No. 08-680

In the Supreme Court of the United States

STATE OF MARYLAND,

PETITIONER,

v.

MICHAEL BLAINE SHATZER, SR.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether this Court should create exceptions to the bright-line rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), let alone exceptions that would permit police from the same jurisdiction to reinterrogate a continuously imprisoned suspect about the very same offense as to which he had originally invoked his right to counsel.

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INTEREST OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all fifty states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association ("ABA") recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately thirty-five *amicus curiae* briefs each year in this Court and other courts. NACDL previously has filed *amicus curiae* briefs in this Court in cases, like the present one, involving *Miranda v. Arizona* and the Fifth Amendment right against compelled self-incrimination. *See Maryland v. Blake*, 546 U.S. 72 (2005); *Missouri v. Seibert*, 542 U.S. 600 (2004); *Dickerson v. United States*, 530 U.S. 428 (2000).

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* the NACDL, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief from petitioner and respondent have been lodged with the Clerk of the Court pursuant to Rule 37.3.

SUMMARY OF ARGUMENT

This Court should reaffirm the bright-line rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), and hold that when a suspect invokes his Fifth Amendment right to counsel, the police may not reinitiate interrogation without making counsel available to the suspect, regardless of any alleged break in custody or lapse in time since the invocation of this right. At an absolute minimum, this Court should not permit police to reinitiate interrogation of a suspect concerning the very same offense as to which he invoked the right to counsel, especially where the suspect is incarcerated.

1. In *Edwards*, the Court held that a suspect who has "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." *Id.* at 484–85. Thus, a suspect who has invoked his Fifth Amendment right to counsel in response to custodial interrogation is irrebuttably presumed unable to waive that right *unless* (1) counsel is present or (2) the suspect reinitiates communication with police. This rule serves to protect the right against self-incrimination by enforcing a suspect's choice to talk with police only through an attorney. The rule is also necessary in order to provide judges, law enforcement, and citizens clear guidance respecting the boundaries of the Fifth Amendment right to counsel.

2. The State urges this Court to create exceptions to the *Edwards* presumption following a substantial passage of time, a break in custody, or both. Each of

these proposed exceptions contravenes *Edwards*'s dual purposes.

a. The State's proposed "substantial period of time" exception to *Edwards* rests upon the erroneous assumption that a suspect's beliefs about the coercive pressures of custodial interrogation are altered with the passage of time. However, the mere passage of time presents nothing from which to "deduce that [a suspect's] original belief in his vulnerability to the pressures of custodial interrogation [has] diminished." *United States v. Green*, 592 A.2d 985, 989 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993). Furthermore, no principled basis exists for determining how much time must pass before *Edwards* would expire. Without a specific expiration period, a "substantial passage of time" exception would be arbitrary and would significantly erode *Edwards*'s bright-line rule.

b. A break-in-custody exception would also fatally undermine the *Edwards* rule. *Edwards* protects a suspect who has indicated he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney. This discomfort is precisely the state of mind that *Edwards* presumes to persist …." *Arizona v. Roberson*, 486 U.S. 675, 684 (1988). A break in custody between interrogations does not change the pressures of custodial interrogation that initially gave rise to a suspect's belief that he is unable to bear police questioning without counsel. Moreover, a break-in-custody exception would serve only to increase these pressures by incentivizing police to badger suspects through repetitive catch-and-release tactics.

c. A combined substantial passage-of-time and break-in-custody exception would also defeat *Edwards*'s objectives. Courts applying a combined exception reason that *Edwards* should no longer apply following a break in custody when a suspect has sufficient time to contact a lawyer. This Court's decision in *Minnick v. Mississippi*, 498 U.S. 146, 153–54 (1990), discredits that reasoning. Furthermore, a combined exception would not reduce incentives for police to badger suspects.

3. Even if this Court were inclined to consider a break-in-custody exception to *Edwards*, the Court should not create such an exception in this case because, as a prison inmate, Shatzer remained in continuous custody since invoking his Fifth Amendment right to counsel. A person is in custody for *Miranda* purposes if a reasonable person would understand he was under "formal arrest" or restrained in his "freedom of movement [to] the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994) (internal quotation marks and citation omitted). Because *Edwards* is a corollary of the *Miranda* rule, this "reasonable person" standard for custody controls *Edwards* cases.

A reasonable person would understand incarceration within the general prison population as a restraint on his freedom of movement at least equal to that of formal arrest. A person who is not just temporarily arrested, but who is imprisoned for a set term under government control is, *a fortiori*, in custody. The realities of prison life support this conclusion: prison exerts pressure on inmates by physically confining them, reducing their expectations of privacy, placing them under constant surveillance,

and pressuring them into cooperating with authorities to be eligible for parole. Unlike a person not in custody, a prisoner cannot "shut his door or walk away to avoid police badgering." *Montejo v. Louisiana*, 77 U.S.L.W. 4423, 4428 (U.S. May 26, 2009) (No. 07-1529).

4. At the very least, the Court should affirm because here, police within the same jurisdiction resumed interrogating Shatzer regarding the very offenses under investigation when he originally invoked the right, yet failed to provide him counsel. Protection against coerced waiver of the right to counsel in these circumstances is at the very core of *Edwards*. Once a suspect has invoked the right to counsel in a particular investigation, a court should presume at a minimum that a suspect desires assistance from counsel as to (1) all interrogation prior to a break in custody and (2) any further government-initiated interrogation regarding that offense. This presumption is essential to ensure that the government does not coerce a suspect into waiving his right to counsel after he already invoked that right as to the same offense, especially where the suspect is imprisoned.

