22-5935
No.

IN THE
SUPREME COURT OF THE UNITED STATES

DEVON MILLER

PETITIONER,

V.

UNITED STATE OF AMERICA

RESPONDENT(S)

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

(1). The court first core constitutional holding in Miranda v. Arizona was to confirm that the Fith Amendment privilege serves to protect all persons in all settings in which their freedom a of action(s) is curtailed in any significant way from being compelled to incriminate themselves. This privilege is clearly embodied during compulsion exerted by law enforcement during custodial interrogation

(2). This court landmark decision in Miranda v. Arizona is the bedrock against self-incrimination, and the statue is clear that confessions should be voluntarily given and the Fifth amendment privilege against self-incrimination is full applicable during custodial interrogation.

(3). The Fith amendment privilege against self-incrimination is not soley a privilege to be free from abuse at the police precinct but its also a privilege not to become an unwitting or unwilling witness against ones-self while being subjected to the pressures inherent during custodial interrogation.

LIST OF PARTIES

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

RELATED CASES

There are no following proceedings that are directly related case.

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28 U.S.C.A. § 1254 (1)
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STATE STATUES :

9 NYCRR 364.1 (g)
CPL § 140.10 (1)(b)

OPINIONS BELOW

FEDERAL COURTS

The judgement of the United States Court of Appeals for the Second Circuit affirming the District Court's Order is attached to this petition as "**Appendix # "A.**" Petitioner filed a pro se petition for Panel Rehearing to the United States Court of Appeals for the Second Circuit, and the Second Circuit denied petitioner's application; See "**Appendix # "B.**" The order of the Southern District of New York, is attached to this petition as "**Appendix # "C.**" Petitioner filed a pro se petition for Reconsideration to the Southern District of New York, and this reconsideration motion was denied; see "**Appendix # "D.**"

STATE COURTS

Petitioner thereafter sought leave to appeal to the Court of Appeals and this application was denied. See "**Appendix # "E.**" Petitioner appealed the conviction and sentence to the New York State Appellate Division of the Supreme Court, First Department. The Appellate Division affirmed the judgment. See "**Appendix # "F.**" Petitioner next filed a motion to vacate conviction pursuant to N.Y. Criminal Proc. L. § 440.10, and this motion was also denied. "**Appendix # "G.**" After the conclusion of this denial petitioner appealed to the New York State Appellate Division of the Supreme Court, First Department. The Appellate Division denied entry. See "**Appendix # "H.**"

Upon conclusion of petitioner post-conviction motions. Petitioner filed a Reargument motion pursuant to C.P.L.R. 2221, back in the trail court. After consideration by trial court this motion was also denied. See "**Appendix # "I.**"

STATEMENT OF JURISDICTION

The Second Circuit judgement was entered on May 26, 2022. See. **Appendix # "A."**

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 25, 2022.

This petition is filed within 90 days after the denial of the second Circuit. This Court has jurisdiction under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 1651, gives the Supreme Court jurisdiction to issue a Writ of Certiorari to a person under the violation of the Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "The admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded hiss privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself ... . By custodial interrogation, we mean questioning initiated by Law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way. Miranda v. Arizona, 384 U.S. at 439, 444-45."

STATEMENT OF THE CASE

On June 9, 2010, following a jury trial, petitioner was sentenced in the Supreme Court, State of New York, Bronx County (Carter, J.) To an aggregate term of life imprisonment without parole for the April 13, 2008, murder of Chelsea Frazier. Central to the prosecutions case were five written statements obtained from petitioner by the NYPD detectives and a video confession to an assistant district attorney. The detectives administered *Miranda* warnings to petitioner between the third and fourth written statements, eleven(11) hours after he first arrived at the precinct. In total, petitioner spent approximately 18 hours in police custody before being formally charged.

Petitioner appealed the conviction and sentence to the New York State Appellate Division of the Supreme Court, First Department ("Appellate Division"). The Appellate Division affirmed the judgment. Petitioner thereafter sought leave to appeal to the Court of Appeals. The application was denied.

Petitioner then filed a petition for a Writ of Error *Coram Nobis* in the Appellate Division. This petition was also denied.

Petitioner next filed a motion to vacate conviction pursuant to N.Y. Criminal Proc. L. § 440.10, and this motion was also denied.

Petitioner filed a *pro se* petition for a Writ of Habeas Corpus in the Southern District of New York on February 26, 2018. Petitioner raised two principle arguments. The first being "the statements and video confession were obtained in violation of *Miranda*. Second, petitioner argued "ineffective assistance of counsel, for trial and appellate counsel.

On July 31, 2020, the District court denied the Habeas Corpus petition. Petitioner timely appealed. By order dated October 15, 2020, the District court granted petitioner's motion for a Certificate of Appealability regarding petitioners *Miranda* claims but denied it regarding petitioners claim of ineffective assistance of counsel.

On May 26, 2022, the Second Circuit rendered a decision to petitioners petition , stating: " **UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment entered on July 31, 2020, is **AFFIRMED**

A timely petition for Panel Rehearing was filed, and denied by the United States Court of Appeals on the following date: July 25, 2022.

REASON FOR GRANTING THE WRIT

I. THE DECISION'S BELOW SQUARELY CONFLICTS WITH THE UNITED STATES SUPREME COURT DECISION

A state court decision is contrary to clearly established federal law if it "applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or if it "confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." Williams v. Taylor, 529 U.S. 362, 405 (2000). A state court decision involves an unreasonable application of clearly established law if the state court " identifies the correct governing legal principle from this court's decision, but unreasonably applied that principle to the facts of the petitioner's case." Id. at 413; See also Wiggins v. Smith, 123 S.Ct. 2527,2534 (2002). In other words, a "federal court may grant relief when a state court has misapplied a 'governing legal principle' to a 'set of facts different from those of the case in which the principle was announced.'" Wiggins, 123 S.Ct. at 2535. (Quoting Lockyer v. Andrade, 538 U.S. 63, 76, 123 S.Ct. 1166, 1175 (2003). In short, the relevant inquiry is whether the state court decision was "objectively unreasonable." Williams, 529 U.S. at 409.

In petitioner's state appeal, there remains one loose end with respect to petitioner's Miranda claims. The state court did not distinguish between petitioner's "First" and "Second" sessions of obtaining admissions/confessions as they should have. Instead, they incorrectly under Federal Law, held that petitioner was not in custody when he made his "First three" admissions/confessions. But they, perhaps, also failed to distinguish the admissions/confessions because the "New York Court of Appeals" has declined on "State Constitutional" grounds to follow the rule announced in, Oregon v. Elstad, 470 U.S. 298; and Missouri v. Seibert, 542 U.S. 600. The state court follows, People v. Chapple, 38 N.Y.2d 112, 378 N.Y.S.2d 682,685-686; People v. Bethea, 67 N.Y.2d 364, 502

N.Y.S.2d at 714, ("The ruling of the Chapple case, therefore, continues as a matter of state constitutional law, to govern the admissibility of statements obtained as a result of continuous interrogations."), which is clearly contrary to the Supreme Courts ruling in, *Seibert* and *Elstad,* supra.

The State reviewing courts did not conduct the requisite federal standard announced in Rhode Island v. Innis, 446 U.S. 291; Thompson v. Keohane, 516 U.S. 99; and Missouri v. Seibert, 542 U.S. 600, into the "Deliberate" character of the *Miranda* circumvention and the effectiveness of the belated warnings, the state decision was both "contrary to" and an "unreasonable application of the principles stated herein, 28 U.S.C. § 2254 (D)(1)(2).

