

18-7155 ORIGINAL
No.

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
DEC 17 2018
OFFICE OF THE CLERK

ALFREDO PROVENCIO — PETITIONER
(Your Name)

vs.

JOE LIZARRAGA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

EASTERN DISTRICT OF CALIFORNIA, FRESNO
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Alfredo Provencio

(Your Name)

CTF, P.O. BOX 705

(Address)

Soledad, CA 93960

(City, State, Zip Code)

N/A

(Phone Number)

QUESTION(S) PRESENTED

Under the Fifth Amendment/Miranda Right's; The Sixth Amendment And Due Process Clause of the Fourtheenth Amendment as Applied to AEDPA Habeas Corpus. 28 U.S.C. §2254

- I. WHETHER UNDER MIRANDA MUST A DEFENDANT'S INCRIMINATING STATEMENTS AND BODY LANGUAGE BE EXCLUDED AS CUSTODIAL INTERROGATION WITHOUT ADVISEMENT OF HIS MIRANDA RIGHTS" WHERE A SUSPECT HAS BEEN TAKEN TO A POLICE STATION IN A PATROL CAR, PLACED IN A ROOM WITHOUT HANDCUFFS BY A DETECTIVE, TOLD HE IS FREE TO LEAVE. ?
- II. WHETHER ALLEGED NON-CUSTODIAL INTERROGATIONS AT A POLICE STATION OR AT WHAT POINT THE INTERROGATIONS BECOME CUSTODIAL AND INADMISSIBLE IN LIGHT OF MIRANDA. ?
- III. WHETHER, CONFUSING, CONFLICTING AND MISLEADING INSTRUCTIONS THAT INFORMS THE JURY THE REQUIRED PROOF OF UNION OR JOINT OPERATION OF ACT CONCERNING CONTINUOUS SEXUAL ABUSE OF A MINOR, REQUIRE REVERSAL BECAUSE IT IS IMPOSSIBLE TO DETERMINE WHICH CONFLICTING INSTRUCTIONS THE JURY FOLLOWED.?
- IV. WHETHER OR WHAT DEGREE OF EVIDENCE IS REQUIRED TO ESTABLISH A DEFENDANT HAS INFILCTED BODILY HARM RESULTING FROM THE USE OF FORCE MORE THAN THE FORCE NECESSARY TO COMMIT SPECIFIED SEXUAL OFFENSES.?
- V. WHETHER THE STATE COURTS DECISION WAS AN UNREASONABLE APPLICATION OF CLEARLY ESTABLISHED FEDERAL LAW.?
- VI. WHETHER UNDER THE AEDPA STANDARD PETITIONER HAD MADE A SUFFICIENT SHOWING OF A CONSTITUTIONAL DEPRIVATION NECESSARY FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY (COA).?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF AUTHORITIES CITED

CASES

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix "C&D" to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix "A & B" to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix "F" to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the STATE COURT OF APPEALS court appears at Appendix "E" to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 3, 2018.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 25, 2018, and a copy of the order denying rehearing appears at Appendix "C".

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was JUNE 11, 2014. A copy of that decision appears at Appendix "F".

A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, AMENDMENT V:

NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHER WISE INFAMOUS CRIME, UNLESS ON A PRESENTIMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC RANGER: NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB; NOR SHALL BE COMPLIED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF; NOR BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY, WITHOUT DUE PROCESS OF LAW, NOR SHALL DEPRIVED OR PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION

U.S. CONSTITUTION, AMENDMENT VI:

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM, TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

U.S. CONSTITUTION, AMENDMENT XIV, §1:

ALL PERSON BORN OR NATURALIZED IN THE UNITED STATES AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZEN OF THE UNITED STATES AND OF THE STATE AND OF THE STATE WHERE THEY RESIDE, NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF THE CITIZENS OF THE UNITED STATES, NOR SHALL ANY STATE DEPRIVED ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCEDED OF LAW, NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

Petitioner accepts the facts and procedural history as set forth in the California Court of Appeal, fifth Appellate District, Affirming the Judgment of Conviction Filed on April 3, 2014 Which is Attached as Appendix E, for purposes of this petition only. Petitioner reserves the right to Cite additional facts and/or Procedural history herein as appropriate.

