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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MARYLAND, :

4 Petitioner :

5 v. : No. 08-680

6 MICHAEL BLAINE SHATZER, SR. :

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8 Washington, D.C.

9 Monday, October 5, 2009

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:05 a.m.

14 APPEARANCES:

15 GEN. DOUGLAS F. GANSLER, ESQ., Attorney General,
16 Baltimore, Md.; on behalf of the Petitioner.

17 TOBY J. HEYTENS, ESQ., Assistant to the Solicitor
18 General, Department of Justice, Washington, D.C.; on
19 behalf of the United States, as amicus curiae,
20 supporting the Petitioner.

21 CELIA A. DAVIS, ESQ., Assistant Public Defender,
22 Baltimore, Md.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this term in Case 08-680, Maryland v. Shatzer.

General Gansler.

ORAL ARGUMENT OF GEN. DOUGLAS F. GANSLER

ON BEHALF OF THE PETITIONER

MR. GANSLER: Mr. Chief Justice and may it please the Court:

This case is here from the Maryland Court of Appeals. In that case, the court of appeals suppressed a statement that was given by Respondent following what the trial court found to be a valid waiver of his Miranda rights and following a free and voluntary confession.

The reason why the court did so is because, two years and seven months prior to that, the defendant was in a different custodial interrogation and at that time invoked his right to counsel. We ask that this Court reverse the Maryland Court of Appeals.

It is our position that a break in custody from custodial interrogation should be the bright line that this Court adopts in order to end the irrebuttable presumption that this Court created in the Edwards case.

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1 CHIEF JUSTICE ROBERTS: Without regard to
2 the time? A break in custody of one day, do you think
3 that should be enough?

4 MR. GANSLER: Your Honor, we do think one
5 day should be enough, as long as it is not in the
6 pretrial detention category. Obviously, the three cases
7 that have come before this Court, Edwards, Minnick and,
8 Roberson, all -- two of them were three days, and one of
9 them was one day, but those defendants were in the
10 pretrial detention status.

11 So if in fact a defendant is brought in,
12 questioned, and then released back to his or her daily
13 routine, and away from the isolation of the custodial
14 interrogation, we feel that that should be the bright
15 line for a break in custody.

16 CHIEF JUSTICE ROBERTS: So what if it's
17 repeatedly done? You know, you -- you bring him in, you
18 give him his Miranda rights. He says, I don't want to
19 talk. You let him go. You bring him in, give him his
20 Miranda rights. He says, I don't want to talk. You
21 know, just sort of catch and release, until he finally
22 breaks down and says, All right, I'll talk.

23 MR. GANSLER: There is parade of horrors
24 of catch and release and Your Honor just went through
25 one of them, and there are obviously a number of

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1 hypotheticals that one could posit. We would suggest
2 that the break of custody would be the end of the
3 Edwards irrebuttable presumption. However, there are
4 still three responses to that. The first would be the
5 defendant could still say that his or her Miranda rights
6 were not given voluntarily and willfully. Secondly, the
7 due process jurisprudence that this Court had prior to
8 Miranda still is in existence, and therefore the
9 defendant could argue that that confession was given in
10 an overborne way, that his will was overborne.

11 But finally and I think most relevant,
12 because this is sort of the other side of this case, is
13 that there has been -- since 1982 eight Federal circuits
14 and over 20 States have had the break of custody rule in
15 effect. And in fact this Court in the McNeil case,
16 albeit in dicta and parenthetically, assumed a break in
17 custody as the rule. There has not been one published
18 opinion, at least that we could find, that has this --
19 that has that scenario --

20 JUSTICE KENNEDY: Is the rationale for the
21 break in custody that there is a likelihood of
22 non-coercion? Is that the reason that you offer for the
23 rule?

24 MR. GANSLER: Your Honor, it goes to --
25 yes, this Court has said, most recently again in

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1 Montejo, that the reason for Edwards is that we want to
2 prevent badgering.

3 JUSTICE KENNEDY: All right. But this
4 person was in custody in the sense he was in prison and
5 the brief said, oh, he was released to the general
6 population. But the possibilities for coercion or
7 pressure are very substantial in the prison. The warden
8 comes in and says: Oh, your cell doesn't have a window.
9 I mine, there's countless way in which a prisoner in the
10 general prison population would consider that he is --
11 that there has been no break in custody. I think that's
12 a very difficult rule that you are proposing.

13 MR. GANSLER: Well, the courts -- the lower
14 courts have shown that there is a difference between
15 police interrogational custody and correctional custody.
16 What we are suggesting is once the person -- in our
17 case, for example, in the second interview, the
18 defendant was in what's called -- what's called a
19 maintenance room in the room, with a metal table and the
20 two chairs. It was clearly an interrogation context.
21 When that person is released from that, some people are
22 habitual criminals and they're put back into the general
23 population amongst -- that's where they live for that
24 time period. Other people go home. But the break in
25 custody for Edwards purposes ought to end at the end of

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1 the interrogation.

2 Now, could there be an interrogational
3 situation while the person's in prison? Absolutely.
4 You can envision a correctional officer coming to the
5 cafeteria when there's, the public is there, the public
6 being other inmates, and that would not be deemed to be
7 an interrogation atmosphere. If, however, they cleared
8 the cafeteria and had officers standing by the doors and
9 blocking the doors and saying no one's allowed to come
10 in here, that could then become interrogation custody.

11 And this Court and other courts, the courts
12 all the time, have to decide in the Edwards context
13 whether or not the defendant was in custody when the
14 statement was given.

15 JUSTICE GINSBURG: But if the defendant goes
16 home, he can contact a lawyer. In prison he can't do
17 that. So, if the whole idea is to protect his right to
18 counsel, then it makes a big difference whether he's at
19 home or in prison.

20 MR. GANSLER: Your Honor -- well, first of
21 all, the defendant while they're in prison can contact a
22 lawyer in some circumstances. For example, during the
23 two years and seven months between these two
24 interrogations he could have written, he could have
25 called.

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1 But let's say that that was unavailable to
2 that particular defendant. It's our position that what
3 Edwards does, Miranda, Edwards, Roberson, Minnick, it
4 provides the opportunity to consult counsel. But the --
5 what we are talking about here is the custodial
6 interrogation situation. In other words, the police
7 don't have to get somebody a lawyer. Whether or not
8 somebody has the opportunity to consult a lawyer or not,
9 as long as they are provided with their Miranda rights,
10 the Miranda rights themselves are the protection that
11 the defendant has.

12 We know, for example, in this case --

13 JUSTICE STEVENS: Do we know exactly what
14 the Miranda warning in this case was?

15 MR. GANSLER: The Miranda warnings in this
16 case the judge, the trial judge, found exactly comported
17 with the Miranda warning --

18 JUSTICE STEVENS: But what did it tell the
19 person in prison he could do about a lawyer?

20 MR. GANSLER: That he had the right to a
21 lawyer and --

22 JUSTICE STEVENS: Did it tell him how he
23 could get a lawyer?

24 MR. GANSLER: It didn't --

25 JUSTICE STEVENS: If you're in prison and

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1 they give you the Miranda warnings, what would that tell
2 the average prisoner with respect to access to a lawyer?

3 MR. GANSLER: It would tell them they have a
4 right to counsel and if they couldn't get one one would
5 be provided to them.

6 JUSTICE STEVENS: And would they have
7 provided a lawyer to him right away if they had -- he
8 had asked for it?

9 MR. GANSLER: Well, had he asked for one,
10 which he did the first time, what they did there --

11 JUSTICE STEVENS: When he is in prison, I
12 mean.

13 MR. GANSLER: Yes. It's unclear from the
14 record whether they would have or not. That would be
15 conjecture. What they do what the bright line of
16 Edwards says is they have to stop asking questions.

17 JUSTICE STEVENS: Well, I understand that.

18 MR. GANSLER: Right.

19 JUSTICE STEVENS: I'm just wondering if he
20 thinks, well, I'd like a lawyer, what can he do?

21 MR. GANSLER: He could -- during those two
22 years and seven months in this case, he could have tried
23 to get a lawyer through -- either his own lawyer in the
24 case.

25 JUSTICE STEVENS: Right on the spot, when he

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1 is in the room there and they give him the Miranda
2 warnings and he says, that sounds like a good idea, what
3 would happen?

