No. 22-___

IN THE

Supreme Court of the United States

ADREAN L. SMITH,

Petitioner,

v.

GARY A. BOUGHTON, WARDEN,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a habeas petitioner "fairly presents" the "substance" of his federal claim in state court by identifying the relevant facts and the relevant constitutional guarantee, regardless of whether his state-court briefs cited the exact same precedents that he invoked in federal court.

2. Whether *Connecticut v. Barrett*, 479 U.S. 523 (1987), which held that invocations of *Miranda* rights must be construed broadly, requires police to stop questioning a suspect who invokes his Fifth Amendment rights by repeatedly stating, "I don't want to talk" and "I don't want to talk about this," even if the invocation is arguably ambiguous in scope.

PARTIES TO THE PROCEEDING

Petitioner Adrean L. Smith was Petitioner in the district court and Appellant in the court of appeals.

Respondent Gary A. Boughton, Warden, was Respondent in the district court and Appellee in the court of appeals.

RELATED CASES

The proceedings identified below are directly related to this case in this Court:

Criminal judgment and direct appeals:

- *State v. Smith* (Wis. Cir. Ct.), case nos. 10-CF-5301, 10-CM-5837, judgment entered July 27, 2011
- *State v. Smith*, 827 N.W.2d 929 (Wis. Ct. App.), appeal no. 2012AP520-CR, judgment entered January 23, 2013
- *State v. Smith*, 357 Wis. 2d 1 (Wis.), case no. 2012AP520-CR, judgment entered July 24, 2014

Federal habeas proceedings:

- *Smith v. Boughton*, 2017 WL 1743703 (E.D. Wis.), case no. 15-C-1235, judgment entered May 4, 2017
- *Smith v. Boughton*, 43 F.4th 702 (7th Cir.), case no. 17-2192, judgment entered August 4, 2022

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CONSTITUTIONAL AND STATUTORY AUTHORITIES

INTRODUCTION

During his custodial interrogation, Petitioner Adrean Smith attempted to invoke his right to remain silent, repeatedly telling the police, "I don't want to talk" and "I don't want to talk about this." Under *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, the interrogation should have ended immediately. But the interrogator pressed ahead, falsely insisting that the police had "a right" to continue with the questioning. During the lengthy interrogation that followed, Mr. Smith made statements implicating him in the robberies under investigation.

When he was later charged with crimes related to those robberies, Mr. Smith moved to suppress the inculpatory statements he made. Both at the trial level and throughout his direct appeal, Mr. Smith asserted that the statements had been obtained in violation of the Fifth Amendment because the police's questioning continued after he invoked his right to silence. Yet the Wisconsin courts disagreed, with the Wisconsin Supreme Court ultimately holding—in a 4–3 ruling—that it was unclear whether Mr. Smith wished to invoke his right to silence for all topics or for just some areas of inquiry, and that this ambiguity negated his attempt to invoke his right to silence.

Turning next to the federal courts, Mr. Smith filed a habeas petition under 28 U.S.C. § 2254, arguing yet again that questioning should have ended once he invoked his right to silence. As Mr. Smith explained, the state courts had erred by finding his invocation ineffective, because he had unambiguously invoked his right to silence. At a minimum, Mr. Smith

explained, he had unequivocally invoked his right to silence as to at least some topics, and the *scope* of such an unequivocal invocation should have been construed in Mr. Smith's favor under *Connecticut v. Barrett*, 479 U.S. 523 (1987). The Seventh Circuit held first that it was reasonable for the state courts to conclude Mr. Smith's invocations were ambiguous in scope. It then held that Mr. Smith had failed to exhaust his argument that he was entitled to relief despite any ambiguity in scope, because he had not cited *Barrett* during his state court proceedings—even though Mr. Smith had *always* argued that his statements were improperly obtained after he invoked his right to silence. Thus, the Seventh Circuit affirmed the denial of Mr. Smith's 28 U.S.C. § 2254 petition.

That decision was plainly wrong under this Court's holdings, and should be summarily reversed. But it also reflects deep and longstanding confusion among the lower courts with respect to how individuals must invoke their rights—both during custodial interrogation and during state-court proceedings. If the Court does not summarily reverse, it should grant certiorari to provide much-needed guidance on these critical questions.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Seventh Circuit affirming the denial of petitioner's 28 U.S.C. § 2254 petition (Pet.App.1a) is reported at 43 F.4th 702. The opinion of the district court (Pet.App.44a) is unreported but is available at 2017 WL 1743703.

JURISDICTION

The Seventh Circuit issued its opinion and entered judgment on August 4, 2022. Pet.App.1a. On October 20, 2022, this Court granted an extension of time to file a petition of certiorari to December 2, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is reproduced at Pet.App.114a. The relevant statutory provision (28 U.S.C. § 2254) is reproduced in relevant part at Pet.App.115a.

STATEMENT

A. Arrest and Interrogation

In November 2010, Mr. Smith was arrested after the van he was driving was pulled over and determined to be stolen. Pet.App.45a. After Mr. Smith was advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), he agreed to speak with the police. *Id*. The resulting interrogation was audio recorded, and the content of the recordings is undisputed. *Id.*

The interrogating officer, Detective Travis Guy, initially questioned Mr. Smith regarding the circumstances of his arrest, including how he came to be driving a stolen van. Pet.App.45a-47a. Mr. Smith denied having stolen the van, but acknowledged that it was stolen, and offered to repay the van's owners for any damage. Pet.App.47a.

