No. 24-5717

IN THE SUPREME COURT OF THE UNITED STATES

DAVID DEVANEY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

BRENT S. WIBLE
Principal Deputy Assistant
Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether petitioner unequivocally invoked his right to counsel during custodial interrogation.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (N.D. Tex.):

United States v. Devaney, No. 22-cr-213 (May 8, 2023)

United States Court of Appeals (5th Cir.):

United States v. Devaney, No. 23-10480 (July 22, 2024)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A14[1]) is reported at 109 F.4th 322. The order of the district court (Pet. App. C1-C4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2024. The petition for a writ of certiorari was filed on

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[1] Appendix A to the petition for a writ of certiorari is not sequentially paginated. This brief treats it as if it were and designates the first page following the cover page as "A1."

October 7, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Texas, petitioner was convicted of conspiring to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. 846. Judgment 1. The court sentenced petitioner to 480 months of imprisonment, to be followed by four years of supervised release. Judgment 2. The court of appeals affirmed. Pet. App. A1.

1. Petitioner provided security for a drug sale orchestrated by his father. Pet. App. A4. Petitioner and his father met with two buyers, but the sale went awry when the buyers declined to travel from their meeting place to a hotel room. Ibid. When the buyers left, petitioner, his father, and another individual chased them in multiple vehicles. Ibid. Petitioner caught up to the buyers and shot at them, wounding one of the buyers and killing an innocent bystander. Ibid.

The day after the shooting, law-enforcement officers spotted petitioner in a car. Pet. App. A4. Petitioner led the officers on a high-speed chase, then attempted to flee on foot, and was ultimately arrested. Ibid. Officers executed search warrants for petitioner's car -- where they found 108 grams of methamphetamine and drug paraphernalia -- and his two cell

phones -- where they found text messages between petitioner and his father discussing drug trafficking. Ibid.

During a post-arrest interview, which was recorded and transcribed, petitioner admitted that he provided security for the drug deal and to chasing the buyers' car, but he denied firing a gun. Pet. App. A4; see D. Ct. Doc. 59-1 (Sept. 1, 2022) (interview transcript). The officers advised petitioner of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), including his right to have counsel present. D. Ct. Doc. 59-1, at 5. Petitioner stated that he understood his rights and "want[ed] to talk" with the officers, ibid.; he then began discussing his involvement in his father's scheme, id. at 6-9.

At a few points during the interview, petitioner referred to an attorney. See Pet. App. A9 (summarizing the statements). When the officers told petitioner that they believed he may have been the shooter, petitioner stated that before he was willing to talk, he wanted "assurances." D. Ct. Doc. 59-1, at 9-10. One officer explained that they could not give petitioner assurances and that one of the victims had died. Id. at 10-12. Petitioner responded: "But then I have to get a lawyer, then. * * * I have to get a lawyer. I have to shut the interview -- I mean, I don't want to, but." Id. at 12-13. The officer responded that "the interview is on you" and that he could not promise that petitioner would not go to jail that day. Id. at

13. Petitioner agreed that he knew he was "going to jail today" and answered a few more questions. Id. at 13-14. The officer then asked whether petitioner was "asking for an attorney." Id. at 14. Petitioner responded, "Not yet, not yet * * * I'm not asking for an attorney yet." Ibid.; see Pet. App. A9.

The interview continued, and petitioner later asked whether the officers would "have a problem calling" attorney Brian Poe (whom one of the officers appeared to know), stating that petitioner wanted Poe's "advice." D. Ct. Doc. 59-1, at 20.[2] The officer said that he (the officer) could not call Poe himself. Id. at 20-21. Petitioner then clarified that "it's like calling a friend" because petitioner was "not hiring [Poe] yet." Id. at 21; see Pet. App. A9; see also D. Ct. Doc. 59-1, at 22-23 (petitioner later describing his friendship with "Brian" to the officers). When another officer suggested that making the call would put them "in an awkward spot," petitioner stated, "Yeah, I don't want to end the interview." D. Ct. Doc. 59-1, at 21.

