No. 04-373

IN THE

Supreme Court of the United States

STATE OF MARYLAND,
Petitioner,

v.

LEEANDER JEROME BLAKE,
Respondent.

On Writ of Certiorari To The Court of Appeals of Maryland

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Blake concedes that an improper comment by the police after invocation of the right to counsel does not preclude a suspect from initiating further conversation pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981). Resp. Br. at 14, 20-22. He concedes that subsequent events, such as curative measures and intervening circumstances, can be considered in determining whether the suspect initiated further communication. *Id*. Blake disagrees with Maryland, however, as to the proper analysis for determining whether a curative measure is sufficient to allow a suspect to initiate further conversation. The test proposed by Maryland is whether a curative measure conveys to a reasonable person in the suspect's shoes that he has a choice whether to speak to the police and that the police will honor that choice. When that test is met, the purpose of *Edwards*'s prophylactic rule to prevent badgering is satisfied. If the suspect then initiates further communication, a court can proceed to determine the voluntariness of any subsequent statement by the suspect.

Blake's contention that Detective Johns did not cure the impropriety here fails for several reasons. First, he erroneously proposes a Fourth Amendment causation analysis, which is not appropriate for a violation of *Edwards*'s prophylactic rule. Second, he applies an inappropriate standard of review for determining initiation. Third, he mistakenly argues that Maryland's position would eviscerate *Edwards*. Fourth, he misconstrues the effect of the curative measures in this case.

A. A Fourth Amendment causation analysis is not the appropriate test for a violation of *Edwards*'s prophylactic rule.

Blake places great reliance on the suppression court's finding that his initiation of contact with the police was in direct response to Officer Reese's improper comment. This

focus on the "causal connection" between Officer Reese's comment and Blake's initiation is an application of the test used to determine whether evidence obtained after a Fourth Amendment constitutional violation is admissible. *See Taylor v. Alabama*, 457 U.S. 687, 690 (1982). It is not the proper analysis for a violation of the prophylactic rule established in *Miranda v. Arizona*, 384 U.S. 436 (1966), much less for a violation of *Edwards*'s additional layer of prophylaxis.

"[V]iolations of judicially crafted prophylactic rules do not violate the constitutional rights of any person." *Chavez v. Martinez*, 538 U.S. 760, 772 (2003) (plurality opinion). Although *Miranda* is "constitutionally based" in that it protects the Fifth Amendment right against compelled self-incrimination, *Dickerson v. United States*, 530 U.S. 428, 440 (2000), it is a prophylactic rule in the sense that, at times, it will preclude admission of "statements that are otherwise voluntary within the meaning of the Fifth Amendment." *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). In *Elstad*, this Court explained that the causal connection test, or "fruits" analysis, developed for a constitutional violation of the Fourth Amendment is inapplicable to a procedural *Miranda* violation. *Id*. at 306-09. *Accord Missouri v. Seibert*, 124 S.Ct. 2601, 2610 n.4 (2004) (Souter, J., plurality opinion); *id*. at 2616-17 (O'Connor, J., dissenting).

Edwards is 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)). A violation of *Edwards*'s prophylactic rule, therefore, is not by itself a constitutional violation. Thus, the causal connection test, or "fruits" analysis, which was rejected in *Elstad* where there was no constitutional violation, 470 U.S. at 306-09, similarly should be rejected in the *Edwards* context. Just as the issue in *Elstad* was not whether the earlier,

unwarned statement may have psychologically prompted Elstad to make a later, warned statement, *id*. at 312, so too here, the issue is not whether Reese's improper interrogation may have psychologically affected Blake's decision to later initiate communication with Johns.

A prophylactic rule must be justified by reference to its purpose. *See Connecticut v. Barrett*, 479 U.S. 523, 528 (1987). The purpose of *Edwards* is to prevent police badgering, to prevent a waiver of rights that has come at the authorities' "behest" and "insistence." *Arizona v. Roberson*, 486 U.S. 675, 681 (1988).[1] Subsequent events, such as curative measures and intervening circumstances, can dissipate the risk of police badgering and permit a finding that an accused initiated further contact with the police.

