No. 08-1470

In the Supreme Court of the United States

MARY BERGHUIS, WARDEN, PETITIONER

v.

VAN CHESTER THOMPKINS

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether respondent's voluntary statements—obtained in response to questioning after a police officer informed respondent of his *Miranda* rights, respondent stated that he understood those rights, and respondent neither expressly invoked nor expressly waived his rights—may be admitted against him consistent with his Fifth Amendment privilege against compelled self-incrimination.

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INTEREST OF THE UNITED STATES

This case presents issues concerning the application of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), including whether a suspect must unambiguously invoke the right to remain silent in order to preclude police questioning; whether the police may question a suspect who has been informed of his *Miranda* rights, has stated that he understood his rights, and has not invoked or waived those rights; and whether a suspect who is aware of his rights waives them when he knowingly, intelligently, and voluntarily responds to police questioning. Although the case arises on federal habeas review of a state conviction under 28 U.S.C. 2254, the Court's view of the underlying *Miranda* questions has substantial implications for federal criminal investigations and trials. Accordingly, the

United States has a significant federal interest in the case.

STATEMENT

1. On January 10, 2000, a shooting occurred outside a strip mall in Southfield, Michigan. Pet. App. 3a. The two victims, Frederick France and Samuel Morris, were driving around the mall when several men on foot, including respondent, stopped in front of their car and began staring them down. *Ibid.* France and Morris had words with respondent, then drove away. *Ibid.* A few minutes later, respondent and his crew pulled up in a van next to France and Morris, so that the passenger side of the van (where respondent sat) was aligned with the driver's side of the car (where Morris sat). *Ibid.* Respondent said to France and Morris, "What you say, Big Dog?," and then pulled out a gun and fired several shots at them. *Ibid.*; J.A. 72a-73a. Morris died from multiple gunshot wounds; France was injured but eventually recovered. Pet. App. 74a-75a.

Respondent fled and was apprehended about a year later in Ohio. Pet. App. 4a. Two Southfield police officers traveled to Ohio to interview respondent while he was being held pending extradition. *Id.* at 4a-5a; J.A. 7a-8a. The interview began at approximately 1:30 p.m. and lasted between two and one-half and three hours. J.A. 8a, 10a, 12a, 18a.[1] Respondent was not sick, injured, or intoxicated during the interview, J.A. 23a, and the police never threatened him, J.A. 158a.

Detective Christopher Helgert began the interview by presenting respondent with an advice of rights form. Pet. App. 5a; J.A. 8a-9a, 12a. The form stated the *Miranda* warnings, followed by the question, "Do you

[1] The interview was not recorded. J.A. 160a.

understand each of these rights that I have explained to you?" Pet. Br. 60 (attachment); see J.A. 146a-147a. Detective Helgert asked respondent to read one of the warnings out loud in order to ensure that respondent understood English; respondent did. J.A. 8a-9a, 12a, 147a-148a. Detective Helgert then read all of the warnings to respondent and asked him to sign the form to evidence his understanding of his rights; respondent declined to do so. J.A. 9a, 12a-14a. Detective Helgert "asked [respondent] if he understood the Rights," and respondent answered "Yes." J.A. 9a.[2]

During the interview, respondent never said that he did not want to talk with the police or that he wanted an attorney. J.A. 10a, 19a, 21a-22a, 148a-149a. He mostly listened as the two officers talked to him. J.A. 10a. Although Detective Helgert described the interview as "very, very one-sided," *ibid.*, he stated that respondent occasionally shared "limited verbal responses" with the officers—such as "Yes," "No," or "I don't know"—and communicated nonverbally by making eye contact and nodding his head, J.A. 9a-10a, 21a, 23a-24a.

The officers told respondent that they had information about the murder and that they wanted to hear his side of the story, because there are two sides to every story. J.A. 10a, 13a-14a, 16a. Detective Helgert also suggested that respondent provide information to help

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[2] Detective Helgert's statements to that effect came at the suppression hearing. J.A. 9a. At trial, Detective Helgert could not recall specifically asking respondent whether he understood his rights. J.A. 148a ("I don't know that I orally asked him that question."). The Michigan Court of Appeals, however, stated that respondent had "verbally acknowledged that he understood [his] rights," Pet App. 75a, the court of appeals accepted that finding, Pet. App. 5a, and respondent has not challenged it.

himself. J.A. 21a, 150a. Respondent listened but did not have "any significant response" to those suggestions. J.A. 150a.

Finally, Detective Helgert tried "a spiritual tac[k]." J.A. 11a-12a; see Pet. App. 6a. He asked respondent whether he believed in God. J.A. 11. Respondent made eye contact with Detective Helgert, said "Yes," and his eyes "well[ed] up with tears." *Ibid.* Detective Helgert asked respondent whether he prayed to God, and respondent said, "Yes." *Ibid.* Detective Helgert then asked respondent, "Do you pray to God to forgive you for shooting that boy down?" J.A. 153a; see J.A. 11a. Respondent answered "Yes" and looked down. J.A. 11a, 153a. Respondent declined to write anything down, and the interview ended shortly thereafter. J.A. 11a.

2. Respondent was charged with first-degree murder, assault with intent to commit murder, and several firearms-related offenses. Compl. 1-4. He moved to suppress his statements, arguing that he had implicitly invoked his right to silence and that his statements were involuntary. J.A. 26a-27a. The trial court denied the motion. J.A. 25a-28a. The court determined that respondent never invoked his *Miranda* rights, J.A. 26a, and that he knowingly, intelligently, and voluntarily waived those rights, J.A. 27a-28a. The court observed that respondent stated that he understood his rights, occasionally "participated in the interview," and then answered a series of questions regarding his belief in God. J.A. 28a. The court also observed that respondent "was not injured, intoxicated or ill," "subjected * * * to threatened or actual physical abuse," "deprived * * * of food or medical attention," or questioned for an impermissibly long time. J.A. 27a-28a.

