ANOTHER TWEAK TO *MIRANDA*: THE SUPREME COURT SIGNIFICANTLY LIMITS THE *EDWARDS* PRESUMPTION OF INVOLUNTARINESS IN CUSTODIAL INTERROGATION

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I. INTRODUCTION

The Self-Incrimination Clause of the Fifth Amendment provides: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[1] This protection extends to an individual during police questioning, and throughout the trial phase. In criminal procedure, there is a certain necessity to obtaining confessions from individuals who are willing to provide them.[2] The use of these confessions helps expedite the criminal investigation and adjudication processes, accordingly preserving government resources.[3] Problems with infringing upon the Fifth Amendment's protections arise, however, when a confession is not obtained voluntarily and is the product of police coercion.[4] Sometimes it can be difficult for both courts and law enforcement to distinguish between what constitutes a voluntary or an involuntary confession. As a result, the Supreme Court has fashioned certain guidelines, better known as prophylactic rules, to determine whether a Fifth Amendment violation has taken place.[5] In February 2010, the Supreme Court created yet another Fifth Amendment prophylactic rule with its decision in the case of *Maryland v. Shatzer*.[6]

This Note will examine *Maryland v. Shatzer* in light of the prophylactic rule it establishes, as well as how the rule may yield to

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1. U.S. CONST. amend. V.
2. Miranda v. Arizona, 384 U.S. 436, 478 (1966); United States v. Washington, 431 U.S. 181, 187 (1977).
3. Paul G. Cassell & Bret S. Hayman, *Dialogue on Miranda: Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906-911 (1996).
4. *See generally Miranda*, 384 U.S. 436.
5. *See, e.g., id.* at 467-474 (1966); Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).
6. Maryland v. Shatzer, 130 S. Ct. 1213 (2010).

exceptions in the future. Section II will further explain judicially created prophylactic rules. Particular prophylactic rules that serve as relevant precedent are also discussed. Section III discusses the factual background and procedural history of *Maryland v. Shatzer*, as well as the Supreme Court's opinion in the case. Finally, Section IV questions whether the Court properly promulgated a prophylactic rule according to its own guidelines and analyzes the future of *Maryland v. Shatzer* as a judicially created prophylactic rule.

II. BACKGROUND

To fully understand the gravity of the decision in *Shatzer*, it is necessary to understand the nature of prophylactic rules, as well as the controversy surrounding them. It is also important to be familiar with the particular prophylactic rules the Court established in the past, which create the background for the new rule the Court promulgated in *Shatzer*.

A. Description of Prophylactic Rules

A prophylactic rule is one that is judicially created and "functions as a preventative safeguard to insure that constitutional violations will not occur."[7] They are essentially a subset of risk-avoidance rules issued by the Court.[8] A prophylactic rule can also be defined as "a standard for government behavior designed to reduce violations or make alleged violations easier to adjudicate."[9] Such rules are not mandated by the Constitution itself, yet are imposed upon the states to protect constitutional interests.[10] Prophylactic rules can also be categorized as "hybrid rules" since they are not constitutionally derived but are not the product of legislative action, either.[11] These rules do have some constitutional basis "because they are predicated on a judicial judgment that the risk of a constitutional violation is sufficiently great that simple case-by-case enforcement of the core right is insufficient to secure that right."[12] But because such rules are not constitutional mandates, Congress and the states

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7. Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U. L. REV. 100, 105 (1985).
8. Brian K. Landsberg, *Safeguarding Constitutional Rights: The Uses and Limits of Prophylactic Rules*, 66. TENN. L. REV. 925, 957 (1999).
9. Susan R. Klein, *The Fate of the Pre-Dickerson Exceptions to Miranda: Identifying and Reformulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L. REV. 1030, 1033 (2001).
10. Grano, *supra* note 7, at 105.
11. Landsberg, *supra* note 8, at 950.
12. *Id.*

generally have the power to alter judicially created prophylactic rules so long as the core constitutional value behind the rule is appropriately protected.[13] Therefore, it can be stated that prophylactic rules are inherently flexible and are easily changed.[14]

The legitimacy of prophylactic rules has been debated for decades.[15] Critics of prophylactic rules believe the Supreme Court is acting outside of its Article III authority when it creates and imposes these types of rules upon the states.[16] Proponents of prophylactic rules argue they are necessary to enforce constitutional rights and to improve efficiency in the application of constitutional law.[17] Despite the criticism prophylactic rules receive, the Supreme Court has not set forth a clear set of guidelines to aid in the creation of prophylactic rules.[18] In the context of the Fifth Amendment, the Supreme Court has provided minimal guidance regarding prophylactic rules. The Court has stated, "the closest possible fit should be maintained between the Self-Incrimination Clause and any rule designed to protect it."[19]

The use of prophylactic rules has been widespread in the realm of criminal procedure. [20] There are many instances where the Court has had difficulty determining the exact parameters of a constitutional procedure at issue and had to establish guidelines to determine whether a violation of the right had occurred, which in turn are imposed upon the federal executive branch and the states.[21] By imposing rules which are designed to protect the Constitution but which can be violated without infringing upon the Constitution, the Court raises concerns about separation of powers.[22] The Court is essentially drafting criminal procedure rules and rights that are traditionally within legislative authority with the intent to deter executive branch officials from violating the Constitution.[23] Critics also argue that imposing non-constitutional rules on the states is a violation of federalism principles. [24] It is a generally understood notion that Article III does not

