No. __________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

LISA GRAHAM,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

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June 15, 2020

CAPITAL CASE

QUESTIONS PRESENTED

Before police ever formally questioned Lisa Graham, officers sent her husband into the interview room after he claimed that he could get his wife to "tell the truth" about their daughter's death on tape, without advising Ms. Graham of her constitutional rights or notifying her that she was being recorded. At Ms. Graham's first capital murder trial, the judge ruled the recorded conversation with her husband was inadmissible, because it was protected by the martial communications privilege, before declaring a mistrial. At Ms. Graham's second capital murder trial, a different judge reopened the suppression hearing, concluded that the conversation with her husband was not confidential, and admitted it.

In affirming the trial court's decision that the marital communications privilege had been waived, the Alabama Court of Criminal Appeals held that the question was "whether Graham had any expectation of privacy in the conversation she had with her husband," Graham v. State, No. CR-15-0201, 2019 WL 3070058, at *18 (Ala. Crim. App. July 12, 2019), thereby disregarding the standard established by Wolfle v. United States, 291 U.S. 7 (1934), and Pereira v. United States, 347 U.S. 1 (1954), which requires the State to prove that Ms. Graham had not intended the conversation to be private, regardless of any objective reasonable expectation of privacy. Further, the lower court also held that the conversation between Ms. Graham and her husband was not the "functional equivalent" of an un-warned police interrogation based solely on the fact that Ms. Graham's husband initially requested to speak to his wife and was not asked to do so by police.

The lower court's holdings give rise to the following important questions:

1. Can a court, consistent with Wolfle and its progeny, utilize the "reasonable expectation of privacy" doctrine to defeat the marital communications privilege where the conversation between a party and her spouse was "intended to be confidential"?

2. Does self-initiated third-party questioning aimed at getting a suspect "to tell the truth," surreptitiously recorded by the police, constitute the "functional equivalent" of an un-Mirandized interrogation, as set forth in Arizona v. Mauro, 481 U.S. 520 (1987), and Rhode Island v. Innis, 446 U.S. 291 (1980), in violation of the Fifth and Fourteenth Amendments?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iv

OPINIONS BELOW. 1

JURISDICTION. 2

RELEVANT CONSTITUTIONAL PROVISIONS. 2

STATEMENT OF THE CASE. 3

I. FACTS MATERIAL TO THE QUESTION PRESENTED 4

II. PROCEDURAL HISTORY AND THE STATE COURT RULING ON REVIEW 9

REASONS FOR GRANTING THE WRIT. 10

I. THE LOWER COURT'S DETERMINATION THAT MS. GRAHAM'S CONVERSATION WITH HER HUSBAND WAS NOT PROTECTED BY THE MARITAL COMMUNICATIONS PRIVILEGE UNLESS SHE DEMONSTRATED BOTH AN INTENT FOR THE CONVERSATION TO REMAIN PRIVATE AND A REASONABLE EXPECTATION OF PRIVACY CONFLICTS WITH WOLFLE AND ITS PROGENY.. . . . 11

II. REVIEW SHOULD ALSO BE GRANTED TO CLARIFY THAT SELF-INITIATED THIRD-PARTY QUESTIONING AIMED AT GETTING A SUSPECT "TO TELL THE TRUTH," SURREPTITIOUSLY RECORDED BY THE POLICE, CONSTITUTES THE "FUNCTIONAL EQUIVALENT OF INTERROGATION," SUCH THAT THE FAILURE TO GIVE MIRANDA WARNINGS VIOLATES THE FIFTH AMENDMENT. . 16

CONCLUSION. 21

PROOF OF SERVICE

APPENDIX A — Alabama Court of Criminal Appeals order denying relief, Graham v. State, No. CR-15-0201, 2019 WL 3070058 (Ala. Crim. App. July 12, 2019), and order denying rehearing.

APPENDIX B — Alabama Supreme Court order denying petition for a writ of certiorari and certificate of judgment, Ex parte Graham, No. 1181043 (Ala. Jan. 17, 2020)

<u>TABLE OF CITED AUTHORITIES</u>

CASES

United States v. Alexander, 447 F.3d 1290 (10th Cir. 2006) 19

Blau v. United States, 340 U.S. 332 (1951) 11

People v. Bryant, Smith & Wheeler, 334 P.3d 573 (Cal. 2014) 15

United States v. Dunbar, 553 F.3d 48 (1st Cir. 2009) 14

State v. Gosnell, 62 S.W.3d 740 (Tenn. Crim. App. 2001) 15

Graham v. State, No. CR-15-0201, 2019 WL 3070058 (Ala. Crim. App. July 12, 2019) . . . . i, 2, 9, 13, 17, 18

