

No.

IN THE
Supreme Court of the United States

VICENTE QUIROZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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February 26, 2018

QUESTION PRESENTED

To prove an arrestee waived his privilege against self-incrimination, the government must show waiver was made “knowingly and intelligently.” *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). This Court has provided guidance on the type and degree of evidence sufficient to show waiver was both knowing and intelligent when an arrestee affirmatively declares that he understands his rights, or, at a minimum, acknowledges the officer’s warnings. *See, e.g., Fare v. Michael C.*, 442 U.S. 707, 726-727 (1979) (defendant stated that he understood his rights); *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (same); *North Carolina v. Butler*, 441 U.S. 369, 371 (1979) (same); *Berghuis v. Thompson*, 560 U.S. 370, 385-86 (2010) (noting there was sufficient evidence defendant understood his rights when there was “no contention that [defendant] did not understand his rights” and defendant “received a written copy of the *Miranda* warnings”).

However, when an arrestee does not affirm his understanding, or, as here, where the arrestee *does not acknowledge the officer’s warnings at all*, lower courts lack direction. As a result, courts have turned to divergent, often contradictory factors to determine whether waiver was made knowingly and intelligently in such situations.

The question presented is:

When a defendant does not acknowledge an arresting officer’s recitation of the *Miranda* warnings, what must the prosecution show to overcome the presumption that the defendant did not knowingly and intelligently waive his rights?

PARTIES TO THE PROCEEDINGS BELOW

The following were parties to the proceedings in the United States Court of Appeals for the Seventh Circuit:

1. Vicente Quiroz, the petitioner on review, was defendant-appellant below.
2. United States of America, the respondent on review, was plaintiff-appellee below.

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INTRODUCTION

This Court has long imposed “high standards of proof for the waiver of constitutional rights.” *Miranda v. Arizona*, 384 U.S. 436, 475 (1966); *see also Brewer v. Williams*, 430 U.S. 387, 404 (1977) (courts should “indulge in every reasonable presumption against waiver” of constitutional rights). Here, there is no dispute that the defendant (“Quiroz”) did not acknowledge or admit that he was read his *Miranda* rights. Instead, both the district and appellate courts found that Quiroz impliedly waived his *Miranda* rights before confessing to the drug transactions for which he was convicted. While the reasoning behind each opinion differed, both courts made the same error: they did not set a “high standard[] of proof” to find that Quiroz ***understood*** his rights before he confessed. *See Berghuis v. Thompson*, 560 U.S. 370, 384 (2010) (requiring the government to make “the additional showing that the accused *understood*” his rights.) (emphasis added).

Rather than making *any* express finding that Quiroz understood his rights, the district court held: “it’s an implied waiver when you talk after you’ve been told you don’t have to talk. It’s just common sense.” App. 49a. This holding puts the cart before the horse. An implied waiver can exist only if there is proof that an arrestee understood his rights in the first instance. Put simply, this holding ignores entirely this Court’s requirement that the government prove the arrestee understood his rights. *See Tague v. Louisiana*, 444 U.S. 469 (1980) (per curiam).

When Quiroz pointed out this error on appeal, the Seventh Circuit sidestepped the district court’s holding. Instead of addressing it, the appellate court

identified three observations made by the district court that the appellate court believed, taken together, were sufficient to support a finding that Quiroz understood his rights: (1) he is an intelligent individual who speaks English; (2) he aggressively asserted his rights during *trial* proceedings subsequent to his arrest; and (3) he consented to a search of his home and the search was completed before interrogation began. App. 10a-11a. In the absence of evidence Quiroz heard the *Miranda* warnings, these reasons are insufficient to overcome the presumption that Quiroz did not knowingly and intelligently waive his rights. And, as discussed fully below, this holding is both self-contradictory and at odds with holdings of other courts.

The decisions of both the district court and the Seventh Circuit are symptomatic of a larger issue presented for this Court to resolve. At present, lower courts are able to consistently apply this Court's precedents in situations where an arrestee acknowledges the officer's warnings. *See, e.g., Fare v. Michael C.*, 442 U.S. 707, 726-727 (1979). However, lower courts currently have little guidance in cases such as this one, where ***the arrestee does not acknowledge being read his rights***. In such situations, the question is not only whether the arrestee has the *capacity* to understand the warnings, but also whether waiver was *actually* made with "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" despite a lack of evidence that the arrestee heard the *Miranda* warnings at all. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

Accordingly, this Court should grant this petition to answer the following question: When a defendant does not acknowledge an arresting officer's recitation of the *Miranda* warnings, what must the prosecution show to overcome the presumption that the defendant did not knowingly and intelligently waive his rights?

