CAPITAL CASE

No. 2_-____

In the Supreme Court of the United States

KYLE T. FLACK,

Petitioner

v.

STATE OF KANSAS,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Miranda v. Arizona*, the Court announced prophylactic rules deemed necessary to safeguard the Fifth Amendment privilege against self-incrimination, including an individual's "right to cut off questioning" during custodial interrogation. 384 U.S. 436, 474 (1966); *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975). Since then, the Court has reiterated that whether a suspect unambiguously invoked his *Miranda* rights requires an "objective inquiry." *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010); *Davis v. United States*, 512 U.S. 452, 459 (1994); *see also Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) ("Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous."). And yet, lower courts remain deeply divided on how and when an individual invokes "the right to cut off questioning," and whether speculation into an individual's subjective motivations may render a plain *Miranda* invocation ambiguous. The questions presented are:

1. During a custodial interrogation, may police ignore an individual's repeated and unambiguous demands to "cut off questioning"?

2. May speculation into an individual's subjective motivations provide the context that renders an otherwise plain *Miranda* invocation ambiguous?

PARTIES TO THE PROCEEDING

Petitioner is Kyle T. Flack. Respondent is the State of Kansas. Neither party is a corporation. Rule 29.6.

RELATED PROCEEDINGS

Kansas Supreme Court:

State v. Kyle T. Flack, 541 P.3d 717 (Kan. 2024).

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PETITION FOR WRIT OF CERTIORARI

Petitioner Kyle T. Flack respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court.

INTRODUCTION

This case presents two unsettled questions of national importance: (1) during a custodial interrogation, may police ignore an individual's repeated and unambiguous demands to "cut off questioning"?; and (2) may speculation into an individual's subjective motivations provide the context that renders an otherwise plain *Miranda* invocation ambiguous?

A deep divide exists amongst lower courts over whether and how *Miranda*'s right-to-cut-off-questioning applies when an individual unambiguously demands that his interrogation end but when his request does not invoke the individual's right to silence or counsel. Some courts of last resort recognize individuals may invoke the right to cut off questioning independently of the right to silence or counsel, and analyze whether an individual's purported invocation unambiguously communicated a desire to terminate questioning. The Kansas Supreme Court in this case, however, aligned itself with other state courts of last resort, which hold that the right to cut off questioning may be invoked only in those instances where an individual unambiguously invokes his right to silence or counsel. Unless and until this Court clarifies that *Miranda* and its progeny prevent police from continuing to interrogate

an individual who has unambiguously expressed his desire that the interrogation end, the breadth of the constitutional safeguards protecting one's right against self-incrimination depends wholly upon his location, and courts remain free to abrogate *Miranda*'s core protections, as the Kansas Supreme Court did in this case.

Likewise, a deep division amongst federal and state high courts exists over when it is appropriate for courts to evaluate the context of an individual's otherwise plain *Miranda* invocation. This Court has repeatedly held that evaluating whether a suspect has unambiguously invoked his rights under *Miranda* is an "objective inquiry." *Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) (quoting *Davis v. United States*, 512 U.S. 452, 458-59 (1994)). And, in accordance with this precedent, one line of cases expressly reject the notion that ambiguity can arise from the context of an otherwise unambiguous invocation. In these cases, an accused's subjective motivation for invoking *Miranda* has no relevance to the inquiry of whether the accused's words, on their face, unambiguously invoked *Miranda*. In stark contrast, in this case, the Kansas Supreme Court joined an increasing number of courts which speculate into an accused's subjective motivations for invoking *Miranda* to provide the context that renders an otherwise plain invocation ambiguous. Unless and until this Court clarifies that, with regard to *Miranda* invocations, speculation into an accused's possible subjective motivations is irrelevant, courts remain free to severely restrict the constitutional safeguards upholding the privilege against self-incrimination.

This case presents an ideal vehicle for reaching both questions presented, which address open divisions amongst federal and state courts on crucial issues affecting the scope of the Fifth Amendment's privilege against self-incrimination and the safeguards necessary to protect it. The case comes to this Court on direct appeal from a death sentence, unencumbered by the procedural complexities commensurate with a case at a later stage of review. The Kansas Supreme Court examined on an undisputed record whether Mr. Flack unambiguously invoked *Miranda*, and the admission of his statements greatly impact the outcome of Mr. Flack's case, and life. The petition for a writ of certiorari should be granted.

OPINIONS BELOW

The opinion of the Kansas Supreme Court is reported at 541 P.3d 717, Petition Appendix at 1a-88a ("App.").

JURISDICTION

The Kansas Supreme Court affirmed Mr. Flack's convictions and sentence on January 19, 2024, and denied his motion for rehearing on May 29, 2024. On August 7, 2024, Justice Gorsuch extended the time to file a petition for a writ of certiorari to September 26, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the United States Constitution are reproduced in the appendix. App.91a-95a.

STATEMENT OF THE CASE

A. Factual Background

Police arrested Mr. Flack in May 2013 while investigating the death of three adults and searching for a missing child. App. 4a. At approximately 3:30 a.m., police read Mr. Flack his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), which included the warning that Mr. Flack "c[ould] decide at any time to exercise his rights and [] not answer any questions or make any statements[.]" App. 4a, 14a. Mr. Flack agreed to speak with the police. App. 4a-5a, 14a. Over the hours that followed, police interrogated Mr. Flack, recording the entirety of the encounter. App. 4a-5a. The parties agree the video and transcript accurately reflect what transpired. App. 16a.

As the interrogation progressed and became increasingly heated, Mr. Flack attempted numerous times to end the questioning. He repeatedly gestured to the handcuffs he had worn during his arrest, asked police to put them back on him, and to take him to jail. As shown below, he made ten requests to terminate the encounter.

After the police told Mr. Flack that certain details of his story did not match what other witnesses had reported, Mr. Flack responded that he had told the truth, requested that police put him back in handcuffs, and asked where police would take him: "All right, whatever. So apparently we're at a stalemate so do I put these back on and you take me somewhere or what's the deal?" App. 18a, 98a.