Graham v. State, No. CR-15-0201 (Ala. Crim. App. Sept. 13, 2019) 2, 10

Ex parte Graham, No. 1181043 (Ala. Jan. 17, 2020) 2, 10

United States v. Hamilton, 701 F.3d 404 (4th Cir. 2012) 13

State v. Howard, 728 A.2d 1178 (Del. Super. Ct. 1998) 14

Rhode Island v. Innis, 446 U.S. 291 (1980). . . . . i, 10, 16, 18, 20

United States v. de la Jara, 973 F.2d 746 (9th Cir. 1992) 13

SEC v. Lavin, 111 F.3d 921 (D.C. Cir. 1997) 13

United States v. Madoch, 149 F.3d 596 (7th Cir. 1998) 14

Massiah v. United States, 377 U.S. 201 (1964) 20

Arizona v. Mauro, 481 U.S. 520 (1987) . . . . i, 16, 18, 19, 20

People v. Mickey, 818 P.2d 84 (Cal. 1991) 15

Miranda v. Arizona, 384 U.S. 436 (1966) 16

Nelson v. Fulcomer, 911 F.2d 928 (3d Cir. 1990) 18

North v. Superior Court, 502 P.2d 1305 (Cal. 1972). 14

Pereira v. United States, 347 U.S. 1 (1954) . . . . i, 9, 12, 14, 15

State v. Rollins, 675 S.E.2d 334 (N.C. 2009). 15

State v. Sewell, 205 A.3d 966, 978 (Md. 2019) 14

Stein v. Bowman, 13 Pet. 209 (1839). 11

State v. Terry, 699 S.E.2d 671 (N.C. Ct. App. 2010) 14

Trammel v. United States, 445 U.S. 40 (1980). 11

Whitehead v. Cowan, 263 F.3d 708 (7th Cir. 2001) 19

Wolfle v. United States, 291 U.S. 7 (1934) . . . . i, 9, 11, 12, 14

Yokie v. State, 773 So. 2d 115 (Fla. Dist. Ct. App. 2000). 12

STATUTES

28 U.S.C. § 1257. 2

RULES

Ala. R. Evid. 504. 12

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PETITION FOR A WRIT OF CERTIORARI

Lisa Graham respectfully petitions for a writ of certiorari to review the judgment of the Alabama Court of Criminal Appeals in this case.

OPINIONS BELOW

On March 15, 2015, a jury in Russell County, Alabama convicted Lisa Graham of one count of capital murder-for-hire, in connection with the death of her daughter, Stephanie "Shea" Graham. (C. 80; R. 4283.)[1] The jury returned a ten (10) to two (2)

[1]References to the clerk's record are cited herein as "C. __." The reporter's transcript at trial is cited as "R. __." The supplemental reporter's transcript is cited

verdict recommending a death sentence. (R. 4368.) On November 18, 2015, the trial court sentenced Ms. Graham to death. (R. 4429.)

The opinion of the Alabama Court of Criminal Appeals affirming Ms. Graham's conviction and death sentence, Graham v. State, No. CR-15-0201, 2019 WL 3070058 (Ala. Crim. App. July 12, 2019), is not yet reported and is attached as Appendix A, as is the order of that court overruling Ms. Graham's application for rehearing, Graham v. State, No. CR-15-0201 (Ala. Crim. App. Sept. 13, 2019). The order of the Alabama Supreme Court denying Ms. Graham's petition for a writ of certiorari is also unreported and is attached as Appendix B. Ex parte Graham, No. 1181043 (Ala. Jan. 17, 2020).

JURISDICTION

The decision of the Alabama Court of Criminal Appeals affirming Ms. Graham's conviction and sentence was issued on July 12, 2019. See Appendix A. On September 13, 2019, the Court of Criminal Appeals denied rehearing. See id. The Alabama Supreme Court denied Ms. Graham's petition for a writ of certiorari on January 17, 2020. See Appendix B. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent

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as "S. __." References to relevant portions of Ms. Graham's interrogation are cited as "State's Ex. 27 at __." State's Exhibit 27 is the DVD of Ms. Graham's un-redacted statement introduced at the suppression hearing. (R. 2593.)

part:

> [N]or shall any person . . . be compelled in any criminal case to be a witness against himself.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Lisa Graham's daughter, Stephanie "Shea" Graham, was shot and killed by Kenneth Walton on July 5, 2007. (R. 2925-28.) Walton was a family friend and had worked for Shea's father, Kevin Graham, but Kevin fired Walton two days prior to Shea's death. (R. 3366, 3560; C. 1013.)

