No. 17-6542

IN THE SUPREME COURT OF THE UNITED STATES

GAVIN YEPA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's statements to police officers during the execution of a search warrant of his person were spontaneous or were the result of interrogation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 862 F.3d 1252.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2017. The petition for a writ of certiorari was filed on October 16, 2017 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of first-

degree murder in Indian Country, in violation of 18 U.S.C. 1111 and 18 U.S.C. 1153 (2006). Pet. App. B1. He was sentenced to life imprisonment. Id. at B2. The court of appeals affirmed. Id. at A1-A16.

1. On December 28, 2011, petitioner and two friends picked up Lynette Becenti as she was walking along the side of the road. Gov't C.A. Br. 2-3. The group drove to a liquor store and, after petitioner bought a bottle of vodka, they ended up at petitioner's house where they continued to drink until about 8:30 p.m., when everyone except petitioner and Becenti left. Id. at 4-5. Sometime after 9:00 p.m., petitioner's cousin, Rodney Adams, arrived at petitioner's house and saw Becenti lying on the floor with her breasts exposed and pants pulled down. Id. at 6. He then witnessed petitioner sexually assault Becenti by shoving a water bottle into Becenti's vagina. Id. at 6-7; see Pet. App. A2.

Around midnight, petitioner went to a neighbor's home and told the neighbor that there was a woman at his house who was not breathing. Pet. App. A2. Petitioner and the neighbor ran back to petitioner's house where the neighbor found Becenti's dead body on the floor, naked and covered with blood. Ibid. Petitioner admitted that he had been trying to have sex with Becenti but claimed that he did not remember what had happened. Gov't C.A. Br. 8. An autopsy determined that Becenti had died from a wound

from a shovel that had penetrated her body through her vagina into her abdomen. Pet. App. A2; Gov't C.A. Br. 21-22.

Petitioner was arrested and advised of his Miranda rights. Pet. App. A2. Petitioner invoked his right to counsel, and he was transported to the Jemez Pueblo Police Department for processing. Ibid. Agent Ben Bourgeois of the Federal Bureau of Investigation obtained a warrant to search petitioner's body. Ibid. The body warrant "authorized photographing [petitioner], taking his clothes for analysis, taking a blood sample for intoxication, and swabbing areas of his body for DNA testing." Ibid.

The search took place in a room at the police department. Pet. App. A2. The search took "a bit more than 50 minutes" and was audio recorded. Ibid. During the search, petitioner made several statements to the officers. Id. at A2-A3; see id. at A3-A8 (describing the recording in detail). For example, as the officers were instructing petitioner about where to stand as they took photographs of petitioner's body ("Let me have you back up against the wall a little bit more."), petitioner stated that his toes, feet, and face were "bloody." Id. at A5. In another instance, petitioner blurted out that "Oh, man, it got sick," after one of the officers told petitioner he would get petitioner the water he had requested. Id. at A7. Petitioner said that he had tried to have sex with Becenti, asked the officers whether they

believed he had killed her, and repeatedly asserted his innocence. Id. at A3-A7.

In a largely inaudible exchange, Agent Bourgeois attempted to clarify a reference by petitioner to "[t]hat chick." Pet. App. A7; see ibid. ("With who?") (emphasis omitted). During that same exchange, in response to petitioner's comment that "we picked her up," Bourgeois and another officer asked petitioner, "Who were you with?" Ibid. (emphasis omitted). Petitioner did not answer. Ibid. The officers concluded their search shortly thereafter. Ibid. Some statements during the search labeled as "inaudible" appear to be in Towa, the language of the Jemez Pueblo. Ibid. "The record contains no translation of those portions." Id. at A3.

2. Before trial, petitioner moved to suppress his statements from the recording of his body search, arguing that they were in response to interrogation by the officers. Pet. App. A8. The district court denied the motion, finding that petitioner's "statements during the execution of the search warrant for [his] person were spontaneous and were not the result of interrogation." Ibid. The court further found that petitioner's "responses to the very few follow-up questions * * * were simply neutral efforts to clarify his spontaneous volunteered statements, and did not constitute interrogation." Ibid. The court also found that the agents "were business-like but polite toward [petitioner] at all times," and found "absolutely no

evidence * * * of any implied or explicit threats or coercion or any other form of law enforcement overreaching." Ibid.

At trial, petitioner's statements were admitted into evidence, along with the testimony of the witnesses who observed the events described above. Gov't C.A. Br. 23, 35. Forensic evidence also established, among other things, that Becenti's blood was on petitioner's clothing and that petitioner's fingerprint was on the shovel that killed Becenti and was stained with her blood. Id. at 20-21, 35. The jury found petitioner guilty of first-degree murder in Indian Country, in violation of 18 U.S.C. 1111 and 18 U.S.C. 1153 (2006). Pet. App. A2; Gov't C.A. Br. 1. The district court sentenced petitioner to imprisonment for life. Pet. App. B2.

