No. 12-276

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

PETITIONER'S REPLY BRIEF

GARY K. KING
Attorney General of New Mexico

JAMES W. GRAYSON
Assistant Attorney General
Counsel of Record

NICOLE BEDER
Assistant Attorney General

MARGARET ELIZABETH MCLEAN
Assistant Attorney General

Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6937
jgrayson@nmag.gov

Counsel for Petitioner

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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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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REPLY TO THE BRIEF IN OPPOSITION

In answer to the question presented, Respondent contends only that *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010) "needs no clarification" because this Court did not consider "the manner in which the rights were read." Br. in Opp'n at 12-13. Respondent does not address whether or under what circumstances *Thompkins* requires advice about the fifth right in order to obtain a knowing and voluntary waiver of rights aside from claiming that any rule omitting advice about the fifth right "would eviscerate *Miranda*." *Id.*

Instead of meaningfully addressing the important constitutional question at issue, Respondent defends the merits of the state court's ruling by taking the unsupported and rather astonishing position that "[m]ere technical compliance with *Miranda* is insufficient." Br. in Opp'n at 19. As she did in the New Mexico Supreme Court, Respondent invites an unfocused judicial evaluation of "the manner in which the *Miranda* rights were read" and the officer's subjective motivations, supporting the latter with the Ninth Circuit's reliance on an officer "downplaying" the advice of rights. Br. in Opp'n at 6, 19. Respondent's vague and malleable standard – which apparently includes giving advice at some specific, but unspecified, speed with a particular, though unexplained, level of detail and spoken with a certain emphatic, but presumably not forceful, tone of voice – would be impossible for officers to follow and courts to apply. And *Miranda* requires advice, not an

admonishment. Respondent's position, and the adoption of it by the New Mexico Supreme Court, underscores the need for this Court to reiterate *Miranda*'s goal of clarity and predictability.

Beyond her untenable view of *Miranda*, Respondent offers only baseless procedural arguments. There is simply no question whatsoever that the trial court relied on the fifth right to suppress Respondent's statement. The State properly preserved its arguments in the trial court and appealed the issue whether Respondent knowingly waived her *Miranda* rights after a complete set of required warnings. In the New Mexico Supreme Court, the State argued that officers are not required to advise suspects about the fifth right and relied on *Thompkins*' holding to assert a knowing waiver under the totality of circumstances based on the giving of advice, an express statement of understanding, a decision to speak, and no evidence contradicting the statement of understanding. Finally, the New Mexico Supreme Court did not rely on state law.

Procedurally and substantively, this case squarely presents the issue of the importance of the fifth right to a waiver inquiry under *Thompkins*. The petition should be granted to address this question and reverse the New Mexico Supreme Court's misapplication of *Miranda*.

I. The record unequivocally establishes the trial court's reliance on the fifth right and the State's argument of the issue below.

1. Respondent filed her motion to suppress eleven days prior to her scheduled trial. (State R. 187.) In the motion, she argued that she did not knowingly waive her right to remain silent because Detective Conger read the rights "so quickly as to be almost unintelligible . . . and totally garbled the last advice to Ms. Herring that 'you do not have to talk to me, but if you do, you have the right to stop talking at any time.'" (State R. 188.) Respondent argued that this "garbled" advice resulted in "a partial reading of the warnings." (State R. 191.) Respondent also denied saying she understood her rights. (State R. 191.)

At the hearing on the motion, Respondent submitted the video recording but did not testify. The court listened to the advice of rights on the recording twice, and Respondent relied on her inaccurate transcript to argue that, "at the end" of the advice, the detective said Respondent should make a statement if she decided to exercise her rights at any time. (Hr'g 9:22:09.) Respondent argued this advice was misleading, prompting the judge to look at the transcript. (Hr'g 9:22:56.) The judge asked whether Respondent was "specifically" arguing "that she wasn't advised that she could assert her *Miranda* rights at any time and cease the interrogation." (Hr'g 9:26:50.) Respondent said, "Exactly, Your Honor. That's correct."

