

No. _____

In The
Supreme Court of the United States

BRIAN FAYNE,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The police must immediately cease questioning a suspect who invokes his right to counsel. *Edwards v. Arizona*, 451 U.S. 477 (1981). The State conceded at every stage of the proceedings that Petitioner Fayne unequivocally invoked his right to counsel and that the police continued to interrogate him for approximately ninety minutes in violation of *Edwards*. Seconds after police left the room, Fayne knocked on the door and indicated that he was willing to talk to the investigators, leading to incriminating statements. The Supreme Court of Virginia held that *Edwards* only requires that the questioning cease, and that the failure to honor Fayne's invocation was not relevant to the analysis as to whether the interrogation ultimately ceased. The court did not inquire as to whether the reinitiation was the result of the violation.

The Question Presented is:

Whether, after police continue interrogating a suspect in violation of *Edwards v. Arizona* despite his unequivocal invocation of counsel, the State may rely solely on the suspect's subsequent reinitiation of communication to admit his statements, or whether the Fifth Amendment requires the State to establish that the suspect's reinitiation and subsequent waiver were not the product of the unlawful interrogation.

PROCEEDINGS BELOW

- I. Commonwealth v. Fayne, Case No. CR21000769 (Hampton Circuit Court, Sept. 18, 2023)
- II. Fayne v. Commonwealth, 83 Va. App. 686, 911 S.E.2d 842 (2025)
- III. Commonwealth v. Fayne, 928 S.E.2d 406 (Va. 2026)

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Petitioner Brian Fayne respectfully petitions for a writ of *certiorari* to review the judgment of the Supreme Court of Virginia.

OPINIONS BELOW

The published opinion of the Virginia Supreme Court is at *Commonwealth v. Fayne*, 928 S.E.2d 406 (Va. 2026). The opinion of the Court of Appeals is at *Fayne v. Commonwealth*, 83 Va. App. 686, 911 S.E.2d 842 (2025). The opinion of the Hampton Circuit Court was issued from the bench and is not reported, but the transcript of the ruling is reprinted at App. 29.

JURISDICTION

On April 23rd, 2026, the Supreme Court of Virginia entered an order overturning the Virginia Court of Appeals and reinstating Fayne’s conviction. On May 27, 2026 the Virginia Supreme Court entered a final order denying Fayne’s petition for a rehearing. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION

United States Constitution, Amendment V, in relevant part: “No person ... shall be compelled in any criminal case to be a witness against himself ...”

INTRODUCTION

This case presents an important question left unresolved this Court’s long history of ensuring accused’s rights under the Fifth Amendment are protected: whether an accused can voluntarily reinitiate questioning when that purported reinitiation is the product of a prolonged and egregious *Edwards* violation. *Edwards*

v. Arizona. 451 U.S. 477 (1981). The holdings and spirit of this Court's holdings protecting an accused's rights under the Fifth Amendment dictate that the police cannot create the very "reinitiation" required to resume interrogation by continuing the interrogation that *Edwards v. Arizona* forbids. Yet, that is exactly what happened to Fayne and what was approved by the Virginia Supreme Court, which held that investigators leaving the room an hour and a half after the illegal interrogation began qualified as a "cease" in the interrogation, and no further inquiry or analysis was required beyond finding who reinitiated the conversation; the *Edwards* violation had no impact.

On December 18, 2020, Brian Fayne was detained as a suspect in a homicide in the city of Hampton, Virginia before being advised of his rights and interrogated. Fayne made a clear and unambiguous invocation of his right to counsel. Nonetheless, the detectives ignored it and continued to interrogate him. The ensuing *Edwards* violation was neither slight nor inadvertent. Instead, for over seventy-five minutes the detectives egregiously pressure, berate, coerce, and otherwise employ every interrogation tactic they could to try and secure a confession from him. They told him they *knew* he wanted to make a statement, that he would sleep better if he did, and that this was his only opportunity. They tell him that a lawyer will make things difficult for him to talk to the detectives, that lawyers might not want him to talk, and that this would be his last opportunity to talk face-to-face if a lawyer was involved.

They ask him to stand up, tell him to breathe, and then corner him as they continue to try and get him to talk. Fayne—upset and overwhelmed—says that he thought he could just make one statement with his attorney there along with the prosecutor. They tell him that’s not going to happen.

Finally, after nearly an hour and a half *after* Fayne invoked his right to an attorney, they give up and leave the room, telling him that there is nothing more they can do for him. Twenty seconds later, Fayne taps on the door and asks to speak to the other detective. The Virginia Supreme Court found this to be a voluntary reinitiation.

In overturning the Virginia Court of Appeals and reinstating Fayne’s conviction, the Supreme Court of Virginia wrongfully applied this Court’s holdings in *Edwards* and its progeny, and explicitly held that questioning must only “cease” without regard to *when* that cessation actually occurs or whether there was a violation of rights prior to the cessation. The Supreme Court of Virginia ignored the prolonged, flagrant violation of Fayne’s rights under *Miranda*, and erroneously found this reinitiation to be voluntary. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Since *Edwards*, this Court has not ruled on whether a reinitiation can be voluntary if it occurs only after a significant and prolonged violation of the rule. The staggering opinion by the Virginia Supreme Court completely ignores the impact of an *Edwards* violation on the voluntariness or willfulness of an alleged reinitiation, and completely ignores the impact of an *Edwards* violation on a subsequent waiver. It transforms the Court’s requirement that an invocation be honored and questioning must immediately cease, in to a requirement that simply looks to see if

there is ever a gap in the interrogation. Furthermore, Virginia’s decision conflicts with federal appellate decisions and the state supreme court of every state that has taken up the issue. Therefore, review is warranted by this Court.

