No. 09-636

In The
Supreme Court of the United States

SAMUEL SHABAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the Court with the opportunity of resolving a split among the circuits regarding the correct interpretation of *Davis v. United States* regarding a suspect's invocation and waiver of his right to counsel. Specifically, the split focuses on the question of whether the "unambiguous and unequivocal request" rule, as announced by the Court in *Davis,* applies in both pre-waiver and post-waiver settings thereby eliminating the government's heavy burden of proving that a waiver has occurred, as interpreted by the Third, Fourth, Fifth, Sixth, and Tenth Circuits, or applies only in post-waiver or re-invocation settings, after the heavy burden has been met, as interpreted by the Second and Ninth Circuits.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Samuel Shabaz ("Mr. Shabaz"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the judgment of United States District Court for the Northern District of Illinois that denied Shabaz's Motion to Suppress Statements and Evidence ("Motion").

OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1-11), is reported at *Shabaz v. United States of America*, 579 F.3d 815 (7th Cir. 2009). The opinion of the District Court denying the Motion (App. 12-30), has not been published.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 27, 2009. There were no petitions for rehearing. This petition is timely filed within 90 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Amendment Five provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

STATEMENT OF THE CASE

On December 21, 2007, Mr. Shabaz was arrested at his house and driven to the Calumet City police station for interrogation on the suspicion that he had committed an armed robbery of a federally insured bank in violation of 18 U.S.C. § 2113(a). (App. 13) While waiting at the police station, prior to his interrogation, Mr. Shabaz asked FBI agent Watson, "***Am I going to be able to get an attorney?***" (App. 5, 18, 40) Agent Watson ignored Mr. Shabaz's request for counsel and directed Mr. Shabaz to the interrogation

room where he remained handcuffed. (App. 5, 18, 24, 25, 39-40, 66) Agent Watson explained to Mr. Shabaz the reasons for his arrest, and then provided Mr. Shabaz with an advice of rights form, which asked him to agree in writing to waive his rights. (App. 2-3, 18-19, 43-44, 47-49) Mr. Shabaz acknowledged that he understood his rights, but refused to sign the waiver of rights form. *Id.*

Following Mr. Shabaz's request for counsel and refusal to sign a waiver of *Miranda* rights form, Mr. Shabaz was subjected to questioning by law enforcement officers. (App. 5, 18-19, 23-25, 43-49) As a result of this questioning, Mr. Shabaz eventually made inculpatory statements and signed a consent to search form. (App. 3-4, 19, 49-50)

Mr. Shabaz moved to suppress evidence of his inculpatory statements and evidence obtained from the search on the grounds that he had been deprived of his *Miranda* rights because his request for counsel had been ignored. (App. 4, 12-13, 33) The suppression motion was heard by a Magistrate Judge who held an evidentiary hearing. (App. 4, 12-13, 31-75) The Magistrate Judge ultimately concluded that the government had met its burden of establishing that Mr. Shabaz had knowingly and voluntarily waived his *Miranda* rights and denied the motion to suppress. (App. 4-5, 17-19, 31-34)

Mr. Shabaz filed objections to the Magistrate Judge's Report and Recommendations with the District Court. (App. 5, 20) The District Court overruled

the objections, finding that Agent Watson's failure to respond to Mr. Shabaz's request for an attorney did not deny him his right to counsel, it merely "deferred" the question. (App. 5, 25, 40) The District Court then adopted the Magistrate Judge's Report and Recommendation and denied the motion to suppress. (App. 5, 29-30)

On October 29, 2008, Mr. Shabaz appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit (the "Seventh Circuit"). Oral argument was held on June 4, 2009. (App. 1) On August 27, 2009, the Seventh Circuit issued an opinion affirming the District Court's decision. (App. 1-11) In affirming the District Court's decision, the Seventh Circuit found that Mr. Shabaz's question was not a clear and unambiguous request for counsel sufficient for the right to counsel to attach. (App. 8-9)

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit's Decision Is Inconsistent With The Rulings Of Other Circuits Which Have Considered The Issue Of Whether The *Davis* Rule Applies In Pre-Waiver Settings.

