No. _____

In The
Supreme Court of the United States

STEVIE ENGLAND,

Petitioner,

v.

DEEDRA HART, WARDEN,

Respondent.

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

Long established precedent of this Court requires law enforcement officers to cease interrogating a suspect upon assertion of his right to counsel. *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). To assert the right to counsel, a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459 (1994).

Davis held that "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an *objective inquiry*." *Id.* at 458–59 (citing *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987)) (emphasis added). At least six federal circuits and ten state high courts, however, consider *subjective* factors, such as the beliefs of the interrogating officer and the underlying motivations of the suspect, to determine whether suspects have invoked their right to counsel. By contrast, a separate group of federal circuits and state high courts reject such subjective analyses, understanding them to be expressly prohibited by *Davis*. The question presented is:

> Whether the "objective inquiry" required by *Davis* may be based on subjective factors.

STATEMENT OF RELATED PROCEEDINGS

Commonwealth v. England, No. 01-CR-0068, Graves County Circuit Court. Judgment entered April 15, 2003.

England v. Commonwealth, Nos. 2003-SC-0328, 2004 SC-0506, Supreme Court of Kentucky. Judgment entered May 26, 2005.

England v. White, No. 5:06-cv-00091, U.S. District Court for the Western District of Kentucky. Judgment entered September 11, 2018.

England v. Hart, No. 18-6039, U.S. Court of Appeals for the Sixth Circuit. Judgment entered August 17, 2020.

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The opinion of the court of appeals (Pet. App. 1-37) is reported at 970 F.3d 698. The district court's Memorandum Opinion (Pet. App. 110-52) is unpublished but is available at 2018 WL 4353692. The opinion of the Supreme Court of Kentucky on direct appeal of the underlying state case (Pet. App. 169-94) is unpublished but is available at 2005 WL 1185204.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person * * * shall be compelled in any criminal case to be a witness against himself."

Section 2254 of Title 28 of the United States Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was

> adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

A. Factual background

In July 2000, police in Symsonia, Kentucky began an investigation into the killing of Lisa Halvorson. Pet. App. 3. After the announcement of a $10,000 reward, Karl Woodfork, a convicted felon who had been charged in another matter, told police that he and petitioner had been paid to kill Halvorson by her former boyfriend, Tyrone McCary. *Id.* Police outfitted Woodfork with a wire and had him record conversations with petitioner. In none of the recorded conversations did petitioner purport to have participated in any assault or the killing of Halvorson. During one conversation, he did, however, complain that McCary owed him money. *Id.*

In March 2001, police brought petitioner in for questioning. During the interrogation, in response to an officer saying "[w]e've got you," petitioner made the following statement:

> Well, I mean you know, I guess **you'll just have to go on and lock me up then and call my lawyer**, cause I don't, I don't know what you're talking about.

Pet. App. 162 (emphasis added). The officer did not call petitioner's lawyer, but instead persisted with the interrogation. Moments later, petitioner said:

> And then I'm going to tell you, I mean, I don't want. See, I don't want to get in no trouble. I mean my lawyer. I don't know. I don't know if I should be talking or not. I don't know. I don't know what to do.

Pet. App. 167. To that statement, the police officer responded:

> I'm telling you as a friend, and you can talk to your lawyer, but I'm telling you as a friend, you need to cut a break. You're not in the position to lawyer up and say 'I ain't saying nothing' because they've got enough to take you on your own.

Pet. App. 168. The police still did not call petitioner's attorney. Nor did they cease the interrogation. Instead, they continued questioning petitioner and pressuring him to speak, including by reminding him that he was being investigated for a crime "punishable by death." Pet. App. 164. Ultimately, petitioner made an

inculpatory statement that he had been present when McCary had choked, beaten, and run over Halvorson with a car. Pet. App. 171. Petitioner also admitted to having struck Halvorson. *Id.* But, petitioner stated that he did not otherwise participate in the attack on Halvorson, and explained to the contrary that he had attempted to persuade McCary to stop. *Id.* Still, based in part on his inculpatory statements, petitioner was charged with capital murder. Pet. App. 4.

B. Procedural background

1. In January 2003, petitioner was tried in Kentucky state court. Over petitioner's objection, the State was permitted to introduce his inculpatory statements from the interrogation. The jury convicted petitioner of complicity to murder and petitioner received a sentence of life imprisonment without parole. *Id.*

After trial, petitioner—who is African-American—discovered forensic test results showing Caucasian hair in Halvorson's hands and underwear. Pet. App. 182. This evidence supported petitioner's defense at trial that Halvorson had been killed by her ex-husband, who is white. Petitioner moved for a new trial based on the uncovered evidence, but the court denied the motion. *Id.*

2. Petitioner timely appealed. He argued, among other things, that his inculpatory statements from the interrogation should not have been introduced at trial

because they had been made after he had clearly invoked his right to counsel. Pet. App. 172.

