No. 12-1074

In the Supreme Court of the United States

MARY BERGHUIS, WARDEN, PETITIONER

v.

KEVIN MOORE

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

REPLY BRIEF

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INTRODUCTION

This Court asks a simple question to determine whether someone has invoked the *Miranda* right to counsel: Has the accused "expressed his desire to deal with the police only through counsel"? *Edwards* v. *Arizona*, 451 U.S. 477, 484 (1981); *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 . . . ."). Moore did nothing of the sort; to the contrary, after an attempt to telephone an attorney was unsuccessful, he chose to deal with police without counsel. Neither the Fifth Amendment nor this Court's cases provide any reason to exclude his voluntary confession.

Moore never addresses this controlling question. Instead, he equates any request for counsel—even one followed by an affirmative willingness to talk without counsel—with an invocation of the Fifth Amendment right to remain silent. This legal error pervades his opposition.

For example, Moore asserts that the State is asking this Court to correct a factual finding that was decided against it at the trial court, has been affirmed by every subsequent court, and has never been at issue. Each part of this assertion is wrong. First, whether Moore invoked his Fifth Amendment right to counsel is not a factual question, but a legal one. Second, before the Sixth Circuit, *no* court had made a clear holding on the question; instead, each had rejected Moore's claim on other grounds. And third, the State has consistently argued before every court that

Moore did not invoke his right to counsel. In short, this case provides an appropriate vehicle to address the underlying constitutional question.

Moore also contends that *Edwards* is only about what police must do *after* a suspect invokes his right to counsel, and has nothing to say about *how* a suspect invokes his right to counsel. But *Edwards* identifies both the consequence and the triggering event. No court, including the Sixth Circuit, has found that Moore ever "expressed his desire to deal with the police only through counsel." 451 U.S. at 484. In other words, the Sixth Circuit found an *Edwards* violation in this case without asking whether the event triggering *Edwards*' prophylactic rule occurred. Moore points out that the question whether a suspect has invoked his right to counsel is a fact-specific one, and that the outcome "will necessarily differ from case to case." Br. in Opp. 3. Of course. But the problem is not that courts are reaching different answers—the problem is that they are not even asking the right question.

ARGUMENT

I. This case presents a suitable vehicle for resolution of this constitutional question.

A. Whether a suspect has invoked his Fifth Amendment right to counsel is a legal question, not a factual one.

Moore characterizes the question at issue as a "factual finding." Br. in Opp. 1, 3, 8. It is not. It is a legal question that depends on factual findings. The trial court had to resolve factual questions—what

Moore did and said, what Gardner did and said, and in what order—before reaching the legal questions. Gardner and Moore told different stories of what happened in the interrogation room, and the trial court resolved that dispute by making factual findings. Pet. App. 70a–71a. Those findings have not been disturbed by any court since, and neither the State nor Moore asks this Court to disturb them. See Br. in Opp. 4.

But those findings do not answer whether Moore invoked his right to counsel, whether Moore or Gardner reinitiated questioning for *Edwards* purposes, whether Moore's Fifth Amendment waiver was valid, or the ultimate question, whether the statements were admissible at trial. Even though the answers to these questions depend on the facts to which they are applied, the answers are legal holdings, not factual findings. E.g., *Connecticut* v. *Barrett*, 479 U.S. 523, 528 n.1 (1987) ("The holding that Barrett had invoked his right to counsel, then, rests on a legal conclusion about the effect of this limited invocation rather than a factual finding.").

Moore also argues that the legal question whether a suspect has invoked his Fifth Amendment rights is "not appropriate for review by this Court," Br. in Opp. 3. But this Court has repeatedly granted certiorari to answer exactly this question, in cases such as *Berghuis* v. *Thompkins*, 130 S. Ct. 2250 (2010), *Davis* v. *United States*, 512 U.S. 452 (1994), and *Fare* v. *Michael C.*, 442 U.S. 707 (1979). This Court rightly considers the question whether a suspect has invoked his constitutional rights to be more than a mere matter of "fact-bound error correction."

B. Before the Sixth Circuit panel majority's erroneous holding, no court had held that Moore invoked his right to counsel.

Moore tells this Court that "[t]he state trial court (and every subsequent reviewing court) found that Respondent Kevin Moore had invoked his right to counsel pursuant to *Edwards* v. *Arizona*." Br. in Opp. 1 (citation omitted). Actually, no court made such a holding until the Sixth Circuit did.

