No. _____

In the Supreme Court of the United States

MARY BERGHUIS, WARDEN, PETITIONER

v.

KEVIN MOORE

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

Whether a suspect unequivocally invokes his right to counsel under *Edwards* v. *Arizona*, 451 U.S. 477, 484 (1981), when he makes a simple request to contact an attorney but does not express an unwillingness to speak with police without the attorney present.

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption. The petitioner is Mary Berghuis, warden of a Michigan correctional facility. The respondent is Kevin Moore, an inmate. Berghuis has been substituted as habeas respondent for two of Moore's predecessor wardens (Thomas K. Bell and Mitch Perry), both of whom were terminated as parties in the Sixth Circuit.

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JURISDICTION

The Sixth Circuit's judgment was entered on November 30, 2012. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

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

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

Section 2254 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104–132, 104, 110 Stat. 1214, 1219 (codified at 28 U.S.C. § 2241 *et seq*.), provides in relevant 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; . . . .

INTRODUCTION

The police must have clear guidance about when to stop questioning a suspect who has invoked his *Miranda* right "to deal with the police only through counsel." *Edwards* v. *Arizona*, 451 U.S. 477, 484 (1981). Creating a bright-line rule was, after all, a major purpose of *Miranda*'s prophylactic rules. But the current state of the law is anything but clear. To the contrary, what it takes to invoke the right depends entirely on which circuit (or state) one is in.

This case involves a suspect who asked a police officer to call an attorney listed on a business card. When the officer reached an answering machine, the suspect did not refuse to speak without counsel present. Instead, he signed a *Miranda* waiver and then confessed to a brutal murder. The Sixth Circuit concluded that this conduct was an unequivocal invocation of the right, barring further questioning (as well as the confession). But when confronted with similar situations, both the Seventh and the Eleventh Circuits have reached the opposite conclusion, holding that such behavior is not a clear request for counsel.

That conflict only begins to scratch the surface of the considerable confusion in this area of *Miranda* law. If a suspect says something like "I think I need a lawyer," three circuits (the Fourth, Seventh, and Ninth) would treat that as an equivocal request that does not prohibit further police questioning. But three circuits (the Second, Sixth, and Eleventh) would treat the statement as an unequivocal request that *does* bar additional questioning. And conflicts exist even within the circuits and among the states.

This confusion exists because lower courts are separating the prophylactic *Miranda* right to counsel from the right it is meant to protect—the right to remain silent. In other words, lower courts engage in only half of the relevant analysis: they correctly ask whether a given statement is a request for counsel, but they stop there, without asking whether the suspect has expressed a desire to remain silent if not assisted by counsel. While a request for counsel is a necessary predicate under *Miranda* and *Edwards* to invoke the right to counsel, it is not sufficient to invoke the right to remain silent unless assisted by counsel. The suspect must also manifest, by word or action, an unwillingness to speak to police without counsel.

Moore, the defendant here, never showed any unwillingness to speak. He turned himself in voluntarily and told his story. He chose to speak, and nothing he said or did after that could have suggested to a reasonable observer that he did not wish to speak.

This Court should grant certiorari and reverse to reaffirm the *Miranda-Edwards* line of cases. Most important, the Court should use this opportunity to provide guidance to the lower courts in the proper analysis of an alleged invocation of the *Miranda-Edwards* right to counsel. Such guidance is particularly necessary to courts sitting in habeas review, which are commanded by statute, case law, and the principles of comity and federalism, to look only to the constitutional holdings of this Court to determine the reasonableness of state-court decisions.

STATEMENT OF THE CASE

A. Kevin Moore's murder of Hyshanti Johns and his self-serving confession to police

One Sunday night in 2000, Kevin Moore and his girlfriend Sharita Hutson went to a club. 4/17/01 Trial Tr. at 80. Before leaving for the club, Moore put his shotgun in the van. *Id*. at 102. When Moore and Hutson left the club, Hyshanti Johns left with them. *Id*. at 108. Moore took Hutson home and told her he was going to take Johns home. *Id*. at 112. Instead, Moore shot Johns to death with four shotgun blasts to the back of the head, abdomen, back, and groin. 4/16/01 Trial Tr. at 141.

The next day, Moore confided in Hutson that he had murdered Johns—first telling her he shot Johns in self-defense, then telling her he was hired to kill Johns. Pet. App. 62a. Moore then told Hutson that Johns was a witness to another crime he had committed. *Id*. Within days, Moore threw the shotgun in a river and fled Detroit for Chicago. 4/17/01 Trial Tr. at 138–40.

Moore later returned to Michigan, turned himself in at the Detroit Police Department, and gave the police a self-serving statement regarding his motives and state of mind when he killed Johns.

Before giving his statement, Moore handed Detroit Police Sergeant Kenneth Gardner a business card with a number printed on it and asked Gardner to call the number. Pet. App. 66a. Gardner called the number and reached an answering service. *Id*. He returned to Moore and explained that he had only reached an answering service. *Id*. Moore said that it was all right

and took back the card. *Id*. Gardner then asked if Moore wished to speak, and Moore said that he did. 7/25/00 Hr'g Tr. at 10. Moore executed a written waiver of his constitutional rights and then gave Gardner a statement admitting to killing Hyshanti Johns. Pet. App. 71a. Moore claimed that he shot Johns after she tried to rob him with the shotgun. 4/19/01 Trial Tr. at 55. He told Gardner that he wrested the shotgun from her and "just blanked out," shooting her because he "thought it was [his] own safety." *Id*. at 56.

