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Fifth Amendment--The Constitutionality of Custodial Confessions

Anne Elizabeth Link

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FIFTH AMENDMENT—THE CONSTITUTIONALITY OF CUSTODIAL CONFESSIONS

Minnick v. Mississippi, 111 S.Ct. 486 (1990)

I. INTRODUCTION

In *Minnick v. Mississippi*[1] the Supreme Court held that the Fifth Amendment protection of *Edwards v. Arizona*[2] prohibiting authorities from initiating questioning of the accused in counsel's absence, is not terminated or suspended when an accused has consulted with an attorney prior to questioning. Although extending *Edwards*, *Minnick* continues the ad hoc, often chaotic legacy of *Miranda v. Arizona*.[3]

This Note examines the background of *Miranda* and *Edwards*. After summarizing the facts of the case and the Court's opinion, this Note discusses how *Minnick v. Mississippi* fits into the post-*Miranda* caselaw. The final section of this Note includes: (a) an analysis of the Court's weakening of the *Miranda* holding and resulting problems; (b) a discussion of the differing practical and theoretical perspectives of the Justices in *Minnick*, which echo the *Miranda* Justices' views; (c) an analysis of *Minnick*'s failure to solve the problems of *Miranda* and the Court's treatment of it; and (d) a proposal of a new rule to solve the problems of *Miranda* and its legacy - inadmissibility of custodial confessions not made in the presence of counsel.

II. HISTORICAL BACKGROUND

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself."[4] The Constitution further guarantees that in criminal proceedings the accused has the right "to have the Assistance of Counsel for his defense."[5] The Supreme Court's famous articulation of so-called *Miranda* rights in *Miranda v. Arizona*[6] established procedures which

1 111 S. Ct. 486 (1990).
2 451 U.S. 477 (1981).
3 384 U.S. 436 (1966).
4 U.S. CONST. amend. V, cl.2.
5 U.S. CONST. amend. VI, § 3.
6 384 U.S. 436 (1966).

ostensibly guarantee that police inform criminal suspects of these constitutional provisions and ensure that police respect suspects' rights.

Prior to *Miranda*, the Court articulated several tests for the admissibility of custodial confessions. In *Hopt v. Utah* the Court fashioned a "voluntariness test" under which confessions were presumed voluntary if made without threats or inducements.[7] This test focused on the suspect's state of mind and the trustworthiness and believability of his statement rather than on the tactics of police in eliciting the confession.[8] Later, the Court included police conduct as one of several factors to be considered in determining voluntariness.[9] In *Brown v. Mississippi*, the next step in its analysis of voluntariness, the Court relied on the due process clauses of the Fifth and Fourteenth Amendments to reverse a conviction where the police had admitted to whipping and hanging defendants until they confessed.[10] This new due process test forced the Court to decide whether confessions were compelled, and thus inadmissible, through ad hoc case-by-case analysis of police tactics.

After *Brown v. Mississippi*, the Court vacillated between focusing on the reliability of confessions under the voluntariness test and ex-

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[7] 110 U.S. 574, 585 (1884). The Court stated:

> [T]he presumption upon which weight is given to [confessions], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements . . . or because of a threat or promise . . . operating upon the fears or hopes of the accused. . .depriv[ing] him of that freedom of will or self-control essential to make his confession voluntary. . . .

Id.

[8] For a full explanation of this test, see Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1831 (1987).

[9] In Ziang Sung Wan v. U.S., the Court concluded that "the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by promise or threat" but that if the facts show that a confession was obtained through compulsion applied by police officers, such conduct makes the confession inadmissible. 266 U.S. 1, 14-15 (1924). In Bram v. U.S., the Court held:

> The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but . . . [that] the accused was not involuntarily impelled to make a statement when but for the improper influences he would have remained silent. With this understanding of the rule, we come to consideration of the authorities['] [actions].

168 U.S. 532, 549 (1897).

[10] Brown v. Mississippi, 297 U.S. 278 (1936). The Court held:

> The due process clause requires that state action . . . be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confession of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

Id. at 286 (citation omitted).

amining the circumstances of the interrogation under due process standards.[11] Under the due process test the Court attempted to define the process due to suspects and wanted the lower courts to closely examine the record of an interrogation to decide whether such process had been impaired.[12] Eventually, the Court merged these two tests, combining the voluntariness test's emphasis on guarding against unreliable confessions and the due process standard's assessment of confession admitted in court proceedings.[13] Yet this combined approach still had many of the problems of the individual tests, such as lack of uniform application of factors to be considered in the decision, little opportunity for the court to articulate clear standards of police conduct, and lack of clear guidelines for lower courts to apply in deciding the admissibility of confessions.[14] Therefore, the Court had no definitive test of whether a confession was compelled or voluntary. This confusion in application of various standards allowed, if not encouraged, police to engage in tactics on or beyond the edge of constitutional permissibility, including physical and mental abuse of suspects.[15]

The *Miranda* Court[16] attempted to end this confusion in the law of admissibility of custodial confessions, by making three major rulings.[17] First, the Court decided that informal pressures to speak can

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11 Under its due process review the Court based its decisions on the premise that "the public interest requires that interrogation . . . , at a police station, not completely be forbidden, so long as it is conducted fairly . . . ." State v. Smith, 161 A.2d 520, 537 (1960).

12 Note, *Developments in the Law-Confessions*, 79 HARV. L. REV. 635, 662-63 (1966) (discussion of the Court's "difficulties in deciding just what process is due at interrogation," leaving lower courts without clear guidance as to what circumstances surrounding interrogation are relevant under due process analysis).

13 The merged "due process voluntariness standard has three possible goals: (1) ensuring that convictions are based on reliable evidence; (2) deterring improper police conduct; or (3) assuring that a defendant's confession is the product of his free and rational choice." *Id.* at 663-64.

14 Ogletree, *supra* note 8, at 1833-34.

15 *See e.g.*, Lisenba v. California, 314 U.S. 219, 240 (1941) (police officers engaged in "lawless practices", but the defendant's collected attitude refuted the charge of involuntariness); Watts v. Indiana, 338 U.S. 49, 53 (1949) (reversed conviction based on confession because defendant was "overborne" by "sustained pressure by the police"); Spano v. New York, 360 U.S. 315, 323 (1959) (reversed conviction of suspect "overborne by . . . sympathy falsely aroused" by police acting as friend and misrepresenting facts to encourage confession).

16 Chief Justice Warren wrote for the five member majority with Justice Clark concurring and Justice Harlan and Justice White dissenting.

