

**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 FOR RESPONDENT
—◆—

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QUESTION PRESENTED

Is the *Edwards v. Arizona*, 451 U.S. 477 (1981), prohibition against re-interrogation of a suspect who has invoked the right to have counsel present during custodial interrogation applicable to Respondent, who remained in state custody for two years and seven months and was re-interrogated without counsel about the same allegations?

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STATEMENT OF FACTS

During 2003, Hagerstown City Police Department Detective Shane Blankenship was assigned to the Criminal Investigation Division and, within that unit, to the Child Advocacy Center. JA 8-9. In July of that year, he received a report from a social worker containing allegations that Respondent ordered his son to perform fellatio on him. JA 9-10. According to Detective Blankenship, the child “didn’t say he actually did that, he just described the exposure and that was as far as it went by his description.” JA 10.

On August 7, 2003, Detective Blankenship met with Respondent, who was incarcerated at the Maryland Correctional Institution in Hagerstown. JA 10. Detective Blankenship administered *Miranda*¹ warnings using a standardized form which Respondent signed. JA 10. Respondent was initially confused; when he realized that Detective Blankenship wanted to question him about a crime, he refused to make a statement and said that he wanted an attorney present. JA 12. Detective Blankenship wrote in his report: “When I attempted to again initiate the interview, he told me that he would not talk about this case without having an attorney present.” JA 19. Detective Blankenship asked Respondent “to contact me once he obtained an attorney.” JA 19. The investigation was closed in 2003. JA 20.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

On February 28, 2006, Detective Paul Hoover was assigned to conduct a follow-up investigation in the case previously assigned to Detective Blankenship. JA 22-23. Detective Hoover learned about the previous investigation from the social worker, who told him about the prior investigation and that she had “opened up a new investigation because these same allegations had popped up again.” JA 23. Detective Hoover told Detective Blankenship about his investigation involving Respondent. JA 16. Detective Blankenship informed Detective Hoover that he had been assigned to the case before and was familiar with it. JA 17. Detective Blankenship testified that he “may have” told Detective Hoover that Respondent asked for a lawyer during the 2003 interview, but could not “remember that specifically.” JA 17. The two detectives worked together, shared an office, and saw each other every day. JA 46.

Detective Hoover interviewed Respondent on March 2, 2006, at the Roxbury Correctional Institution. JA 24. Respondent had been transferred to this correctional facility and was serving the same sentence that he was in 2003. JA 51, 67. The interrogation took place in “more of a maintenance room than anything else”; it contained a desk and at least three chairs. JA 28-29. Detective Hoover noticed that Respondent seemed surprised: “I recall him saying that he thought that this . . . , these allegations were investigated previously.” JA 26 (ellipsis in original). He thought the case was over. JA 39. Detective Hoover informed him that “we were talking to him

again about the same allegations.” JA 26. Respondent told Detective Hoover that he had been interviewed by Detective Blankenship. JA 28. Detective Hoover provided *Miranda* warnings, obtained a waiver, and questioned Respondent for about one-half hour. JA 28, 30-31. Respondent discussed the allegations, made a statement, and agreed to submit to a polygraph examination. JA 31.

On March 7, 2006, Detective Hoover returned to the prison along with Detective Shawn Schultz, a polygraph examiner. JA 32. They used the same room for the polygraph examination as was used for the March 2, 2006, interview. JA 35. Detective Schultz provided *Miranda* warnings using a standardized form. JA 33-34. After Detective Schultz administered the polygraph examination, he and Detective Hoover questioned Respondent together. JA 34. During the course of this third interrogation by the two detectives, Respondent began to cry and stated: “I didn’t force him. I didn’t force him.” JA 36, 77. He then asked for an attorney and the interview stopped. JA 36. When the prosecutor asked Detective Hoover at the suppression hearing whether he “would . . . have done [anything] differently” had he been aware of Respondent’s prior request for counsel, Detective Hoover answered: “I don’t think I would have done anything differently. I think I would have proceeded the way I did. I don’t think I had a choice of the matter at the time. I had to do an investigation.” JA 46. Following his interrogations of Respondent,

Detective Hoover sought criminal charges, and an indictment was filed on June 16, 2006. JA 1, 37.

At the conclusion of the suppression hearing, defense counsel argued that Respondent had unambiguously invoked his right to counsel when first questioned, and that interrogating him for a second and third time without counsel present violated the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981). JA 50-52. The hearing court ruled on September 14, 2006, that Respondent's statements were admissible and denied the motion to suppress evidence. JA 58-59, 67-68. On September 21, 2006, Respondent appeared before the court and entered a not guilty plea to an agreed statement of facts.² JA 72. The trial court found Respondent guilty of sexual child abuse based in part on the statements Respondent made to Detective Hoover and Detective Schultz. JA 79.

Respondent noted a direct appeal to the Court of Special Appeals of Maryland on December 28, 2006. JA 1. Before Maryland's intermediate appellate court could rule, the Court of Appeals of Maryland issued a writ of certiorari on its own initiative. *Shatzer v. State*, 941 A.2d 1104 (Md. 2008). JA 89. In a decision issued on August 26, 2008, the Court reversed the suppression hearing court's ruling. JA 128. The Court recognized that the first two interrogations were

² Trial by agreed statement of facts is "essentially a trial by stipulation, at which generally no live witnesses are called." *Atkinson v. State*, 627 A.2d 1019, 1021 n.3 (Md. 1993).

separated only by time; the detectives questioned Respondent about the same allegations, and there was no intervening event such as a guilty plea or sentencing between the interrogations. JA 117. The Court held that the passage of time, by itself, could not void the protection of *Edwards* because “the fact-based analysis such a rule would require would run contrary to the bright-line rule established in *Edwards* and the purpose of *Edwards*.” JA 111. The Court declined to recognize a break in custody exception to the rule in *Edwards* “regarding an inmate who is subject to uninterrupted, continuous incarceration between the first invocation of the right to counsel and a second interrogation when the interrogation relates to the same investigation.” JA 126. The Court reasoned that release into the general prison population between the periods of police interrogation could not constitute a break in custody where the person remained in continuous government custody and where “the second interrogation regards the same underlying crime as the first interrogation involved.” JA 112. The Court concluded that, for an inmate continuously serving a sentence who invokes the right to have counsel present during questioning, *Edwards* applies until counsel is provided or the inmate initiates further conversation with law enforcement officers. JA 128.

