No. 15-

IN THE

Supreme Court of the United States

DANTE L. BENNETT,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF SPECIAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *United States* v. *Davis*, 512 U.S. 452 (1994), this Court held that to invoke the right to counsel during a custodial police interrogation, and therefore require police to cease questioning, a person must request counsel clearly. Appellate courts are divided, however, over whether satisfying *Davis*'s clear-invocation standard requires a person to specify that his mid-interrogation request for counsel is for counsel during that interrogation, rather than for some other purpose or proceeding. Here, the Maryland courts rejected petitioner's Fifth Amendment challenge on the ground that his mid-interrogation statement to police, "Okay, okay, so I need to call an attorney," failed to specify that his request was for counsel during the interrogation, and thus did not satisfy *Davis*. The question presented is:

Whether the Maryland courts erred in rejecting petitioner's Fifth Amendment challenge to the admission at trial of statements he made to detectives after telling them, during a custodial interrogation, "okay, so I need to call an attorney."

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Dante Bennett respectfully petitions for a writ of certiorari to review the judgment of the Maryland Court of Special Appeals in this case.

OPINIONS BELOW

The opinion of the Maryland Court of Special Appeals (App. 1a-33a) is unpublished. The order of the Maryland Court of Appeals denying discretionary review (App. 35a) is reported in a table decision at 118 A.3d 861. The relevant trial court proceedings (App. 37a-42a) are unpublished.

JURISDICTION

The Maryland Court of Special Appeals issued its decision in this case on March 23, 2015. App. 1a. The

Maryland Court of Appeals denied petitioner's timely petition for discretionary review of that decision on July 27, 2015. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides in relevant part that "[n]o person … shall be compelled in any criminal case to be a witness against himself."

STATEMENT

1. *The Interrogation.* On November 20, 2011, two masked men entered a gas station store in Ellicott City, Maryland, one of them holding a shotgun. App. 3a. Petitioner Dante Bennett, a regular at the store's lottery-game counter, was in the store when the robbery began. *Id.* Later explaining that he feared for his safety, Interrogation Tr. 5-6, Bennett, "as viewed from the [store's] surveillance video," slipped out of the store during the robbery and left the scene, App 3a.

Police eventually came to believe that Bennett was an accomplice to the robbery; he was arrested in March 2012, App. 4a; 10/3/2012 Trial Tr. 52, and charged with robbery with a dangerous weapon, conspiracy to commit that crime, first-degree assault, and theft of over $1,000, R. 18-19. The arresting officer took Bennett to a police station, where two detectives, Allison Ehart and Lance Bergerson, questioned him. 10/3/2012 Trial Tr. 55; Interrogation Tr. 1. Detective Ehart began by reading Bennett his *Miranda* rights, which Bennett waived. Interrogation Tr. 3. After approximately twelve minutes of questioning, however, Bennett asked for further information about his situation:

> Before we continue, I have nothing to hide but um, are you charging me this? Do I need to call an attorney? I'm, I'm trying to figure out what's going on here because I had absolutely nothing to do with it. But I'm not going to sit here and go back and forth. I'll help you as much as I can like you said, you talk to [the other witness who observed the robbery]. You didn't talk to me, maybe that's why I don't know, let me know what's going on here.

Id. at 13; App. 11a. Detective Ehart responded, "[y]ou are being charged with an armed robbery. You were arrested on a warrant today yes." Interrogation Tr. 14; App. 11a. Bennett then replied: "*Okay, okay, so I need to call an attorney*." Interrogation Tr. 14 (emphasis added); *see also* App. 11a-12a. Instead of ceasing their questioning of Bennett, Detective Ehart precipitated the following exchange:

> Det. Ehart: That's completely up to you, you can, you can continue talking to me or you can, you can contact your attorney and[—]
>
> Bennett: Okay, so no matter what I say here I'm being charged?
>
> Det. Ehart: You have, the charges have already been filed.

Interrogation Tr. 14; *see also* App. 12a. Detectives Ehart and Bergerson continued questioning Bennett for two more hours. During this time, Bennett discussed his recollection of the robbery, his activities before and after it, and telephone calls he made and received on his cellular phone around the time of the robbery. Interrogation Tr. 17-91. But he maintained his innocence throughout the entire interrogation.