17 The Court summarized its three holdings, stating:

> [T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. [W]ithout proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compel-

constitute compulsion under the Fifth Amendment.[18] Informal compulsion involves pressures apart from formal legal sanctions or process.[19] Following closely from this definition of compulsion, the Court also held that any custodial hearing no matter how brief will involve enough pressure on the suspect to speak to constitute compulsion.[20] By ruling that the nature of custody is compelling *per se*, the Court attempted to end the arbitrariness and confusion in decisions under the voluntariness and reliability tests. The third and most famous holding in *Miranda* is that the police must inform a criminal suspect of his rights prior to questioning.[21] The purpose of these warnings was to "dispel the compulsion inherent in custodial surroundings."[22]

The Warren Court sought to protect suspects by requiring that police read suspects their rights to remain silent and to speak with counsel, thereby reducing the custodial pressures to confess and giving police incentives not to actively pressure suspects.[23] If the police wish to admit into evidence at trial any statement made by the suspect while in custody without counsel present, the State must prove the suspect "knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[24] The Court applied the high standard of proof required for the waiver of other constitutional rights to the waiver of *Miranda* rights. The standard was articulated by the Court in *Johnson v. Zerbst* as "an intentional relinquishment or abandonment of a known right or privilege."[25] Unless the government can prove compliance with the procedures required by the Court or meet the *Zerbst* burden of

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ling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively appraised of his rights and the exercise of those rights must be fully honored.

384 U.S. 436, 467 (1966). For a full explanation of *Miranda*, see Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHIC. L. REV. 435 (1987).

18 *Miranda*, 384 U.S. at 467.

19 *Id.*

20 *Id.*

21 The Court also held:

As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

Id. at 444.

22 *Id.* at 458.

23 *See* Ogletree, *supra* note 8.

24 *Miranda*, 384 U.S. at 475 (footnote omitted).

25 304 U.S. 458, 464 (1938).

proof standard, statements made by a suspect in custody are inadmissible as a matter of law.[26] Contrary to the due process voluntariness standard, the Court refused to engage in a balancing test of the needs of law enforcement authorities in investigating crimes and the rights of suspects.[27] The Court explicitly rejected a case-by-case analysis and held the warnings to be "fundamental with respect to Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation."[28]

In a corollary to *Miranda*, the Court furthered its goal of protecting suspects from police coercion in *Edwards v. Arizona*.[29] In *Edwards*, the Court recognized the need for additional safeguards against police compulsion when a suspect has requested counsel by holding:

> 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 . . . [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 . . . with the police.[30]

The *Edwards* rule thus furthers the goal of *Miranda* by strengthening the prohibition of coercive police tactics. One commentator has described the relationship of these two cases and their effort to control police abuse of suspects as follows:

> *Miranda* forces the police to tell suspects up front that they can stop the questioning if they wish and can call on a lawyer if they need help. *Edwards* in turn tells the police that they will pay a heavy price if the suspect calls for help . . . [T]his gives police a strong incentive to avoid the kinds of tactics that are likely to lead suspects to seek a lawyer's assistance, because those tactics will be counterproductive.[31]

By giving the suspect the power to determine for himself under what circumstances he needs the assistance of counsel, that is, whether the police tactics used constitute abuse or not, the *Edwards* rule both relieves the courts from making that determination and discourages police from engaging in abusive tactics that will induce

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26 *Miranda*, 384 U.S. at 479. The Court stated, "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against [the accused]." *Id.*

27 Ogletree, *supra* note 8, at 1838.

28 *Miranda*, 384 U.S. at 476.

29 451 U.S. 477 (1981).

30 *Id.* at 484-85.

31 William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 820-21 (1989).

the accused to implement his right to counsel.[32]

Thus, together *Miranda* and *Edwards* effectively protect suspects from the often severe physical abuse they received from police before the decisions.[33] However, these decisions have also given police incentives to use trickery and deceptive tactics to obtain confessions from defendants.[34] When these non-abusive tactics cross the line and become coercive making confessions inadmissible has been the newest problem the Court must address. Also, the Court must grapple with the issue of the validity of waivers of rights when an accused is subjected to such psychological tactics. That is the issue in *Minnick v. Mississippi*.

III. Factual and Procedural History

Petitioner Robert Minnick along with a fellow inmate, James Dyess, escaped from a county jail in Mississippi on April 25, 1986.[35] The next day, Minnick and Dyess broke into a mobile home in an attempt to steal weapons.[36] While searching the trailer, the two men were surprised by Ellis Thomas, the trailer's owner, and Lamar Lafferty and Lafferty's young son.[37] Minnick claimed that Dyess killed one of the men and forced Minnick to kill the second.[38] Two women arrived at the trailer before Minnick and Dyess could flee the scene.[39] Minnick states that he convinced Dyess not to hurt the women, who they tied up and then fled.[40]

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32 *Id.* at 821.

33 *See, e.g.*, Davis v. North Carolina, 384 U.S. 737 (1966) (suspect kept in custody for 16 days of interrogation during which he lost 15 pounds); Culombe v. Connecticut, 367 U.S. 568 (1961) (mentally deficient man interrogated for four nights and five days and denied counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (mentally deficient ninteen year old man held incommunicado for three days and told he would only be protected from mob if he confessed); Harris v. South Carolina, 338 U.S. 68 (1949) (suspect held in small hot room and subjected to night and day relay interrogation and threatened with arrest of his mother); White v. Texas, 310 U.S. 530 (1940) (suspect confessed after several beatings on nightly "trips to the woods" from the jail).

34 *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291 (1980) (police commented within hearing of accused how horrible it would be if neighborhood child who accidently found murder weapon was injured); Arizona v. Mauro, 481 U.S. 520 (1987) (police recorded conversation between accused and his wife); Moran v. Burbine, 475 U.S. 412 (1986) (accused in custody not told that his lawyer had tried to reach him); Brewer v. Williams, 430 U.S. 387 (1977) (knowing that the accused was very religious, police commented to him how the victim deserved a "Christian burial" to get accused to take them to the body).

35 Minnick v. Mississippi, 111 S. Ct. 486, 488 (1990).

36 *Id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 Minnick v. State, 551 So. 2d 77, 82 (Miss. 1988).

The two men drove Thomas' truck to New Orleans where they abandoned it.[41] They then fled to Mexico where the two men fought, resulting in Minnick proceeding alone to Lemon Grove, California where he was arrested on Friday, August 22, 1986 and held in a San Diego jail.[42]

The day after his arrest, two FBI agents came to interview Minnick.[43] Minnick was told by his jailers after he refused to talk to the agents that he would "have to go down [to the interview] or else."[44] During this interrogation Minnick refused to sign a waiver of rights statement[45] which read:

> I have read this statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.[46]

The FBI report of the interview says that Minnick was read his *Miranda* rights and that he acknowledged and understood those rights.[47] Minnick did discuss with the agents the jail break and the flight to Mexico.[48] However, when questioned about the two murders, Minnick refused to answer and invoked his right to have counsel present.[49] According to the report, "Minnick stated 'Come back Monday when I have a lawyer,' and stated that he would make a more complete statement then with his lawyer present."[50] The interview then ended.[51]

An attorney was later appointed to represent Minnick. Minnick spoke with his attorney two or three times, although the record is unclear as to whether these conversations were in person or by telephone.[52] Minnick's attorney told him not to answer any questions or sign any statements.[53]

The San Diego police informed Deputy Sheriff J.C. Denham of Clarke County, Mississippi of Minnick's arrest. Denham interviewed

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41 *Minnick*, 111 S. Ct. at 488.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.*

46 Brief for Petitioner at 23, Minnick v. Mississippi, 111 S. Ct. 486 (1990) (No. 89-6332) [hereinafter Brief for Petitioner].

