No._____

In the
SUPREME COURT OF THE UNITED STATES

MICHAEL DAMEON BLACKBURN., Petitioner

v.

UNITED STATES OF AMERICA, Respondent

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

Petition for Writ of Certiorari

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Question Presented

Is a written-only advisement of Miranda rights -without time or silence to read it - a sufficient advisal allowing a knowing, intelligent and voluntary waiver?

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Petition for Writ of Certiorari

Michael Blackburn petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The Tenth Circuit's decision in *United States v. Blackburn*, Case No. 17-2141, was not published.[1] The district court's memorandum opinion finding Mr. Blackburn voluntarily, knowingly, and intelligently waived his Fifth Amendment rights was not published.[2]

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[1] App. 2a-9a. "App." refers to the appendix.

[2] App. 11a

Statement of Jurisdiction

On August 23, 2019, the Tenth Circuit affirmed the district court's decision that Mr. Blackburn voluntarily, knowingly, and intelligently waived his Fifth and Sixth Amendment rights. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Pertinent Constitutional Provisions

Amendment V

No person…shall be compelled in any criminal proceeding to be a witness against himself.

I. Introduction

No one disputes the necessity of the four *Miranda* warnings. The recitation of these four warnings need not adhere to any strict language. *California v. Prysock*, 453 U.S. 355, 361 (1981). Instead, "what *Miranda* requires 'is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act.'" *United States v. Connell*, 869 F.2d 1349, 1351 (9th Cir. 1989) (quoting *Coyote v. United States*, 380 F.2d 305, 308 (10th Cir. 1967)).

In assessing the adequacy of the advisal, a court must take a "practical viewpoint," considering the totality of the circumstances to determine if a layperson could reasonably understand each *Miranda* right. *United States v. Noti*, 731 F.2d 610, 614 (9th Cir. 1984). Several Circuits and at least one State court held that *Miranda* warnings can be provided to a suspect in written form only. But providing only a piece of paper with neither time nor silence to read it, while treating it as routine necessary paperwork, renders a written-only advisement wholly inadequate. "The crucial test is whether the words in the context used, considering the age, background, and intelligence of the individual being interrogated, impart a clear, understandable warning of all his

rights." *Coyote*, 380 F.2d at 308; *see also Connell*, 869 F.2d at 1353.

Here, the full context reveals the advisal as unclear and confusing. First, Mr. Blackburn was never given time nor silence to read the advisal. Second, besides making it difficult to read the advisal, Agent Breen downplayed, minimized, and trivialized the importance of the advisal – suggesting it was just a piece of bureaucratic paperwork he had to have. The advisal thus fell below the minimum *Miranda* standard; it was as if Mr. Blackburn did not receive the *Miranda* warnings at all.

II. Factual Background

In 2013, the Cyber Crimes Center, an investigative branch of Homeland Security, discovered a pornographic image of a toddler girl and adult male. The image's megadata indicated the photo was taken in Albuquerque, New Mexico, in May 2013 on an iPhone. Cyber Crimes forwarded the image to the Homeland Security office in New Mexico. Agent Breen investigated; he determined the child's parents' names, Tom and Maria Doe, and their location. Early one morning, officers approached the girl's two-story unit to do a "knock-and-talk."

Mr. Blackburn answered the front door wearing only boxers. Officers were taken aback; they had expected Mr. or Mrs. Doe to answer the door. Police had no indication that other adults lived with the family. Det. Sabaugh, with the Bernalillo County Sheriff's Office, explained they were looking for the Does and their children. Mr. Blackburn told the officers the children's parents had left town. He lived there with the children. When Det. Sabaugh requested to check on the children, Mr. Blackburn acquiesced.

As the officers were talking with Mr. Blackburn, Jane and John Doe, both toddlers, came down the stairs clad only in diapers. Agent

Breen and Det. Sabaugh immediately recognized Jane as the girl in the photos. The detective took the children upstairs to find clothes.

