Supreme Court, U.S.
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In the Supreme Court of the United States

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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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE—NO EXECUTION DATE SET

QUESTIONS PRESENTED

1. Did the Sixth Circuit contravene the directives of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") when it abandoned the "in custody" requirement of *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981)?

2. Under the clearly established law of *Oregon v. Elstad*, 470 U.S. 298 (1985), does the interviewer's state of mind have any bearing on whether a suspect's statement is voluntary?

3. Did the Sixth Circuit exceed its authority under AEDPA when it condemned the use of the "prisoner's dilemma"—where the police indicate that favorable treatment will go to the first suspect who cooperates—as an unconstitutionally coercive interrogation tactic?

LIST OF PARTIES

The Petitioner is David Bobby, the Warden of the Ohio State Penitentiary. Bobby is substituted for his predecessor, Marc C. Houk. See Fed. R. Civ. P. 25(d).

The Respondent is Archie Dixon, an inmate at the Ohio State Penitentiary.

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PETITION FOR WRIT OF CERTIORARI

The Attorney General of Ohio, on behalf of David Bobby, Warden of the Ohio State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion, *Dixon v. Houk*, 627 F.3d 553 (6th Cir. 2010), is reproduced at App. 4a. The Sixth Circuit's order granting en banc rehearing is reproduced at App. 2a, and its order reinstating the panel opinion is reproduced at App. 1a. The United States District Court for the Northern District of Ohio's opinion is reproduced at App. 44a. The Ohio Supreme Court's opinion on direct appeal, *State v. Dixon*, 805 N.E.2d 1042 (2004), is reproduced at App. 116a.

JURISDICTIONAL STATEMENT

The Sixth Circuit vacated its order granting the Warden's petition for rehearing en banc on April 6, 2011. The Warden now files this petition and invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

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

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

On November 9, 1993, detectives twice questioned Respondent Archie Dixon about the disappearance of his former roommate. At the morning encounter, detectives failed to give *Miranda* warnings. But they also did not get anywhere with their questions; Dixon denied any knowledge of his roommate's whereabouts. Several hours later, detectives dug up a body. At an evening interview, after detectives issued two sets of *Miranda* warnings, Dixon confessed that he and an accomplice violently attacked his roommate and then buried him alive.

The Ohio Supreme Court conducted a faultless analysis of the confession's admissibility under *Oregon v. Elstad*, 470 U.S. 298 (1985): Dixon's initial (unwarned) encounter with detectives, though in violation of *Miranda*, was voluntary; and his statements at the later (warned) session were voluntary. Given "the[se] surrounding circumstances and the entire course of police conduct," the state court concluded that Dixon's confession was "voluntarily made" and, thus, admissible under *Elstad*, 470 U.S. at 318.

In overturning that judgment, the Sixth Circuit mangled three blackletter rules of criminal procedure. First, the court stated that Dixon had invoked his *Miranda* rights during a prior conversation with police on November 4, and that *Edwards v. Arizona*, 451 U.S. 477 (1981), prohibited any questioning on November 9. But the *Edwards* bar does not apply because Dixon was not "in custody" during that previous meeting with police.

Second, the Sixth Circuit complained that detectives deliberately withheld *Miranda* warnings at the first interview on November 9. But an officer's state of mind is irrelevant to whether *a suspect's statement* "is knowingly and voluntarily made." *Elstad*, 470 U.S. at 309.

Third, the Sixth Circuit held that detectives coerced Dixon's statements by inviting him to "cut a deal" before his accomplice—a classic "prisoner's dilemma." The State is aware of no authority condemning this interrogation method as unconstitutionally coercive.

Each holding defies well-established precedent from this Court, creates stark divisions of authority among the circuit courts, and ignores the deferential nature of federal habeas review under AEDPA. For these reasons, this Court should grant the Warden's petition and reverse the Sixth Circuit's judgment.

STATEMENT OF THE CASE

A. Dixon violently attacked his former roommate and buried him alive.

In the early morning hours of September 22, 1993, Dixon and his two former roommates—Timothy Hoffner and Christopher Hammer—traveled to the Toledo home of Dixon's girlfriend, Kirsten Wilkerson. Once there, Dixon and Hoffner attacked Hammer. Hoffner tried to break Hammer's neck while Dixon struck him with a wine bottle—all while Hammer begged them to stop. Dixon and Hoffner then tied Hammer to a ladder, emptied his wallet, and seized his birth certificate and social security card. App. 117a.