B. State-court proceedings

Before trial, Moore sought to have his statement to Gardner suppressed as involuntary. Following a hearing at which Gardner and Moore testified, the trial court found that Moore validly waived his rights and denied the motion to suppress. Pet. App. 71a–72a.

A jury convicted Moore of first-degree premeditated murder. Moore appealed, arguing that the trial court erred in denying his motion to suppress. The Michigan Court of Appeals affirmed, finding no error in the denial of Moore's motion. Pet. App. 65a. The Michigan Supreme Court denied Moore's application for leave to appeal. Pet. App. 59a.

C. Federal habeas proceedings

Moore filed a petition for federal habeas relief, claiming that the state-court decision admitting his statement to the police was objectively unreasonable. The district court did not definitively rule on whether the statement was admissible because it found that the error, if any, was harmless in light of his confession to

Hutson and the other evidence of his guilt. Pet. App. 51a–53a. The district court denied all of Moore's claims for habeas relief and dismissed the petition. Pet. App. 58a. But it granted a certificate of appealability only for the claim that Moore's "Fifth Amendment rights were violated by the admission of his custodial statement into evidence." Pet. App. 29a. The district court did not hold that Moore had invoked his right to counsel. Pet. App. 51a–52a (stating that Moore "most likely invoked his right to counsel," but holding that, "assuming *Edwards* applies," Moore failed to show prejudice). Nor is it clear that the state trial court so held. Pet. App. 71a ("that *would have been* an initial request for an attorney, . . .") (emphasis added).

D. Sixth Circuit proceedings

Moore appealed, and the State argued, among other things, that Moore's statements and conduct did not constitute an invocation of the right to counsel, pointing out that Moore did not "*ever* indicate he would not speak to the officer without an attorney present." Sixth Cir. Br. for Resp't-Appellant 26.

A two-judge panel majority held that Moore unequivocally invoked his right to counsel, the State court unreasonably determined that Moore (not the officer) reinitiated communication after the invocation, and the statement's admission was not harmless. Pet. App. 9a–15a. Judge Boggs, writing in dissent, expressed no view as to whether Moore had invoked his right to counsel, but said that the State court's holding that Moore initiated further conversation was "not beyond fairminded disagreement," given the "somewhat murky record." Pet. App. 17a–18a.

The Sixth Circuit majority's analysis of Moore's invocation of the right to counsel consisted of one sentence and one citation. It is reproduced here in its entirety:

> We agree with both the trial court and the district court that, after being taken into custody, Moore invoked his constitutional right to counsel by requesting that the police officer call his attorney's phone number. *See Abela* v. *Martin*, 380 F.3d 915, 926 (6th Cir. 2004) (citing *Davis* v. *United States*, 512 U.S. 452 (1994)) (finding the accused "clearly and unequivocally invoke[d] the right to counsel" when he said "[m]aybe I should talk to an attorney" and showed the officer his attorney's business card). [Pet. App. 9a.]

REASONS FOR GRANTING THE PETITION

I. The circuits are split about what constitutes invocation of the *Miranda* right to counsel.

A. Uniformity is especially important for prophylactic rules designed to guide law enforcement.

"A major purpose of the Court's opinion in *Miranda* v. *Arizona* was 'to give concrete constitutional guidelines for law enforcement agencies and courts to follow." *Arizona* v. *Roberson*, 486 U.S. 675, 680 (1988) (citation omitted). "'One of the principal advantages' of *Miranda* is the ease and clarity of its application." *Id*. (quoting *Berkemer* v. *McCarty*, 468 U.S. 420, 430 (1984)).

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court recognized a corollary rule to *Miranda*: "an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication . . . . with the police." *Id*. at 484–85. This rule provides "a second layer of prophylaxis for the *Miranda* right to counsel." *McNeil* v. *Wisconsin*, 501 U.S. 171, 176 (1991). And this Court "repeatedly emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*." *Roberson*, 486 U.S. at 681.

B. The circuits are split over whether presenting an attorney's business card invokes the *Miranda* right to counsel.

That goal of a bright-line rule is still aspirational, because the circuit courts are separating the *Miranda* right to counsel from its roots in the right to remain silent. The courts focus simply on the request for counsel without linking it to a desire to remain silent if counsel is not present.

For example, this case would have come out differently in the Seventh Circuit. In *Quadrini* v. *Clusen*, a murder suspect who had received *Miranda* warnings twice agreed to talk with detectives. 864 F.2d 577, 579 (7th Cir. 1989). In fact, he "specifically replied" to the second set of warnings "that he did not want an attorney present despite the fact that after his court appearance that day he had been told by an investigator from the public defender's office that he should not make a statement." *Id*. at 579. After making

several incriminating statements, Quadrini showed the detectives "the business cards of the public defender and his investigator," but he did not state that he would not talk without counsel. *Id*. at 580. Instead, he continued to talk and "calmly . . . describ[ed] in detail how he had strangled Leverett with his belt." *Id*. After signing a waiver form, he repeated his incriminating statement on a tape recording. *Id*.

