IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee	)	PETITION FOR RECONSIDERATION
v.	)	Crim.App. Dkt. No. 200800393
Lawrence G. HUTCHINS III, Sergeant (E-5) U.S. Marine Corps Appellant	)	USCA Dkt. No. 12-0408/MC

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

Pursuant to Rule 31 of this Court's Practice and Procedure, the Court is requested to reconsider its opinion in this case for the following reasons:

I. The majority opinion adopts a minority approach in its application of *Edwards*, because it does not assess whether the NCIS Agent's request for consent to search amounted to the functional equivalent of an interrogation. Judge Ryan's concurrence adopts the more accepted application of *Edwards*, but applies *Innis* in a novel and unsupported manner.

II. The majority opinion misapplies dicta from the *Bradshaw* plurality opinion to improperly establish that the NCIS Agent's request for consent to search on May 18, 2006, constituted a "reinitiation" of communications.

In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Supreme Court stated that "The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application. We have confirmed that the *Edwards* rule provides 'clear and

unequivocal' guidelines to the law enforcement profession." 498 U.S. at 150 (citations omitted). The majority opinion in the instant case, however, undermines both the clarity and certainty of *United States v. Edwards*, 451 U.S. 477 (1981), by introducing an unnecessary layer of analysis into the question of whether a suspect, having previously invoked his Fifth Amendment right to counsel, validly reinitiated communications with law enforcement.

Specifically, the majority opinion makes two critical errors. First, the opinion breaks from decades of precedent by focusing its inquiry on whether "the Government or Hutchins . . . reinitiated further communications," rather than on whether the Government's communication to Hutchins on May 18, 2006, constituted the functional equivalent of an interrogation. Second, having asked the wrong question, the majority reaches the wrong answer, improperly applying dicta from the plurality opinion in *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), to evaluate the substance of the Government's communication to Hutchins.

For these reasons, as outlined in greater detail below, this Court should reconsider its majority opinion, and affirm the decision of the lower court.

I. The majority opinion adopts a minority approach in its application of *Edwards*, because it does not assess whether the NCIS Agent's request for consent to search amounted to the functional equivalent of an interrogation. Judge Ryan's concurrence adopts the more accepted application of *Edwards*, but applies *Innis* in a novel and unsupported manner.

A. The *Edwards* prophylactic rule protects against *Miranda* violations——specifically, against custodial interrogations without an attorney present, where the suspect has invoked his Fifth Amendment right to have an attorney present during questioning.

At the heart of this case is Appellant's Fifth Amendment right against being "compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court fortified this right, requiring that law enforcement apprise suspects of their rights to remain silent and to have an attorney present during questioning. *Id*. at 478-79. For more than three decades, the *Miranda* warnings stood as "[p]rocedural safeguards" upon the "privilege against self-incrimination," *id*.; yet it was not until 2000 that the Supreme Court confirmed that these "procedural safeguards" not only protected the Fifth Amendment, but also articulated a constitutional rule required by the Fifth Amendment. *Dickerson v. United States*, 530 U.S. 428, 440 n.4-5 (2000).

This context is instrumental in understanding *Edwards*, upon which the majority opinion in this case premises its reasoning.

United States v. Hutchins, No. 12-0408/MC, slip op. at 4 (C.A.A.F. June 26, 2013). After *Miranda*, substantial confusion arose concerning the breadth of the protection it afforded, whether the protection could be waived, and what was the effect of the waiver on further interrogation. *See*, *e.g.*, *Michigan v. Mosley*, 423 U.S. 96 (1975)(interrogation must cease only if suspect affirmatively states a desire to have attorney present); *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979)(express waiver not required for interrogation to continue); *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980)(if suspect affirmatively invokes right to counsel, no further interrogation is permitted unless counsel is provided).

Similarly, *Edwards* presented a fact pattern that fell into *Miranda*'s interstices. There, appellant was arrested and, after being read and waiving his *Miranda* rights, submitted to a custodial interview. 451 U.S. at 478-79. During the interrogation, Edwards demanded to speak to an attorney, at which time all questioning ceased and Edwards was placed in the county lock-up. *Id*. at 479. The next day, two detectives visited Edwards at the jail, and the jail's detention officer told Edwards that "'he had' to talk" to them. *Id*. The detectives again read Edwards his *Miranda* rights, which Edwards waived, and Edwards provided an inculpatory statement. *Id*.