Moore contends that "[t]he state trial court expressly held that he did invoke that right." Br. in Opp. 11. Not so. The trial court, which held that the statements were admissible, made only a factual statement that there was "an initial request for an attorney." Pet. App. 71a. But even if Moore *requested* counsel, this does not resolve whether Moore *invoked* his Fifth Amendment right to counsel. A request for an attorney is one component of an invocation of the right to counsel, but it is not, by itself, sufficient, because an invocation of the right to counsel must include an expression of unwillingness to speak without counsel. *Edwards*, 451 U.S. at 484; *Patterson*, 487 U.S. at 291.

The trial court correctly found it significant that Moore "indicated he did want to make a statement." Pet App. 71a. In fact, the trial court also asked the right question, observing that after Moore expressed a willingness to make a statement, "[t]here was no other indication given by [Moore] to Sergeant Gardner that he wanted an attorney before making a statement." *Id.* And based on these facts, the trial court did not hold that Moore invoked his right to counsel. Accord *Thompkins*, 130 S. Ct. at 2262 ("the law can presume that an individual who, with a full understanding of

his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford").

The Michigan Court of Appeals also did not hold that Moore invoked his right to counsel. Instead, it simply held that there was "no clear error" in the trial court's factual determinations, and that, "[u]nder the circumstances, the statement was properly obtained." Pet. App. 66a. Similarly, the Michigan Supreme Court did not hold that Moore invoked his right to counsel; instead, it declined to hear the case without considering the merits of Moore's claims. Pet. App. 59a.

In any event, even if any of the state-court decisions could be read as concluding that Moore invoked his right to counsel, that legal conclusion would not control, because federal courts have an independent obligation to grant habeas relief "only on the ground that [a person] is in custody in violation of the Constitution." 28 U.S.C. § 2254(a). That condition is not satisfied here, because Moore voluntarily confessed without ever having expressed a desire to deal with police only through counsel.

The district court made no holding on the question. Though it opined that Moore "most likely invoked his right to counsel," Pet. App. 51a, it declined to actually make such a holding, deciding instead to reject Moore's habeas claim because, "[e]ven if [Moore] was interrogated in violation of *Edwards*," there was no prejudice, in light of the other direct and circumstantial evidence against him, including his other confession. Pet. App. 53a.

The Sixth Circuit was the first court to hold that Moore had invoked his right to counsel. And contrary to Moore's assertion, Br. in Opp. 11, the dissenting judge did not agree that Moore had invoked his right to counsel, but only agreed that Moore had "asked the officer to call a particular attorney for him," Pet. App. 16a. This is uncontroversial as a factual finding, but again, it does not address the controlling legal question: whether Moore expressed a desire to deal with police only through counsel.

C. The State argued at every stage of the proceedings that Moore did not invoke the *Miranda* right to counsel.

Moore also tells this Court that the question the State presents "has never been at issue in this case." Br. in Opp. 1. The truth is that no court, other than the Sixth Circuit panel majority, has found it necessary to reach the question, because each court has found it easier to reject Moore's claim on other grounds. But this does not mean the State failed to raise the question.

In the trial court, the assistant prosecutor argued that "[t]he People's position is that this was not the request by the defendant. To call some person's number on a card is not a clear and unequivocal request for an attorney." 7/25/00 Hr'g Tr. at 58. On direct appeal, the State argued that "[t]his defendant may have asked to call an attorney, but . . . did not make any indication that he was asserting his right to counsel. This was truly [an] equivocal, at best, reference to an attorney." Br. of Pl.-Appellee 21. In the district court, the State argued that Moore "made no

indication that he was asserting his right to counsel." Resp't's Answer in Opp. to Pet. for Writ of Habeas Corpus 19. And in the Sixth Circuit, the State raised the argument again. Sixth Cir. Br. for Resp't-Appellee 23–29.

In sum, the invocation question has *always* been at issue in this case. The fact that most courts have found it easier to dispose of the case on other grounds does not remove the question from this Court's consideration.

II. This Court's prophylactic rules, created in *Miranda* and *Edwards*, were designed to promote consistent and predictable results.

