No. _____

In The
Supreme Court of the United States

STATE OF NEW MEXICO,

Petitioner,

vs.

CONTESSA HERRING,

Respondent.

On Petition For A Writ Of Certiorari To The New Mexico Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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August 2012

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QUESTION PRESENTED

Whether *Berghuis v. Thompkins* requires advice that a suspect has the right to stop talking at any time in order to establish an implied waiver of *Miranda* rights.

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PETITION FOR A WRIT OF CERTIORARI

The State of New Mexico respectfully petitions for the issuance of a writ of certiorari to review the judgment of the New Mexico Supreme Court.

OPINIONS AND ORDERS BELOW

The New Mexico district court's suppression order is unreported. App. 10. The decision of the New Mexico Supreme Court, App. 1-9, is also unreported but is available to the public at http://www.nmcompcomm.us/nmcases/NMSCUnreported/2012/SC32836.pdf, and may be cited in the courts of New Mexico "for any persuasive value." N.M.R. Ann. 12-405(A).

JURISDICTION

The New Mexico Supreme Court filed its decision on June 1, 2012. App. 1. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a). *See Arkansas v. Sullivan*, 532 U.S. 769, 771 n.1 (2001) (per curiam) (noting jurisdiction over interlocutory suppression orders).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment V:

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

STATEMENT OF THE CASE

Over the course of a four-hour interview with Detective Mark Conger, Respondent repeatedly told a fairly consistent narrative of the events earlier that morning leading to the death of her stepson, Julian. Each time she retold her story, however, she added an additional inculpatory detail. A recollection that began as a relatively innocuous morning with a three-year-old child who did not want to nap was, by the end, a horrific scene involving repeated beatings and Respondent smothering her stepson. In her first version of events Respondent tried to rock Julian to sleep, wrapped him in a sheet, placed him in bed, and ultimately lay down with him to help him calm down; a far different picture of the morning later emerged.

By the final count, Respondent had hit Julian in the head three or four times, and Julian had "accidentally" hit his head an additional three or four times. She slapped his head twice as she rocked him in the living room because he called her "a bitch." Then, as she began to wrap him in a sheet, a process that included fully covering his head, he fell back and hit his head "hard." Next, as Respondent carried

Julian in the sheet from the living room to the bedroom, she dropped him on the floor. After placing Julian in his bed and leaving the room, Respondent heard a thump. Julian fell out of his bed and hit his head on a dresser drawer. Respondent climbed in bed with Julian, but he called her names and said she was not his mother, something the boy's father had also said. Enraged, Respondent straddled her stepson and punched him with a closed fist one or two times in the head. After she left the room, Julian fell out of bed a second time. It was only when Respondent unwrapped the sheet and Julian's limp body rolled out that she knew something was wrong.

The State charged Respondent with intentional child abuse resulting in death. Respondent moved to suppress her statement as having been taken in violation of the Fifth and Fourteenth Amendments to the United States Constitution. (State R. 191.) Respondent submitted a video recording of the interrogation. The trial court watched no more than a minute of the five-hour recording; the state appellate court referenced only events occurring during the initial forty-five minutes.

The video shows Respondent, age twenty-seven with no apparent intellectual deficits, alone in an unlocked police interview room for close to forty minutes. App. 2. She immediately began talking to herself, saying "I'm not religious, but please God, please . . . let my baby be okay." *Id.* Within two minutes of her arrival, an officer asked Respondent if she was okay and if she wanted "water or anything."

Respondent said, "I want to go home, I want to see my baby." That officer left, and Respondent returned to her mumbled prayer. (Def. Ex. B (DVD) :30 to 1:55.)

When Detective Conger entered the interview room, he asked Respondent's name, which she spelled for him, and her birth date, which she provided. Conger introduced himself, and Respondent said, "I want to go home to my baby." Conger said he was there to talk to her, to "read [her] this," and to ask a few questions. He said she was not under arrest, but because he was talking to her, he "need[ed] to read [her] this." Respondent asked, "My Miranda rights?" Conger replied, "Uh-huh. I'm sure you have heard them on TV before." Respondent said, "Yeah." (DVD 38:00 to 39:10.)

Conger informed Respondent,

> You have the right to remain silent.
>
> Anything you say can be used against you in a court of law.
>
> You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning, if you so desire.
>
> If you cannot afford an attorney you have the right to have an attorney appointed for you prior to questioning.

> You can decide at any time to exercise these rights and not answer any questions or make any statements.
>
> Do you understand them?

App. 3, 13. (DVD 39:12.) Respondent answered, "I understand," and proceeded to answer Conger's questions. (DVD 39:28.)

Respondent argued to the trial court that she had not knowingly waived her rights because the detective read them in a "peremptory, garbled way." (State R. 191.) More specifically, Respondent focused on the officer's advice about her right to cease answering questions during the course of the interrogation: "The last sentence of the advice of rights was so garbled it is difficult to understand . . . ." (State R. 188-89.) She described this sentence as unclear and misleading (Hr'g 9:22:22), and she submitted an unofficial transcription of the interrogation that correctly transcribed the first four warnings but misquoted the last advice as follows: "If you decide at any time to exercise the rights during questioning, make a statement."[1] (Def. Ex. A at 10-11.)

At a hearing on February 22, 2010, the trial judge confirmed that Respondent's argument was that she was not adequately advised of her right to cease questioning and asked the prosecutor where

[1] There are numerous errors and omissions throughout the unofficial transcription.

such advice could be found on the recording. (Hr'g 9:26:55, 9:28:50.) The court reluctantly allowed the detective to testify, and in response to the court asking why he read the rights quickly and why Respondent's transcript deviated from the *Miranda* card he uses, Conger said he read the card, which he believed the recording confirmed. (Hr'g 9:31:30, 9:36:25, 9:39:50.)

After listening to the recording again, the trial court found the detective read all of the rights as provided on his card, but the court was "troubled" by the speed of the advice and the lack of clarity of the last warning, which the transcription supported. (Hr'g 9:44:30, 9:47:15.) The court determined that Respondent did not understand that she had a right to cease answering questions at any time.[2] (Hr'g 9:53:10 to :45.) In its suppression order, the court mentioned the inaccurate transcription and concluded "[t]he warnings were read so rapidly as to be garbled to such an extent that [Respondent] was not advised that she had the right to refuse to talk to Conger at any time and to stop talking at any time during the interrogation." App. 11-12.

On direct appeal to the state's highest court, the New Mexico Supreme Court quoted this finding and

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[2] The court based its ruling on the mistaken belief that the transcription was prepared by a court reporter in the interrogation room. (Hr'g 9:51:48.) When alerted that Respondent had procured the transcript after the fact, the court did not change its view. (Hr'g 9:52:30.)

"agree[d] with the district judge that [Conger] read [Respondent] her rights in a garbled manner." App. 4, 8. The court said "[i]t appears as if [Conger] merely wanted to get the 'legal technicality' out of the way." App. 8. Aside from mentioning that Respondent looked distraught and appeared to vomit in a trash can before the detective entered the room, App. 7,[3] neither state court evaluated the remainder of the recording.

