No. S106440

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

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| PEOPLE OF THE STATE OF CALIFORNIA, | ) | Court of Appeal |
| | ) | No. F036055 |
| Plaintiffs and Respondents, | ) | |
| | ) | Superior Court |
| v. | ) | Tulare County |
| | ) | No. 41889 |
| KENNETH RAY NEAL, | ) | (Hon. Gerald F. |
| | ) | Sevier, Judge |
| Defendant and Petitioner. | ) | Presiding) |
| _____ | ) | |

# BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AS *AMICUS CURIAE*, SUPPORTING PETITIONER


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## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

*Amicus Curiae*, the California Attorneys for Criminal Justice ("CACJ") is a non-profit corporation founded in 1972. CACJ has over 2,400 dues-paying members, primarily criminal defense lawyers. One of the principal purposes of CACJ, as set forth in its By-laws, is to defend the rights of individuals guaranteed by the United States and California Constitutions. The members of CACJ are gravely concerned about law enforcement efforts to circumvent the rulings in *Miranda v. Arizona*, 384 U.S. 436 (1966) and *Edwards v. Arizona*, 451 U.S. 477 (1981). For that reason, CACJ previously filed *amicus curiae* briefs in *People v. Peevy*, 17 Cal. 4th 1184, *cert. denied*, 525 U.S. 1042 (1998), *Dickerson v. United States*, 530 U.S. 428 (2000), *People v. Storm*, 28 Cal. 4th 1007 (2002), *cert. denied*, 123 S.Ct. 899 (2003), and *Chavez v. Martinez*, No. 01-1444 (U.S.). CACJ joined with other plaintiffs to bring a civil rights action to prohibit questioning over an invocation of the right to counsel (*see California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert denied*, 530 U.S. 1261 (2000)) and sponsored legislation in California to prohibit law enforcement agencies from training officers to disregard *Miranda*. *See* S.B. 1211, 2001-01 Reg. Sess. (Cal. 2001). Senate Bill 1211 passed the California Senate but was opposed by the California District Attorneys' Association, the California Peace Officers' Association and the California Police Chiefs' Association, and did not pass the California Assembly.

This brief supports Mr. Neal. Police should not be permitted to interrogate a young suspect who has repeatedly asked for counsel, tell the suspect that he needs to explain himself to police to avoid a murder charge, put the suspect in a holding cell overnight without food or a toilet, and then claim that the suspect has voluntarily initiated contact with police in the

morning and has waived his right to counsel.

Part I of the Argument explains that the State cannot claim "initiation" when officers disregard repeated requests for counsel and badger a suspect into believing that he must talk. Allowing the statement to be used under these circumstances is inconsistent with *Edwards*, fails to protect the Fifth Amendment privilege and gives police every incentive to keep questioning. A decision from the United States Supreme Court next Term may provide further support for this point. On April 21, 2003, the Court granted review in *United States v. Patane*, No. 02-1183, to re-examine *Oregon v. Elstad*, 470 U.S. 298 (1985) in light of *Dickerson*. *Patane* may give additional guidance about the scope of *Miranda*'s exclusionary rule.

In Part II of the Argument, *amicus curiae* demonstrates that Mr. Neal's purported waiver was not knowing, intelligent or voluntary, and that he did not truly initiate contact with police.

Finally, Part III explains that Mr. Neal's statements were not voluntary. Mr. Neal was misled about his right to counsel, badgered into speaking, and held overnight under harsh conditions. After independently reviewing the trial judge's conclusions, this Court should find that Mr. Neal's April 5th statements were involuntary. In so doing, the Court should emphasize for police and the lower courts that deliberate violations of the right to counsel are significant factors in the voluntariness determination.

## FACTS

This *amicus curiae* brief focuses upon the repeated *Miranda* violations that occurred during the initial interrogation and the impact of these violations upon Mr. Neal. The text of Mr. Neal's nine requests for counsel and the detective's responses are not completely set forth in the parties' briefs, and so are reproduced here.

Mr. Neal was interrogated for the first time in custody on April 4, 1999, beginning at 5:11 p.m. [1 SCT 73[1]] At 5:45 p.m., after Mr. Neal asked officers either to charge him or to let him go, Tulare County Sheriff's Detective Mario Martin gave Mr. Neal the warnings required by *Miranda*. [1 SCT 92-93] Mr. Neal denied killing Mr. Collins and eventually asked for counsel. His clear and unequivocal assertions of the right to counsel and to remain silent are highlighted below, with the number of invocations in brackets. Because Detective Martin's continued questioning communicated to Mr. Neal that, contrary to the warnings, Mr. Neal could not claim a right to counsel, the officer's responses are also included:

| | |
|---|---|
| Kenneth Neal: | **[1] I'm ready to talk to my lawyer, I ain't gonna say nothing now.** |
| Det. Martin: | Okay that's fine, remember when you wrote these, (unintel) |
| Kenneth Neal: | Yeah there's nothing on here saying that I fuckin killed anybody (unintel) I didn't. |
| Det. Martin: | Alright. (Unintel) |
| Kenneth Neal: | Even though you took my pictures I didn't kill nobody. |

[1] "1 SCT" refers to the first volume of the Supplemental Clerk's Transcript on appeal. "RT" refers to the Reporter's Transcript on appeal.

[1 SCT 105]

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|---|---|
| Kenneth Neal: | I don't know you just need to do something cause **[2] I'm ready to talk to my lawyer, I'm ready to go.** |
| Det. Martin: | Well I have to ask you this, you said you left Rossie or Don's at 5:30 last night. |
| Kenneth Neal: | **[3] Did you just hear me, that's my right and that's what I want to do.** |
| Det. Martin: | Okay how come earlier you said you went to sleep at 2:30? |
| Kenneth Neal: | **[4] Did you hear me, I want to talk to my lawyer or I want to go cause** (unintel) damn thing (unintel) |
| Det. Martin: | Well your under arrest period okay, that's what it comes down to right here. |
| Kenneth Neal: | I'm under arrest? |
| Det. Martin: | You're under arrest. |
| Kenneth Neal: | For what? What's the charges? |
| Det. Martin: | Murder. |
| Kenneth Neal: | Murder. |
| Det. Martin: | If you hadn't figured that out, how many times do I have to tell you. You're here now for the murder of uh Don. |
| Kenneth Neal: | I didn't murder nobody, shit. |
| Det. Martin: | Well then convince me that you didn't. |

Kenneth Neal: How in the hell am I suppose to convince you. You're gonna believe what you want to believe anyhow.

[1 SCT 112-113]

* * *

Det. Martin: Well how come earlier you said you went straight to Rosie's and never left (unintel)

Kenneth Neal: **[5] I'm ready to talk to my fuckin lawyer.** (Unintel) shit here and pin a murder on me and I didn't even fuckin do this shit, trying to get someone caught up.

Det. Martin: Well only lies will catch you up.

Kenneth Neal: Yeah I know and I ain't lying. That's why I said **[6] I wanted to talk to my lawyer. I'm through.**

Det. Martin: Do you have a lawyer?

Kenneth Neal: **[7] No but I'll get one.**

Det. Martin: Do you think you need a lawyer for this?

Kenneth Neal: Do I what?

Det. Martin: Do you think you need a lawyer for this?

Kenneth Neal: Well fuck if you're gonna charge me for murder **[8] I do.** Shit.

Det. Martin: Well I mean are you guilty or not?

[1 SCT 114]

* * *

Kenneth Neal: **[9] Well you go ahead and let me talk to my lawyer**, you gotta have proof before you can nail this shit on me and I didn't do it.

Det. Martin: Oh I'll get the proof.

Kenneth Neal: Man I, I (unintel) well go ahead and get the proof, I didn't do a damn thing.

