No. 14-941

In the Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

- vs -

JERMAINE DUNBAR,

Respondent.

On Petition for a Writ of Certiorari to the New York Court of Appeals

Brief for the Respondent in Opposition

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AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jermaine Dunbar, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$	$	$	$
Self-employment	$ N/A	$ N/A	$ N/A	$ N/A
Income from real property (such as rental income)	$	$	$	$
Interest and dividends	$	$	$	$
Gifts	$	$	$	$
Alimony	$ N/A	$ N/A	$ NONE	$
Child Support	$	$	$	$
Retirement (such as social security, pensions, annuities, insurance)	$	$	$	$
Disability (such as social security, insurance payments)	$ N/A	$ N/A	$ N/A	$ N/A
Unemployment payments	$ N/A	$ N/A	$ N/A	$ N/A
Public-assistance (such as welfare)	$ N/A	$ N/A	$ N/A	$ N/A
Other (specify):	$ N/A	$ N/A	$ N/A	$ N/A
Total monthly income:	$ N/A	$	$ NONE	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	NONE	NONE	$ NONE
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	NONE	NONE	$ NONE
			$
			$

4. How much cash do you and your spouse have? $_____
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
NONE	NONE	$	$ NONE
		$ NONE	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value NONE

☐ Other real estate
Value NONE

☐ Motor Vehicle #1
Year, make & model NONE
Value

☐ Motor Vehicle #2
Year, make & model NONE
Value

☐ Other assets
Description NONE
Value

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ N/A	$ N/A

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$	$
Home maintenance (repairs and upkeep)	$	$
Food	$	$
Clothing	$	$
Laundry and dry-cleaning	$	$
Medical and dental expenses	$	$

NONE

	You	Your spouse
Transportation (not including motor vehicle payments)	$ N/A	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$	$
Life	$	$
Health	$	$
Motor Vehicle	$	$
Other: N/A	$	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ N/A	$ N/A
Installment payments		
Motor Vehicle	$	$
Credit card(s)	$	$
Department store(s)	$	$
Other:	$	$
Alimony, maintenance, and support paid to others	$	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$	$
Other (specify): N/A	$	$
Total monthly expenses:	$	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? N/A

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

Being incarcerated without any financial support.

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

Executed on: 2-25-, 2015

Sworn to before me this 25th day of February 2015

Takara S Strong

TAKARA S. STRONG
Notary Public, State of New York
Registration #01ST6302691
Qualified In New York County
Commission Expires May 5, 20 18

Jermeine Dunbar
(Signature)

QUESTION PRESENTED

Whether the New York Court of Appeals correctly held that Mr. Dunbar was never "adequately and effectively" advised of the privilege against self-incrimination and right to counsel because the pre-*Miranda* script read by the Queens County District Attorney's Office undermined the subsequently-delivered *Miranda* warnings?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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In the Supreme Court of the United States

No. 14-941
THE STATE OF NEW YORK

v.

JERMAINE DUNBAR

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the New York Court of Appeals is reported at 24 N.Y.3d 304. This decision affirmed two orders of the Appellate Division, Second Department reported at 104 A.D.3d 198; 958 N.Y.S.764 (2d Dept. 2013) and 102 A.D.3d 986; 958 N.Y.S.2d 774 (2d Dept. 2013).

JURISDICTION

The judgment of the New York Court of Appeals was entered on October 28, 2014. Petitioner filed writ of certiorari on January 26, 2015. It invoked the jurisdiction of this Court under 28 U.S.C. §1257(a).

STATEMENT

In 2007, the District Attorney of one county in New York State began a pre-arraignment interrogation program in which uncounseled, indigent defendants were questioned by members of the District Attorney's Office in "Central Booking" immediately prior to their arraignments. Respondent Jermaine Dunbar was one of those defendants. Collin Lloyd-Douglas, the respondent in the companion case, was another.

