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McNeil v. Wisconsin: The Supreme Court Has Another Bout with the Right to Counsel

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McNeil v. Wisconsin: The Supreme Court has Another Bout with the Right to Counsel

The sixth amendment to the United States Constitution provides that "[i]n all criminal proceedings, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[1] Further, the United States Supreme Court in *Miranda v. Arizona*[2] construed the fifth amendment to afford the accused a right to counsel during police custodial interrogation.[3] Both the fifth and sixth amendment rights to counsel have been subject to much debate in the Supreme Court.[4]

The United States Supreme Court discussed the interplay between the sixth amendment right to counsel and the right to counsel derived from the fifth amendment, as created by *Miranda*,

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1. U.S. CONST. amend. VI.

2. 384 U.S. 436 (1966).

3. *See id.* at 478-79 (holding that police are required to give the accused a four-part warning: (1) The accused has the right to remain silent; (2) anything said can and will be used against the individual in court; (3) the accused has a right to consult with a lawyer and to have the lawyer present during interrogation; and (4) if the accused is indigent, the accused must be informed that a lawyer will be appointed for representation). The *Miranda* Court required the warning because the circumstances surrounding police custodial interrogation are likely to induce the accused to make statements which are incriminating due to the inherently coercive nature of the confrontation. *Id.* at 469. Hence, the right to have counsel present at interrogation is imperative in order to protect the accused's right against self-incrimination. *Id. See infra* notes 21-25 and accompanying text (examining the Supreme Court's decision in *Miranda*).

4. *See infra* notes 14-106 and accompanying text (addressing the various problems the Supreme Court has faced in the areas of right to counsel under the fifth and sixth amendments).

in the recent case of *McNeil v. Wisconsin.*[5] In *McNeil*, the Supreme Court held that the accused's invocation of the sixth amendment right to counsel during an adversarial proceeding does not automatically invoke the *Miranda* fifth amendment right to counsel which would preclude all subsequent police custodial interrogation.[6] The Supreme Court's decision in *McNeil* resolved a conflict between the Wisconsin Supreme Court's decision in *McNeil*[7] and a Seventh Circuit Court of Appeals decision in *United States ex rel. Espinoza v. Fairman*[8] as to whether the invocation of the sixth amendment right to counsel also acts as an invocation of the fifth amendment right to counsel.[9] A resolution of this conflict was critical to provide guidance to lower courts, as the scope of constitutional protection provided under the fifth and sixth amendments substantially affects whether police interrogation can continue once the accused invokes the sixth amendment right to counsel.[10]

Part I of this Note reviews the evolution of the fifth and sixth amendment rights to counsel.[11] Part II examines the United States Supreme Court's opinion in *McNeil v. Wisconsin.*[12] Finally, Part III assesses the impact on criminal procedure resulting from the *McNeil* decision.[13]

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5. 111 S. Ct. 2204 (1991).

6. *See infra* notes 107-218 and accompanying text (discussing the Supreme Court's holding in *McNeil*). *See also* Edwards v. Arizona, 451 U.S. 477, 482 (1986) (indicating that once a suspect invokes the *Miranda* right to counsel, all police custodial interrogation must cease unless the suspect reinitiates the questioning).

7. 155 Wis. 2d 24, 454 N.W.2d 742 *cert. granted*, 111 S. Ct. 340 (1990).

8. 813 F.2d 117 (7th Cir.), *cert. denied*, 483 U.S. 1010 (1987).

9. *McNeil*, 111 S. Ct. at 2207. *Compare Espinoza*, 813 F.2d at 123 (stating that an individual who invokes the right to counsel at an adversarial proceeding is invoking both the fifth and sixth amendment right to counsel) *with McNeil*, 155 Wis. 2d at 28, 454 N.W.2d at 746 (holding that invoking the sixth amendment right to counsel does not constitute an invocation of the *Miranda* right to counsel) *and* State v. Stewart, 113 Wash. 2d 462, 478, 780 P.2d 844, 853 (1989) (finding an invocation of the sixth amendment right to counsel when the accused requests an attorney at an arraignment does not constitute an invocation of the fifth amendment right to counsel).

10. *See infra* notes 156-159 and accompanying text (assessing *McNeil's* effect on the scope of police interrogation).

11. *See infra* notes 14-106 and accompanying text.

12. *See infra* notes 107-218 and accompanying text.

13. *See infra* notes 219-252 and accompanying text.

I. LEGAL BACKGROUND

Prior to *McNeil*, the decisions by the United States Supreme Court concerning the right to counsel involved two distinct lines of cases.[14] One line of cases can be traced to *Miranda* where the Court recognized that the fifth amendment privilege against self-incrimination afforded a criminal suspect the right to counsel during police custodial interrogation.[15] The other line of cases stems from *Massiah v. United States*[16] where the Supreme Court held that the sixth amendment precluded the use of statements deliberately elicited from a suspect once the sixth amendment right to counsel had been invoked at suspect's indictment.[17] Although the *Miranda* right to counsel and the sixth amendment right to counsel are separate and distinct rights, two recent Supreme Court decisions, *Michigan v. Jackson*[18] and *Arizona v. Roberson*,[19] created some confusion among the lower courts as to the interrelationship of the protections of each amendment, and it was this interrelationship which the Supreme Court addressed in *McNeil*.[20] To understand the complexity surrounding the sixth amendment right to counsel and the *Miranda* right to counsel provided under the fifth amendment, it is important to examine the relevant case law in each of these areas.

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14. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Massiah v. United States, 377 U.S. 201 (1964).

15. *Miranda*, 384 U.S. at 474. *See infra* notes 21-43 and accompanying text (examining the Supreme Court's decision in *Miranda* and the impact of subsequent Supreme Court decisions on the scope of its rights).

16. 377 U.S. 201 (1964).

17. *Id.* at 205-206. *See infra* notes 44-49 and accompanying text (discussing the *Massiah* decision).

18. 475 U.S. 625 (1986).

19. 486 U.S. 675 (1988).