2. *Trial Court Proceedings*. Before trial, Bennett moved to suppress the statements he made to the detectives after telling them, "so I need to call an attorney." 9/10/2012 Hr'g Tr. 26-27. He argued that because that statement clearly invoked his right to counsel, the detectives were required to end the interrogation immediately. *See Davis* v. *United States*, 512 U.S. 452, 458 (1994) ("[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation." (citing *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981)).

The trial court rejected Bennett's argument. Contrasting his words with those that halted questioning in *Davis*—"I think I want a lawyer before I say anything else"—and those the Maryland Court of Appeals deemed sufficient to invoke the right to counsel in *Ballard* v. *State*, 24 A.3d 96 (Md. 2011)—"You mind if I not say no more and just talk to an attorney about this"—the trial court concluded that Bennett's statement was ambiguous because the court "didn't get the sense that this was a request for an attorney to be present *during interrogation*." App. 41a (emphasis added). According to the court, an important, "common threa[d]" uniting the suspects' statements in *Davis* and *Ballard* was "a demonstration that the person is actually seeking an attorney *as a connection to the interrogation itself*." App. 41a, 42a (emphasis added). Since Bennett, in the court's view, made no similar connection, but instead returned to the question "whether or not he's been charged," App. 41a, the court held that he had not clearly invoked his right to counsel, and accordingly denied his suppression motion, App. 42a.

At trial, the prosecution relied heavily on statements Bennett made during the interrogation but after

his "I need to call an attorney" statement (even though, as noted, he continued to deny having any involvement in the robbery). The prosecution, contending that Bennett's words conflicted with the evidence at every turn, *see* 10/4/2012 Trial Tr. 133-145, told jurors that he had been "lying" to the detectives throughout his interview and that his "lies" showed his guilt, *id.* at 144; 10/2/2012 Trial Tr. 102.

The jury found petitioner guilty of all four charges, App. 1a-2a; 10/4/2012 Trial Tr. 183-184, and the trial court subsequently sentenced him to 30 years in prison, App. 2a; 11/26/2012 Sentencing Tr. 25-27.

3. *Appellate Proceedings*. A two-judge panel of the Maryland Court of Special Appeals affirmed.[1] As relevant here, the court held that Bennett's "so I need to call an attorney" statement did not clearly invoke his right to counsel. The appellate court generally "agree[d] with the [trial] court's analysis," App. 14a, asserting that Bennett's statement was ambiguous because "it did not relate to a desire to stop speaking with the police until an attorney was present," *id.* Rather, the court concluded, petitioner asked for counsel "to help him get out of being charged" and to "explain[] his side of the story at trial." App. 14a-15a.

Bennett then sought discretionary review in the Maryland Court of Appeals. He renewed his argument that his critical statement, made during a custodial interrogation, was a clear invocation of his right to counsel, such that this Court's precedent required police to immediately cease interrogating him. The court denied review. App. 35a.

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[1] Three judges heard oral argument but one did not participate in the decision of the appeal. App. 1a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IMPLICATES AN ESTABLISHED CONFLICT AMONG APPELLATE COURTS ON AN IMPORTANT AND RECURRING QUESTION ABOUT THE RIGHT TO COUNSEL

The decision of the Maryland Court of Special Appeals in this case addresses the question whether an individual who invokes his right to counsel during a custodial police interrogation must, in order to meet the clear-invocation standard announced in *United States* v. *Davis*, 512 U.S. 452 (1994), specify that he seeks counsel's assistance in dealing with that interrogation, rather than for some other reason. That is a recurring question of federal law on which state and lower federal appellate courts are divided. And answering it is important both for effective law enforcement and for meaningful protection of individuals' fundamental Fifth Amendment privilege against self-incrimination. This Court's review is therefore warranted.

A. Background

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held "that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins," *Davis*, 512 U.S. at 457 (citing *Miranda*, 384 U.S. at 469-473). That holding seeks to ensure that the "inherently compelling pressures" of custodial interrogation, *Miranda*, 384 U.S. at 467, do not induce involuntary confessions, in violation of the Fifth Amendment privilege against compulsory self-incrimination, *see Davis*, 512 U.S. at 457.

