Fall 1983

Fifth Amendment--Fifth Amendment Exclusionary Rule: The Assertion and Subsequent Waiver of the Right to Counsel

Lee A. Weiss

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

Recommended Citation

Lee A. Weiss, Fifth Amendment--Fifth Amendment Exclusionary Rule: The Assertion and Subsequent Waiver of the Right to Counsel, 74 J. Crim. L. & Criminology 1315 (1983)

This Supreme Court Review is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

FIFTH AMENDMENT—FIFTH AMENDMENT EXCLUSIONARY RULE: THE ASSERTION AND SUBSEQUENT WAIVER OF THE RIGHT TO COUNSEL

Oregon v. Bradshaw, 103 S. Ct. 2830 (1983).

I. INTRODUCTION

The fifth amendment right against self-incrimination encompasses the right to counsel and the right to remain silent.¹ The Supreme Court requires that suspects be informed of these rights upon arrest² because the inherent coerciveness of the custodial setting could prompt involuntary confessions absent these safeguards.³ Once a suspect asserts the right to counsel, a heavy burden has traditionally rested on the state to prove that the right has been waived.⁴ In *Oregon v. Bradshaw*,⁵ however, the Court narrowed the scope of the right to counsel during custodial interrogation by making it easier for the state to prove that the right was waived after it was asserted by the suspect. The Court thus restricted one of the fundamental rights established in *Miranda v. Arizona*⁶ and reasserted in *Edwards v. Arizona*.⁷

Bradshaw is the first Supreme Court case to interpret fully the decision in *Edwards*.⁸ Unfortunately, the Court failed to clarify *Edwards*, which indicated that once the accused requests an attorney, he may not be interrogated until his attorney is present.⁹ The Court instead confused the issue by making a fact-based decision which failed to provide the lower courts and law enforcement agencies with clear constitutional

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² *Id.* at 478-79.

³ *Id.* at 467.

⁴ *Id.* at 475.

⁵ 103 S. Ct. 2830 (1983).

⁶ 384 U.S. 436 (1966).

⁷ 451 U.S. 477 (1981). See *infra* notes 47-54 and accompanying text.

⁸ *Wyrick v. Fields*, 103 S. Ct. 394 (1983), was summarily disposed of without argument or brief. In *Wyrick*, the Court held that once the accused made a voluntary, knowing, and intelligent waiver of his right to counsel during a polygraph examination, it was not necessary for the police to advise him of his rights again before post-examination questioning.

⁹ 451 U.S. 477, 484-85 (1981). See *infra* notes 47-54 and accompanying text.

guidelines for determining when an accused who has asserted the right to counsel subsequently waives that right.

By broadly interpreting the exception to the rule laid out in *Edwards*, the Court resumes the trend,¹⁰ only temporarily interrupted by *Edwards*, toward eroding *Miranda* to the point of almost overruling the decision and reestablishing the voluntariness standard for the admissibility of confessions¹¹ used before *Miranda*.¹² Since 1969, the Burger Court has narrowly interpreted *Miranda* and has moved away from its "bright line" rule and toward the fact-specific, case-by-case analysis of the voluntariness standard.¹³

This Note will examine the Court's interpretation of precedent and its decision to broaden the waiver exception to the fifth amendment exclusionary rule, which will allow the police to extract confessions after the suspect asserts the right to counsel. This Note will also discuss the practical implications of the decision for police departments, lower courts, and accused persons.

II. HISTORY

Prior to the Court's decision in *Miranda*, confessions were admissible if they were made voluntarily. The constitutional ground for disallowing an involuntary confession was the fourteenth amendment right to due process.¹⁴ Under the voluntariness standard, courts would make a subjective examination of the circumstances surrounding the confession¹⁵ to determine whether the accused confessed of his own free will. If the suspect's "capacity for self-determination [was] critically impaired" the confession was inadmissible as a violation of due process.¹⁶

¹⁰ See *infra* notes 30-46 and accompanying text. For comprehensive discussions of this trend, see Grossman & Lane, *Miranda: The Erosion of a Doctrine*, 62 CHI. B. REC. 250 (1981); Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405 (1982); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

¹¹ See *infra* notes 14-23 and accompanying text.

¹² *Haynes v. Washington*, 373 U.S. 503 (1963); *Payne v. Arkansas*, 356 U.S. 560 (1958); *White v. Texas*, 310 U.S. 530 (1940); *Chambers v. Florida*, 309 U.S. 227 (1940); *Brown v. Mississippi*, 297 U.S. 278 (1936).

¹³ See Sonenshein, *supra* note 10, at 422-23.

¹⁴ *Brown v. Mississippi*, 297 U.S. 278 (1936). *Malloy v. Hogan*, 378 U.S. 1 (1964), explicitly applied the fifth amendment to the states through the fourteenth amendment and gave the states another constitutional ground for invalidating confessions. However, in the majority opinion in *Miranda*, Chief Justice Warren indicated that the applicability of the fifth amendment to all criminal trials may have been settled as early as 1897 in *Bram v. United States*, 168 U.S. 532, 542 (1897). *Miranda*, 384 U.S. at 461; see also *Wan v. United States*, 266 U.S. 1, 14-15 (1924).

¹⁵ *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961).

¹⁶ *Id.* The purposes of the voluntariness standard include preventing police from obtaining confessions by impermissible means, *Rogers v. Richmond*, 365 U.S. 534, 541 (1961), and ensuring that the evidence obtained is reliable, *Lisenba v. California*, 314 U.S. 219, 236

Miranda, the first case in which the Court rendered a confession inadmissible in a state court as a violation of the fifth amendment right against self-incrimination,¹⁷ substantially changed the way the Court viewed the admissibility of confessions. The Court held that when an individual is deprived of his freedom and subjected to custodial interrogation, procedural safeguards must be used to protect the individual's right against self-incrimination.¹⁸ If these safeguards were lacking, any admissions made by the suspect were inadmissible. The Court admitted that the confession rendered inadmissible under *Miranda*'s stricter standard may not have been involuntary under the traditional test.¹⁹ *Miranda* thus created a "bright line" or *per se* test which was to create a clearly defined constitutional guideline for the courts and law enforcement officials to follow:²⁰ a confession elicited without "adequate protective devices" (i.e. *Miranda* warnings) was not a result of the accused's free choice because of the inherently coercive setting of custodial interrogation,²¹ and was therefore the product of compulsion and inadmissible in a court of law.²² It appeared as though the voluntariness standard which considered the totality of the circumstances was no longer the law of the land.²³

The Court did recognize that an individual could waive the right to counsel.²⁴ As an example, the Court explained that "[a]n express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver."²⁵ The Court placed the burden on the state to show that the

(1941); see Comment, *The Declining Miranda Doctrine: The Supreme Court's Development of Miranda Issues*, 36 WASH. & LEE L. REV. 259, 259 n.2 (1979).