20. *See infra* notes 73-106 and accompanying text (describing the *Jackson* and *Roberson* decisions). *See generally* Howe, *Cleaning Up the Counsel Clause: Revisiting* Massiah v. United States, 25 U.S.F. L. REV. 93, 103-08 (1990) (pointing to the confusion surrounding the application of the sixth amendment to the fifth amendment); Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 976-77 (1986) (illustrating that the protections afforded by the fifth and sixth amendment are not mutually exclusive and as a result, suspects often have a right to counsel under both contexts).

A. Miranda and Its Progeny -- The Fifth Amendment Right to Counsel

In 1966, the United States Supreme Court held in *Miranda v. Arizona*[21] that procedural safeguards must be placed on custodial interrogation to protect the accused's fifth amendment right against self-incrimination.[22] Although the Court in *Miranda* noted that the use of physical acts to induce confessions were not as frequent as they once were, physical acts were replaced by psychological means which were equally effective.[23] In order to apprise a suspect of the suspect's right against self-incrimination, the Supreme Court formulated what has become known as the "*Miranda* warnings."[24] Under the *Miranda* rule, once the suspect

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21. 384 U.S. 436 (1966).

22. *Id.* at 447 (holding that limitations must be placed on police custodial interrogation to prevent physical force from being used to obtain confessions). *See* 1 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE: CRIMINAL PRACTICE SERIES § 6.4, at 458-64 (1984 & Supp. 1991) (analyzing the evolution of the fifth amendment case law up to the Court's decision in *Miranda*). *See also* Tomkovicz, *supra* note 20, at 988 (explaining that the Supreme Court in *Miranda* called for a "protective shield" in order to prevent violating a suspect's right against self-incrimination); Loucks, *Initiation: The Emperor's New Test*, 53 GEO. WASH. L. REV. 608, 625 (1985) (identifying the *Miranda* Court's concern with the inherent compulsion in the custodial setting and the need for protecting the suspect's fifth amendment rights).

23. *Miranda*, 384 U.S. at 448 (citing findings in the National Commission on Law Observance and Enforcement). The Court found support in police manuals which suggested that isolation was a principal psychological factor which assists the police in a successful interrogation. *Id.* at 449. Moreover, depriving a suspect of any psychological advantage will also assist the police during an interrogation. *Id.* The manuals also suggested that interrogation should continue for several hours with breaks given only for necessities in order to avoid charges of duress. *Id.* at 451. By keeping the subject off balance, the police could manipulate the subject into foregoing the subject's constitutional rights. *Id.* at 455. The *Miranda* Court concluded that custodial interrogation places a heavy mental burden on the suspect even with the absence of brutality by the police. *See* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 6.5, at 284 (1985) (illustrating the effects of custodial interrogation upon a suspect and the ability of the police to extract information from the suspect during interrogation).

24. *Miranda*, 384 U.S. at 444. The *Miranda* Court devised the following warning: "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.* The *Miranda* Court stated that the presence of counsel is an adequate device for protecting the accused's right against self-incrimination and to ensure that the police conform with the accused's privilege to remain silent. *Id.* at 466. *See* W. LAFAVE & J. ISRAEL, *supra* note 22, § 6.4, at 467-83 (addressing a suspect's right to counsel under the fifth amendment). *See generally* Stoneman, *Investigation and Police Practices Custodial Interrogation*, 79 GEO. L.J. 710, 711 (1991) (pointing to the *Miranda* Court's requirement that the police apprise a suspect of the *Miranda* warnings or warnings which are similar to those defined in *Miranda*).

indicates the desire to have counsel present, all interrogation must cease unless the accused makes a "knowing and intelligent" waiver of the *Miranda* right to counsel.[25]

Subsequent cases have clarified certain aspects of the *Miranda* decision.[26] One of the most important of these is the United States Supreme Court case of *Edwards v. Arizona.*[27] Edwards was arrested for robbery, burglary and first-degree murder.[28] Edwards initially agreed to speak to police officers but later retracted his consent and requested to speak with an attorney.[29] The following day, Edwards was questioned, without counsel present, and implicated himself in the crimes.[30] Edwards' admissions were used against him at the trial which resulted in a guilty verdict.[31]

The Supreme Court reversed the guilty verdict and held that the admission of Edwards' statements violated Edwards' fifth amendment right to counsel under *Miranda.*[32] The Court reasoned that a valid waiver of the right to counsel cannot be established merely by showing that the suspect responded to questioning, as occurred in *Edwards.*[33] Instead, in order to establish a valid

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25. *Miranda*, 384 U.S. at 474. Once a suspect invokes the right to counsel under the fifth amendment, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.* at 475. *See* Brewer v. Williams, 430 U.S. 387, 404 (1977) (defining the proper test for finding a valid waiver of a constitutional right as "an intentional relinquishment or abandonment of a known right or privilege"). *See also* Note, *Pretrial Rights to Counsel, Under the Fifth & Sixth Amendments: A Distinction Without a Difference*, 12 LOY. U. CHI. L.J. 79, 90-91 (1980) (discussing the *Miranda* decision and the test espoused in *Brewer*); Markman, Miranda v. Arizona: *A Historical Perspective*, 24 AM. CRIM. L. REV. 193, 219 (1986) (addressing the requirement of a knowing and intelligent waiver in order for a suspect to waive the *Miranda* right to counsel).

26. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (defining interrogation as questioning that is direct or that is "reasonably likely to elicit an incriminating response from the suspect"); Orozco v. Texas, 394 U.S. 324, 326-27 (1969) (holding that police questioning outside a police station can be construed as custodial interrogation and requires *Miranda* warnings). *See also* Markman, *supra* note 25, at 197-241 (outlining the historical antecedents to the *Miranda* decision and the developments of case law concerning pre-trial interrogation since *Miranda*).

27. 451 U.S. 477 (1981). *See* Markman, *supra* note 25, at 239 (identifying *Edwards* as "the principal right-to-counsel case drawing on *Miranda*").

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

29. *Id.* at 478-79.

30. *Id.* at 479.

31. *Id.* at 480.

