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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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ARGUMENT

I. THE *SHATZER* RULE SHOULD BE FORMALLY ADOPTED IN WISCONSIN.

Edler argues that this court should reject the *Shatzer*[1] rule as incompatible with the Wisconsin Constitution, because it supposedly limits the protections

[1] *Maryland v. Shatzer*, 559 U.S. 98, 130 S. Ct. 1213 (2010).

previously provided to suspects under *Edwards.*[2] (*See* respondent's brief at 8-9). To support this contention, Edler argues that prior to *Shatzer*, *Edwards* protections remained viable whenever a defendant is in custody after asserting his *Miranda* right to counsel, regardless of any break in custody after the original assertion. (*Id.*). Therefore, since *Shatzer* sets the time limit prohibiting a police initiated contact at fourteen continuous, non-custodial days after the assertion, Edler reasons that *Shatzer* restricts *Edwards.* The state readily concedes that fourteen days is less than always, but the flaw in Edler's analysis is that *Edwards* protections, prior to *Shatzer*, have been consistently and uniformly interpreted as evaporating after there is a break in custody after the assertion. "Lower courts have uniformly held that a break in custody ends the *Edwards* presumption." *Maryland v. Shatzer*, *Shatzer* 130 S. Ct. 1213, 1220 (2010). *Also see Clark v. State*, 140 Md. App. 540, 781 A.2d 913, 941-42 (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); *McNeil v. Wisconsin*, 501 U.S. 171, 177 (1991) (dictum).

Edler discounts the authority supporting the contention that *Edwards* rights dissipate after a break in custody, and the complete absence of any authority suggesting to the contrary, by claiming that no Wisconsin case law or any United States Supreme Court case, prior to *Shatzer*, placed significance to a break in custody in an *Edwards* analysis. However, the United States Supreme Court created the *Edwards* rule and is therefore the best judge as to what it means. The *Shatzer* Court makes it clear that the accepted meaning of its *Edwards* decision is that *Edwards* rights are lost after a break in custody. If the Supreme Court felt otherwise and meant *Edwards* to mean what Edler says it means; that the *Edwards* protections merely lapse when a person is out of custody and reappear

[2]*Edwards v. Arizona*, 451 U.S. 477 (1981).

upon a return to custody, then there would have been no need to craft a fourteen-day rule. The *Shatzer* Court would merely have reaffirmed its original meaning in *Edwards* and scolded all the other courts for drifting away from their original intent by placing a break in custody restriction to *Edwards* applications. Instead, the *Shatzer* Court did not clarify *Edwards*, but rather modified it, extending its "shelf life" from a break in custody date to a fourteen continuous days of non-custody date.

Edler claims that *Shatzer* limits *Edwards* protections, and thus runs afoul of the Wisconsin Constitution; the state submits that *Shatzer* expands *Edwards* protections providing more rights to citizens and therefore is compatible with the Wisconsin Constitution. The state submits that the best arbiter for the issue as to whether *Shatzer* restricts *Edwards* or expands it is the United States Supreme Court, which authored both decisions. Clearly, the *Shatzer* Court believed it was expanding *Edwards*, when it wrote, "We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judiciously prescribed prophylaxis. ... Because *Edwards* is 'our rule, not a constitutional command,' 'it is our obligation to justify its expansion.'" *Shatzer*, 130 S. Ct. at 1220 (citations omitted).

Furthermore, the *Shatzer* Court gives a policy reason for expanding *Edwards* protections beyond the break-in custody rule. The Court wrote,

> The 14-day limitation meets Shatzer's concern that a break-in custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for reinterrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain by such gamesmanship—nothing, that is, except the entirely appropriate gain of being able to

> interrogate a suspect who has made a valid waiver of his *Miranda* rights.

Shatzer, 130 S. Ct. at 1223.

Edler seeks to limit his revolutionary expansion of *Edwards* to a particular offense. In defending his rule Edler writes, "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." (Respondents brief at 12-13) (emphasis added). This flies in the face of *Arizona v. Roberson*, 486 U.S. 675 (1988), which rejected the state's attempt to limit *Edwards* protections to a particular charge. Now, trying to justify an overreaching rule that would in effect prevent the police forever from reinitiating contact with a person who asserts his *Miranda* right to an attorney, regardless of breaks in custody, Edler seeks to soften its sting by trying the same argument that the state failed at in *Roberson*. The United States Supreme Court has made it clear in *Roberson* that the Fifth Amendment is about a citizen's right to an attorney during any custodial interrogation, no matter the charge. Under *Roberson,* when a citizen asserts his *Miranda* right to an attorney, he/she is asserting the right to any law enforcement agency about any charge, for as long as he/she remains in custody. As the *Roberson* Court synopsized: "[T]here is no reason to assume that a suspect's state of mind is in any way investigation-specific." *Roberson*, 486 U.S. at 684.

