UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DEBRA JEAN MILKE, Petitioner - Appellant, vs. DORA B. SCHRIRO, Respondent - Appellee.	No. 07-99001 District Court No. CV-98 00060-PHX-RCB **DEATH PENALTY CASE**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

SUPPLEMENTAL BRIEF RE: DISTRICT COURT'S JANUARY 29, 2010 ORDER AND FINDINGS

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I. INTRODUCTION

This Court's September 28, 2009 Order states:

> **A complete review of the record discloses no evidence supporting a finding that petitioner voluntarily, knowingly and intelligently waived her rights under *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). *See* 28 U.S.C.A. §2254(d), (e).** Under these circumstances, an evidentiary hearing in federal court is required. *See Frantz v. Hazey*, 533 F.3d 724, 745 (9th Cir. 2008) (en banc). We therefore remand with instructions to conduct a limited hearing on the sole issue of whether petitioner validly waived her *Miranda* rights; respondent shall have the burden of proof. The district court must conduct the hearing and render its findings within 60 days of this order.

(CR 163)(emphasis added). Following the evidentiary hearing on January 11-12, 2010, both parties acknowledged that Saldate's and Debra's testimony was consistent with their testimony in state court. (CR 190, 191). The district court also found their hearing testimony "mirrors" that provided in state court. (CR 195). Notwithstanding that fact and this Court's September 28 Order, the district court somehow found that the State met its burden of proving Debra waived her *Miranda* rights. (Id.). There is no legitimate basis for this finding.

II. EVIDENTIARY HEARING

A. State's Evidence.

The only "new" evidence from the State were photocopies of two *Miranda* rights' cards (Ex. 51)[1] and pages from witness Paul Huebl's website

[1] All hearing exhibits were admitted by stipulation.

used as impeachment. (Ex. 57(a)). Its only witness was Detective Saldate, who provided no new testimony on waiver and acknowledged he had nothing to add to what was presented in state court. (RT 1/11/10 at 35). This was consistent with his prehearing interview. (Ex. 21 at 5-7).

At the hearing, Saldate confirmed the information in his police report, voluntariness hearing testimony, pretrial interview, and trial testimony. (Exs. 50, 52-56). He also said he knew the law regarding *Miranda* and had been instructed about it throughout his career. (RT 1/11/10 at 38). Yet, he admitted that contrary to law[2] and Phoenix Police Department (PPD) policy,[3] when suspects requested counsel, he would not cease interrogation but would continue to "have a conversation" with them.[4] (Id. at 38-40).

Saldate testified that on December 3, 1989, he was called to help investigate Christopher Milke's disappearance. (Id. at 9-12, 48-49). Upon arrival at the police station, he was briefed on the investigation status. Jim

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[2] *Edwards v. Arizona*, 451 U.S. 477 (1981); *Smith v. Illinois*, 469 U.S. 91 (1984).

[3] 1989 PPD Operations Order C-5, ¶ 14(E) directs that interrogation must "cease immediately" when a person wishes to remain silent or have an attorney present, and states that if investigation would be furthered by continuing, the officer may seek assistance from PPD's Legal Advisor with a supervisor's permission. (Ex. 19; ER 930).

[4] Extensive evidence was presented on Saldate's history of ignoring police procedures and defendants' constitutional rights, including his pattern of failing to scrupulously honor *Miranda* invocations. (Exs. 7 through 17).

Styers and Roger Scott were there and had been talking with Detective Mills. (Id. at 49-50). Saldate first spoke with Styers, who gave no incriminating statements. (Id. at 52). Critical of the way Detective Mills was interrogating Scott, Saldate decided to interrogate him alone. (Id. at 53-54). Saldate had a "gut suspicion" Scott was involved so he read his rights. Saldate used his "interrogation style" of getting within 6-12 inches of Scott, said he would not tolerate lies, threatened to question Scott's sick mother, and eventually obtained incriminating statements. (Id. at 55-62).[5] Scott did not incriminate Debra during the interrogation. (Id. at 63).

Saldate and Mills drove Scott to the crime scene. While en route, Saldate says Scott mentioned in an offhand remark that Debra was also "involved," but provided no details. (Id. at 63-64).[6] With only this vague statement and no physical evidence connecting Debra to the crime, Saldate flew by helicopter to Florence to interrogate her. (Id. at 64-65, 75). His supervisor, Sgt. Ontiveros, told him to record the interrogation, but he did not bring a recorder or ask for

[5] Saldate said his "interrogation style" was always the same. He takes control, directly confronts his subjects, gets within 6 to 12 inches of them, insists they maintain eye contact, and says he will only listen to the truth and won't "tolerate lies." (Id. at 55-58).

[6] The district court erroneously claims it is "undisputed" that Scott "provided information implicating Petitioner." (CR 195 at 9). Even Saldate doesn't claim this. He says Scott vaguely mentioned Debra was "involved" but didn't provide any supporting information. (RT 1/11/10 at 63-64, 75).

one in Florence. It was Saldate's practice to not record interrogations because he feels it deters subjects from speaking freely. (Id. at 66-71).

Before meeting Debra, Saldate decided to arrest her and was confident he would get a confession. (Id. at 76, 77, 82). Although he quibbled over whether this was an interview or interrogation, he conceded that under PPD procedures, he went to interrogate her. (Id. at 45-48). He had decided Debra was guilty based on Scott's offhand comment, even though PPD policy directed officers to keep open minds when conducting interrogations. (Id. at 82-83).