The Supreme Court of Kentucky affirmed. Although the state court cited *Davis*, it failed to apply *Davis*'s rule that a request for counsel need only be "sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for attorney." *Davis*, 512 U.S. at 459. Instead, the court applied a different, incorrect legal standard, finding that petitioner's statements were "not unambiguous and unequivocal invocations of the right to counsel" because they did "not rise to the level of impressing upon the interrogator that [petitioner] ha[d] requested an attorney." Pet. App. 174.

3. In 2006, petitioner timely filed a *pro se* habeas petition in the United States District Court for the Western District of Kentucky. He asserted a number of grounds for relief, including that he had unambiguously invoked his right to counsel during interrogation and thus that the trial court had violated his Fifth Amendment rights by admitting his inculpatory statements at trial. Pet. App. 64. In 2017, a magistrate judge recommended that the petition be denied. Pet. App. 109.

In 2018, the district court adopted the magistrate judge's recommendation. Pet. App. 110. Without acknowledging any shortcomings in the Kentucky Supreme Court's analysis, the court concluded that petitioner had not made an unequivocal request for counsel because his statements could have been

"interpreted * * * as a negotiation tactic, rather than [] request[s] for counsel." Pet. App. 118.

4. Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit. Petitioner argued that he was due relief under 28 U.S.C. § 2254(d)(1) because the Supreme Court of Kentucky had contradicted the United States Supreme Court's precedent of *Davis* by performing a subjective inquiry to determine whether petitioner's statements were unambiguous invocations of his right to counsel. Petitioner argued that the district court had also violated *Davis* by performing a subjective inquiry of its own.

The Sixth Circuit affirmed, with Judge Moore concurring in part.[1] The majority opinion concluded that

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[1] Judge Moore's concurrence did not address the issue of invocation. Instead, it concluded that petitioner's "police-interrogation confession * * * [was] [non]-prejudicial" based on recordings of separate discussions with Woodfork. But in the latter, petitioner did not state that he was even at the scene of the killing, let alone that he assaulted the victim. Indeed, the Woodfork recordings merely include statements "that McCary owe[d] [petitioner] money," and that petitioner would "consider[] ways to get McCary to pay [him]." Pet. App. 35. Petitioner's statements during the police interrogation were the *only* evidence presented at trial that placed petitioner at the scene of the crime. When considered in view of the evidence that petitioner uncovered after trial—i.e. the Caucasian hair in Halvorson's hands and underwear, which accorded with petitioner's defense that Halvorson's white boyfriend had been the killer—there is a reasonable probability that, had petitioner's interrogation statements been excluded, the result of the proceeding would have been different. *See Bagley*, 473 U.S. 667, 682 (1985). The concurring opinion therefore erred and does not provide an alternative ground for affirmance.

petitioner's statements did not qualify as unequivocal requests for counsel, explaining that it did "not tak[e] [petitioner's] statement[s] literally," but rather interpreted them as "indicative of [his] sarcasm." Pet. App. 10. The majority opinion also denied petitioner's contention that the Kentucky Supreme Court had ruled in contradiction of *Davis*. The majority characterized the Kentucky Supreme Court's analysis as using "poor phrasing" in deciding that petitioner had not invoked his right due to his failure to "impress[ ] upon the interrogator that [he] [was] request[ing] an attorney," Pet. App. 13, but held that the standard applied by the state court "was not 'diametrically different,' 'opposite in character or nature,' 'or mutually opposed' from the *Davis* standard" as was necessary to warrant reversal under § 2254(d). Pet. App. 13-14 (quoting *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). The majority opinion also rejected petitioner's contention that the district court had contravened *Davis* by "speculat[ing] about [his] subjective mental state" in declaring his statement to be "a negotiation tactic," rather than a request for counsel. Pet. App. 14. The court offered two explanations for why it denied the claim: (1) it understood the district court's decision to be consistent with the Sixth Circuit's opinion in *Perreault v. Smith*, 874 F.3d 516, 519–20 (6th Cir. 2017), which had "approv[ed] [a] * * * court's classification of [a] suspect's statement as a negotiation"; and (2) that even if *Perreault* had improperly "sharpen[ed] [the] general principle" of *Davis*, Pet. App. 14 (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam)), its "use of *Perreault*

[was] immaterial, as the [Kentucky Supreme] [C]ourt's decision" was adequate on its own. Pet. App. 14-15.

Judge Moore's concurrence declined to address the issue of invocation and instead would have affirmed on the basis that petitioner's statements to Woodfork served as "an independent, recorded confession." Pet. App. 34; *see supra* note 1.

REASONS FOR GRANTING THE PETITION

A. This case adds to a growing conflict

Davis demands an "objective inquiry" into whether a suspect made a request for an attorney "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations." *Davis*, 512 U.S. at 458–59. Some federal circuits and state high courts continue to recognize what *Davis* requires: that subjective factors cannot be considered as part of *Davis*'s inquiry. An increasing number of others, however, perform subjective inquiries to determine whether a suspect has invoked his right to counsel.[2] This latter group uses subjective evidence to support both cases ruling that no request for counsel was made, and those prohibiting the use of otherwise admissible custodial statements. These

[2] In *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the Court held that the same "objective inquiry" controls the question of whether a suspect has invoked his right to silence. *Id.* at 381. Lower courts have also performed subjective inquiries in determining whether suspects have invoked their right to silence, and this petition includes examples of both right to silence and right to counsel cases.

lower courts generally consider two primary subjective factors: (i) the beliefs of the interrogating officer—i.e. whether the officer in fact (allegedly) understood the suspect's statement to be an invocation of the right to counsel; and (ii) the (alleged) underlying motivations of the suspect in making the statement at issue—i.e. an accused's intent. This split among courts reveals a need for additional guidance from this Court.

