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Arizona v. Roberson: Further Extending the Bright-Line

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ARIZONA v. ROBERSON: FURTHER EXTENDING THE BRIGHT-LINE

INTRODUCTION

Picture the following scene:[1] The sheriff of a small Mississippi town hangs a black man by the neck from a tree, after repeatedly beating and whipping the man until he finally signs a confession which the sheriff dictated.[2] The sheriff then convinces two other black men in custody to confess by whipping them with leather straps inlaid with metal buckles.[3] At trial, the court convicts these three men of murder, based solely upon their confessions.[4]

Although this scenario may sound repulsive to the average American's sense of justice, it was exactly what the United States Supreme Court had in mind when they issued the landmark decision of *Miranda v. Arizona*.[5] Although *Miranda* had the egalitarian goal of preserving a person's fifth amendment privilege against self-incrimination,[6] its subsequent history has been somewhat checkered. However, the Court's recent expansion of *Edwards v. Arizona* in *Arizona v. Roberson*[7] has seemingly given *Miranda* its second wind. Whether this expansion is justified remains to be seen.

This casenote will summarize the case scenario and holding in *Roberson*. To place *Roberson* in context, it will then examine the legal history of the fifth amendment right to counsel and will critically analyze *Roberson* by questioning the necessity of its holding, reviewing the Court's cost/benefit analysis, and examining the dangers of overextending the rule in *Edwards*. Finally, this casenote will discuss *Roberson's* potential impact.

FACTS

On April 16, 1985, police arrested Ronald Roberson at the scene of a burglary.[8] Pursuant to *Miranda*,[9] the arresting officer advised Roberson that he had the right to remain silent and that he was entitled to have an attorney present during any

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[1] The "scene" is adapted from the facts of Brown v. Mississippi, 297 U.S. 278 (1936).
[2] Lippman, *Miranda v. Arizona: Twenty Years Later*, 9 CRIM. JUST. J. 241, 245 (1987) describing the facts of Brown v. Mississippi, 297 U.S. 278, 279-82 (1936).
[3] *Id.*
[4] *Id.*
[5] *Miranda* v. Arizona, 384 U.S. 436 (1966).
[6] Inbau & Manuk, *Miranda v. Arizona - Is It Worth the Cost? (A Sample Survey, With Commentary, of the Expenditure of Court Time and Effort)*, 24 CAL. W.L. REV. 185 (1987/88).
[7] Arizona v. Roberson, 108 S. Ct. 2093 (1988).
[8] *Id.* at 2096.
[9] *Miranda*, 384 U.S. at 467-79.

interrogation.[10] Roberson stated his desire for counsel before answering any questions.[11] The arresting officer recorded Roberson's request for counsel in the officer's written report of the incident.[12] The police then took Roberson to a Tucson police station where Roberson made certain incriminating statements concerning the April 16 burglary.[13]

Meanwhile, a detective from another precinct learned of Roberson's arrest and sought out Roberson for questioning concerning an April 15, 1985 burglary.[14] The detective did not know that Roberson had requested counsel earlier.[15] On April 19, 1985, the detective told Roberson that he wished to discuss the April 15 burglary, and then gave Roberson a fresh set of Miranda warnings.[16] Roberson indicated his willingness to talk, and did not express any desire to consult with counsel.[17] The detective subsequently obtained an incriminating statement from Roberson concerning the April 15 burglary.[18]

The state first prosecuted and convicted Roberson for the April 16 burglary.[19] During the subsequent prosecution of Roberson for the April 15 burglary, the trial court suppressed the incriminating statements taken by the detective.[20] The trial court based this suppression directly upon the Arizona Supreme Court case of *State v. Routhier*.[21] *Routhier* extended the doctrine in *Edwards*[22] to cases involving the reinterrogation of a suspect concerning a separate and unrelated offense. The Arizona Court of Appeals affirmed the suppression order, also based on *Routhier*.[24] The Arizona Supreme Court denied a petition for review.[25]

The United States Supreme Court granted certiorari to solve a conflict among certain state court decisions.[26] In a six to two decision, the Supreme Court affirmed,

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[10] *Roberson*, 108 S. Ct. at 2096.
[11] *Id.*
[12] *Id.*
[13] During Roberson's trial for the April 16 burglary, the trial court allowed these statements to be admitted only for impeachment purposes. *Id.* at 2103 (Kennedy, J., dissenting).
[14] *Id.* at 2096.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), *cert. denied*, 464 U.S. 1073 (1984).
[22] Edwards v. Arizona, 451 U.S. 477, 484-85 (1981). *Edwards* states that after a suspect requests counsel, the police cannot continue interrogating, or later reinterrogate, the suspect until counsel has been provided, unless the suspect initiates further communication. *Id.*
[23] *Routhier*, 137 Ariz. at 97, 669 P.2d at 75.
[24] *Roberson*, 108 S. Ct. at 2096-97.
[25] *Id.* at 2097.
[26] *Id.*, (citing State v. Dampier, 314 N.C. 292, 333 S.E.2d 230 (1985), and McFadden v. Commonwealth, 225 Va. 103, 300 S.E.2d 924 (1983)). These cases refused to extend *Edwards* while cases such as State v. Routhier, 137 Ariz. 90, 669 P.2d 68 (1983), and State v. Arceneaux, 425 So. 2d 740 (La. 1983), did so.