Fifteen years after *Miranda*, this Court held in *Edwards* that "law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation." *Davis*, 512 U.S. at 454. That holding addresses the danger of police trying to circumvent the rule of *Miranda* by "badgering a defendant into waiving his previously asserted *Miranda* rights." *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990).

Lastly, thirteen years after *Edwards*, this Court held in *Davis* that to trigger the protections of *Miranda* and *Edwards*, an individual undergoing a custodial interrogation "must unambiguously request counsel." *Davis*, 512 U.S. at 459. What that means, the Court explained, is that the individual must make "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Id.*; *see also id.* (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"). This requirement, however, does not mean that the individual must "speak with the discrimination of an Oxford don." *Id.*

B. Disagreement Among Lower State And Federal Appellate Courts

This Court did not state or suggest in *Davis* that in order to "unambiguously request counsel," 512 U.S. at 459, a person in custody must specify to the interrogating officers that his request for counsel pertains to the interrogation in which the request is made and not to some unspecified future proceeding or other purpose. Some courts, however, including the trial judge and the Maryland Court of Special Appeals in this case, have

imposed that requirement, rejecting Fifth Amendment challenges on the ground that the defendant failed to state, in requesting counsel during an interrogation, that counsel's assistance was sought for that interrogation rather than for some other reason. Other appellate courts, by contrast, have declined to impose such a specificity requirement.

1. In *People* v. *Bradshaw*, 156 P.3d 452 (Colo. 2007) (en banc), the Colorado Supreme Court considered whether a suspect (Bradshaw) had unambiguously invoked his right to counsel after being told by police during a custodial interrogation that the alleged victim had accused him of sexual assault. Upon hearing of the accusation, Bradshaw stated, "I'm going to have to talk to an attorney about this, because this is, this is, you know, I mean, this obviously, this is a serious thing." *Id.* at 454. On appeal, the state insisted that the request did not meet *Davis*'s "clear-invocation" standard because it was "an expression of future intent and not a present request for representation." *Id.* at 457. The court rejected that argument, holding that the invocation was unequivocal despite Bradshaw's failure to refer specifically to needing counsel for the interrogation, and indeed despite his use of the "future imperative" tense. *Id.* The court emphasized that the statement was made during custodial interrogation and just after learning that the alleged victim had accused him of a serious crime. *Id.* at 457-458. Under these circumstances, the court held, when a defendant "specifically sp[eaks] of his desire to 'talk to,' 'see,' or 'have' an attorney," he "demonstrate[s] a clear intent to invoke [his] right to representation," satisfying *Davis*. *Id.* at 457; *accord People* v. *Lynn*, 278 P.3d 365, 369 (Colo. 2012) (en banc) (deeming it "not particularly significant" that a suspect's mid-interrogation request for

counsel—"When can I talk to a lawyer?"—"might possibly be interpreted to involve the future rather than the present").

The Ninth Circuit reached a similar conclusion in *Robinson* v. *Borg*, 918 F.2d 1387 (9th Cir. 1990). There, the court considered whether a suspect's mid-interrogation statement, "I have to get me a good lawyer, man," followed by, "Can I make a phone call?" qualified as an unambiguous invocation of the right to counsel. *Id.* at 1389. The state argued that the suspect's words amounted only to a "recognition that he faced a difficult criminal trial ahead," rather than constituting an "attempt[] to invoke a *present* right to counsel." *Id.* at 1391. The court of appeals disagreed, concluding that the statements, "made in the middle of an interrogation, can only reasonably be understood as expressing a desire to obtain counsel and to do so immediately, not at a trial several months later." *Id.*[2]

The First Circuit has followed *Robinson* in an unpublished opinion. *See Sundstrom* v. *Powell*, 960 F.2d 143 (table), 1992 U.S. App. LEXIS 15158, *14 (1st Cir. Apr. 23, 1992) (per curiam). After anticipating this Court's holding in *Davis* that "the protections of *Miranda* and *Edwards* come into play" "only when a defendant expresses an unequivocal … desire for the *present* assistance of counsel," the court of appeals stated that "[i]t is certainly true that '[t]here is no requirement that a suspect specify that he wants counsel at the questioning.'" *Id.* (second alteration in original)

[2] Although *Robinson* was decided before *Davis*, the Ninth Circuit had already embraced, and thus was applying, the same clear-invocation standard that *Davis* later adopted. *See Robinson*, 918 F.2d at 1393 (holding that the suspect had invoked his right to counsel because his request was "unambiguous and unequivocal").