A number of aspects of the interrogation inform Respondent's choice to speak to Conger after he read the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). Of particular note, Respondent did not ask Conger to repeat or clarify his *Miranda* warnings. Nor did she ask any questions about the warnings. But she asked a number of times during the interview if Conger would clarify or repeat his questions. For example, when Conger asked what Respondent did when she woke up that morning, she asked, "When I got up?" (DVD 44:05.) Conger asked where she had found Julian's pillows and blankets, and Respondent said, "Huh?" (DVD 47:50.) Conger repeated the question, and Respondent answered that they came from Julian's room. Asked if Julian was crying, Respondent again said, "Huh?" (DVD 52:00.) Conger clarified he wanted to know if Julian "was still crying when [Respondent] went in and smoked a

[3] The trash can sat two feet from Respondent and Conger for the remaining four hours of the interview with neither of them giving it a glance.

cigarette," and Respondent said yes. Conger suggested that Respondent might have lost her temper and "done something," and she said, "You think I what?" (DVD 1:17:25.) At another point, Conger asked if Respondent had shaken Julian, and she asked if Conger meant "when he was on the bed." (DVD 2:27:42.) She then insisted that she had not.

In addition to asking Conger to clarify or repeat his questions, Respondent asked questions of her own and corrected Conger when he misunderstood her. For example, she wanted to know why Conger kept asking her about sheets, and he explained officers found a sheet in her house with blood on it. (DVD 2:19:42.) At another point, Respondent said she took Julian to his room and lay down with him to check his breathing after wrapping his head in a sheet. (DVD 2:33:10.) Conger said that he thought she got in bed with him to check on him after he hit his head during the wrapping. She corrected Conger, saying again that she did it to check his breathing. Respondent also asked Conger if she could ask him a question and told him she did not know if she "backhanded" Julian or "did anything else." (DVD 3:32:55.)

Respondent further indicated she knew the consequences of speaking. She asked what was going to happen to her. Conger said he did not know and asked her to tell him the whole truth. She responded, "Will you tell me, honestly, laws that have been broken? . . . They'll get me on manslaughter; they're gonna have me for killing my baby." (DVD 4:14:30.)

Although aware of this possible criminal charge, Respondent primarily focused on her husband's potential reaction. She asked where her husband was and told Conger, "I'm dead, because he's going to say that I killed my son and I didn't." (DVD 2:18:30.) "I'm going to jail for killing my stepson . . . . But my husband will kill me when I leave here if you don't." (DVD 2:20:18.) Conger told her he would not let anyone hurt her; "if the reason you're not telling me something is because you're afraid somebody is going to hurt you, I'm telling you that nobody's going to hurt you." (DVD 39:10.) She interrupted, "That's it." And when Conger asked what Respondent had accidentally done, she said, "No, because everybody . . . will say I hit my son. . . . If I did spank him, it was because of his mouth." (DVD 3:34:30.)

Respondent also did not hesitate to speak. Immediately after saying she understood the *Miranda* warnings, Respondent explained that she had been married to Julian's father for about two years and considered Julian to be her baby. She described Julian as an "accident prone" child and said his "equilibrium [was] off." When Julian was injured, "for some reason the bruises stay on him for about a month." He often fell and ran into walls, repeatedly hitting himself in the same place. (DVD 40:10, 57:12, 58:22, 1:00:16.)

A few months earlier, Julian fell, and his bike handle hit him in the eye. Respondent took Julian to the doctor because he had black eyes and she wanted "to find out why he kept getting hurt." Respondent

later clarified she went to the doctor because someone observed bruises and bite marks all over Julian and called the police. A child protection caseworker instructed her to take Julian to the doctor. More recently, Julian had fallen off his toy truck. (DVD 58:05 to 1:01:10.)

Having portrayed Julian as accident prone, Respondent began answering Conger's specific questions about that morning. She described first one and ultimately a series of falls. She repeatedly claimed that she did not "hurt [her] baby, and if [she] did, [she] didn't do it on purpose," because she "would not neglect or abuse [her] baby." (DVD 2:37:40.) When Conger told her even multiple falls would not have caused Julian's extensive head injuries, Respondent asked him, "What would have caused it?" (DVD 3:29:40.) Conger explained he needed to hear that from her, prompting her to repeat her question. She then asked if she could "say [she] hit him when he was laying on his side in his room." (DVD 4:01:30.) Conger responded that he did not know what happened and wanted her to tell him.

Left alone numerous times in the interview room, Respondent continued talking. She said, apparently to herself, "Please tell me my son's okay," and "he was fine until I looked in on him." (DVD 1:29:02, 1:30:35.) Also while alone, she said, "I haven't done nothing to my baby. I don't even remember spanking him." (DVD 1:27:18.) She added, "There are times when I want to hit my baby." (DVD 1:31:40.) Alone a different time, she continued talking: "I can't explain . . . . I didn't do

it . . . . I didn't hurt my baby . . . . That's okay. I'm definitely going to get out of here . . . . Things aren't adding up. But they're blaming me." She then leaned back and appeared to relax for ten minutes. (DVD 1:49:00 to 2:10:48.) Conger returned and asked if she had anything to say. Respondent said she spanked Julian early that morning but could not remember if she spanked him later. (DVD 2:11:03.)

When asked if she had ever seen a bruise on Julian's ear, Respondent explained that Julian had "been known to" hit himself on the head and ear with a hammer he had received for Christmas. (DVD 1:38:15.) Conger said a bruise on Julian's ear was the reason for talking to her, to which Respondent said, "Well, now I want to know what happened to my baby because I didn't do it. . . . No, honestly, please stay with me because I would not hurt my baby like that." (DVD 1:42:32.)

During the latter part of the interview, Conger again asked what happened, and Respondent said she would "love to tell" him. She then mumbled something and said she wanted "to leave to go [see] her baby." Conger asked, "Do you want to tell me what happened?" Respondent replied affirmatively. Conger said, "Tell me what happened; it's up to you." (DVD 4:01:30.)

At one point, Respondent asked for paper and a pen – without prompting – so she could "figure it out" and "put everything in order." (DVD 2:39:40.) Conger later told Respondent she could stop talking to him or

write down what she wanted to say. After Conger had read a statement Respondent wrote, he asked if she wanted to "stick with" that or tell him what happened. (DVD 3:45:05.) Respondent did not reply, and Conger asked if she could agree that something "major" had happened. Respondent agreed and repeated, "If I did spank him, it's because . . . he was running his mouth, but I don't think I did." (DVD 3:50:21.)

After they had been speaking for over an hour, Conger told Respondent that Julian had died. She began to sob, and Conger asked Respondent if she wanted some water. Respondent asked for a cigarette instead and told Conger, "I didn't do it. I didn't do anything that would hurt my baby." After a few seconds, she stopped crying and took a puff of her cigarette. (DVD 2:16:45.)

