STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2916-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

ANDREW M. EDLER,

Defendant-Respondent.

CERTIFICATION OF AN 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 AND APPENDIX OF PLAINTIFF-APPELLANT

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STATEMENT OF ISSUES

I. Should the State of Wisconsin follow the United States Supreme Court holding in *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213 (2010), expanding *Edwards v. Arizona*, 451 U.S. 477 (1981), protections from the release from custody date to fourteen days after the release from custody?

The trial court did not answer this question finding that the police officer violated *Miranda v. Arizona*, 384 U.S. 436 (1966), as modified by *Edwards*, when he ignored what the court perceived to be Edler's clear

invocation of his *Miranda* right to counsel. The court of appeals certified this issue to this court.

II. Is Edler's question as to whether an attorney can be present at an interrogation, asked over fifteen minutes before the police and Edler arrived at the interrogation site, answered quickly and honestly by the police, a clear unequivocal invocation of Edler's *Miranda* right to counsel, so as to prevent the police from even reading Edler his *Miranda* rights and try to start an interrogation?

The trial court answered this question: Yes. The court of appeals certified this issue to this court.

III. If Edler's informational question as to whether his attorney could be present at an upcoming interrogation is found to be ambiguous, in an assertion of the *Miranda* right to counsel context, are the police required to seek clarification, when the police are not required in Wisconsin to seek clarification of ambiguous references to counsel in the post-waiver circumstance? *See State v. Jennings*, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142.

The trial court did not answer this question since it found that Edler had clearly and unequivocally asserted his *Miranda* right to counsel during his transport to the interrogation site. The court of appeals certified this issue to this court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to have the certification granted by this court, the State requests both oral argument and publication of the court's opinion.

STATEMENT OF THE CASE

This is an appeal from an order filed November 21, 2011, in the Sheboygan County Circuit Court (36; A-Ap. 101-02[1]) in which the Honorable Terence T. Bourke, granted Edler's motion to suppress evidence obtained pursuant to an interrogation conducted on April 20, 2011.

A criminal complaint filed April 22, 2011, charged Edler with two counts of party to a crime of arson of a building and one count of party to a crime of selling/possessing/manufacturing Molotov cocktails, contrary to Wis. Stat. §§ 943.02(1)(a), 939.50(3)(c), 939.05, and 943.06(2), 939.50(3)(h), 939.05 (1:1-2; A-Ap. 103-04).

According to allegations in the complaint, the charges were based in part on statements Edler made to the police on April 20, 2011 (1:2-4; A-Ap. 104-06).

An information filed April 27, 2011, charged Edler with two counts of party to the crime of arson of a building and one count of party to the crime of selling/possessing/manufacturing Molotov cocktails (8:1-2; A-Ap. 110-11).

On June 10, 2011, Edler filed a motion to suppress statements and derivative evidence asserting that the statements he made to the police on or after March 30, 2011, were obtained in violation of his Fifth Amendment rights (19; A-Ap. 112-15).

A hearing on the suppression motion was held on August 30, 2011 (42:1-38; A-Ap. 116-53). The court issued its oral ruling on November 7, 2011, finding that there was no Sixth Amendment violation but granting Edler's motion to suppress his April 20, 2011 statements based on the police violating Edler's Fifth Amendment right to counsel during a custodial interrogation (35:1-9;

[1]Record 36 is listed as two pages. However, the order consists of one page. Page two is a duplicate of page one.

A-Ap. 154-62). The written order granting Edler's motion for suppression was filed on November 19, 2011 (36; A-Ap. 101-102).

The state appealed from the order granting the motion to suppress (40:1-2). On November 14, 2012, the Wisconsin Court of Appeals, District II, certified the appeal to the Wisconsin Supreme Court. The certification was granted by the Wisconsin Supreme Court on January 15, 2013.