In determining the efficacy of curative measures, the proper test is whether curative measures after an improper police comment neutralize the comment by conveying to a reasonable person in the suspect's shoes that it is his choice whether to speak to the police and that the police will honor that choice. Where the curative measure conveys that the suspect has a "genuine choice" whether to speak to the police, *see Seibert*, 124 S.Ct. at 2612 (plurality opinion), the purpose of *Edwards* is satisfied. If the suspect then "evince[s] a willingness and a desire" to talk about the investigation, *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983) (plurality opinion), as Blake clearly did here, he has "initiated" further

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[1] "Behest" is defined as a "command, injunction, bidding," 2 The Oxford English Dictionary 75 (2d ed. 1991), and as "an authoritative command: order," Webster's II New Riverside University Dictionary 163 (1988).

conversation under *Edwards* and the presumption of involuntariness is inapplicable.

The suppression court erred in applying a causal connection analysis. Thus, the court's finding that Blake's statement was in direct response to Officer Reese's remark, (JA. 359-60), is not dispositive regarding the issue of initiation. Indeed, the suppression court misapplied even the causal connection test. In declaring that the State had to prove that Blake's waiver was "in no way due" to the improper interrogation, (JA. 363), the suppression court appeared to apply a "but for" analysis. This Court has made clear that the causal connection test does not embrace a "but for" rule, even where constitutional violations, as opposed to prophylactic rules, are concerned. *Brown v. Illinois*, 422 U.S. 590, 603 (1975). *Cf. Arizona v. Fulminante*, 499 U.S. 279, 285 (1991) ("but for" test not standard for determining voluntariness of a confession). Blake's reliance on the suppression court's causal connection finding is misplaced.

B. The issue of "initiation" requires de novo review.

Blake contends that the determination whether the accused initiated further contact with the police is "a simple factual question," which is entitled to deferential review. Resp. Br. at 12, 15-19. Contrary to Blake's assertion, however, the issue of initiation is more than a simple question regarding "who said what first." *Bradshaw*, 462 U.S. at 1051 (Powell, J., concurring). Particularly here, where the question is whether, and under what circumstances, subsequent events can be found to cure an improper police comment and allow a suspect to initiate contact, the issue is a mixed question of fact and law that is subject to de novo review.

Reviewing courts apply the deferential clearly erroneous standard to purely factual findings. *Hernandez v. New York*, 500 U.S. 352, 366 (1991); *Maine v. Taylor*, 477 U.S. 131, 145 (1986). Issues of fact encompass "basic, primary, or historical facts: facts in the sense of a recital of external events and the credibility of their narrators." *Thompson v. Keohane*, 516 U.S. 99, 109-10 (1995) (internal citations and quotation marks omitted). By contrast, "[s]o-called mixed questions of fact and law, which require the application of a legal standard to the historical-fact determinations . . . are not facts in this sense." *Id*. at 110 (internal citation and quotation marks omitted).

In *Thompson*, 516 U.S. at 112, this Court held that the determination of custody for *Miranda* purposes is a mixed question of law and fact requiring independent review. It did so because the Court applied an objective test to resolve the inquiry whether a "reasonable person" would have felt at liberty to terminate the interrogation. *Id*. This inquiry "calls for application of the controlling legal standard to the historical facts." *Id*. Important to the Court's decision was that a reasonable person analysis does not require an assessment of credibility and demeanor. *Id*. at 113-14. In addition, the Court noted that judges make "in custody" assessments "with a view to identifying recurrent patterns, and advancing uniform outcomes." *Id*. at 113 n.13. In this way, "independent review potentially may guide police, unify precedent, and stabilize the law." *Id*. at 115. Similarly, a determination whether a suspect has initiated contact after an improper police comment, which under the State's proposed test requires a reasonable person analysis, is a mixed question of fact and law requiring de novo review.[2]

