

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2023

ALEX MARQUEZ, *Petitioner*,

v.

TIM GARRETT, et al., *Respondents*.

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

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED

1. Did the Ninth Circuit err when Alex Marquez made a substantial showing of the denial of a constitutional right as to an inadequate *Miranda* warning leading to an involuntary confession, and thus not an improper waiver of his rights under the Fifth Amendment?
2. Did the Ninth Circuit err when Alex Marquez made a substantial showing of the denial of a constitutional right as to the failure by counsel to move to suppress his unconstitutionally-obtained statements, and failure by counsel to investigate the circumstances by which the statements were made?

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I.

PRAYER FOR RELIEF

Alex Marquez respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review its decision that affirmed the denial of habeas relief as to: (1) the inadequacy of the *Miranda* warning and waiver, and (2) ineffective assistance of counsel related thereto. The basis of this petition is that the Ninth Circuit erroneously decided that Alex Marquez has not shown that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” For the reasons stated herein, Alex Marquez’s petition should be granted.

II.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit entered a memorandum that affirmed the decision of the United States District Court as to Alex Marquez’s certified and uncertified claims. *Marquez v. Tim Garrett, et al.*, No. 22-15422 (9th Cir. October 11, 2023). *Appendix A*. The Ninth Circuit found that under the deferential standard of AEDPA and the Nevada Supreme Court’s review for plain error, the Nevada Supreme Court reasonably concluded that, based on the totality of the circumstances, the warnings reasonably conveyed the rights afforded under *Miranda*. *Appendix A*. The Ninth Circuit found that the Nevada Court of Appeals

reasonably determined that Alex Marquez failed to show that his trial counsel's performance was deficient in failing to move to suppress Marquez's statements to police under *Miranda*. *Appendix A*. The Ninth Circuit found that the request to expand the certificate of appealability was denied as to Alex Marquez's uncertified claims that his trial should have been severed from his codefendants' trials and that there was insufficient evidence to support his convictions. *Appendix A*.

III.

BASIS FOR JURISDICTION

On October 11, 2023, the United States Court of Appeals for the Ninth Circuit delivered an order that affirmed the United States District Court's denial of the petition for writ of habeas corpus. *Appendix A; Appendix B*. This is the final judgment for which a writ of certiorari is sought. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

IV.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THE CASE

Pursuant to Title 28 United States Code Section 2254(d):

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

V.

STATEMENT OF THE CASE

A. Jurisdiction of the Courts of First Instance.

The district court had jurisdiction under 28 U.S.C. § 2254. The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 2253(a).

B. Facts Material to the Questions Presented.

a. November 2005 Underlying Events.

In November of 2005, Bobby Wood asked Brian Snapp to move out of an apartment in Reno, Nevada that was already being lived in by Bobby Wood, William Wood, and Jeff Lowe. On November 8, 2005, Brian Snapp visited the apartment, intoxicated and slurring his words. Brian Snapp threw a glass bottle at a female friend, and threatened to return and “kill” her, and “get everybody else.” Billy Wood broke up the argument, and both Billy Wood and Bobby Wood told Brian Snapp to leave and not come back. Brian Snapp responded that he was going to come back and “kill you mother f’ers” and “kill all of you.”

Later that night, Brian Snapp arrived at a friend’s apartment, visibly upset, and told the people present he had been in a fight where his two best friends had turned on him, kicked him out, and would not allow him to retrieve his possessions. One of the people present to hear Brian Snapp’s lamenting was Alex Marquez. Alex Marquez asked Eduardo Camacho to accompany him and Brian Snapp to “get this [sic] stuff out of the apartment” because Brian Snapp was “kicked out or something.” There were

details related about a safe in the apartment with money or drugs inside, but it was not demonstrated that Alex Marquez knew about the safe or its contents.

Around 9:40 p.m., Billy Wood was sitting inside the subject apartment when he heard a knock at the door. Billy Wood answered the door when Brian Snapp, Eduardo Camacho and Alex Marquez kicked the door open and knocked Billy Wood to the ground. Brian Snapp was first to enter and strike Billy Wood on the head with a “claw hammer,” with Eduardo Camacho and Alex Marquez then entering and hitting Billy Wood with baseball bats.

Billy Wood was stabbed, but did not know when or by whom. Eduardo Camacho continued to hit Billy Wood on the head with a baseball bat while Brian Snapp and Alex Marquez pursued Jeff Lowe. Jeff Lowe screamed “why are you killing me?” and “Brian, why are you killing me?” Billy Wood escaped to a bedroom for a time and tried to scare the others away by yelling that the “cops are here.”

Bobby Wood was upstairs in a different apartment when he heard a commotion coming from his apartment. Bobby Wood grabbed a baseball bat and ran quickly to his apartment. Once inside, Bobby Wood was overtaken and hit from all directions, losing consciousness.

