

No. 08-1470

In The
Supreme Court of the United States

MARY BERGHUIS
Petitioner,

v.

VAN CHESTER THOMPkins
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

REPLY BRIEF

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INTRODUCTION

There are two primary errors that underlie Thompkins's analysis on the *Miranda* claim.

First, Thompkins fails to recognize that this Court does not impose new rules on State courts when examining the reasonableness of a decision under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254 *et seq.* Thompkins proposes new and incompatible rules expanding *Miranda*. One seeks to impose an "immediacy requirement" after the provision of the rights under *Miranda* in order for an implied waiver to be valid. The other asks that this Court exclude pre-waiver interrogation, effectively asking this Court to overrule *North Carolina v. Butler*. These are not clearly established rules, but rather are new rules that cannot be imposed on habeas review.

The clearly established law from this Court provides that a waiver can be inferred from the actions and words of the person interrogated. This Court expressly stated in *Butler* that there might be an implied waiver in the circumstance in which a person remains silent in response to his rights but indicates an understanding of these rights and engages in a course of conduct that indicates a waiver. The Michigan Court of Appeals did not act unreasonably in concluding that Thompkins impliedly waived his rights. He read out loud from the waiver form, expressly acknowledged his rights, provided some limited responses during the interview, did not invoke his right to cut off questioning, and then specifically answered questions that implicated him in the crime. The conclusion that this was an implied waiver was not objectively unreasonable. Thompkins's contention

that his will was overborne is untenable. There was nothing coercive about the interview.

Second, the Michigan Court of Appeals did not reach an unreasonable conclusion in determining that Thompkins never invoked his right to remain silent. Thompkins never clearly indicated in any manner that he was unwilling to submit to questioning. Knowing that he did not need to respond, Thompkins answered a series of questions implicating him. There was no invocation of his right to remain silent. This conclusion is confirmed by this Court's analysis in *Davis v. United States*, which requires an unambiguous assertion of one's right to counsel. The justification underlying this Court's decision in *Davis v. United States* applies here – the police need not cease interrogation based on Thompkins's conduct even if this Court interpreted his conduct as an ambiguous assertion to remain silent.

Regarding Thompkins's claim of ineffective assistance of counsel, there was no reasonable probability that a jury instruction that limited the jury's consideration of Eric Purifoy's acquittal would have affected the verdict. The jury in Purifoy's trial was never asked to determine whether he was the shooter, only whether he was an aider and abettor – a claim that it rejected. Thus, the fact that Purifoy's jury had already acquitted Purifoy did not contradict Thompkins's theory of innocence at trial. Moreover, this instruction would have had no bearing on the foundations of the evidence against Thompkins – Frederick France's identification, Thompkins's confession to a civilian witness (Omar Stephens), and Thompkins's guilty conduct after the crime. This Court should reverse.

ARGUMENT

I. The Michigan State courts did not reach an objectively unreasonable decision in ruling that Thompkins impliedly waived his right to remain silent.

In order to merit relief when challenging his conviction for a proceeding in habeas corpus, Thompkins was required to demonstrate that the decision of the Michigan Court of Appeals was "contrary to, or involved an unreasonable application of, clearly established" Supreme Court precedent under 28 U.S.C. § 2254(d). The clearly established law must be drawn from the holdings of this Court, not from obiter dictum.¹ And in order to qualify for relief, the State court decision has to be more than merely "incorrect," it has to be "objectively unreasonable."²

The Michigan Court of Appeals rejected Thompkins's claim that he had implicitly invoked his right to remain silent. The Michigan Court found that Thompkins was advised of his rights and verbally acknowledged them. Pet. App. 75a. The Michigan Court also found that Thompkins refused to sign the advice of rights form, but continued to talk with the police, "albeit sporadically." Pet. App. 75a. It then affirmed the State trial court's determination that Thompkins had validly waived his right to remain silent. Pet. App. 75a. The State trial court concluded that Thompkins waived his right by his conduct:

¹ *Williams v. Taylor*, 529 U.S. 362, 403-404 (2000) (O'Connor, J. for the Court).

² *Williams*, 529 U.S. at 409, 411-412 (O'Connor, J. for the Court).

The defendant never invoked his right to remain silent, and participated in the interview by making eye contact, nodding, and answering questions with "I don't know." Defendant then answered the two questions at issue. Defendant knowingly and intelligently waived his rights. [J.A. 28a.]

This conclusion was not objectively unreasonable. Thompkins impliedly waived his right to remain silent when he incriminated himself knowing that he did not need to answer the questions of the police officers.

Thompkins attempts to blunt the significance of *Butler* by adding an "immediacy requirement" for an implied waiver to be valid – that is, that the implied waiver may only occur shortly after providing an accused his rights under *Miranda*. Resp. Br. 19. This would be a new rule if imposed in this case. Thompkins also argues alternatively that all pre-waiver interrogation should be prohibited, effectively asking this Court to overrule or limit *Butler*, rejecting the legal principle that a waiver may be implied through an understanding of one's rights and a course of conduct that indicates waiver. This Court does not impose new rules onto the State courts on habeas review to provide a criminal defendant relief.

