No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ISIDRO ROMERO-CORONA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

Motion for Leave to Proceed *In Forma Pauperis*

Pursuant to 18 U.S.C. § 3006A and Supreme Court Rule 39, the Petitioner, Isidro Romero-Corona, asks for leave to file a Petition for Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit without pre-payment of fees or costs and to proceed *in forma pauperis*. The Petitioner was represented by counsel appointed pursuant to 18 U.S.C. § 3006A in the district court and on appeal to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

December 6, 2024

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QUESTION PRESENTED

In *Howes v. Fields*, 565 U.S. 499 (2012), the Court established a two-step test for determining whether a suspect is "in custody" for purposes of *Miranda v. Arizona,* 384 U.S. 436 (1966). Under step one, courts consult a list of relevant factors to determine whether a reasonable person would feel free to leave. But because "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*," courts then proceed to the second step of determining "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at 509.

In the dozen years since *Howes*, nine circuit courts have adopted this two-step test. But the Eighth and Tenth Circuits continue to apply only the first step. And the Ninth Circuit sometimes applies the first step and sometimes considers a completely different test—whether the stop was permissible under *Terry v. Ohio*, 392 U.S. 1 (1968). Accordingly, the question presented is:

Whether courts must apply the second step of *Howes* to determine if a person is "in custody" for *Miranda* purposes.

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Isidro Romero-Corona and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Isidro Romero-Corona,* U.S. District Court for the Southern District of California, Oral ruling issued January 24, 2023.
- *United States v. Isidro Romero-Corona*, No. 23-1520, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition issued September 12, 2024.

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A.	*United States v. Isidro Romero-Corona*, No. 23-1520, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition issued September 12, 2024.

IN THE SUPREME COURT OF THE UNITED STATES

ISIDRO ROMERO-CORONA,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

In *Howes v. Fields*, 565 U.S. 499 (2012), the Court established a two-step test for determining whether a suspect is "in custody" for purposes of *Miranda v. Arizona,* 384 U.S. 436 (1966). Nine circuit courts apply that test. Three do not.

The Eighth and Tenth Circuits have never mentioned the second step of this test—let alone applied it. And the Ninth Circuit applies only the first step or else holds, as it did in this case, that the relevant inquiry is whether a stop is "permissible pursuant to *Terry*, rather than whether [the person] was 'in custody' pursuant to *Miranda*." *United States v. Cabrera*, 83 F.4th 729, 735 (9th Cir. 2023). As a result, federal courts in nearly every state west of the Mississippi River apply a different rule for determining "custody" than federal courts in every state east of the Mississippi River. To ensure that all federal courts are uniformly applying the Court's precedent on a critical and oft-arising Fifth Amendment issue, the Court

should grant certiorari.

OPINION BELOW

A three-judge panel of the Ninth Circuit affirmed Mr. Romero-Corona's conviction in an unpublished memorandum disposition. *See United States v. Romero-Corona*, No. 23-1520 (9th Cir. Sept. 12, 2024) (attached here as Appendix A).

JURISDICTION

On September 12, 2024, the Ninth Circuit denied Mr. Romero-Corona's appeal and affirmed his conviction. *See* Appendix A. This Court thus has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF FACTS

Isidro Romero-Corona is a 63-year-old Mexican citizen who has spent over 30 years of his life working as a seasonal laborer in the United States. Due to the severe poverty his family faced in Mexico, he had been forced to leave school and begin working at age 8. Throughout his life, he has worked both as a fisherman and as an agricultural field worker. He has lived in at least six different states, following whatever work he could find through Alaska, Oregon, Washington, Montana, Idaho, and California.

On July 21, 2022, Mr. Romero-Corona was apprehended by a Border Patrol Agent after allegedly finding him hiding in the brush near a dirt road approximately 1000 feet north of the U.S./Mexico border. Prior to returning to the United States, Mr. Romero-Corona had been homeless in Mexico. At the time of his

arrest, he had no money or cell phone; the sole item in his possession was a Bible.