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13. *Id.* at 974-75.
14. *Id*. at 963.
15. *See e.g.*, Grano, *supra* note 7, at 123-56 (questioning legitimacy of prophylactic rules); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195-209 (1988) (supporting the use of prophylactic rules).
16. *See generally* Grano, *supra* note 7, at 123-28.
17. *See generally* Landsberg, *supra* note 8, at 930-31.
18. *Id.* at 963.
19. United States v. Patane, 542 U.S. 630, 641 (2004) (plurality opinion); *see generally* Chavez v. Martinez, 538 U.S. 760, 772 (2003) (plurality opinion); Montejo v. Louisana, 129 S. Ct. 2079, 2096 (2009).
20. Klein, *supra* note 9, at 1032.
21. *Id.*
22. Grano, *supra* note 7, at 124.
23. Klein, *supra* note 9, at 1032.
24. Grano, *supra* note 7, at 124.

vest federal courts with the power to create a general common law that binds the states in their courts or replaces state law in federal courts.[25]

Arguments exist, however, to justify the use of prophylactic rules as well. Proponents of prophylactic rules argue that they "are not exceptional measures of questionable legitimacy but are a central and necessary feature of constitutional law."[26] It has also been suggested that prophylactic rules are created out of necessity.[27] Courts have been forced to adopt prophylactic rules when states fail to protect constitutional procedural guarantees in their criminal trials.[28] The same applies for instances in which Congress and the Attorney General have not adequately protected constitutional criminal procedure guarantees of defendants in federal courts.[29] An additional argument posits that prophylactic rules are required for the Court to carry out its role to find and enforce public values.[30]

B. Prophylactic Rules Serving as Relevant Precedent

1. The Most Famous Prophylactic Rule, Miranda v. Arizona[31]

Perhaps the most well known prophylactic rule was established in *Miranda v. Arizona*.[32] This case is important because it helps to establish the background that provides the context in which *Maryland v. Shatzer* was decided.

In *Miranda* and its companion cases,[33] the Court was faced with deciding whether statements obtained from the product of custodial interrogation could be admissible under the Fifth Amendment.[34] The defendants in *Miranda* and its companion cases were questioned by police in a room where their freedom of movement was severely limited.[35] Prior to questioning, the defendants were not advised of their rights, and all eventually produced self-incriminating statements after lengthy interrogations. [36] The Court expressed concern for certain interrogation techniques used to illicit statements from criminal suspects and the coercive

25. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938).
26. Strauss, *supra* note 15, at 190.
27. Klein, *supra* note 9, at 1052.
28. *Id.*
29. *Id.*
30. Landsberg, *supra* note 8, at 958.
31. Miranda v. Arizona, 384 U.S. 436 (1966).
32. *Id.*
33. Westover v. United States; Vignera v. New York; and California v. Stewart (consolidated with *Miranda*, 384 U.S. 436).
34. *Miranda*, 384 U.S. at 439.
35. *Id.* at 445.
36. *Id.* at 456 .

pressures such techniques created.[37] Next, the Court articulated its apprehension as to the voluntariness of statements obtained in the inherently coercive interrogation setting.[38] The Court stated, "[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[39]

The Court went on to find that safeguards are necessary to fight the coercive pressures of custodial interrogation and to ensure suspects are afforded a chance to invoke their constitutional rights.[40] These safeguards include informing a suspect he or she has the right to remain silent at the outset of the interrogation[41] and that "anything said [in waiver of the right to remain silent] can and will be used against the individual in court."[42] Additionally, a suspect must be informed that he has the right to an attorney and that one will be appointed for the indigent.[43] Once a suspect has been advised of his rights, any invocation of these rights must terminate the interrogation.[44] The rights articulated in *Miranda* can be waived by the suspect upon "[a]n express statement that [he or she] is willing to make a statement and does not want an attorney [present during questioning, that is subsequently followed] by a statement[.]"[45] The suspect must "knowingly and intelligently" waive his rights in order for the waiver to be considered voluntary.[46] The burden is placed on the government to show that any waiver obtained by police was, in fact, voluntary.[47] The Court found informing suspects of these rights and obtaining waiver of them to be "fundamental with respect to Fifth Amendment privilege . . . ."[48] Finally, the Court held "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[49]

Much discussion over prophylactic rules has been generated by the Court's decision in *Miranda*.[50] The text of the *Miranda* opinion does not

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37. *Id.* at 445-56.
38. *Id.* at 457.
39. *Id.* at 458.
40. *Id.* at 467.
41. *Id.* at 467-68.
42. *Id.* at 469.
43. *Id.* at 473.
44. *Id.* at 474.
45. *Id.* at 475.
46. *Id.* at 479.
47. *Id.* at 475.
48. *Id.* at 476.
49. *Id.* at 444.
50. Landsberg, *supra* note 8, at 933.