Two judges filed a dissenting opinion and would have affirmed the hearing court’s ruling admitting Respondent’s statements. JA 129-66. In their view, *Oregon v. Elstad*, 470 U.S. 298 (1985), and *Missouri v.*

Seibert, 542 U.S. 600 (2004), provided analogous situations in which statements taken in violation of *Miranda* may be admitted after “a substantial passage of time and finding the existence of curative measures.” JA 130. The dissenters identified three different tests from *Seibert* used to determine if a statement made to police officers after an unwarned statement could be admitted into evidence and determined that, applying each test to the facts of this case, Respondent’s statements made during police questioning in 2006 should be admissible into evidence. JA 143, 146. They concluded that “a substantial break in time and a second *Miranda* warning disengages the need for *Edwards*’ protections where the police have acted in good faith.” JA 147.

On November 24, 2008, the State of Maryland filed a Petition for Writ of Certiorari. This Court granted the writ on January 26, 2009.



SUMMARY OF ARGUMENT

The Court of Appeals of Maryland properly concluded that the rule of *Edwards* was applicable to Respondent’s case and required suppression of two statements he made after invoking his right to have counsel present during custodial interrogation because Respondent remained in continuous government custody for a period of two years and seven months and was re-interrogated about the same criminal allegations without counsel present.

A. In *Edwards v. Arizona*, 451 U.S. at 484-85, the Court held that an accused in custody who has invoked the right to have counsel present “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused initiates further communication, exchanges, or conversations with the police.” *Edwards* represents a bright-line rule which the Court has maintained in the face of requests for exceptions twice before.

B. Permitting an exception for a break in custody does not provide a basis for the Court to formulate an effective alternative rule. A request for help from an attorney during custodial interrogation is no less valid after a person is released. If *Edwards* is restricted in its application only to a period of temporary investigative custody, then its protection would apply to a small number of suspects accused of committing crimes. In addition, permitting an exception to *Edwards* for a break in custody would undermine four recognized goals of its rule: (1) ensuring that confessions made during custodial interrogation are the product of a free choice to speak and not of coercion, (2) providing clear and unequivocal guidance to law enforcement officers and the courts, (3) preventing police officers from badgering suspects into waiving previously asserted *Miranda* rights, and (4) maintaining confidence in the administration of the criminal justice system.

C. Even if the Court were to recognize an exception to the *Edwards* rule where there has been a break in custody, it would not apply in this case. On

August 7, 2003, Respondent invoked his right to have counsel present during custodial interrogation. He was continually incarcerated, without access to counsel, and he did not initiate contact with the police before a detective returned to question him two years later. Furthermore, when questioned on March 2 and March 7, 2006, Respondent did not have counsel with him. Therefore, he was in the same position regarding the investigators in 2006 as he was in 2003; nothing had changed such that his initial election to deal with police interrogation only with assistance from an attorney should not have been honored.

D. There is no logical point on a time line at which the rule of *Edwards* should diminish or expire. Permitting re-interrogation without counsel after 30 days (as proposed by the Criminal Justice Legal Foundation) presents risks of badgering and coercion. Permitting re-interrogation after a longer period of time does not necessarily reduce coercive pressures and would have to take into account changes in circumstances on a case-by-case basis, undermining the usefulness of a bright-line rule.

E. Law enforcement officers are already familiar with the requirements of *Edwards* and have developed policies to ensure compliance with its clear command. *Edwards* itself permits the use of statements made after counsel has been made available or the accused reinitiates contact with the police. Developments in the case law suggest other permissible uses of evidence under circumstances

including: non-custodial interrogation, questioning in response to a public safety emergency, physical fruits of an *Edwards* violation, use of statements resulting from a violation of the rule for impeachment purposes, and the use of statements concerning crimes committed after a suspect invoked the right to counsel. Preserving the rule of *Edwards* will not result in the exclusion of all evidence resulting from re-interrogation.

F. Petitioner's argument that *Edwards* should be overruled is not properly before this Court. It is not supported by the United States as amicus curiae. The *Edwards* rule is clear and easy to apply in all situations. Where Petitioner does not propose an effective alternative, the clear rule of *Edwards* should be preserved.



ARGUMENT

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRES SUPPRESSION OF RESPONDENT'S MARCH 2006 STATEMENTS.

A. The Court has established a bright-line rule specifying when police officers can re-interrogate a suspect in custody who has invoked the right to counsel.

The Fifth Amendment to the United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness

against himself[.]” In *Miranda v. Arizona*, 384 U.S. 436, 470-73 (1966), the Court ruled that a suspect subject to interrogation while in police custody has the rights to remain silent, to consult with an attorney, to have an attorney present during questioning, and to have an attorney appointed if the suspect is indigent. These rights, stemming from the Fifth and Fourteenth Amendments to the United States Constitution, must be explained prior to the start of questioning. *Id.* at 467-68. “If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Id.* at 474. *Miranda* rights are procedural safeguards put in place to ensure that the Fifth Amendment guarantee is honored. *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). A statement resulting from custodial interrogation in violation of *Miranda’s* safeguards may not be admitted in the prosecution’s case in chief, *Miranda*, 384 U.S. at 479, though it may be admitted for other purposes (as discussed in Section E, below).

The rule of *Edwards* affords protection in addition to *Miranda*. *Davis v. United States*, 512 U.S. 452, 461 (1994). In *Edwards*, the Court held:

that when an accused has invoked the right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an

accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85 (footnote omitted). A purported waiver of the right to counsel one day after invoking the right was ruled invalid when the second interrogation was initiated by law enforcement officers and not by the suspect. *Id.* at 485. The rule is needed to enforce the warnings required by *Miranda* because it is “inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.” *Id.*

The Court has recognized that *Edwards* is a bright-line rule. *Davis*, 512 U.S. at 461 (“The *Edwards* rule . . . provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information.”); *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (“*Edwards* set forth a ‘bright-line rule’ that *all* questioning must cease after an accused requests counsel.”) (emphasis in original); *Solem v. Stumes*, 465 U.S. 638, 646 (1984) (“*Edwards* established a bright-line rule to safeguard pre-existing rights[.]”); *Michigan v. Jackson*, 475 U.S. 625, 634 (1986) (“one of the characteristics of *Edwards* is its

clear, ‘bright-line’ quality”). *See also* 2 Wayne R. LaFare, *Criminal Procedure*, § 6.9(f) (3d ed. 2007) (“*Edwards* is best viewed as a *per se* rule proscribing any interrogation of a person held in custody who has invoked his right to counsel absent the individual’s subsequent initiation of conversation.”) (footnotes omitted).

The Court has not retreated from the bright-line rule in the cases decided since *Edwards*. In *Arizona v. Roberson*, 486 U.S. 675, 677 (1988), the Court considered whether there is an exception to *Edwards* “for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation.” The Court concluded that a statement made by Roberson while he was in custody for a different crime and after he invoked the right to counsel must be suppressed. *Id.* at 678. If a suspect invoked the right to counsel during the first interrogation, then law enforcement officers may not initiate a second interrogation unless the suspect has had another opportunity to speak with counsel or is in the presence of counsel. *Id.* at 682. The Court applied a presumption that, if a suspect did not want to speak without an attorney the first time, then he is presumed to want to speak with counsel before making a statement; to presume anything else would violate the prohibition against self-incrimination. *Id.* at 683.

