IN THE

SUPREME COURT OF THE UNITED STATES

No. _____

OCTOBER TERM, 2019

MARCOS PALOMAR,

Petitioner,

- vs -

RAYMOND MADDEN, Warden

Respondent.

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

GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether a Miranda v. Arizona 384 U.S. 436 (1966), rights advisal is invalid if police indicate the right to appointed counsel prior to questioning is discretionary by advising an individual that an attorney "can" be appointed to him without cost if he cannot afford one, as opposed to providing the required advisal that counsel "will" be appointed in such a circumstance?

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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 June 14, 2019. The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on August 29, 2019.

JURISDICTION AND CITATION OF OPINION BELOW

On June 14, 2019, the Ninth Circuit affirmed Petitioner's conviction in a Memorandum, attached as Exhibit "A" to this petition.[1] The Ninth Circuit denied Petitioner's petition for rehearing, and suggestion for rehearing en banc, on August 29, 2019. [Ex. "B"]. The Court has jurisdiction to review the Ninth Circuit's decision pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION AT ISSUE

U.S. Const. amend. V:

> 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.

[1] The Memorandum will be cited herein as "Mem."

INTRODUCTION

Petitioner asks this Court to grant review in the instant case to decide a straightforward and important Miranda v. Arizona, 384 U.S. 436 (1966), advisal issue. Following Petitioner's arrest, detectives advised him, in the Spanish language and as to the fourth part of the Miranda warning: "[i]f you cannot get a lawyer, one *can* be appointed to you without payment before we ask you any questions." [Mem at 4](emphasis in original). Petitioner argued that the detective's advisal that an attorney "can be appointed," as opposed to the Court's "will be appointed" language from Miranda, 384 U.S. at 473, indicated that the right to appointed counsel prior to questioning was discretionary, thereby invalidating the advisal and his waiver.

The Ninth Circuit, contrary to its own precedent in which it concluded that use of the word "could" instead of "will" in this context was improper and violated Miranda, see United States v. Botello-Rosales, 728 F.3d 865 (9th Cir. 2013), denied relief, concluding that this language would not have led Petitioner to believe "that his right to counsel prior to questioning was discretionary or contingent on the approval of a request or on the lawyer's availability." [Mem at 5]. Petitioner now asks for review of this case to allow the Court to correct the Ninth Circuit's erroneous application of Supreme Court precedent as well as its own case law, and also to provide lower courts and law enforcement personnel much-needed guidance as to the

proper administration of the Miranda warnings.

STATEMENT OF FACTS AND CASE

A. Trial Court Proceedings

Petitioner was arrested in connection with charges alleging the sexual abuse of a minor. [ER 33-34].[2] Petitioner had two separate interviews with the police during which he made damaging statements -- one on the evening of his arrest while at the police station, and another three days later at the jail. Prior to the first interview, the officer told Petitioner: "[i]f you cannot get a lawyer, one can be appointed to you without payment before we ask you any questions." [Mem at 4]. In the second advisal, the officer again advised Petitioner using the "can" language, and also failed on that occasion to indicate that the lawyer would be provided to Petitioner at no cost. [Mem at 5].

Petitioner thereafter was charged with four counts relating to the sexual abuse of a minor. The government used both of Petitioner's statements at trial. Petitioner was convicted of all counts, and sentenced to a determinate term of sixteen years in prison on counts two through four, and a consecutive indeterminate term of fifteen years to life on count one. [Lodg. 9 (CT) at 184–87].

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[2] "ER" refers to Appellant's Excerpts of Record filed with the Ninth Circuit Court of Appeals. "Lodg" refers to the lodgments filed as part of the record in the Ninth Circuit.

B. State Appeal

On direct appeal, Petitioner argued that reversal was required because both warnings violated Miranda. More specifically, Petitioner alleged that the advisals were invalid because the detectives used language indicating to Petitioner that if he could not afford counsel, his right to appointed counsel prior to questioning was discretionary. Petitioner raised this claim both in a stand-alone Miranda challenge, and also in an ineffective assistance of counsel ("IAC") claim on the same basis.

