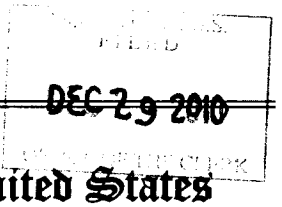
No. 10-680



In The

Supreme Court of the United States

CAROL HOWES,
Petitioner,

v.

RANDALL FIELDS,
Respondent.

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

REPLY BRIEF

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INTRODUCTION

In this habeas case, the United States Court of Appeals for the Sixth Circuit expanded *Miranda*'s requirements – creating a new rule that this Court has never established – which afforded prisoners with broader protections than citizens who are not incarcerated. Respondent's arguments against this Court granting the petition fail for three primary reasons.

First, this Court has never established as a "bright-line" test that *Miranda* warnings must be given whenever a suspect who is incarcerated is questioned away from the general prison population about conduct that occurred outside the prison. Respondent candidly acknowledges that this is a bright-line rule and proffers only that it is based on "legal principles" – not any specific *holding* of this Court. Never has this Court held that in such situations the surrounding circumstances do not matter. That is exactly what the Sixth Circuit did here when it created a per se rule.[1]

Moreover, because this Court has never held that this rule applies, the Sixth Circuit's new test cannot be considered clearly established federal law under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). A State court's opinion cannot be contrary to or an unreasonable application of a rule that does not exist. Respondent's claims that the Sixth Circuit's novel bright-line test fits "squarely" in clearly established precedent is unpersuasive in light of the

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[1] The Sixth Circuit employed the same approach in *Simpson v. Jackson*, 615 F.3d 421 (6th Cir. 2010). The State of Ohio has filed a petition for certiorari in *Simpson* (Case No. 10-458).

lack of a holding from this Court. The State court opinion here was not contrary to clearly established federal law.

Second, Respondent's attempt to distinguish and minimize the Circuit split on this jurisprudentially significant issue is unavailing. Respondent's effort to factually distinguish the cases from the other circuits highlights the fact that there is no per se rule. The Sixth Circuit's novel blanket rule has created an active split in the circuits on the issue presented here. No other circuit has created this rule. In fact, two circuits are directly in conflict.

Third, Respondent's focus on selected, disputed factual points surrounding the interview only emphasizes that there is no per se rule. Respondent's characterizations of those facts are not supported by the record. Moreover, the State court opinion was not an unreasonable determination of the facts in light of the evidence under AEDPA.

This Court should grant the petition.

ARGUMENTS

I. Respondent implicitly acknowledges that clearly established precedent does not establish a bright-line rule.

Respondent does not point to any holding of this Court that mandates that *Miranda* warnings be given whenever a prisoner is questioned away from the general prison population about conduct that occurred outside the prison. The Sixth Circuit's novel bright-line test is not established by this Court's holding in *United States v. Mathis*.[2] *Mathis* established no such rule. Rather, *Mathis* only held that *Miranda* generally applies to prisoners – rejecting the argument that *Miranda*'s holding should never apply to prisoners serving a sentence for an unrelated offense because they are not being held in custody for purposes of questioning.

Miranda held that the Fifth Amendment's privilege against self-incrimination also protects individuals from the "informal compulsion exerted by law enforcement officers during in-custody questioning."[3] The protection applies only when the suspect is "in custody."[4] In *Thompson v. Keohane*, this Court determined that whether a person is in custody is context specific – considering (1) circumstances of the interrogation and (2) whether a reasonable person would have felt able to end the interrogation and leave.[5] According to *Stansbury v. California*, all the

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[2] *Mathis v. United States*, 391 U.S. 1 (1968).

[3] *Miranda v. Arizona*, 384 U.S. 436, 464 (1966).

[4] *See Rhode Island v. Innis*, 446 U.S. 291, 300 (1980).