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[2] Other determinations regarding the admissibility of a confession likewise require de novo review. *See Arizona v.*

The Maryland Court of Appeals thus applied the wrong standard of review in determining whether Blake initiated further contact. To be sure, the court noted that federal circuit courts have split on the proper standard of review,[3] and it purported to uphold the lower court's ruling under either standard. (JA. 416). But the court actually reviewed the suppression court's ruling on the pertinent inquiry for clear error. (JA. 417) ("Judge North's conclusion that Detective Johns's remarks did not negate the prior unlawful interrogation by Officer Reese was not clearly erroneous."). In applying a clearly erroneous standard, the court erred.

Mauro, 481 U.S. 520, 528 n.6 (1987) (whether actions constituted interrogation reviewed de novo); *Miller v. Fenton*, 474 U.S. 104, 110 (1985) (issue whether confession is voluntary requires independent review); *see also Ornelas v. United States*, 517 U.S. 690, 699 (1996) (determination of reasonable suspicion and probable cause reviewed de novo).

[3] *Compare Holman v. Kemna*, 212 F.3d 413, 417 (8th Cir.) (stating, in habeas corpus case, that presumption of correctness is accorded to facts found by state court, but whether facts constituted "initiation" under *Edwards* was legal question requiring de novo review), *cert. denied*, 531 U.S. 1021 (2000), *and United States v. Whaley*, 13 F.3d 963, 968 (6th Cir. 1994) (whether facts, considered together, constituted "initiation" was legal question to be reviewed de novo), *with United States v. Michaud*, 268 F.3d 728, 737 (9th Cir. 2001) (whether accused changed her mind and initiated conversation is factual question), *cert. denied*, 537 U.S. 867 (2002), *and United States v. Gomez*, 927 F.2d 1530, 1539 n.9 (11th Cir. 1991) (same).

C. Allowing proper consideration of curative measures maintains the protections of *Edwards* and strikes an appropriate balance between competing concerns.

Blake is wrong in arguing that Maryland's proposed test allowing police to cure an impropriety would "map out an end run around *Miranda*'s requirements," Resp. Br. at 28, and "eviscerate" *Edwards*'s protection, *id*. at 30. The analysis Maryland proposes is consistent with *Edwards*.

Maryland's proposed test maintains *Edwards*'s presumption of involuntariness unless, as is currently the law, the suspect initiates further contact with the police. It merely allows consideration of all the circumstances in determining whether a suspect initiated contact, as opposed to a per se rule that an improper police comment after invocation of the right to counsel precludes a suspect from changing his mind and initiating further contact. The requirement that curative measures effectively give a suspect a "real choice" whether to speak to the police, *see Seibert*, 124 S.Ct. at 2610, satisfies the purpose of *Edwards* to prevent police badgering. At the same time, it retains the suspect's choice whether to speak to the police, *see Moran v. Burbine*, 475 U.S. 412, 426 (1986) (*Miranda* gives the suspect "the power to exert some control over the course of the interrogation"), and it recognizes the value to society in allowing the admission of uncoerced confessions, *see id*. (admissions of guilt are more than merely "desirable," they are essential to society's compelling interest in finding and convicting violators of the law).

Indeed, although Blake disparages Maryland's proposed test, his approach also requires a case-by-case analysis of all the facts. He concedes that curative measures can be taken into account, and he points to a variety of factors that are relevant to a determination of initiation — "a gap in time, a break in

custody, a promise by officers to respect an invocation of counsel." Resp. Br. at 14.

Allowing consideration of subsequent events, such as curative measures and intervening circumstances, as Blake concedes is proper, would not "invite exploitation and circumvention" by police officers. NACDL Br. at 15. The police have little to gain by attempting to exploit such a rule because the risks that a subsequent statement would be ruled inadmissible, risks outside the control of the police, are substantial.

