No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2021

JUAN MANUEL CONTRERAS-ZAMORA,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN 00792137

Attorney for Petitioner

Question Presented

1. If, during a criminal interrogation, the suspect states, "Look man, I'm going to tell you just like this; I need my lawyer," must there be some lapse of time before the suspect can be deemed to have re-initiated the interrogation?

Table of Contents

Table of Authorities

Page(s)

Cases

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner Juan Manuel Contreras-Zamora (Contreras) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Contreras' sentence is styled: *United States v. Contreras-Zamora*, ___ F. App'x ___, 2022 U.S. App. LEXIS 12589 (5th Cir. 2022).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Contreras' sentences and convictions was announced May 10, 2022 and is attached hereto as Appendix A. The Fifth Circuit's denial of Contreras' petition for rehearing en banc was issued May 31, 2022 and is attached hereto as Appendix B. Pursuant to Supreme Court Rule 13.3, this Petition has been filed within 90 days of the date of the

order denying the petition for rehearing en banc. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provision

U.S. Const. amend. V:

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

Statement of the Case

Contreras was charged and convicted (following a jury trial) of the following three offenses:

- Conspiracy to distribute methamphetamine,
- Attempt to possess with intent to distribute methamphetamine, and
- Possession of a firearm in furtherance of a drug trafficking crime.

The main issue on appeal was whether the trial court erred in denying Contreras' motion to suppress statements he made during a post-arrest interrogation. The relevant facts were as follows.

Following a traffic stop, officers searched Contreras' vehicle and found a backpack containing (1) a glass pipe with methamphetamine residue in it, (2) a small flip phone, (3) three rubber-banded stacks of money, and (4) a firearm. Contreras was arrested and taken to jail. At the jail, DEA Task Force Officers William Snow, Greg Jones and Special Agent Evan Binkley read Contreras his Miranda rights and began interrogating him. After approximately thirteen minutes, Officer Snow

told Contreras he was lying, Contreras immediately responding that he wanted a lawyer:

Ofr. Snow: You know you're probably lying to me, right?

Contreras : *Look man. I'm going to tell you just like this. I need my lawyer.*

For the next fourteen seconds, Agent Snow, Agent Jones and Contreras engaged in a heated exchange, with the agents talking over Contreras:

Contreras: Look, man. I'm going to tell you just like this. I need my lawyer.

Ofr. Snow: Okay.

Contreras: You know, you want to talk to me because you know –

Ofr. Snow: We were trying to give you an opportunity is what we're trying to do.

Contreras: No. I mean – I mean, you're talking –

Ofr. Snow: We're being cool.

Contreras: -- about notebook. You're talking about phones (indiscernible) –

Ofr. Snow: No. I'm just telling you what they found in the car.

Contreras: -- all kinds of shit when I – I know what I got. I know I have $15,000. I have a fucking .25. That was it.

Ofr. Snow: Okay.

Ofr. Jones: Hey, listen – listen to this.

Contreras: And I (indiscernible) you know what I mean?

Ofr. Jones: Hey, I'm not going to ask you any questions. I just want you to listen.

Agent Jones then took over the session and for the next three minutes threatened Contreras with the amount of time Contreras would spend in prison if he didn't talk. For example:

> *But you're not messing with a little state case anymore. Okay? We're with the DEA.* So if we see in all our investigation that you've been dealing dope through your phone and through those ledgers, and we add it all up, *we're going to charge you with all that dope out of the book.* Now, you want to play the hard role because you've been down before and you think you know the system, then you play the hard role. *We're trying to give you an opportunity to come clean. And we're being cool about it*. Now, if you want to be hard and I ain't going to be a snitch and all that like a lot of these other motherfuckers try to do, let me tell you, about 98 percent of them sit here and say that to ya'll. But when they get in here with the room with us, they talk.
>
> Because you know what? If you've been down, *you know you don't want to do 30 years being down. Because from what I'm hearing that's in those books, you going to be looking at close to that.*

Contreras did eventually make statements inculpating himself (which were the basis for the Government's case as to all three charged offenses).

