No. NEW CASE
22-7679

IN THE SUPREME COURT OF THE UNITED STATES

FREDERIC GABRIEL - PETITIONER

vs.

SEC'Y FLA. DEP'T OF CORR.-RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. DIST. COURT SOUTHERN DISTRICT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Frederic Gabriel
Hardee Correctional Institution
6901 State Road 62,
Bowling Green, FL 33834

QUESTION(S) PRESENTED

1. DID THE ACTIONS OF POLICE VIOLATE THE PETITIONER'S FIFTH AMENDMENT RIGHT WHEN THE PETITIONER INVOKED HIS RIGHT TO SILENCE BY UNAMBIGUOUSLY STATING: "NO, I DON'T WANT TO TALK TO YOU" TO DETECTIVES WHO ACKNOWLEDGED THIS STATEMENT BUT REFUSED TO SCRUPULOUSLY HONOR THE PETITIONER'S STATEMENT BY NOT CEASING THE INTERROGATION AND SUBSEQUENTLY USED THE STATEMENT AGAINST THE PETITIONER AT TRIAL?

2. DOES LAW ENFORCEMENT VIOLATE A SUSPECT'S FIFTH AMENDMENT RIGHT WHEN THEY OBTAIN AN INCRIMINATING STATEMENT IN DIRECT VIOLATION OF MIRANDA, FROM A DEFENDANT WHO HAS VERY LIMITED ENGLISH, SO LONG AS THEY ALSO GET THE SUSPECT TO RESTATE PORTIONS OF A PREVIOUS NON-INCRIMINATING STATEMENT THEREBY RENDERING THE SUBSEQUENT STATEMENT CUMULATIVE?

LIST OF PARTIES

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

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

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APPENDIX A – State Trial Court's postconviction denial, State Appellate Court's denial, U.S. Dist. Court (M.D. Fla.) Magistrate Report and Order adopting Magistrate Report, U.S. Court of Appeals (11th Cir.) denial of COA.

APPENDIX B – None

APPENDIX C – U.S. Court of Appeals (11th Cir.) Reconsideration denial.

APPENDIX D – None

APPENDIX E – State level postconviction motion, 2254 Petition raising 5th Amendment issue, and Petitioner's Objections to the Magistrate Report.

APPENDIX F – Trial Transcripts pgs 241-265 of First and Second statements being presented to the jury.

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix A to The petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix A to The petition and is

[X] reported at 2021 U.S. Dist. Lexis 237922 ; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appear at Appendix_____ to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____court
appears at Appendix _____to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For case from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 9, 2023.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 6, 2023, and a copy of the Order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No. _____A_____.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was_____. A copy of that decision appears at Appendix_____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing Appears at Appendix_____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including_____(date) on_____(date) in Application No. _____A_____.

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution, which provides: "That no person shall be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

The State of Florida charged the Petitioner with two counts of lewd and lascivious battery of a minor between twelve and sixteen years of age. The first count alleged that the Petitioner "[put] his penis in [the victim's] mouth." The second count alleged that he "caus[ed] his penis to penetrate or have union with the [victim's] vagina." The jury convicted the Petitioner of count one and acquitted him of count two. The trial court sentenced the Petitioner to fifteen years in prison.

The Petitioner appealed. The Fourth District Court of Appeals affirmed without comment.

Through counsel, the Petitioner timely filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The Petitioner gave two statements to law enforcement during the investigation. Relevant here, the Petitioner argued that counsel ineffectively failed to move to suppress his second statement to the police, in which he expressly stated that the Petitioner saw the victim's mouth on his penis.

The trial court denied this claim reasoning that, even had counsel deficiently failed to move to suppress the second statement, the Petitioner could not show prejudice. This was because "the first taped conversation essentially includes the same information as the second recording." The Petitioner appealed, and the Forth District again affirmed without comment.

The Petitioner timely filed a § 2254 petition. The Petitioner argued that counsel ineffectively failed to move to suppress his first and second statements

because: 1) there was no interpreter present and he did not understand his *Miranda* rights because of his limited understanding of English; 2) the police obtained prejudicial statements during the second interview after he allegedly invoked his right to remain silent; and 3) he was "physically and mentally exhausted during his second interview."

The State filed a Response, and relevant here, the State contends that "the substance of each statement was the same."

The Petitioner filed a Reply where he contends that the trial court's conclusion that the second statement was the same in substance as the first is clearly erroneous based on the transcript.

