No. S088712

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Court of Appeal
	)	No. D030950
Plaintiffs and Respondents,	)	
	)	Superior Court
v.	)	County No. 175583
	)	
CHARLES EDWARD STORM,	)	(Hon. C. Goldsmith,
	)	Judge Presiding)
Defendant and Petitioner.	)	
_____	)	

BRIEF OF CALIFORNIA ATTORNEYS
FOR CRIMINAL JUSTICE, AS *AMICUS CURIAE*,
SUPPORTING PETITIONER

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus curiae, the California Attorneys for Criminal Justice ("CACJ") is a non-profit corporation founded in 1972. CACJ has over 2,400 dues-paying members, primarily criminal defense lawyers. One of the principal purposes of CACJ, as set forth in its By-laws, is to defend the rights of individuals guaranteed by the United States and California Constitutions. The members of CACJ are gravely concerned about law enforcement efforts to circumvent the ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). As a result, CACJ previously filed an *amicus curiae* brief in *People v. Peevy*, 17 Cal. 4th 1184 (1998), and authorized the organization to join with other plaintiffs to bring a civil rights action to prohibit questioning over an invocation of the right to counsel. *See California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir.) (as amended), *cert. denied*, 120 S. Ct. 2717 (2000).

This brief supports Mr. Storm and explains that police should not be able to circumvent a suspect's assertion of the right to counsel by releasing the suspect for a brief time. Part I of the Argument demonstrates that there is no basis in law or policy for a "break in custody" exception to the United States Supreme Court's ruling in *Edwards v. Arizona*, 451 U.S. 477 (1981). Part II explains that regardless of a break in custody, continued police interrogation after a suspect invokes the right to counsel violates the Fifth

Amendment, and therefore subsequent statements and their fruits should be excluded from the prosecution's case. Finally, Part III points out that even if the break in custody exception is adopted, Mr. Storm's case should be remanded because the lower court did not acknowledge violations of *Edwards* in determining whether Mr. Storm was in custody.

This case is all the more important following the United States Supreme Court's decision last term in *Dickerson v. United States*, 120 S. Ct. 2326 (2000), which placed *Miranda* on a secure constitutional footing. Here the State is asking this Court to follow a road that leads away from the clear rules the Court established in *Dickerson*, *Miranda* and *Edwards*. This Court ought to decline the State's invitation.

ARGUMENT

I. THERE IS NO BREAK IN CUSTODY EXCEPTION TO *EDWARDS V. ARIZONA*

Over thirty-four years ago, the United States Supreme Court issued its landmark ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966), and established its familiar regime of warnings and waivers. Fifteen years later, in *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court firmly fixed the duties of police when a person in custody asks for counsel: the suspect

> is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or

conversations with the police. (*Id*. at 484-85).

Most recently, in *Dickerson v. United States*, 120 S. Ct. 2326, 2333 (2000), the Supreme Court turned aside a challenge to *Miranda*, reaffirming that the landmark decision and its progeny describe constitutional procedures, not mere prophylactic rules of evidence. This Court, too, has held that *Miranda* and *Edwards* impose affirmative obligations upon police. *See People v. Peevy*, 17 Cal. 4th 1184, 1202 (1998).

As a constitutional holding, *Edwards'* boundaries must be respected. This Court is bound by the decisions of the United States Supreme Court in defining the rights established by *Miranda v. Arizona*, 384 U.S. 436 (1996). *See, e.g., Peevy*, 17 Cal. 4th at 1188 (holding that statements taken in violation of *Miranda* are to be excluded from evidence to the extent required by the federal Constitution); *People v. May*, 44 Cal. 3d 309, 319-20 (1988) (holding that Proposition 8, and its "Truth in Evidence" component (Cal. Const., art. I, §28, subd. (d)) is intended to preserve legislatively created and federal Constitutional rules, while abrogating exclusionary rules based solely on the state Constitution). In the present case, the State is asking this Court to create a new "break in custody" exception to the bright-line rule of *Edwards v. Arizona*. The Court should reject the State's request for two reasons: a) *Edwards* establishes a clear constitutional rule that the United States Supreme Court has repeatedly protected against encroachment; and b)

the sole reference by the Supreme Court to a break in custody exception is in a dictum from a case on the relationship between the Fifth and Sixth Amendment. That dictum does not detract from the clear holding in *Edwards*.

A. *Edwards* Established A Bright-Line Constitutional Rule That The Supreme Court Has Carefully Protected

In *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981), the United States Supreme Court held that once a suspect asks for counsel, interrogation must cease until counsel is made available or the suspect initiates further communication. The Supreme Court has continually praised *Edwards* for providing "clear and unequivocal" guidelines to the law enforcement profession. In *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court "emphasized the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*," stating:

> The relatively rigid requirement that interrogation must cease upon the accused's request for an attorney . . . has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation. (*Id.* at 681) (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979)).

In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Supreme Court again emphasized:

> *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in

practical and straightforward terms." (*Id*. at 151).

The Supreme Court has repeatedly protected *Edwards* against encroachment, proving that *Edwards'* rule was no passing fancy. In *Roberson*, the State of Arizona asked the Supreme Court to craft an exception to *Edwards* where police-initiated interrogation following a suspect's request for counsel was limited to a separate criminal investigation. The Court refused:

> [T]he *Edwards* rule . . . serves the purpose of providing "clear and unequivocal" guidelines to the law enforcement profession. Surely there is nothing ambiguous about the requirement that after a person in custody has expressed the desire to deal with police only through counsel, he "is not subject to further interrogation by the authorities until counsel has been made available to him" . . . (*Id*., 486 U.S. at 682).

Likewise, in *Minnick*, the Mississippi Supreme Court attempted to rely on the language of *Edwards* - that an accused who invokes his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him" - to hold that the protection of *Edwards* terminates once counsel has consulted with the suspect. *Id*., 498 U.S. at 150. However, the United States Supreme Court rejected this proposed adjustment to *Edwards'* rule, finding that such an inroad "would undermine the advantages flowing from *Edwards'* 'clear and unequivocal' character." *Id*. at 154. The Court explained that it would be impossible to determine the extent of consultation with an attorney necessary to displace

the *Edwards* rule:

> Consultation is not a precise concept, for it may encompass variations from a telephone call to say that the attorney is en route, to a hurried interchange between the attorney and client in a detention facility corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice respecting all matters that might be covered in further interrogations. (*Id.* at 155).

