No. 04-373

In the Supreme Court of the United States

STATE OF MARYLAND, PETITIONER

v.

LEEANDER JEROME BLAKE

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, under *Edwards* v. *Arizona*, 451 U.S. 477 (1981), after a suspect has invoked his right to have counsel present during custodial interrogation and a police officer engages in improper communications with the suspect, curative measures and intervening circumstances may enable the suspect validly to reinitiate dialogue about the investigation and agree to waive his rights.

TABLE OF CONTENTS

Table of Contents—Continued: Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

In the Supreme Court of the United States

No. 04-373

STATE OF MARYLAND, PETITIONER

v.

LEEANDER JEROME BLAKE

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether *Edwards* v. *Arizona*, 451 U.S. 477 (1981), permits courts to consider whether curative measures and intervening circumstances can neutralize the effect of a police officer's improper communications with a suspect after the suspect's invocation of the right to have counsel present at questioning. Because of its role in the investigation and prosecution of federal crimes, the United States has a substantial interest in that issue. In particular, the government has an interest in an interpretation of *Edwards* that allows consideration of curative measures, such that a suspect who has once invoked his right to counsel may validly re-initiate communication with law-enforcement agents, and make statements that can be admitted into evidence, even if agents previously made comments that are construed as improper interrogation.

STATEMENT

1. On September 19, 2002, Straughan Lee Griffin, a resident of Annapolis, Maryland, was shot and killed in front of his house. Pet. App. 3a. On October 25, 2002, Terrence Tolbert, who had been arrested in connection with Griffin's

murder, implicated respondent in the crime. That day, police obtained an arrest warrant for respondent and a warrant to search his house. Before executing the warrants, Sergeant Gregory Kirchner instructed the officers not to speak to respondent. J.A. 238. Between 4:30 and 5:00 a.m. the next morning, Anne Arundel County police arrested respondent at his home, handcuffed him, and transported him to the Annapolis Police Department. At the time, respondent was wearing only a tank top and boxer shorts with no shoes. Pet. App. 4a.

In the "intake" or "booking" room of the station house, Detective William Johns, the lead detective investigating the Griffin murder, advised petitioner of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Petitioner invoked his right to counsel, stating that he did not wish to speak with the police officers without an attorney. After respondent signed an advice-of-rights form, the police placed him in a holding cell. Pet. App. 4a.

About 35 minutes later, at 6 a.m., Detective Johns, accompanied by Officer Curtis Reese, went to respondent's cell and handed him a copy of the arrest warrant and statement of charges, as they were required to do under Maryland law. See Md. R. 4-212(e) (providing that "the officer shall inform the defendant of the nature of the offense charged" and "[a] copy of the warrant and charging document shall be served on the defendant"). Detective Johns explained the charges to respondent, told him that they were serious charges, and said that respondent should read the document carefully and make sure he understood it. Pet. App. 4a-5a.

The statement of charges that Detective Johns handed to respondent consisted of a District Court of Maryland computer printout. The document indicated that petitioner was charged with first-degree murder, second-degree murder, armed robbery, armed carjacking, and using a handgun in a crime of violence. The computer-generated document listed the generally applicable maximum penalties for each offense.

Pet. App. 39a, 49a. The document stated that the maximum penalty for first degree murder is "DEATH." While that was a correct statement of the statutory maximum penalty for that offense, respondent was not eligible for the death penalty under Maryland law because he was under the age of 18 at the time of the offense. Pet. App. 5a. See generally Md. Code Ann., Crim. Law § 2-202(b)(2)(i) (Michie 2002).

After Detective Johns handed the charging document to respondent and turned to leave, Officer Reese stated to respondent, in a tone that Detective Johns later characterized as loud and confrontational, "I bet you want to talk now, huh!" Detective Johns was surprised by the statement, and he "pushed/escorted" Officer Reese out of the cell, stating very loudly within respondent's hearing, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." Pet. App. 6a, 71a. Detective Johns testified that he made the statement because he was concerned that "Officer Reese's outburst would violate [respondent's] request for counsel prior to being questioned." Respondent said nothing at the time. *Id.* at 5a-6a.

Petitioner remained in his cell, wearing the clothes he had on at the time of his arrest. Approximately 30 minutes after the earlier encounter, Detective Johns returned to the cell to give respondent clothing that had been brought from respondent's home. After Detective Johns handed respondent his clothing, respondent asked, "I can still talk to you?" Detective Johns responded, "Are you saying that you want to talk to me now?" Petitioner answered, "Yes." Detective Johns left the cell area and returned after a few minutes. He then brought respondent to the intake room and re-administered *Miranda* warnings. Respondent waived his rights and made incriminating statements to Detective Johns concerning his involvement in the Griffin murder. In response to a request from Detective Johns, respondent agreed to take a polygraph examination. Officers transported respondent to a State Police barracks in Annapolis, where he was

again advised of his *Miranda* rights. Following the polygraph, respondent made additional statements. Pet. App. 6a-7a.

2. A state grand jury indicted respondent for first-degree murder, second-degree murder, and manslaughter. Before trial, respondent moved to suppress his statements, arguing that Officer Reese's comment to him violated the rule of *Edwards* v. *Arizona*, 451 U.S. 477 (1981), which holds that statements obtained by police during custodial interrogation are not admissible once a suspect has invoked his right to counsel, unless the suspect initiates communication with police. After an evidentiary hearing, the trial court granted respondent's motion. Pet. App. 59a-85a.

The court ruled that Officer Reese's statement to respondent constituted interrogation for purposes of the *Edwards* rule (Pet. App. 72a, 76a), finding that the statement was "made specifically for the purpose of getting [respondent] to talk," *id.* at 75a. The court observed, however, that Detective Johns's act of handing respondent the charging document "does not amount to interrogation and is part of a lawful booking process." *Id.* at 76a. In addition, the court found that the boilerplate recitation of maximum penalties in the charging document, which incorrectly suggested that respondent was eligible for the death penalty, had been "done by mistake," not intentionally. *Id.* at 72a.