Edler is in a trick box. If he urges the adoption of a rule that once a person asserts his *Miranda* right to a lawyer, he/she is "off limits" for the police when in custody, regardless of any breaks in custody. Then under *Roberson,* this rule would prevent any police contact about any matter whenever the person is in custody, regardless of breaks in custody. Conversely, if Edler tries to make his rule more palatable and limit it to a particular offense, as he does here, he runs contra to the well-

established notion that the Fifth Amendment is about custody and the Sixth Amendment is charge specific. *See McNeil*, 501 U.S. 171. Moreover, Edler is rejecting the core of the *Roberson* decision; a decision which substantially increased citizens' rights.

The state submits that Edler's proposed rule is either wildly expansive of any protections contemplated by *Edwards, Roberson,* and *Shatzer,* or conflicts with the Court's reasoning in *McNeil* and *Roberson.* The state asks this court to reject Edler's proposed rule and ratify the *Shatzer* rule which clearly and effectively balances citizens' right to be free of police exploitation of custodial pressures with society's interest that the police not be unduly hamstrung in conducting investigations.

Edler argues that if this court is uninterested in his argument for expanding *Edwards* protections, then it should in the alternative adopt a totality of the circumstances approach in evaluating when the police can re-approach a suspect who has asserted his *Miranda* right to an attorney. While it is true that this court has favored a totality of circumstance approach to both Fourth Amendment and voluntariness of confession issues, such an approach is far more difficult to employ when considering a court-created prophylactic rule. Indeed, it would be impossible for either a citizen or police to predict with any clarity as to whether in their particular case, no days, or four days, or fourteen days, or six months, away from custody are sufficient to wipe the slate clean. The *Shatzer* Court understood the impractical nature of a totality of circumstances test when it wrote, "It is impractical to leave the answer to that question [how long is a sufficient break in custody to end *Edward's* protections] for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful." *Shatzer,* 130 S. Ct. at 1222-23.

For the convenience of a suppression ruling in this case, Edler is asking this court to radically expand

Edwards by applying Sixth Amendment principles to a Fifth Amendment analysis, or in the alternative to adopt a totality of circumstances test, that flies in the face of the goal of *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny "'to give concrete constitutional guidelines for law enforcement agencies and courts to follow.'" *Roberson*, 486 U.S. at 680 (quoted source omitted). The United States Supreme Court did not employ a totality of circumstances test for *Edwards*, *Roberson*, or *Shatzer*. The Court was carving out bright-line prophylactic rules that would assist law enforcement and protect citizens. The state asks this court to do the same by rejecting Edler's totality of circumstances approach and formally adopt the *Shatzer* rule for Wisconsin.[3]

II. EDLER DID NOT CLEARLY AND UNEQUIVOCALLY ASSERT HIS *MIRANDA* RIGHT TO COUNSEL.

The core issue decided by the trial court was whether Edler clearly invoked his *Miranda* right to counsel when he asked the police, at least fifteen minutes before arriving at the interrogation site, "can my lawyer be present for this?" (Both parties agree that "this" means the upcoming interrogation). The trial court held this was a clear invocation; the state appealed this holding and the court of appeals certified the issue to this court.

Edler cites several cases to support his contention that his saying "can my lawyer be present for this?" is a

[3] In supporting his totality of circumstance test, Edler makes much of his discomfort, and his obvious stress symptoms, to support the notion that a person like himself, would need a far longer period than fourteen days to recover from the pressures of his previous interrogation. (Respondent's brief at 17). However, these arguments belong in a voluntariness analysis, where the totality of circumstance approach is effective, and not in an *Edwards*, *Roberson*, and *Shatzer* discussion where it is not. Nowhere has Edler argued that his confession was involuntary. Instead, he has argued that his statement should be suppressed on *Miranda* grounds.

clear invocation of his *Miranda* right to counsel. The problem with the cases cited is that in every instance the challenged statement, found to be clear, was made immediately before, during, or after the *Miranda* warning, whereas in our case, the comment was made more than fifteen minutes before Edler arrived at the interrogation site and was read his *Miranda* warning. Edler scoffs at the state for suggesting that the context, from which the challenged remark is made, is relevant to an ambiguity analysis. (Respondent's brief at 25). However, the ambiguity jurisprudence is replete with cases "splitting hairs" in deciding whether a comment is ambiguous or clear. Indeed, in the *Lewis v. State* case Edler cites, the court goes through a tortured analysis between the difference between the words "can" or "could" in determining that "can" is clear and "could" is ambiguous. *Lewis v. State*, 966 N.E.2d 1283, 1289 (2012). In *State v. Dumas*, another case cited by Edler, the court found the statement "Can I get a lawyer" to be clear because of the way the word "can" is used in normal parlance. *State v. Dumas*, 750 A.2d 420, 424-25 (R.I. 2000).

