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STATE OF WISCONSIN

IN SUPREME COURT

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Case 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 OF DEFENDANT-RESPONDENT

HOLDEN & HAHN, S.C.

Richard Hahn
State Bar ID No. 1019020
Christopher M. Eippert
State Bar ID No. 1049883
Attorneys for Defendant-Respondent

903 North Sixth Street
Sheboygan, WI 53081
Tel: (920) 458-0707
Fax: (920) 458-4359
consult@holdenandhahn.com
c.eippert@holdenandhahn.com

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ISSUES PRESENTED FOR REVIEW

1. In *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct 1323 (2010), the United States Supreme Court held that, when a suspect invokes his *Miranda* right to counsel during a custodial interrogation, after a fourteen-day continuous break in custody, police again have the right to ask the suspect permission to conduct an in-custody interrogation. Should the State of Wisconsin follow this bright-line rule that arbitrarily limits the protections granted to suspects pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981), or rely upon the Wisconsin Constitution to afford suspects greater protections after they have invoked their *Miranda* right to counsel?

The trial court did not answer this question, and the Court of Appeals certified this issue to this Court.

2. If the Court determines that the *Shatzer* fourteen-day rule is applicable in Wisconsin, does that decision, giving police the right to again ask a suspect permission to conduct an interrogation, sanction the police conduct in this case, where police, albeit after Edler had been released from custody for nineteen days, coerced Edler into waiving his previously asserted right to counsel?

The trial court did not answer this question, Edler raised this issue on appeal, and the Court of Appeals did not directly address this issue in its certification request.

3. Was Edler's statement to law enforcement on April 20, 2011, "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," and the Court of Appeals certified this issue to this Court.

4. If Edler's April 20, 2011 statement to law enforcement, "Can my attorney be present for this," is found to be an ambiguous request for counsel, is this statement held to a lower standard of clarity than the unequivocal standard from *Davis v. United States*, 512 U.S. 452 (1994), and was law enforcement required to clarify any ambiguity prior to going forward with further interrogation, based on the fact that Edler's request was made prior to waiving his *Miranda* rights on that date, and before his *Miranda* rights were even provided to him on that date?

The trial court did not answer this question, and the Court of Appeals certified this issue to this Court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The defendant-respondent requests both oral argument and publication of the Court's opinion.

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 and Court of Appeals. 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 ("Sheriff's Department") began to investigate Edler, a 17-year-old boy, 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 arson case and how it pointed to Edler as the culprit, and he continued to stress to Edler that he should cooperate in the arson 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 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 the burglary. (*Id.* at 17:15:30-17:23:40).

The following day, March 31, 2011, while Edler was still in custody awaiting charges on the burglary matter, 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 in part on the statements Edler made during the April 20, 2011 interview, 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

I. 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.*

II. ARTICLE I, SECTION 8 OF THE WISCONSIN CONSTITUTION PROVIDES GREATER PROTECTIONS TO SUSPECTS THAN THE ANALOGOUS PROVISION IN THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AND THE FOURTEEN-DAY RULE OF *MARYLAND V. SHATZER* SHOULD THEREFORE NOT APPLY IN WISCONSIN

A. Introduction

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 I, 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*, 559 U.S. 98, 130 S. Ct. 1213 (2010), the United States Supreme Court recently addressed the question of whether the protections afforded under *Edwards* to a suspect who invokes the right to counsel are affected by a break in custody. In answering that question, the *Shatzer* Court held that a fourteen-day break in custody after a defendant invokes his right to counsel "ends the presumption of involuntariness established in *Edwards* . . . ." *Id.* at 1217. In *Shatzer*, 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.

No Wisconsin appellate Court has yet directly addressed the *Shatzer* case and whether its fourteen-day rule is the limit of protection afforded to suspects in Wisconsin. Therefore, in this case, the Court of Appeals certified the question of whether Article 1, Section 8 of the Wisconsin Constitution provides greater protection to suspects than the *Shatzer* fourteen-day rule. The State argues that the *Shatzer* rule is actually an expansion of the protections under *Edwards* and should apply in Wisconsin. However, the *Shatzer* rule clearly limits the rights of suspects who have invoked their right to counsel during custodial interrogation, as it authorizes law enforcement, after a fourteen-day break, to completely disregard a suspect's wishes to deal with custodial questioning only with counsel. The Wisconsin Constitution cannot authorize such a practice.