¹⁷ The Court had previously decided *Escobedo v. Illinois*, 378 U.S. 478 (1964), under the sixth amendment right to counsel. In *Escobedo*, the defendant's attorney was denied access to the room where the defendant was being questioned, a clear violation of the sixth amendment right to counsel. *Miranda*, however, involved the admissibility of confessions and the procedure required by the constitution in order to admit the incriminating statements into court.

¹⁸ *Miranda*, 384 U.S. at 478-79. The Court held that an individual must be warned that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. *Id.* at 479.

¹⁹ *Id.* at 457.

²⁰ *Id.* at 441-42. The decision was also meant to clarify any ambiguity resulting from the decision in *Escobedo*. *Id.* at 440-41.

²¹ *Id.* at 458.

²² *Id.* at 474, 476.

²³ Although *Miranda* provided clear, definite standards for the states to follow, these policies were not necessarily adhered to in the state courts. For a detailed analysis, see Romans, *The Role of State Supreme Courts in Judicial Policy Making: Escobedo, Miranda, and the Use of Judicial Impact Analysis*, 27 W. POL. Q. 38 (1974).

²⁴ *Miranda*, 384 U.S. at 475.

²⁵ *Id.*

defendant knowingly and intelligently waived his fifth amendment rights, since the state controls the circumstances surrounding the interrogation.²⁶ The Court continued to require "high standards of proof for the waiver of constitutional rights,"²⁷ and it warned that a defendant's silence following the warnings did not constitute a valid waiver. The Court also stated that the eventual extraction of a confession did not prove that a valid waiver had been given.²⁸ *Miranda*, therefore, did not affect the status of truly volunteered statements, as long as police informed defendants of their rights.²⁹

The changes effected by *Miranda*, however, were soon tempered.³⁰ The Court later held that *Miranda* violations would not preclude the admission of statements into court for impeachment purposes,³¹ or for establishing the credibility of a witness.³² In addition, the Court narrowly interpreted the definition of custodial interrogation by allowing the receipt of incriminating statements taken at the defendant's home by Internal Revenue Service agents in an atmosphere described as "friendly" and "relaxed"³³ and incriminating statements obtained at a

²⁶ *Id.*; see also *Escobedo*, 378 U.S. at 490 n.14 (recognizing that accused persons may waive their right against self-incrimination according to the knowing and intelligent standard).

²⁷ *Miranda*, 384 U.S. at 470; see also *Johnson v. Zerbst*, 304 U.S. 458 (1938).

²⁸ 384 U.S. at 475.

²⁹ *Id.* at 478.

³⁰ The changes meant to be effected by *Miranda* may never have come about. "[T]he response of the police, defendants, and attorneys to *Miranda* did not conform to the ideal envisioned by the Court" Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1394 (1968); see also Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519, 1613-16 (1967).

³¹ *Harris v. New York*, 401 U.S. 222 (1971). In *Harris*, the accused was arrested for selling heroin and was questioned by police. At his trial, Harris' testimony contradicted some of the statements he made to the police after his arrest. The statements were not directly admitted into evidence because they violated *Miranda*, but the Court held that they could be used to impeach the witness. See Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

³² *Oregon v. Hass*, 420 U.S. 714 (1975). In *Hass*, the accused asked to see his attorney after he was arrested for stealing bicycles. He then admitted that he knew the houses from which the bicycles were stolen. The Court held that although the accused had not been advised of his *Miranda* rights, the court could allow the officer to testify to the accused's admission to call into question the credibility of his testimony. See Note, *Criminal Procedure—Testimony Obtained in Violation of Miranda is Admissible in Evidence for Impeachment Purposes*, 10 TULSA L.J. 697 (1975); Note, *Constitutional Law: A Clash Between Impeaching the Accused's Testimony and Protecting His Right to Counsel*, 28 U. FLA. L. REV. 289 (1975).

³³ *Beckwith v. United States*, 425 U.S. 341, 343 (1976). See Note, *Criminal Law—Income Tax Investigations—Miranda Warning not Required Prior to Non-Custodial Interview with IRS Agents*, 81 DICK. L. REV. 368 (1977); Note, *Criminal Procedure: Constitutionality of Interrogation without Miranda Warnings in Tax Cases*, 20 HOW. L.J. 212 (1977); Note, *Constitutional Law—Full-Blown Miranda Warnings are not Required to be Given to a Criminal Tax Fraud Suspect not Subjected to In-Custodial Interrogation*, 4 TEX. S. U. L. REV. 157 (1976); Note, *Taxpayer Rights in Noncustodial IRS Investigations after Beckwith v. United States*, 10 U. MICH. J.L. REF. 297 (1977).

state patrol station house while the defendant was not under arrest.³⁴

The Supreme Court also refused to read *Miranda* as requiring a *per se* exclusion of incriminating statements made without procedural safeguards. In *Rhode Island v. Innis*,³⁵ the Court narrowly defined interrogation as "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect"³⁶ The Court held admissible incriminating statements made by the accused after he invoked his right to counsel because the conduct of the police was found not to have constituted interrogation.³⁷ In *North Carolina v. Butler*,³⁸ the Court held that an express statement is not indispensable to finding a waiver,³⁹ and in *Fare v. Michael C.*,⁴⁰ the Court refused to recognize a juvenile's request to see his probation officer as an assertion of his right to counsel.⁴¹ In these cases, the once clearly defined *per se* rule established in *Miranda* became tangled in a web of exceptions and uncertainties.⁴² The trend indicated that the Court was attempting to erode the objective test in *Miranda* to the point where it essentially became the old voluntariness standard.⁴³

Consistent with this trend, the Supreme Court held in *Michigan v. Mosley* that there is no *per se* prohibition against reinterrogation after a

³⁴ *Oregon v. Mathiason*, 429 U.S. 492 (1977). The Court determined that the defendant was free to leave, and therefore was not in custody, so *Miranda* warnings were not required. *Id.* at 495; see Note, *Constitutional Law—Supreme Court Limits Applicability of Miranda by Narrowing the Definition of "Custodial Interrogation,"* 45 FORDHAM L. REV. 1222 (1977); Note, *"In Custody?": A Relaxation of Miranda*, 23 LOY. L. REV. 1057 (1977); Note, *Criminal Procedure—Defining "Custodial Interrogation" for Purposes of Miranda: Oregon v. Mathiason*, 57 ORE. L. REV. 184 (1977).

³⁵ 446 U.S. 291 (1980).

³⁶ *Id.* at 301.