OPINIONS BELOW

The Seventh Circuit's decision is published at 874 F.3d 562 and reprinted in the Appendix ("App.") at App. 2a-18a. The Seventh Circuit's order denying the petition for rehearing *en banc* is reprinted at App. 1a. Excerpts from transcripts of relevant proceedings in the district court, including the the district court's decision to admit defendant's confession, are reprinted at App. 19a-68a.

JURISDICTION

The Seventh Circuit issued its decision on October 26, 2017. App. 2a. On November 9, 2017, petitioner filed a petition for rehearing *en banc*. The Seventh Circuit denied that petition on November 27, 2017. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

Under the Fifth Amendment of the Constitution, "[No person] . . . shall be compelled in any criminal case to be a witness against himself" U.S. Const. amend. V.

STATEMENT OF THE CASE

A. Trial Court Proceedings

Petitioner Vicente Quiroz was charged in the Northern District of Illinois with four counts, brought in two indictments, related to the sale and

distribution of certain illegal narcotics. The district court (Durkin, J.) had jurisdiction over these charges pursuant to 18 U.S.C. § 3231. Quiroz chose to try each indictment separately.

Before his first trial, Quiroz requested a hearing to determine whether the arresting officer, Christopher O'Reilly of the Drug Enforcement Agency, had properly administered *Miranda* warnings. App. 19a-22a. O'Reilly arrested Quiroz at his mother's home in Arizona on March 27, 2013, while his children were present. App. 26a-27a, 37a. According to O'Reilly, he administered the warnings only once, and recited at least some portion of the warnings, "off the top of [his] head," while Quiroz sat in the backseat of O'Reilly's vehicle. App. 25a-33a, 48a. At Quiroz's suppression hearing, O'Reilly testified that he had no recollection of receiving acknowledgment from Quiroz that he heard, let alone understood, the warnings. App. 30a-31a (O'Reilly testifying that he could not "remember if [Quiroz] acknowledged his *Miranda* warnings being given."). Instead, O'Reilly stated that Quiroz "was looking around, and he immediately said, 'I did nothing.'" App. 30a-31a. O'Reilly later admitted that, after this single recitation of the *Miranda* warnings, he failed to ask whether Quiroz was willing to answer questions, in contravention of the steps included on his DEA-13a form. App. 45a.

O'Reilly and other DEA agents then questioned Quiroz—who is a native Spanish speaker from Mexico—for approximately 45 minutes to an hour outside of his mother's house before taking him to a DEA office for further interrogation. App. 34a. It was there that he made a series of inculpatory statements. App. 32a-33a. Quiroz did not ask for or receive

anything in exchange for these admissions. Nor did he acknowledge that he could refuse to answer any particular question or line of questioning. App. 39a-43a. Though O'Reilly and the other agents "had an arrest package which contain[ed] the *Miranda* warnings in English and Spanish" at the DEA office, neither O'Reilly nor the other agents showed Quiroz those forms or administered the warnings a second time. App. 34a, 42a.

O'Reilly was the only witness to testify at Quiroz's suppression hearing, and the government only presented evidence of the agent's recollection of the arrest. Neither side introduced any evidence regarding Quiroz's background or intellectual faculties. Based solely on O'Reilly's testimony, District Judge Thomas Durkin determined that the agent had recited the *Miranda* warnings. App. 49a-50a.

The district court also determined that Quiroz had impliedly waived his constitutional right to remain silent because he spoke after O'Reilly orally recited the *Miranda* warnings, holding: "Once he's been given his rights, he waives them impliedly -- I find it's an implied waiver when you talk after you've been told you don't have to talk. It's just common sense." App. 49a. Based on that holding, the district court denied Quiroz's motion to suppress his post-arrest statement. App. 50a-51a. The statement was admitted in both of Quiroz's trials, App. 52a-53a, 60a-61a, and the government repeatedly referenced the statement during closing arguments in both trials. App. 54a-59a, 62a-66a.

In his first trial (which proceeded as a bench trial), the district court found Quiroz guilty of conspiracy to

possess with intent to distribute and distribution of methamphetamine in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. 13 CR 968, Dkt, 105. In the second trial, a jury found Quiroz guilty of conspiracy to possess with intent to distribute and distribution of marijuana in violation of the same statutes. 13 CR 21 Dkt, 137. Judge Durkin sentenced Quiroz to a 15-year term on each count in each case, all sentences to run concurrently. App. 67a-68a.

