IN THE
Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

MICHAEL BLAINE SHATZER, SR.,
Respondent.

On Petition for Writ of Certiorari
To The Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

DOUGLAS F. GANSLER
Attorney General of Maryland

BRIAN S. KLEINBORD*
MARY ANN RAPP INCE
Assistant Attorneys General

Office of the Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202
(410) 576-6435

Counsel for Petitioner
**Counsel of Record*

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*?

PARTIES TO THE PROCEEDING

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Michael Blaine Shatzer, Sr. v. State of Maryland*, 405 Md. 585, 954 A.2d 1118 (2008), reversing the judgment of the Circuit Court for Washington County, Maryland, is reproduced in Appendix A. (App. 1a-81a).

The Order of the Court of Appeals of Maryland, *Michael Blaine Shatzer, Sr. v. State of Maryland*, 403 Md. 304, 941 A.2d 1104 (2008), granting certiorari review before judgment in the Court of Special Appeals of Maryland on direct appeal, is reproduced in Appendix B. (App. 82a-83a).

The unreported decision of the Circuit Court for Washington County, Maryland, Case No. 21-K-06-37799, *State of Maryland v. Michael Blaine Shatzer, Sr.*, denying Shatzer's motion to suppress, is reproduced in Appendix C . (App. 84a-98a).

STATEMENT OF JURISDICTION

The decision of the Court of Appeals of Maryland reversing the judgment of the Circuit Court for Washington County, Maryland, was filed on August 26, 2008. This petition is filed within 90 days of the filing of the opinion, as required by Rule 13 of the Rules of the Supreme Court. Therefore, jurisdiction of this Court is properly invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On June 16, 2006, Respondent Michael Blaine Shatzer, Sr., was charged by criminal information filed in the Circuit Court for Washington County, Maryland, Case No. 21-K-06-37799, with a sexual offense in the

second degree, sexual child abuse by a parent, second degree assault, and contributing to conditions rendering a child in need of assistance. The charges were filed in connection with Shatzer's conduct in August, 2003, involving Shatzer's three-year-old son.

Prior to trial, Shatzer moved to suppress his March 2, 2006, inculpatory statements to the police. Following a hearing on the suppression motion on August 29, 2006, the circuit court denied Shatzer's motion to suppress in a ruling in open court on September 14, 2006. (App. 84a-98a). Two witnesses testified at the suppression hearing on August 29, 2006: Detective Shane Blankenship and Detective Paul Steven Hoover. Both officers were assigned to the Criminal Investigation Division of the Hagerstown, Maryland, police department.

Detective Blankenship testified that in August, 2003, he was assigned to the Child Advocacy Center of the Criminal Investigation Division where he received a referral from Brenda Lohman, a social worker also assigned to the Center, regarding Shatzer's son's description of an event involving Shatzer. Detective Blankenship interviewed Shatzer's son, who described an incident in which his father "pulled his pants down, exposed his penis, apparently put milk on his penis and told him to lick his worm, or suck his worm, or something to that effect."

On August 7, 2003, Detective Blankenship contacted Shatzer at the Maryland Correctional Institute, where Shatzer was being held on a sex offense charge involving a different victim. Detective Blankenship told Shatzer that he was a police officer

and read Shatzer his *Miranda* rights.[1] Shatzer indicated that he understood the form, but refused to give a statement, telling Detective Blankenship that he did not want to talk about the case without an attorney present. At that point Detective Blankenship asked Shatzer to contact him when he obtained an attorney, and the interview ended. (*See* App. 85a-86a).

Detective Blankenship testified that he learned at some point in 2006 that there had been a new investigation regarding Shatzer's son's allegations. The case had been assigned to Detective Hoover because Detective Blankenship was on leave at the time the newly-reopened case was assigned. Detective Hoover mentioned the facts of the case to Detective Blankenship, and Detective Blankenship said that he had had the case before and was familiar with it, but he did not "think that there was much conversation about it after that." Detective Blankenship could not recall at the suppression hearing whether he said anything to Detective Hoover about Shatzer's terminating the interview.

Detective Hoover testified at the suppression hearing that on February 28, 2006, social worker Brenda Lohman contacted the police regarding the incident reported by Shatzer's son, and a new investigation was opened and forwarded to the detective. Ms. Lohman advised Detective Hoover that there had been an old investigation, but the disclosure on the initial investigation was not detailed enough to go forward.