1. *Soffar v. Cockrell*, 300 F.3d 588 (5th Cir. 2002) provides a clear example of a court recognizing *Davis*'s prohibition on considering subjective factors. In *Soffar*, a habeas petitioner who had been convicted of capital murder argued that an interrogating officer's testimony that "he believed [the defendant] wanted an attorney," supported the conclusion "that a reasonable officer would interpret [the defendant's statements] as an unambiguous request for counsel." *Id.* at 595 n.7. The Fifth Circuit rejected that argument because "the [officer's] perception of [the suspect's] intent is irrelevant," as "the inquiry under *Davis* is an objective one." *Id.*

The Supreme Court of Virginia's decision in *Commonwealth v. Hilliard*, 270 Va. 42 (2005) is much the same. There, a defendant charged with murder moved to suppress an incriminating statement he had made to police, arguing it came after an invocation of his right to counsel. *Id.* at 45. The trial court and intermediate state appellate court rejected that argument, relying in part on the fact that the interrogating detective had understood the defendant not to have invoked his right. *Id.* at 50. The state supreme court

reversed, holding that because the "inquiry" under *Davis* is "purely objective," "the detectives' subjective understanding is irrelevant" and thus the lower courts had "erred in referring to [it]." *Id.*

2. Consistent with *Davis*, a number of circuit courts have also explicitly rejected inquiries into a defendant's subjective intentions or motivations in making a statement that is contended to have requested counsel. For instance, in *United States v. Carpentino*, 948 F.3d 10 (1st Cir. 2020), the First Circuit affirmed a district court's denial of a motion to suppress statements made by the defendant during interrogation. The court concluded that the defendant's statements were not invocations, explaining that although "it [was] possible that the defendant subjectively wanted" to invoke his right to counsel, "the defendant's two statements" "failed to make clear" to "a reasonable officer" "that [the defendant] wanted to speak with his lawyer in order to secure assistance with the" interrogation. *Id.* at 24–25. In other words, what the defendant subjectively believed was irrelevant to the inquiry under *Davis*.

In *Diaz v. Senkowski*, 76 F.3d 61 (2d Cir. 1996), the Second Circuit likewise explained that a suspect's subjective intent is irrelevant to the *Davis* analysis and noted that a subjective inquiry would work to the detriment of police. In *Diaz*, a habeas petitioner argued that he was due relief because he had "intended to invoke his right" to counsel during interrogation. *Id.* at 64. The court rejected the argument, stating that "*Davis* * * * tells us that a suspect's intent is not the

controlling factor" to the invocation inquiry. *Id.* What controls is whether the suspect has made a "clear statement" that he desires counsel to be present. *Id.* The court reasoned that "if officers had to be guided by speculation as to a suspect's intent, too great a limitation would be put on their ability to obtain information." *Id.*

3. Alarmingly, however, an increasing number of courts, including at least six federal circuits and ten state high courts, consider subjective factors in determining whether a suspect has invoked either his right to counsel or right to silence.

The Fourth, Sixth, Ninth, and Tenth Circuits treat the interrogating officer's subjective understanding as relevant to the *Davis* inquiry. State high courts in Alaska, Colorado, Massachusetts, Nebraska, New Hampshire, Oregon, and Pennsylvania do so as well.[3]

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[3] There are also a significant number of federal district courts that consider the subjective understandings of interrogating officers as part of the *Davis* analysis. *See, e.g., United States v. Coriz*, 2018 WL 4222383 at *4 (D.N.M. Sept. 5, 2018) (citing "the fact that [the interrogating officer] construed [the suspect's] statement as an invocation * * * [as] suggest[ing] that a reasonable officer would likewise consider the statement * * * to be a clear invocation of his rights"); *United States v. Shoulders*, 2018 WL 4204452 at *2 (D.S.D. Sept. 4, 2018) (finding invocation solely based on interrogating officers' testimony that they "believed [the suspect to have] invoked his right"); *United States v. Allegra*, 187 F. Supp. 3d 918, 924 (N.D. Ill. 2015) (interrogating law enforcement officers' "responses to [the suspect's] [statement] provide additional support for the conclusion that he successfully invoked his right to counsel"); *United States v. Ward*, 2015 WL 5474232 at *5 (E.D. Ky. Sept. 17, 2015) (finding no invocation based on

The Ninth Circuit's decision in *Garcia v. Long*, 808 F.3d 771 (9th Cir. 2015) exemplifies this reliance on the subjective. *Garcia* involved a habeas petition filed by a state prisoner who, during interrogation, answered "no" to the question of whether he "wish[ed] to talk to" police. *Id.* at 773. The state court ruled that the statement was ambiguous and thus not an invocation of the