The court concluded that respondent's later request to speak to Johns was "in direct response to Reese's previous statement." Pet. App. 75a. The court viewed respondent's agreement to take a polygraph exam as part of "one continuous course of conduct beginning with Officer Reese's statement" (*id.* at 82a), adding that "[t]here was no lengthy period of time * * * to break the chain of events and to prove attenuation." *Ibid.* Although the court acknowledged that respondent had testified that he was motivated to speak after he had read the charging papers and learned that Tolbert had blamed the murder on him and "he wanted the police to

know the truth," *id.* at 81a, the court said that "[t]he State has not met its heavy burden of proving a voluntary, knowing and intelligent waiver or showing that [respondent] was not still suffering under the impact of Reese's unlawful course of interrogation." *Ibid.* The court rejected the State's argument that the immediate curative action taken by Detective Johns negated any intent to elicit statements from respondent. *Id.* at 73a-74a.

3. A divided panel of the Court of Special Appeals of Maryland reversed, concluding that Officer Reese's statement to respondent did not qualify as interrogation for purposes of the *Edwards* rule. Pet. App. 30a-58a. The majority concluded that Officer Reese's "blurt[ed]" statement was "rhetorical in nature," *id.* at 52a, and that it did not suggest "that [respondent] was * * * expected to respond, and he did not respond." *Ibid.* The majority emphasized that respondent "was not 'badgered' or subjected to 'compelling influences' or 'psychological ploys.'" *Ibid.* The dissenting judge concluded that "Officer Reese should have known that his statement * * * was reasonably likely to elicit an incriminating response." *Id.* at 58a.

4. The Court of Appeals of Maryland granted respondent's petition for a writ of certiorari, reversed the judgment of the intermediate appellate court, and reinstated the suppression order. Pet. App. 1a-29a.

The court first held that Officer Reese's statement amounted to "the functional equivalent of interrogation." Pet. App. 20a. The court acknowledged that the act of merely serving the charging document, with its inaccurate suggestion that respondent was subject to the death penalty, did not constitute interrogation. *Id.* at 22a. But in light of the almost simultaneous service of the document, "any reasonable officer had to know that [Officer Reese's] comment was reasonably likely to elicit an incriminating response." *Id.* at 21a.

The court rejected the State's argument that, even if Officer Reese's statement constituted interrogation, *Edwards* did not bar admission of his statements because it was respondent who reinitiated communication by asking to speak with Detective Johns. The court stated that, although respondent's request to speak may have constituted "initiation" in the "'dictionary sense' of the word," there was no initiation by respondent "as that term is contemplated in the legal sense." Pet. App. 26a. In reaching that conclusion, the court considered the following factors:

> Petitioner had requested counsel; he had been given a document that told him he was subject to the death penalty, when legally he was not; he was seventeen years of age; he had not consulted with counsel; he was in a cold holding cell with little clothing; an officer had suggested in a confrontational tone that petitioner might want to talk; and the misstatement as to the potential penalty as one of "DEATH" had never been corrected.

Ibid.

The court also rejected the State's argument that Detective Johns neutralized the effect of Officer Reese's comment by saying that police could not talk to respondent in light of his invocation of the right to counsel, stating only that the trial court's conclusion that Johns's comment did not negate the violation was "not clearly erroneous." Pet. App. 27a. The court emphasized that "[t]he delay of twenty-eight minutes" between Officer Reese's comment and respondent's inquiry about speaking with police was "insufficient to constitute a waiver of his right to have counsel present." *Ibid.* The court suggested that, "once the police violate *Edwards*, it does not make sense to say that an accused can thereafter 'initiate' conversation with the police unless a substantial amount of time has elapsed such that 'the coercive effect of the interrogation has subsided.'" *Id.* at 28a (quoting *United States* v. *Gomez*, 927 F.2d 1530, 1539 n.8 (11th Cir. 1991)).

The court stated that, "[a]lthough the accused technically may begin a conversation with the police, if this occurs after the police have interrogated the accused in violation of *Edwards*, the voluntariness of such 'initiation' is suspect and statements subsequently obtained are inadmissible." *Ibid.* (citing *Gomez*, 927 F.2d at 1539).

SUMMARY OF ARGUMENT

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court adopted, as a prophylactic measure to protect Fifth Amendment rights, the rule that in order for a suspect to give an admissible statement during custodial interrogation, he must generally first be advised of specified rights and voluntarily agree to waive them. In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court built on its *Miranda* jurisprudence by holding that, when a suspect has been advised of his right to have counsel present during custodial interrogation and invokes that right, statements made in response to further police questioning of an uncounseled suspect must be excluded, even if the defendant has received fresh *Miranda* warnings and voluntarily waived his rights. *Edwards* establishes an "anti-badgering" rule on the premise that, once a defendant has evinced an unwillingness to deal with custodial interrogation without counsel's assistance, further police efforts to induce him to waive his rights pose an undue risk that a decision to speak without counsel will not be a product of free choice. The *Edwards* rule, however, does not prelude a suspect from himself choosing to re-initiate dialogue with the authorities and then validly waiving his rights. To the contrary, *Edwards* respects the principle that an informed defendant has free choice to elect to reopen communications with the police without counsel. *Id.* at 485; *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion).

The Court of Appeals of Maryland held below that, once a police officer improperly questions a suspect who has asserted his *Miranda* right to counsel, any later effort by the

suspect to re-establish communications with the police and waive his rights must be deemed invalid unless there has been a break in custody or a substantial lapse of time. The court of appeals erred in adding a new presumption to *Edwards* that frustrates a suspect's voluntary desire to communicate with the authorities. In a case where intervening circumstances or curative measures have neutralized the impact of improper questioning, there should be no per se rule that a break in custody or a substantial lapse of time must occur before a suspect may validly reinitiate communications with police.

Edwards's concern is that a defendant who expresses the desire to deal with the police through counsel may be unable to resist further entreaties to talk. After improper questioning, such a defendant might find fresh *Miranda* warnings alone insufficient reassurance, because the police have already failed to respect his assertion of the right to have counsel present. But when one officer asks an improper question and another officer promptly applies an effective curative measure—such as reiterating that respondent's invocation of the right to counsel means that he cannot be questioned—there is no reason to reject a suspect's later initiation of communications with the police on the basis of a conclusive presumption of involuntariness.

