No. 17-1047

IN THE
Supreme Court of the United States

SCOTT DAVID PERREAULT,

Petitioner-Appellant,

v.

ANTHONY STEWART, Warden,

Respondent-Appellee.

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

BRIEF OF *AMICI CURIAE* CRIMINAL PROCEDURE AND NEGOTIATION SCHOLARS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether under the objective test established in *Davis v. United States*, 512 U.S. 452 (1994), courts may rely on a suspect's purported subjective motivation for invoking the *Miranda* right to counsel in order to cast doubt on the clarity of an otherwise unambiguous and unequivocal invocation.

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STATEMENT OF INTEREST

This brief of *Amici Curiae* is respectfully submitted pursuant to Supreme Court Rule 37(2).[1] It is filed in support of the Petition for a Writ of Certiorari.

Amici are experts in the fields of criminal law, criminal procedure and negotiation theory.[2] They teach and have written extensively on those subjects. *Amici* are committed to ensuring that the laws established by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny are upheld and uniformly applied by the lower courts, not only to safeguard the Fifth Amendment rights of the accused, but also to guarantee that this body of law remains unified and cohesive so that it may be readily taught to the next generation of attorneys.

Amici believe this submission will assist the Court in its deliberations.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of Record for all parties were provided more than 10 days' notice and consented in writing to the filing of this brief.

[2] A list of *amici* criminal procedure and negotiation scholars is set forth in Appendix A. The opinions of *amici* negotiation scholars are reflected only in Section I.D, *infra*.

SUMMARY OF ARGUMENT

For over two decades, courts have conducted an "objective inquiry" to determine whether a suspect has invoked the *Miranda* right to counsel. *Davis v. United States*, 512 U.S. 452 (1994). This case presents a fundamental challenge to that long-standing test. Although Petitioner clearly and unequivocally requested an attorney, both the Michigan state court and the Sixth Circuit concluded that the request was ambiguous because Petitioner allegedly did not subjectively intend to make a legally operative *Miranda* invocation. The Michigan state court interpreted Petitioner's request for an attorney as only "akin to negotiations." The Sixth Circuit endorsed that analogy, holding that Petitioner's request for an attorney could be interpreted as a "negotiating tactic." Those decisions conflict with this Court's clearly established law. The Sixth Circuit decision also undermines the uniformity of federal law by creating a circuit split with the Ninth Circuit. The Ninth Circuit has twice held that state courts unreasonably applied federal law by relying on a suspect's purported subjective motivations for invoking the *Miranda* right to remain silent in order to cast doubt on the clarity of an otherwise unambiguous invocation. This Court should grant certiorari to reverse the Sixth Circuit's erroneous decision and restore uniformity to federal law.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CLEARLY ESTABLISHED LAW.

A. This Court Clearly Established an Objective Inquiry for Determining When a Suspect Has Invoked the *Miranda* Right to Counsel.

The Fifth Amendment states that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. To safeguard the Fifth Amendment privilege against self-incrimination, this Court held in *Miranda* that a suspect subject to custodial interrogation has the right to consult an attorney and have counsel present during questioning, and that the police must inform the suspect that he possesses those rights before the interrogation begins. 384 U.S. at 469-73. The *Miranda* right to counsel is not required by the Fifth Amendment itself, but rather was established "to insure that the right against compulsory self-incrimination was protected" from the inherently coercive effects of custodial interrogation. *See Michigan v. Tucker*, 417 U.S. 433, 443-44 (1974).