The Sixth Circuit's error is symptomatic of a confusion in the federal and state courts that produces inconsistent results and undermines this Court's goal of a bright-line rule. Moore says that the only bright line is the rule that police must cease interrogation when a suspect has invoked his right to counsel, and that no such line governs whether a suspect has made such an invocation. But this Court's goal in *Miranda* of "giv[ing] concrete constitutional guidelines for law enforcement agencies and courts to follow," *Arizona* v. *Roberson*, 486 U.S. 675, 680 (1988), was not limited to the subsidiary question of what to do after invocation, at the expense of the threshold question of invocation itself; it was intended to produce consistent outcomes in criminal cases by addressing both questions.

Moore's argument misses the point. Police and courts must first determine whether a suspect invoked his right to counsel before they can apply the protection of ending the interrogation. And although

Moore is correct that the inquiry is a fact-specific one, this Court's precedents still provide a bright line governing that inquiry. *Edwards* identifies not only the consequences of an invocation, but also the event that triggers its protections: "[W]hen 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 . . . ." 451 U.S. at 484 (emphasis added). "We further hold that an accused, . . . *having expressed his desire to deal with the police only through counsel*, is not subject to further interrogation" unless counsel is present or the accused reinitiates communication. *Id.* at 484–85 (emphasis added). Thus, *Edwards* instructs lower courts not only about what to do after an invocation of the right to counsel, but also about what constitutes such an invocation. And this Court has provided further guidance on the question of how a suspect invokes his Fifth Amendment rights in *Thompkins*, *Davis*, and *Michael C.*

It is by ignoring this instruction and substituting its own precedent that the Sixth Circuit was able to hold that Moore invoked his right to counsel, even though Moore never "expressed his desire to deal with the police only through counsel." *Edwards*, 451 U.S. at 484–85. Similarly, as outlined in the petition, state and federal courts have reached inconsistent results in cases with similar facts by confining the inquiry to the clarity of the request for counsel, without examining the true issue—the suspect's unwillingness to speak.

Moore tries to explain away the disparate results by noting that whether a suspect has invoked his Fifth Amendment rights is a fact-specific question. But the problem is not that courts are reaching different results by applying the correct legal standard to different sets of facts. The problem is that, in many cases, including this one, courts are not applying the correct legal standard at all. This problem is not merely an "illusion of inconsistency" or an "overly simplified catalog of statements," as Moore contends, Br. in Opp. 12, 17; it is a real problem that a leading treatise illustrates with a three-page list of conflicting decisions. Wayne R. LaFave, et al., 2 Criminal Procedure § 6.9(g) n.166 (3d ed. 2012).

For example, in *Wood* v. *Ercole*, 644 F.3d 83, 90–92 (2d Cir. 2011), the Second Circuit spent much of its analysis on whether the phrase "I think I should get a lawyer" constitutes an unambiguous request for counsel. Moore points out that the *Wood* court "analyzed the context of the statement," Br. in Opp. 16, but again misses the point. The Second Circuit did not analyze the context to determine whether the suspect was expressing an unwillingness to speak without counsel, but only to determine whether the words spoken were ambiguous. *Id*. at 91. Similarly the courts in *Cannady* v. *Dugger*, 931 F.2d 752 (11th Cir. 1991), *Burket* v. *Angelone*, 208 F.3d 172 (4th Cir. 2000), and *Clark* v. *Murphy*, 331 F.3d 1062 (9th Cir.), overruled in part on other grounds by *Lockyer* v. *Andrade*, 538 U.S. 63 (2003), all confined their analyses to whether the suspect's language was ambiguous, without ever considering the critical inquiry whether the suspect was expressing an unwillingness to speak without

counsel. This led to different outcomes in four cases that considered virtually identical statements.

Moore's attempts to distinguish the circuit split on the specific issue of business cards also misses the point. In both *Quadrini* v. *Clusen*, 864 F.2d 577 (7th Cir. 1989), and *United States* v. *Tran*, 171 F. App'x 758 (11th Cir. 2006), the Seventh and Eleventh Circuits rejected the proposition that the Sixth Circuit accepted—that presenting an attorney's business card was all that was necessary to invoke the *Miranda* right to counsel. Further, the statement Moore relies on from *Quadrini*—that Quadrini specifically stated that he did not want an attorney—came *before* he presented the business card, 864 F.2d at 579–80; after presenting the business card (and thereby potentially making a new request for an attorney), Quadrini, just like Moore, willingly confessed to the murder, instead of expressing a desire to speak only with counsel present.

CONCLUSION

The petition for writ of certiorari should be granted.

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