According to Border Patrol Agent Richard Woods, at approximately 3:15 p.m. on July 21, 2022, he received a radio call stating that a motion sensor had gone off in the area. He then learned that camera operators had seen a person walking down a hill toward a road, then jumping off the road and hiding behind a bush. Agent Woods drove to the area and parked near the bush. He walked over to the bush and found Mr. Romero-Corona curled up in the fetal position on the ground. Agent Woods identified himself as a Border Patrol Agent and instructed Mr. Romero-Corona to stand up and walk up to the road. He then guided Mr. Romero-Corona up the hill. Agent Woods was wearing his full uniform, with multiple weapons visible on his service belt: a firearm, pepper spray, and a baton.

Once Mr. Romero-Corona came up to the road, Agent Woods sat him down next to his vehicle in order to conduct his questioning. Agent Woods' vehicle was a large white truck with "Border Patrol" written on the side. Agent Woods, who is approximately six feet tall, stood over the sitting Mr. Romero-Corona, who is about 5'6", during the interrogation.

Per Agent Woods, the inquiry consisted of four questions: (1) What country are you a citizen of?; (2) What country were you born in?; (3) Do you have documents to be in the United States legally?; and (4) Are you here illegally? Agent Woods testified at Mr. Romero-Corona's trial that those are the standard four questions he asks in every field immigration inspection.

Mr. Romero-Corona stated that he was a citizen and national of Mexico and

had no legal permission to enter the United States. Records checks revealed that Mr. Romero-Corona had been previously removed from the United States to Mexico on multiple occasions, so he was placed under arrest. The United States charged Mr. Romero-Corona with attempted reentry of a removed alien pursuant to 8 U.S.C. §§ 1326(a) and (b), a felony.

Mr. Romero-Corona pleaded not guilty to the charge and a jury trial was held on January 24, 2023. Prior to the trial, the United States filed a motion *in limine* seeking to "Admit Field Admissions about Citizenship, Immigration Status, and Entry into the United States." Mr. Romero-Corona opposed that motion, arguing that those field statements were inadmissible because they were taken in violation of Mr. Romero-Corona's *Miranda* rights. The District Court deferred ruling on the motion until the time of trial, finding it had insufficient facts to make a determination.

On the first day of trial, the District Court held a brief evidentiary hearing as to the circumstances of the interrogation. After Agent Woods testified, the district court admitted the field statements. In its oral ruling, the District Court stated, "I think the question is whether a reasonable person would feel, after brief questioning, he was free to leave. And I find, based on the testimony, that a reasonable person would feel free to leave. So I will allow the testimony."

The United States then presented its case against Mr. Romero-Corona. He did not present any evidence on his own behalf. After approximately 6.5 hours of deliberation, the jury found Mr. Romero-Corona guilty. On July 10, 2023, the

District Court sentenced Mr. Romero-Corona to 41 months custody to be followed by 3 years supervised release.

Mr. Romero-Corona appealed his conviction to the Ninth Circuit Court of Appeals, arguing *inter alia* that the district court erred by failing to suppress his non-*Mirandized* statements. Under this Court's most recent precedent, judges must apply a two-step test to determine whether a person is "in custody" for purposes of *Miranda*. *See Howes v. Fields*, 565 U.S. 499 (2012). The "initial step" requires courts to consider the "objective circumstances of the interrogation" to determine whether "a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 509 (quotations and alterations omitted). Factors relevant to this analysis include the "location of the questioning," its "duration," the "statements made," any use of "physical restraints," and whether the person is released "at the end of the questioning." *Id.*

But even if these factors suggest a reasonable person would not feel free to leave, "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Id.* So under *Howes*, courts must then proceed to the second step by asking the "additional question" of "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.*

The Ninth Circuit affirmed Mr. Romero-Corona's conviction in a memorandum disposition. In finding that there was no Fifth Amendment violation, it cited to its recent decision in *United States v. Cabrera*, 83 F.4th 729 (9th Cir.

2023). The *Cabrera* opinion addressed the issue of *Miranda* rights in the context of field statements made to a Border Patrol Agent, in a circumstance very similar to Mr. Romero-Corona's arrest.

