No. 08-680

In the Supreme Court of the United States

STATE OF MARYLAND,

Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,

Respondent.

On Writ of Certiorari to the Court of Appeals of Maryland

BRIEF OF FLORIDA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MASSACHUSETTS, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, WISCONSIN AND WYOMING, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is the *Edwards v. Arizona* prohibition against interrogation of a suspect who has invoked the Fifth Amendment right to counsel inapplicable if, after the suspect asks for counsel, there is a break in custody or a substantial lapse in time (more than two years and six months) before commencing reinterrogation pursuant to Miranda?

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STATEMENT OF AMICI INTEREST

The amici states have a direct interest in this case because by making defendants forever immune from questioning, particularly in the prison setting, the Maryland Court of Appeals interpreted the prophylactic rule of *Edwards v. Arizona* in a way that prevents law enforcement from investigating new leads via consensual re-interrogation. This interpretation disserves the states' criminal justice interest in solving "cold cases." Such dormant cases are a significant source of frustration to the states' ability to reduce crime and bring criminals to justice. More importantly, these cases are a particularly significant source of frustration to the victims of such long-unsolved crimes.

The states' interest in fighting crime would be better served by allowing law enforcement to reopen investigations and re-interview potential suspects after there has been a break in custody, rather than automatically applying the *Edwards* rule for all time. After a break in custody, there will be little risk of the potential police coercion and badgering that troubled the Court in *Edwards* and subsequent decisions. At the same time, there is no countervailing reason for this Court to adopt the kind of categorical denial of any ability to effectively follow up on new leads by consensual questioning that results from the Maryland Court of Appeals decision.

SUMMARY OF ARGUMENT

This Court should clarify that in applying the prophylactic *Edwards* rule against police-initiated

re-interrogation after a suspect has invoked his right to counsel (a second-tier protection that flows from *Miranda*), a break in the initial custodial relationship or a substantial lapse of time vitiates the concerns addressed in *Edwards* that police may attempt to badger or coerce a suspect. Investigators and prosecutors would be better served by a more pragmatic rule than the per se *ad infinitum* rule the Maryland Court of Appeals adopted. A better approach focuses on a break in custody, reasoning that such a break obviates the need for the second-level protections of *Edwards*. As long as the break in custody cannot be shown to be a pretextual move by officers in that they have conducted their investigation in good faith, they should be able to re-initiate their investigation and potentially obtain a voluntary waiver from a previous suspect. This approach would have fewer negative societal impacts by not impairing law enforcement's efforts to solve stagnant investigations and bring "cold case" suspects to justice. Additionally, a break in custody vitiates the concerns of coercion and badgering that were the reasons behind *Edwards*'s second-level prophylactic protection.

The majority of federal and state courts have recognized a break in custody approach that obviates the need for the *Edwards* protection. Moreover, a suspect's ongoing incarceration and return to prison is not continuing *Miranda* custody under *Edwards*. There is no need to provide blanket *Edwards* protection indefinitely under these circumstances, and to do so gives little weight to the substantial state interests in solving dormant cases for the benefit of victims and the community. Police need to

be able to pursue new leads in dormant "cold case" investigations, which often include re-interviewing witnesses and suspects. Many suspects or witnesses are incarcerated on unrelated charges at the time of re-interrogation. No significant purpose is served by shielding a suspect from further voluntary questioning once the former investigation has stalled or closed and the suspect was previously released.

The amici states, in keeping with a majority of federal and state courts, urge this Court to adopt a rule that *Edwards* no longer applies when there has been a break in custody or substantial lapse in time, with no evidence of pretext or that any subsequent investigation has been conducted in bad faith. This approach better ensures that the prophylactic reasons behind *Miranda* and *Edwards* are being served, while at the same time giving weight to the significant state interests in effective law enforcement and criminal justice.

ARGUMENT

I. THE MARYLAND COURT'S DECISION IS AT ODDS WITH THE REASONING OF FEDERAL AND STATE COURTS THAT A BREAK IN CUSTODY MOLLIFIES THE CONCERNS AT ISSUE IN *EDWARDS* REGARDING SUBSEQUENT INTERROGATION.

Federal and state courts, including courts in Florida, have held that a break in custody (which includes at least some lapse in time) renders the application of the bright-line *Edwards* rule

inappropriate. As pointed out by Judge Harrell in dissent from the Maryland Court of Appeals majority, federal courts have admitted statements obtained in violation of *Miranda* when there has been a substantial passage of time and curative measures have been exercised. *See Shatzer v. State*, 954 A.2d 1118, 1138 (Md. Ct. App. 2008) (Harrell, J., dissenting). The majority erred in failing to apply the rationale of these cases, reasoning instead that the goals behind *Edwards* would be thwarted in the absence of applying its bright-line rule *ad infinitum*. *See id.* Instead, a break in time following a break in *Miranda* custody should be enough to vitiate the *Edwards* concerns regarding pressure and coercion. *Edwards* should therefore not apply in these situations.

A. Courts should apply a more pragmatic approach to situations where there has been a break in custody, in order to further the goals of *Edwards* while taking into account the states' substantial interests.