Presented with these facts, the *Edwards* Court could simply have applied *Miranda*'s directive that, "Once warnings have been given . . . [i]f the individual states he wants an attorney, the interrogation must cease until an attorney is present," *Miranda*, 384 U.S. at 473; consequently, because no attorney was provided to Edwards, his statement was the product of an unlawful custodial interrogation and therefore *per se* inadmissible. Indeed, Edwards made this precise argument on brief. Brief for the Petitioner, *Edwards v. Arizona*, 451 U.S. 477 (1981), (No. 79-5269), 1980 U.S. S. Ct. Briefs LEXIS 2160 at *29-*35. Specifically, Edwards asked the Court to adopt a post-*Miranda* rule crafted by the Fifth Circuit: "'Where there is a request for an attorney prior to any questioning . . . a finding of knowing and intelligent waiver of the right to an attorney is impossible.'" *Id*. at *32-*33 (*quoting United States v. Priest*, 409 F.2d 491 (5th Cir. 1969)).

The Supreme Court rejected this invitation to apply *Miranda* so broadly, and instead crafted the rule at issue in this case: "[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 communications, exchanges, or conversations with the police."

Edwards, 451 U.S. at 484-85 (emphasis added).[1] This resolution corresponded with the general distinction the Supreme Court previously made between the Fifth Amendment right to counsel during custodial interrogation and the Sixth Amendment right to counsel during trial litigation: "We have consistently applied the deliberate-elicitation standard in subsequent Sixth Amendment cases . . . and we have expressly distinguished this standard from the *Fifth Amendment custodial-interrogation standard*." *Massiah v. United States*, 377 U.S. 201, 206 (1964) (emphasis added).

The first part of the *Edwards* rule merely restates *Miranda*; the second part carves out a substantial legal caveat to *Miranda*'s application. Importantly, however, nothing in *Edwards* purports to expand *Miranda* to prohibit the Government from engaging in communications with a suspect not amounting to custodial interrogation——even after invocation of the right to counsel. As the *Edwards* Court itself stated, "The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such

[1] This rule also reflects an alternate argument advanced by Edwards's counsel. *See* Brief for Petitioner, *Edwards v. Arizona*, at *38 ("[P]ostassertion interrogation is barred completely in some jurisdictions and barred in others unless initiated by the suspect. The result in the instant case would be the same regardless of the theory chosen."). It is therefore apparent that the Court considered both positions and adopted the less expansive rule.

interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a waiver." *Id*. at 485-86.

B. *Edwards* does not prevent the Government from communicating with an accused for noninterrogative purposes——only those communications that amount to further interrogation are prohibited.

1. The majority of Federal courts evaluate whether the Government communication amounted to custodial interrogation.

The Supreme Court has clearly stated that the *Edwards* rule does not govern noninterrogative types of interactions between the police and an accused——"nor [does *Edwards*] govern other, noninterrogative types of interactions between the defendant and the State (like pretrial lineups)." *Montejo v. Louisiana*, 556 U.S. 778, 795 (2009). In the instant case, this Court did not cite *Montejo* or articulate why a request for consent to search should be different than a request to participate in a pretrial lineup, which the Supreme Court said was not governed by the *Edwards* rule. The *Edwards* rule does not prevent the police from having noninterrogative interactions with an accused, even if those interactions are to further the investigation.

The majority of Federal courts have applied *Edwards* in a similar manner——that is, where the Government does not engage in further custodial interrogation prior to a suspect's reinitiation of communications, there is no *Edwards* violation.

In *United States v. Robinson*, 586 F.3d 540 (7th Cir. 2009), for example, the court determined that police officers' subterfuge—telling a suspect they were taking him to one prison when in fact they were taking him to another—that spurred the suspect to reinitiate communications did not violate *Edwards* because it was not the functional equivalent of a custodial interrogation. 586 F.3d at 546 (*citing Innis*, 446 U.S. at 301).