Allowing curative measures to restore a suspect's ability to reinitiate communications would not invite abuses by the authorities. Curative measures could not retroactively render admissible any earlier, improperly elicited statements. Nor would curative measures alter the government's burden to show a re-initiation of communications and a voluntary and intelligent waiver of rights. And there is no significant danger that recognizing curative measures would encourage intentional strategies by the police to circumvent *Edwards*, because officers could not control whether a suspect would voluntarily choose to reopen dialogue with the police, and the authorities would have much to lose if improper ques-

tioning were held to render *all* subsequent communications with the suspect involuntary. Recognizing the ability of intervening circumstances or curative measures to neutralize improper questioning would render the law under *Edwards* consistent with this Court's approach to parallel issues under *Miranda* itself. See *Oregon* v. *Elstad*, 470 U.S. 298 (1985); *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004).

Under a proper analysis, and freed from the court of appeals' conclusive presumption that a break in custody or a substantial lapse in time is necessary to dissipate the effects of improper questioning, the facts of this case illustrate that adequate curative measures can effectively enable a defendant to exercise free choice in reinitiating dialogue with the authorities. After Officer Reese made a single statement to respondent that the court of appeals construed as interrogation, Detective Johns—the lead investigator—immediately silenced Reese, ushered him from respondent's cell, and loudly reaffirmed that respondent did not want to speak to the police, that he had asked for counsel, and that "[w]e cannot talk to him now." Pet. App. 6a. That information notified respondent that he was not required to speak and reassured him that the police would respect his assertion of the right to counsel. Twenty-eight minutes later—without any police prompting, and without having provided any information to the police—respondent, having read the charges against him, asked whether he could still talk to the police. Nothing in *Edwards* precludes giving effect to respondent's choice at that time. A suspect's voluntary decision to reopen dialogue and his subsequent voluntary waiver of rights should be respected, without applying any further prophylactic presumptions that would frustrate his free will and discredit the voluntary nature of his statements.

ARGUMENT

CURATIVE POLICE MEASURES NEUTRALIZED THE EFFECT OF ONE OFFICER'S IMPROPER COMMUNICATIONS WITH RESPONDENT AFTER HIS INVOCATION OF THE RIGHT TO HAVE COUNSEL PRESENT AT QUESTIONING

A. *Edwards* v. *Arizona* Creates A Prophylactic Rule To Protect Against Police Badgering Of A Suspect Who Has Asserted His Rights

In *Miranda* v. *Arizona*, 384 U.S. 436 (1966), this Court held that statements made by a defendant in response to custodial interrogation are not generally admissible against him in the government's case in chief unless the defendant voluntarily and knowingly agreed to speak after the administration of specified warnings. Specifically, the suspect must "be warned that he has a right to remain silent, that any statements he does make may be used as evidence against him, and that he has a right to the presence of an attorney" during custodial questioning. *Id.* at 444. The *Miranda* rule is a "prophylactic" measure. See, *e.g.*, *New York* v. *Quarles*, 467 U.S. 649, 653 (1984). The premise of *Miranda* is that custodial interrogations "contain[] inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 384 U.S. at 467. The rule is designed to protect the Fifth Amendment privilege by reducing the "risk of overlooking an involuntary custodial confession" under the "traditional totality-of-the-circumstances test." *Dickerson* v. *United States*, 530 U.S. 428, 442 (2000).

In *Edwards* v. *Arizona*, 451 U.S. 477 (1981), this Court created a "second layer of prophylaxis" for the *Miranda* right to counsel. *Davis* v. *United States*, 512 U.S. 452, 458 (1994) (quoting *McNeil* v. *Wisconsin*, 501 U.S. 171, 176 (1991)). *Edwards* addresses situations in which a suspect requests counsel after *Miranda* warnings have been given. To

protect the assertion of that right, under *Edwards*, once a defendant invokes his right to counsel, statements made during government-initiated custodial interrogation of an uncounseled suspect are barred from the government's case in chief, even if the defendant receives and voluntarily waives his *Miranda* rights. 451 U.S. at 484, 487; see *Minnick* v. *Mississippi*, 498 U.S. 146 (1990). As the Court has explained, the *Edwards* rule "presume[s]" that "if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then * * * any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Arizona* v. *Roberson*, 486 U.S. 675, 681 (1988) (quoting *Miranda*, 384 U.S. at 467). *Edwards* thus protects against police "badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick*, 498 U.S. at 150 (quoting *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990)).

Edwards itself makes clear, however, that no absolute presumption of coercion is warranted following a suspect's invocation of his right to counsel, and further interrogation is permissible, if "the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S. at 485; accord *Oregon* v. *Bradshaw*, 462 U.S. 1039, 1043-1044 (1983) (plurality opinion). *Edwards* thus allows a defendant to make a voluntary decision to change his mind, after the assertion of the right to counsel, and to approach officers to discuss the investigation. That rule respects the principle that is at the heart of *Miranda* and *Edwards*: the right of a suspect who is informed of his rights to make a decision for himself whether to "face the State's officers during questioning with the aid of counsel, or go it alone." *Patterson* v. *Illinois*, 487 U.S. 285, 291 (1988) ("Preserving the integrity of an accused's choice * * * is the essence of *Edwards*."); *Minnick*, 498 U.S. at 153 (stating that the purpose

of the *Edwards* rule is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel"); *Connecticut* v. *Barrett*, 479 U.S. 523, 528 (1987) ("The fundamental purpose of the Court's decision in *Miranda* was 'to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process.") (quoting *Miranda*, 384 U.S. at 469).

