No. _____

In the

Supreme Court of the United States

_____

David Devaney, Jr.,

Petitioner,

v.

United States of America,

Respondent.

_____

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

_____

PETITION FOR A WRIT OF CERTIORARI

_____

Matthew J. Smid
Law Office of Matthew J. Smid, PLLC

301 Commerce Street, Suite 2001
Fort Worth, Texas 76102
Telephone: (817) 332-3822
Facsimile: (817) 332-2763
E-mail: matt@mattsmidlaw.com
Texas State Bar No. 24063541

QUESTION PRESENTED

Whether the statement of "I have to get a lawyer, I have to shut the interview down" constitutes an unambiguous request for counsel, and can a defendant's responses to questions after that statement be used to transform the request, which was originally unequivocal, to an equivocal request for counsel?

PARTIES TO THE PROCEEDING

Petitioner is David Devaney, Jr., who was the Defendant-Appellant in the court below. Respondent, the United States of America, was the Plaintiff-Appellee in the court below.

TABLE OF CONTENTS

INDEX TO APPENDICES

Table of Authorities

STATUTE

UNITED STATES CONSTITUTION

PETITION FOR A WRIT OF CERTIORARI

Petitioner David Devaney, Jr. seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The published Opinion of the panel of the court of appeals is reported at *United States v. Devaney*, 109 F.4d 322 (5th Cir. July 22, 2024), and is attached at Appendix A to this Petition. The district court's Judgment and Sentence is attached at Appendix B to this Petition. Its Order Denying the Motion to Suppress is attached at Appendix C to this Petition. The Motion itself, along with the exhibits that Petitioner attached to the Motion, is attached at Appendix D to this Petition.

JURISDICTION

The Opinion and Judgment of the Fifth Circuit were entered on July 22, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides, in part:

> No person…shall be compelled in any criminal case to be a witness against himself.

STATEMENT OF THE CASE

A. Petitioner's Request for Counsel

On June 25, 2022, Petitioner was arrested on aggravated assault with a deadly weapon warrant issued by the Burleson Police Department. (ROA. 376.) Upon being arrested, Petitioner was placed in an interview room at the Burleson Police Department and interrogated by law enforcement, which was audio and video recorded. (ROA. 369.)

During the custodial interrogation, there were three different investigators present: Burleson Police Commander Sparks, Burleson Police Detective Morrison, and HSI Special Agent Mike McCurdy. (ROA. 369.) Toward the beginning of the interview, Petitioner was read his *Miranda* rights and asked if he wanted to talk to the investigators. (ROA. 372.) Petitioner told investigators he wanted some assurances. (ROA. 377.) When the investigators indicated that they could not provide these assurances, Petitioner said "I have to get a lawyer then. I've got to shut the interview down." (ROA. 380.) Despite this unequivocal request, the investigators continued to ask Petitioner questions. (ROA. 380.)

A few minutes later, Petitioner asked for a lawyer by name, Brian Poe. (ROA. 387.) He said he wanted to call Mr. Poe to "ask for his advice." (ROA. 387.) Sparks indicated he knew who Poe was. (ROA. 387). Despite this unequivocal request, investigators continued to ask questions. (ROA. 389.) Later in the interview, Petitioner asked the investigators "Is there a way to talk to my attorney without ending the interview?" (ROA. 417.) Sparks replied "No." (ROA. 417.) Petitioner

then asked "there is not at all? I can't call him?" (ROA. 417.) Sparks said "no." (ROA. 417.) Devaney then said "not even as a friend?" (ROA. 417.) Sparks said "I'm not letting you make no phone calls while were in the middle of an interview." (ROA. 417.) Investigators then inexplicably resumed their questioning of Petitioner, and asked him 86 questions. (ROA. 417-60.)

B. District Court Proceedings

On August 29, 2022, Petitioner filed his "Motion to Suppress His Custodial Interrogation," arguing that investigators continued an interrogation of Petitioner despite Petitioner's numerous unequivocal requests to speak with an attorney. (ROA. 86.) On September 8, 2022, the Court denied Petitioner's pre-trial motions to suppress his statement. (ROA. 307.) In denying the motion, the Court held that Petitioner "did not unequivocally request counsel." (ROA 309.)

On November 1, 2022, Petitioner stipulated the facts necessary to support a conviction for conspiracy to possess a controlled substance with the intent to distribute, a violation of 21 U.S.C. Section 846 and Section 841(a)(1) & (b)(1)(b). (ROA. 519.) By entering into this stipulation, Petitioner expressly reserved the right to appeal the Court's adverse rulings on his motions to suppress. (ROA. 515, 519.) The Court, having received the stipulation, conducted a brief stipulated bench trial. (ROA. 771.) At the conclusion of the bench trial, the Court found Petitioner guilty of possession of a controlled substance with the intent to distribute. (ROA. 773.) On May 4, 2023, the Court sentenced Petitioner to 480 months. (ROA. 538.)

