five grounds for relief which allege discrete instances of ineffective assistance of trial counsel. **Grounds Raised:**

1. trial counsel's failure to properly litigate the motion to suppress his statements to the police, failing to call Dr. Norvin Cooley, as an expert witness in support of the suppression motion.
2. trial counsel's failed to present expert testimony from DR. Cooley at trial in order to undermine the validity of the statements petitioner made during the police the police interview;
3. trial counsel's failed to to present DR. Cooley as an expert witness pertaining to issues of child memory;
4. trial counsel's failed to adequately prepare for trial when he did not secure the services of an interpreter;
5. trial counsel failed to present a coherent defense, calling witnesses to testify about the propriety of petitioners conduct around children when those witnesses were unable to present such testimony; and
6. the cumulative nature of counsel's errors violate petitioner's right to due process and effective assistance of counsel.

In every step at the State level and federal habeas, petitioner argued that his statements to police were involuntary; And that petitioner was prejudiced by trial counsel's ineffectiveness under the Sixth Amendment to the United States Constitution as well as *Strickland v. Washington*, 466 U.S. At 694. However, PCR appellate counsel only presented ground one before the Oregon Court of appeals and before the Supreme Court on review, leaving the other five grounds PCR appeal attorney failed to fairly present ground two through six. It is not disputed that this issues are procedurally defaulted. However, the default should be excused under *Martinez v Ryan*, 566 U.S. 1, 14 (2012). In federal habeas corpus for ground one, petitioner argued that it was incumbent upon counsel to call Dr. Cooley as an expert witness to describe how petitioner's personal characteristics made it more likely that his statements made it more likely that his statements were involuntary. In conflict of petitioner's argument, the defendant in federal habeas responded stating that "although Dr. Cooley could have testified to these issue, his testimony

could have been quite damaging to petitioner's claim of coercion". In addition the defendant stated that "the issue petitioner fairly presented to the Oregon Supreme Court mirrors his claim in ground one". Because the time for including the claims in grounds one through six in PCR appeal passed long ago, those claims are procedurally defaulted. And that "petitioner makes no showing that would excuse this default".

The District Court "ORDERED AND JUDGED that this Action is DISMISSED, with prejudice". Stating that "the court declines to issue a certificate of appealability on the basis that petitioner has not made a substantial showing of the denial of constitutional right pursuant to 28 U.S.C. § 2253 (c) (2)".

H. The Ninth Circuit Court of Appeals:

Following the U.S. District Court's denial of habeas petition and denial of certificate of appealability, petitioner filed a 'petition for appealability to the Ninth Circuit Court of Appeals for the District of Oregon arguing that, he has made a substantial showing of a denial of Constitutional Rights pursuant to 28 U.S.C.A. § 2253(c)(2). Petitioners constitutional rights were violated by the conviction, sentence entered in Washington County Circuit Court Case No. C092404CR, and review of said sentence in the Oregon Court of Appeals, Supreme Court and District Court for the District of Oregon.

REASONS FOR GRANTING THE WRIT:

Certiorari should be granted because petitioner's Constitutional rights are violated, the Ninth Circuit Court of appeals denied Certificate of appealability and as discussed below, the U.S. District court erroneously diminished petitioner's ineffective assistance of counsel claims and denied appointment of counsel. The state courts erroneously diminished record evidence critical to the Strickland analysis and, doing so, conflicts established federal law.

A Court decision is "contrary to ...clearly established precedent if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or "if the state

court confronts a set of facts that are material indistinguishable from a decision of [the Supreme] president. “*Williams v Taylor*, 529 U.S. 362, 405-06 (2000). Under the “unreasonable application” clause, a federal Habeas court may grant relief “if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case.” Id at 413. The “unreasonable application” clause requires the state court's decision to be more than incorrect or erroneous. In this case the decisions of the courts are unreasonable incorrect and erroneous.

A. Court's decisions contrary to clearly established federal law.

In petitioner's case, the state circuit court, the state court of appeals, the post conviction court, the PCR court of appeals, the (U.S. District Court and Ninth Circuit Court of Appeal's decision was unreasonable in violation of clearly established state and federal constitutional law. As explained below, it is shown that the relevant state-court decision was contrary to, or involved an unreasonable application of, clearly established federal law, and was based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding. 28 U.S.C.S. § 2254(d).