In *Edwards v. Arizona*, 451 U.S. 477 (1981), this Court created a "second layer of prophylaxis" to protect the privilege against self-incrimination. *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). The Court held in *Edwards* that if a suspect requests an attorney at any time during a custodial interrogation, the police must immediately stop questioning the suspect until a lawyer is made available or the suspect knowingly and intelligently waives the *Miranda* right to counsel after voluntarily reinitiating the conversation. 451 U.S. at 484-85; *see also Oregon v. Bradshaw*, 462 U.S. 1039, 1044-46 (1983). That "bright line" rule was crafted to solve problems on both sides of the "*Miranda* equation." *Davis*, 512 U.S. at 461. By requiring the police to end an interrogation when a suspect requests counsel, the *Edwards* rule "prevent[s] police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan v. Harvey*, 494 U.S. 344, 350 (1990). And by clearly instructing the police how to proceed if a suspect invokes *Miranda*, the *Edwards* rule ensures that *Miranda*'s protections will not "unduly hamper[] the gathering of information." *Davis*, 512 U.S. at 461.

After *Edwards*, an invocation of the *Miranda* right to counsel "require[d], at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *McNeil*, 501 U.S. at 178. Furthermore, if a suspect invoked that right without question, *Edwards* specified that the police must halt the interrogation. 451 U.S. at 485. *Edwards* did not, however, provide any guidance for circumstances where a suspect only "*might* be invoking the right to counsel". *Davis*, 512 U.S. at 459.

This Court answered that question in *Davis*. There, this Court observed that the "applicability of the 'rigid prophylactic rule' of *Edwards*" required courts to determine, in the first place, "whether the accused *actually invoked* his right to counsel." *Id.* at

458 (quoting *Smith v. Illinois*, 469 U.S. 91, 94 (1984) (internal quotations omitted)). "To avoid difficulties of proof and to provide guidance to officers conducting interrogations," this Court stressed that such an inquiry must be an "*objective* inquiry." *Id.* at 458-59 (emphasis added) (citing *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987)). *Davis* instructs that "[a]lthough 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." *Id.* at 459 (citation omitted). A request that is "ambiguous or equivocal," by contrast, is not sufficient to invoke the *Edwards* prohibition on further questioning. *Id.*

Davis's objective inquiry is central to this Court's post-*Miranda* jurisprudence. It is how the police and reviewing courts determine whether *Edwards*'s prohibition on post-invocation questioning applies, or should have been applied, during an interrogation.

B. Petitioner Objectively Invoked His *Miranda* Right to Counsel Unambiguously and Unequivocally.

Under this Court's precedents, Petitioner's statement—"Well, then let's call the lawyer then 'cause I gave what I could"—is an objectively unambiguous and unequivocal request for counsel. *See Davis*, 512 U.S. at 459.

First, Petitioner's statement is a plain and direct declaration that would ordinarily be understood "at a minimum" as expressing a "desire for the assistance of an attorney." *McNeil*, 501 U.S. at 178; *see also Barrett*, 479 U.S. at 529 (explaining that the words of a request for counsel will be "understood as ordinary people would understand them"). Petitioner did not equivocate by using familiar qualifiers such as "maybe" or "might" or "I think." *See Davis*, 512 U.S. at 462 (holding that "[m]aybe I should talk to a lawyer" was not a sufficiently unequivocal request for counsel). Nor did Petitioner condition his request for counsel upon the occurrence of an event that did not come to pass. *See Barrett*, 479 U.S. at 529-30 (holding that a suspect who stated that he would not make a written statement outside the presence of counsel did not invoke his right to counsel "for all purposes," such as with respect to oral statements).

Second, "the circumstances" of Petitioner's interrogation underscore that his request for counsel cannot be reasonably understood as anything other than a legally operative *Miranda* invocation. *Davis*, 512 U.S. at 459. By the time he invoked his right to counsel, Petitioner had made two earlier references to an attorney. When an officer asked if Petitioner would be willing to undergo a polygraph examination, Petitioner replied conditionally that if he were to submit to a polygraph, he would need an attorney. Pet'r Br. at 3. Later, after an officer suggested that he did not find parts of Petitioner's story credible, Petitioner stated, "What do I got to do? I mean do I need to call a lawyer or something?" *Ibid.* The officer responded that Petitioner should look out for his best interests. *Ibid.* It was after an officer *again* suggested that Petitioner's story was "jacked up," *ibid.*, that Petitioner attempted to end the interrogation by unambiguously and unequivocally invoking his

Miranda right to counsel and stating that he had nothing further to say to the police—"Well, then let's call the lawyer then 'cause I gave what I could." *Ibid.* Although that invocation is clear on its face, under "the circumstances" of the preceding exchanges regarding whether Petitioner wanted or needed counsel, a reasonable officer would have objectively understood Petitioner's final statement as a legally operative request for an attorney. *Davis*, 512 U.S. at 459.