When Conger did not accept her accident story, Respondent portrayed herself as an overwhelmed mother on the edge. Initially, Respondent asked Conger not to "imply that [she] hurt her baby," and explained that, while in the past she had lost her temper, that morning she had phone calls to make and a soap opera to watch and did not have "time to lose [her] temper." (DVD 1:15:57.) But later, although she could not say she "blacked out," she had "so much on [her] mind, . . . all [she] wanted was for him to go to sleep. . . . [She] had to constantly yell at him." (DVD 3:33:10.) Respondent explained that she had woken up at 3:00 a.m. and had tried "to get help" by calling the guidance center because her anxiety and anger were increasing and she needed to be put back

on her antidepressants. (DVD 4:23:30.) She could not reach the counselors or get medication, and when Julian told Respondent she was not his mother, she became so angry she "couldn't see straight." (DVD 4:35:15.)

REASONS FOR GRANTING THE PETITION

The Fifth Amendment requires police officers to warn a suspect during a custodial interrogation (1) of the right to remain silent, (2) that anything said may be used against the person in a court of law, (3) of the right to have an attorney present, and (4) that an attorney will be appointed if desired prior to questioning if the suspect is unable to afford one. *Florida v. Powell*, 130 S. Ct. 1195, 1203 (2010). This Court has held that, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2262 (2010).

Despite the clarity of these propositions, the New Mexico Supreme Court found that the State had not established an implied waiver of the right to remain silent even though Detective Conger read the four required *Miranda* warnings, Respondent said she understood them, and Respondent immediately answered questions and provided an uncoerced statement. The state court based its ruling on

perceived deficiencies in the detective's advice to Respondent that she had the right to stop talking at any time, the so-called "fifth right." This Court has not squarely addressed whether *Miranda* requires such advice. Lower courts, with some lingering confusion, are largely in agreement that, although a suspect has the right to exercise his or her rights at any time, officers need not include this right in providing *Miranda* warnings; *Miranda* thus sets out five rights but requires only four warnings. However, these courts have not addressed the effect of a failure to advise a suspect about this fifth right on an implied waiver inquiry.

This Court gave particular importance to the officer's reading of the fifth right in finding an implied waiver of *Miranda* rights in *Thompkins*. Portions of this Court's opinion could suggest that such advice is necessary to show that an implied waiver of rights is knowing and intelligent.

The facts relevant to this point in *Thompkins*, however, were unusual. The respondent remained mostly silent, with the exception of a few one-word verbal responses, for close to three hours before finally exhibiting conduct indicating an implied waiver. 130 S. Ct. at 2256-57. This Court held that under such circumstances officers may interrogate a suspect after providing the required warnings but before a suspect expressly or impliedly waives his or her rights. *Id.* at 2264. And officers need not rewarn a suspect from time to time during the interrogation. *Id.* at 2263. Because of a delayed waiver, the specific

facts in *Thompkins* highlighted the officer's advice about invoking the right to remain silent at any time. When a suspect does not immediately indicate a wish to speak or to remain silent, advice concerning the fifth right impacts the delayed waiver to some degree. But when a suspect expressly or implicitly waives the right to remain silent immediately after being warned of this right, the suspect knows he or she can either speak or not at that time, and the choice to speak establishes a knowing waiver. A later change of mind is a question of invocation of a right already waived, not waiver of the right in the first instance.

This Court should clarify its opinion in *Thompkins* and hold that the failure to advise a suspect of the right to cease answering questions during the course of the interrogation is irrelevant to an express or implied waiver of rights that occurs at the outset of an interrogation. The New Mexico court should be reversed for failing to follow *Thompkins*' directive that the State establishes waiver when warnings were given, the suspect understood them, and the suspect chose to speak without coercion.

Even if an implied waiver requires advice on the fifth right, the lower court erred here in finding such advice to be inadequate based primarily on factors that should not be relevant to a waiver inquiry under *Miranda*. The New Mexico court held there was insufficient evidence of waiver because the detective "garbled" his advice that Respondent could exercise her rights at any time and because the court perceived the officer to read the warnings too quickly

and treat the warnings as a "'technicality.'" A lower court's discomfort with a suspect's choice to talk to the police should not be grounds to substitute the court's own understanding of an officer's warnings for that of the suspect. Nor should a reviewing court assess a police officer's subjective motivations or his reverence for *Miranda* when the officer has provided the required warnings. Detective Conger advised Respondent of her *Miranda* rights, she expressly stated she understood, and she has never introduced evidence to show she did not understand. Whether because the fifth right is unnecessary to establish waiver or because an officer is entitled to rely on a suspect's express statement of understanding and choice to talk as a knowing waiver, the state court erred and should be reversed.

I. This Court has not decided whether *Miranda* requires officers to warn a suspect of the right to cease talking at any time or how this so-called fifth warning affects a waiver inquiry.

A. *Miranda* and Its Progeny

Miranda establishes a prophylactic rule to guard against the inherent pressures of custodial interrogation and supplements the due process protection against involuntary confessions. *Miranda*, 384 U.S. at 457, 460-67. Three warnings are "absolute prerequisite[s] to interrogation" and must be given regardless of any pre-existing awareness of the right: The suspect has a right to remain silent, anything said may

be used against the suspect in a court of law, and the suspect has a right to consult with an attorney before and during questioning. *Id.* at 468-72. In addition, absent a clear indication of existing representation or adequate funds for an attorney, police must inform the suspect that counsel will be appointed prior to questioning if the suspect cannot afford one. *Id.* at 472-73 & n.43.

In *Miranda*, this Court also recognized "the right to cut off questioning." 384 U.S. at 474. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Id.* at 473-74. However, the Court did not indicate whether or when an officer would be required to advise a suspect of this right, other than to exclude this right from the list of "absolute prerequisite[s] to interrogation" and to distinguish the need for officers to "*inform* accused persons of their right to remain silent" from the need to "assure a continuous *opportunity* to exercise it." *Id.* at 444, 472 (emphasis added).

To admit a statement made during a custodial interrogation, the government must show the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[4] *Miranda*, 384 U.S. at 475. "[A]

[4] Respondent did not contest her understanding of her right to counsel. She instead filed a motion to suppress because "there was no voluntary, knowing and intelligent waiver of [her] right to remain silent." (State R. at 187.)

valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Id.* The Court emphasized, however, that voluntary confessions made after a knowing waiver of rights "remain a proper element in law enforcement." *Id.* at 478.

This Court's subsequent cases have clarified many aspects of *Miranda*. Of relevance here, *Miranda* warnings are constitutionally required. *Dickerson v. United States*, 530 U.S. 428, 432 (2000). *Miranda*'s "relatively rigid" directives have "the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). At the same time, *Miranda* retains sufficient flexibility in practice to give "ample latitude to law enforcement agencies in the legitimate exercise of their duties" while operating under "trying circumstances." *Miranda*, 384 U.S. at 481. Thus, although it is desirable police practice "to state warnings with maximum clarity," an officer's advice is not read like the terms of a will or deemed insufficient simply because it is not "the *clearest possible* formulation." *Powell*, 130 S. Ct. at 1205-06. There are no magic words; the warnings must only "reasonably 'convey to [a suspect] his rights as required by *Miranda*.'" *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989)

(quoting *California v. Prysock*, 453 U.S. 355, 361 (1981) (per curiam)) (alteration in original).