Contreras moved to suppress the statements he made after invoking his right to counsel, arguing that once he had invoked his right to counsel, the interrogating officers had a duty under *Miranda v. Arizona* to stop the conversation. The Government argued that Contreras had reinitiated the interrogation and therefore the officers had no duty to stop the conversation. The district court agreed with the Government's argument and denied the motion to suppress without an evidentiary hearing.

First Reason for Granting the Writ: *The Fifth Circuit's decision is contrary to Supreme Court precedent (the Edwards rule) regarding what constitutes a suspect's re-initiation of an interrogation.*

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona,* 440 U.S. 436, 444 (1966). Interrogation refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attended to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis,* 446 U.S. 291, 301 (1980). This definition "focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.* at 301.

In *Edwards v. Arizona,* 451 U.S. 477 (1981), a murder suspect in custody informed interrogating officers "I want an attorney before making a deal," at which time questioning ceased. *Id.* at 479. When detectives arrived the next morning to speak with the suspect, he stated he did not want to speak with them but was told by a guard that he had to speak with them. *Id.* After listening to taped statement of an alleged

accomplice who had implicated him, the suspect stated "I'll tell you anything you want to know, but I don't want it on tape," at which time he then implicated himself in the crime. *Id.* Evidence of the suspect's confession was admitted at his trial and he was convicted. *Id.* at 480. The Supreme Court reversed. The following holding as come to be known as the *Edwards* rule[1]:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.* (Emphasis added.)

Id. at 484-85. "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990). The Supreme Court later noted that this rule is "designed to prevent police from badgering a defendant into waiving

[1] See *United States v. Bentley*, 726 F.2d 1124, 1127 (6th Cir. 1984).

his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990).

In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), this Court addressed what constitutes a suspect's re-initiating of an interrogation. The petitioner – convicted of (among other things) manslaughter – had been arrested and advised of his *Miranda* rights which he invoked, at which time the interrogating officer terminated the conversation. *Id.* at 1041-42. Sometime later, while being transported from the police station to the county jail, the petitioner inquired of a police officer "[w]ell, what is going to happen to me now?" *Id.* at 1042. The next day he took a polygraph examination, and upon being advised he had not been telling the truth, admitted that he had been at the wheel of the vehicle that killed the decedent. *Id.* The Supreme Court held that the question asked by the petitioner constituted "initiating" further conversation:

> There can be no doubt in this case that in asking, "Well, what is going to happen to me now?", respondent "initiated" further conversation in the ordinary dictionary[2] sense of that word.

Id. at 1045.

[2] "Initiate" means (among other things) to "introduce by first doing; start." Webster's New World Dictionary 725 (2nd college ed. 1970).

> Although ambiguous, the respondent's question in this case as to what was going to happen to him *evinced a willingness and a desire for a generalized discussion about the investigation*. . . . On these facts we believe that there was not a violation of the *Edwards* rule. (Emphasis added.)

Id. at 1045-46. "Initiating" can only occur if it is done "at the suspect's own instigation[.]" *Maryland v. Shatzer,* 559 U.S. 98, 104 (2010).

In this case, there was no break in the action. After the heated exchange between Agents Snow, Agent Jones and Contreras, the Agents immediately launched into lecture to Contreras about how he was going to spend life in prison if he didn't talk. "This was not at [Contreras'] suggestion or request." *Edwards,* 451 U.S. at 487.

***Second Reason for Granting the Writ**: In every published circuit court opinion where a suspect has been deemed to have re-initiated an interrogation, there has been an appreciable lapse of time between invocation of counsel and the re-initiation.*

What follows is a nearly exhaustive list of forty-nine published federal circuit court cases (and one Supreme Court case) wherein a suspect in custody has invoked his or her right to counsel (or right to remain silent) and been held to have subsequently re-initiated

communication with law officers. *In each and every case*, there was a pause in the action, a lapse of time, between the invocation of right to counsel and the suspect reaching out to initiate further conversation.

Supreme Court

Bobby v. Dixon, 565 U.S. 23, 25-26, 32 (2011) (Four hours between end of interrogation and suspect's unsolicited statement to police, "I want to tell you what happened").

First Circuit

United States v. Thongsophaporn, 503 F.3d 51, 56 (1st Cir. 2007) (Five minutes after stating he did not wish to answer any questions, suspect asked agent "what was going on."); *Obershaw v. Lanman*, 453 F.3d 56, 58 (1st Cir. 2006) (After suspect spent "some time outside with his dog," suspect told officers "this wasn't premeditated," and "he didn't plan it.").