This case presents an opportunity for the Court to resolve a Circuit split on a critical issue. Specifically, the Seventh Circuit's decision in this case is inconsistent with the Second and Ninth Circuit decisions in *United States v. Plugh*, 576 F.3d 135 (2nd

Cir. 2009) and *United States v. Rodriguez*, 518 F.3d 1072 (9th Cir. 2008), respectively. It is also contrary to this Court's holding in *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994), which the Second and Ninth Circuits properly followed. In particular, the Second and Ninth Circuits correctly interpreted *Davis* as requiring that a suspect demonstrate an unambiguous and unequivocal invocation of his Fifth Amendment rights only where that suspect already has waived those rights and thereafter attempts to invoke them. *Plugh*, 576 F.3d at 142; *Rodriguez*, 518 F.3d at 1078-79. Other Circuits similarly have misapplied *Davis* to pre-waiver interrogation situations. These Circuits include the Third, Fourth, Fifth, Sixth, and Tenth Circuits.[1] However, we are aware of no case in which any circuit court has actually examined or considered the issue of whether *Davis* should be applied to both pre-and post-waiver settings.[2]

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[1] *See, e.g., United States v. Johnson,* 400 F.3d 187, 194-95 (4th Cir. 2005) (applying *Davis* to a pre-waiver statement); *United States v. Lee*, 413 F.3d 622, 626 (7th Cir. 2005) (same); *United States v. Brown,* 287 F.3d 965, 972-73 (10th Cir. 2002) (same); *United States v. Syslo,* 303 F.3d 860, 866 (8th Cir. 2002) (same); *United States v. Suarez*, 263 F.3d 468, 482-83 (6th Cir. 2001) (same); *Grant-Chase v. Comm'r, New Hampshire Dep't of Corr.,* 145 F.3d 431, 436 & n. 5 (1st Cir. 1998) (same); *United States v. Posada-Rios,* 158 F.3d 832, 867 (5th Cir. 1998) (same).

[2] While no other Circuit Courts have examined the issue of whether *Davis* should be applied only in post-waiver settings, a majority of state supreme courts to consider the issue have held that the "unambiguous or unequivocal request" rule of *Davis* is

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The court has a long history of honoring a suspect's Fifth Amendment rights, including several prophylactic rules which custodial officers must obey once the suspect is in custody. This Court's decision in *Miranda* stands for the proposition that, simply because a suspect was properly advised of his rights does not lead to the inevitable conclusion that any subsequent statements were obtained without violating those rights. Specifically, this Court found that the "heavy burden" is on the government to demonstrate that a suspect has waived his right to remain silent:

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limited to post-waiver scenarios. *Rodriguez*, 518 F.3d at 1079 n. 6 (citing cases: *State v. Tuttle,* 650 N.W.2d 20, 28 (S.D. 2002) ("*Davis,* in sum, applies to an equivocal postwaiver invocation of rights. For an initial waiver, however, the State still bears 'a heavy burden to demonstrate that the defendant knowingly and intelligently waived' *Miranda* rights." (quoting *Miranda,* 384 U.S. at 475, 86 S. Ct. 1602, 1628)); *State v. Holloway,* 760 A.2d 223, 228 (Me. 2000) (declining "to require an unambiguous invocation of the right to remain silent and the right to an attorney in the absence of a prior waiver"); *State v. Leyva,* 951 P.2d 738, 743 (Utah 1997) ("The Court in *Davis* made clear that its holding applied only to a suspect's attempt to reinvoke his *Miranda* rights 'after a knowing and voluntary waiver' of the same. . . . Plainly, [it] did not intend its holding to extend to prewaiver scenarios, and we see no reason to so extend it." (quoting *Davis,* 512 U.S. at 461, 114 S. Ct. 2350, 2356)); *cf. In re Christopher K.,* 217 Ill. 2d 348, 299 Ill. Dec. 213, 841 N.E.2d 945, 964-65 (2005) (noting that the U.S. Supreme Court has left open the issue of whether the objective *Davis* test applies in a pre-waiver setting and applying the "clear statement" rule of *Davis* in an initial waiver situation).

