Volume 63 | Number 6 Article 18

8-1-1985

State v. Thomas: When Is a Confession Coerced and When Is It Voluntary

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State v. Thomas: When Is a Confession Coerced and When Is It Voluntary?

The United States Constitution provides a criminal defendant with the right to due process of law,[1] the right to assistance of counsel,[2] and the privilege against self-incrimination.[3] American courts have used all three of these constitutional provisions to refuse to admit into evidence certain confessions made by criminal defendants.[4] No matter which premise is used to determine whether confessions are admissible, the underlying theme is the same: confessions extracted by unacceptable means will not be used as substantive evidence against a defendant.[5] There are, however, varying interpretations concerning what are unacceptable means. Some methods of extracting a confession have been found to be clearly unacceptable.[6] Many questionable methods, however, have been found acceptable.[7]

In *State v. Thomas*[8] the North Carolina Supreme Court reviewed the admissibility of a defendant's confession in light of two rules of evidence.[9] One rule arose from the United States Supreme Court's decision in *Edwards v. Arizona*[10] that once an accused invokes his fifth amendment right to counsel, there can be no further police interrogation unless the accused initiates the dialogue.[11]

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1. U.S. CONST. amend. XIV, § 1.

2. U.S. CONST. amend. VI.

3. U.S. CONST. amend. V.

4. C. WHITEBREAD, CRIMINAL PROCEDURE § 15.01 (1980); J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 70 (1974).

5. Although not admitted for substantive purposes, in "some circumstances an improperly obtained confession may be used for impeachment purposes." J. COOK, *supra* note 4, § 70. Also, in Milton v. Wainwright, 407 U.S. 371 (1972), the United States Supreme Court upheld the admission into evidence of a confession that arguably resulted from the violation of the defendant's fifth and sixth amendment rights because the admission was shown beyond a reasonable doubt to be harmless error. *Id.* at 372-73. Commenting on the harmless error doctrine, Professor Whitebread observed: "If the primary reason for *Miranda* is to deter coercive methods by the police, then the harmless error doctrine should seldom, if ever, be applicable." C. WHITEBREAD, *supra* note 4, § 15.06, at 322.

6. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966) (confession obtained during police custodial interrogation from a suspect who was not warned of his fifth amendment right against self-incrimination); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (confession obtained through long-term interrogation of defendant who was deprived of sleep); Brown v. Mississippi, 297 U.S. 278 (1936) (confession obtained through the use of physical brutality).

7. *See, e.g.*, Leuschen v. State, 41 Md. App. 423, 397 A.2d 622, *cert. denied*, 444 U.S. 933 (1979) (inculpatory statements made by defendant to an undercover officer during the course of general conversation in defendant's cell were not obtained in violation of defendant's *Miranda* rights); State v. Franklin, 308 N.C. 682, 687-89, 304 S.E.2d 579, 583-84 (1983) (defendant's sixth amendment right to counsel had not yet arisen while he was in custody on an unrelated charge but before a warrant for his arrest concerning the crime at issue had been executed); State v. Pacheco, 481 A.2d 1009, 1022-27 (R.I. 1984) (police officer's promise to help defendant receive sentence to be served at an out-of-state prison and to dismiss charges against defendant's companion did not make defendant's confession involuntary).

8. 310 N.C. 369, 312 S.E.2d 458 (1984).

9. *Id.* at 377-79, 312 S.E.2d at 462-64.

10. 451 U.S. 477 (1981).

11. *Id.* at 484-85. The Court in *Edwards* noted that *Miranda* "declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation." *Id.* at 482. For a discussion of the *Edwards* holding, see *infra* text accompanying notes 53-59.

The other rule is a North Carolina requirement that a confession be voluntary to be admissible.[12] This Note discusses the background of both rules and the reasoning used by the court in applying them. This Note also analyzes the ambiguities inherent in both rules but unaddressed by the court. It concludes that although the *Thomas* decision is not a pronounced deviation from existing case law involving either rule,[13] there are problems with the court's straightforward approach, including the possibility that use of coercive confessions will be less restricted in the future.

At approximately 5:30 a.m. on May 26, 1982, a ten year old boy was sexually assaulted while on his newspaper route in Winston-Salem.[14] The victim described his assailant as a jogger.[15] On August 6, 1982, the victim identified the defendant as his assailant from a group of six photographs.[16] Defendant had been arrested on August 5, 1982, for a different assault, which occurred on August 4, 1982.[17] At the time of his arrest defendant was informed of his *Miranda* rights,[18] and he apparently understood them.[19] The next day, defendant was taken by two police officers from jail to the city hall, where he was again informed of his rights, both orally and in writing.[20] After defendant waived his rights,[21] the two officers began to question him "in very general terms."[22] When they began to question him specifically about the assault of May 26, "defendant indicated that he did not want to talk further and that he wanted an attorney."[23] The officers then stopped questioning defendant and took him to the Office of the Clerk of Superior Court, where one of the officers filled out an arrest warrant.[24]

While filling out the arrest warrant, one of the officers said to defendant: "Be sure to tell your attorney that you had the opportunity to help yourself and didn't."[25] Approximately five minutes after the officer made the comment, defendant asked the officer if he still wanted a statement. The officer responded that it was up to defendant.[26] Defendant was again taken to the city hall and informed of his rights. Defendant then waived his rights and gave an incrimi-

12. *Thomas*, 310 N.C. at 378-79, 312 S.E.2d at 463-64. For a discussion of North Carolina's voluntariness rule, see *infra* notes 69-74 and accompanying text.