Interrogation after invocation of the right to counsel could result in suppression of a subsequent statement under several scenarios. For example, if officers wrongly initiate interrogation after a request for counsel, and the suspect gives a statement before curative measures are taken, the statement would be inadmissible in the State's case in chief under *Edwards*. Moreover, if a statement is made after curative measures are taken, the police will nevertheless run the risk that a reviewing court would find that the curative measures were insufficient to cure the initial *Edwards* impropriety.

Even if a court finds a curative measure sufficient to allow a suspect to initiate contact, this merely makes the *Edwards* presumption of involuntariness inapplicable; it does not automatically make the ensuing statement admissible because a reviewing court must still determine the validity of the waiver under the totality of the circumstances. *Smith v. Illinois*, 469 U.S. 91, 95 (1984). By engaging in interrogation after invocation of the right to counsel and then attempting to cure the impropriety, the police run the risk that a reviewing court will find, under the second step, that the interrogation was so coercive as to render the ensuing statement involuntary and

therefore inadmissible for any purpose. *See Oregon v. Hass*, 420 U.S. 714, 723 (1975).

Accordingly, it is not true that the police have "nothing to lose" by continuing to interrogate a suspect after invocation of the right to counsel. Resp. Br. at 29. Under any of the above scenarios, police interrogation would result in the loss of the ability to use a subsequent statement by a suspect who decided that he wanted to talk to the police and then initiated further communications. *See Edwards*, 451 U.S. at 490 (Powell, J., concurring) ("It is not unusual for a person in custody who previously has expressed an unwillingness to talk or a desire to have a lawyer, to change his mind and even welcome an opportunity to talk."). A court's ability to consider subsequent curative measures will not give the police incentive to violate *Edwards*.

D. Subsequent events cured Officer Reese's improper comment, terminated the police-initiated interrogation, and allowed Blake to initiate further communication with the police.

Whether this Court applies Maryland's test, which looks to whether the police honored the suspect's rights and gave him a real choice whether to speak without counsel, or applies Blake's causal connection test, events subsequent to Officer Reese's comment cured the impropriety. Blake's choice to speak to the police, therefore, was initiation pursuant to *Edwards*.

1. Detective Johns's actions after Officer Reese's improper comment were sufficient to convey to a reasonable suspect that he had a genuine choice to speak to the police and that the police intended to honor that choice.

There is no dispute that Blake initiated communication with Johns in the "dictionary sense." *Bradshaw*, 462 U.S. at 1045. Almost a half hour after the prior encounter, Blake posed the question to Detective Johns, "I can still talk to you?" — a question showing not only that he felt no compulsion to speak, but that he was not even sure he would be allowed to speak. In determining whether this actual initiation of conversation should be considered initiation within the meaning of *Edwards*, the question is whether a reasonable suspect in Blake's shoes would have understood that he had a genuine choice whether to speak to police and that the police would honor that choice. The facts in this case, taken together, demonstrate that the answer is plainly yes.

First, Detective Johns immediately terminated questioning when Blake invoked his right to counsel. (JA. 21). Second, unlike *Edwards*, where the suspect was told "he had" to talk with the police, *Edwards*, 451 U.S. at 479, or *Minnick v. Mississippi*, 498 U.S. 146, 149 (1990), where the suspect was told he "could not refuse" to talk, there was no such police badgering in this case. Third, immediately after Officer Reese's brief comment, Detective Johns declared: "No, he doesn't want to talk to us. He already asked for a lawyer. We cannot talk to him now." (JA. 23). Detective Johns then pushed Officer Reese out of the cellblock area. (JA. 23, 240).[4]

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[4] In addition, prior to making a statement, Blake was again advised of, and waived, his *Miranda* rights, (JA. 27-30; State's

These circumstances lead ineluctably to the conclusion that a reasonable person in Blake's position would have understood that he had a genuine choice to speak to the police and that the police intended to honor that choice. Blake's subsequent decision to speak with the police was initiation under *Edwards*. This is so regardless of whether Blake's initiation was, in part, a response to Officer Reese's remark.[5]