[1 SCT 117]

* * *

After ignoring all of these invocations and denying Mr. Neal his right to counsel and right to remain silent, Detective Martin delivered the "bus driver speech," which made clear that Mr. Neal was a powerless passenger in the sole hands of the driver, Martin. Here is what the officer said:

Det. Martin: And uh all I'm asking for you is to tell me if there's a reason why it happened. I mean cause this, this is your one chance, I mean I'm the, I'm the bus driver on that greyhound bus and you're the passenger back there. I mean let's make believe that I'm driving the bus . . . and you want to get off the bus. It's gonna be up to the bus driver, me, you know to let you off that bus you know closer to home or I can take you all the way to Timbucktoo. Now I'm the one that you need to tell hey I want to get off this bus. I want to lay it on the table, this is what happened and I can make it as best as I can for you, but believe me if you don't try to cooperate and say hey look this is the reason it happened or whatever, the systems gonna stick it to you as hard as they can. Now if there's a reason why this happened then if you can justify why it happened, I mean there's what's called justifiable homicide, there's

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|---|---|
| | manslaughter, there's a whole lot of other things that can help you out, but if you can't give no reason they're just gonna hit you as hard as they can. |
| Kenneth Neal: | What do you mean hit my ass as hard as they can? |
| Det. Martin: | Yeah charge you with as heavy of a charge as they can, you know first degree murder or whatever. |

[1 SCT 117]

Even after the "bus driver speech," Mr. Neal denied killing Mr. Collins, and stated that he had been in a fight the previous night. [1 SCT 117-18] Detective Martin repeatedly told Mr. Neal that he would face murder charges unless Mr. Neal could prove to Detective Martin that he got into a fight. [1 SCT 119-123] Detective Martin finally ended the interrogation at 6:17 p.m. [1 SCT 127]

Next, Mr. Neal was booked, during which he had another conversation with Detective Martin. Martin said that Mr. Neal should tell him that Mr. Neal knew something about Mr. Collins' death. [RT 46] At the end of the evening, after all of Detective Martin's importuning to get Mr. Neal to talk, Mr. Neal said that he would "sleep on it and maybe get back in touch with [Detective Martin]." [RT 47]

Mr. Neal was placed in a booking cell for the night, without a sink or toilet. [RT 147] He had no food during the entire time he was held at the sheriff's station; he had not eaten since noon on April 4. [RT 148] The next morning, April 5—after spending the night in the booking cell and still without counsel—Mr. Neal asked to see Detective Martin. Detective Martin took Mr. Neal back into the interrogation room at about noon [RT 48-49], and the second round of interrogations began.

At the beginning of the second interrogation, Mr. Neal was given *Miranda* warnings, which he allegedly waived. His waiver was mumbled, if it was given at all, and as the highlighted statements prove, Mr. Neal directly linked his "initiation" to the detective's improper promises:

| | |
|---|---|
| Det. Martin: | Okay you understand that you have the right to remain silent? |
| Kenneth Neal: | Yeah. |
| Det. Martin: | And anything you say can and will be used against you in court. You understand that? |
| Kenneth Neal: | Mmm mmm. |
| Det. Martin: | And you, you have the right to talk to an attorney and have him present while I talk to you. You understand that? |
| Kenneth Neal: | Yeah. |
| Det. Martin: | And if you can't afford one, one will be appointed to represent you. |
| Kenneth Neal: | Mmm mmm. |
| Det. Martin: | You understand that? |
| Kenneth Neal: | Yeah. |
| Det. Martin: | Okay and you've decided to talk to me re . . . regarding this, right? |
| Kenneth Neal: | Mmm mmm. |
| Det. Martin: | Okay. Now, right now you said that and the only promises that I've told you that we would do, you want me to send a letter to your mom. |

| | |
|---|---|
| Kenneth Neal: | Yeah. Oh and also **you got to make it, you got to tell them that I helped you out so they'd help me out when I go to court.** |
| Det. Martin: | **That's no problem and that's on tape.** |

[1 SCT 176-77] Mr. Neal made a statement to Detective Martin and gave an additional statement later in the day.

The trial court denied Mr. Neal's motion to suppress the two statements on April 5th, finding that they "were not the tainted product of Detective Martin's disregard of—blatant disregard, I might add, of Mr. Neal's April 4th invocation of his right to counsel." [RT 257] In so ruling, the trial judge stated his legal conclusions, but did not make specific factual findings. [*See* RT 256-59] The court of appeal affirmed. *See People v. Neal*, 2002 Cal. App. Unpub. LEXIS 2424 (2002).

## ARGUMENT

### I. ALL OF MR. NEAL'S STATEMENTS SHOULD HAVE BEEN SUPPRESSED BECAUSE POLICE FAILED TO COMPLY WITH THE PROCEDURES REQUIRED BY *MIRANDA V. ARIZONA*, *EDWARDS V. ARIZONA* AND THE FIFTH AMENDMENT.

Mr. Neal has asked this Court to find that his April 5th statements were improperly admitted, and thus that his conviction should be reversed. [*See* Appellant's Opening Brief ("AOB") at 13] The State concedes that Mr. Neal was questioned in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), but argues that Mr. Neal's April 5th statements were admissible in the government's case-in-chief under *Edwards v. Arizona*, 451 U.S. 477 (1981), because Mr. Neal "re-initiated contact with the detective." [Respondent's Brief at 29, 41] The State overlooks an important, threshold question.

In *Edwards*, the U.S. Supreme Court emphasized an officer's fundamental obligation under *Miranda*: Once the right to counsel is "exercised by the accused, 'the interrogation must cease until an attorney is present.'" *Id*. at 485 (quoting *Miranda*, 384 U.S. at 474). In the passage relied upon by the State, the Court further held that "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id*. at 484-85. The problem with the State's argument is that because Detective Martin did not comply with the primary duty under *Edwards*—to cease the interrogation promptly—the State cannot take advantage of the exception contained in *Edwards*, which may permit further interrogation when a suspect initiates contact with the police. "Initiation" depends upon cessation. If officers fail

to comply with the fundamental requirement of *Edwards* and continue to badger the suspect, the State may not take advantage of the *Edwards* "initiation" exception.

This Court should not accept the State's invitation to erase the primary obligation of *Miranda* and *Edwards*. First, the language in *Edwards* about initiation is wholly based upon the premise that police will have terminated questioning immediately after an accused has asked for counsel. Initiation only makes sense if the interrogation has promptly terminated and the initiation exception is only available to the State if police have scrupulously honored the invocation. Second, any other result would violate *Dickerson v. United States*, 530 U.S. 428 (2000), *Miranda*, *Edwards*, and the Fifth Amendment. The lower courts looked only at the voluntariness of Mr. Neal's statements. This procedure is not constitutionally adequate because it is not sufficient to dispel the compulsion that is inherent in a custodial interrogation. Third, given the endemic "outside *Miranda*" training in California—that is, the widespread training that police may continue to question a suspect who has invoked his or her rights—the State's proposal will erase the bright line rules of *Miranda* and *Edwards* and continue to embroil this Court and the lower courts in innumerable battles over the voluntariness of suspects' statements. Finally, these principles and the U.S. Supreme Court's recent grant of certiorari in *United States v. Patane*, No. 02-1183 are cause for this Court to re-examine or limit parts of the holdings in *People v. Bradford*, 14 Cal. 4th 1005, *cert. denied*, 522 U.S. 953 (1997), and *People v. Storm*, 28 Cal. 4th 1007 (2002), *cert. denied*, 123 S.Ct. 899 (2003), to the extent that they may be contrary.

### A. *Edwards* Does Not Permit the State to Claim That a Suspect Has Initiated Contact with Police Unless the Officers Have Promptly Terminated Questioning after the Suspect Has Asked for Counsel.

*Edwards*' command is clear. A suspect who has said that he or she will deal with police only through counsel "is not subject to further interrogation" until counsel has been provided. *Id*. at 484-485. Further, "it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id*. at 485. The reason for this rule is to prevent just what happened here. As Chief Justice Rehnquist has written, *Edwards* was "designed to protect an accused in police custody from being badgered by police officers." *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion); *see also People v. Storm*, 28 Cal. 4th 1007, 1024 (2002) (quoting *Bradshaw*); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990) (*Edwards* is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.")

In the two decades since *Edwards* was decided, its holding—and the prohibition against badgering—has only been strengthened. In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court held that an accused who invokes the right to counsel under *Edwards* cannot be questioned about any other offenses. In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court found that an accused who has asked for counsel cannot be questioned by police even after an attorney has been available to him. Mr. Minnick was interrogated by officials and said that he would make a complete statement once he had an attorney. He met with counsel and was questioned afterwards by police. *Id*. at 148-49. Even these circumstances, the Court ruled, did not sufficiently shield Mr. Minnick from the officers' badgering: "A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged." *Id*. at 153.