[5] *Thompson v. Keohane*, 516 U.S. 99, 112 (1995).

circumstances are reviewed, and the initial-custody determination is an objective standard.[6]

In *Mathis*, this Court addressed whether *Miranda* warnings apply to a suspect who was incarcerated on an unrelated matter.[7] Neither the government nor the defendant in *Mathis* challenged whether the defendant was in custody for *Miranda* purposes. The government argued, and this Court rejected, that *Miranda* was "applicable only to questioning one who is 'in custody' in connection with the very case under investigation."[8] Specifically, this Court concluded that there was no basis for "curtail[ing]" *Miranda* warnings "based on the reason why the person is in custody."[9]

Since this Court did not reach the issue presented here, the Sixth Circuit was wrong when it held: "The central holding of *Mathis* is that a *Miranda* warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated . . . about conduct occurring outside of the prison." Pet. App. 10a. To the contrary, in *Shatzer* this Court stated, "We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined

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[6] *Stansbury v. California*, 511 U.S. 318, 322 (1994).

[7] *Mathis*, 391 U.S. at 1.

[8] *Mathis*, 391 U.S. at 4.

[9] *Mathis*, 391 U.S. at 4.

to address the issue."[10] *Shatzer* further underscores the Sixth Circuit's error here.

Respondent unintentionally admits that the Sixth Circuit changed the law and did something new when it applied a new "bright line rule." Resp. Br. pp. 3, 18. Citing the Sixth Circuit's opinion, Respondent argues that "*a bright line rule only makes it easier to apply clearly established Federal law.*" Resp. Br. p. 19 (emphasis added). There is a reason that the Sixth Circuit rule is easier to apply – the court no longer needs to examine the surrounding circumstances to determine if the prisoner is in custody. But that is what makes it a new rule.

A new rule, by its nature, is not clearly established federal law.[11] Nor can an open question form the basis of clearly established federal law.[12] "[I]t is not 'an unreasonable application of clearly established Federal law' for a state court to decline to apply a specific legal rule that has not been squarely established by this Court."[13]

Respondent's claim that the Sixth Circuit's new rule is "clearly established" Supreme Court precedent under AEDPA is unpersuasive in light of this Court's

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[10] *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010). *See also 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").

[11] *Williams v. Taylor*, 529 U.S. 362, 381 (2000).

[12] *See Wright v. VanPatten*, 552 U.S. 120, 125 (2008); *Carey v. Musladin*, 549 U.S. 70, 76 (2006).

[13] *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009).

jurisprudence on that issue. In *Carey* and *Wright*, there was no holding from this Court requiring the rule the lower federal court applied.[14] Similarly, in *Berghuis v. Smith* and *Renico v. Lett*, this Court rejected the Sixth Circuit's expansion of the applicable rules.[15]

Respondent agrees that if the lower federal court "modified" this Court's precedent, it is not applying clearly established Supreme Court precedent. Resp. Br. p. 18. Here, the Sixth Circuit created a new rule because it has modified the general test from *Keohane* and *Thompson*, in which the court should examine the surrounding circumstances. Since the Sixth Circuit created a new rule, the State court's opinion cannot be contrary to clearly established federal law. And the fact that the other the circuits' decisions diverge is relevant to the inquiry whether there is clearly established federal law.[16] Here, the Sixth Circuit stands alone.

In examining only clearly established Supreme Court precedent, the State court correctly applied the principles of *Miranda* and its progeny to the facts here. Pet. App. 54a-56a. Based on the (1) circumstances of the interrogation and (2) whether a reasonable person would have felt able to end the interrogation and leave, the State court reasonably concluded that Respondent

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[14] *Carey*, 549 U.S. at 77; *Wright*, 552 U.S. at 125-126.

[15] *Berghuis v. Smith*, 130 S. Ct. 1382, 1393-1394 (2010) (noting precedent did not establish which test is required to calculate disparity for purposes of determining a Sixth Amendment fair-cross-section claim); *Renico v. Lett*, 130 S. Ct. 1855, 1866 (2010) (concluding that precedent did not mandate set three-part test for determining whether trial court exercised sound discretion before declaring a mistrial).