Detective Guy then attempted to ask Mr. Smith about a series of robberies he was investigating, which he believed were connected to the van Mr. Smith had

been driving. Pet.App.48a. As Detective Guy described one of those robberies, Mr. Smith interrupted:

Smith:	See, I don't want to talk about, I don't want to talk about this. I don't know nothing about this.
Detective:	Okay.
Smith:	I don't know nothing. See, look, I'm talking about this van. I don't know nothing about no robbery. Or no—what's the other thing?
Detective:	Hmmm?
Smith:	What was the other thing that this is about?
Detective:	Okay.
Smith:	I don't want to talk. . . . I don't know nothing about this, see. That's—I'm talking about this, uh, van. This stolen van. I don't know nothing about this stuff. So, I don't even want to talk about this.
Detective:	I got a right to ask you about it.

Pet.App.48a-49a. After Detective Guy asserted that he had "a right" to continue the questioning, Mr. Smith relented and objected no further. Detective Guy then continued the interrogation. *Id*. Eventually, Mr. Smith made incriminating statements concerning his participation in the robberies. Pet.App.50a.

B. Motion to Suppress and Guilty Plea

Following the interrogation, the State of Wisconsin charged Mr. Smith with various crimes related to the

robberies discussed during the interrogation. Pet.App.50a-51a.

Mr. Smith moved to suppress his statements made to Detective Guy after his attempt to cut off questioning. *Id*. Because the interrogation was recorded, the court ruled on the motion without taking testimony. Following a brief hearing at which attorneys for each side provided argument, the court denied the motion to suppress, identifying purported "ambiguities" in Mr. Smith's statements. *See* Pet.App.112a.

Shortly after, Mr. Smith pled guilty to three counts of armed robbery and one count of first degree reckless injury. Pet.App.6a. Mr. Smith was sentenced to a total of thirty-five years of imprisonment: twenty-five years of initial confinement and ten years of extended supervision. *Id*.

C. Subsequent State Court Proceedings

As permitted by Wis. Stat. § 971.31(10) following a guilty plea, Mr. Smith timely appealed the denial of his motion to suppress. Pet.App.110a. Like he had before the trial court, Mr. Smith argued on appeal that he had invoked his right to remain silent when he interrupted the interrogation to tell the officer that he did not want to talk. Pet.App.109a. But the Wisconsin Court of Appeals disagreed and affirmed the trial court's judgment, concluding that because "Smith did not say, 'I don't want to talk about this' and then stop talking," he had "failed to make an unequivocal invocation of the right to remain silent, so the detective was not required to terminate the interview." Pet.App.112a-13a.

Mr. Smith then sought and was granted discretionary review by the Wisconsin Supreme Court, which affirmed. The four-justice majority recognized that "standing alone, Smith's statements might constitute the sort of unequivocal invocation required to cut off questioning." Pet.App.91a. Nonetheless, relying on "the full context of [Smith's] interrogation," the majority concluded that "it is not clear whether Smith's statements were intended to cut off questioning about the robberies, cut off questioning about the minivan, or cut off questioning entirely." Pet.App.92a. Finding that the scope of Mr. Smith's invocation was therefore ambiguous, the majority held that Mr. Smith "did not unequivocally invoke his right to remain silent." Pet.App.94a.

Three justices dissented, arguing that Mr. Smith's statements should have been suppressed. Pet.App.98a-107a. As Justice Prosser's opinion for two dissenters explained, "When Smith said, 'I don't want to talk about this,' he unambiguously indicated that he did indeed not want to talk anymore." Pet.App.100a. Another dissenter agreed, writing that "the majority opinion finds equivocation where . . . none exists and ignores the plain meaning of [Mr. Smith's] requests." Pet.App.104a (Abrahamson, C.J., dissenting). Noting that the majority "seems to assert that [Mr. Smith] did not mean what [he] said," Chief Justice Abrahamson also asserted that the majority "arguably employ[ed] the wrong test" by relying on what they believed to be Mr. Smith's subjective intent rather than the objective meaning of his words. *Id.*

Mr. Smith did not seek certiorari from this Court.

D. Federal Habeas Proceedings

Mr. Smith timely filed the present habeas petition under 28 U.S.C. § 2254 in the Eastern District of Wisconsin. Pet.App.44a. Mr. Smith argued that the Wisconsin Supreme Court's holding was contrary to or an unreasonable application of clearly established federal law because he had unequivocally invoked his right to silence.

The district court (Adelman, J.) disagreed, concluding that "Smith did not interrupt [the interrogation] to say that he was done talking, that he did not want to talk anymore, or use any other language indicating that he wanted the interrogation to stop." Pet.App.58a. Instead, the court asserted that "at most," Smith's statements "express a desire to cut off questioning about the robbery." Pet.App.59a. The district court concluded that this selective invocation of the right to silence was inadequate to "unambiguously invoke his right to cut off further questioning." Pet.App.66a.

The Seventh Circuit granted a Certificate of Appealability as to the issue of "whether Smith's confession was obtained in violation of his right to end a custodial interview." Case No. 17-2192, ECF No. 14 (7th Cir. May 19, 2021). The court also *sua sponte* appointed the undersigned counsel to represent Mr. Smith for his appeal. *See* Case No. 17-2192, ECF No. 15 (7th Cir. May 20, 2021).

A divided panel affirmed the district court's denial of Mr. Smith's petition. *Smith v. Boughton*, 43 F.4th 702 (7th Cir. 2022). The majority (Sykes, C.J., and Scudder, J.) reasoned that it was not unreasonable for the Wisconsin state courts to conclude that Mr.