In keeping with Ninth Circuit precedent, the *Cabrera* Court did not apply the *Howes* two-step test. Initially, the court noted that "[o]rdinarily, we assess whether someone is 'in custody' for *Miranda* purposes by determining whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." *Id.* at 734. But it then declined to undertake this step-one analysis at all, holding that in the context of "*Miranda* challenges at the border," the relevant question was whether the detention "constituted a permissible *Terry* stop, or something more." *Id.* In fact, the Ninth Circuit went so far as to say that in cases involving defendants making field statements to Border Patrol Agents, the issue is whether the questioning was "permissible pursuant to *Terry,* rather than whether [a defendant] was 'in custody' pursuant to *Miranda.*" *Id.* at 735.

The Ninth Circuit made a similar analysis in Mr. Romero-Corona's case. The Ninth Circuit did not apply the *Howes* two-step test, noting that per *Cabrera*, "*Terry v. Ohio* provides the relevant inquiry." *Id.* (internal citation omitted). Instead, it stated, "The relevant questions are whether the Border Patrol officer had a reasonable suspicion to stop Romero-Corona, whether the stop involved limited and reasonable restraint, and whether the officer's questions were reasonable related to the justification for the stop." Pet. App. A at 2. These factors appear nowhere in the

Howes two-step custody analysis. In upholding the lower court's ruling, it concluded that "[t]he circumstances here all indicate that the stop was a permissible *Terry* stop." *Id.* At no point did the Ninth Circuit conduct the second step of the *Miranda* custody inquiry by asking "whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509. In other words, the Ninth Circuit applied an entirely different custodial test than this Court mandated in *Howes*—one that focused purely on whether the detention was a *Terry* stop.

The Ninth Circuit affirmed Mr. Romero-Corona's conviction and sentence. This petition follows.

REASONS FOR GRANTING THE PETITION

I.

The courts of appeals are applying different tests to determine whether a person is "in custody" for purposes of *Miranda*.

In the dozen years since this Court issued *Howes*, most circuit courts have adhered to its two-part test to determine whether a suspect is "in custody" for purposes of *Miranda*. But three holdouts remain. The Eighth and Tenth Circuits have yet to acknowledge *Howes'* second step and continue to apply only the first step of whether a reasonable person would feel free to leave. The Ninth Circuit usually does the same. But in the context of border-related detentions, the Ninth Circuit does not even do this—instead, it determines whether a stop is "permissible pursuant to *Terry*, rather than whether [the person] was 'in custody' pursuant to *Miranda*." *Cabrera*, 83 F.4th at 735. To ensure that all the circuits are uniformly

applying established precedent on an important Fifth Amendment issue, this Court should grant certiorari.

A. *Howes* set forth a two-step test for determining whether a person is "in custody" for *Miranda* purposes.

In *Howes v. Fields*, this Court considered whether an inmate who was taken to a separate room and questioned about events that occurred before he came to prison was "in custody" for *Miranda* purposes. 565 U.S. at 505. The Court observed that "custody" is a "term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id.* at 508–09. Thus, to determine whether a person is in custody, the "initial step" is to decide "whether, in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 509 (quotations, citation, and alteration omitted). To do so, courts consider a series of "[r]elevant factors," such as the "location of the questioning," its "duration," the "statements made during the interview," the use of any "physical restraints," and "the release of the interviewee at the end of the questioning." *Id.*

But the Court clarified that determining whether "an individual's freedom of movement was curtailed" is "simply the first step in the analysis, not the last." *Id.* Because the Court has "'declined to accord talismanic power' to the freedom-of-movement inquiry," it explained that "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*." *Id.* (quoting *Berkemer v. McCarty,* 468 U.S. 420, 437 (1984)). Thus, after courts analyze the freedom-of-movement factors under step one, they must ask an "additional question" under step two—whether

"the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* Because step one is only a "necessary and not a sufficient condition for *Miranda* custody," the facts must satisfy both steps before an interrogation is deemed custodial. *Id.*

B. Nine courts of appeals have adopted *Howes*' two-step test.

In the dozen years since *Howes*, most circuit courts have applied this two-step approach to custodial determinations. Citing *Howes*, the First Circuit explained that "[a] two-step inquiry is used to determine whether a suspect is in custody," in which courts decide 1) whether a reasonable person would have felt free to leave and 2) if not, whether "the environment in which the interrogation occurred 'presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'" *United States v. Monson*, 72 F.4th 1, 10 (1st Cir. 2023) (quoting *Howes*, 565 U.S. at 509) (alteration omitted). The Eleventh Circuit similarly explained that "[o]ur evaluation of this coercion question proceeds in two steps." *United States v. Woodson, 30 F.4th* 1295, 1303 (11th Cir. 2022) (citing Howes); *see also United States v. Leggette*, 57 F.4th 406, 410–11 (4th Cir. 2023) (discussing the "two steps" for determining custody under *Howes*).

