No. 08-1470

In the Supreme Court of the United States

MARY BERGHUIS, Warden,
Petitioner,

v

VAN CHESTER THOMPKINS,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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PETITIONER'S REPLY BRIEF

This case involves an important question of federal law that should be settled by this Court. Respondent's brief confirms that the Sixth Circuit added a new layer of prophylaxis to *Miranda* without an adequate rationale, making its decision sufficiently serious to merit review by this Court. Supreme Court Rule 10(a), (c).[1] Respondent does not attempt to defend the stated reasoning for the Sixth Circuit's decision. Instead, Respondent asserts in his brief that his conduct during the police interview constituted an invocation of his right to remain silent. But the Sixth Circuit decision expressly declined to reach the issue of the invocation of the right to remain silent, and instead it found that the right was violated because the right was never waived. Petitioner's shifting of the argument underscores the fact that the Sixth Circuit's decision departed from the mainstream form of analysis and instead expanded *Miranda's* protection in way not justified by this Court's decisions.

Moreover, with respect to the ineffective assistance of counsel issue, Respondent acknowledges in his brief that he was required to show that the State court's denial of the claim was not only erroneous but was also objectively unreasonable. Respondent defends the Sixth Circuit decision by pointing to the alleged importance of the limiting jury instruction he claims his counsel should have requested. But Respondent has not adequately responded to Petitioner's contention—which is supported by this Court's decision in *Strickland* itself—that the evidence of his guilt was so powerful that

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[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

it was not objectively unreasonable for the State court to deny relief despite the failure to request the instruction.[2]

I. The Sixth Circuit expanded the *Miranda* rule without adequate justification.

Respondent argues that his conduct following the receipt of the *Miranda* warnings constituted an invocation of this right to remain silent. This argument ignores the basis of the Sixth Circuit's decision, which expressly declined to reach the invocation issue. The Sixth Circuit candidly announced that it was departing from that standard mode of analysis:

> Because we conclude that the Michigan Court of Appeals unreasonably applied clearly established federal law in determining that Thompkins *waived* his right to remain silent, we do not need to resolve whether the state court further unreasonably applied clearly established law in determining that Thompkins failed to *invoke* his right to remain silent by in fact remaining substantively silent for nearly three hours. (emphasis added) [Appendix 29a]

If the Sixth Circuit had found that Respondent invoked his right to remain silent by his conduct, it would have erred, but the case would at least fit into the analytical framework established by this Court. Instead, it found that Respondent's statement to police was taken in violation of his right to remain silent because Respondent never waived that right despite his knowing receipt of *Miranda* warnings coupled with his statements

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

following a non-coercive conversation persuading him to cooperate. The distinction is critical because by avoiding the invocation issue, the Sixth Circuit has expanded *Miranda's* prophylactic rule.

A finding that a defendant invoked his right to remain silent has clear legal consequences. Under this Court's established law, if a defendant invokes his *Miranda* rights, questioning must immediately cease.[3] That principle is not at issue here. If Respondent had invoked his right to remain silent—as he now argues but contrary to the basis of the Sixth Circuit's decision—the police would have been prohibited from attempting to non-coercively convince him to make a statement. But this Court has never held that the police must cease communication with a suspect after he knowingly receives his rights and where the suspect does *not* invoke them. The question here is what procedure should be followed when a suspect expresses an understanding of his *Miranda* rights but neither invokes nor waives them. May the police then seek to convince the defendant to waive them by non-coercive means? And if the defendant does agree to cooperate by making a statement, can the statement itself indicate a waiver of his rights?

Respondent avoids these important questions in his brief in opposition. The Sixth Circuit answered them, however, by effectively adding a new layer of prophylaxis to *Miranda*—by prohibiting the police from communicating with a suspect after the knowing receipt of his rights until he has decided whether to invoke or waive his rights. The added protection is unwarranted by the principles on which *Miranda* was based. When the warnings have been understandingly received, the inherent coercion of the custodial interrogation has been

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[3] *Miranda*, 384 U.S. at 473-74.

dispelled and what remains is the prohibition against obtaining a confession that is the product of force, threats, or promises by the government:

> When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs. The value of any prophylactic rule must be assessed not only on the basis of what is gained, but also on the basis of what is lost.[4]

In *Miranda*, this Court created the rule that if a statement is obtained after warnings are given, it is admissible at trial only if the government meets its "heavy burden" of demonstrating that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[5] But a waiver need not be explicit. In *Butler*, this Court held that "an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case."[6] This Court explained that to show an implied waiver "mere silence is not enough," but that this "does not mean that the defendant's silence coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights."[7] Where—as here—a defendant verbally

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[4] *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009).

[5] *Miranda*, 384 U.S. at 475.

[6] *North Carolina v. Butler*, 441 U.S. 369 (1979).

[7] *Butler*, 441 U.S. at 373.

confirms an understanding of his right to an officer, there is more than mere silence.

Neither *Miranda* nor any other decision from this Court holds that interaction between the police and a suspect must cease between the warnings and the waiver. This Court has held only that the interrogation must cease if the defendant "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent[.]"[8] In other words, interrogation must stop only if a suspect invokes is rights, an issue that the Sixth Circuit explicitly avoided in this case. Instead, it found that the post-warning non-coercive communication rendered the subsequent statement involuntary. This ruling was not required by clearly established Supreme Court precedent under 28 U.S.C. § 2254(d) but rather constitutes an expansion of *Miranda's* protection and deserves consideration by this Court.

II. The weighty evidence of guilt allowed the State court to reasonably deny Respondent's ineffective assistance of counsel claim.

Respondent acknowledges the limitations that 28 U.S.C. § 2254(d) that put on the review of claims that were denied by the State court on the merits. But he argues only that because the limiting instruction was so important in light of the nature of the challenged evidence, that it was unreasonable for the State court to find that Respondent was not prejudiced by his counsel's failure to request it. The argument is not responsive to Petitioner's claim—that despite any instructional error—the evidence in this case was so powerful that it was not objectively unreasonable for the State court to find that there was a reasonable likelihood that Respondent would

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[8] *Miranda,* 383 U.S. at 473-74.

have been acquitted had his counsel requested the instruction.

This Court has held that the question of prejudice, when evaluating a claim of ineffective assistance of counsel, requires a weighing of the totality of the evidence before the trier of fact.[9] A guilty verdict only weakly supported by the record is more likely to have been affected by error than one with overwhelming record support.[10] And here, as outlined in the Petition, the trial evidence strongly indicated Respondent's guilt: (1) one of the intended murder victims survived and identified Respondent as the shooter; (2) Respondent admitted his guilt to another man; (3) Respondent's van which was used in the murder was stripped and dumped after the crime; and (4) Respondent fled the State and changed his identity after the crime. In light of this powerful evidence of his guilt, it was not objectively unreasonable for the State court to find no reasonable probability of acquittal no matter the nature of counsel's error.

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[9] *Strickland*, 466 U.S. at 694-695.

[10] *Strickland*, 466 U.S. at 696.

CONCLUSION

The State of Michigan respectfully requests that this Honorable Court grant the writ of certiorari.

Respectfully submitted

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Dated: August, 2009