B. Seventh Circuit Proceedings

Quiroz appealed his convictions to the United States Court of Appeals for the Seventh Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. Quiroz argued, *inter alia*, that the admission of his post-arrest statement violated his Fifth Amendment rights as articulated in this Court’s decision in *Miranda v. Arizona*, 384 U.S. 436 (1966). Specifically, Quiroz pointed out that the district court’s holding that “it’s an implied waiver when you talk after you’ve been told you don’t have to talk” erroneously omitted a crucial element of the waiver analysis required by this Court—*i.e.*, whether the government proved that Quiroz actually ***understood*** his rights. *See Berghuis*, 560 U.S. at 384; *Tague*, 444 U.S. at 469.

The Seventh Circuit, however, affirmed. App. 3a. Tellingly, the Seventh Circuit’s opinion did not mention the government’s “great” and “heavy burden” to show waiver. *Miranda*, 384 U.S. at 475; *North Carolina v. Butler*, 441 U.S. 369, 373 (1979). Instead of addressing the district court’s actual implied waiver holding, the appellate court relied on three other observations made by the district court that supposedly showed that Quiroz understood his rights. First, the appellate court noted the district court’s

observation that Quiroz “use[s] words and sentences that are entirely consistent with the intelligence a person would need to understand the words read to him by the agent relating to his *Miranda* rights.” App. 10a (citing App. 48a-50a).

Second, the appellate court relied on the district court’s observation that Quiroz was not “a timid person in asserting his rights relating to trial procedures and certainly discovery obligations.” App. 10a (citing App. 46a-47a). In particular, the appellate court cited Quiroz’s request for a suppression hearing as evidence that he “had at least some knowledge of the system.” App. 10a-11a.

Finally, the appellate court noted that Quiroz consented to a protective sweep of his mother’s property, which was completed before questioning began. App. 11a. Based on these observations, the appellate court concluded that “[t]he totality of the circumstances shows that it is more likely than not that Quiroz understood his rights” and that “his uncoerced statement after he was read his rights constituted a valid implicit waiver.” App. 12a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled by This Court.

To determine whether “waiver [was] made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it,” *Moran*, 475 U.S. at 421, this Court has instructed lower courts to consider “the totality of the circumstances surrounding the confession.” *Colorado*

v. Connelly, 479 U.S. 157, 176 (1986). In cases where the question of waiver is raised, the arrestee often acknowledges the arresting officer’s warning and in many cases even affirmatively states that he understands his rights. *See, e.g., Michael C.*, 442 U.S. at 726-727 (defendant stated that he understood his rights); *Connelly*, 479 U.S. at 161-62 (same); *Moran*, 475 U.S. at 421 (same); *Butler*, 441 U.S. at 371 (same); *Berghuis*, 560 U.S. at 385-86 (noting there was sufficient evidence defendant understood his rights when there was “no contention that [defendant] did not understand his rights” and defendant “received a written copy of the *Miranda* warnings”); *Contrast Tague*, 444 U.S. at 471 (summary reversal in the absence of evidence of understanding); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962) (government could not show the defendant “understandingly” waived his right to counsel in light of “silent record”). When an arrestee acknowledges the warnings, lower courts can apply the wisdom of this body of cases to determine whether the defendant knowingly and intelligently waived his rights.

However, this Court’s precedent sheds little light in cases—such as this one—where there is no evidence that the arrestee ever acknowledged the officer’s warnings prior to giving a statement. In such cases, the question is not whether the arrestee lacked the *capacity* to understand the warnings, but rather whether the government proved the waiver was knowing and intelligent *even though the arrestee may not have heard the warnings at all*. As it is, lower courts lack guidance as to the type and degree of evidence needed to show understanding in these situations.

This dearth of guidance invites arbitrary results. Here, for example, the Seventh Circuit held that exercising one's rights (at trial) *and* failing to exercise one's rights (by consenting to a search) are *both* evidence of understanding. When read in tandem with its holding in *United States v. Brown*, 664 F.3d 1115 (7th Cir. 2011), the Seventh Circuit will now consider as evidence of understanding:

- Exercising one's rights at trial (App. 10a-11a);
- Failing to exercise one's right to refuse an officer permission to search one's home (*Id.*);
- Exercising one's right to remain silent by not answering certain questions (*Brown*, 664 F.3d at 1118);
- Failing to exercise one's right to remain silent by negotiating with investigators (*Id.*).

These contrary factors are likely to produce capricious results, putting future litigants in an impossible position. This alone demonstrates the need for direction from this Court.