The U.S. Supreme Court has never wavered from the rigid requirement that when an accused in custody asks for counsel, questioning must cease and cease immediately. Indeed, "the merit of the *Edwards* decision lies in the clarity of its command and certainty of its application." *Minnick*, 498 U.S. at 151. Because *Edwards* was designed to prevent the police from badgering a suspect and trying to convince him to waive his rights, the Court could only assume that officers would cease questioning a suspect who has unequivocally asked for counsel. Although *Edwards* does contain an exception for further questioning if a suspect initiates contact with police, the indisputable premise for that exception is that officers comply with the primary obligation of *Miranda* and *Edwards*; that is, officers must have promptly terminated questioning as soon an accused has asked for counsel. The Louisiana Supreme Court put it this way: "just as one cannot start an engine that is already running, a suspect cannot 'initiate' an on-going interrogation." *State v. Abadie*, 612 So. 2d 1, 16 (La. 1993), *cert. denied*, 510 U.S. 816 (1993). *Cf. Michigan v. Mosley*, 423 U.S. 96, 104-07 (1975) ("the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut of questioning' was 'scrupulously honored'" (quoting *Miranda*, 384 U.S. at 474, 479)).

In rejecting the State's request to erase the requirement that questioning cease, this Court may draw support from Judge Alex Kozinski's concurring opinion in *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (en banc), *cert. denied*, 502 U.S. 1031 (1992). In *Collazo*, San Jose police failed to cease an interrogation after the suspect asked for a lawyer. As here, the officers tried to talk Mr. Collazo out of speaking with counsel. The police eventually ended the interrogation, but claimed that three hours later Mr. Collazo contacted a sergeant, asking "Where are the investigators?" *Id*.

at 414. The Ninth Circuit found that Mr. Collazo's subsequent statements were not voluntary and that his waivers of *Miranda* were not constitutionally valid. Noting that *Edwards* is designed to prevent police from badgering a suspect, Judge Kozinski wrote that the court should not permit officers to take advantage of the "initiation" exception in *Edwards* when they failed to cease questioning upon the suspect's invocation of the right to counsel. Said Judge Kozinski:

> [T]he police forfeit the benefit of the *Edwards* exception once they use the type of pressure tactics demonstrated in this record. Because *Edwards* is designed to prevent police from badgering suspects into giving up their right to counsel, the narrow exception to *Edwards* cannot apply in a case where the police actually engaged in badgering. If the police want to keep the *Edwards* escape hatch open, they must cease their interrogation as soon as the suspect asserts his right to counsel, and then hope he changes his mind on his own. Any other rule would invite police misconduct and enmesh the courts in the type of metaphysical unscrambling of which this case is a perfect example.

*Id*. at 427 (Kozinski, J. concurring).

Judge Kozinski got it right in *Collazo*. As the next part of the argument explains, permitting officers to disregard the primary obligation of *Miranda* and *Edwards* would fail to protect the privilege against self-incrimination.

### B. The State's Proposed Revision of *Miranda* and *Edwards* Would Not Effectively Protect an Accused's Ability to Exercise the Fifth Amendment Privilege Against Self Incrimination.

Under the State's theory, a police officer may badger a suspect in custody who has asked for counsel, in an effort to convince the suspect that he or she will be better off talking to police. If the accused eventually rises to the bait, the suspect will be deemed to have "initiated" contact with police, and the statement will be admissible if the suspect is again read his *Miranda* rights and the statement is voluntary. But this revision of *Miranda* and *Edwards* does not adequately protect a suspect's Fifth Amendment privilege. Where an officer has continued to question a suspect over his invocation of the right to counsel, a court cannot be assured by the officer's readministration of the *Miranda* warnings because the officer will have already proven to the suspect that he does not really have a right to counsel. The State's proposed replacement for *Miranda* and *Edwards* is, at bottom, a voluntariness determination, and the U.S. Supreme Court in *Dickerson* has held that the voluntariness test is not a constitutionally-acceptable substitute for *Miranda*'s procedures.

The foundation for *Miranda* is that "without proper safeguards the process of in-custody interrogation . . . contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak when he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. To combat these inherently compelling pressures "and to permit a full opportunity to exercise the privilege of self-incrimination," the accused must be appraised of his rights "and the exercise of those rights must be fully honored." *Id*. This is *Miranda*'s touchstone.

Whenever the government asserts that some other procedure should replace *Miranda*'s requirements, the U.S. Supreme Court has gone back to

this touchstone. The Court has asked whether the newly proposed procedures would combat those inherently compelling pressures and adequately protect the privilege against self-incrimination. Thus, in *Roberson*, the Court rejected the State's proposal that officers should be permitted to question a suspect about a separate offense after he or she has invoked the right to counsel. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Roberson*, 486 U.S. at 686. Likewise, in *Minnick*, the Court held that when counsel is requested, interrogation must cease and may not be reinitiated by police, regardless whether the defendant has actually consulted with an attorney. Even though Mr. Minnick had in fact met with a lawyer, that consultation was not enough to relieve "the coercive pressures that accompany custody." *Minnick*, 498 U.S. at 153. Mr. Minnick's subsequent statements were held inadmissible, even though the trial court found that the statements were "freely and voluntarily given." *Id*. at 158 (Scalia, J., dissenting).

Critically, the U.S. Supreme Court has refused to accept the claim that readministering *Miranda* warnings is sufficient to combat the pressures that are inherent in an interrogation when a suspect has requested counsel, counsel has not been provided, and the suspect remains in custody. As the Court expressly held in *Roberson*:

> [W]e . . . disagree with [the State's] contention that fresh sets of *Miranda* warnings will "reassure" a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammeled. . . . Especially in a case such as this, in which a period of three days elapsed between the unsatisfied request for counsel and the interrogation about a second offense, there is a serious risk that the mere repetition of *Miranda* warnings would not overcome the presumption of

coercion that is created by prolonged police custody. *Roberson*, 486 U.S. at 686. Though the Court pointed to the lapse of time between the request for counsel and the reinterrogation, the rule of *Roberson* applies to any effort to contact a suspect, whether that occurs the next morning or three days later. *Roberson* thus stands for the proposition that repeating *Miranda* warnings does not overcome the presumption of coercion for any suspect who has requested counsel and remains in police custody.

This conclusion is surely correct. When police tell a custodial suspect that he has a right to counsel, but then go on to deny a request for a lawyer, the police make clear that the right exists on paper but not in practice. If the officers later return and readvise the custodial suspect that he has a right to counsel, but still no lawyer has been provided, the accused has no reason to believe that asking for counsel again will have any effect. When the rights conveyed in the warnings are not been honored, reconveying those rights is simply meaningless. Indeed, in *Roberson*, the Solicitor General suggested that the defendant should be faulted for failing to assert his right to counsel a second time when reapproached by police. The Court found this contention "surprising," noting that Roberson had not been given the attorney he had already requested. *See id.* at 686 n.6. *See also United States v. Baker*, 888 F. Supp. 1521, 1535 (D. Haw. 1995) (citing *Roberson* and stating that "[r]e-reading the rights, after an unequivocal request for an attorney, does nothing to alleviate" the pressures of custodial interrogation).