REASONS FOR GRANTING THE PETITION

THIS HONORABLE U.S. SUPREME COURT SHOULD BE PROVIDE GUIDANCE NATION WIDE THAT AFTER AGREEING TO SPEAK WITH DETECTIVES AND OR LAW ENFORCEMENT ABOUT UNKNOW MATTER AT THE POLICE STATION, THE DEFENDANT IS TAKEN IN THE BACK OF A PATROL CAR TO THE STATION WHERE QUASTIONING BEGAN BY A DETECTIVE IN AN INTERVIEW ROOM, AND THE DEFENDANT IS TOLD HE IS FREE TO LEAVE AND AFTER AN INTERVIEW OF ABOUT AN HOUR, THE INTERVIEWING DETECTIVE LEFT AND RETURNED WITH HIS PARTNA ANOTHER DETECTIVE AND THE QUESTIONING BECOME ACCUSATORY, WHETHER THE DEFENDANT INTERVIEW WITHOUT INFORMING OF HIS MIRANDA RIGHTS THUS CONSTITUTED A VIOLATION OF THE DEFENDANTS MIRANDA RIGHTS?

In Miranda-v-Arizona, the U.S. Supreme Court held that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination requires that an accused be informed of his right to have counsel present during custodial interrogation. If the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rest on the government to demostrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appointed Counsel. Miranda-v-Arizona(1986) 384 U.S. 436.

An important question of Law which is in conflict between the Federal Court of Appeal's and are divided on the Question at what point during a noncustodial interrogation at a police station does it become custodial. Guidance is necesary by this United States Supreme Court (U.S.S.C.) to all Federal and State Courts as well as to all defendants and litigants Nation Wide.

In this Particular Case, after agreeing to speak with detectives about an unknown matter at the police station, petitioner was taken from his front yard in the back of a patrol car to the station where questioning began by a detective in an interview room. Petitioner was told he was free to leave. After interviewing petitioner for about an hour, the detective left the room and returned with another detective.

The questioning became accusatory. The detective told petitioner they had completed a "bunch" of interviews, their

investigation clearly showed petitioner was sexually abusing his daughter, the detective wanted to know why and asked petitioner if it was because he was not getting attention from his wife. Petitioner responded by nodding his head and saying, "mhm." The detective continued, stating he understood that petitioner's daughter was a pretty girl and petitioner knew he was not getting the attention he deserved as a man from his wife. At that point petitioner responded by nodding his head and stating:

Answer: mhm. I think at this point I mean you guys basically already arrested me. I should get an attorney or something.

Question: Is that what you're asking for an attorney?

Answer: I don't want to talk. I don't want to say anything I shouldn't say.

Question: mhm. Its your choice.

Answer: Yeah, I mean I have talked to you I've told you everything.

Question: But you really haven't told me anything, that's the thing.

Answer: No, I told you what I feel and I'm telling you what I feel right now:

Question: And what is that? What do you feel right now?

Answer: That...that I should get an attorney. These are serious charges you're talking about.

Question: You have no idea.

Answer: No, I do.

Question: Here's the thing its that you are being charged with the allegations are that you've been abusing her.

Answer: Yea, I...I understand.

Question: For seven years.

Answer: I understand.

Question: Straight.

Answer: I understand.

Question: Not only.

Answer: Understand I don't have a family anymore now. Do you understand that?

Question: I do.

Answer: So everything that I am working for and doing that's gone. This is extremely serious. This is my life, over.

Question: That's why I would think that you would want to get your side of the story out.

Answer: No. What I want to do is make sure that I have an attorney before I say anything else.