Even courts that have not expressly referred to the inquiry as a two-step analysis still apply the second prong. For instance, the Seventh Circuit stated that "[i]n the end, there is no custody unless 'the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'") *United States v. Cox*, 54 F.4th 502, 511 (7th Cir. 2022) (quoting

Howes, 565 U.S. at 509). *See also United States v. Schaffer*, 851 F.3d 166, 175 (2d Cir. 2017) ("Where there is evidence that an individual's freedom to move was limited, courts should consider whether 'the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.'") (quoting *Howes*); *United States v. Ludwikowski*, 944 F.3d 123, 131 (3d Cir. 2019) (same); *United States v. Howard*, 815 F. App'x 69, 78–79 (6th Cir. 2020) (same); *United States v. Cooper*, 949 F.3d 744, 748 (D.C. Cir. 2020) (same). Indeed, the Fifth Circuit reversed where a district court had "confined its analysis to the first inquiry" and the interrogation did not occur in "in an environment resembling the station house questioning at issue in *Miranda*." *United States v. Coulter*, 41 F.4th 451, 457–58 (5th Cir. 2022). Thus, nine courts of appeals follow the *Howes*' two-step approach to custodial determination.

C. Three courts of appeals apply only the first *Howes* step or a different test entirely.

As these nine courts of appeals have shown, the *Howes* two-step test for determining custody is not complicated. Yet inexplicably, three circuit courts have ignored it, continuing to apply their own pre-*Howes* precedent.

The Eighth Circuit applies only the first step of "whether, given the totality of the circumstances, a reasonable person would have felt at liberty to terminate the interrogation and leave or cause the agents to leave." *United States v. Sandell*, 27 F.4th 625, 628–29 (8th Cir. 2022) (quotations omitted); *see also United States v. Treanton*, 57 F.4th 638, 641 (8th Cir. 2023) ("We consider 'the circumstances surrounding the questioning and whether, given those circumstances, a reasonable

person would have felt free to terminate the questioning and leave.'") (quoting *United States v. Ferguson*, 970 F.3d 895, 901 (8th Cir. 2020)). The Tenth Circuit does the same—curiously, by quoting *Howes* but *only* as to the first step. *See United States v. Wagner*, 951 F.3d 1232, 1250 (10th Cir. 2020) ("An interrogation is custodial when, 'in light of the objective circumstances of the interrogation, a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.'") (quoting *Howes*, 565 U.S. at 509); *see also United States v. Guillen*, 995 F.3d 1095, 1109 (10th Cir. 2021). Neither the Eight nor Tenth Circuit has ever applied or even mentioned the second step of whether "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509.

The Ninth Circuit takes an even more arbitrary approach. In many situations, the Ninth Circuit mirrors the Eighth and Tenth Circuits by applying only the first step of whether a reasonable person "would have felt, under a totality of the circumstances, that they were not at liberty to terminate the interrogation and leave." *United States v. Mora-Alcaraz*, 986 F.3d 1151, 1155 (9th Cir. 2021) (quotations omitted). Under this inquiry, the Ninth Circuit applies the "*Kim* factors," which pre-date *Howes* and largely resemble the *Howes* first-step inquiry. *Id.* at 1156 (citing *United States v. Kim*, 292 F.3d 969 (9th Cir. 2002)).

But in cases involving border-related detentions, the Ninth Circuit applies an entirely different test. In a series of cases, the court has likened border stops to the traffic stop at issue in *Berkemer*, 468 U.S. 420, concluding that border-related stops

are "ordinarily a *Terry* stop" not requiring *Miranda* warnings. *United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001). So rather than applying the factors set forth in *Howes* (or even *Kim*), the Ninth Circuit focuses on *Terry*-related factors such as whether there was "reasonable suspicion" for the stop and whether the questions were "reasonably limited in scope" to the justification for the stop. *United States v. Cervantes-Flores*, 421 F.3d 825, 830 (9th Cir. 2005). For instance, in one case where a Border Patrol agent prevented a person from leaving a parking lot by "blocking his car, approaching it with his gun drawn, and interrogating him about his citizenship and immigration status," the court refused to consider the question of whether a reasonable person would feel free to leave, holding only that the agent did not exceed the scope of *Terry* or *Berkemer*. *United States v. Medina-Villa*, 567 F.3d 507, 520 (9th Cir. 2009), *as amended* (June 23, 2009).