13. *See infra* text following note 74.

14. *Thomas*, 310 N.C. at 370, 312 S.E.2d at 459.

15. *Id.*

16. *Id.*

17. *Id.* at 375, 312 S.E.2d at 462.

18. For a discussion of the holding in Miranda v. Arizona, 384 U.S. 436 (1966), see *infra* notes 38-40 and accompanying text.

19. *Thomas*, 310 N.C. at 375, 312 S.E.2d at 462.

20. *Id.* at 376, 312 S.E.2d at 462.

21. Brief for Appellant at 72 app., *Thomas*.

22. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 462.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* During the *voir dire* hearing, *see infra* note 28, defendant gave his version of what took place after he asked for an attorney:

> I'm not sure if Mr. Weavil [one of the police officers] got up and left the room or not, but Mr. Dalton [the second police officer] was there, and he was very polite and asked what

nating statement to the officers.[27]

At trial the court conducted a *voir dire* hearing to determine the admissibility of defendant's confession.[28] Finding that the confession was not the result of any questioning or inducement by the officers and that the confession "was made freely, voluntarily, and understandingly,"[29] the trial court admitted the confession into evidence over defendant's objection. The jury found Thomas guilty and sentenced him to life imprisonment.[30]

Thomas came before the North Carolina Supreme Court on an appeal of right.[31] Defendant assigned as error the admission of his confession, basing his argument on two grounds. First, he claimed that the confession was obtained in violation of the *Edwards* rule because the officer's suggestion that defendant tell his attorney he had been given an opportunity to help himself was interrogation initiated by the officer after defendant had invoked his right to counsel.[32] Second, defendant claimed that his confession was involuntary because it was "induced by the suggestion of hope or fear implanted in his mind" by the officer's comment.[33]

The North Carolina Supreme Court's rejection of defendant's claims was brief. First, the court held that the officer's comment was not interrogation and therefore did not violate the *Edwards* rule.[34] Second, the court held that the confession was not the product of coercion or fear and therefore was made by

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religion I was. Said, "You're a reasonable person." And I said I was raised as a Southern Baptist, and he said good morals, that sort of thing.

"You're a smart person. If you had a chance to help yourself, wouldn't you?" And I said, "Yes, I would." And he said, "Well, a statement would help you very much." And I said, "I have nothing further to say."

And then he sat up in his chair and shuffled his papers and he said, "Well, when you do speak to your lawyer, tell him you had a chance to help yourself and you didn't."

Brief for Appellant at 61 app., *Thomas*.

27. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 462.

28. *Id.* When a defendant objects to the admission of his confession into evidence, "the trial judge should then excuse the jury and in the absence of the jury hear the evidence of both State and the defendant upon the question of whether defendant, if he made an admission or confession, voluntarily and understandingly made the admission or confession." State v. Bishop, 272 N.C. 283, 291, 158 S.E.2d 511, 516 (1968).

29. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 462.

30. *Id.* at 370, 312 S.E.2d at 459.

31. The appeal as a matter of right was in accordance with N.C. GEN. STAT. § 7A-27 (1981).

32. *Thomas*, 310 N.C. at 375, 312 S.E.2d at 462-63. For a discussion of the holding in *Edwards*, see *infra* text accompanying notes 53-59.

33. *Thomas*, 310 N.C. at 375, 312 S.E.2d at 463. Defendant assigned two other points as error. First, defendant contended that the trial court had admitted evidence which tended to show that defendant had committed a separate offense. The trial court had admitted the evidence on the ground that defendant had put his identity and presence at the crime scene in issue. The court, therefore, permitted the State to present evidence of a second crime by defendant which involved facts sufficiently unusual that they indicated the commission of both crimes by the same person. The North Carolina Supreme Court upheld the admission of this evidence. *Id.* at 371-74, 312 S.E.2d at 459-61.

Second, defendant assigned as error the trial court's denial of defense counsel's motion to withdraw himself from the case because of a potential conflict of interest. The supreme court stated that motions to withdraw generally are left to the trial judge's discretion unless an abuse of discretion is demonstrated. The court found no showing of abuse and therefore upheld the trial court's ruling on the withdrawal motion. *Id.* at 375, 312 S.E.2d at 461.

