AUG 1 2011

No. 10-1540

In the Supreme Court of the United States

DAVID BOBBY, Warden,

Petitioner,

v.

ARCHIE DIXON,

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

MICHAEL DEWINE
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
THOMAS E. MADDEN
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
alexandra.schimmer@
ohioattorneygeneral.gov

Counsel for Petitioner
David Bobby, Warden

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REPLY OF THE PETITIONER

At an evening police interview on November 9, 1993, Archie Dixon received two warnings under *Miranda v. Arizona,* 384 U.S. 436 (1966), signed a waiver, and affirmed that he was acting of "his own free will." App. 127a. He then confessed to murdering Chris Hammer. Although police improperly withheld *Miranda* warnings to Dixon at an encounter earlier that day, the Ohio Supreme Court determined that Dixon's statement at the evening interview was voluntary and admissible under *Oregon v. Elstad*, 470 U.S. 298 (1985).

According to Dixon, the Sixth Circuit's judgment below—condemning the Ohio Supreme Court's analysis and granting habeas relief—"fully comports" with this Court's decisions. Opp'n at 8. He is wrong. The Sixth Circuit ignored *Miranda*'s "custody" requirement, incorporated a novel state-of-mind inquiry into *Elstad*, and denounced a common method of police questioning. Dixon offers no defense of these actions; he simply parrots the Sixth Circuit's analysis and proclaims its fidelity to precedent.

Given the gravity of the errors and the number of conflicts created by the decision below, the Court should grant certiorari.

A. The facts are not in dispute; the law is.

Throughout his Opposition, Dixon embraces the state trial court's opinion. To be clear, the Warden does not quibble with the trial court's factual recitation, which matches the Ohio Supreme Court's. The Warden disputes the trial court's *legal analysis* and the Sixth Circuit's decision adopting it.

As to the facts, the state trial court offered a fair summary. During a visit to an impound lot on November 4, 1993, Dixon encountered two detectives who sought to question him about Hammer's disappearance. "Dixon was not in custody, and not under arrest" at the time, and he "departed . . . without answering questions." Trial Ct. Op. at 6 (attached to Opp'n).

On November 9, police arrested Dixon for auto title forgery. Detectives questioned him between 11:30 a.m. and 3:30 p.m., but the actual interview was much shorter because "there were frequent breaks." *Id.* at 10. Although Dixon was in custody, detectives made the "conscious choice not to *Mirandize* [him]." *Id.* at 11. Responding to their questions, Dixon confessed to selling a car "by means of a false State I.D. card and a false duplicate title," *id.*, but he insisted that he had "[n]othing whatsoever" to do with Hammer's disappearance.[1] App. 186a.

After locating Hammer's dead body, detectives brought Dixon back to the station at 7:30 p.m. for a second interview. Dixon (1) inquired if police had "dug up a body," (2) asked "whether Hoffner was in custody," and (3) indicated that he would "tell the detectives everything." Trial Ct. Op. at 15.

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[1] At this first session, Dixon says he expressed a "clear statement that he had already requested a lawyer." Opp'n at 10. That is inaccurate. As the state trial court observed, Dixon made a "cryptic reference" to an attorney, but his words "did not amount to an invocation of his Fifth Amendment right to counsel." Trial Ct. Op. at 25 (citing *Davis v. United States*, 512 U.S. 452 (1994)).

Detectives then "read Dixon his *Miranda* rights and warnings, and had Dixon sign the standard written waiver form." *Id.* at 16.

Detectives spoke with Dixon "between 7:30 and 8:00 p.m.," but "[n]o record exists as to [their] statements or comments." *Id.* At 8:00 p.m., detectives started a recording device.[2] They "began with a verbal rehashing of the *Miranda* rights and warnings, and Dixon reiterated his written waiver." *Id.* Dixon then confessed to murdering Hammer with his accomplice, Timothy Hoffner.

Although this recitation is largely accurate, the trial court's legal analysis was off the mark.

Due to the absence of *Miranda* warnings, the trial court properly suppressed Dixon's statements at the first November 9 interview. Trial Ct. Op. at 21. But the court went further. It held that the *Miranda* error at the first interview tainted the second interview and, with it, Dixon's murder confession.

The trial court rejected the State's invocation of *Oregon v. Elstad*, 470 U.S. 298 (1985), because that case "involved no purposeful conduct on the part of the police." *Id.* at 31. Instead, the court imported a fruit-of-the-poisonous-tree analysis from *Wong Sun v. United States*, 371 U.S. 471 (1963): "When a purposeful *Miranda* violation occurs, the court said, "a subsequent warned statement is inadmissible even if it was voluntarily made." *Id.* at 34.

