No. 10-458

IN THE

Supreme Court of the United States

MICHAEL SHEETS, WARDEN,
Petitioner,

v.

DONOVAN E. SIMPSON,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a prison inmate is in "custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), when state agents unaffiliated with the prison isolate him from the general population and interrogate him about a crime unrelated to his incarceration.

2. Whether a state can demonstrate that a suspect knowingly and voluntarily waived his *Miranda* rights when the interrogating officers obtained the waiver by: (i) falsely promising the suspect that he would be released if he agreed to and passed a polygraph examination; (ii) threatening that if the suspect did not agree to waive his rights and submit to the polygraph, there would be "no holds barred" and he would "spend the rest of [his] life in jail"; and (iii) telling the suspect that he should invoke his right to counsel only if he was lying.

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BRIEF IN OPPOSITION

INTRODUCTION

The Warden and his *amici* principally argue that this Court should grant certiorari to resolve an alleged split between the Sixth Circuit and other courts of appeals regarding the circumstances in which a suspect interrogated while serving a sentence for an unrelated offense is in "custody" under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In fact, no such split exists. While the circuits may have used somewhat differing formulations of the test for custody, their fundamental conclusions have been wholly consistent. Unsurprisingly, therefore, no court has recognized any substantive disagreement—and the Sixth Circuit has expressly distinguished the cases on the other side of the alleged split.

Moreover, even if the alleged disagreement in the lower courts might otherwise merit review, the petition should still be denied because this case would be a poor vehicle for resolving it. Most importantly, the alleged split is not implicated here because the interrogations at issue were custodial even under the Warden's preferred formulation of the test. Indeed, the Warden has not cited any case holding an interrogation like the ones at issue here to be noncustodial.

This case is also a poor vehicle because of the presence of the second question presented. The Sixth Circuit held that respondent Donovan Simpson was entitled to partial habeas relief not only because his unwarned statements during two prison interviews should have been suppressed, but also because his *Miranda* waiver in a separate interview was rendered invalid by coercive police conduct. That holding is an independent and sufficient basis for the judgment below. Yet as to the second question presented, the Warden does not allege a conflict in the lower courts or otherwise attempt to satisfy this Court's criteria for certiorari. Instead, he argues that the Sixth Circuit misapplied *Miranda* and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d), to the particular circumstances of this case. But the decision below was correct. Moreover, even if the Sixth Circuit had erred, this fact-bound question would not merit this Court's review. Accordingly, even if this Court were inclined to take up the first question presented, it should await a case in which the correctness of the lower court's judgment depends solely on the resolution of that question and is not also supported by an independent holding that does not merit further examination.

STATEMENT

Simpson was convicted of murder and other offenses for aiding and abetting a fatal arson by serving as the driver for the principal offender. The evidence linking him to the crime consisted almost exclusively of statements he made during four police interviews, which were recorded and played in full at his trial. The Sixth Circuit granted partial habeas relief after concluding that the admission of three of those interviews was contrary to, or an unreasonable application of, clearly established federal law as established by *Miranda* and its progeny.

1. The first two interviews occurred in April 2000, while Simpson was incarcerated in an Ohio prison for an unrelated offense. The two officers investigating the arson—Detective Edward Kallay and Special Agent Dan Ozbolt—decided to question Simpson after an informant told them that he had been with their principal suspect, Daryl Kelly, either during or immediately after the crime.

The officers first arranged to question Simpson on April 24, 2000. Simpson was not told that they would be coming or of the purpose of their visit. A131-132.[1] Instead, he was "pulled from the general prison population and escorted to the warden's office by prison guards." Pet. App. 9a. The officers interrogated Simpson about the arson for approximately an hour, but did not advise him of his *Miranda* rights at any point. *Id.* at 39a. In response to questioning, Simpson "denied

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[1] Citations in the form "A__" refer to the Appendix that Simpson filed in the Sixth Circuit, which is available via PACER. *See* http://ecf.ca6.uscourts.gov (Dkt. No. 08-3224).

any involvement at all in the arson" but claimed to have incriminating information about Kelly and another suspect, Leah Smith. *Id.* at 38a-39a.

The officers questioned Simpson a second time on April 27. As on April 24, he had no advance notice of their visit and did not ask them to come. A136-137. Once again, the officers never advised him of his *Miranda* rights. Pet. App. 39a. Simpson's statements during this second session matched what he had told the officers during the first interview. *Id.* at 6a.

After the two April interviews, the officers arranged to have Simpson released from prison so that he could cooperate in their investigation. Pet. App. 6a-7a.

2. The third interview, which is not directly at issue here, occurred on June 16, 2000, several weeks after Simpson had been released. On that date, Kallay and Ozbolt re-arrested him for failure to comply with the conditions of his release and because he had not cooperated in their investigation. Pet. App. 7a, 13a.

By this point, the officers had come to believe that Simpson had helped Kelly commit the arson. They took him to a police station and questioned him about the crime for approximately two and a half hours. Although Simpson initially refused to talk about the arson, the officers pressured him to confess using a variety of tactics. Most notably, they told him that he faced life in prison or even the death penalty if he refused to cooperate, but suggested that he would receive lenient treatment if he admitted to being Kelly's driver. Pet. App. 13a-25a. Eventually, Simpson admitted to driving Kelly to commit the offense, but denied involvement in starting the fire and also "disclaimed having been involved in the planning of the attack or having any intent to kill or harm anyone." *Id.* at 25a.

3. The fourth interview, which is the subject of the Warden's second question presented, occurred on June 20. At the end of the June 16 interview, the officers promised (falsely, as it turned out) that if Simpson passed a polygraph and agreed to cooperate in their investigation, they would have him released again. Pet. App. 26a, 28a n.4. But they warned that if Simpson refused to take the polygraph or otherwise failed to cooperate, they would "charge [him] with complicity to commit agg[ravated] murder, right away." *Id.* The officers emphasized that he "d[id]n't have a choice at this time" regarding the polygraph interview. *Id.* at 27a.

