No. 19-8782
CAPITAL CASE

In the SUPREME COURT of the UNITED STATES

LISA GRAHAM,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for a Writ of Certiorari to the
Alabama Court of Criminal Appeals

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Steve Marshall
Alabama Attorney General

Audrey Jordan
Assistant Attorney General
Counsel of Record *

Office of the Attorney General
501 Washington Avenue
Montgomery, Alabama 36130-0152
Audrey.Jordan@AlabamaAG.gov
(334) 353-3637 Facsimile
(334) 242-7300, 353-4338 *

August 21, 2020

CAPITAL CASE
QUESTIONS PRESENTED

Lisa Graham hired Kenneth Walton to murder her daughter, and Walton accomplished his task. Before the police interviewed Graham at the police station, her husband requested to speak with her. Though only Graham and her husband were in the interview room, Graham knew the police were "recording everything" she and her husband were "saying." At trial, the court admitted the recorded conversation between Graham and her husband.

The questions presented are:

1. Does the marital communications privilege apply to a conversation a defendant has with her spouse when she knows police are recording the conversation?
2. Was the conversation between Graham and her husband the functional equivalent of a police interrogation?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF THE CASE

Lisa Graham hired Kenneth Walton to murder her daughter. Walton confessed to meeting with Graham to discuss her daughter's murder, retrieving the murder weapon from Graham's vehicle, and ultimately shooting the victim multiple times. Before Graham was questioned by police, her husband requested to speak with her because he believed Graham would disclose her involvement in their daughter's murder. Graham knew their conversation was being recorded, and a recording of their conversation was admitted at trial. Graham now challenges the admission of the recorded conversation on two grounds: first, she argues that it was inadmissible under the marital privilege; and second, she contends that her conversation with her husband was the functional equivalent of police interrogation, such that she should have received Miranda warnings before being allow to speak with him.

Neither claim merits review. Both claims are fact-bound, and the state court correctly applied this Court's precedents. The marital communication privilege did not apply because Graham knew that her conversation was being recorded. She said so on the recording. Nor is there any evidence to support the notion that the officer's "decision to allow [Graham's husband] to see [her] was the kind of psychological ploy that properly could be treated as the functional equivalent of interrogation." Arizona v. Mauro, 481 U.S. 520, 527 (1987). Thus, this Court should deny Graham's petition.

A. The Proceedings Below

Graham was convicted of hiring Walton to murder her daughter, Stephanie "Shea" Graham. A Russell County grand jury indicted Graham for capital murder, charging her with one count of murder in exchange for "an unspecified sum of United States currency or other valuable consideration" in violation of Section 13A-5-40(a)(7) of the Code of Alabama (1975). Mid-trial, a mistrial was declared based on the trial judge's failing health. In the subsequent retrial, the jury found Graham guilty as charged in the indictment and recommended she be sentenced to death by a vote of 10 to 2. After determining the aggravating circumstances outweighed the mitigating circumstances, the trial court sentenced Graham to death. The Alabama Court of Criminal Appeals affirmed Graham's capital murder conviction and his death sentence. Graham v. State, CR-15-0201, 2019 WL 3070058 (Ala. Crim. App. July 12, 2019). The Alabama Supreme Court denied Graham's petition for writ of certiorari.

B. Statement of the Facts

The facts presented at trial showed Graham's repeatedly expressed hatred for her daughter: "I fucking hate her; I fucking hate that bitch." (R. 3099.) "If I could kill her myself and get away with it, I would[.]" (R. 3101.) In Graham's view, her daughter had ruined Graham's life. Shea was using cocaine and stripping (C. 1300), and she was recently arrested for her involvement in a drive-by shooting (R. 2968),

which resulted in the Grahams posting a $100,000 cash bond and hiring an attorney for their daughter. See Graham, 2019 WL 3070058, at *34. A few weeks before Shea's murder, Graham offered to pay a neighbor $5,000 to kill Shea, stating she "wanted the little bitch dead[.]" Id. at *2–3 (citing (R. 3481.)). Around this time, Graham was also overheard speaking with Walton "about how to kill [Shea], what they need to do, [what] would be the best clean up for that, how fast it would be, and how easy they would be able to get it done." Id. at 3 (citing (R. 3448.)).

Walton and Graham discussed murdering Shea again at a public library days before Shea's body was discovered. (R. 2913-14.) She gave Walton the keys to her truck where he retrieved Graham's 9 mm handgun. (R. 2920.)

The day of Shea's murder, Graham and Walton spoke briefly over the telephone. (R. 3927; C. 1348.) A few hours later, Walton convinced Shea to meet him at a Racetrac gas station to "give her a car to get away with[.]" (R. 2913.) Walton drove her to Russell County, and, when she told him she needed to use the restroom, he drove down a secluded dirt road and stopped. (R. 2925.) While Shea was outside the truck using the bathroom, Walton shot her twice in the head. (R. 2926-27.) He then walked around the vehicle and shot Shea four more times. When he drove away, he drove over her right arm. (R. 2928.) See Graham, 2019 WL 3070058, at *2.