Dixon, Hoffner, and Wilkerson drove Hammer to a wooded area. Dixon and Hoffner then gagged and blindfolded Hammer, tied his hands and feet behind his back, and pushed him into a freshly dug grave. After smoking a cigarette and saying a prayer, they buried Hammer alive. Dixon and Hoffner then walked across the grave to pack down the dirt. App. 117a-118a.

An autopsy report concluded that Hammer "remained conscious during the first two to three minutes" after being buried alive. App. 119a. "[W]ithin eight minutes," he "died of asphyxia." *Id.*

B. After police located the victim's body, Dixon confessed to the murder.

On September 25, 1993, Dixon obtained a state identification card bearing his photograph and Hammer's name. Five days later, he secured a duplicate certificate of title to Hammer's Dodge Daytona, and sold the car for $2,800. App. 118a.

About a month later, on November 1, a police officer stopped Dixon for a traffic violation. After discovering that Dixon lacked driving privileges, the officer impounded the car. An inventory search uncovered the identification card with Hammer's name and Dixon's photograph. App. 118a.

On November 4, as part of the investigation into Hammer's disappearance, Detective Ron Scanlon traveled to the Sylvania Township Police Department to meet Detective Vern Snow. App. 121a. By happenstance, Dixon walked into the station around the same time and attempted to claim his impounded car. *Id.* Scanlon and Snow sought to question Dixon about Hammer's disappearance.

Although Dixon was not under arrest or in custody, Scanlon issued *Miranda* warnings. *Id.* Dixon then indicated that he wanted to speak first with his attorney. The detectives immediately ceased their questioning and Dixon left the station. *Id.*

By November 8, police had located Hammer's Dodge Daytona at a used car lot and identified Dixon as the prime suspect in the transaction. App. 118a.

On the morning of November 9, police arrested Dixon on forgery charges. Around 11:30 a.m., Detective Snow and Detective Phil Kulakoski interviewed Dixon at the Toledo Police Department.[1] App. 121a. Although Dixon was in custody, the detectives deliberately chose to withhold *Miranda* warnings because they "believed that Dixon would invoke his right to counsel if he were issued *Miranda* warnings." *Id.* In response to their questions, "Dixon made incriminating statements regarding only the forgery charge," and "[h]e denied all knowledge of Hammer's disappearance." App. 121a-122a. The entire interview "lasted only about 45 minutes." App. 121a. At 3:30 p.m., police transported Dixon to the county jail.

Also on November 9, Detective Robert Leiter and another officer encountered Hoffner while executing a search warrant at Kirsten Wilkerson's home. Hoffner "made statements implicating Dixon" and "led police to [Hammer's] gravesite." *State v. Hoffner*, 811 N.E.2d 48, 52 (Ohio 2004). Around 3:30 p.m. that afternoon, Hoffner waived his *Miranda* rights and gave a taped statement fingering Dixon in

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[1] The interview transcript, which erroneously identifies Detective Scanlon as a participant, is reproduced at App. 156a.

Hammer's murder. *Id.* Detectives then released Hoffner from custody.

Around 7:30 p.m., Detective Kulakoski and Detective Leiter picked Dixon up from the jail and transported him back to the Toledo Police Department. App. 122a. Before any questioning, Dixon indicated that "he had heard that police had found a body and asked whether Hoffner was in custody." *Id.* Dixon further stated that he had spoken to an attorney and was willing to discuss what happened. *Id.*

The detectives read *Miranda* rights to Dixon. *Id.* Dixon then signed a waiver form (dated November 9, 1993, at 7:30 p.m.) indicating that he was "willing to answer questions and make a statement," and that he "d[id] not want a lawyer at this time." App. 189a. Dixon made an initial statement, and detectives set up a tape recorder.

Around 8:00 p.m., with the tape recorder running, Detective Kulakoski again advised Dixon of his *Miranda* rights. App. 191a. He further confirmed the validity of Dixon's signature on the waiver form. App. 192a. Dixon then confessed to murdering Hammer with Hoffner's assistance. App.196a-205a.