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[2] Regarding this second session, Dixon claims that "[o]nly after getting incriminating statements from [him] did the police turn on the tape recorder and give basic *Miranda* warnings." Opp'n at 10. Not so. Dixon signed a *Miranda* waiver *at 7:30 p.m.*, at the very start of this interview. See App. 189a.

By contrast, the Warden argues—and the Ohio court of appeals, the Ohio Supreme Court, the federal district court, and Judge Siler's dissent below agreed—that the detectives' state of mind on November 9 is irrelevant. So long as Dixon's confession at the second (warned) interview was voluntary, it was admissible under *Elstad*.

This dispute forms the core of the Warden's petition for certiorari.

B. The Sixth Circuit ignored the "custody" requirement of *Miranda*.

The Sixth Circuit identified "three clear constitutional errors" in the Ohio Supreme Court's decision approving the admissibility of Dixon's confession. App. 12a.

The court first highlighted Dixon's exchange at the impound lot on November 4: "Dixon had made it completely clear to the police that he did not want to talk to detectives without a lawyer present." App. 10a. According to the Sixth Circuit, this encounter triggered "the bright-line rule of *Miranda* against further interrogation," rendering Dixon's confession on November 9 inadmissible. App. 11a.

This is a patent misapplication of *Miranda*. To trigger "the bright-line rule" against further interrogation," the suspect must invoke his rights "in the context of custodial interrogation." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2090 (2009). Because Dixon was not in custody on November 4, he could not "invoke his *Miranda* rights anticipatorily" to prohibit police questioning on a later date. *McNeil v. Wisconsin*, 501 U.S.171, 182 n.3 (1991).

Dixon criticizes the Warden for discussing *Edwards v. Arizona*, 451 U.S. 477 (1981), in his petition. Although the Sixth Circuit's opinion cited *Edwards*, Dixon says that the court relied entirely "upon fundamental principles of *Miranda*." Opp'n at 8.

Even if one accepts that dubious claim, the Sixth Circuit still misconstrued *Miranda*'s "fundamental principles." The decision protects "an individual . . . subjected to *custodial* police interrogation." *Miranda*, 384 U.S. at 439 (emphasis added). Dixon does not—and cannot—defend the Sixth Circuit's extension of *Miranda* to the non-custodial setting.

C. The Sixth Circuit improperly evaluated the detectives' state of mind.

The Sixth Circuit found Dixon's confession inadmissible for a second reason: The detectives' "deliberate, planned refusal to warn" Dixon of his *Miranda* rights at the first session on November 9 tainted the second session in which he confessed to murder. App. 12a.

Dixon asserts that "the Circuit was correct to consider the deliberate nature of the violation." Opp'n at 9. That is wrong.

1. The interviewer's state of mind is irrelevant to the *Elstad* inquiry.

In *Elstad*, the Court outlined the inquiry for determining when "an initial failure of law enforcement to administer the warnings required by *Miranda* . . . 'taints' subsequent admissions made after a suspect has been fully advised of and has

waived his *Miranda* rights." 470 U.S. at 300. The analysis turns on "voluntariness." A court first asks whether the suspect's initial statement, "though technically in violation of *Miranda*, was voluntary." *Id.* at 318. It then determines "whether . . . the second [warned] statement was also voluntarily made." *Id.* If the suspect spoke voluntarily on both occasions, "[n]o . . . purpose is served by imputing 'taint' [from the unwarned statement] to subsequent statements." *Id. see also id.* at 305-08 (rejecting the *Wong Sun* fruits doctrine for analyzing the admissibility of a subsequent warned confession following an initial failure to warn).

The "voluntariness" inquiry examines "the characteristics of the accused and the details of the interrogation." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). But the police officer's state of mind "is irrelevant to the question of . . . voluntariness." *Moran v. Burbine*, 475 U.S. 412, 423 (1986). Just last term, this Court emphasized that "an officer's purely internal thoughts *have no conceivable effect* on how a reasonable person in the suspect's position would understand his freedom of action." *J.D.B. v. North Carolina*, 180 L.Ed.2d 310, 326 n.8. (2011) (emphasis added).

The facts are clear: Detectives deliberately withheld *Miranda* warnings at the first meeting on November 9. But the law is equally clear: The detectives' state of mind is irrelevant to an assessment of whether Dixon's confession at the second November 9 meeting was voluntary or coerced. The Ohio Supreme Court correctly discounted this evidence in its *Elstad* analysis. See App. 124a ("Dixon has failed to explain how the

detectives' subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent.").