Some time later, petitioner asked whether there was "a way to talk to my attorney without ending the interview." D. Ct. Doc. 59-1, at 50. The officer said no. Ibid.; see Pet. App. A9. Petitioner asked, "how about as a friend?" D. Ct. Doc. 59-1, at 50. The officer responded that he would not let

[2] Poe later represented petitioner during the district court proceedings. See Pet. App. D10.

petitioner make phone calls in the middle of the interview. Ibid.; see Pet. App. A9. Petitioner then continued to provide information. D. Ct. Doc. 59-1, at 51.

2. A federal grand jury for the Northern District of Texas charged petitioner with conspiring to possess a controlled substance with intent to distribute, in violation of 21 U.S.C. 846; possessing a controlled substance with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A); possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1)(A); committing a drive-by shooting, in violation of 18 U.S.C. 36(b)(2)(B); and discharging a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(iii). Superseding Indictment 1, 4, 7-9.

The district court denied petitioner's pre-trial motion to suppress his post-arrest statements, rejecting petitioner's assertion that he had invoked his right to counsel on the ground that he "did not unequivocally request counsel." Pet. App. C3; see id. at C3-C4. The parties then entered into a joint stipulation of the facts establishing petitioner's guilt on the drug-conspiracy count but that permitted petitioner to appeal the denial of his suppression motion. Id. at A4-A5. After a bench trial, petitioner was convicted on that count and (taking into account his extensive criminal history) sentenced to 480

months of imprisonment, to be followed by four years of supervised release. Judgment 1-2; see Pet. App. A5.

3. The court of appeals affirmed, agreeing with the district court that petitioner did not unequivocally invoke his right to counsel during the post-arrest interview. Pet. App. A9-A10. The court of appeals found that, in context, none of petitioner's statements was "sufficiently unequivocal and unambiguous" to invoke the right. Id. at A9-A10. The court emphasized that in the first two instances in which petitioner mentioned counsel, he "affirmatively disclaimed his intent to invoke counsel and his intent to retain Poe as counsel, respectively." Id. at A10. The court further observed that although petitioner mentioned his "attorney" on two more occasions, he explicitly stated that he did not want to end the interview and also asked whether it was possible to speak to an attorney without ending the interview. Ibid. And while the court acknowledged the officer's statement that petitioner could not make a phone call during the interview, the court explained that this remark was made immediately after petitioner asked to call Poe "'as a friend'" -- which indicated a desire to "make a personal phone call to Poe," not a desire to have counsel present. Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 4-10) that the officers violated his rights under Miranda v. Arizona, 384 U.S. 436 (1966), by continuing a custodial interview after he invoked his right to counsel. The lower courts correctly rejected that claim, and their fact-bound determination does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. In Edwards v. Arizona, 451 U.S. 477 (1981), this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, * * * [he] is not subject to further interrogation by the authorities until counsel has been made available to him." Id. at 484-485 (footnote omitted). This Court has made clear, however, that if a defendant wants to invoke that right to counsel, he "must unambiguously request counsel." Davis v. United States, 512 U.S. 452, 458-459 (1994).

The Court in Davis explained that a suspect "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, 461 U.S. at 459; see ibid. (noting that this is an "objective inquiry"). Thus, if the suspect's request is "'ambiguous or equivocal,'" Edwards does not require the police

"to end the interrogation," or even to "ask questions to clarify whether the accused wants to invoke his or her Miranda rights." Berghuis v. Thompkins, 560 U.S. 370, 381 (2010) (citation omitted).