Mr. Dunbar's interrogation began with an Assistant District Attorney and a detective introducing themselves and, reading from what appeared to be the criminal complaint, informing Mr. Dunbar of the charges against him (Pet. App. at 4a, 86a). Mr. Dunbar immediately started speaking when he heard the charges, but stopped as the detective continued reading (*Id.* at 87a). The detective then informed Mr. Dunbar that, "in a few minutes," she would read him his *Miranda* rights, and that "after that" he would "be given the opportunity to explain what [he] did and what happened at that date, time, and place" (*Id.* at 4a, 86a-87a). She then instructed him as follows:

> If you have an alibi, give me as much information as you can, including the names of any people you were with.
>
> If your version of what happened is different from what we've been told, this is your opportunity to tell us your story.
>
> If there is something you need us to investigate about this case you have to tell us now so we can look into it.
>
> Even if you have already spoken to someone else you do not have to talk to us. This will be your only opportunity to speak with us before you go to court on these charges (*Id.* at 4a, 86a-87a).

The detective then explained that the questioning was being recorded (*Id.* at 4a, 86a-87a). Only then did she read Mr. Dunbar his *Miranda* rights and elicit his waiver of them (*Id.*). Mr. Dunbar answered questions about the attempted robbery with which he was being charged, and twice asked the interrogators whether they could "help" him (*Id.* at 5a). Toward the end of the interrogation, Mr. Dunbar asked, "after I finish talking to y'all, who am I going to talk to, the DA?" (*Id.* at 100a). He was told that he would be talking to his lawyer next, and that both of the interrogators worked for the District Attorney (*Id.*).

The hearing court denied Mr. Dunbar's motion to suppress his statement, but acknowledged that the pre-*Miranda* script was deceptive because it was "not true" that "if there is anything the defendant wished the Office of the District Attorney to investigate, he had to tell them at that time" (*Id.* at 60a). It nevertheless found that the deception was not "so egregious as to deprive the defendant of due process" (*Id.* at 61a). The tape of Mr. Dunbar's interrogation was played at his trial, where he was convicted of attempted second-degree robbery and fourth-degree criminal mischief.

On appeal, Mr. Dunbar argued, *inter alia*, that his statements should be suppressed because the pre-*Miranda* script read by members of the District Attorney's Office undermined *Miranda*, preventing the effective conveyance of his rights. In a unanimous decision, the Appellate Division, Second Department, reversed Mr. Dunbar's conviction, finding that his videotaped interrogation should have been suppressed because he "never received a clear and unequivocal

advisement of his rights" given the pre-*Miranda* script, which added "information and suggestion to the *Miranda* warnings," "prevent[ing] them from effectively conveying to suspects their rights" (*Id.* at 22a 33a-35a, citing *Miranda*, 384 U.S. at 467-68).

The New York Court of Appeals granted the District Attorney leave to appeal, and in a six-to-one decision issued on October 28, 2014, affirmed the Appellate Division's holding (Pet. App. at 1a-20a). The Court of Appeals held that the standardized recitation of the pre-*Miranda* script "at best confus[ed] and at worst misle[d]" a reasonable person about his rights and "rendered the subsequent *Miranda* warnings inadequate and ineffective" (*Id.* at 11a-15a).

The Court of Appeals rejected the District Attorney's argument that the mere reading of the *Miranda* warnings to suspects after the script meant that the warnings were effectively conveyed. "[J]ust as no 'talismanic incantation [is] required to satisfy [*Miranda's*] strictures,'" the Court wrote, "'it would be absurd to think that mere recitation of the litany suffices to satisfy Miranda in every conceivable circumstance'" (*Id.* at 13a-14a, quoting *California v. Prysock*, 453 U.S. 355, 359 (1981), and *Missouri v. Seibert*, 542 U.S. 600, 611 (2004) (brackets in the original)). "[T]he issue" was not "whether, under the totality of the circumstances," Mr. Dunbar's waiver was "valid, but rather whether or not" he was "ever clearly informed of" his "*Miranda* rights in the first place, as is constitutionally required" (*Id.* at 14a). In his dissenting opinion, Justice Robert S. Smith agreed with the majority's legal conclusion that prefacing the warnings with a contradictory set of

instructions would violate *Miranda*, but disagreed that the pre-*Miranda* script did so in this case (*Id.* at 17a).

ARGUMENT

The District Attorney contends that the decision of the New York Court of Appeals "contravened this Court's precedent" by failing to apply its "case law defining the elements required for effective conveyance of the [*Miranda*] warnings," and that this Court should grant certiorari to "prevent" the "misapplication" of *Miranda* in "innumerable cases to follow" (Pet. App. 15, 19). Far from contradicting this Court's *Miranda* jurisprudence, however, the decision applied well-settled law and does *not* conflict with any decisions by this Court or any other appellate court. Moreover, the decision has no broad application because the procedure is so plainly unconstitutional that it has been used only by one District Attorney's Office, in one county, in one state. Finally, the issue is moot because the Queens District Attorney's Office abandoned the script used in this case approximately five years ago. Therefore, this case presents no pressing issue necessitating this Court's review.