ARGUMENT

I. THE *EDWARDS* BRIGHT-LINE RULE PROHIBITS *ANY* CUSTODIAL REINTERROGATION OF A SUSPECT UNTIL COUNSEL IS PRESENT OR THE SUSPECT INITIATES FURTHER COMMUNICATION

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court established a clear and effective rule to protect a suspect who invokes his Fifth Amendment right to

counsel against the coercive pressures of custodial interrogation. A suspect's assertion of the right to counsel is a "significant event." *Id.* at 485. Accordingly, the Court held that a suspect who has "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." *Id.* at 484–85. In other words, police may reinterrogate a suspect who has invoked the right to counsel and who is in custody only (1) when counsel is present or (2) when the suspect himself initiates further discussion. The Court emphasized that "it is inconsistent with *Miranda* … for the authorities, at their insistence, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." *Id.* at 485. *Edwards* thus "established a second layer of prophylaxis for the *Miranda* right to counsel." *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991). This "bright-line, prophylactic *Edwards* rule" has been in place for nearly thirty years. *Arizona v. Roberson*, 486 U.S. 675, 682 (1988).

Edwards serves both substantive and administrative purposes. Substantively, *Edwards* protects the right against self-incrimination by preventing police from badgering a suspect into "'waiving his previously asserted *Miranda* rights.'" *Davis v. United States*, 512 U.S. 452, 458 (1994) (citation omitted); *see also Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) ("The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures."). In particular, *Edwards* protects the right against self-incrimination by

enforcing a suspect's choice to talk with police only through an attorney. "Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* and its progeny …." *Patterson v. Illinois*, 487 U.S. 285, 291 (1988); *see also Texas v. Cobb*, 532 U.S. 162, 175 (2001) (Kennedy, J., concurring) (*Edwards* "protect[s] a suspect's voluntary choice not to speak outside his lawyer's presence").

Edwards's protection thus ensures that a vulnerable suspect will be able to take advantage of the many benefits of having counsel present during custodial interrogation. First, counsel can modulate an officer's potentially overbearing conduct. *See, e.g.*, *Edwards*, 451 U.S. at 479 (officer insisted that suspect speak with police despite request for counsel). Second, counsel can advise the suspect of his rights. Despite a *Miranda* warning, suspects often misunderstand the implications of speaking with police. *See, e.g.*, *Connecticut v. Barrett*, 479 U.S. 523, 525–26 (1987) (suspect refused to make a written statement without an attorney, but agreed to speak with police orally). Third, counsel can assist in creating a dependable record of the interrogation. Fourth, counsel can advise a suspect regarding the advantages of a potential plea bargain to aid law enforcement in solving past or ongoing crimes.

Administratively, the *Edwards* bright-line rule—like the *Miranda* rule this Court reaffirmed in *Dickerson v. United States*, 530 U.S. 428 (2000)—provides judges and law enforcement with a clear and easily enforceable line demarking the boundaries of the right to counsel. As this Court observed in *Minnick*, "[t]he merit of the *Edwards* decision lies in the clarity

of its command and the certainty of its application." 498 U.S. at 151. "[T]his Court has praised *Edwards* precisely because it provides clear and unequivocal guidelines to the law enforcement profession. Our cases make clear which sorts of statements trigger its protections, and once triggered, the rule operates as a bright line." *Montejo v. Louisiana*, 77 U.S.L.W. 4423, 4429 (U.S. May 26, 2009) (No. 07-1529) (quotation marks and citations omitted).

This bright-line rule protects the rights of the accused, *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam), and aids law enforcement alike, by ensuring that confessions are reliable and admissible, *Davis*, 512 U.S. at 461. The "'rigid[ity]'" of the rule is thus a "'virtue'": It "'inform[s] police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.'" *Roberson*, 486 U.S. at 681–82 (1988) (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)); *see also Minnick*, 498 U.S. at 151 (*Edwards*'s clarity "conserves judicial resources which would otherwise be expended in making difficult determinations, and implements the protections of *Miranda* in practical and straightforward terms"). "Surely there is nothing ambiguous about the [*Edwards*] requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation ….'" 486 U.S. at 682 (quoting *Edwards*, 451 U.S. at 484).

This Court repeatedly has reaffirmed *Edwards*, explaining that once a suspect in custody has invoked his right to counsel, reinterrogation without counsel

present "may *only* occur if 'the accused himself initiates further communication.'" *Roberson*, 486 U.S. at 680–81 (emphasis added) (quoting *Edwards*, 451 U.S. at 485). In *Minnick*, the Court confirmed that *Edwards* "bar[s] police-initiated interrogation unless the accused has counsel with him at the time of questioning." 498 U.S. at 153. The Court's language was unequivocal: "Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present …." *Id.* More recently, in *Montejo v. Louisiana*, the Court described *Edwards* in similarly unambiguous terms: "[A] defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but 'badgering' by later requests is prohibited." 77 U.S.L.W. at 4428. Thus, once a suspect invokes his right to counsel, "*any* subsequent conversation [in the absence of counsel] must be initiated by [the suspect]." *Solem v. Stumes*, 465 U.S. 638, 641 (1984) (emphasis added); *see also Shea v. Louisiana*, 470 U.S. 51, 52, 54–55 (1985); *Wyrick v. Fields*, 459 U.S. 42, 45–46 (1982) (per curiam). Indeed, the United States, as *amicus curiae*, acknowledges that the Court's decisions in *Edwards*, *Roberson*, and *Minnick* suggest that *Edwards* is an absolute rule. United States Br. 13–14.