C. Appellate Proceedings

The Fifth Circuit Court of Appeals affirmed the judgment. *See United States v. Devaney*, 109 F.4d 322 (5th Cir. 2024). The court held that despite making several requests for counsel, Petitioner "did not invoke his right to counsel." The Court reasoned that Petitioner "disclaimed his intent to invoke counsel" *after* making his intentions known that he wanted counsel. The Court further reasoned that Petitioner's additional request was equivocal because he asked "whether he could invoke his right to counsel without terminating the interview." Finally, the Court took issue with Petitioner asking to speak to a specific lawyer "as a friend" and reasoned that this meant Petitioner wanted to make a "personal call" to the attorney.

REASONS FOR GRANTING THE PETITION

The decision below turned this Court's ruling in *Smith v. Illinois* on its head when it used Petitioner's *postrequest* responses to law enforcement's questioning to find that Petitioner failed to unequivocally invoke his right to counsel after Petitioner stated he "had to get a lawyer." After the *postrequest* responses, which the Court deemed as sufficient to cause equivocation, Petitioner requested a specific lawyer, and asked law enforcement "is there a way to talk to my lawyer without ending the interview?" Further, the Fifth Circuit's decision is in direct conflict with decisions of the Second, Sixth, Ninth, and Eleventh Circuits. Simply put, Petitioner would have clearly prevailed on his claim had he been in those circuits and this creates an unjust and unfair circuit split that warrants review by this Court.

A. The decision below contradicts well-settled law and turns *Smith v. Illinois* on its head.

Petitioner clearly and unequivocally requested that a lawyer be present at his interrogation with law enforcement when he stated "I have to get a lawyer, I have to shut the interview down." The Fifth Circuit claimed that this request was equivocal due to his responses to questions *after* this statement. This reasoning turns this Court's decision in *Smith v. Illinois* on its head.

The Fifth Amendment provides that "no person…shall be compelled in any criminal case to be a witness against himself." U.S. Conts., Amdt. 5. In an effort to protect a suspect's Fifth Amendment rights, this Court has held that law enforcement must warn a suspect prior to questioning that he has a right to remain silent and the right to the presence of an attorney. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). "After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease." *Maryland v. Shatzer*, 559 U.S. 98, 104 (2010). "Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.*

Once a defendant has asserted his Fifth Amendment rights, all interrogation must cease, and may only begin after the defendant has consulted with an attorney, or the defendant initiated the further communication. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). "*Edwards* set forth a 'bright-line rule' that *all* questioning must cease after an accused requests counsel." *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (internal citation omitted). An accused *postrequest* response to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself.

Id. at 100. A defendant must 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). If the statement fails to meet the requisite level of clarity, Edwards does not require that the officers stop questioning the suspect. *Id*.

The decision below held that Petitioner's invocation of his right to counsel was not "sufficiently unequivocal or unambiguous." *Devaney*, 109 F.4th. at 328. However, Petitioner clearly and unambiguously requested counsel by making the following statements during his custodial interview:

- **"I have to get a lawyer then. I've got to shut the interview down." (ROA. 380.)**
- **Do you have a problem calling Mr. Poe? Brian? Do you know Brian?[1] (ROA. 387.)**
- **Do you have a problem calling him (Mr. Poe) so I can ask his advice? (ROA. 387.)**
- **Is there a way to talk to my attorney without ending the interview? (ROA. 417.)**

Any one of these requests in isolation should be deemed unequivocal, much less all four combined. This Court has deemed even closer calls unequivocal. *Edwards,* 451 U.S at 459—"I want an attorney before making a deal."; *Smith*, 469 U.S. at 491—In response to an officer informing Smith of his right to have a lawyer present he stated "Uh, yeah. I'd like to do that."

[1] Brian Poe was Petitioner's lawyer in a previous case and ultimately co-counsel in the underlying case. The agent responded that he did know who Poe was and therefore knew he was an attorney.

The decision below primarily based its holding on Petitioner's conduct which occurred *postrequest*, specifically his responses to questions from the interrogating officer about whether Petitioner was sure he wanted to invoke his right to counsel. *Devaney*, No. 23-10480 at 8. This Court specifically disavowed such consideration of answers to questions *postrequest* when determining whether an invocation of counsel was unequivocal. *Smith v. Illinois*, 469 U.S. at 100. In reaching its holding, the Fifth Circuit not only considered answers to *postrequest* questions, they hung their hat on these responses. The Court reasoned that in response to *postrequest* questions, Petitioner "affirmatively disclaimed his intent to invoke counsel" and therefore his assertion of right to counsel did not "articulate a desire to have counsel present." *Devaney*, 109 F.4d 328. This concerning analysis is in direct contradiction with *Smith v. Illinois* and therefore warrants review by this Court.