STATEMENT OF FACTS

On March 30, 2011, Detective Gerald Urban, an eight-year veteran of the Sheboygan County Sheriff's Department, interviewed Andrew Edler in connection with Edler's possible involvement in a burglary (42:9-11; A-Ap. 124-26). During the custodial interrogation, Detective Urban changed his focus from a burglary to an alleged arson incident (42:11; A-Ap. 126). Shortly after the interview ventured into the arson area, Edler advised Detective Urban that he would like a lawyer from this point on and Detective Urban stopped the questioning (42:11-12; A-Ap. 126-27). Detective Urban advised Edler that he should be quiet as Edler had invoked his right to an attorney (42:12; A-Ap. 127).

On March 31, 2011, Edler, still in custody, reinitiated contact with Detective Urban (42:12-13; A-Ap. 127-28). However, during this contact there was no substantive discussion about either the burglary or the arson cases (42:13; A-Ap. 128). Edler was formally charged with burglary on April 1, 2011, by the Sheboygan County District Attorney's office and counsel was appointed for Edler to represent him in the burglary case (42:13-14; A-Ap. 128-29). Edler was then released from custody when he bonded out on April 1, 2011 (42:14-15; A-Ap. 129-30). *See* Wisconsin Court System Circuit Court Access for Sheboygan County Case No. 2011CF0146.

On April 18, 2011, Detective Urban had an interview with Shawn Jones during which Jones implicated Edler as to the arson case Urban was investigating (42:15; A-Ap. 130). Shawn Jones agreed to wear a wire in setting up a conversation with Edler about the arson matter. The meeting was set up for April 18 and took place in Edler's home (42:15-16; A-Ap. 130-31). During the wired conversation with Jones, Edler made some inculpatory remarks about his involvement in the arson (42:16-17; A-Ap. 131-32).

On April 20, 2011, Detective Urban and Detective Judd went to Edler's home and arrested Edler for arson (42:16-17, 25-26; A-Ap. 131-32, 140-41). Edler's father was present when Detective Urban arrested Edler (42:26; A-Ap. 141). Edler's father told Edler that he should cooperate with law enforcement and should tell the truth (42:26; A-Ap. 141). Edler was then handcuffed, placed in the squad and Detective Urban sat next to Edler (42:26; A-Ap. 141). As the drive began, Urban told Edler that he should consider taking his father's advice about telling the truth (42:17; A-Ap. 132). About five minutes into the twenty-minute drive to the Sheboygan County Sheriff's Department, Edler asked Detective Urban, "can my attorney be present for this?," and Urban told him yes (42:27; A-Ap. 142). During the rest of the ride, Edler did not discuss anything about wanting an attorney (42:27; A-Ap. 142). Detective Urban did not question Edler about the charged burglary or the arson matters during transport (42:27; A-Ap. 142).

Upon arrival at the Sheboygan County Sheriff's Department, Edler was brought into the interview room and was read his *Miranda* rights (42:28; A-Ap. 143). When Detective Urban read the second right of the *Miranda* warning (the right to counsel), Edler interrupted Urban and asked if requesting an attorney would impact whether or not he would have to remain in custody and Urban apprised Edler that it would have no impact on Urban's decision as to whether or not Edler should remain in custody (42:29; A-Ap. 144). After the interruption,

Urban re-read the *Miranda* warning in its entirety and Edler waived his rights and agreed to answer questions (42:29-30; A-Ap. 144-45). Edler then made several admissions implicating himself in the arson case (1:2-4; A-Ap. 104-06).

ARGUMENT

I. THE *SHATZER* RULE EXPANDING *EDWARDS* PROTECTIONS FOR FOURTEEN DAYS AFTER A SUBJECT'S RELEASE FROM CUSTODY IS COMPATIBLE WITH ARTICLE 1, § 8 OF THE WISCONSIN CONSTITUTION AND PROVIDES CLEAR DIRECTION TO LAW ENFORCEMENT WHILE PROTECTING CITIZENS FROM POLICE BADGERING.