Billy Wood ventured out from the bedroom and overtook Eduardo Camacho, with Camacho running out of the apartment. Billy Wood then saw Alex Marquez watching Jeff Lowe, who was bleeding from a chest wound. Billy Wood attacked Alex Marquez with a weightlifting bar, causing Alex Marquez to run out of the apartment. Billy

Wood saw Jeff Lowe run for cover into a bedroom. Billy Wood stopped Brian Snapp from attacking Bobby Wood by taking the hammer out of Brian Snapp's hand and chasing Brian Snapp into the hallway with the hammer.

A witness heard Brian Snapp later that night state that he had "stabbed" one of people in the apartment. None of the assailants demanded money, property, or similar, and nothing was taken from the apartment. The other apartment occupants survived their injuries, with Jeff Lowe tragically dying from two chest stab wounds.

b. Incriminating Statements Following *Miranda* Warning Given from the Detective's Memory to a Person with a Ninth-Grade Education and in a Non-Native Language.

After the incident, a detective conducted a traffic stop of Alex Marquez's vehicle, telling Alex Marquez that the detective had another person in custody, and the detective wanted to obtain Alex Marquez's "side of the story." According to the detective's testimony at trial, Alex Marquez agreed to go to the police station to talk with the detective.

The detective and a colleague transported Alex Marquez to the Reno Police Department in an unmarked police vehicle. The detective then took Alex Marquez to an interrogation room. The detective, the detective's colleague, and Alex Marquez were in the interrogation room. The interview started at approximately 10:00 p.m. on November 9, 2005. The detective told Alex Marquez that they had arrested Brian Snapp and that they would be taking breaks during the interrogation of Alex Marquez to compare Brian Snapp's story with Alex Marquez's version of the events.

The detective told Alex Marquez that Alex Marquez has “certain rights.” The detective told Alex Marquez that the detective was “not thinking necessarily that you guys went over there with the intention to kill any people over at that place but I don’t know that until I have a chance to talk to you.” The detective asked Alex Marquez if Alex Marquez knew his rights, but Alex Marquez’s response was “inaudible.”

The detective gave Alex Marquez “a simple version of the *Miranda* rights” from memory. The detective told Alex Marquez:

1. that he had the right to remain silent, which meant Alex Marquez did not have to talk to him or “say anything” to him. The detective explained that meant it was Alex Marquez’s decision whether to speak with the detective and Alex Marquez could not be forced to talk to the detective;
2. that the information Alex Marquez provided “would be documented in [the detective’s] police report” and reviewed by the District Attorney;
3. that “nothing [Alex Marquez] told [the detective] would be off the record, that everything he told [the detective] would be on the record,” or “I am going to document it and say, ‘hey, this is off the record just between you and me, what happened,’ everything you tell me I’m going to document in my police report so that the District Attorney knows and sees that, all right,” and;
4. that he had a right to an attorney and if he could not afford one, but desired one, “the courts would appoint an attorney to represent him for any questioning.”

When asked by the detective if he understood “all of that” Alex Marquez answered “yes.” The detective then asked Alex Marquez:

Knowing that those are your rights and you don’t have to talk to me, that you have a right to an attorney, everything you say is going to go into my police report, do you mind telling me your side of this?

The detective told Alex Marquez that Alex Marquez's statements "would be used against him" but did not specifically inform that the statements would be used against him "as evidence" or "in court."

The detective did not consider reading the *Miranda* rights to Alex Marquez in the Spanish language as the detective thought that Alex Marquez understood the English language and did not seem to be impaired by any substance. Alex Marquez proceeded to admit to the police that he entered the apartment with a baseball bat and was involved in the attack. Alex Marquez also consented to a collection of his DNA and clothing. Jeff Lowe's DNA was found on dried blood from Alex Marquez's shoe.

At the state post-conviction hearing, Alex Marquez testified that he was twenty years old at the time of the interrogation and had never been arrested before. Alex Marquez's native and first language is Spanish. Alex Marquez lived in Mexico from age one to the sixth grade and moved to the United States in the sixth grade, with his education being in ESL (English as a Second Language) classes. Alex Marquez had a ninth-grade education, had difficulty understanding things in school, and worked in landscaping and warehouse jobs after high school.

Alex Marquez did not understand that his statements to the police would be used as evidence against him in court. Alex Marquez told his trial attorney that he was under the influence of methamphetamine at the time of the interrogation. Alex Marquez was "coming off the drug" during the interrogation and did not ask questions of the detective to explain what the detective was advising. Alex Marquez did not

know what a “District Attorney” was or what the district attorney does with a report. Alex Marquez understood some English but did not understand legal terms.

Alex Marquez understood “some” of the detective questions and tried to answer the questions truthfully. Alex Marquez felt compelled to answer the detective’s questions and did not understand that he could stop the interview. Trial counsel testified during the post-conviction evidentiary hearing that Alex Marquez may have had difficulty understanding the “legal import of some of the concepts that were involved such as the District Attorney being the prosecuting entity.”

c. Lack of Determination of Voluntariness of Alex Marquez Statements.