explicitly categorize the Court's holding as prophylactic, although there is language to suggest such a finding.[51] The Court speaks of the "appropriateness of a prophylaxis stemming from the very fact of interrogation itself,"[52] and protecting the privilege against self-incrimination in custodial interrogation settings.[53] It was not until 1973 that the Court used the term "prophylactic" to describe the protections afforded by *Miranda*.[54] Acknowledging *Miranda* to be a prophylactic rule legitimized the use of exceptions to its rule.[55] For example, the Court has found that statements taken in violation of *Miranda* can be used for impeachment purposes but are barred from use in the prosecution's case-in-chief.[56] The "fruit of the poisonous tree" doctrine[57] does not apply to statements taken in violation of *Miranda*, so any tangible evidence derived from information in an unwarned confession will not be excluded.[58] An exception to *Miranda* has also been recognized to allow the use of unwarned interrogation when issues of "public safety" arise.[59] Similar to the public safety exception, another possible exception to *Miranda* may also exist in the "rescue doctrine."[60] Statements obtained in violation of *Miranda* have been held by state courts to be admissible if the interrogation is motivated to save the life of a kidnapping victim.[61] The Court, however, has not completely abandoned the *Miranda* rule.[62]

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51. Grano, *supra* note 7, at 107-08.
52. *Miranda*, 384 U.S. at 463 (discussing McNabb v. United States, 318 U.S. 332, 343-44 (1943); Mallory v. United States, 354 U.S. 449, 455-56 (1957)).
53. *Id.* at 477.
54. *See* Michigan v. Payne, 412 U.S. 47, 53 (1973).
55. Evan H. Caminker, *Miranda and Some Puzzles of "Prophylactic Rules,"* 70 U. CIN. L. REV. 1, 4 (2001).
56. Harris v. New York, 401 U.S. 222, 224-26 (1971).
57. This doctrine is an extension of the Fourth Amendment exclusionary rule established in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), which basically stands for the proposition that if the source of evidence (the tree) is improperly obtained, then anything obtained from that evidence (the fruit) is tainted; *see also* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963).
58. Michigan v. Tucker, 417 U.S. 433, 451-52 (1974).
59. New York v. Quarles, 467 U.S. 649, 655-56 (1984).
60. For a discussion of this topic, *see generally* William T. Pizzi, *The Privilege Against Self-Incrimination in a Rescue Situation*, 76 J. CRIM. L. & CRIMINOLOGY 567 (1985).
61. *See* People v. Dean, 114 Cal. Rptr. 555, 559-62 (Cal. Ct. App. 1974); People v. Krom, 461 N.E.2d 276, 281 (N.Y.1984).
62. In fact, the Court backtracked to describe *Miranda* as a constitutional mandate in Dickerson v. United States, 530 U.S. 428, 432 (2000), further complicating the realm of prophylactic rules.

2. The Court Further Protects Miranda in Edwards v. Arizona[63]

In 1981, the Court was given the chance to extend *Miranda* protections by creating another prophylactic rule in *Edwards v. Arizona*.[64] In order to fully understand the consequences of the Court's decision in *Shatzer*, it is necessary to explain the Court's rule in *Edwards* as well. In that case, the defendant, Edwards, was arrested at his home on various charges and taken to the police station where he was informed of his *Miranda* rights.[65] Edwards agreed to participate in questioning and expressed interest in "making a deal" with the county attorney.[66] Edwards stated, however, that he desired the presence of an attorney to represent his interests prior to committing to anything.[67] Upon Edwards's request for counsel, the interrogation terminated and he was taken back to jail.[68] The next day, detectives came to question Edwards, who after expressing reluctance to participate, was informed he was required to speak with the detectives.[69] At this time, Edwards was again informed of his *Miranda* rights.[70] During this second investigation Edwards confessed to several crimes.[71] Prior to trial, Edwards sought to suppress his confession on the basis that the second interrogation by police after he had invoked his right to counsel was in violation of his *Miranda* rights.[72] The trial court denied this motion, finding Edwards's confession to be voluntary, and he was later convicted.[73] The Supreme Court of Arizona held that Edwards had successfully invoked his *Miranda* rights during the first interrogation, but that he had waived those rights during the second interrogation after he was again informed of them.[74] The United States Supreme Court granted certiorari to determine whether Edwards' invocation of his right to counsel during the first interview precluded the police from obtaining a confession from him during a subsequent interrogation that took place the next day. [75]

The Supreme Court unanimously reversed the Supreme Court of Arizona's finding that Edwards had effectively waived his right to

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63. Edwards v. Arizona, 451 U.S. 477 (1981).
64. *Id.* at 484-85.
65. *Id.* at 478.
66. *Id.* at 478-79.
67. *Id.* at 479.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 480.
74. *Id.*
75. *Id.* at 478.

counsel.[76] The Court held that after a defendant invokes his right to counsel during interrogation, police may not reinitiate custodial interrogation without counsel present unless the accused actually initiates further communication with police.[77]

In its reasoning, the Court noted that in the past "the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel."[78] This statement demonstrates the Court's creation of a prophylactic rule to ensure that *Miranda* rights are protected. Later cases verified that a prophylactic rule had been created in *Edwards*.[79]