> If the individual indicates *in any manner*, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease.
>
> * * *
>
> If the interrogation continues without the presence of an attorney and a statement is taken, a *heavy burden rests on the government* to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retain or appoint counsel.

Miranda v. State of Arizona, 384 U.S. 436, 473, 86 S. Ct. 1602, 1628, 16 L. Ed. 2d 694 (1966) (emphasis supplied). *See also Montejo v. Louisiana*, ___ U.S. ___, 129 S. Ct. 2079, 2089, 173 L. Ed. 2d 955 (2009) ("under *Miranda's* prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right."). Indeed, "courts must presume that a defendant *did not* waive his rights until the government proves otherwise by a preponderance of the evidence" *Colorado v. Connelly*, 479 U.S. 157, 169, 107 S. Ct. 515, 522, 93 L. Ed. 2d 473 (1986) (internal citations omitted) (emphasis supplied). In other words, unless the government can prove by a preponderance of the evidence that a suspect waived his or her rights, courts must presume that the suspect retained them.

The Court further fleshed out the mechanisms for ensuring the viability of these constitutional protections in *Edwards v. Arizona*, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 2d 378 (1981). There, the Court held 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 a 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, 101 S. Ct. at 1884-85. The Court later cautioned that "[i]nvocation and waiver [of *Miranda* rights] are entirely distinct inquiries, and the two must not be blurred by merging them together." *Smith v. Illinois*, 469 U.S. 91, 98, 105 S. Ct. 490, 449, 83 L. Ed. 2d 488 (1984).

The *Davis* Court applied an additional layer to the invocation analysis, holding that, if a suspect initially waives his or her Fifth Amendment rights and *thereafter* attempts to invoke those rights, the suspect bears the burden of showing that the invocation was sufficiently unambiguous and unequivocal to trigger the prophylaxis rules. *Plugh*, 576 F.3d at 142 (citing *Davis*, 512 U.S. at 460-62, 114 S. Ct. 2350, 2355-57).

Certain Circuit Courts have interpreted *Davis* as requiring that a suspect's initial invocation of his right to counsel be unambiguous, and that the ambiguity is resolved *against the suspect. See supra* at n. 1. This interpretation effectively shifts much of the government's "heavy burden" of establishing that a

suspect waived his rights from the government to the suspect. Such a view reflects a serious misinterpretation of *Davis*.

The Second and Ninth Circuits, properly limited the *Davis* holding to post-waiver situations. In *Plugh*, the Second Circuit affirmed a district court's decision to suppress the defendant's statements, finding that the defendant properly invoked his right to counsel by stating, "I am not sure if I should be talking to you," and "I don't know if I need a lawyer," and by refusing to sign a waiver of rights form. *Plugh,* 576 F.3d at 142. In affirming, the Second Circuit declined to apply the holding in *Davis* that an invocation of the right to counsel be unambiguous where that invocation occurs before the suspect has waived his *Miranda* rights. *Id.* at 142-43. The *Plugh* court found that there is no instruction in *Davis* regarding how courts should analyze an initial invocation of one's right to counsel where no waiver occurred. *Id.* (finding that "*Davis* only provides guidance for circumstances in which a defendant makes a claim that he subsequently invoked previously waived Fifth Amendment rights."). The court noted that the burden is on the government to prove that a suspect has waived his rights in order to use any statements made by the suspect without counsel present. *Id.* at 143 (citing *Connelly*, 479 U.S. at 169, 107 S. Ct. at 522, 93 L. Ed. 2d 473). If the government meets this burden, "the suspect has the burden of proving that he resurrected rights previously waived." *Id.* It is under this circumstance that *Davis* requires the

invocation to be unambiguous and unequivocal. *Id.* Indeed, the *Davis* Court was careful to note that, only "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Davis*, 512 U.S. at 461, 114 S. Ct. at 2356. The *Plugh* court pointed to numerous statements by the *Davis* Court to support its limited application of the holding. *Plugh,* 576 F.3d at 143 (quoting *Davis* at 459, 114 S. Ct. at 2355 (noting that an ambiguous reference to an attorney would not compel the "*cessation* of questioning") (emphasis added); *id.* (noting that a "statement [that] fails to meet the requisite level of clarity . . . does not require that the officers *stop* questioning the suspect") (emphasis added); *id.* (declining to extend *Edwards* to require officers to "*cease* questioning" upon an equivocal statement by a suspect) (emphasis added)).