Smith's "statement was not a clear and unequivocal invocation of the right to remain silent about any and all topics." *Id.* at 711. The majority also rejected Mr. Smith's argument that his statements were at least "an unambiguous invocation as to *some topics*—either the robberies, the van, or everything"—with this Court's decision in *Barrett* directing that "any ambiguity as to the scope of his invocation" should have been "resolved in his favor." *Id.* at 712. The majority declined to reach this argument on exhaustion grounds, asserting that "Smith never presented this argument to the Wisconsin courts" because "[n]owhere in his briefs before the Wisconsin Supreme Court did he reference *Barrett*." *Id.* But the majority also suggested that *Barrett* would not alter its analysis, because "the Wisconsin Supreme Court was within its rights to conclude that the statement was not an unambiguous all-or-nothing invocation under *Thompkins*." *Id.* Thus, while the majority agreed that Mr. Smith had "advanced a serious *Miranda* claim" and noted that "[a]ll judges to have considered it . . . have struggled with the issue," *id.* at 713, it denied Mr. Smith habeas relief.

Judge Jackson-Akiwumi dissented, explaining that Mr. Smith's state-court briefing not only "fairly presented the facts necessary to state a claim for relief" but also "identified the specific constitutional right violated (his Fifth Amendment right to be free from self-incrimination) and the specific issue (that he unambiguously invoked his right to cut off questioning but the detective did not honor his request)." *Id.* at 719. Because Mr. Smith's *Barrett* argument was "[a]t most . . . a mere variation in legal theory," it was "of no consequence" that he did not cite *Barrett*

specifically in his state-court briefing. And for the dissent, *Barrett* was decisive: "To the extent there was any ambiguity about the scope of Smith's request, the Wisconsin Supreme Court was required to construe the ambiguity in Smith's favor. But it did not." *Id*. at 720.

REASONS FOR GRANTING THE WRIT

In *Picard v. Connor*, this Court held that a habeas petitioner need not "cit[e] book and verse on the federal constitution" to fairly present his claims and exhaust his state remedies. 404 U.S. 270, 275, 278 (1971). In *Connecticut v. Barrett*, this Court held that courts are "require[d] . . . to give a broad, rather than a narrow, interpretation to a defendant's" invocation of his *Miranda* rights. 479 U.S. at 529. This Court has never overruled (or even called into question) either holding.

The Seventh Circuit's decision in this case runs directly afoul of both *Picard* and *Barrett*. A panel majority first held that Mr. Smith could not rely on *Barrett* in federal court because he did not specifically cite that case in Wisconsin state courts, flouting the rule that this Court established in *Picard*. The majority then rubber-stamped the Wisconsin state courts' decision interpreting Mr. Smith's invocation of his right to silence as narrowly as possible, ignoring the controlling effect of *Barrett*. Because the Seventh Circuit's holding cannot be squared with this Court's precedents, this Court should summarily reverse. Because *Picard* and *Barrett* have both been inconsistently applied in the lower courts, though, if this Court does not summarily reverse, it should grant

certiorari to correct the confusion among the lower courts with respect to these decisions.

I. THE SEVENTH CIRCUIT'S DECISION SHOULD BE SUMMARILY REVERSED.

This case is an easy candidate for summary reversal. There are no factual disputes, the case's procedural history is simple and straightforward, and the correct outcome is defined by two long-standing Supreme Court precedents that have never been questioned. In other words, "Because the Court of Appeals' decision was obviously wrong and squarely foreclosed by [this Court's] precedent, this case merits summary reversal." *Shoop v. Cassano*, 142 S. Ct. 2051, 2057 (2022) (Thomas, J., dissenting); *see also Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999) (per curiam) (summary reversal is appropriate to "correct[] a lower court's demonstrably erroneous application of federal law").

A. Mr. Smith Exhausted His State Remedies.

In *Picard*, this Court held that a State habeas petitioner has exhausted his state-law remedies as required to seek relief in federal court if the "substance" of his federal claim was "fairly presented" to the state courts. 404 U.S. at 275, 278. The exhaustion requirement is not meant to "trap the unwary *pro se* prisoner." *Rose v. Lundy*, 455 U.S. 509, 520 (1982). Instead, it is intended as "a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Id*.

For that reason, a habeas petitioner need not "cit[e] book and verse on the federal constitution" to the state courts to satisfy the exhaustion requirement. *Picard*,

404 U.S. at 275, 278 (quotation omitted). Instead, a claim is properly before a federal habeas court so long as "the ultimate question for disposition" is the same, "despite variations in the legal theory or factual allegations urged in its support." *Id.* at 277. In other words, as this Court has explained, a petitioner exhausts his state-court remedies when his state-court briefing "include[s] reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief." *Gray v. Netherland*, 518 U.S. 152, 162 (1996). So long as those criteria are met, the claim is exhausted unless the petitioner "fundamentally alter[s]" his request for relief. *Vasquez v. Hillery*, 474 U.S. 254, 260 (1986). Finding a claim unexhausted when it clearly satisfies the *Picard* standard is grounds for summary reversal, as this Court held in *Dye v. Hofbauer*, 546 U.S. 1 (2005) (per curiam).

The *Picard* standard is plainly satisfied here, and this Court should thus summarily reverse, as it did in *Dye*. The ultimate question for disposition is whether Mr. Smith sufficiently invoked his Fifth Amendment rights such that the police should have ended their interrogation. That is the only claim Mr. Smith pressed before the state courts, and it remains his only claim before the federal courts. Nor did Mr. Smith vary his factual allegations or evidence when he came to federal court—he relies wholly on the same few sentences of the interrogation transcript that have been at issue since the initial suppression hearing.

Even the Seventh Circuit panel majority recognized that Mr. Smith had exhausted his argument that the Wisconsin state court decisions "reflected an unreasonable application of the Supreme Court's

Miranda line of cases." *Smith*, 43 F.4th at 704. The majority reached a contrary conclusion for Mr. Smith's *Barrett* argument, but *Barrett* is part of the *Miranda* line of cases. After all, the question in *Barrett* was whether the Connecticut state courts had properly applied *Miranda*. *Barrett*, 479 U.S. at 528.

To explain its contrary view that Mr. Smith was somehow barred from relying on *Barrett*, the panel majority offered two quick points in a short, conclusory paragraph. Neither holds water.

