No. 08-1470

In The
Supreme Court of the United States

MARY BERGHUIS, Warden,

Petitioner,

v.

VAN CHESTER THOMPKINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Whether the Sixth Circuit expanded the *Miranda v Arizona* rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them and then he remained silent for almost three hours.

II. Whether the Sixth Circuit Court of Appeals failed to afford the State court the deference it was entitled to under 28 U.S.C. 2254(d), when it granted habeas relief with respect to an ineffective assistance of counsel claim where the substantial evidence of defendant's guilt allowed the State to reasonably reject the claim.

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STATEMENT OF FACTS

On January 10, 2000, at about 9:00 p.m. a shooting occurred in a strip mall parking lot on Greenfield Road in the city of Southfield, Michigan. Samuel Morris died from multiple gunshot wounds. His friend, Frederick France, although shot several times, survived. Three men were identified as being wanted for questioning. These three were Eric Purifoy, Myzell Woodward and the Respondent. Myzell Woodward contacted the police shortly after the incident, gave a statement, and was never charged. Eric Purifoy, after a phone call from the police, turned himself in. He was charged with the same crimes with which Respondent would be charged. He was tried in August of 2000, and was acquitted of murder and assault charges and convicted of carrying a concealed weapon. The jury hung on two other gun charges to which he pled guilty at a later date.

A year after the incident on February 19, 2001, Respondent was arrested on a tip near Columbus, Ohio. Two days later Detective Helgert of the Southfield Police Department and his partner interrogated the Respondent at the county jail in Columbus, Ohio. A statement was obtained and he was returned to Michigan to stand trial. J.A. 4a-28a.

At a hearing on the admissibility of the statement, Detective Helgert testified that both he and Detective Dowling engaged in the interrogation. J.A. 21a. Respondent was advised of his *Miranda*

rights but refused to sign the acknowledgment form. He rarely made eye contact with the officers. J.A. 11a. The interrogation lasted upwards of three hours in which the only verbal statement concerning Respondent's involvement occurred near the end of the interview. J.A. 8a, 10a.

At that point, almost three hours into the interrogation, with no statement obtained, Detective Helgert decided to take a spiritual tack by asking Respondent if he believed in God and if he prayed to God to forgive him for shooting that boy down. The Respondent, through tears, answered "Yes" to both questions. He refused to write this down. J.A. 11a. These two "Yes" answers were offered in evidence against him. The questions were asked after Respondent consistently exercised his right to remain silent for at least two hours and 45 minutes. J.A. 20a.

The officer characterized the interrogation as "very, very one-sided" J.A. 10a, "nearly a monologue" J.A. 17a, and described the Respondent as "largely silent" J.A. 19a and "uncommunicative" J.A. 10a and "not verbally communicative" J.A. 17a.

When questioned about the exercise of his rights, the following colloquy was had:

> Q. But consistently . . . every time you gave him an opportunity to participate meaningfully in the conversation he exercised his right to remain silent.

> A. Largely, he remained silent, that's correct.

J.A. 18a-19a.

The trial court denied the motion to suppress finding that the defendant never invoked his right to remain silent. It found that the defendant participated in the interview by making eye contact, nodding, and answering questions, "I don't know." J.A. 28a.

TRIAL

On May 13, 2002, trial began. The defense theory was that Eric Purifoy was the shooter and that Respondent was merely present.

In the prosecution's case-in-chief, Frederick France testified that he and Samuel Morris were driving a red car into the parking lot of a strip mall when several men exited Lou's Deli and walked in front of their car. One of the men stared into the red car. That man was identified as the Respondent. France observed some of the men get into a white van. The van pulled up parallel with the red car. The passenger in the van shot into the driver's plastic-covered window of the red car. Mr. France exited from the passenger's side and ran to a drug store. He was hit by several bullets. J.A. 74a-76a. Returning to the scene, he found his friend lying on the ground by the passenger door.

France testified that the day after the shooting, a detective showed him a still photo off of a videotape from Lou's Deli. France pointed to Respondent in the photo and said he was the shooter. He admitted that when subsequently shown a photo array that included a photo of the Respondent, he selected another person. J.A. 98a. France also identified Eric Purifoy from the still photo and described him as the driver. J.A. 79a.

The following colloquy was then had concerning Purifoy:

> Q. Do you know if he was charged?
>
> A. Yeah, he got charged, but he got found not guilty on having anything to do with this.
>
> Q. The murder?
>
> A. Yes.

J.A. 82a-83a.

On redirect, the following occurred:

> Q. When you testified at Eric Purifoy's trial who did you testify shot you?
>
> A. Van Thompkins.
>
> Q. When you testified at Eric Purifoy's trial who did you testify was the driver of the car that drove Van Thompkins to shoot you?
>
> A. Eric Purifoy.

J.A. 99a.

Upon his arrest, Respondent offered an alias. Officer James Parrish believed the person in custody was Van Chester Thompkins and so he called out "Van." The Respondent replied, "What?". After that the Respondent stopped talking. J.A. 130a.

Detective Helgert testified that Eric Purifoy had been charged as an aider and abettor with the same seven counts as Respondent. He was acquitted of the murder and assault with intent to commit murder charges and was found guilty of carrying a concealed weapon in the motor vehicle. The jury hung as to two other gun charges. Subsequently, he pled guilty to those two charges. J.A. 139a-141a.

In regard to the interrogation, Detective Helgert testified that it took place in an austere, 8 x 10 foot room at a detention facility. The Respondent sat in a school-room type chair. J.A. 144a-145a. The Detective used an Acknowledgment of Rights form to advise Thompkins of his *Miranda* rights. J.A. 147a. The form is reproduced in Petitioner's Brief p 60. The officer did not recall asking the Respondent if he understood his rights, but the Respondent never stated that he did not understand them. He did not agree to initial or sign the form. J.A. 147a-148a.

The Detective described Mr. Thompkins as "[p]eculiar. Sullen. Generally quiet." The Respondent would not look at him and Helgert had to tell him to look at him and to pay attention. J.A. 149a. He simply held his head down. J.A. 152a. When asked how Thompkins responded to the attempts to get him

to talk, the Detective stated that "not only did it not illicit (sic) any admissions or denials, for that matter, it didn't really illicit (sic) any sort of reaction." J.A. 152a. After some prodding as to what else the Respondent may have communicated, the Detective remembered that he declined the offer of a mint, and unbidden, stated that the chair was hard. J.A. 152a.

Helgert used several themes to persuade Respondent to talk with him such as there are two sides to a story, but he didn't "provide any reasonable, any significant response." J.A. 149a. He also told him, "People are going to want to hear from you" and also gave him disinformation. J.A. 150a. The Detective described his efforts during the interrogation as "repetitive." J.A. 153a.

At the end of the interview, Helgert then asked him if he believed in God and if he prayed to God to forgive him for shooting that boy down. Thompkins through tears answered "yes" to both questions. J.A. 153a.

The jury returned verdicts of guilty of premeditated first degree murder; possession of a firearm during the commission of a felony; assault with intent to murder; possession of a firearm during the commission of a felony; felon in possession of a firearm; possession of a firearm during the commission of a felony; and carrying a concealed weapon in a motor vehicle. The Respondent was sentenced to life in prison without parole on the

murder charge, among other sentences imposed for the other offenses.

STATE POST CONVICTION PROCEEDINGS

In a motion for new trial, Respondent challenged the admissibility of the statement and the constitutionality of the identification procedures. He also raised several issues in regard to prosecutorial misconduct and ineffective assistance of counsel. He asked for a hearing on the latter issue.

The trial court denied the request for a hearing and denied the motion for new trial. However, it found that trial counsel's performance was deficient in three ways. First, counsel failed to request a limiting instruction both immediately after the accomplice testimony and also an instruction to be given during the charge to the jury concerning the accomplice's acquittals on the murder and assault charges, his conviction by jury of a gun count, and his guilty pleas to gun charges upon which the jury had hung; failed to ask for an instruction on the use of evidence of prior convictions, failed to ask for a limiting instruction concerning defendant's conviction for a prior felony that was a predicate offense to the felon in possession charge. J.A. 236a.

Second, counsel was deficient when he entered into stipulations that were unfairly prejudicial. J.A. 236a. One stipulation concerned a discovery violation which blamed the violation on the defendant but had

no relevance to the issue of guilt or innocence. The second stipulation concerned the felon in possession charge. As worded it allowed the jurors to speculate that the defendant had more than one prior felony and thus implied that he was incorrigible.

