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Last Prophylactic Standing: Why the Quarles' "Public-Safety Exception" Should not Be Expanded to Excuse Edwards Violations that Occur During Exigent "Public Safety" Circumstances

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LAST PROPHYLACTIC STANDING:

WHY THE *QUARLES'* "PUBLIC-SAFETY EXCEPTION" SHOULD NOT BE EXPANDED TO EXCUSE *EDWARDS* VIOLATIONS THAT OCCUR DURING EXIGENT "PUBLIC SAFETY" CIRCUMSTANCES

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INTRODUCTION

At ten o'clock on a mild Tuesday morning in September, D.B. Cooper commits an armed robbery at House of Cards Savings & Loan. Cooper flees the scene on foot and traverses through a predominately residential neighborhood in an effort to elude the police. During his flight he travels over three miles through the backyards of homes, the grounds of a junior high school, and a playground attached to a church's daycare center. Lieutenant McClain finally finds Cooper one hour later hiding in Bart Simpson's tree house and arrests him. McClain's custodial search incident to the lawful arrest reveals that Cooper is no longer carrying the gun that was used during the armed robbery. McClain reads Cooper the Miranda warnings[1] and then asks him where the gun is. Cooper refuses to answer the question and immediately and unequivocally invokes his right to have an attorney present during his questioning.[2] McClain reasonably believes

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[1] These warnings . . . are: a suspect "has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." Dickerson v. United States, 530 U.S. 428, 435 (2000) (quoting Miranda v. Arizona, 384 U.S. 436, 479 (1966)).

[2] *See, e.g.*, Edwards v. Arizona, 451 U.S. 477, 482 (1981) ("[A]n accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation.").

that Cooper must have ditched the gun in the midst of his flight somewhere between the bank and the place of his arrest. McClain worries because he knows that at noon the junior high school and the church's daycare center will let out for recess, and the neighborhood will be bustling with children who could possibly stumble upon Cooper's gun. McClain is familiar with the "public-safety exception"[3] to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence.[4] He knows that it applies when officers ask questions reasonably prompted by a concern for the public safety.[5] McClain must now determine whether the exception may be utilized to permit continued questioning of Cooper despite his invocation of the right to an attorney[6] in order to procure information about the whereabouts of the gun and quell the imminent threat to public safety.

The issue facing Lieutenant McClain is currently an unresolved issue of law.[7] The Supreme Court has never answered the question of whether the "public-safety exception"[8] can be applied post-Miranda warnings to excuse continued questioning of a suspect who has invoked his right to an attorney and to allow any statements volunteered during that questioning to be admitted into evidence at trial. [9] The Court also has yet to determine the admissibility of physical evidence that is derived from statements obtained during such questioning.[10] Should police officers be allowed, during

3 *See* New York v. Quarles, 467 U.S. 649, 657 (1984) (concluding that a need for answers to questions when circumstances pose a threat to the public safety outweighs the need for the prophylactic Miranda warnings requirement); *see also* State v. Cosby, 169 P.3d 1128, 1137 (Kan. 2007) (stating that "the need to ascertain the location of a potential danger to the public outweigh[s] the need for the 'prophylactic rule' of *Miranda*" (quoting *Quarles*, 467 U.S. at 657)).

4 *See Quarles*, 467 U.S. at 655.

5 *See id.* at 656.

6 *See Edwards*, 451 U.S. at 484–85 (holding that custodial questioning must cease when the accused invokes his right to an attorney).

7 *See* State v. Harris, 544 N.W.2d 545, 549 n.5 (Wis. 1996) (noting that "the United States Supreme Court has yet to rule directly on [this] point"); *see also* People v. Zanini, No. F038571, 2003 WL 103464, at *5 (Cal. App. 5 Dist. Jan. 10, 2003) (stating that "[t]he 'knotty issue' of whether the *Edwards* no-recontact rule is subject to a public safety exception has not been addressed by . . . the United States Supreme Court . . . ").

8 *See Quarles*, 467 U.S. at 655–56 ("[T]here is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved."); *see also Cosby*, 169 P.3d at 1137 ("[T]he need to ascertain the location of a potential danger to the public outweigh[s] the need for the 'prophylactic rule' of *Miranda*." (quoting *Quarles*, 467 U.S. at 657)).

9 *See Harris*, 544 N.W.2d at 549 n.5 ("[T]he United States Supreme Court has yet to rule directly on point."); *see also Zanini*, 2003 WL 103464, at *5 ("The 'knotty issue' of whether the *Edwards* no-recontact rule is subject to a public safety exception has not been addressed by . . . the United States Supreme Court . . . "); *see also Cosby*, 169 P.3d at 1138 ("There is a split of authority on this issue.").

10 *See Harris*, 544 N.W.2d at 549 n.5 ("The [Supreme] Court has not addressed the question of admissibility of physical evidence derived from an *Edwards* violation.").

exigent "public safety" circumstances, to continue questioning a suspect who has invoked his right to an attorney? If yes, should courts allow the incriminating statements obtained, or the physical evidence that arises out of those statements, to be admitted into evidence at trial?

Four compelling interests must be balanced while contemplating these questions. The public safety, the suspect's right against self-incrimination and to an attorney,[11] the admissibility of statements obtained during continued questioning, and the admissibility of derivative physical evidence must be properly weighed in creating a rule to govern police behavior and provide evidentiary standards for exigent "public safety" circumstances. Should police be forced to stop questioning a suspect who could help put an end to an imminent threat to public safety once he has invoked his right to an attorney? Does an imminent threat to public safety justify the denial of a suspect's right to have an attorney present during interrogation? Should statements obtained during continued questioning of a suspect after the right to an attorney has been invoked be admissible at trial? What about physical evidence arising out of those statements?

This note argues that when circumstances present a real and immediate threat to public safety, law enforcement should be allowed to continue questioning a suspect who has invoked his right to counsel. Statements made during such questioning, however, should be suppressed at trial.[12] Instead of the "public-safety exception," other Fifth Amendment principles[13] should be utilized to allow the introduction of evidence arising out of those statements, while simultaneously suppressing the actual incriminating statements themselves. This solution will strike the

[11] *See* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself[.]"); *see also Edwards v. Arizona*, 451 U.S. 477, 482 (1980) ("*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation.").

[12] *See Edwards*, 451 U.S. at 487 (holding that statements that the defendant made after he invoked his right to counsel were inadmissible at trial).

[13] *See Quarles*, 467 U.S. at 660 (O'Conner, J., concurring in part and dissenting in part) (stating, "I would require the suppression of the initial statement taken from respondent . . . . [N]othing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation, and I therefore agree . . . that admission of the gun in evidence is proper"); United States v. Cherry, 794 F.2d 201, 207–08 (5th Cir. 1986) (holding that when a suspect's right to an attorney is ignored the statements taken in violation of *Miranda* should be suppressed; however since the statements were voluntary, his Fifth Amendment right against self-incrimination was not violated, and the physical evidence derived from that statement does not have to be suppressed); Michigan v. Tucker, 417 U.S. 433, 446–47 (1974) (concluding that when police conduct violates the prophylactic standards laid down in *Miranda*, but does not violate the defendant's constitutional privilege against compulsory self-incrimination, the Fourth Amendment exclusionary rule does not apply to suppress derivative evidence); Oregon v. Elstad, 470 U.S. 298, 309 (1985) (finding that a violation of the prophylactic *Miranda* procedures is not necessarily a Fifth Amendment violation, and therefore subsequent statements need not be suppressed if the statements were made knowingly and voluntarily).

appropriate balance between the four interests at stake.

Part I of this note discusses the Fifth Amendment right against self-incrimination, its procedural safeguards, and the current applicable Fifth Amendment evidentiary rules. Part II introduces the "public-safety exception" to the administration of the *Miranda* warnings and considers the rationale justifying its adoption to excuse continued questioning of a suspect who has invoked his right to counsel during exigent "public safety" circumstances. This Part then argues that a failure by police to administer the Miranda warnings is distinguishable from a failure to honor the invocation of the right to counsel, and therefore the adoption of the "public-safety exception" to these circumstances is inappropriate. Part III argues that other exceptions apply such that law enforcement should be allowed to continue questioning a suspect after he has invoked his right to counsel. This Part further concludes that the statements obtained during that questioning should be suppressed at trial, but that absent coercion, the "fruits" of those statements should be admissible.

I. THE RIGHT AGAINST SELF-INCRIMINATION

This section explores the Fifth Amendment protection against self-incrimination and its safeguard in the constitutionally based[14] Miranda warnings. Next, it introduces the bright-line rule forbidding continued questioning of a suspect who has invoked the right to counsel.[15] Finally, it discusses the evidentiary rules[16] that govern *Miranda* violations.

A. The Fifth Amendment Right Against Self-Incrimination and its Miranda Safeguard

The Fifth Amendment guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself."[17] The Miranda warnings are procedural safeguards that protect that right.[18] In

[14] *See Dickerson v. United States*, 530 U.S. 428, 444 (2000) ("[W]e conclude that *Miranda* announced a constitutional rule[.]").

[15] *See Edwards*, 451 U.S. at 484–85 (holding that custodial questioning must cease when the accused invokes his right to an attorney).

[16] *See, e.g., Tucker*, 417 U.S. at 446–47 (determining that when police conduct violates the prophylactic standards laid down in *Miranda*, but not the defendant's constitutional privilege against compulsory self-incrimination, the Fourth Amendment exclusionary rule does not apply to suppress derivative evidence); *Elstad*, 470 U.S. at 309 (finding that a violation of the prophylactic *Miranda* procedures is not necessarily a Fifth Amendment violation, and therefore subsequent statements need not be suppressed under the exclusionary rule if the statements were made knowingly and voluntarily).

[17] *Quarles*, 467 U.S. at 654.

[18] *See Tucker*, 417 U.S. at 444 (noting that the *Miranda* rights are procedural safeguards that insure

Miranda v. Arizona,[19] the Supreme Court held that certain warnings must be given before a statement made by a suspect during a custodial interrogation may be admitted into evidence.[20] The administration of these warnings is necessary to ensure that a suspect's statements are voluntary,[21] since the coercion that is inherent in custodial interrogation heightens the risk that an individual will not be accorded his Fifth Amendment privilege.[22] A suspect must be specifically informed of his Miranda rights and must voluntarily decide to forgo those rights in order for the statements made during custodial circumstances to be admissible.[23]

Since deciding *Miranda*, the Court has retreated somewhat from the absolute nature of the Miranda warnings requirement.[24] The Miranda warnings requirement has subsequently been described as a "practical reinforcement" of the Fifth Amendment right against self-incrimination[25] rather than a right protected by the Constitution.[26] The Court has concluded that *Miranda* "sweeps more broadly than the Fifth Amendment itself."[27] Since the Fifth Amendment "does not prohibit all incriminating admissions,"[28] the Fifth Amendment privilege against self-incrimination is

that the right against compulsory self-incrimination is protected); *see also* Hannon v. Sanner, 441 F.3d 635, 637 (8th Cir. 2006) (stating that the Miranda rights are "not themselves rights protected by the Constitution" but are instead "measures to insure that the right against compulsory self-incrimination [is] protected."); United States v. Spencer, 955 F.2d 814, 818 (2d Cir. 1992) (discussing the *Tucker* court's distinction between "a violation of a defendant's constitutional rights and a mere violation of *Miranda's* prophylactic safeguards. ...").