B. Curative Measures Can Dissipate The Effects Of Improper Questioning After A Suspect Asserts The Right To Counsel

The Court of Appeals of Maryland concluded that, if a police officer makes a comment that qualifies as interrogation after the suspect has invoked his *Miranda* right to counsel, a suspect cannot be deemed to have initiated any subsequent communication unless there "was [a] break in custody or adequate lapse in time sufficient to vitiate the coercive effect of the impermissive [*sic*] interrogation." Pet. App. 26a; see also *id.* at 28a (accused cannot be deemed to have initiated subsequent conversation "unless a substantial amount of time has elapsed"). Although recognizing that "the accused *technically* may begin a conversation with police," *ibid.* (emphasis added), the court concluded that, "in the legal sense," *id.* at 26a, the statements must be deemed a continuation of earlier interrogation because of "the coercive effect of the interrogation." *Id.* at 28a (quoting *United States* v. *Gomez*, 927 F.2d 1530, 1539 n.8 (11th Cir. 1991)). In doing so, the court essentially extended *Edwards*'s presumption of coercion to include not just statements made "at the authorities' behest" after the suspect invokes his right to the presence of counsel at questioning, *Roberson*, 486 U.S. at 681, but also statements made "at the suspect's own instigation" after improper police questioning. *Ibid.*

That conclusion was error. Because curative efforts by police and intervening circumstances can dissipate the effects of "interrogation," there is no basis for conclusively

presuming that a suspect's decision to initiate dialogue with the police and his ensuing statements are the product of coercion. The court below appeared to concede as much by recognizing that a lengthy lapse of time or break in custody could have a curative effect. There is no reason that curative measures by the police that more directly address the effects of post-invocation questioning cannot have a similar effect. In this case, Detective Johns's actions dissipated the risk that respondent would be "badgered" into making statements, and "allow[ed] [respondent] a real choice between talking and remaining silent." *Missouri* v. *Siebert*, 124 S. Ct. 2601, 2608 (2004) (plurality opinion). Accordingly, voluntary statements that respondent subsequently made are admissible.

1. Courts have recognized that intervening circumstances can minimize the risks that *Edwards* was designed to address

The *Edwards* rule addresses the risk that police through "'badger[ing]' or 'overreaching' * * * might * * * wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith* v. *Illinois*, 469 U.S. 91, 98 (1984) (per curiam); *id.* at 99 n.8 ("It was precisely such 'badger[ing] that the *Edwards* safeguard was designed to prevent."); *Bradshaw*, 462 U.S. at 1044 (plurality opinion) (stating that the *Edwards* rule is "designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was"). But this Court has noted that the *Edwards* presumption of coercion does not apply in situations in which the risk of police badgering is not significant. In *McNeil*, 501 U.S. at 177, the Court indicated that statements need not be "presumed involuntary and therefore inadmissible as substantive evidence at trial" under *Edwards* where there was a "break in custody" between the suspect's invocation of the right to counsel and subsequent interroga-

tion. Based on *McNeil*, the federal courts of appeals that have addressed the question uniformly have held that *Edwards* does not require a presumption of coercion where post-invocation interrogation occurs after a break in custody, even in cases in which the suspect's interrogation began immediately after he invoked his right to counsel.[1] Similarly, the federal courts of appeals that have addressed the issue have concluded, consistent with the court below, that a significant lapse of time between initial post-invocation interrogation and a suspect's later initiation of communications with the police supports the conclusion that coercion should not be presumed and that statements may be found admissible.[2]

The *Edwards* presumption of coercion is inapplicable under those circumstances because they operate to diminish "the inherently coercive nature of custody itself," and "there is little to no risk of badgering by the authorities." *United States* v. *Bautista*, 145 F.3d 1140, 1150 (10th Cir.), cert. denied, 525 U.S. 911 (1998); *United States* v. *Harris*, 221 F.3d 1048, 1052 (8th Cir. 2000) ("Concern that a suspect will be 'badgered' * * * is not present * * * where a person is

---

[1] See, *e.g.*, *McFadden* v. *Garraghty*, 820 F.2d 654, 661 (4th Cir. 1987); *United States* v. *Barlow*, 41 F.3d 935, 945 & n.35 (5th Cir. 1994), cert. denied, 514 U.S. 1030 (1995); *United States ex rel. Espinoza* v. *Fairman*, 813 F.2d 117, 125 (7th Cir.), cert. denied, 483 U.S. 1010 (1987), overruled on other grounds by *United States* v. *LaGrone*, 43 F.3d 332 (7th Cir. 1994); *United States* v. *Harris*, 221 F.3d 1048, 1052 (8th Cir. 2000) (collecting cases); *United States* v. *Skinner*, 667 F.2d 1306, 1309 (9th Cir. 1982), cert. denied, 463 U.S. 1229 (1983); *United States* v. *Bautista*, 145 F.3d 1140, 1150 (10th Cir.), cert. denied, 525 U.S. 911 (1998); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988), cert. denied, 489 U.S. 1059 (1989).

[2] See *Hill* v. *Brigano*, 199 F.3d 833, 842 (6th Cir. 1999), cert. denied, 529 U.S. 1134 (2000); see also *Gomez*, 927 F.2d at 1539 n.8 (suggesting that "[i]t may be possible for enough time to elapse between the impermissible further interrogation and the 'initiation' that the coercive effect of the interrogation will have subsided"); *Butzin* v. *Wood*, 886 F.2d 1016, 1018 (8th Cir. 1989) (concluding that defendant's confession was not the product of previous day's interrogation where the defendant renewed contact following a night in jail and defendant was not under great pressure from authorities to speak), cert. denied, 496 U.S. 909 (1990).

not in continuous custody and the coercive effects of confinement dissolve."); *United States* v. *Barlow*, 41 F.3d 935, 945-946 & n.35 (5th Cir. 1994) (same), cert. denied, 514 U.S. 1030 (1995); *Dunkins* v. *Thigpen*, 854 F.2d 394, 397 (11th Cir. 1988) (same), cert. denied, 489 U.S. 1059 (1989). The Court of Appeals of Maryland itself acknowledged that a "break in custody or adequate lapse in time" could "vitiate the coercive effect" of post-invocation custodial interrogation. Pet. App. 26a (citing *Dunkins*).

There is no reason why a break in custody or a lapse in time should exhaust "[the] scenarios [that] may * * * militate against the finding of an *Edwards* violation." *Holman* v. *Kemna*, 212 F.3d 413, 419 (8th Cir.), cert. denied, 531 U.S. 1021 (2000). Other circumstances may reduce the risk of badgering sufficiently that no presumption of coercion is justified. See *ibid.* And curative measures that reinforce the message that a suspect's invocation of the right to counsel will be honored, notwithstanding a prior improper comment, fall precisely into the category of actions that justify permitting a suspect validly to reinitiate dialogue with the police on the subject of the investigation.

