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No. 10-\_\_\_\_ OFFICE OF THE CLERK  
**In the Supreme Court of the United States**

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MICHAEL SHEETS, Warden,  
*Petitioner,*

v.

DONOVAN E. SIMPSON,  
*Respondent.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Is a prison inmate in “custody” for *Miranda* purposes if law enforcement officers isolate and question him about criminal conduct occurring outside the prison but impose no additional restraints or coercive pressures beyond those inherent in ordinary prison confinement?
2. When a suspect asks an officer for advice on whether a polygraph examination will confirm the veracity of his statements, does the officer violate clearly established *Miranda* law by advising the defendant that he will not have any trouble if his statements are truthful, but that he should terminate the examination and consult an attorney if he is lying?

**LIST OF PARTIES**

The Petitioner is Michael Sheets, the Warden of the Warren Correctional Institution. Sheets is substituted for his predecessor, Wanza Jackson. See Fed. R. Civ. P. 25(d).

The Respondent is Donovan E. Simpson, an inmate at the Warren Correctional Institution.

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## **PETITION FOR WRIT OF CERTIORARI**

The Attorney General of Ohio, on behalf of Michael Sheets, Warden of the Warren Correctional Institution, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

### **OPINIONS BELOW**

The Sixth Circuit's opinion, *Simpson v. Jackson*, No. 08-3224, 2010 U.S. App. Lexis 14251 (6th Cir. July 13, 2010), is reproduced at App. 1a. The United States District Court for the Southern District of Ohio's opinions and orders are reproduced at App. 60a and App. 98a. The Reports and Recommendations of the United States Magistrate Judge are reproduced at App. 66a and App. 101a. The Ohio court of appeals' opinion on direct appeal, *State v. Simpson*, No. 01AP-757, 2002 Ohio App. Lexis 3785 (Ohio Ct. App. July 23, 2002), is reproduced at App. 177a.

### **JURISDICTIONAL STATEMENT**

The Sixth Circuit issued its judgment and opinion on July 13, 2010. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The Fifth Amendment to the United States Constitution provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

The Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), Section 2254(d) of Title 28 of the United States Code, provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

- (1) 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.

### INTRODUCTION

This case raises two questions that warrant the Court’s review. First, the circuits are divided on the question of *Miranda*’s applicability in the prison context. No one doubts that prisoners are sometimes entitled to *Miranda* warnings; *Mathis v. United States*, 391 U.S. 1, 4-5 (1968), establishes as much. But *Miranda* warnings are only required when a suspect is “in custody,” and this Court has never “clarif[ied] what constitutes ‘custody’ for *Miranda* purposes in the prison setting,” *Bradley v. Ohio*, 497 U.S. 1011, 1015 (1990) (Marshall, J., dissenting from the denial of certiorari).

The circuits have divided sharply on the question. The majority view, held by at least five circuits, is that an inmate is “in custody” (and therefore entitled to *Miranda* warnings) only when the questioner applies restraints or coercive tactics beyond those inherent in everyday prison life. The

Sixth Circuit, by contrast, has adopted a categorical rule: *All* inmates are entitled to *Miranda* warnings before authorities may question them about criminal conduct occurring outside the prison. The Sixth Circuit applied that bright line approach in this case and granted habeas relief to Respondent Donovan Simpson on the ground that two of his statements admitting knowledge about a recent arson, made to authorities while in prison, were inadmissible.

Second, the Sixth Circuit exceeded its authority under AEDPA when it deemed a third set of statements by Simpson inadmissible under *Miranda*. After his release from prison, and while on probation, Simpson agreed to cooperate with the arson investigation by taking a polygraph examination. After the polygraph examiner read the *Miranda* warnings, Simpson asked whether the exam would confirm the veracity of his statements. The examiner told Simpson that he “wo[uldn’t] have a problem with the test” if he was “telling . . . the truth.” App. 32a. But if he “was lying,” the examiner advised Simpson to “get an attorney” and “[not] take the test.” *Id.* Simpson never invoked that right, and made additional damaging admissions.

The Sixth Circuit wrongly characterized the examiner’s response as an improper attempt to dissuade Simpson from exercising his *Miranda* rights. The examiner’s response was a genuine effort to answer Simpson’s questions about the polygraph’s operation, nothing more. Therefore, the state court’s decision to admit this interview into evidence did not offend clearly established law.

The Court should grant review and reverse the Sixth Circuit's judgment on both questions presented.

### STATEMENT OF THE CASE

**A. A jury convicted Simpson of murder, arson, and assault for setting fire to a Columbus family's house.**

In October 1997, a fire erupted at a home on Columbus's West Side. Six people were in the house at the time: Aleta Bell, her three children (Shenequa, Elijah, and Myesha), Terrance Hall, and Gary Williams. Four of the occupants—Bell, her daughter Myesha, Hall, and Williams—escaped. But they could not reach Shenequa and Elijah, who were sleeping in a back bedroom. Firefighters eventually rescued the children and rushed them to the hospital. Shenequa died several days later. Elijah suffered serious injuries but survived. App. 177a-178a.