19 384 U.S. 436, 478–79 (1966) (providing the warnings and waiver that are necessary to use evidence obtained during an interrogation against a defendant at trial).

20 *Id.*; Dickerson v. United States, 530 U.S. 428, 431 (2000) (reiterating "that certain warnings must be given before a suspect's statement made during custodial interrogation could be admitted in evidence" (quoting *Miranda*, 384 U.S. at 478–79)).

21 *See id.* at 432–33 (describing how prior to *Miranda*, the Supreme Court evaluated the admissibility of a suspect's confession under a voluntariness test).

22 *See id.* at 435 (discussing the *Miranda* court's conclusion that the inherent coercion during custodial interrogation heightens the risk that an individual will not be accorded his Fifth Amendment privilege).

23 *See Quarles*, 467 U.S. at 654 (summarizing the findings of the *Miranda* court).

24 *See, e.g., id.* at 655–56 (holding that "there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence . . . ."); *see also Dickerson,* 530 U.S. at 454 (Scalia, J., dissenting) ("The proposition that failure to comply with *Miranda's* rules does not establish a constitutional violation was central to the *holdings* of *Tucker, Hass, Quarles,* and *Elstad.*").

25 *Quarles,* 467 U.S. at 654 ("Requiring *Miranda* warnings before custodial interrogation provides 'practical reinforcement' for the *Fifth Amendment* right." (citing Michigan v. Tucker, 417 U.S. 433, 444 (1974))).

26 *See id.*; *Michigan v. Tucker,* 417 U.S. 433, 444 (1974) ("[T]hese procedural safeguards [are] not themselves rights protected by the Constitution but [are] instead measure to insure that the right against compulsory self-incrimination was protected.").

27 Oregon v. Elstad, 470 U.S. 298, 306 (1985) (noting that the *Miranda* exclusionary rule "serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself").

28 *Quarles*, 467 U.S. at 654 (discussing the Fifth Amendment lack of prohibiting incriminating admissions).

not violated by even the most damning admissions absent some officially coerced self-accusation.[29] The Fifth Amendment prohibits only compelled testimony;[30] therefore, statements that are otherwise voluntary, but are taken without properly administering the Miranda warnings,[31] do not necessarily violate the Fifth Amendment.[32] Voluntary statements taken without following proper *Miranda* procedures may be admissible in certain circumstances.[33] Despite the limiting language of the decision and its numerous exceptions,[34] *Miranda* was recently reaffirmed[35] as a "constitutional decision."[36] *Miranda* now stands as a "concrete constitutional guidelin[e] for law enforcement agencies and courts to follow."[37]

B. *The Protection Against Continued Questioning After Invoking the Right to an Attorney During Custodial Interrogations: The Edwards Bright-Line Rule*

The Supreme Court's decision in *Edwards v. Arizona*[38] provided further

29 *Id.* (noting that "'absent some officially *coerced* self-accusation, the *Fifth Amendment* privilege is not violated by even the most damning admissions.'" (quoting United States v. Washington, 431 U.S. 181, 187 (1977))).

30 *See* Hiibel v. Sixth Judicial District, 542 U.S. 177, 189 (2004) ("The Fifth Amendment prohibits only compelled testimony that is incriminating."); *Elstad*, 470 U.S. at 306–07 ("The Fifth Amendment prohibits use by the prosecution in its case in chief only of compelled testimony.").

31 *See* Dickerson v. United States, 530 U.S. 428, 432–33 (2000) ("Prior to *Miranda*, [the Supreme Court] evaluated the admissibility of a suspect's confession under a voluntariness test"); *Tucker*, 417 U.S. at 441 ("Before *Miranda* the principal issue [in determining Fifth Amendment violations] . . . was . . . whether [the defendant's] statement was 'voluntary.'); Robert L. Gottsfield, *Is Miranda Still With US? Are the Police Duty-Bound to Comply?*, 43 ARIZ. ATT'Y 12, 13 (2006) ("There is a difference between the issues presented by whether Miranda warnings were properly given and the voluntariness of a confession in a criminal prosecution.").

32 *See* Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation.").

33 *See, e.g., Quarles*, 467 U.S. at 655–56 (holding that "there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence . . ."); *Elstad*, 470 U.S. at 307 (citing Harris v. New York, 401 U.S. 222 (1971) (noting that although "patently voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case," the presumption of coercion does not bar the use of those statements for impeachment purposes on cross-examination). *See generally, Dickerson*, 530 U.S. at 432–33 (describing how prior to *Miranda*, the Supreme Court evaluated the admissibility of a suspect's confession under a voluntariness test).

34 *See, e.g., Dickerson*, 530 U.S. at 454 (2000) (Scalia, J., dissenting) ("The proposition that failure to comply with *Miranda's* rules does not establish a constitutional violation was central to the *holdings* of *Tucker, Hass, Quarles*, and *Elstad*.").

35 *See id.* at 441 (indicating that the cases finding exceptions to *Miranda* "illustrate the principle – not that *Miranda* is not a constitutional rule – but that no constitutional rule is immutable").

36 *Id.* at 444 ("In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively.").

37 *Id.* at 439 (quoting Miranda v. Arizona, 384 U.S. 436, 441–42 (1966)).

38 451 U.S. 477 (1981).

procedural protection[39] against self-incrimination by announcing a bright-line rule that supplied clear and unequivocal guidelines for how to deal with a suspect who invoked his right to counsel[40] during a custodial interrogation.[41] In *Edwards*, a murder suspect was arrested in his house pursuant to a warrant and brought to the police station for questioning.[42] At the station, officers administered the Miranda warnings.[43] The suspect stated that he understood his rights and that he was willing to submit to questioning.[44] During the interrogation, the suspect stated that he sought to "make a deal," and the interrogating officer provided him with the telephone number of a county attorney.[45] After making the call, the suspect proclaimed that he wanted an attorney before making a deal.[46] At that point the questioning ceased and the suspect was taken to county jail.[47] The next morning two officers went to the jail in order to meet with the suspect.[48] The suspect was told that he had to speak with the officers even though he did not wish to.[49] The officers once again informed the suspect of his *Miranda* rights, and the suspect indicated that he would be willing to speak with them if he could first hear a recording of an alleged accomplice implicating him in the crime.[50] After hearing the recording, the suspect implicated himself in the crime.[51] At trial, the suspect sought to suppress his confession on the ground that his *Miranda* rights were violated when the officers returned to question him after he invoked his right to counsel.[52] The Supreme Court agreed.[53]

39 *See id.* at 484 (determining that even though the accused may validly waive his rights after being properly given his Miranda warnings, "additional safeguards are necessary when the accused asks for counsel").

40 *Id.* at 482 ("The accused's right to counsel during custodial interrogation arises . . . under the Fifth and Fourteenth Amendments.").

41 State v. Harris, 544 N.W.2d 545, 549 (Wis. 1996) (quoting *Edwards*, 451 U.S. at 484–85) (discussing what to do when the accused expresses his desire to have counsel present).

42 *Edwards*, 451 U.S. at 478.

43 *Id.*

44 *Id.*

45 *Id.* at 479.

46 *Id.*

47 *Id.*

48 *Id.*

49 *Id.*

50 *Id.*

51 *See id.* (describing how Edwards agreed to make a statement to the officers as long as it was not tape-recorded and then proceeded to implicate himself in the crime).

52 *Id.* ("Prior to trial, Edwards moved to suppress his confession on the ground that his *Miranda* rights had been violated when the officers returned to question him after he had invoked his right to counsel.").

53 *See id.* at 487 ("We think it is clear that Edwards was subjected to custodial interrogation . . . and that this occurred at the instance of the authorities. His statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.").

The Court held that once a suspect expresses his desire to deal with the police only through counsel, he should not be subject to further interrogation until counsel has been made available to him or he himself initiates further communication with the police.[54] The fact that the suspect responded to further police-initiated custodial interrogation did not establish a valid waiver of a previously asserted right to counsel.[55] This rule would apply even if he had been advised of his rights.[56]

Edwards stands firmly for the proposition that a suspect's request for an attorney is an invocation of his Fifth Amendment rights and requires that all interrogation cease.[57] When the police continue to question a suspect after he has invoked his right to an attorney, they violate the bright-line rule in *Edwards*.[58] Statements made by a suspect during questioning that violate the *Edwards* rule must be suppressed.[59] The Supreme Court, however, has never determined the admissibility of physical evidence derived from an *Edwards* violation.[60]

C. Evidentiary Rules that Govern Miranda Violations: Tucker and Elstad

A brief discussion of the evidentiary rules that govern *Miranda* violations is necessary to provide guidance and context for the rule that this note proposes. Since the Supreme Court has never determined the admissibility of physical evidence derived from a violation of the *Edwards* rule,[61] these evidentiary principles provide insight into the Court's understanding of the Fifth Amendment right against self-incrimination and its relationship to the *Miranda* safeguard.

A comparison to the evidentiary remedy for police violations of the Fourth Amendment proscription against "unreasonable searches and seizures"[62] is necessary to understand the relationship between the Fifth

54 *Id.* at 484–85 ("Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication. . . .").

55 *Id.* at 484 (stating that waiver cannot be established even if a suspect is advised of his rights).

56 *Id.* (indicating that even if the suspect responds to police initiated interrogation after asking for counsel to be present, waiver is not valid).

57 *Id.* at 485 (noting that it is a "'rigid rule that an accused's request for an attorney is *per se* an invocation of his *Fifth Amendment* rights . . .'" (quoting Fare v. Michael C., 422 U.S. 707, 719 (1979))).

58 *Id.* at 484–85 (discussing what is necessary once the accused asks for counsel).

59 *Id.* at 487 ("His statement, made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.").

60 *State v. Harris*, 544 N.W.2d 545, 549 n.5 (Wis. 1996) ("The [Supreme] Court has not addressed the question of admissibility of physical evidence derived from an *Edwards* violation.").

61 *Id.* (discussing the lack of Supreme Court decisions on this topic).

62 *See* U.S. CONST. amend. IV ("The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").

Amendment right against being "compelled in any criminal case to be a witness against [oneself]"[63] and its *Miranda* safeguard. A procedural *Miranda* violation differs significantly from a Fourth Amendment violation.[64]

Fourth Amendment violations have traditionally mandated the broad application of what has come to be known as the "fruit of the poisonous tree"[65] exclusionary rule.[66] Evidence seized during an unlawful search cannot be introduced at trial as evidence against the victim of that unlawful search.[67] In addition, tangible materials, or "fruits," obtained as a direct result of an unlawful invasion, or "the poisonous tree," are also barred from trial.[68] Evidence that has been discovered by exploiting an illegal search or seizure, rather then by "means sufficiently distinguishable to be purged of the primary taint" of the Fourth Amendment violation, must be suppressed.[69]

In *Michigan v. Tucker*,[70] the Supreme Court distinguished a *Miranda* violation from a Fourth Amendment violation by holding that when law enforcement officers unknowingly[71] departed from the prophylactic *Miranda* standards, but did not abridge the suspect's constitutional privilege against compulsory self-incrimination,[72] the case was not controlled by the "fruit of the poisonous tree" doctrine.[73] The question of whether police conduct directly infringed upon a suspect's right against

63 U.S. CONST. amend. V.

64 *See* Oregon v. Elstad, 470 U.S. 298, 306 (1985) (discussing the differences between Fourth and Fifth Amendment violations and clarifying that "[w]here a Fourth Amendment violation 'taints' the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted into evidence); Taylor v. Alabama, 457 U.S. 687, 690 (1982) (explaining that when the exclusionary rule is used to effectuate the Fourth Amendment, it serves interests and policies that are distinct from those that it serves when it is used to effectuate the Fourth Amendment).