Detective Hoover, accompanied by Ms. Lohman, interviewed Shatzer on March 2, 2006, over two and

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

one-half years after the questioning by Detective Blankenship. None of the three, Detective Blankenship, Ms. Lohman or Shatzer, advised Detective Hoover that Shatzer had previously asked for an attorney when he was questioned in 2003. Shatzer expressed surprise to see Detective Hoover, stating that he thought the case was over. Detective Hoover indicated that they had "opened a new file, it's the same allegations."

Detective Hoover read the *Miranda* form to Shatzer, who signed the form and agreed to talk with the officer. Detective Hoover testified that at no time did Shatzer say that he wanted an attorney. Detective Hoover stated that there was no concern in his mind when he interviewed Shatzer that Shatzer understood all of his rights, including the right to have an attorney. At the end of the half hour interview, Detective Hoover asked Shatzer if he would submit to a polygraph examination, and Shatzer agreed to submit to that test.

On March 7, 2006, Shatzer took a polygraph test. Detective Hoover testified at the suppression hearing that the procedure entailed the polygraph operator giving a standardized *Miranda* warning before any questioning or examination procedures commence. Shatzer waived his *Miranda* rights. Shatzer gave a statement, admitting to having masturbated in front of his son but claiming "I didn't force him. I didn't force him." Shatzer then became very emotional, requested an attorney, and the interview stopped. Detective Shawn Schultz, the polygraph examiner, scored Shatzer as failing the test.

The suppression court, in making its factual findings, accepted Detective Blankenship's testimony

that he contacted Shatzer at the Maryland Correctional Institution on August 7, 2003, where Shatzer was incarcerated for a child sexual abuse matter involving a different child. The court further found that, as a result of confusion that Detective Blankenship was an attorney, "or for whatever reason, [Shatzer] refused to talk to the Detective without the presence of an attorney." (App. 85a-86a).

With respect to Detective Hoover's contact with Shatzer, the suppression court found:

> Detective Hoover began an investigation February twenty-eighth, 2006 about the same sexual abuse matter that Detective Blankenship had been investigating back in 2003. Detective Hoover, however, did not know of any previous contact at that time between Detective Blankenship and the defendant nor of any request by the defendant to have an attorney present during any discussions.
>
> New information apparently had arisen because the child was then more mature, able to articulate what had happened to him several years before and the allegations against the defendant were more specific. So, because of that Detective Hoover on March second, 2006 interviewed the defendant at the Roxbury Correctional Institution. Present at that time was Brenda Lohman of the Department of Social Services, who, I believe may have been present on the August seventh, 2003 occasion when he was questioned or attempted to be questioned.
>
> On March second, 200[6] when Detective Hoover was about to question the defendant,

Miranda rights were read to him once again. He signed them, initialed them at the appropriate locations and agreed to speak with the detective. The defendant was surprised that Detective Hoover was there because alle . . . he thought allegations had been disposed of.

Once again, he signed and initialed the document, waiving his *Miranda* rights, did not ask for an attorney. I think he may have said that there was a prior interview with Detective Blankenship but there's no mention, once again, that he previously had requested an attorney. So, that had taken place on March second, 200[6].

Detective Hoover asked him to submit to a polygraph, which he agreed to. On March seventh, apparently, once again *Miranda* was read to him. He submitted to a polygraph and was interviewed once again and did not request the presence of an attorney.

He became very emotional and therefore stopped. Ms. Lohman never said anything to Detective Hoover about the defendant wanting an attorney in the past and Detective Hoover until recently, it appears, did not know of the previous investigation or specifically, that during the investigation, the discussion that Detective Blankenship had with Mr. Shatzer, that he had requested an attorney back in 2003.

Between July of . . . I'm sorry, August seventh, 2003 when Detective Blankenship saw the defendant at MCI and March sixth of 2006, when Detective Hoover interviewed the defendant at RCI, two years and seven months

had transpired and expired.
(App. 86a-87a).

