No. 24-_____

IN THE SUPREME COURT OF THE UNITED STATES

NORBERTO SERNA

Petitioner,

v.

O'BRIAN BAILEY, Warden of Valley State Prison,

Respondent.

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

# PETITION FOR WRIT OF CERTIORARI

JAMES S. THOMSON*
California SBN 79658
Attorney & Counselor at Law
732 Addison Street, Suite A
Berkeley, California 94710
Telephone: (510) 525-9123

Attorney for Petitioner NORBERTO SERNA

*Attorney of Record

## QUESTION PRESENTED FOR REVIEW

Mr. Serna demonstrated below that linguistic and cultural barriers prevented him from understanding the *Miranda* warning and that timely consulate intervention would have protected his rights such that he would not have waived his *Miranda* rights. Yet, both the District Court and the Court of Appeals denied a certificate of appealability. Both courts failed the test for determining the issuance of a certificate.

"The standard for granting a certificate of appealability is low." *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016). A petitioner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). He need only show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Mr. Serna did so without a doubt.

As a result, the denial of a certificate of appealability violates Mr. Serna's Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial. As such, the question presented is as follows:

1. Whether the Court of Appeal imposed a certificate of appealability standard in conflict with *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); and *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 773 (2017) when it denied a certificate after petitioner demonstrated "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2)?

## PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Ninth Circuit were Norberto Serna (appellant below), and the Warden of Valley State Prison, O'Brian Bailey (appellee below).

## LIST OF RELATED CASES

*People v. Serna*, Santa Clara Superior Court, Case No. F1138356, Judgment entered December 5, 2014.

*People v. Serna*, Cal. App. Case No. H041769, Judgment entered January 29, 2018.

*People v. Serna*, California Supreme Court, Case No. S247496, Judgment entered May 9, 2018.

*Serna v. California*, United States Supreme Court, Case No. 18-5408, Judgment entered October 1, 2018.

*In re Serna*, Santa Clara Superior Court, Case No. F1138356, Judgment entered March 8, 2019.

*In re Serna*, California Supreme Court, Case No. S255097, Judgment entered April 15, 2020.

*Serna v. Holbrook*, United States District Court for the Northern District of California, Case No. 21-cv-02654-WHO, Judgment entered January 11, 2023.

*Serna v. Holbrook*, United States Court of Appeals for the Ninth Circuit, Case No. 23-15095. Judgment entered on May 10, 2024.

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# PETITION FOR WRIT OF CERTIORARI

Petitioner, NORBERTO SERNA, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit denying his request for a certificate of appealability. *Serna v. Holbrook*, United States Court of Appeals for the Ninth Circuit, Case No. 23-15095.

## OPINION BELOW

On May 10, 2024, the Court of Appeals for the Ninth Circuit denied Mr. Serna's request for a certificate of appealability. Appendix A.

## JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §2255. The Court of Appeals had jurisdiction under 28 U.S.C. §1291 and §2253(a). This Court has jurisdiction under 28 U.S.C. §1254(1).

## PROVISIONS OF LAW INVOLVED

**The Fifth Amendment** to the United States Constitution, provides, in pertinent part, that no person "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." U.S. Con., Amend V.

**The Sixth Amendment** to the United States Constitution reads: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Con., Amend VI.

**The Fourteenth Amendment** to the United States Constitution, Section 1 provides, in pertinent part: "[No State] shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Con., Amend XIV, § 1.

**The federal habeas corpus statute**, 28 U.S.C. §2254 (d)(1) & (2) provides:

An application for a writ of habeas corpus on behalf of a person in custody

pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

### PROCEDURAL HISTORY

#### A. Trial

On June 3, 2013, petitioner was charged with various crimes including assault, threats, robbery, burglary, theft, kidnapping, torture, arson, and stealing (Cal. Pen. Code[1] §209(a), §209(b)(1), §206, §245(a)(1), §422, §211– 213(a)(1)(A), §459– 460(a), §484–487(c), §451(d), Cal. Vehi. Code §10851(a)). Augmented Clerk's Transcript ("ACT") 26–35. He was also charged with inflicting great bodily injury and using a firearm (§§12022.53 and 12022.7).