On that day, Shea arranged to meet Walton at a Racetrac gas station in Russell County, Alabama. (R. 3132.) Shea had contacted him to ask for help obtaining a car so she could get out of town. (R. 2913, 2916, 2921, 3132.) She was due in court the following morning on charges related to a drive-by shooting in Columbus, Georgia. (R. 3570-71, 4112.) Sometime between 9:30 and 10:00 p.m., Walton met Shea at the gas station, where she had driven with four friends. (R. 3129, 3133-34.) Shea left her purse, cell phone, and truck with her friend Amy Brittingham and said she would let her know when she was done with Walton and ready to be picked up. (R. 2923. 3134.) Shea then got in Walton's truck, and he drove around until Shea told him she needed

to use the bathroom. (R. 2929-25.) Walton pulled over near Bowden Road, and, as Shea left the vehicle, he grabbed a gun and shot her six times, killing her. (R. 2925-28.) Walton got back in his truck and drove away from the scene, running over Shea's arm as he left. (R. 2928.) A trucker spotted her body later that night, and the police launched an investigation. (R. 2772-73.)

I. FACTS MATERIAL TO THE QUESTION PRESENTED

When Shea was identified the next day, the police notified her parents, Kevin and Lisa Graham. (R. 3225-26, 3834.) Kevin quickly told police that Kenny Walton likely killed his daughter; Kevin initially believed that Walton must have decided to take revenge after Kevin fired him. (R. 3366, 3560; C. 1013.) Walton came into the Sheriff's office the following evening, on July 7, and police interrogated him for several hours. (R. 3371-73.) Past midnight on July 8, after Walton had given his statement, investigators searched Ms. Graham's house and vehicle. They ultimately recovered her gun, which Walton had used in the shooting, from her grandfather, Warren Thompson, who lived next door. (R. 3062-63, 3858, 3862.)

At around 2:00 a.m., Ms. Graham was brought to the Sheriff's office in a patrol car, and Kevin accompanied her in his own car. (R. 2582-83.) On the way, Ms. Graham mentioned to one of the officers that she would need to hire a lawyer, but she was not read her Miranda rights at that time. (C. 1017; R. 2604.) Ms. Graham was placed in an interrogation room equipped with a camera capable of recording and streaming a contemporaneous feed on a closed circuit television in the station. (R. 2584-85, 2604.)

Soon after, Kevin asked Sheriff Heath Taylor if he could speak with his wife alone in the interrogation room because "he felt like he could get her to tell the truth about her involvement with Shea." (R. 2585, 2604.) Sheriff Taylor advised Kevin that the conversation would be recorded, but he did not give Ms. Graham a similar warning or read her any Miranda rights before sending Kevin into the room. (R. 2603-04.) Then, as Sheriff Taylor watched, Ms. Graham told her husband that she "loaned" Walton her gun to "get" his cousin Ieisha Hodge, who she suspected of having an affair with Kevin. (C. 989; R. 2586-87.) They spoke for about an hour, and, at times, Ms. Graham whispered to Kevin to avoid being heard. (R. 2587, 2675; State's Ex. 27 at 4:51, 30:58.) Sheriff Taylor advised Ms. Graham of her Miranda rights and interrogated her himself immediately after Kevin left the room. At that point, it was around 3:00 a.m. (R. 2588.)

Ms. Graham was subsequently indicted for two counts of capital murder: murder for consideration or for hire and murder committed by shooting from a vehicle. (C. 80, 220.); Ala. Code § 13A-5-40(a)(7), (18). After the trial court denied the State's motion to consolidate the offenses, the State proceeded to trial only on the murder-for-hire charge. (C. 163.) Ms. Graham's first trial began on September 21, 2012, and a suppression hearing was held on September 21 and 24. (S. 1222, 1341, 1360.) At that hearing, Judge Greene ruled that Ms. Graham's statements to Sheriff Taylor were admissible but suppressed the recorded conversation with her husband, because she was not advised of her Miranda rights beforehand, and use of the conversation would violate the marital privilege rule. (S. 1380, 1390, 1472-74.) The next day, Judge

Greene abruptly announced that there would be a mistrial because he was having health issues.[2]

Ms. Graham was not retried until February 2015. Judge Walker, who presided over the second trial, reopened the suppression hearing, over defense objection, at the State's request. (R. 346.) At this second hearing, Sheriff Taylor testified that by the time the Grahams arrived at the station, he was aware that Kevin was feeling "real uneasy" about his wife's possible role in Shea's death. (R. 2585.) Sheriff Taylor explained that, earlier that night, at the house, Kevin cooperated with police by telling them where to look for Ms. Graham's handgun, calling Mr. Thompson about the gun at their instruction, accompanying the officers to collect it from him, and, later, by turning over a tape he had recorded on his phone of a conversation between his wife and Kenneth Walton. (R. 2584, 2585-86.) According to Sheriff Taylor, Kevin was "obviously, feeling like . . . there is some involvement," so "he ha[d] this dialogue with me about wanting to go and speak to her," to "get her to tell the truth." (R. 2585-86.) On cross-examination, Sheriff Taylor further testified as follows:

> Q: Okay. Well, you and Kevin Graham had a conversation –
> A: Yes.