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interrogating detective's testimony that "he did not understand [the suspect's] statements to be an invocation of his right"); *United States v. Lopez-Ayola*, 2014 WL 2197065 at *3 (D. Utah May 27, 2014) (looking to an interrogating officer's "thought[s]" and displays of "impatien[ce]" as indicating that suspect "did not clearly and unambiguously invoke the right to counsel"); *United States v. Valadez-Nonato*, 2011 WL 4738544 at *3 (D. Idaho, Oct. 6, 2011) (considering interrogating officer's testimony that "she did not understand [the suspect] to be invoking his right to speak with an attorney"); *United States v. Roberts*, 2010 WL 672856 at *2 (N.D. Ga. Feb. 19, 2010), *rev'd on other grounds*, 440 Fed. App'x. 859 (11th Cir. Sept. 20, 2011) ("recogniz[ing] that [the interrogating agent's] subjective belief about whether [the suspect] invoked his right to counsel [was] not determinative because 'this is an objective inquiry,' " but still relying on "the perceptions of the question[ing] [officer] [as] helpful in discerning whether [the suspect's invocation] was equivocal"); *United States v. Owens*, 2007 WL 2823320 at *10 (E.D. Tenn. Sept. 27, 2007) (holding no invocation based on officer "clearly interpret[ing]" the "statement as a misunderstanding rather than a request for counsel"); *United States v. Young*, 2005 WL 2789185 at *2 (E.D. Pa. Oct. 25, 2005) (citing interrogating detective's subjective "underst[anding]" of the suspect's actions in concluding that statement was "an effective invocation of the right to remain silent."). Yet other district courts interpret statements based on the supposed subjective motivations and intentions of the suspect. *See, e.g., United States v. Johnson*, 2011 WL 2604774 at *5 (W.D. Mich. June 30, 2011) (finding invocation because suspect "believed * * * his interests would be better served by complete candor and openness with the interviewing officers.").

right to silence. On habeas review, the district court reversed and the Ninth Circuit affirmed. The Ninth Circuit held that the state court's conclusion was "belied by the interrogating officers' own statements during the interview." 808 F.3d at 781. The Ninth Circuit reasoned that the fact that interrogating officers did not "believe" the petitioner's statement to be disingenuous suggested that the statement had been a straightforward and clear invocation of petitioner's right to silence. *Id.* In support, the court cited its earlier decision in *Hurd v. Terhune*, 619 F.3d 1080, 1089 (9th Cir. 2010), where it considered relevant to the *Davis* inquiry the fact that "interrogating officers * * * *subjectively understood* [the defendant's] responses [to police to be] unambiguous" referrals to his right to counsel. *Garcia*, 808 F.3d at 781 (emphasis added). In neither *Garcia* nor *Hurd* did the court recognize that considering an officer's subjective understandings conflicts with the objective rule set forth in *Davis*.

The Fourth and Sixth Circuits also permit subjective analyses. For example, in *Grueninger v. Director, Virginia Dept. of Corrections*, 813 F.3d 517 (4th Cir. 2016), the Fourth Circuit on habeas review concluded that the state court erred in concluding that the petitioner had not invoked his right to counsel. The court acknowledged that *Davis* sets forth an objective standard. *Id.* at 530. Yet the court proceeded to rely on subjective factors, stating that its ruling was "confirmed by the fact that [the interrogating officer] himself understood" the suspect's statement to be an invocation, and "ask[ed] no further questions once [the suspect]

announced his need for a lawyer." *Id.* Reliance on subjective considerations is antithetical to an objective analysis, even if framed as "confirmatory." This is no less of a violation of *Davis*, as an inquiry that includes subjective components cannot be "purely objective." *Hilliard*, 270 Va. at 50. And allowing courts to consider subjective factors undermines the fundamental purpose of *Davis*'s objective test, which is to "avoid difficulties of proof" and provide "guidance to officers conducting interrogations." *Davis*, 512 U.S. at 458–59. The Sixth Circuit's decision in *Abela v. Martin*, 380 F.3d 915 (6th Cir. 2004) presents the same problems. There, on habeas review, the court determined that the petitioner's statements were sufficiently clear to have invoked his right to counsel. *Id.* at 927. After acknowledging that the inquiry was "an objective one," however, the court relied on the interrogating officer's "actions" in response to the petitioner's statement as "confirm[ing] that a reasonable officer would understand [the statements] to be a clear request for counsel." *Id.* at 926.

The Tenth Circuit similarly relied on an officer's subjective beliefs in *Mitchell v. Gibson*, 262 F.3d 1036 (10th Cir. 2001). There, on habeas review the Tenth Circuit affirmed a state court's ruling that a petitioner had not unambiguously invoked his right to counsel by asking his interrogating officers whether he needed an attorney. *Id.* at 1056. The court determined that the petitioner's question was "not * * * a sufficiently clear request for counsel * * * under *Davis*" because "[t]he officers" interrogating him "knew that [the petitioner] had previous experience with the criminal justice

system and had in fact gone through a juvenile adjudication." *Id.* at 1056. In other words, the court relied on the officers' subjective belief as to the meaning of the petitioner's statement based on past experiences with him, a subjective standard.