holding that the rule in *Edwards* applies to bar police-initiated interrogations concerning a separate and unrelated investigation following a suspect's request for counsel.[27]

The Court first expounded upon the benefits of the bright-line prophylactic rule contained in *Edwards*.[28] The Court found that such a rule provides a clear guideline for both police and prosecutors in conducting interrogations, and for the courts in admitting evidence.[29] The Court then reviewed its decisions in relevant earlier cases and concluded that those cases did not compel an exception to the rule in *Edwards*.[30] Finally, the Court addressed the nature and factual setting of *Roberson*, and found that the danger of coerced confessions was great enough to warrant the application of the *Edwards* rule to this situation.[31]

Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist joined.[32] Justice Kennedy argued that the majority's rule was not necessary to protect the rights of suspects.[33] Justice Kennedy feared that such a rule will, in many instances, deprive our nationwide law enforcement network of a legitimate investigative technique now routinely used to resolve major crimes.[34] Justice Kennedy also viewed the danger of coerced confessions as minimal, and insufficient to justify the adoption of a rigid per se rule.[35] Furthermore, Justice Kennedy found that the rule in *Edwards* (without being applied to Roberson's situation) was sufficient to protect the suspect's right against self incrimination.[36]

BACKGROUND

The present-day right to counsel during custodial interrogation originates with the right against self incrimination contained in the fifth amendment.[37] Prior to *Miranda*, the standard in federal courts for admissibility of confessions was voluntariness.[38] In 1897, the courts extended the fifth amendment right against self incrimination to involuntary coerced confessions with the case of *Braums v. United States*.[39] Consequently, a coerced confession obtained by federal officers violated the fifth amendment right against self incrimination, and therefore was inadmis-

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[27] *Roberson*, 108 S. Ct. at 2093.
[28] *Id.* at 2097-98.
[29] *Id.*
[30] *Id.* at 2098-2100.
[31] *Id.* at 2100-01.
[32] *Id.* at 2101 (Kennedy, J., dissenting).
[33] *Id.* at 2102 (Kennedy, J., Dissenting).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] The fifth amendment to the United States Constitution provides in pertinent part that "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. AMEND. V.
[38] Lippman, *supra* note 2, at 242 (citing Hopt v. Territory of Utah, 110 U.S. 574, 585 (1884)).
[39] Lippman, *supra* note 2, at 243 (citing Braums v. United States, 168 U.S. 532, 542 (1897)).

sible.[40]

On the other hand, the Supreme Court did not apply the fifth amendment right against self incrimination to the states until 1964.[41] Before 1964, the state courts used a voluntariness test, but implemented it only through the fourteenth amendment due process clause.[42] In *Brown v. Mississippi* and its progeny,[43] the Court followed the traditional voluntariness test.[44] The Court ruled that the introduction into evidence of confessions extricated from the defendant by physical and psychological abuse are inherently untrustworthy and violative of due process of law.[45] To help determine whether a waiver was indeed voluntary, the Supreme Court adopted a "totality of the circumstances" test in *Johnson v. Zerbst*.[46] Although *Zerbst* was a sixth amendment right to counsel case, the courts subsequently applied the "totality of the circumstances" test to numerous cases involving custodial interrogation.[47] As the Supreme Court applied the voluntariness test using a case by case analysis, many felt that there was no general or reliable evidentiary standard that was evenly applied when determining the voluntariness of a confession.[48]

The Supreme Court then decided *Miranda*,[49] which had a huge impact upon the law surrounding confessions. In *Miranda*, the Court concluded that custodial interrogation is inherently compelling and works to undermine the suspect's will.[50] As a result, the Court established procedural safeguards designed to overcome this coercive setting.[51] More specifically, the Court held that a court should deem any statement made during custodial interrogation inadmissible, unless the accused are informed of, and then waive their right to remain silent and right to the presence of counsel.[52] If the suspects state that they want the assistance of counsel before being interrogated, or in the midst of interrogation, the police must cease interrogation until counsel is present.[53] Although the Court recognized that suspects could still