The jury found respondent guilty on all counts, and the court sentenced him to imprisonment for life. Pet. App. 74a.

3. The Michigan Court of Appeals affirmed. Pet. App. 74a-82a. The court rejected respondent's arguments that he "'implicitly' invoked his right to remain silent by failing to answer the officers' questions" and that his statements were coerced. *Id.* at 75a. The court noted that respondent "never said he did not want to talk or that he was not going to say anything" and in fact "he continued to talk with the officer[s], albeit sporadically." *Ibid.* The court also observed that respondent "verbally acknowledged that he understood [the *Miranda*] rights" and "voluntarily waived his right to remain silent." *Ibid.*

The Michigan Supreme Court denied discretionary review. Pet. App. 73a.

4. Respondent filed a federal habeas petition, Pet. App. 83a-91a, which the district court denied, *id.* at 39a-72a. As relevant here, the court rejected respondent's arguments that he had invoked his right to remain silent and that his statements were the result of police coercion. *Id.* at 66a-69a. Citing *Davis* v. *United States*, 512 U.S. 452 (1994), the court determined that an invocation of the right to silence, like an invocation of the right to counsel, must be unequivocal. Pet. App. 67a. The court explained that there was no such invocation here, because respondent never told the officers that he wanted an attorney or that he did not want to talk with them, and because respondent occasionally participated in the interview. *Id.* at 67a-68a. The court also determined that neither the length of the interview nor Detective Helgert's appeal to respondent's religious beliefs rendered his statements involuntary. *Id.* at 68a-69a.

5. The court of appeals reversed. Pet. App. 1a-37a. The court considered two distinct Fifth Amendment inquiries: whether respondent invoked his right to counsel (so that interrogation must cease) and whether he validly waived his right to counsel (so that any statements obtained from him would be admissible at his trial). *Id.* at 18a-19a. The court expressly declined to address the invocation issue. *Id.* at 20a n.4, 29a.

On the waiver issue, the court stated that the government has a "heavy burden * * * to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination." Pet. App. 16a-17a (quoting *Miranda*, 384 U.S. at 475). The court observed that a waiver need not be express; it can be "inferred from the actions and words of the person interrogated." *Id.* at 17a (quoting *North Carolina* v. *Butler*, 441 U.S. 369, 373 & n.4 (1979)). But, the court noted, a waiver may not "be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." *Ibid.* (quoting *Miranda*, 384 U.S. at 475).

Here, the court of appeals held, the state court unreasonably determined the facts and unreasonably applied clearly established federal law in finding an implied waiver. Pet. App. 29a. In the court's view, respondent's "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: [respondent] did not wish to waive his rights." *Ibid.*

SUMMARY OF ARGUMENT

Respondent validly waived his Fifth Amendment privilege against compelled self-incrimination when he

answered police questions after receiving and understanding his *Miranda* rights. Respondent listened to police questions for a time, without either invoking or waiving his rights, but he ultimately decided to speak. That course of conduct evidenced a knowing, intelligent, and voluntary waiver of his *Miranda* rights, and his statements were therefore admissible in the State's case in chief.

The Fifth Amendment analysis in this case consists of three inquiries: whether respondent invoked his Fifth Amendment rights after receiving the *Miranda* warnings; whether the police permissibly interrogated respondent after he stated that he understood his rights but he neither invoked nor waived them; and whether respondent validly waived his rights when he made incriminating statements to the police.

A. Respondent did not invoke his Fifth Amendment rights because he did not communicate clearly that he wished to exercise his right to "cut off questioning." *Michigan* v. *Mosley*, 423 U.S. 96, 100 (1975) (quoting *Miranda* v. *Arizona*, 384 U.S. 436, 474 (1966)). In *Davis* v. *United States*, 512 U.S. 452 (1994), this Court held that, once a suspect has been informed of his right to counsel, the suspect must invoke that right unambiguously. The inquiry under *Davis* is whether a reasonable police officer in the circumstances would understand that the suspect requested counsel. An ambiguous request does not require the police to cease questioning, the Court held, because such a rule would interfere with effective law enforcement without providing any necessary protection to Fifth Amendment rights.

Although *Davis* addressed the *Miranda* right to counsel, its requirement of an "unambiguous or unequivocal" invocation, 512 U.S. at 462, should apply to the

right to silence as well. Requiring an objectively clear assertion of a suspect's "right to cut off questioning," *Mosley*, 423 U.S. at 103, respects the suspect's rights while providing clear guidance to the police and permitting legitimate law enforcement activity. And, although *Davis* applied its unequivocal-invocation standard after an initial waiver of Fifth Amendment rights, the *Davis* standard should apply to initial invocations as well.

In this case, respondent did not clearly invoke his right "to terminate questioning." *Mosley*, 423 U.S. at 103. Respondent never stated that he did not want to talk with the police. Nor did he attempt to end the interview. Respondent suggests that he implicitly invoked his right to silence by remaining silent much of the time. But a suspect may silently listen to questions for some period without unambiguously invoking his right to terminate questioning. In any event, even during the time in which he did not answer questions seeking his account of the crime, respondent did occasionally participate in the interview. Under the circumstances, respondent did not invoke his right to silence.

B. If, after receiving and understanding the warnings, a suspect neither invokes nor waives his rights under *Miranda*, officers may engage in non-coercive questioning and efforts to persuade the suspect to speak. *Miranda* requires the police to provide a suspect in custody with certain warnings in order to dispel the coercion inherent in custodial interrogation. When a suspect has received the *Miranda* warnings and has an opportunity to exercise his rights, the suspect has received the protections envisioned in *Miranda*, and the police may question him.

The police are not required to obtain a waiver of a suspect's rights before engaging in questioning. Such a

rule would penalize legitimate police investigations with no concomitant Fifth Amendment benefit, and it would be inconsistent with this Court's holding that a waiver may be inferred from conduct and speech during interrogation. See *North Carolina* v. *Butler*, 441 U.S. 369 (1979). Here, the police provided respondent with complete *Miranda* warnings, respondent said he understood his rights, and respondent did not immediately either invoke or waive those rights. The police therefore could question respondent consistent with the Fifth Amendment.