Police discovered Mr. Blackburn's cellphone contained two photos of Jane and John "consistent with child pornography." Agent Breen testified that, after viewing those photos, he felt he had probable cause to arrest Mr. Blackburn.

Agent Breen testified he asked Mr. Blackburn if he would go to the police station to be interviewed. Mr. Blackburn agreed. The officers handcuffed him, searched him, buckled him into the front-seat of a police car, and drove him to the police station with Agent Breen and Det. Sabaugh. No officer read or explained the *Miranda* warnings at the house or on the way to the police station.

Once at the station, officers took Mr. Blackburn to a small locked interview room at the police station. He arrived at 8:52 a.m. An officer removed Mr. Blackburn's handcuffs. Mr. Blackburn rubbed his wrists for a while. After about three and a half hours of confinement there, he had one brief contact with an officer to get a cup of water. Agent Breen and Det. Sabaugh finally arrived at the room at 12:29 p.m.

Det. Sabaugh: All right, Michael. My name is Detective Tracy Sabaugh, and I'm with the Bernalillo County Sheriff's Department Special Victim's Unit, and this is Special Agent Ryan Breen with Homeland Security Investigations, okay. And your name is Michael --

Mr. Blackburn: Blackburn.

Det. Sabaugh: I'm sorry?

Mr. Blackburn: Blackburn.

Det. Sabaugh: Is it --

Mr. Blackburn: B-L-A-C-K-B-U-R-N.

Det. Sabaugh: B-U-R-N -- just how it's spelled or how it sounds. And what's your date of birth?

Mr. Blackburn: October Xth, 1985.

Det. Sabaugh: '95?

Mr. Blackburn: '85.

Det. Sabaugh: And your Social?

Mr. Blackburn: 247-XX-XXXX.

Agt. Breen: Okay.

Det. Sabaugh: And is that Wyoming address your address?

Mr. Blackburn: That's where I was staying, but it's – the actual name on the lease was Tom and Maria Doe.

Det. Sabaugh: Okay. But you live there?

Mr. Blackburn: Yeah.

Det. Sabaugh: Okay.

[After a minute and fifteen seconds elapsed, Agt. Breen handed Mr. Blackburn the form below. Agt. Breen had already filled in the times and date]

Agt. Breen: Okay. That's a Waivers form. I just need you to read it before we go into our questions.

U.S. Immigration and Customs Enforcement

STATEMENT OF RIGHTS

MB Before we ask you any questions, it is my duty to advise you of your rights.

MB You have the right to remain silent.

MB Anything you say can be used against you in court, or other proceedings.

MB You have the right to consult an attorney before making any statement or answering any questions.

MB You have the right to have an attorney present with you during questioning.

MB If you cannot afford an attorney, one will be appointed for you before any questioning, if you wish.

MB If you decide to answer questions now, you still have the right to stop the questioning at any time, or to stop the questioning for the purpose of consulting an attorney.

WAIVER

I have had the above statement of my rights read and explained to me and I fully understand these rights. I waive them freely and voluntarily, without threat or intimidation and without any promise of reward or immunity. I was taken into custody at 9:30 (time), on 12/17/13 (date), and have signed this document at 12:31pm (time), on 12/17/13 (date).

Michael Blackburn
Print Name

Michael Blackburn
Signature

WITNESS: DATE: 12/17/13

WITNESS: DATE: 12/17/13

GOVERNMENT EXHIBIT 28

Det. Sabaugh: Basically, we want to explain to you everything that's going on, you know, so that way you can tell your side of the story. We can tell you what's going on on our side, so you know everything that's going on. But you do have to know your rights. Okay?

Mr. Blackburn: Right.

Det. Sabaugh: Your Constitutional rights.

Mr. Blackburn: Okay.

Det. Sabaugh: We want to make sure you understand them and that you have -- you know, that you understand that. You cannot talk to us if you want to.

Mr. Blackburn: Right.

Det. Sabaugh: But

Agt. Breen: But because of -- so like I explained to you before, it's a group of divisions that work on stuff like this. And so Teresa has her policies that, she has to follow; I have my policies that I have to follow. We have to report to 45 different bosses

Mr. Blackburn: Right.