(quoting *Robinson*, 918 F.2d at 1392). In other words, the court continued, a suspect is "'not required to make a temporal statement—to say that he wanted counsel right away—and his failure to do so does not render his invocation of his right less than immediate.'" *Id.* (quoting *Robinson*, 918 F.2d at 1392).

2. In contrast to the cases just discussed (but in accord with the Maryland courts here), other appellate courts have held that to satisfy *Davis*'s clear-invocation standard, a suspect who requests counsel during a custodial interrogation must specify that he seeks counsel's assistance with that interrogation.

For example, in *Stevens* v. *Commonwealth*, 720 S.E.2d 80 (Va. 2012), the Virginia Supreme Court held that a suspect's (Stevens') statement, "[t]hat's what I want, a lawyer, man," *id.* at 81, was insufficiently clear to satisfy *Davis*. Noting that the officers knew that "one of the reasons Stevens was brought to the court building [where the interrogation at issue occurred] was for the appointment of an attorney," *id.* at 84, the court agreed with the Commonwealth that the relevant statement could reasonably be understood "to refer to either a lawyer for purposes of the custodial interrogation *or* a lawyer to represent Stevens in court," *id.* (emphasis added). Because Stevens had failed to specify which one, the court held that his request was ambiguous and thus found no constitutional violation in the officers' failure to stop the interrogation.

To the same effect (though even starker) is the Arkansas Supreme Court's decision in *Baker* v. *State*, 214 S.W.3d 239 (Ark. 2005). There, the suspect (Baker) told police during a custodial interrogation, "I don't feel like I can talk with you without an attorney sitting right here to give—have them here to give me some legal

advice." *Id.* at 242. An officer then asked, "So you're telling me you want an attorney?" and Baker replied, "I think I'm going to need one." *Id.* Although Baker made these statements during interrogation (and notwithstanding his seemingly specific reference to having "an attorney sitting *right here*"), the court held that *Davis* was not satisfied, *id.* at 243. Focusing on Baker's second statement ("I think I'm going to need one"), the court characterized the request for counsel as "prospective, indicating Baker thought he might need an attorney at some time in the foreseeable future." *Id.* This was sufficient for the court to conclude that "law enforcement officers did not violate Baker's right to counsel by continuing to question him." *Id.*

Finally, in *State* v. *Warledo*, 190 P.3d 937 (Kan. 2008), the Kansas Supreme Court announced that to satisfy *Davis*, a suspect not only "must 'articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney,'" *id.* at 947 (quoting *Davis*, 512 U.S. at 459), but also must make a request that is "for assistance with the custodial interrogation, not for subsequent hearings," *id.* (citing *McNeil* v. *Wisconsin*, 501 U.S. 171, 178 (1991)).

In short, the Maryland Court of Special Appeals' decision here perpetuates an established conflict among state and federal appellate courts around the country about the scope of the federal right to counsel.

C. The Question Presented Is Recurring And Important, And This Case Is A Good Vehicle To Address It

The foregoing conflict warrants resolution by this Court. To begin with, the conflict concerns a crucial

constitutional protection. As this Court has explained, "*Miranda* safeguards 'a fundamental trial right,'" the privilege against self-incrimination. *Withrow* v. *Williams*, 507 U.S. 680, 691 (1993) (emphasis omitted) (quoting *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990)). And "[t]he privilege," in turn, "reflects many of our fundamental values," including "our fear that self-incriminating statements will be elicited by inhumane treatment and abuses" and "our realization that the privilege … is often a protection to the innocent." *Id.* at 691-692 (paragraph break and internal quotation marks omitted); *accord*, *e.g.*, *United States* v. *Mandujano*, 425 U.S. 564, 588 (1976) ("The Fifth Amendment privilege, the essential mainstay of our adversary system, registers an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized." (citation and internal quotation marks omitted)). Indeed, in *Davis* itself the Court noted that the "right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations … that it requires the special protection of the knowing and intelligent waiver standard." 512 U.S. at 458 (brackets and internal quotation marks omitted).[3]