First, the majority contended that Mr. Smith's Wisconsin Supreme Court briefs did not "suggest that his statements could be interpreted as selective invocations as to the robbery." *Smith*, 43 F.4th at 712. But of course, the state courts were acutely aware of the argument that Mr. Smith's statements could be interpreted as selective invocations—that was the *State's* argument before the state courts, and it was the basis for the Wisconsin Supreme Court's decision. That Smith declined to concede that argument hardly makes his *Barrett* argument unexhausted—particularly because his *Barrett* argument rests on just two points, both of which are fully consistent with his arguments before the state courts: (1) his statements can be understood as invocations of an overall right to silence, and (2) his statements unambiguously invoke his right to silence as to at least *something*. All the relevant facts were clearly before the state courts.

Second, the majority observed that Mr. Smith's "briefs before the Wisconsin Supreme Court did [not] reference *Barrett*." *Id*. But requiring Mr. Smith to cite

a particular case in order to exhaust a claim contravenes this Court's longstanding precedents.

For example, *Picard* specifically admonished that defendants are not required to cite "book and verse" of the basis of their federal claims to fairly present them. 404 U.S. at 278; *see also Eddings v. Oklahoma*, 455 U.S. 104, 113 n.9 (1982) (reaching issue of whether state court's opinion was consistent with Supreme Court's *Lockett* decision even though neither petitioner's briefing nor the state court decision "spoke to our decision in *Lockett* by name"). In addition, this Court has always permitted "variations in the legal theory." *Picard*, 404 U.S. at 277. And this Court has emphasized that courts must not conflate "evidence that must be presented to the state courts to be considered by federal courts in habeas proceedings and theories about that evidence," which can be adjusted in federal court. *Miller-El v. Dretke*, 545 U.S. 231, 241 n.2 (2005). It is difficult to imagine a more minor supposed "variation in legal theory" than the one at issue here. In state court, Mr. Smith urged that he unambiguously invoked his right to silence, requiring police to cut off questioning. In federal court, Mr. Smith urged that he unambiguously invoked his right to silence, requiring police to cut off questioning, and that this is true despite the State's counterargument that there was some ambiguity about the scope of the invocation. And throughout, Mr. Smith's arguments relied on the same, undisputed evidence.

The Seventh Circuit's holding on exhaustion in this case thus cannot be squared with this Court's precedents, and this Court should intervene to ensure

that lower courts faithfully apply *Picard* in future cases.

B. Mr. Smith Unambiguously Invoked His Right To Silence.

Nor can the Seventh Circuit's decision that Mr. Smith is not entitled to habeas relief be justified on the merits of his *Miranda* claim—namely, that police improperly continued questioning him after he unequivocally invoked his right to silence. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Mr. Smith is entitled to a writ of habeas corpus if the state court's adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 413 (2000). A decision is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The Wisconsin Supreme Court's decision in this case was both contrary to and an unreasonable application of this Court's precedents, and Mr. Smith should be granted habeas relief.

1. To start, the rights at issue are beyond doubt clearly established by this Court's precedents. The

Fifth Amendment to the United States Constitution provides that "No person . . . shall be compelled in any criminal case to be a witness against himself." *Miranda* effectuates that right through protections during police interrogations, establishing in relevant part that "[i]f the individual [being questioned] indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74; *see also Garcia v. Long*, 808 F.3d 771, 778 (9th Cir. 2015) ("The Supreme Court has . . . clearly established . . . [that] an unambiguous and unequivocal *Miranda* invocation 'cuts off' questioning."); *Smiley v. Thurmer*, 542 F.3d 574, 583 (7th Cir. 2008) (*Miranda* rights are clearly established).

Moreover, the right recognized in *Miranda* has never been limited only to requests to stop *all* questioning. To the contrary, *Miranda* allows suspects to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975). Thus, the "mere fact that [a suspect] may have answered some questions or volunteered some statements on his own does not deprive him of the right" to cut off further questioning. *Miranda*, 384 U.S. at 445.

Since *Miranda*, this Court has repeatedly addressed how suspects must invoke their rights—and how police must respond. First, in *Barrett*, the Court acknowledged the "settled approach" that courts must "give a broad, rather than a narrow, interpretation to a defendant's" invocation of his *Miranda* rights. 479 U.S. at 529. At the same time, the Court declined to "address the question left open" in the Supreme

Court's earlier cases of how police should respond to ambiguous or equivocal invocations of *Miranda*. *Id*. at 529-30 & n.3 (citing *Smith v. Illinois*, 469 U.S. 91, 96 & n.3 (1984)). In other words, *Barrett* treated it as settled that once a suspect clearly attempts to invoke his *Miranda* rights, the invocation has to be construed broadly in his favor—but *Barrett* left open what happens if it is unclear whether the suspect was invoking his *Miranda* rights at all.

The Court ultimately resolved that latter question by holding that police need not stop questioning if "a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking" his Fifth Amendment rights. *Davis v. United States*, 512 U.S. 452, 459 (1994) (addressing right to counsel); *Berghuis v. Thompkins*, 560 U.S. 370, 381 (2010) (extending *Davis* to right to silence). While a certain degree of clarity is required, though, "a suspect need not 'speak with the discrimination of an Oxford don.'" *Davis*, 512 U.S. at 459. Instead, he need only "articulate his desire [to invoke his *Miranda* rights] sufficiently clearly that a reasonable police officer in the circumstances would understand the statement" as an invocation of the *Miranda* rights. *Id*. "[T]his is an objective inquiry," rather than a question about what any particular suspect actually intended or what any particular officer actually understood. *Id*. at 458-59.