2. Dixon offers no support for his contrary reading of *Elstad*.

Taking the opposite view, Dixon says that the touchstone of *Elstad* is "whether the violation of *Miranda* was deliberate or not," and courts should apply the voluntariness test in only those cases that involve a *Miranda* "oversight." Opp'n at 9.

Not so. The *Elstad* framework governs all violations of *Miranda*, "[w]hatever the reason." *Elstad*, 470 U.S. at 316. Indeed, the *Elstad* Court expressed clear disinterest in the explanation behind the officer's failure to issue *Miranda* warnings in that case: The violation could have been inadvertent—he was "confus[ed] as to whether the brief exchange qualified as 'custodial interrogation.'" *Id.* at 315. Or the violation could have been intentional—the officer was "reluctan[t] to initiate an alarming police procedure." *Id.* In both instances, the voluntariness inquiry applies with equal force.

Invoking *Missouri v. Seibert*, 542 U.S. 600 (2004), Dixon argues that *Elstad* is "limited . . . to 'arguably innocent neglect of *Miranda*.'" Opp'n at 9. But he mistakenly quotes the plurality opinion to advance that proposition.

Justice Kennedy's concurrence is the controlling opinion in *Seibert*. See *Marks v. United States*, 430 U.S. 188, 193 (1977). And his concurrence makes clear that a "deliberate violation of *Miranda*" is not enough to remove a case from the *Elstad* framework. *Seibert*, 542 U.S. at 620. *Elstad* becomes

inapplicable only when officers deliberately recite *Miranda* warnings "midinterrogation, after inculpatory statements have already been obtained." *Id.*

Detectives did not use that technique on Dixon—they did not elicit incriminating statements about Hammer's murder, recite *Miranda* warnings, and then re-elicit those same incriminating statements. The *Elstad* voluntariness test therefore applies, and the deliberate nature of the detectives' violation is irrelevant. The Sixth Circuit was wrong to hold otherwise.

Contrary to Dixon's assertions (Opp'n at 9), the decision below creates deep divisions in lower court authority. Other circuits apply *Elstad* as "the general rule," *United States v. Street*, 472 F.3d 1298, 1312 (11th Cir. 2006), and they invoke *Seibert*'s "presumptive rule of exclusion" in the rare case where police "intentionally withh[old]" *Miranda* warnings "until after the suspect confesses," *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004). The Sixth Circuit turned that framework on its head: *Elstad* is the exception, applying only to "momentary, innocent failure[s] to warn." App. 12a. A broad theory of exclusion—essentially, a fruit-of-the-poisonous-tree rule—governs all other cases

The Court should resolve this disagreement.

D. The Sixth Circuit denounced a long-sanctioned interview tactic.

Dixon embraces the Sixth Circuit's third holding: the Ohio Supreme Court's voluntariness finding "was based on an unreasonable determination of facts." App. 13a.

The Ohio Supreme Court reviewed every aspect of the November 9 interviews: their length and location; Dixon's age, education, and familiarity with the criminal justice system; the absence of physical coercion or threats; and Dixon's verbal responses to detectives. Balancing this evidence, the court determined that Dixon's statements at both sessions were voluntary. Therefore, his confession at the second (warned) session was admissible under *Elstad*. See App. 121a-128a.

Both the district court and the dissenting judge below characterized this finding as "reasonable," and they were right.

Dixon offers two meager responses: First, he trumpets the opinion of the state trial court, which "decid[ed] that Mr. Dixon's statement was involuntary." Opp'n at 11 (citing Trial Ct. Op. at 37-38). That reliance is misplaced. On habeas review, federal courts examine "the last state court to issue a reasoned opinion." *Payne v. Bell*, 418 F.3d 644, 660 (6th Cir. 2005). Under 28 U.S.C. § 2254(d), the question is not whether the Ohio Supreme Court performed a better analysis than the trial court, but only whether its analysis is "reasonable."

The Ohio Supreme Court's analysis is both reasonable and better than the state trial court's. It examined the same interview recordings and transcripts. But unlike the trial court, the Ohio Supreme Court applied the correct legal standard. Whereas the trial court relied on the detectives' "deliberate decision" to withhold *Miranda* warnings, see Trial Ct. Op. at 37, the Ohio Supreme Court properly dismissed that state-of-mind evidence as

irrelevant to the question whether Dixon spoke voluntarily. See App. 124a.

Next, Dixon condemns the detectives' "get on the bus" admonition in the first November 9 interview as an "inherently coercive tactic." Opp'n at 12. Yet he commits the same mistakes as the Sixth Circuit. [3]

Dixon was entirely unphased by the "bus" comment: "That's no problem," "I told you everything I know," and "All I know is that [Hammer] said he was going to Tennessee." App. 183a, 186a. These are hardly the responses of an individual bullied into a confession. (Dixon only confessed four hours later, after he learned that police had located a body and spoke to Hoffner, and after police issued two *Miranda* warnings.)