34. *Id.* at 377-78, 312 S.E.2d at 463.

defendant voluntarily.[35] Judge Exum dissented from the affirmance of the trial court's decision, considering the officer's remark to be an interrogation and believing the confession to be involuntary because it was the product of a promise of leniency.[36]

To thoroughly reanalyze defendant's claims, it is necessary to consider the development of the two admissibility rules from which the claims arose. The *Edwards* rule grew out of *Miranda v. Arizona*.[37] The United States Supreme Court in *Miranda* held that certain threshold procedures were necessary to protect a criminal defendant's fifth amendment privilege against self-incrimination.[38] The Court held that a person subjected to custodial interrogation must be warned in "clear and unequivocal terms" that he has the right to remain silent; that anything he says may be used against him; that he has the right to speak with an attorney; and that he has the right to have an attorney appointed for him if he is indigent.[39] Although noting that a defendant could waive these rights, the Court put a heavy burden on the government to show that any waiver was made knowingly and intelligently.[40] Following *Miranda*, the United States Supreme Court decided three fifth amendment cases relevant to the issues in *Thomas*:[41] *Edwards*,[42] *Rhode Island v. Innis*,[43] and *Oregon v. Bradshaw*.[44]

In the first case in the trilogy, *Innis*, defendant had been arrested for murder and was being transported in a police wagon by two police officers.[45] With the defendant listening, the two officers engaged in conversation concerning the location of the gun used in the murder. They expressed great concern over the possibility that the gun might fall into the hands of one of the retarded children

35. *Id.* at 379, 312 S.E.2d at 464.

36. *Id.* at 381-84, 312 S.E.2d at 465-66 (Exum, J., dissenting).

37. 384 U.S. 436 (1966). *Edwards* was based on the statement in *Miranda* that "the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' " *Edwards*, 451 U.S. at 485 (quoting *Miranda*, 384 U.S. at 474).

38. *Miranda*, 384 U.S. at 467-79.

39. *Id.* The Court in *Miranda* stated that it intended to give "concrete constitutional guidelines for law enforcement agencies and courts to follow," *id.* at 441-42, guidelines aimed at ensuring that an accused was given his fifth amendment privilege. *Id.* The Court was concerned with suspects' compulsion to confess during custodial interrogation, even when, "in traditional terms," the suspects' statements were made voluntarily. *Id.* at 457. The Court created procedural "safeguards" which must be observed unless the states devise "other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise" that right. *Id.* at 467.

40. *Id.* at 479.

41. Although the court in *Thomas* stated that there was "no violation of defendant's Sixth Amendment right to counsel," *Thomas*, 310 N.C. at 377, 312 S.E.2d at 463, defendant's assignment of error and the court's analysis were based on the *Edwards* rule, which protects the fifth amendment privilege against self-incrimination. Therefore, the part of this Note concerning the interrogation issue is a fifth amendment discussion. The United States Supreme Court noted that "[t]he definitions of 'interrogation' under the Fifth and Sixth Amendments, if indeed the term 'interrogation' is even apt in the Sixth Amendment context, are not necessarily interchangeable, since the policies underlying the two constitutional protections are quite distinct." *Innis*, 446 U.S. at 300 n.4.

42. 451 U.S. 477 (1981).

43. 446 U.S. 291 (1980).

44. 462 U.S. 1039 (1983).

45. *Innis*, 446 U.S. at 293-94.

who attended a nearby school.[46] The conversation was between the two officers only and did not include defendant. However, defendant spoke up from the back seat and told the officers that he wanted to retrieve the gun because of the children around the school, thereby incriminating himself.[47]

Defendant in *Innis* had been informed of his *Miranda* rights and had invoked his right to counsel before the officers' conversation about the gun took place.[48] The defendant was clearly in custody at the time he made the inculpatory statement;[49] therefore, the only question for the Court to decide under the *Miranda* standard was whether the officers' conversation was "interrogation."[50] Squarely addressing what constitutes interrogation, the Court stated:

> [T]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. . . . [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect rather than the intent of the police. . . . [T]he *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.[51]

The Supreme Court applied this definition to the officers' front seat conversation and found that the conversation was not interrogation.[52]

A year after *Innis*, the Court decided *Edwards*. In *Edwards* defendant, arrested for robbery, burglary, and first-degree murder, was informed of his *Miranda* rights.[53] He invoked his right to counsel, interrogation ceased, and he was jailed.[54] The next morning he was told that he had to talk with two detectives, although he had not yet seen an attorney. The conversation with the detectives resulted in his confession.[55] The Supreme Court 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 rights."[56] The Court further held that when an accused has "expressed his desire to deal with the police only through counsel, [he] is not subject

46. *Id.* at 294-95.
47. *Id.* at 295.
48. *Id.* at 294.
49. *Id.* at 298. The Court in *Miranda* established that "custody," for *Miranda* purposes means that the defendant is either "in custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 445.
50. *Innis*, 446 U.S. at 298.
51. *Id.* at 300-01.
52. *Id.* at 303.
53. *Edwards*, 451 U.S. at 478.
54. *Id.* at 479.
55. *Id.*
56. *Id.* at 484.