A straightforward application of *Edwards* to this case compels affirmance of the Maryland Court of Appeals' decision. No party disputes that Shatzer was in custody during his initial interrogation in August 2003 or that Shatzer validly invoked his right to

counsel at that time. *See* JA 10, 12, 19. Likewise, no party disputes that Shatzer was in custody during the second set of interrogations in March 2006. *See* JA 24, 28–32, 35–36; United States Br. 21. Because Shatzer already had invoked his right to counsel before the March 2006 interrogation, his alleged waiver of this right during questioning initiated by the police was invalid under *Edwards*. Having once invoked his right to counsel in response to custodial interrogation, Shatzer was "not subject to further interrogation by the authorities until counsel has been made available to him." *Edwards*, 451 U.S. at 484–85.

II. NONE OF THE STATE'S PROPOSED EXCEPTIONS TO *EDWARDS* ARE CONSISTENT WITH PRECEDENT OR LOGIC

The State and *amici* urge this Court to reverse the decision below by creating new exceptions to *Edwards*: (1) following a "substantial passage of time," Pet. Br. 24–28; (2) following a break in custody, Pet. Br. 20–24; United States Br. 11–14; or (3) following both a break in custody and a substantial passage of time, Pet. Br. 28, 32. Each of these exceptions is at odds with *Edwards*'s objectives.

A. The Court Should Not Create a "Substantial Passage of Time" Exception to *Edwards*

1. The *Edwards* rule has no passage-of-time exception. In *Edwards*, *Roberson*, and *Minnick*, the Court made clear that once a suspect in custody has expressed his desire to communicate through counsel, police may not initiate any further questioning in the absence of counsel. Although the time period between

the defendant's initial invocation of the right to counsel and reinterrogation in those cases was short, *see* Pet. Br. 26 (citing *Minnick*, 498 U.S. at 148–49 (three days); *Roberson*, 486 U.S. at 678 (three days); *Edwards*, 451 U.S. at 479 (one day)), these cases do not suggest that the *Edwards* presumption has an expiration date. If anything, a longer time period in government control warrants more—not less—protection.

The Court's failure to reference a time limit in *Edwards* should be juxtaposed with *Michigan v. Mosley*, 423 U.S. 96 (1975), decided only six years earlier. In *Mosley*, the Court concluded that a suspect's Fifth Amendment right to remain silent was "scrupulously honored" when the police immediately ceased interrogating and resumed questioning only after "the passage of a significant period of time." *Id.* at 104, 106. The Court expressly rejected the notion that the *right to silence*, once invoked, could persist indefinitely: "Clearly … neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to *remain silent*." *Id.* at 102–03 (emphasis added); *see also id.* at 101 n.7 (stressing that the case did not involve the right to counsel).

Justice White, concurring in *Mosley*, recognized the need for fundamentally different and greater protection of the right to counsel. When the right to counsel is invoked, police have no reason to "keep the lines of communication open"; instead, the police must communicate with the suspect through an attorney. *Id.* at 110 n.2 (White, J., concurring). Once "[t]he accused [has] expressed his own view that he is not competent

to deal with the authorities without legal advice," a court "may properly … view[] with skepticism" "a later decision at the authorities' insistence to make a statement without counsel's presence." *Id.*

In deciding *Edwards* just six years later, the Court rejected the notion that police could "scrupulously honor" the right to counsel by reapproaching a suspect after a significant period of time. Instead, the *Edwards* Court embraced Justice White's view in *Mosley* that the right to counsel requires greater protection. *Edwards*, 451 U.S. at 485; *see also Roberson*, 486 U.S. at 681. By declining to apply the *Mosley* standards to the right to counsel, the Court reached a considered decision that the *Edwards* presumption is not time-limited.

The State's substantial reliance on *Mosley* to limit *Edwards*'s applicability and to support a passage-of-time exception is thus both misplaced and ironic. Pet. Br. 14–15, 30, 31. The State's argument based on *Mosley* is *mistaken* for the same reason that led the Court in *Edwards*, and again in *Roberson*, to reject it. "[A]s *Mosley* made clear, a suspect's decision to cut off questioning, *unlike his request for counsel*, does not raise the presumption that he is unable to proceed without a lawyer's advice." *Roberson*, 486 U.S. at 683 (emphasis added); *see also Edwards*, 451 U.S. at 485.

The State's reliance on *Mosley* is *ironic* because, despite the State's contrary suggestion, Pet. Br. 30, the Court did not hold that the passage of two hours' time between interrogations was sufficient in and of itself to satisfy the obligation to scrupulously honor Mosley's rights. Instead, the Court relied heavily upon the fact that Mosley's second interrogation pertained to an entirely unrelated investigation, observing that the

"questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies." *Mosley*, 423 U.S. at 104–05; *see also id.* at 105–06 ("This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning" in part because the police "restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."). *Mosley* decidedly does not suggest that the mere passage of time could validate reinterrogation of a suspect who has invoked the right to counsel, let alone validate reinterrogation about the very same offense as to which the suspect had invoked that right.

