No. 06–17161

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JONATHAN ANDREW DOODY,

PETITIONER-APPELLANT,

–VS–

DORA B. SCHRIRO, et. al.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, No. CV–98–00528–EHC

RESPONDENTS-APPELLEES' MOTION FOR REHEARING EN BANC

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PRELIMINARY STATEMENT

Respondents seek rehearing en banc from the panel's November 20, 2008, opinion (Attached as Appendix A) holding that the Arizona Court of Appeals' determination that Petitioner Jonathan Doody's statements to law enforcement officers were voluntary within the ambit of the Fourteenth Amendment amounted to an "objectively unreasonable" application of clearly established federal law pursuant to U.S.C. § 2254 of the "Anti-Terrorism and Effective Death Penalty Act of 1996" (hereinafter "AEDPA").

Pursuant to Rule 35(b)(1) of the Federal Rules of Appellate Procedure, Respondents assert that the panel decision conflicts with decisions of the United States Supreme Court requiring federal courts to grant state court decisions substantial deference under the AEDPA, which also involves a question of exceptional importance. And, more specifically, this appears to be the first AEDPA case where a federal court reviewing a state court decision has found a habeas petitioner's statements involuntary under the Fourteenth Amendment while upholding the state court finding that the statements were *Miranda*-compliant.

STATEMENT OF THE CASE

In 1991, Jonathan Doody was living at Luke Air Force Base west of Phoenix, Arizona with his parents. (Exhibit Y, at 129.)[1] His brother, David, was a novice monk at the Buddhist Temple, and his mother cooked meals for the monks. (*Id.* at 136, 114; Exhibit Z, at 166–67.) Doody attended Agua Fria High School, where he was the commander of the R.O.T.C. Color Guard, and also was active in the Civil Air Patrol. (Exhibit Y, at 123–27; Exhibit Z, at 166.)

In early June, Doody suggested to his friend, Alex Garcia, that they rob the Temple. (Exhibit Y at 130–31, 177; Exhibit Z, at 156.) During their visits with David at the Temple, they asked him about details of the Temple. (Exhibit Y, at 135–38.) Doody wanted to wait to rob the Temple until David left the Temple, so David would not recognize him. (*Id.* at 144; Exhibit Z, at 184–85.),

Initially, the plan was "just robbery" but, in late July, Doody decided to "just basically go ahead and shoot them," "execution style" so there would be "[n]o witnesses." (Exhibit Y, at 145–47.)

[1] Due to the voluminous nature of the record, Respondents included in their supplemental excerpts of record (SER) only the transcripts of the 10-day voluntariness hearing, as well as excerpts from the October 25–26, 1991, transcript of the police interview of Doody. Citation to other transcripts, or other items not included in the excerpt of record (ER) or SER, was to the exhibits submitted to the district court. (Clerk's Record (CR) 7, 19.)

Doody and Garcia decided to commit the robbery on the night of August 9, 1991. (Exhibit Y, at 186.) On August 7, they borrowed a .22 caliber rifle from Rolando Caratachea. (*Id.* at 145, 152–53.) They decided that Garcia would also borrow his father's 20-gauge shotgun, which he would carry, and that Doody would have the .22 rifle. (*Id.* at 159.)

A week prior to August 9, Doody was with Brandon Burner, a fellow student and member of the R.O.T.C. Color Guard. (Exhibit SS, at 89–90, 102, 114.) Doody told Burner that he could not be with him on Friday, August 9, because he and Garcia were going on an "intrusion alert" near the Buddhist Temple. (*Id.* at 101–02, 111–12, 122.)

On the evening of August 9, Doody and Garcia met at Amanda Hoelzen's house, and left at about 9:00 p.m. (Exhibit Y, at 187–88.) They drove to a citrus grove and changed into camouflage clothing. (*Id.* at 189.) They entered the Temple, told the occupants that they were the police, and moved them to a room. (*Id.* at 192–94.) While Garcia stood guard over the monks, Doody went through the rooms looking for valuables. (*Id.* at 196.) Doody then stood guard over the monks while Garcia went through the rooms looking for any valuables that Doody had missed. (*Id.* at 196–97.) After a while, a nun who apparently had been asleep, came out, and they made her stay in the room with the eight men. (*Id.* at 205–06.) After they had put all of their loot in the car, they shot the

victims; Doody fired 17 .22 caliber bullets into the heads of the victims, and Garcia fired four shots from the shotgun. (*Id.* at 209–16.) They took six cameras, a CD player, two portable stereo sets, some jewelry, several wallets, a knife, a police scanner, and $2,650 in cash. (Exhibit Z, at 29–30, 41–42, 50–55, 66.)

