No. 21-6616

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

GABRIEL SCHAAF — PETITIONER
(Your Name)

vs.

TIM SHOOP — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Sixth Circuit Federal Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Gabriel Schaaf
(Your Name)

15802 St. Rt. 104 North, P.O. box 5500
(Address)

Chillicothe, Ohio 45601
(City, State, Zip Code)

N/A
(Phone Number)

QUESTIONS PRESENTED

1. Whether police must wait for counsel to be present, before questioning a suspect who has invoked his right to remain silent and to have counsel present, prior to questioning and prior to being "in-custody"?

2. Whether armed detectives wearing bullet-proof vests, combind with summoning an individual on his own property to their presence, contributes to a show of authority escalating to the equivelant of an "in-custody" interrogation?

3. Whether police must wait for counsel to be present, before questioning a suspect who has invoked his right to remain silent and to have counsel present, prior to questioning and prior to being "in-custody"?

3b. And if not, how long must police wait to question again before they must Mirandize without counsel present?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

STATE v. SCHAAF, 17-CR-12359, Preble Cty., Ohio (March 13, 2018).

STATE v. SCHAAF, 2019-Ohio-196, CA2018-03-004 (January 22, 2019).

STATE v. SCHAAF, 2019-Ohio- 2019-0355 (May 1, 2019).

GABRIEL SCHAAF v. TIM SHOOP, Warden, Chillicothe Corr. Inst., 2020 U.S. Dist. LEXIS 241071, Case No. 3:20-cv-090 (December 22, 2020).

GABRIEL SCHAAF v. TIM SHOOP, Warden Chillicothe Corr. Inst., 2021 U.S. App. LEXIS 19990, Case No. 21-3024 (6th Cir. July 6, 2021).

TABLE OF AUTHORITIES

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at SCHOOP v. SHOOP, 2021 U.S. App. LEXIS 19990; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was July 6, 2021.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

USCS Constitution Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

USCS Constitution Amendment Fourteen

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States wherein they reside. 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 persons within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

On July 10, 2017 Petitioner was indicted for murder. (R. 30-31) A motion to suppress was filed on August 15, 2017, (R. 33) and a hearing was held on September 5, 2017. The motion was overruled on September 11, 2017. (R. 35-37) Jury trial commenced on January 22, 2018. Petitioner was convicted on January 23, 2018. (R. 38-42) He was sentenced to twenty-five years to life. (R. 43) He timely appealed. (R. 45) Petitioner's appeal was denied on January 22, 2019. (Appendix E) Supreme Court of Ohio declined jurisdiction on May 1, 2019. (Appendix G) Petitioner timely petitioned for Writ of Habeas Corpus with Federal District Court on March 12, 2020. Then, on October 21, 2020 Magistrate Judge issued Report and Recommendations. (Appendix C) Petitioner filed objections, and Magistrate Judge issued Supplemental Report and Recommendations. (Appendix D) The District Judge then issued Decision and Order on December 22, 2020. (Appendix B) Petitioner appealed to the Federal Sixth Circuit, timely. The Sixth Circuit denied COA on July 6, 2021. (Appendix A) Petitioner now seeks Certiorari with This Honorable Court, timely within the 150 day deadline prescribed by This Court.

The following are facts relevant to this case. On December 27, 2016, Petitioner called the police and reported the death of his son Jonathan. (R. 431-32) Several Officers arrived. (R. 432, 449) Initially, it was reported as an apparent robbery with the intruders killing Jonathan. (R. 559) When officers arrived, Petitioner was in his car. He told the officers were he found the body inside. (R. 434) Officers located Jonathan's body. (R.

438-39) They went outside, and confirmed with Petitioner that his son was deceased, and he began crying. (R. 439)

Petitioner was interviewed almost immediately. Petitioner explained the night before that his son was asleep at 11pm on the couch. And, that the following morning his son was still asleep at 7:30am on the couch, when the Petitioner left. (R. 441-42) Petitioner found the body when he returned from work. (R. 455-56) When asked who would murder Jonathan, he told officers that there were some people from Eldorado that had threatened his son. (R. 458)

While many suspects were interviewed, Detective Miller believed Petitioner was the primary person of interest. (R. 479) Miller determined Petitioner was the last to see Jonathan alive. Miller thought Petitioner's actions were strange, because he never called the detectives for updates on the investigation. (R. 480) They also felt suspicious, because Petitioner would not come in for interviews, as his attorney had advised him not to. (R. 481)

Petitioner cancelled an interview with detectives set for Fecruary 16, 2017. He left a voicemail explaining an attorney advised him not to speak with investigators. Petitioner ended the voicemail, basically saying if you want to give me a call --contact me or you can contact my attorney, and he left a couple phone numbers. (R. 217-18)

Detectives sought out Petitioner at his residence on June 8, 2017 to initiate contact with him. They were in an unmarked unit, and were wearing visible ballistic vests and armed. (R.