Thompkins further contends that he only confessed because his will was overborne. This claim is rebutted by the record. The Michigan Court of Appeals reasonably concluded that Thompkins's implied waiver here was voluntary.

A. The law from the United States Supreme Court is that a waiver of one's rights under *Miranda* may be inferred from the actions and words of the accused.

This Court in *North Carolina v. Butler* specifically rejected the conclusion that a waiver of a suspect's rights under *Miranda* and the Fifth Amendment must be express.³ Rather, this Court noted that depending on the particular facts surrounding the case that there might be an implied waiver:

[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.⁴

This Court further explained that it could not exclude the possibility that there were circumstances in which "silence," when coupled with other factors, might nevertheless be consistent with a finding of waiver:

The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may

³ *North Carolina v. Butler*, 441 U.S. 369, 375-376 (1979).

⁴ *Butler*, 441 U.S. at 373.

never support a conclusion that a defendant has waived his rights.⁵

In other words, this Court identified circumstances in which a defendant might be silent when informed of his rights but nevertheless later waive those rights.

That is what occurred in *Butler*. The accused "said nothing when advised of his right to the assistance of a lawyer."⁶ Also, "[a]t no time did [he] request counsel or attempt to terminate the agents' questioning."⁷ Significantly, the accused in *Butler* specifically refused to sign "the waiver" on the advice of rights form.⁸ This Court stated that the accused agreed to speak with the agents, and explained – without specifying a time – that he "then" made inculpatory statements.⁹

That is also what occurred here. As found by the State trial court, Thompkins was specifically informed of his rights and he verbally acknowledged them. J.A. 26a. In particular, Thompkins read out loud his fifth right on the notification form that essentially stated that he may exercise his rights at any time, regarding his right to remain silent or speak with an attorney. J.A. 146a. Thompkins never asked to speak with an attorney and did not indicate that he was unwilling to talk with the officers. After providing a few limited responses, he then made incriminating admissions to

⁵ *Butler*, 441 U.S. at 373.

⁶ *Butler*, 441 U.S. at 371.

⁷ *Butler*, 441 U.S. at 371.

⁸ *Butler*, 441 U.S. at 371.

⁹ *Butler*, 441 U.S. at 371.

the police. In these ways, this case is factually like *Butler*.

In response to this comparison between this case and *Butler*, Thompkins cites the notification form used here and contends that the Michigan police were not interested in obtaining a waiver. Resp. Br. 20. This is not true. Detective Helgert expressly testified that "it was necessary for [Thompkins] to waive his rights." J.A. 14a. And regarding the notification form, if anything, the refusal by the accused in *Butler* to sign the waiver at the bottom of the advice of rights form was a more powerful indication that he did not wish to waive his rights than the refusal here by Thompkins who refused to sign a mere notification form. J.A. 13a.

Thompkins, p. 18, and the National Association of Criminal Defense Lawyers (NACDL), p. 23, argue that there was no valid implied waiver here, relying on the statement from *Miranda* that a waiver cannot be inferred from the silence of the accused or from the mere fact that the accused ultimately confesses.¹⁰ This Court in *Butler*, however, clarified (as noted above) that there are circumstances in which an accused's silence when *coupled with other factors* may give rise to an implied waiver.¹¹ In applying this rule, the lower courts on direct review have found that there are circumstances in which the confession will provide the support for the inference that there was an implied

¹⁰ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) ("But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.").

¹¹ *Butler*, 441 U.S. at 373.

waiver.¹² This includes the federal appellate courts on direct review.¹³ The Michigan State courts cannot be objectively unreasonable in concluding the same here – Thompkins's answers to the questions incriminating himself in these circumstances knowing that he did not need to answer served as the basis for his voluntarily waiver.

The government has the burden of demonstrating that the accused "voluntarily, knowingly and intelligently" waived his rights.¹⁴ This inquiry has two facets: (1) "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"; and (2) "the 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."¹⁵ See U.S. Br. 23. In order to determine whether there is a valid waiver, this Court noted that a court should examine

¹² See 2 W. LaFave, J. Israel, N King & O. Kerr, *Criminal Procedure* § 6.9(d)(3d 2007), p. 831 ("But what if the defendant expresses an understanding of the *Miranda* warnings he has received and thereafter an incriminating statement is obtained from him? In the language of *Butler*, does this amount to a showing of 'an understanding of his rights and a course of conduct indicating waiver'? Several courts have answered this question in the affirmative.").

¹³ See, e.g., *United States v. Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005) ("Because Hinson had been fully informed and indicated his understanding of his *Miranda* rights, his willingness to answer Agent High's question is as clear an indicia of his implied waiver of his right to remain silent as we can imagine.").

¹⁴ *Miranda*, 384 U.S. at 444, 475-476.

