No. 10-680

In The

Supreme Court of the United States

CAROL HOWES,

Petitioner,

vs.

RANDALL FIELDS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF FOR THE RESPONDENT

ELIZABETH L. JACOBS
Counsel for Respondent
615 Griswold, Suite 1125
Detroit, Michigan 48226
elzjacobs@aol.com
(313) 962-4090

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court's clearly established precedent holds that a prisoner is "in custody" for purposes of *Miranda* when he is removed from the general prison population, subjected to further restrictions on his freedom of movement and interrogated about conduct occurring outside the prison and unrelated to the reason for his incarceration.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

COUNTER STATEMENT OF THE CASE

In December of 2001, Randall Fields was serving a 45-day sentence on a disorderly conduct conviction. On December 23, 2001, two sheriff's deputies investigating a sexual assault complaint came to the jail and had Mr. Fields removed from his cell. They had him taken under guard through a locked door into the administrative section of the jail, and there, without being advised of his Miranda rights, the deputies extracted an inculpatory statement from him regarding conduct occurring outside the prison. This interrogation occurred after hours and lasted hours.

A. Pre-trial and Trial Proceedings

Before trial, Respondent moved to exclude the statement from evidence because it was taken in violation of his Fifth Amendment rights. In deciding the issue, the trial court reviewed Respondent's testimony taken at an evidentiary hearing and also the testimony of Deputy Batterson offered at the preliminary examination.

Respondent testified that a jail guard and Deputies Batterson and Sharp took him out of his cell and walked him from his cell on the third floor to the second floor and through J door, a locked door which separated the jail from the Sheriff's Department. The guard left him at the door. He was inside a conference room with the two deputies. Pet. App. 68a-69a, 72a.

He was not advised that he was a suspect in a criminal investigation nor was he advised of his Miranda rights. Pet. App. 70a-71a. Deputy Batterson told him he could get up and leave anytime he wanted to, but he knew he "could not freely leave. I was well aware of that." Pet. App. 71a.

He was wearing an orange jumpsuit, but was unsure if he had handcuffs and ankle cuffs on. He felt:

> There was no freedom to leave. I mean, I was trapped. I couldn't – even if I would have gotten up and left, I wouldn't have known how to get back to the jail. The door was locked so there was no place for me to go.

Pet. App. 71a. Respondent was quite sure that the deputies would not have allowed him to leave. Pet. App. 72a.

He felt intimidated by the situation because both deputies had guns and because the door was locked. He admitted to being fearful and so scared that he got cotton mouth. He had never been in that area of the building before and had no idea how to get back to his cell. Pet. App. 74a-75a. In fact when walking back to his cell at 1:30 a.m., he started down the wrong hall. Pet. App. 76a, 77a.

He was frightened of Deputy Batterson who spoke harshly to him, swore at him, and commanded him to remain seated. Pet. App. 76a-77a. Respondent felt that he did not have an option on whether to speak to Batterson. He had to speak to him because

he was isolated and had no idea how to get back. Pet. App. 77a.

Respondent estimated that the deputies came to get him about 8:00 p.m. and he got back to his cell at 2:00 a.m. Pet. App. 77a. It was December 23 and he was conscious of the fact that the jail was short staffed and his guards mentioned that they did not understand why the interrogation was taking place at such an unusual time. Pet. App. 78a.

The interrogation ended three hours after he would normally be asleep. This also meant that he missed taking his medication at 10:00 p.m. The petitioner had a transplanted kidney and needed to take Prograf (sp) and Cellcept, anti-rejection drugs, and also Paxil, a medication for depression.[1] Pet. App. 78a-80a.

It took 20 minutes for a jailor to arrive to return him to his cell and during that time he was still being questioned. Pet. App. 89a, 92a-93a.

Batterson testified that he had Defendant's jailors take him out of his cell and bring him to a conference room on a different floor in the main part of the Sheriff's Department, away from the jail. Fields was dressed in jail oranges. The detective

[1] Upon returning to his cell, Respondent was told that he could not be given these medications because it was too close in time to his 5:00 a.m. meds. Pet. App. Transcript of Hearing 78a-80a.

admitted that the Defendant could not have just gotten up and walked out of the room. He would have had to wait until a corrections officer came to escort him back to the cell. Res. App. 16a-17a.

The trial court denied the motion to exclude the statement finding that the defendant knew he was free to leave. Res. App. 8a.

At trial, Deputy Batterson on cross examination admitted that the interrogation started at either 7:00 p.m. or 9:00 p.m. and lasted until 1:00 a.m. or 2:00 a.m. The admissions occurred near the end of that time period. Pet. App. 123a-124a. Earlier in the interrogation, the defendant became upset. The Deputy told him he could leave but never got someone to take him back to his cell. Pet. App. 125a-126a.

Deputy Dale Sharp testified that he was a field training officer and his job was to observe Deputy Batterson's behavior and make sure it was appropriate. Pet. App. 128a. The interrogation started probably at 6:00 p.m. in the evening and lasted about 7 hours. Pet. App. 129a, 132a-134a. The officer testified that a seven-hour interrogation was not unusual although he admitted that this was the only interrogation of that length that he had either observed or in which he had taken part. Pet. App. 132a. Mr. Fields was never told that he did not have to talk to the deputies. Pet. App. 134a-135a. Mr. Fields never asked to leave. Pet. App. 130a.

After a jury trial, Randall Fields was convicted of two counts of criminal sexual conduct in the third degree. He was sentenced to 10-15 years in prison.

B. State Appellate Proceedings

On May 6, 2004, the Michigan Court of Appeals in a per curiam opinion affirmed Respondent's convictions. Pet. App. 53a-62a. The Court stated:

> Here defendant was unquestionably in custody, but on a matter unrelated to the interrogation. Although, defendant was not read his Miranda rights, he was told that he was free to leave the conference room and return to his cell. Defendant never asked to leave. Because Miranda warnings were not required, the trial court did not err in denying defendant's motion to suppress his statement.

Pet. App. 56a.

On December 9, 2004, the Michigan Supreme Court, in *People v. Fields*, 472 Mich. 938; 698 N.W.2d 394, denied leave to appeal stating that it was not persuaded that the questions presented should be reviewed by the Court. One justice would have granted leave to appeal. Pet. App. 52a.

C. Federal Habeas Review

Randall Fields filed a petition for a writ of habeas corpus in the United States District Court for Eastern District of Michigan. On February 9, 2009,

the district court judge issued a conditional writ of habeas corpus. Pet. App. 32a-51a. The Court found:

> *Mathis* clearly states that Miranda warnings are required when a suspect is in custody regardless of the reason why the suspect is in custody. The Michigan Court of Appeals' conclusion that investigators were not required to advise Petitioner of his Miranda rights because his custody was unrelated to the crime under investigation is an unreasonable application of *Mathis*.

Pet. App. 45a.

On August 20, 2010, the United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court in *Fields v. Howes*, 617 F.3d 813. Pet. App. 2a-30a. In reference to *Mathis*, the Court stated:

> The central holding in *Mathis* is that a Miranda warning is required whenever an incarcerated individual is isolated from the general prison population and interrogated, i.e. questioned in a manner likely to lead to self-incrimination, about conduct occurring outside of the prison.

Pet. App. 10a. It further found that the state court's decision was contrary to clearly established Supreme Court law. Pet. App. 10a.

> The Michigan Court of Appeals did not cite *Mathis* nor any case relying upon *Mathis* in its decision. However, the material facts in

> this case are indistinguishable from *Mathis*. In both cases, the imprisoned suspect was interrogated about a matter unrelated to his offense of incarceration. Yet, while the Supreme Court in *Mathis* held that the suspect was entitled to a Miranda warning prior to interrogation, the Michigan Court of Appeals ruled that a Miranda warning was not required. The Michigan Court of Appeals therefore arrived at a conclusion contrary to clearly established federal law.

