IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Respondent on Review, v. ROBERT DARNELL BOYD, Defendant-Appellant Petitioner on Review.	Lane County Circuit Court Case No. 201026332 CA A151157 SC S063260

PETITIONER'S REPLY BRIEF ON THE MERITS

Review of the Decision of the Court of Appeals
on Appeal from a Judgment of the Circuit Court for Multnomah County
Honorable Lauren S. Holland, Judge

Opinion Filed: March 25, 2015
Author of Opinion: Egan, J.
Before: Armstrong, Presiding Judge, and Nakamoto, Judge, and Egan, Judge

ERNEST G. LANNET #013248
Chief Defender
Criminal Appellate Section
LAURA A. FRIKERT #990503
Deputy Public Defender
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301
Laura.Frikert@opds.state.or.us
Phone: (503) 378-3349
Attorneys for Petitioner on Review

ELLEN F. ROSENBLUM #753239
Attorney General
PAUL L. SMITH #001870
Deputy Solicitor General
REBECCA M. AUTEN #083710
Assistant Attorney General
400 Justice Building
1162 Court Street NE
Salem, OR 97301
rebecca.m.auten@doj.state.or.us
Phone: (503) 378-4402
Attorneys for Respondent on Review

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Argument

The decision in *Miranda v. Arizona*, 384 US 437, 86 S Ct 1602, 16 L Ed 2d 694 (1966), is one of the greatest judicial efforts to protect suspects from conditions that can produce involuntary and unreliable confessions.[1] Although the *Miranda* Court discussed the use of trickery and deception in interrogations, it did not prohibit those deceptive tactics. *Miranda*, 384 US at 446-456. Instead, the court empowered suspects with rights that could be used to halt an interrogation.

Miranda requires that the police inform a suspect that he has the right to an attorney before and during questioning and that an attorney will be provided if the suspect cannot afford one.

In *Edwards v. Arizona*, 451 US 477, 101 S Ct 1880, 68 L Ed 2d 378 (1981), the Court held that when a suspect has invoked the right to counsel during custodial interrogation, courts may not infer a waiver of that right when the suspect subsequently responds to police-initiated interrogation. No subsequent interrogation of the suspect in the absence of counsel is permitted

[1] False convictions were a significant contributing factor in 88 of the 325 convictions that have been overturned by DNA evidence. *See* The Innocence Project at the Benjamin N. Cardozo School of Law at Yeshiva University; http://www.innocenceproject.org/causes-wrongful-conviction (retrieved December 12, 2015).

unless the suspect himself initiates the conversation with the police and affirmatively waives his *Miranda* rights. Thus, application of the rule in *Edwards* turns on the application of the concepts of "initiation" and "interrogation." If a suspect initiates communication after having invoked his right to counsel, the *Edwards* rule does not apply and the police may obtain a valid *Miranda* waiver. Conversely, if the police initiate an interrogation, the *Edwards* rule applies and precludes obtaining a valid waiver of counsel.

The state argues in the alternative that (1) Sergeant Lewis did not interrogate defendant; (2) even if Lewis interrogated defendant, Lewis did not initiate the interrogation; or (3) even if Lewis interrogated defendant in violation of *Edwards*, that violation does not render defendant's statements to Detective Meyers inadmissible, because defendant initiated the interrogation with Meyers. The state is wrong on all accounts.

I. Lewis interrogated defendant.

Applying the definition in *Rhode Island v. Innis*, 446 US 291, 100 S Ct 1682, 64 L Ed 2d 297 (1980), the state asserts that Lewis's questions were not "interrogation" because his questions were not reasonably likely to elicit a response that the prosecution may seek to introduce at trial. *See* Respondent's Brief on the Merits ("RespBOM") at 14-18. The state construes *Innis* too narrowly and ignores Lewis's expertise and role in the investigation.

> "The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly, for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'"

Miranda, 384 US at 476-477.

In *Pennsylvania v. Muniz*, 496 US 582, 110 S Ct 2638, 110 L Ed 2d 528 (1990), the defendant was arrested for driving under the influence of alcohol. Without giving any *Miranda* warnings, a police officer asked the defendant if he knew the date of his sixth birthday. Even though the police had no obvious investigatory interest in the actual date of the defendant's birthday, the Court concluded that the question constituted interrogation[2] and that the defendant's answer was incriminating. The Court explained: "the trier of fact could infer from [the defendant's] answer (that he did not know the proper date) that his mental state was confused." *Id.* at 593.

