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THINKING THE UNTHINKABLE: RECASTING THE PRESUMPTION OF EDWARDS v. ARIZONA

EUGENE L. SHAPIRO*

Introduction

There is a certain quality to Edwards v. Arizona1 and its progeny that discourages predictions about their future development. In establishing a second tier of procedural protections for the defendant who asserts his right to counsel under Miranda,2 Edwards set forth a clear prophylactic rule which has survived several significant efforts at qualification and has withstood vigorous criticism by members of the Court. The rule of Edwards is simple enough to state: when, during custodial interrogation, a suspect requests the presence of an attorney, questioning must cease and the suspect may not be interrogated without the presence of counsel unless the suspect himself reinitiates conversation about the subject matter at issue.3 As articulated in subsequent cases, it simply is presumed, irrebuttably, that "he considers himself unable to deal with the pressures of custodial interrogation without legal assistance."4 Edwards' judicially crafted prophylactic rule, constructed to address the expressed needs of a suspect under Miranda, may be tempered only by the Court, but the Court has repeatedly declined to do so. The Court has held that Edwards' ban on police-initiated re-interrogation extends to questioning about unrelated matters5 even when pursued by authorities of another jurisdiction,6 and it continues after the suspect has consulted with an attorney.7 While a broad and somewhat controversial view of what might constitute a suspect's re-initiation of conversation has evolved,8 by and large the protective rule of Edwards has remained fixed. In rejecting attempts at modification, the Court has repeatedly praised Edwards' bright line quality as offering clear guidance to law enforcement authorities as to what is permissible.9 Understandably then,

* Professor of Law, Cecil C. Humphreys School of Law, University of Memphis. I wish to thank my colleague, David Romantz, and my student assistant, William Allen, for their valuable comments.
3. See id. at 484-85.
5. See id. at 677-78.
7. See id.
9. See Roberson, 486 U.S. at 681; Michigan v. Jackson, 475 U.S. 625, 634 (1986); Smith v. Illinois,
discussion of potential limitations upon the Edwards doctrine may seem speculative and even presumptuous.

It is in this context that courts and commentators have addressed the very important question of when the protection of Edwards might end. To many, the need for some limitation on the Edwards doctrine has been self-evident. On a seemingly intuitive level, they have regarded as unsustainable the idea that a suspect must forever be immunized from all police-initiated custodial interrogation, regardless of how many years have passed since his request for an attorney and regardless of any intervening circumstances that may have transpired.

This has resulted in developments in the area which are sometimes eagerly accepted by lower courts as appropriate limitations upon the Edwards doctrine, but which lack a cohesive rationale. Most notable has been the widely accepted view that a break in custody terminates the Edwards presumption. Commentators have attempted to characterize the types of events which should affect the duration of the Edwards prohibition. The discussion of the issue usually has involved a kind of wholesale or generic characterization of these events and an examination of how each category might be viewed in the context of the Edwards doctrine.10

This process has been helpful, and events such as an interruption in custody, the passage of time, and the disposition of the matter originally under investigation have been explored. While prompted by a doctrine which regards the presumption of Edwards as irrebuttable and by the consequent question of whether or when its prophylaxis might end, it sometimes seems that this wholesale categorization11 of intervening events misses the mark in attempting to address the real concerns underlying Edwards. Wholesale generalizations about the types of events which might render Edwards' protections inapplicable can lead to unwarranted assumptions and anomalous results. Edwards rests upon the presumption of a suspect's helplessness, and the process of relying upon generic conclusions about a particular type of intervening circumstance often seems to neglect a very real need for a more particularized inquiry as to how an event specifically bears upon a suspect's articulated need for an attorney during custodial interrogation.

All of this suggests that it might be useful to explore the issue of whether the importation of Miranda's "conclusive presumption" analysis into the realm of Edwards' second tier of protections is appropriate. With regard to the nature of conclusive and rebuttable presumptions in general, Professors Stephen Schulhofer and David Strauss have suggested that they are not as different in kind as is often


11. This description has long been used by Professor Gerald Gunther to characterize the Supreme Court's evaluation of entire categories of speech for the purpose of determining whether they warrant full protection under the First Amendment. See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1078 (1997).
believed.\textsuperscript{12} While their view is not uncontroversial,\textsuperscript{13} the further possibility that the Edwards presumption might be recast as rebuttable is intriguing. It is quite possible that Edwards' conclusive presumption was not mandated by the same imperatives as was Miranda's, and that a rebuttable presumption would be more suited to the advancement of the goals of Edwards.

A major challenge accompanying any modification of Edwards' prophylaxis of course would be the articulation of a standard that truly has teeth. Any rule must be difficult to thwart and must be manageable both in the interrogation room and in court. Under a modified approach, Edwards' presumption that a suspect continues to perceive himself to be "unable to proceed without a lawyer's advice"\textsuperscript{14} may be regarded as exceedingly strong, yet still rebuttable by evidence of special circumstances, known at the time of the reinterrogation, which compel the conclusion that the assumptions flowing from the suspect's request for a lawyer are no longer applicable. While an approach regarding Edwards' presumption as rebuttable is likely to yield a number of definite conclusions concerning some specific types of events which would permit reinterrogation, it would arrive at these conclusions by a route more suited to the evaluation of the variety of circumstances which might occur than does the current effort to anticipate and categorize those events. Moreover, this approach need not degenerate into the kind of amorphous "totality of the circumstances" approach that the Court has always eschewed in the area.\textsuperscript{15} The application of the presumption, a high standard for its rebuttal — applied rigorously — and perhaps even the designation of types of events which may not be considered, can prevent uncertainty.

\textit{The Evolution of the Edwards Presumption}

The Edwards doctrine developed gradually. Edwards itself did not speak in terms of a presumption. Rather, the Court addressed the significance of a suspect's request for counsel in the context of evaluating the sufficiency of traditional waiver analysis. In fact, events in Edwards might well have presented an occasion for the Court to discuss whether the suspect had sufficiently invoked his right to the presence of counsel before any further interrogation. Nevertheless, both the lower court and the Supreme Court treated the assertion of the right as sufficient.\textsuperscript{16}

Edwards, a murder arrestee who had initially agreed to custodial interrogation at a police station, was informed of his Miranda rights and asserted an alibi defense after being told that he had been implicated by another suspect. He then sought to "make a deal" and was afforded an opportunity to speak with a prosecuting attorney on the


\textsuperscript{14} \textit{Roberson}, 486 U.S. at 683.