B. The *Shatzer* rule limits the protections afforded to suspects under *Edwards*

As mentioned above, the State suggests that the *Shatzer* fourteen-day rule actually expands the *Edwards* protections for suspects who invoke their right to assistance

of counsel during custodial interrogation. In support of this proposition, the State cites to a number of non-binding state and federal cases that previously concluded that suspects' *Edwards* protections, under certain circumstances, ended after a release from custody. *See* State's Brief at 7. However, there is absolutely no Wisconsin case law or any United States Supreme Court decisions, pre-*Shatzer*, that limited *Edwards* protections in this manner.

To be sure, the United States Supreme Court, long before *Shatzer*, observed in dicta that a suspect's statements should be presumed involuntary "assuming there has been no break in custody." *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991). But is important to note that this language from *McNeil* simply acknowledged that *Edwards* does not apply when a suspect is not in custody. The United States Supreme Court's recent discussion in *Montejo v. Louisiana*, 556 U.S. 778 (2009), 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 . . . ." *Id.* at 795.

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, under the Wisconsin Constitution, *Edwards* should continue to protect a suspect who has clearly indicated that he is unable to handle the coercive pressures of custodial interrogation without counsel. Until *Shatzer*, the United States Supreme Court never held otherwise. Nor has any Wisconsin appellate court, leaving the issue still undecided in Wisconsin.

C. Article I, Section 8 of the Wisconsin Constitution provides greater protections to suspects than the *Shatzer* rule

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. 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.

In fact, as the Court of Appeals noted in its certification, the Wisconsin Supreme Court "ha[s] more often interpreted the Wisconsin Constitution differently than the federal constitution in regard to Article I, Sections 7 and 8 than in regard to Article I, Section 11 [addressing searches and seizures]." (quoting *State v. Felix*, 2012 WI 36, ¶ 36, 339 Wis. 2d 670, 811 N.W.2d 775). In *Knapp*, where the Wisconsin Supreme Court concluded that Article I, Section 8 provides suspects more protection than the Fifth Amendment with respect to use of physical evidence obtained via intentional *Miranda* violations, the Court emphasized that the rights intended to be protected by Article I, Section 8 of the Wisconsin Constitution " 'are so sacred, and the pressure so great toward their relaxation in case[s] where suspicion of guilt is strong and evidence obscure, that it is the duty of the courts to liberally construe the prohibition in favor of private rights.' " *Knapp*, 2005 WI 127, ¶ 63 (citations omitted).

Based on this Court's duty to liberally construe the Wisconsin Constitution's prohibition against self-incrimination in favor of suspects' rights, this Court should conclude that Article I, Section 8 provides greater protections than those announced in the *Shatzer* decision. The fourteen-day-break-in-custody rule announced in that case, while a

bright-line rule, is completely arbitrary in its basis. In reaching its conclusion that a fourteen-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 fourteen 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).

The State emphasizes that the fourteen-day rule is a bright-line rule that provides clear guidance to law enforcement and courts. Edler concedes that bright-line rules can have such benefits. However, bright-line rules are not necessary to prevent Fifth Amendment violations, as the United States Supreme Court has made clear when refusing to adopt such rules in other cases involving *Miranda* rights. *See, e.g.*, *Michigan v. Mosely*, 423 U.S. 96, 103-04 (1975). Further, "an otherwise arbitrary rule is not justifiable merely because it gives clear instruction to law enforcement officers." *Shatzer*, 130 S. Ct. at 1228 (Thomas, J. concurring in judgment).

Moreover, the *Shatzer* majority's suggestion that having an opportunity to "consult with friends and counsel" while released is sufficient justification for limiting the protections of *Edwards* to fourteen days after being released is seriously flawed. The United States Supreme Court

previously held that for *Edwards* protections to end, it is not sufficient that a suspect have an opportunity to speak with a lawyer or even did speak with a lawyer. *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (noting that "consultation with an attorney" does not prevent "persistent attempts by officers to persuade [a suspect] to waive his rights . . . ."). Providing a suspect the opportunity to consult with counsel while out of custody is simply not a substitute for the presence of counsel during custodial interrogation.