Here, the state had an investigatory interest in whether defendant remembered that was dead. As in *Muniz*, defendant's mental faculties were an issue of investigatory import to the police—not only because defendant had put his mental functioning at issue, but because defendant's mental state impacted his level of culpability. Lewis interrogated defendant as to his mental functioning when he asked him whether he was asking to call

[2] The state did not challenge the lower court's conclusion that the sixth birthday question constituted an unwarned interrogation. *Id.* at 600.

and whether he remembered that he had been told he had been arrested for causing death.

The state's brief underplays Lewis's role in this investigation by characterizing his inquiries as "clarifying questions" in response to being "genuinely" or "understandably confused." ResBOM at 16-17. But Lewis was an officer with 28 years of experience, 19 as a detective. Tr 112-13. He had watched defendant react emotionally when he was arrested and advised of death. He had visited the homicide scene and been briefed by other officers before he visited defendant in his jail cell. Whether Lewis shrewdly or guilelessly turned the tables on defendant by answering his questions with questions, his questions to defendant constituted an interrogation because they were likely to—and in fact did—provide law enforcement with information about defendant's mental state—the only issue that required any further investigation.

The state also argues that "Lewis's questions did not constitute interrogation merely because they were questions." RespBOM at 18-23 (arguing that the *Innis* "reasonably likely to elicit an incriminating response" test should apply to direct questioning that occurs apart from a formal, inherently coercive, interrogation). The state acknowledges that *Innis* defines interrogation disjunctively as either questioning or its functional equivalent. But it asserts that the Court's subsequent cases suggest that *not* all direct

questioning constitutes interrogation. ResBOM at 21. Defendant agrees that the Court's subsequent case law carves out exceptions to the scope of *Miranda*'s application for direct questioning in specific contexts. Defendant disagrees that those cases abrogate *Innis*'s distinction between express, or direct, questioning and its functional equivalent.

As a starting point, *Muniz* makes clear that direct questioning that occurs in the booking process implicates *Miranda*. *Muniz* creates an exception to *Miranda* for routine booking questions—so long as those questions are not likely to call for an incriminating response. *See* Petitioner's Brief on the Merits ("PetBOM") at 32-34. That the Court referenced the *Innis* test when circumscribing the questions allowed in the booking context does not mean that the *Innis* test applies to all direct questioning. In fact, the holding in *Muniz* indicates the opposite. If *Innis* applied to all direct questioning, there would be no basis for the "routine booking questions" exception as it is stated in *Muniz*.

In addition to the routine booking questions exception, the Court created a public safety exception to *Miranda*'s requirements. *See New York v. Quarles*, 467 US 649, 657, 104 S Ct 2626, 81 L Ed 2d 550 (1984). That exception permits law enforcement to question a suspect directly when the limitations in *Miranda* would otherwise apply, under circumstances where it is necessary for the police "to secure their own safety or the safety of the public." *Id.* at 659. In such a case, the suspect's responses—whether or not the questions were

likely to call for an incriminating response—can be used at trial, even though the suspect was not advised of their rights under *Miranda* prior to questioning. *Id.*

And in *Oregon v. Bradshaw*, 462 US 1039, 1039, 103 S Ct 2830, 2831, 77 L Ed 2d 405 (1983), the court indicated that direct questioning by the police, relating to the routine incidents of the custodial relationship, is not police-initiated interrogation. "Such inquiries or statements, *by either an accused or a police officer*, relating to routine incidents of the custodial relationship, will not generally 'initiate' a conversation in the sense in which that word was used in *Edwards*." *Id.* at 1045.

In short, under *Miranda* and its progeny, the police may not directly question a suspect who has asserted his rights under *Miranda* outside of the booking process except about routine incidents of custody or to address a pressing safety concern. Because Lewis's questions do not fall under any of those exceptions, this court should hold that Lewis interrogated defendant when he asked him if wanted to call the victim of the homicide and when he asked him if he remembered the substance of an earlier police interrogation.

II. Lewis initiated the interrogation.

The state argues that even assuming Lewis's questions were interrogation, that questioning did not run afoul of *Edwards* because Lewis did not initiate the questioning, but merely questioned defendant in response to his

questions. RespBOM at 24-26. In advancing that argument, the state supplants the initiation test in *Bradshaw* with a dictionary definition of the word "initiate." But the *Bradshaw* Court plainly held that it is not who speaks first that is the dispositive inquiry. *Bradshaw*, 462 US at 1045-46. An initiation occurs when a suspect "evince[s] a willingness and a desire for a generalized discussion about the investigation." *Id*. On the other hand, questions relating to routine incidence of the custodial relationship, do not qualify as an initiation. *Id.* at 1045.