STATEMENT OF THE CASE

I. Factual History

The facts of the case are not in dispute. Fayne was taken into custody on December 21st, 2020 pursuant to a homicide investigation in the city of Hampton. Detective Daniel Smith transported Fayne to the Hampton Police Division Investigations interview room, where the subsequent interrogation was video and audio recorded. Detective Smith advised Fayne of his rights under *Miranda*, and Fayne acknowledged he understood those rights. Fayne initially agreed to speak with Detective Smith and the other detective in the room.

Throughout the interrogation, Fayne told Detective Smith on multiple occasions that he was interested in giving a statement but that he would prefer an attorney to be present when he did so. Detective Smith told Fayne that this would be his one and only opportunity to the police, as he believed—based on his training and experience—that an attorney would not allow him to make a statement with him. Fayne stated that he wanted to make one, single statement in the presence of his lawyer and the Commonwealth’s Attorney.

At approximately four hours into the interrogation, Fayne emphatically states

“I feel like this is a waste of your time, my time or money towards a lawyer. *That is why I strongly request him here.* I hate to do this in front, but before I give a statement, I’m going to give, even before talking him to him, I just want him.”

The Commonwealth of Virginia conceded that this was an invocation of his right to an attorney. Detective Smith, on the recording, replied “That’s your choice.” At the suppression hearing, however, Detective Smith testified that he asked questions to clarify what Fayne meant. The recording made it clear that this testimony was untrue, and no such questions were ever actually asked. In fact, Detective Smith previously failed to honor a suspect’s invocation of a right to an attorney and previously lied to the Hampton Commonwealth’s Attorney about this fact. Such information was included in a *Brady* disclosure to Fayne’s counsel.

After the invocation, the police did not end the interrogation. Instead, the detectives continued interrogating him for over 75 more minutes. Less than a minute after the invocation, Detective Smith tells Fayne:

“I know you want to make a statement ... I get it. I completely understand. My only—let me just. Let me say my peace on that. That is your right. You can tell me at anytime you want one. The fact is, after we leave this room, I don’t know what’s going to happen. After we walk out of here, after you go next door, I can’t promise you that a defense attorney will want to talk to me for even a second.”

Detective Smith then continues the interrogation, explicitly trying to talk Fayne out of invoking rather than honoring his invocation, saying: “That’s the problem. I know you want to make a statement. *I think it would be good for your mental health for you to make a statement. I think you would sleep better if you made a statement.*”

Detective Smith then tells Fayne:

“I know you want it. I think you need it personally, but at the end of the day that defense attorney can do whatever the hell they want.

Money or not, your request or not. ... You're not going to have a direct line to me. I can give you my number, and you can call me, but" that his father could shred his business card if an attorney was hired.

Afterward, the detectives tell Fayne¹:

- "This might be the last time you and I have a face to face like this"
- "You can request it all day, but unless your attorney makes it happen, I don't know if he will. That's why I'm putting so much stress on this one meeting, because I never get another opportunity"
- "When we walk out of this precinct, and we go to the magistrate's office, that is it."
- "If you have an attorney, I can't just come over and talk to people like that. I have to go through them."
- "You can tell me to pack sand all you want and I'll shut my mouth and walk out of here."
- "I'll happily meet with you every day of the week ... but that will be up a a third party [a lawyer]. Whatever a third party does, I have no control."
- "You can tell third party A, your lawyer, and he can say "Sure I'll get right on that" ...That's why I put so much effort and progress into this room."

Fayne reiterates his concerns, saying "I don't want to mess up right now." Six minutes after his invocation, both Detective Smith and the other office remain in the room, continuing with the following:

- "The statement you want to make, and I'm going to guess, if that's okay. I'm thinking the statement you want to make is bout the why? ... Why did this happen? But you don't want to make a mistake."

¹ The statements by the detectives following Fayne's invocation, contained throughout this brief, are not inclusive of every question and statement the detectives made during the 90 minute period after the invocation.

- “The evidence is the evidence. It speaks for itself.”
- “You’ve already said you can better elaborate things to me. Say it straight to me, man.”
- “Start at the beginning. We are asking for 2 minutes. When Cierra got into that car, what was said between the two of you?”

Approximately twelve minutes after his invocation, Detective Smith exits the interview room leaving the other officer present with Fayne. The officer also does not honor Fayne’s invocation, and continues asking questions before Detective Smith reenters 15 minutes later and states the following:

- “I’m going to be very blunt. Almost mean. Do you think your cards really matter when you look at just the evidence I’ve shown you?”
- “You can hold onto cards for a deal later ... If we are playing spades, and my Commonwealth is holding spades, how willing is she going to be to play with somebody who just has clubs?”
- Detective Smith asks Fayne whose narcotics were found in their home, his or his girlfriend’s, saying “I’m not trying to get your girl hooked up in this BS,” and reminding him that she is pregnant

Detective Carpenter joined the interview and takes a more aggressive approach with Fayne, telling him “I can’t put words into your mouth about what happened. But I need to know what happened. So be up front and honest with us. ... Help me and out and tell me what happened, man. Be honest with me.” Detective Smith tells Fayne, “Tell him the truth, that’s what relieves the pressure.”