Pet. App. 11a.

On November 18, 2010, the State of Michigan filed its petition for certiorari. On January 24, 2011, this Court granted the petition.

SUMMARY OF ARGUMENT

The Petitioner contends that by using the phrase "bright-line approach" the Sixth Circuit has made new law on habeas review contrary to the commands of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). 28 U.S.C. 2254(d). However, not every bright-line approach necessarily overrules precedent, breaks new ground, or imposes new obligations on the government. This certainly has not happened here where the dictates of *Miranda*, *Mathis*, *Mathiason*, and *Perkins* controlled the interrogation of this in-custody suspect who was isolated from the general prison population while being questioned by officers unaffiliated with the prison about events occurring

outside of the prison. This bright-line approach merely distilled clearly established Supreme Court law. Those four cases mandated that Respondent be advised of his rights before he was interrogated.

But even if this Court should find that this particular bright-line approach is neither clearly established Supreme Court law nor reflective of it, the writ should still issue. The Michigan Court of Appeals opinion was obviously contrary to clearly established Supreme Court law because it relied on a test rejected by the *Mathis* Court. The decision was also based on an unreasonable application of the principles espoused by the above four cases to the facts of this case. 28 U.S.C. 2254(d)(1).

ARGUMENT

I. Where clearly established Supreme Court law consists of a principle that owes its origin to more than one case, it does not necessarily break new legal ground or impose new obligations on the States and the Federal government.

The Anti-Terrorism and Effective Death Penalty Act (AEDPA) amended the habeas statute found at 28 U.S.C. 2254. Subsection (d) of the statute states, in pertinent part, that an application for a writ of habeas corpus challenging a state court conviction may only be granted if the petitioner shows that the proceeding

> 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;

Under this statute, this Court must determine whether a particular decision of a lower court announced a new rule or whether it simply applied "a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Williams v. Taylor*, 529 U.S. 362, 381 (2000). Rules which break new ground or impose new obligations on the States or the Federal government fall outside the rubric of "clearly established Federal law." If the Supreme Court "has not broken sufficient legal ground to establish an asked-for constitutional principle, the lower federal courts cannot themselves establish such a principle. . . ." *Id.*

Clearly established Supreme Court law excludes *dicta*. It is "the governing legal principle or principles set forth by the Supreme Court at the time the State court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). It refers to more than just the cases in which there was a controlling decision as opposed to those where no such decision is made. The former category would include very few cases since a rule is controlling only if it matches the case before the court both as to law and facts. Most cases are factually distinguishable in some respect.

Certain principles are so fundamental that when new factual permutations arise, the necessity of applying the earlier rule will be beyond doubt. While the difference between applying a rule and extending a rationale is not always clear, even extending a rationale does not always mean making new law. *Yarborough v. Alvardo*, 541 U.S. 652, 666 (2004). *Miranda* itself felt that it was not making new law. It stated that its "holding was not an innovation in our jurisprudence, but an application of principles long recognized and applied in other settings." *Miranda*, 384 U.S. at 442.

As this Court has noted, a rule of law may be sufficiently clear for habeas purposes even when it is expressed in terms of a generalized standard rather than as a bright-line rule.

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule . . . . Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts it will be the **infrequent case** that yields a result so novel that it forges a new rule, one not dictated by precedent. (emphasis added).

Williams, *supra* at 382 quoting from *Wright v. West*, 505 U.S. 277, 308-309 (1992) (Kennedy J., concurring

in an opinion applying *Teague v. Lane*, 489 U.S. 288 (1989)).

The lack of an explicit statement from one case only is not determinative of whether clearly established law exists because relevant precedent includes bright-line rules, legal principles, and standards flowing from precedents. The fact that a principle is based on more than one case does not conflict with subsection (d)(1). Congress used the phrase "clearly established Supreme Court **law**", not clearly established Supreme Court **precedent**. A habeas court is not limited to one Supreme Court case in making its decision. It may rely on a matrix of cases from the Supreme Court to identify the controlling principle in the case before it.

A. Clearly established Supreme Court law requires that Miranda rights be given to an inmate who has been removed from the general prison population and is being questioned about events that occurred outside the prison by officers unaffiliated with the prison.

Under subsection (d)(1), a state court decision is an unreasonable application of clearly established law if the state court identified the correct governing principle from "this Court's decisions" but unreasonably applied that principle to the facts of the inmate's case. A state court decision is contrary to clearly established Supreme Court precedent if the state court arrived at a conclusion opposite to that reached

by the Court on a question of law or if the state court decided a case differently than the Court has on a set of materially indistinguishable facts. *Williams*, *supra* at 412-413. The *Williams* Court speculated that there would be a variety of cases in which both phrases would be implicated. *Id*. at 385-386.

Starting with *Miranda v. Arizona*, 384 U.S. 436 (1966), clearly established law of this Court holds that a suspect who has been taken into custody, or otherwise deprived of his freedom of movement in any significant way, must be advised of four rights. Custody for Miranda purposes is distinguished by the fact that the suspect is held incommunicado in an unfamiliar police-dominated atmosphere. *Id.* at 457. Incommunicado interrogation is the principal psychological factor contributing to a successful interrogation. *Id*. at 445. It involves psychological pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. *Id.* at 467.

In determining if a suspect is in custody, a court examines two factors. First, what were the circumstances surrounding the interrogation, and second, given those circumstances, would a reasonable person have felt at liberty to terminate the interrogation and leave. This an objective test. *Thompson v. Keohane*, 516 U.S. 99, 112 (1995). If custody is present, the duty to advise the suspect of his rights is triggered. But the *Miranda* Court also identified two exceptions to this rule. These were for circumstances where the statement is voluntary and where the statement is

taken at the scene of the crime. *Miranda, supra* at 477-478. *Miranda* did not recognize a prison-setting exception to statements taken from an inmate.

If there was any uncertainty that *Miranda* was applicable behind prison walls, it was resolved in *Mathis v. United States*, 391 U.S. 1 (1968). The Supreme Court held that when officers unaffiliated with a prison seek to question an inmate about conduct occurring outside the prison, the inmate must be advised of his Miranda rights. In arriving at its decision, the *Mathis* Court rejected the Government's attempt to narrow the scope of *Miranda*.

> The Government also seeks to narrow the scope of the *Miranda* holding by making it applicable only to questioning one who is in 'custody' in connection with the very case under investigation. There is no substance to such a distinction, and in effect it goes against the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights.

Id. at 4. The Court called making a distinction based on why the suspect was incarcerated or who incarcerated him "too minor and shadowy to justify a departure from the well considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody." *Id.* Instead the *Mathis* Court reaffirmed the definition of custody found in *Miranda*.

> . . . we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant

> way and is subjected to questioning, the privilege against self-incrimination is jeopardized.

Mathis, 391 U.S. at 5 quoting from *Miranda*, *supra* at 478. It recognized that nothing in *Miranda*, called for curtailment of the warnings solely because one was already in custody. *Mathis*, *supra* at 4-5. *Mathis* made no change to the existing law excluding volunteered statements and statements taken at the scene of a crime from the Miranda requirement.