Agt. Breen: -- about all the different stuff. So I apologize that it took us so long to get in here and talk to you. We were really hoping for a much quicker turn-around.

Mr. Blackburn: Right.

Agt. Breen: You know, but like Teresa was saying, I just need you to have those, to be aware of them, okay? And then we can -- I can get you to sign that you received them.

Mr. Blackburn: Okay.

Agt. Breen: But that doesn't change anything about the rights that you have…

Mr. Blackburn: Right.

Agt. Breen: …from this. Do you understand that?

Mr. Blackburn: Yes, sir.

Agt. Breen: Okay, so why don't you just stand right over there out of the way. We'll get all this filled out. Okay?

[70 seconds elapsed since Agt. Breen handed Mr. Blackburn the waiver form. Agt. Breen escorts Mr. Blackburn over to a table in the corner.]

Mr. Blackburn: Okay.

Agt. Breen: So you understand these? Would you mind just putting your initials right next to them to show that you've read those rights?

Mr. Blackburn: (Inaudible).

[The video shows Mr. Blackburn lean over from a standing position and initial the form seven times in 20 seconds. Agt. Breen is silent for approximately 8 seconds of this time.]

Agt. Breen: Usually, I have these in Spanish, too, but I didn't feel we all wanted Spanish lessons on how to read rights right now. So -- okay. And then what I need you to do here -- this says you're willing to talk to us right now. It doesn't mean you've got to continue. But for right now, you want to talk to us. I just need you to print your name there and sign right there for me.

Mr. Blackburn: Okay.

Agt. Breen: All right. Thanks a lot, Michael. Go ahead and grab a seat again. Now that that silliness is out of the way…

The entire exchange from the time they entered the room until Agt. Breen stated, "that silliness is out of the way" took slightly less than three minutes and thirty seconds. Mr. Blackburn had the form only seventy seconds before Agt. Breen escorted him to the table to sign it. The video indicates Mr. Blackburn looked down at the form for no more than a discontinuous 27 seconds before signing. The officers talked almost the entire time.

While some of what the officers talked to Mr. Blackburn about concerned his rights, neither officer explained his attorney-related rights or that anything he said could be used against him. The officers gave Mr. Blackburn no quiet time to read the form. It is not clear whether he was reading the form during those spare seconds while the officers continued to speak.