Third, the interrogating officer's responses demonstrate precisely that very understanding. After Petitioner stated, "Well, then let's call the lawyer then 'cause I gave what I could," the interrogating officer replied, "That's fine." Pet'r Br. at 3. The officer did not respond by asking a clarification question—or any other follow-up question—because no clarification was required. Moreover, the officer's subsequent response to Petitioner's first post-request statement further demonstrates that Petitioner's invocation was objectively unambiguous. *Davis*, 512 U.S. at 459. After the officer signaled that he understood that Petitioner had invoked his right to counsel by responding "[t]hat's fine," Petitioner then stated, "There's no reason for anybody to take me to jail." Pet'r Br. at 3. The officer responded, "You getting a lawyer's not going to prevent you from going to jail." *Ibid.* at 4. That statement makes no sense unless the officer understood that Petitioner had requested a lawyer. No reasonable officer would have thought otherwise.

Finally, although Petitioner did continue to speak with the police after he invoked the *Miranda* right to counsel, those statements, as a matter of law, cannot be used to interpret away the objective clarity of his invocation. *See Smith*, 469 U.S. at 100 ("[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.").[3]

C. The Sixth Circuit Impermissibly Relied Upon Petitioner's Purported Mental State To Cast Doubt on the Clarity of Petitioner's Facially Unambiguous Invocation.

Notwithstanding that the language Petitioner used to request counsel would ordinarily be, and was, understood as a legally operative *Miranda* invocation, the Sixth Circuit held that Petitioner's request for counsel was ambiguous. *See Perreault v. Smith*, 874 F.3d 516, 520-21 (6th Cir. 2017). In order to reach that conclusion, the Sixth Circuit improperly weighed Petitioner's purported subjective motivations for

[3] Although the police can continue interrogating a suspect who has invoked the *Miranda* right to counsel if the suspect himself reinitiates the conversation *and* makes a knowing and voluntary waiver, Petitioner's post-invocation statement does not constitute a reinitiation. In *Bradshaw*, this Court held that the *Edwards* prohibition on post-invocation questioning does not apply when a suspect makes post-invocation statements that "evidence[] a willingness and a desire for a generalized discussion about the investigation." 462 U.S. at 1045-46. Here, after Petitioner requested counsel and stated that he had nothing further to say to the police, Petitioner declared: "There's no reason for anybody to take me to jail." *See* Pet'r Br. at 3. In the context of those immediately preceding statements, a reasonable officer would not have understood Petitioner's post-invocation declaration as revealing any intention to reinitiate a "generalized discussion about the investigation." *See Bradshaw*, 462 U.S. at 1046.

invoking his right to counsel against the facially unambiguous language by which the request was made. That is not permitted under the "objective inquiry" established in *Davis*. 512 U.S. at 459.

According to the state court, Petitioner's request for counsel was merely "akin to negotiations" with the police. Pet'r Br. at 7. The Sixth Circuit endorsed that flawed analogy. *Perreault*, 874 F.3d at 520. In the Sixth Circuit's view, a reasonable police officer could interpret the statement, "Well, then let's call the lawyer then 'cause I gave what I could" as ambiguous because it could have been intended as a "negotiating tactic". *Id.*

Citing a September 2017 Harvard Business Review article about negotiation theory, the Sixth Circuit likened Petitioner's invocation of his constitutionally protected right to counsel to a display of "one of the most commonly employed bargaining strategies" discussed in "[n]egotiation literature": the so-called "best alternative to a negotiated agreement," known colloquially as "threatening to walk away." *Id.* The Sixth Circuit then described several hypothetical scenarios that it believed were analogous to Petitioner's "negotiation" with the police who involuntarily held and interrogated him:

> "One sees something similar at car dealerships. When a would-be car purchaser threatens to walk away, that's not because he wants to leave; it's because he wants the salesman to lower the price or otherwise sweeten the deal. When a child threatens to call Mom if his older sister refuses to return

> a favorite toy, the goal is not to call Mom. The goal is to convince the older sister to return the toy or at least to give it back at some point. The threat works only if Mom is never called. So too of the threat: 'Well, then, I will see you in court!' No one takes that as a request for litigation. Consider federal regulatory schemes, which commonly allow private parties to negotiate deals with one another in the shadow of binding arbitration should they fail to reach agreement. Here too, we wouldn't be surprised to hear, mid-negotiation, "Well, then let's call the arbitrator then 'cause I gave what I could."

Id. (citations omitted).

In each of those examples, the party threatening to walk away—that is, the party analogous to Petitioner—makes a statement that is strategically insincere. Despite their express statements to the contrary, the would-be car purchaser does not actually want to leave the dealership, the child does not actually want to call the mother, the person threatening to sue does not actually want to litigate and the private party threating binding arbitration does not actually want to arbitrate. Put differently, they did not mean what they said. That is how the Sixth Circuit interpreted Petitioner's invocation.

The Sixth Circuit did not find that the *language* Petitioner used to request counsel was ambiguous or equivocal on its face. Rather, the Sixth Circuit found only that the invocation itself could have been interpreted as not genuine. Like the parties in the hypothetical scenarios, although Petitioner's words objectively indicated one thing—namely, that he was invoking his right to counsel—the Sixth Circuit concluded that Petitioner may have subjectively *meant* something else. As to what else Petitioner may have meant, or why a reasonable officer would think that Petitioner's invocation is insincere, the Sixth Circuit does not say.

The Sixth Circuit's reliance on Petitioner's purported mental state to cast doubt on the clarity of his invocation is incompatible with the "objective inquiry" established by this Court. *See Berghuis v. Thompkins*, 560 U.S. 370, 371 (2010) ("The unambiguous invocation requirement 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." (quoting *Davis*, 512 U.S. at 458-59)). That inquiry turns on the language of the invocation itself. "[A] statement either is [] an assertion [of the right to counsel] or it is not." *Smith*, 469 U.S. at 97-98. It is irrelevant whether or not the interrogating officer, or a reviewing court, believes that a suspect's subjective motive for requesting counsel is to gain leverage in a "negotiation." Indeed, this Court has already stated that "the *likelihood* that a suspect would wish counsel to be present is not the test" for determining when a suspect has invoked his *Miranda* right to counsel. *McNeil*, 501 U.S. at 178. The Sixth Circuit's conclusion that Petitioner's request for counsel was ambiguous because it could have been "interpreted as a negotiating tactic" is therefore contrary to clearly established law. *See Perreault*, 874 F.3d at 520.

One federal court has already held that the same reasoning adopted by the Sixth Circuit is contrary to this Court's law. In *Saeger v. Avila*, 930 F. Supp. 2d 1009 (E.D. Wis. 2013), the District Court for the Eastern District of Wisconsin held that the Wisconsin state court violated clearly established law when it found that the petitioner's facially clear invocation of the *Miranda* right to remain silent was ambiguous because it could be interpreted as a "*negotiating ploy*." *Id.* at 1015 (emphasis added). "[T]he Wisconsin [state] court found that while [the petitioner's] actual words were clear, *he did not really mean them*." *Id.* According to the state court, "[b]ecause a reasonable person could find that [the petitioner] might have had a motive other than to protect himself against self-incrimination, his otherwise clear invocation of his *Miranda* right . . . was . . . ambiguous." *Id.* In rejecting what it characterized as the state court's "foray into the mental state of the accused," the district court held that assuming a suspect "may be simply bargaining for a better deal" is "directly contrary to clearly established federal law, which states that the determination of whether an accused has invoked his rights under *Miranda* 'is an objective inquiry.'" *Id.* at 1017, 1019 (quoting *Davis*, 512 U.S. at 459). The district court further held that "[i]n an interrogation setting, one could always imagine plausible alternative motives for stating a desire for interrogation to end," but this Court's law "does not require that a suspect unambiguously invoke the right to remain silent and also explain *why* they are doing so." *Id.* at 1016.

