

No.

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**IN THE SUPREME COURT OF THE UNITED STATES**

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EZEKIEL DELGADO,

Petitioner

v.

NEIL McDOWELL, Warden,

Respondent

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED

Delgado was convicted of two counts of first degree murder. In a published decision, the California Court of Appeal held that detectives violated then-sixteen year old Delgado's *Miranda* rights when they obtained a confession. However, the Court of Appeal found that Delgado's subsequent warned statement, which was taken during a single continuous interrogation, was properly admitted as evidence at trial.

The question presented is: Did the Court of Appeal decision affirming the admissibility of Delgado's second confession unreasonably apply this Court's decisions in *Miranda v. Arizona*, 384 U.S. 436 (1966), *Oregon v. Elstad*, 470 U.S. 298 (1984) and *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) because the detectives obtained Delgado's second confession without taking any steps to cure their violation of his *Miranda* rights?

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner, Ezekiel Delgado, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case, which affirmed the district court order denying his petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254.

**OPINIONS BELOW**

The Ninth Circuit Court of Appeals issued an unpublished decision affirming the district court's order denying the petition. App. 1.<sup>1</sup> The district court order denying the petition is

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<sup>1</sup> "App" refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and "CT" refers to the Clerk's Transcript.



unreported. App. 7, 8, 10. The California Court of Appeal denied Delgado’s appeal in a published decision, *People v. Delgado*, 27 Cal.App.5th 1092 (2018). App. 63.

### **JURISDICTION**

The final judgment of the Ninth Circuit Court of Appeals affirming dismissal of the petition was entered on September 20, 2024. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

### **STATUTE AND CONSTITUTIONAL PROVISION INVOLVED**

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: “No state shall . . . deprive any person of life, liberty or property without due process of law.”

28 U.S.C. § 2254 (a) provides: “The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

### **STATEMENT OF THE CASE**

On July 10, 2020, Delgado was convicted in Sacramento County Superior Court of two counts of first degree murder with a special circumstance of multiple murders and one count of discharging a firearm into an occupied vehicle. Cal. Penal Code §§ 187, 189, 246.

On October 1, 2018, the California Court of Appeal affirmed the judgment and reversed Delgado’s sentence in a published decision. *People v. Delgado*, 27 Cal.App.5th 1092 (2018). 1-ER-58. Delgado was resentenced to a term of 100 years to life. Lodged Doc. No. 18. On

January 2, 2019, the California Supreme Court denied review without comment or citation to authority. 1-ER-56.

Delgado timely filed a petition for a writ of habeas corpus in the federal district court on June 21, 2021. CR 1. On August 11, 2023, the petition was denied. 1-ER-1.

On September 20, 2024, the Ninth Circuit Court of Appeals affirmed the district court judgment. App. 1.

### **Statement of Facts**

#### **A. Introduction**

Delgado's conviction of two counts of first degree murder is based on the prosecution's argument that he suddenly and unexpectedly shot Deshawn Cannon and Gina Elarms while attempting to purchase a small amount of marijuana from Cannon.

There were two uncharged co-perpetrators, Eloise Brown and Taylor Cober, both of whom testified as prosecution witnesses at trial. Delgado and Brown were close friends. 3-ER-514-515.

#### **B. The conflicting testimony describing the charged homicides**

Cober, who received a grant of immunity, testified that on April 10, 2014, he, Brown, and Delgado had spent the day smoking marijuana at Brown's sister's apartment. 3-ER-468. When their supply of marijuana ran out, Brown called an acquaintance on his cell phone to arrange to buy more. 3-ER-472-473.

Delgado, Brown, and Cober walked to a nearby apartment complex to complete the transaction. Delgado was wearing a white t-shirt, Cober was wearing a red sweater and Brown was wearing a gray "hoodie." 3-ER-475-476.

Cober said that he stayed by an entry gate while Delgado and Brown walked through the parking lot. 3-ER-477-478. After about ten minutes, Cober heard shots fired and he began to walk away. 3-ER-480. When Cober saw Delgado and Brown running toward him, he also began to run. 3-ER-481.

According to Brown, who also testified with a grant of immunity, Cober had accompanied Brown and Delgado to the victims' car to complete the marijuana deal. 3-ER-516-517. Brown then changed his story and said that Cober was not present. 3-ER-517. Then, Brown said that Cober *was* by the car when the shooting occurred. 3-ER-573.

According to Brown, Delgado had sampled some marijuana from the driver, Deshawn Cannon. Delgado had then handed Brown some money to complete the purchase. As Brown was counting the cash, he was suddenly pushed to the ground. He heard ten shots and then Delgado was gone. Brown denied that he himself had fired any shots or that he saw the shooting. 3-ER-529-533.

After the shooting, Cannon and his companion, Gina Elarms, were dead. Brown admitted that he had stolen Elarms' purse and that he had tried to take Cannon's phone. 3-ER-562-565.

Cober testified that, as the three fled the scene, he had called a friend to get a ride. Brown and Delgado then asked Cober to dispose of Delgado's white T-shirt, which Cober threw into a trash can. 3-ER-484-486.

According to Brown, Delgado then said that he had shot Elarms and Cannon because he had thought that Cannon was going to shoot them. Brown thought Delgado had saved his life. 3-ER-533-534-575.

When they returned to the apartment, Cober saw Delgado and Brown going through Elarm's purse. 3-ER-486-491. In the purse, Brown found eight \$100 bills. He gave half of the money to Delgado. At Brown's request, Cober wiped down both the purse and the gun and disposed of them. 3-ER-488-489; 3-ER-539-540.

Brown admitted that he had lied to police by telling them that he was with his friend Lance at the time of the murders. 3-ER-553. When he heard a tape recording of Delgado's statement, Brown changed his story. 3-ER-560-561. After his attorney negotiated an immunity agreement, Brown confessed to taking Elarms' purse from the vehicle after the shooting. 3-ER-564-565.

**C. The initial investigation**

Police discovered the bodies of Cannon and Elarms in a parked car. 1 RT 213-218. Cannon had been shot five times and Elarms three times. The shooter had been positioned behind them. 2 RT 557; 572-582. Elarms had a torn purse strap around her torso and her purse was missing. 1 RT 217-221, 259. There were ten 9-millimeter bullet casings in the parking lot. 1 RT 251; 2 RT 395.

Eleven fingerprints were taken from the exterior of the passenger side of the car and the handle was swabbed for DNA. 1 RT 276-280, 282. Delgado's fingerprints and DNA did not match any of the samples. Elase Brown's palm print was found on the rear passenger door. 1 RT 280-281.