The California Court of Appeal affirmed the judgment. [ER 67-110]. It found that Petitioner forfeited his stand-alone Miranda claim by failing to raise it in the trial court. [ER 71-77]. As to the IAC claim, the court of appeal proceeded straight to prejudice and found that any violation was harmless beyond a reasonable doubt given the trial evidence. [ER 77-81].

C. Federal Habeas

Petitioner subsequently filed a 28 U.S.C. § 2254 petition arguing that he was entitled to relief for his preserved Miranda claim because his advisals and waivers were invalid. In the alternative, Petitioner asserted that if his Miranda claim had been forfeited, his attorney had been prejudicially ineffective in failing to raise this claim. [ER 1-27]. The district court, in adopting the magistrate judge's findings

and recommendations in its entirety, [Ex. "C"], ruled that the Miranda claim was procedurally defaulted, and that Petitioner failed to establish that the state court's IAC decision was "contrary to, or an unreasonable application of, clearly established federal law, or was based on an unreasonable determination of fact." [ER 44-45].

D. Ninth Circuit Proceedings

The Ninth Circuit granted a Certificate of Appealability ("COA"), as to three issues, two of which are relevant here: "(1) whether the district court erred in finding that the claim regarding violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), was procedurally defaulted," and "(2) whether trial counsel provided ineffective assistance by failing to object to the *Miranda* violation." [ER 28-29].

As to the procedural default issue, Petitioner asserted that any default was excused because he demonstrated cause and prejudice for his default. Under such a cause and prejudice analysis, the merits of the Miranda claim required adjudication under a de novo standard. Alternatively, Petitioner argued that if the Miranda claim was procedurally barred, reversal remained required because his trial counsel committed prejudicial ineffective assistance of counsel by failing to raise the meritorious Miranda claim sufficiently below.

The Ninth Circuit disagreed, finding that Petitioner's stand-alone Miranda claim was procedurally barred, and that his attorney was not ineffective in

failing to raise this claim below. As to both issues (cause and prejudice for the procedural default, and deficient performance in the IAC claim), the panel examined de novo whether the Miranda warnings provided were deficient. As to the detectives' use of the word "can," as opposed to "will," in the advisals, the panel concluded that the language used did not render the right to appointment of counsel prior to questioning contingent. [Mem 4]. Relying upon Duckworth v. Eagan, 492 U.S. 195, 198 (1989), the panel concluded that "[the detective] did not say anything that would have led Petitioner to believe that his right to counsel prior to questioning was discretionary or contingent on the approval of a request or on the lawyer's availability. *See United States v. Botello-Rosales*, 728 F.3d 865 (9th Cir. 2013)." [Mem 4].

Petitioner's petition for rehearing, and suggestion for rehearing en banc, was denied without comment.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A *MIRANDA* WARNING WHICH ADVISES THE INDIVIDUAL THAT A LAWYER *CAN* BE APPOINTED IF HE CANNOT AFFORD ONE, AS OPPOSED TO ADVISING HIM THAT COUNSEL *WILL* BE APPOINTED IN SUCH A CIRCUMSTANCE, VIOLATES *MIRANDA* BECAUSE IT IMPLIES THAT APPOINTMENT OF COUNSEL IS DISCRETIONARY RATHER THAN OBLIGATORY

"When an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized." Miranda, 384 U.S. at 478-79. "He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479.