The Maryland court's holding goes well beyond the prophylactic rule articulated in *Edwards*, treating suspects as indefinitely unquestionable. This is true regardless of whether subsequent statements were made as a result of pressure and coercion, and regardless of whether the suspect remained "in custody" for *Miranda* purposes. Such a draconian, unending extension of *Edwards* fails to take into account the states' strong interest in bringing criminals to justice by investigating new

leads in order to solve dormant or "cold cases." The interests in criminal justice and victims' rights would be properly accounted for in adopting a break in custody approach rendering *Edwards* inapplicable.

No sufficient justification exists for the Maryland court's per se application of *Edwards* to bar questioning forever. Instead, a more pragmatic analysis should be conducted to ensure that the goals behind the *Edwards* second-level prophylaxis are being served, while also determining whether its second-tier protection is warranted after a passage of time. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (discussing goal of *Edwards* as ensuring that subsequent statements are "not the result of coercive pressures."). Where a break in custody occurs, the substantial public interest in criminal justice and victims' rights may be significant while the continuing application of *Edwards* is unnecessary.

Judge Harrell correctly noted that the Maryland court's opinion does nothing to further the "laudable goals" of *Edwards,* which were to prevent coercion and badgering by police, and to "conserve judicial resources by relieving courts from having to make difficult determinations of voluntariness." *Shatzer,* 954 A.2d at 1146 (Harrell, J., dissenting). In cases such as Shatzer's, there is no evidence of coercion, no evidence of any "psychological disadvantage" as a result of questioning more than two years later, and no evidence that police badgered the suspect into answering questions, especially because later investigators were not aware that the suspect had previously asked for counsel. *See id.* To

create a per se rule in this kind of situation produces "absurd results" in that it creates "a class of prisoners who are forever question proof – even though law enforcement officers would have no way of knowing that the prisoner enjoys question-proof status." *Clark v. State*, 781 A.2d 913, 947-48 (Md. Ct. Spec. App. 2001). Instead, a break in custody should enable investigators to constitutionally attempt to solve "cold cases" via consensual re-interrogations.

Given the specific concerns behind the creation of the second-level prophylactic protection in *Edwards*, there is no need for courts to apply its additional *Miranda* safeguards *ad infinitum*. A break in custody combined with the absence of coercion or other improper tactics should serve to undercut the rationales of *Edwards* and eliminate the need for the broad approach of the Maryland court of appeals. This break in custody approach, which recognizes that the rationales behind *Edwards* may no longer be relevant under the circumstances, is analogous to the Court's application of *Miranda* to subsequent interrogations. *See Oregon v. Elstad*, 470 U.S. 298, 303, 308 (1985) (reasoning that proper *Miranda* warnings and a voluntary waiver of rights could "cure" any violation as a result of an earlier, unwarned but voluntary statement because "the twin rationales – trustworthiness and deterrence" would not be furthered by a broader rule); *compare Missouri v. Seibert,* 542 U.S. 600 (2004) (holding that "two-step" interrogation process, where officers violated *Miranda* by eliciting unwarned statements prior to re-interrogating and eliciting repeated statements after the warnings, necessitated suppression of all statements because the procedure

was meant to coerce the suspect and get around the *Miranda* requirements); *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984) (reasoning that *Miranda* must be applied strictly, "but only in those types of situations in which the concerns that powered the decision are implicated.").

A break in custody approach, rendering the rule of *Edwards* inapplicable, would still take account of the interests behind *Edwards* (ensuring voluntary statements by disapproving coercion and badgering) while at the same time recognizing the essential goals of law enforcement and public safety. In Shatzer's case, no evidence exists of coercion, badgering, or improper attempts to get around the requirements of *Miranda*, particularly given the break in custody and substantial passage of time. As such, law enforcement should have leeway under these circumstances to pursue new leads and solve stagnant investigations that may not otherwise be solved without re-interrogating past suspects or witnesses and obtaining voluntary statements.

To hold otherwise, as Judge Harrell emphasized, would have "troubling policy implications." *Shatzer,* 954 A.2d at 1152. It would create more difficult investigations where inmate questioning is involved, making resolution of long-unsolved crimes much more difficult and time-consuming for police, who will have to determine whether an inmate has ever invoked his right to counsel before proceeding to question him voluntarily about an unsolved crime. This law enforcement hardship is the result of the "boundless"

scope of the Maryland majority's holding in Shatzer's case. *See id.* at 1153.

The key inquiry in these cases should be the status of the suspect in between the two investigations. There is no need for the continued application of the bright-line *Edwards* rule against police-initiated interrogation when the suspect was released from custody for a period of time between two interrogations. The accused's status has changed so significantly that there is no longer any need for an irrebuttable prophylactic rule. The focus should instead be on the voluntariness of the suspect's statements for purposes of the Fifth Amendment and the appropriateness of police conduct. A break in time, combined with no evidence of badgering and coercion, should remove any *Edwards* barrier to admission of statements made as part of a subsequent investigation after proper *Miranda* warnings have been given. To hold otherwise is to stop the pursuit of potential new avenues of investigation in their tracks without serving any interest articulated in *Edwards*.