The Ninth Circuit likewise found that the holding of *Davis* was narrowly addressed to the facts of the case: "We therefore hold that, *after a knowing and voluntary waiver of the* Miranda *rights,* law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Rodriguez*, 518 F.3d 1072, 1078 (quoting *Davis*, at 461, 114 S. Ct. 2350). The court further noted that the *Davis* opinion "asks whether 'further questioning' is permitted upon an equivocal or ambiguous invocation of the right to counsel, or, rather, whether questioning must 'cease,' or 'stop,' – all implying that legal questioning, following a valid initial *Miranda* waiver,

was already occurring." *Id.* (citing *Davis* at 454, 458-62, 114 S. Ct. at 2351, 2354-57). The *Rodriguez* court also noted the *Smith* Court's caution against conflating the analysis of invocation and waiver of *Miranda* rights, noting that they are two distinct inquiries. *Id.* (citing *Smith v. Illinois,* 469 U.S. 91, 98, 105 S. Ct. 490, 494, 83 L. Ed. 2d 488 (1984)). As a result, the court found that *Davis* did not address what police must obtain in the initial waiver context to begin questioning; rather, *Davis* "addressed what the suspect must do to *restore* his *Miranda* rights after having already knowingly and voluntarily waived them." *Id.* at 1079 (emphasis supplied).

II. The Seventh Circuit's Decision Is Inconsistent With *Miranda* And Its Progeny And Reflects A Misapplication Of This Court's Narrow Holding In *Davis*.

Had the Seventh Circuit properly applied *Miranda* and its progeny, and properly limited the holding in *Davis* to post-waiver settings, Mr. Shabaz would have been successful in his appeal below. Specifically, Mr. Shabaz's statement, "Am I going to be able to get an attorney," satisfies *Miranda's* standard for indicating "in any manner" that he preferred to remain silent. Applying *Edwards,* Mr. Shabaz could not have effected a valid waiver of his right to have counsel present simply because he subsequently "responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards,* 451 U.S. at 484, 101 S. Ct. at 1884-85.

However, contrary to the holdings of *Miranda*, *Edwards,* and their progeny, the Seventh Circuit did not recognize the presumption that Mr. Shabaz had not waived his rights. The court further did not require the government to meet its "heavy burden" of demonstrating that Mr. Shabaz knowingly and intelligently waived his rights. On the contrary, the Seventh Circuit impermissibly blurred together its analysis of invocation and waiver of Mr. Shabaz's *Miranda* rights. (App. 7-9) In particular, the Seventh Circuit erroneously applied *Davis* in this pre-waiver context, finding that Mr. Shabaz's statement was not an unambiguous invocation of his right to counsel. Moreover, the Seventh Circuit found that, even when Mr. Shabaz later was read his *Miranda* rights and refused to sign the proffered waiver form, his subsequent submission to police-initiated custodial interrogation constituted evidence of waiver. (App. 9) In reaching this decision, the Seventh Circuit pointed to Mr. Shabaz's failure to "follow[ ] up on his initial question" about an attorney as further justification for the police to proceed with their interrogation of him. (App. 9) This analysis demonstrates that the Seventh Circuit effectively shifted the burden of proof from the government carrying its "heavy burden" of proving waiver to the suspect instead proving an unambiguous invocation. This analysis is impermissible in a pre-waiver context.

The interpretation of *Davis* offered by the Second and Ninth Circuits as limited to a post-waiver context are better reasoned and more consistent with this

Court's careful guarding of constitutional rights and presumption against waiver. As the *Miranda* court announced, "This Court has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied in custody interrogation." *Miranda,* 384 U.S. at 475, 86 S. Ct. 1602, 1628 (citation omitted). Therefore, as the *Rodriguez* court reasoned:

> Once the "heavy burden" has been met, however, *Davis* indicated that the benefits of *Miranda* have been realized: the suspect has understood his rights and has freely chosen to proceed. It is then the police's right to interrogate the suspect, and the suspect, in effect, who bears the "burden" of cutting off questioning by unambiguously retracting the clear waiver he has already given.