2. The Court should not now introduce an exception to *Edwards* that voids its protection over time. NACDL is not aware of any court that has held that the mere passage of time can dissolve *Edwards* protection. The absence of such a decision is no surprise. The State's proposed "substantial period of time" exception rests upon the false assumption that the coercive pressures of custodial interrogation diminish over time. However, "there is nothing in the lapse of time itself from which to deduce that [a suspect's] original belief in his vulnerability to the pressures of custodial interrogation [has] diminished." *United States v. Green*, 592 A.2d 985, 989 (D.C. 1991), *cert. granted*, 504 U.S. 908 (1992), *cert. dismissed*, 507 U.S. 545 (1993). Instead, coercion is likely to *increase* over time. In part because of the mounting coercive pressures of custodial interrogation, the Court concluded in *Minnick* that a suspect's opportunity to consult with counsel is insufficient to lift *Edwards*

protection even when the suspect in fact had consulted with counsel. The Court reasoned that "the coercive pressures that accompany custody … may increase as custody is prolonged." 498 U.S. at 153.

A suspect who has been incarcerated since the initial invocation of the right to counsel is subject to added coercive pressures over time. *Infra* at 15; *see also* Marcy Strauss, *Reinterrogation*, Hastings Const. L.Q. 359, 398 (1995) ("The atmosphere of incarceration works to undermine a person's free will over time, not enhance it."). As a prisoner serves his sentence, pressure builds on a prisoner to waive the right to an attorney and talk to police to curry favor for parole, good-time credits, or similar rewards. A time-based exception to *Edwards* would only increase these coercive pressures by creating an incentive for police to wear down a prisoner who has invoked his right to counsel. Indeed, a passage-of-time exception is particularly inappropriate for a suspect in continuous custody when the suspect has done nothing to indicate he has changed his mind about talking directly to police despite ample opportunity. A suspect in continuous custody need only inform the guards nearby that he wants to speak with police. *See id.* at 402–03.

Indeed, the longer the government disregards a suspect's request for counsel, the more likely a suspect will be to conclude that the government has no interest in honoring his request—thereby increasing the suspect's sense of coercion. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion

to speak the suspect may be feeling." *Roberson*, 486 U.S. at 686.

3. A time-based exception also would significantly erode *Edwards*'s clarity, undermining its administrative simplicity. Police and courts would become embroiled in case-by-case analysis regarding when and whether the passage of time has sufficiently removed the coercive pressures of custodial interrogation to permit reinterrogation. "At what point in time and in conjunction with what other circumstances does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part?" *Green*, 592 A.2d at 989. Would the conditions of the suspect's confinement during the lapse in interrogation be relevant to the amount of time that must pass before *Edwards* expires? What should courts look to in order to determine whether the exception triggers?

The Court should not reject the clear and easily administrable *Edwards* rule simply because it places responsibility upon police to determine whether a suspect has previously invoked the right to counsel. *See* United States Br. at 20. *Edwards* "attach[es] no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel." *Roberson*, 486 U.S. at 687. That same responsibility to respect a suspect's request should apply across jurisdictions. Courts often have imputed knowledge that a suspect invoked his right to counsel from one jurisdiction to another, recognizing that governments often work as teams. *See United States v. Scalf*, 708 F.2d 1540, 1544–45 (10th Cir. 1983) (per curiam). By imputing the knowledge of

the initial interrogator to other officers, "[l]aw enforcement officers working in teams should be discouraged from violating the accused's constitutional rights by failing to ascertain or advise one another whether those rights had been previously asserted." *United States v. Downing*, 665 F.2d 404, 407 (1st Cir. 1981); *see also White v. Finkbeiner*, 687 F.2d 885, 887 n.9 (7th Cir. 1982) ("[I]t would be inconsistent with *Edwards* to find [the defendant's] confession admissible because the second interrogators were not informed of his request for counsel. To so hold would be tantamount to creating a 'good faith' exception to the *Edwards* rule … and might permit relatively easy circumvention of [*Edwards*]."), *vacated on other grounds*, 465 U.S. 1075 (1984).[2] Most fundamentally, "*Edwards* focuses on the state of mind of the suspect and not of the police." *Roberson*, 486 U.S. at 687.

4. To be sure, the Court could preserve the benefits of a bright-line rule by selecting an arbitrary time period after which *Edwards*'s protections would lapse. But taking this step would be inconsistent with this Court's constitutional criminal procedure jurisprudence. Indeed, the Court has been particularly reluctant to specify a fixed time period for determining when an accused's constitutional rights have been denied where, as here, varying circumstances make it "impossible to determine with precision" where the

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[2] In any event, this case involves police from the same detective unit who failed to check an easily accessible record documenting Shatzer's invocation of the right to counsel, the Court has no reason to address Petitioner's concerns about holding police from a different jurisdiction responsible for a suspect's past invocations of the right to counsel. *See* Pet. Br. 31; United States Br. 20.

Court should draw the line. *Barker v. Wingo*, 407 U.S. 514, 521 (1972). For example, the Court has declined to identify a particular time period within which a trial must be held to satisfy the Speedy Trial Clause. Observing that the varying circumstances make it impossible to "say how long is too long," the Court declined to specify particular limits in this context. *Id.* at 521–23. Likewise, in this case, no principled basis exists for selecting a particular time period after which *Edwards* protection no longer applies, and the appropriate time period might well vary depending upon the circumstances of custody. Because any time-based exception would thus be arbitrary and lead to widely inconsistent results, the Court should decline to create one.

B. The Court Should Not Create a Break-in-Custody Exception to *Edwards*

The State "has not denied that respondent was 'in custody' for purposes of both *Miranda* and *Edwards* during the August 7, 2003 and March 2006 interviews and that he was subject to 'interrogation' during those times." United States Br. 21. Instead, the State argues that Shatzer was not in custody during the time period between these two interrogations and that this alleged break in custody should serve to terminate the effects of Shatzer's prior request for counsel.