Roberson and *Minnick* together demonstrate the Court's resolve not to create exceptions to the clear command of *Edwards*.

Most recently, in *Dickerson v. United States*, the Supreme Court again emphasized the value of the bright-line rules in *Edwards* and *Miranda*. The Court observed that "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Id*., 120 S. Ct. at 2336. The Court quoted former Chief Justice Burger, who wrote that:

> The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures." (*Id.*) (quoting *Rhode Island v. Innis*, 446 U.S. 291 (1980) (Burger, C.J., concurring)).

Given both *Dickerson's* reaffirmation of the constitutional basis for *Miranda* and *Edwards*, and the Court's refusal to depart from *Edwards'* rule, this Court ought not treat a proposed exception to *Edwards* lightly. As set forth below, the United States Supreme Court has never decided a case involving the break in custody exception, nor given any clear indication that it

supports the creation of such a broad exception.

B. Neither *McNeil v. Wisconsin* Nor Any Other Supreme Court Case Provides A Basis To Create A "Break In Custody" Exception

The dispute at hand is rooted in a dictum within a parenthetical in *McNeil v. Wisconsin*, 501 U.S. 171 (1991). There Justice Scalia, paraphrasing *Edwards'* rule, wrote that:

> if police do subsequently initiate an encounter in the absence of counsel (*assuming there has been no break in custody*), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial. . . . (*Id.* at 177) (emphasis added).

This parenthetical is wholly unrelated to the Court's holding, yet it is apparently the foundation upon which a number of lower courts have created a "break in custody" exception to *Edwards*.[1] *Amicus curiae* submits that *McNeil's* parenthetical dictum is not a proper basis for creating a wholesale exception to *Edwards*.

The *McNeil* dictum is a weaker basis for an exception to *Edwards* than the language put forth in *Minnick*, where the Mississippi Supreme Court at

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[1]*See e.g.*, *United States v. Bautista*, 145 F.3d 1140, 1146-1147 (10th Cir.1998), *cert. denied*, 525 U.S. 911 (1998); *United States v. Drake*, 934 F.Supp. 953, 962 (N.D.Ill.1996); *Keys v. State*, 606 So.2d 669, 671-672 (Fla.App. 1st Dist.1992); *Wilson v. State*, 444 S.E.2d 306, 309 (Ga.), *cert. denied*, 513 U.S. 988 (1994).

least employed a phrase from *Edwards* to try to create an exception. In *McNeil*, the United States Supreme Court was not even addressing a proposed exception to *Edwards*. The issue in *McNeil* was

> whether an accused's invocation of his Sixth Amendment right to counsel during a judicial proceeding constitutes an invocation of his *Miranda* right to counsel. (501 U.S. at 173).

There was no break in custody, and Justice Scalia's "assumption" played no role whatsoever in the Court's holding. The Court did not discuss the assumption anywhere else in the opinion, nor did the Court address the policy implications of a break in custody exception or the contours of any such exception. Such vague dicta ought not support the conclusion that *Edwards* does not apply where the suspect has been released for any length of time. *See* Eugene L. Shapiro, *Thinking the Unthinkable: Recasting the Presumption of Edwards v. Arizona*, 53 OKLA. L. REV. 11, 23-24 (2000) (explaining that "*McNeil*'s 'assumption,' noted in dictum for the purpose of broadly stating the *Edwards* rule, did not discuss specific policy considerations flowing from a break in custody, nor did it indicate what sort of break might make a difference.").

McNeil provides even weaker support for a break in custody exception following the Court's decision in *Dickerson*. In *McNeil*, Justice Scalia wrote that *Edwards* "established a second layer of prophylaxis for the *Miranda* right to counsel." 501 U.S. at 176. This same view later commanded only

two votes in *Dickerson*, where Justice Scalia argued in dissent that *Miranda* and its progeny announced

> not the circumstances in which custodial interrogation runs afoul of the Fifth or Fourteenth Amendment, but rather only 'prophylactic' rules that go beyond the right against compelled self-incrimination." (120 S. Ct. at 2340).

The majority in *Dickerson* squarely rejected the claim that *Miranda* may be treated as a mere prophylactic procedure without roots in the Constitution, declaring that *Miranda* and *Edwards* describe "constitutional" rules. *See* 120 S. Ct. at 2333, 2335. This Court should therefore decline to create an exception to *Edwards* on the basis of the *McNeil* dictum. *McNeil*'s dictum is the product of a now-repudiated view of *Miranda* and *Edwards* as sub-constitutional decisions.

In addition, this Court should reject *McNeil's* dictum because the rationale given for adopting it - that a break in custody gives the suspect an opportunity to consult an attorney and terminates the coercive effect of custodial interrogation[2] - has been undermined by subsequent Supreme Court

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[2]For cases relying on various policy rationales for the proposed exception, *see, e.g.*, *United States v. Barlow*, 41 F.3d 935, 945-946 (5th Cir.1994), *cert. denied*, 514 U.S. 1030 (1995); *United States v. Hines*, 963 F.2d 255, 256-257 (9th Cir.1992); *Dunkins v. Thigpen*, 854 F.2d 394, 397-398 (11th Cir.1988), *cert. denied*, 489 U.S. 1059 (1989); *McFadden v. Garraghty*, 820 F.2d 654, 661 (4th Cir.1987); *United States ex rel. Espinoza v. Fairman*, 813 F.2d 117, 125 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987); *United States v. Skinner*, 667 F.2d 1306, 1309 (9th Cir.1982), *cert. denied*, 463 U.S. 1229 (1983); *United States v. Garey*, 813

cases. In *Minnick*, the Court rejected the notion that a suspect's *Edwards* rights dissolve once he has met with an attorney, holding that:

> When counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, *whether or not* the accused has consulted with his attorney. (498 U.S. 153 (emphasis added)).[3]

The *Minnick* Court stated that:

> A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade to waive his rights, or from the coercive pressures that accompany custody . . ." (*Id*.).