On August 14, 2014, trial began.[2] 9 Reporter's Transcript ("RT") 317, 328. On August 21, 2014, petitioner was convicted of all counts. 2CT 381–396. The

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[1] All statutory references are to the California Penal Code, except as noted.

[2] Petitioner was tried separately from co-defendants Juan Fonseca, Ernesto Gonzales and Angel Reyes. 1 Clerk's Transcript ("CT") 153.

great bodily injury allegations were found true. 2CT 382, 385, 388. The firearm allegations were found not true. 2CT 383, 384, 388, 389, 391, 392.

On December 5, 2014, petitioner was sentenced to life in prison without the possibility of parole consecutive to a five year and four month sentence. 15RT 3001, 3015; 2 CT 449, 452–457.

### B. State Appeal and Habeas Corpus

On January 29, 2018, the court of appeal affirmed petitioner's convictions and sentence. People v. Serna, Cal. App. Case No. H041769. On May 9, 2018, the California Supreme Court denied review. *Id.* People v. Serna, Cal. Case No. S247496. On October 1, 2018, this Court denied certiorari. Serna v. California, U.S. Case No. 18-5408.

On March 8, 2019, the superior court denied habeas corpus review. In re Serna, Case No. F1138356. On April 15, 2020, the California Supreme Court denied habeas corpus review. In re Serna, Cal. Case No. S255097.

### C. Federal Habeas Corpus and Appeal

On April 13, 2021, petitioner filed a habeas corpus petition with the district court. Dist-Doc. #1. Petitioner sought an evidentiary hearing and discovery. Dist-Doc. #23. The State filed a response. Dist-Doc. #14. Petitioner filed a traverse. Dist-Doc. #22.

On January 11, 2023, the district court denied the petition and request for an evidentiary hearing and discovery, and declined to issue a certificate of appealability. Appendix B, Dist-Doc. #26, #27. On January 20, 2023, petitioner

timely appealed. Dist-Doc. #28.

On February 14, 2023, petitioner filed a request for certificate of appealability in the Court of Appeals. *Serna v. Holbrook*, United States Court of Appeals for the Ninth Circuit, Case No. 23-15095, Cir. Doc #2.

On May 10, 2024, the Court of Appeals denied the request for certificate of appealability. Cir. Doc #3. Judgment was entered. *Id.*

## REASONS FOR GRANTING THE WRIT

### I. CERTIORARI SHOULD BE GRANTED TO SETTLE THE IMPORTANT QUESTION OF WHETHER THE COURT OF APPEALS IMPOSED A CERTIFICATE OF APPEALABILITY STANDARD IN CONFLICT WITH THIS COURT'S JURISPRUDENCE BECAUSE REASONABLE JURISTS COULD DEBATE WHETHER PETITIONER KNOWINGLY WAIVED HIS *MIRANDA* RIGHTS AND WHETHER THE VIOLATIONS OF PETITIONER'S CONSULAR RIGHTS WAS PREJUDICIAL.

#### A. Factual Background.

Petitioner is a Mexican national. When he was arrested, law enforcement knew he was from Mexico.

Following his arrest, he made an involuntary statement to law enforcement. It was obtained as the result of intimidating and coercive conduct by the police. He feared being attacked by a canine when he was taken into custody. After he was placed in custody, he was handcuffed and transported to jail. 7RT 216-217, 224-225.

Petitioner sat handcuffed, with his hands behind his back, for almost nine hours before he was interrogated. 7RT 233-234. He was forced to wait not knowing the nature of his detention. He was not advised of his right to consular notification

under the Vienna Convention. Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77.

Petitioner's "English was very limited." 7RT 228–29. Sergeant Quinonez interrogated him in broken Spanish. 7RT 240-241. He deviated from the language printed on his *Miranda* card.

Sgt. Quinonez informed petitioner about his right to an attorney. He did not conjugate the verb "to pay" correctly. The proper verb, as written on the *Miranda* card, is "pagarle." Instead, Quinonez said either "a pagar" or "apagar," which translates to either a grammatically incorrect translation of "to pay," or a grammatically correct but nonsensical use of "to turn off." 7RT 255, 258.

An interpreter for the court testified at trial. He translated the *Miranda* warnings given to petitioner into English. 2RT 275-276. Regarding Quinonez's statement concerning petitioner's right to an attorney, the interpreter testified that there are two options of the words used.