On June 20, the officers brought Simpson back to the police station for the polygraph. As he was escorted into the interview room, Simpson expressed second thoughts about the test. Pet. App. 26a. In response, the officers reiterated that if he refused the polygraph, he would be charged with aggravated murder that day. *Id.* at 29a. They also threatened that if Simpson did not "cooperate" by taking the exam, "there are no holds barred, and you're gonnna lose. You're gonna spend the rest of your life in jail." *Id.*

Kallay and Ozbolt then left the room to allow the polygraph operator, Randy Walker, to conduct the exam. Walker began by informing Simpson of his *Miranda* rights. In the course of advising Simpson of his right to counsel, however, Walker told him that he should request a lawyer only if he "was lying" and implied that Simpson would not be able to take the polygraph—and thus, according to Kallay and Ozbolt, would immediately be charged with murder—if he requested a lawyer. Pet. App. 32a. Although Simpson stated that he was being "railroaded" and did not "feel right" about the interview, A526, A532, he eventually agreed to waive his rights and submit to the polygraph, A542.

"Simpson never actually took the polygraph, but spoke at length with [Walker]. At one point, he retracted his admissions of June 16th, returning to the position he took in April that he was not involved at all. However, after further pressure from Kallay and Ozbolt, Simpson admitted to being even more involved than he had admitted in his June 16th statement." Pet. App. 44a. Even in his June 20 statement, however, "Simpson still maintained that he had not been involved in the planning of the arson and had no intent to kill anyone." Pet. App. 45a.

4. Simpson was charged with aggravated murder, attempted murder, felonious assault, and aggravated arson. At trial, audiotapes of the April interviews and videotapes of the June interviews were played for the jury over Simpson's objection. The prosecution did not introduce any physical evidence tying Simpson to the crime. Pet. App. 48a.

The jury found Simpson not guilty of one count of aggravated murder, but guilty of the lesser-included offense of murder. It also found him guilty on the remaining counts, including a different count of aggravated murder. The trial court imposed a total term of 90 years to life. A7. The Ohio Court of Appeals remanded on a state-law issue that reduced this sentence to 79 years to life, but otherwise affirmed Simpson's convictions. Pet. App. 10a.

5. Simpson filed a timely federal habeas petition raising, among other claims, *Miranda* and voluntariness challenges to the admission of his April and June statements. The district court, accepting a magistrate judge's recommendations, denied relief. Pet. App. 60a, 98a. Simpson filed a timely notice of appeal and the dis-

trict court granted in part his request for a certificate of appealability. *Id.* at 11a.

6. The Sixth Circuit granted partial habeas relief, finding that the admission of Simpson's statements from three of the four interviews was contrary to or an unreasonable application of clearly established law.

The court concluded that the admission of Simpson's April statements was contrary to this Court's decisions in *Miranda* and *Mathis* v. *United States*, 391 U.S. 1 (1968), which held that a similar interrogation of a prisoner serving a sentence for an unrelated offense was custodial. The Court explained that there was "no relevant factual distinction between *Mathis* and the circumstances of Simpson's April statements." Pet. App. 42a.

With respect to the June 20 interview, the court held that Walker's suggestion that Simpson should only request a lawyer if he was lying rendered Simpson's waiver of his *Miranda* rights invalid because it implied that "if he requested an attorney, he would be admitting to lying, which would result in his immediately being charged with aggravated murder." Pet. App. 36a.

The Sixth Circuit granted only partial relief because it rejected Simpson's challenges to the admission of his June 16 interview. The court held that the erroneous admission of the other three interviews was prejudicial as to Simpson's convictions for aggravated murder, murder, and attempted murder—which required proof of specific intent to kill—but harmless as to his convictions for arson and assault because the properly admitted June 16 statements were sufficient evidence of guilt as to those general-intent crimes. Pet. App. 50a-51a.

Judge White concurred in part and dissented in part. She agreed with the majority that the admission of Simpson's statements during the April 24, April 27, and June 20 interviews violated clearly established law. But she also would have held the June 16 interview inadmissible under *Smith* v. *Illinois*, 469 U.S. 91 (1984), because the officers failed to terminate the interrogation immediately when Simpson unambiguously invoked his right to remain silent. Pet. App. 52a-59a.

REASONS FOR DENYING THE PETITION

I. THE *MIRANDA* CUSTODY ISSUE DOES NOT MERIT THIS COURT'S REVIEW, AND IN ANY EVENT THIS CASE WOULD BE A POOR VEHICLE FOR RESOLVING IT

More than twenty years ago, Justice Marshall urged this Court to "clarify 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 Warden argues that the Court should now "accept Justice Marshall's invitation." Pet. 22. But the Court has repeatedly and recently declined to consider this issue[2]—presumably because, although the courts of appeals have sometimes articulated the test for custody in the prison context in different ways, they have reached consistent results.

Nothing in the recent decisions of the Sixth Circuit creates a circuit conflict or otherwise makes this issue more suitable for the Court's review. If anything, fur-

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[2] *See, e.g.*, *Ellison* v. *United States*, 131 S. Ct. 295 (2010) (No. 10-5425); *Jones* v. *United States*, 130 S. Ct. 3371 (2010) (No. 09-10431); *Macklem* v. *California*, 552 U.S. 1189 (2008) (No. 07-7163); *Lindsey* v. *United States*, 552 U.S. 1077 (2007) (No. 07-5379).

ther guidance from this Court has recently become *less* necessary in light of *Maryland* v. *Shatzer*, 130 S. Ct. 1213 (2010), which squarely addressed the meaning of *Miranda* custody in the prison context. In so doing, *Shatzer* resolved the open question noted in Justice Marshall's *Bradley* dissent and also confirmed the correctness of the Sixth Circuit's decision in this case.

In any event, even if the question presented might otherwise merit review, the petition should be denied because this case is a poor vehicle for resolving it.