Washington County Circuit court and Court of appeals had erred when it denied petitioner's motion to suppress involuntary statements. This decision is contrary to Oregon Supreme Court's decision in *State v. Jackson*, 364 Or 1, 430 P.3d 1067 (Or. 2018), ruling that “trial court concluded that certain exculpatory statements that defendant had made during and immediately after the interrogation were not voluntary. The provision of Miranda warnings is not a guarantee that statements made after the warnings are voluntary. See *McAnulty* , 356 Or. at 459, 338 P.3d 653 (considering whether coercive tactics rendered a defendant's post-Miranda

statements involuntary); *State v. James* , 339 Or. 476, 488-89, 123 P.3d 251 (2005) (rejecting [364 Or. 22] argument that statements made after waiver [430 P.3d 1079] of *Miranda* rights are presumptively admissible). ORS 136.425 which states (“A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against the defendant when it was made under the influence of fear produced by threats.”) Moreover the court's decision in this case was unreasonable and contradicts the Constitution. The Fifth Amendment provides that no person "...shall be compelled in any criminal case to be a witness against himself ..." U.S. CONST. Amend. V. In *Miranda*, the Supreme Court held the privilege against self-incrimination requires that incriminating statements obtained during a custodial interrogation be inadmissible as evidence against a petitioner unless the defendant was provided a full and effective warning of his rights. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2D 694 (1966).

Petitioner's statements were made involuntarily, the state courts (trial court and appellate court) erred by denying petitioner's motion to suppress. Petitioner's own testimony showed that he was “nervous and fearful” at the interview. (Tr 463). He did not know what to expect. He was surprised about the allegations. (Tr-Trans 464). He was told by an expert interviewer that admitting crimes would help Jasmin. (Tr-trans 465). Petitioner was also told that denying those crimes would harm the her (*the victim*). (Tr-Trans 466). He was told that he had “no choice” but to admit the crimes, to keep Jasmin from killing herself. (Tr-Trans 467). The officers called him a “cruel monster.” (Tr-Trans 466). The circumstances of the interrogation, as well as the officer's interrogation techniques, made him feel that he had to admit something, in order to help

Jasmin. (Tr-Trans 484). Petitioner made some admissions because he wanted to help her. (Tr-Trans 467). **Those admissions were lies.** (Tr-Trans 474). In short, the officers coerced petitioner into making false statements.

On top of all that evidence the circuit court held a hearing to determine whether petitioner's statements were admissible. The trial court found that there was no evidence that the statements of Detective Kirlin and Brown are:

... “sufficient kinds of threats that the average person would be overborne by those statements. I have no evidence that this particular defendant was overborne by those statements. I don't have any evidence that he was crying, or upset, or distraught, or anything. The information that i have is that this was a conversation and it remained on that level. I have no evidence before me that these particular statements with this particular defendant were such because of something unique to him, that he's not the average person. That something unique to him made it so that he couldn't find withstand those kinds of statements having been made. Again, I don't find those statements in and of themselves for the average individual would be sufficient to cause them to confess to a crime that they did not otherwise commit.” This court's decision contradicts state and clearly established federal law. Is in contrast of the decision in *Miranda v. Arizona*.

In this present case Mr. Raymundo the petitioner was not given a full and effective warning of his rights. Petitioner didn't know what these such rights involved, he did not have a clear and full knowledge of the Miranda rights, this amounted to a violation against self-incrimination. In *Miranda* the Supreme Court held that, the privilege against self-incrimination requires that incriminating statements obtained during a custodial interrogation be inadmissible as evidence against a defendant unless the defendant was provided a full and effective warning of his rights. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

B. A criminal defendant is constitutionally entitled to effective and adequate representation.

The Sixth and Fourteenth Amendments of the United states Constitution require that all criminal defendants receive effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104, S Ct 2052, 80 L Ed 2d 674 91984). A post conviction petitioner must prove that counsel's performance "fell below an objective standard of reasonableness" to establish ineffective assistance. Id Under the Sixth Amendment, a counsel's ineffectiveness prejudices a petitioner if there is a "reasonable provability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland v. Washington*, 466 U.S. At 694. In March 11, 2010, Initial counsel Huseby filed a motion to suppress petitioner's statements on the basis that were involuntary.