47 *Minnick*, 111 S. Ct. at 488.

48 *Id.*

49 Brief for Petitioner, *supra* note 46, at 22.

50 *Minnick*, 111 S.Ct. at 488.

51 *Id.*

52 *Id.*

53 Minnick v. State, 551 So. 2d 77, 83 n.1 (Miss. 1988).

Minnick in San Diego on Monday, August 25, 1986.[54] Again, the police informed Minnick that he "could not refuse" to be interviewed by Denham.[55] The police further told Minnick that his lawyer "wasn't nothing" and that he "had to talk."[56]

Despite the fact that Minnick already had an attorney, Denham read Minnick his *Miranda* rights before interrogating him.[57] Minnick still refused to sign the waiver of rights statement or discuss the murders.[58] However, Denham and Minnick did discuss how Minnick's family and friends were back in Clarke County and the jail escape.[59] According to Denham, Minnick then proceeded to confess to the events at the Thomas trailer.[60] Mississippi's case for capital murder focused on Minnick's confession.[61] The trial court denied Minnick's motions to suppress his statements to Denham, but suppressed his statements to the FBI.[62] Minnick was convicted and appealed to the Mississippi Supreme Court on the grounds that his Fifth and Sixth Amendment rights had been violated.[63] In rejecting the Fifth Amendment claim the Mississippi Supreme Court held:

> While it is true Minnick invoked his Fifth Amendment right to counsel, it is also true, by his own admission, that Minnick was provided an attorney who advised him not to speak to anyone else about any charges against him. In this kind of situation, the *Edwards* bright-line rule as to initiation does not apply. The key phrase in *Edwards* which applies here is "until counsel has been made available to him."[64]

The court also dismissed as meritless Minnick's Sixth Amendment claim that his right to counsel under Mississippi law had attached by

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54 Brief for Petitioner, *supra* note 46, at 22.

55 *Minnick*, 111 S. Ct. at 488-89.

56 Brief for Petitioner, *supra* note 46, at 22.

57 *Id.*

58 *Id.* at 22-23.

59 *Minnick*, 111 S. Ct. at 493 (Scalia, J., dissenting).

60 Brief for Petitioner, *supra* note 46, at 23. The content of Minnick's statement was included in the Joint Appendix (32-33) as follows:

> Minnick advised Dyess told him he knew the trailer had some guns in it. Minnick advised they entered the trailer and found some guns and started collecting them up when they heard a vehicle drive up in the yard of the trailer. Minnick advised the two men and a small child stayed out in the yard for a few minutes. Minnick advised when they started toward the trailer Dyess jumped out the trailer door with a shotgun. At this point Minnick advised Dyess shot one of the men in the back with a shotgun and then in the head with a pistol. After doing this Dyess gave Minnick the pistol and made him shoot the other man while Dyess held a shotgun to Minnick's head.

61 Brief for Petitioner, *supra* note 46, at 23.

62 *Minnick*, 111 S. Ct. at 489.

63 *Id.*

64 555 So. 2d 77, 83 (Miss. 1988) (footnote omitted) (quoting Edwards v. Arizona, 451 U.S. 477, 485 (1981)).

the time of the Denham interview and that he had not waived that right.[65] The court held that because Minnick knew he had the right to have counsel present during Denham's reinterrogation and had already spoken with counsel, he waived his Sixth Amendment rights.[66]

The United States Supreme Court granted certiorari to address the issue of whether *Edwards* protection of the Fifth Amendment privilege against self-incrimination ceases once the suspect has consulted with an attorney.[67]

IV. SUPREME COURT OPINIONS

In a 6-2 decision the Supreme Court reversed the Mississippi Supreme Court. The Court decided that the Fifth Amendment protection of *Edwards* prohibiting authorities from initiating questioning of the accused in counsel's absence is not terminated or suspended when an accused has consulted with an attorney prior to questioning.[68] The Court did not address Minnick's Sixth Amendment claims.[69]

A. MAJORITY OPINION

Justice Kennedy delivered the opinion of the Court and was joined by Justices White, Marshall, Blackmun, Stevens and O'Connor. The Court started its opinion by emphasizing the merits of its decisions in *Miranda* and *Edwards*.[70] First, the Court concluded that the *Edwards* rule is "designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[71] Second, the *Edwards* holding conserves judicial resources by implementing *Miranda* in a "straightforward" manner.[72] Third and most significant to the Court, the *Edwards* decision increases certainty in

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65 *Id.* at 85.

66 *Id.*

67 *Minnick*, 111 S. Ct. at 489.

68 *Id.*

69 *Id.*

70 *Id.* In *Miranda v. Arizona*, the Court held that interrogation "must cease until an attorney is present" and that an accused has a right to have an attorney "present during any subsequent questioning." 384 U.S. 436, 474 (1966). *See supra* text accompanying notes 17-28. In *Edwards v. Arizona*, the Court stated, "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." 451 U.S. 477, 484 (1981). *See supra* text accompanying notes 29-32.

71 *Minnick*, 111 S. Ct. at 489 (quoting Michigan v. Harvey, 110 S. Ct. 1176, 1180 (1990)).

72 *Id.* at 489-90.

the application of substantive rights by providing "clear and unequivocal" guidance to police, prosecutors and courts.[73] The Court concluded that these benefits of *Edwards* outweigh the burdens *Miranda* imposes on law enforcement officials by requiring the suppression of probative evidence under certain circumstances.[74]

The Court also discussed the misinterpretation of *Edwards* by the Mississippi Supreme Court. The state court focused on the statement in *Edwards* that an accused "is not subject to further interrogation by the authorities until counsel has been made available to him . . . ."[75] However, the Court placed this phrase, isolated by the Mississippi court, back into context and stated that "a fair reading of *Edwards* and subsequent cases" shows that the rule prohibits police-initiated interrogation "unless the accused has counsel with him at the time of questioning."[76] Based on their reading of *Edwards*, the Court directly held that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[77]

The Court rejected the respondent's proposed exception to *Edwards* that would remove protection from police-initiated interrogations if an accused has previously consulted with an attorney.[78] The Court reasoned that Minnick's "isolated consultations" with counsel did not protect him from the "coercive pressures that accompany custody and that may increase as custody is prolonged."[79] The Court also believed that consultations with counsel may "not always [be] effective in instructing the suspect of his rights."[80] Minnick may have mistakenly believed that his statements were protected since he did not sign the waiver form.[81] The proposed exception, that would substitute consultation with counsel for having counsel present during questioning is "inconsistent" with *Miranda*, according to the Court.[82] In *Miranda*, the Court stated that "[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process."[83] Through its deci-

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73 *Id.* at 490.

