No. _____

In The
Supreme Court of the United States

ASHLEY KENNETH HUNTER,

Petitioner,

v.

STATE OF NORTH DAKOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NORTH DAKOTA STATE SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

There is currently no nationwide standard regarding recording requirements of Miranda and/or interrogations. The state level jurisdictions are split with twenty-seven (27) having some type of recording mandate, and a wide variety of consequences for failing to record; by contrast, twenty-four (24) jurisdictions have no rule, statute, or case law regarding recording of Miranda and/or interrogations.

Here, petitioner has asserted he never received Miranda Warnings. Even though North Dakota is one of the twenty-four (24) jurisdictions that does not have a recording mandate, the police department here has such a policy. The district court reasoned, "Miranda warnings could have been given…." The North Dakota Supreme Court affirmed the district court's ruling under the standard of review analysis without addressing the lack of Miranda warnings being captured in over 4 hours of recorded interview footage, therefore the question presented is as follows:

1. When lower courts distort the rule announced in Colorado v. Connelly, 479 U.S. 157 (1986) (burden of proof), should this Court correct that distortion?
2. When there is no recording (audio or visual) of the alleged issuance of the Miranda warning, should the presumption be, no warnings were given?

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JURISDICTIONAL STATEMENT

Petitioner Ashley Kenneth Hunter respectfully prays that this Honorable Court issue a writ of certiorari to review the opinion of the North Dakota Supreme Court entered on July 11, 2018 and corrected (non-substantively) on September 6, 2018. This petition for writ of certiorari is filed on the jurisdiction resting in 28 U.S.C. 1257(a).

OPINIONS BELOW

The aforementioned corrected and original opinions of the North Dakota Supreme Court are reported at North Dakota v. Hunter, 2018 ND 173, 914 N.W.2d 527. App. 1a.

The district court's denial of the renewed motion to suppress petitioner's statement made during trial, by the Honorable Judge Norman G. Anderson, on May 24, 2017, was not reduced to a written opinion, but is captured in selected transcripts excerpts App. 70a-72a.

The written opinions by the Honorable Judge Norman G. Anderson of the district court's denial of the petitioner's motion to suppress the statement and motion for reconsideration were filed on May 10, 2017 and May 12, 2017 respectively. App. 19a.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:

> No person…shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law….

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right…to be informed of the nature and cause of the accusation…and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

It is undisputed that if Miranda warnings were given in this case, they were undocumented, unrecorded, and unacknowledged by the petitioner in violation of the Fargo Police Department policy to do so. It is undisputed, that the Miranda warning, if given at all, had to be given by Detective Nick Kjonaas between 6:41 a.m. and 6:53 a.m. on morning of June 23, 2015. This is the only time wherein the petitioner was not being recorded, nor surrounded by other officers. It is undisputed, Detective Kjonaas claims to have provided the petitioner his Miranda warning outside the presence of any other officer. It is undisputed that Detective Kjonaas is not documented on the crime scene roster for the petitioner's arrest location, where the alleged Miranda warning was to have been provided, despite all other officers being so documented. Further, it is undisputed Detective Kjonaas did not document his alleged providing the petitioner the Miranda warning in his own report. Finally, it is undisputed that the petitioner was not mirandized at the outset of the interrogation in violation of the Fargo Police Department policy to do so.

At approximately 6:34 a.m. on June 23, 2015, the petitioner was placed under arrest for an outstanding shoplifting warrant, and as a person of interest in the deaths of two Fargo citizens. After being handcuffed, searched, having contraband removed, he was placed in a squad car of one of the two arresting officers, that of Officer Wes Libner, at approximately 6:41 a.m.. The squad car

footage begins recording at 6:53 a.m., twelve (12) minutes later. App. 69a, lns. 11-17.

The squad car footage begins with the petitioner already in the back seat, talking to someone (who was never identified) sitting in the front seat. As of 6:53 a.m., the petitioner was under constant video surveillance with audio feeds. He was transported to the Fargo Police Station interrogation room, where he sat handcuffed for approximately 45 minutes. At that point Detectives Ysteboe and Kjonaas enter the interrogation room and immediately begin questioning the petitioner with no preface, no introduction, or even an explanation as to why the petitioner is being held. App. 56a-57a, 19-25, 1-10.

