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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

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Debra Jean Milke,

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Plaintiff,

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vs.

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Charles Ryan, et al.,

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Defendant.

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) No. CV 98-60-PHX-RCB

) DEATH PENALTY CASE

) **FINDINGS AND ORDER**

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On November 28, 2006, this Court denied Petitioner’s amended habeas petition. (Dkts. 151, 152.) In an order filed September 28, 2009, the Ninth Circuit Court of Appeals, stating 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),” remanded the case and instructed this Court “to conduct a limited evidentiary hearing on the sole issue of whether petitioner validly waived her Miranda rights.” (Dkt. 163.) The circuit court directed this Court to conduct the hearing and make its findings within 60 days. (*Id.*) The Court set the hearing for November 16, 2009. (Dkt. 167.) Petitioner filed a motion with the circuit seeking a 45-day extension of the deadline. (Dkt. 168.) The circuit granted the motion and this Court set a hearing date of January 4, 2010. (Dkts. 168, 169.) The parties sought another extension, which the circuit granted, and the hearing date was extended to January 11, 2010. (Dkt. 173.) Prior to the hearing, Respondents filed a Motion to Preclude Consideration of Professor Richard Leo’s Testimony. (Dkt. 176.) Following the hearing, the parties filed memoranda on the waiver

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1 issue. (Dkts. 190, 191, 192.)

2 **Background**

3 Twenty years ago, on the night of December 3, 1989, Phoenix Police Detective
4 Armando Saldate interrogated Petitioner in connection with the murder of her four-year-old
5 son, Christopher. According to Saldate, Petitioner provided incriminating information.
6 Petitioner was sentenced to death after a jury convicted her of first-degree murder and
7 conspiracy to commit first-degree murder for arranging Christopher's killing.¹ Christopher
8 had been driven by co-defendants James Styers and Roger Scott to a desert wash and shot
9 three times in the back of the head.² The Arizona Supreme Court affirmed Milke's
10 convictions and sentences. *State v. Milke*, 177 Ariz. 118, 865 P.2d 779 (1993).

11 In state court, at a suppression hearing and again at trial, Saldate testified that he read
12 Petitioner her *Miranda* rights, which she indicated she understood, and she then spoke with
13 him without invoking her rights. (Ex. 52 (RT 9/10/90 at 48-60); Ex. 55 (RT 9/12/90 at 64-
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16 ¹ The trial court found three aggravating factors: the victim was under age 15,
17 the murder was especially heinous or depraved, and the murder was committed in the
18 expectation of pecuniary gain. The latter finding was based on information concerning a life
19 insurance policy Petitioner had taken out on the child. The Arizona Supreme Court struck
20 the pecuniary gain factor, independently reweighed the aggravating and mitigating
circumstances, and affirmed the death sentence. *Milke*, 177 Ariz. at 126-29, 865 P.2d at 787-
90.

21 ² Styers and Scott were also convicted and sentenced to death. The Arizona
22 Supreme Court affirmed the verdicts and sentences. *State v. Styers*, 177 Ariz. 104, 865 P.2d
23 765 (1993); *State v. Scott*, 177 Ariz. 131, 865 P.2d 792 (1993). The district court denied
24 habeas relief. *Styers v. Schriro*, No. 98-CV-2244-EHC, 2007 WL 86944 (D. Ariz. Jan. 10,
25 2007); *Scott v. Schriro*, No. 97-CV-1554-PGR (D. Ariz. July 5, 2005). In *Styers*, the Ninth
26 Circuit Court of Appeals reversed in part and remanded for a new sentencing proceeding.
27 *Styers v. Schriro*, 547 F.3d 1026, 1036 (9th Cir. 2008) (per curiam), cert. denied *Ryan v. Scott*,
28 --- S. Ct. ---, 2009 WL 2823584 (U.S. Dec. 14, 2009). Neither *Scott* nor *Schriro* addressed
the issue before this Court.

1 70).³ Petitioner did not testify at the suppression hearing. She presented witnesses,
2 however, including a jail psychologist, Dr. Kassell, who testified that Petitioner was too
3 distraught to understand the *Miranda* warnings; a criminologist who testified that Saldate's
4 report was altered or fabricated; and an investigator who testified that Petitioner told him she
5 had asked for an attorney early in the interview. (Ex. 52 (RT 9/10/90 at 80-94, 134, 157).)

6 The trial judge denied the suppression motion, making the following findings:

7 The Court finds that the Defendant was properly Mirandized. The Court
8 finds that, notwithstanding the Defendant's emotional state at the time, she
9 understood those rights. The Court finds that at no time did the Defendant
10 request an attorney, either before or after she was advised of her rights. The
11 Defendant was given a free choice to discuss, admit or deny or refuse to
12 answer questions. The Defendant voluntarily, knowingly and intelligently
13 relinquished her right to counsel and her right to remain silent. She
14 voluntarily, knowingly and intelligently made statements without any promises
15 being made, without there being any threats or coercion, either psychological
16 or physical.

17 (Ex. 53 (RT 9/11/90 at 32-33).)

18 Petitioner testified at trial that Saldate administered the *Miranda* advisory, which she
19 was too distraught to understand, and that she then asked for a lawyer. Saldate's trial
20 testimony was consistent with that offered during the suppression hearing.⁴ At the

21 ³ "RT" refers to the court reporter's transcript.