Similarly, in *United States v. Allen*, 247 F.3d 741 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 953 (2002), there was no *Edwards* violation where "detectives informed Allen of the results of the lineup—that three out of four eyewitnesses placed him at the scene of the crime the previous day—at which point Allen asked to speak with . . . an officer Allen knew from an earlier case," whereupon he was readvised of his rights and confessed. 247 F.3d at 764. In *McKinney v. Ludwick*, 649 F.3d 484 (6th Cir. 2011), the court suggested that a guard's comment to a suspect that he could face the death penalty may not be an *Edwards* violation, but rather merely a "type of 'subtle compulsion' to cooperate that is not foreclosed by *Miranda* and *Edwards*." 649 F.3d at 490 (*citing Innis*, 446 U.S. at 303) (casting doubt on the Michigan Court of Appeals finding that this was an improper interrogation, but nevertheless accepting the finding under AEDPA). *See also Mickey v. Ayers*, 606 F.3d 1223, 1235 (9th Cir. 2010) ("*Miranda* and *Edwards*, however, only

apply to interrogations"); *United States v. Jennings*, 515 F.3d 980 (9th Cir. 2008) (no interrogation or *Edwards* violation where law enforcement agents merely identified themselves and asked suspect whether he had personal property to retrieve); *United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1998) (no interrogation or *Edwards* violation where agents told suspect they were going to interrogate suspect's girlfriend and family); *United States v. Thongsophaporn*, 503 F.3d 51 (1st Cir. 2007) (no interrogation or *Edwards* violation where agent stayed in interrogation room and stared at suspect); *United States v. Conley*, 156 F.3d 78 (1st Cir. 1998) (no interrogation or *Edwards* violation where agents described evidence in detail and the potential charges the suspect faced); *United States v. Robak*, 230 Fed. App'x 607 (7th Cir. 2007) (no interrogation or *Edwards* violation where officer greeted suspect in suspect's native language); *Acosta v. Artuz*, 575 F.3d 177 (2d Cir. 2009) (critical question is whether appellant's confession was a "self-initiated communication and not the product of impermissible 'interrogation' as that term is defined by *Innis*.").

Courts that have found *Edwards* violations similarly focus on the critical question of whether the police or investigators continued or recommenced custodial interrogation after a valid invocation of the right to counsel. *See Arizona v. Roberson*,

486 U.S. 675, 687-88 ("Whether a contemplate *reinterrogation* concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second interrogation, the same need to determine whether the suspect has requested counsel exists."); *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (*Edwards* violation where officer continued interrogating suspect following invocation of rights, telling him "it might be worse" for him if he talked to an attorney); *United States v. Miller*, 116 F.3d 641 (2d Cir. 1997) (agent's statement informing an arrestee that "any cooperation would be brought to the attention of the Assistant United States Attorney" constitutes impermissible interrogation if statement is unsolicited by the arrestee); *United States v. Porter*, 764 F.2d 1 (1st Cir. 1985) (*Edwards* violation where appellant made inculpatory statements after different agent re-advised suspect of *Miranda* rights following initial invocation of right to counsel).

Two Fifth Circuit cases with divergent outcomes clearly elucidate this approach. In *Plazinich v. Lynaugh*, 843 F.2d 836 (5th Cir. 1988), *cert. denied*, 488 U.S. 1031 (1989), the court considered a set of circumstances in which Plazinich, a murder suspect in custody, invoked his right to counsel; subsequently, Officer Rossi, a sheriff's deputy, informed him that his co-defendant had attempted suicide by slashing her wrists in the

jail. 843 F.2d at 837. Plazinich then asked to speak to an assistant district attorney and provided a confession to the murder. *Id*. The *Plazinich* court determined that the confession was not obtained in violation of *Miranda* and *Edwards*, holding that *Edwards* "emphasizes that the police have fatally erred only when they recommence *interrogation* after an accused has asserted his right to counsel. Officer Rossi's reporting to Plazinich one true fact concerning his co-defendant cannot be interpreted to have reinstituted custodial interrogation." *Id*. at 839.