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[2]When the State asked whether there was a manifest necessity for a mistrial, Judge Greene responded, "Yeah, for me." (C. 356; S. 1594-95.) At a later hearing on a motion to dismiss the indictment on double-jeopardy grounds, the basis for the mistrial was contested: Judge Greene testified that he could have continued the trial but was ordered to declare a mistrial by Judge Johnson, while Judge Johnson said that he merely expressed concern for Judge Greene's health and left the decision to declare a mistrial in his discretion. (R. 244-45, 251-52.) Judge Greene also testified that he did not give the defense any opportunity to object to the mistrial or inquire as to its necessity. (R. 176.)

Q: – and my client was not in on that conversation. Is that correct?
A: That's correct.
Q: And based on that conversation with Mr. Graham, you knew that it was Mr. Graham's intent to go into that room and to attempt to talk to Ms. Graham in such [a] way that you would be able to have a tape of what was said. Is that correct?
A: Yes, Ma'am. That's what he requested.
Q: But my client was not made aware of that by you. Is that correct?
. . .
A: You're – absolutely.
Q: Is that correct? And at that point in time you were aware that they were married. Is that right?
A: Yes ma'am.
Q: And as far as the situation while they were in there together, you never at any time made her aware that she was being recorded. Is that correct? I am asking what you did.
A: I don't think – I don't think I had said anything to her about that at the time of their conversation.
Q: Okay. And then after – at the time I know the conversation was being recorded. But were you listening and watching as it was occurring?
A: Yes, ma'am.

(R. 2603-04.) Nevertheless, Judge Walker, substituting his decision for Judge Greene's, concluded that Ms. Graham's conversation with her husband was admissible under the marital privilege rule, because the confidentiality of their communications was violated when investigators recorded them. (R. 2676-77, 2705.)

The State's theory at trial was that Ms. Graham had a motive to kill her daughter because she was fed up with her behavior and worried that she would lose the bond money she and her husband had put up if Shea missed her court date. (R. 2741-42.) The State argued that Ms. Graham met with Walton at the library and asked him to kill Shea as a "favor." (R. 4056, 4080-81.) Walton, the only witness who was able to speak to the nature of this alleged agreement, testified that he killed Shea

because Ms. Graham asked him to do her a favor and that he owed her the favor because he had been covering up Kevin's affair with his cousin, Ieisha Hodge. (R. 2946.) He said that Ms. Graham told him that he could call her if he ever needed anything – but he never testified that Ms. Graham offered or promised him money or anything else of economic value. (R. 2946.) Accordingly, defense counsel moved for a judgment of acquittal after the State rested, arguing that the prosecution had failed to prove the element of pecuniary gain or valuable consideration required to prove capital murder for hire. (R. 3991.) The court denied the motion, accepting the State's argument that valuable consideration can be "almost anything." (R. 4004-06.)

In closing, the prosecutor pointed to Ms. Graham's statements to Kevin and argued that she was guilty of murder if she intended to have Walton kill Ieisha Hodge, positing that if "she loaned her gun to Kenny Walton to kill any human being in America, she is guilty of murder." (R. 4155.) He read at length from the transcript of Ms. Graham's conversation with her husband. (R. 4175-78.) The trial court went on to instruct the jury, consistent with this argument, that Ms. Graham must have had the intent to kill Shea "or another person." (R. 4228.) The court overruled defense counsel's objection to the instruction, (R. 4257, 4260-61), and the jury subsequently found Ms. Graham guilty of capital murder-for-hire. (R. 4283.)

At the penalty phase, the jury recommended a sentence of death by a vote of ten to two. (R. 4368.) The court found one aggravating circumstance: that the murder was committed for pecuniary gain, as established by the jury's verdict at the guilt phase. (C. 40.) It found two statutory mitigators: Ms. Graham's lack of criminal history and

that her capacity to appreciate the criminality of her conduct or to conform her conduct to the law was substantially impaired. (C. 42-43.) Ultimately, the court concluded that the aggravating circumstance outweighed the mitigation and sentenced Ms. Graham to death. (C. 49; R. 4429.)