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."[57] The police had interrogated defendant after he invoked his right to counsel and defendant had not initiated the exchange.[58] Therefore, his confession was inadmissible.[59]

Edwards established an apparent per se rule which would operate to exclude a confession upon a showing that a defendant did not initiate the dialogue that resulted in the confession.[60] *Edwards'* impact was somewhat lessened, however, by the subsequent decision of the Court in *Oregon v. Bradshaw*.[61] Just as the Court defined "interrogation" in *Innis*, the court in *Bradshaw* refined *Edwards'* reference to "initiation" of communication with the police by an accused.[62] In *Bradshaw* defendant was arrested for furnishing liquor to a minor and was informed of his *Miranda* rights. When he requested an attorney, interrogation ended and he was transported from the police station to jail.[63] During the trip, Bradshaw asked a police officer, "Well, what is going to happen to me now?"[64] The subsequent discussion eventuated in defendant's confession.[65] The Court held that defendant's question "evinced a willingness and a desire for a generalized discussion about the investigation" and that "[i]t could reasonably have been interpreted by the officer as relating generally to the investigation."[66] Therefore, defendant's question satisfied the *Edwards'* "initiation" requirement.[67]

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57. *Id.* at 484-85. The Court addressed how it would define defendant-initiated dialogue in Oregon v. Bradshaw, 462 U.S. 1039, 1044-45 (1983). *See infra* notes 62-67 and accompanying text.

58. *Edwards*, 451 U.S. at 487.

59. *Id.*

60. Lower courts have interpreted *Edwards* in two different ways. One interpretation views *Edwards* as presenting the initiation requirement as just one factor to be considered in a totality of the circumstances test. The other view of *Edwards* is that it mandates a two-step process in which it is first determined whether defendant initiated the dialogue; then, if defendant did initiate it, a totality of circumstances test is used to determine whether defendant knowingly and intelligently waived his rights. This latter view is really a per se rule because of the requirement that defendant initiate the dialogue before there is waiver. Comment, Oregon v. Bradshaw: *Right to Counsel Under* Miranda*—The Waiver Standard*, 19 NEW ENG. L. REV. 513, 519-20 (1984). Oregon v. Bradshaw made it clear that the latter view is what the *Edwards* Court intended. *See Bradshaw*, 462 U.S. at 1044-45.

61. 462 U.S. 1039 (1983).

62. *Bradshaw*, 462 U.S. at 1045-46. For a discussion of the reference to initiation in *Edwards*, see *supra* text accompanying note 57.

63. *Bradshaw*, 462 U.S. at 1041-42.

64. *Id.* at 1042.

65. *Id.*

66. *Id.* at 1045-46.

67. *Id.* The Court explained its holding:

> While we doubt that it would be desirable to build a superstructure of legal refinements around the word "initiate" in this context, there are undoubtedly situations where a bare inquiry by either defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*.

Id. at 1045.

North Carolina, following the United States Supreme Court, adopted the *Edwards* rule.[68] The definition of interrogation in *Innis* and of defendant-initiated dialogue in *Bradshaw* combine with the basic rule of *Edwards*—that once a defendant requests counsel, interrogation by the police must cease unless the defendant initiates dialogue with the police—to form the framework of analysis for defendant's *Edwards* claim in *Thomas*.

Defendant's claim that his confession was inadmissible because it was involuntary has different origins. North Carolina's voluntariness standard has its origin in the belief that confessions induced by hope or fear are generally unreliable.[69] Originally, the United States Supreme Court also used a voluntariness standard, but the basis for its use was the due process clause of the fourteenth amendment.[70] As federal confession law developed, the due process voluntariness test was superseded by modern confession law's emphasis on *Miranda*.[71] North Carolina's confession law, while recognizing the *Miranda* requirements, still incorporates the test of voluntariness.[72] The North Carolina Supreme Court recently stated that in testing the voluntariness of a confession, "the court looks at the totality of the circumstances of the case."[73] Whenever a confession is the product of a threat or a promise of leniency, the confession is considered involuntary and inadmissible.[74]

A survey of the background of both the *Edwards* and the voluntariness claims asserted by defendant in *Thomas* reveals that the North Carolina Supreme Court's decision on both claims is consistent with prior law. The troublesome aspect of *Thomas* is that the *Edwards* rule and the voluntariness test are both surrounded by ambiguity in their application—ambiguity that necessarily permeates *Thomas*.

The ambiguity associated with the *Edwards* rule involves *Miranda*. *Miranda* provided clear-cut procedural protection against the potential for coerced confessions by persons in police custody.[75] There was speculation after *Miranda*, however, that the Court was moving away from *Miranda* and its empha-

68. *See, e.g.*, State v. Bauguss, 310 N.C. 259, 311 S.E.2d 248, *cert. denied*, 105 S. Ct. 136 (1984) (quoting the *Edwards* rule but finding it inapplicable because defendant never invoked his right to counsel); State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983) (quoting the *Edwards* rule and determining that defendant initiated dialogue with the police but holding that there was prejudicial error in the trial court's fact-finding effort to establish whether defendant made a "knowing, intelligent and valid" waiver of his right); State v. Franklin, 308 N.C. 682, 304 S.E.2d 579 (1983) (quoting the *Edwards* rule but finding it inapplicable because defendant never invoked his right to counsel).

69. *See* 2 H. BRANDIS, BRANDIS ON NORTH CAROLINA EVIDENCE, SECOND REVISED EDITION OF STANSBURY'S NORTH CAROLINA EVIDENCE § 183 (1982).

70. *See* Spano v. New York, 360 U.S. 315 (1959); Fikes v. Alabama, 352 U.S. 191 (1957); Ashcraft v. Tennessee, 322 U.S. 143 (1944); Brown v. Mississippi, 297 U.S. 278 (1936); C. WHITEBREAD, *supra* note 4, § 15.02; 2 H. BRANDIS, *supra* note 69, § 183.