¹⁵ *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

the particular facts and circumstances surrounding the waiver.¹⁶

The key to the analysis here is that Thompkins was apprised of his rights and knew that he did not have to answer questions and could ask for an attorney at any time. He never invoked his rights, never attempted to stop the interview, and made some responses, verbal and non-verbal, to the police overtures. His decision ultimately to answer Detective Helgert's questions was inconsistent with his exercise of his right to remain silent. J.A. 10a-11a. He knew he did not have to answer these questions but chose to do so anyway. This was his voluntary decision. In doing so, his actions and words indicated that he was waiving his known rights. In the words of *Miranda*, this statement was "the product of his free choice."¹⁷ The Michigan courts were not objectively unreasonable in admitting them.

Thompkins also contends that the Michigan Court of Appeals was objectively unreasonable in relying on a state case, *People v. McReavy*,¹⁸ an invocation case, when the issue presented was whether Thompkins validly waived his right to remain silent. Resp. Br. 24. But the Michigan Court of Appeals also answered the question of invocation because that was the specific claim raised by Thompkins on appeal. Thompkins argued this point in the Michigan Court of Appeals as an invocation claim. See State Brief for Thompkins in the Michigan Court of Appeals, p. 6

¹⁶ *Butler*, 441 U.S. at 374-375.

¹⁷ *Miranda*, 384 U.S. at 457, 458.

¹⁸ *People v. McReavy*, 436 Mich. 197; 462 N.W.2d 1 (1990).

("[Thompkins] was unequivocally exercising his Fifth Amendment privilege against self-incrimination"). In fact, Thompkins himself cited *McReavy* in his brief, p. 8, to the Michigan Court of Appeals. Thus, the suggestion by Thompkins that the Michigan Court misread the law or his argument is not supported by the record.

The conclusion by the Michigan courts that this was an implied waiver was not objectively unreasonable. This Court has not clearly established there can be no implied waiver when an accused acknowledges his rights, does not invoke them, provides limited responses, and then voluntarily answers questions knowing that he need not.

B. There is no clearly established "immediacy requirement."

In contending that *Butler* does not apply, Thompkins attempts to narrow *Butler* and argues that it contains an "immediacy requirement." See Resp. Br. 19. The amicus on behalf of NACDL similarly contends that any such implied waiver if allowed should be limited to the "initial investigative questions." See NACDL Br. 15. But these standards do not appear in *Butler* and they are not required by *Miranda*. These would be new rules.

As already noted, the law that is relevant for determining what is "clearly established" under 28 U.S.C. § 2254(d) is limited to the holdings of this Court.¹⁹ This Court cannot impose new obligations not

¹⁹ *Williams*, 529 U.S. at 403-404 (O'Connor, J. for the Court).

clearly established "under the guise of extensions to existing law."²⁰

The contention that this Court has restricted the time period in which an implied waiver may occur is not supported by *Butler* or by the decisions of this Court following *Butler*. This Court has not established time parameters on when an accused may impliedly waive his right to remain silent in speaking with the police. The federal appellate courts have generally recognized that a waiver may be implied by voluntarily answering questions after a knowing reception of one's rights under *Miranda*.²¹

In evaluating these cases, Thompkins attempts to distill a principle consistent with one that he advocates that limits the implied waiver to cases in which the waiver occurs "immediate[ly]" following the provision of rights. Resp. Br. 22. But the rule advocated by Thompkins has not been established by this Court.

The only indication of a time limitation regarding a valid waiver may be inferred from *Miranda* itself. This Court indicated that a "lengthy interrogation" before a statement militates against a finding of a valid waiver:

[T]he fact of lengthy interrogation or incommunicado incarceration before a

²⁰ *Yarborough v. Alvarado*, 541 U.S. 652, 666 (2004).

²¹ See, e.g., *United States v. Velasquez*, 626 F.2d 314, 320 (3rd Cir. 1980); *Cardwell*, 433 F.3d at 389-390 (4th Cir. 2005); *United States v. Nichols*, 512 F.3d 789, 798 (6th Cir. 2008); and *United States v. Washington*, 462 F.3d 1124, 1134 (9th Cir. 2006).

statement is made is strong evidence that the accused did not validly waive his rights.²²

The waiver obtained by the police in these circumstances would arise not from a free election of the accused, but from the "compelling influence of the interrogation."²³

But the interrogation here was not lengthy. The entire interview lasted only two hours and forty-five minutes in the middle of the afternoon. The police advised Thompkins of his rights at 1:30 p.m., and Detective Helgert's police report indicated that the police left at 4:15 p.m. J.A. 15a, 16a. According to Detective Helgert, the police changed their tactic near the end of the interview, which the attorney for Thompkins marked at two hours and fifteen minutes. J.A. 16a-17a, 18a.²⁴ Thus, the interview lasted two hours and fifteen minutes or two hours and a half before Thompkins impliedly waived his rights by answering a series of questions, culminating in his admission that he prayed to God for forgiveness for "shooting that boy down." J.A. 11a.

²² *Miranda*, 384 U.S. at 476.

²³ *Miranda*, 384 U.S. at 476.

²⁴ Thompkins and NACDL indicate that the interview lasted for "two hours and forty five minutes" or "nearly three hours" before Thompkins incriminated himself. Resp. Br. 25; NACDL Br. 5. These claims are not factually sensitive to the record. Two hours and forty five minutes marks the total interview time. J.A. 16a. Detective Helgert explained that after Thompkins had implicated himself the interview lasted "fifteen (15), twenty (20) minutes more." J.A. 11a.

