

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

BRAYAN GUTIERREZ-DIAZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTION PRESENTED

Whether and to what extent a mistranslated *Miranda* warning, which does not reasonably convey the right to appointed counsel during interrogation, fails to protect a defendant's Fifth Amendment right against self-incrimination when the resulting confession is later used to convict the defendant?

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Petitioner, Brayan Gutierrez-Diaz, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

On February 6, 2020, the Ninth Circuit affirmed Petitioner's conviction, rejecting his claim that his pre-interrogation *Miranda* warning was insufficient so his resulting statement should have been suppressed. *See App.*

JURISDICTION

Petitioner was convicted of violating of 21 U.S.C. § 841, for possessing a controlled substance with the intent to distribute it, in the United States District

Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291, and affirmed on February 6, 2020. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

U.S. Const. amend. V

The Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, ...; nor shall any person be subject for the same offense 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; ...

STATEMENT OF THE CASE

A. After arresting Petitioner for possession of a controlled substance, agents interrogate him without providing him with a proper *Miranda* advisal, and his resulting confession is used to convict him.

Petitioner was stopped at a border patrol checkpoint near San Diego, where a dog alerted to his car. After a further search, agents discovered heroin hidden in the rocker panels of the car he was driving and he was arrested.

About five hours later, four agents interrogated Petitioner in Spanish. A DEA agent began by reading from a DEA form (DEA Form 13b) that purports to be a *Miranda* warning in Spanish. The Spanish warning on the form translates to:

- You have the right to remain silent.
- Anything you say can be used against you before a court.
- Before asking him/her any questions you have the right to consult an attorney.
- You have the right to have an attorney present during the interrogation.
- If unable to pay for the services of an attorney, and if you wish, one will be appointed to you before asking him/her any questions.

Petitioner initialed next to each right on the form and agreed to answer the four agents' questions. During the interrogation, Petitioner admitted that he was being paid to transport the heroin found in his car.

He was charged with possession of heroin with intent to distribute and moved to suppress his statement. He argued that the *Miranda* warning was inadequate because it did not properly translate his right to counsel. Rather than inform him of his right to have counsel appointed before any interrogation, the mis-translated

advisal stated that if he was unable to pay for an attorney and wanted to have one appointed, “one [would] be appointed to you before asking him/her any questions.”

Along with his motion, Petitioner submitted a declaration from a court-certified interpreter that explained the basis for his translation, why the Spanish *Miranda* advisal did not convey its intended message, and how the Spanish *Miranda* advisal should have been written to adequately convey the *Miranda* rights. For instance, for the fifth right, which Petitioner challenged as inadequate, the interpreter stated that this advisal translated as: “[I]f unable to pay for the services of an attorney, and if you wish, one will be appointed to you before asking [him/her] any questions.” The Spanish warning misused the relative pronoun “le” when translating the right and “makes it read as if the reader or addressee would be asking the attorney questions” instead of the reader/addressee being asked questions by law enforcement. In order to convey the intended meaning, the Spanish version should not read, “se le nombrará uno antes de hacerle cualquier pregunta,” and instead should read, “se le nombrará uno antes de **que yo le haga/le hagamos cualquier pregunta a usted.**” The correct translation means “one will be appointed to you before I/we ask you any questions.”

The government disagreed, contesting Petitioner’s translation and arguing that the advisal properly conveyed *Miranda’s* requirements. The district court assumed that Petitioner’s proposed translation was correct but found that it nevertheless was sufficient and denied Petitioner’s motion to suppress his statement.

The court stated:

I think I would say, regardless of which – maybe I should put it this way: It's not perfect, right? It would have been nice if it were more clear, but I think it's substantively close enough. I think it gave all the information he needed.

...

I think the warnings were substantively enough and as counsel just indicated, when you look at the transcript of the video, there's no indication that he didn't understand; [he] didn't ask any questions. So I just think on the warning issue that we're okay.

The district court convicted Petitioner after a stipulated facts bench trial. His post-arrest interrogation was important to his conviction, as two of the stipulated facts were that he “confessed that he knew there was a federally controlled substance in the car,” and that he “confessed that he was being paid to deliver the drugs to someone else.”

B. Petitioner appealed, arguing that the *Miranda* translation did not adequately inform him of his right to have counsel present at his interrogation, but the Ninth Circuit affirmed.

On appeal, Petitioner argued that his confession should have been suppressed because he was given a confusing and invalid warning that did not sufficiently explain his right to counsel. Because of the inadequate translation, Petitioner was warned that an attorney would be appointed before he asked the lawyer any questions—instead of that a lawyer would be appointed before agents asked Petitioner any questions. This did not comply with *Miranda v. Arizona*, 384 U.S. 436, 479 (1966) (requiring an advisal that if the accused “cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.”).

The Ninth Circuit disagreed. It relied on Petitioner’s proffered translation and held that the *Miranda* advisal was adequate because it informed him that he could consult with an attorney, have an attorney present during the interrogation, and that he could have appointed counsel if he could not pay an attorney. *See* App.