In response, police continued to question Mr. Flack: "Well I'm hopin' you'll tell me what the hell happened out there." App. 98a. Mr. Flack insisted he had no further information. App. 98a. But the police continued to pressure him, telling Mr. Flack that he knew what happened to the victims and the missing child; that they knew he was present and at least partially responsible. App. 99a. Mr. Flack denied the allegations, and, for the second time, demanded police put him in handcuffs and take him to jail:

> I didn't do it at all. Think I'd kill my fuckin' friends? Then add some fuckin' baby, *take me to jail*. Y'all ain't – nah, fuck this, man. *Put these motherfuckers on me, take me where you need to* [], do your fuckin' business. But I didn't kill my fuckin' friends. I didn't kill them fuckin' people and I didn't fuckin' take no baby.

App. 18a, 99a (emphases added). The police did not stop the questioning, leading Mr. Flack to request for the third time that police handcuff him:

Detective: Then who do we need to talk to?

Mr. Flack: How the fuck should I know? You're the police. Do your fuckin' job. Put her fucking face on the fuckin' news all the – we got fuckin' red tape. That baby shoulda hit the fuckin' news the minute you found out she was fuckin' – somebody had questioned it. You should had fuckin' –

Detective: Where would we go to find her?

Mr. Flack: How the fuck should I know?

Detective: 'Cause you're the only one that does.

Mr. Flack: *You know what? Put these on.*

Detective: You're the only –

Mr. Flack: Hey – no –

Detective: —one that knows.

App. 19a-20a, 99a-100a (emphasis added). Mr. Flack continued to deny knowing the child's whereabouts, and demanded for the fourth time that the officers quit: "I don't fuckin' know. Goddamn, quit –" App. 19a-20a, 99a-100a.

But the police continued to question Mr. Flack. Exasperated, he told police that he had no additional information and asked for the fifth time to end the interrogation, specifically for police to handcuff him and take him to jail:

> **Mr. Flack:** I don't fuckin' know. You know what? *Wrap these up, take me to fuckin' jail because obviously you're just gonna keep fuckin' goin'* so I can't give you information I don't fuckin' have so do what you do.

App. 20a, 102a (emphasis added). But the police continued badgering Mr. Flack as if he had said nothing, leading Mr. Flack to demand, "take me to jail," five times in quick succession:

> **Mr. Flack:** *[F]uckin' take me to jail, charge me, whatever*, I – we done sat here and fuckin' talked about it, okay? It's that simple.
>
> **Detective**: So you're gonna leave [L.B.] out there for nobody to freakin' find? . . . . Okay what do they drive?
>
> **Mr. Flack**: *Take me to jail.*
>
> **Detective**: What do they drive?

Mr. Flack: Drive – *take me to jail.* You – you're –

Detective: What are their phone numbers?

Mr. Flack: *Take me to jail.*

Detective: Kyle, this is your opportunity to help yourself . . . . Who do you deliver for?

Mr. Flack: *Take me to jail***.** I'm there, I'm fuckin' doin' death row than fuckin'—

App. 21a-23a, 103a-107a (emphases added). Following Mr. Flack's eighth request to terminate the encounter, police remained silent for several seconds before resuming their questioning. App. 74a. Following Mr. Flack's tenth request to terminate the interrogation, he put his head down on the table to signal an end to the interview. App. 74a. Police did not end the interview, and instead responded: "Okay. Kyle, let's help yourself, okay?" App. 21a-23a, 103a-107a.

Mr. Flack began to cry. App. 107a. He then implicated himself in the homicides, stating he shot one victim, he witnessed others committing the remaining homicides, and he assisted in disposing of evidence. App. 6a-10a.

B. Procedural History

The trial court held two pre-trial hearings on the admissibility of Mr. Flack's statements. The first concerned the statements' admissibility at the preliminary hearing, and the second, their admissibility at trial. App. 13a-15a. The parties

established the facts surrounding Mr. Flack's arrest and questioning, and the timing of the *Miranda* warnings at the first hearing. At the second, the trial judge read the transcript from the first hearing, and a transcript of the interrogation. (R. 16, p. 4).

The hearings centered on whether Mr. Flack invoked his right to counsel during the interrogation and whether he gave his statements voluntarily. App. 14a-15a. The trial court held that Mr. Flack never unambiguously invoked his right to counsel and that his statements were voluntary. App. 15a. Neither the parties nor the trial court addressed Mr. Flack's repeated requests to terminate the interrogation. App. 15a. The trial court granted Mr. Flack a continuing objection to the admission of his statements; counsel also objected contemporaneously to the admission of Mr. Flack's statements at trial, and again at the close of the prosecution's evidence. (R. 16, p. 98-99, 101-104; R. 46, p. 2575, 2593-95, 2607-09; R. 47, p. 2664, 2712-13; R. 56, p. 5007).

During trial, the jury viewed the recording of Mr. Flack's interrogation, which the court admitted into evidence, and the State heavily relied on Mr. Flack's statements as a basic blueprint for how the victims died, arguing that the homicides occurred much as Mr. Flack had described them, except that he was solely responsible for each of the murders. App. 11a. The State again relied on Mr. Flack's statements to argue that the jury should impose the death penalty. App. 12a. The jury convicted Mr. Flack of first-degree murder and capital murder and unanimously agreed to impose the penalty of death. App. 12a-13a.

Majority Opinion

On direct appeal to the Kansas Supreme Court, Mr. Flack argued that his repeated demands that police "take [him] to jail" required officers to end the interrogation and "cut off questioning" under *Miranda*. Although the trial court had not addressed Mr. Flack's "take me to jail" invocations, the Kansas Supreme Court considered the merits of the argument as asserted error in a capital case. App. 13a, 15a. It found review possible because the issue arose on undisputed facts preserved by a video recording and transcript of the interrogation. App. 13a, 15a.

The Kansas Supreme Court held that the district court did not error by admitting Mr. Flack's statements because the "statements did not unambiguously and unequivocally assert his right to silence." App. 23a-24a. The court determined that Mr. Flack's repeated demands to be taken to jail could have been "an expression of frustration and anger," a "recognition of his difficult predicament," or a "negotiat[ion] tactic," and because his statements were open to "multiple interpretations," it "render[ed] his communications unclear." App. 18a-23a.