Petitioner filed a motion to suppress his statement given to law enforcement that day. Prior to a motion hearing held on April 26, 2017, before the Honorable Judge Norman G. Anderson, the only reference to Miranda warning was a single statement in Detective Ysteboe's report, "Hunter was given his Miranda warning and he agreed to speak with your affiant and Detective Kjonaas." App. 45a. It was not until the motion hearing nearly two years later where it is revealed that Detective Kjonaas was the actual administrator of the Miranda warning to the petitioner. App. 54a, lns. 5-16.

Detective Kjonaas claimed to have heard over the radio that the petitioner was taken into custody around the block from the crime scene at 6:34 a.m. App. 6a, ¶ 15. Per Detective Kjonaas' testimony, he walked around the block, communicated with the two arresting officers (one of which was

Officer Libner), then proceeding to the squad car and allegedly provided the petitioner with the Miranda warning and closed the door without any assurance the petitioner heard them, let alone understood them. App. 6a, ¶ 15; 62a, lns 9-11. Detective Kjonaas acknowledged that he did not document this interaction in his own report. App. 54a, lns 14-16. After the alleged issuance of the Miranda warning, Detective Kjonaas discussed with Officer Wes Libner (for a second interaction) the plan for where to take the petitioner. App. 55a, lns. 6-11. Despite these two separate interactions and conversations between Libner and Kjonaas (before and after), Officer Libner testified that he did not recall ever actually seeing Detective Kjonaas on the scene at all. App. 67a-68a, lns 5-25, 1-16.

Following the motion hearing, the district court issued its order denying the petitioner's motion to suppress the statement stating, "[n]o evidence was offered at the suppression hearing to suggest Hunter did not receive a full Miranda warning. Furthermore, there is no contention, let alone evidence, that Hunter did understand the warning." App. 28a ¶24. Thus, the district court "presumed" the Miranda warning was given, and placed the burden of disproving its existence on the petitioner. For this reason, petitioner filed a motion to reconsider, citing this inappropriate burden placement, as well as pointing out to the district court the fundamental flaw in Detective Kjonaas' version of events.

In addition to all the aforementioned inconsistencies was the unquestionable violation of the Fargo Police Department policy regarding the issuance of the Miranda warning. Petitioner provided the district court with legislative testimony before the North Dakota legislature from the 2012 legislative session discussing video recording of all custodial interrogations. S.B. 2125, ND Cong. (2012). The testimony before the North Dakota Legislature came from 17 separate police departments on the viability of a mandatory law requiring interrogations and Miranda warnings to be recorded (audibly or visually). Of the 17 police departments to provide testimony and evidence, the Fargo Police Department is cited as having a mandatory recording policy for all interrogations and Miranda warnings dating back to 2006. Memorandum in Support of S.B. 2125, The Electronic Recording of Custodial Interrogations Act (Sept. 25, 2012) (on file with the North Dakota Legislature). One specific purpose, enumerated in the policy was to "protect detectives against suspects' claims that the Miranda warnings were not given. Id. at 2.

Yet despite, Detective Kjonaas not being logged into the crime scene roster; not being seen by the arresting officer on scene, in the face of two supposed conversations; his failure to document his own actions in his own report; his unmistakable violation of department policy; and the incorrect burden placement on the petitioner by the district court, the motion to reconsider was ultimately denied. App. 44a.

Once again, at trial, on May 24, 2017, the testimony of Officer Wes Libner necessitated the renewed motion to suppress the petitioner's statement. App. 67a-70a. Officer Libner's testimony failed to corroborate Detective Kjonaas' version of events. The district court itself questioned Officer Libner in excess of five (5) transcript pages outside the presence of the jury until it ultimately ruled, "as I said before, if there's that time frame where it's open and the Miranda warning could have been given during that period of time…." App. 71a, lns. 15-18. Thus, all inferences with regard to the issuance of the Miranda warning, were drawn in favor of the prosecution, thus no burden was ever placed on the prosecution.

