No. ______

In the Supreme Court of the United States

SCOTT DAVID PERREAULT, PETITIONER

v.

ANTHONY STEWART, WARDEN

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Davis* v. *United States*, 512 U.S. 452, 459 (1994), this Court held that when a suspect invokes his right to counsel, "he 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." This Court has explained that the "requirement of an unambiguous invocation of *Miranda* rights results in 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* v. *Thompkins*, 560 U.S. 370, 381 (2010) (alterations and omission in original) (quoting *Davis*, 512 U.S. at 458-459). Despite this Court's clear directive, division has emerged as to whether the analysis of a suspect's invocation of his right to counsel should focus on the plain meaning of a suspect's words or whether it permits courts to examine a suspect's subjective intent, as the court below and some state high courts have done.

When a suspect says during a custodial interrogation, "Well, then let's call the lawyer then 'cause I gave what I could," does a state court unreasonably apply *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and its progeny in concluding that a suspect's words were "akin to negotiations," and thus not an unequivocal invocation of his right to counsel?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

The following list provides the names of all parties to the proceedings below:

Petitioner Scott David Perreault was the petitioner-appellant in the U.S. Court of Appeals for the Sixth Circuit.

Respondent Anthony Stewart in his official capacity as Warden of the G. Robert Cotton Correctional Facility, where Petitioner is currently held. Willie Smith was respondent-appellee in the Sixth Circuit because he was Warden of the Ionia Correctional Facility, where Petitioner was then held. Petitioner has since been moved to the G. Robert Cotton Correctional Facility, and the identity of the Respondent has been updated accordingly.

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In the Supreme Court of the United States

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ANTHONY STEWART, WARDEN

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

PETITION FOR A WRIT OF CERTIORARI

Petitioner Scott David Perreault respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals denying Petitioner's appeal (App., *infra*, 76a) is unreported but available at 2011 WL 1901994. The decision of the Michigan Supreme Court denying Petitioner's application for leave to appeal (App., *infra*, 75a) is reported at 805 N.W.2d 191 (Mich. 2011) (mem.).

The opinion of the Circuit Court for the County of Saginaw denying Petitioner's motion for relief from judgment (App., *infra*, 69a) is unreported. The decision of the Michigan Court of Appeals refusing to review the denial (*id.* at 68a) is unreported. The decision of the

Michigan Supreme Court denying Petitioner's application for leave to appeal (*id.* at 67a) is reported at 845 N.W.2d 122 (Mich. 2014) (mem.).

The decision of the U.S. District Court for the Eastern District of Michigan (App., *infra*, 18a) is unreported. The decision of the U.S. Court of Appeals for the Sixth Circuit (*id.* at 1a) is reported at 874 F.3d 516 (6th Cir. 2017).

JURISDICTION

The judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on October 27, 2017. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution and 28 U.S.C. 2254(d), which are reproduced at App., *infra*, 13a-14a.

STATEMENT OF THE CASE

A. Factual history

J.P. was the daughter of Petitioner and Jamie Newman. Petitioner had been staying at Ms. Newman's residence in August 2008, and the two were engaged to be married. Tr. Excerpt, R. 10-10, Page ID 454[1]; Tr. R. 10-11, Page ID 477. Ms. Newman thought Petitioner was a good, loving father. *Id.* at 479, 488.

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[1] Record for *People of the State of Michigan* v. *Scott David Perrault*, Mich. Cir. Ct. No. 08-031-751-FC-1 as cited in *Perreault* v. *Bauman*, No. 2:14-cv-11022, (E.D. Mich.), ECF Dkt. No. 10 (Sept. 16, 2014).

On the morning of September 2, 2008, Ms. Newman left J.P. at home with Petitioner while she took her other daughter to school and ran errands. Tr. R. 10-2, Page ID 218-219; Tr. R. 10-9, Page ID 427. When Ms. Newman returned, Petitioner had called 911 to report that J.P. was injured. Tr. Excerpt, R. 10-12, Page ID 516. Police and paramedics arrived at the scene, and J.P. was transported to the hospital. Tr. R. 10-9, Page ID 413. J.P. remained in the hospital for treatment, and ultimately died from her injuries two days later. Tr. R. 10-2, Page ID 227.

Police spoke with Petitioner at the house, then brought him in handcuffs to the stationhouse for further questioning. Tr. R. 10-6, Page ID 317-319; Tr. R. 10-13, Page ID 552; App., *infra*, 56a-57a. At the station, Petitioner repeatedly asked to make a phone call, but his requests were ignored. Tr. R. 10-6, Page ID 304-308, 326-28. An officer asked if Petitioner would be willing to undergo a polygraph examination, to which Petitioner replied that if he was going to take a polygraph, he needed an attorney. *Id*. at 303-304, 308-309; App., *infra*, 56a-57a. Later, after an officer suggested that he did not find parts of Petitioner's story credible, Petitioner said, "What do I got to do? I mean do I need to call a lawyer or something?" App., *infra*, 57a. The officer responded that Petitioner should look out for his best interests. *Ibid.*

Later in the conversation, Petitioner again mentioned getting an attorney. An officer suggested Petitioner's story was "jacked up." App., *infra*, 57a. Petitioner replied, "Well, then let's call the lawyer then 'cause I gave what I could." *Ibid.* The officer said, "That's fine." *Ibid.* After this, Petitioner said, "There's no reason for anybody to take me to jail." *Ibid.* The officer told Petitioner, "You getting a lawyer's not going to prevent you from going to jail." *Ibid.* Following this exchange, the interrogation continued. *Ibid.* During the interrogation, Petitioner gave multiple accounts of the events that led to J.P.'s injuries. Tr. R. 10-14, Page ID 570-571; Tr. R. 10-17, Page ID 625-626.