Nor does *Miranda*'s formalistic requirement of providing warnings "impose a formalistic waiver procedure that a suspect must follow to relinquish those rights." *Thompkins*, 130 S. Ct. at 2262. The State must prove waiver by a preponderance of the evidence, but the waiver need not be express and can be implied by the giving of warnings, evidence the suspect understood them, and the suspect's choice to speak. *Id.* at 2261-62. Courts evaluate "the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel." *Michael C.,* 442 U.S. at 725.

This Court has also seemingly clarified that *Miranda* requires four warnings. *Powell*, 130 S. Ct. at 1203-04. *Powell*, however, involved only *Miranda*'s "third warning," the right to consult an attorney before or during questioning. *Id.* at 1203. The Court did not squarely address whether officers must advise a suspect of the right to stop answering questions at any time. In fact, the Court relied on advice concerning the fifth right to resolve an ambiguity in the officer's formulation of the right to counsel. *Id.* at 1204-05. In *Thompkins*, the Court listed the five warnings provided by the officer, noted the suspect read the fifth right aloud, and said the officer then advised the suspect of "the other" four "*warnings*" required by *Miranda*. 130 S. Ct. at 2256 (emphasis

added). Earlier, this Court quoted a waiver form that included all five rights and held that the form "touched all of the bases required by *Miranda*," reiterating the advice that the suspect could stop talking at any time. *Duckworth*, 492 U.S. at 198-99, 203. But the Court described in another case an officer providing *Miranda* warnings and "also" advice about the fifth right. *Colorado v. Spring*, 479 U.S. 564, 567 (1987).

B. This Court's opinion in *Berghuis v. Thompkins* suggests that advice about the fifth right could be important to show an implied waiver, at least when officers begin their interrogation before obtaining a waiver.

In addition to describing the fifth right as the "other" warning required by *Miranda* in a recitation of facts, 130 S. Ct. at 2256, this Court in *Thompkins* discussed the officer's advice on this subject in two different parts of the analysis. In addressing implied waiver, the Court again labeled the advice "the fifth warning" and observed that this right informed Thompkins "that his right to remain silent would not dissipate after a certain amount of time and that police would have to honor his right to be silent and his right to counsel during the whole course of interrogation." *Id.* at 2262.

Although these statements alone imply an important role for the fifth right in an implied waiver inquiry, the Court returned to this advice in rejecting

the argument that the police needed to obtain a waiver before starting their interrogation. Thompkins did not waive his rights until three hours after the interrogation began. 130 S. Ct. at 2263. Relying on the right to invoke *Miranda* rights at any time, the Court said as follows:

> Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. *When the suspect knows that Miranda rights can be invoked at any time*, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps towards relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

Id. at 2264 (emphasis added); *see Spring*, 479 U.S. at 574 (observing in the context of waiver that *Miranda* warnings "ensur[e] that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time").

This language creates uncertainty for interrogations that precede waiver (as to whether a suspect must be warned of the fifth right as a prerequisite to them), but it also clarifies the Court's reliance on the fifth right to find an implied waiver. Thompkins knew at the time of the warnings that he had a right to remain silent, but because his behavior for most of the interrogation did not persuasively indicate invocation or waiver, Thompkins' delayed waiver would not be knowing and intelligent if he did not understand his right to invoke his rights at any time.[5] In fact, this Court observed in *Miranda* that "the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda*, 384 U.S. at 476. *Thompkins* does not resolve whether the giving and understanding of the four required *Miranda* warnings can implicitly establish that a suspect also understands the right to invoke his or her rights at any time when providing a delayed waiver.

[5] This would only be true if the delay represented a failure to make a choice to waive or a change of mind after a choice to remain silent unaccompanied by an unambiguous invocation. It would not apply if the suspect chose to waive when initially warned but simply did not exhibit conduct indicating such a choice. But, of course, officers would have no way of telling the difference between the two in assessing waiver based on silence.

C. Although there is some confusion on the matter, lower courts predominantly have held that *Miranda* does not require warnings to include the fifth right but have not addressed its importance to a waiver inquiry.

Given the slight ambiguity in *Miranda* precedent as to whether a suspect must be warned about a right to exercise his or her rights at any time during the interrogation, it is not surprising that a few courts continue to include the fifth right in a list of the required *Miranda* warnings. *E.g.*, *State v. Nyhammer*, 963 A.2d 316, 326 (N.J. 2009) ("The fifth requirement is that a person must be told that he can exercise his rights at any time during the interrogation."). But when squarely addressing whether such advice is necessary, state courts of last resort and the Circuit Courts of Appeals almost uniformly hold that, although *Miranda* protects the right to cease questioning at any time, it does not require an explicit warning of this right. *See State v. Mitchell*, 482 N.W.2d 364, 373-74 (Wis. 1992) (listing the Second, Sixth, Seventh, and Tenth Circuits and twenty states); *see also United States v. Lares-Valdez*, 939 F.2d 688, 690 (9th Cir. 1991) (per curiam) ("*Miranda* requires that Lares-Valdez understood the right to remain silent; when and how he then chose to exercise that right is up to him."); *State v. Bible*, 452 P.2d 700, 701-02 (Ariz. 1969); *State v. Crowhurst*, 470 A.2d 1138, 1142 (R.I. 1984). *But see Putnam v. State*, 649 So. 2d 1328, 1330 (Ala. Crim. App. 1994) (concluding that advice was incomplete without including the

fifth right but that an earlier complete warning with the fifth right rendered the deficiency harmless).

As these cases illustrate, the fifth right has been the subject of a great deal of litigation. Nonetheless, very few courts have discussed the relevance of the fifth right to a knowing waiver of the right to remain silent. The Tenth Circuit, although declining to require a warning on the subject, suggested that the failure to warn could be relevant to the voluntariness of the statement, an issue separate from a *Miranda* waiver inquiry, *see Colorado v. Connelly*, 479 U.S. 157, 163-70 (1986). *United States v. DiGiacomo*, 579 F.2d 1211, 1214 (10th Cir. 1978); *accord Commonwealth v. Novo*, 812 N.E.2d 1169, 1176 (Mass. 2004) ("Put another way, although a police officer is not *required* to give the fifth *Miranda* warning, if the officer gives the warning and gets it wrong, the incorrect statement of rights may affect the voluntariness of the defendant's confession."). The Supreme Judicial Court of Maine has said that the failure to give such advice will be considered among the totality of circumstances for determining whether a juvenile has knowingly waived his *Miranda* rights. *State v. S.*, 444 A.2d 373, 378 (Me. 1981) ("The failure to give this warning . . . will generally raise a serious question as to the adequacy of the juvenile's understanding of his rights. . . .").