The Ninth Circuit doubled down on this approach in *Cabrera*. It acknowledged that "[o]rdinarily, we assess whether someone is 'in custody' for *Miranda* purposes by determining whether a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave." 83 F.4th at 734 (quotations omitted). But because it was a border-related stop, the court refused to conduct this step-one analysis, asking instead "whether the detention constituted a permissible *Terry* stop, or something more." *Id.* In fact, the court abandoned any pretense of applying the *Howes* step-one factors, stating that, "in considering Cabrera's case, we must determine whether his being questioned in between the border fences was permissible pursuant to *Terry*,

rather than whether he was 'in custody' pursuant to *Miranda*." *Id.* at 735. In Mr. Romero-Corona's case, the Ninth Circuit took the exact same approach, conducting a *Terry* analysis instead of a *Miranda* analysis. Pet. App. A at 2.

But the *Howes* test is different than the *Terry* test. *Terry* held that an officer may briefly detain and question a person so long as the stop's "intensity and scope" do not transform it into an "unreasonable" search or seizure under the Fourth Amendment. *Terry*, 392 U.S. at 18. But *Howes* raises an entirely different constitutional question—not whether the officer's actions were "reasonable," but whether the officer's actions, combined with the "coercive pressures" of the "relevant environment," trigger an objective conclusion that a person was in custody. *Howes*, 565 U.S. at 509; *see also Leggette*, 57 F.4th at 411 n.5 ("*Terry*'s Fourth Amendment analysis and *Miranda*'s Fifth Amendment analysis remain distinct inquiries, focused on different questions."). So while an unreasonable stop under the Fourth Amendment might contribute to the coercion that transforms a detention into custody for *Miranda* purposes, "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." *Fisher v. United States*, 425 U.S. 391, 400 (1976); *New York v. Quarles*, 467 U.S. 649, 653 n.3 (1984) (same);

Here, for instance, the Ninth Circuit did not compare the "relevant environment"—interrogation by a fully uniformed and armed Border Patrol agent of a substantially smaller man with no personal property who had been cowering in a bush—to that of the "coercive pressures" of the station house in *Miranda*. *Howes*, 565 U.S. at 509. Instead, it considered this environment *only* to find that the agent

had "reasonable suspicion that Romero-Corona had entered the country unlawfully" under *Terry*. Pet. App. A at 2. The only other factors it considered were whether the agent's questions were "reasonably related" to the justification for the stop and whether the stop involved "limited and reasonable restraint." *Id.* But again, "the Fifth Amendment's strictures, unlike the Fourth's, are not removed by showing reasonableness." *Fisher*, 425 U.S. at 400. So even if the agent's "reasonable" actions justified a seizure under the Fourth Amendment, the Ninth Circuit did not answer the separate Fifth Amendment inquiry of whether a person in Mr. Romero-Corona's position would feel free to leave and whether the environment posed the "same inherently coercive pressures" as in *Miranda*. *Howes*, 565 U.S. at 509.

This Court did not obfuscate or hide the ball in *Howes*—it set forth a straightforward two-step test for determining whether an individual is in custody for *Miranda* purposes. Despite having more than a decade to adopt and apply this test, three courts of appeals are ignoring it—in fact, the Ninth Circuit here issued a published opinion that further entrenched its arbitrary approach. This Court should grant certiorari to bring the Eighth, Ninth, and Tenth Circuits in line with the other nine courts of appeals that faithfully apply *Howes*.

II.

This case presents an important and recurring constitutional issue.