B. Proceedings below

Petitioner was charged with first-degree felony murder and two counts of first-degree child abuse.[2] Tr. R. 10-9, Page ID 390; Tr. R. 10-19, Page ID 768. He was tried in May 2009 in the Circuit Court for Saginaw County, Michigan.

Before trial, Petitioner moved to suppress the statements he made to the police at the station on the basis that he had invoked his right to counsel and that questioning therefore ought to have ceased, with any statements made thereafter in response to further questioning being inadmissible. Tr. R. 10-5, Page ID 285; see *Davis* v. *United States*, 512 U.S. 452, 458 (1994) ("[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation."). The trial court denied Petitioner's motion to suppress what it termed the "statement/confession," holding that the discussions "did not appear to this Court to be an unequivocal request to have an attorney present." App., *infra*, 99a, 101a. The

[2] The second first-degree child abuse count was added prior to the beginning of trial and related to injuries the child had sustained weeks before the September 2 incident. Tr. R. 10-5, Page ID 288-289; Tr. R. 10-7, Page ID 346-350; Tr. R. 10-9. Page ID 390. Petitioner was acquitted of this count. Tr. R. 10-19, Page ID 779.

court noted that "the defendant continued discussions with the officers after making [the] comment that now might be the time or words to that effect to speak to [a lawyer]." *Ibid.*

At trial, the state emphasized the inconsistencies in the accounts of events Petitioner provided to police. From the beginning of its case, the state stressed that Petitioner had changed his story multiple times while at the station and had there admitted that details in an earlier version of events he provided to police were untrue. Tr. R. 10-9, Page ID 393-394. Among the state's key evidence was the testimony of the police officers who had interviewed Petitioner. Through the officers' testimony, the state highlighted the inconsistent accounts Petitioner gave the officers of what had led to J.P.'s injuries. Tr. R. 10-14, Page ID 570-574; Tr. R. 10-17, Page ID 625-626; Tr. R. 10-19, Page ID 764-765. The state also played a video recording of the entire interrogation during its case-in-chief. Tr. R. 10-14, Page ID 574-575. It later replayed portions of the video during its closing arguments. Tr. R. 10-19, Page ID 765. In those closing arguments, the prosecutor told the jury, "It's very important for you to watch the chronology of the events as he relates them * * *. Look hard at his statements and see how they progress * * * . [Y]ou don't have to keep changing your story if you tell the truth." *Id.* at 764-766. After inviting the jurors to examine Petitioner's statements to the police in the jury room, the prosecutor reminded them that Petitioner's statements to the police were "absolutely critical to [their] decision making" and that "[y]ou would have to * * * [almost] be brain dead * * * to not want to look at everything he said and scrutinize it with a magnifying glass." *Id.* at 765, 771. And just to assure the jurors that the damaging statements were permissible evidence, the prosecutor attested to their legal admissibility: "I guarantee you're not going to hear any instruction from this Court that's going to tell you that you should eliminate that as evidence for you to consider." *Id.* at 771.

The jury found Petitioner guilty of first-degree felony murder and one count of first-degree child abuse. Tr. R. 10-20, Page ID 793; App., *infra*, 76a. The court sentenced Petitioner to a mandatory term of life imprisonment on the felony-murder charge and fifteen years on the child abuse charge. Tr. R. 10-20, Page ID 799. At sentencing, Petitioner maintained his innocence. *Id.* at 797. During his allocution, he said that he "loved [his daughter] and * * * miss[ed] her, * * * [and] would have never hurt her on purpose." *Ibid.*

Petitioner appealed as of right to the Court of Appeals of Michigan. App., *infra*, 76a. His counsel raised only one claim: insufficiency of the evidence. *Ibid.*; R. 10-23, Page ID 841, 863-872. Petitioner filed a supplemental pro se brief raising twenty-two additional claims, including that the statements made during his interrogation at the police station should have been suppressed because he unequivocally invoked his right to counsel. *Id.* at 885-937. The Court of Appeals affirmed Petitioner's conviction. App., *infra*, 76a. The Michigan Supreme Court denied Petitioner's application for leave to appeal the Court of Appeals' judgment. *Id.* at 75a.

Petitioner then filed a motion for relief from judgment in the trial court, which was denied. App., *infra*, 69a. The Court of Appeals denied Petitioner's application for leave to appeal that order. *Id.* at 68a. The

Michigan Supreme Court denied Petitioner's application for leave to appeal. *Id.* at 67a.

Petitioner filed a petition for a writ of habeas corpus in the U.S. District Court for the Eastern District of Michigan, raising four arguments. Pet. Am. Br., Dkt. 2 (Mar. 14, 2014); Am. Pet., Dkt. 6 (May 2, 2014). The district court denied Petitioner's petition but granted a certificate of appealability with respect to two issues, including "Petitioner's claim that his statement, 'Well, then let's call the lawyer then 'cause I gave you what I could,' constituted an unambiguous request for counsel that required the cessation of police questioning." App., *infra*, 65a-66a.

In a published decision, the Court of Appeals for the Sixth Circuit affirmed the district court's judgment. App., *infra*, 11a. With respect to the question raised here, the Sixth Circuit held that the state court had not unreasonably rejected Petitioner's claim that the state violated his Fifth Amendment right to counsel when it used statements he made after telling officers, "Well, then let's call the lawyer then 'cause I gave you what I could." *Id.* at 6a-7a.[3] Specifically, the panel held that the state court reasonably determined that Petitioner's statement was merely "akin to negotiations."

