CAPITAL CASE

No. 24-5637

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

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Because an individual's inability to protect the privilege against self-incrimination before trial practically nullifies his Fifth Amendment right to *not* be compelled to testify against himself at trial, *Miranda v. Arizona*, 384 U.S. 436, 474-79 (1966), adopted prophylactic safeguards to fortify the Fifth Amendment. These safeguards grant individuals undergoing custodial interrogation the rights to remain silent, to the assistance of counsel, and to cut off questioning. *Id.*; *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975). The right to cut off questioning, in particular, confers on the individual the indispensable "power" to control the time, subject, and manner of custodial interrogations. *Moran v. Burbine*, 475 U.S. 412, 426 (1986); *Mosley*, 384 U.S. at 474. *Miranda*'s safeguards remain the principal assurance that an individual's custodial statements resulted from his free choice. *Elstad v. Oregon*, 470 U.S. 298, 306-07 (1985).

Kansas, by repeatedly conflating the Fifth Amendment with *Miranda*'s safeguards, fails to respond to Mr. Flack's first question presented, which asks this Court to uphold *Miranda* by requiring police to cut off questioning following an individual's unambiguous request to terminate his interrogation. Kansas merely asserts that the rights to silence and to cut off questioning are interchangeable, and in so doing, fails to analyze whether *Miranda* and its progeny permit police to continue the interrogation of an individual who has unambiguously requested that the interrogation end. Kansas further attempts to distract from this issue of national

importance by raising a novel preservation claim that remains unsupported by the record, and by ignoring disagreement amongst lower courts over when an individual's unambiguous attempt to terminate questioning invokes *Miranda*'s safeguards.

Likewise, Kansas fails to comprehend the second question presented, which asks this Court to clarify that when an individual subjected to custodial interrogation plainly invokes *Miranda*, inquiry into why the individual invoked is both irrelevant and impermissible. Like the court below, Kansas speculates about what Mr. Flack's statements "could" have been trying to achieve to imbue his otherwise plain words with ambiguity. Kansas disregards the ordinary meaning of Mr. Flack's words, and fails to recognize that first ascribing an invocation its plain meaning is integral to the objective inquiry mandated by this Court. *Davis v. United States*, 512 U.S. 452, 459 (1994). Kansas further ignores the untenable split amongst lower courts over whether context can nullify a facially unambiguous invocation, as well as the danger in permitting police to disregard unambiguous invocations based on conjecture.

The prosecution may not rely on statements taken in violation of *Miranda* to prove its case at trial. *Miranda*, 384 U.S. at 479. If Mr. Flack is correct that the police violated *Miranda* by continuing to badger him after he clearly requested that his interrogation end, and by speculating about his motives for invoking *Miranda* to nullify his otherwise plain demand to cut off questioning, then the reliability of the jury's decision to sentence Mr. Flack to death cannot withstand scrutiny—especially because the prosecution relied heavily on Mr. Flack's statements in both the guilt and

punishment phases of his trial. Kansas thus fails to supply any reason why this Court should not grant Mr. Flack's petition to address these important questions.

ARGUMENT

I. Mr. Flack unambiguously expressed his desire to cut off questioning.

Kansas attempts to counter Mr. Flack's claim that he unambiguously invoked his right to cut off questioning by suggesting that when he said "take me to jail," he *could* have meant, *inter alia*, "I'm telling the truth." Opp. 11. But "interpretation [of an invocation] is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987). And, even then, "courts must not use context to turn an unambiguous statement into an ambiguous one in 'disregard of the [statement's] ordinary meaning.'" *Jones v. Cromwell*, 75 F.4th 722, 726 (7th Cir. 2023) (quoting *Barrett*, 479 U.S. at 529). Here, the phrase "take me to jail," lacks ambiguity, and thus requires no further analysis and permits no speculation. Instead, when Mr. Flack demanded that police "take [him] to jail" nearly ten times verbatim in response to the officers' questions, and then buried his head in his arms and placed them on the table, the "unambiguous meaning of his words and their necessary implication [was clear]: terminate the encounter by taking him to jail." App. 74a.