> Officer: Okay. And if you cannot turn off for an attorney, one be named for free, um, before and during any integration. Do you understand that?

Or:

> Officer: Okay. And if you cannot to pay for an attorney, one be named for free, um, before and during any integration.

2RT 276–77.

Following the flawed advisement, Quinonez removed the handcuffs and began questioning petitioner. At the end of the interrogation, Quinonez

asked petitioner if he wanted an attorney. Petitioner "mentioned not having money to pay for one." 7RT 243, 262.

Petitioner filed a motion to suppress his statement. 1CT 233–245. The court denied the motion. 9RT 326. The trial court's ruling was erroneous. Both linguistically and culturally, petitioner did not understand what Quinonez told him.

### B. The State Court Erred in Denying the *Miranda* Claim.

"*Miranda* forbids coercion." *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). "Coercion is determined from the perspective of the suspect." *Id.* "Psychological coercion is equally likely to result in involuntary statements, and thus is also forbidden." *Collazo v. Estelle*, 940 F.2d 411, 416 (9th Cir. 1991).

Petitioner's waiver was not "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Berghuis v. Thompkins,* 560 U.S. 370, 382 (2010). It is only when the "'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). "Language difficulties may impair the ability of a person in custody to waive [*Miranda*] rights in a free and aware manner." *United States v. Heredia-Fernandez*, 756 F.2d 1412, 1415 (9th Cir. 1985).

#### 1. Linguistic Barrier to Understanding Waiver

Quinonez's statement misled petitioner about his right to counsel. Quinonez informed petitioner he had the right to an attorney during "any *integration*" instead

of "any *interrogation*." 7RT 276-277 (emphasis added). "Integration" was not defined. Petitioner could assume that an "integration" is a future legal proceeding during which a lawyer may be present.

Quinonez did not convey that a lawyer was available to assist petitioner if he could not retain one. He used the wrong conjugation of "to pay" or a word meaning to "turn off." Even if petitioner understood "to pay," the phrase only informed him that an attorney could be "named" for free, not that the attorney would be free.

The State failed in its burden to show "that the defendant 'voluntarily, knowingly and intelligently' waived his rights." *J.D.B. v. North Carolina*, 564 U.S. 261, 269–270 (2011). Petitioner did not understand his *Miranda* rights. He did know he had the right to a free attorney, nor that he could have an attorney present during questioning.

Under *Burbine*, the court must assume petitioner understood Quinonez's statement as: "if you cannot turn off for an attorney, one be named for free, um, before and during any integration." 7RT 277. This statement did not reasonably convey that petitioner had a right to appointed counsel prior to the interrogation, or that the attorney would be appointed by the court. The statement conveyed that petitioner could be referred to an attorney for free, but not that the State would pay for the attorney. The statement does not convey that an attorney was available if petitioner cannot pay for one. *United States v. Botello-Rosales*, 728 F.3d 865, 867 (2013) (finding statement involuntary after *Miranda* waiver was inaccurately translated as: "If you don't have the money to pay for a lawyer, you have the right.

One who is [at liberty], could be given to you.").

In sum, petitioner did not understand Quinonez's statement to mean that he had the right to an attorney during questioning. Quinonez said that an attorney would be available at "any integration." Integration does not mean questioning.

### 2. Cultural Barrier to Understanding Waiver

Petitioner's understanding is colored by his background. He was led to believe he had an obligation to cooperate. Many Mexican nationals do not believe that they have a right to remain silent. Janet Bauer, *Speaking of Cultures*, Immigrants in Courts 19, 8-28 (Joanne Moore Ed,. 1999); Floralynn Eniesman, *Cultural Issues in Motions to Suppress Statements*, Cultural Issues in Criminal Defense, §4.6(b) (James Conell and Rene Valladares eds., 2003). Petitioner's lack of awareness of rights afforded in the United States are shown by him explaining—at the end of his interrogation—that he could not have an attorney because he could not pay one. Doc. #15-10 at 76; 7RT 283.