By comparison to the two hours and fifteen minutes of interrogation before waiver here, this Court in *Frazier v. Cupp* described as a "short duration" an interrogation that began at 5 p.m. and concluded at 6:45 p.m. when examining a confession for voluntariness under *Escobedo v. Illinois*.²⁵ The durations that this Court has identified as coercive were substantially longer than one hour and forty five minutes in *Frazier* or the two hours and fifteen minutes here. Compare *Michigan v. Mosley* (characterizing as "prolonged interrogation" the interrogation in *Westover v. United States* in which the police arrested the accused at 9:45 p.m. and then interrogated him throughout the night and through the next morning);²⁶ *Darwin v. Connecticut* (the police kept the accused incommunicado for 30 to 48 hours before his confession);²⁷ and *Blackburn v. Georgia* (eight or nine hours of interrogation for an accused who was probably "insane and incompetent").²⁸ See U.S. Br. 30. The law from this Court indicates that the interrogation here was short and did not render any waiver invalid.

C. There is no clearly established prohibition against pre-waiver interrogation.

Both Thompkins and the NACDL amicus indicate that this Court's decision in *Miranda* forbade pre-waiver interrogation. Resp. Br. 42-44; NACDL Br.

²⁵ *Frazier v. Cupp*, 394 U.S. 731, 738 (1969), relying on the voluntariness test of *Escobedo v. Illinois*, 378 U.S. 478 (1964).

²⁶ *Michigan v. Mosley*, 423 U.S. 96, 106 (1975), citing *Westover v. United States*, 384 U.S. 346 (1966) (companion case to *Miranda*).

²⁷ *Darwin v. Connecticut*, 391 U.S. 346, 349 (1968).

²⁸ *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

8-15. This is wrong. Their contention is not supported by *Miranda*, would require the overruling of this Court's decision in *Butler*, and would contradict the holdings of many federal appellate circuits on direct review. See U.S. Br. 20-21. This Court does not create new rules in habeas to provide a criminal defendant relief.²⁹

This Court's decision in *Miranda* itself allows that the police might engage in interrogation after giving the warnings themselves but before the accused had waived his rights. In describing the procedure, this Court indicated that *the warnings themselves* were the essential prerequisite to questioning:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.³⁰

This ordering of the process suggests that the questioning may ensue after the knowing reception of the warnings.

This Court further explained that "lengthy interrogation" would be "strong evidence" that there was no valid waiver.³¹ This is because the "compelling influence of the interrogation" may "finally" force the

²⁹ See *Yarborough*, 541 U.S. at 666.

³⁰ *Miranda*, 384 U.S. at 473-474.

³¹ *Miranda*, 384 U.S. at 476.

accused to waive his rights.³² This point is cited for a different reason by both Thompkins and the NACDL amicus. See Resp. Br. 18; NACDL Br. 9, 10, 16, 17, 19. But the fact of lengthy interrogation is only relevant where the interrogation *precedes* the waiver, otherwise the interrogation would not have the "compelling influence" that might coerce a waiver.³³ In other words, this presumption against waiver after lengthy interrogation is predicated on the understanding that there was an interrogation *before* the waiver occurred. It assumes pre-waiver interrogation and indicates that if this interrogation is "lengthy," this is strong evidence that the waiver was not voluntary. But if the interrogation were not lengthy, the evidence would not contradict the finding of a knowing waiver. This point is fatal to the claim that *Miranda* forecloses all pre-waiver interrogation.

The NACDL amicus, p. 8, relies on the following statement from *Miranda* for its contention that *Miranda* forecloses pre-waiver interrogation:

After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained

³² *Miranda*, 384 U.S. at 476.

³³ *Miranda*, 384 U.S. at 476.

as a result of interrogation can be used against him.³⁴

But this Court does not state that the waiver must occur before questioning can occur. Rather, this Court is clear that warnings and waiver are prerequisites as a matter of proof at trial for the admission of the statements. As long as the waiver is proven, the statements are admissible.

Moreover, the decision in *Butler* clearly contemplates pre-waiver interrogation. It is significant that in his three pages of analysis on this claim, Thompkins does not cite *Butler* at all. Resp. Br. 42-44. And the brief for NACDL wrongly claims that the analysis from *Butler* is mere obiter dictum. NACDL Br. 13-14. That is a misreading of *Butler*.

The standard identified by this Court in *Butler* is that a waiver can be "inferred from the actions and words of the person *interrogated*."³⁵ The clear indication is that there are "at least some cases" in which an accused's responses during the interrogation might give rise to the conclusion that he has waived his rights. Even where the accused is silent regarding whether he will waive his rights, the understanding of his rights and course of conduct might indicate waiver.³⁶ Moreover, the cases cited in *Butler* for the proposition that the lower courts had rejected the

³⁴ *Miranda*, 384 U.S. at 479.

³⁵ *Butler*, 441 U.S. at 373 (emphasis added).