Because Mr. Flack was under arrest, he could only terminate his interrogation by returning to jail. "[T]ake me to jail," thus sufficiently articulated Mr.

Flack's desire to leave the interrogation and thereby cut off questioning. Kansas's argument to the contrary lacks both legal and logical support. *See also*, Issue III, *infra.*

II. *Miranda* requires police to terminate custodial interrogations upon an individual's clear request.

A. Mr. Flack properly preserved this issue for the Court's review.

Whether police violated *Miranda* by continuing to question Mr. Flack after he repeatedly demanded that his interrogation end is properly before this Court. The record belies Kansas's assertion to the contrary. Opp. 14. Mr. Flack's initial brief before the Kansas Supreme Court explained that "[t]he central question in [his] case [wa]s whether [he] clearly asserted his right to cut off questioning." Br. 60; Pet. 24. Moreover, by the questions the justices posed at oral argument, the court below signaled that it understood that Mr. Flack's argument focused on his right to cut off questioning and thus end his interrogation:

> Justice Stegall: "So, you don't think there is any other plausible interpretation of [take me to jail] . . . the communicative content of those words can't be anything other than, 'end the interrogation'?"
>
> Counsel for Mr. Flack: "Yes."

Kansas Supreme Court, *115,964–State v. Kyle Trevor Flack–Part One*, YouTube (34:24-34:32), https://www.youtube.com/watch?v=yT3h0XV2Csk (last visited Dec. 2, 2024).

Accordingly, when the court below held that Mr. Flack's attempts to cut off questioning failed to invoke his right to *silence*, it implicitly concluded that police may continue to interrogate an individual after he has clearly demanded his interrogation end when the demand is not couched in a request to remain silent. In fact, it has explicitly held so before. *State v. Scott*, 286 Kan. 54, 70–71 (2008) (holding accused's request to delay interrogation did not require its termination because though an individual "can decide he or she does not want to answer questions at [any] time" he "must still unequivocally invoke the right [to remain silent]."), *rev'd on other grounds State v. Dunn*, 304 Kan. 773 (2016).

This case's procedural history, including the State's own admissions, further establish that Mr. Flack properly preserved this issue for this Court's review. Mr. Flack filed a motion for rehearing that included the argument presented here. First Mot. For Reh'g, 42-54. The State moved to strike the motion, identifying three claims other than this one as "being raised for the first time[,]" while recognizing "the rest" of Mr. Flack's motion "addresse[d] issues previously raised[.]" Mot. To Strike, 4. The court below struck Mr. Flack's first motion and allowed him to refile it without the new claims. Ord. ¶1, April 25, 2024. Mr. Flack's second motion excised the three new claims, but retained argument on the police's violation of his right to cut off questioning, which the State acknowledged he had "previously raised." Second Mot. For Reh'g, 14-21; Mot. To Strike, 4. The court accepted Mr. Flack's second motion, implicitly finding that it complied with its April 25 Order. The Kansas Supreme Court

thus heard and decided the federal question at issue here, which Mr. Flack properly presented.

But even if this Court construes the denial of Mr. Flack's second motion for rehearing as the silent application of a state procedural bar, this Court cannot conclude the state court consistently relies upon the rule. *See, e.g., State v. Holley*, 315 Kan. 512, 513 (2022) (granting Kansas's motion for rehearing; directing the parties to file supplemental briefing on several of the Court's own, new questions related to the use of self-defense). It therefore would not constitute an adequate ground barring this Court's review. *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982) ("unless the procedural rule is 'strictly or regularly followed'" it does not bar this Court's review of a federal question) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149 (1964)). Accordingly, review is proper.

B. The police's duty to terminate custodial interrogation upon an individual's clear request exists regardless of whether the right to cut off questioning is distinct from, or a part of, the right to silence.

Contrary to *Miranda*'s historical record, Kansas next argues that the rights to silence and to terminate questioning constitute "interchangeable terms," which "are, in fact, the same thing." Opp. 13-14, 18. The Court intentionally added the phrase "the right to cut off questioning" to *Miranda*, only excluding the right from *Miranda*'s express warnings because of fear that including it would undermine the FBI procedure on which warnings were modeled, not because of disagreement over

the right's existence. Pet. 13-15. If the right to remain silent and the right to cut off questioning truly meant the same thing, the Court would not have contemplated warning individuals about their right to terminate interrogations, nor would the Court have included the phrase "the right to cut off questioning" in *Miranda*; it would have been mere surplusage.