³⁷ *Id.* In *Innis*, the accused in a murder case invoked his right to counsel and the police officers ceased questioning. While riding to the police station in a car, the police officers expressed concern that a child might find the murder weapon and injure herself. The suspect then offered to show the officers where the shotgun was hidden. *Id.* at 294-95. The Court held that the conversation was not interrogation and admitted the conversation into evidence. *Id.* at 302.

³⁸ 441 U.S. 369 (1979).

³⁹ *Id.* at 373. In *Butler*, the Court held that the suspect's actions implied a waiver. The suspect had refused to sign a waiver of his rights, but agreed to answer questions which led to inculpatory statements. *Id.* at 371. The Court rejected the argument that an express statement is specifically required to establish a waiver under *Miranda*. *Id.* at 377 (Brennan, J., dissenting). The Court concluded that the guidelines of *Miranda* allowed the implied waiver in *Butler*. *Id.* at 373; see also *Miranda*, 384 U.S. at 475.

⁴⁰ 442 U.S. 707 (1979).

⁴¹ *Id.* at 724. The Court reasoned that a "lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation," while "[a] probation officer is not in the same posture with regard to either the accused or the system of justice as a whole." *Id.* at 719.

⁴² Grossman & Lane, *supra* note 10, at 250.

⁴³ *Id.* at 268.

suspect asserts the right to remain silent.⁴⁴ The *Mosley* Court held that a suspect may be reinterrogated as long as his right to remain silent is "scrupulously honored."⁴⁵ The Court's application of the "scrupulously honored" test was tailored to the specific facts of *Mosley* and was of limited use to other courts.⁴⁶ It was clear, however, that the Court would allow renewed interrogation in some circumstances.

The Court interrupted the trend by excluding incriminating statements made by the suspect in another renewed interrogation case, *Edwards v. Arizona*.⁴⁷ *Edwards* was alternatively hailed and criticized by commentators as reinvigorating *Miranda*⁴⁸ or as limiting the impact of *Miranda* because of its failure to clearly establish a *per se* exclusionary rule.⁴⁹ In reality, it did a little of both. *Edwards* was the first case in which the Burger Court heard oral argument and decided to exclude evidence as a violation of *Miranda*.⁵⁰ The Court held that once the right to counsel was asserted, the defendant could not be subjected to further

⁴⁴ 423 U.S. 96, 102-03 (1975). In *Mosley*, the suspect asserted his right to remain silent after being read his *Miranda* rights. Later, Mosley was reinterrogated after he was again advised of his rights. The Court ruled the incriminating responses made at this second interrogation were admissible. *Id.* at 107. The Court emphasized that the incriminating responses were elicited two hours later by another officer, in a different room, and focused on a different crime. In addition, the defendant's rights were read a second time. *Id.* at 98, 106. The Court did not indicate, however, which of these factors was dispositive.

⁴⁵ *Id.* at 104. The Court found in *Mosley* that the police did not fail "to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind." *Id.* at 105-06.

⁴⁶ Note, *Criminal Procedure—Michigan v. Mosley: A New Constitutional Procedure*, 54 N.C.L. REV. 695, 703-04 (1976); see, e.g., *United States v. Hernandez*, 574 F.2d 1362, 1369 (5th Cir. 1978) ("*Mosley* teaches that a Court must adopt a case by case approach"); *United States v. Nixon*, 571 F.2d 1121 (9th Cir. 1978); *United States v. Finch*, 557 F.2d 1234, 1236 (8th Cir.), cert. denied, 434 U.S. 927 (1977); *United States v. Koch*, 552 F.2d 1216, 1218 (7th Cir. 1977).

⁴⁷ 451 U.S. 477 (1981). Upon arrest, Edwards was informed of his *Miranda* rights. Before making a deal with police, Edwards asserted his right to counsel and interrogation ceased. The next day two detectives sought to speak to Edwards, but he refused. The guard told him he "had to" talk and took him to meet the detectives. The Court refused to admit the subsequent incriminating statements. *Id.* at 478-80.

⁴⁸ Most authors concluded that *Edwards* created a *per se* rule that prevented the police from confronting suspects after they assert their right to counsel. Kamisar, *Edwards v. Arizona in the Lower Courts: Applying a Reinvigorated Miranda*, in J. CHOPER, Y. KAMISAR, & L. TRIBE, *THE SUPREME COURT: TRENDS AND DEVELOPMENTS, 1981-82*, at 107, 107-08 (1983); see also Note, *Edwards v. Arizona: The Burger Court Breathes New Life Into Miranda*, 69 CAL. L. REV. 1734, 1740-51 (1981); Note, *Criminal Procedure—Self-Incrimination: Miranda Lives*, 33 U. FLA. L. REV. 788 (1981) [hereinafter cited as Note, *Miranda Lives*].

⁴⁹ See Note, *Fifth Amendment—Waiver of Previously Invoked Right to Counsel*, 72 J. CRIM. L. & CRIMINOLOGY 1288 (1981).

⁵⁰ In *Tague v. Louisiana*, 444 U.S. 469 (1980) (per curiam), the Burger Court excluded a confession without hearing oral arguments. The Court stated that there was no evidence "to prove that petitioner knowingly and intelligently waived his rights before making the inculpatory statement." *Id.* at 471; see Note, *Miranda Lives*, *supra* note 48, at 796; see also Stone, *supra* note 10, at 100-01.

interrogation until his attorney was present "unless the accused himself initiates communication, exchanges, or conversations with the police."⁵¹ *Edwards* had the effect of prohibiting police officers from reapproaching a suspect to renew interrogation, but *Edwards* also left open the possibility of reinterrogation by creating the "initiation of conversation" exception to this rule.

The Court's opinion in *Edwards* contained two ambiguities. First, because the Court did not define the parameters of the initiation exception, courts alternatively interpreted the decision as creating a *per se* rule,⁵² or as simply restating the *Miranda* decision.⁵³ Second, the Court failed to provide legal definitions of the words "initiate" and "communication, exchanges, or conversations."⁵⁴ *Bradshaw* afforded the Court the opportunity to clarify these ambiguities.

III. FACTS OF THE CASE

In September 1980, the police were investigating the death of Lowell Reynolds, whose body was found in his wrecked pickup truck partially submerged in a shallow creek.⁵⁵ While investigating the death, police asked respondent, James Edward Bradshaw, to accompany a police officer to the station for questioning.⁵⁶ At the police station, Bradshaw was read his *Miranda* rights, and he proceeded to answer questions

⁵¹ 451 U.S. at 485. The Court held that the Arizona Supreme Court erroneously applied the voluntariness standard. *Id.* at 482. The Court stated that the correct test is whether the right to counsel was knowingly and intelligently relinquished by the accused according to the *Zerbst* requirements. *Id.*

⁵² *Giacomazzi v. State*, 633 P.2d 218, 226 (Alaska 1981) (Robinowitz, J., dissenting) (the "Supreme Court fashioned a *per se* rule in the right to counsel area"); *Wilson v. Zant*, 249 Ga. 373, 376, 290 S.E.2d 442, 446 (accepting that *Edwards* created a *per se* exclusionary rule), *cert. denied*, 103 S. Ct. 580 (1982); *State v. Willie*, 410 So. 2d 1019, 1028 (La. 1982) (recognizes *per se* rule but decides case on other grounds); *State v. McCloskey*, 90 N.J. 18, 28, 446 A.2d 1201, 1205 (1982) ("*Edwards* established a *per se* rule").