In *Oregon v. Mathiason*, 429 U.S. 492, 494 (1977), the Court, looking to *Mathis*, stated that " . . . the Miranda principle [is] applicable to questioning which takes place in a prison setting during a suspect's term of imprisonment on a separate offense." The Court rejected the argument that *Miranda* applies to a suspect who voluntarily entered a state police office and was also told that he was not under arrest. It stated:

> Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

Id. at 495. The Court also refused to find the environment coercive where the parolee, by phone, agreed to meet with the officer. He was given the opportunity to select a location for the meeting but declined to do so. The officer then suggested the parole office to which the parolee consented. The interview lasted 30

minutes and the suspect departed on his own. The Court noted that the question of whether the environment was coercive is a separate question from that of custody. *Id.* at 495-496. This is a subjective test. *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

Besides *Miranda*, *Mathis*, and *Mathiason* a fourth case forms part of the matrix of clearly established law on the issue of prison interrogations. That case is *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). In *Perkins*, an undercover agent posing as an inmate shared a cell with the defendant. The Court found that Miranda warnings were not required because the imprisoned Mr. Perkins was not aware that his interrogator was an officer and he was not isolated from the general prison population. The "danger of coercion [that] results from the interaction of custody and official interrogation" was lacking. *Id*. This statement fell into one of the two exceptions to the Miranda rule, voluntariness, and it also lacked a condition precedent, custody.

From these four cases, the following principles flow: (1) custodial interrogation requires the advice of rights; (2) *Miranda* travels over prison walls; (3) not every official interrogation in a potentially coercive environment is in-custody questioning; (4) Miranda custody is more than ordinary prison custody; and (5) Miranda custody in prison is marked by isolation from the general prison population and questioning by officers unaffiliated with the facility.

So neither *Mathis*, which noted several salient facts in arriving at its decision, nor the Sixth Circuit based their decision solely on the assumption that just because one is incarcerated, the custody requirement of *Miranda* is automatically met. In particular, the circuit court did not merely find that Fields was in a state prison and cease further analysis. Instead it too looked to the circumstances of the interrogation in order to see if the element of coercive custody was present. It found it to be present where the interrogation, that is – questioning in a manner likely to lead to self-incrimination – occurred while the inmate was isolated from the general prison population. This, then, is the key to applying *Mathis*, Pet. App. 10a.

> The critical issue in this inquiry becomes whether the prisoner is isolated from the general prison population for questioning. "*Miranda* . . . was designed to guard against . . . the 'danger of coercion [that] results from the interaction of custody and official interrogation." *Id.* at 1224 (citing *Illinois v. Perkins*, 496 U.S. 292, 297 (1990)).

Pet. App. Opinion 19a.

Petitioner contends that *Illinois v. Perkins* did not decide whether the condition of being a prisoner meets the definition of custody for Miranda purposes and thus there was no clearly established law on this issue. But a principle flowing from *Perkins* is part of the matrix of holdings on the subject of Miranda rights behind bars.

Petitioner further argues that the issue before this Court was not decided until last year in *Maryland v. Shatzer*, 130 S. Ct. 1213, 1224 (2010), and thus it was not clearly established law at the time of the state court's decision. Respondent concedes that the *Shatzer* Court stated that the question of whether prison custody is the equivalent of Miranda custody had never been decided. However, sufficient legal ground had already been broken so that at the time of the state court's decision in this case, clearly established Supreme Court law had already answered the question. The *Shatzer* holding that "lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*" is anti-climatic. The only new rule promulgated in *Shatzer* is the 14-day rule.

Here, neither the district court's opinion nor the circuit court's opinion broke new ground. Neither court relied on ordinary prison custody alone for its conclusion. They relied on the circumstances of that custody at the time the statement was taken. These circumstances were that the defendant was serving time on a matter unrelated to the subject of the questioning; he was removed from his cell and taken to another location away from the prison proper; he was questioned by officers unaffiliated with the jail; he was dependent on them for movement; the questioning concerned conduct occurring outside of the prison; and he was isolated from an environment with which he was familiar.

Petitioner reads the decision of the Sixth Circuit in this case too broadly. The court did not hold that every time a prisoner is removed from his normal life in prison and taken to an isolated area he is in Miranda custody. Pet. Brief 18. The Sixth Circuit instead read *Mathis* as follows:

> 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, i.e. questioned in a manner likely to lead to self-incrimination about conduct occurring outside of the prison.

Pet. App. 1a. Petitioner ignores that last prepositional phrase "about conduct occurring outside of the prison." That qualifier makes all the difference. The Sixth Circuit again referred to *Mathis*' "essential holding" as follows:

> Miranda warnings must be administered when law enforcement officers remove an inmate from the general prison population and interrogate him regarding criminal conduct that took place outside the jail or prison.

Pet. App. 13a. As will be discussed below, without this qualifier, the prison administration might feel handcuffed in applying its own rules of security.

Isolation is the key to Miranda custody because when coupled with official questioning it has a coercive effect on the individual. Here Miranda custody was present because the interrogation occurred

outside the jail proper, by officers not affiliated with it, in a place where the Respondent had never been, behind a locked door (the J door) in a police-dominated atmosphere. It occurred after hours where the Respondent was not just isolated from his fellow prisoners and his familiar surroundings but also from his jailers. The questioning concerned conduct occurring beyond the prison walls. The fact that the interrogation is conducted by officials from outside the prison adds to the coercive nature of the interrogative environment. *Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir. 1978).

The Sixth Circuit Court of Appeals relied on the contrary clause of 28 U.S.C. 2254(d)(1) in affirming the issuance of the writ. A state court decision is contrary to clearly established Supreme Court precedent if the state court applies a rule that contradicts the governing law set forth in Supreme Court cases. *Williams*, *supra*, at 405. "Contrary to" means diametrically different, opposite in character or nature, or mutually opposed. In *Mathis*, the Court had decisively rejected the argument that *Miranda* did not apply where the inmate was in custody on a completely different offense from the one on which he was being questioned and where the interrogating officers were not the ones holding him in custody. *Mathis*, 391 U.S. at 4-5. But the Michigan Court of Appeals held just that. *Miranda* was not applicable because the interrogation was unrelated to the reasons why the inmate was in custody. Pet. App. 56a. This holding was diametrically opposed to the *Mathis* holding. Pet.

App. 10a-11a. The district court found that both clauses of subsection (d)(1) had been violated by the state court. Pet. App. 43a. As the *Williams* Court observed, both phrases may be implicated in one case.

Fidelity to *Miranda* requires "that it be enforced strictly, in those situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984). The matrix of cases discussed above compel the result reached by the Sixth Circuit regardless of whether there was a bright-line rule. The state court decision was contrary to and an unreasonable application of this clearly established Supreme Court law. Especially when the contrary clause of subsection (d)(1) is invoked, the extreme malfunction requirement of *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) is easily met.

B. The Sixth Circuit's bright-line approach rests on well established constitutional principles already identified by this Court.

Petitioner argues that the Sixth Circuit in announcing its bright-line approach was making new law and thus not remaining within the restriction imposed by 28 U.S.C. 2254(d)(1). It contends that the court of appeals resorted to this because of this Court's silence on the issue. To illustrate its argument, Petitioner cites to *Carey v. Musladin*[2] and *Wright v.*

[2] 549 U.S. 70 (2006).

Van Patten,[3] but these two cases offer little support to Petitioner.

In *Musladin*, the Ninth Circuit relying on *Estelle v. Williams*, 425 U.S. 501 (1976) (defendant, forced to wear prison garb by the State, was denied a fair trial), held that the defendant was denied due process where family members wore buttons displaying a photo of the deceased during the murder trial. In reversing this decision, the Supreme Court noted that the *Estelle* case applied only to government-sponsored conduct, not to private conduct. Notably, the Court did not base its decision on a lack of factual similarity. Instead, it found that there was a lack of holdings from the Supreme Court on spectator conduct in court rooms.

As for *Wright v. Van Patten*, the Seventh Circuit had extended the holding in *United States v. Cronic*, 466 U.S. 648 (1984), in which the prejudice prong of *Strickland* was presumed where counsel was completely absent, to an instance where counsel was physically absent but participated via speakerphone. In reversing, this Court noted that its precedents do not address whether participation by speaker phone constitutes the complete absence of counsel. *Cronic* of course announced a narrow rule to be applied in rare circumstances. One would not expect its extension to other fact situations.