The killings were discovered on the morning of August 10. (Exhibit Q, at 48–52, 75–78.) At 4:30 that afternoon, Doody saw his friend Angel Rowlett, and told him about the killings, saying that the monks had been killed with rifles. (Exhibit HH, at 20–21.) At 7:00 that evening, Doody was driving in his car with Brandon Burner, and "out of the blue" began talking about the Temple killings. (Exhibit SS, at 107, 114–17, 124–25.) Doody said the Buddhists were murdered for nothing, that there were a bunch of gunshots that went off, and that they were shot in the chest and head. (*Id.* at 115–16.)

By August 12, it was determined that the murder weapon was a .22 caliber rifle manufactured by the Marlin Company. (Exhibit S, at 116.) On August 21, while with Doody on Luke Air Force Base, Rolando Caratachea consented to a search of his car, and a military police officer found a Marlin .22 caliber rifle in the car. (Exhibit T, at 70–81.) The rifle remained in Caratachea's possession. (*Id.* at 83.) The Air Force police subsequently told the officers investigating the

Temple murders of the August 21 incident, and gave them Caratachea's name. (*Id.*, at 124.)

On September 10, Detective Sinsabaugh went to where Rolando Caratachea was working, told him he was investigating a burglary, and that he thought a rifle Caratachea had might have been taken in a burglary. (Exhibit T, at 127–28.) Sinsabaugh asked Caratachea if he would mind giving it to him so he could check it and Caratchea agreed. (*Id.*) They went to the apartment Caratachea shared with Myers and Doody, and Caratachea gave Sinsabaugh the rifle. (*Id.* at 131–32, 138.),

Sinsabaugh interviewed Doody because his brother had lived in the Temple. (*Id.* at 134.) Doody was not a suspect. (*Id.* at 135.) Doody talked about his brother being a novice monk at the Temple and of visiting him there, sometimes with Alex Garcia and Angel Rowlett. (*Id.* at 136–38.)

Also, on September 10, the investigating officers learned from the Tucson Police Department that a person who claimed his name was "John" said he had information on the Temple murders. (*Id.*) Officers later learned that "John" was Mike McGraw, and he was a patient at the Tucson Psychiatric Hospital. (*Id.* at 98.) McGraw said that he and three others were involved, Leo Bruce, Mark Nunez, and Dante Parker (the "Tucson Four"). (*Id.* at 115.) The officers

arrested the four Tucson suspects on September 13 and 14, and the State later charged them with the Temple murders. (*Id.* at 114–15.)

Although the officers believed they had the killers, they still had not identified the murder weapon. By September 10, they had collected 96 Marlin rifles, all of which had to be tested. (*Id.* at 117–19.) Caratachea's rifle was not submitted for testing until a month later. (*Id.* at 119.)

On October 22, the task force officers learned that Caratachea's rifle was the murder weapon. (Exhibit S, at 120–21.) Officers contacted Caratachea, and he agreed to come to the police station. (SER 5, at 87; SER 10, at 99–100.) Caratachea said he had loaned his .22 rifle to Garcia and Doody on August 8 or 9, 1991. (SER 5, at 92–93, 96–97.)

At about 8:00 p.m., Detective Patrick Riley and F.B.I. Special Agent Gary Woodling drove to the Agua Fria High school football game, where Doody was present in his role as commander of the R.O.T.C. Color Guard. (SER 2, at 144–45, 149–50, 155, 159; SER 3, at 40, 54, 140, 142.) When they arrived, they learned that Doody was in the parking lot, so they drove up to him, and while seated in the car, identified themselves. (SER 2, at 152; SER 3, at 58.)

