IN THE SUPREME COURT OF THE UNITED STATES

Term Commencing October 2019

MICHAEL ANTHONY CLAYTON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

File No. _____

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: November 6, 2019

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QUESTION PRESENTED

1. Must an Officer Tell a Criminal Suspect in Custody That He Has the Right to Have an Attorney Present During the Interview, in Order to Use the Suspect's Statements Against Him?

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PETITION FOR CERTIORARI

Michael Anthony Clayton respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was published as United States v. Clayton, 937 F.3d 630 (6th Cir. 2019) (Pt. App. 1a).

JURISDICTION

The Sixth Circuit's opinion was filed on August 30, 2019. Clayton's petition for rehearing was denied on October 24, 2019.The Sixth Circuit's mandate issued on November 1, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution.The Amendment says in part that no person "shall be compelled in any criminal case to be a witness against himself . . ."U.S. Const. amend V.

STATEMENT OF THE CASE

The government charged Clayton with seven counts in a superceding indictment. The charges included Count 1, conspiracy to use a minor to engage in sexually explicit conduct for the purpose of producing a visual depiction of that conduct, Counts 3, 4, and 5, sexual exploitation of three minors, J.P., H.K., and K.P., Count 6, causing J.P. to engage in one or more commercial sex acts, Count 7, conspiracy to distribute cocaine, and Count 8, possession of firearms after having been convicted of a felony.[1] (Superceding Indictment, R. 51, Page ID # 116–123).

A jury convicted Clayton of all charges. Crucial to the verdict were admissions that Clayton made when police officers questioned him. The district court admitted the admissions over Clayton's objections.

The district court sentenced Clayton to life in prison on the count of causing a minor to engage in commercial sex acts and to lesser concurrent terms in prison on the other counts.(Sentencing Tr., R.214,

[1]Clayton's co-defendant, Ramiro Hernandez, Jr., was charged in Counts 1, 2, and 7. Count 2 charged Hernandez only.

Page ID # 1799).

The case began on October 5, 2017, when J.P. texted family members that she was being held against her will in a home in Battle Creek, Michigan. Officers went there and found her in the basement. They got a search warrant, searched the home, and found cocaine and firearms. They arrested Clayton and seized cell phones from him.(Trial Tr., R. 211, Page ID # 1446, 1449, 1461–64, 1477, 1509–10).

Tyler Sutherland, a Battle Creek Police Detective, questioned Clayton first. When he started the interview Sutherland read from the Battle Creek Police Department waiver of rights form, but left out parts of the form.(Supp. Tr., R. 82, Page ID # 237–38).[2]

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[2]The form says:

YOUR RIGHTS

Before we ask you any questions, you must understand your rights.
You have the right to remain silent.
Anything you say can and will be used against you in court.
You have the right to talk to a lawyer before we ask you any questions and to have him/her with you during questioning.
If you cannot afford to have a lawyer, one will be appointed for you before any questioning if you wish.

Sutherland did not tell Clayton he could have an attorney with him during questioning nor did he ask Clayton if Clayton was willing to talk to him or if Clayton was willing to waive his rights. Clayton refused to sign the form, but talked to Sutherland.(Id., Page ID # 246, 255, 266).

Sutherland took a break to speak to J.P., then spoke to Clayton again. Later Jeff Williams, a Homeland Security Special Agent, questioned Clayton. No one advised Clayton of his Miranda[3] rights at these later interviews.(Supp. Tr., R. 82, Page ID # 247, 260–61, 267, 269, 290–91).

During the questioning Clayton admitted he had had intercourse with J.P. about three times, and that he filmed one of those times on his cell phone.Clayton identified his Snapchat User I.D. and his

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WAIVER OF RIGHTS

> I have read and understand my rights. I am willing to talk to you and answer questions.

(Supp. Tr., R. 82, Exhibit 2, Page ID # 246).

[3]Miranda v. Arizona, 384 U.S. 436 (1966)

Facebook account and gave officers the pass codes to his cell phone.(Id., Page ID # 1498, Suppression Hearing Transcript ("Supp.Tr."), R. 82, " Page ID # 274, 284).

Before trial Clayton filed a motion to suppress his statements and the evidence obtained from the cell phone. The district court conducted a hearing. Clayton's first interview with Sutherland was recorded on videotape and admitted at the hearing. (Id., Exhibits 1, 1A–1D, Page ID # 239–240).So were tapes of the other interviews. The rights form was also admitted. (Id., Exhibit 2, Page ID # 246).