---

[3] 552 U.S. 120 (2008).

Here, the Sixth Circuit found that there was no lack of Supreme Court opinions on Miranda custody and *Miranda* behind bars to guide it. It did not take a narrow principle and enlarge it to reach a novel situation, nor did it extend established principles to a new situation. But in *Musladin* and *Wright*, the circuit courts did just that, extending Supreme Court principles to new situations which could not possibly have been contemplated by this Court.

Petitioner also anchors its argument on the use of the phrase "bright-line." But not every bright-line rule is a new law. *Solem v. Stumes*, 465 U.S. 638, 646 (1984) (*Edwards* established a bright-line rule to safeguard pre-existing rights, not a new substantive requirement). The rule of which Petitioner complains is formulated as follows:

> A Miranda warning must be given when an inmate is isolated from the general prison population and interrogated about conduct occurring outside the prison.

Pet. App. 19a. The Sixth Circuit described its approach thus,

> This bright-line approach will obviate the fact-specific inquiries by lower courts into the precise circumstances of prison interrogations conducted in isolation away from the general prison population.

Pet. App. Opinion 20a.

In arriving at this approach, the Circuit Court looked to such factors as whether the inmate was placed in a room apart from other prisoners, whether he was taken to a separate location, and whether the duration of the interrogation was dependent on his interrogators. Pet. App. 19a. These factors, although gleaned from *Shatzer, supra* at 1224-1225, are found in *Mathis* and *Perkins*.[4] The *Shatzer* Court itself found interrogative custody to be present when the inmate "remains cut off from his normal life and isolated in a 'police-dominated atmosphere,' *Miranda v. Arizona*, 384 U.S. 436, 456, . . . where his captors 'appear to control [his] fate.' *Illinois v. Perkins*, 496 U.S. 292 . . . ." *Shatzer, supra* at 1216, 1221. So both *Shatzer* and the Sixth Circuit relied on the well-worn principles of *Miranda*.

This approach breaks no new legal ground, nor does it impose a new obligation on the States and the Federal government that they did not have before the decision in the instant case. The requirement that an inmate be advised of his rights where there is both interrogation and isolation is not a new obligation. Even before *Mathis*, an inmate removed from the general population and questioned about conduct occurring outside the prison would have had to have been Mirandized because *Miranda* made no exception

---

[4] This bright-line approach was recently used to reject a finding of Miranda custody because the inmate was questioned by a prison guard about a fight occurring within the prison. *Wilson v. Cain*, ___ F.3d ___, 2011 WL 1792073 (CA. 5 LA).

for the prison setting. The Sixth Circuit's approach merely makes it easier to apply the principles flowing from clearly established Supreme Court precedents.

Contrast this approach with the bright-line rule announced in *Shatzer* requiring the re-advice of rights 14 days after their assertion if the inmate has been returned to the general prison population. This imposed a new obligation on interrogating officers.

The bright-line approach has the same virtue found in *Miranda*. It informs "police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and it informs courts under what circumstances statements obtained during such interrogations are admissible." *Fare v. Michael C.*, 442 U.S. 707, 718 (1979). If officers are entering a prison to question an inmate about conduct occurring outside the prison, and if they isolate the inmate from the general prison population, the inmate must first be advised of his rights. Any exceptions proposed by Petitioner would detract from the clarity and the simplicity of this rule. See also *Berkemer v. McCarty*, 468 U.S. 420 (1984) (applying *Miranda* to some traffic stops but not to others would erode the clarity and simplicity of the rule).

Thus the bright-line Petitioner complains of is not one which holds that prison custody is sufficient for Miranda custody because that was not the holding of the Sixth Circuit. Rather the bright-line is the one separating an inmate from the general prison population, sequestering him with his interrogators, and

making him dependant on them to return to the prison population. *Shatzer* merely confirms this. Nothing in the Sixth Circuit Court of Appeals' decision requires the advice of rights if a prisoner wants to volunteer information. Nothing in the Sixth Circuit Court of Appeals' decision requires the advice of rights before on-the-scene questioning may occur.

The Petitioner cannot point to any clearly established Supreme Court law which would permit officers to omit the advice of rights in the prison setting. The State court's refusal to follow clearly established Supreme Court law was contrary to and an unreasonable application of the holdings in *Miranda*, *Mathis*, *Mathiason*, and *Perkins*.

If *Miranda* thought its decision rested on long recognized principles, this Court cannot find that the Sixth Circuit's bright-line approach to interrogative custody was not also based on clearly established Supreme Court law.

C. That no circuit, other than the Sixth Circuit, has used a bright-line approach is not decisive where it was the only one to be presented with a fact situation identical to the one found in *Mathis*.

Petitioner contends that the Sixth Circuit reasoning must be flawed since no other circuit interpreted *Mathis* as establishing a bright-line rule. Petitioner is incorrect in arguing that the bright-line approach is

based only on *Mathis*. It is also based on *Miranda*'s holding that the rights must be given where there is incommunicado interrogation and official questioning. Moreover, a brief review of the cases cited by Petitioner shows that only the Sixth Circuit has been confronted by facts almost identical to those found in *Mathis*. Petitioner's cases all fit within one of the exceptions to the advice-of-rights requirement recognized in *Miranda* itself.

The first exception is not really an exception, but a condition precedent to the application of *Miranda.* That condition is "custody". When the suspect is not in custody, the interrogation is not inherently coercive. Only custodial interrogation isolates and pressures the individual even without employing brutality or the third degree. It exacts a heavy toll on individual liberty and trades on the weakness of individuals. *Miranda, supra* at, 449-450, 455; *Dickerson v. United States*, 530 U.S. 428, 435 (2000). If there is no custody, *Miranda* does not apply. Into this first category, *United States v. Ozuna*, 170 F.3d 654, 658 (6th Cir. 1999), falls. Ozuna was being questioned by customs and immigration agents as he was trying to enter the United States. The Sixth Circuit held that routine questioning did not require the advice of rights. Some further restriction on one's freedom was necessary. This was a non-inmate and a not-in-custody case. There would be no reason for the Sixth Circuit to look to *Mathis* as controlling precedent.

The second and most obvious exception is where the statement is voluntarily made. This occurs where

the inmate consents to the questioning or initiates the contact with the authorities or where other factors make the statement voluntary. *Miranda* is not applicable because "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding . . . ." *Miranda, supra* at 478. If a statement is volunteered, *Mathis* would not apply.

A recent example of this is *United States v. Ellison*, 632 F.3d 727 (1st Cir. 2010) (Souter, J.) in which an inmate who was also awaiting trial for burning his ex-girlfriend's house, was voluntarily talking with a police officer. He let it be known that he could also provide information on a robbery committed by his ex-girlfriend occurring in another jurisdiction. The next day he met with another officer in the prison library. He gave a statement implicating the girl friend in the robbery and, in so doing, implicated himself.

Relying on *Shatzer*, the Court found that lawful imprisonment imposed on conviction for a crime did not create the coercive pressures identified in *Miranda*. *Ellison*, at 729-730. Justice Souter went on to explain that freedom of movement was just one factor to look at when deciding whether an inmate is in Miranda custody. There must be a further deprivation on top of ordinary prison custody and *Ellison* did not present any other facts that would create a coercive atmosphere. The Court also noted that Ellison asked to talk to officers and that the questioning occurred in

the prison library where there was a button which he could press to summon a guard.

The First Circuit also stated that coercion was absent because prison officials could not affect the sentence length of an uncooperative prisoner. This is a limited view of life behind bars especially in light of this Court's 48-page expose of prison conditions in California. *Brown v. Plata*, 131 S. Ct. 1910 (2011). Coercion comes in all forms and is not necessarily related to the length of one's sentence.

