No.

In the Supreme Court of the United States

EDMUND ZAGORSKI,

Petitioner,

v.

RICKY BELL, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

PAUL R. BOTTEI
Office of the Federal
Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

Counsel for Petitioner

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a "security" justification for abusive pretrial confinement precludes, as a matter of law, a determination that the circumstances of confinement impermissibly coerced the making of custodial statements.

2. Whether a defendant's initiation of contact with police per se establishes the admissibility of his statements, or whether the court must consider the totality of the circumstances in determining whether inculpatory statements made by the defendant were voluntary.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Edmund Zagorski respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (App., *infra*, 1a-14a) is unpublished and reprinted at 326 F. App'x 336. The court of appeals' order denying rehearing and rehearing en banc (App., *infra*, 224a) is unpublished. The district court's order denying a writ of habeas corpus (App., *infra*, 15a-223a) is also unpublished.

The opinion of the Tennessee Supreme Court affirming the denial of post-conviction relief is reported at 983 S.W.2d 654. The opinion of the Court of Criminal Appeals of Tennessee and the opinion and order of the Criminal Court for Robertson County, Tennessee, both denying post-conviction relief, are not reported; the opinion of the court of criminal appeals is available at 1997 WL 311926.

The opinion of the Tennessee Supreme Court on direct appeal is reported at 701 S.W.2d 808.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2009. A timely petition for rehearing was denied on August 7, 2009. On October 26, 2009, Justice Stevens extended the time for filing a petition for a writ of certiorari to January 4, 2010. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in pertinent part: "No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

Petitioner spent four months after his arrest for murder in solitary confinement, held in an eight-foot by eight-foot, windowless, unventilated, metal-walled cell in the "obsolete, antiquated and inadequate" Robertson County, Tennessee, Jail. C.A. App. 534.[1] Cut off from natural light and virtually all human contact, petitioner's physical and psychological condition deteriorated dramatically. The isolation and extreme summer heat drove him to self-mutilation and attempted suicide, resulting in repeated emergency room visits and the administration of at least five separate mind-altering medications. Two months into his pretrial confinement, after a heat wave pushed the temperature in his cell over 100 degrees, petitioner contacted authorities: Unaccompanied by his lawyers and recently released from the emergency room, petitioner offered to confess if he could "pick the type of execution and the date and time of execution." Prelim. Mot. Hr'g Tr. 76-77, *State* v. *Zagorski*, No. 6052 (Robertson Cty. Crim. Ct. Feb.

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[1] Report of Anthony S. Kuharich, Jail Consultant (May 10, 1983), Ex. 4 to Petr.'s Response Resp.'s Mot. Summ. J. (Oct. 1, 2002).

17, 1984) (testimony of Ronnie Perry), reprinted in C.A. App. 92-93. He then provided two inculpatory statements that were later used against him at trial, where he was convicted of first-degree murder and sentenced to death.

The court of appeals' decision affirming the introduction into evidence of these statements was plainly wrong. The court rejected petitioner's argument that he was coerced into making the statements by the oppressive conditions of his confinement on the ground that those conditions were prompted by security concerns, but the state's assertedly legitimate reasons for placing a suspect in an unventilated steel box cannot justify the use at trial of coerced statements. The Sixth Circuit also thought use of the statements permissible because petitioner approached the authorities and, as the court put it, "insisted on confessing" (App., *infra*, 9a)—but it would seem elementary that a suspect coerced into initiating an exchange with police has still been the subject of impermissible coercion. When errors of this magnitude are made in a decision upholding a sentence of death, review by this Court is warranted.

A. Factual Background

On May 26, 1983, petitioner was arrested in Ohio on suspicion of involvement in the deaths of two drug dealers whose bodies had been found 20 days earlier in Robertson County, Tennessee. App., *infra*, 20a. Wounded during the arrest, petitioner was taken to a hospital in Huntington, West Virginia, where he was met by law enforcement officials from Robertson County, including Sheriff Ted Emery and Sheriff's Office Detective Ronnie Perry, and invoked his right to counsel. *Id*. at 21a-22a. Sheriff Emery and Detec-

tive Perry escorted petitioner to Tennessee on May 31, 1983; upon his arrival that night, authorities placed petitioner in a "drunk tank" at the Robertson County Jail. Hr'g Tr. 53 (testimony of Ted Emery), reprinted in C.A. App. 77. The next day, "after he invoked his rights to silence and to counsel" but without having been provided an attorney (App., *infra*, 7a), petitioner gave the first of three inculpatory statements to law enforcement officials that subsequently were introduced at his trial. *Id*. at 7a-9a.[2]

1. Circumstances Of Confinement

Within a few days of petitioner's arrival in Tennessee, authorities moved him to a newly completed metal-walled isolation cell in the bottom cell block of the jail. Hr'g Tr. 68, 77 (testimony of Ronnie Perry). Sheriff Emery had recently been enjoined against placing any inmate in disciplinary or administrative segregation at the jail for more than ten days in response to complaints that, among other things, physical facilities and medical treatment in the jail were so inadequate as to violate the Eighth and Fourteenth Amendments. Agreed Order, *Douglas* v. *Emery*, No. 81-3826 (M.D. Tenn. Apr. 15, 1983), re-

[2] Petitioner also made a statement on May 27 after he first had requested counsel; the State agreed not to introduce that statement at trial. *State* v. *Zagorski*, 701 S.W.2d 808, 812 (Tenn. 1985). The date of that statement has also been given as May 28, rather than May 27, over the course of litigation. See *Zagorski* v. *State*, 1997 WL 311926, at *10 (Tenn. Crim. App. June 6, 1997). This discrepancy, which is not material for present purposes, is likely attributable to law enforcement officials having visited petitioner on both days and petitioner staying overnight at a hospital during that time. Hr'g Tr. 33 (testimony of Ted Emery).

printed in App., *infra*, 225a-229a.[3] Notwithstanding that injunction, Sheriff Emery confined petitioner in isolation for over four months pending his trial.