A. The ultimate "in custody" determination for miranda purposes are two discrete inquiries; first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he was not at liberty to terminate the interrogation and leave

In the case at bar, a lengthy pre-trial hearing was conducted to ascertain the facts surrounding petitioner's "admissions/confessions." The State Court selectively relied on only isolated portions of the facts to deny petitioner's motion to suppress his confession on *Miranda* and *Voluntariness* grounds. As this court has recognized, evidence "must be examined in its totality, not by microscopic dissection of bits and pieces." Here the totality of the circumstance that preceded the admission/confession(s) in this case goes beyond allowable limits. When all of the evidence surrounding petitioner's "admission/confession(s)" is fairly evaluated, there can be no doubt that the jury should never have heard these admissions/confessions. The interrogation tactics conducted was a blatant violation of Miranda.

This court has repeatedly stated that it will make an independent examination of the facts in cases where the volutariness of a confession is questioned. The facts being of greatest importance in this case compelles a chronological telling of the facts.

FIRST ENCOUNTER:

On April 13, 2008, During detectives(D.t.) Bulding and Martin's investigation into the shooting death of Chelsea Frazier, and the shooting of Carlos Cruz, these detectives got information from Cruz who stated: " that a black man had approached his car and took his chain and shot his girl, then shot him once in the leg, and left in a green SUV." **(H.16-17)**. Also during this investigation a civilian witness also told D.t. Bulding: "a black man with braided or deadlocks hair fired a shot at the scene, and left the scene in a green SUV. **(H. 17-18, 32)**.

During further investigation D.t. Bulding observed a black man with braided hair visiting Cruz at the hospital and identified this man as petitioner. **(H. 17-18,21)**. D.t. Bulding, acknowledged that he took petitioner's pedigree information. **(H. 19)**. Now armed with this information D.t. Bulding discovered petitioner was a parolee and petitioner had a criminal history. **(H.19, 564)**.

A routine canvass of the immediate area was conducted and Sgt. Milligan discovered a green SUV with Massachusetts plates parked a couple of blocks from the crime scene, Sgt. Milligan contacted D.t. Bulding with this information, and D.t. Bulding ran a computer check which discovered that the SUV was registered to Harry Miller, petitioner's Father, to an address in Massachusetts, where both Cruz and the victim lived. On April 13, 2008, around 9pm, D.t. Bulding advised Sgt. Milligan to secure said SUV.

D.t. Bulding, clearly explained his position when he testified at petitioner's suppression hearing by stating: " he had a *'HUNCH'* that petitioner was the shooter. **(H.31)**. The lower court's seem to always make reference to petitioner being a "witness," but none of the information D.t. Bulding or Martin gathered from Cruz or the civilian witness made petitioner a witness, instead they both made petitioner a "suspect."

At 9am on April 14, 2008, on the following day, D.t. Bulding directed Sgt. Mulligan to impound said vehicle. The SUV was legally parked and in no violation of any traffic law. Nor, was the SUV caught in the act or commission of a crime. Nor was there any witnesses that can definitively say this was the exact green SUV that left the scene of the crime. All D.t.'s Building and Martin had was a general color of a SUV. D.t.'s Building and Martin had more then enough time to secure a warrant, but no warrant was ever secured, and this was an illegal impoundment. The SUV was vouched, processed and logged as evidence to this homicide, on April 14, 2008, by D.t. Garrity, "hours" before petitioner and H. Miller was commanded to come down to the precinct.

SECOND ENCOUNTER:

As a parolee petitioner knew that it was incumbent upon him to follow the demand's of D.t.'s Bulding and Martin when they "commanded petitioner to go down to the police station, so that petitioner could tell them what he and Cruz were talking about at the hospital, and to write a formal statement." **(H. 28).** Under petitioner's conditional release conditions, **9 NYCRR 364. 1 (g),** (obey any law or order to which the individual is subject). Petitioner had to follow all commands given to him by law enforcement. Petitioner's liberties as a parolee enables him to do a wide range of things open to citizens who have never been convicted of a crime, and also subject petitioner to restrictions not applicable to the ordinary citizen.

D.t.'s Building and Martin used a full-blown *"RUSE"* to gain petitioner's consent , and petitioner's actions was not the product of a free, voluntary and unconstrained choice of petitioner because of petitioner's parole status. Misrepresentation by D.t.'s Building and Martin is crystal clear when clearly petitioner's actions were a submission to "authority of the badge." D.t.'s Building and Martin, never told petitioner prior to coming down to the police station that he did not have to succumb to these demands. Miranda, 384 U.S. at 444, 86 S.C.. at 1612; see also Thompson v.

Keohane, 516 U.S. 99, 105; ("These features, the court indicated, were key: .... Thompson was told he was free to go at any time.").

ARRIVAL POLICE STATION:

When petitioner arrived at the precinct around 1:30 or 2:00 p.m. on April 14, 2008. **(H. 23, 29)**, accompanied by his Father, H. Miller and other family members. D.t. Building did not speak to petitioner instead he directed D.t. Martin and Pereira to do so, nor did D.t. Building " direct these detectives to question petitioner about the conversation that petitioner had with Cruz at the hospital." **(H. 46,84)**. Petitioner was immediately separated from family and placed in an interrogation room. **(H. 51, 149)**. See Miranda v. Arizona, 384 U.S. 463, 449. D.t. Pereira, escorted petitioner to a second floor secured area, which required a punch code key-pad to enter. Petitioner was strategically directed to sit behind a desk, with little to no moving room and D.t. Pereria sat on the other side blocking petitioners path to the exit door. In order to leave the room petitioner would have to climb over the desk, then over the detective to get to the exit door. This created an "interrogation environment." see Miranda, at. 457-458. D.t. Pereira, testified at petitioner's hearing that prior to questioning petitioner: " he was aware that an eye witness had seen a black man with dreadlocks...." **(H. 164)** confirming he, D.t.'s Building and Martin all shared the same information, and D.t. Pereira had knowledge that the description matched petitioner. **(H. 160, 164)**. Petitoner's initial conversation with D.t. Pereira was not video recorded, and lasted one(1) hour. D.t. Pereira demanded petitioner to write out a statement of his activities for the date of April 13, 2008. Petitioner providing the detective's with a formal statement not long after arriving, and petitioner denied any involvement in the commission of the crime, and said nothing inculpatory in the 3:10pm statement. **(H. 154)**.

FROM THIS MOMENT ON PETITIONER WAS IN CUSTODY :

Petitioner requested to "leave" and asked "to speak to his parents who he knew were downstairs," and this request was an out right denial by D.t. Pereria who stated that: " I had to wait until the interview was over. " see **(440 affidavit)**. This denial undisputedly tipped the scale toward custody, and petitioner's movement was curtailed. Any reasonable person in petitioners shoes would no longer have felt free to break off questioning and leave. See **(440. Affidavit)**. Thus, keeping petitioner isolated from family, and lying to petitioner's family about petitioner not needing an attorney, show's that petitioner's movement was absolutely restricted. See. Miranda at 449. Also See. Miller v. Superintendent, 2020 WL 4432096, Pg. 13 (S.D.N.Y. 2020)(" some of [Miller's] family members were in the precinct downstairs" waiting for him and that Miller asked to "go downstairs to speak to my family."). Further, strengthening petitioners claim is, D.t. Bulding nor Martin, never advised D.t. Pereria to ask petitioner about " the conversation between petitioner and Cruz at the hospital." **(H. 165)**. Which was the stated purpose for petitioner being demanded to come down to the police station. These are the factors *Miranda* speak of when they refer to police atmosphere.