The next day, Walton and Graham met to discuss Shea's murder; and, when Walton attempted to return the handgun, he followed Graham's instructions to return

it to the truck. (R. 2938.) Walton told Graham to have the gun cleaned. (R. 2939.) Graham gave the weapon to her father, Warren Thompson, for cleaning. (R. 2939.)

Walton later confessed to police that he shot and killed Shea for Graham. (R. 2944-46.) Walton contacted Graham, told her police had a warrant for his arrest, and asked her to hire an attorney. (R. 3911.) He also asked her to post his bond. (R. 3916.) Graham's husband, Kevin Graham,[1] recorded this conversation and turned it over to police. (R. 3540.) When police arrived to search the Grahams' home, Graham denied knowing the location of the handgun; however, with help from Kevin, police located the handgun with Thompson. (R. 3387.)

At that point, Graham was transported to the sheriff's office for an interview. (R. 3863-64.) Before police interviewed Graham, Kevin asked if he could speak with her. (R. 3867.) Police warned him that the room was being recorded. (R. 3867.) While speaking with Kevin, Graham denied involvement with Shea's murder. Graham admitted that she met Walton at the library and gave him the handgun, but she stated she believed Walton planned to use it on Kevin's girlfriend. Graham, 2019 WL 3070058, at *17. Graham also acknowledged giving the handgun to Thompson for cleaning. (C. 993, 997.) She further acknowledged that she had stated, "I'm fixing to kill you" on occasion to Shea, but Graham claimed she was "joking

1. To avoid confusion, the brief will use only Kevin's first name when referring to him. "Graham" will refer to Lisa Graham.

around[.]" (C. 1005-06.) Talking about their murdered daughter, Graham said to Kevin, "I told you that child would ruin my life, didn't I?" (C. 1007.)

Graham knew she her conversation with Kevin was being recorded. When Kevin initially began speaking with Graham, he remarked, "I don't know why they got us in a room by ourselves." (C. 990.) Graham replied, "Because they're recording everything we're saying." (R. 990.) Later, Graham noted that there was a camera and that she saw police put a tape in the camera "so [they] c[ould] record everything." (C. 1010.)

REASONS FOR DENYING THE PETITION

The petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. The petition presents no arguable split of authority, is heavily fact-bound, and thus fails to establish any of the grounds for granting certiorari review. Graham's claims were rejected by the Alabama Court of Criminal Appeals after a thorough consideration of the facts and circumstances of this case, and Graham has shown no genuine conflict between that decision and a decision of any other court.

Moreover, Graham's claims are without merit. Both claims center on the admission a recorded conversation between Graham and her husband. This conversation was properly admitted because Graham was aware police were

recording it, and the conversation was not the functional equivalent of a police interrogation that would require Miranda warnings. This Court should deny the writ.

I. The marital communication privilege did not apply to Graham's conversation with her husband because she knew police were recording the conversation.

This Court has recognized that any communication *privately* made between spouses is "generally assumed to have been intended to be confidential, and . . . [is] privileged; but, wherever a communication, *because of its nature or the circumstances under which it was made*, was obviously not intended to be confidential, it is not a privileged communication." Wolfle v. United States, 291 U.S. 7, 14 (1934) (emphasis added); see also Blau v. United States, 340 U.S. 332, 333 (1951). Graham argues that the state appellate court's examination of whether the Grahams had "any expectation of privacy" regarding their recorded conversation in the police interview room and finding that their conversation was not "confidential" went beyond the parameters of Wolfle and "imposed a new requirement – a reasonable expectation of privacy – on top of the intent-based inquiry under" this Court's precedent. (Pet. 15.) Graham argues that "marital privilege precedent focuses on a party's intent." (Pet. 14.) Yet the confidential marital communications privilege applies, fittingly enough, only to confidential spousal communication.

Though presumed confidential, a marital communication loses its privilege status when facts show the communication was not intended to be private. Pereira v. United States, 347 U.S. 1, 6 (1954) (citations omitted). This Court has recognized that not only can the "presence of a third party negat[e] the presumption of privacy," but also "the intention that information conveyed be transmitted to a third party" negates that presumption. Id.

Graham avers that she merely "expressed concern" that their conversation was being recorded and that evidence of her whispering at several points demonstrated her intent to keep the conversation confidential. Her statements during the conversation, however, shows that she was fully aware that their conversation was being recorded. Graham, 2019 WL 3070058, at *19. Specifically, not only did Graham note almost immediately after entering the room that police were recording their conversation, see id. (citing (C. 1111.), she also told her husband that there was a camera and that she saw "old doofas [sic] in there putting a tape in there so he can record everything." Id. (citing (C. 1131.)). Because Graham knew that her conversation was being listened to by police, her conversation with Kevin was not confidential and thus was not privileged. For if even "communications between husband and wife, voluntarily made in the presence of … members of the family within the intimacy of the family circle, are not privileged," Wolfle, 291 U.S. at 17,

then surely communications knowingly made within earshot of police and their recording devices are not privileged.