C. A jury convicted Dixon of murder and recommended a death sentence.

A grand jury indicted Dixon for aggravated murder, kidnapping, and aggravated robbery. App. 119a. Dixon then filed a motion to suppress his confession. The trial court suppressed Dixon's first November 9 statement without objection from the State. App. 122a. But the trial court also

suppressed the second statement on the ground that detectives deliberately withheld *Miranda* warnings during the first encounter on November 9. That error, the court said, tainted the admissibility of Dixon's confession at the second encounter under *Wong Sun v. United States*, 371 U.S. 471 (1963).

On interlocutory appeal, the Ohio court of appeals reversed: The detectives' decision to withhold *Miranda* warnings to Dixon at the first encounter, the court found, "d[id] not . . . reach[] so far as to taint [his] later *Mirandized* statements." *State v. Dixon*, 656 N.E.2d 1, 4 (Ohio Ct. App. 1995).

At trial, the State introduced Dixon's confession from the second November 9 interview. The jury found Dixon guilty on all charges. It later recommended a death sentence, which the trial court imposed. App. 120a.

D. The Ohio Supreme Court affirmed Dixon's conviction and sentence.

On direct appeal, the Ohio Supreme Court determined that Dixon's confession was admissible: "[I]f a suspect's statement obtained in violation of *Miranda* is nevertheless voluntary, the Fifth Amendment does not require the suppression of a subsequent confession made after a suspect has been fully advised of and has properly waived *Miranda* rights." App. 123a (citing *Oregon v. Elstad*, 470 U.S. 298, 318 (1985)).

The Ohio Supreme Court concluded that Dixon's first encounter with police on November 9, "though technically obtained in violation of *Miranda*, had been voluntary." *Id.* The court observed that "detectives did not threaten Dixon," that they gave

him "several breaks during the interview," App. 124a, and that Dixon "indicated his awareness of his rights during [the] session," App. 126a.

The Ohio Supreme Court found Dixon's second statement voluntary as well: Dixon received *Miranda* warnings, signed a waiver, expressed his willingness to discuss Hammer's disappearance, and remained calm at all times. App. 127a. Furthermore, the court indicated that the earlier unwarned session "did not affect the voluntariness of [this] session." App. 126a. Because "Dixon [previously] denied all knowledge of Hammer's disappearance," the court found "no nexus . . . between Dixon's unwarned statements . . . and his confession." *Id.*

In light of these findings, the Ohio Supreme Court deemed Dixon's confession admissible. After rejecting Dixon's other claims, the court affirmed his murder conviction and death sentence.

E. The federal district court denied Dixon's habeas petition, but the Sixth Circuit reversed.

The district court denied habeas relief, observing that detectives advised Dixon of his *Miranda* rights "before he admitted to any knowledge of Hammer's disappearance," and that Dixon "had experience with the criminal justice system and knew how to invoke his *Miranda* rights." App. 63a. The initial (unwarned) interview, the court further noted, was "only . . . 45 minutes" and contained "[n]o evidence of physical punishment." App. 63a-64a. Given these facts, the court concluded "that the Ohio Supreme Court did not unreasonably

apply *Elstad*" when it found Dixon's confession voluntary and, thus, admissible.[2] App. 62a-63a.

The district court also rejected arguments that police disregarded Dixon's earlier *Miranda* invocation at the impound lot: "Since Dixon was not in custody on November 4, he could not anticipatorily invoke his *Miranda* rights to take effect at some indefinite moment in the future." App. 66a.

The Sixth Circuit reversed on three separate grounds. First, the court indicated that "Dixon had made it completely clear to the police" on November 4 "that he did not want to talk to detectives without a lawyer present." App. 10a. That invocation, the court said, foreclosed any new questioning on November 9.

Second, the Sixth Circuit stated that the Ohio Supreme Court "unreasonably applied" *Elstad* because the detectives' "deliberate, planned refusal to warn, followed by warnings" was different than "the momentary, innocent failure to warn in *Elstad*." App. 12a.