D.t Pereira, at no time either before or during the alleged interview *advise petitioner of his Miranda rights or told petitioner that he was free to leave at any time, nor did he have to answer any questions, and was not under arrest.* **(H. 166)**. See also, D.t. Martin's testimony stating: "*No,*" to counsel question: "was petitioner ever told that he could leave and come back." **(H. 88)**. Also, during D.t. Garrity's testimony at the hearing's on May 18, 2010, he acknowledged during his time with petitioner starting at 4pm on April 14, 2008, he stated: " No, I never heard anybody say you're free to leave." **(H. 251)**. After fulfilling stated purpose for being at the precinct, petitioner clearly was never afforded the liberties of the pre-requisite warnings of terminating the interrogation and leaving. See. Thompson v. Keohane, 516 U.S. 99, 105; ("These features, the court indicated, were key: .... Thompson was told he was free to go at any time."). In the case at bar these detective were

not rookies, they were seasoned veterans to policing and interrogations. They should have known that their questioning about the homicide of Chelsea Frazier, could have led to an incriminating response. See Rhode island v. Innis, 446 U.S. 291, 301 (".... the police should know are reasonably likely to elicit an incriminating response from the suspect"). Thus, showing that petitioner's movement was curtailed as a " suspect " and not a " witness." Petitioner was not free to move about on his own free will. See **(440 Affidavit)**.

D.t. Martin, comes into the room and begins to question petitioner about his 3pm statement, and continued to question petitioner for about one(1) hour. Petitioner maintained his innocence and reassured the detectives that petitioner basically told the detectives everything petitioner knew, and asked to leave again, and this request was also denied. See **(440 affidavit)**. D.t. Garrity now enters the interrogation room around 4pm, **(H. 243)**, and backs up D.t. Martin, telling petitioner repeatedly to tell them what happened. **(H. 245)**. D.t. Martin and Garrity, for hours continuously tag-teamed petitioner with a barrage of accusatory questions, and when one detective would leave the room the other detective pressed petitioner for more information, insisting that petitioner tell the truth. **(H. 244, 247)**. See Rhode Island v. Innis, 446 U.S. 291, 300-301 (1980).

The tone of the interrogation became accusatory, and petitioner was being interrogated by D.t. Martin and Garrity in an interrogative police-dominated atmosphere. See Miranda, at 456-457. Petitioner asked to leave again and this request was also ignored. See **(440 Affidavit)**. Both D.t.'s Martin and Garrity, then began to confront petitioner with discrepancies in his story again. **(H. 259)**. *Miranda warning were never given, and never once was petitioner's ever told he did not have to answer any questions and was free to leave.* See Miranda, 384 U.S. at 1612; see also Thompson v. Keohane, 516 U.S. 99, 105; (" These features, the court indicated, were key: .... Thompson was told he was free to go at any time.").

STATUS OF PETITIONERS FATHER HARRY MILLER WHILE AT THE PRECINCT

Another important factor that keeps being " *overlooked* " is, petitioner's father, H. Miller, was at the precinct on April 14, 2008, to write out a formal statement as well. H. Miller was immediately separated from family and escorted to a second floor secured area, placed in an interrogation room, which required a punch code onto a key-pad to enter. H. Miller, gave his statement and was told by D.t. Bulding that he was free to leave. **(T. 175).** [because he was not a suspect].This was not done with petitioner, However, while petitioner was being questioned in the other room, petitioner was never afforded the same liberties as his father.

After being released petitioner's father and mother inquired about petitioner's status, and was told lies by D.t. Martin preventing petitioner's parents from securing petitioner an attorney. See. **(440.10 motion H. Miller and M. Torres, statements).**

NOW 7-PM, FOUR HOURS OF INTERROGATION AFTER PETITIONER'S ARRIVAL AT THE PRECINCT

The Turning Point: Conversion upon suspects awareness of grounds for arrest

From 4pm on April 14, 2008, until 7pm on the same day, petitioner was continuously being interrogated by D.t. Martin and Garrity, and accused of shooting Chelsea Frazier. They also, informed petitioner that Cruz was telling them: " I got him a gun, and I was the one that committed this crime." **(H. 105, 255).** The record is *undisputable* and confirms that D.t.'s Bulding, Martin and Garrity were in fact feeding petitioner facts. **(H. 255).** The interrogation by D.t.'s Martin and Garrity was absolutely and undisputably accusatory and confrontational by 7pm.

THE DISTRICT ATTORNEY'S RESPONSE:

D.t. Bulding called Assistant District Attorney(ADA) Suminski at 7pm on April 14, 2008,

and asked could he arrest petitioner !!! The advise given back to D.t. Bulding was:

".... the district attorney's position is we were waiting for if and when a statement in the form of confession or a full statement would be required"

Q. In order to authorize an arrest of Miller. (H. 131).

D.t's Bulding, Martin and Garrity, all knew this information, and yet ***none of the detectives ever told petitioner that he was free to leave, and did not have to answer any more questions. Nor did they decide to give petitioner Miranda warnings.*** **(H. 88, 166, 251).**

This information is crucial because petitioner was *never* a " *witness*," but was always a " suspect" at 7pm. Why else would D.t. Bulding want to arrest petitioner if petitioner was only a witness. Interrogation in the hope that something might turn up continued, and a police-dominate custodial atmosphere definitively was created, and petitioners movement was absolutely curtailed. See Thompson v. Koehane, 516 U.S. 99,112 (1995). (Any reasonable person in petitioners shoes would not have felt that he was at liberty to terminate the interrogation and leave).

(3) HOURS AFTER THE CALL TO ADA SUMINSKI, AT 10-PM CRUZ IMPLICATES PETITIONER IN THE COMMISSION OF THE CRIME

After speaking with ADA Suminski, D.t. Bulding, gave D.t.'s Martin and Garrity specific instructions to keep interrogating petitioner until " a statement in the form of a confession or a full statement would be required, which was needed in order to authorize petitioner's arrest for the homicide." **(H. 130-32)**. After receiving these instructions petitioner did not stand a chance. D.t. Bulding, Martin and Garrity zeroed in on petitioner without mercy, completely disregarding *Miranda* requirements and failed to give petitioner *Miranda* warnings. These detectives proceeded to obtain a confession by any means necessary. See Miranda; See also Rhode Island v. Innis, 446 us 291,301

Cruz made a statement implicating petitioner as the shooter at 10pm on April 14, 2008. Cruz

also told the police that petitioner had " *robbed*" him and " *assaulted* " him by shooting him in the leg, and petitioner was the one that shot Chelsea Frazier See. **(H. 34-35,96-97)**. At this point detectives had "more than enough information " to arrest petitioner for " *robbery* " and " *assault* " or Chelsea Frazier's murder. D.t.'s Bulding, Martin and Garrity, surely had enough information to at least give petitioner *Miranda* warnings. See CPL § **140.10 (1)(b)** (A crime when he or she has reasonable cause to believe that such person has committed such crime, whether in his or her presence or otherwise). Petitioner was absolutely and undisputedly " *in custody*" at Cruz's 10pm statement. **(H. 198, 208).** See also People v. Berzups, 49 N.Y.2d 417, 427 ("Probable cause for the arrest is readily found in Massurin's implication of Berzups, his ability to lead the police to him, and his accurate description of him ..."). **(H. 208-09)**.

APPOINTED COUNSEL DANIEL PEREZ MIS-INFORMED THE COURT DURING ORAL ARGUMENT TO THE SECOND CIRCUIT OF AN 8 HOUR GAP BETWEEN THE 1ST AND 2ND STATEMENTS

A certificate of Appealability was granted, and during the hearing counsel mis-informed the court that there was an 8 hour gap between the 1st and 2nd statement, this statement made by counsel was absolutely wrong.

The record dose show what transpired between the 3pm and 11pm statements. What happened was all of these detectives denied informing petitioner that he could leave. **(H. 88, 166, 251)**. See. Thompson v. Koehane, 516 U.S. 99, 105; (" These features, the court indicated, were key: .... Thompson was told he was free to go at any time.").

D.t.'s Martin and Garrity, stated that during those eight (8) hours, petitioner was never alone while at the 43rd Precinct. Petitioner was "constantly in the presence of a detective," and "continuously interrogated." **(H. 89, 110, 243)**. D.t. Martin, testified that during this eight hour period

he, D.t. Garrity and petitioner " were discussing the interview of Carlos Cruz," and D.t. Martin had "found out what Cruz was saying." **(H. 94)**. D.t. Martin, also confirmed he still never gave petitioner the pre-requisite *Miranda* warning after finding out this information. **(H. 96-97)**, nor after 8 hours of incommunicado interrogation did he ask petitioner about the conversation between petitioner and Cruz that took place at the hospital. **(H. 84-86)**.

