No. 22-6778

IN THE
SUPREME COURT OF THE UNITED STATES

Mi-in-gun Justin Charette, aka Justin Marshall Critt,

Petitioner,

v.

Minnesota,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a suspect in custody anticipatorily invoke his Fifth Amendment right to counsel when interrogation is imminent?

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INTRODUCTION

This Court should deny the Petition for a Writ of Certiorari for four reasons. First, this Court has already addressed when suspects can invoke their Fifth Amendment right to counsel. To invoke the right to counsel, the suspect must be both in custody and approached for interrogation. *Montejo v. Louisiana*, 556 U.S. 778, 794–97 (2009). *Miranda*[1] does not apply to noninterrogative interactions with law enforcement, like the one at issue here. *Id.* at 795.

Second, the lower courts' decisions do not conflict. Instead, lower courts consistently examine the record for both custody and interrogation, and then apply the law accordingly. When suspects like Petitioner have noninterrogative interactions with law enforcement, the lower courts consistently hold that the suspect cannot invoke the right to counsel.

Third, this case is not a good vehicle to consider the question presented. Although Petitioner claims that this case involves "imminent interrogation," the record reflects that Petitioner referenced a lawyer nearly a full day before he was approached for interrogation. Thus, Petitioner's interrogation was not "imminent" in any sense of the word.

Fourth, the Minnesota Court of Appeals correctly concluded that Petitioner did not clearly invoke his right to counsel. The judgment below is therefore supported by independent grounds.

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

STATEMENT OF THE CASE

1. A jury found Petitioner Mi-in-gun Justin Charette a/k/a Justin Marshall Critt guilty of second-degree murder and first-degree arson. (Pet. App. 2.) The district court sentenced Petitioner to 528 months in prison. (*Id.*)

The offense occurred on June 28, 2016, in Moorhead, Minnesota. (*Id.* at 17.) Moorhead police officers responded to a call about a disturbance at a home where the victim was staying. (*Id.*) The victim and Petitioner had been arguing, and the victim was "distraught." (*Id.*) The officers got Petitioner to leave, but the victim called a friend shortly after he left and said, "He's back; he's here; he's outside of the windows and he's taunting me." (*Id.*) The fire department then responded to a fire at the home and found the victim inside dead from head trauma. (*Id.*)

Later that evening, Petitioner returned to the scene. (*Id.*) The officers on-site detained him as a person of interest regarding the fire and as a possible suspect in an unrelated robbery and assault that occurred the previous day in Fargo, North Dakota. (*Id.*) Petitioner was told that he was being detained and investigators would like to speak with him. (*Id.* at 3, 14–15.) He was handcuffed and transported to the local law enforcement center. (*Id.* at 3.)

2. At the law enforcement center, an officer brought Petitioner to an interview room and began to remove the handcuffs. (3/9/17 Omnibus Exh. 1.)[2] Petitioner appeared intoxicated and angrily demanded his phone. (Omnibus Exh. 1 at 00:00–00:11; Omnibus Tr. at 22–23.) The officer told Petitioner "if you're gonna

[2] Omnibus Exhibit 1 is a video recording of Petitioner's time in the interview room. The video is 13 minutes and 52 seconds long.

stay like this, you're gonna stay in cuffs." (Omnibus Exh. 1 at 00:00–00:11.) Petitioner responded, "Fuck, let me be in cuffs," so the officer left the handcuffs on. (*Id.*)

Contrary to the Petition, the detectives were not in the interview room when Petitioner arrived. (*Compare* Pet. 4 *with* Omnibus Exh. 1.) The record reflects that the detectives had no intention of speaking with Petitioner because "[h]is behavior was irrational" and he seemed "impaired" by drugs or alcohol. (3/9/17 Omnibus Tr. at 22–23.) Instead, Petitioner was in the interview room waiting for law enforcement from Fargo to arrive to confirm that Petitioner was a suspect in the Fargo matter. (*Id.* at 22–23, 28, 40–41.)