Additionally, in a subsequent case applying *Edwards*, Justice Scalia argued in the dissenting opinion that the Court's decision was "the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement."[80] If exceptions can arise to *Miranda* because of its status as a prophylactic rule, it then follows that exceptions can arise to *Edwards* because it is a prophylactic rule as well. Although the Supreme Court has not considered whether a public safety exception exists to *Edwards*, lower federal courts have held that it does.[81] According to state courts and lower federal courts, another exception to *Edwards* exists when there is a break in custody.[82] The Supreme Court has not directly addressed this issue, but has suggested in dicta that a break in custody exception may exist.[83]

It is possible to interpret *Edwards* to create an indefinite extension on the presumption of involuntariness it creates. The Court further clarified the scope of the *Edwards* rule seven years after its creation in *Arizona v. Roberson*[84], and held that police cannot initiate custodial interrogations about crimes other than the one for which the suspect has invoked his right to counsel.[85] The Court has also held that interrogation must cease at the time an accused requests counsel and questioning cannot resume unless counsel is present, regardless of whether the suspect has actually consulted

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76. *Id.* at 480.
77. *Id.* at 484.
78. *Id.*
79. McNeil v. Wisconsin, 501 U.S. 171, 176 (1991) (referring to the *Edwards* rule as a "second layer of prophylaxis"); Michigan v. Harvey, 494 U.S. 344, 350 (1990) (*Edwards* established another prophylactic rule protecting a defendant who has waived his Miranda rights); Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (plurality opinion) (*Edwards* was designed to protect accused suspects in custody from being coerced into giving a confession).
80. Minnick v. Mississippi, 498 U.S. 146, 166 (1990) (Scalia, J., dissenting).
81. *See* United States v. Mobley, 40 F.3d 688, 693 (4th Cir. 1994); United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989).
82. *See e.g.* People v. Storm, 52 P.3d 52, 62 (Cal. 2002) (collecting state and federal cases finding a break in custody to end the *Edwards* presumption).
83. *McNeil*, 501 U.S. at 177.
84. Arizona v. Roberson, 486 U.S. 675, 680-83 (1988).
85. *Id.* at 687-88.

with his or her attorney because subsequent attempts to interrogate are more likely to be subject to coercion.[86]

In summary, prophylactic rules are created by the Court to safeguard a constitutional protection.[87] There is inherent flexibility in a prophylactic rule because it is not a constitutional mandate, and for this reason such rules are subject to change.[88] The Court's treatment of the *Miranda* rule is an example of this flexibility because, since deciding *Miranda*, the Court has narrowed its scope and protections.[89] In *Edwards*, the Court enacted a "second layer of prophylaxis," to *Miranda* protections in attempt to make the constitutional safeguard easier to apply.[90] The *Edwards* prophylactic rule has also proven to be flexible, as evidenced by the changes the Court has made to this rule.[91]

III. EXPOSITION OF THE CASE

In *Maryland v. Shatzer*, the Supreme Court considered the issue of whether a break in custody ends the presumption established by *Edwards*.[92] In this case, the Court significantly narrowed the scope of *Edwards* and established a new, bright line prophylactic rule.[93] The Court held that the *Edwards* presumption lasts for only fourteen days following a break in *Miranda* custody.[94] Furthermore, the Court held that "lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*," and a break in custody can occur in the course of imprisonment.[95]

A. Facts and Procedural History

In August, 2003, Michael Shatzer was already incarcerated in a Maryland prison for a sexual abuse charge when allegations arose that he had also sexually abused his son.[96] A detective attempted to question Shatzer regarding these allegations at the correctional center in which Shatzer was housed on August 7, 2003.[97] At this time, Shatzer was advised

86. Minnick v. Mississippi, 498 U.S. 146, 153 (1990).
87. Grano, *supra* note 7, at 105.
88. Landsberg, *supra* note 8, at 963.
89. Klein, *supra* note 9, at 1039.
90. McNeil v. Wisconsin, 501 U.S. 171, 176 (1991).
91. *See, e.g.*, Arizona v. Roberson, 486 U.S. 675, 680-83 (1988).
92. Maryland v. Shatzer, 130 S. Ct. 1213, 1217 (2010).
93. *Id.* at 1223.
94. *Id.*
95. *Id.* at 1224.
96. *Id.* at 1217.
97. *Id.*

of his *Miranda* rights and he voluntarily signed a written waiver of those rights prior to questioning.[98] When the detective explained he was there to question Shatzer regarding allegations of sexual abuse of his son, Shatzer chose to invoke his right to counsel, terminating his written waiver.[99] The interview was immediately concluded and Shatzer was released back into the general prison population.[100] The investigation concerning the allegations of sexual abuse of Shatzer's son was closed soon after.[101]

Two and a half years later, police received additional information regarding the alleged incident of sexual abuse and a second detective attempted to interview Shatzer on March 2, 2006.[102] Shatzer was taken to a maintenance room with a desk and chairs, where the detective informed Shatzer of his reason for meeting with him.[103] The detective advised Shatzer of his *Miranda* rights prior to questioning and obtained from Shatzer a written waiver of *Miranda* rights.[104] After approximately thirty minutes of interrogation, Shatzer admitted several incriminating facts and agreed to submit to a polygraph examination.[105] At no point during the second interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without the presence of counsel.[106] Five days later, two detectives returned to the prison to administer the polygraph examination.[107] Shatzer was advised of his *Miranda* rights, and again a written waiver of those rights was obtained prior to administration of the polygraph examination.[108] At the conclusion of the polygraph examination, Shatzer was advised that he had failed.[109] At this time, Shatzer became upset, made some incriminating statements regarding sexual abuse of his son and requested an attorney, ending the interrogation session.[110]