2. Applying these clearly established standards, Mr. Smith successfully invoked his right to silence, and police questioning should have ceased. Mr. Smith initially agreed to speak with police officers, and he answered questions regarding the stolen van he was driving when he was arrested. But when the officer

raised questions regarding robberies, Mr. Smith made clear that he no longer wished to cooperate. In fact, he did not even let the investigator complete a single question about the robberies before interrupting to say, "I don't want to talk about, I don't want to talk about this." Pet.App.3a. That alone was an unequivocal invocation of the right to silence, as reflected by the countless lower-court decisions finding *Davis* and *Thompkins* satisfied by similar statements[1]—and as confirmed by the fact that Mr. Smith's statements look nothing like those that have been held elsewhere to be equivocal. Such ineffective invocations generally either (1) "equivocate by using words such as 'maybe' or 'might' or 'I think'", *Jones v. Harrington*, 829 F.3d 1128, 1140 (9th Cir. 2016),[2] (2) ask whether a suspect should or could invoke

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[1] *E.g., McGraw v. Holland*, 257 F.3d 513, 515, 518 (6th Cir. 2001) ("I don't wanna talk about it."); *Tice v. Johnson*, 647 F.3d 87, 107 (4th Cir. 2011) ("I have decided not to say any more."); *Jones v. Harrington*, 829 F.3d 1128, 1140 (9th Cir. 2016) ("I don't want to talk no more."); *Marshall v. Eckstein*, No. 15-cv-008, 2020 WL 1939182, at *14 (E.D. Wis. Apr. 22, 2020) ("I ain't going to talk no more."); *United States v. Pere-Quiroz*, No. 16-cr-93, 2016 WL 4435714, at *2 (D. Nev. July 21, 2016) ("I don't want to talk."); *United States v. Buchanan*, No. 14-cr-3, 2014 WL 1757588, at *2 (D. Neb. Apr. 30, 2014) ("I don't want to talk about it."); *United States v. McCarthy*, 382 F. App'x 789, 791-92 (10th Cir. 2010) ("I don't want nothing to say to anyone."); *United States v. Reid*, 211 F. Supp. 2d 366, 372 (D. Mass. 2002) ("I have nothing else to say.").

[2] *See also Davis*, 512 U.S. at 458-60, 462 ("Maybe I should talk to a lawyer."); *United States v. Hampton*, 885 F.3d 1016, 1018 (7th Cir. 2018) (per curiam) ("Maybe I should have a lawyer."); *United States v. Walker*, 272 F.3d 407, 413-14 (7th Cir. 2001) (suspect "wasn't sure whether he should talk to" detective); *United States v. Thousand*, 558 F. App'x 666, 671-72 (7th Cir. 2014) ("I think I need a lawyer, I don't know, but I want to cooperate and talk.").

Miranda,[3] or (3) involve silence without explanation.[4] Mr. Smith did none of these: he plainly indicated that he did not want to talk.

And if that were not enough, Mr. Smith went on to clarify exactly what he meant. He believed he had been arrested solely about the stolen van, and upon learning that a robbery "was the other thing that *this* is about," he repeated, "I don't even want to talk about *this*." Pet.App.4a (emphasis added). As Mr. Smith's explanation made clear, by this point in the interrogation, he understood that the van and the robberies were part of a single investigation—and he had no interest in cooperating in that broader investigation.

To the extent there was any ambiguity in Mr. Smith's statements, it concerned solely the *scope*—not the *fact*—of his invocation. Even the Wisconsin Supreme Court suggested as much. *See* Pet.App.92a. Under this Court's precedents, though, that type of ambiguity is not fatal at all—because in all events, Mr. Smith was still invoking his *Miranda* rights and,

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[3] *E.g., United States v. Shabaz*, 579 F.3d 815, 819 (7th Cir. 2009) ("am I *going to be able* to get an attorney?") (emphasis in original); *Mueller v. Angelone*, 181 F.3d 557, 573-74 (4th Cir. 1999) ("Do you think I need an attorney here?"); *Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996) ("Do you think I need a lawyer?"); *United States v. March*, 999 F.2d 456, 460 (10th Cir. 1993) ("Do you think I need an attorney?").

[4] *See, e.g., United States v. Stewart*, 902 F.3d 664, 670 (7th Cir. 2018) (suspect "appeared to" shake his head no); *United States v. Thurman*, 889 F.3d 356, 365 (7th Cir. 2018) (suspect refused to sign waiver form).

under *Barrett*, any remaining ambiguity must be construed in his favor.[5]

3. In concluding otherwise, narrow majorities of both the Wisconsin Supreme Court and the Seventh Circuit panel ignored *Barrett* altogether, relying on *Davis* and *Thompkins* alone to assess the effect of Mr. Smith's statements. *See* Pet.App.87a-88a; *Smith*, 43 F.4th at 709 (citing *Davis* as laying out the "key inquiry"). That was plain error. *Davis* and *Thompkins* are largely irrelevant in light of the undisputed facts. Those cases apply where it unclear whether a suspect was trying to invoke his *Miranda* rights *at all*—but here, Mr. Smith clearly sought to invoke his right to remain silent about at least *something*. In that scenario, *Barrett* provides the controlling rule: courts must broadly construe such invocations.

Similarly, both the Wisconsin Supreme Court majority and the Seventh Circuit panel majority cited *Fare v. Michael C.*, 442 U.S. 707 (1979), in support of their view that Smith's statements could be construed as a selective refusal to answer specific questions, rather than an invocation of the right to cut off questioning. But in *Michael C.*, the Court did not

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[5] To be sure, had Mr. Smith made clear that he was only selectively invoking his right to silence—by stating that he did not want to discuss the robberies, but would be happy to continue answering questions about the van, for example—officers would have been justified in proceeding according to those instructions. *Cf. Griffith v. State*, 132 Nev. 974, 385 P.3d 580, at *3 (2016) (unpublished) (suspect repeatedly "indicated that he did not want to answer individual questions without counsel present" but also "invited the detectives to ask additional questions"). But Mr. Smith did no such thing—and no Wisconsin court even thought he did.

identify any ambiguity in the invocation's scope. *Id.* at 727. Under *Barrett*, if the scope of the invocation is ambiguous, the police must construe it broadly—which here meant that the police should have stopped questioning Mr. Smith.