When Saldate arrived in Florence, he went to the Sheriff's Office room where Debra was held. (Id. at 76). He introduced himself and asked Debra's friend to leave. (Id. at 80). He shut the door, wanting a "one-on-one" situation with Debra. (Id. at 79). He did not ask Phoenix Detective Hamrick, who was just outside the door, to witness the interrogation. (Id. at 101). Inside the room, Debra was seated in a chair against the wall. He pulled up another chair directly in front of her, got within 6-12 inches, and looked at her eye-to-eye. (Id. at 80). Saldate claims he said her son had been found shot to death and she was under arrest. (Id. at 80-81; 20). Debra began to scream and make noises. (Id. at 81). On direct, Saldate said Debra was only "excited," but on cross he conceded having previously described her as "hysterical." (Id. at 26, 81).

Saldate said, "I won't tolerate that!" (Id.). Throughout the interrogation, he said he would not "tolerate lies" and would only "tolerate the truth." (Id. at 84-85).

Saldate then removed a card from his badge case and read the *Miranda* rights as printed. (Id. at 20-22). He says one of the cards introduced by the State is like the one he used to read Debra's rights. (Id.). There is no statement on the card asking if the subject agrees to waive her rights. (Ex. 51). There is a place for the interrogating officer to initial, but none for the subject to acknowledge the rights were read. (Id.). At no time did Saldate ask Debra if she would waive her rights. (Id. at 90). He claims that asking Debra if she understood her rights was sufficient and he was not required to ask if she waived. (Id. at 24).[7] Saldate claims Debra acknowledged her understanding by nodding and saying "yes" when he demanded a verbal response. (Id. at 23-24, 85). He testified that immediately afterward, he asked if Debra wanted the interrogation recorded, but she said no. (Id. at 17-18, 85-86).[8]

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[7] The district court seems to suggest Saldate could not ask this question because a PPD policy provided that the rights were to be read verbatim. (CR 195 at 10). Saldate's admission to routinely ignoring *Miranda* invocations shows he wasn't really worried about complying with PPD policy or the law. Even assuming he felt so constrained, the policy itself would be problematic, as the law requires more than just to "read the rights."

[8] Saldate claims Debra never requested counsel, and had she done so, he would have noted it in his report. He says he always did this, even when continuing interrogation after invocations. (RT 1/11/10 at 29-31). In fact, of Saldate's other cases submitted as exhibits or excerpts, only two indicate he

Saldate took control of the interrogation. With his chair directly in front of Debra, he leaned within 6-12 inches of her face. He forced her to make eye-contact and said repeatedly, "I will not tolerate lies." (Id. at 79-83). Whenever she deviated from what he believed was the truth (ie: she's guilty) or reacted emotionally, he said he would "not tolerate" it. (Id. at 84-85, 92-93). Saldate described his interrogation style as being "honest" and "truthful" with subjects. (Id. at 58).[9] He said he told Debra, "I'm going to deal with you honestly and I want you to deal honestly with me." (Id. at 80). In fact, Saldate immediately lied to Debra by saying **both** Styers and Scott had implicated her. (Id. at 94-97; Ex. 50 at 1). At the hearing, he admitted that was untrue. (Id. at 95).

The interrogation lasted around 30 minutes, during which Saldate says Debra confessed and never denied involvement. (Id. at 22, 29, 96). But he conceded that whenever he felt Debra got "off track," he'd say, "I won't

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made such notations. (Exs. 10, 12). Saldate apparently did not make this claim in the other cases involving *Miranda* invocations. (Exs. 11, 16 & ERs 1442; 1476; 1453; 1449). In one of those, *another officer* made a notation, not Saldate. (ER 1453).

[9] Saldate said he'd never put his position on the line by "intentionally lying" (RT 1/11/10 at 31-32), but he was disciplined for lying during an internal investigation into misconduct involving a female motorist until after taking a polygraph. (Ex. 18; ER 913-15). PPD found Saldate's "image of honesty, competency, and overall reliability must be questioned." (Id.). Although the district court ordered this disciplinary report disclosed to Debra in habeas proceedings, it now virtually ignores the report, which goes directly to Saldate's credibility and reliability. It merely mentions Saldate "was disciplined for misconduct in 1973" and received some commendations. (CR 195 at 8).

tolerate that type of behavior. I just want the truth." (Id. at 96). He also said he was less tolerant here, as he had worked 12 hours on his day off. (Id. at 98-99).

Although Saldate was in control, he did not memorialize or corroborate what occurred. He did not record Debra's statement (during or after interrogation), did not bring Detective Hamrick (or another officer) in to witness/corroborate the interrogation, never had Debra sign or write anything saying she waived her rights or have her write a statement. (Id. at 100-105). He knew this created a "he said-she said" situation but claims he is "telling the truth" while she "is now denying it." (Id. at 92). Saldate said it is "his word as a police officer and investigator of that case," against "her word," revealing his belief that his version would be credited more. (Id. at 92-93).[10]

B. Petitioner's Evidence.

1. Debra Milke.

Debra's testimony was also the same as at trial. (Ex. 1). By the interrogation at 8:00 p.m. Sunday night, she was physically and mentally exhausted and emotionally drained. (RT 1/11/10 at 138). She had not heard any

[10] This is precisely what is wrong with this case. Saldate did not memorialize or corroborate the interrogation because ***he knew*** that as a police officer, his version would be viewed as more credible than Debra's. In stating throughout its findings that Debra's claims are supported by nothing but her "self-serving" testimony, the district court did just that. (CR 195 at 18-20). Why Saldate's testimony is not also "self-serving" and how Debra could possibly have corroborated her testimony when Saldate ensured this would be a "swearing contest" is not addressed by the district court.

news about Chris since Saturday afternoon. She had just 2-3 hours of sleep since Saturday morning, had only eaten one half sandwich since Friday night, and had ingested alcohol and prescription medication. (Id. at 127-138).[11] She then waited 2 hours at the Sherriff's Office for Saldate's arrival and was not allowed to leave the room even for a drink of water. (Id. at 137).