3. The court of appeals affirmed. Pet. App. A1-A16. After identifying five specific statements whose admission petitioner challenged, the court stated that petitioner "must establish that the challenged statements were (1) the result of words or actions of law-enforcement officers (2) that constituted interrogation." Id. at A11. The court then reviewed in detail each of the statements and affirmed the district court's determination that they were not in response to interrogation. See, e.g., id. at A11-A12 (petitioner's statement acknowledging that "his toes, feet, and face were bloody, and that he had abrasions on his body" was not the product of Agent Bourgeois's question at least ten minutes

earlier asking whether petitioner had "any scars," "[m]arks," or "[a]nything like that"); id. at A12-A13 (agent's comments that petitioner was a "tough guy" and "not a real modest guy" referred to petitioner's "coping with the cold" and his "comfort with being photographed" and did not constitute interrogation or goad petitioner into making inculpatory statements 16 to 29 minutes later) (citation omitted). The court also rejected petitioner's argument that the officers' interaction with him constituted interrogation because a reasonable officer would have considered that petitioner was particularly vulnerable as a result of his intoxication, fatigue, and emotional distress. Id. at A13. Finally, the court concluded that, although "there could be some doubt" about whether the officer's question "Who were you with?" constituted interrogation, it did not need to resolve the issue because petitioner did not answer that question. Id. at A15.

ARGUMENT

Petitioner contends (Pet. 14-19) that the government has the burden of demonstrating that a defendant's statements were not the result of interrogation by police officers. Petitioner did not adequately preserve that contention below, and the court of appeals does not appear to have directly resolved it. This case also would be a poor vehicle for addressing that question, as the allocation of the burden here did not alter the court of appeals' determination that the district court properly denied petitioner's

motion to suppress. In any event, the decision below is correct; it does not implicate a conflict of authority among the courts of appeals or state courts of last resort; and any evidentiary error would have been harmless because overwhelming evidence established petitioner's guilt. Further review is unwarranted.

1. The court of appeals correctly determined that the district court did not err in denying petitioner's motion to suppress. When a suspect invokes his Fifth Amendment right to counsel, later statements resulting from custodial interrogation in the absence of counsel are generally inadmissible unless the suspect himself initiates further communication with the police and makes a knowing and intelligent waiver of his rights. See Minnick v. Mississippi, 498 U.S. 146, 150-151 (1990); Edwards v. Arizona, 451 U.S. 477, 482-486 & n.9 (1981). Interrogation, for these purposes, is limited to express questioning or its "functional equivalent," namely, "words or actions on the part of the 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, 300-301 (1980) (footnote omitted). If a defendant "himself initiates further communication" with law enforcement, "nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary,

volunteered statements and using them against him at the trial." Edwards, 451 U.S. at 485.

For example, in Pennsylvania v. Muniz, 496 U.S. 582 (1990), this Court held that the defendant's incriminating remarks during sobriety testing at a police station were not part of an "interrogation." Id. at 605. He made those remarks following his arrest for driving under the influence, and the officer's statements during the testing (such as informing the defendant how to conduct a breathalyzer test and informing him of the state's implied consent law) were "limited and focused inquiries" that were "necessarily 'attendant to' the legitimate police procedure" and "were not likely to be perceived as calling for any incriminating response." Ibid. (citation omitted); see id. at 602-605.

In this case, the district court applied those settled principles to the particular facts before it and determined that petitioner's "statements during the execution of the search warrant for [his] person were spontaneous and were not the result of interrogation." Pet. App. A8 (citation omitted). The court of appeals then applied those same principles in reviewing that determination, and correctly affirmed. It considered each challenged statement in context and correctly concluded that the officers did not interrogate petitioner after he invoked his right to counsel and that petitioner's statements were spontaneous. As

the court explained, most of petitioner's statements were not responsive to questions or comments by the officers that were identified by petitioner, many of which had been uttered many minutes before. See Innis, 446 U.S. at 301-302 ("[T]he police surely cannot be held accountable for the unforeseeable results of their words or actions."). Petitioner challenges (Pet. 20-23) the court of appeals' determinations about his interactions with the officers, but the court's factbound conclusions are correct and do not warrant further review.

2. Petitioner contends (Pet. 10-16) that the court of appeals erred by stating that he had to "establish that the challenged statements were (1) the result of words or actions of law-enforcement officers (2) that constituted interrogation." Pet. App. A11. Petitioner contends that the court thus placed the burden on him to establish that the police were engaged in interrogation, when (he asserts) the government should bear the burden of establishing the absence of interrogation.

a. As a threshold matter, petitioner did not preserve this issue in any manner that would make it suitable for further review. Petitioner did not raise any question in his opening brief on appeal about who bore the burden of proof in establishing that interrogation had (or had not) resumed. See Pet. C.A. Br. 1-56. The government in turn did not address the question in its brief on appeal. See Gov't C.A. Br. 1-37. Petitioner contends (Pet.