32. *Id.*

33. *Id.* at 484.

waiver, the prosecutor must show that the accused initiated the communication.[34] The *Edwards* Court observed that requiring a suspect to initiate the communication is consistent with *Miranda* and its progeny[35] since *Miranda* required all police questioning to cease once the suspect requests counsel.[36] The *Edwards* Court noted that once the suspect has reinitiated the questioning, nothing under the fifth amendment would prohibit the police from listening to the statements since the statements would clearly be voluntary.[37] However, since Edwards did not reinitiate his questioning with the police, the Court determined that Edwards had been subjected to custodial interrogation.[38] Therefore, the Court found that the statements made by Edwards without the assistance of counsel were inadmissible.[39]

As a result of *Edwards*, another layer of protection, which has become known as the "*Edwards* rule,"[40] was added to the *Miranda* decision.[41] Simply stated, the *Edwards* rule requires that

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34. *Id.* at 484-85. *See generally* Loucks, *supra* note 22, at 612 (examining the *Edwards* Court's requirement that the suspect reinitiate further communication with the police before a valid waiver may be obtained).

35. *Edwards*, 451 U.S at 485. *See, e.g.*, Rhode Island v. Innis, 446 U.S. 291, 298 (1980) (emphasizing that a suspect who is taken into custody has an undisputed right to silence and to have an attorney present during interrogation); Fare v. Michael C., 442 U.S. 707, 719 (1979) (stating that upon a request for counsel, *Miranda* requires all interrogation to cease); Michigan v. Mosley, 423 U.S. 96, 101 n.7 (1975) (indicating that *Miranda* distinguished between the request to remain silent and the request for an attorney and that interrogation must cease upon request for an attorney). *See also* Radek, Arizona v. Roberson: *The Supreme Court Expands Suspects' Rights in the Custodial Interrogation Setting*, 22 J. MARSHALL L. REV. 685, 690 (1989) (addressing the *Edwards* Court's concern with remaining consistent with *Miranda*).

36. *Edwards*, 451 U.S. at 485. *See Mosley*, 423 U.S. at 96, 103 (safeguarding a suspect's right to remain silent by requiring police to "scrupulously honor" this right).

37. *Edwards*, 451 U.S. at 485.

38. *Id.* at 487.

39. *Id.*

40. *See* Michigan v. Jackson, 475 U.S. 625, 630 (1986) (addressing the Court's creation of the *Edwards* rule); Solem v. Stumes 465 U.S. 638, 646 (1984) (identifying the additional protection afforded by the *Edwards* rule).

41. *See* Arizona v. Roberson, 486 U.S. 675, 681 (1988) (stating that pursuant to *Edwards*, reinterrogation may only occur if the accused initiates the interrogation). The *Roberson* Court stated:

> Thus, the prophylactic protections that *Miranda* warnings provide to counteract the inherently compelling pressures of custodial interrogation and to permit a full opportunity to exercise the privilege against self incrimination are implemented in the *Edwards* corollary that if a suspect believes that he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come

police questioning must cease until counsel is provided for the suspect, unless the suspect initiates further communication with the police.[42] This extra protection, added by the *Edwards* rule, has affected later Supreme Court decisions involving the fifth and sixth amendment rights to counsel and ultimately, the Supreme Court's decision in *McNeil*.[43]

B. *Massiah and Its Progeny -- The Sixth Amendment Right to Counsel*

In *Massiah v. United States*,[44] the Supreme Court afforded the criminally accused the right to counsel under the sixth amendment once the suspect was indicted.[45] Traditionally, the sixth amendment right to counsel was intended to protect the unaided layman from the complexities of a trial, and the sixth amendment right only applied to adversarial judicial proceedings.[46] The *Massiah* court held that once suspects reach the "status of accused," the suspects are entitled to a right to counsel at

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at the authorities' behest and not at the suspect's own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choice of the suspect.

Id. at 681 (citations omitted).

42. *Edwards*, 451 U.S. at 482. *See* Erickson, *The Unfulfilled Promise of* Miranda v. Arizona, 24 AM. CRIM. L. REV. 291, 295 (1986) (illustrating how the Supreme Court interpreted dictum in *Miranda* in order to create the *Edwards* rule). The *Edwards* decision has been criticized as being based merely on dicta in the Supreme Court's opinion in *Miranda*. *Id. See also* Loucks, *supra* note 22, at 612-13 (characterizing the Court's decision in *Edwards* as powerful dicta unexplained in the opinion); Tomkovicz, *supra* note 20, at 1007 (noting that the Court in *Edwards* undermines itself with the interpretation of some of the issues).

43. *See infra* notes 147-162 and accompanying text (discussing the impact of the *Edwards* rule on the Court's decision in *McNeil*).

44. 377 U.S. 201 (1964).

45. *Massiah*, 377 U.S. at 206. *See generally* Howe, *supra* note 20, at 93-95 (describing how the *Massiah* decision increased the scope of protection of the sixth amendment from adversarial proceedings to situations where little confrontation against a prosecutor occurs).

46. *See* Howe, *supra* note 20, at 99-101 (stating that the confrontation between the accused and the prosecutor has been labeled unequal and unfair, thus the purpose of the sixth amendment is to equalize this adversarial imbalance); Tomkovicz, *supra* note 20, at 987 (indicating that the sixth amendment right to counsel attaches only "to instances of governmental conduct that pose cognizable risks to the goal of adversarial equality"). *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963); Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938); Powell v. Alabama, 287 U.S. 45, 68-69 (1932) (illustrating that the sixth amendment right to counsel was traditionally afforded in adversarial proceedings in order to protect the unaided laymen against the complexities of trial).

confrontations with the state government.[47] Expanding the traditional view that the sixth amendment right to counsel is strictly applicable only in judicial proceedings, the Court in *Massiah* determined that the sixth amendment protection included confrontations outside the courtroom.[48] Having once increased the scope of protection provided by the sixth amendment right to counsel, the Supreme Court had to revisit the *Massiah* decision to define the scope of the sixth amendment protection in a multitude of extrajudicial settings.[49]

In *United States v. Henry,*[50] the Supreme Court addressed the issue of whether the use of government informants in extrajudicial settings violated the sixth amendment right to counsel.[51] Henry had been arrested, indicted and imprisoned for bank robbery.[52] The inmate who shared a cell with Henry was a government informant who testified at Henry's trial.[53] The informant testified as to statements Henry made while in prison regarding the armed robbery of the bank.[54] The *Henry* Court reasoned that the nature