Citing a September 2017 Harvard Business Review article about negotiation theory, the Sixth Circuit con-

[3] At oral argument, Judge Sutton indicated multiple times that Petitioner had demonstrated that the use of the statements was prejudicial. Oral Argument at 10:45, 22:45, *Perreault* v. *Smith*, 874 F.3d 516 (6th Cir. 2017) (No. 16-1213). But in its opinion, the court held that Petitioner had not unambiguously invoked his right to counsel.

cluded that the state court had reasonably viewed Petitioner's statement as a mere negotiating tactic and accordingly it was ambiguous whether Petitioner had invoked his right to counsel. The court compared Petitioner's statement to statements made in various negotiations:

i. a potential car purchaser threatening to walk away at a car dealership "not because he wants to leave[, but rather] because he wants the salesman to lower the price or otherwise sweeten the deal";

ii. a child threatening a sibling to call their mother, not with the intention of following through, but instead "to convince the older [sibling] to return the toy or at least to give it back at some point"; and

iii. a person telling her adversary, "Well, then, I will see you in court!" or "Well, then let's call the arbitrator * * * 'cause I gave what I could," which "[n]o one takes * * * as a request for litigation" or arbitration. *Id.* at 5a-6a.

These examples, the court reasoned, showed that Petitioner's statement, "Well, then let's call the lawyer then 'cause I gave what I could," could reasonably be interpreted as "as a negotiation tactic." *Id.* at 5a.

REASONS FOR GRANTING THE PETITION

This Court should address the Sixth Circuit's dangerous conclusion that the state court reasonably determined that Petitioner's request for counsel was "akin to negotiations," and thus not an unequivocal invocation of his Fifth Amendment rights.

First, the Sixth Circuit's decision conflicts with this Court's clearly established law. Second, the reasoning of the Michigan Court of Appeals, adopted by the Sixth Circuit, adds to a divide among state appellate courts. Further, by adopting the reasoning of the Michigan Court of Appeals, the Sixth Circuit created a split with the Court of Appeals for the Ninth Circuit. Finally, the decision of the court below will have broad ramifications throughout the country, hampering suspects' ability to vindicate their rights during interrogations.

I. THE STATE COURT DECISION CONFLICTS WITH THIS COURT'S CLEARLY ESTABLISHED LAW ON AN ISSUE OF FUNDAMENTAL IMPORTANCE

Petitioner is entitled to habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 because the state court's decision that Petitioner's statement was "akin to negotiations," and therefore not an unambiguous request for counsel, was "an unreasonable application" of this Court's clearly established jurisprudence. 28 U.S.C. 2254(d)(1). It is clear "beyond any possibility for fair-minded disagreement," *Harrington* v. *Richter*, 562 U.S. 86, 103 (2011), that the statement, "Well, then, let's call the lawyer then 'cause I gave what I could," was an unambiguous invocation of Petitioner's right to counsel.

This Court has made clear that courts must determine whether a suspect made such a request by looking at how the suspect's words would be objectively understood. And this Court has explained, time and again, that invoking the right to counsel is a legally operative request. Once a suspect invokes the right, police must cease questioning. The state court acted contrary to this Court's clearly established law in two ways. First, the state court examined Petitioner's potential subjective intent, rather than the objective meaning of his words. Second, by treating Petitioner's invocation as "akin to negotiations," the state court disregarded this Court's clear instructions that an invocation is an operative request—it cannot be ignored or treated as a mere tactic.

A. Under this Court's Clearly Established Law, Petitioner Invoked His Right to Counsel

Petitioner's statement, "Well, then let's call the lawyer then 'cause I gave what I could" satisfies this Court's clearly established standards to invoke the right to counsel.

An individual subject to a custodial interrogation[4] has a right to seek counsel at any point during questioning. *Miranda* v. *Arizona*, 384 U.S. 436, 479 (1966). Once an accused invokes this right, he "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981).

The request for counsel need not be perfectly articulated; it must just be unambiguous. *Davis* v. *United States*, 512 U.S. 452, 459 (1994). That is, the 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

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[4] There was no dispute in the court below that when Petitioner was questioned at the police station he was subject to a custodial interrogation. Appellee C.A. Br. 37-39.

request for an attorney." *Ibid.* This is "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* v. *Thompkins*, 560 U.S. 370, 381 (2010) (alterations and omission in original) (quoting *Davis*, 512 U.S. at 458-459). "[A]n accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Smith* v. *Illinois*, 469 U.S. 91, 100 (1984) (per curiam) (emphasis omitted).

Under this precedent, Petitioner's statement, "Well, then let's call the lawyer then 'cause I gave what I could," was an unequivocal request for counsel. "Let's call the lawyer then" is a plain, declarative request for an attorney. The request expressed no hesitation. Cf. *Davis*, 512 U.S. at 462 ("'Maybe I should talk to a lawyer' * * * was not a request for counsel * * *."). The next clause, "'cause I gave what I could" only strengthens the force of this request. "[N]othing about the request for counsel or the circumstances leading up to the request * * * render[ed] it ambiguous * * *." *Smith*, 469 U.S. at 98. Indeed, the officer's response, "That's fine," reflects what a reasonable officer under those circumstances would have understood: that Petitioner had unambiguously requested an attorney.

B. Characterizing a Suspect's Request for Counsel as a Negotiation Tactic Misunderstands the Nature of Police Interrogations and Impermissibly Injects Subjectivity into an Objective Test

The Sixth Circuit held that viewing Petitioner's statements as "akin to negotiations" was "plausible." App., *infra*, 5a. Because Petitioner's statement could have been viewed as a "negotiation tactic," the court explained, it did not amount "to an unequivocal request for counsel." *Id.* at 7a. However, viewing Petitioner's—or any suspect's—statement requesting counsel during an interrogation as a negotiation tactic is fundamentally incompatible with this Court's clear jurisprudence on custodial interrogations and the right to counsel.