Petitioner through his PCR counsel pursue Post Conviction and alleged , *inter alia*, that his trial counsel Mr. Huseby, received a report from Dr. Cooley, regarding a psychological evaluation of petitioner for possible use in support of the Motion. (*Cooley's report, under seal*). The same day that he received the report, trial counsel Huseby filed a motion to withdraw as petitioner's counsel on the basis that "the attorney -client relationship has grown increasingly contentious. However, initial counsel withdrew after filing motion to suppress, and James Jensen, was appointed. Second counsel Mr. James Jensen's, failure to properly litigate the motion to suppress amounted to ineffective assistance of counsel and has prejudiced petitioner's case. *Strickland's* requirement that the reasonableness of counsel's performance be evaluated in light of the relevant standard of care as evidenced by the then-prevailing professional norms. *Strickland*, 466 U.S. At 688. An Attorney exercising reasonable professional skill and judgment would offer available evidence to support a motion to suppress statements as involuntary. In this case the

state witness testified that their interview with petitioner did not involve threats or promises and was a kin to a normal conversation. However, the record reflects that statements were involuntary.

Threats to petitioner by the detectives:

During the interview, petitioner “repeatedly denied sexually touching the victim. (Tr-21. The detectives told petitioner that the victim had been suffering emotional problems for the seven years since the abuse. (Tr-22-23). Detective Kirlin told petitioner that he would be reporting petitioner's statements to the District Attorney, who either would “see somebody who is truthful, and honest, and apologetic and took responsibility, or somebody who said that he didn't do anything , and basically saying that the victim is laying. (Tr-24. He also said that after watching the videotape of the victim's interview, the prosecutor would likely believe the victim and be angry that petitioner continued to deny the allegations. (Tr-23-24)”.

Moreover, the detective told petitioner that he believe Jasmine was telling the truth. He also said that jasmine was having emotional problems and had been suicidal. He told petitioner he could help her heal. Those statements made petitioner afraid that Jasmine would harm herself, if he did not make some admissions. Because petitioner care about her, and because he did not want her to have emotional problems, *he was induced to believe that he could help her by making certain statements.* The detective's statements caused petitioner to be afraid about Jasmine. Naturally, he made some statements that the detectives said would be helpful to her. Not only did the detective's statement and questioning methods involved fear, they also amounted to threats. Implicit in the statements about Jasmine was the threat or promise, that the

detective would tell Jasmine what petitioner had told him. Petitioner knew she would hear whatever he said. That was added inducement for him to help her by making certain statements.

Yet more threatening were the detective's statements about taking the case to the prosecutor, who would be "angry" if petitioner denied the allegations. In other words, the detectives told petitioner that, if he did not admit to committing the crimes, the prosecutor would punish him by making things even worse for him than they already were. That was a threat. That was an inducement to get petitioner to make certain statements by intimidating him. As a result, his statements were obtained by threatening him with wrath of the prosecutor.

The admission of petitioner's statements in Court violated clearly established precedent because statements made involuntarily as the result of police coercion are inherently untrustworthy and unlawfully obtained. As such, they must be suppressed. *Jackson*, 378 at 385-86. "In this state, confessions and admissions are initially deemed to be involuntary".

The Courts refused to consider such external factors as the duration of the interrogation, the persistence of the officers, police trickery, absence of family and counsel, and threats and promises made by the police. See *Davis v. North Carolina*, 384 US 737, 746-47, 752, 86 S Ct 1761, 16 L Ed 2d 895 (1966) (duration, treatment); *haynes v. Washington*, 373 US 503, 514-15, 83 S Ct 1336, 10 L Ed 2d 513 (1963) (threats, promises, absence of family and counsel). In addition, "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus." *Colorado v. Connelly*, 479 US 157, 163, 107 S Ct 515, 93 L Ed 2d 473 (1986).