The state court did not determine the voluntariness of Alex Marquez’s statements. Alex Marquez’s trial counsel did not move to suppress Alex Marquez’s statements or object to trial testimony about the statements made by Alex Marquez.

During trial, the state court instructed the jury to determine whether the statements from the defendants were “confessions, admissions or neither.” The state court instructed that if the jury determined a statement was a confession, it must determine whether it was voluntarily made by considering “the effect of the totality of the circumstances on the will of the defendant.” The “totality of the circumstances” included the “youth” and the “lack of education” of the accused. If the jury determined that the statement was not voluntary, then the jury was instructed not to consider the statement for any purpose.

d. Jury Trial with Convictions and a Resulting Sentence of 47 Years to Life Imprisonment.

In a joint trial with Carlos Ruiz, Brian Snapp, and Eduardo Camacho, a jury convicted Alex Marquez of: (1) first-degree murder with use of a deadly weapon, (2) attempted robbery with use of a deadly weapon, (3) burglary with use of a deadly weapon, and (4) two counts of battery with use of a deadly weapon. Alex Marquez was sentenced to 47 years to life imprisonment.

e. Federal Court Post-Conviction and Subsequent Appellate Proceedings.

Alex Marquez filed his original federal petition for writ of habeas corpus on November 9, 2015. A counseled first-amended petition was filed on May 20, 2016. On July 21, 2016, Respondents filed a motion to dismiss the first-amended petition. Following a response and reply, the federal district court issued an order in January of 2017 that dismissed the action for an untimely petition. Judgment entered for Respondents on the same day. Alex Marquez filed an appeal of the order and judgment. In June of 2018, the United States Court of Appeals for the Ninth Circuit issued a memorandum opinion that reversed and remanded the case back to the federal district court.

On June 4, 2019, following remand, Respondents filed a new motion to dismiss the first-amended petition. After briefing, the federal district court issued an order on February 3, 2020 that granted in part and denied in part Respondents' motion to dismiss. The district court ordered Alex Marquez within thirty days from the date of

the order to file a motion to dismiss without prejudice the entire petition, for partial dismissal of certain grounds, or other appropriate relief.

On March 3, 2020, Alex Marquez filed a motion to dismiss certain unexhausted grounds. On April 7, 2020, the district court entered an order that dismissed: (a) Ground One as to rights other than the Fifth Amendment, (b) Ground Three as to a violation of equal protection or the Sixth Amendment, (c) Ground Four, (d) Ground Five, (e) Ground Seven as to the five new claims of ineffective assistance of counsel, (f) Ground Ten, and (g) Ground Eleven as to its unexhausted claims.

On October 28, 2020, Respondents filed their answer to the first-amended petition. On December 18, 2020, Alex Marquez filed his reply to the first-amended petition. On March 14, 2022, the federal district court issued an order that: (1) denied the petition for writ of habeas corpus in its entirety, (2) granted a certificate of appealability for a “substantial showing of the denial of a constitutional right” as to Ground One and Ground Six of the petition, and (3) denied a certificate of appealability as to all other grounds. 28 U.S.C. § 2253(c)(2).

On October 11, 2023, following an appeal and briefing, the United States Court of Appeals for the Ninth Circuit issued an unpublished memorandum in the case that affirmed the decision of the district court. The Ninth Circuit found that:

- a. Under the deferential standard of AEDPA and the Nevada Supreme Court’s review for plain error, the Nevada Supreme Court reasonably concluded that, based on the totality of the circumstances, the warnings

reasonably conveyed the rights afforded under *Miranda*.

- b. The Nevada Court of Appeals reasonably determined that Marquez failed to show that his trial counsel's performance was deficient in failing to move to suppress Marquez's statements to police under *Miranda*.
- c. The request to expand the certificate of appealability was denied as to Marquez's uncertified claims that his trial should have been severed from his codefendants' trials and that there was insufficient evidence to support his convictions.

Appendix A. This petition follows.

VI.

REASONS SUPPORTING ALLOWANCE OF THE WRIT

This writ should be granted to allow this Court to correct the erroneous decision by the Ninth Circuit Court of Appeals that affirmed the decision of the federal district court in denying Alex Marquez's petition for writ of habeas corpus. The issues allowed a certificate of appealability by the United States District Court and raised in this petition state a valid claim of the denial of a constitutional right. This includes: (1) the *Miranda* warning given being inadequate by omitting a required element, (2) the inadequate *Miranda* warning leading to an involuntary confession by Alex Marquez, (3) the *Miranda* waiver by Alex Marquez not knowing, voluntary, or intelligent under the circumstances, and (4) the failure by counsel to move to suppress the statements, or

investigate the circumstances under which the statements were made. It is thus respectfully requested that Alex Marquez's petition for writ of certiorari be granted.

A. The Petition Should be Granted Because the *Miranda* Warning Omitted a Required Element as to Potential Use as Evidence in a Court of Law, Depriving Alex Marquez of his Fifth Amendment Rights.