74 *Id.*

75 Minnick v. State, 551 So. 2d 77, 83 (1988) (quoting Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).

76 *Minnick*, 111 S. Ct. at 491.

77 *Id.*

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id.*

82 *Id.*

83 384 U.S. 436, 470 (1966).

sion in *Minnick*, the Court reaffirmed the *Miranda* protections of an accused in custody.

The Court also concluded that the respondent's proposed exception would undermine the "clear and unequivocal character" of the *Edwards* rule.[84] Under the proposed exception, *Edwards* protection would terminate once counsel has consulted with the suspect[85] but, would resume if the suspect again requested counsel.[86] Thus, *Edwards* protection could "pass in and out of existence multiple times."[87] The Court stated the proposed exception would "spread confusion through the justice system" and would "detract from the efficacy of the [*Edwards*] rule."[88]

Finally, the Court stated that this decision "does not foreclose finding a waiver of Fifth Amendment protections."[89] If an accused reinitiates discussion with authorities, even after counsel has been requested, a valid voluntary waiver may exist.[90] However, the Court stressed that in *Minnick* "[t]here can be no doubt that the interrogation in question was initiated by the police" and that petitioner was "compelled to attend."[91] Therefore, Minnick did not validly waive his *Miranda* and *Edwards* protections and his statement to Denham was not admissible at trial. Consequently, the Court reversed Minnick's conviction.

B. DISSENTING OPINION

In dissent Justice Scalia, joined by Chief Justice Rehnquist, believed the Court established an "irrebuttable presumption" that a suspect can *never* validly waive his *Miranda* right to counsel after already invoking them.[92] Justice Scalia contended that the Constitution does not call for this expansion of the *Edwards* rule.[93] According to Justice Scalia, the Court's ruling that Minnick's confession must be suppressed as a "systemic assurance"[94] against the pressures of custody is an unauthorized "incursion upon state practices" since the suppression is not based on constitutionally recog-

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84 *Minnick*, 111 S. Ct. at 492.
85 *Id.* at 490.
86 *Id.* at 492.
87 *Id.*
88 *Id.*
89 *Id.*
90 *Id.*
91 *Id.*
92 *Id.* at 492 (Scalia, J., dissenting).
93 *Id.* at 493 (Scalia, J., dissenting).
94 *Id.* at 492 (Scalia, J., dissenting).

nized principles, such as compulsion or ignorance of rights.[95]

Justice Scalia next distinguished the rules of *Miranda* and *Edwards* from the Court's decision in this case. *Miranda* recognized that an accused could knowingly and intelligently waive his right to counsel and expressly adopted "the high standard of proof for the waiver of constitutional rights"[96] articulated in *Johnson v. Zerbst*.[97] While the same waiver standard used for constitutional rights applies to *Miranda* rights,[98] Justice Scalia argued that the Court should not "impos[e] on the States a *higher* standard for the waiver of *Miranda* rights."[99] Previous Court decisions have rejected a rule that waivers of *Miranda* rights must be deemed involuntary unless expressly stated as waived by the suspect.[100] Justice Scalia believed that the *Edwards* holding — that police-initiated questioning after a suspect has requested counsel, but before counsel had been provided, was *per se* involuntary — "stands as a solitary exception to our waiver jurisprudence."[101] While Justice Scalia recognized its merits pointed out by the Court, he stated that the *Edwards* rule "must be assessed not only on the basis of what is gained, but also on the basis of what is lost."[102] The Court's expansion of *Edwards* in this case creates greater losses than gains for the criminal justice system and society, according to Justice Scalia.[103] The desirable consequences of the Court's decision, such as conservation of judicial resources, clear guidance to courts, and greater assurance against coercion are outweighed by the State's paramount "need for police questioning as a tool for effective enforcement of criminal laws."[104]

According to Justice Scalia, the importance of the *Miranda*-created right to counsel is not questioned in this case, but rather the case addresses whether the State should not be given a chance to

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95 *Id.* at 494 (Scalia, J., dissenting).

96 Miranda v. Arizona, 384 U.S. 436, 475 (1966).

97 304 U.S. 458 (1938).

98 In Michigan v. Tucker, the Court held that *Miranda* rights are "not themselves rights protected by the Constitution but. . .instead measures to insure that the right against compulsory self-incrimination [is] protected." 417 U.S. 433, 444 (1974).

99 *Minnick*, 111 S. Ct. at 494 (Scalia, J., dissenting).

100 *Id.* at 494-95. *See also* North Carolina v. Butler, 441 U.S. 369 (1979) (waivers of *Miranda* rights are not to be deemed involuntary absent an explicit assertion of waiver by suspect); Fare v. Michael, 442 U.S. 707 (1979) (waivers of *Miranda* rights by juveniles are not *per se* involuntary).

101 *Minnick*, 111 S. Ct. at 495 (Scalia, J., dissenting).

102 *Id.*

103 *Id.*

104 *Id.* (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

prove under *Zerbst* that such a right was waived.[105] The Court defines too broadly the "certain circumstances" in which waiver will be presumed involuntary.[106] The only legitimate circumstances, according to Justice Scalia, would be the same situation as found in *Edwards* itself.[107] Stressing the second part of the *Zerbst* standard, that the suspect must "intelligently" waive his rights, Justice Scalia would draw the "bright-line" rule at the time a suspect speaks with counsel.[108] After a consultation with an attorney the suspect has a "heightened awareness" of his rights and the *Edwards* exclusionary rule should cease to apply.[109] Justice Scalia maintained that if during post-consultation the police threaten or coerce a suspect into confessing, the *Zerbst* standard of "voluntarily and knowingly" will protect the suspect's rights and result in the suppression of any coerced confession.[110] This "clear and simple" rule would have all the advantages of the Court's expansion of *Edwards*, but would not harshly constrict law enforcement efforts during criminal investigations.[111]

Finally, Justice Scalia philosophized that to allow an honest confession to be viewed as a mistake that should be suppressed is detrimental both to the suspect and society.[112] In Justice Scalia's opinion, a confession to a crime "advances the goals of both 'justice and rehabilitation' " and the Court's "misguided" decision abandons these principles.[113]

V. ANALYSIS

The opinions in *Minnick* demonstrate the different views the Justices hold regarding both the practical realities of custodial interrogation and the theoretical justifications for protection of suspects and society. These divergent viewpoints have led the Court away from the bright-line rules of *Miranda* and *Edwards* into a chaotic case-by-case analysis of *Miranda* rights issues. This type of ad hoc reasoning has weakened and limited the rights of suspects in custo-

105 *Id.*
106 *Id.*
107 *Id.* Justice Scalia would even limit that circumstance, viewing *Edwards* as a "past mistake." *Id.* at 497.
108 *Id.* at 497. "Drawing a distinction between police-initiated inquiry before consultation with counsel and police-initiated inquiry after consultation with counsel is assuredly more reasonable than other distinctions . . . . " *Id.*
109 *Id.* at 496.
110 *Id.*
111 *Id.*
112 *Id.* at 498.
113 *Id.* (quoting Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974)).

dial custody. Thus, much of the Court's recent caselaw has rendered *Miranda* almost meaningless.

