No. 15-374

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS - PETITIONER

VS.

LUIS A. AGUIRRE - RESPONDENT

On Petition for Writ of Certiorari to the Supreme Court of Kansas

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Does an expression of willingness to resume questioning at a later time automatically always negate a suspect's invocation of the Fifth Amendment right to remain silent?

II. Does the phrase "I guess" used in a suspect's invocation of the Fifth Amendment right to remain silent automatically always negate that invocation?

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BRIEF IN OPPOSITION

Respondent, Luis A. Aguirre, respectfully requests that this Court deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Luis Aguirre, a suspect in the death of Tanya Maldonado and their son Juan, was questioned by police detectives from Kansas at a police station in Austin, Texas. App. 6. He was told that he was not under arrest, and he was advised, per an "Advice of Rights" form, "If you decide to answer questions now without a lawyer present you will have the right to stop answering at any time." App. 9, 14. When the questioning became confrontational, Luis, unaware that his interrogators had decided to arrest him, told them that he wanted to leave: "I'm in a proposition right now though. I want to go and turn in David to his family and then I will be here as long as you want me to afterwards." App. 9. One of the detectives replied that they could help him get David (his fiancée's child) to his family and the other detective continued with the questioning, suggesting that he may have killed Tanya and Juan accidentally. App. 9-10. Luis then replied that he was taking his rights, and that he would come back later: "This is – I guess where I, I'm going to take my rights and I want to turn in David to his family and I'll be back here. I mean, I would like to keep helping you guys I just want to …" App. 10. One of the detectives cut him off before he could finish, told him that he could not go home and began telling him about the search warrants that they had obtained. The other detective again suggested that the deaths of Tanya and Juan were accidental. Under continued questioning, Luis soon stated that their deaths were not intentional, and then made a series of statements about those deaths. App.10-11, 39-65.

Luis' statements were the only direct evidence that Tanya and Juan were with him when they died. There was no forensic, eyewitness or circumstantial evidence establishing that Tanya and Juan were ever inside Luis' apartment. App. 21. The State presented evidence of a financial motive for their deaths, evidence that Luis was in Chicago the same weekend that Tanya told a witness she was leaving Chicago with the father of her child, and evidence that Tanya and Juan were buried in the country, near the Kansas town where Luis lived at the time Tanya and Juan left Chicago. App. 20.

On appeal, the primary issue before the Kansas Supreme Court was whether Luis' statements, made after he asserted that he was taking his rights and wanted to leave, should have been admitted into evidence against him. This issue turned on whether Luis unequivocally invoked his right to remain silent. App. 8.

To make this determination, the Kansas Supreme Court, examined "what [Luis] said and the context in which he said it." App. 8. After examining all the circumstances of this case, the court found that he had unequivocally invoked his right to stop answering questions, as he had been advised that he could. App.14-15. The totality of the circumstances considered by the court included the language of the advice of rights form and waiver. That form referred to "my rights," informed him that he had the right to stop answering questions at any time without stating any reason, and informed him that he could stop answering questions temporarily ("until you talk to a lawyer'). App. 14-16. The circumstances of the invocation also included Luis' expressed desire to resume the interview at a later time, after being allowed to leave. App. 16-17. The court found that the words, "I guess" did not render his invocation equivocal because the detectives had already brushed aside his first request that he be allowed to leave and continued questioning him. At best, the court found, it showed uncertainty as to how to invoke his rights, as his first attempt

had been ignored. App. 16. The court ordered his post-invocation statements from this interview suppressed, as well as those from a later, second interview, because his right to cut off questioning had not been scrupulously honored when it was asserted. App. 19.

The dissent found that the detectives acting properly in asking follow up questions to clarify what Luis meant. App. 22-23. However, the transcript of the interrogation reveals no clarifying questions, just suggestions that the deaths were accidental, after he stated that he wanted to leave, followed by statements regarding search warrants, the news that he would not be allowed to leave, and further questioning. App. 9-10.