Based on the lack of reasoning from the Supreme Court in asserting fourteen 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. Edler suggests that the Wisconsin Constitution provides not only greater protections, but protections that are more rationally based than this fourteen-day rule. First, Edler suggests that, under the Wisconsin Constitution, once a suspect invokes his right to have counsel assist during custodial interrogation regarding an offense, law enforcement cannot subject the suspect to further custodial interrogation at any time regarding *that specific offense* until either a lawyer has been made available to the suspect or the suspect reinitiates the conversation. If the Court does not agree with this interpretation of the Wisconsin Constitution, Edler submits that each case presenting this issue must be addressed on an individual basis, under a totality of the circumstances analysis.

1. Once a suspect invokes his right to counsel during custodial interrogation regarding an offense, law enforcement should never be able to subject the suspect to further custodial interrogation with respect to that offense, regardless of any break in custody, unless a lawyer is made available or the suspect reinitiates the conversation

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 United States Supreme Court's reasoning in *Mosley* strongly suggests the opposite is true, that is, 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. *See Mosley*, 423 U.S. at 104-05.

Opponents of such a rule may contend that if this Court does not follow the bright-line rule of *Shatzer*, and instead concludes that *Edwards* protections never extinguish with respect to a specific offense, that law enforcement will never have a further opportunity to question suspects about that offense, significantly hampering law enforcement efforts. However, any such contention completely ignores the ability of law enforcement to still question suspects who have invoked their right to counsel under a variety of circumstances: (1) the suspect initiates further communication; (2) law enforcement makes counsel available to the suspect during custodial interrogation; and (3) questioning a suspect when not in custody. Any such concerns regarding any impediment to law enforcement are significantly overstated, and in any event, this concern should not justify any 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.

With such a non-arbitrary bright-line rule, law enforcement had no right to reinitiate custodial interrogation of Edler in this case regarding his involvement in the alleged

arsons, as that is the specific offense that Edler, on March 30, 2011, invoked his right to counsel on.

> 2. In the alternative, when a break in custody occurs after a request for counsel, whether and how law enforcement can reinitiate custodial interrogation should be determined in each case under the totality of the circumstances

If this Court disagrees that Article I, Section 8 of the Wisconsin Constitution provides that *Edwards* protections should not be limited and should last indefinitely with respect to specific offenses, the only other non-arbitrary test for determining whether law enforcement can reinitiate custodial interrogation after a suspect has invoked his right to counsel is a totality of the circumstances test. Such a test would be much more appropriate and in-step with the protections of Article I, Section 8 of the Wisconsin Constitution than the *Shatzer* majority's arbitrary fourteen-day rule, or any specific timeframe for cutting off *Edwards* protections, because it is "impossible to determine with precision" where to draw a line that fits neatly into every case. *Shatzer*, 130 S. Ct. at 1234 (Stevens, J. concurring in judgment (quoting *Barker v. Wingo*, 407 U.S. 514, 521 (1972))). Further, it is significant to emphasize that "[n]either a break in custody nor the passage of time has an inherent, curative power." *Id.* (Stevens, J. concurring in judgment).

An appropriate totality of the circumstances approach should start with the basic framework utilized by Wisconsin courts in determining the voluntariness of statements obtained by police. *See State v. Clappes*, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). In such a case, the State has the burden of proving that any confession given by a defendant was the product of the defendant's deliberate choice and unconstrained will, as opposed to improper police tactics. *Id.* To make this determination, the Court must examine the totality of the circumstances surrounding the confession, first analyzing the characteristics of the defendant, including age,

education and intelligence, physical and emotional condition, and prior experience with police. *Id.* These characteristics must be balanced against the police tactics used, such as the length of the interrogation, any delay in arraignment, the general conditions under which the confession took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threats, methods or strategies utilized by the police to compel a response, and whether the individual was informed of his right to counsel and right against self-incrimination. *Id.* at 236-37 (citations omitted).

In the situation at hand, however, where the suspect has previously invoked his *Miranda* right to counsel regarding the same offense that law enforcement is seeking to conduct a subsequent custodial interrogation regarding, there must be a presumption that any further police attempt at custodial interrogation is not allowed, and that any alleged subsequent waiver of the right to counsel by the suspect is not valid. This is because, once a suspect has invoked his right to counsel during custodial interrogation, a subsequent waiver of that right "cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 U.S. at 484; *Long*, 190 Wis. 2d at 395. As the Wisconsin Supreme Court has stressed, such a waiver is presumed to be invalid, and any fruits of the subsequent interrogation initiated by police must be suppressed. *Harris*, 199 Wis. 2d at 252.