**D. The cell phone evidence that tied Elose Brown to the shootings**

Cannon's cell phone contained text messages indicating he had arranged to sell Elose Brown 8 grams of marijuana for \$70 shortly before the shootings. 2 RT 305-312, 318. Based on those messages, police obtained a warrant to search Brown and his residence. 2 RT 321.

**E. Independent witness testimony indicating that the shooter was a white or Hispanic male wearing a white T-shirt**

Shortly before the shooting, security guard Rafael Carrasquel saw three juvenile Hispanic males walking down the street near the location of the charged incident. One wore a white t-shirt, the second wore a red "hoodie" and the third was wearing a grey "hoodie." 2 RT 372-379.

About 10-15 minutes later, Carrasquel saw the same teenagers running in the opposite direction. The one in the grey "hoodie" was carrying a black bag and another item that Carrasquel could not identify. The other two teenagers were not carrying anything. 2 RT 387-390. Carrasquel could not identify them. 2 RT 386.

Jasmyne Garlington, a tenant of the apartment complex where the shooting occurred, testified that she had heard shots fired on the night of the homicides. From her apartment balcony, she saw a young white or Hispanic male wearing a white T-shirt standing near a vehicle on the passenger side. He was hunched over the car door as though he was trying to get something out of the car. 2 RT 350-355.

Garlington saw another man by the car, who looked older. He was heavier and possibly white or Hispanic and wearing a light colored blue t-shirt. Garlington saw that man walk around from the driver's side to the passenger's side. It sounded like the two men were arguing while

they were both hunched over the passenger side door. The man in the white T-shirt then ran away very fast, with his hands extended like he was holding something. 2 RT 356-361.

The second man continued to struggle with something on the passenger side of the car. Within ten seconds, he ran off in the same direction as the first man. Garlington could not identify either man. 2 RT 363, 371.

**F. The arrest and initial interrogation of Delgado and Brown, where Brown was accompanied by his mother and an attorney while Delgado was alone**

On April 11, 2014, at about 5:30 p.m., police served a search warrant at Eloise Brown's home in Sacramento. During the search, officers found Delgado sleeping on a couch. 2 RT 323-324.

Sacramento County Homicide Detective Angela Kirby testified that, when Delgado was questioned, he gave a false name. Detective Kirby knew Delgado was on juvenile probation with a search condition. 1 RT 99-100. After telling the officers his true name, Delgado told them that he thought he had an outstanding arrest warrant for absconding from probation. 1 RT 289-290. However, that was not true. 1-ER-91. The detectives handcuffed Delgado and searched him. 1 RT 290, 293-295.

Delgado was handcuffed and transported to the station in a police car. Brown was driven there by his mother, who stayed with him while he was questioned and obtained an attorney to assist him. 2 RT 324-325, 327, 338-343. With assistance of counsel, Brown secured an agreement for use immunity and an agreement that he would not be arrested for felony murder. 2 RT 403-408.

**G. Delgado's first inculpatory statement taken without *Miranda* warnings**

Officers drove Delgado to a police station. They took Delgado to an interrogation room where they removed his handcuffs and shackled his leg to the floor. 2-ER-261. The officers took Delgado's jewelry, wallet, cell phone, belt, and other personal items. They then left him alone in the interrogation room, chained to the floor, for about 84 minutes. 2-ER-301.

**1. Interrogation outside *Miranda* by Detective Meux**

After speaking with Brown and his mother, Detective Brian Meux went to the room where Delgado was confined. Delgado asked to use a restroom and Meux agreed. When Delgado pointed out that he was chained to the floor, Meux released him and then escorted Delgado to a restroom and then back to the interrogation room. 2-ER-261-263; 3-ER-421-422.

Meux then told Delgado that "at least as far as [Meux] knew" Delgado was not under arrest. Meux said he had left the interview room door open to indicate to Delgado that he could leave. Meux told Delgado that he was free to go. 2-ER-137; 3-ER-422; 2-ER-264. However, at that time, the detectives had not returned Delgado's cell phone, money and other property.

Meux told Delgado that he was investigating a double murder and that Delgado's name had "come up" in their investigation. 2-ER-136-137. Meux told Delgado he was there to "figure out how to clear [Delgado's] name. . ." 2-ER-137-138. At that point, it was about 8:30 p.m. and Delgado had been in custody for about three hours.

Delgado denied he was involved in the murders and said he had been in another part of town. 2-ER-141-142. However, Meux did not believe Delgado because he had already spoken

to Cober and Delgado's statements did not match Cober's account. 2-ER-266-267. Meux asked Delgado "Were you involved at all in this double murder?" Delgado said "No sir." 2-ER-144.

Meux told Delgado that he was "very similar in appearance" to one of the people who was observed running away after the shooting. 2-ER-144. He also told Delgado that detectives would be showing Delgado's photograph to the witnesses. He asked Delgado if there was any reason that a witness might identify him as one of the people seen running from the scene. Id.

When Delgado continued to deny his involvement, Meux said that Delgado's name had come up in conversations with Brown and his family. 2-ER-145. Meux then grilled Delgado about the details of his whereabouts on the night of the murders. The detective also continued to pressure Delgado by telling him that unnamed other witnesses had given a different story about his whereabouts that evening. 2-ER-146-148. ["I've had multiple people say that's not the case."].

When Delgado continued to deny that he had participated in the murders, the detective said "that means the other people I'm talking to are either confused or lying about you?" "Is that what you're telling me?" 1 CT 124. The detective then continued to grill Delgado about his activities on the day of the homicides. 2-ER-148-156.

Meux then said "We found you at the house of somebody who we know has an intimate connection to this double murder. " Delgado replied "What does intimate mean?" The detective then apologized for using a "big term" and tried to explain its meaning. 2-ER-156-157. He then, again, pressured Delgado by stating that Delgado fit the description of the people who fled the murder scene. He said "you gotta help us help you." The detective again asked Delgado if he was present during the murders and Delgado said "No." 2-ER-157.



then said that Delgado should think about his whereabouts that night because that information was “critically important” to help exonerate Delgado of the murders. Meux said he would confer with other officers and be “right back.” He again told Delgado he was not under arrest. 2-ER-158.

**2. Further interrogation outside *Miranda* by Detective Lonteen**

At about 9:17 p.m., Detective Jason Lonteen came into the interview room. Lonteen handed Delgado his previously confiscated cell phone and ordered him to enter the security code. 2-ER-159. Delgado entered the code and then said “How long am I gonna be here?” Lonteen said “We’re gonna try to make it not too much longer.” He also asked Delgado for the phone security code so the officers could access Delgado’s phone themselves. Delgado gave him the code. 2-ER-159-160.