Dissenting Opinion

Justice Evelyn Wilson dissented, finding Mr. Flack's final four "take-me-to-jail" requests together unambiguously invoked *Miranda*, requiring police to terminate the interrogation. App. 71a. Justice Wilson recognized that the law requires courts to evaluate invocations using an objective standard, which asks what a reasonable officer would have understood the accused to have said, rather than a

subjective standard that examines what the officers did understand. She concluded that when Mr. Flack "repeated his precise request to be taken to jail over and over," that such "exact repetition" could not fairly be viewed "as anything other than an attempt to terminate the conversation." App. 71-72a, 78a. Justice Wilson criticized the majority for undermining *Miranda* "by penalizing [Mr.] Flack for failing to utter the proper incantation – despite his repeated, clear requests that the detectives take him to jail, which would necessarily [have] terminate[d] the interview." App. 88a.

REASONS FOR GRANTING THE PETITION

In *Miranda v. Arizona*, the Court pronounced prophylactic rules deemed necessary to safeguard the Fifth Amendment privilege against self-incrimination, including an individual's "right to cut off questioning" during custodial interrogation. 384 U.S. 436, 474 (1966); *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975) ("Through the exercise of [an accused's] option to terminate questioning, he can control the time at which the questioning occurs, the subjects discussed, and the duration of the interrogation."). In *Davis v. United States*, 512 U.S. 452, 459 (1994), this Court held that determining whether an individual unambiguously invoked his rights under *Miranda* requires an objective inquiry, which examines whether the accused "articulate[d] his desire to [invoke his rights] sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be [an invocation]." *See also Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) ("Interpretation is only required

where the defendant's words, understood as ordinary people would understand them, are ambiguous.").

The Kansas Supreme Court's decision in Mr. Flack's case runs afoul of *Miranda*, *Berghuis*, *Davis,* and *Barrett*. The Kansas Court nullified an accused's right to cut off questioning—a safeguard deemed constitutionally necessary by this Court—by considering only whether Mr. Flack's repeated requests "take me to jail" unambiguously invoked his right to remain silent, and not whether a reasonable officer under the circumstances would have understood Mr. Flack's unambiguous invocation of the right to cut off questioning.

Further, the decision below speculated as to Mr. Flack's potential subjective motivations for attempting to terminate the encounter, concluding that they provided context that rendered his requests "take me to jail" ambiguous, and therefore insufficient to invoke *Miranda*. This reasoning violated this Court's directive that courts must assess invocations using an objective inquiry, and that interpretation is unnecessary unless the language is ambiguous on its face.

The Kansas Supreme Court's erroneous reasoning on both accounts cannot be squared with this Court's jurisprudence. Yet, the decision below joins open divisions amongst federal and state high courts on both issues. A split exists amongst lower courts on whether police may ignore an accused's plain attempt to end an interrogation if the attempt did not invoke the right to silence or counsel. Likewise, a split amongst lower courts exists as to whether an accused's subjective motivations

for attempting to end an interrogation provides "context" that can render otherwise plain words ambiguous. As a result, significant confusion exists in the lower courts over how to analyze a suspect's unambiguous request to terminate an interrogation, and if and when courts may consider any subjective criteria within the objective-inquiry analysis. This Court should grant certiorari to clarify the correct standards for evaluating *Miranda* invocations, and to harmonize Fifth Amendment law on these issues of fundamental importance.

I. Police violated Mr. Flack's "right to cut off questioning" by ignoring his repeated, unambiguous attempts to end the interrogation, and the Kansas Supreme Court erred by holding otherwise

Miranda and its progeny definitively established an individual's "right to cut off questioning" when subjected to custodial interrogation. *Miranda*, 384 U.S. at 474; *Mosley*, 423 U.S. at 103-04. But courts disagree over whether an individual may invoke this right independently of the rights to silence or counsel—a question this Court has yet to squarely address.

Nonetheless, this Court's jurisprudence compels the conclusion that "the right to cut of questioning" guarantees a suspect the right to end an interrogation that is broader than and distinct from his right to silence or counsel. Instead, the right to cut off questioning is, in the Court's own words, one of the "power[s]" *Miranda* safeguarded for the individual, which permits him "to exert some control over the course of the interrogation." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). The Court safeguarded this right to counteract 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." *Miranda*, 384 U.S. at 467. Permitting police to continue badgering an individual who unambiguously requests to end a custodial interrogation violates the letter and spirit of *Miranda*.

A. *Miranda* and its progeny make clear that police must terminate a custodial interrogation when an individual unambiguously invokes the right to cut off questioning.

Whether police may continue a custodial interrogation of an individual who unambiguously invokes his right to "cut off questioning" (*i.e.*, to end the interrogation) when that request does not directly invoke the right to silence or counsel presents an issue of first impression for this Court. This Court's jurisprudence and *Miranda*'s history lead to the conclusion that the Kansas Court's decision here—which narrowed the right to cut off questioning to only those instances involving an unambiguous request to remain silent or to counsel—is wrong.

In *Miranda,* the Court recognized "that without proper safeguards," custodial interrogation "contains inherently compelling pressures which work to undermine [an] individual's will to resist and to compel him to speak where he would not otherwise . . . ." 384 U.S. at 467. Accordingly, "to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination," *id.*, the Court "adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights from the government 'compulsion, subtle or otherwise,' that 'operates on the individual to overcome free choice in producing a statement[.]'" *Barrett*, 479 U.S. at

528 (quoting *Miranda*, 384 U.S. at 474). Thus, before police may obtain a custodial statement from an individual for later use at trial, they must inform the individual of certain rights, and must follow certain procedures once the individual invokes his rights. *Miranda*, 384 U.S. at 444-45, 473-74. For instance, *Miranda* requires police to terminate the custodial interrogation of an individual following his request to remain silent or for counsel. *Id.*

But to adequately safeguard the fundamental Fifth Amendment privilege against self-incrimination, *Miranda* also recognized "the right to cut off questioning." *Id.* at 474. The history behind the inclusion of this language is enlightening. While Chief Justice Warren's draft opinion of *Miranda* commanded police to cease questioning following a custodial suspect's invocation of the right to silence or counsel, it did not state that an accused had the "right to cut off questioning." Laurent Sacharoff*, Miranda's Hidden Right*, 63 Ala. L. Rev. 535, 551 (2012) (citing Draft Opinion of Chief Justice Earl Warren, at 31, *Miranda*, 384 U.S. 436 (May 9, 1966) (Nos. 584, 759-610) (unpublished draft opinion on file with the Library of Congress)).