The District Court adopted and affirmed the Report of the Magistrate Judge and further held that the Petitioner's claims lacked merit and therefore also denied a Certificate of Appealability.

The Petitioner then sought a Certificate of Appealability from the U.S. Circuit Court of Appeals for the 11th Circuit.

The Circuit Court denied the Petitioner a Certificate of Appealability holding that the Petitioner failed to demonstrate prejudice.

The Petitioner timely filed a Motion for Reconsideration which the Court denied.

The Petitioner now seeks a writ of Certiorari

REASONS FOR GRANTING THE PETITION

Certificates of Appealability are not issued as a matter of right, but may issue only if the applicant has made a substantial showing of the denial of a Federal Constitutional Right. 28 USC 2253 (c)(2). This substantial showing occurs by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 US 473, 484 (2000). In 2254 habeas proceedings, relief may not be granted unless the State court adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court. 28 USC 2254 (d)(1).

The Petitioner asserts that reasonable jurists can and would debate that the State Court's adjudication was contrary to the bright-line rule this Court created in *Miranda v. Arizona*, 384 US 436 (1966).

The State Trial Court determined that Petitioner's statement "No, I don't want to talk to you" was made ambiguous by statements he made later in the interrogation. As Petitioner demonstrates in Part A, this determination was contrary to and an unreasonable application of clearly established Supreme Court law. 28 USC 2254 (d)(1). By continuing to interrogate Petitioner after he had invoked his right to remain silent, the Detective violated Miranda, which means the government cannot use against Petitioner anything he said after his unambiguous invocation. This includes using Petitioner's subsequent statements to detectives to "cast retrospective doubt on the clarity of the initial request itself." *Smith v. Illinois*, 469 US 91, 100 (1984). "To permit the continuation of custodial

interrogation" after Petitioner's invocation "would clearly frustrate the purposes of *Miranda*." *Michigan v. Mosley*, 423 US 96, 102 (1975). To the extent the State Trial Court read ambiguity into Petitioner's invocation – based on statements he made later – that finding was "an unreasonable determination of the facts," 28 USC 2254 (d)(2). Because the admission of this evidence at trial was prejudicial, this aspect will be addressed and demonstrated in Part B.

A. Violation of clearly established law

1. Detectives violated *Miranda* by continuing to interrogate Petitioner after he invoked his right to remain silent by telling Detective "No, I don't want to talk to you."

The Supreme Court has made clear that once a person being questioned "indicates in any manner that he does not wish to be interrogated, the police may not question him." *Miranda*, 384 U.S. at 445. "The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries." Id. To make sure that we understood this procedure, the Court repeated it: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." Id. at 473-74. "[A]ny statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." Id. at 474. Once a person has "exercise[d] . . . his option to terminate questioning[,] he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation... [T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his right

to cut off questioning was scrupulously honored." *Mosley*, 423 U.S. at 103-04 (internal quotation marks omitted).

The Supreme Court has left the courts with no doubt that this prohibition on continued questioning is a "bright-line" rule, "a prophylactic safeguard whose application does not turn on whether coercion in fact was employed." Id. at 98, 99 n.8. "[C]onjecture and hair-splitting" is what "the Supreme Court wanted to avoid when it fashioned the bright-line rule in *Miranda*." *Anderson v. Terhune*, 516 F.3d 781, 790 (9th Cir. 2008); cf. Davis v. United States, 512 U.S. 452, 461 (1994) (noting that the benefit of a bright-line rule is the "clarity and ease of application" that "can be applied by officers in the real world . . . without unduly hampering the gathering of information" by forcing them "to make difficult judgment calls" with a "threat of suppression if they guess wrong").

Here, there is no doubt the Detective violated *Miranda*. Certainly, the Petitioner saying "No, I don't want to talk to you" qualifies as "indicat[ing] **in any manner** that he does not wish to be interrogated." *Miranda*, 384 U.S. at 445 (emphasis added). And there is no real dispute that the detective continued interrogating the Petitioner. The detective knew well that he was invoking his right, but continued to push the Petitioner for more answers: "Okay - - Okay, Okay, I understand that - - ." No fairminded jurist could reasonably interpret this statement to be "ceasing" the interrogation. Id.