C. If a suspect knows and understands his *Miranda* rights, and makes statements to the police free of coercion, that is sufficient to demonstrate a waiver of the suspect's rights. A waiver of *Miranda* rights must be knowing, intelligent, and voluntary. The government need not prove that the suspect expressly waived his rights; under *Butler*, a waiver may be inferred from the totality of the circumstances. When a suspect receives the *Miranda* warnings and evidences his understanding of his rights, then his subsequent statements are knowing and intelligent. When the government shows that the suspect's statements were not coerced, then the statements are voluntary. In holding that respondent did not waive his rights, the court of appeals incorrectly focused on respondent's conduct before making his statements, rather than asking whether his later decision to answer questions was knowing, intelligent, and voluntary.

Respondent validly waived his *Miranda* rights here. Respondent read a portion of the *Miranda* warnings out loud, then told the officers that he understood the warnings. He controlled when he would participate in the interview, and he ultimately decided to answer a series

of questions in response to the officers' appeal to his conscience and religious beliefs. Nothing suggests that police coercion led him to speak. Respondent's statements therefore were properly admitted in the State's case in chief at trial.

ARGUMENT

RESPONDENT VALIDLY WAIVED HIS FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

The Fifth Amendment provides that "[n]o person shall * * * be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. Under this Court's decision in *Miranda*, a suspect in custodial interrogation must be informed of his rights, but he may voluntarily choose to waive them. In this case, the officers gave respondent his *Miranda* warnings, obtained his assurance that he understood the warnings, and then proceeded to question him. For much of the interview, respondent was silent, but when the police appealed to his religious beliefs, respondent answered a series of questions. Those answers were properly admitted in the State's case in chief at respondent's murder trial.

The admissibility of respondent's statements under *Miranda* depends upon three inquiries: whether respondent invoked his Fifth Amendment right to silence; whether the police could question respondent after he was advised of his rights, stated that he understood them, and neither invoked nor waived them; and whether respondent ultimately waived his Fifth Amendment rights.[3] In this case, respondent never invoked his right

[3] The court of appeals expressly addressed the third issue (waiver). Pet. App. 22a-29a. Although the court of appeals declined to address the first issue (invocation), *id.* at 20a n.4, 29a, the issue appears to be before the Court, because respondent has raised the issue as an alter-

to silence; the police permissibly questioned him about the crimes at issue; and respondent ultimately waived his rights when he made incriminating statements.

A. An Invocation Of The Fifth Amendment Right To Silence Must Be Unequivocal

1. In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), the Court applied the Fifth Amendment privilege against self-incrimination in the context of custodial interrogation. The Court held that, in order to "dispel the compulsion inherent in custodial" interrogation, certain warnings must be given "at the outset of the interrogation." *Id.* at 457-458. Those warnings advise the suspect that he has the right to remain silent, that any statements he makes can be used against him in court, that he has the right to consult with counsel, and that if he cannot afford an attorney, one will be provided for him prior to questioning. *Id.* at 479. If the police fail to provide the *Miranda* warnings or a fully effective equivalent, any statements obtained from the suspect are inadmissible in the government's case in chief. *Dickerson* v. *United States*, 530 U.S. 428, 443-444 (2000).

A suspect who receives *Miranda* warnings may then choose to waive or invoke his rights. Invocation has significant consequences for the course of the interrogation. If the suspect invokes his right to "cut off questioning," the police must "scrupulously honor[]" that right to silence by ceasing interrogation. *Michigan* v. *Mosley*,

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native ground for affirmance, Br. in Opp. 7-13. The court of appeals also did not expressly address the second issue (interrogation), but that question is bound up in the first and third questions, because what the police can do when a suspect neither invokes nor waives his rights depends upon what is necessary for an invocation and for a waiver. See Pet. 9-15.

423 U.S. 96, 103-104 (1975) (quoting *Miranda*, 384 U.S. at 474, 479). The police may later re-approach the suspect, provide him with fresh warnings, and attempt to persuade him to cooperate. *Id.* at 104-107 (noting lapse of time and other circumstances). If the suspect invokes his right to counsel, then the police must cease questioning him until counsel has been made available to him, unless he initiates further contact with the police. *Edwards* v. *Arizona*, 451 U.S. 477, 484-485 (1981); see also *Maryland* v. *Shatzer*, No. 08-680 (argued Oct. 5, 2009) (considering possible circumstances in which *Edwards* protection lapses).

2. In *Davis* v. *United States*, 512 U.S. 452 (1994), this Court addressed what a suspect must do to invoke the right to counsel. There, the police provided the suspect with *Miranda* warnings, and he initially waived his rights to silence and to counsel. *Id.* at 454-455. One and one-half hours later, the suspect remarked, "Maybe I should talk to a lawyer." *Id.* at 455. The Court concluded that the statement was insufficient to invoke the right to counsel. *Id.* at 458.

The Court held that, in order to invoke his right to counsel, a suspect must "unambiguously" request counsel—that is, "he 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." *Davis*, 512 U.S. at 459. If a suspect makes a statement "that is ambiguous or equivocal," the police are not required to cease questioning him. *Ibid.* Nor are the police required to ask questions to clarify an ambiguous reference to counsel, although it will often be "good police practice" to do so. *Id.* at 461-462.

An "objective inquiry" is required, the Court explained, to "avoid difficulties of proof and to provide guidance to officers conducting investigations." *Davis*, 512 U.S. at 458-459. And, the Court determined, an unambiguous invocation standard best balances the Fifth Amendment interest in protecting against official compulsion and society's interest in uncovering and prosecuting criminal activity. *Id.* at 459-460. A rule that would require police officers to cease questioning a suspect when they "do not know whether or not the suspect wants a lawyer * * * 'would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity.'" *Id.* at 460 (quoting *Mosley*, 423 U.S. at 102).