Saldate entered the room, asked her friend to leave, shut the door, sat in a chair at the desk, took out a pen and started writing on a notebook. (Id. at 139; Ex. 1: RT 10/3/90 at 12-13). Debra was in another chair next to the desk and against the wall. (RT 1/11/10 at 136; Ex.22). She asked if he had heard anything, which he ignored. (RT 1/11/10 at 140; Ex. 1: RT 10/3/90 at 13). After a few moments he said, "We found your son, he was murdered and you are under arrest." (Id.). She "screamed," "started crying" and yelled, "what, what?" (Id.). He said he was "not going to tolerate" her crying and she moaned, "Why are you doing this?," but he just "told [her] to be quiet." (Id. at 140-41;

[11] The district court claims it is "undisputed" that when Debra was awakened at her father's house and told that deputies wanted to speak with her, she said "what the fuck do they want?" (CR 195 at 8). Aside from being irrelevant to the waiver issue, this is not undisputed. Debra testified at trial that she was disoriented at the time and doesn't know what she said. (RT 10/2/90 at 123). The State did not ask Debra about this at the evidentiary hearing. The district court cites only to a portion of Paul Huebl's testimony where the State asked if he remembered references to this incident at Debra's trial. (RT 1/12/10 at 25). Huebl thought he remembered Debra's sister, Sandra, saying something like that, but Sandra was not even in Florence. (Id.).

13). He then pulled out a card and read her *Miranda* rights. (Id.). She heard him speaking words, but didn't fully comprehend them. (Id. at 176-78). She recalled him saying she "had the right to remain silent" and mentioning "attorney." (Id. at 141; 17). When he asked if she understood, she said no, as she had never been in trouble or under arrest. (Id.). Debra was also "in shock because of the horror that my son was dead," "disbelief of being accused of his murder," and confused about why Saldate was reading her rights. (Id. at 141-44; 17).[12] Saldate ignored her, did not offer to re-read the rights or have her read them herself, and instead asked, "Do you want this interview recorded?" (Id. at 142-44; 17; Ex: 1; 10/4/90 at 77-80). Debra said, "No, I need a lawyer," which Saldate ignored. (Id.). Debra testified she was not really saying she didn't want it recorded, but that she wanted an attorney and for the interrogation to stop.

[12] The district court says Debra was aware of *Miranda* based on her ex-husband's drug arrest and her good high school GPA. The fact that Debra may have known generally about *Miranda* and did well 7 years earlier in high school does not negate her claim that she did not fully comprehend her rights because **she** had never been arrested, and due to her confused mental state when Saldate confronted her with Chris' death *and* her arrest for his murder. The court also claims Debra admitted to having "previously lied under oath," but leaves out details of the domestic violence proceeding where Debra says she denied the incident after her ex-husband (whom she feared) told her to deny it after he was released from jail. (RT 1/11/10 at 175-76). This behavior is common for domestic violence victims, and not an indicator of Debra's overall veracity.

(RT 1/11/10 at 142-45, 153).[13] She realized she needed an attorney, even though she didn't fully understand her rights, including her right to stop the interrogation when Saldate ignored her invocation and proceeded with questioning. (Id. at 176-80).[14]

After ignoring Debra's invocation, Saldate moved his chair in front of hers so their knees were touching. (RT 1/11/10 at 145-46; Ex. 1: 10/3/90 at 17-18). He asked Debra's age and said "I have a daughter about your age, so I understand how you feel." (Id. at 146-47; 18). He leaned forward, put his hands on her knees and said she could trust him, that he was her friend and was there to find out what happened. (Id.). Saldate was in her face, about 6 to 12 inches away. (Id. at 147; 18). Debra just sat there crying. He said "I'm not going to tolerate this activity," "I'm here to question you about the murder of your son," "this is your opportunity to tell me the truth," and "I won't tolerate any lies."

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[13] The district court calls it "unclear" from Debra's testimony whether she was asking for an attorney, for it to not be recorded, or both. There is nothing unclear about the statement: "I need a lawyer." And, Debra clearly explained that her focus was not on whether Saldate tape recorded the interview, but on obtaining an attorney, as Saldate had just read her rights ***immediately before*** asking if she wanted it recorded. (Id. at 142-45).

[14] The district court misconstrues this testimony to mean it is "undisputed" that Debra never invoked her right to remain silent and "made no request that the interrogation cease." (CR 195 at 10). Debra's request for counsel **subsumes** a request that the interrogation cease. *Edwards*, 451 U.S. 477. When Saldate ignored her request, she became confused and didn't think she could just stop talking to him. (RT 1/11/10 at 178).