To be sure, some officers may try to suggest to suspects that their *Miranda* rights are subject to negotiation. See Richard A. Leo, Police Interrogation and American Justice 126-164 (2008). That is, police "use * * * negative and positive incentives * * * to *make the suspect view* the interrogation as a negotiation in which he has little meaningful choice but through which he can put an end to this distressing process and gain a better outcome before it is too late." *Id.* at 134 (emphasis added). For example, officers may tell a suspect that they will portray the suspect's story more favorably to the prosecution or that the suspect will receive more lenient treatment if he waives his right to counsel. See *id.* at 128-129. Officers may also suggest that if a suspect waives his rights and tells his story, he can go home afterward. *Id.* at 132; see also Christopher Slobogin, *Manipulation of Suspects and Unrecorded Questioning: After Fifty Years of* Miranda *Jurisprudence, Still Two (or Maybe Three) Burning Issues*, 97 B.U. L. Rev. 1157, 1169 (2017).

But viewing suspects' attempts to invoke their constitutional rights as mere negotiating ploys is inconsistent with both the nature of interrogations and this Court's clearly established law. As an initial matter, regardless of the strategies officers may use, interrogations are completely different from negotiations. A custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966). "It is obvious that [a custodial] interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Id.* at 457. That is, "the singular purpose of American police interrogation is to elicit incriminating statements and admissions—ideally a full confession—in order to assist the State in its prosecution of the defendant." Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 911 (2004); see also *Miranda*, 384 U.S. at 449.

By contrast, a negotiation is a "back-and-forth communication designed to reach an *agreement* when you and the other side have *some interests that are shared* and others that are opposed (as well as some that may simply be different)." Roger Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In xxvii (2011) (emphases added). People either try to get what they want at the expense of their relationship with the other side or "both sides look for mutual gains whenever possible, and where * * * interests conflict, [parties] * * * insist that the result be based on some fair standards independent of the will of either side." *Id.* at xxviii (comparing "standard" with "principled" negotiations). Unlike an interrogation, where the goal is to obtain an incriminating statement, see *Mi-*

randa, 384 U.S. at 449, 451, negotiations try to reach a place of mutual agreement.[5]

Moreover, treating the invocation of the right to counsel as a negotiation tactic is inconsistent with this Court's clearly established law. First, the right to counsel is not a mere bargaining chip. Rather, "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." *Miranda*, 384 U.S. at 469. The presence of counsel ensures that any decision a suspect makes—negotiated agreement or otherwise—is reached in a way that safeguards a suspect's rights. See *ibid.* "The presence of counsel at the interrogation may serve several significant subsidiary functions as well," including "mitigat[ing] the dangers of untrustworthiness," reducing the likelihood of police coercion, and "help[ing] to guarantee that the accused gives a fully accurate statement to the police." *Id.* at 470. Even if a court be-

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[5] *Edwards* v. *Arizona*, 451 U.S. 477 (1981), illustrates this distinction between an interrogation and a negotiation. In *Edwards*, "[t]he interrogating officer told [Edwards] that he wanted a statement, *but that he did not have the authority to negotiate a deal*." *Id.* at 479 (emphasis added). In negotiations leading to a plea deal, a deferred prosecution agreement, a non-prosecution agreement, or any other disposition, both sides are trying to reach a point of agreement on what the conviction and sentence should be (if any). For example, a prosecutor may agree to a given disposition if an accused agrees not to go to trial or contest certain issues. Cf. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv. L. Rev. 2548, 2554-2556 (2004). There is no suggestion that such a negotiation took place here. Rather, what occurred was a classic interrogation, questioning where police tried to obtain a statement from Petitioner. See *Miranda,* 384 U.S. at 457.

lieved that some aspects of a suspect's interrogation were "akin to negotiations," the court is required to view the presence of an attorney as an essential tool for the protection of the suspect's rights during the interrogation, and not as a negotiation tool.

Second, treating an unambiguous request for counsel as a threat issued during a negotiation adds an element of subjectivity into what this Court has clearly established as "an objective inquiry." *Berghuis* v. *Thompkins*, 560 U.S. at 381; *Davis*, 512 U.S. at 459 ("[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."). The decision of the court below suggests that one looks at the underlying motivation of the speaker even if the statement itself is clear. See App., *infra*, 7a. The Sixth Circuit reasoned: "When a would-be car purchaser threatens to walk away, that's not because he wants to leave * * *. When a child threatens to call Mom if his older sister refuses to return a favorite toy, the goal is not to call Mom."[6] *Id.* at 5a-6a. Under this logic, police—and courts on review—can interpret statements as clear as "I would like to leave the dealership now" or

[6] The examples provided by the court below are also inapposite on their own terms. In each of these scenarios, the person threatens an outcome he presumably does not want—and would incur some downside if that outcome occurred: the car buyer does not actually want to leave the dealership but wants to get the car at a better price; the child does not actually want to involve Mom but wants the toy back. Here, there is no indication that Petitioner did not want counsel or perceived any downside in obtaining counsel.

"I would like to call Mom now" (or "I would like an attorney now") as a "tactic" rather than what the plain words convey. Cf. *King* v. *Burwell*, 135 S. Ct. 2480, 2503 (2015) (Scalia, J., dissenting) ("If that is all it takes to make something ambiguous, everything is ambiguous."). Such an approach imputes a speaker's possible subjective intent into an otherwise clear statement and is inconsistent with this Court's clearly established law.

Finally, invoking the right to counsel cannot be considered a strategic "threat" because officers must abide by the request. In the Sixth Circuit's "car dealership" example, a prospective car purchaser could say (or threaten), "I'm going to leave now." The car dealer could then try to convince the prospective purchaser not to leave. Or the car dealer could simply shrug and wait to see if the customer actually leaves. This is because in a negotiation, the other side "can ignore threats" or "take them as * * * simply irrelevant." Fisher et al., *supra*, at 140. Threats have no necessary immediate ramifications. See *ibid.* However, once a suspect says, "I would like to speak to an attorney now," police must cease all questioning.