Third, counsel failed to object to prosecutorial misconduct. This was held to be error. J.A. 236a. The prosecutor offered evidence of the co-defendant's jury verdict and guilty plea convictions; denigrated counsel by implying that he was a liar; elicited evidence that the Detective believed Defendant was at the scene and that Purifoy was charged as an aider and abettor; and elicited evidence that the Respondent may have committed other crimes during that time he was absent from the jurisdiction. The trial court found error on the issue of prosecutorial misconduct, but found that the errors did not affect the outcome of the trial. J.A. 235a-236a.

On the prejudice prong of the test for ineffective assistance of counsel, the trial court concluded that but for these errors the outcome of the trial would not have been different. J.A. 236a-237a.

On appeal to the Michigan Court of Appeals, Respondent asked the Court to remand the matter to the trial court for a *Strickland* hearing. That motion was denied. On February 3, 2004, the Court of Appeals in a per curiam opinion affirmed Respondent's convictions. J.A. 84a. In regard to the *Miranda* issue, the Court found that the trial court did not clearly err in concluding that the defendant

voluntarily waived his right to remain silent and that he did not subsequently invoke his right to silence. It relied on *People v McReavy*, 436 Mich. 197; 462 N.W.2d 1 (1990). Res. App. 53a-54a.

In regard to the failure of counsel to request a limiting instruction, the Court found no error because the prosecution did not argue that the guilty plea convictions should be used for an improper purpose. Res. App. 56a. The court cited to *People v Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997) for the test for ineffective assistance of counsel quoting from it that defendant must show that "the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." Res. App. 55a.

Respondent timely requested leave to appeal in the Michigan Supreme Court. On July 29, 2004, in case # 125667, the Court denied leave to appeal stating that it was not persuaded that the questions presented should be reviewed by the Court. Res. App. 52a.

PROCEEDINGS PURSUANT TO 28 U.S.C. 2254

On January 19, 2005, Respondent filed a petition for a writ of habeas corpus in the Eastern District of Michigan which included a request for a *Strickland* hearing. Thompkins raised four issues in the habeas application. Res. App. 20a-21a. The district court found that Thompkins had failed to "clearly and unequivocally" invoke his right to remain silent and

found that head-nodding constituted participation in the conversation. It also referred to "yeah," "no," and "I don't know" responses. Res. App. 47a-49a. The district court found that an effective attorney would have requested these instructions, but it concluded that the failure to request them did not render the trial fundamentally unfair. Res. App. 42a. The court only discussed the effect that evidence of Purifoy's convictions had on the case, but not the effect of Purifoy's acquittals.

A certificate of appealability was granted on three issues. These three issues were the challenge to statements under *Miranda v Arizona*, trial counsel's failure to request certain jury instructions, and prosecutorial misconduct stemming from the use of the accomplice's jury verdicts and guilty plea.

The Sixth Circuit denied relief based on the latter issue, but it reversed the judgment of the district court on the *Miranda* issue and on the ineffective assistance of counsel claim. Res. App. 16a. On the *Miranda* issue, the Circuit Court acknowledged that its ultimate review of the State court's decision was controlled by the standards set forth at 28 U.S.C. 2254(d) and that subsidiary findings of fact were entitled to a presumption of correctness under 28 U.S.C. 2254(e). Preliminarily, it reviewed the district court's determination regarding the constitutionality of a *Miranda* waiver de novo and the district court's underlying factual findings for clear error. On the waiver of rights, it reviewed de novo the district court's factual findings for clear error and

whether the words actually invoked the right. Res. App. 9a. The Sixth Circuit found that the State court's decision that Respondent had waived his *Miranda* rights was based on an unreasonable determination of the facts in light of the evidence and involved an unreasonable application of clearly established federal law. Because of this finding, it did not reach the invocation issue. Res. App. 12a-13a.

The Circuit Court also found that the State court applied the prejudice prong of the *Strickland* analysis in an objectively unreasonable manner. Res. App. 16a.

A request for en banc review was denied. Res. App. 18a.

On May 26, 2009, the State of Michigan filed a Petition for Writ of Certiorari. This Court granted the writ on September 30, 2009.

SUMMARY OF ARGUMENT

The Sixth Circuit Court of Appeals properly vacated the district court's denial of the writ on two grounds.

I. On the first ground, it found that the State court's decision that Respondent had waived his *Miranda* rights was based on an unreasonable determination of the facts in light of the evidence and involved an unreasonable application of clearly established federal law. After being advised of his

rights, Respondent refused to sign an acknowledgment of rights form. He was never asked if he wanted to waive his rights, nor was he ever offered a waiver of rights form to sign. Despite persistent questioning, he remained silent for almost three hours. At that point, the officers asked the Respondent if he believed in God and if he felt bad for killing that boy. Respondent through tears answered "Yes" to both questions. Under *Miranda,* once the defendant began to exercise his right to remain silent, all questioning should have ceased.

It was the State's heavy burden to show a valid waiver of the *Miranda* rights. In *North Carolina v Butler*, this Court recognized a narrow exception to *Miranda*'s preference for explicit waivers. Where a suspect refuses to sign a waiver of rights form but confesses shortly thereafter, with no prompting from the police, an implied waiver of the right to remain silent will be found. The facts and circumstances of this case, however, do not fit into that narrow exception.

The State's argument that a valid waiver may be predicated on giving two answers after three hours of questioning must be rejected. It ignores the finding by the *Miranda* court that without a valid waiver, there can be no questioning.

The Sixth Circuit, having found no valid waiver, did not reach the issue of whether a suspect must invoke the rights. In *Davis v United States,* this Court held that in order to restore a waived right to

counsel, the suspect must unambiguously assert the right. The State's argument that the *Davis* unambiguous assertion requirement also be applied to the initial stage of the interrogation process and to the right to remain silent would require this Court to overturn most of the decision in *Miranda v Arizona* and its progeny leaving only the formulaic recitation of the rights intact.

The rule was based on whether an officer who having obtained a valid waiver and being in mid-interrogation should be required to stop based on an ambiguous request for counsel. Such a rule maintains a fair balance between a suspect's Fifth Amendment rights and law enforcement's need to investigate crimes. These concerns are not present where no valid waiver has been obtained because the police, who are not permitted to question a suspect absent a valid waiver, are not in mid-interrogation.

The State's suggestion that officers be permitted unlimited pre-waiver interrogation would also be a radical revision of the dictates of *Miranda*. It ignores the fact that without giving the suspect the opportunity to waive his rights, the compulsion inherent in the custodial interrogation setting is not dispelled. It would also result in badgering or overreaching which whether explicit or subtle, deliberate or unintentional, might otherwise wear down the accused and persuade him to incriminate himself. *Smith v Illinois*, 469 U.S. 91, 493 (1984).

II. On the second ground, the Sixth Circuit vacated the district court's denial of the writ because that court erred in finding that Respondent was not prejudiced by the failure of counsel to request certain jury instructions. These instructions would have explained to the jury that evidence of the accomplice's acquittals and convictions could not be used as substantive evidence of Respondent's guilt.

The Circuit Court acted properly in not giving complete deference to a decision in which the test for prejudice was not based on clearly established law as determined by the Supreme Court. The State court had applied the *Fretwell* fundamental fairness test for prejudice rather than the *Strickland* "reasonable probability of a different result" test. The Sixth Circuit also acted properly in not deferring to the State court's prejudice determination where it was based on an objectively unreasonable application of the law to the facts. The State court had failed to re-evaluate the totality of the evidence after finding a deficient performance. It based its prejudice finding on whether the prosecutor argued the evidence for an improper purpose, not on whether the outcome of the proceedings would have been different absent the error.

ARGUMENT

I.

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES SUPPRESSION OF RESPONDENT'S TWO "YES" ANSWERS OBTAINED IN THE ABSENCE OF A VALID WAIVER WHERE RESPONDENT HAD REFUSED TO SIGN AN ACKNOWLEDGMENT OF RIGHTS FORM AND WHERE HE REMAINED SILENT DURING ALMOST THREE HOURS OF INCOMMUNICADO INTERROGATION.

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]"

Under 28 U.S.C. 2254d, an application for a writ of habeas corpus shall not be granted unless the decision of the State court is based on an unreasonable application of, or is contrary to, clearly established federal law as determined by the Supreme Court of the United States, or the decision is based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. "Clearly established federal law as determined by the Supreme Court" means just that – law determined by the Court. *Williams v Taylor*, 529 U.S. 362 (2000).

In the absence of clearly established law as determined by the Supreme Court, the Sixth Circuit

correctly found that the Michigan Courts had acted unreasonably in rejecting Respondent's Fifth Amendment claim on two grounds. First, the Michigan Courts made an unreasonable determination of the facts in light of the evidence and, second, it then unreasonably applied clearly established Supreme Court law to the facts.

A. Clearly established federal law requires the cessation of interrogation after a suspect has indicated in any manner that he wants to remain silent.