2. Numerous state high courts also contravene *Davis* by relying on the interrogating officer's subjective views rather than applying an objective test. The Supreme Court of Pennsylvania's decision in *Commonwealth v. Lukach*, 195 A.3d 176 (2018) is illustrative. Central to the court's decision that the defendant had invoked his right to silence was the court's conclusion that "there [could] be no doubt [the interrogating officer] understood [the defendant's] statement as an invocation of his right to remain silent." *Id.* at 190. The Supreme Judicial Court of Massachusetts' decision in *Commonwealth v. Santana*, 988 N.E.2d 825 (2013) applies a similar analysis. To support the conclusion that the suspect "clearly invoked his right to remain silent," the court cited that "[t]he officers conducting the interview understood the [suspect's] * * * statement as terminating the interview." *Id.* at 835. The Supreme Court of New Hampshire's decision in *State v. Lynch*, 156 A.3d 1012 (2017) relied on the fact that "it was not clear" to the interrogating officer "whether the [suspect] had actually invoked his right to remain silent or his right to counsel," in ruling that the suspect's statements were insufficient to qualify as invocations. *Id.* at 1020 (internal quotation marks omitted). In addition, like some of the aforementioned federal circuits, the Supreme Court of Alaska in *Munson v. State*, 123 P.3d

1042 (2005) acknowledged that *Davis* mandates "an objective" "test" but nevertheless supported its decision that the suspect had invoked his right to silence with its observation that "the investigator [had] understood that [the suspect] wanted to stop" the questioning. *Id.* at 1046 (internal quotation marks omitted).

Even more concerning is that multiple state high courts *require* consideration of the interrogating officer's subjective beliefs. In *People v. Kutlak*, 364 P.3d 199 (2016), for example, the Supreme Court of Colorado described its approach to "assess[ing] whether a request for counsel is ambiguous" as "considering * * * such factors as * * * the officer's response to the accused's reference to counsel." Similarly, in *State v. Avila-Nava*, 341 P.3d 714 (2014), the Supreme Court of Oregon held that its courts are to consider in such inquiries "the demeanor and tone of the interrogating officer." *Id.* at 723. And in *State v. Rogers*, 760 N.W.2d 35 (2009), the Supreme Court of Nebraska wrote that among the "circumstances" "[r]elevant" to "considering whether a suspect has clearly invoked the right to remain silent" are "the officer's response to the suspect's words * * * [and] the demeanor and tone of the interrogating officer." *Id.* at 58.

3. Multiple courts, including the Eleventh, Sixth, and Seventh Circuits, likewise contravene *Davis* by permitting examination of the subjective intentions or motivations underlying a suspect's statement. *See Thompkins*, 560 U.S. at 381–82 (objective inquiry is intended to obviate need for officers to "make difficult decisions about an accused's unclear intent.").

Just last year, for example, the Eleventh Circuit in *United States v. Garrett*, 805 Fed. App'x. 709 (11th Cir. 2020) decided that a suspect's statement of "I would rather have my lawyer present" was "ambiguous" because the suspect "may" have meant the statement as "an indirect attempt to ferret out from the officers the purpose of the interview." *Id.* at 712, 716. Such an analysis is irreconcilable with *Davis*'s objective inquiry: even the most unambiguous request for counsel could, in the right circumstances, be said to be subjectively an "indirect attempt" by the suspect to uncover other information. The same is true for the Seventh Circuit's decision in *United States v. Sherrod*, 445 F.3d 980 (7th Cir. 2006), which involved a claim that a defendant had invoked his right to silence. The court rejected the contention, holding that the defendant's statement that he was "not going to talk about nothin'" was "as much a taunt—even a provocation—as it [was] an invocation of the right to remain silent." *Id.* at 982. Yet in *Davis*, as Justice Souter's concurrence made clear, to invoke his rights, a suspect need not "speak with the discrimination of an Oxford don." 512 U.S. at 476 (Souter, J., concurring). The ruling in *Sherrod* holds suspects (and officers interpreting their statements) to an impossible standard: not only must their words express a clear invocation of their rights, but so too must they refrain from doing anything that could even suggest that they may carry mixed motivations. In addition, as discussed (*infra* p. 25), the Sixth Circuit has approved, both in the case at bar and in *Perreault v. Smith*, 874 F.3d 516 (6th Cir. 2017), interpreting a suspect's statement not

by the plain meaning of its words but rather as a "bargaining strateg[y]" or "tactic." *Id.* at 520.