Lonteen then questioned Delgado in an accusatory manner. He said “you gotta clarify some things.” The detective grilled Delgado about his whereabouts on the night of the murders and the two days before. 2-ER-162-164.

Lonteen told Delgado that the detectives “knew” that he was lying about his whereabouts. Lonteen also said he knew that Delgado had been staying with Brown. Referring to Delgado’s claim that he was not present during the murders, Lonteen said “I don’t believe you based on some stuff that we know.” Lonteen asked Delgado if Brown and his mother had “a reason to lie about that.” Delgado admitted he had stayed at Brown’s place for two nights. 2-ER-164-169.

Delgado then insisted that on the night of the murders, he was not with Brown, he was at a friend's house." Lonteen grilled Delgado about the details of his trip to and from that location. 2-ER-169-174.

Lonteen again accused Delgado of lying. Lonteen said that if Delgado had traveled on the light rail system as he had said, there would be video images of him on the train. Lonteen said "I know that's not a true story" and "I don't believe you." 2-ER-175-176.

Lonteen continued to pressure Delgado. He said "you need to tell me [the truth] right now" and "You're not telling me the truth," "We've already spoken to those people" and "We've already looked at the light rail surveillance video." Delgado still insisted that he had been in South Sacramento on the night of the murders. 2-ER-175-180.

Lonteen then said "We didn't come to speak to you by accident. Lonteen said he knew that Brown and Delgado were both involved in the shooting and said this was Delgado's "opportunity" to tell his side of the story. 2-ER-179-180.

Delgado continued to insist that he had left Brown's house with another person before the shooting. 2-ER-180-181. He gave a detailed description of his actions and the person who had picked him up. Delgado said he had been at Brown's apartment that night and that Cober and Brown had arranged to buy some marijuana. Delgado insisted that he had not accompanied them. 2-ER-182-189.

Lonteen then said that Brown had been "coming around to start telling a little bit of the truth" and that this was Delgado's "one opportunity" to tell the detective "his side." Delgado replied "I told you what happened that night." 2-ER-191.

Lonteen said that, based on witness statements, he believed that Delgado was involved in the murders. Delgado replied “Um no.” Lonteen said he knew Delgado was “not being truthful.” 2-ER-192. Only then, after denying that he had been involved multiple times, Delgado suddenly confessed:

I'll tell you straight up ... [Brown] came with me to get some weed off this man. ... I did shoot him. I shot him and his girl. He reached for something. I was really trying to get weed. As you can see, in my wallet, I have money. Me and [Brown] were gonna go half ... we were gonna buy some weed ... He [the driver] said, 'You guys are looking smirky.' And he went to go reach for something. I thought he was reaching for his gun so I shot him. And I shot his girlfriend too. This situation ... went all wrong. I was going off of self-defense. ... He reached for something shiny ... That's my reaction. I've been shot at so many times ... my cousin just got shot ... in her face.

2-ER-193-194.

Delgado said that Brown and Cober did not know he had a gun. When Lonteen asked who had taken Elarms' purse, Delgado said “I took it.” 2-ER-196. That admission was later determined to be false, as Brown admitted to stealing the purse. 3-ER-460.

Not only did Delgado falsely confess to taking the purse, he also falsely told Lonteen that he, not Cober, had *disposed* of the purse. At first Delgado said he had placed it in a dumpster next to a mall. Then he said he disposed of it in a dumpster behind Brown's house. 2-ER-197-198.

Delgado insisted that Brown and Cober did not have anything at all to do with the murders or the robbery of Elarms' purse, even though that was plainly not true. 2-ER-195. Delgado even said that he was the one who had negotiated the marijuana deal, when the deal

was arranged by Brown. 2-ER-199. (See 3-ER-521 [Brown testified that he was the one who arranged the deal on his cell phone]).

Delgado also told Lonteen that he had disposed of the gun in the American River at about 3:00 a.m. 2-ER-201. He asked Lonteen to tell Brown and his family that he loved them and that he was sorry. 2-ER-202.

**H. The second statement obtained with *Miranda* warnings given after Delgado had already confessed**

While Delgado was giving an un-*Mirandized* confession to Detective Lonteen, Detective Kirby was watching and listening to the interrogation from an observation room. 2-ER-313-314. After Lonteen obtained a complete confession, he continued to interrogate Delgado. Kirby sent a text message to Lonteen stating that Delgado “needs to be *Mirandized*.” 2-ER-314.

Lonteen left and re-entered the interrogation room and told Delgado that they were “going to go back over from the beginning.” 2-ER-202. Lonteen asked Delgado to agree to repeat his entire account of the shooting and Delgado said “all right.” Only then did Lonteen recite the *Miranda* warnings. Instead of asking Delgado if he was willing to waive his right to counsel and to remain silent Lonteen ended the recitation of the warnings with: “Okay. I’m gonna kind of go back over a lot of these things that we talked about and make sure that, again I understand the right story. Are you okay with that?” Lonteen never asked Delgado if he was willing to waive his *Miranda* rights. 2-ER-203.

Delgado replied “You say what?” Lonteen said they would be “going back” over the information Delgado had just given him. Delgado said “Yeah yeah yeah.” 2-ER-203.

In the post-*Miranda* statement, Delgado described, in greater detail, how he and Brown had discussed buying about 10 grams of marijuana. Delgado said he was wearing a white t-shirt that evening and that he and Brown had been standing near the rear passenger window right before the shooting. Delgado said that Cober was not by the car during the incident. 2-ER-204-209.

Delgado described how he spoke to Cannon and sampled the marijuana for sale. Delgado said he had asked Cannon for some “swishers” which are papers to roll marijuana cigarettes. Cannon gave Delgado some papers and Delgado saw a small package of marijuana on Cannon’s lap. 2-ER-216.

Cannon began to look at Delgado strangely, with a “really hard” and “really weird” expression. Cannon then said “You all is looking smirkyish.” Delgado said that he saw Cannon turn and reach for something and he thought it was a gun. Delgado said he then fired ten shots from his position behind the rear passenger window. He fired at the driver first, and then shot the female passenger. After shooting her, he shot the driver a couple more times. 2-ER-216-219.

Through the remainder of the interview, Delgado continued to insist that his friends Brown and Cober did not rob Elarms of her purse, take the money from it or dispose of it. He claimed that Brown had not even tried to reach into the car to get the purse. Delgado also said that he alone had taken money from the purse. He further attempted to exculpate Brown, saying that the purse contained only \$400. 2-ER-229-234. 2 Delgado also insisted that Brown and Cober were both shocked and did not “care about” the contents of the purse. 2-ER-234.