65 Wong Sun v. United States, 371 U.S. 471, 488 (1963) (holding seized evidence to be "fruit of the poisonous tree" where it was discovered only "by the exploitation of" an illegal search).

66 *Elstad*, 470 U.S. at 306 ("The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits.").

67 *See Wong Sun*, 371 U.S. at 484 (citing Weeks v. United States, 232 U.S. 383 (1914)) (finding petitioner's incriminating statements made to the police immediately after an unlawful entry into petitioner's home inadmissible).

68 *Id.* at 485 ("The exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of unlawful invasion.").

69 *Id.* at 488 (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT 221 (Little, Brown and Company 1959)).

70 417 U.S. 433 (1974).

71 *See Tucker*, 417 U.S. at 437 (noting that the interrogation of Tucker occurred prior to the Court's decision in *Miranda*, but the trial occurred afterwards).

72 *Id.* at 446.

73 Oregon v. Elstad, 470 U.S. 298, 308 (1985) (citing *Tucker*, 417 U.S. at 446 (1974)) (stating that *the* Tucker decision was not controlled by the doctrine that fruits of a constitutional violation must suppressed).

compulsory self-incrimination was a separate question from whether that conduct violated the prophylactic *Miranda* rules developed to protect that right.[74] The Court concluded that the suspect's unwarned testimony was inadmissible at trial, but that the testimony of a man whom he identified to law enforcement in statements made during that questioning was admissible.[75]

In *Oregon v. Elstad*,[76] the Supreme Court built on the holding of *Tucker* and further differentiated a *Miranda* violation from a Fourth Amendment violation.[77] A violation of *Miranda* does not necessarily involve an actual infringement on the suspect's constitutional rights[78] since the Fifth Amendment privilege against self-incrimination is not violated absent some officially coerced self-accusation.[79] The Court determined that the *Miranda* protections "[sweep] more broadly then the Fifth Amendment itself,"[80] providing a remedy "even to [a] defendant who has suffered no identifiable constitutional harm."[81]

A "simple failure to administer the [Miranda] warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," does not taint the investigatory process so greatly "that a subsequent voluntary and informed waiver is ineffective. . . ." [82] The Court in *Elstad* held that "a suspect who has once responded to unwarned yet noncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings."[83] The Fourth Amendment exclusionary rule therefore does not apply when questioning merely departs from the prophylactic standards of *Miranda* since there is "no actual infringement of the suspect's

74 Dickerson v. United States, 530 U.S. 428, 451 (2000) (Scalia, J., dissenting) (citing *Michigan v. Tucker*, 417 U.S. at 439) (explaining the Court's reasoning in *Tucker*).

75 *See Tucker*, 417 U.S. at 452 (holding that the suspect's statements were properly excluded from trial, but that the testimony of the witness identified in those statements should have been admitted).

76 470 U.S. 298 (1985).

77 *Id.* at 308; *Dickerson*, 530 U.S. at 453 (Scalia, J., dissenting) (citing *Elstad*, 470 U.S. at 308) (explaining that in *Elstad*, the Court distinguished the case "from those holding that a confession obtained as a result of an unconstitutional search is inadmissible. . . .").

78 *Dickerson*, 530 U.S. at 453 (noting that a distinction was made between *Elstad* and other cases "on the ground that the violation of *Miranda* [did] not involve an 'actual infringement of the suspect's constitutional rights[.]'").

79 *New York v. Quarles*, 467 U.S. 649, 654 (1984) (explaining that without an "'officially coerced self- accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.'" (quoting United States v. Washington, 431 U.S. 181, 187 (1977))).

80 *Elstad*, 470 U.S. at 306.

81 *Dickerson*, 530 U.S. at 453 (Scalia, J., dissenting) ("'Miranda's preventative medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.'" (quoting *Elstad*, 470 U.S. at 308)).

82 *Elstad*, 470 U.S. at 309.

83 *Id.* at 318.

constitutional rights" absent actual compulsion.[84]

Tucker and *Elstad* stand for the principle that errors made by law enforcement in administering the prophylactic Miranda warnings will not have the same consequences as violations of the Fifth Amendment.[85] While a confession taken in violation of the *Miranda* procedures must be suppressed, "absent coercion, any other evidence derived from a voluntary confession will be admitted."[86]

II. THE "PUBLIC-SAFETY EXCEPTION" TO THE *MIRANDA* WARNINGS REQUIREMENT AND WHETHER IT IS APPROPRIATE TO ADOPT IT TO EXCUSE AN *EDWARDS* VIOLATION THAT OCCURS DURING EXIGENT "PUBLIC-SAFETY" CIRCUMSTANCES

This section examines the "public-safety exception" to the administration of the Miranda warnings and the justification behind it.[87] It then discusses the rationale for adopting this exception to excuse a violation of the *Edwards* bright-line rule that occurs during an exigent "public safety" circumstance.[88] Finally, it argues that both the nature and the procedure of the *Edwards* rule distinguishes it from the *Miranda* prophylactic safeguard, and therefore the "public-safety exception" is not the proper doctrine to apply in these circumstances.

[84] *Id.* at 308 (stating that in *Michigan v. Tucker*, the Court concluded that unwarned questioning did not abridge respondent's constitutional privilege, but rather only violated prophylactic standards, and since there was no actual infringement of the suspect's constitutional rights, the exclusionary rule did not apply).

[85] *See Elstad*, 470 U.S. at 309 ("If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself."); *Michigan v. Tucker*, 417 U.S. 433, 446 (1974) (explaining that because the law cannot "realistically require that policemen investigating serious crimes make no errors whatsoever," a court must carefully consider whether a "sanction serves a valid and useful purpose" before if penalizes police error).

[86] Gottsfield, *supra* note 31, at 13–14 ("There is a difference between the issues presented by whether Miranda warnings were properly given and the voluntariness of a confession in a criminal prosecution.").

[87] *See* New York v. Quarles, 467 U.S. 649, 655–56 (1984) (articulating the "public safety exception").

[88] *See* United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989) ("The same considerations that allow the police to dispense with providing Miranda warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel."); United States v. Mobley, 40 F.3d 688, 692 (4th Cir. 1994) (holding that it agrees with the Ninth Circuit that the "public-safety exception" to the Miranda warnings should be recognized when *Edwards* is violated in public safety circumstances).

A. The Quarles "Public-Safety Exception"

In *New York v. Quarles*,[89] the Supreme Court modified the general rule that unwarned statements must be suppressed[90] by admitting statements obtained prior to the administration of the Miranda Warnings in an exigent "public safety" circumstance.[91] In *Quarles*, two New York City police officers were on road patrol in Queens when a young woman approached their car and told them that a black male had just raped her.[92] She gave the officers a description of the man and told them that he had just entered a nearby supermarket carrying a gun.[93] The officers drove with the woman to the supermarket where they spotted the suspect near the checkout counter.[94] One of the officers pursued him through the store, losing sight of him for several seconds before finally ordering him to stop and put his hands over his head.[95] The officer frisked the suspect and discovered that he was wearing an empty shoulder holster.[96] The officer handcuffed the suspect and then asked him where the gun was. The suspect responded by nodding in the direction of some empty cartons and saying "the gun is over there."[97] The suspect was then read his Miranda warnings.[98] The New York Court of Appeals concluded that the exigencies of the situation did not justify the officer's failure to read the suspect his Miranda rights until after they had located the gun[99] and thus upheld the suppression of the suspect's statement.[100]

The Supreme Court granted certiorari and reversed,[101] determining that the need for answers to questions in a situation posing a threat to the public safety outweighed the need for the prophylactic rule protecting the Fifth Amendment privilege against self-incrimination.[102] Since there was no

89 467 U.S. 649 (1984).

90 *See* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (explaining that an unwarned confession must be suppressed).

91 *See Quarles*, 467 U.S. at 659 (holding that the Court of Appeals of New York erred in excluding from trial the incriminating statements made by the suspect based on the police officer's failure to read the suspect his Miranda rights due to exigent circumstances).

92 *Id.* at 651.

93 *Id.* at 651–52.

94 *Id.* at 652.

95 *Id.*

96 *Id.*

97 *Quarles*, 467 U.S. at 652.

98 *Id.*

99 *Id.* at 653.

100 *Id.* at 652–53.

101 *Id.* at 659–60.

102 *See id.* at 657 (holding that the public's safety outweighs an individual's right not to make self-incriminating statements).

claim that the suspect's statements were coerced, the only issue before the Court was whether the officer was justified by the circumstances for failing to administer the *Miranda* warnings.[103] Based on the above facts, the Court created a "public-safety exception" to the requirement that Miranda warnings must be given before a suspect's statements may be admitted into evidence.[104] When exigent circumstances "pose a threat to the public safety, a police officer may question suspects prior to advising them of their rights"[105] and any statements that are made may be admitted into evidence.[106] "[T]he availability of [this] exception does not depend upon the motivation of the individual officers involved"[107] and applies in situations in which police officers ask questions reasonably prompted[108] by a concern for the public safety[109] or the safety of the officers at the scene.[110]

Procedural safeguards that deter a suspect from responding to police questioning were deemed acceptable in *Miranda* to protect the Fifth Amendment privilege because "the primary social cost of those added protections [was] the possibility of fewer convictions."[111] In exigent circumstances, however, the Supreme Court determined that the cost would be more than merely fewer convictions; the cost would be the inability to protect the public from the danger of a concealed gun in a public area.[112]

103 *Quarles*, 467 U.S. at 654–55 ("In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist . . . . [T]hus the only issue before us is whether [the officer] was justified in failing to make available [the Miranda warnings.]").

104 *Id.* at 655–56 (articulating the public safety exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence).

105 STEVE ANDREW DRIZIN, *Supreme Court Review: Fifth Amendment – Will the Public Safety Exception Swallow The Miranda Exclusionary Rule?: New York v. Quarles, 104 S. Ct. 2526 (1984)*, 75 J. CRIM. L. & CRIMINOLOGY 692, 700 (1984) (discussing the holding in *Quarles*).

106 *See Quarles*, 467 U.S. at 660 (holding that the New York Court of appeals erred by excluding the unwarned statement).

107 *Id.* at 656 (indicating that an individual officer's motivation has no effect on the public safety exception to the Miranda rights of an individual).

108 *Id.* at 658–59 ("We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.").

109 *See id.* at 656 ("Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.").