In *Minnick v. Mississippi*, 498 U.S. 146, 147 (1990), the Court was asked “whether *Edwards*’ protection ceases once the suspect has consulted with

an attorney.” The Court answered in the negative, ruling that “the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel.” *Id.* at 150. In *Minnick*, the suspect was arrested on a Friday; on Saturday, when he was questioned by two FBI agents who provided *Miranda* warnings, Minnick told them: “Come back Monday when I have a lawyer.” *Id.* at 148-49. He spoke with an attorney two or three times; on Monday, he was questioned without counsel present and made a statement later admitted against him. *Id.* The Court held: “[W]hen counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.” *Id.* at 153.

In *United States v. Green*, 592 A.2d 985, 986 (D.C. 1991), *cert. granted*, 504 U.S. 908, *cert. dismissed*, 507 U.S. 545 (1993), this Court was presented with the question: “Whether *Edwards v. Arizona*, 451 U.S. 477 (1981), requires the suppression of a voluntary confession because law enforcement officers initiated interrogation of the suspect five months after he invoked his right to counsel in connection with an unrelated offense, where the suspect consulted with counsel and pleaded guilty to the unrelated offense prior to the interrogation?”. The Respondent died before the Court issued its opinion; the order granting the writ of certiorari was vacated and the petition was dismissed. *Id.*

B. A break in custody should not render the *Edwards* rule inapplicable.

The protection afforded by *Edwards*, once invoked, continues unless an attorney is present during questioning of a suspect in custody or until the suspect initiates contact with the authorities. Nothing in the *Edwards* opinion, or in *Minnick* or *Roberson*, indicates that the protection could be extinguished by a break in custody or would expire over time. The suggestion in *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991), that the *Edwards* protection continues “in the absence of counsel (assuming there has been no break in custody)” was neither essential nor relevant to the holding in that case, which involved the Sixth Amendment right to counsel.

Even defined broadly, a break in custody does not present a principled basis upon which to restrict the scope of *Edwards*. The Court in *Edwards* found that asking for counsel is a significant event beyond deciding to remain silent: “additional safeguards are necessary when the accused asks for counsel.” *Edwards*, 451 U.S. at 484. When a suspect being questioned by a police officer asks for an attorney, it is because the person wants help in dealing with the investigative authorities. Whether the person is released from the police station out onto the street, or is released to the general prison population, the fact of the release does not affect the validity of the request for counsel. The Court in *Roberson*, 486 U.S. at 683, recognized that “the presumption raised by a suspect’s request for counsel – that he considers

himself unable to deal with the pressures of custodial interrogation without legal assistance – does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation.” A suspect who has requested counsel must, even if there has been a break in custody, be presumed to want to have counsel to assist him or her in dealing with a second interrogation regarding the same criminal allegations.

To the extent that a break in custody is defined as the end of police custody, recognition of a break in custody exception to the *Edwards* rule would make its protection inapplicable to all but a small number of criminal defendants. This is because a case involving multiple custodial interrogations will almost always involve a break in police custody. A period of investigative detention is generally of a short duration. *See, e.g.*, Fed. R. Crim. Proc. 5(a) (person making an arrest must take the defendant “without unnecessary delay” before a magistrate judge or state or local judicial officer); Md. Rule 4-212(f) (arrestee must be presented before a judicial officer no later than 24 hours after arrest). Therefore, the creation of such an exception would not merely permit but, in fact, would encourage, the police to ignore a suspect’s request for counsel in the hope that the suspect will change his or her mind after a brief respite from custody.

A break in custody exception to the rule in *Edwards* does not provide the framework for a clear

and workable rule. Recognizing such an exception would undermine four important goals served by protecting the right to have counsel present for a suspect undergoing custodial interrogation who, like Respondent, asked for help from a lawyer.

1. One primary purpose of *Edwards* is to safeguard the choice of an individual in custody to have an attorney present during questioning. *Davis*, 512 U.S. at 460 (“The rationale underlying *Edwards* is that the police must respect a suspect’s wishes regarding his right to have an attorney present during custodial interrogation.”). The safeguards set forth in *Miranda* help to ensure that a suspect being interrogated in custody has a free choice between speaking or remaining silent. *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). *See also Patterson v. Illinois*, 487 U.S. 285, 291 (1988) (“Preserving the integrity of an accused’s choice to communicate with police only through counsel is the essence of *Edwards* and its progeny[.]”). “The reason for the *Edwards* rule is not that confessions are disfavored but that coercion is feared.” *Roberson*, 486 U.S. at 690 (Kennedy, J., dissenting). Applying *Miranda* and *Edwards* together to prohibit law enforcement officers from re-interrogating a suspect who has asked for help from an attorney but who does not have counsel when the investigators return helps to ensure that confessions made while in police custody are the product of free choice and not of coercion.

2. A second purpose served by the bright-line approach of *Edwards* is providing “‘clear and unequivocal’ guidelines to the law enforcement profession.” *Roberson*, 486 U.S. at 682. In *Minnick*, 490 U.S. at 151, the Court noted: “The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application.” Day to day, “it is police officers who must actually decide whether or not they can question a suspect.” *Davis*, 512 U.S. at 461. The bright-line rule of *Edwards* is practical and not unduly limiting to law enforcement efforts. Permitting a break in custody to excuse the protection afforded by *Edwards* would require law enforcement officers to make decisions about whether a suspect has been in custody when the definition of custody in this context is not entirely clear.

A break in custody cannot be defined as a change in physical circumstances because this does not say anything about a person’s choice to deal with investigators only with an attorney present. One alternative uses a change in circumstances along with something else. The Court of Appeals of Maryland suggested that “the more appropriate view of custody, for *Edwards* purposes, should be a test on the freedom of movement of the individual and whether the suspect had a meaningful opportunity to secure counsel.” JA 122. However, introducing these factors also presents problems of vagueness and undermines the usefulness of a bright-line rule. Police officers would be faced with difficult factual determinations in every case to decide if *Edwards* is

applicable and whether questioning a suspect without an attorney present is permissible.

What the Court said about the value of a bright-line rule in the context of *Miranda* (before *Edwards* was decided) remains true today:

Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda's* holding has the virtue of informing police and prosecutors with specificity as to what they may do in custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.

Fare v. Michael C., 442 U.S. 707, 718 (1979). The same need for clear guidance exists in the context of the *Edwards* rule. What is different since *Fare v. Michael C.* was decided is that the burden on law enforcement agencies is less because police officers have become familiar with the rules of *Miranda* and *Edwards*.