22 ⁴ With respect to the contents of the interrogation, the Arizona Supreme Court
23 provided the following summary of Saldate's testimony:

24 [Milke] was upset with her son because he was going to turn out like his father
25 – in jail, an alcoholic, and a drug user. Milke said that she verbalized these
26 fears to Styers but did not think that he would ever hurt the child. She stated
27 that she was not crazy, she just did not want Christopher to grow up like his
28 father. She told the detective that she wanted God to take care of Christopher.
She said she thought about suicide but decided against it because Christopher
would then be in his father's custody. She decided it would be best for
Christopher to die. She stated that she had a hard time telling Styers what she
wanted, but she finally told him, and he agreed to help. Milke and Styers
discussed the plan several times and included Scott on at least one occasion.
Ultimately, they decided that Styers and Scott would take Christopher, kill
him, and then report him missing at Metrocenter [shopping mall], but Milke

1 conclusion of the trial, the judge instructed jury:

2 You must not consider any statements made by the Defendant to a law
3 enforcement officer unless you determine beyond a reasonable doubt that the
4 Defendant made statements voluntarily. The Defendant's statement is not
5 voluntary if it resulted from the Defendant's will being overcome by a law
6 enforcement officer's use of any sort of violence, coercion or threats or by
7 direct or implied promises, however slight. You must give such weight to the
8 Defendant's statement as you feel it deserved under all the circumstances.

6 (RT 10/11/90 at 78.)

7 Following her conviction, Petitioner moved for a judgment notwithstanding the
8 verdict. In denying the motion, the court reiterated its finding that Petitioner had not "made
9 a request for an attorney prior to or during her questioning by Detective Saldate." (RT
10 1/18/91.)

11 In seeking post-conviction relief before the trial judge, Petitioner challenged the
12 manner in which Saldate conducted the interrogation and his account of the statements made
13 by Petitioner. In rejecting these allegations, the court again explained that "the trial court
14 made the factual determination that [Petitioner] did not ask for an attorney at the beginning
15 of the interview." (Minute Entry 11/18/96 at 5.) The court further determined that Petitioner
16 was able to comprehend her rights. (*Id.* at 4.)

17 With respect to the issue of voluntariness, the court found that Saldate did not
18 overbear Petitioner's will during the interview such that her statements were involuntary.
19 The court explained its ruling as follows:

20 was not to know how Christopher was killed.

21 On Saturday morning, December 2, 1989, Styers told Milke that they
22 were going to murder Christopher that day. They told Christopher that he was
23 going to see Santa Claus at Metrocenter. Milke told police that she did not
24 have a \$5000 life insurance policy on Christopher, but her father did. She
25 denied that insurance money was her motivation, but admitted that it may have
26 been Styers' and Scott's because Styers knew of the policy.

26 *Milke*, 177 Ariz. at 121, 865 P.2d at 782. This is consistent with the information contained
27 in Saldate's seven-page supplemental report. (Ex. 53.)

1 The legal standard to be employed to determine the admissibility of the
2 defendant's statements made during the police interrogation is whether the will
3 of the defendant was overcome by coercion or threats or promises. . . . There
4 is no indication of any implied promise or improper influence in this case.
5 There is no indication the defendant was mentally impaired or hysterical to the
6 point of being unable to comprehend what was being said to her.

7 The extent to which Ms. Milke may have felt intimidated or coerced to
8 make a statement to Det. Saldate was a jury question. The jury was properly
9 instructed on the law on this issue. . . . The jurors were told they were not to
10 consider any statements made by the defendant to a police officer unless they
11 first determined, beyond a reasonable doubt, that the statements were made
12 voluntarily.

13 When the defendant related her version of the interview by Det. Saldate
14 to Dr. Kassell, her version of what was said was substantially the same as what
15 was in Det. Saldate's report. When the defendant testified, she told the jury
16 about her interrogation by Det. Saldate. Her version of the interrogation was
17 not much different from the version given by Det. Saldate. The only
18 significant difference between Ms. Milke's recollection of the interview and
19 Det. Saldate's recollection is when and how she requested an attorney. The
20 defendant said she asked for an attorney at the beginning of the interview. Her
21 statement was, "I don't want a tape recorder, I want an attorney." . . . Det.
22 Saldate disputes that the request for an attorney was made at that time. He
23 says that at the conclusion of the interview, when the defendant was told she
24 was going to jail, she asked the detective to call her father so that he could get
25 an attorney for her. The trial court made the factual determination that the
26 defendant did not ask for an attorney at the beginning of the interview.

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28 The defendant's statements to Det. Saldate were not an unequivocal
confession of "Yes, I did it." If Det. Saldate were to fabricate a confession he
could do a better job of making the confession concrete and less abstract.
Perhaps the most inculpatory statement Det. Saldate attributes to the defendant
is her comment that she did not want her son to grow up to be like his father
. . . . Reasonable minds could differ as to the interpretations to be given to the
statements and the conclusions that could be reached. The jury made the
determination of the reliability of the statements and the conclusions to be
reached after considering the statements.

(Minute Entry 11/18/96 at 3-7.)

Applicable Law

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held that prior to
custodial interrogation a suspect must be informed of his right to remain silent and his right
to have an attorney present. If the suspect invokes either of these rights, interrogation must
cease. After being given his *Miranda* warnings, a suspect may waive his rights. The waiver

1 must be made knowingly and voluntarily. *Id.* at 475; *see Edwards v. Arizona*, 451 U.S. 477,
2 482 (1981). Although the Court in *Miranda* characterized as “heavy” the burden of proving
3 a knowing and voluntary waiver, subsequently, in *Colorado v. Connelly*, 479 U.S. 157, 168
4 (1986), the Court clarified that the government must prove such a waiver by a preponderance
5 of the evidence.