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[40] *See* Lippman, *supra* note 2, at 243.
[41] Malloy v. Hogan, 378 U.S. 1, 8 (1964) (where the Court incorporated the fifth amendment privilege against self incrimination into the fourteenth amendment due process clause, thus making it applicable to the states).
[42] *Brown*, 297 U.S. at 286.
[43] Lippman, *supra* note 2, at 246-248 (citing Chambers v. Florida, 309 U.S. 227 (1948), where the Court extended due process protection to defendants subjected to psychological coercion), and Ashcraft v. Tennessee, 322 U.S. 143 (1944)).
[44] Lippman, *supra* note 2, at 246.
[45] *Id.*
[46] Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The Court held that the validity of a waiver of counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused. *Id.*
[47] Culombe v. Connecticut, 367 U.S. 568 (1961); Leyra v. Denno, 347 U.S. 556 (1954); Haynes v. Washington, 373 U.S. 503 (1963).
[48] Lippman, *supra* note 2, at 249-50.
[49] Miranda v. Arizona, 384 U.S. 436 (1966).
[50] *Id.* at 467.
[51] *Id.* at 467-73.
[52] *Id.*
[53] *Id.* at 474.

voluntarily waive their rights without an attorney present, the Court placed a heavy burden on the government to show a "knowing and intelligent waiver."[54] The purposes of *Miranda* were to protect a suspect's fifth amendment rights by establishing a clear brightline rule to serve as a guideline for police, prosecutors, and courts.[55]

In the years after *Miranda* and before *Edwards*, *Miranda* was widely criticized while its impact steadily declined.[56] The three common criticisms of *Miranda* were that: (1) it did not properly interpret the fifth amendment;[57] (2) it was an exercise of judicial authority not conveyed by the constitution;[58] and (3) the costs of the *Miranda* rule outweighed the benefits.[59]

Edwards v. Arizona

In *Edwards*, the police arrested the suspect, took him to the local police station, and informed him of his rights under *Miranda*.[60] The suspect agreed to speak with police, but later demanded an attorney before "making a deal."[61] The police immediately ceased interrogation of the suspect.[62] The next morning, the police resumed interrogation concerning the same crime, despite the suspect's assertion that he did not wish to speak to anyone.[63] The suspect then agreed to make a statement if the

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[54] *Id.* at 475. Also note the use of the words "knowing and intelligent" to describe the type of waiver required. The "knowing and intelligent waiver" standard is a stricter standard than the traditional "voluntary" waiver standard, and is judged upon the particular facts and circumstances of each case. *See Edwards*, 451 U.S. at 482-84.

[55] *Roberson*, 108 S. Ct. at 2097.

[56] Note, *Edwards v. Arizona: The Burger Court Breathes New Life Into Miranda*, 69 CAL. L. REV. 1734, 1738 (1981) (citing Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100-101, for the following cases: Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Haas, 420 U.S. 714 (1975), (holding that evidence obtained in violation of Miranda is admissible against the suspect for impeachment purposes); Baxter v. Palmigiano, 425 U.S. 308 (1976) (holding that a prisoner's silence at a prison disciplinary proceeding may be the basis for an adverse inference); Michigan v. Tucker, 417 U.S. 433 (1974) (holding that an incriminating statement is admissible despite the fact that the suspect had not been informed that counsel would be appointed if he was indigent); Michigan v. Mosely, 423 U.S. 96 (1975), *cert.* denied, 434 U.S. 861 (1977), (holding that reinterrogation of a suspect has invoked right to remain silent so long as such right is scrupulously honored); Rhode Island v. Innis, 446 U.S. 291 (1980), *cert. denied*, 456 U.S. 930 (1982), (holding that conversation among police officers which caused suspect to incriminate himself was not interrogation even though suspect had been subjected to subtle compulsion); Fare v. Michael C., 442 U.S. 707 (1979), *reh'g denied*, 444 U.S. 887 (1979), (holding that juvenile's request to see probation officer was not equivalent to request for counsel); North Carolina v. Butler, 441 U.S. 369 (1979), (holding that a waiver of fifth amendment rights may be inferred from suspect's actions and words, although it is not to be presumed)).

[57] Special Project, *Criminal Procedure: The Justice Department's Report Against the Miranda Rule*, 10 HARV. J.L. & PUB. POL'Y 779, 785 (1987).

[58] Grano, *Miranda's Constitutional Difficulties: A Reply To Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176-81 (1988).

[59] *Miranda*, 384 U.S. at 542 (White, J., dissenting) (expressing concern that a killer or rapist will return to the streets and be free to repeat the crime).

[60] *Edwards*, 451 U.S. at 478.

[61] *Id.*

[62] *Id.*

[63] *Id.*

statement was not recorded.[64] The suspect subsequently implicated himself in the crime.[65]

The Supreme Court first held that a suspect's waiver of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right.[66] The Court then held that once a suspect requests counsel, the police must cease all interrogation until counsel is present or until the accused initiates further communication, exchanges or conversations with the police.[67] Thus, *Edwards* creates a per se rule that once a suspect requests counsel, any statements subsequently taken are inadmissible unless the suspect validly waives his or her fifth amendment right to counsel.[68]

The holding in *Edwards* corollates with the holding in *Miranda*.[69] Because the Court recognized *Miranda*'s attempt to counteract the compelling pressures of custodial interrogation, the Court felt it would be inconsistent to allow the reinterrogation of a suspect after the suspect had requested counsel.[70] As a result, the Court adopted a bright-line prophylactic rule designed to carry out the intentions of *Miranda*.[71]