Moreover, even if both rights are merely facets of the right to silence, it undermines *Miranda* and *Mosley*—which aimed to give individuals the power to combat coercive interrogations—to require individuals to unambiguously invoke their right to silence when, in fact, they merely want to terminate the interrogation. While individuals must invoke *Miranda* unambiguously, "no ritualistic formula or talismanic phrase" is required, *Emspak v. United States*, 349 U.S. 190, 194 (1955), nor must the individual "speak with the discrimination of an Oxford don." *Davis*, 512 U.S. at 459.

In fact, this Court has explicitly disapproved of cases in which "police failed to honor a decision of a person in custody to cut off questioning . . . by refusing to discontinue the interrogation upon request." *Mosley*, 423 U.S. at 105; *see also*, *State v. Cobbs*, 324 A.2d 234, 244 (Conn. 1973) ("[I]f an accused wishes to stop answering questions the police have a duty to close the interrogation."). Thus, even if Kansas correctly identifies the right to silence and the right to terminate questioning as two sides of the same coin, *Miranda* and *Mosley* still indicate that police must stop questioning an individual upon his unambiguous invocation of the right to remain

silent, which necessitates the termination of interrogation, *or* upon his unambiguous invocation of the right to terminate the interrogation, which necessarily requires police to honor his right to silence.

C. Lower courts disagree over whether police may refuse to terminate questioning upon request.

Kansas's assertion that no disagreement exists over the breadth of *Miranda*'s safeguards because no court "has affirmatively held there are two separate Fifth Amendment rights at play in the context of custodial interrogation" misses the point. Opp. 17-18. First, only one Fifth Amendment right against self-incrimination exists. Second, regardless of whether the right to cut off questioning is distinct from the right to silence, or an integral part of it, the question remains whether unambiguous requests to terminate questioning require police to discontinue interrogations. On this question, two splits exist.

First, courts disagree on the analysis *Miranda* requires. Some courts examine whether a purported invocation clearly communicates an individual's desire to remain silent *or* to cut off questioning, while other courts examine invocations only to determine if they communicated a desire to remain silent. *Compare Delap v. Dugger*, 890 F.2d 285, 293 (11th Cir. 1989) (analyzing whether individual's questions regarding how much longer he would be detained invoked his "right to terminate questioning"), *and People v. Villasenor*, 242 Cal. App. 4th 42, 64-66, 69 (2015) (examining individual's statements to determine whether he "unambiguously

demanded that the interrogation end" and holding that "his *Miranda* right to cut off questioning was violated"), *with 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.")

Second, courts disagree over whether unambiguous requests to cut off questioning require custodial interrogations to end. Some courts hold that phrases communicating a desire to terminate the interrogation—such as "take me to jail," or "take me home"—require the interrogation to end either because they unambiguously invoked the individual's right to cut off questioning, or because a demand that interrogation cease necessarily invokes a right to silence—while other courts conclude that only specific references to silence require police to cease questioning. Pet. 19-21, 30 (*comparing Dorsey v. United States*, 60 A.3d 1171, 1189 n.27, 1200 (D.C. Cir. 2013) ("[A]sking to be taken back to the cellblock 'now,' after having made several similar requests in the proceeding hour" "invoke[d accused's] right to end the interrogation"), and *Deviney v. State*, 112 So.3d 57, 77-78 (Fla. 2013) (holding individual's repeated iterations of "I'm done. I'm ready to go home. Can I leave?," indicated "his desire to end questioning" and required cessation of interrogation), *with State v. Cummings*, 850 N.W.2d 915, 926 (Wis. 2014) (holding police not required to terminate interrogation when accused said, "well, then, take me to my cell. Why waste your time?" because it didn't unambiguously invoke right to silence), and *State*

v. Waloke, 835 N.W.2d 105, 112 (S.D. 2013) (holding accused's "statements that she wanted to go home or that officers should just take her to jail" did not require discontinuation of interrogation because accused didn't say that "she wanted to remain silent or did not want to speak with police anymore")).