A. There Is No Conflict Among The Circuits

1. In the opinion below, the Sixth Circuit acknowledged that a prisoner serving a sentence for an unrelated offense is not necessarily in "custody" as that term was used in *Miranda*, but held that Simpson was in custody under the facts of this case because "state agents unaffiliated with the prison isolated [him] and questioned him about an unrelated incident." Pet. App. 42a. In the other recent Sixth Circuit case relied upon by the Warden, the court confirmed that "[a] *Miranda* warning must be given when an inmate is isolated from the general prison population and interrogated about conduct occurring outside of the prison." *Fields* v. *Howes*, 617 F.3d 813, 822 (6th Cir.), *pet. for cert. filed*, No. 10-680 (U.S. Nov. 18, 2010).

The Sixth Circuit's decisions in this case and *Fields* followed directly from *Mathis*, which also involved a conviction resting on unwarned statements "obtained from [a suspect] by a government agent while [the suspect] was in prison serving a state sentence." 391 U.S. at 2. In that case, the government argued that the petitioner had not been in "custody" for purposes of *Miranda* because he "had not been put in jail by the of-

ficers questioning him, but was there for an entirely separate offense." *Id.* at 4. The Court emphatically rejected this argument:

> There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision .... We find nothing in the *Miranda* opinion which 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 Sixth Circuit correctly concluded that *Mathis* controls this case because "[t]here is no relevant factual distinction between *Mathis* and the circumstances of Simpson's April statements. Pet. App. 42a. In both cases, "state agents unaffiliated with the prison isolated an inmate and questioned him about an unrelated incident without first giving *Miranda* warnings." *Id.*

2. The Warden first contends that the Sixth Circuit's reading of *Mathis* departs from the "added restriction" test for custody set forth in *Cervantes* v. *Walker*, 589 F.2d 424 (9th Cir. 1978), and subsequently adopted by several other circuits. Pet. 16-17. That characterization is refuted by *Cervantes* itself.

In *Cervantes*, the Ninth Circuit declined to read *Mathis* as "creat[ing] a *per se* rule that any investigatory questioning inside a prison requires *Miranda* warnings." 589 F.2d at 427. Such a rule, the court explained, would "totally disrupt prison administration" because it would prevent prison officials from engaging in "'[g]eneral on-the-scene'" questioning about incidents

occurring in the prison. *Id.*[3] Accordingly, the court concluded that a prisoner is in *Miranda* custody only if he is interrogated under circumstances in which "a reasonable person would believe there had been a restriction on his freedom over and above that in his normal prisoner setting." *Id.* at 428.

Crucially, however, the Ninth Circuit reconciled this "added restriction" test with *Mathis*, and did so in a way that anticipated the rule applied by the Sixth Circuit here:

> [The "added restriction" test] best reconciles *Mathis* with the principles of *Miranda*. The questioning of Mathis by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself may be said to have constituted an additional imposition on his limited freedom of movement, thus requiring *Miranda* warnings. ... At the same time, *Mathis*, so interpreted, does not bar all instances of the on-the-scene questioning so carefully excluded from the *Miranda* requirements.

589 F.2d at 428. In other words, *Cervantes* made clear that the type of interrogation at issue in this case and in *Mathis* requires *Miranda* warnings because such interrogation *by definition* constitutes an "added restriction" on a prisoner's freedom.

In subsequent cases, the Ninth Circuit has reaffirmed this rule and suppressed unwarned statements

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[3] In *Cervantes*, for example, a guard searching an inmate's cell found a substance later determined to be marijuana and asked the inmate, "'What's this?'" 589 F.2d at 427.

made in prison interviews that share these characteristics. *See, e.g., United States* v. *Cheely*, 36 F.3d 1439, 1447 (9th Cir. 1994) (finding a prison interrogation to be custodial and stating that *Mathis* and *Cervantes* established that "*Miranda* warnings were required where a prisoner was questioned 'by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself' because that questioning 'constituted an additional imposition on his limited freedom of movement'").

The Sixth Circuit's decisions in this case and in *Fields* are thus entirely consistent with *Cervantes*, which, as the Warden acknowledges, is the leading lower court precedent in this area. Pet. 16. Indeed, the Sixth Circuit's "bright line" test, *Fields*, 617 F.3d at 822, can be understood as a specific application of the "added restriction" test—an application endorsed by *Cervantes* itself.

3. The Warden next argues that the Sixth Circuit's decisions in this case and *Fields* conflict with the decisions of five circuits that have applied the *Cervantes* "added restriction" test to interrogations about conduct occurring *outside* the prison. Pet. 17-19. But each of the cases cited by the Warden is distinguishable. Moreover, the Sixth Circuit has *actually drawn* the relevant distinctions, making clear that there is no substantive disagreement among the lower courts—and also indicating that the Sixth Circuit's "bright line" test is subject to exceptions.

As the Warden concedes (Pet. 17), three of his five cases involved interviews that were conducted *at the inmate's request*. *See United States* v. *Ellison*, No. 09-1234, 2010 WL 1493847, at *3 (Apr. 15, 2010) ("[The suspect] had suggested such an interview, and [the offi-

cer] was there to take him up on his proposal."); *United States* v. *Barner*, 572 F.3d 1239, 1245 (11th Cir. 2009) ("Of particular significance is the fact that the ... interview was initiated by [the suspect] ...."); *Leviston* v. *Black*, 843 F.2d 302, 303 (8th Cir. 1988) ("[The suspect] initiated the police inquiry ...."). The Sixth Circuit cited and expressly distinguished *Leviston* on this basis, recognizing that an inmate who seeks out the police is in a very different situation from one who is isolated without his consent and then interrogated. *See* Pet. App. 40a n.7; *see also Fields*, 617 F.3d at 819 & n.4.[4]

The Warden's other two cases are distinguishable on a similar ground: Both inmates were asked in advance whether they were willing to meet with the officers under circumstances that made clear they were free to decline to do so, and both interviews were conducted in an open area. *See Georgison* v. *Donelli*, 588 F.3d 145, 149, 157 (2d Cir. 2009) (a guard "asked [the suspect] if he was willing to talk to the detectives," there "were no rules or regulations ... requiring an inmate to speak with visitors such as detectives," and the interview "took place in a visitor's room"); *United States* v. *Menzer*, 29 F.3d 1223, 1232 (7th Cir. 1994) (the inmate was "free to decide whether he wanted to meet with the agents" and the questioning occurred in an unlocked room with "two windows exposing the interview room to the prison administrative office area"). Once again, the Sixth Circuit has made clear that it