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<sup>2</sup> Brown later told police the purse had contained \$800 and the two had split the money. 3-ER-539-540.

Delgado began to tell Lonteen that he threw the gun in a river but then abandoned that story and said he had disposed of the purse and the gun, by placing them in a dumpster. 2-ER-241. He also claimed he had extracted Elarms' purse after the shooting without breaking the strap. 2-ER-230. However, the strap was broken when officers discovered Elarms's body shortly after the shooting. 2-ER-285.

When asked again about the disposal of the purse, Delgado said he, not Cober, had thrown the purse "in the garbage" behind the house. 2-ER-235. Just as with the scene at the side of the car, Delgado provided a physical description and step by step details as to how he alone had purportedly disposed of the purse. 2-ER-236. Delgado also said he threw the gun in the American River. Then he again said he disposed of it in a dumpster. 2-ER-241.

Delgado also said that an unknown person had given him, for free, the firearm he used to commit the murders. 2-ER-219-220.

As the interview drew to a close, Delgado continued to attempt to exculpate Brown and Cober. Delgado said they had not known that he had a gun. 2-ER-246. Delgado also said that Brown and Cober had not discussed the shooting afterward, or planned what to say if they were questioned by police. Delgado said that he alone had spoken of those subjects and that Brown and Cober had said nothing. 2-ER-237.

**I. The trial court hearing on Delgado's motion to suppress his custodial statements**

Prior to trial, Delgado's counsel filed a motion to suppress all of his custodial statements on grounds that they were taken in violation of *Miranda* and were involuntary. 2-ER-122. The prosecutor filed a written opposition. 2-ER-71. On December 2, 2015, the trial court conducted

an evidentiary hearing, during which the prosecutor presented testimony of Detectives Kirby, Lonteen and Meux. 2-ER-252-393

At the suppression hearing, Detective Meux testified that Delgado was not in custody until after he made his first admissions. 2-ER-296. Meux claimed that after Delgado had been released from the floor shackle and before he confessed, he could have left the station and the officers would have driven him home. 2-ER-272-294-295.

Meux also admitted that he had deliberately decided not to read Delgado the *Miranda* rights. 2 RT 61. However, Meux denied that his decision to tell Delgado that he was not in custody and to forego *Miranda* warnings were tactics to extract a confession. 2-ER-297.

Detective Meux admitted that when he himself was unable to extract any admissions from Delgado, Detective Lonteen tried again. Before Lonteen's interrogation began, Meux told Lonteen that he did not think Delgado was being truthful about his whereabouts at the time of the shooting. 2-ER-307.

Lonteen testified that, at the time of the interrogation, he knew that a witness had described the shooting suspects as "light skinned Hispanics." 2-ER-322. Lonteen also knew that Brown and another suspect, Lynch, were Black. 2-ER-324. Lonteen had assumed Delgado was not under arrest because the detectives had not yet discussed whether they would arrest him. 2-ER-318. Lonteen testified he did not at that time consider Delgado to be "involved" in the shootings even though that is what he told Delgado during the interrogation. 2-ER-327-328. Lonteen said he did not believe Delgado was in custody until after he read Delgado the *Miranda* rights. 2-ER-329.

Lonteen also admitted that the questioning of Delgado before and after the *Miranda* warnings was “essentially” part of a single continuous interrogation. 2-ER-330.

**J. The trial court’s oral and written decisions on the motion to suppress Delgado’s statements**

The trial court denied the motion to suppress in a preliminary oral ruling and in a written decision. 1-ER-87; 2-ER-386. The court found that Delgado was in custody from the time he was handcuffed, arrested, and transported, through the first approximately 90 minute period that he spent in an interrogation room with his leg shackled to the floor. 1-ER-97-98.

The trial also court found that Detective Meaux did not believe Delgado was in custody after Meaux unshackled him. The court also found that Delgado was not in custody from the time he was unshackled until his first inculpatory statement. 1-ER-96-98-103; 2-ER-386-389.

The trial court found that both the warned and unwarned statements were admissible on grounds that the detectives had not deliberately withheld the *Miranda* warnings in a two-step interrogation process and that there was no “policy or protocol” to evade *Miranda*. 1-ER-104-107. The trial court also found that Delgado’s statements were voluntary. 1-ER-108-109.

Accordingly, the trial court admitted at trial the entirety of Delgado’s statements, including both the initial unwarned confession and the subsequent confession taken after the *Miranda* warnings. 1-ER-109.

**K. Delgado’s state court appeal**

On appeal, Delgado argued: (1) his entire interrogation was custodial and therefore, the trial court should not have admitted any statements made prior to the *Miranda* warnings; and (2) because the environment of the interrogation was coercive, and because the police employed



a two-step process that circumvented *Miranda*, Delgado's post-*Miranda* statement was inadmissible under *Oregon v. Elstad*, 470 U.S. 298 (1985) and *Missouri v Seibert*, 542 U.S. 600, 615 (2004). Finally, Delgado argued that his warned and unwarned confessions were false and involuntary. Lodged Doc. No. 8.

The Court of Appeal held:

Although we do not agree entirely with defendant, we agree that many mistakes were made. As we will describe, the communication among the involved detectives was inadequate to say the least.

I-ER-61.

The Court of Appeal described the circumstances of the interrogation and disagreed with the trial court's conclusion that Delgado was not "back into custody" until he said that he had shot the victims:

We disagree with the trial court's determination of when custody was reinstated. When the second interrogator demanded access to defendant's cell phone and indicated he could not leave until it was examined, defendant was back in custody, and therefore his unwarned statements should have been excluded. No reasonable person would have felt free to leave at that time under these circumstances. However, precedent dictates that absent a deliberate policy or practice to evade *Miranda*, a subsequent voluntary warned confession is admissible notwithstanding a prior unwarned confession. (See *Missouri v. Seibert* (2004) 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643; *People v. Camino* (2010) 188 Cal.App.4th 1359, 116 Cal.Rptr.3d 173 (*Camino*).) Although all of defendant's unwarned statements should have been suppressed as the products of a custodial interrogation without a *Miranda* waiver, the finding that the subsequent warned confession was voluntary is supported by the record.