In denying the motion to suppress Shatzer's statements, and rejecting Shatzer's claim that his statements were obtained in violation of *Edwards v. Arizona*, 451 U.S. 477 (1981), the circuit court relied on a state intermediate appellate court ruling, *Clark v. State*, 140 Md. App. 540 , 781 A.2d 913 (2001), *cert. denied*, 365 Md. 527, 796 A.2d 695 (2002). (App. 89a-96a). The suppression court noted that the question in *Clark* was whether a five-year-period between the original assertion of the right to counsel and reinterrogation was enough to "vitiate the *Edwards* requirement that once a defendant asserts his right to counsel, the police cannot go re-interrogate the defendant, even if he waives his Fifth Amendment rights unless and until he has the presence of counsel." (*Id.*). The suppression court stated that in *Clark*, the court found that the five-year period "broke that chain of events for *Miranda* purposes, for Fifth Amendment and Fourteenth Amendment purposes and therefore the statements made after the reinterrogation was not inadmissible as a result of *Edwards*." (*Id.*).

The suppression court found that Shatzer's case was "very similar" because there was "a little bit more than two and a half years gap between the original interrogation, the original questioning by Detective Blankenship, the assertion of his right to counsel and the reinterrogation by Detective Hoover where he waived his right to counsel." The court found that Shatzer was "in custody throughout the entire period of time," "placed back into the general population." (*Id.*). As such, the court held:

> [T]here was a break in custody for *Miranda*

> purposes because of the length of time that he was incarcerated continuously in the Division of Corrections. And because of that the requirements of *Edward[s]*; that is to not question the defendant without having an attorney present once he asserts those rights; did not apply. So, I would find that in this case because of the significant length of time, the fact that the defendant was continuously incarcerated, the fact that he waived his right to *Miranda* two years and seven months after being originally interviewed, the fact that Detective Hoover did not know the defendant had asserted his rights to have an attorney back in August of 2003, all this leads the court to find that the defendant's motion to suppress the statements that he made to Detective Hoover and Detective Schultz in March of 2006 must be denied.

(App. 95a-96a).

Shatzer proceeded to trial on September 21, 2006, on a plea of not guilty submitted on an agreed statement of facts. The agreed statement of facts submitted at trial referred to the minor victim's videotaped account that the victim had performed fellatio on Respondent at Respondent's direction, after Respondent, who was standing naked in the dining room of the family home, had told his son, "[s]uck my private," and had yelled at the victim. The agreed statement also included Shatzer's statements to the police, in which Shatzer denied that his son had touched him, but admitted having masturbated three feet in front of his son and claimed: "I didn't force him. I didn't force him."

Based on the agreed statement, the trial court found Shatzer guilty of sexual child abuse by a parent. The prosecutor entered a *nolle prosequi* to the second degree sexual offenses and the remaining two charges were dismissed as barred on statute of limitations grounds.

Shatzer was sentenced on December 21, 2006, to a term of imprisonment of 15 years, consecutive to any outstanding or unserved Maryland sentence, with five years of supervised probation upon release. Shatzer noted an appeal on December 28, 2006, to the Maryland Court of Special Appeals. On February 13, 2008, the Maryland Court of Appeals issued a writ of certiorari on its own motion, prior to judgment in the intermediate appellate court. (App. 82a-83a).

In an opinion filed on August 26, 2008, the Court of Appeals of Maryland reversed the judgment of the trial court. (App.1a-81a). Citing *Edwards v. Arizona*, the Court of Appeals held that "the passage of time *alone* is insufficient to expire the protections afforded by *Edwards*." (App. 27a). Stating that, "[w]ithout further guidance from the Supreme Court," it would adhere to the bright-line rule of *Edwards*, the Court of Appeals "decline[d] to consider the broad question of whether a break in custody would vitiate the *Edwards* presumption, because even assuming *arguendo* that a break in custody would do so, under the facts of this case, the only event that may support a break in custody was Shatzer's release back into the general prison population in between the two police interrogations." (App. 28a).

The Dissenting Opinion noted the Majority Opinion's "reluctant tone because of the lack of direct guidance from the U.S. Supreme Court regarding

limitations on the breadth of application of the *Edwards* rule," and the fact that "that the 'issue of whether the passage of time could terminate the protections of *Edwards* remains an open question.'" The dissent stated that, for "at least two independent reasons," Shatzer's case provides "sufficient cause not to apply the bright line rule of *Edwards*." (App. 46a). The dissent opined that "[a] break in time of over two years is enough to disengage the blanket rule of *Edwards*," and that "a non-pretextual break in custody here makes inappropriate application of the holding in *Edwards*." (*Id.*).