The scene in the interview room quickly became chaotic. Petitioner repeatedly cursed and yelled for his phone, stomped his feet, and spat at the officers. When officers left the room, Petitioner talked to himself, continued to yell and curse, and tried multiple times to move the handcuffs from behind his back to the front of his body. Each time Petitioner tried to move his hands to the front, officers held Petitioner down while instructing Petitioner to get his hands behind his back. While being held down, Petitioner continued to argue with himself as well as the officers. Law enforcement did not, at any time, ask Petitioner questions about the death and fire in Moorhead or the Fargo matter. (Omnibus Exh. 1.)

During this encounter, Petitioner referenced a lawyer twice. The first time Petitioner said to one of the officers, "Hey, where's my lawyer? I'm dummying up." The officer responded that Petitioner was "not under arrest right now." Petitioner

said, "No, I know. Where's my phone? Thank you, Sergeant. No, you ain't a Sergeant." Petitioner then continued to angrily demand his phone, and the officer left the room. (*Id.* at 00:00–00:30.)

The second time occurred while he was being held down after trying to move the handcuffs to the front of his body. Officers explained that he had to keep his hands behind his back. Petitioner said, "I'm not arrested." An officer told him he was "being detained for the moment." Petitioner said, "And then, where's my lawyer?" An officer responded, "We haven't asked you any questions yet." (*Id.* at 03:54–04:45.)

After a few minutes, Fargo law enforcement arrived. (Omnibus Tr. at 28.) The Moorhead officers were then instructed to arrest Petitioner for the Fargo matter and move him from the interview room to the Moorhead jail. (*Id.*) The entire encounter lasted less than 14 minutes. (Omnibus Exh. 1.)

3. The next day (June 29) law enforcement brought Petitioner back to the interview room to question him about the death and fire in Moorhead. (Pet. App. 4.)[3] Unlike the previous encounter, Petitioner was calm and sat in a chair without handcuffs. (*Id.*) A detective read Petitioner his *Miranda* rights, which Petitioner waived. (*Id.*; Pet. 5.) Petitioner then spoke with detectives for over 30 minutes. (Pet. App. 4.)

During the conversation, Petitioner identified a person he was with the previous day. (Pet. App. 18.) Law enforcement subsequently interviewed this person, who said Petitioner told him, "I just killed someone," he should "watch the news," and

[3] A video recording and transcript of the June 29 interview is in the record. (3/9/17 Omnibus Exhs. 2, 2A.)

"it wouldn't be the first time [Petitioner] killed someone." (*Id.*) The witness's neighbor also recalled Petitioner saying, "something along the lines of 'you'll hear about me in the news for this' or 'for what I've done.'" (*Id.*)

After being charged with second-degree murder and first-degree arson, Petitioner moved to suppress the June 29 statements. (*Id.* at 19.) Petitioner argued, among other things, that his references to an attorney on June 28 invoked his right to counsel, and the detectives therefore violated his rights by questioning him on June 29 without counsel. (*Id.* at 4–5.) The district court denied the motion to suppress, reasoning that the Fifth Amendment right to counsel arises only when a person is subject to both custody and interrogation. (*Id.* at 45.) Because Petitioner was not interrogated on June 28, his references to a lawyer did not invoke his right to counsel. (*Id.*) A jury found Petitioner guilty of both counts. (*Id.* at 5.)

4. Petitioner filed a petition for postconviction relief, challenging the denial of his motion to suppress his June 29 statements. (*Id.* at 28.) The district court denied the petition, again concluding that Petitioner was not interrogated on June 28, so he could not invoke his right to counsel. (*Id.* at 28, 35.) The court also found the length of time between the June 28 and June 29 encounters was enough to consider them "two separate events." (*Id.* at 35.) The district court noted that "Petitioner has cited to no case law, and this Court is unaware of any, that suggests the right to counsel attaches preemptively." (*Id.*)

The Minnesota Court of Appeals affirmed, but on separate grounds. (*Id.* at 16.) The court of appeals concluded that it did not need to decide whether Petitioner *could*

invoke his right to counsel on June 28 because Petitioner *did not*, in fact, invoke his right to counsel. (*Id.* at 21–23.)[4] The references to a lawyer were "mere outbursts" amid "belligerent and agitated behavior," they were "vague," and they were phrased as "questions, not requests." (*Id.* at 21–22.) To the extent the statements were ambiguous, law enforcement "responded appropriately" by clarifying Petitioner's intentions through an accurate *Miranda* warning and voluntary waiver on June 29. (*Id.* at 22–23.)