2. Petitioner's invocation was not ambiguous under *Berghuis v. Thompkins*.

This Court added another layer to the *Miranda* inquiry: Whether the suspect

invoked his right to remain silent unambiguously. *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010). Up until *Thompkins*, the right to remain silent could be invoked in "any manner." *Miranda*, 384 U.S. at 445. On the other hand, the right to counsel could be invoked only "unambiguously." *Thompkins*, 560 U.S. at 381. In *Thompkins*, this Court clarified that the requirement that the right to counsel be invoked "unambiguously" would now be applied with respect to requests to remain silent. Id. Because the courts must now apply the rules from right to counsel cases to right to silence cases like the Petitioner's, the Petitioner first addresses right to counsel caselaw.

In *Miranda*, this Court held that the right to remain silent could be invoked "in any manner" and that the interrogation must then "cease." *Miranda*, 384 U.S. at 445. By contrast, with respect to the right to counsel, *Miranda* announced a slightly different rule: "If the individual states that he wants an attorney, the interrogation must cease **until an attorney is present**." 384 U.S. at 474 (emphasis added). The scope of the two rights was thus not coextensive – this Court in *Miranda* was unequivocal on what officers must do when an accused invoked his right to silence; it was not as clear what they had to do when the right to counsel was invoked.

From there the case law diverged into two lines: One addressing invocations of the right to silence, the other addressing invocations of the right to counsel. In *Michigan v. Mosley*, 423 U.S. 96 (1976), with respect to the right to silence, this Court clarified that *Miranda* did not mean that "once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present,"

id. at 104 n.10, but repeated what *Miranda* had said: the suspect's "right to cut off questioning" must be "fully respected," id. at 104.

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court continued to develop the requirements for invocations of the right to counsel. It held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police – initiated custodial interrogation even if he has been advised of his rights." Id. at 484 (footnote omitted). This was a change – a strengthening of the accused's rights – in the right to counsel: "Edwards established a new test for when . . . waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication." *Solem v. Stumes*, 465 U.S. 638, 646 (1984). See id. at 648. This was different than the test for the right to silence, which allowed police to continue questioning after some delay. *Mosley*, 423 U.S. at 118.

Right to counsel cases then addressed the requirement at issue in this case: How courts determine that "the suspect [has] unambiguously request[ed] counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994). This development in the right to counsel context makes sense. Suspects can invoke their right to remain silent in many ways. They may invoke their right by simply remaining silent, or they may indicate in other ways – including by words – that they do not want to talk with police. By contrast, invoking the right to counsel cannot be accomplished by silence or pantomime, but requires the suspect to articulate specifically that she wants

counsel. This line of cases explained that an "ambiguous or equivocal" request for counsel does not require police questioning to end and places no limits on how the interrogation can be used later. Id.

This Court also held that the standard for invoking the right to counsel unambiguously was not a demanding one. A suspect need only invoke his rights "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be [such] a request." Id. at 459. He need not specifically reference his constitutional rights, nor need he use any specific terminology. Id.

This Court clarified that in determining whether an invocation of the right to counsel is ambiguous, "[u]nder *Miranda* and *Edwards*, . . . an accused's postrequest responses to further interrogation may not be used to cast doubt on the clarity of his initial request for counsel." *Smith*, 469 U.S. at 92. Allowing the government to use these postrequest statements to "cast retrospective doubt" on prior unambiguous invocations would give officers an incentive to ignore invocations in the hopes that a suspect may be persuaded to talk anyway. Id. at 100. "No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement . . . ." Id. at 99. Construing a person's unambiguous invocation of his Fifth Amendment rights by "looking to [his] subsequent responses to continued police questioning" and whether "considered in total, [his] statements were equivocal" is "unprecedented and

untenable." Id. at 97 (emphasis removed). Accordingly, "under the clear logical force of settled precedent, an accused's post request responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver." Id. at 100.

Finally, in *Thompkins*, this Court noted it had "not yet stated" whether the rules about ambiguity it had developed in the context of invocations of the right to counsel should also apply in the context of invocations of the right to silence. *Thompkins*, 560 U.S. at 381. This Court held "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*." Id. Thus, the Court held that the same "standards" about ambiguity it had developed in *Davis* and its progeny should now apply to invocations of the right to silence. Id.

