NO:

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

DANIEL OCHOA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Mr. Ochoa's Fifth Amendment rights were violated when the Eleventh Circuit Court of Appeals found that the public-safety exception to this Court's general rule in *Miranda v. Arizona,* 384 U.S. 436, 460-61 (1966) justified pre-*Miranda* questioning of Mr. Ochoa who was in custody when he was questioned?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the caption of the case.

RELATED PROCEEDINGS

United States District Court (S.D. Fla.):

United States v. Daniel Ochoa, No. 14-20674-Cr-King (2014)

United States District Court (S.D. Fla.):

United States v. Daniel Ochoa, No. 17-20595-Cr-Middlebrooks (2017)

United States Court of Appeals (11th Cir.):

United States v. Daniel Ochoa, No. 16-17609
(October 25, 2019)

United States Court of Appeals (11th Cir.):

United States v. Daniel Ochoa, No. 18-10142
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PETITION FOR WRIT OF CERTIORARI

Daniel Ochoa respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case numbers 16-17609 and 18-10142 in that court on October 25, 2019, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida.

OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, is contained in the Appendix (A-1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and PART III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 25, 2019. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

Fifth Amendment to the United States Constitution

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

STATEMENT OF THE CASE

On August 15, 2014, an armored Brinks truck stopped at a check cashing store to deliver $30,000. Shortly after he got out of the truck, the guard, who was in charge of delivering the bag of money, was approached by a man pointing a gun at him demanding he hand over the bag. The guard did not immediately hand over the bag and so the gunman shot him in the leg, picked up the bag and ran away. Later, a confidential source, working with the ATF, told law enforcement that Daniel Ochoa committed the robbery. An arrest warrant was obtained and executed on September 5, 2014, at Mr. Ochoa's residence.

The government filed an indictment against Mr. Ochoa charging him with committing a Hobbs Act Robbery, in violation of 18 U.S.C. § 1951(a), using and carrying a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii), and being a felon-in-possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1).

The felon-in-possession count was severed from the two robbery-related counts.

Several pretrial motions were filed and ruled upon prior to the start of and during the trial. Mr. Ochoa filed a motion to suppress statements he made to a SWAT team member and to the lead investigator during questioning at a Federal Bureau of Investigation ("FBI") field office. Mr. Ochoa argued that the SWAT team member questioned him after he was arrested, but before he was informed of his

right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). As a result of the unlawful questioning, Mr. Ochoa asked the court to suppress any evidence seized from Mr. Ochoa's residence.

The Magistrate Judge held an evidentiary hearing on the motion to suppress. FBI Special Agent Geoffrey Swinerton testified that he was the SWAT team leader in charge of executing an arrest warrant and arresting Mr. Ochoa at his home on September 5, 2014. He testified that the SWAT team entered the home's front door and ordered everyone out of the house. Five people—three males and two females--came out. There was an older man, who seemed to be a "father figure," a younger teenage male and Mr. Ochoa.

SA Swinerton asked the males, who were handcuffed and either sitting or kneeling, if there was anyone else in the house or anything that could cause harm to any of the agents. Mr. Ochoa was under arrest at the time. The males said no one else was in the house. Prior to any SWAT team members, or other law enforcement entering the home, SA Swinerton also asked if there was anything else in the home that could cause harm, such as weapons, bombs or booby traps. He admitted that his men would have done a protective sweep of the house no matter what the three males said. At first, the three males said nothing and the older man looked surprised. Mr. Ochoa didn't respond and kept his head down and so SA Swinerton "pressed the question again." He said, "[Y]ou know we are going to end up finding the stuff, but I don't want anybody to get hurt. You have to let me know if there's

anything that could hurt my guys before we go in." Mr. Ochoa then stated there was a handgun in a bedroom drawer. It is not the job of the SWAT team to look for weapons once the home was cleared as long as there was no weapon found near a person. SA Swinerton admitted that if there were no other people in the home, the gun, by itself, did not pose a threat to his men. He also admitted that he knew, when he twice asked the question, that Mr. Ochoa was a convicted felon and was not allowed to possess a gun. He stated, however, he was asking the question "in general to everybody there." He turned the scene over to the lead investigator, Task Force Officer Starkey, and relayed what Mr. Ochoa told him about the gun and its location.