2. Curative measures can neutralize the potential harms of improper questioning following an invocation of the right to counsel

The effectiveness of a post-interrogation curative statement must be judged in relation to the harms post-invocation interrogation might cause. When a law enforcement officer interrogates a suspect despite his invocation of his right to the presence of counsel at questioning, the suspect may assume that, despite the *Miranda* warnings, the right to counsel does not apply under those circumstances or at least that the police have no intention of respecting it. The *Edwards* rule thus assures "that any statement made in subsequent interrogation [was] not the result of coercive pressures." *Minnick*, 498 U.S. at 151; see *Roberson*, 486 U.S. at 686

("[T]o a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling.").

A curative statement by police may effectively address the harms caused by non-coercive post-invocation interrogation by reassuring the suspect that police will honor his right not to speak without the presence of counsel. A simple re-administering of *Miranda* warnings might be insufficient, because the suspect, having already been subjected to interrogation despite the warnings and despite his invocation of counsel, would not necessarily credit new warnings as giving him a true choice to discontinue questioning or believe that police would subsequently honor his wish to speak to them only with the assistance of counsel. Cf. *Roberson*, 486 U.S. at 686 (finding fresh *Miranda* warnings inadequate to dispel *Edwards* presumption of coercion with respect to police-initiated questioning on a separate investigation). Rather, an adequate curative measure would have to convey the message that there would be no further police-initiated questioning without counsel while the suspect remained in custody. Such a measure would justify allowing the suspect to exercise free choice on whether or not to initiate contact with the police, and, if he does so, to allow courts to find a valid waiver of *Miranda* rights based on the usual totality-of-the-circumstances test, free from a conclusive presumption that the waiver is ineffective.

Curative measures, of course, would not retroactively render admissible statements made in response to post-invocation interrogation before curative steps were taken. In addition, curative measures would not relieve the government of the burden of establishing that the curative measures were sufficient, that the suspect initiated dialogue with the police, and that he knowingly, voluntarily, and intelligently waived his *Miranda* right to counsel in custodial in-

terrogation. *Bradshaw*, 462 U.S. at 1044 (plurality opinion); *Edwards*, 451 U.S. at 468 n.9; cf. *Colorado* v. *Connelly*, 479 US. 157, 168-169 (1986) (burden is on prosecution to show waiver by a preponderance of the evidence).[3] And where the initial interrogation was actually coercive in the due process sense, see *Arizona* v. *Fulminante*, 499 U.S. 279 (1991), the government would bear the burden of showing that the suspect did not speak because of "the continuing effect of the coercive practices." *Lyons* v. *Oklahoma*, 322 U.S. 596, 602 (1944). Such protections are adequate to safeguard the underlying Fifth Amendment right, without imposing a per se rule requiring a break in custody or a significant lapse of time before a suspect may validly initiate dialogue with the police following a breach of the prophylactic *Edwards* rule.

3. This Court's decisions support the conclusion that curative measures can vitiate the *Edwards* presumption of coercion

In *Oregon* v. *Elstad*, 470 U.S. 298 (1985), this Court confronted an analogous claim that a suspect's giving of an initial statement without *Miranda* warnings tainted his later provision of a second statement after he received *Miranda* warnings and waived his rights. There, the police first elic-

---

[3] The court of appeals apparently erred by combining the inquiry whether a suspect "initiated" communication with the ultimate inquiry whether the waiver of *Miranda* rights was voluntary. In considering whether respondent initiated conversation, the court of appeals weighed several factors that, while relevant to the ultimate issue of the voluntariness of statements, are not relevant to determining whether the suspect "initiated" communication. See Pet. App. 26a (considering, among other factors, the fact that respondent "was seventeen years of age [and] he was in a cold holding cell with little clothing" in determining that he had not "initiated the contact as that term is contemplated in the legal sense"). The court erred by "melding [initiation and voluntariness] together." *Bradshaw*, 462 U.S. at 1045 ("[T]he Oregon Court of Appeals was wrong in thinking that an 'initiation' of a conversation or discussion by an accused * * * sufficed to show a waiver of the previously asserted right to counsel. The inquiries are separate.").

ited an incriminating statement from the defendant without administering *Miranda* warnings. One hour later, the same officer who had taken the earlier statement administered the warnings, and Elstad waived his rights and made additional incriminating statements. Although the period between the two statements was short and there was no change of personnel or significant intervening circumstance, the Court held that the provision of *Miranda* warnings meant that courts should no longer "presume the privilege against compulsory self-incrimination ha[d] not been intelligently exercised." *Id.* at 310. The Court explained that, "absent deliberately coercive or improper tactics in obtaining the initial statement,"

> a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible. The warning conveys the relevant information and thereafter the suspect's choice whether to exercise his privilege to remain silent should ordinarily be viewed as an 'act of free will.'

Id. at 310-311 (quoting *Wong Sun* v. *United States*, 371 U.S. 471, 486 (1963)); see also *id.* at 314 (a "subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded the admission of the earlier statement").

Just as the provision of *Miranda* warnings in *Elstad* served to vitiate the "presum[ption]" of compulsion in the initial unwarned questioning, 470 U.S. at 310, and thereby permitted the suspect validly to choose to speak to the police, *id.* at 314, so too an effective curative statement can serve to neutralize any presumption of coercion and permit the suspect to reinitiate dialogue with the police and validly waive his rights. A curative statement to a suspect that his right to counsel will be honored and that there will be no further questioning in the absence of counsel neutralizes the

continuing impact of post-invocation police-initiated questioning. As in *Elstad*, once a suspect is assured that he will not be subjected to further police-initiated interrogation in the absence of counsel, "the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities." *Id.* at 308.