It stands to reason that, if no warning on the subject is required, the government can establish a knowing waiver without the warning having been given; that is, a warning for the fifth right is not

necessary to establish waiver. But if the evidence of waiver is not beyond dispute, courts have not adequately evaluated what weight a warning for the fifth right, or its absence, carries in a waiver analysis.

D. The New Mexico court did not require the officer's warnings to include the fifth right but relied on a finding of inadequate advice concerning the right to stop answering questions at any time to find an unknowing waiver.

New Mexico courts have previously held that officers are not required to warn suspects about the fifth right. *State v. Carlton*, 495 P.2d 1091, 1101 (N.M. Ct. App. 1972). The New Mexico Supreme Court did not overrule *Carlton* in its decision here. In fact, consistent with this Court's opinion in *Powell*, the court stated that officers must provide four warnings. App. 5.

But the state court considered advice about the fifth right in making its waiver determination. Specifically, the New Mexico Supreme Court set out the trial court's finding that the officer's advice about the fifth right was garbled and found "there was sufficient evidence from which the district judge could have found that Detective's reading of Defendant's rights was too rapid and garbled for comprehension."[6]

[6] Although referencing *de novo* review for the ultimate determination of a waiver's validity, App. 6, the New Mexico

(Continued on following page)

App. 2, 4. The state appellate court further clarified that it "agree[d]" the detective garbled the advice. App. 8. And, again, the fifth right was the only advice the trial court found to be garbled. App. 4, 11-12. The state court's holding of an unknowing waiver thus hinged on a finding that the officer's advice about the fifth right was deficient.

E. When a suspect waives his or her rights immediately after being warned of the right to remain silent, the fifth right is irrelevant to the question of a knowing waiver.

Unlike *Thompkins*, the present case does not involve a delayed waiver. Immediately after Respondent stated that she understood her rights, she answered the detective's questions. In doing so, she implicitly waived her right to remain silent. *See Thompkins*, 130 S. Ct. at 2262.

Supreme Court treated Respondent's waiver as a factual issue to be reviewed for sufficient evidence. But even if the question of the warnings' comprehensibility were one of fact, the appellate court was in as good a position as the trial court to review the video recording. *See, e.g., People v. Al-Yousif*, 49 P.3d 1165, 1171-72 (Colo. 2002); *cf. Thompson v. Keohane*, 516 U.S. 99, 114 (1995) ("[T]he trial court does not have a first person vantage on whether a defendant was 'in custody' for *Miranda* purposes."). This error in the applicable standard of appellate review may be corrected on certiorari. *See Ornelas v. United States*, 517 U.S. 690, 696-98 (1996).

This Court recognized in *Miranda* that advice of the right to remain silent "is indispensable . . . to insure that the individual knows he is free to exercise the privilege *at that point in time*." 384 U.S. at 469 (emphasis added). Respondent waived her rights at a point in time when she was cognizant of the right to remain silent and knew she could exercise that right.

When a waiver is immediate rather than delayed, there is no justification for assessing waiver against an officer's decision to warn or not to warn a suspect of the fifth right. At the time of waiver, the suspect needs to know only that he or she can remain silent, not the additional information that he or she can cease the interrogation at any time.

A suspect's knowledge of the fifth right after waiver could in theory be relevant to a mid-interrogation invocation inquiry, but such information would inject the kind of ambiguity and confusion into the police-suspect exchange that this Court has sought to avoid. *Thompkins*, 130 S. Ct. at 2260. Invocation is "an objective inquiry" that requires a suspect to unambiguously invoke his or her rights following a waiver because officers need a clear picture of how to proceed; any other rule would require officers to speculate about a suspect's state of mind, and possible change of heart about speaking to the police, at the risk of stopping an interrogation that may help solve or prove a crime even though the suspect wishes to continue. *See Davis v. United States*, 512 U.S. 452, 458-60 (1994). "[T]he primary protection afforded suspects subject to custodial

interrogation is the *Miranda* warnings themselves." *Id.* at 460.

In any event, the New Mexico court found that Respondent's initial waiver was unknowing, not that she would have invoked her rights had she been provided with additional information. Respondent did not need advice about the fifth right to waive the right to remain silent about which she had just been informed and said she understood.

II. Even if a suspect's knowledge of the right to cease an interrogation at any time is relevant to a waiver inquiry, the State established that Respondent had adequate knowledge of this right; the state courts improperly relied on their own ability to understand the warnings on a recording rather than the suspect's understanding of the warnings at the time they were given, and it is the suspect's understanding with which *Miranda* is concerned.

The state trial court found that Detective Conger read the warnings contained on his *Miranda* card, warnings that include the suspect's right to exercise the rights at any time. App. 11, 13. The New Mexico Supreme Court recognized the officer's reading of *Miranda* warnings was "undisputed." App. 2. Further, Respondent was familiar with *Miranda* warnings from television shows. Unlike for those unaware of the right to remain silent, Respondent's pre-existing knowledge of the privilege met "the threshold

requirement for an intelligent decision as to its exercise." *Miranda*, 384 U.S. at 468. When Conger advised Respondent of the right to remain silent, he satisfied the "absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere" and showed he would honor Respondent's exercise of the right. *Id.* Conger also told Respondent about the consequences of speaking, making her "more acutely aware" she was "faced with a phase of the adversary system – that [she was] not in the presence of persons acting solely in [her] interest." *Id.* at 469. Finally, the officer told Respondent several times throughout the interrogation that she did not have to speak to him.

Respondent said she understood the five warnings after Conger provided them. She did not ask for clarification of the rights or say she had any difficulty hearing. At other times during the interrogation, Respondent asked the detective to repeat himself if she did not understand or hear something he said. Respondent also demonstrated her knowledge of the right to remain silent by telling the detective later in the interrogation that she wanted to speak to him. And she demonstrated her knowledge of the consequences of speaking by observing that her confession could make her culpable for manslaughter.

Under these facts, Conger had every reason to believe Respondent understood his warnings and no reason to think otherwise. Even at the motion hearing, Respondent did not testify or otherwise explain or retract her statement of understanding or these other indicia of comprehension.

This Court's *Miranda* precedent is designed for practical application by police officers in the field at a time when they are faced with varying and often stressful interrogation environments. This Court has repeatedly emphasized that "'[one] of the principal advantages' of *Miranda* is the ease and clarity of its application." *Moran v. Burbine*, 475 U.S. 412, 425 (1986) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 430 (1984)). This goal reflects the reality that "it is police officers" at the time of the interrogation, not courts after the fact, "who must actually decide whether or not they can question a suspect." *Davis*, 512 U.S. at 461. And just as the requirement of an unambiguous invocation of a *Miranda* right allows officers to know how to proceed, officers must be able to ascertain – on the spot and with some degree of accuracy – whether and when a suspect has waived his or her rights.