REASONS FOR DENYING THE WRIT

The Petitioner seeks to convince this Court that the Kansas Supreme Court has rendered a decision which makes "any request for a *temporary* cessation in questioning…even when that request is prefaced by "I guess"…a clear and unequivocal assertion of the right to remain silent." Pet. 11. But the court made no such holding. This decision extends no further than its particular facts.

The Petitioner invites this Court to hold that an expression of willingness to resume questioning at a later time automatically always negates a suspect's invocation of the Fifth Amendment right to remain silent, as does the use of the phrase "I guess." But the question of whether certain words and/or phrases have automatic and universal effect was not reached by the Kansas Supreme Court. And this Court should not embark upon the task of comprising a list of words or phrases that automatically always negate any attempted invocation of the Fifth Amendment right against self-incrimination.

If this Court does not wish to begin a list of forbidden words and phrases with universal and automatic application, the only purpose for the exercise of this Court's discretionary

jurisdiction would be to review the facts of this case, then agree or disagree with the Kansas Supreme Court's view of those facts. The judgment of this Court, in that event, will apply to this case and only this case, as every case that follows will be factually distinguishable. This case does not merit the exercise of this Court's discretionary review.

Question I

Does an expression of willingness to resume questioning at a later time automatically always negate a suspect's invocation of the Fifth Amendment right to remain silent?

To convince this Court to exercise jurisdiction, the Petitioner first contends that "The court's opinion effectively adopted a *per se* rule that *any* request for *any* break in questioning for *any* amount of time and for *any* reason invokes the constitutional right to stop questioning." Pet. 12. There is simply no support in the record for this contention. Neither is there support for Petitioner's contention that this case presents the question of whether a request to temporarily cease questioning is "automatically an unequivocal assertion of the right to remain silent." Pet. 13. As noted in the statement of the case, the decision of the Kansas Supreme Court turned on the unique facts and entire context of Luis' interactions with his interrogators, including, but not limited to, the wording of the advice of rights form that he read, his attempt to leave followed by his straightforward reference to "my rights," the same language used on the form, his second attempt to leave and his statement that he would come back later. The court's ruling, by focusing on the particular facts of this case, leaves room for future courts to take into consideration the full context of a suspect's statements, in determining whether there had been an unequivocal invocation. It allows for different results under different circumstances.

The Petitioner's assertions stretch the court's holding far beyond any language in the opinion. Indeed, it is necessary to distort the court's ruling to argue that it conflicts with any of the equally fact-driven authorities that the Petitioner has offered for this Court's consideration.

The Petitioner cites People v. Rundle, 180 P.3d 224 (2008), *as modified* (May 14, 2008) *disapproved of on other grounds by* People v. Doolin, 198 P.3d 11 (2009) in which the court found that "defendant's request to return to jail cell due to a headache, coupled with expression of desire to resume interview when headache went away, did not constitute invocation of Fifth Amendment right to remain silent." 180 P.3d 263-264. Factually, Rundle has little in common with this case. In Rundle, the police officers actually *stopped* questioning the defendant when he asked to end the interview. In Luis' case, they never stopped questioning him, and even cut him off when he tried to elaborate on his desire to end the interview. In Rundle, the only further question was whether they could question him later, and he agreed. Unlike Luis, the defendant in Rundle made no reference to his rights. The court determined it was not required to suppress the statements the defendant made when, consistent with their agreement, questioning resumed later. 180 P.3d 263. Had Luis been allowed to leave, or had the police stopped questioning him when he asserted his rights, as occurred in Rundle, the Kansas Supreme Court may have found any subsequent statements admissible. There is no conflict here.