4 MR. GANSLER: He would not be given a lawyer
5 by the police at that time. There's not a lawyer sort
6 of waiting outside.

7 JUSTICE STEVENS: So the Miranda warning is
8 a little misleading, isn't it, in that context?

9 MR. GANSLER: Well, I would argue that it is
10 not, because he is given the right. He is said, if you
11 want a lawyer before talking to us, that's fine; you
12 have to invoke your right to counsel. He invokes the
13 right to counsel, they stop talking to him. What he
14 can--

15 JUSTICE STEVENS: Do they also say it will
16 be provided to you?

17 MR. GANSLER: Yes, but he can -- there's a
18 number of --

19 JUSTICE STEVENS: And it's not going to be
20 provided to him.

21 MR. GANSLER: Well, it would be, Your Honor,
22 if, for example, the lawyer in his underlying case came,
23 he could say, look, I need a lawyer, they're asking me
24 questions about this other case; can you represent me on
25 that case?

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1 JUSTICE SOTOMAYOR: What if asks for a
2 lawyer. He said: I don't want to talk to you without a
3 lawyer, correct?

4 MR. GANSLER: In 2003, yes.

5 JUSTICE SOTOMAYOR: And the State doesn't
6 provide him with a lawyer, correct?

7 MR. GANSLER: That's correct.

8 JUSTICE SOTOMAYOR: All right. So what
9 gives him an understanding that one will be provided the
10 next time he's questioned?

11 MR. GANSLER: Well, what he does understand
12 from the first time he is questioned -- and he
13 understood the rights because he himself invoked that
14 right to counsel. So he knew that he could say "I want
15 a lawyer," and he did. What he understands is the
16 police will stop questioning him at that point.

17 There is no, as far as I can tell from the
18 jurisprudence and this Court's holdings, there is no
19 obligation for the police to actually go out, nor would
20 I suggest that you want to have that rule, to go out and
21 actually ascertain, get a lawyer.

22 JUSTICE SOTOMAYOR: No, because we tell the
23 police they have to stop.

24 MR. GANSLER: Right.

25 JUSTICE SOTOMAYOR: So presumably they

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1 wouldn't re-engage until the lawyer is present,
2 correct? That's what Edwards tells them not to do.

3 MR. GANSLER: Well, Edwards tells them to
4 stop questioning. Minnick says that if they have the
5 opportunity to consult with a lawyer they still can't
6 start without the lawyer being there. But that is a
7 different analysis than that because had they asked him
8 on the second time, after they read his rights and he
9 said, I want a lawyer, they couldn't keep going until
10 there was a lawyer present. He chose during that two
11 years and seven months when he had a mental reset that
12 he didn't need a lawyer.

13 JUSTICE SOTOMAYOR: Well, this is a
14 different part of your argument. This is not the
15 custody or break in custody. This is the time and the
16 fact that such a prolonged period of time has minimized
17 any coercive effect, correct?

18 MR. GANSLER: No, Your Honor. We would
19 still argue that -- in this case, obviously both exist.
20 The Court could fashion a bright line rule. This Court
21 has shown an interest in bright line rules in this area.
22 And this Court could adopt a bright line rule of a
23 particular time period. We are arguing the better
24 bright line rule would be a break in custody. Obviously
25 a break in custody plus --

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1 JUSTICE SOTOMAYOR: Catch and release then
2 no longer -- catch and release is unimportant to you?
3 There is no meaning to Edwards in that situation,
4 because every prisoner, because he is a captive, is
5 questioned in a place and then told to go back to his
6 room. His room happens to be a locked cell. So he
7 doesn't have the freedom to leave and he doesn't have
8 the freedom necessarily to make calls to discuss his
9 choice with anyone.

10 MR. GANSLER: Well, in this case --

11 JUSTICE SOTOMAYOR: This is a very different
12 situation than someone who is free to go home.

13 MR. GANSLER: I'm not sure -- the question
14 sort of posits two different scenarios. One scenario is
15 when the defendant is arrested, they are questioned and
16 then they are put into a cell. That is a different
17 scenario. That would be a pretrial detention analysis,
18 which in Minnick, Roberson and Edwards extended up to
19 three days, which we would argue is sort of the end of
20 the time line right as it exists today.

21 The different scenario, which is in this
22 case, is, yes, he is locked up in the general
23 population, he comes in for the interrogation, he is
24 then released back to his daily routine. And at that
25 point our view is that the rebuttable presumption of

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1 Edwards ends. And you know --

2 JUSTICE SOTOMAYOR: Because he is not in
3 custody, when he is in jail.

4 MR. GANSLER: He is not --

5 JUSTICE SOTOMAYOR: When he can't leave --

6 JUSTICE STEVENS: True, we have to reach out
7 and find some arbitrary number, but after all, Edwards
8 is an arbitrary rule.

9 MR. GANSLER: The reason why I think break
10 in custody is not as problematic, and this goes to the
11 Justice's earlier question as well, is because literally
12 the year after Edwards, 1982, was the first of the eight
13 Federal circuits that found the break in custody rule.
14 And there is no -- they have been able to work with
15 this.

16 JUSTICE SOTOMAYOR: What -- there is no
17 small --

18 JUSTICE GINSBURG: In those cases, was there
19 a considerable interval between --

20 MR. GANSLER: Not --

21 JUSTICE GINSBURG: It was just the break in
22 custody? A week --

23 MR. GANSLER: Yes, Your Honor.

24 JUSTICE GINSBURG: -- was enough?

25 MR. GANSLER: Yes, Your Honor. Obviously,

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1 in different cases there's different lengths of time.
2 But if -- in Justice Kennedy's question, if we were
3 going to adopt a time limit, I -- we would suggest,
4 like, for example, a seven-day time limit. The Court
5 suggests that is arbitrary. The reason why I would pick
6 seven days is, right now the rule is three days, and you
7 cannot envision the situation, at least I can't, where
8 somebody would be held without being presented for more
9 than three or four days, so --

10 JUSTICE SCALIA: Why do you say the rule is
11 three days? What rule is that?

12 MR. GANSLER: Because right now, if you look
13 at Edwards being the next day, Minnick and Roberson
14 being three days, that that is the only cases from this
15 Court which says when the Edwards presumption goes. So
16 we don't have -- whether -- what Respondent's rule would
17 do is, in our view, extend it right now from the
18 three-day limit -- now, many have suggested that's in
19 perpetuity.

20 JUSTICE SCALIA: Yeah, but you -- you are
21 not arguing for a seven-day limit no matter what, even
22 if he is held in jail, are you?

23 MR. GANSLER: If he is held in jail on his
24 own case -- see, the most difficult scenario, in our
25 view, is one that we don't think the Court needs to

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1 reach here, which is actually the Green case from the
2 District of Columbia, where he is held on his own case
3 in a pretrial detention --

4 JUSTICE SCALIA: Right.

5 MR. GANSLER: -- scenario, because then he
6 does have different incentives to cooperate or not
7 cooperate with the police and then the question would
8 be, well, does that -- is the break of custody there at
9 conviction or at sentencing? And we can quibble about
10 that.

11 We don't need to get to that in this case.
12 But if he is held in jail on another case, that's where
13 he lives. He is there for 10, 15, 20 years, and he is
14 brought in, away from the life that he is accustomed to,
15 and put there with different officers in a metal room --

16 JUSTICE GINSBURG: Suppose it's the same
17 officer. Does -- you said in your brief and just now it
18 was a different officer. Suppose it was the same
19 officer?

20 MR. GANSLER: Well, I actually think for --
21 in this case, with Detective Blankenship and Detective
22 Hoover, the Court should assume it's one and the same.
23 In fact, Roberson said just that, that within the same
24 department -- but it is instructive in this sense. In
25 Respondent's -- if Respondent's rule were to be adopted,

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1 there is no way that one police department can know what
2 happened in front of another police department, in front
3 of another police department, while that person is being
4 detained --

5 JUSTICE GINSBURG: Well, you could limit it
6 to the same police department, the same investigation,
7 so you are not covering the waterfront of every
8 interrogation about any crime, any place.

9 MR. GANSLER: Except for right now, we live
10 in a world of Roberson, where we do. So in other words,
11 if a defendant invokes in California for a shoplifting
12 case and then is transported to Iowa and then to
13 Maryland, the Maryland authorities have no idea whether
14 he invoked in one of the other two.

