IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2019

ROGER CHA,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

Is a *Miranda* waiver invalidated when the law enforcement officer providing the advisal involves himself in the waiver process by asking the subject of the interrogation whether "we agree" that he wants to waive his rights and make a statement, rather than asking him "do you agree?"

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Petitioner respectfully prays that a *writ of certiorari* issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 28, 2019.

JURISDICTION AND CITATION OF OPINION BELOW

On March 28, 2019, the Ninth Circuit affirmed Petitioner's conviction in an unpublished Memorandum opinion, attached as Exhibit "A" to this petition. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on June 5, 2019. [Ex. "B"]. This Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AT ISSUE

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment 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 danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor 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; nor shall private property be taken for public use, without just compensation.

U.S. Constit., Amendment V.

INTRODUCTION

Petitioner asks this Court to grant review of the instant case to decide a novel and important Miranda v. Arizona, 384 U.S. 436 (1966), waiver issue. Petitioner, a man with just a 66 IQ, was subjected to a custodial interview in his home by two armed U.S. Secret Service agents. After properly advising Petitioner of his Miranda rights, the agent proceeded to the waiver portion of the process. Instead of asking Petitioner, "do you agree" to waive your rights and made a statement, the agent twice involved himself in the process by asking him if "we agree." The agent's indication that the Miranda waiver decision was a mutual one was coercive and deceptive, and rendered Petitioner's subsequent waiver invalid. Review of the Ninth Circuit decision upholding the validity of Petitioner's waiver is warranted in order to decide this novel Miranda waiver issue and provide, as this case demonstrates, much-needed guidance to law enforcement officials about the impropriety of such an approach.

STATEMENT OF FACTS AND CASE

Petitioner, Roger Cha, is a 32 year-old United States citizen. Petitioner has an IQ of 66, placing him in the bottom five percent of persons his age, and leaving him with a cognitive function between the intellectually disabled and borderline ranges of functioning. [RT 724-75].[1]

In November 2011, the U.S. Secret Service initiated an investigation after an agent found a computer that was offering to share images of child pornography with other network users. [PSR 4]. The government located the computer and obtained a search warrant for the home where Petitioner lived with his family. [PSR 6]. While the government was executing the warrant, Petitioner was interrogated by two armed agents in a back bedroom of the family home. After asking Petitioner various biographical questions, Secret Service Agent Amaro provided Petitioner with his version of a Miranda advisal:

> AA: WE'LL GET TO THAT LATER. ALRIGHT, BEFORE WE PROCEED UM, I HAVE TO READ YOU YOUR RIGHTS, THIS IS JUST THE LAW. YOU MUST UNDERSTAND YOUR RIGHTS BEFORE WE ASK YOU ANY QUESTIONS. YOU HAVE THE RIGHT TO REMAIN SILENT. ANYTHING YOU SAY CAN BE USED AGAINST YOU IN COURT OR OTHER PROCEEDINGS. YOU HAVE THE RIGHT TO TALK

[1] "ER" denotes Appellant's excerpts of record filed in the Ninth Circuit Court of Appeals. "RT" refers to the reporter's transcript of proceedings.

TO A LAWYER FOR ADVICE BEFORE WE QUESTION YOU AND TO HAVE HIM WITH YOU DURING QUESTIONING. IF YOU CANNOT AFFORD A LAWYER AND WANT ONE, A LAWYER WILL BE APPOINTED TO YOU BY THE COURT. IF YOU DECIDE NOW TO ANSWER QUESTIONS NOW WITHOUT A LAWYER PRESENT, YOU STILL HAVE THE RIGHT TO STOP THE QUESTIONING AT ANY TIME. YOU ALSO HAVE THE RIGHT TO STOP THE QUESTIONING AT ANY TIME UNTIL YOU TALK TO A LAWYER. UH, I HAVE READ THE STATEMENT OF MY RIGHTS AND IT HAS BEEN READ TO ME AND I UNDERSTAND WHAT MY RIGHTS ARE. **DO WE AGREE?**

RC: UH-HUH.