Based upon his inculpatory statements, Shatzer was charged with various offenses, including sexual abuse of a child.[111] Prior to trial, Shatzer moved to suppress his statements pursuant to the *Edwards* rule,[112] which

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98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 1217-18.
103. *Id.* at 1218.
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

requires that when a defendant invokes a right to counsel, interrogation must cease until either counsel is present or a knowing relinquishment of that right is made.[113] The motion to suppress was denied by the trial court, on the basis that Shatzer's release into the general prison population following the first interrogation was a break in custody sufficient to terminate the invocation of his right to have counsel present during questioning.[114] Shatzer entered a plea of not guilty and waived his right to a jury trial.[115] A bench trial commenced based upon stipulated facts, including Shatzer's inculpatory statements, and Shazter was found guilty of sexual child abuse.[116]

The Court of Appeals of Maryland reversed the trial court's decision and remanded the case, holding that "the passage of time alone is insufficient to end the protections afforded by *Edwards"* and that Shatzer's return to the general prison population was not a break in custody.[117] The prosecution petitioned the Supreme Court for a writ of certiorari, which was granted to determine whether Shatzer's return to the general prison population following the initial interrogation constituted a break in custody sufficient to end the *Edwards* presumption.[118]

B. Majority Opinion

The Supreme Court reversed the judgment of the Court of Appeals of Maryland, agreeing with the trial court's finding that there was a break in custody, which terminated the *Edwards* presumption.[119] The Court held police may re-open questioning if there has been a fourteen day break in *Miranda* custody.[120] Additionally, the Court held that lawful imprisonment upon conviction of a crime can lead to a break in *Miranda* custody.[121]

The Supreme Court first explained that *Edwards* was not a constitutional mandate and the resulting rule was a "judicially created prophylaxis."[122] As a result, lower courts had come to recognize an exception to *Edwards* when a break in custody occurred before questioning resumed.[123] The Court reasoned that a different analysis must be applied

113. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).
114. *Shatzer*, 130 S. Ct. at 1218.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 1227.
120. *Id.* at 1223.
121. *Id.*
122. *Id.* at 1220.
123. *Id*.

when there is a break in custody before the subsequent interrogation takes place.[124] Next, the Court created a new, bright-line rule to determine whether a sufficient period had lapsed to constitute a break in custody sufficient for police to resume questioning.[125] The resulting rule stated that police were free to re-question a suspect after a fourteen-day break in custody.[126] The Court reasoned that confessions made after the passage of fourteen days are unlikely to be compelled by the custodial arrest and would be unreasonably excluded if *Edwards* was extended indefinitely.[127] To justify the rule, the Court stated that fourteen days is sufficient to provide "plenty of time for the suspect to get re-acclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody."[128] Additionally, the Court reasoned that in cases where defendants seek to invoke *Edwards*, it must be determined whether the suspect was in custody when the statements sought to be suppressed were made.[129] Under the new rule, courts would only need to "repeat the inquiry for the time between the initial invocation and re-interrogation."[130]

The second issue in this case required the Court to decide whether a break in custody for *Edwards* purposes could occur during the course of incarceration.[131] The Court held that because "lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*," a break occurred when Shatzer was returned to the general prison population.[132] In coming to this decision, the Court distinguished the case at bar from the *Miranda* paradigm because "sentenced prisoners … are not isolated with their accusers."[133] The Court also stated that in cases of incarcerated individuals, a return to the general prison population places them back into their normal way of life prior to the interrogation.[134]

C. Justice Thomas' Concurring Opinion

In *Shatzer*, Justice Thomas wrote a concurring opinion agreeing with the proposition that a limitation to *Edwards* should be found to exist when a

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124. *Id.* at 1223.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 1224.
132. *Id.*
133. *Id.*
134. *Id.*

break in custody occurs.[135] Justice Thomas did not, however, join the majority in its decision to establish fourteen days as the cut-off for *Edwards*'s protections.[136] Justice Thomas points out the majority's concession that the rule is prophylactic, then goes on to state that the fourteen-day limitation is not a prophylactic rule created within the guidelines for such rules established by the Court.[137] The Court failed to sufficiently explain why fourteen days is enough time for the coercive pressures of custodial interrogation to dissipate, and also did not explain how the benefits to the prophylactic rule outweigh its costs.[138]

Additionally, Justice Thomas points out that "bright line rules are not necessary to prevent Fifth Amendment violations … [and that] an otherwise arbitrary rule is not justified merely because it gives clear instruction to law enforcement officers."[139] Because the Court's fourteen-day rule failed to meet the criteria for prophylactic rules set forth in the Court's precedents, Justice Thomas reasoned that he could not join the majority opinion.[140]