Third, the court held that detectives coerced Dixon's confession with an improper threat. App. 13a. During the first (unwarned) session on November 9, they advised Dixon that "a bus [was]

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[2] The district court also declined Dixon's invitation to apply *Missouri v. Seibert*, 542 U.S. 600 (2004), which "only governs instances where police first obtain an unwarned confession, then warn the suspect, and then obtain a repeated confession." App. 61a. "*Seibert* does not control" this case, the court said, because "Dixon never confessed to any knowledge [about Hammer's disappearance] before his warnings." *Id.*

leaving," and that "[t]he first one that gets on it is the only one that's gonna get on." App. 183a.

The Sixth Circuit granted Dixon's habeas petition and directed the State to either release or retry Dixon within 180 days. App. 14a. Judge Siler dissented, criticizing the majority's *Elstad* analysis for focusing on the detectives' motives. App. 38a.

The Sixth Circuit granted the Warden's petition for rehearing en banc. App. 2a. Three weeks later, and without explanation, the court vacated its order and reinstated the panel's decision. App. 1a.

REASONS FOR GRANTING THE WRIT

Each of the Sixth Circuit's three holdings drastically upsets settled jurisprudence. First, Dixon's invocation of his right to counsel on November 4 did not trigger *Edwards* (and did not taint the admissibility of his later confession) because Dixon was not in custody on that date. Second, this Court has repeatedly confirmed that an officer's state of mind is irrelevant to the *Elstad* voluntariness test. Whatever the reason for the officers' failure to warn Dixon during the first encounter on November 9, that meeting had none of the hallmarks of coercion and thus did not taint Dixon's subsequent confession. Third, telling a suspect that he may want to "get on the bus" before his accomplice is nothing more than a classic prisoner's dilemma—a constitutionally permissible approach to police questioning.

The Ohio Supreme Court did everything right in this case. It examined the totality of circumstances surrounding Dixon's two November 9

interviews and concluded that his statements in both sessions were voluntary. Therefore, any taint arising from the detectives' *Miranda* error at the first meeting did not infect the second. In reaching a contrary conclusion, the Sixth Circuit abandoned the "custody" requirement of *Edwards*, distorted the voluntariness inquiry of *Elstad*, and condemned the prisoner's dilemma as unconstitutionally coercive. Because these holdings refashion well-worn rules governing the admissibility of confessions, the Court should grant certiorari.

A. The Sixth Circuit discarded the "custody" component of *Miranda* and *Edwards*.

In granting habeas relief, the Sixth Circuit trumpeted Dixon's exchange with police on November 4: "Dixon had made it completely clear to the police that he did not want to talk to the detectives without a lawyer present." App. 10a. Thus, the court said, "the bright-line rule of *Miranda* against further interrogation by police remain[ed] in effect" on November 9. App. 11a (citing *Edwards v. Arizona*, 451 U.S. 477 (1981)).

The Sixth Circuit's holding disregards one critical—and undisputed—fact: Dixon "was not under arrest or in custody" during this encounter. App. 121a. In fact, "he freely walked out of the station." App. 66a.

Time and again, this Court has said that *Miranda* is triggered only when two conditions—"custody" and "express questioning or its functional equivalent"—exist simultaneously. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980). Because Dixon was not in custody on November 4, the "bright-line

rule of *Miranda* against further interrogation" was not triggered.

The non-custodial nature of the November 4 encounter also vitiates any *Edwards* claim. Under that decision, a suspect "is not subject to future interrogation by the authorities" if he previously "invoked his right to have counsel present during *custodial* interrogation." 451 U.S. at 484-85 (emphasis added).

In short, "the *Miranda-Edwards* regime . . . applies only in the context of custodial interrogation." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2090 (2009). "If the defendant is not in custody then those decisions do not apply." *Id.* The other circuits have expressly recognized that limitation. See, e.g., *United States v. Cook*, 599 F.3d 1208, 1215 (10th Cir. 2010); *Burket v. Angelone*, 208 F.3d 172, 197 (4th Cir. 2000); *United States v. Wyatt*, 179 F.3d 532, 535 (7th Cir. 1999); *Tukes v. Dugger*, 911 F.2d 508, 515-16 (11th Cir. 1990).

Not only did the Sixth Circuit part ways with this Court and its sister circuits, it endorsed a new practice of anticipatory *Miranda* invocations. Although the November 4 encounter was non-custodial, the Sixth Circuit found that Dixon had successfully invoked *Miranda* and *Edwards*. That determination runs headlong into *McNeil v. Wisconsin*, 501 U.S. 171, 182 n.3 (1991), where this Court found no precedent for the proposition "that a person can invoke his *Miranda* rights anticipatorily, in a context other than 'custodial interrogation.'"