TFO Starkey also testified and stated that SA Swinerton told him there was a gun in a bedroom on the right side of the home off the kitchen. Based on the information, he decided to obtain a search warrant. He secured the house which had not yet been searched.

At the conclusion of the testimony, the Magistrate Judge stated that even if he excised Mr. Ochoa's pre-Miranda and post-Miranda statements out of the affidavit for a search warrant, there was "ample" probable cause to issue a search warrant. The Magistrate Judge issued a Report and Recommendation recommending that the motion to suppress be denied. The Magistrate Judge found that the pre-Miranda statements made by Mr. Ochoa to SA Swinerton, the SWAT team leader, were in response to questions asked for the safety of the SWAT team which was entering the home to conduct a protective sweep.

Mr. Ochoa objected to the Magistrate's Judge's finding that SA Swinerton's questioning of Mr. Ochoa was justified under the public-safety exception.

At the jury trial, the government called SA Swinerton who testified that he went to Mr. Ochoa's home on September 5, 2014 at 6:00 a.m. to arrest him. Although he didn't know how many people were in Mr. Ochoa's home, five people exited the house. After being asked if there was anything dangerous in the house which could harm SWAT team members, Mr. Ochoa responded that there was a gun inside the house in a bedroom drawer. SA Swinerton was not responsible for securing the house after Mr. Ochoa's arrest.

FBI SA Jason Kaelin testified he was asked to help execute a search warrant at Mr. Ochoa's home on September 5, 2014. He searched Mr. Ochoa's bedroom looking for items belonging to Mr. Ochoa and found a driver's license, a wallet, mail and an identification card containing Mr. Ochoa's name. He did not find a gun, but he found an empty gun holster, a loaded high-capacity magazine and a box containing four Hornady .45 caliber bullets in a dresser drawer.

FBI analyst Casey Quigley testified that he was asked to examine some items for fingerprints. He only found fingerprints on a tray which held bullets and came from the ammunition box found in the dresser drawer, but the fingerprints did not belong to Mr. Ochoa. A jury returned a guilty verdict.

The district court sentenced Mr. Ochoa to a 120-month sentence, the statutory maximum.

Mr. Ochoa appealed the denial of his motion to suppress his pre-*Miranda* statement that there was a gun in a bedroom drawer. In a published opinion, two Eleventh Circuit Court of Appeals judges found that the public-safety exception applied to the facts of the case. A third judge, however, filed a dissenting opinion finding that the public-safety exception did not apply and the judge would vacate Mr. Ochoa's conviction and sentence for being a felon-in-possession and remand for a new trial. *United States v. Daniel Ochoa*, 941 F.3d 1074, 1111 (11th Cir. 2019) (Rosenbaum, J., dissenting).

REASON FOR GRANTING THE WRIT

SWAT team leader Swinerton's questioning of Mr. Ochoa, before he received his warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), violated Mr. Ochoa's constitutional rights under the Fifth Amendment. To safeguard the Fifth Amendment right against compelled self-incrimination, this Court created a general rule in *Miranda* that statements made during custodial interrogation are inadmissible unless a suspect is informed of his right to remain silent. *New York v. Quarles*, 467 U.S. 649, 654 (1984).

In *Quarles*, this Court recognized an exception to the general rule "for public safety." *Id.* Certain questions, prompted by the need to protect the public safety, can be asked and the answers are admissible against the speaker. In *Quarles*, a woman told police she had been raped by a man who then went into a supermarket. *Id.* at 651-52. When the defendant was taken into custody and frisked, police found an empty gun holster and, before he was informed of his *Miranda* rights, the defendant was asked where the gun was located. *Id.* at 652. The defendant pointed out the gun. *Id.* The trial court suppressed the statement, but this Court found that there is a public-safety exception to the *Miranda* general rule. *Id.* at 657-58.