By definition, every *Miranda* analysis requires judges, prosecutors, and defense attorneys to make a threshold determination of whether there was "such a restriction on a person's freedom as to render him 'in custody.'" *Oregon v.*

Mathiason, 429 U.S. 492, 495 (1977) (per curiam). Not surprisingly, this question arises daily in a variety of interrogation contexts, such as prisons, *Maryland v. Shatzer*, 559 U.S. 98 (2010), schools, *J.D.B. v. North Carolina*, 564 U.S. 261 (2011), police stations, *Thompson v. Keohane*, 516 U.S. 99 (1995), private homes, *Beckwith v. United States*, 425 U.S. 341 (1976), and traffic stops, *Berkemer*, 468 U.S. 420. Apart from the Fourth Amendment, it is hard to imagine a more frequently-implicated constitutional protection in criminal cases.

Not only does this inquiry occupy the minds of judges and lawyers *after* criminal charges arise, it affects police officers who must make "in-the-moment judgments as to when to administer *Miranda* warnings." *J.D.B.*, 564 U.S. at 271. Not surprisingly, such officers often have "difficulty deciding exactly when a suspect has been taken into custody." *Berkemer*, 468 U.S. at 441. Accordingly, one of the Court's goals in creating an objective custody test was to "give clear guidance to the police." *Yarborough v. Alvarado*, 541 U.S. 652, 668 (2004). But when three circuit courts encompassing 22 states—i.e., nearly the entire population west of the Mississippi River—decline to follow even the guidance this Court *has* issued, it is no wonder police struggle to make "in-the-moment judgments as to when to administer *Miranda* warnings." *J.D.B.*, 564 U.S. at 271.

When police are confused as to the rule for determining custody, this confusion clogs trial and appellate courts with pretrial motions, direct appeals, and habeas challenges. Many challenges could be easily avoided if all circuits simply took note of and implemented this Court's holdings. Thus, this case presents a

recurring and important issue that the Court should resolve.

IV.

This Court should bring the Eighth, Ninth, and Tenth Circuits in line with its precedent.

It goes without saying that courts of appeals do not have discretion to ignore this Court's precedent. Given that nine circuit courts have adopted *Howes*' two-step test, it was not buried in the decision or hidden to the average jurist. Yet three courts of appeals have simply failed to apply it for more than a decade, creating an unnecessary and unjustified circuit split. Because it would take little for this Court to bring all circuit courts into alignment, this Court should grant the petition for certiorari.

CONCLUSION

For these reasons, this Court should grant Mr. Romero-Corona's petition for a writ of certiorari.

Respectfully submitted,

Date: December 6, 2024

s/ Tommy H. Vu
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Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION

FILED

SEP 12 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. ISIDRO ROMERO-CORONA, Defendant - Appellant.	No. 23-1520 D.C. No. 3:22-cr-01886-BAS-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Cynthia A. Bashant, District Judge, Presiding

Submitted September 10, 2024**
Pasadena, California

Before: IKUTA and FRIEDLAND, Circuit Judges, and HSU, District Judge.***

Isidro Romero-Corona appeals his conviction and sentence for attempted unlawful reentry under 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Wesley L. Hsu, United States District Judge for the Central District of California, sitting by designation.

§ 1291, and we affirm.

1. Romero-Corona contends that the admission at trial of statements he made to a Border Patrol officer violated his Fifth Amendment rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). We decide that question de novo. *United States v. Cabrera*, 83 F.4th 729, 734 (9th Cir. 2023).

As Romero-Corona acknowledges, we have already rejected that argument in very similar circumstances. *See, e.g.*, *id.* at 735. The relevant questions are whether the Border Patrol officer had reasonable suspicion to stop Romero-Corona, whether the stop involved limited and reasonable restraint, and whether the officer's questions were reasonably related to the justification for the stop. *Id.* at 734-35 (explaining that *Terry v. Ohio*, 392 U.S. 1 (1968), provides the relevant inquiry).

The circumstances here all indicate that the stop was a permissible *Terry* stop. The Border Patrol officer found Romero-Corona hiding behind a bush a short distance from the border, providing reasonable suspicion that Romero-Corona had entered the country unlawfully. Under our caselaw, the stop was not "overly intrusive." *Cabrera*, 83 F.4th at 735. The officer directed Romero-Corona to sit next to the officer's Border Patrol truck, and the officer asked four questions over the course of about thirty seconds. The officer did not brandish his weapons and did not handcuff Romero-Corona. Finally, the officer's questions were

reasonably related to the justification for the stop. Romero-Corona argues that the questioning here went beyond "a typical immigration inspection" because the officer asked not only about Romero-Corona's citizenship, country of birth, and possession of immigration documents, but also about whether he was "here illegally." We disagree. That question did not materially differ from the questions we have treated as permissible, and it was reasonably related to the officer's justification for stopping Romero-Corona. *See United States v. Galindo-Gallegos*, 244 F.3d 728, 729, 732 (9th Cir. 2001) (holding that a stop was proper where officers asked the people stopped "whether they had a legal right to be in the United States").