110 United States v. DeSantis, 870 F.2d 536, 539 (9th Cir. 1989) (citing *Quarles*, 467 U.S. at 658–59) (noting that the exception applies to "both the public at large and the officers on the scene.").

111 *Quarles*, 467 U.S. at 657 (stating that the Court acknowledges the reality that giving individuals Miranda rights could lead to fewer convictions because of the individual's ability to withhold information that could incriminate himself).

112 *See id.* ("[The officer] needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in

For the majority, this cost was too great.[113] "[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment privilege against self-incrimination."[114]

B. The Rationale Behind Adopting the "Public-Safety Exception" to Excuse an Edwards Violation that Occurs During Exigent "Public Safety" Circumstances

In *United States v. DeSantis,*[115] the Ninth Circuit was the first appellate court[116] to determine that the "public-safety exception" was applicable to excuse an *Edwards* violation that occurred in an exigent "public-safety" situation.[117] An *Edwards* violation occurs when police continue to question a suspect during a custodial interrogation after he has invoked his right to an attorney.[118] Four compelling interests should be kept in mind while reading this section. Does the adoption of the "public-safety exception" strike the proper balance between the public safety, the suspect's right against self-incrimination and right to an attorney, the admissibility of statements obtained during continued questioning, and the admissibility of derivative physical evidence?

In *DeSantis*, the suspect was arrested in his apartment by U.S. marshals pursuant to an arrest warrant.[119] The officers searched the suspect for weapons, conducted a security sweep of his apartment to ensure that no one else was there, and then read the suspect his Miranda warnings.[120] At this point, the suspect asked if he would be going to court, and the officer responded that he would be.[121] The suspect then asked if he could change his clothes because he was barefoot and wearing jogging pants and a t-shirt.

a public area.").

113 *See id.* at 657–58 (explaining that there are times when officers should be free to protect the public without having to make split-second value judgments about the admissibility of evidence).

114 *Id* at 657.

115 870 F.2d 536 (9th Cir. 1989).

116 *See id.* at 538 ("We are called upon . . . to decide whether the 'public safety' exception . . . applies to the situation in which an accused asserts a right to speak with counsel. This [is a] question of first impression . . . . "); United States v. Mobley, 40 F.3d 688, 692 (4th Cir. 1994) (noting that the Ninth Circuit was the only circuit to address this question).

117 *See DeSantis,* 870 F.2d at 541 ("The same considerations that allow the police to dispense with providing Miranda warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel.").

118 Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that a police interrogation must cease once the suspect has requested to speak to an attorney).

119 *DeSantis*, 870 F.2d at 537.

120 *Id.*

121 *Id.*

He indicated to the officers that his clothing was in the adjoining bedroom.[122] One of the officers asked him whether there were any weapons in the bedroom.[123] The suspect responded in the affirmative, telling officers that there was a gun on the shelf in the closet.[124] In his testimony, the suspect claimed that he had asked to call his lawyer as soon as the officers entered the apartment but the officer refused to allow him to do so.[125] On appeal to the Ninth Circuit, he contended that the statements and gun were erroneously admitted into evidence in violation of his conditional rights under the Fifth Amendment.[126]

The Ninth Circuit decided that the procedural protection of the *Edwards* rule must give way to the overriding concern for public safety.[127] The same considerations in the *Quarles* case "that allow the police to dispense with providing *Miranda* warnings in a public-safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel."[128]

The court determined that society's need to procure information about the location of a dangerous weapon is as great after the request for counsel as it was before.[129] The officers' questions were intended to secure their own protection rather then to elicit testimonial evidence.[130] The court concluded that like *Miranda* violations that occur during exigent "public-safety" circumstances, the *Edwards* prophylactic rule should be disregarded[131] and the focus should be on whether the statements in question were obtained coercively.[132] Both the gun and the suspect's voluntary statement were held to be admissible.[133] This was the first time a court allowed statements obtained in violation of *Edwards* to be admitted

122 *Id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.* at 537–38.

127 *Id.* at 538 ("Because we find that the procedural protections erected in *Edwards* and *Jackson* must give way to the overriding concerns of public safety in this case, we reject DeSantis' contention.").

128 *Id.* at 541.

129 *Id.* (reasoning that the public safety outweighs badgering an accused).

130 *Id.* (discussing whether the officers coerced DeSantis into making a confession).

131 *Id.* (applying the reasoning in *Quarles* to the *Edwards* rule violation).

132 *See id.* (noting that when continued police questioning is motivated by the necessity "to secure their own safety or the safety of the public," the court must consider the totality of the circumstances to determine whether the suspect was coerced into his statements).

133 *See id.* (concluding that the inspectors were lawfully entitled to question DeSantis for the purpose of securing their safety even after DeSantis asserted his desire to speak with counsel, and since his decision to respond to the questioning was voluntary, the statements and the firearm could be admitted into evidence).

into evidence.[134]

The Fourth Circuit was the next appellate court to apply the "public-safety exception" to an *Edwards* violation.[135] In *United States v. Mobley,*[136] the Fourth Circuit agreed that a danger to the public is just as evident after the Miranda warnings have been given as before.[137] Therefore, "the same considerations that allow the police to dispense with providing Miranda warnings in a public safety situation also [permits] them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel."[138]

In *Mobley*, the suspect was encountered naked and by the time he was arrested, the FBI had already made a security sweep of his premises.[139] As he was being led away, an FBI agent asked him whether there were any weapons present.[140] The court found that "these facts contrasted sharply with those in *Quarles*."[141] The court held that in general, the *Quarles* "public-safety exception" would be applicable to *Edwards* violations that occur during exigent "public safety" circumstances.[142] However, no such danger was apparent from the facts of this particular case.[143] When the circumstances presented do not pose an objective danger to the public or police, the suspicion is that the police are fishing for information.[144] This concern about bad faith therefore outweighs the claim that the improper questioning was motivated by public safety.[145]

134 *See* United States v. Mobley, 40 F.3d 688, 692 (4th Cir. 1994) (explaining that the Ninth Circuit was the only court to have addressed whether the reasoning behind *Quarles* could be "appl[ied] with equal force to the procedural safeguards established when the accused asks for the aid of counsel" and holding that absent coercion by arresting officers, such questions do not need to be suppressed (quoting United States v. DeSantis, 870 F.2d 536, 541)).

135 *See id.* at 692 (agreeing with the Ninth Circuit that the "public-safety exception" to the *Miranda* warnings should be recognized when *Edwards* is violated in public safety circumstances).

136 40 F.3d 688 (4th Cir. 1994).

137 *Id.* at 692 (noting that "the danger to the public and police from hidden traps and discarded weapons is as evident after the *Miranda* warnings have been given as before . . . .").

138 *Id.* (quoting *DeSantis*, 870 F.2d at 541).

139 *See id.* at 693.

140 *See id.*

141 *Id.*

142 *See id.* ("Although we believe that the public safety exception is a valid and completely warranted exception to the *Miranda* and *Edwards* rules, we are persuaded that there was no demonstration of an "immediate need" that would validate protection under the *Quarles* exception in this instance.").

143 *See id.* (indicating that there must not have been any extraordinary circumstances during the arrest to prompt the questioning because there was no explanation as to such circumstances).

144 *See id.* (concluding that if there is no objective danger present in the circumstances, the suspicion that the police are on a fishing expedition will outweigh the belief that the questioning was motivated by public safety).

145 *Id.* (recognizing the need for a narrow construction of the "public safety exception" to avoid potential injustices perpetrated by police).

Both the Ninth and Fourth Circuits believe the *Edwards* rule to be a mere prophylactic safeguard.[146] This conception of the *Edwards* rule provides the underlying rationale to justify applying the "public-safety exception" to the *Miranda* safeguard to excuse *Edwards* violations.[147] Since these courts view both the *Miranda* procedures and *Edwards* rule as mere prophylactic safeguards rather than constitutional rights,[148] they apply the "public-safety exception" to excuse both types of violations.[149] Cases in other appellate jurisdictions have subsequently adopted the rationale of *DeSantis* and *Mobley* and have expanded the "public-safety exception" to excuse *Edwards* violations occurring during exigent "public-safety" circumstances.[150]

C. *The Nature and Procedure of the Edwards Rule Distinguishes it From the Miranda Prophylactic Safeguard Making it Inappropriate to Adopt the "Public-Safety Exception" in these Circumstances*

Miranda "announced a constitutional rule."[151] That rule, however, is not

146 *See* United States v. DeSantis, 870 F.2d 536, 538 (9th Cir. 1989) (referring to the *Edwards* rule as a "procedural safeguard"); *Mobley*, 40 F.3d at 692 (stating that the *Edwards* rule is a "prophylactic safeguard").

147 *See DeSantis*, 870 F.2d at 541 (applying the reasoning behind the "public-safety exception" to the procedural safeguard established when the accused asks for the aid of counsel); *Mobley*, 40 F.3d at 692 (agreeing with the Ninth Circuit's rationale in *DeSantis* and holding that the "public-safety exception" will apply in an *Edwards* situation).

148 *See DeSantis*, 870 F.2d at 541 (explaining that *Edwards*, like *Miranda* "'did not confer a substantive constitutional right that had not existed before . . . . " (quoting Solem v. Stumes, 465 U.S. 638, 644 n.4 (1984))); *Mobley*, 40 F.3d at 692 (noting that "the same considerations that allow the police to dispense with providing the *Miranda* warnings in a public safety situation also would permit them to dispense with the prophylactic safeguard that forbids initiating further questioning of an accused who requests counsel").

149 *See Mobley*, 40 F.3d at 693 ("[T]he public safety exception articulated in *Quarles* will apply in an *Edwards* situation as well.").

150 *See* Trice v. United States, 662 A.2d 891, 895 (D.C. 1995) (concluding that the reasoning in *Quarles* justifying a public safety exception to *Miranda* "may be extended, logically, to a situation in which the police initiate questioning after the subject has invoked the right to counsel – for the straightforward reason that the danger does not abate with *Miranda* warnings . . . . "); Borrell v. State, 733 So.2d 1087, 1089–90 (Fla. Dist. Ct. App. 1999) (holding that a post-*Miranda* interrogation of the defendant did not violate his rights because the questioning was justified by an objectively reasonable need to protect the police and the public from danger); State v. Davis, No. 96-CO-44, 1999 WL 1050092, at *6 (Ohio App. Nov. 19, 1999) (explaining that "public safety" exception to the "*Miranda* rule extends to a situation where a suspect has been informed of his *Miranda* rights and invokes his right to counsel, but only in certain narrow circumstances"). *Contra* United States v. Anderson, 929 F.2d 96, 102 (2d Cir. 1991) (holding that exigent circumstances did not excuse coercive interrogation tactics); State v. Pante, 739 A.2d 433, 439 (N.J. Super. Ct. App. Div. 1999) (refusing to allow exigent circumstances to excuse an *Edwards* violation); People v. Zanini, No. F038571, 2003 WL 103464, at *7 (Cal. Ct. App. Jan. 10, 2003) (concluding that although situations may arise in which statements inadmissible under the *Edwards* no-recontact rule are rendered admissible in the prosecution's case-in-chief because of the public safety exception, that justification does not warrant the admission of the statements in this case).