The district court's conclusion in *Saeger* that the state court violated clearly established law by considering the suspect's supposed subjective motivation for invoking the *Miranda* right to remain silent is equally applicable to the Sixth Circuit's reasoning in this case. *See Berghuis*, 560 U.S. at 381 ("[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.").

D. The Sixth Circuit's "Negotiation" Analogy Is Fundamentally Incompatible with This Court's Understanding of the Relationship Between Custodial Interrogation and the Fifth Amendment.

The Court's jurisprudence regarding the coercive nature of custodial interrogation further underscores the fallacy of the Sixth Circuit's interpretation of Petitioner's request for counsel as ambiguous because it could be part of a "bargaining strateg[y]." *See Perreault*, 874 F.3d at 520.

As this Court recognized in *Miranda*, "[i]t is obvious that [] a[] [custodial] interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner." *Miranda*, 384 U.S. at 457. The examiner's will, in turn, is invariably marshaled for the "singular purpose" of obtaining a confession from the suspect. *See, e.g.*, Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 911 (2004) (stating that the fundamental goal of police interrogation "is to elicit incriminating statements and admissions—ideally a full confession"). That is why this Court concluded that custodial interrogation is so potentially injurious to a suspect's right against self-incrimination that not one but two layers of "prophylactic" protection—*Miranda*'s warnings and *Edwards*'s prohibition on post-invocation interrogation—are necessary. *See Davis*, 512 U.S. at 458; *Harvey,* 494 U.S. at 350; *Edwards*, 451 U.S. at 484-85.

This Court's understanding of custodial interrogation is fundamentally irreconcilable with the Sixth Circuit's interpretation of Petitioner's invocation as a "bargaining strateg[y]," particularly the concept known as the "best alternative to a negotiated agreement." *See Perreault*, 874 F.3d at 520. In negotiation theory, the "best alternative to a negotiated agreement," or "BATNA," is a heuristic device that functions as "the standard against which any proposed [negotiated] agreement should be measured." Roger Fisher et al., Getting to Yes: Negotiating Agreement Without Giving In 100 (1991). In practice, the "best alternative" is the outcome that would be attained by "walking away" from the negotiation. *See* Jay A. Hewlin, *The Most Overused Negotiating Tactic Is Threatening to Walk Away*, HARV. BUS. REV. (Sept. 18, 2017), https://hbr.org/2017/09/the-most-overused-negotiating-tactic-is-threatening-to-walk-away (hereinafter HBR Article) (describing the "Best Alternative to a Negotiated Agreement" as the "walk away" outcome). Indeed, the threat of "walking away" is the theme that unites the parties in the Sixth

Circuit's list of purportedly analogous negotiations. *See Perreault*, 874 F.3d at 520. But unlike would-be car purchasers, angry siblings, prospective litigants or potential parties to an arbitration, a suspect in a custodial interrogation literally cannot walk away or even credibly threaten to do so. Moreover, the purpose of threating to walk away from a negotiation is to extract a concession from the other party. But in a custodial interrogation, a suspect cannot extract concessions from the police by invoking the *Miranda* right to counsel. In any interrogation, the police will either believe a suspect's story and set him free or keep him in custody and continue to question him—asking for a lawyer does not make either outcome more likely.