Here, a review of the totality of the circumstances, including a balancing of the personal characteristics of Edler with the tactics utilized by police in attempting to get Edler to waive his previously invoked right to counsel, demonstrates that Detective Urban's attempt at reinterrogation of Edler was outside the bounds of the Wisconsin Constitution.

As discussed above, Edler clearly and unequivocally invoked his right to counsel while being interrogated by Detective Urban while in custody on March 30th when he stated, "From this point on, I'd like a lawyer here." (24:Exh. 1 at 17:12:54). The State does not dispute this. *See* State's

Supreme Court Brief at 4, 12. 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 previously asserted 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).

Under the totality of the circumstances, Detective Urban's tactics used in conducting a custodial interrogation of Edler just three weeks after Edler clearly invoked his right to counsel on the exact same matter are not in step with the liberally construed protections provided to criminal defendants under Article I, Section 8 of the Wisconsin Constitution. This is especially so, based on the nature of Edler's original invocation: "*From this point on*, I'd like a lawyer here." (24:Exh. 1 at 17:12:54). Of further significance is the fact that Edler again references his desire to have counsel present on April 20th after Detective Urban begins badgering him and makes clear that interrogation is forthcoming on that date. Even if Edler's protections under *Edwards* do not automatically extend indefinitely with respect to his invocation of counsel as to interrogation on the arsons, under the circumstances of this case, Detective Urban's subsequent attempt at interrogation was not allowed. Under either scenario, any statements made by Edler during the custodial interrogation on April 20th must be suppressed.

III. EVEN IF THE *SHATZER* RULE DOES APPLY IN WISCONSIN, THAT DECISION DOES NOT SANCTION THE POLICE CONDUCT IN THIS CASE, WHERE LAW ENFORCEMENT BADGERED EDLER INTO WAIVING HIS PREVIOUSLY INVOKED RIGHT TO COUNSEL

Edler submits that even if this Court determines that the *Shatzer* fourteen-day-break-in-custody rule applies, that the United States Supreme Court's decision in that case does not sanction Detective Urban's attempt to reinterrogate Edler on April 20, 2011, in light of all of the circumstances.

As discussed above, the United States Supreme Court's fourteen-day-break-in-custody rule announced in *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, although it significantly limits the protections of *Edwards*, does not give police the absolute right after fourteen days to reinterrogate a suspect who has previously invoked his right to counsel. *Id.*

In this respect, 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 fourteen-day break in custody. *Id.* at 1225. Instead, the decision merely allows police to again ask a suspect permission to be interrogated if a fourteen-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.

The facts of the *Shatzer* case further 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 fourteen-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 nineteen days Edler was out of custody after he first invoked his right to an attorney and before Detective Urban reinterrogated him on April 20th. However, the facts in the case at hand are significantly distinguishable from those in *Shatzer*, and the fourteen-day-break-in-custody rule should not operate to allow use of Edler's statements obtained in this case on April 20th.

The specific facts of Edler's case are laid out above both in the Statement of Facts, *supra* at pages 3-6, as well as in support of Edler's argument that the Wisconsin Constitution provides greater protections than offered by *Shatzer*, *supra* at pages 15-17. Therefore, there is no need to again repeat all of those facts here.

Looking at all of the facts in this case, this is clearly 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.

IV. 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* rule applies in Wisconsin, allowing the attempted reinterrogation on April 20th, and that Detective Urban's conduct in coaxing Edler into waiving his previously asserted rights is sanctioned by the *Shatzer* decision, suppression of the April 20th statements is still warranted. 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.

A. 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. In this respect, 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). In such a situation, 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.

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)). It is also important to stress that courts are to examine not only the words used by the suspect, but also all of the circumstances precipitating the request and the context of the actual request. *Davis*, 512 U.S. at 459 (stating that "[a suspect] must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer *in the circumstances* would understand that statement to be a request for an attorney"). Finally, any later equivocation from the suspect cannot render ambiguous an earlier clear and unequivocal invocation of the right to counsel. *Smith v. Illinois*, 469 U.S. 91, 97-98 (1984).