(Id. at 147-48; 18). Debra said, "What do you want from me?" and he said, "The truth. I'm here to get the truth." (Id. at 148; 19). Debra said she didn't know anything about Chris' murder because she wasn't involved. (RT 1/11/10 at 149). She then started defending herself by explaining she wasn't the type of person who would do something like this, but he wouldn't believe her. (Id. at 149-155). She was "reeling" and didn't know what he wanted to hear. (Id. at 149). Saldate stayed in her face, and kept saying throughout the interrogation, "you're not telling me the truth," "I came here to get the truth," "I'm not going to tolerate any lies." (Id. at 152-154). Debra didn't know she could stop talking to Saldate because: (1) he ignored her request for an attorney, (2) he kept "badgering" and accusing her of not being truthful, (3) he was a physically imposing man who was right in her face, and (4) she was confused and in shock and felt she had to "defend" herself. (Id.).[15]

Debra said Saldate never: (1) showed or gave her the *Miranda* card to read, (2) asked her to initial the card or sign anything acknowledging she

[15] The district court says Debra's claim to have been in shock is "inconsistent" with "her ability to vividly recall its details," but says in the very next paragraph that her "demeanor" showed she was lying because she did **not "**detail[] her version of the facts of the interrogation." (CR 195 at 20). It also says the "similarities" between Saldate's and Debra's accounts show Saldate was telling the truth, but fails to explain how agreement as to some portions of the interrogation means Saldate is telling the truth as to the disputed portions, or why it couldn't also mean Debra was telling the truth. The district court's credibility findings defy logic.

understood her rights, (3) asked her to sign anything saying she wanted to waive her rights and talk to him, (4) asked if she wanted to waive her rights or talk to him, (5) offered to bring another officer to witness the interrogation, (6) brought a tape recorder or offered to get one, (7) offered to have her write out a statement after the interrogation, or (8) offered to re-interview her on tape. (Id. at 160-62). Although the room had a phone, Saldate never gave Debra any opportunity to speak with a lawyer or make a call. (Id. at 162; Ex. 1: 10/3/90 at 39, 56). Debra testified she did not confess, told Saldate she was not involved, and tried to defend herself after he ignored her invocation. (Id. at 149, 152-53). Whenever she tried to explain why she couldn't have been involved, Saldate would "get in her face" and say he would not "tolerate any lies." (Id. at 154).[16]

After Debra was transported to Phoenix and was being processed in jail, investigative reporter Paul Huebl requested to see her and asked if she had confessed as police claimed. (Id. at 157-58). Debra was shocked, confused and adamantly denied having confessed. (Id.). He then said he understood it had

[16] The district court describes Debra's hearing testimony as "rehearsed" and "formulated to support her legal arguments." Yet, it also acknowledges her hearing testimony "mirrors" her trial testimony (which was elicited long before her appeals). Plus, Debra has been on death row for 20 years, so any perception that her testimony was "rehearsed" likely reflects the fact that she has had two decades of incarceration to reflect on what happened at the interrogation.

something to do with insurance money, and she said "I heard that too and that's crazy." (Id.).[17] She also asked when she could speak to an attorney. (Id. at 167).

Debra also consistently relayed her account to jail psychiatrist, Dr. Kassell, within 3 months of her arrest. (RT 1/11/10 at 158-60; Exs. 2, 3 52). Dr. Kassell testified at the voluntariness hearing that when Saldate "Mirandized" Debra, she "did not fully comprehend what was being said because she was too involved with absorbing the information that her son was killed." (Ex. 52: RT 9/10/90 at 82). It was Dr. Kassell's opinion within a reasonable degree of medical and psychiatric certainty that, at the time, Debra "may have heard what was being said and may have understood to a certain degree what was being said but I doubt that she really fully comprehended what the Mirandizing was all about." (Id. at 94).[18] Dr. Kassell recorded this session and the tape was admitted into evidence at the voluntariness hearing. (Id. at 87, 95, 168-72; ER 2045). It was also admitted and played in part at the evidentiary hearing. (Id. at 159-60; Exs. 2, 3).

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[17] Debra testified at trial that Saldate indicated Christopher may have been killed for insurance money.

[18] Ignoring Dr. Kassell's uncontroverted opinion, the district court claimed there was "no evidence that Petitioner was incapable of comprehending her rights, and only her self-serving testimony suggested she did not understand them when they were recited by Saldate." (CR 195 at 18-19).

2. Paul Huebl.

Paul Huebl testified regarding his jailhouse interview of Debra. (RT 1/12/10 at 3-46). His testimony was consistent with Debra's but he also recalled Debra saying she had asked for a lawyer and hadn't seen one yet. (Id. at 11). Huebl didn't tell Debra's trial attorney about her statements, as he was angry with Huebl for talking to Debra. Huebl also thought he knew about the interview, as it was taped and played to one million viewers. (Id. at 11-13).[19] Although Huebl wrote two articles on his website about Debra's case, the district court incorrectly claims one shows he felt Debra was innocent because she "had a new boyfriend and a job at an insurance agency." (CR 195 at 13).[20]

3. Professor Richard Leo.

Interrogations expert Richard Leo testified regarding Saldate's interrogation practices in Debra's case (and others). His reports were admitted by stipulation. (RT 1/12/10 at 48-135; Exs 4, 5, 6). During his 20 year career, Leo's research has focused on interrogation practices, *Miranda* requirements/practices and false confessions. (Id. at 48-53; Ex. 4). One of the

[19] At the hearing, a broadcast of Huebl's post-trial interview with Debra was played in which he noted that in their initial interview, Debra denied confessing. (RT 1/12/10 at 17-23; Ex. 23).

[20] Huebl's article says nothing about a "new boyfriend." (RT 1/12/10 at 36-37). It says Debra had found a new job across town, arranged for day care for Christopher, and rented a two-bedroom apartment for the two of them, and that Jim Styers would no longer have the use of Debra's vehicle, etc. (Id.).

foremost interrogation experts, Leo has numerous publications (including a leading textbook) and has testified in over 185 voluntariness hearings, trials and post-conviction proceedings. (Id. at 51-52, 85-86).