That is, the invocation of the right to counsel is legally operative. "[I]f the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present." *Davis* v. *United States*, 512 U.S. 452, 462 (1994); see also *Edwards*, 451 U.S. at 484-485. Accordingly, unlike with otherwise similar statements in other contexts, when it comes to invoking the right to counsel, the police cannot try to ignore the request or see if the suspect will follow through on it. The decision below that Petitioner's statement could have been "akin to negotiations" and therefore ambiguous is fundamentally incompatible with clearly established law.

II. The Decision Below Substantially Contributes to a Significant Division Among Appellate Courts

In adopting the "negotiation" framework, the Sixth Circuit's decision creates confusion in both state and federal courts. First, state high courts have squarely rejected the negotiation framework. Second, the decision of the Michigan Court of Appeals, adopted by the Sixth Circuit, contributes to a significant division between state appellate courts as to whether officers and courts can consider a suspect's subjective intent when invoking counsel. Third, the Sixth Circuit's reasoning creates a split with the Ninth Circuit, which has emphasized the Supreme Court's clear precedent requiring courts to consider the objective meaning of a suspect's words.

A. State High Courts that Have Encountered the Negotiation Framework Have Rejected It

The opinion of the Michigan Court of Appeals, adopted by the Sixth Circuit,[7] directly conflicts with

[7] The Sixth Circuit stated that "habeas review requires us to consider what arguments or theories supported or *could have supported* the state court's decision" and indicated that its explanation of why Petitioner's statement might have been interpreted as negotiation was sufficient to do so. App., *infra*, 7a (citing *Harrington* v. *Richter*, 562 U.S. 86, 102 (2011); *Davis* v. *Carpenter*, 798 F.3d 468, 475 (6th Cir. 2015)). The opinion did not discuss any other reasons why Petitioner's statement could be ambiguous. Accord-

the decisions of two state high courts. Specifically, the Massachusetts Supreme Judicial Court and the District of Columbia Court of Appeals have both rejected the notion that a statement appearing on its face to be a request for counsel can be made ambiguous by construing it as a negotiation tactic or sarcastic comment. These state high courts encountered statements materially indistinguishable from Petitioner's and held them unambiguous. The decisions of the Sixth Circuit and Michigan Court of Appeals thus not only inappropriately applied the objective test of *Davis* but also created confusion among state courts by allowing inquiries into the subjective purposes of unambiguous words.

In *Commonwealth* v. *Hearns*, 10 N.E.3d 108 (Mass. 2014), the Massachusetts Supreme Judicial Court (SJC) confronted a statement almost identical to Petitioner's.[8] There, Hearns told the interrogating officer, "Well then, I don't want to talk. I haven't got nothing to say." *Id.* at 112. The SJC found this statement "was a clear invocation of [Hearns's] right to remain silent." *Id.* at

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ingly, the Sixth Circuit independently endorsed the negotiation-as-ambiguity rationale and rested its decision upon it. *Ibid.*

[8] Although *Hearns* involved the right to remain silent, rather than the right to counsel, the standard for evaluating the invocation is the same for both rights. See *Berghuis* v. *Thompkins*, 560 U.S. 370, 381 (2010) ("[T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*."). Accordingly, the SJC applied the *Davis* standard in its analysis. See *Hearns*, 10 N.E.3d at 116 ("[W]e consider whether a reasonable police officer in the circumstances would understand the statement to be an invocation." (citing *Davis*, 512 U.S. at 459)).

116. Further, the court rejected the Commonwealth's argument and the motion judge's ruling "that the [suspect]'s statement was merely a negotiating ploy." *Id.* at 117. The SJC explained, inter alia, that the suspect's "'statement of the reason why' he invoked his *Miranda* protections 'does not render the request ambiguous.'" *Ibid.* (quoting *Commonwealth* v. *Santos*, 974 N.E.2d 1, 13 (Mass. 2012)).

The District of Columbia Court of Appeals, the District of Columbia's highest court, has also declined to read a subjective intent to "negotiate" into an objective invocation of the right to counsel. See *Jennings* v. *United States*, 989 A.2d 1106 (D.C. 2010). In *Jennings*, the court held that the statement, "I'm done talking to you. Go get my lawyer," *id.* at 1110, was a clear invocation of the right to counsel, even though the manner in which the defendant spoke caused the D.C. Court of Appeals to acknowledge, "we can see why the trial judge may have thought [Jennings]'s statement [asking for his attorney] was sarcastic." *Id.* at 1112. "[A]pply[ing] the objective test enunciated in *Davis*," it "conclude[d] that [Jennings] was 'sufficiently clear[] that a reasonable police officer' would have understood his statement as a request for an attorney." *Id.* at 1113 (final alteration in original) (quoting *Davis* v. *United States*, 512 U.S. 452, 459 (1994)). The trial court's suggestion that the statement was not subjectively serious (and the observation of the Court of Appeals that such an interpretation was understandable) was insufficient to make the statement equivocal.

The reasoning of the Sixth Circuit and the Michigan Court of Appeals is inconsistent with the decisions of these state high courts. Viewing the statements together, there seems to be no linguistic reason to distinguish them as invocations. *Compare* App., *infra*, 3a. ("Well, then let's call the lawyer then 'cause I gave what I could."), with *Hearns*, 10 N.E.3d at 112 ("Well then, I don't want to talk. I haven't got nothing to say."), and *Jennings*, 989 A.2d at 1110 ("I'm done talking to you. Go get my lawyer."). Nor has any been offered. The decisions of the Sixth Circuit and Michigan Court of Appeals instead rest entirely on the assumption that Petitioner might not have meant what he said.

