No. 04-17237

Before the Honorable Alex Kozinski, M. Margaret McKeown, CJJ, and Michael R. Hogan, DJ
Panel Opinion filed November 8, 2006

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON,	)	
	)	
Petitioner-Appellant,	)	D.C. NO. Civ. S 00-002494 WBS
	)	
v.	)	
	)	
C.A. TERHUNE, Warden,	)	
	)	
Respondent-Appellee.	)	
_____	)	

On Appeal from the United States District Court

for the Eastern District of California

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS AND THE FEDERAL AND COMMUNITY DEFENDERS IN THE NINTH CIRCUIT IN SUPPORT OF MR. ANDERSON'S PETITION FOR REHEARING

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, counsel states:

1. The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional Bar Association for the criminal defense bar, with over ten thousand members. The American Bar Association recognizes the NACDL as one of its affiliate organizations and awards it full representation in its House of Delegates.

2. The NACDL is not a publicly held company; does not have any parent corporation; does not issue or have any stock; and does not have any financial interest in the outcome of this litigation.

Dated: December 21, 2006

Respectfully submitted,

_____

CHARLES D. WEISSELBERG

No. 04-17237

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEROME ALVIN ANDERSON, Petitioner-Appellant, v. C.A. TERHUNE, Warden, Respondent-Appellee.	D.C. NO. Civ. S 00-002494 WBS **BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS AND THE FEDERAL AND COMMUNITY DEFENDERS IN THE NINTH CIRCUIT IN SUPPORT OF MR. ANDERSON'S PETITION FOR REHEARING**

I. INTERESTS OF *AMICI CURIAE* AND AUTHORITY TO FILE

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders, and law professors. Among NACDL's objectives are to ensure that a citizen’s invocation of his privilege against self-incrimination is scrupulously honored.

The Ninth Circuit Federal and Community Public Defenders represent indigent litigants in federal court in the Ninth Circuit pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. These organizations have a unique perspective to offer the Court concerning their clients’ invocation of the privilege against self incrimination as that issue is litigated in both habeas and

direct appeal contexts.[1]

II. SUMMARY OF ARGUMENT

During custodial interrogation, Mr. Anderson repeatedly said that he wanted to remain silent, a right guaranteed to him under *Miranda v. Arizona*, 384 U.S. 436 (1966). He even said, “I plead the fifth.” Rather than honor any of his invocations, the interrogator deftly shifted among topics and challenged Mr. Anderson's express invocation of the Fifth Amendment. Predictably, these tactics succeeded.

The petition for rehearing en banc should be granted. *First*, as set forth in Mr. Anderson's petition and Judge McKeown's dissent, the state court's decision is contrary to and an unreasonable application of several controlling decisions of the United States Supreme Court. *Second*, the officer's tactic was a textbook example of questioning “outside *Miranda*,” a practice that flourished in California at the time Mr. Anderson was interrogated. *Third*, the panel’s decision, written by a district judge sitting by designation, will encourage further sharp practices, especially when officers seek “implied” rather than “express” waivers of Fifth Amendment rights; thus, the case is exceptionally important.

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[1] All parties have consented to the filing of this brief *amici curiae*. *See* Fed. R. App. P. 29(a).

III. REASONS TO GRANT REHEARING EN BANC

A. The state court's decision is contrary to and unreasonably applies Supreme Court precedent.

Amici agree with Mr. Anderson and Judge McKeown that the state court's decision is contrary to, and unreasonably applies, four Supreme Court opinions, in addition to *Miranda* itself: (a) *Davis v. United States*, 512 U.S. 452, 459 (1994) (whether a suspect has invoked his rights is "an objective inquiry," assessed from the standpoint of "a reasonable officer"); (b) *Michigan v. Mosley*, 423 U.S. 96, 102, 104 (1975) (request to remain silent must be "scrupulously honored," and "[t]o permit the continuation of custodial questioning after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the [suspect's] will"); (c) *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (finding a limited assertion of *Miranda* rights, but only where the suspect's own words provided those limits); and (d) *Smith v. Illinois*, 469 U.S. 91, 100 (1984) ("postrequest responses to further interrogation" cannot cast doubt on initial invocation). None of these cases was cited by the state appellate court, and only *Davis* was addressed by the panel majority in this Court.

