

No. 17-425

IN THE
Supreme Court of the United States

SHAWN WILLIAM WASS,

Petitioner

v.

STATE OF IDAHO,

Respondent.

On Petition For A Writ Of Certiorari To
The Supreme Court Of Idaho

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court’s Rule 15.8, Petitioner files this supplemental brief to address the Court’s decision in *Hughes v. United States*, No. 17-155 (U.S. June 4, 2018), issued after Petitioner filed his petition and reply brief in this case.

1. The petition set forth an acknowledged conflict involving 26 circuits and state high courts regarding the admissibility of a suspect’s statement where an officer “questions first”—*i.e.*, the officer elicits an admission without providing a *Miranda* warning, then provides the warning to elicit the same admission. Nine courts hold that in these circumstances, the Fifth Amendment calls for the objective, suspect-focused test articulated by the plurality opinion in *Missouri v. Seibert*, 542 U.S. 600 (2004). Pet. at 14–17. Seventeen courts hold that the Fifth Amendment calls for the subjective, officer-focused test articulated in the concurring opinion. Pet. at 12–14. Respondent conceded that this conflict over the appropriate constitutional test extends to at least 20 circuits and state high courts. Pet. Reply at 1–2; BIO at 1–2, 14–15.

2. This Court held the petition pending *Hughes*, whose first two questions presented related to the process of interpreting fractured decisions of this Court under *Marks v. United States*, 430 U.S. 188 (1977). *See Hughes*, slip op. at 2. This Court’s decision in *Hughes* did not resolve those questions and, instead, simply decided the merits of the sentencing issue raised by the petitioner in that case. *Id.* at 3, 8–9.

3. *Hughes* thus did not resolve the conflict over the proper constitutional test for determining the admissibility of a statement when an officer “questions first” and does nothing to undermine the reasons for granting review set forth in the petition. The Court should now grant certiorari in this case and, as in *Hughes*, resolve the merits of the question giving rise to the intractable conflict among the lower courts. Absent the Court’s intervention, that conflict will persist, and the outcome of criminal prosecutions will turn arbitrarily on the jurisdiction in which the suspect happens to reside. Indeed, in at least six states, law enforcement and suspects are accountable to two different constitutional rules at the same time. Pet. at 21; *see also Hughes*, slip op. at 3 (explaining that “[t]aking instruction from the cases decided in the wake of [its earlier fractured decision] and the systemic concerns that have arisen,” a majority of this Court could resolve the issue and “give the necessary guidance” to lower courts).

Respondent conceded that the question of which constitutional test applies is dispositive of this case and has not even attempted to argue that further percolation would be beneficial. Pet. Reply at 1, 4. The Court should grant certiorari.¹

¹ The Court has, in the past, granted review when it holds a petition pending another case that could bear on, but does not ultimately resolve the issue warranting certiorari. *E.g.*, *Kappos v. Hyatt*, 564 U.S. 1036 (2011) (held pending *Microsoft Corp. v. I4I Ltd. P’ship*, 564 U.S. 91 (2011), and subsequently granted).

CONCLUSION

For the foregoing reasons and those stated in the petition and reply, the Court should grant certiorari.

Respectfully submitted,

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