*Roberson*'s holding and this conclusion are completely faithful to *Miranda*, for *Miranda* describes how officers may compel a suspect to speak after the suspect has asked for counsel. The *Miranda* Court reviewed a number of interrogation manuals. As the leading manual then described, if the suspect asks for an attorney, one interrogation tactic is to suggest that an

attorney is unnecessary, "particularly if [the suspect] is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.'" *Miranda*, 384 U.S. 454 (quoting FRED E. INBAU & JOHN E. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962)).[2] In this case, Detective Martin employed this very tactic, asking Mr. Neal, "Do you think you need a lawyer for this?" When Mr. Neal said he did need counsel, Martin pushed even harder, "Well I mean are you guilty or not?" [1 SCT 114]. This tactic fits with the psychological theory of police interrogation, which is to be alone with the suspect, "deprive him of any outside support," and exude an "aura of confidence in his guilt [which] undermines his will to resist." *Miranda*, 384 U.S. at 455.[3]

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[2] The treatise, now authored by Inbau, Reid, Buckley and Jayne, is currently in its fourth edition. "Athough many police interrogation manuals have been produced . . . , undoubtedly the most authoritative and influential manual is the one written by Inbau, Reid and Buckley." GISLI GUDJONSSON, THE PSYCHOLOGY OF INTERROGATIONS, CONFESSIONS AND TESTIMONY 31 (1992). Various editions of the Inbau and Reid treatise have been featured in the U.S. Supreme Court's decisions, beginning with *Miranda*. *See Miranda*, 384 U.S. at 449-55; *Davis v. United States*, 512 U.S. 452, 470 n.4 (1994) (Souter, J., concurring); *Stansbury v. California*, 511 U.S. 318, 324 (1994) (per curiam); *Colorado v. Spring*, 479 U.S. 564, 580 (1987) (Marshall, J., dissenting); *Moran v. Burbine*, 475 U.S. 412, 459 n. 45 (1986) (Stevens, J., dissenting); *Oregon v. Elstad*, 470 U.S. 298, 328 (1985) (Brennan, J., dissenting).

[3] This remains the primary psychological approach to police interrogation. The leading manual contains, for example, an entire chapter on the physical arrangement of the interrogation room. *See* FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS 51-64 (4th ed. 2001). The very first step of the nine-step interrogation process is "direct, postive confrontation." The investigator should "initiate the interrogation with a direct statement indicating absolute certainty in the suspect's guilt." *Id*. at 218-19. An expert

Because the U.S. Supreme Court has firmly and appropriately rejected the claim that, for a suspect in custody who has asked for counsel, readministering *Miranda* warnings combats an interrogation's inherently compelling pressures, the State's argument is nothing more than a request to replace *Miranda* and *Edwards* with the voluntariness test. Of course, this is the very argument that was disapproved in *Dickerson*. There the Supreme Court overturned a federal statute, 18 U.S.C. §3501, that would permit "voluntary" statements to be admitted into evidence even if police failed to follow *Miranda*'s procedures. The Court found that the statute was not a sufficient replacement for *Miranda*. While *Miranda* left the door open for a legislative solution to the inherently compelling pressures of custodial interrogation, any proposed replacement for *Miranda* must be "at least as effective in apprising accused persons of their right of silence *and in assuring a continuous opportunity to exercise it*." *Dickerson*, 530 U.S. at 440 (quoting *Miranda*, 384 U.S. at 467; footnote omitted, emphasis added). Section 3501 did not adequately protect the Fifth Amendment privilege because it considered the administration of pre-interrogation warnings "as only one factor in determining the voluntariness of a suspect's confession." *Id*. at 442.

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in the psychology of interrogation characterizes these techniques this way: "Against the backdrop of a physical environment that promotes feelings of social isolation, sensory deprivation, and a lack of control, Inbau et al. . . . describe[] in vivid detail a nine-step procedure designed to overcome the resistance of reluctant suspects." Saul M. Kassin, *The Psychology of Confession Evidence*, 52 AM. PSYCHOLOGIST 221, 222 (Mar. 1997). *See also* A. DANIEL YARMEY, UNDERSTANDING POLICE AND POLICE WORK: PSYCHOSOCIAL ISSUES 157 (1990) ("The interrogation area is manipulated to give the suspect the expectation that the forces of the law are invincible. The suspect may be 'softened up' by being put into isolated and unfamiliar surroundings and deprived of sleep and/or food.")

In this case, Detective Martin deliberately and repeatedly ignored Mr. Neal's express requests for counsel. Detecive Martin made clear that although the law afforded Mr. Neal a right to counsel, Martin had no intention of allowing Mr. Neal to exercise that right. The officer badgered Mr. Neal, saying that the State would punish him as hard as possible if he did not make a statement, and the detective went to far as to characterize himself as the driver on a bus that could take Mr. Neal all the way to Timbuktu. The government's proposed replacement for *Miranda* and *Edwards*—allowing police to ignore repeated assertions of the right to counsel, badger a suspect, and then take advantage of the "initiation" exception in *Edwards*—is not effective in protecting the Fifth Amendment privilege. By relying solely on the voluntariness test to measure the admissibility of a post-invocation, badgered statement, the State's proposed procedure fails to protect the Fifth Amendment privilege. It does not "assur[e] a continuous opportunity to exercise" the privilege. *Dickerson*, 530 U.S. at 440 (quoting *Miranda*, 384 U.S. at 467). In this case, it is impossible to conclude that the detective's interrogation practices provided any meaningful opportunity for Mr. Neal to exercise his Fifth Amendment privilege, much less a process that is equally as effective as the procedures required by *Miranda*.

### C. The State's Proposal Would to Give Officers an Even Greater Incentive to Violate *Miranda* and *Edwards*.

If this Court allows officers to take advantage of the initiation exception of *Edwards* without first obeying their fundamental duties under *Edwards* and *Miranda*, officers will have yet another incentive to violate the law. This case provides positive proof that this Court's prior admonitions to police have not been effective. If this Court truly wants officers to stop questioning suspects who have asked for counsel, this Court will have to say so in clear terms and will have to couple its hortatory language with a

meaningful rule of exclusion. This part of the brief makes use of police training materials to explain why police still have an incentive to violate *Miranda* and *Edwards*.

As this Court is aware, there has been widespread training in California on questioning "outside *Miranda*," questioning suspects who have invoked their right to counsel or right to remain silent during a custodial interrogation. CACJ, as *amicus curiae*, brought this to the attention of this Court in *Peevy* and *Storm.* This training and practice is well documented. *See* Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109 (1998) and *In the Stationhouse After* Dickerson, 99 MICH. LAW REV. 1121 (2001).[4] In *Peevy*, the State and its *amici* sought to defend the practice of questioning "outside *Miranda*," arguing that there is no constitutionally-required duty under *Miranda* to cease interrogating a suspect who has invoked his or her rights. This Court strongly rejected that argument, noting that the U.S. Supreme Court "never has retreated from the requirement that police officers regulate their conduct according to the dictates of these cases." *Id*., 17 Cal. 4th at 1203. Evidence taken in violation of *Miranda* and

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[4] *Amicus curiae* cites these training materials and articles for a different purpose than the training materials were offered in *Peevy*. In *Peevy*, this Court denied CACJ's request to take judicial notice of training materials, noting that trial counsel had not raised the issue whether the San Bernardino sheriff's deputies interrogated Mr. Peevy pursuant to a policy in that jurisdiction to violate *Miranda*. *See* 17 Cal. 4th at 1208 n. 4. In this case, trial counsel tried to establish that Detective Martin acted pursuant to a policy within the sheriff's office, but the prosecutor objected and the objections were sustained. [RT 103-04, 105-06] Nevertheless, whether or not there is any policy or practice to circumvent *Miranda* and *Edwards* in Tulare County, CACJ simply points out that if Mr. Neal's conviction is affirmed, this Court should expect police to be trained that it is permissible to badger a suspect and then claim that the suspect has reinitiated contact with police.

*Edwards* is excluded, this Court said unanimously, "because the evidence was obtained *illegally*." *Id*. at 1204. *Peevy* was not the first time this Court had cautioned officers. In *People v. Bradford*, 14 Cal. 4th 1005 (1997), this Court warned that deliberate questioning over an invocation of the right to counsel is "unethical and it is strongly disapproved." *Id*. at 1042.

This case proves that even harsh words are not enough. *Peevy* was decided on May 7, 1998. Detective Martin interrogated Mr. Neal in April 1999, eleven months after *Peevy* was decided and over two years after the *Bradford* Court "disapproved" questioning "outside *Miranda*." Detective Martin deliberately continued to question Mr. Neal to obtain a statement to use for impeachment [RT 36, 105], the very tactic condemned in *Peevy*. Detective Martin admitted that he had been trained in this technique by Lieutenant Lomeli, one of Martin's supervisors in the Tulare County Sheriff's Department. [RT 36-37, 105] The prosecutor did not introduce any evidence or otherwise attempt to argue that the Tulare County Sheriff's Department had undertaken any effort to retrain its officers in the wake of *Bradford* or *Peevy*.