AA: SIGN WHERE IT SAYS SIGNATURE. ALRIGHT, THE NEXT PART OF THIS IS, I DO NOT WANT A LAWYER AT THIS TIME. I UNDERSTAND AND KNOW WHAT I AM DOING. NO PROMISES OR THREATS HAVE BEEN MADE TO ME AND NO PRESSURE OR FORCE OF ANY KIND HAS BEEN USED AGAINST ME. I HEREBY VOLUNTARILY AND INTENTIONALLY WAIVE MY RIGHT TO REMAIN SILENT AND MY RIGHT TO HAVE AN ATTORNEY AT THIS TIME. I AM WILLING TO MAKE A STATEMENT AND ANSWER QUESTIONS. **WE AGREE?**

RC: (INAUDIBLE).

AA: K, SIGNATURE RIGHT BELOW. THERE YOU GO, OKAY. NOW THAT ALL THAT PAPERWORK IS OUT OF THE WAY, I WANT TO TALK TO YOU A LITTLE ABOUT – DON'T YOU KNOW WHY WE'RE HERE?

[ER 133-34](bolding added).

Petitioner thereafter made inculpatory oral and written statements regarding having knowledge of illicit images which the government found on a computer located in a common area of the home. The government subsequently charged Petitioner with possessing a visual depiction of a minor engaged in sexually explicit conduct, in violation of 18 U.S.C. § 2252(a)(4)(B).

Petitioner moved to suppress his statements, claiming that his Miranda waiver was invalid and involuntary. The district court denied the motion, finding that although Petitioner suffered from an intellectual disability, the recording of the interrogation demonstrated that Appellant's waiver was valid and his statements were not rendered involuntary by the actions of the agents. [ER 34].

The case proceeded to trial. The government acknowledged that the only evidence it had tying Petitioner to the illicit materials were his statements. The defense presented a false confession defense at trial, arguing that Petitioner only made inculpatory statements during the interview (after initially denying any knowledge of the illicit content) after the agents threatened to arrest his father.

The jury convicted Petitioner of the charge. On appeal, Petitioner challenged, among other things, the validity of his Miranda advisal and waiver based upon Amaro's involvement of himself in the waiver decision. The Ninth Circuit

found that the advisal was proper because "the agent provided a straightforward reading of the requisite warnings that 'reasonably convey[ed] Cha's constitutional rights. *United States v. Loucious*, 847 F.3d 1146, 1149 (9th Cir. 2017)(citation omitted)." [Ex. "A" at 2]. The Ninth Circuit panel further concluded that Petitioner's waiver was knowing and voluntary. [Ex. "A" at 2-3].

ARGUMENT

THIS COURT SHOULD GRANT THIS PETITION IN ORDER TO DECIDE WHETHER A *MIRANDA* WAIVER IS INVALIDATED WHEN A LAW ENFORCEMENT AGENT INVOLVES HIMSELF IN THE WAIVER PROCESS

A. Applicable Law

"Just as 'no talismanic incantation [is] required to satisfy [Miranda's] strictures,' California v. Prysock, 453 U.S. 355, 359 [] (1981) (per curiam), it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance." Missouri v. Seibert, 542 U.S. 600, 611 (2004). "The [relevant] inquiry is simply whether the warnings reasonably convey to a suspect his rights as required by Miranda." Duckworth v. Eagan, 492 U.S. 195, 203 (1989)(citation, alterations, and internal quotation marks omitted).

"The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As the Court articulated in Moran v. Burbine, 475 U.S. 412, 421 (1986), an inquiry into the validity of such a waiver has "two distinct dimensions." "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate

choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." It is only if the totality of the circumstances surrounding the interrogation "'reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.'" Id. (quoting Fare v. Michael C., 442 U.S. 707, 725 (1979)).