B. State Appellate Courts Are Divided on Whether Subjective Intent Introduces Ambiguity

As described above, the prior decisions in Petitioner's case endorse factoring subjective intent into a court's analysis of a suspect's invocation. In this respect, lower courts diverge. Many recognize that clear Supreme Court precedent requires an objective, plain-meaning review of a suspect's statement within its context. But a disconcerting number of others have begun to incorporate subjective factors into *Davis*'s "bright-line" rule. These subjective factors undermine the rule's purposes of clarity, consistency, and objectivity. This Court's review is necessary to restore harmony to the growing cacophony emerging from state appellate courts across the country.

Several state courts have rightly understood *Davis* to require an objective review of the substance of a suspect's statements. A number of state high courts, including those in Part II.A, have rejected subjective analyses of objectively unequivocal invocations. For example, in *Smith* v. *United States*, 529 A.2d 312 (D.C. 1987), the District of Columbia Court of Appeals reversed a trial court's denial of a motion to suppress in a case involving a controverted invocation of counsel. The interrogating officer asked Smith three questions pertaining to his *Miranda* rights.[9] *Id.* at 314. Smith replied "Yes" to each. *Ibid.* The officer then asked Smith if he was willing to answer questions without an attorney, and Smith responded, "No." *Ibid.* The officer was surprised and asked again in order to clarify Smith's intention. *Ibid.* Smith said that he had been confused and that he would answer questions without an attorney. *Ibid.* The D.C. Court of Appeals reversed the trial court's decision denying Smith's motion to suppress, holding that Smith had invoked his right to counsel. *Id.* at 316-318. It "decline[d] to accord weight to an officer's subjective impression that a suspect's request for counsel was equivocal, when that impression is unsupported by any objective circumstances appearing in the record." *Id.* at 317.

In *State* v. *S.S.*, 162 A.3d 1058 (N.J. 2017), the Supreme Court of New Jersey similarly cautioned against introducing subjectivity into the analysis of whether a suspect unequivocally invoked the right to remain silent. *See id.* at 1072-1073. There, the suspect stated, "No, that's all I got to say. That's it." *Id.* at 1072. The Appellate Division of the New Jersey Superior Court had found the suspect's statement ambiguous based on his "level unchanged tone." *Id.* at 1064. The Supreme Court of New Jersey reversed. *Id.* at 1061. It explained that "[w]hatever the tone of a suspect's voice,

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[9] These questions were: (1) "Have you read or had read to you the warning as to your rights?"; (2) "Do you understand these rights?"; and (3) "Do you wish to answer any questions?" *Smith*, 529 A.2d at 314 n.2.

whether it is loud or soft or unchanged or shifting, or whether the suspect is calm or jittery or submissive or antagonistic, words will make a difference and oftentimes have an objective meaning to reasonable law enforcement officers." *Id.* at 1072. The court noted that "*[e]levating the importance of tone over the import of words*, as the [court below] did here, *can lead to injecting a high degree of subjectivity into the analysis*." *Id.* at 1072-1073 (emphases added).

The Maryland Court of Appeals, Maryland's highest court, also focused on the suspect's words, rather than his potential subjective intent. See *Ballard* v. *State*, 24 A.3d 96, 102-104 (Md. 2011). Ballard had said, "You mind if I not say no more and just talk to an attorney about this." *Id.* at 97. The trial court had reasoned that it looks at "not the words alone[,] * * * not only the typed word on a piece of paper, but ** * [also at] [the suspect's] inflection, of the tone and things of that sort." *Id.* at 100. The Maryland high court rejected this reasoning, emphasizing that its review centered upon whether Ballard's "words were an unambiguous and unequivocal assertion of the right to counsel." *Id.* at 102.

On the other side of the divide, several state courts have incorporated subjective factors into their review of whether a suspect invoked his right to counsel. Unsurprisingly, these courts also frequently find alleged invocations ambiguous. In *Dodge* v. *State*, 427 S.W.3d 149 (Ark. Ct. App. 2013), the Arkansas Court of Appeals appeared to endorse the reasoning that the statement, "*I really need to call for a lawyer*," *id.* at 151, was "rhetorical and ambiguous because Dodge never said that he no longer wanted to talk or that he was 'done' until he got a lawyer." *Id.* at 153. It found no error in the trial court's finding that Dodge's comments "indicated that he was merely considering asking for" an attorney. In essence, the *Dodge* court found what was said less important than whether it believed the suspect meant it.

In *Quisenberry* v. *Commonwealth*, 336 S.W.3d 19 (Ky. 2011), the Supreme Court of Kentucky mixed in a subjective analysis with its review of whether a statement was unequivocal. There, co-defendant Williams had said, "This is all I'm saying, can I tell my lawyer the real story and he tell y'all?" *Id.* at 33. The court held that this statement was ambiguous in part because it was unclear whether Williams's "interest in counsel [was] for the sake of counsel's advice or merely in hopes that counsel could screen him from being perceived as a snitch." *Id.* at 34. The differing possibilities for the suspect's intent were adjudged sufficient to find the suspect's statement was not an invocation. *Ibid.*

California state courts also appear to discount objectively unequivocal statements "where the interrogating officer could reasonably construe the statement as one of *passing* or *momentary* frustration, or simply a denial of guilt, rather than a demand to end the interrogation." *People* v. *Villasenor*, 194 Cal. Rptr. 3d 796, 814 (Ct. App. 2015) (discussing, among other California cases, *People* v. *Jennings*, 760 P.2d 475 (Cal. 1988), *modified* (Nov. 10, 1988)); see also *People* v. *Thomas*, 150 Cal. Rptr. 3d 361, 375 (Ct. App. 2012) (holding the statement, "I ain't talking no more and we can leave it at that," was an "expression of momentary frustration and, at most, was an ambiguous invocation"). In *People* v. *Davis*, 208 P.3d 78 (Cal. 2009), Davis had said, "Well then book me and let's get a lawyer and let's go for it, you know." *Id.* at 118. The Supreme Court of California held that the trial court reasonably concluded this statement was "a challenge" and a "technique" similar to that being used by the interrogating officers, not an invocation. *Ibid.*