Although *Edwards* appeared to strongly reconfirm *Miranda*, the status of *Miranda* again became clouded in the years following *Edwards*. In *Oregon v. Bradshaw*,[72] the Court held that the ambiguous statement "What is going to happen to me now?" constituted an "initiation" of conversation leading to a knowing and intelligent waiver, even though the suspect had earlier requested counsel.[73] In *New York v. Quarles*,[74] the Court carved out a public safety exception to *Miranda*.[75] In *Oregon v. Elstad*,[76] the Court allowed a second incriminating statement to be admitted, even though the police had obtained the suspect's first statement in violation of *Miranda*.[77] The Court expressed its dislike for rigid rules and stated that as long as the suspect's first statement was voluntary, there was no reason to presume coercion regarding the second statement.[78] Finally, in *Connecticut v. Barrett*,[79] the Court upheld the admissibility of a suspect's oral incriminating statements even

[64] *Id.*
[65] *Id.*
[66] *Id.* at 482.
[67] *Id.* at 484-85.
[68] Note, *supra* note 56, at 1740-43.
[69] *Edwards*, 451 U.S. at 482.
[70] *Id.* at 485.
[71] *Id.*
[72] Oregon v. Bradshaw, 462 U.S. 1039 (1983).
[73] *Id.* at 1045-46.
[74] New York v. Quarles, 467 U.S. 649 (1984).
[75] *Id.* at 657.
[76] Oregon v. Elstad, 470 U.S. 298 (1985).
[77] *Id.* at 318.
[78] *Id.*
[79] Connecticut v. Barrett, 107 S. Ct. 828 (1987).

though the suspect had requested counsel before making a written statement.[80] One author has gone so far as to say that because a similar situation arose in *Edwards*,[81] the holding in *Barrett* overrules *Edwards* for all practical purposes.[82] Against this inauspicious background, the United States Supreme Court decided *Roberson*.[83]

ANALYSIS

Arizona v. Roberson

In *Roberson*, the United States Supreme Court held that the per se prophylactic rule in *Edwards*[84] bars police-initiated interrogation regarding an unrelated investigation following a suspect's initial request for counsel.[85] Essentially, the Court based its holding upon: (1) the benefits of bright-line prophylactic rules such as that contained in *Edwards* and now in *Roberson*,[86] and (2) the underlying aim of *Miranda* in trying to counteract the compelling pressures of custodial interrogation and preventing coerced confessions.[87] As Justice Kennedy stated in his dissent, "the majority does not have a convincing case."[88] Indeed, for most of the *Roberson* opinion, the majority seems to have assumed a defensive posture rather than affirmatively asserting the merits of its decision.[89]

A. *Roberson* as an Unnecessary Extension of *Edwards*

As Justice Kennedy recognized in his dissent, the rule in *Edwards* is the Court's rule, and not a constitutional command.[90] Consequently, the Court must justify an expansion of such a rule before actually doing so.[91] In *Roberson*, the Court may not have provided adequate justification for so expanding *Edwards*.[92]

The privilege against self incrimination is best understood as a denial of the government's power to extract confessions forcibly and indecently, not as a denial of the value of confessions.[93] The Constitution does not necessarily require adherence to any particular solution for the inherent compulsions of the interrogation

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[80] *Id.* at 832.
[81] *Edwards*, 451 U.S. at 479 (where the suspect requested Counsel before making a deal).
[82] Special Project, *supra* note 57, at 784.
[83] Arizona v. Roberson, 108 S. Ct. 2093 (1988).
[84] *Edwards*, 451 U.S. at 484-87 (holding that a suspect is not subject to further interrogation after a request for counsel, unless the suspect initiates the communication with the police).
[85] *Roberson*, 108 S. Ct. at 2095.
[86] *Id.* at 2097-98.
[87] *Id.*
[88] *Id.* at 2102 (Kennedy, J., dissenting).
[89] *Id.* at 2098-2101 (Section III and IV of the opinion).
[90] *Id.* at 2102 (Kennedy, J., dissenting).
[91] *Id.*
[92] *Id.*
[93] Caplan, *Questioning Miranda*, 38 Vand. L. Rev. 1417, 1475 (1985).

process.[94] In fact, the Court did not intend the suggested safeguards of *Miranda* to create a constitutional straightjacket.[95] Rather, the Court intended to provide practical reinforcement for the privilege against self incrimination.[96] Therefore, it is puzzling that the *Roberson* Court almost summarily decided to extend the rigid per se rule of *Edwards* to the situation in *Roberson*.