Therefore, regardless of a law enforcement policy to record statements and/or Miranda warnings, the standard used by North Dakota courts, as well as the twenty-three (23) other "non-record-rule" jurisdictions stands to encourage law enforcement to simply not record or document anything. Assuming, as in this case. the testimony of one sole officer will suffice the issuance of the Miranda warning, notwithstanding all evidence to the contrary that such an interaction never happened and was impossible to have happened.

REASONS FOR GRANTING THE WRIT

A. The North Dakota Supreme Court affirmed a decision by a district court placing the burden of Miranda warning issuance improperly on the petitioner in contrast and conflict with this Court's rulings and holdings.

United States Supreme Court Rule 10(c) tells us that a compelling reason this Court will consider granting Writ of Certiorari is when "a state court…has decided an important federal question in a way that conflicts with relevant decisions of this Court." This case presents that exact situation, wherein the state district court established the burden of proving the Miranda warning was ***not*** given, was on the defense (petitioner). See App. 28a, ¶ 24, (decision by the district court, "[n]o evidence was offered at the suppression hearing to suggest [petitioner] did not receive a full Miranda warning. Furthermore, there is no contention, let alone evidence, that [petitioner] did not understand the warning.")

In this ruling, the implication cannot be misconstrued, "[n]o evidence offered…to suggest [petitioner] did not receive a full Miranda warning." Id. The court is asserting it was the defense's responsibility to offer evidence to suggest Miranda was not given. However, this Court's rulings over the years has been abundantly consistent, "we have stated in passing that the ***State*** bears the 'heavy' burden in proving waiver…." Colorado v. Connelly, 479 U.S. 157, 167 (1986) (emphasis added) (citing Tague v. Louisiana, 444 U.S. 469 (1980) *(per curiam);* North Carolina v. Butler, 441 U.S. 369, 373 (1979); Miranda v. Arizona, 384 U.S. 436, 475 (1966)).

Although the North Dakota Supreme Court reflected in its ruling that the burden was in fact on the State, it did so by distinguishing "waiver of rights" from the actual issuance of the Miranda warning in the first place. App. 9a, ¶ 23. ("The State must show waiver by a preponderance of the evidence.") The result of such an analysis by the North Dakota Supreme Court fails to follow their own standard in that determining the voluntariness of statements, one must consider the totality of the circumstance. App. 9a, ¶ 22. The totality of the circumstances ***must*** then include an analysis of the actual issuance of Miranda in the first place, for a defendant to have properly waived those rights. Yet, in the case at bar, both lower courts separated out the issuance of Miranda as an independent distinct issue from waiver of Miranda.

However, this Court has distinctively never separated the issuance of Miranda from the waiver of Miranda, unlike the lower courts in this case. This Court has stated, and continues to hold to this day, "[w]henever the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our ***Miranda doctrine***…." Connelly, 479 U.S. at 168 (emphasis added, encompassing the requirements of Miranda under one united heading – "Miranda Doctrine") (citing Nix v. Williams, 467 U.S. 431, 444, and n. 5 (1984); United States v. Matlock, 415 U.S. 164, 178, n. 14 (1974)). Thus, this Court recognizes the analysis of the entire Miranda doctrine, which starts from the issuance of the warnings, all the way to the point where a defendant chooses to waive any or all of the rights.

What's more, is the undisputed testimony of Detective Kjonaas, where he describes his issuance of the Miranda warning to the petitioner:

> *(NOTE: Questioning by district court)*
> Q. Okay. When you went to the car and you say you opened the door and you advised Mr. Hunter of Miranda, what happened? Tell me in detail what happened.
>
> A. I opened the door. I read him his Miranda warning.
>
> Q. Off a prepared card or from memory?
>
> A. No, from memory.
>
> Q. Okay.
>
> A. And as soon as I had completed the Miranda warning, I don't believe he gave a response, and I shut the door.
> …
> *(NOTE: Questioning now by defense counsel)*
> Q. When you read the Miranda warning to him and you said he didn't have any response, did you ask him if he understood?
>
> A. I don't recall asking him if he understood.
>
> Q. Do you recall if you explained why he was under arrest?
>
> A. No, I don't think I explained to him why he was under arrest.

App. 61a-62a, lns. 25, 1-11; 63a-64a, 22-25, 1-4. Thus, by his own statement, Detective Kjonaas actually did not comply with the full "Miranda doctrine" by ensuring the suspect understood the rights, and was willing to talk to the detectives voluntarily.