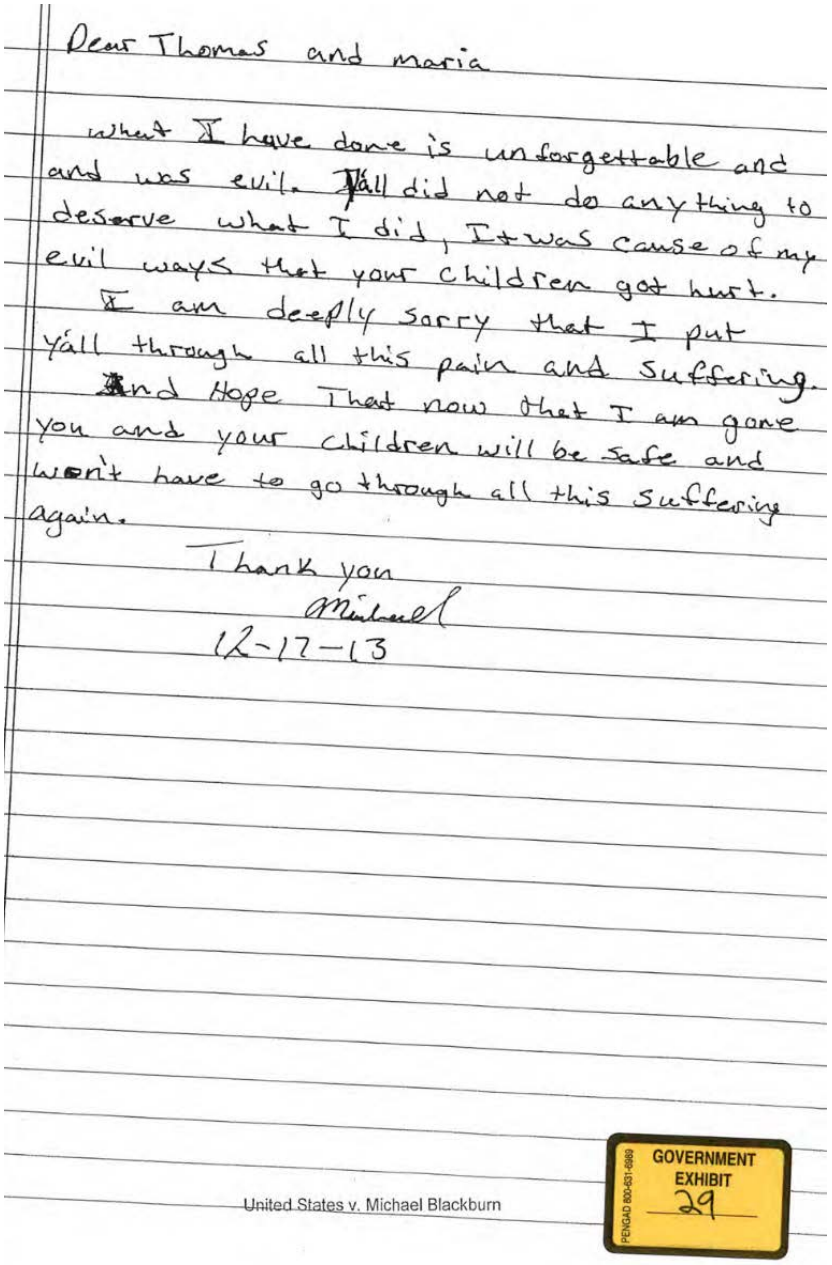
Two minutes and twenty seconds after entering the room, seventy seconds after handing Mr. Blackburn the waiver form, Agent Breen escorted Mr. Blackburn over to a table to initial and sign it. Agent Breen did not ask him if he had finished reading. He did not tell Mr.

Blackburn his signature indicated his rights had been read and explained to him. He did not tell Mr. Blackburn his signature indicated he "fully" understood the listed rights. He did not tell Mr. Blackburn his signature indicated he freely waived those rights, including his attorney-related rights. The agent never asked Mr. Blackburn if he wished to waive his rights.

At the suppression hearing, both Agent Breen and Det. Sabaugh testified they had no reason to believe Mr. Blackburn did not understand the form. However, the video shows that Det. Sabaugh was multi-tasking, looking at her phone.

The officers questioned Mr. Blackburn about several child pornographic photos on his cell phone. Mr. Blackburn attempted to state when and where the photo was taken and what was happening in the photos. The officers had him write information on the photos. He spelled nephew as "newphe" and penis as "pines." He did later spell penis correctly, but twice wrote "taking" for took. In another, he wrote "temping" presumably for attempting. Either he wrote down what the officers told him to write down or the officers remained silent while he wrote.

The officers gave him an opportunity to write an apology to the Does. He took approximately 8 minutes to write a simple, nine-line letter in complete silence.


Dear Thomas and maria

what I have done is unforgettable and and was evil. Y'all did not do anything to deserve what I did, It was cause of my evil ways that your children got hurt.
I am deeply sorry that I put Y'all through all this pain and suffering. And Hope That now that I am gone you and your children will be safe and won't have to go through all this suffering again.

Thank you
Michael
12-17-13

United States v. Michael Blackburn

GOVERNMENT EXHIBIT 29

PENGAD 800-631-6989

The government presented this letter at the suppression hearing to demonstrate that the written advisal was sufficient. The government also suggested "*Miranda* warnings are something that are fairly commonplace nowadays [.] Most people know what those are [.]"