Courts evaluate a suspect's comprehension based on "the 'totality of the circumstances.'" *Moran*, 475 U.S. at 421 (quoting *Michael C.*, 442 U.S. at 725). But "[t]he underlying police-regulatory purpose of *Miranda* compels that these circumstances be examined, in their totality, primarily from the perspective of the police." *Garner v. Mitchell*, 557 F.3d 257, 263 (6th Cir. 2009). "[T]he question is not whether if [the suspect] were more intelligent, informed, balanced, and so forth he would not have waived his *Miranda* rights, but whether the police believed he understood their explanation of those rights . . . ." *Rice v. Cooper*,

148 F.3d 747, 750 (7th Cir. 1998) (Posner, J.). "On this analysis, the knowledge of the police is vital." *Id.*

Under this approach, there is simply no question that Respondent validly waived her *Miranda* rights. But the New Mexico Supreme Court took a different approach. Based on its impressions from listening to a small portion of the recording and based on one of the many sloppy errors by an unofficial transcriptionist hired by Respondent, the court determined that the advice of the fifth right was garbled. The court did not rely on Respondent's subjective understanding of her rights, or the objective indications of understanding she gave the detective, but instead substituted its understanding for that of Respondent.

Next, the New Mexico court said the detective read the rights too fast. Without indicating what speed would be just right, the court mentioned that Conger read the warnings all of three seconds slower at the hearing. App. 7. The court discussed at some length, at least relative to its abbreviated analysis, Respondent's distraught mental state, apparently as helpful background information given that this factor did not figure in the court's conclusion of an unknowing waiver. App. 7-8. Last, the court accused the detective of treating the warnings as a "'technicality,'" despite the undisputed fact that Conger read the rights on his *Miranda* card. App. 8.

This Court has never required the police to assume the role of counsel and convince a suspect not to speak or otherwise convey "the wisdom of a

Miranda waiver," *Spring*, 479 U.S. at 577. *Miranda* instead requires the police to inform. As long as an officer's advice is intelligible to the suspect and the officer does not add something to obfuscate or nullify the required advice, an officer's tone of voice, speed of delivery, or overall reverence for *Miranda* is beside the point. *See Moran*, 475 U.S. at 423 ("[T]he state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights.").

These aspects of the New Mexico court's decision conflict with this Court's *Miranda* precedent in that they focus on the lower court's understanding of the warnings rather than the suspect's. As this Court said in *Duckworth*, *Miranda* warnings are given in a charged atmosphere where an officer might not necessarily have the printed warnings or might "inadvertently depart from routine practice." 492 U.S. at 203. It is enough if the warnings reasonably convey the *Miranda* rights to "respondent," *Prysock*, 453 U.S. at 361, meaning "'[a suspect],'" *Duckworth*, 492 U.S. at 203 (quoting *Prysock*, 453 U.S. at 361) (alteration in original).

The New Mexico court's ruling also conflicts in one way or another with decisions of the Circuit Courts of Appeals and state courts of last resort, while also highlighting some degree of conflict in the decisions of those courts and lower courts – though not a conflict that could be fairly described as deep and intractable. *Compare Rice*, 148 F.3d at 750 (considering waiver from the officer's perspective based

on objective indicia of understanding), *United States v. Square*, 790 F. Supp. 2d 626, 634 (N.D. Ohio 2011) ("Defendant does not cite any authority for the proposition that the speed with which a *Miranda* warning is given is relevant to its validity, nor has the Court been able to locate any authority for such a position."), *Al-Yousif*, 49 P.3d at 1171-72 (refusing to suppress a statement when an officer read *Miranda* rights quickly because the defendant said he understood and there was no indication that the defendant failed to understand), *Buck v. State*, 956 A.2d 884, 911 n.12 (Md. Ct. Spec. App. 2008) (declining to address the speed at which rights had been read), *and State v. Campbell*, No. A10-512, 2011 Minn. App. Unpub. Lexis 461, at *9 (Minn. Ct. App. May 16, 2011) (rejecting a seventeen-second reading as hurried when the court could read the rights slowly in twenty-five seconds), *rev'd in part on other grounds*, 814 N.W.2d 1 (Minn. 2012), *with Doody v. Ryan*, 649 F.3d 986, 1003 (9th Cir.) ("The *Miranda* warnings . . . were defective because [the detective] downplayed the warnings' significance . . . ."), *cert. denied*, 132 S. Ct. 414 (2011), *Rambo v. State*, 939 A.2d 1275, 1279 (Del. 2007) (considering the speed of the warnings as a factor in a waiver analysis), *Clay v. State*, 725 S.E.2d 260, 265-66 (Ga. 2012) (relying on speed), *State v. S.*, 444 A.2d at 378 (concluding that the "objective indicia" of waiver are "in most instances . . . inadequate"), *and State v. Grimestad*, 598 P.2d 198, 203 (Mont. 1979) (determining that an officer's downplaying of *Miranda* rights and giving them "mere lip service"

has the effect of nullifying warnings and a defendant's claimed understanding).

But the significance of the New Mexico court's analysis is not only that it exemplifies a national debate and appears to contravene decisions of this Court. It is also that there is sufficient ambiguity in *Miranda* jurisprudence to allow a lower court to depart so dramatically from this Court's goal of making *Miranda* requirements clear and easy to apply.

Miranda strikes a "careful 'balance'" that seeks to insulate suspects from the inherent pressures of custodial interrogation without sacrificing legitimate law enforcement efforts to investigate crime. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2413 (2011) (Alito, J., dissenting) (quoting *Moran*, 475 U.S. at 424). Undue expansions of the *Miranda* rule threaten its simplicity and exact a greater societal cost than the prophylactic rule warrants. *See id.* Police officers are not to be condemned for attempting to obtain a voluntary confession; instead, voluntary confessions are an unmitigated good and an essential part of assuring justice in criminal prosecutions. *Howes v. Fields*, 132 S. Ct. 1181, 1192 (2012).

The New Mexico court failed to heed this Court's admonitions by relying on its own subjective impressions of a detective's speech and delivery rather than the objective facts of the detective providing warnings and the suspect expressing her understanding. Conger properly addressed Respondent, not the video

camera, and he correctly based his belief that Respondent had waived her rights on her conduct and statements in the interview room, not on a later judicial interpretation of a poor-quality recording. That a lower court could apply *Miranda* in such an unpredictable manner poses a substantial risk to this Court's goal of clarity and administrability. This Court should emphasize that an unwise choice to waive is not the same as an unknowing waiver.

III. The importance of advice about the fifth right to a waiver inquiry is a recurring question of national importance that should be addressed at the earliest opportunity to assure officers know what advice to provide and suspects receive the proper warnings.

It is no exaggeration to say that *Miranda* warnings play a part in virtually all criminal investigations. It is *Miranda*'s ubiquity and universality that serves to protect individual rights against the coercion inherent in a police interrogation; at the same time, however, the frequency of its application and the importance of the evidence obtained during an interrogation demands a clear rule that officers can and will follow.