Given the size of the fire, the time it took to extinguish it, and the presence of "fire flashback," firefighters surmised that the blaze was intentionally set. App. 179a. After surveying the damage, an arson investigator concluded "that the fire had been set by a Molotov cocktail that was thrown through the large window in the living room." App. 180a.

The police focused their investigation on Daryl "Pumpkin" Kelly. Sixth Circuit Joint Appendix ("J.A.") 60. Columbus Police Detective Edward Kallay, Jr., learned from an informant that Respondent Donovan Simpson might have information about Kelly's involvement in the fire.

App. 181a. The police proceeded to conduct four interviews with Simpson that are the subject of the *Miranda* claims in this case.

The first two interviews occurred while Simpson was still incarcerated on an unrelated theft conviction. App. 181a; J.A. 133. On April 24, 2000, Kallay and ATF Agent Dan Ozbolt went to the prison to meet Simpson, who was in boot camp when they arrived. App. 181a; J.A. 131. Prison officials notified Simpson, drove him to an administrative building, and took him to a conference room near the warden's office. J.A. 131.

During the interview, Kallay and Ozbolt did not advise Simpson of his *Miranda* rights. J.A. 61-62. They informed Simpson that he was not a suspect, and that they had learned he might have incriminating information about Kelly. J.A. 133, 160. Kallay and Ozbolt also offered to assist Simpson in obtaining early release from prison if he agreed to cooperate in their investigation. J.A. 135-36. Simpson indicated that he never felt threatened by the officers. J.A. 161; accord App. 24a (characterizing interaction as "consensual").

During the interview, which lasted an hour, J.A. 108, Simpson said that he was with Daryl Kelly on the day before the fire. He overheard Leah Smith (Aleta Bell's former neighbor) tell Kelly to "take care of this for me." App. 181a. Then, on the morning of the fire, Kelly called him to ask for a ride. When Simpson picked Kelly up, Kelly smelled like gasoline. App. 182a.

Kallay and Ozbolt returned to the prison on April 27 for their second interview with Simpson. *Id.*

The encounter took place in the infirmary and lasted thirty minutes. J.A. 108, 136. No *Miranda* warnings were issued. This “second contact was more to finalize trying to get [Simpson] out of prison to help . . . on the Shenequa Bell homicide,” and to ask Simpson if he had information about an unrelated criminal matter. J.A. 70, 137. Simpson again implicated Daryl Kelly and Leah Smith. App. 182a.

After this meeting, Kallay secured Simpson’s release on probation. *Id.* Once released, however, Simpson failed to cooperate in the investigation, and he also violated the terms of his probation. Kallay arrested Simpson on June 16, 2000. *Id.*

The third interview with Simpson occurred at Columbus police headquarters the day of his arrest. After Kallay and Ozbolt advised him of his *Miranda* rights, J.A. 389, Simpson admitted personal involvement in the arson. On the day before the fire, Simpson said, Leah Smith instructed him to drive Daryl Kelly around that night, J.A. 418-19, and Smith gave them money for “gas”—“[n]ot for the car,” J.A. 422. Kelly then purchased two glass bottles, J.A. 422, filled them with gasoline, J.A. 425, and created wicks out of a towel, J.A. 430, 461. Simpson drove Kelly to Aleta Bell’s house, with Kelly laughing that “this shit got to get done” and “we[ are] gonna blow this bitch up.” J.A. 446, 457. Once there, Simpson and Kelly smoked crack cocaine. Simpson then saw Kelly get out of the car, heard the sound of breaking glass, and observed Kelly running back to the car without the two bottles. J.A. 437-38, 464-65. Simpson and Kelly drove away and paged Smith, who paid them both in crack cocaine. J.A. 443.

In light of these new admissions, the detectives gave Simpson an ultimatum: They would “bring [him] in for a polygraph,” and, if he passed, they would “reinstate [his] bond.” J.A. 492. But if he refused, detectives would “charge [him] with complicity to commit agg[ravated] murder, right away.” *Id.* Simpson responded, “Deal.” J.A. 493.

The fourth interview took place on June 20, when Kallay made arrangements for Simpson to take the polygraph test. App. 183a. Before starting the examination, the examiner informed Simpson of his *Miranda* rights. *Id.* Shortly after these warnings, Simpson became uncooperative. He expressed irritation at the detectives for threatening him with murder charges, confusion as to the polygraph’s operation, and uncertainty as to whether he wanted to take the test. J.A. 529-42. No test was ever performed, but Simpson “made more admissions regarding his involvement in the fire” at the session. App. 183a.

A grand jury indicted Simpson on thirteen counts relating to the fire: two counts of aggravated murder (with death penalty specifications) for the death of Shenequa Bell, five counts of attempted murder, one count of aggravated arson, and five counts of felonious assault. App. 178a. At trial, the trial court admitted Simpson’s four statements over defense objections. The State also presented testimony from a deputy sheriff and a fellow prisoner, each of whom heard Simpson make incriminating statements about his participation in the arson. App. 183a-184a. The defense did not call any witnesses, and Simpson did not testify. App. 184a.