Voluntariness also relieved the need to give the warnings in *Leviston v. Black*, 843 F.2d 302 (8th Cir. 1988) (defendant while incarcerated on a misdemeanor called the police and asked to speak to officers about a robbery) and in *United States v. Turner*, 28 F.3d 981, 983 (9th Cir. 1994) (defendant, in jail on unrelated state charges, called the postal agent and asked him questions about the investigation and then answered a few himself).

In *United States v. Menzer*, 29 F.3d 1223 (7th Cir. 1994), the interrogating officers went to extraordinary lengths to insure that the meeting with the inmate was as non-coercive as possible. Before the meeting, the officers faxed the inmate the questions they would ask so that the defendant could decide if he wanted to meet with them. He could have declined the meeting by fax. When they met with him, they told him he was free to leave at any time and that he could terminate the interview at any time. The door to the interview room was not locked. One other

factor proved significant. The inmate was in a facility where it was generally understood that one did not have to meet with law enforcement officers. Although the meeting was not inmate-initiated, the Seventh Circuit concluded that the inmate entered into the meeting knowingly and voluntarily. There were also no added impositions on his freedom of movement nor any measure of compulsion beyond his imprisonment. *Menzer* at 1232.

In *Georgison v. Donelli*, 588 F.3d 145 (2d Cir. 2009), the inmate was in prison on a robbery conviction when detectives came to the facility to interview him about a three-year old assault charge. As in *Menzer*, there was no facility requirement that inmates speak with law enforcement personnel. The corrections officer, not the interrogating officers, asked Georgison if he was willing to talk with police detectives. He consented to the interview which was held in the visitors' room of the prison. The corrections officer waited outside the room while the conversation occurred. During the interview, the inmate unknowingly made some admissions. He was then offered the opportunity to become "a rat" to which he took umbrage. He immediately terminated the interview and walked out of the room.

While the Second Circuit did not mention a bright-line approach, it certainly engaged in the kind of analysis that the Sixth Circuit used in this case. It found that there were no restrictions on the inmate's freedom over and above ordinary prison confinement. The inmate consented to the interview. The interview

was conducted in a visiting room. Thus there was no coercive pressure brought to bear that tended to undermine Georgison's will or compel him to speak. This was supported by the fact that Georgison left the visiting room at a time and in a manner of his choosing. The Court concluded that

> . . . the coercion inherent in custodial interrogation, which was of concern in *Miranda*, simply was not present here. There was no 'measure of compulsion above and beyond that inherent in custody itself,' . . . Georgison was not 'subjected to restraints comparable to those associated with a formal arrest,'. . . .

Georgison at 157 (internal citations omitted).

In *Alston v. Redman*, 34 F.3d 1237 (3d Cir. 1994), the statement was found to be voluntary because the inmate was advised of his rights on two separate occasions and waived them. In between the two, he met with a public defender and signed a document stating that he would only be interviewed with a lawyer present. There is some question about whether this document was ever transmitted to the warden. The major issue here was the admissibility of the second statement under *Edwards v. Arizona.*[5]

Lastly, in *United States v. Willoughby*, 860 F.2d 15, 24 (2d Cir. 1988), the inmate was talking voluntarily to an old girl friend who had, unbeknownst to

[5] 451 U.S. 477 (1981).

him, agreed to wear a wire. The Second Circuit relied upon the fact that the conversation was voluntary to affirm the conviction. This case was similar to *Perkins* in that the inmate was not subjected to official interrogation so the element of coercion was absent.

The third *Miranda* exception is for on-the-scene questioning. "General on-the-scene questioning as to facts surrounding a crime . . . is not affected by our holding." 384 U.S. at 477. Into this category falls *Cervantes v. Walker*, 589 F.2d 424 (9th Cir. 1978). After a fight, Cervantes was being transferred from one jail cell to another. He was taken to the prison library so a shift commander could talk with him. He deposited all of his belongings on a table outside the library. Per jail regulations, a guard was required to conduct a search of them. He found a green odorless substance in a match box. The guard entered the library and asked the inmate "What's this?" Cervantes admitted that it was marijuana.

The Ninth Circuit found that *Mathis* did not eliminate the on-the-scene-questioning exception to *Miranda* merely because of inmate status.

> The questioning of Mathis by a government agent, not himself a member of the prison staff, on a matter not under investigation within the prison itself, may be said to have constituted an additional imposition on his limited freedom of movement thus requiring Miranda rights. . . . At the same time, *Mathis*, so interpreted, does not bar all instances of the on-the-scene questioning so

> carefully excluded from the Miranda requirements.

Cervantes, 589 F.2d at 427. But it rejected a freedom of movement test for Miranda custody as not being useful in the prison setting. Instead it noted with approval *Mathiason*'s test which looked to see if there was a restriction on a prisoner's freedom to depart.

> The concept of 'restriction' is significant in a prison setting, for it implies the need for a showing that the officers have in some way acted upon the defendant so as to 'deprive (him) of his freedom of action in any significant way,' *Miranda v. Arizona* (citation omitted). In the prison situation, this necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement.

Id. at 428. The *Cervantes* Court acknowledged that questioning by an officer who is not a member of the prison staff constitutes "an additional imposition on [the prisoner's] limited freedom of movement thus requiring Miranda warnings." *Id.*

The on-the-scene exception was also found in *United States v. Conley*, 779 F.2d 970, 973 (4th Cir. 1985). An inmate, possibly injured during an assault, was in a conference room waiting to see medical staff. The prisoner initiated the conversation with the guard by asking, "What's going on?". The Fourth Circuit agreed with *Cervantes* that a prison inmate is not automatically in custody within the meaning of *Miranda*.

> . . . otherwise [requiring warnings] would seriously disrupt prison administration by requiring, as a prudential matter, formal warnings prior to any of the myriad informal conversations between inmates and prison guards which may touch on past or future criminal activity and which may yield potentially incriminating statements useful at trial.

The Court also noted that such a requirement would provide greater protection to prisoners than to their non-imprisoned counterparts.

These same concerns were also expressed in *Garcia v. Singletary*, 13 F.3d 1487, 1491-90 (11th Cir. 1994), another on-the-scene questioning case. An officer observed a fire in a cell. He removed the inmate, doused the flames, and then asked Garcia why he set the fire. Pursuant to *Cervantes*, the *Garcia* Court found that *Mathis* did not impose a per se rule because inmates would have greater rights than non-inmates and because the inmates freedom of movement was not further diminished. See also *United States v. Scalf*, 725 F.2d 1272, 1275 (10th Cir. 1984) (*Miranda* did not apply to on-the-scene questioning of an inmate after the inmate was locked in his own cell and the officer stood outside it and asked about the assault).

Of these 12 cases from 10 of the circuits, not one involved an inmate who was actually removed from his place of confinement to a different location. Not one involved an inmate separated from his familiar surroundings by a locked door. Not one involved an

inmate subjected to prolonged interrogation. Out of these 12 cases, one concerned a not-in-custody immigrant. One involved a *Perkins* situation where coercion was lacking because the inmate was not being questioned by officers. One, in fact, concerned a Mirandized inmate. Four involved on-the-scene questioning. The remaining five were all instances of voluntary statements. In that latter category, three of the inmates actually called the police; one consented to the interview after receiving the questions by fax; one, Georgison, consented to the interview after the officers arrived at the prison.

All of the above cases are factually distinct from Respondent's. He did not consent to the interview. He did not contact the officers and invite them to the prison. He was not responding to on-the-scene questioning. He was removed from the jail itself. He did not have a magic button to press to summon his jailers to end the interrogation. He was being interrogated about a crime that occurred outside of the prison. Only Respondent's case presented a combination of factors which required the advice of rights.