This Court's opinion in *Thompkins* signals an ambiguity in *Miranda*'s requirements that is better resolved sooner than later. This is not a problem that should be allowed to percolate, with the drastic effect of courts unnecessarily suppressing confessions to

crime. The widespread use of *Miranda* by police officers in this country for nearly fifty years leaves no room for uncertainty. This Court has said that it will only expand *Miranda* when necessary to protect its prophylactic purposes. *See Maryland v. Shatzer*, 130 S. Ct. 1213, 1220 (2010). When a lower court unnecessarily broadens *Miranda*, its error should be quickly corrected before it takes hold and "mudd[ies] *Miranda*'s otherwise relatively clear waters." *Moran*, 475 U.S. at 425.

Miranda warnings serve the dual function of prophylaxis and predictability. The New Mexico Supreme Court dispensed with clarity and objectivity – not to respond to any lack of understanding by an individual suspect but apparently to achieve the court's notion of ideal police procedure. In doing so, the court ignored the fact that the purpose of *Miranda* "is not to mold police conduct for its own sake." *Moran*, 475 U.S. at 425. The ruling should not be allowed to stand because it conflicts with this Court's precedent and disrupts the balance struck in *Miranda* by unduly interfering with legitimate law enforcement practices.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the New Mexico Supreme Court reversed, either summarily or upon plenary review.

Respectfully submitted,

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August 2012

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: June 1, 2012

NO. 32,836

STATE OF NEW MEXICO,

Plaintiff-Appellant,

v.

CONTESSA HERRING,

Defendant-Appellee.

APPEAL FROM THE
DISTRICT COURT OF LEA COUNTY
William G.W. Shoobridge, District Judge

Gary K. King, Attorney General
James W. Grayson, Assistant Attorney General
Santa Fe, NM

for Appellant

Liane E. Kerr, LLC
Liane E. Kerr
Albuquerque, NM

for Appellee

DECISION

MAES, Chief Justice.

{1} This case is before us on interlocutory appeal from the Fifth Judicial District. We are asked to

review the conduct of a detective from the Hobbs Police Department (Detective) when he informed Contessa Herring (Defendant) of her *Miranda* rights. It is undisputed that Defendant's interview with Detective was a custodial interrogation and that Detective read Defendant her *Miranda* warnings prior to the interrogation. Although Defendant said she understood her rights following Detective's reading of her *Miranda* rights, she claims that the State did not meet its burden of demonstrating by a preponderance of the evidence that she knowingly, intelligently, and voluntarily waived her rights. We hold that there was sufficient evidence from which the district judge could have found that Detective's reading of Defendant's rights was too rapid and garbled for comprehension and affirm the suppression of Defendant's statement.

FACTS AND PROCEDURAL HISTORY

{2} On the night of the incident, Detective interviewed Defendant in a standard interview room at the Hobbs police station. Defendant waited alone in the interrogation room for about thirty-eight minutes before Detective entered. When Detective entered the room, he introduced himself, asked Defendant her name, and informed her that she was not under arrest. Detective then told Defendant that he needed to read Defendant statements from a card before asking her some questions. Defendant asked, "My *Miranda* rights?" Detective said "uh-huh" and told her she had probably seen *Miranda* rights given on television. Defendant responded, "Yeah."

{3} Detective proceeded to read Defendant her *Miranda* rights from the *Miranda* warning card he kept in his pocket. At the end of the recitation, he asked Defendant if she understood "that." Defendant said, "I understand." Defendant then talked to Detective about the incident for almost five hours. During the interview, Defendant admitted that prior to her son's death, she had slapped him twice and punched him in the head with a closed fist.

{4} The State charged Defendant with "knowingly, intentionally, and without justification, tortur[ing], cruelly confin[ing] or cruelly punish[ing] a child under 12 years of age, resulting in the death of [the child], contrary to Sections 30-6-1D(2), F, NMSA 1978." Julian Herring (Child), was Defendant's three-year-old son.

{5} Before trial Defendant filed a motion to suppress her statement from the night of the incident, claiming that she had not knowingly and voluntarily waived her right to remain silent during the interview. Defendant claimed that the Detective "read the warnings to [her] from a card so quickly as to be almost unintelligible (entire reading approximately 17 seconds) and totally garbled the last advice to [her] that 'you do not have to talk to me, but if you do, you have the right to stop talking at any time.'"

{6} Detective testified at the suppression hearing. A video recording of Detective's custodial interrogation of Defendant, a transcript of the interrogation procured by Defendant, and a copy of *Miranda* warning

card that Detective carried in his pocket were all entered into evidence. In the Order Suppressing Statement, the district judge made the following findings:

> 6. [Detective] read the warning from a pocket sized card very rapidly, completing the reading in only a matter of seconds;
>
> 7. The stenographic court reporter who transcribed the DVD of the warning given to [Defendant] did not understand the language of the warnings on the DVD to match the language of the advice of rights card used by [Detective];
>
> 8. The [c]ourt had to listen to the DVD of the warning given to [Defendant] three times, the final time with the [c]ourt reading a copy [of Detective's] advice of rights card along with the DVD, before the actual warnings could be deciphered;
>
> 9. The warnings were read so rapidly as to be garbled to such an extent that [Defendant] was not advised that she had the right to refuse to talk to [Detective] at any time and to stop talking at any time during the interrogation.

As a result of these findings, the district judge concluded that Defendant "did not make a knowing, voluntary, and intelligent waiver of her rights pursuant to the requirements of the New Mexico Constitution and the United States Constitution, because she was not advised of such rights in a manner in which she could [have understood] them," and therefore ordered

that Defendant's statement to Detective be suppressed.

{7} The State appealed the district judge's suppression ruling to the Court of Appeals. *See* NMSA 1978, § 39-3-3(B)(2) (1972) ("In any criminal proceeding in district court an appeal may be taken by the state to the supreme court or court of appeals, as appellate jurisdiction may be vested by law in these courts: within ten days from a decision or order of a district court suppressing or excluding evidence. . . ."). Because intentional child abuse resulting in the death of a child under the age of twelve carries a potential sentence of life imprisonment, the Court of Appeals transferred the appeal to this Court pursuant to NMSA 1978, § 34-5-10 (1966). *See State v. Smallwood*, 2007-NMSC-005, ¶ 11, 141 N.M. 178, 152 P.3d 821. ("[W]e conclude that the legislature intended for us to have jurisdiction over interlocutory appeals in situations where a defendant may possibly be sentenced to life imprisonment or death.")