The Court's recent decision in *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004), is likewise consistent with this approach. In *Seibert*, a police officer employed a two-step questioning procedure under which he intentionally withheld *Miranda* warnings, obtained a confession, and then, with the confession in hand, went over the same ground with the suspect after administering the warnings. The intentional strategy in that case was based "on the assumption that *Miranda* warnings will tend to mean less when recited mid-interrogation, after inculpatory statements have already been obtained." *Id.* at 2615 (Kennedy, J., concurring in the judgment). The plurality and Justice Kennedy concluded that, under the circumstances, the post-warning confession was inadmissible. *Id.* at 2613 (plurality opinion); *id.* at 2616 (Kennedy, J., concurring in the judgment)). But a majority of the Court reaffirmed the general validity of the *Elstad* approach, *id.* at 2616 (Kennedy, J., concurring in the judgment); *id.* at 2619 (O'Connor, J., dissenting), and several Justices suggested (or explicitly stated) that even intentional two-step questioning would not render later warned statements inadmissible if police made curative statements to reduce the effect of previous unwarned interrogation on the suspect. See *id.* at 2613 (plurality opinion) (emphasizing that "[n]othing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after" interrogation); *id.* at 2615-2616 (Kennedy, J., concurring in the judgment) (stating that "curative steps" such as a "warning that explains the likely inadmissibility of [a] prewarning custodial statement" can render post-warning statements admissible).

Seibert, like *Elstad*, thus reinforces that improper deviation from the *Miranda* safeguards does not prevent a suspect, who is properly advised of his rights, from later deciding to speak. As in those contexts, analysis under *Edwards* should not be governed exclusively by legal presumptions that for a significant period of time preclude a suspect from exercising free choice, despite the taking of curative measures.

4. The broad attenuation analysis used in Fourth Amendment cases is not warranted in the *Edwards* context

Although the record is not entirely clear, it appears that the trial court employed a broad attenuation analysis of the sort developed for use in addressing the admissibility of evidence derived from Fourth Amendment violations. See Pet. App. 79a (stating that prosecution must prove that respondent's waiver of right to counsel "was in no way due to the unlawful and coercive interrogation"); *id.* at 81a (emphasizing that "[t]here was no break in time or place" and "[n]o attenuation" between Officer Reese's statement and respondent's later incriminating statements). See generally *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975) (in determining whether illegal search or seizure under the Fourth Amendment requires suppression of subsequent confession, looking to "[t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct"); *Wong Sun*, 371 U.S. at 486. In both *Elstad* and *Seibert*, this Court rejected suggestions to employ the sort of broad attenuation analysis applicable in the Fourth Amendment. Cf. *Elstad*, 470 U.S. at 304-314; *Seibert*, 124 S. Ct. at 2610 n.4 (plurality opinion); see also *id.* at 2616-2617 (O'Connor, J., dissenting).[4]

[4] Although the *Seibert* plurality formulated a multi-factor test similar to *Brown*'s for determining whether the second, warned confession was admissible, it "look[ed] to those factors to inform the *psychological* judg-

Especially because *Edwards* is a prophylactic rule adopted to implement the *Miranda* rule, and thus post-invocation questioning does not itself violate the core of the Fifth Amendment, there is no more reason here than in *Elstad* and *Seibert* to apply the broad Fourth Amendment "fruits" analysis.

As the Court has observed, "the exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth," *Elstad*, 470 U.S. at 306 (quoting *Brown*, 422 U.S. at 601), and those differences warrant a different approach to the exclusion of purported derivative evidence. The Fourth Amendment "prohibits 'unreasonable searches and seizures' whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is 'fully accomplished' at the time of an unreasonable governmental intrusion." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 264 (1990). Because the constitutional violation is already complete and cannot be cured, the purpose of the judicially created exclusionary rule is not to protect the defendant's rights, but to deter law enforcement officers from committing future Fourth Amendment violations. See, *e.g.*, *Brown*, 422 U.S. at 600-601. The Fourth Amendment test is designed to determine whether the "causal chain" between the Fourth Amendment violation and the confession is sufficiently "broken" so that the admission of a confession that stems from a Fourth Amendment violation will not undermine the deterrent rationale of the exclusionary rule. *Id.* at 602-603; *Taylor* v. *Alabama*, 457 U.S. 687, 690 (1982). No curative measure, such as the giving of *Miranda* warnings, can definitively break the causal chain, because the ques-

---

ment regarding whether the suspect had been informed effectively of her right to remain silent." 124 S. Ct. at 2617 (O'Connor, J., dissenting). Hence, "[t]he analytical underpinnings of the two approaches [the plurality's and *Brown*'s] are * * * entirely distinct, and they should not be conflated just because they function similarly in practice." *Ibid.*

tioning in at least some degree is always an "exploitation of the illegality," if only in the sense that the illegal search or seizure made the questioning possible. *Brown*, 422 U.S. at 600; see *id.* at 603 (*Miranda* warnings are an "important factor," but do not automatically mean that "the Fourth Amendment violation has not been unduly exploited").

In the *Edwards* context, as in *Elstad*, there has been only a violation of a prophylactic rule designed to protect an underlying constitutional right.[5] The purpose of excluding statements under *Edwards* is to provide an additional safeguard for the defendant's Fifth Amendment right at trial to be free from compelled self-incrimination. A curative measure that ensures that, before the time of a subsequent waiver, the defendant understood that police would honor his decision not to speak to them without counsel eliminates the need for a presumption of coercion and thus for excluding the statements. Particularly where (as here) the accused has made no incriminating statements at the time police take curative action, such curative measures would put the accused in the *very same position* he was before he was subject to post-invocation questioning.

Accordingly, whereas the Fourth Amendment test focuses on the extent of any objective causal connection between the completed Fourth Amendment violation and the confession, the relevant inquiry here must more narrowly focus on whether the curative measures taken neutralized the impact

---

[5] See *Chavez* v. *Martinez*, 538 U.S. 760, 772 (2003) (plurality opinion) (custodial interrogation without administration of *Miranda* warnings does not violate the Constitution, so that there is no right to damages under 42 U.S.C. 1983 for such interrogation); *id.* at 777 (Souter, J., concurring in the judgment) (cause of action for damages for unwarned interrogation would be "well outside the core of Fifth Amendment protection"); *id.* at 789 (Kennedy, J., concurring in part and dissenting in part) (agreeing with plurality opinion that a "failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues").

of police-initiated, post-invocation questioning on the defendant's ability validly to waive his rights. See *Seibert*, 124 S. Ct. at 2610 n.4 (plurality opinion) ("[i]n a sequential confession case," the appropriate inquiry is "whether in the circumstances the *Miranda* warnings given could reasonably be found effective," thereby permitting a valid waiver); *Elstad*, 470 U.S. at 309 ("Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn * * * *solely* on whether it is knowingly and voluntarily made.") (emphasis added).