The incomplete *Miranda* warning in this case compelled Alex Marquez to be a witness against himself, resulting in deprivation of Marquez's Fifth Amendment rights.

Whenever an individual is "taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." *Miranda v. Arizona*, 384 U.S. 436, 478 (1996). The Fifth Amendment's guarantee is both simple and fundamental: the accused "may not be compelled to be a witness against himself in any respect." *Colorado v. Spring*, 479 U.S. 564, 574, 107 S.Ct. 851 (1987).

Under the totality of the circumstances and the facts of the missing waiver elements as well as Alex Marquez's specific characteristics, the *Miranda* waiver by Marquez was not valid. A suspect's waiver of *Miranda* rights is valid only if it is "voluntary, knowing and intelligent. *Miranda*, 384 U.S. at 479. The waiver inquiry has "two distinct dimensions," the first that the waiver must be "voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and second it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis v. Thompson*, 560 U.S. 370, 382-83, 130 S.Ct. 2250 (2010) (quoting *Moran*

v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 2560 (1979)). A waiver satisfies this two-part standard only “if the totality of the circumstances surrounding the interrogation reveal both an uncoerced choice and the requisite level of comprehension.” *Burbine*, 475 U.S. at 421 (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560 (1979)).

For the sake of argument, even if an adequate *Miranda* warning was given to Alex Marquez, there is not an indication that Alex Marquez understood the rights provided to constitute a valid waiver of those rights. Case law demonstrates that even if the full *Miranda* warning was given and the accused made uncoerced statements, these facts standing alone are insufficient to demonstrate a “valid” waiver of the suspect’s *Miranda* rights. *Thompkins*, 560 U.S. at 384. The prosecution must make an additional showing that the accused understood those rights for the waiver to be knowing and intelligent, the determination of which depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019 (1938).

The *Miranda* warning in this case was inadequate. This is important because adequacy of the warnings received by the suspect is a factor in the voluntariness determination. *Withrow v. Williams*, 507 U.S. 680, 693-94, 113 S.Ct. 1745 (1993). Even if *Miranda* does not require a “rigid” or a “constitutional straightjacket” standard, there remains a constitutional minimum mandatory standard. *Miranda*, 384 U.S. at 467. There is still a “requirement that all elements of *Miranda* be conveyed.” *United States v. Tillman*, 963 F.2d 137, 141 (6th Cir 1992).

The missing element from Alex Marquez's *Miranda* warning was that any statement he does make "may be used as evidence against him in a court of law." *Miranda*, 384 U.S. at 444-45, 467-79. The language in *Miranda* as to "in a court of law" has a specific and important warning to the accused as to how the responses to the questions may be used. The *Miranda* case itself identified that the warning makes the individual "more acutely aware that he is faced with a phase of the adversary system – that he is not in the presence of persons acting solely in his interest." *Miranda*, 384 U.S. at 469.

The language utilized in the incomplete *Miranda* warning of "document in my police report so that the District Attorney knows and sees that" has either an absence of meaning or an ambiguous meaning. Neither the police nor the prosecutor is synonymous with a "court of law." A "court of law" includes the judge, all counsel, and a jury if the case proceeds to trial, a much larger audience for the statements to be used against Alex Marquez than the prosecutor's office alone.

Another missing element of the language in the Alex Marquez case as compared to a proper *Miranda* warning was the word "evidence." The word "evidence" in its common usage ties the statements into a court case, where evidence is presented to a judge or a jury, and would have likely signified to Alex Marquez that his statements would be presented in court of law. Alex Marquez himself testified under oath that he did not understand the *Miranda* warning given by the detective, and specifically did not think that the statements could be used against him in a court of law.

The language utilized by the detective of “on record” or “off record” has either an absence of meaning or an ambiguous meaning. The phrase “on record” could have been interpreted as: (1) going in the record of the police file, (2) going on the record of the prosecutor’s office, and/or (3) going “on record” with a media source and not the court system. Alex Marquez testified that he did not know what a District Attorney was, and thus likely did not know the significance or meaning of providing information to the District Attorney.

Further, the detective’s language of “off record” acts in contravention of the required *Miranda* element of being “used as evidence against him in a court of law” when “off record” typically means that the statements will not be used against Alex Marquez in any forum, especially not a court of law. None of the statements of: (1) “document in my police report,” (2) document so the “District Attorney knows and sees that,” and (3) “off record” or “on record” would indicate to Alex Marquez or any person in Alex Marquez’s position that the statements would be used as “evidence against him in a court of law.”

The *Miranda* warning given did not “clearly convey” to Alex Marquez his rights, specifically the Fifth Amendment right to remain silent when the statements might have been, and actually were, used as “evidence against him in a court of law.” *California v. Prysock*, 453 U.S. 355, 360-61 (1981). Alex Marquez respectfully requests that his petition be granted on this basis.