4. The opposite approach adopted by the Seventh Circuit here would eviscerate *Miranda*'s protections, allowing police to ignore a suspect's invocation of his rights so long as they can conjure some purported post hoc ambiguity. And to be clear, that will almost always be possible. Take the prototypical example of an unequivocal invocation given in *Thompkins*, a statement that a suspect "did not want to talk with the police." 560 U.S. at 382. Does that statement extend to all law enforcement officers, or just to the "police"? And if police prepared a written statement for the suspect, might he be willing to sign it so long as he was not asked to "talk" about it? Similar ambiguity can be found in all of the statements this Court has previously considered sufficient to cut off questioning. *See, e.g.*, *Oregon v. Bradshaw*, 462 U.S. 1038, 1041-42 (1983) ("I do want an attorney before it goes very much further" required cutting off all questioning immediately, despite ambiguity about how "much further" the suspect was willing to go); *Edwards v. Arizona*, 451 U.S. 477, 479 (1981) ("I want an attorney before making a deal" required cutting off all questioning immediately, despite ambiguity about whether suspect might be willing to talk up until confirming a deal). As these examples show, it would take the "discrimination of an Oxford don" to craft an invocation that eliminated all ambiguity as to the scope of a *Miranda* invocation. Such a carefully crafted invocation has never been required.

Moreover, under the approach taken by the Wisconsin Supreme Court and approved by the Seventh Circuit in this case, if a suspect clearly invokes his *Miranda* rights but is unclear about the scope of that invocation, *the police can ignore the unequivocal invocation altogether*. Here, then, because it was arguably ambiguous whether Mr. Smith wanted to cut off questioning as to the van, the robbery, or both, the police got to continue asking him questions about everything. That is not and cannot be right under this Court's precedents. Indeed, as Judge Jackson-Akiwumi explained in her dissent below, "This case is a poster child for what *Miranda* and its progeny were designed to prevent." *Smith*, 43 F.4th at 713 (Jackson-Akiwumi, J., dissenting). The Court should summarily reverse the Seventh Circuit's plainly erroneous decision.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE PERSISTENT CONFUSION IN THE LOWER COURTS ON TWO IMPORTANT ISSUES.

Although the Seventh Circuit's decision was wrong under any plausible standard, its errors reflect broader confusion on the two important, recurring legal questions presented in this case. If this Court does not summarily reverse, it should grant certiorari to provide much-needed clarification on issues that have long perplexed the lower courts notwithstanding this Court's previous, straightforward guidance.

A. Courts Are Divided On How Habeas Petitioners Must Satisfy The "Fair Presentment" Requirement.

As explained above, application of the exhaustion requirement for habeas petitioners should have been straightforward in this case. But the Seventh Circuit's error reflects the reality that fair presentment, while straightforward in theory, often turns on the happenstance of the circuit, or even the panel, by which it is being reviewed, rather than on the petitioner's actions in state court.

1. "[A]s a legion of . . . cases attest," application of the *Picard* standard has "much bedeviled courts." *Nadworny v. Fair*, 872 F.2d 1093, 1096-97 (1st Cir. 1989); *see also Clark v. Pennsylvania*, 892 F.2d 1142, 1146 (3d Cir. 1989) ("how this requirement is satisfied is not so readily ascertainable"). The post-*Picard* landscape is accordingly littered with a variety of often-incompatible legal standards, of which the decision below is just the latest example.

The most widely cited of these standards was first articulated in *Daye v. Attorney General*, 696 F.2d 186 (2d Cir. 1982) (en banc), and requires merely that a petitioner present his challenge in terms that are "likely to alert the [state] court[s] to the claim's federal nature." *Id*. at 192. Under *Daye*, this requirement can be satisfied in one of five specific ways: (1) identification of the relevant "chapter and verse of the Constitution," (2) "reliance on pertinent federal cases employing constitutional analysis," (3) "reliance on state cases employing constitutional analysis in like fact situations," (4) "assertion of the claim in terms so particular as to call to mind a specific right

protected by the Constitution," or (5) "allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Id.* at 194. *Daye* has been applied wholesale in at least some cases in the Third, Seventh, and Sixth Circuits. *See Evans v. Court of Common Pleas*, 959 F.2d 1227, 1231-32 (3d Cir. 1992); *Verdin v. O'Leary*, 972 F.2d 1467, 1473-74 (7th Cir. 1992); *Franklin v. Rose*, 811 F.2d 322, 326 (6th Cir. 1987).

Cases in the First and Eighth Circuits, meanwhile, apply versions of the *Daye* test modified in various ways. *See, e.g., Nadworny v. Fair*, 872 F.2d 1093, 1097 (1st Cir. 1989) (noting that "*Daye* provides valuable insights and mechanisms" but rejecting its "mechanistic tests" in favor of "a quadripartite set of guidelines"); *Kelly v. Trickey*, 844 F.2d 557, 558 (8th Cir. 1988) (relying on a different set of four factors, and rejecting what it saw as the "more lenient" *Daye* test).