³⁶ *Butler*, 441 U.S. at 373.

requirement of an express waiver had themselves specifically allowed pre-waiver interrogation.³⁷

The contention that this is mere dicta is not well taken. This Court established the standard for the lower court (the North Carolina Supreme Court) to apply on remand. These standards were integral to the Court's analysis where it did not indicate whether the conduct of Butler in the specific case constituted an implied waiver.

Moreover, the federal courts on direct review have recognized that an accused's answers in response to interrogation may themselves serve as the basis for the implied waiver.³⁸ Examining the actions of the federal courts is useful in evaluating the reasonableness of the State's decision.³⁹ The State trial court's decision here – that after an express acknowledgement of his rights, not invoking his rights, and participating in a limited way in the interview, that Thompkins's answers to the questions themselves served as the waiver, J.A. 28 – is supported by the decisions of the lower federal courts on direct review. There is no clearly established precedent that indicates that pre-waiver interrogation is improper. To the contrary, as argued above, this Court's jurisprudence in *Miranda* and *Butler* supports it.

The standards urged by Thompkins, eliminating the use of pre-waiver interrogation, would curtail

³⁷ *Butler*, 441 U.S. at 376, citing among others, *Blackmon v. Blackledge*, 541 F.2d 1070, 1072 (4th Cir. 1976).

³⁸ See n. 21 above.

³⁹ See *Price v. Vincent*, 538 U.S. 634, 643 (2003).

legitimate police practices by effectively requiring the police to obtain an express waiver from the inception of the interview. The suggestion by Thompkins, pp. 20, 27-28, that the police acted improperly here by failing to ask directly whether he was waiving his right to remain silent was rejected in *Butler*.⁴⁰ Moreover, the Constitution does not require the police to immediately obtain a waiver. Such a rule would unnecessarily inhibit suspects and the police. See U.S. Br. 18.

There also is nothing in the record to suggest that the Michigan police are trained to attempt to subvert the *Miranda* warnings. Unlike Thompkins's comparison of the conduct in this case to the police conduct in *Missouri v. Seibert*, see Resp. Br. 43, the police did not render the *Miranda* warnings "ineffective."⁴¹ Thompkins knew he could end the interview at any time, but elected not to do so. This Court has repeatedly recognized the value of voluntary confessions in criminal prosecutions.⁴²

The use of pre-waiver interrogation is not a distortion of *Miranda* as Thompkins contends. The core value of *Miranda* is to ensure that any statement given

⁴⁰ This is the same point that Justice Brennan advanced in his dissent. See *Butler*, 441 U.S. at 379 (Brennan, J. dissenting).

⁴¹ *Missouri v. Seibert*, 542 U.S. 600, 613 (2004) (Souter, J. plurality).

⁴² *Burbine*, 475 U.S. at 426 ("Admissions of guilt are more than merely 'desirable,' . . . they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.") (citation omitted). See also *Oregon v. Elstad*, 470 U.S. 298, 312 (1985); *Schneekloth v. Bustamonte*, 412 U.S. 218, 225 (1973).

is a matter of "free choice."⁴³ Knowing that he did not need to answer Detective Helgert's questions, Thompkins did so anyway. The fact that Thompkins elected to speak was his free decision.⁴⁴

D. Thompkins was not "oppress[ed]," "badgered," without "power," or "impaired."

Although not found by the Sixth Circuit, Thompkins contends that the incriminating statement that he gave was a product of coercion. Resp. Br. 29. He argued that the interrogation conditions were "oppressive" (p. 30), that Thompkins had "no power to affect his situation" (p. 31), that "his capacity for rational judgment was impaired" (p. 33), and that he was "badgered" for almost three hours before his will was "overborne" (p. 33). These assertions are contradicted by the record. Thompkins's waiver was voluntary. See U.S. Br. 29-30. The fundamental error of this entire line of analysis for Thompkins is predicated on his failure to address the significance of the fact that he expressly acknowledged his rights.

⁴³ *Miranda*, 384 U.S. at 457. See also *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987), quoting *Miranda* at 469 ("The fundamental purpose of the Court's decision in *Miranda* was 'to assure that the individual's right to choose between speech and silence remains unfettered throughout the interrogation process.'").

⁴⁴ The amicus brief for NACDL asserts that reiterating the *Butler* rule as understood by the lower courts would "subvert" the settled practices of the police. NACDL Br. 34. As the cases applying the implied-waiver doctrine demonstrate, the practice of pre-waiver interrogation is common. It is the rejection of this practice by limiting the holding in *Butler* – an inappropriate action in habeas review – that would require the police to change their practices.

Detective Helgert testified that he initially established that Thompkins could read English by asking him to read out loud the fifth point on the notification of rights form. J.A. 8a. This right provided basically that "you can exercise your [r]ights at any time" by "[s]top answering questions" or "summon[ing] an attorney." J.A. 146a. Detective Helgert also explained that he read out loud the four rights listed under *Miranda*, J.A. 8a, and he testified that "I believe I asked him if he understood the Rights, and I think I got a verbal answer to that as a 'yes.'" J.A. 9a. On this point, the Michigan courts specifically found that Thompkins had expressly acknowledged his rights. J.A. 26a; Pet. App. 75a. This factual determination is entitled to deference under AEDPA under 28 U.S.C. § 2254(d)(2) or (e)(1).

