



No. 10-458

In the Supreme Court of the United States

MICHAEL SHEETS, Warden,

Petitioner,

v.

DONOVAN E. SIMPSON,

Respondent.

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

**REPLY IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

RICHARD CORDRAY
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Chief Deputy Solicitor General
**Counsel of Record*

DAVID M. LIEBERMAN

ELISABETH A. LONG

Deputy Solicitors

GENE D. PARK

Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-3980

alexandra.schimmer@
ohioattorneygeneral.gov

Counsel for Petitioner
Michael Sheets, Warden

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REPLY OF THE PETITIONER

This case warrants review. On the Warden's first question, the circuits apply inconsistent definitions of *Miranda* custody in the prison setting, and the admissibility of Simpson's April statements turns on that issue. The Court should resolve the confusion. On the second question, the Sixth Circuit expanded *Miranda* to a new scenario—where the suspect *seeks* advice from the officer on whether to invoke his rights. No clearly established law from this Court dictates how an officer should respond, and the Sixth Circuit exceeded its authority by condemning the officer's response here.

A. The Sixth Circuit's bright line test for *Miranda* custody in the prison setting departs from the majority approach.

1. *Mathis* did not address the issue of *Miranda* custody.

Simpson initially claims that this case can be resolved on *Mathis v. United States*, 391 U.S. 1 (1968), alone. The Sixth Circuit's decision, he says, "flowed directly from *Mathis*," Br. 9, which established that a prisoner is in *Miranda* custody whenever "state agents unaffiliated with the prison isolate[] an inmate and question[] him about an unrelated incident." Br. 10 (quoting App. 42a).

That claim dramatically overstates the scope of *Mathis*. Although the *Mathis* Court extended *Miranda* to the prison setting, it did not identify *why* the "deprivation" suffered by the defendant "was significant in the circumstances" to constitute *Miranda* custody. *United States v. Ellison*, No. 09-1234, 2010 U.S. App. Lexis 7814, at *6 n.1 (1st Cir.

Apr. 15, 2010); accord *Georgison v. Donelli*, 588 F.3d 145, 155 (2d Cir. 2009).

The *Mathis* Court’s failure to address the issue of “*Miranda* custody” is hardly surprising. As of 1968, the Court had not formulated a clear definition of *Miranda* custody. That development occurred years later. See *California v. Beheler*, 463 U.S. 1121, 1125 (1983). Moreover, the government’s *Mathis* brief did not press the custody issue generally; it argued a narrower proposition that *Miranda* should “appl[y] only to [the] questioning [of a prisoner] who is ‘in custody’ in connection with the very case under investigation.” *Mathis*, 391 U.S. at 4. While the Court rejected “such a distinction,” *id.*, it did not offer a framework for assessing *Miranda* custody in the prison setting.

To prove this point, the Warden cited five circuit decisions that rejected *Miranda* claims by prisoners who, like the *Mathis* defendant, (1) were questioned away from the general population, (2) by officials unaffiliated with the prison, (3) about matters occurring outside the prison. See Pet. at 17-18. Those authorities undercut Simpson’s claim (and the Sixth Circuit’s holding) that *Mathis* “necessarily established—at an absolute minimum—that an inmate *is* in [*Miranda*] custody if he is interrogated under [these] circumstances.” Br. 20.

2. Five circuits use a totality inquiry to define *Miranda* custody whereas the Sixth Circuit uses a bright line.

After *Mathis*, the lower courts developed “different approach[es] to the [*Miranda*] custody

determination . . . in the paradigmatic custodial prison setting.” *United States v. Conley*, 779 F.3d 970, 973 (4th Cir. 1985). Those efforts are far from consistent.

The Warden and Simpson agree on the origin of this endeavor: In *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978), the Ninth Circuit eschewed the traditional “free to leave” standard for *Miranda* custody in the prison context, instead asking whether the prisoner experienced “a restriction of his freedom over and above that in his normal prisoner setting.” *Id.* at 428. This inquiry examines “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.*

In dicta, the Ninth Circuit surmised that the circumstances of *Mathis*—“[t]he questioning of [a prisoner] by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison”—“may be said to have constituted an additional imposition on his limited freedom of movement.” *Id.* And as Simpson notes, the Ninth Circuit has not extended *Cervantes* to evaluate the admissibility of prisoner statements about conduct occurring *outside* the prison. Br. 12.