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[4] The Sixth Circuit has not expressly addressed *Ellison* and *Barner*, likely because those cases were not cited in the briefs in either this case or *Fields*. But the court's treatment of *Leviston* makes clear that it would distinguish *Ellison* and *Barner* on the same grounds.

would not hold an interview conducted under such circumstances to be custodial by expressly distinguishing *Menzer* on this basis. *See Fields*, 617 F.3d at 819 & n.4.[5]

Accordingly, the Warden has not identified a single case from another circuit that would have been decided differently by the Sixth Circuit. Moreover, other circuits reach the same result when presented with the facts on which the Sixth Circuit relied—i.e., when officers from outside the prison isolate an inmate and question him about unrelated criminal conduct, and where the inmate neither initiated contact with the officers nor agreed to the interview in advance.[6]

4. The Warden's *amici* add nothing to the split alleged by the Warden. They cite cases from ten circuits, including the Sixth Circuit, stating that *Mathis* does

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[5] As with *Ellison* and *Barner*, the Sixth Circuit has not expressly addressed *Georgison* because it was not cited in the briefs in this case or *Fields*. But the court's distinction of *Menzer* applies equally to *Georgison*.

[6] *See, e.g., Jackson* v. *Giurbino*, 364 F.3d 1002, 1008 (9th Cir. 2004) (citing *Mathis* for the proposition that "*Miranda* plainly applies" to such an interrogation); *United States* v. *Chamberlain*, 163 F.3d 499, 503 (8th Cir. 1999) ("Chamberlain's situation ... differs from Leviston's because Chamberlain did not initiate the conversations with [the investigating officers]"); *United States* v. *Byram*, 145 F.3d 405, 409 n.1 (1st Cir. 1998) (an inmate being held for another offense was in custody because "he was taken to a separate room in the courthouse, left effectively in [the questioning officer's] immediate control"); *United States* v. *Conley*, 779 F.2d 970, 974 n.5 (4th Cir. 1985) (suggesting that a district court properly applied *Mathis* to exclude statements made to an "'outside agent who has come in'" to the prison); *see also Barner*, 572 F.3d at 1245 (citing *Mathis* for the proposition that a suspect "in jail on another charge" was in "a form of custody that would generally require the administration of the *Miranda* warnings").

not establish that prisoners are *always* in custody for purposes of *Miranda*. *Amici* Br. 12-14. But the Sixth Circuit has not suggested otherwise. To the contrary, as explained above, the court has made clear that in numerous situations *Miranda* warnings are *not* required when a prisoner is questioned—often citing the very cases on which the *amici* now rely. For example, warnings are not necessary in cases involving "on-the-scene questioning by prison officials concerning an offense committed in the jail itself." *Fields*, 617 F.3d at 819 & n.3 (citing *Garcia* v. *Singletary*, 13 F.3d 1487 (11th Cir. 1994), *United States* v. *Conley*, 779 F.2d 970 (1985), and *United States* v. *Scalf*, 725 F.2d 1272 (10th Cir. 1984)). Similarly, warnings are not required when an inmate initiates the encounter or agrees to speak to the police and is not "interrogated in isolation." *Fields*, 617 F.3d at 819 & n.4 (citing *Menzer* and *Leviston*).

Accordingly, all of the circuits, including the Sixth Circuit, recognize that *Mathis* does not require warnings in *all* cases of prison interrogation. But courts have consistently recognized that warnings *are* required under the particular circumstances found here—i.e., where an inmate is interrogated [1] in isolation [2] by state agents other than members of the prison staff [3] about conduct occurring outside the prison, and [4] where the inmate did not initiate contact or agree to meet with the officers in advance. And the Sixth Circuit's "bright line" test does not apply outside this narrow class of interrogations.

5. Finally, even if the Sixth Circuit's recent decisions had created a circuit conflict, further review at this point would be premature. Although one judge on the court has expressed disagreement with the Sixth Circuit's approach, *see Fields*, 617 F.3d at 824 (McKeague, J., concurring), neither the Warden nor the re-

spondent in *Fields* sought rehearing en banc. The full Sixth Circuit thus has not yet considered the question.[7]

B. This Case Would Be A Poor Vehicle For Resolving The Question Presented

Even if this Court were otherwise inclined to clarify the circumstances under which a prison inmate is in "custody" for *Miranda* purposes, the petition should still be denied because this case presents a poor vehicle in which to take up that question.

1. Most importantly, the resolution of the question presented would not affect the outcome because Simpson was in custody during the April interviews under any test. The Warden and his *amici* appear to believe that courts should follow the Ninth Circuit's approach in *Cervantes* and examine the "totality of the circumstances" to determine whether the interrogation resulted in an "added restriction" on the prisoner's freedom of movement. Pet. 16-17; *Amici* Br. 10-12.

As noted above, the Sixth Circuit's conclusion in this case is entirely consistent with the "added restriction" test because, as *Cervantes* explained, questioning by officers from outside the prison about unrelated criminal conduct *by definition* "constitute[s] an additional imposition" on a prisoner's freedom. 589 F.2d at 428. But even setting aside the impositions that the Ninth Circuit correctly recognized to be inherent in the sort of interrogation at issue here, it is clear that Simp-

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[7] In light of these facts, the Warden's claim that the alleged split is "entrenched" because "the Sixth Circuit is not about to waver from its bright line approach," Pet. 22, is puzzling.

son was subjected to an "added restriction" over and above that inherent in everyday confinement.