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47. *Massiah*, 377 U.S. at 205. *Massiah* defined the status of an accused as spanning from arraignment through trial. *Id.* The *Massiah* Court noted that the accused's need for counsel from the period of arraignment to the beginning of trial is as great as the accused's need for counsel during trial. *Id.* After the indictment, any interrogation without the assistance of counsel contravenes fairness in the criminal case. *Id.*

48. *Id.* at 204. The *Massiah* Court adopted the views espoused by the concurring Justices in *Spano v. New York*, 360 U.S. 315 (1959). *Id. See Spano*, 360 U.S. at 324-27 (Douglas, J., concurring) (indicating that an accused may be denied effective representation if the suspect is denied counsel before trial but after the indictment). In *Spano*, the Court found that allowing the police to produce vital evidence in the form of a confession without the presence of counsel would effectively deny the accused's right to counsel under the sixth amendment. *Id.* at 326 (Douglas, J., concurring). The Court in *Spano* questioned the effectiveness of having a right to counsel at every critical stage if suspects can be questioned until they confess prior to providing the suspect with counsel's assistance. *Id.* (Douglas, J., concurring). The Court in *Massiah* accepted the argument that the status of the defendant changed from "suspect" to "accused" once the suspect is indicted, even if no custodial interrogation is involved. *Massiah*, 377 U.S. at 260. *See* W. LAFAVE & J. ISRAEL, *supra* note 23, § 6.4 (explaining the *Massiah* Court's adoption of the argument that the suspect becomes the "accused" once the suspect is indicted).

49. *See* Howe, *supra* note 20, at 95 (indicating that the majority of the sixth amendment right to counsel cases involve the use of undercover government agents). *See also infra* notes 50-69 and accompanying text (discussing the use of government informants in *Henry* and *Moulton*).

50. 447 U.S. 264 (1980).

51. *Id.* at 270.

52. *Id.* at 265-66.

53. *Id.* at 267.

54. *Id.*

of confinement may elicit information from an individual which an accused would not reveal to a known government agent.[55] Therefore, the Supreme Court determined that the statements made by Henry were deliberately elicited by the government's use of an agent in a custodial setting.[56] Although the incriminating statements were not obtained through the use of affirmative conduct by the police, the *Henry* Court held that the statements were inadmissible because the police created a situation likely to induce incriminating statements.[57]

Another post-*Edwards* case requiring the Supreme Court to assess the constitutionality of police questioning in extrajudicial settings was *Maine v. Moulton*.[58] The *Moulton* Court was concerned with the admissibility of extrajudicial statements obtained by the police through a codefendant of the suspect.[59] Colson, a codefendant of Moulton in an automobile theft, confessed to police officers and agreed to testify against Moulton at trial if no further charges were brought against Colson.[60] Colson agreed to

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55. *Id.* at 274. The Supreme Court distinguished the use of government informants in the context of the fourth and fifth amendments. *Id.* at 272. A suspect is not protected under the fourth amendment because the fourth amendment does not protect a party's belief that the party's statements will not be revealed by the person to whom the suspect confides. *Id.* Similarly, under the fifth amendment, the absence of compulsion prevents the suspect from claiming fifth amendment protection. *Id.* The Supreme Court indicated that the fourth and fifth amendment holdings are not relevant in the sixth amendment context. *Id. Cf.* Hoffa v. United States, 385 U.S. 293, 302 (1966) (maintaining that the fourth amendment does not protect a suspect's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it"); Illinois v. Perkins, 110 S. Ct. 2394, 2398 (1990) (holding that "*Miranda* was not meant to protect suspects from boasting about their criminal activities in front of their cellmates").

56. *Henry*, 447 U.S. at 274. The Court also noted that the conversations were facilitated because each cellmate shared a common plight and there was evidence that the informant had gained Henry's confidence since Henry had solicited the informant to participate in an escape plan. *Id.*

57. *Id.* Although the informant was told not to initiate the conversation with Henry, the Court rejected this argument, finding that, because the informant's payment was contingent on obtaining information, the government must have known that the informant would take steps to secure information against Henry. *Id.* at 270-71. *See* W. LAFAVE & J. ISRAEL, *supra* note 23, at 280 (describing the holding of the Supreme Court in *Henry*).

58. 474 U.S. 159 (1985).

59. *Id.* at 167-68.

60. *Id.* at 162-63. The police agreed not to bring any additional charges against Colson as long as the codefendant would cooperate in the prosecution of Moulton. *Id.* at 163. As a result of his cooperation with the authorities, Colson was sentenced to two years imprisonment and all but 15 days were suspended. *Id.* at 163 n.2.

wear a recording device at a meeting with Moulton, after the police had learned from tape recorded telephone conversations between Colson and Moulton that the two were planning a defense strategy for the upcoming trial.[61] At the meeting, Moulton made incriminating statements which were used to convict Moulton at trial.[62]

Moulton appealed the conviction on the grounds that admitting the statements into evidence violated his sixth amendment right to assistance of counsel.[63] On appeal, the Supreme Judicial Court of Maine[64] held that the statements made by Moulton to the confidential informant, Colson, were inadmissible under the sixth amendment because the State knew or should have known that Moulton would make incriminating statements regarding crimes to which charges were pending.[65]

On appeal, the United States Supreme Court held the statements inadmissable, affirming the holding of the Supreme Judicial Court of Maine.[66] The United States Supreme Court refused to distinguish *Massiah* and *Henry* from *Moulton* merely because the police initiated the questioning in *Massiah* and *Henry* while Moulton initiated the communication with the informant Colson.[67] The *Moulton* Court concluded that when the government created a situation where a suspect is likely to make incriminating statements without the presence of counsel, the suspect's sixth amendment

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61. *Id.* at 163-65. According to Colson, Moulton had proposed killing a state's witness. *Id.* at 162.

62. *Id.* at 165, 167. Moulton and Colson discussed creating false alibis, and Colson elicited other statements from Moulton relating to the theft of a truck. *Id.* at 165-66.

63. *Id.* at 167.