REASONS FOR GRANTING THE WRIT

As the Maryland court observed (App. 22a-44a), state and federal courts are in conflict regarding application of *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), with respect to a break in custody and a substantial lapse of time before reinterrogation of a suspect who has invoked the right to counsel. Although a majority of courts conclude that a break in custody terminates the *Edwards* prohibition against further questioning of a suspect who invokes the Fifth Amendment right to an attorney (*see* App. 16a-17a & nn.6, 7 (collecting cases)), the matter has not been addressed by this Court. In addition, the issue of what, if any, time limitations apply to application of the *Edwards* rule has not been addressed by the Court. Shatzer's case presents an appropriate case for addressing these issues.

In *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991), the Court chronicled the evolution of the prophylactic rights relating to the Fifth Amendment

guarantee against self-incrimination, beginning with the "concrete constitutional guidelines for law enforcement agencies and courts to follow" set forth in *Miranda v. Arizona*, 384 U.S. 436, 441-44 (1966), which require the police to advise a suspect in custody of various rights, including the right to remain silent and the right to have a lawyer present during questioning. A "second layer of prophylaxis" was set forth in *Edwards*, 451 U.S. at 484-85, permitting police interrogation of an accused who invokes his right to counsel only if "the accused himself initiates further communications, exchanges or conversations with the police." The rule of *Edwards* was expanded in *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990), establishing that, "when 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." The *Minnick* ruling, along with the ruling in *Arizona v. Roberson*, 486 U.S. 675, 677 (1988), that a suspect who has invoked his right to counsel is not subject to further interrogation until counsel is made available, have been construed as establishing through *Edwards* a bright-line rule prohibiting reinterrogation unless an attorney is present or unless the suspect initiates the questioning, regardless of how much time has elapsed or the suspect's release from police custody.

Shatzer's case presents the Court with the opportunity for a two-fold examination of the application of *Edwards* and establishment of an effective prophylactic rule for the assessing an alleged *Edwards* violation. In Shatzer's case, a break in custody and the expiration of a substantial amount of time vitiated the *Edwards* concern of eliminating

police badgering. In addition, the suspect was advised of and waived his *Miranda* rights and agreed to give a statement. Police and prosecutors would be better served by a more pragmatic rule, with fewer negative societal impacts and obviation of the impairment of law enforcement efforts that results under the construction of *Edwards* employed by the Maryland court.

The protections of *Edwards*, which prohibit re-interrogation in the absence of counsel or initiation by the suspect, should terminate when there is a break in *Miranda* custody or a substantial lapse of time. Here, both of those conditions were present. There was a break in custody because, although Shatzer was being held in a correctional institution as an inmate, he was not in police custody for *Miranda* purposes after he invoked his right to counsel. Moreover, there was a two-year and seven-month lapse of time between the invocation of his right and the reinterrogation. Under these circumstances, the concern with eliminating police badgering, which is the goal of *Edwards*, is vitiated, and the police properly should be permitted to reinitiate interrogation to advise the suspect of his *Miranda* rights and ask if he wants to waive those rights and make a statement.

I. This Court has not decided whether a break in *Miranda* custody terminates a suspect's *Edwards* rights and lower courts are divided on the issue.

With respect to a police-initiated encounter after invocation of the right to counsel, the Court indicated in *McNeil* that it was "assuming there has been no

break in custody." 501 U.S. at 177. Based on the language in *McNeil*, the Maryland court recognized that "many courts have found that a break in custody exception exists to the *Edwards* rule, where the defendant was released from custody in the interim." (App. 17a-18a & nn. 6 & 7(collecting cases)). The fact that the Maryland court, in its prior decision in *Blake v. State*, 381 Md. 218, 849 A.2d 410 (2004), *cert. dismissed as improvidently granted, Maryland v. Blake*, 546 U.S. 72 (2005), "observed that '[t]here was no break in custody or adequate lapse of time sufficient to vitiate the coercive effect of the impermissible interrogation,'" supports the need for guidance to the courts, where the Maryland court declined to recognize the break in custody and adequate lapse of time in Shatzer's case. (App. 19a-20a).