As in Rundle, in Com. v. Pennellatore, 467 N.E.2d 820, 822 (1984), when the defendant became emotional during the questioning, he asked that the interrogation stop, and it did. The officers took a break, they got the defendant a can of soda and then continued with the questioning. The court examined the entire context of his request to stop the questioning and found that there was no indication that it "was meant to be an assertion of his right to remain silent or to stop the questioning permanently." 467 N.E.2d 823-24. As with the instant case, there

is no holding in Pennellatore beyond the facts presented, and in contrast to our case, the defendant did not make specific reference to his rights, nor did he try to leave.

In State v. Holcomb, 159 P.3d 1271, 1279 (2007) the defendant said that he was going to do the right thing and that he didn't want to make a statement "right now." The court found that this statement was equivocal, and thus officers were allowed to ask clarifying questions. When they did, instead of answering, the defendant reinitiated the questioning. Despite the contention of the dissent in this case, Luis' interrogators asked no clarifying questions. Instead, they brushed aside Luis' statement that he wanted to leave. Then, when he stated he was taking his rights, and repeated that he wanted to leave, they cut off his request with further interrogation, rendering his case dramatically different from Holcomb. In Holcomb, the court stated, "To determine whether defendant unequivocally or equivocally invoked his right against compelled self-incrimination, we analyze the request in light of the totality of the circumstances at the time it was made. 159 P.3d 1278. Likewise, the Kansas Supreme Court analyzed Luis' request in the totality of the circumstances and is not in conflict with Holcomb court.

In United States v. McCluskey, 893 F. Supp. 2d 1117, 1130 (D.N.M. 2012), the court stated, "In order to determine if a suspect's invocation of his *Miranda* rights is clear and unambiguous, the Court must examine the entire context of the relevant statement." The defendant was in the hospital awaiting surgery, and on pain medications. He had indicated a willingness to be interviewed. The court determined his statements were not invocations, merely an expression of his preference to conduct the interview at a more convenient time. 893 F. Supp. 2d 1130. Unlike Luis, he did not make reference to his rights. And like the Kansas Supreme Court, the McCluskey court analyzed the statement in its entire context.

Petitioner cites three cases for the proposition that ambiguous requests can be rendered unequivocal due to uncooperative behavior from the suspect. (Presumably in order to argue that Luis should have been rude or aggressive to invoke his rights). In State v. Johnson, 576 A.2d 834, 839 (1990) the court found, that the defendant repeatedly responded to questions with prolonged silences and by saying he could not talk about the murders or did not want to talk about them. The court stated, "Defendant's reluctance to answer questions was not confined to an isolated, ambiguous remark. He persisted, for well over an hour, in a pattern of prolonged silences and unresponsiveness, refusing to answer any and all questions about the Sharps' murders. **Under those circumstances**, it was not defendant's obligation to state his position more clearly; the police officers had the duty to determine specifically whether defendant's uncooperative responses constituted an assertion of the right to cut off questioning." 576 A.2d 845-46 (emphasis added). This decision is based on all the facts of that particular case, and does not hold that a suspect must indicate he or she wants to permanently end questioning and does not require that a suspect be uncooperative or unresponsive to render an invocation unequivocal.

Nor does the decision in State v. Harvey, 581 A.2d 483, 488-90 (1990) conflict with the decision in this case. Under questioning, the defendant asked to speak with his father and indicated he would talk about the crime in question after he spoke with his father. He had been in custody for three days, refusing to answer questions. 581 A.2d 488. The court considered that he had made it clear that he would talk to officers only after he spoke with his father. The court found that under those conditions, "The implied intent to talk later does not change the fact …that defendant sought to terminate the interrogation." 581 A.2d 489. But the court did not find that an invocation must be accompanied by three days of refusal to answer questions or any level of resistance.

The Petitioner's authority, People v. Dreas, 200 Cal. Rptr. 586, 591 (Ct. App. 1984) states Luis' position eloquently:

> In addressing the principal issue of whether appellant here has invoked his Fifth Amendment privilege by intending to talk to some of his friends during the police interrogation, we initially note that no particular form of words or conduct is necessary to assertion of the privilege and that **the invocation of privilege or its waiver constitutes a question of fact which cannot be resolved by a per se rule, but only on an ad hoc basis taking into account the special circumstances of each case.**

(emphasis added).