6 In *North Carolina v. Butler*, 441 U.S. 369 (1979), the Supreme Court held that a
7 waiver of *Miranda* rights need not be express, explaining that “in at least some cases waiver
8 can be clearly inferred from the actions and words of the person interrogated.” *Id.* at 373
9 (explaining that an express written or oral waiver “is usually strong proof of the validity of
10 that waiver, but is not inevitably either necessary or sufficient to establish waiver”); *see, e.g.,*
11 *Terranova v. Kincheloe*, 912 F.2d 1176, 1179 (9th Cir. 1990). “[T]he question of waiver
12 must be determined on ‘the particular facts and circumstances surrounding that case,
13 including the background, experience, and conduct of the accused.’” *Id.* at 374-75 (quoting
14 *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Although the Court described the
15 prosecution’s burden as “great,” it held that a “defendant’s silence, coupled with an
16 understanding of his rights and a course of conduct indicating waiver,” may be sufficient to
17 establish a waiver. *Id.* at 373.

18 The Ninth Circuit has explained, in accordance with *Butler*, that “[t]o solicit a waiver
19 of *Miranda* rights, a police officer need neither use a waiver form nor ask explicitly whether
20 the defendant intends to waive his rights.” *United States v. Cazares*, 121 F.3d 1241, 1244
21 (9th Cir. 1997). However, “[a] waiver cannot be presumed simply from the fact that *Miranda*
22 warnings were given and a confession was eventually obtained.” *United States v. Ramirez*,
23 710 F.2d 535, 542 (9th Cir. 1983) (citing *Miranda*, 384 U.S. at 475). Nonetheless, where it
24 is clear that the defendant acknowledged his understanding of his rights, his subsequent
25 answers to questions constitutes a valid implicit waiver. *Id.*; *see United States v. Younger*,
26 398 F.3d 1179, 1186 (9th Cir. 2005) (“the district court did not clearly err in finding that
27 defendant’s conduct in making a spontaneous statement and continuing to respond to
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1 questioning . . . constituted an implied waiver”); *United States v. Rodriguez-Preciado*, 399
2 F.3d 1118, 1127 (9th Cir. 2005) (“Waivers of *Miranda* rights need not be explicit; a suspect
3 may impliedly waive the rights by answering an officer’s questions after receiving *Miranda*
4 warnings.”) (citing *Terrovona*, 912 F.2d at 1179-80); *see also United States v. Adams*, 583
5 F.3d 457, 467-68 (6th Cir. 2009) (valid waiver where defendant was read his rights, indicated
6 he understood them, and continued talking with officer); *United States v. Binion*, 570 F.3d
7 1034, 1041 (8th Cir. 2009) (“Since Binion had been informed of his rights and had neither
8 invoked his Fifth Amendment privilege nor requested an attorney, his decision to volunteer
9 an incriminating response was an intelligent waiver of that right.”); *United States v. Nichols*,
10 512 F.3d 789, 798 (6th Cir. 2008) (“One such case where waiver may be clearly inferred is
11 when a defendant, after being properly informed of his rights and indicating that he
12 understands them, nevertheless does nothing to invoke those rights.”); *United States v.*
13 *Cardwell*, 433 F.3d 378, 389-90 (4th Cir. 2005) (“Because [the defendant] had been fully
14 informed and indicated his understanding of his *Miranda* rights, his willingness to answer
15 [the officer]’s question is as clear an indicia of his implied waiver of his right to remain silent
16 as we can imagine.” (citation omitted)); *United States v. Boon San Chong*, 829 F.2d 1572,
17 1574 (11th Cir. 1987) (“if after being advised of his rights an individual responds willingly
18 to questions without requesting an attorney, waiver may be implied”). Moreover, in *Davis*
19 *v. United States*, 512 U.S. 452, 460 (1994), the Supreme Court held that officers who have
20 given *Miranda* warnings may continue to question a defendant even when a request for
21 counsel is equivocal, a holding that also necessarily applies when the defendant makes no
22 request for counsel at all.

23 Courts consider the dynamics of the interview when determining whether a defendant
24 impliedly waived his *Miranda* rights. In *Bui v. DiPaolo*, 170 F.3d 232, 238-41 (1st Cir.
25 1999), the First Circuit, reviewing relevant case law, noted that “courts regularly have found
26 waivers” “if a defendant’s incriminating statements were made either as part of a ‘steady
27 stream’ of speech, *Bradley v. Meachum*, 918 F.2d 338, 342 (2d Cir. 1990), or as part of a
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1 back-and-forth conversation with the police, *Baskin v. Clark*, 956 F.2d 142, 146 (7th Cir.
2 1992).” On the other hand, a defendant’s silence in the face of repeated questions is
3 indicative of a lack of waiver. *United States v. Wallace*, 848 F.2d 1464, 1475 (9th Cir.
4 1988). In *Thomkins v. Berghuis*, 547 F.3d 572, 587-588 (6th Cir. 2008), *cert. granted*, 130
5 S. Ct. 48 (U.S. September 30, 2009) (No. 08-1470), no waiver was found where there was
6 no back and forth conversation during the two hour and 45 minute interview, which consisted
7 of the officer engaging in a monologue while the defendant remained mostly silent.

8 **Evidentiary Hearing**

9 The evidentiary hearing testimony of Petitioner and Saldate mirrors the testimony they
10 provided in state court. This Court is faced, as the state court was 20 years ago, with two
11 versions of the interrogation, presented under oath by its principals. While the versions
12 conflict at several key points, at many other points they converge. The following facts are
13 not in dispute.