As to the video tape of Delgado's interrogation, the Court of Appeal held that it demonstrated that Delgado's statements were voluntary:

Defendant presents as a mature and savvy youth; he never appears cowed or browbeaten. The questioning was not abusive, and defendant had three restroom breaks, was given water twice, and was given a snack. During the post-warning period, entirely

on his own initiative, he acted out the murders complete with sound effects. Nothing in the video indicates that defendant felt coerced in the constitutional sense of the term at any time while he was being questioned.

1-ER-74.

The Court of Appeal concluded that the *Miranda* error was harmless and affirmed the conviction, commenting:

Our conclusion should not be read to condone the multiple inexplicable failures to communicate and other mistakes demonstrated by this record.

1-ER-61-62. The Ninth Circuit Court of Appeals affirmed the district court judgment affirming Delgado's conviction and sentence. App. 1.

### **REASONS FOR GRANTING THE PETITION**

**THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE STATE COURT'S PUBLISHED DECISION CONFLICTS WITH *MIRANDA V. ARIZONA*, *OREGON V. ELSTAD*, AND *MISSOURI V. SEIBERT* AND BECAUSE THE LOWER COURTS REQUIRE ADDITIONAL GUIDANCE AS TO THE APPLICATION OF *SEIBERT* WHEN POLICE DELIBERATELY VIOLATE THE *MIRANDA* RULE**

Certiorari should be granted because the state court's published decision in this case conflicts with this Court's clearly established decisions concerning the right to counsel and the right to remain silent during police interrogation. Moreover, the lower courts require guidance as to the application of the *Miranda* rule when the target of police interrogation is a juvenile. The issues are worthy of this Court's review because they concern the correct interpretation of decisions of this Court and, in particular, *Missouri v. Seibert*, 542 U.S. 600 (2004), which involved a fundamental question of federal constitutional law.

This Court decided *Seibert* to resolve a split among federal circuits regarding the admissibility of statements obtained when a law enforcement officer "questions first" - i.e., he

or she elicits an admission without providing the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), then provides the warning and elicits the statement again. Yet, as exemplified by this case, the lower courts still issue inconsistent decisions as to exactly how and when the *Seibert* rule applies. This case presents an ideal record to resolve this issue. The facts are settled and simple. The question presented is well preserved and the issue was the primary and most important constitutional question presented in the proceedings below.

The California Court of Appeal agreed that there was a *Miranda* violation in this case. The Court concluded, in a published decision, that Delgado's initial admissions were unlawfully obtained without *Miranda* warnings. App. 75-76. However, the Court of Appeal found that Delgado's subsequent warned statement, which was taken during a single continuous interrogation, was properly admitted. App. 76-78. The Court of Appeal decision affirming the trial court order was contrary to and an unreasonable application of clearly established federal law pursuant to *Miranda*, *Oregon v. Elstad*, 470 U.S. 298 (1984) and *Missouri v. Seibert*, 542 U.S. 600, 608 (2004). Those cases bar admission of a confession taken after a deliberate *Miranda* violation if there are not sufficient curative measures.

This Court should accept certiorari to provide guidance to the lower courts as to the standard for evaluating deliberate delay. Here, the Court of Appeal unreasonably concluded that the detectives did not deliberately delay the *Miranda* warnings and that their failure to do so was the result of mistakes and miscommunication. App. 78-79.

As set forth in more detail below, a team of three experienced detectives arrested then-sixteen-year-old Delgado after they obtained evidence connecting him to a double homicide. They confined him to a small room, chained his leg to the floor, accompanied him

back and forth to the restroom, and subjected him to accusatory questioning, all without reading the *Miranda* warnings. After Delgado confessed to the shooting, a detective belatedly rushed through the *Miranda* warnings and obtained a second confession without asking for or obtaining a waiver of Delgado's right to counsel or his right to remain silent.

The detectives claimed that they delayed the *Miranda* warnings because Delgado was not a "suspect" until after he confessed, which was not credible. Because their questions called for responses that were incriminating and because Delgado was in custody, the experienced detectives plainly deliberately delayed the *Miranda* warnings. Certiorari should be granted to clarify the evidence necessary to establish deliberate delay.

Moreover, certiorari should be granted to provide guidance to the lower courts concerning the measures necessary to cure a deliberate *Miranda* violation. Here, the detectives did not employ any curative measures to address the coercive effect of the *Miranda* violation. There was no significant break between the first and second confession. Moreover, the warned interrogation fully overlapped with and drew upon the complete confession obtained during the unwarned phase.

Accordingly, the Court of Appeal unreasonably applied *Seibert* and *Elstad* when it found that the second statement was properly admitted at trial. Certiorari should be granted because the state court decisions conflicts with *Miranda*, *Seibert* and *Elstad*.

Certiorari should also be granted because the California Court of Appeal decision in this case unreasonably applied *Elstad* when it found that Delgado's statements were voluntary. Delgado was a minor and had no parent or attorney with him at the time of the interrogation. The detectives intimidated him by shackling his leg to the floor, seizing his wallet and cell phone and

interrogating him aggressively. The Court of Appeal's conclusion that his statements were voluntary was objectively unreasonable.

Delgado's confession was also not credible because his primary focus was exculpating his friends. He falsely confessed to acts he did not commit, by claiming, for example, that he stole a victim's purse and that he disposed of the purse and a gun. Two prosecution witnesses testified at trial that they, not Delgado, had committed those crimes. Under all of these circumstances, Delgado's confession was unreliable and involuntary.

The error was prejudicial because Delgado's pre and post-*Miranda* statements admitted at his trial were the highlight of the prosecution's case and in fact the only evidence identifying him as the shooter. This Court should grant certiorari, grant the writ and order that Delgado's statements may not be admitted as evidence at a retrial.

### **Argument**

**I. Delgado's custodial statements should have been suppressed because the police obtained his confessions after deliberately withholding the *Miranda* warnings and failing to provide curative measures in violation of *Miranda*, *Seibert* and *Elstad***

**A. The Court of Appeal held correctly that Delgado's first statement should have been suppressed because the detectives interrogated him while he was in custody without providing *Miranda* warnings**

Under *Miranda v. Arizona*, 384 U.S. 436 (1966), before conducting a custodial interrogation, police must advise the subject of his right to remain silent and his right to the assistance of counsel. *Missouri v. Seibert*, 542 U.S. 600, 608 (2004) (plurality opn.)

A person is interrogated when police ask questions that are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). Here, both of the detectives plainly interrogated Delgado throughout their interviews. Detective Meux began

interrogating Delgado when he said “I’m here to figure out how to clear your name from this if you weren’t involved in this” and “Were you involved at all in this double murder?” 2-ER-138, 143-144. Accordingly, if Delgado was in custody during the questioning, the detectives were required to provide *Miranda* warnings.