The "break-in-custody" exception the State advocates would be inconsistent with the *Edwards* rule. This Court has never held that *Edwards* permits renewed custodial interrogation following a break in custody, nor should it now. *Edwards* protects a suspect who has indicated he does "not feel sufficiently comfortable with the pressures of custodial interrogation to answer questions without an attorney.

This discomfort is precisely the state of mind that *Edwards* presumes to persist …." *Roberson*, 486 U.S. at 684. The *Edwards* presumption should not disappear simply because police have released the suspect from custody and given him some time to consider going it alone.

The State's flawed argument rests on a misreading of language in *McNeil v. Wisconsin*, 501 U.S. 171 (1991). In *McNeil*, the Court observed in dicta that a suspect's statements should be presumed involuntary "assuming there has been no break in custody." *Id.* at 177. But this language simply acknowledges that *Edwards* does not apply when a suspect is not in custody. The Court's recent discussion in *Montejo* properly frames the role of custody and the limits of *Edwards* protection. "If the defendant is not in custody then [the *Miranda-Edwards* regime] do[es] not apply; nor do they govern other, noninterrogative types of interactions …." 77 U.S.L.W. at 4428. In short, *Edwards* does not forbid police from asking suspects questions when suspects are not in custody. If a suspect is placed back into custody, however, *Edwards* continues to protect a suspect who has clearly indicated that he is unable to handle the coercive pressures of custodial interrogation without counsel.

A fresh *Miranda* warning does not somehow rebut the *Edwards* presumption by vitiating the coercive environment of reinterrogation. If police reapproach a suspect who has previously invoked his right to counsel, that suspect may well assume that invoking his right is not effective and forego invoking his rights. "[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without

counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Roberson*, 486 U.S. at 686. When again confronted with a renewed interrogation, the suspect may not be able to resist the coercive environment he perceives. "[T]he mere repetition of the *Miranda* warnings [should thus] not overcome the presumption of coercion …." *Id.*

Indeed, the second custodial interrogation is, if anything, more intimidating. A suspect should not be penalized if he fails to make a second request for counsel in that highly charged environment. "[I]f any assumption can be made, it should be that a suspect in this position would want to pursue precisely the same course as before: that is, deal with the police only with the buffer and protection of counsel." Strauss, *supra*, at 389. Although a break in custody can lessen the restrictions upon a suspect's freedom for a short time, the break does not enhance his ability to handle the coercive pressures of renewed custodial interrogation, nor does his failure to persist in demanding counsel imply a change of heart.

If the *Edwards* presumption expired upon a break in custody, courts would be granting police license to badger suspects. Police could easily adopt a repetitive "catch-and-release" approach to questioning suspects who invoke their Fifth Amendment right to counsel. Indeed, lower court decisions applying a break-in-custody exception all but sanction this approach by, in some cases, denying *Edwards* protection to suspects released and then subjected to custodial reinterrogation the *next day* or even within a matter of *hours*. *See, e.g.*, *Dunkins v. Thigpen*, 854 F.2d 394, 396–97 (11th Cir. 1988) (police picked up defendant at

work the morning after defendant attempted to invoke his Fifth Amendment right to counsel), *cert. denied*, 489 U.S. 1059 (1989); *State v. Alley*, 841 A.2d 803, 809–10 (Me.) (police released and then recaptured suspect within six hours), *cert. denied*, 541 U.S. 1078 (2004). These catch, release, and recapture tactics enhance the coercive pressures a suspect faces by creating a harassing, uncertain environment.

A so-called break-in-custody exception also would undermine the clarity of *Edwards*'s bright-line rule. This Court has recognized that "the task of defining 'custody' is a slippery one …." *Oregon v. Elstad*, 470 U.S. 298, 309 (1985). Yet under the State's proposal, judges and "[p]olice officers would be forced to make difficult judgment calls" regarding when the suspect has been released from custody to trigger this exception. *Davis*, 512 U.S. at 461. For example, a break-in-custody exception would unnecessarily complicate a court's custody analysis as applied to inmates. Prisoners in the general prison population share common restrictions on their freedom. But if *Edwards* depended on the level of a prisoner's confinement, inmates frequently would pass in and out of custody with modifications in their conditions of incarceration. "Vagaries of this sort spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle." *Minnick*, 498 U.S. at 155. Given this difficulty, this Court should eschew a regime "in which *Edwards* protection could pass in and out of existence multiple times." *Id.* at 154–55.

C. The Court Should Not Create a Combined Break-in-Custody and Passage-of-Time Exception to *Edwards*

The State offers the Court a third possible exception to *Edwards*, combining a break in custody with the passage of time. Pet. Br. 28–32. The Court should reject this composite approach, which suffers from the same defects as its component parts.

An *Edwards* exception that combines a break in custody with a passage of time is based in part upon the premise that a break in custody "give[s] the suspect reasonable time and opportunity, while free from coercive custodial pressures, to consult counsel." *People v. Storm*, 52 P.3d 52, 63 (Cal. 2002) (emphasis omitted), *cert. denied*, 537 U.S. 1127 (2003). This idea is largely derived from two pre-*Minnick* cases, *United States v. Skinner*, 667 F.2d 1306 (9th Cir. 1982), *cert. denied*, 463 U.S. 1229 (1983), and *Dunkins v. Thigpen*, 854 F.2d 394 (11th Cir. 1988), both of which placed significance on the suspect's opportunity to consult with counsel while each was released from custody. *See Dunkins*, 854 F.2d at 397 ("If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why *Edwards* should bar the admission of any subsequent statements."); *Skinner*, 667 F.2d at 1309.