More specifically, the issue here is important to law-enforcement officials because they need to know in advance what *Davis* requires, so that they can effectively gather evidence and solve cases without risking a later suppression ruling. And the issue is important to

[3] The correctness of this Court's recognition that the self-incrimination privilege is a key protection against wrongful convictions has been confirmed in recent years by a number of cases in which wrongful convictions involved interrogation-induced false confessions. *See, e.g.*, Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 88-91 (2008).

criminal defendants because the answer frequently determines whether the trial judge will grant a motion to suppress statements made after the right to counsel is invoked. Moreover, in cases (like this one) in which the prosecution's case is weak, that ruling will often mean the difference between conviction and acquittal.[4]

Finally, the question is a recurring one. According to LEXIS, *Davis* has been cited in over 2,500 cases. While many of those do not raise the precise issue here, many other cases undoubtedly do raise the issue but are never addressed by an appellate court, whether because the suspect is ultimately not charged, or is acquitted, or for other reasons. A mature nationwide conflict among appellate courts concerning the protection of a fundamental constitutional right invoked regularly throughout the nation's criminal-justice systems surely warrants resolution by this Court.

This case is a good vehicle for the Court to provide that resolution. The Maryland Court of Special Appeals explicitly affirmed Bennett's convictions on the ground (also adopted by the trial judge in denying suppression) that Bennett failed to satisfy *Davis* because he did not specifically tie his request for counsel to the ongoing interrogation. App. 14a. And given the prosecution's thin evidence at trial, and the extent to which prosecutors consequently had to rely on statements

[4] Of course, where the prosecution's case is very strong (or where improperly obtained statements are cumulative of evidence properly gathered), the harmless-error doctrine ensures that the conviction stands and thus that society's legitimate interest in punishing the guilty is served. *See, e.g.*, *Commonwealth* v. *Contos*, 754 N.E.2d 647, 658 (Mass. 2001) (affirming after holding an *Edwards* violation harmless beyond a reasonable doubt). The state has never argued here, however, that if a constitutional violation occurred, the error in admitting Bennett's statements was harmless.

Bennett made during the interrogation but after seeking to invoke his right to counsel, the issue may very well be outcome-determinative here.

II. THE DECISION BELOW IS WRONG

A. A Suspect Who Requests Counsel During A Custodial Interrogation Is Not Required, In Order To Satisfy *Davis*, To Specify That The Request Pertains To That Interrogation

As a matter of both this Court's precedent and first principles, the Maryland Court of Special Appeals erred in holding that a suspect who asks for counsel while in custody and already in the middle of a police interrogation must, in order to satisfy *Davis*'s clear-invocation standard, specify that his mid-interrogation request is for counsel during the present interrogation rather than for some unspecified future proceeding or other purpose.

1. As discussed, this Court held in *Davis* that to invoke the rule of *Edwards*—that police must stop an interrogation when counsel is requested—a suspect undergoing a custodial interrogation "must unambiguously request counsel." 512 U.S. at 459. The Court did not say, however, that the suspect must "unambiguously request counsel *for the interrogation*," or anything similar. Nor was such an additional specificity requirement included in *Davis*'s later elaboration of its clear-statement rule. The Court explained, for example, that a suspect's request must be "sufficiently clear[] that a reasonable police offer in the circumstances would understand the statement to be a request for an attorney," *id.*—*not* "for an attorney during that interrogation." Indeed, although the Court referred a number of times (and with varying phrasing) to a suspect's "request for an attorney" or "request for

counsel," it never once qualified that such a "request" must be for counsel during the interrogation. *See, e.g.*, *id.* at 458 ("[I]f a suspect requests counsel at any time during the interview, he is not subject to further questioning."); *id.* at 459 ("[T]he suspect must unambiguously request counsel."); *id.* ("'[T]he interrogation must cease … *only* [i]f the individual states that he wants an attorney[.]'" (first two alterations in original) (quoting *Moran* v. *Burbine*, 475 U.S. 412, 433 n.4 (1986))).