In *United States v. Cannon*, 981 F.2d 785 (5th Cir. 1993), the fact pattern was similar but the outcome was different. In that case, police executing a warrant apprehended Cannon on suspicion of manufacturing methamphetamine, and Cannon invoked his right to have counsel present during questioning. 981 F.2d at 786. Several hours later, a sheriff's deputy engaged Cannon in conversation, and that the conversation "turned to the execution of the search warrant." *Id*. Deputies then questioned Cannon about the manufacture of methamphetamine on the site, and Cannon gave incriminating answers and led officers to incriminating evidence. *Id*. Based on this pattern of facts, the court found an interrogation in violation of *Edwards*: noting that in *Plazinich* it had held that "[o]nce the topic turned to illegal conduct, [the deputy] interrogated Cannon," and that "*Edwards* demonstrate[s] that the resumption of

questioning about crimes, after a request for counsel and before an attorney has been made available, constitutes overreaching." *Id*. at 788.

2. Prior to this case, this Court also adopted the majority view of *Edwards*, analyzing whether the Government's communications amounted to the functional equivalent of interrogation.

In previous cases applying *Edwards*, this Court also adopted the majority approach and focused on whether the interaction at issue constituted impermissible custodial interrogation. The first case in this line is *United States v. Reeves*, 20 M.J. 234 (C.M.A. 1985), in which the appellant, in custody, made an incriminating statement to his company commander after having previously invoked his rights to counsel while being questioned by Army Criminal Investigative Division (CID) personnel. 20 M.J. at 235. This Court determined that the company commander engaged in interrogation: "[I]ndeed, the captain recognized that it was interrogation because he read appellant his rights." *Id*. at 236. Because the captain's communication constituted a reinterrogation, and was not initiated by Reeves, this Court applied *Edwards* and excluded the inculpatory statement. *Id*. Indeed, *Reeves* presented a fact pattern closely akin to *Edwards*, *Porter*, and other cases where government agents simply re-advised a suspect of his *Miranda* rights and continued the interrogation.

Similarly, in *United States v. Brabant*, 29 M.J. 259 (C.M.A. 1989), the critical question again was whether the suspect's acting commander had recommenced a custodial interrogation when he called the suspect in for the "sole purpose to inform him that he needed to talk to a lawyer." 29 M.J. at 261. Evaluating the factual circumstances of that case, including the fact that "appellee was required to stand by for 5 hours at the police station," "was not provided a break in this custody," that "[s]trict military formality was maintained at the meeting," and that the investigator who had initially interrogated Brabant was still present, this Court determined that the acting commander's meeting with Brabant was nevertheless the functional equivalent of an interrogation as defined by *Innis* and Article 31, UCMJ, and therefore in violation of *Edwards*. *Id*. at 262.

C. <u>The majority opinion adopts a minority approach, which holds that essentially any Government communication nullifies a contemporaneous or subsequent reinitiation of communications by the suspect</u>.

The majority opinion in the instant case breaks from decades of precedent by abstracting away from the question of whether the Naval Criminal Investigative Service (NCIS) agent's contact with Appellant constituted "interrogation" or the functional equivalent thereof. Instead, the majority focuses "on whether, under the circumstances of this case, it was the

Government or Hutchins that reinitiated further communication under *Edwards* and *Bradshaw*." *Hutchins*, *supra*, slip op. at 8. The majority clearly states that whether the NCIS agent's communication to Appellant on May 18, 2006, constituted a resumption of interrogation is irrelevant: "[T]he issue we address today is not whether the request for consent was an 'interrogation,' but rather was it a reinitiation of 'further communication' prohibited by *Edwards* and *Bradshaw*." *Id.* at 13 n.9.

This interpretation of *Edwards* is not wholly unsupported in American jurisprudence, but it is distinctly a minority application. In *Smith v. Endell*, 860 F.2d 1528 (9th Cir. 1988), the Ninth Circuit stated that "[t]he *Edwards* prophylactic rule applies to the initiation of any 'communications, exchanges or conversations.'" 860 F.2d at 1534 (*quoting Edwards*, 451 U.S. at 485). Consequently, it was immaterial in *Smith* that the district court magistrate had determined that a post-invocation conversation between a police officer and the accused was not an interrogation. *Id*. Judge O'Scannlain dissented from this expansion of *Edwards*, calling the panel majority's opinion a decision to "delegate to a knowledgeable defendant . . . the right to lay down to police the conditions upon which his

interrogation may or may not proceed." *Id*. at 1537 (O'Scannlain, J., dissenting)[2].

