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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2011AP2916-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

-v-

ANDREW M. EDLER,

Defendant-Respondent.

ON APPEAL FROM AN ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE, ENTERED IN THE CIRCUIT COURT FOR SHEBOYGAN COUNTY, THE HONORABLE TERENCE T. BOURKE PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

1. Did Edler's request for counsel during his March 30, 2011 interrogation bar law enforcement from reinitiating any in-custody interrogation of Edler on April 20, 2011, requiring suppression of Edler's statements made during that April 20th interrogation?

The trial court did not answer this question.

2. If Edler's April 20th statement to law enforcement, "Can my attorney be present for this," was an ambiguous request for counsel, was law enforcement required to clarify the ambiguity prior to going forward with any further interrogation, based on the fact that Edler's request was made prior to him waiving his *Miranda* rights on that date?

The trial court did not answer this question.

3. Was Edler's statement to law enforcement on April 20th, "Can my attorney be present for this," in light of all of the surrounding circumstances, an unequivocal assertion of his *Miranda* right to counsel, requiring suppression of all statements subsequently made to law enforcement in response to continued interrogation?

The trial court answered, "Yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-respondent does not believe that oral argument is necessary, as he believes that the parties' briefs will fully develop the issues presented for review. He does, however, request that this Court's decision be published, as there is currently no guidance from Wisconsin appellate court decisions on two of the issues presented for review: (1) whether Wisconsin will adopt the United States Supreme Court's 14-day-break-from-custody rule established in *Maryland v. Shatzer*, ___ U.S. ___, 130 S. Ct. 1323 (2010); and (2) whether, in Wisconsin, the rule of *Davis v. United States*, 512 U.S. 452 (1994), that a *Miranda* request for counsel must be unequivocal for interrogation to cease, applies if the request for counsel occurs before a waiver of the *Miranda* rights. The case at hand also addresses the unique situation of a previously undisputed clear request for counsel, combined with a request for counsel prior to a subsequent interrogation that is alleged to be equivocal. Guidance from the courts on this issue would also be helpful.

STATEMENT OF THE CASE

The defendant-respondent, Andrew M. Edler ("Edler"), submits that the State's statement of the case is accurate with respect to the procedural history and disposition in the trial court. However, Edler will provide his own statement of relevant facts below in order to appropriately frame the issues presented for review for this Court's determination.

STATEMENT OF FACTS

In February and March of 2011, the Sheboygan County Sheriff's Department began to investigate Edler, a 17-year-old, regarding his suspected involvement in both a burglary and two alleged arsons. (42:9-11). On March 30, 2011, Detective Gerald Urban ("Detective Urban") of the Sheriff's Department contacted Edler and ultimately interviewed him in an interview room at the Sheriff's Department. (42:10). That interview was video recorded. (42:10; 24:Exh. 1).

Detective Urban reviewed with Edler his *Miranda* rights, and Edler agreed to answer questions regarding the burglary investigation. (24:Exh. 1 at 15:58:00-15:58:43). After completing the interview regarding the burglary, Detective Urban turned to the arson investigation. (42:11; 24:Exh. 1 at 16:42:50). During Detective Urban's interview of Edler with respect to the arsons, Edler made numerous exculpatory statements. (24:Exh. 1 at 16:48:40-17:11:00). Detective Urban then began to accuse Edler of committing the arsons. (*Id.* at 17:12:00-17:12:50). At that point, Edler stated, "From this point on, I'd like a lawyer here." (*Id.* at 17:12:54).

After that point, Detective Urban stopped asking Edler specific questions, but he continued for several minutes to discuss the evidence in the case and how it pointed to Edler as the culprit, and he continued to stress to Edler that he should cooperate in the investigation in the future. (*Id.* at 17:13:00-17:15:30). Edler began to respond to some of the statements Detective Urban made, but Detective Urban would cut him off. (*Id.*). The interview then ended, Edler was arrested and

booked on the burglary charge, and he was detained pending criminal charges in connection with that matter. (*Id.* at 17:15:30-17:23:40).

The following day, March 31, 2011, while Edler was still in custody on the burglary charge, he requested to speak with Detective Urban. (42:12). Detective Urban proceeded to meet with Edler on that date, but there appeared to be some misunderstanding as to what Edler wanted to discuss, and the meeting was therefore very brief. (24:Exh. 2 at 15:14:00-15:15:30; 42:22-23). When Detective Urban questioned Edler as to whether he wanted to make any additional statements in order to clear up the arson investigation, Edler responded by saying that "I honestly don't have anything to say about that." (*Id.* at 15:14:55-15:15:05). That brief interview was also video recorded. (24:Exh. 2).

On April 1, 2011, the State charged Edler with one count of burglary and one count of misdemeanor theft. (25:1-2). Edler was represented by a representative of the State Public Defender's office at the Initial Appearance on that date. (*Id.* at 3). Edler was released from custody shortly after the Initial Appearance. (*Id.*; 42:14). On April 4, 2011, the State Public Defender's Office appointed counsel to represent Edler on that case. (25:3).