Additionally, Graham never intended for her conversation with her husband to remain confidential. When later interviewed, she repeated the substance of her conversation with her husband to police. She told officers that she met Walton at the library (C. 1130, 1302), that she provided Walton with a handgun (C. 1110, 12-3-04), and that she believed Walton intended to kill her husband's mistress. (C. 1110, 1209.) Accordingly, this Court should deny Graham's petition.

II. Graham was not entitled to Miranda warnings because her conversation with her husband was not the functional equivalent of a police interrogation and she was not in custody.

Graham also argues the admission of the recorded conversation with her husband violated safeguards under Miranda v. Arizona, 384 U.S. 436 (1966), because the conversation was the functional equivalent of an interrogation. She asks this Court "to confirm that third-party questioning need not [be] initiate[d by] the police to qualify as functional interrogation." (Cert. Pet. 18.) She asserts that her husband "was effectively acting as an 'agent' of the police." (Id. at 19.) Graham's claim fails for two reasons: first, her conversation with her husband was not the functional equivalent to an interrogation, and second, she was not "in custody" during the conversation.

Miranda safeguards apply when a suspect is subjected to the "functional equivalent" to a custodial interrogation, which include "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980). Court must determine whether police used "psychological ploys" in an "interrogation environment" that were deliberately designed to "subjugate the individual to the will of his examiner' and thereby undermine the privilege against self-incrimination." Arizona v. Mauro, 481 U.S. 520, 526 (1987). "In deciding whether particular police conduct is interrogation," the Court focuses on "the purpose behind [its] decisions in *Miranda* and *Edwards:* preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." Id. at 529-30.

The Alabama Court of Criminal Appeals correctly determined that Graham's conversation with Kevin was not the functional equivalent of an interrogation. Graham, 2019 WL 3070058, at *20. First, there was no evidence that Kevin was acting as an agent for police. Rather, he requested to speak with Graham because "he felt like he could get her to tell the truth about her involvement with Shea." (R. 2585.) Officers advised Kevin that they did not "have a problem with him doing that, but he had to understand that the room was being recorded." (R. 2586.) There was

no evidence that police directed or requested Kevin to speak with Graham. Though officers were aware that Kevin sought to speak with Graham about her involvement, "the 'possibility' that an accused will incriminate [her]self, and even the subjective 'hope' on the part of police that [she] will do so, is not the functional equivalent of interrogation." Mauro, 481 U.S. at 528-29.

Like the defendant in Mauro, who spoke to his spouse while at a police station, Graham "was not subjected to compelling influences, psychological ploys, or direct questioning." Id. at 529. Indeed, there is nothing in the record, nor does Graham suggest, that she felt coerced to incriminate herself. To the contrary, she continually denied asking Walton to murder her daughter.

Graham also argues that her husband's cooperation with police made him an agent of the police. (Cert. Pet. 19.) But Kevin's request to speak to his wife did not make him an agent of the police. See Schneckloth v. Bustamonte, 412 U.S. 218, 234, n.15 (1973) (discussing Coolidge v. New Hampshire, 403 U.S. 553 (1971)) ("[A] suspect's wife was not operating as an agent of the State when she handed over her husband's guns and clothing to the police."); see also United States v. Alexander, 447 F.3d 1290, 1297 (10th Cir. 2006) ("An agency relationship does not develop where the government is an incidental beneficiary of another party's actions, even where the government admittedly facilitates the conversation that leads to the suspect's decision to reinitiate questioning."). Thus, police were not required to

advise Graham of her Miranda warnings before allowing her to speak with her husband. In sum, because Graham's statement was "given freely and voluntarily without any compelling influences," it "is, of course, admissible in evidence." Mauro, 481 U.S. at 529. The state courts thus followed settled precedent when they admitted that evidence, and Graham's petition should be denied.

Moreover, Graham's claim also fails because she was not "in custody" when she spoke with her husband in the interview room. When determining whether a suspect is "in custody," the Court must examine whether, under the circumstances, the suspect would reasonably believe she was free to leave. See Miranda, 384 U.S. at 444; Thompson v. Keohane, 516 U.S. 99, 112 (1995). In Graham's case, the totality of the circumstances surrounding her travel to the sheriff's office demonstrated she was not in custody. Rather, she voluntarily traveled to the sheriff's office (R. 2582); she was assured that she was not under arrest and was free to leave at any time (R. 2583, 2617); and, after she was questioned, Graham returned to her home. (R. 2592, 2594.) Further, Miranda warnings were not required simply because the recorded conversation occurred at the sheriff's office. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (holding that police are not required to give Miranda warnings "simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect"). Indeed, a reasonable person in Graham's position would have believed that she was free to

leave; thus, she was not "in custody" and officers were not required to advise of her Miranda warnings.

CONCLUSION

For the reasons set forth above, this Court should deny Graham's petition for writ of certiorari.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

/s/Audrey Jordan
Audrey Jordan
Assistant Attorney General