The judge asked the prosecutor to identify in the transcript advice that Respondent could cease the interview at any time. (Hr'g 9:28:45.) He then had a lengthy exchange with Detective Conger about the transcript's variance from the detective's *Miranda* card with respect to the fifth right and watched the recording two more times. (Hr'g 9:39:30.) The judge said he was "troubled" by the speed at which the detective read the warnings, the number of times he had to listen to the recording in order to discern the detective's words, and the transcriptionist's misunderstanding of the fifth warning. (Hr'g 9:44:30.) The judge found that the detective read the "bullet points" contained on his *Miranda* card (Hr'g 9:47:08) but mentioned the court reporter's faulty transcription of the fifth right three more times before finding that the detective's advice was "garbled":

> In particular, it is required under *Miranda* that the defendant acknowledge that she understands each of the rights that are provided in the *Miranda* case, and in this case, it is certainly, in the court's mind, not clear that you could understand based on how the rights were read to her or presented to her by Detective Conger that she had a right to cease the interrogation and exercise any of the rights set out in *Miranda*. So, I am suppressing the statement.

(Hr'g 9:52:55.)

The court's order again referred to the difference between the transcription and the *Miranda* card

(with the only difference being the advice about the fifth right) and expressly found that Respondent was not adequately advised of the fifth right. App. 11. The record leaves no doubt that (1) the only advice argued and found to be garbled was the fifth right, (2) the trial court misinterpreted *Miranda* as requiring advice about the fifth right, and (3) the court refused to accept Respondent's express statement of understanding and found the waiver to be unknowing based on the perceived garbling of the fifth right and the speed of the warnings as a whole.

The New Mexico Supreme Court "agree[d] with the district judge that Detective read [Respondent] her rights in a garbled manner," and despite recognizing the undisputed fact that Detective Conger read Respondent her warnings and she said she understood, the court upheld the ruling based on a determination that there was sufficient evidence to support the trial court's finding that the advice "was too rapid and garbled for comprehension." App. 2, 8. The appellate court's holding could have been stated with greater clarity, but the court signaled its reliance on the fifth right by adopting the trial court's finding of garbled advice – a finding limited to the fifth right.

2. For constitutional claims in New Mexico, "[a]ssertion of the legal principle and development of the facts are generally the only requirement to assert a claim on appeal." *State v. Gomez*, 932 P.2d 1, 8 (N.M. 1997). "The trial court is charged with knowing and correctly applying established New Mexico

precedent," such that preservation does not require the citation of authorities. *Id.* at 9.

The State argued to the trial court that Detective Conger had fully advised Respondent of her rights and she knowingly waived her rights by saying she understood, by never indicating any difficulty understanding, and by speaking to the detective. (Hr'g 9:50:30.) *Thompkins* had not yet been decided, and the State did not need to cite existing New Mexico precedent holding that advice about the fifth right is not required in order to preserve its objection to the trial court's ruling for appeal. In fact, Respondent argued preservation to the New Mexico Supreme Court, but the court implicitly rejected this claim by reaching the merits of the State's appeal.

3. Respondent does not contest, and thus accepts, the facts stated in the petition.[1] *See* Sup. Ct. R. 15(2). Nor does Respondent contest the relevance of these facts to her knowing waiver of rights. Instead, Respondent says that the State did not rely on some of these facts in the state courts. Br. in Opp'n at 5-6.

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[1] There is no discrepancy in the length of the interview. *See* Br. in Opp'n at 5. The *recording* is four hours and fifty-three minutes long, but Detective Conger did not enter the room until minute thirty-eight. Further, the detective left Respondent alone in the room numerous times (DVD 1:06:30, 1:25:30, 2:40:00, 3:37:00, 4:09:12, 4:37:10), at one point for over twenty minutes (DVD 1:48:45 to 2:11:00), and Respondent left the room for more than ten minutes to use the restroom (DVD 3:10:30 to 3:23:50). In total, Detective Conger spent less than three hours talking to Respondent.