64. State v. Moulton, 481 A.2d. 155 (Me. 1984), *cert. granted*, 469 U.S. 1206 (1985).

65. *Moulton*, 474 U.S. at 168. The Supreme Judicial Court of Maine indicated that the statements could be used in the investigation or prosecution of charges in which adversarial proceedings had not begun. *Id.* Since the sixth amendment right to counsel had attached for the theft charges, the statements made to Colson by Moulton were inadmissible. *Id.*

66. *Id.* at 180.

67. *Id.* at 174. The Supreme Court indicated that the identity of the party who initiated the conversation was not controlling in either *Massiah* or *Henry*. *Id.* In *Henry*, the Court had found it irrelevant that in *Massiah*, the agent had to arrange the meeting between Massiah and his codefendant, while the agents in *Henry* already had an undercover informant in close proximity to the suspect. *Id.* at 175.

right to counsel is violated.[68] The Court found that Moulton was denied his sixth amendment right to counsel because the police concealed the fact that Colson was a government agent.[69]

Beginning with *Massiah*, the Supreme Court gradually extended the scope of the sixth amendment right to counsel to encompass proceedings outside of the trial setting.[70] The *Moulton* decision, which held that creating a situation which is likely to elicit incriminating statements from a suspect violates the sixth amendment, exemplifies the Court's greatest departure from the traditional protection afforded by the sixth amendment right to counsel.[71] Increasing the scope of protection of the sixth amendment to encompass extrajudicial settings created some confusion when the fifth and sixth amendment rights to counsel were considered in a single context.[72] As a result of this confusion, further elucidations by the Supreme Court were required in this area of constitutional criminal law.

C. *Setting the Stage for* McNeil

The Supreme Court attempted to clarify the scope of protection of the fifth and sixth amendments in *Michigan v. Jackson*[73] and *Arizona v. Roberson*.[74] In *Jackson*, the defendant, Jackson, requested and received counsel at his arraignment on charges for murder.[75] The following day, Jackson was questioned by police officers before having the opportunity to speak with his attorney.[76] After being given the *Miranda* warnings, Jackson waived his fifth

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68. *Id.* at 174.

69. *Id.* at 179-80.

70. *See supra* notes 44-49 and accompanying text (discussing the Supreme Court's holding in *Massiah*).

71. *See supra* notes 44-69 and accompanying text (examining the scope of the right to counsel afforded under the sixth amendment).

72. *See infra* notes 73-92 and accompanying text (analyzing the interplay between the fifth and sixth amendment rights to counsel and the difficulty the Supreme Court has encountered in defining these rights).

73. 475 U.S. 625 (1986).

74. 486 U.S. 675 (1988).

75. *Jackson*, 475 U.S. at 628.

76. *Id.*

amendment right to counsel.[77] The statements elicited from Jackson during the interrogation were admitted at trial and consequently, Jackson was convicted of murder and conspiracy to commit second-degree murder.[78]

On appeal, the United States Supreme Court was confronted with the issue of whether Jackson's waiver of the fifth amendment right to counsel constituted a valid waiver once the right to counsel had been invoked at the arraignment.[79] The Supreme Court held that once the suspect invoked the sixth amendment right to counsel, any subsequent waiver of that right to counsel is insufficient unless the accused initiates the questioning.[80] The *Jackson* Court indicated that the right to counsel originated from two sources: the fifth amendment right to counsel which protects against compelled self-incrimination during custodial interrogation, and the sixth amendment guarantee which provides counsel during post-arraignment confrontations.[81] In effect, the Supreme Court held that the *Edwards* rule, requiring a suspect to reinitiate questioning with the police once the fifth amendment right to counsel is invoked, would apply to the sixth amendment right to counsel as well.[82]

In *Jackson,* the State argued that the *Edwards* rule should not apply because the relevance of the legal principles underlying the fifth amendment is questionable in a sixth amendment context.[83]

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77. *Id.*

78. *Id.* at 627-28.

79. *Id.* at 630.

80. *Id.* at 636.

81. *Id.* at 629. The Court identified the fifth amendment right against self-incrimination and the sixth amendment right to counsel at post-arraignment interrogation by police as two sources for an accused's right to counsel. *Id.*

82. *Id.* at 632. *See* Edwards v. Arizona, 451 U.S. 477, 484-85 (1981) (requiring the police to discontinue custodial interrogation once the suspect requests the *Miranda* right to counsel unless the suspect reinitiates communications with the police officers). *See also supra* notes 27-43 and accompanying text (describing the Supreme Court's expansion on the *Miranda* decision through the creation of the *Edwards* rule).

83. *Jackson,* 475 U.S. at 631. The State contended that the *Edwards* rule applies to custodial interrogation under the fifth amendment, and that it would be improper to apply the *Edwards* rule to the sixth amendment because its relevance was not clear. *Id.* In addition, the State urged the inapplicability of the *Edwards* rule because there were factual and legal differences in the basis for fifth and sixth amendment claims, and the suspect had signed valid waivers of the right to counsel

The State also argued that a suspect's request for counsel at an arraignment may not be intended to encompass a request for counsel during custodial interrogation of the suspect.[84] The Supreme Court, however, was not persuaded by the State's arguments and found that the reasoning of *Edwards* was applicable in the sixth amendment context because a suspect's need for counsel is even greater following the suspect's request for counsel after formal charges have been filed.[85] The *Jackson* Court recognized that the sixth amendment right to counsel should be afforded at least as much protection as the fifth amendment right to counsel.[86] The Court reasoned that the sixth amendment right to counsel protects the accused at the initiation of adversarial criminal proceedings; therefore, the suspect must be provided counsel as a medium between the State and the suspect.[87]

Further, the Court refused to adopt the State's theory that Jackson's waiver of his *Miranda* right to counsel during police interrogation acted as a waiver of Jackson's sixth amendment right to counsel.[88] The Court indicated that once the suspect invokes the right to counsel under either the fifth or sixth amendment, simply readvising the suspect of the *Miranda* right to counsel and securing a waiver will not constitute a valid waiver.[89] Essentially,

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at the post-arraignment custodial interrogation. *Id.* at 630-31.

84. *Id.* at 632-33.