A. Introduction.

In its certification, the court of appeals noted the *Shatzer* fourteen-day rule and posed the question as to whether Wisconsin should follow *Shatzer* or rely on the Wisconsin Constitution and modify the rule to provide more protection to citizens. The state recognizes that this court is not bound by the United States Supreme Court interpretations of the United States Constitution and is free to articulate higher standards on the police under the Wisconsin Constitution. *See Cooper v. California*, 386 U.S. 58, 62 (1967). Indeed, this court did so in the Fifth Amendment context in *State v. Knapp*, 2005 WI 127, 285 Wis. 2d 86, 700 N.W.2d 899. However, this court's history is to use this power sparingly and as the *Knapp* court noted in referencing its decision in *State v. Jennings* 2002 WI 44, 252 Wis. 2d. 228, 647 N.W.2d 142, the language of the Fifth Amendment in the United States Constitution is virtually identical to art. 1, § 8 of the Wisconsin Constitution. *See Knapp*, 285 Wis. 2d 86, ¶ 58.

The state submits that the *Shatzer* rule actually enhanced protections previously offered to citizens in *Edwards v. Arizona*, and *State v. Long*, 190 Wis. 2d 386, 526 N.W.2d 826 (Ct. App. 1994). This is so because under *Edwards* and its pre-*Shatzer* progeny, a defendant's custodial assertion of his *Miranda* right to counsel only prevented a police initiated interrogation on the matter while the person was in continuous custody. *See Clark v. State*, 140 Md. App. 540, 589, 781 A.2d 913 (2001); *United States v. Harris*, 221 F.3d 1048, 1052-53 (8th Cir. 2000); *United States v. Hines*, 963 F.2d 255, 257 (9th Cir. 1992); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125-26 (7th Cir. 1987). Now, under *Shatzer*, a subject who asserts the *Miranda* right to counsel has an extra fourteen days of insulation from police contact.

This court asserted its independence from a federal Fifth Amendment interpretation in *Knapp* when it determined that the Wisconsin Constitution demanded extra protections for its citizens and prohibited the admission of derivative evidence stemming from an intentional *Miranda* violation. *See Knapp*, 285 Wis. 2d 86, ¶ 73. Moreover, this court felt compelled to provide Wisconsin citizens with an extra layer of protection because it found the police conduct involved to be "particularly repugnant" and requiring deterrence. *See Knapp*, 285 Wis. 2d 86, ¶ 75. The state submits that in this case there were no intentional violations of *Miranda* when they waited over fourteen days after Edler had been released from custody to approach him, and no need to trump a federal rule which provided far more protections to citizens than both the federal and Wisconsin courts had previously offered.

Finally, the state contends that one factor promoting the tendency to interpret both the United States Constitution and the Wisconsin Constitution similarly is the need for clarity and harmony in the law. *See Knapp*, 285 Wis. 2d 86, ¶ 59. The fourteen-day "cooling off" period gives clear direction to the police and a fair

opportunity for a citizen to clear his head after being released from custody.

The *Edwards* rule was followed by Wisconsin. The state reasons that the *Shatzer* rule expanding *Edwards* to provide more protections to citizens should be similarly followed.

B. The *Shatzer* rule.

When an accused invokes his *Miranda* right to counsel during a custodial interrogation, the police must not conduct any further custodial interrogations unless the accused has obtained counsel or initiates the new contact with the police. *Edwards*, 451 U.S. at 484-85. The rationale of *Edwards* is that once a suspect invokes his *Miranda* right to counsel, any subsequent waiver that comes at the authorities behest is the product of unlawful pressures on the defendant. *Shatzer*, 130 S. Ct. at 1219. The *Edwards* rule prevents the police from taking advantage of the mounting pressures of continuous police custody and breaking down the original resolve of the defendant to not answer questions without an attorney present. *See Shatzer*, 130 S. Ct. at 1219-20. The *Edwards* rule is not a constitutional mandate but rather a judicially created rule designed to protect a suspect's Fifth Amendment rights. *Id.* at 1220. As a judicial rule, the *Edwards* rule is only justified by its prophylactic purpose. *Id.* The *Edwards* rule is designed to prevent the police from badgering a defendant from waiving his previously asserted *Miranda* right to counsel. *Montejo v. Louisiana*, 556 U.S. 778, 787 (2009).