⁵³ *Richardson v. State*, 274 Ark. 473, 478, 625 S.W.2d 504, 507 (1981) (the *Edwards* requirement "is really no different than the holding in *Miranda*"), *cert. denied*, 456 U.S. 1008 (1982); *State v. Acquin*, 187 Conn. 647, —, 448 A.2d 163, 174 (1982) ("the *Edwards* opinion is a restatement of existing principles of Constitutional law"); *Leuschner v. State*, 49 Md. App. 490, 497, 433 A.2d 1195, 1199 (1981) ("the court's opinion can be read as not departing from established doctrine"); *Bryant v. State*, 49 Md. App. 272, 278, 431 A.2d 714, 717 (1981) ("*Edwards* does not . . . expand upon *Miranda's* breadth"), *cert. denied*, 456 U.S. 949 (1982).

⁵⁴ Lower courts focused on the definition of initiation in determining the scope of the exception. *See United States v. Thierman*, 678 F.2d 1331, 1334 (9th Cir. 1982); *United States v. Downing*, 665 F.2d 404, 406 (1st Cir. 1981); *State v. Woratzeck*, 130 Ariz. 499, 502, 637 P.2d 301, 304 (1981); *Coble v. State*, 274 Ark. 134, 139, 624 S.W.2d 421, 424 (1981); *State v. Acquin*, 187 Conn. 647, —, 448 A.2d 163, 174 (1982); *State v. Fuller*, 54 Or. App. 815, —, 636 P.2d 447, 449-50 (1981); *State v. Price*, 111 Wis. 2d 366, 371-72, 330 N.W.2d 779, 784-85 (1983); *see also infra* notes 95-97 and accompanying text.

⁵⁵ 103 S. Ct. at 2832. Death had been caused by traumatic injury and asphyxia by drowning. It appeared as though Reynolds had been a passenger in the truck. *Id.* at 2832-33.

⁵⁶ *Id.* at 2833.

about events on the evening of Reynolds' death. Bradshaw admitted serving alcohol to Reynolds, a minor, but denied involvement in the traffic accident.⁵⁷ Bradshaw was then placed under arrest for providing alcohol to a minor and his rights were again read to him. A police officer continued to question Bradshaw and he replied, "I do want an attorney before it goes very much further."⁵⁸ The officer then ended the interrogation.⁵⁹

Sometime later, Bradshaw was taken from the police station to the county jail, a distance of ten or fifteen miles. Either just before or during the trip,⁶⁰ Bradshaw asked a police officer, "Well, what is going to happen to me now?"⁶¹ The officer replied, "You do not have to talk to me . . . since you have requested an attorney, you know, it has to be at your own free will."⁶² Bradshaw indicated that he understood. The two then continued their conversation, discussing where they were going and the charges to be brought against Bradshaw. The officer then suggested that Bradshaw take a polygraph examination to "clear this matter up," and Bradshaw agreed.⁶³

The next day, Bradshaw was again advised of his rights and signed a waiver card.⁶⁴ After the polygraph examination, the officer told Bradshaw that he believed Bradshaw was not telling the truth and that Bradshaw had been driving the truck when the accident occurred.⁶⁵ Bradshaw then changed his story and admitted that he had passed out behind the wheel of the truck after consuming "a considerable amount of alcohol."⁶⁶ Bradshaw was then "charged with first degree manslaughter, driving while under the influence of intoxicants, and driving while his license was revoked."⁶⁷ The trial court refused to suppress his confession, and Bradshaw was convicted on all three counts after a bench trial.⁶⁸

The Oregon Court of Appeals reversed, relying on *Edwards*.⁶⁹ The

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Bradshaw claimed he asked the question while in the police car on the way to the county jail. The state contended that the question was asked while he was still at the police station. *State v. Bradshaw*, 636 P.2d 1011, 1011 (1981).

⁶¹ 103 S. Ct. at 2833.

⁶² 636 P.2d at 1011-12.

⁶³ *Id.* at 1012.

⁶⁴ *Id.*

⁶⁵ *Id.* Bradshaw contended that the officer "told him he was not telling the truth and that they had ways of breaking it down to prove that I was driving the truck." *Id.*

⁶⁶ 103 S. Ct. at 2833.

⁶⁷ *Id.*

⁶⁸ 636 P.2d at 1011.

⁶⁹ *Id.* at 1012. The court declared that it had a "duty to interpret constitutional standards

court noted that Bradshaw did not request a lie detector test, nor the reinterrogation that followed, and thus did not "initiate" the conversation.⁷⁰ The court concluded:

We do not construe defendant's question about what was going to happen to him to have been a waiver of his right to counsel, invoked only minutes before, or anything other than a normal reaction to being taken from the police station and placed in a police car, obviously for transport to some destination. Though a conversation ensued, the police officer clearly took advantage of the opening to reinterrogate defendant⁷¹

The United States Supreme Court granted certiorari, reversed the appellate court decision, and reinstated the trial court verdict.⁷²

IV. THE SUPREME COURT OPINIONS

Justice Rehnquist's plurality opinion reinstated Bradshaw's conviction, held that Bradshaw waived his right to counsel, and found no error in the admission of his incriminating statements in the trial court.⁷³ The Court held that, according to *Edwards*, the initiation of conversation and the knowing and intelligent waiver of the right to counsel are two separate inquiries that must not be combined into one test as was done by the Oregon Court of Appeals.⁷⁴

The Court then applied the two-pronged test to the facts of *Bradshaw*. The first test was whether Bradshaw "initiated conversation" with the police. The Court concluded that by asking "Well, what is going to happen to me now?" Bradshaw "evinced a willingness and a desire for a generalized discussion about the investigation: it was not merely a necessary inquiry arising out of the incidents of the custodial relationship."⁷⁵ Because the officer warned that "you do not have to talk to me," and Bradshaw indicated that he "understood," the plurality concluded that the *Edwards* rule against badgering suspects once they have asserted the right to counsel was not violated.⁷⁶

and require conformance thereto," and therefore it could reverse the trial court's factual finding that Bradshaw had knowingly and intelligently waived his rights. *Id.*

⁷⁰ *Id.* at 1013.