On April 18, 2011, Detective Urban interviewed Sean Jones ("Jones"), who made statements regarding Edler's involvement in the two arsons. (42:15). On that same date, Detective Urban requested that Jones wear a covert wire and set up a meeting with Edler, and Jones agreed. (*Id.* at 15-16). While wired, Jones met later that day with Edler at Edlers's home, and during their discussion, Edler made inculpatory statements regarding his involvement in the arsons. (*Id.*).

Finally, on April 20, 2011, Detective Urban arrested Edler at his home with respect to the arsons. (42:15-17; 26:1). Prior to taking Edler into custody, Detective Urban spoke with Edler's father and told him that it was important for Edler to cooperate. (26:1). Edler's father proceeded to tell Edler, immediately prior to him being taken away, that he needed to cooperate with investigators. (*Id.* at 1-2). While Detective Urban was transporting Edler to the Sheriff's

Department, Detective Urban told Edler that he needed to take his father's advice and tell the truth, that Edler still had an opportunity to help himself out, and that they would talk about it more at the Sheriff's Department. (*Id.* at 2). Edler responded by stating, "Can my attorney be present for this?" (*Id.*). Detective Urban answered, "Yes he can." (*Id.*).

Once at the Sheriff's Department, Edler was placed in an interrogation room, where a video camera recorded the contact. (*Id.*; 24:Exh. 3). Edler was extremely nervous, was crying, and even had difficulty breathing after he was brought into the room. (24:Exh. 3 at 16:43:31-16:45:00).

When Detective Urban entered the room, he did not immediately go through Edler's *Miranda* rights with him or even begin to question Edler regarding the arsons. Instead, he stressed that, based on his investigation, he had no doubt that Edler was responsible for the arsons, and that he already had enough evidence and information to convict Edler of the arsons. (26:2; 24:Exh. 3 at 16:48:30-16:49:27). Further, Detective Urban again emphasized that Edler needed to take his father's advice, cooperate and tell the truth, and that this could help Edler. (26:2; 24:Exh. 3 at 16:49:05-10, 16:49:28-50, 16:50:35-45).

Detective Urban then began to read Edler his *Miranda* rights. (24:Exh. 3 at 16:51:00). When Detective Urban got to the part regarding Edler's right to an attorney, Edler asked whether requesting an attorney would affect whether Edler would have to sit in jail. (*Id.* at 16:51:08-22). Detective Urban told Edler that it would not change things in that respect. (*Id.* at 16:51:22-26). Detective Urban then completed reading Edler his *Miranda* rights, and Edler agreed to answer questions regarding the arson. (*Id.* at 16:51:39-16:52:27). During this interview, Edler eventually made statements admitting to his involvement in the two arsons. (*Id.* at 16:59:00-17:56:00). At the conclusion of the interview, Edler continued to have difficulty breathing, and he even vomited. (*Id.* at 18:01:00-18:03:10).

Based on the statements Edler made during the April 20, 2011 interview, as well as other evidence, Edler was charged on April 22, 2011 with two counts of arson and one

count of manufacturing a Molotov cocktail, all as party to the crime. (1:1-7).

ARGUMENT

THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S DECISION SUPPRESSING EDLER'S STATEMENTS MADE TO LAW ENFORCEMENT ON APRIL 20, 2011

A. Introduction

The State proposes in its brief that there is only one issue presented for this Court's review, that being whether Edler's statement on April 20, 2011 regarding his attorney being present for the interrogation was a clear and unequivocal invocation of Edler's *Miranda* right to counsel. State's Brief at 1-2. The State clarifies its position in this regard in the introduction to its argument: "This appeal hinges on one issue; that being whether [on April 20th] Edler clearly and unequivocally asserted his *Miranda* right to an attorney during his transport to the sheriff's department and at least fifteen minutes before the reading of his rights, so as to prohibit the police from attempting to start an interrogation." *Id.* at 5.

In limiting the issue in this manner, the State only cursorily discusses Edler's invocation of his right to counsel during the March 30, 2011 interrogation and its effect on the analysis in this case. *See Id.* at 5-6. In fact, the State appears to suggest that Edler's initial request for counsel should have little, if any, bearing on the Court's decision in this case.

While the State briefly discusses Edler's argument that police could not initiate subsequent interrogation on April 20th, in light of his invocation of right to counsel on March 30th, it quickly dismisses this argument with little analysis. Indeed, the State argues that this issue is "not critical to resolving this dispute." *Id.* at 9.

Edler submits that the issue surrounding his March 30th request for counsel and its effect on whether police had any right to interrogate him on April 20th, regardless of

Edler's request for a lawyer on that date, presents a significant question that has not yet been addressed by any Wisconsin appellate court. Edler will therefore address that issue in detail, including whether the Wisconsin Constitution provides greater protections than the United States Constitution in this regard.