This Court should, at a minimum, grant certiorari, vacate the Ninth Circuit's decision as well as the U.S. District's decision, and order it to remand this matter to the proper court for further proceedings. Cooley's testimony could have supported the argument that the statement were involuntary. That is, Cooley could have described the police coercion that was a prerequisite to a finding of involuntariness.

D. Oregon U.S. District Court's Denial of Motions for Counsel, Habeas Corpus Proceedings Case # 2:18CV-00491-MO

The U.S. District Court's decision was prejudicial to petitioner's case and contradicts established federal law. The U.S. District Court's decision contravenes this Court's precedent that allows appointment of counsel to Pro Se litigants in federal habeas corpus when the circumstances of the case Indicate that appointment of counsel was necessary to prevent due process violations. Counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is a person of such limited education as to be incapable of fairly presenting his claims. *See Chaney*, 801 F.2d at 1196; *see also Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970).

Is indisputable that the circumstances of this case Indicate that appointment of counsel was necessary to prevent due process violations. Petitioner has made a substantial showing that he is unable to litigate habeas proceedings due to the fact that the issues are of such complexity that petitioner *cannot properly* present them *pro se*. Mr. Raymundo *has* demonstrated his disability to articulate his grounds for relief due to his language barrier, he is unable to use the computer, all information available for research is in English.

Petitioner was also denied multiple request for an evidentiary hearing multiple times.

E. The Ninth Circuit Court of Appeals denied request for certificate of appealability;

Following the U.S. District Court's denial of habeas petition and denial of certificate of appealability, petitioner filed a 'petition for appealability to the Ninth Circuit Court of Appeals for the District of Oregon.

On August 6th 2020, had denied certificate of appealability stating that “because appellant has not shown that ‘Jurists of reason’ would find it debatable whether the petition states valid claim of the denial of a Constitutional right and that jurists of reason would find it debatable whether the District Court was correct in its procedural ruling.” (*citing*) *Slack v. McDaniel*, 529 U.S. 473, 484, (2000); 28 U.S.C. 2253 (c)(2).

Petitioner has made a substantial showing of a denial of Constitutional Rights pursuant to 28 U.S.C.A. § 2253(c)(2). Petitioners constitutional rights were violated by the conviction, sentence entered in Washington County Circuit Court Case No. C092404CR, and review of said sentence in the Oregon Court of Appeals, Supreme Court and District Court for the District of Oregon. The Court's decision was prejudicial to petitioner's case and contradicts established federal law. The U.S. District Court's decision contravenes this Court's precedent that allows appointment of counsel to Pro Se litigants in federal habeas corpus when the circumstances of the case indicate that appointment of counsel was necessary to prevent due process violations. Counsel must be appointed if the complexities of the case are such that denial of counsel would amount to a denial of due process, and where the petitioner is a person of such limited education as to be incapable of fairly presenting his claims. *See Chaney*, 801 F.2d at 1196; *see also Hawkins v. Bennett*, 423 F.2d 948 (8th Cir. 1970).

By denying certificate of appealability in this case, the Ninth Circuit Court is also making an unreasonable decision and violates of petitioner's due process of law and Equal protection. Review is necessary because as explained above and below, it is established that Admission of a defendant's involuntary statement violates due process, and a statement may be involuntary due to psychological coercion. *United States v. Miller*, 984 F.2d 1028, 1030 (9th Cir. 1993). “[I]n extreme cases, appealing to a defendant's moral obligation to his or her family as leverage to coerce [a confession] is unconstitutional,” *Ortiz v. Uribe*, 671 F.3d 863, 872 (9th Cir. 2011). *In Miranda v. Arizona* , 384 U.S. 436, 468-70, 86 S. Ct. 1602, 16 L.Ed. 2d 694 (1966). When a suspect voluntarily declines to exercise those rights, he or she chooses to proceed knowing that the circumstances are inherently coercive. Thus, police tactics that are calculated to

persuade a suspect to confess are not generally impermissible; nothing less than an inherently coercive atmosphere is to be expected.