It should not surprise this Court that *Bradford* and *Peevy* went unheeded, for this Court failed to give officers any incentive to stop questioning "outside *Miranda*." Although *Peevy* condemns questioning "outside *Miranda*," calling the tactic "illegal" and "misconduct," the Court ruled that statements taken in deliberate violation of *Miranda* are nevertheless admissible for impeachment. Many officers have noted *Peevy*'s bottom-line holding, not its toothless admonition. The State's leading training body, the California Commission on Peace Officer Standards and Training ("POST"), produces monthly training videos that are broadcast to law enforcement departments throughout California. POST's July 1998 broadcast termed *Peevy*'s strong language "dicta," "not binding on anybody"

and the "personal opinions" of the Court's justices.[5] A training bulletin

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[5] The POST trainer, then a deputy district attorney, told officers that statements taken in deliberate violation of *Miranda* are admissible for impeachment. He added the following:

> Another caution. You see sometimes the newscasters giving you the news and then they want to give you their opinion about that. They want to add something that's not the facts, it's just their commentary. And so at the bottom of the screen it says, opinion or commentary. When a court does that they call it *dicta*. They've got the ruling, which might be the news, and then they've got their commentary, which is called *dicta*. It means this is not binding on anybody. This is not a statement of the law. This is just us expressing our personal opinions about something.
>
> In Parts B and C of their opinion in *Peevy*, the California Supreme Court expressed its displeasure with the tactic of questioning outside *Miranda* in order to obtain an impeachment statement. They made it very clear they don't approve of it. They thought in their opinion that it was illegal, they said. That's the word that they used, though they were unable to cite to a U.S. Supreme Court case, since there isn't one, saying that it's illegal. The U.S. Supreme Court has consistently said this is an evidentiary rule that will limit use of the statement in court. They have never said it is illegal to question without *Miranda* compliance. Nor, I will bet my money, will they ever. But the California Supreme Court in its commentary, in its *dicta* said, this is illegal, it's improper.
>
> So before you decide whether or not you want to go outside *Miranda* and take an impeachment statement that will be admissible if it's otherwise voluntary, you may want to do what we always caution you to do, seek advice from your departmental legal adviser, local prosecutor, city attorney or county counsel, whoever you turn to for advice. I commend you to their advice. As to the admissibility of the evidence, a statement deliberately taken outside *Miranda*, if it's otherwise voluntary, is admissible for impeachment, *People v. Peevy*. You're up-to-date as of now.

distributed by the Orange County District Attorney's Office was positively gleeful in emphasizing the admissibility of an "outside *Miranda*" statement, and in downplaying the Court's admonition: "If you've caught the fish, don't fret about losing the bait."[6]

Although *Peevy* had little impact on the law enforcement community, there has been some change in police training prompted by *Dickerson* and by *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 1999), *cert denied*, 530 U.S. 1261 (2000), which established civil rights liability for officers who violate the rights protected by *Miranda*. A number of law enforcement agencies in California have ceased training officers to question "outside *Miranda*." *See* Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. LAW REV. at 1135-54 (reviewing police training materials produced in California after *Peevy*, *CACJ v. Butts*, and *Dickerson*). Whether this cessation will alter longstanding police practices is unclear; officers are not likely to stop what they were told to do for many years unless there is consistent reinforcement from the courts and from supervisors within the law enforcement agencies. *See id*., 99 MICH. LAW REV. at 1155-56.[7]

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Videotape: Case Law Updates: Questioning "Outside *Miranda*" for Impeachment (Golden West College) (POST July 9, 1998) (quoted in Weisselberg, *In the Stationhouse After* Dickerson, *supra,* 99 MICH. LAW REV. at 1137-38).

[6] Orange County District Attorney, *Impeachment With Post-Invocation Statements*, GOOD TO KNOW . . . (May 12, 1998), at 1-2 (quoted in Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. LAW REV. at 1144).

[7] Moreover, to the extent that any police departments stopped training officers to question "outside *Miranda*" due to the prospect of civil rights liability, that incentive may be undermined by *Chavez v. Martinez*, No. 01-1444 (argued Dec. 4, 2002). The Court in *Chavez* will likely decide whether

If this Court permits Mr. Neal's statements to be admitted into evidence, officers will be trained that it is permissible to badger a suspect and then later claim that he or she has initiated contact with police. As the U.S. Supreme Court recognizes, "A ruling admitting evidence in a criminal trial . . . has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). The strong language in *Peevy* did not lead the Tulare County Sheriff's Department to retrain Detective Martin. If this Court expects law enforcement supervisors and line officers to pay attention to its rulings, this Court must couple its language with a meaningful sanction. Otherwise, police will continue to violate *Miranda* and *Edwards*, and this Court should not deceive itself into believing otherwise.

### D. This Court Should Revisit and Limit *People v. Bradford* and *People v. Storm.*

Two prior decisions from this Court, *People v. Bradford* and *People v. Storm*, 28 Cal. 4th 1007 (2002), are relevant to the analysis of the *Edwards* violation. These two decisions should be re-examined and limited, and the need to do so is particularly apparent from the U.S. Supreme Court's grant of certiorari on April 21, 2003 in *United States v. Patane*, No. 02-1183. Certiorari was granted to reconsider the holding in *Oregon v. Elstad*,

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officers who coerce a statement from a suspect, without administering *Miranda* warnings, are entitled to qualified immunity in a civil rights action, if the resulting statement is not introduced in a criminal trial. For discussions of civil rights liability and officers' incentives to comply with *Miranda*, *see* Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337, 1354-57 (2003) and Weisselberg, *In the Stationhouse After* Dickerson, 99 MICH. LAW REV. at 1154-62.

470 U.S. 298 (1985) in light of *Dickerson*.[8] *Bradford* and *Storm* depend upon *Elstad*, and are thus also in question.

*Bradford* addressed the admissibility of several statements made by the defendant after he asserted his right to counsel. Relying upon *Elstad*, this Court concluded that "if the statement made after an *Edwards* violation is voluntary, 'the admissibility of any subsequent statement should turn in these circumstances solely upon whether it is knowingly and voluntarily made.'" *Bradford*, 14 Cal. 4th at 1040 (quoting *Elstad*, 470 U.S. at 309). *Elstad*, however, dealt only with whether a statement was admissible when a suspect was initially questioned without having been given *Miranda* warnings. *Elstad* did not involve questioning over an invocation.

In *amicus*'s view, this Court went astray in *Bradford* in at least two respects. First, the Court should not have applied *Elstad* when *Miranda* is violated by questioning over a suspect's assertion of rights. As the New Jersey Supreme Court and other courts recognize, there is "a qualitative difference between a failure to administer *Miranda* warnings in the first place, and a failure to honor, after they have been asserted, the constitutional rights that those warnings are designed to secure." *State v. Hartley*, 511 A.2d 80, 90 (N.J. 1986)[9]; *see also Storm*, 28 Cal. 4th at 1045-46 (Chin, J., joined by George, C.J., dissenting) (calling *Hartley* a "well- reasoned

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[8] The question presented in *Patane* is: "Whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona*, 384 U.S. 436 (1966), requires the suppression of physical evidence derived from the suspect's unwarned but voluntary statement?" Petition for a Writ of Certiorari, *United States v. Patane*, No. 02-1183, at I (filed Feb. 12, 2003).

[9] New Jersey has subsequently permitted the *impeachment* use of a statement taken in violation of *Miranda*. *See State v. Burris*, 679 A. 2d 121 (N.J. 1996). In *Hartley*—as here—the statements were admitted in the prosecution's case-in-chief. *See Hartley*, 511 A.2d at 81.

opinion," and noting the difference between the failure to give warnings and questioning over an invocation); *State v. Crump*, 834 S.W. 2d 265, 270 (Tenn.) (following *Hartley*), *cert. denied*, 506 U.S. 905 (1992). This surely makes sense. A suspect who is not told his *Miranda* rights is not properly informed. A suspect who is told his rights, who asserts his rights, and who is questioned in the face of his assertion is sent the unmistakable message that the officers are prepared to disobey the law to obtain a statement.