State courts have likewise adopted rules that are incompatible with the rule of *Davis*. Take for example the Supreme Court of Ohio's decision in *State v. Murphy*, 747 N.E.2d 765 (2001). There, the defendant had during interrogation told police that he was "ready to quit talking and * * * ready to go home." *Id.* at 519. The court nonetheless found that because "it appeare[d]" that the defendant had "wanted * * * to be released," "his words did not necessarily mean that he wanted to stop talking." *Id.* at 521. Under this approach, nearly any invocation could be ignored. Even the clearest of invocations could be viewed as motivated by a suspect's desire to go home. The Supreme Court of Wisconsin's decision in *State v. Cummings*, 850 N.W.2d 915 (2014) reflects similar deviation from *Davis*. In *Cummings*, the court acknowledged that the suspect's statement of "[w]ell, then, take me to my cell. Why waste your time?" if "read literally," would be understood as making clear that "he was no longer interested in talking to the officers." *Id.* at 926. The court held, however, that because there was also the "possibility" "that [the] statement" could be understood as "a rhetorical device intended to elicit additional information from the officers," it did not qualify as an unambiguous invocation. *Id.* Finally, the Supreme Court of California's decision in *People v. Williams*, 233 P.3d 1000 (2010) further illustrates the same point. In that case, the court interpreted the defendant's statements as "mere[ ] expressions of passing frustration

or animosity towards the officers," rather than an invocation of his right to silence. *Id.* at 1023 (citation omitted). Yet a suspect can invoke a clear invocation while also expressing frustration or anger towards interrogators. It would vitiate *Davis* to allow such subjective motivations to overcome a statement's plain meaning.

4. The reliance on subjective factors is contrary to both the letter and spirit of the objective rule of *Davis*. Starting in *Miranda v. Arizona*, 384 U.S. 436 (1966), this Court established the rule that police "interrogation" of a suspect "must cease" if the suspect "states that he wants an attorney." *Id.* at 474. In the years that followed, lower courts "developed conflicting standards for determining" whether a suspect's "request for counsel" triggered *Miranda*'s protection. *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam). "Some" lower courts required "questioning [to] cease upon *any* request for or reference to counsel," while "[o]thers" "attempted to define a threshold standard of clarity for * * * requests * * * to trigger the right." *Id*. at 96 n.3. The Court "left" that divide "open" for the next decade. *Connecticut v. Barrett*, 479 U.S. 523, 529 n.3 (1987). In the meantime, however, it suggested that regardless of which standard applied, a court was required to interpret a suspect's statements objectively; whether a suspect had invoked his right to counsel turned on how his "words" "would" be "underst[oo]d" by "ordinary people." *Id.* at 529.

The Court's decision in *Davis v. United States*, 512 U.S. 452 (1994) clarified the governing standards.

First, the Court held, to warrant *Miranda*'s protection, a "suspect must *unambiguously* request counsel." *Id.* at 459 (emphasis added). Second, it held that to determine whether a suspect has made such an unambiguous request, courts must perform "an objective inquiry," which asks whether "a reasonable police officer in the circumstances would understand [the suspect's] statement to be a request for an attorney." *Id.* at 458–59. This objective test was intended "[t]o avoid difficulties of proof and to provide guidance to officers conducting interrogations." *Id.*

In the years since, this Court has reaffirmed this fundamental aspect of the objective rule. In 2010, the Court extended *Davis*'s rule to apply in the context of the right to silence. In *Thompkins*, finding "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*," the Court held that an invocation of the right to silence must also be made "unambiguously." 560 U.S. at 381. And, the Court emphasized "[a] requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that 'avoids difficulties of proof and provides guidance to officers' on how to proceed in the face of ambiguity." *Id.* (quoting *Davis*, 512 U.S. at 458–59) (alterations omitted). In view of the number of courts that have strayed from these principles, a writ of certiorari should be granted to correct course.

B. The decision below is wrong

This Court's review is further warranted because the decision below is incompatible with this Court's prior decisions. On direct review, the Supreme Court of Kentucky contradicted the objective rule of *Davis* by performing a patently subjective analysis into whether petitioner's statements had "impress[ed] upon the interrogator" that petitioner was requesting an attorney. Pet. App. 174. On AEDPA review, the district court ignored the state high court's error and performed a subjective inquiry of its own, ruling that petitioner's statements were part of "a negotiation tactic, rather than a request for counsel." Pet. App. 118. On appeal, the Sixth Circuit dismissed the Kentucky court's subjective inquiry as merely a use of "poor phrasing." Pet. App. 13. It also approved the district court's reliance on subjective factors, finding it to be supported by circuit precedent. Pet. App. 14. In reaching these conclusions, the Sixth Circuit violated this Court's precedent in the same manner as had the lower courts: it disregarded the "literal"—i.e. objective—meaning of petitioner's statements in favor of a subjective reading as "sarcas[tic]" remarks that did not qualify as invocations. Pet. App. 10.

The Supreme Court of Kentucky's decision in this case violated *Davis*. In denying petitioner's direct appeal, the court "h[e]ld that" his "statements" were "not unambiguous and unequivocal invocations of the right to counsel" because they did "not rise to the level of impressing upon the interrogator that [he] had requested an attorney." Pet. App. 13. This analysis,

which considered only the views of the particular officer who interrogated petitioner, is plainly subjective. *See Subjective*, Merriam-Webster Unabridged Dictionary (defining "subjective" as "peculiar to a *particular individual*; personal") (emphasis added). It runs directly contrary to the Court's clear mandate in *Davis* that a court is to consider not the views of the particular interrogating officer, but rather what "a reasonable police officer in the circumstances," i.e. the hypothetical objective officer, "would understand the statement to be." 512 U.S. at 458–59.