When Quadrini later tried to suppress the testimony, arguing "that he invoked his right to counsel when he showed the business cards," the Seventh Circuit held that "the display of the business cards and the content of the accompanying statement were insufficient to invoke the petitioner's right to counsel." *Id*. at 582. The Seventh Circuit properly treated his failure to express a desire to remain silent in the absence of counsel as a failure to unequivocally invoke his rights and accordingly denied habeas relief.

Like Quadrini, Moore presented an attorney's business card during questioning. And like Quadrini, Moore did not affirmatively assert a right to remain silent until counsel was present. But Moore received habeas relief, because the Sixth Circuit treated the mere presentation of the business card as an invocation of the right to deal with police only through counsel, even though Moore never expressed that desire.

The Eleventh Circuit also would not have concluded Moore had invoked his right to counsel. In *United States* v. *Tran*, Tran "requested his bankruptcy lawyer's business card" before receiving *Miranda* warnings, but then, after receiving the warnings, made statements he later wanted to suppress. 171 F. App'x 758, 759–760 (11th Cir. Feb. 28, 2006). Applying this

Court's decision in *Davis* v. *United States*, 512 U.S. 452 (1984), which held that a "suspect must unambiguously request counsel," the Eleventh Circuit rejected his argument: "even if Tran had made the request to retrieve his bankruptcy lawyer's business card, this request was too ambiguous to have constituted an invocation of his right to counsel." 171 F. App'x at 761.

C. The circuits are also split over what statements invoke the right to speak only with counsel.

The division among the circuits regarding a suspect's provision of his lawyer's business card is just the tip of the *Edwards* iceberg. Consider four statements:

1. "I think I should get a lawyer."

2. "I think I should call my lawyer."

3. "I think I need a lawyer."

4. "I think I would like to talk to a lawyer."

An unambiguous bright-line rule would ensure that these four virtually identical statements are treated equally for *Miranda* purposes. Yet the Second and Eleventh Circuits held that two of the statements were unequivocal invocations of *Miranda-Edwards*, while the Fourth and Ninth Circuits held that the other two were not. Compare *Wood* v. *Ercole*, 644 F.3d 83, 87 (2d Cir. 2011) (statement #1), and *Cannady* v. *Dugger*, 931 F.2d 752, 755 (11th Cir. 1991) (statement #2), with *Burket* v. *Angelone*, 208 F.3d 172, 198 (4th Cir. 2000) (statement #3), and *Clark* v. *Murphy*, 331 F.3d 1062,

1070 (9th Cir. 2003) (statement #4). None of the four courts discussed whether the suspect had expressed an unwillingness to speak to police.

The inconsistency is not only between circuits, but within them. Take the Sixth Circuit, for example. In *Kyger* v. *Carlton*, the Sixth Circuit held, with virtually no discussion, that the suspect's statement, "I'd just as soon have an attorney" was sufficient to trigger *Edwards* protections. 146 F.3d 374, 376, 379 (6th Cir. 1998). But in *Henness* v. *Bagley*, the Sixth Circuit was confronted with a suspect who told police, "I think I need a lawyer because if I tell everything I know, how do I know I'm not going to wind up with a complicity charge?" 644 F.3d 308, 319 (6th Cir. 2011). The *Henness* court held that it was not unreasonable to find that statement ambiguous. *Id.* at 320. Neither the *Kyger* court nor the *Henness* court examined whether the suspect expressed a desire not to deal with police.

Or consider the Seventh Circuit. In *United States* v. *Lee*, the Seventh Circuit examined a suspect's statement, "Can I have a lawyer?" 413 F.3d 622, 625 (7th Cir. 2005). Rather than analyze the statement in context to determine whether the accused was expressing an unwillingness to speak, the court simply compared the statement to other statements held to be unambiguous in other cases, and said that the statement triggered *Edwards* protections. *Id.* at 626. But in *United States* v. *Shabaz*, the suspect asked, "Am I going to be able to get an attorney?" 579 F.3d 815, 817 (7th Cir. 2009). The *Shabaz* court compared the statements to the same precedents cited in *Lee*, but held that the statement was *not* an unambiguous invocation of the right to counsel. *Id.* at 819; see

generally *Davis* v. *Texas*, 313 S.W.3d 317, 339–41 (Tex. Crim. App. 2010) (collecting cases); Marcy Strauss, *Understanding* Davis v. United States, 40 Loy. L.A. L. Rev. 1011, 1034–55 (2007) (same).

Indeed, this problem is not limited to the federal courts. As highlighted in a leading treatise, Wayne R. LaFave, et al., 2 Criminal Procedure § 6.9(g) n.166 (3d ed. 2012), and as illustrated by the following two tables (one for statements found to be equivocal, the other for those determined to be unequivocal), the states are also widely split about whether these same sorts of statements suffice to invoke the *Miranda* right to counsel.