\textsuperscript{15} \textit{Id.} (comparing and rejecting application of the standard of \textit{Michigan v. Mosley}, which required that police "scrupulously honor" suspect's assertion of right to silence).

telephone. After a few minutes, Edwards hung up and said, "I want an attorney before making a deal." Questioning then ceased and Edwards was taken to the county jail. The next morning, two different detectives arrived at the jail and asked to speak with Edwards. Edwards was so informed, and he replied that he did not wish to talk to anyone. Told that he had no choice and again informed of his Miranda rights, Edwards relented, spoke with the officers, and incriminated himself after hearing the taped statement of the individual who had implicated him. His confession was admitted at trial, and on appeal of his conviction the Arizona Supreme Court held that Edwards' assertion at the police station of both his right to remain silent and his right to counsel were sufficiently clear, but that both rights were waived during the jailhouse exchange. The U.S. Supreme Court focused upon the insufficiency of the state court's standard for evaluating waiver, underlining the fact that it must be not only voluntary, but that it must also comport with the familiar standard of Johnson v. Zerbst, constituting "a knowing and intelligent relinquishment or abandonment of a known right or privilege." The Court then went on to emphasize the need for additional safeguards when the accused has invoked his right to the presence of counsel during custodial interrogation. It noted that Miranda treated the assertion of the right to counsel as significant and stated that "the interrogation must cease until an attorney is present." The Court held:

When an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Chief Justice Burger, concurring in the judgment, described this requirement as a "special rule as to how an accused in custody may waive the right to be free from custodial interrogation."

17. See id. at 478-79.
18. See id. at 479.
19. See id. at 480.
20. 304 U.S. 458 (1938).
22. Id. at 485 (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).
23. Id. at 484-85 (footnote omitted). The Court added in Michigan v. Mosley, 423 U.S. 96 (1975), where it had held that a suspect's invocation of the right to silence must be "scrupulously honored," that it had recognized Miranda's distinction between "the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel." Edwards, 451 U.S. at 485 (citing Mosley, 423 U.S. at 104 n.10).
Elaboration of the policy underlying *Edwards* was left for later cases. *Arizona v. Roberson*, decided seven years later, is one of the most interesting, for it both articulated the rationale for *Edwards* and provided the basis for expanding its reach to foreclose reinterrogation by law enforcement authorities from other jurisdictions. The opinion began with the modest statement that the Court was declining Arizona's request that it "craft an exception to [the *Edwards*] rule for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." While the Arizona courts had agreed with this conclusion, the Court noted that it granted certiorari to resolve a conflict with decisions of other state courts, including one holding *Edwards* inapplicable to an interrogation on an unrelated matter by authorities from a different state.

Roberson, arrested at a burglary scene, was informed of his *Miranda* rights and stated that he "wanted a lawyer before answering any questions." Three days later, while he was still in custody, Roberson was questioned about a different burglary by another officer who was unaware that he had previously asserted his rights. Again, he was advised of his *Miranda* rights and then incriminated himself. Pursuant to *Edwards*, the incriminating statement was suppressed at trial and the suppression order was affirmed on appeal. When *Roberson* reached the Supreme Court, the Court noted that a primary purpose of *Miranda* was "to give concrete constitutional guidelines for law enforcement agencies and courts to follow," and reiterated that "[o]ne of the principal advantages of *Miranda* is the ease and clarity of its application." As to *Edwards'* reinterrogation standard, it added:

>[T]he prophylactic protections that the *Miranda* warnings provide to counteract the "inherently compelling pressures" of custodial interrogation and to "permit a full opportunity to exercise the privilege against self-incrimination," are implemented by the application of the *Edwards* corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the "inherently compelling pressures" and not the purely voluntary choice of the suspect. As Justice WHITE has explained, "the accused having expressed his own view that he is not competent to deal with the authorities without legal

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26. Id. at 678-79.
27. See id. at 679.
28. See id. at 679 n.3 (citing State v. Dampier, 333 S.E.2d 230 (N.C. 1985)).
29. Id. at 678.
30. See id.
31. See id. at 678-79. The Arizona Court of Appeals affirmed the suppression and the Arizona Supreme Court denied a petition for review. See id.
32. Id. at 680 (quoting *Miranda v. Arizona*, 384 U.S. 436, 441-42 (1966)).
33. Id. at 680 (quoting *Moran v. Burbine*, 475 U.S. 412, 425 (1986)).
advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.\textsuperscript{34}

The Court went on to praise the "bright-line, prophylactic" quality of the \textit{Edwards} rule, observing that the explanation it offered in 1979 for the "per se aspect of \textit{Miranda}" was applicable here.\textsuperscript{35}

\textbf{[T]he "relatively rigid requirement that interrogation must cease upon the accused's request for an attorney \ldots has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in \textit{Miranda} imposes on law enforcement agencies and the courts \ldots."}\textsuperscript{36}

The Court also noted specifically that "whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists."\textsuperscript{37}

Since \textit{Roberson}, the Court's approach to the rule in \textit{Edwards} most accurately can be characterized as one imposing a presumption that is irrebuttable. This is clearly reflected in the dissent of Justice Scalia in \textit{Minnick v. Mississippi}.\textsuperscript{38} In \textit{Minnick}, the Court considered the question of "whether \textit{Edwards}' protection ceases once the suspect has consulted with an attorney,"\textsuperscript{39} and concluded that the "protection of Edwards is not terminated or suspended" by such consultation.\textsuperscript{40} Minnick had spoken with his attorney on two or three occasions, after having asserted his \textit{Miranda} right to counsel during a double murder investigation by FBI agents. Questioning was resumed by state officials after Minnick's legal consultations, and Minnick's responses to this second round of questioning were admitted at his state trial.\textsuperscript{41} On appeal following conviction, the Mississippi Supreme Court held that the \textit{Edwards} reinitiation requirement was inapplicable, since counsel had been made available.\textsuperscript{42} The U.S. Supreme Court rejected this conclusion and emphasized the importance of counsel during interrogation.

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 681 (citations omitted).
\item \textsuperscript{35} \textit{Id.} at 682.
\item \textsuperscript{36} \textit{Id.} at 681-82 (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)). The Court added that the applicability of the "per se" aspect of \textit{Miranda} to the \textit{Edwards} doctrine was significant, as the former was "based on the unique role the lawyer plays in the adversary system of criminal justice in this country." \textit{Id.} at 682 n.4 (quoting Fare, 442 U.S. at 719).
\item \textsuperscript{37} \textit{Id.} at 687-88. In dissent, Justice Kennedy noted that the Court's rule "will bar law enforcement officials, even those from some other city or other jurisdiction, from questioning a suspect about an unrelated matter." \textit{Id.} at 689 (Kennedy, J., dissenting).
\item \textsuperscript{38} 498 U.S. 146 (1990).
\item \textsuperscript{39} \textit{Id.} at 147.
\item \textsuperscript{40} \textit{Id.} at 150.
\item \textsuperscript{41} \textit{See id.} at 148-49.
\item \textsuperscript{42} \textit{See id.} at 149-50.
\end{itemize}
In our view, a fair reading of Edwards and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.43

Justice Kennedy, a dissenter in Roberson, took the occasion on behalf of the Court to reaffirm Edwards' goal of preventing the police from badgering a defendant,44 and to praise "the clarity of its command and the certainty of its application."45 He noted that a single consultation with an attorney does not insulate a suspect from badgering, and that consultation is not always effective in informing a suspect of his rights.46 The difficulties in evaluating the scope and quality of consultation with counsel without interfering with the attorney-client privilege were also evident to the Court.47

Justice Scalia, in dissent, characterized the opinion as "establish[ing] an irrebuttable presumption that a criminal suspect, after invoking his Miranda right to counsel, can never validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple Miranda warnings and has actually consulted his attorney."48 For Justice Scalia, the issue was whether the irrebuttable presumption of Edwards should continue.49 His conclusion was that the Edwards rule should cease to apply after the first consultation, because the presumption that a "confession is the result of ignorance of rights" or coercion would then have "no genuine basis in fact."50 Justice Scalia characterized the Edwards prohibition as perpetual, adding:

"Perpetuality" is not too strong a term, since, although the Court rejects one logical moment at which the Edwards presumption might end, it suggests no alternative. In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I

43. Id. at 153.
44. See id. at 150 (citing Michigan v. Harvey, 494 U.S. 344, 350 (1990)).
45. Id. at 151.
46. See id. at 153-54.
47. See id. at 155. The Court also noted:
   Added to these difficulties in definition and application of the proposed rule is our concern over its consequence that the suspect whose counsel is prompt would lose the protection of Edwards, while the one whose counsel is dilatory would not. There is more than irony to this result. There is a strong possibility that it would distort the proper conception of the attorney's duty to the client and set us on a course at odds with what ought to be effective representation.
48. Id. at 156 (Scalia, J., dissenting) (emphasis added). Chief Justice Rehnquist joined in the dissent.
49. See id. at 161.
50. Id. at 162.
might add, not merely to interrogations involving the original crime, but
to those involving other subjects as well.\textsuperscript{51}

It seems clear that, as a consequence of the irrebuttable nature of \textit{Edwards}'
presumption, the implementation of the very legitimate concerns stemming from a
suspect's expression of potential helplessness has become a problematic all-or-nothing
issue. When the presumption flowing from a request for counsel is applicable, the rule
of \textit{Edwards} is given full sway, constituting a prophylaxis "with a vengeance."\textsuperscript{52}
Under this approach, the benefits of clarity and ease of application certainly are clear.
The costs are also significant, however, and they threaten to undermine the goals of
\textit{Edwards} itself. Where courts are willing, with or without sufficient doctrinal
justification, to see this powerful and irrebuttable presumption as no longer applicable
—as in the "break in custody" cases — the question of who reinitiates
interrogation, so telling and conclusive under \textit{Edwards}, fades into relative obscurity.\textsuperscript{53}
Perhaps more alarmingly, the breathtaking scope of the \textit{Edwards} presumption,
extending to questioning by other jurisdictions, encompassing the discussion of
unrelated matters, and possessing no articulated durational limitation, threatens to
pressure courts to discharge the mandate of \textit{Edwards} in a begrudging and potentially
undermining manner. A defendant may be more likely to be seen as having
insufficiently invoked his right to counsel during custodial interrogation. One wonders
how \textit{Edwards}' own invocation might be evaluated today were it to arise in the context
of assessing a reinterrogation by an oblivious officer from another state, years later,
about another matter. Resolution of the issue of whether a suspect has reinitiated a
conversation might likewise be influenced.\textsuperscript{54} The broad brush and indelible ink with
which \textit{Edwards} is now implemented are not without their problems.

\textit{The Litigation in United States v. Green}

In 1992, \textit{United States v. Green}\textsuperscript{55} presented the Court with an opportunity to
address the question of when the \textit{Edwards} presumption might terminate. In early
1993, the death of the defendant brought an abrupt halt to the litigation, but only after
the Court had heard oral argument in the case. That oral argument provides a
revealing indication of the Court's concerns at the time.

Lowell Green was arrested on July 18, 1989, and charged with the possession of
a controlled substance with intent to distribute. When presented with a consent form,
he noted in writing that he was not willing to answer questions without an attorney
present.\textsuperscript{56} No interrogation occurred.\textsuperscript{57} Before his indictment, he was remanded to

\begin{itemize}
\item 51. \textit{Id.} at 163 (citation omitted).
\item 52. Dissenting in \textit{Miranda}, Justice Harlan described its goals as the seeking of voluntariness "with
suitable to describe the operation of the \textit{Edwards} prophylaxis.
\item 53. This fact would of course continue to be relevant to traditional waiver analysis.
\item 54. \textit{See} Strauss, \textit{Reinterrogation, supra} note 10, at 400.
(1993).
\item 56. \textit{See id.} at 985.
\item 57. While not specifically noted in the opinion of the court of appeals, the questioning ceased. \textit{See}
\end{itemize}
the custody of juvenile authorities in connection with an unrelated matter. An attorney had been appointed to represent him at an initial arraignment on the drug charge,\(^5\) and on September 27, 1987 he pleaded guilty in the case to a lesser included drug offense.\(^6\) He remained in juvenile custody when, before his sentencing, he was booked on an unrelated murder warrant. At that booking, on January 5, 1990, he was advised of his *Miranda* rights and indicated on a written form that he was willing to waive them. After some discussion of his involvement in the murder, Green again was advised of his rights and agreed to make a videotaped statement. On tape, he confessed to his involvement in the murder.\(^6\)

Green was indicted for first degree murder, and his motion to suppress the statement was initially denied on the basis of several factors. The trial court noted that five months had elapsed after Green's invocation of his *Miranda* rights, that the later portion of his custody had occurred in the less coercive environment of a youth facility, and that Green had had several opportunities to confer with counsel.\(^6\) *Minnick* was decided shortly afterwards, and the trial court then reversed its ruling, since Green's opportunities to confer with appointed counsel had been the most significant ground for its initial decision.\(^2\)

The District of Columbia Court of Appeals affirmed the suppression of Green's statement.\(^3\) The court discussed the government's effort to distinguish *Edwards, Roberson* and *Minnick* based upon the "sheer length of time" between Green's assertion of the right to counsel and the questioning.\(^4\) It noted that "to the extent *Edwards* is 'designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights,' . . . that danger is reduced when the police have made no effort to interrogate the defendant for more than five months."\(^5\) While the court characterized this as a substantial argument,\(^6\) it assumed that the defendant's only contact with investigators and prosecutors was through his attorney or in the attorney's presence. Consequently, it noted that "there is nothing in the lapse of time itself from which to deduce that his original belief in his vulnerability to the pressures of custodial interrogation had diminished."\(^7\)

The court recalled the Supreme Court's insistence that the *Edwards* rule be kept "clear and unequivocal," and asked, "[a]t what point in time — and in conjunction

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58. *See Green*, 592 A.2d at 985. The drug charge was initially dismissed at a preliminary hearing but was reinstated. See id. at 985-86.

59. *See id.* at 986.

60. *See id.* He also confessed to robbing the victim. *See id.*

61. *See id.*

62. *See id.*

63. *See id.* at 985.

64. *Id.* at 988.

65. *Id.* (quoting *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990)).

66. *See id.* The court also observed that while Green had been held in the "presumably less coercive environment" of a youth facility, the government's concession that Green had been in "continuous custody for purposes of the *Edwards* prophylactic rule," *id.* at 988-89, "relinquished[ed] any argument based upon differing degrees of coerciveness in the custodial environment." *Id.* at 989 n.5.

67. *Id.* at 989.
with what other circumstances — does it make doctrinal sense to treat the defendant's invocation of his right to counsel as countermanded without any initiating activity on his part?”

It added, “ultimately, given its emphasis on the need for a bright line rule in this area, we think only the Supreme Court can explain whether the Edwards rule is time-tethered.”