The Sixth Circuit's decision below is another example of a trend that these state court decisions demonstrate: inserting a subjective element into what this Court has clearly stated is an objective analysis. In doing so, these courts reason in a way that is contrary to this Court's clearly established law. Further, because these decisions changed the analysis set forth by this Court, there are now conflicting approaches to analyzing invocations of *Miranda* rights throughout the country. The decisions of the Sixth Circuit and the Michigan Court of Appeals countenance an extreme version of the subjective approach. Viewing an objectively unambiguous statement as a potential negotiation allows a court to go behind the spoken words and examine the sincerity or motive of the suspect's request. This makes the contrast between the objective and subjective approaches even more stark.

C. The Sixth Circuit's Reasoning Conflicts with That of the Ninth Circuit

In addition to implicating disagreement among state high courts, the decision below creates a split between circuits. The Ninth Circuit has repeatedly limited the scope of its invocation analysis to objective factors. In *Anderson* v. *Terhune*, 516 F.3d 781 (9th Cir. 2008) (en banc), the Ninth Circuit forcefully rejected a state court's reasoning that a suspect's statement, "I plead the Fifth," was ambiguous because it "could have been interpreted as not wanting officers to pursue the particulars of [an incriminating line of questioning] as opposed to not wanting to continue the questioning at all." *Id.* at 789 (citation omitted). Referencing *Connecticut* v. *Barrett*, 479 U.S. 523, 529 (1987), the Ninth Circuit observed, "What about the words 'I plead the Fifth' is unclear, ambiguous, or confusing to a reasonable officer? Nothing." *Anderson*, 516 F.3d at 789.

The Ninth Circuit found another suspect's statement unequivocal despite a dissent's suggestion that the statement might have been seen as a negotiation tactic. In *Sessoms* v. *Grounds*, 776 F.3d 615 (9th Cir. 2015) (en banc), the court similarly asserted, "When a suspect says 'give me a lawyer,' * * * [i]t is an unambiguous request for a lawyer, no matter how you slice it. The statement is unequivocal—it is not a maybe or a perhaps—it is an invocation of the Fifth Amendment right to counsel." *Id.* at 617.

Finally, the Ninth Circuit has recently once again repudiated questioning of a suspect's subjective motivation in order to find ambiguity, as performed by other courts. See *Garcia* v. *Long*, 808 F.3d 771 (9th Cir. 2015). In the *Garcia* case, the suspect was asked, "[H]aving [your *Miranda* rights] in mind, do you wish to talk to me?," and he responded, "No." *Id.* at 774. The California state court determined "that Garcia's 'no' was ambiguous because it may not have been 'genuine.'" *Id.* at 780. The Ninth Circuit held that the state court's understanding was "an unreasonable determination of the facts," as "nothing in Garcia's prerequest statements support[ed] this finding." *Ibid.*

These decisions reject the reasoning underlying the Sixth Circuit's opinion. Rather than reviewing a statement for ambiguity of intent, the Ninth Circuit has focused on the statement itself and whether (in its appropriate context) it is ambiguous. This cannot be squared with the Sixth Circuit's rationale that a statement did not rise to an unequivocal request for counsel because it reasonably could be understood as a negotiating tactic.[10]

Because of this divergence of approaches, identical statements made under similar circumstances may be treated differently based on where a suspect resides or how creative a court can be in imagining the alternative motivations of a suspect. This is precisely the type of inconsistency this Court has sought to avoid by creating an objective test through which to view invocations. See *Berghuis* v. *Thompkins*, 560 U.S. 370, 381 (2010); *Davis* v. *United States*, 512 U.S. 452, 459 (1994). The petition should be granted in order to prevent such divergent outcomes and to ensure that all unequivocal

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[10] As discussed above, the Supreme Court of California takes the opposite approach to the Ninth Circuit. See p. 24, *supra*. Accordingly, a state high court and the federal circuit court encompassing that state have divergent interpretations of federal law. This results in a Rube Goldberg–esque process that a California defendant must go through to secure his *Miranda* protections. First, the defendant will lose his motion to suppress on the basis that his invocation might have been a "technique" and the decision will be affirmed on appeal. Next, he must exhaust his state post-conviction remedies through the California state courts, which also consider a suspect's potential subjective intent and will deny relief on the same basis. Then, having lost, the defendant can bring a federal habeas petition, which, as in *Sessoms*, will be granted because under the Ninth Circuit's approach a suspect's potential subjective intent should not be considered when evaluating a statement. And the defendant will finally have a new trial without the contested statement, likely many years after his conviction. See, *e.g.*, *Garcia*, 808 F.3d at 784 (granting habeas relief to a California petitioner nearly six years after his trial).

requests for counsel are treated as such, without regard to geography.

III. THE OUTCOME OF THIS CASE CONSTRAINS THE ABILITY OF SUSPECTS ACROSS THE COUNTRY TO INVOKE A CRITICAL CONSTITUTIONAL PROTECTION

The Sixth Circuit's decision will have a substantial impact on suspects' rights, constraining them in their ability to invoke their right to counsel.