Under this reasoning, it does not matter whether a break in custody gives the suspect a chance to consult an attorney; what matters is whether an attorney

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F.Supp. 1069, 1073 (D. Vt 1993), *aff'd* 19 F.3d 8 (2d Cir.1994); *People v. Trujillo,* 773 P.2d 1086, 1091-1092 (Colo. 1989); *Gonzalez v. State,* 449 So.2d 882, 886 (Fla.App. 3d Dist.1984); *State v. Bymes,* 375 S.E.2d 41, 41-42 (Ga. 1989); *State v. Norris,* 768 P.2d 296, 301-302 (Kan. 1989); *Com. v. Galford,* 597 N.E.2d 410, 413-14 (Mass. 1992), *cert. denied*, 506 U.S. 1065 (1993); *Willie v. State,* 585 So.2d 660, 666-667 (Miss. 1991); *State v. Kyger,* 787 S.W.2d 13, 24-25 (Tenn.Crim.App. 1989), *cert. denied*, 525 U.S. 1028 (1998); *State v. Furlough,* 797 S.W.2d 631, 640-641 (Tenn.Crim.App. 1990); *Tipton v. Com.,* 447 S.E.2d 539, 540-541 (Va. 1994); *State v. McKenzie,* 475 S.E.2d 521, 529-530 (W.Va.), *cert. denied*, 519 U.S. 1016 (1996).

[3] Perhaps not surprisingly, Justice Scalia dissented in *Minnick*, which emphasized "the advantages flowing from Edwards' 'clear and unequivocal' character." 498 U.S. at 154. He wrote "the rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion." *Id.* at 156 (quoting *Arizona v. Roberson*, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting)). This characterization of *Edwards*, based on the same view espoused by Justice Scalia in *McNeil* and rejected by the Supreme Court in *Dickerson,* should make this Court all the more unwilling to elevate the *McNeil* dictum to the status of an established exception.

is present at interrogation.

The second justification for the break in custody exception - that a suspect's release terminates the coercive effect of the initial interrogation - is cast into doubt by the Supreme Court's holding in *Arizona v. Roberson*, 486 U.S. 675 (1988). In *Roberson*, the Court refused to temper *Edwards'* rule even when a suspect's rights were reread to him:

> [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 . . . will surely exacerbate whatever compulsion to speak the suspect may be feeling. (*Id*. at 686).

If rereading a suspect his *Miranda* rights does not extinguish the coercion present in the initial interrogation, neither should a break in custody. There is nothing about a break in custody that suggests the suspect has changed his mind and now wishes to speak to police without counsel. A suspect who states that he is incapable of dealing with law enforcement officials without counsel present is unlikely to change that belief upon a break in custody. *See* Marcy Strauss, *Reinterrogation*, 22 HASTINGS CONST. L.Q. 359, 389 (1995) (explaining that the *Roberson* majority emphasized that a suspect's request for counsel raises the presumption that the suspect is unable to deal with authorities without counsel present, and a brief break in custody - like a fresh set of warnings - does nothing to extinguish this presumption). Further, where - as here - a suspect asks for

counsel and is questioned anyway, a break in custody may not eliminate, and may even exacerbate, the coercive effect of the custodial interrogation. Professor Elizabeth Levy explains that a break in custody may increase the level of coercion experienced by a suspect:

> If the accused was sufficiently intimidated or concerned to request the assistance of counsel for the first interrogation, his second arrest and interrogation is likely to further enhance that fear. He may even feel that if the police have rearrested him then they may have more incriminating evidence, thereby leading him to believe that he is trapped and that it is useless to obtain legal assistance.

Elizabeth E. Levy, *Non-Continuous Custody and the Miranda-Edwards Rule: Break in Custody Severs Safeguards*, 20 NEW ENG. J. ON CRIM. & CIVIL CONFINEMENT 539, 568-69 (1994). Likewise, Professor Strauss observes that a break in custody does not alleviate the danger that the suspect will feel his will is being overborne by police who reapproach him to obtain a waiver. "The uncertainty of fate that being released from custody and then reapprehended entails is, in some circumstances, more coercive than continual custody." Strauss, *supra*, 22 HASTINGS CONST. L.Q. at 390. Strauss' and Levy's logic ought to apply to suspects who are reapproached by police as well as suspects who are rearrested. In both instances, suspects would understand that police control the timing and extent of their interactions.

Finally, *amicus curiae* urges this Court to consider that a ruling for

the State in this case will result in some or even widespread law enforcement training that officers may circumvent *Edwards* by releasing suspects for short periods of time. In *People v. Peevy*, 17 Cal. 4th 1184 (1998), this Court held that evidence acquired in deliberate violation of *Edwards* is admissible for impeachment. *Id*. at 1202. At the same time, this Court firmly rejected the argument that *Miranda* and *Edwards* are simply rules of evidence that do not regulate police conduct, holding that "it is indeed police misconduct to interrogate a suspect in custody who has invoked the right to counsel" (*id*. at 1205), and that evidence acquired in violation of *Edwards* is "obtained *illegally*." *Id*. at 1204.

In the wake of *Peevy*, law enforcement agencies generally issued training materials emphasizing that evidence acquired in violation of *Edwards* is admissible for impeachment. A number of agencies, including the Attorney General's office, failed to instruct police to comply with *Peevy's* call to observe *Miranda* and *Edwards*, claiming that this part of the opinion was mere dicta. *See* Charles Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 187 (1998); *see also* Weisselberg, *In the Stationhouse After Miranda*, at 17-18, 20, forthcoming in 99 MICH. LAW REV. __ (2001) (available at http://papers.ssrn.com/paper.taf?abstract id=256021) (reviewing police training materials produced after *Peevy*, *CACJ*

v. Butts, and *Dickerson*).[4] As it turns out, *Peevy* had only a modest effect on the practice of questioning "outside *Miranda*" in California. The Attorney General and a number of agencies eventually ceased training officers that they could violate *Miranda* only after it appeared that such questioning might subject officers and cities to civil liability, or only after *Dickerson* was announced. *See* Seth Rosenfeld, *Police Told to Respect Miranda Ruling*, S.F. Examiner at A-1 - A-7 (Aug. 27, 2000) (describing change in training after the decisions in *Dickerson* and *Butts*, but noting that training did not generally change after *Peevy*); Weisselberg, *In the Stationhouse After Miranda*, *supra*, at 31, Table 1. But it is not even clear today whether the practice of questioning "outside *Miranda*" has ended in many jurisdictions. *See generally* Weisselberg, *In the Stationhouse*, *supra*. Simply put, if this Court finds that *Edwards'* protection dissolves after a break in custody, many officers will be affirmatively trained under the new exception.