(A) The New York Court of Appeals Did Not "Misconstrue[ ] *Miranda*'s Core Holding."

The District Attorney contends that the New York Court of Appeals erred in suppressing Mr. Dunbar statement because the mere recitation of the *Miranda* warnings was sufficient to convey his rights notwithstanding the pre-*Miranda* script (*Id.* at 15, 18-31). The District Attorney contends that *Miranda* is "necessarily

satisfied" "as long as *Miranda* rights" are stated (*Id.* at 24). It is well established, however, that *Miranda* is not a "talisman[ ]" and that *Miranda* warnings must be "adequately and effectively" conveyed before a suspect can make a knowing and voluntary waiver of his rights. *Missouri v. Seibert*, 542 U.S. 600, 611 (2004); *Miranda v. Arizona*, 384 U.S. 436, 467-69; *see also Florida v. Powell*, 559 U.S. 50, 62 (2010) (threshold inquiry is whether the warnings, as given, "reasonably convey to a suspect his rights as required by *Miranda*") (internal bracketing and quotations omitted); *accord Duckworth v. Eagan,* 492 U.S. 195, 203 (1989); *California v. Prysock*, 453 U.S. 355, 361 (1981).

As this Court has long held, an interrogator must inform a defendant of his or her *Miranda* rights in "clear and unequivocal terms." *Miranda*, 384 U.S. at 467-69, 471-72 (1966). If effective warnings are not provided prior to an interrogation, any statement given by the defendant is inadmissible at trial. *Id.* at 491-99. Since *Miranda*, this Court has consistently held that interrogators must follow the *Miranda* procedure, and it has explicitly rejected arguments, like the ones the District Attorney advances (Pet. App. at 20-24), that are aimed at reviving the old totality-of-the-circumstances test based on an individualized assessment of voluntariness. *See Dickerson v. United States*, 530 U.S. 428, 442-44 (2000) (rejecting a congressional attempt to "revive" the old totality-of-the-circumstances test because *Miranda* is "constitutionally based" and governs the admissibility of statements in federal and state courts).

This Court has also made clear that interrogation procedures designed to undermine the warnings read to defendants are unconstitutional. *Seibert*, 542 U.S. at 615-16. Warnings may be "render[ed]" "ineffective" by what precedes them and it "would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance." *Id.* at 611. Deviations and omissions from the language of the warnings are constitutional only if a "reasonable defendant" would still have understood his rights and the consequences of foregoing them. *See Powell*, 559 U.S. at 60-63; *Duckworth*, 492 U.S. at 203-04.

Here, before the interrogators read the *Miranda* warnings, they told Mr. Dunbar to "give [them] as much information as" he could, that it was his "only opportunity" to do so, and that he "ha[d] to tell [them] now" (Pet. App. at 4a, 86a-87a). The Court of Appeals concluded that this pre-*Miranda* script "rendered the subsequent *Miranda* warnings inadequate and ineffective" and that Mr. Dunbar was, therefore, never "adequately and effectively apprised of his rights" (*Id.* at 3a, 14a). Contrary to petitioner's contention (*id.* at 30), the decision of the New York Court of Appeals that *Miranda* was never clearly provided to Mr. Dunbar was a straightforward application of this Court's precedent.

The conclusion of the New York Court of Appeals that the pre-*Miranda* script "effectively vitiated" or "neutralized" the *Miranda* warnings was also correct (Pet. App. at 14a). As the court found, Mr. Dunbar was warned "for all intents and purposes, that remaining silent or invoking the right to counsel would come at a price" because he "would be giving up a valuable opportunity to speak with an

assistant district attorney, to have [his] case[ ] investigated, or to assert [an] alibi defense[ ]" (*Id.*). Further, the directives to "give" "as much information as you can" because "this is your opportunity to tell us your story," and that you "have to tell us now," "directly contradicted the later warning that [he] had the right to remain silent" (*Id.*).