Equivocal		
State	Case	Defendant's statement
Ark.	*Robertson* v. *State*, 2009 Ark. 430, 347 S.W.3d 460 (2009)	"Do I need a lawyer?"
	Holsombach v. *State*, 368 Ark. 415, 246 S.W.3d 871 (2007)	"You'll furnish me a public defender"
	Flanagan v. *State*, 368 Ark. 143, 243 S.W.3d 866 (2006)	"Do I need an attorney?"
Cal.	*People* v. *Bacon*, 50 Cal. 4th 1082, 116 Cal. Rptr. 3d 723, 240 P.3d 204 (2010)	"I think it'd probably be a good idea for me to get an attorney"

Equivocal		
State	Case	Defendant's statement
D.C.	*Riley* v. *United States*, 923 A.2d 868 (D.C. App. 2007)	Checking "no" on form next to question "Do you want to make a statement at this time without a lawyer?"
Ga.	*Crawford* v. *State*, 288 Ga. 425, 704 S.E.2d 772 (2011)	Asking officer if he needed a lawyer
Iowa	*State* v. *Harris*, 741 N.W.2d 1 (Iowa 2007)	"If I need a lawyer, tell me now"
Ky.	*Bradley* v. *Commonwealth*, 327 S.W.3d 512 (Ky. 2010)	"I need a lawyer or something"
Me.	*State* v. *Nielsen*, 946 A.2d 382 (Me. 2008)	In response to question whether he should wait for counsel, responding it's "not a bad idea"
Mass.	*Commonwealth* v. *Morganti*, 455 Mass. 388, 917 N.E.2d 191 (2009)	"[T]hinking I might need a lawyer and want to talk with him before talking to you"
	Commonwealth v. *Dubois*, 451 Mass. 20, 883 N.E.2d 276 (2008)	"Maybe I better get a lawyer"

Equivocal		
State	Case	Defendant's statement
Miss.	*Barnes* v. *State*, 30 So.3d 313 (Miss. 2010)	On separate occasions: "So, I don't need legal"; "I don't have an attorney here"; and "if I do need to get a lawyer . . . I will get one"
	Thomas v. *State*, 42 So.3d 528 (Miss. 2010)	"I may need to talk to a lawyer"
	Delashmit v. *State*, 991 So.2d 1215 (Miss. 2008)	"I prefer a lawyer"
Mont.	*State* v. *Main*, 360 Mont. 470, 255 P.3d 1240 (2011)	Defendant's request to "call his mother to call his lawyer"
	State v. *Scheffer*, 355 Mont. 523, 230 P.3d 462 (2010)	Defendant's statement that "I don't need an attorney or nothing" followed by "Maybe I should call my lawyer"
Neb.	*State* v. *Hilding*, 278 Neb. 115, 769 N.W.2d 326 (2009)	"Probably should have an attorney"
R.I.	*State* v. *Taoussi*, 973 A.2d 1142 (R.I. 2009)	Asking detective whether he needed an attorney

Equivocal		
State	Case	Defendant's statement
S.D.	*State* v. *Wright*, 768 N.W.2d 512 (S.D. 2009)	"Do I need to call a lawyer?"
Tex.	*Davis* v. *State*, 313 S.W.3d 317 (Tex. Crim. App. 2010)	"I should have an attorney," given context, including defendant asking detectives "why he should help them out"
Wash.	*State* v. *Radcliffe*, 164 Wash. 2d 900, 194 P.3d 250 (2008)	"maybe [I] should contact an attorney"
Wis.	*State* v. *Ward*, 318 Wis. 2d 301, 767 N.W.2d 236 (2009)	Asking officer if she should call an attorney

Unequivocal		
State	Case	Defendant's statement
Colo.	*People* v. *Lynn*, 278 P.3d 365 (Colo. 2012)	"When can I talk to a lawyer?"
	People v. *Bradshaw*, 156 P.3d 452 (Colo. 2007)	"I'm going to have to talk to an attorney about this"
	People v. *Adkins*, 113 P.3d 788 (Colo. 2005)	On hearing the *Miranda* warnings, defendant asked "Why don't I have an attorney now?"

Unequivocal		
State	Case	Defendant's statement
D.C.	*Jennings* v. *United States*, 989 A.2d 1106 (D.C. App. 2010)	"Go get my lawyer"
Fla.	*State* v. *Glatzmayer*, 789 So. 2d 297 (Fla. 2001)	Defendant asked officers whether he should have an attorney but police properly answered that decision was not theirs to make
	Almeida v. *State*, 737 So. 2d 520 (Fla. 1999)	Defendant's post-waiver question, "what good is an attorney going to do?," was an *un*equivocal question, and thus required an answer from police
Ga.	*Wheeler* v. *State*, 289 Ga. 537, 713 S.E.2d 393 (2011)	"I need to discuss it with a lawyer before I … talk to you"
	State v. *Brown*, 287 Ga. 473, 697 S.E.2d 192 (2010)	"I want a lawyer"
	Manley v. *State*, 287 Ga. 338, 698 S.E.2d 301 (2010)	On being told of right to counsel, defendant said "That's what I want right there"