II. PROCEDURAL HISTORY AND THE STATE COURT RULING ON REVIEW

Ms. Graham filed a timely appeal from her conviction and death sentence in the Alabama Court of Criminal Appeals. Ms. Graham argued that the recorded conversation with her husband should have been suppressed for two reasons: it was protected by the marital communications privilege and it was the functional equivalent of an un-warned police interrogation and therefore violated her Fifth and Fourteenth Amendment rights. The Alabama Court of Criminal Appeals rejected these arguments in its decision affirming Ms. Graham's conviction and sentence. Appendix A, Graham v. State, No. CR-15-0201, 2019 WL 3070058 (Ala. Crim. App. July 12, 2019). First, in affirming the trial court's decision that marital privilege had been waived, the court held that "the question is not whether a third party was present with Graham and her husband but whether Graham had any expectation of privacy in the conversation she had with her husband," thereby disregarding the standard established by Wolfle v. United States, 291 U.S. 7 (1934), and Pereira v. United States, 347 U.S. 1, 6 (1954), which requires the State to prove that Ms. Graham had not "intended" the conversation to be private, regardless of any objective reasonable expectation of privacy. Graham, 2019 WL 3070058, at *18. Second, in holding that the conversation between Ms. Graham and her husband did not amount to "the functional equivalent

of a police interrogation" and that Miranda warnings were therefore "not necessary," the court reasoned that, since "Kevin asked to speak to his wife before she was questioned and was not asked or coerced to speak to Graham by police," there "[wa]s no evidence indicating that police used [him] as a ploy to make Graham confess." Id. at *20. The court's analysis went no further: the court did not assess whether, despite the fact that Kevin initiated the conversation, the police should have known that such third-party questioning was "reasonably likely to elicit an incriminating response." Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

Ms. Graham then filed a timely application for rehearing, which the Court of Criminal Appeals denied on September 13, 2019. Appendix A, Graham v. State, No. CR-15-0201 (Ala. Crim. App. Sept. 13, 2019). Ms. Graham timely petitioned the Alabama Supreme Court for a writ of certiorari, which was denied on January 17, 2020. Appendix B, Ex parte Graham, No. 1181043 (Ala. Jan. 17, 2020).

REASONS FOR GRANTING THE WRIT

In this capital case, the trial court erroneously admitted a conversation between Ms. Graham and her husband that was both protected by the marital privilege rule and the product of an un-Mirandized, functional equivalent of interrogation by police – after a different judge had properly found the statement inadmissible at a prior suppression hearing. The trial court admitted the statement in the face of testimony from the lead investigator that he sent Ms. Graham's husband into the interrogation room knowing that it was his intent to get his wife to "tell the truth" about their daughter's death on tape; that he did not notify Ms. Graham that their conversation

would be recorded; and that Ms. Graham made efforts to keep their communications private by lowering her voice. Subsequently, the State relied heavily on this conversation between husband and wife to argue that Ms. Graham had the requisite intent to kill. This Court should grant review because the lower court's application a new "reasonable expectation of privacy" requirement conflicts with its clearly established precedent on the marital privilege rule. This petition also asks the Court to affirm that the complicity of police in third-party questioning of a suspect is not negated when that questioning is initiated at the request of the third party.

I. THE LOWER COURT'S DETERMINATION THAT MS. GRAHAM'S CONVERSATION WITH HER HUSBAND WAS NOT PROTECTED BY THE MARITAL COMMUNICATIONS PRIVILEGE UNLESS SHE DEMONSTRATED BOTH AN INTENT FOR THE CONVERSATION TO REMAIN PRIVATE AND A REASONABLE EXPECTATION OF PRIVACY CONFLICTS WITH WOLFLE AND ITS PROGENY.

"Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged." Wolfle v. United States, 291 U.S. 7, 14 (1934); see also Blau v. United States, 340 U.S. 332, 333 (1951) ("[M]arital communications are presumptively confidential."). The marital communications privilege – like the privileges between priest and penitent, attorney and client, and physician and patient – is "rooted in the imperative need for confidence and trust." Trammel v. United States, 445 U.S. 40, 51 (1980). Indeed, this Court has described the confidence of the marital relationship as "the best solace of human existence." Id. (quoting Stein v. Bowman, 13 Pet. 209, 223 (1839)); see also Wolfle, 291 U.S. at 14 ("The basis of the immunity given to communications between husband and

wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails.").