⁷¹ *Id.*

⁷² 103 S. Ct. at 2832.

⁷³ *Id.* at 2835.

⁷⁴ *Id.* In the plurality opinion, Justice Rehnquist stated:

[T]he Oregon Court of Appeals was wrong in thinking that an "initiation" of a conversation or discussion by an accused not only satisfied the *Edwards* rule, but *ex proprio vigore* sufficed to show a waiver of the previously asserted right to counsel. The inquiries are separate, and clarity of application is not gained by melding them together.

Id. Justice Marshall disagreed, however, and stated that the Oregon Court of Appeals failed to find that Bradshaw initiated the conversation and thus never reached the second prong of the admissibility test. *Id.* at 2839 n.1 (Marshall, J., dissenting).

⁷⁵ *Id.* at 2835.

⁷⁶ *Id.*

The plurality insisted that "[t]here can be no doubt" that Bradshaw's question "initiated" conversation in the ordinary sense of the word.⁷⁷ The Court stated it would recognize all conversations by the suspect after the assertion of the right to counsel as initiation except "inquiries or statements . . . relating to routine incidents of the custodial relationship."⁷⁸ The Court held that because Bradshaw's question "could reasonably have been interpreted by the officer as relating generally to the investigation," there was no violation of *Edwards*.⁷⁹

After passing the threshold test of initiation, Justice Rehnquist considered the second prong of the test: whether a knowing and intelligent waiver was established according to the *Johnson v. Zerbst* standard.⁸⁰ The waiver of the right to counsel is valid only if "the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused . . . reopened the dialogue with the authorities."⁸¹

The plurality held that the trial court had adequately weighed these considerations as the trier of fact and found that Bradshaw knowingly and intelligently waived his right. The Court found no reason to dispute these findings of fact and therefore reversed the Oregon Court of Appeals decision and reinstated Bradshaw's conviction.⁸²

Justice Powell concurred in the judgment because he agreed that waiver, an issue of fact, was properly decided by the trial court,⁸³ but he criticized the bifurcated standard used by both the plurality and dissent.⁸⁴ Justice Powell had hoped that "this case would afford an opportunity to clarify the confusion" that became apparent in the lower courts regarding the decision in *Edwards*,⁸⁵ and he was disappointed with the Court's two-pronged analysis which, he stated, would confound the confusion.⁸⁶ He instead recommended that the courts follow only the *Zerbst* standard because it had been widely understood and followed

⁷⁷ *Id.*

⁷⁸ *Id.* The only exceptions the Court recognized in *Bradshaw* were requests for a drink of water or to use a telephone. These requests, the Court stated, "are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* *Johnson v. Zerbst*, 304 U.S. 458 (1938), has often been cited as the standard for determining when constitutional rights, especially the right to counsel, have been waived. *See infra* notes 105, 130-33 and accompanying text.

⁸¹ 103 S. Ct. at 2835 (quoting *Edwards*, 451 U.S. at 486 n.9).

⁸² 103 S. Ct. at 2835.

⁸³ *Id.* at 2838 (Powell, J., concurring).

⁸⁴ *Id.* at 2837.

⁸⁵ *Id.* at 2836.

⁸⁶ *Id.* at 2837.

by the courts in determining when a right had been waived.⁸⁷ He added that "[c]ourts should engage in more substantive inquiries than 'who said what first,' " and he refused to agree with the plurality that *Edwards* should be interpreted this way.⁸⁸ Justice Powell asserted that the bifurcated test applied by both the plurality and dissent has no basis in *Edwards*, because the facts in *Edwards* did not call into question who spoke first but merely considered whether the actions of the police were coercive. Thus, a two-step analysis was neither used nor required.⁸⁹

Justice Powell also criticized the threshold initiation test because a court may never get to the second step if the accused was not the first to speak. The dissenting opinion strictly adhered to this test and therefore did not reach the second step to consider the relevant facts and circumstances.⁹⁰ Justice Powell's criticism focused on the possibility that a valid waiver will not be recognized simply because the accused was not the first to speak.⁹¹ Nevertheless, Justice Powell concurred with the plurality that the trial court "has had the benefit of hearing the evidence and assessing the weight and credibility of testimony."⁹²

Justice Marshall dissented, believing that "[t]o hold that respondent's question in this case opened a dialogue with the authorities flies in the face of the basic purpose of the *Miranda* safeguards."⁹³ Justice Marshall recognized the importance of the right to counsel and emphasized the lawyer's "unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation."⁹⁴ Justice Marshall pointed out that once the suspect admits that he cannot act on his own without counsel, a later decision to waive that right should be viewed with questionable reliability.⁹⁵

Like the plurality, the dissent applied the bifurcated standard but found that Bradshaw did not initiate a conversation under the first prong of the admissibility test. In determining whether conversation was initiated, Justice Marshall focused not on who spoke first, but on whether the conversation was "about the subject matter of the criminal investigation."⁹⁶ According to Justice Marshall, focus on the content of the conversation is warranted because the content should reveal whether

⁸⁷ *Id.*

⁸⁸ *Id.* at 2838.

⁸⁹ *Id.* at 2837.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 2838.

⁹³ *Id.* at 2840 (Marshall, J., dissenting).

⁹⁴ *Id.* at 2838 (quoting *Fare v. Michael C.*, 442 U.S. 707, 719 (1979)).

⁹⁵ 103 S. Ct. at 2838; see also *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring).

⁹⁶ 103 S. Ct. at 2839 (Marshall, J., dissenting).

the suspect invited reinterrogation upon speaking.⁹⁷ The dissent refused to agree with the plurality's claim that Bradshaw's question showed "a desire for a generalized discussion about the investigation."⁹⁸ Instead, Justice Marshall stated that "under the circumstances of this case, it is plain that respondent's only 'desire' was to find out where the police were going to take him."⁹⁹ Thus, Bradshaw's question was a response to his custodial setting and should be protected by the *Miranda* safeguards which "were adopted precisely in order 'to dispel the compulsion inherent in custodial surroundings.'"¹⁰⁰

The dissent recognized that the right to counsel may be waived if it is clear that the accused reopened discussion about the subject matter of the investigation. Justice Marshall stated that lower courts have had no difficulty recognizing such situations¹⁰¹ but asserted that there was no waiver of that right in *Bradshaw*. Because the "initiation of conversation" prong of the admissibility test is a threshold test, and Bradshaw did not initiate conversation, Justice Marshall never reached the second prong to consider the totality of the circumstances according to the *Zerbst* standard. Therefore, Justice Marshall concluded that the incriminating statements were inadmissible and stated that he would uphold the decision of the Oregon Court of Appeals.¹⁰²

V. ANALYSIS

The right to counsel is guaranteed by the Constitution,¹⁰³ implicit in the right against self-incrimination,¹⁰⁴ and may be waived only in a knowing and intelligent manner.¹⁰⁵ The right to counsel is unique: by

⁹⁷ *Id.*; see also *Edwards*, 451 U.S. at 485.