The United States Supreme Court expanded the *Edwards* rule in *Shatzer*. The high court reasoned that even after a person has been released from custody, there is a need for a continuance of *Edwards* protections for a period of time. The court held that the need for *Edwards* protections dissipate when a subject, who asserts his *Miranda* right to counsel during a custodial interrogation,

is released from custody for fourteen continuous days after the custodial invocation. *Shatzer*, 130 S. Ct. at 1223. The court opined that the newly crafted fourteen-day break from custody extension of *Edwards* provides ample time for a suspect to get re-acclimated to normal life, and to shake off any of the residual coercive effects of his/her prior custody. *Id.* So, *Shatzer* enhanced citizen rights, rather than restrict them. Oddly, Edler wants this court to abandon the new protections offered by *Shatzer*, and use its powers to create a totality of circumstances test that may, in some instances, create less rights for citizens (if under the totality of circumstance test a period of fewer than fourteen days would seem appropriate). The state asks this court to decline this invitation.

C. The *Shatzer* rule is a bright-line rule.

The *Shatzer* Court makes it clear that they are establishing a bright-line rule. Recognizing the somewhat arbitrary nature of a fourteen-day standard, the Court defends its actions by noting, "It is impractical to leave the answer to that question [how long is a sufficient break in custody to end *Edwards* protections] for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when a renewed interrogation is lawful." *Shatzer*, 130 S. Ct. at 1222-23. The *Shatzer* Court wanted to give the police clear direction as to when the *Edwards* protections run out; a break in custody for fourteen consecutive days. Just as clearly, the *Shatzer* Court rejected a case-by-case approach to analyzing *Edwards*. The state respectfully submits that this court should do the same.

The state submits that the *Shatzer* rule expanded previous *Edwards* protections, which had been endorsed by Wisconsin courts. As the original *Edwards* rule was compatible with the Wisconsin Constitution, so too should be its expansion. Moreover, while the *Shatzer* rule enhances citizen rights, it does not do so at the expense of

clarity as it provides a clear framework to guide police action. The state asks this court to affirm the *Shatzer* rule for Wisconsin.

D. Application of the *Shatzer* rule to the facts of this case.

Since, Edler's challenged statements to the police occurred on April 20, five days after the *Shatzer* fourteen-day rule had passed, Edler's statements should not be suppressed because of his custodial invocation of his *Miranda* right to counsel on March 30.

II. EDLER DID NOT CLEARLY AND UNEQUIVOCALLY ASSERT HIS *MIRANDA* RIGHT TO AN ATTORNEY BEFORE BEING READ HIS RIGHTS, AND AFTER THE READING OF THE *MIRANDA* WARNING EDLER CLEARLY AND KNOWINGLY WAIVED HIS RIGHTS.

A. Introduction.

As argued above, the police were free to initiate contact with Edler on April 20, nineteen days after his release from custody. However, this does not end our inquiry as to the admissibility of the challenged April 20 statements. Two issues remain to be resolved and these issues were certified by the court of appeals for review by this court. The first issue is whether Edler clearly and unequivocally asserted his *Miranda* right to counsel, prior to his questioning, so as to trigger *Edwards* protections.