At bottom, the Sixth Circuit jettisoned the "custody" requirement of *Miranda* and *Edwards*.

Now, in this circuit (and only this circuit), a suspect's invocation of his *Miranda* rights in a non-custodial setting erects a "bright-line rule . . . against further interrogation." App. 11a. That dramatic departure from precedent provides ample justification for certiorari.

B. The Sixth Circuit improperly introduced a state-of-mind inquiry into the *Oregon v. Elstad* analysis.

The Sixth Circuit next turned its attention to the detectives' motives: Because detectives engaged in a "deliberate, planned refusal to warn" Dixon of his *Miranda* rights at the first session on November 9, the court held that Dixon's confession at the second (warned) session was tainted under *Elstad*. App.12a.

Again, the Sixth Circuit disregarded well-established case law. When assessing the voluntariness of a suspect's statement, the thoughts and intentions of the interviewer are irrelevant.

1. The Ohio Supreme Court reasonably concluded that Dixon's confession was voluntary under *Elstad*.

In *Elstad*, officers arrested an eighteen-year-old suspect in his home for burglary. 470 U.S. at 300. One officer accompanied the suspect's mother into the kitchen to discuss the charges. The other officer remained in the living room with the arrested suspect, but did not issue *Miranda* warnings. *Id.* at 301. He asked three questions, and the suspect gave incriminating responses. *Id.* Officers then transported the suspect to the stationhouse and

issued *Miranda* warnings. The suspect gave a full statement confessing to the crime. *Id.* at 301-02. Notwithstanding the earlier *Miranda* violation, the *Elstad* Court held that the suspect's later confession was admissible.

In doing so, the Court announced a framework 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." *Id.* at 300. A court first assesses whether the suspect's initial unwarned statement "though technically in violation of *Miranda*, was voluntary." *Id.* at 318. It then evaluates "whether . . . the second [warned] statement was also voluntarily made." *Id.* If the suspect spoke voluntarily at both encounters, any "taint" from the initial statement is "[n]o[t] . . . imput[ed] . . . to [the] subsequent statement[]." *Id.*

The Ohio Supreme Court hewed exactly to the *Elstad* framework. The court concluded that Dixon's "first statement, though technically obtained in violation of *Miranda*, had been voluntary": "[D]etectives did not threaten Dixon in any way, nor was there physical or verbal abuse." App. 123a, 124a. They gave him "several breaks during the interview," offering him food, drink, and the opportunity to use the restroom. App. 124a. Furthermore, the court noted, Dixon's statements

indicated that he was aware of his rights, and that he was acting on his own volition.[3] App. 126a.

The Ohio Supreme Court next found that Dixon's later (warned) statement "was knowingly and voluntarily made." *Id.* As the court observed, "Dixon initiated the conversation . . . by asking about the discovery of Hammer's body and Hoffner's whereabouts," and by "indicat[ing] his willingness to talk." App. 127a. "Police twice read *Miranda* warnings to Dixon," "Dixon . . . signed a waiver-of-rights form," and he indicated his understanding "that no deals or promises had been made in exchange for his confession." *Id.* Furthermore, "[t]he entire interview lasted approximately half an hour, there was no evidence of mistreatment, and Dixon remained calm and collected throughout." *Id.*

Finally, the Ohio Supreme Court concluded that the earlier unwarned session "did not affect the voluntariness of [this] session." App. 126a. Because "Dixon [previously] denied all knowledge of Hammer's disappearance," the state court found "no nexus . . . between Dixon's unwarned statements . . . and his confession." *Id.*

The Ohio Supreme Court's analysis is unimpeachable. The court cataloged the circumstances of each interview: the absence of any physical coercion or threats, the length of the questioning, the meeting location, Dixon's maturity and education level, and his mental condition. Cf. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)

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[3] At this first session, Dixon stated to detectives, "[E]verything I know I've already told you. I have been more than welcome to tell you." App. 126a.

(listing factors). Balancing these factors, the state high court reasonably concluded that Dixon spoke voluntarily at both sessions. Therefore, his murder confession was admissible under *Elstad*.