As noted by the Court of Appeals in its certification, Wisconsin case law on this issue does not include any guidance as to whether the precise statement made by Edler, "Can my attorney be present for this," or any similar statement, is an unequivocal request for counsel. Therefore, a review of case law from other jurisdictions can provide persuasive authority. *See State v. Harvey*, 2006 WI App 482, ¶ 20, n.7, 289 Wis. 2d 222, 710 N.W.2d 482. Edler, in his Court of Appeals brief, cited to 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?" is 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.*

Since the filing of the Court of Appeals briefs, Edler's counsel has located two additional, more recent cases that further support Edler's position. In *United States v. Wysinger*, 683 F.3d 784 (7th Cir. 2012), the Seventh Circuit discussed its previous holding in *Lee* and emphasized that the question, "Can I have a lawyer?" is a "direct request for a lawyer." *Id.* at 795.

Similarly, in *Lewis v. State*, 966 N.E.2d 1283 (Ind. Ct. App. 2012), the Court of Appeals of Indiana held that a suspect's question, "Can I get a lawyer?" is an unambiguous invocation of the right to counsel. *Id.* at 1288. That court stressed that when a suspect uses the word, "can" in requesting an attorney, that the suspect is expressing certainty and that the question should be more reasonably interpreted as an intentional request for an attorney. *Id.* at 1289.

The State cites to one case, *Commonwealth v. Redmond*, 264 Va. 321, 568 S.E.2d 695 (2002), for comparison purposes and in support of its position that Edler's statement on April 20th was not sufficient to invoke his right to counsel. In that case, during a custodial interrogation, the suspect stated, " 'Can I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?' " The Virginia Supreme Court held that, under the circumstances of that case, the suspect's statements were not an unequivocal request for counsel.

B. 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*, *Taylor*, *Lee*, and *Lewis*, *supra*, Edler stated, "Can my attorney be present for this?"

The State argues that Edler's reliance on these cases from other jurisdictions is misplaced, suggesting that the facts in these cases are distinguishable from the facts in the case at hand. The primary difference the State points to is that Edler's request for counsel occurred approximately fifteen minutes prior to the interrogation beginning, while the requests in the cases cited occurred after police had read suspects their *Miranda* rights. Complementing this argument, the State infers that Edler's lack of response to Detective's Urban's "Yes he can" answer during the ride to the Sheriff's Department, as well as Edler's follow-up question regarding counsel when Detective Urban later read the *Miranda* rights provides evidence that Edler's request was ambiguous.

The first problem with the State's arguments in this regard is that the State has cited to absolutely no authority suggesting that these differences have any relevance to the analysis. Quite the opposite, the Court of Appeals, in its certification, wrote that it was not inclined in its analysis to consider any statements made by Edler after the particular statement in question. *See* Certification at 8 n.6. In support of this conclusion, the Court of Appeals cited to *Commonwealth v. Redmond*, 568 S.E.2d at 698, the sole comparative case cited by the State ("[A]n accused's subsequent statements are not relevant to the question whether he invoked his right to counsel. A statement either asserts or fails to assert [this right]"); *see also Smith v. Illinois*, 469 U.S. at 97-99 (holding that any later equivocation cannot render ambiguous an earlier clear and unequivocal invocation of the right to counsel).

Further, the State, in making these arguments, ignores the fact that Edler had previously been advised of his *Miranda* rights on March 30th, and had undisputedly invoked his right to counsel on that date regarding the exact offense he was arrested for on April 20th. There is no dispute by the State that during the ride to the Sheriff's Department on April 20th, interrogation regarding this offense was impending, and that Edler knew this. That is why Edler stated, "Can my attorney be present for *this*?" Clearly, "this" was the impending interrogation, demonstrating that Edler wanted his attorney there. Edler's question is extremely similar to the suspect's question in *Taylor*, *supra*, "Can I have a lawyer present when I do *that*?" in response to a request by law enforcement that the suspect tell her side of the story.

Finally, the State suggests that, unlike law enforcement in *Taylor* and *Lee*, Edler was never badgered by police into waiving his rights and that Detective Urban "scrupulously honored" his prior invocation. However, a review of the facts of this case clearly shows that Detective Urban, both before and after Edler stated, "Can my attorney be present for this," badgered Edler into waiving his previously asserted right to counsel.