But five other circuits have. The Eighth Circuit led the way. In *Leviston v. Black*, 843 F.2d 302, 304 (8th Cir. 1988), the court employed the *Cervantes* factors to affirm the admissibility of a prisoner’s statements to detectives about outside criminal conduct. In *United States v. Menzer*, 29

F.3d 1223, 1232 (7th Cir. 1994), the Seventh Circuit adopted a similar approach in admitting an inmate's statement to federal agents, finding that the inmate suffered no "measure of compulsion above and beyond the confinement" during the interview. Accord *Ellison*, 2010 U.S. App. Lexis 7841, at *8; *Georgison*, 588 F.3d at 157; *United States v. Barner*, 572 F.3d 1239, 1245 (11th Cir. 2009).

Simpson discounts each of these decisions as myopically turning on one particular feature of the interview: the inmates in *Ellison*, *Barner*, and *Leviston* requested to speak with police, and the police in *Georgison* and *Menzer* asked the prisoners "in advance whether they were willing to meet," and interviewed them "in an open area." Br. 12-13.

To the contrary, each circuit "examined 'the totality of the circumstances' to determine whether the inmate was 'in custody' as set forth in *Miranda*." *Menzer*, 29 F.3d at 1232. Relevant factors included the initiating party's identity, the interview's location, its duration, the subject matter, the prisoner's ability to terminate the encounter, and the use of physical restraints or other strong-arm tactics. *Id*; accord *Ellison*, 2010 U.S. App. Lexis 7841, at *8; *Georgison*, 588 F.3d at 157; *Barner*, 572 F.3d at 1245; *Leviston*, 843 F.3d at 304. No one factor was controlling.

The Sixth Circuit, by contrast, "formalize[d] a bright line test." *Fields v. Howes*, 617 F.3d 813, 822 (6th Cir. 2010). On two occasions, the court has stated that a prisoner is in *Miranda* custody whenever "state agents unaffiliated with the prison isolate[] . . . and question[] him about an unrelated

incident.” App. 42a; accord *Fields*, 617 F.3d at 822. The Sixth Circuit extolled its “bright line approach” because it “obviate[s] fact-specific inquiries by lower courts into the precise circumstances of prison interrogations,” *id.* at 823—the very approach taken by five other circuits.

The inter-circuit disagreement—a “totality of the circumstances” inquiry or a “bright line test”—could not be more stark. Only this Court can resolve the confusion.

3. The admissibility of Simpson’s April statements turns on the issue of *Miranda* custody.

Finally, Simpson asserts that “resolution of the question presented would not affect the outcome.” Br. 16. He contends that he “was in custody during the April interviews” even under the totality approach used in the majority of circuits, adopted by the Ohio appellate court, and urged by the Warden here. *Id.* That argument fails for three reasons.

First, Simpson complains that he “did not initiate the interviews,” and that, on April 24, he was “pulled from the general prison population” and “escorted” to the meeting. Br. 17. Neither fact is dispositive in a totality inquiry. Notably, the prisoner in *Georgison* did not initiate his interview with detectives, and a guard escorted him to the meeting. See 588 F.3d at 149. Moreover, the fact that Simpson was “escorted” is not an *additional* restraint on his freedom. This was, after all, a prison. Inmates are typically escorted.

Second, many other factors confirm that Simpson did not experience “any measure of compulsion above and beyond the confinement” itself. *Menzer*, 29 F.3d at 1232 (alteration and citation omitted). On April 24, detectives interviewed Simpson in a less-secure administrative building away from the main compound. J.A. 131. And on April 27, detectives found Simpson in the infirmary, J.A. 136—an area that was presumably “well lit” and “expos[ed]” to medical staff and other inmates. *Menzer*, 29 F.3d at 1232. The encounters were not long (one hour and half an hour respectively), and the state court found no evidence that Simpson was restrained. App. 190a.

Third, Simpson’s *own testimony* establishes the low-key nature of these encounters. Simpson did not “feel threatened” on either date. Sixth Cir. Joint Appendix (“J.A.”) 200. He understood that he was “not being accused of anything,” J.A. 133, and that the detectives were there to deal: “They would go to bat” for him if he had “information about [Daryl Kelly].” J.A. 135.