Detective Carpenter then stands up, tells Fayne to stand up, and tells him to breathe. Fayne remains standing in the corner as Detective Carpenter and Detective Smith corner him. Carpenter tells him “Tell me the story about what happened. Why

did you shoot at the car? ... You have to explain to us, or you go down as a cold blooded killer.”

Approximately 50 minutes after the invocation, Detective Carpenter offers Fayne a cigarette, and Detective Smith offers him water. The detectives say to him:

- “You gotta talk to me man. I’m going to help you the best I can help you, but you gotta tell me what’s going on.”
- “I’m going to give you a fair shake man ... Sometimes people make mistakes. I’m not saying that was a mistake. Maybe there was a reason why that happened. But I need you to explain to me.”
- “Once I can get you down the right path of being up front and honest, I can lay it out for everyone else ... I’m here to help you”
- “I know it’s tough. But you owe it to that young lady.”
- “I’m here to help you get out with what you need to get off your chest.”
- “Explain to me what happened, man.” (5:30:00)

After nearly an hour and a half after he invoked his right to an attorney, and under consistent and persistent aggressive interrogation, Fayne tells Detective Carpenter: “He told me he would let me do it all at once,” referring to Detective Smith, saying he could have a one single interview with the Commonwealth Attorney and his attorney present. Detective Carpenter tells him “I’m telling you right now that’s not going to happen.”

Detective Carpenter leaves the room nearly an hour and a half after the invocation, telling Fayne “There’s nothing else I can do for you Brian.”

A few seconds later, Fayne knocks on the door and asks to speak to the detectives. They do not readvise him of his *Miranda* right, nor inquire about his previous invocation. Fayne proceeds to make incriminating statements.

II. The Proceedings Below

On April 21, 2023 the Hampton Circuit Court presided over a Motion to Suppress, ultimately denying the motion on the grounds that Fayne reinitiated. The court ruled from the bench rather than issuing a written opinion. A conditional guilty plea was entered on June 20, 2023, preserving his right to appeal, and Fayne was ultimately sentenced to thirty-five years of active incarceration on September 18, 2023. A timely appeal to the Court of Appeals of Virginia followed, where the appellate court overturned the trial court and found that it was an error not to exclude Fayne's statements. *Fayne v. Commonwealth*, 83 Va. App. 686, 911 S.E.2d 842 (2025). The intermediate court held that the police misconduct tainted the subsequent confession.

The Virginia Supreme Court accepted the appeal from the Commonwealth and overturned the Court of Appeals. *Commonwealth v. Fayne*, 928 S.E.2d 406 (Va. 2026). That court acknowledged in its opinion that Fayne's invocation was clear and unambiguous, and that it was not immediately honored by law enforcement. The court further recognized that for nearly an hour and a half, Fayne was subjected to an unlawful interrogation that is well-documented in the audio recording in terms of the tenor and nature.

However, the Virginia Supreme Court held the moment the police left the room, the interrogation “ceased” for the purposes of *Edwards*, even though it took an hour and a half of interrogation following the invocation. When Fayne knocked on the door 22 seconds later, *the* Court found that there was no “continued coercion” that resulted in that reinitiation, and thus found it willing and voluntary. The court further held that the subsequent waiver was knowing and intelligent.

In its holding, the Virginia Supreme Court stated:

Edwards does not turn on whether a violation occurred in the first instance; it turns on what follows—whether the interrogation ceased, whether the suspect reinitiated communication, and whether a valid waiver ensued. The premise underlying the Court of Appeals' analysis—that the initial violation continued to control the admissibility of Fayne's later statements absent a meaningful cessation of questioning—is inconsistent with that framework. *Id.* at 410-411.

The court then held that once the officers left the room, that was cessation, stating:

The fact “[o]fficers earlier failed to honor Fayne’s invocation of his right to counsel does not change this analysis. The rule requires that questioning cease. It does not resolve the admissibility of statements made after questioning in fact ends. *Id.*

Petitioner now seeks relief from this Court through the granting of a writ of *certiorari*.

REASONS FOR GRANTING PETITION

- I. Lower courts are now split as to whether a reinitiation can be voluntary if it is the product of a prolonged *Edwards* violation, and they are split as to whether a violation precludes a finding that the invocation was ever honored.

The Virginia Supreme Court ruled that once the interrogation ceased, regardless of the previous prolonged violation, the courts simply needed to look next as to whether the suspect reinitiated the communication. The court did not consider the previous violation, and specifically whether the reinitiation was in fact the product of the violation and thus not voluntary. Though this Court has never ruled on this issue, several appellate courts and many other state supreme courts have rendered decisions that conflict with Virginia.

All of those other courts which have been faced with this issue uniformly issued rulings that split from the Virginia Supreme Court. They found that the courts must consider whether or not the invocation was in fact honored, and require a determination as to whether or not the reinitiation and subsequent waiver were in fact voluntary or the result of the prior *Edwards* violation. The latter, of course, would essentially render the reinitiation at the behest of the authorities—as prohibited by this Court.