During Edler's arrest on April 20th, Detective Urban first used Edler's father as a tool in convincing Edler to waive his rights. (26:1). Then, during the ride to the Sheriff's Department, Detective Urban continued to badger Edler, stressing that he needed to follow his father's advice and cooperate, and that this was his opportunity to help himself out. (*Id.* at 2). When Detective Urban told Edler that they would talk about it further at the Sheriff's Department, Edler told Detective Urban, "Can my attorney be present for this?" (*Id.)*.

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 advice, 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 was unequivocal, therefore requiring police to cease any further questioning on that date.

As discussed above, the State cites to only one case in support of its position, *Commonwealth v. Redmond*, 264 Va. 321, 568 S.E.2d at 695 (2002) (Virginia Supreme Court concluded that suspect stating, " 'Can I speak to my lawyer? I can't even talk to [a] lawyer before I make any kinds of comments or anything?' " was not an unequivocal request for counsel). First, the suspect's statement in *Redmond* lacks the substantial similarity to Edler's request for counsel and those requests in the cases cited by Edler. In *Redmond*, the suspect did not request that a lawyer be present with him, but simply asked whether he could speak with an attorney. Further, the *Redmond* court, in determining that the statement was not an unequivocal request for counsel, relied on various factors that were not even detailed in the decision, including the suspect's tone of voice, his voice inflections, and his demeanor. *Redmond*, 264 Va. at 330. The *Redmond* case is therefore inappropriate to use for comparison purposes.

The State's reliance on *Redmond* becomes even more questionable, considering that the Virginia Supreme Court, since deciding *Redmond*, has determined that a suspect's statement that is much more similar to Edler's was an unequivocal request for counsel. *See Commonwealth v. Hilliard*, 270 Va. 42, 52, 613 S.E.2d 579 (2005) (Holding that statement by suspect, "Can I get a lawyer in here? . . . I already have a lawyer," as a matter of law, was an unequivocal request for counsel).

Under all of the circumstances, 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.

V. EDLER'S STATEMENT ON APRIL 20TH, "CAN MY ATTORNEY BE PRESENT FOR THIS," MADE PRIOR TO EDLER BEING ADVISED OF HIS *MIRANDA* RIGHTS, IS NOT SUBJECT TO THE *DAVIS* STANDARD OF CLARITY, AND AT MOST, DETECTIVE URBAN WAS ALLOWED TO CLARIFY ANY ALLEGED AMBIGUITY PRIOR TO COMMENCING INTERROGATION

A. Applicable Law

It is significant to again emphasize that the United States Supreme Court's holding in *Davis* that a suspect's arguable request for counsel must be unequivocal 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 of whether the *Davis* "unequivocal" standard should apply to pre-*Miranda*-waiver situations. Nor has any Wisconsin appellate court addressed this issue.

As discussed by Edler in his Court of Appeals brief, the large majority of 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 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."); *United States v. Rodriguez*, 518 F.3d 1072, 1078-79 (9th Cir. 2008).

Further, a prominent commentator agrees with this premise. *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").

Edler acknowledges that a handful of courts, but by far the minority, have applied the *Davis* unequivocal standard in a pre-waiver situation. *See In re Christopher K.*, 217 Ill. 2d 348, 299 Ill. Dec. 213, 841 N.E.2d 945, 964–65 (2005) (citing three other cases that applied *Davis* in a pre-waiver context).

Most of the courts that expressly support the limitation of the *Davis* rule to post-waiver contexts 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). These cases are helpful in resolving the issues in the case at hand, as they suggest that the *Davis*

standard should never be applied before a suspect waives his *Miranda* rights. Here, there is no dispute that Edler had not yet waived his *Miranda* rights on April 20th when he requested an attorney. Under this majority position, Detective Urban was not allowed to proceed with any further interrogation, but could only ask questions to clarify any alleged ambiguity in Edler's request.