In sum, *amicus curiae* submits that there is neither constitutional

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[4]*Amicus curiae* cites these articles for a different purpose than the training materials were offered in *Peevy*. In *Peevy*, this Court denied CACJ's request to take judicial notice of training materials, noting that trial counsel had not raised the issue whether the San Bernardino sheriff's deputies interrogated Mr. Peevy pursuant to a policy in that jurisdiction to violate *Miranda*. 17 Cal. 4th at 1208 n. 4. Here, CACJ is not asserting that there is any current policy or practice to circumvent *Edwards* though a pre-textual release from custody. Rather, CACJ simply points out that if a break in custody exception is established, this Court should expect police to be trained in that exception.

support nor a solid policy rationale for a break in custody exception to *Edwards*. While we recognize that other courts have adopted a break in custody exception to *Edwards*, none of these decisions are controlling and, in the wake of *Dickerson*, none of these decisions should be followed. *Amicus curiae* respectfully suggests that this Court should protect *Edwards* against encroachment and decline the State's invitation to create a break in custody exception.

II. UNWARNED STATEMENTS DERIVED FROM AN *EDWARDS* VIOLATION ARE INADMISSIBLE FRUITS OF THE POISONOUS TREE

A. Fruits of an *Edwards* Violation Are Generally Inadmissible

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the United States Supreme Court established its familiar warnings and waiver regime. In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court ruled that *Miranda* forbids officers from reinterrogating a suspect who has asked for counsel. *Miranda* also establishes a broad rule of exclusion for statements and evidence that are not properly obtained by police. If officers fail to comply with the procedures required by *Miranda*, "no evidence obtained as a result of interrogation can be used" against the suspect." *Id*. at 479. By its own terms, the "no evidence" rule encompasses the fruits–the "evidence obtained as a result"–of a *Miranda* violation. *Dickerson*, the United States Supreme Court's most recent pronouncement on the matter, reaffirms that *Miranda* and *Edwards* describe constitutional rules.

Since *Miranda* was decided, the Supreme Court has adopted several exceptions to *Miranda*'s rule of complete exclusion. The familiar "impeachment" exception allows certain evidence taken in violation of *Miranda* to be used to cross examine an accused at trial. *See Harris v. New*

York, 401 U.S. 222 (1971). The Court has also carved out a "public safety" exception. *See New York v. Quarles*, 467 U.S. 649 (1984). In addition, in *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court permitted the fruits of an *unwarned* statement to be used in the prosecution's case-in-chief. Even so, as discussed in more detail below, the *Elstad* Court distinguished the far more serious circumstance of an *Edwards* violation, indicating that the fruits of an *Edwards* violation would and should be treated differently.

Consistent with *Miranda*, *Edwards*, and *Elstad*, this Court has ruled that the fruits of an *Edwards* violation must be suppressed from the prosecution's case-in-chief, unless the prosecution shows sufficient attenuation. *See People v. Sims*, 5 Cal. 4th 405 (1993), *cert. denied*, 512 U.S. 1253 (1994). In *Sims*, the police questioned the defendant after he invoked his rights under *Miranda*. *Id.* at 445. Mr. Sims made an incriminating statement in response to this questioning. *Id.* The following day, Mr. Sims called the police and asked to speak with them. *Id.* at 446. Prior to beginning the second interview, the police gave Mr. Sims *Miranda* warnings. *Id.* After executing a valid waiver of his rights, Mr. Sims gave a full confession. *Id.* This Court held that where a defendant confesses as a result of improper police conduct, subsequent confessions are presumed to be the tainted fruits of the first confession. *Id.* at 445.

However, the prosecution was able to rebut the presumption that Mr.

Sims' confession was the tainted fruit of his first illegally-obtained statement because the defendant reinitiated contact with the police, and was *both* readvised of his rights *and* waived those rights prior to confessing. *Id.* at 446. The Court therefore found sufficient attenuation. In the present case, where the police reinitiated contact with Mr. Storm and neither readvised him of his rights nor obtained a waiver, the taint of the *Edwards* violation has not been attenuated and the rule in *Sims* mandates exclusion of Mr. Storm's second statement.

In *People v. Bradford*, 14 Cal. 4th 1005, *cert. denied*, 522 U.S. 953 (1997), this Court qualified *Sims*, ruling that a subsequent statement taken after an *Edwards* violation may be admitted if voluntary. It was not necessary for the Court to revise *Sims* to reach its holding in *Bradford*, however, as the suspect in *Bradford* reinitiated contact with police. See *Bradford*, 14 Cal. 4th at 1030.[5] Moreover, *Bradford*–like *McNeil*–springs from a view of *Miranda* and *Edwards* as merely establishing "prophylactic" or "non-constitutional" rules. This view was rejected by the Supreme Court in *Dickerson*.

Amicus curiae respectfully suggests that *Dickerson* gives cause to revisit *Bradford* and reaffirm the basic holding in *Sims*. In the remainder of

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[5]Because of the multiple statements at issue in *Bradford*, *amicus* notes that this was the statement made to Detective Arnold.

this section, *amicus* explains why the rule in *Sims* is most consistent with decisions of the United States Supreme Court, as well as this and other courts, and why it ought to prevail. Furthermore, because officers did not give Mr. Storm the requisite warnings or attempt to obtain a waiver of his right to counsel prior to interrogating him a second time, his second statement cannot be deemed attenuated from the earlier *Edwards* violation.

B. *Sims* Is Consistent With *Elstad* and Later Decisions From the United States Supreme Court

In *Oregon v. Elstad*, 470 U.S. 298 (1985), the United States Supreme Court distinguished police disregard for a suspect's request for an attorney from a mere failure to provide *Miranda* warnings. The defendant in *Elstad* made an incriminating statement about his participation in a burglary in response to brief police questioning at his home. *Id.* at 300-01. The police did not give *Miranda* warnings until the accused was taken to the police station, at which time he waived his rights and made another statement. *Id.* at 301. The Court held that while Mr. Elstad's first, unwarned statement was a violation of *Miranda* and therefore inadmissible, it was not unconstitutional and its fruits–his second, warned statement–were not inherently tainted. *Id.* at 309.