221-22) Petitioner was mowing the lawn on a riding mower, and continued to mow the lawn for several passes. The officers summoned Petitioner to their presence. (R. 217-18) They were convinced that Petitioner had something to do with it, and they laid the groundwork for him to confess. (R. 232) Petitioner was presented with a self-defense position and told them it happened at 10:00 the night it happened. (R. 224-25) The questioning lasted close to an hour. (R. 225)

The detectives arrested Petitioner after he confessed, and took him to the sheriff's office. (R. 227, 237) He did not understand why he was being taken to the sheriff's office. (R. 246-47) Detective Blevins, who was with Detective Miller at Petitioner's house, obtained Miranda waiver at sheriff's office, (R. 238) and spent almost another hour taking another statement from Petitioner. (R. 241) The second statement at the sheriff's office was almost immediately after the initial interview. (R. 728, ¶1)

The detectives both firmly believed Petitioner was responsible for killing his son. (R. 480) And, their sole intent of going to his house was to confront him with what they thought happened. (R. 482) Detective Miller said, "I mean, it was lead in, it was kind of -- it was suggested if that's what it was, you can tell us that's what it was..." (R. 232)

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted, because the Federal Sixth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court; and, has decided an important federal question in a way that conflicts with relevant decisions of this Court.

I. STANDARD FOR THE FEDERAL SIXTH CIRCUIT

"Until the prisoner secures a COA, the Court of Appeals may not rule on the merits of his case." Buck v. Davis, 137 S.Ct. 759, 773 (2017), citing Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

"At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" Buck, at 773.

II. PETITIONER INVOKED HIS RIGHT TO REMAIN SILENT IN CONNECTION WITH HIS RIGHT TO HAVE HIS ATTORNEY PRESENT

Jurists of reason could disagree with the Federal District and the Sixth Circuit Courts' review of Application for COA.

This Court has questioned, but not explicitly overruled the language in Miranda suggesting that the right to counsel may be invoked "prior" to custodial interrogation. Compare Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) ("if the individual indicates in any manner, at any time prior to or during questioning, that

he wishes to remain silent, the interrogation must cease."), with McNiel v. Wisconson, 501 U.S. 171, 182n.3 (1991) ("We have in fact never held that a person can invoke his Miranda rights anticipatorily, in a context other than 'custodial interrogation.'")

Prior Supreme Court precedent holds, that the first inquiry is whether the accused invoked their right to counsel. If so, the police must cease all questioning. Smith v. Illinois, 469 U.S. 91, 95 (1984); Miranda, 384 U.S., at 473-74. Further questioning is barred "unless the acussed himself initiates further communication, exchanges, or conversations with the police," and subsequent events indicate that the accused waived his right to counsel. See Oregon v. Bradshaw, 462 U.S. 1039, 1043, 1045-46 (1983) (plurality opinion) (accused inquired, initiating conversation); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981); U.S. v. Whaley, 13 F.3d 963, 968-69 (6th Cir. 1994) (impermissible interrogation because after defendant invoked right to counsel, officers reinterrogated defendant 3 weeks later though nothing during that time demonstrated defendant's willingness to discuss case).

According to Detective Miller's suppression testimony, the day before a scheduled questioning with Petitioner:

> "February the 15th, the day prior, Mr. Schaaf left a voicemail on Detective Blevins' desk phone advising that he had, had spoken to an attorney and that attorney advised him not to speak with the investigators. And he concluded his voicemail that, basically saying if you want to give me a call -- contact me or you can call my attorney, and he left a couple of phone numbers."

(Page ID 217-18) This certainly can be construed as canceling the

scheduled questioning, and also likened to invoking his right not to speak. And, this can be seen as request to have counsel present for questioning, because Miller's testimony shows that Schaaf had counsel, and that the detectives could call the attorney for the purpose of setting up an appointment for such questioing with counsel present. See Conn. v. Barrett, 479 U.S. 523, Syllabus (1987) (held: (b)..."Request for counsel must be given broad, all inclusive effect only when the defendant's words, understood as ordinary people would understand them, are ambiguous. Here respondent clearly and unequivocally expressed...").