D. Justice Stevens' Concurring Opinion

Justice Stevens also wrote a concurring opinion in *Shatzer* to express his frustration with the Court's choice to adopt the fourteen-day limitation.[141] Justice Stevens reasoned that the majority disregarded the significant issues underlying the *Edwards* case and its progeny.[142] The issue regarding a heightened degree of coercion that can take place when the indigent suspect has not been provided with counsel after he or she has made such a request was particularly disregarded by the majority.[143] Stevens points out that fourteen days following *Miranda* custody is not enough to take away the compelling nature of a second custodial interrogation.[144]

The majority's position was criticized for being completely arbitrary because no sound reason was given to justify the application of the fourteen-day limitation, which was based on mere speculation.[145] In recognizing issues with this rule, Stevens stated "the Court gives no reason

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135. *Shatzer*, 130 S. Ct. at 1227 (Thomas, J., concurring).
136. *Id.*
137. *Id.*
138. *Id.* at 1228.
139. *Id.*
140. *Id.*
141. *Id.* at 1228 (Stevens, J., concurring).
142. *Id.* at 1229.
143. *Id.* at 1229 n.2.
144. *Id.* at 1231.
145. *Id.* at 1231 n.4.

for that speculation, which may well prove inaccurate in many circumstances."[146] The speculation relied upon by the majority is based upon a factual question which would best be determined on a case-by-case basis rather than with a bright-line rule.[147] Finally, Stevens criticized the rule by astutely noting "[n]either a break in custody nor the passage of time has an inherent, curative power."[148] While recognizing that some pressures may dissipate with the progression of time, Stevens noted that such a fact-based determination makes it "impossible to determine with precision where to draw the line."[149]

IV. ANALYSIS

The Court's decision in *Shatzer* to place a limitation on the *Edwards* rule was appropriate. The bright-line rule imposed by the Court, however, is more troubling because of its status as a new prophylactic rule. Part A of this section discusses why a portion of the Court's reasoning and holding was accurately decided. Part B questions the Court's choice to establish a bright line period of fourteen days to gauge whether the *Edwards* presumption has ended. Part C goes on to discuss possible exceptions to the *Shatzer* rule that may arise in the future. Finally, Part D discusses the possibility of using the fourteen-day prophylactic rule as a rebuttable presumption to increase its utility.

A. The Court's Decision to Limit *Edwards* was Proper

The Court was correct in reversing the Court of Appeals of Maryland. It makes little sense that the *Edwards* presumption of involuntariness could last indefinitely. The facts giving rise to *Shatzer* are a prime example of the problems of an indefinite application of *Edwards*. Two years following a suspect's invocation of his or her *Miranda* rights is a very long time for law enforcement to keep track of the suspect's assertion. Law enforcement personnel could easily come and go within police departments and case assignments may change, making it quite possible for a good faith mistake to occur. In this case, it appears as though the second detective to question Shatzer was completely unaware Shatzer had invoked his rights during the first interrogation performed two and a half years before, though this fact is not explicitly stated.[150]

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146. *Id.*
147. *Id.* at 1232.
148. *Id.* at 1234.
149. *Id.* (internal citations omitted).
150. *Id.* at 1218.

Also, the problems stemming from an indefinite extension of *Edwards* are especially pronounced when the suspect is questioned about different crimes or by different law enforcement agencies. It is possible that an individual in custody could be suspected of multiple crimes. If different police departments—or even different divisions within the same department—are investigating separate crimes, the application of *Edwards* becomes confounded. If a person suspected of multiple crimes invokes his or her *Miranda* rights regarding one crime and is released from custody, days later he or she could be taken into custody to be questioned about a different crime. If the *Edwards* presumption is to extend indefinitely, it would serve to render involuntary any statement given by the suspect regarding the second case. This is true even if that suspect knowingly and willingly waived his or her *Miranda* rights with regard to the second crime. Such an application would bar the use of an otherwise appropriate statement or confession. Justice requires a different result, and the Supreme Court was absolutely correct when it held that the *Edwards* presumption of involuntariness could end when there is a break in custody.

In formulating its opinion, the Court relied heavily upon *Edwards*' status as a prophylactic rule to justify its limitation of the rule's scope.[151] A benefit of prophylactic rules is that they can be easily changed by the Court when they have proven to be unrealistic in practice.[152] Indeed, leading up to this decision, lower courts had consistently held that a break in *Miranda* custody could terminate the *Edwards* presumption of involuntariness in custodial interrogations.[153] This is significant because it demonstrates that lower courts had recognized the flaws of indefinitely extending *Edwards* and had started to create an exception to the rule. The reasoning behind these lower court decisions and the Court's holding limiting *Edwards* is justified.

Additionally, the Court was correct to recognize that there can be an end to the *Edwards* limitation because the coercive pressures *Miranda* and *Edwards* are designed to protect will likely disappear with the passage of time.[154] This case is distinguishable from *Miranda* and *Edwards* because, in those cases, the suspects remained in custody for the duration of the questioning and were not allowed to return to their normal lives free from the coercive pressures inherent in custodial interrogations. The Court stated, "[t]he only logical endpoint of *Edwards* disability is termination of

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151. *Id.* at 1220.

152. Landsberg, *supra* note 8, at 974 (If original prophylactic rule was based upon assumptions, changed assumptions may necessitate a change in the rule).

153. *Shatzer*, 130 S. Ct. at 1220.

154. *Id.* at 1221.