This is not a case revealing a police strategy to undermine the *Edwards* rule. Nor is it a case involving a brief lapse in time between questioning while the suspect is still in *Miranda* custody, which would indicate obvious coercion and confusion. *See Seibert*, 542 U.S. at 616-17 (asserting that "a reasonable person in the suspect's shoes would not have understood [the officers] to convey a message that she retained a choice about continuing to talk."). There is nothing that demonstrates a desire by the officers to get around the prohibition on re-

interrogation by releasing the suspect and letting a brief amount of time pass before initiating further questioning.

Here, the evidence demonstrates that the defendant was no longer in custodial interrogation flowing from the original investigation. The officer involved in the interrogation after two-and-a-half years was unaware of the previous invocation, and did not attempt to pressure the suspect in any way. The subsequent questioning in this case was conducted in good faith after a non-pretextual break in custody and a substantial passage of time. There is no justification for the continued application of the *Edwards* protection, which was meant to prevent police from making an end-run around the *Miranda* protections, thereby preventing a suspect from effectively invoking his right to counsel. *See id.* at 617 (Breyer, J., concurring).

The Maryland court's decision makes a prisoner forever unquestionable unless police conduct an exhaustive analysis of the prisoner's prior interrogations. This is true even though many suspects commit multiple crimes, become suspects for unrelated crimes while incarcerated, and are often questioned at various times by many different law enforcement agencies. This does not serve the interests set forth in *Edwards* and it disserves the public's interest in criminal justice. If there was ever a previous invocation, all statements would be excluded, even though officers may have no way of knowing whether there was a previous invocation, perhaps in a distant locale many years ago. Police may have to wait until a prisoner is released and

there is a clear break in prison custody, creating an even longer passage of time and exponentially reducing the possibility that a "cold case" will be solved. The Maryland court disregarded the public's interest in solving dormant cases when it created such a hard-line per se *Edwards* approach.[1]

Prophylactic rules are easy to understand and administer, but they should be no broader than necessary to accomplish their objectives. *See, e.g., Hill v. Colorado,* 530 U.S. 703, 762 (2000) (Scalia, J., dissenting) (discussing restrictions on freedom of expression and reasoning that "[p]rophylaxis is the antithesis of narrow tailoring"); *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (reasoning that prophylactic rules must be understood in light of the prophylactic purposes that justify them). Rote application of the *Edwards* rule in situations where there has been a break in custody would further no prophylactic interests while dealing an unnecessarily debilitating blow to law enforcement's ability to

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[1] *See, e.g.,* Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 Okla. L. Rev. 11, 28 (2000) (stating that "one might also examine the nature of the evil sought to be avoided by Edwards – the badgering of a suspect who has expressed helplessness without the assistance of counsel during custodial interrogation – and ask whether its irrebuttable presumption and attendant cost is necessary, or even appropriate, in furthering that goal."). Professor Shapiro suggests that the bright-line *Edwards* presumption should be rebuttable, and depending on the circumstances of a particular case, re-interrogation should be permitted. He includes in these potential circumstances cases in which "the passage of a specific, particularly lengthy period of time might well have the bright line consequence of permitting reinterrogation." *Id.* at 33.

crack unsolved crimes. As Justice Kennedy noted in *Seibert*, evidence should be admissible in *Miranda* suppression cases when the "central concerns" of the prophylactic rule are "not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction." *Seibert*, 542 U.S. at 618-19 (Kennedy, J., concurring). Similarly, when there is no pressure or coercion, the continued application of the bright-line *Edwards* rule against police-initiated questioning is not necessary, and the circumstances dictate against per se suppression of statements obtained after re-interrogation. *See id.* at 620-21 (discussing per se suppression due to a previous *Miranda* violation and reasoning that such an approach does not serve the deterrence goals of *Miranda* and fails to take account of the interest in admitting trustworthy evidence).

Edwards was meant to give proper effect to the *Miranda* warnings, which include invocation of the right to counsel. There is simply no need to extend *Edwards* for all time without regard to the circumstances of re-opened cases. The important analysis in determining whether *Edwards* should apply is to determine whether its second-level prophylactic goals are being thwarted such that the suspect's statements were made against his will and without proper recognition of his previous invocation of the right to counsel. This may not be the case when there has been a "substantial break in time and circumstances." *Id.* at 622.

In this case, the suspect was previously released from custody, a substantial break in time occurred, and he voluntarily waived his rights. The

officer conducting the re-interrogation had nothing to do with the previous investigation and was not aware of any previous invocation. There was no reason Shatzer would feel "badgered" or coerced by the police under these circumstances, or that officers did not intend to honor his previously stated desire to have counsel present. *Cf. Minnesota v. Murphy*, 465 U.S. 420, 433 (1984) (reasoning that "the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained."). The Maryland court's application of *Edwards* and creation of a per se *ad infinitum* rule was therefore unwarranted.

B. Courts have overwhelmingly held that *Edwards* does not apply when there has been a break in custody, which can include a return to the inmate population.

Contrary to the Maryland court's reasoning, the majority of courts applying *Edwards* have not adopted an *ad infinitum* approach to applying its second-level protection. Federal courts and courts in many states have held that a break in custody, which can include a return to the inmate population after interrogation, disengages the prophylactic *Edwards* rule against police-initiated re-interrogation. Courts have adopted this approach in line with the Court's statement in *McNeil v. Wisconsin,* 501 U.S. 171, 176-77 (1991), that "[i]f police do subsequently initiate an encounter in the absence of counsel (*assuming there has been no break in custody*), the suspect's

statements are presumed involuntary." (emphasis added).