It follows that, under this Court's precedents, the presumptive confidentiality of marital communications is not easily defeated. Only when such "a communication, because of its nature or the circumstances under which it was made, was **obviously not intended to be confidential**," is it no longer deemed privileged. Wolfle, 291 U.S. at 14 (emphasis added); see also Ala. R. Evid. 504(a) ("A communication is 'confidential' if it is made during marriage privately by any person to that person's spouse and is not intended for disclosure to any other person."). In other words, "Although marital communications are presumed to be confidential, that presumption may be overcome by proof of facts showing that they were **not intended to be private**." Pereira, 347 U.S. at 6 (emphasis added). Specifically, this Court has explained that the "presence of a third party" or the "intention that the information conveyed be transmitted to a third party" serves to "negative[] the presumption of privacy." Id.; see also Wolfle, 291 U.S. at 14.

In this case, the evidence at trial demonstrated that Ms. Graham intended her conversation with her husband to be private. Although, as the Alabama Court of Criminal Appeals observed, Ms. Graham expressed concern about the possibility that the police were eavesdropping, Kevin Graham made her think they were not. (C. 990, 1010.) See Yokie v. State, 773 So. 2d 115, 117 (Fla. Dist. Ct. App. 2000) ("A spouse's concern that the other might be allowing someone to listen to a private conversation

cannot, taken alone, support a conclusion that the spouse thereby waived the privilege when the other has assured the concerned spouse that their conversation is private."). At several points during their exchange, Ms. Graham whispered to avoid being heard because she wanted the conversation to remain confidential. (R. 2675; State's Exhibit 27 at 4:51, 30:58.); see SEC v. Lavin, 111 F.3d 921, 930 (D.C. Cir. 1997) (spouses "took all reasonable steps to protect their taped conversations from disclosure and thus did not waive the privilege"); United States v. de la Jara, 973 F.2d 746, 750 (9th Cir. 1992) ("When the disclosure is involuntary, we will find the [attorney-client] privilege preserved if the privilege holder has made efforts 'reasonably designed' to protect and preserve the privilege."); cf. United States v. Hamilton, 701 F.3d 404, 409 (4th Cir. 2012) ("[O]ne who is on notice that the allegedly privileged material is subject to search may waive the privilege when he makes not efforts to protect it"). The Alabama court's analysis, however, was entirely divorced from this essential evidence of intent.

Instead of determining whether the State presented evidence to overcome the presumption that Ms. Graham **intended** her conversation to be confidential, see Pereira, 347 U.S. at 6, the Court of Criminal Appeals set out to answer the question "whether Graham had any **expectation** of privacy in the conversation she had with her husband." Graham v. State, No. CR-15-0201, 2019 WL 3070058, at *18 (Ala. Crim. App. July 12, 2019) (emphasis added). In so doing, the lower court relied on a North Carolina state court decision finding the marital communications privilege waived when "the defendant and his wife did not have a reasonable expectation of privacy in

the [police] interview room." State v. Terry, 699 S.E.2d 671, 676 (N.C. Ct. App. 2010).[3] More critically, the Court of Criminal Appeals failed to address the readily apparent conflict in this case between its assessment of reasonable expectations of privacy and Ms. Graham's demonstrated intent to keep her communications confidential.

This Court's marital privilege precedent focuses on a party's intent. See Pereira, 347 U.S. at 6; Wolfle, 291 U.S. at 14. Nevertheless, as the lower court did in this case, courts around the country have additionally required proof of a reasonable expectation of privacy in order to protect otherwise confidential marital communications. See, e.g., United States v. Dunbar, 553 F.3d 48, 57-58 (1st Cir. 2009) (recorded communications between husband and wife in the back of a police cruiser not protected "[s]ince the police car was not a reasonably confidential place to talk"); United States v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998) (communications made by incarcerated spouse from jail "are likely to be overheard by others, and, thus, it is unreasonable to intend such a communication to be confidential"); State v. Sewell, 205 A.3d 966, 978 (Md. 2019) ("In evaluating a privilege claim, we consider whether the information could reasonably be

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[3]The Court of Criminal Appeals ignored evidence that, unlike the facts of Terry, Ms. Graham was in a private room at the Sheriff's office, was not under arrest, had not been read Miranda warnings, had not been put on notice that she was being recorded, and had yet to be formally interrogated by police. See also State v. Howard, 728 A.2d 1178, 1184 (Del. Super. Ct. 1998) (communications in police interview room protected by marital privilege when there was no evidence defendant was told about monitoring and no testimony that monitoring was done for security purposes); North v. Superior Court, 502 P.2d 1305, 1311 (Cal. 1972) (jailhouse communications protected by marital privilege when "conversation occurred in a detective's private office under circumstances which strongly indicate that petitioner and his wife were lulled into believing that their conversation would be confidential").