The extension of the *Edwards* rule to the situation in *Roberson* may have been wholly unnecessary to protect a suspect's fifth amendment rights.[97] The Court in *Edwards* established a per se rule prohibiting the further interrogation of a suspect after counsel has been requested, unless the suspect initiates the communication.[98] Any statements obtained in violation of this rule are inadmissible.[99] In actuality, the rule in *Edwards* seems to encase the fact situation of *Roberson*, thereby making *Roberson*'s extension of *Edwards* unnecessary.[100]

When investigating a possible unrelated offense, the police must still necessarily inform the suspect of his or her right to counsel.[101] If the suspect does request counsel, the questioning must cease until counsel is provided.[102] If the interrogation concerning this unrelated offense persists and an incriminating statement is given, the police must show that the suspect not only voluntarily, but knowlingly and intelligently waived his or her right to counsel.[103] This would be a heavy burden for the police to shoulder.[104]

If the suspects waive their rights, there is no violation of the fifth amendment,[105] and no violation of *Edwards*.[106] If the Court finds that the suspect was badgered during the second investigation, or in the combination of the first and second investigations, the Court will exclude any incriminating statements pursuant to *Edwards*.[107] In other words, the *Edwards* rule appears to protect the suspect *without* the *Roberson* expansion.

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[94] *Miranda*, 384 U.S. at 467.
[95] *Tucker*, 417 U.S. at 444.
[96] *Id.*
[97] *Roberson*, 108 S. Ct. at 2102 (Kennedy, J., dissenting).
[98] *Edwards*, 451 U.S. at 484-85.
[99] *Id.*
[100] *Roberson*, 108 S. Ct. at 2102-03 (Kennedy, J., dissenting).
[101] *Miranda*,384 U.S. at 471.
[102] *Edwards*, 451 U.S. at 484-85.
[103] *Miranda*, 384 U.S. at 475.
[104] This burden has not been very heavy since cases such as Oregon v. Bradshaw, 462 U.S. 1039 (1983) (where suspect was held to have knowlingly and intelligently waived the right to counsel after asking the ambiguous question: "What is going to happen to me now?," and then agreeing to a police officer's suggestion that suspect take a polygraph test); and North Carolina v. Butler, 4441 U.S. 369 (1979) (where the Court held that in some cases, express waiver is not required but may be inferred from the actions and words of the suspect). *But see* note 112, *infra*.
[105] *Miranda*, 384 U.S. at 475.
[106] *Edwards*, 451 U.S. at 484.
[107] *See generally* Edwards v. Arizona, 451 U.S. 477 (1981).

The only burden left upon the suspect is the arguably minor burden of requesting counsel regarding the second investigation.[108] Indeed, if *Edwards* is correctly applied, the suspect will understand from his first invocation of rights that a second such invocation regarding a second investigation will produce a similar result, the cessation of interrogation.[109] If the *Edwards* rule is breached,[110] the courts protect the suspect by excluding any evidence obtained as a result of such breach.

Rather than unnecessarily expanding the already rigid per se rule of *Edwards*, the Court could have alleviated its fear of suspect badgering[111] by bolstering the "knowing and intelligent waiver" standard.[112] By doing so, the Court could have ensured the suspect's rights, while maintaining the status quo regarding the *Edwards* rule. Thus, it is curious that the *Roberson* Court did not choose this course of action, especially in light of the disfavor in which *Miranda* seems to have fallen.[113]

The Court could also have opted for other methods of protecting a suspect's rights without extending the per se prophylactic rule of *Edwards*. For example, the Court could have mandated compliance with prompt arraignment statutes,[114] or formulated an administrative policy concerning custodial questioning.[115] Such a policy would include: (1) a requirement that interrogations be videotaped (thus providing an accurate record for the Court to determine the existence of coercion), (2) rules relating to permissible duration and frequency of questioning, and (3) rules concerning behavior and demeanor in questioning suspects.[116]

In summation, it appears that the *Roberson* Court unnecessarily extended the rigid per se rule of *Edwards* to a new line of cases without properly considering all of the available alternatives.

B. Costs v. Benefits of Extending Edwards

Various courts and scholars have deemed the holdings in *Miranda*,[117] *Ed-*

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[108] *Roberson*, 108 S. Ct. at 2103 (Kennedy, J., dissenting).

[109] *Id.*

[110] The *Edwards* rule is breached when police officers persist in interrogating, or later attempt to reinterrogate, a suspect after the suspect has requested counsel and has not initiated communication with the police.

[111] *Roberson*, 108 S. Ct. at 2100.

[112] Caplan, *supra* note 93, at 1473-74. Caplan suggests as one alternative to *Miranda* that the Court require the government to prove the voluntariness of a waiver beyond a reasonable doubt rather than by preponderance of the evidence. *Id.*

[113] *See* Note *supra* note 56 and Section II.

[114] Caplan, *supra* note 93, at 1474. Prompt arrangement statutes are in effect in approximately 75% of the states. *Id.*

[115] KAMISAR, LAFAVE & ISRAEL, MODERN CRIMINAL PROCEDURE 107, 109 (Supp. 1988) (citing United States Department of Justice, Office of Legal Policy, Report to the Attorney General On the Law of Pre-Trial Interrogation (1987).