In their quest to obtain a confession by any means necessary D.t. Garrity testified that D.t. Martin "did most of the speaking." **(H. 245-46)**. When asked to provide the substance of that conversation, D.t. Garrity stated: " they were just asking him what happened." **(H. 245-46)**. This is an indication that D.t. Martin and Garrity did not accept petitioner's answers, and continued to interrogate petitioner until petitioner's answers met their approval as to the false facts they were feeding petitioner. **(H. 258-59)**. See Rhode Island v. Innis, at. 301. Petitioner had every reason to believe that there might never be an end to the questioning. In addition D.t. Garrity, testified that he and D.t. Martin "were in there for hours with petitioner," and that there was "continuous conversation," and he could only specify that the discussion concerned " the death of the victim." **(H. 247)**. See. Missouri v. Seibert, 542 U.S. 600, 609-11. This testimony clearly contradicts hearing Judge, John Carter, **Decision and Order** on **Pg.** 11, stating: "... the questioning of the defendant was not continuous or coercive. Certainly, it was not continuous between 3pm and 11:25pm." These circumstances amounted to an incommuicado detention, and petitioner should have been afforded his constitutional rights under *Miranda*. This unwarned admission at 11pm should have been suppressed. Miranda, at. 444.

POLICE TAKE A THIRD WRITTEN STATEMENT FROM PETITIONER, AGAIN WITHOUT GIVING PETITIONER MIRANDA WARNINGS

D.t.'s Martin and Garrity, "continuously interrogated" petitioner non stop, **(H. 247)**, and

obtained a written statement from petitioner at 12am on April 15, 2008, only 45 minutes after they extracted the 11pm statement. According to D.t. Martin, between the 11pm and 12am statements: "**I believed I left the room, I read the 11pm statement over, I came back in, and I told him, I says, listen, Cruz is telling me that you got the gun for him.**" **(H. 105)**. Surly after this information was passed along by D.t. Building to D.t.'s Martin and Garrity, petitioner should have, and still was not advised of his *Miranda* right's. See Rhode island v. Innis, at. 301.

Another factor which continues to be "***overlooked***" is when D.t. Garrity was asked what was said to petitioner between the 11pm and 12am statements, D.t. Garrity admitted: "**there was a point where ... D.t. Martin was telling petitioner about, um, this guy [Cruz] is giving you up, you know, he's going to put it all on you and just worked it like that.**" **(H. 255)**. D.t. Martin and Garrity, also told petitioner that Cruz "**is saying you did it. Are you going to defend yourself. You're going to let him put this all on you, you know.**" *Id.* D.t.'s Martin and Garrity, still did not administer *Miranda* warnings to petitioner before or immediately after petitioner made his third exculpatory statement, but "continuously interrogated" petitioner in furtherance of getting an inculpatory statement from petitioner. See Miranda, at 444. This third exculpatory unwarned admission/confession(s) should have been suppressed as well. *Id.*

POLICE FINALLY GIVE PETITIONER *MIRANDA* WARNINGS ELEVEN HOURS AFTER THEY BEGAN INTERROGATING PETITIONER

Prior to 12:48am on April 15, 2008, D.t. Martin and Garrity were continuously interrogating petitioner in an accusatory manner in a police dominated atmosphere, after petitioner already had given three prior statements. Yet, D.t.'s Building, Martin and Garrity should have known their word or actions were reasonably likely to elicit an incriminating response from petitioner. See Rhode island v. Innis, 446 U.S. 291, 301-302. Still these veteran detectives did not provide petitioner with

the constitutionally required *Miranda* warnings. What prompt D.t.'s Martin and Garrity to give petitioner *Miranda* warnings is when petitioner abandoned his earlier claims of not being at the scene and verbally stated: "that he shot his cousin in the leg," only after this statement was given verbally was *Miranda* warnings given. **(H. 67).**

This verbal statement was reduced to writing, and D.t.'s Martin and Garrity continued to pressure petitioner to give every details of the shooting and petitioner's subsequent conduct, including how and where petitioner attempted to dispose of the weapon. **(H. 259).** At this point petitioner had been at the 43rd precinct, incommunicado for over eleven(11) hours. When interrogation of petitioner is so long continued, with such purpose, and under such circumstances, as to make the whole proceeding an effective instrument for extorting an unwilling confession of guilt, due process precludes the use of the confession thus obtained. See Culombe v. Connecticut, 367 U.S. 568, 635.

D.t. Martin also confirmed that, petitioner never said anything about being involved in the shooting of, Frazier. **(H. 67-68).** Petitioner was never told prior to this interrogation that petitioner did not have to answer anymore question, and that petitioner was free to leave. **(H. 88, 166, 251).** Thus the "completeness of the pre-warning interrogation" too indicates a deliberate interrogation tactic. See Missouri v. Seibert, 542 U.S. 600, 615. These unwarned "exculpatory admissions/confession(s)" should have all been suppressed. See also Miranda, at. 444.

The State Court applied People v. Chapple, 38 N.Y.2d 112,115-116 (1975), " which resulted in a decision that was contrary to ", or " involved an unreasonable application of clearly established federal law," under Oregon v. Elstad, 470 U.S. 298; Rhode Island v. Innis, 446 U.S. 291; Thompson v. Keohane, 516 U.S. 99; and Missouri v. Seibert, 542 U.S. 600, ("Miranda warnings given Mid-interrogation, after defendant gave unwarned confession, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial.").

The State reviewing courts did not conduct the requisite federal standard announced in Missouri v. Seibert, 542 U.S. 600, into the "Deliberate" character of the *Miranda* circumvention and the effectiveness of the belated warnings, the state decision was both "contrary to" and an "unreasonable application of the principles stated herein, 28 U.S.C. § 2254 (D)(1)(2).

DETECTIVES OBTAINED A FOURTH WRITTEN STATEMENT FROM PETITIONER, THE FIRST STATEMENT THAT FOLLOWED THE ISSUANCE OF *MIRANDA* WARNINGS

Petitioner was held until he broke, and gave his 1pm statement on April 15, 2008, petitioner had already been interrogated in a hostile environment for well over 11 hours without rest, food and drink was only given as a reward for giving a coerced inculpatory statement. The question must enquire as to whether or not petitioner was *capable* of making a voluntary confession, suffering from lack of sleep, lack of food and drink, being constantly interrogated, cut off from family and friends, confined to a coercive environment, all of these are overpowering forces ment to break petitioners will. The conduct of the officers was hardly consistent with any concern for petitioner's rights under the Fifth and Fourteenth Amendment of the constitution of the United States.

Shortly after they administered *Miranda* warnings to petitioner at 12:48am, D.t. Martin and Garrity, testified that between petitioner's previous statements at 12am and the next statement taken at 1am, D.t. Martin gave petitioner:

"more information about what Cruz was telling me, specifically that Cruz had said I was there, and the he [Miller] got the gun and he shot ... the gun." (H. 112).

D.t. Garrity, was asked if whether petitioner made these statements on his own or whether questions were being put to petitioner, D.t. Garrity stated:

"well, after, you know, when he first came, he said he didn't know anything about it. He didn't know nothing. Then he started to give a little more information. He started to give a little bit more information. We kept talking to him. He kept giving a little more information until he gave the statement at the end ....

Before the statements being done he was, he was saying things, and he was catching himself in things that, you know, that he lied, you know. At first, like I said, at first he didn't know anything about it. *'It is just a continuous thing, counselor. It's just continuous.'* You keep talking. He says something. You counter it , and you keep going and then you get to the end, you get to the statement. (H. 258-59)."