Simpson’s claim that he would prevail under the totality-of-the-circumstances test also disregards AEDPA and the deferential posture of this proceeding. The Ohio appellate court employed the totality approach used in five circuits to determine *Miranda* custody. App. 188a-190a. Because the state court’s inquiry was not an “objectively unreasonable” application of that approach, its judgment cannot be disturbed on habeas review. *Renico v. Lett*, 130 S.Ct. 1855, 1862 (2010). Moreover, as Justice Marshall observed twenty years

ago, 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). Thus, “it cannot be said that the state court ‘unreasonably applied clearly established Federal law’” under 28 U.S.C. § 2254(d)(1). *Carey v. Musladin*, 549 U.S. 70, 77 (2006) (alterations omitted).

In short, this case more than satisfies the well-worn criteria for certiorari—lack of guidance from this Court, inter-circuit disagreement, and a state court caught in the middle. This Court should accept review and clarify the issue of *Miranda* custody in the prison setting.

B. This is an appropriate vehicle to resolve the issue.

Simpson next claims that two obstacles preclude review of the Warden’s first question regarding the April statements.

First, he argues that his April statements (and the *Miranda* custody issue) are inextricably bound to his June 20 statement. And because the Sixth Circuit’s treatment of that later statement is “unworthy of this Court’s review,” Simpson urges this Court to decline all review. Br. 18. As discussed below, however, the Warden’s second question *is* worthy of certiorari.

In any event, the Warden’s first question stands on its own because the admission of Simpson’s June 20 statement (if error) was harmless. On June 16, Simpson confessed to watching Kelly prepare the Molotov cocktail, driving Kelly to the

scene so he could “blow that bitch up,” and helping Kelly flee. J.A. 430, 438, 457. At this point, Simpson faced the “ugly truth” of an aggravated murder charge. App. 31a. His April statements—combined with his June 16 admissions—“made [Simpson] appear . . . to be a liar,” and demonstrated that he “must have acted with the purpose of causing death.” App. 47a. In fact, the Sixth Circuit avoided finding that the admission of the June 20 statement was *itself* reversible error. App. 50a. And for good reason: the June 20 statement was “all over the place”—Simpson “retracted his admissions of June 16,” but “admitted to being even more involved.” App. 44a. Given its frenetic nature, the June 20 statement was not essential to Simpson’s convictions.

Simpson also claims that the Warden waived any argument that the admission of his June 20 statement was harmless, Br. 18, but he is wrong. The Warden did acknowledge that “the main thing that got [Simpson] convicted were his confessions on *June 16 and June 20*,” and that the Warden could not “argu[e] harmless error for *those statements*.” Oral Arg. Recording 25:39 (emphases added). But the Warden said nothing about—let alone waived—harmless error with respect to the June 20 statement *alone*. In any event, the Sixth Circuit addressed harmless error, App. 43a, and this Court’s “practice permits review of an issue not pressed so long as it has been passed upon” below. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration and citation omitted). Therefore, if this Court declines the Warden’s second question, it should still resolve the *Miranda* custody issue, find the

admission of the June 20 statement harmless, and deny habeas relief.

Second, Simpson complains that the district court's habeas record does not include the audiotapes of his April statements (which were part of the state court record).¹ Br. 19. That is no obstacle to this Court's review. The burden is on *Simpson* to "prov[e] all facts necessary to show a constitutional violation." *Caver v. Straub*, 349 F.3d 340, 351 (6th Cir. 2003) (citation omitted). In proceedings below, the magistrate noticed that the record did not include recordings of Simpson's June statements and ordered the Warden to locate them. App. 156a. The Warden complied. App. 67a. Simpson did not then ask the magistrate to order production of the April recordings. Thus, the incomplete record in this case falls at Simpson's feet. His failure to ensure proper record development is a reason to deny habeas relief—*not a reason to grant it*. Yet the Sixth Circuit did so anyway.

If the existing record did not preclude the Sixth Circuit from granting habeas relief, it certainly does not preclude this Court from reviewing that judgment. After all, the validity of the Sixth Circuit's decision turns on a pure issue of law—whether *Miranda* custody should be assessed under a totality test or a bright line rule. This Court should resolve that threshold legal question. If it then finds the habeas record insufficient, the Court

¹ In habeas proceedings, the Warden must lodge relevant transcripts, but *not* recordings, with the district court. See Rule 5(c), Rules Governing § 2254 Cases.

has discretion to remand the case to the district court for an evidentiary hearing.

C. The Sixth Circuit contravened AEDPA by overturning the state court's reasonable judgment admitting Simpson's June 20 statement.

Simpson characterizes the Warden's second question as a "fact-bound application of *Miranda*" that fails "to satisfy this Court's traditional criteria for certiorari." Br. 25. To the contrary, the Warden seeks review of the Sixth Circuit's novel extension of *Miranda* to a circumstance not contemplated by any decision of this Court.