Moreover, the state did not argue that defendant's questions to Lewis constituted an initiation under *Bradshaw* or make any argument that the Court of Appeals' decision on this issue was erroneous. *See State v. Boyd*, 270 Or App 41, 47, 346 P3d 626 (2015) (holding that defendant's questions did not demonstrate a desire for a generalized discussion about the investigation); PetBOM at 22-29.[3] The state also did not argue that Lewis's questions only "related to routine incidents of the custodial relationship" and were not an initiation under *Bradshaw*. For those reasons, the state's argument fails.

[3] *See also* ORS 133.235, which provides that an officer "shall inform the person to be arrested of the officer's authority and reason for the arrest * * * as soon as practicable," and supports defendant's argument that asking an officer about the charges is a routine inquiry.

III. Defendant did not initiate the interrogation with Meyers.

As its last stand, the state asserts that Lewis's violation of defendant's rights did not "induce" defendant to initiate communication with Meyers. RespBOM at 27-31. But a waiver of an expressed right to counsel "cannot be established by showing only that [a defendant] responded to further police-initiated custodial interrogation even if he has been advised of his rights." *Edwards*, 451 US at 484. In this case, defendant responded to further police-initiated custodial interrogation when Lewis questioned him. One of his responses was a request to speak to Meyers. That request is not an initiation; it was made *during* Lewis's unlawful interrogation.

State v. Acrement, 338 Or 302, 108 P3d 1139 (2005), on which the state relies, is distinguishable. In *Acrement*, the defendant invoked his right to counsel during the course of a custodial interrogation. *Id.* at 318. The police violated the defendant's right to counsel by continuing to question him for 13 minutes. Then police handcuffed the defendant and left him alone in the interview room. One hour later, the defendant knocked on the door to summon an officer and requested to speak with the detectives. The defendant "acknowledged that he initiated the subsequent police contact" but argued that it was "induced" by the officers failures to provide him with counsel. *Id.* at 322. This court held that the defendant's initiation was valid because it was done without police prompting. *Id.* at 323.

Here, unlike in *Acrement*, there was no break in time between the unlawful interrogation and defendant's request to speak with Meyers. Further, unlike in *Acrement*, defendant is not arguing that his request to speak to Meyers was caused by or derived from Lewis's violation of his rights. Rather, defendant argues that his request to speak with Meyers was not an initiation because it was offered in response to further police questioning. In that way, defendant asserts a direct violation of the rule in *Edwards*.

In *United States v. Gomez*, 927 F2d 1530 (11th Cir 1991), the Eleventh Circuit held that where only a few minutes had elapsed between unlawful interrogation and the defendant's renewed contact with a different officer, such contact did not constitute 'initiation' under *Edwards*. The court explained: "the validity of [a defendant's waiver of his *Miranda* rights] logically depends on the accused being free from further interrogation. In other words, the 'initiation' must come prior to the further interrogation." *See also, Hill v. Brigano*, 199 F3d 833, 842 (6th Cir 1999) (passage of time of approximately 12 hours was sufficient to find a defendant's initiation valid).

IV. Defendant's statements to Meyers were obtained in violation of the rule in *Edwards*.

The premise that underlies *Edwards* is that when a custodial suspect invokes his right to counsel, he expresses his belief that he is incapable of undergoing police questioning without legal assistance. 451 US at 484. From

that premise, the *Edwards* Court drew a conclusive presumption that after a defendant requests assistance of counsel, a valid wavier of that right may not occur in response to police-initiated custodial interrogation. Here, defendant's questions to Lewis were not an initiation because they related to the routine incidents of custody. On the other hand, Lewis's questions initiated an interrogation either because they were direct questions that were unrelated to the incidence of custody or because they were questions that were reasonably likely to elicit an incriminating response. Defendant's request to speak with Meyers was not a valid initiation because it occurred during Lewis's interrogation.

CONCLUSION

Defendant requests that this court order the suppression of defendant's statements to Meyers, reverse the Court of Appeals' decision on the issue of interrogation, and remand to the trial court for further proceeding

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

LAURA A. FRIKERT OSB #990503
DEPUTY PUBLIC DEFENDER
Laura.Frikert@opds.state.or.us

Attorneys for Defendant-Appellant
Robert Darnell Boyd

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,205 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Petitioner's Reply Brief on the Merits to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on December 17, 2015.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Petitioner's Reply Brief on the Merits will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Paul L. Smith, #001870, Deputy Solicitor General, attorney for Plaintiff-Respondent.

Respectfully submitted,

ERNEST G. LANNET
CHIEF DEFENDER
CRIMINIAL APPELLATE SECTION
OFFICE OF PUBLIC DEFENSE SERVICES

ESigned

_____

LAURA A. FRIKERT OSB #990503
DEPUTY PUBLIC DEFENDER
Laura.Frikert@opds.state.or.us

Attorneys for Defendant-Appellant
Robert Darnell Boyd