B. The Petition Should be Granted When the Inadequate *Miranda* Warning Led to an Involuntary Confession by Alex Marquez.

Custodial interrogations, by their very nature, generate “compelling pressure which work to undermine the individual’s will to resist and to compel him to speak where he would not otherwise do so freely.” *Miranda*, 384 U.S. at 467. A confession is involuntary whenever the confession is not “the product of rational intellect and free will.” *Mederios v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989) (citation omitted). Whether a confession is involuntary must be analyzed within the “totality of [the] circumstances.” *Withrow*, 507 U.S. at 693. The factors to be considered include: (1) the degree of police coercion, (2) the length, location and continuity of the interrogation, and (3) the defendant’s maturity, education, physical condition, mental health, and age. *Brown v. Horell*, 644 F.3d 969, 979 (9th Cir. 2011) (citations omitted). In Alex Marquez’s case, the confession was involuntary when: (1) the *Miranda* warning was not delivered to Alex Marquez in his native language of Spanish, (2) Alex Marquez lacked the education, intelligence, or prior interactions with the legal system to be able to understand the inadequate *Miranda* warnings provided, and (3) Alex Marquez was suffering from a diminished mental capacity due to being under the influence of drugs at the time of the interrogation.

- a. The *Miranda* Warning was Inadequate due to Lack of Translation into Alex Marquez's Native Language of Spanish.

Alex Marquez's confession was involuntary when Marquez was not given a *Miranda* warning as to the import of what he was agreeing to waive in Marquez's native language. Alex Marquez was born and lived in the United States for one year and then moved to and lived in Mexico from the age of one to approximately the age of twelve. Upon moving back to the United States in approximately the sixth grade, Marquez had to take English-as-a-Second-Language classes. Alex Marquez ended his educational journey with the equivalent of a ninth-grade education.

It was not enough that the detective did not consider providing the *Miranda* warnings in Spanish because Alex Marquez "understood their 'dialog in English.'" Alex Marquez testified that he only understood some of the questions posed by the detective. Alex Marquez's understanding of the English language was limited to the ability to "converse" but not as to "legal terms."

Despite Alex Marquez's native language being Spanish, Marquez was not given any *Miranda* warnings in Spanish, either in written or verbal form. *Miranda* warnings are advisements of rights that are more complex than "dialog" or to "converse." A lack of translation or interpretation into Alex Marquez's native language did not convey to Marquez the "substance of the suspect's rights." *See, e.g. United States v. Botello-Rosales*, 728 F.3d 865, 867-68 (9th Cir. 2013) (Spanish-language *Miranda* warning by detective was "affirmatively misleading" and did not satisfy *Miranda* requirements);

see also United States v. Perez-Lopez, 348 F.3d 839 (9th Cir. 2003) (police officer advisement of the right to “solicit the court for an attorney if you have no funds” was “affirmatively misleading” and an improper *Miranda* warning.) Alex Marquez respectfully requests that his petition be granted on this basis.

b. The *Miranda* warning was Inadequate due to Alex Marquez’s Lack of Education, Intelligence, or Law Enforcement Experience.

Alex Marquez’s confession was involuntary when Marquez lacked education, intelligence, or prior interactions with the legal system to be able to understand the *Miranda* warnings provided in the case. A defendant’s mental capacity directly bears upon the question whether he understood the meaning of his *Miranda* rights and the “significance of waiving his constitutional rights.” *Derrick v. Peterson*, 924 F.2d 813, 817-24 (9th Cir. 1990), *overruled on other grounds by United States v. Preston*, 751 F.3d 1008 (9th Cir. 2014) (en banc)). It “takes less” in terms of sophisticated police interrogation techniques “to interfere with the deliberative processes of one whose capacity for rational choice is limited than it takes to affect the deliberative processes of one whose capacity is not so limited.” *Preston*, 751 F.3d at 1022 (quoting *Smith v. Duckworth*, 910 F.2d 1492, 1497 (7th Cir. 1990)).

Alex Marquez lacked the education, intelligence, or prior experience to be able to voluntarily confess under the circumstances. To determine whether a confession is involuntary, we must ask “whether a defendant’s will was overborne by the circumstances surrounding the giving of a confession,” considering “the totality of all

the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.” *Dickerson v. United States*, 530 U.S. 428, 434, 120 S.Ct. 2326 (2000) (internal quotation marks and citations omitted). “The characteristics of the accused can include the suspect’s age, education, and intelligence as well as a suspect’s prior experience with law enforcement.” *Yarborough v. Alvarado*, 541 U.S. 652, 668, 124 S.Ct. 2140 (2004) (citations omitted).

At the time of the interrogation, Alex Marquez was barely out of his teenage years, specifically twenty years of age. Like the suspect in *Rodriguez v. McDonald*, 872 F.3d 908 (9th Cir. 2017), Alex Marquez had a ninth-grade education level of intelligence. Alex Marquez had never arrested before, indicating zero prior experience with the criminal justice system and its procedures, including what it means to waive one’s rights under *Miranda*. Alex Marquez testified that did not understand legal terms.