Question: Ok. That's cool. (CT 185-186) 1./

The relevant inquiry in determining whether custodial interrogation has begun is "how a reasonable man in the suspect's position would have understood his or her situation." See Berkemer-v-McCarty (1984) 468 U.S. 420, 442. In this particular case, At one point petitioner even informed the detectives they had "basically already arrested me." Was that not a reasonable conclusion given that petitioner had been taken from his home in the back of a squad car and placed in a room with two detectives, one of whom accused him of child molestation? Would a reasonable man believe he was free to go after the detective advised petitioner they had conducted a "bunch" of interviews and they knew he had done it and merely wanted to know why?

Had not custodial interrogation begun when the detective announced they had conducted interviews, they knew petitioner had sexually abused his daughter and the only thing they wanted to know was whether it was because he was not getting attention from his wife ?

The California Court of Appeals relies on People-v-Moore (2011) 51 Cal. 4th 386, 402-403 in concluding there had been no custodial interrogation in petitioner's case.

1. "CT" refers to the Clerk's transcript; And "RT" refers to reporter's transcript; And "ACT" refers to the augmented Clerk's transcript

(California Court of Appeals, Fifth Appellate District Unpublished Opinion at pgs:9-13.)

Moore is distinguishable from petitioner's case, because In Moore, the setting was not custodial because the defendant was consistently told he was being questioned only as a witness and the interviewers did not claim to know he was guilty. (Id. at p. 403.)

Contrary and distinguishes from Moore, Petitioner was explicitly told they had conducted numerous interviews and knew he had sexually abused the girl. **Petitioner was effectively told he was a defendant, not a witness.**

The United States District Court for the Eastern District of California, denied petitioner's Miranda Claim concluding that, Even assuming Petitioner was in custody and the nodding should be suppressed, any error in admitting this evidence did not have a "substantial and injurious effect or influence in the jury's verdict." (United States District Court for the Eastern District of California, Findings and Recommendation to Deny Petition for Writ of Habeas Corpus, at Pgs: 10-20.)

The United States Court of Appeals for the Ninth Circuit, Just refused and denied petitioner's request for the Issuance of a Certificate of Appealability (COA) and Subsequently, Also denied petitioner's petition for Rehearing and his request for en banc review.

Petitioner contends that this Issue is Ripe for Certiorari to settle this Question of law and to provide guidance Nation Wide to State and Federal Courts as well as to All litigants including criminal defendants Because the Fifth Amendment Guarantee and in Miranda the U.S.S.C. set a clear bright-line rule; "Prior to any questioning the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence and representation of an attorney.

Finally, Petitioner contends that this issue is Ripe for Certiorari Because The State Court's as well as the Federal Courts unreasonably and contrary applied clearly established precedent under Miranda and the Fifth Amendment Guarantee and needs to provide guidance Nation Wide regarding what constituted Custodial interrogation's and or at what point during a non-custodial interrogation at a police station does it become custodial.

For these Reasons a Writ of Certiorari Should be Issued to provide Guidance to all Federal and State Courts, and Criminal Litigants raised by this Issue of Whether or at what point non-custodial interrogations become custodial in Light of Miranda.

REASONS FOR GRANTING THE PETITION

II

GUIDANCE IS NECESSARY NATION WIDE CONCERNING, TRIAL COURT CONFUSING, CONFLICTING AND MISLEADING INSTRUCTIONS WHICH INFORMS THE JURY THE REQUIRED PROOF OF UNION OR JOINT OPERATION OF AN ACT CONCERNING CONTINUOUS SEXUAL ABUSE OF A MINOR; BECAUSE IT IS IMPOSSIBLE TO DETERMINE WHICH CONFLICTING INSTRUCTIONS THE JURY FOLLOWED

An important Question of Law that has not but should be Settled by this U.S.S.C . is raised by this issue Regarding the Trial court instructional error which become impossible to determine which conflicting instructions the jury followed..