Unequivocal		
State	Case	Defendant's statement
	Robinson v. *State*, 286 Ga. 42, 684 S.E.2d 863 (2009)	"I would like a lawyer"
	Taylor v. *State*, 274 Ga. 269, 553 S.E.2d 598 (2001)	"Can I have a lawyer present when I do that?" followed by "Okay" when told she could
	Lucas v. *State*, 273 Ga. 88, 538 S.E.2d 44 (2000)	"My attorney told me not to answer nothing"
Ind.	*Carr* v. *State*, 934 N.E.2d 1096 (Ind. 2010)	"I really need an attorney to . . . talk with" and "I need to have an attorney to deal with because this is a serious thing"
Iowa	*State* v. *Harris*, 741 N.W.2d 1 (Iowa 2007)	"We're going to do it with a lawyer"
La.	*State* v. *Bell*, 958 So.2d 1173 (La. 2007)	"I'd rather wait until my mom get me a lawyer"
	State v. *Leger*, 936 So. 2d 108 (La. 2006)	"I know I need to see" a lawyer
Md.	*Ballard* v. *State*, 420 Md. 480, 24 A.3d 96 (2011)	"You mind if I not say no more and just talk to an attorney about this"

Unequivocal		
State	Case	Defendant's statement
Mass.	*Commonwealth* v. *Hoyt*, 461 Mass. 143, 958 N.E.2d 834 (2011)	"I'd like a attorney present . . . but I can't afford one"
	Commonwealth v. *Contos*, 435 Mass. 19, 754 N.E.2d 647 (2001)	"I think I'm going to get a lawyer"
Minn.	*State* v. *Hannon*, 636 N.W.2d 796 (Minn. 2001)	"Can I have a drink of water and then lock me up—I think we really should have an attorney"
	State v. *Munson*, 594 N.W.2d 128 (Minn. 1999)	"I think I'd rather talk to a lawyer"
Miss.	*Gillett* v. *State*, 56 So. 3d 469 (Miss. 2010)	"I need to speak with an attorney"
Mont.	*State* v. *Spang*, 310 Mont. 52, 48 P.3d 727 (2002) overruled on other grounds by *State* v. *Buck*, 331 Mont. 517, 134 P.3d 53 (2006) (interpreting the Montana Constitution)	"Sh*t, I need a lawyer, man"
Or.	*State* v. *Acremant*, 338 Or. 302, 108 P.3d 1139 (2005)	"I think that I do need a lawyer, I do"

Unequivocal		
State	Case	Defendant's statement
R.I.	*State* v. *Dumas*, 750 A.2d 420 (R.I. 2000)	"'Can I get a lawyer?' could be sufficiently clear in some circumstances," and thus remand needed to determine if that is what defendant said and how police responded
S.C.	*State* v. *Kennedy*, 333 S.C. 426, 510 S.E.2d 714 (1998)	"I think I need a lawyer present"
Tex.	*State* v. *Gobert*, 275 S.W.3d 888 (Tex. Crim. App. 2009)	"I don't want to give up any right though, if I don't got no lawyer"
Va.	*Commonwealth* v. *Hilliard*, 270 Va. 42, 613 S.E.2d 579 (2005)	"Can I get a lawyer in here?"

As these cases demonstrate, determining whether a suspect has invoked the *Miranda* right to counsel is a recurring issue, yet confusion, not uniformity, exists.

What will happen to the next Michigan habeas petitioner who challenges the admission of statements made after he told police, "I might want a lawyer"? Will the court follow the precedent of *Kyger* (because "might" is similar to "would just as soon"), and find it

an unequivocal invocation? Or will it follow *Henness* (because "I might" is similar to "I think"), and hold it ambiguous? What will happen to the next Illinois federal defendant who asks police, "Is it possible that I could have a lawyer"? Does that question fall under *Lee*, because "possible" is similar to "can"? Or does it fall under *Shabaz*, because "possible" is similar to "to be able to"?

The outcome in these cases will remain impossible for police officers to predict if courts continue to focus on the semantic content of the words spoken and fail to look at what is really at stake under *Edwards*—the expression of a desire to remain silent unless assisted by counsel. Worse, similarly situated defendants will continue to be treated differently, and voluntary confessions will be excluded. "Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser." *McNeil*, 501 U.S. at 181.

Edwards and *Miranda* protect suspects' Fifth Amendment rights. The Fifth Amendment does not include a free-standing right to counsel, but rather couples with the Fifth Amendment right against self-incrimination, a right to be free from questioning without counsel. The right is not self-executing, but must be asserted. Thus, the question in every case should be the question derived from the *Edwards* holding: Has the accused "expressed his desire to deal with the police only through counsel"? 451 U.S. at 484.

This Court should grant certiorari and provide much needed clarity by refocusing the lower-court inquiry on a suspect's expressed desire to deal with the police only through counsel.

II. The Sixth Circuit failed to properly apply this Court's decision in *Edwards*.

A. This Court has applied the *Miranda-Edwards* prophylaxis only in cases in which the accused has affirmatively expressed an unwillingness to speak without counsel present.