As the Sixth Circuit explained, it is "undisputed" that prior to the April 24 interview Simpson was "pulled from the general prison population" and then "escorted to the warden's office by prison guards." Pet. App. 9a.[8] Courts applying the "added restriction" test hold that interviews conducted in such circumstances are custodial. *See, e.g.*, *Chamberlain*, 163 F.3d at 503-504 (prisoner was in custody where he was "escorted" to an interview in a "secure area" where he "could not have entered on his own"). Furthermore, in contrast to cases in which prison interviews have been held to be non-custodial, Simpson did not initiate the interviews and there was no indication that he "could have terminated his conversation[s] with [the officers]," *United States* v. *Willoughby*, 860 F.2d 15, 24 (2d Cir. 1988), or that "he was free to leave at any time," *Menzer*, 29 F.3d at 1232.[9]

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[8] The record contains less detail about the circumstances of the April 27 interview, but the parties and the courts below have treated the two interrogations as indistinguishable for purposes of the custody inquiry.

[9] The Ohio Court of Appeals stated that "[i]t does not appear from the record that [Simpson] was placed under any additional restriction of his freedom." Pet. App. 190a. But the court ignored Simpson's uncontradicted testimony at the suppression hearing that he was pulled from the general population by prison guards and escorted to the Warden's office. Simpson argued below that this was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). The Warden did not dispute the point, and the Sixth Circuit thus properly treated the additional facts reflected in Simpson's testimony as "undisputed." Pet. App. 9a.

2. This case is also a poor vehicle because of the presence of the second question presented, which seeks review of the Sixth Circuit's suppression of Simpson's June 20 interview on different grounds. As explained below, that question is splitless, fact-bound, and unworthy of this Court's review. *See infra* Part II. But even if this Court reversed the Sixth Circuit's suppression of Simpson's April statements, the result below would not change unless the Court also reviewed, and ultimately reversed, the Sixth Circuit's suppression of Simpson's June 20 interview: The erroneous admission of that interview could not be deemed harmless as to Simpson's convictions for aggravated murder, murder, and attempted murder, and thus would fully support the Sixth Circuit's grant of partial habeas relief even if Simpson's April statements were properly admitted.

The Sixth Circuit had no occasion to consider the prejudicial effect of the admission of the June 20 statements apart from the April statements. But the Warden has forfeited any claim that the erroneous admission of those statements was harmless error by failing to raise it below. *See* 2 Hertz & Liebman, *Federal Habeas Corpus Practice & Procedure* § 31.2a (5th ed. 2005) ("[T]he 'harmless error' obstacle does not arise unless the state asserts it; the state's failure to do so in a timely and unequivocal fashion waives the defense."). Indeed, during oral argument before the Sixth Circuit the Warden's counsel expressly waived any harmless-error argument as to the June 20 statement. *See* Oral Arg. Recording 25:39 ("[T]he main thing that got [Simpson] convicted were his confessions on June 16

and June 20, so I'm not arguing harmless error for those statements.").[10]

Accordingly, if the Court would otherwise be inclined to take up the first question presented in the petition but not the second, it should decline to review both questions pursuant to its customary practice of awaiting a case in which the correctness of the lower court's judgment turns on the resolution of the issue to be decided.[11]

3. This case is also a poor vehicle because the record in this habeas proceeding is deficient in a potentially significant respect. The Warden contends that whether Simpson was in custody depends on the "totality of the circumstances," including "'the extent to which he [was] confronted with evidence of his guilt, and the additional pressures exerted to detain him'" during the interview. Pet. 16-17. Much of the information relevant to this inquiry is contained in the audiotapes of Simpson's April interviews, which were played at trial and reviewed by the trial judge in ruling on Simpson's suppression motion. But the tapes are not part of the record before this Court because the War-

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[10] In any event, the admission of Simpson's June 20 statements plainly was not harmless. Far from being cumulative of his earlier statements, "Simpson's admissions on June 20th were, by far, the strongest evidence of not only his involvement in the arson, but also the *extent* of his knowledge and involvement before, during, and after the arson." Pet. App. 44a-45a.

[11] The fact that the suppression of the June 20 statements independently supports the Sixth Circuit's judgment also means that in the event that the Court chooses to take up the custody issue in another case, there would be no need to hold the Warden's petition pending the disposition of that case.

den failed to include either the tapes themselves or a transcript in the record filed in the district court.[12] A case with a more complete record would be a better vehicle for this Court to resolve the question presented and provide guidance to the lower courts.

C. The Sixth Circuit's Decision Was Correct

1. Further review is also unwarranted because the Sixth Circuit correctly concluded that the admission of Simpson's April interviews was contrary to clearly established law as established by this Court's decisions in *Miranda* and *Mathis*. Although *Mathis* did not elaborate at length on the test for custody in the prison context and left open the question whether prisoners are *always* in *Miranda* custody, the Court's decision necessarily established—at an absolute minimum—that an inmate *is* in custody if he is interrogated under circumstances that are materially identical to those in *Mathis*.[13]

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[12] Before the Sixth Circuit, Simpson argued in the alternative that this failure required a remand to supplement the record with the audiotapes. Appellant's Br. 37-38.

[13] The Warden's *amici* assert that *Mathis* does not establish even this much because "the issue of whether the defendant was in custody for purposes of *Miranda* was not challenged." *Amici* Br. 6. That is demonstrably incorrect. The government conceded that the suspect in *Mathis* was in "custody" in some sense of the word. But it argued vigorously that he was not in "custody" for *Miranda* purposes. *See* U.S. Br. 17, *Mathis*, No. 67-726, 1968 WL 129324 (U.S. Feb. 26, 1968) ("[T]he Court's analysis in *Miranda* indicates a finding that the type of custody involved in that case, combined with police interrogation, produced compelling pressures on the individual to speak against his will. There is no parallel here."). Accordingly, the dissent in *Mathis* described the Court as "concluding that petitioner was 'in custody' in the sense in which that

In this case, the Sixth Circuit found that Simpson's April interrogations were "factually indistinguishable" from the one in *Mathis*. Pet. App. 40a. The Warden did not dispute that characterization below, and still has not identified any relevant factual distinction in his petition. That should be the end of the matter: "A state-court decision [is] contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Williams* v. *Taylor*, 529 U.S. 362, 406 (2000).