The *Miranda* warnings ensured that any participation by Thompkins would be voluntary: "[f]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process."⁴⁵ That is the key point.

Once Thompkins knowingly understood his rights, the claim that the next two hours and fifteen minutes of interrogation overcame his will is untenable. Thompkins was not injured or intoxicated. J.A. 23a. The interview occurred during the afternoon. There were no threats or promises, and there was nothing improper about the religious content of the

⁴⁵ *Davis v. United States*, 512 U.S. 452, 460 (1994) (brackets in original and internal quotes omitted), citing *Burbine*, 475 U.S. at 427.

questions. See U.S. Br. 30-31. The interview was not lengthy as noted above. Thompkins had the tools to end the interrogation after he knowingly received his rights.

The suggestion that the implied waiver or confession was involuntary is meritless. The Michigan Court of Appeals was not objectively unreasonable in concluding that his waiver was voluntary.

II. The Michigan Court of Appeals was not objectively unreasonable in rejecting the contention that Thompkins invoked his right to remain silent.

The Michigan Court of Appeals concluded that Thompkins did not impliedly invoke his right to remain silent by his conduct during the interview, but rather determined that he voluntarily waived his right to remain silent. Pet. App. 75a.

In his brief, Thompkins contends that his conduct of largely remaining silent during the interview was an invocation of his right to remain silent. This contention is belied by the record. The State courts did not unreasonably apply clearly established Supreme Court precedent in concluding that Thompkins did not invoke his right to remain silent. This Court's decision in *Davis v. United States* further corroborates this conclusion.

A. Thompkins did not indicate that he wanted to "cut off questioning" – he never indicated that he wished to remain silent.

The inquiry into whether there is a waiver of one's right to remain silent is distinct from the inquiry whether there has been an invocation of that right.⁴⁶ This Court in *Miranda* stated that an accused invokes his right to remain silent where he indicates "in any manner, at any time prior to or during questioning, that he wishes to remain silent[.]"⁴⁷ This is the

⁴⁶ *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

⁴⁷ *Miranda*, 384 U.S. at 473-474.

accused's right to "cut off questioning."⁴⁸ As noted by the lower courts, however, this Court has not delineated the standard by which the courts are to determine whether ambiguous conduct is sufficient to constitute an invocation of an accused's right to remain silent.⁴⁹ Therefore, there is no clearly established law on this point. See U.S. Brief 14-15.

Thompkins contends that by his manner during the interview he "unequivocally" indicated that he wished to remain silent. Resp. Br. 16-18, 27-28. But this contention was contradicted by the State court findings and the factual record.

Although Thompkins remained largely verbally silent during the interview, J.A. 19a, he did participate in the interview before his confession:

Q. And, you said there were times that he responded, correct?

A. Yes.

Q. And, his response for what, to engage you in conversation, or simply say something to the effect that 'I'm not talking to you.'

A. Never 'I'm not talking to you.' Sometimes it would be eye-contact, sometimes it would be a nod of the head, sometimes, I know the

⁴⁸ *Miranda*, 384 U.S. at 474.

⁴⁹ See, e.g., *Bui v. DiPaulo*, 170 F.3d 232, 239-240 (1st Cir. 1999) (examining the application of *Davis* to an equivocal assertion of a right to remain silent in habeas).

words, 'I don't know.' was quite prevalent. [J.A. 21a.]

* * *

Q. You said you got both verbal and non-verbal [responses]?

A. Yes.

Q. What do you mean by non-verbal?

A. Sometimes it would be a word or two. A 'yeah', or a 'no', or 'I don't know.'

Sometimes a nod of the head. And sometimes because he looked – he simply sat down like I'm sitting (indicating) with my head in my hands looking down. Sometimes it was just something he would look up and make eye-contact would be the only response.

Q. Okay.

Did you take these non-verbal responses to be also to be engaging in a conversation?

A. *Well, as limited as it was, yeah, that's what he was doing.* [J.A. 23a-24a (emphasis added).]

From this record, the Michigan Court of Appeals determined that Thompkins continued to communicate with the officer "albeit sporadically" during the interview. Pet. App. 75a. Thompkins has failed to

demonstrate this was "an unreasonable determination of the facts in light of the evidence" under 28 U.S.C. § 2254(d)(2) or that it was rebutted by "clear and convincing evidence" under 28 U.S.C. § 2254(e)(1).

Significantly, Detective Helgert also testified that Thompkins never indicated that he wished to remain silent:

Q. Did he ever indicate to you, sir, that he wanted Counsel?

A. No.

Q. *Did he ever indicate to you that he was unwilling to talk to you?*

A. *No.*

Q. Did he ever indicate to you, sir, that he was invoking any of this [sic, these] Rights?

A. No. [J.A. 10a (emphasis added).]

The determination that Thompkins did not invoke his right to remain silent was not unreasonable in light of these facts. Thompkins did not testify and did not dispute Detective Helgert's testimony.