3. Although *Davis* involved a suspect's post-waiver invocation of the right to counsel, the rule it announced should apply to any potential invocation of *Miranda* rights.

a. The *Davis* rule should apply to the right to remain silent and "terminate questioning," *Mosley*, 423 U.S. at 103, just as it applies to the right to counsel. Both rights protect the Fifth Amendment's privilege against compulsory self-incrimination. *Miranda*, 384 U.S. at 467-473. The Court's rationale for requiring that an invocation of the right to counsel be unambiguous applies equally to the right to silence. In both instances, clear rules "avoid difficulties of proof and * * * provide guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U.S. at 458-459.

An unambiguous-invocation requirement for the right to remain silent and terminate questioning strikes the appropriate balance between protecting the suspect's rights and permitting valuable police investigation. As this Court has noted, "the primary protection

afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460. The Constitution requires that the police respect a suspect's choice to remain silent once that choice has been made, *Miranda*, 384 U.S. at 473-474, but it does not require that the police interpret ambiguous statements as invocations of *Miranda* rights. Although treating an ambiguous statement as an invocation of rights "might add marginally to *Miranda*'s goal of dispelling the compulsion inherent in custodial interrogation," *Moran* v. *Burbine*, 475 U.S. 412, 425 (1986), it would in some instances make the suspect's choice for him, rather than ensuring the *suspect's* "right to choose between silence and speech," *Miranda*, 384 U.S. at 469.

Treating an ambiguous remark as an invocation would also place a heavy burden on law enforcement, by requiring officers "to make difficult judgment calls" about a suspect's poorly expressed intentions and then suffer the consequence of suppression "if they guess[ed] wrong." *Davis*, 512 U.S. at 461. The suppression of a voluntary confession in these circumstances would exact a substantial and unjustified societal price. *Burbine*, 475 U.S. at 427; see *United States* v. *Washington*, 431 U.S. 181, 187 (1977) ("[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers * * * are inherently desirable.").

Respondent argues (Br. in Opp. 11) that "the assertion of the right to remain silent need not be as unequivocal as is required for the assertion of the right to counsel," because the *Miranda* Court stated that questioning must cease "[i]f the individual indicates in any manner * * * that he wishes to remain silent." 384 U.S. at 473-474. But *Miranda* did not purport to address how to interpret an ambiguous statement about either counsel

or silence. *Miranda* indicated that a suspect need not use particular words to invoke his right to remain silent and "cut off questioning," *id.* at 473; the Court said he may do so "in any manner." *Id.* at 473-474. But the Court did not address the level of clarity required in the suspect's statement. Indeed, the *Miranda* Court also used the "in any manner" language with respect to the right to counsel, *id.* at 444-445, 473-474, yet *Davis* considered the standard for invocation of counsel an open question, 512 U.S. at 456. To the extent that the *Miranda* Court considered the question of invocation at issue here, the Court suggested that the police need not stop questioning in the face of an "indecisive" suspect. *Id.* at 485. Consistent with that suggestion, this Court should hold that the *Davis* standard applies to invocations of the right to remain silent.[4]

b. *Davis* does not support a distinction between a defendant who initially waived his *Miranda* rights and then reconsidered (the facts in *Davis*) and a suspect who is considering in the first instance whether to invoke his rights following warnings (the facts in this case). *Davis* states a general rule: a request for counsel must be unambiguous, so that a reasonable police officer can recog-

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[4] Every court of appeals to squarely consider the issue has applied the *Davis* rule to the right to remain silent. See *United States* v. *Nelson*, 450 F.3d 1201, 1211-1212 (10th Cir.), cert. denied, 549 U.S. 937 (2006); *United States* v. *Acosta*, 363 F.3d 1141, 1152 (11th Cir. 2004); *United States* v. *Hurst*, 228 F.3d 751, 759-760 (6th Cir. 2000); *United States* v. *Banks*, 78 F.3d 1190, 1197-1198 (7th Cir.), rev'd on other grounds, 519 U.S. 990 (1996); *Medina* v. *Singletary*, 59 F.3d 1095, 1100-1101 (11th Cir. 1995), cert. denied, 517 U.S. 1247 (1996); *United States* v. *Johnson*, 56 F.3d 947, 955 (8th Cir. 1995). See also *United States* v. *Ramirez*, 79 F.3d 298, 305 (2d Cir.) (assuming that *Davis* applies to invocations of the right to remain silent), cert. denied, 519 U.S. 850 (1996).

nize it as an invocation of *Miranda* rights and respect the suspect's wishes. *Davis*, 512 U.S. at 459. That reasoning applies equally to both initial and post-waiver invocations of *Miranda* rights. Presuming that the suspect has requested counsel when he has made an ambiguous invocation—whether it is an initial invocation or a post-waiver invocation—would "needlessly prevent the police from questioning a suspect * * * even if the suspect did not wish to" exercise his rights. *Id.* at 460.

Initial and post-waiver invocations are governed by the same rule for sound reasons. A suspect's *Miranda* rights do not vary based on whether the suspect has previously waived those rights. The suspect can choose to stop speaking at any time; likewise, officers must cease questioning whenever a proper invocation occurs. *Miranda*, 384 U.S. at 473-474. As Justice Souter explained in his opinion concurring in the judgment in *Davis*, "*Miranda* itself discredited" any distinction between initial and post-waiver invocations, by explaining that warnings ensure "a continuous opportunity to exercise" Fifth Amendment rights. *Davis*, 512 U.S. at 470-471 (quoting *Miranda*, 384 U.S. at 444).