Culturally, petitioner believed he had to talk to detectives as remaining silent would have led to more problems. At most, he believed a lawyer would be appointed for him later at the "integration." He could not waive rights he did not understand. He could not intelligently assure he understood his rights, when he had not been advised accurately. And because officers violated petitioner's consular rights, he lost the opportunity to have someone with a shared cultural background explain his rights to him in fluent Spanish.

### 3. Summation

Petitioner's statement should have been suppressed. He was prejudiced by the trial court's failure to suppress his statement. Without the statement, the prosecution had insufficient evidence to sustain any conviction against him.

## C. Certiorari Should Be Granted to Settle the Important Question of Whether the State Court Erred in Denying the Consular Rights Claim.

### 1. Foreign Nationals Must Be Informed of Their Consular Rights.

Foreign nationals must be informed of their right to consular notification upon arrest under state, federal, and international law. VCCR; §843c(a)(1). As noted, petitioner is a Mexican national. Appendix C, Pre-Booking Information Sheet for Norberto Serna (May 5, 2011). State law requires notification even for a "suspected" foreign national. §834c(a)(1).

The VCCR is a multilateral treaty regulating consular rights, functions and obligations of some 170 nations, including Mexico and the United States. The United States unconditionally ratified the treaty in 1969, making it binding on local and state authorities under the Supremacy Clause. U.S. Const. Art. VI, cl. 2; *Hines v. Davidowitz*, 312 U.S. 52, 62–63 (1941).

Article 36(1)(b) places obligations upon detaining authorities:

> [I]f he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph.

Article 36(1)(c) grants consular officers the right "to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation." The State Department's Consular Notification and Access ("CNA") Instructions set out law enforcement's obligations. §834c(a)(2); *Charlton v. Kelly*, 229 U.S. 447, 468 (1913); *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006). California implemented the Convention's requirements by obligating that "upon arrest and booking or detention for more than two hours of a known or suspected foreign national, [a peace officer] shall advise the foreign national that he or she has a right to communicate with an official from the consulate of his or her country." §834c(a)(1).

**2. Petitioner Was Not Informed of His Consular Rights.**

Petitioner was not informed of his right to consular notification upon his arrest and prior to his interrogation. Appendix D, Declaration of Norberto Serna (July 18, 2017). The Mexican Consulate would have informed petitioner about his rights, provided appropriate legal representation and interpretation and obtained vital records in Mexico that could have aided petitioner's defense. Appendix E, Declaration of San Francisco Mexican Consular Official Wilma Laura Gandoy Vazquez (July 3, 2017); Appendix F, Declaration of San Francisco Mexican Consular Official Wilma Laura Gandoy Vázquez (Jan. 11, 2019); and Appendix G, Declaration of San Jose Mexican Consular Official Rodrigo Navarro García (Dec. 31, 2018).

The Article 36 and section 843c violations were a crucial missing factor in the

state court analysis of the voluntariness of petitioner's statement to police. Had petitioner known his rights to consular notification, he would have had time to confer with a representative of the Mexican Consulate before his interrogation. Appendix D, Declaration of Norberto Serna (July 18, 2017). A representative would have explained petitioner's rights and obligations to him in fluent Spanish. A representative would have assisted in securing legal representation for petitioner. Appendix E, Declaration of San Francisco Mexican Consular Official Wilma Laura Gandoy Vazquez (July 3, 2017); Appendix F, Declaration of San Francisco Mexican Consular Official Wilma Laura Gandoy Vázquez (Jan. 11, 2019); and Appendix G, Declaration of San Jose Mexican Consular Official Rodrigo Navarro García (Dec. 31, 2018).

### 3. Petitioner Would Not Have Given A Statement Had He Received Consular Assistance.

Petitioner would not have made incriminating statements had he received consular assistance and truly understood his constitutional rights. Appendix D, Declaration of Norberto Serna (July 18, 2017). There were numerous problems in the communication of petitioner's rights that would have been alleviated by proper consular notification. Consular assistance would have protected petitioner.

The flawed explanation of *Miranda* rights—delivered in broken Spanish—is precisely the situation governments hoped to avoid by signing the VCCR. This Court has held that suppression of evidence obtained in violation of Article 36 is not a *per se* remedy. *Sanchez-Llamas*, 548 U.S. at 350. However, suppression may lie

if a "defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to the police." *Id.* The Court has established that compliance with Article 36 is an important factor in determining whether a statement was voluntary.