Finally the Petitioner, in an attempt to demonstrate a conflict among cases, cites State v. DuPont, 659 So. 2d 405, 407 (Fla. Dist. Ct. App. 1995) as a case that establishes a bright line rule that *any* request to leave is an unequivocal invocation of the right to remain silent. The defendant told a detective that he wanted to leave, and the detective told him he could. However, the defendant stayed, remaining silent for some time. Then the interrogation resumed. The Florida court actually found that the defendant's statements and actions were *equivocal,* but further held that the detective should have clarified before resuming questioning.

Because all the decisions cited by the Petitioner, as well as the decision in this case, are limited to their facts, there is no conflict among authorities that calls for this Court's resolution.

Under this Court's precedent, the invocation of the right to remain silent is only a temporary bar to questioning. Thus, a suspect's request to stop questioning, coupled with an expression of willingness to resume questioning later, can be, depending on the entire context of the request, a valid invocation of the right to remain silent. In Michigan v. Mosley, 423 U.S. 96 (1975) this Court held that after a suspect has invoked the right to remain silent, law enforcement officers may resume questioning later, under certain circumstances, the primary one being whether or not the suspect's right to cut off questioning was scrupulously honored at the time it was made. 423 U.S. 101-102, 104. This Court stated: "Through the exercise of his option to

terminate questioning [the defendant] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." 423 U.S. 103-104.

A suspect's stated willingness to resume questioning later is consistent with his or her right to control the timing and duration of the interrogation, as well as his interrogators' right to resume questioning later, as described in Mosley. Therefore, an expression of willingness to resume questioning later cannot automatically always negate the suspect's invocation of his right to terminate questioning. Put another way, a suspect's request to temporarily cease questioning can be, depending on the entire context of the request, a valid invocation of the right to remain silent, as it is in harmony with this Court's precedent.

The Petition should be denied.

Question 2

Does the phrase "I guess" used in a suspect's invocation of the Fifth Amendment right to remain silent automatically always negate that invocation?

In Davis v. United States, 512 U.S. 452, 459 (1994). this Court stated that when invoking the right to counsel, a suspect "need not speak with the discrimination of an Oxford don." (internal quotation marks and citation omitted). The Petitioner, however, urges this Court to make just such a requirement by arguing that "the two word 'I guess' are *necessarily* and *inevitably* equivocal." Pet.18 (emphasis in original). The Petitioner would have this Court find that a suspect who includes the words "I guess" in his or her invocation of the right to remain silent, no matter what other words are spoken, no matter what the entire context of the exchange, negates his invocation. The suspect's words are an important factor in determining whether he or she has invoked his right to remain silent, as well as his or her actions, the words and actions of his or her interrogators and the context of the interrogation. But the words "I guess" have no

magical meaning that renders them more important than the rest of the words, actions and context of the questioning. This phrase may or may not render a suspect's reference to taking his or her rights ambiguous, depending on the entire context of the interaction between the suspect and law enforcement. Each case must be judged on its unique facts.

The Petitioner has relied on several authorities to support its contention that the phrase "I guess" is inevitably equivocal. In United States v. Havlik, 710 F.3d 818, 820 (8th Cir. 2013), the court found equivocal the phrase, "I guess you better get me a lawyer then." However, this does not mean that a slightly different phrase, including the words "I guess" would not have produced a different result. For example, had the defendant said, "I guess you better get me a lawyer then, if you want me to answer any more questions." or "I guess you better get me a lawyer then, or I'm not talking." it is unlikely that the Havlik court would rely on two words to negate the suspect's clear intention to consult with a lawyer before proceeding.