A person is in custody if he is deprived of his freedom of action in any significant way. *Miranda v. Arizona, supra*, 384 U.S. at 444. A formal arrest is not required. The inquiry is whether there has been “restraint of freedom of movement of the degree associated with a formal arrest.” *California v. Beheler*, 463 U.S. 1121, 1125 (1983).

The custody test is also an objective one. *Stansbury v. California*, 511 U.S. 318, 322 (1994). The court should look to the totality of circumstances to determine whether a reasonable person in the suspect’s position would have understood that his freedom of movement was restrained. *Berkemer v. McCarty*, 468 U.S. 420, 424 (1984); *Thompson v. Keohane*, 516 U.S. 99, 112 (1999). Relevant factors include whether the suspect was transported to the station by police, whether the suspect was restrained, whether the questioning was accusatory and whether the suspect was advised that he or she was free to leave. *Id.*

A juvenile suspect’s age must be considered when determining whether he or she was in custody at the time of a police interrogation. *J.D.B. v. North Carolina*, 564 U.S. 261, 272-275 (2011). That is because juveniles are inherently more susceptible to pressure and coercion than adults and therefore at greater risk of confessing to crimes they did not commit. *Id.* p. 269. Here, as set forth in more detail below, Delgado was in custody throughout the entire interrogation because no reasonable person in his position would have believed he was free to leave.

**1. Delgado was in custody because he was arrested, transported to the station in handcuffs and confined to a small room with his leg chained to the floor and his phone and wallet were seized**

The detectives' testimony at the suppression hearing that they thought Delgado was only a witness and that he was free to leave at any time is belied by the circumstances of Delgado's interrogation.

First, Delgado was handcuffed and transported involuntarily to the station by a homicide detective. There, his wallet, keys, cell phone and other personal items were seized. His leg was shackled to the floor in an interrogation room where he was left alone for almost ninety minutes. 1-ER-89-90.

The Court of Appeal unreasonably relied on Detective Meux's testimony that he had told Delgado that he was free to go. 1-ER-70-71. When Meux made that comment he did not give Delgado an opportunity to respond. 2-ER-137. As the district court observed, Meux instead launched into a series of questions and did not pause so that Delgado could act on his purported freedom to leave. 2-ER-39.

Delgado himself asked Detective Lonteen *when* he would in fact be allowed to leave, Lonteen effectively denied his request by telling him that his cell phone data had to be extracted first. 1-ER-71. As a result, no person in Delgado's position would have believed he was free to go.

**2. Delgado also could not have believed he was free to end the interrogation because the detectives plainly considered him to be a suspect in the homicides**

When an officer conveys to a person the officer's belief that he has committed a serious offense, it is unlikely that a reasonable person would thereafter believe he is free to terminate the interview and leave. *Stansbury*, 511 U.S. at 325.

Here, almost immediately after Detective Meux suggested to Delgado that he was free to go, the detective also made it clear to Delgado that he was a focus of their double homicide investigation. 2-ER-143 ("Were you involved in this double murder?")

Under those circumstances, no reasonable person in Delgado's position, particularly a minor, would have believed he was free to terminate the interview and leave. Accordingly, the detectives were required to provide *Miranda* warnings before asking Delgado any questions that were reasonably likely to elicit an incriminating response.

**3. Because Delgado was interrogated in custody without *Miranda* warnings, the Court of Appeal held correctly that his first statement should have been suppressed**

The Court of Appeal and the district court held correctly that Detective Lonteen violated Delgado's *Miranda* rights when he failed to provide *Miranda* warnings before Lonteen obtained Delgado's first inculpatory statement. I-ER 62, 45.

Those Courts also held correctly that the first (unwarned) confession should have been suppressed. *Id.* As set forth in more detail below, because the post-*Miranda* interrogation also violated Delgado's right to due process, the entirety of his custodial interrogation should have been suppressed and this Court should grant the writ.



**B. The Court of Appeal unreasonably applied *Seibert* and *Elstad* when it affirmed the admission of Delgado’s second custodial statement**

**1. The *Seibert* standard governing post-*Miranda* statements obtained after an unwarned custodial interrogation**

*Missouri v. Seibert*, 542 U.S. 600, 608 (2004) and *Oregon v. Elstad*, 470 U.S. 298 (1985) set forth the clearly established standards for a two-stage interrogation such as this, where police first elicit an un-warned confession, then deliver the *Miranda* warnings and ask the suspect to repeat his confession.

This process has been described as a "two-step" interrogation strategy, because it has been used to circumvent *Miranda*. *United States v. Williams*, 435 F.3d 1148, 1154 (9th Cir. 2006) citing *Seibert*, 542 U.S. at 604, 609-11 (Souter, J., plurality opinion); *Reyes v. Lewis*, 833 F.3d 1001, 1026 (9<sup>th</sup> Cir. 2016).

In *Seibert*, this Court addressed a case similar to this one, where police delayed *Miranda* warnings during a single continuous interview in a police interrogation room. This Court condemned the “question first and warn later” strategy, because it “effectively threatens to thwart *Miranda's* purpose” by reducing the effectiveness of the belatedly-delivered warnings and undermining the defendant's ability to make a fully voluntary and intelligent choice whether to waive his right to counsel and to speak with police interrogators. *Id.* at 617.

Justice Kennedy viewed the crucial consideration as the “deliberate” character of the “two-step questioning technique” and the absence of any additional “curative” measures at the time of the belated *Miranda* warnings. *Seibert* at 618-622 Kennedy, J., concur.).

Justice Kennedy emphasized “When an interrogator uses this two-step strategy, predicated upon violating *Miranda* during an extended interview, post-warning statements that

are related to the substance of pre-warning statements must be excluded absent specific, curative steps.” *Id.* at 621. The “[c]urative measures should be designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.” *Seibert*, 542 U.S. at 622, 124 S.Ct. 2601 (Kennedy, J., concurring); *Reyes*, 833 F.3d at 1028.

Therefore, under *Seibert*, a post-warning statement must be suppressed if interrogating officers deliberately delay the *Miranda* warnings, and if there were not sufficient effective curative measures. In such circumstances, the resulting post-warning confession is inadmissible even if it was voluntary. *Reyes*, p. 1029.

In *Elstad*, this Court held that where police obtain an initial unwarned statement under circumstances that do *not* suggest a deliberate intent to circumvent *Miranda*, the confession is only admissible where both the initial unwarned confession and the subsequent warned one are “wholly voluntary.” *Elstad*, 470 U.S. at 318; *Reyes*, 833 F.3d at 1026.