14 The day after her son was reported missing, Petitioner was asleep at her father’s house
15 in Florence, Arizona, when sheriff’s deputies arrived. (RT 1/11/10 at 132-33.) Upon being
16 awakened by her stepsister and informed of the deputies’ presence, she replied, “What the
17 fuck do they want?” (RT 1/12/10 at 25.) The deputies asked Petitioner to come to the
18 sheriff’s office to be interviewed by Phoenix detectives. (RT 1/11/10 at 133.) She drove
19 there with a family friend. (*Id.*)

20 Detective Saldate was a 22-year law enforcement veteran, with 15 years as a
21 detective.⁵ (*Id.* at 8.) He had been involved in approximately 300 homicide cases. (*Id.* at
22 10.) Saldate was disciplined for misconduct in 1973. (*Id.* at 12, 112; Ex. 18.) He also
23 received several commendations for his work as a police officer and detective. (*Id.* at 12.)

24 Saldate first interviewed co-defendants Styers and Scott in Phoenix; only Scott
25 provided inculpatory information. (*Id.* at 50-62.) Scott then led Saldate to Christopher’s

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27 ⁵ Saldate retired in 1990. He is now the elected constable for the Encanto Justice
28 Precinct. (RT 1/11/10 at 9.)

1 body and provided information implicating Petitioner. (*Id.* at 63-64.) Thereafter Saldate
2 traveled to Florence to interrogate Petitioner.⁶ (*Id.* at 64-74.)

3 The interrogation took place in Florence at the Pinal County Sheriff's Office in a 15-
4 by-15 room containing a desk and two chairs. (RT 1/11/10 at 65, 134.) Petitioner was
5 waiting in the room with her friend. (*Id.* at 19, 133.) Saldate entered, introduced himself,
6 asked Petitioner's companion to leave, and shut the door. (*Id.* at 19, 139.) He informed
7 Petitioner that her son had been found, that he had been murdered, and that she was under
8 arrest. (*Id.* at 20, 140.) Petitioner shouted "What, what" and began crying. (*Id.* at 20, 140.)
9 Saldate stated that he would not tolerate her crying. (*Id.* at 81, 140.) He then removed a card
10 from his badge case and recited the *Miranda* advisory. (*Id.* at 20, 140-41.) He asked
11 Petitioner if she understood her rights but did not ask her if she waived those rights. (*Id.* at
12 24, 142.) Saldate, having been requested by a supervisor to tape-record the interrogation,
13 asked Petitioner if she wanted the interrogation to be recorded. (*Id.* at 17-18, 142.)
14 Petitioner did not want it recorded. (*Id.*) Saldate did not bring a tape-recorder with him to
15 the interrogation but could have obtained one at the sheriff's office. (*Id.* at 18-19.)

16 Saldate placed his chair within six to 12 inches of Petitioner. (*Id.* at 79-80, 145, 147.)
17 He told her he wouldn't tolerate any lies and was there to get the truth. (*Id.* at 92, 148.)
18 Petitioner did most of the talking during the interrogation, with Saldate mainly listening. (*Id.*
19 at 173-74.) Petitioner told Saldate that she was not "crazy" or an "animal." (*Id.* at 152.) She
20 also provided information about her background, portraying herself in a positive light to
21 show she was not the kind of person who would commit such a crime. (*Id.* at 154-55.) She
22 told Saldate that she did not want her son to grow up to be like his father, a person who

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24 ⁶ Saldate characterized his encounter with Petitioner as an "interview." (*See* RT
25 1/11/10 at 17, 44-48.) This was a reference to what he described as his conversational, non-
26 confrontational style. (*Id.* at 17, 45.) According to the definition set forth in the Phoenix
27 Police Department's General Investigative Procedures, however, Saldate's meeting with
28 Petitioner was an "interrogation" because Petitioner was a suspect rather than a victim or
witness. (*Id.*; *see* Ex. 19 at 921.) The Court will use the term "interrogation" to refer to the
encounter between Saldate and Petitioner.

1 abused drugs and got into legal trouble. (*Id.* at 151.) Saldate took handwritten notes during
2 the interrogation. (*Id.* at 101, 173.) Petitioner never invoked her right to remain silent and
3 made no request that the interrogation cease. (*Id.* at 153, 178.) The interrogation lasted
4 about 30 minutes. (*Id.* at 27, 152.) After the interrogation, Saldate drove Petitioner, whom
5 he did not handcuff, from Florence to Phoenix. (*Id.* at 33-34, 156.) While she was being
6 transported, Petitioner asked Saldate to call her father to see if he could get an attorney for
7 her. (*Id.*)

8 The interrogation was not recorded. (*Id.* at 17.) Saldate did not obtain a signed
9 waiver or acknowledgment of rights, nor did he subsequently corroborate the confession with
10 another officer. (*Id.* at 101, 161-62.) He destroyed his handwritten notes after preparing a
11 supplemental report. (*Id.* at 102.)

12 The record is also undisputed with respect to the contents of the *Miranda* card Saldate
13 read to Petitioner prior to the interrogation. The card contained the four *Miranda* rights and
14 a single follow-up question: “DO YOU UNDERSTAND THESE RIGHTS?” (Ex. 51.) The
15 card did not contain a second question asking whether the suspect waives his rights. (*Id.*)
16 Pursuant to the Phoenix Police Department’s General Investigative Procedures, “Admonition
17 of rights will be read verbatim from the Notification of Rights card distributed by the
18 department.” (Ex. 19 at 930.) The card included spaces for the case number and the officer’s
19 signature, but not a space for the suspect’s signature. (Ex. 51.)

20 It is further undisputed that in 1989 there was no requirement, under the policies and
21 procedures of the Phoenix Police Department, that interrogations be recorded or that officers
22 obtain a signed waiver. (*See* RT 1/11/10 at 24-26; RT 1/12/10 at 116, 119.)⁷

23 ***Saldate’s version of the interrogation***

24 Saldate testified that after reading the *Miranda* warning he asked Petitioner if she

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26 ⁷ The procedures require only that “[w]hen officers tape record an interrogation
27 or interview with a suspect . . . the tapes must be preserved for trial.” (Ex. 19 at 933.) They
28 also instruct officers to “[d]ocument everything said by the suspect. He may contradict
himself which will help impeach his testimony later.” (*Id.* at 921.)