151 United States v. Dickerson, 530 U.S. 428, 444 (2000) (respecting the principle of *stare decisis*

immutable.[152] An infringement upon a suspect's *Miranda* rights is not automatically an infringement upon his Fifth Amendment rights.[153] *Miranda* sweeps more broadly then the Fifth Amendment itself and therefore "*Miranda*'s preventative medicine [can provide] a remedy even to the defendant who has suffered no identifiable constitutional harm."[154] The Supreme Court has recognized the difference between an unwarned interrogation and an unreasonable search under the Fourth Amendment and has refused to apply the "fruits of the poisonous tree" exclusionary rule to a procedural *Miranda* violation[155] when the subsequent statements were voluntary.[156] An *Edwards* violation occurs when police continue questioning a suspect in a custodial interrogation after he has invoked his right to counsel.[157] A valid waiver of the right to counsel cannot be established by showing only that the suspect responded to further police initiated questioning, even if he had been advised of his rights.[158] Due to the nature and procedure of the *Edwards* rule, continued questioning of a suspect who has invoked his right to counsel should be distinguished from a *Miranda* violation[159] and be considered a violation of a suspect's Fifth Amendment rights.[160]

and declining to overrule *Miranda*).

152 *See id.* at 441 (noting that the exceptions to the *Miranda* procedure illustrate that no constitutional rule is immutable).

153 *See id.* at 453 (Scalia, J., dissenting) ("[T]he violation of *Miranda* does not involve an 'actual infringement of the suspect's constitutional rights.'" (quoting Elstad v. Oregon, 470 U.S. 298, 308 (1985))); United States v. Cherry, 794 F.2d 201, 204 (5th Cir. 1986) (explaining that *Elstad* mandates an inquiry into whether or not a suspect's Fifth Amendment rights were violated when his *Miranda* rights are violated).

154 *Dickerson*, 530 U.S. at 453 (Scalia, J., dissenting) (quoting *Elstad*, 470 U.S. at 306–07).

155 *See id.* (discussing the Court's refusal in *Elstad* to adopt the Fourth Amendment exclusionary rule to a Miranda violation).

156 *See* Oregon v. Elstad, 470 U.S. 298, 318 (1985) (requiring that statements made by a suspect responding to unwarned yet uncoercive questioning be suppressed, but allowing the admission of subsequent statements made after the suspect has chosen to waive his *Miranda* rights).

157 *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that "an accused, such as Edwards, having expressed his desire to deal with 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").

158 *See Edwards*, 451 U.S. at 484 (explaining that when the accused has invoked his right to have counsel present during custodial interrogation, the accused's response to police-initiated interrogation does not equate to a relinquishment of that right); *see also* Massiah v. United States, 377 U.S. 201, 205–07 (1964) (holding that where the suspects invokes his right to consel, and then federal agents deliberately elicit information from the suspect in the absence of counsel, the statements are inadmissible at trial).

159 *See Dickerson,* 530 U.S. at 453 (Scalia, J., dissenting) (explaining that "the violation of *Miranda* does not involve an 'actual infringement of the suspect's constitutional rights'" (citing *Elstad*, 470 U.S. at 308)).

160 *See* Minnick v. Mississippi 498 U.S. 146, 153 (1990) (indicating that the Supreme Court has interpreted the holding in *Edwards* to mean that "authorities may not initiate questioning of the accused in counsel's absence" and that statements made in the absence of counsel violate the Fifth Amendment);

In *State v. Harris*,[161] the Wisconsin Supreme Court distinguished between violations of *Miranda* procedures and violations of the *Edwards* bright-line rule.[162] Although the interrogation that occurred in that case could be described as being motivated by a threat to "public-safety,"[163] the court did not specifically discuss whether or not the "public-safety exception" should be expanded to excuse the *Edwards* violation that transpired there.[164] Rather, the court concluded that the nature of the *Edwards* rule required that the "public-safety exception" not be applied to excuse *Edwards* violations.[165]

In *Harris*, the police initiated a conversation with a murder suspect who they knew had invoked his right to an attorney.[166] The police officers claimed they merely wanted to speak with him in order to advise him of the charges against him and to assess his demeanor for security purposes because they would be extraditing him from Amarillo to Milwaukee on public carriers.[167] During that conversation, the police told the suspect that they had arrested one of his associates back in Milwaukee and had charged him with the same murder. The suspect responded that his associate "had nothing to do with it."[168] The suspect then indicated that he wanted to tell the officers about the offense.[169] The police gave the suspect his Miranda warnings and the suspect indicated that he was willing to waive his right to an attorney.[170] He then made out a full confession, admitting to the killing and telling the officers how and where he had disposed of the murder

State v. Harris, 544 N.W.2d 545, 553 (Wis. 1996) ("A violation of *Edwards* is a violation of the right to counsel under the Fifth Amendment.").

161 544 N.W.2d 545 (Wis. 1996).

162 *See id.* at 553 (explaining that a crucial difference between *Miranda* and *Edwards* is that the procedure under *Miranda* is that "warnings must be given prior to custodial interrogation[,]" whereas the procedure required by *Edwards* "is that once a suspect invokes the right to counsel, all police-initiated questioning must cease until counsel is present"); *see also* United States v. Downing, 665 F. 2d 404, 409 (1st Cir. 1981) (holding that any evidence obtained as a result of a violation of a suspect's Fifth Amendment right to have counsel present during interrogation is inadmissible at trial); United States ex rel. Hudson v. Cannon, 529 F.2d 890, 892 (7th Cir. 1976) (noting that a violation of the Fifth Amendment right to counsel invokes the "fruit of the poisonous tree" exclusionary rule).

163 *See Harris*, 544 N.W.2d at 547 (stating that the officers' motivation behind the questioning was to assess the suspect's demeanor for security reasons because they had to escort him on public carriers).

164 *See id.* at 553 (basing the ruling on other grounds).

165 *See id.* (explaining that although one can violate *Miranda* procedures without violating the Fifth Amendment, "a violation of *Edwards* is a violation of the right to counsel under the Fifth Amendment").

166 *See id.* at 547 (describing how the officers reviewed the police reports that indicated that Harris had invoked his right to an attorney before they started questioning Harris).

167 *See id.*

168 *Id.*

169 *See id.*

170 *See id.*

weapon.[171] At trial, the suspect moved to suppress his statements and the derivative evidence because it had been obtained in violation of *Edwards*.[172]

The Wisconsin Supreme Court distinguished an *Edwards* violation from a mere defect in the administration of the Miranda warnings.[173] The court noted that in *Elstad*,[174] the issue before the United States Supreme Court was whether an initial failure to administer the Miranda warnings, "without more," tainted the subsequent admission that was made after a suspect had been fully advised of, and had chosen to waive, his *Miranda* rights.[175] An *Edwards* violation occurs after the Miranda warnings have been given, have been understood, and have been invoked.[176] The Supreme Court has made it clear that the failure to administer the Miranda warnings in and of itself is not a constitutional infringement.[177] However, the Court has never equated "failure to administer the warnings with failure to 'carry out the obligations' of *Miranda*."[178] In fact, the United States Supreme Court has explicitly distinguished cases in which the police continue interrogations in spite of the suspect's invocation of the right to counsel from cases in which the police fail to administer the Miranda warnings.[179]

In *Harris*, the Wisconsin Supreme Court found that a violation of *Edwards* is unlike a mere defect in the administration of the Miranda warnings.[180] A violation of *Edwards* is a violation of a constitutional

171 *See id.* at 547–48

172 *See id.* (explaining the lower court's finding in the suppression hearing that Harris had asserted his right to counsel and that the *Edwards* per se exclusionary rule for his subsequent statement had been triggered).

173 *See id.* at 552 (noting that *Cherry, Tucker*, and *Elstad* involved only defects in the administration of Miranda warnings).

174 Oregon v. Elstad, 470 U.S. 298 (1985).

175 *Harris*, 544 N.W.2d. at 551 (quoting *Elstad*, 470 U.S. at 300) (illustrating that the Court in *Elstad* framed the issue as whether an initial failure to administer *Miranda* warnings taints admissions made after proper *Miranda* warnings).

176 *See* Edwards v. Arizona, 451 U.S. 477, 478–79 (1981) (describing how the suspect in *Edwards* was given his Miranda rights, invoked his right to an attorney, and was then subject to continued interrogation by the police).

177 *See Harris*, 544 N.W.2d. at 552 (stating that "'failure to give or carry out the obligation of Miranda warnings in and of itself is not a constitutional infringement'" (quoting United States v. Cherry, 794 F.2d 201, 207 (5th Cir. 1986))).

178 *Id.*

179 *Id.* at 553 ("'[I]inapposite are the cases the dissent cites concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored . . . .'" (quoting *Elstad*, 470 U.S. at 312–13 n.3)); Michigan v. Tucker, 417 U.S. 433, 448 n.22 (1974) (determining that a case in which a suspect's express and repeated requests to see his lawyer were denied was in direct contrast to a case where an interrogation occurred without proper *Miranda* procedure).

180 *See Harris*, 544 N.W.2d at 553. ("We find that there is a critical difference between a mere defect in the administration of *Miranda* warnings 'without more' and police-initiated interrogation conducted after a suspect unambiguously invokes the right to have counsel present during questioning.").

right.[181] "The right [of a suspect] to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . ."[182] There is a critical difference between a violation of procedure and a violation of a right.[183] While it is possible to violate the procedure required under *Miranda* in a manner that does not violate the right that it protects, it is not possible to do the same with a violation of *Edwards* since a violation of *Edwards* is a violation of the right to counsel under the Fifth Amendment.[184] The jurisdictions that apply the "public-safety exception" to excuse an *Edwards* violation fail to make this distinction as to the nature of an *Edwards* violation.[185]

A distinction between *Miranda* and *Edwards* procedures exists as well. A determination of whether or not a statement is "voluntary" is important in distinguishing a *Miranda* violation from a Fifth Amendment violation.[186] If the *Miranda* procedure is violated, the question becomes whether the suspect's statements were voluntary.[187] There is no similar prescription for such an inquiry with a violation of *Edwards*.[188]

The "public-safety exception" is applied by courts to excuse the questioning of a suspect that occurred during exigent circumstances

181 *See id.* (stating that "[a] violation of *Edwards* is a violation of the right to counsel under the Fifth Amendment").

182 *Id.* at 550 (quoting Arizona v. Roberson, 486 U.S. 675, 682 n.4 (1988)).

183 *See id.* at 553 (indicating that the primary flaw in the State's argument was the failure to distinguish between informing an accused of his rights, and a violation of the right to have counsel present during an interrogation); Michigan v. Tucker, 417 U.S. 433, 444 (1974) (distinguishing between a violation of *Miranda* procedure and a violation of a constitutional right by noting that the procedural safeguards under *Miranda* are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected").

184 *See Harris*, 544 N.W.2d at 553 (explaining that a *Miranda* violation is a breach of a safeguard, and not of a constitutional right, whereas an *Edwards* violation is a breach of the constitutional right to counsel under the Fifth Amendment).

185 *See, e.g.*, United States v. Mobley, 40 F.3d 688, 692 (4th Cir. 1994) (referring to the *Edwards* rule as a "prophylactic safeguard"); United States v. DeSantis, 870 F.2d 536, 538 (9th Cir. 1989) (stating that the *Edwards* rule is a "procedural safeguard").