15 What is worse is right now, since we don't
16 have a break in custody rule, this defendant, Shatzer
17 himself, could have invoked counsel 20, 25 years ago in
18 some other State. We have no way of knowing that.

19 JUSTICE SOTOMAYOR: Counsel, the
20 hypothetical you are positing is an investigation about
21 unrelated crimes. We are talking about, and I think
22 it's what Justice Ginsburg was pointing to, it was an
23 invocation on this crime, on this criminal activity, not
24 one in another State or another police department. And
25 so that's a substantially different question.

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1 MR. GANSLER: It is, though he is not being
2 held on -- on that crime. He is being held on a
3 completely unrelated sexual abuse case. I mean, it's
4 related in the sense it's the same crime, but it's a
5 different case.

6 CHIEF JUSTICE ROBERTS: So I thought
7 Roberson told us it's not a different question, that
8 it's the same question. Roberson did not draw a
9 distinction between what crime he was being questioned
10 on the second time.

11 MR. GANSLER: That's exactly right, and
12 that's what creates the problem that if defendant -- if
13 we don't have a break in custody rule, a defendant who
14 invokes anywhere at any time is forever immune from
15 being questioned by the police, regardless of what would
16 be a sort of a wholly irrational view and an absurd
17 result, which I think is where we live right now.

18 And it becomes, obviously, greater in a
19 world where we have DNA. Obviously, there was no DNA in
20 1981, but with these cold cases coming back 15, 20, 25
21 years later --

22 JUSTICE STEVENS: Well, I wonder if you're
23 right about that premise. Supposing the prison had a
24 rule that the inmate does not have to see visitors and
25 they say that: Somebody here wants to talk to you. And

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1 he says: I don't want to talk to him. And if he
2 refused to talk, then if he did talk, it would be
3 voluntary, rather than the situation you described. Do
4 I make myself clear?

5 MR. GANSLER: Yes, Your Honor, and I don't
6 know sort of what the protocol of each of the prisons
7 would be, but I would think that if a prisoner did not
8 want to speak with the officers that came to see him
9 about a crime, the prisoner would be able to say so and
10 has. And this defendant has -- has actually been able
11 to invoke that himself. If there's --

12 JUSTICE SOTOMAYOR: What is the shortest
13 time period that any circuit court has found a break in
14 custody in a similar situation?

15 MR. GANSLER: A break in custody that --

16 JUSTICE SOTOMAYOR: Between the invocation
17 of counsel and a questioning. You said a number of
18 circuit courts have recognized this break in custody
19 theory.

20 MR. GANSLER: Actually, all -- eight Federal
21 circuits. I don't know what the shortest is. But there
22 are cases that are weeks rather than years that they
23 have --

24 JUSTICE SOTOMAYOR: Which are days?

25 MR. GANSLER: What's that?

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1 JUSTICE SOTOMAYOR: Any are days?

2 MR. GANSLER: Not that I am aware of, Your
3 Honor.

4 And with that, I will reserve -- if there
5 are no further questions, I will reserve the remainder
6 of my time.

7 CHIEF JUSTICE ROBERTS: Thank you, counsel.
8 Mr. Heytens.

9 ORAL ARGUMENT OF TOBY J. HEYTENS
10 ON BEHALF OF THE UNITED STATES,
11 AS AMICUS CURIAE,
12 SUPPORTING THE PETITIONER

13 MR. HEYTENS: Mr. Chief Justice, and may it
14 please the Court:

15 This Court has repeatedly made clear that
16 Edwards v. Arizona is a prophylactic rule designed to
17 implement the protections of Miranda v. Arizona, and it
18 does so by operating as an anti-badgering rule. On the
19 facts of this case, I don't think there is any colorable
20 argument that Mr. Shatzer was badgered into waiving his
21 Sixth Amendment rights.

22 JUSTICE BREYER: Now, I know that you're
23 going to go into the question of how we shape a rule,
24 and I would like you, and perhaps on rebuttal your other
25 counsel, to comment on the following: I don't see -- as

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1 Justice Kennedy had a problem, so do I have a problem
2 with anything that just says break in custody, and
3 taking time seems fairly arbitrary.

4 Suppose you -- could you try to shape a rule
5 on the civil situation, the codes of ethics, where you
6 are not supposed to talk to a client who is represented
7 by a lawyer? That's where my mind is going. And the
8 best I could do at the moment is you would say: When,
9 due to a breach in custody and the passage of time, the
10 questioner did not and would not reasonably believe that
11 the suspect was looking for or was represented by
12 counsel?

13 What I've tried to do is take the purpose of
14 the civil rule, the ordinary ethical rule, and then use
15 it to shape a standard. So I would appreciate any
16 comments on that thought.

17 MR. HEYTENS: Justice Breyer, I think there
18 is a few problems with that approach. First of all,
19 this case is not about the Sixth Amendment right to the
20 assistance of counsel. It's about the Fifth Amendment
21 right against compulsory self-incrimination, and this
22 Court has said several times that rules of legal ethics
23 are not relevant to the Fifth Amendment
24 self-incrimination rule. It says that in the Burbine
25 case, for example. That is the case where, although the

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1 questioner knew that the suspect had an attorney who was
2 trying to reach him, the Court said that is not a Fifth
3 Amendment self-incrimination problem, because we have to
4 look at things from the perspective of the suspect.

5 The question is whether the --

6 JUSTICE BREYER: Quite a lot of what I read
7 was about the problems of counsel. Counsel has nothing
8 to do with this, nothing at all?

9 MR. HEYTENS: Counsel has something to do
10 with it, but the Court has made clear going back to
11 Miranda that when we're we are talking about the Fifth
12 Amendment right to counsel, the only reason that counsel
13 matters is to help to make sure that --

14 JUSTICE BREYER: If -- are we interested in
15 counsel or not? If we are interested in whether he's
16 represented by counsel, and Miranda covers both, then I
17 would repeat my question.

18 MR. HEYTENS: We are not --

19 JUSTICE BREYER: If we are not interested in
20 representation by counsel, then I would withdraw my
21 question and you don't have to answer it.

22 MR. HEYTENS: We have -- in the Fifth
23 Amendment context, we are interested in counsel only as
24 a derivative of his right not to be forced to
25 incriminate himself. It is in this context a purely

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1 derivative right, and we need to look at it from his
2 perspective.

3 I think the reason that this case matters in
4 an intensely practical way is, there are approximately a
5 million and a half prison inmates in this country right
6 now, many of whom are serving extremely long sentences.

7 JUSTICE ALITO: Well, couldn't we say that
8 in -- in the situation where there is a change from
9 pretrial status to post-conviction status, the Edwards
10 rule is no longer an irrebuttable presumption, but it's
11 simply a rebuttable presumption? And that there -- that
12 the rule would not apply if the prosecution could show
13 that under the circumstances the reason for the rule,
14 the concern about law enforcement badgering, was not
15 present?

16 MR. HEYTENS: That would certainly be open
17 to the Court to say that, Justice Alito. Ultimately,
18 this is a -- a second-order --

19 JUSTICE SCALIA: Would it be a good idea to
20 say that?

21 MR. HEYTENS: I don't think it would be a
22 good idea.

23 JUSTICE SCALIA: I thought we liked clear
24 lines in this. I mean, the police won't know what to
25 do.

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1 MR. HEYTENS: And, Justice Scalia, that's --

2 JUSTICE STEVENS: But carrying -- carrying
3 that analysis one step further, if you are just talking
4 about people who were inmates pursuant to prior
5 conviction, why wouldn't the better rule be that if the
6 inmate is given the opportunity to say no, I don't want
7 a visitor today, and then if he accepts the visitor, you
8 would say he is no longer in custody? But if he says, I
9 don't want to, then he -- then he is in custody and you
10 preserves the presumption.

11 MR. HEYTENS: Well, Justice Stevens, I
12 suspect that's what the police would do, if you ruled
13 against the State in this case. But I think the reason
14 that you shouldn't do that is you have to ask yourself
15 what is the benefit that such a rule is trying to
16 accomplish. The Court has made clear again --

17 JUSTICE STEVENS: Well, that -- such a rule
18 would accomplish the benefit when he really wants --
19 willing to talk, he would say: I would be glad to talk
20 to the officer.