The Court distinguished a "procedural" *Miranda* violation like that in *Elstad*, where the police merely failed to provide the defendant with timely

warnings without using coercion or improper tactics, from an infringement of the Fifth Amendment itself. *Id*. at 306, 309. Where the *Miranda* violation is simply a failure to warn, the proper inquiry for determining whether the fruits of the violation are admissible is the traditional test of voluntariness. *Id*. at 309. According to the Court, this rule is justified because there is no concern for trustworthiness of confessions or deterrence of police misconduct where a statement is obtained without coercion or improper tactics. *Id*. at 308. However, where the *Miranda* violation involves coercion or improper tactics, subsequent statements can no longer be voluntary and violate the Constitution. *Id*. at 309. The consequences of such a constitutional violation are "irremediable," and therefore the trustworthiness and deterrence rationales mandate that subsequent statements and their fruits be excluded. *Id*.

The majority in *Elstad* indicated that unlike "failure to warn" violations, deliberate *Edwards* violations would be treated as improper tactics under this framework. The majority distinguished cases cited by the dissent on the grounds that they involved

> suspects whose invocation of their rights to remain silent and to have counsel were flatly ignored while police subjected them to continued interrogation. (*Id*. at 313 n.3).

The dissent, in turn, underscored this distinction, noting that the majority conceded that its ruling "does not apply where the authorities have ignored

the accused's actual invocation" of his right to counsel. In such circumstances, the dissent noted, "the courts should continue to apply the traditional presumption of tainted connection." *Id*. at 346 n.28 (Brennan, J., dissenting). *Elstad* thus strongly suggests that the Supreme Court would consider a deliberate violation of *Edwards* to be a violation of the Fifth Amendment, rendering subsequent statements involuntary and requiring the suppression of those statements and their fruits.

Elstad also dealt with police conduct that pales in comparison to the tactics in the case at bench. The "interrogation" in *Elstad* (quotation marks in original) took place in the defendant's home with his mother present. *Id*. at 315. In contrast, Mr. Storm was interrogated alone at the police station. In *Elstad*, the Court implied that the police did not knowingly violate *Miranda*, attributing the officers' failure to read Mr. Elstad his rights during the encounter at his home to their confusion as to whether he was actually in custody at that point. *Id*. at 316. However, the police in the present case were aware that they were violating the law by continuing to question Mr. Storm after he asked for a lawyer; indeed, that is precisely why they eventually stopped the interrogation.

United States Supreme Court decisions both prior to and after *Elstad* also distinguish between police failure to warn a suspect of his rights and police abuse of those rights by refusing to honor a suspect's request for

counsel. In *Michigan v. Tucker*, 417 U.S. 433 (1974), a case decided prior to both *Edwards* and *Elstad*, the suspect was read his rights by the police, but he was not informed that he had a right to free counsel. *Id*. at 436. Mr. Tucker said that he did not want an attorney, and then gave a statement which led police to a third-party witness who testified against Mr. Tucker at trial. *Id*. at 437. The Court held that while Mr. Tucker's statement was inadmissible, the admission of the witness' testimony was proper. The Court justified its ruling on the grounds that the case was *not* one in which "the policemen interrogating the suspect had refused his repeated requests to see his lawyer" or had otherwise engaged in willful or negligent misconduct. *Id.* at 438, 447. Indeed, as the interrogation in *Tucker* took place prior to the Court's decision in *Miranda* (*see id*. at 447), there could not have been a deliberate *Miranda* violation. This strongly suggests that if Mr. Tucker *had* invoked his right to counsel as in *Sims* and the present case, the Court would have ruled differently.

In *Oregon v. Hass*, 420 U.S. 714 (1975), decided a year after *Tucker*, the Supreme Court permitted the impeachment use of statements made after a suspect invoked his right to counsel. Because the statements made by Mr. Storm during his second interrogation by police were admitted in the prosecution's case-in-chief, however, *Hass* does not govern this case, nor does it have any bearing on *Sims*. *Hass* is also distinguishable from the

present case and *Sims* because the police in *Hass* did not refuse to honor the defendant's invocation; they ceased interrogating him upon his request for counsel, and a fair reading of *Haas* is that the defendant volunteered incriminating information. *Id.* at 715-16. *Miranda* provides that "[v]olunteered statements of any kind are not barred." 384 U.S. at 478. Likewise, *Edwards* does not protect a suspect who reinitiates contact with the police. *See Edwards*, 452 U.S. at 484-85.

The Supreme Court's decisions after *Edwards* and *Elstad* make clear that police refusal to cease interrogation after a suspect's request for counsel is a constitutional violation. In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Court described the *Edwards* ruling to be

> that subsequent incriminating statements made without [an] attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments. (*Id.* at 1043).

Likewise, in *Shea v. Louisiana*, 470 U.S. 51 (1985), the Court stated that in *Edwards* it had ruled that

> a criminal defendant's rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation–without counsel present–after he requested an attorney. (*Id.* at 52).

Furthermore, in *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court held that *Edwards* prohibits further police interrogation without counsel present, even where the initial interrogation ceased upon the suspect's request for

counsel and counsel was in fact provided. The Justices stated that *Edwards* "does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, *provided the accused has initiated the conversation* . . . with the authorities"–the situation in *Hass* and *Bradford*–but found that "that is not the case before us." *Id.* at 156 (emphasis added). Nor, *amicus curiae* may point out, did Mr. Storm waive his rights or reinitiate conversation with police after invoking his right to counsel.

Finally, in its recent decision in *Dickerson v. United States*, 120 S. Ct. 2326 (2000), the Supreme Court reaffirmed the constitutional basis for *Miranda*, rejecting the notion that it is merely a sub-constitutional rule of evidence. Dismissing an attempt to draw support for this notion from *Elstad*, the Court stated that *Elstad*

> simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from *unwarned* interrogation under the Fifth Amendment. (*Id.* at 2335 (emphasis added)).

The Court thus recognized that its ruling in *Elstad* is restricted to unwarned statements that contravene *Miranda* and does not extend to *Edwards* violations such as those in *Sims* and the present case. The framework of *Sims* is therefore fully consistent with *Elstad* and United States Supreme Court rulings.