71. *See* C. WHITEBREAD, *supra* note 4, § 15.04.

72. 2 H. BRANDIS, *supra* note 69, § 183.

73. State v. Jackson, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983).

74. *See, e.g.*, State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975); State v. Woodruff, 259 N.C. 333, 130 S.E.2d 641 (1963); State v. Livingston, 202 N.C. 809, 164 S.E. 337 (1932); State v. Whitfield, 70 N.C. 356 (1874); State v. Roberts, 12 N.C. (1 Dev.) 259 (1827).

75. *See supra* note 39 and accompanying text.

sis on objective procedures.[76] *Edwards*, with its objective per se test, settled speculation over whether the Court was in the process of abolishing *Miranda*.[77] A rule can be diminished without being abolished, however, and *Edwards* does not preclude the possible diminution of *Miranda*.[78] That *Edwards* itself is circumscribed by *Innis* and *Bradshaw* bears out this conclusion. *Innis* defined interrogation as "words or actions . . . the police should know are reasonably likely to elicit an incriminating response from the suspect"[79] and then applied the term in a relatively conservative manner.[80] *Bradshaw* determined that a statement from a suspect that "could reasonably have been interpreted by the officer as relating generally to the investigation" is sufficient to meet the *Edwards* provision that there may be further interrogation even after a suspect has requested an attorney if the suspect initiates dialogue with the police.[81] Therefore, although the basic rule of *Edwards* is per se, it is restrained by tests of reasonableness. The questions inherent in a reasonableness approach are twofold: Has the application of the reasonableness standard diminished *Miranda*'s substantive goal of protecting suspects in police custody from the threat of coerced confessions, and does the reasonableness test's influence on *Edwards* diminish the *Miranda* emphasis on objective procedural rules?[82]

These questions apply to the holding in *Thomas*. In *Thomas*, the North Carolina Supreme Court, with minimal discussion, applied the *Edwards* rule and the test for voluntariness to defendant's confession. The court quoted the *Edwards* rule[83] but then unequivocally stated that it was not violated because the police officer's statement at issue was not interrogation.[84] The court based its decision on the *Innis* definition of "interrogation,"[85] concluding that it was not true in this case that the officer "should have known that his 'off-hand' remark was reasonably likely to provoke defendant into making an incriminating statement."[86]

The North Carolina Supreme Court's conservative application of the *Innis* definition is in accord with the United States Supreme Court's application of it in *Innis*. Although *Innis* supported *Miranda* by specifying that interrogation

76. *See* C. WHITEBREAD, *supra* note 4, § 15.08; Comment, Edwards v. Arizona: *The Burger Court Breathes New Life Into* Miranda, 69 CALIF. L. REV. 1734, 1738-40 (1981).

77. *Edwards* has been called "the Burger Court's first clear-cut victory for *Miranda*." Sonenshein, Miranda *and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405, 447 (1982). No dissents were filed in *Edwards*.

78. *See* Comment, *supra* note 76, at 1748-51.

79. *Innis*, 446 U.S. at 300-01. *See also supra* text accompanying note 51 (setting forth the *Innis* Court's interpretation of "interrogation").

80. *See supra* text accompanying notes 45-52.

81. *Bradshaw*, 462 U.S. at 1046.

82. *See* Fyfe, *Enforcement Workshop*: Oregon v. Bradshaw—*What's Happening Here?*, 20 CRIM. L. BULL. 154, 158-60 (1984); Sonenshein, *supra* note 77, at 446; Comment, *supra* note 60, at 527-30.

83. *Thomas*, 310 N.C. at 377, 312 S.E.2d at 462.

84. *Id.* at 377-78, 312 S.E.2d at 463.

85. The court actually cited a North Carolina case that stated the *Innis* definition, noting that "[w]e have recognized that 'interrogation is not limited to express questioning by the police.' " *Id.* at 377, 312 S.E.2d at 463 (quoting State v. Ladd, 308 N.C. 272, 280, 302 S.E.2d 164, 170 (1983)).

86. *Id.* at 377-78, 312 S.E.2d at 463.

under *Miranda* could include police activities other than questioning,[87] it also refused to find that there was interrogation by the police officers during their front seat conversation.[88] The *Innis* holding—that police officers are not expected to know that a discussion about the danger of a school child finding a missing gun might provoke an incriminating response from a defendant—was reasonable. At least one commentator, however, has questioned whether this application of the reasonableness test in *Innis* undermined *Miranda* by refusing to classify police statements that directly resulted in defendant's incriminating statements as interrogation.[89] Justice Marshall, in a dissenting opinion in *Innis*, described the majority's "reasonably likely to provoke" definition of interrogation as consistent with *Miranda* but considered the Court's holding on the facts of *Innis* contradictory to that definition.[90]

