

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Shatzer would have the prophylactic rule this Court established in *Edwards v. Arizona*, 451 U.S. 477 (1981), and expanded in *Arizona v. Roberson*, 486 U.S. 675 (1988), and *Minnick v. Mississippi*, 498 U.S. 146 (1990)—cases where law enforcement officers sought to question a suspect within three days of his assertion of his Fifth Amendment right to counsel—apply forever, regardless of the passage of time or any change in a suspect’s circumstances. Resp. Br. 33. This would be an unjustified expansion of *Edwards*. If, as Shatzer acknowledges, the basis for the *Edwards* rule is that “coercion is feared,” Resp. Br. 16 (quoting *Roberson*, 486 U.S. at 690 (Kennedy, J., dissenting)), this case would seem a strained application of that rule.

“When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant ‘reasoning’ is the weighing of the rule’s benefits against its costs.” *Montejo v. Louisiana*, 129 S. Ct. 2079, 2089 (2009). The benefits of the rule established by *Edwards* are measured by “the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted.” *Montejo*, 129 S. Ct. at 2089 (discussing the Sixth Amendment analog to *Edwards*). Its costs are measured by the extent to which the rule hinders “society’s compelling interest in finding, convicting, and punishing those who violate the law.” *Id.* (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

Shatzer’s approach would transform the rule of *Edwards* and its progeny “into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests.”

Michigan v. Mosley, 423 U.S. 96, 102 (1975) (discussing the safeguards provided by *Miranda v. Arizona*, 384 U.S. 436 (1966), and the Fifth Amendment right against compelled self-incrimination). Shatzer claims that “*Edwards* is practical and not unduly limiting to law enforcement efforts.” Resp. Br. 17. To the contrary, the expansion of the rule that Shatzer advocates is both unworkable and unnecessary.

Shatzer’s proposed construction of the rule is unworkable because it would require law enforcement officials to keep track of every suspect who has ever asserted his Fifth Amendment right to counsel, at any time and in any jurisdiction in the entire country—something that common experience demonstrates officials could do only with great difficulty and expense, if at all. Shatzer claims that a perpetual *Edwards* presumption would “not unduly hamper law enforcement efforts,” Resp. Br. 33, but fails to account for the myriad of administrative problems such a sweeping policy would necessarily entail. How, for example, would the *Edwards* invocation follow the individual who asserts his right to counsel in a shoplifting case in the District of Columbia, who is later transferred to Maryland authorities on a detainer for an armed robbery, and who is subsequently extradited to California for questioning on a homicide? Further, any conceivable central repository of *Edwards* invocations, an undertaking that Shatzer claims would “not impose an onerous burden,” Resp. Br. 35, would have to account for a host of related issues, including dissemination among law enforcement agencies, criminals’ reliance on aliases, and the fact that such a database would ensnare individuals who invoked their

right to counsel but were never arrested, much less convicted.

The broad application of the rule urged by Shatzer is also unnecessary. Even after the rule's presumption of coercion is terminated, a statement will be rendered inadmissible where actual coercion or badgering is established. The *Edwards* presumption of coercion should only apply in circumstances where the likelihood of badgering raises a genuine concern that *Miranda* warnings would be inadequate to protect a suspect's Fifth Amendment rights. Application of the presumption where as a general matter there is no possibility that a suspect was badgered into waiving his previously asserted rights requires the exclusion of statements that are entirely voluntary and inhibits legitimate police investigation.

Unless application of the rule is circumscribed, it will be unworkable and unjustified by any reference to its proper purpose. The clarity of a bright line rule, however, need not be sacrificed. One clear termination point is a break in custody. Another would be the passage of a fixed period of time, determined by the Court, after which badgering is unlikely to have occurred. Both provide easily identifiable and practical points at which the *Edwards* presumption would terminate, and both are preferable to the limitless application of *Edwards* that Shatzer advocates.

A. A break in custody, based on return to the general prison population, provides a clear, easily administrable limitation on the *Edwards* prophylactic rule.