Leo did an extensive evaluation of the materials in this case.[21] He prepared an initial report focused on Saldate's interrogation practices and the unreliability of Saldate's account. (Ex. 5). Leo then reviewed additional materials and prepared a supplemental report on the *Miranda* waiver issue. (Ex. 6). In Leo's opinion, Saldate's practices: (1) in handling *Miranda* waivers and invocations, and (2) in failing to memorialize or corroborate waivers or interrogations in any way, were not consistent with good interrogation practice throughout the country at that time, and were in fact "strikingly bad." (RT 1/12/10 at 70; Ex. 6). Leo explained how easy it is to obtain and document a waiver and said police are trained to do so because they know the State has the burden of proving waiver, and they need more than an officer's subjective account. (Id. at 70-79).

Leo, who has observed/reviewed hundreds of interrogations, opined that what occurred in Debra's case, especially the failure to create any type of objective, independent record of the waiver (or interrogation), was

[21] Leo did not interview Debra or Saldate because there is no need in post-conviction cases with complete records and transcripts. (Id. at 85-86).

"extraordinary," especially in a capital case. (Id. at 58-65, 70-72, 133-134). He also testified that in cases he has examined involving implied waiver, there was at least **some** objective memorialization of the interrogation (through recording) and/or of the waiver (through signing a rights card or some other documentation showing they understood their rights and wanted to move forward with interrogation), or the facts of what occurred during the interrogation were undisputed and/or corroborated by the presence of other officers. (Id.; Ex. 6). But he has never seen a case in which a valid implied waiver was based solely on a "swearing contest" between a single officer and the accused, where critical facts of what occurred during the interrogation were in dispute, including whether the suspect asserted her right to counsel. (Id.).

Leo also testified that Saldate's practice of continuing to "have a conversation" with suspects after they invoked their right to counsel was (and is) not at all in accordance with general police practices, as it is understood that the "bright line rule" of *Edwards* requires police to "scrupulously honor" invocations by *immediately ceasing* interrogation. (Id. at 73-75). He also noted that Saldate's practice defied then-existing PPD policies. (Id. at 75; Ex. 19). According to Leo, Saldate's subjective account of what occurred is not reliable enough to support a finding of implied waiver relative to hundreds of other interrogations he has reviewed. In reaching this opinion, Leo pointed to: (1)

Sadate's admitted practice of ignoring *Miranda* invocations, (2) Saldate's demonstrated "confirmation bias" (believing Debra was guilty at the outset and misconstruing her statements and body language in inculpatory ways), (3) Saldate's "wildly implausible assertions" regarding what occurred during interrogation, and (4) Saldate's documented tendency to misstate what occurs in interviews when he prepares his reports (ie: his interview with Debra's sister, Sandra). (RT 1/12/10 testimony; Ex. 5, 6). Leo's opinion is not merely that Saldate isn't "telling the truth," but that Saldate's account of what occurred is not reliable in light of Leo's expertise, research and experience in the field of police interrogation practices. (Id. at 90-91, 108-111, 125-26).

III. LEGAL ARGUMENT

A. Standard of Review.

This Court reviews district court findings of fact for clear error and questions of law de novo. *Lott v. Mueller*, 304 F.3d 918 (9th Cir. 2002); *Canales v. Roe*, 151 F.3d 1226, 1228-29 (9th Cir.1998).

B. The District Court Clearly Erred and Exceeded its Authority in Finding the State Met Its Burden of Proving Waiver.

1. No New or Additional Evidence Was Presented at the Hearing to Support the District Court's Waiver Finding.

Nothing in the pre-existing record supports the state court's waiver finding. After the State conceded as much at oral argument, this Court ordered

supplemental briefing, where the State argued that Debra's waiver was "implied." After considering the briefing and reviewing the record, this Court determined that "A complete review of the record discloses no evidence supporting a finding that petitioner voluntarily, knowingly and intelligently waived her rights under *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966). *See* 28 U.S.C.A. §2254(d), (e)." (CR 163).

In making this finding under *Miranda* **and §2254(d), (e)**, this Court necessarily determined that: (1) the state court's finding involved an unreasonable application of clearly established federal law; (2) its determinations of fact regarding waiver were "objectively unreasonable;" and/or (3) its findings failed to survive an intrinsic challenge of objective reasonableness and were not entitled to a "presumption of correctness" under §2254(e)(1). *See Taylor v. Maddox*, 366 F.3d 992 (9th Cir. 2004).[22]

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[22] The district court's implication that this Court has "sidestepped" the AEDPA by ordering it to hold an evidentiary hearing and make findings "without regard to the state court's rulings" (CR 195 at 15-16) ignores this Court's citation to 28 U.S.C.A. §2254(d), (e) in issuing its determination that the record reveals no evidence of a valid waiver. If there is **no evidence** of a valid waiver in the record, the state court's fact-finding on this issue is necessarily objectively unreasonable under §2254(d)(2), and §2254(e)(1)'s presumption of correctness and clear-and-convincing standard do not come into play. *Gonzalez v. Pliler,* 341 F.3d 897, 903 (9th Cir. 2003) (state court findings of fact are presumed correct unless rebutted by clear and convincing evidence ***or*** based on an unreasonable evidentiary foundation); *see also Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004) (objectively unreasonable state court findings are not entitled to a presumption of correctness under

In ordering an evidentiary hearing pursuant to *Franz,* 533 F.3d at 745, this Court gave the State an opportunity to further develop the record and meet its burden of proving waiver.[23] Although the State called Saldate at the hearing, it admitted his testimony was "consistent with his prior testimony at both Petitioner's voluntariness hearing and her trial." (CR 190 at 2). Other than copies of *Miranda* cards, the State offered no new or additional evidence to support a waiver finding. In its findings and order, the district court agreed that the hearing testimony of both Saldate and Debra "mirrors" their testimony in

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§2254(e)(1)). The parties addressed the AEDPA issue in their briefs before this Court issued its September 2009 Order. This Court also recently noted that "deference" to state court determinations under §2254(d) does not mean "rubber stamping" whatever the state court decides or turning a blind eye to objectively unreasonable state court findings. *Doody v. Schriro,* 2010 WL 653441, Slip. Op. at 2981, 3016 (9th Cir. Feb. 25, 2010) (en banc).