At the suppression hearing, Mr. Blackburn presented Ms. Abeles, an educational diagnostician. Mr. Blackburn has an average IQ. According to her, he also did about average compared to the rest of the population in untimed tests determining ability to read and comprehend. But in a timed test, he scored in the bottom one percentile in reading speed and comprehension. After viewing the video of the *Miranda*-waiver process, Ms. Abeles opined that Mr. Blackburn could not read or understand the *Miranda* form in the time and manner he was presented with it.

A. District Court's Decision

The district court believed Mr. Blackburn could read and understanding his rights under the circumstances based on non-*Miranda*-related things he could do with no time pressure. The court noted Mr. Blackburn could explain different technologies he used. The court felt Mr. Blackburn evidenced multi-tasking skills when he responded to Agent Breen's questions about photos and wrote information on the pictures. It also relied on Mr. Blackburn's ability to engage in written exchanges with others online, his apology letter, and

texted conversations with his son's mother. The district court gave "minimal weight" to Ms. Abeles's testimony.

The district court determined from the video of the interrogation that Mr. Blackburn did not appear to have difficulty understanding what he was reading. The court deduced a full understanding of his rights from Mr. Blackburn's failure to ask for clarification. The district court found Mr. Blackburn made a knowing and intelligent Miranda rights waiver.

B. Tenth Circuit's Decision

The Tenth Circuit Court of Appeals affirmed the district court noting, "There is no legal requirement that officers orally advise a suspect of his *Miranda* rights." *United States v. Blackburn*, No. 17-2141, 2019 WL 3991103, at *5 (10th Cir. Aug. 23, 2019). The court also pointed out that Mr. Blackburn "initialed next to each right listed on the waiver form and then signed the bottom portion indicating his waiver."

III. Reasons for Granting the Writ

A. For a written-only advisal to be sufficient the atmosphere must not be distracting; it must be conducive to reading and understanding.

"Just as 'no talismanic incantation [is] required to satisfy [*Miranda's*] strictures,' 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) (internal citation omitted). The majority of circuits have held a written advisement only sufficient, most also agree the defendant must be given sufficient time to read it. *See e.g., United States v. Sledge,* 546 F.2d 1120, 1122 (4th Cir. 1977); *United States v. Bailey,* 468 F.2d 652, 659-660 (5th Cir. 1972); *United States v. Van Dusen,* 431 F.2d 1278, 1280 (1st Cir. 1970); *United States v. Osterburg,* 423 F.2d 704 (9th Cir. 1970); *Bell v. United States,* 382 F.2D 985, 987 (9th Cir. 1967).

Although holding a written only advisement sufficient, the majority of courts also emphasize the better practice is to give both oral and written warnings. In *Van Dusen*, the First Circuit held that as a matter of law oral warnings were not required where the defendant was given adequate time to read the form and was observed to read it. He

refused to sign the waiver but nevertheless told the agents he understood his rights and then answered questions. The defendant "thought that his signature was a magical key and that, so long as he refused his signature, he could talk with impunity." 431 F.2d at 1280. The court noted given that belief "an oral presentation of his rights would have added little." But the court explained such a contradiction "may indicate a serious misunderstanding on the part of the accused. In such a succession of events, we wish to make it clear to the courts and prosecutors in this circuit that the burden of persuasion resting on the prosecution measurably increases." *Id*. In *Sledge* the Fourth Circuit emphasized the preferred practice included both an oral recitation of the rights and a written explanation thereof with a request he execute a written waiver of the rights. 546 F.2d at 1122.

The Tenth Circuit found the written-only advisement sufficient without hesitation or expressed preference for both oral and written. *United States v. Coleman,* 524 F.2d 593, 594 (10th 1975). The court relied upon *Coleman* to dismiss Mr. Blackburn's contention that the written-only advisement without time or silence to read was insufficient. Nor did the court in *Coleman* make any determinations

about the circumstances under which the defendant read the rights – holding the defendant only need to be able to read, write, and understand English. *Coleman* relied, as did many other circuits, on *Bell,* 382 F.2d 985. This reliance is misplaced; the Ninth Circuit did not require the Government to prove a knowing waiver. But instead required the defendant to prove he did not read and understand the warnings and so was not properly advised of his rights. *Id*. at 987. Because *Bell* used an incorrect standard, cases that relied on it to uphold written-only advisals, such as *Coleman*, should be discounted.