The Warden and his *amici* argue that this reading of *Mathis* is inconsistent with *Illinois* v. *Perkins*, 496 U.S. 292 (1990), and Justice Marshall's dissent from the denial of certiorari in *Bradley*, 497 U.S. at 1015. *See* Pet. 14-16; *Amici* Br. 5-10. But *Perkins* simply noted that "[t]he bare fact of custody [on an unrelated offense] may not in every instance require a warning." 496 U.S. at 299. This statement recognized that *Mathis* did not establish a *per se* rule that inmates are *always* in custody. But nothing in *Perkins* remotely suggested that *Mathis*'s finding of custody was no longer good law on the facts present in *Mathis* itself. Similarly, Justice

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phrase was used in *Miranda*." 391 U.S. at 7 (White, J., dissenting). And subsequent decisions have consistently characterized the Court's holding the same way. *See New York* v. *Quarles*, 467 U.S. 649, 654 & n.4 (1984) (*Mathis* held that a "prison cell during [the] defendant's sentence for an unrelated offense" was a "custodial circumstance[]"); *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495 (1977) (discussing *Mathis* while reviewing precedents defining "custodial interrogation"); *Beckwith* v. *United States*, 425 U.S. 341, 347 (1976) (*Mathis* "squarely grounded its holding on the custodial aspects of the situation").

Marshall's opinion in *Bradley* noted that the courts of appeals had not treated *Mathis* as establishing that all incarceration constitutes *Miranda* custody and urged the Court to grant review to adopt such a *per se* approach. *See* 497 U.S. at 1012-1015. He did not remotely suggest that there was any doubt that *Mathis* remained good law on the facts at issue in that case.

2. Although it is not controlling here because it post-dates the Ohio Court of Appeals' judgment, this Court's recent decision in *Shatzer* further confirms the correctness of the Sixth Circuit's approach and the absence of any need for further review. Like this case, *Shatzer* concerned statements made by a suspect interviewed on two occasions while incarcerated for an unrelated offense. The specific question presented was whether that suspect was in "custody" for *Miranda* purposes during the two-and-a-half years *between* those interrogations, such that *Edwards* v. *Arizona*, 451 U.S. 477 (1981), barred the police from attempting to interrogate him a second time after he invoked his right to counsel during the first interview.

In *Shatzer*, the Court resolved the question left open in *Perkins*, holding that mere incarceration, without more, does not constitute "custody for *Miranda* purposes." 130 S. Ct. at 1224. The Court explained that during "the interim period during which [the] suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction," he was not in custody because the "coercive pressures identified in *Miranda*" were absent. *Id.*[14]

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[14] In light of this clear holding in *Shatzer*, the Warden and his *amici* are wrong to assert that "[t]he Court has never addressed

In holding that ordinary incarceration is not *Miranda* custody, however, the Court was careful to "distinguish the duration of incarceration from the duration of what might be termed interrogative custody." 130 S. Ct. at 1225 n.8. The Court explained that "[w]hen a prisoner is removed from the general prison population and taken to a separate location for questioning, the duration of *that separation* is assuredly dependent upon his interrogators" and accordingly *does* constitute *Miranda* custody. *Id.* It is undisputed that Simpson was "removed from the general prison population and taken to a separate location for questioning." Accordingly, *Shatzer* confirms that he was in custody for purposes of *Miranda*.

Relying on the Court's observation that "no one questions that Shatzer was in custody for *Miranda* purposes during the interviews," 130 S. Ct. at 1224, the Warden suggests that this aspect of *Shatzer* was merely dicta. Pet. 20. But that is incorrect. *Shatzer*'s holding elaborated on *Edwards* by establishing a bright-line rule that police may initiate questioning of a suspect who has previously invoked his *Miranda* right to counsel if and only if he has experienced a "break in custody" of more than "14 days." 130 S. Ct. at 1222-1223. The Court made clear that its distinction between ordinary incarceration (which is not *Miranda* custody) and "interrogative custody" (which is) was an important qualification to this 14-day rule, explaining that "once he has asserted a refusal to speak without the assistance of counsel[,] *Edwards* prevents any efforts to get [a suspect incarcerated for an unrelated of-

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the *Miranda* custody requirement for prison questioning." Pet. 13; *see also* Pet. 2; *Amici* Br. 5.

fense] to change his mind *during that interrogative custody*." *Id.* at 1225 n.8. This limitation is as much a part of the Court's holding as the 14-day rule that it qualifies.[15]

3. Finally, the Warden and his *amici* contend that the Sixth Circuit's approach improperly fails to consider whether a particular interrogation carries the coercive pressures that motivated the *Miranda* rule. Pet. 21-22; *Amici* Br. 15-18. But as the Sixth Circuit explained, the interrogations covered by its rule necessarily carry the same sorts of coercive pressures associated with stationhouse interviews: "Assuming that the inmate is indeed undergoing interrogation, being placed in a room, apart from others within the prison population, sequesters the prisoner with his accusers in the type of scenario for which *Miranda* seeks to provide protection." *Fields*, 617 U.S. at 823. And *Shatzer* confirms that such interrogations are inherently coercive

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[15] Contrary to the Warden's characterization, Pet. 20-21, the First Circuit's decision in *Ellison* does not adopt a different reading of *Shatzer*. In *Ellison*, the defendant did not argue that his case was factually indistinguishable from *Mathis*. Instead, he argued that *Mathis* established a *per se* rule that inmates are *always* in custody for *Miranda* purposes. *See* 2010 WL 1493847, at *2 n.1. In rejecting that argument, the court correctly explained that *Mathis* did not adopt such a *per se* rule and that *Shatzer* forecloses any claim that mere incarceration always constitutes *Miranda* custody. *See id.* ("[*Mathis*] 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. ... [T]he Court's opinion in *Shatzer* forecloses Ellison's reading of the case for the former proposition."). But nothing in this characterization of *Mathis* and *Shatzer* undermines the conclusion that where, as here, a prisoner is subjected to "interrogative custody" under circumstances indistinguishable from *Mathis*, he is in "custody" under *Miranda*.

because "the duration of [the inmate's separation from the general population] is assuredly dependent upon his interrogators." 130 S. Ct. at 1225 n.8. The Warden's contrary claim echoes the arguments made by the United States—and rejected by this Court—in *Mathis*. *See* U.S. Br. 19, *Mathis*, No. 67-726, 1968 WL 129324 (U.S. Feb. 26, 1968) ("Whatever facts may be presented by other instances of prison questioning, we submit that the circumstances of this case exhibit no 'pressures which work to undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely.'").