No fairminded jurist could determine that Petitioner's invocation was ambiguous. First, Petitioner's initial request to remain silent was unambiguous on its face, and nothing about the prior context of the statement made it ambiguous or equivocal. Petitioner stated: "No, I don't want to talk to you"; in other words, **he did not want to talk anymore**. See *Garcia v. Long*, 808 F.3d 771, 773-74 (9th Cir. 2015) (holding that a suspect answering "no" to the question "[d]o you wish to talk to me?" was an unambiguous request to remain silent under *Miranda*). The Petitioner did not equivocate by using words such as "maybe" or "might" or "I think." See *Anderson*, 516 F.3d at 788; cf. *Smith*, 469 U.S. at 96-97 (holding that nothing in the

statement "Uh, yeah. I'd like to do that" suggested equivocation). Nor did anything the Petitioner did or said leading up to this statement make it ambiguous. During the interrogation leading up to this point, the Detective had just read the Petitioner his *Miranda* warnings and then asked: "Mr. Gabriel, do you want to talk to me? I'm going to ask you one more time?", to which the Petitioner immediately responded, "No, I don't want to talk to you." In any event, the fact that the Petitioner spoke to Detectives before invoking his right to remain silent makes no difference. The State Postconviction Court's decision is simply "contrary to" and "an unreasonable application" of *Miranda*. 28 U.S.C. § 2254(d)(1); *Miranda*, 384 U.S. at 473-74 (holding that the right to remain silent can be invoked "any time prior to or during questioning").

The only statements that could cast any ambiguity on the Petitioner's initial invocation were statements he made after the fact. Indeed, the State postconviction Court relied largely on Petitioner's statement made after the Detective continued interrogating him, reasoning that because the Petitioner made a follow-up statement after only a single clarifying comment from the Detective, his initial invocation was ambiguous. But it was clearly established, when determining whether the invocation of a constitutional right is ambiguous, that the courts could not look to post-invocation statements to "cast retrospective doubt on the clarity of [Petitioner's] initial request itself." *Smith*, 469 U.S. at 98-99. The Detective continued to interrogate the Petitioner after he had unambiguously asked to remain silent. When the Petitioner said "No, I don't want to talk to you," the detective

responded: "Okay, Okay, I understand that- -." That means the government cannot rely on the Petitioner's later statements to establish that his earlier statement was ambiguous.

The State Court's allusion that the Petitioner's continued conversation was in some way cumulative to the First Statement given and therefore his invocation was ambiguous is of no matter. Even one question was one question too many. When an "individual indicates **in any manner, at any time** prior to or during questioning, that he wishes to remain silent, **the interrogation must cease.**" *Miranda*, 384 U.S. at 473-74 (emphasis added). Therefore, the State Court's determination that the Second Statement given was cumulative to the First is improper since the holdings of this Court in *Smith*, 469 U.S. at 100, prohibits the use of post request conversation to cast retrospective doubt. Simply put, the State Court cannot use later conversation against the Petitioner. In Part B the Petitioner will address this cumulative claim in more detail and demonstrate how the Second Statement given was not cumulative to the First Statement.

It does not matter, that the Petitioner did not repeat his request to remain silent later in the interrogation: "Under *Miranda*, the onus [is] not on [the Petitioner] to be persistent in [his] demand to remain silent. Rather, the responsibility f[alls] to the law enforcement officers to scrupulously respect [his] demand." *United States v. Lafferty*, 503 F.3d 293, 304 (3d Cir. 2007). Relying on the fact that "[i]t was the defendant, not the interrogators, who continued the discussion," "ignores the bedrock principle that the interrogators should have

stopped all questioning. A statement taken after the suspect invoked his right to remain silent 'cannot be other than the product of compulsion, subtle or otherwise.'" *Anderson*, 516 F.3d at 789-90 (quoting *Miranda*, 384 U.S. at 474).

The State Court made another unreasonable determination that the Petitioner's statement: "No, I don't want to talk to you," was not an unambiguous revocation of his prior waiver and therefore was not an unequivocal invocation of the right to remain silent. This is "contrary to" and an "unreasonable application" of clearly established federal law, as determined by this Court. No reasonable jurists could debate that the Petitioner's direct response to the detective's question: "Mr. Gabriel, do you want to talk to me? I'm going to ask you one more time," was anything but an unambiguous invocation of the Petitioner's right to silence and thereby requiring the immediate cessation of the custodial interrogation. See *Miranda*, 384 U.S. at 473-74; *Mosley*, 423 U.S. at 103-04.