It is factually undisputed that Edler's comment at issue was made during transport to the interrogation site and at least fifteen minutes before the formal interrogation began. It is also uncontested that Edler already had an attorney, appointed for him on April 1, to handle an

unrelated matter, and that the police were aware of this. Finally, it is agreed that Edler's comment was, "can my attorney be present for this?." The state submits that in the context of these facts Edler's reference to an attorney was a request for information and not an assertion of a right. At the least, the statement is ambiguous and capable of disparate yet equally reasonable interpretations. Consequently, the state argues that since Edler did not clearly and unequivocally assert his *Miranda* right to an attorney, the police were free to attempt an interrogation more than fifteen minutes later.

B. Standard of review.

The sufficiency of a defendant's invocation of his *Miranda* right to counsel is a question of constitutional fact. *Jennings*, 252 Wis. 2d 228, ¶ 20. Constitutional facts are reviewed under a two-part standard. The circuit court's findings of fact are to be upheld unless clearly erroneous, and the application of constitutional principles to those evidentiary facts are reviewed *de novo*. *Id.* So, this court reviews independently the issue of whether "can my attorney be present for this?," under this case's factual context, is a clear assertion of the *Miranda* right to counsel or an ambiguous statement permitting the police to lawfully continue towards an interrogation.

C. Application of the law to the facts of this case.

As mentioned above, it is undisputed that Edler's challenged comment occurred at least fifteen minutes before the police actually attempted a custodial interrogation. So, Edler was either making an anticipatory ambiguous reference to counsel, as the state submits, or an anticipatory yet clear assertion of his right to counsel, as Edler contends. In either case, the comment was anticipatory. The issue of the validity of an anticipatory assertion of the *Miranda* right to counsel was addressed but not definitively resolved by this court in *State v.*

Hambly, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48. Nevertheless, the state leaves that battle for another day as it concedes under the circumstances present here, particularly the police mentioning to Edler that he should heed his father's advice to tell the truth, that an attempted interrogation was forthcoming. However, while the state does not fight in this instance Edler's right to invoke his *Miranda* rights during the police transport, it maintains that the lack of temporal proximity between the challenged statement and the onset of the interrogation is a factor in determining the core issue as to whether Edler's squad car comment was clear or ambiguous.

The law concerning the clarity of a *Miranda* invocation is articulated in the seminal case of *Davis v. United States*, 512 U.S. 452 (1994). In *Davis* the high Court opined that determining whether a reference to an attorney is a clear or ambiguous assertion of the *Miranda* right to counsel is an objective inquiry based on all the circumstances present. *Davis*, 512 U.S. at 459. Edler's statement made during transport was, "can my attorney be present for this?" (42:27; A-Ap. 142). While the record is unclear, the assumption, an assumption that the state does not challenge, is that "this" meant an upcoming interrogation. The salient facts surrounding Edler's statement are as follows:

- Edler was interrogated on March 30, 2011, by Detective Urban concerning Edler's role in a burglary case (42:9-11; A-Ap. 124-26).

- During this interrogation, Edler clearly asserted his *Miranda* right to counsel terminating the interview (42:11; A-Ap. 126).

- Edler was formally charged with burglary on April 1, 2011, and counsel was appointed for him (42:13-14; A-Ap. 128-29).

- Edler bonded out on the burglary charge and was released from custody on April 1, 2011 (42:14-15; A-Ap. 129-30).

- On April 20, 2011, Edler was arrested at his family residence for arson (42:16-17, 25-26; A-Ap. 131-32, 140-41).

- After Edler was arrested, Edler's father, in front of the police, told Edler to tell the truth (42:26; A-Ap. 141).

- Edler was handcuffed, and placed in a squad next to Detective Urban (42:26; A-Ap. 141).

- As the drive to the Sheboygan County Sheriff's Department began, Detective Urban told Edler that Edler should consider taking his father's advice about telling the truth (42:17; A-Ap. 132).

- About five minutes into the twenty-minute drive, Edler asked Detective Urban if Edler's lawyer could be present and Detective Urban told Edler, yes (42:27; A-Ap. 142).

- Edler made no further mention of an attorney throughout the rest of the ride (42:27; A-Ap. 142).