1 understood her rights. (RT 1/11/10 at 22-23.) She nodded. (*Id.* at 24.) Saldate told her he
2 needed a verbal confirmation that she understood her rights. (*Id.*) She said yes. (*Id.*) He
3 then asked if he could tape record the interrogation. (*Id.* at 18, 115.) She said no. (*Id.*)

4 Saldate testified that he had no reason to believe that Petitioner did not understand her
5 rights. (*Id.* at 26.) She appeared very intelligent. (*Id.* at 29.) Petitioner was upset and crying
6 early in the interrogation, although Saldate believed she was feigning her emotional reaction
7 in an attempt to manipulate the interrogation. (*Id.* at 26-27.) Thereafter they had a “very
8 composed conversation.” (*Id.*) During the interrogation, Petitioner never asked questions
9 about her son or denied involvement in his murder. (*Id.* at 27, 29.) Saldate did not threaten
10 or strike Petitioner or make any promises. (*Id.* at 29.) He testified that Petitioner never asked
11 for an attorney. (*Id.*) If she had, Saldate would have noted it and included the information
12 in his supplemental report. (*Id.*) He had done so in other cases, including cases where he
13 continued to converse with suspects even after they had invoked their right to remain silent
14 or their right to an attorney. (*Id.* at 29-31, 118-19; *see* Exs. 10, 11, 12.) In some of these
15 cases evidence was suppressed as a result of Saldate’s conduct during the interrogations. (*Id.*
16 at 105-11; *see* Exs. 8, 11.)

17 ***Petitioner’s version of the interrogation***

18 Petitioner testified that when Saldate administered the *Miranda* advisory, she
19 responded, “Why are you doing this?” (*id.* at 141), by which she meant, “Why are you
20 reading me my rights?” (*id.* at 164). When Saldate asked if she understood her rights, she
21 replied, “No. I’ve never been in trouble before. I never had my rights read to me before.”
22 (*Id.* at 142.) When asked if she wanted the interview recorded, she replied, “No, I need a
23 lawyer.” (*Id.* at 142-43.) It was unclear from Petitioner’s testimony at the evidentiary hearing
24 whether this statement was intended to convey both a request for counsel and a refusal to
25 have the interrogation recorded. (*Id.*)

26 Petitioner testified that although she heard Saldate read the *Miranda* advisory – i.e.,
27 she heard Saldate inform her that she had the right to an attorney and the right to remain
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1 silent – she did not fully comprehend those rights because she was too upset at hearing the
2 news of her son’s death and being told she was under arrest; she was in “shock” and
3 “reeling.” (*Id.* at 141, 149, 170, 176-78.) She testified, however, that she understood her
4 rights sufficiently to ask for an attorney (*id.* at 172) and was aware that she was being
5 informed of her rights because she had been arrested (*id.* at 164).

6 Petitioner believed she could not invoke her right to remain silent, given that Saldate
7 had ignored her request for an attorney. (*Id.* at 143-44, 153.) She testified repeatedly that
8 Saldate “badgered” her and was “in her face” throughout the interrogation so that she felt
9 “psychologically threatened.” (*Id.* at 153, 168, 179.) She conceded that she spoke positively
10 about her background, mentioning that she was popular in high school and nearly a straight-
11 A student, but only in order to defend herself. (*Id.* at 154.) She denied any involvement in
12 her son’s murder. (*Id.* at 149.) Soon after the interrogation, when she arrived in Phoenix,
13 Petitioner encountered a journalist named Paul Huebl. (*Id.* at 157-58.) In response to his
14 questions, Petitioner denied that she had confessed to the crime or that she had been
15 motivated by insurance proceeds. (*Id.* at 158.) She also asked Huebl, “When can I talk to
16 a lawyer.” (*Id.* at 167.)

17 Petitioner acknowledged that, although she had never been arrested before, she had
18 had previous interactions with the police, when officers raided her home in connection with
19 her then-husband’s drug use. (*Id.* at 165-66.) Prior to her arrest she was aware of what
20 *Miranda* rights were. (*Id.* at 166.) Petitioner testified that she considered herself smart; she
21 achieved a 3.9 grade point average in high school and was a member of the Spanish Honor
22 Society. (*Id.* at 171.) Petitioner had pursued restraining orders against her ex-husband. (*Id.*
23 at 150.) She acknowledged having previously lied under oath, falsely testifying that she had
24 not been abused by her ex-husband. (*Id.* at 175.)

25 ***Paul Huebl***

26 Paul Huebl, a private investigator and journalist, interviewed Petitioner for a
27 television station in the hours after her arrest and interrogation. Huebl testified that during
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1 the interview Petitioner expressed shock when he informed her of the rumors that she had
2 confessed to the crime and was motivated by insurance money. (RT 1/12/10 at 9-11.) She
3 denied any involvement in her son's murder. (*Id.*) According to Huebl, Petitioner also told
4 him she had asked for a lawyer but hadn't seen one yet; she asked Huebl how she could get
5 a lawyer. (*Id.* at 11.) She did not indicate when she had asked for a lawyer. (*Id.* at 27.) At
6 the time of the interview, Petitioner appeared "sober" and "sane." (*Id.* at 32.)

7 On cross-examination Huebl acknowledged that he maintains a website on which he
8 has written and posted articles advocating Petitioner's innocence. (*Id.* at 33-37.) He believes
9 she did not commit the murder because at the time she had a new boyfriend and a job at an
10 insurance agency. (*Id.* at 36.)