Detective Riley asked Doody if he remembered his previous interview with Detective Sinsabaugh; Doody said he did. (SER 3, at 58, 140.) Riley explained that they had some additional questions about the rifle they had taken

from Caratachea and asked Doody if he was willing to go to the police station; Doody said he was willing, opened the door of the police car himself, and got into the back seat. (SER 2, at 145, 152–53; SER 3, at 46–47, 59–60, 141, 142.) As the officers were leaving, they received word that Garcia was also in the area, so Special Agent Woodling got out of the car to look for Garcia, and Doody got into the front seat. (SER 2, at 154; SER 3, at 47, 60.) Detective Riley and Doody arrived at headquarters at 9:10 p.m. (SER 3, at 69, 146; SER 10, at 102.) Doody was not a suspect. (SER 3 at 153.)

The interview began with Detectives Riley and Manley present. (*Id.* at 75.) The interview was tape-recorded, without any breaks in the tape-recording. (SER 3, at 78–79, 155–57; SER 4, at 27.) Riley gave Doody the *Miranda* warnings, employing the standard-issue juvenile *Miranda* form. (SER 3 at 77–78, 148–54; SER 5, at 37.) Before proceeding through the warnings, Riley followed standard procedure by obtaining from Doody his age, date of birth, grade in school, and overall performance in school. (SER 3, at 79; SER 5, at 39.) Doody said that he was in the 11th grade and had an overall "B" average. (SER 3, at 80–81.) Doody appeared to understand the warnings, and did not show any doubt or confusion. (*Id.* at 81.) Riley added some explanations to help Doody understand his rights. (*Id.* at 87–88; SER 4, at 79–80.) Doody

initialed the boxes on the juvenile *Miranda* form. (SER 3, at 80, 81–82, 149.) Doody agreed to speak to the officers. (*Id.* at 82.)

When asked about Caratachea's rifle, Doody initially denied that he ever borrowed or possessed it. (*Id.* at 99.) However, about 2 hours into the interview, he admitted that he and Garcia had borrowed it. (*Id.* at 99, 164, 169; SER 4, at 18, 23, 27.) As the detectives' questions became more pointed, Doody began looking down, playing with his R.O.T.C. beret and a pop can, ceased eye contact, and became quiet. (*Id.* at 101–02, 163–65; SER 4, at 35.) Doody said he was afraid, because there had been threats toward his girlfriend and his family. (*Id.* at 103.)

The only other officers in the room during parts of the interview were Captain White and Detective Sinsabaugh. (SER 3, at 105–06; SER 4, at 37, 50; SER 5, at 107–08.) When Sinsabaugh entered the room at about 2:45 a.m., he became the primary questioner. (SER 4, at 38, 41–42.) At that point, Detective Sinsabaugh noted that Doody was "very erect, had a military bearing, and he appeared alert." (SER 5, at 101.) Doody indicated that he was afraid for his own safety, and that of his girlfriend and family. (*Id.* at 105.) Sinsabaugh asked, "Were you involved?" (*Id.*, at 105.) Doody replied, "Yes." (*Id.*)

Doody said that he and Garcia drove and parked near the Temple, and that Rolando Caratachea, George Gonzalez, and at least one other person arrived in

another car. (*Id.* at 23–26.) Doody claimed that the only plan was to probe the Temple security system, but things "just went downhill" and they entered the Temple. (*Id.* at 7–9, 34.) Doody said that eight monks and a nun were taken from their rooms and put in the living room and they "ransack[ed]" the rooms. (*Id.* at 9–11.) Doody claimed that one of the captives yelled out Gonzalez' name and Doody was told to go outside to determine if the Temple was "soundproof." (*Id.* at 12–13, 27–28, 64, 69.) Doody said that, after he went outside, he heard a shot fired, he walked into the Temple, then there were three shotgun blasts and several shots fired from the .22 rifle, into the heads of the monks and nun. (*Id.* at 13–14.) Doody denied shooting any of the victims. (*Id.* at 17.) He claimed that they grabbed some items from the Temple, including cameras, a radio, and cash found under a bed, and fled. (*Id.* at 16–17, 53–54.)

Doody claimed that Gonzalez and some of the others threatened to kill him, his girlfriend, and members of his family if he told anybody what happened. (*Id.* at 18–19, 37–38.) Doody said, "I didn't know it was supposed to happen," and, "I've never meant to get involved." (*Id.* at 79, 83.)