⁹⁸ 103 S. Ct. at 2835; 103 S. Ct. at 2840 (Marshall, J., dissenting).

⁹⁹ *Id.* at 2840.

¹⁰⁰ *Id.* (quoting *Miranda*, 384 U.S. at 458).

¹⁰¹ 103 S. Ct. at 2839; see, e.g., *McCree v. Housewright*, 689 F.2d 797 (8th Cir. 1982) (accused knocked on cell door stating he had something to say); *United States v. Gordon*, 655 F.2d 478 (2d Cir. 1981) (accused expressed desire to provide information about an accomplice); *Payne v. State*, 424 So. 2d 722 (Ala. Crim. App. 1982) (appellant requested the meeting with police); *State v. Brezee*, 66 Hawaii 163, 657 P.2d 1044 (1983) (accused asked detective to come to his cell and said he wanted to make a statement); *People v. Thomas*, 98 Ill. App. 3d 852, 424 N.E.2d 985 (1981) (accused asked what his accomplices said about his involvement), *cert. denied*, 456 U.S. 993 (1982).

¹⁰² *Cf.* 103 S. Ct. at 2840 (Marshall, J., dissenting).

¹⁰³ U. S. CONST. amend. VI states: "In all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defence."

¹⁰⁴ U.S. CONST. amend. V states that "no person . . . shall be compelled in any criminal case to be a witness against himself."

¹⁰⁵ *Johnson v. Zerbst*, 304 U.S. 458 (1938). The Court has often used the knowing and intelligent waiver standard by considering the facts and circumstances of the case "including the background, experience, and conduct of the accused." *Id.* at 464; see also *Edwards*, 451 U.S. at 482-83; *Fare v. Michael C.*, 442 U.S. 707, 724-25 (1979); *North Carolina v. Butler*, 441 U.S.

asserting the right to counsel, the suspect is expressing the opinion that he or she is unable to cope with the situation without legal assistance.¹⁰⁶ Therefore, the judicial system should view the waiver of a previously asserted right to counsel with skepticism. Unfortunately, the *Bradshaw* Court failed to articulate a clear standard for determining the valid waiver of the right to counsel and created an additional loophole through which the police may extract confessions. The Court also retreated further from *Miranda* and once again demonstrated its intention to place discretion in the hands of local authorities by revitalizing the voluntariness standard.¹⁰⁷ The Court's decision is thus unlikely to prevent, and may facilitate, the violation of constitutional rights.

The rights of individuals under arrest are protected by exclusionary rules that preclude the admission of illegally obtained evidence at trial.¹⁰⁸ These rules protect fundamental personal liberties afforded by the privilege against self-incrimination¹⁰⁹ and deter illegal police con-

369, 374-75 (1979); *Brewer v. Williams*, 430 U.S. 387, 404 (1977); *Faretta v. California*, 422 U.S. 806, 835 (1975).

¹⁰⁶ *Mosley*, 423 U.S. at 110 n.2 (White, J., concurring). Justice White indicated that for this reason the right to counsel may be different than the right to silence for waiver purposes, because waiving the right to remain silent merely indicates that the accused changed his or her mind.

¹⁰⁷ See *supra* notes 10-16, 33-46 and accompanying text.

¹⁰⁸ The first exclusionary rule was established in *Weeks v. United States*, 232 U.S. 383 (1914), where the Court excluded illegally seized evidence from trial because the evidence was taken in violation of the defendant's fourth amendment rights. The exclusionary rule against unlawful search and seizure was applied to the states through the fourteenth amendment in *Mapp v. Ohio*, 367 U.S. 643 (1961).

In *United States v. Wade*, 388 U.S. 218 (1967), the Court applied the exclusionary rule to the sixth amendment to exclude evidence of a witness' pretrial identification of an accused in a line-up because the accused did not have counsel. The Court simultaneously applied the rule to the states. *Gilbert v. California*, 388 U.S. 263 (1967). For a discussion of how these rules operate, see T. ABBOTT, J. CRATSLEY, S. ENGELBERG, D. GROVE, P. MANAHAN & B. SAYPOL, *LAW AND TACTICS IN EXCLUSIONARY HEARINGS* (1969); S. SCHLESINGER, *EXCLUSIONARY INJUSTICE: THE PROBLEM OF ILLEGALLY OBTAINED EVIDENCE* 1 (1977).

¹⁰⁹ In vacating a judgment for civil contempt against petitioners for failing to answer questions at the respondent's hearing, the Court stated in *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52 (1964):

The privilege against self-incrimination . . . reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, *Evidence* (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald*, 233 F.2d 556, 581-582 (Frank, J., dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn v. United States*, 349 U.S. 155, 162.

duct,¹¹⁰ especially when they are "bright line" or *per se* rules. *Per se* rules can guide police policy to prevent "well-intentioned but mistakenly over-zealous [sic] executive officers" from depriving individuals of their constitutional rights.¹¹¹

Therefore, the Court should have interpreted *Edwards* as establishing a *per se* rule excluding all confessions obtained after the accused invokes the right to counsel. The Court should have applied that rule in *Bradshaw* to hold that after Bradshaw asserted his right to counsel, his remark was merely a response to the custodial setting and therefore not a waiver of his previously invoked right to counsel. This objective test would have better protected Bradshaw's fifth amendment right against self-incrimination. Additionally, this objective test would have provided a bright line standard against which law enforcement agencies could evaluate their conduct, and under which courts could interpret the law.

Unfortunately, the *Bradshaw* decision makes it more difficult for police and judges to determine whether an individual has waived the right to counsel, and accused persons must remain silent for fear that any simple question or remark will be regarded as a waiver of that right. After *Bradshaw*, officials must follow this procedure to obtain a confession: suspects must be read their *Miranda* rights. If the suspect waives these rights,¹¹² the confession is admissible; but, if the fifth amendment right to counsel is invoked, interrogation must cease.¹¹³ This procedure, however, does not impose a blanket prohibition on interrogation. If the suspect waives the right to counsel by "initiating conversation,"¹¹⁴ interrogation may commence again, and any incriminating statements made at this time cannot be excluded from court on fifth amendment grounds.¹¹⁵

The *Bradshaw* "initiation" exception is not consistent with the spirit

Murphy, 378 U.S. at 55; see also *Gould v. United States*, 255 U.S. 298, 304 (1921); *Boyd v. United States*, 116 U.S. 616, 635 (1886).