[23] The district court claims that waiver was not raised in Debra's habeas petition. (CR 195 at 15). Its evaluation of the procedural posture of this issue exceeds the scope of the remand order and is simply inaccurate. Debra raised the *Miranda* waiver issue both in her habeas brief on the merits (CR 98 at 52, 36-40) and her reply brief. (CR 117 at 12-19, 27-28). The district court acknowledged as much, stating: "Specifically, Petitioner asserts that her statement was elicited involuntarily **and in violation of her rights under *Miranda*.**" (CR 150, 151 at 7; ER 00018). It then discussed the evidence, quoted the state court's post conviction ruling that Debra's *Miranda* rights were not violated, and denied habeas relief on Debra's *Miranda* claim because the state court findings were entitled to a "presumption of correctness." (ER 00018-00030). The parties already addressed this procedural issue directly with this Court in their Supplemental Briefs prior to the September 28 Order determining that no evidence supports the waiver finding and remanding for a hearing. Moreover, "a federal court must conduct an independent review of validity of a waiver." *Terravona v. Kincheloe,* 852 F.2d 424427 (9th Cir. 1988).

state court. Because the State's evidence was no different, the district court could not properly have found that the State has now "suddenly" met its burden of proving Debra voluntarily, knowingly and intelligently waived her *Miranda* rights. This Court should reject its findings on this basis alone.

2. No Evidence Supports a Finding of Implied Waiver.

The State bears a "heavy burden" in proving a voluntary, knowing, intelligent waiver of *Miranda* rights. *Miranda*, 384 U.S. 436; *North Carolina v. Butler*, 441 U.S. 369, 373 (1979); *United States v. Heldt*, 745 F.2d 1275, 1277 (9th Cir. 1984). Although this burden has since been equated to a preponderance standard, *Colorado v. Connelly,* 479 U.S. 157, 168 (1986), there is a *presumption against* finding waiver, *Butler*, 441 U.S. at 373, which the district court failed to apply.

The issue of waiver "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Id.* at 374-75. "An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver." *Miranda,* 384 U.S. at 475; *Butler*, 441 U.S. at 373. "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of [its] validity," but an express waiver "is not inevitably either necessary or

sufficient[.]" *Id.* Although courts must presume a defendant did not waive her rights, "in at least **some** cases waiver can be ***clearly inferred*** from the actions and words of the person interrogated." *Id.* However, "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.*

What happened during Debra's interrogation is contested and lacks objective memorialization or corroboration. Thus, like the pre-existing record, the facts developed during the evidentiary hearing cannot support a waiver finding because waiver cannot be ***clearly inferred*** from Debra's actions and words.[24] *Id.* These circumstances distinguish Debra's case from those finding implied waivers where: (1) the facts of what happened during the interrogations were uncontroverted or undisputed **and/or** (2) there were objective, independent records of the interrogation; plus (3) they involved conduct by the accused that "clearly inferred" waiver.

The cases cited by the district court are distinct on some or all of these grounds, including *Butler*, where the agent's testimony was **uncontroverted**.

[24] Like the State, the district court misconstrues Debra's position as promoting a "per se" rule that "as a matter of law," the State can never prove waiver where there is conflicting testimony between a detective and defendant. Accurately stated, Debra's position is that the disputed nature of the facts in ***this*** case (especially regarding invocation), and the lack of any objective record or corroboration, mean that waiver cannot be "clearly inferred" from ***this*** record.

441 U.S. at 370, 371. After Butler read an "Advice of Rights" form, he acknowledged his understanding but refused to sign a waiver form. **Two agents** explained he was not required to speak or sign the form, but they wanted him to talk with them. He replied, "I will talk to you but I am not signing any form," then made inculpatory statements. Butler said nothing when advised of his right to counsel and never invoked or attempted to terminate questioning. Thus, there was "no doubt" Butler was "adequately and effectively apprised of his rights," and his refusal to sign the waiver form did not preclude a finding of waiver on the uncontroverted facts of that case. *Id.* at 374-376.

The other implied waiver cases cited by the district court are similarly distinct. In *Terravona v. Kincheloe*, 912 F.2d 1176, 1179 (9th Cir. 1990), waiver was implied where **undisputed facts** showed that **two officers** read and explained the *Miranda* rights, the suspect understood his rights, and **he did not request counsel until after making inculpatory statements**. The suspect also demonstrated experience dealing with police by objecting to the warrantless search and requesting counsel. In *United States v. Younger*, 398 F.3d 1179, 1184-86 (9th Cir. 2005), waiver was implied where the suspect was read his rights, acknowledged his understanding, **made spontaneous inculpatory statements prior to questioning**, and responded to further questions **without referencing counsel**, which was **memorialized by tape recording**. In *United*

States v. Cazares, 121 F.3d 1241, 1244 (9th Cir. 1997), the facts of the interrogation are not set forth in detail but the court found that "the sum of the evidence presented to the district court" (which was **corroborated**) supports the conclusion that despite language difficulties, the suspect understood and knowingly waived his rights. In *United States v. Ramirez,* 710 F.2d 535, 542 (9th Cir. 1983), the **suspect agreed** he was administered *Miranda* rights, said he understood, and **indicated he wanted to speak with the *two* officers**.[25] In *United States v. Rodriguez-Preciado,* 399 F.3d 1118, 1125 (9th Cir. 2005), at least **two officers** questioned defendant, who was orally Mirandized and given a card reciting the warnings in English and Spanish, then said he understood. He **did not contest that he waived his rights**, but claimed his waiver was *involuntary* because officers were in his room.