The Court has long since rejected this logic. In *Minnick*, the Court concluded that the opportunity to consult counsel neither negates a suspect's request to communicate with police only through counsel nor "remove[s] the suspect from persistent attempts by officials to persuade him to waive his rights." 498 U.S. at 153. Providing a suspect the opportunity to consult with counsel while out of custody is not a substitute for

the presence of counsel during interrogation. Strauss, *supra*, at 388.

The sole virtue of combining a break-in-custody exception with a passage-of-time requirement would be to reduce the incentive for police to rely on pretextual breaks in custody to evade *Edwards*. Yet simply placing a time buffer between two custodial interrogations does not eliminate this incentive structure. Without the clarity of the *Edwards* rule, courts will engage in a case-by-case analysis that likely would encourage badgering through pretextual catch-and-release reinterrogation within short time intervals.

Designating a specific time period after which *Edwards* expires following a break in custody would provide some clarity, but the costs of this approach far outweigh the benefits. As discussed above, drawing the line would be both arbitrary and difficult. *Supra* at 16–17. Without a principled basis for drawing the line, doing so would be both challenging and dangerous. If the time period is too short, "the fear of badgering and coercing confessions … becomes all too real." Strauss, *supra*, at 397. Police would have a clear timetable for badgering suspects.

The Court should be particularly hesitant to recognize a combined exception in light of its recent ruling in *Montejo v. Louisiana*. In *Montejo*, the Court overturned the rule of *Michigan v. Jackson*, which protected an accused's Sixth Amendment right to counsel by "forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding." 77 U.S.L.W. at 4424 (citing *Michigan v. Jackson*, 475 U.S. 625, 636 (1986)). In *Montejo*, the Court emphasized that overruling *Jackson* did not deprive suspects of the

right against compelled self-incrimination because *Edwards* sufficiently protected that right. The Court observed that "the *Miranda-Edwards-Minnick* line of cases … *is not in doubt*." *Id.* at 4428 (emphasis added).

The Court further explained that because the *Edwards* "regime suffices to protect the integrity of 'a suspect's voluntary choice not to speak outside his lawyer's presence,' before his arraignment, it is hard to see why it would not also suffice to protect that same choice *after arraignment*." *Id.* (quoting *Cobb*, 532 U.S. at 175 (Kennedy, J., concurring) (emphasis added). Because states generally do not take defendants back into police custody following arraignment, but release them on bail or send them to a regional detention facility, *Montejo* clearly contemplates that *Edwards*'s protection does not end the moment a suspect leaves the police. More broadly, the Court in *Montejo* "change[d] the legal landscape … in part based on the protections already provided by *Edwards*," leaving *Edwards* as a suspect's main protection against custodial interrogation after arraignment. *Id.* at 4429; *see also id.* at 4428 ("*Jackson* is simply superfluous."); *id.* (noting that there is no reason to retain *Jackson* if the policies underlying the *Jackson* rule are "being adequately served" through *Edwards*). The Court should decline to undermine the sufficiency of the *Edwards* regime to protect suspects' Fifth Amendment right to counsel by creating new exceptions to *Edwards*'s clear and unequivocal guidelines.

III. BECAUSE SHATZER WAS CONTINUOUSLY "IN CUSTODY," A BREAK-IN-CUSTODY EXCEPTION WOULD NOT APPLY IN THIS CASE

Even if this Court were inclined to consider a break-in-custody exception to *Edwards*, the Court should not create such an exception in this case because, as a prison inmate, Shatzer remained in continuous custody since he initially invoked his Fifth Amendment right to counsel. Incarcerated prisoners such as Shatzer are "in custody" for purposes of both the *Miranda* and *Edwards* prophylactic rules. To hold otherwise would ignore the reality that the prison environment places precisely the restrictions on freedom that *Miranda* and *Edwards* held were presumptively coercive.

1. To determine whether a defendant is "in custody" for *Miranda*, this Court employs a reasonable-person approach. "[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *see also Stansbury v. California*, 511 U.S. 318, 323 (1994) ("[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on … subjective views …."). "'[T]he ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'" *Stansbury*, 511 U.S. at 322 (citation omitted) (alteration in original). Thus, a defendant is "in custody" for *Miranda* purposes if a reasonable person would understand he was under "formal arrest" or restrained in his "'freedom of movement [to] the degree associated with a formal

arrest.'" *Id.* (citation omitted); *see also Berkemer*, 468 U.S. at 442.

A reasonable person would undoubtedly understand incarceration as a restraint on his freedom of movement to at least the degree associated with formal arrest. While prisons may vary in their conditions of confinement, all prisons share four common factors that create a particularly coercive environment. First, prison "deprive[s] [inmates] of [their] freedom … in [a] significant way." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966). Prisoners are physically confined in a limited space, often in the same place and sometimes alone for several hours each day. In addition to the physical limits, inmates can only go places and do things as the prison authority permits. Second, prisoners have reduced expectations of privacy as recognized under this Court's Fourth Amendment jurisprudence. *See Hudson v. Palmer*, 468 U.S. 517, 527 (1984). Without an expectation of privacy, a prisoner can feel powerless to resist the authorities' requests. Third, the government places prisoners under constant surveillance. The government's ever-watching eye reminds the prisoner that the government controls his life. Fourth, prisoners often have pressure to cooperate with authorities, including pressure to speak with police without counsel because many state governments—including Maryland—consider a prisoner's cooperation with law enforcement authorities favorably for purposes of parole. *See, e.g.*, Md. Code Regs. 12.08.01.18(A)(3) (2009) (considering "[t]he offender's behavior and adjustment" and "[t]he offender's current attitude toward society, discipline, and other authority" for parole).