Even beyond these conflicts internal to the Seventh Circuit, the lack of direction in this area has led to contradictory approaches among different courts. For example, the Seventh Circuit's approach here is notably different from the Second Circuit's approach in *United States v. Murphy*, 703 F.3d 182 (2d Cir. 2012). In *Murphy*, a state trooper stopped a motorist ("Webster") and his passenger ("Murphy"). *Id.* at 185. After Webster consented to a search of the vehicle, the trooper discovered cocaine and other evidence of illegal narcotics trafficking. *Id.* After they were arrested and warned pursuant to *Miranda*, both Murphy and Webster made inculpatory statements. *Id.* Both defendants later moved to suppress those

statements before trial. *Id.* at 188. At the suppression hearing, the district court held that the trooper had not correctly recited the *Miranda* warnings to Murphy, and therefore Murphy had not been properly warned. *United States v. Murphy*, 778 F. Supp. 2d 237, 259 (N.D.N.Y. 2011).

As for Webster, he, like Quiroz: (1) spoke English; (2) consented to a search, which was completed before any interrogation began; and (3) asserted his rights relating to certain trial procedures by moving to suppress his statement. *Murphy*, 703 F.3d at 185, 187-88. Accordingly, all three evidentiary reasons cited by the Seventh Circuit in *Quiroz* to show understanding likewise applied to Webster. Moreover, Webster, unlike Quiroz, “told [one of the officers] that he had already been read his rights” after he was transported to the police station. *Id.* at 193 & n. 9.

Yet in *Murphy*, neither the district court nor the Second Circuit found these facts sufficient to demonstrate Webster understood his rights. Nor did the court focus on the substance of the officer’s warning. Instead, the Second Circuit noted that the arresting officer testified that he “did not know whether Webster acknowledged hearing the *Miranda* warnings.” *Id.* at 193-94; *Compare* App. 30a-31a (O’Reilly testifying that he could not “remember if [Quiroz] acknowledged his *Miranda* warnings being given.”). Accordingly, because there was “no record evidence that [Webster] heard [the trooper] give the warnings,” the court held that the government did not meet its burden of proving Webster understood his rights. *Murphy*, 703 F.3d at 193-94. In reaching its decision, the Second Circuit, in direct contravention of the lower court’s holding here, explained that “the

Government must do more than show simply that a *Miranda* warning was given and the accused thereafter made a statement. We may imply waiver only when ***the prosecution*** has made ‘the additional showing that the accused *understood* these rights.’ On this record, the District Court properly concluded ***the Government failed to show*** Webster waived his *Miranda* rights.” *Id.* at 194 (quoting *Berghuis*, 130 S.Ct. at 2261) (emphasis added). In short, as a result of the lack of guidance regarding what must be shown to establish understanding when an arrestee does not acknowledge an officer’s warnings, the Second Circuit reached the opposite conclusion as the lower courts did here.

Critically, not only did the Second and Seventh Circuits reach differing conclusions, the evidentiary inquiry in *Murphy* sharply diverges from the inquiry in *Quiroz*. In *Murphy*, the Second Circuit focused on the issue of whether Webster actually heard the warnings. In contrast, the Seventh Circuit went in search of any evidence that Quiroz’s conduct subsequent to his arrest evinced an understanding of the system. Arguably, the Second Circuit’s approach—which focuses on the evidence the government actually presented at the suppression hearing and the bases the district court actually articulated for reaching its finding—adheres more closely to this Court’s precedent. See *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (“whether there is a proper waiver should be clearly determined by the ***trial court***, and it would be fitting and appropriate for that determination to appear upon the record.”) (emphasis added); *Michigan v. Harvey*, 494 U.S. 344, 354 (1990) (Supreme Court declining to make its own determination regarding waiver and instead

remanding to lower courts “to conduct a hearing on that question” where it would be “the State's burden to show that a waiver” occurred).

At bottom, the lower courts’ contradictory views on the type and degree of evidence sufficient to show understanding in situations where an arrestee does not acknowledge being read his rights indicates that direction from this Court is needed.

II. This Case Is An Ideal Vehicle For Determining What Evidence is Competent to Show Understanding When An Arrestee Does Not Acknowledge An Officer’s Recitation of the *Miranda* Warnings.

Each of the Seventh Circuit’s three reasons for finding waiver presents an opportunity for this Court to clarify what evidence is (or is not) competent to show a defendant understood his rights in the absence of evidence he acknowledged hearing the *Miranda* warnings.