In *United States v. Adams,* 583 F.3d 457 (6th Cir. 2009), it was **undisputed** that the defendant was read and understood his *Miranda* rights, and **never asked for a lawyer**. He continued talking to the officer, then **completed a written questionnaire admitting guilt.** His argument that he did not waive his rights because the "WAIVER" box on the questionnaire wasn't

[25] *Ramirez* also stands for the proposition that even where the defendant fails to challenge the admissibility of confession evidence, the prosecution must still meet its burden of showing that proper *Miranda* warnings were given "*and the elucidated rights were waived.*" 710 F.2d at 542.

marked was rejected because that only referred to whether a "waiver form" was executed. In *United States v. Binion,* 570 F.3d 1034, 1041 (8th Cir. 2009), it was **undisputed** that **two officers** read the defendant his *Miranda* rights, which he said he understood. **He refused to sign a waiver form**, **so the officers did not ask potentially incriminating questions.** They simply asked whether he had anything else to say, after which **he volunteered incriminating statements and did not ask for an attorney**. In *United States v. Nichols,* 512 F.3d 789, 798-99 (6th Cir. 2008), it was **undisputed** that after Nichols was informed of his rights and indicated his understanding, he responded to officers' questions by lying about his identity and **did not invoke his rights**. While the officer was completing arrest paperwork, they engaged in general conversation, at which time Nichols **voluntarily confessed** his identity and made inculpatory statements. The court rejected Nichols' argument that the "NO WAIVER" box was checked on the paperwork, as that referred to written waivers.

In *United States v. Cardwell*, 433 F.3d 378 (4th Cir. 2005), **two agents** questioned the defendant who admitted he was Mirandized, said he understood, and **did not invoke his rights**. He further agreed he just continued to answer the agents' questions. In *United States v. Boon San Chong,* 829 F.2d 1572 (11th Cir. 1987), the court rejected defendant's argument that his failure to sign a waiver form automatically rendered questioning improper. It was **undisputed**

he was advised of his rights in two languages, said he understood and **did not request an attorney**. **His decision to answer only select questions** after reading the rights form showed he knowingly waived. In *Bui v. DiPaolo,* 170 F.3d 232 (1st Cir. 1999), it was **undisputed** that the defendant was advised in two languages, said he understood and added "my Constitution will protect me." Then, without questioning, he **spontaneously uttered** "you have nothing," after which the officer asked if he had something to say about the arrest. The defendant said "no," but immediately asked "who said I did this?," then conversed "back and forth" with police and selectively answered questions.

In *Bradley v. Meachum,* 918 F.2d 338, 342-43 (2nd Cir. 1990), defendant claimed he invoked his right to silence. The **undisputed facts** show he was advised of his rights and said he was willing to talk to police but unwilling to sign a waiver form. The court found **his statement that "he wasn't going to say whether he was involved" was not a valid invocation**, as it was part of an ongoing stream of speech which included a denial of involvement. In *Baskin v. Clark,* 956 F.2d 142, 146 (7th Cir. 1992), the **uncontroverted evidence** showed the defendant was advised of and said he understood his rights, then **immediately responded to and asked questions without requesting counsel**. He then made **spontaneous incriminating statements** during a "back and forth" conversation with officers.

As the district court noted, *United States v. Wallace*, 848 F.2d 1464 (9th Cir. 1988), found no waiver because in the face of repeated questioning by the agent, the defendant maintained her silence for up to ten minutes. A valid waiver will not be presumed simply from the silence of the accused after warnings are given. Moreover, this Court found that the agent's ongoing questioning violated *Miranda's* directive to cease interrogation.[26] Finally, in *Thompkins v. Berghuis*, 547 F.3d 572, 581 (6th Cir. 2008), *cert. granted,* 130 S.Ct. 48 (2009), there was no implied waiver of the right to silence where the defendant was largely uncommunicative for nearly three hours. Like many cases above, **two officers** were present and the facts of what occurred were **undisputed.** Unlike this case, the officers in *Thompkins* provided the defendant an opportunity to sign a *Miranda* waiver form and/or write a statement.

The district court next cites several cases for the proposition that courts have found waivers based on conflicting testimony of suspects and officers. Notably, *none* of these are capital cases where one's life is hanging in the balance based on a swearing contest between one interrogator and suspect. In *United States v. Gaines*, 295 F.3d 293, 298 (2nd Cir. 2002), the defendant didn't claim he failed to waive his rights, but that the officers did not inform

[26] Saldate likewise violated *Miranda* and *Edwards* by continuing to question Debra after she requested counsel. Saldate admits he routinely continued questioning after invocations.

him of his rights before taking a statement. Although there was no signed acknowledgement that Gaines received and understood his rights: (1) **his statement was memorialized (and signed)**; (2) **the detective's credibility was un-impeached**; and (3) there were **no other grounds to evaluate credibility**, so the circuit court had to rely on the district court's findings. *Id.* at 300. In *United States v. Doe*, 149 F.3d 634, 639 (7th Cir. 1998): (1) the defendant signed a **written waiver**, (2) **multiple officers were present to corroborate** what occurred, (3) the defendant's claim that he signed the waiver because police held a gun to his head was implausible, and (4) the mere setting of the questioning (a car) did not nullify the written waiver.