Furthermore, if a suspect makes a "limited request[]" for counsel -- i.e., for a limited purpose -- the police do not need to end all questioning. Connecticut v. Barrett, 479 U.S. 523, 529 (1987). For example, where a defendant "told the officers that he would not give a written statement unless his attorney was present but had 'no problem' talking about the incident," id. at 525 (citation omitted), "obtain[ing] an oral confession is quite consistent with the Fifth Amendment," id. at 529. The courts of appeals have accordingly recognized that a suspect does not invoke his right to counsel, thereby requiring termination of the interview, merely by referring to counsel without unequivocally and unambiguously requesting the intervention of an attorney.[3]

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[3] See, e.g., United States v. Medunjanin, 752 F.3d 576, 583, 587 (2d Cir.) (no invocation of right to counsel where suspect asked whether his attorney had been contacted when a search warrant was executed), cert. denied, 574 U.S. 916 (2014); Soffar v. Cockrell, 300 F.3d 588, 595 (5th Cir. 2002) (en banc) (no invocation of right to counsel where suspect asked "whether he should get an attorney; how he could get one; and how long it would take to have an attorney appointed"); United States v. Potter, 927 F.3d 446, 449, 451 (6th Cir.) (no invocation of right to counsel where suspect mentioned a lawyer and asked whether he needed one), cert. denied, 140 S. Ct. 436 (2019);

2. The lower courts here correctly found that petitioner did not clearly and unequivocally invoke his right to counsel during the interview. Pet. App. A9-A10, C3-C4. Petitioner primarily relies (Pet. i, 5-7) on his first statement, upon hearing that he was a suspect in the fatal shooting and that the officers were not willing to make any promises, that "I have to get a lawyer, then. * * * I have to shut the interview." D. Ct. Doc. 59-1, at 12-13.[4] But petitioner omits that his very next words (without any further questioning from the officers) were: "I mean, I don't want to, but." Id. at 13 (emphasis added). Petitioner thus disclaimed a desire to invoke counsel, rendering the overall statement ambiguous at best.

The court of appeals also correctly recognized that petitioner's later references to a specific attorney, Poe, were not unequivocal requests for the assistance of counsel. Pet.

United States v. Hampton, 885 F.3d 1016, 1019-1020 (7th Cir. 2018) (per curiam) (no invocation of right to counsel where suspect stated that he had not gotten "a chance to get a lawyer"); United States v. Zamora, 222 F.3d 756, 765-766 (10th Cir.) (no invocation of right to counsel where suspect said, "if that's the case, []then I might want to talk to my attorney)"), cert. denied, 531 U.S. 1043 (2000).

[4] Petitioner's transcription of the statement in the petition for certiorari and in his suppression motion differs from the interview transcript that the district court reviewed. See D. Ct. Doc. 59-1, at 12-13; Pet. App. C4.

App. A10; see Pet. 6. Petitioner initially asked only whether the officers had "a problem" with "calling" Poe, which sounded like he wanted the officers themselves to speak to Poe. D. Ct. Doc. 59-1, at 20. Petitioner then disclaimed an intent to hire Poe at that time and repeatedly indicated that he merely wanted to speak to Poe as "a friend." Id. at 21, 50; see id. at 22-23 (petitioner telling the officers about his friendship with Poe).

Similarly, petitioner's question (Pet. 7) about whether he could invoke his right to counsel without ending the interview, D. Ct. Doc. 59-1, at 50, was a "procedural inquiry," Pet. App. A10, not an actual invocation of the right. And while petitioner highlights (Pet. 7-8) the officer's later remark that he would not allow petitioner to make any phone calls, petitioner disregards that the officer made that statement after petitioner had specifically asked whether he could call Poe "as a friend." D. Ct. Doc. 59-1, at 50.

Petitioner now asserts (Pet. 8) that he only made that additional request because he had already been denied the opportunity to speak to Poe as counsel. But the transcript shows that, in context, the officers had merely indicated to petitioner that there was no way for him to speak to his attorney without ending the interview, thus leading petitioner to ask whether the interview could continue if he spoke to Poe as a friend. See D. Ct. Doc. 59-1, at 50. At a minimum, that

is a reasonable understanding of the exchange, undermining any suggestion that the officers rejected an unequivocal request by petitioner to call someone who would act as his attorney.