The isolation cell measured eight feet by eight feet. Hr'g Tr. 77 (testimony of Ronnie Perry), reprinted in C.A. App. 93. The walls were steel. *Id.* at 85 (testimony of Ted Emery), reprinted in C.A. App. 85. The cell received no natural light and petitioner was not allowed any exercise. *Id.* at 85-86 (testimony of Ted Emery). The metal-walled cell worsened the summer heat; the jail's ventilation system had been "inoperative since the jail was built," C.A. App. 510,[4] and even with personal fans, "the [indoor] temperature still [rose] up in the hundred degree range in the summertime," *id.* at 512. Over four months of pre-trial incarceration, petitioner was kept in complete isolation but for a handful of meetings with his attorneys and encounters with Detective Perry. His only trips outdoors were several visits to the local hospital emergency room and two to court. Hr'g Tr. 78 (testimony of Ronnie Perry).

Lengthy isolation in these circumstances had a pronounced effect on petitioner's physical and psychological condition. Throughout his incarceration, petitioner suffered from acute anxiety attacks, rashes, insomnia, and uncontrollable rage, resulting in the emergency room visits. C.A. App. 615-617. Over the first two months of his incarceration petitioner was treated with at least five different anti-psychotic or mood-altering medications—Valium,

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[3] The unpublished *Douglas* decree was Ex. 2 to Petr.'s Response Resp.'s Mot. Summ. J. (Oct. 1, 2002). C.A. App. 503-508.

[4] Testimony of Sheriff Emery in *Douglas* v. *Emery*, Ex. 3 to Petr.'s Response Resp.'s Mot. Summ. J. (Oct. 1, 2002).

Serax, Vistaril, Librium, and Haldol—along with the anti-migraine medication Midrin and Restoril, used to treat insomnia. *Ibid*. By October 6, 1983, when he finally was transferred out of the Robertson County Jail, petitioner had been treated twice for intentional drug overdoses, *id*. at 637, 643, and once after attempting to electrocute himself, *id*. at 656. He lost 30 pounds as a result of his treatment during this period. *Id*. at 635.[5]

2. July 27 And August 1 Statements

The temperature in Robertson County rose in mid-July, exceeding 90 degrees on July 13. C.A. App. at 629. As the "sweltering summer heat wave" ruined crops and killed livestock across the County, *id*. at 623,[6] petitioner was hospitalized twice. On July 16, petitioner was treated for an intentional overdose of Valium. *Id*. at 637. Within two days of his overdose, petitioner was back in the emergency room with an anxiety attack, where he requested sedatives and stated that he wanted "to sleep till the police fry him." *Id*. at 639. Petitioner appeared "listless and dazed" at a July 20 hearing where he unsuccessfully requested removal from isolation. *Id*. at 635.

On July 22, when the outdoor temperature reached 100 degrees, *id*. at 629, petitioner asked to speak with Detective Perry or Sheriff Emery. Hr'g Tr. 71 (testimony of Ronnie Perry), reprinted in C.A. App. 87. Five days passed without a response. On the

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[5] Rich Barrett, *Suspect Bound Over in Drug Deal*, Robertson County Times, July 21, 1983. Ex. 17 to Petr.'s Response Resp.'s Mot. Summ. J. (Oct. 1, 2002).

[6] *Heat Reaches 100 Degrees; Crops Damaged*, Robertson County Times, July 28, 1983, at 1a. Ex. 13 to Petr.'s Response Resp.'s Mot. Summ. J. (Oct. 1, 2002).

second day, petitioner was again taken to the hospital, suffering from a migraine and insomnia and complaining of numbness in his extremities. The doctor noted that petitioner's blood pressure was "way up" (150/90) and that petitioner, though alert, exhibited "poor judgment." C.A. App. 641. The doctor added a daily migraine drug and nightly sleeping pills to petitioner's multiple prescriptions. *Ibid.*

Detective Perry finally met with petitioner on July 27. Hr'g Tr. 72 (testimony of Ronnie Perry), reprinted in C.A. App. 88. At this meeting, petitioner stated: "I'd confess to these murders if you all would do one thing for me; if you all would let me pick the type of execution and the date and time of execution." *Id.* at 76-77 (testimony of Ronnie Perry), reprinted in C.A. App. 92-93. Although petitioner did not confess to the murders, he went on to provide inculpatory details about where the murders had taken place. App., *infra*, 8a. On August 1, petitioner again contacted Detective Perry and made an additional inculpatory statement during an hour-long meeting at the jail. *Id.* at 8a-9a. This time, petitioner denied killing the deceased but declared that his job had been to "set the murders up"; he provided details about how the men had been killed. *Ibid.* Petitioner was not joined by counsel at either meeting. These statements became a central element of petitioner's subsequent trial.

B. Petitioner's Trial

Petitioner was indicted in Tennessee on two counts of murder. Prior to trial, defense counsel filed a preliminary motion to suppress the statements petitioner made to the police on June 1, July 27, and August 1. App., *infra*, 24a. The trial judge overruled the defense motion after hearing testimony from

Sheriff Emery and Detective Perry. Hr'g Tr. 31-88. The judge stated he was convinced that petitioner was aware of his rights when he made the June 1 statement. *Id.* at 89. Although he expressed concern that petitioner was medicated and under strain, the judge nonetheless found that neither force nor coercion was involved when petitioner spoke to Detective Perry on July 27 and August 1. *Id.* at 96-97, reprinted in C.A. App. 94-95.