[116] *Id.*

[117] Miranda v. Arizona, 384 U.S. 436 (1966).

wards,[118] and now *Roberson*[119] to be prophylactic in nature.[120] A prophylactic constitutional rule functions as a preventive safeguard to ensure that constitutional violations will not occur.[121] As a result, the rule may be violated without violating the constitution.[122] Because of this feature, such a rule poses several serious threats if improperly created or expanded.[123]

First, the Court may violate the separation of powers doctrine by invading an area left to the legislative or executive branch under the Constitution.[124] In other words, the Court must show that a violation of the Constitution has occurred, or that there is adequate justification for creating such a rule without a constitutional violation.[125] By creating or expanding a prophylactic rule without the above prerequisites, the Court will be promulgating legislation, a practice barred by the separation of powers doctrine.[126] Second, the Court may violate the principle of federalism, which is embodied in the tenth amendment and in the structure of the Constitution.[127] By barring practices which are not prohibited by the Constitution, the Court would be intruding into an area reserved to the states.[128] To avoid these serious infractions, the Court must balance the attendant costs and benefits of the proposed prophylactic rule before creating or extending such a rule.[129] It appears that the *Roberson* Court may not have conducted this cost/benefit analysis properly before expanding the prophylactic rule of *Edwards*.

The benefits of a bright-line prophylactic rule appear to be the Court's primary reason for extending *Edwards*.[130] The Court claims that a bright-line prophylactic rule specifically instructs police and prosecutors as to how they may conduct custodial interrogations.[131] Furthermore, such a rule informs courts of the circumstances which renders suspects' statements inadmissible.[132] However, several recent cases seem to have blurred this so-called bright-line.

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[118] Edwards v. Arizona, 451 U.S. 477 (1981).
[119] Arizona v. Roberson, 108 S. Ct. 2093 (1988).
[120] Grano, *Prophylactic Rules In Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100, 106 (1985) (*Miranda* provides a good illustration of a prophylactic rule); *Bradshaw*, 462 U.S. at 1044 (clarifying the rule in *Edwards* as being prophylactic); *Roberson*, 108 S. Ct. at 2097-98 (prophylactic protections of *Miranda* and *Edwards* applied to *Roberson*)).
[121] Grano, *supra* note 120, at 105.
[122] *Id.*
[123] *Id.* at 123-24.
[124] *Id.* at 124.
[125] *See Roberson*, 108 S. Ct. at 2102 (Kennedy, J., dissenting).
[126] Grano, *supra* note 120, at 124.
[127] *Id.*
[128] *Id.*
[129] *See generally* New York v. Quarles, 467 U.S. 649 (1984); Special Project, *supra* note 57, at 783, 779 (citing Justice White's dissent in *Miranda*, 384 U.S. at 542); and *Roberson*, 108 S. Ct. at 2103 (Kennedy, J., dissenting).
[130] *Roberson*, 108 S. Ct. at 2095.
[131] *Id.* at 2098 (citing Fare v. Michael C., 442 U.S. 707, 718 (1979)).
[132] *Id.*

In *Oregon v. Elstad*,[133] the police questioned a suspect about a burglary before giving *Miranda* warnings.[134] The suspect promptly made an incriminating statement.[135] The police then read the suspect his *Miranda* warnings, after which the suspect made a second incriminating statement.[136] Traditionally, pursuant to the bright-line rule of *Miranda* and its progeny, the Court would have summarily suppressed the second statement as not being a valid waiver.[137] However, the *Elstad* Court refused to apply the rigid bright-line rule of *Miranda*.[138] The Court held that fruits of an otherwise voluntary statement need not be discarded as inherently tainted.[139] Consequently, the *Elstad* Court clouded the traditionally rigid bright-line rule regarding the admissibility of evidence abtained without *Miranda* warnings.[140]

In *New York v. Quarles*,[141] the police apprehended a rape suspect in a grocery store, but were unable to locate a gun they thought the suspect was carrying.[142] The arresting officer immediately questioned the suspect concerning the location of the gun without first giving the suspect *Miranda* warnings.[143] The suspect then disclosed the location of the gun.[144] After being given *Miranda* warnings, the suspect made another incriminating statement.[145] The *Quarles* Court admitted the evidence based on a public safety exception to *Miranda*.[146] The Court found that considerations of public safety in those situations outweigh the need for the per se prophylactic rule of *Miranda*.[147] Thus, *Quarles* further blurred the bright-line because the Court did not establish any standards to guide the police in applying the public safety exception.[148] In his dissent, Justice Marshall contended that the holding in *Quarles* "condemns the American judiciary to a new era of *post hoc* inquiry into the propriety of custodial interrogations."[149]

To further complicate matters, the bright-line rule in *Edwards* is not a model of clarity.[150] Rarely will it be absolutely clear whether the police or the suspect initiated the conversation.[151] Because the holding in *Roberson* corollates with the