The custodial pressures of prison stand in stark contrast to the freedoms a citizen enjoys when not in custody. "When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering." *Montejo*, 77 U.S.L.W. at 4428. On the other hand, when an inmate is incarcerated, he is not in a position to avoid police, but is restricted in a location where police can easily question him. A prisoner's long-term confinement and accessibility to police make him very different from those people who the government has temporarily restricted, but whom it has *not* placed in custody for *Miranda* purposes. Unlike people subject to a traffic or *Terry* stop, prisoners are restricted in their freedom for far longer than a "temporary and brief" time and are "completely at the mercy of the [State]." *Berkemer*, 468 U.S. at 437-38. This stark contrast in time and control between a prisoner and the suspect questioned during a traffic stop in *Berkemer* support holding that a prisoner is in custody for *Miranda* purposes.

Just as incarcerated prisoners are "in custody" for *Miranda* purposes, they are equally "in custody" for *Edwards* purposes. *Edwards* is a "corollary to *Miranda*[]," *Roberson*, 486 U.S. at 680. Accordingly, the definition of custody should be the same in both contexts. As the United States points out in its brief, "[i]t is logical to use the same definition of 'custody' for purposes of both the rule and its corollary …." United States Br. 19. Both *Miranda* and *Edwards* established rules to protect suspects' Fifth Amendment rights against coercion during custodial interrogation. *Edwards*, 451 U.S. at 484–85; *Miranda*, 384 U.S. at 474. Such coercion can take the form of badgering in police custody or the more subtle pressures of incarceration.

Both are "inherently coercive." *Barrett*, 479 U.S. at 531. Statements made in this context after the invocation of counsel are presumed to be "the product of compulsion, *subtle or otherwise*." 384 U.S. at 474 (emphasis added).

2. In contrast to this Court's common-sense, reasonable-person approach to custody, the State argues for an unpredictable approach that misapplies precedent. Specifically, the State argues that prisoners are not "in custody" for *Miranda* or *Edwards* if the police do not badger the suspect or place a suspect in circumstances distinct from those to which he is routinely exposed as an incident of incarceration. Pet. Br. 22–24. According to the State, "[r]estraints 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." Pet. Br. 22. Only after an interrogator "[i]mpos[es] … *additional* restraint" will a suspect "return … to a custodial state and [be] entitle[d to] … *Miranda* warnings before any interrogation." Pet. Br. 23 (emphasis added). This argument is fundamentally flawed because it ignores this Court's reasonable-person approach from *Berkemer* and instead applies an alternative, erroneous concept of custody.

The State's analysis erroneously requires courts to discount what a reasonable person might think of prison and instead to assume that inmates have grown so accustomed to prison that the coercive pressure of incarceration somehow evaporates. Pet. Br. 22–24; *see also* United States Br. 18. In other words, to evaluate whether a prisoner is "in custody" under this approach, courts must reset the baseline against which the

coercive pressures of custodial interrogation are measured to that of a hypothetical "reasonable prisoner." The State's proposed "in custody" standard would lead to absurd results: a prisoner who is normally immobilized in a maximum security prison would neither be "in custody," nor would he be under coercive pressure to waive his right to counsel as long as the questioner added no additional restraints on his freedom.

Moreover, this Court's precedents make clear that determining whether a suspect is in custody for *Miranda* and *Edwards* purposes does not depend on assessing the "coercive pressures" that the suspect may feel subjectively. Rather, this Court repeatedly has emphasized that the key is whether the government has restrained the suspect's freedom in a manner similar to arresting him. With respect to persons such as Shatzer incarcerated in prison, the answer to that inquiry is obvious.

The United States argues that this Court took into account the background circumstances of a suspect questioned on a bus in a Fourth Amendment seizure case. *See* United States Br. 17 (citing *Florida v. Bostick*, 501 U.S. 429, 435–36 (1991)). But this Court did not disregard any government-imposed restrictions on a person's freedom in *Bostick*. Rather, this Court held that the police did not seize the bus passenger in that case because he *chose* to ride the bus. The State and *amici* cannot cite any of this Court's cases in support of their claim that courts may properly separate the restrictions imposed by an interrogator from other state-imposed restrictions on the suspect's freedom. *See, e.g.*, Pet. Br. 22–23; United States Br. at 16–17. All state-imposed restrictions on freedom that

are of the kind typically associated with formal arrest constitute "custody" under *Miranda*.

The Court need not deny the obviously custodial nature of prison to ensure that incarcerated prisoners are not rendered forever "question-proof," as the State and *amici* contend. Pet. Br. 22; United States Br. 19–20; Florida Br. 15. Although prisoners remain in custody for *Miranda* and *Edwards* purposes, the "on-the-scene questioning" exception would continue to apply to inmates. *See Miranda*, 384 U.S. at 477–78. Additionally, prisoners may always self-initiate conversation with law enforcement. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1044–45 (1983). Many of the courts of appeals cases the State cites to claim that prisoners are not always in custody for *Miranda* purposes could have been decided by applying either of these two exceptions—without rendering the defendants in those cases "question-proof." *See Garcia v. Singletary*, 13 F.3d 1498, 1489 (11th Cir.) (on-the-scene questioning), *cert. denied*, 513 U.S. 908 (1994); *Cervantes v. Walker*, 589 F.2d 424, 427 (9th Cir. 1978) (same); *Saleh v. Fleming*, 512 F.3d 548, 551 (9th Cir. 2008) (self-initiation). And, of course, the State can always choose to have counsel present.