Therefore, it is not surprising that no other circuit has had occasion to adopt a bright-line approach since all of their cases fell into exceptions to the Miranda rule. It would only be the kind of case that is now before this Court where there was ordinary prison custody plus the further restriction of being removed from and isolated from the general prison population that a court might analyze the case

in terms of a bright-line approach. Four cases, *Cervantes* relying on *Mathiason*, *Ellison* relying on *Shatzer*, *Georgison*, and *Menzer* try to arrive at a test for Miranda custody just as the Sixth Circuit did in this case. The Sixth Circuit's approach of isolation from the general prison population can be said to include the tests discussed in those four cases. If one is isolated in that setting, one's freedom of movement is completely restricted.

D. The circumstances of Respondent's interrogation demonstrate that he was in Miranda custody.

In the case at bar, the trial court held that because the officers told defendant he was free to leave, he was not in custody for Miranda purposes. Res. App. 8a. The Michigan Court of Appeals described the facts of the case as follows:

> At trial, Deputy Batterson testified that he removed defendant from his cell, where he was jailed on domestic assault, and led him to a conference room. He told defendant that he wanted to speak with him in regard to the victim whom defendant indicated he knew. The interview began around 7:00 or 9:00 p.m. and ended around midnight. Defendant was not read his Miranda rights, but Deputy Batterson told him he was free to leave the conference room and return to his jail cell. Deputy Batterson told defendant that there had been allegations of a sexual nature involving the victim. Defendant stated that he

> was a fatherly figure to the victim. Although defendant did not initially acknowledge any sexual relations, ...

Pet. App. 54a-55a. The state appellate court concluded:

> Here, defendant was unquestionably in custody, but on a matter unrelated to the interrogation. Although defendant was not read his Miranda rights, he was told that he was free to leave the conference room and return to his cell. Defendant never asked to leave. Because Miranda warnings were not required, the trial court did not err in denying defendant's motion to suppress his statement.

Pet. App. 56a. This decision was contrary to the principles flowing from *Miranda* and *Mathis*, and also from *Mathiason* and *Perkins*. It was also an unreasonable application of those principles to the facts of this case. 28 U.S.C. 2254(d)(1).

Deputy Batterson testified that he had Defendant's jailers take him out of his cell and bring him to a conference room on a different floor in the main part of the Sheriff's Department, away from the jail. He was dressed in jail oranges. He was told that he was free to leave. Pet. App. 70a. The detective admitted that Defendant could not have just gotten up and walked out of the room. He would have had to wait until a corrections officer came to escort him back to the cell. Res. App. 21a-23a. Deputy Sharp testified that the Respondent was never advised that he did not have to talk to the deputies. Pet. App. 135a.

Defendant testified that he knew he could not freely leave the room. He was frightened of Deputy Batterson. He did not know how to get back to his cell from the conference room. The door was shut and he knew that the J door was locked. Pet. App. 67a-77a. Both Batterson and Sharp were armed. Pet. App. 74a. The interrogation ended three hours after he would normally be asleep. This also meant that he missed taking his medication at 10:00 p.m. Pet. App. 77a-80a. When Respondent asked to leave it took 20 minutes for a corrections officer to arrive to return him to his cell and during that time he was still being questioned. He had twice told the officers that he did not want to talk anymore, but his assertions were not honored. Pet. App. 89a-93a.

The interrogation occurred in the evening, after hours. The detectives stayed for six hours, well past 1:00 a.m. and well past the time at which the Petitioner would have gone to sleep. It lasted approximately six hours, a period of time longer than any interrogation with which Deputy Sharp was familiar. Pet. App. 129a.

Questioning was done for the purpose of obtaining incriminating statements about conduct occurring outside the prison. His admissions only occurred near the end of this lengthy interrogation period. Pet. App. 123a-124a. The questioning was not cordial. A sharp tone was used, along with swearing and yelling. Pet. App. 76a-77a, 89a, 130a.

Petitioner points out, on page 33 of its Brief, that Respondent said that he felt like he was in a safe environment. But that comment was made in reference to while he was still in the jail, not to the time period after he passed through J door.

> Q. Would it be safe to say that you were fairly trusting that they weren't taking you anyplace terrible?
>
> A. No, it – actually, it was – I thought I was just I didn't know where I was going; no one ever said where I was going.
>
> Q. Okay. But you didn't ask. Is that –
>
> A. No, I did not.
>
> Q. So you weren't worried about where you were going?
>
> A. I felt like I was in a safe environment.
>
> Q. You went through the J door. Did you still feel like you were in a safe environment?
>
> A. I asked where I was going when I got to the J door.

Pet. App. 87a-88a. So once Respondent arrived at J door he became concerned enough to make inquiry.

The Government argues that the conference room was not claustrophobic, but there is nothing in the record from which the Government can draw this conclusion. The absence of any mention of a window might just as easily lead to the opposite conclusion. The description of the conference room is not much

different from a standard interrogation room, except for the large conference table and the white board. Despite these two amenities, Respondent was still removed from the general prison population. He was still in a room at the mercy of his interrogators. His freedom of movement was restricted to that one room and he knew he could not leave that room without an officer escorting him back to his cell. He knew in fact that there was at least one locked door he would have to pass through to get back to his cell. If it had been possible for him to leave that room under his own steam, could he even find his way back to his cell? If he refused to talk and walked out of the room, would the interrogating officers report that he was loose? What would happen if he was found wandering around the Sheriff's Department in jail oranges unescorted? Would he be accused of attempting to escape? Or would he receive an "out-of-place" ticket?

Although Petitioner writes that Respondent was **repeatedly** told he was free to leave, citing to four pages in the transcript,[6] he was not told this on four separate occasions. He was told this when he first entered the room by Batterson, 70a, and again by Batterson when Batterson was yelling and swearing at him, 89a. The reference to page 90a by Petitioner is again to the incident where Batterson is yelling at him. On page 92a, the last of Petitioner's cites, there

[6] Petitioner's Brief at page 36.

is only a discussion of what Respondent's understanding was of his ability to leave the room.

Moreover, a prisoner being told he is free to leave is only one of numerous factors to look at to decide if one is in custody. *Yarborough v. Alvardo*, 541 U.S. 652, 653 (2004). No reasonable person in Respondent's place would have felt free to terminate the interrogation and leave the room. *Keohane*, 516 U.S. at 112. Significantly on the issue of whether defendant felt free to leave is the fact that the time for taking his anti-rejection medicine had passed and yet the defendant did not feel he could ask to leave the interrogation room to take these medications. Pet. App. 78a-80a.

In his concurrence, Judge McKeague also mentioned that Fields knew he could leave. Pet. App. 29a fn.3. But Respondent testified that he did not feel he could leave. Pet. App. 71a-72a. He did not even know where he was nor how to get back to the jail. Pet. App. 74a-77a. He had never been on that side of the Sheriff's Department before. Pet. App. 75a. He would have needed an escort to return to his cell. Unlike *Cervantes* and *Ellison*, there was no button for him to push so he could summon his jailers. He was at the mercy of his interrogators.

The encounter between the Respondent and the two detectives was neither voluntary nor on-the-scene questioning. Fields was clearly in Miranda custody at the time of the interrogation and not just because he was serving time on a disorderly conduct conviction.

He was isolated from the other prisoners and from his jailers. He was in a new location, one with which he was not familiar. His interrogators were not affiliated with the prison. He was removed from the jail at a time and in a location where there would not be much foot traffic. He was not told that he did not have to talk with the deputies. Batterson and Sharp created a coercive atmosphere. The Respondent was in Miranda custody.

A strong presumption also exists that a statement taken after prolonged incommunicado interrogation, six hours in this case, is the product of coercion. *Miranda*, 384 U.S. at 476.