DISCUSSION

{8} When conducting a custodial interrogation, law enforcement officials "must advise a suspect that he [or she] has a right to remain silent, that any statement he [or she] does make may be used as evidence against him [or her], and that he [or she] has a right to the presence of an attorney, either retained or appointed." *State v. Martinez*, 1999-NMSC-018, ¶ 13, 127 N.M. 207, 979 P.2d 718 (quoting *Miranda v.*

Arizona, 384 U.S. 436, 444 (1966) (internal quotation marks omitted) (alterations in original). "Before statements obtained during a custodial interrogation may be introduced at trial, the State must demonstrate a knowing, intelligent, and voluntary waiver of [his or her *Miranda*] rights by a preponderance of the evidence." *State v. Gutierrez*, 2011-NMSC-024, ¶ 7, 150 N.M. 232, 258 P.3d 1024 (internal quotation marks and citation omitted). When reviewing a claim that the admission of a police confession violates a defendant's constitutional rights, we "review the [district judge's] findings of fact for substantial evidence and review de novo the ultimate determination of whether a defendant validly waived his or her *Miranda* rights prior to police questioning. In determining whether a waiver of rights is knowing, intelligent, and voluntary, we assess the totality of circumstances." *State v. Barrera*, 2001-NMSC-014, ¶ 23, 130 N.M. 227, 22 P.3d 1177. In assessing the totality of the circumstances, we look at factors such as "the mental and physical condition, background, experience, and conduct of the accused, as well as the conduct of the police, in determining whether the State has successfully carried its burden in demonstrating a knowing and voluntary waiver," indulging in every reasonable presumption against waiver. *Martinez*, 1999-NMSC-018, ¶ 14 (internal quotation marks and citations omitted).

{9} Each Justice reviewed the DVD recording of Defendant's custodial interview the night of the incident. We note that after being taken to the police

station, Defendant waited in a video-wired interrogation room for thirty-eight minutes. During this time Defendant was recorded sitting, rocking back and forth, sobbing, and praying. Defendant kept saying, "Please God, let my baby be ok." Defendant is also recorded leaving the interrogation room five times during the thirty-eight minute waiting period. Defendant repeatedly asked, either the officers or herself, how long she was going to have to wait, begging to get back to her baby. At one point during this time, Defendant left the room and upon her immediate return, threw up in a nearby trash can. It is apparent from the video that Defendant was both mentally and physically distraught from the time she entered the police station.

{10} When Detective finally entered the interrogation room, he talked to Defendant very slowly, saying, "You know, [Defendant], that you're not under arrest, right? I'm just here to talk to you and see what's going on." Then, after reminding Defendant for the second time that she was not under arrest, Detective proceeded to read Defendant her *Miranda* rights. Unlike the slow and unhurried pace in which Detective initially talked to Defendant, Detective read Defendant's rights in a hurried and garbled manner. Additionally, while testifying at the suppression hearing, Detective read the same rights at a slightly slower pace, approximately three seconds slower than when he read them to Defendant during the interview.

{11} Because we indulge in every presumption against waiver, we agree with the district judge that Detective read Defendant her rights in a garbled manner. It appears as if Detective merely wanted to get the "legal technicality" out of the way, rather than ensuring that Defendant understood her rights.

CONCLUSION

{12} Looking at the totality of the circumstances, the State did not meet its burden of making a prima facie case that Defendant knowingly waived her rights because Detective, who had before him an accused mother, anxious and distraught to know the status of her child, proceeded to rapidly recite Defendant's rights to her, thereby failing to effectively communicate the potential ramifications of her waiver. Accordingly, Defendant did not make a knowing, voluntary, and intelligent waiver. We affirm the district judge's order suppressing Defendant's statement and remand for further proceedings.

{13} IT IS SO ORDERED.

PETRA JIMENEZ MAES,
Chief Justice

WE CONCUR:

PATRICIO M. SERNA,
Justice

RICHARD C. BOSSON,
Justice

EDWARD L. CHÁVEZ,
Justice

CHARLES W. DANIELS,
Justice

STATE OF NEW MEXICO
COUNTY OF LEA
IN THE FIFTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

v. No. CR-2008-173S

Contessa Herring,

Defendant.

ORDER SUPPRESSING STATEMENT

(Filed Mar. 29, 2010)

THIS MATTER having come before the Court on Mrs. Contessa Herring's (hereafter "Mrs. Herring"), Motion to Suppress her statement elicited at the Hobbs Police Department and the Court having listened to evidence, reviewed pertinent transcripts, heard arguments of counsel and being fully advised in the premises finds:

1. On January 10, 2008, Ms. Contessa Herring was in the custody of the Hobbs Police Department in an interrogation room at the Hobbs Police Department when Detective Mark Conger (hereafter "Conger") interrogated her and elicited statements from her;

2. Prior to the interrogation, Conger read information to Ms. Herring, purporting to be the standard *Miranda* warnings required to be provided Ms. Herring before her custodial interrogation;

3. The Hobbs Police Department provides detectives with a written Advice of Rights form which sets out the standard *Miranda* Warnings and provides a structured format to provide the rights and assure that the rights are understood by a person requested to make a statement (a copy of which is attached to the motion to suppress and has been made a part of the record herein);

4. There is no Hobbs Police Department Policy that requires Conger to use the written form;

5. Although some detectives use this form, Conger never uses this form and did not use it in this case;

6. Conger read the warning from a pocket sized card very rapidly, completing the reading in only a matter of seconds;

7. The stenographic court reporter who transcribed the DVD of the warning given to Ms. Herring did not understand the language of the warnings on the DVD to match the language of the advice of rights card used by Conger (a copy of said card has been made a part of the record;

8. The Court had to listen to the DVD of the warning given to Ms. Herring three times, the final time with the Court reading a copy Conger's advice of rights card along with the DVD, before the actual warnings could be deciphered;

9. The warnings were read so rapidly as to be garbled to such an extent that Ms. Herring was not advised that she had the right to refuse to talk to

Conger at any time and to stop talking at any time during the interrogation.

THE COURT CONCLUDES Ms. Herring did not make a knowing, voluntary, and intelligent waiver of her rights pursuant to the requirements of the New Mexico Constitution and the United States Constitution, because she was not advised of such rights in a manner in which she could understand them.

IT IS THEREFORE ORDERED that Ms. Herring's statement to Conger is suppressed.

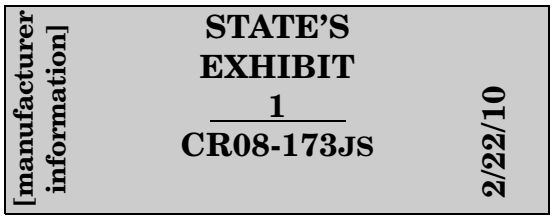
/s/ William G.W. Shoobridge
William G.W. Shoobridge,
District Judge

APPROVED

/s/ Rebecca L. Reese
Rebecca L. Reese,
Attorney for Ms. Herring

AS TO FORM:

Tara Wood, Attorney for State



MIRANDA WARNING

You have the right to remain silent.

Anything you say can be used against you in a court of law.

You have the right to the presence of an attorney to assist you prior to questioning and to be with you during questioning, if you so desire.

If you cannot afford an attorney you have the right to have an attorney appointed for you prior to questioning.

You can decide at any time to exercise these rights and not answer any questions or make any statements.

Do you understand each of these rights I have explained to you?

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