21 MR. HEYTENS: Well, Justice Stevens --

22 JUSTICE STEVENS: If he doesn't want to, he
23 should just say no.

24 MR. HEYTENS: Justice Stevens, if he didn't
25 want to talk to the officer, there was nothing to

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1 prevent him from invoking his Fifth Amendment right to
2 counsel.

3 JUSTICE STEVENS: But it is a little
4 different when the man first comes, says, will you talk
5 to officer. He can very clearly say no. But if he is
6 in the room with two or three people around in a
7 different setting, then he is still in custody.

8 MR. HEYTENS: He is in custody, Justice
9 Stevens, but the premise of Miranda is that a person who
10 is given the Miranda warnings can choose to decide
11 whether to talk or not to talk.

12 JUSTICE ALITO: If the change --

13 JUSTICE SCALIA: You started to tell us why
14 this case was important. Would you -- would you finish
15 that? You said there were --

16 MR. HEYTENS: Certainly. The reason this
17 case is important, Justice Scalia, is that because under
18 the Maryland Court of Appeals decision no police
19 officer, no corrections official, can approach any
20 prisoner without first attempting to determine if at
21 some point, to someone, at some place, during the period
22 of continuous incarceration he has ever invoked his
23 Fifth Amendment right to counsel.

24 JUSTICE STEVENS: That's not true, because
25 my hypothetical, if you told him you don't have to talk

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1 to the officer, and you could produce something, they
2 could question every -- everybody in jail all over the
3 country.

4 MR. HEYTENS: Well, they can't approach him
5 for questioning.

6 JUSTICE STEVENS: They can't force him to
7 attend the questioning. But if they give him an
8 opportunity to say, I -- I'm a prisoner, I just want to
9 stay in the prison population and not go to an
10 interrogation room. And if he is willing to go, you
11 could question him. You do not have the example of no
12 possibility.

13 MR. HEYTENS: Justice Stevens, the problem
14 in that situation, again, though, is that ultimately the
15 only basis for applying this presumption at all is if
16 it's appropriate to apply an irrebuttable presumption
17 that, even though we gave him the Miranda warnings and
18 even though he said, I am happy to talk to you, we
19 should presume that when he said that, that wasn't the
20 truth.

21 JUSTICE SCALIA: I -- I thought that you
22 couldn't approach him. I thought that once he's invoked
23 his right to counsel, you can't approach him and say,
24 would you like to talk now? Right? Isn't that -- isn't
25 that the rule?

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1 MR. HEYTENS: Well, under Rhode Island v.
2 Ennis, you are entitled to -- to update him on the
3 status of the interrogation, but you are not entitled to
4 resume custodial interrogation unless there has been a
5 break in custody or something has terminated Edwards.

6 JUSTICE SCALIA: Well, if the incarceration
7 is a continuation of custodial custody, to be redundant,
8 if it is a continuation of the custody, then why
9 wouldn't asking him whether he would like to see
10 visitors who want to ask him about a particular crime,
11 why wouldn't that be a violation of Edwards?

12 MR. HEYTENS: I think defendants may well
13 argue that it was --

14 JUSTICE SCALIA: I'm sure they would.

15 MR. HEYTENS: -- Justice Scalia, and --

16 JUSTICE SCALIA: So the -- the -- the scheme
17 that Justice Stevens proposes wouldn't work. You would
18 be violating Edwards when you asked him if he wanted to
19 see interrogators.

20 MR. HEYTENS: I think there would be a risk
21 of that happening. I think the other reason is --
22 again, this is a second order prophylactic rule that the
23 Court has adopted solely in order to prevent people from
24 being coerced, coerced into incriminating themselves
25 when they don't want to.

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1 JUSTICE STEVENS: You join counsel for the
2 State in just not wanting to argue for a time rule,
3 which seems to me the only thing that would work.

4 MR. HEYTENS: We -- we -- think the break in
5 custody approach is the more appropriate one that will
6 lead to fewer line-drawing problems. It is certainly
7 open to --

8 JUSTICE STEVENS: That's become apparent,
9 and I'm indicating that I think the time rule might have
10 some benefits.

11 MR. HEYTENS: Well, we certainly don't
12 oppose the Court adopting a time rule in the event that
13 it rejects our primary submission. In *United States v.*
14 *Green*, the government argued for a raw passage of time
15 approach, and we think, ultimately, this is the Court's
16 rule, it's a second order prophylaxis rule that is
17 designed to implement the Fifth Amendment, and it would
18 certainly be open to the Court if it thought necessary
19 to --

20 JUSTICE KENNEDY: But you don't give us
21 any -- any suggestions. As -- you know, the State opens
22 the bidding with seven days.

23 (Laughter.)

24 JUSTICE KENNEDY: But the Speedy Trial Act,
25 with many exceptions, requires that you go to trial

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1 within 70 days. Would that be a benchmark?

2 MR. HEYTENS: Well, I think as a practical
3 matter, though, there are so -- as you point out,
4 Justice Kennedy, there are so many exceptions to that.
5 We think that would be far longer than would be
6 necessary or appropriate under the circumstances. I
7 mean --

8 JUSTICE GINSBURG: In this -- in this case
9 it's two years and seven months. Why should the Court
10 take that -- a period of that length and say, well, we
11 are going to now rule for all future cases it should be,
12 say, six months.

13 MR. HEYTENS: Well, I think that is another
14 potential defect in adopting a pure passage of time
15 approach, though I think this case is particularly easy.

16 And I think the fact that the Maryland Court
17 of Appeals in this case concluded that two years and
18 seven months is covered by an anti-badgering rule just
19 shows at some point how far this has departed from the
20 original purposes of Edwards in the first place.

21 So, I do think -- I mean, the Court could
22 simply say this case is too long, though at that point
23 the Court isn't providing a great deal of guidance to
24 the lower courts that have to deal with these problems
25 on a day-to-day basis.

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1 JUSTICE SCALIA: Or to the police who have
2 to decide whether they can interrogate or not.

3 MR. HEYTENS: Absolutely. It would also not
4 provide very much guidance to the police to just say two
5 years and seven months is too long. And that's again
6 why we think an approach that is either -- either
7 tethered to the break in custody, which as I think I
8 have said, we think better maps on to the concern that
9 motivated Edwards --

10 Let me address for a moment the catch and
11 release situation.

12 JUSTICE SOTOMAYOR: I don't want to
13 interrupt that, but there were two aspects to Edwards.
14 One was the coercion, but the other was the respect for
15 the advisement of counsel. And so the test that you are
16 proposing only addresses the coercion prong of it, not
17 the respect for the invocation of counsel.

18 MR. HEYTENS: The Court has mentioned
19 respect in the choice. I think, with respect,
20 ultimately though, that can't be the basis for the
21 Edwards rule. The Court has made clear repeatedly that
22 the Fifth Amendment prohibits only compelling someone to
23 be a witness against himself.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Ms. Davis.

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1 ORAL ARGUMENT OF CELIA A. DAVIS

2 ON BEHALF OF THE RESPONDENT

3 MS. DAVIS: Mr. Chief Justice, and may it
4 please the Court:

5 Creating exceptions to the rule of Edwards
6 means a clear rule is lost. It introduces uncertainty
7 into the determinations of what constitutes custody and
8 what length of time might be adequate to excuse the
9 protection.

10 JUSTICE ALITO: This is an area where it is
11 very difficult to draw lines, at least I find it
12 difficult to draw lines. So let me start you out with
13 an extreme hypothetical, and I would like you tell me
14 whether you think the Edwards rule reaches this far.
15 And if it doesn't, then I would like you to tell me why
16 it doesn't. And what limitations, if any, on the rule
17 you would be willing to defend as consistent with the
18 rationale for the rule.

19 Someone is taken into custody in Maryland in
20 1999 and questioned for joy riding, released from
21 custody, and then in 2009 is taken into custody and
22 questioned for murder in Montana.

23 Now, at the time of the first questioning,
24 the -- the suspect invokes the Fifth Amendment right to
25 counsel. Now, does the Edwards rule apply to the second

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1 interrogation?