Although appearing to strengthen *Miranda* and *Edwards*, *Minnick* is still just another case in the Court's chaotic case-by-case approach to suspect rights questions. *Minnick's* holding is limited to its factual situation and thus, will have little impact on the redrawing of *Miranda's* bright-line. Also, the Court in *Minnick* returns the emphasis to the suspect's state of mind when making a waiver, much like the pre-*Miranda* voluntariness test, instead of focusing on the conduct of officials. Thus, coercive practices are not diminished by *Minnick's* holding. Finally, *Minnick's* holding does not address the major problems of *Miranda* — the correct definition and application of the *Zerbst* waiver standard and the police having to inform suspects of their rights.

This Note argues that the Court should address the many problems left by the *Miranda* caselaw, including *Minnick*, by making custodial confessions inadmissible unless made in the presence of an attorney. After analyzing how the rule solves the problems of the custodial confession caselaw and refuting criticism of the rule, this Note concludes that such a rule best solves the problems created by the Court's ad hoc treatment of custodial confessions.

A. THE COURT'S GRADUAL BLURRING OF *MIRANDA'S* BRIGHT-LINE

One of the principle goals of the *Miranda* and *Edwards* Courts was to provide clear guidance to police and lower courts as to what tactics constitute coercion rendering confessions inadmissible. However, the bright-line of these decisions has been blurred. The Court has allowed admissions of statements for purposes of impeachment when *Miranda* warnings were not given to the suspect,[114] incriminating statements made after police discuss the case within hearing of a suspect as long as police can claim they did not reasonably expect to elicit such statements,[115] and statements regarding more serious crimes after the suspect has only waived his right to silence for questioning about a lesser offense.[116] The suspect's right to silence does not bar further interrogation as long as police " 'scrupulously honor[ ]' " the suspect's rights before they resume questioning.[117] Also, police are allowed to "cure" a confession by giving the *Miranda* warnings after an initial answer by a suspect,

114 Harris v. New York, 401 U.S. 222 (1971).
115 Rhode Island v. Innis, 446 U.S. 291 (1980).
116 Colorado v. Spring, 107 S. Ct. 851 (1987).
117 Michigan v. Moseley, 423 U.S. 96, 103 (1975) (quoting *Miranda*, 384 U.S. at 479).

then asking him to repeat his statement.[118] The Court also has weakened the *Miranda* rule by allowing for a public safety exception.[119]

The Court has also created loopholes in the *Miranda* decision by tampering with the definition of "custody" itself. On one hand, the Court has held that several officers questioning a suspect in his bedroom at 4:00 a.m. was custodial interrogation.[120] Later, the Court declared that questioning by several IRS agents of a defendant at his home did not constitute "custody" requiring the procedures of *Miranda*.[121] However, an interview by an IRS agent of a defendant in jail on unrelated charges was deemed custodial.[122] Also, the Court's inconsistency is shown by its decision that an ordered psychiatric examination of a defendant while in jail is custodial,[123] even though an ordered appearance before a grand jury[124] and a required meeting with probation officer[125] do not constitute custody.

This type of erosion of *Miranda*'s goal of protecting suspects from police overreaching also extends to the issue of validity of waivers. The *Miranda* Court applied the *Zerbst* standard of knowing and intelligent waiver to a suspect's waiver of the right of silence and the right to counsel. However, the Court has recently lessened the burden on the police to prove valid waivers of these rights. In *Colorado v. Connelly*,[126] for example, the Court ruled the defendant validly waived his rights despite the testimony of an examining psychiatrist that the defendant suffered from "command hallucinations" and was unable "to make free and rationale choices."[127] Writing for the majority, Justice Rehnquist apparently reasoned that if there was no police coercion then there was no violation of the suspect's rights and a valid waiver occurred. There is no indication that the *Zerbst* standard of waiver was even considered. The Court

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

119 Statements made by a suspect will be admissible despite the suspect not being read his *Miranda* rights if there is some public danger present. New York v. Quarles, 467 U.S. 649 (1984). In *Quarles*, the defendant was arrested and handcuffed by several police in a convenience store late at night and was not read his rights even though there was only negligible danger to the public. In fact, the police tactics involved in *Quarles* probably would have been ruled coercive under pre-*Miranda* tests.

120 Orozco v. Texas, 394 U.S. 324 (1969).

121 Beckworth v. U.S., 425 U.S. 341 (1976).

122 Mathis v. U.S., 391 U.S. 1 (1968).

123 Estelle v. Smith, 451 U.S. 454 (1981).

124 U.S. v. Mandujano, 425 U.S. 564 (1976).

125 Minnesota v. Murphy, 465 U.S. 420 (1984).

126 107 S. Ct. 515 (1986).

127 *Id.* at 526. (Brennan, J., dissenting).

had ignored the *Zerbst* standard earlier in *Lego v. Twomey*,[128] when it declared that the voluntariness of a confession can be established by a preponderance of the evidence.

As two commentators note, the Court's insistence that *Miranda* is good law along with its willingness to render decisions that reduce *Miranda*'s significance is a "dishonest approach that can breed only disrespect for the law."[129]

B. THE *MINNICK* JUSTICES DISAGREEMENT: THE ECHOING OF *MIRANDA*'S DIFFERING PRACTICAL AND THEORETICAL PERSPECTIVES ON CUSTODIAL INTERROGATION

If its recent decisions so undermine the goals of *Miranda*, why does the Court not realize this erosion of rights? Why has the Rehnquist Court continued to vacillate on suspect rights questions under an ad hoc case-by-case analysis despite the ruling of *Miranda*? Why has *Miranda*'s *per se* holding been replaced with numerous exceptions to the *Miranda* rights? The answer lies in the practical and theoretical differences between liberal and conservative members of the Court. The opinions in *Minnick v. Mississippi* illustrate these differing viewpoints.

In *Minnick*, the Justices revealed different opinions of what really happens during custodial interrogation. Justice Kennedy stressed the vulnerability of a suspect in custody and the need for the Court to insure suspects' rights:

> A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged. The case before us well illustrates the pressures, and abuses, that may be concomitants of custody.[130]

The majority recognized that police have a duty to try to make suspects talk. As one commentator notes, "[t]o induce a confession, an act that ordinarily runs against inclination and interest, [an interrogator] manipulates and deceives the suspect."[131] The majority is not naive to the problems created by requiring police to inform suspects of their rights and protect those rights. As Professor Kamisar

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128 404 U.S. 477 (1972).