A custodial interrogation, by definition, is not a freely consented-to negotiation. *See Miranda*, 384 U.S. at 444 (defining custodial interrogation as "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"). The substantial asymmetry in power between the interrogating officer and the suspect is precisely what compelled the Court to create prophylactic procedures in *Miranda* and *Edwards* to mitigate the risk of coerced confession. *See Davis*, 512 U.S. at 457. Given the inequality in bargaining positions attendant to any interrogation, the Sixth Circuit's interpretation of Petitioner's request for counsel as equivalent to the BATNA option in a negotiation is inapplicable on its own terms. As the HBR Article cited by the Sixth Circuit notes, where, as here, one party to a negotiation has significantly less leverage than the counter-party, the "best alternative to a negotiated agreement" is "virtually meaningless[,] as would be any corresponding strategy based on the same." HBR Article. Accordingly, construing Petitioner's *Miranda* invocation as equivalent to a BATNA-style "bargaining strateg[y]" is fundamentally unreasonable. *See Perreault*, 874 F.3d at 520.

E. By Contravening This Court's Clearly Established Law, the Sixth Circuit Could Meaningfully Weaken the *Miranda* Right to Counsel.

1. The Sixth Circuit's Decision Makes It More Difficult for Suspects To Invoke the *Miranda* Right to Counsel.

Although *Davis*'s clarity requirement already sets the bar high for many suspects who wish to invoke the *Miranda* right to counsel, the Sixth Circuit's decision threatens to move it entirely out of reach. In *Davis*, this Court "recognize[d] that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." 512 U.S. at 460. Many legal scholars and commentators agreed, arguing that most people—especially non-native English speakers—do not speak with the clarity required by *Davis* under normal circumstances, let alone while being interrogated by the police. *See, e.g.*, Marcy Strauss, *Understanding* Davis v. United States, 40 LOY. L.A. L. REV. 1011 (2007); David Aram Kaiser & Paul Lufkin, *Deconstructing* Davis v. United States*: Intention and Meaning in Ambiguous Requests for Counsel*, 32 HASTINGS CONST. L.Q. 737 (2005); Peter M. Tiersma & Lawrence M. Solan, *Cops and Robbers: Selective Literalism in American Criminal Law*, 38 LAW & SOC'Y REV. 229 (2004); Wayne D. Holly, *Ambiguous Invocations of the Right to Remain Silent: A Post-*Davis *Analysis and Proposal*, 29 SETON HALL L. REV. 558 (1998). *Davis*, however, only requires a request for counsel to be "articulate[d] . . . sufficiently clearly." 512 U.S. at 459. The Sixth Circuit decision, by contrast, requires that request to be clear *and convincing*.

According to the Sixth Circuit, a suspect must not only request counsel through language that is unambiguous, but that language must also be sufficient to persuade the police that the suspect subjectively intends the request to be legally operative. As the District Court for the Eastern District of Wisconsin found in *Saeger*, under that standard "it is difficult to imagine a situation where a suspect could meaningfully invoke [*Miranda*] right[s]." 930 F. Supp. 2d at 1016. No matter the clarity of an invocation, the Sixth Circuit decision impermissibly allows courts to find that a request for counsel was ambiguous because it could be interpreted as a "negotiating tactic"—or as invalidated by some other ulterior motive. If suspects can only request counsel through language that disavows all other possible motives apart from the genuine desire to have counsel present, then suspects will effectively be prevented from invoking the *Miranda* right to counsel "no matter what words" they use. *Saeger*, 930 F. Supp. 2d at 1016.

Ultimately, when "a suspect believes that his request for counsel was ignored or minimized, they are unlikely to believe that any future request will be honored" and are more likely to make potentially incriminatory statements. Strauss, *supra* page 16, at 1059.

2. The Sixth Circuit's Decision May Encourage Changes in Law Enforcement Practices That Are Not Sanctioned by This Court.