The North Carolina Supreme Court's holding in *Thomas* is subject to the same criticisms as those aimed at *Innis*. The Supreme Court's holding in *Innis*, however, did not require the result reached by the *Thomas* court. First, *Innis* and *Thomas* are factually distinct. *Innis* involved a conversation between two officers in which neither one spoke to the accused at all.[91] *Thomas*, on the other hand, dealt with a remark made directly to the accused by an officer.[92] Second, Professor White has suggested that the Court's focus in *Innis* was on an objective standard rather than on the "actual intent" of the police. Professor White has noted that the Court, in footnote seven of the majority opinion, "stated that when 'a police practice is designed to elicit an incriminating response,' it is 'unlikely' that the 'reasonably likely' test will not be met."[93] Professor White therefore has proposed:

> In order to preserve both the majority's objective approach and a close correlation between the officer's purpose and the "reasonably likely" standard, the best reading of the *Innis* test is that it turns upon the objective purpose manifested by the police. Thus, an officer "should know" that his speech or conduct will be "reasonably likely to elicit an incriminating response" when he should realize that the speech or conduct will probably be viewed by the suspect as designed to achieve this purpose. To ensure that the inquiry is entirely objective, the proposed test could be framed as follows: if an objective observer (with the same knowledge of the suspect as the police officer) would, on the sole basis of hearing the officer's remarks, infer that the remarks were designed to elicit an incriminating response, then the remarks should constitute "interrogation."[94]

Applying Professor White's interpretation of the *Innis* test to the officer's

87. *See* White, *Interrogation Without Questions:* Rhode Island v. Innis *and* United States v. Henry, 78 MICH. L. REV. 1209, 1223 (1980).

88. *See* Sonenshein, *supra* note 77, at 446-47.

89. *See id.* at 446 (noting that *Innis* created a "potentially gaping hole in *Miranda*").

90. *Innis*, 446 U.S. at 305 (Marshall, J., dissenting).

91. *Id.* at 294-95.

92. *Thomas*, 310 N.C. at 376, 312 S.E.2d at 463.

93. White, *supra* note 87, at 1231 (quoting *Innis*, 446 U.S. at 302 n.7).

94. *Id.* at 1231-32 (emphasis omitted).

remark in *Thomas*, it is possible to reach a different result than the court in *Thomas* reached. An objective listener probably would infer that the officer told defendant to tell his attorney about the opportunity defendant had been given to help himself in an effort to elicit self-incrimination.

Because the North Carolina Supreme Court in *Thomas* construed the interrogation definition so narrowly, *Edwards'* application in the North Carolina courts is excessively constricted. If the courts continue to follow such a conservative interpretation of the *Innis* definition of interrogation, police may skillfully use manipulative techniques that do not rise to the level of what the North Carolina Supreme Court has perceived as "interrogation" and thus circumvent the *Miranda* goal of minimizing the coercive element of custodial interrogation.[95] These methods would not violate *Edwards* because technically they would not be interrogation, but they would violate the spirit of *Miranda* by inducing confessions that are the result of subtle compulsion.[96]

It is worth considering, therefore, whether the North Carolina Supreme Court followed the best line of interpretation of *Edwards* in *Thomas*. The United States Supreme Court has indicated that although it might not expand *Miranda* in the future, it will support it.[97] Given the facts of *Thomas*, it would be criticizing the North Carolina Supreme Court too harshly to say that the court violated the meaning of *Miranda* in *Thomas*. Even if Professor White's interpretation of the *Innis* rule is applied to *Thomas*, the fact situation in *Thomas* is sufficiently ambiguous to allow support for the court's decision. The real problem with *Thomas* is that it may encourage a much looser application of both *Miranda* and *Edwards* in North Carolina courts.

The United States Supreme Court's decision in *Oregon v. Bradshaw* leaves open an issue which the Court may soon have to address—an issue of interest to the North Carolina courts after *Thomas*. That issue concerns the relationship between the threshold at which police comments and activity become interrogation and the threshold at which a suspect's comments are considered to be initiation of dialogue with the police. In *Innis* the officers' comments about the

95. This potential implication reflects Justice Marshall's complaint in his *Bradshaw* dissent concerning the Court's broad interpretation of what is an initiation of dialogue by a defendant. (Justice Marshall was joined in his dissent by Justices Brennan, Blackmun, and Stevens.) He stated that "[t]o allow the authorities to recommence an interrogation based on such a question is to permit them to capitalize on the custodial setting. Yet *Miranda*'s procedural protections were adopted precisely in order 'to dispel the compulsion inherent in custodial surroundings.'" *Bradshaw*, 462 U.S. at 1056 (Marshall, J., dissenting) (quoting *Miranda*, 384 U.S. at 458).

96. *See id.* A similar fear has been voiced concerning the *Bradshaw* initiation rule:

> By focusing on who initiates the dialogue, the *Edwards-Bradshaw* rule ignores certain coercive aspects of the custodial environment. It would be possible for the police to manipulate the initiation step to their own advantage by subjecting the suspect to more subtle forms of coercion. For example, the police could ignore the suspect until concern about his status, and the coerciveness of the custodial environment generally, induce him to initiate a conversation with the police.

Comment, *supra* note 60, at 527-28.