[16] *Carey*, 549 U.S. at 76.

was not in custody. The Sixth Circuit erred in holding that the State court opinion contradicted *Mathis*. Pet. App. 20a. The concurring opinion in this case was correct that neither *Mathis* nor *Shatzer* supports a per se rule. Pet. App. 22a-26a.

II. The Sixth Circuit's new rule creates an active split between the circuits.

The case here is indistinguishable from two circuit cases. Respondent's treatment of these cases underscores the fact of a conflict.

For the first case, the United States Court of Appeals for the Second Circuit in *Georgison v. Donelli* applied the fact-specific custody analysis used in *Miranda* cases.[17] In doing so, the Second Circuit flatly rejected that clearly established federal law created a per se rule.[18]

In the face of *Georgison*, Respondent claims that "*Georgison* really belongs in the . . . category of cases where the suspect consents to the interview," and therefore no *Miranda* warnings were required. Resp. Br. p. 14. Respondent's attempt to characterize *Georgison* as a consent case misses the mark. Custody – and therefore whether *Miranda* warnings were required – *was* the question in *Georgison*. If the Sixth Circuit rule were correct, Georgison was in custody and consent to interrogation would not change the fact. And

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[17] *Georgison v. Donelli*, 588 F.3d 145, 157 (2d Cir. 2009).

[18] *Georgison*, 588 F.3d at 156 ("Because the per se rule by Georgison is not clearly established federal law, the state courts here did not unreasonably decline to apply it.") citing *Musladin*, 549 U.S. at 77.

of course, the police must warn under *Miranda* before seeking to obtain a waiver for an in-custody suspect.[19] Accordingly, consent would not alleviate the obligation to provide the warnings under *Miranda*. Because the analysis of the Second Circuit cannot be reconciled with that of the Sixth, there is an unmistakable conflict between the present case and *Georgison*.

Moreover, in attempting to distinguish the case here on the facts, Respondent inadvertently confirms that *Georgison* rejects the bright-line test. Respondent notes that "there was no coercive pressure brought to bear that tended to undermine Georgison's will or to compel him to speak." Resp. Br. p. 14. The same is true here. But in claiming that *Georgison* involved "a less coercive atmosphere" than the case here, Respondent undermines his own argument that a per se rule is the test. Resp. Br. p. 17. An analysis of the surrounding circumstances is only relevant where there is no bright-line test, in contrast to the Sixth Circuit's holding here.

For the second case, Respondent fails to address the case at all, which the State briefed. Pet. pp. 11-12. In *United States v. Ellison*, the United States Court of Appeals for the First Circuit, written by Justice Souter, explained that the restrictions placed on a prisoner's freedom of movement "do not necessarily equate his condition during any interrogation with *Miranda* custody."[20] Justice Souter relied on this Court's discussion in *Shatzer*, that *Mathis* did not specifically

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[19] *Miranda*, 384 U.S. at 478-479.

[20] *United States v. Ellison*, 2010 U.S. App. LEXIS 7814 (1st Cir. Apr. 15, 2010).

address the circumstances of custody and why it fell within *Miranda*.[21] But Justice Souter believed that *Shatzer* foreclosed any possibility of a bright-line rule.[22] *Ellison* is squarely in conflict with the Sixth Circuit decision here.

Regarding the other circuit court cases, Respondent misses the point of the State citing those cases. Respondent claims that because those cases involve other exceptions to *Miranda* or different circumstances, they are irrelevant to the question whether there is a split in the circuits. But Respondent cannot dispute the real point that in those cases the circuits rejected a per se rule regarding custody.[23] The fact that the circuits have universally rejected the bright-line rule set forth by the Sixth Circuit in varied circumstances, underscores that no per se rule exists. In fact, the Sixth Circuit did not need to look to the other circuits to see this point. It was in its own precedent.[24]

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[21] *Ellison*, 2010 U.S. App. LEXIS at *7.