85. *Id.* at 631. The Court indicated that the State's argument that the *Edwards* rule should not apply to a sixth amendment claim did not appropriately address the "nature of the pretrial protections afforded by the sixth amendment." *Id.*

86. *Id.* at 632. The Court reiterated the importance of having the right to rely on counsel after the initiation of formal charges. *Id.* The Court stated that the importance of the constitutional right to the assistance of counsel prohibits the police from eliciting information from a suspect even though the techniques may have been proper had the suspect not invoked the suspect's right to counsel. *Id.*

87. *Id. See* Massiah v. United States, 377 U.S. 201, 205 (1964)(identifying a constitutional principle that a suspect is entitled to the assistance of counsel "during perhaps the most critical period of the proceedings . . . that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important [to] the defendants").

88. *Jackson*, 475 U.S. at 633. The State contended that the respondents waived their sixth amendment right to counsel since they made post-arraignment confessions after being advised of their *Miranda* rights. *Id.* at 635.

89. *Id.* at 635. The Court concluded that because written waivers are insufficient in a fifth amendment context, written waivers are insufficient to justify police initiated interrogations after the request for counsel in a sixth amendment context. *Id.* In order for a waiver to be valid, the suspect

the *Jackson* Court adopted the *Edwards* rule under the sixth amendment when interrogation occurs after a suspect has invoked the right to counsel.[90] Thus, the *Jackson* Court required a suspect to reinitiate communication with the police before a valid waiver of the suspect's sixth amendment right to counsel could be obtained.[91]

The Supreme Court's decision in *Jackson* was the first case in which principles underlying the fifth amendment right to counsel were applied to the sixth amendment. The application of fifth amendment principles in a sixth amendment context resulted in confusion among the lower courts as to the scope of protection provided by each of these amendments.[92] Ultimately adding to this confusion was the United States Supreme Court's decision in *Arizona v. Roberson.*[93] Although the *Roberson* Court decided an issue solely based on the fifth amendment right to counsel, *Roberson* laid the foundation for the Supreme Court's decision in *McNeil.*

In *Roberson,* the Supreme Court considered the issue of whether the *Edwards* rule precluded interrogation by police in the context of an investigation, once the fifth amendment right to

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must initiate the questioning prior to the police securing a waiver. *Id.* at 636.

90. *See id.* at 637, 639-40 (Rehnquist, J., dissenting) (stating that the *Edwards* rule only provided a second layer of protection to *Miranda,* and the *Jackson* decision had cut the *Edwards* rule loose from its "analytical moorings").

91. *Id.* at 635.

92. *See infra* notes 107-218 and accompanying text (discussing the Supreme Court's decision in *McNeil*). Legal scholars have indicated that the Supreme Court's decision in *Jackson* demonstrates the doctrinal confusion between the fifth and sixth amendments. Erickson, *supra* note 42, at 300. Justice Erickson of the Supreme Court of Colorado indicated that interrogation under the sixth amendment depends upon whether the police deliberately elicited information from the suspect, whereas interrogation under the fifth amendment is defined as express questioning or actions reasonably likely to elicit incriminating responses. *Id.* As a result, Justice Erickson has stated that the United States Supreme Court's decisions have lead to uncertainty in the area of fifth and sixth amendment interrogations and confessions. *Id. See, e.g.,* Moran v. Burbine, 475 U.S. 412, 420-34 (1986) (analyzing the sixth amendment right to counsel and the *Miranda* right to counsel and finding that the failure to inform a suspect that an attorney had attempted to contact the suspect at the police station did not invalidate confessions obtained from the defendant).

93. 486 U.S. 675 (1988).

counsel had been invoked for a separate offense.[94] In *Roberson*, the suspect was arrested at the scene of the crime and was advised of his *Miranda* right to counsel.[95] Roberson invoked his *Miranda* rights stating that he wished to speak with an attorney.[96] Three days later, however, Roberson was questioned regarding a separate offense by a different officer who was unaware Roberson had previously invoked his fifth amendment right to counsel for the first offense.[97] During the second interrogation, Roberson made incriminating statements regarding the first offense to which the *Miranda* right to counsel had attached.[98]

The trial court suppressed the statements elicited from Roberson during the second interrogation, and on appeal, the Arizona Court of Appeals affirmed.[99] The State contended that *Edwards* should only preclude police questioning regarding the offense for which the suspect invoked the *Miranda* right to counsel, and that the suspect's request for counsel should not apply in the context of a separate interrogation.[100]

On appeal, the Supreme Court held that once a suspect invokes the *Miranda* right to counsel, police interrogation must cease even though the suspect invokes the right to counsel with respect to a separate offense.[101] The Court based this decision on its prior

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94. *Id.* at 687. *See* Radek, *supra* note 35, at 685 (analyzing the Supreme Court's holding in *Roberson* and suggesting that the *Roberson* decision reflects the Court's effort to build on the *Miranda* decision rather than undercut *Miranda*).

95. *Roberson*, 486 U.S. at 678.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 678. The Arizona trial court based its decision on the Arizona Supreme Court's holding in *State v. Routhier*, 137 Ariz. 90, 97, 669 P.2d 68, 75 (1983). *Roberson*, 486 U.S. at 678. The Arizona Supreme Court held that *Edwards* still applied whether or not the defendant was interrogated about the same or a different offense. *Id.* n.2. The United States Supreme Court granted certiorari after the Arizona Supreme Court denied review. *Id.* at 678-79. Because state court decisions were in conflict, the Supreme Court granted review of the *Roberson* case in order to provide concrete guidelines. *Id.*

100. *Id.* at 682.

101. *Id.* at 687-88. The Supreme Court indicated that the same need to determine whether the accused has requested counsel exists regardless of who performs the interrogation and whether or not the interrogation concerns the same or a different offense. *Id.*

holdings in *Miranda* and *Edwards*.[102] The Court had noted in *Edwards* that it would be inconsistent with *Miranda* if the suspect could be reinterrogated after the suspect had asserted the right to counsel, since the suspect had expressed the inability to undergo police questioning without the presence of counsel.[103] The *Roberson* Court applied the same rationale by stating that it would be inconsistent with *Miranda* and *Edwards* to allow a suspect to be interrogated regarding a separate offense once the suspect invokes *Miranda*.[104]

The Court in *Roberson* reasoned that if a suspect felt unable to adequately safeguard the right against self-incrimination during police interrogation regarding the charged offense, the inability to safeguard this right would not change if the police questioned the suspect regarding a separate offense.[105] Based on this reasoning, the Court rejected the State's argument that the *Edwards* rule should not apply in the context of a separate investigation.[106] The Supreme Court's holding in *Roberson* provided a "bright-line" rule regarding the scope of protection of the *Miranda-Edwards* guarantee once a suspect invokes the fifth amendment right to counsel. However, when lower courts began applying the Supreme Court's decision in *Roberson* and *Jackson*, confusion arose and the stage was set for the Court's decision in *McNeil*.