A. The Virginia Supreme Court’s decision conflicts with federal appellate decisions

In *Collazo v. Estelle*, the Ninth Circuit—sitting *en banc* in a *habeas* appeal from the state court—reversed the lower court and excluded the petitioner’s statement under a very similar fact pattern, finding that the purported reinitiation was instead the product of an *Edwards* violation rather than a voluntary act. 940 F.2d 411, 413 (9th Cir. 1991)(*en banc*)(*cert denied*). Collazo was detained by police on suspicion of murder, and during his interrogation he invoked his right to an attorney. In response, he was told by the police that by invoking, “It might be worse”

for him. Three hours later, Collazo changed his mind about his invocation, was readvised of his *Miranda* rights, and agreed to speak.

The Ninth Circuit found that the decision to reinitiate was involuntary because of the coercive nature of the *Edwards* violation. Specifically, the Ninth Circuit ruled that “initiation of the communication leading to the second interrogation was the *product of coercive statements* made by the police during the first, illegal interrogation.” *Id.* at 420. The court found that the detectives conduct was a direct violation of “the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses.” *Id.* at 419. *See also Plascencia v. Estelle*, No. 91-55558, 1993 U.S. App. LEXIS 8205, at *1 (9th Cir. Apr. 13, 1993)(finding appellant's statement and confession were the product of police coercion and involuntary.)

Compared to this case, the *Edwards* violation in *Collazo* was relatively benign. However, the *Collazo* decision became the foundation for several of the state supreme court decisions, discussed *infra*, that conflict with Virginia’s decision. In its decision, the court eloquently stated:

“This is a nation where the rule of law prevails, where ends do not justify inappropriate means. *Miranda* has been part of our law since 1966. Most law enforcement officers abide faithfully by its requirements even though they find them on occasion to be frustrating. As long as *Miranda* is on the books, it must be respected. In this case, it was not honored. It was disobeyed.” *Id.* at 419.

The same rationale applies for Fayne, and it warrants review by this Court.

The Second Circuit employs a similar analysis to the Ninth Circuit’s, and one in which the Virginia Supreme Court rejected. *United States v. Anderson* presented

that circuit with a dissimilar scenario but with a similar overarching legal issue: how should the court's manage the taint of police misconduct? 929 F.2d 96, 102 (2d Cir. 1991) In it, the police coerced a first confession and despite being re-*Mirandized*, a second confession was ruled to be inadmissible. The court found that

“nothing in the record suggests that the taint clinging to the first confession was dissipated. No significant time elapsed between the first questioning [and the second, and] The suspect was at all times in custody and under close police supervision with the same agents present on both occasions.” *Id.* at 103.

The court suppressed the confession, relying on this Court's holding in *Oregon v. Elstad*, 470 U.S. 298, 105 S. Ct. 1285 (1985). Again, while the facts are not analogous to *Fayne*, the legal analysis—specifically, determining whether or not the “taint” of a Fifth Amendment violations extends to the later actions of the accused, whether it be reinitiation or waiver—appropriately aligned with this Court's prior holdings and the overarching purpose of those holdings in deterring coercive police misconduct. This type of analysis was eschewed by the Virginia Supreme Court in favor of a mechanical application of *Edwards* without regard to the taint, and it justifies review by this Court so that the lower courts have clear guidance in the future that the taint of an *Edwards* violation must be examined as it relates to the reinitiation and waiver.

While there are no factually similar cases in the First Circuit, they have held that “[t]o qualify for [the reinitiation by the accused] exception, the suspect must initiate this further communication without coercion or probing.” *United States v. Carpentino*, 948 F.3d 10, 21-22 (1st Cir. 2020).

B. The Virginia Supreme Court stands alone among state courts of last resort as well as the DC federal circuit.

Virginia is the only state supreme court to mechanically find that a break of any sort following an extended violation of the *Edwards* rule was sufficient to be viewed as honoring the invocation, and that the reinitiation was voluntary. All other of the highest courts in other states have ruled that the court must determine whether the reinitiation was the product of the *Edwards* violations, including Maryland, Vermont, Kentucky, Mississippi, California, Florida, as well as the DC Court of Appeals. In none of those states was the violation as egregious as it is here.

In *Blake v. State*, Maryland's high court held that when an accused's reinitiation "was in direct response to ... unlawful interrogation," then the accused did not voluntarily reinitiate and that it was instead "a product of the unlawful police-initiated interrogation which violated Edwards." 381 Md. 218, 230, 849 A2d 410, 417 (Md. 2004) In that case, the accused invoked his right and the police certainly honored that right by terminating the interview. However, the police brought him to the police station and told him, "I bet you want to talk now, huh!" after he sees that the penalty for murder is potentially death. The police then left him for an hour and a half before he asked if they can talk.

The *Blake* court held that, "[a]lthough the accused technically may begin a conversation with the police, if this occurs after the police have interrogated the accused in violation of Edwards, the voluntariness of such 'reinitiation' is *suspect* and statements subsequently obtained are inadmissible." *Id.* at 35 (quoting *United States v. Gomez*, 927 F2d 1530, 1539 (11th Cir. 1991)) (emphasis added). This is

exactly the type of rule that is in accordance with both the explicit holdings and more importantly the purpose of this Court's rules from *Edwards* onward.

Importantly, this Court previously granted a writ of *certiorari* for *Maryland v. Blake*, 546 U.S. 72 (2006)). However, the case was ultimately dismissed as improvidently granted. *Fayne* presents this Court with a new opportunity, under a straightforward factual scenario to rule on this incredibly important issue. Although the Court did not reach the merits in *Blake*, its grant of *certiorari* underscores the recurring and substantial importance of the issue and that it is worthy of this Court's review. Notably, this writ was granted before any split was present throughout the states.