In declining to deviate in Shatzer's case from the bright-line rule of *Edwards* to consider whether a break in custody would vitiate the *Edwards* presumption, the Maryland court noted that "[s]ince the dismissal in [*United States v. Green*, 592 A.2d 985 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993)], the Supreme Court has not granted certiorari to consider potential expiration-triggering events of protections afforded in *Edwards*, nor has it ruled that a break in custody terminates the presumption of *Edwards*." (App. 15a-16a). The Maryland court observed that "[c]ommentators and courts have been struggling with how to resolve the question of whether the protective rule of *Edwards* has remained fixed or whether the protection announced by *Edwards* ever ends." The Court of Appeals recognized that some courts have found that a break in custody terminates *Edwards*

protections based upon the rationale that it is "unacceptable" that a suspect be "forever immunized from all police-initiated custodial interrogation." (App. 22a; *see also* App. 30a ("debate continues about the legitimacy and rationale behind recognizing a break in custody exception to *Edwards*").

Subsequent to *Minnick*, the Court reaffirmed that the purpose of *Edwards* was to prevent the police from badgering an accused into waiving his *Miranda* rights. *See Davis v. United States*, 512 U.S. 452, 458 (1994) (*Edwards* "'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights'") (quoting *Michigan v. Harvey*, 494 U.S. 344, 350 (1990)). *Accord Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam) (*Edwards* precludes authorities from badgering or overreaching that might "otherwise wear down the accused and persuade him to incriminate himself."); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (*Edwards* is a "prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was.").

Based upon its claim of a lack of guidance from this Court, the Majority Opinion's interpretation of *Edwards,* amounting to an endorsement of permanent insulation from questioning, does not further the *Edwards* goal of "ensur[ing] that any statement made in subsequent interrogation is not the result of coercive pressures." *See Minnick*, 498 U.S. at 151. Accordingly, this Court should undertake the opportunity this case presents to address and resolve courts' confusion as to the scope of *Edwards.*

A. Absent a ruling by this Court, state and federal courts lack guidance as to whether a break in custody terminates application of the *Edwards* rule.

As the Maryland court recognized, many state and federal courts, based primarily on the Court's language in *McNeil*, 501 U.S. at 177, have recognized a break in custody exception to the *Edwards* rule. (*See* App. 17a-18a & n.6 (citing cases from the 4th, 5th, 6th, 7th, 8th, 10th and 11th federal circuits and from California, Colorado, Florida, Georgia, Kansas, Louisiana, Massachusetts, Mississippi, Missouri, Pennsylvania, and Wyoming)) *See also* Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 Okla. L. Rev. 23 & nn.90, 91 (2000) (listing federal circuits and state courts that "have embraced a rule terminating the *Edwards* presumption when there has been a break in custody"). However, courts have also relied upon prior language of the Court questioning "whether *Edwards* announced a *per se* rule, and, if so what rule," *Oregon v. Bradshaw*, 462 U.S. 1039, 1047-48 (1983) (Powell, J., concurring), concluding on that basis that "[i]f *Edwards* is to be further modified, . . . it is for the Supreme Court to do it." *United States v. Ortiz*, 177 F.3d 108, 110 (1st Cir. 1999), *citing Bradshaw*, 462 U.S. at 1047-51 (Powell, J., concurring). Allowing review of the Maryland court's decision in *Shatzer* would permit the clarification the courts are seeking.

B. Shatzer's return to the Division of Correction population did not constitute custody for purposes of Edwards.

The Maryland court Majority "decline[d] to consider the broad question of whether a break in custody would vitiate the *Edwards* presumption," finding that "Shatzer's release back into the general prison population in between the two police interrogations" amounted to continuous government custody for *Edwards* purposes. (App. 28a-29a). In the view of the Dissenting Opinion, "[t]he Majority Opinion's ruling, combined with the facts and holding of *Roberson*[, 486 U.S. at 675], extends to almost an unfathomable scope." (App. 80a & n.26).