Second Circuit

United States v. Colon, 835 F.2d 27, 29 (2d Cir. 1987) (More than two days after invoking his right to counsel, while being transported to the courthouse, suspect spontaneously stated that fellow arrestee "had

nothing to do with the theft of the checks."); *United States v. Gonzalez*, 764 F.3d 159, 164 (2d Cir. 2014) (When officers began to leave, suspect then said he want to speak to the agents and told them not to leave); *United States v. Gordon*, 655 F.2d 478, 482 (2d Cir. 1981) (At FBI Field Office, after being informed of the basis for his arrest, suspect wanted to furnish information concerning "somebody else that should be arrested for the same thing."); *Acosta v. Artuz*, 575 F.3d 177, 181-82 (2d Cir. 2009) (Two hours after invoking his right to counsel, suspect asked detective if he could speak to prosecutor).

Third Circuit

United States v. Velasquez, 885 F.2d 1076, 1085-86 (3d Cir. 1989) (Half hour after interview was terminated, suspect asked arresting officer to get investigators so he could ask "[w]hat is going to happen?").

Fourth Circuit

Howard v. Moore, 131 F.3d 399, 413 (4th Cir. 1997) ("[A] week and a half or maybe two weeks" after being arrested, suspect confessed to federal probation officer.); *United States v. Blake*, 571 F.3d 331, 336-37

(4th Cir. 2009) ("[A]bout one half hour" after detective spoke with suspect, suspect inquired "I can still talk to you?").

Fifth Circuit

United States v. Dougall, 919 F.2d 932, 936 (5th Cir. 1990) ("The agents sat quietly" after suspect invoked his right to counsel.); *Willie v. Maggio*, 737 F.2d 1372, 1384 (5th Cir. 1984) (Six days between invocation of right to counsel and suspect's statement to jailer that he wanted to speak to FBI agent); *United States v. Anthony*, 474 F.2d 770, 772 n.4 (5th Cir. 1973) (After suspect invoked his right to counsel, and after asking (and being told) what he was charged with, suspect stated, among other things, that he was a good thief.); *United States v. Hopkins*, 433 F.2d 1041, 1044 (5th Cir. 1970) (After suspect refused to sign waiver form, and FBI agent got up to leave, suspect stated "I didn't steal the car in the first place."); *United States v. Hodge*, 487 F.2d 945, 946 (5th Cir. 1973) (After suspect requested an attorney, he changed his mind and volunteered to make a statement); *United States v. Cavallino*, 498 F.2d 1200, 1203 (5th Cir. 1974) (Suspect, after being returned to the "booking cell," sent a message to police sergeant that he wanted to speak with him); *United States v. Perkins*, 608 F.2d 1064, 1066 (5th Cir. 1979) (As DEA agents

attempted to terminate discussion, suspect spent 45 minutes posing hypothetical questions to agents, at which time the discussion was terminated by agents because "nothing was getting resolved"; suspect then asked "Well, what happens now?"); *United States v. Carrillo,* 660 F.3d 914, 919 (5th Cir. 2011) (The next day after Carrillo invoked his right to counsel, the detective received a call from an officer at the jail, stating that Carrillo wanted to talk to him.).[3]

Sixth Circuit

McKinney v. Ludwick, 649 F.3d 484, 491 (6th Cir. 2011) (Entire night passed between detective's death penalty comment and suspect's request to talk about his case); *Henness v. Bagley*, 644 F.3d 308, 319 (6th Cir. 2011) (After interview was terminated, suspect told a friend by phone that if the detectives would come see him, he would tell them about the murder); *Hill v. Brigano*, 199 F.3d 833, 841-42 (6th Cir. 1999) (Two days after invoking right to counsel, suspect asked to speak to sheriff); *United States v. Williams*, 612 F.3d 417, 421 (6th Cir. 2010) (Six hours elapsed between suspect's invocation of right to counsel and suspect's request to

[3] *Carillo* was the case cited by the Government and relied upon by the district court in denying Contreras' motion to suppress.

speak to an investigator "about the case."); *United States v. Mills*, 1 F.3d 414, 417 (6th Cir. 1993) (After arraignment, suspect approached ATF agents and asked to speak to them); *Shaneberger v. Jones*, 615 F.3d 448, 454 (6th Cir. 2010) (Suspect "chose to speak to an entirely different officer at a different location and time[.]").