Petitioner errs when it argues that this case is similar to *Ellison* where the inmate asked to speak to the officers because he was trying to exact revenge on a girl friend, was still within the jail proper, and had the power to summon his jailors at the touch of a button. Nor is this like *Georgison* where prison policy gave him the option to speak to the officers and a guard, not an interrogating officer, asked him if he would talk to them. He consented to the interview which took place in a visitor's room. The prison guard remained outside the visitor's room during the interview. Unlike Georgison, the Respondent did not remain in familiar surroundings. Unlike Georgison, he was never informed by anyone that he could refuse to talk with detectives. Unlike Georgison, the people interrogating him were armed. Unlike Georgison, he was not interrogated in a prison visitor's room. Unlike Georgison, he could not get up and leave but was

dependent on his interrogators to contact his jailers so he could be returned to the jail. The fact that he was in danger of organ rejection because he missed taking his medication on time and yet did not end the interrogation shows that he did not feel empowered to do so.

Nor is this case like *Mathiason* where a parolee, a person not in prison, was asked by phone if he would speak with an officer and was asked where he would like to have the conversation. When Mathiason said it did not matter to him, arrangements were made to talk in a parole office in a building which housed several state agencies. The parolee arrived on his own and left on his own. *Miranda* was not required in these cases, *Ellison*, *Georgison*, and *Mathiason*, because the setting of the interviews was not coercive and the conversations were voluntary.

Of course, the element of ordinary prison custody was also lacking in *Mathiason*, as it was in two of the cases cited by the United States. In *United States v. King*, 604 F.3d 125 (3d Cir. 2010), the Court applied a five-factor test to determine custody, but one factor dominated. King called the FBI to make arrangements to come in and talk with the agents. This weighed heavily in favor of a finding of voluntariness. In *United States v. Jamison*, 509 F.3d 623 (4th Cir. 2007), the defendant was a felon who accidentally shot himself. He was questioned by officers at the hospital. The Court found that the hospital impeded his freedom of movement not the officers. Like

Mathiason, these are not prison cases. Only in the prison cases is it more likely that the environment might be coercive.

The Government deems all of the facts Respondent points to as indicia of a coercive environment as just baseline restrictions attendant to ordinary prison custody. But isolation from the general prison population is not a baseline restriction. It was exactly this kind of custody, incommunicado interrogation, that *Miranda* found to be constitutionally abhorrent. This isolation meets the "custody plus" test of *Shatzer*.

The Government, in trying to discount the fact that the deputies were armed, compares it with the fact that the police are armed during a traffic stop and this Court has refused to find such a stop the equivalent of custody. *Berkemer*, 468 U.S. at 437-439. This comparison is inapt. A traffic stop occurs in the open, not in isolation, so the presence of the weapon is not a threatening factor. On the facts of this case, the guns contributed to the coercive pressure of the incommunicado interrogation. Further a driver stopped for an infraction knows that the restriction on his freedom of movement will be brief and he is not at the mercy of the officers. *Id*. at 437-438. A prisoner, at the mercy of interrogating officers, has no such expectation. He knows he is in for the long haul.

Petitioner contends that the case at bar is factually distinct from *Mathis* because Mr. Fields is highly educated, he was aware that a criminal matter was

being investigated, and told that he could leave the interview whenever he wished. Pet. Brief at 30. While Mr. Fields is educated, he has never been to law school. His area of expertise is social work, not law. There were no facts from which to infer what Mathis' education level was, but he was educated enough to have the kind of tax problems that interest the IRS. There is no Miranda exception for people that are college graduates. In fact, a suspect's individual characteristics, unless they are children, are not relevant on the decision as to whether the suspect should be advised of his rights. *Miranda, supra* at 468-469; *JDB v. North Carolina*, 564 U.S. ___ (2011). Otherwise, as pointed out in Justice Alito's dissent in *JDB*, courts would be spending precious judicial time on examining the sensitive suspect and the pliable prisoner.

The instant case falls squarely within the ambit of *Miranda* and *Mathis* because the Respondent experienced further restrictions on his freedom of movement than that occurring with ordinary prison custody and he was interrogated by officers unaffiliated with the prison concerning conduct occurring outside the prison. This interaction of official questioning and restrictive custody created a coercive atmosphere undispelled by the advice of rights.

This Court should reject the arguments made by the Petitioner and the Amici that Miranda warnings should not be required in the prison context. A penal environment is a naturally coercive environment. One of the most important aspects of that environment is

to force the prisoner to obey the rules of the prison without questioning them. A prisoner, upon entering a correctional institution, also quickly discovers that many of the rights he enjoyed in the free world are now denied to him. In this situation, an inmate, isolated from the general prison population and being questioned for conduct occurring outside the prison, must be informed that he still retains Miranda rights. Only this simple expedient will dispel the coercive nature of custodial interrogation.

II. In *Miranda*, this Court simplified procedures to be followed during custodial questioning to protect the Fifth Amendment privilege. That privilege will continue to be protected by, and law enforcement and the judiciary will benefit from, a bright-line approach to the question of when a prisoner is in interrogative custody.

As soon as the decision in *Escobedo v. Illinois*, 378 U.S. 478 (1964), was issued, it became the subject of spirited legal debate, scholarly writings and conflicting judicial opinions. This was the first case to require officers to advise suspects of the right to remain silent and to counsel before questioning. Law enforcement was concerned with how to execute the requirements of *Escobedo* and the judiciary was concerned with how to apply its dictates to the facts

before it.[7] In order to resolve the problems arising from the decision and to clarify the opinion, the Court issued its decision in *Miranda v. Arizona* just two years later adopting a bright-line approach. The question of when a prisoner is in custody for *Miranda* purposes would benefit from just such a bright-line approach. It would offer clarity to officers questioning inmates, clarity to Courts in applying the rule, and consistency in the resulting jurisprudence.

A. Isolation from the general prison population and questioning by officers unaffiliated with the facility about conduct occurring outside the prison are the three necessary elements triggering the requirement that warnings be administered.

Using a "freedom of movement" test is not an efficacious one in the prison setting because all inmates have their movements restricted. The Court rejected this as a test for interrogative custody in *Shatzer* calling it only a necessary condition for custody but not a sufficient one. 130 S. Ct. at 1224. Likewise, other baseline restraints which are conditions

[7] Just three years earlier, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court held that counsel must be appointed for indigent felons. After *Escobedo*, the police were especially concerned about supplying counsel to suspects in the station house before questioning.

of ordinary prison life do not turn ordinary prison custody into interrogative custody. *Id.*

The condition of being isolated from the general prison population would be a useful test. Ordinary prison custody does not involve such isolation. It involves the opposite, a life lived under constant scrutiny in the company of hundreds. Isolation from the general prison population is usually reserved for punishment. Using this test dovetails well with *Miranda*'s holding that isolation from others is the key element contributing to the coercive effect of official questioning.

Shatzer has already recognized that isolation from the general prison population is a line of demarcation. Crossing that line marks either an exit from or a return to ordinary prison life. An inmate isolated from the general prison population is cut off from his normal life thus fulfilling one of the requirements for Miranda custody. Official interrogation fulfills the other. The inmate finds himself in a police-dominated atmosphere where his interrogators appear to be in control of his fate. These facts exert the coercive pressure that *Miranda* was designed to guard against. *Shatzer* at 1224.

Under this test, questioning in the general prison population would not require Miranda warnings, but removing the inmate from that population and isolating him in a cell, a conference room, an empty visitors room would. The maintenance room, nicely outfitted with a desk and three chairs, was deemed to be an

interrogative setting by the *Shatzer* Court. There was no further discussion about whether the inmate thought he was free to leave because the incommunicado aspect of the interrogation was the sufficient condition. This kind of isolation exerts the coercive pressures that *Miranda* was designed to guard against.