Respondent acknowledges, however, that the New Mexico Supreme Court both assessed the totality of the circumstances and reviewed the video recording of the interrogation.[2] Br. in Opp'n at 4-5. Further, the State argued both in the trial court and on appeal that Respondent never indicated any lack of understanding of the detective's warnings. (Hr'g 9:50:30; State's Reply Br. at 3.)

In any case, Respondent invited the New Mexico Supreme Court to undertake a more extensive review of the recording than the trial court. Respondent argued in the appellate court that portions of the recording other than the advice of rights showed her mental anguish during the interrogation. The New Mexico Supreme Court accepted this argument in its decision, App. 7, despite Respondent conceding at oral argument that she had not relied on those facts in the trial court. Respondent now erroneously suggests that her invitation to review the totality of circumstances permits a review of only those facts she believes to be in her favor. The State fairly presented its argument to the New Mexico Supreme Court that

[2] Respondent mistakenly suggests that the State questions whether the justices of the New Mexico Supreme Court reviewed the video recording as stated in the lower court decision. Br. in Opp'n at 5. The State is unconcerned with the review of the video and instead focuses on which relevant facts the New Mexico Supreme Court *evaluated* in its totality of the circumstances inquiry. Of the numerous relevant post-waiver facts described in the petition, not a single one appears in the state court decision.

advice about the fifth right was not required, that Respondent received and understood advice about the fifth right, and that the totality of the circumstances showed a valid waiver of rights under *Thompkins*. (State's Br. in Chief at 8-12; State's Reply Br. at 1-4.)

4. The New Mexico courts relied on *Miranda* and decided this case under the Fifth and Fourteenth Amendments. App. 2, 5-6, 10-11. Respondent did not cite or argue the state constitution in her appellate brief, and the New Mexico Supreme Court did not cite the state provision protecting the right against self-incrimination, N.M. Const. art. II, § 15, in its decision. App. 1-9. The face of the opinion does not clearly state the adequacy and independence of any state ground. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983). Respondent's procedural arguments for denying the petition are without merit.

II. An officer's reading of the required warnings fully satisfies *Miranda*; describing such advice as mere technical compliance does not undermine its validity.

Respondent seems to take the position that a suspect's choice to speak to a police officer means the officer's advice must have been defective in some way. She claims that "perfunctor[y]" advice "amounts to a non-reading of the *Miranda* warnings," "[a] hasty reading of the rights does not adequately and fully convey the rights," and "merely reciting" or "rattl[ing] off" the rights is insufficient. Br. in Opp'n at 2, 10, 11,

17. Respondent further argues, contrary to this Court's express holding in *Thompkins*, that a statement of understanding and a choice to speak does not establish a knowing waiver. Br. in Opp'n at 13. The New Mexico Supreme Court accepted these arguments and found that the detective treated the rights as a "'legal technicality.'" App. 8.

But this Court's precedent makes it clear that *Miranda* does not establish a policy against custodial confessions or require officers to convince suspects to invoke their rights. Without voluntary confessions, "crimes go unsolved and criminals unpunished." *Montejo v. Louisiana*, 556 U.S. 778, 796 (2009). The Court has rejected attempts to alter *Miranda* in ways that would require officers to make "difficult judgment calls" such that "clarity and ease of application would be lost" in favor of "'wholly irrational obstacles to legitimate police investigative activity.'" *Davis v. United States*, 512 U.S. 452, 460-61 (1994) (quoting *Michigan v. Mosley*, 423 U.S. 96, 102 (1975)). It is not *Miranda*'s purpose to "deter[] law enforcement officers from even trying to obtain voluntary confessions." *Montejo*, 556 U.S. at 796.

As Respondent acknowledges, this Court has specifically rejected a lower court's attempt to require a "precise formulation" of warnings and clarified that *Miranda* does not specify a "talismanic incantation" or "any desirable rigidity in the *form* of the required warnings." *California v. Prysock*, 453 U.S. 355, 359

(1981).[3] Nonetheless, the New Mexico Supreme Court is not alone in relying on vague and subjective criteria, as demonstrated by Respondent's use of *Doody v. Ryan*, 649 F.3d 986 (9th Cir.) (en banc), *cert. denied*, 132 S. Ct. 414 (2011).