Second, the *Bradford* Court should have examined the impact of questioning over an invocation of the right to *counsel*, and the reasons why administering a fresh set of *Miranda* warnings does not dispel the compelling pressures inherent in such an interrogation. The assertion of the right to counsel is even more powerful than the assertion of the right to remain silent; a suspect who invokes only the right to remain silent may be reapproached later, provided that officers scrupulously honor the initial invocation, cut off questioning and later administer a fresh set of warnings. *See Mosley*, 423 U.S. at 104-07. *Edwards*, of course, completely bars officers from reapproaching a suspect who has invoked the right to counsel. *Edwards*, 451 U.S. at 484-85. And *Roberson* holds that giving fresh sets of *Miranda* warnings will not dispel the compulsion inherent in questioning a suspect who has already asked for counsel, even when questioning is about another offense. *Roberson*, 486 U.S. at 686-87. The reason for the greater degree of protection is that a suspect who has asked for a lawyer has declared that he is simply unable to deal with police alone. The Court in *Bradford* should have specifically addressed the difference between the assertion of the right to counsel and the right to remain silent, as well as *Roberson*'s holding about readministering *Miranda* warnings.

*Bradford* was followed by *Storm*. *Storm* is distinguishable on the facts from the case at bench, though it reinforced some of the unfortunate

legal conclusions of *Bradford*.

In *Storm*, the Court found that the protections of *Edwards* dissipate once a suspect is released from custody. Because the suspect is no longer subject to the compelling pressures that are inherent in a custodial interrogation, officers may recontact the accused and need not administer a fresh set of *Miranda* warnings. *See Storm*, 28 Cal. 4th at 1024-27. Though the Court several times emphasized the narrow nature of the holding (*see id*. at 1024-25, 1038), the Court also revisited *Bradford*. The opinion restates *Bradford*'s focus on voluntariness as the sole measure of the admissibility of a statement that follows an *Edwards* violation. *See id*. at 1033. *Storm* also holds that *Elstad* remains good law after *Dickerson* (*see Storm*, 28 Cal. 4th at 1033 n.11), the question presented in *Patane*.

To the extent that *Storm* is relevant to this case (and it is nowhere close to the facts of Mr. Neal's interrogation), this Court may wish to revisit and limit the reach of *Storm.* If *Storm* truly adopts the view that voluntariness is the sole measure of the admissibility of a statement after an *Edwards* violation, that holding is directly counter to *Dickerson*. Further, because the *Storm* Court addressed the admissibility of an *out-of-custody* statement obtained after an *Edwards* violation, it had no occasion to consider the continued coercive impact *of continued custody* upon a suspect who has been questioned over the assertion of the right to counsel, which was instead at issue in *Roberson*. Finally, because the U.S. Supreme Court is considering whether *Elstad* remains good law—and *Elstad* provides the foundation for *Bradford* and *Storm*—this Court should revisit and limit both of those decisions.

## II. MR. NEAL DID NOT "INITIATE" CONTACT WITH OFFICERS AND HIS *MIRANDA* "WAIVER" WAS NOT VOLUNTARY, KNOWING OR INTELLIGENT.

*Amicus curiae* agrees with petitioner that his April 5th statements were inadmissible in court because of the *Miranda* and Fifth Amendment violations. [*See* AOB at 36-40] Due to *amicus*'s special concern about the practice of questioning "outside *Miranda*, we write separately to emphasize the impact of this interrogation practice upon Mr. Neal. Mr. Neal's "waiver" was neither knowing nor intelligent because Mr. Neal could not believe that he really did have a right to counsel. Further, the "initiation" and waiver were not voluntary because they were the product of the detective's earlier badgering. This portion of the brief addresses these Fifth Amendment concerns. Part III of the brief, *infra*, explains that Mr. Neal's April 5th statements were involuntary under traditional due process standards.

Prior to police questioning, a suspect must first understand and voluntarily waive his Fifth Amendment rights. *See Miranda*, 384 U.S. at 444. To be knowing and intelligent, the waiver must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). To be voluntary, the waiver must be "the product of a free and deliberate choice, rather than intimidation, coercion or deception." *Id*. In conducting these two distinct inquiries, a court is to apply a totality of the circumstances test, examining both the details of the interrogation and the characteristics of the accused. *See id*. at 421-22; *Fare v. Michael C.*, 442 U.S. 707, 725 (1979). The government bears the burden of proving that the waiver was voluntary, knowing and intelligent. *See Colorado v. Connelly*, 479 U.S. 157, 168 (1986). And, of course, because Mr. Neal asserted his Fifth Amendment privilege, officers could only conduct a further interrogation if Mr. Neal voluntarily initiated contact with police. *See Edwards*, 451 U.S. at 484-85. On appeal, this Court must conduct an independent review of the undisputed facts and the trial court's legal

conclusions to determine whether the statements were illegally obtained. *See People v. Boyer*, 48 Cal. 3d 247, 263 (1989), *cert. denied*, 493 U.S. 975 (1989), *partially overruled on othr grnds*, *People v. Stansbury*, 9 Cal. 4th 824, 830 (1995).

**A. The "Waiver" Was Neither Knowing Nor Intelligent.**

Due to the repeated and deliberate violations of his right to counsel, Mr. Neal was not fully aware of the nature of his *Miranda* rights when he purportedly waived these rights on April 5th. During the initial interrogation on April 4th, Detective Martin told Mr. Neal that he had a right to counsel during questioning. [1 SCT 92] Mr. Neal then asked for counsel, and the detective deliberately ignored all nine unequivocal requests. Mr. Neal knew that the law guaranteed him a lawyer right then and there and he pointedly asked, "Did you hear me, that's my right and that's what I want to do," and "Did you hear me, I want to talk to my lawyer or I want to go." [1 SCT 112] By continuing the interrogation despite these responses, Detective Martin made clear his intention to deny Mr. Neal access to a lawyer. *Mr. Neal knew that the law entitled him to a lawyer, but that Detective Martin would not let him get one.*

Because Detective Martin made clear that Mr. Neal had no real right to counsel on April 4th, Mr. Neal had no reason to believe that he had suddenly acquired that right on April 5th. The warnings given on April 5th were the same as those given the day before.[10] Certainly nothing in the

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[10] On April 4, Detective Martin read the rights this way:

> Det. Martin: And you have the right to talk to an attorney and request that he be present while I question you. Do you understand that?

Detective's rote re-reading of the *Miranda* warnings conveyed a change of heart or intention on the part of the detective. Nothing in the form language of the warnings allowed Mr. Neal to believe that this time the words really did have meaning. The detective did not refer to Mr. Neal's previous requests for counsel and these were the same warnings that held false promises the day before. The *Roberson* Court was surely correct in holding that the mere readministration of *Miranda* warnings has no real meaning for a suspect who has already been deprived the right to counsel and who remains in the hands of the police. *See Roberson*, 486 U.S. at 686; *see also Collazo*, 940 F.2d at

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| | |
|---|---|
| Kenneth Neal: | Uhm-huh. |
| Det. Martin: | And if you cannot pay for an attorney if you want one, one can be appointed to represent you at no charge. Do you understand that? |

[1 SCT 92]

On April 5, Detective Martin gave the same warnings almost verbatim, without mentioning Mr. Neal's previous requests for counsel:

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|---|---|
| Det. Martin: | And you, you have the right to talk to an attorney and have him present while I talk to you. You understand that? |
| Kenneth Neal: | Yeah. |
| Det. Martin: | And if you can't afford one, one will be appointed to represent you. |
| Kenneth Neal: | Mmm mmm. |
| Det. Martin: | You understand that? |

[1 SCT 176-77]

421 ("Because we conclude that Officer Destro induced Collazo's purported waiver by initially insisting that Collazo cooperate, we believe *Roberson*'s warning is highly pertinent.")

Further, Detective Martin deliberately deceived Mr. Neal about the scope of his right to counsel. Responding to one of Mr. Neal's requests for counsel, Detective Martin replied, "Do you have an attorney?," indicating that it was Mr. Neal's obligation to find one. [1 SCT 114] Unlike mere failures to provide information extrinsic to the warnings (such as information about the subject of the interrogation or events occuring outside of the interrogation room), this question deliberately misled Mr. Neal about the dimensions of the *Miranda* rights themselves. It is, of course, the *State's* obligation to provide an attorney to an indigent suspect who wants one; it is not the obligation of the counsel-less accused to try to retain a lawyer in the middle of a coercive interrogation. Mr. Neal was also told that he did not need a lawyer if he was innocent. [1 SCT 114] These police tactics are wholly unacceptable. *See Collazo*, 940 F.2d at 423 (invalidating waiver because, among other things, officer told the defendant that he might be worse off with counsel); *Jackson v. Litscher*, 194 F. Supp. 2d 849, 863 (E.D. Wis 2002) (invalidating waiver due to false statement about when counsel could be obtained).