Like the Sixth Circuit, Thompkins predicates his argument on the claim that he remained *entirely* silent before he implicated himself. Resp. Br. 28 ("not talking for almost three hours").⁵⁰ The amicus brief contends

⁵⁰ The Sixth Circuit wrongly indicated that Thompkins "was silent for two hours and forty-five minutes." *Thompkins v. Berghuis*, 547 F.3d 572, 586 (6th Cir. 2008).

the same. NACDL Br. 5 ("nearly three hours straight spent questioning a silent Thompkins"). These arguments disregard the factual findings of the Michigan courts on Thompkins's conduct. The record is clear that Thompkins did not remain completely silent. He provided some limited responses as noted above. J.A. 21a, 23a-24a. The contention advanced by NACDL that the responses he gave were not in response to substantive questions is also not supported by the record. NACDL Br. 5. Detective Helgert did not state that Thompkins gave his short answers to questions that were unrelated to the murder investigation.

Thompkins also suggests that he did not have an opportunity to invoke his rights. Resp. Br. 33. *Miranda* requires that the accused have an opportunity to exercise his rights throughout the interrogation.⁵¹ But the record is clear that Thompkins had an opportunity to invoke his rights throughout the interview. The police did not restrict his ability to speak at all.

In brief, there was no clear indication that Thompkins wanted to "cut off questioning."⁵² In fact, Detective Helgert provided the only testimony at the hearing and characterized the interview as a "limited" conversation. J.A. 24a. There is a fundamental difference between (1) refusing to answer all questions and remaining absolutely silent and (2) participating in a limited way in a conversation with police. The fact that Thompkins participated in only a limited fashion does not mean that he refused to participate at all. It was a conversation, albeit a largely one-sided one, in

⁵¹ *Miranda*, 384 U.S. at 479.

⁵² *Miranda*, 384 U.S. at 474.

which Thompkins's participation was voluntary. J.A. 21a, 23a-24a. There is no clearly established Supreme Court precedent that this kind of conduct constitutes an implied invocation of an accused's right to remain silent. The Michigan courts were not objectively unreasonable.

B. The rule in *Davis v. United States* if applied to the right to remain silent would corroborate the conclusion that Thompkins did not invoke his rights.

Regarding an accused's right to counsel, this Court in *Davis v. United States* made clear that an accused must "unambiguously request counsel" before the police must cease asking questions during a custodial interrogation.⁵³ The inquiry is an objective one.⁵⁴ This Court has not addressed the point whether this rule would also apply to the invocation of an accused's right to remain silent.

Thompkins contends that the *Davis* rule is predicated on a "two-stage interrogation" analysis in which the waiver has already been obtained and the issue is whether the accused is asking to assert a right that has been waived. Resp. Br. 34-41. Although that was the factual posture of the case in *Davis*, the decisions in *Miranda* and *Butler* allow pre-waiver interrogation.

The holding of *Davis* applies the *Miranda* rules in the post-waiver circumstance, but there is nothing in the logic of the rule that would limit its application

⁵³ *Davis*, 512 U.S. at 459.

⁵⁴ *Davis*, 512 U.S. at 459.

to the circumstance where there has not already been an express waiver of that right. The knowing reception of the rights under *Miranda* "dispel[s] whatever coercion is inherent in the interrogation process."⁵⁵ The provision of the *Miranda* warnings to the accused equips him to make a determination whether to answer questions or stop the questioning regardless whether the accused then expressly waives these rights.

In requiring that the invocation of the right to counsel be unequivocal under *Miranda*, this Court explained in *Davis* that this rule is based on the countervailing need for effective law enforcement:

[I]t is police officers who must actually decide whether or not they can question a suspect. . . . [I]f we were to require questioning to cease if a suspect makes a statement that might be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.⁵⁶

This point applies with equal force for equivocal assertions of the right to remain silent regardless whether there has been an express waiver. The police will be forced to guess whether there has been an

⁵⁵ *Davis*, 512 U.S. at 460, citing *Burbine*, 475 U.S. at 427.

⁵⁶ *Davis*, 512 U.S. at 461.

invocation of the right to remain silent in the absence of a clear statement. See U.S. Br. 13-17.

Of course, here Thompkins did not even equivocally assert his right to remain silent. He never indicated that he wanted the questions to stop, and he participated in a limited way in the interview even if he did remain largely silent. J.A. 10a, 21a, 23a-24a.

The contention of Thompkins that a "reasonable police officer" would have known that Thompkins had unequivocally invoked his right to remain silent is contradicted by the record. Resp. Br. 28. Thompkins never indicated that he was unwilling to talk. J.A. 10a. Detective Helgert explained that Thompkins was communicating with him in a limited way. J.A. 23a-24a. Insofar as Thompkins provided some responses, but declined the opportunity to give his version of events, this is consistent with the rule of *Miranda* applied by the lower courts that the refusal to answer some questions but not others does not constitute an invocation.⁵⁷ That was the basis on which the Michigan Court of Appeals rejected Thompkins's invocation claim.⁵⁸ This conclusion was not an unreasonable application of clearly established Supreme Court precedent.