Blake argues that impermissible interrogation cannot be cured with words, Resp. Br. at 24; that "mere repetition of *Miranda* warnings is insufficient to remedy an *Edwards* violation," Resp. Br. at 23; and that "[a] promise, once broken, can rarely be repaired with yet more promises," Resp. Br. at 26. Maryland is not suggesting that a mere recitation of the *Miranda* warnings, by itself, would cure an improper police comment after invocation of the right to counsel. *See Roberson*, 486 U.S. at 686 (administration of new *Miranda*

Exhibit 2), and he explicitly confirmed that he had changed his mind about his desire to talk to the police, (JA. 33-36; State's Exhibit 5).

[5] Blake contends that the suppression court found that the "primary" reason Blake initiated contact was because of Officer Reese's comment. Resp. Br. at 17. This misstates the record and ignores a key reason that Blake changed his mind about speaking with the police. Blake testified at the suppression hearing that when he read the complete charges, he saw for the first time that Tolbert said that Blake shot the victim, took the car keys from the victim's pocket, and ran over the victim while leaving the scene. (JA. 215-217). Blake stated that Tolbert was the one who did those things, that he, Blake, felt angry and betrayed, and that he wanted the police to know the truth. (JA. 217-218). The suppression court credited this testimony in its findings. (JA. 365).

warnings insufficient to dispel presumption of coercion). When a suspect has been given *Miranda* warnings, invoked his right to counsel, and then been subjected to interrogation despite his invocation, he might assume, despite readvisement of *Miranda* warnings, that the police have no intention of respecting his choice not to speak to the police without counsel. *See Davis*, 512 U.S. at 472-73 (Souter, J., concurring in the judgment) (when a suspect's request for counsel is ignored, in contravention of the rights recited, "he may well see further objection as futile and confession . . . as the only way to end his interrogation"). Here, there was nothing remotely suggesting that further objection would be futile. Detective Johns's immediate, forceful response to Officer Reese's comment was much more than the mere recitation of *Miranda* rights; it made clear that the police intended to honor Blake's choice and would not seek to question him without counsel present.

Moreover, Detective Johns, the lead detective who initially gave Blake his *Miranda* warnings, did not break any promise. He complied with *Edwards* by terminating questioning when Blake invoked his right to counsel. (JA. 20-21). When Officer Reese made an improper comment, Detective Johns immediately admonished the patrol officer and pushed him out of the cell. (JA. 23). Detective Johns's decisive words and actions, even if not formally directed at Blake, Resp. Br. at 30, conveyed to Blake, as they would to any reasonable person, that Blake's choice whether to speak with the police would be respected.

The purpose of *Edwards*'s prophylactic rule, therefore, was satisfied. Applying the test set forth by this Court in *Seibert* and *Elstad*, Detective Johns cured the impropriety in Officer

Reese's remark. Blake's subsequent request to speak with Detective Johns was initiation under *Edwards*.[6]

2. Even under a causal connection test, the taint of Officer Reese's comment was purged.

Even if this Court adopts a causal connection test, that Blake's statement was in direct response to Officer Reese's comment, (JA. 359-360), is not dispositive. As explained in Section A, the suppression court, in applying a causal connection test, erroneously applied a "but for" analysis. (JA. 363). The causal connection test does not embrace a "but for" rule. Rather, it considers other factors to determine whether the

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[6] Whether there was initiation is the only question before this Court; the second step of the analysis, voluntariness under the totality of the circumstances, has been determined by the Maryland Court of Special Appeals. Blake is wrong in stating that the Maryland Court of Special Appeals "reversed the trial court solely on the theory that Officer Reese's comment did not amount to interrogation." Resp. Br. at 7. The intermediate court recognized that, based on its finding that Officer Reese's comment did not constitute interrogation, there was no presumption of involuntariness and that, therefore, it had to determine, under the totality of the circumstances, whether the statements were voluntary. (JA. 382 n.3). The court reversed the circuit court's order suppressing Blake's statements, (JA. 388), thereby necessarily, albeit implicitly, finding the statements voluntary.