186 *See* Oregon v. Elstad, 470 U.S. 298, 309 (1985) (determining that it was "an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective . . . ").

187 *See* Dickerson v. United States, 530 U.S. 428, 432–33 (2000) (describing how prior to *Miranda*, the Supreme Court evaluated the admissibility of a suspect's confession under a voluntariness test); *Tucker*, 417 U.S. at 441 (discussing how "[b]efore *Miranda* the principal issue [to determine Fifth Amendment violations]. . . was . . . whether [the defendant's] statement was 'voluntary'"); Gottsfield, *supra* note 31, at 13 (stating that "[t]here is a difference between the issues presented by whether Miranda warnings were properly given and the voluntariness of a confession in a criminal prosecution").

188 *See* Edwards v. Arizona, 451 U.S. 477, 484 (1981) (holding that a valid waiver of the invocation of the right to counsel cannot be established by showing only that a suspect responded to further police-initiated custodial interrogation, even if that suspect was advised of his rights).

without the prior administration of the Miranda warnings.[189] If there is a *Miranda* violation in non-exigent circumstances, the statements must be suppressed. The "fruits" of those statements, however, do not have to be suppressed if the subsequent statements were made knowingly and voluntarily.[190] The "public-safety exception" changed this rule in exigent circumstances by making admissible the incriminating statements made without a prior administration of the Miranda warnings.[191]

In *Quarles*, the fact that the defendant's statements were voluntary was crucial to the Court's holding.[192] The *Quarles* Court "merely addresse[d] the knowing and intelligent aspects of the requirements for waiver of constitutional rights[,]"[193] and therefore it can be inferred that the Court's analysis would have been different had the suspect alleged that his statement was obtained through coercion.[194] An allegation of coercion does not change the analysis when dealing with a violation of *Edwards*.[195]

In direct contrast to a *Miranda* procedural violation, the Supreme Court in *Edwards* specifically held that "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

189 *See* New York v. Quarles, 467 U.S. 649, 655 (1984) (holding that "there is a public safety exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence . . . . ").

190 *See* Patane v. United States, 542 U.S. 630, 639 (2004) (explaining that *Miranda* does not require discarding uncompelled statements); *see also Elstad*, 470 U.S. at 309 (finding that although unwarned admissions must be suppressed, the admissibility of any subsequent statement should turn solely on whether it is knowingly and voluntarily made).

191 *See Quarles*, 467 U.S. at 659 (holding that because exigent circumstances existed at the time of the questioning, the Court of Appeals of New York erred in excluding the suspect's incriminating statements on account of the police officer's failure to read him his Miranda warnings); *see also* United States v. Zubiate, No. 08-CR-507 (JG), 2009 U.S. Dist. LEXIS 14706, at *19 (E.D.N.Y. Feb. 25, 2009) (stating that a narrow exception exists when immediate police questioning is prompted by concern for public safety).

192 *See Quarles*, 467 U.S. at 654 ("In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist."); *see also* United States v. DeSantis, 870 F.2d 536, 540 (9th Cir. 1989) ("The *Quarles* decision does not warrant the conclusion that the 'public safety' exception allows the police to obtain involuntary, or coerced, statements in exigent circumstances.").

193 *DeSantis*, 870 F.2d at 540.

194 *See Quarles*, 467 U.S. at 654 (explaining that because there was "no claim that respondent's statements were actually compelled by police conduct . . . [,]" the only issue before the court concerned the officer's justification for failing to give proper Miranda warnings); *see also DeSantis*, 870 F.2d at 540 (explaining that the *Quarles* decision does not authorize the use of involuntary statements made in exigent circumstances).

195 *See* Edwards v. Arizona, 451 U.S. 477, 484 (1981) ("[A] valid waiver of [the right to counsel] cannot be established by showing only that [a suspect] responded to further police-initiated custodial interrogation even if he has been advised of his rights.").

rights."[196] A suspect who invokes his right to an attorney is not to be subjected to further questioning until counsel has been made available to him, unless the suspect initiates further communication, exchanges, or conversations with the police.[197] Therefore, even voluntary responses to police initiated questioning are in violation of the right to an attorney under *Edwards*.[198]

Unlike police violations of *Miranda*,[199] violations of the *Edwards* bright-line rule do not require any further inquiry into whether the statements made in response to the continued questioning were voluntary.[200] A violation of *Edwards* is simply a violation of the right to counsel under the Fifth Amendment.[201] Therefore, in exigent circumstances, as in all other circumstances, statements obtained during continued questioning of a suspect who has invoked his right to an attorney must be suppressed.[202]

The jurisdictions that apply the "public-safety exception" to excuse an *Edwards* violation fail to make this distinction as to the nature and procedure of the *Edwards* rule.[203] It is true that "[s]ociety's need to procure

196 *Id.*

197 *See* Minnick v. Mississippi, 498 U.S. 146, 147 (1990) ("To protect the privilege against self-incrimination guaranteed by the Fifth Amendment, we have held that the police must terminate interrogation of an accused in custody if the accused requests the assistance of counsel."); *see also Edwards*, 451 U.S. at 484–85 ("[A]n accused ... having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

198 *See Minnick*, 498 U.S. at 147 ("[O]nce the accused requests counsel, officials may not reinitiate questioning 'until counsel has been made available' to him" (quoting *Edwards*, 451 U.S. at 484–85)); *see also Edwards*, 451 U.S. at 484–85 (holding that once an accused invokes his right to counsel, only he may initiate further communication with police).

199 *See Quarles*, 467 U.S. at 654 ("In this case we have before us no claim that respondent's statements were actually compelled by police conduct which overcame his will to resist."); *see also DeSantis*, 870 F.2d at 540 ("The *Quarles* decision does not warrant the conclusion that the 'public safety' exception allows the police to obtain involuntary, or coerced, statements in exigent circumstances."); Dickerson v. United States, 530 U.S. 428, 451 (2000) (Scalia, J., dissenting) ("[T]he question whether the 'police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination' was a 'separate question' from 'whether it instead violated only the prophylactic rules developed to protect that right.'" (quoting Michigan v. Tucker, 417 U.S. 433, 439 (1974))).

200 *See Edwards*, 451 U.S. at 484–85 (holding that once an accused invokes his right to counsel, further interrogation without the presence of counsel must cease, unless the accused initiates further communication with police).

201 State v. Harris, 544 N.W.2d 545, 553 (Wis. 1996) (stating that an Edwards violation is a violation of the Fifth Amendment's right to counsel); Ferguson v. Commonwealth, 654 S.E.2d 328, 338 (Va. Ct. App, 2007) (holding that a police officer's failure to cease interrogation after a request for counsel violated the accused's Fifth Amendment rights).

202 *See, e.g., Harris*, 544 N.W.2d at 552 (citing United States v. Cherry, 794 F.2d 201, 204 (5th Cir. 1986)) (explaining that in *Cherry*, the lower court held that when a suspect requests an attorney and the police do not provide one, the suspect's confession must be suppressed because it violates *Miranda* and *Edwards*,)

203 *See* United States v. Mobley, 40 F.3d 688, 692 (4th Cir. 1994) (referring to the *Edwards* rule as a prophylactic safeguard, yet still extending public safety exception); United States v. DeSantis, 870

information about the location of a dangerous weapon is as great after, as it was before, the request for counsel."[204] However, due to the nature and procedure of the *Edwards* rule, the same considerations that allow the police to dispense with providing Miranda warnings in a "public-safety" situation do not also permit police to continue questioning a suspect who has invoked the right to counsel.[205] Even if the statements obtained were voluntary, continued questioning always violates the bright-line rule in *Edwards*.[206] "A violation of *Edwards* is a violation of the right to counsel under the Fifth Amendment."[207] Therefore it is inappropriate to adopt the "public-safety exception" to excuse an *Edwards* violation.

III. HOW COURTS SHOULD DEAL WITH AN *EDWARDS* VIOLATION THAT OCCURS DURING EXIGENT "PUBLIC-SAFETY" CIRCUMSTANCES

This section begins by determining that it would be inappropriate to apply the Fourth Amendment "fruit of the poisonous tree doctrine"[208] to govern *Edwards* violations that occur during exigent "public-safety" circumstances. It then sets forth other Fifth Amendment principles[209] that

F.2d 536, 541 (9th Cir. 1989) (calling the *Edwards* rule a prophylactic safeguard, yet still applying the public safety exception).

204 *DeSantis*, 870 F.2d at 541. *See* Deleon v. Texas, 758 S.W.2d 621, 625 (Tex. Ct. App. 1988) (stating that, with regard to the Fifth Amendment privilege against self incrimination, the need to locate knives hidden in a volatile prison presented a public safety issue that outweighed the prophylactic safeguard of the Miranda rights).

205 *Contra Desantis*, 870 F.2d at 541 (allowing the same considerations that permit the public-safety exception pre-*Miranda* to justify the rule in *Edwards* violations). *See* M.K.B. Darmer, *Lessons from the Lindh Case: Public Safety and the Fifth Amendment*, 68 Brook. L. Rev. 241, 279 (2002) (arguing that the *Edwards* rule, no less than *Miranda*, should be subject to the public safety exception).

206 *See* Edwards v. Arizona, 451 U.S. 477, 484 (1981) (holding that the interrogation of a suspect must stop once the suspect invokes his right to an attorney, and that merely demonstrating that the suspect responded to further police-initiated custodial interrogation after requesting counsel and being advised of his rights does not constitute a waiver); Minnick v. Mississippi, 498 U.S. 146, 156 (1990) (stating that police-initiated interrogation after the accused's request for counsel was impermissible absent initiation by the accused himself).

207 State v. Harris, 544 N.W.2d 545, 553 (Wis. 1996).

208 Wong Sun v. United States, 371 U.S. 471, 488 (1963) (articulating that the "fruit of the poisonous tree doctrine" entails an inquiry into whether the evidence was discovered by the exploitation of illegal police actions, or instead by means sufficiently distinguishable to be purged of the taint).

209 *See* New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Conner, J., concurring in part and dissenting in part) (noting that *Miranda* does not require the exclusion of nontestimonial evidence from informal custodial interrogations); United States v. Cherry, 794 F.2d 201, 207–08 (5th Cir. 1986) (indicating that when a suspect's right to an attorney is ignored, the statements taken in violation of *Miranda* should be suppressed, but holding that since the statements were voluntary, the suspect's Fifth Amendment right against self-incrimination was not violated and physical evidence derived from that statement need not be suppressed); *see also* Michigan v. Tucker, 417 U.S. 433, 446–47 (1974) (determining that when police conduct violates the prophylactic standards laid down in *Miranda*, but not the defendant's constitutional privilege against compulsory self-incrimination, the Fourth Amendment exclusionary rule does not apply to suppress derivative evidence); Oregon v. Elstad, 470

provide a framework to create a workable alternative. Next, it proposes that although law enforcement should be allowed to continue questioning a suspect after he has invoked his right to counsel during exigent "public safety" circumstances, the statements obtained during that questioning should be suppressed at trial. Absent coercion, however, the "fruits" of those statements should be admissible. Finally, it concludes that this proposal will strike the proper balance between the public's safety, the rights of the accused, the admissibility of statements, and the admissibility of physical evidence.