Responding to the government's argument that defendant's counseled guilty plea to the drug offense constituted a "break in events sufficient to sever any link" between defendant's assertion of his Miranda right to counsel and interrogation about the unrelated murder, the court stated that it "must decide whether by pleading guilty in the drug case defendant can be said to have 'reopened the dialogue with the authorities' within the meaning of Edwards." Thus framing the issue in terms of whether the plea constituted the defendant's reinitiation under Edwards, the court noted that the defendant had pleaded guilty with the assistance and advice of counsel. Although the plea presumably demonstrated personal acceptance of responsibility, it was consistent with his original decision to deal with the government officials through an attorney. Counsel's negotiation of a plea to a lesser charge "would only have confirmed the wisdom of his choice to insist on the shield of legal representation." The plea could not, therefore, be regarded as a prelude to a waiver constituting an "initial election by the accused to deal with the authorities on his own."

In the arguments before the Supreme Court, the government emphasized the fact that a guilty plea constitutes a waiver of the privilege against compulsory self-incrimination, noting both that a plea initiated a change in the accused's status and that a suspect who has so waived his privilege "is unlikely to feel badgered if the police subsequently approach him, repeat the Miranda warnings, and seek to question him about an unrelated offense." At oral argument, questioning by the Court of the Deputy Solicitor General focused on the fact that Green had not yet been sentenced, and that he may have experienced coercive pressures. The issue of how the Court might approach the possible termination of the Edwards presumption was addressed as follows:

68. Id.
69. Id. The court also cited the importance of a defendant's continuous custody in reaching this decision. See id.
70. Id. at 990 (quoting Edwards v. Arizona, 451 U.S. 477, 486 n.9 (1981)).
71. See id.
72. Id.
73. Id. at 991. The dissent maintained that, with the guilty plea, the circumstances had so changed "that any coercive effect must be deemed to have been dissipated." Id. at 992 (Steadman, J., dissenting).
75. See id. at 17.
76. Id. at 8, 25. For additional discussion of the government's arguments, see Jeffrey E. Richardson, Note, It's Not Easy Being Green, 31 AM. CRIM. L. REV. 145, 156-58 (1993).
QUESTION: Do you agree that there should be some bright line test for any cutoff of the duration of the Edwards rule?

MR. ROBERTS: No, Your Honor, I don't think that the brightness of the line is absolutely paramount to all other factors. The guilty —

QUESTION: You'd have us apply a totality of the circumstances test?

MR. ROBERTS: I don't think it goes that far. The dichotomy between the clear Edwards rule and our proposal today I think is a very false one. When the Court applies Edwards today, it looks at the circumstances of each case. It has to look to see if the individual is in custody. It has to look to see if what he has done amounts to an invocation of his right to counsel. It has to look to see whether or not he has waived that invocation by subsequent initiation. It has to look to see whether or not what the police are doing is interrogation, and although this Court hasn't decided it yet, we think they have to look to see to make sure he has been continuously in custody.\(^78\)

This discussion was followed by a colloquy illustrating the difficulties of line drawing with the passage of time.\(^79\) In turn, defense counsel was examined about the perpetuality of the Edwards' rule:

MR. CONTE [Responding to the question of whether sentencing might terminate Edwards' protection]: After sentencing, I think you would have that assurance. I think the person is in a much different psychological state of mind after sentencing.

QUESTION: So you don't — you say Edwards wouldn't last forever, but after sentencing?

MR. CONTE: I still think it should last forever, but after sentencing would certainly be a better break if this Court was going to end it than it would be after a plea and before sentencing.

QUESTION: Nothing lasts forever, Mr. Conte.

(Laughter.)

\(^78\) Oral Arg. at 10-11, Green (No. 91-1521).

\(^79\) A question, later attributed to Justice White, was posed as to whether Edwards "just wears out."

_id. at 16; see 52 Crim. L. Rep. (BNA) 3097 (Nov. 30, 1992). The following then occurred:

QUESTION: Well, it isn't clear to me what you would say. Suppose he had remained in custody and it had been 3 months and the police hadn't asked him anything and no guilty plea. Now, is that enough?

MR. ROBERTS: Yes, it is, and —

QUESTION: 2 months?

MR. ROBERTS: 2 months is enough and —

QUESTION: 1 month?

MR. ROBERTS: 1 month is enough.

QUESTION: 2 days?

MR. ROBERTS: 2 days is probably not enough. Now, it isn't a bright line.

QUESTION: It isn't even a line, is it?

Oral Arg. at 17-18, Green (No. 91-1521). The first four indented questions are attributed to Justice O'Connor at 52 Crim. L. Rep. (BNA) 3097 (Nov. 30, 1992).
MR. CONTE: That's true, Your Honor.\textsuperscript{80}

The suggestion that a totality of the circumstances test constitutes an alternative to a bright line approach is telling. It reflects the problem posed by the casting of the \textit{Edwards} presumption as conclusive, while it also seems evident that it should not last forever. Under the current framework, the "rigid"\textsuperscript{81} rule of \textit{Edwards} (derived from the "rigid"\textsuperscript{82} rule of \textit{Miranda} requiring the cessation of questioning upon a request for counsel) invites the Court to consider each specific circumstance as a distinct point at which the irrebuttable presumption no longer applies. It is clear from the oral argument in \textit{Green} that the Court might instead consider the possibility of a vague totality of the circumstances approach to the question of when the presumption ends. This approach could have a substantial and unacceptable institutional cost, sacrificing too much of the focus which is important for \textit{Edwards'} implementation by law enforcement authorities.\textsuperscript{83} A view that regards the \textit{Edwards} presumption as rebuttable might provide an alternative.

\textit{Intervening Circumstances: Discussions Thus Far}

As government counsel observed during oral argument in \textit{Green}, the Supreme Court has never held that a break in custody terminates the presumption of \textit{Edwards}.\textsuperscript{84} Rather, a fleeting reference to continuous custody in dictum in \textit{McNeil v. Wisconsin}\textsuperscript{85} is sometimes cited as an indication of the Court's view of the issue. The Court's statement there provides a tenuous basis for such a significant conclusion. In \textit{McNeil}, the Court expressly held that the defendant's right to counsel under \textit{Miranda} was not at all implicated. The defendant had invoked his Sixth Amendment right to counsel at an initial appearance on a charge of armed robbery, when he was represented by an appointed attorney. Afterwards, while in custody, McNeil was questioned several times about an unrelated homicide. He signed a waiver form at each session and incriminated himself. After he was charged with the murder and related offenses, McNeil moved to suppress his statements on the ground that his courtroom appearance constituted an invocation of his \textit{Miranda} right to counsel and that his waivers during the police-initiated interrogation sessions were invalid.\textsuperscript{86}

The Court rejected his argument. Noting that the Sixth Amendment right to counsel is offense-specific and would not bar police-initiated reinterrogation on an unrelated crime,\textsuperscript{87} it held that McNeil's invocation of the right to counsel at his judicial