Following a 12-day evidentiary hearing, the trial court denied Doody's motion to suppress in a lengthy order, finding that Doody was advised of and waived his *Miranda* rights, and that his subsequent statements were voluntary. (ER 1–7; *see also* SER 2–13.) Doody was subsequently convicted of nine

counts of first-degree murder and received nine consecutive terms of life imprisonment. (E.R. 12–13.)

On direct appeal, the Arizona Court of Appeals addressed Doody's *Miranda* and voluntariness claims at length, finding that his statements were *Miranda* compliant and voluntary. *State v. Doody*, 930 P.2d 440, 445–49 (Ariz. App. 1996) (Attached as Appendix B). On federal habeas review, the district court magistrate carefully, and in detail, reviewed the *Miranda* and voluntariness claims, concluding that the Arizona Court of Appeals' rejection of the claims was neither contrary to, nor an unreasonable application of, clearly established federal law. (ER 109–41.) The district court adopted the magistrate's findings. (ER 146–47.)

On appeal, the panel below found that the Arizona Court of Appeals' determination that Doody voluntarily waived, and never invoked, his *Miranda* rights was "reasonable." *Doody v. Schriro*, ___ F.3d ___ 2008 WL 497964, *16 (9th Cir. Nov. 20, 2008) (Appendix A.). The panel nevertheless held that the state court's determination that Doody's statements were voluntary was an "'objectively unreasonable' application of clearly established federal law." *Id.* at *19.

ARGUMENT

THE PANEL FAILED TO ACCORD THE STATE COURT'S FINDING OF VOLUNTARINESS ADEQUATE DEFERENCE UNDER THE AEDPA.

While the panel below paid lip service to the AEDPA, it essentially substituted its judgment for that of the Arizona Court of Appeals.

Under the "unreasonable application" clause of 28 § 2254(d), a federal court is prohibited from issuing a writ "simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Lockyer v. Andrade*, 538 U.S. 63, 75–76 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362, 411 (2000)). "A state-court decision involves an unreasonable application of this Court's clearly established precedents if the state court applies this Court's precedents to the facts in an objectively unreasonable manner." *Brown v. Payton*, 544 U.S. 133, 141 (2005). For a state court decision to be unreasonable, it must lie "well outside the boundaries of permissible differences of opinion," *Hardaway v. Young*, 302 F.3d 757, 762 (7th Cir. 2002) or produce an answer not "within the range of defensible positions." *Taylor v. Bradley*, 448 F.3d 942, 948 (7th Cir. 2006). "[A] state court decision is objectively unreasonable under AEDPA only if it is 'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible,

credible outcomes.'" *Kibbe v. DuBois*, 269 F.3d 26, 36 (1st Cir. 2001), quoting *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998).

Clearly established federal law for purposes of determining the voluntariness of statements makes clear that the focus is upon "'whether a defendant's will was overborne by the circumstances surrounding the giving of a confession.'" *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)). That same standard applies to statements of juveniles, *Faye v. Michael C.*, 442 U.S. 707, 725 (1979), with the caveat that "admissions and confessions of juveniles require special caution." *In re: Gault*, 387 U.S. 1, 45 (1967).

The panel's conclusion that the state court's finding of voluntariness is objectively unreasonable is based in large part upon its conclusion that Doody "was given Miranda warnings in a down-played manner that ensured he would not take them seriously and would waive his rights." 2008WL 497964 at *19. However, the nefarious intent attributed to Detective Riley is at odds with the state court's findings. *See* 930 P.2d at 449. As previously noted, at the outset of the interview, Doody was not a suspect. (SER 3 at 153) Thus, his statements that informing Doody of his rights were not meant to "scare" him and was "for your [Doody's] benefit and for our benefit" (ER 44), was factually accurate. There was *no* evidence that Detective Riley made these statements to

"downplay" the significance of the *Miranda* rights, or ensure that Doody would "waive" his rights. Similarly, the fact that Detective Riley not only "read," but also endeavored to explain the rights to Doody (ER 50–51), was not intended to downplay the significance of the rights, obtain a waiver, or "suggest that one would only ask for an attorney if he was guilty." 2008 WL 497964, at *14.