**2. The State Court of Appeal unreasonably applied *Seibert* and *Elstad* when it held that the officers did not deliberately delay the *Miranda* warnings because there was overwhelming objective evidence of deliberate delay**

The California Court of Appeal found that the detectives’ conduct in this case was not deliberate because they had “acted with little or no method at all.” App. 78. The Court of Appeal’s conclusion that the police did not deliberately delay the *Miranda* warnings was objectively unreasonable.

Evidence of a deliberate intent to violate *Miranda* can be objective or subjective. *United States v. Williams*, 435 F.3d at 1158. Objective evidence that is relevant to a finding of deliberateness includes “the timing, setting and completeness of the pre-warning interrogation,

the continuity of police personnel and the overlapping content of the pre- and post-warning statements.” *Williams*. at pp. 1158-1159; *see also United States v. Barnes*, 713 F.3d 1200, 1205 (9th Cir. 2013) (per curiam); *United States v. Capers*, 627 F.3d 470, 479 (2<sup>nd</sup> Cir. 2010)(“in most instances the inquiry will rely heavily, if not entirely, upon objective evidence.”).

The Court of Appeal’s published decision unreasonably applied *Seibert* because it ignored the overwhelming objective evidence that the detectives deliberately delayed the *Miranda* warnings until after Delgado had confessed. The detectives’ testimony that they did not advise Delgado of his *Miranda* rights because they did not consider him to be a suspect is contradicted by their own statements and actions throughout the interrogation.

**a. The officers failure to immediately provide *Miranda* warnings upon commencing their accusatory questioning is evidence of a deliberate two-step strategy**

As an initial matter, there were *three* experienced homicide detectives involved in Delgado’s arrest and interrogation. Detective Meux had been a police officer for 20 years (2-ER-253), Detective Kirby for 20 years (2-ER-334) and Detective Lonteen for 16 years. 2-ER-304. Given their positions and experience, it is simply implausible that their failure to provide *Miranda* warnings until after Delgado confessed to two murders was simply a bumbling mistake.

Once police have detained a suspect and subjected him to interrogation, there is “rarely, if ever, a legitimate reason to delay the *Miranda* warnings until after he has confessed.” *United States v. Williams*, 435 F.3d 1148, 1158-59 (9<sup>th</sup> Cir. 2006). Here, the Court of Appeal emphasized its displeasure with the circumstances of Delgado’s interrogation and commented that “many mistakes were made.” 1-ER-61. However, the Court of Appeal’s suggestion that the three experienced detectives who interrogated sixteen year old Delgado about his involvement in

a double murder simply forgot to read him his *Miranda* rights is on its face objectively unreasonable. As set forth in more detail below, other objective evidence also supports that conclusion

**b. The timing, setting, and content of the delayed *Miranda* warnings is additional objective evidence of the detectives' intent to delay providing the *Miranda* warnings**

Objective evidence that is relevant to a finding of deliberateness includes “the timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the two statements.” *Williams*. at pp. 1158-1159; *see also United States v. Barnes*, 713 F.3d 1200, 1205 (9th Cir. 2013) (per curiam).

Here, the timing and setting of the pre and post *Miranda* interrogation supports a finding that the delay in providing *Miranda* warnings was deliberate. Two detectives, working together, took turns interrogating Delgado. Delgado was in the same interrogation room the entire time and there was no significant break between the un-warned and warned confession.

The detectives also demonstrated an intent to circumvent *Miranda* because they did not stop and provide the advisements as soon as the interrogation became accusatory. Detective Lonteen's conduct was particularly egregious because he continued to interrogate Delgado outside *Miranda* even *after* Delgado said that he alone had committed the shootings. 2-ER-194-200. Only after extracting a complete confession on every material aspect of the charged incident did the detective belatedly advise Delgado of his *Miranda* rights.

The same detective then re-questioned Delgado at length, covering the same information as in the unwarned confession. Delgado, predictably, repeated the confession he had given minutes before, in greater detail, including additional false embellishments all directed toward

the same goal: exculpating his friends Brown and Cober from any responsibility for the homicide.

Moreover, Lonteen undermined the effect of the warnings because he never gave Delgado a realistic opportunity to exercise his right to silence or to ask for counsel. Lonteen rushed through the warnings and immediately recommenced questioning without even asking for a waiver. 2-ER-202-203.

In summary, Delgado's interrogation was a text-book example of a two-step interrogation, regardless of the detectives' testimony about their subjective intent to evade *Miranda*. Three experienced detectives isolated, shackled, pressured and accused Delgado without providing *Miranda* warnings until after he confessed. As in *Thompson* and *Reyes*, there is no reasonable conclusion here but that the *Miranda* warnings were deliberately delayed.

**c. The detectives' testimony at the suppression hearing was not credible**

The "most plausible reason" for delaying *Miranda* warnings until after a suspect has confessed is "the interrogator's desire to weaken the warning's effectiveness," *see Williams*, 435 F.3d at 1159. This Court has likewise observed that "the intent of the officer will rarely be as candidly admitted as it was [in *Seibert*]." *Id.* at 1158 (*quoting Seibert*, 542 U.S. at 617 n.6, 124 S.Ct. 2601 (Souter, J., plurality opinion)).

Here, the detectives suggested at the suppression hearing that they only delayed the *Miranda* warnings because Delgado was not "a suspect" until he confessed. However, as the district court correctly observed, the detectives' testimony on that point was not credible under the circumstances. 1-ER-41-43. The district court observed "Whether or not Meux and Lonteen

considered petitioner the shooter, their questions and behavior certainly indicated they thought he was involved.” I-ER-39.

Moreover the seizure and search of Delgado’s personal property belies the detectives’ testimony at the suppression hearing that they thought Delgado was only a possible witness. 2-ER-133-135. Detective Lonteen even demanded the security code to Delgado’s phone so that the detective could examine its contents. 2-ER-159.

As the district court observed, Lonteen and Meaux’s suppression hearing testimony also often lacked substance and was contradictory. 1-ER-40. For example, Detective Meaux testified that he believed Delgado was present during the homicide and also testified that there was “no evidence” placing Delgado on the scene. *Id.* If the detectives had honestly believed that they were only interrogating Delgado because he was a potential witness, they would not have given such evasive, contradictory and vague testimony at the suppression hearing.

Ultimately, the Court of Appeal’s published decision unreasonably assumed that the failure to provide *Miranda* warnings was the result of incompetence without any evidence to support such a finding, and failed to consider the objective evidence that the detectives deliberately delayed the *Miranda* warnings.