In *United States v. Whitworth,* 856 F.2d 1268 (9th Cir. 1988): (1) **two FBI agents were present**, (2) the defendant was not "in custody" when issued warnings, (3) **the defendant signed a written waiver**, and (4) **he did not ask to speak with a lawyer until two hours after signing the waiver** (when agents ceased questioning). In *United States v. Nelson,* 137 F.3d 1094 (9th Cir. 1998): (1) **multiple officers** interrogated, (2) the **interrogation was recorded**, (3) the defendant's claim that she was impaired by prescription medication and coerced when the recorder was off were uncorroborated (ie: no evidence she was taking medication), and (4) **she never claimed to have invoked** her rights.

United States v. Montalvo-Ortiz, 983 F.Supp. 78 (D. Puerto Rico 1997): (1) involved **three officers**, (2) the defendant read the *Miranda* form out loud after receiving the warnings, (3) **defendant signed a waiver form** (which was subsequently misplaced by police), (4) **all three officers verified these facts without being impeached**, and (5) the defendant's claim that he invoked was not credible because someone with his experience with law enforcement would not have continued answering questions after invocation. In *State v. Mazuera,* 756 F.Supp. 564 (S.D. Fla. 1991): (1) **multiple agents** were present, (2) both defendants **signed written statements**, (3) one defendant admitted they were Mirandized at the station, after which he gave his written statement, (4) the other admitted she was present when her husband was Mirandized and **the form on which she provided her written statement contained *Miranda* warnings**, and (5) **two agents testified un-impeached**.

None of these cases support the district court's finding that the State met its burden in Debra's case.[27] Moreover, at least ten cases cited by the district court involved interrogations in the field, rather than in custodial settings (*Terravona*, *Rodriguez-Preciado*, *Adams*, *Nichols*, *Cardwell*, *Baskin, Wallace*,

[27] In *United States v. Dagnan,* 2008 WL 4280024 (4th Cir. 2008), an unpublished 2-page decision cited by the district court, it is unclear what evidence was presented regarding waiver. The defendant said the lower court failed to support its credibility determinations, and the circuit court simply said there was no reason on the record to disturb the lower court's findings.

Doe, *Whitworth* and *Mazuera*). Of these, nine involved multiple officers and/or undisputed facts (*Terravona, Rodriguez-Preciado, Adams, Nichols, Cardwell, Baskin, Doe, Whitworth* and *Mazuera*), two had written waivers (*Doe* and *Whitworth*), and two had written statements/confessions (*Adams* and *Mazuera*).

Only six cases involved interrogations in traditional custodial settings (jails, police stations, prisons) where recording equipment was more readily available, and two of those were, in fact, recorded (*Younger* and *Nelson*). All others in custodial settings involved multiple officers (*Binion*, *Thompkins* and *Montalvo-Ortiz*) except one, in which the facts of what occurred were undisputed (*Bradley*). It is not clear from the remaining cases where the interrogations occurred (*Cazares*, *Ramirez, Boon San Chong, Bui, Gaines and Dagham*), however, three involved undisputed facts and/or multiple officers (*Ramirez, Boon San Chong and Bui*), and one had a signed statement by defendant (*Gaines*). The interrogation facts are not detailed in the other two decisions. (*Cazares* and *Dagnam*).

In addition to relying on cases that are materially distinct from Debra's, the district court ignores the fact that Saldate, who controlled the interrogation, failed to create an objective record, knowing full well that this created a "swearing contest," which "as a police officer and investigator of that case," he knew he would likely win. (RT 1/11/10 at 92-93). Nor did it address key Ninth

Circuit and Supreme Court cases emphasizing that "swearing contests" created by police are highly suspect relative to other types of credibility determinations. *See Taylor,* 366 F.3d 992 (police officers' claims regarding what happened during interrogation are not entitled to special deference, especially where officers created conditions they knew would result in a "swearing contest"); *Reck v. Pate*, 367 U.S. 433, 446 (1961)("There is the word of the accused against the police. But his voice has little persuasion."); *Miranda,* 384 U.S. at 475 ("the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence…"); *see also Doody,* 2010 WL 653441, Slip. Op. at 2987 (noting that "the audiotapes of Doody's interrogation are dispositive in this case, as we are not consigned to an evaluation of a cold record, or limited to reliance on the detectives' testimony.").

In sum, no case cited by the district court involved a one-on-one interrogation in a traditional custodial setting that was not objectively memorialized or corroborated, and where the facts of what occurred – especially regarding invocation – are in dispute. That is the situation here. The lack of physical evidence and testimony directly linking Debra to the murder further distinguishes her case, as does her capital sentence.

CONCLUSION

Petitioner/Appellant requests this Court to reject the district court's findings as clearly erroneous and unsupported by facts or law. There is no evidence supporting a waiver finding, making Debra entitled to habeas relief.

DATED this 17th day of March, 2010.

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CERTIFICATE OF COMPLIANCE
FOR CASE NUMBER 07-99001

I certify that this Supplemental Brief Re: District Court's January 29, 2010 Order and Findings is being filed in a capital case in accordance with Circuit Rule 32-4 and this Court's February 3, 2010 Order, and is proportionately spaced, has a typeface of 14 points or more and contains 7,959 words.

March 17, 2010	/s/ Lori L. Voepel
Date	Signature of Attorney or Unrepresented Litigant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 17, 2010.

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