In finding Doody's statements voluntary, the Arizona Court of Appeals carefully considered the totality of the circumstances, including Doody's age (17½ years), experience, intelligence, and communication skills, the "time and duration of the interrogation," Doody's demeanor during the interrogation, and the "tactics" used by the officer during the investigation. 930 P.2d at 446–48. The panel below simply placed greater emphasis on particular factors and, in conjunction with its erroneous conclusion that Doody "was given *Miranda* warnings in a downplayed manner that ensured he would not take them seriously and would waive his rights," reached a different conclusion. 2008WL 497964 at **16–19. That does not render the Arizona Court of Appeals' contrary conclusion "objectively unreasonable," *Payton*, 544 U.S. at 141, "well outside the boundaries of permissible opinion," *Hardaway*, 302 F.3d at 762, outside "the range of defensible positions," *Taylor*, 448 F.3d at 948, or "'so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate

that it is outside the universe of plausible, credible outcomes.'" *Kibbe*, 269 F.3d at 36 (quoting *O'Brien*, 145 F.3d at 25).

Another indication that the panel's holding in this case fails to accord due deference to the state court's voluntariness finding is that Respondents' research has not disclosed a single AEDPA case where a federal court has upheld a state court's determination that statements to law enforcement officers were *Miranda*-compliant, yet found that the state court's finding that statements were voluntary was objectively unreasonable. The panel cited four cases in which a federal court found compliance with *Miranda* but, nonetheless, found the statement involuntary, but they are all *pre*-AEDPA cases. *See* 2008 WL 497964 at *11–12, *16–17.

While the Supreme Court has not stated that "compliance with Miranda conclusively establishes the voluntariness of a subsequent confession," it has noted that "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984); *see also Dickerson*, 530 U.S. at 444. More recently, a plurality of the Court wrote, "giving the [*Miranda*] warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings

and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver." *Missouri v. Seibert*, 542 U.S. 600, 608–09 (2004) (pluralilty opinion). When juxtaposed with the AEDPA's highly deferential standard of review, it would appear to be virtually impossible for a federal court to logically conclude that a state court's finding of voluntariness of *Miranda*-compliant statements is objectively unreasonable.

CONCLUSION

For the reasons set forth above, Respondents respectfully request the Court grant *en banc* review of the panel opinion.

RESPECTFULLY SUBMITTED,

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IN THE

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PETITIONER - APPELLANT JOHNATHAN DOODY'S
RESPONSE TO THE PETITION FOR REHEARING EN BANC

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INTRODUCTION

Petitioner Johnathan Doody respectfully submits this response to the State's motion for rehearing en banc, pursuant to the Court's order of January 9, 2009.

From the outset, this fact-specific and unusual case raised disturbing questions about the circumstances under which the confessions in this case were obtained and the reliability of Johnathan Doody's confession, for, as even the State must concede, this was a case rife with confessions that were false. Under tremendous pressure to solve the Temple murders, a quickly assembled Task Force, acting on a tip, brought four men to Task Force headquarters who later became known as the Tucson Four. Interrogated by the same officers who later interrogated Johnathan Doody, the four men confessed to the Temple murders, providing details that were fed to them by their interrogators. Based on their confessions, the Tucson Four had already been charged with those murders at the time Doody was picked up from his high school and brought directly to Task Force Headquarters for questioning. The Task Force believed Doody could provide evidence connecting the just-identified murder weapon and Doody himself to the Tucson Four.

Ultimately, Johnathan Doody did implicate the Tucson Four in the Temple murders, and he implicated himself as well. The State's position is that what he said about the men from Tucson was untrue (and, though it is reluctant to say this: that it was coerced), but that certain answers Doody gave in the course of his interrogation were both voluntary and reliable.

On habeas, the Ninth Circuit panel – Judges Fletcher, Berzon and Rawlinson – agreed that Johnathan Doody's confession was involuntary, and granted him habeas relief on that basis. Doody v. Schriro, 548 F.3d 843 (9th Cir. 2008). In so doing, the panel correctly set forth and conscientiously applied the controlling standards for relief under the AEDPA.

The State does not take issue with the panel's statement of those standards nor with the Constitutional principles that the panel applied in assessing the voluntariness of a juvenile's confession. The State's own motion agrees with Petitioner that, under clearly established federal law, where "a defendant's will was overborne by the circumstances surrounding the giving of a confession," the confession is not voluntary, and that, in assessing the voluntariness of a juvenile's statement, "special caution" is required. (Motion at 12) After listening to 13 hours of interrogation recorded on 17 audiotapes[1] – the panel painstakingly applied the

[1] See 548 F.3d at 851, n.3.