The Minnesota Supreme Court granted review and affirmed, but on the same grounds as the district court. (*Id.* at 15.) The supreme court held that Petitioner "was not subjected to custodial interrogation" on June 28, so "he did not have a Fifth Amendment right to counsel at that time." (*Id.*) The court reasoned that *Miranda* only applies to situations "in which the concerns that powered the decision are implicated." (*Id.* at 14 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) (quotation marks omitted)).) These concerns arise from "the interaction of custody and official interrogation," which can "undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (*Id.* (quoting *Miranda*, 384 U.S. at 467 and *Illinois v. Perkins*, 496 U.S. 292, 297 (1990) (quotation marks omitted)); *see also id.* at 7.) Custodial interrogation did not occur here because on June 28,

[4] Petitioner inaccurately claims that "[t]he record is clear that [he] requested an attorney." (Pet. 17; *see also infra* at 15.)

> None of the officers present mentioned the fire or the deceased person found inside the burned-out house. [Petitioner] was not told that his cooperation would result in lenient treatment. There is no evidence of any "psychological ploys" wielded by the officers. None of the officers asked [Petitioner] any questions or tried to elicit an incriminating response about his involvement in a possible murder and arson.

(*Id.* at 14.)

Contrary to the Petition, the court agreed with Petitioner that the context of custodial interrogation includes a brief period before *Miranda* rights are read and the first question is asked. (*Compare id.* at 11 *with* Pet. 3, 15 (inaccurately claiming that the court held suspects in Minnesota must wait for the start of questioning).) The court simply disagreed with Petitioner that his June 28 encounter was anywhere near the context of custodial interrogation. (Pet. App. 14–15.) The court also declined Petitioner's invitation to extend Minnesota law beyond the context of custodial interrogation to so-called "imminent interrogation." (*Id.* at 7, 10–11.) The court was concerned about the undefined boundaries of when exactly a defendant should be able to anticipate law enforcement questioning, particularly since Petitioner did not provide any suggestions about how to define "imminent" or apply his proposed rule. (*Id.* at 10–11.) Nevertheless, the court did not foreclose the issue for future cases with different facts, stating only that it was declining to adopt such a rule "at this time" and "under the facts of this case." (*Id.* at 10–12.)

REASONS FOR DENYING THE PETITION

The question presented is whether a suspect in custody can invoke the right to counsel when interrogation is "imminent." This Court already denied nearly identical petitions for writs of certiorari. Petition for Writ of Certiorari, *Gupta v. Maryland*,

138 S. Ct. 201 (2017) (17-12), 2017 WL 2839358, at *9–22; Petition for Writ of Certiorari, *Pardon v. Jones*, 577 U.S. 975 (2015) (15-377), 2015 WL 13732209, at *9–23. The Court should do so again here for four reasons: (1) this Court has already settled the question presented; (2) the lower courts' decisions do not conflict; (3) custodial interrogation was not "imminent" when Petitioner referenced a lawyer; and (4) Petitioner's references to an attorney were ambiguous at best.

I. THIS COURT HAS ALREADY SETTLED THE QUESTION PRESENTED.

Whether suspects can anticipatorily invoke their right to counsel for custodial interrogation outside the actual context of a custodial interrogation is well-settled. They cannot.