Occasional state court decisions have also made similar abstractions from *Edwards*. "If, subsequently [to a suspect's invocation of counsel], assuming there is no break in custody, police initiate a meeting in the absence of counsel, the suspect's statements are presumed involuntary and are inadmissible as substantive evidence at trial." *People v. Crittenden*, 885 P.2d 887, 911 (Cal. 1994); *see also In re Gilbert E.*, 38 Cal. Rptr. 2d 866 (Cal. Ct. App. 1995).

These discrete, occasional cases, however, stand in stark contrast to the *Edwards* rule as interpreted by the vast majority of courts throughout the country. Further, the cases most closely aligned with the majority opinion in this case are decades old and do not represent a mature understanding of *Edwards*. They are not significant of emerging viewpoints or doctrines interpreting *Edwards* in a more liberal manner.

Additionally, the majority opinion does not state any military-specific rationale for departing from precedent and expanding the *Edwards* rule.

---

[2] Incidentally, the question at issue in *Smith*——whether and to what extent police questioning may continue after an ambiguous waiver——was later resolved by the Supreme Court in *Davis v. United States*, 512 U.S. 452, 457 (1994), in a manner contrary to the *Smith* court's reasoning. The persuasive authority of *Smith* is therefore limited.

D. Judge Ryan's concurrence applies *Edwards* in a more widely accepted manner, but improperly evaluates whether the NCIS Agent's communication on May 18, 2006, amounted to the functional equivalent of a custodial interrogation.

Judge Ryan's concurrence aptly intuits the problems with the majority opinion, and instead evaluates "whether NCIS' reinitiation of contact with Appellant should be deemed a reinitiation of interrogation in contravention of *Edwards*." *Hutchins*, *supra*, slip op. at 3 (Ryan, J., concurring).

Having asked the right question, however, Judge Ryan constructs an unwieldy, uncited, six-part, fact-intensive apparatus to justify arriving at the wrong answer. *Id*., slip op. at 4-5. Of the six factors Judge Ryan cites, the first four are unique to this case and unlikely to be repeated. The fifth factor——that the government agent who communicated with Appellant on May 18, 2006, was the same person who conducted the initial interrogation——is directly contravened by Supreme Court precedent: in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Supreme Court "attach[ed] no significance" to the issue of whether the same agent conducted both interrogations. *See also Michigan v. Jackson*, 475 U.S. 675 (1985). The Supreme Court would mandate the same result, therefore, regardless of whether the same NCIS agent or a different agent approached Appellant a week after the initial interrogation. Finally, Judge Ryan's sixth consideration——that Appellant did not submit to

interrogation or provide a statement until the following day—— weighs heavily in the Government's favor, as Judge Ryan acknowledges. *Id*., slip op. at 5.

Instead of adopting Judge Ryan's test, this Court should instead focus on the import of two critical elements of the NCIS communication to Appellant on May 18, 2006. As the majority opinion notes, these elements were (1) that the NCIS agent "requested permission to search Hutchins's personal belongings," and (2) that "[i]n connection with this request Hutchins was provided a permissive search authorization . . . [that] reminded Hutchins that he was under investigation for conspiracy, murder, assault, and kidnapping." *Hutchins*, *supra*, slip op. at 11.

As the majority opinion notes, mere requests for consent to search "are not interrogations and the consent given is ordinarily not a statement." *Id*., slip op. at 12 (*quoting United States v. Frazier*, 34 M.J. 135, 137 (C.M.A. 1992)). The majority opinion properly assesses this point, and both its determination and *Frazier* are in concert with Federal case law. *See United States v. Knope*, 655 F.3d 647, 654 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1060 (2012); *United States v. Rodriguez-Garcia*, 983 F.3d 1563 (10th Cir. 1993); *United States v. Lewis*, 921 F.2d 1294 (D.C. Cir. 1990); *Cody v. Solem*, 755 F.2d 1323 (8th Cir.), *cert. denied*, 474 U.S. 833; *Smith v. Wainwright*, 581 F.2d 1149 (5th Cir. 1978); *United States v.*

Lemon, 550 F.2d 467 (9th Cir. 1977); *United States v. Faruolo*, 506 F.2d 490 (2nd Cir. 1974).