Violations of Article 36 and section 834c are relevant in determining whether a *Miranda* waiver leading to incriminating statements was knowing, intelligent and voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973); *Davis v. State of N.C.*, 384 U.S. 737, 741 (1966); *United States v. Amando*, 229 F.3d 801 (9th Cir. 2000). Here, both the section 834c obligation to inform the detainee of his consular rights within two hours of his detention and the Article 36 obligation to inform petitioner of his rights "without delay" attached prior to his interrogation.

A Mexican national, like petitioner, is particularly vulnerable to uninformed and sometimes disastrous relinquishments of constitutional rights. A suspect's foreign nationality, inexperience, and indigency have long been relevant to the voluntariness inquiry. *Miranda*, 384 U.S. 457; *Heredia-Fernandez*, 756 F.2d at 1415. Many Mexican nationals do not believe they have a right to remain silent in the face of interrogation. Bauer, *Speaking of Cultures*, 8–28; Eniesman, *Cultural Issues*, §4.6.

Petitioner was particularly vulnerable in light of his inability to speak English and his unfamiliarity with his rights in the American legal system. Appendix D, Declaration of Norberto Serna (July 18, 2017). These issues were exacerbated since petitioner (1) feared attack by a canine when he was taken into

custody; (2) was held in custody for nine hours prior to his interrogation; (3) was handcuffed with his hands behind his back the entire time; (4) was forced to wait not knowing the nature of his detention; and (5) only had his handcuffs removed after the *Miranda* warnings were given. Moreover, petitioner was scared of retaliation, and Quinonez's statement was an improper appeal to petitioner's manhood.

The failure to notify petitioner of his right to consular notification added to the deficiencies noted above. The lack of notification prevented petitioner from learning his rights in straightforward, comprehensible Spanish. It prevented him from learning he could have an attorney provided for free, and he could have that attorney present at any questioning. This lack of understanding left petitioner vulnerable to the coercive tactics utilized by the police, and led him to make an incriminating statement.

Petitioner was born in El Saucillo, Calvillo in the United Mexican States. Appendix D, Declaration of Norberto Serna (July 18, 2017). His Mexican nationality was apparent to Quinonez. Petitioner was unable to communicate in English, thus Quinonez attempted to inform him of his constitutional rights in broken Spanish. People's State-Petition-Exhibit 2-A. Petitioner informed Quiononez that his wife and daughters lived in Mexico. State-Petition-Exhibit 2-A, Track 1 at 3–4. In the Pre-Booking Information, Officer Tracey noted petitioner was not a United States citizen and was born in Mexico. Appendix C, Pre-Booking Information Sheet for Norberto Serna (May 5, 2011). Tracey did not fill out the

form's boxes labeled "Request Notification to Consulate" or "Mandatory Notification to Consulate" despite indicating he was a Mexican national. *Id.* This awareness of foreign nationality was sufficient to trigger the consular advisement obligation.

The State Department's directives on the VCCR carry great weight. *Sanchez-Llamas*, 548 U.S. at 355. The department instructs officers on compliance with the VCCR: "If it appears that the person is probably a foreign national, you should provide consular information and treat the person like a foreign national until and unless you confirm that he or she is instead a U.S. citizen." U.S. Department of State, Consular Notification and Access 21 (4th ed. March 2014). The CNA cites foreign birth and lack of English proficiency as indicators that should trigger a consular rights advisement. CNA at 13, United States Department of State, Consular Notification and Access (3d Ed. Sep. 2010).

Quinonez failed to provide consular information though it was apparent that petitioner is a Mexican national. The police had more than adequate time to advise petitioner of his consular rights and to notify the consulate *prior* to the commencement of the interrogation. Under state law, petitioner should have known of his consular rights seven hours before his interrogation. §834. Under Article 36(b) and the CNA instructions, petitioner should have been informed of his rights "[w]ithout delay." CNA at 25.