- Throughout the entire ride, Edler was not read the *Miranda* warning and was not questioned about either the charged burglary matter or the uncharged arson case (42:27; A-Ap. 142).

- Upon arrival at the Sheboygan County Sheriff's Department, Edler was brought

into an interview room and read the *Miranda* warning (42:28; A-Ap. 143).

- During that portion of the *Miranda* warning dealing with Edler's right to counsel, Edler interrupted Detective Urban and asked if his requesting an attorney would impact on whether he would be placed in custody or on whether he would go to jail (42:29-30; A-Ap. 144-45; 24:Ex. 3 minute 16:51:20).

- Detective Urban told Edler that he was already in custody and that he would be willing to discuss the issue further after a reading of the rights. Urban then reread the *Miranda* warning in its entirety and Edler waived his rights and began to answer questions (42:29-30; A-Ap. 144-45).

The state submits that in light of these facts, Edler's statement, "can my attorney be present for this?" was a question about his rights and not an assertion of them. The statement is ambiguous as it can be interpreted as a request for information, as easily as it can be interpreted as a clear expression of a desire not to answer any questions without an attorney present. Moreover, after making this statement, the police did not ignore Edler, or try to distract him with a new subject, but answered his query quickly, clearly, and correctly, that yes his attorney could be present. Both parties, Edler and Detective Urban, knew that Edler had an attorney on the charged burglary matter. Hence, it made perfect sense that Edler reference this lawyer when being transported for questioning about the arson. However, asking if his lawyer could attend an interrogation is a different matter than requesting that his lawyer be present. It is akin to asking, "Do I have to answer questions when you interview me?," and being told no, you don't have to answer questions. This would not be considered an invocation of the *Miranda* right to silence nor is the question posed here by Edler an invocation of his *Miranda*

right to counsel. In either instance, no clarity as to the subject's intent can be gleaned from a question about a right and its answer. Clarity comes with how the subject responds to the information. Edler did not give a response, did not show how he wished to proceed or not proceed armed with the information that his attorney could be present, if he so wished. Under these circumstances, Edler's statement is ambiguous as it relates to a desire to have a lawyer assisting him during a custodial questioning.

The state submits that Edler's query to the police during transport is analogous to what occurred in *Commonwealth of Virginia v. Redmond*, 264 Va. 321, 568 S.E.2d 695 (2002), where the Virginia Supreme Court held that statements made by a defendant during an ongoing custodial interrogation: "'Can I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?'" were a desire by a defendant to obtain information about the scope of his rights and not an assertion of them. *See id.* at 700. In this case, all parties knew Edler had a lawyer representing him on a different charge and therefore his asking if this lawyer could attend an interrogation about a new matter is a predictable question. It is a question about what options were available to him; not an assertion of a particular one. Moreover, the police answered the question quickly and accurately by advising Edler in the affirmative.

Edler relies heavily on *Taylor v. State*, 274 Ga. 269, 553 S.E.2d 598, 601 (2001), for support of his position that his statement "can my attorney be present for this?" is a clear assertion of his *Miranda* right to counsel. In *Taylor,* the defendant said "Can I have a lawyer present when I do that" in response to the interrogating officer requesting that Taylor tell her side of the story. However, *Taylor* is distinguishable from our case because Taylor made the comment after being Mirandized and questioning had begun, and not fifteen minutes before an interrogation was even initiated. Also, the *Taylor* court was motivated in large part about what they perceived to

be poor police conduct in handling Taylor's challenged statement, accusing the police of trying to steer Taylor away from obtaining counsel. *See id.* at 602. In our case, the police answered Edler's question about his lawyer quickly and accurately.

Similarly, Edler's reliance on *United States v. Lee*, 413 F.3d 622 (7th Cir. 2005), is misplaced. In *Lee*, the defendant during an ongoing custody interrogation said, "Can I have a lawyer?," and this statement was interpreted as a clear invocation of the *Miranda* right to counsel. Again, *Lee's* context is different than ours as the interrogation was already underway; Lee did not have an attorney at that point; and the police responded to his question with several statements designed to discourage Lee from seeking counsel. *Id.* at 624.