Under *Miranda*, a person subjected to custodial interrogation must be advised before interrogation begins of their right to have an attorney present. 384 U.S. at 474. This Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody." *Id.* at 444. The purpose of this prophylactic safeguard is to protect the person from the "inherently compelling pressures" of custodial interrogation, "which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467. But the privilege of self-incrimination is only jeopardized "when an individual is taken into custody" and "is subjected to questioning." *Id.* at 478; *see also id.* at 477 ("The principles announced today deal with the protection which must be given . . . when the individual is first subjected to police interrogation while in custody . . . .").

If the person requests an attorney, the interrogation must cease until an attorney is present. *Id.* at 474. This Court noted that "[a]n individual need not make a pre-interrogation request for a lawyer." *Id.* at 470. But such a request "affirmatively secures his right to have one." *Id.* Statements obtained in violation of these rules must be suppressed. *Id.* at 479.

Since *Miranda*, this Court has "engaged in the process of charting the dimensions of these new prophylactic rules." *Vega v. Tekoh*, 142 S. Ct. 2095, 2103 (2022). With respect to the question presented here, the Court has done so clearly. Indeed, this Court has clarified that when a suspect invokes their right to counsel, not only must questioning cease, but the suspect can then only waive that right if counsel has been made available or the suspect initiates further communication. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). The invocation also is not limited to a particular offense or to the officers present. *Arizona v. Roberson*, 486 U.S. 675, 684 (1988).

In addition, this Court has clarified the meaning of "custodial interrogation" by specifically defining "custody" and "interrogation." *J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011); *Rhode Island v. Innis*, 446 U.S. 291, 299–302 (1980). As relevant here, "interrogation" means "express questioning" and "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 300–01. This Court again anchored its decision to the purpose of

Miranda safeguards, explaining that interrogation "must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 300.

When defendants, like Petitioner, attempted to expand *Miranda* beyond the context of custodial interrogation, this Court made it clear that, "We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991). This Court reasoned that "[m]ost rights must be asserted when the government seeks to take the action they protect against," *i.e.* the inherently compelling pressures of custodial interrogation. *Id.* The fact that invocation of the right to counsel applies to future custodial interrogation does not mean it can be invoked "outside the context of custodial interrogation, with similar future effect." *Id.*

In *Montejo*, this Court reiterated and expounded on this principle. 556 U.S. at 797. This Court stated again that, "We have in fact never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'" *Id.* (quoting *McNeil*, 501 U.S. at 182 n.3). The Court then explained that "noninterrogative types of interactions," are not governed by *Miranda* because they do not involve the inherently compelling pressures that might lead to involuntary waivers of rights. *Id.* at 795. "What matters for *Miranda* and *Edwards* is what happens when the defendant is approached for interrogation, and (if he consents) what happens during the interrogation." *Id.* at 797. "[A] defendant who

does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings." *Id.* at 794.

Therefore, the well-settled rule is that suspects can invoke their right to counsel when they are in custody and approached for interrogation. And if Petitioner was using the term "imminent" to refer to the brief moments between being approached for interrogation and the first question, that would be one thing. But that is not what Petitioner is doing. Petitioner is using the term "imminent" expansively to refer to his June 28 encounter, which occurred the day before he was actually approached for interrogation. Because Petitioner was not approached for interrogation on June 28, he could not invoke his right to counsel at that time. When Petitioner was approached for interrogation on June 29, he chose not to invoke.

That is the essence of the Minnesota Supreme Court's decision, and it is consistent with this Court's precedent. (*See* Pet. App. 11 (individuals subjected to a custodial interrogation do not need to wait for *Miranda* warnings or the first question to invoke their right to counsel); *id.* (rejecting Petitioner's proposed imminent interrogation rule, which would allow defendants to anticipate law enforcement questioning at least a day in advance if not earlier).)