129 Irene M. Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions*, 68 N.C. L. REV. 69, 98 (1989) (proposing a *per se* rule that "out-of-court statements made by defendants while in custody, whether or not the result of interrogation, cannot be used to establish guilt in criminal trials."). *Id.* at 75.

130 *Minnick*, 111 S. Ct. at 491.

131 Gerald M. Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1458 (1985) (footnote omitted).

stated "when we expect police dutifully" to inform suspects of their rights, "we demand too much of even our best officers."[132] The Court, therefore, views the realities of interrogation behind the stationhouse door with due skepticism since police conduct over the years may hardly be said to have inspired judicial confidence.[133]

In contrast, Justice Scalia based his dissent in *Minnick* on an underlying belief that police conduct during custodial confessions is not as harsh and abusive as the Court contended. Justice Scalia stated:

> [T]he *Edwards* rule rests upon an assumption similar to that of *Miranda* itself: that when a suspect in police custody is first questioned he is likely to be ignorant of his rights and to feel isolated in a hostile environment . . . After a suspect has seen his request for an attorney honored, however, and has actually spoken with that attorney . . . the suspect then knows that he has an advocate on his side, and that the police will permit him to consult that advocate. He almost certainly also has a heightened awareness . . . of his right[s]. . .[134]

This view suggests that the dissent was unsympathetic to the claimed inherent pressures of custodial interrogation and *Miranda*'s express warning that "[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process."[135] Justice Scalia also apparently believed that feelings of guilt motivate confessions more than custodial coercion by the police.

The opinions in *Minnick* thus reflect the attitudes of the majority and dissent in *Miranda* in the way the Justices differ on the realities of custodial interrogation. For the majority in *Miranda*, Justice Warren referring to several police manuals on interrogation tactics concluded, "[t]hese tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already - that he is guilty. Explanations to the contrary are dismissed and discouraged."[136] Dissenting, Justice Harlan referred to police tactics as "minor pressures and disadvantages intrinsic to any kind of police interrogation" that are merely "inconvenient and unpleasant for the suspect."[137] Under these practical differences regarding custodial interrogation lay funda-

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132 Yale Kamisar, *Equal Justice in the Gatehouse and Mansions of American Criminal Procedure, in* CRIMINAL JUSTICE IN OUR TIME 35-36 (A.E. Dick Howard ed., 1965).

133 Caplan, *supra* note 131. *See also*, cases cited *supra* note 34.

134 *Minnick*, 111 S. Ct. at 495-96 (Scalia, J., dissenting).

135 Miranda v. Arizona, 384 U.S. 436, 470 (1966).

136 *Id.* at 450.

137 *Id.* at 516-17 (Harlan, J., dissenting).

mental theoretical differences between the majority and dissents evidenced by both *Miranda* and *Minnick*.

As Chief Justice Warren explained in *Miranda*, "the constitutional foundation underlying the privilege is the respect a government . . . must accord to the dignity and integrity of its citizens."[138] Therefore, to the *Miranda* Court, any compulsion was improper because it did not comport with human dignity.[139] Chief Justice Warren continued that the custodial environment "carries its own badge of intimidation" that is as "equally destructive of human dignity" as physical abuse.[140] The *Minnick* Court echoes this theory by refusing to remove *Edwards* protection when a suspect has consulted with an attorney, but did not have counsel present during interrogation. Removal of protection, which then might "pass in and out" would lead to a "loss of respect for the underlying constitutional principle[s]."[141]

In *Miranda* and *Minnick*, the dissents primarily based their opinions on the need for strong law enforcement to protect society and the morality of confessions. In *Miranda* Justice Harlan stated, "[s]ociety has always paid a stiff price for law and order, and peaceful interrogation is not one of the dark moments of the law."[142] Justice White emphasized the view that there is "nothing wrong or immoral" in police interrogation of suspects, even if subtly coercive.[143] In *Minnick*, Justice Scalia stated that confessions are beneficial "[n]ot only for society, but for the wrongdoer himself, admission of guilt. . .if not coerced, is inherently desirable, because it advances the goals of both justice and rehabilitation."[144] He concluded that "[t]o design our laws on premises contrary to these is to abandon belief in . . . the moral claim of just government to obedience."[145]

C. *MINNICK*'S FAILURE TO ADEQUATELY ADDRESS THE PROBLEMS OF *MIRANDA*

Minnick v. Mississippi is a piece of the *Miranda* puzzle. Although the Court in *Minnick* attempted to add another brick into the wall of protection provided by *Miranda* and *Edwards*, its temporary bit of

138 *Id.* at 460.
139 Rosenberg & Rosenberg, *supra* note 129, at 77 (footnote omitted).
140 *Miranda*, 384 U.S. at 457.
141 Minnick v. Mississippi, 111 S. Ct. 486, 492 (1990).
142 *Miranda*, 384 U.S. at 517 (Harlan, J., dissenting).
143 *Id.* at 538 (White, J., dissenting).
144 *Minnick*, 111 S. Ct. at 498 (Scalia, J., dissenting) (citations omitted).
145 *Id.*

construction in a world of turbulent decisions fails to guarantee stability for suspects' rights. *Minnick* is indeed a creature of *Miranda* — it has its reasoning and its problems.

As discussed previously, the goals of *Miranda* were to protect suspects from police abuse and coercion, to provide clear guidelines for police and lower courts regarding the admissibility of confessions and the validity of waivers, and finally, as a result of its *per se* rule, conserve judicial resources that had been used in making case-by-case determinations under the voluntariness test. Both proponents and opponents of the *Miranda* ruling agree that these goals have not been met.[146] As evidenced by the Court's inconsistent treatment of the *Miranda* line of cases, the *per se* presumptions of *Miranda* have given way in large part to a resurrected case-by-case analysis and a reemphasis on the voluntary nature of the confession instead of on police tactics. Several loopholes left by the *Miranda* Court, such as the definition of custody and the correct application and definitions of the *Zerbst* waiver standard, not only remain today but have become sinkholes which may completely swallow *Miranda*. Finally, the requirement that police be given the conflicting duties of both informing the suspect of his rights and of trying to make him give up those rights is problematic by its very nature.

In *Minnick*, the Court tried to prop up the falling *Miranda* and *Edwards* rules to again protect the rights of an accused and provide clear guidance to police and courts. The *Minnick* Court refused to limit the *Edwards* rule that police must stop interrogation when a suspect invokes his right to counsel. The Court strengthened the *Edwards* rule by holding that, not only must interrogation cease upon request for counsel, but "officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[147] Further, the Court "insist[ed] that neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause."[148] This holding creates a presumption that confessions are inadmissible unless police implement certain protective procedures. *Minnick* also goes further than *Miranda* and *Edwards* by expressly requiring an attorney's presence to commence reinterrogation. The Court's decision seems to pro-

146 *See* Rosenberg & Rosenberg, *supra* note 129; Stuntz, *supra* note 31, at 820-21; Schulhofer, *supra* note 17; Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering Miranda,"* 54 U. Chi. L.Rev. 938, 949 (1987); Ogletree, *supra* note 8, at 1827.