Although federal courts, including this Court, give considerable deference to the state courts, "AEDPA deference is not a rubber stamp." *Anderson*, 516 F.3d at 786 (citing *Miller-El v. Dretke*, 545 U.S. 231, 240, 265 (2005)). The State Postconviction Court's determination that the Petitioner's statement "No, I don't want to talk to you" was ambiguous based on his responses to further questioning was either "an unreasonable determination of the facts," 28 U.S.C. § 2254(d)(2), or an "unreasonable application" of *Miranda*, id. § 2254(d)(1). By continuing to ask questions, the Detectives failed to "scrupulously honor" the Petitioner's simple unambiguous request. Accordingly, 28 U.S.C. § 2254(d) does not bar habeas review

of the Petitioner's *Miranda* claim, and that a Certificate of Appealability should issue as the Petitioner has, "made a substantial showing of the denial of a Constitutional right." 28 U.S.C. § 2253 (c)(2), and that "reasonable jurists would find that the District Court's assessment of the Constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

B. Harmlessness

1. State Court's decision that Second Statement was cumulative to First to support harmless error was unreasonable.

The Petitioner was involved in two separate recorded interviews. The First one took place in the back of a patrol car. The Second was done several hours later in an interrogation room. Both interviews were played at trial for the jury. The First statement is rather lengthy and mainly provides an accounting of the Petitioner's whereabouts over several days and why the Petitioner was in Florida. This interview also shows that not only does the Petitioner not speak or understand English very well but also has no understanding of *Miranda*. At the conclusion of this interview the only thing established related to the alleged crime was, that the victim TRIED to pull down the Petitioner's pants which is what woke him up and he called out to someone else in the home. This fact was also acknowledged by the 11th Circuit in its denial of the COA stating: "Gabriel confessed that M. J. tried to take down his pants and do "stuff" to him." Due to the Petitioner not providing a confession, the Detective conducted a Second interview several hours later. If the First Statement was sufficient, then there was no reason for the Second.

At the beginning of the Second interview, the Detective again goes over the

Miranda warnings with the Petitioner. Once done the Detective asks the following unambiguous question: "Mr. Gabriel, do you want to talk to me? I'm going to ask you one more time?" The Petitioner immediately responds with the following unambiguous response: "No, I don't want to talk to you." As shown in Part A, this was a clear unequivocal invocation of the Petitioner's right to silence mandating that the interrogation must cease. However, the Detective failed to "scrupulously honor" this request and continued the interrogation in hopes of obtaining an incriminating confession since his efforts during the First interview failed to produce one. The Detective steers the conversation back to the night in question. Due to the First interview being rather detailed, it only stands to reason that the Petitioner's Second accounting of the events would be cumulative to the First. It was not until after the Detective was asking crime specific questions that the Petitioner provided what the State considered a confession.

The State Court made the determination that the admission of the Second Statement was harmless due to the cumulativeness of the Statement. The State Court is suggesting that it is ok for law enforcement to disregard an unequivocal invocation of the suspect's right to silence and continue the interrogation until an incriminating statement is obtained so long as law enforcement gets the suspect to restate previous statements made thereby rendering the subsequent statement cumulative and therefore its admission will be harmless. Since *Miranda*, and any of this Court's subsequent clarifying cases, do not provide an exception for cumulativeness, the State Court's determination is "contrary to" or an

"unreasonable application of *Miranda*, thereby making the admission of this Second Statement obtained in direct violation of Miranda harmful. In this case, the Petitioner at the start of this Second interrogation invoked his right to silence. This Court in *Smith*, 469 U.S. 91, 100, addressed the issue of using postrequest statements against a suspect to cast retrospective doubt on the initial request. The State Court did exactly what the *Smith* Court prohibited and used the postrequest statements to determine; 1) that the Second interview was cumulative to the first, 2) the invocation was equivocal because the Petitioner continued to answer questions; and 3) the subsequent admission of the Second interview at trial was harmless error.

2. The State's use of Petitioner's Second Statement at trial was prejudicial.

The State Court attempted to bolster its conclusion about the Petitioner's statements, in the Second interview, by claiming that he waived his right to remain silent in continuing to answer the Detective's questions after he stated, "No, I don't want to talk to you": while words of invocation were spoken by the Petitioner, the court concluded that, in any case, the Petitioner effectively waived the right to remain silent by what followed. By continuing to talk to the Detective, the Petitioner demonstrated a willingness to continue to discuss the case. Put another way, the State Court endorses the principle that once the Detective ignored the Petitioner's unequivocal invocation of the Fifth Amendment, their questioning kept the Petitioner talking and resulted in a waiver of his right to remain silent. This analysis directly contravenes this Court's precedent: "under the clear logical force of

settled precedent, an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Smith*, 469 U.S. at 100 (emphasis in original).