II. THE LOWER COURTS' DECISIONS DO NOT CONFLICT.

Although lower courts may use different verbiage to describe the brief moments between being approached for interrogation and the first question, their holdings do not conflict. Indeed, this Court previously denied nearly identical petitions for writs of certiorari. Petition for Writ of Certiorari, *Gupta*, 138 S. Ct. 201 (No. 17-12), 2017 WL 2839358, at *9–22; Petition for Writ of Certiorari, *Pardon*, 577

U.S. 975 (No. 15-377), 2015 WL 13732209, at *9–23. Nothing has changed since this Court last considered and declined this issue in *Gupta*.

Like the *Gupta* petition, this Petition attempts to obscure the lack of conflict with voluminous string citations and isolated quotations taken out of context. (Pet. 11–16.) But when the cases are organized based on their facts and holdings, the "conflict" vanishes. Instead, lower courts consistently look for both custody and interrogation, and then apply the law accordingly.

For example, one group of cases involved forms signed by defendants while in custody. The forms anticipatorily invoked the right to counsel, but courts consistently found the invocations ineffective because the defendants were not subjected to interrogation when they signed the forms. *See, e.g.*, *United States v. Grimes*, 142 F.3d 1342, 1345, 1348 (11th Cir. 1998) (claim of rights form signed after counsel was appointed outside the context of custodial interrogation); *Alston v. Redman*, 34 F.3d 1237, 1240, 1245, 1251 (3d. Cir. 1994) (form letter signed while meeting with public defender's office "free of any interrogation, impending or otherwise"); *Commonwealth v. Bland*, 115 A.3d 854, 856, 861–62 (Pa. 2015) (defender association letter signed while merely in custody); *Ault v. State*, 866 So.2d 674, 678, 682–83 (Fla. 2003) (form signed at magistrate hearing when "he was not being interrogated, and no interrogation was imminent"); *People v. Villalobos*, 737 N.E.2d 639, 641–42 (Ill. 2000) (form signed at bond hearing with "no dispute that defendant was not subject to interrogation at that time"); *see also United States v. Wright*, 962 F.2d 953, 954 (9th

Cir. 1992) (oral invocation by appointed attorney at arraignment outside the context of custodial interrogation).

Another group of cases involved noninterrogative interactions that occurred during custodial situations. Like Petitioner, these defendants referenced a lawyer after being taken into custody but before being approached for interrogation. Like the Minnesota Supreme Court, other courts consistently found *Miranda* inapplicable due to the absence of interrogation. *See, e.g.*, *Pardon v. Sec'y, Fla. Dep't of Corr.*, 607 Fed. App'x 908, 912 (11th Cir. 2015) ("[A]lthough Petitioner was in custody when he inquired about an attorney, he was not undergoing or imminently subject to 'interrogation.'"), *cert. denied*, 577 U.S. 975 (2015); *Gupta v. State*, 156 A.3d 785, 800, 803–04 (Md. 2017) (repeated demands for a lawyer from holding cell before the interrogation began insufficient because it was outside the context of custodial interrogation), *cert. denied*, 138 S. Ct. 201 (2017); *United States v. Vega-Figueroa*, 234 F.3d 744, 748–49 (1st Cir. 2000) (statement to another arrestee during routine fingerprinting and photographing and no words or actions on the part of law enforcement that were likely to elicit his incriminating statements); *United States v. LaGrone*, 43 F.3d 332, 333, 337, 339 (7th Cir. 1994) (defendant made a limited request to consult an attorney about whether to consent to a search his business—defendant did not request an attorney "*immediately before, in response to, or during custodial interrogation*"); *State v. Appleby*, 221 P.3d 525, 548 (Kan. 2009) (references to an attorney during the book-in process ineffective, and defendant clearly waived his rights when he was approached for interrogation); *State v. Aubuchont*, 784 A.2d 1170,

1177–78 (N.H. 2001) (telling spouse to call an attorney while being arrested ineffective because "he had no expectation that imminent interrogation would commence"); *Sauerheber v. State*, 698 N.E.2d 796, 800, 802 (Ind. 1998) (requests for attorney during collection of hair, saliva, and blood ineffective because he was not being questioned).