In order to dispel the coercion inherent in custodial interrogation, a suspect must be advised that he has the right to remain silent, to consult with an attorney, to have an attorney present during questioning, and to have an attorney appointed if the suspect is indigent. In the absence of the advice of rights or a valid waiver of those rights any statement taken is inadmissible. *Miranda v Arizona,* 384 U.S. 436, 470-473 (1966). But warnings alone do not dispel the coercive atmosphere. The decision itself to remain silent must be scrupulously honored. Assertion of the right can be done "in any manner." *Id.* at 479. A statement taken after the person exercises his privilege cannot be other than the product of compulsion. *Id.* at 473-474.

Consequently, the continuation of questioning after an accused has indicated in any manner that he wants to exercise his right to remain silent operates

on the individual to overcome his free choice in giving a statement. It circumvents the warnings themselves. Subsequent persistent questioning will be viewed as an effort to wear down the suspect's resistance to force him to change his mind. *Michigan v Moseley*, 423 U.S. 96, 104, 105-106 (1975).

The phrase "in any manner" encompasses silence as an assertion of the right because the word "any" is not an adjective of limit. It demands a broad interpretation, albeit, one read in context. *United States v Gonzales*, 520 U.S. 1, 5 1997) (relying upon *Webster's Third New International Dictionary* 97 (1976). When read with the admonition to police officers that they must scrupulously honor the exercise of the right, and in the absence of any limiting language in *Miranda*, the phrase "in any manner" calls for the broadest of interpretations, one that includes silence.

At least two Circuits, beside the Sixth, and one State court have found that remaining silent is a sufficient assertion of the right. The Ninth Circuit, in *United States v Wallace*, 848 F.2d 1464 (9th Cir. 1988), held that just 10 minutes of silence invoked the right. The Second Circuit, in *United States v Ramirez*, 79 F.3d 298, 304-305 (2nd Cir. 1996), found that "remaining totally silent would invoke the right" and that "a defendant need not rely on talismanic phrases or any special combination of words to invoke his Fifth Amendment right to remain silent." See also *United States v Montana*, 958 F.2d 516, 518 (2nd Cir.

1992) where the defendant nodded that he understood his *Miranda* rights then remained silent in response to all pedigree questions. This was a sufficient invocation of the right to remain silent. In *State v Hodges*, 77 P.3d 375, 376 (Wash. 2003), the Court held that remaining silent can be an invocation when the circumstances evince a clear and unequivocal invocation of the right.

B. Clearly established federal law places a heavy burden on the prosecution to prove that the defendant waived his right to remain silent. There is no burden on the defendant to show that he asserted his right.

The prosecution has the burden of establishing a voluntary, knowing, and intelligent waiver of the rights. *Tague v Louisiana*, 444 U.S. 469 (1980). This burden is a heavy one. *North Carolina v Butler*, 441 U.S. 369, 373 (1979). To be valid, it must be the product of a free and deliberate choice, not the product of deception. *Colorado v Spring*, 479 U.S. 564, 573 (1987).

Every reasonable presumption against waiver is indulged. *Miranda, supra* at 471. It "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." *Id.* at 475. In fact, silence plus a lengthy incommunicado interrogation before a statement is taken is strong evidence that the accused did not waive his rights. *Id*.

1. An explicit waiver of *Miranda* rights is the rule while an implied waiver is the exception.

Miranda requires an affirmative waiver of rights before questioning begins. 384 U.S. at 470. A narrow exception to this rule was carved out by the Court in *North Carolina v Butler*. The exception permits implied waivers where even though a defendant refuses to waive the rights in writing, he immediately engages in conversation with the interrogating officer. The *Butler* defendant acknowledged his rights and refused to sign the waiver form. The officers told him they would still like to speak with him. He then stated, "I will talk to you but I'm not signing any form." A statement was taken shortly thereafter.

Only a narrow exception comports with the presumption that a defendant did not waive his rights and comports with its corollary that a presumption of waiver will not be supported by a silent record. Nor would a valid waiver be found simply from the fact that a confession was eventually obtained. *Miranda*, 384 U.S. at 475. A narrow exception is consistent with the idea that the custodial setting works very quickly to undermine the individual's will to resist and would compel him to speak when he would not otherwise do so. *Id.* at 467. An explicit waiver rule is a bright-line rule that is easy to apply. The *Butler* exception is also easy to apply as long as the immediacy requirement remains.

Without the immediacy requirement, courts cannot be assured that the confession is the product of the accused's unfettered will.

The facts in *Butler* contrast dramatically with those in the case at bar in three significant ways. First, the officers were not concerned with obtaining any waiver, express or implied. This is evident from reviewing the one form they brought with them to the detention facility. It was only an acknowledgment of the receipt of rights. Brief for Petitioner p 60. Despite the fact that there was plenty of blank space on the acknowledgment form, it did not also include a signature line below a phrase such as "I now give up my right to remain silent and will answer questions." The *Butler* officers were trying to comply with the dictates of *Miranda* by obtaining a valid waiver. No evidence points to this being a goal of the *Thompkins* officers. Mr. Butler's objection was only to signing a document, not to speaking with the officers. By contrast, Mr. Thompkins not only wouldn't sign anything, he was, in Detective Helgert's own words, uncommunicative.

Second, rather than ask a clarifying question after the defendant refused to sign the acknowledgment of rights form, the police made statements which undermined the right to remain silent. Detective Helgert recounted his discussion with Thompkins " . . . we had to advise him of his rights before we talked to him. And the purpose of us wanting to talk to him was to acquire his version of events, because the theme would have been, of

course, there is (sic) always sides to any of them." J.A. 13a-14a. The detective explained that " . . . we tried to persuade him to sign his Rights Form and make the initials and so on, and he wouldn't and then we did enter into an interview mode." J.A. 15a. He further told Thompkins, "This is your opportunity to talk. What do you think is going to happen? Who is going to speak up for you if you don't speak up for yourself?" J.A. 21a. At trial, the detective testified that he told him "You need to help yourself, you need to put forth an explanation. People are going to want to hear from you." J.A. 150a. These comments were not clarifying questions, but attempts to persuade the Respondent to forego his privilege against self-incrimination and right to counsel.

Third, the Respondent did not immediately give a statement as Mr. Butler did. In fact, it took the officers almost three hours to pry one out of him. And then it was only in response to a question designed to wear down whatever resistance remained. Mr. Butler was not badgered. Mr. Thompkins was.

All other cases cited by Petitioner fall into this narrow exception where a refusal to sign a waiver of rights form followed shortly thereafter by a confession is found to be an implied waiver. See *e.g. United States v Velasquez*, 626 F.2d 314, 320 (3rd Cir. 1980) (the accused immediately responded to questions with a view to minimizing her role in the offense); *United States v Washington*, 462 F.3d 1124, 1134 (6th Cir. 2006) (defendant signed a form agreeing to listen without counsel to the officers as they discussed

cooperation and upon being shown a photo of the robbery stated "anybody can see that's me in the picture."); *United States v Nichols*, 512 F.3d 789, 798 (6th Cir. 2008) (defendant's refusal to identify himself did not function as an invocation of the right to remain silent where a few minutes later during the booking procedure he confessed); *United States v Binion*, 570 F.3d 1034, 1041 (8th Cir. 2009) (the defendant verbally acknowledged his rights, refused to sign the waiver form and when asked if he had anything further to say responded "I'm booked, I'll be back in 10-15 [years]. Did you see what they took off of me?"). In this last case, the Eighth Circuit did not use an implied waiver analysis holding instead that the question was not designed to elicit an incriminating response. It cited to *Rhode Island v Innis*, 446 U.S. 291 (1980).

All of these cases fit within that narrow *Butler* exception. The suspects refused to sign the waiver of rights form and then they readily entered into a discussion with the police. The immediate and voluntary nature of the subsequent discussion became the basis for finding a valid waiver.

Both Petitioner and the United States as amicus curiae cite to *United States v Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005), suggesting a similarity to the facts at bar because that defendant remained silent for an hour and a half before making admissions. But a closer examination of the facts reveal just how different the two cases are. After being advised of his rights, the defendant in *Cardwell* was placed in the

front seat of the scout car, hands cuffed in front, for an hours-long drive to the jail. About an hour and a half into the drive, the defendant began discussing farming and continued to talk for 20-30 minutes. The agent then asked why the defendant had not immediately come to the door when the police announced their presence. The defendant answered, "If I knew (sic) it was the police, I would have gotten a gun," and "there would have been a gunfight." The Fourth Circuit found the defendant's willingness to engage in conversation an indication of voluntariness. It was also not ready to find that sitting in the front of a patrol car with one's hands cuffed in front was the equivalent of oppressive custodial conditions. *Id.* at 390 fn 4.