Regarding the second factor, Federal case law is equally clear that informing a suspect of the charges he may face is also not an interrogation. *United States v. Hull*, 419 F.3d 762 (8th Cir. 2005); *United States v. Wipf*, 397 F.3d 677 (8th Cir. 2005); *United States v. Conley*, 156 F.3d 78, 83 (1st Cir. 1998); *United States v. Trimble*, 986 F.2d 394, 401 (10th Cir. 1993); *United States v. Payne*, 954 F.2d 199, 203 (4th Cir. 1992); *United States v. Crisco*, 725 F.2d 1228, 1232 (9th Cir. 1984), *cert. denied*, 466 U.S. 977 (1984).

In sum, neither asking consent for search nor presenting Appellant with a permissive search form that "reminded Hutchins that he was under investigation for conspiracy, murder, assault, and kidnapping" cannot be the basis of a finding, *par Innis*, that the NCIS agent's communications constituted interrogation or the functional equivalent thereof. Consequently, there is no *Miranda* or *Edwards* violation, and this Court should affirm the decision of the lower court.

II. The majority opinion misapplies dicta from the *Bradshaw* plurality opinion to improperly establish that the NCIS Agent's request for consent to search on May 18, 2006, constituted a "reinitiation" of communications.

A. Nothing in *Bradshaw* purports to overrule *Edwards* or place communications by the Government on a par with communications by a suspect.

Applying *Edwards*, the Court in *Bradshaw* fractured over the question of what a suspect must do in order to "initiate[] further communications, exchanges, or conversations with the police." *Bradshaw*, 462 U.S. at 1043 (*quoting Edwards*, 451 U.S. at 485).

The four-justice plurality, which reversed the Oregon Court of Appeals and determined that Bradshaw *had* validly reinitiated communication with police, opined:

> There are undoubtedly situations where a bare inquiry by either a 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*.

462 U.S. at 1045 (emphasis added). Importantly, despite the plurality's ostensible equivocation between "a bare inquiry by either a defendant or by a police officer," as well as

"statements, by either an accused or a police officer," absolutely nothing in this opinion places communications by law enforcement on an analytical par with communications by a suspect. On the contrary, the entire purpose of this dicta is to expound, however briefly, upon the definition of "initiate," *as the word is used in Edwards*. The *Edwards* rule is that the Government may not subject a suspect who has invoked his right to counsel "to further interrogation . . . unless the *accused himself initiates* further communications, exchanges, or conversations with police." 451 U.S. at 485.

As established *supra*, the relevant inquiry when evaluating Government communications in light of *Edwards* is whether they amount to "further interrogation" under *Innis*. The *Bradshaw* test——whether the communication relates to "routine incidents of the custodial relationship" or reflects a desire "to open up a more generalized discussion"——applies *only* to communications, exchanges, or conversations *by a suspect*. 462 U.S. at 1044.

This interpretation is supported by reference to the four-justice dissent in *Bradshaw*, which would have affirmed the Oregon Court of Appeals and excluded Bradshaw's subsequent confession.

Writing critically of the plurality's standard, Justice Marshall wrote that the Court had misapplied *Edwards*:

> When this Court in *Edwards* spoke of '[initiating] further communication' with the police and '[reopening] the dialogue with the authorities,' it obviously had in mind communication or dialogue *about the subject matter of the investigation*. The rule announced in *Edwards* was designed to ensure that any interrogation subsequent to an invocation of the right to counsel be at the instance of the accused, not the authorities.

462 U.S. at 1053 (Marshall, J., dissenting op.) (emphasis in original). If the *Bradshaw* Court had intended to apply its interpretation of "initiation" to communications by the Government, the dissent here would make no sense at all, because it would allow the Government to engage in a much broader range of communication than would the plurality, just so long as it didn't engage an accused in dialogue "about the subject matter of the investigation."