In a third group of cases, the courts found the defendant's invocation of the right to counsel effective. But none of these cases genuinely conflict with the other cases. Unlike the other cases, the defendants in these cases invoked their right to counsel when they were both in custody and approached for interrogation. *See, e.g.*, *United States v. Santistevan*, 701 F.3d 1289, 1291, 1293 (10th Cir. 2012) (defendant invoked when he was in jail and approached by FBI agent for interrogation); *United States v. Kelsey*, 951 F.2d 1196, 1199 (10th Cir. 1991) (defendant was arrested in his house, and the record was "clear" that the police were going to question him on the spot); *State v. Hambly*, 745 N.W.2d 48, 52–53, 59 (Wis. 2008) (detective made it clear that he was approaching the defendant because he personally intended to question him); *State v. Torres*, 412 S.E.2d 20, 26 (N.C. 1992) (defendant was in conference room at the sheriff's department awaiting impending interrogation).

A final group of cases are simply not relevant to the issue in this case. *See, e.g.*, *Abela v. Martin*, 380 F.3d 915, 925–26 (6th Cir. 2004) (undisputed that the defendant was subjected to custodial interrogation when he referenced an attorney, so the issue was whether defendant unequivocally invoked); *United States v. Rambo*, 365 F.3d 906, 910 (10th Cir. 2004) (issue was whether the officer's statements to

defendant were likely to elicit incriminating response); *United States v. Garcia Abrego*, 141 F.3d 142, 168 n.14 (5th Cir. 1998) (imminence issue not properly raised and, in any event, the defendant was in Mexico in the custody of Mexican authorities when he referenced an attorney); *Barnett v. State*, 2013 WL 7155560, at *1–2 (Nev. 2013) (unpublished decision about right to silence); *State v. Bradshaw*, 457 S.E.2d 456, 465 (W.Va. 1995) (issue was whether the defendant unambiguously invoked during custodial interrogation); *Russell v. State*, 215 S.W.3d 531 (Tex. App. 2007) (not a state court of last resort).

In sum, the lower courts' decisions do not conflict. Rather, courts have consistently applied this Court's precedent to the facts before them by carefully examining whether the suspect's invocation occurred in the context of custodial interrogation. A writ of certiorari is not warranted under these circumstances. *See, e.g.*, *Gupta*, 138 S. Ct. at 201; *Pardon*, 577 U.S. at 975.

III. CUSTODIAL INTERROGATION WAS NOT "IMMINENT" IN ANY SENSE OF THE WORD WHEN PETITIONER REFERENCED A LAWYER.

To create a conflict, Petitioner attempts to recast this case as being about imminent interrogation rather than noninterrogative interactions. Petitioner does so by asserting that "there is no dispute that custodial interrogation was imminent when Petitioner requested an attorney." (Pet. 17.) Petitioner also claims that "he requested counsel immediately before the detectives intended to question him." (*Id.*)

Petitioner mischaracterizes both the facts and the State's position. Interrogation was not ongoing or imminent when Petitioner referenced a lawyer. So

even if a genuine conflict existed about boundaries of imminent interrogation, this case would be a bad vehicle to address it.

When Petitioner referenced a lawyer during the June 28 encounter, custodial interrogation was not "imminent" under any reasonable definition of the word. *See, e.g.*, American Heritage College Dictionary 693 (4th ed. 2004) (defining "imminent" as "[a]bout to occur"). The record is clear that the detectives had no intention of questioning Petitioner on June 28 because "[h]is behavior was irrational" and he seemed "impaired" by drugs or alcohol. In addition, none of the officers present during Petitioner's June 28 detention asked him any questions about the fire or the deceased. The officers also did not use any words or take any actions that were likely to elicit an incriminating response.

In fact, Petitioner was not approached for custodial interrogation until the evening of June 29, nearly a full day after his detention. And because custodial interrogation was imminent at that time, the detectives provided *Miranda* warnings. Petitioner ultimately decided to waive his *Miranda* rights and speak with the officers.