2 MS. DAVIS: Yes, it does, Justice Alito.

3 The Edwards rule provides two ending points as it stands
4 right now.

5 JUSTICE ALITO: And you don't think that's a
6 ridiculous application of the rule? First of all, how
7 are the authorities in Montana possibly going to know
8 whether this person was interrogated previously on a
9 crime for which the person was never convicted in
10 Maryland, and that invoked the right not to be
11 questioned without -- without an attorney? And you
12 think there is badgering in that situation?

13 MS. DAVIS: Yes, Justice Alito, because
14 badgering in this context has become a term of art. It
15 is used in quotation marks in the Montejo opinion.

16 JUSTICE SCALIA: It doesn't mean badgering.

17 MS. DAVIS: It means an attempt by --

18 JUSTICE SCALIA: We ought to get another
19 term for it then.

20 (Laughter.)

21 JUSTICE SCALIA: Questioning?

22 MS. DAVIS: I think it means returning in an
23 attempt to get a suspect to change his or her mind. And
24 in this case, the suspect said when first questioned --

25 JUSTICE SCALIA: There was no attempt in

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1 this hypothetical to get him to change his mind. They
2 didn't know he had made up his mind.

3 MS. DAVIS: Well, first of all, I didn't
4 answer the question properly. But the police, I think,
5 can run a rap sheet and find out from prior arrests if a
6 person has been taken into custody. And that would
7 alert a police officer that that person may have invoked
8 their right and they should do more to find out. And
9 second --

10 JUSTICE ALITO: So all right, they run the
11 rap sheet and they find out, if they do, that the person
12 was arrested ten years earlier in Maryland and then
13 what? They try to find the detective that questioned
14 the -- the suspect in 1999 in Maryland? And they find
15 out that the detective is retired and is now, you know,
16 fishing down in the Florida Keys, and they have to track
17 this person down and say, now do you recall whether this
18 person -- that's the rule you are arguing for?

19 MS. DAVIS: Well, the police officer should
20 attempt to do so. But I understand that --

21 CHIEF JUSTICE ROBERTS: I'm sorry to
22 interrupt you -- interrupt there, and I will let you get
23 back to the answer. They should attempt to do so. The
24 rule here does not allow the police to approach that
25 person, a murder suspect. And you are saying he cannot

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1 even be approached to see if he would waive his rights
2 ten years later because he was -- invoked the right in
3 connection with joy riding?

4 MS. DAVIS: Yes. Because --

5 CHIEF JUSTICE ROBERTS: Okay.

6 MS. DAVIS: -- if they have invoked the
7 right, then the second approach means an attempt to
8 persuade the person to change their mind about having
9 counsel. And where they haven't done so in the interim,
10 that amounts to --

11 JUSTICE ALITO: Let me pose you my
12 hypothetical again, the same joy riding questioning, and
13 then 40 years later after the person has gotten a law
14 degree and become an entrepreneur and made \$20 million,
15 he's taken into custody and questioned by the Federal
16 authorities for stock fraud. Forever, you know, this
17 right that was invoked back in adolescence continues
18 forever.

19 MS. DAVIS: It should. But let's look at
20 this case, Your Honor, because here this suspect was
21 questioned about the same allegations by detectives from
22 the same police department and while he was in custody
23 continuously. And under those circumstances Edwards and
24 the rationale of Edwards should apply strongly.

25 JUSTICE BREYER: Just in case -- just in

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1 case we don't -- we want to put a time limit on it,
2 which I know you don't want us to do. I'm now thinking
3 and I would like your comment, if you want, of a
4 combination of what Justice Alito said and what I said,
5 that is, that there are two parts to the Edwards thing.
6 One is the lawyer part, and the other is the
7 incriminating self part.

8 Now the lawyer part would be handled by
9 shaping a rule based on the rules of evidence, along the
10 lines I suggested. And that would give you a time. And
11 then the Miranda part could be handled by saying: but
12 the suspect retains the right to show that this
13 questioning is badgering without the question marks. In
14 other words what they are really up to is to try to get
15 him to change his mind. Now would that work?

16 MS. DAVIS: I -- I believe the Court could
17 adopt a type of rebuttable presumption under these
18 circumstances but it shows the difficulty that courts
19 would have and police officers, too, in measuring
20 degrees, degrees of coercion or degrees of custody. I
21 think the foregoing discussion has illustrated that
22 prisoners may be under different types of coercion in
23 their prison context. I just --

24 JUSTICE SOTOMAYOR: Can I ask something?
25 What does that have to do with the hypothetical Justice

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1 Alito gave you, which is the person is not in custody,
2 right?

3 MS. DAVIS: Well--

4 JUSTICE SOTOMAYOR: He is arrested for joy
5 riding; he is let go; and you are saying that for 20,
6 40 years he is now immunized from being reapproached by
7 the police under the Edwards rule?

8 MS. DAVIS: Yes.

9 JUSTICE SOTOMAYOR: So you are advocating
10 that no break in custody ever stops the Edwards clock.

11 MS. DAVIS: Right. The problems with the
12 break in custody are a break will exist in almost every
13 case, and even in Edwards there was a change in
14 custody --

15 CHIEF JUSTICE ROBERTS: Well, but not --

16 MS. DAVIS: -- between the police to a State
17 or county jail. So there is a change in -- a break in
18 custody right there. The prisoner was removed from the
19 police department and taken to the county jail.

20 CHIEF JUSTICE ROBERTS: It was one day. He
21 said he wanted the --

22 MS. DAVIS: Yes.

23 CHIEF JUSTICE ROBERTS: -- to remain silent
24 in the evening, and at 9:00 the next morning they were
25 back.

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1 MS. DAVIS: But a -- a release from custody
2 does not signal that a person who has asked for counsel
3 has changed.

4 JUSTICE SOTOMAYOR: But you are now -- you
5 are now accepting your adversary's point that somehow a
6 -- a change from a locked room in a prison to a
7 different locked room is a release from custody.

8 MS. DAVIS: No, I don't --

9 JUSTICE SOTOMAYOR: If we don't -- if we
10 don't accept that proposition, isn't there a clear break
11 when someone is let to go home? When someone is
12 released and permitted to go home?

13 MS. DAVIS: There is more of a break,
14 Justice Sotomayor, but it doesn't say anything about
15 that person's choice to proceed with counsel, and if
16 counsel is not provided then the attorney is excluded
17 from the adversary system of Federal justice.

18 JUSTICE STEVENS: May I ask you about a
19 different approach? We are dealing in this case with
20 somebody who was constantly in custody but for a
21 different reason than the during the pretrial situation.
22 He is in the general prison population. What -- what
23 would be wrong with the rule that said that a person in
24 that situation should be advised that somebody wants to
25 question him, and he has a right to say I do or do not

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1 want to talk to the visitor? And if he is willing to
2 talk to the visitor, then you have to give him new
3 Miranda warnings and you start from scratch.

4 But have the -- have the focus on whether he
5 is in custody at the time of the questioning, and say
6 that an inability to refuse to go to the interrogation
7 room would be not treated as custody. It would be
8 treated as in the general prison population. What would
9 be wrong with such a rule?

10 MS. DAVIS: I don't think anything's wrong
11 and I don't think a new rule is needed to cover that
12 situation, because it is conceivable that a person, even
13 in a prison environment, if they have control, if they
14 were to telephone out or to be free to refuse visitors,
15 might not be considered in custody.

16 But in this case Michael Shatzer lived in a
17 prison environment. He was not free to --

18 JUSTICE STEVENS: But the record doesn't
19 tell us whether he was given an opportunity to say "I
20 don't want any visitors today."

21 MS. DAVIS: No, it does not, but I think the
22 State has the burden to show. The circumstances --

23 JUSTICE STEVENS: No, it's a question who
24 has the burden of showing he's in custody or is he free
25 to live leave. If he has the burden, he didn't carry

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1 the burden in this case.

2 MS. DAVIS: Well, the record does show that
3 he lived in a maximum security prison --

4 JUSTICE STEVENS: Correct.

5 MS. DAVIS: -- and does not show that he
6 would be free to refuse.

7 JUSTICE STEVENS: But you can still live in
8 a maximum security prison and say I don't want any
9 visitors.

10 MS. DAVIS: We don't know that he could have
11 refused under the --

12 JUSTICE STEVENS: As far as the records
13 show.

14 MS. DAVIS: Right, we don't know that. But
15 Justice Stevens --

16 JUSTICE SCALIA: Do -- do we have to ask
17 him, you know, what visitors? I mean, is that the
18 question?

19 MS. DAVIS: Well --

20 JUSTICE SCALIA: Do you want to have any
21 visitors today?

22 MS. DAVIS: This shows --

23 JUSTICE SCALIA: He says, I don't know. Is
24 it my mother?

25 (Laughter.)