Similarly, in explaining what is insufficient to invoke the rule of *Edwards*, *Davis* focused not on requests that are unclear about whether the suspect wants an attorney for the interrogation (as opposed to for some other reason), but rather on requests that are unclear regarding whether the suspect wants an attorney at all. Hence the Court explained that its clear-invocation standard would not be met by "a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," 512 U.S. at 459 (emphasis omitted)—not, "might be invoking the right to counsel or *is* invoking it but only for some other proceeding." The Court also stated that it was unwilling to "prevent police questioning when the suspect might want a lawyer," *id.* at 462 (emphasis omitted), i.e., "when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer" for any purpose, *id.* at 460; *accord id.* at 461 (declining "to require questioning to cease if a suspect makes a statement that might be a request for an attorney" (emphasis omitted)). In none of these references did the Court mention a request for an attorney for any specific purpose. That requirement, in short, simply does not appear in *Davis*.

2. The state noted in its brief in the lower courts that in *McNeil* v. *Wisconsin*, this Court stated that invocation of the *Miranda* right to counsel requires a suspect to clarify that his request is "for the assistance of an attorney *in dealing with custodial interrogation by the police*." 501 U.S. at 178. That dicta does not support the Maryland court's ruling here, for two reasons.

First, although *Davis* twice cited *McNeil*, it notably did not adopt that dicta in announcing the clear-statement rule. Indeed, the Court appeared to make a conscious effort not to do so, ending a quotation from *McNeil* right at the point where the relevant language begins. *Compare McNeil*, 501 U.S. at 178 (invoking *Miranda* and *Edwards* "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*"), *with Davis*, 512 U.S. at 459 (stopping immediately before the italicized phrase when quoting this language). If anything, then, *Davis* undercuts the suggestion that the *McNeil* dicta is law.

More fundamentally, even assuming that the language just quoted from *McNeil* accurately states the law, that language does not answer the question here. The question is whether an unadorned request for counsel—made to police in the middle of a custodial interrogation—can reasonably be construed as a request for counsel in connection with something other than the present interrogation. Or, to put it in *McNeil*'s terms, the issue is whether a mid-interrogation request for counsel, absent additional specificity, *is* a "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." 501 U.S. at 178 (emphasis omitted).

The answer to that question is yes—as *McNeil* itself makes clear in the very paragraph the state relied on here. *McNeil* held that "[r]equesting the assistance of an attorney at a bail hearing" *cannot* "reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." 501 U.S. at 178 (emphasis omitted). It held, in other words, that requesting counsel in the middle of one proceeding is not "reasonably … construed" as a request that pertains to something else. *Id.* That holding applies equally in the converse situation presented here: Requesting counsel during a custodial interrogation cannot reasonably be construed as a request that concerns a bail hearing, or any other separate proceeding.

To be sure, if a suspect affirmatively indicates during a custodial interrogation that he does *not* want counsel then and there, but rather wants counsel "sometime" or in the "future" or only "for trial," then *Edwards*'s prophylactic protections do not apply. That is because, as courts have held, a reasonable officer would not interpret an express request for counsel at another time or for another purpose as a request for counsel then and there. *See Dubose* v. *State*, 755 S.E.2d 174, 179-180 (Ga. 2014) (suspect's statement that he was "gonna need [a lawyer] eventually" held insufficient to satisfy *Davis*); *Commonwealth* v. *Jones*, 786 N.E.2d 1197, 1204, 1206 (Mass. 2003) (same for suspect's statement that "I'm going to need a lawyer sometime"); *State* v. *McCray*, 506 S.E.2d 301, 306 (S.C. 1998) (same for statement that suspect would "retain a lawyer at some future date"); *United States* v. *Schroeder*, 39 M.J. 471, 475 (C.M.A. 1994) (same where suspect said, "I will

eventually get a lawyer"). But again, the issue here is whether a request for counsel that is not specific either way, i.e., does not expressly refer either to counsel during the interrogation or to counsel for some other purpose, is reasonably construed—notwithstanding that the request is made in the middle of a custodial interrogation—as pertaining to some other proceeding. As explained, *McNeil* makes clear that the answer is no.