In this particular case, Petitioner alleged that the trial court instructional error resulted in continuing the jurors as to the applicable state of mind for the offense of continuous sexual abuse of a minor, Because the trial court instructed the jury that continuous sexual abuse of a minor was a general intent offense even though there was evidence that some of the alleged conduct was lewd and lascivious act, a specific offense. Although, the trial court did note in the instruction on lewd and lascivious acts with a minor and lewd and lascivious acts with a minor by force the requirement for a specific intent...The trial court failed to tie any such requirement regarding the allegation of continuous sexual abuse of a minor. (CT 127, 7RT 1105-1107.)

More specifically, as far as continuous sexual abuse of a child under 14, the trial court instructed the jury that the defendant must have engaged "in three or more acts of substantial sexual conduct or lewd or lascivious conduct with the child." (6RT 945-947; CT 139.). The instruction also advised the jury that for lewd or lascivious conduct, any willful touching of a child must be "accomplished with the intent to sexually arouse the perpetrator or the child." (6RT 946; CT 139).

The instruction also informed the jury that "You cannot convict the defendant unless all of you agree that he committed three or more acts over a period of at least three months, but you do not all need to agree on which three acts were committed." (CT 139; 6RT 946).

The California Court of Appeals, Fifth Appellate District denied this constitutional ground contending that there was no error in view of the other properly given instructions defining the necessary specific intent. (Opn. at pp.13-15.)

The United States District Court for the Eastern District of California, denied petitioners Constitutional Ground because according to the Eastern District, The State Court of Appeals determined that the instructions properly instructed the jury on the substantive element of state criminal law, and that there is no basis to conclude that the jury applied the instructions in a way that violated the constitution. (Id. at pp 21-22).

The United States Court of Appeals for the Ninth Circuit, Denied petitioner's COA request and subsequent petition for Rehearing and en banc review.

Petitioner Contends that this issue is Ripe for Certiorari to Settle the Question presented by this Issue and to provide Guidance Nation Wide of WHETHER CONFUSING, CONFLICTING AND MISLEADING INSTRUCTIONS, VIOLATE THE DEFENDANT'S RIGHT TO PROOF BEYOND A REASONABLE DOUBT, HIS RIGHT TO A UNANIMOUS VERDICT BY A JURY AND DUE PROCESS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

For these Reasons a Writ of Certiorari Should be Issued to provide Guidance to all Federal and State Courts as well as to All criminal defendants and Litigants.

REASONS FOR GRANTING THE PETITION

III

BECAUSE THIS COURT HAS NOT YET DECIDED THE QUESTION OF WHAT DEGREE OF EVIDENCE IS REQUIRED TO ESTABLISH A DEFENDANT HAS INFILCTED BODILY HARM RESULTING FROM THE USE OF FORCE MORE THAN THE FORCE NECESSARY TO COMMIT SPECIFIED SEXUAL OFFENSES, GUIDANCE IS NECESSARY.

Petitioner contends that Certiorari should be granted to settle an important question of law in itself and provide guidance Nation wide by defining the degree of injury required to constitute "bodily harm"

In this particular case Petitioner contends that the jury finding that he inflicted bodily harm to his victim is not supported by substantial evidence. The Own State Court of Appeals holds in its opinion that the testimony relating to the injurues sustained by the victim was limited and not overwhelming the court concluded that it was sufficient to support the jury's finding.

The eastern District Denied this issue because according to the District Court Petitioner's claim presented a question of state law which is not subject to federal review.

Certiorary is necessary to decide if the question presented in this case regarding of what degree of evidence is required to establish a defendant has inflicted bodily harm; Whether this claim should be considered in Light of Jackson-v-Virginia, 443 U.S. 307, 319 (1979) and to determine whether any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364 (1970); Chein-v-Shumsky, 373 F.3d 978, 982 (9th Cir. 2004); Cavazos-v-Smith, 565 U.S. 1 (2011).

For these Reasons a Writ of Certiorari should be Issued to provide Guidance to all Federal and State Courts and Criminal Litigants Nation Wide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Alfredo Provencio
ALFREDO PROVENCIO

Date: December 16, 2018