Second, Edler will address another question that does not appear to have ever been squarely addressed by any Wisconsin appellate court: whether the rule established in *Davis v. United States,* 512 U.S. 452 (1994), requiring that an in-custody request for counsel be unequivocal for questioning to cease, applies to a request for counsel made before a suspect waives his *Miranda* rights. The determination of this question is significant in this case, as Edler made his request for counsel on April 20th before waiving his *Miranda* rights. Despite this, Detective Urban did not clarify Edler's wishes regarding an attorney, and instead, continued to press Edler into waiving his rights. Edler acknowledges that he did not raise this issue in the trial court. However, a respondent may advance for the first time on appeal, and an appellate court may consider, any basis for sustaining the trial court's decision. *Am. Family Mut. Ins. Co. v. Bateman*, 2006 WI App 251, ¶ 27 n.7, 297 Wis. 2d 828, 726 N.W.2d 678.

Finally, Edler will separately address the issue of whether Edler unequivocally invoked his *Miranda* right to counsel on April 20th.

B. Standard of review

An appellate court reviews a motion to suppress statements under a two-pronged analysis. *State v. Turner*, 136 Wis. 2d 333, 343-44, 401 N.W.2d 827 (1987). The reviewing court must uphold the trial court's findings of historical or evidentiary facts as long as they are not clearly erroneous. *Id.* However, the reviewing court independently determines whether those facts resulted in a constitutional violation. *Id.*

C. Edler's request for counsel during the March 30th custodial interrogation prohibited law enforcement from reinitiating in-custody interrogation on April 20th, requiring suppression of all statements made on that date

1. Applicable law

The Fifth Amendment to the United States Constitution, which applies to the states through the Fourteenth Amendment, provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V. Further, Article One, Section 8 of the Wisconsin Constitution provides that "[n]o person . . . may be compelled in any criminal case to be a witness against himself or herself." WIS. CONST., art. I, § 8.

Miranda v. Arizona, 384 U.S. 436 (1966), established the right to have counsel present during custodial interrogation as a safeguard against the relinquishment of the Fifth Amendment privilege against self-incrimination. *State v. Dagnall*, 2000 WI 82, ¶ 31, 236 Wis. 2d 339, 612 N.W.2d 680 (citing *Miranda*, 384 U.S. at 463–66). If a suspect requests counsel at any time during such an interview, questioning by law enforcement must immediately cease, and the suspect is not subject to further questioning by law enforcement until a lawyer has been made available or the suspect reinitiates conversation. *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). Wisconsin recognizes the *Edwards* right-to-counsel holding as a "bright-line" rule. *See State v. Long*, 190 Wis. 2d 386, 395, 526 N.W.2d 826 (Ct. App. 1994).

A waiver of the right to counsel, after a suspect has requested counsel, "cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484. Such a waiver is presumed to be invalid, and any fruits of the subsequent interrogation initiated by police must be suppressed. *State v. Harris*, 199 Wis. 2d 227, 252, 544 N.W.2d 545 (1996).

In *Maryland v. Shatzer*, ___ U.S. ___, 130 S. Ct. 1213 (2010), the United States Supreme Court held that a 14-day break in custody after a defendant invokes his right to counsel "ends the presumption of involuntariness established in *Edwards* . . . ." *Id.* at 1217. In that decision, the Supreme Court further emphasized the benefits of the *Edwards* rule, which preserves "the integrity of an accused's choice to communicate with police only through counsel," and prevents "police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Id.* at 1220.

The *Shatzer* majority emphasized that its decision did not authorize "reinterrogating" a suspect after the suspect has invoked his right to counsel, even after a 14-day break in custody. *Id.* at 1225. Instead, the decision merely allows police to again ask a suspect permission to be interrogated if a 14-day break has occurred. *Id.* The Court further explained the limited reach of its decision as follows:

> An officer has in no sense lied to a suspect when, after advising, as *Miranda* requires, "You have the right to remain silent, and if you choose to speak you have the right to the presence of an attorney," he promptly ends the attempted interrogation because the suspect declines to speak without counsel present, and then, two weeks later, reapproaches the suspect and asks, "Are you now willing to speak without a lawyer present?"

Id.

No Wisconsin appellate court has yet adopted the standard set forth in the United States Supreme Court's *Shatzer* decision.[1] In that regard, Wisconsin courts are certainly not required to accept that standard. The United States Supreme Court has repeatedly recognized the power of states to adopt higher standards to protect individual liberties than those mandated by the federal constitution. *See State v.*

[1] The only Wisconsin appellate case that counsel can locate that cites to *Shatzer* is *State v. Bean*, 2011 WI App 129, 337 Wis. 2d 406, 804 N.W.2d 696. In that case, the defendant argued that *Shatzer* should apply to the facts there, but the Wisconsin Court of Appeals rejected this argument, as the defendant in that case was arguing that police had violated his right to silence, not his right to counsel. *Id.* at ¶ 33. As it was not necessary, the Court of Appeals made absolutely no comment on whether the *Shatzer* rule would apply to any situation in Wisconsin. *Id.*

Knapp, 2005 WI 127, ¶ 57, 285 Wis. 2d 86, 700 N.W.2d 899 (citing various United States Supreme Court cases). This applies even when state courts are interpreting state constitutional provisions that are parallel and analogous to federal constitutional provisions. *State v. Forbush*, 2011 WI 25, ¶ 68, 332 Wis. 2d 620, 796 N.W.2d 741 (Abrahamson, J. concurring in judgment, citing numerous United States Supreme Court cases). Indeed, "it is the prerogative of the State of Wisconsin to afford greater protection to the liberties of persons within its boundaries under the Wisconsin Constitution than is mandated by the United States Supreme Court . . . ." *State v. Doe*, 78 Wis. 2d 161, 171, 254 N.W.2d 210 (1977). In *Knapp*, the Wisconsin Supreme Court recently concluded that the right against self-incrimination clause in Article I, Section 8 of the Wisconsin Constitution provides greater protection to individuals than the analogous provision in the Fifth Amendment to the United States Constitution. *Knapp*, 2005 WI 127, ¶¶ 79-83.