11 ***Richard Leo***

12 As indicated above, Respondents move the Court to preclude consideration of Dr.
13 Richard Leo's testimony. (Dkt. 176.) The motion is denied. The Court will consider the
14 testimony in a manner consistent with Rule 702 of the Federal Rules of Evidence and to the
15 extent that it is relevant to the factual issues before the Court.

16 Dr. Leo, currently an associate professor of law at the University of San Francisco,
17 formerly a professor of criminology, psychology, and sociology at the University of
18 California-Irvine and the University of Colorado, testified on Petitioner's behalf. (*Id.* at 48-
19 49; Ex. 4.) His field of expertise includes "police interrogation and investigation, the
20 psychology and practices, *Miranda* requirements and how *Miranda* plays out in practice,
21 false confessions and wrongful convictions." (*Id.* at 51.) The bulk of his research on such
22 issues has involved California cases; Arizona cases have constituted perhaps two to 10
23 percent of his research. (*Id.* at 118.) Professor Leo has testified in court 186 or 187 times,
24 in all but one case on behalf of the defense. (*Id.* at 81-82.)

25 Professor Leo was initially retained by Petitioner's habeas counsel in these
26 proceedings to render an opinion on "the quality of interrogation practices used by Detective
27 Saldade and whether they likely resulted in a fabricated or false confession from Debra
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1 Milke.” (Ex. 5 at 5; *see* RT 1/12/10 at 52-53.) In his report, dated April 19, 2002, Professor
2 Leo concluded that Saldate’s interview techniques were unprofessional, his version of the
3 interview was implausible, and it was possible he had fabricated a confession. (Ex. 5 at 10-
4 11.) Professor Leo also wrote that the manner in which Detective Saldate stated he obtained
5 a *Miranda* waiver from Petitioner was “troubling, if not illegal” and that Petitioner alleged
6 that Saldate had “bullied” her into waiving her rights. (RT 1/12/10 at 57; Ex. 5 at 7.)
7 However, on appeal from this Court’s denial of habeas relief, the issue apparently became
8 whether or not Petitioner validly waived her *Miranda* rights. Petitioner again retained
9 Professor Leo. In support of the issue as it is now presented, Professor Leo has prepared a
10 supplemental report in which he corrects his original report to indicate that there was no
11 *Miranda* waiver. (RT 1/12/10 at 54, 57; Ex. 6 at 7-8.) Professor Leo has never interviewed
12 Petitioner or Saldate. (*Id.* at 85-86.)

13 During his testimony at the evidentiary hearing, Professor Leo acknowledged that he
14 typically does not testify on the issue of *Miranda* waivers as opposed to “interrogation
15 practices, the techniques, the psychology of interrogations and issues having to do with
16 coercion and reliability and false confessions.” (*Id.* at 107.) Professor Leo offered no
17 opinion as to whether Petitioner could or did understand the *Miranda* warnings. (*Id.* at 83.)
18 He did note that the warnings are “pitched” at eighth or ninth grade reading level. (*Id.* at 83.)

19 With respect to the legal question before this Court, Professor Leo testified that the
20 state can never meet its “heavy burden” of proving an implied *Miranda* waiver when the
21 interrogation is not recorded or otherwise memorialized and when the suspect and the
22 interrogator provide conflicting versions of what transpired. (*Id.* at 124-25.) Professor Leo
23 stated that these factors are compounded when the participants offer widely divergent reports
24 of the details of the interrogation. (*Id.* at 133.) According to Professor Leo, such a case
25 constitutes a mere “swearing contest” which by its nature is insufficient to support the heavy
26 burden of establishing a waiver. (*Id.* at 108-09.) Professor Leo did not mention in his
27 testimony that the appropriate standard for determining a *Miranda* waiver is by
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1 preponderance of the evidence.

2 After testifying that there was no evidence supporting the existence of an implied
3 waiver in Petitioner’s case, Professor Leo conceded that Saldate’s testimony “technically”
4 constituted such evidence. (*Id.* at 106.) He opined, however, that Saldate’s version of the
5 interrogation was “wildly implausible and contradictory and make[s] no sense in light of how
6 police are trained to and observed to give *Miranda* warnings and conduct their
7 interrogations.” (*Id.* at 77; *see id.* at 111.) Nevertheless, Professor Leo conceded that some
8 of the features he found incredible in Saldate’s account of the interview – asking if Petitioner
9 wanted the interrogation taped, listening to Petitioner rather than asking questions – were
10 corroborated by Petitioner’s own testimony. (*See id.* at 77, 93-94, 111-12.)

11 **Discussion**

12 ***Standard of review***

13 The Court has been directed to determine whether Petitioner validly waived her
14 *Miranda* rights. In her habeas petition Petitioner alleged that her rights were violated during
15 the interview with Saldate because he used coercive techniques, ignored her invocation of
16 her right to an attorney, and inaccurately reported her responses. (Dkt. 98 at 21-52.) Before
17 this Court, Petitioner did not directly address the issue of waiver or argue that a waiver could
18 not be implied from the circumstances of the interrogation. However, following oral
19 argument on appeal, the circuit court ordered the parties to file supplemental briefs on the
20 following questions: “What evidence is required to prove that a defendant’s waiver of rights
21 under *Miranda* . . . was made ‘voluntarily, knowingly and intelligently’ . . . and is that burden
22 met in this case?”⁸ *Milke v. Schriro*, No. 07-99001 (9th Cir. Sept. 5, 2008). Had these issues
23 been raised in the amended habeas petition, this Court would have applied the deferential
24 standards set forth in the AEDPA to the state court’s ruling that Petitioner knowingly and
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26 ⁸ It is not clear whether the Court of Appeals, in remanding this case for an
27 evidentiary hearing, determined that Petitioner had properly raised the waiver issue before
28 this Court in her habeas petition.