The bright-line rule of *Edwards* also benefits the courts in that it “conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms.” *Minnick*, 498 U.S. at 151. Trial judges called upon to ensure compliance with the requirements of *Miranda* and *Edwards* are best served by a bright-line rule. Prior to the decision in *Edwards*, courts engaged in a case-by-case analysis of whether a waiver of the right to counsel by a person who had previously invoked it was knowing, voluntary, and intelligent. *Solem v. Stumes*, 465 U.S. at 647. *See also Dickerson v. United States*, 530 U.S. 428, 432-33 (2000) (“Prior to *Miranda*, we evaluated the admissibility of a suspect’s confession under a voluntariness test.”). Permitting a break in custody to excuse compliance with *Edwards* requires fact-based determinations of what constitutes custody as well as what would constitute a break in custody. Petitioner’s approach would require a return to the case-by-case analysis which undermines the benefit of a rule allowing police officers, prosecutors and trial judges to readily determine the admissibility of statements made during custodial interrogation. Pet. Br. 32.

3. In *Minnick*, 498 U.S. at 150-51, and in *Michigan v. Harvey*, 494 U.S. 344, 350 (1990), the Court observed that a purpose of *Edwards* is “to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” Permitting a break in custody to excuse the

protection of *Edwards* would encourage police officers to release a suspect they have questioned, re-arrest the person, provide *Miranda* warnings again, then ask the suspect to waive the rights to remain silent and to have counsel present. Law enforcement officers who repeatedly interrogate suspects who have already invoked the right to counsel, after the passage of 30 days, six months, or any period of time, are engaging in badgering, particularly where, as in Respondent's case, the subject matter of the subsequent interrogation is the same as the interrogation during which the suspects invoked.³

4. Permitting investigators to re-interrogate a suspect who has asked for but who has not received assistance from an attorney would undermine confidence in the criminal justice system. Re-interrogation without counsel present excludes the lawyer from pre-trial proceedings. The duty of an attorney is to protect the rights of the client: "In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our

³ Petitioner's assertion that "[t]here was no claim in the courts below, nor could there be, that the police badgered Respondent into giving a statement, or that Respondent's statement was not knowing and voluntary" is wrong. Pet. Br. 9. Respondent argued in the Maryland courts that "[t]he second and third interrogations in this case amounted to badgering" and that the two interrogations in 2006 were presumed to be coerced. Appellant's Brief and Appendix at 11-12, *Michael Blaine Shatzer, Sr. v. State of Maryland*, No. 127, September Term 2007 (Dec. 27, 2007).

Constitution.” *Miranda*, 384 U.S. at 481. “Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts.” *Fare v. Michael C.*, 442 U.S. at 719. The rule in *Miranda* “was based on this Court’s perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation.” *Id.* A suspect in custody asks for an attorney because he or she perceives the need for legal advice before speaking with the police. A lawyer can act to protect the rights of a client by determining if or how the client is involved in the crime being investigated by the police and by providing advice. *Id.* at 721. A lawyer’s presence during questioning can also help prevent over-reaching by police officers and ensure the accuracy of any statements made. *Miranda*, 384 U.S. at 466, 470. These benefits are lost where, as a result of police-initiated questioning following a break in custody, a suspect who has never had access to counsel succumbs to the pressures of custodial interrogation and waives the right to have counsel present.

The United States as amicus curiae argues that, if a suspect who has previously invoked the right to have counsel present wished to have counsel present during a subsequent interrogation, then he or she can ask for an attorney again, thus reinstating the protection of *Edwards*. U.S. Br. 14-15. A similar

argument advanced by the United States as amicus curiae in support of the Petitioner, the State of Arizona, in *Roberson*, 486 U.S. at 686, was rejected. The Court did not agree with the assertion that repeating *Miranda* warnings after a request for counsel went unfulfilled for three days could overcome the presumption of coercion created by prolonged police custody. *Id.* The same argument made in this case should be rejected for the same reason.

Allowing the right to have counsel present during custodial interrogation to exist, to expire, and to renew itself, as if a Phoenix rising from its own ashes, means that the mechanism for protection has been severed from the constitutional right intended to be safeguarded by means of counsel's presence. The goal of giving the suspect undergoing interrogation some means of control over the proceedings, identified by the Court in *Moran v. Burbine*, 475 U.S. 412, 426 (1986), is undermined when law enforcement officers explain the right to have counsel present, the suspect invokes it, but counsel is never made available. It is unreasonable to expect that a suspect will invoke the right to have counsel a second time when it was never satisfied when first invoked. It is more likely that a suspect would believe that any effort to invoke the right would be futile and that he or she has no choice but to give a statement to the investigator. A suspect in custody who has asked for counsel should not be repeatedly tested to see if he or she still wants an attorney because *Edwards* permits the use of statements made by a suspect who changes his or her

mind and contacts a law enforcement officer. The right to have counsel present during custodial interrogation is not an evil to be avoided. Rather, it is a mechanism put in place to safeguard an important constitutional right.

C. Respondent did not experience a break in custody.

Even if the Court were to recognize that a break in custody could terminate the *Edwards* bar to police-initiated re-interrogation, Respondent did not experience a break such that an exception would apply to him. There is no dispute that Respondent was taken into police custody on August 7, 2003, when Detective Blankenship arrived to meet with him at the Maryland Correctional Institution. JA 10. Respondent refused to give a statement and Detective Blankenship recorded in his report that: “he told me that he would not talk about this case without having an attorney present.” JA 19. When the interview ended, Respondent remained in custody within the correctional institution. During the period between the first interrogation on August 7, 2003, and March 2, 2006, when Detective Hoover began the second interrogation, Respondent was never free; he remained incarcerated in connection with an offense unrelated to the investigation. JA 24. Respondent’s movement within the prison was controlled by correctional officers. There is no indication in the record that he could have refused to meet with detectives who entered the prison to speak with him.

He was subject to restrictions incident to confinement in a medium security prison. State of Maryland, Dept. of Public Safety and Corr. Services, DCD # 10-12, "Security Levels and Custody Factors," (designating the Maryland Correctional Institution-Hagerstown as Medium Security Level I and the Roxbury Correctional Institution as Medium Security Level II), Appendix 1 (issued May 30, 2002). The Court has held that other fundamental rights may be denied prison inmates. *See, e.g., Bell v. Wolfish*, 441 U.S. 520, 556-57 (1979) (a person confined in a detention facility has no protection from the Fourth Amendment in his room or cell).