Constitutional principles to the particular and troubling facts of this case. The panel also carefully and appropriately set forth and applied the controlling standards for relief under the AEDPA. The unanimous decision, written by Judge Berzon, explains the panel's reasoning, and the facts and authorities upon which the panel relied. This case was carefully considered and correctly decided, and makes no new law. In any event, it does not satisfy the standards for en banc review.

While the State's motion asserts that the panel decision "conflicts with decisions of the United States Supreme Court requiring federal courts to grant state court decisions substantial deference under the AEDPA" and "involves a question of exceptional importance" (Motion at 1), the State does not identify a single Supreme Court decision with which the panel decision conflicts. The State does not set forth any question, let alone one of "exceptional importance" that the case is claimed to present. This is a fact-specific application of settled law to largely undisputed facts, since the interrogation was tape recorded. It is an inappropriate case for en banc consideration.

STATEMENT OF FACTS

The State's statement of facts is misleading. Attempting to convince this Court that Doody is guilty of the crimes and that the State adduced substantial evidence to prove it, the State sets forth the version of events which was testified to

by Alex Garcia, who pled guilty and testified against the Petitioner pursuant to a plea deal that spared Garcia's life.[2] But the State's papers and the form of its citations to the record obscure the fact that this version of events rests entirely on Garcia's testimony, and that the jury in Doody's case did not buy it.

Garcia testified that Doody devised a plan to go to the Temple and shoot everyone there,[3] and that Doody himself shot all the victims, a clear case of intentional murder if Garcia had been believed. The jury rejected Garcia's version of the events, for it acquitted Doody of intentional murder, convicting him of felony murder, a disposition that was wholly inconsistent with Garcia's account. The State nevertheless sticks with Garcia's rejected story.

Apart from statements Doody made during the course of his interrogation, and Garcia's testimony, as the panel found, there was virtually no evidence suggesting that Doody was involved in the crimes, and what little there

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[2] In his deal, Garcia pled guilty to the murder of the nine Temple victims and to a subsequent unrelated cold-blooded murder of a lone, defenseless woman, Alice Cameron, that occurred in the relatively brief period after the Temple homicides but prior to Garcia's arrest. A man by the name of George Peterson had already confessed to the Alice Cameron murder, and was incarcerated for a long period on the basis of that false confession – another stark reminder of the ease and frequency with which some law enforcement authorities obtain, and act upon, false confessions.

[3] The murder weapon belonged to Rolando Caratachea, who was a good friend of Garcia's but not of Doody's.

was was both "peripheral" and circumstantial. See 548 F.3d at 870. Given Garcia's lack of credibility and the very weak circumstantial evidence it had, the State argued to the jury that it could convict Johnathan Doody based on his confession alone.

The Ninth Circuit panel approached the case with the utmost circumspection, probing and challenging the parties' positions at oral argument. It then held the case under advisement for almost a year.[4] On November 20, 2008, it issued a lengthy and thoughtful decision concluding that the determination of the Arizona Court of Appeals that Doody's confession was voluntary was an unreasonable application of clearly established law.

ARGUMENT

THE PANEL GAVE THE STATE COURT'S DETERMINATION THE DEFERENCE TO WHICH IT WAS ENTITLED, AND, APPLYING THE PROPER STANDARDS, PROPERLY AND CORRECTLY DETERMINED THAT THE STATE COURT'S RULING CONSTITUTED AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED LAW

The panel's ruling does not conflict with any Supreme Court precedent, or any decision of this Court. It is a reasoned application of the well-settled law to

[4] Doody's 2254 petition was filed in the district court in March of 1998 and was not determined by the district court until October of 2006, an unexplained delay of more than eight years. Seventeen when he was first taken into custody, Doody has already been in custody for 17 years – half of his entire lifetime.

the facts, in which the panel clearly understood both the deference to which State court determinations are entitled, as well as the responsibilities of federal courts under the AEDPA.