The *Cardwell* defendant was neither isolated, one of the hallmarks of custodial interrogation, nor was he subjected to persistent questioning. He voluntarily, without prompting, began a conversation with the officer. The condition of driving along a road even for a lengthy period of time where the suspect is not subjected to persistent questioning is completely dissimilar to the facts at bar.

The United States argues that *Cardwell* stands for the proposition that even if not immediate, a suspect's incriminating answers manifest a waiver. But *Miranda* rejected such a formulation. 384 U.S. at 475. Incriminating answers eventually obtained do not manifest a valid waiver. They manifest the

maxim that "persistent questioning wears down a suspect's resistance forcing him to change his mind." *Moseley, supra* at 105-106.

The Michigan Court's decision in relying upon *People v McReavy*, 436 Mich. 197; 462 N.W.2d 1 (1990), was objectively unreasonable in light of the clearly established Supreme Court law. It expanded the implied waiver doctrine found in *North Carolina v Butler* to the second stage of an interrogation. In *McReavy*, the defendant was twice advised of his *Miranda* rights and agreed to speak with officers. After the waiver, he then remained silent in answer to some questions but readily answered others. The *McReavy* Court analyzed the issue as a restoration of rights that had already been waived. This will be discussed in part B.

2. The State court made an unreasonable determination that there was an implied waiver in the absence of facts to support the finding.

The Sixth Circuit also vacated the district court's decision finding a valid waiver because the State court's decision was an unreasonable determination of the facts in light of the evidence under 28 U.S.C. 2254(d)(2).

The transcript of the evidentiary hearing and testimony at trial in this case belie the contention that Thompkins impliedly waived his rights and voluntarily participated in the interrogation. The

defendant was brought to an austere 8' x 10' room at a detention facility. J.A. 144a-145a. Present in this room were two detectives, both of whom took part in questioning. The defendant was made to sit in a school chair. J.A. 21a.

After he was advised of his rights, Respondent refused to sign the acknowledgment form. The Detective offered the Respondent a mint which was refused. Respondent commented that the chair was hard. J.A. 152a. He rarely made eye contact with the officers. J.A. 11a. The interrogation lasted upwards of three hours in which the only verbal statement concerning Respondent's involvement would have been near the end of the interview. J.A. 8a, 10a.

At that point, almost three hours into the interrogation, Detective Helgert decided to take a spiritual tack by asking him if he believed in God and asking him if he prayed to God to forgive him for shooting that boy down. The Respondent, through tears, answered "Yes" to both questions. He refused to write this down. J.A. 11a. These two "Yes" answers were offered in evidence against him. The questions were asked after Respondent consistently exercised his right to remain silent for at least two hours and 45 minutes. J.A. 20a.

The officer while referring to Mr. Thompkins' sporadic answers was unable to identify anything else he said before those two inculpatory answers. J.A. 10a. Surely, if Respondent had offered any inculpatory or even exculpatory comments, the officer

would have testified to them. Instead when given the chance to expand his testimony, the officer merely characterized the conversation as "very, very one-sided," J.A. 10a and "nearly a monologue." He described the Respondent as "not verbally communicative" J.A. 17a, "largely silent" J.A. 19a, and "uncommunicative." J.A. 10a. At trial, after much prodding as to what else the Respondent may have said, the Detective remembered that he declined the offer of a mint, and unbidden, stated that the chair was hard. J.A. 152a.

These facts are a far cry from those found in the cases offered by Petitioner. The only similarity is a refusal to sign a form and here it wasn't even the advice of rights form, only the acknowledgment of rights form. Thompkins did not engage the officers in conversation about anything. He barely looked at them and barely spoke. He at no time felt empowered enough in that austere room on that hard chair to tell these officers to return him to his cell. He consistently exercised his right to remain silent. Because the officers were met with silence, they had to keep changing themes and trying different tacks to get the Respondent to talk. J.A. 10a-11a and 151a.

Detective Helgert and, consequently, the State courts could not point to anything the Respondent said of an inculpatory or even an exculpatory nature. While the Michigan Court of Appeals said that the Respondent said "I don't know," there is nothing to show to what that answer was in response. Nor was there any testimony as to what he may have nodded

his head. The testimony that Respondent was largely, consistently silent and uncommunicative and refused to look at the officers was ignored. The heavy burden was on the prosecution to prove a valid, voluntary waiver. The defendant had no burden to sustain.

An implied waiver cannot be found on these facts. Nor should it be predicated on the refusal of the mint or the assessment of the comfort level of the chair. The State court's determination of the facts was objectively unreasonable. The Sixth Circuit could not defer to the objectively unreasonable finding that there was an implied, voluntary waiver.

This Court should also reject the State's claims that the record is deficient in showing that Respondent unequivocally asserted his right. This ignores the presumptive nature of the right by shifting the burden to the defendant. Moreover, if the record is deficient, it is so because of two tactical choices made by the officers. First, they deliberately refrained from obtaining an express waiver either orally or in writing. The acknowledgment of rights form does not replace a waiver of rights form. From the failure of the officers to offer the defendant a waiver of rights form to sign, one can infer that they knew they were not going to get a waiver. In fact the officer never testified that he even asked the Respondent if he would be willing to waive his rights. He finessed the answer by talking about the Respondent's failure to sign the acknowledgment form and how they then began the interrogation, J.A. 9a and 13a-14a.

Second, the officers failed to record the session or make a verbatim record of it despite the fact that tape recording devices were available. J.A. 160a. The officers should not now be rewarded when their actions obfuscated the record preventing a meaningful assessment of the alleged waiver.

In this case, not talking for almost three hours along with a refusal to sign an acknowledgment of rights form constituted an invocation of the right to remain silent. Once Thompkins invoked his right to remain silent by refusing to talk and by refusing to sign the acknowledgment of rights form, the police were under an obligation to "scrupulously honor" his decision by immediately ceasing to question him.

Nor was Respondent's conduct ambiguous. A reasonable police officer[1] would have known that the Respondent was invoking his rights. Detective Helgert knew it, which was why he kept trying different themes to get the Respondent to talk. If there was any ambiguity, it was created by the officers themselves. They made a conscious choice not to seek an express waiver by only offering the Respondent the opportunity to sign a form which was only an acknowledgment of the receipt of rights. They made a conscious choice not to ask clarifying questions, but rather to ask substantive questions

[1] Standard from *Texas v Cobb*, 532 U.S. 162, 176 (2001) (Kennedy, J., concurring).

about the offense. They made a conscious choice not even to ask him if he was going to waive his rights.

Under 28 U.S.C. 2254(d)(2), the Circuit Court acted properly in the ruling that the State court's decision was an unreasonable determination of the facts in light of the evidence presented in the State court.

3. In the absence of a valid waiver, either express or implied, the officers entered into a course of conduct designed to overcome Respondent's decision to exercise his right to remain silent.

The *Miranda* Court stated that an interrogation environment is created for no other purpose than to subjugate the individual to the will of the interrogator. While the atmosphere may not be one of physical intimidation it is still equally destructive of human dignity. 384 U.S. at 457. Thus any statement taken in the absence of a valid waiver is deemed to be compelled. Beside this presumption of compulsion, several other factors combined to sap Respondent's powers of resistance and self-control. *Culombe v Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J).

First, almost three hours seated on an uncomfortable chair in a small room dominated by two other men in authority created and maintained a coercive atmosphere. The United States as amicus curiae suggests that the duration was not coercive

and points to three cases where the time periods were either the same or exceeded the three hours that Thompkins endured. However in those cases, the defendants were not in custody.[2] The other cases the United States cites to in which the Court disapproved of lengthy interrogations are all pre-*Miranda* indicating that one of the positive effects of the *Miranda* decision was to decrease lengthy incommunicado interrogations.[3]

Second, an 8' x 10' room containing desks and chairs and three grown adults is confining, not relaxing. Respondent was also forced to sit in a chair so uncomfortable that in three hours of silence the only voluntary comment he made concerned the chair. These conditions were oppressive.

Third, the psychological aspects of the interrogation were also designed to chip away at the Respondent's resolve.[4] The officers used a classic

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[2] *Diaz v Senkowski*, 76 F.3d 61, 62-63 (2nd Cir. 1996) (Diaz was not yet formally in custody and he agreed to answer questions); *Jenner v Smith*, 982 F.2d 329 (8th Cir. 1993) (Court found that the questioning was far from custodial); *United States v Guarno*, 819 F.2d 28, 32 (2nd Cir. l987) (Defendant was not under arrest and was discussing a cooperation agreement).

[3] *Greenwald v Wisconsin*, 390 U.S. 519, 524 fn* (1968) (Trial started before the date of the *Miranda* decision); *Davis v North Carolina*, 384 U.S. 737, 739 (1966) (in reversing the conviction, court mentioned that had the confession been taken after the *Miranda* decision, it would have summarily reversed).