2. *Maryland v. Shatzer* does not sanction the police action in this case

The circuit court below did not address in its decision suppressing Edler's statements whether the United States Supreme Court's 14-day-break-in-custody rule announced in *Maryland v. Shatzer* applied in this case. In concluding that Edler's request for an attorney on April 20th was clear and unequivocal, the court did not need to address the *Shatzer* issue. Edler submits that even if this Court determines that Edler's request for counsel on April 20th was ineffective to invoke his *Miranda* right to counsel, that *Shatzer* does not sanction Detective Urban's attempt to reinterrogate Edler on April 20th, in light of all of the circumstances, likewise requiring suppression. This Court can affirm on grounds different than those relied upon by the circuit court. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995).

The United States Supreme Court's 14-day-break-in-custody rule announced in *Maryland v. Shatzer* "end[ed] the presumption of involuntariness established in *Edwards* . . . ." 130 S. Ct. at 1217. More specifically, the Supreme Court held that, after a suspect who invokes his right to counsel

during a custodial interrogation, once a 14-day continuous break in custody occurs, police again have the right to ask the suspect permission to conduct an interrogation. *Id.* at 1225. This holding does not give police the absolute right to reinterrogate a suspect in this situation. *Id.*

The facts of the *Shatzer* case demonstrate the limited extent of the holding. The defendant in *Shatzer* requested counsel during his first interview with police, and police immediately ended the interview. *Id.* at 1217. Two years and six months later, police again contacted Shatzer, wanting to interrogate him regarding the same accusations. *Id.* at 1218. Police advised him of his *Miranda* rights and obtained a written waiver. *Id.* During this second interview, at no point prior to making incriminating statements did Shatzer request an attorney or refer to his prior request. *Id.* Under all of the facts in that case, and with its new 14-day rule, the Supreme Court concluded that the second police contact of Shatzer after he previously invoked his right to counsel did not mandate suppression of Shatzer's incriminating statements to police during that second interview. *Id.* at 1227.

At first glance, the *Shatzer* holding would appear to apply here based on the 21-day break between when Edler first invoked his right to an attorney and when Detective Urban reinterrogated him on April 20th. However, the facts in the case at hand are significantly distinguishable from those in *Shatzer*, and the 14-day-break-in-custody rule therefore should not apply here.

Edler clearly and unequivocally invoked his right to counsel while being interrogated by Detective Urban while in custody on March 30th. (24:Exh. 1 at 17:12:54). The State does not dispute this. *See* State's Brief at 11. After Edler clearly invoked this right, Detective Urban stopped asking any specific questions about the arsons; however, Detective Urban did not stop talking. For several minutes, Detective Urban told Edler that the evidence would not lie, kept telling Edler how the evidence all pointed at him, and continued to emphasize that Edler should cooperate in the investigation. (24:Exh. 1 at 17:13:00-17:15:30). Therefore, immediately after Edler invoked his right to have an attorney present during any interrogations, Detective Urban already began

pressing on Edler in an attempt to get him to cooperate and make further statements in the future. This type of "badgering" is exactly what the *Edwards* rule was designed to prevent against. *Shatzer*, 130 S. Ct. at 1220.

One day later, on March 31, 2011, Edler requested to speak with Detective Urban. (42:12). When they met, it became immediately clear that all Edler wanted to discuss was when he was going to go to court on his burglary charge. (*Id.* at 22-23). Nonetheless, Detective Urban used this as another opportunity to ask Edler if he would make any further statements regarding the arsons. (24:Exh. 2 at 15:14:55-15:05). Edler again stressed to Detective Urban that he had nothing to say to him about the arson investigation. (*Id.*). Edler was then appointed counsel in connection with his burglary case, and Detective Urban was well aware that Edler had an attorney.

Then on April 20th, Detective Urban arrested Edler on the arson charges. (42:15-17; 26:1). With Edler's father present during the arrest, Detective Urban saw the father as a further tool to put pressure on Edler to cooperate. Specifically, Detective Urban made a point of stressing to Edler's father that Edler needed to cooperate going forward. (26:1). Not surprisingly, and exactly according to Detective Urban's plan, Edler's father told Edler prior to being taken away that he needed to cooperate. (*Id.* at 1-2). Detective Urban's badgering of Edler into waiving his rights continued during the ride to the Sheriff's Department, before even advising Edler of his *Miranda* rights. Detective Urban particularly emphasized during the ride that Edler needed to follow his father's advice about cooperating. (*Id.* at 2). Detective Urban continued during the ride to stress the importance of thinking about what both Detective Urban and his father had told him, and that Edler had an opportunity to help himself out. (*Id.*).