After Chief Justice Warren circulated the draft opinion, however, Justice Brennan suggested changes, noting that "a problem" that "appears" is whether the "right to silence" means merely a right not to answer questions, or additionally, a right to control the course of questioning. Letter from William J. Brennan, J., U.S. Supreme Court, to Earl Warren, C.J., United States Supreme Court, at 16 (May 11, 1966) (hereinafter J. Brennan's Letter), https://www.loc.gov/static/research-

centers/law-library-of-congress/images/lib-guides/miranda/william-j-brennan-memorandum-to-earl-warren.pdf. Justice Brennan recognized that the draft opinion emphasized the right to control questioning as a necessary safeguard to protect the accused, and questioned why an accused would not be told such: "the accused must be told only that he need not answer[;] should he not be told of his full power?" J. Brennan's Letter, at 16. In response to Justice Brennan's critique, Chief Justice Warren's law clerks agreed that "the individual has a right to call off the interrogation," but advised against including this right in the required warnings because it differed from the FBI warnings on which it had based *Miranda*'s language. Sacharoff*, Miranda's Hidden Right*, 63 Ala. L. Rev. at 552 (quoting Memorandum from Jim Hale et al., Law Clerks for Chief Justice Earl Warren, Supreme Court of the United States, to Chief Justice Earl Warren, Supreme Court of the United States (May 13, 1966) (on file with the Library of Congress)).

Ultimately, the *Miranda* court clarified that the accused has the "right to cut off questioning," and acknowledged that without this "right," "the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." 384 U.S. at 474; *see also Moran*, 475 U.S. at 426 (acknowledging that to counter the coercive pressures of a custodial interrogation, *Miranda* gave "the *defendant* the power to exert some control over the course of the interrogation.") (emphasis in original).

Miranda thus enshrined an individual's power to end a custodial interrogation by invoking his right to silence, right to counsel, or right to terminate the interview itself: if the individual "indicates in any manner that he does not wish to be interrogated, the police may not question him." 384 U.S. at 445.

The Court reemphasized the right to cut off questioning in *Mosley*. 423 U.S. at 103-04. While *Mosley* addressed when police may constitutionally resume questioning an accused who unambiguously invoked his right to silence, the Court stressed the right to terminate questioning was the "critical safeguard" at issue:

> Through the exercise of [an accused's] option to terminate questioning, he can control the time at which the questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of *that option* counteracts the coercive pressures of the custodial setting.

Mosley, 423 U.S. at 103-04 (emphasis added). *Mosley* thus highlights key differences between the rights to silence and to terminate questioning. The right to silence gives an individual the power to not speak in response to police interrogation, whereas the right to terminate questioning permits the accused to control when police question him, for how long, and on what topics.

Since *Mosley*, the Court has clarified how individuals must invoke the rights to counsel or silence to require police to cease a custodial interrogation. *Berghuis*, 560 U.S. at 381-82; *Davis*, 512 U.S. at 458-59. But nothing in those precedents abrogate the right to cut off questioning, or narrow the breadth of the right to only those instances where an individual invokes his right to silence or counsel. The Court

granted individuals the right to cut off questioning as a constitutional standard necessary to protect the privilege against self-incrimination; individuals must be able to invoke the right independent from the rights to remain silent or to counsel. *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984) (noting that *Miranda* adopted constitutional standards for protection of the privilege); *see also Eagle v. Lumpkin*, 33 F.4th 783, 792-93 n.34 (5th Cir. 2022) ("The *Miranda* Court made clear that the right to terminate police questioning is of a constitutional dimension (even though the police are not required to warn the defendant that he has such a right).")

B. An untenable schism exists amongst lower courts over whether an unambiguous invocation of the right to cut off questioning requires police to terminate a custodial interrogation.

Despite the wealth of authority acknowledging that *Miranda* established the "right to cut off questioning," a sharp divide exists amongst courts over whether and how that right applies when an individual unequivocally requests to end an interrogation, but the request does not invoke the right to counsel or silence.

1. Some courts find a defendant's statements inadmissible at trial where police fail to terminate an interrogation following an accused's unambiguous request to cut off questioning, regardless of whether the accused separately invoked the right to silence or to counsel. *See, e.g., Burket v. Commonwealth,* 450 S.E.2d 124, 132 (Va. 1994) (finding defendant did not invoke his "right to remain silent *or* his right to terminate questioning") (emphasis added); *State v. Bradford*, 484 S.E.2d 221, 228 (W. Va. 1997) ("To assert the *Miranda* right to terminate police interrogation, the words

or conduct must be explicitly clear that the suspect wishes to terminate all questioning . . . ."); *Day v. State*, No. 04-22-00494-CR, 2024 WL 3054814, at *3 (Tex. App. June 20, 2024) (applying *Ramos* post-*Berghuis*, and holding that an accused has invoked *Miranda* if he unambiguously requests "to terminate the interview or to invoke the right to silence."); *see also Eagle*, 33 F. 4th at 792-93 n.34 (recognizing the distinct "right to terminate police questioning" as one of "constitutional dimension").