While *Edwards* creates a bright-line rule, courts have not applied this rule in cases where the suspect has been released from coercive interrogation and a lapse of time has occurred. In such cases, whenever the suspect has been removed from the coercive environment, he has not remained in continuous custody in order to justify the additional layer of prophylaxis above and beyond the *Miranda* protections. *See Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (discussing *Edwards* as a "corollary" to *Miranda*). A return to daily prison life after interrogation does not constitute continuing custody such that subsequent interrogation is forever barred in the absence of adherence to *Edwards*. Judge Harrell correctly reasoned that "custody" in this case means the same thing as it would under *Miranda*, and returning to daily life, whether in the general or prison population, cannot constitute a continuation of custody for the purpose of interrogation. *See Shatzer*, 954 A.2d at 1147-49 (Harrell, J., dissenting). This reasoning correctly gives effect to the general goal behind *Edwards*: to give further protection from coercion that would render *Miranda* ineffective.

In *United States v. Hall*, 905 F.2d 959, 962 (6th Cir. 1990), for example, the Sixth Circuit Court of Appeals reasoned that a prisoner interrogated after being incarcerated was not "in custody" prior to the actual interrogation. The court explained that because the inmate was already serving a prior sentence, he "was no stranger to the penitentiary"

and could not be in custody for purposes of the *Edwards* protection. *Id.* Statements given by the defendant three months after invocation of the right to counsel were accordingly not barred by *Edwards* simply because the defendant was incarcerated prior to re-interrogation. *See id.* at 962-63. More recently, the Eleventh Circuit Court of Appeals reasoned that being a part of the general prison population is "the accustomed milieu" for inmates, and is not the kind of potentially coercive situation that would constitute continued *Miranda* custody. *See Isaacs v. Head*, 300 F.3d 1232, 1267 (11th Cir. 2002).

The defendant, while technically in government prison custody, is not "in custody" in the sense that he would be subject to the "coercive pressures" that are the concern of the prophylactic protections of *Miranda* and *Edwards*. *See id.* at 1266. Incarceration following conviction, as in Shatzer's case, therefore constitutes a break in custody. *See also United States v. Arrington,* 215 F.3d 855, 856 (8th Cir. 2000) (holding that conviction and sentencing was an intervening event, and transfer from "police custody to correctional custody" meant that the suspect was no longer "in custody" under *Edwards*); *United States v. Conley*, 779 F.2d 970, 972-73 (4th Cir. 1985) (reasoning that a prison inmate is not automatically "in custody," otherwise *Miranda* would be stretched to the "illogical position of providing greater protection to a prisoner than to his nonimprisoned counterpart") (citation omitted) *Cervantes v. Walker*, 589 F.2d 424, 428 (9th Cir. 1978) (reasoning that "in custody" in the prison setting "implies a change of surroundings of the prisoner which results in an added imposition on his

freedom of movement," and as such the court should "look to some act which places further limitations on the prisoner.").

If the "inherent coercion" from police presence is absent from the circumstances, which can include regular prison life, then the prophylactic *Miranda* and *Edwards* rules need not apply. *See Illinois v. Perkins*, 496 U.S. 292 (1990). This is true because there is "little cause for concern that a police officer will 'appear to control the suspect's fate' . . ., at least in the absence of a showing that the officer's conduct somehow creates an atmosphere of custody going beyond that to which the suspect is accustomed in his normal setting." *Kochutin v. State*, 813 P.2d 298, 309 (Alaska Ct. App. 1991) (Bryner, J., dissenting) (citing federal cases). Once an incarcerated suspect returns to the "ordinary routine" of prison life, he should be treated in the same manner as if there had been a break in custody due to his release. *See id.* at 309-10.

Shatzer's re-interrogation did not occur until two-and-a-half years had passed, long after any coercive pressures or potential badgering could have been at issue. It makes no sense, as courts have recognized, to extend the blanket protections of *Edwards* indefinitely to situations such as Shatzer's, creating presumptively question-proof inmates even though investigators re-open important investigations into serious crimes and essentially start from scratch, with no suspects currently in custody. *See, e.g., Hall,* 905 F.2d at 963. There is no reason to give inmates *more* protection under *Edwards* than most courts, following this Court's

statement in *McNeil*, would give a suspect released into the community prior to re-interrogation.

A large number of states have also recognized the countervailing interests at play when a suspect is re-questioned after his release and the passage of time. Courts in Florida and across the country have held that a break in custody vitiates the *Edwards* rule. In *Keys v. State*, 606 So. 2d 669, 671 (Fla. Dist. Ct. App. 1992), for example, the Florida First District Court of Appeal adhered to the Eleventh Circuit's decision in *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), reasoning that a break in custody after the invocation of Fifth Amendment rights "ends the need for the *Edwards* rule." *Id.* A suspect may validly waive his *Miranda* rights after a break in custody, as there would be no evidence of coercion due to "prolonged police custody." *Id.* (citing *Arizona v. Roberson*, 486 U.S. 675, 686 (1988)). In Keys's case, there was a clear break in custody between a previous interrogation in a juvenile case and the subsequent interrogation as part of a murder investigation. *See id.* at 672; *see also Perrine v. State*, 919 So. 2d 520, 524-25 (Fla. Dist. Ct. App. 2005) (reasoning that the defendant's leaving the police station for 30 minutes to meet with a bail bondsman, followed by a return to the station and subsequent waiver of *Miranda* rights, "obviated" the effect of a previous improper police interrogation).