II. THE SIXTH CIRCUIT'S HOLDING THAT THE ADMISSION OF SIMPSON'S JUNE 20 STATEMENTS VIOLATED *MIRANDA* DOES NOT MERIT REVIEW

As to the second question presented, the Warden does not allege a split among the lower courts, suggest that the issue is of great importance, or otherwise attempt to satisfy this Court's traditional criteria for certiorari. Instead, the Warden challenges the Sixth Circuit's fact-bound application of *Miranda* and the AEDPA standard to the circumstances of this case. Such a request for error correction does not warrant this Court's review. In any event, the Sixth Circuit correctly held that Simpson's *Miranda* waiver was invalid and that a contrary determination would be an unreasonable application of *Miranda*. And that point becomes particularly clear when the scope of the question presented is properly expanded to encompass *all* of the police conduct bearing on the voluntariness of Simpson's waiver.

1. While advising Simpson of his *Miranda* rights on June 20, polygraph operator Randy Walker told him that he should request a lawyer only if he was lying:

"[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." Pet. App. 32a.

The Sixth Circuit held that Walker's statement rendered Simpson's subsequent waiver of his *Miranda* rights invalid because "[t]he obvious takeaway from the perspective of someone in Simpson's position is that, if he requested an attorney, he would be admitting to lying." Pet. App. 36a. The court explained that "[f]raming the issue in this way is inherently coercive and violative of *Miranda*." *Id.* The court further observed that Walker's comments incorrectly suggested that if Simpson requested an attorney, he would forgo his ability to take a polygraph examination and thus lose all hope of cooperating with the police: "It is quite possible that had Simpson spoken with an attorney, the attorney could have arranged for a polygraph at a later date. Officer Walker essentially advised Simspon to the contrary." *Id.* The Sixth Circuit concluded that to allow police to use these tactics to discourage suspects from invoking their right to counsel would be "an unreasonable reading of *Miranda*." *Id.*[16]

The Warden does not contend that the Sixth Circuit's interpretation of *Miranda* was contrary to the decision of any other court of appeals or inconsistent

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[16] The Warden states that "the Sixth Circuit found" that Simpson "validly waived his *Miranda* rights at the June 20th polygraph session." Pet. 24-25. But the Sixth Circuit held that Simpson's waiver of his *Miranda* rights was rendered invalid by Officer Walker's statements, which the Court found to be "inherently coercive." Pet. App. 36a.

with this Court's precedents. Instead, he argues only that this Court has not squarely addressed the question presented here and thus that the Sixth Circuit erred in holding that the Ohio courts' application of *Miranda* was unreasonable. That fact-bound inquiry does not merit this Court's review.

2. In an apparent attempt to raise a broader legal question, the Warden argues that the Sixth Circuit departed from AEDPA by relying on its own prior decision in *Kyger* v. *Carlton*, 146 F.3d 374 (6th Cir. 1998), rather than clearly established law as established by this Court's precedents. Pet. 26-28. This argument fails for two reasons.

First, the Sixth Circuit took care to note that "'only Supreme Court case law is relevant under the AEDPA in examining what Federal law is "clearly established."'" Pet. App. 38a n.6; *see also id.* at 34a n.5. Accordingly, the court relied on *Kyger*'s previous application of *Miranda* to similar facts only "because the relevant proposition from *Kyger* is that the statement in question was a clear violation of Supreme Court precedent." *Id.* at 34a n.5. Contrary to the Warden's characterization, therefore, the Sixth Circuit in no way "ignored" or "disregarded" AEDPA. Pet. 13, 24.

Second, although Simpson relied heavily on *Kyger* in the relevant portions of his briefs before the Sixth Circuit, *see* Appellant's Br. 55, the Warden did not deny that the case reflected clearly established law as established in *Miranda* or suggest that AEDPA barred reliance on *Kyger*. Instead, the Warden sought only to distinguish *Kyger* on its facts. *See* Appellee's Br. 62-63. Thus, the Warden has forfeited any AEDPA-based objection to the Sixth Circuit's reliance on *Kyger*.

3. In any event, even setting aside *Kyger* the Sixth Circuit's decision was correct. *Miranda* held that statements made during custodial interrogation may be admitted against a defendant only if he "voluntarily, knowingly, and intelligently" waived his rights. 384 U.S. at 444. The government bears the "heavy burden" of demonstrating a knowing and voluntary waiver. *Id.* at 475. In determining whether that burden has been met, "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Id.* at 476; *see also Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (a *Miranda* waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception").

As one example of a device used to "persuade, trick, or cajole [a suspect] out of exercising his constitutional rights," 384 U.S. at 455, *Miranda* noted that interrogation manuals advised police to respond to a request for counsel by "'suggest[ing] that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation.'" *Id.* at 454. The manual also advised police to tell the suspect: "[I]f you're telling the truth, that's it. You can handle this by yourself." *Id.* (internal quotation marks omitted). Relying on this passage, the Sixth Circuit held that Walker's statement that Simpson should request a lawyer only if he "was lying" was a tactic that had been "expressly disapproved" in *Miranda*. Pet. App. 36a.

The Warden does not appear to deny that *Miranda* bars police from telling a suspect that he should request counsel only if he is guilty. He argues, however, that this prohibition only applies after a suspect has *clearly*

requested counsel, and that this case is distinguishable because Simpson did not "clearly express his wish to speak to an attorney" and because the exchange that prompted Walker's improper statement was not about counsel at all. These arguments should be rejected.