The Sixth Circuit's qualifier that the interrogation must concern conduct occurring outside the prison is also an essential factor in the bright-line approach as will be discussed in the next section.

B. The decision of the Sixth Circuit does not confer greater rights on the imprisoned than it does on the unimprisoned, nor does it conflict with administrative concerns within the prison.

The decision of the court of appeals does not, as Petitioner and the United States fear, give prisoners more rights than it does to people who are not imprisoned. This argument is found only in cases like *Cervantes*, *Conley* and *Garcia* where the issue was on-the-scene questioning in the prison setting. The Ninth Circuit in *Cervantes* held that if it adopted the broad reading of *Mathis* as argued by Cervantes and required the advice of rights before there can be any on-the-scene questioning in prison, prisoners would have more rights than nonprisoners. The Ninth Circuit was right. To apply *Mathis* in that fashion without acknowledging that *Miranda* excluded

on-the-scene questioning from the advice of rights requirement would result in greater protection for prisoners. But no case holds that the advice of rights is required before a guard may question an inmate about conduct occurring within the prison. If it did, it would be in direct conflict with *Miranda*.

The Sixth Circuit was not faced with an issue of on-the-scene questioning, so its decision does not grant greater rights to inmates. It wisely limited its holding to conduct occurring outside of the prison, so on-the-scene questioning is not implicated.

In fact, this is a key distinction, but Petitioner asks this Court to reject this distinction while the Government argues in its amicus brief that this distinction informs the custody analysis. The United States' concern is with the disruption to prison administration if corrections officials wanting to talk with a prisoner about matters occurring inside the prison must first give the warnings. The *Conley* Court anticipated this concern finding that a prisoner is not always in custody for Miranda purposes,

> . . . otherwise [requiring warnings] would seriously disrupt prison administration by requiring, as a prudential matter, formal warnings prior to any of the myriad informal conversations between inmates and prison guards which may touch on past or future criminal activity and which may yield potentially incriminating statements useful at trial.

Conley, *supra* at 973.

Cervantes also found that when officers from outside the prison come into the prison to interview an inmate, there is an additional imposition on the inmate's limited freedom of movement. *Cervantes*, *supra* at 428. But this coercive effect is absent if a prisoner is talking to a prison guard, a person with whom he is familiar. In the latter circumstance, warnings would not be required.

Considering the location of the crime in the equation does not endanger a finding of voluntariness. Obviously, if the conduct occurs inside the prison it is more likely to be on-the-scene questioning conducted by prison guards. If the conduct occurs outside the prison, the questioning is more likely to be conducted by outside officers investigating a non-prison crime. It is also more likely to be conducted away from the general prison population and more likely to be marked by additional restrictions on the inmates freedom of movement and therefore be more coercive. These are the very factors which require the advice of rights and which should be considered in deciding whether *Miranda* is applicable.

Neither *Miranda,* nor the Sixth Circuit in this case, intended to limit the use of voluntary statements or statements made as a result of on-the-scene questioning. What both Courts were concerned with is the use of coerced statements and false confessions. Consequently, *Miranda*'s progeny must be read in light of *Miranda* itself. Warnings are not required if a prisoner wants to talk with a corrections official because that would be a voluntary statement regardless

of where the conversation occurs. Warnings are also not required for on-the-scene questioning of a prisoner.

C. Society's need for interrogation does not outweigh the Fifth Amendment privilege.

The *Miranda* Court did not intend to hamper law enforcement efforts to enforce laws and prosecute criminals. It believed that confessions were an important law enforcement tool, yet it also believed that Society's need for interrogation did not outweigh the Fifth Amendment privilege. *Id.* at 477-479. In discussing the tension between the tool and the principle, it came down solidly on the side of the constitutional principle:

> . . . the Constitution has prescribed rights of the individual when confronted with the power of government when it provided in the Fifth Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged.

Id. at 479. It noted that the four cases before it that day presented graphic examples of the overstatement of the need for confessions. In each of the cases, considerable evidence had been amassed against each defendant through standard investigative practices. *Id.* at 481.

Two years earlier, these same justices, in *Escobedo*, had observed that as a society,

> We have learned the lesson of history, ancient and modern, that a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.

Escobedo v. Illinois, *supra* at 488-489.

Now 45 years after *Miranda* was decided, developments in science and technology have made proof of crime a much easier and more accurate proposition for the prosecution so that reliance on confessions, and the danger of the false confession, can be reduced even more. For instance, in *Miranda*'s year, 1966, a prosecution might have relied on blood typing from body fluids which, if the type was O, would narrow the possible perpetrator to 60% of the population. Now DNA, extracted not just from blood, saliva, or semen, but from hair or other material shed from a body at the scene of the crime, increases that 60% probability to almost 100% accuracy. This Court has called DNA testing powerful new evidence "unlike anything known before." *District Attorney's Office for the Third Judicial District v. Osborne*, 129 S. Ct. 2308, 2316 (2009).

The ubiquity of audio and video equipment also relieves the prosecution from reliance on confessions.

Where there were only bank cameras in 1966, there are now cameras in and around numerous commercial establishments and other public places including some focused on the street by various governmental entities. Cell phones also offer a fertile source from which to discover evidence. A pattern of calls displayed in memory or on a bill can establish that co-defendants, or the suspect and the victim, knew each other, or it can provide circumstantial evidence that they were together at the time of the crime. Data from cell phone towers can place a defendant in the vicinity of a crime at the time it occurred.[8] Cell phones not only offer information about with whom the defendant spoke and where the phone was at the time of its use, but cell phones sometimes provide incriminating photos and text messages.[9] This point is made by the fact that no amount of "enhanced interrogation" led to the discovery of the location of Osama Bin Laden, but a cell phone did.

If a camera uses a flash card, the geotag can be accessed. That tag shows by latitude and longitude, the exact spot from where a photo was taken. Hidden devices in the Apple IPad and 3G IPhones also track

---

[8] *People v. Mario Willis*, Mich. COA #298643, appeal pending.

[9] *People v. Kilpatrick*, Wayne County Circuit Court #08-10496. Defendant pled guilty to obstruction of justice. Text messages proved that the Mayor of Detroit lied at a civil trial when he claimed that he had not had an affair with his Chief of Staff.

and store the user's location. These files also store data from cell phone towers and from nearby Wi-Fi locations.[10]

But the mother lode of incriminating evidence, not in use in 1966 but in use now, is the jail phone. All calls an inmate places are recorded. At the Wayne County Jail in the city of Detroit, an employee of the Sheriff's Department reviews hundreds of hours of recordings and if there are useful statements, the call is flagged and turned over to the prosecution.[11]

Likewise, computer hard drives may contain either direct or circumstantial evidence, or negative character evidence. Proof that an online search for a criminal defense attorney was conducted on a home computer just hours after a statement was taken from a murder suspect, was offered in evidence as consciousness of guilt.[12] Social networking sites are also a source of evidence because people persist in writing about or displaying themselves in compromising positions.

---

[10] "The New York Times" April 21, 2010 Business Section, B page 1.

[11] In *People v. Orlewicz*, ___ N.W.2d ___ (2011), 2011 WL 234390, six hundred hours of phone calls over a five-month period were reviewed. The prosecution played snippets of conversations between the 17 year-old defendant and his parents. They were used to attack the defendant's character and his defense.

[12] *Id.*

If a confession is truly voluntary, there should be no bar to its admission in evidence. But as the first nation to enshrine the privilege against self incrimination in a written Constitution, we should no longer be relying on confessions extracted from the innocent or the unwary when we have more reliable and more sophisticated means of proof.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ELIZABETH L. JACOBS
Counsel for Respondent
615 Griswold, Suite 1125
Detroit, Michigan 48226
(313) 962-4090

DATED: July 7, 2011