\textsuperscript{80} Oral Arg. at 29-30, \textit{Green} (No. 91-1521).
\textsuperscript{82} See Fare, 442 U.S. at 719.
\textsuperscript{83} Such tests often provide little guidance as to how relevant factors are to be weighed, or indeed, which factors are most significant.
\textsuperscript{84} See supra note 78 and accompanying text.
\textsuperscript{86} See id. at 173-74.
\textsuperscript{87} See id. at 175-76.
appearance did not constitute an invocation of the non-offense-specific *Miranda-Edwards* right. 88 When characterizing *Edwards*, the Court stated:

In *Edwards* . . . we established a second layer of prophylaxis for the *Miranda* right to counsel: Once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," [*Edwards*] which means, we have most recently held, that counsel must be present [Minnick]. If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.89

Six federal circuits80 and more than a dozen state courts81 have embraced a rule terminating the *Edwards* presumption when there has been a break in custody. Many of these cases predate *McNeil*, and citation by others to the above-quoted parenthetical82 adds little to the evaluation of the matter. The Supreme Court's *McNeil* "assumption," noted in dictum for the purpose of broadly stating the *Edwards* rule, did not discuss specific policy considerations flowing from a break in custody, nor did it

88. See id. at 177-78. The Court observed that the purposes of the guarantees are different. While the purpose of the Sixth Amendment right is "to 'protect[] the unaided layman at critical confrontations' with his 'expert adversary'" after positions have solidified with respect to a particular offense, id. (quoting United States v. Gouveia, 447 U.S. 180, 189 (1984)), the *Miranda-Edwards* rule was designed to protect "the suspect's 'desire to deal with the police only through counsel,'" *McNeil*, 501 U.S. at 178 (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)). As the *Edwards* rule relates not only to custodial interrogation, but also extends to any crime, regardless of whether an "adversarial relationship" has arisen, "[t]o invoke the Sixth Amendment interest is, as a matter of fact, not to invoke the *Miranda-Edwards* interest." *McNeil*, 501 U.S. at 178 (emphasis added). The Court added that invocation of the Fifth Amendment right requires a statement that can "reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." *Id.* (emphasis added). It also noted that it had never held that *Miranda* rights can be invoked anticipatorily, outside of the context of custodial interrogation. See *id.* at 182 n.3.

89. Id. at 176-77.

90. See Kyger v. Carlton, 146 F.3d 374, 380-81 (6th Cir. 1998); United States v. Barlow, 41 F.3d 925, 945-46 (5th Cir. 1994); United States v. Hines, 963 F.2d 255, 257 (9th Cir. 1992); Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988); McFadden v. Garraghty, 820 F.2d 654, 661 (4th Cir. 1987); United States *ex rel.* Espinoza v. Fairman, 813 F.2d 117, 125-26 (7th Cir. 1987) (dictum); United States v. Skinner, 657 F.2d 1306, 1309 (9th Cir. 1982); see also United States v. Vaughters, 44 M.J. 377, 379 (C.A.A.F. 1996).


92. See *Vaughters*, 44 M.J. at 379; Keys, 606 So. 2d at 672; Wyatt, 688 A.2d at 713.
indicate what sort of break might make a difference. The propriety of attaching significance to a break in custody that would entirely terminate the Edwards presumption must be examined in light of the logic of Edwards itself.

Indeed, some of the early and most frequently cited cases in the area reflect the notion that a break in custody is determinative because it gives a suspect an opportunity to consult with an attorney — a view that has since been undermined by Minnick. The Eleventh Circuit's opinion in Dunkins v. Thigpen provides such an example. Noting that a break in custody "dissolves" a defendant's Edwards claim, the Court of Appeals for the Eleventh Circuit added, "If the police release the defendant, and if the defendant has a reasonable opportunity to contact his attorney, then we see no reason why Edwards should bar the admission of any subsequent statements." By itself, this discredited rationale would not be important, were it not for its reappearance in some post-Minnick opinions.

Far more often, the courts' acceptance of a "break in custody" dissolution of Edwards' protection is unadorned by any extensive effort to articulate a rationale. Of those mentioned, most frequently stated is the observation that a release from custody simply terminates coercive pressures. Precisely why this is assumed to be true even after a resumption of custody is an issue that is left unexplored, suggesting that courts are eager to find some limit to Edwards. The break in custody rule has been applied to a release for a period as short as one day and as long as approximately fifteen months without apparent distinction. The rule at times has also been accompanied by the observation that a suspect's release from custody must not constitute a mere contrivance or pretext to permit reinterrogation. The cases are devoid of any suggestions as to the standard to be applied in divining whether a pretextual motive underlies a break in custody, absent an outright admission by authorities. If judicial efforts under the Fourth Amendment to monitor "pretextual" traffic stops before Whren v. United States are any indication, this issue would certainly be a difficult one to explore. Citing the need for clarity on this matter, Professor Marcy Strauss

93. 854 F.2d 394 (11th Cir. 1988).
94. Id. at 397; see also Skinner, 667 F.2d at 1309.
95. See Vaughters, 44 M.J. at 379. The court stated that, even after Minnick, i t "continue[d] to be persuaded that Edwards and its progeny did not intend to preclude further interrogation by police where a suspect has been provided . . . 'real opportunity to seek legal advice.'" Id. (quoting United States v. Schake, 30 M.J. 314, 319 (C.A.A.F. 1990)); see also Wyatt, 688 A.2d at 713.
96. See, e.g., United States ex rel. Espinoza v. Fairman, 813 F.2d 117, 125 (7th Cir. 1987); Bonnie H., 65 Cal. Rptr. 2d at 526; Trujillo, 773 P.2d at 1092.
97. See generally United States v. Skinner, 667 F.2d 1306 (9th Cir. 1982).
100. See, e.g., Bonnie H., 65 Cal. Rptr. 2d at 525; Trujillo, 773 P.2d at 1092.
102. Before Whren, it had been assumed by some that the Fourth Amendment prohibited a pretextual traffic stop, where an officer was motivated by a desire to search for evidence of another offense. See generally Ed Aro, Note, The Pretext Problem Revisited: A Doctrinal Exploration of Bad Faith in Search and Seizure Cases, 70 B.U. L. Rev. 111 (1990). Whren held an officer's ulterior motives
has also correctly criticized the approach which terminates Edwards' protection upon any break in custody as ill-suited to serve the rule's potential justifications.\textsuperscript{103} She has noted that release does not necessarily dissipate any initial coercion, and even may, under some circumstances, enhance the coercive effect of custody through the intimidating process of reapprehension.\textsuperscript{104} It is also striking that those courts which employ a break in custody approach seldom discuss, or even acknowledge, the potential effect of coercive influences after custody is resumed.

The passage of time, another circumstance potentially affecting the duration of the Edwards presumption, was expressly discussed during the Green litigation. This issue remains open and the Court might well modify the current doctrine. Such a modification would of course require the generalization that, in fact, a protected suspect's need is not a "perpetual" one — to use Justice Scalia's term\textsuperscript{105} — and that at a certain point one should conclude that it is likely that the helplessness manifested by an initial request for counsel is absent. As the duration involved lengthens, debate about the influence of time upon a suspect's helplessness is likely to decrease, and the possibility of a suspect's change of heart may seem significant to the Court. Any perception that judicial line-drawing is arbitrary is also likely to fade if this point is marked at two or three years, rather than two or three months.\textsuperscript{106} As suggested by the litigation in Green, the "time-tethering"\textsuperscript{107} of Edwards' irrebuttable presumption may be inevitable when a truly lengthy period has elapsed.