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[133] Oregon v. Elstad, 470 U.S. 298 (1985).
[134] *Id.* at 301.
[135] *Id.*
[136] *Id.*
[137] Lippman, *supra* note 2, at 268.
[138] *Elstad*, 470 U.S. at 318.
[139] *Id.* at 309.
[140] Special Project, *supra* note 57, at 784.
[141] New York v. Quarles, 467 U.S. 649 (1984).
[142] *Id.* at 652.
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.* at 651.
[147] *Id.* at 657.
[148] Lippman, *supra* note 2, at 265.
[149] *Quarles*, 467 U.S. at 674 (Marshall, J., dissenting).
[150] *See generally* Oregon v. Bradshaw, 462 U.S. 1039 (1983) (interpreting *Edwards*.)
[151] Note, *Balancing the Right To Interrogate Against the Right To Counsel: Edwards v. Arizona*, 17 GONZ. L. REV. 697, 712 (1982).

holding in *Edwards*, the *Edwards* confusion will probably extend to *Roberson* regarding the initiation of communication.

Additionally, the costs of extending the *Edwards* rule seem considerable. First, the *Roberson* rule may prevent a suspect from knowing that a second investigation exists.[152] As a result, the *Roberson* rule will often deprive the suspect of the chance to cooperate in the second investigation, either for tactical reasons or otherwise.[153] The majority maintains that police can still pass information to the suspect regarding the second offense if it does not amount to interrogation.[154] However, the Court's somewhat inconsistent definitions of interrogation may have a chilling effect upon police officers involved in a second investigation.[155] Police officers may choose not to inform the suspect of the second investigation for fear that the courts will misconstrue this communication as interrogation.

Second, as with *Miranda* and *Edwards*, the *Roberson* decision will ultimately prove costly to the public.[156] Justice White's insightful dissent in *Miranda* applies with equal force to *Roberson*. Justice White stated "[i]n some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him."[157] The impact on society is further emphasized by the possibility that the *Roberson* expansion of *Edwards* may have been unnecessary to protect suspects' rights.[158]

Third, the *Roberson* rule will prove costly to law enforcement officials.[159] When a suspect is placed in custody, the suspect is frequently wanted for questioning with respect to an unrelated crime.[160] By extending the *Edwards* rule to interrogations occurring in the course of unrelated investigations, the Court is depriving the police of an extremely valuable investigative resource - interrogation.[161] After the suspect's initial request for counsel, the *Roberson* rule effectively bars officers investigating an unrelated crime from interrogating the suspect.[162] This bar operates

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[152] *Roberson*, 108 S. Ct. at 2103 (Kennedy, J., dissenting).

[153] Brief for the United States as Amicus Curiae Supporting Petitioner; Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

[154] *Roberson*, 108 S. Ct. at 2101.

[155] *See generally* Rhode Island v. Innis, 446 U.S. 291 (1980) (where the Court held that a subtly compelling conversation between two police officers in the presence of the suspect did not constitute interrogation). *But see* Brewer v. Williams, 430 U.S. 387 (1977), *reh'g denied* 431 U.S. 925 (1977) (where the Court held that a police officer's speech to a suspect was tantamount to an interrogation for sixth and fourteenth amendment purposes).

[156] Inbau & Manuk, *supra* note 6, at 198 (describing the impact on victims).

[157] *Id.* at 542 (White, J., dissenting).

[158] *See supra* Analysis Section, *Roberson* as an Unnecessary Extention of *Edwards*.

[159] *Roberson*, 108 S. Ct. at 2102 (Kennedy, J., dissenting).

[160] *Id.*

[161] Brief for the United States as Amicus Curiae Supporting Petitioner; Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

[162] *Roberson*, 108 S. Ct. at 2095.

no matter how minor the crime prompting the unrelated arrest, nor how serious the crime prompting the unrelated investigation. Consequently, the *Roberson* rule may further reduce the number of confessions and incriminating statements obtained by police.[163]

In summation, the purpose of any rule is not to make a court's role easier, but rather, to establish the best approach for seeking justice.[164] To fulfill this objective, the costs and benefits of the rule must be balanced.[165] In *Roberson*, it appears that when the Court considered the benefits of expanding *Edwards*, it overlooked some of the negative aspects of the *Edwards* and *Miranda* bright-line rule. As a result, the Court may not have conducted an accurate cost/benefit analysis before extending the *Edwards* rule.

C. Potential Impact of Roberson

The holding in *Roberson* extends the per se rule of *Edwards* to investigations regarding unrelated offenses.[166] In theory, *Roberson* establishes a clear guideline for officials investigating unrelated offenses regarding their ability to interrogate the suspect.[167] In reality, the *Roberson* holding remains unclear.[168]

The Court's application of the per se rule of *Edwards* to *Roberson* further increases the importance which *Miranda* and *Edwards* placed on the presence of counsel during custodial interrogation.[169] As a result, *Roberson* may further hamper law enforcement efforts, at least in regard to investigations concerning unrelated offenses.[170] Although one could argue against this result, in reality, the presence of counsel signals the vanishing point for confessions.[171]

Roberson may lead to the following scenario. State or local police arrest a suspect, inform the suspect of his or her rights, and then fingerprint the suspect.[172] The suspect then requests counsel for this offense. Meanwhile, by matching

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[163] Caplan, *supra* note 93, at 1464 (citing a Pittsburgh study. Before *Miranda*, the detective division obtained confessions in 54.5% of all cases). After Miranda, confessions were secured in only 37.5% of all cases, an overall decline of 31%. *See* Burger & Wettick, *Miranda in Pittsburgh - A Statistical Study*, 29 U. PITT. L. REV. 1, 11 (1967).