The Supreme Court of California adopted a break in custody approach to *Edwards*'s prophylactic rule in *People v. Storm*, 52 P.2d 52 (Cal. 2002). In *Storm*, the defendant left police custody and was re-interrogated two days later at his home after

previously invoking his *Miranda* rights. *See id.* at 54. The California court reasoned that in this situation, the "special protections" of *Miranda* and *Edwards* should not apply because there was no evidence of coercion that comes from police custody. *Id.* at 55. The *Edwards* rule only "guards against police badgering designed to wear down a suspect who *remains in custody* after invoking his *Miranda* right to counsel during custodial questioning." *Id.* Because there was no evidence of coercion or involuntary statements after a break in custody and a lapse in time (of two days) had occurred, the *Edwards* rule did not apply. *See id.* at 55, 62-63; *see also People v. Bonnie H.*, 65 Cal. Rptr. 2d 513, 514 (Cal. Ct. App. 1997) (reasoning that on issue of first impression, there is no policy reason why a "good-faith break in custody" should not dissolve the *Edwards* bar to admission of statements later obtained after valid *Miranda* waiver).

When the suspect has been released, he is simply "no longer under the 'inherently compelling pressures' of continuous custody where there is a reasonable possibility of wearing the suspect down by badgering police tactics to the point the suspect would waive the previously invoked right to counsel." *Bonnie H.*, 65 Cal. Rptr. 2d at 526. This break in custody approach permits law enforcement to follow up on investigations into the most serious crimes via voluntary re-interrogation.[2]

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[2] Courts in numerous other states have adopted the approach that a break in custody eliminates the concerns in *Edwards* that police may coerce or badger an in-custody suspect, and (Continued…)

therefore *Edwards* no longer applies. *See, e.g.,* Pet. at 16 (listing states); *Kochutin v. State*, 875 P.2d 778, 779 (Alaska Ct. App. 1994) (discussing the "universally recognized" rule that a break in custody renders *Edwards* inapplicable); *People v. Trujillo*, 773 P.2d 1086, 1092 (Colo. 1989) (holding that *Edwards* does not apply when there has been a break in custody); *United States v. Green,* 592 A.2d 985 (D.C. Ct. App. 1991) (discussing reduced danger of coercion and badgering when interrogation had not occurred for several months); *Wilson v. State*, 444 S.E.2d 306, 309 (Ga. 1994) (reasoning that "[b]ecause of the absence or dissipation of coercion once a suspect is released from custody," *Edwards* did not compel suppression); *State v. Alley*, 841 A.2d 803, 809-10 (Me. 2004) (admitting statements made after six-hour break in custody); *Commonwealth v. Galford*, 597 N.E.2d 410, 413-14 (Mass. 1992) (adopting break in custody approach); *People v. Harris*, 680 N.W.2d 17, 23 (Mich. Ct. App. 2004) (holding that *Edwards* rule did not apply to interrogation that occurred 11 days after the initial questioning after a break in custody because "the concern of *Edwards* – coercive questioning by the government that deprives a suspect of the benefits" of counsel – is not implicated); *State v. Scanlon*, 719 N.W.2d 674, 682 (Minn. 2006) (holding that a lapse in time of several months during which the defendant was not in custody limited the applicability of *Edwards*); *Willie v. State*, 585 So. 2d 660, 666-67 (Miss. 1991) (stating that break in custody obviates *Edwards*); *State v. Harrison*, 213 S.W.3d 58, 72 (Mo. Ct. App. 2007) (affirming denial of motion to suppress statements made following a break in custody of several days because the suspect was "no longer subject to the inherently compelling pressures of custodial interrogation"); *State v. Warren*, 499 S.E.2d 431, 440-41 (N.C. 1998) (reasoning that *Edwards* does not apply when there has been a break in custody); *State v. Neely*, 829 N.E.2d 718, 724-25 (Ohio Ct. App. 2005) (reasoning that a break in custody for a reasonable period of time vitiates the rule in *Edwards* and noting that "other courts have unanimously reached this conclusion"); *Commonwealth v. Wyatt*, 688 A.2d 710, 712-13 (Pa. 1997) (reasoning that break in custody makes *Edwards* inapplicable); *Commonwealth v. Gregory*, 557 S.E.2d 715, 722-23 (Va. 2002) (stating that the "underlying concern of *Miranda,*

(Continued…)

The Maryland Court of Special Appeals previously adopted the approach that a break in custody vitiates the *Edwards* second-level protection as a matter of first impression, well before the decision at issue. *See Clark v. State*, 781 A.2d 913 (Md. Ct. Spec. App. 2001). The court emphasized that this is true even if the defendant pleads guilty and is incarcerated prior to re-interrogation. *See id.* at 929-30. Because the defendant does not necessarily enter the coercive and restrictive environment that brings *Miranda* and *Edwards* into play, even if he normally resides in prison, the second-tier protection may not apply. *See id.*; *see also id.* at 942 (citing federal and state courts that have "unanimously" interpreted the Supreme Court's decision in *McNeil v. Wisconsin* as rendering *Edwards* inapplicable when there has been a break in custody).