2. Romero-Corona next argues that the district court erred in refusing to apply an acceptance of responsibility reduction when calculating the applicable Guidelines sentencing range. We review the district court's factual findings related to acceptance of responsibility for clear error, and we review de novo whether the district court correctly applied the law. *United States v. Green*, 940 F.3d 1038, 1041 (9th Cir. 2019).

The district court did not clearly err in concluding that Romero-Corona had not accepted responsibility, and it did not base its conclusion on his decision to go to trial. Romero-Corona points to facts that could be consistent with an acceptance of responsibility, such as his truthful answers to the Border Patrol officer's

questions. But he points to no evidence demonstrating that he actually "show[ed] contrition or remorse" as required to be eligible for the adjustment. *United States v. Nielsen*, 371 F.3d 574, 582 (9th Cir. 2004).

3. Romero-Corona also contends that the district court erred by failing to address several of his mitigation arguments under the 18 U.S.C. § 3553(a) factors. The district court explained that a 41-month sentence was "sufficient but not greater than necessary" because Romero-Corona had numerous prior convictions for unlawfully entering the United States and because his most recent 34-month sentence did not "seem to have deterred [him]." The court did not explicitly explain its thinking on Romero-Corona's arguments about his age, lack of family relationships, limited education, poverty, and many years working in agriculture in the United States. The district court also did not address Romero-Corona's argument that a lower sentence was merited because he was likely to face custody for violating the terms of his supervised release, or because the government had offered him a plea agreement for an offense that had a maximum custodial sentence of 24 months.

We review a district court's sentencing explanation for abuse of discretion.[1]

[1] The Government contends that we should review this issue for plain error because it was not properly preserved. Romero-Corona contends that, in context, his objection at sentencing "on procedural grounds" preserved this argument. Because we conclude that the district court did not abuse its discretion, we need not decide whether the more stringent plain error standard applies.

United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). We conclude that the district court did not abuse its discretion. The court orally explained the primary reasons for the sentence. Given the relative simplicity of the case, and given that the court indicated at the outset of the hearing that it had reviewed the relevant materials, no more was required. *See id.* at 992 ("[A]dequate explanation in some cases may . . . be inferred from the [Presentence Report] or the record as a whole. What constitutes a sufficient explanation will necessarily vary depending upon the complexity of the particular case.").

4. Finally, Romero-Corona argues that his sentence is substantively unreasonable. Reviewing for abuse of discretion, *id.* at 993, we conclude that the district court did not abuse its discretion in imposing a low-end Guidelines sentence in light of the circumstances, including Romero-Corona's multiple prior convictions for the same offense.

AFFIRMED.

No. _____

IN THE
Supreme Court of the United States

ISIDRO ROMERO-CORONA,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

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

Certificate of Compliance

As required by Supreme Court Rule 33.1(h), I certify that the petition for a writ of certiorari contains 4,051 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 6, 2024.

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Attorney for Petitioner

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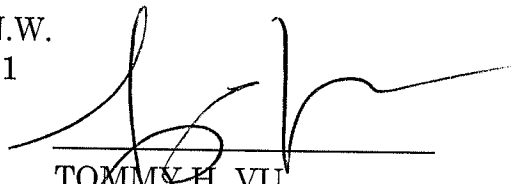
Certificate of Service

I, Tommy H. Vu, appointed to represent the petitioner under the Criminal Justice Act, certify that on December 6, 2024, one copy of the Petition for a Writ of Certiorari, the Appendix, and a Motion to Proceed *In Forma Pauperis* in the above-captioned case were served by first-class mail, postage prepaid, to respondent's counsel. I further certify that all parties required to be served have been served. Service was addressed as follows:

Elizabeth Prelogar
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001



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