First, once a suspect clearly requests counsel, *all* interrogation must cease immediately. *See Davis* v. *United States*, 512 U.S. 452, 459 (1994). *Miranda*'s disapproval of statements equating a request for counsel with an admission of guilt, in contrast, reflects the broader rule that police may not "threaten[], trick[], or cajole[]" a suspect into waiving his rights. 384 U.S. at 476. And, as the Sixth Circuit recognized, such a statement is equally coercive when it is made preemptively, before a suspect has had a chance to make a clear request. *See* Pet. App. 35a-36a. Accordingly, lower courts have interpreted *Miranda* to bar officers from obtaining waivers by discouraging suspects from invoking their rights even in the absence of clear invocations. *See, e.g.*, *Hart* v. *Attorney Gen. of Fla.*, 323 F.3d 884, 894-895 (11th Cir. 2003); *United States* v. *Harrison*, 34 F.3d 886, 891-892 (9th Cir. 1994); *United States* v. *Anderson*, 929 F.2d 96, 98 (2d Cir. 1991).

Second, the Warden gives no reason to think that statements like Walker's are less coercive when they are made in response to something other than a question about counsel. A pre-waiver statement equating an invocation of the right to counsel with an admission of guilt and suggesting that it will bar future opportunities to cooperate with police is "inherently coercive" no matter what prompts it. Pet. App. 36a.

Third, and in any event, Walker's statements here *were* linked to a discussion of the right to an attorney. The relevant colloquy began when Walker advised

Simpson of his right to counsel and Simpson responded, with surprise, "Oh, I can have an attorney present?" Pet. App. 31a. In response, Walker made clear that if Simpson exercised that right, he would not be able to take the test—which meant, in light of Kallay's earlier statements, that he would be charged with aggravated murder that day. *See id.* at 31a-32a (Walker: "You c-can any-anytime, you can always have an attorney present. It is my understanding that you wanted to take the test.").

The Warden argues that Walker's subsequent statement that Simpson should request a lawyer only if he was lying was unconnected to this discussion about the right to counsel and instead was "answering an unrelated question posed by Simpson about the polygraph exam." Pet. 28. But the brief intervening exchange must be viewed through the lens of Walker's implication that Simpson would not be allowed to take the polygraph if he requested an attorney. Under the circumstances, any discussion "about the polygraph exam" were closely connected with Simpson's decision whether to request an attorney.

Moreover, the videotape of the interview suggests that Walker's improper comment actually *was* made in direct response to a question about a lawyer. The Warden relies on the transcript, which records the relevant exchange as follows:

> SIMPSON: I understand I have a lot to lose.
>
> WALKER: If the person's telling the truth ...
>
> SIMPSON: It don't make no difference if I was telling the truth, right?
>
> WALKER: Well—yea, 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, yea, if I was lying, I probably would, I'd probably get an attorney. I probably wouldn't take the test.

A531. The video of the interview (which was part of the record before the Sixth Circuit) indicates that the first two statements by Simpson are transcribed incorrectly. The beginning of the first statement is unintelligible, but it appears to end with "... without no lawyer?" And the second statement appears to be: "It don't make no difference about counsel, right?"[17] Therefore, even if the Warden were correct that officers are free to disparage the right to counsel so long as they do not do so in response to the suspect's direct question about obtaining a lawyer, Walker's comment here was still improperly coercive.

4. Finally, two other aspects of the officers' conduct confirm that Simpson's June 20 *Miranda* waiver was invalid. Consideration of this additional conduct is appropriate because the voluntariness of a *Miranda* waiver must be determined based on "an inquiry into

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[17] The relevant exchange occurs at 14:02-14:08 in the video. This is not the only error in the transcript of the June interviews. The prosecution, which prepared the transcript, emphasized at trial that it was "in no way, shape or form ... a hundred percent accurate." A266. Before the Sixth Circuit, Simpson identified a material error in the transcription of the June 16 *Miranda* colloquy, *see* Appellant's Br. 38-39 & n.18, and the Warden "accept[ed] [Simpson's] transcription of the relevant portion of the June 16th interrogation," including the correction, Appellee's Br. 33.

the totality of the circumstances surrounding the interrogation." *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979). The validity of Simpson's June 20 *Miranda* waiver thus must be assessed in light of all of the relevant police conduct, two aspects of which—particularly in combination with Walker's improper comment—rendered the waiver involuntary.[18]

First, Simpson's agreement to waive his rights and participate in the polygraph interview on June 20 was induced by the officers' promise that if he passed a polygraph, they would "reinstate [his] bond" and release him. A492. But as Kallay candidly admitted, that promise was a sham—a deliberate lie intended to induce Simpson to agree to further questioning:

> Q: There is a reference at the end of the tape to if he passed the polygraph, you would let him reinstate his bond and let him back out of jail.
>
> Do you recall that?
>
> A: Yes, sir.
>
> Q: Was that accurate?
>
> A: No, sir.
>
> Q: Why would you tell him that if it wasn't accurate?

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[18] Although the Sixth Circuit rejected these additional arguments, *see* Pet. App. 29a-31a, Simpson is "'entitled ... to urge any grounds which would lend support to the judgment below.'" *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

> A: Because we had not had him take the polygraph test yet, and we still wanted him to take it.

A508-509; *see also* A332 (the officers "felt that like there might be more information that [they] could get by conducting more interviews").

Second, Simpson's waiver was also the product of the sort of "threat[s]" condemned in *Miranda*. When Simpson expressed second thoughts at the beginning of the June 20 interview, Kallay told him, among other things, that: "If you don't take the test today ... we're gonna file the paper on you today for complicity to commit agg[ravated] murder. It's that simple." A518.

As the Sixth Circuit recognized, these threats "had a very strong influence on Simpson's decision to waive his rights." Pet. App. 30a. Indeed, before waiving his rights, Simpson repeatedly stated that he had no choice but to take the test. *See, e.g.*, A521 ("I don't have a choice. At all. I don't have no choice."); A526 ("Well, I just feel like I'm be-being railroaded ...."); A527 ("I got to [take this test].... If I don't, they gonna ... put charges on me.").

Particularly when these two coercive tactics are considered in combination with Walker's attempt to dissuade Simpson from requesting counsel, as they must be, they confirm that the Sixth Circuit correctly held that his June 20 *Miranda* waiver was involuntary.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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