Even when released to the general prison population, an inmate is placed "in a very different atmosphere than the one he endured after arrest . . . worried and uncertain about his fate with regard to the pending charges." *Id.* at 946. "Common sense dictates" that the extra prophylactic protections are not needed when the *Edwards* rationales no longer

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Edwards, and their progeny is the coercive atmosphere of custodial interrogation and the state of mind of the suspect," and reasoning that protections should not apply when there is a break in custody, otherwise the *Edwards* prohibition "illogically extends into perpetuity"); *State v. McKenzie*, 475 S.E.2d 521, 530 (W. Va. 1996) (stating that break in custody obviates *Edwards*).

apply under the circumstances. *Id.* at 947.[3] In short, once there is a break in custody and a "period of liberty" in that police are no longer questioning the suspect, those factors "mitigate strongly" against the *Edwards* presumption that a suspect is incapable of voluntarily waiving his *Miranda* rights. *Kochutin*, 875 P.2d at 780. Coercion should not be presumed, and there is no reason to believe that the suspect cannot voluntarily waive his rights under *Miranda*.

The bottom line is that *Edwards* should not be a bright-line rule that becomes a "laser, burning inexorably through form and substance into infinity." *Kochutin*, 813 P.2d at 310 (Bryner, J., dissenting). *Edwards* is prophylactic, not constitutionally required, and its application in cases like Shatzer's results in the suppression of uncoerced confessions to serious crimes, while furthering none of its purported goals. There is "no good basis for extending [*Edwards*] to insulate some suspects from questioning for years or even their entire life based

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[3] Commentators acknowledge the large number of federal and state courts that have adopted the presumption that *Edwards* does not apply when there has been a break in custody. *See, e.g.,* Shapiro, *supra* note 1, at 23. The concerns about coercion and police badgering are not present in such cases. *See* Marcy Strauss, *Reinterrogation,* 22 Hastings L.Q. 359, 396-97 (1995) (contending that the concerns in *Edwards* about compulsion to speak are "significantly lessened" when police have not questioned the suspect for "a substantial period of time"); Elizabeth Levy, *Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards,* 20 New Eng. J. on Crim. & Civ. Confinement 539, 569 (1994); *see also* Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects,* 58 Ohio St. L.J. 883, 932 (1997).

on a single request, long ago, for counsel." *Clark*, 781 A.2d at 946. If the policies behind *Edwards* no longer apply under the circumstances of a given case, then its bright line should "cease to shine." *See Kochutin,* 813 P.2d at 310.

The amici states urge this Court to explicitly make clear that the additional Fifth Amendment protections of *Edwards* are no longer necessary in cases where the suspect has been released from custody for purposes of *Miranda* and he is no longer in the potentially coercive environment of interrogation. Once a break in custody occurs and there is no police misconduct, there is no reason to believe that the suspect cannot make a knowing, intelligent and voluntary waiver of his *Miranda* rights.

II. THE MARYLAND COURT'S DECISION NEGATIVELY IMPACTS THE STATES' INTEREST IN FIGHTING CRIME AND SOLVING "COLD CASES."

This Court has recognized that "the need for police questioning as a tool for effective enforcement of criminal laws cannot be doubted," and that "[a]dmissions of guilt are more than merely 'desirable'...; they are essential to society's compelling interest in finding, convicting and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). Excluding reliable, fairly obtained and voluntary confessions therefore exacts high costs from society. Confessions not only resolve "cold cases," they also ensure confidence in criminal judgments, reduce the risk

that innocent people will be convicted, and alleviate heavy burdens on the criminal justice system and victims of crime. A rule that *permanently* applies *Edwards* to police-initiated re-interrogations exacts all of these high costs.

The reality of law enforcement, as seen in both practice and in dramatic depictions on television and in the movies, is that police often investigate new and crucial leads after a substantial period of time in an attempt to resolve dormant cases that can have a devastating impact on victims and the community. These new leads often result in the need to re-interrogate past suspects regarding historical events that occurred long ago, some of which may have been the focus of prior interrogations that resulted in the invocation of the right to counsel followed by release from custody.

A good example of a heinous and excruciating "cold case" that was solved by subsequent leads and re-interrogation can be found in the facts of *Kochutin v. State*, 813 P.2d 298 (Alaska Ct. App. 1991). In that case, a seven-year-old boy was sexually abused and brutally murdered by a defendant who later became a prison inmate on unrelated offenses. *See id.* at 300. The defendant inmate contacted his attorney on the previous charges for which he was incarcerated, and informed police that he did not wish to be interviewed in relation to the homicide. *See id.*

A week later, police arrested another suspect in relation to the child's sexual abuse, but made no further contact with the inmate for the remainder of the year. *See id.* at 301. The case remained

unresolved for nearly a year, when officers then interviewed the incarcerated suspect without his previous attorney present. *See id.* Kochutin ultimately confessed to the sexual abuse and murder during subsequent interviews. *See id.* at 302.