147 *Minnick*, 111 S. Ct. at 491.

148 *Id.* at 492.

vide a clear guideline for police and courts to follow while at the same time protecting suspects from police coercion. Even the most notorious police interrogator will hesitate before engaging in overreaching coercive tactics when the suspect's attorney is in the room. Also, courts will not have to delve into the contents of consultations between attorneys and clients in order to determine if the suspect had enough information to "knowingly and intelligently" waive his rights. This not only conserves judicial resources, but also avoids attorney-client privilege problems as the Court points out.[149]

Although the Court's decision in *Minnick* does not, as do several recent decisions, erode the protections guaranteed suspects in *Miranda* and *Edwards*, it fails to provide a solid solution to the many problems of *Miranda* caselaw. While expressly calling for the presence of counsel in order for the police to reinitiate interrogation, the *Minnick* holding excepts from this protection instances where the accused has reinitiated discussions with police. This suspect reinitiation exception does nothing to address the Court's primary problems since *Miranda*: When do police tactics become coercion? And when is a waiver valid?

Deciding if the suspect was coerced into reinitiating discussions with police will often be very difficult. Not all coercive tactics will be as blatant as the police telling Minnick that his lawyer was "nothing" and that he "had to talk."[150] The Court will have to engage in a case-by-case analysis of what went on behind the stationhouse door, which will often be impossible to completely determine. This inability to determine whether the suspect was coerced into reinitiating talks with the police makes impossible the determination of whether that reinitiation counts as a valid waiver under the *Zerbst* "knowingly and intelligently waived" standard.

Also, both the majority and dissent in *Minnick* engaged in a balancing of the suspect's rights and the need for police questioning in criminal investigations, despite *Miranda*'s explicit rejection of any balancing tests. The majority and dissent obviously gave different weight to the factors to be balanced. The majority's emphasis on the vulnerable suspect in the inherently coercive atmosphere of custody is completely contrary to the dissent's vision of the "heightened awareness" of suspects who have been read their rights and have consulted with counsel. These different views indicate the split in the Court as to the correct "realities" and philosophies of custodial interrogation. Such a split of opinion diminishes clear guide-

149 *Id.*

150 Brief for Petitioner, *supra* note 46, at 22.

lines sent by the Court to police and lower courts because which viewpoint will prevail in any given case is unclear. The Court's swinging from one perspective to the other in its case-by-case analysis will only increase as new Justices Souter and Thomas enter the debate.

The problems created by the Court's reluctance to follow the *per se* rules of *Miranda*, *Edwards* and possibly in the future, *Minnick* are great. The caselaw dealing with suspects' rights is as confusing today as it was before *Miranda*. Police do not have "clear and unequivocal" guidelines to follow. In fact, the Court's decisions may have encouraged police to adopt procedures in the gray area between compulsion and investigation, since it is unclear what will be allowed. The loopholes allowing waivers of the right to counsel and right of silence result in the Court having to determine the validity of those waivers on a case-by-case "totality of circumstances" basis. The *Zerbst* standard that waivers must be knowingly and intelligently waived is easily manipulated depending on the practical and theoretical viewpoints of the members of the majority in any given case.

Therefore, a more comprehensive approach to the problems of *Miranda* and the cases that are its legacy is necessary to fully protect the constitutional rights of suspects during custodial interrogation. *Minnick* is a step in the right direction, but what is needed is a leap toward absolute protection of suspects' rights under the Constitution.

VI. A Proposed Solution: The Inadmissibility of Custodial Confessions Unless Made in the Presence of an Attorney

A. The Problems of Custodial Confessions

Several solutions for the problems in the current law of custodial confessions have been proposed over the years. A few of these procedures are simply technical cures[151] not really getting at the issue — the need to protect suspects from coercive pressures to speak, while still allowing truly voluntary confessions to be given. Other proposals attempt to restructure the legal process to provide

151 These cures include giving suspects a cooling off period in which to rethink their decision to either confess or remain silent, allowing neutral observers from the community to be present during interrogations, and more strictly enforcing prompt arraignment statutes. *See generally*, Caplan, *supra* note 131, at 1464, 1474. These proposed solutions cannot seriously impact on the underlying problems of custodial confessions because they fail to protect suspects from coercion during the cooling off period or before arraignment and because neutral observers will not know if suspects are correctly informed of their rights.

more adequate protection while providing for admission of truly voluntary confessions to be admissible.[152] Finally, more radical solutions have been proposed, such as making the right to counsel non-waivable[153] and excluding all custodial confessions made under any circumstance.[154] None of these proposals satisfactorily address the problems left by the chaotic caselaw following *Miranda*.

This Note's proposed solution to the problems currently faced in the area of custodial confessions is to make any confession made to police outside the presence of an attorney *per se* inadmissible. As the Court in *Minnick* emphasized, it is the presence of counsel that is the important feature of *Edwards*.[155] By making only statements made to police with assistance of counsel admissible the goals of *Miranda* are best protected.

First, this rule eliminates police abuse of suspects and use of overreaching coercive tactics. Police will have no incentive to convince suspects to incriminate themselves because unless an attorney is present when the confession is offered it is inadmissible. This also eliminates the problems of determining when a suspect reinitiates discussions with police free from coercion and whether that reinitiation constitutes a valid waiver of rights under *Zerbst*. The rule still requires the presence of an attorney during suspect-initiated interrogation in order for any statements made by the suspect to be admissible in court.

Second, this rule fulfills the goal of having suspects adequately informed of their rights. No longer do the courts have to guess as to

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152 One such proposed solution includes creating a higher burden of proof for the admission of custodial confessions. *See id.* at 1474. However, the Court has already applied the highest standard, the *Zerbst* standard, to police wishing to admit custodial confessions. Yet, these standards will always be ill-defined, debatable and manipulable in a case-by-case analysis. Another legally-based proposal is to add teeth to the old voluntariness test by having *per se* rules prohibiting certain practices, such as relay interrogations. This proposal still leaves unanswered the question of whether the police have violated the prohibitive rule.

153 This proposal too greatly restricts confessions by not allowing a suspect who understands his rights, but truly wants to relieve his conscious and face his punishment through confession of his crimes, to do so without considerable waste of time and judicial resources.

154 *See* Rosenberg & Rosenberg, *supra* note 129. Under this most radical solution, truly guilty defendants would have to wait until arraignment to plead guilty. Although this would reduce police coercion to confess, it would slow investigations of criminal activity to an unacceptable level since almost all questioning of suspects would cease. Also, this solution would waste judicial resources.