The jury convicted Simpson on one count of aggravated murder, one count of murder, one count of aggravated arson, and five counts each of attempted murder and felonious assault. *Id.* At the penalty phase, the jury weighed the aggravating circumstances against the mitigating factors and voted to impose a sentence of life imprisonment on Simpson for the aggravated murder conviction. *Id.* All told, Simpson received a sentence of seventy-nine years to life in prison. App. 10a.

**B. The Ohio court of appeals affirmed Simpson's convictions, and the Ohio Supreme Court denied review.**

On appeal, Simpson argued that the trial court should have suppressed his four statements to the police. J.A. 1060. The Ohio court of appeals disagreed and affirmed Simpson's convictions.<sup>1</sup>

With respect to the two April statements made in prison, Simpson complained that he was entitled to *Miranda* warnings. After an extensive survey of federal and state decisions, the state court "agree[d] with the majority of courts, which conclude that *Miranda* warnings must be given to individuals in prison before questioning only when there is some added restriction on the prisoner's already restricted freedom." App. 189a. The court then examined "(1) the language used to summon the individual; (2) the physical surroundings of the interrogation; (3) the extent to which he is confronted with evidence of his guilt; and (4) the additional pressure exerted to detain him." *Id.*

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<sup>1</sup> The state appeals court vacated Simpson's sentence for reasons not germane to this case. App. 215a.

The state appellate court observed that “[t]he conversations were held in an office,” they were “amicable,” “[t]he officers did not, at that time, see [Simpson] as a suspect,” and “[t]he officers told [Simpson] many times in both conversations that they were there to get information about Kelly.” App. 189a-190a. Simpson “was not confronted with any evidence suggesting that he may have been involved in the fire,” he was “not . . . placed under any additional restriction of his freedom,” and “[t]he questioning officer did not use coercion or threats.” App. 190a. Therefore, the court found that Simpson “was not in custody for purposes of *Miranda*.” *Id.*

The state appellate court next rejected Simpson’s claim that the two June statements were involuntary, and thus inadmissible: “The videotape of the [June 16th] interrogation does not reveal an unduly coercive environment or improper police tactics.” App. 193a. And although police threatened Simpson with “future charges for aggravated murder” if he failed to cooperate at the June 20th polygraph session, the court held that such a threat “is not sufficiently coercive, by itself, to render [Simpson’s] admissions involuntary.” App. 195a.

The Ohio Supreme Court declined discretionary review of the case. See *State v. Simpson*, 780 N.E.2d 286 (Ohio 2002).

### **C. The federal district court denied Simpson’s habeas petition.**

Simpson next sought habeas relief in federal court, raising eleven constitutional claims. The magistrate judge recommended that all the claims be dismissed save one—Simpson’s allegation that his

statements from June 16 and June 20 were unconstitutionally coerced. App. 175a. After viewing the videotapes, the magistrate found no constitutional error in the state court's admission of the two June statements: "Police did not use physical force or subject [Simpson] to an unduly lengthy interview process." App. 96a. Although the detectives repeatedly promised to advise the prosecutor of Simpson's cooperation during the interviews, the magistrate observed that "such statements did not render [Simpson's] confession(s) involuntary or coerced." App. 94a.

After reviewing the record de novo, the district court agreed with the magistrate and adopted the report and recommendation. App. 65a, 100a. The district court found that Simpson "was properly advised of his *Miranda* rights and voluntarily agreed to speak with the detectives" during the two June meetings. App. 64a. It further observed that Simpson "at no time clearly indicated that he did not want to talk, or that he wanted an attorney," and that the record contained no evidence of "coercive police tactics." App. 64a-65a. The court accordingly dismissed Simpson's habeas petition.

**D. The Sixth Circuit reversed the district court and vacated Simpson's life sentence.**

The Sixth Circuit reversed. First, the court found that the state trial court's admission of Simpson's two April statements violated *United States v. Mathis*, 391 U.S. 1 (1968): "Here, as in *Mathis*, state agents unaffiliated with the prison isolated an inmate and questioned him about an unrelated incident without first giving *Miranda*

warnings. The Supreme Court ruled that such action was improper and that any resulting statements must be suppressed.” App. 42a.

Second, the Sixth Circuit found no error in the state trial court’s admission of Simpson’s June 16th interview. The court concluded that Simpson validly waived his *Miranda* rights at this meeting, and that his incriminating statements were voluntarily made. App. 16a-25a.

Third, the Sixth Circuit held that the state court mistakenly admitted Simpson’s statements from June 20. The court acknowledged that the polygraph examiner advised Simpson of his *Miranda* rights, including his right to an attorney. App. 25a. But it found that the examiner violated the Fifth Amendment when Simpson asked him about the polygraph’s operation:

Simpson: It don’t make no difference if I was telling the truth, right?

Walker: Well-yeah, I mean, what would make the difference . . .

Simpson: Okay.