Under this line of cases, when the suspect says "take me home," or "take me to jail," or "I'm done," the court analyzes whether the statement clearly and unequivocally communicated a desire to terminate questioning. *See, e.g., People v. Villasenor*, 242 Cal. App. 4th 42, 64-66, 69 (2015) (finding juvenile defendant who asked to be taken home 13 times in the span of 14 minutes "meant to invoke his right to end the interrogation"; describing test as whether the accused "unambiguously demanded that the interrogation end" and holding that "[b]ecause the interrogation continued despite defendant's repeated unambiguous demands for it to end, his *Miranda* right to cut off questioning was violated."); *People v. Grey*, 975 P.2d 1124, 1130 (Colo. App. 1997) (remanding case for lower court to consider "whether a reasonable police officer would understand the [accused's] statement and conduct at issue to be an unequivocal and unambiguous assertion of the right to terminate questioning" when accused told interrogators he was "tired of them fucking with him" and police prevented him from leaving).

2. Another line of cases hold that an individual may invoke the right to cut off questioning *only* by unambiguously invoking the right to silence or counsel. *See*, *e.g.*, *Garcia v. Long*, 808 F.3d 771, 777 (9th Cir. 2015) ("[T]he suspect's right to cut off police questioning is triggered only when the suspect *unambiguously and unequivocally* invokes it, by invoking either the right to remain silent or the right to counsel.") (emphasis in original); *State v. Clifton*, 892 N.W.2d 112, 132 (Neb. 2017) ("To invoke the right to cut off questioning, the suspect must articulate his or her desire with sufficient clarity such that a reasonable police officer under the circumstances would understand the statement as an invocation of the *Miranda* right to remain silent.").

Under this line of cases, a second rift emerges. Some courts conclude that an individual's repeated statements that he wants to go home or that officers should take him to jail do not require police to stop badgering him because such statements do not specifically invoke the right to silence or counsel. *See, e.g., DeWeaver v. Runnels*, 556 F.3d 995, 1002 (9th Cir. 2009) (finding reasonable officer would not have understood accused's request to be taken back to jail as an invocation of the right to silence); *Bullitt v. Commonwealth*, 595 S.W.3d 106, 117 (Ky. 2019) ("Bullitt's statement about being taken to jail did not clearly communicate to the officer that he wanted to remain silent or that he did not want to talk with police"); *State v. Waloke*, 835 N.W.2d 105, 112 (S.D. 2013) ("Waloke's statements that she wanted to go home or that officers should just take her to jail were not unequivocal or unambiguous

requests to stop the interrogation. Waloke did not say that she wanted to remain silent or did not want to speak with police anymore."); *Clark v. State*, 808 N.E.2d 1183, 1190 (Ind. 2004) (police did not violate accused's *Miranda* rights by continuing to question him after he repeatedly requested that police "send [him] across the street [to jail]," because he "did not expressly invoke his right to remain silent, or request an attorney."); *Commonwealth v. Durand*, 59 N.E.3d 1152, 1161 (Mass. 2016) (finding that reasonable police officer under the circumstances would not have understood statements by accused that he "[couldn't] take any more of this" and that he "want[ed] to go home and . . . go to bed" to be "invocation[s] of the right to silence.").

Conversely, other courts conclude that attempts to terminate an interrogation such as "take me to jail," or "take me home," *do* unambiguously invoke the right to silence because a request to terminate an interview necessarily encompasses a request to remain silent. *See, e.g.*, *Dorsey v. United States*, 60 A.3d 1171, 1189 n. 27, 1200 (D.C. Cir. 2013) (holding that by "asking to be taken back to the cellblock 'now,' after having made several similar requests in the proceeding hour" accused "did all he needed to do to invoke his right to end the interrogation and remain silent."); *State v. DeJong*, 845 N.W.2d 864, 874 (Neb. 2014) (holding statements by accused that she was done, tired, and wanted to go sleep invoked her right to remain silent and required police to terminate questioning); *Devineу v. State*, 112 So.3d 57, 77-78 (Fla. 2013) (holding that suspect's repeated iterations of "I'm done. I'm ready to go home. Can I leave?," along with standing up and attempting to leave, indicated "his desire

to end questioning" and therefore constituted a "vociferous invocation of his right to remain silent.")

Only this Court can resolve the mass confusion amongst lower courts on these two interrelated issues: (1) whether an individual may invoke the right to cut off questioning independently of the rights to silence or counsel; and (2) whether statements by an accused that unambiguously indicate a desire to end interrogation—such as "take me to jail" or "take me home"—require police to cut off questioning. Presently, an individual's location determines whether police must cease badgering him, and whether subsequent statements obtained can be used against him. Such uncertainty over the breadth of protections afforded the privilege against self-incrimination is untenable.

C. Intervention by the Court is necessary to effectuate *Miranda*'s core protections, which police threaten by continuing to interrogate an individual who has asked them to stop.

Moreover, intervention by the Court is necessary to effectuate *Miranda*'s core protections. If an individual subjected to custodial interrogation uses plain words that convey a desire to end the interview, and yet, police may continue to badger that individual, *Miranda*'s guarantee that suspects be free to determine whether and when they will submit to custodial interrogation has been violated.

Indeed, it makes little sense to acknowledge that individuals have the right to terminate a custodial interrogation while frustrating a direct invocation of that right. To recognize only invocations of the right to silence or counsel as invocations of the

right to terminate questioning would "play[] a strange linguistic trick on suspects: to end questioning, to assert one right [the right to terminate questioning], [they] must unambiguously invoke another right [the right to counsel or silence]. [They], lay [people], must understand . . . that the words 'remain silent' actually mean 'police stop questioning.'" Laurent Sacharoff, Miranda, Berghuis, *and the Ambiguous Right to Cut Off Police Questioning*, 43 N. Ky. L. Rev. 389, 390 (2016). This defies logic, while allowing police and courts alike to ignore clear attempts by individuals subjected to custodial interrogation to exert control over those interrogations: the very thing *Miranda* intended that they be able to do.

Additionally, clarification that an individual's unambiguous assertion of his desire to end a custodial interrogation requires police to cease questioning would provide criminal-legal-system actors the type of bright-line rule this Court favors in the Fifth-Amendment-invocation context. *Arizona v. Roberson*, 486 U.S. 675, 681-83 (1988) ("We have repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* and *Miranda*.") (citing cases). Indeed, "[a] requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that avoids difficulties of proof and . . . provides guidance to officers on how to proceed in the face of ambiguity." *Berghuis*, 560 U.S. at 381-82 (quoting *Davis*, 512 U.S. at 458-59) (internal citations and punctuation omitted).