At trial, Detective Perry testified at length regarding the June 1, July 27, and August 1 statements. Trial Tr. 883-890, 894-895, 911-924, *State* v. *Zagorski*, No. 6052 (Robertson Cty. Crim. Ct. Mar. 4, 1984). He declared, for example, that on June 1 petitioner "stated that he didn't say he wasn't involved in the murders." *Id.* at 889 (testimony of Ronnie Perry), reprinted in C.A. App. 187. During the next meeting between Detective Perry and petitioner, the detective elaborated, petitioner "said that he and two other men had been hired to kill Jimmy Porter, and that John Dale Dotson's death was a mistake." *Id.* at 894, reprinted in C.A. App. 188. And Detective Perry testified that petitioner provided further details of the circumstances surrounding the murders at their final meeting: Petitioner told him, he informed the jury, that "Jimmy Porter and Dale Dotson exited the vehicle, and within five seconds after they exited the car, they were shot to death. Said then their bodies were put in plastic bags and brought up here in Robertson County and dumped." *Id.* at 895 (testimony of Ronnie Perry), reprinted in C.A. App. 189.

The prosecutor further emphasized this testimony in closing arguments, walking through each statement, *id.* at 1018-1020, reprinted in C.A. App. 197-199, and urging the jury: "When you go back

there to deliberate, consider the different accounts of the murders that [petitioner] gave to different people at different times." *Id.* at 1018, reprinted in C.A. App. 197. The prosecutor carefully pointed out that on July 27, "[petitioner] implicated himself in a murder for hire situation," and "further implicated himself in a murder for hire situation" when he spoke to Detective Perry on August 1. *Id.* at 1020, reprinted in C.A. App. 199.

Petitioner was convicted on two counts of first-degree murder. During the sentencing phase of the trial, the prosecutor assured the jury that "[t]hings have been done properly in this case from the very beginning, from [petitioner's] arrest until this very moment. Things have been done properly according to the law * * *." *Id.* at 1125-1126. The jury sentenced petitioner to death.

C. Direct Appeal And State Post-Conviction Proceedings

1. Petitioner appealed the conviction directly to the Tennessee Supreme Court on multiple grounds, among them that the trial court erred by refusing to suppress petitioner's custodial statements to law enforcement officials. *State* v. *Zagorski*, 701 S.W.2d 808 (Tenn. 1985). Noting petitioner's argument "that he was questioned after having asked for an attorney and that he was coerced into making statements by the circumstances of his confinement and his physical and mental condition," *id.* at 812, the court rejected this contention in reliance on *Smith* v. *Illinois*, 469 U.S. 91 (1984), and *Edwards* v. *Arizona*, 451 U.S. 477 (1981). In its entirety, the court's analysis ran:

> [W]e concluded that the evidence supports the trial court's finding that the defendant initiated the interrogations, that he was not subject to any coercive action on the part of the state, and that he knowingly and intelligently waived his right to have counsel present during the interrogations.

701 S.W.2d at 812. This Court denied review. *Zagorski* v. *Tennessee*, 478 U.S. 1010 (1986).

2. Petitioner then initiated post-conviction proceedings in Tennessee state court, asserting multiple grounds for relief.[7] Arguing that his trial counsel's failure to have his coerced statements excluded at trial constituted ineffective assistance, petitioner introduced additional evidence at a post-conviction evidentiary hearing of his physical and mental condition at the time of his confinement. Post-Conviction Technical R. with Exs., *Zagorski* v. *State*, No. 01C01-9609-CC-00397 (Tenn. Crim. App. Sept. 12, 1996), Exs. 14-16. The Criminal Court for Robertson County, Tennessee, nevertheless dismissed the petition and denied post-conviction relief on all grounds, Memorandum Opinion and Order, *Zagorski* v. *State*, No. 6052 (Tenn. Crim. Ct. Apr. 19, 1996), reprinted in Technical Record, *supra*, at 38-50. Both the Court of Criminal Appeals of Tennessee, *Zagorski* v. *State*, No. 01C01-9609-CC-00397, 1997 WL 311926 (Tenn. Crim. App. June 6, 1997), and the Tennessee Supreme Court affirmed. *Zagorski* v. *State*, 983 S.W.2d

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[7] Petitioner initially filed his petition for post-conviction relief in Tennessee state court in January 1987. The first evidentiary hearing did not take place until November 1995, almost nine years later. App., *infra*, 26a.

654 (Tenn. 1998), affirmed. This Court again denied review. *Zagorski* v. *Tennessee*, 528 U.S. 829 (1999).

D. Federal Court Proceedings

1. In 1999, petitioner filed a timely petition for a writ of habeas corpus in the Middle District of Tennessee. He raised multiple constitutional claims, including the argument that his inculpatory statements were involuntary and should have been suppressed under the Fifth and Fourteenth Amendments. Am. Pet. for Writ of Habeas Corpus at 5-12, *Zagorski* v. *Bell*, No. 3:99-1193 (M.D. Tenn. Aug. 4, 2000). The district court rejected this argument without addressing the circumstances of confinement, declaring that petitioner had not rebutted the "presumption" that the state supreme court was correct when it found that he "'knowingly and intelligently waived his right to have counsel present' because he 'initiated the interrogations [and] that he was not subject to any coercive action on the part of the state.'" App., *infra*, 34a. The court also rejected petitioner's other claims for relief; the inculpatory statements were the first piece of "evidence in support of the verdicts" cited by the court. *Id.* at 130a-131a.