Walker: . . . do you follow what I’m sayin’? That’s . . . i-i-if you’re telling me the truth, then you won’t have a problem with the test. If you’re lying, then, uh, yeah, if I was lying, I probably would, I’d probably get an attorney, I probably wouldn’t take the test.

J.A. 531. The Sixth Circuit held that this “technique in which the interrogator tries to dissuade a suspect

from speaking with an attorney” runs afoul of *Miranda*: “Officer Walker crossed the line separating adversary from advisor when he said that Simpson only needed an attorney if he was lying.” App. 38a.

Having concluded that the state court erroneously admitted three of Simpson’s four statements, the Sixth Circuit performed a harmless error inquiry. The court held that the June 16th statement, standing alone, was “more than adequate to allow a reasonable juror to convict [Simpson] on the general intent crimes”—aggravated arson and the five counts of felonious assault. App. 51a. But it found “that the admission of the April statements was not harmless as to those convictions that required as an essential element a specific intent to cause the death of another.” App. 50a. Those April statements “made [Simpson] appear to the jury to be a liar,” App. 47a, thus undercutting “Simpson’s June statements admitting to participation [in the arson] but disclaiming knowledge or purpose,” App. 48a.

The Sixth Circuit then vacated Simpson’s three convictions for specific intent crimes—aggravated murder, murder, and attempted murder. That action reduced Simpson’s sentence from life to seventeen years. App. 51a & n.11.

### REASONS FOR GRANTING THE WRIT

The Court should grant both questions presented by the Warden. First, the circuits are sharply divided on the concept of “*Miranda* custody” in the prison setting. Under the majority view, a prisoner is in custody—and entitled to *Miranda* warnings—only when the questioner applies

additional restraints or coercive tactics beyond those inherent in prison life. Under the Sixth Circuit's bright line rule, by contrast, a prisoner is in custody whenever an official questions him in isolation about criminal conduct occurring outside the prison.

Second, the Sixth Circuit ignored AEDPA when it found constitutional error in the admission of Simpson's June 20th statement. *Miranda* condemns attempts by police to dissuade a suspect from invoking his right to counsel. It does not address a situation where an examiner reasonably responds to a question by a suspect about the operation of a polygraph test.

**A. The circuit courts are divided on the definition of “*Miranda* custody” in the prison setting.**

**1. The Court has never addressed the *Miranda* custody requirement for prison questioning.**

The “*Miranda* custody” question is critical because it defines when a suspect is entitled to the requisite warnings: A suspect must be advised of his right to remain silent and his right to an attorney whenever he “is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning.” *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). To “determin[e] . . . whether a suspect is ‘in custody’ for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” *California*

*v. Beheler*, 462 U.S. 1121, 1125 (1983) (citation omitted).

This inquiry is applied routinely to on-the-street questioning, investigatory traffic stops, and stationhouse interrogations. Courts first ask whether “a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave.” *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). If a reasonable person would feel so detained, courts then determine whether the questioning “exerts upon [the] detained person pressures that sufficiently impair his free exercise of his privilege against self-incrimination.” *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). Only when both prongs are satisfied must *Miranda* warnings be given. A stationhouse interrogation is the paradigmatic example of an environment that is both custodial and coercive. *Id.* at 438.

The “free-to-leave” test, however, does not readily transfer to prisons, because “[a] rational inmate will always accurately perceive that his ultimate freedom of movement is absolutely restrained.” *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985). The Sixth Circuit assumed that this Court’s decision in *Mathis* settled the matter, App. 41a, but it did not. *Mathis* established that *Miranda* applies in the prison context, 391 U.S. at 4-5, but it did not define *when* prisoners are in *Miranda* custody.

In *Mathis*, an IRS agent failed to give *Miranda* warnings to a state prisoner before questioning him about his tax returns. *Id.* at 2-3. The prisoner sought to suppress his statements in a later prosecution. The federal government claimed

that no violation occurred because the prisoner “had not been put in jail by the officers questioning him, but was there for an entirely separate offense.” *Id.* at 4. This Court disagreed: “[N]othing in the *Miranda* opinion . . . calls for a curtailment of the warnings to be given persons under interrogation by officers based on the reason why the person is in custody.” *Id.* at 4-5.

The *Mathis* Court understood the prisoner to be in *Miranda* custody when the questioning occurred, but it did not explain *why* that was so. As Justice Souter, sitting by designation on the First Circuit, recently observed, “[t]he Court . . . did not say whether the interview with Mathis fell within *Miranda* because of his incarceration or because of some other deprivation that was significant in the circumstances.” *United States v. Ellison*, No. 09-1234, 2010 U.S. App. Lexis 7814, at \*6 n.1 (1st Cir. Apr. 15, 2010).