The authorities cited in Havlik do not address the question of whether the phrase "I guess" renders equivocal the invocation of the right to remain silent during a custodial interrogation, under any and all circumstances. Culkin v. Purkett, 45 F.3d 1229, 1233 (8th Cir. 1995) concerns a court's decision to appoint counsel for a witness who said "I guess" when asked if she wanted to testify without counsel. In United States v. Nelson, 450 F.3d 1201, 1212 (10th Cir. 2006) the defendant stated, "I guess I'm ready to go to jail then" after asking what evidence had been found in his home. The police detective had just finished reading the Miranda warnings, and was not questioning him, and merely answered his question. Additionally, upon hearing "I guess I'm ready to go to jail then." the detective stopped the interview and transported him to the jail. Under those circumstances, the defendant's statement was clearly a comment regarding the quality of the evidence against him, rather than an invocation of the right to remain

silent (although the detective treated it as one). The court's decision did not turn on the words, "I guess," and the court would have reached the same conclusion if the defendant had merely said, "I'm ready to go to jail then." In United States v. Wiggins, 131 F.3d 1440, 1442 (11th Cir. 1997) the court described the defendant in United States v. Quinones, 97 F.3d 473, 475 (11th Cir. 1996) as pleading guilty in an equivocal manner when he said, "I plead guilty, I guess." But the court in Quinones was not asked to determine whether or not the guilty plea was equivocal, the issue before the court was whether or not the district court had made certain that the defendant understood the charges against him.

In Burket v. Angelone, 208 F.3d 172, 197-98 (4th Cir. 2000) the defendant's statement, "I think I need a lawyer," was found to be equivocal. However, even without the words, "I think" the resulting phrase "I need a lawyer." can be as equivocal, as it is not a statement that the suspect actually wants a lawyer. In contrast, the phrase "I want a lawyer right now" is not any more unequivocal than "I think I want a lawyer right now."

In Taylor v. State, 689 N.E.2d 699, 703 (Ind. 1997), the defendant said "I guess I really want a lawyer, but, I mean, I've never done this before so I don't know." The court found that this statement was an expression of doubt, not an invocation. In contrast, Luis did not say, "I guess I really want to take my rights, but I don't know." He said he was wanted to leave, then said he taking his rights, repeated that he wanted to leave and tried to explain further when he was cut off by more questions.

In United States v. Clark, 746 F. Supp. 2d 176, 179 (D. Me. 2010) the defendant said "I guess this is where I have to stop and ask for a lawyer, I guess." But his interrogator did not hear him say, "and ask for a lawyer I guess." The Court did find that the phrase "I guess" was one factor rendering this attempted invocation equivocal, but also found that it should have been

clear to the defendant that the detective had not heard him ask for a lawyer. 746 F.Supp. 186. In this case, Luis' interrogators heard him say he wanted to leave, heard him say he was taking his rights, heard him say he wanted to leave a second time, and cut him off before he could invoke his rights again.

Petitioner concludes with a warning, that, without this Court's intervention, "in Kansas, but probably nowhere else, law enforcement officer will be unable to ask clarifying questions when a suspect states 'I guess' I will assert 'my rights' or any words to that effect." Pet. 19. That is unlikely, given that this Court has approved the use of clarifying questions:

> Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. … Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.
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> …
>
> The courts below found that petitioner's remark to the NIS agents—"Maybe I should talk to a lawyer"—was not a request for counsel, and we see no reason to disturb that conclusion. The NIS agents therefore were not required to stop questioning petitioner, though it was entirely proper for them to clarify whether petitioner in fact wanted a lawyer.

Davis, 512 U.S. 461-62.

This Court should not accept the Petitioner's invitation to find that a word or phrase, whenever used in connection with an invocation of the right to remain silent, automatically negates that invocation, no matter the context, or the rest of the wording of the invocation. The Petition should be denied.

CONCLUSION

For all these reasons, the Respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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