[4] See *Miranda*, 384 U.S. 448-456, for a discussion of the psychological aspects of police interrogation.

softening technique. The offer of the mint and the implication that perhaps the crime was not his fault but the fault of others. J.A. 16a. The attitude they displayed towards Respondent through their comments and questions is one of the techniques taught to law enforcement officers and is designed to erode a suspect's will.[5] That the questioning was persistent was also calculated to erode his resistance. That it was conducted by two officers placed Respondent at a distinct disadvantage both psychologically and physically. When the police failed to scrupulously honor his decision to exercise his right to remain silent, Respondent found himself in a situation where there was no end in sight. That he complained about the chair but got no relief showed Thompkins that he had no power to affect his situation. That he was not participating in the conversation but that the officers would not leave exacerbated these feelings of powerlessness.

Despite the above combination of factors, Respondent refused to give up his right to remain silent. In the face of this silence, the Detective was forced to switch tacks. He appealed to Respondent's religious sensibilities. This move was calculated to wear down whatever resistance remained. No case holds that it is improper to make religious appeals. Nor has any case held that it should never be a consideration. The

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[5] Wesselberg, C., *Mourning Miranda*, California Law Review Vol. 96:1519 pp 1558-1564 (2008).

test is whether the waiver of the rights was the product of an unfettered will.

The United States writing as amicus curiae discusses several cases in which religion was a factor, but in none of them did the confession come, as it did here, hard on the heels of a religious discussion during an uncounseled, custodial interrogation where the suspect had not been engaging the police in conversation and had not agreed to talk with them. *e.g. Barrera v Young*, 794 F.2d 1264, 1267 (7th Cir. 1986) (On his third meeting with the police, on counsel's advice and with counsel on the other side of the door and easily accessible, this not-in-custody defendant confessed to a polygrapher who at some point in the discussion had mentioned his savior); *United States v Miller*, 984 F.2d 1028 (9th Cir. 1993) (No nexus found where two days after a religious discussion with a non-interrogating agent, the not-in-custody defendant confessed); *Muniz v Johnson*, 132 F.3d 214 (5th Cir. 1998) (Defendant was in custody and at one point the officer offered to get the defendant a priest, but it was only after being a shown a photograph of the body of the victim that Muniz confessed); *Brewer v Williams*, 430 U.S. 387, 397-398 (1997) (In this "the Christian burial speech" case, the court never reached the issue, instead reversing on effective assistance of counsel grounds). Religious appeals should be one of the factors considered because the test for voluntariness is a broad one, whether the waiver and the admissions were the product of a free choice. Here, the effect of

the appeal was to put the Respondent in such an emotional State that his capacity for rational judgment was impaired. *Miranda,* 384 U.S. at 465.

Following *Miranda* procedures was supposed to dispel the coercion inherent in custodial interrogation, but everything the officers did in this case maintained and increased the coercive atmosphere. Coercion occurred where the police forced Respondent to sit in an uncomfortable chair, failed to honor the exercise of his right to remain silent, badgered him for almost three hours, and then appealed to his religious feelings whereupon his will was overborne. There was no express waiver of the right to remain silent. There was no implied waiver. In a system where the voluntariness of a confession depends not only on whether it is the result of a free choice but also on whether the interrogator's techniques "are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means,"[6] the two "Yes," answers should have been excluded from evidence.

The State did not meet its heavy burden in proving a valid, voluntary waiver of the right to remain silent. Thompkins' refusal to sign an acknowledgment form followed by a lengthy incommunicado interrogation was strong evidence that any alleged waiver was not voluntary, *Miranda,* 384 U.S. at 475. The State's own witness described the

[6] *Miller v Fenton*, 474 U.S. 104, 115-116 (1985).

defendant as consistently exercising his right to remain silent, as being uncommunicative and largely silent. The officers made statements designed to undermine the Respondent's decision to remain silent. It was only after being continually badgered by two officers for almost three hours that Respondent's will was overborne. The two "Yes" answers even without the coercive nature of the subsequent interrogation, are presumed to be compelled. The State's evidence that the Respondent answered "I don't know" and nodded a few times without being able to point to what these actions were in response, neither rebuts the presumption that the right is being exercised, nor meets the heavy burden of proof that there was an implied valid waiver.

Respondent's two answers were not the product of his unfettered will. The Circuit Court's decision that the State court's decision was an unreasonable application of clearly established supreme court law and also that the State court's decision was based on an unreasonable determination of the facts in light of the evidence must be affirmed.

C. There is no clearly established Supreme Court law applying the assertion requirement of *Davis v United States* either to the initial stage of the interrogation or to the right to remain silent.

It is evident from the facts of this case that the two "Yes" answers were not the product of an

unfettered will. Because the State can show neither an express waiver, nor an implied waiver, nor any facts to support the notion that, after three hours of badgering, somehow the answers were voluntary, it now argues that the Respondent had a duty to assert his right to remain silent under *Davis v United States*, 512 U.S. 452 (1994). Since *Davis* concerns the restoration of rights waived, the State cannot prevail on that theory either.

In *Davis*, the Court held that where there has been a valid waiver of the rights and where, during subsequent interrogation, the suspect ambiguously asserts the right to counsel, the police may continue questioning without asking any clarifying questions. An unambiguous assertion, however, will be deemed an invocation of the right after which all questioning must cease. The Court addressed itself narrowly to the facts before it, "We therefore hold that, *after a knowing and voluntary waiver of the* Miranda *rights*, law enforcement officers may *continue* questioning until and unless the suspect clearly requests an attorney." *Id.* at 461 (emphasis added).

Davis, then, is a case concerned with the restoration of the right to counsel. It envisions a two-stage interrogation. In the first stage, Davis waived his rights, both orally and in writing, and answered questions. The second stage occurred when the defendant mentioned with some uncertainty that perhaps he should consult with counsel. The opinion itself was narrowly drawn applying only to the right to counsel and only to post-waiver situations. Thus,

as clearly established Supreme Court law, the *Davis* case applies only to the right to counsel and only to situations where the suspect initially waives his rights and then appears to renege.

Petitioner, while arguing that the Sixth Circuit expanded the *Miranda* decision, is actually seeking a two-fold expansion of *Davis*. It seeks to have it apply not only to the right to remain silent, but also to the initial stage of the interrogation. Since no clearly established federal law as determined by the Supreme Court has done so and since it would be unreasonable to apply such a rule in the context of the right to remain silent, the Sixth Circuit did not err. The Sixth Circuit did not even reach the *Davis* issue "[b]ecause the resolution of this issue is not critical to the outcome of this case – that is, we conclude that the prosecution failed to meet its 'heavy burden' in first showing that Thompkins waived his *Miranda* rights – we need not address Thompkins' arguments that the *Davis* standard does not apply to invoking the right to remain silent." *Berghuis v Thompkins*, Res. App. 9a n.4.

1. The *Davis* rule should not be applied to the initial stage of the interrogation, nor should it be applied to the right to remain silent.

Requiring a suspect to assert his Fifth Amendment right removes the presumption granted him under the Constitution.

Although several circuits have applied the *Davis* requirement to the right to remain silent, they did so with little or no explanation.[7] Only, the Second and the Ninth Circuits looked to the reasoning behind *Davis* and, in so doing, found it not applicable to the initial stage of the interrogation. The Ninth Circuit concluded that such an application would be incompatible with the historic presumption against finding a waiver of constitutional rights, a presumption imported into *Miranda* with the concomitant heavy burden to prove a waiver before questioning may begin. *Davis*' concern was for the practical problems interrogating officers encounter if the Court was to decide that ambiguous statements concerning lawyers would trigger the *Edwards*[8] duties. Should the interrogation of a suspect which is producing valuable evidence be stopped merely based on an ambiguous statement about a lawyer? But at the initial stage, there is no interrogation because no

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[7] *United States v Nelson*, 450 F.3d 1201, 1211-12 (10th Cir. 2006) (referred to the weight of authority and agreed with its reasoning; *Coleman v Singletary*, 30 F.3d 1420, 1424 n.5 (11th Cir. 1994) (the justifications apply with equal force . . . and because we have previously held that the same rule should apply in both contexts . . .); *United States v Banks*, 78 F.3d 1190 (7th Cir. 1996) (If *Davis* does not require the cessation of all questioning where the right to counsel invocation is ambiguous, then *Davis* does not permit such a rule in relation to the right to remain silent).