C. *Sims* Is Also Consistent With Later Decisions From This

Court, the Lower California Courts, and the Ninth Circuit

This Court ruled in *Sims* that unwarned statements derived from *Edwards* violations must be excluded from the prosecution's case in chief as fruit of the poisonous tree, unless the prosecution shows that the taint is sufficiently attenuated. *See Sims*, 5 Cal. 4th at 445. *Sims* is consistent with later decisions by this Court, such as *Peevy*, which holds that statements obtained after a suspect invokes his right to counsel are admissible if used solely for impeachment. *Sims* also coheres with rulings of the California Courts of Appeals and the United States Court of Appeals for the Ninth Circuit, although those decisions contradict this Court's indication in *Bradford* that police failure to cease interrogating a suspect after he requests an attorney might not violate the Fifth Amendment.

i. California Supreme Court Decisions

In *Bradford*, 14 Cal. 4th 1005 (1997), this Court held that a fruits analysis is not necessary where a defendant reinitiates contact with police after an *Edwards* violation. The officers in *Bradford* continued to interrogate the defendant after he asked for a lawyer and obtained an incriminating statement. *Id.* at 1025. The next day, the accused called the police to make a full confession. *Id.* at 1030. This Court found that the defendant's earlier statements were properly excluded because they were obtained in violation of *Edwards*. *Id.* at 1039. However, the Court held that

police disregard for a suspect's invocation of his right to counsel does not automatically constitute coercion, and therefore subsequent statements may be admitted if voluntary. *Id.* at 1039-40. Citing *Elstad*, the Court further held that if statements are voluntary, their fruits are also admissible. *Id.* Since the defendant sought out the police to give his subsequent confession, it was properly admitted.

Although *Bradford* is not necessarily inconsistent with *Sims*, its reliance on *Elstad* is misplaced. *Elstad* dealt with the admissibility of the fruits of an unwarned statement, not the fruits of an *Edwards* violation. Indeed, in the passage from *Elstad* cited by the *Bradford* Court–"the admissibility of any subsequent statement should turn in these circumstances on whether it is knowingly and voluntarily made" (*id*. at 1040) –the "circumstances" referred to are an *unwarned* statement, not one obtained in violation of *Edwards*. *See Elstad*, 470 U.S. at 309.

Likewise inapposite are the Supreme Court cases cited by the *Bradford* Court to support its holding that an *Edwards* violation does not render subsequent statements involuntary; these cases merely state that *Edwards* is justified by *Miranda's* "prophylactic purpose." *Bradford*, 14 Cal. 4th at 1039 (discussing *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987); *Solem v. Stumes*, 465 U.S. 638, 644 (1984)). In addition, the Supreme Court's recent decision in *Dickerson* clarifies that *Miranda* is not

merely a "prophylactic" rule but a constitutional command. Therefore, *Sims* is more faithful to federal authority as established in *Edwards*, *Elstad*, and *Minnick* than is *Bradford*.

In *People v. Peevy*, 17 Cal. 4th 1184 (1998), this Court ruled that a statement obtained from the defendant in deliberate violation of *Edwards* could not be admitted in the prosecution's case in chief, but could be used for impeachment. Although Mr. Peevy did not contend that his statement was involuntary, the Court noted that "deliberate police misconduct . . . may cross the line into coercion." *Id.* at 1202. In fact, in a trial court ruling not before the Court on appeal (or on writ), the Superior Court found that the police crossed this line when they took an additional statement from Mr. Peevy in violation of *Edwards*. *Id.* at 1190. Even though the police readvised Mr. Peevy of his rights and he waived those rights, the trial judge ruled that the confession was "abusive" and not admissible for any purpose. *Id.* at 1215, 1223.[6] The fruits issue in *Peevy* never came before this Court, however, and the holding that Mr. Peevy's first statement was admissible for impeachment is consistent with *Sims*.

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[6]In its most recent decision regarding an *Edwards* violation, *People v. Carpenter*, 21 Cal. 4th 1016, 1040 (1999), *cert. denied*, 121 S.Ct. 99 (2000), this Court found it unnecessary to apply fruits analysis to third-party witness testimony derived from a statement obtained in violation of *Edwards* because the witness would have been discovered by the police even without the violation.

ii. California Courts of Appeal Decisions

Recent rulings by the California Courts of Appeal regarding the effects of an *Edwards* violation are also more consistent with *Sims*. In *People v. Montano*, 226 Cal. App. 3d 914 (1st Dist. 1991), the court of appeal excluded the fruits of a statement obtained through improper police tactics. There the police continued to interrogate the defendant after he repeatedly invoked his right to remain silent and officers obtained a partial confession. *Id*. at 921-29. The defendant later asked to speak with police and, after being readvised of his rights, gave a full confession. *Id*. at 929. On appeal, the first confession was ruled involuntary and the second confession was excluded as the tainted fruit of the first. *Id*. at 941. The justices found that *Elstad* did not apply, because it governed only "technical" or "procedural" Miranda violations, such as failure to warn. *Id*. at 923-33. The court noted that *Elstad* itself distinguished between such "noncoercive," "nonconstitutional" violations and cases where police ignored a suspect's invocation of his rights. *Id*. at 933-34. Finding that the case before it was of the latter type, the justices lambasted the officers' "flagrantly trampling" of the defendant's rights and "arrogating to themselves the exclusive power to decide whether a constitutional right would have more than a purely theoretical existence" (*id*. at 935), stating:

It soon became apparent to [the defendant] that his attempts to

> halt the questioning, using the right he was told was his, were a waste of time because the officers were not going to respect his invocation of that right . . . The officers' conduct conveyed the unmistakable message that defendant's rights were meaningless. (*Id.* at 936).

Having determined that police misconduct rendered Mr. Montano's first confession involuntary, the court applied the fruit of the poisonous tree doctrine to exclude his second confession. *Id.* at 937. [7] *See also In re Gilbert E.*, 32 Cal. App. 4th 1598 (2d Dist. 1995) (holding that a statement obtained after a suspect invoked his right to remain silent was involuntary and inadmissible);[8] *People v. Bey*, 21 Cal. App. 4th 1623 (2d Dist. 1993) (holding that a statement obtained through a deliberate *Edwards* violation by police was involuntary and not admissible even for impeachment).[9]

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[7]The court found that the break between the confessions and the fact that the second one was initiated by the defendant and preceded by *Miranda* warnings were not sufficient to dispel the taint of the earlier constitutional violation. *Id.* at 938. Since the prosecution had not met its burden of showing that the second confession was sufficiently attenuated from the first, and since the presence of police misconduct meant that the deterrence purpose of the exclusionary rule would be served, the court excluded the second confession. *Id.* at 940.

[8]The Court in *Gilbert E.* found police disrespect of a suspect's rights to remain silent or have counsel "indicative of coercion" and warned that it would decrease respect for the law. *Id.* at 1601-1602.