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1 JUSTICE SCALIA: Or -- or do you ask him,
2 are you willing to speak to investigators about a crime?
3 And he says what crime? I mean, how specific does --
4 does the request for permission to have visitors have to
5 be?

6 MS. DAVIS: Well, I think --

7 JUSTICE SCALIA: -- for this rule to cut in?

8 MS. DAVIS: This discussion shows the
9 problems with allowing such a determination in the first
10 place. Our position is the definition of custody for
11 Miranda purposes must be the same for Edwards purposes,
12 for a prisoner lives within confined space under
13 constant surveillance, and with no freedoms and limited
14 expectation of privacy.

15 CHIEF JUSTICE ROBERTS: So then I don't
16 understand why your answer to Justice Alito's
17 hypothetical was what it was, because that person
18 obvious was not in custody.

19 MS. DAVIS: It -- all I'm saying is that if
20 we were to adopt the language that this Court in Montejo
21 utilized, if a person is in control, if a person is not
22 in custody, they are in control and can shut the door or
23 walk away. If that's an operable definition, then it
24 did not apply in this case, because Michael Shatzer did
25 not have such freedom of --

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1 JUSTICE BREYER: Well, if you're -- if you
2 are going to use the Edwards, which I think is a good
3 idea, as counsel part, which I think is a good starting
4 place, you and every other member of the bar deals with
5 this problem every day of the week. Not every day of
6 the week, but very often. You know somebody's
7 represented in a case, and you know you are supposed to
8 talk to the lawyer. But eventually time passes, and
9 then you are probably free to talk to him, because the
10 whole thing's gone away.

11 Now that's a pretty vague rule. You could
12 make it more specific, but the -- the bar has lived with
13 that kind of situation, I guess for years.

14 MS. DAVIS: Well --

15 JUSTICE BREYER: So why can't we here?

16 MS. DAVIS: We -- I think we should. The
17 police officers have lived with the Edwards decision
18 which says --

19 JUSTICE BREYER: No, no, that's not what I
20 mean. I mean that the obligation to deal with counsel,
21 you don't have, after enough time passes, that it's no
22 longer reasonable to think that that individual either
23 has or wants counsel.

24 MS. DAVIS: Well, in this case there is no
25 reason to think that this suspect changed his mind.

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1 When first given his --

2 JUSTICE SCALIA: Excuse me, what is the
3 ethical rule about counsel? I thought if -- if there's
4 counsel in a particular case and you want to approach
5 the client about that case, you can't do it without
6 going to counsel.

7 MS. DAVIS: I think, though --

8 JUSTICE SCALIA: But when there is an
9 entirely different case, there is totally different
10 litigation, you can't approach the fellow without going
11 back to the counsel whom he hired for a different case?
12 I don't think that's the ethical rule. But that's the
13 effect of Edwards. Even if it's a different crime, you
14 have to go back to the counsel whom he hired for a
15 different prosecution? That bears no relationship to
16 the ethical rules of -- of counsel.

17 MS. DAVIS: Well this Court could adopt a
18 rule that the Edwards protection -- an alternative that
19 was raised in United States v. Green -- that the Edwards
20 protection extends to the same case for which the police
21 initially questioned the suspect and for which he asked
22 for counsel. That's one alternative and I submit that
23 would be more clear than --

24 JUSTICE GINSBURG: It would make a
25 difference? Does it make a difference? If -- we can

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1 limit it to the same case. But here, the reason that
2 the police came back is that they had additional
3 evidence, and so they wanted to ask him, confront him
4 with the new evidence. It's not the same situation that
5 it was when he was initially questioned.

6 MS. DAVIS: Well, I think from the suspect's
7 point of view it is the same situation. He was in the
8 same position, facing the police in 2003 as he was in
9 2006, in that he was accused of committing crime and in
10 the interim he had no access to counsel and I think that
11 this is significant in this case, because it's not clear
12 that even if he had been able to call out of the prison
13 he would have had representation, because the public
14 defender's office was under no constitutional or
15 statutory duty to provide counsel for a person who's not
16 presently being questioned and who has not yet been
17 charged.

18 JUSTICE SCALIA: What if -- what if we
19 limited Edwards to the same crime? That would -- that
20 would really make it much easier for the police to --

21 MS. DAVIS: I agree.

22 JUSTICE SCALIA: -- to know whether this
23 person in fact invoked the right to counsel.

24 MS. DAVIS: It would be easier, yes; and it
25 would apply to this case because it was the same crime.

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1 JUSTICE SCALIA: So that would --

2 JUSTICE STEVENS: Would that require us to
3 overrule Roberson?

4 MS. DAVIS: Well, it does present some
5 tensions with Roberson. However, in this case, since it
6 is limited to the same crime, does it extend as far as
7 Roberson does? And I would like to answer Justice
8 Stevens' question.

9 In this case, the suspect was told -- he was
10 advised of his rights and said, "I have the right to
11 talk to a lawyer and have him present with me while I'm
12 being questioned. If I cannot afford to hire a lawyer,
13 one will be appointed to represent -- represent me before
14 any questioning, if I wish."

15 Those rights were never fulfilled in the two
16 years and seven months they've had.

17 CHIEF JUSTICE ROBERTS: Well, but the
18 Miranda Rights do not require the police to provide
19 counsel. They have to mean -- mean you have to stop
20 questioning, until the person has right to counsel.

21 MS. DAVIS: Yes. They have to.

22 CHIEF JUSTICE ROBERTS: And the one thing
23 this person knew from the prior Miranda situation -- was
24 2003?

25 MS. DAVIS: Yes.

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1 CHIEF JUSTICE ROBERTS: Is that, if he said,
2 "I don't want to talk without counsel," the one thing he
3 knew is that the police would stop questioning because
4 that's what they did.

5 MS. DAVIS: But that's not the same, Chief
6 Justice Roberts, as having the counsel present during
7 questioning.

8 CHIEF JUSTICE ROBERTS: Well, Miranda
9 doesn't --

10 MS. DAVIS: If your Miranda advice --

11 CHIEF JUSTICE ROBERTS: Go ahead.

12 MS. DAVIS: -- says that you have the right
13 to have a counsel present during questioning, and all
14 that advice means, after time, is, We will stop
15 questioning you, then the right has been diminished over
16 time.

17 JUSTICE ALITO: Why is there a greater risk
18 of badgering when the questioning is about a different
19 offense?

20 MS. DAVIS: I think the risk is the same.
21 The risk --

22 JUSTICE ALITO: I thought you just said we
23 could -- you were suggesting an -- as an alternative,
24 that -- that Edwards be limited to situations where the
25 questioning is about the same offense.

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1 MS. DAVIS: Well, that's possible -- well,
2 the rationale that was extended in the Greene case is
3 that, if questioning is about a different time, the
4 perception, from the suspect's point of view, that the
5 police are badgering him, would be less.

6 JUSTICE ALITO: I mean, this isn't fanciful.
7 We just were asked to take a case involving a statute of
8 limitations issue for a murder that was committed like
9 30 years ago, and it said suppose somebody is questioned
10 by State authorities for a murder and taken into custody
11 and then released and then, 30 years later, taken into
12 custody by Federal authorities and questioned for a
13 civil rights violation, based on the same underlying
14 transaction.

15 You would say the Edwards rule applies in
16 that situation?

17 MS. DAVIS: Yes. It does. Now, a police
18 officer in that situation, really, has three
19 alternatives. One, they could wait until counsel was
20 present, to be sure of obtaining a statement admissible
21 in the State's case-in-chief.

22 Number 2, they could take a chance, as
23 happened in this case, where Detective Hoover never
24 opened a case file and didn't know that the suspect had
25 ever invoked his right, take a statement anyway, and run

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1 the risk that it may have to be excluded. Or, three --

2 JUSTICE SCALIA: Well, you are being very
3 unrealistic. Have you ever known defense counsel who
4 says, "Oh, yes," to submit to the interrogation? I
5 mean -- you know, once they are lawyered up, they are
6 not going to talk. You know that.