Under either scenario, the consulate would have accessed petitioner before the interrogation. United States Department of State, Consular Notification and Access (3d Ed. Sep. 2010). Appendix E, Declaration of Consular Official Wilma

Laura Gandoy Vázquez at ¶4, ("[I]n serious cases, such as this one, the consular response would consist of a telephone call to and/or a direct visit with the detainee as soon as contact or visitation could be arranged with the detaining agency."), ¶5 ("[H]ad the Consulate General of Mexico in San Jose been notified of Mr. Serna's detention 'without delay,' . . . a consular protection officer would have attempted to visit him or speak with him by telephone that same day."); and Declaration of Consular Official Rodrigo Navarro García, Declaration of San Jose Mexican Consular Official Rodrigo Navarro García (Dec. 31, 2018), Appendix G, at ¶4 (same), ¶5 ("the Santa Clara County Sheriff's Department . . . permits consular contact by telephone with detained Mexican nationals. Mexico's consular officers frequently visit that location.").

The state courts erred in finding that petitioner would not have sought and received consular support prior to his interrogation. Petitioner would have accepted consular assistance. Appendix D, Declaration of Norberto Serna (July 18, 2017). Had he known of the right to consular notification and assistance, he would have exercised that right prior to speaking to police. *Id.* Petitioner was unprepared to navigate the American criminal justice system while facing a life without parole sentence. He did not speak English. "Even with an interpreter, [petitioner] sensed that things were lost in translation." 2CT 428. His education ended at "4th grade." 2CT 435.

The chain of events that led petitioner to make an involuntary and incriminating statement began with the state's failure to inform him of his right to

consular notification. The benefits of consular notification have long been recognized. *Sanchez v. State*, 157 N.E. 1, 4–5 (1927).

- With consular notification, petitioner would have had somebody to speak to about the legal process before being thrust into it. Instead, petitioner spent hours in fear—fear for his and his son's safety, fear of the police dog, and fear of the indeterminate wait in handcuffs—with little to no understanding of his circumstances.
- With consular notification, petitioner would have known and exercised his *Miranda* rights. Instead, petitioner was presented with confusing an unintelligible warnings that led him to believe he had no choice but to speak with Quinonez.
- With consular notification, somebody with a cultural understanding of petitioner's situation could have assuaged his fears. Instead, petitioner believed the only way to ensure his safety and the safety of his son was to curry the favor of Quinonez by giving a statement.

The state courts erred in failing to find prejudice from trial counsel's failure to raise petitioner's consular rights, and the state courts erred in failing to suppress petitioner's statement.

A consular official would have either called or visited petitioner that business day if notified of his detention—before the 6PM interrogation. With no evidence to support its finding and without holding an evidentiary hearing, the state court found petitioner's declaration stating he would have exercised his consular rights

was not credible. Dist-Doc. #16-13 at 232. This was unreasonable—there was no basis on which to find that petitioner would have refused help from a legally-sophisticated official from his country, speaking his language, who would have reached out to him seeking to help him in the midst of an overwhelming, 9-hour detention.

#### 4. Summation

Petitioner should have been advised of his consular rights. Had he been advised and spoken with consular officials, he would have exercised his rights under *Miranda.* Had he done so, he would not have made any incriminating statements.

### D. The District Court and The Court of Appeals Should Have Granted a Certificate of Appealability.

The District Court and the Court of Appeals should have granted a certificate of appealability because reasonable jurists can debate whether petitioner knowingly waived his *Miranda* rights under clearly-established Supreme Court precedent, whether the state court made an unreasonable determination of the facts in concluding he had understood his rights and whether the violation of petitioner's consular rights was prejudicial.

The courts have found that a Spanish-language *Miranda* warning failed to "'reasonably convey' to . . . 'rights as required by *Miranda* . . . ." *Botello-Rosales*, 728 F.3d at 867. The officer had informed Botello that "[i]f 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.* But a subtle inaccuracy in the translation meant *Botello* was not actually informed of his right to a "free" attorney:

> The detective used the Spanish word "libre" to mean "free". . . . "Libre" translates to "free" as in being available or at liberty to do something. Additionally, 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.* "[S]uch an affirmatively misleading advisory does not satisfy *Miranda*'s strictures." *Id.* This Court has explained that "as 'an absolute prerequisite to interrogation,' [] an individual held for questioning 'must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation.'" *Florida v. Powell*, 559 U.S. 50, 60 (2010).