Clearly the actions taken by D.t.'s Bulding, Martin and Garrity, were "*overlooked*" by the previous court's. The Appellate Division first Department, and the Court of Appeals, applied there own rule set in People v. Chapple, 38 N.Y.2d 112, 115, ("... later is to late, unless there is such a definite, pronounced break in the interrogation that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning ..."). The Southern District of New York, and The Second Circuit Court of Appeals, affirmed the state courts decision that was clearly contrary to the Supreme Court presedent set out in Missouri v. Seibert, 542 U.S. 600, ("Miranda warnings given mid-interrogation, after defendant gave unwarned confessions, were ineffective, and thus confession repeated after warnings were given was inadmissible at trial ...") These D.t.'s actions created a police-dominated atmosphere, coupled together with custodial interrogation of petitioner, and not providing petitioner with the procedural safeguard of pre-requisite *Miranda* warnings violated the requirements set forth in the United States Supreme Court precedent under, Miranda v. Arizona, 384 U.S. at. 444-48; Rhode Island v. Innis, 446 U.S. 291, 301; Thompson v. Keohane, 516 U.S. 99, 105; also, Missouri v. Seibert, 542 U.S. 600, 609-17. Petitioner's pre-*Miranda* statements should have never been suppressed.

II. THESE DETECTIVES DELIBERATELY CONTINUED THE UNWARNED CUSTODIAL INTERROGATION IN ORDER TO KEEP PETITIONER TALKING AND DELIVERED *MIRANDA* ONLY AFTER OBTAINING A VERBAL CONFESSION, PETITIONER'S SUBSEQUENT STATEMENT REPEATING THAT CONFESSION WERE INADMISSIBLE UNDER MISSOURI v. SEIBERT

Under the familiar principles of *Miranda v. Arizona*, 384 U.S. 436 (1966), and its many

progeny, police must advise a suspect of his constitutional rights, including his rights to remain silent and to the presence of an attorney during questioning, before conducting any " custodial interrogation." Failure to give the prescribed warnings and obtained a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. See Missouri v. Seibert, 542 U.S. 600, 608 (2004).

The interrogation followed a sequence which is sadly familiar from many reported cases. Though D.t.'s Bulding, Martin and Garrity, admittedly viewed petitioner as the "primary suspect," they did not administer *Miranda* until more than half-way through the interrogation, only after petitioner had confessed to shooting Cruz in the leg. Instead the detectives conducted an increasingly accusatory and intimidating interrogation, in which they lied to petitioner about the existence of witnesses, testimonial and forensic evidence supposedly inculpatory petitioner. In the face of the detectives misrepresentations about the state of the evidence and the suggestion that petitioners father would be released if petitioner cooperated, petitioner abandoned his claim of innocence and placed himself at the scene of the crime.

Only after questioning petitioner on every aspect of the fatal altercation and petitioners subsequent conduct did D.t.'s Martin and Garrity belatedly advise petitioner of his *Miranda* rights. Without any breaks in the interrogation, D.t.'s Building, Martin, and Garrity then re-interrogated petitioner, and made petitioner write out his verbal confession covering the identical ground as in the unwarned verbal confession. The accusatorial interrogation of petitioner became a police-dominated custodial interrogation prior to petitioner's initial confession and long before D.t.'s Martin and Garrity administered Miranda warnings.

A. Two-Step Interrogation : Substantive Governing Post-*Miranda* Statements Obtained After An Initial Unwarned Custodial Interrogation

Two United States Supreme cases frame opinions on the "clearly established" standard

governing a two-stage interrogation such as this, in which police first elicit an unwarned confession and delivered *Miranda* advisements and have the suspect repeat his account. See. Missouri v. Seibert, 542 U.S. 600 (2004); See also Oregon v. Elstad, 470 U.S. 298(1985).

Petitioner, contends that his post-*Miranda* statements were inadmissible under either *Seibert* or *Elstad* analysis. They were inadmissible under *Seibert* because the objective circumstances of this two-stage "***Miranda in the Middle***" interrogation, as well as detectives admissions regarding interrogation "tactics," compel the conclusion that the two-step approach was a deliberate tactic to ensure elicitation of a coerced confession before petitioner had an opportunity to make an informed decision on whether to waive his rights. Miranda v. Arizona, 348 U.S. 436 (1966).

B. The State Court Decision Was Contrary to Clearly Established Federal Law, Because the State Court Did Not Assess the Deliberate Character of the Two-Step Interrogation of the Effectiveness of the Belated *Miranda* Warnings to the Unwarned Confessions

Under *Missouri v. Seibert,* the admissibility of otherwise voluntary post *Miranda* confession obtained through a two-step interrogation such as this turns upon the "Deliberate" character of the two-step approach and upon the "Effectiveness" of the belated *Miranda* advisements to fully inform the petitioner of his rights and options and to dissipate the effect of the initial *Miranda* violation. See. Missouri v. Seibert, 542 U.S. 600, 616-617; See also U.S. v. Capers, 627 F.3d 470,476-77.

In petitioner's state appeal, there remains one loose end with respect to petitioner's *Miranda* claims. The state court did not distinguish between the "*FIRST*" and "*SECOND*" sessions as is required by Seibert, supra. The state court presumably did this in part because it incorrectly under *FEDERAL* law held that petitioner was not in custody when petitioner made his "*FIRST THREE*" admission/confession(s). But they, perhaps, also failed to distinguish the confession because the New York Court of Appeals has declined on state constitutional grounds to follow the rules or Law announced in, Oregon v. Elstad, supra; or Missouri v. Seibert, supra. The state court follows, People

v. Chapple, 38 N.Y.2d 112, 378 N.Y.S.2d 682,685-686; People v. Bethea, 67 N.Y.2d 364, 502 N.Y.S.2d at 714, ("The ruling of the Chapple case, therefore, continues as a matter of state constitutional law, to govern the admissibility of statements obtained as a result of continuous interrogations."). This ruling is clearly contrary to the clearly established Supreme Court precedent announced under Missouri v. Seibert, 542 U.S. 600.

The State Appellate Court, nonetheless, framed its inquiry solely in traditional voluntariness terms. Because *Seibert* applies to petitioner's case and the state reviewing court did not conduct the requisite federal standard announced in *Seibert* into the "Deliberate" character of the *Miranda* circumvention and the effectiveness of the belated warnings, the state decision was both "contrary to" *Seibert* and an "unreasonable application of the principles stated herein, 28 U.S.C. § 2254(D)(1).

C. The Two-Step Interrogation Was a Deliberate Police Tactic to Keep Petitioner Talking

Though *Seibert* requires judicial assessment of the offices' intent in deferring *Miranda* warnings, the United States Supreme Court has recognized that: "Because the intent of the officers will rarely be candidly admitted as it was here, the focus on facts apart from intent shows the question-first tactic at work." See. Seibert, 542 U.S. at 616, Fn.7(plurality Opn.)

In determining the interrogators deliberately withheld the *Miranda* warnings, courts should consider whether objective evidence and *any* available subjective evidence, such as an "officer's testimony" support an inference that the two-step interrogation procedure was used to undermine the *Miranda* warnings. Such objective evidence would include the; ***Timing, setting, and Completeness of the pre-warning interrogation, The continuity of police personnel, and the overlapping content of the pre-and-post Miranda statements,*** was totally disregarded by the state court. See *Id.* at. 615.

Here both "Objective" and "Subjective" evidence compels the conclusion that this two-step

interrogation was a deliberate tactic conducted by these detectives to defer *Miranda* warnings until after elicitation of complete admissions and confessions.

Objective-Evidence :

Timing, Setting and Completeness of Pre-Warnings interrogation :

This was not a brief exchange in the field of a booking which some how slid, without planning, into an interrogation; nor were there any other circumstances that distinguished it from a traditional interrogation. See. Berkemer v. McCarty, 468 U.S. 420.