It is worth mentioning, although a factual determination by the lower courts, a factor utilized in denying the suppression and affirming the districts ruling was the supposed corroboration by Detective Ysteboe of Detective Kjonaas' statements. However, the "corroboration" was that of Detective Kjonaas telling Detective Ysteboe that he had provided Miranda to the petitioner. However, this corroboration comes in the form of a statement in Detective Ysteboe's affidavit, "Hunter was given his Miranda warning and he agreed to speak with your affiant and Detective Kjonaas." App. 45a. The implication of this statement tends to lead a reader to believe two things, 1) the petitioner was provided his Miranda warning by the drafter; and 2) the petitioner affirmatively agreed to speak with the detectives after being advised of his Miranda warning. However, what we learn from the testimony of the officers, neither is in fact true. The Miranda warning was not given by Detective Ysteboe. Further, under Detective Kjonaas' version, after the alleged Miranda warning issuance, the petitioner made no comment, asked no questions, and was not even asked if he understood his rights.

The broad implications of this case and its current holding in the lower court is a dangerous distortion of this Court's jurisprudence. The Miranda doctrine was established, and has stood the test of time, to ensure suspects' Constitutional rights were known, identified, and protected. Under this case, distinguishing the "issuance" of Miranda from the "waiver" of Miranda serves

no legitimate purpose and only creates a slippery slope to elimination of Miranda altogether.

Based on this ruling, the warning itself need not even be given, and one officers testimony alone has created an automatic "presumption" they were; to which the lower courts here, then burdened the defense with disproving. Then, under that "presumption" moved into the "waiver of the rights" analysis. In the face of overwhelming evidence that Detective Kjonaas could not have possibly given the petitioner the Miranda warning, the district court still reasoned, "the Miranda warning could have been given…." App. 71a, ln. 17.

It is for this reason, this Court should grant this Writ of Certiorari, to reaffirm the one and combined analysis, all lower courts should be using when assessing the alleged violations of the Miranda doctrine. Issuance of the warning up and through the waiver of the rights must be a combined and complete analysis under the totality of the circumstances.

B. There is currently a distinct and dramatic split among lower courts regarding the proper remedy or burden of proof necessary to establish a proper Miranda warning was given in the absence of a recording. This is leading to disparity and the unequal application of this Court's prior rulings and holdings.

Currently, there is no unifying rule on recording, or lack thereof, the Miranda warning and a subsequent statement provided by a suspect. By statute, case law, or court rule, the District of Columbia, Maine, New Mexico, Indiana, Utah, and Wisconsin require custodial interrogations to be taped, but only under certain circumstances, and make no reference to the inclusion of the Miranda warning. See generally, DC Code §5-116.01-03 (2006); ME Rev. Stat. Ann., title 25, §2803-B(1)(K) (2007); NM Stat. Ann. §29-1-16 (2006); IN Supreme Court Evidence Rule 617 (2009); UT Supreme Court Rule 616 (2015); WI Stat. §968.073, §972.115 (2005). These state laws do not have a categorical "ban" on the use of unrecorded statements; but all have exceptions built in and establish a rebuttable presumption that an unrecorded interrogation is inadmissible in court.

However, of note, each of these state statutes delineate the types of crimes for which unrecorded interrogations have a rebuttable presumption. The District of Columbia statute applies to "crimes of violence;" Maine's statute applies only to "serious crimes;" New Mexico, Indiana, and Utah are limited to felonies only; while Wisconsin applies to juveniles for all crimes, and only felonies for adults. Id.

These inconsistencies continue to be seen throughout the remaining twenty-seven (27) jurisdictions who have adopted such regulations. Illinois mandates recordings in vehicular homicides and some other specified felony homicides. 705 IL Comp. Stat. Ann. §405/5-401.5, 725 ICSA §5/103-2.1 (2003, 2005, 2013). North Carolina similarly follows Wisconsin for recording juvenile statements, but then varies in that only specified felonies require such a recording. NC Gen. Stat. §15A-211 (2007, 2011). Maryland, Nebraska, Missouri, Oregon, Connecticut, Michigan, Colorado, New York, and Texas all likewise limit their mandate on recordings to only that involving specified felonies. See, MD Code Ann., Crim. Proc. §2-402-03 (2008); NE Rev. Stat. Ann. §29-4501-08 (2008); MO Rev. Stat. ch. 590.700 and 700.1 (2009 and 2015); OR Rev. Stat. §133.400 (2010); CT Gen. Stat. §54-10 (2011); MI Comp. Laws §763.7-11 (2012); CO Rev. Stat., title 16, art. 3, part 6, §16-3-601-03 (2016); NY Crim. Proc. §60.45-3 and Family Court Act §344.3; Tex. Code Crim. Proc. Ann. Art. 38.22, § 3.