[22] *Ellison*, 2010 U.S. App. LEXIS at *7.

[23] *See Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir. 1978); *United States v. Conley*, 779 F.2d 970, 972 (4th Cir. 1985); *United States v. Menzer*, 29 F.3d 1223, 1232 (7th Cir. 1994); *United States v. Scalf*, 725 F.2d 1272, 1275 (10th Cir. 1984); *Garcia v. Singletary*, 13 F.3d 1487, 1491 (11th Cir. 1994); *United States v. Willoughby*, 860 F.2d 15, 24 (2d Cir. 1988); *Alston v. Redman*, 34 F.3d 1237, 1245 (3d Cir. 1994); *Leviston v. Black*, 843 F.2d 302, 304 (8th Cir. 1988).

[24] *See United States v. Ozuna*, 170 F.3d 654, 658 (6th Cir. 1999) ("[P]risoners are not free to leave their prisons, but *Miranda* warnings need not precede questioning until there has been 'a restriction of [the prisoner's] freedom over and above that of his normal prisoner setting.'"), quoting *Cervantes*, 589 F.2d at 428.

III. Respondent's factual assertions only underscore that the proper inquiry requires looking at the surrounding circumstances, and here, such a review supports the State court opinion.

Respondent undermines his argument for the existence of a per se rule when he attempts to characterize and highlight the importance of certain facts surrounding the interview. But Respondent's characterizations are mistaken, and the State court opinion was not an unreasonable determination of the facts in light of the evidence under 28 U.S.C. § 2254(D)(2).

Unlike Respondent's assertions, deputies did not "*extract*[ ] an inculpatory statement." Resp. Br. p. 3 (emphasis added). Nor was Respondent "*deprived* of his freedom of movement in a significant way," beyond the broader context of already being in jail. Resp. Br. pp. 3, 5 (emphasis added). Nor is there any support for any suggestion that Respondent was being deprived of his medications to achieve a confession. Resp. Br. pp. 5, 21. Nor is there any support for the implication that there was a point in time during the interview when Respondent became angry, asked to leave, but no one returned him to his cell. Resp. Br. p. 6.

Rather, Respondent is a man with a bachelor's degree in psychology and a master's degree in counseling. Pet. App. 81a. When Respondent was escorted from his holding cell to a conference room, he was neither shackled nor handcuffed. Pet. App. 67a-69a, 71a-72a. Further, any implication from Respondent that the door to the conference room was locked is incorrect. Resp. Br. pp. 5, 16, 21. The Sixth

Circuit majority misconstrued Respondent's testimony. Pet. App. 3a. Respondent's unremarkable testimony was that the door separating the jail from the administrative offices was locked, not the door to the conference room where he was interviewed. Pet. App. 71a-72a, 91a. This was not an interrogation room, but a well-lit conference room that contained a conference table, chair, desk, and wipe-board. Pet. App. 88a.

Respondent admitted that he "could get up and leave whenever [he] wanted to." Pet. App. 70a-71a. At one point in the interview, following being confronted with the accusations, Respondent became belligerent and was told he could return to his cell. Pet. App. 125a-126a. Even Respondent's version of that event includes that he was told he could leave. Pet. App. 71a, 88a-93a. At that time, Respondent never asked to return to his cell but continued with the interview. Pet. App. 92a-93a, 126a. In fact, Respondent admitted that he believed that a jailer would have taken him back to his cell if he had asked. Pet. App. 92a. Respondent was never physically touched or threatened while interviewed. Pet. App. 88a-89a, 129a.

Respondent never asked to leave the conference room. Pet. App. 124a, 130a. Respondent then admitted to engaging in oral sex with the victim and manually masturbating the victim. Pet. App. 112a-114a, 124a-126a.

The factual circumstances surrounding the interview support the State court's opinion that Respondent was not in custody during the interview. There was no unreasonable application of clearly established Supreme Court precedent.

CONCLUSION

This Court should grant the petition.

Respectfully submitted,

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