2. The Sixth Circuit certified five claims for review and affirmed the district court's denial of relief on all of them. App., *infra*, 1a. On the issue whether the state trial court improperly admitted testimony regarding petitioner's inculpatory statements to police, the court of appeals focused on the July 27 and August 1 statements; it did not directly address the admissibility of the June 1 statement, declaring that its admission, even if erroneous, would be harmless

if the later two statements were admissible. *Id*. at 7a.[8]

The court acknowledged petitioner's claim that "he made the statements because he had been incarcerated under oppressive conditions, kept in isolation, and deprived of exercise or sunlight." App., *infra*, 9a. And it did not take issue in any respect with his characterization of the conditions of his confinement and their deleterious physical and psychiatric effects on him. The court nonetheless held that the statements were properly admitted, for two reasons.

First, the court held it to be determinative that the authorities did not act with the *purpose* of forcing a confession when they subjected petitioner to unbearable conditions: "[T]he need for security prompted [petitioner's] confinement, not coercion. Sheriff Emery testified that [petitioner] attempted suicide by overdosing on medication obtained from other prisoners and that he attempted to escape (and injured himself in the process) on another occasion." *Ibid*. In so holding, the court did not note the federal court order precluding such treatment of prisoners in the Robertson County Jail.

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[8] In fact, considered on its own merits the June 1 statement plainly should have been excluded. The governing test comes from *Edwards* v. *Arizona*, 451 U.S. 477 (1981): Once a suspect has invoked his right to counsel, law enforcement authorities may not question him without counsel present unless the suspect voluntarily reinitiates contact with the authorities. Petitioner invoked his right to counsel on May 27 and again on June 1. He specifically stated on June 1 that he did not want to talk about the murders, but the police nevertheless questioned him, resulting in the first inculpatory statement. Hr'g. Tr. 40-41.

Second, the court held the statements admissible because petitioner "requested to speak with Detective Perry on his own initiative and insisted on confessing even though the detective advised him to speak with his lawyer first." *Ibid*. Relying on *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which states that authorities may interrogate a suspect who initiates contact with the police after previously having requested counsel, the court reasoned that here, petitioner "did not just express a voluntary willingness 'to talk generally about his case'—he insisted on giving Detective Perry specific details." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

Petitioner made the inculpatory statements used to convict him of a capital offense after being isolated for two months in an unventilated, windowless, eight-foot by eight-foot steel box, in heat that came to exceed 100 degrees. Unsurprisingly, these conditions produced physical and psychological distress so severe that it resulted in repeated suicide attempts, to which authorities responded by administering petitioner a cocktail of mind-altering drugs. This treatment ultimately led petitioner to summon a detective and declare that he would "confess to these murders if you all would do one thing for me; if you all would let me pick the type of execution and the date and time of execution." Hr'g Tr. 76-77, reprinted in C.A. App. 92-93. He then made the statements in which he implicated himself in the killings.

These statements cannot be regarded as voluntary—and the Sixth Circuit's ruling to the contrary was a manifest departure from clear and repeated holdings of this Court. The court of appeals found it critical that authorities did not intend abusive

treatment of petitioner to induce a confession, but *the authorities'* state of mind (even crediting their assertion that producing a confession was absent from their thoughts) is wholly immaterial here; what matters is whether *the defendant's* will was overborne. The court of appeals also observed that petitioner "initiated" his conversations with Detective Perry, but that, too, is beside the point if the initiation was itself coerced by intolerable treatment. When errors of this magnitude are made by a court that is affirming a sentence of death, corrective review by this Court is imperative. Indeed, the errors committed below are so clear and the consequences so severe that this Court may wish to consider the possibility of summary reversal.

I. THE DECISION BELOW ALLOWED THE ADMISSION INTO EVIDENCE OF INVOLUNTARY STATEMENTS

The principles that control here—developed, in large part, in cases quite like this one—are settled and fundamental. The Fifth and Fourteenth Amendments preclude the admission into evidence of involuntary statements; "what the Constitution abhors[] [is] *compelled* confession." *Dickerson* v. *United States*, 530 U.S. 428, 450 (2000) (Scalia, J., dissenting). Both this Court's precedent and the teaching of common experience establish that petitioner's statements in this case were compelled. The decision below permitting use of these statements by the prosecution therefore should be reversed.

A. Petitioner's Statements Were Not Voluntary And Should Not Have Been Admitted

1. The Court has "recognized two constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment." *Dickerson*, 530 U.S. at 433. As the Court has explained, "[a] coerced confession is offensive to basic standards of justice * * * because declarations procured by torture are not premises from which a civilized forum will infer guilt." *Lyons* v. *Oklahoma*, 322 U.S. 596, 605 (1944). By the same token, the use of coercive methods to extract confessions "offend[s] an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers* v. *Richmond*, 365 U.S. 534, 541 (1961). Adding to the force of these principles, the Court also has long "recognized that coerced confessions are inherently untrustworthy." *Dickerson*, 530 U.S. at 433; see, *e.g.*, *Arizona* v. *Fulminante*, 499 U.S. 279, 293 (1991) (White, J., dissenting); *Jackson* v. *Denno*, 378 U.S. 368, 383-384 (1964); *Spano* v. *New York*, 360 U.S. 315, 320-321 (1959); *Hopt* v. *Territory of Utah*, 110 U.S. 574, 585 (1884).