¹¹⁰ If rights are violated, the exclusionary rule requires that the illegally obtained evidence not be admitted into court, and the government is less likely to obtain a conviction. Therefore, exclusion seems to be the most effective means of requiring law enforcement agencies to comply with constitutional requirements. See Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 GEO. WASH. L. REV. 193, 211-18 (1963).

¹¹¹ *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (quoting *Gould*, 255 U.S. at 304).

¹¹² A waiver may not be implied by silence, *Miranda*, 384 U.S. at 475, but may be implied by actions or words, *Butler*, 441 U.S. at 373.

¹¹³ The *Innis* Court defined interrogation as "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Innis*, 446 U.S. at 301. The Court focused on the perceptions of the accused and held the police to a standard of reasonableness in their practices.

¹¹⁴ *Oregon v. Bradshaw*, 103 S. Ct. 2830 (1983).

¹¹⁵ The Court did not specify how soon after the conversation is initiated that reinterrigation may begin. The police may have nearly an unlimited period of time since *Bradshaw*

of *Miranda*, which requires a "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease."¹¹⁶ *Bradshaw* places unnecessary discretion in the hands of local authorities who may gradually erode fifth amendment rights.¹¹⁷ Law enforcement officials might wait for the suspect to initiate conversation so they may begin reinterrogation.¹¹⁸ Since the Court ruled that a question as insignificant as "Well, what is going to happen to me now?" constitutes initiation of conversation for waiver purposes, it seems unlikely that officials would have to wait long for a suspect to start a conversation that would be recognized as a waiver of the right to counsel.¹¹⁹ This result is prejudicial to first-time offenders who are unfamiliar with police procedure and are less knowledgeable about their rights and how to respond to the custodial setting.¹²⁰

Miranda emphasized the inherent coerciveness of the custodial setting and placed a heavy burden of proof on the state to show a valid waiver.¹²¹ Despite these protections afforded by the fifth amendment

"initiated conversation" on the night of his arrest yet was not reinterrogated by the lie detector test which led to his incriminating statements until the next day. 103 S. Ct. at 2833.

¹¹⁶ *Fare v. Michael C.*, 442 U.S. 707, 719 (1979).

¹¹⁷ See *Goulded*, 255 U.S. at 304. In *Goulded*, the Court stated that the fourth and fifth amendments "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous [sic] executive officers." *Id.*; see also *Hoffman v. United States*, 341 U.S. 479 (1951). *Hoffman* states that the self-incrimination clause "must be accorded liberal construction in favor of the right it was intended to secure." *Id.* at 486.

¹¹⁸ Likewise, trial courts may further erode a suspect's fifth amendment protections by applying the *Bradshaw* "initiation exception" to fact situations where the suspect clearly does not intend to waive his right to counsel. These factual determinations are unlikely to be overturned by appellate courts which only rule on matters of law. It is likely that *Bradshaw* will be no more useful to trial courts than *Mosley*. The "scrupulously honored" test of *Mosley* has been applied to the facts of lower court cases, despite the Supreme Court's failure to establish guidelines for its application. "Consequently, the courts will, in all probability, admit confessions taken under conditions more coercive than those that existed in *Mosley*." Note, *supra* note 46, at 704.

¹¹⁹ Professor Kamisar explained:

[P]eople sitting close together in a vehicle are in a "social situation." They are likely to engage in "small talk" or to "visit." Few suspects in such situations are likely to snarl at their captors, "I don't talk to cops." Few suspects in such a situation are likely to want to irritate or offend their police "companions."

Kamisar, *supra* note 48, at 108.

¹²⁰ Studies have shown that *Miranda* is important because it has made suspects more aware of their rights, and because police know that their actions are subject to judicial review. Some suspects still do not understand their rights, however, and many researchers have concluded that counsel should therefore be available to all accused persons before interrogation begins. See Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1 (1970); Medalie, Zeitz & Alexander, *supra* note 30; Project, *supra* note 30, at 1613-16. "With a record, a suspect is more likely to be in sufficient control to evaluate the evidence and decide whether cooperation is the rational course of action. Without a prior record, a suspect is more likely to be at a detective's mercy." Project, *supra* note 30, at 1648.

¹²¹ 103 S. Ct. at 2834.

and *Miranda*, the Court refused to recognize that Bradshaw's question was in direct response to the custodial setting and not a waiver of his right to counsel. The Court thus created a general rule which, as applied by the Court, lightens the prosecutor's burden in proving waiver.¹²²

The Supreme Court's conflicting opinions¹²³ and the lack of a majority in *Bradshaw* demonstrate how difficult it is to recognize a waiver of the right to counsel and show the need for a clearly articulated standard. *Edwards'* *per se* analysis was meant to provide such a standard, but the plurality's application of the rule seriously undermines its efficiency. A clear exclusionary rule would preclude the admission of confessions elicited after the right to counsel was asserted, "subject only to a few specifically established and well-delineated exceptions."¹²⁴

The plurality's *per se* analysis consists of two prongs. The first prong, a threshold test, requires courts to determine whether the accused "initiated conversation" after invoking the right to counsel.¹²⁵ If the court concludes that the accused initiated conversation the analysis proceeds to the second prong to determine whether, under the totality of the circumstances, the suspect knowingly and intelligently waived the right to counsel.¹²⁶ The court will admit incriminating statements only after these two requirements are met.

Although this two-pronged analysis appears sufficiently rigid to allow only "a few specifically established and well-delineated excep-

¹²² *Id.* at 2835.

¹²³ In his concurring opinion, Justice Powell claimed that the plurality and dissenting opinions disagree over whether *Edwards* created a *per se* rule. 103 S. Ct. at 2836 (Powell, J., concurring). In dissent, Justice Marshall declared that the plurality and dissenting opinions agreed that *Edwards* announced a *per se* rule. 103 S. Ct. at 2840 n.2 (Marshall, J., dissenting).

¹²⁴ *Katz v. United States*, 389 U.S. 347, 357 (1967). In *Katz*, the Court refused to create an exception to the fourth amendment exclusionary rule and did not admit evidence obtained by wiretapping a telephone. See also *Arkansas v. Sanders*, 442 U.S. 753, 759-60 (1979). In that case, the Court refused to extend the automobile exception to the fourth amendment exclusionary rule to the search of luggage obtained from an automobile. The Court stated that "we have limited the reach of each exception to that which is necessary to accommodate the identified needs of society," *id.* at 760, and failed to extend the automobile exception or to create a new exception for the *Sanders* situation.

In *Ross v. United States*, 456 U.S. 798 (1982), the Court broadened the exception to the fourth amendment exclusionary rule for the search of automobiles under the guise of creating a bright line standard. See Note, *Fourth Amendment—Overextending the Automobile Exception to Justify the Warrantless Search of Closed Containers in Cars*, 73 J. CRIM. L. & CRIMINOLOGY 1430 (1982). Although this extension may be justified in *Ross*, *Bradshaw* presents no legitimate rationale for eroding the *per se* rule. In *Bradshaw*, the goals of maintaining a *per se* rule and limiting the exceptions to the exclusionary rule may be accomplished by rejecting the plurality's application of the *Edwards* rule.