[9]In *Bey*, unlike in *Peevy*, the police ignored repeated requests for counsel by the defendant, and they suggested to him that his statement could not be used against him in court. *Id.* at 1627. The court found that this conduct by the police was an "attempt to capitalize" on the Supreme Court's decision in *Harris v. New York*, 401 U.S. 222 (1971), which held that statements obtained without *Miranda* warnings may be admitted for

iii. Ninth Circuit Decisions

Sims is also consistent with recent rulings of the United States Court of Appeals for the Ninth Circuit. The Circuit has held, on both direct appeal and habeas corpus review of California state court judgments, that the fruits of deliberate violations of *Miranda* and *Edwards* must be excluded. In *Henry v. Kernan*, 197 F.3d 1021 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 1262 (2000), a habeas corpus case, the Circuit held that statements obtained where the police "deliberately set out" to violate the suspect's right to counsel are not admissible for any purpose, and the court overturned Mr. Henry's California second-degree murder conviction. *Id.* at 1029, 1031.[10] The court distinguished *Harris* on the grounds that there was no claim in *Harris* that the police knowingly disregarded the suspect's rights. *Henry*, 197 F.3d at 1029.

The Ninth Circuit has also excluded incriminating statements and their fruits even where the police misconduct in obtaining them was merely a failure to warn. In *United States v. Orso*, 234 F.3d 436 (9th Cir. 2000), the

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impeachment. *Id.* at 1627. Noting that this was "not a new tactic" on the part of police, the court refused to apply *Harris*. *Id.*

[10]*See also California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir.) (as amended), *cert. denied*, 120 S.Ct. 2717 (2000) (holding that plaintiffs in civil suit who alleged that police deliberately interrogated them in violation of *Miranda* alleged violation of constitutional rights) .

court held that where the police deliberately neglected to give a suspect *Miranda* warnings in order to elicit incriminating information for use against her in a later interrogation, both the initial unwarned statement and the subsequent warned statement were inadmissible.[11] The court found that the Supreme Court's ruling in *Elstad* does not apply where the police use deliberately improper tactics. *Id.* at 440, 441. The court found such tactics to be present in *Orso* because the police had used the "breakthrough" incriminating information obtained from Ms. Orso prior to advising her of her rights as a "beachhead" to "'set [her] up to talk to them" later on, at which point they finally provided her with *Miranda* warnings so that her ensuing statements would be admissible. *Id.* at 441 (citing *Pope v. Zenon*, 69 F.3d 1018, 1023 (9th Cir. 1995)). These tactics were "'precisely what the Supreme Court had in mind' in *Elstad* when it exempted such conduct from the general rule that a post-*Miranda* statement is admissible if it is voluntary." *Id.* at 441-42 (citing *Pope*, 69 F.3d at 1024). Moreover, the judges noted, such tactics "had been described in police manuals examined by the Supreme Court, and declared to be unlawful." *Id.* at 441. The circuit then

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[11]*See also United States v. Lee*, 699 F.2d 466 (9th Cir. 1982), in which the court held that where the police obtained an initial confession without providing *Miranda* warnings, a subsequent confession volunteered by the defendant after waiving his rights was properly excluded as fruit of the poisonous tree, even after a day-long break in custody.

applied the fruit of the poisonous tree doctrine to exclude Ms. Orso's later confession obtained after she waived her rights. *Id*. at 442.

Sims is consistent with these cases, and the facts in the case at hand are similar to those in *Henry* and *Orso*. Like Mr. Storm, Mr. Henry made clear and repeated invocations of his right to counsel while being interrogated in police custody. *Id*. at 1029. As with Mr. Storm, the police ignored Mr. Henry's requests and continued to interrogate him, even though they were aware they were violating the law in doing so. *Id*. at 1024. In response to this interrogation, Mr. Henry gave a "rambling" and "disjointed" statement, during which he was shaken, confused, and crying. *Id*. at 1027. Similarly, Mr. Storm was "sobbing and crying" during his own "rambling" statement. *People v. Storm*, 79 Cal. App. 4th 1324, 1329-30 (2000). While the police did not explicitly suggest to Mr. Storm that his statements could not be used against him, as did the police in *Henry*, they encouraged him to make a statement after he asked whether he could do so off the record.[12] *Id.* at 1329. Both cases exhibit "slippery and illegal" police tactics. *Henry*, 197 F.3d at 1024.

The police in the present case also used improper tactics very similar

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[12]When Mr. Storm stated to the interrogating officer, "'I'd like to say something off the record but I know that's impossible right now'," the officer "asked him to make the statement 'for his own comfort'." *Id*. at 1329.

to those in *Orso*. The police in *Orso* set the defendant up to make a later *warned* statement; the police set Mr. Storm up to make a later statement outside of custody, where *Miranda* warnings are not even required. The intent and the effect are the same: to use statements obtained illegally to elicit additional incriminating statements under circumstances not barring their admissibility. However, the police misconduct in this case is more egregious than that in *Orso*, consisting not of a mere failure to warn Mr. Storm of his rights but a failure to honor his actual invocation of those rights. As alluded to by the court in *Orso* and demonstrated after *Peevy*, the police have institutionalized such improper practices. To continue to condone them by admitting Mr. Storm's statements in this case would "'only encourage police to resort to unacceptable tactics to circumvent *Miranda*'." *Orso*, 234 F.3d at 441 (citing *Pope*, 69 F.3d at 1024).

D. There Can Be No Attenuation of an *Edwards* Violation Where the Second Statement Is Not Preceded by Fresh Warnings and a Valid Waiver

In *Sims*, this Court ruled that the fruits of an *Edwards* violation must be excluded unless the prosecution shows sufficient attenuation. *Sims*, 5 Cal. 4th at 445. The appropriate inquiry in determining attenuation is:

> whether . . . the evidence . . . has been come at by exploitation of illegality or instead by means sufficiently distinguishable to be purged of the primary taint. (*Id.* (citing *Wong Sun v. United*

States, 371 U.S. 471, 487-88 (1963)).

For attenuation to be sufficient, it must "break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the illegality." *Sims*, 5 Cal. 4th at 445.

This Court found sufficient attenuation in *Sims* because the police informed Sims at the end of his first interrogation that they could not speak to him again unless Mr. Sims himself reinitiated contact, and then the next day Mr. Sims in fact contacted the police in order to give a second statement. *Id*. at 446. Moreover, Mr. Sims was readvised of his rights and executed a valid waiver of those rights prior to his second statement. *Id.*

There can be no attenuation here. Mr. Storm did not reinitiate contact with police after his first interrogation–it was the police who came to him–nor did he receive fresh warnings or execute a waiver before his second interrogation.