The Sixth Circuit decision could encourage local police departments to amend their protocols, procedures and training practices to permit officers to continue interrogating suspects after they have requested counsel. It is undisputed that this Court's decisions have led to changes in policing on the ground. *See, e.g.*, *Missouri v. Seibert*, 542 U.S. 600, 610 n.2 (citing training programs that incorporate the familiar list of warnings required in *Miranda* as well as programs that train officers to circumvent those requirements due to the impeachment exception recognized in *Harris v. New York*, 401 U.S. 222 (1971)); *see also* Anthony O'Rourke, *Structural Overdelegation in Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 407, 453 (2013); Michael C. Gizzi & R. Craig Curtis, *The Impact of* Arizona v. Gant *on Search and Seizure Law as Applied to Vehicle Searches*, 1 U. DENV. CRIM. L. REV. 30, 48 (2011); Corey Fleming Hirokawa, *Making the "Law of the Land" the Law on the Street: How Police Academies Teach Evolving Fourth Amendment Law*, 49 EMORY L. J. 295, 331 (2000). However, lower court decisions can also produce meaningful changes in police conduct. *See* *generally* Charles D. Weisselberg, *Mourning* Miranda, 96 CALIF. L. REV. 1519 (2008) (illustrating how California police departments incorporate decisions of federal circuit courts and the California Supreme Court into their training protocols). For example, when the Ninth Circuit held that police officers could be individually liable under 42 U.S.C. § 1983 for intentionally circumventing *Miranda*'s requirements, *see California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039, 1045-50 (9th Cir. 1999), police practices were altered as a result. *See* Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Towards* Miranda *and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 894-95 (2007) ("In a follow-up study of the impact of the risk of lawsuits, Weisselberg found that the California District Attorneys Association and the California Peace Officers' Association had discouraged the practice" of operating "outside Miranda."). Absent review by this Court, police departments within the Sixth Circuit could modify their protocols, procedures and training practices to instruct officers that so long as they can identify anything that could be interpreted to suggest that a suspect did not subjectively intend their *Miranda* invocation to be legally operative—*e.g.*, the suspect's body language, tone or inflection—they may continue interrogating suspects regardless of whether they have clearly requested counsel.

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE SIXTH AND NINTH CIRCUITS REGARDING WHETHER COURTS MAY RELY ON A SUSPECT'S MENTAL STATE TO CAST DOUBT ON THE CLARITY OF AN OTHERWISE UNAMBIGUOUS MIRANDA INVOCATION.

The Sixth Circuit's holding that Petitioner's facially unambiguous request for counsel could be interpreted as a "negotiating tactic" and, thus, as ambiguous, creates a circuit split with the Ninth Circuit. *See Perreault*, 874 F.3d at 520. Whereas the Sixth Circuit held that Petitioner did not unambiguously invoke his *Miranda* right to counsel because he may not have subjectively intended the invocation to be legally operative, the Ninth Circuit has twice held that such reasoning violates this Court's clearly established law with respect to the *Miranda* right to remain silent. Although those Ninth Circuit cases do not expressly consider the *Miranda* right to counsel, this Court has stated that "there is no principled reason to adopt different standards for determining when an accused has invoked [either] *Miranda* right." *Berghuis*, 560 U.S. at 381. Indeed, both rights must be invoked "unambiguously." *Id.* at 381-82.

In *Garcia v. Long*, 808 F.3d 771 (9th Cir. 2015), the Ninth Circuit held that a California state court violated clearly established law in ruling that a petitioner's clear invocation of the *Miranda* right to remain silent was rendered ambiguous, *inter alia*, because the suspect may not have subjectively intended the invocation to be legally operative. There, the California state court held that the petitioner's "no" response to the officer's question, "[D]o you wish to talk with me?", was not an unambiguous invocation because it could be interpreted as not "genuine." *Id.* at 778-80. Earlier in the interrogation, the police had asked the petitioner two questions—"Do you ever go by any other names?" and "Have you ever been arrested before?"—and the petitioner initially answered "no" to each question before expanding on his responses. *Id.* at 779. "Under the state court's logic, because [the petitioner] ha[d] volunteered information twice before, it [wa]s legitimate for the police to ask a clarifying question after he ha[d] unambiguously invoked his *Miranda* rights because perhaps he [would] volunteer more information a third time." *Id.* at 780. The state court, in other words, concluded that the police could continue questioning the petitioner even after he had clearly invoked the right to remain silent because he may not have meant what the plain meaning of his words would ordinarily convey.