Perhaps owing to the clarity of these principles, the number of coerced confession cases coming before this Court has dwindled in recent decades. That development likely also has been aided by the advent of more professional means of policing and the ubiquity

of *Miranda* warnings; "[c]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Dickerson*, 530 U.S. at 444 (citation omitted). But as the Court has explained, it "ha[s] never abandoned th[e] due process jurisprudence, and thus continue[s] to exclude confessions that were obtained involuntarily." *Id.* at 434. "The requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry." *Id.* at 444.

In determining whether or not an inculpatory statement was involuntary, the Court conducts an "inquiry that examines 'whether a defendant's will was overborne' by the circumstances surrounding the giving of a confession.'" *Dickerson*, 530 U.S. at 434 (quoting *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973)). This determination turns on "whether the accused, at the time he confesses, is in possession of 'mental freedom' to confess to or deny a suspected participation in a crime." *Lyons*, 322 U.S. at 602. Courts accordingly must look at "whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth." *Rogers*, 365 U.S. at 544.

When making this inquiry, the Court "takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'" *Dickerson*, 530 U.S. at 434 (quoting *Schneckloth*, 412 U.S. at 226). "The determination 'depend[s] upon a weighing of

the circumstances of pressure against the power of resistance of the person confessing.'" *Ibid.* (quoting *Stein* v. *New York*, 346 U.S. 156, 185 (1953)). See also *Withrow* v. *Williams*, 507 U.S. 680, 689 (1993) ("[W]e continue to employ the totality-of-circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process."); *Reck* v. *Pate*, 367 U.S. 433, 440 (1961) ("[A]ll the circumstances attendant upon the confession must be taken into account."); *Malinski* v. *New York*, 324 U.S. 401, 404 (1945) ("If all the attendant circumstances indicate that the confession was coerced or compelled, it may not be used to convict a defendant.").

2. In making the determination whether the defendant's "will was overborne," the Court has identified several considerations that are relevant here:

First, and of obvious salience, are oppressive conditions of confinement and interrogation, which may place irresistible pressure on the accused to confess. In *Brooks* v. *Florida*, 389 U.S. 413 (1967), for example, the defendant confessed after spending two weeks in a "windowless sweatbox" without seeing "one friendly face from outside the prison" during that time. *Brooks*, 389 U.S. at 414. Adding to the discomfort of his confinement, Brooks "subsisted on a daily fare of 12 ounces of thin soup and eight ounces of water." *Ibid.* The Court found that this record "document[ed] a shocking display of barbarism" that produced an involuntary, and therefore inadmissible, confession. *Id.* at 415. See also, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737, 745-746, 752 (1966) ("[T]he uncontested fact that *no one* other than the police spoke to Davis during the 16 days of detention and interrogation that preceded his confessions is signifi-

cant in the determination of voluntariness." (emphasis added)); *United States* v. *Koch*, 552 F.2d 1216, 1218 (7th Cir. 1977) (defendant's statement was the result of coercion because the defendant had been placed in isolation in a windowless "boxcar cell"); *Ammons* v. *State*, 32 So. 9, 10 (Miss. 1902) (defendant's confession inadmissible when he had been held during "the hot weather of summer" in a six-by-eight-foot, windowless, blanketed "sweatbox"); *cf. Chambers* v. *Florida*, 309 U.S. 227, 237-238 (1940) (condemning "[t]he rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular").

Needless to say, it has long been recognized that "sweat boxes" and solitary confinement will produce involuntary confessions.[9] See generally Nat'l Comm'n on Law Observance & Enforcement, *Report on Lawlessness in Law Enforcement* 47, 167-168 (1931); Charles Franklin, *The Third Degree* 42 (1970). Indeed, "long periods of lonely suspense may well lead an innocent man to admit guilt, even if no third-degree practices in the strict sense are employed." Nat'l Comm'n on Law Observance & Enforcement, *supra*, at 167-168.

Second, the Court has also looked at the defendant's mental state in determining whether the in-

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[9] The original "sweat box," dating to the Civil War era, was "a cell in close proximity to a stove, in which a scorching fire was built and fed with old bones, pieces of rubber shoes, etc., all to make great heat and offensive smells, until the sickened and perspiring inmate of the cell confessed in order to get released." Nat'l Comm'n on Law Observance & Enforcement, *Report on Lawlessness in Law Enforcement* 38-39 (1931).

culpatory statement in question was voluntary. The use of mind-altering drugs thus is one relevant factor in the totality-of-circumstances test. As the Court explained in *Townsend* v. *Sain*, a confession is inadmissible if it is not "the product of a rational intellect and a free will"; this standard applies "whether a confession is the product of physical intimidation or psychological pressure" and is "equally applicable to a drug-induced statement." 372 U.S. 293, 307 (1963) (quoting *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960)). "Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible." *Id.* at 308 (emphasis added).

Third, mental illness also is "one of the characteristics of the accused" that bears on the voluntariness determination. The Court reasoned in *Blackburn* that because "the evidence indisputably establishes the strongest probability that Blackburn was insane and incompetent at the time he allegedly confessed," his confession should not be admitted. *Blackburn*, 361 U.S. at 207. The Court elaborated on this point as follows:

> Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane; and this judgment can without difficulty be articulated in terms of the unreliability of the confession, the lack of rational choice of the accused, or simply a strong conviction that our system of law enforcement should not operate so as to take advantage of a person in this fashion.

Ibid. "[A] history of emotional instability" is a related factor that the Court has deemed material in determining whether an inculpatory statement was involuntary, *Spano*, 360 U.S. at 322; "mental condition is surely relevant to an individual's susceptibility to police coercion," *Colorado* v. *Connelly*, 479 U.S. 157, 165 (1986).