The State attempts to dismiss these disparate outcomes with the platitude that "facts matter." Opp. 17. And certainly, some of those cases turned on "facts" the courts speculated might have motivated the words the accused used—a problem discussed more thoroughly in Issue III. But here is a platitude in return: words mean what they say.

The same unambiguous words must have the same legal meaning regardless of where they are spoken because a statement is either an invocation or it is not. *Smith v. Illinois*, 469 U.S. 91, 97 (1984). To hold otherwise would make the inquiry into whether the accused invoked a subjective one, which "defies both common sense and established Supreme Court law." *Anderson v. Terhune*, 516 F.3d 781, 787-88 (9th Cir. 2008) (*en banc*). It is not that the facts surrounding an individual's invocation lack importance, but that the plain meaning of ordinary words controls. *Id.* at 787. As such, that nearly identical phrases like "take me to jail" or "take me home" do not uniformly result in the termination of questioning demonstrates the problematic split that exists over whether police must honor clear requests to terminate interrogations that begs this Court's intervention.

III. The court below nullified Mr. Flack's plain *Miranda* invocation by speculating as to his subjective motives for invoking.

Kansas's assertion that the court below did not speculate into Mr. Flack's subjective intent when determining if "take me to jail" constituted a valid invocation is unpersuasive. Opp. 18-19. Because interpreting an invocation is necessary only when the invocation's words, "understood as ordinary people would understand them, are ambiguous," *Barrett*, 479 U.S. at 529, ascribing an invocation its plain meaning constitutes a key part of the objective inquiry required by *Davis*. *See* Pet. 30-32. But Kansas fails to cite to any analysis in the decision below of the plain meaning of Mr. Flack's insistent requests to "take [him] to jail," nor does it offer any analysis of its own. Instead, it replicates the lower court's errors by ignoring the ordinary meaning of the phrase "take me to jail" and by suggesting this phrase "could be viewed" as a negotiating tactic, or an attempt to bolster Mr. Flack's credibility. Opp. 10-12. But neither Kansas, nor the court below, know why Mr. Flack invoked; thus, any guess as to his motive for invoking is both subjective and speculative.

Kansas's next argument—that the lower court relied on what a reasonable officer might have understood Mr. Flack's intent to be but not Mr. Flack's subjective intent—creates a distinction without a difference. Opp. 18-19. Guessing what a reasonable officer might have speculated merely creates a two-tiered inquiry into an individual's subjective motivations. And such speculation permits police to ignore plain invocations if they can conjure some ulterior motive for an individual to have

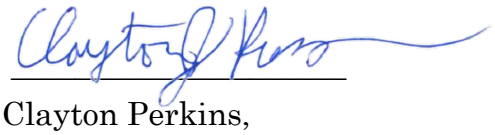
invoked. This guts *Miranda* and its practical reinforcement of the Fifth Amendment privilege against self-incrimination.

Moreover, deep schisms in authority exist on this issue, notwithstanding Kansas's bald refusal to acknowledge them. Opp. 19; *see* Pet. 28-32 (*comparing United States v. Abdallah*, 911 F.3d 201, 212 (4th Cir. 2018) (rejecting government's argument that context indicating accused was angry should nullify his otherwise clear invocation, 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") *with People v. Williams*, 233 P.3d 1000, 1023 (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). These divisions necessarily implicate the scope of protections afforded the privilege against self-incrimination. While the analysis of an invocation necessarily turns on what the accused said, this Court should reject Kansas's attempt to use "factual differences" to veil the ever-growing split appearing in lower courts' analyses as to whether speculation into an individual's subjective intent is permissible in assessing the validity of a *Miranda* invocation. This Court should intervene to clarify that when an individual plainly invokes *Miranda*, there is no room for guesswork on the reasons why.

CONCLUSION

The Court should grant Mr. Flack's petition for a writ of certiorari.

Respectfully submitted.



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