The Court has “explicitly declined to address the issue of” of whether the questioning of an “incarcerat[ed] [suspect] constitutes custody for *Miranda* purposes.” *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010); accord *Illinois v. Perkins*, 496 U.S. 292, 299 (1990) (“The bare fact of custody may not in every instance require a warning even when the suspect is aware that he is speaking to an official, but we do not have occasion to explore that issue here.”). In *Bradley v. Ohio*, 497 U.S. 1011, 1012 (1990), Justice Marshall, dissenting from the denial of certiorari, observed that “the courts of appeals have approached the issue of what constitutes custody in the prison setting in differing ways.” He urged the Court to clarify the doctrine, *id.* at 1015,

but it has never done so, leaving the circuits to adopt their own formulations.

**2. Five circuits examine the totality of the circumstances to determine whether a prisoner is in *Miranda* custody during questioning.**

After *Mathis*, the circuits moved to define *Miranda*'s contours in the prison setting. A majority view emerged under which a prisoner is not automatically in "custody" by virtue of his incarceration; rather, the courts assess the totality of the circumstances to determine whether the custodial requirement is satisfied.

The Ninth Circuit led the way in crafting this majority rule, beginning with interviews concerning in-prison conduct. In *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978), the prisoner argued that he was entitled to *Miranda* warnings before guards questioned him about marijuana found in his cell, because his inability to "leave the prison freely" meant that he was "in custody." *Id.* at 428. In rejecting the prisoner's claim, however, the Ninth Circuit eschewed the traditional definition of "*Miranda* custody": "When prison questioning is at issue . . . th[e] 'free to leave' standard ceases to be a useful tool in determining the necessity of *Miranda* warnings." *Id.* The court instead adopted an alternative formulation—*Miranda* custody in prison occurs only when "a change in the surroundings of the prisoner . . . results in an added imposition on his freedom of movement." *Id.* This inquiry turns on "the language used to summon the individual, the physical surroundings of the interrogation, the extent to which he is confronted with evidence of his

guilt, and the additional pressure exerted to detain him.” *Id.*

Other circuits followed suit and applied *Cervantes* to assess whether an inmate’s admissions of prison misconduct were admissible under *Miranda*. See, e.g., *Garcia v. Singletary*, 13 F.3d 1487, 1492 (11th Cir. 1994); *Conley*, 779 F.2d at 973 (4th Cir.); *United States v. Scalf*, 725 F.2d 1272, 1275 (10th Cir. 1984).

Many courts went a step farther and used the same approach to evaluate the admissibility of in-prison statements by inmates about criminal conduct occurring *outside* the prison. In *Leviston v. Black*, 843 F.2d 302, 303 (8th Cir. 1988), for instance, a police officer twice questioned a prisoner (then serving time for assault) about an unrelated robbery. Applying the *Cervantes* factors, the Eighth Circuit observed that the prisoner initiated contact with police, that he was free to leave the interviews, that the interviews were brief, and that the officer did not use coercive tactics. *Id.* at 304. Therefore, the prisoner was not “in custody” and not entitled to *Miranda* warnings. *Id.* The First and Eleventh Circuits are in accord. See *Ellison*, 2010 U.S. App. Lexis 7814, at \*8 (no *Miranda* violation where prisoner informed police of desire to provide information, interview occurred in prison library, and officers told prisoner that he was not under arrest and did not have to cooperate); *United States v. Barner*, 572 F.3d 1239, 1245 (11th Cir. 2009) (same).

The fact that the inmate initiated the contact with police in these cases was a relevant factor in the totality analysis, but the case law establishes that

this factor is not dispositive. In *United States v. Menzer*, 29 F.3d 1223, 1225 (7th Cir. 1994), federal authorities sought to question a state prisoner (incarcerated on a probation revocation) about an unrelated arson. *Miranda* warnings were not required, the Seventh Circuit said, because the prisoner was not “in custody”; he voluntarily appeared for the interviews, the room was well lit and exposed to an office area, the door was unlocked, and the prisoner was free to leave at any time. *Id.* at 1232.

The Second Circuit reached a similar result in *Georgison v. Donelli*, 588 F.3d 145 (2d Cir. 2009). Detectives sought to question an inmate (then serving a sentence for robbery) about an assault. *Id.* at 149. The inmate agreed to the meeting, the interview occurred in the visitors’ room, and the inmate was not restrained. *Id.* “*Miranda* warnings were not required,” the Second Circuit held, because “there were no restrictions . . . over and above ordinary prison confinement” and the inmate “agreed to be interviewed.” *Id.* at 157 (citation omitted). When conducting its analysis, the court expressly declined “to interpret *Mathis*” as “stand[ing] for the proposition that persons in prison are per se ‘in custody’ for purposes of *Miranda*.” *Id.* at 154.

All five cases contained fact patterns similar to *Mathis*: police officers questioning a prisoner in isolation about criminal conduct occurring outside the prison. Yet all five circuits concluded that the prisoner was not in *Miranda* custody. See also 2 Wayne R. LaFave et al., *Criminal Procedure* § 6.6(b) (3d ed. 2007) (observing that “most courts” define *Miranda* custody in the prison setting as “some

added restriction on the inmate's freedom of movement during the interrogation").