Detective Urban, after perfectly setting the stage for convincing Edler to waive his previously asserted right to counsel, told Edler that they would talk about it further at the Sheriff's Department. (*Id.*). That's when Edler told Detective Urban, "Can my attorney be present for this." (*Id.*).

Detective Urban, knowing very well that Edler had an attorney, responded to Edler, "Yes he can." (*Id.*).

The video of Edler's interview at the Sheriff's Department clearly shows that Edler, just 17 years old at the time, was extremely nervous and even having difficulty breathing as he was brought into the interview room. (24:Exh. 3 at 16:43:31-16:45:00). Edler's extreme stress during this interview is further demonstrated by his continued difficulty breathing and even vomiting at the end of the interview. (*Id.* at 18:01:00-18:03:10). Despite the obvious stress and difficulty Edler was experiencing based on his arrest and confinement, Detective Urban continued at this time with his plot to convince Edler to talk without an attorney.

Once again, prior to reading any *Miranda* rights to Edler, Detective Urban told Edler that there was no doubt in his mind that Edler was involved in the arsons, and that they had overwhelming evidence against him. (26:2; 24:Exh. 3 at 16:48:30-16:49:27). Detective Urban further convinced Edler that talking was in his best interest, telling him that he had an opportunity to help himself and to make things right. (26:2; 24:Exh. 3 at 16:49:05-10, 16:49:28-50, 16:50:35-45). He again used Edler's father as a tool, reminding Edler that he should take his father's advice to cooperate. (26:2; 24:Exh. 3 at 16:50:35-45). Only after badgering Edler into waiving his rights for several minutes, did Detective Urban go through Edler's *Miranda* rights with him, with Edler, not surprisingly, then stating that he would answer questions. (24:Exh. 3 at 16:51:00-16:52:27).

This is not the type of situation that the *Shatzer* Court anticipated where police would simply renew contact with a suspect after a 14-day break in custody in order to again ask permission to interrogate. In this case, police continued to work and work on Edler to get him to break down and agree to answer questions. It started immediately after Edler asked for an attorney on March 30th, when Detective Urban continued to stress the evidence he had and that it would be important for Edler to cooperate. Then, when he arrested him on April 20th, Detective Urban got Edler's father to tell Edler to cooperate, he continued to emphasize this during the ride to

the Sheriff's Department, and again while at the Sheriff's Department and prior to reading Edler his rights.

Of additional significance is the fact that Edler, during the ride to the Sheriff's Department, requested counsel for a second time. Even if this was an equivocal request, which Edler will argue below that it is not, it significantly distinguishes Edler's case from the *Shatzer* case, where the suspect at no time prior to making inculpatory statements made any reference to an attorney or his prior request. Further, Detective Urban knew that Edler actually had counsel on the burglary case, further removing this situation from that covered by the holding of the *Shatzer* case. Under all of the facts of Edler's case, the *Shatzer* rule should not apply. Detective Urban had no right to reinitiate any interrogation of Edler, and Edler's statements made to Detective Urban on April 20th should be suppressed on those grounds alone.

3. The *Maryland v. Shatzer* rule should not apply in Wisconsin, as the right against self-incrimination provision in Article I, Section 8 of the Wisconsin Constitution provides greater protection than the analogous provision in the Fifth Amendment to the United States Constitution

As discussed, above, the 14-day-break-in-custody rule established in *Maryland v. Shatzer* has not yet been adopted by the Wisconsin courts. The *Shatzer* Court specifically discussed and analyzed the reach and limit of the *Edwards* prophylactic rule derived from the Fifth Amendment, which bars police from reinitiating questioning of a suspect who has invoked his right to an attorney. Edler maintains that Article I, Section 8 of the Wisconsin Constitution requires more than what is sanctioned under the Fifth Amendment by the *Shatzer* Court.

Specifically, Edler submits that the right against self-incrimination clause in the Wisconsin Constitution requires that the presumption of involuntariness of statements made in response to police initiated questioning after a suspect invokes his right to counsel remains for much longer than 14

days after the original invocation of the right. He further submits that each case presenting this issue must be addressed on an individual basis, under a totality of the circumstances analysis.

In reaching its conclusion that a 14-day break in custody ends the *Edwards* presumption of involuntariness after a suspect invokes his right to counsel, the *Shatzer* majority offered little reasoning why 14 days is the appropriate amount of time. Justice Stevens stressed his concern with this lack of reasoning in his concurring opinion:

> Today's decision, moreover, offers no reason for its 14–day time period. To be sure, it may be difficult to marshal conclusive evidence when setting an arbitrary time period. But in light of the basis for *Edwards*, we should tread carefully. Instead, the only reason for choosing a 14–day time period, the Court tells us, is that "[i]t seems to us that period is 14 days." *Ante*, at 1223. That time period is "plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody." *Ibid.* But the Court gives no reason for that speculation, which may well prove inaccurate in many circumstances.

Shatzer, 130 S. Ct. at 1231 n.7 (Stevens, J. concurring in judgment).