Petitioner and his father H. Miller had been ordered to come down to the police station. This was a classic Four-Detective police station interrogation of a petitioner, in both form and substance, the interrogation had all the classic indicia of a "Primary Suspect" that these detectives zeroed in on for committing a homicide. See. **(H. 29,31).** The interrogation took place in an interrogation room, occurred in the afternoon beginning at 2:00pm. Miranda warning were never given, and never once was petitioner's ever told he did not have to answer any questions and was free to leave. Miranda, 384 U.S. at 1612; See also Thompson v. Keohane, 516 U.S. 99, 105; ("These features, the court indicated, were key: .... Thompson was told he was free to go at any time."). Petitioner was surrounded by detectives who were behind two desks and D.t.'s Bulding and Martin sat on the opposite side effectively boxing petitioner in, and Garrity sat directly facing petitioner on the same side. The unwarned portion of the interrogation lasted approximately Ten(10) and a half hours until 12:48am.

Beginning early in the interrogation, the detectives made it plain that they did not believe petitioner's account in his first statement which was taken at (3:10pm statement), or petitioner revised second statement, that petitioner was there and saw something happen at (11:25pm statement). The detectives employed several common interrogation "techniques" or "tactics" to keep the interrogation

going and were ordered to obtain an admission/confession from petitioner, by ADA Suminski in order to authorize an arrest. **(H. 105, 131,)(T. 73-74)**. D.t. Garrity stated: "We kept talking. He says something. You counter it, and you keep going and you get to the end, you get to the statement." **(H. 259)**. Not satisfied with petitioner's story, the police applied further psychological pressure, and pressed on with their intentions of obtaining a confession from petitioner by any means necessary. Petitioner told D.t.'s Bulding, Martin and Garrity that's all petitioner knew in his 11:25pm statement, but these detectives lied to petitioner about the existence of both eye-witness accounts and physical evidence inculpating petitioner. **(H. 105,255)**. Petitioner then felt compelled to give another statement that would meet D.t.'s Bulding, Martin and Garrity's wish's at (12:15pm), wherein petitioner stated that amongst other things Cruz asked if petitioner could get him a gun.

After giving three statements and being repeatedly lied to by D.t.'s Martin and Garrity, denied access to speak to counsel, request to leave aslo denied, and being denied access to speak to H. Miller who petitioner came down to the precinct with, petitioner was at the end of his wits. The incommunicado interrogation continued and petitioner then gave a verbal statement that was later reduced to a written statement given at (1:00am statement). **(H. 105)**. D.t. Garrity deployed yet another successful tactic as "*Countering*" petitioner's explanations. **(H. 259)**. D.t.'s Garrity and Martin then feed petitioner scenarios which appeared to "*Minimize*" his culpability, **(H. 118)**, as means to obtain petitioner's initial crucial admission of his involvement in a fatal homicide.

Disregarding all of the above, it was only after petitioner verbally admitted to shooting Carlos Cruz, did the state court determined the interrogation to be custodial. See. **(Hearing Court "Decision and Order" at Pg.9-10)**. After making two request to leave and for counsel went unheard, petitioner felt that the police would not let petitioner go. **(440 Affidavit)**. Having no where else to turn especially after being denied the opportunity to speak to H. Miller, petitioner's will was finally

broken and told the police what they wanted to hear. Petitioner abandoned his earlier claims that he did not know what happened, and then , made an admission/confession to shooting Carlos Cruz in the leg. Then and only then were *Miranda* warnings were given, and D.t.'s Building, Martin and Garrity continued to complete their interrogation, by going over every detail of petitioner's previous three statements and petitioner's conduct, including how and where petitioner attempted to dispose of the gun. Thus, the "Completeness of the pre-warning interrogation" too indicates a deliberate " Two-Step" interrogation tactic. See Seibert, 542 U.S. at 616-17; See also Williams, 435 F.3d at 1159.

This court must hold these detectives deliberately violated *Miranda* or withheld warnings under these circumstances and should have recognized the importance of giving petitioner these pre-requisite warnings. Both the warned and the unwarned statements must be inadmissible. *Miranda* itself contains an exclusionary rule. D.t.'s Bulding, Martin and Garrity must give warnings and allow the petitioner an opportunity to invoke his rights. Exclusion deters violations of these procedures and ensures the reliability of trial testimony. If warnings are constitutional required under Dickerson v. U.S. 530 U.S. 428 (2000), then they necessitate specific remedies to insure compliance. In every context where this Court has recognized obligatory rules of police conduct, it has concluded that excluding derivative evidence is essential for meaningful deterrence of violations. *Miranda* deserves its constitutional respect, and D.t.'s Building Martin and Garrity will be deterred from this "Two-Step" interrogation policy only if derivative evidence is suppressed. Otherwise, the unwarned statements will infiltrate the governments case-in-chief, as it did here, through an end-run around a constitutional rule.

***Continuity of police personnel and overlapping content of pre-and post-warnings statements*:**

There was even greater "continuity" between the un-warned and warned interrogations here then in *Seibert*. D.t.'s Martin and Garrity, administered the belated *Miranda* advisement midway

through a single interrogation session lasting ten(10) hours. These detectives did not take a break between the two phases, as in *Seibert*, but continued the interrogation without missing a beat. Cf. *Seibert*, 542 U.S. at 616 ("a pause of only 15 to 20 minutes").

There was complete "continuity of police personnel" D.t.'s Bulding, Martin and Garrity conducted the entire interrogation, both pre- and post-warning phases. D.t. Bulding was present when the video-confession was recorded. It is an understatement to say that the pre- and post-warning interrogation "overlapped." ADA Suminski was the assistant district attorney that took petitioner's video-statement and used the unwarned confessions as a template and took petitioner step-by-step back through what was already written pre- and post-*Miranda*. See. **(Video-Statement).**

Just as in *Seibert*, "the interrogating officer here relied on petitioners pre-warning statements to use against petitioner at trial." *Seibert*, 542 U.S. at 621(Kennedy, J., concur). Here too ADA Suminski referred back to petitioner's unwarned admissions/confession(s). See. **(Video-Statement).** An implicit suggestion that the mere repetition of the earlier statement was not independently incriminating would be tragic to the law set by the supreme court. *Ibid.* The two-step tactic undermined the effectiveness of the belated *Miranda* advisement in exactly the way decried in *Seibert*.

Subjective Evidence :

Evidence of Subjective evidence, when available, remains a relevant factor. D.t.'s Bulding, Martin and Garrity, testimony removes any doubt that the delay of *Miranda* warnings until after the detectives obtained petitioner's complete confession was a deliberate tactic. See. **(H. 247,251-52, 258-59); (T. 201-202)(D.t. Bulding); (T. 578)(D.t. Martin).** Although *Seibert* recognized that officers will "rarely be" entirely "candid" in admitting the purpose of a two-step approach; Seibert, U.S. at 616, fn.6, (plurality Opn.).

Petitioner had been viewed as the "primary suspect" from the start, and by the time the

detectives commenced the interrogation, D.t. Bulding, already "had a belief it was petitioner who committed the crime," D.t. Bulding stated: **"I had a Hunch petitioner was the shooter." (H. 31-32),(T. 194, 202)**, and continued on that track during all of petitioner's interrogation. D.t. Bulding, shared this "I had a hunch" theory with D.t.'s Martin and Garrity, during this station house interrogation. **(H. 34-35)(T. 200).** D.t. Garrity testified at the Huntley hearings "... Keep the interrogation going, he says something you counter it and you get to the end." **(H. 259)**, so he wanted to keep questioning petitioner until he got a confession, before giving the required *Miranda* warnings because D.t. Garrity deemed petitioner to be a suspect.