**3. In the Sixth Circuit, an inmate is in *Miranda* custody whenever he is questioned about criminal conduct occurring outside the prison.**

The Sixth Circuit in this case parted ways with these five circuits. It interpreted *Mathis* to require *Miranda* warnings whenever an officer "unaffiliated with the prison isolate[s] an inmate and question[s] him about an unrelated incident." App. 42a. Such a prisoner is automatically "in custody" for purposes of *Miranda*. *Id.* In a subsequent decision, the Sixth Circuit reaffirmed its "bright line approach." *Fields v. Howes*, No. 09-1215, 2010 U.S. App. Lexis 17366, at \*25 (6th Cir. Aug. 20, 2010).

The Sixth Circuit offered three explanations for its rule. First, it stated that Simpson's in-prison interviews were "factually indistinguishable" from those in *Mathis*. App. 40a. But that observation presumes that the *Mathis* prisoner was "in custody" solely because officers "unaffiliated with the prison isolated [him] and questioned him about an unrelated incident." App. 42a. As discussed above, five circuits refuse to make that presumption. Rather, they read *Mathis* as inconclusive on the issue of *Miranda* custody in the prison setting, and they look to other authorities for guidance. See, e.g., *Ellison*, 2010 U.S. App. Lexis 7814, at \*6 n.1 (speculating that *Mathis* might have been in *Miranda* custody "because of some other deprivation that was significant in the circumstances"); *Georgison*, 588 F.3d at 155 ("*Mathis* does not detail the particular circumstances of the defendant's

interrogation in that case; e.g., whether the defendant was handcuffed, compelled to enter the interrogation room with investigators, and how many people were present during the interview.”).

Second, the Sixth Circuit stated that this Court’s recent opinion in *Maryland v. Shatzer* reinforced its interpretation of *Mathis*. In *Shatzer*, the Court addressed when, if ever, the police may reinitiate contact with a suspect who had previously invoked his Fifth Amendment right to counsel. 130 S. Ct. at 1217. The suspect in that case was incarcerated when police attempted to reinitiate contact. *Id.*

The Court noted that “[n]o one question[ed] that Shatzer was in custody for *Miranda* purposes during the interviews.” *Id.* at 1224. Extrapolating from that observation, the Sixth Circuit concluded that a prisoner must be in *Miranda* custody whenever he is treated like Shatzer—that is, “removed from the general prison population and taken to a separate location for questioning.” App. 43 n.8 (quoting *Shatzer*, 130 S. Ct. at 1225 n.8). But “the fact that no one questioned whether Shatzer was in custody[] does not mean (or clearly establish) that anytime an inmate is removed from the general prison population and interrogated he is ‘in custody’ for *Miranda* purposes.” *Fields*, 2010 U.S. App. Lexis 17366, at \*31 (McKeague, J., concurring). “Instead, it only means that the parties [in *Shatzer*], unlike the government in this case, did not make an issue of the ‘in custody’ requirement in relation to those specific interrogations.” *Id.*

What is more, the First Circuit, in an opinion by Justice Souter, recently read *Shatzer* as

supporting the opposite proposition—that an inmate’s incarceration does not necessarily render him “in custody.” The court reasoned that isolated interrogation in the prison is typically *less coercive* than in the stationhouse: “While the suspect in a case just like *Miranda* may well feel that the only way to end the pressure on him is to answer the questions, the usual circumstances of someone serving prison time following a conviction characteristically save him from any such apprehension.” 2010 U.S. App. Lexis 7814, at \*6 (citing *Shatzer*, 130 S. Ct. at 1224-25). Justice Souter explained that, “so long as [the prisoner] is not threatened with harsher confinement than normal until he talks” and “knows that the worst that can happen will be his return to prison routine,” *id.*, interrogation in prison does not “create the atmosphere of coercion subject to *Miranda* concern,” *id.* at \*8.

Third, the Sixth Circuit touted its rule as the better one because it “obviat[es]” the need for “fact-specific inquiries by lower courts into the precise circumstances of prison interrogations.” *Fields*, 2010 U.S. App. Lexis 17366, at \*25. But the Sixth Circuit’s approach also obviates the second half of the *Miranda* custody test: Instead of asking whether the suspect actually experienced “pressures that sufficiently impair[ed] his free exercise of his privilege against self-incrimination” during the questioning, *Berkemer*, 468 U.S. at 437, the Sixth Circuit *presumes* that such pressures exist whenever a prisoner is questioned in isolation. App. 42a; accord *Fields*, 2010 U.S. App. Lexis 17366, at \*24-25. By skipping the second inquiry, the Sixth Circuit’s rule “provid[es] greater [*Miranda*] protection to a

prisoner than to his nonimprisoned counterpart.” *Cervantes*, 589 F.2d at 427.

The division between the Sixth Circuit and its sister circuits is therefore both stark and entrenched. At least five other circuits would have applied a different rule to Simpson’s April statements. And the recent decision in *Fields* shows that the Sixth Circuit is not about to waver from its bright line approach. Given this state of affairs, the Court should accept Justice Marshall’s invitation from two decades ago and clarify the concept of *Miranda* custody in the prison setting. See *Bradley*, 497 U.S. at 1015.