C. A Rule That Improper Police Comments Cannot Be Cured Absent A Break In Custody Or A Lapse In Time Would Impose Unjustified Costs On The Criminal Justice System

In determining whether to apply the *Miranda* and *Edwards* rules to a new class of cases, this Court consistently has weighed the benefits of applying those rules against the costs incurred in those circumstances. See, *e.g.*, *Quarles*, 467 U.S. at 657; *Elstad*, 470 U.S. at 308-309; *Michigan* v. *Tucker*, 417 U.S. 433, 450-451 (1974). Refusing to recognize the efficacy of curative measures under *Edwards* would impose unjustified costs on the criminal justice system that outweigh any countervailing interests.

The cost to the criminal justice system of suppressing voluntary confessions is great. Voluntary admissions of guilt "are more than merely desirable; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Texas* v. *Cobb*, 532 U.S. 162, 172 (2001) (final quotation marks omitted) (quoting *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986)); *McNeil*, 501 U.S. at 181; *Elstad*, 470 U.S. at 305. Excluding such admissions damages the truth-seeking function of criminal trials and runs a serious risk of permitting guilty defendants to go free. It likewise imposes significant costs on the justice system to pre-

sume conclusively that once police have approached a suspect who has previously invoked his right to counsel, *any* communication initiated by the suspect was the product of coercion—notwithstanding the prompt administration of curative measures. "It is not unusual for a person * * * who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome the opportunity to talk." *Edwards*, 451 U.S. at 490 (Powell, J., concurring in the result); *McNeil*, 501 U.S. at 178 ("suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions").

There is no justification for automatically incurring those costs simply because the police engaged in questioning after a request for counsel, even if the police take effective steps to cure the continuing effects of that action. This Court has consistently rejected constructions of the *Miranda* rule that would render it "a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation," noting that such an interpretation "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigation activity." *Michigan* v. *Mosley*, 423 U.S. 96, 102 (1975); cf. *United States* v. *Ceccolini*, 435 U.S. 268, 278 (1978) ("[W]e have specifically refused to hold that 'making a confession under circumstances which preclude its use, perpetually disables the confessor from making a useable one after those conditions have been removed.'") (quoting *United States* v. *Bayer*, 331 U.S. 532, 541 (1947)).

Recognizing that curative efforts may be effective would not derogate from any deterrent function of the *Edwards* rule.[6] (Indeed, it would provide a healthy incentive to take

[6] The *Edwards* rule, of course, does not directly deter constitutional violations. See *United States* v. *Patane*, 124 S. Ct. 2620, 2629 (2004) (plurality opinion) (because police do not violate a suspect's constitutional rights by failing to give *Miranda* warnings, "there is * * * nothing to

curative measures when police take actions that, it left uncorrected, would lead to suppression under *Edwards*.) Police already have substantial incentives to refrain from interrogating suspects who have invoked their right to counsel. The inadmissibility in the government's case in chief of any statement obtained before curative steps were taken itself provides a strong incentive to comply with *Edwards*. See *Harris* v. *New York*, 401 U.S. 222, 225 (1971) ("[S]ufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief."). Police officers who engage in interrogation after a suspect has invoked his right to counsel also run the risk of a judicial finding that any statement given was coerced. See *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975). In that event, the initial statement would be unusable for any purpose, physical evidence derived from the statement might have to be suppressed, and before any subsequent statements were admissible, the court would have to consider whether the effects of the coercion "ha[d] carried over into the second confession." *Elstad*, 470 U.S. at 310.

In contrast, officers who abide by *Miranda* and *Edwards* are likely to persuade courts that all the statements they have obtained are voluntary. As this Court has explained, "cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Berkemer* v. *McCarty*, 468 U.S. 420, 433 n.20 (1984); accord *Seibert*, 124 S. Ct. at 2608 (plurality opinion); *Dickerson*, 530 U.S. at 444. Thus, considering curative measures in determining whether a defendant

---

deter"); but see *id.* at 2631 (Kennedy, J., concurring in the judgment) (finding it "unnecessary to decide * * * whether there is '[any]thing to deter' so long as the unwarned statements are not later introduced at trial"); cf. also *Seibert*, 124 S. Ct. at 2616 (O'Connor, J., dissenting) ("This Court has made clear that there simply is no place for a robust deterrence doctrine with regard to violations of *Miranda* v. *Arizona*.").

has initiated communication will still leave officers with strong incentives to honor a suspect's request to remain silent. See *Hass*, 420 U.S. at 723 (stating that the risk that an officer intentionally will "continue[] his interrogation after the suspect asks for an attorney" because there is "perhaps something to gain by way of possibly uncovering impeachment material" is only a "speculative possibility").

There is no appreciable danger that considering curative measures in applying *Edwards* would enable law enforcement officers to circumvent the *Edwards* rule, as by engaging in an intentional two-step strategy of the sort that was at issue in *Seibert*. If officers themselves initiate interrogation of a suspect a second time, they would once again run afoul of *Edwards* and statements obtained would be inadmissible. An officer's ability to obtain admissible statements after a suspect's invocation of the right to counsel turns entirely on the *suspect* taking the initiative to approach the *police*—and that event is outside their control. If the curative measures are sufficient, initial post-invocation questioning would make the suspect no more likely to initiate a discussion with the police. And it would make no sense for police officers deliberately to initiate questioning after a suspect has invoked his right to counsel, with all the risks that that entails, on the mere hope that, after they have assured the suspect that henceforth they will honor his request to stop discussing the case, he will voluntarily approach police and initiate further communication. Cf. *Nix* v. *Williams*, 467 U.S. 431, 445 (1984) ("A police officer who is faced with the opportunity to obtain evidence illegally will rarely, if ever, be in a position to calculate whether the evidence sought would inevitably be discovered.").