The interrogating officer's conduct after Petitioner's initial unambiguous request for counsel compounded the Fifth Amendment violation and further justifies a review by this Court. Several minutes after Petitioner's original request, Petitioner made yet another request to speak with his attorney by asking Commander Sparks "is there a way to talk to my attorney without ending the interview?" (ROA. 417.) Commander Sparks quickly told Petitioner that he wasn't allowed to call anyone during the interview (ROA. 417.) After Petitioner asked the question of whether he could talk to his attorney without ending the interview, Sparks replied, **"No."** (ROA. 417.) Critically, Petitioner himself asked a clarifying question immediately after Sparks response. Petitioner asked, **"There's not at all, like I can't call him?"**

(ROA. 417.) Sparks inexplicably replied by saying, **"No, no" and "I'm not letting you make no phone calls right now."** (ROA. 417.) Sparks then said he would be willing to let Petitioner talk with an attorney if this wasn't a "murder investigation," seemingly creating his own exception to the *Edwards* bright line rule. (ROA. 417.) Petitioner respectfully requests that this Court not allow law enforcement to carve out their own exceptions to this Court's precedent.

Finally, the Fifth Circuit further dismantled Petitioner's argument that he requested counsel because he asked to talk to Brian Poe as "a friend," and therefore this would be a "personal call." *Devaney*, 109 F.4d 328. However, a closer review of the record shows that he only requested to talk to Poe "as a friend" because he was denied the right to talk to him as counsel.

> MR. DEVANEY: Okay. Can -- is there a way -- can you all give me a concession, right? Like, well just like two small -- is there a way to talk to my attorney without ending the interview?
>
> CDR. SPARKS: No.
>
> MR. DEVANEY: There's not at all, like I can't, I can't call him?
>
> CDR. SPARKS: No, no.
>
> MR. DEVANEY: What is it for -- how about as a friend?
>
> CDR. SPARKS: No.

(ROA 417.)

B. The Fifth Circuit's ruling regarding Petitioner's request for counsel is in direct conflict with the Second, Sixth, Nineth, and Eleventh Circuits decisions on the same issue.

Several circuits have held that the use of terms of uncertainty while requesting a lawyer does not, by itself, make the request equivocal. *Wood v. Ercole*, 644 F.3d 83, 92 (2nd Cir. 2011); *Abela v. Martin*, 380 F.3d 915, 927 (6th Cir. 2004); *Alvarez v. Gomez*, 185 F.3d 995, 997 (9th Cir. 1999); *Smith v. Ednell*, 860 F.2d 1528, 1529 (9th Cir. 1988); *Cannaday v. Dugger*, 931 F.2d 752, 754-55 (11th Cir. 1991).

A side-by-side comparison of Petitioner's above-mentioned statements show strikingly similarities to statements from other circuits, which were deemed unequivocal. Such a comparison demonstrates that if this case was heard in either of those circuits, Petitioner would have prevailed on this issue. Those respective courts held that the following statements "in isolation" were unequivocal requests for counsel.

- **Second Circuit—"I think I should get a lawyer." *Wood,* 644 F.3d at 92.**
- **Sixth Circuit—"maybe I should talk to an attorney by the name of William Evans." *Abela,* 380 F.3d at 927.**
- **Ninth Circuit—"can I get an attorney right now man?" *Alvarez,* 185 F.3d at 997.**
- **Ninth Circuit— "Can I talk to a lawyer?" *Smith,* 860 F.2d at 1529**
- **Eleventh Circuit— "I think I should call my lawyer." *Cannaday,* 931 F.2d at 754-55.**

These decisions compared to the Fifth Circuit's decision in Petitioner's case establish an alarming circuit split. The Fifth Circuit's decision regarding Petitioner's request for counsel is in direct conflict with the Second, Sixth, Ninth, and Eleventh Circuit's rulings. This conflict has created, and will continue to create, inconsistent and unfair results throughout the country and therefore warrants review by this Court.

CONCLUSION

Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted this 2nd day of October, 2024.

MATTHEW J. SMID
Law Office of Matthew J. Smid, PLLC

Matthew J. Smid
301 Commerce Street, Suite 2001
Fort Worth, TX 76102
817.332.3822 (t)
817.332.2763 (f)
matt@mattsmidlaw.com
TX Bar No. 24063541
Attorney for Petitioner