On habeas review, in reaching its own conclusion that petitioner had not invoked his right to counsel, the district court relied on a separate type of subjective judgment: it "interpreted [petitioner's] statement[s] as [] negotiation tactic[s], rather than [] request[s] for counsel." Pet. App. 118. In other words, the court looked not to the statements' plain meaning, but rather what it understood—many years after the fact—petitioner to have intended with the statements. Though different from the state court's analysis, the district court's inquiry is equally subjective. *See Subjective*, Cambridge Dictionary (defining "subjective" as "influenced by or *based on personal beliefs or feelings*, rather than based on facts.") (emphasis added). And it is by definition contradictory to an objective inquiry. *See Objective*, Merriam-Webster Unabridged Dictionary (defining "objective" as "expressing or dealing with facts or conditions as perceived *without distortion by personal feelings*, prejudices, or interpretations.") (emphasis added).

The Sixth Circuit's decision on appeal exacerbated the violation of *Davis*. As to the state court decision, the Sixth Circuit appeared to acknowledge that the Kentucky Supreme Court erred by considering whether petitioner's statement "impress[ed] upon" the interrogating officer. This mistake, however, the Sixth Circuit concluded, indicated that the state court had used "poor phrasing." Pet. App. 13. But merely using "poor phrasing," the Sixth Circuit concluded, does not constitute applying a "diametrically different [standard] * * * from the *Davis* standard, as [would be] required to find that the state court misinterpreted federal law." Pet. App. 13-14 (quoting *Williams*, 529 U.S. at 405–06).

This conclusion is untenable. A subjective inquiry into a particular officer's supposed beliefs is the opposite of an objective inquiry asking what "a reasonable officer" would have understood the statement to mean. The standard definitions of the terms "objective" and "subjective" amply demonstrate this. For example, Black's Law Dictionary defines "subjective" as something "[b]ased on an individual's perceptions [and] feelings * * * as opposed to externally verifiable phenomena," while "objective" is that which is "[o]f, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions [and] feelings." *Subjective*, Black's Law Dictionary (11th ed. 2019); *Objective*, Black's Law Dictionary (11th ed. 2019). The Oxford English Dictionary defines "subjective" as "proceeding from an individual's thoughts [and] views," while "objective" is defined as "*not* influenced by personal feelings or opinions." *Subjective*, Oxford English

Dictionary Online, https://tinyurl.com/y3mac6wf (last visited January 12, 2021); *Objective*, Oxford English Dictionary Online, https://tinyurl.com/y6onfbsp (last visited January 12, 2021) (emphasis added). Indeed, in both dictionaries, as in others, the two words are specifically noted as opposites. It is thus hard to imagine a state court applying a standard more "diametrically different," "opposite in character or nature," "or mutually opposed" from the standard established by *Davis*.

The Sixth Circuit's contrary conclusion was left largely unexplained. The court wrote that a state court conducting a subjective inquiry instead of an objective inquiry "is far different than a court's stating the wrong burden of proof in an ineffective assistance of counsel claim," Pet. App. 14, as the state court in *Williams* had done. The Sixth Circuit erred in its conclusion. If anything, the state court's decision in *Williams*—which had misunderstood the Supreme Court's decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993) to have modified the rule established by *Strickland v. Washington*, 466 U.S. 668, 694 (1984)—was, though "contrary to" federal law, a much closer call than is the question here. Indeed, in that case, three Justices dissented, and would have ruled that the state court's adjudication had not been "contrary to" Supreme Court precedent.

Although its treatment of the state court's *Davis* violation warrants reversal in its own right, the Sixth Circuit also erred by approving the district court's subjective analysis on habeas review. The Sixth Circuit gave two reasons for why the district court's reliance

on a plainly subjective evaluation—its view that petitioner's statements were "negotiation tactic[s], rather than [] request[s] for counsel,"—was not error. Neither withstands scrutiny.

First, the panel ruled that the district court's decision accorded with *Perreault*, a case where the Sixth Circuit had on habeas review approved of a state court's conclusion that a suspect's statement was not an invocation but rather a tactic "akin to negotiations." 874 F.3d at 520. But, that a prior panel of the Sixth Circuit had approved of a subjective consideration does not render a subjective analysis consistent with *Davis*'s mandate that such inquiries be objective.

Second, the panel stated that "the district court's use of *Perreault* is immaterial, as the state court's decision is supported by sufficient federal law without looking to *Perreault*." Pet. App. 14-15. For the reasons just explained, that is not correct: the state court's decision is antipodal to *Davis* and thus is not supported by federal law.

Tellingly, in reaching its own conclusion that petitioner's statements had not been invocations, the Sixth Circuit conducted a similar—and inappropriate—inquiry into petitioner's subjective mental state. Without watching or even listening to the recordings of petitioner's interrogation, the court held that petitioner's statements were "not" to be "take[n] * * * literally," but rather as "indicative of [petitioner's] sarcasm." Pet. App. 10. In other words, the panel rejected the objective meaning of petitioner's statements and instead

read into them an indication of petitioner's unspoken sarcastic intent.