In arguing that a break in custody never

terminates the *Edwards* presumption, Shatzer virtually ignores what this Court recently emphasized in *Montejo*, that the purpose of the *Edwards* rule is to prevent police badgering. *Montejo*, 129 S. Ct. at 2085, 2086, 2087, 2089, 2090. Properly viewed as an antibadgering provision, the *Edwards* presumption should terminate when the circumstances are such that it is no longer reasonable to presume that the police are badgering a witness into withdrawing his invocation of the right to counsel. With a break in custody, whether a release to the street or, as in this case, a return to the general prison population, the individual is no longer isolated by the police and is able to resume his daily routine. The break thus serves as a clear, objectively verifiable event sufficient to terminate an irrebuttable presumption of coercion.¹

A break in custody terminates “an interrogator’s imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained”; ends a suspect’s custodial communication with the police; and, at that moment, eliminates *Miranda*’s concern with compelled self-incrimination.

¹Shatzer and his amicus argue that if the *Edwards* presumption expired upon a break in custody, police might adopt a repetitive “catch-and-release” tactic to circumvent *Edwards*. Resp. Br. 19-20; National Association of Criminal Defense Lawyers (“NACDL”) Br. 19. The issue of a pretextual break in custody is not before the Court in this case. Here, the police acted in good faith, and there is no suggestion that Shatzer’s release back to the prison population was pretextual. Were the issue to arise, however, the Court could establish a narrow exception, as it did in *Missouri v. Seibert*, 542 U.S. 600 (2004), and *Oregon v. Elstad*, 470 U.S. 298 (1985), for circumstances where the police have adopted policies specifically designed to circumvent the rule.

Miranda, 384 U.S. at 468. If and when a suspect is returned to custody for further investigation, readvisement of the *Miranda* rights—“the primary protection afforded suspects subject to custodial interrogation,” *Davis v. United States*, 512 U.S. 452, 460 (1994)—suffices.

Contrary to the claim that a break in custody rule “would be granting police a license to badger suspects,” NACDL Br. 19, a break in a suspect’s custody terminates the *Edwards* presumption and reflects compliance with the prophylactic protection propounded by the Court in that case. Recognition of the expiration of the *Edwards* protection upon a break in custody provides a bright-line rule and safeguards the Fifth Amendment right against compelled self-incrimination.

Shatzer and his amicus also seek to equate his incarceration on an unrelated conviction as custody for *Edwards* purposes. Resp. Br. at 23-26; NACDL Br. 9-10. Under Shatzer’s rationale, any prisoner who has previously invoked his right to counsel may not be questioned by any state agent, however informally and regardless of the purpose of the questioning, absent *Miranda* warnings. This is inconsistent with this Court’s precedent. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Court stated:

It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent.

Id. at 297.² Shatzer’s proposed definition of custody under which all inmates are in *Miranda* custody at all times would not only expand *Edwards*, but also *Miranda* itself.

“Continuous government custody,” Resp. Br. 6, is not the proper standard for determining whether the *Edwards* presumption applies. *Miranda* itself was based on the “inherently compelling pressures” that exist during protracted “in-custody interrogation.” 384 U.S. at 467. In *Roberson*, this Court reiterated that the presumption of coercion is based on “prolonged police custody.” *Roberson*, 486 U.S. at 686.

Shatzer’s proposed reading of *Edwards* is also at odds with *McNeil v. Wisconsin*, 501 U.S. 171 (1991), in which the Court stated that the *Edwards* rule applies “assuming there has been no break in custody.” *Id.* at 177. Despite this Court’s express language in *McNeil*, Shatzer posits that a request for an attorney during custodial interrogation “is no less valid after a person is released.” Resp. Br. 7. Likewise, his amicus asserts that Petitioner’s position, that a break in custody terminates the *Edwards* presumption of coercion, “rests on a misreading” of *McNeil*. NACDL Br. 18. Shatzer’s amicus contends that the Court’s language in *McNeil* “simply acknowledges that *Edwards* does not apply when a suspect is not in custody.” *Id.* To the contrary, the Court’s express assumption in *McNeil* of the absence of any “break in custody” is not surplusage,

²As held in *Perkins*, whether a suspect is in *Miranda* custody is determined by the specific circumstances under which the suspect is questioned. 496 U.S. at 297-98; *see also* Wayne R. LaFave, et al., *Criminal Procedure* § 6.6 (“*Miranda*: When interrogation is ‘custodial.’”) (3d ed. 2007).

but reflects the context of *Edwards*, as well as *Minnick* and *Roberson*, each of which involved continuous investigative police custody.