The Court of Appeals, in its certification, briefly referred to the United States Supreme Court's recent decision in *Berghuis v. Tompkins*, ___ U.S. ___, 130 S. Ct. 2250 (2010). It is unclear whether that decision, which addressed a suspect's debatable invocation of the right to silence prior to a waiver of the *Miranda* rights, 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 arguably infers that the *Davis* unequivocal standard applies to an initial invocation of the right to silence or counsel. *Id.* at 2259-60. However, as the Court of Appeals noted, the *Berghuis* decision is not particularly helpful to the case at hand, where Edler made his request for counsel on April 20th before even having his *Miranda* rights read to him. To the contrary, the *Berghuis* Court emphasized that it was significant that the suspect in that case had been read the *Miranda* rights before any arguable invocation. *Id.* at 2262.

Further, closely reviewing all of the above-referenced cases that discuss the pre-waiver, post-waiver distinction, it appears that none of those cases directly involved an alleged ambiguous invocation of the right to counsel before the *Miranda* warnings were even read to the suspect. In fact, the Illinois Supreme Court, in *In re Christopher K.*, one of the cases cited by the State, explicitly limited its extension of the *Davis* rule to those pre-waiver cases where "the suspect makes a reference to counsel immediately *after* he has been advised of his *Miranda* rights." 217 Ill. 2d at 381 (emphasis added).

However, *Sessoms v. Runnels*, 691 F.3d 1054 (9th Cir. 2012), a case decided since the time of the briefing in the Court of Appeals on this case, and which is discussed by the Court of Appeals in its certification, squarely addresses such

a situation where a reference to counsel is made before *Miranda* rights are read. In that case, the Ninth Circuit held that the *Davis* unequivocal rule does not apply when a suspect arguably requests an attorney before receiving a clear and complete set of *Miranda* warnings.

In *Sessoms*, shortly after officers entered an interrogation room, and before they even began to read Sessoms his *Miranda* rights, Sessoms stated, "There wouldn't be any possible way that I could have a—a lawyer present while we do this? . . . Yeah, that's what my dad asked me to ask you guys . . . uh, give me a lawyer." *Id.* at 1055. Despite these statements, Officers continued to talk to Sessoms, telling him that they already knew what happened, already had enough evidence against Sessoms, and that this was Sessoms' opportunity to tell his version of the story. *Id*. at 1056-57. Only after this occurred did police read Sessoms his *Miranda* rights, and Sessoms eventually said, "Let's talk," and proceeded to make inculpatory statements. *Id.* at 1057.

Sessoms moved to suppress his statements, and this motion was denied by the trial court. On appeal, the California Court of Appeals applied the *Davis* rule and concluded that Sessoms' references to an attorney were not an unequivocal request for counsel. On federal habeas review, the district court denied Sessoms' petition. Eventually, on a rehearing en banc, the Ninth Circuit reversed in favor of Sessoms. *Id*. at 1057-58.

The Ninth Circuit emphasized, as many other courts previously have, that *Davis* only applies after a knowing and voluntary waiver of *Miranda* rights. *Id.* at 1061. The court further stressed that when there has been no such waiver, " '[i]nvocation of the *Miranda* right to counsel requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney, . . . but the assertion need not be "unambiguous or unequivocal." *Id.* (quoting *Davis*, 512 U.S. at 459; and *McNeil*, 501 U.S. at 178). The court further analyzed this distinction in light of the United States Supreme Court's recent decision in *Berghuis*, and highlighted that, unlike the

suspects in both *Davis* and *Berghuis*, Sessoms made his references to an attorney before being informed of his *Miranda* rights. *Id.* at 1062. Based on this critical factual distinction, the *Sessoms* court concluded that the *Berghuis* decision did not alter the fact that the *Davis* unequivocal standard applies only after a suspect has been informed of his *Miranda* rights. *Id.* The rationale for this distinction is that "[a] person not aware of his rights cannot be expected to clearly invoke them. Once, however, a suspect has been read his *Miranda* rights, it is reasonable to ascribe to him knowledge of those rights." *Id.*

As Sessoms made his references to an attorney before being advised of his *Miranda* rights, the court held that the clear invocation rule of *Davis* should not have been applied. *Id.* Applying the appropriate standard, that the references to an attorney "can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by police," the court found that Sessoms' statements easily met this standard. *Id.* at 1063 (quoting *McNeil*, 501 U.S. at 178). The court therefore concluded that police, following these references to any attorney should have immediately ceased questioning Sessoms. *Id.* at 1064.