In contrast to the states limiting recording requirements to certain felonies only, other states differentiate even further. California only statutorily requires the recordings in homicide cases. CA Penal Code §859.5 and CA Welfare & Insts. Code §626.8 (2013). Rhode Island has limited their statute to only those cases involving capitol offenses. RI PAC Accreditation Standards Manual, §8.10 (2013). Vermont and Kansas statutes requires the recordings

in homicides and sexual assaults. 13 VT S.A. ch. 182. Subch. 3, §5561, sec. 4, 5 (2014); KSA 2016 Supp. 21-6804 (y) §1 (2017).

Finally, the remainder of the "twenty-seven," Alaska, Minnesota, New Jersey, Montana, and Arkansas, require recording of statements in every single crime. See, Stephan v. Alaska, 711 P.2d 1156 (AK 1985); Minnesota v. Scales, 518 N.W.2d 587 (MN 1994); NJ Supreme Court Rule 3:17 (2005); MT Code Ann. §46-4-406-410 (2009); AR Supreme Court Rule of Criminal Procedure 4.7 (2012).

The overwhelming benefit to having a law or rule regarding the recording of interrogations (to include the Miranda warning) has been being tested since the inception of the very first case law mandate dating back to 1985 in Alaska. Stephan, 711 P.2d 1156. The advent of the "smartphone" or even cost-effective hand-held digital recording devices were still nearly twenty years away when Alaska took the first step in this initiative. Alaska was then followed suit by Minnesota in 1994, in the adoption is what has been come be known throughout the state as the "Scales Rule." Scales, 518 N.W.2d 587. In fact, Alan Harris, a veteran prosecutor in Minnesota, is quoted stating, the Scale Rule was "the best thing we've ever had rammed down our throats." Thomas P. Sullivan, The Journal of Criminal Law and Criminology, Vol. 95, Issue No. 3, Article 12, pg. 1127 Electronic Recording of Custodial Interrogations: Everybody Wins. Montana followed suit one year later in 1995 citing both Alaska and Minnesota. Montana v. Grey, 907 P.2d 951 (Mont. 1995). Montana

however, stopped short of Alaska and Minnesota's mandate that the Miranda warning as well needed to be recorded, simply that a written waiver of the warnings would be sufficient to show the warnings themselves were in fact given. Id. at 952.

Therefore, for nearly thirty-three years some states have been following some sort of rule requiring the recording of the Miranda warning and any subsequent interrogation.

The significance of recording statutes and case rulings leave little to doubt that the benefits of such requirements far outweigh the costs. The rules protect officers, suspects, courts, and the overall integrity of the process as a whole. The petitioner here makes no argument for this Court to adopt a mandate regarding the recording of the Miranda warning and interrogations, as Mr. Sullivan asserts quite eloquently, such mandates are best instituted through legislation. Thomas P. Sullivan, supra at 1129. Instead, petitioner urges this Court to simply unify a rule when a recording does not exist, how lower courts should analyze the absence of a recording, whether it be audibly or visually.

Twenty-seven jurisdictions have some rule on this subject, however, the rules vary in requirement, ramifications for failure to abide by the rule, and how to proceed without a recording. Twenty-four jurisdictions have no rule whatsoever. This can lead to, and has already led to, as can be seen in the case at bar, an absurd result where the defense is burdened with proving something did not happen. Then after undertaking such a burden, produce overwhelming

evidence the Miranda warning was never provided, is still ignored by the lower courts under the auspice of, the warnings "could have been given."

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the North Dakota Supreme Court.

Respectfully submitted this Tuesday, October 9, 2018.

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