Certain factors identified by the *Miranda* court as contributing to the compulsion to speak while being questioned in police custody – including isolation from familiar surroundings, being confronted with antagonistic forces, and facing techniques of persuasion – are also present in the prison environment. *Miranda*, 384 U.S. at 461. *See also Mathis v. United States*, 391 U.S. 1, 4-5 (1968) (federal agents questioning a suspect in state prison must comply with *Miranda*). Professor Richard A. Leo has identified some of the sources of stress and pressure that can lead to confessions in police custody: "social isolation; confinement in an unfamiliar setting; physical discomfort; perceived lack of control, even helplessness; fear; confusion; uncertainty; the detectives' interpersonal style; the aversive, manipulative, and threatening nature of accusatorial interrogation techniques; and the fear of

being caught, arrested, and prosecuted.” Richard A. Leo, *Police Interrogation and American Justice*, 162-63 (Harvard Univ. Press 2008). That many of these factors are present in the prison setting is not surprising, the prison environment being designed to make individuals more, not less, submissive to authority.

At the same time, a criminal case had not been brought against Respondent in 2003; therefore, uncertainty and the threat of potential charges and punishment were present when Respondent was questioned in 2006. The possibility that the interrogator could control Respondent’s fate was raised in 2003 and again in 2006 when Detective Hoover appeared to question him. Here, unlike in *Arizona v. Roberson* or *United States v. Green*, Respondent was questioned repeatedly about the same allegations. The decision not to speak without an attorney present must be presumed to apply to future interrogations on the same subject. Nothing had changed such that a court could find that Respondent had changed his mind about dealing with the police only with help from an attorney.

Another factor considered significant by many lower courts is, as the Court of Appeals of Maryland utilized as part of its test for custody, “whether the suspect had a meaningful opportunity to secure counsel.” JA 122. It is not clear what steps would constitute a “meaningful opportunity to secure counsel.” In *Edwards*, police officers provided the suspect with the telephone number for a county

attorney and permitted him to use the telephone. *Edwards*, 451 U.S. at 479. However, no matter how this phrase is construed, Respondent was not provided with a meaningful opportunity to obtain assistance from a lawyer, a fact of which he was quite obviously aware.

The United States as amicus curiae argues that a prison inmate knows that incarceration will continue whether or not he submits to interrogation. U.S. Br. 18. It is true that, unlike a suspect being held for questioning in a police station, a sentenced inmate cannot anticipate being released immediately if he or she cooperates with the interrogation. However, it is possible that a suspect who is serving a prison sentence could receive a benefit from cooperation with the investigating detectives. For example, a motion for modification or reduction of sentence, if not opposed by the prosecutor, could result in a shorter sentence. Or, cooperating with an investigation could influence investigators to make a recommendation favorably impacting an inmate's chances for parole. Conversely, a prisoner might fear that failing to cooperate will lead to more onerous conditions or even adversely affect his or her release. Despite the sparse record in this case, it is a fair inference that these possibilities dominated Respondent's thoughts as he was being led to the interview room. Continuous imprisonment in state custody, repeated interrogation regarding the same criminal allegations, and the lack of access to counsel make clear that Respondent was not afforded a break in custody.

D. The *Edwards* rule should not be relaxed merely by the passage of time.

At various points in its brief, Petitioner refers to the passage of time it argues is necessary to vitiate the *Edwards* protection as a “substantial passage of time,” Pet. Br. 24, 28; a “considerable amount of time,” Pet. Br. 24; a “significant period of time,” Pet. Br. 25; a “substantial lapse in time,” Pet. Br. 26; a “lengthy passage of time,” Pet. Br. 27; a “significant lapse of time,” Pet. Br. 28; and a “long passage of time,” Pet. Br. 28. Presumably, Petitioner intends each phrase to have the same meaning, although it does not bode well for future application of its suggested exception that Petitioner does not employ them in a consistent manner. For example, after stating that the passage of “a significant period of time” requires a lapse of “years, not hours or days,” Pet. Br. 25, Petitioner uses the phrase “significant lapse of time” to describe the time between the interrogations in *Holman v. Kemna*, 212 F.3d 413 (8th Cir.), *cert. denied*, 531 U.S. 1021 (2000), and *Hill v. Brigano*, 199 F.3d 833 (6th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000), cases involving the passage of one day and two days, respectively.⁴ Adding to the

⁴ The precise issue before the courts in *Holman* and *Hill* was not whether there was a violation of the *Edwards* rule *per se* but, rather, whether the defendants’ confessions were tainted by prior interrogations conducted in violation of *Edwards*. Therefore, the “lapse of time” discussed in both cases was the time between the impermissible interrogations and the interrogations resulting in the confessions. See *Holman*, 212 F.3d at 419; *Hill*, 199 F.3d at 842.

confusion, the Court utilized similar terminology – “a significant period of time” – when describing a break of approximately two hours between a suspect’s invocation of the right to remain silent and the resumption of questioning by the police in *Michigan v. Mosley*, 423 U.S. 96, 106 (1975). *Cf. United States v. Coleman*, 208 F.3d 786, 790 (9th Cir. 2000) (describing six-day release from custody as “a significant period of time”).

Ultimately, although Petitioner does not acknowledge this, it is impossible to specify a non-arbitrary time after which the *Edwards* protection should cease to apply. It is one thing to posit, as Petitioner does, that a suspect who has requested counsel is not likely to feel coerced when the police return to question him or her after the passage of a “substantial,” “significant,” or “considerable” period of time. It is quite another to fashion a time restriction that both preserves the bright-line nature of the *Edwards* rule and does so in a principled way.

Of the three amici curiae filing briefs in support of Petitioner, only one, the Criminal Justice Legal Foundation (“CJLF”), offers a specific time after which the *Edwards* bar on custodial interrogation should expire. CJLF urges this Court to adopt a 30-day time limit, ostensibly to promote clarity of application with, according to CJLF, “the additional benefit of recency [to the suspect’s invocation of the

right to counsel].”⁵ CJLF Br. 19. Just why the police should be able to reinitiate questioning after 30 days, as opposed to three weeks, three days, or even three hours, all of which would also possess “the benefit of recency,” CJLF does not explain. More importantly, it is hard to see how the fact that the police return to question a suspect soon after he or she has requested counsel will reduce the risk that the suspect will feel pressured into giving a confession. As one scholar who has endorsed a longer (six month) period, acknowledges, “[t]o the extent one errs, making the time interval too short, the fear of badgering and coercing confessions in violation of the Fifth Amendment becomes all too real.” Marcy Strauss, *Reinterrogation*, 22 *Hastings Const. L.Q.* 359, 397 (1995). That fear is heightened, not decreased, for the very reasons CJLF sets forth to defend its proposal: the interrogations are more likely to concern the same offense and be conducted by the same law

⁵ Elsewhere in its brief, CJLF contends that the *Edwards* rule should cease to apply where an invocation of the right to counsel is followed by a “significant lapse in time” or a “significant period of time.” CJLF Br. 9, 11. Amici curiae the State of Florida, *et al.*, argue that the *Edwards* rule should not apply after a “substantial lapse of time,” but, like Petitioner, make no attempt to specify how much time must pass other than to cite cases in which courts admitted confessions made after periods of time ranging from six hours to “several months.” Fla. Br. 2, 17 n.2. Amicus curiae the United States does not contend that the passage of time alone should suffice to vitiate the *Edwards* protection. U.S. Br. 21-23.

enforcement agency, if not the same investigators, the suspect is more likely to feel badgered by his or her interrogators, and the suspect is more likely to still be in police or other government custody.