Adopting different standards for initial and post-waiver invocations would create uncertainties in an area in which the Court has stressed the need for clear "guidance to police officers conducting interrogations." *Davis*, 512 U.S. at 458-459. Police officers conducting custodial interrogations then would have to determine whether a prior waiver had occurred even before assessing whether a suspect is now invoking his rights—all with the threat of suppression looming "if they guess

wrong." *Id.* at 461. The *Davis* unambiguous-invocation standard therefore should apply to both contexts.[5]

4. In this case, respondent did not clearly or unequivocally invoke his right "to cut off questioning." *Miranda*, 384 U.S. at 474. Officer Helgert began the interview by providing respondent with complete *Miranda* rights, and respondent stated that he understood them. J.A. 9a. But "[h]e never indicated to [the officer] that he was going to exercise his Right to Remain Silent." J.A. 19a. Respondent "never" said "I'm not talking to you" or "I am not saying anything" or "I don't want to talk to you." J.A. 21a-22a (internal quotation marks omitted); see J.A. 148a-149a. Respondent did not state any "unwillingness to cooperate with th[e] conversation"—only an "unwillingness * * * to sign anything." J.A. 14a. That unwillingness to sign alone does not demonstrate that respondent wished to invoke his right to silence. See *North Carolina* v. *Butler*, 441 U.S. 369, 371 (1979). Because respondent did not affirmatively indicate that he wished to terminate question-

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[5] The majority of courts of appeals have assumed that the *Davis* standard applies to both initial and post-waiver invocations of *Miranda* rights. See *United States* v. *Lee*, 413 F.3d 622, 626 (7th Cir. 2005); *United States* v. *Johnson*, 400 F.3d 187, 194-195 (4th Cir.), cert. denied, 546 U.S. 856 (2005); *United States* v. *Syslo*, 303 F.3d 860, 866 (8th Cir. 2002) (per curiam); *United States* v. *Suarez*, 263 F.3d 468, 482-483 (6th Cir. 2001), cert. denied, 535 U.S. 991 (2002); *United States* v. *Brown*, 287 F.3d 965, 972-973 (10th Cir. 2002); *Hurst*, 228 F.3d at 759-760; *United States* v. *Posada-Rios*, 158 F.3d 832, 867 (5th Cir. 1998), cert. denied, 526 U.S. 1031 (1999); *Grant-Chase* v. *Commissioner, N.H. Dep't of Corr.*, 145 F.3d 431, 436 & n.5 (1st Cir.), cert. denied, 525 U.S. 941 (1998). Two courts of appeals have limited the *Davis* rule to post-waiver invocations. See *United States* v. *Plugh*, 576 F.3d 135, 142-143 (2d Cir. 2009); *United States* v. *Rodriguez*, 518 F.3d 1072, 1078-1080 (9th Cir. 2008).

ing, let alone unambiguously invoke his rights, the state court correctly concluded (Pet. App. 75a) that he had not invoked his right to silence.

Respondent contends (Br. in Opp. 7, 9-10) that he invoked his rights simply by remaining silent. But this case does not present the question of whether a suspect who remains mute invokes his right to silence in a way that requires the police to cease questioning, because respondent did not remain mute in the face of police questioning. Rather, he "continued to talk" with the officers, albeit "sporadically," J.A. 9a; see J.A. 21a, 23a-24a, and Detective Helgert "understood" him to be "engaging in conversation" though his limited verbal and non-verbal responses, J.A. 26a.

In any event, respondent's contention lacks merit. Although the right of silence, in contrast to the right to counsel, can be exercised passively (by not speaking), a suspect's initial reticence does not inherently convey to a reasonable police officer that the suspect wishes to exercise a right to silence and terminate the interview. A suspect may want to listen to a recitation of the evidence against him or learn about the benefits of cooperation before deciding whether to exercise his rights. Or a suspect may be formulating an explanation of events that lessens his culpability, planning an alibi, or thinking through his options. Or he may be willing to talk about some topics but not others. *E.g.*, *Commonwealth* v. *Sicari*, 752 N.E.2d 684, 695-696 (Mass. 2001) (silent suspect was "redevelop[ing] his strategy and decid[ing] how he wished to respond to the discovery of" incriminating evidence), cert. denied, 534 U.S. 1142 (2002). Simply presuming an invocation after some initial period of silence, as respondent suggests (Br. in Opp. 9-10), would override the wishes of those suspects who wanted to

listen and deliberate further, rather than to end questioning. It would also create an impossible situation for the police, who would have no clear guidelines on their conduct when a suspect initially says nothing but appears receptive to listening. Thus, even if a defendant remains silent after hearing the warnings, that *alone* would not convey an unambiguous message requiring the police to cease questioning him.[6]

B. The Police May Interrogate A Suspect Who Has Received *Miranda* Warnings And Has Neither Invoked Nor Waived His Fifth Amendment Rights

1. After a suspect receives his *Miranda* warnings, he may invoke them, thereby ending the interview, see *Mosley*, *supra*, or he may waive them and make statements to the police. But he also may take no action to invoke or waive his rights, instead waiting to see how the interview unfolds. In those circumstances, the police may conduct interrogation—*i.e.*, may make statements

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[6] Suspects routinely affirmatively and unambiguously invoke their right to silence. See, *e.g.*, *United States* v. *DeMarce*, 564 F.3d 989, 994 (8th Cir. 2009) (defendant said "You know, I don't want to talk to you. I'm not going to sign anything" and left room); *Anderson* v. *Terhune*, 516 F.3d 781, 789 (9th Cir.) (en banc) ("I plead the Fifth."), cert. denied, 129 S. Ct. 344 (2008); *State* v. *Day*, 619 N.W.2d 745, 749 (Minn. 2000) ("Said I don't want to tell you guys anything to say about me in court."). Of course, a suspect's silence in response to questions over a protracted period coupled with body language and demeanor could communicate to a reasonable police officer the suspect's intention to cut off questioning. Cf. *Davis*, 512 U.S. at 459 (framing the relevant question as whether "a reasonable police officer in the circumstances would understand" the suspect to be invoking his rights). But when, as in this case, a suspect participates in some fashion in interchange with the officers, and the officers reasonably understand him to be engaged (even if sporadically) in conversation, the suspect's failure to answer questions is at best ambiguous and does not amount to an invocation.

reasonably likely to elicit an incriminating response. *Rhode Island* v. *Innes*, 446 U.S. 291, 301-302 (1980).