In *Miranda* v. *Arizona*, this Court admonished police officers to cease questioning when a suspect invokes his right to counsel, 384 U.S. 436, 474 (1966), but that case did not address what constitutes such an invocation. Fifteen years later, this Court faced the question whether the police can, consistent with the Fifth Amendment, resume interrogation of a suspect who has already invoked his right to counsel, possibly badgering the suspect into speaking to police. *Edwards* v. *Arizona*, 451 U.S. 477 (1981).

In *Edwards*, the suspect, Robert Edwards, told the interrogating police officer that he wanted to "make a deal," and, after unsuccessfully trying to reach a deal with the county attorney, told the officer, "I want an attorney before making a deal." 451 U.S. at 479. The officer cut off questioning and took Edwards to jail. The next morning, two colleagues of the officer came to the jail to interrogate Edwards. *Id*. Edwards told the guard that he did not want to speak to the police, but the guard told Edwards that "he had" to talk to the detectives. *Id*.

This Court held that Edwards had invoked his right to counsel, and that "when an accused has invoked his right to have counsel present *during*

custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484 (emphasis added). This Court went on to hold "that an accused . . . having expressed his *desire to deal with the police only through counsel*, 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." *Id.* at 484–85 (emphasis added); *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) ("Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny . . . .").

Thus, the *Edwards* Court held that it is not a mere "request for counsel" that invokes the *Miranda* right to counsel, but a suspect's expression of his unwillingness to speak to police *without counsel present*. That conclusion makes sense: the *Miranda* right to counsel is a judicially created right that exists only to protect the Fifth Amendment right not to speak. And if there was any doubt that an expression of unwillingness to speak is the core of a *Miranda-Edwards* invocation, this Court put it to rest in later decisions.

In *Connecticut* v. *Barrett*, 479 U.S. 523 (1987), the Court again looked for an unwillingness to speak unless assisted by counsel. In that case, the police arrested William Barrett and questioned him as a suspect in a sexual assault. *Id.* at 525. When Barrett arrived at the police station, an officer advised him of his *Miranda* rights, and Barrett said that he would

talk, but would not give a written statement. *Id*. The officers Mirandized Barrett again before questioning, and he told the officers that he would speak to them, but "that he would not give a written statement unless his attorney was present." *Id*. Before a second interview, Barrett was again advised of his rights, and, "[f]or the third time," told police "that 'he was willing to talk about [the incident] verbally but he did not want to put anything in writing until his attorney came.'" *Id*. at 525–26. Barrett made oral statements at both interviews, without counsel. *Id*. He then challenged the admissibility of the statements, and the Connecticut Supreme Court reversed his conviction, holding that "Barrett's expressed desire for counsel before making a written statement served as an invocation of the right for all purposes." *Id*. at 526 (citing *Connecticut* v. *Barrett*, 197 Conn. 50, 495 A.2d 1044 (1985)).

This Court reversed, holding that Barrett's request for counsel before making a written statement did not serve as an all-purpose invocation of the Fifth Amendment right to counsel barring police questioning. *Barrett*, 479 U.S. at 527–28. Although Barrett "desired the presence of counsel before making a written statement," he did not express any unwillingness to make an oral statement, and there was no need to suppress the confession. *Id*. at 529. This Court pointed out that "*Miranda* gives the defendant a right to choose between speech and silence, and Barrett chose to speak." *Id*.

The Court emphasized in *McNeil* v. *Wisconsin* that "[t]he purpose of the *Miranda-Edwards* guarantee" is to protect "the suspect's 'desire *to deal with the police only through counsel*.'" 501 U.S. 171, 173 (1991)

(quoting *Edwards*, 451 U.S. at 484) (emphasis added). The state arraigned Paul McNeil on an armed robbery charge, and McNeil was represented by counsel at the pretrial hearing. *Id*. Later that evening, a detective questioned McNeil about unrelated crimes. *Id*. McNeil waived his *Miranda* rights and did not ask for an attorney. *Id*. at 173–74. Two days later, police returned, and McNeil again waived his *Miranda* rights and confessed to his involvement in the crimes. *Id*. at 174. McNeil challenged the admissibility of his confession.

This Court accepted the uncontested assertion that McNeil invoked his Sixth Amendment right to counsel by requesting counsel at the pretrial hearing. *Id*. at 175. That right, this Court held, guards the interest of "'protec[ting] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified.'" 501 U.S. 171, 177–78 (1991) (quoting *United States* v. *Gouveia*, 467 U.S. 180, 189 (1984)). But a suspect's invocation of his Sixth Amendment right to counsel "is, as a matter of *fact*, *not* to invoke the *Miranda-Edwards* interest." *Id*. at 178 (emphasis in original). The invocation of the "*Miranda-Edwards* Fifth Amendment right to counsel" requires, "at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." *Id*. (emphasis in original). Because McNeil's request for an attorney did not contain such a statement, McNeil did not invoke his Fifth Amendment right not to speak without counsel present. *Id*.