B. Petitioner's *Miranda* Waiver Was Invalid Due to The Secret Service Agent's Involvement Of Himself In The Waiver Decision

The agent's use of the pronoun "we," when asking Petitioner whether he understood his Miranda rights and agreed to waive them and speak to the agents, had a profound effect on the validity of Petitioner's waiver. When Amaro was inquiring whether Petitioner understood what his rights were, he asked him, "do we agree" that he understood his rights. [ER 133]. Next, when Amaro asked Petitioner if he was willing to waive his rights and make a statement, he again asked Petitioner if "we agree" to do that. [ER 133]. Not "do you agree" to waive your rights and talk, but rather, do "we agree?"

By including himself in the Miranda waiver process in this manner, Amaro indicated to Petitioner that the Miranda waiver process was a mutual one. The

Court has never addressed the propriety of this law enforcement tactic in the context of Miranda, but the Ninth Circuit, albeit under different facts, has addressed the effect of a law enforcement agent involving himself in the Miranda waiver process.

In Doody v. Ryan, 649 F.3d 986, 1004-05 (9th Cir. 2011)(en banc), the Ninth Circuit examined whether the police had provided inadequate Miranda warnings. Part of Appellant's complaint was that on three occasions, the interrogator indicated that the Miranda rights were "for your benefit and our benefit." Id. at 1005 (""It's only something for, for your benefit and for our benefit, okay[.]"). The Ninth Circuit found that "by informing Doody that the *Miranda* warnings were for the mutual benefit of Doody and the officers," the officer created a "drastically different connotation than if the detective had given Doody a straight-forward explanation that the warnings were given for Doody's protection, to preserve valuable constitutional rights." Id. at 1005.

As the Ninth Circuit addressed in Doody, Amaro very much indicated to Petitioner that there was a mutual role in the Miranda warning and waiver process. When Amaro asked Petitioner "do we agree" that you understand your rights, he was telling a man with a 66 IQ that "I agree that you understand your rights, how about you?" When he then asked Petitioner if "we agree" that you "want to waive [your] right to remain silent and [your] right to have an attorney at this time," and that you

are "willing to make a statement and answer questions," [ER 133-34], Amaro, again, was suggesting to Petitioner that *he* already had agreed that Petitioner should do this, and he just needed Petitioner to concur. Amaro carefully deviated from the Miranda form in order to make it appear to Petitioner that the Miranda advisal and waiver was a mutual process and decision, that he already had concluded that Petitioner understood his rights and should waive them and make a statement, and Petitioner simply needed Petitioner to go along with him.

This tactic by Amaro to involve himself in the Miranda process represents his improper use of coercion and deception to obtain a Miranda waiver and statement from Petitioner. See Moran, 475 U.S. at 421 (setting forth dimensions of waiver analysis). This should be the conclusion as to an average defendant given the instant record, but it surely is the case given the background of Petitioner. See Zerbst, 304 U.S. at 464 (determination of whether there has been intelligent waiver of right to counsel "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."); United States v. Preston, 751 F.3d 1008, 1016 (9th Cir. 2014)(en banc)(quoting ABA Criminal Justice Mental Health Standards, Standard 7-5.8(b))("'Official conduct that does not constitute impermissible coercion when employed with nondisabled persons may impair the voluntariness of the statements

of persons who are mentally ill or mentally retarded.'"). At the time of the interrogation, Petitioner, with a 66 IQ, was isolated in a bedroom with the door closed, there were two armed agents conducting the interview, and he had never been interrogated by law enforcement previously. The agent deceived Petitioner as to "the nature of the right being abandoned[,]" Moran, 475 U.S. at 421, by suggesting that it was mutually applicable, and he coerced Petitioner into waiving his rights by telling him that he already had made his decision that waiver was the proper course of action. Given the "particular facts and circumstances surrounding [this] case," Zerbst, 304 U.S. at 464, the Ninth Circuit's finding that Petitioner validly waived his Miranda rights was erroneous, and this case should be reviewed by the Court.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the Court grant the instant petition to review the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: August 30, 2019

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