D. Detective Johns's Statements Dissipated The Effects Of Post-Invocation Questioning

The Maryland Court of Appeals concluded that although respondent had "initiat[ed]" communication with police in

the "'dictionary sense' of the word," he did not initiate communication "as that term is contemplated in the legal sense," Pet. App. 26a, because "the voluntariness of such 'initiation' [wa]s suspect" in light of the prior police questioning after respondent's request for counsel. *Id.* at 28a. That conclusion was mistaken. This case provides a particularly strong illustration of curative actions that effectively negated the effects of the improper question.[7]

Detective Johns's immediate response to Officer Reese's statement—loudly stating, "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now," Pet. App. 6a, and ushering Officer Reese out of the holding cell—made plain to respondent that the officers were barred from talking to him in light of his invocation of the right to counsel, that respondent's invocation of his right to counsel would be honored, and that efforts to badger him into talking would not be tolerated. If, before intervening, Johns had stood by and allowed respondent to make incriminating statements in response to Reese's statement, or had allowed Reese to continue to attempt to elicit incriminating statements, respondent might have had cause to question

---

[7] Before respondent initiated communication with police, the only conduct that occurred that could qualify as "interrogation" was Officer Reese's statement, "I bet you want to talk now, huh!" Detective Johns's acts of handing the charging papers to respondent and informing him of the charges did not constitute interrogation. Maryland law required the officers to "inform the defendant of the nature of the offense charged" and to serve "[a] copy of the warrant and charging document * * * on the defendant promptly after the arrest." Md. R. 4-212(e); cf. Fed. R. Crim. P. 4(c)(3)(A); Fed. R. Crim. P. 9(c)(1)(a); Fed. R. Crim. P. 4, advisory committee notes to 2002 amendments ("Rule 4(c)(3)(A) explicitly requires the arresting officer in all instances to inform the defendant of the offense charged and of the fact that an arrest warrant exists."). Such routine behavior in conjunction with an arrest is not tantamount to interrogation. This Court has held that statements by law enforcement officers "normally attendant to arrest and custody," *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1980)—which certainly includes notice of the charges as required by court rules—do not constitute interrogation for purposes of *Miranda*.

Johns's good faith. Cf. *Bautista*, 145 F.3d at 1151 (continuing interrogation after invocation would increase the coercive effect of custody, "because the suspect would believe that the police 'promises' to provide the suspect's constitutional rights were untrustworthy") (quoting *Tukes* v. *Dugger*, 911 F.2d 508, 516 n.11 (11th Cir. 1990), cert. denied, 502 U.S. 898 (1991)). But Johns's decisive action clearly demonstrated that respondent was not expected to respond to Reese's remark and that he would not be subject to further questioning before counsel arrived.

Nothing in the surrounding circumstances suggests that Detective Johns's action was ineffective to assure respondent that the officers would respect his rights. Because of Detective Johns's prompt action, there is no question here of the authorities having exploited a prior confession in order to obtain a new one. Cf. *Seibert*, 124 S. Ct. at 2612 (plurality opinion). And Officer Reese's eight-word statement was a far cry from the sort of sustained badgering that prompted the *Edwards* rule. Cf., *e.g.*, *Edwards*, 451 U.S. at 479. Reese did not conduct a full-scale, formal interrogation, but instead made what reasonably appears to be a statement in the heat of the moment. Nor did the statement involve threats, promises, inducements, or a demand for an answer.[8] See Pet. App. 52a.

---

[8] There was also no finding that police planned Reese's question as an intentional strategy to undermine respondent's invocation of the right to counsel. Because intentionally improper conduct in this setting is unlikely in any event, see pp. 24-26, *supra*, analysis should focus on the objective character of the police action. The trial judge explicitly concluded that the boilerplate statement of penalties included in the charging document, which incorrectly suggested that the defendant was eligible for the death penalty, was not done intentionally to influence the defendant, Pet. App. 72a, and in any event, that reference did not constitute "interrogation" within the meaning of *Miranda*. See note 7, *supra*. Any role that the misleading reference to the death sentence may have played in motivating respondent to re-initiate dialogue with the police does not undercut the fact that Detective Johns cured the only improper conduct under *Edwards*

The circumstances of respondent's reinitiation also justify respecting it as an act of respondent's choice. Twenty-eight minutes elapsed between Detective Johns's curative statement and respondent's request to talk, during which the officers made no attempt to resume the interrogation and did not return to respondent's cell. And respondent expressed his desire to speak to *Detective Johns*, who had returned to respondent's cell for unrelated purposes (to deliver clothes retrieved from respondent's home). Respondent had no reason to fear that Johns would attempt to elicit statements from him, since Johns was the officer who had earlier rebuked Reese and made clear that the police would respect his wishes not to be questioned in the absence of counsel. Officer Reese was not present. Cf. *Elstad*, 470 U.S. at 310 ("When a prior statement is actually coerced, * * * [a] change in identity of the interrogators * * * bear[s] on whether coercion has carried over into the second confession."). Finally, before allowing respondent to discuss the case, Detective Johns gave him a fresh set of *Miranda* warnings. The warnings not only reaffirmed respondent's right to counsel, but provided respondent with an additional demonstration of Detective Johns's attention to the protection of his rights.

In short, despite Officer Reese's improper comment, by the time respondent waived his rights he could not have reasonably believed that his right to counsel was a fiction or that he faced the threat of further uncounseled interrogation by police. Indeed, Detective Johns's prompt rebuke of Officer Reese provided respondent with a demonstration of the *Edwards* rule that should have left him even more confident about the reality of his right to counsel than the ordinary suspect would be after initially receiving *Miranda* warnings. Under the circumstances, there is every reason to respect

---

by reaffirming respondent's invocation of his right to counsel and by stating that "[w]e cannot talk to him now." Pet. App. 6a.

respondent's decision to initiate dialogue with the police, and no reason to apply the "extraordinary" (*McNeil*, 501 U.S. at 183 (Kennedy, J., concurring)) and conclusive presumption of coercion to the statements respondent made after initiating communications with police.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

JOHN C. RICHTER
Acting Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

JOHN P. ELWOOD
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

JUNE 2005