On the morning of April 5th, when Detective Martin told Mr. Neal that the right to remain silent and the right to an attorney, Mr. Neal could only view these warning as words without meaning. He may have heard the detective's words, but he could not understand the full dimensions of his rights. By previously ignoring the right to counsel and deceiving Mr. Neal about the availability and utility of counsel, Detective Martin succeeded in misleading Mr. Neal about the protections afforded by *Miranda*. The alleged waiver was neither knowing nor intelligent. Just as in *Collazo*, the officer's

"readvice of rights" and purported waiver "was an empty ceremony." *Collazo*, 940 F.2d at 423. Mr. Neal could not have had a "full awareness" of his right to counsel or of the consequences of abandoning it. *Moran*, 475 U.S. 421.

### B. Mr. Neal Did Not Voluntarily "Initiate" Contact With Officers and the "Waiver" Was Not Voluntary.

Mr. Neal did not voluntarily "initiate" the contact with Detective Martin, nor was any *Miranda* waiver voluntary. Admittedly, Mr. Neal's words on the morning of April 5th—stripped of all context—would suggest that he sought to engage the police in conversation. However, this Court must look at all of the circumstances to determine whether Mr. Neal's actions were simply a "response" or "delayed product" of the previous interrogation, and not the result of the his free will. *See, e.g. Boyer*, 48 Cal. 3d at 275 (looking at overall interaction between suspect and police and refusing to characterize encounter as "initiation"); *People v. McClary*, 20 Cal. 3d 218, 226-30 (1977)[11] (examining all of the facts to assess whether second interrogation was voluntarily initiated by the accused); *Collazo*, 940 F.2d at 423 (holding that although Collazo's words "could normally be construed as 'initiation' . . . an analysis of the substance of the entire transaction . . . demonstrates that Collazo did not 'intitiate' further conversation"); *United States v. Gomez*, 927 F.2d 1530, 1539 (11th Cir. 1991) (considering *Edwards* violation in finding that suspect did not voluntarily reinitiate contact with officers); *Abadie*, 612 So. 2d at 15-16 (examining overall context and concluding that there was no "initiation.") This Court must "independently determine from the undisputed facts" whether the statements were illegally obtained. *Boyer*, 48 Cal. 3d at 263.

Mr. Neal's actions in initiating conversation are best understood as the delayed response of the earlier illegal interrogation. The combined coercive effects of Detective Martin's improper tactics and the harsh custodial conditions on the poorly educated, 18-year-old compelled him to

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[11] *Partially overruled on othr grnds*, *People v. Cahill*, 5 Cal. 4th 478, 509 n.17 (1993).

respond to the specific threats and promises of Detective Martin. In the "bus driver speech," Detective Martin put it to Mr. Neal that Neal needed to make a statement before going to court. At the same time, the officer made clear that Mr. Neal could not have counsel's guiding hand in making that statement. The record plainly shows that Mr. Neal was persuaded to talk because of the detective's threats and promises. When Detective Martin took the "waiver" on April 5th, Mr. Neal said that "you got to tell them that I helped you out so they'd help me out when I go to court." Detective Martin agreed, stating, "That's no problem and that's on tape." [1 SCT 117] Yet, as *Miranda* plainly holds, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda,* 384 U.S. at 476.

The officer's outrageous conduct had a measurable effect upon Mr. Neal, and "[t]here was 'no break in the stream of events … sufficient to insulate the statement from the effect of all that went before.'" *Collazo,* 940 F.2d at 423 (quoting *Clewis v. Texis*, 386 U.S. 707, 710 (1967)). There was no break in custody between interrogations, only an overnight incarceration under coercive conditions. Rather than mitigating the compelling effects of the interrogation, "the fact that after the first interrogation session defendant had been booked and put in a jail cell could only have increased his feelings of helplessness in that 'strictest of custodial conditions.'" *People v. Montano*, 226 Cal.App.3d 914, 939 (1st Dist. 1991) (citation omitted); *see also Miranda,* 384 U.S. at 476 ("the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights.")

The present circumstances are far removed from the exception envisioned in *Edwards*. Mr. Neal's initiation of contact was not an "unbadgered" desire for a generalized discussion about the investigation. To

the contrary, his effort to cooperate was "'prompted by continued interrogation and efforts to convince the defendant to communicate with the officers' [and] cannot be considered a voluntary, self-initiated conversation." *McClary*, 20 Cal. 3d at 226-27 (quoting *People v. Randall*, 1 Cal. 3d 948, 956 n.7 (1970)). Just as in *Collazo*, Mr. Neal's "words and actions in calling back the officers and in 'waiving' his rights were nothing less than the *delayed product* of [the officer's] admonitory adventure . . ., and hence were 'initiated' by the police," not by Mr. Neal. *Collazo*, 940 F.2d at 423. To fit these circumstances under the *Edwards* exception would render *Edwards* meaningless.

The facts of the interrogations are not in dispute. It is clear who said what to whom. Looking at the undisputed facts and independently reviewing the trial judge's conclusions, as this Court is required to do, it must be held that Mr. Neal did not voluntarily initiate conduct with police, and that he did not knowingly, voluntarily or intelligently waive his *Miranda* rights. The trial court therefore erred when it ruled that Mr. Neal's April 5 statements were admissible in court. The statements were admitted in violation of *Miranda*, *Edwards* and the Fifth Amendment.

## III. MR. NEAL'S APRIL 5TH STATEMENTS WERE INVOLUNTARY.

In addition to the Fifth Amendment violations, Mr. Neal's April 5th statements were involuntary and were admitted in violation of the Fourteenth Amendment's Due Process Clause. The Appellant's Opening Brief explains that officers locked up a poorly-educated young man, threatened him, promised him leniency, deceived him about the evidence, kept him without food or access to a toilet, and questioned him over his many requests for counsel. [*See* AOB at 23-36] *Amicus* agrees with Mr. Neal's argument, but will focus on the impact of Detective Martin's deliberate decision to deny Mr. Neal counsel. In finding that Mr. Neal's statements were voluntary, the lower courts largely disregarded the detective's deliberate violations of *Edwards*. On review, this Court should conclude that Mr. Neal's statements were involuntary, and make clear that violations of the right to counsel are substantial factors in the voluntariness test. That will give police at least some incentive to comply with *Miranda* and *Edwards*.

Under both federal and state law, courts apply a totality of the circumstances test to determine whether a statement was voluntary, weighing the details of the interrogation and police coercion, and the characteristics of the accused. *See People v. Boyette*, 29 Cal. 4th 381, 411 (2002). The question is whether the suspect's decision to talk was not free because his will was overborne by the officer's conduct. *See id*. The burden is on the prosecution to prove that any statement was voluntary. *See Bradford*, 14 Cal. 4th at 1033. This Court must independently review the trial court's voluntariness decision. *See id*. Voluntariness presents a uniquely legal question, "turning as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by

inquisitorial means as on whether the defendant's will was in fact overborne." *Miller v. Fenton*, 474 U.S. 104, 116 (1985).