7 MS. DAVIS: Yes. I know that, but that --
8 this Court, in Miranda, was concerned with the limits
9 that society must impose, consistent with the
10 Constitution, in prosecuting crimes, and I think Edwards
11 strikes the balance between the individual faced in
12 captivity questioned by interrogators and the State.

13 CHIEF JUSTICE ROBERTS: Well, you say, "in
14 captivity," but you think the rule applies, whether they
15 are in captivity or not. In -- in Justice Alito's
16 hypothetical, the person was free for 40 years, so
17 captivity is not a limitation on your -- your proposed
18 rule.

19 MS. DAVIS: Well, a person is going to be in
20 custody in each Edwards scenario at the time they are
21 questioned, so the question is the intervening time
22 period. I want to say --

23 JUSTICE STEVENS: Well, you agreed that, if
24 he is questioned and he is not in custody when he is
25 being questioned. If he stopped on the street or in his

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1 living room, they can question him there. That's the --

2 MS. DAVIS: Yes, because Edwards only
3 applies to custodial interrogation, and, under these
4 circumstances, Edwards strikes a balance in a familiar
5 and predictable way. The fact that these case -- this
6 case does not -- does not --

7 JUSTICE SOTOMAYOR: Counsel, we --

8 MS. DAVIS: -- permit an exception.

9 JUSTICE SOTOMAYOR: We don't have a case.
10 None of the cases in this area, where we have applied
11 Edwards, has dealt with a situation with -- where a
12 prisoner has been released from custody, in any sense of
13 that word, i.e., sent home.

14 In all of the three situations that I am
15 aware of, in which the Edwards rule has applied, the
16 prisoner has stayed in jail -- some form of jail.
17 Correct?

18 MS. DAVIS: Yes, some form of jail. But
19 there is -- you know, Chief Justice Roberts referred to
20 the difference between the -- the police station and the
21 prison.

22 There are also pretrial detention centers,
23 and there is a range of custodial scenarios that -- that
24 police officers might encounter. And advancing an
25 exception to the rule for a break in custody presents

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1 practical problems.

2 JUSTICE SOTOMAYOR: Well --

3 CHIEF JUSTICE ROBERTS: Well, I suppose, if
4 they are in a pretrial detention center, they know they
5 are still being looked at for the crime as to which they
6 have invoked the Miranda warnings.

7 MS. DAVIS: Yes.

8 CHIEF JUSTICE ROBERTS: So you wouldn't call
9 that -- and I don't understand the other side to argue
10 that that is -- there is a break in custody there.

11 MS. DAVIS: But a transfer within -- look.
12 If it doesn't, then -- then it doesn't, but there should
13 not be a break there. Otherwise, there would have been
14 a break in Edwards and in many --

15 CHIEF JUSTICE ROBERTS: No. No. I agree
16 with you. There shouldn't be a break there, but, here,
17 the situation is quite different. There is a break
18 between jail for questioning and prison for 15 years --
19 or whatever your sentence is.

20 MS. DAVIS: But, from the suspect's point of
21 view, the only thing that changed is the State agents
22 who temporarily held him in a room for questioning. He
23 was still --

24 JUSTICE STEVENS: Yes, but -- but wouldn't
25 it make sense to treat the -- the change from a pretrial

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1 detention to a general prison population as, by itself,
2 a no longer custody, provided he is told that he doesn't
3 have to talk to people who want to pay him a visit.

4 He could say -- they could have a rule, say
5 that the prisoner does not have to talk to everybody who
6 comes -- comes around, and then you could treat that as
7 the functional equivalent of not being in custody.

8 Wouldn't that be a sensible rule?

9 MS. DAVIS: It's -- it's one possibility,
10 but I don't think it's a workable rule. The
11 circumstances of custody within an institution can
12 change dramatically.

13 JUSTICE STEVENS: They can, but, if you say,
14 as a condition to -- to questioning, he just has to know
15 that he doesn't have to see visitors he doesn't want to
16 see, which doesn't seem, to me, a very hard rule to
17 administer.

18 MS. DAVIS: It doesn't, Justice Stevens, but
19 I think the problem is it's a hard rule for police
20 officers to know. If they go to an institution to
21 question someone, how do they know if that rule is
22 applicable to that prisoner?

23 JUSTICE STEVENS: Well --

24 JUSTICE SCALIA: Doesn't -- but doesn't the
25 beginning of the Miranda warning tell him that he

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1 doesn't have to --

2 JUSTICE STEVENS: They have the prisoner
3 there, and he shows up, and then -- that's the end of
4 it.

5 MS. DAVIS: I still think it presents
6 difficulties.

7 JUSTICE STEVENS: I --

8 JUSTICE SOTOMAYOR: Could I have a
9 clarification of the facts for a moment?

10 In 2003, he was in one State facility, a
11 sentenced prisoner. Correct?

12 MS. DAVIS: Correct.

13 JUSTICE SOTOMAYOR: And he was just moved
14 from one State prison to another. He wasn't in pretrial
15 detention in either of these timeframes. Correct?

16 MS. DAVIS: That's correct.

17 JUSTICE SOTOMAYOR: We are just talking
18 about a change in facility, not in status?

19 MS. DAVIS: Exactly. And, Justice
20 Sotomayor, I wanted to answer your question about the
21 time period, where the circuit courts have sanctioned a
22 break in custody. One is cited in the Respondent's
23 brief, at page 27, is Holman versus Kemna, and a one-day
24 break was -- was authorized in that case. That's a very
25 short time period.

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1 JUSTICE SOTOMAYOR: What were the
2 circumstances? I don't recall the case.

3 MS. DAVIS: Well, that was the case that is
4 not entirely analogous, but it's close, where the
5 question was whether a statement was tainted by an
6 Edwards' violation. It also involved the Sixth
7 Amendment, I believe, so --

8 JUSTICE SOTOMAYOR: Was the prisoner in a
9 prison the entire 24 hours? Or was the individual
10 released home, that sort of --

11 MS. DAVIS: I think it was a release home.
12 If I recall correctly, I would have to double-check, but
13 there was a one-day period that the Court recognized.

14 JUSTICE SCALIA: Do I misunderstand Miranda
15 warnings? Isn't he told, at the very outset of the
16 Miranda warning, that he doesn't have to talk, if he
17 doesn't want to talk?

18 Is that -- is that any less strong than --
19 than asking him whether he wants to receive visitors, in
20 general? Or, in particular, a visitor who wants to ask
21 him about a particular crime?

22 I mean, he is -- he is told that with the
23 Miranda warning, which he is given the second time. If
24 you don't want to talk, you don't have to. If you want
25 a lawyer to be present, you are entitled to a lawyer,

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1 or -- and -- and or, else, we terminate.

2 I don't know why that isn't enough.

3 MS. DAVIS: It isn't enough, Justice Scalia,
4 because -- and I think this came out of Arizona versus
5 Roberson. Merely repeating advice, when the right to
6 counsel has not been fulfilled, is not enough because
7 the person, over time, might lose hope of ever seeing an
8 attorney, and, certainly, a prisoner has less means than
9 someone on the street to hire an attorney.

10 JUSTICE SCALIA: He doesn't care whether he
11 gets an attorney, so long as he doesn't have to talk to
12 investigators. That's the issue, whether he must talk
13 to these investigators, and he is told, right up-front,
14 You don't have to do it, and if -- if you want an
15 attorney for it, we will get you an attorney.
16 Otherwise, we -- we will terminate the interview.

17 MS. DAVIS: But, if he has asked for an
18 attorney in the past and, over two years and seven
19 months, has never seen the right fulfilled, I think that
20 the -- that the pressure to cooperate with interrogators
21 has increased.

22 CHIEF JUSTICE ROBERTS: That is a -- isn't
23 that a Sixth Amendment question? That's not a Miranda
24 question, if he has not been provided a lawyer.

25 MS. DAVIS: Well, in this case, Chief

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1 Justice Roberts, the Sixth Amendment never attached
2 because this suspect had never been charged.