A. This Decision Will Have Significant and Far-Reaching Consequences

The circumstances of Petitioner's interrogation mirror a situation that occurs many times a day across the country. Petitioner was brought by the police to the station for questioning, was read his *Miranda* rights, and was asked to waive them. And Petitioner, like most suspects, complied with the request and initially waived his right to counsel. [11] Petitioner later tried to invoke his right to counsel, but the courts below determined that in making that request, he may not have actually meant what he said. Absent intervention from this Court, these decisions will affect how officers

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[11] The vast majority of suspects waive their *Miranda* rights. See Yueran Yang et al., Application: The Self and False Confessions in the Courtroom, in Social Psychology: How Other People Influence Our Thoughts and Actions 219 (Randal W. Summers ed., 2017); Anthony J. Domanico et al., *Overcoming* Miranda*: A Content Analysis of the* Miranda *Portion of Police Interrogations*, 49 Idaho L. Rev. 1, 13 (2012). Accordingly, for most suspects who choose to invoke their right to counsel, the decision to do so is likely made in the midst of an interrogation.

throughout the country conduct interrogations and how courts interpret requests for counsel.

The decisions of the court below will allow officers to conduct their interrogations in a way that effectively eliminates a suspect's ability to request counsel. While suspects encounter an unfamiliar environment in interrogations, police plan and prepare for interrogations. See, *e.g.*, Fred E. Inbau et al., Criminal Interrogation and Confessions (2013). Officers enter interrogations trained on how to elicit statements consistent with the law. "Basic academy instruction conveys the fundamentals of *Miranda* and Fifth Amendment law. Advanced courses in interviews and interrogations often teach legal constraints and interrogation techniques together." Charles D. Weisselberg, *Mourning* Miranda, 96 Calif. L. Rev. 1519, 1539 (2008); see also Inbau et al., *supra*, at 404-407 (explaining *Miranda* and its progeny and how to conduct interrogations accordingly). Further, police guides and manuals rely on federal and state caselaw to determine the boundaries of police interrogation techniques and what constitutes an unequivocal request for counsel. *Ibid.*; see, *e.g.*, Pamela B. Loginsky, *Confessions, Search, Seizure, and Arrest: A Guide for Police Officers and Prosecutors* 28-35, 59-66 (2012), http://www.kingcounty.gov/~/media/operations/oleo/files/ConfessionsSearchSeizureandArrest.ashx.

If the decisions of the courts below stand, officers and the government can argue that a request for counsel made with a certain tone or inflection, or with certain body language, was in fact just a negotiating tactic. Indeed, under the reasoning of the courts below, officers may even engage in negotiation tactics when a suspect requests a lawyer, so that invoking the right to counsel becomes even more difficult. These outcomes affect not only those suspects seeking to invoke their right to counsel but also those seeking to invoke their right to remain silent. See *Berghuis* v. *Thompkins*, 560 U.S. 370, 381 (2010).

In this environment, a suspect's ability to invoke his *Miranda* rights will be substantially and impermissibly impaired. Under this Court's precedent, "a suspect need not 'speak with the discrimination of an Oxford don,' * * * he 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) (quoting *id.* at 476 (Souter, J., concurring in the judgment)). This Court was clear this is an "objective inquiry." *Berghuis*, 560 U.S. at 382. If the decisions below stand, this "objective inquiry" will now also have a subjective component—whether the suspect really meant what he or she said.

B. This Decision Compounds the Inherent Pressures Preventing Suspects from Invoking Their Rights

This outcome is particularly problematic given the pressures inherent in interrogations. As this Court has acknowledged in *Miranda* and its progeny, the interrogation "atmosphere carries its own badge of intimidation." *Miranda*, 384 U.S. at 457. "Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment." *Minnesota* v. *Murphy*, 465 U.S. 420, 433 (1984); see also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 911-912 (2004) ("[P]olice interrogation is stress-inducing by design; it is intentionally structured to promote isolation, anxiety, fear, powerlessness, and hopelessness.").

Given these stressors, jurists and academics alike have expressed concern that it is a significant burden for suspects to invoke their *Miranda* rights. See, *e.g.*, *Davis* v. *United States*, 512 U.S. 452, 469-470 (Souter, J., concurring in the judgment) ("[M]any * * * will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them."). Research suggests that groups including the "powerless" and those of a lower socioeconomic status are more likely to speak with "an indirect speech style and greater use of hedging." Peter M. Tiersma & Lawrence M. Solan, *Cops & Robbers: Selective Literalism in American Criminal Law*, 38 Law & Soc'y Rev. 229, 253-254 (2004); see also Yale Kamisar, *The Rise, Decline and Fall(?) of* Miranda, 87 Wash. L. Rev. 965, 996 (2012) ("[S]ince the custodial police interrogation environment involves an 'imbalance of power' between suspects and their interrogators, such an environment increases the likelihood that a suspect will adopt an indirect or hedged—and thus ambiguous-means of expression."). And Justice Souter's concurrence in *Davis* correctly predicts that "interrogators' denial of [a suspect's] requests to talk to a lawyer," even if linguistically ambiguous, "may well [cause a suspect to] see further objection as futile." *Davis*, 512 U.S. at 472-473 (Souter, J., concurring in the judgment). That is, "[w]hen the police ignore an ambiguous response altogether, or try to deflect a request for counsel, any future invocation of the right to counsel by the suspect is unlikely." Marcy Strauss, *Understanding* Davis v. United States, 40 Loy. L.A. L. Rev. 1011, 1059 (2007).

The Sixth Circuit and the Michigan Court of Appeals add yet another hurdle for a suspect to overcome. Not only must the suspect articulate the invocation without linguistic ambiguity, but now he must also assert it without ambiguity as to his intent. And so the suspect is caught on the horns of a dilemma: be more deferential, and risk permitting alternative readings of his words, or be more assertive, and risk the possibility of the invocation being dismissed as a threat, negotiating tactic, or passing frustration. If an invocation need not be made with the discrimination of an Oxford don, it ought not require the justification of a teleological philosopher either. The purpose of *Edwards*'s lifeline is to allow a suspect the opportunity to dispel the pressures of interrogation without undue hardship. If courts hold other suspects to the same standard as Petitioner, many will be left without a lawyer despite stating in no uncertain terms their desire to have one.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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