Miranda custody and any of its lingering effects."[155] This is a correct observation because it is unnecessary to extend a second layer of protection to situations in which the evils sought to be cured by the primary prophylactic rule have dissipated. A change in the *Edwards* prophylactic rule was warranted to accommodate situations where there is a break in *Miranda* custody.

Also, the Court's finding that a break in Miranda custody occurs when an incarcerated individual is released back into the general prison population after custodial questioning is correct. It is correct because once an incarcerated suspect is released from custodial interrogation, the coercive pressures do not follow him or her back into the normal way of life. An incarcerated individual, like Shatzer, lives daily inside the general prison population of a correctional facility. His or her life is comprised of various institutional routines, similar to the lives of those who are not incarcerated. Incarceration, in and of itself, does not create the coercive pressures *Miranda* and *Edwards* were designed to alleviate. Incarcerated individuals are not isolated with their accusers as was the case for the suspects in *Miranda* and *Edwards*. There is little reason to believe the coercive pressures of custodial interrogation follow an incarcerated individual back into the general prison population any more than the pressures follow a free citizen back to his or her normal life after they are released from custody. This proposition was so persuasive that it commanded agreement by all nine of the justices.[156]

B. The Court's Fourteen Day Rule is Questionable

The bright-line, fourteen-day limitation the Court placed on *Edwards* was improperly decided. The Court's decision to impose a bright-line rule is both arbitrary and unwarranted. This limitation is arbitrary because there is no real justification for this particular time limit and it is unfounded in logic.[157] Justice Thomas accurately describes the majority's fourteen-day limitation as an *ipse dixit*.[158] According to the majority, fourteen days is sufficient for the coercive pressures of custodial interrogation to disappear because it says so. This rule is unwarranted because a time-specific rule is not necessary to find an endpoint to *Edwards'* protections. Also, such a

155. *Id.* at 1222.
156. *Id.* at 1227 (Thomas, J., concurring); *Id.* at 1228 (Stevens, J., concurring).
157. *See id.* at 1227-28 (Thomas, J., concurring).
158. *Id.* at 1228. Translated literally, *ipse dixit* means "he himself said it." In law, it is an evidentiary term used to describe "something asserted but not proved." BLACK'S LAW DICTIONARY 905 (9th ed. 2009).

bright-line rule fails to take into account various circumstances that might yield to the need for exceptions in the future.

In Justice Thomas' concurring opinion, he argued that the majority's fourteen-day rule was completely arbitrary and did not meet the requirements for judicially created prophylactic rules set forth by the Court.[159] Questions remain as to whether the fourteen-day rule created to limit *Edwards* is a prophylactic rule that demonstrates "the closest possible fit" between the rule and the Fifth Amendment interests sought to be protected.[160] A prophylactic rule must be the "closest possible fit" between the constitutional provision it aims to protect and the method chosen to protect it.[161] Justice Thomas' proposition is most likely correct because there is nothing inherent in the passage of fourteen days' time that will surely remedy the coercive pressures toward self-incrimination prohibited by the Fifth Amendment. Also, a prophylactic rule is only justified when its benefits outweigh its costs.[162] There is no question that the bright-line rule established by the majority will provide law enforcement with a clear guideline as to when it is acceptable to re-interrogate a suspect after he or she has been released from custody. As Justice Thomas appropriately points out, however, "bright-line rules are not necessary to prevent Fifth Amendment violations."[163] Furthermore, this benefit does not outweigh the detriment created by this rule: the exclusion of voluntary confessions. As discussed above, fourteen days may be more than enough time for the coercive pressures of custody to dissolve and a voluntary confession made before the expiration of fourteen days may be unnecessarily excluded.

C. There Could be Exceptions to the Fourteen Day Rule in the Future

Because the rule established in *Shatzer* has the status of a prophylactic rule and is not a constitutional mandate, exceptions to the rule may arise in the future. If a prophylactic rule is "justified only by reference to its prophylactic purpose,"[164] the benefit of the rule may well be outweighed by the number of voluntary confessions it excludes. The majority opinion suggests certain circumstances would change its analysis, such as a good faith mistake by interrogators unaware of a suspect's invocation of rights or when suspects are held in a more physically restrictive confinement because

159. *Shatzer*, 130 S. Ct. at 1227-28.
160. *See* United States v. Patane, 542 U.S. 630, 641 (2004) (plurality opinion).
161. *Id.* at 640-41.
162. Montejo v. Louisana, 129 S. Ct. 2079, 2098 (2009).
163. *Shatzer*, 130 S. Ct. at 1228 (Thomas, J., concurring).
164. Davis v. United States, 512 U.S. 452, 458 (1994).

of interrogation.[165] The reasoning the Court relied upon in *Shatzer* to limit the *Edwards* rule may be applied to its rule as well. If a fourteen-day limitation proves to be unworkable or inefficient, it may become necessary to establish certain exceptions to the rule.[166]

Certain exceptions to *Miranda* may also be justified exceptions to *Shatzer* as well. The discussion of some hypothetical situations may be useful in demonstrating this proposition. Imagine the police interrogate an individual in custody about a burglary then later release the suspect. Two days later there is reason to believe the same suspect has kidnapped a young child. Can the police circumvent the *Shatzer* limitation to interrogate the suspect in an effort to save the life of the victim? The "rescue doctrine" some courts have applied to *Miranda* may also be necessary in this context as well. Again, the benefit of a prophylactic rule must be balanced with its detriments. The potential to save a life may very well justify departure from the fourteen-day limitation; therefore, police should be allowed to continue questioning in an attempt to save a life.