⁵⁷ See, e.g., *Bruni v. Lewis*, 847 F.2d 561, 564 (9th Cir. 1988) (the accused "effected a selective waiver by indicating an agreement to answer some questions but not others."). See also *Connecticut v. Barrett*, 479 U.S. at 528 (recognizing "limited invocation").

⁵⁸ "When a defendant speaks after receiving *Miranda* warnings, a momentary pause or even a failure to answer a question will not be construed as an affirmative invocation by the defendant of a right to remain silent." Pet. App. 75a, citing *McReavy*, 436 Mich. at 222; 462 N.W.2d at 12. (internal quotes omitted).

III. With respect to the *Strickland* claim, there was no prejudice here because the fact of Purifoy's acquittal did not benefit the prosecution, and the addition of a jury instruction regarding the use of Purifoy's acquittal would have had no impact on the weighty evidence of Thompkins's guilt.

Thompkins was not prejudiced by his counsel's failure to request a jury instruction limiting consideration of Eric Purifoy's acquittal to assess his credibility. The absence of the instruction did not allow the jury to find Thompkins guilty by process of elimination, as he argues in his brief, because a presumptively-reasonable jury that followed its other instructions could not have deduced Thompkins's guilt from the fact that Purifoy was acquitted of aiding him. Moreover, the inclusion of such an instruction would not have diminished the overwhelming evidence that led the jury to convict Thompkins.

A. There was no process of elimination that led the jury to find Thompkins guilty.

Thompkins asserts that the jury deduced his guilt from Purifoy's acquittal. In his words: "If one of the two people sitting in the front seat was acquitted of the crime, that would only leave the other person as the shooter." Resp. Br. 58. The equivocation between "crime" and "shooter" in this sentence reveals the flaw in his argument. Purifoy was not acquitted of being the "shooter." He was acquitted of the crime on the theory that he aided Thompkins. J.A. 99a, 139a-141a, 177a. The prosecution contended at both trials that Thompkins was the shooter and Purifoy aided him.

Had Purifoy been found guilty under that theory, Thompkins's jury would have known that another jury had been convinced beyond a reasonable doubt of the theory that was being offered to it. In that circumstance, the jury could have concluded that Purifoy's conviction supported Thompkins's conviction. But Purifoy was acquitted. The acquittal was not relevant to Thompkins's theory of innocence. If anything, the acquittal undercut the prosecution's theory, which is why in its closing argument the prosecution stated: "you are not bound by what [Purifoy's] jury found." J.A. 202a.⁵⁹

The possibility that the jury found Thompkins guilty by process of elimination despite the illogic of doing so is not the sort of prejudice that can support a claim under *Strickland*. *Strickland* requires a reviewing court to assume that the fact-finder will follow its instructions and act reasonably.⁶⁰ Thompkins's jury was instructed that it was the sole fact-finder and was instructed to acquit unless Thompkins's guilt was proved beyond a reasonable doubt. J.A. 207a-209a, 228a. The jury would have had to ignore these instructions to give weight to Purifoy's jury's decision. It would have had to act unreasonably to deduce Thompkins's guilt as a shooter from Purifoy's

⁵⁹ There is no *legal* distinction under Michigan law between principals and aiders and abettors. MICH. COMP. LAWS 767.39. But this does not affect the analysis. The elimination of the distinction simply allows the prosecution to charge a suspect under a single statute, and it subjects a person to the same penalty no matter his role in the crime. The *factual* distinction, and the logical consequences that follow from it, remain.

⁶⁰ *Strickland v. Washington*, 466 U.S. 668, 694-695 (1984).

acquittal as an aider. The one does not follow from the other.

B. The inclusion of a limiting jury instruction would not have altered the outcome of the trial.

Purifoy's acquittal did not lead to Thompkins's conviction – the evidence of his guilt did. A limiting instruction regarding the permissible use of Purifoy's acquittal would only have served to protect against a jury that disregarded its other instructions and disregarded the theories of the parties. In other words, it would not have affected the jury's proper deliberations. Under *Strickland*, the question is whether the addition of the limiting instruction would have created a reasonable probability that the jury would have acquitted.⁶¹ It would not have here.

The addition of the limiting instruction would not have diminished the powerful evidence proving Thompkins's guilt. It would have had no bearing on the jury's decision to believe Frederick France's identification of Thompkins as the shooter, which was strongly supported by the videotape evidence. It would have had no bearing on Thompkins's confession to Omar Stephens, the details of which were corroborated by other evidence. And it would have had no bearing on the evidence that Thompkins fled the State and changed his identity, whereas Purifoy turned himself in to the police. There is no reasonable probability that the addition of this limiting jury instruction would have changed the outcome of this one-sided trial.

⁶¹ *Strickland*, 466 U.S. at 695-696.

CONCLUSION

For these reasons, the State of Michigan asks this Court to reverse the decision of the Sixth Circuit.

Respectfully submitted,

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Dated: February 18, 2010