The Court of Appeals of Alaska initially held that the subsequent interviews violated *Edwards*. It then vacated its first opinion, reasoning that the one-year break in custody "mitigated strongly against the presumption" that the suspect could not voluntarily waive his *Miranda* rights. *See id.* at 308; *Kochutin v. State*, 875 P.2d 778, 780 (Alaska Ct. App. 1994). The application of the "break in custody" rule to a crucial follow-up investigation of a "cold case" led to the conviction of an admitted child sex abuser and murderer.

Although not specifically a case involving the application of *Edwards,* another example of a particularly horrific "cold case" solved by the tireless and persistent efforts of law enforcement is discussed in *Texas v. Cobb*, 532 U.S. 162 (2001). There, nearly two years after a burglary and more than a year after appointment of counsel, the burglary suspect was questioned about the disappearance of a woman and her 16-month-old daughter. *See id.* at 165. He was given *Miranda* warnings and ultimately confessed to stabbing the woman to death and burying her with her child, who was still alive. *See id.* at 166. This Court ultimately ruled that the subsequent confession without counsel present did not violate the Sixth Amendment. The facts also demonstrate the persistence of police in pursuing leads and conducting good faith interrogations in an

effort to solve stagnating investigations. *See id.* at 176.

From actual news stories to reality and dramatic depictions such as the CBS television program "Cold Case,"[4] media outlets are also rife with examples of law enforcement pursuing new leads, including re-interrogations, in an effort to resolve stagnant investigations. It has been estimated that approximately 6,000 murders go unsolved each year in the United States, with at least 200,000 "cold cases" existing since 1960.[5] Approximately one-third of all murders are not solved within the first year of their commission.[6]

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[4] *See* http://www.cbs.com/primetime/cold_case/, for a synopsis of this popular and long-running television program. The show's web page synopsis states that the detective involved "interrogat[es] witnesses whose lives and circumstances have since changed, making use of today's new science and finding fresh clues to solve cases that were previously unsolvable…" *See id.* The popular on-line encyclopedia "Wikipedia" also has a page dedicated to Cold Cases, defined as unsolved cases "for which new information could emerge from new witness testimony or re-examined archives." *See* "*Cold Case*," available at http://en.wikipedia.org/wiki/Cold_case (last visited March 17, 2009). There is also a "Wikipedia" page listing unsolved murders and deaths from 1800 through the present day. *See "List of unsolved murders and deaths,"* available at http://en.wikipedia.org/wiki/List_of_unsolved_murders_and_deaths (last visited Mar. 17, 2009).

[5] *See, e.g., The Cold Case Cowboys,* Dateline NBC, Jan. 29, 2006, transcript available at http://www.msnbc.msn.com/id/11093484.

[6] *See Resurrecting Cold Case Serial Homicide Investigations,* FBI Law Enforcement Bulletin, available at
(Continued…)

Solving this vast number of cases often takes both innovative and traditional efforts by law enforcement agencies, including follow-up interviews with past witnesses and suspects. "Cold case" investigative teams must find new techniques to uncover lost leads, and much of their information must come from interviews with formerly interrogated suspects.[7]

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http://www.fbi.gov/publications/leb/2005/august2005/august05leb.htm (Aug. 2005). The article describes the action of a cold-case investigative team, with the help of the FBI's National Center for the Analysis of Violent Crime, that linked three homicides to a suspect after re-opening the cases 20 years after the first murder and immediately interviewing him. *See id.* The FBI recommended re-interrogation as the first order of business and the team ultimately obtained a confession. *See id; see also* Beth Schuster, *Cold Cases: Strategies Explored at NIJ Regional Trainings,* NIJ Journal 260 (2008), available at www.dna.gov/training (discussing availability of witnesses and suspects as primary reasons to reopen cold cases).

[7] *See The Cold Case Cowboys, supra* note 6. "The Cold Case Cowboys" were a team of volunteers, including former law enforcement officers, hired by the sheriff's department in an Oregon town in an effort to put to rest its stack of unsolved murders. Among the volunteer team's success stories was an eight-year-old "cold case" murder that was solved through interviews with a former suspect, who was serving time in an Oregon prison. *See id.; see also* Jana Bommersbach, *Cold Case Unit,* Phoenix Magazine, April 2006, available at http://www.janabommersbach.com/pm-fea-apr06-2.php (profiling the Cold Case Unit of the Phoenix Police Department and its tireless efforts to solve decades-old stagnant cases through the use of new technology and re-interviewing witnesses and suspects); *Who Murdered the Rock Star?*, 48 Hours, Jan. 8, 2005, available at http://www.cbsnews.com/stories/2004/05/14/48hours/main617479.shtml (profiling the 1993 "cold case" murder of musician Mia Zapata in Seattle and (Continued…)

A recent example involved the reopened investigation into a 2000 abduction and murder of a 16-year-old lifeguard in Massachusetts.[8] In that case, which involved hundreds of tips and the largest manhunt in Massachusetts history, police acted on a tip to interview a potential suspect located in a Florida jail who had pled guilty to separate murder charges.[9] Without a "break in custody/lapse in time" approach rendering the prophylactic *Edwards* rule inapplicable, long-stagnating investigations into brutal murders such as the one in Massachusetts would be significantly thwarted by the risk that all

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the Cold Case Squad's efforts to solve the city's 300 stagnant cases).