The detective noted that Alex Marquez was “very cooperative” in the interview. Alex Marquez was likely “very cooperative” because Marquez felt that he “had to talk to” the detective in order to “tell [his] side of the story.” Put another way, Alex Marquez’s “will was overborne by the circumstances surrounding the giving of a confession.” *Dickerson*, 530 U.S. at 434. Alex Marquez respectfully requests that his petition be granted on this basis.

c. The *Miranda* Warning was Inadequate due to Alex Marquez's Impairment during the Interrogation.

Alex Marquez testified at a post-conviction evidentiary hearing that he was under the influence of methamphetamine both when the crime was committed and when he was later interrogated about his role in the offense. During the interrogation, Alex Marquez did not ask questions or ask to clarify what the detective was telling him because Marquez was “coming off the drugs.”

It was not enough that the detective did not notice “signs or symptoms” of impairment. Whether the accused was under the influence of drugs at the time of the interrogation cannot be proven or disproven through testimony. The record is devoid of the detective asking whether Alex Marquez was under the influence of any drug, substance, or medication prior to asking questions, or being administered a test to determine the same. Without the question being asked by the detective, then it leaves an open question as to Alex Marquez’s mental capacity at the time of the interrogation, which directly bears upon the question whether Marquez understood the meaning of his *Miranda* rights and the “significance of waiving his constitutional rights.” *Derrick*, 924 F.2d at 817-24. Alex Marquez respectfully requests that his petition be granted on this basis.

C. The Petition Should be Granted When the Waiver by Alex Marquez was not Knowing, Voluntary, or Intelligent and Therefore not Valid under the Totality-of-the-Circumstances.

A defendant may waive the rights set forth in the Miranda warnings so long as the waiver is made “voluntarily, knowingly, and intelligently.” *Moran v. Burbine*, 475 U.S. at 421 (citing *Miranda*, 384 U.S. at 444)). First, “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.” *Id.* Second, a waiver must “have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Id.* “Only if the ‘totality of the circumstances surrounding the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” *Id.* (citations omitted); *see also Berghuis v. Thompkins*, 560 U.S. 370 (2010).

Alex Marquez’s waiver was not “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.” *Moran*, 475 U.S. at 421. Detective Chalmers acknowledged that he did not advise Alex Marquez that the statements could be used against him as “evidence” in “court.” The *Miranda* warning should have been provided under a higher standard than as an “abundance of caution” in these circumstances. Alex Marquez was very likely “taken into custody or otherwise deprived of his freedom by the authorities in any significant way and [was] subjected to questioning.” *Miranda*, 384 U.S. at 478. Whenever these

circumstances exist, the privilege against self-incrimination is jeopardized,” then *Miranda* warnings were required. *Id.*

The detective’s “simple version” of a *Miranda* warning that was “from memory” was incomplete. Without an appropriate *Miranda* warning, the danger of Alex Marquez’s compulsory self-incrimination greatly increased. A potential sign that the *Miranda* warning was flawed was the testimony by Detective Chalmers that Alex Marquez was “very cooperative” throughout the interrogation. Alex Marquez felt compelled to answer the detective’s questions and did not understand that he could stop the interview. If Alex Marquez was provided with a complete *Miranda* warning then it may have been less likely that Marquez would have been “very cooperative” during the interrogation.

A proper *Miranda* warning should have been given due to the nature of the case, including an eventual conviction for first-degree murder. Following the improper *Miranda* warning, Alex Marquez proceeded to give several prejudicial admissions as to: (1) being present and involved in the attack, (2) being armed with a baseball bat, (3) the bat with the blood on it belonging to him, (4) striking the door with a bat when one of the victims was inside the room to dissuade the victim from calling the police, and (5) entering the apartment to steal money from a safe. Alex Marquez was prejudiced at trial when Detective Chalmers testified to the jury as to the statements made. The waiver of *Miranda* rights by Marquez was not done knowingly, voluntarily, or intelligently. *Miranda*, 384 U.S. at 479. Under the totality-of-the-circumstances, the

waiver was not valid. *Fare v. Michael C.*, 442 U.S. at 723.

The state court found that Alex Marquez's testimony was not credible as to not understanding the adversarial system or the prosecutor's role as "the adversary who could use those statements against him in court." The state court found that Alex Marquez's claim was "untrue" that Marquez did not validly waive his rights because of a difficulty understanding English or being under the influence of drugs at the time of the interrogation.

Involuntary or coerced confessions are inadmissible at trial because their admission is a violation of a defendant's rights to due process under the Fourteenth Amendment. *Jackson v. Denno*, 378 U.S. 368, 385-86, 84 S.Ct. 1774 (1964). This is true even if the confession is true. The Supreme Court has made clear that the "aim of the requirement of due process is not to exclude presumptively false evidence but to prevent fundamental unfairness in the use of evidence whether true or false. *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280 (1941). The use of coerced confessions, "whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego v. Twomey*, 404 U.S. 477, 484-85 (1972). As demonstrated herein, the confession by Alex Marquez, even if true, created fundamental unfairness in the use of evidence at trial.