**4. The Sixth Circuit ignored AEDPA when it concluded that its prison-custody rule is clearly established law.**

The Sixth Circuit’s ruling on Simpson’s April statements also warrants review for its treatment of AEDPA. Given the division of authority among the circuits, the court’s categorical approach—that a prisoner is in *Miranda* custody whenever he is questioned in isolation about outside criminal conduct—is not “clearly established” for AEDPA purposes.

AEDPA dictates that habeas relief shall not be granted “unless the [state court’s] adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law.” 28 U.S.C. § 2254(d)(1). The phrase “clearly established Federal law” “refers to the holdings, as opposed to the dicta, of this Court’s decisions as of the time of the relevant state-

court decision.” *Williams v. Taylor*, 529 U.S. 362, 412 (2000). A state court’s adjudication is not contrary to or an unreasonable application of clearly established federal law where this Court has never addressed the type of claim presented and the lower courts have diverged in their treatment of the claim. See *Carey v. Musladin*, 549 U.S. 70, 76-77 (2006); accord *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007).

The Ohio court of appeals found that Simpson’s April statements were admissible. Applying the totality of the circumstances test first adopted by the Ninth Circuit in *Cervantes*, the state court held that Simpson was not in *Miranda* custody during these interviews because there was no “added restriction on the prisoner’s already restricted freedom.” App. 18a.

In granting habeas relief to Simpson, the Sixth Circuit wrongly deprived the Ohio court’s reasonable decision of the deference it was due under AEDPA. The Ohio court applied a rule that is good law in at least five federal circuits. Only the Sixth Circuit takes a different approach. Given this divergence, one of two things must be true: either (1) the Sixth Circuit’s reading of *Mathis* is incorrect, and prisoners are not necessarily in *Miranda* custody whenever they are isolated and questioned about criminal conduct occurring outside the prison; or (2) the Sixth Circuit’s reading of *Mathis*, while plausible, is not clearly established by this Court’s decisions. If the former is true—and the Warden maintains that it is—then Simpson’s April statements are admissible despite the lack of *Miranda* warnings. But even if the latter is true, the

Ohio court of appeals did not misapply clearly established federal law when it adopted the majority view and affirmed the admission of those statements. See *Musladin*, 549 U.S. at 76-77; accord *Georgison*, 588 F.3d at 154, 158 (state court’s determination that prisoner was not in *Miranda* custody because “he was not shackled or otherwise subject to unusual restraints” during questioning “was not contrary to, or an unreasonable application of, clearly established federal law”).

**B. The Sixth Circuit failed to apply AEDPA deference to the state court’s reasonable decision on the admissibility of Simpson’s June 20th statement.**

The Sixth Circuit also disregarded AEDPA when it held that the admission of Simpson’s June 20th statement violated clearly established *Miranda* law. The Ohio court of appeals found no evidence that Simpson’s June 20th statement was unconstitutionally coerced, App. 195a, yet the Sixth Circuit disagreed, holding that the polygraph examiner improperly discouraged Simpson from invoking his right to counsel under *Miranda*. App. 38a. That analysis mischaracterizes the examiner’s statements, distorts this Court’s precedents, and ignores AEDPA.

After Simpson incriminated himself in the arson at the June 16th interview, detectives gave him a choice—he could take a polygraph and cooperate in their investigation of Daryl Kelly and Leah Smith, or he could return to prison and face aggravated murder charges. J.A. 492. Simpson agreed to the polygraph and, as the Sixth Circuit

found, validly waived his *Miranda* rights at the June 20th polygraph session. App. 29a-31a.

At the start of the session, the examiner re-informed Simpson of his right to an attorney. J.A. 528. Simpson asked, "Oh, I can have an attorney present [during the exam]?" *Id.* The examiner indicated that Simpson could consult with an attorney: "You c-can-any-anytime, you can always have an attorney present. It is my understanding that you wanted to take the test." J.A. 529. After this exchange, Simpson did not express any other interest in an attorney.

Simpson and the examiner then had a lengthy dialogue about the polygraph exam. Simpson first expressed irritation at the detectives: "[T]hey didn't tell me they was gonna make me take this test or hit me with charges today." *Id.* He next insisted, "I didn't do nothing . . . I'm gonna pass I'm-I'm gonna take this test," and asked the examiner, "what'd you do?" J.A. 530. The examiner responded: "Do you know you're telling the truth? If you're telling the truth, then you don't have to worry about uh-that kind of stuff. Now, if you're lying, then, yea, then, uh-I'm sure . . . they're gonna go and tell the prosecutor." *Id.*

Simpson then inquired about the polygraph itself: "It don't make no difference if I was telling the truth, right?" J.A. 531. The examiner responded: "[D]o you follow what I'm sayin'? . . . [I]f you're telling me the truth, then you won't have a problem with the test. If you're lying, then, uh, yeah, if I was lying, I probably would, I'd probably get an attorney, I probably wouldn't take the test." *Id.* This back-and-forth continued for ten more transcript pages.