The Ninth Circuit held that the state court's analysis is "an objectively unreasonable application of the Supreme Court's precedents." *Id.* "*Miranda* could not have been more clear on this point: when an 'individual indicates *in any manner*, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease*.'" *Id.* (quoting *Miranda*, 384 U.S. at 473-74). Although the state court found that the petitioner's "no" was "ambiguous because it may not have been 'genuine,'" the Ninth Circuit found that the "[t]he officers had no reason to believe that [the petitioner] was answering questions contrary to what he meant." *Id.* at 780-81. By contrast, the Ninth Circuit noted that the interrogating officers' specific responses to the petitioner's "no" demonstrated that they understood that he had invoked his right to remain silent. *Id.* at 781. Therefore, in the Ninth Circuit's view, the state court's decision was "an unreasonable application of [*Miranda*'s] clear commands." *Id.* at 780.

Likewise, in *Anderson v. Terhune*, 516 F.3d 781 (9th Cir. 2008) (en banc), the Ninth Circuit held that a state court unreasonably applied federal law in finding that the petitioner's statement was "ambiguous in context." *Id.* at 787. The petitioner in that case was interrogated for more than three hours after he was identified as a suspect for the murder of his friend. At one point, the defendant stated, "I don't even wanna talk about this no more." *Id.* at 785. After police continued to question him about his drug use on the day of the murder, the defendant said, "I'm through with this. I'm through. . . . I plead the [F]ifth." *Id.* at 785-86. The state court reasoned that although the petitioner's language, viewed in isolation, was clearly an invocation of the right to remain silent, it was nonetheless ambiguous because the petitioner may have subjectively intended to limit the *scope* of the invocation. *Id.* at 787. In the state court's view, "the defendant's comments were ambiguous in context because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all." *Id.*

The Ninth Circuit rejected that reasoning as impermissible under *Davis*'s objective inquiry.

> "Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law. It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence. As the Supreme Court has observed, in invoking a constitutional right, 'a suspect need not speak with the discrimination of an Oxford don.'"

Id. (quoting *Davis*, 512 U.S. at 459 (internal quotations omitted)). The Ninth Circuit emphasized that the state court's analysis was particularly unreasonable given that the petitioner had already twice attempted unsuccessfully to invoke his right to remain silent and that neither "the officers or the court were left scratching their heads as to what [the petitioner's invocation] meant." *Id.*

Accordingly, the Sixth and Ninth Circuits are divided on the question of whether a suspect's purported subjective motivation for invoking a *Miranda* right can render ambiguous an otherwise unambiguous invocation. In both this case and in the Ninth Circuit cases, the *Miranda* invocation at issue is clear and unambiguous. In both this case and in the Ninth Circuit cases, the record demonstrates that the interrogating officer understood that the suspect had invoked his *Miranda* rights. And in both this case and in the Ninth Circuit cases, the state court found that the suspect nonetheless did not unambiguously invoke his *Miranda* rights because he may not have subjectively intended the invocation to be legally operative—here, because the suspect may have intended to use the invocation as a "negotiating tactic"; in *Garcia* and *Anderson*, respectively, because the suspect may not have intended the invocation to be "genuine" or to be unlimited in scope. But whereas the Ninth Circuit held that such reasoning is an unreasonable application of *Edwards* and its progeny, the Sixth Circuit reached the opposite conclusion.

This Court should therefore grant certiorari to clarify whether courts may rely on a suspect's supposed subjective motivations for invoking *Miranda* rights in interpreting the clarity of *Miranda* invocations.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

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Respectfully submitted,

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