Blake did not challenge this finding in Maryland's highest court, and the voluntariness issue has not been presented in this Court. Thus, if the Court finds that Blake initiated contact, the Maryland appellate court's implicit finding that the statements were voluntary under the totality of the circumstances stands.

initial taint has been purged, including the temporal proximity of the illegality and the confession, the presence of intervening circumstances, and "the purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 603-04. Applying these factors compels the conclusion that the taint from Officer Reese's remark was purged and that Blake's initiation was an independent act of free will.

With respect to temporal proximity, Blake did not make a statement immediately after Officer Reese's remark. Although the time period before Blake asked to speak with the police was not long, approximately a half hour, (JA. 25-26), it gave Blake time to consider his choices.

More significant to the analysis is the second factor, the presence of intervening circumstances. As indicated, Detective Johns's immediate response to Officer Reese's comment neutralized the remark and made it clear that the police would honor Blake's choice whether to speak to the police without counsel. In addition, Blake admitted that, after learning for the first time that his co-defendant was pinning the blame for the murder on him, (JA. 215-17, 355-56), he wanted the police to know the truth. (JA. 218).[7] And Blake's statement was made

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[7] Blake did not argue, for good reason, that it was improper to present him with the charging document, including the application for statement of charges that contained reference to Tolbert's statement that Blake shot the victim. As the Maryland courts correctly noted, Maryland Rule 4-212(e) requires the police to serve on a defendant a copy of the warrant and charging document promptly after arrest. (JA. 364-65, 382 n.4, 385, 413). *Accord State v. Conover*, 312 Md. 33, 42-43 (1988) (application for statement of charges treated as part of charging document under Maryland rule).

to Detective Johns, out of Officer Reese's presence. (JA. 25, 189). Thus, although the Maryland Court of Appeals focused solely on whether there was a break in custody or significant lapse of time, (JA. 417), there were other significant intervening circumstances here.

Finally, with respect to the last factor, Officer Reese's comment was not flagrant misconduct.[8] Indeed, the appellate courts of Maryland were in disagreement whether it was improper at all. *Compare* (JA. 357-358, 396) (functional equivalent of interrogation) *with* (JA. 388) (not interrogation).

Moreover, Blake's suggestion that Officer Reese's comment was an intentional police strategy, Resp. Br. at 29, is unavailing. Although the intent of the police is not relevant to the analysis, *see Seibert*, 124 S.Ct. at 2612 n.6 (plurality opinion); *id*. at 2617-19 (O'Connor, J., dissenting), the record belies any assertion of an intentional police strategy. Detective Johns expressly denied that this was a preconceived plan, (JA. 24), and the suppression court found him to be a credible witness, (JA. 361). Detective Johns's immediate admonition to Reese, (JA. 23), his anger at the statement, and his reporting of the incident to his supervisor, (JA. 23-25), rebut any suggestion of a coordinated plan.

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[8] There is no basis for Blake's suggestion that Officer Reese's statement implied that Blake's refusal to speak with officers made it more likely that he would receive the death penalty. Resp. Br. at 27. The statement implied no such thing. And Detective Johns's response in no way made it "plain" that Blake had made an incorrect choice to request counsel and that he was going to suffer the consequences of a potential death penalty. Resp. Br. at 28.

Reviewing all of the circumstances, including curative measures and intervening circumstances, shows that the taint of Officer Reese's comment was purged. Blake's initiation of contact was an independent act of free will. Although Maryland submits that the proper analysis is that set forth by this Court in *Elstad* and *Seibert*, under any test, the facts in this case demonstrate that Blake initiated further communication with the police pursuant to *Edwards*.

CONCLUSION

For the reasons stated herein, and in the State of Maryland's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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