Other cases in the Fourth, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits have eschewed the *Daye* framework altogether and not applied any palpable test, instead merely citing the exhaustion requirement and then stating a conclusion, with varying degrees of apparent flexibility in application. *See, e.g., Gentry v. Sinclair*, 705 F.3d 884, 897 (9th Cir. 2012) ("All exhaustion requires is that the state courts have the opportunity to remedy an error."); *Jones v. Sussex I State Prison*, 591 F.3d 707, 712-13 (4th Cir. 2010) (requiring that "both the operative facts and the controlling legal principles" have been presented to state court); *Pethtel v. Ballard*, 617 F.3d 299, 306 (4th Cir. 2010) ("the substance of the claim requires that the claim be presented face-up and squarely; the federal question must be plainly defined"); *Lewis v.*

Quarterman, 541 F.3d 280, 285 (5th Cir. 2008) (citing "fairly presented" standard without elaboration); *Pope v. Sec'y for Dep't of Corr.*, 680 F.3d 1271, 1286 (11th Cir. 2012) ("courts should exercise flexibility" and rely on a "reasonable reader" standard); *Prendergast v. Clements*, 699 F.3d 1182, 1184 (10th Cir. 2012) (asking "whether the 'substance' of the petitioner's claim has been presented for the state courts in a manner sufficient to put the courts on notice of the federal constitutional claim"); *Wagner v. Smith*, 581 F.3d 410, 417 (6th Cir. 2009) (exhaustion requires a petitioner to present "the same claim under the same theory"); *United States ex rel. Kemp v. Pate*, 359 F.2d 749, 751 (7th Cir. 1966) (exhaustion "demands only that the state courts first be presented with an opportunity to apply controlling legal principles to the facts bearing upon the constitutional claim . . . before any application is made to the federal courts. . . . The opportunity need not be measured by the state court's nonrecognition of available precedent").

Finally, in some cases in the Fifth, Sixth, and Seventh Circuits, including the one below, an extremely strict standard is applied, creating precisely the "trap [for] the unwary" this Court disclaimed in *Lundy*. 455 U.S. at 520. For example, in *King v. Berghuis*, 744 F.3d 961 (6th Cir. 2014), the Sixth Circuit held that a petitioner had failed to exhaust his claim that his guilty plea was not knowingly and voluntarily entered, even though the petitioner had argued exactly that in his state-court brief, because that brief did not cite the specific Supreme Court case underlying his federal habeas claim. *King*, 744 F.3d at 965. Similarly, in *Canales v. Stephens*, 765 F.3d 551, 577 (5th Cir. 2014), the Fifth Circuit concluded that

even though the petitioner challenged the same conduct and *quoted* the same federal constitutional case, *Illinois v. Allen*, 397 U.S. 337 (1970), in his state and federal proceedings, the federal claim was not fairly presented in state court because the petitioner "did not cite *Allen* for its constitutional holding" in state court. *Canales*, 765 F.3d at 577. As shown by these cases, and the case below, the lack of recent guidance from this Court has allowed the *Picard* standard to drift beyond recognition.

2. With such widely varying approaches to the exhaustion requirement, the lower courts' outcomes on this issue are predictably unpredictable. Depending on the test employed, the circuit, and even the panel, fair presentment analyses can result in starkly different treatment of similar cases.

Consider, for example, three cases involving habeas petitioners, all of whom objected in state courts to the improper use of out-of-court statements, but without using the phrase "confrontation clause." In two, the courts held that the petitioner had nonetheless exhausted his confrontation clause claim: The Second Circuit (applying *Daye*), *see Jackson v. Scully*, 781 F.2d 291 (2d Cir. 1986), and the Eleventh Circuit (while not applying *Daye* or any similar test), *see Hutchins v. Wainwright*, 715 F.2d 512, 518-19 (11th Cir. 1983). In sharp contrast, the Eighth Circuit concluded that a petitioner who objects to improper use of out-of-court statements has failed to exhaust a confrontation clause argument if his state-court briefing did not mention the confrontation clause, the Sixth Amendment, or a relevant case applying the confrontation clause. *Ashker v. Leapley*, 5 F.3d 1178 (8th Cir. 1993). These cases cannot be reconciled on

any basis other than the application of different exhaustion tests.

Similarly, in cases like the one below, where a petitioner raises the specific facts and the specific constitutional provision in state courts but adds nuance in federal court, the outcome is far from certain. Contrast the decision below, for example, with *Watkins v. Callahan*, 724 F.2d 1038 (1st Cir. 1984). There, the petitioner argued in state court that his inculpatory statements should have been suppressed under *Miranda*. *Id.* at 1040. In federal court, the petitioner added that the state courts should have at least held an evidentiary hearing to determine "who initiated the post-[invocation] conversation." *Id.* at 1041. The First Circuit found this claim to have been exhausted, even though it was not explicitly raised in state court, because the petitioner's state-court arguments "presented the 'substance' of his present federal habeas corpus claim." *Id.* Under that standard, Mr. Smith's case would come out differently.

The Courts of Appeals are thus deeply divided as to what it means to "fairly present" the "substance" of a claim to state court. The divisions are longstanding and have eluded resolution, and it is long past time for this Court to intervene to provide additional guidance. Until then, whether a particular habeas petitioner will be found to have exhausted his state remedies will turn on little more than luck of the draw.

B. The Seventh Circuit Is Not Alone In Its Confusion About *Barrett*'s Application After *Thompkins* and *Davis*.

Lower courts have proven still more confused by *Barrett*, at least in the aftermath of *Thompkins* and

Davis. In particular, while some courts continue to acknowledge the binding effect of *Barrett*, others have seemingly abandoned it altogether.

1. Some courts draw precisely the distinction the Seventh Circuit refused to draw here. For example, the Ninth Circuit has maintained after *Davis* that, in line with *Barrett*, courts must "give a broad, rather than a narrow, interpretation to a defendant's request for counsel." *Krysinski v. Rowland*, 89 F.3d 845 (9th Cir. 1996). Thus, in *Anderson v. Terhune*, the Ninth Circuit held that the state courts acted unreasonably in failing to suppress a suspect's statement when they "recognized that [the statement] was an invocation of the right to silence" and "detected ambiguity only as to the scope of the invocation." 516 F.3d 781, 788 n.4 (9th Cir. 2008).