Without repeating Petitioner's arguments, *amici* underscore one point. In the context of a custodial interrogation, no

minimally trained police officer could think of the statement, “I plead the fifth” as anything other than an unequivocal and unconditional assertion of the right to remain silent.

Officers in California receive basic training at academies certified by “POST,” the California Commission on Peace Officer Standards and Training. The POST-approved curriculum includes workbooks organized around 41 “learning domains” or subjects.[2] POST's workbooks emphasize the connection between the Fifth Amendment privilege against self-incrimination and *Miranda*'s procedures. See Basic Course Workbook Series, Learning Domain 15: Laws of Arrest (2001) (“LD-15”) at 1-6 (quoting Fifth Amendment and stating, “Peace officers need to understand the relationship between a person's right against self-incrimination and the *Miranda* decision.”)[3]

Officers are also taught about invocations and waivers of *Miranda* rights. POST’s basic training materials acknowledge that “The right to remain silent may be invoked by any words or conduct which reflect an unwillingness to discuss the case.” *Id*. at 5-12. In this case, although Mr. Anderson expressly asserted

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[2] See Basic Course Instructional System, available at: http://www.post.ca.gov/training/store/default.asp (last visited Dec. 12, 2006).

[3] See also *id*. at 5-3 (describing *Miranda*'s warnings as relieving inherently compelling pressures, thus protecting the Fifth Amendment privilege); *id*., Learning Domain 30: Preliminary Investigation (2001), at 3-13 (linking *Miranda* to Fifth Amendment privilege against self-incrimination).

his Fifth Amendment privilege, the state appellate court found that his assertion was limited, meaning that he was supposedly willing to speak about some topics but not others. ER 16. Put another way, Mr. Anderson purportedly waived his *Miranda* rights on the condition he not be asked about topics he did not wish to discuss. Yet POST's basic training materials define a conditional waiver as occurring when a suspect "acknowledges understanding the warnings and is willing to go forward, but places a limitation/qualification on answering questions." LD-15 at 5-10. Consistent with *Barrett*, POST's training materials provide that any limitation or qualification must be articulated by the suspect, rather than be inferred by the officer.

A suspect's invocation is assessed objectively, from the standpoint of a reasonable officer. *Davis*, 512 U.S. at 458-59; see also *United States v. Younger*, 398 F.3d 1179, 1187 (9th Cir. 2005). While he was interrogated in custody, Mr. Anderson said, without limitation or qualification, "I plead the fifth." No reasonable officer who ever pinned on a badge or strapped on a gun could mistake the meaning of that phrase.

B. The officer's conduct in this case should be considered in the context of widespread training of police in California to question suspects after they have invoked their Fifth Amendment rights.

Amici agree with all of the points expressed in Judge McKeown's dissent, save one: regrettably, in our experience, it

is not "extraordinary to see such flagrant disregard of the right to remain silent." Slip op. at 18400.

Mr. Anderson was interrogated in July 1997. At the time, POST, the State Attorney General's Office, various District Attorneys' offices, police departments and other agencies distributed training materials that encouraged officers to continue to question suspects who invoked their Fifth Amendment rights. Police were told that it is permissible (and tactically advantageous) to ignore an invocation to take advantage of the impeachment exception to Miranda's exclusionary rule, and to obtain the fruits of an otherwise inadmissible statement. This practice, widely known as questioning "outside *Miranda*," has been the focus of decisions of this Court and the California Supreme Court,[4] and has been documented by researchers.[5] In 2004, the United States Supreme Court took note of this practice and quoted

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[4] See, e.g., *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1049-50 (9th Cir. 2000) (officers trained to question "outside *Miranda*" were not entitled to qualified immunity in civil rights action); *People v. Peevy*, 17 Cal. 4th 1184, 1202-05 (1998) (statement taken in deliberate violation of *Miranda*, while admissible for impeachment, results from "illegal" practice and "police misconduct"); *People v. Neal*, 31 Cal. 4th 63, 78-85 (2003) (statement involuntary where an officer deliberately ignored repeated invocations, as he was trained to do).