Seventh Circuit

United States v. Huerta, 239 F.3d 865, 868 (7th Cir. 2001) (After detectives took suspect's shoes as evidence and began to walk away, suspect called to them to come back and informed them she wanted to talk); *Robinson v. Percy*, 738 F.2d 214, 217-18 (7th Cir. 1984), *disapproved of on other grounds*, *Patterson v. Illinois,* 487 U.S. 285 (1988) (Suspect told police sergeant he had to "clear the air" or "get something off his chest."); *United States v. Hampton,* 675 F.3d 720, 728-29 (7th Cir. 2012) ("After a long pause . . . hemming for a few minutes," suspect stated unambiguously that he wanted to continue without a lawyer.); *Jackson v. Frank*, 348 F.3d 658, 662 n.4 (7th Cir. 2003) (Detective was gathering his material and preparing to leave the room when suspect confessed); *United States v. Jackson*, 189 F.3d 502, 511 (7th Cir. 1999) (As detective led suspect back to his cell, suspect stated "that he wished to speak with

the police to discuss his arrests for driving with a revoked license and possessing a controlled substance.").

Eighth Circuit

Holman v. Kemna, 212 F.3d 413, 419 (8th Cir. 2000) (Suspect decided day after interview terminated, and after talking to his stepfather, not to wait any longer in speaking to deputy); *Bannister v. Armontrout*, 4 F.3d 1434, 1436 (8th Cir. 1993) (Upon entering jail, suspect told officer "he would like to talk to the person in charge"); *United States v. Palega*, 556 F.3d 709, 715 (8th Cir. 2009) (Thirty minutes elapsed between suspect's invocation of right to counsel and request to speak to officer); *Pittman v. Black*, 764 F.2d 545, 546 (8th Cir. 1985) (As officer "gathered his papers and prepared to leave the room" suspect asked whether the other suspects were trying to put all the blame on him.); *United States v. Valdez*, 146 F.3d 547, 551 (8th Cir. 1998) (Suspect "initiated further conversation by telling agents as they were leaving the room that he had changed his mind and wanted to answer questions."); *United States v. Sawyer*, 588 F.3d 548, 552 (8th Cir. 2009) (An hour and a half after stating he had "nothing to say," suspect, upon learning that his shoe matched the print taken from the bank counter, began asking

questions about the case); *McCree v. Housewright*, 689 F.2d 797, 800 (8th Cir. 1982) (Approximately six hours after invoking right to counsel, suspect stated to officer "I want to tell you just exactly what happened.").

Ninth Circuit

United States v. Thierman, 678 F.2d 1331, 1332-33 (9th Cir. 1982) (When detectives ceased questioning and said "That's it, let's go talk to the girl," suspect stopped them and said he would turn over stolen money orders if girl were left out of it); *United States v. Most*, 789 F.2d 1411, 1413-14 (9th Cir. 1986) (Suspect inquired as to (1) how his codefendant girlfriend was, (2) what would happen to him, and (3) "What's going on?"); *United States v. Morgan,* 738 F.3d 1002, 1004 (9th Cir. 2013) (Suspect gave a confession three hours after stating she did not need an attorney and wanted to waive her right to counsel); *Bradford v. Davis*, 923 F.3d 599, 620-21 (9th Cir. 2019) (Approximately twenty-four hours elapsed between suspect's invocation and suspect's call to detective that he wanted to put a statement on the record.).

Tenth Circuit

Pickens v. Gibson, 206 F.3d 988, 993-94 (10th Cir. 2000) (After being advised of the charges on which he was being booked, suspect agreed to talk to officer.); *United States v. Willis*, 826 F.3d 1265, 1276 (10th Cir. 2016) ("As the agents prepared to leave, [suspect] asked if it was too late to change his mind and to speak to them."); *United States v. Obregon*, 748 F.2d 1371, 1377-78 (10th Cir. 1984) (As Narcotics Agent told suspect Agent was not going to ask suspect any questions, suspect asked what would happen to him "if he helped me and told me what I wanted to know.").