1 voluntarily waived her *Miranda* rights.⁹ Moreover, the state court’s factual determination
2 that Petitioner understood her rights and did not invoke her right to an attorney would have
3 been entitled to a presumption of correctness, which Petitioner would have been obliged to
4 rebut by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). See *Henderson v. DeTella*,
5 97 F.3d 942, 946 (7th Cir. 1996) (“The state court’s historical findings as to the petitioner’s
6 knowledge, understanding, and determination to forgo his *Miranda* rights are, consequently,
7 entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1).”); *Everett v. Barnett*,
8 162 F.3d 498, 500-01 (7th Cir. 1998).

9 Given the posture of the case and the directive from the Court of Appeals, it appears
10 that this Court is being instructed to make its findings based on an independent review of the
11 evidence, without regard to the state court’s rulings. In doing so, the Court must assess the
12 witnesses’ relative credibility and the plausibility of their conflicting accounts.

13 “Frequently, . . . the state and the petitioner offer conflicting testimony as to whether
14 the petitioner was apprised of and willingly relinquished his rights; assessing the *Miranda*
15 waiver thus demands credibility assessments that typically only the trier of fact can make.”
16 *Henderson*, 97 F.3d at 946; cf. *Miller v. Fenton*, 474 U.S. 104, 117 (1985) (“Of course,
17 subsidiary questions, such as the length and circumstances of the interrogation, the
18 defendant’s prior experience with the legal process, and familiarity with the *Miranda*
19 warnings, often require the resolution of conflicting testimony of police and defendant.”).
20 Thus, notwithstanding Petitioner’s arguments and Professor Leo’s opinion to the contrary,

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22 ⁹ Under the Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28
23 U.S.C. § 2254(d), a petitioner is not entitled to habeas relief on any claim “adjudicated on
24 the merits” by the state court unless that adjudication:

- 25 (1) resulted in a decision that was contrary to, or involved an unreasonable
26 application of, clearly established Federal law, as determined by the Supreme
27 Court of the United States; or
28 (2) resulted in a decision that was based on an unreasonable determination of
the facts in light of the evidence presented in the State court proceeding.

1 there are cases in which courts have found a *Miranda* waiver by a preponderance of the
2 evidence based on the conflicting testimony of suspects and officers. *See, e.g., United States*
3 *v. Gaines*, 295 F.3d 293, 298 (2d Cir. 2002) (“While it would be preferable to have physical
4 evidence supporting [Detective] Williams’ testimony, such as Gaines’ signature of
5 acknowledgment [that he received and understood his *Miranda* rights]. . . defendant points
6 to no evidence that would establish clear error on the part of the district court in choosing to
7 credit Williams’ testimony over Gaines’.”); *United States v. Doe*, 149 F.3d 634, 639 (7th Cir.
8 1998) (affirming credibility findings of district court, which “relied more on the overall
9 plausibility of the competing accounts than on the demeanor of the witnesses,” which “was
10 equally good on both sides”); *United States v. Whitworth*, 856 F.2d 1268, 1278 (9th Cir.
11 1988) (affirming denial of suppression motion where district judge, “presented with
12 conflicting facts, credited the testimony” of FBI agents).

13 Other rulings also belie the premise that in cases such as Petitioner’s a valid waiver
14 cannot be found. In *United States v. Nelson*, 137 F.3d 1094, 1110 (9th Cir. 1998), the
15 defendant moved to suppress her statement on the grounds that the officer made threats and
16 promises during a period when the tape recorder was turned off. The Ninth Circuit affirmed
17 the district court’s denial of the motion, explaining that the defendant “present[ed] little
18 evidence – other than her own allegations – to suggest that her statements were involuntary.”
19 *Id.* In *United States v. Dagnan*, 293 Fed. Appx. 205, 206-207, 2008 WL 4280024 (4th Cir.
20 2008), a police officer testified before the district court that he gave *Miranda* warnings to the
21 defendant, while the defendant testified that no warnings were given. *Id.* at 206. The court
22 credited the officer’s testimony, despite the fact that the defendant was never asked to sign
23 a *Miranda* waiver and the officer did not have his *Miranda* card with him, which he said he
24 always used in giving warnings to suspects. *Id.* The Fourth Circuit held that the defendant
25 provided no reason to overturn the lower court’s credibility assessment, explaining that “[t]he
26 district court had the opportunity to observe the witnesses, listen to their testimony, and was
27 in the best position to make the credibility finding.” *Id.* at 207. In *United States v.*
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1 *Montalvo-Ortiz*, 983 F. Supp. 78, 81 (D. Puerto Rico 1997), officers testified that the
2 defendant signed a *Miranda* waiver form, which they subsequently lost, while the defendant
3 testified that he did not sign a form and had requested an attorney. The district court
4 concluded, “After evaluating the testimony of the defendant and the three agents, including
5 their responsiveness and their demeanor on the stand, the Court, using the preponderance of
6 the evidence standard, finds the account of the agents to be more credible.” *Id.* In *United*
7 *States v. Mazuera*, 756 F. Supp. 564, 569 (S. D. Fla. 1991), the court was “confronted with
8 highly conflicting testimony” on the issue of a *Miranda* waiver. Nevertheless, the court
9 found that the government had met its burden based on the more credible version of events
10 testified to by the experienced law enforcement officers. *Id.*

11 The Court therefore rejects Petitioner’s contention that as a matter of law Respondents
12 cannot prove, under the preponderance of the evidence standard, the existence of a valid
13 *Miranda* waiver based on the conflicting testimony of Saldate and Petitioner.