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 a legal terrain full of semantic tug of wars, the state submits that the timing of the comment is a relevant factor in evaluating its meaning.

There are no cases cited by Edler, nor is the state aware of any case, that deals with the clarity of an invocation made in the anticipatory fashion we have here. As the state mentioned in its original brief, the law is still murky as to whether there can be an anticipatory invocation of *Miranda* rights. *See State v. Hambly*, 2008 WI 10, 307 Wis. 2d 98, 745 N.W.2d 48. While the state leaves that battle for another day, it also argues that the lack of temporal proximity between the challenged statement and the onset of the interrogation is a relevant factor in determining the core issue as to whether Edler's squad car comment was clear or ambiguous.

The state submits that in light of all the surrounding facts of this case (*see* appellant's brief at 12-14 for a recitation of the salient circumstances of this case), Edler's statement, "can my attorney be present for this?" was a question about his rights and not an assertion of them. Edler knew how to clearly assert his right to counsel. He had done so on March 30. He did not do so here.

III. THE POLICE DID NOT HAVE TO CLARIFY EDLER'S AMBIGUOUS COMMENT MADE DURING TRANSPORT SINCE THE ULTIMATE CLARIFICATION OF THE READING OF THE *MIRANDA* WARNING WAS YET TO COME.

The state concedes that the police made no attempt to clarify Edler's meaning when he made his ambiguous reference to an attorney during transport to the interrogation site. It is also clear, under both the United States and Wisconsin Constitutions that the police are not required to clarify any ambiguous post-*Miranda* waiver references to counsel. *Davis v. United States*, 512 U.S. 452 (1994); *State v. Jennings*, 2002 WI 44, 252 Wis. 2d 228, 647 N.W.2d 142. So the question is: 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?

Again, this issue of clarification has never arisen under the circumstances that we have here; a comment made over fifteen minutes before arriving at the interrogation site. Instead, pre-waiver clarification cases have all spawned from statements made at the brink of the reading of the *Miranda* warning. The case closest to our scenario, but still far different, is the case Edler heavily relies on and the case extensively discussed by the court of appeals in its certification: *Sessoms v. Runnels*, 691 F.3d 1054 (9th Cir. 2012). The case most closely resembles ours because the comment was made before the reading of the warning and not during it. However, again the comment was made almost immediately before the warning was to be read and not more than fifteen minutes before arriving at the interrogation site. Also in *Sessoms*, the suspect's references to an attorney were far clearer than what we have here, and many of the judges in ruling with the majority, also found that taken together Sessom's statements were not even ambiguous. *Id.* at 1064. Also in *Sessoms*, the waters were sufficiently muddied by egregious police behavior where the police not only did not answer Sessoms' questions about an attorney but actively tried to persuade Sessoms that getting a lawyer would be a bad idea. *Id.* at 1056.

Edler again minimizes the import of temporal proximity in addressing the clarification issue, as he does in analyzing the ambiguity issue. (Respondent's brief at 33). The state submits that timing is significant and that the obligation to clarify an ambiguity is less pressing when the reading of the *Miranda* warning is not imminent. This is true, because the police will have the obligation to provide for the ultimate clarification, the reading of the *Miranda* warning, and they will be doing so at a place and time substantially removed from the echo of the ambiguous comment.

The state recognizes that a pre-waiver situation differs from a post-waiver situation, in that a suspect will be less likely to clearly articulate a right he/she has not yet been made formally aware of.[4] However, on the other hand, pre-waiver ambiguity is less critical to clarify as the suspect will have the benefit of having his intentions clearly plumbed by the reading of the *Miranda* warning.

CONCLUSION

For the reasons stated by the state in its brief and chief and this reply, the state respectfully requests that the order granting Edler's motion to suppress be reversed.

Dated this 18th day of March, 2013.

Respectfully submitted,

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[4]Interestingly, Edler does not really fit this justification since he had been read his rights nineteen days earlier and had demonstrated then that he knew how to clearly assert them.

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 2,821 words.

Dated this 18th day of March, 2013.

_____
DAVID H. PERLMAN
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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 18th day of March, 2013.

_____
DAVID H. PERLMAN
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