And a bright-line rule is called for here, when, in the absence of definitive guidance by the Court, lower courts increasingly examine an accused's subjective

motives for invoking his rights. In the absence of clarity on whether oft-seen phrases like "Take me to jail," or "Take me home," which plainly indicate an individual's desire to cut off questions, law enforcement and courts may speculate whether the accused sought to end the interrogation because he desired to remain silent, or for some other purpose.

But, as the Alaska Supreme Court cogently recognized, attempting to discern an individual's motives for invoking *Miranda* threatens its guarantees:

> The bright line rules articulated by *Miranda* and its progeny exist precisely because it is inappropriate to require the police to make difficult judgment calls about a defendant's underlying motivations for invoking his rights. It will not always be apparent whether a suspect is attempting to cut off questioning to prevent self-incrimination; or because he is emotional, tired, angry, confused, frightened, or overwhelmed; or because of a combination of reasons. And the cost of clarification is simply too great: Not only would inquiry into a suspect's motivations prove a quagmire for police interrogators, but it would radically diminish *Miranda's* protections.

Munson v. State, 123 P.3d 1042, 1049 (Alaska 2005). Clarifying that police may not continue to question a suspect who unequivocally indicates that he wants the interrogation to end would eliminate the need for any subjective speculation. Rather, "a statement either [would be] an assertion of the right . . . or it [would] not." *Smith v. Illinois,* 469 U.S 91, 97-98 (1984) (*per curiam*).

D. Intervention by the Court is also necessary to correct the Kansas Supreme Court's evisceration of the "right to cut off questioning," which culminated in this death penalty case.

The Kansas Court's decision has narrowed the breadth of *Miranda*'s guarantee to the "right to cut off questioning." Mr. Flack's convictions and death sentence represent an extreme example of how an accused's right to cut off questioning has been eroded absent additional guidance from this Court. The case is unique amongst "right to cut off questioning" cases because police did advise him that he could invoke his rights at any time as part of his *Miranda* warnings. (R. 2, 771, 932.) Mr. Flack tried to do so, asking *ten times* for police to handcuff him and "take [him] to jail."

On appeal, though he acknowledged his concomitant right to silence in one heading, Mr. Flack argued that the police violated his *Miranda* rights by failing to terminate his custodial interrogation when he exercised "his right to cut off questioning." *Compare* (Appellant's Brief, 58) ("Mr. Flack's assertions of his right to remain silent were ignored"), *with, e.g.*, (Appellant's Brief, 51.) ("Mr. Flack's interrogators violated his right to cut off questioning."); (Appellant's Brief, 52) ("The transcripts reveal that Mr. Flack attempted, several times, to exercise his right to end the interrogation, and those attempts were ignored."); (Appellant's Brief, 60) ("The central question in this case is whether Mr. Flack clearly asserted his right to cut off questioning."); (Appellant's Brief, 64) ("Mr. Flack attempted to exercise his

right to cut off questioning when he told his interrogators, repeatedly, to handcuff him and take him to jail.")

But the Kansas Supreme Court approved of continued police questioning despite Mr. Flack's repeated pleas to be taken to jail because those pleas did not unequivocally and unambiguously invoke his right to *silence*. *See* App. 18a ("This plainly fails to invoke a right to remain silent."); App. 20a ("[T]aken together or separately, he does not unambiguously invoke his right to remain silent."); App. 23a ("Flack meant 'I don't know,' rather than invoking his right to remain silent."); App. 23a ("We hold Flack did not invoke his right to remain silent by repeatedly suggesting he be taken to jail. Isolated or combined, his statements did not unambiguously and unequivocally assert his right to silence."). By finding Mr. Flack's repeated invocations insufficient because they failed to invoke his right to silence, the Kansas Supreme Court nullified a *Miranda* right this Court deemed necessary to safeguard the privilege against self-incrimination, and ignored the very rights of which police advised Mr. Flack in this case.

This is not the first time the Kansas Supreme Court has unreasonably limited an accused's right to terminate custodial questioning. In *State v. Scott*, the Court similarly held that the accused's request to delay a portion of his interrogation did not implicate *Miranda* because the accused did not attempt to control the questioning by first invoking the right to silence: "[a] suspect can decide he or she does not want to answer questions at [any] time and invoke his or her right to remain silent, thus

forcing police to question him or her at a different time. However, in doing so, the suspect must still unequivocally invoke the right [to remain silent]." 286 Kan. 54, 70–71 (2008), *overruled on other grounds by State v. Dunn*, 304 Kan. 773 (2016).

The Kansas Supreme Court's refusal to recognize the full breadth of the constitutional safeguards this Court deemed necessary to protect the privilege against self-incrimination cannot be squared with decisions of this Court, incentivizes lower courts to examine an accused's subjective motives for invoking *Miranda*, and deepens an existing rift amongst lower courts on how police must respond to unambiguous requests to cut off questioning. Most strikingly, it upholds Mr. Flack's death sentence where the jury relied on his damaging statements in both phases of his capital trial—statements that would have been deemed inadmissible as obtained in violation of *Miranda* and its progeny in many other jurisdictions. The Court should intervene to correct these disturbing injustices.

II. The Kansas Supreme Court violated Mr. Flack's rights under *Miranda* by finding that subjective context made the plain words he used to invoke his rights ambiguous and insufficient.

This Court has reiterated that whether a suspect unambiguously invoked his right to remain silent or to counsel under *Miranda* requires an "objective inquiry that 'avoid[s] difficulties of proof and . . . provide[s] guidance to officers' on how to proceed in the face of ambiguity." *Berghuis*, 560 U.S. at 381-82 (quoting *Davis*, 512 U.S. at 458-59). It is what the suspect says that matters given that a "statement either is such an assertion of [*Miranda* rights] or it is not." *Smith*, 469 U.S. at 97-98 (citation

omitted); *see also Barrett*, 479 U.S. at 529 ("Interpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous.").