Yet, while it may be correct to say as a general matter that the possibility of coercion increases as the time between interrogations lessens, the opposite does not hold true. This is because, as the time between interrogations grows, the range of circumstances in which the suspect may find him- or herself also grows. For example, the vast majority of cases in which courts have endorsed a break in custody exception to the *Edwards* rule involve the release (or escape) of the questioned individual from confinement. See, e.g., *United States v. Harris*, 221 F.3d 1048 (8th Cir. 2000); *United States v. Bautista*, 145 F.3d 1140 (10th Cir.), cert. denied, 525 U.S. 911 (1998); *United States v. Barlow*, 41 F.3d 935 (5th Cir. 1994), cert. denied, 514 U.S. 1030 (1995); *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989); *Bussard v. State*, 759 S.W.2d 24 (Ark. 1988); *People v. Storm*, 52 P.3d 52 (Cal. 2002), cert. denied, 537 U.S. 1127 (2003); *State v. Norris*, 768 P.2d 296 (Kan. 1989); *State v. Scanlon*, 719 N.W.2d 674 (Minn. 2006). In a number of other cases, re-interrogation did not occur until after the individual had time to enter a plea deal with respect to the offense being investigated when he or she invoked the right to counsel. See, e.g., *United States v. Arrington*, 215 F.3d 855 (8th Cir. 2000); *United States v. Garey*,

813 F.Supp. 1069 (D.Vt. 1993); *United States v. Green*, 592 A.2d 985 (D.C. 1991); *Commonwealth v. Wyatt*, 688 A.2d 710 (Pa. Super. Ct. 1997). In contrast, the biggest change in Respondent's life during the period of time between the interrogations was his transfer from Maryland Correctional Institution to Roxbury Correctional Institution, a distance of approximately two-tenths of a mile. JA 10, 24.

Furthermore, as CJLF correctly observes, Respondent did not have a right to appointed counsel during the break between interrogations. CJLF Br. 18 n.2. While the Maryland Office of the Public Defender may, and sometimes does, provide counsel for individuals not facing pending charges, it was under no constitutional or statutory obligation to do so for Respondent. *See* Md. Code Ann., Crim. Proc. Art. § 16-204(b)(1)(i)-(ii) (2008) (stating that indigent defendant is eligible for representation by Office of the Public Defender in “a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense” and “a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge”). Nor were the police under any obligation to assist Respondent in obtaining counsel. *Cf. Duckworth v. Eagan*, 492 U.S. 195, 203-04 (1989) (holding that advisement to defendant that police “have no way of giving [him] a lawyer, but one will be appointed for [him] . . . if and when [he] go[es] to court” was not

improper as matter of state law, under which he was not entitled to counsel prior to filing of formal charges and initial appearance in court, or decision in *Miranda*, which “requires only that the police not question a suspect unless he waives his right to counsel” and “does not require that attorneys be producible on call”). Thus, unlike a defendant who can afford private counsel or an indigent defendant facing pending charges, there was no one to advise Respondent that he needed to re-invoke his right to counsel if and when the police returned to question him after the passage of 30 days, six months, or two years and seven months.

Indeed, the *Miranda* warnings themselves must have appeared differently to Respondent when the police returned to question him for the second time. As noted, it had been over two years since he asked for an attorney, and none had been appointed for him. To the extent that the police were nevertheless permitted to reinitiate questioning after a period of time, re-invocation of the right to counsel at most held out the promise of another temporary reprieve from interrogation. Under these circumstances, the pressure on Respondent to incriminate himself became more, not less, acute due to the passage of time.

E. Declining to recognize exceptions to *Edwards* will not unduly hamper law enforcement efforts.

In the 28 years since *Edwards* was decided, law enforcement officers have become familiar with the procedures required to comply with the Court's ruling. One author advises police officers dealing with suspects invoking the right to counsel: "The key is to listen carefully and document." Ralph B. Means, *Interrogation Law . . . Reloaded: The Two Rights to Counsel*, *The Police Chief*, Vol. 70, No. 12, December 2003. He continues:

Once an in-custody suspect has asserted his Fifth Amendment right to counsel, police are prohibited from all further interrogation efforts in all crimes unless the suspect initiates the communication concerning his involvement or counsel has been made available to the suspect. This rule applies even when follow-up interrogators are completely unaware of the earlier assertion of rights. The burden has been placed on the law enforcement community to devise a system for warning investigators of earlier assertions.

Id. (Footnote omitted).

Detailed procedures ensuring compliance are available to police officers. For example, the FBI Legal Handbook for Special Agents contains instructions for (1) documenting a suspect's invocation of the right to counsel, (2) determining if a suspect in the

custody of officers in a different jurisdiction has invoked the right to counsel, (3) creating and maintaining interview logs recording requests for counsel, and (4) retaining records and handwritten interview notes. *FBI Legal Handbook for Special Agents*, §§ 7-4.1-7-13, at 6-18 (2003). Another author recommends that law enforcement agencies develop policies requiring detailed record-keeping when suspects invoke the right to counsel including:

whether the subject invoked the right to silence or counsel under *Miranda*;

whether the subject was in custody at the time of the invocation;

whether there has been any break in custody;

whether adversarial judicial proceedings have been initiated;

what are the specific charges filed against the subject;

whether the subject requested or accepted the appointment of counsel;

the names and contact numbers of individuals in the prosecutors' offices that can provide information regarding the status of the prosecutions; and the names and contact numbers of the subjects' defense counsel.

Kimberly A. Crawford, *Constitutional Rights to Counsel During Interrogation: Comparing Rights*

Under the Fifth and Sixth Amendments, FBI Law Enforcement Bulletin, Sept. 2002 at 31.

Keeping track of whether a suspect in custody has invoked the right to counsel and maintaining records over the years does not impose an onerous burden on law enforcement agencies as this case demonstrates. Detective Blankenship included in his report made after the August 7, 2003, interview: “When I attempted to again initiate the interview, he told me that he would not talk about this case without having an attorney present.” JA 19. The file containing the report was maintained by the Hagerstown Police Department as a matter of course, was available to Detective Hoover, and was produced at the suppression hearing. JA 18, 20, 39. The superiority of a bright-line rule lies in the ease of administration by law enforcement officers and the clear message not to repeatedly question a person who has requested the presence of an attorney. Permitting a break in custody to excuse the protection of *Edwards* would require law enforcement officers to determine whether a suspect in custody who has asked for counsel can be re-interrogated without counsel present under innumerable factual scenarios.