For a written-only advisement to be sufficient, the Government must prove more than the suspect can read and write. They must prove that the suspect was given sufficient time and silence to read and understand the rights. By giving written only advisals and not giving suspects time to read or silence to read the forms, police effectively render the advisement a nullity.

Further complicating a written-only advisal is how variable such advisals are. In 2007, researchers conducted a large-scale survey of *Miranda* warnings; jurisdictions submitted over 560 *Miranda* Warnings. *See* Richard Rogers et al., *The Language of Miranda*

Warnings in American Jurisdictions: A Replication and Vocabulary Analysis, 32 Law & Hum. Bbehav. 124, 125 (2008). Of those warnings, 95% had their own, unique formulation; i.e., there were 532 different phrasings of the *Miranda* warnings. The warnings could be as succinct as 49 words or close to two (double-spaced) pages[3] long at 547 words. *Id.* The reading comprehension required vacillated wildly from grade 2.8 to post-graduate. *Id.*

Just as advisement can be rendered insufficient by an officer speed-reading it to a suspect so the Miranda warnings resemble gibberish, so too can distracting an individual from attending to the waiver form – especially when that is the only form of advisement the suspect receives. "It is axiomatic that a rendering of the *Miranda* warnings must be intelligible before a defendant can knowingly and intelligently waive the rights involved." *Clay v. State*, 725 S.E.2d 260, 266 (Ga. 2012).

[3] https://wordcounter.io/faq/how-many-pages-is-500-words. Last visited November 18, 2019

B. Suggesting the waiver form is just a required piece of bureaucratic paperwork renders the written-only advisal inadequate.

After giving Mr. Blackburn the written advisal, police continued to speak to him. They gave him only seventy-seconds, in which they continued to converse with him, to read the form. Further, they gave the impression the waiver was insignificant, explaining "But because of -- so like I explained to you before, it's a group of divisions that work on stuff like this. And so Teresa has her policies that, she has to follow; I have my policies that I have to follow. We have to report to 45 different bosses." Within ten-seconds, he said, "You know, but like Teresa was saying, I just need you to have those, to be aware of them, okay? And then we can -- I can get you to sign that you received them." And after Mr. Blackburn signed the form, Agt. Breen confirmed the paperwork as inconsequential; "Now that that silliness is out of the way" they could talk. "*Miranda* warnings … [a]re defective" when an officer "downplay[s] the [*Miranda*] warnings' significance." *Doody v. Ryan*, 649 F.3d 986, 1002-03 (9th Cir. 2011) (reversing, under the deferential AEDPA standard, for inadequate Miranda advisal where detective told suspect "the warnings were just formalities"). By both words and

actions, police here treated the written-only advisement as a trivial red tape.

"In substantially delivering the required text of *Miranda,* however, the interrogator should not, even in subtle ways, seek to undercut its essential message." *State v. Luckett* 981 A.2d 835, 850 (Md. App. 2009). If the courts presume that *Miranda* rights are common knowledge, then most *Miranda* advisements reflect obligatory, pro forma recitations rather than constituting a truly informative, essential component of procedural justice – and undercut its essential message. The manner in which police presented the written-only advisement downplayed, diminished, and trivialized the warnings, making the written-only advisal inadequate as a matter of law.

IV. Conclusion

The manner in which police present a written-only advisement can render it a nullity; it reduces giving the *Miranda* warnings to a hollow and meaningless exercise. Such a pro forma ritual does not comport with due process. This Court should grant this petition to reaffirm the crucial importance of Miranda warnings.

Respectfully submitted,

DATED: November 19, 2019

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I, Margaret Katze, certify this petition uses a Century Schoolbook, a proportionally spaced 14-point type. Excluding table of contents, table of citations, and the question presented, it contains 3,379 words. I relied on my word processor, Word Version 2016, to obtain the word count.

s/ Margaret Katze
Attorney for Appellant