United States v. Tillman, 963 F.2d 137 (6th Cir. 1992) and several other cases cited rely upon the United States Supreme Court case of *Miranda*, with *Tillman* relying on the important Fifth Amendment aspect of *Miranda* at issue in the instant case:

Of all of the elements provided for in *Miranda*, this element [the right to be advised that anything you say may be used against you] is perhaps the most critical because it lies at the heart of the need to protect a citizen's Fifth Amendment rights. The underlying rationale for the *Miranda* warnings is to protect people from being coerced or forced into making self-incriminating statements by the government. By omitting this essential element from the *Miranda* warnings a person may not realize why the right to remain silent is so critical...This is a dangerous omission because a person under arrest would feel more compelled to answer questions of police officers.

Tillman, id., at 141. The *Tillman* case was cited in the United States Supreme Court case of *Florida v. Powell*, 559 U.S. 50, 130 S.Ct. 1195, 1211 fn. 8 (2010) for the conclusion that several Courts of Appeals “have held that warnings did not expressly inform a suspect of his right to have counsel present during interrogation did not adequately inform a suspect of his *Miranda* rights.” To guard against this very omission, the Ninth Circuit has “encouraged” officers to “read the defendant his rights from a prepared card.” *United States v. Noti*, 731 F.2d 610, 615 (9th Cir. 1984).

Reversal on collateral review is appropriate whenever the Court has “grave doubt about whether a trial error of federal law had ‘substantial and injurious effect or influence in determining the jury’s verdict.’” *Davis v. Ayala*, 576 U.S. 257, 135 S.Ct. 2187, 2197-98 (2015) (quoting *O’Neal v McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992 (1995)). Under this standard, an error is “harmless unless the record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury’s verdict...that, in the judge’s mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.” *Padilla v. Terhune*,

309 F.3d 614, 621-22 (9th Cir. 2002) (quoting *O'Neal*, 513 U.S. at 435)).

Here, the state court's adjudication of this claim was an unreasonable application of clearly established federal law, and based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C. § 2254(d). The state court's determination contradicts clearly established federal law when the *Miranda* warning given did not "clearly convey" to Alex Marquez his rights under the Fifth Amendment.

This incomplete *Miranda* warning led to an involuntary confession, especially when considering Alex Marquez's lack of English language comprehension, lack of education or intelligence, lack of experience with the criminal justice system, and diminished mental capacity. This error was not harmless when the statements utilized formed the basis for Alex Marquez's convictions and had a "substantial and injurious effect or influence in determining the jury's verdict." Alex Marquez respectfully requests that his petition be granted on this basis.

D. The Petition Should be Granted When Alex Marquez was Prejudiced by Trial Counsel's Failure to: (1) Move to Suppress Unconstitutionally Obtained Statements, and (2) Investigate the Circumstances by Which the Statements were Made.

Trial counsel's performance fell below an objective standard of reasonableness when trial counsel failed to investigate the circumstances of the interrogation. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Alex Marquez testified under oath that he informed his trial counsel that he was under the influence of

methamphetamine when Detective Chalmers interrogated him. Trial counsel did not appear to review or take any steps to pursue an investigation of the same.

Trial counsel denied that Alex Marquez informed him about being under the influence during the incident, or during the interrogation. Even if trial counsel did not recall Alex Marquez advising counsel about being under the influence of drugs, there remains a duty by counsel to conduct an independent investigation. The facts of the case strongly indicated that there was the involvement of drugs precipitating the events at issue.

Trial counsel testified that it seemed “clear” to trial counsel that Alex Marquez knew about the adversarial process. There was a lack of information to indicate how trial counsel arrived at this conclusion. Trial counsel did not hire an expert to evaluate Alex Marquez’s relative intelligence. *See Cook v. Kernan*, 948 F.3d 952, 962 (9th Cir. 2020); *see also Rodriguez v. McDonald*, 872 F.3d at 915-16 (evaluation by a psychologist to determine intelligence). During the interrogation, the detective asked Alex Marquez if Marquez knew his rights, but Marquez’s response was “inaudible,” indicating lack of an understanding about waiver of rights, even if properly given.

It was also “apparent” to trial counsel that Alex Marquez spoke English “fluently” and never indicated a need for an interpreter. There does not appear to be a great level of detail as to the type of knowledge that trial counsel relied upon as to Alex Marquez’s relative English-language knowledge, intellect, or prior experience with the criminal justice system. There are also facts that dispute this, when Alex Marquez has

the equivalent of a ninth-grade education and was taking English-as-a-Second-Language classes, indicating an understanding in Marquez's native language of Spanish, and not English.