Along this same line, if there is sufficient evidence to indicate a suspect has planted a high-powered explosive in a densely populated area and there is a large likelihood that many innocent people will be killed, would the police be precluded from continuing to interrogate the suspect after he has asserted his right to counsel? The answer to this question involves another *Miranda* exception: the public safety exception.[167] Following the reasoning used to establish this exception to Miranda, it makes sense that police should be able to continue questioning an individual in order to ensure the public is safe from harm.[168] The interest of public safety is greater than the benefit of a prophylactic rule, and an exception could be created for these situations as well. Should a good faith exception apply to the public safety exception as well? The reasoning behind the good faith and the public safety exceptions could easily be combined to determine that it is necessary to permit police questioning when an officer believes in good faith that the suspect knows something that can stop a threat to public safety. This is especially true in instances of domestic or foreign terror, such as in the bomb hypothetical posed above.

Turning to a potential exception suggested by the majority in *Shatzer*, would fourteen days be enough for an incarcerated individual to shake off the coercive pressures if he or she was placed in a higher level of security,

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165. *Shatzer*, 130 S. Ct. at 1222 (possibly suggesting a willingness to recognize a good faith exception); *Id*. at 1225 (distinguishing release into general prison population from a situation in which suspect was placed in a higher level of custody or subjected to continuing restraints as a result of custodial interrogation).

166. Landsberg, *supra* note 8, at 974.

167. *See* New York v. Quarles, 467 U.S. 649, 655-56 (1984).

168. *Id.*

or if ongoing restraints were used because of the custodial interrogation? The majority suggests that the reasoning in finding a break in custody can occur during the course of incarceration would change if these circumstances were present.[169] Such continued incarceration would presumably be insufficient to constitute a break in *Miranda* custody for *Edwards* purposes and would therefore justify a departure from the fourteen-day rule.

If the decision in this case depends upon a certain number of days to lapse prior to re-questioning, questions can, and probably will, arise concerning the calculation of the fourteen day period. If an officer inadvertently, but in good faith, miscalculates the number of days elapsed since a custodial interrogation of a suspect and initiates a second interview, in which the suspect subsequently waives his rights knowingly and voluntarily and confesses, should the confession be excluded? The answer to this question should be no. The majority did touch upon this issue in its opinion, but did not expressly address it.[170] This question is analogous to the reasoning applied to the good faith exception to the Fourth Amendment exclusionary rule,[171] which permits the admission of evidence obtained in violation of the Fourth Amendment provided that the evidence sought to be suppressed was obtained in good faith reliance that the search and seizure were constitutional. If an officer believes that the appropriate number of days have passed and in good faith obtains a voluntary confession, that confession should not be excluded.

D. The Fourteen-Day *Shatzer* Limitation as a Rebuttable Presumption

Because the fourteen-day rule articulated in *Shatzer* has the status of a prophylactic rule, there is the potential that it could be altered.[172] In Professor Grano's critique of prophylactic rules, he indicated that allowing federal courts "to promulgate certain rebuttable presumptions in state cases while denying them the authority to create conclusive presumptions" would be a more legitimate approach to rulemaking.[173]

Professor Grano's proposition is appealing because it would allow federal courts to set guidelines to determine whether a constitutional violation has occurred without overprotecting the constitutional right. Such guidelines would be helpful to law enforcement agencies because it provides a clear idea as to when re-interrogation may occur. The law in the

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169. *Shatzer*, 130 S. Ct. at 1225.
170. *Id.* at 1222.
171. United States v. Leon, 468 U.S. 897, 909 (1984).
172. Landsberg, *supra* note 8, at 974.
173. Grano, *supra* note 7, at 147.

criminal context can turn on minute, fact-based details. A rebuttable presumption would allow the facts surrounding a second custodial interrogation to be analyzed to determine whether any statement taken was, in fact, voluntary. Such an approach would help to increase the utility of the *Shatzer* prophylactic rule because it would decrease the number of voluntary confessions unnecessarily excluded, while also providing law enforcement and courts with a guideline to use in determining whether enough time has passed to dissolve the coercive pressures of custodial interrogation.

V. CONCLUSION

The Court was correct to hold that the *Edwards* presumption of involuntariness in the setting of custodial interrogation should not last indefinitely. The facts that gave rise to *Shatzer* demonstrate the problems with such an interpretation of the *Edwards* rule. The fourteen-day limitation created by the Court, however, is not justified. The arbitrary assignment of fourteen days is not the "closest possible fit" to the Self-Incrimination Clause of the Fifth Amendment, and therefore, is not an appropriate prophylactic rule. There are many potential situations that could warrant departure from this bright line rule. Instead of applying a strict fourteen-day limit, the use of fourteen days as a rebuttable presumption is preferable. Such practice would afford courts the flexibility needed in adjudicating factually diverse self-incrimination cases, as well as provide law enforcement with a standard to promote compliance with the constitutional rights of criminal suspects.