The *McNeil* Court discussed at some length the distinction between the two rights to counsel. 501 U.S. at 177–80. Running through the discussion is the fact that the Fifth Amendment right is not simply the right to have counsel, but the right to "the particular sort of lawyerly assistance that is the subject of *Miranda*." 501 U.S. at 178. Of critical importance, it "is not necessarily true" that a suspect who wants the assistance of counsel in defending against a prosecution "would want counsel present for all custodial interrogation," because "suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions." 501 U.S. at 178.

For example, a suspect who, like Moore, knows that there is strong evidence tying him to a murder, and who has confessed his guilt to a third party, might wish to go voluntarily to the police, unassisted, to tell them a tale that, if believed, would either negate the necessary *mens rea* for murder or support a theory of self-defense, as Moore did. See also *Texas* v. *Cobb*, 532 U.S. 162, 177 (2001) (Kennedy, J., concurring) ("It is quite unremarkable that a suspect might want the assistance of an expert in the law to guide him through hearings and trial, and the attendant complex legal matters that might arise, but nonetheless might choose to give on his own a forthright account of the events that occurred.").

In both *Barrett* and *McNeil*, this Court held that the police were not barred from questioning the suspects despite the fact that the suspects had requested counsel in far clearer terms than Moore did

here. William Barrett requested an attorney and refused to put anything in writing without one. Paul McNeil requested the appointment of counsel in his defense. But in both cases, the suspects did not link their requests for counsel with a refusal to speak. This fact commanded a finding that *Miranda-Edwards* did not apply to bar police questioning. Accordingly, Moore's conduct, even if it constituted a request for counsel, did not bar police questioning.

Additional cases demonstrate that this Court has not extended the *Miranda-Edwards* prophylaxis to cases in which the accused merely mentions an attorney without pairing the reference to an attorney with a refusal to speak. For example, in *Maryland* v. *Shatzer*, the accused told the interrogating detective "that he *would not talk about this case* without having an attorney present." 130 S. Ct. 1213, 1224 (2010) (quotation marks omitted; emphasis added). This Court treated this statement as an unambiguous invocation of the right to counsel. *Id*. The Court's other decisions have followed the same path. See *Minnick* v. *Mississippi*, 498 U.S. 146, 148 (1990) ("*Come back Monday* when I have a lawyer" was invocation) (emphasis added); *Roberson*, 486 U.S. at 678 (finding invocation where accused said "that he 'wanted a lawyer *before answering any questions*'") (emphasis added); *Shea* v. *Louisiana*, 470 U.S. 51, 52 (1985) (finding invocation where accused said "that he *did not wish to make any statement* until he saw a lawyer") (emphasis added); *Smith* v. *Illinois*, 469 U.S. 91, 93 (1984) (finding invocation where accused said that he would "*like to do that*" when told he had the right "to have a lawyer *present with you when you're being questioned*") (second emphasis added).

In contrast, in *Davis* v. *United States*, the accused told the police, "Maybe I should talk to a lawyer." 512 U.S. 452, 455 (1994). This Court held that this was not a sufficiently clear invocation of the right to counsel to require police to stop questioning. *Id.* at 462. Discussion of Davis's willingness to speak with police was unnecessary because Davis's statement was not even a sufficiently clear expression of this desire for an attorney.

B. Lower courts have failed to observe the importance of *Edwards*'s requirement that a suspect express his unwillingness to speak without a lawyer.

In spite of clear precedent from this Court, the circuit courts have found *Edwards* violations even where the suspect never indicates that he does not wish to speak with police.

For example, in *Abela* v. *Martin* (the sole case the Sixth Circuit relied on here, Pet. App. 9a), the Sixth Circuit held that a suspect, Kevin Abela, who handed the interrogating officer a business card and said, "[M]aybe I should talk to an attorney by the name of William Evans" had unequivocally invoked his right to counsel, triggering *Edwards*. 380 F.3d 915, 926–27 (6th Cir. 2004). Absent from the Sixth Circuit's discussion of invocation is any discussion of whether Abela had ever indicated—whether by words, actions, or surrounding circumstances—that he did not wish to speak to police without a lawyer. *Id.* at 925–27.

In *Wood* v. *Ercole* (statement #1, discussed above), the suspect, Ellis Wood, told police, "I think I should

get a lawyer," and was allowed to make a telephone call. 644 F.3d 87. After the call, he waived his *Miranda* rights and made a statement. *Id.* The Second Circuit held that Wood's statement was an unequivocal invocation of the right to counsel, triggering *Edwards*. *Id.* at 92. Though the court carefully parsed the presence of the words "think" and "should," as well as the absence of the words "perhaps" and "maybe," it never discussed the most important question: whether Wood ever expressed an unwillingness to speak with the police. *Id.* at 91–92; see also *Cannady*, 931 F.2d at 753–55 (11th Cir.) (holding that the statement "I think I should call my lawyer" constitutes an unequivocal invocation of right to counsel, while neglecting to discuss willingness to speak with police).

The courts' error, put simply, is in proceeding from the correct principle that an unambiguous request for counsel is *necessary* to find an invocation of the *Edwards* right to counsel, see *Davis*, 512 U.S. at 462, to the incorrect principle that an unambiguous request for counsel is *sufficient* to find such an invocation—or, in other words, that a request for counsel *is the same as* an invocation to remain silent absent counsel.