Eleventh Circuit

Ford v. Hall, 546 F.3d 1326, 1338-39 (11th Cir. 2008) (After suspect was advised he could call his attorney he began questioning Georgia Bureau of Investigation agent about codefendant's statement); *Jacobs v. Singletary*, 952 F.2d 1282, 1293-94, 1295-96 (11th Cir. 1992) (Two hours between suspect's invocation of right to counsel and suspect's question to police officer as to why she was being detained at police station; seven hours after invocation she told police lieutenant she wanted to talk to him in private.); *Witt v. Wainwright*, 714 F.2d 1069, 1071 (11th Cir. 1983)

(After interrogation by FBI agent and assistant state prosecutor ceased, suspect asked deputy "if all the sheriff's murder cases were solved[.]"); *United States v. Kroesser*, 731 F.2d 1509, 1514 (11th Cir. 1984) (During fingerprinting, suspect "broke down and tearfully voiced his regrets at having gotten [codefendant] involved."); *Henderson v. Singletary*, 968 F.2d 1070, 1071-72 (11th Cir. 1992) (Suspect advised deputy that he might talk later, and four months later while suspect was being transported, he stated "[g]ive me a Pepsi and a pack of Winstons and I'll tell you about this shit[.]"); *Fike v. James*, 833 F.2d 1503, 1504-05 (11th Cir. 1987) (Suspect requested that sheriff's officer speak with him, was told to get some rest, and was then interviewed twelve hours later).

D.C. Circuit

United States v. Straker, 800 F.3d 570, 623 (D.C. Cir. 2015) (suspect left a voicemail with agent asking agent to "call him back" eighteen months after he was initially interrogated).

***Third Reason for Granting the Writ**: The Fifth Circuit's decision is contrary to Supreme Court precedent in that, absent some lapse of time after a suspect invokes his right to counsel, it is impossible for a suspect to be deemed to have re-waived his Miranda rights – an absolute necessity for re-initiation.*

Even if a suspect is determined to have initiated further discussions with the police, his responses to further questioning are still not admissible absent a finding that the suspect "knowingly and intelligently waived the right he invoked." *Smith v. Illinois,* 469 U.S. 91, 94-95 (1984). A *Miranda* waiver may be sufficient at the time of an initial attempted interrogation, but it is not sufficient at the time of subsequent attempts if the suspect requests the presence of counsel. *Shatzer,* 559 U.S. at 105. The burden remains on the government to show that subsequent events indicated a waiver of the right to counsel. *Bradshaw,* 462 U.S. at 1044. In order to waive a previously-invoked right to counsel, the government most demonstrate two things:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.

Moran v. Burbine, 475 U.S. 412, 421 (1986). "The courts must presume that a defendant did not waive his rights[.]" *North Carolina v. Butler,* 441 U.S. 369, 373 (1979). The fact that a suspect responds to further police questioning does not constitute a re-waiver of his *Miranda* rights:

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

Edwards, 451 U.S. at 484.

In this case, in part because the interrogating agents never stopped talking, nothing remotely suggests that Contreras knowingly and voluntarily re-waived his right to counsel. Therefore he could not have re-initiated the interrogation.

Fourth Reason for Granting the Writ*: This Court should address the distinction between a suspect's re-initiation of an interrogation and a suspect's spontaneous inculpatory outburst.*

The general rule is once a suspect invokes his right to counsel, questioning must stop:

> [O]nce . . . a defendant [internal quotation marks omitted] has invoked his right to have counsel present, interrogation must stop. . . . At that point, not only must the immediate contact end, but "badgering"[4] by later requests is prohibited.

Montejo v. Louisiana, 556 U.S. 778, 794-95 (2009). If police subsequently initiate an encounter in the absence of counsel, the suspect's statements are presumed involuntary. *McNeil v. Wisconsin,* 501 U.S. 171, 177 (1991). But what if the suspect makes a spontaneous outburst; i.e., he inculpates himself at the same time he is invoking his right to counsel?

Spontaneous inculpatory outbursts are different from re-initiating an interrogation in that the suspect makes inculpatory statements (not asks a question) *at the same time* (or immediately thereafter) he is invoking his right to counsel. *See e.g. Lamb v. Peyton,* 273 F. Supp. 242,

[4] To "badger" means to "nag at." Webster's New World Dictionary 104 (2nd college ed. 1970).