Other precedent of this Court does so as well. In *Montejo* v. *Louisiana*, 556 U.S. 778, 797 (2009), this Court overruled its holding in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), under which law-enforcement officials had to presume that a request for counsel at arraignment encompassed an invocation of the Sixth Amendment right to counsel "at every critical stage of the prosecution," *id.* at 633, including future attempts by police to question the accused. Expressing "doubt that defendants 'actually inten[d] their request for counsel to encompass representation during any further questioning,'" *Montejo*, 556 U.S. at 787, this Court rejected *Jackson*'s presumption and embraced the pre-*Jackson*, common-sense notion that a request for counsel made during an arraignment is for counsel at that arraignment, i.e., is a request for counsel at that time and in connection with the event during which the request is made, *see id.* at 789. The same logic applies to requests for counsel made in the middle of custodial interrogations.

Montejo's overruling of *Jackson*, moreover, rested to a considerable degree on the Court's view that *Miranda* and *Edwards* provide sufficient protection for suspects during custodial interrogations. *See Montejo*, 556 U.S. at 795-796 ("*Jackson* was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule. *Miranda*

and the cases that elaborate upon it already guarantee … noncoercion[.]"). Having reached that conclusion, the Court should not then permit lower courts to substantially weaken the protection that *Miranda* and *Edwards* provide—as a rule requiring a specific reference to counsel for an ongoing interrogation does.

3. The Court in *Davis* "recognize[d] that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present." 512 U.S. at 460; *accord id.* at 469-470 (Souter, J., concurring in the judgment). But, the Court reasoned, "the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. '[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'" *Id.* at 460 (maj. op.) (alterations in original) (quoting *Moran*, 475 U.S. at 427).

A requirement that suspects specify that their mid-interrogation requests for counsel pertain to the immediate interrogations is inconsistent with that reasoning. Under *Miranda*, what suspects must be told regarding counsel—and what Bennett was told here, *see* Interrogation Tr. 3—is that they have the right "to have counsel present during questioning." *Davis*, 512 U.S. at 457; *see also Miranda*, 384 U.S. at 471 ("an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation"). Hence, a suspect with "[f]ull comprehension" of the *Miranda* rights understands only that he has a right to counsel in connection with the interrogation—nowhere else. Given that,

to hold that an unelaborated mid-interrogation request for counsel could reasonably refer to something *other* than counsel during the interrogation severely distorts *Davis*'s "[f]ull comprehension" reasoning. Indeed, such a holding would set an improper trap for the unwary, who would have no reason to know, despite fully comprehending the *Miranda* rights, about a highly counterintuitive rule that simply asking for counsel during an interrogation is insufficient to invoke those rights.[5]

Put simply, where, as here, an accused in custodial interrogation—who has recently been advised of a right to have counsel *only* at the interrogation—states an unequivocal desire to "have" or "see" or "call" an attorney, that statement satisfies *Davis* because it can reasonably be interpreted only as a request for counsel during the interrogation, and not for some other purpose.[6]

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[5] As noted, *Davis* explained that clearly invoking the right to counsel does not require a suspect to "speak with the discrimination of an Oxford don." 512 U.S. at 459. The specificity requirement discussed herein is inconsistent with that guidance.

[6] The Maryland Court of Special Appeals' holding was particularly indefensible because the "other purpose" for which the court concluded Bennett was requesting counsel was "to help him get out of being charged." App. 14a. That conclusion makes no sense because it was too late for that: The detectives told Bennett immediately before his "I need to call an attorney" statement that he had already been charged. *See* App. 11a ("You are being charged with an armed robbery. You were arrested on a warrant today yes."). An objectively reasonable police officer who has just told a suspect that the suspect has been charged with a crime does not interpret an immediate response from the suspect about needing to call a lawyer as a request for counsel "to help him get out of being charged." App. 14a.