First, this Court should examine the Seventh Circuit’s reliance on the district court’s observation that Quiroz was not “a timid person in asserting his rights relating to trial procedures and certainly discovery obligations.” App. 10a-11a, (citing App. 46a-47a). As an initial matter, the district court itself ***did not rely*** on that observation in coming to its own finding, and rightfully so. Immediately prior to the statement cited by the Seventh Circuit, the district court observed that: “Mr. Quiroz is an intelligent individual. I’ve observed that from his appearances in court. He is no shrinking violet. He knows his rights. **Well I don’t know – whether he knows his rights is a question for this hearing.**” App. 46a-47a (emphasis added). And the Seventh Circuit omitted

the district court's subsequent qualification as well: "[Mr. Quiroz] certainly is not a timid person in asserting his rights relating to trial procedures and certainly discovery obligations. **But that's all after the fact.**" *Id.* (emphasis added). The district court was correct on this point: Quiroz's willingness to assert his rights at trial is not probative of whether he understood his rights *at the time of his arrest*. The purpose of the suppression hearing was to hold the government to its burden of proving Quiroz understood his rights before he made a statement, not for the court to assess his awareness of his rights at the time of trial. *See Jackson v. Denno*, 378 U.S. 368, 380 (1964) (defendant is "entitled to a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably determined"). Likewise, neither was Quiroz's request for a suppression hearing evidence that he "had at least some knowledge of the system" *at the time of his arrest*. App. 10a-11a.

Moreover, by penalizing a criminal defendant for participating in the pretrial process, the appellate court's decision set a dangerous precedent that threatens future defendants' right to a fair trial. Because of the court's holding, a defendant in the Seventh Circuit who is set to be heard on a motion to suppress faces an intractable dilemma: he can either (1) waive his rights relating to pretrial procedures and discovery; or (2) assert his rights and risk having his willingness to do so used against him during a suppression hearing. The potential chilling effect of this predicament alone presents good cause for this Court to exercise its supervisory authority. *See United States v. Jackson*, 390 U.S. 570, 581 (1968) (considering question of whether chilling effect of

death penalty statute on defendants' exercise of their Sixth Amendment rights was "unnecessary and therefore excessive"); *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 273-74 (1982) (Blackmun, J., dissenting) (noting the Supreme Court's vindictive prosecution doctrine is "designed to prevent" an unconstitutional "chilling effect" on defendants "exercising [their] legal rights").

Second, this Court has an opportunity to clarify the elements required to show a knowing and intelligent waiver in the absence of evidence the arrestee heard the officer's warnings. Specifically, this Court can explain that the question of the defendant's capacity to understand the *Miranda* warnings is not coterminous with whether waiver was *in fact* knowing and intelligent. Here, the Seventh Circuit relied on the fact that Quiroz speaks English and is intellectually capable of understanding the warnings. App. 10a (citing App. 48a-49a). However, as in *Murphy*, the evidence presented during the suppression hearing indicated that Quiroz did not acknowledge O'Reilly's recitation of the warnings at all. Compare App. 30a-31a (O'Reilly testifying that he could not "remember if [Quiroz] acknowledged his *Miranda* warnings being given.") with *Murphy*, 703 F.3d at 193-94 (the arresting officer "did not know whether Webster acknowledged hearing the *Miranda* warnings."). This Court should exercise its supervisory authority to ensure that lower courts make the distinction between the arrestee's ability to understand and actual real-time comprehension. See *Tague*, 444 U.S. at 469 (holding the government had not met its burden when arresting officer "could not recall whether he asked [the arrestee] whether he understood the rights as read to him").

Finally, this Court can assess the relevance of O'Reilly's testimony that "the agents asked for and received Quiroz's consent for a protective sweep of the property; it wasn't until the search was complete that they began questioning him." App. 11a, (citing App. 27a-29a). Though the Seventh Circuit relied on this statement as evidence of understanding, O'Reilly's testimony is inapposite. Granting an officer permission to perform a search is more probative of a finding that an arrestee did *not* understand his rights, rather than the opposite. *See Murphy*, 703 F.3d at 187 (finding government's evidence was insufficient to demonstrate defendant waived his *Miranda* rights even though defendant gave officer permission to search his vehicle and questioning began after the search was performed).

In sum, due to a lack of guidance from this Court as to what constitutes competent evidence of understanding, the Seventh Circuit and the district court reached beyond the evidence presented by the government to justify their finding of a knowing and intelligent waiver. At a minimum, this Court should clarify that the government's evidence was insufficient to meet the "great" and "heavy burden" imposed by this Court, that the lower courts failed to impose a "high standard[] of proof" for showing waiver was made knowingly and intelligently, and that Quiroz's confession was wrongfully admitted as a result. *Miranda*, 384 U.S. at 475; *Butler*, 441 U.S. at 373.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

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