Based on the lack of reasoning from the Supreme Court in asserting 14 days as an appropriate period for cutting off the protections of *Edwards*, this Court should find that the Wisconsin Constitution does not support such an arbitrary bright-line rule. The State, in its brief, argues that because Wisconsin has adopted the *Edwards* rule, authored by the United States Supreme Court, it is "illogical to suggest that Wisconsin . . . would not endorse that court's adaptations to the rule[, such as the *Shatzer* rule]." State's Brief at 9. However, it is the State's position in this regard that is illogical, as Wisconsin should not and cannot follow the dictates of the United States Supreme Court, when it does not comport with Wisconsin's constitution, simply because it stems from a rule that was previously adopted by the state.

Here, a totality of the circumstances analysis is much more appropriate and in-step with the protections of Article I, Section 8 of the Wisconsin Constitution, as opposed to an arbitrary 14-day-break-in-custody rule that cannot adequately serve to protect the liberties of Wisconsin citizens. Therefore, this totality of the circumstances approach should be adopted as the proper analysis in this State.

Under this analysis, in the case at hand, as described above, Edler should not lose the presumption of the involuntariness of his statements following his March 30th request for counsel. Therefore, police should not have been able to reinterrogate Edler on April 20th, and any statements he made pursuant to that interrogation must be suppressed.

D. After Edler stated, "Can my attorney be present for this," on April 20th, which was prior to Edler's waiver of rights, Detective Urban was required to cease all questioning until he clarified any alleged ambiguity in Edler's statement regarding counsel

1. Applicable law

The cases of *Davis v. United States*, 512 U.S. 452 (1994), and *State v. Jennings*, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142, are certainly important with respect to the invocation of the Fifth Amendment right to counsel during interrogation. The United States Supreme Court in *Davis* held that for *Edwards* protections to come into play after a suspect has already waived his *Miranda* rights, a suspect must unambiguously request counsel. *Davis*, 512 U.S. at 458-59. Therefore, the Supreme Court held that, "*after a knowing and voluntary waiver of the Miranda rights*, law enforcement may continue questioning until and unless the suspect clearly requests an attorney." *Id.* at 461 (emphasis added). If the suspect's request for counsel is not sufficiently clear, officers need neither stop an interrogation nor ask clarifying questions. *Id.* at 461-62. The Wisconsin Supreme Court subsequently adopted the holdings of *Davis*. *Jennings*, 2002 WI 44 at ¶¶ 32-36.

It is significant to emphasize again that the United States Supreme Court's holding in *Davis* was limited to

situations when a suspect arguably invoked the right to counsel *after* the suspect has already waived his *Miranda* rights. *Davis*, 512 U.S. at 461. The Wisconsin Supreme Court in *Jennings*, 2002 WI 44, like the *Davis* Court, made it clear that the issue in *Jennings* was "the sufficiency of the defendant's invocation of his right to counsel *mid-way through his custodial interrogation*." *Id.* at ¶ 20 (emphasis added). Since the *Davis* decision, the United States Supreme Court has not directly addressed this issue.[2] Nor has any Wisconsin appellate court addressed this issue. In such a situation, this Court may look to other jurisdictions for persuasive authority. *State v. Harvey*, 2006 WI App 482, ¶ 20, n.7, 289 Wis. 2d 222, 710 N.W.2d 482.

It appears that the large majority of state appellate courts that have expressly considered the pre-waiver and post-waiver distinction have concluded that the requirement that a request for an attorney be clear and unequivocal applies only after a suspect has waived his *Miranda* rights. *See State v. Collins*, 937 So. 2d 86, 93 (Ala. Ct. App. 2005) (holding that *Davis* did not apply where the defendant's questions regarding a lawyer were asked "before she signed the waiver-of-rights form"); *Noyakuk v. State*, 127 P.3d 856, 869 (Alaska Ct. App. 2006) ("[T]he *Davis* rule (that interrogating officers need not interrupt their questioning to clarify the suspect's wishes) applies only to a post-*Miranda*-waiver setting."); *Almeida v. State*, 737 So. 2d 520, 523 n.7 (Fla. 1999) (holding that the requirement of clarity "applies only where the suspect has waived the right earlier during the session."); *State v. Holloway*, 760 A.2d 223, 228 (Me. 2000) (declining to extend *Davis* "to require an unambiguous *invocation* of . . . the right to an attorney in the absence of a prior waiver"); *Freeman v. State*, 158 Md. App. 402, 857 A.2d 557, 573 (Ct. App. 2004) ("[A] careful reading of *Davis* reveals that the Supreme Court's bright line rule, requiring an unequivocal assertion of the right to counsel, pertains to a situation in which the defendant had previously waived his right and then, during

[2] It is unclear whether the United States Supreme Court's decision in *Berghuis v. Tompkins*, ___ U.S. ___, 130 S. Ct. 2250 (2010), which addressed a suspect's initial invocation of the right to silence, affects the *Davis* distinction between pre-waiver and post-waiver requests for counsel. In that case, in what appears to be dictum, the Supreme Court appears to indicate that the *Davis* unequivocal standard applies to an initial invocation of the right to silence or counsel. *Id.* at 2259-60.