[8] *See Justice for Molly: Is Killer Already in Jail?*, available at http://abcnews.go.com/print?id=6797785 (Feb. 4, 2009).

[9] *See id.* There are many more examples of "cold cases" where police have seemingly little faith of ever solving the crime, other than hoping that previous suspects or jail inmates will come forward with new leads concerning the long-stagnant investigation. *See, e.g., 20 Years Later, Family Still Searching for Tiffany Sessions,* available at http://www2.tbo.com /content/2009/feb/09/091828 (Feb. 10, 2009) (discussing February 9, 1989 disappearance of a University of Florida student and other "cold cases," including police methods of sending information to prison inmates in the hopes of obtaining new leads on old cases); *HCSO Turning Up Heat on Cold Cases,* available at http://www.newssun.com (Feb. 10, 2009) (discussing 22 cases in a Florida sheriff's office cold case unit and the methods used to solve them, including talking to people who have had a "change of heart" over a period of time and become willing to talk to police). The Cold Case Center also provides information on new cold cases and all federal and state agencies charged with attempting to solve such long-stagnant cases. *See* http://www.coldcasecenter.com/cold_cases.htm.

subsequent interrogations, although conducted in good faith, could later be suppressed in court.[10]

In Florida, at least 24 city and county law enforcement agencies have their own websites dedicated to investigating and solving cold cases.[11] As of March 2009, the Florida Department of Law Enforcement lists 61 state homicides as unsolved.[12] Moreover, Florida has an on-line database set up to receive information regarding unidentified decedents, which lists seven cases in which new information resulted in the identification of deceased persons, many of whom were crime victims.[13] This information and the use of new technology not only

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[10] Most recently, a Salvadoran immigrant located in a California prison on assault convictions was identified as the suspect in the unsolved 2001 slaying of Washington, DC intern Chandra Levy. *See, e.g., Affidavit: Chandra Levy Suspect Kept Her Photo in His Cell*, available at http://www.cnn.com/2009/CRIME/03/04/chandra.levy.suspect.guandique (Mar. 11, 2009). Police issued the arrest warrant eight years later after following up with several witnesses as part of their investigation into "one of Washington's most notorious cold cases." *See id.*

[11] *See* http://www.coldcasecenter.com/cold_cases.htm (last visited Mar. 20, 2009).

[12] *See* Florida Dept. of Law Enforcement, http://www.fdle.state.fl.us (last visited Mar. 20, 2009). The FDLE's website also describes "Cold Case Playing Cards" it has been using since July 2007. The cards, featuring the faces of victims and information on unsolved crimes, were distributed to inmates in the state's prisons and have thus far led to the resolution of two unsolved homicides. *See id.*

[13] *See* http://www.fluiddb.com (last visited Mar. 20, 2009).

demonstrates the large number of unsolved cases and missing persons, but it also shows that law enforcement agencies need to be flexible and use creative ways to solve frustrating and long-stagnant investigations. A "break in custody" approach removing the second-tier prophylactic barrier of *Edwards* would help ensure that police are not thwarted in their wide-ranging efforts to bring justice to victims and the community.

Certainly, in analyzing whether a break in custody has removed the protection of *Edwards*, courts should not allow officers to conspire to avoid the requirements of *Miranda.* Officers cannot pressure and coerce a suspect who has previously indicated his desire to communicate only through counsel. Officers should, however, be able to resume investigations into "cold cases" after a period of time without needless barriers. Officers acting in bad faith or attempting to avoid the prophylactic requirements of *Miranda* and *Edwards* would not have the benefit of statements obtained involuntarily.

At the same time, there is no reason to exclude statements made by a suspect after a break in custody, so that a subsequent waiver of rights can be considered a rational and voluntary choice. *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985); *see also* Shapiro, *supra* note 2, at 12-13 (discussing the possibility of treating the *Edwards* presumption against questioning as a rebuttable one depending on the circumstances). This approach properly takes the substantial public interest in solving dormant cases

into account, for the benefit of victims and the community at large.

While the ultimate goal of *Edwards* is laudable – to protect against potential end-runs around the prophylactic *Miranda* protections – there is no reason why that goal cannot be furthered while still respecting the need to solve serious and heinous crimes. In cases such as this one, where there is no reason to believe that investigators were trying to avoid *Miranda*, applying *Edwards* in a draconian and essentially never-ending way simply makes no sense. Of course, in any case police still must adhere to the requirements of *Miranda*, ensuring that the suspect's choice to speak to police is made freely and voluntarily. The amici states urge this Court to clarify that *Edwards* has its limits and should be applied pragmatically and logically under the circumstances of each case.

CONCLUSION

For all of the above reasons, this Court should reverse the Court of Appeals of Maryland and rule that *Edwards* is inapplicable when there has been a break in custody such that a suspect can voluntarily waive his rights under *Miranda.*

Respectfully submitted,

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