Detective Martin employed a variety of coercive tactics during the interrogation. The first, of course, was the continued questioning of Mr. Neal after his repeated and unequivocal requests for counsel. The U.S. Supreme Court—as well as this and other courts—have ruled that violations of *Miranda* are important to the voluntariness inquiry. *See*, *e.g. Davis v. North Carolina*, 384 U.S. 737, 740 (1966) (failure to administer Miranda warnings "is a significant factor" in voluntariness analysis); *McClary*, 20 Cal. 3d at 229 (failing to honor repeated requests for the assistance of counsel is a significant fact in the voluntariness analysis); *People v. Bey*, 21 Cal. App. 4th 1623, 1626-28 (2d Dist. 1993) (deliberate questioning in violation of *Miranda* coupled with legal misrepresentation led to "coerced and involuntary" statement); *Montano*, 226 Cal. App. 3d at 935-40 (continued questioning over suspect's repeated requests to end interrogation led to an involuntary statement); *Henry v. Kernan*, 197 F.3d 1021, 1027-29 (9th Cir. 1999) (deliberate violations of *Miranda* were some of the "slippery and illegal tactics" that overcame the defendant's will, which rendered the statement involuntary), *cert. denied*, 528 U.S. 1198 (2000); *Collazo*, 940 F.2d at 416-20 (discussing *Edwards* violations and other tactics and concluding that statement was involuntary). Intentional *Miranda* violations warrant serious consideration because they "exacerbate whatever compulsion to speak the suspect may be feeling" and demean the role of counsel. *See Collazo*, 940 F.2d at 418 (citing *Roberson*, 486 U.S. at 686). They are also incompatible with our system of justice.

Detective Martin's deliberate and illegal tactics had their intended effect. The violations here were neither accidental failures to administer the warnings, nor hypertechnical omissions of some portion of them, nor even

brief comments after an invocation of the right to remain silent. The misconduct here was deliberately continuing the interrogation over Mr. Neal's nine efforts to convey "his inability to cope with the pressures of custodial interrogation by requesting counsel." *Roberson*, 486 U.S. at 686. Each instance reinforced the power differential between the detective and the accused, intensifying the coercive atmosphere of the interrogation. Mr. Neal *knew* that Detective Martin would prevent him from talking to a lawyer. Further, Detective Martin deceived Mr. Neal as to the protections afforded under *Miranda*, suggesting that it was Mr. Neal's obligation to find a lawyer. [1 SCT 114] This intentional misrepresentation further increased the pressure. *See Jackson*, 194 F. Supp. 2d at 863.

These violations must be considered very significant factors in the voluntariness inquiry. It is true that a "violation 'unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will'" might not render a resulting statement involuntary. *Bradford*, 14 Cal. 4th at 1040 (quoting *Elstad*, 470 U.S. at 309); *Storm*, 28 Cal. 4th at 1033 (quoting *Bradford* and *Elstad*). However, where coercive tactics are joined with *Miranda* violations, this Court has found that resulting statements are involuntary. *See, e.g.*, *McClary*, 20 Cal. 3d at 228-30 (*Miranda* violations coupled with promises of leniency and threats of punishment). In addition to deliberately continuing the interrogation in violation of *Miranda*, Detective Martin promised leniency and threatened severe punishment. In the "bus driver speech," Martin employed these transparently coercive tactics. Framing his metaphor to include only himself ("the bus driver") and the powerless accused ("the passenger back there"), Detective Martin portrayed Mr. Neal's situation as urgent ("this is your one chance") and as lacking other options ("I'm the one that you need to tell hey I want to get off this bus"). [1 SCT 117] Then Detective Martin promised that

if Mr. Neal would "lay it on the table" Martin would "make it as best as I can for you," and warned, "if you don't try to cooperate, the systems gonna stick it to you as hard is it can." [1 SCT 117] He reinforced his point and made it clear: "I mean there's what's called justifiable homicide, there's manslaughter, there's a whole lot of other things that can help you out, but if you can't give no reason they're just gonna hit you as hard as they can" with "a first degree murder charge." [1 SCT 117]

Detective Martin's carrot-and-nightstick approach cannot not be fairly construed as "a dialogue or debate between suspect and police in which the police commented on the realities of [Mr. Neal's] position and the courses of conduct open" to him." *People v. Andersen*, 101 Cal. App. 3d 563, 583 (2d Dist. 1980). The "system" did not and could not put Mr. Neal to a choice of cooperating without the help of counsel and receiving a charge of less than first-degree murder, or persisting in remaining silent at the cost of being charged with first-degree murder. This calculated characterization of a judicial system eager to condition punishment on cooperation was false, and pushed the detective's comments outside the range of mere commentary on "that which flows naturally from a truthful and honest course of conduct." *People v. Vasila*, 38 Cal. App. 4th 865, 874 (1st Dist. 1995) (quoting *People v. Hill*, 66 Cal. 2d 536, 549 (1967)). Detective Martin's comments are properly seen as containing implied threats and promises, similar to those that troubled this Court when police threatened to inform the judge that the defendant lied (*People v. Brommel*, 56 Cal. 2d 629, 633 (1961)[12]), and when police implied that the defendant might be charged only as an accessory if she changed her story. *See McClary*, 20 Cal. 3d at 229. Despite the trial

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[12] *Partially overruled on othr grnds*, *People v. Cahill*, 5 Cal. 4th 478, 509 n.17 (1993).

court's ultimate legal conclusions, it is clear from the record that Mr. Neal talked in reliance upon these threats and promises. As he gave his purported *Miranda* waiver, he specifically instructed the detective that "you got to tell them that I helped you out so they'd help me out when I go to court." Detective Martin sealed the bargain, saying, "That's no problem and that's on tape." [1 SCT 117]

This Court has demonstrated little tolerance for improper threats and promises. "[W]here a person in authority makes an express or clearly implied promise of leniency or advantage for the accused which is the motivating cause of the decision to confess, the confession is involuntary and inadmissible as a matter of law." *People v. Boyde*, 46 Cal. 3d 212, 238 (1988) (citing *Brommel*, 56 Cal. 2d at 632); *see also People v. Cahill*, 22 Cal. App. 4th 296, 311 (3d Dist. 1994) (recognizing that "threats of harsh penalty often contain an implicit promise of more lenient treatment.") The undisputed facts establish that Detective Martin's threats and promises were indeed the motivating cause of Mr. Neal's statements, and the statements must therefore be deemed involuntary. This conclusion is especially compelling in light of the other coercive aspects of the interrogation. *See* AOB at 23-36.

There is no indication that the trial judge in this case gave the *Miranda* violations significant weight in the voluntariness analysis and the trial court made no detailed factual findings. Instead of discussing the impact of the violations upon Mr. Neal, the trial judge simply stated his legal conclusions that the April 5th statements were attenuated from the April 4th misconduct, and that the statements were not the product of any coercion. [*See* RT 258-59] The judge did not address, for example, Mr. Neal's insistence that the full bargain be recorded ("you got to tell them that I helped you out so they'd help me out when I go to court"), nor did the trial court

explain *how* this could have been anything other than the product of the *Edwards* violations and the "bus driver speech." On appeal, the court of appeal reprinted the trial court's legal conclusions and summarily affirmed them. *See Neal*, 2002 Cal. App. Unpub. LEXIS 2414 at *46-*53.

The trial judge's conclusions must be independently reviewed by this Court and, of course, the voluntariness determination is primarily one of law. We submit that the detective's illegal tactics and all the circumstances of the interrogations overcame Mr. Neal's free will and the detective's tactics were inconsistent with our system of justice. As part of its independent review, this Court should emphasize that deliberate police misconduct is a significant factor in the voluntariness analysis. That message should be sent loud and clear to police and to the lower courts. If that message is not sent, and if this Court affirms on this record, officers will continue to believe that extreme conduct will always be tolerated and that their actions will never be subjected to serious scrutiny by the courts.

## CONCLUSION

*Amicus curiae*, California Attorneys for Criminal Justice, respectfully asks the Court to reverse the decision below.

Respectfully submitted,

John T. Philipsborn
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April 25, 2003

By_____
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## CERTIFICATE OF COUNSEL

Pursuant to California Rule of Court 14(c)(1), the undersigned certifies that this brief contains 11,930 words, according to the WordPerfect word count program. The word count includes footnotes but excludes the cover, table of contents, table of authorities, proof of service and this certificate.

April 25, 2003 _____

John T. Philipsborn

## PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

I am employed in the county of Alameda, State of California. I am over the age of 18 and not a party to the within action; my business address is Center for Clinical Education, School of Law (Boalt Hall), Berkeley, CA 94720-7200. On April 25, 2003, I served the foregoing document described as BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, AS *AMICUS CURIAE*, SUPPORTING PETITIONER, in *People v. Neal* (Case No. S106440) on the interested parties in this action by placing a true copy thereof in sealed envelopes addressed as follows:

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Each envelope was then deposited in the United States mail by me at Berkeley, California, on April 25, 2003, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 25, 2003.

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