While the "four warnings *Miranda* requires are invariable," this "Court has not dictated the words in which the essential information must be conveyed." Florida v. Powell, 559 U.S. 50, 60 (2010). But "[j]ust 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, 612 (2004)(quoting California v. Prysock, 453 U.S. 355 (1981)(per curiam)). "The inquiry is simply whether the

warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'" Duckworth, 492 U.S. at 203 (1989)(quoting Prysock, 453 U.S. at 361).[3]

A. *Miranda*'s Requirements

The Ninth Circuit panel cited Duckworth v. Eagan, 492 U.S. 195 (1989), in support of its conclusion that the instant advisal comported with Miranda. Rather than supporting the Ninth Circuit's conclusion, Duckworth, as well as other Miranda cases from the Court, compels the conclusion that the language employed by the detectives invalidated both of Petitioner's advisals, and his subsequent waivers.

In Duckworth, the Miranda advisal included the statement that "[w]e have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." Id. at 198. A divided Seventh Circuit found that the advice that counsel would be appointed "if and when you go to court" was "'constitutionally defective because it denies an accused indigent a clear and

[3] Because Petitioner challenged the imposition of a procedural bar through a cause and prejudice claim, the Ninth Circuit panel properly engaged in a de novo review of the Miranda issue. See Mem at 3; Martinez v. Ryan, __ U.S. __, 132 S. Ct. 1309, 1320 (2012)(noting that whether "cause" exists to excuse a procedural default is a threshold legal question covered by the procedural default doctrine, not 28 U.S.C. § 2254); Visciotti v. Martel, 839 F.3d 845, 865 (9th Cir. 2016)(Court does not give AEDPA deference to a state court's determination when deciding whether it constitutes cause for procedural default). Accordingly, albeit in an unusual procedural context, this Miranda issue is squarely before the Court.

unequivocal warning of the right to appointed counsel before any interrogation,' and 'link[s] an indigent's right to counsel before interrogation with a future event.'" Id. at 200 (quoting Duckworth, 843 F.2d at 1555-1556).

The Court reversed, concluding that the "warnings given to respondent touched all of the bases required by *Miranda*." Id. at 203. As to the suspect language, the Court first found that this advisal was permissible because "this instruction accurately described the procedure for the appointment of counsel in Indiana[,]" as "counsel is appointed at the defendant's initial appearance in court . . . and formal charges must be filed at or before that hearing." Id. at 204. Additionally, the Court noted that "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." Id.

Duckworth addressed a wholly dissimilar variation from what occurred in the instant case, and therefore its conclusion should not control the instant analysis. Nothing in the instant case concerned the timing for appointment of counsel, it concerned whether counsel would necessarily be made available at all. What should be taken from Duckworth in connection with this case, however, is what the Court reminded when describing what Miranda requires to be communicated to a defendant

about the availability of counsel. Notably, the Court wrote that a defendant must be told that "he has the right to an attorney before and during questioning, and that an attorney *would* be appointed for him if he could not afford one." Id. at 204 (emphasis added). This definitive language[4] is in-line with Miranda's clear directive that "[i]n order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer *will* be appointed to represent him." Miranda, 384 U.S. at 473 (emphasis added). "If [an individual] cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Id. at 479.

B. Advising Petitioner That An Attorney "Can" Be Appointed If He Cannot Afford To Hire His Own Indicated To Him That His Right To Counsel Prior To Questioning Was Not Absolute

The inquiry as to the validity of a Miranda advisal is "simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" Duckworth, 492 U.S. at 203 (1989)(quoting Prysock, 453 U.S. at 361). While the Court "has not dictated the words," to be used in this process, Powell, 559 U.S. at 60,

[4] "Would" is the past tense of "will," and is defined as "express[ing] plan or intention." See https://www.merriam-webster.com/dictionary/would. "Will" is used in this context to "express futurity." See https://www.merriam-webster.com/dictionary/will

comparing the instant advisal language to the Court's clear statements about what is required for that portion of a Miranda advisal demonstrates that what the detectives stated to Petitioner fell materially short. The Ninth Circuit itself has explained why in the context of nearly this exact language.