**3. Because the detectives failed to use any curative measures, the post-*Miranda* statements should have been suppressed**

Because the detectives deliberately delayed the *Miranda* warnings, the detectives were required to provide curative measures such as: (1) advising Delgado that his pre-warning statement could not be used at a trial; or (2) providing a substantial break in the interrogation so

that Delgado understood that the interrogation had “taken a new turn.” *Seibert*, p. 622; *Williams*, pp. 1160-1161.

Here, far from providing curative measures, Detective Lonteen treated the second statement like an extension of the first. Lonteen did not provide any significant break in the interrogation and he treated the mid-stream *Miranda* warnings like a formality. 2-ER-202-203.

In summary, the detectives provided no curative steps to ameliorate the initial *Miranda* violation. Instead of telling Delgado that his first statement could not be used in court, Lonteen created the opposite impression by suggesting that the second statement was only necessary to fill in some missing details. Under these circumstances, Delgado could not have recognized that the interrogation had taken “a new turn.” *Williams*, at pp. 1160-1161.

For all of these reasons, the Court of Appeal Opinion unreasonably applied *Seibert* when it failed to analyze *Seibert*’s requirement of curative factors. Because the detectives took *no* steps to cure their own *Miranda* violation, all of Delgado’s pre and post-*Miranda* statements should have been suppressed.

**2. The Court of Appeal’s holding that Delgado’s second statement was admissible if it was voluntary misapprehended and unreasonably applied *Seibert***

The voluntariness of a post-warning statement is *irrelevant* under *Seibert* if there were insufficient curative measures for the preceding *Miranda* violation. *Reyes v. Lewis*, 833 F.3d at 1029. Here, as in *Reyes*, the Court of Appeal unreasonably applied *Seibert* and *Elstad* because it focused on the voluntariness of the warned statement rather than whether there were curative measures sufficient to overcome the effect of the previous violation.

The material facts in *Reyes* are similar to those in this case. Detectives, who were investigating a homicide, first questioned 15 year old Reyes at his home. About a month later, Reyes accompanied one of the officers to the station voluntarily. Officers told him he did not have to answer any of their questions and interrogated him aggressively, in a manner similar to that of the detectives in this case. *Reyes* pp. 1016-1018.

Reyes denied that he was the shooter and (unlike Delgado) he was allowed to go home. The next day, after Reyes took a polygraph examination, an officer told Reyes he had failed and pressured him to confess, which he did. *Reyes* at pp. 1019-1020.

The officers drove Reyes to another police station where he was provided *Miranda* warnings and he repeated the confession that had been obtained outside *Miranda*. *Reyes* at pp. 1021-1022. As in this case, the only evidence identifying Reyes as the shooter was his confession. Moreover, as in this case, there were objective facts suggesting that Reyes's confession was false. *Reyes*, p. 1022. For all of these reasons, the facts of this case and those in *Reyes* are materially indistinguishable and this Court should grant the writ.

**III. The admission of Delgado's statements was prejudicial because they were crucial to the prosecution's proof of identity, malice, and the special circumstances**

On habeas review, this Court should evaluate prejudice arising from erroneously admitted custodial statements under the standard in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Anderson v. Terhune*, 516 F.3d 781, 792 (9<sup>th</sup> Cir. 2008). Under *Brecht*, the Court must determine whether the error had a "substantial and injurious effect or influence" on the verdict. *Arnold v. Runnels*, 421 F.3d 859, 869 (9<sup>th</sup> Cir. 2005).



Due to the unique importance of a confession, improper admission of such evidence is the kind of error most likely to prejudice the outcome of a trial. “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.” *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991); *accord Anderson v. Terhune*, 516 F.3d at 792.

Moreover, the prejudicial impact will be greatest: (1) where the confession is not cumulative and there is no eyewitness or forensic evidence directly establishing the defendant's guilt, or (2) where the confession provides a complete account of the crime, rather than an isolated incriminating admission. *Fulminante*, 499 U.S. at 296; *Taylor v. Maddox*, 366 F.3d at 1017.

Prior to Delgado’s interrogation, there was “no eyewitness to the incident that could identify him as the assailant ....” *Taylor v. Maddox*, 366 F.3d at 1017. Delgado’s confession was therefore the only concrete proof of every element of the murder charge: identity, malice, actus reus and the special circumstance.

Specifically, there was no eyewitness or forensic evidence establishing that Delgado shot the victims and not Brown or Cober. Accordingly, the custodial statements were crucial to Delgado’s conviction and not cumulative of any other evidence.

Finally, admission of the statements was prejudicial because they included so many false admissions that they resulted in Delgado’s conviction based on patently unreliable evidence. Delgado’s statements provided a complete and detailed account of his purported actions, including some detailed admissions (to stealing the purse) that were demonstrably not true.

Delgado falsely confessed that he alone emptied the purse and took the money from Elarms' wallet. Delgado also told the detective that the purse contained only \$400 and that he kept all of the money for himself. 2-ER-234-235. However, Brown said there was \$800 and that he took half. 3-ER-539-540. Delgado also confessed that he disposed of the purse and the gun, even going so far as to provide details about the location of the dumpsters where he purportedly threw the weapon. 2-ER-197-235-241-246. In fact Cober disposed of those items. 2-ER-539.

Delgado's motive to give a false confession – his desire to protect his friends – was apparent throughout his conversation with Detective Lonteen. Throughout the interrogation, Delgado insisted that Brown and Cober had nothing at all to do with the murder/robbery. However, after being given immunity for their testimony, they both admitted that they participated in the incident and helped dispose of the evidence.

All of these facts tend to show the most extreme form of prejudice – that Delgado was convicted based on a false confession.

Because there was no eyewitness testimony as to the identity of the shooter and no forensic evidence, the confession was the centerpiece of the prosecution case, and the prosecutor referred to information obtained only from Delgado's statements repeatedly during closing arguments to the jury. *E.g.*, RT 627, 629-633; *see Arnold v. Runnels, supra*, at 859, 868, 869 (erroneously admitted statements prejudicial because they were "highlighted" in the prosecutor's closing argument). For all of these reasons, the error could not have been harmless under *Brecht*. Accordingly, this Court should grant certiorari and grant the writ.

### **Conclusion**

For the reasons set forth above, this Court should grant certiorari, find that Delgado's right to silence and to counsel were violated during his police interrogation, reverse the judgment of the district court and remand this case to the district court for further proceedings.

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Respectfully submitted,

/s/ Stephanie M. Adraktas

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