There is no dispute Mr. Ochoa was "in custody" for *Miranda* purposes when he was handcuffed and kneeling in his front yard after the SWAT team broke through the home's front door. There is also no dispute that SA Swinerton asked Mr. Ochoa

(and it makes no difference if he was part of a group of people or not) whether there were any weapons in the house. *See Rhode Island v. Innis,* 446 U.S. 291 (1980) ("Interrogation for Miranda purposes is express questioning or words or action by law enforcement that they should know are reasonably likely to elicit an incriminating response."). There is also no dispute that Mr. Ochoa did not "knowingly" waive his *Miranda* rights at the time he was questioned by SA Swinerton.

SA Swinerton knew Mr. Ochoa was a convicted felon and not permitted to possess a weapon, but he questioned him despite that knowledge. He also put pressure on Mr. Ochoa to answer his questions even though Mr. Ochoa initially chose to remain silent. After the first question, Mr. Ochoa didn't respond and kept his head down. SA Swinerton testified that he told Mr. Ochoa that SWAT would "end up finding the stuff. You have to let me know if there's anything that could hurt my guys." He admitted, however, that his men would have searched the house even if Mr. Ochoa had not answered his question. The finding, therefore, that the pre-*Miranda* questioning was permissible as a "public-safety exception," was incorrect.

This case is distinguishable from *United States v. Newsome,* 475 F.3d 1221, 1224 (11th Cir. 2007), the case relied upon by the Magistrate Judge and the majority in *Ochoa.* In *Newsome,* the Eleventh Circuit Court of Appeals pointed out that the public-safety exception is narrow. *Id.* at 1224. Additionally, Newsome was

arrested inside a public hotel room where he had easy access to any possible weapon. *Id.* at 1223. Arresting officers also knew there was a woman in the hotel room in close proximity to the gun. *Id.* As the dissent stated in *Ochoa*, the officers in this case were searching a private home—not a public space—and, therefore, no members of the public were at risk of entering and unsuspectingly stumbling upon a firearm. *Ochoa,* 941 F.3d at 1113. The dissent argues that the majority "misses the mark" when it held that the facts of *Newsome* were analogous to the facts in *Ochoa*. *Id.* "[N]o members of the public were at risk of finding the gun while the officers were present in the motel room and arresting the defendant. Instead, the public-safety risk stemmed from the possibility that members of the public may have discovered the weapon after the police left the premises." *Id.* The dissent also distinguished *Newsome* because, in this case, SA Swinerton specifically asked if there were "weapons" in the house, but the mere existence of a weapon, without human intervention, would not harm the officers, unlike a bomb or a booby trap. *Id.* The dissent pointed out that even SA Swinerton admitted that a gun could not independently harm the officers because "guns can't fire on their own." *Id.* at 1114. Even though Ochoa told SA Swinerton there was a gun in the house, the officers did nothing directed at the gun when they performed a safety search of the house. The dissent held that "officers proceed with the same caution in the absence of knowledge of a gun that they do if they know of a firearm's presence in the home." *Id.* In light of SA Swinerton's testimony, the public-safety exception cannot justify asking a

suspect about the presence of weapons. *Quarles,* 467 U.S. at 659. "An officer may not cleanse an impermissible pre-*Miranda* question by burying it in a heap of permissible ones," such as the existence of bombs or booby traps which could harm officers conducting a safety sweep of the house. *Ochoa,* 941 F.3d at 1115.

The error was not harmless in light of *Chapman v. California,* 386 U.S. 18 (1967) because we cannot say beyond a reasonable doubt that the error "did not contribute to the [defendant's] conviction [ ]." *Id.* at 26.

Mr. Ochoa's statement to SA Swinerton should have been suppressed and any evidence seized as a result of the statement should also have been suppressed. The Fifth Amendment violation warrants vacating Mr. Ochoa's conviction and sentence as to the felon-in-possession count and entitles him to a new trial.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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