3. Viewed against this background, there can be no serious doubt that petitioner's July and August statements were involuntary. Before making those statements, petitioner was confined for two months in a small, unventilated, windowless steel box, where the temperature came to exceed 100 degrees. He was not allowed exercise or the sight of sunlight and, with the exception of a handful of attorney visits, saw not "one friendly face" during this period. *Brooks*, 389 U.S. at 414. Indeed, in significant respects the conditions of petitioner's confinement were worse than those condemned by this Court as "a shocking display of barbarism" in *Brooks*. *Id.* at 415.[10] After the outdoor temperature reached 100 degrees, petitioner finally summoned a detective and offered to confess if he could "pick the type of execution and the date and time of execution." Hr'g Tr. 76-77, reprinted in C.A. App. 92-93. It is difficult to escape the conclusion that the treatment petitioner received "was such as to overbear [his] will to resist and bring about confessions not freely self-determined." *Rogers*, 365 U.S. at 544.

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[10] There is no indication that Brooks was held in "sweatbox"-like temperatures; Brooks's cell also may have been larger than that holding petitioner, see 389 U.S. at 413-414. Additionally, petitioner was held in complete isolation while Brooks had companions in his cell, *id.* at 413.

This conclusion is confirmed by the other circumstances of petitioner's confinement. Petitioner was emaciated and his mental state was precarious; he experienced acute anxiety attacks, insomnia, and uncontrollable rage, resulting in at least eight emergency room visits prior to trial. During the first two months of his confinement petitioner was treated with at least five different anti-psychotic or mood-stabilizing medications—Valium, Serax, Vistaril, Librium, and Haldol—along with Midrin, for migraines, and Restoril, used to treat insomnia. C.A. App. 615-617. By the time he was transferred out of the Robertson County Jail, he had also been treated twice for intentional drug overdoses, *id.* at 637, 643, and once after attempting to electrocute himself, *id.* at 656. These circumstances doubtless rendered petitioner "susceptibl[e]," *Connelly*, 479 U.S. at 165, to police pressure; his statements could not have been "the product of a free intellect," *Townsend*, 372 U.S. at 308. In combination with the coercive conditions of confinement, petitioner's disturbed mental state doubtless explains why, after twice previously having invoked his right to counsel, he "insisted on confessing even though the detective advised him to speak with his lawyer first" (App., *infra*, 9a), so long as he could choose the method of execution—surely the act of a person *in extremis*. Such coerced statements should not be used to convict the speaker of a capital offense.

B. The Sixth Circuit Failed To Apply The Proper Due Process Test And Misapplied *Edwards* v. *Arizona*

Faced with these circumstances, the Sixth Circuit very notably did not take issue with petitioner's account of his confinement, dispute the coercive ef-

fect of that confinement, or question whether petitioner's inculpatory statements affected the outcome of the trial. Instead, it offered two different bases for holding petitioner's statements admissible. It relied on the observation that "the need for security prompted [petitioner's] confinement, not coercion." App., *infra*, 9a. And it opined that petitioner offered the inculpatory statements "on his own initiative," making them admissible under the standard of *Edwards* v. *Arizona*. *Ibid.* But these holdings, which are flatly inconsistent with decisions of this Court, rest on serious confusion about the state of the law.

1. The Sixth Circuit's Focus On Security Has No Basis In This Court's Precedent

The Sixth Circuit dismissed the coercive effect of petitioner's confinement on the ground that he was put in isolation for security reasons. But whether or not that concern was legitimate (and disregarding the sheriff's failure to abide by the controlling federal court order on the treatment of prisoners in the Robertson County Jail), the reasons for petitioner's confinement have no bearing on the due process voluntariness inquiry—whether, under the totality of the circumstances, petitioner was subjected to conditions that were sufficient to overbear his will.

The totality-of-circumstances test is an individualized, fact-based inquiry that focuses on the experience of the accused, not the intent of the interrogator. The test requires a reviewing court to analyze the circumstances of an interrogation from the point of view of the defendant, "assess[] the psychological impact" of the conditions on the accused, and "evaluate[] the legal significance" of his reaction. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973) (citing *Culombe* v. *Connecticut*, 367 U.S. 568, 603 (1961)).

The circumstances of confinement and interrogation, and their effect on the accused, are determinative; the court is not required to, and should not, look to the needs or intent of law enforcement officials in making its determination.

Accordingly, this Court has explicitly foreclosed consideration of necessity arguments—like the security rationale invoked by the Sixth Circuit—when holding statements inadmissible because involuntary. Like the sheriff's department here, the authorities in *Davis* v. *North Carolina*, 384 U.S. 737 (1966), had a legitimate reason for subjecting the suspect to special restraint. But the Court still separately considered whether the conditions of Davis's confinement were coercive:

> [I]t is irrelevant to the consideration of voluntariness that Davis was an escapee from a prison camp. Of course Davis was not entitled to be released. But this does not alleviate the coercive effect of his extended detention and repeated interrogation while isolated from everyone but the police in the police jail.

384 U.S. at 752.

The Court, concerned with the effect of such circumstances on Davis's will, looked beyond the *reasons* for his confinement to the conditions he experienced in lockup—days of repeated, incommunicado interrogation and a limited diet. And although the Court "readily agree[d]" with the lower courts that the police did not *intend* to starve Davis, it still expressed concern that his "extremely limited" diet might have had "a significant effect on Davis' physical strength and therefore his ability to resist" police questioning. *Id*. at 746. Looking at these circum-

stances, the Court reached the "inevitable" conclusion that Davis's statements were involuntary and inadmissible. *Id.* at 752. This holding did not depend on the plans or intent of the police, but on the nature of the conditions of confinement. See, *e.g.*, *id.* at 752 ("So far as Davis could have known, the interrogation in the overnight lockup might still be going on today had he not confessed.").