97. The substance of the *Edwards* decision itself indicates this. It is interesting to note what Chief Justice Burger said in his concurring opinion in *Innis*: "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would never overrule *Miranda*, disparage it, nor extend it at this late date." *Innis*, 446 U.S. at 304 (Burger, J., concurring).

missing gun directly preceded the defendant's self-incrimination; yet, those comments were not considered interrogation by the Court.[98] But in *Bradshaw* the defendant's question as to what would happen to him next was considered to be an initiation of the dialogue which resulted in a confession.[99] The level of police activity that is considered interrogation—and therefore a trigger of the *Edwards* requirement that interrogation cease when defendant requests an attorney—is much higher than that at which a defendant's comment or question is considered an initiation of dialogue and therefore sufficient to allow interrogation to begin again. If that difference in thresholds is the rule, the ironic import of *Edwards* is that, while the case purports to further *Miranda*'s goal of protecting a defendant in custody from self-incrimination, it actually diminishes *Miranda*. The Court should consider setting thresholds at more comparable levels.[100]

Thomas also raises questions concerning *Miranda*'s procedural goals. One of the primary goals of *Miranda* was to provide clear-cut rules of procedure to help implement the constitutional protections.[101] *Edwards* has been greeted as an effort by the Court to again provide a bright-line test.[102] Because the North Carolina Supreme Court in *Thomas* provides little analysis to support its conclusion that the remark at issue in the case was not interrogation,[103] *Thomas* offers little in the way of guidelines for the police to follow in attempting to obey the dictates of *Edwards*. If the *Edwards* tests for interrogation and initiation are dependent upon a case-by-case analysis, law enforcement officials are left in the position of having to guess in advance what a court will and will not admit into evidence.[104] Lack of procedural guidelines also impedes one of the stated purposes for the *Edwards* rule: "to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was."[105] If police are not fairly certain of what constitutes "badgering" and are only able to find out by a process of "trial and error," the *Edwards* "prophylactic rule" will not be consistently effective.[106]

Just as the problems inherent in the *Edwards* rule affect the decision in *Thomas*, the ambiguity inherent in the North Carolina test for voluntariness in confessions also affects the *Thomas* decision. A pure application of the *Edwards*

98. *See id.* at 294-95, 303.

99. *See supra* text accompanying notes 64-67.

100. *See generally* Fyfe, *supra* note 82, at 159-60 (concluding that "*Bradshaw* represents a serious erosion of *Miranda* and of the *Edwards* test").

101. *See supra* note 39 and accompanying text.

102. *See* Sonenshein, *supra* note 77, at 447-51.

103. *Thomas*, 310 N.C. at 377-78, 312 S.E.2d at 463.

104. Justice Burger was troubled by this problem when he encountered it in the *Innis* definition. According to the Chief Justice, "It may introduce new elements of uncertainty; under the Court's test, a police officer, in the brief time available, apparently must evaluate the suggestibility and susceptibility of an accused." He noted that "[f]ew, if any, police officers are competent enough to have the kind of evaluation seemingly contemplated." 446 U.S. at 304 (Burger, J., concurring).

105. *Bradshaw*, 462 U.S. at 1044.

106. Professor Sonenshein has summed up the significance of guidelines in the *Miranda* area. He concludes, "If there is a *Miranda* theme, it is that abuse of authority thrives on discretion. If there is a legacy in *Miranda*, it is that the privilege against self-incrimination will only be honored in the official interrogation setting when police and judges operate within clearly delineated guidelines." Sonenshein, *supra* note 77, at 462.

rule, after a finding that defendant initiated dialogue, would require the state to prove that any confession resulting from the dialogue was made only after the accused waived his rights. Such waiver must have been made knowingly and intelligently in view of the totality of the circumstances.[107] The *Edwards* requirement that there be a valid waiver, however, apparently is not considered to be the equivalent of the voluntariness requirement in North Carolina.[108] The requirement that a defendant's confession be voluntary in order to be admissible must be satisfied even when the rules of both *Miranda* and *Edwards* have been met.[109] North Carolina's voluntariness test grows out of a long history of case law, much of which is still cited frequently by North Carolina courts.[110]

While the supreme court in *Thomas* did not specifically discuss waiver, it did discuss the voluntariness of defendant's confession. The court applied a totality of the circumstances test to determine whether the confession in *Thomas* was made voluntarily.[111] Applying the rule of *State v. Corley*,[112] which indicated that involuntariness is not caused by a single factor, the court noted that no attempt was made to frighten or threaten defendant or otherwise coerce him into making a statement.[113] The court concluded that the officer's "off-hand" statement was not a sufficient basis for considering defendant's confession involuntary[114] and admitted the confession into evidence.[115]

The court's "totality of the circumstances" test for voluntariness is somewhat puzzling in light of traditional North Carolina confession law. North Carolina cases repeatedly state that a confession produced by a promise of leniency or by a threat—a confession that is the result of hope or fear induced by the police in a defendant—is not a voluntary confession.[116] In *Corley* the court adamantly stated that this standard was not a per se rule,[117] finding instead that the totality of the circumstances had to indicate the confession was involuntary.

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107. *See supra* note 60.