245 (W.D. Va. 1967) (Before police chief had finished reading suspect his *Miranda* rights, suspect stated "I took this truck and parked it in Lynchburg"); *United States v. Jackson,* 852 F.3d 764, 770 (8th Cir. 2017) (After suspect stated he would prefer to have an attorney present, he then blurted out that he had been "slamming meth," that he had been up for several days and that the only sleep he had was in jail just prior to the interview); *Tolliver v. Sheets*, 594 F.3d 900, 918 (6th Cir. 2010) (As officer was preparing to go over *Miranda* rights with suspect, suspect broke in and said "Let me tell you something . . . I am going to tell you right now, okay?"); *United States v. Lame*, 716 F.2d 515, 520-21 (8th Cir. 1983) (After suspect stated "maybe I should get a lawyer", FBI agents remained silent, at which time suspect quickly resumed his narrative without any prompting from agents); *United States v. Johnson,* 812 F.2d 1329, 1330 (11th Cir. 1986) (Suspect requested that a lawyer be present during questioning but "in the same breath" stated, "I know all about the checks and where they came from."); *McKinney v. Hoffner,* 830 F.3d 363, 373 (6th Cir. 2016) (Suspect's statements, "only two seconds apart, said he wanted an attorney *and* that he wanted to talk.").

In this case, there was not a spontaneous outburst by Contreras because he did not make any inculpatory statements during the back-and-forth with the interrogating agents. He continued to deny that he sold drugs.

***Fifth Reason for Granting the Writ**: The Ninth and Eleventh Circuits, in circumstances similar to this case, have held that the suspect did not re-initiate interrogation, and that his Miranda rights were violated.*

In *Martinez v. Cate,* 903 F.3d 982 (9th Cir. 2018) the defendant (Martinez) was arrested on a murder charge, had his *Miranda* rights read to him, at which time he immediately asked "I can have an attorney?" *Id.* at 988. Without a break, the detective then asked Martinez if he already had an attorney (yes), the attorney's name (Percy), whether Martinez had spoken to his attorney (no), and whether Martinez would talk "but with an attorney present?" Martinez replied: Yeah cuz I don't know much about the law" (cleaned up). *Id.* The following exchange then took place:

Detective: All I wanted was your side of the story. That's it. OK. So, I'm pretty much done with you then. Um, I guess I don't know another option but to go ahead and book you. OK. Because

Martinez: under? What am I being booked

Detective: You're going to be booked for murder because I only got one side of the story. OK.

Id. at 996. After additional back-and-forth about how Martinez was going to get in touch with his attorney, Martinez eventually asked "what did you want to talk to me about," the detective stating that he just wanted Martinez's side of the story, and Martinez then agreeing to tell the truth if that "helped him walk away." (cleaned up). *Id.* at 989. The California Court of Appeals ruled that Martinez's statements were admissible. *Id.* at 990. The Ninth Circuit disagreed:

> We hold that the only reasonable interpretation of what occurred between Navarro and Martinez is that Navarro continued interrogating Martinez after the suspect had clearly . . . invoked his right to counsel, and that Navarro badgered Martinez into waiving that right.

Id. at 993.

> Because [Detective] Navarro continued to interrogate Martinez after Martinez had invoked his right to counsel, Navarro violated the clearly-established rule from *Edwards*. It was an unreasonable application of *Innis* and *Edwards* to conclude otherwise.

Id. at 996.

> The government argues that Martinez initiated further conversation by asking, "[w]hat am I being booked under?" . . . No fairminded jurist could interpret Martinez's statement as a re-initiation of the conversation. For one, the conversation between Navarro and Martinez never stopped. Initiate means "to begin" and no reasonable jurist could review the transcript of the interaction between Detective Navarro and conclude that Martinez *began* the exchange about being booked for murder.

Id. at 996.

> In every other case where the Supreme Court has held that a defendant initiated the communication with the police, *there was some break in questioning*. (Emphasis added.)

Id. at 997.