Moreover, the state rejects the notion that in this instance "can my lawyer be present" is the colloquial equivalent of "I want my lawyer present." The state readily concedes that in certain situations, "Can" means "I want." For example a child asking a teacher during class, "can I go to the bathroom" or a patron asking a waitress, "can I have a Diet Coke," are not requests for information but rather a clear expression of a desire. This is true, because of the immediacy between the request and the ability to fulfill it. Conversely, the colloquial interplay of "Can" and "I want" dissipates the farther the question is asked in relation to the ability to deliver the mentioned request. Thus, the state contends that Edler asking "can my attorney be present for this?," fifteen minutes before even arriving at the interrogation site, should be interpreted by its plain meaning as a question about the scope of his rights and not as a colloquial clear assertion of them.

In this case, Edler's question, "can my attorney be present for this?" is only a clear request for an explanation as to the scope of his rights. Edler was not badgered by the police after making this statement and was dutifully read his full *Miranda* warning at least a quarter of an hour

after making the statement. Edler's ambiguous question should not trigger the *Edwards* rule. This is especially so, since he would be using the rule as protection from the protective measure of being read his rights, rather than protection to stop an ongoing interrogation. Edler knew how to assert his right to counsel. He had done so on March 30 and the police had scrupulously honored his invocation. He did not do so here.

III. DETECTIVE URBAN WAS NOT REQUIRED TO CLARIFY EDLERS AMBIGUOUS REFERENCE TO HIS ATTORNEY, FIFTEEN MINUTES BEFORE EDLER EVEN ARRIVED AT THE INTERROGATION SITE.

A. Introduction.

As argued above, the state contends that the police were free to approach Edler for custodial questioning under *Shatzer,* and because Edler did not clearly and unequivocally invoke his right to counsel, the police were not prevented by *Edwards* from proceeding to attempt a formal interrogation. However, one issue remains: Whether the police were legally required to seek clarification of Edler's ambiguous comment made prior to the formal reading of the *Miranda* warning.

The state concedes that the police made no attempt to clarify Edler's meaning when he made his ambiguous reference to his lawyer during transport to the interrogation site. Also, the law is well established, both under the United States and the Wisconsin Constitutions, that the police are not required to clarify any ambiguous post-*Miranda* waiver references to counsel. *See Davis*, 512 U.S. 452; *Jennings*, 252 Wis. 2d 228. So, we are left with this question: Are the police required to clarify ambiguous references to counsel made prior to a *Miranda* waiver though they are not required to do so in the post-waiver environment?

The state contends that while there is some conflict amongst courts as to the issue of clarification in a pre-waiver posture, this issue has not arisen in a setting several minutes before the subject has even arrived at the interrogation site. While the state believes that *Davis* and *Jennings* remain applicable pre-waiver, the state argues that, under the facts presented in this case, the police are not required to seek clarification as the citizen will have the protection of being fully advised of his/her *Miranda* rights many minutes later and in a different location. The reading of the warning in this type of context is the ultimate search for clarification.

B. Applicable law and its application to the facts.

As the court of appeals noted in its certification, there is controversy as to whether the police face a higher standard in a pre-waiver situation and therefore must clarify any ambiguous references to counsel. There are many cases that do extend the *Davis* rule to pre-waiver ambiguous references to counsel: *In re Christopher K.*, 217 Ill. 2d 348, 841 N.E.2d 945, 963-65 (2005); *United States v. Brown,* 287 F.3d 965, 971-73 (10th Cir. 2002); *United States v. Muhammad,* 120 F.3d 688, 697-98 (7th Cir. 1997); *Moore v. State*, 321 Ark. 249, 903 S.W.2d 154, 158 (1995). Also, in *Berghuis v. Thompkins* ___U.S.___, 130 S. Ct. 2250 (2010), the court, by implication, held that the *Davis* rule could be extended to a pre-waiver (albeit post-warning) situation, when it did not require the police to clarify Thompkin's intentions after he demonstrated ambiguous conduct in relation to asserting his *Miranda* right to silence. All cases on this issue, whether requiring clarification or not in the pre-waiver setting, stemmed from ambiguous references to counsel made immediately before, during, or after the reading of the *Miranda* warnings, but before waiver. Accordingly, none of these cases raise the issue that this one does: Whether there is a need for clarification when the ambiguous reference to counsel was made