[5] See, e.g., Richard A. Leo & Welsh S. White, *Adapting to* Miranda*: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 461-63 (1999); Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 132-39 (1998); Charles D. Weisselberg, *In the Stationhouse After* Dickerson, 99 Mich. L. Rev. 1121, 1123-54 (2001).

from an advanced training videotape distributed by POST in 1996 (one year before the interrogation in this case). *See Missouri v. Seibert*, 542 U.S. 600, 611 n.2 (2004) (plurality opinion).

The training videotape quoted in *Seibert* is particularly revealing:

> Today we're going to talk again about one of our favorite controversial topics on this program and that is the issue of continuing to question a suspect after they've invoked their *Miranda* rights. . . ..
>
> [Since 1988], we . . . on this program, or some of us in this program, have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights . . . to lock them into their story now . . .
>
> Despite the fact that that is the law, despite the fact we've been encouraging you to do this for the last eight years, some judges . . . have taken exception to that and everybody's entitled to their opinion, and certainly judges are entitled to think that "You know, that's just not a good idea." But some judges . . . have gone so far as to . . . prohibit those kinds of statements from coming in even for impeachment purposes. . . .
>
> So what does all this mean? What it means is, our job is getting harder with respect to obtaining information from a suspect after they've invoked their *Miranda* rights. I'm not telling you, "Stop questioning him after that." The law under *Harris v. New York* . . . is what it is . . . and we want to take advantage of that to the extent that we can . . . Somehow, if it can be done, you need to have the suspect to acknowledge a willingness to continue to speak even after he's invoked his *Miranda* rights.
>
> So for example, you read him his *Miranda rights*, and he invokes his right to silence. What can you do? You can ask him something like this: "Would it be O.K. if I continue to ask you a few questions about something related or even peripheral to the case?" Get him to acknowledge that it would be O.K. for you to continue

> to ask him those questions, or if he invokes his right to silence, you could say, "Lookit, would it be O.K. if I turn the tape recorder off?" . . . If after setting the criteria, he acknowledges a willingness to talk . . ., at least that puts something on the record . . . acknowledging that these additional statements . . . are voluntarily made.[6]

Mr. Anderson was questioned "outside *Miranda*." The officer ignored repeated invocations of the right to remain silent, shifting topics to keep Mr. Anderson talking. Although the trial judge curtailed cross-examination about training, one of the interrogating officers acknowledged that he had received advanced POST training, and that there had been "discussion" of post-invocation questioning.[7] The panel majority's decision would further encourage this practice. This is an additional reason why the case is exceptionally important, and should be reheard en banc.

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[6] POST, Case Law Today, *Miranda*: Post-Invocation Questioning (broadcast July 11, 1996). A complete transcript is available at: http://www.cacjweb.org/about/ps12.asp (last visited Dec. 17, 2006). A catalogue of POST videos about the law, including this one, is available at: http://www.post.ca.gov/training/cptn/pdf/CLT_List.pdf (last visited Dec. 17, 2006).

[7] RT (pre-trial motions) 218-21. The officer denied "receiving training" on this technique. RT 219. However, he admitted receiving POST training and attending presentations by Devallis Rutledge. RT 218. Mr. Rutledge was a leading "outside *Miranda*" trainer. RT 221. See *Saving* Miranda, 84 Cornell L. Rev. at 133, 135-36, 189-92 (training materials prepared by Mr. Rutledge).

C. Given current practices with respect to implied waivers of Fifth Amendment rights, rehearing en banc is particularly important.

The officers who interrogated Mr. Anderson purportedly obtained an "implied waiver." That is, the officers advised Mr. Anderson of his *Miranda* rights and had him say that he understood them. Then, instead of expressly asking if he agreed to give up his rights and speak with police, they simply asked questions about the homicide. ER 13; see also Interrogation Transcript at 1-2. A suspect who answers such questions may, courts hold, have "impliedly" waived his rights. See, e.g., *Younger*, 398 F.3d at 1185-86; *People v. Whitson*, 17 Cal. 4th 229, 250 (1998). With the frequency of "implied" waivers, it is particularly important to grant en banc review.