[8] *Edwards v Arizona*, 451 U.S. 477 (1981) (Questioning must cease if the defendant requests counsel and may not be resumed without counsel unless the defendant initiates contact).

rights have been waived and an ambiguous statement thwarts nothing. Thus, *Davis* is understandable only in the context of an ongoing interrogation which would be interrupted by the need to clarify ambiguous remarks. *United States v Rodriquez*, 518 F.3d 1072, 1079-1080 (9th Cir. 2008). An officer should not have to interrupt the flow of questions to determine whether a statement as to counsel is an ambiguous assertion of the right or an unambiguous assertion. With the right to remain silent, no flow of questions has begun because no valid waiver, either express or implied, has been obtained. The Ninth Circuit put off for another day the question of whether the *Davis* requirement should apply to the right to remain silent at the second stage of an interrogation.

The Second Circuit, in refusing to expand *Davis*, pointed out that an initial waiver was critical to the *Davis* Court's thinking because an understanding of the rights and a valid waiver dispel the coercion inherent in the interrogation process. In their absence, the police have no right to question a suspect. Thus the Second Circuit found that the refusal to sign a waiver of rights form even along with a statement "I am not sure if I should be talking to you" and "I don't know if I need a lawyer" constituted an invocation of the Fifth Amendment rights. *United States v Plugh*, 576 F.3d 135, 142-143 (2nd Cir. 2009). The assertion requirement, it noted, was fashioned to avoid transforming the *Miranda* rights into "wholly irrational obstacles to legitimate

police investigative activity." Quoting *Davis, supra* at 460. It was premised on the notion that "a suspect not use the Fifth Amendment as a sword to excise unfavorable evidence after discarding it as a shield." *Plugh, supra* at 143. If a valid waiver has not been obtained, the shield is still raised.

Most State courts to consider the issue limit the rule in *Davis* to the post-waiver scenario. See *Plugh*, *supra* at 1079 fn 6 for a collection of cases. One other federal court found *Davis* to be a post-waiver case. *United States v Eastman*, 256 F.Supp.2d 1012, 1019 (D.S.D. 2003).

Rejecting the bright-line rule of *Miranda* will invite the ingenious officer to invent new stratagems to produce colorable waivers. And despite the assurances of *Miranda* that a defendant does not have to speak like an Oxford don in order to assert the right,[9] the police and courts have been quick to interpret obvious comments on silence as ambiguous.[10] On the other hand, officers who want to comply with the Constitution will find it more difficult to do so. It will also increase the burdens on courts when asked to apply *Miranda*.

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[9] *Davis*, *supra* at 459.

[10] See *Anderson v Terhune*, 516 F.3d 781 (9th Cir. 2008) (Not until en banc review did a court finally find that "I'll plead the Fifth" was an unambiguous assertion of the right).

Expanding *Davis* to the initial stage and to the right to remain silent will also be unfairly disadvantageous to the poorest, least powerful, and least sophisticated; those, in short, who need the constitutional protections most. For instance, many suspects under custodial interrogation may use indirect or tentative speech patterns or use verbs like "maybe, might, or could." Women and members of certain cultures tend to use hedges in normal speech because they are not used to making demands.[11] Custodial interrogation exacerbates these tendencies. This is also true of people at the lowest rung of society such as Respondent who could not even ask for another chair. What may appear to be an ambiguity to a person in power may not be an ambiguity to the person who is acting as assertively as he or she knows how.

Since the right to remain silent is a right retained until waived and does not need a formal invocation, no right needs to be restored. To require an unambiguous assertion of the right in both the initial stage and any subsequent stage would also unfairly shift the burden of proof. A defendant would have to show an explicit assertion of the right while the prosecution could prove admissibility by only

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[11] Strauss, Marcy, *The Sounds of Silence: Reconsidering the Invocation of the Right to Remain Silent Under Miranda* (2008) pp 17-19. The author is a professor of law at Loyola Law School. The paper can be accessed online at Social Science Research Network.

showing an implied waiver. The right to remain silent is also self-activating in that a suspect does not need the aid of a law enforcement official to exercise it, unlike the right to counsel.

The bright-line rule of *Miranda* was a stroke of jurisprudential genius, an elegant solution to the huge volume of cases clogging the courts with involuntariness issues under the totality of the circumstances test. To apply an assertion requirement to the right to remain silent and to permit unlimited questioning by officers will only increase, not decrease litigation. By declining to extend *Davis* this Court will preserve the balance between law enforcement interests in obtaining evidence and a suspect's Fifth Amendment rights. *Moran v Burbine*, 475 U.S. 412, 426 (1986).

Mr. Thompkins did not waive his right to remain silent. He unequivocally asserted it by exercising it. At that point, the police had to stop their interrogation. But even if this Court found that silence was an ambiguous assertion of this retained right, a reasonable officer would have asked a clarifying question. The officers here did not ask any clarifying questions.

2. A rule permitting pre-waiver interrogation would overrule all of *Miranda v Arizona* except for that part of it which requires the police to read a suspect his or her rights.

Petitioner contends that no case forbids the police from continuing to question between the warnings and the waiver. The United States as amicus curiae refers to this as pre-waiver interrogation. This contention is a misreading of *Miranda* and its progeny. The presumption is that the suspect has the right to remain silent, so any questioning done in the absence of a waiver is done in violation of *Miranda*. It ignores the fact that without giving the suspect the opportunity to waive his rights, the compulsion inherent in the custodial interrogation setting is not dispelled. *Miranda* envisioned that a suspect would have an opportunity for the right to be exercised. 384 U.S. at 467. A pre-waiver interrogation rule omits the opportunity. It would also result in badgering or overreaching which whether explicit or subtle, deliberate or unintentional, might otherwise wear down the accused and persuade him to incriminate himself. *Smith v Illinois*, 469 U.S. 91, 95 n.2 (1984).

Adoption of such a rule will result in exactly what occurred in this case where no attempt was made to obtain a waiver and where the questioning was lengthy and persistent. The interrogation will include all the psychological ploys *Miranda* decried which break down the will of the individual so that

his choice to speak or remain silent will not be unfettered, only forced. Such a rule tips the delicate balance *Miranda* sought to maintain between the suspect's Fifth Amendment right and the police need to investigate in favor of the latter. As the *Miranda* Court noted, the procedures it was adopting do not forbid the police from utilizing other avenues of investigation. 384 U.S. at 477. It only forbids them from trampling on one of our Nation's most cherished principles – that an individual may not be compelled to incriminate himself.

A pre-waiver interrogation rule is inconsistent with the rationale behind *Davis* and inconsistent with the efforts of *Miranda* to dispel the coercive effects of custodial interrogation. Adopting Petitioner's position would eviscerate *Miranda* because it is not just the advice of rights which dispels the coercive atmosphere. It is also the respect accorded to the individual's decision to exercise those rights which makes custodial interrogation consonant with an accusatorial system of justice rather than an inquisitorial one. The police only have the right to question a suspect after obtaining a valid waiver. No waiver, no questions. If the suspect chooses to exercise the right simply by remaining silent, the police must honor that decision.

Such a rule is reminiscent of the Missouri two-step held to violate *Miranda* in *Missouri v Seibert*, 542 U.S. 600, 621 (2004). In that case, warnings were given mid-interrogation. The Court found that, in reality, this resulted in a suspect having no real

choice about whether to exercise his rights because the barn door was already opened. Justice Kennedy in a concurring opinion found such a technique to be a distortion of *Miranda* with no legitimate countervailing interest being served. *Id*. at 621 (Kennedy, J., concurring).

Permitting the interrogation to proceed, post-advice of rights but without first requiring a waiver, is another attempt at a radical revision of Fifth Amendment law. Waivers obtained as a result of this procedure will not be the product of an unfettered will. They will be the result of an officer ignoring all attempts by a suspect to exercise the right to remain silent until the suspect after enduring hours of questioning gives in, signs a waiver form, and then signs a confession.

An expansion of *Davis* and the adoption of a pre-waiver interrogation rule would leave *Miranda* toothless. It would become just general principles having "little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality." *Miranda*, 384 U.S. at 443-444, quoting from *United States v Weems*, 217 U.S. 349, 373 (1910).

D. The Circuit Court did not expand the law found in *Miranda v Arizona* because that opinion allows a suspect to exercise his right to remain silent in any manner and also requires the police to scrupulously honor the exercise of that right.

Petitioner cites to *Carey v Musladin*[12] and *Wright v Van Patten*[13] to argue that the Sixth Circuit went beyond the right created by this Court's clearly established law. In both of those cases involving State court convictions, principles expressed by this Court were modified by the Courts of Appeals to apply to the case before them. In *Carey*, the Ninth Circuit, relying on *Estelle v Williams*, 426 U.S. 501 (1976), a case in which a defendant forced to wear prison garb by the State during trial was denied a fair trial, held that where family members wore buttons with photos of the deceased at defendant's murder trial, he was denied due process. The Supreme Court held that the *Estelle* case applied only to government-sponsored conduct, not to private conduct. In *Wright*, this Court reversed a Seventh Circuit decision extending the holding in *United States v Cronic*, 466 U.S. 648 (1984) that the prejudice prong of *Strickland* is not applicable to the complete absence of counsel, to instances where counsel is present via speaker phone but is absent physically. This Court noted that no

[12] 549 U.S. 70 (2006).