Consistent with this focus on the accused's experience, police overreaching has also been defined broadly to encompass situations where the mere act of questioning an accused is presumptively coercive due to underlying circumstances the interrogating agents themselves had no hand in creating. In *Mincey* v. *Arizona*, for example, the Court found that the circumstances of Mincey's interrogation, particularly that it was conducted in a hospital intensive care unit while he was "weakened by pain and shock * * * and barely conscious," rendered his statement involuntary. 437 U.S. 385, 401-402 (1978). The Court analyzed the situation from Mincey's point of view, concluding that the situation put him "at the complete mercy" of his interrogator, *id.* at 399 (quoting *Beecher* v. *Alabama*, 389 U.S. 35, 38 (1967)); any statements made in these conditions could not have been "the product of his free and rational choice," *id.* at 401 (quoting *Greenwald* v. *Wisconsin*, 390 U.S. 519, 521 (1968)). See also *Arizona* v. *Roberson*, 486 U.S. 675, 687 (1988) ("*Edwards* focuses on the state of mind of the suspect and not of the police * * *.").

The conclusion that the reason for abusive treatment of the accused has no bearing on the admissibility of the resulting statements follows necessarily from the considerations that underlie the bar on the use of compelled confessions. Whatever the

police motivation, a statement produced by solitary confinement for protracted periods in a "sweatbox" is "inherently untrustworthy," *Dickerson*, 530 U.S. at 433, and its use is "offensive to basic standards of justice," *Lyons*, 322 U.S. at 605. Hinging admissibility on police motivation also would present insurmountable practical problems, as it would require answering in every case the imponderable question *why* law enforcement authorities took particular custodial steps, an approach that would invite manipulation. *Cf. Roberson*, 486 U.S. at 681 (noting "the virtues of a bright-line rule"). Unlike the Sixth Circuit here, this Court has never endorsed such an approach.

2. The Sixth Circuit Improperly Characterized Petitioner's July And August Statements As Voluntary Initiations Of Contact With Police Under Edwards *v.* Arizona

In addition, the court of appeals held petitioner's statements admissible because he "requested to speak to Detective Perry on his own initiative." App., *infra*, 9a. This request, the court believed, satisfied the rule of *Edwards*, under which questioning by police is permissible when a suspect initiates contact with law enforcement personnel after previously having invoked his right to counsel. But this holding is wrong in two respects. The *Edwards* test cannot be used as a substitute for the constitutional voluntariness inquiry. And, in any event, petitioner's statements did *not* satisfy the requirements of *Edwards*.

First, the *Edwards* rule functions as a "corollary" to *Miranda*'s protection of the Fifth Amendment right against self-incrimination, *Roberson*, 486 U.S. at 681-682, providing that a suspect who has invoked

his right to counsel may not be subjected to additional interrogation unless he or she "initiates further communication, exchanges, or conversations with the police," *Edwards*, 451 U.S. at 485. But "[t]he requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry," *Dickerson*, 530 U.S. at 444; "voluntariness remains the *constitutional* standard," *id.* at 464 (Scalia, J., dissenting), and the Court therefore "continue[s] to exclude confessions that were obtained involuntarily," *id.* at 434 (majority opinion). Had the Sixth Circuit followed this Court's precedent in its due process analysis, consideration of *Edwards* therefore would have been unnecessary in this case: Admitting petitioner's coerced statements was a constitutional violation whether and however the *Edwards* rule applies.

Second, after invoking *Edwards* the Sixth Circuit clearly misapplied it (as had the Tennessee courts before it, see 28 U.S.C. § 2254(d)(1)). In applying *Edwards*, the court of appeals contented itself with the observation that petitioner "requested to speak to Detective Perry on his own initiative." App., *infra*, 9a. But the simple fact that the accused began the conversation with law enforcement authorities is the beginning, not the end, of the *Edwards* inquiry; it does not alone "amount to a waiver of a previously invoked right to counsel." *Oregon* v. *Bradshaw*, 462 U.S 1039, 1044 (1983). "[T]he burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation." *Ibid.*

In conducting this voluntariness inquiry, the Court applies the same "totality-of-the-circumstances" test used in the due process context.

Thus, "[o]nly if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Moran* v. *Burbine*, 475 U.S. 412, 421 (1986) (quoting *Fare* v. *Michael C.*, 442 U.S. 707, 725 (1979)). *Miranda* itself made it clear that coercion undermines the validity of a waiver, however explicitly executed, and looked to the same indicia of coercion often used in the due process context: "Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights." *Miranda* v. *Arizona*, 384 U.S. 436, 476 (1966). Subsequent decisions have confirmed that voluntary waivers under *Miranda* or *Edwards* must be "the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Moran*, 475 U.S. at 421. See, *e.g.*, *United States* v. *Cristobal*, 293 F.3d 134, 140 (4th Cir. 2002) (stating waiver voluntariness test as "whether a defendant's will has been overborne or his capacity for self determination critically impaired"); *United States* v. *Velasquez*, 885 F.2d 1076, 1089 (3d Cir. 1989) (considering whether defendant's "will was overcome or her capacity for self-control vitiated" prior to waiver).