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102. *Id.* at 680. *See supra* notes 21-26 and accompanying text *and supra* notes 27-43 and accompanying text (discussing the Supreme Court's holding in *Miranda* and *Edwards*, respectively).

103. *Roberson*, 486 U.S. at 680 (citing Edwards v. Arizona, 451 U.S. 477, 485 (1981)).

104. *Id.* The Court stated that *Edwards* and *Miranda* provided unequivocal guidelines to law enforcement, and the Supreme Court in *Roberson* desired to maintain these clear and unequivocal guidelines. *Id.* at 681-82.

105. *Id.* at 681. *See* W. LAFAVE & J. ISRAEL, *supra* note 23, at 314 (discussing the *Roberson* majority's emphasis on the importance of maintaining *Edwards* as a bright line rule in cases where the suspect requests an attorney).

106. *Roberson*, 486 U.S. at 682-83. The State attempted to use the Supreme Court's holding in *Michigan v. Mosley*, 423 U.S. 96, 103-04 (1975), where the Court had stated that once the suspect cuts off questioning, the questioning could be resumed after a significant period of time. *Mosley*, 423 U.S. at 106. The *Roberson* Court distinguished *Mosley* since the decision to cut off questioning is different than requesting an attorney to be present during questioning. *Roberson*, 486 U.S. at 683.

II. THE CASE

A. Factual and Procedural History

In *McNeil v. Wisconsin*,[107] Paul McNeil was arrested in Omaha, Nebraska in May 1987, pursuant to a warrant charging McNeil with armed robbery in West Allis, Wisconsin.[108] After his arrest the police sought to question McNeil, and consequently advised him of his *Miranda* rights.[109] McNeil refused to speak to the officers but he did not invoke his *Miranda* right to counsel.[110] McNeil was brought before a Milwaukee County Court Commissioner where bail was set on the armed robbery charge.[111] At the bail hearing, McNeil was accompanied by court appointed counsel.[112]

During that same evening, Detective Butts of the Milwaukee County Sheriff's Department questioned McNeil regarding offenses other than the armed robbery charge.[113] Detective Butts was investigating an attempted murder and an armed burglary in the town of Caledonia, Wisconsin.[114] McNeil waived his *Miranda* rights and denied being involved in the Caledonia crimes.[115] Two days later, McNeil was questioned by the same officer regarding the Caledonia offenses.[116] Again, McNeil waived his *Miranda* rights and signed a waiver form.[117] During this second period of questioning, McNeil admitted his involvement in the Caledonia

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107. 111 S. Ct. 2204 (1991).

108. *Id.* at 2206.

109. *Id.*

110. *Id.* Although McNeil refused to answer the police officers' questions, McNeil never expressly stated that he wanted to speak to counsel during his initial confrontation with the police. *Id.*

111. *Id.*

112. *Id.* McNeil's accompaniment by court appointed counsel triggered the sixth amendment protection afforded under *Massiah* and its progeny with respect to the West Allis armed robbery. *Id.* at 2207. *See supra* notes 44-106 and accompanying text (illustrating the protection afforded a suspect by the sixth amendment once the right to counsel has attached).

113. *McNeil*, 111 S. Ct. at 2206.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 2207.

crimes and implicated two other men, Willie Pope and Lloyd Crowley.[118] Subsequently, McNeil signed a typed document memorializing the statements made to the police.[119]

Pursuant to McNeil's statements, the police questioned Willie Pope.[120] However, Pope convinced the police that he was not involved in the Caledonia crimes.[121] As a result of Pope's denial, the police questioned McNeil a third time.[122] Prior to the third interrogation, McNeil again waived his *Miranda* rights and signed another waiver form.[123] During the questioning, McNeil stated that he had lied about Pope's involvement in the crimes and made other statements implicating himself in the Caledonia crimes.[124] The following day, McNeil was charged with the Caledonia offenses.[125] McNeil's pre-trial motion to suppress the statements made to the officers was denied.[126] Subsequently, McNeil was convicted and sentenced to sixty years in prison for the Caledonia crimes.[127]

McNeil appealed to the Wisconsin Court of Appeals claiming that his appearance with counsel at the bail hearing for the West Allis armed robbery invoked his *Miranda* right to counsel.[128] As a result, McNeil contended that his subsequent waiver of *Miranda* was invalid, thus rendering inadmissible at trial McNeil's statements regarding the Caledonia crimes.[129] Because it had never been addressed, the court of appeals certified to the Supreme Court of Wisconsin the issue of whether an accused's request for

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118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* The questioning was again performed by Detective Butts and Caledonia police officers. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* McNeil was convicted on charges of second-degree murder, attempted first-degree murder, and armed robbery. *Id.*
128. *Id.*
129. *Id.*

counsel at an initial appearance constitutes an invocation of the fifth amendment right to counsel under *Miranda*.[130]

The Wisconsin Supreme Court answered in the negative; the invocation of McNeil's sixth amendment right to counsel did not constitute an invocation of his fifth amendment right to counsel.[131] Therefore, in the absence of a fifth amendment invocation, the *Edwards* rule did not apply and the police were not precluded from questioning the defendant.[132] The Wisconsin Supreme Court recognized that the *Edwards* rule applied to both the fifth and sixth amendment under the Court's decision in *Michigan v. Jackson*.[133] However, the Supreme Court of Wisconsin contrasted the fifth and sixth amendment, noting that the sixth amendment does not trigger the *Edwards* rule with respect to interrogation regarding uncharged offenses.[134] The court indicated that the fifth amendment right to counsel only attaches during custodial interrogation and does not attend the suspect under all circumstances.[135] Determining that the *Edwards* rule does not affect interrogation on uncharged offenses, the Supreme Court of Wisconsin reasoned that the sixth amendment right to counsel had been invoked for the West Allis crimes but not for the uncharged Caledonia crimes.[136] McNeil appealed to the Supreme Court of the United States to determine whether his invocation of the sixth amendment right to counsel during an initial appearance constituted an invocation of his *Miranda* right to counsel with regard to future police interrogation on uncharged offenses.[137]

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130. *Id.*

131. State v. McNeil, 155 Wis. 2d 24, 28-29, 454 N.W.2d 742, 743, *cert. granted*, 111 S. Ct. 340 (1990).

132. *Id.* at 36, 454 N.W. 2d at 746.