The *Miranda* warnings are provided "[p]rior to any questioning" in order to dispel the coercion inherent in custodial interrogation. 384 U.S. at 444. As the Court has explained, "[T]he primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves." *Davis*, 512 U.S. at 460. The recitation of the warnings "make[s] the[] [suspect] aware" of the privilege against self-incrimination and "show[s] the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it," thereby ensuring that any resulting statements are "the product of [the suspect's] free choice." *Miranda*, 384 U.S. at 458, 468.

Once a suspect has been provided with the requisite warnings and has had an opportunity to invoke his rights, the primary purposes of *Miranda* are fulfilled. This Court has described "a person's right to cut off questioning" as "[t]he critical safeguard" provided by the *Miranda* warnings, *Mosley*, 423 U.S. at 103 (internal quotation marks omitted). After a suspect learns of that right and does not invoke it, the police may proceed to question him.

2. The police need not obtain a waiver of rights from the suspect before questioning him. If the suspect makes a statement during custodial interrogation and the government wishes to introduce it at trial, the government must "demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda*, 384 U.S. at 474-475. But that does not mean that the police must obtain a waiver before asking any questions. Only the warnings are "an abso-

lute prerequisite to interrogation," *id.* at 471; the warnings plus a waiver are "prerequisites to the admissibility of any statement made by a defendant," *id.* at 476.

Requiring the police to obtain a waiver before any questioning would substantially hinder criminal investigations, with no substantial Fifth Amendment benefit. A suspect may be willing to talk with police once he learns of the evidence against him or of the benefits of cooperation, yet police officers who were unable to obtain an immediate waiver would be hesitant to advise the suspect of those facts, for fear that doing so would be deemed impermissible interrogation. Such a rule would curtail potentially fruitful interaction before it could begin, and would force the suspect to make an immediate, even if premature, choice as to how to proceed, rather than allowing him an "unfettered" "right to choose between silence and speech * * * *throughout* the interrogation process." *Miranda*, 384 U.S. at 469 (emphasis added).

A rule demanding pre-interrogation waiver also would be inconsistent with the Court's implied waiver doctrine. As explained *infra* (pp. 23-24), a waiver of *Miranda* rights may be established either through the suspect's express statement or through evidence of the defendant's "understanding of his rights and a course of conduct indicating waiver." *Butler*, 441 U.S. at 373. In the latter instance, waiver is "inferred from the actions and words of the person interrogated." *Ibid.* That explanation assumes that the police may lawfully interrogate a suspect who has not yet waived his rights. See p. 24, *infra*.

3. In *Davis*, the Court stated that "[i]f the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to

question him." 512 U.S. at 458; see *id.* at 461. But that statement simply reflects the facts of *Davis*—in which the suspect initially waived his rights, *id.* at 455—and does not indicate that the police necessarily must obtain a waiver before questioning a suspect. Similarly, in *Missouri* v. *Seibert*, 542 U.S. 600 (2004), the plurality remarked in passing that the "failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained." *Id.* at 608 (plurality opinion). But *Seibert* did not involve a question of waiver after proper warnings, because in that case prior, unwarned questioning rendered the warnings themselves ineffective. *Id.* at 611-614 (plurality opinion); *id.* at 618-622 (Kennedy, J., concurring in the judgment) (requiring curative measures after deliberate two-step interrogation strategy). And the context makes clear that the plurality was describing prerequisites for the admission of the suspect's statements into evidence, not prerequisites for interrogation itself. *Id.* at 608-609 & n.1 (plurality opinion).

4. In this case, after the police provided respondent with *Miranda* warnings, he took no steps to invoke his rights to silence and to counsel. See pp. 17-19, *supra*. At the same time, he did not immediately "indicate * * * that he would be willing to waive his Rights." J.A. 9a. Instead, respondent "sat there and listened" as the police advised him of the evidence they had gathered and attempted to persuade him to tell his side of the story. J.A. 22a; see J.A. 10a, 13a-14a, 16a, 21a, 150a. That police conduct, which the courts below assumed

constituted "interrogation," J.A. 26a-27a; Pet. App. 23a, 67a, 75a, was permissible.[7]

C. A Suspect Who Has Received *Miranda* Warnings, Evidenced An Understanding Of His Rights, And Made Uncoerced Statements To The Police Has Validly Waived His Rights

1. If a suspect makes a statement during custodial interrogation, the burden is on the government to show, as a "prerequisite[] to the admissibility of [the] statement," that the defendant "voluntarily, knowingly and intelligently" waived his rights. *Miranda*, 384 U.S. at 444, 475-476. The waiver inquiry "has two distinct dimensions": "the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception," and "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Burbine*, 475 U.S. at 421. Whether a suspect has waived his rights "must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" *Butler*, 441 U.S. at 374-375 (quoting *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)). The government has the burden to establish waiver by a preponderance of the evidence. *Colorado* v. *Connelly*, 479 U.S. 157, 168 (1986).

The Court has made clear, however, that a suspect need not expressly waive his *Miranda* rights. In *North*

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[7] The court of appeals apparently agreed, because it suggested that a waiver could have been found if respondent answered more of the officers' questions (Pet. App. 26a), thus assuming that it was proper for the police to ask those questions.

Carolina v. *Butler*, 441 U.S. 369 (1979), the Court explained that "in at least some cases" waiver may be "inferred from the actions and words of the person interrogated." *Id.* at 373. There, the police advised a suspect of his *Miranda* rights, and he indicated that he understood them, but refused to sign a waiver form. *Id.* at 371. The suspect stated, however, that he would talk to the agents, and he made inculpatory statements. *Ibid.* At no time did the suspect request counsel or attempt to stop the interview. *Ibid.* The Court held, contrary to the state supreme court, that a waiver can be implied rather than express, and remanded the case for application of that standard. *Id.* at 374-376.