the interrogation, arguably sought to exercise his rights."); *State v. Tuttle*, 650 N.W.2d 20, 28 (S.D. 2002) ("*Davis*, in sum, applies to an equivocal postwaiver invocation of rights."); *State v. Turner*, 305 S.W.3d 508, 519 (Tenn. 2010) ("In our view, the ruling in *Davis* applies only to post-waiver requests for counsel."); *State v. Leyva*, 951 P.2d 738, 743 (Utah 1997) ("[T]he Court in *Davis* did not intend its holding to extend to prewaiver scenarios."); *but see In re Christopher K.*, 217 Ill. 2d 348, 299 Ill. Dec. 213, 841 N.E.2d 945, 964–65 (2005) (acknowledging that the holding in *Davis* is limited to an alleged invocation of the right to counsel in the post-waiver context, but choosing to also apply it in the pre-waiver context where the Supreme Court has "left open the issue").

Further, at least one federal circuit court has concluded the same. *See United States v. Rodriguez*, 518 F.3d 1072, 1078-79 (9th Cir. 2008). Finally, at least one prominent commentator has agreed with this rationale. *See* WAYNE R. LAFAVE, ET AL., 2 CRIMINAL PROCEDURE § 6.9(g), n. 185 (3d ed. 2009) (observing that "[a]lthough the point is sometimes missed, *Davis* is limited to the post-waiver context").

2. Detective Urban was required to clarify Edler's desire for counsel before continuing with the interrogation on April 20th

As discussed above, the United States Supreme Court in *Davis* limited its "clear and unequivocal" rule to situations where a suspect makes an arguable request for counsel "after a knowing and voluntary waiver of the *Miranda* rights." *Davis*, 512 U.S. at 461. This distinction between post-waiver and pre-waiver invocations of the right to counsel has been endorsed by nearly all of the numerous courts that have considered it. *See* cases cited *supra*.

Most of the courts that expressly support this distinction have held that, when an ambiguous request for counsel is made prior to a suspect waiving his or her rights, that the only further questions police may ask are those aimed at clarifying the suspect's wishes. *See, e.g.*, *State v. Collins*, 937 So. 2d 86, 93 (Ala. Crim. App. 2005); *Noyakuk v. State*, 127 P.3d 856, 869 (Alaska Ct. App. 2006); *State v. Leyva*, 951 P.2d 738, 743 (Utah 1997); *United States v. Rodriguez*,

518 F.3d 1072, 1080 (9th Cir. 2008). Placing this requirement on law enforcement is entirely consistent with "a heavy burden" that the United States Supreme Court has stated rests on law enforcement officers "to demonstrate that the defendant knowingly and intelligently waived" his *Miranda* rights. *Miranda*, 384 U.S. at 475. Edler maintains that this requirement applies to Wisconsin law enforcement officers when presented with an ambiguous request for counsel before a suspect waives his *Miranda* rights.

Here, on April 20th, during the drive to the Sheriff's Department, Edler, responding to Detective Urban's constant pressing to cooperate and follow his father's advice, asked, "Can my attorney be present for this?" (26:2). The only response Detective Urban gave was, "Yes, he can." (*Id.*). Detective Urban never asked any other questions to clarify whether Edler actually wanted his attorney there.

Instead, when they arrived at the Sheriff's Department and went into the interrogation room, Detective Urban immediately turned back to his tactics of badgering Edler into waiving his rights. Only after this badgering and Detective Urban's intentional failure to clarify Edler's request for an attorney did Detective Urban read Edler his rights and obtain an alleged waiver. Detective Urban's conduct was completely inappropriate under the circumstances, and the State therefore cannot meet its "heavy burden" of demonstrating that Edler knowingly and intelligently waived his *Miranda* rights on April 20th. Therefore, on this basis, the circuit court's decision should be upheld, and all statements made by Edler to police on April 20th must be suppressed.

E. Edler unequivocally invoked his *Miranda* right to counsel on April 20th when he asked Detective Urban, "Can my attorney be present for this?"

Even if this Court determines that the *Shatzer* 14-day-break-from custody rule applies in this case, allowing the attempted reinterrogation on April 20th, and that Edler's request for counsel on April 20th must be unequivocal to invoke the protections of *Edwards*, the circuit court's decision

should still be upheld. Such a result is warranted because Edler's statement, "Can my attorney be present for this," taking into account all of the surrounding circumstances, was an unequivocal request for counsel.

1. Applicable law

To determine whether a statement by a suspect clearly invokes the right to counsel, courts are presented with a fact-intensive inquiry. In *Davis*, the defendant's statement, "Maybe I should talk to a lawyer," was found to be equivocal. 512 U.S. at 462. Jennings' statement, "I think maybe I need to talk to a lawyer," which was very much like Davis', was similarly found to be an insufficient invocation of the right to counsel. *Jennings*, 2002 WI 44 at ¶ 36.

The United States Supreme Court has emphasized that the inquiry about the request for counsel is an objective one. *Davis*, 512 U.S. at 459. One of the most often cited quotes from *Davis* is that a suspect need not speak with the discrimination of an "Oxford Don" and must merely articulate his desire to have counsel present so that a reasonable police officer under the circumstances would understand the statement to be a request for an attorney. *Jennings*, 2002 WI 44 at ¶ 30 (citing *Davis*, 512 U.S. at 476 (Souter, J. concurring in judgment)).