Indeed, other courts have rejected the Maryland court's reasoning. In *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002), *cert. denied*, 538 U.S. 988 (2003), the Eleventh Circuit declined to find that *Edwards* was violated by questioning a defendant who was in custody "only in the sense that he is incarcerated as part of the general prison population." *Id.* at 1266. The court noted that:

> *Edwards* is designed to counteract the "coercive pressures" of being in custody. But for Isaacs, and many other inmates who might have invoked the right to counsel at some past time, incarceration in prison is an accustomed milieu and is far from the potentially coercive situation that gives rise to concerns over police badgering. Therefore, the concerns underlying *Edwards* and its progeny are weaker under the circumstances of this case.

Id. at 1266 (citations omitted). The Eleventh Circuit

concluded that incarceration following a conviction constitutes a break in custody, thereby ending the *Edwards* protections. *Id.* at 1267. *Accord United States v. Arrington*, 215 F.3d 855 (8th Cir. 2000) (when Arrington transferred from police custody to correctional custody, *Edwards* presumption was inapplicable), *cert. denied*, 534 U.S. 1049 (2001).

Likewise, in *State v. Hall*, 905 F.2d 959, 962 (6th Cir. 1990), *cert. denied*, 501 U.S. 1233 (1991), the government argued that statements given three months after invocation of the right to counsel were not barred by *Edwards* because, although Hall remained in jail, he was not "in custody" as the term was used in *Edwards*. The Sixth Circuit noted that one could argue that Hall was more comfortable within the surroundings in which he was interrogated than the two secret service agents who interrogated him. *Id.* at 962. The court reasoned that *Edwards* cannot be interpreted to grant "a blanket protection continuing *ad infinitum*." *Id.* at 963.

In this case, after Shatzer's invocation of the right to counsel, Shatzer was returned to the correctional population, where he remained until his reinterrogation two years and seven months later. Given that the police immediately honored Shatzer's request not to speak without an attorney, and that the police had no contact with Shatzer for several years, there was no concern regarding police badgering in his case. Indeed, Shatzer's lengthy incarceration between the two interrogations resulted in the elimination of any coercive or intimidating process of rearrest and removal back into custody.

The restraints necessarily imposed by incarceration become familiar matters to an inmate and do not

create the coercive circumstances in which it must be presumed that one's will is overborne. (*See* App. 34a ("the *Isaacs*[, 300 F.3d at 1267,] and [*Arrington*, 215 F.3d at 856,] courts both viewed incarceration within the general prison population insufficient to serve as custody for the purposes of the *Edwards* rule") & n.11 (quoting Laurie Magid, *Questioning the Question-Proof Inmate: Defining Miranda Custody for Incarcerated Suspects*, 58 Ohio St. L.J. 883, 935 & n.174 (1997) ("[a]fter *Mathis [v. United States*, 391 U.S. 1, 4- 5 (1968)], numerous state and lower courts expressly held that not all incarceration constitutes *Miranda* custody and that 'incarceration does not *ipso facto* render an interrogation custodial'")).

As courts have recognized, release into the general prison population as a sentenced prisoner terminates both *Miranda* custody and the question-proof status conferred by an earlier invocation of the right to counsel. The inmate who has assumed his routine in prison no longer needs the extra protection that *Edwards* was designed to safeguard. In light of the break in custody issue in Shatzer's case, the Court should grant certiorari review to clarify that the *Edwards* rule precluding reinterrogation is not applicable.

II. The Maryland court's opinion does not serve the purposes of *Edwards* given that the reinterrogation was more than two years after Shatzer invoked his right to an attorney.

The concern and goal of *Edwards* is to prevent police from badgering a defendant into waiving his

previously asserted *Miranda* rights. *See Minnick*, 498 U.S. at 150. When, as in Shatzer's case, the police have honored a suspect's request for counsel for a significant period of time, and renewed questioning occurs only after a substantial time lapse and the suspect's waiver of his *Miranda* rights, the purpose behind the *Edwards* prophylactic rule is not implicated. However, notwithstanding the assumption set forth in *McNeil,* the Maryland court's language in *Blake*, or the holdings of other courts, the Maryland court nonetheless agreed with the District of Columbia Court of Appeals in *United States v. Green*, 592 A.2d at 989, "that 'only the Supreme Court can explain whether the *Edwards* rule is time-tethered.'" (App. 22a).