Clayton argued, among other things, that the district court should suppress his statements because he was not given complete Miranda warnings including the advice that he could have a lawyer present during questioning. (Id., Page ID # 331–32). The district court disagreed. It ruled that omitting the advice that Clayton could have a lawyer with him during questioning was not fatal. The district court denied the motion. (Supp. Tr., R. 82, Page ID # 338, 342–43).

At trial the government played recordings of Clayton's inculpatory statements and showed images and videos from his cell phone.(Trial Tr., R. 211, Page ID # 1499–1501, 1512, 1521–22, Trial Tr., R. 212,

Page ID # 1535–38, 1540, 1545–46).

On appeal Clayton renewed his argument that officers did not give him proper Miranda warnings before questioning him.

The Sixth Circuit Court of Appeals affirmed Clayton's convictions and sentence. It upheld the admission of Clayton's statements, saying that admitting them was consistent with this Court's ruling in Florida v. Powell, 559 U.S. 50 (2010), United States v. Clayton, 937 F.3d 630, 2019 U.S. App. LEXIS 26382 at * 20–21.

Clayton petitioned for rehearing.He pointed out that the court had overlooked United States v. Tillman, 963 F.2d 137, 140–41 (6th Cir. 1992), an earlier published opinion holding that a suspect must be told that he has the right to have a lawyer present with him during interrogation. Clayton also said the warnings given in his case differed from those given in Powell, but the court denied his petition without comment. United States v. Clayton, No. 18-2237, Order dated October 24, 2019, (Pt. App. 20a).

Now Clayton asks the Court to grant his petition for certiorari to resolve a conflict among the circuit courts about what officers should tell a suspect in custody about his right to have a lawyer with him

during questioning.

The circuit courts of appeals align this way: the Fifth, Sixth (before Clayton's case), Ninth, and Tenth Circuits require explicit warning that a suspect may have a lawyer with him during questioning. The Second, Fourth, Seventh, and Eighth Circuits do not.

REASONS FOR GRANTING THE WRIT

1. The Court Should Grant the Petition to Settle a Split Among the Circuit Courts About the Warnings Police Must Give a Criminal Suspect in Custody About the Right to the Presence of an Attorney During Questioning.

When deciding if it will grant a petition for certiorari the Court will consider if "a United States court of appeals has entered a decision in conflict with a decision of another United States court of appeals on the same important matter . . ." S. Ct. Rule 10.

In this case, the decision in Clayton's case squarely conflicts with the decisions of several courts of appeals and concerns an important matter that has broad application.

The warnings that officers must give about the presence of an attorney in order to comply with Miranda v. Arizona comes up every time officers question suspects in custody.

To secure the Fifth Amendment's privilege against self-incrimination the Court required in Miranda that suspects receive specific warnings before custodial interrogation begins. Officers must inform suspects in custody that they have the right to remain silent, that their statements may be used against them at trial, that they have the right to the presence of an attorney during questioning, and that if they cannot afford an attorney one will be appointed for them. Miranda v. Arizona, 384 U.S. at 478–79.

The warnings required and the waiver necessary ... "are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant." Miranda v. Arizona, 384 U.S. at 476.

If Miranda warnings are not given the inquiry stops: the statements are not admissible. Miranda v. Arizona, 384 U.S. at 479, United States v. Patane, 542 U.S. 630, 645–46 ((2004) (Souter, J. dissenting) ("There is, of course, a price for excluding evidence, but the Fifth Amendment is worth the price . . .").

But did Miranda create a bright-line rule so that any deviation from the warnings requires the court to suppress the defendant's

statements? Yes and no. There is no set form of words officers must use to tell a suspect of his rights under Miranda, yet what the officers say must reasonably convey the substance of the warnings to the suspect. Florida v. Powell, 559 U.S. at 60.

The dispute in Clayton's case turns on the warning about the right to have a lawyer present during questioning. The Court must decide if a defendant in Clayton's position would reasonably understand that he had the right to have a lawyer present during questioning based on Sutherland's incomplete warnings .Florida v. Powell, 559 U.S. at 60.

In Powell the Court approved warnings that gave more information than the warnings Sutherland gave Clayton. The warnings in Powell said "You have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in court. You have the right to talk to a lawyer before answering any of our questions. If you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning. You have the right to use any of these rights anytime you want during this interview."Florida v. Powell, 559 U.S. at 54. The Court said that these

statements implied the right to have counsel present during questioning.(Id., at 62–63).