Johnathan Doody, a juvenile from Thailand raised in the Buddhist tradition,[5] was interrogated by teams of Task Force officers for nearly 13 hours straight. His interrogation began late at night and continued through the next morning, with but a couple of bathroom breaks. Doody received no food whatsoever. He was all alone, without any friendly or supportive adult. At the least, the Task Force officers made no attempt to let his stepfather know that the child was being brought in for questioning with respect to the Temple murders; at the most, they made efforts to send his stepfather away so that he would be in no position to help the boy. See 548 F.3d at 867-68 & n.22.[6]

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[5] Doody was born in rural Korat Province to Thai parents. At age five, he was present as his father died suddenly right before his eyes. Shortly after that, his mother left him for three years. Then, without warning, she wrenched him from the relatives with whom he had been staying and took him to Germany, where she had married an American serviceman. After Germany, he moved to Georgia, to Guam, and then to Arizona.

[6] Johnathan's family had moved to Colorado, but his stepfather (Brian) and brother (David) were in Phoenix on the day Johnathan was brought in for questioning. Coincidentally, at the very time Rolando Caratachea's rifle was identified as the likely murder weapon, Brian and David were being interviewed by Task Force officers Richard Sinsabaugh and Patrick Riley at the Task Force offices. (6/1/93:42-43) David had lived at the Temple at one time and had studied with the

The interrogation was preceded by an administration of Miranda warnings which, the panel determined, were delivered so as to minimize their effectiveness in protecting against an involuntary confession. See 548 F.3d at 862-66. Nevertheless, appreciating AEDPA's constraints, the panel rejected Doody's Miranda claim and ruled that the state court's determination that the warnings were adequate, though a close question, was not an unreasonable application of clearly established federal law. 548 F.3d at 864.

The interrogation that followed was prolonged and relentless. During the course of that very long night, the interrogating officers pleaded with Doody, and also questioned him and spoke to him in tones that were scolding, sarcastic, demeaning, demanding, menacing and coercive. At many points in the interrogation,

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monks there, and Brian and David had come to Phoenix to help the Task Force determine what property had been at the Temple before the homicides. (Id. at 44-46) When the rifle was identified, that meeting was quickly concluded, enabling the Task Force to concentrate on the task at hand without Brian Doody's by-then inconvenient presence. (Id. at 47-49)

Extraordinary steps were then taken to get Brian Doody out of town. Although nobody associated with the Task Force could explain how it came about, or who authorized it, after the decision was made to bring in Caratachea, Garcia and Doody for questioning, highly unusual arrangements were made for Sheriff's Lieutenant William Heath to personally deliver to Brian Doody, on the other side of town, reimbursement in cash for his travel expenses to Arizona, so that he could and would return to Colorado. (6/1/93:51-54; 6/29/93:81-82; DX 331[interview of Heath]) This occurred at precisely the same time Johnathan was being brought in.

Doody was entirely unresponsive to the officers' questioning, remaining totally silent for long periods of time. As Doody remained silent, the officers told him again and again that the questioning would not cease until he told them what they wanted to hear – and they were true to their word. Because the Task Force was still looking for information that would link the rifle and Doody to the Tucson Four – they continued their interrogation until Doody gave them what they wanted and he indicated that the men from Tucson were there. See 548 F.3d at 854-55. And all this effort and manpower was directed at a juvenile who had spent most of his lifetime outside the United States, who had no experience with the criminal justice system, and who had never even heard of Miranda warnings or the rights those warnings are designed to protect.

The State's essential claim is that, because the panel determined that the State court's decision that the Miranda warnings were adequate did not provide a basis for habeas relief, the State court's voluntariness determination could not be objectively unreasonable. (Motion at 15) The argument is without merit. If the State were correct, it would mean that, as long as Miranda warnings had been given, a child could be starved or beaten until he confessed, and a state court determination that the confession was voluntarily would nevertheless be reasonable. That is not the law.

Miranda and voluntariness are different questions. "The requirement that Miranda warnings be given does not, of course, dispense with the voluntariness inquiry. Dickerson v. United States, 530 U.S. 428, 444 (2000). Though the Supreme Court has said that it is the "rare" case where an incriminating statement will be deemed compelled where law enforcement authorities have complied with Miranda, the Supreme Court itself recognized that there would be rare cases, and this is such a case. See Berkemer v. McCarty, 468 U.S. 420, 433 n.20 (1984).