In *Doody*, the suspect, like Respondent, indicated that he understood the detective's warnings and spoke to the detective at length without hesitation or the assertion of his rights. *Id.* at 1031-32 (Tallman, J., dissenting). But the Ninth Circuit, like the New Mexico Supreme Court, was not satisfied with the suspect's own statement of understanding. Whereas Respondent complains that the detective's warnings were too rote, the Ninth Circuit determined in *Doody* that the officer's warnings were not rote enough: "Overall, the fact that Detective Riley's explanation of a one-page *Miranda* warning form consumed twelve transcribed pages of text is a testament to the confusion generated by the detective's obfuscation." *Id.* at 1003. The court chastised the officer for implying "that the warnings were just formalities" and for describing the advice of rights as "mutually beneficial." *Id.* at 1002, 1005. The court also dismissed this Court's reversal of the lower courts' strict construction of

[3] Despite her seeming awareness of this principle, Respondent faults the detective for not using a different *Miranda* form than his card and suggests that the flexibility this Court provided to officers somehow allows state courts to impose stricter requirements than the ones adopted by this Court. Br. in Opp'n at 15-18. This Court's opinion in *Prysock* should have been sufficient to retire such claims.

warnings in *Prysock* and *Duckworth v. Eagan*, 492 U.S. 195 (1989) by observing that those cases did not specifically involve a deviation from a printed form "with inaccurate[4] and garbled elaborations" or any "downplaying of the significance of the *Miranda* warnings." *Doody*, 649 F.3d at 1004; *accord State v. Grimestad*, 598 P.2d 198, 200, 203 (Mont. 1979) (finding an advice of rights inadequate and characterizing the advice as paying "lip service" to *Miranda* and "downplaying" the rights by describing warnings as routine procedure).

Requiring an exact method for the giving of *Miranda* warnings not only contradicts this Court's objective standard but threatens to transform a straightforward prophylactic rule into a prohibition against police interrogations by virtue of the rule's uncertainty. Officers cannot know in advance whether a court will subjectively interpret a genial tone as downplaying the warnings' significance or a gruff manner as treating the warnings dismissively. Nor

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[4] The description of the detective's extended warnings as misleading is refuted in the dissenting opinion. *See Doody*, 649 F.3d at 1034-41 (Tallman, J., dissenting). Like the form in *Duckworth* stating that the suspect would be provided counsel "'if and when you go to court,'" 492 U.S. at 198, the detective advised the suspect he had the right to the presence of an attorney before and during questioning and described a lawyer as someone who would speak for the suspect if the officers thought he was involved. *Doody*, 649 F.3d at 1035 (Tallman, J., dissenting). This Court held in *Duckworth* that the form's description of the process for the appointment of counsel did not negate the advice of the right to an attorney before or during questioning. 492 U.S. at 203-04.

can they know whether a court will view their warnings as being too fast or too slow. Officers can only know with certainty whether they have advised the suspect of the required warnings and whether the suspect has waived his or her rights by an express statement of waiver or by choosing to speak while indicating an understanding of the rights. By the same token, courts cannot know whether a suspect subjectively chooses to speak to the police for her own reasons (such as to unburden herself, to minimize her culpability, or to alleviate her guilt) or because of an officer's interrogation tactics and thus could only speculate about the effect of any so-called downplaying, garbling, or rushing of the warnings on the suspect's choice to speak.

Miranda requires nothing more than the warnings being comprehensible and the suspect comprehending them. To maintain the goal of predictability, both of these requirements must be based on objective criteria. The subjective "manner in which the rights were read" cannot displace the objective fact of a suspect's own statement of understanding. Respondent's attempt to require something more than a "technical" reading of rights but less than the elaboration in *Doody* should be rejected and the clarity of the *Miranda* rule reaffirmed.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the New Mexico Supreme Court summarily reversed.

Respectfully submitted,

GARY K. KING
Attorney General of New Mexico

JAMES W. GRAYSON
Assistant Attorney General
Counsel of Record

NICOLE BEDER
Assistant Attorney General

MARGARET ELIZABETH MCLEAN
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