Kentucky is also split from Virginia in its holding and analyses on this issue. While the case of *Bradley v. Commonwealth* is factually distinct in that it does not appear there was a break in the interrogation after invocation, the Kentucky Supreme Court nonetheless addressed the issue in holding that, "the authorities cannot continue to cajole or otherwise induce the suspect to continue to speak without first affording the suspect an attorney." 327 S.W.3d 512, 517 (Ky.2010). There, the defendant unequivocally stated that "I need a lawyer or something." The police continued to unlawfully interrogate him thereafter before he made incriminating statements. Relying on *Bradley*, the Kentucky Supreme Court in its unpublished opinion, *Ruff v. Commonwealth*, held "[a]n accused's post-invocation reinitiation of questioning must be *independently* made, and cannot be considered voluntary if it is

the *product* of police inducement or encouragement.” No. 2011-SC-000640-MR, 2013 WL 1789861 (Ky. Apr. 25, 2013) (emphasis added).

In *Benjamin v. State*, the Supreme Court of Mississippi held that the trial court erred in failing to suppress a statement because the police subjected the defendant to interrogation after he invoked his right to counsel. *Benjamin v. State*, 116 So. 3d 115 (Miss. 2013). In that case, the juvenile defendant invoked his right to an attorney, but ultimately began to speak with the police again upon pressure by his mother. The Mississippi high court established as a matter of law that its lower courts were required to analyze the pressures of post-invocation continued interrogation in determining whether subsequent reinitiation and waiver were in fact voluntary.

The Supreme Court in Florida, unlike Virginia, also requires an analysis as to whether a reinitiation or waiver is actually the product of the violation of the accused’s rights. In *Shelly v. State*, the court found that “[the accused’s] subsequent waiver was the product of Detective Consalo’s coercively persistent and repeated efforts to wear down Shelly’s resistance and induce Shelly to continue the interrogation and eventually confess.”² 262 So. 3d 1 (Fla. 2018)

In *State v. Yoh*, the Vermont high court interpreted the Constitution as requiring that a defendant’s statement would only be admissible if his “[d]ecision to

² At the time, Florida provided for greater constitutional protections by requiring police to re-*Mirandize* suspects upon reinitiation. *Welch v. State*, 992 So. 2d 206 (Fla. 2008). This requirement was subsequently abandoned by the Florida Supreme Court. *State v. Penna*, 385 So. 3d 595 (Fla. 2024)

initiate [another] interview was voluntary, and not *the product of the coercion that took place*” beforehand. 80 Vt. 317, 910 A2d 853, 861 (Vt. 2006)(emphasis added). *Yoh* ultimately concluded that a lapse of time sufficiently attenuated the reinitiation from the prior *Edwards* violation. *Compare with Dorsey v. United States*, 60 A.3d 1171 (D.C. 2013)(finding that reinitiation was the product of the earlier violation despite a significant lapse in time after the termination of the interview)(discussed *infra*) The rule established in Vermont is at odds with Virginia’s analysis where no consideration is given to determine whether a reinitiation is the product of *prior* coercion or not.

Similarly, Georgia requires that the courts determine whether the invocation was ever actually honored in the first place. In *Mack v. State*, the court ruled:

The determination as to whether the police have scrupulously honored the defendant's right to remain silent rests in part upon their immediate response to the defendant's invocation of the right; a showing of respect for the defendant's right, by immediately ceasing questioning upon its invocation, is a significant factor in this analysis. 296 Ga. 239, 765 S.E.2d 896 (Ga. 2014).

The District of Columbia’s Court of Appeals ruled on this issue in *Dorsey v. United States*, 60 A.3d 1171 (D.C. 2013)(*en banc*). In a divided *en banc* decision, they held that the defendant could not voluntarily reinitiate after a prolonged, grueling period of unlawful interrogation following a valid invocation. *Id.* This was despite the fact that a seven hour break occurred following the termination of the interrogation. *Id.* The court stated, “[i]n the present case, of course, the police did not ‘scrupulously honor’ Dorsey’s Fifth Amendment rights,” and that “to condone such tactics would be contrary to the principles of *Miranda* and *Mosley*.” *Id.* at 74. (relying in part on *Yoh v. State*). *See Michigan v. Mosley*, 423 U.S. 96, 96 S. Ct. 321 (1975)(requiring that an

invocation to the right to remain silent be “scrupulously honored”) Two judges dissented in the *Dorsey* panel, highlighting the uncertainty as to this issue.

Finally, in *People v. Boyer*, the California Supreme Court faced a factually similar scenario as *Fayne* and yet reached the opposite conclusion. 768 P2d 610 (Cal. 1989) There, Boyer undoubtedly invoked his right to an attorney, and the police undoubtedly continued to question and interrogate him in violation of that right. When police turned and left, letting only a few seconds pass by, Boyer called out, “Hey, wait a minute. Come back here and sit down. You're right, I can't live with it. I did it. I didn't mean to do it. But I did it.” *Id.* at 619. The detective returned and the interrogation continued. The California high court refused to find that this was a reinitiation because it was preceded by an ongoing violation of Boyer’s previously invoked rights.