The deferral of *Miranda* warnings plainly served that "intention." None of these D.t.'s Bulding, Martin or Garrity, ever advised petitioner of the pre-requisite constitutionally required *Miranda* warnings, nor advised petitioner that he was not under arrest and that petitioner can terminate the questioning at any time and leave, because these detectives wanted to continue their interrogation. **(H. 247,252,259)**. By the time D.t. Garrity delivered this, "Carlos Cruz is giving you up, are you going to defend yourself" speech, **(H. 255)**, it would be reasonably clear to any reasonable person in petitioner's position that he was not free to leave. The District Attorney's Office took a position as well, and their advise to the detectives of the 43rd precinct explains the need to continue the interrogation until petitioner fully confessed to murder. See D.t. Bulding testimony at, **(H. 36), (T. 201-202)**; also A.D.A. Suminski hearing testimony at **(H. 131)(T. 73-75)**.

Upon considering the videotape and surrounding circumstances, including the **"17 hours"** of incommunicado interrogation petitioner was being held against his will at the precinct. By this time D.t's Martin and Garrity fed petitioner facts, D.t. Martin told petitioner: "I got him a gun, and I was the one that committed this crime." **(H. 105,255)**, and D.t. Garrity's: "... this guy [Cruz] is giving you up, you know, he's going to put it all on you and just worked it like that," D.t. Garrity also stated:

"[Cruz] is saying you did it are you going to defend yourself. You're going to let him put this all on you ..." **(H. 255).** It would be reasonably clear to any reasonable person being subjected to this continuous interrogation that petitioner would not feel free to leave.

Once a law enforcement officer has detained a suspect and subjects him to interrogation as was the case in *Seibert* and is the case here, there is rarely if ever a legitimate reason to delay giving a *Miranda* warnings until after the suspect has confessed. Instead, the most plausible reason for the delay is an *illegitimate* one, which is the interrogator's desire to weaken the warning's effectiveness. Seibert, 542 U.S. at 620, 124 S.Ct. 2601.

These detectives admitted in several ways that their various tactics throughout the interrogation, lies about evidence, continuously telling petitioner to tell the truth, declining to arrest petitioner until petitioner confessed to his involvement in the crime, and they would arrest his father H Miller for being an accomplice. All served D.t.'s Bulding, Martin and Garrity, intended purpose of keeping petitioner talking until petitioner had confessed to murder. The deferral of *Miranda* warnings until after these detectives had obtained a complete confession was part and parcel of that same deliberate strategy.

Like the interrogation in *Seibert*, this was a classic example of trained detectives' deliberate use of the "two step strategy" to ruin the Law set forth in *Miranda*.

D. The Delayed *Miranda* Warnings Were Ineffective to Cure the Violation, In View of the Continuous Character of the Warned and Unwarned Phases of the Interrogation, the Overlapping Content, and the Absence of Any Curative Steps

When an interrogation has deliberately employed the two-step strategy, *Seibert*, requires the court then to evaluate the effectiveness of the mid-*Miranda* warnings to determine whether the post-warning statement is admissible. See. Seibert, 542 U.S. at 615-616.

Thus, the court must address: (1) the completeness and detail of the pre-warning interrogation,

(2) the overlapping content of the two rounds of interrogation, (3) the timing and circumstances of both interrogations, (4) the continuity of police personnel, (5) the extent to which the interrogator's questions treated the second round of interrogation as continuous with the first and (6) whether any curative measures were taken. *Ibid.*

As petitioner has already addressed in context:

[1] The pre-warning questioning represented a deliberate interrogation on every aspect of petitioner's movements and petitioner's subsequent conduct; [2]. The pre-and post-warning interrogation overlapped, as the detectives led petitioner back through the same account to which petitioner had confessed before the warnings; [3]. Both phases of the interrogation took place in the 43rd precinct interrogation rooms (with the exception of leaving handcuffed with detectives to recover the firearm); [4]. There was a complete "continuity of police personal," namely D.t.'s Bulding, Martin and Garrity.

During both the pre and post-warning sessions at the precinct, D.t.'s Martin and Garrity treated the unwarned and warned sessions as one. After the recovery of the firearm, ADA Suminski, during the video-statement reminded petitioner of his prior unwarned statements and referred back to petitioner's pre-warning admission/confession(s). Consequently, "the interrogation and ADA Suminsk, questions treated the second round of interrogation" as a continuation of the unwarned session. See. Seibert, 616-17.

The detectives, nor ADA Suminski, did not take any additional "Specific Curative steps" in conjunction with the untimely *Miranda* delivery, such as "explaining the likely inadmissibility of the pre-warning custodial statement." See. Seibert, 542 at. 621-622,(Kennedy, J., concur.); Seibert, at. 616,(Plurality Opn.).

This interrogation featured every one of the factors which *Seibert* identified as negating the efficiency of the untimely *Miranda* warnings. Nothing was said or done to dispel the oddity of

warning about legal rights to silence and counsel after the police had led petitioner through a systematic interrogation ... The impression that the further questioning was a mere continuation of the earlier question and responses was fostered by reference back to the confessions already given. It would have been reasonable to regard the two sessions as part of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the understanding and efficiency of the *Miranda* warnings to the point that a reasonable person in the petitioner's shoes would not have understood them to convey a message that petitioner retained a choice about continuing to talk. See. Seibert, 542 U.S. at. 616-617,(plurality opn.).

This case is on point with all of *Seibert's* mandated rules. The two-step interrogation was a deliberate police tactic to keep petitioner talking, See **(H. 258-259)**, and the "midstream" *Miranda* advisement, after police had obtained unwarned admission/confession(s), were ineffective to convey to petitioner that he "retained a choice about continuing to talk." *Seibert*, at. 617. *Seibert* requires exclusion of all petitioner's statement.

Because the facts of petitioner's case "are materially indistinguishable from" those of seibert, the state court admission of petitioner's post-advisement statements was "contrary to" *Seibert*, under § 2254(D)(1). See. Williams v. Taylor, 529 U.S. 362, 405(2000). Moreover, because all the factors identified in *Seibert* indicated that the two-step interrogation was a deliberate tactic to circumvent *Miranda* and that the belated *Miranda* advisements were "ineffective," the state court's disposition was also "objectively unreasonable" and thus an "unreasonable application" of clearly established law under the United States Supreme Court case, Missouri v. Seibert, 542 U.S. 600.

III. PETITIONER'S WAIVER WHICH CAME IN THE MIDDLE OF THE INTERROGATION WAS NOT VOLUNTARY, KNOWING OR INTELLIGENT, THUS RENDERING THE SUBSEQUENT STATEMENT INVOLUNTARY

"The voluntariness of a waiver of the 5th amendment privilege has always depended on the absence of police overreaching ..." Colorado v. Connelly, 479 U.S. 157,170; See. Moran v. Burbine, 475 U.S. at 421, 106 S.Ct. at 1141(" The relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception..."

Under the totality of the circumstances presented in petitioner's case, D.t.'s Bulding, Martin and Garrity, overreaching rendered petitioner's waiver involuntary. These detectives tactics were intended to deprive petitioner of the opportunity to knowingly and intelligently waive his *Miranda* rights. Both stages of the interrogation formed the basis for a continuous interrogation. Petitioner was interrogated by the same detectives in the same location with only minutes separating the unwarned and warned interrogation sessions. There are no circumstances that would seem to dispel the effect of a *Miranda* violation. For the these reasons, petitioner's post *Miranda* waiver and pre-*Miranda* admission/confession(s) were involuntary, and otherwise inadmissible.

Guided by *Seibert*, the lower court must make a determination, whether D.t.'s Bulding, Martin or Garrity, used a method calculated to undermine petitioner's free will, Citing. Elstad, 470 U.S. at 309. If the mid-stream waiver was involuntary, as the *Missouri* Supreme court found in Missouri v. Seibert, 542 U.S. 600, the duplicated statement is inadmissible, through standard *Miranda* exclusion.