By allowing officers to infer a subject-matter limitation on an assertion of the right to remain silent, the state court decision permits police to treat an unequivocal, unqualified invocation as a conditional waiver. This tactic is contrary to *Barrett*. It also encourages officers to continue to question after an invocation, but to shift subject areas, which is contrary to *Mosley*. This approach becomes even more pernicious as police increasingly seek "implied" rather than "express" waivers. If a suspect is never expressly asked whether he wishes to speak with police, and police can treat any invocation to a specific question as a limited invocation or a conditional

waiver, it will be very difficult for a suspect to invoke his Fifth Amendment rights effectively. In a world of “implied” waivers, this case is exceptionally important.

IV. CONCLUSION

The petition for rehearing en banc should be granted.

Dated: December 21, 2006

Respectfully submitted,

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CHARLES D. WEISSELBERG

No. 04-17237

IN THE UNITED STATES COURT OF APPEALS

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JEROME ALVIN ANDERSON,	)	
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Petitioner-Appellant,	)	D.C. NO. Civ. S 00-002494 WBS
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C.A. TERHUNE, Warden,	)	
	)	
Respondent-Appellee.	)	
_____	)	

BRIEF FORMAT CERTIFICATION PURSUANT TO FEDERAL RULES OF APPELLATE PROCEDURE 29(d), 32(a)(5) AND 35, AND CIRCUIT RULE 40-1(a)

Pursuant to Rules 29(d), 32(a)(5), and 35, Federal Rules of Appellate Procedure, and Ninth Circuit Rule 40-1(a), I certify that this brief *amicus curiae* is in courier (new) monospaced typeface, has 10.5 or less characters per inch, and contains 2098 words.

Dated: December 21, 2006

Respectfully submitted,

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CHARLES D. WEISSELBERG

TABLE OF CONTENTS

Page

Disclosure Statement i

Table of Authorities iii

I. Interest of *Amici Curiae* and Authority to File 1

II. Summary of Argument 2

III. Reasons to Grant Rehearing En Banc 3

A. The state court's decision is contrary to and unreasonably applies Supreme Court precedent. . . . 3

B. The officer’s conduct in this case should be considered in the context of widespread training of police in California to question suspects after they have invoked their Fifth Amendment rights. 5

C. Given current practices with respect to implied waivers of Fifth Amendment rights, rehearing en banc is particularly important. 9

IV. Conclusion 10

Brief Format Certification Pursuant to Federal Rules of Appellate Procedure 29(d), 32(a)(5) and 35, and Circuit Rule 40-1(a) . iv

TABLE OF AUTHORITIES

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California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 2000) 6

Connecticut v. Barrett, 479 U.S. 523 (1987) 3

Davis v. United States, 512 U.S. 452 (1994) 3, 5

Michigan v. Mosley, 423 U.S. 96 (1975) 3

Miranda v. Arizona, 384 U.S. 436 (1966) 2

Missouri v. Seibert, 542 U.S. 600 (2004) 7

Smith v. Illinois, 469 U.S. 91 (1984) 3

United States v. Younger, 398 F.3d 1179 (9th Cir. 2005) . . 5, 9

STATE CASES

People v. Neal, 31 Cal. 4th 63 (2003) 6

People v. Peevy, 17 Cal. 4th 1184 (1998) 6

People v. Whitson, 17 Cal. 4th 229 (1998) 9

FEDERAL STATUTES AND RULES

18 U.S.C. § 3006A 1

Fed. R. App. P. 29(a) 2

SECONDARY SOURCES

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Charles D. Weisselberg, *Saving* Miranda, 84 Cornell L. Rev. 109, 132-39 (1998) 6, 8

Richard A. Leo & Welsh S. White, *Adapting to* Miranda: *Modern Interrogators' Strategies for Dealing with the Obstacles Posed by* Miranda, 84 Minn. L. Rev. 397, 461-63 (1999) 6