Schaaf clearly expressed that he had an attorney. And, he ambiguously expressed that the attorney should be contacted to set up an appointment for the questioning. Additionally, the trial judge expressed concearn over the invokation to remain silent and to counsel, at the suppression hearing saying, "In particular with respect to the, that he had an attorney at some point in time." (Page ID 251)

Thus, both legal and factual ground provide that reasonable jurists could find that the Federal District and Sixth Circuit Courts' decisions are both debatable regarding whether the statements should have been excluded or not. See Smith v. Illinois, 469 U.S. 91 (1984) (holding that the first inquiry is whether the accused invoked their right to counsel. If so, the police must then cease all questioning); Miranda, 384 U.S., at 473-74; Edwards, 451 U.S., at 484-85.

III. PETITIONER WAS DEPRIVED OF HIS FREEDOM FOR "IN-CUSTODY" PURPOSES OF MIRANDA

The Miranda custody test is objective, with two discrete and essential inquiries: 1) the circumstances surrounding the interrogation, and 2) given those circumstances, whether a reasonable person would have felt free to terminate the interrogation and leave. Yarborough v. Alvarado, 541 U.S. 652, Syl. (2004); Mirand, 384 U.S., at Syl.

"The only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Berkemer v. McCarty, 486 U.S. 420, 442 (1984); U.S. v. Mendenhall, 466 U.S. 544, 554 (1980).

a) The Officers Summoned Schaaf to their Presence.

The Supreme Court lists several examples of circumstances that might indicate a seizure, even where the person did not attempt to leave. Particular to Schaaf's case is the example of "the usage or tone of voice indicating compliance with the officer might be compelled." Mendenhall, 466 U.S., at 554; and an example of where "no seizure" occurred was where they [officers] "did not summon respondent to their presence." Id., at 555.

The arrival of officers in Schaaf's case actually progressed to the point of detectives summoning Schaaf to their presence. (Page ID 210-11, 217-18, 483)

b) Bullet-proof Vests Could be Viewed as a show of Authority Designed to Assure that Schaaf Would be Coerced to Talk, Contributing to the Equivelant of "In-Custody" Interogation.

Although bullet-proof vests are sometimes part of the uniform worn by officers, it is in particular circumstances that this part of the uniform is used. And, even within a single court, two views of wearing a bullet-proof vest can be held. Some view as normal, however others view the bullet-proof vests as a view of force. See People v. Fredrick, 313 Mich. App. 457, 462 Cf. 496 (Mich. App. 2015) (that the officers wore these vests conveyed a message by the uniform traditionally worn by an ordinary officer. However, the dissent countered that being armed and in tactical gear, could be viewed as a show of authority designed to assure that defendants would not deny their "request to talk" in the defendant's home); People v. Dent, 343 Ill. App.3d 567, 579-81 (Ill. App. 2003) (Appellate court disagreed with the prosecution, that the presence of police armed and with bullet-proof vests would not cause an innocent person to reasonably believe that he or she was detained).

Some view the wearing of bulletproof vests in the courthouse, and particularly in the courtroom, to be beyond normal. See U.S. v. Castellano, 610 F.Supp. 1359, 1403-04 (S.D.N.Y. 1985) (Viewing the scene of officers wearing bulletproof vests escorting codefendant, prompted jurors whether the case involved the mafia, which it did); Gardner v. Galetka, 568 F.3d 862, 890 (10th Cir.) (bulletproof vests worn in the competing interests of ensuring the safety of trial participants).

In Schaaf's case, "detectives" were wearing tactical vests (bulletproof vests) on the exterior of their clothing. (Page ID 222) That the detectives wore these tactical vests is notable, seeing that it is in particular circumstances that they wear these. Such as in U.S. v. Jones, 154 F.Supp.2d 617, 619 (S.D.N.Y. 2001) (bulletproof vests worn when serving arrest warrant); U.S. v. Degaule, 797 F.Supp.2d 1332, 1364 (N.D. Ga. 2011)(Same); U.S. v. Vado, 87 F.Supp.3d 472, 474-75 (S.D.N.Y. 2015) (bulletproof vests worn when executing search warrant); U.S. v. Walters, 963 F.Supp.2d 138, 142 (E.D.N.Y. 2013) (bulletproof vests worn when conducting a ruse).

c) Overall Circumstances

In accordance to his declared right to remain silent, the Petitioner was avoiding meeting with detectives. (Page ID 210-11, 217-18, 481) Ultimately the detectives sought out Petitioner at his home, without calling as they had previously done. (Page ID 220) They were armed and wearing tactical vests on the exterior of their plain clothing. (Page ID 222) And, although on his lawn-mower, Schaaf was already at home, having nowhere to retreat from armed detectives who had "summoned him to their presence." (Page ID 210-11, 217-18, 483) Berkemer, 486 U.S., at 442.