At the outset, the Warden acknowledges that his Petition relied on the June 20 interview transcript, as the Sixth Circuit did below. App. 32a. Simpson's transcription of the videotape, Br. 31, appears accurate, but it does not change the outcome of this question.

The Warden and Simpson agree on much. If a suspect makes an unequivocal request to consult an attorney, all questioning must cease. See *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). The officer may not cajole the suspect to change his mind by saying, "I'm only looking for the truth" or "You can handle this by yourself." *Miranda v. Arizona*, 384 U.S. 436, 454 (1966). If a suspect instead makes an equivocal request, the officer must either make "an appropriate attempt to get [him] to clarify his response," or continue the interview without interruption. *Davis v. United States*, 512 U.S. 452, 461-62 (1994).

For the sake of argument, the Warden accepts the cited passage from *Kyger v. Carlton*, 146 F.3d 374 (6th Cir. 1998). In the face of an “equivocal” request for counsel, the questioner may not engage in “an inappropriate effort [to] pressur[e] [the suspect] to answer” by telling him “[i]f you ain’t got nothing to hide . . . you can answer our questions.” *Id.* at 379. Rather, he must follow *Davis. Id.*; accord *Thompson v. Wainwright*, 601 F.2d 768, 769, 772 (5th Cir. 1979) (finding *Miranda* violation after suspect’s “equivocal request for legal counsel” because officer then told the suspect that counsel “could not relate [his] story to the police”).

That did not occur here. The examiner read *Miranda* warnings to Simpson at the start of the June 20 session, and Simpson did not request an attorney. J.A. 528. Later, while the examiner was describing the polygraph’s operation, Simpson apparently asked, “It don’t make no difference about counsel, right?” Br. 31.

At most, Simpson was asking the examiner for *advice* on whether to consult with counsel before taking the polygraph. His question was neither an equivocal nor an unequivocal request for counsel, as the Ninth Circuit made clear in *United States v. Ogbuehi*, 18 F.3d 807 (9th Cir. 1994). After receiving *Miranda* rights, the suspect there asked “Do I need a lawyer” or “Do you think I need a lawyer.” *Id.* at 813. The Ninth Circuit held that this statement “d[id] not rise to the level of an ‘equivocal request’” for counsel. *Id.*; accord *Norman v. Ducharme*, 871 F.2d 1483, 1486 (9th Cir. 1989) (suspect’s question “if

he should see a lawyer . . . d[id] not constitute an equivocal request for counsel”).

Although Simpson made no request for counsel, the Sixth Circuit condemned the examiner for “mov[ing] into the realm of offering advice.” App. 36a. To support that holding, the court cited *Kyger* and *Thompson*. But those cases implicated the *Davis* scenario; the suspect made an equivocal request for counsel and the officer asked an inappropriate clarifying question.

Here, by contrast, Simpson “asked for advice, not an attorney.” *Ogbuehi*, 18 F.3d at 814. Simpson offers no authority from this Court discussing an officer’s obligations when a suspect asks for advice. Maybe the officer should stop all questions as in *Edwards*, seek a *Davis*-type clarification, or repeat a prophylactic warning akin to *Miranda*. Or maybe the officer has no obligations at all.

Because this Court’s precedents do not provide an answer, the state court’s admission of Simpson’s June 20 statement did not violate any clearly established federal law.² See *Musladin*, 549 U.S. at 77.

² Simpson briefly contends that his *Miranda* waiver was involuntary due to a false promise (detectives pledged to reinstate Simpson’s bond if he cooperated) and a threat (detectives vowed to seek aggravated murder charges if he refused). Br. 32-33. The Sixth Circuit correctly rejected both claims. The first statement—cooperate and stay out on bond—was not “a promise of immunity,” App. 30a, but a common dilemma faced by every probationer who undergoes questioning. And the second—the threat of murder charges—was an “essentially true” appraisal of the evidence. *Id.*

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Chief Deputy Solicitor General
**Counsel of Record*

DAVID M. LIEBERMAN

ELISABETH A. LONG

Deputy Solicitors

GENE D. PARK

Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980

alexandra.schimmer@
ohioattorneygeneral.gov

Counsel for Petitioner
Michael Sheets, Warden

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Simpson offers no clearly established authority demonstrating that either statement rendered his *Miranda* waiver involuntary.

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