[164] Note, *supra* note 151, at 709.

[165] *See supra* note 129.

[166] *Roberson*, 108 S. Ct. at 2095.

[167] *Id.* at 2098.

[168] The clarity of *Roberson* depends in large part upon the practical ability of police officials to improve record keeping. That is, *Roberson* will have no preventive impact unless it is clear to officers investigating an unrelated offense that the suspect has already requested counsel.

[169] *Roberson*, 108 S. Ct. at 2097-98.

[170] *Id.* at 2102 (Kennedy, J., dissenting).

[171] Inbau & Manuk, *supra* note 6, at 196 (citing Justice Jackson in Watts v. Indiana, 338 U.S. 49, 59 (1949) who stated that "to bring in a lawyer means a real peril to the solution of the crime . . . Any lawyer worth his salt will tell the suspect . . . to make no statement to police under any circumstances.")

[172] *Roberson*, 108 S. Ct. at 2102 (Kennedy, J., dissenting).

fingerprints, federal investigators find that the suspect is wanted for questioning regarding a federal offense.[173] The federal investigators arrive to question the suspect, but due to a lack of communication or poor record keeping, the federal officers are not informed of the suspect's earlier request for counsel.[174] Consequently, the federal investigators may get a completely voluntary statement from the suspect, but will be barred from using this statement by *Roberson*.[175]

Although *Roberson* expands the holding in *Edwards*, it does not seem to clarify a nagging question left by *Edwards*.[176] *Edwards* provides no answer to the difficult question of how to determine who initiates subsequent communication after a suspect requests counsel.[177] *Roberson* must be read as prohibiting interrogation regarding an unrelated offense after a suspect has requested counsel, unless the suspect himself initiates the communication.[178] However, *Roberson* does not establish a standard for determining the difficult question of who initiated the communication. Thus, in the day-to-day realities of police work, it will still rarely be clear whether the police or the suspect initiated a conversation.[179] Consequently, *Roberson* may be difficult to apply in practice.

Although doubtful, *Roberson* could also elicit a major change in procedure in the area of the fifth amendment right to counsel. Many scholars believe that *Miranda* is ripe for being overruled or superceded by legislation.[180] In *Roberson*, the Court appears to have come dangerously close to overextending the prophylactic rule of *Miranda* and *Edwards*.[181] Therefore, to avoid a possible violation of the separation of powers doctrine, or the principle of federalism, Congress could replace *Miranda* with another procedure designed to protect a suspect's rights.[184]

CONCLUSION

Edwards attempted to further the underlying goals of *Miranda*[185] and to counteract the inherently compelling pressures of custodial interrogation by estab-

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[173] Brief for the United States as Amicus Curiae Supporting Petitioner; Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

[174] *See id.*

[175] *See generally Roberson*, 108 S. Ct. 2093 (1988).

[176] Note, *supra* note 151, at 712, which stated that *Edwards* left much to be desired because it created a per se rule centering around who started a conversation, but in reality, it is difficult to determine whether the police or the suspect initiated the conversation.

[177] *See generally Edwards*, 451 U.S. 477 (1981).

[178] *See Roberson*, 108 S. Ct. at 2095.

[179] *See supra* note 176.

[180] Grano, *supra* note 58, at 175-81; Caplan, *supra* note 93, at 1474-75; Special Project, *supra* note 57, at 785.

[181] *Roberson*, 108 S. Ct. at 2103 (Kennedy, J., dissenting).

[182] Grano, *supra* note 120, at 124.

[183] *Id.*

[184] *See supra* Analysis Section for alternative procedures.

[185] *Roberson*, 108 S. Ct. at 2097.

lishing a per se prophylactic rule.[186] This rule prohibited any further interrogation after the suspect requests counsel.[187] To that end, *Edwards* clearly made sense. However, the holding in *Roberson* expands the per se rule of *Edwards* well beyond that needed to protect a suspect's fifth amendment rights. Any number of alternatives short of expanding the *Edwards* per se rule would appear to have been sufficient.

Considering the constitutional dangers of overextending prophylactic rules,[188] it is puzzling that the Court did not conduct a more thorough cost/benefit analysis before expanding *Edwards*. Consequently, *Roberson* leaves a harsh per se rule which will ultimately hamper law enforcement efforts, while barely disturbing the status quo of *Edwards* regarding benefits to the suspect.

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[186] *Id.* at 2098.
[187] *Id.* at 2095.
[188] *See* Grano, *supra* note 120, at 124.