Rodriguez, 518 F.3d at 1079. While a majority of circuit courts have applied the *Davis* rule in a pre-waiver or initial waiver context, we are not aware of any circuit court that has done so following a similar consideration of the issue of whether the *Davis* rule is more appropriately interpreted as applying only to the post-waiver context. Specifically, the Seventh Circuit did not consider whether *Davis* should be limited to post-waiver settings and incorrectly conflated the analysis of invocation and waiver, contrary to this Court's holding in *Smith v. Illinois*. The Second and Ninth Circuits, on the other hand, offer a careful analysis of the narrow holding in *Davis* and the

consistency of the post-waiver interpretation with earlier precedent of this Court.

There is no factual dispute here. Mr. Shabaz made the statement, "Am I going to be able to get an attorney?" There is no dispute that he made this statement before submitting to any questions by the police. Further, there is no dispute that Mr. Shabaz was then led into an interrogation room, where he was read his *Miranda* rights and refused to sign a written waiver. There is no dispute that the police ignored Mr. Shabaz's request for an attorney and refusal to sign a waiver form, and instead began questioning him. The only evidence offered by the government to establish that Mr. Shabaz waived his rights was that he responded to questioning by the police during his interrogation.

Certainly, the government here did not meet its "heavy burden" of establishing that Mr. Shabaz made a knowing and intelligent waiver of his *Miranda* rights. However, the Seventh Circuit misapplied *Davis* to the pre-waiver setting at issue to find that Mr. Shabaz's request was not sufficiently unambiguous to invoke his right to counsel. If the Seventh Circuit had applied the well-reasoned analysis offered by the Second and Ninth Circuits limiting the *Davis* rule to post-waiver settings, there would have been no question that Mr. Shabaz properly invoked his right to counsel. Indeed, the facts in *Plugh* are on all fours. As in *Plugh,* Mr. Shabaz made a request for an attorney that was determined to be ambiguous. In *Plugh,* the suspect stated, "I am not sure if I should be talking to you," and "I don't know if I need a

lawyer." Here, Mr. Shabaz stated, "Am I going to be able to get an attorney." Both Mr. Shabaz and the suspect in *Plugh* refused to sign waiver forms after being read their *Miranda* rights. The Second Circuit refused to apply the *Davis* rule in this pre-waiver setting and found that the suspect had invoked his right to counsel. Given nearly identical facts, the Seventh Circuit applied *Davis* to a pre-waiver context and found that Mr. Shabaz had not invoked his right to counsel. The better reasoned interpretation of the *Davis* rule offered by the Second and Ninth Circuits should have been applied in this case to exclude any statements by Mr. Shabaz following his request for counsel and refusal to sign the waiver form.

CONCLUSION

The Seventh Circuit has erroneously read *Davis* broadly as requiring an unambiguous invocation by a suspect of his right to counsel regardless of whether a suspect has not yet waived his *Miranda* rights. In doing so, the Seventh Circuit has departed from the reasoning offered by *Miranda* and its progeny which have imposed a "heavy burden" on the government to establish that a suspect has waived his constitutional rights. This Court's long history of precedent, starting with *Miranda*, *Edwards*, and *Smith v. Illinois,* clearly recognizes a presumption that a suspect has not waived his rights and that this presumption may be overcome only where the government meets its "heavy burden" to establish that a waiver has occurred. The *Davis* rule may be reconciled with this

precedent because it applies to post-waiver settings where a suspect already has indicated full comprehension of his rights and has made a knowing and voluntary waiver of his rights, thereby dispelling whatever coercion is inherent in the interrogation process. The same cannot be said of pre-waiver settings and, therefore, the presumption against waiver must apply unless and until the government can carry its "heavy burden" of proving waiver. Accordingly, Mr. Shabaz respectfully requests that this Court grant the writ of certiorari and hear this case on the merits.

DATED THIS 24TH DAY OF NOVEMBER, 2009.

Respectfully submitted,

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