As Green also illustrates, a number of difficulties will surround any effort to characterize a procedural development with regard to the prosecution of the case originally under investigation as an event that should end Edwards' protection. Despite the possibility that a variety of events might be portrayed as constituting the conclusive disposition of a proceeding,\textsuperscript{108} few in fact qualify. The expiration of a statute of limitations or the applicability of a constitutional bar to a prosecution\textsuperscript{109} are rare. Even under those circumstances, it does not necessarily follow that the non-offense-specific Edwards presumption should automatically terminate without some factual basis for concluding that a suspect's expressed needs have changed with regard to subsequent custodial interrogation.\textsuperscript{110}

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\textsuperscript{103} See Strauss, Reinterrogation, supra note 10, at 386-92. She would, however, endorse the termination of Edwards' protections if six months or more has transpired since the suspect's release. See id. at 401-02.
\textsuperscript{104} See id. at 389-90.
\textsuperscript{105} See supra note 51 and accompanying text.
\textsuperscript{106} See supra note 79 and accompanying text.
\textsuperscript{107} See supra note 69 and accompanying text.
\textsuperscript{108} Professor Strauss has observed that "[t]he end of an offense might be defined in many ways; it could include the government's decision to drop charges, the expiration of the statute of limitations, conviction for the offense, or sentencing." Strauss, Reinterrogation, supra note 10, at 392.
\textsuperscript{109} Examples would include situations where the right to a speedy trial, double jeopardy or due process forecloses prosecution.
\textsuperscript{110} Cf. Strauss, Reinterrogation, supra note 10, at 393 (noting that a guilty plea does not have this inevitable effect).
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Efforts to characterize other nondispositive events as in fact manifesting a change of perception by a represented defendant are on an even weaker footing. In Green, the government's argument that the guilty plea constituted a relinquishment of the privilege against compulsory self-incrimination was met by the court of appeals' conclusion that the plea "was consistent with [Green's] original election to deal with government officials only through an attorney." At the subsequent oral argument before the Court, it was suggested by a question that sentencing upon the initial charge would furnish an appropriate point for the expiration of the Edwards presumption.

Once again, this question seems to reflect a potential judicial view, manifested elsewhere during the argument, that there should be some limitation upon the Edwards rule. But the grounding of such a conclusion in the logic of the Edwards presumption has yet to be developed.

The discussion of intervening events which may affect the duration of Edwards' irrebuttable presumption at times has thus been marked by abstract, overbroad, or unexplained generalizations about their effects. The conclusiveness of the presumption and the consequent framing of the question of whether the presumption might inevitably have a "termination" point caused by a particular type of event have played no small role in shaping the discourse. Whether the conclusiveness of the presumption is really necessary for the adequate implementation of the goals of Edwards is a question worth asking.

The Suitability of Edwards' Conclusive Presumption

The evolution of our way of thinking about Edwards has been the product of our way of thinking about the rules of Miranda. Those rules were adopted in response to the deficiencies of the due process involuntariness standard, which failed to give police, prosecutors, and the courts adequate guidance for its implementation. The bright line qualities of the Miranda rules, including the mandate that interrogation must cease upon a suspect's request for a lawyer, were designed to provide needed specificity for the preservation of Fifth Amendment rights. Edwards itself linked its policies to the latter requirement, and in Smith v. Illinois the Court traced the prophylactic nature of the Edwards rule to Miranda's approach. The casting of Edwards as incorporating an irrebuttable

111. United States v. Green, 592 A.2d 985, 990 (D.C. 1991); see also supra note 71 and accompanying text.
112. "QUESTION: Well, I would have thought that the Edwards rule might expire at some point, certainly after he is sentenced after the drug charge." Oral Arg. at 25-26, United States v. Green, 504 U.S. 908 (1992) (No. 91-1521).
117. An accused in custody, "having expressed . . . his desire to deal with the police only through
presumption similarly parallels the evolution of the doctrine of *Miranda* as one in which, in the absence of its required warnings, an irrebuttable "presumption of compulsion" is created. ¹¹⁸ As is so evident from *Edwards, Roberson, and Minnick*, this importation of *Miranda*'s approach has been the result of the Court's conviction that *Miranda* has provided an effective methodology for dealing with the problems of custodial interrogation. The questions which have evolved under *Edwards* now suggest the need for a fresh look at the suitability of imposing a conclusive presumption in the *Edwards* context.

An examination of the dynamics which were evident in the *Green* litigation may provide a starting point. Focusing upon the potential issues which it presented, Professor George Dix has aptly characterized them as examples of the possible incorporation of "case-specific considerations" into a prophylactic rule "in order to avoid absurd results."¹¹⁹ He has also added that some advantages of the prophylactic rule might thereby have been sacrificed and that, in such a situation, "there is an increased risk that the incorporated qualifications will multiply until so-called prophylactic rules become indistinguishable from others."¹²⁰ The pressures in *Green* which could have prompted the modification of *Edwards' prophylaxis* — the possible avoidance of undesirable results — may also be seen as a general reflection of the unsuitability of the *Edwards* rule's current structure. If modification of the rule's overbreadth through the identification of presumption-terminating events would have been appropriate, perhaps the conclusive nature of the *Edwards* presumption should be reconsidered.

Whether the irrebuttable presumption analysis of *Edwards* is in need of any modification at all depends, of course, in part upon the extent to which its
counsel, is not subject to further interrogation by the authorities until counsel has been made available to him," unless he validly waives his earlier request for the assistance of counsel. *Id.* at 94-95. This "rigid" prophylactic rule, *Fare v. Michael C.*, 442 U.S. 707, 719 (1979), embodies two distinct inquiries:
First, courts must determine whether the accused actually invoked his right to counsel.
Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.

*Smith* 469 U.S. at 94-95 (citations omitted). In the pre-*Edwards* opinion of *Fare v. Michael C.*, the Court had noted:
The rule in *Miranda* . . . was based on this Court's perception that the 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. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment rights once the client becomes enmeshed in the adversary process, the Court found that "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system" established by the Court. [*Miranda*]
The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice of this country.

*Fare*, 442 U.S. at 719.
¹²⁰. *Id.*
overbreadth leads to undesirable or absurd results. In addition to considering the intervening circumstances discussed above, the overbreadth of Edwards' prophylaxis may be explored by positing an intervening event which does not fall into any ready category. Assume that a suspect has adequately invoked the protection of Edwards and remains incarcerated. While in jail, he approaches the authorities and volunteers to serve as a police informant concerning other inmates' criminal activities which are entirely unrelated to the matter about which he had been questioned. Thus, he cannot be seen as reinitiating conversation about the subject matter of the interrogation. The suspect remains "interrogation-proof" under Edwards. It cannot seriously be argued that his actions still manifest the sort of helplessness in dealing with authorities that Edwards was designed to address. It is not inappropriate to contemplate unusual situations, however statistically improbable they may be, in light of the myriad of unforeseeable intervening events that might occur under Edwards.