20) that he preserved this issue in his reply brief. See Pet. C.A. Reply Br. 13, 19. But the two passing references to the burden in his reply brief, ibid., did not adequately present the issue. The Tenth Circuit "will not consider * * * arguments * * * raised for the first time in [a] reply brief." Wheeler v. Commissioner, 521 F.3d 1289, 1291 (2008); e.g., Rowley v. Morant, 631 Fed. Appx. 651, 655 (2015) ("[A]n argument made for the first time in a reply brief comes too late."); see Fed. R. App. P. 28(a)(8)(A) (requiring an opening brief to contain "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies").

The court of appeals does not appear to have considered or directly decided this question notwithstanding petitioner's failure to preserve it. Petitioner focuses on a single sentence of the court's opinion, stating that petitioner "must establish that the challenged statements were (1) the result of words or actions of law-enforcement officers (2) that constituted interrogation." Pet. App. A11. But that sentence does not use the word "burden," cite any legal authority, assert that petitioner had an affirmative legal obligation in the district court in the first instance, or explain the reasons why that would be so. See Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (declining to review claim "without the benefit of thorough lower court opinions

to guide our analysis of the merits"). Rather, that sentence appears simply to describe in accurate terms what petitioner needed to establish on appeal to justify reversing the district court's conclusion that suppression was unwarranted, given the court's findings that petitioner's statements were spontaneous and not the result of any interrogation. Petitioner thus failed to preserve this claim of error below, and further review would be at odds with this Court's "traditional rule * * * preclud[ing] a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted).

b. This case would also be a poor vehicle for addressing any question about the allocation of the burden of proof, because the court of appeals' decision does not depend on the allocation of the burden of proof. As this Court has observed, placing the burden of proof by a preponderance of the evidence on one party rather than another has practical consequence "only in a narrow class of cases where the evidence is in equipoise; that is, where the evidence" on one side "is just as strong" as the evidence on the other. Medina v. California, 505 U.S. 437, 449 (1992). "In truth, however, very few cases will be in evidentiary equipoise." Meacham v. Knolls Atomic Power Lab., 554 U.S. 84, 101 (2008) (quoting Schaffer v. Weast, 546 U.S. 49, 58 (2005)). This case is

not one of the "very few" cases within that "narrow class." Ibid.; Medina, 505 U.S. at 449.

Here, it is undisputed that the body search was not in itself an interrogation. Cf. Muniz, 496 U.S. at 605. Thus, the only issues are what to make of petitioner's various statements during the body search, and how to understand their relationship to the handful of questions the police officers asked him during that time. In resolving those issues, the district court did not indicate that the evidence was in equipoise or even closely balanced, nor did it point to a lack of proof of any particular fact. Rather, relying on the transcript of the body search, the court squarely found that petitioner's statements "were spontaneous and were not the result of interrogation." Pet. App. A8; see ibid. ("The audio transcript reveals that the agents executing the warrant were business-like but polite toward [petitioner] at all times."). The court of appeals then reviewed the district court's findings of fact for clear error and its legal conclusions de novo, before affirming the district court's judgment. See Pet. App. A11-A16. Like the district court's decision, the court of appeals' decision does not state or otherwise indicate that the evidence was in equipoise or even that it was close.

c. In any event, petitioner's claim of error is unsupported and would not warrant certiorari even if petitioner had preserved

it and it were squarely presented here. Consistent with the general rule that the movant ordinarily bears the burden of proof, the movant ordinarily bears the burden of proof when seeking to suppress evidence. E.g., United States v. Smith, 783 F.2d 648, 650 (6th Cir. 1986) ("The burden of production and persuasion rests on the person seeking to suppress evidence."); United States v. Arboleda, 633 F.2d 985, 989 (2d Cir. 1980) (collecting cases), cert. denied, 450 U.S. 917 (1981).