Furthermore, Petitioner’s argument that accepting Respondent’s position – that neither a break in custody nor the passage of time constitutes an exception to the bright-line rule set forth in *Edwards* – will lead to the creation of a class of “question proof” individuals, or individuals “forever

immune from police-initiated questioning,” Pet. Br. 10-11, 20, 22, is inaccurate. The similar concern of amici curiae the State of Florida, *et al.*, that preserving the *Edwards* rule would interfere with efforts to solve “cold cases,” Fla. Br. 21, is exaggerated. *Edwards* permits, or at least does not expressly prohibit, the use at trial of evidence gained through custodial interrogation under a variety of different circumstances, including:

1. Initiation by the suspect

By its own terms, the *Edwards* rule does not govern the use of statements obtained when, after invoking the right to counsel, “the accused himself initiates further communication, exchanges, or conversations with the police.” *Edwards*, 451 U.S. at 484-85. Thus, a suspect who, after requesting counsel during custodial interrogation, later changes his or her mind and wishes to speak to the police can do so, *see, e.g., Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983), and the police can respond with questions of their own so long as they obtain a valid *Miranda* waiver. Further, the burden on the prosecution to demonstrate re-initiation is far less onerous than the corresponding burden on the accused to prove invocation in the first instance. *Compare Bradshaw*, 462 U.S. at 1045-46 (suspect reinitiates interrogation by asking “ambiguous” question that can “reasonably [be] interpreted by the officer as relating generally to the investigation”), *with Davis*, 512 U.S. at 459 (suspect must “unambiguously” invoke right to counsel).

2. Making counsel available to the suspect

The Court's decision in *Edwards* likewise provides for the second manner in which the prosecution can introduce a statement elicited after a suspect has requested counsel. Even where the individual does not initiate questioning, the police may resume their interrogation after "counsel has been made available to him." *Edwards*, 451 U.S. at 484-85. To be sure, this places some burden on the police. As the Court made clear, it is not enough for the police to give the suspect the phone number of local counsel. *Id.* at 479. Nor may the police reinitiate interrogation without counsel actually being present. *Minnick*, 498 U.S. at 153. Nevertheless, if the concern is that a suspect may change his or her mind sometime after invoking the right to counsel, returning to obtain a waiver only after counsel has been made available is, as the Court of Appeals of Maryland recognized, "a very real and viable alternative" for the police. JA 125. Supplying the accused with counsel is also advantageous to the prosecution, as the suspect will have greater difficulty arguing that any statements made in counsel's presence were not voluntary. *Dickerson*, 530 U.S. at 444.

3. Non-custodial interrogation

As yet, the Court has not confronted a situation in which the police reinitiate questioning at a time when the suspect is no longer in custody. However, the Court's prior decisions suggest that non-custodial interrogation following an invocation of the right to

counsel may not run afoul of the *Edwards* rule. In particular, the Court has consistently resisted efforts to extend *Miranda* to interrogation taking place outside of the context of police custody. See *Pennsylvania v. Bruder*, 488 U.S. 9, 9-11 (1988) (per curiam) (ordinary traffic stop); *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (same); *Minnesota v. Murphy*, 465 U.S. 420, 430-31 (1984) (meeting with probation officer); *California v. Beheler*, 463 U.S. 1121, 1121-22 (1983) (per curiam) (suspect who voluntarily went to police station and was allowed to leave following interview); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (same); *United States v. Mandujano*, 425 U.S. 564, 579-80 (1976) (grand jury investigation); *Beckwith v. United States*, 425 U.S. 341, 347 (1976) (interview with government agents at suspect's residence); *Garner v. United States*, 424 U.S. 648, 658 (1976) (tax return). Further, language in *Edwards* can be read as restricting its holding to custodial interrogation following a request for counsel. See *Edwards*, 451 U.S. at 485 (“We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused *in custody* if he has clearly asserted his right to counsel.”) (emphasis added).⁶ See also *United*

⁶ As one commentator has observed, statements made by the suspect would still be subject to suppression under the traditional due process voluntariness test. Strauss, *supra*, at 403 n.154.

States v. Grimes, 911 F.Supp. 1485, 1494 (M.D. Fla. 1996) (observing that “prohibition of further interrogation is limited to subsequent *police-initiated* custodial interrogation and does not preclude mere contact”) (emphasis in original); *Wilson v. State*, 444 S.E.2d 306, 311 (Ga.) (Carley, J., concurring) (“Since ‘custodial interrogation’ is ‘absent’ in the instant case, there was ‘no infringement’ of appellant’s previously asserted right to counsel and there is ‘no occasion’ to determine whether appellant made a valid waiver of that previously asserted right.”), *cert. denied*, 513 U.S. 988 (1994).

4. Public safety exception

In *New York v. Quarles*, 467 U.S. 649, 655-56 (1984), the Court recognized a “‘public safety’ exception to the requirement that Miranda warnings be given before a suspect’s answers may be admitted into evidence[.]” While the interrogation in *Quarles* did not take place subsequent to an invocation of the right to counsel, and thus the *Edwards* rule was not directly implicated, lower courts have extended the public safety exception to the *Edwards* context. *See, e.g., United States v. Mobley*, 40 F.3d 688, 692-93 (4th Cir. 1994), *cert. denied*, 514 U.S. 1129 (1995); *United States v. DeSantis*, 870 F.2d 536, 540-41 (9th Cir. 1989); *Trice v. United States*, 662 A.2d 891, 895 (D.C. 1995); *Borrell v. State*, 733 So.2d 1087, 1089-90 (Fla. Dist. Ct. App. 1999). The rationale for recognizing a public safety exception is that “the need for answers to questions in a situation posing a threat to the

public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment’s privilege against self-incrimination.” *Quarles*, 467 U.S. at 657. Whether a suspect requested counsel during an earlier interrogation has no bearing on the existence of a threat to the public safety sometime in the future. And, in fact, it is easy to imagine circumstances akin to those before the Court in *Quarles* taking place within the confines of a prison. Thus, by declining to recognize a break in custody or time lapse exception to the *Edwards* rule, the Court would not hamper the ability of law enforcement officials to quickly and effectively respond to emergencies.