14 ***Findings***

15 In Petitioner’s case, the record unequivocally shows that there was no express waiver,
16 written or oral. Therefore, the Court must determine, applying the law set forth above to the
17 facts elicited at the evidentiary hearing, whether a valid implied waiver can be found. The
18 Court concludes that Respondents have proved by a preponderance of the evidence that
19 Petitioner waived her *Miranda* rights. This conclusion is based on the following findings.

20 (1) Saldate advised Petitioner of her *Miranda* rights and asked her if she understood
21 them. In doing so, Saldate followed Phoenix police procedures. He read, verbatim, the
22 *Miranda* advisory, which listed four rights and one follow-up question. He documented
23 Petitioner’s statements in his contemporaneous, hand-written notes and then in his
24 supplemental report.

25 (2) Petitioner acknowledged that she understood her rights, first by nodding
26 affirmatively and then, when asked to supply a verbal answer, by stating yes. There was no
27 evidence that Petitioner was incapable of comprehending her rights, and only her self-serving
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1 testimony suggested that she did not understand them when they were recited by Saldate.
2 Petitioner was 25 years old at the time of the interrogation. She was employed at an
3 insurance agency. In high school she achieved a 3.9 GPA. She had had prior encounters
4 with the police and the court system.

5 (3) Petitioner did not invoke her right to counsel or her right to remain silent. There
6 is no contention that she invoked her right to remain silent. As described below, the Court's
7 determination that Petitioner did not invoke her right to an attorney is based on the Court's
8 assessment of the relative credibility of Petitioner and Saldate and their versions of the
9 interrogation.

10 (4) The circumstances of the subsequent interrogation support a finding that
11 Petitioner waived her *Miranda* rights. Petitioner chose not to have the interrogation
12 recorded. She exhibited no unwillingness to answer questions or provide information. She
13 did not remain silent or ask to terminate the interview. Instead, Petitioner spoke freely about
14 a range of topics, seeking to explain and justify her actions. According to her own testimony,
15 which was consistent with Saldate's, Petitioner dominated the conversation with her attempts
16 to explain and defend herself.

17 (5) Petitioner's testimony at the evidentiary hearing before this Court was
18 inconsistent and self-serving. She stated that Saldate "badgered" her and was "in her face"
19 throughout the 30-minute interrogation. However, she acknowledged that she did most of
20 the talking during the interrogation, providing Saldate with a variety of information and
21 confiding details about her personal life and background. During the period when Saldate
22 was allegedly badgering Petitioner and in her face, he was listening to her story and taking
23 notes.

24 At the conclusion of the interrogation, while being transported from Florence to
25 Phoenix, Petitioner asked Saldate to call her father to see if he would get her a lawyer. This
26 is not consistent with her testimony that because Saldate failed to honor her initial request
27 for an attorney, she felt psychologically threatened by him and was convinced he would
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1 ignore any further requests for counsel. Petitioner also testified that she was in shock and
2 could not understand her *Miranda* rights, yet she was already familiar with those rights, she
3 asked Saldate why he was reading her the rights, and, according to Petitioner, she
4 immediately invoked her right to counsel. Petitioner's claim to have been in a state of shock
5 during the interrogation is also inconsistent with her ability to vividly recall its details.

6 The Court further notes that Petitioner's demeanor on the stand did not enhance her
7 credibility but instead emphasized the self-serving nature of her testimony. Rather than
8 detailing her version of the facts of the interrogation, Petitioner's responses appeared
9 rehearsed and formulated to support her legal arguments.

10 By contrast, the credibility of Saldate's testimony is supported by several factors. As
11 already noted, there are many similarities in the two accounts. The key differences pertain
12 to details of the interrogation which are incriminating or detrimental to Petitioner's claim of
13 a *Miranda* violation. In addition, the details Saldate provided with respect to the content of
14 the interrogation lends credibility to his testimony that Petitioner did not request an attorney.
15 Saldate did not report that Petitioner gave a straight-forward confession of guilt as to her role
16 in her son's murder, as he could have done if he were fabricating his account of the
17 interrogation. Instead, he reported that Petitioner offered a series of justifications for her
18 conduct and attempted to portray herself in a positive light. It is simply not plausible that
19 Saldate concocted this information, particularly since much of it was corroborated by
20 Petitioner's version of the interrogation. The credibility of this aspect of Saldate's account
21 supports a conclusion that he also accurately reported Petitioner's failure to request an
22 attorney.

23 In addition, it was Saldate's practice to note in his reports if a suspect invoked his
24 right to remain silent or his right to an attorney. The fact that his report in this case does not
25 contain such a notation supports his testimony that Petitioner did not ask for an attorney at
26 the outset of the interrogation.

27 Finally, although this Court's credibility assessments have been made independently,
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1 based on the record and the evidence introduced at the evidentiary hearing, the Court notes
2 that they are consistent with those rendered by the state court which on three occasions
3 rejected Petitioner's account of the interrogation, finding that Petitioner understood her
4 *Miranda* rights and did not invoke her right to an attorney.


5 **Conclusion**

6 Respondents have proved by a preponderance of the evidence that Petitioner
7 knowingly, voluntarily, and intelligently waived her *Miranda* rights during her interrogation
8 by Detective Saldate.

9 **IT IS HEREBY ORDERED** denying Respondent's Motion to Preclude
10 Consideration of Professor Richard Leo's Testimony (Dkt. 176).

11 **IT IS FURTHER ORDERED** that the Clerk of Court shall forward a copy of this
12 Order to the Ninth Circuit Court of Appeals forthwith.

13 Dated this 29th day of January , 2010 .
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18 _____
19 Robert C. Broomfield
20 Senior United States District Judge
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