A. It Is Inappropriate to Adopt the Fourth Amendment Exclusionary Rule

It would be equally inappropriate to adopt the Fourth Amendment exclusionary rule to suppress the fruits of an *Edwards* violation as it would be to adopt the "public-safety exception." Before the Supreme Court penalizes a constitutional error, it must consider whether that sanction serves a valid and useful purpose.[210] The primary purpose of the exclusionary rule "'is to deter future unlawful police conduct'" in order to "'effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'"[211] This deterrent purpose "necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right."[212] The Court has found that the deterrence rationale behind the exclusionary rule "loses much of its force" when the police action in question was pursued in complete good faith.[213]

It would be inappropriate to apply the exclusionary rule to *Edwards* violations that occur during exigent circumstances because there would be no deterrent effect on police behavior. The availability of a "public-safety exception" from *Quarles* does not depend upon the conscious motivation of

U.S. 298, 309 (1985) (finding that a violation of the prophylactic *Miranda* procedures is not necessarily a Fifth Amendment violation, and therefore subsequent statements do not need to be suppressed if the statements were made knowingly and voluntarily).

210 *Tucker*, 417 U.S. at 446 ("Before we penalize police error , . . . we must consider whether the sanction serves a valid and useful purpose."); United States v. Watts, 513 F.2d 5 (10th Cir. 1975) ("[B]efore such an error will be penalized it must be determined that such sanction serves a valid and useful purpose.").

211 *Tucker*, 417 U.S. at 446 (quoting United States v. Calandra, 414 U.S. 338, 347 (1974)).

212 *Id.* at 447.

213 *Id.* (noting that when an officer acts in complete good faith, the deterrence rational becomes less compelling); United States v. Spencer, 955 F.2d 814, 817 (2nd Cir. 1992) (holding that without evidence of coercion or compulsion by an FBI agent, exclusion of evidence would not serve the deterrent purposes of *Miranda*).

the individual officers involved.[214] The Supreme Court believed that police officers can almost instinctively distinguish "between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect."[215] The Court believed that the "public-safety exception" would "not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it."[216]

The Court's view that the exigent circumstances themselves objectively justify law enforcement action[217] should also be applicable to violations of *Edwards* that occur during exigent "public-safety" circumstances.[218] Based on this rationale, there would be no purpose in applying the exclusionary rule to *Edwards* violations that occur during exigent circumstances because, like with *Miranda* violations, the exigency itself justifies the police actions.[219] The deterrence rationale behind the exclusionary rule loses its force when the court assumes that the questioning is being pursued in good faith.[220]

B. Fifth Amendment Principles That Create a Framework for a Workable Solution

The Fifth Amendment "does not prohibit all incriminating admissions."[221] The Fifth Amendment's privilege against self-incrimination is "'not violated by even the most damning admissions'". . . "'absent some officially coerced self-accusation.'"[222] It "does not protect an accused from being compelled to surrender *nontestimonial* evidence

214 New York v. Quarles, 467 U.S. 649, 656 (1984) ("Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.").

215 *Id.* at 658–59.

216 *Id.* at 658.

217 *Id.* (stating that the public-safety exception to the *Miranda* rule "will be circumscribed by the exigency which justifies it").

218 *See* Horton v. California, 496 U.S. 128, 138 (1990) ("[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.").

219 *See Quarles,* 467 U.S. at 658 ("The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it.").

220 *See* Michigan v. Tucker, 417 U.S. 433, 447 (1974) (noting that that the deterrence rationale behind the exclusionary rule loses much of its force when the police action in question was pursued in complete good faith).

221 *Quarles*, 467 U.S. at 654. *See* United States v. Washington, 431 U.S. 181, 187 (1977) ("Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable.")

222 *Quarles*, 467 U.S. at 654 (quoting *Washington*, 431 U.S. at 187).

against himself."[223] The Court in *Miranda* did not determine whether physical evidence arising out of a violation of its procedures would be admissible.[224] That determination, however, was made in subsequent decisions.[225] In fashioning Fifth Amendment *Miranda* evidentiary rules, the Court has distinguished between the admissibility of the statements taken in violation of *Miranda* and the admissibility of the evidence identified in those statements.[226] A similar distinction should be made in creating a rule to govern an *Edwards* violation that occurs during exigent "public-safety" circumstances.

In *Quarles*, Justice O'Conner distinguished the statement obtained in violation of *Miranda* from the physical evidence that was derived from that statement.[227] O'Conner concurred in the judgment that the gun was admissible but dissented from the Court's ruling that the statement "the gun is over there" was also admissible.[228] She believed that the Court did not provide sufficient justification for departing from or blurring *Miranda*'s clear standards, and therefore the Court should have required suppression of the initial statement but allowed admission of the gun into evidence.[229] O'Conner emphasized the fact that the suspect did not claim that his Fifth Amendment rights had been abridged, but only that there was a

223 *Id.* at 666 (O'Connor, J., concurring in part); *See* Fisher v. United States, 425 U.S. 391, 408 (1976) (stating that the Fifth Amendment "applies only when the accused is compelled to make a testimonial communication that is incriminating").

224 *See Quarles*, 467 U.S. at 667 (O'Connor, J., concurring in part) ("It is settled that *Miranda* did not itself determine whether physical evidence obtained in this manner would be admissible."); *Tucker*, 417 U.S. at 446, 452 n.26 (noting that even if *Miranda* were retroactively applied to the facts of the case, it would not resolve the question of whether testimony arising out of violative procedures must be excluded).

225 *See, e.g., Tucker*, 417 U.S. at 446–48 (determining that when police conduct violates the prophylactic standards laid down in *Miranda*, but not the defendant's constitutional privilege against compulsory self-incrimination, the Fourth Amendment exclusionary rule does not apply to suppress derivative evidence); Oregon v. Elstad, 470 U.S. 298, 309 (1985) (finding that a violation of the prophylactic *Miranda* procedures is not necessarily a Fifth Amendment violation, and therefore subsequent statements need not be suppressed under the exclusionary rule if they were made knowingly and voluntarily).

226 *See, e.g., Tucker*, 417 U.S. at 451–52 (holding that the suspect's statements were properly excluded from trial, but that the testimony of the witness identified in those statements should have been admitted); Harris v. New York, 401 U.S. 222, 224 (1971) (commenting that *Miranda* does not bar evidence that is inadmissible against accused in the prosecution's case in chief for all purposes).

227 *See Quarles*, 467 U.S. at 660 (O'Conner, J., concurring in part and dissenting in part) ("I would require the suppression of the initial statement taken from respondent . . . [but] nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation, and I therefore agree . . . . that admission of the gun in evidence is proper.").

228 *Id.* at 660 (O'Conner, J., concurring in part and dissenting in part) (asserting that the defendant's statements were properly inadmissible, but that the gun should have not have been suppressed). *See* Drizin, *supra* note 105, at 703 (commenting on the distinction established by Justice O'Connor that the statements were inadmissible, but that the gun should not have been suppressed).

229 *See Quarles*, 467 U.S. at 660 (O'Conner, J., concurring in part and dissenting in part) (discussing the Court's departure from *Miranda*'s clear standards).

prophylactic error.[230] There is nothing about an exigent circumstance "that makes custodial interrogation any less compelling;"[231] however, where a suspect fails to demonstrate actual compulsion that amounts to a violation of a fundamental right, only the suspect's self-incriminating statement should be excluded.[232]

"[N]othing in *Miranda* or the privilege itself requires the exclusion of nontestimonial evidence derived from informal custodial interrogation."[233] Since the Miranda warnings and waiver are only required to ensure that the testimony used against the accused at trial was given voluntarily, once those statements have been suppressed the failure to administer the Miranda warnings should no longer be of concern.[234] When the only evidence to be admitted is derivative evidence that was not derived from actual compulsion, *Miranda* does not require suppression.[235] Based on this rationale, O'Connor concluded that the statements taken in violation of *Miranda* should be suppressed, but that nontestimonial derivative evidence should not.[236] A similar rationale should be followed in creating a rule to deal with *Edwards* violations that occur during exigent "public-safety" circumstances.

At least one Circuit Court has distinguished testimonial evidence from nontestimonial derivative evidence that arises out of a non-exigent

230 *See id.* at 672 n.5 (O'Conner, J., concurring part and dissenting in part) (explaining that the suspect's only argument was that the police failed to administer the Miranda warnings); Drizin, *supra* note 105, at 703 (discussing O'Conner's contention that the suspect in *Quarles* merely asserted a "nonconstitutional prophylactic error").

231 *Quarles*, 467 U.S. at 665 (O'Conner, J., concurring in part, dissenting in part) (examining exigent circumstances and the effects on custodial interrogation).

232 *See id.* at 671 (indicating that there is an distinction between actual and presumed compulsion); *see also* Drizin, *supra* note 105, at 704 (discussing Justice O'Connor's distinction between actual compulsion amounting to a constitutional violation and presumed compulsion amounting to a *Miranda* violation).

233 *Quarles*, 467 U.S. at 660 (1984) (O'Conner, J., concurring in part and dissenting in part).

234 *See id.* at 669 (noting O'Conner's concern that *Miranda* warnings are only to be used for testimonial self-incriminations); *see also* Sean Tirrell, *Physical Evidence Obtained As A Result Of Unwarned, Voluntary Statement Held Admissible Despite Failure To Issue Miranda Warnings*, 10 SULLFOK J. TRIAL & APP. ADVOC. 183, 183 (2005) (discussing the Court's decision not to extend the exclusionary principle to situations where the police obtain physical evidence as a result of an unwarned, voluntary statement).

235 *Quarles*, 467 U.S. at 671 (O'Conner, J., concurring in part and dissenting in part) (explaining that the values underlying the privilege do not require suppression when the only evidence is derived from statements taken in the absence of Miranda warnings); United States v. Patane, 542 U.S. 630, 643 (2004) (Souter, J., dissenting) (noting that a nontestimonial, voluntary statement involving physical evidence "presents no risk that a defendant's *coerced* statements will be used against him at a criminal trial").

236 *See Quarles*, 467 U.S. at 673 (O'Conner, J., concurring in part and dissenting in part) (explaining that the admission of nontestimonial evidfence is "based on the sensible view that procedural errors should not cause entire investigations and prosecutions to be lost").