In this case, contrary to *Edwards* and both the plurality and dissent in *Bradshaw*, the majority opinion improperly evaluates the NCIS agent's request for consent to search under the two-factor test applied by the *Bradshaw* plurality to communications *by a suspect*. *Hutchins*, *supra*, slip op. at 8-10. Notwithstanding Appellant's Brief, (Appellant's Br. at 49), no authority exists to support such application. The majority opinion cites no authority in support, and undersigned counsel

avers that an exhaustive search of Federal case law failed to return any good case law directly in support.[3]

Consequently, even if this Court decides that the critical question in this case is not whether the NCIS agent's communication with Hutchins on May 18, 2006, amounted to further custodial interrogation, it should not apply the *Bradshaw* plurality's language to evaluate whether the agent's communication was permissible. Such application was not contemplated by *Bradshaw* itself, and is not supported by any subsequent case law interpreting *Bradshaw*.

[3] The only case even tangentially in support is *Christopher v. Florida*, 824 F.2d 836 (11th Cir. 1987). In that case, police continued to ask the suspect questions after he "invoked his right to cut off questioning" and remain silent. 824 F.2d at 845. Interpreting *Edwards*, the court stated:

> [A]ny discussion with the suspect other than that 'relating to routine incidents of the custodial relationship' must be considered a continuation of the interrogation. *See Bradshaw.* Specifically, the police may make routine inquiries of a suspect after he requests that they terminate questioning, such as whether he would like a drink of water. *See id.*

Id. (citations omitted). *Christopher* has been cited for this proposition three times, but not since 1993. *People v. Baker*, 625 N.E.2d 719 (Ill. App. Ct. 1993); *Jacobs v. Singletary*, 952 F.2d 1282 (11th Cir. 1992); *Smith v. Endell*, *supra*. Its continued vitality is doubtful considering recent Supreme Court case law interpreting the right to remain silent. *See*, *e.g.*, *Berghuis v. Thompkins*, 131 S. Ct. 33 (2010).

B. At a minimum, this Court should acknowledge that *Edwards* and *Bradshaw* do not clearly resolve this issue.

Finally, as noted *supra*, it is possible under a minority construction to construe this case as a situation in which the Government did not recommence custodial interrogation, but also where Appellant himself nevertheless did not "reinitiate" communications. If that is the case, the Court should clarify and opine that the fact pattern here falls into territory left unresolved by *Edwards* and *Bradshaw*. Even under this construction, however, there is no basis in *Bradshaw* to proscribe or otherwise censure the Government against communicating with a suspect in custody in order to seek consent to search his belongings.

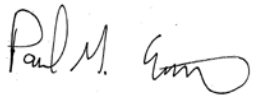
Conclusion

In summary, the Supreme Court has consistently held that *Edwards* and its progeny are intended to apply a clear, bright-line prophylactic rule "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Minnick*, 498 U.S. at 150. In this case, not only was *Edwards* not violated, but there is no evidence of badgering, coercion, or any other improper influence upon Appellant by the police or other Government representatives. On the contrary, Appellant clearly demonstrated a desire to "tell his side of the story," and persisted in this desire after sleeping on his decision

overnight. (J.A. 128.) This reinitation was voluntary, and his subsequent waiver of his right to counsel was knowing and intelligent. This Court should therefore reconsider its application of *Edwards*, assess the facts and circumstances surrounding Appellant's subsequent waiver, and affirm the decision of the Court below.

WHEREFORE, the Government requests this Court reconsider its opinion and affirm the decision of the lower court.

DAVID N. ROBERTS
Major, U.S. Marine Corps
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris St., SE
Washington, D.C. 20374-5124
(202) 685-7059, fax (202) 685-7687
Bar No. 35491



PAUL M. ERVASTI
Major, U.S. Marine Corps
Senior Appellate Counsel
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris St., SE
Washington, D.C. 20374-5124
(202) 685-7679, fax (202) 685-7687
Bar No. 35274

CERTIFICATE OF FILING AND SERVICE

I certify that this document was delivered electronically to the Court, and that copies were delivered electronically to Appellant's Defense Counsel, Major S. Babu KAZA, U.S. Marine Corps, Navy-Marine Corps Appellate Review Activity on July 8, 2013.

DAVID N. ROBERTS
Major, U.S. Marine Corps
Appellate Government Division
Navy-Marine Corps Appellate
Review Activity
Bldg. 58, Suite B01
1254 Charles Morris St., SE
Washington, D.C. 20374-5124
(202) 685-7059, fax (202) 685-7687
Bar No. 35491