And in *People v. Firestine*, the court explained in a case strikingly similar to this one that "[t]here is no question that [the defendant] unequivocally invoked his right to counsel" and that the "only question is the *scope* of the defendant's invocation of his right to counsel." 132 N.E.3d 886, 892 (Ill. Ct. App. 2019). Relying on *Davis* and *Barrett* together, the Court concluded that, given ambiguity as to the *scope* of the invocation, police were required to stop questioning the suspect. *Id*. at 895. As the court explained, the problem with the alternative "is that it [would] render[] the defendant's otherwise clear and unequivocal request for counsel completely ineffective." *Id*. at 894. The better approach, as per *Barrett*, "is to hold that, if a qualification or limit is ambiguous, the qualification or limit itself"—rather than the invocation—"is ineffective." *Id*. at 894–95. *See also Smith v. State*, 779 S.W.2d 417, 425–26 (Tex.

Crim. App. 1989) ("A request for counsel that is ambiguous in scope will be afforded a 'broad rather than a narrow, interpretation.'"); *United States v. Iyamu*, 356 F. Supp. 3d 810, 820 (D. Minn. 2018) (statements had to be suppressed "[e]ven if [suspect's] invocation could somehow be construed as limited").

2. As the *Firestine* court acknowledged, though, other courts—like the Wisconsin Supreme Court and the Seventh Circuit below—have reached precisely the opposite conclusion about the continued vitality of *Barrett* after *Davis* and *Thompkins*. Indeed, the *Firestine* court analyzed, and rejected, the contrary reasoning of *Burrell v. Commonwealth*, 710 S.E.2d 509 (Va. Ct. App. 2011). In *Burrell*, the court acknowledged *Barrett* for some purposes, but failed to address its clear requirement that invocations of *Miranda* rights must be given a broad, rather than a narrow scope. Instead, the court turned to *Davis* to declare that "when a suspect makes a qualified invocation . . . the qualification must also be unequivocal and unambiguous and thereby make it clear to a reasonable police officer what kinds of questions the suspect is unwilling to answer." *Id.* at 515. Many courts have similarly refused to apply *Barrett* to unequivocal invocations of *Miranda* rights of uncertain scope. *See, e.g., State v. Bailey*, 186 P.3d 908, 912 (N.M. Ct. App. 2008) (holding an invocation was ineffective "because its intended scope was not clear" when the suspect asserted that he did not want to say "anything else"), *cert. denied*, 144 N.M. 331 (2008). And some courts have held that such invocations allow continued questioning at least so long as "police officers did not attempt to hone in on" areas apparently within the scope of the invocation.

Raras v. State, 780 A.2d 322, 337 (Md. Ct. App. 2001), *cert. denied*, 367 Md. 90 (2001).

3. Yet other courts have taken a third approach, concluding that where a statement is an unambiguous invocation, but the scope is ambiguous, police officers have a choice: they are "entitled either to stop their interrogation completely or to properly seek clarification regarding the scope of [the] invocation." *State v. Tiedemann*, 162 P.3d 1106, 1111 (Utah 2007); *see also United States v. Reyes-Martinez*, No. 17-CR-00035-GNS-2, 2020 WL 6820800, at *9 (W.D. Ky. Nov. 20, 2020) ("Defendant's second conditional invocation created an ambiguity sufficient to allow the Detective Nade to clarify the scope."); *Tiedemann v. Bigelow*, No. 10-CV-803 CW, 2012 WL 4584492, at *6 (D. Utah Oct. 1, 2012), *certificate of appealability denied*, 539 F. App'x 860 (10th Cir. 2013). On that view, Mr. Smith's statements should have been suppressed—Detective Guy continued his interrogation of Mr. Smith after he invoked his rights without any attempt to discern the scope of Mr. Smith's invocation. To the contrary, rather than seeking clarification and then honoring the scope of the invocation, Detective Guy falsely told Mr. Smith that he had a right to continue his questioning, and then persisted in questioning Mr. Smith regarding all the topics of interest.

4. This division among lower courts is particularly troubling because, for many courts, the rejection of *Barrett* is seemingly rooted in a misguided view that *Barrett* is in tension with *Davis* and *Thompkins*. Even were that so, lower courts are not entitled to pick and choose which Supreme Court precedents to follow. A clearly established Supreme Court precedent on a question of constitutional law remains binding on both

state and federal courts until the Supreme Court expressly overrules it. *See, e.g., Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) (lower courts should "leav[e] to this Court the prerogative of overruling its own decisions"). Mere perceived tension between two Supreme Court cases does not allow lower courts to disregard controlling precedent or assume the earlier precedent has been overruled. *Hohn v. United States*, 524 U.S. 236, 252–253 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

Neither *Davis* nor *Thompkins* so much as hinted as overruling *Barrett*, yet some lower courts have treated *Barrett* as a dead letter. And that trend is only growing—the Seventh Circuit reflects the latest court to reach this problematic conclusion. Given the realities of colloquial speech, particularly the speech of unrepresented suspects facing the pressures of custodial interrogation, the issue is bound to continue arising. This Court should intervene to clarify that *Barrett* remains good law and works in concert with, rather than against, *Davis* and *Thompkins*.

* * *

Because the Seventh Circuit's decision is directly contrary to this Court's precedents, it should be summarily reversed. However, while the Seventh Circuit panel majority's errors are particularly

egregious in this case, it is not alone in its confusion. If this Court chooses not to summarily reverse, it should grant certiorari to reaffirm the continued force of *Picard* and *Barrett*.

CONCLUSION

This Court should summarily reverse or, in the alternative, grant the petition for certiorari.

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Respectfully submitted,

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