To be sure, "in some well-defined situations the ultimate burden of persuasion may shift to the government upon an initial showing of certain facts by the defendant." United States v. de la Fuente, 548 F.2d 528, 533 (5th Cir.), cert. denied, 431 U.S. 932, and 434 U.S. 954 (1977). In particular, this Court has placed the burden on the government in "situations where the government sought to introduce inculpatory evidence obtained by virtue of a waiver of, or in violation of, a defendant's constitutional rights," Medina, 505 U.S. at 451-452, including waiver of rights under Miranda, see Berghuis v. Thompkins, 560 U.S. 370, 382 (2010); Colorado v. Connelly, 479 U.S. 157, 168 (1986). Here, however, the question is not whether petitioner waived his constitutional rights or whether the government may introduce evidence notwithstanding a finding that it was obtained in violation of constitutional rights, but instead whether petitioner was subject to interrogation in the first place and thus whether his

constitutional rights were violated at all. Petitioner provides no sound basis for concluding that the burden should shift to the government in that context.

d. Petitioner contends (Pet. 16-19) that a conflict exists among the circuit courts and state courts over who bears the burden of proving that remarks are (or are not) the result of interrogation. But perhaps reflecting that the allocation of the burden is relevant only in a "narrow class" of cases, Medina, 505 U.S. at 449, no such conflict exists. As previously discussed, it is far from clear that the court of appeals' decision here answers any question about the burden of proof that it would apply in a case in which the evidence is in equipoise. See pp. 10-12, supra. But even if it had, there would still be no conflict. Petitioner contends (Pet. 16) that the First and Ninth Circuits place the burden on the government to establish that interrogation has not occurred. See United States v. Jackson, 544 F.3d 351 (1st Cir. 2008); United States v. Smith, 48 F.3d 1229, 1995 WL 81943 (9th Cir. 1995) (Tbl.). But Jackson does not even discuss the burden of proof, much less resolve the question. The court instead found it "clear that the police subjected [the defendant] to custodial interrogation," 544 F.3d at 360, thus indicating that the evidence was not in equipoise and therefore that the question was not

presented. And Smith is unpublished and therefore does not establish circuit precedent. See 9th Cir. R. 36-3(a).*

Petitioner identifies (Pet. 18) two cases from state courts of last resort, but they do not support petitioner's claim of a conflict either. In State v. Thelusma, 113 A.3d 1165, 1169 (N.H. 2015), the court relied on state law to conclude that the government bore the burden of proof. And in People v. Stoesser, 421 N.E.2d 110, 111 (N.Y. 1981), the court appeared to assume that the government bore the burden of proof, but did not discuss the issue. See ibid. The court instead appears to have reversed and remanded because the trial court had failed to make any finding as to whether interrogation had occurred under the Innis standard. Ibid. (stating that "[n]o finding was made by the courts below in this regard" and that the determination could not be made as a matter of law).

Petitioner otherwise relies (Pet. 17-18) on decisions of the federal district courts and lower state courts. But any conflict between those decisions and the decision below would provide no

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* Some circuit courts have stated that a defendant must demonstrate that police questioning in the absence of Miranda warnings is "custodial." See Pet. 18-19 (citing United States v. Lawrence, 892 F.2d 80, 1989 WL 153161 at *5 (6th Cir. 1989) (per curiam) (Tbl.), cert. denied, 494 U.S. 1019, and 494 U.S. 1069 (1990); United States v. Jorgensen, 871 F.2d 725, 729 (8th Cir. 1989); de la Fuente, 548 F.2d at 533. But petitioner does not identify any decision of a court of appeals that has held that the burden is on the government to prove that interrogation did not occur.

basis for further review by this Court. See Sup. Ct. R. 10. Furthermore, the cases that petitioner cites from state lower courts relied on state law, see Pet. 18 (citing Commonwealth v. Culver, No. 321 WDA 2013, 2014 WL 10795161, at *3 (Pa. Super. Ct. Oct. 1, 2014) (unpublished); People v. Whitfield, 54 Cal. Rptr. 2d 370, 373 (Cal. Ct. App. 1996); State v. Boggs, 559 P.2d 11, 15 (Wash. Ct. App. 1977)), and the cited district court decisions (Pet. 17) do not discuss the burden issue in any depth. Many of those cases simply cite Connelly, supra, for the proposition that the prosecution bears the burden of proving that a defendant waived his Miranda rights, a principle that is not at issue here. See, e.g., United States v. Ivery, No. 16-cr-158, 2017 WL 728309, at *2 (S.D. W. Va. Feb. 24, 2017); United States v. Abdallah, 196 F. Supp. 3d 599, 600 (E.D. Va. 2016); United States v. Freeman, 61 F. Supp. 3d 534, 536 (E.D. Va. 2014); United States v. Eggers, 21 F. Supp. 2d 261, 266 (S.D.N.Y. 1998).

3. Finally, even if there had been an evidentiary error, it would have been harmless beyond a reasonable doubt. See, e.g., Neder v. United States, 527 U.S. 1, 7 (1999). Several witnesses testified that petitioner was alone with Becenti at his house, and Adams testified that he observed petitioner sexually assault Becenti. Moreover, petitioner's fingerprint was on the shovel that caused Becenti's death, further confirming petitioner's guilt. See Gov't C.A. Br. 35-36. Conversely, petitioner's

statements during the body search, many of which were assertions of innocence, contributed little to the government's proof.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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