The Sixth Circuit's ruling in Clayton's case extends this inference one more step. The police did not give Clayton a catch-all warning like the one given to Powell. Clayton was told only that he had the right to talk to a lawyer " before we ask you any questions."(Supp. Tr., R. 82, Page ID # 255, 262).

This warning did not tell Clayton that he could have his lawyer with him during questioning. It did not tell him that he could talk to his lawyer after questioning started. And he was not told that he could invoke his right to a lawyer at any time. The warnings given to Clayton were not a "fully effective equivalent" to the warnings Miranda requires.[4] The Sixth Circuit was wrong to rely on Powell to uphold the district court's ruling denying Clayton's motion to suppress.

The circuit courts are split on what Miranda requires officers to

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[4]Effective means "having an expected or desired result." Webster's II New College Dictionary (2001). Equivalent means equal in force, value, or meaning; having identical or similar effects.(Id.) The warnings given Clayton did not produce the result of letting him know he could have a lawyer with him during questioning.

say about the presence of a lawyer during questioning. Four circuits, including the Sixth Circuit (before Clayton) say that Miranda requires that a suspect be told that he has the right to have an attorney present before and during custodial interrogation. United States v. Tillman, 963 F.2d at 140–41, United States v. Noti, 731 F.2d 610, 615 (9th Cir. 1984), United States v. Oliver, 421 F.2d 1034, 1037–38 (10th Cir. 1970), and Atwell v. United States, 398 F.2d 507, 510 (5th Cir. 1968).These courts require that the police make clear to the defendant that he has the right to have an attorney before, during, and after questioning in keeping with Miranda's statement that a defendant must be "clearly informed" that he has the right to have a lawyer with him during interrogation. Miranda v. Arizona, 384 U.S. at 471.In Miranda the Court also said that the right to have counsel present "at the . . . interrogation is indispensable to overcome its pressures" (Id., at 469), and that "[T]he need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning . . ." (Id., at 470).

But four other circuits disagree. They say that a general warning

about the right to counsel is enough as long as there is no limit on when the right applies. United States v. Warren, 642 F.3d 182, 185 (3rd Cir.2011), United States v. Frankson, 83 F.3d 79, 82 (4th Cir. 1996), United States v. Caldwell, 954 F.2d 496, 502 (8th Cir. 1992), and United States v. Lamia, 429 F.2d 373, 376–77 (2nd Cir. 1970).

State courts are divided too. Compare People v. Matthews, 324 Mich. App. 416, 433–44 (2018), mot. for immediate consideration granted, 503 Mich. 882 (2018) (disagreeing that the right to the advice of an attorney impliedly informs a suspect of the right to have an attorney present during interrogation because Miranda says warnings must be clear and unambiguous and because impliedly informing a suspect assumes, contrary to Miranda, that all suspects, regardless of their backgrounds, have a working knowledge of everything implied by reference to the right to an attorney) with Carter v. People, 398 P.3d 124, 127–28 (Colo. 2017)(holding that being advised that he had the right to have an attorney immediately after being advised that before the detective could talk to him she had to do "the little formal rights things" was enough to convey the right to have an attorney present.)

The Court should grant the petition for certiorari to resolve this

conflict. And the Court should make clear that inference about substance is not acceptable. As the Court said in Miranda, "[n]o amount of circumstantial evidence that the person may have been aware of [the right to counsel] will suffice" in the absence of sufficient express warnings. Miranda v. Arizona, 384 U.S. at 471–72.In short, the police must convey the substance of the warnings, even if they can use different words. Id.

The Court should hold that the warnings given Clayton did not comply with Miranda, and should consider changing how it analyzes warnings about the right to have a lawyer present during questioning. The Court should require the express recitation of the warning, not just words that convey the same thing. A bright-line rule would better protect the rights of defendants and would not impose a significant burden on the police. A bright-line rule would avoid the need for courts to parse incomplete warnings or warnings that vary from those spelled out in Miranda to see if they convey the substance of what Miranda requires. It would remove the need to assume what the defendant understood and it would remove any incentive for officers to try to skirt giving a warning that Miranda requires. Carter v. People, 398 P.3d

131, 133–34 (Hood, J. dissenting and noting that the detective interviewing Carter stopped using the police department's written Miranda form containing express advice about the timing and immediacy of the rights after attending training about minimizing the impact of Miranda on the interview).

Clayton's statements should be ordered suppressed.

CONCLUSION

The Court should grant the petition for certiorari and vacate Clayton's convictions and order a new trial without the use of Clayton's statements.

Dated: November 6, 2019 Respectfully submitted,

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