REASONS FOR GRANTING THE PETITION

- A. The Ninth Circuit’s decision conflicts with this Court’s decision in *Miranda* because Petitioner’s conviction rested upon an admission made after an inadequate and mistranslated *Miranda* advisal that did not reasonably convey the right to appointed counsel during interrogation.**

Miranda requires that, when the government wishes to use an individual’s statement made during a custodial interrogation, the individual must have been warned before questioning that, among other things, 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.” 384 U.S. at 479.

While this Court has previously noted that a proper *Miranda* advisal need not be a “virtual incantation of the precise language” in *Miranda*, *California v. Prysock*, 453 U.S. 355, 355 (1981), the advisal must nevertheless convey the right to appointed counsel before and during interrogation. *Id.* at 361. The question is whether “the warnings reasonably convey to a suspect his rights as required by *Miranda*.” *See Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (quoting *Prysock*, 453 U.S. at 361) (alterations in quotation omitted). To “reasonably convey” the rights *Miranda* requires and to protect an individual’s Fifth Amendment right not to be compelled to

incriminate himself, he must be informed that if he cannot afford an attorney, one will be appointed for him before he is questioned. *Miranda*, 384 U.S. at 479.

Yet the Ninth Circuit found that the warning Petitioner received was adequate, even though it never conveyed that before Petitioner was interrogated he could have a lawyer appointed for him at no cost. The warning stated that he could consult with an attorney before asking the attorney any questions, that he had the right to counsel during the interrogation, and that he could have an attorney appointed before asking the attorney any questions. But these warnings do not “reasonably convey” the right to appointed counsel before Petitioner was interrogated. *See Duckworth*, 492 U.S. at 203. At most, stitching together these three rights would convey that Petitioner could have counsel appointed so that he could ask counsel questions, and that he could have counsel present during the interrogation. But there is nothing in the three mistranslated and misleading advisals that conveys that *appointed* counsel could be present during the interrogation. All the warnings conveyed was that Petitioner could have counsel appointed if Petitioner wanted to ask questions.

This warning did not adequately protect Petitioner’s Fifth Amendment right against self-incrimination. The warning did nothing to dissipate the coercive pressure of being in custody and out-numbered during his interrogation. *See Miranda*, 384 U.S. at 445 (discussing coercive nature of in-custody interrogation and noting “incommunicado interrogation of individuals in a police-dominated atmosphere”). While Petitioner was interrogated by *four* officers, he was never made aware that he

could have counsel appointed, at no cost to him, to even out the imbalance of power he faced. The Ninth Circuit’s decision in blessing the mistranslated advisal as sufficient when it did not reasonably convey *Miranda*’s warnings conflicts with this Court’s decision in *Miranda*. *See* Sup. Ct R. 10(c).

B. This case presents an ideal vehicle to resolve the issue of a widely used and mistranslated *Miranda* advisal that does not sufficiently convey the right to counsel.

The issue presented in this Petition is of exceptional importance. First, the mistranslated advisal given to Petitioner was on a pre-printed form used by the DEA—“FORM DEA-13b”—to “advise” suspects of their *Miranda* rights in Spanish. This form is used by the DEA all over the country, likely every day, before interrogations of suspects who do not speak English. *See, e.g., United States v. Bello-Murillo*, 62 F. Supp. 3d 488, 496-97 (E.D. Va. 2014) (DEA agents used a pre-printed advisal form that translated *Miranda* warning into Spanish); *United States v. Martinez*, 992 F. Supp. 2d 322, 332, 335 (S.D.N.Y. 2014) (DEA agents advised suspect of *Miranda* rights by reading from a pre-printed “Form DEA-13 card”); *United States v. Valencia-Aguilar*, 2007 WL 4468719, *2 (D. Az. Dec. 14, 2007) (unpublished) (DEA agent advised in-custody suspect of his *Miranda* rights in Spanish using “DEA Form 13A” “waiver form”). This is, therefore, not an issue that is unique to Petitioner’s case. Given that the DEA uses the same form to advise suspects in different judicial districts around the country, this issue has a broad impact on federal criminal law

and the fair administration of justice, especially for vulnerable immigrants or others who do not speak English.

Second, the issue is of constitutional importance. Protecting in-custody suspects from coercive police tactics and the inherently coercive nature of custodial interrogation, in order to protect suspects' Fifth Amendment rights, *see Miranda*, 384 U.S. at 445, is an issue of incredible importance.

Moreover, Petitioner's case is an ideal vehicle for resolving the issue and clarifying that *Miranda* advisals must be accurately translated. The issue was clearly preserved, ruled upon by the Ninth Circuit, and was not harmless. Petitioner's confession was one of the stipulated facts the district court relied upon when reaching its decision of guilt.

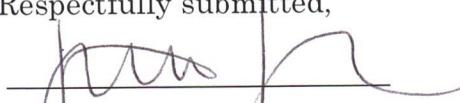
Accordingly, this Court should grant the Petition. *See* Sup. Ct. R. 10(c).

CONCLUSION

This Court should grant the writ to address this important question of constitutional law and ensure that Spanish-speaking defendants' Fifth Amendment rights are adequately protected during custodial interrogations.

Date: July 3, 2020

Respectfully submitted,


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