108. The North Carolina Supreme Court has stated that "in determining whether a defendant's confession was voluntarily and intelligently made . . . '[t]he North Carolina rule and the federal rule for determining the admissibility of a confession is [sic] the same.' " State v. Corley, 310 N.C. 40, 48, 311 S.E.2d 540, 545 (quoting State v. Jackson, 308 N.C. 549, 581, 304 S.E.2d 134, 152 (1983)). The court went on to add, however, that "this principle controls 'without regard to whether the claim of inadmissibility rests upon constitutional grounds *or rests solely upon our rule of evidence requiring the exclusion of involuntary confessions.*' " *Id.* at 48, 311 S.E.2d at 545 (quoting State v. Branch, 306 N.C. 101, 108, 291 S.E.2d 653, 658 (1982)) (emphasis added).

Within the *Miranda* context itself, a voluntary confession is not prohibited. The Supreme Court said in *Miranda* that "[a]ny statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." *Miranda*, 384 U.S. at 478.

109. *See* State v. Corley, 310 N.C. 40, 47, 311 S.E.2d 540, 545 (1984).

110. *See, e.g.*, State v. Jackson, 308 N.C. 549, 304 S.E.2d 134 (1983); State v. Pruitt, 286 N.C. 442, 212 S.E.2d 92 (1975); State v. Bishop, 272 N.C. 283, 158 S.E.2d 511 (1968); State v. Roberts, 12 N.C. (1 Dev.) 259 (1827).

111. *Thomas*, 310 N.C. at 378-79, 312 S.E.2d at 463-64.

112. 310 N.C. 40, 47, 311 S.E.2d 540, 547 (1984).

113. *Thomas*, 310 N.C. at 379, 312 S.E.2d at 464.

114. *Id.*

115. *Id.*

116. *See supra* note 74 and accompanying text.

117. 310 N.C. at 48, 311 S.E.2d at 544.

The court in *Corley* implied that it did not overrule prior law.[118]

The juxtaposition of *Corley* and the existing case law creates confusion regarding the voluntariness test. That *Thomas* restated the totality of circumstances test, while applying it in a situation in which defendant's confession could well have been a product of hope or fear, increases the existing uncertainty surrounding the voluntariness rule.

In a dissent to *Corley*, Justice Exum expressed concern over the ambiguity in the application of the voluntariness standard, stating that the totality of the circumstances rule previously had been used to determine voluntariness only "[i]n the absence of a promise or threat."[119] In his dissent in *Thomas*, Exum stated, "When a confession follows a promise of leniency, the confession is inadmissible unless it can be shown that the influence of the promise had been entirely dissipated so that the promise did not in fact induce the confession."[120] He then explained that "[w]here there is evidence in the case that the influence of a promise of leniency has been dissipated, or 'entirely done away with,' before the confession was made, then the question of whether the confession was a product of the promise is resolved by considering the 'totality of circumstances.' "[121] According to Exum, "[t]here is nothing in the record to indicate that [defendant's confession] could have been the product of anything" other than the officer's statement.[122]

The most troublesome aspect of the voluntariness issue in *Thomas* is not whether the majority was justified in dismissing the comment as an "off-hand statement of an officer, which is at best ambiguous,"[123] but rather is the same problem of uncertainty present in the court's decision concerning defendant's *Edwards* claim. If the application of a totality of circumstances test requires a case-by-case analysis of every confession the voluntariness of which is at issue, the result is a situation in which police have few guidelines.[124] The same problems, confusions, and abuses that exist in the *Miranda* context when its guidelines are blurred are present in the totality of circumstances interpretation of the voluntariness standard.[125] Justice Exum's perspective, which incorporates North Carolina's historical test for voluntariness, provides a great deal more objectivity and certainty for the law of confessions than does the majority's approach in *Thomas*.

The court's decision in *Thomas* made no definite changes in the law gov-

118. *See id.*

119. *Id.* at 56-58, 311 S.E.2d at 550 (Exum, J., dissenting).

120. 310 N.C. at 382, 312 S.E.2d at 465 (Exum, J., dissenting).

121. *Id.* at 382, 312 S.E.2d at 466 (Exum, J., dissenting).

122. *Id.* at 382, 312 S.E.2d at 465 (Exum, J., dissenting).

123. *Id.* at 379, 312 S.E.2d at 464.

124. One commentator discussing the *Bradshaw* decision expressed concern over what he referred to as "attempts to individualize justice." He noted that these efforts may please arresting officers, but they also "seriously damage the quality of justice in the great majority of cases." Furthermore, he stated that "[f]ew of us enjoy seeing the factually guilty escape conviction, but the reality is that rules and principles that enhance justice in the general run of cases are certain to enhance opportunities for injustice in some specific cases." Fyfe, *supra* note 82, at 154.

125. *See supra* notes 104-06 and accompanying text.

erning the admission of confessions into evidence and was not overtly inconsistent with United States Supreme Court decisions concerning confessions. The decision, however, might have undercut *Miranda* and *Edwards* unnecessarily and in so doing might have set a hazardous precedent for North Carolina courts to follow. *Thomas* also might have hastened a course of uncertainty in the application of North Carolina's voluntariness standard. Both results of the case might mean future abuse as both courts and law enforcement officials attempt to function with diminishing or minimal guidelines.

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