Trial counsel's performance also below an objective standard of reasonableness when trial counsel failed move to suppress Alex Marquez's resulting statements. *Strickland*, 466 U.S. at 687. Trial counsel testified in a post-conviction hearing that he considered moving to suppress the statements by Marquez, but ultimately decided against it. Trial counsel thought a motion to suppress would be "meritless" because trial counsel believed that the *Miranda* warnings were "adequate" as the detective "made clear" that what Alex Marquez said to police could be used against him. Trial counsel's determination that a motion to suppress would be "meritless" is in question when trial counsel also testified that Alex Marquez may have had difficulty understanding the "legal import of some of the concepts that were involved such as the District Attorney being the prosecuting entity."

Trial counsel's performance was deficient in the determination that Alex Marquez's statements assisted Marquez at trial. Trial counsel testified in a post-conviction hearing that he had reviewed the transcript of the interrogation "in detail" and determined that it assisted Alex Marquez's case due to portraying Marquez's involvement as "being limited to being enlisted to help somebody obtain their property and...everything went south." Trial counsel also testified that he did not move to suppress the statements because trial counsel used Alex Marquez's statements about

“his limited role” as mitigation evidence at sentencing.

Trial counsel’s performance was deficient when the *Miranda* warning to Alex Marquez did not “make clear” Marquez’s statements would be used as evidence against Marquez in a court of law. It was unreasonable to believe that allowing the statements to be admitted without challenge would benefit Alex Marquez’s defense. It is unclear as to what or which statements that trial counsel would have made the strategic decision to include at trial. The admission of Alex Marquez’s statements did little to limit Marquez’s involvement, when Marquez admitted: (1) to being present and involved, (2) to being armed with a baseball bat, (3) that the bat with the blood of a victim belonging to him, (4) to dissuading a victim from calling the police through the use of a baseball bat, and (5) to entering the apartment with the intent to steal money from a safe.

The motion had not been litigated, much less fully litigated such that a motion would have been futile. *See Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1982). Alex Marquez’s trial counsel did not move to suppress Marquez’s statements or object to trial testimony about the statements made by Marquez. Due to trial counsel’s failure to file a motion to suppress, the state court did not determine the voluntariness of Alex Marquez’s statements.

The state court determined that Alex Marquez was not prejudiced by the admission of the statements when Marquez was “assisted in his defense by the admission.” Said assistance according to the state court was that Alex Marquez would

not have to take the stand and be exposed to cross-examination.

The determination of the state court did not take into consideration that Alex Marquez could have maintained his Fifth Amendment rights and not testified at trial. Additionally, Alex Marquez would have been forced to waive his Fifth Amendment rights and testify to challenge his own prior statements. There was prejudice created as to the admission of the statements when, for example, it was not demonstrated that Alex Marquez knew about the safe or its contents, but the admission by Marquez contradicted the same.

Trial counsel did not object to the admission of Alex Marquez's statements during trial. When the jury determined whether the statements by Alex Marquez were "confessions, admissions or neither," or whether Marquez made the confession voluntarily by considering the "totality of the circumstances," then prejudice already attached when the jury heard the statements in order to make its determination. If the jury determined that the statement was not voluntary, then the jury was instructed not to consider the statement for any purpose. The jury appeared to accept Alex Marquez's statements, or considered the same regardless of instruction, because Marquez was found guilty on all charges.

Without the admission of the statements, the likelihood of a different result was substantial. *Strickland*, 466 U.S. at 693; *see also Djerf v. Ryan*, 931 P.3d 870, 881 (9th Cir. 2019). The admissions were several, with Alex Marquez admitting that: (1) he was there, (2) his purpose was to be "back up," (3) his purpose was to assist another person

in “crack[ing]” a safe to obtain cash, (4) he was with a co-defendant, (5) he beat the victims, (6) he tackled the occupants to the floor to be able to get to the safe, (7) one of the co-defendants “shanked” one of the people in the apartment.

The resulting sentence based upon the admitted statements was and is also substantial, and involved the most serious type of murder conviction available. Alex Marquez was sentenced to forty-seven years to life imprisonment, with the most serious convictions of first-degree murder and a deadly weapon enhancement on first-degree murder combining to create a forty out of the forty-seven year minimum.

Other evidence does not change the fact that Alex Marquez’s own statements are what formed the requisite intent for the jury to find Marquez guilty of first-degree murder. The Nevada Court of Appeals found that Alex Marquez was not prejudiced by the admission of the statements when the surviving victims identified Marquez, and there was the deceased victim’s blood discovered on Marquez’s shoe. Although Alex Marquez may have had difficulty arguing that he was not present at the time, without the admission of the statements, Marquez could have been able to argue against his first-degree murder convictions, which created Marquez’s current life sentence. Alex Marquez respectfully requests that his petition be granted on this basis.

VII.

CONCLUSION

For the foregoing reasons, Alex Marquez respectfully asks this Court to grant this petition for writ of certiorari.

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Respectfully submitted,

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