Despite this clear guidance, however, lower courts have developed an increasingly entrenched conflict over whether and when speculation into an individual's subjective purpose may provide context that renders an otherwise plain invocation ambiguous. Some federal and state high courts have, in accordance with *Berghuis* and *Davis*, expressly rejected arguments that an individual's otherwise plain invocation may be rendered ambiguous through manufactured "context"—*e.g.*, speculating as to an individual's subjective intent behind an invocation. An increasing number of other federal and state high courts, however, are willing to speculate into an individual's possible subjective motivation to provide the "context" that renders an otherwise plain invocation ambiguous. The Kansas Supreme Court has joined this latter group of cases, abandoning this Court's clear objective-inquiry-directives pronounced in *Berghuis* and *Davis*.

Federal and state high courts are thus in open division over the breadth of protections afforded suspects under *Miranda*'s safeguards. This Court should grant certiorari to resolve this untenable split.

A. Courts remain sharply divided over whether the plain language of an alleged invocation controls, or whether the context of an otherwise plain invocation renders it ambiguous.

1. One line of cases expressly rejects the notion that ambiguity can arise from the context of an otherwise unambiguous invocation. Recognizing the Court's statement in *Barrett*, 479 U.S. at 529, that "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous," this line of cases examines the context surrounding an individual's alleged invocation only when the words used by the accused are ambiguous on their face. For example, in *Anderson v. Terhune*, 516 F.3d 781, 787-88 (9th Cir. 2008) (*en banc*), the United States Court of Appeals for the Ninth Circuit evaluated a state court's conclusion that an accused's statements—that he wanted to "plead the Fifth," "[did]n't want to talk about this no more," and that he was "through" and wanted to "be taken into custody"—were ambiguous when considering their context. In reversing the State's conclusion that the accused had failed to unambiguously invoke his *Miranda* rights, the Ninth Circuit Court of Appeals held that "context" could not be "manufactured by straining" to render an otherwise unambiguous invocation of *Miranda* rights invalid. *Terhune*, 516 F.3d at 787. Because the accused's statements were plain on their face, and not susceptible to multiple interpretations, the *Terhune* court recognized that the "context"—that is, that the accused potentially uttered the invocations as a "statement of [his] frustration"—was irrelevant. 516 F.3d at 787-88. *See also United States v. Rambo*, 365 F.3d 906, 910 (10th Cir. 2004) ("Although the

context and nuances of a request to end questioning can create ambiguity, they cannot overcome a clear expression of the desire to remain silent.").

Under this line of cases, an accused's possible subjective reasons for invoking *Miranda* has no relevance if the words themselves constitute an unambiguous invocation. *See*, *e.g.*, *Jones v. Cromwell*, 75 F.4th 722, 726 (7th Cir. 2023) (citing *Barrett*, 479 U.S. at 529, for the proposition that, while courts may look to context to interpret an invocation, courts may not rely on context to turn an unambiguous statement into an ambiguous one in "disregard of the [statement's] ordinary meaning."); *United States v. Abdallah*, 911 F.3d 201 (4th Cir. 2018) (rejecting government's argument that context should render an unambiguous invocation ambiguous when the accused invoked in anger, noting "no requirement [exists] that *Miranda* invocations be measured, polite, or free of anger, in the assessment of the officers to whom they are directed."); *Munson*, 123 P.3d at 1048-52 (rejecting State's argument that the accused's "desire to cut off questioning became equivocal because he evidently invoked it for a specific reason other than the one specified by the constitution: avoiding self-incrimination" and noting that if an accused's "apparent motives do not cast genuine doubt on *what* he wants (that is, to stop questioning entirely), then the issue of *why* he wants it is constitutionally irrelevant."); *Commonwealth v. Hearns*, 10 N.E.3d 108, 117 (Mass. 2014) ("The defendant's statement of the reason why he invoked his *Miranda* protections does not render the request ambiguous." (internal citation and punctuation omitted)).

2. In contrast, another line of cases examines the context of *Miranda* invocations, even when the words the accused used to attempt to invoke *Miranda* are plain and facially unambiguous. Under this line of cases, courts frequently find an accused's subjective motivation for attempting to invoke *Miranda* creates context critical to determining the effectiveness of the invocation. For instance, if an accused asks for a lawyer out of frustration, or tells police he no longer wants to talk as a negotiating tactic, then police may continue the interrogation because the accused's motivation for attempting to invoke was not for the express purpose of protecting his right against self-incrimination. In *State v. Cummings*, 850 N.W.2d 915, 926 (Wis. 2014), for example, the Wisconsin Supreme Court noted that the accused's plain statement, "Well, then, take me to my cell. Why waste your time?" if "read literally," would be "a request that he be removed from the room because he was no longer interested in talking to the officers." Yet, it concluded that because the "possibility" existed that the accused made the statement as a "rhetorical device intended to elicit additional information from the officers," it was ambiguous and therefore insufficient to invoke *Miranda*.

The Kansas Supreme Court's decision in this case, relying in part upon *Cummings*, emphasized Mr. Flack's alleged subjective intent when he asked to be taken to jail rather than whether the phrase(s) "take me to jail" constituted a plain invocation on its face. The Kansas Supreme Court concluded that because Mr. Flack's requests to be taken to jail could have been motivated by his frustration, by an

attempt to bolster his credibility, or by a desire to negotiate with his interrogators, the statement "take me to jail" was ambiguous in context, and therefore did not require police to stop questioning him—whether after the first, fourth, or tenth time he repeated it. App. 23a-34a.