On one level, this suspect's circumstance can be seen as no more than a mere reflection of the fact that Edwards' irrebuttable presumption presents us with a prophylactic rule. Such rules, of course, are overbroad by definition, and the cost of sweeping some non-problematic situations within their protections are often outweighed by their advantages. But, looking more closely, one might also examine the nature of the evil sought to be avoided by Edwards — the badgering of a suspect who has expressed helplessness without the assistance of counsel during custodial interrogation — and ask whether its irrebuttable presumption and attendant cost is necessary, or even appropriate, in furthering that goal. The sorts of facts that might dispel, and may sometimes even conclusively dispel, the presumed helplessness of a suspect may sometimes be easily ascertainable by the interrogating authorities. To say that the application of Edwards to the suspect in the above hypothetical "makes no sense" means more than just saying that the goals of Edwards are not served when applied to an unintimidated suspect. Here, the result enters into the realm of the absurd because the relevant facts concerning the suspect's comfort level in communicating with authorities are not only obtainable but are already known. The application of Edwards' irrebuttable presumption is not only unfortunate, it is jarring.

It is at this point that the comments of Professors Stephen Schulhofer, David Strauss and Joseph Grano are especially interesting, for their debate about the distinctions between rebuttable and irrebuttable presumptions may shed some light upon the question of which is most appropriate for Edwards. In 1987, Professor Schulhofer examined Miranda's conclusive presumption of compulsion and addressed the criticism of some, including Professor Grano, that it lacked legitimacy.121 He observed that "[a]ll agree that a court's responsibility for accurate factfinding allows it to assign burdens of proof and to adopt rebuttable

presumptions." Professor Schulhofer regarded "conclusive presumptions and related forms of prophylactic rules" as "aids to adjudication," and observed that a conclusive presumption is at times the best way "to minimize adjudicatory error." Of course, one must look closely at prophylactic rules to see whether they are appropriate for the context in which the Court has applied them. But there is nothing inherently improper or illegitimate about a rule just because it embodies a conclusive presumption." Recognizing that the pervasiveness of prophylactic rules alone does not necessarily establish their legitimacy, Professor Schulhofer proceeded to argue that the irrebuttable presumption of *Miranda* was particularly appropriate. The Court had arrived at its approach after "decades of experience with case-by-case assessment of all the circumstances."

Whatever logic may have suggested about the rigidity of conclusive presumptions, experience had shown that the flexible due process test created numerous problems, not only for suspects facing interrogation, but also for the courts and for the police. Although the shift from due process to the fifth amendment approach reduced the permissible degree of pressure and ostensibly eliminated the basis for "balancing" the need for a confession against the suspect's right to silence, other difficulties of the due process approach remained. The flexible test had left lower courts without usable standards and thus had created disproportionate demands for case-by-case review in the federal courts. The problems of judicial review also meant that intense interrogation pressures were inadequately controlled in practice . . . . Finally, case-by-case [due process] review left police without adequate guidance.

Under these circumstances, is it any wonder that the Court, exasperated after years of case-by-case adjudication, finally adopted a prophylactic rule? A conclusive presumption of compulsion is in fact a responsible reaction to the problems of the voluntariness test, to the rarity of cases in which compelling pressures are truly absent, and to the adjudicatory costs of case-by-case decisions in this area.

Professor Schulhofer's view of both rebuttable and irrebuttable presumptions as qualitatively comparable adjudicatory tools of varying suitability was shared by Professor Strauss, who regarded them as equally legitimate.

122. Schulhofer, supra note 12, at 450.
123. See id.
124. *Id.* at 448.
125. *Id.* at 450.
126. *Id.* at 451.
127. See *id.* at 450.
128. *Id.* at 451.
129. *Id.* at 451-53.
also noted that, in constructing rebuttable presumptions, courts consider both the constitutional values at stake and "the institutional difficulties that courts face in advancing those values." As to the formulation of the irrebuttable presumption of Miranda, he advanced the view that a similar assessment of the capacity of the judiciary was at work. "Traditional constitutional theory calls for courts to admit that they are not very good at finding the facts that bear on large-scale social problems; Miranda made essentially that admission about the facts of a certain category of particular cases." To Professor Strauss, prophylactic rules with structures paralleling that of Miranda's rule are common and legitimate features of constitutional doctrine.

Professor Grano's vigorous response to these views focused principally upon his earlier concern — the legitimacy of the Court's imposition of Miranda's judicially created prophylaxis. His subsequent writing has also made it clear that his concerns about legitimacy also extend to rebuttable presumptions. Of particular interest here, however, are Professor Grano's comments in 1988 about what he perceived to be differences between the nature of rebuttable and conclusive presumptions. Disagreeing with the views of Professors Schulhofer and Strauss that they are qualitatively comparable, Professor Grano stated:

Conclusive presumptions differ in kind, not simply degree, from rebuttable presumptions. Indeed, conclusive presumptions are not evidentiary or adjudicatory devices at all, but rather substantive rules of law:

In the case of what is commonly called a conclusive or irrebuttable presumption, when fact B is proven, fact A must be taken as true, and the adversary is not allowed to dispute this at all. For example, if it is proven that a child is under seven years of age, the courts have stated that it is conclusively presumed that he could not have committed a felony. In so doing, the courts are not stating a presumption at all, but simply expressing the rule of law that someone under seven years old cannot legally be convicted of a felony.

131. Id. at 192.
132. See id. at 208.
133. Id. at 209.
134. See id. at 195-207.
135. See generally Grano, Miranda, supra note 13. For Professor Grano, the legitimacy of the Court's imposition of the rule of Miranda remained the principal issue.

A prophylactic rule in the constitutional context is a court-created rule that can be violated without violating the Constitution itself. As the Supreme Court has explained with regard to Miranda, the police may violate Miranda's prophylactic rules without necessarily violating the Fifth Amendment. The proper question, therefore, is whether the Constitution grants the Supreme Court authority to reverse a conviction, particularly a state conviction, when no constitutional violation has occurred.

Id. at 176-77 (footnotes omitted).

The conclusive presumption operates, therefore, to make the presumed fact "legally immaterial."137

When examining the appropriateness of Edwards' conclusive presumption, it is useful to consider these views. Was the rule of Edwards constructed under circumstances in which the Court was prepared to regard the presumed fact — a suspect's continuing helplessness — as legally immaterial? The rule itself belies any such contention. By its own terms, a suspect who reinitiates a conversation about the subject matter of the interrogation may then be reinterrogated. This aspect of the Edwards rule is not merely a qualification of a stated proscription. It is a manifestation of the Court's conclusion that suspect helplessness remains, under the facts of a case, an important issue, and that reinitiation by the suspect is a sufficient index of his or her change in perception. A suspect's reinitiation of a conversation about a matter is certainly not identical to his or her statement that, "I am sufficiently unintimidated to be reinterrogated without a lawyer present." But under Edwards it is good enough. This suggests that the rule, in this aspect of its structure, might more closely resemble a rebuttable presumption than a conclusive one. The question of whether the policy of Edwards might also tolerate the consideration of circumstances other than reinitiation which bear upon the issue of suspect helplessness thus becomes an ancillary matter of efficacy and desirability, rather than a structural mandate.