¹²⁵ 103 S. Ct. at 2840 n.2 (Marshall, J., dissenting).

¹²⁶ *Id.* at 2835 (applying the *Zerbst* standard).

tions,"¹²⁷ in its application the plurality created an exception that prevents the test from being "a true guide to constitutional police action" by creating "exceptions [that are] . . . enthroned into the rule."¹²⁸ The plurality, in the first prong of the admissibility test, focused on who initiated the conversation instead of the context of the initiated conversation. This broadens the exception to the point where almost any conversation by the suspect is recognized as a waiver of the right to counsel, as long as the accused was the first to speak. The plurality thereby defeats the purpose of the exclusionary rule.¹²⁹

Under the plurality's *per se* test, if a court determines that the suspect initiated conversation, it must then turn to the second prong to determine whether the waiver was knowing and intelligent under the totality of the circumstances, including the fact that the suspect initiated discussion with the police.¹³⁰ This standard has been applied in several different situations to determine whether criminal defendants have waived their rights.¹³¹ The knowing and intelligent standard has most often been applied to test the validity of a waiver of counsel.¹³² Lower courts have found this standard easy to use to identify situations where the suspect truly wants to waive the right.¹³³

Although the adoption of an absolute *per se* rule would afford the greatest protection of the rights of the suspect and would be practical to apply for the courts and police,¹³⁴ the opinions in *Bradshaw* indicated that the Court will use a *per se* rule only with exceptions.¹³⁵ To comport with the fifth amendment goal of protecting the accused, however, the Court should adopt the dissent's interpretation of the first prong of the

¹²⁷ *Katz*, 389 U.S. at 357.

¹²⁸ *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971) (quoting *United States v. Rabinowitz*, 339 U.S. 56, 80 (1950) (Frankfurter, J., dissenting)).

¹²⁹ In *Sanders*, the Court stated that "because each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few [exceptions] . . . have been carefully delineated." 442 U.S. at 759-60. The Court should create similar "carefully delineated" exceptions to the fifth amendment exclusionary rule to protect the accused's right to counsel.

¹³⁰ *Bradshaw*, 103 S. Ct. at 2835; see also *Johnson v. Zerbst*, 304 U.S. 458 (1938).

¹³¹ The knowing and intelligent waiver standard has been applied to the waiver of the right to confrontation, *Barber v. Page*, 390 U.S. 719 (1968), a speedy trial, *Barker v. Wingo*, 407 U.S. 514 (1972), and the right to be free from double jeopardy, *Green v. United States*, 355 U.S. 184 (1957), cited in *Schneekloth v. Bustamonte*, 412 U.S. 218, 237-38 (1973).

¹³² This standard has also been applied to the waiver of counsel at trial, *Carnley v. Cochran*, 369 U.S. 506 (1962), or the waiver of counsel before pleading guilty, *Boyd v. Dutton*, 405 U.S. 1 (1972), cited in *Schneekloth*, 412 U.S. at 237.

¹³³ See *supra* note 101 and accompanying text.

¹³⁴ Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 203 (1977): "Per se rules somewhat simplify the task of the law enforcement officer. Similarly, trial and reviewing courts need not be bogged down by the necessity for making individual determinations of reasonableness."

¹³⁵ 103 S. Ct. at 2837 (Powell, J., concurring).

admissibility test. By focusing on the nature of the conversation initiated by the suspect, the dissent narrowly limited the exception to situations where the suspect converses about the subject matter of the investigation. The exception created by the dissent puts the burden on the state to show that the suspect initiated conversation about the subject matter of the criminal investigation, a heavier burden than merely showing that the suspect was the first to speak.

In addition, focus on the conversation instead of initiation would assuage Justice Powell's two criticisms of the bifurcated standard. First, Justice Powell stated that the standard confounds confusion.¹³⁶ This criticism is justified when, as in the plurality opinion, the exception becomes so large that it is likely to swallow the rule.¹³⁷ The confusion would be mitigated, however, if the exclusionary rule were applied, subject only to the narrowly defined exception created by Marshall in the dissent.¹³⁸ Second, by focusing on the definition of conversation and limiting the exception to situations where the accused clearly requests a waiver, Justice Powell's desire that courts address more substantive issues than "who said what first" should be satisfied.¹³⁹

The above considerations should have encouraged the Court to adopt the dissent's focus on the meaning of conversation to limit the scope of the initiation exception to the exclusionary rule. The *Miranda* safeguards were meant to protect the suspect from the influences of the custodial setting. In *Bradshaw*, as the dissent pointed out,¹⁴⁰ the suspect's conversation was in direct response to that setting. "To allow the authorities to recommence an interrogation based on such a question is to permit them to capitalize on the custodial setting."¹⁴¹ This was not the intent of *Miranda*, and the procedural protections adopted there should not have been undermined.

VI. CONCLUSION

Justice Powell emphasized the compelling duty of the Court to provide clarification of the standards for courts and law enforcement agencies.¹⁴² The Court, however, failed to provide such clarification. Justice Powell analogized the situation in *Bradshaw* to that in *Robbins v. Califor-*

¹³⁶ *Id.*

¹³⁷ See *Dunaway v. New York*, 442 U.S. 200 (1979), which stated that "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow up the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Id.* at 213.

¹³⁸ 103 S. Ct. at 2839 (Marshall, J., dissenting).

¹³⁹ *Id.* at 2838 (Powell, J., concurring).

¹⁴⁰ *Id.* at 2840 (Marshall, J., dissenting).

¹⁴¹ *Id.*

¹⁴² *Id.* at 2837 n.3 (Powell, J., concurring).

*nia*¹⁴³ where the Court, in a plurality opinion, created a rule which was too refined to be consistently applied in cases of warrantless searches of closed containers found in automobiles.¹⁴⁴ *Robbins* was overruled by *United States v. Ross*,¹⁴⁵ and a bright line rule was adopted in its place. The Court should likewise overrule the plurality decision in *Bradshaw* and establish a bright line standard for determining when a waiver occurs. It is clear from the opinions in *Bradshaw* that no reasonable guidance has emerged, and the Court should take the advice of Justice Powell and establish clear constitutional guidelines for determining the valid waiver of the right to counsel.

LEE A. WEISS

¹⁴³ 453 U.S. 420 (1981) (Powell, J., concurring).

¹⁴⁴ 103 S. Ct. at 2837 n.3 (Powell, J., concurring).

¹⁴⁵ 456 U.S. 798 (1982); *see also* note 124.