B. Detective Urban was required to either cease questioning Edler altogether, or at most, ask questions to clarify Edler's desire for counsel before continuing with the interrogation on April 20th

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). Even if Edler's statement regarding his wish for an attorney was not unequivocal, it easily meets the lower standard of clarity as expressed by the *Sessoms* court, as Edler's statement, at a minimum, is "some expression of a desire for the assistance of an attorney." *Sessoms*, 691 F.3d at 1064. Taking into consideration all of the circumstances, including Edler's

undisputed clear invocation of the right to counsel regarding the same offense just three weeks earlier, and Detective Urban's knowledge that Edler had an attorney, it becomes even clearer that Edler's statement on April 20th, at a minimum, meets this lower standard.

Understanding the significance of *Sessoms* and the support it gives to Edler's position, the State attempts to distinguish that case factually from the case at hand. First, the State stresses that in *Sessoms*, the suspect made his references to an attorney *immediately* before police read the *Miranda* rights, while Edler made his reference to an attorney at least fifteen minutes prior to arriving at the interrogation site. However, the State fails to offer any explanation as to why this makes any difference. The *Sessoms* court placed absolutely no emphasis on the length of time between the reference to an attorney and when the *Miranda* rights are later read. Indeed, the length of time involved is completely irrelevant, and the only pertinent factor is whether those rights have yet been read at all. The *Sessoms* court made clear the rationale for not requiring as much clarity from a suspect prior to the *Miranda* rights being read: "A person not aware of his rights cannot be expected to clearly invoke them. Once, however, a suspect has been read his *Miranda* rights, it is reasonable to ascribe to him knowledge of those rights." *Id.* at 1062. Both the suspect in *Sessoms* and Edler in this case knew that interrogation was forthcoming, but had not yet been read their rights when they made their references to counsel. In fact, Edler's request, "Can my attorney be present for *this*?" shows that Edler wanted an attorney during *the interrogation*, just like the suspect in *Sessoms*. There is no appreciable difference between these situations that should subject Edler's statements to any higher level of clarity.

The State next argues that Detective Urban's conduct in this case is distinguishable from the police conduct in *Sessoms*. Specifically, the State suggests that Detective Urban did nothing to dissuade Edler from invoking his right to an attorney after Edler's statement, "Can my attorney be present for this?" Surely, Detective Urban never told Edler, "You should not get an attorney." However, Detective

Urban's continual pressing of Edler into waiving his previously asserted rights effectively sent the message to Edler that it was futile for him to have an attorney present during interrogation. This is exactly what the police did in *Sessoms*. *Id.* at 1063.

The only response Detective Urban gave to Edler's request for an attorney to be present during interrogation was, "Yes, he can." (*Id.*). Detective Urban never asked any other questions to clarify whether Edler actually wanted his attorney there. The State concedes that Detective Urban made no such attempts in the squad car following Edler's request for an attorney. 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, which had begun upon Edler's arrest in front of his father. Only after Detective Urban's continual pressure and intentional failure to clarify Edler's request for an attorney did Detective Urban read Edler his *Miranda* rights and obtain an alleged waiver. Detective Urban's conduct demonstrates that he knew Edler wanted his attorney present, and the State therefore cannot meet its "heavy burden" of demonstrating that Edler knowingly and intelligently waived his *Miranda* rights on April 20th.

In such a situation, following Edler's statement, "Can my attorney be present for this?" Detective Urban was not allowed to go forward with any interrogation. At most, Detective Urban was allowed to ask Edler questions aimed at clarifying Edler's desire to have an attorney. Clearly, Detective Urban was not allowed to badger Edler into waiving his previously invoked right to counsel, which is exactly what happened. 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.

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 this 4th day of March, 2013

HOLDEN & HAHN, S.C.

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Richard Hahn
State Bar No. 1019020
Christopher M. Eippert
State Bar No. 1049883
Attorneys for Defendant-Respondent
903 North Sixth Street
Sheboygan, WI 53081
Tel: (920) 458-0707

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 10,614 words.

Dated this 4th day of March, 2013

HOLDEN & HAHN, S.C.

_____
Christopher M. Eippert
Attorney for Defendant-Respondent

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 4th day of March, 2013

HOLDEN & HAHN, S.C.

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Christopher M. Eippert
Attorney for Defendant-Respondent