This brings us to the observation of Professor Strauss that institutional considerations are often critical in the formulation of both rebuttable and conclusive presumptions. In few areas is this as evident as with Miranda. But do the same institutional considerations warrant the importation of Miranda's conclusive presumption analysis into the context of Edwards? Not necessarily.

The principal difference is in the interrogation room. Miranda's presumption was designed in part to influence police behavior which was sometimes spontaneous, under a range of circumstances which often included the wish to obtain a quick confession from a recently apprehended suspect. The absolute requirement that Miranda's procedures be implemented, coupled with an irrebuttable presumption of compulsion if they were not, was an effective tool in directing police activities. The context of Edwards is quite different.

Once a suspect has asserted his or her right to an attorney, the possibility of reinterrogation involves a need for considered judgment. The involvement of a prosecutor is more frequent. A would-be interrogator must be aware of a suspect's prior assertions of the right,138 must examine the adequacy of such assertions, and must consider whether the suspect has sufficiently reinitiated conversations so as to permit questioning. The point raised by the Government during oral argument in Green139 — that such matters must be explored during a judicial review of the reinterrogation — apply no less to the duties of the police. With the greater

137. **Id.** at 179 (quoting *McCormick on Evidence* § 342 (Edward W. Cleary ed., 1984) (emphasis added); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 640 n.2 (1954)).
138. This requirement is perhaps one of the most onerous tasks imposed by the Edwards doctrine.
139. See supra note 78 and accompanying text.
availability of prosecutorial advice, the process of assessing the propriety of reinterrogation under Edwards often lacks the need for on-the-spot police evaluation that is evident with many initial interrogations. As was also observed by counsel in Green, some of the matters which must already be considered under Edwards are inherently fact-specific. In short, the institutional effect of a bright line, conclusive presumption in regulating the activities of the police is significantly different in the contexts of Miranda and Edwards. It should also be noted that during the process of reinterrogation there are no urgent institutional circumstances like those which have elsewhere served as a justification for a bright line rule for law enforcement. A prominent modern example of this sort of factor, which has appeared in both the Fourth and Fifth Amendment contexts, has been the need to protect the safety of the public or the police.

A chief consideration that must be borne in mind when considering any modification of the Edwards doctrine is the constant threat that its policies may be undermined by law enforcement, prosecuting authorities, or by erroneous application in the courts. Efforts to thwart Miranda's goals are well documented, and tinkering with Edwards is a risky business. That being said, it is still useful to explore whether a modification of Edwards' conclusive presumption doctrine might be workable and effective, for, as noted above, the problems posed by Edwards' current breadth already include that of parsimonious implementation.

In application, the recasting of the Edwards presumption as rebuttable has the potential for tailoring the Edwards doctrine in a logical manner, consistently with its goals. Intervening events would be considered only as they bear upon the factual assumption of suspect helplessness that is inherent in the rule. Thus, for example, a break in custody followed by reapprehension and the resumption of custodial interrogation would be examined for its potentially ameliorative or coercive effects, and only if the sequence of events was in fact sufficiently likely to have dissipated coercive influences would the presumption be rebutted. With this inquiry, wholesale, overinclusive generalizations about the inevitable effects of all breaks in custody would be avoided, and rarefied inquiries about non-existent factual contingencies would be unnecessary.

As the presumption of Edwards is itself unique, so may be the formulation of any burden of proof which, if satisfied, would permit it to be rebutted. The costs of sacrificing the bright line qualities of Edwards' current approach, even for the purpose of addressing significant problems, are not to be ignored. The Court has repeatedly acknowledged that the certainty of Edwards' consistent application and

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140. See supra note 78 and accompanying text.
141. See New York v. Quarles, 467 U.S. 649, 653-60 (1984) (creating a public safety exception to Miranda); New York v. Belton, 453 U.S. 454, 462-63 (1981) (holding that where an occupant of automobile has been arrested, search incident to arrest justification authorizes search of entire passenger compartment). Critical of Belton, Professor Wayne LaFave has noted that an important inquiry in the consideration of a bright line rule for law enforcement should be "whether the bright line rule is responsive to a genuine need to forego case-by-case application of a principle." LaFave, supra note 113, at 855.
142. See Weisselberg, supra note 113, at 132-40.
the resulting preservation of its values are in large measure the reasons for its retention.\textsuperscript{143} The challenge of modifying \textit{Edwards} by constructing a high standard for rebuttal that is not readily susceptible to abuse or misinterpretation is evident. This challenge need not be insurmountable. When considering a standard, the Court should not be confined to traditional verbal formulations which have had their own checkered histories of implementation.\textsuperscript{144} In the context of a suspect having expressed his or her need for counsel, the Court should make a number of things clear. First, in light of the evolution of \textit{Edwards}' very stringent approach, it may be emphasized that the presumption that a suspect's expressed need continues is exceedingly strong and that the circumstances under which it may be rebutted are rare indeed. One possible formulation of this policy may state that only circumstances which compel a conclusion that the suspect's initial expression of helplessness no longer obtains would permit reinterrogation. Second, in order to reduce the possibility of a \textit{post hoc} rationalization of official misconduct, only facts known to the authorities at the time of a reinterrogation should be considered. Third, the Court may specifically enumerate any circumstances which have insufficient bearing upon the matter to be considered. For example, the Court may regard a suspect's \textit{pro se} appearance in a judicial proceeding as having little or no relevance to an expressed need for counsel during custodial interrogation. Finally, expressing the standard for rebuttal in general terms would not foreclose the Court from further identifying any specific condition under which the standard might be deemed to be satisfied. Thus, the passage of a specific, particularly lengthy period of time might well have the bright line consequence of permitting reinterrogation.

\textit{Conclusion}

It is quite possible that the Court would be reluctant to relinquish the certainty provided by \textit{Edwards}' current approach, and as suggested during argument in \textit{Green}, it may address current issues by identifying potential termination points for \textit{Edwards}' conclusive presumption. While this would itself represent a significant modification of \textit{Edwards}, it would also require the Court to anticipate each of the conditions which would have such a terminating effect.

In any event, \textit{Edwards} is already changing in the lower courts. The perpetuity and reach of the rule in \textit{Edwards} threatens to undermine its expansive implementation, and if the "break in custody" cases are any indication, courts may continue to construct limitations upon \textit{Edwards} which have little more doctrinal support than the dictum in \textit{McNeil}. The possibility of recasting \textit{Edwards}' presumption as rebuttable offers an alternative which may adequately further \textit{Edwards}' goals and provide the flexibility needed to address a variety of circumstances. An obvious

\textsuperscript{143} See supra note 9 and accompanying text.\textsuperscript{144} For example, application of the "clear and convincing evidence" standard of \textit{United States v. Wade}, 388 U.S. 218, 240 (1967), necessary for the prosecution to establish an independent origin for a courtroom identification after an improperly uncounseled lineup, has been less than rigorous. See \textit{generally} \textsc{Charles H. Whitebread & Christopher Slobogin, Criminal Procedure § 17.05(a)} (1993).
prerequisite to the Court's consideration of any such change must be its confidence in the formulation of a high standard for rebuttal of the presumption and its determination to insist upon its rigorous application. If the Court is of the view that a high standard may be maintained in practice, it may yet come to regard the recasting of the presumption as desirable.