The Sixth Circuit should have ended its inquiry here. Because the Ohio Supreme Court conducted an objectively reasonable (indeed, perfectly faithful) application of *Elstad*, AEDPA bars habeas relief.

2. The detectives' state of mind is irrelevant to the *Elstad* voluntariness inquiry.

In its *Elstad* analysis, the Ohio Supreme Court attached no significance to the fact that detectives deliberately withheld *Miranda* warnings at the first meeting on November 9: "Dixon has failed to explain how the detectives' subjective intent coerced him to a greater extent than if the *Miranda* violation had been inadvertent."[4] App. 124a.

The state court's analysis was exactly right. This Court has repeatedly confirmed that the *officer's* state of mind is irrelevant to whether the *suspect's* decision to speak was voluntary.

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[4] The Sixth Circuit criticized this statement for "erroneously plac[ing] the burden of proof on Dixon to prove that his confession was coerced." App. 13a. The Ohio Supreme Court did nothing of the sort. The court made clear that "*the state* carrie[d] the burden of proving voluntariness by a preponderance of the evidence." App. 124a (emphasis added). It simply (and correctly) observed that evidence of the detectives' subjective intent was factually irrelevant to the inquiry.

One need only examine *Elstad*, where this Court expressed indifference as to why the officer failed to issue *Miranda* warnings before his initial questioning of the arrested suspect. The officer's omission might have been inadvertent (he was "confus[ed] as to whether the brief exchange qualified as 'custodial interrogation'") or deliberate (he was "reluctan[t] to initiate an alarming police procedure"). 470 U.S. at 315-16. "Whatever the reason for [the officer's] oversight," this Court indicated that the confession was admissible because "the incident had none of the earmarks of coercion." *Id.* at 316; accord *Missouri v. Seibert*, 542 U.S. 600, 615 (2004) (plurality) ("[T]he *Elstad* Court expressed no explicit conclusion about either officer's state of mind.").

Other lines of *Miranda* jurisprudence reinforce this principle. For instance, a suspect may waive his *Miranda* rights, so long as his waiver is knowing and voluntary. See *Davis v. United States*, 512 U.S. 452, 460-61 (1994). This voluntariness inquiry turns on the perspective of the *suspect*: "[T]he state of mind of the police is irrelevant to the question of the intelligence and voluntariness of [the suspect's] election to abandon his rights." *Moran v. Burbine*, 475 U.S. 412, 423 (1986); see also *Stansbury v. California*, 511 U.S. 318, 324 (1994) (per curiam) ("[O]ne cannot expect the person under interrogation to probe the officer's innermost thoughts.").

Finally, this Court's decision in *Seibert* confirms that the detectives' intentions are

inconsequential to the *Elstad* inquiry.[5] The *Seibert* Court confronted "a police protocol for custodial interrogation that call[ed] for giving no warnings of rights to silence and counsel until interrogation has produced a confession." 542 U.S. at 604. A fractured Court held that incriminating statements obtained after use of this protocol are presumptively inadmissible. *Id.* at 617.

"[A]t least seven members of the Court rejected an intent-based approach" to *Elstad*. *United States v. Heron*, 564 F.3d 879, 885 (7th Cir. 2009); accord *Seibert*, 542 U.S. at 624 (O'Connor, J., dissenting) (commending "[t]he plurality's rejection of an intent-based test"). But Justice Kennedy, casting the fifth vote in *Seibert*, concluded that an officer's intentional withholding of *Miranda* warnings is relevant in one narrow circumstance: "The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed." 542 U.S. at 622 (Kennedy, J., concurring in the judgment).

Under Justice Kennedy's analysis then, an officer's "deliberate violation of *Miranda*" is *not* enough to remove a case from the *Elstad* framework. *Id.* at 620. That occurs only if the officer uses the two-step protocol—that is, if the officer recites *Miranda* warnings "midinterrogation, after

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[5] Because the Ohio Supreme Court issued its decision two months before *Seibert*, the Sixth Circuit majority and dissent agreed "that the *Seibert* decision was not binding upon the Ohio Supreme Court." App. 36a (Siler, J., dissenting). *Seibert* nevertheless informs an interpretation of *Elstad*.

inculpatory statements have already been obtained." *Id.*

There is no dispute that detectives intentionally withheld *Miranda* warnings from Dixon during their first meeting on November 9. But they did not use the two-step protocol condemned in *Seibert*—they did not elicit incriminating statements from Dixon, recite *Miranda* warnings, and then re-elicit those same incriminating statements. Therefore, *Elstad* applies, and the detectives' motives for withholding the warnings are irrelevant.