The reason that a valid *Miranda* waiver cannot be dispositive of voluntariness, of course, is that, even if a person has the capacity to execute such a waiver before the interrogation begins, police might do something after that point to impair the person's capacity for self-determination. For example, they might beat him. Impairment can also result from psychological pressure, such as where police inform a suspect that his baby is in critical medical condition and that the baby's life may depend on the suspect's providing information immediately. *See Ruiz-Piza* , 262 Or. App. at 572-75, 325 P.3d 802. Petitioner's trial counsel was also ineffective in the following particulars because, trial counsel should have known that there was no evidence he could use to support the involuntary argument, *unless* he offered an available expert witness, who could have described petitioner's personal characteristics that made it more likely his statements were involuntary. Trial counsel provided ineffective assistance of counsel when he failed to do so.

Cooley's testimony would have *bolstered* the argument and weighed in favor of the statements being involuntary. Cooley could have testified to coercion by the police through effective interrogation tactics. He also could have testified to particular characteristics of petitioner. Trial counsel's assessment of Cooley's usefulness as a witness is not reasonable, based on Cooley's report. Cooley despite finding that petitioner understood his *Miranda* rights and was not suggestible, did conclude that petitioner "was faced with highly skill detectives who very effectively used the tactics of minimization" and had a tendency toward deception and shaped his behavior". The record reflects that *DR. Cooley* told petitioner's initial counsel on a note his opinion stating, "he did not personally think the court would find the confession was coerced, but that Cooley personally thought it was coerced. "

As in *Thomas v. Chappell*, the courts holding is, that an attorney's failure to call a witness could not be excused as a tactical decision because the attorney "did not have sufficient information with which to make an informed decision". In this case counsel's decision **can't be** said that it was tactical, but instead is a 'Strickland error because when counsel's failure to call a witness "could not be excused as tactical decision****Thomas v. Chappell*, 678 F.3d 1086, 1104-

05 (9th Cir. 2012). In this case the result of the proceeding could have been different if counsel had effectively litigated the motion to suppress. Dr Cooley's testimony could have bolstered the motion to suppress and led to a ruling from the trial court suppressing the statements, because of the involuntary statements given by petitioner to the detectives.

As explained above, U.S. District Court and Ninth Circuit Court of Appeal's decision was unreasonable and "contrary to, *and* involved an unreasonable application of, clearly established Federal law." § 2254(d)(1). These decisions had prejudiced the petitioner.

Trial counsel failed to effectively implement the strategy by offering evidence at the motion hearing to support the argument.

At the hearing petitioner did not testify that his will was overborne. Trial counsel thus only had the state's witnesses' statements to work with. Trial counsel should have known that to be successful he would need to offer something else.

Cooley's testimony would have *bolstered* the argument and weighed in favor of the statements being involuntary. Cooley could have testified to coercion by the police through effective interrogation tactics. He also could have testified to particular characteristics of petitioner. Trial counsel's assessment of Cooley's usefulness as a witness is not reasonable, based on Cooley's report. Cooley despite finding that petitioner understood his Miranda rights and was not suggestible, did conclude that petitioner "was faced with highly skill detectives who very effectively used the tactics of minimization" and had a tendency toward deception and shaped his behavior".

The record undercuts the U.S. District Court's assumptions about the post conviction counsel's thought process. At a minimum, the District Court should have granted appointment of counsel and should have granted an evidentiary hearing for further evidentiary development of the actual reasons for counsel's deficiencies. The record reflects that DR. Cooley told petitioner's

initial counsel on a note his opinion stating, "he did not personally think the court would find the confession was coerced, but that Cooley personally thought it was coerced."

This Court should, at a minimum, grant certiorari, vacate the Ninth Circuit's decision as well as the U.S. District's decision, and order it to remand this matter to the proper court for further proceedings. Cooley's testimony could have supported the argument that the statement were involuntary. That is, Cooley could have described the police coercion that was a prerequisite to a finding of involuntariness.

Based upon the foregoing and authorities, petitioner has met his burden to prove a substantial violation of his state and federal constitutional right to effective and adequate assistance of counsel on every claim alleged herein. Wherefore, petitioner respectfully request that based upon the points and authorities set forth above, the Court grant him the claims presented in his writ of federal habeas corpus and grant relief in the form of remand to the Linn County Circuit Court for a trial and sentencing.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Re-Submitted on:

DATED this 10th day of May 2021

Playmundo Noriega E.