Wisconsin case law on this issue does not include any guidance as to whether the precise statement made by Edler or any similar statement is an unequivocal request for counsel. Therefore, a review of case law from other jurisdictions can provide persuasive authority. *See Harvey*, 2006 WI App 482, at ¶ 20, n.7. Counsel has located three cases that discuss requests for an attorney similar to Edler's on April 20th, and are thus helpful to the determination in this case.

First, the Rhode Island Supreme Court held that the statement, "Can I get a lawyer," could be sufficiently clear to constitute an invocation of the right to counsel. *State v. Dumas*, 750 A. 2d 420, 424-25 (R.I. 2000). The Court went on to explain its holding as follows:

> In normal parlance, this syntactic phraseology is an acceptable and reasonable way to frame a request. . . . For example, a customer at a restaurant may ask the server, "Can I get a cup of chowder?" An impatient shopper might ask a sales clerk, "Can I get some service over here?" In each case, it is clearly understood that the speaker is making a request for a particular desired object or action.

Id. at 425 & n.5.

Second, in a case from Georgia, and even more on point, a suspect stated, "Can I have a lawyer present when I do that," in response to a request by the interrogating officer that she tell her side of the story. The Georgia Supreme Court held that this request was unequivocal. *Taylor v. State*, 274 Ga. 269, 272, 577 S.E.2d 590 (2001). Similar to the court in *Dumas*, the Georgia Supreme Court emphasized, "[The suspect's] desire for counsel was not ambiguous simply because it was articulated in the form of a question; it is common for people to ask for things by saying "Can I have . . . ?" *Id.*

Finally, one case from the Seventh Circuit, *United States v. Lee*, 413 F.3d 622 (7th Cir. 2005), is also on point. In that case, the defendant, during an in-custody interrogation, stated, "Can I have a lawyer?" *Id.* at 624. Police then advised the defendant that they would not question him if an attorney were present, that an attorney would tell him not to say anything, and that the defendant could help himself by talking. *Id.* The defendant then stated that he wanted to talk and went on to make incriminating statements. *Id.*

The Seventh Circuit in that case held that the defendant's statement, "Can I have a lawyer?" was a valid invocation of the right to an attorney. *Id.* at 626. The court concluded that "unless the police obtained further clarification from Lee that this was actually an unequivocal request for an attorney, they should have halted the interrogation." *Id.* The court, although not basing its decision on this ground, expressed concern with the police conduct after the defendant advised, "Can I have a lawyer?" *Id.* at 627. Specifically, police continued to persuade the defendant to talk to them without an attorney, stressing that he could help himself by talking. *Id.*

2. Edler made an unequivocal request for counsel on April 20th, requiring that Detective Urban cease all further questioning

Edler certainly articulated his desire to have counsel present on April 20th by asking that his attorney be allowed to be there. Very similar to the statements made in *Dumas* and *Taylor*, *supra*, Edler stated, "Can my attorney be present for this?"

The surrounding circumstances in Edler's case only strengthen the argument that this was an unequivocal request for counsel that should have been honored by Detective Urban, and which should have lead to all questioning being ceased. These circumstances include the fact that Edler, just 17 years old at the time, had previously invoked his right to counsel to Detective Urban back on March 30th, and had made clear again on March 31st that he did not want to speak about the arsons.

Furthermore, Detective Urban was well aware that Edler had been charged in the burglary case back in early April, and that Edler actually had an attorney at the time of the April 20th arrest. This made Edler's statement, "Can my attorney be present for this," even more clear, as there was a specific attorney that could have been contacted prior to continuing the interrogation.

Finally, and perhaps most significantly, after Edler stated, "Can my attorney be present for this," Detective Urban continued to persuade Edler into waiving his rights and to cooperate, stressing how strong of a case the police had against him, reminding him to follow his father's advise, and that it was in Edler's best interest to talk. This is exactly the type of police conduct the Seventh Circuit frowned upon in *Lee*, *supra*. Under all of the facts of this case, and based on the supporting law cited above, this Court should conclude that Edler's request for counsel on April 20th required police to cease any further questioning on that date.

Under all of the circumstances, Edler's request to have counsel present on April 20th was unequivocal, and Detective

Urban should not have gone forward with any interview after that point.

Edler's request for counsel during the ride to the Sheriff's Department was an effective invocation of his Fifth Amendment right to counsel, and Detective Urban was not allowed to question Edler at all after that point. All statements made by Edler during that subsequent interview on April 20th should be suppressed.

CONCLUSION

For the reasons asserted above, Edler respectfully requests that this Court affirm the circuit court's order suppressing all statements made by Edler in response to interrogation by law enforcement on April 20, 2011.

Dated at this 18th day of May, 2012.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(8)(b) and (c)

I hereby certify that this brief conforms to rules contained to Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. This brief is 6,877 words.

Dated this 18th day of May, 2012

HOLDEN & HAHN, S.C.

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CERTIFICATE OF COMPLIANCE
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I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12).

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court served on all opposing parties.

Dated this 18th day of May, 2012

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