[13] 128 S. Ct. 743 (2008).

precedent addressed the presence of counsel over a speaker phone.

The Sixth Circuit made no modification of existing law to reach the decision it did in this case. First, the *Miranda* Court's holding that the right to remain silent could be asserted in any manner is broad to begin with. The *Moseley* Court's prohibition on persistent questioning encompasses what occurred here. Placing the burden on the State to prove the intentional relinquishment of a known right is squarely within the holdings of *Colorado v Connelly*, 479 U.S. 564 (1987) and *North Carolina v Butler*. The burden is not met where the police engaged in a course of conduct which would render the waiver involuntary. *Michigan v Harvey,* 494 U.S. 344, 354 (1990).

This case is analogous to the decision in *Edwards v Arizona*, 451 U.S. 477 (1981) where the Court refused to recognize a valid waiver of the right to counsel where the defendant had been badgered into forgoing the right. The *Edwards*' prophylactic rule was designed to preserve the free choice of the suspect to remain silent. *Texas v Cobb*, 532 U.S. 162, 173 (2001) (Kennedy, J., concurring).

The decision of the Michigan Courts was based on an unreasonable application of clearly established federal law as determined by the Supreme Court of the United States. 28 U.S.C. 2254(d)(1). It is contrary to clearly established federal law as determined by the Supreme Court of the United States in the above

cases. 28 U.S.C. 2254(d)(1). It also resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. 28 U.S.C. 2254(d)(2). The Sixth Circuit could not decide this case in any other way without violating the strictures against making new law on habeas review. 28 U.S.C. 2254(d).

Furthermore, since this case could be resolved within clearly established Supreme Court law, it was not unreasonable for the Sixth Circuit to decline to reach the *Davis* issue.

CONCLUSION

Petitioner is asking this Court to continue the slow erosion of safeguards the *Miranda* Court deemed necessary to protect a person's Fifth Amendment right. It asks this Court to find that an officer can give the advice of rights and proceed to question a suspect in the absence of a waiver, while the United States asks this Court to focus its waiver analysis only on a suspect's answer to the questions[14] which elicited the inculpatory answers rather than on, for instance here, the previous three hours. If these suggestions were to be adopted, they would sweep *Miranda* and its progeny into the dustbin of history.

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[14] Brief for the United States, page 25.

II.

THE SIXTH CIRCUIT COURT OF APPEALS DID NOT IMPROPERLY APPLY THE 28 U.S.C. 2254d DEFERENCE STANDARD WHEN IT GRANTED HABEAS RELIEF BASED ON A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

To find that a defendant's right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show 1) that counsel's performance fell below an objective standard of reasonableness, and 2) that the deficient performance prejudiced the defendant. As to the second prong, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v Washington*, 466 U.S. 668, 687-688, 694 (1984). The court specifically rejected the more stringent standard of "more likely than not." *Id.* at 693. In applying the reasonable probability standard, the court must re-weigh the evidence. *Williams v Taylor*, 529 U.S. 362, 397-398 (2000); *Porter v McCollum*, 558 U.S. ___; 130 S. Ct. 447 (2009) (in applying the reasonable probability standard to the facts on the prejudice prong the available evidence adduced at trial and adduced in the habeas proceeding must be re-weighed against evidence of aggravation). While *Porter* concerned the mitigation phase, there is no reason to think that there is a different test for the guilt phase of a trial.

Both prongs of the *Strickland* test are mixed questions of law and fact to which deference was not owed pre-1996. *Strickland, supra* at 698. The 1996 amendment to 28 U.S.C. 2254(d), AEDPA, placed a new constraint on the power of federal habeas courts to grant the writ to State prisoners. It may do so only if the State court's decision was contrary to or was an unreasonable application of clearly established law as determined by this Court. *Williams v Taylor, supra* at 412-413; 28 U.S.C. 2254(d)(1). The *Williams* case did not address subsection (d)(2) which permits issuance of the writ where the State court's decision was based on an unreasonable determination of the facts.

This case concerns the prejudice prong of *Strickland*. Because the State court's decision was contrary to clearly established law in relying on a rule that was not clearly established and because the State court applied *Strickland* to the facts of this case in an objectively unreasonable manner, deference is not owed to the State court's decision on the prejudice prong.

A. The Sixth Circuit correctly found that the State courts adopted an objectively unreasonable test on the prejudice prong under *Strickland v Washington*.

Respondent's theory at trial was that Eric Purifoy was the shooter. The prosecution established that Eric Purifoy had been charged with the same crimes as the defendant, had been charged as an

aider and abettor, had been acquitted of the murder and assault charges, had been convicted of one weapons charge, and had pled guilty to two other weapons charges on which the jury had hung. J.A. 139a-141a.

In his closing argument, the prosecution started off as follows:

> Ladies and Gentlemen, this is a case about the relationship between these two people. At Eric Purifoy's trial, the jury had to find, in order to find him guilty of first degree murder, that he drove up to that Rite Aid and sat there, thereby assisting Van Thompkins. . . . Did Eric Purifoy's jury make the right decision? . . . You are not bound by what his jury found. Take his testimony for what it was.

Prosecutor's Closing Argument, J.A. 201a-202a.

Counsel failed to request limiting instructions at the time the above evidence was elicited and also limiting instructions in the final charge to the jury. The court instructed the jury that it could "convict based only on the accomplice's testimony alone. . . ." J.A. 214a. Counsel also failed to ask for an instruction that evidence that Purifoy was tried on a theory of aiding and abetting was opinion testimony and could be disregard. The trial court found the admission of this evidence to be plain error, but it did not affect the outcome. J.A. 235a-236a.

The failure to request limiting instructions meant that Petitioner's jury could consider this evidence as substantive evidence of Respondent's guilt. A limiting instruction would have directed the jury to consider the evidence only on the issue of Purifoy's credibility. In Michigan, had the request been made the court would have had to give the instruction pursuant to the decision in *People v Allen*, 424 Mich. 109; 378 N.W.2d 481 (Mich. 1985) (Upon request, the jury must be given a cautionary instruction that they can only use an accomplice's conviction to assess credibility).

On the motion for new trial, along with other claims of attorney error,[15] the trial court found that the "failure to request certain jury instructions . . . [was] error. However, the court did not find that, but for the error, the results of the proceeding would have been different." J.A. 236a. The trial court also did not find the use of the acquittals to be error. J.A. 235a.

The State appellate court accepted the trial court's finding on the performance prong. It stated that the burden on an ineffectiveness claim was on the defendant "to show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment and that the deficient performance so prejudiced the defense as to deprive the defendant of a fair trial." It cited to *People v Mitchell*, 454 Mich. 145, 156; 560 N.W.2d 600 (1997).

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[15] J.A. 234a-237a.

Res. App. 55a. On the prejudice prong, the court stated, "we also agree with the trial court that defendant was not prejudiced by defense counsel's failure to request certain jury instructions. Although the court did not specifically instruct the jury that it could consider Purifoy's conviction only for purposes of his credibility, the record does not disclose an attempt to argue that conviction for an improper purpose." Res. App. 56a.[16]

The Circuit Court found that if the evidence of Purifoy's convictions and acquittals was used substantively by the jury because no limiting instruction was requested by counsel then "a reasonable probability exists that the jury understood Purifoy's acquittal as powerful evidence that Thompkins, the only other individual in the front seat of the van, must have been the shooter." Res. App. 16a.

Petitioner claims that the Sixth Circuit Court of Appeals erred in deciding the prejudice prong because it focused on its own determination of prejudice rather than focusing on whether the State court's decision was unreasonable. This claim is erroneous for two reasons. First, the State court used an erroneous definition of prejudice. The appellate court

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[16] Despite the fact that this is not a factor to be considered on the prejudice prong as is discussed *infra*, the prosecutor in the passage reproduced above did argue the evidence improperly.

applied a fundamental fairness test rather than an outcome determinative test. The use of the fundamental fairness language found in *Lockhart v Fretwell*, 506 U.S. 364 (1992), neither replaced nor modified the *Strickland* standard for determining prejudice. *Fretwell, supra* at 372 (O'Connor, J., concurring). This was an unreasonable application of the clear law as established by *Strickland*. As Justice O'Connor pointed out in her concurring opinion in *Williams,* it is impossible to determine the extent to which the State court's error with respect to its reading of *Lockhart* affected its ultimate finding that the defendant suffered prejudice. *Williams, supra* at 414. So even if the Michigan court relied on a case which relied on a case that cited the correct standard, a reviewing court cannot assess how much the use of the inapplicable standard affected the State court's decision on the prejudice prong.