Petitioner also errs in contending (Pet. 7) that the officers violated Smith v. Illinois, 469 U.S. 91 (1984) (per curiam), by continuing to question him after he had allegedly invoked his right to counsel near the interview's outset. Smith addressed whether responses to questioning after an unequivocal and unambiguous request for counsel can retrospectively render it ambiguous. Id. at 95-98. But where, as here, there was no unequivocal and unambiguous request to begin with, the officers were not required to end the interview. See p. 9, supra; Davis, 512 U.S. at 460.

3. Contrary to petitioner's assertion (Pet. 9-10), the fact-bound decision below does not conflict with any decision of another court of appeals. Petitioner cites (Pet. 9) decisions from the Second, Sixth, Ninth, and Eleventh Circuits, but each involves distinctly different facts.

For instance, in Abela v. Martin, 380 F.3d 915 (6th Cir. 2004), the suspect stated "maybe I should talk to an attorney by the name of William Evans" and showed the interrogator the attorney's business card; the interrogator then agreed that he would call Evans and left the room before returning and resuming interrogation. Id. at 919. The Sixth Circuit reasoned that the

suspect's request for a specific attorney together with his handing over the business card with the phone number and the officer's response that he would call the attorney rendered the statement an unequivocal request. Id. at 926; see ibid. (noting that "language that might be less than clear, when viewed in isolation, can become clear and unambiguous when the immediately surrounding circumstances render [it] so"). Indeed, the Sixth Circuit has subsequently emphasized that those "surrounding circumstances" were what made the difference in Abela. United States v. Potter, 927 F.3d 446, 451 (6th Cir.), cert. denied, 140 S. Ct. 436 (2019); see ibid. (explaining that hypothetically-phrased statements generally do not qualify as unequivocal).

The two Ninth Circuit decisions that petitioner cites -- Smith v. Endell, 860 F.2d 1528 (1988), cert. denied, 498 U.S. 981 (1990), and Alvarez v. Gomez, 185 F.3d 995 (1999) -- are also readily distinguishable. In Smith, the defendant stated, "[c]an I talk to a lawyer? At this point, I think maybe you're looking at me as a suspect, and I should talk to a lawyer." 860 F.2d at 1529. And in Alvarez, the Ninth Circuit found that a suspect's multiple questions -- "Can I get an attorney right now, man?"; "You can have attorney right now?"; and "Well, like right now you got one?" -- constituted an unequivocal request for an attorney when considered together. 185 F.3d at 998. In

neither case did the suspect simultaneously disclaim a desire to speak to a lawyer, see p. 9, supra, or indicate that he wished to speak to a lawyer "as a friend" to avoid ending the interview, see p. 10, supra.

Petitioner additionally relies on two decisions -- Cannady v. Dugger, 931 F.2d 752 (11th Cir. 1991), and Wood v. Ercole, 644 F.3d 83 (2d Cir. 2011) -- in which the suspect prefaced a reference to calling a lawyer with "I think I should." See Cannady, 931 F.2d at 755 ("I think I should call my lawyer."); Wood, 644 F.3d at 91 ("I think I should get a lawyer."). Cannady, however, preceded this Court's decision in Davis, which held that "Maybe I should talk to a lawyer" does not constitute an unequivocal and unambiguous invocation of the right to counsel. See Davis, 512 U.S. at 462. And in Wood, the Second Circuit found that the statement's surrounding circumstances "erase[d] any possible ambiguity," because the officer revealed that he understood the statement as a request for counsel by immediately handing the suspect a phone and asking no clarifying questions. 644 F.3d at 91; see id. at 91-92. In neither case did the suspect state in the same breath that he did not "want" to end the interview or create ambiguity about whether he wished to speak to an attorney in a personal capacity, as is the case here. See pp. 9-10, supra.

At most, therefore, the petition challenges the lower courts' assessment of the particular circumstances of this case. Such a fact-bound claim does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). This Court "do[es] not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). And "under what [the Court] ha[s] called the 'two-court rule,' the policy has been applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires." Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

BRENT S. WIBLE
Principal Deputy Assistant
Attorney General

THOMAS E. BOOTH
Attorney

JANUARY 2025