Here, the trial court found the defense Spanish-language expert credible, noting "[t]here were some technical issues in the admonition." The court went on to find the admonition sufficient because "[t]he defendant did not appear to misunderstand or fail to understand the admonitions. He did not ask for clarification." The court ruled "that even if the word 'integration' had been used instead of 'interrogation' [] the defendant understood the required admonitions subjectively." 9RT 324–25.

A reasonable jurist could easily debate whether this was an unreasonable determination of the facts. A jurist could debate whether petitioner was "clearly informed" of his right to have an attorney present during questioning and to have an attorney that was free of cost, as clearly-established Supreme Court case law

requires. *Powell*, 559 U.S. at 60. It was erroneous for the trial court to expect someone with no cultural background in *Miranda* rights to guess the meaning of out-of-place Spanish words.

Rather than focusing on whether a defendant asked to clarify the ambiguity, the court held the warnings are found to be insufficient because "there [was] no indication in the record that the government clarified which set of warnings was correct." *Botello*, 728 F.3d at 867. Thus, reasonable jurists could debate whether the trial court "indulge[d] in every reasonable presumption against waiver" by assuming from petitioner's failure to ask for clarification that he understood rights that were inaccurately communicated to him. *Burbine*, 475 U.S. at 450 n.32.

A certificate of appealability should have issued for the Court of Appeals to review the state court's denial of petitioner's *Miranda* claim. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003); *Buck v. Davis*, 580 U.S. ___, 137 S.Ct. 759, 773 (2017); *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016). Reasonable jurists could debate whether the superior court reasonably held that petitioner "had not established prejudice arising from the consular notification violation." Dist-Doc. #26 at 33. The district court found that the state court was reasonable in finding no prejudice because the "*Miranda* warnings in Spanish . . . adequately advised Serna of his rights." *Id.* at 32. Because petitioner was not adequately informed of his *Miranda* rights, and it was uncontested that consular officials would have advised him of his rights, reasonable jurists could debate whether he was prejudiced by the violation of his consular

rights. The violation resulted in him involuntarily incriminating himself.

Reasonable jurists could debate whether the state court engaged in an unreasonable fact-finding process. Petitioner was denied a state and federal evidentiary hearing to further develop facts regarding this claim. He had no chance to show details about what services consular officials would have provided him. He had no a chance to testify, to bring an expert on police interrogations, or to bring consular officials to show that he would not have spoken to officers if he had been informed of his consular rights as required.

The district court dismissed these arguments. It found the state court reasonable in "express[ing] skepticism that Serna would have waited for consular assistance before speaking to law enforcement." Dist-Doc. #26. Reasonable jurists could debate whether the state court was reasonable in refusing to find that petitioner would have received consular assistance. Since petitioner was detained almost 9 hours before his interrogation, and the officers were required to inform him of his rights within two hours of detaining him pursuant to section 843c(a)(1), petitioner would have had seven hours to exercise his consular rights before the interrogation.

Both the District Court and the Court of Appeals denied a certificate of appealability when petitioner demonstrated that linguistic and cultural barriers prevented him from understanding the *Miranda* warning and timely consulate intervention would have protected his rights such that he would not have waived his *Miranda* rights. In doing so, the courts ran afoul of this Court's jurisprudence.

By imposing a higher standard, petitioner was denied his rights.

"The standard for granting a certificate of appealability is low." *Frost v. Gilbert*, 835 F.3d 883, 888 (9th Cir. 2016). A petitioner need only demonstrate "a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). He need only show that "reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

As a result, the denial of a certificate of appealability violates Mr. Serna's Fifth, Sixth and Fourteenth Amendment rights to due process and a fair trial.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted, and the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Dated: August 7, 2024

Respectfully submitted,

By: _____
JAMES S. THOMSON*

Attorney for Petitioner
NORBERTO SERNA

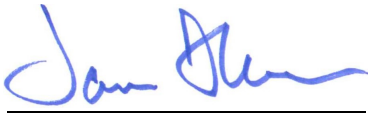
*Attorney of Record

## CERTIFICATE OF COMPLIANCE
## PURSUANT TO USSC RULE 33

Case No. 24-_____

I certify that the foregoing petitioner's petition for writ of certiorari is:

X___ Proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and has 5,180 words.



JAMES S. THOMSON