substantially before the custodial subject had even arrived at the interrogation site.

In its certification, the court of appeals, paid a great deal of attention to *Sessoms v. Runnels*, 691 F.3d 1054 (9th Cir. 2012), in analyzing the clarification issue. In *Sessoms*, a divided court held that *Davis* is inapplicable to a pre-waiver setting. However, *Sessoms* is a poor compass for this court to employ in navigating the clarification issue, for a variety of reasons. First, *Sessoms* involved a subject making two, rapid-fire references to an attorney at the brink of the reading of the warning. Second, the subject's references were far more demonstrative of a wish for a lawyer than is true in the instant case; the first remark was "There wouldn't be any possible way that I could have a-a lawyer present while we do this?," and the second comment made moments later was "Yeah, that's what my dad asked me to ask you guys---uh, give me a lawyer." *Sessoms*, 691 F.3d at 1063. Indeed many of the judges in *Sessoms*, ruled with the majority, but also found that Sessoms' statements, taken together, were not even ambiguous. *Id.* at 1064. Third, the police did not answer Sessoms' question about an attorney and, more than ignoring it, tried to persuade Sessoms that getting a lawyer would be a bad idea. *Id.* at 1056. In effect, the police in *Sessoms* took a "cake and eat it" approach by treating *Sessoms* question as informational and not an assertion, but then not providing the information. Such is decidedly not the case here, where Detective Urban quickly and correctly answered Edler's question and never sought to dissuade Edler from invoking his right to an attorney.

Our case is different from those that have wrestled with the clarification issue as the ambiguous reference to counsel was not made immediately before, during, or immediately after the reading of the *Miranda* warning. It was made at least fifteen minutes before Edler even arrived at the interrogation site. There was an obligation for the police to answer Edler's question correctly. The police did so. There was no obligation to clarify as to

whether or not Edler was asserting his *Miranda* right to counsel as not only had the warning not been read, its reading was not imminent. Indeed, the ultimate clarification as to Edler's position on counsel did take place when he was formally advised of his rights some fifteen minutes after his making the ambiguous reference to counsel.

SUMMARY

The police were free to initiate a custodial questioning of Edler, under *Shatzer*, since he had been released from custody for nineteen days since previously asserting his *Miranda* right to counsel. Edler made one reference to an attorney during transport to the sheriff's department. The statement was not a clear request for counsel to assist him in handling questions or even a demand for the attorney's presence at the upcoming interrogation. Edler's question as to the scope of his rights, was not an assertion of his rights, and therefore did not trigger *Edwards* protections. The police were under no obligation to clarify Edler's intentions when he made his ambiguous comment, particularly because they were to fully ascertain Edler's wishes when they would read Edler the *Miranda* warning more than fifteen minutes later. The state respectfully submits that the trial court improperly implemented the *Edwards* rule to bar the police questioning of Edler and improperly suppressed Edler's statements made to Detective Urban after Edler knowingly waived his Fifth Amendment rights.

CONCLUSION

For all of the forgoing reasons, the State respectfully submits that the order of suppression should

be reversed, and the case be remanded for further proceedings.

Dated this 12th day of February, 2013.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,680 words.

Dated this 12th day of February, 2013.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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 and served on all opposing parties.

Dated this 12th day of February, 2013.

_____
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