This Court's decisions applying the *Edwards* rule all involved repeated police-initiated questioning within a short time period after the suspect's arrest and original invocation of the right to counsel. In *Edwards*, the police reinitiated interrogation only one day after the suspect invoked the right to counsel. 451 U.S. at 479. In *Roberson*, 486 U.S. at 678, as well as in *Minnick*, 498 U.S. at 149, the time interval was three days.

After a substantial period of time, however, the presumption that the defendant wishes to proceed only in the presence of counsel is not reasonable. "It is not unusual for a person in custody who previously has expressed an unwillingness to talk or desire to have a lawyer, to change his mind and even welcome an opportunity to talk." *Edwards*, 451 U.S. at 490 (Powell, J., concurring). Thus, it is appropriate to allow the police to approach a suspect, give the *Miranda* warnings again, and determine whether time

has changed his desire to be questioned only in the presence of counsel.

Indeed, the strong dissent in *Minnick* characterized that opinion as establishing "an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can never validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney." 498 U.S. at 156 (Scalia, J., dissenting). The dissent construed the interpretation of the *Edwards* prohibition in that case to be perpetual, stating:

> "Perpetuality" is not too strong a term since, although the Court rejects one logical moment at which the *Edwards* presumption might end, it suggests no alternative. In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well.

Id. at 163. The view of the dissent was that the *Edwards* rule should cease to apply after a consultation with counsel, because the presumption that a confession is the result of "ignorance of rights" or "coercion" would have "no genuine basis in fact." *Id.*

As the Maryland court noted, in 1992 in *United States v. Green*, 592 A.2d at 985, *cert. granted*, 504 U.S. at 908, the Court undertook the question of when the protections of *Edwards* terminate. In that case, Green was arrested in July, 1989 for possession of a

controlled substance with intent to distribute and he invoked his right to counsel. *Id.* at 985. Green was remanded to the custody of juvenile authorities in connection with an unrelated matter. *Id.* at 985-96. In September, 1989 he pled guilty to a lesser included drug offense, and he remained in juvenile custody. *Id.* at 986. Before sentencing, he was charged with an unrelated murder. *Id.* In January, 1990 he was advised of his *Miranda* rights, and he waived his rights and confessed to his involvement in the murder. *Id.*

The District of Columbia Court of Appeals addressed the government's argument that *Edwards*, *Roberson*, and *Minnick* were distinguishable based on the "sheer length of time" between the invocation of the right to counsel and the police questioning. *Id.* at 988. Although agreeing that there was "a substantial argument" that the concern in *Edwards*, of police badgering and coercion, was inapplicable to interrogation five months after invocation of the right to counsel, the D.C. court stated that "only the Supreme Court can explain whether the *Edwards* rule is time-tethered and whether a five-month interval, during which no efforts at custodial interrogation took place, is too long a period to justify a continuing irrebuttable presumption that any police-initiated waiver was invalid." *Id.* at 989. The court held that, until the Supreme Court provided further guidance, as long as the defendant remained in custody, a five month lapse in time did not justify a departure from *Edwards*.[2] This Court did not issue an opinion because

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[2] The court stated that it had "no occasion to decide whether different considerations would come into play if the

Green died during the pendency of the case and the Court dismissed the case after oral argument. 507 U.S. at 545 (1993). Since its dismissal of *Green,* this Court has not decided whether a substantial lapse of time terminates the *Edwards* protection. *Shatzer* now presents the Court with an appropriate opportunity to do so.

Lower state and federal courts have indicated that the protection of *Edwards* terminates after a significant lapse of time. Indeed, in the Maryland intermediate appellate court ruling in *Clark*, 140 Md. App. at 599, 781 A.2d at 947, the court held that a five-year lapse of time between invocation of the right to counsel and re-interrogation terminated the *Edwards* protections when Clark remained in jail during that time. The court rejected the argument that the time lapse made no difference, stating that such a rule "would produce absurd results. It would create a class of prisoners who are forever question-proof." *Id.* The court further stated that applying the *Edwards* rule in that case "would not help achieve *Edwards*'s goal of preventing police badgering, nor would it accomplish any other discernable public good." *Id.* at 599; 781 A.2d at 947-48.

As the Maryland court noted:

> Common sense dictates that, if a rule is devised to prevent badgering a suspect into giving up his right to counsel, and because of an immense time gap, no badgering even arguably occurred, then blind obedience to the rule is not

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defendant, although still in custody, were transferred to the general prison population following imposition of sentence." *Id.* at 990, n.8.