Moreover, the "bus" comment is simply a variant of the "prisoner's dilemma." Harboring suspicions that two individuals committed a crime, police offer favorable treatment to the one who cooperates first. Neither this Court nor any other court has condemned this interview practice. See *Elstad*, 470 U.S. at 317 (refusing "to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily"). To the contrary, courts have deemed it "constitutional." *United States v. Maddox*, 48 F.3d 791, 796 (4th Cir. 1995); accord *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978).

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[3] Dixon also mischaracterizes the statement as an ultimatum to "confess" or "get the electric chair." When detectives made the comment, this was a missing persons case. Given that fact, it is inconceivable that detectives were threatening a death sentence unless Dixon confessed to murder.

The Ohio Supreme Court's *Elstad* analysis flagged all the signs of voluntariness: Dixon twice "waived his rights," he indicated that he was acting "of his own free will," he affirmed that "no deals or promises had been made," he "remained calm and collected," and "there was no evidence of mistreatment." App. 127a. To overturn that reasonable judgment, the Sixth Circuit took two impermissible steps—it ignored the dictates of 28 U.S.C. § 2254 and it barred a common method of police questioning.

E. Dixon's remaining arguments misstate the record and the law.

Dixon attempts to defeat the Warden's petition with two other arguments—both frivolous.

First, Dixon claims that "the Ohio Supreme Court improperly imposed the burden on [him] to prove that his confession was coerced." Opp'n at 12. To the contrary, the Ohio Supreme Court made clear that "*the state* carrie[d] the burden of proving voluntariness by a preponderance of the evidence." App. 124a (emphasis added). The court even referenced the leading federal case—*Colorado v. Connelly*, 479 U.S. 157 (1986)—for that rule. *Id.*

Second, Dixon contends that the Anti-Terrorism and Effective Death Penalty Act (AEDPA) "does not apply" because the Ohio Supreme Court "did not, and could not, apply *Seibert*" on direct appeal. Opp'n at 14-15. All four federal judges assigned to this case rejected that proposition. And for good reason: AEDPA governs any claim "adjudicated on the merits in State court." 28 U.S.C. § 2254(d). Because

the Ohio Supreme Court adjudicated Dixon's *Miranda* claim "on the merits," AEDPA applies.

To be sure, an open question exists on whether *Seibert* qualifies as "clearly established Federal law" under AEDPA in this case. The Ohio Supreme Court rejected Dixon's appeal in April 2004. While his petition for certiorari was pending, this Court issued *Seibert*. Because the Ohio Supreme Court did not have the benefit of *Seibert*, it is unclear whether a federal court can apply that decision on habeas review. (The Court will resolve this question shortly in *Greene v. Fisher*, No. 10-637.)

But the question is academic. Even if *Seibert* supplies "clearly established law" for this case, Dixon cannot show that the Ohio Supreme Court's decision was "contrary to" or an "unreasonable application of" *Seibert*.[4] 28 U.S.C. § 2254(d)(1). As explained above, Justice Kennedy's controlling opinion establishes a presumptive rule of exclusion when police deliberately elicit a confession, recite *Miranda* warnings, and then re-elicit the same confession. Because the detectives did not use that technique on Dixon, this case is "governed by the principles of *Elstad*." *Seibert*, 542 U.S at 622.

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[4] Dixon is also not "entitled to de novo review" because the Ohio Supreme Court's opinion failed "to address the impact of *Seibert*." Opp'n at 15. AEDPA "does not require citation of [this Court's] cases—indeed, it does not even require *awareness* of [those] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early v. Packer*, 537 U.S. 3, 8 (2002).

* * *

Because detectives violated *Miranda* at the first November 9 interview, the Ohio courts properly suppressed Dixon's statements from that session. But extending that remedy to the second November 9 interview (where detectives issued two *Miranda* warnings) was wrong: The Sixth Circuit ignored this Court's precedents, parted company with its sister circuits, and denounced well-worn police interviewing techniques. Errors of such magnitude warrant certiorari.

CONCLUSION

The Court should grant the Warden's petition.

Respectfully submitted,

MICHAEL DEWINE
Attorney General of Ohio

ALEXANDRA T. SCHIMMER*
Solicitor General
**Counsel of Record*
DAVID M. LIEBERMAN
Deputy Solicitor
THOMAS E. MADDEN
Assistant Attorney General
30 East Broad St., 17th Floor
Columbus, Ohio 43215
614-466-8980
alexandra.schimmer@
ohioattorneygeneral.gov

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