While this analysis seems an obvious departure from the objective inquiry described by *Berghuis* and *Davis*, numerous state courts of last resort, and numerous federal Circuit Courts routinely find invocations ambiguous—not because the accused's words were unclear, but because he did not actually mean them. *See*, *e.g.*, *Quisenberry v. Commonwealth*, 336 S.W.3d 19, 33 (Ky. 2011) (holding that accused's statement "take me to jail" was ambiguous because, while it might have been a clear demand that questioning cease, defendant also could merely have been conceding his predicament); *People v. Williams*, 233 P.3d 1000 (Cal. 2010) (finding statements, including "I want to see my attorney cause you're all bullshitting now," ambiguous in context because the accused could have made statements as an "expression[] of passing frustration or animosity towards the officers," rather than for the purpose of invoking his rights); *State v. Murphy*, 747 N.E.2d 765, 778-79 (Ohio 2001) (concluding that accused's statement "I'm ready to quit talking and I'm ready to go home, too," did not unambiguously invoke his right to silence because what he "appear[ed] to have wanted was to be released," and "if police were not ready to let him go, he [might] well have wanted to keep trying to persuade them of his innocence" by continuing the encounter)*; see also Perreault v. Smith*, 874 F.3d 516, 520 (6th Cir. 2017) (finding that

accused's statement "[w]ell, then let's call the lawyer then 'cause I gave what I could" failed to unambiguously invoke his right to counsel because he might have said it as a "bargaining strateg[y]" or "tactic."); *United States v. Sherrod*, 445 F.3d 980 (7th Cir. 2006) (ruling that accused's statement that he was "not going to talk about nothin' " was "as much a taunt—even a provocation—as it [wa]s an invocation of the right to remain silent.").

Because some courts rely exclusively on the plain language of an invocation to determine if it unambiguously asserts a *Miranda* right while other courts rely on context to determine if the accused subjectively intended to invoke the privilege against self-incrimination, identical invocations by an accused have diametrically opposed outcomes depending on jurisdiction or how willing the reviewing court is to exert their "mastery of speculative mental gymnastics" to determine why the accused used the words at issue. *Flack*, App. 76a (Wilson J., dissenting). Such inconsistency leaves a world in which "[o]ne is forced to wonder, despite a plethora of caselaw to the contrary, whether magic words are required . . . before a suspect clearly and unambiguously invokes the right to silence under the Fifth Amendment." App. 77a (Wilson J., dissenting). That is precisely the type of arbitrariness that the *Davis* court sought to avoid in creating an objective-inquiry test. *See Davis*, 512 U.S. at 459. Mr. Flack asks the Court to intervene, and to resolve this growing split.

B. Intervention by this Court is necessary to curtail Kansas's attempt to evade the objective inquiry of an accused's invocation required by *Davis* and *Berghuis*.

The Court's jurisprudence makes clear that only one side of the split has taken a constitutionally tenable position, and it is not the side the Kansas Supreme Court took in this case.

The Court has clarified that a statement is either an invocation, or it is not. *Smith*, 469 U.S at 98; *see also Barrett,* 479 U.S. at 529 ("interpretation [of an invocation] is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous."). And *Davis* and *Berghuis* mandate that the test for whether an accused unambiguously invoked *Miranda* is an objective one. *Berghuis*, 560 U.S. at 381; *Davis*, 512 U.S. at 459. Reading these cases together leads to a single conclusion: if the plain language of a statement unambiguously invokes an accused's *Miranda* rights, then context, including the accused's subjective motivation for making the statement, is irrelevant. Likewise, while police and courts may look at the "context" of an ambiguous invocation to clarify if the accused indeed invoked, they may not rely on context to find otherwise plain words ambiguous.

By finding to the contrary in this case, the Kansas Supreme Court misapplied this Court's precedents. Indeed, the majority opinion never examined whether Mr. Flack's repeated pleas to "take [him] to jail" used language that was plain on its face, or what those words would have conveyed to a reasonable officer under the circumstances. Nor did the opinion look at the context of Mr. Flack's interrogation to

clarify whether a reasonable officer would have understood those words to constitute an invocation. Had it done so, as Justice Wilson did in the dissent, Mr. Flack's actions of placing his head on the table and remaining silent following his tenth invocation would have clarified that he intended to invoke his right to terminate the interview and remain silent. App. 73a-74a. Moreover, the majority opinion ignored critical clarifying context for Mr. Flack's statements: he was in custody, and not otherwise free to leave the interrogation, except by returning to jail. A reasonable officer in this situation would have recognized an individual's repeated demands during a custodial interrogation to be handcuffed and taken to jail as unambiguous invocations of *Miranda*'s protections, which allow an accused to "control the time at which the questioning occurs, the subjects discussed, and the duration of the interrogation." *Mosley*, 423 U.S. at 103-04. As such, intervention by the Court is necessary to correct the Kansas Supreme Court's troubling misapplication of controlling federal law, and to stem the rising tide of cases employing similar logic.

III. Mr. Flack's case provides an ideal vehicle for reaching the questions presented.

Mr. Flack's case provides an ideal vehicle for reaching both questions presented. First, his case comes to this Court on direct appeal from a death sentence, unencumbered by the procedural complexities of a case on *habeas* review. Second, the Kansas Supreme Court examined whether Mr. Flack unambiguously invoked *Miranda*, noting that the issue arose on an undisputed record, making it plainly

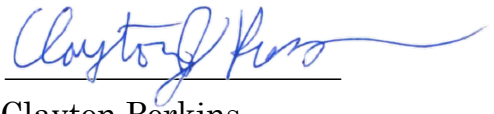
addressable on appeal. App. 16a. Third, the majority's conclusion that Mr. Flack's repeated pleas to "take him to jail" did not unambiguously invoke his rights under *Miranda* generated a strong dissent from Justice Wilson, which highlighted the majority's problematic and speculative reasoning. App. 71a-80a. Fourth, as explained by Justice Wilson in her dissent, the admission of Mr. Flack's statements mattered to the outcome of his case. App. 80a-88a. Indeed, Mr. Flack faces execution as a result of the jury's decisions to convict him and sentence him to death—decisions based, in large part, on his statements: *i.e.*, "the most probative and damaging evidence" that could have been admitted against him. *Arizona v. Fulminante*, 499 U.S. 279, 292 (1991) (White, J., dissenting) (quotations and citations omitted).

As a result, a decision by this Court on whether police may ignore an unambiguous invocation of the right to cut off questioning, or use context to subsume the plain meaning of an accused's invocation, would meaningfully impact this high-stakes capital case, which warrants the extreme remedy of this Court's intervention.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Flack's petition for a writ of certiorari.

Respectfully submitted.



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