That necessarily is so; a statement "initiated" by a suspect desperate to end months-long, isolated confinement in a stifling "sweatbox" can hardly be thought voluntary. The conditions of confinement that the Sixth Circuit overlooked in its due process analysis therefore also demonstrate that petitioner here did not waive his rights under *Edwards*. Petitioner approached authorities only after two months

of unbearable heat and crushing isolation—heavily medicated, suicidal, and evidently desperate to escape those conditions. That is apparent in the very words used by petitioner and in the Sixth Circuit's own account of his statement: After declaring that he would confess to two murders if he could choose the method of execution, petitioner "insisted on confessing even though the detective advised him to speak with his lawyer first" and "insisted on giving Detective Perry specific details." App., *infra*, 9a, 10a. Coming after two months' confinement in intolerable circumstances, these statements were the obvious product of treatment that "undermine[d] [petitioner's] will to resist and * * * compel[led] him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. Petitioner's decision to waive his rights to counsel and to silence accordingly was the product of coercion.

II. IN A CAPITAL CASE, ERRORS OF THE MAGNITUDE OF THOSE COMMITTED BY THE SIXTH CIRCUIT HERE CALL FOR CORRECTION BY THIS COURT

We recognize, of course, that this Court will not correct every error, or even every manifest error, that is brought to its attention. For several reasons, however, the special circumstances of this case make review appropriate.

First, petitioner is under sentence of death and, with the filing of this petition, has exhausted his opportunities for judicial review. As the Court has noted, its "duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case." *Burger* v. *Kemp*, 483 U.S. 776, 785 (1987). The Court has been willing to act summarily to prevent injustice in such cases, even when

the question presented might not otherwise have satisfied the Court's usual standards for review; it has done so twice already this Term. See *Porter* v. *McCollum*, No. 08-10537 (Nov. 30, 2009) (per curiam); *Corcoran* v. *Levenhagen*, No. 08-10495 (Oct. 20, 2009) (per curiam). See also, *e.g.*, *Smith* v. *Texas*, 543 U.S. 37 (2004) (per curiam). "[R]egardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands." *Lyons*, 322 U.S. at 602.

Second, petitioner's statements were the product of deeply disturbing state behavior, quite similar to that condemned by this Court in a closely related context as "a shocking display of barbarism." *Brooks*, 389 U.S. at 415. Before making the statements, petitioner was isolated in a small, windowless, oppressively hot steel box for a period of two months in direct contravention of a federal court order that had recently been entered against the jail's sheriff—a period when petitioner several times attempted suicide and was in obvious psychological distress. This kind of treatment, harkening back to the Civil War-era "sweatbox," was once a familiar means of extracting an involuntary confession. Whether or not this treatment of petitioner and the particular circumstances of his confinement served legitimate and justifiable purposes, the use of an inculpatory statement generated by such treatment—much less its use to produce a death sentence—should not be countenanced.

Third, the Sixth Circuit's errors are obvious and suggest a surprisingly cavalier treatment of a capital case. The court's blithe dismissal of petitioner's challenge on the ground that "security" justified the con-

ditions of his confinement ignores the fundamental principles that govern in this area of the law; its holding that petitioner's statements are admissible under *Edwards* betrays serious confusion about the meaning and applicability of that decision's test. The Sixth Circuit's failure to publish its opinion cannot hide the severity of those errors. See *Holland* v. *Jackson*, 542 U.S. 649 (2004) (per curiam) (summarily reversing unpublished Sixth Circuit decision). And that is especially so because there is every reason to believe that admission of petitioner's statements had a "substantial and injurious effect" upon the jury's decision to convict him and then unanimously vote for the death sentence. *Fry* v. *Pliler*, 551 U.S. 112, 114 (2007). Indeed, the prosecution emphasized those statements in its evidentiary presentation and summation to the jury, and the Sixth Circuit did not accept the State's invitation to label the admission of the statements harmless.[11]

Finally, the prospect of involuntary statements resulting from coercive state action (intentionally or otherwise) may arise in many contexts. Police command complete control over suspects held in custody, and recent events illustrate that episodes of abusive coercion, though doubtless relatively rare, are not a historical curiosity. See, *e.g.*, *Kaine Grants Conditional Pardons to "Norfolk Four,"* Rich. Times-Dispatch, Aug. 6, 2009, http://bit.ly/73xle1 (indications that coercion of four Navy sailors into admitting involvement in rape and murder formed partial

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[11] Because the court of appeals did not address the harmless-error question, it would be appropriate for that court to address harmlessness in the first instance on remand. See *Hedgepeth* v. *Pulido*, 129 S. Ct. 530, 533 n.* (2008)

basis for Governor's pardon); Steve Mills & Jeff Coen, *Feds Catch Up with Burge*, Chi. Trib., Oct. 22, 2008, at 1 (Jon Burge, former Commander in the Chicago Police Department, allegedly coerced dozens of confessions from defendants using methods such as electric shocks and suffocation); see also, *e.g.*, April Witt, *In Pr. George's Homicides, No Rest for the Suspects*, Wash. Post, June 4, 2001, at A1 (in the three years preceding the article, people were convicted and imprisoned based on interrogations lasting 32, 35, 51, and 80 hours). Because the voluntariness of any waiver of rights must be assessed in all cases involving custodial statements, see *Montejo* v. *Louisiana*, 129 S. Ct. 2079 (2009), the Sixth Circuit's voluntariness analysis portends serious mischief in this area of the law. This Court's affirmance of the principle that coerced, involuntary statements may not be used to secure convictions is therefore a matter of general, and continuing, importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

PAUL R. BOTTEI
Office of the Federal
Public Defender
810 Broadway, Suite 200
Nashville, TN 37203
(615) 736-5047

Counsel for Petitioner

JANUARY 2010