Rather than create a new standard by which to determine the custodial status of prisoners in this case, the Court should adhere to its well-established standards for determining custody. Because incarceration in prison undoubtedly constitutes "custody" under *Miranda* and *Edwards*, and Shatzer was continuously incarcerated between his 2003 and 2006 interrogations, this case simply does not constitute an occasion for considering the

establishment of a break in custody exception to *Edwards*'s clear rule.

IV. AT THE VERY LEAST, *EDWARDS* PROHIBITS OFFICERS IN THE VERY SAME JURISDICTION FROM REINTERROGATING AN INCARCERATED SUSPECT CONCERNING THE VERY SAME OFFENSE AS TO WHICH THE SUSPECT ORIGINALLY INVOKED THE RIGHT TO COUNSEL

Even if the Court were inclined to adopt any of the limitations on *Edwards* urged by the State, the Court should not go so far as to eliminate the *Edwards* rule where, as here, officers within the same jurisdiction reinterrogated a suspect regarding the same investigation for which the suspect initially invoked the right to counsel. At an absolute minimum, police cannot subject a suspect to further questioning without counsel when the suspect invoked his right to counsel with respect to the same investigation or offense, especially when the suspect is incarcerated. A contrary holding would remove the core protection *Edwards* provides when a suspect has invoked his right to counsel.

When a suspect questioned by police as to a particular offense has invoked his right to counsel under *Edwards*, that invocation constitutes a clear expression that the suspect does not feel comfortable with any further custodial interrogation regarding that offense without counsel present. Even if it were true that a break in custody or the passage of time could wipe the slate sufficiently clean to permit reinterrogation on a *different* charge or investigation,

when a suspect has expressed his need for the assistance of counsel as to the matter being investigated, police have no reason to assume that a break in custody or the passage of time has caused the suspect to change his mind. Indeed, the Court's reasoning in *Mosley* strongly suggests the opposite is true: the minimum "reasonable interpretation" of a suspect's invocation of his Fifth Amendment right to counsel in the context of a particular investigation is that he does not wish to proceed with further custodial interrogation on that subject. *Cf. Mosley*, 423 U.S. at 104–05.

The State and *amici* complain of a parade of horribles that would result if the Court were to reaffirm *Edwards* and its progeny. In particular, the State and *amici* contend that absent exceptions to *Edwards*, law enforcement would face substantial administrative difficulties in discerning whether a suspect previously has invoked the right to counsel in a different jurisdiction. Pet. Br. 31; United States Br. 20. No concern about the difficulty of ascertaining whether a suspect has previously invoked the right to counsel in a different jurisdiction could possibly justify creating an exception to *Edwards* that would permit reinterrogation as to the very same offense, by the same jurisdiction, as to which the suspect had previously invoked the right to counsel. Police should be held responsible for knowing the contents of the investigative files pertaining to the very offenses as to which they wish to interrogate the suspect.[3]

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[3] NACDL recognizes that "society[] [has a] compelling interest in finding, convicting, and punishing those who violate the law." *Moran v. Burbine*, 475 U.S. 412, 426 (1986). However, *Edwards* does not prevent police from investigating crimes, and

The State and *amici* likewise contend that without curtailment of *Edwards*, individuals serving long prison sentences would be rendered forever "question-proof" as to any offense. Pet. Br. 22. Even setting aside the fact that this assertion utterly disregards the ability of law enforcement officers to reinterrogate these individuals *with counsel present*, *see Minnick*, 498 U.S. at 150, this concern once again cannot justify an exception that would permit disregarding a suspect's invocation of the right to counsel as to the very offense in connection with which the suspect had previously invoked the right.

In reality, the exceptions the State and its *amici* advocate would gut *Edwards*'s core holding: A suspect who has "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 initiates further communication … with the police." *Edwards*, 451 U.S. at 484–85. Here, no party disputes that Shatzer clearly "expressed his desire to deal with the police only through counsel" by invoking his right to counsel in response to the initial, custodial interrogation. Nevertheless, without ever providing Shatzer with counsel and without so much as investigating whether he previously invoked the right to counsel, the State subjected Shatzer to reinterrogation with regard to the very same offense. To conclude in these circumstances that Shatzer's

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rules like *Edwards* that exclude confessions do not necessarily reduce conviction rates. *See, e.g.*, Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. Chi. L. Rev. 435, 457 (1987) (finding no significant decline in conviction rates in a Pittsburgh study even with a decrease in the confession rate).

supposed waiver of his Fifth Amendment right to counsel during the second interrogation was valid would eviscerate the presumption that lies at the heart of *Edwards*.

It would be especially incongruous to apply break-in-custody or passage-of-time exceptions to incarcerated suspects such as Shatzer. Whatever impact a break in custody or passage of time may have on a suspect outside of prison, a "break" in custody or in time does not have the same effect on a continuously imprisoned suspect. *See supra* at 14, 26, 27–28.

Accordingly, the Court should conclude that even if break-in-custody or passage-of-time exceptions might *otherwise* exist, they do not apply to a suspect reinterrogated without counsel regarding the very same offense for which he invoked the right to counsel. This minimal protection is especially warranted when suspects like Shatzer remain in prison throughout the time period between the first and second interrogations.

CONCLUSION

The judgment of the Court of Appeals of Maryland should be affirmed.

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