> The detective's statements linking Martinez's booking to his invocation of the right to counsel, and the detective's comments that Martinez would need to call his own attorney from jail *are exactly the type of badgering that Edwards was crafted to prevent.* (Emphasis added)

Id.

> Second, even if Martinez did reinitiate, his statements are not admissible because in light of the *Edwards* violation it is presumed that Martinez's waiver of his right to counsel was invalid. . . . No fairminded jurist could review this record, conclude that the State overcame the *Edwards* presumption, and hold that Martinez's waiver was voluntary.

Id.

> [B]ecause custodial interrogation never stopped, the only reasonable interpretation of Navarro's responses to Martinez's invocation of the right to counsel is that the detective was badgering the defendant into waiving his previously asserted *Miranda* rights. (cleaned up)

Id. at 997-98.

In *United States v. Gomez*, 927 F.2d 1530 (11th Cir. 1991), after Gomez was arrested and advised of his rights, he stated "he had been sent to Tampa to pick up $7,000 in cash"; he refused to cooperate and requested an attorney. *Id.* at 1532-33. The interviewing DEA agent immediately told Gomez that he faced a sentence of from ten years to life in prison and that the only way he could receive a lighter sentence was by cooperating. *Id.* at 1533. Gomez then left the room and as he was being returned to the holding cell, he asked another agent why he had been arrested. *Id.* at 1533, 1536. When advised (incorrectly) as to what he was charged with, Gomez "immediately expressed his desire to cooperate." *Id.* at 1536. The time between the DEA agent's statement to Gomez that he was in serious trouble and needed to cooperate and Gomez's "cooperation" was no more than a few minutes. *Id.* Gomez argued on appeal that the statements made by the agents about possible sentences improperly constituted further interrogation after he had requested counsel. *Id.* at 1537. The Eleventh Circuit agreed:

> [T]he agents here continued to talk to Gomez after he requested counsel, stressing the importance of cooperating. In addition, Gomez's "initiation" of a conversation with [Agent] Henley occurred almost immediately after the interrogation[.]

Id.

> [T]he issue before us [is] whether the agents should have known that agent Henley's statements to Gomez regarding possible sentencing and the benefits of cooperation were reasonably likely to illicit an incriminating response. In light of the Supreme Court's opinion in *Innis* . . . these statements clearly constituted further interrogation. [E]xplanations of possible sentences and of the criminal justice system, though seemingly innocent, are often designed to inform the accused that cooperation may be beneficial[.]This type of helpfulness is often used to indicate to the accused that the law enforcement officers will "be good if the accused will be good," or infer "Why don't you be good and tell us about it?" . . . It best serves all interests, especially law enforcement, to remain close to the "bright line": interrogation must cease when the accused in custody requests the presence of a lawyer before further interrogation.

Id. at 1538.

> The mere fact that agent Henley told Gomez that he need not respond does not alleviate his duty to cease interrogation; that would place the officer's artifice in interrogation over our concern with the interrogatory environment. Once Gomez requested an attorney, agent Henley should have respected that request. Any information he had regarding cooperation and sentencing could be addressed to the attorney.

Id.

> The fact that Gomez began the conversation with agent Hastings does not cure the infection of the further interrogation. Although *Edwards* permits further interrogation if the accused initiates the conversation, . . . the validity of this waiver logically depends on the accused being free from further interrogation. In other words, the "initiation" must come prior to the further interrogation; initiation only becomes an issue if the agents follow *Edwards and cease interrogation upon a request for*

> *counsel. Once the agents have, as here, violated Edwards, no claim that the accused "initiated" more conversation will be heard.* Indeed, *Edwards* would be rendered meaningless if agents were permitted to continue interrogation after the request for counsel, and *then claim that the consequent response by the accused represented initiation and permitted a waiver of the asserted counsel right.* (Emphasis added.)

Id. at 1538-39.

Conclusion

For the foregoing reasons, Petitioner Contreras respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera
JOHN A. KUCHERA
210 N. 6th St.
Waco, Texas 76701
(254) 754-3075
(254) 756-2193 (facsimile)
johnkuchera@210law.com
SBN. 00792137

Attorney for Petitioner

Certificate of Service

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 10th day of June 2022.

/s/ John A. Kuchera
John A. Kuchera,
Attorney for Petitioner Juan Manuel Contreras-Zamora