In Botello-Rosales, 728 F.3d 865, 867 (9th Cir. 2013), the Ninth Circuit examined a Miranda advisal claim which, for purposes of this case, is indistinguishable from what occurred here. There, the district court found that the detective advised the defendant, in Spanish, of the following Miranda right regarding appointment of counsel: "If you don't have the money to pay for a lawyer, you have the right. One, who is free, could be given to you." Id. at 867. The district court did not exclude the statements, but nonetheless found that "this warning failed to reasonably convey the government's obligation to appoint an attorney for an indigent suspect who wishes to consult one." Id.

The Ninth Circuit agreed with this conclusion and ordered suppression, concluding that "the phrasing of the warning -- that a lawyer who is free *could* be appointed -- suggests that the right to appointed counsel is contingent on the approval of a request or on the lawyer's availability, rather than the government's absolute obligation." Id. (emphasis added). The panel found that this "affirmatively misleading advisory does not satisfy *Miranda*'s strictures." Id. Other Ninth Circuit

cases have highlighted the importance of advising the individual of the government's absolute *obligation* to appoint counsel to indigent persons. See United States v. Perez-Lopez, 348 F.3d 839, 848 (9th Cir. 2003)(Ninth Circuit finding advisal erroneous because "it did not convey to him the government's *obligation* to appoint an attorney for indigent accused); United States v. San Juan-Cruz, 314 F.3d 384, 388 (9th Cir. 2002)(Miranda warning "also must make clear that if the arrested party would like to retain an attorney but cannot afford one, the Government is obligated to appoint an attorney for free.").

Petitioner argued below that this case law required the panel to find that the advisals provided to Petitioner violated Miranda. In substance, the only difference Botello-Rosales and Petitioner's case was that while in Botello-Rosales the detective used the word "could," here the detectives used the word "can." But this is no distinction at all. "Can and "could" are both auxiliary verbs, with "could" merely being the past tense of "can."[5] Among other definitions, "can" is "used to indicate possibility," as in "[t]hose things *can* happen." Id. "Can" is "sometimes used interchangeably with may." Id. Accordingly, in the instant context, there is no material difference between the words "could" and "can."

Just as the Ninth Circuit found in Botello-Rosales that the deviation from

[5] https://www.merriam-webster.com/dictionary/can

the standard advisal there "suggest[ed] that the right to appointed counsel [was] contingent on the approval of a request or on the lawyer's availability, rather than the government's absolute obligation[,]" Botello-Rosales, 728 F.3d at 867, the same conclusion should apply here. Whether the detectives told Petitioner an attorney "could" or "can" be appointed if he could not afford one, the result in either case was that the government fell short of informing Petitioner that it was "obligated to appoint an attorney for free." San Juan-Cruz, 314 F.3d at 388. This crucial omission of this "invariable" warning, Powell, 559 U.S. at 60, rendered the Miranda advisals, and Petitioner's subsequent waivers, invalid.

In sum, while the Ninth Circuit in Botello-Rosales resolved this exact issue consistently with the Court's precedent, it departed from this legally-sound interpretation by concluding here that detectives advising Petitioner that an attorney "can" be appointed prior to questioning was no different from telling him that an attorney "will" be appointed. This conclusion is contrary to the plain meaning of these terms, and the Court's precedent requiring full compliance with Miranda's quadripartite rule. By electing, on two separate occasions, to vary from the required Miranda language as to right to appointed counsel in this context, the detectives failed to reasonably "conve[y] to [Petitioner] his rights as required by Miranda." Prysock, 453 U.S. at 361). Review of this case is required not only to correct this error and

resolve the intra-Circuit tension created by this case, but also to provide guidance to lower courts and law enforcement personnel as to the proper application of this fourth element of the Miranda rule.

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: November 27, 2019

/s/ Gary P. Burcham

GARY PAUL BURCHAM
BURCHAM & ZUGMAN
402 West Broadway, Suite 1130
San Diego, CA 92101
Telephone: (619) 699-5930
Attorney for Petitioner