Second, the Circuit Court found that the State appellate court had added an additional burden for the defendant to meet when it held that prejudice required a showing that the prosecution used Purifoy's conviction for an improper purpose. It noted that the prosecution's intent is irrelevant in analyzing prejudice from attorney error. No such showing is required. The State court made no other analysis of the evidence.

This error is different qualitatively from that found in *Woodford v Visciotti*, 537 U.S. 19 (2003). That error was merely a slight misstatement of the standard and the correct standard was still applied.

In this case the standard applied was not based on clearly established Supreme Court law and it was applied in an objectively unreasonable fashion.

Because the State court applied the wrong standard for prejudice, failed to evaluate the totality of the admissible evidence, and failed to accord appropriate weight to the evidence, deference is not owed. Consequently, the Circuit Court correctly found that the Michigan court applied the prejudice prong in an objectively unreasonable manner. Res. App. 15a-16a.

B. Any extra latitude a State court may have in applying general rules to a set of facts does not insulate it from all habeas review.

Petitioner contends that a State court has extra latitude in making its determination because the standard of prejudice is a general rule. In *Yarborough v Alvarado*, 541 U.S. 652, 664 (2004), this Court noted that

> Applying a general standard to a specific case can demand a substantial element of judgment. . . . The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

The *Alvarado* Court was concerned with whether a 17-year old suspect's age should be considered when determining custodial status, not with a prejudice standard.

In *Knowles v Mirzayance*, ___ U.S. ___; 129 S. Ct. 1411, 1420; 173 L.Ed.2d 251 (2009), also cited by Petitioner, this Court held that since the performance prong of *Strickland* was a general rule, analysis of it was owed a high degree of deference. "Judicial scrutiny of counsel's performance must be highly deferential . . . " quoting *Strickland, supra* at 689. *Strickland* said that the proper measure of attorney performance remains simply reasonableness under prevailing professional norms. *Id.* at 688. It is this standard which *Knowles* deems general permitting a State court even more latitude to reasonably determine that the defendant has satisfied it. *Knowles, supra* at 1420. *Knowles* states no new law in this regard. Deference has always been accorded to counsel's strategic decisions. But *Knowles* addressed only the performance prong not the prejudice prong of *Strickland*.

But even if this court holds that *Knowles* also applies to the prejudice prong, the judgment which is to be given wide latitude must start with a correct formulation of the principle to be applied. As was shown above, the State court used an incorrect definition of prejudice. That incorrect definition resulted not merely in an incorrect application of the law, but in an objectively unreasonable application of the law. This will be discussed at greater length in part D, *infra*. AEDPA does not prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those in the case in which the principle was

announced. The statute recognizes that even a general standard may be applied in an unreasonable manner. *Panetti v Quarterman*, 551 U.S. 930 (2007). Deference does not by definition preclude relief. *Miller El v Dretke*, 545 U.S. 231, 240 (2005).

Consequently just because a standard is stated in general terms does not always mean that it was applied reasonably. State courts do not have a blank check to determine at their whim whether counsel's deficient performance prejudiced the defendant.

C. Respondent will reap no windfall in this case.

Petitioner contends that the *Fretwell* case aids analysis here. If it does so, it does so in Respondent's favor. The *Fretwell* case added the meritless objection to the list of factors that ought not to be considered in a prejudice analysis.[17] In *Fretwell,* trial counsel failed to make a *Collins*[18] objection during the mitigation phase. After Fretwell's trial, the *Collins* rule was abandoned. If Fretwell's conviction was overturned, at a retrial the unobjected-to evidence would be admissible. He would have obtained a windfall

[17] The other factors include a failure to put on perjured testimony and meritless Fourth Amendment claims. *Lockhart, supra* at 374.

[18] *Collins v Lockhart*, 754 F.2d 258 (8th Cir. 1985) (An aggravating factor may not duplicate an element of the underlying felony murder).

because counsel's error would no longer be considered error. Justice O'Connor described the *Fretwell* case as one that "concerns the unusual circumstances where the defendant attempts to demonstrate prejudice based on considerations that as a matter of law ought not to inform the inquiry." *Fretwell, supra* at 372.

Respondent's case is not *Fretwellian*. The law at the time of his trial required that upon request a jury be instructed on the uses it could make of an accomplice's acquittals and convictions. Unlike *Fretwell*, that is still the law. On retrial, the jury would be properly instructed. Rather than getting a windfall, Respondent would only receive what he had a right to receive, the effective assistance of counsel in obtaining a properly instructed jury.

Petitioner raises concerns about a lawless decisionmaker. Such a concern is not present in this case. Respondent is not arguing that the jury disregarded its oath or ignored its instructions. The problem here is that the jury remained uninstructed on the relevant law on this key issue. The notion that convictions are used for one purpose and not for another is a pretty sophisticated idea for jurors to stumble across on their own. Respondent's jury, uninstructed, would have used the gun convictions to infer that Respondent had ready access to one of Purifoy's weapons and would have used the acquittals to infer that defendant was the shooter.

D. The Sixth Circuit correctly found that there was a reasonable probability that counsel's deficient performance prejudiced Respondent.

Both the trial court and the State appellate court, engaged in little analysis of the facts. When that occurs, a habeas court must be permitted, as required by *Strickland*, to engage in a complete review of the facts, otherwise, it cannot fairly arrive at a determination as to whether the error affected the outcome of the trial. In reviewing the totality of the evidence, "some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have an isolated, trivial effect." *Strickland, supra* at 695-696.

On the most important aspect of Respondent's claim of ineffective assistance of counsel, that of guilt by association, the State courts held it to be a serious mistake of counsel to fail to object to prosecutorial references to a co-defendant's convictions but found that he was not prejudiced by the evidence. This error, however, prejudiced Petitioner even more than in the usual case because here the jury verdict was not guilty. Testimony showed that the weapon was fired from the front seat of the car. J.A. 71a-72a. 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. In this case, by this process of elimination the jury returned a guilty verdict as to Respondent. Another error concerned

Detective Helgert's opinion evidence offered to Respondent's jury that Purifoy was charged under an aiding and abetting theory. The trial court found this to be plain error but harmless. J.A. 235a-236a.[19] The failure to request an instruction on opinion testimony resulted in the corroboration of the prosecution's own theory of the case and the bolstering of the credibility of its star witness, Eric Purifoy.

The evidence against Respondent was also highly contradictory on significant points. The shooter was identified as being right-handed by the survivor. J.A. 89a. Yet two of defendant's witnesses described the defendant as left-handed. J.A. 99a. The survivor also described the shooter as light-skinned while defendant is dark complected. Three officers testified that the survivor used the phrase "light-skinned" to describe the shooter. J.A. 196a-198a. The survivor also failed to pick appellant out of a photo array, picking out another person instead. J.A. 97a-98a.

Evidence of an in-court identification based on a problematic show up procedure followed by a failure

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[19] Trial counsel had adopted a defense that was completely counter to State law which eradicated the distinction between principal and aiders and abettors in 1855. MCL 767.39; *People v Stratton*, 1 Mich. NP 33 (1869). Both classes of actors are informed against under the same statute, the jury is almost always instructed on aiding and abetting, and upon conviction they face the same penalty. The transcript of Purifoy's trial has not been made a part of this record. Defendant's jury was charged on aiding abetting. J.A. 216a-217a.

to identify the defendant at another pre-trial identification procedure is not strong evidence when it merely places the defendant at the scene just as Purifoy was placed at the scene but was found not guilty of the murder. Nor would the prosecution's adoption of an aiding and abetting theory have been viable since Purifoy was tried on that theory and not convicted.

In reviewing the prejudice prong, the Sixth Circuit held that there was a reasonable probability that the respondent's jury "understood the Purifoy acquittal as powerful evidence that Thompkins, the only other individual in the front seat of the van, must have been the shooter." Res. App. 16a. The errors here had a pervasive effect on the inferences to be drawn. There was a reasonable probability that without this error the outcome of the trial would have been different.

The Sixth Circuit Court of Appeals could not defer to the State court's application of the wrong standard for prejudice. Nor could it give complete deference to the State court's evaluation of the evidence where the State court failed to re-weigh the admissible evidence and failed to accord appropriate weight to the evidence. Consequently, the Circuit Court correctly found that the Michigan Court applied the prejudice prong in an objectively unreasonable manner.

This Court should affirm the decision of the Sixth Circuit.

CONCLUSION

For these reasons, Respondent asks this Court to affirm the decision of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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