The *Boyer* case highlights the split created by Virginia’s decision in *Fayne*, as it is remarkably similar in its facts and particularly the timing. In both cases invocation is clear, the *Edwards* violation is lengthy, and the time between “termination” and purported reinitiation is minimal. Yet, the two courts reached dramatically different outcomes.

Even within Virginia itself, its own state Supreme Court has now issued conflicting decisions in an identical factual scenario without overruling the prior decision. While this is not in and of itself a reason for this Court to grant review, the Virginia Supreme Court created uncertainty within its own state and misapplied federal law, further demonstrating that there is no consistent rule for dealing with prolonged *Edwards* violations. Specifically, the Virginia Supreme Court’s holding in this case contradicts its own holding in *Commonwealth v. Ferguson*, 278 Va. 118, 677

S.E.2d 45 (2009)(affirming *Ferguson v. Commonwealth*, 52 Va. App. 324, 663 S.E.2d 505 (2008)(en banc)(*Ferguson v. Commonwealth*, 51 Va. App. 48, 654 S.E.2d 328 (2007))).

The facts of *Fayne* and *Ferguson* are identical: in both cases the accused invoked his right to a counsel and the police deliberately ignored it. In *Ferguson*, as here, the detective then stepped out of the room only for suspect to knock on the door and allegedly reinitiate. Unlike in *Fayne*, though, in *Ferguson*, the court held that it was “one continuous custodial interrogation conducted in such a manner as to deliberately disregard a clear, unambiguous and unequivocal invocation of the right to counsel and coerce Ferguson to incriminate himself.” There was no meaningful factual distinction between the facts of *Fayne* and *Ferguson*.³ In discussing the reinitiation, the Supreme Court of Virginia in *Ferguson* held:

“Whatever the significance of Ferguson’s comments that broke the silence, they were the product of the coercive interrogation and environment created by police. Surely, police may not use the product of such techniques as proof of a voluntary reinitiation of communication and subsequent waiver of the right to counsel.” *Id.* (emphasis added)

Ferguson has not been overruled. In fact, it was cited and relied upon by the D.C. Court of Appeals in *Dorsey*. The very fact that Virginia’s own highest court is inconsistent in its application of *Edwards*, particularly when faced with an identical

³ While in *Ferguson* there was a silent, non-interrogator who remained in the room, even the dissenting opinions in the affirmed Court of Appeals case recognized that “[his] unbroken silence was [not] the functional equivalent of an interrogation. It would take a remarkably potent -- and, to date, unprecedented -- legal fiction to deem an utterly mute police officer as the functional equivalent of an interrogator.” 52 Va. App. 324, 663 S.E.2d 505 (2008)(dissent)

fact pattern, is further evidence that this issue is of such importance that the writ for review should be granted.

No other state Supreme Court has ruled similarly to Virginia. No other state allows the lower courts to ignore the *Miranda* and *Edwards* violations and not consider it at all in the analysis as to whether or not a reinitiation or waiver was in fact voluntary. Virginia's split from federal interpretation and the interpretations of the courts of last resort from its sister states warrants review by this Court, particularly in light of the importance of this Constitutional issue on future accused.

II. The Supreme Court of Virginia erred by holding that an accused's reinitiation may be voluntary when it follows from continued interrogation after invocation.

Simply put, Virginia's Supreme Court does not view *Edwards*' as requiring that an interrogation cease *immediately*. Instead, it ruled that the interrogation did "cease"—albeit an hour and a half later—and that afterwards *Edwards* merely requires the court to next determine who reinitiated the communication. The violation had no impact on the analysis. The decision of the Virginia Supreme Court stands in stark contrast to the decisions, and the purpose behind those decisions, by this Court.

In *Moran v. Burbine*, this Court wrote "[t]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." 475 U.S. 412, 421, 106 S. Ct. 1135, 1141 (1986); *see also Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851 (1987). Further, this Court has continuously noted the inherent coercive nature of police

custody and interrogation, which was a driving factor behind the initial *Miranda* decision and the cases thereafter. *See Maryland v. Shatzer* 559 U.S. 98, 130 S. Ct. 1213 (2010). The coercive nature of Fayne’s unlawful hour-and-a-half interrogation were not merely inherent though; they were outright, prevalent, and ongoing.

Yet, the Virginia Supreme Court disregarded this Court’s holdings regarding that coercive nature and found that once the detectives left the room, the analysis simply moved on to the first prong of the *Edwards* test without consideration of that prior extensive violation. The Virginia high court explicitly stated that “*Edwards* does not turn on whether a violation occurred in the first instance; it turns on whether the interrogation *ceased*, whether the suspect reinitiated communication, and whether a valid waiver ensued.” In other words, they applied a mechanical application of *Edwards* to the *actions* of Fayne without regard to whether those actions were a product of the unlawful interrogation. They found that once the interrogation ceased, the only question left was to determine whether Fayne was the one who reinitiated; there was no analysis as to whether or not the unconstitutional interrogation had any impact on his decisions, or whether the cessation needed to be immediate or not.

This was error. The Virginia Supreme Court was required to determine if the reinitiation was in fact voluntary or at the behest of the authorities through that prolonged violation of his rights, and the Court further was required to assess whether or not the police in fact honored his invocation in the first place. (emphasis added). As Justice Scalia wrote in *Maryland v. Shatzer*, “[i]t is easy to believe that a

suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case.” *Id.* at 98.