expected to remain confidential."); People v. Bryant, Smith & Wheeler, 334 P.3d 573, 648 (Cal. 2014) ("To make a communication 'in confidence,' one must intend nondisclosure **and** have a reasonable expectation of privacy." (quoting People v. Mickey, 818 P.2d 84, 102 (Cal. 1991)) (internal citations omitted) (emphasis added)); State v. Rollins, 675 S.E.2d 334, 338 (N.C. 2009) ("[A] confidential communication requires (1) physical privacy, **and** (2) an intent on the holder's part to maintain secrecy" (internal citations omitted) (emphasis added)); State v. Gosnell, 62 S.W.3d 740, 747 (Tenn. Crim. App. 2001) (holding that, "if it is objectively unreasonable to expect that a conversation in the back of a police car is private, then it is also unreasonable to expect that the conversation is confidential," despite evidence "reflect[ing] that the Gosnells' communications were subjectively intended to be private").

This Court's review is necessary here to affirm that the presumptive confidentiality of marital communications may only "be overcome by proof of facts showing that they were not intended to be private." Pereira, 347 U.S. at 6. The Alabama court, in line with scattered courts across the country, imposed a new requirement – a reasonable expectation of privacy – on top of the intent-based inquiry mandated by this Court's longstanding precedent. This objective factor is categorically distinct from the considerations this Court has specifically recognized as rebutting the presumption – the "presence of a third party" or the "intention that the information conveyed be transmitted to a third party." See id. Nevertheless, in light of this new requirement, the Court of Criminal Appeals found the privilege waived in spite of evidence of Ms. Graham's efforts to maintain confidentiality. Application of this

additional objective "reasonable expectation of privacy" requirement conflicts with the intent standard firmly established by Wolfle and its progeny and risks undercutting the sanctity of marital confidences the common-law privilege exists to protect.

II. REVIEW SHOULD ALSO BE GRANTED TO CLARIFY THAT SELF-INITIATED THIRD-PARTY QUESTIONING AIMED AT GETTING A SUSPECT "TO TELL THE TRUTH," SURREPTITIOUSLY RECORDED BY THE POLICE, CONSTITUTES THE "FUNCTIONAL EQUIVALENT OF INTERROGATION," SUCH THAT THE FAILURE TO GIVE MIRANDA WARNINGS VIOLATES THE FIFTH AMENDMENT.

The Fifth and Fourteenth Amendments to the United States Constitution forbid the admission of a defendant's statements "stemming from custodial interrogation," unless the State "demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda v. Arizona, 384 U.S. 436, 444 (1966). This Court has further explained that "the Miranda safeguards come into play whenever a person in custody is subjected to either questioning or its functional equivalent." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). "Interrogation" refers "not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301. Among such "questioned practices," this Court has recognized "a variety of 'psychological ploys, such as to posi[t] the guilt of the subject, to minimize the moral seriousness of the offense, and to cast blame on the victim or on society.'" Arizona v. Mauro, 481 U.S. 520, 526 (1987) (quoting Innis, 446 U.S. at 299).

In Mauro, on a closely analogous – although distinguishable – set of facts, this

Court was asked to determine whether the police functionally interrogated a suspect when they permitted his wife to speak with him in the presence of an officer. Under the circumstances of that case, this Court held that the officer's decision to allow Mauro's wife to see him was not "the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." Id. at 527. The Court underscored two facts. First, Mrs. Mauro asked to see her husband, and "the officers tried to discourage her" before finally "yield[ing] to her insistent demands." Id. at 528. Second, the detective who oversaw and openly recorded the conversation testified to "a number of legitimate reasons – not related to securing incriminating statements – for having a police officer present." Id. In light of these facts, the Court concluded that there was "no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements." Id. The additional fact that the officers involved were aware that there was a "possibility" that Mauro would make an incriminating statement while talking to his wife was insufficient to establish the functional equivalent of interrogation, since "[o]fficers do not interrogate a suspect simply by hoping that he will incriminate himself." Id. at 528-29.

In Ms. Graham's case, the Alabama Court of Criminal Appeals grounded its decision that there was "no evidence indicating that police used Graham's husband as a ploy to make [her] confess" exclusively on the fact that "Kevin asked to speak to his wife . . . and was not asked or coerced to speak to [her] by police." Graham v. State, No. CR-15-0201, 2019 WL 3070058, at *20 (Ala. Crim. App. July 12, 2019). This

reasoning is at odds with this Court's holdings in Mauro and Innis.[4] Mauro held that more than knowledge of a mere "possibility" that a certain practice might evoke an incriminating response is required on the part of police; it did not replace Innis's "reasonable likelihood" standard with a requirement of police orchestration from the outset. Rather, Mauro left open the question of the precise extent of police complicity – deliberation, planning, and direction – required for a third-party intervention to rise to the level of functional interrogation. Although the lower courts have adopted differing approaches to evaluating official complicity, none require police initiation.