Although the panel's decision rests principally upon the unreasonableness of the state court's legal conclusion, the panel also identified "unreasonable determination[s] of the facts in light of the evidence presented in the State Court proceedings," which provides another basis for the granting of habeas relief. 548 F.3d 868; 28 U.S.C. § 2254(d)(2). See Wiggins v. Smith, 539 U.S. 510, 528 (2003)("This partial reliance on an erroneous factual finding further highlights the unreasonableness of the state court's decision."). The state court inexplicably found that Doody was alert and responsive throughout the interrogation, though the audiotapes conclusively prove that he was not responsive for long periods of time. See 548 F.3d at 868-69. The panel also ruled that the state court's finding that the questioning was "courteous, [and] almost pleading" did not square with what was

contained on the audiotapes, which included statements such as, "I'm gonna stay here until I get an answer."[7] Petitioner submits that the panel gave the state court decision more deference than it deserved, given its unsupported factual determinations, and its own view of its Constitutional and appellate responsibilities.

The Arizona Court of Appeals did not discharge its responsibilities under In re Gault, 387 U.S. 1 (1967); it did not exercise special care. On the contrary, and notwithstanding the trial judge's expressed view that the voluntariness question was a close one, and that he would welcome careful appellate review, the Arizona Court of Appeals deferred to the trial judge's discretion, foreclosing the careful review the trial court itself anticipated and encouraged. Further minimizing the importance of its own responsibility, the state appellate court noted that the jury was the ultimate arbiter of voluntariness. (State v. Doody, 187 Ariz. 363, 930 P.2d 440, 448 (1996), reproduced in State's Appendix B)

Finally, the issue the State raises is particularly inappropriate for en banc review. Because of its disposition, the panel did not reach several other questions that Petitioner had presented. It did not decide whether a habeas court may consider evidence about the defendant, his background, and his vulnerability presented in

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[7] At some points, Det. Sinsabaugh's questioning of Doody was so loud that it can be heard on the tapes of the interrogation of Garcia, which was being conducted in another room. (6/9/93pm:41)

connection with his sentencing in determining whether his confession was involuntary. See 548 F.3d at 850, n.1. Likewise, though his interrogators repeatedly told Doody that he had to answer their questions,[8] the panel did not decide whether, under clearly established federal law, the interrogating officers' insistence that Doody had to answer their questions was conduct that "de-Mirandized" Doody by providing advice contradicting that given during the formal warnings, namely, that he was required to answer and could not invoke his right to remain silent. 548 F.3d at 865, n.18. Nor did the panel decide whether Doody was de-Mirandized when, contradicting Miranda's warning that what he said could and would be used against him, the officers (falsely) told him that what he said would stay in that room.[9] Accordingly, even if en banc review were granted and the court disagreed with the panel on the voluntariness question, the en banc court – or the panel – would have to consider the questions the panel did not reach. Moreover, if en banc consideration

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[8] Among other things, the interrogators told Doody, "you just have to open up"(DI13:27); "I'm gonna stay here until I get an answer" (DI9:3); "you have to tell us;" "You have to let us know;" "if it's gonna take you all night to tell me two little simple things, we're gonna have a problem." (548 F.3d at 865)

[9] E.g., "We're in a room, you're not in a court, you need to come clean with us on this." (DI12:17); "What you tell us right now is gonna stay right here."(DI3:27); "Johnathan, we're not even gonna go out and be telling everyone what you're saying, that's not the way we do business." (DI9:9); "We're gonna protect this, this stuff." (DI15:27); "This is what you gotta trust me on, again, okay ... We're not going to be going and telling people what you told us." (DI11:13)

is granted, the en banc court should also consider the "close question" that was resolved in the State's favor – the adequacy of the Miranda warnings. Doody submits that, on that question, the panel gave too much deference to the state court's decision, and that the inadequacy of the Miranda warnings provides an independent basis for habeas relief.

CONCLUSION

For all of these reasons, Petitioner respectfully requests that the State's Motion for en banc reconsideration should be denied.

Respectfully submitted,

_____/s/_____
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Dated: January 27, 2009

CERTIFICATE OF COMPLIANCE

Pursuant to Circuit Rule 32-1, Rules of the Ninth Circuit Court of Appeals, I certify that this motion is proportionately spaced, has a typeface of 14 point or more and contains 2867 words.

_____/s/_____
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Dated: January 27, 2009

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