> required. Put another way, when as here, "the factual circumstances of the case fall into a predictable potentially recurring pattern to which the underlying policy of *Miranda* and *Edwards* cease to apply, then so too does the bright-line of *Edwards* cease to shine."

Id., *quoting Kochutin v. Alaska*, 813 P.2d 298, 310 (Alaska Ct.App. 1991) (Bryner, J., dissenting), *vacated on rehearing*, 875 P.2d 778 (1994). Other courts have similarly recognized that coercion should not be presumed when there is a significant lapse of time between invocation of the right to counsel and subsequent reinterrogation and, if the suspect waives his right to counsel, the statements may be admissible. *See Hill v. Brigano*, 199 F.3d 833, 842 (6th Cir. 1999), *cert. denied*, 529 U.S. 1134 (2000); *Holman v. Kannah*, 212 F.3d 413, 419 (8th Cir.) (recognizing a lapse in time as a scenario that will militate against a finding of an *Edwards* violation), *cert. denied*, 531 U.S. 1021 (2000). As the Court has recognized, a bright-line rule is justified only where it fits the problem it is intended to remedy. *McNeil*, 501 U.S. at 182 (guidelines for judicial review of prophylactic rules should be "clear and unequivocal" to "guide sensibly").

Where, as in Shatzer's case, the police waited more than two years and six months after his request for counsel before reinterrogation, and where there was a break in police custody and advisement of *Miranda* rights, it is appropriate to conclude that the *Edwards* presumption of coercion is inapplicable. Accordingly, this Court should grant certiorari review to confirm that, after Shatzer was read his *Miranda* rights, waived those rights and agreed to talk to the police, his statements were properly admitted into evidence.

III. The substantial impairment of law enforcement interests resulting from the Maryland court's interpretation of *Edwards* outweighs any benefit of the application of a bright line prophylactic rule.

Edwards aims to ensure "that any statement made in subsequent interrogation is not the result of coercive pressures." *Minnick*, 498 U.S. at 151. Because of the fact that "subsequent interrogation" is permissible and contemplated, the result of the Maryland Majority Opinion's interpretation is correctly construed by the Dissenting Opinion making suspects "forever unquestionable." (App. 80a (Dissenting Opinion)). As the Dissenting Opinion accurately observes, the Majority Opinion's interpretation of the *Edwards* prophylactic rule discourages police from investigating new leads and impedes resolution of dormant or "cold cases." (*Id.* at 80a-81).

The Dissenting Opinion proposes evaluating the *Edwards* rule under a test akin to and derived from the examinations propounded in *Missouri v. Seibert*, 542 U.S. 600 (2004), for evaluating two-step interrogations. The dissent's proposal is eminently reasonable in cases such as Shatzer's, and would further the goals of police and the public. (*See* App. 59a-66a (Dissenting Opinion)). Under the state court dissent's proposal, reinterrogation of a suspect, following a break in custody and passage of a substantial lapse of time, would be evaluated under one of a combination of three inquiries. A multi-factor test would evaluate if "the [*Miranda*] warnings effectively advise the suspect that he had a real choice

about giving an admissible statement at that juncture." Application of a good faith test would eliminate concern "that the interrogators conspired to avoid the requirements of *Miranda* by delaying an interrogation." Lastly, a curative measures test would "require that where police officers willfully avoid necessary *Miranda* warnings, subsequent statements must be excluded unless 'curative measures are taken.'" *Id.* The evaluation advocated by the Dissenting Opinion serves the goal of ensuring that the defendant who, after requesting counsel, waives his *Miranda* rights following a break in custody and expiration of a substantial lapse of time, "made a rational and intelligent choice whether to waive or invoke his rights." *See Oregon v. Elstad*, 470 U.S. 298, 314 (1985). Evaluation of the *Edwards* rule under the facts of Shatzer's case for the guidance of courts and law enforcement is necessary and warranted.

CONCLUSION

For the foregoing reasons, the State of Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

DOUGLAS F. GANSLER
Attorney General of Maryland

BRIAN S. KLEINBORD*
MARY ANN RAPP INCE
Assistant Attorneys General

Counsel for Petitioner

**Counsel of Record*
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