Moreover, by "advising" him "that speaking would facilitate an investigation, the interrogators implied" that Mr. Dunbar's "words would be used to help" him, "thus undoing the heart of the warning that anything [he] said could and would be used against" him (*Id.*). Finally, "the statement that the prearraignment interrogation" was the "'only opportunity' to speak falsely suggested that requesting counsel" meant that Mr. Dunbar would "lose the chance to talk to an assistant district attorney" (*Id.*). Thus, in effect, the pre-*Miranda* script "undercut the meaning of all four *Miranda* warnings, depriving" Mr. Dunbar "of an effective explanation of [his] rights" (*Id.* at 15a).

Tellingly, the District Attorney does not contend that this decision conflicts with rulings from other appellate courts and fails to point to a single example of any court, federal or state, coming to a contrary conclusion in a parallel situation. This is because the holding here does not conflict with that of any other federal circuit court or state high court. Notably, even Judge Smith's dissenting opinion, in concurring with the majority on the legal standard, undercuts petitioner's contention that this case involves serious legal disputes (Pet. App. at 17a) ("I agree with the majority that [*Miranda*] would also be violated if the warnings were

accompanied by statements that were directly or indirectly contrary to the warnings").

Rather, ignoring *Miranda*, *Seibert*, and *Powell*, petitioner repeatedly contends that the Court of Appeals should have applied a different legal standard: the due process, totality-of-the-circumstances test. Law enforcement may encourage a suspect to speak *after* effectively conveying *Miranda* if the suspect waives his rights. But, here, as the Court of Appeals determined, *Miranda* was never effectively conveyed. Because petitioner did not meet this threshold burden of adequately conveying *Miranda* rights, the due process, totality-of-the-circumstances test was inapplicable. Thus, the case presents no question about what legal standard applies.

Because the New York Court of Appeals correctly held that Mr. Dunbar's statement was obtained in violation of his *Miranda* rights and no conflict exists among state or federal courts concerning the question presented, no further review is warranted.

(B) This Case Is Limited to One County, In One State, and Has No Broad Application.

The District Attorney overstates the wide reaching implication of the decision at issue here (*Id.* at 15, 31). The Queens County Pre-Arraignment Interrogation Program is the isolated practice of a single District Attorney's Office operating in one borough in New York City. Respondent is aware of no other District Attorney in New York State, let alone in any other jurisdiction in the nation, that has used a standardized, pre-*Miranda* script, telling defendants, *inter alia*, that they "have to

talk" "now" and that it is their "only opportunity" to do so. Petitioner does not point to any similar program elsewhere. Petitioner's contention, therefore, that this decision is "far-reaching" and could impact "innumerable cases" to follow (Pet. App. at 15) is pure fiction.

(C) **This Issue is Moot Because the Queens County District Attorney Abandoned the Pre-*Miranda* Script Used in This Case Five Years Ago.**

This case would be a poor vehicle for addressing petitioner's contentions in any event because the script at issue was discarded by the District Attorney's Office in 2010, years before the Appellate Division formally outlawed it. *See* "Script Read to Suspects Is Leading to New Trials," N.Y. TIMES, Jan. 31, 2013, at A17 (Queens District Attorney confirmed in a statement that "the remarks the judges took issue with had been removed from the script more than three years ago"). The District Attorney's decision to modify the script five years ago refutes its contention that this case presents an issue of ongoing importance. Because the script has been abandoned for years, any decision by this Court would have virtually no relevance. The problem has been identified and addressed, and the New York Court of Appeals has provided what should remain the final statement on the program's illegality.

* * *

That petitioner is unsatisfied with the decisions of the New York appellate courts does not mean there is a need for direction from this Court. On the contrary, it would be a misuse of this Court's time to hear a case applying well-settled

Miranda law to a unique program from one county that has not been adopted by any other jurisdiction and is no longer in use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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Date: 3/24, 2015

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Proof of Service

I, LEILA HULL, do declare that on December 3, 2012, as required by Supreme Court Rule 29, I served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*, and BRIEF FOR RESPONDENT IN OPPOSITION, on counsel for Petitioner by depositing envelopes containing the above documents in the United States mail properly addressed and with first-class postage pre-paid.

Respondent's name and address are as follows: Hon. Richard A. Brown, District Attorney, Queens County, 125-01 Queens Boulevard, Kew Gardens, NY 11415 718.286.6100.

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

Leila Hull
Of Counsel

MARCH 24, 2015