This Court's review is necessary to confirm that third-party questioning need not initiate at the direction of the police to qualify as functional interrogation. Regardless of who set the plan in motion, Sheriff Taylor ultimately "sent [Kevin] in to see [his wife] for the purpose of eliciting incriminating statements," without advising Ms. Graham of her constitutional rights or notifying her that the conversation was being recorded. Id. at 528; see Nelson v. Fulcomer, 911 F.2d 928, 937 (3d Cir. 1990) (remanding for an evidentiary hearing on habeas review when "the police knowingly

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[4]Separately, the Court of Criminal Appeals emphasized that Ms. Graham "did not **confess** during her conversation with her husband." Graham, 2019 WL 3070058, at *20 (emphasis added). Of course, in Innis, this Court held that "[a] practice that the police should know is reasonably likely to evoke an **incriminating response** from a suspect thus amounts to interrogation." 446 U.S. at 301 (emphasis added). In a footnote, the Court defined the term "incriminating response" as "any response – whether inculpatory or exculpatory – that the prosecution may seek to introduce at trial." Id. at 301 n.5. It is, therefore, wholly inapposite whether or not Ms. Graham actually "confessed" to her husband, especially because the State highlighted her statements to her husband as a basis for finding her guilty of capital murder. (See, e.g., R. 4175-78.)

confronted [two suspects] for the sole purpose of eliciting an incriminating response and [one] had been 'primed' by the police specifically for that purpose"); see also Mauro, 481 U.S. at 535 (Stevens, J., dissenting) ("It is undisputed that a police decision to place two suspects in the same room and then to listen to or record their conversation may constitute a form of interrogation even if no questions are asked by any police officers.").

Although only two circuit courts have expressly required as much, the evidence at the suppression hearing demonstrated that Mr. Graham was effectively acting as an "agent" of the police. See United States v. Alexander, 447 F.3d 1290, 1295 (10th Cir. 2006); Whitehead v. Cowan, 263 F.3d 708, 719 (7th Cir. 2001). Sheriff Taylor testified that Mr. Graham proposed meeting with his wife because he "felt like he could get her to tell the truth about her involvement with Shea." (R. 2585, 2604.) Accordingly, Sheriff Taylor affirmed that he "knew that it was Mr. Graham's intent to go into that room and to attempt to talk to Ms. Graham in such way that you would be able to have a tape of what was said." (R. 2603.) That is, the lead investigator on Ms. Graham's case knew that Kevin's purpose in talking to her was to encourage her to make an incriminating statement on tape. Kevin Graham had also already been working with the police against his wife when he offered to speak with her. As police were searching their house, he directed officers to Ms. Graham's gun and helped them recover it from Mr. Thompson next door. (R. 2584, 2585-86.) By the time Kevin arrived at the station, Sheriff Taylor was well aware that he was feeling "real uneasy" about his wife's potential involvement in Shea's death. (R. 2585.) Then, before Kevin

entered the interrogation room to confront his wife, he handed over a tape he had recorded of her conversation with Kenneth Walton and, later, disingenuously told Ms. Graham that the police had taken the tape from him during a pat-down. (R. 2585-86; C. 1010.)

The Alabama court's ruling conflicts with Mauro. This Court's decision finding no functional equivalent of interrogation in that case was based on the fact that officers "tried to discourage [Mrs. Mauro] from talking" to the accused and so officers had "no idea what to expect" from their conversation – unlike the police's actions in Ms. Graham's case. Mauro, 481 U.S. at 524, 528. Furthermore, also unlike in Mauro, the officers involved in the third-party questioning here did not testify to any legitimate reasons for recording the conversation, much less for doing so without warning Ms. Graham. Cf. Massiah v. United States, 377 U.S. 201, 206 (1964) (defendant's Sixth Amendment rights violated when police deliberately elicited incriminating statements through "indirect and surreptitious interrogation[]" when he was recorded without his knowledge by cooperating co-defendant). While the officers may not have instigated the intervention, everything that followed from Kevin's initial request constituted the very sort of "explicit police subterfuge" condemned in Mauro. Id. at 534 (Stevens, J., dissenting). This Court should clarify that, under Innis and Mauro, self-initiated third-party questioning "that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." Innis, 446 U.S. at 301. As it stands, contrary to this Court's precedent, the Alabama court's decision sanctioned officers' secret exploitation of marital confidences for the sole purpose of

gathering incriminating evidence.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the Alabama Court of Criminal Appeals.

Respectfully Submitted,

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