Petitioner struggles for a distinction because as *Miranda* and *Seiberi* supra, acknowledges, if D.t.'s Bulding, Martin and Garrity, all exploited the unwarned admission to pressure a waiver, "petitioner's wavier and subsequent statements will very well have been compelled." The constitutionally required *Miranda* protections did not disappear when belated warnings were recited, and a wavier was obtained. Petitioner was never advised that the previous statements could not be used against him. See. Missouri v. Seibert, 542 U.S. 600-17.(In particular, the police did not advise

petitioner that the prior statements could not be used. Fn.7.).

The danger is too great that these tactics will result in unwarned statements and involuntary waiver. If this court does not apply a broad exclusionary rule to deter this misconduct, it should nonetheless reverse the lower courts decision that petitioner's waiver and subsequent statements were voluntary. When police officer's unreasonably withhold *Miranda* at the outset of custodial interrogations, in a calculated attempt to undermine the petitioner's free will, this Court must presume that improper tactic(s) achieved its goal and rendered the warnings ineffective and the wavier involuntary. The viewing court must apply, Westover v. United States, 384 U.S. at 496-97; and Missouri v. Seibert, 542 U.S. 600., along with *Miranda* to petitioner's claims.

An incommunicado marathon of 10 and a half hours prior to obtaining a verbal confession by concededly illegal methods, these detectives used that verbal confession to extract a second one, *Wholly for the purpose of* supplementing the first confession. The warnings, designed as a prophylactic measure, were insufficient to cure such blatant disregard for Miranda warnings, or to compensate for the continuous coercion in the case.

IV. THE ADMISSION OF PETITIONER'S CONFESSION HAD A "SUBSTANTIAL AND INJURIOUS EFFECT OR INFLUENCE," UNDER *BRECHT*, BECAUSE THE CONFESSION WAS CRUCIAL TO THE PROSECUTIONS PROOF OF IDENTITY AND OF PREMEDITATION

A *Miranda* violation is subjected to prejudice standard of Brecht v. Abrahamson, 507 U.S. 619 (1993) The prejudice from petitioner's confession cannot be soft pedaled, and the error was not harmless. *Id.* At 623. "In determining whether error was harmless, we do 'not examine whether there was sufficient evidence to support the conviction in the absence of the constitutional error.' See Kotteakos v. U.S., 328 U.S. 750, 763-65, 66 S.Ct. 1239; Brecht, 507 U.S. at 642-43. Rather, we determine 'whether the error had a substantial and injurious effect or influence'" on the jury verdict.

See brecht, at 642-643. The admission/confession(s) were central to petitioner's conviction. See. Arizona v. Fulminante, 499 U.S. 279, 296, 11 S.Ct 1246.

Due to the importance of a petitioner's own confession to a jury's determination of petitioner's guilt and level of culpability, improper admission of the admission/confession(s) represents the type of evidentiary error most likely to prejudice the outcome of the trial. "A confession is like no other evidence. Indeed, the petitioner's own confession is probably the most ... damaging evidence that can be admitted against him." See. Arizona v. Fulminante, 499 U.S. 279,296(1991).

Moreover, the prejudicial impact will be greatest: [1]. Where the confession is not cumulative and there is no eyewitness or forensic evidence to directly establish the petitioner's guilt, or [2]. Where the confession provides a complete account of the crime, rather than an isolated incriminating admission. "A full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon the evidence alone in reaching its decision." Fulminante, 499 U.S. at 296.

All of those conditions are presented here. Petitioner's confession was crucial both to the prosecutions proof of petitioner's identity as the alleged *Shooter* and to its establishment of the offense as first-degree murder, rather then a lesser form of homicide. There was good reason to regard petitioner as a suspect in Frazier's death, in view of the information that was gathered from eyewitnesses description, See. **(H. 16-19,79-80)**, a description from Carlos Cruz, and the impounding of petitioner Father's SUV Petitioner matched that general description, and drove that type of SUV. **(H.29)**.

In obtaining the confession, the detectives employed the ruse of lying to petitioner about physical evidence. But the detective actually had no such definitive evidence. **(T. 531-32)**. While the evidence, apart from the illegally obtained admission/confession(s), may well have provided probable

cause for petitioner's arrest and prosecution, it left ample room for jurors to harbor reasonable doubts.

However, petitioner's admission/confession(s) extinguished any doubt in the matter. In the absence of any definitive eyewitness testimony or forensic evidence, it became the centerpiece of the prosecution's case, and the prosecutor referred to it repeatedly during closing arguments to the jury. See. **(T. 696,699,700,702,727-28).**

Petitioner's confession was even more important on the question of petitioner's level of culpability. Even if jurors had been satisfied that petitioner was the alleged shooter, it is inconceivable that they would have returned a unanimous verdict of *First-Degree* murder in the absence of petitioner's own account of the coerced particulars of the homicide. There was ample evidence that Carlos Cruz, was desperate to retain his relationship with Frazier, but petitioner harbored no pre-existing intent to kill or harm Frazier. There was no evidence that petitioner went to this particular area with any plan to murder Frazier. Nor was there any proof that petitioner possessed the firearm prior to the murder. The same circumstances which cast petitioner as the primary suspect, also strongly suggested that the killing was a crime of passion, a lovers quarrel, rather than a *deliberate and premeditated* murder. Without petitioner's confession or any other detailed account of the crime, the most probable verdict would have been **NOT GUILTY.**

Petitioner's confession changed all of that. Petitioner admitted to his bad acts in admitting that he shot his cousin Carlos Cruz. See. **(1:00am, Statement).** Most damning of all was petitioner's coerced admission that, petitioner allegedly killed Frazier. See. **(2:25am, Statement).** Petitioner's coerced admission that his final act was "preceded and accompanied by deliberate intent to kill" represented a "cold, calculated judgement," guaranteeing a verdict of first-degree murder. Not surprisingly, the prosecution relied on this aspect of petitioner's confession as conclusive proof of intent to prove the elements required to convict petitioner of First-degree Murder.

Given the prosecutor's emphasis on the, **(2:25am, Statement)**, and the video-statement of petitioner's confession, this court cannot say that the evidence had no substantial influence upon the jury verdict. Petitioner's confession was central to the conviction, See Fulminante, 499 U.S. at 296, as to both petitioner's identity as the alleged killer, and the alleged premeditation necessary to elevate the homicide to first-degree murder.

The prejudice from petitioner's admission/confession(s) cannot be taken lightly, and the error was not harmless under the *Brecht* standard. The admission of the admission/confession(s) were not harmless error with respect to the Murder conviction. Without the confession, there was arguably insufficient evidence before the jury to support a conviction.

CONCLUSION

For all the reasons stated above, this viewing court must find that petitioner's waiver and subsequent statements were involuntary under *Westover, Thompson Miranda* and *Seibert,* supra. The two-step interrogation technique is the classic example of an improper tactic calculated to undermine a suspects free will. Such tactic(s) will very often result in an involuntary waiver and statement(s), as it did here. This is why this court must presume compulsion and exclude evidence taken from unreasonable withholding of warnings. Such exclusion is the effective way to deter misconduct, to ensure the protection of the privilege, and guarantee that involuntary statements will not infect the reliability of the evidence at trial.

If mid-stream warnings are condoned, the "two-step interrogation" will thrive. *Miranda* sought an end to secret interrogations of unwarned suspects, *Westover* declared that this tactic of mid-stream warnings between two parts of an interrogation would result in a presumptively invalid waivers. The real question now is whether *Miranda* will remain a potent protector of the privilege, or dissolve into an optional strategic tool for the police. Petitioner's pre- and post-*Miranda* statements as well as the

video-statement must be suppressed. Accordingly, the judgement of the lower Supreme court of New York, Southern District of New York, and Second Circuit Court of Appeals, should be reversed.

Petitioner respectfully ask this court to *reverse* the judgment of the lower courts and order that the *Writ of Certiorari, to be* GRANTED, or in the alternative that a hearing be held to determine whether the application for *Writ of Certiorari* should be granted.