Although, as Shatzer acknowledges, “[a] period of investigative detention is generally of a short duration,” Resp. Br. 15, it is prolonged police custody and an “interrogator’s insinuations that the interrogation will continue until a confession is obtained,” *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984), that constitute the coercion inherent in custodial interrogations. It is this coercion that is the target of the *Edwards* prophylactic rule. The no-break-in-custody situation assumed in *McNeil* is the paradigm in which the Court has been operating in *Edwards* and in the cases applying *Edwards*. The cessation of questioning and Shatzer’s return to the general prison population ended police custody and should therefore terminate *Edwards*’s irrebuttable presumption of coercion.

B. *Edwards*’s Court-created presumption of coercion should terminate at a point in time when the presumption is incorrect and its prophylactic purpose is no longer being served.

Shatzer argues that “it is impossible to specify a non-arbitrary time after which the *Edwards* protection should cease to apply.” Resp. Br. 28. Based on the alleged inability to establish a principled point of termination, Shatzer concludes that the *Edwards* presumption of coercion should never be terminated by the passage of time, but should apply in perpetuity. Resp. Br. 27. This conclusion is flawed in several

respects. *Edwards*, *Roberson*, and *Minnick* can be construed so as to preserve the rule's clarity without resort to an endless presumption of coercion that has no proper basis in fact or law.

Shatzer is wrong as a legal matter in that he assumes the presumption should continue forever unless a termination point can be established with precision. Because *Edwards*'s prophylactic rule is not a constitutional command, but was devised by this Court, it is the Court's "obligation to justify its expansion" to the circumstances presented in this case. *Minnick*, 498 U.S. at 156 (Scalia, J., dissenting) (quoting *Roberson*, 486 U.S. at 688 (Kennedy, J., dissenting)); accord *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987) (emphasizing that a prophylactic rule must be justified by reference to its purpose). Per se rules require the Court to make broad generalizations and "should not be applied . . . in situations where the generalization is incorrect as an empirical matter; the justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S. 722, 737 (1991). It is therefore appropriate to terminate the application of a Court-created presumption at the point where it is reasonable to assume that it is generally incorrect and its purpose is no longer being served.

This Court recently underscored that "[t]he *Edwards* rule is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights[.]'" *Montejo*, 129 S. Ct. at 2085 (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). To "badger" is "to harass or urge persistently; pester; nag." *The Random House Dictionary of the*

English Language 154 (2d ed. 1987). In the *Edwards* context, to “badger” is to ask the individual to reconsider his decision with an insistence or frequency that indicates his prior decision to invoke the right to counsel is not being honored. In *Edwards*, the police returned to the defendant the very morning after he had invoked his right to counsel, 451 U.S. at 479; while in *Roberson*, 486 U.S. at 678, and *Minnick*, 498 U.S. at 148-49, law enforcement officers returned within three days of the assertion of the right. In addition, a prison guard informed Edwards that he “had to” talk to the detectives, 451 U.S. at 479, while jailers announced to Minnick that he would “have to talk” to the sheriff and “could not refuse.” 498 U.S. at 149. A presumption of coercion, which rendered the renewed *Miranda* waivers in those cases invalid, was well-grounded in fact.