The Virginia Supreme Court opinion begins with “[t]his case turns on sequence. Fayne invoked his right to counsel. The police continued questioning in violation of *Edwards*. The interrogation then ended. Fayne—not the police—resumed communication.” *Fayne* at 409. However, this Court has always required that the analysis involve a totality of the circumstances, and that attention be given to the “lingering effects” of custody. Instead, Virginia created a new legal rule inapposite to this Court’s holdings and analyses, wherein the court mechanically analyzes the facts in sequence under *Edwards* without regard to the impact of the violation in considering either voluntariness or whether the invocation was in fact ever honored. Worse, the Virginia Supreme Court’s interpretation of *Edwards* does not require the police to cease the interrogation immediately; an hour and a half later is sufficient.

In fact, a proper mechanical analysis would have ended the inquiry entirely upon a finding that Fayne’s invocation was never honored. Instead, the Virginia Supreme Court foundt that once the interview “ceased”, despite that cessation being an hour and a half after the invocation, the Court simply needed to only analyze who reinitiated communication without regard to the violation or its coercive impact. This new rule should be reviewed by this Court.

A. Reinitiation cannot be voluntary when it is the product of a prolonged *Edwards* violation

When law enforcement willfully violates the rights of an accused in their custody over an extended period of time, and in a manner that is undoubtedly police

misconduct, the goal is clearly to persuade and coerce the accused into giving a statement. Here, the police gave up and left the room. The Supreme Court of Virginia viewed this as sufficient to be considered “ceased”, and an honoring of his right. The court treated the break in time of 20 seconds a sufficient termination of the interview. So because it was Fayne who knocked on the door, the *Fayne* court simply looked to see who initiated the re-interview rather than considering the prior circumstances and the taint of the *Edwards* violation.

In fact, the Virginia Supreme Court wrote that there was no “continued coercion.” In writing these words, they implicitly recognized that the 90 minutes preceding the knock on the door was in fact rife with coercion. How can it be said then that Fayne’s decision to knock on the door was not the product of that coercion? It appears as if the Virginia Supreme Court would only take issue with the “reinitiation” if the officers were actively on the other side of the door encouraging him to knock. This is an absurd thought, of course, but it demonstrates that the lengthy and extreme *Edwards* violation in this case must have had an impact on Fayne.

If they honored his invocation in the first place, he likely would have been brought before a magistrate and then moved into custody until an attorney was hired or appointed. If, during that time his rights were honored, he decided to reinitiate conversation with the police then it would fall squarely within *Edwards*. However, his decision to knock on the door just twenty second after a lengthy illegal interrogation, and the subsequent statements which were made, was plainly the

result of the detectives coordinated effort to disregard his rights and violate *Edwards*, and ultimately they were not voluntary. The taint of the earlier misconduct cannot be separated from his actions in such a brief period of time, and this Court should grant review to address Virginia's error.

B. The requirement that police honor an invocation imposes an affirmative and immediate duty to cease the interrogation.

More importantly, the requirement that an interrogation "cease" nearly explicitly requires that the cessation be immediate. The Supreme Court of Virginia found that a cessation occurring after 90 minutes of unconstitutional interrogation was sufficient, and that the next step in the analysis was to look at who reinitiated the communication. The Virginia Supreme Court essentially applied *Edwards* in a mechanical fashion without a full consideration of the full circumstances.

Once the detectives left the room, the court viewed that as an honoring of Fayne's right⁴. Because it was Fayne, and not the police, who reinitiated the conversation the court then next found that they could proceed to a waiver analysis. Addressing the right to remain silent, this Court in *Mosley* found that an invocation must be "scrupulously honored." 423 U.S. 96, 96 S. Ct. 321 (1975). Those words have import. The invocation must not merely be honored, but "scrupulously" so. The *Mosley* court could have simply used the term "honored," but it did not. "Scrupulously" must have meaning rather than being surplusage.

⁴ Notably, the detective at the suppression hearing testified that he did not actually view any of Fayne's statements as an invocation.

The same logic applies for the right to counsel, an arguably more *scrupulously* protected right. The cessation must be immediate. This is an affirmative and immediate duty incumbent upon the police, not a duty delayed by an hour and a half of unlawful interrogation.

Justice Brandeis once wrote in a dissent:

In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485, 72 L. Ed. 944, 48 S. Ct. 564 (1928):

In *Maryland v. Shatzer*, one of the factors that this Court considered in determining whether there was violation under *Edwards* was whether the accused “regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.” 559 U.S. 98, 130 S. Ct. 1213 (2010). This was in the context of a suspect who was arrested, invoked, and importantly his invocation was immediately honored. He was then released from custody. The court established a brightline 14-day rule because it “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.” *Id.* at 110.

This case now presents a different scenario that is worthy of judicial review by this Court. Fayne was taken into custody and stripped of the “normalcy” described by the *Shatzer* court. However, his rights were ignored, and for an hour and a half

he was coerced and aggressively interrogated. There can be no doubt that the mere 22 seconds he was left alone prior to knocking was insufficient to “shake off” the coercive effects of custody that this Court is often concerns with. Ultimately, the police failed to observe the law. They outright disregarded it. Any ambiguity as to the obligations and duties of a police officer, and what “honored” truly means, should be ruled upon by this Court.

III. This Court has never resolved whether an accused may voluntarily reinitiate questioning after police have failed to actually honor an invocation of counsel.