C. Moore consistently manifested not only his willingness, but his desire, to speak to the police despite having no counsel present.

The Sixth Circuit's opinion here is typical of the confusion. Of the 15 judges and state-court justices who have been presented with the question in this case so far, 13 of them did not find a constitutional violation, while the other two not only held that there

was a constitutional violation, but also impliedly held that to find otherwise constitutes "an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington* v. *Richter*, 131 S. Ct. 770, 786–87 (2011).

Proper framing of the question brightens the line, both here and in the other varied circumstances described above. Moore arrived at the police station voluntarily and alone, manifesting a willingness to deal with police without counsel. Moore handed Sergeant Gardner the card and never did or said anything to indicate an unwillingness to deal with the police without counsel. Notably, Moore did not hand Gardner the card in response to any interrogation by Gardner. And after Gardner told Moore that he was not able to reach an attorney, Moore did nothing and said nothing to indicate an unwillingness to deal with police without counsel. Showing abundant caution, Sergeant Gardner asked Moore if he wanted to speak, and Moore said that he did. Moore executed a written *Miranda* waiver, and gave his statement. Because Moore never expressed, either through words or actions, "his desire to deal with the police only through counsel," he did not unambiguously and unequivocally invoke his Fifth Amendment right to counsel, and he did not trigger the protection of *Edwards*.

Moore, like William Barrett, had the "right to choose between speech and silence, and . . . chose to speak." *Barrett*, 479 U.S. at 529. He had the right to refuse to speak without counsel, but he chose to tell his tale unassisted. To suppress a statement made when a suspect has chosen to speak, in the absence of any police badgering, is "to 'imprison a man in his

privileges and call it the Constitution.'" *Montejo* v. *Louisiana*, 556 U.S. 778, 788 (2009) (quoting *Adams* v. *United States*, 317 U.S. 269, 280 (1942)).

D. The seriousness of the Sixth Circuit's error is compounded because this is an AEDPA case, which requires federal courts to look only to this Court's constitutional holdings to find clearly established federal law.

AEDPA bars federal courts from granting habeas relief except where the state court's ruling is contrary to, or an unreasonable application of, clearly established federal law, as expressed in the holdings of this Court. 28 U.S.C. § 2254(d)(1). See, e.g., *Parker* v. *Matthews*, 132 S. Ct. 2148, 2155 (2012) (reversing the Sixth Circuit for failing to obey this statutory command); *Renico* v. *Lett*, 130 S. Ct. 1855, 1865–66 (2010) (same). Ignoring this prohibition, the Sixth Circuit here applied its own precedent—and only its own precedent—to determine that Moore's statement to police constituted an unambiguous invocation of the right to counsel. In fact, the Sixth Circuit treated the question as essentially an uncontested one, disposing of it in a single sentence, accompanied by a citation to a single Sixth Circuit opinion. Pet. App. 9a (citing *Abela* v. *Martin*, 380 F.3d 915, 926 (6th Cir. 2004)).

If the Sixth Circuit had constrained its inquiry to this Court's precedent, it would have noted that *Edwards* applies when "an accused . . . ha[s] expressed his desire to deal with the police only through counsel." 451 U.S. at 484. It could have looked to this Court's holdings to see if the Court had *ever* held that a suspect

had made a valid *Miranda-Edwards* invocation without expressing an unwillingness to speak. It would have looked in vain. It would have applied the plain language of *Edwards* to the facts of this case and noted that Moore never clearly expressed a desire to deal with police only through counsel.

Instead, the Sixth Circuit relied solely on *Abela*, one of its own opinions, and, in doing so, repeated *Abela*'s improperly broad application of *Miranda* and *Edwards*. Reversal will not only correct the Sixth Circuit's error, but will also help end inter-circuit, intra-circuit, and inter-state inconsistency by strengthening the status of *Edwards* as a bright-line rule. Certiorari is warranted.

* * *

In *Miranda* and *Edwards*, this Court established bright-line rules concerning police interrogations in the face of an invocation of the right to counsel. *Edwards* "serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Roberson*, 486 U.S. at 682. "Surely there is nothing ambiguous about the requirement that after a person in custody has *expressed his desire to deal with the police only through counsel*, he 'is not subject to further interrogation by the authorities until counsel has been made available to him, . . .' " *Id.* (emphasis added).

State and lower courts have dimmed this bright line by extending the *Edwards* rule to factual scenarios to which it does not apply, namely, those where a suspect requests counsel but does not express an unwillingness to speak to police without counsel

present. Unpredictability and inconsistency are the natural result.

The Sixth Circuit's opinion in this case illustrates this confusion and demonstrates the need for this Court's clarification. The Court should grant certiorari and hold that the *Miranda-Edwards* bar to police questioning is triggered only when a suspect clearly invokes his Fifth Amendment right to counsel by expressing his unwillingness to speak to police without an attorney present.

CONCLUSION

The petition for a writ of certiorari should be granted.

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