Smith mandates that all questioning must immediately cease once the right to remain silent is invoked, and that any subsequent statements by the Petitioner in response to continued interrogation cannot be used to find a waiver or cast ambiguity on the earlier invocation. This Court's somewhat lengthy recitation of this principle is particularly instructive in this case.

This is not a situation where there was a break in questioning after the *Miranda* invocation. Instead, the Detective simply continued the conversation up to the point that the Petitioner provided a confession. Only at that point did the interrogation cease. But it was too late.

We all understand the phrase "scrupulously honor" to have practical meaning. For the "right to remain silent" to have currency, there must be some silence. The interrogation must stop for some period of time. See *Miranda*, 384 U.S. at 473-74; *Mosley*, 423 U.S. at 103-04. Although this Court has yet to tell us how long the break in questioning must last, in this case there was no cessation at all. Because the interrogation was continuous to that point, this Court need not determine whether the Petitioner waived his right to silence nor address whether the Petitioner was coerced.

The prejudice from the Petitioner's confession cannot be soft pedaled, and the error was not harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). The

confession was central to the conviction. See *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence. Indeed, the defendant's own confession is probably the most...damaging evidence that can be admitted against him." (Internal quotation marks omitted)).

Miranda error does not entitle Petitioner to habeas relief if the error was harmless. In AEDPA proceedings, we apply the actual-prejudice standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Under *Brecht*, habeas relief is only available if the constitutional error had a "substantial and injurious effect or influence" on the jury verdict or trial court decision. Id. at 623 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). This standard is satisfied if the record raises "grave doubts" about whether the error influenced the jury's decision. *Davis v. Ayala*, 135 S. Ct. 2187, 2203 (2015) (brackets omitted) (quoting O'Neal v. McAninch, 513 U.S. 432, 436 (1995)).

Under AEDPA, federal courts accord deference to a state court's harmlessness determination. Nevertheless, because the *Brecht* standard that courts apply on collateral review is "less onerous" for the state than the "harmless beyond a reasonable doubt" standard that state courts apply on direct review, *Brecht*, 507 U.S. at 622-23, this Court has explained that "it certainly makes no sense to require formal application of both tests (AEDPA/*Chapman* and *Brecht*) when the latter obviously subsumes the former," *Fry v. Pliler*, 551 U.S. 112, 120 (2007). Federal Courts therefore apply the Brecht test, but we do so with due consideration of the state court's reasons for concluding that the error was harmless beyond a

reasonable doubt. *Davis*, 135 S. Ct. at 2198.

In *Brecht*, this Court determined that the state's improper use of the petitioner's post-*Miranda* silence for impeachment purposes was harmless. 507 U.S. at 638-39. The state's physical evidence against the defendant was "weighty," and the state's references to the post-*Miranda* evidence were "infrequent." Id. at 639.

The same cannot be said here. The Petitioner's own incriminating statements – made after he had invoked his right to silence – formed the backbone of the State's case. Indeed, there was little other evidence before the jury. There was no physical evidence. The State's whole case relied upon the confession and witness credibility. The jury determined that the victim's credibility was in doubt when they chose to acquit the Petitioner of a count alleging actual intercourse, when even though the victim made the allegation that it occurred, forensic evidence was introduced that showed this was an impossibility. Therefore, the State's case in chief relied heavily upon the Petitioner's confession in obtaining the conviction for the remaining count. The only evidence against the Petitioner to the crime was the discredited victim, and a witness whose testimony was based upon supposition and not actual knowledge. The Petitioner likely could not have been convicted without his confession. Importantly, the prosecutor repeatedly referred to the Petitioner's incriminating statements made postrequest.

In exercising "extreme caution," as the Court should, "before determining that the admission of [a] confession at trial was harmless," *Fulminante*, 499 U.S. at 296, the Petitioner asks that this Court determine if the admission of the

Petitioner's Second statement had a substantial and injurious effect on the jury's decision. *Brecht*, 507 U.S. at 637-38.

CONCLUSION

This Court has repeatedly made clear that when a suspect simply and unambiguously says he wants to remain silent, police questioning must end. Under any reasonable interpretation of the facts, the Petitioner simply and unambiguously invoked that right. Clearly established Supreme Court law required the suppression of the Petitioner's Second interrogation.

Based upon the foregoing, the Petitioner contends that reasonable jurists would find debatable or wrong the District Court's disposition and therefore a Certificate of Appealability should issue to allow the Petitioner the opportunity to advance his Fifth Amendment claim to the 11th Circuit Court of Appeals.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Frederic Gabriel, *pro se*

Date: APRIL 26, 2023