This Court has long recognized the coercive nature of police custody, and the inherent pressures upon the accused. This recognition led to *Miranda*, then to *Edwards*, and the long line of cases that expanded or explained the afforded protections. This case presents two separate yet interrelated issues that have never been resolved by this Court, and which are the split seen now in Virginia with the other state supreme courts and federal court. First, under *Edwards* can an accused voluntarily reinitiate questioning if it after an extended violation? And second, what is the definition of an honored invocation? If a detective terminates an accused’s invocation, but only after an hour and a half of violating his rights, is that considered “honored?” Certainly in the context of the right to remain silent that would not be “scrupulous.” Several states have adopted an analysis that goes beyond *Mosley*, explicitly finding one factor to consider in determining whether the invocation was scrupulously honor” “rests in part upon their immediate response to the defendant’s

invocation of the right.” *Mack v. State*, 296 Ga. 239 765 S.E.2d 896 (Ga. 2014). The very same analysis applies to the invocation of the right to counsel.

The conflict between Virginia’s holding and the holding of the other state supreme courts, as well as the federal opinion, is indicative of a clear ambiguity as it relates to *Edwards*.

A. This case is an ideal vehicle to resolve this important and recurring question

The facts of this case reflect exactly the type of police misconduct and coercive behavior that this Court has sought to deter and eliminate since 1936, and the issue is clearly presented for review under the facts. *See Brown v. Mississippi*, 297 U.S. 278, 80 L. Ed. 682, 56 S. Ct. 461 (1936) (use of a defendant's coerced confession in a state criminal trial denies due process). First, there is no question that Fayne invoked his right to counsel; Virginia conceded this point at every stage of the proceedings. Second, and most importantly, the *Edwards* violation here was not a brief or spontaneous instance from the police, but rather it was a lengthy and egregious period after Fayne’s invocation where the police simply did not care. The police yelled at Fayne, berated him, coerced him, and intimidated him over a 75-minute span.

Similarly, the “break” in the interrogation was *de minimis*. Unlike other state supreme court decisions where the time between the actual end of the interrogation and the purported “reinitiation” was several hours long, here the break was a mere twenty seconds. *See, e.g., Dorsey*. There thus can be little room for reasonable minds to disagree as to whether or not this was a sufficient time for the “lingering effects”

of the coercive nature of not only custody, but more importantly the extended violation of Fayne's right through an aggressive and prolonged interrogation, to dissipate. *See Maryland v. Shatzer*, 559 U.S. 98, 209 (2010)

The facts of this case therefore cleanly and squarely frame the question for the Court: can a reinitiation be voluntary after an extended *Edwards* violation, and can an invocation truly be considered honored if it is only after that extended *Edwards* violations. There is little room for debate as to the extent of the *Edwards* violation, and therefore the issues to potentially resolve before this Court are pinpointed for review.

This Court already signaled the importance of this issue by previously granting a writ in *Maryland v. Blake*, before its dismissal as improvidently granted. While the rationale behind that dismissal are unknown, the facts of *this* case are straightforward and ripe for review.

Finally, Fayne has been accused, and is now convicted and sentenced, for the most serious of crimes and faces thirty-five years of incarceration. The rights provided by the Constitution apply to all persons, no matter the severity of the charge or the underlying facts and circumstances. This is exactly the type of case that is worthy of review, as the implications of a Court's ruling extend far beyond Fayne but to countless accused in the future, as well as law enforcement and the duties imposed upon them by the rule of law.

IV. The decision below permits police to circumvent *Edwards's* protections by continuing interrogation in hopes that a suspect later reinitiates.

This is a particularly important case. The implications of the Virginia's decision upon law-enforcement agencies in Virginia and their tactics potentially turns back the clock on nearly a century of appellate decisions and reforms aimed specifically to curb that very misconduct. Justice Frankfurter wrote the oft cited maxim that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Yet, the Virginia Supreme Court's holding in *Fayne* absolves the police of egregious and repugnant misconduct. For approximately ninety minutes, the police engaged in deliberate, coordinated, and systemic wrongdoing by ignoring Fayne's invocation, coercing him, and aggressively interrogating him with the single goal of a confession. There was never, at any point, a deterrence upon their misconduct.

This exact concern was addressed by California in *Boyer*, where the stated unsuccessfully argued that Boyer "ended the encounter by turning away, defendant must be deemed to have initiated a new conversation by calling [him] back." *Id.* at 625. The California Supreme Court rejected this, finding that, "[o]ur concurrence in that view would violate the spirit of *Edwards*. It would allow circumvention of the prophylactic rule against new approaches by the authorities once the suspect has invoked his Miranda right to counsel." *Id.* at 625.

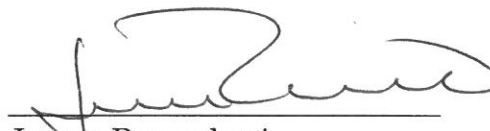
However, Virginia now signals to law enforcement that they are free to deliberately ignore an invocation and engage in prolonged coercive interrogation as they please, with the hope that the suspect knocks on the door a few seconds later if he changes his mind. Then, they are free to reenter the room, not re-*Mirandize* the suspect, and continue to engage in aggressive questioning despite the earlier

invocation. This cannot be the system envisioned by the framers of the Constitution, or the Supreme Court of the United States in *Miranda v. Arizona*, *Edwards v. Arizona*, *Mapp v. Ohio*, and its progeny.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'James Broccoletti', written over a horizontal line.

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