The lack of attenuation in the instant case is also demonstrated by *Brown v. Illinois*, 422 U.S. 590 (1975). There, the Supreme Court held that giving *Miranda* warnings does not in itself constitute sufficient attenuation of the taint of a Fourth Amendment violation and suppressed the defendant's statements made after his illegal arrest. The factors the Court said should be considered in determining whether sufficient attenuation exists are proximity in time between the illegality and the discovery of the evidence, the presence

of intervening circumstances, and the "purpose and flagrancy of the official misconduct." *Brown*, 422 U.S. at 603-04. The Court found that the *Miranda* warnings Mr. Brown received prior to making his statements did not constitute intervening circumstances that demonstrated attenuation. *Id.* at 604-05. Further, the improper police conduct "had a quality of purposefulness," awareness of which the police had "virtually conceded" by casting their action as "investigatory." *Id.* at 605.

Amicus curiae suggests that in the present case the police knew they were questioning Mr. Storm in violation of *Edwards*. While Mr. Storm was allowed to return home, there were no intervening circumstances to dissipate the taint of this violation. Mr. Storm was neither readvised of his rights nor given an opportunity to consult with an attorney as he requested. Nor did he reinitiate contact with the police. *Cf. Wong Sun*, 371 U.S. at 491 (finding that the defendant's act in voluntarily turning himself in to the police was an "intervening independent act of free will" that dissipated the taint between his illegal arrest and his confession). The clear chain of causation in the instant case requires exclusion of Mr. Storm's second statement.

III. THE LOWER COURT FAILED TO CONSIDER THE *EDWARDS* VIOLATIONS IN ASSESSING WHETHER MR. STORM WAS IN CUSTODY

Amicus curiae believes this Court should not adopt a break in custody exception to *Edwards*. Should this Court decide to do so, however, *amicus curiae* urges the Court to reconsider whether Mr. Storm was in custody during his second interrogation. This is necessary because the lower court failed to take the prior violation of *Edwards* into account in assessing custody.

Whether an accused is in custody is determined by "how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Stansbury v. California*, 511 U.S. 318, 325 (1994) (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)); s*ee also Peevy*, 17 Cal. 4th at 1199 (whether a person is in custody for the purposes of *Miranda* depends on the person's perception).[13] The test is whether, bearing in mind the suspect's age, intellect, experience, and physical

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[13]*See also United States v. Doe*, 109 F.3d 626, 634 (9th Cir. 1997) (holding that whether a suspect is in "custody" depends "on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned."); *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1982) (holding that custody exists where "a reasonable innocent person in such circumstances would conclude that after brief questioning he or she would not be free to leave").

condition, the person was reasonably led to believe that he or she was in custody.[14] When there has already been an *Edwards* violation, the question ought to be whether a reasonable person whose invocation of the right to counsel has already been ignored by the police would feel his freedom restricted when reapproached by police. For much the same reason, courts consider evidence of *Miranda* violations in assessing whether a suspect's statements were voluntary. *See Davis v. North Carolina*, 384 U.S. 737, 740-41 (1966) (compliance with *Miranda* is a factor in the determination of voluntariness); *People v. Montano*, 226 Cal. App. 3d 914, 936 (1st Dist. 1991) (repeated *Miranda* violations communicated that the suspect's "attempts to halt the questioning, using the right he was told was his," were useless; thus, *Miranda* violations were considered in assessing voluntariness).

The court of appeal failed to ask the right question in concluding that Mr. Storm was not in custody when reapproached by the police. It failed to account for the fact that Mr. Storm's earlier requests for counsel were ignored. The court concluded that "a reasonable person would not conclude himself to be in custody" simply because the second interrogation was

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[14]*See United States v. James*, 113 F.3d 721, 726 (7th Cir. 1997) (noting that a suspect is in custody when he knows he is speaking with a government agent but does not feel free to end the conversation).

conducted in Mr. Storm's home, there was no indication he would be placed under arrest, and the police engaged in no conduct suggesting he was in custody. *See People v. Storm*, 79 Cal. App. 4th at 1336.

However, completely absent from the lower court's analysis of the second interrogation is any understanding that police violated *Miranda* and *Edwards* during Mr. Storm's first interrogation. *See id*. At the first interrogation, when confronted with lie detector results, Mr. Storm said, "I wanna help you guys close your case but um, uh, *I better talk to an attorney first*." *Id*. at 1329 (emphasis added). Instead of respecting Mr. Storm's invocation of counsel, as required by *Edwards*, the interrogator asked Mr. Storm to make a statement "for [his] own comfort" and get things off his chest. *Id*. Mr. Storm restated his desire to have an attorney: "But seriously *I think I shouldn't talk about it 'til I've consulted with somebody*. I, I needed to consult with somebody, you understand that." *Id*. (emphasis added). The interrogator said he was there to listen if Mr. Storm wanted to talk. Once again, Mr. Storm requested counsel: "Like, like I say, I better stop, I better stop. I, *I've asked to talk to an attorney, I better stop*." *Id*. (emphasis added). Mr. Storm then said, "You guys are gonna book me, you're gonna book me. If you're gonna give me a chance to talk to an attorney, *you're gonna give me a chance to talk with an attorney*." *Id* (emphasis added). The interrogation ended only after Mr. Storm had requested counsel four

times. Before Mr. Storm left, Detective Rowe told him, "Don't think this is over with by . . . any means." *Id*.

The authorities returned to Mr. Storm's home only two days later. Detective Rowe entered Mr. Storm's home with two other officers. *Id* at 1331. Rowe claimed that when the interview was over the officers would leave and Mr. Storm could go back to what he was doing. *Id*. Even so, under *Stansbury*, the question is whether a reasonable person in Mr. Storm's position would feel free to leave or end the questioning when Detective Rowe and the other officers came to his home. More precisely, the question is whether a reasonable person, who two days earlier had repeatedly invoked his right to silence and right to counsel to no avail and who was told "Don't think this is over," would feel that he was in custody when reapproached by officers. *Amicus curiae* submits that the answer ought to be yes. Mr. Storm had no objectively reasonable belief that the officers would honor any of the guarantees they made to him.

CONCLUSION

Amicus curiae, California Attorneys for Criminal Justice, respectfully asks the Court to reverse the decision below.

Respectfully submitted,

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