Both the district court and the Minnesota Supreme Court determined that, under these circumstances, Petitioner was not subjected to custodial interrogation on June 28. Petitioner's suggestion that this case would have come out differently in another court is implausible. To the contrary, two strikingly similar cases came out exactly the same way. *See Pardon*, 607 Fed. App'x 908, *cert. denied*, 577 U.S. 975; *Gupta*, 156 A.3d 785, *cert. denied*, 138 S. Ct. 201.

In *Pardon*, the defendant asked the arresting officer if he could talk to an attorney. 607 Fed. App'x at 909. The arresting officer told the defendant that he would have to "worry about that later." *Id.* The arresting officer did not interrogate him. *Id.* Three hours after being arrested, a detective approached the defendant for interrogation. *Id.* The detective read the defendant his *Miranda* rights, and the defendant disavowed any desire to speak to an attorney at that time. *Id.* The Eleventh Circuit, like the Minnesota Supreme Court, held that the defendant could not invoke the right to counsel during a noninterrogative arrest. *Id.* at 912.

In *Gupta*, the defendant made repeated demands for a lawyer while in a holding cell awaiting interrogation. 156 A.3d at 800–01. As in *Pardon* and this case, Maryland's highest court held that the defendant could not invoke his right to counsel because his demands were outside the context of custodial interrogation. *Id.* at 804. The court also noted that interrogation was not imminent "in any sense of the word" because the defendant was interrogated "a full three hours" after he made his demands. *Id.* at 803–04.

The gap between Petitioner's detention and interrogation was significantly longer than the three-hour gaps in *Pardon* and *Gupta*. Petitioner's case also stands in stark contrast to the situations where a handful of courts have found interrogation to be sufficiently imminent. *Cf. Santistevan*, 701 F.3d at 1291, 1293 (defendant invoked when approached by FBI agent for interrogation); *Kelsey*, 951 F.2d at 1199 (defendant was arrested in his house, and the record was "clear" that the police were going to question him on the spot); *Hambly*, 745 N.W.2d at 52–53, 59 (detective made

it clear that he was approaching the defendant because he personally intended to question him); *Torres*, 412 S.E.2d at 26 (defendant was in conference room at the sheriff's department awaiting impending interrogation).

In short, Petitioner's case is nowhere near the boundaries of "imminent" custodial interrogation. This case is therefore a bad vehicle to consider the question presented.

IV. PETITIONER ALSO DID NOT CLEARLY AND UNEQUIVOCALLY INVOKE THE RIGHT TO COUNSEL.

To invoke the right to counsel, Petitioner had to "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994). Petitioner inaccurately claims that "[t]he record is clear" that he invoked his right to counsel. (Pet. 17.) The parties have disputed both what Petitioner said and its meaning. Petitioner argued below that he said, "Where's my lawyer, I'm dumbing up." (Pet. Minn. Br. 22.) He claimed "dumbing up" obviously meant "not speaking to law enforcement." (*Id.* at 23.) The State, in contrast, argued that he said, "Where's my lawyer, I'm dummying up," but either way it was a nonsensical statement by someone under the influence of drugs or alcohol. (Resp. Minn. Br. 19–20.)

In any event, the Minnesota Court of Appeals correctly held that Petitioner's references to a lawyer were not clear invocations of the right to counsel because they were "mere outbursts" amid "belligerent and agitated behavior," they were "vague," and they were phrased as "questions, not requests." (Pet. App. 21–22.) Going beyond

the requirements of *Davis*, the Minnesota Court of Appeals also held that, to the extent the statements were ambiguous, law enforcement "responded appropriately" by clarifying Petitioner's intentions through an accurate *Miranda* warning and voluntary waiver on June 29. (*Id.* at 22.) Therefore, certiorari is unwarranted because the judgment is supported by an independent basis.

CONCLUSION

For all these reasons, the State of Minnesota respectfully requests that this Court deny the petition for a writ of certiorari.

Dated: June 1, 2023

Respectfully submitted,

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