3. By holding otherwise, the Sixth Circuit cemented its outlier status.

The Sixth Circuit deviated from these clear precedents, announcing that an officer's "deliberate, planned refusal to warn" is different than "the momentary, innocent failure to warn in *Elstad*." App. 12a. "[S]uch a 'police strategy adapted to undermine the *Miranda* warnings' renders the confession inadmissible." App. 10a.

In the Sixth Circuit then, the officer's state of mind is centrally important. A "deliberate, planned refusal to warn" taints a suspect's later confession, regardless of whether police deploy the impermissible two-step protocol. App. 12a. Only a "momentary, innocent failure to warn" triggers the *Elstad* voluntariness inquiry. *Id.*

No other circuit recognizes this distinction. Rather, they say, "*Elstad* sets out the general rule that the existence of a pre-warning statement does not require suppression of a post-warning statement that was knowingly and voluntarily made." *United States v. Street*, 472 F.3d 1298, 1312 (11th Cir. 2006).

But if "*Miranda* warnings are intentionally withheld until after the suspect confesses, the central voluntariness inquiry of *Elstad* [is] replaced by a presumptive rule of exclusion." *United States v. Stewart*, 388 F.3d 1079, 1090 (7th Cir. 2004); accord *United States v. Carter*, 489 F.3d 528, 535 (2d Cir. 2007); *United States v. Mashburn*, 406 F.3d 303, 309 (4th Cir. 2005). Because detectives here did not "withhold[] *Miranda* warnings . . . until [Dixon] g[ave] a confession," *United States v. Courtney*, 463 F.3d 333, 338 (5th Cir. 2006), these circuits would have performed a routine *Elstad* inquiry and discounted any evidence pertaining to the interviewer's subjective intent.

The divergence in approaches alone substantiates the need for this Court's review.

But a second justification exists. This Court "normally take[s] pains to avoid" "the kind of difficult, state-of-mind-inquiry" espoused by the Sixth Circuit. *Seibert*, 542 U.S. at 627 (O'Connor, J., dissenting). "[F]ocusing . . . on a police officer's subjective intent [is] an unattractive proposition"—"the inquiry will be complicated," particularly when multiple officers are involved, and "the likelihood of error will be high." *Id.* at 625-26; accord W. LaFave, Search and Seizure § 1.4(e), p. 124 (3d ed. 1996) ("[T]here is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive.").

To be sure, *Seibert* opened that door a crack. The Court authorized state-of-mind inquiries "in the infrequent case" where an officer deliberately issues *Miranda* warnings to a suspect "midinterrogation, after inculpatory statements have already been

obtained." 542 U.S. at 620, 622 (Kennedy, J., concurring in the judgment). But the Sixth Circuit has now flung the door wide open. The decision below countenances state-of-mind inquiries in every case so long as the suspect alleges a deliberate *Miranda* violation. If such a sea change in jurisprudence is to occur, it should come from this Court.

C. The Sixth Circuit erroneously condemned "the prisoner's dilemma" as an unconstitutionally coercive tactic.

The Sixth Circuit provided a third justification for habeas relief. The Ohio Supreme Court's voluntariness finding, it said, "was based on an unreasonable determination of facts." App. 13a.

As discussed above, the Ohio Supreme Court determined that Dixon's confession was voluntary after a thorough examination of both November 9 sessions: their length, their location, Dixon's age, education, and mental condition, the absence of physical coercion or threats, and Dixon's actual responses. App. 124a-126a. The district court properly recognized this analysis for what it was—an objectively reasonable balancing of the *Schneckloth* factors. App. 63a-64a.

The Sixth Circuit disagreed. Without reviewing any of the *Schneckloth* factors, the court found that detectives coerced a confession from Dixon.

First, the Sixth Circuit stated that, at the evening interview on November 9, "detectives . . . engaged in a thirty-minute interrogation of Dixon before *Miranda* warnings were given." App. 11a.