5. Physical fruits of an *Edwards* violation

In *Quarles*, *supra*, the defendant sought to suppress two pieces of evidence obtained as a result of his interrogation: his statement concerning the location of a firearm and the firearm itself. Holding that the police did not need to read him his rights because of the existence of a threat to public safety, the Court saw no need to address the question of whether the failure to comply with *Miranda* requires suppression of the physical fruits of an unlawful interrogation. *Quarles*, 467 U.S. at 660 n.9. A decade later, the Court answered that question in the negative. In *United States v. Patane*, 542 U.S. 630 (2004), a majority of the Court held that the failure to provide *Miranda* warnings does not require suppression of physical evidence as the “[a]dmission of nontestimonial physical fruits . . . does not run the

risk of admitting into trial an accused's coerced incriminating statements against himself." *Id.* at 645 (Kennedy, J., concurring). As of yet, the Court has not determined whether the physical fruits of an *Edwards* violation also are not subject to suppression, and lower courts are divided on the question. Compare *United States v. Cherry*, 794 F.2d 201, 207-08 (5th Cir. 1986) (holding that consent to search was not invalid despite being obtained after *Edwards* violation), *cert. denied*, 479 U.S. 1056 (1987), and *In re H.V.*, 252 S.W.3d 319, 327-29 (Tex. 2008) (holding that physical evidence seized as result of *Edwards* violation is not ordinarily subject to suppression but suggesting that "evidence obtained through deliberate violations of constitutional rights" would be inadmissible), with *United States v. Gilkeson*, 431 F.Supp.2d 270, 291-94 (N.D.N.Y. 2006) (holding that physical evidence seized as result of *Edwards* violation is not admissible in government's case-in-chief), and *State v. Harris*, 544 N.W.2d 545, 553-54 (Wis. 1996) (same).

6. Statements admissible for impeachment

A statement taken in violation of *Miranda* (and thus *Edwards*) that is nevertheless voluntary may not be used in the prosecution's case-in-chief but is admissible for impeachment purposes if the defendant testifies in a manner inconsistent with the statement. See *Oregon v. Hass*, 420 U.S. 714, 720-24 (1975); *Harris v. New York*, 401 U.S. 222, 224-26 (1971).

7. Post-invocation offenses

There is at least one additional situation in which questioning by police following a suspect's request for counsel may not lead to suppression of the fruits of the interrogation: interrogation relating to crimes committed after the suspect invoked the right to counsel. The Court's precedents do not resolve the admissibility of evidence under these circumstances, as *Edwards* and *Minnick* involved questioning concerning the same offense and *Roberson* involved questioning concerning an offense committed prior to the defendant's arrest for a different offense and his invocation of the right to counsel. However, in *McNeil*, 501 U.S. at 182 n.3, the Court strongly suggested that individuals may not invoke their *Miranda* rights "anticipatorily." Thus, it may be argued that a request for counsel only bars the government from using testimonial evidence concerning crimes committed prior to the request. See *United States v. Hall*, 905 F.2d 959, 962 (6th Cir. 1990) (declining to adopt rule that "once a defendant has had counsel for any other criminal activity, whether or not he was ever formally charged or convicted, the authorities [a]re precluded from speaking to him about new activity without his counsel's presence"), *cert. denied*, 501 U.S. 1233 (1991). On the other hand, such a limitation may be deemed unacceptable on the ground that, by asking to speak to a lawyer, a suspect thereby indicates his or her desire to deal with the police through counsel with respect to any alleged offense, regardless of when it took place. For present

purposes, it is sufficient simply to note that there is at least one more circumstance in which the *Edwards* rule may not apply to exclude evidence obtained as a result of a post-invocation interrogation.

In short, retaining the bright-line *Edwards* protection for the right to have counsel present during custodial interrogation will not unduly burden law enforcement efforts and will not result in the exclusion of all evidence obtained as a result of re-interrogation.

F. Petitioner’s suggestion that *Edwards* be overruled is not properly before the Court.

Petitioner, on the penultimate page of its brief and for the first time in connection with this case, suggests that *Edwards* should be overruled. Pet. Br. 33. This argument was not presented to the Court in the Petition for Writ of Certiorari and is not included in the question presented in this case. The United States as amicus curiae does not seek to overrule *Edwards*. In a brief filed in *Montejo v. Louisiana*, ___ U.S. ___ No. 07-1529 (filed May 26, 2009), the United States took note of the question presented in this case, recognized the validity of *Edwards*, and observed that “*Edwards* would continue to serve as an important supplemental safeguard even if the Court were to impose limits on its duration.” Brief for the United States as Amicus Curiae at 7 n.1, *Montejo v. Louisiana*, No. 07-1529 (April 13, 2009), 2009 WL

1019983. As with *Miranda*, the rule in *Edwards* is clear and easy to apply and has become “embedded in routine police practice.” *Dickerson*, 530 U.S. at 443. Under the doctrine of *stare decisis*, the Court generally will not depart from a constitutional precedent absent “special justification.” *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984). Since *Edwards* was decided in 1981, there has not been a change in circumstances in the outside world to justify a departure from this precedent. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (no showing that circumstances have changed so radically as to undermine the crucial factual assumptions underlying the precedent). Amici curiae the State of Florida, *et al.*, stress the need for law enforcement authorities to solve cold cases. Fla. Br. 21. Surely this same need existed in police work in 1981 and long before that.⁷ Likewise, the need to protect the constitutional right to be free from self-incrimination has not diminished over the years since *Edwards* was decided. Therefore, there is no cause for overruling *Edwards*.



⁷ If anything, the advent of DNA testing in criminal cases since *Edwards* was decided has reduced the need for law enforcement officers to question suspects in order to solve cold cases.

CONCLUSION

The cherished right to be free from compelled self-incrimination is protected only when a suspect in custody “chooses to speak in the unfettered exercise of his own free will.” *Malloy v. Hogan*, 378 U.S. 1, 8 (1964). The Fifth Amendment right to be free from compelled self-incrimination “is protected by the prophylaxis of having an attorney present to counteract the inherent pressures of custodial interrogation, which arise from the fact of such interrogation and exist regardless of the number of crimes under investigation or whether those crimes have resulted in formal charges.” *Roberson*, 486 U.S. at 685. At stake is the need to ensure that government agents respect the “inviolability of the human personality.” *Miranda*, 384 U.S. at 460. The presence of a lawyer requested by a suspect in custody is the mechanism to ensure such respect. Recognizing the evidentiary value of confessions and the need for effective law enforcement efforts to solve crimes and to punish those proven to have violated the criminal law, these needs may still be met while safeguarding individual rights guaranteed by the Constitution. “The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime.” *United States v. White*, 322 U.S. 694, 698-99 (1944). The right to assistance from an attorney during custodial interrogation should not dissipate over time and should not be eroded by

exceptions for a break in custody created on a case-by-case basis.

There is no dispute that, in this case, Respondent did not initiate contact with the police detectives and he had no attorney with him on March 2, 2006, and March 7, 2006. JA 25, 33. Having made a specific request for counsel when he was first interviewed, subsequent questioning initiated by police detectives without counsel present resulted in statements which should have been ruled inadmissible at trial. Therefore, the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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