3 CHIEF JUSTICE ROBERTS: Right. Right. And
4 it's the Fifth Amendment we are worried about, and that
5 is directed to coercion --

6 MS. DAVIS: Yes.

7 CHIEF JUSTICE ROBERTS: -- and that is
8 addressed, if you stop questioning him. You don't even
9 start questioning him, if he says, Look, I don't want to
10 talk without a lawyer.

11 MS. DAVIS: But I think --

12 CHIEF JUSTICE ROBERTS: Talking stopped, as
13 it did the very -- the first time he was approached.

14 MS. DAVIS: It did, but for a prisoner in
15 custody questioned about the same offense, the coercive
16 pressures that were present in Miranda are present for
17 him as well. That's why we think the core holding, the
18 core rationale, of Edwards applies very strongly in this
19 case.

20 JUSTICE GINSBURG: Why wouldn't he think, I
21 invoked my right to remain silent without a lawyer two
22 years and seven months ago, I will do it again; they
23 will have to stop questioning? Why wouldn't that be the
24 most likely mindset of the defendant? He knew that it
25 worked the first time. Why should it not work the

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1 second time?

2 MS. DAVIS: I think it's -- it's possible.
3 But in this case, where the right to counsel went
4 unfulfilled for that period of time, a person might lose
5 hope that that advice that he asked for help would ever
6 be fulfilled.

7 CHIEF JUSTICE ROBERTS: So if he says -- I'm
8 sorry --

9 MS. DAVIS: Go ahead.

10 CHIEF JUSTICE ROBERTS: Are you done
11 answering?

12 So if he said, instead of I want to talk to
13 a lawyer, if he said, I want to remain silent, your case
14 comes out differently? He doesn't say anything about a
15 lawyer. He says, Look, I don't want to talk to you.

16 MS. DAVIS: I think it would come out the
17 same way.

18 CHIEF JUSTICE ROBERTS: Well, but all your
19 arguments about he hasn't been provided a lawyer, there
20 is an ethical obligation to provide a lawyer. Those --
21 those are off the table.

22 MS. DAVIS: Well, what's different is in
23 this Court, I think may be clear in Michigan v. Mosley:
24 Asking for help from an attorney is materially different
25 than saying, I choose to remain silent. And the reason

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1 is a person who invokes the right to silence while
2 questioned in custody is in control and chooses to stop
3 the questioning.

4 JUSTICE SCALIA: He doesn't ask for an
5 attorney. He just says, I don't want to talk without an
6 attorney. That's what he says. He doesn't demand an
7 attorney. He says, I don't want to talk without an
8 attorney. And the investigators say, Okay, in that
9 case, we won't talk to you.

10 MS. DAVIS: Well, and they treated it as a
11 clear invocation of the right to counsel by documenting
12 it in two places and putting that in the case file.

13 JUSTICE SCALIA: The right to counsel in the
14 course of interrogation.

15 MS. DAVIS: Yes. I -- I think what he said
16 was, "I won't speak to you without an attorney," is the
17 same as asking for an attorney.

18 JUSTICE ALITO: I can think of -- I can
19 think of at least one situation in which the Court has
20 held that there is a time limit in which something has
21 to be done in order to comply with a Constitutional
22 requirement. If we were to choose a time period here,
23 what would -- what would you propose?

24 MS. DAVIS: Oh, anything over two years and
25 seven months.

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1 (Laughter.)

2 JUSTICE ALITO: What would be --

3 MS. DAVIS: That still doesn't solve the
4 problem.

5 JUSTICE ALITO: What would be a serious --
6 what would be a serious answer to that question?

7 MS. DAVIS: We've argued that Edwards
8 continues to the end, and the reason is --

9 JUSTICE ALITO: All or nothing.

10 MS. DAVIS: It's all or nothing, Justice
11 Alito, because -- because this Court has already said in
12 Edwards, We will allow the police to come back if the
13 suspect changes his or her mind or if an attorney is
14 present. And those two -- those two alternatives are
15 available every day and they are easy for the police to
16 ascertain.

17 JUSTICE SOTOMAYOR: Your adversary says that
18 they -- he can't change his mind. It has to be a
19 spontaneous, you know, somehow they have to be in a room
20 together that wasn't planned and he has to come up and
21 say, I am confessing out of the kindness of my heart.
22 The police can't even approach him, according to you,
23 once he has invoked counsel, to ask him whether he wants
24 to change his mind.

25 MS. DAVIS: That's right.

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1 JUSTICE SOTOMAYOR: That's the point.

2 MS. DAVIS: That is the badgering. That is
3 the specter of coercion that is inconsistent with the
4 Constitutional right related to Miranda to have counsel
5 present. And that is the reason why --

6 JUSTICE SOTOMAYOR: So there is no
7 termination point, really?

8 MS. DAVIS: It is not confined to time,
9 Justice Sotomayor, but the termination point is,
10 especially for a prisoner, it's easy for the prisoner to
11 contact the police. Just tell the jail guard that you'd
12 like to talk to the police about that investigation.
13 They will make arrangements quickly for that to happen,
14 I'm quite sure, or counsel could be present and
15 questioning can proceed in that instance, and those are
16 the reasons I would ask this Court to affirm the
17 judgment of the Court of Appeals of Maryland.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 Ms. Davis.

21 General Gansler, you have two minutes
22 remaining.

23 REBUTTAL ARGUMENT OF GEN. DOUGLAS F. GANSLER

24 ON BEHALF OF THE PETITIONER

25 MR. GANSLER: In response to Justice

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1 Breyer's question, the ethics rules do not apply to the
2 police, only to lawyers, and I think Justice Scalia hit
3 it right, exactly right, where this -- he's actually --
4 in this case, he is not represented at all. He is in
5 custody because his case has been concluded.

6 JUSTICE BREYER: My thought is, can you use
7 the rule for lawyers, which has worked, to help shape a
8 rule that would work here?

9 MR. GANSLER: Yes, and I will get to that in
10 one second. And I agree -- and that's exactly right.
11 The visitors in jail theory that Justice Stevens brought
12 up: The defendant could say, "I told them I don't want
13 to talk to any visitors, no matter what. I don't want
14 to talk to any visitors. They dragged me up there, made
15 me go into this room and answer questions." Then you
16 have -- while Edwards, in our view, would have already
17 been terminated, you have still the argument that my --
18 my Miranda warnings were not waived voluntarily and
19 freely, and moreover, I was denied due process.

20 In terms of the time limits of the cases, in
21 The State of Maine, Stafiali was six hours, and the
22 following day, Dunkins v. Thigpen in the Eleventh
23 Circuit was the next day, following a break in custody.
24 Now, those cases, the guy basically went home in those
25 scenarios.

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1 The confusion seems to be, in a lot of the
2 questions, regarding what is custody? We will not -- we
3 don't argue -- we are talking about interrogational
4 police custody, which is different than being in jail,
5 lying on your cot, watching cable television. We --
6 this is -- in our scenario, the three days that now
7 exist, whereas no one questions in the Roberson,
8 Minnick, and Edwards cases, those three days were
9 pretrial police custody situations. There is no break
10 in custody --

11 JUSTICE SOTOMAYOR: But -- but there was no
12 difference in those cases, as I understand it. Each of
13 the prisoners was in a particular room being questioned,
14 and then he was released into a more general room later.

15 MR. GANSLER: My understanding of this case
16 --

17 JUSTICE SOTOMAYOR: And brought back.

18 MR. GANSLER: My understanding of this case,
19 they were in the -- sort of the box, as we call it, and
20 then they were put into a holding cell, a cell, and then
21 brought back to the box. Very different --

22 JUSTICE SOTOMAYOR: There is no difference
23 between that and a holding cell, a maintenance room, and
24 being put back into general prison to go sleep.

25 MR. GANSLER: The latter -- the latter

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1 scenario is very different, because that's where they
2 live. That's their daily routine. Through no part of
3 the state, they are habitual offenders. They live in
4 the general population of a jail, in this case it is
5 medium security, not maximum security, and they were put
6 -- there were people around. They have recess, they
7 have television, they have a cafeteria, and so forth.

8 Finally, going to Justice Alito's question
9 regarding the time limit, where you do it. This Court
10 has the County of Riverside -- obviously, there's
11 48 hours from presentment is the time.

12 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
13 The case is submitted.

14 (Whereupon, at 11:04 a.m., the case in the
15 above-entitled matter was submitted.)

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