Shatzer maintains that the pressure on an individual to incriminate himself becomes more, not less, acute with the passage of time. Resp. Br. 32. Shatzer’s amicus similarly contends that there is nothing in the lapse of time itself from which to deduce that coercion has diminished. NACDL Br. 13. This is simply not so. It is the frequent, repeated attempts to question a suspect who has invoked his right to counsel—the badgering—that indicate to the individual that, notwithstanding the propounding of fresh *Miranda* advisements, his decision is not being honored, thereby rendering any waiver invalid. *Minnick*, 498 U.S. at 162-63 (Scalia, J., dissenting) (merely to ask, “without such insistence or frequency as would constitute coercion,” whether suspect would like to reconsider his decision, is not to “badger”). As a general factual proposition, for badgering to be

present, the time between interrogations must be brief.

This is so even where the suspect has been incarcerated. While some inmates may become more compliant with the passage of time, many do not; indeed, many become more hardened and better accustomed over time to dealing with law enforcement authorities. Equally important, as already explained, the restraints that arise with incarceration are not the equivalent of coercion for the purposes of *Miranda* and *Edwards*. That a suspect may become more eager for release as his time in custody increases does not render his waiver involuntary so long as he understands that the choice is his and that it will be honored. “[W]hen a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick” *Montejo*, 129 S. Ct. at 2085. Where there are no circumstances creating a likelihood of badgering, the police should not be precluded from returning to ask if the suspect is now willing to talk to the police without counsel.

Shatzer argues that “the *Miranda* warnings themselves must have appeared differently to [him] when the police returned to question him for the second time” because he had invoked his right to counsel, but “none had been appointed for him.” Resp. Br. 32. Yet, he correctly concedes that the police were under no obligation to assist him in obtaining counsel. Resp. Br. 31. Thus, in 2003, when Shatzer invoked his Fifth Amendment right to counsel, Detective Blankenship asked Shatzer to contact him when he, Shatzer, obtained an attorney, and then ended the interview. (JA 12, 19). Shatzer would have had no reason to expect that the police would obtain counsel

for him.

This Court has praised *Edwards* for the clear and unequivocal guidelines it provides to the law enforcement profession. *Montejo*, 129 S. Ct. at 2091. Should this Court conclude that the clarity of a bright-line rule must be maintained, the Court properly may draw the line at the point where badgering is unlikely to have occurred, be it the three days that were at issue in *Roberson* and *Minnick*, three weeks, or the thirty days suggested by Amicus Curiae, Criminal Justice Legal Foundation. CJLF Br. 19. *Cf. Ballew v. Georgia*, 435 U.S. 223, 239, 245 (1978) (holding that, while six-person juries pass constitutional muster, five-person juries violate the Sixth and Fourteenth Amendments, but admitting that Court did “not pretend to discern a clear line between six members and five”). Drawing the line at the point after which badgering is unlikely to have occurred is preferable to the limitless and interminable presumption of coercion that Shatzer proposes. The existence of actual badgering would still operate to invalidate a waiver after that point, while the establishment of a clear time limit will serve to protect the core purpose of *Edwards*.

If *Michigan v. Jackson*, 475 U.S. 625 (1986), was the “fourth story of prophylaxis” in the Sixth Amendment context, *Montejo*, 129 S. Ct. at 2092 (overruling *Michigan v. Jackson*), then Shatzer’s proposed extension of *Edwards* here would surely amount to a fourth story of Fifth Amendment prophylaxis. And, as this Court concluded in *Montejo*, “the temples have a way of collapsing when one story too many is added.” *Id.* at 2092 (citing *Douglas v. City of Jeanette*, 319 U.S. 157, 181 (1943) (opinion

concurring in result)). Accordingly, this Court should reject the rationale of the Court of Appeals of Maryland and hold that the *Edwards* presumption did not apply when Shatzer was reinterrogated some two-and-a-half years after he invoked his right to counsel.

In sum, *Edwards* should not stand as a permanent bar to all police-initiated questioning where there is no reasonable possibility of badgering. A perpetual presumption of coercion is legally and factually unwarranted, and needlessly hampers legitimate law enforcement efforts. The *Edwards* presumption should terminate with a break in custody, the passage of sufficient time to protect against badgering, or both.

CONCLUSION

For the reasons stated herein, and in the State of Maryland's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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