The district court's and Sixth Circuit's analyses are thus directly contrary to the rule established in *Davis*. Moreover, by transforming the inquiry into a subjective one, the district court and Sixth Circuit do what *Thompkins* warns against: they make the analysis dependent on difficult—and largely unsupported—determinations of a suspect's intent or an officer's belief, instead of taking the suspect's words at their objective face value. *Thompkins*, 560 U.S. at 382 ("If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to *make difficult decisions about an accused's unclear intent* and face the consequences 'if they guess wrong.' ") (quoting *Davis*, 512 U.S. at 461) (emphasis added). This failure to follow Supreme Court precedent warrants reversal in its own right.

Beyond vitiating the *Davis* and *Thompkins* rules, the approach taken by the district court and Sixth Circuit would greatly burden suspects and disadvantage defendants. If courts and police are permitted to ignore the objective, literal meaning of a suspect's statements in favor of his purported underlying intent, potentially nothing a suspect declares could unambiguously establish the invocation of his rights, so long as an officer or court could read into his words some unspoken motivation. This is simply incompatible with this Court's instruction that "a statement either is * * * an assertion of the right to counsel or it is not." *Smith*, 469 U.S. at 97–98 (internal quotation marks and alterations

omitted). Indeed, as courts have recognized, if such "reasoning were accepted, then it is difficult to imagine a situation where a suspect could meaningfully invoke the right to remain silent [or the right to counsel] no matter what words he used." *Saeger v. Avila*, 930 F. Supp. 2d 1009, 1015–16 (E.D. Wis. 2013).

C. The issue is important and recurring, and this case presents a clean vehicle

1. It is difficult to overstate *Miranda*'s importance to our constitutional landscape. As this Court has long and repeatedly held, *Miranda* and its progeny, including *Davis* and *Thompkins*, "safeguard[ ]" "a defendant's Fifth Amendment privilege against self-incrimination," "a fundamental trial right," that "embodies principles of humanity and civil liberty" and "reflects many of our fundamental values and most noble aspirations" including "our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses"; "our distrust of self-deprecatory statements; and our realization that the privilege while sometimes a shelter to the guilty, is often a protection to the innocent." *Withrow v. Williams*, 507 U.S. 680, 691–92 (1993) (internal quotation marks, citations, and alterations omitted).

As this Court has already articulated, requiring an objective inquiry helps secure these fundamental rights by "avoid[ing] [the] difficulties of proof" and the lack of "guidance to officers conducting interrogations"

that would occur under a subjective approach. *Davis*, 512 U.S. at 458–59 (citation omitted).

Beyond that, a subjective test would deprive police officers the clarity needed to assure that their interrogations comport with a suspect's Fifth Amendment rights. At the same time, a subjective test would disadvantage suspects. An officer presumably would testify that he or she only continued interrogating a suspect based on a subjective belief that the suspect had not invocated his rights. Whether a request was "sarcastic" or a "negotiating ploy" are not easily discerned, much less so long after the fact when the custodial interrogation has given way to a criminal prosecution. If the officer's belief is later weighed as part of the court's subjective analysis, the scales will inevitably be tipped against the defendant.

2. The question presented here is tremendously important and is likely to arise on a daily basis. According to estimates of the United States Department of Justice, law enforcement in this country performs between 10 and 11 million arrests every year. *See* Office of Juvenile Justice and Delinquency Prevention, Statistical Briefing Book (2019), available at https://tinyurl.com/y4ao2q6s. Because *Miranda*'s warnings must be read whenever an arrest results in custodial interrogation, and officers must determine whether an invocation has been made, the issue is paramount of how to determine whether an invocation is unambiguous: whether it depends on what a reasonable officer would understand, or rather what the particular officer infers based on any past experiences with the

suspect and perceptions of tone, posture, facial expression, and any of the innumerable other aspects of interpreting communication. Indeed, *Miranda*'s warnings arise so frequently that they "have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000). In simplest terms, as the split described above makes plain (*supra*, pp. 7-19), questions and disputes regarding the invocation of *Miranda* rights arise before the nation's courts at an overwhelming level. Thus, because each of those instances place at issue a suspect's fundamental right against self-incrimination, this Court must take care to assure that the rules it has established, like *Davis*'s requirement that the invocation inquiry be objective, are scrupulously followed by the lower courts.

3. Lastly, this case presents a clean vehicle for clarifying that *Davis*'s objective inquiry does not allow for the consideration of malleable subjective factors. There is no dispute about the jurisdiction of the lower courts. The facts at issue are agreed upon entirely, and the record is clear as to the invocations in question. Petitioner raised the question presented in all stages of both direct and habeas review. The issue is also addressed in full by the Sixth Circuit's decision. Finally, and perhaps most importantly, without this Court's additional guidance, it remains unclear to both suspects and interrogating officers alike whether their subjective thoughts and beliefs are relevant to answering the question of invocation. Because the question arises on a daily basis, and because it deals with the most

fundamental of rights, it warrants this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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