Butler explained that, while an express written or oral waiver of the rights is "usually strong proof of the validity of that wavier," it is "not inevitably either necessary or sufficient to establish waiver." 441 U.S. at 373. The question "is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived [*Miranda*] rights." *Ibid.* The Court emphasized that while a defendant's silence following receipt of the *Miranda* warnings is not alone sufficient to establish a waiver, "the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver" may "support a conclusion that a defendant has waived his rights." *Ibid.* That reasoning echoed the statement in *Miranda* that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." 384 U.S. at 475.

2. The court of appeals held that respondent did not waive his right to remain silent because his "persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story"

demonstrated that he "did not wish to waive his rights." Pet. App. 29a. The court of appeals erred by focusing its waiver analysis on respondent's failure to respond substantively during prior questioning instead of on respondent's answers to Detective Helgert's questions appealing to his conscience and belief in God. The relevant question is whether respondent knowingly, intelligently, and voluntarily waived his rights when he answered three of Detective Helgert's questions with incriminating responses. *Butler*, 441 U.S. at 373. The answer depends on whether respondent understood his rights, *Burbine*, 475 U.S. at 421; whether respondent was subject to police coercion that had the effect of overcoming his free will, *ibid.*; and whether respondent's answers to Detective Helgert's questions about God show a course of conduct from which "waiver can be clearly inferred," *Butler*, 441 U.S. at 373. Neither respondent's failure to give an express waiver nor his non-responsiveness in a prior period prevented him from validly waiving his right to silence by choosing to speak.

The court of appeals apparently focused on respondent's period of near-silence because of this Court's statement that waiver should not be presumed from a silent record. Pet. App. 26a-27a. But the *Miranda* Court's statement (384 U.S. 475, echoed in *Butler*, 441 U.S. at 373) that "a valid waiver will not be presumed simply from the silence of the accused after warnings are given" means simply that there must be some conduct or statements of the suspect from which a court can infer a waiver; *Miranda* hardly prevents a suspect who initially was silent from later deciding to speak. If the suspect does so, his statements are admissible so long as the government shows, directly or circumstantially, that

he waived his rights in making those subsequent statements.

The court also erred in rejecting the finding of waiver here because of the principle that waiver will not be presumed simply because "a confession was in fact eventually obtained." Pet. App. 25a (quoting *Miranda*, 384 U.S. at 475). If the record reflects only that the police gave the suspect his *Miranda* rights and that he confessed—without any evidence of the suspect's understanding of his rights or of an absence of police coercion—the prosecution would be hard-pressed to demonstrate a knowing, intelligent, and voluntary waiver. But waiver can be established when the suspect evidences his understanding of his *Miranda* rights and voluntarily makes a statement. A statement made with an understanding of the *Miranda* rights is knowing and intelligent, and if made freely, rather than as the product of impermissible police coercion, then the statement is voluntary. Under those circumstances, the suspect has validly waived his *Miranda* rights. *E.g.*, *Burbine*, 475 U.S. at 421 (waiver may be found when the "totality of the circumstances" show "both an uncoerced choice and the requisite level of comprehension").

The court of appeals suggested that the State is required to show something more than knowing, intelligent, and voluntary statements. The court cited a variety of cases in which suspects made spontaneous statements or spoke freely with the police "as part of a 'steady stream' of speech or as part of a back-and-forth conversation" and the courts found waivers. Pet. App. 27a-28a (quoting *Bui* v. *DiPaola*, 170 F.3d 232, 239-240 (1st Cir. 1999), cert. denied, 529 U.S. 1086 (2000)). While such extended give-and-take indeed indicates the suspect's willingness to waive his rights, that level of

interchange is not necessary to find waiver. The Fifth Amendment does not require that a suspect's waiver of constitutional rights be swift or enthusiastic. What it requires is that the suspect speak with an understanding of his rights and free of police coercion. If he does, the suspect's incriminating answers, even if not immediate, manifest a waiver. See, *e.g.*, *United States* v. *Cardwell*, 433 F.3d 378, 389-390 (4th Cir. 2005), cert. denied, 547 U.S. 1061 (2006).

3. In this case, respondent validly waived his *Miranda* rights when he answered three questions appealing to his conscience through his religious beliefs.

a. Respondent's answers to Detective Helgert's questions about his belief in God evidenced his decision to speak with the officers. Once the police provided *Miranda* warnings, respondent had the power to terminate questioning simply by saying that he did not wish to speak or by requesting an attorney. But he did not do so, instead listening to the officers' questions and sporadically answering them. J.A. 9a, 21a, 23a-24a. Although respondent did not respond substantively to the officers' suggestions that he help himself by telling his side of the story, J.A. 10a, 13a-14a, 150a, he was moved when Officer Helgert appealed to his religious beliefs, J.A. 11a. He became engaged in the interview, his demeanor changed, and he answered a series of three questions. J.A. 10a-11a, 153a. Those answers reflect his choice to speak.

b. Respondent's decision to speak was knowing and intelligent. At the outset of the interview, Detective Helgert provided respondent with complete *Miranda* warnings, orally and in writing, which advised him that he had a right to the assistance of counsel in connection with the interrogation; that counsel would be provided

for him if he could not afford one; that he had a right to remain silent and that anything he said could be used in evidence against him; and that he could decide to exercise those rights at any time. J.A. 8a-9a; Pet. Br. 60 (attachment). That information was sufficient to inform respondent of the nature of the *Miranda* rights and the consequences of failing to exercise those rights. See, *e.g.*, *Patterson* v. *Illinois*, 487 U.S. 285, 293 (1988) (a suspect "who is told he has such rights * * * is in a curious posture to later complain that his waiver of these rights was unknowing" (internal quotation marks omitted)).