B. The State Court's Fifth Amendment Analysis Also Conflicts With This Court's Precedent

In addition to improperly imposing the specificity requirement discussed above, the Maryland Court of Special Appeals, in rejecting Bennett's Fifth Amendment challenge, departed from this Court's precedent in two ways.

First, the court disregarded *Davis*'s instruction that whether a suspect's statement clearly invoked the right to counsel "is an objective inquiry," 512 U.S. at 459, turning on whether the statement is "sufficiently clear[] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney," *id.* In other words, the views of the actual officer or officers involved are irrelevant. The court ignored this instruction by concluding that Bennett's statement "could be … a question" (and thus was ambiguous) based solely on the fact that "Detective Ehart interpreted the statement as a question." App. 14a. Making matters worse, the court attempted to elide this error by simply labeling Detective Ehart "a reasonable police officer." That is manifestly improper. *Davis* requires a court in this situation to actually *analyze* whether it would have been reasonable under the circumstances for an officer to regard the suspect's statement as something other than a request for an attorney during the interrogation. They cannot take a shortcut of declaring the actual officer "reasonable" and then say it necessarily follows that what the officer did was also reasonable. The question is not whether the actual officer was reasonable, but whether

it was (objectively) reasonable to do what the officer did.[7]

Second, the Court of Special Appeals improperly deemed Bennett's "I need to call an attorney" statement ambiguous based in part on what he said *after* that statement. Specifically, the court noted that after Detective Ehart responded to that statement (by advising Bennett of his options), Bennett "replied by referring back to the charges and asked, in essence, whether there was any way that he could talk his way out of 'being charged.'" App. 14a. And, the court continued, when Detective Ehart then "answered that charges had already been filed against him, [Bennett] stated that he needed to talk to his wife, not an attorney." *Id.* "Thus," the court concluded, petitioner's "reference to the 'need to call an attorney' was ambiguous." *Id.*

"[T]his line of analysis is … untenable." *Smith* v. *Illinois*, 469 U.S. 91, 97 (1984) (per curiam). Under *Miranda* and *Edwards*, "an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial re-

[7] The court may have used this shortcut because a proper analysis shows that it would have been unreasonable, objectively speaking, to regard Bennett's statement as a question. Put simply, the statement is not phrased as a question, unlike in the two cases the Court of Special Appeals relied on, *see Matthews* v. *State*, 666 A.2d 912, 917 (Md. Ct. Spec. App. 1995) ("Where's my lawyer?"); *Minehan* v. *State*, 809 A.2d 66, 72 (Md. Ct. Spec. App. 2002) ("Should I get a lawyer?"), *cited in* App. 8a. Indeed, even the trial judge here never suggested that Bennett's statement could be regarded as a question. *See* App. 37a-42a. In any event, as other appellate courts have recognized, the fact that a request for counsel is phrased as a question does not preclude it from satisfying *Davis*. *See, e.g.*, *United States* v. *Lee*, 413 F.3d 622, 626 (7th Cir. 2005) ("Can I call my lawyer?" held to be an unambiguous request for counsel).

quest itself." *Id.* at 100. That rule ensures that "if the initial request for counsel is clear …, the police may not create ambiguity in a defendant's desire [for counsel] by continuing to question him or her about it." *Connecticut* v. *Barrett*, 479 U.S. 523, 535 n.5 (1987) (Brennan, J., concurring in the judgment). The Court of Special Appeals' stark departure from *Smith*'s clear holding further amplifies the need for this Court's review.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

[8] In its answer to Bennett's request for review by the Maryland Court of Appeals, the State asserted (at 6) that Bennett waived this argument by failing to raise it in the Maryland Court of Special Appeals. "In fact," the State insisted," Bennett "argued the exact opposite." *Id.* The State misread Bennett's opening brief. In that brief, Bennett expressly argued (at 11) that pursuant to *Smith*, "a defendant's subsequent responses to questions cannot be used to create ambiguity in reference to an invocation." Bennett then argued *in the alternative* that "even if a reasonable officer would not have understood Mr. Bennett's initial invocation to be unequivocal, Mr. Bennett removed any ambiguity through subsequent statements." *Id.* at 12 (capitalization altered).

Respectfully submitted.

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