Edwards violation.[237] In *United States v. Cherry*,[238] the suspect was informed of his Miranda rights, but subsequently waived those rights, agreeing to FBI interrogation.[239] At one point during the interrogation, he remarked that "maybe I should talk to an attorney before I make a further statement."[240] The FBI agents informed the suspect that an attorney would probably counsel him to remain silent; however they did not attempt to provide him with an attorney. The agents did, however, ask if the suspect wanted to be alone to consider whether to make further statements.[241] At this point, the suspect asked to see one of his sergeants.[242] While waiting for the sergeant to arrive, the FBI agents mentioned that fellow soldiers had seen him with a .32 caliber pistol even though he had told them that he did not own one.[243] The suspect then responded by asking them, "haven't you found the gun yet?"[244] He then told the agents that the murder weapon was hidden in the ceiling compartment above his cubicle and confessed to the murder.[245]

On appeal, the Fifth Circuit reversed his conviction because the confession "had been obtained in violation the suspect's rights under *Miranda* and [*Edwards*]. . . ."[246] After a second trial and conviction, the suspect appealed the admissibility of the murder weapon at the second trial.[247] The Fifth Circuit held that since the suspect's Fifth Amendment right against self-incrimination was not violated, the murder weapon did not need to be suppressed as a "fruit" of a *Miranda* violation.[248] The court concluded that the rejection of a "fruits" doctrine in *Tucker* and *Elstad* could be applied with equal force to the discovery of evidence that arises

237 *See* United States v. Cherry, 794 F.2d 201, 208 n.6 (5th Cir. 1986) (stating that although the suspect's confession taken in violation of *Edwards* was properly suppressed, "different interests prevail when [the Court] evaluate[s] derivative evidence obtained through the exploitation of statements obtained in violation of *Miranda* and *Edwards*").

238 794 F.2d 201 (5th Cir. 1986).

239 *See id.* at 203.

240 *See id. See generally* State v. Harris, 199 Wis.2d 227, 245 (1996) (citing Davis v. United States, 512 U.S. 452, 458 (1994) (Scalia, J., concurring)) ("It is notable that *Cherry* was decided in 1986, before the Supreme Court's ruling that a request for counsel must be unambiguous in order to preclude further questioning").

241 *See Cherry*, 794 F.2d at 203.

242 *See id.*

243 *See id.*

244 *Id.*

245 *See id.* at 203–04.

246 *Id.* at 204.

247 *See id.* at 205. Cherry argued that the admission of the murder weapon was barred by the exclusionary rule because it was obtained through a search and seizure that violated the Fourth Amendment. *Id.*

248 *Id.* at 208 (holding that since Cherry's statement and consent were voluntary, *Tucker* and *Elstad* apply).

out of an *Edwards* violation.[249] The court noted that the admissibility of physical evidence derived from statements made during continued questioning requires a separate analysis from that which decides whether the statements themselves must be suppressed.[250] Statements taken in violation of *Edwards* must be suppressed, but as long as those statements were voluntary, derivative evidence may be admitted at trial.[251]

The court in *Cherry* believed that "*Elstad* makes it clear that the failure to give or carry out the obligation of Miranda warnings in and of itself is not a constitutional infringement."[252] "[N]owhere in Elstad does the [Supreme] Court equate failure to administer warnings with failure to 'carry out the obligations' of *Miranda.*"[253] For the purposes of this note, the holding of the Fifth Circuit in *Cherry* is an example of how a court should distinguish between statements and derivative evidence obtained from *Edwards* violations occurring exclusively during exigent "public-safety" circumstances.

C. The Proposed Solution

In creating a rule to govern *Edwards* violations that occur during exigent circumstances, four compelling interests must be balanced: the public's safety, the suspect's right against self-incrimination and to an attorney, the admissibility of statements obtained during continued questioning, and the admissibility of derivative physical evidence. Forcing police during exigent "public-safety" circumstances to stop questioning a suspect who has invoked his right to counsel gives too little weight to the public safety interest. Allowing continued questioning and suppressing all statements and derivative evidence gives too little weight to the evidentiary interests of the criminal justice system. Allowing continued questioning all statements and derivative evidence to be admissible gives too little weight to suspect's right against self-incrimination.

Based on the principles discussed above and the balancing of the four

249 *Id.* ("Inasmuch as we find that Cherry's statement and consent were voluntarily given, we are bound by the reasoning of *Tucker* and *Elstad*").

250 *See id.* at 208 n.6 (indicating that confessions taken during continued questioning after the suspect has invoked the right to counsel must be suppressed, but that derivative evidence may be treated differently).

251 *See id.* (concluding that although confessions taken in violation of *Miranda* and *Edwards* must be suppressed, "different interests prevail when [evaluating] derivative evidence obtained through the exploitation of statements obtained in violation of *Miranda* and *Edwards*[,]" and therefore such evidence may be admissible).

252 *Id.* at 207.

253 State v. Harris, 544 N.W.2d 545, 552 (Wis. 1996) (quoting Oregon v. Elstad, 470 U.S. 298, 309 (1985)).

interests, this note proposes that when an *Edwards* violation occurs during exigent circumstances, law enforcement should be allowed to continue the police-initiated questioning of a suspect who has invoked his right to an attorney. Any statements made during that questioning should be suppressed, but absent coercion, the "fruits" of those statements should be admissible.

Despite the justification provided by the exigent circumstances, this note concludes that statements made by a suspect during continued questioning in violation of *Edwards* must be suppressed. Whether responses to police-initiated questioning after a suspect invokes the right to counsel are voluntary or not is irrelevant under *Edwards*.[254] Likewise, the bright-line rule of *Edwards* does not mention exceptions for when police act in good faith.[255] A violation of *Edwards* is a violation of the suspect's Fifth Amendment rights,[256] and therefore statements made taken in violation must be suppressed.

A differentiation must be made between the statements taken in violation of *Edwards* and any physical evidence that is derived from those statements. Absent coercion, the "fruits" of those statements should be admissible at trial. The default Fifth Amendment self-incrimination standard queries whether a suspect's statements were voluntary.[257] If a suspect chooses to make voluntary statements while the police are justifiably denying him access to counsel due to the exigent "public-safety" circumstances, he must suffer some consequences of a non-coerced self-incrimination. There would be no deterrent effect furthered by requiring the suppression of such evidence that was extracted by police in a good-faith attempt to rectify a threat to public safety. Therefore, the exclusionary rule should not be adopted to suppress physical evidence that arises out of an *Edwards* violation that occurs during exigent "public-safety" circumstances.

254 *See* Edwards v. Arizona, 451 U.S. 477, 484 (1981) ("[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.").

255 *See generally id.*; United States v. Giles, 967 F.2d 382, 386 (10th Cir. 1992) (explaining that the only exception to the *Edwards* bright-line rule is "where the accused initiates the conversation with the police").

256 *Harris*, 544 N.W.2d at 553 ("A violation of Edwards is a violation of the right to counsel under the Fifth Amendment.").

257 Michigan v. Tucker, 417 U.S. 433, 441 (1974) ("Before *Miranda* the principal issue [to determine Fifth Amendment violations] . . . was . . . whether [the defendant's] statement was voluntary); Gottsfield, *supra* note 31, at 13 ("There is a difference between the issues presented by whether Miranda warnings were properly given and the voluntariness of a confession in a criminal prosecution."). *See* Oregon v. Elstad, 470 U.S. 298, 306 (1985) ("The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself.").

D. *Why This Proposal Strikes the Proper Balance Between The Four Interests at Stake*

Under this proposal, the public would not have to choose between their safety and the ability to convict a suspect. If a suspect has information that can help quell a public safety risk, the police can continue non-coercive interrogation in order to extract that information from the suspect after he has invoked his right to counsel. If that questioning produces incriminating statements that help to subdue the threat to public safety, then the public is immediately protected. If the questioning leads to derivative physical evidence that helps convict the suspect at trial, then the public is once again protected. The public safety interest is properly balanced because law enforcement would not be forced by exigent "public-safety" circumstances to sacrifice the future ability to convict a suspect for the immediate public safety.

This proposal strikes the proper balance in protecting a suspect's Fifth Amendment right against self-incrimination and to an attorney. The proposed rule recognizes the violation of a suspect's right to an attorney by suppressing statements made in response to police-initiated questioning in violation of *Edwards*.[258] The Fifth Amendment prohibits only the use of compelled testimony by the prosecution,[259] and thus the Fifth Amendment protection should only go so far.[260] If the suspect chooses to make voluntary statements during that continued questioning, there will be consequences adverse to his interests. This proposal would not suppress the "fruits" of voluntary statements made during that continued questioning. The proposed rule protects the Fifth Amendment interests of the suspect only as far as the Constitution demands, thereby striking the proper balance.

The proposed rule's evidentiary middle-ground approach strikes the proper evidentiary balance between allowing it all in,[261] and allowing

258 *See Edwards*, 451 U.S. at 484–85 (holding that custodial questioning must cease when the accused invokes his right to an attorney).

259 *See Elstad*, 470 U.S. at 306–07 ("The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony."); New York v. Quarles, 467 U.S. 649, 654 (1984) ("In *Miranda* this Court for the first time extended the Fifth Amendment privilege against compulsory self-incrimination to individuals subjected to custodial interrogation by the police.").

260 *See Quarles*, 467 U.S. at 654 (quoting United States v. Washington, 431 U.S. 181, 187 (1977)) (discussing how the Fifth Amendment itself does not prohibit all incriminating admissions, and therefore the privilege is not violated by even the most damning admissions absent some officially coerced self-accusation); United States v. Washington, 431 U.S. 181, 187 (1977) (noting that the Fifth Amendment does not preclude a witness from voluntarily testifying about matters which may incriminate him).

261 *See* United States v. DeSantis, 870 F.2d 536, 541 (9th Cir. 1989) (determining that statements

nothing in.[262] The Constitution demands that statements taken in violation of *Edwards* be suppressed. If, however, the self-incrimination is voluntary, the "fruits" of those offending statements will be admissible. The Fifth Amendment itself does not prohibit all incriminating admissions,[263] and therefore the privilege is not violated by even the most damning admissions "'absent some officially coerced self-accusation.'"[264] When the exigency of the circumstances justify the temporary denial of a suspect's right to counsel, absent coercion, the "fruits" of the violation should be allowed in, striking the proper evidentiary balance.

CONCLUSION

Returning to our hypothetical with D.B. Cooper and Lieutenant McClain, we can now apply the proposed rule in order to determine what McClain's course of action should be. McClain would be justified by the exigent circumstances to question Cooper about the whereabouts of the gun, despite Cooper's invocation of his right to an attorney, in a good faith effort to ensure the public's safety. If Cooper makes statements in response to that questioning, he can feel confident that those statements taken in violation of his right to an attorney will not be used against him in court. However, Cooper should speak at his own peril, because if he voluntarily reveals information that leads to the discovery of the gun used in the armed robbery, that physical evidence may be introduced into evidence against him at trial. If the gun is found, the members of public will be safe and they will not have had to trade that immediate safety for the later suppression of that weapon at trial.

By allowing the continued questioning of a suspect who has invoked his right to an attorney during exigent circumstances, suppressing the incriminating statements, and, absent coercion, admitting the evidence that arises out of those statements, the interests of the neighborhood, McClain, and Cooper have been properly balanced.

taken in violation of *Edwards* during "public-safety" circumstances do not need be suppressed unless there is coercion).

262 *See* Wisconsin v. Harris, 544 N.W.2d 545, 553 (Wis. 1996) (holding that *Edwards* violations trigger the fruit of the poisonous tree doctrine and require the suppression of the fruits of that constitutional violation).

263 *See Quarles*, 467 U.S. at 654 (noting that the Fifth Amendment does not protect against self incrimination absent coercion); *Washington*, 431 U.S. at 187 (explaining that admissions of guilt are "desirable if they are not coerced").

264 *Quarles*, 467 U.S. at 654 (quoting United States v. Washington, 431 U.S. 181, 187 (1977)).