Thus, resonable jurists could find the Federal District and Sixth Circuit decisions debatable, and could disagree with whether Schaaf would have understood his situation as to being in custody for Miranda purposes, and whether his statements should have been excluded. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003).

IV. PETITIONER'S CONFESSIONS SHOULD BE SUPPRESSED AS FRUITS OF THE POISONOUS TREE BECAUSE OF DETECTIVES' ASKING QUESTIONS FIRST THEN MIRANDIZING LATER

The Supreme Court addressed the technique of interrogating in successive warned and unwarned phases in Missouri v. Seibert, 542 U.S. 600 (2004). However, the Seibert Court did not produce a majority opinion, as to what test to use, but offered three seperate tests for a constitutional violation of constitutional rights when police use the question-first method of interrogation. Applying Schaaf's facts to any of these tests would show violation of his constitutional right to remain silent and have an attorney present during questioning.

The first test, by Justice Souter, asks whether it would be reasonable to find that Miranda warnings could function 'effectively' under the circumstances. Seibert, 542 U.S., at Syl.(c). The question-first object is to render Miranda warnings ineffective by waiting to give them until after the suspect has already confessed. Id. "By any objective measure, it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation, close in time and similar in content." Id. And, such was the case in Schaaf's circumstances, where the first questioning at his home was followed almost immediately by the successive questioning at the sheriff's office, and by one of the same detectives covering the same general material. (Page ID 728)

The second test, by Justice Bryer, is to treat the failure to warn as a Miranda violation, and apply the fruit of the poisonous tree analysis to that Miranda violation. 542 U.S., at 617. He explained that Justice Souter's plurality test "in practice [would] function as a 'fruits' test" because the only time a court would conclude that Miranda warnings functioned effectively would be when "certain circumstances - a lapse in time, a change in location or interrogating officer, or a shift in the focus of the questioning - intervene between the unwarned questioning and any postwarning statement." Id. And, in Schaaf's case, although the location changed, there was no lapse of time, was by one of the same detectives, and covered the same general material. (Page ID 728)

Justice Bryer's test, differed from the plurality's test in two significant ways. First, the intent of the officer would matter under Justice Bryer's test, and would exclude the subsequent confession unless the failure to warn was in good faith and not deliberate. 542 U.S., at 617. Whereas Justice Souter did not carve out a good faith exception, explaining, "the intent of the officer will rarely be as candidly admitted as it was here." 542 U.S., at 616n.6. Second, Justice Bryer's test would apply the fruit of the poisonous tree doctrine and treet the initial failure to warn as a constitutional violation. 542 U.S., at 618. Whereas Justice Souter's test rejected a fruits analysis and refused to treat Miranda violation as constitutional. 542 U.S., at 612n.4.

Here in Schaaf's case, the detectives were also actually candid, as Detective Miller believed Schaaf was primary suspect, and thought his actions were suspicious and strange. (Page ID 479-81, 560-61) The detectives were convinced Schaaf had something to do with it. (Page ID 232)

None of the reviewing courts, nor the Federal Sixth Circuit reach Petitioner's fruit of the poisonous tree argument. But, the State poses a theoretical question as to whether the second statement at the police station was independantly admissible through attentuation. And, the State argues that, if so, there is overwhelming support for the ultimate guilty verdict even without prior statement.

However, the State's argument is misplaced, as Seibert is the controlling guide for how to handle such a constitutional violation, and any of the objective measures described in Seibert supplant the State's argument.

The trial court's failure to grant Schaaf's Suppression motion, and appellate court's failure to overrule trial court's decision was objectively unreasonable as applied to the facts in this case. And, in light of the holdings in Smith v. Illinois, 469 U.S. 91, 95; Edwards v. Arizona, 451 U.S. 477, 484-85; Miranda v. Arizona, 384 U.S. 436, 473-74; and Missouri v. Seibert, 542 U.S. 600, 612.

Thus, the Federal District and Sixth Circuit Courts' determination can be found debatable, or even wrong as to the confessions made by Schaaf being admitted, when they could be found to be the fruits of the poisonous tree and should have been suppressed, because of the detectives using the question-first method of interrogation and only later Mirandizing.

Finally, the effect of the constitutional violations "had a substantial and injurious effect in determining the jury's verdict," as Petitioner's entire defense was premissed upon inadmissible evidence, and had it been suppressed defense strategies would have been taylored entirely differently, and jury's assesment would have an entirely different perspective. Brecht v. Abrahamson, 507 U.S. 619 (1993).

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Gabriel R. Schaaf

Gariel R. Schaaf, Petitioner

Date: NOV-30-21