Not so. Detectives brought Dixon into the station at 7:30 p.m., and Dixon "initiated the conversation" when he asked whether police had located Hammer's body or arrested Hoffner. App. 122a, 127a. After answering those questions, detectives issued *Miranda* warnings. Dixon then *signed a waiver-of-rights form at 7:30 p.m.*—the very start of this session. App. 189a. Only then did detectives begin their questioning, and only then did Dixon incriminate himself. Detectives then set up a tape recorder and repeated their *Miranda* warnings—at which time, Dixon offered a full confession.

Next, the Sixth Circuit focused on an isolated comment made by Detective Kulakoski near the end of the first session on November 9:

> Arch, there's one thing I want to stress with you. If something happened to Chris and you had any involvement, even though it may not have been a major role in what happened to Chris, you had any involvement now is the time to say so because if [Hoffner] starts cutting a deal over there, this is kinda like, a bus leaving. The first one that gets on it is the only one that's gonna get on. App. 183a.

This comment, the Sixth Circuit said, tainted the second session on November 9: "Holding out the promise of a 'deal' to avoid the death penalty in return for a confession . . . is a high-pressure tactic designed to override Dixon's previous five-day stand against talking. A confession given in response to such tactics is not voluntary." App. 12a.

Once more, the Sixth Circuit mischaracterized the record. When the "get on the bus" comment was uttered, this was a missing-persons investigation. (Hammer's body had not yet been located.) Because it was not yet a murder case, the court was wrong to say that detectives were trying to coerce Dixon into a confession by dangling the carrot of a life sentence in front of him. Moreover, Dixon did *not* confess in response to the comment. Quite the opposite: He said that he had "[n]othing whatsoever" to do with Hammer's disappearance. App. 186a. (Dixon confessed four hours later, after police located a body and spoke to Hoffner, and after police issued two *Miranda* warnings to Dixon.)

Even more troubling, however, was the Sixth Circuit's broad condemnation of the detective's "bus" comment as an unconstitutionally coercive interrogation device. The statement—encouraging Dixon to "get on the bus" before his accomplice—is nothing but a classic "prisoner's dilemma." This approach is effective because neither party to the crime "can[] communicate" with the other, and "each fears that the other will talk." *Page v. United States*, 884 F.2d 300, 301 (7th Cir. 1989).

The prisoner's dilemma is "rather commonplace" in police questioning "because [it is] effective and courts have held that [it is] 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) ("[S]uggesting that his cohorts might leave him 'holding the bag' does not, as a matter of law, overcome a confessor's will."). Indeed, this Court has expressly "refused to find that a defendant who

confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily." *Elstad*, 470 U.S. at 317. The Sixth Circuit ignored those authorities, denounced the prisoner's dilemma as an unconstitutional "high-pressure tactic," and further drifted away from its sister jurisdictions.

As it outlawed a common method of police questioning, the Sixth Circuit ignored clear evidence in the record demonstrating that Dixon's confession was voluntary. Before confessing to Hammer's murder, Dixon affirmed—both in writing and verbally—that he was "willing to answer questions and make a statement," that he "d[id] not want a lawyer," and that he "underst[ood] and kn[ew] what [he was] doing." App. 189a, 191a-192a. Dixon also indicated that he was "making this statement of [his] own free will," that nobody "threaten[ed] [him] or promised [him] anything," and that nobody "ma[de] . . . any deals of any kind." App. 213a-214a.

Under 28 U.S.C. § 2254(d)(2), the two *Miranda* warnings, Dixon's signed waiver, and his verbal affirmations more than substantiate the Ohio Supreme Court's factual determination that Dixon's confession was knowing and voluntary. After all, "[t]he fact that a suspect chooses to speak after being informed of his rights is . . . highly probative" of voluntariness. *Elstad*, 470 U.S. at 318. To find otherwise, the Sixth Circuit had to ban a long-established (and long-approved) technique of police questioning.

* * *

The novelty of the Sixth Circuit's analysis is surpassed only by the number of precedents it ignored and the number of circuit splits it created. And the court did all this under the deferential standards of AEDPA, 28 U.S.C. § 2254(d). Given those transgressions, this Court should grant review and reverse the judgment below.

CONCLUSION

The Court should grant the petition for certiorari.

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