155 "*Edwards*' purpose [is] to protect the suspect's right to have counsel *present* at custodial interrogation." Minnick v. Mississippi, 111 S. Ct. 486, 491 (1990) (emphasis added). *See also*, Patterson v. Illinois, 487 U.S. 285, 291 (1988) ("Preserving the integrity of an accused's choice to communicate with police only through counsel is the essence of *Edwards* . . . .").

whether the suspect really understood the warnings read to him by the police. With an attorney present to explain at length, if necessary, an accused's constitutional rights and to make sure that those rights are truly "knowingly and intelligently" waived, the validity of waivers no longer poses a manipulable loophole for the police and courts to use to run around the Constitution. The rule presumes that the suspect was adequately informed of his rights by counsel and then in the presence of counsel "knowingly and intelligently" waives his rights and confesses to police. Counsel's presence at the confession stage is critical because he can continue to clarify the suspect's understanding of his rights throughout the questioning period.

Finally, this rule gives the clear and unequivocal guidance to police and courts that the *Miranda* Court so strived for, yet without the loopholes associated with case-by-case analysis. Police have no incentive to coerce suspects, either with subtle tricks or blatant physical abuse, because no statement made by the suspect under such circumstances are admissible. Also, the attorney's presence as a requirement of admissibility is straightforward and unmanipulable by the courts. Such clear guidelines, therefore, conserve judicial resources. Courts are freed from collateral *Miranda* issues, such as the validity of waivers, and able to spend more time addressing other issues on their overcrowded dockets.

B. RESPONSE TO CRITICISMS OF THIS RULE

As with any rule, this rule requiring the presence of counsel in order for a suspect's statement to be admissible is not without criticism. The three major criticisms of this rule are: (1) it will eliminate all confessions — both voluntary and coerced; (2) the presence of counsel does not presumptively mean the suspect will be adequately informed of his rights and will "knowingly and intelligently" be able to waive them; and (3) it will be impractical, if not impossible, to implement. These criticisms can be effectively refuted, thereby securing the rule as a valid alternative to the present law of custodial confessions.

Many scholars view the presence of counsel as preventing any and all confessions to the police.[156] In 1986, the ATTORNEY GENERAL'S INTERROGATION REPORT condemned a requirement of the

156 *See*, Fred E. Inbau & James P. Manak, *Miranda v. Arizona - Is it Worth the Cost?*, 21 THE PROSECUTOR 31, 35 (No. 4 1988) ("Once a lawyer enters upon an interrogation scene, he will very rarely do anything more than instruct his client to keep his mouth shut.").

presence of counsel at custodial interrogations, stating "any value of a right to counsel in establishing voluntariness must be weighed against the costs of recognizing such a right . . . If a lawyer appears, he will usually tell his client to say nothing to law enforcement officers, and there will be little point in attempting further questioning."[157] Although this rule will probably reduce the number of confessions, that is in fact its goal. Coerced confessions will be less likely to happen in the presence of counsel, thereby only leaving truly voluntary admissions to be used in court against the suspect. At the same time, this rule agrees with Justice Scalia's belief that it is "virtuous for the wrongdoer to admit his offense and accept the punishment he deserves."[158] A suspect who is indeed willing to "admit his offense and accept the punishment he deserves" will reject his attorney's advice not to say anything to police, and fully understanding that he has the right to remain silent, will confess his illegal actions and clear his conscious.[159] Since this rule does not create an "irrebuttable presumption that a criminal suspect. . .can never validly waive" his rights,[160] all confessions will not be eliminated, merely those that are not completely freely given in the presence of counsel.

Scholars Irene and Yale Rosenberg, who propose the most radical rule, making all custodial confessions inadmissible, would criticize the rule's presumption that the presence of an attorney will result in the suspect being fully informed of his rights.[161] They believe that "given the stress and time pressures of stationhouse questioning, mistakes in judgement, such as erroneous advice to give an exonerating statement, are more likely to occur."[162] However, this criticism's weakness is that no attorney, whether a public defender, prosecutor, or private sector business lawyer is not without pressure-filled busy work days. Yet they are all, for the most part, able to give competent advice during hectic times. As the Court has stated, "any lawyer worth his salt will tell the suspect . . . to make no statement to police under any circumstances."[163] Furthermore, the police are now in the position of informing suspects of their rights. The likelihood of counsel giving the suspect more erroneous advice

157 U.S. DEPARTMENT OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL ON THE LAW OF PRE-TRIAL INTERROGATION 111 (Feb. 12, 1986, with addendum of Jan. 20, 1987).

158 *Minnick*, 111 S. Ct. at 498 (Scalia, J., dissenting).

159 *Id.*

160 *Id.* at 492.

161 Rosenberg & Rosenberg, *supra* note 129, at 104.

162 *Id.* at 105 (footnote omitted).

163 Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part).

than they currently receive from police is extremely small. The presumption remains that most lawyers will adequately inform the suspect of their rights, strengthening the validity of any waiver of those rights.

A third criticism of such a rule is that it is impractical — that public defenders are already overworked, that it would cost an unreasonable amount of money and that there are times when it is impossible to get an attorney to the stationhouse. Granted, public defenders are already overburdened, however this rule does not need to add to their burdens. Other attorneys, or even law students with 7-11 licenses, could sit in on the questioning of the suspect. This could also be done on a voluntary, pro bono basis, thereby keeping extra costs at a minimum. And finally, it is irrelevant that an attorney may not be able to be present during the initial questioning of a suspect. According to the rule, the police cannot use any confession made by a suspect against that person in court unless counsel was present when the statement was made. Initial questioning can therefore be postponed until an attorney is available. And, in cases where immediate questioning is necessary to stop an ongoing or to prevent an impending crime, police could question the witness after fully informing him of his rights. If the witness confesses at that time, he may repeat his confession in the presence of counsel. This still protects the suspect from coercion, since police will not coerce a suspect to get an initial inadmissible statement if they know he will refuse to make it later when fully informed of his rights and in the protective presence of counsel.

VII. Conclusion

Though the Court's decision in *Minnick v. Mississippi* correctly protects suspects' rights, it suffers from faulty reasoning and fails to address the major problems in the area of custodial confessions. The Court's treatment of Fifth Amendment rights issues under a weakened version of *Miranda v. Arizona* is unpredictable, causing confusion where there should be "clear and unequivocal guidelines."

The proposal to make all custodial confessions inadmissible unless made in the presence of counsel is supported by the Court's decisions in *Miranda*, *Edwards* and *Minnick*. Yet those cases do not go far enough and the Court's recent weakening of them has prevented *Miranda*'s goal from being achieved. The rule proposed here achieves those goals; it ensures that suspects will be adequately informed of their rights and that they will not be coerced into confess-

ing by the police. Therefore under this rule, any confessions made and admitted in court will involve an intelligent and knowing waiver of Fifth Amendment rights freely given by the accused.

ANNE ELIZABETH LINK