Of course, a *Miranda* waiver will not be effective if the suspect fails to comprehend the information contained in the warnings. But here, Detective Helgert took steps to document that respondent actually understood his rights. He asked respondent to read a portion of the *Miranda* warnings out loud, in order to ensure that respondent read and understood English. J.A. 9a. Further, Detective Helgert "advised [respondent] of his Miranda rights" and respondent "verbally acknowledged that he understood th[em]." Pet. App. 75a; see J.A. 9a.[8] At the time of the interview, respondent was an adult, was not intoxicated, and had no trouble communicating with the police. J.A. 23a; see J.A. 148a (respondent was

[8] The court of appeals accepted the factual finding that respondent said he understood his rights, Pet. App. 5a, based on Detective Helgert's testimony to that effect at the suppression hearing, J.A. 9a, even though Detective Helgert testified at trial that he did not think he asked respondent to confirm his understanding, J.A. 148a. Respondent also has accepted this factual finding. See Br. in Opp. 7. Even if there is conflicting evidence on this point, the state court could have reasonably adopted the statement closer in time to the interrogation. See 28 U.S.C. 2254(d)(2).

"literate" and "coherent"). Respondent's ultimate choice to respond to the officers therefore was knowing and intelligent. Respondent has not contended otherwise.

c. Respondent's decision to speak also was made voluntarily. A waiver is voluntary when "it [i]s the product of a free and deliberate choice." *Burbine*, 475 U.S. at 421. Only if a suspect's "will [was] overborne and his capacity for self-determination critically impaired because of coercive police conduct" will his waiver of *Miranda* rights be involuntary. *Colorado* v. *Spring*, 479 U.S. 564, 574 (1987) (internal quotation marks omitted). Here, the circumstances of the interview confirm that respondent chose to speak voluntarily. The interview was conducted in a standard-size room, in the early afternoon. J.A. 12a, 18a, 144a-145a. Respondent was not injured, infirm, or intoxicated. J.A. 23a. The police never threatened respondent. J.A. 158a.

The police did not aggressively and relentlessly question respondent. Instead, they told him that "this was his opportunity to explain his side" of the story and advised him that he would be better off if he cooperated. J.A. 10a, 16a-17a, 150a; see J.A. 17a ("It wasn't so much as a question and wait for an answer * * * [W]e were mostly making statements about, 'This is your chance to tell' [in] kind of a monologue expressing that theme."). Although the officers told respondent of the evidence against him and advised him that cooperation would be in his best interests, neither tactic was the type of coercive conduct that would overbear respondent's will. *E.g.*, *Fare* v. *Michael C.*, 442 U.S. 707, 727 (1979) ("indicat[ing] that a cooperative attitude would be to respondent's benefit" was "far from threatening or coercive"); *United States* v. *Bezanson-Perkins*, 390 F.3d 34, 42 (1st

Cir. 2004) (presenting suspect with the evidence of guilt did not render his waiver involuntary).

The length of the interview is not alone enough to render respondent's statements involuntary. The three-hour time period is similar to those the courts of appeals have found acceptable,[9] and does not begin to approach the lengthy interrogations that this Court has disapproved.[10] Further, the length of the interview was reasonable in light of respondent's occasional communication with the officers. The police did not use any physical force against respondent, threaten him, utilize harsh interrogation practices, or ignore any of his physical needs.

Respondent has contended (Pet. App. 68a) that the police impermissibly coerced him by appealing to his religious beliefs. That is incorrect. "The Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" *Connelly*, 479 U.S. at 170 (quoting *Oregon* v. *Elstad*, 470 U.S. 298, 305 (1985)). Accordingly, the courts of appeals have routinely concluded that an appeal to religious beliefs ordinarily does not render a suspect's statements involuntary. *E.g.*,

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[9] *E.g.*, *Diaz* v. *Senkowski*, 76 F.3d 61, 62, 65 (2d Cir. 1996) (four hours); *Jenner* v. *Smith*, 982 F.2d 329, 331-334 (8th Cir.) (six or seven hours), cert. denied, 510 U.S. 822 (1993); *United States* v. *Guarno*, 819 F.2d 28, 30-31 (2d Cir. 1987) (two and one-half hours).

[10] *E.g.*, *Greenwald* v. *Wisconsin*, 390 U.S. 519, 520-521 (1968) (suspect interrogated for over 18 hours and deprived of food or sleep); *Davis* v. *North Carolina*, 384 U.S. 737, 742-752 (1966) (defendant held incommunicado and interrogated for 16 days); *Culombe* v. *Connecticut*, 367 U.S. 568, 631-635 (1961) (defendant questioned repeatedly over period of five days); *Ashcraft* v. *Tennessee*, 322 U.S. 143, 153-154 (1944) (defendant questioned for 36 hours and deprived of sleep).

United States v. *Miller*, 984 F.2d 1028, 1031-1032 (9th Cir.), cert. denied, 510 U.S. 894 (1993); *Muniz* v. *Johnson*, 132 F.3d 214, 219 (5th Cir.), cert. denied, 523 U.S. 1113 (1998); *Barrera* v. *Young*, 794 F.2d 1264, 1270-1271 (7th Cir. 1986); cf. *Brewer* v. *Williams*, 430 U.S. 387, 392-393 (1977) ("Christian burial" speech). Here, respondent's decision to speak resulted from his religious faith and his anguish over his "shooting that boy down," Pet. App. 6a, rather than any coercive conduct on the part of the officers. The police did not overbear respondent's will.

In short, the totality of the circumstances demonstrate that respondent's decision to respond to Detective Helgert's appeals to his religious beliefs was a knowing, intelligent, and voluntary choice. Respondent's statements therefore were properly admitted in the government's case in chief at his trial.

CONCLUSION

The judgment of the court of appeals should be reversed on the first question presented.

Respectfully submitted.

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