Simpson repeatedly made ambiguous statements about his desire to take the exam, see, e.g., J.A. 532 (“I just don’t feel right about this.”); 537 (“I-I mean I-I’m gonna take it. I-I-I taking the test.”), and the examiner repeatedly tried to clarify Simpson’s intent, see, e.g., J.A. 532 (“You don’t feel right about uhm-taking the test? Or . . . you don’t feel right about what?”); 536 (“I’m totally lost. I don’t know where you stand. Whether you want to take the test, or whether you don’t.”); 537 (“I don’t give a rat’s ass whether you take this test or not. . . . What does matter to me is that you want to take it.”). This lack of cooperation prevented administration of the polygraph, but Simpson made additional statements during the session inculcating himself in the arson.

The Sixth Circuit held that the examiner “taint[ed] [Simpson’s] decision-making calculus” when he stated that “[Simpson] only needed a lawyer if he had lied or intended to lie.” App. 36a. This tactic, the court said, “is inherently coercive and violative of *Miranda*.” *Id.* Therefore, the Sixth Circuit concluded, clearly established federal law precluded admission of Simpson’s statements from June 20th at his trial. App. 38a.

Nothing in this Court’s case law, however, condemns what the examiner said. To be sure, the Court in *Miranda* disapproved various police practices designed to coerce confessions from suspects. One manual, for instance, advised police on how to address suspects after they expressed a “wish[] to speak to a relative or an attorney.” 384 U.S. at 454. The manual instructed the interrogator to say, “Joe, I’m only looking for the truth, and if you’re telling the truth, that’s it. You can handle

this by yourself.” *Id.* The Court formally condemned this practice in *Edwards v. Arizona*, 451 U.S. 477 (1981): Once a suspect “express[es] his desire to deal with the police only through counsel,” he “is not subject to further interrogation by the authorities until counsel has been made available to him.” *Id.* at 484-85.

But at no point did Simpson clearly express his wish to speak to an attorney. The examiner therefore could not have executed the tactic described in and denounced by *Miranda*—that is, to persuade a suspect to reconsider his invocation.

With no supportive authority from this Court, the Sixth Circuit grounded its analysis in pre-AEDPA circuit case law. App. 32a-34a. In *Kyger v. Carlton*, 146 F.3d 374, 379 (6th Cir. 1998), the suspect indicated that he would “just as soon have an attorney.” The Sixth Circuit treated this statement as an unequivocal request for counsel, and it held that the police should have terminated the interview under *Edwards*. *Id.* Alternatively, even if this was an equivocal request for counsel, the court held that a later statement by police—“If you ain’t got nothing to hide, you know, you can answer our questions”—“was an inappropriate effort at pressuring Kyger to answer.” *Id.*

Even if *Kyger* is clearly established law (and since it is only circuit authority, it is not), it gives a questioner two options in the face of a suspect’s equivocal invocation of his *Miranda* rights: He may make “an appropriate attempt to get [the suspect] to clarify his response,” *id.*, or he may continue the questioning without interruption, see *Davis v. United States*, 512 U.S. 452, 461-62 (1994). The

questioner may not, however, urge the suspect to keep talking under the guise of asking a clarifying question.

In this case, the examiner adhered to *Kyger's* directive. Simpson's statement—"Oh, I can have an attorney present?"—was, at best, an equivocal invocation of his *Miranda* rights. J.A. 528. The examiner answered with a proper clarifying response: "You c-can any-anytime, you can always have an attorney present." J.A. 529. Then, *at a later point in the interview*, Simpson asked whether it would "make [a] difference" on the polygraph "if [he] was telling the truth." J.A. 531. The examiner said it would: If Simpson had been "telling . . . the truth," then he "wo[uldn't] have a problem with the test." *Id.* But if Simpson had been "lying," he should "get an attorney" and "[not] take the test." *Id.*

As the transcript shows, the examiner was not responding to Simpson's ambiguous statement about his interest in an attorney. Thus, he was not attempting to influence Simpson's decision regarding whether to invoke *Miranda*. Rather, the examiner was answering an unrelated question posed by Simpson about the polygraph exam. Neither *Kyger* nor any holding of this Court prohibited the examiner from responding in the manner that he did.

Clearly established federal law directs police to inform a suspect of his right to an attorney (*Miranda*) and to honor a suspect's unequivocal invocation of that right (*Edwards*). Because the examiner did not violate either of these commands when he responded to Simpson's question about the polygraph, the Ohio courts reasonably admitted Simpson's statement from June 20 into evidence.

The Sixth Circuit's contrary determination is yet another example of its failure to afford proper deference to state court decision-making under AEDPA. See, e.g., *Renico v. Lett*, 130 S. Ct. 1855 (2010); *Berghuis v. Smith*, 130 S. Ct. 1382 (2010); *Smith v. Spisak*, 130 S. Ct. 676 (2010). This Court should accept review and reverse.

### CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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