133. *Id.* at 33-34, 454 N.W. 2d at 745. *See supra* notes 73-91 and accompanying text (discussing Michigan v. Jackson, 475 U.S. 625 (1986)).

134. *Id.* at 34, 454 N.W. 2d at 745-46.

135. *Id.* at 36, 454 N.W. 2d at 746. Although McNeil was subjected to custodial interrogation, he waived the right to the presence of counsel. *Id.* at 45, 454 N.W. 2d at 750-51.

136. *Id.* at 36, 454 N.W. 2d at 746.

137. *McNeil*, 111 S. Ct. at 2207.

B. The Majority Opinion

In an opinion by Justice Scalia, the United States Supreme Court affirmed the decision of the Wisconsin Supreme Court.[138] The majority held that the invocation of the sixth amendment right to counsel in a judicial proceeding does not automatically invoke the fifth amendment right to counsel precluding police interrogation.[139] In reaching its conclusion, the Court in *McNeil* distinguished the fifth and sixth amendments by labeling the sixth amendment right to counsel as "offense specific" and the fifth amendment right as "non-offense specific."[140] Having found the sixth amendment right to counsel to be offense specific, the majority conceded that there could have been no further questioning of McNeil regarding the West Allis armed robbery without the presence of counsel.[141] The *McNeil* Court stated that the offense specific nature of the sixth amendment means an accused cannot invoke sixth amendment protection for all future prosecutions.[142] Rather, the sixth amendment right to counsel can only be invoked once an adversarial judicial proceeding has been initiated.[143] Applying this analysis to the facts of *McNeil*, the majority concluded that since McNeil had not been formally charged with the Caledonia crimes, he could not invoke his sixth amendment right to counsel and the statements McNeil made to the

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138. *Id.* at 2206. Chief Justice Rehnquist and Justices White, Souter and O'Connor joined Justice Scalia in his opinion. *Id.* Justice Kennedy concurred separately. *Id.* at 2211. (Kennedy, J., concurring). Justices Stevens, Marshall and Blackmun dissented. *Id.* at 2212. (Stevens, J., dissenting).

139. *Id.* at 2208.

140. *Id. McNeil* is the first Supreme Court decision in which the Court labeled the sixth amendment right to counsel and the fifth amendment right to counsel as "offense specific" and "non-offense specific" respectively. *Id.* The term "offense specific" simply means the sixth amendment right to counsel only applies to charges formally brought and as a result, any incriminatory statements made by the suspect regarding other crimes are admissible. *Id.*

141. *Id.* at 2207. *See supra* notes 73-92 and accompanying text (analyzing the Supreme Court's holding in *Michigan v. Jackson* that once the right to counsel is invoked, subsequent waivers to police initiated questioning are invalid).

142. *McNeil*, 111 S. Ct. at 2207.

143. *Id. See id.* (quoting United States v. Gouveia, 467 U.S. 180, 188 (1984)) (stating that adversarial proceeding begins "at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information or arraignment").

police regarding the Caledonia offenses were not barred by the sixth amendment.[144]

However, the Court recognized that the fifth amendment right to counsel under *Miranda v. Arizona* is very different from the sixth amendment right to counsel.[145] Under the *Miranda* decision, the Supreme Court developed a number of prophylactic rights designed to protect a suspect during custodial interrogation.[146] The *McNeil* Court recognized that *Edwards v. Arizona*[147] had broadened *Miranda* by adding another prophylactic layer of protection which requires that once the suspect invokes the *Miranda* right to counsel, all questioning must cease and the suspect may not be approached for further questioning until counsel has been made available.[148] The majority stated that, unlike the sixth amendment which provides the accused the right to the presence of counsel during police questioning for the crime charged, the fifth amendment protection afforded by the *Edwards* rule is not offense specific and, once invoked, precludes police questioning regarding all offenses.[149] Therefore, Justice Scalia's opinion indicated that once the *Miranda* right to counsel is

144. *Id.* at 2208. The majority supported its position by citing *Maine v. Moulton*, 474 U.S. 159, 179-80 (1985), stating that the failure to allow the police to perform custodial questioning with regard to other crimes would frustrate the public's interest in the investigation of criminal activities. *McNeil*, 111 S. Ct. at 2208. The *Moulton* Court illustrated the importance of protecting a suspect's right to counsel once the sixth amendment is invoked. *Moulton*, 474 U.S. at 178-80. "To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*." *Id.* at 180. Contrary to this point, the *Moulton* Court indicated that evidence for other crimes should not be excluded simply because other charges were pending, as this would frustrate the police's ability to investigate criminal activity. *Id.*

145. *McNeil*, 111 S. Ct. at 2208. The Court indicated that the purpose of the sixth amendment right to counsel was to protect the unaided laymen at trial whereas the fifth amendment right to counsel provides the assistance of counsel at police custodial interrogation. *Id.* at 2209. The Court relied on this distinction in its labeling of the sixth amendment as "offense specific" and the fifth amendment right to counsel as "non-offense specific". *Id.* at 2208.

146. *Id. See supra* notes 21-25 and accompanying text (outlining the prophylactic protections afforded under the *Miranda* decision).

147. 451 U.S. 477(1981). *See supra* notes 27-43 and accompanying text (discussing the Supreme Court of the United States' holding in *Edwards*).

148. *McNeil*, 111 S. Ct. at 2208.

149. *Id.*

invoked, the suspect may not be questioned regarding any offense.[150]

In distinguishing the fifth and sixth amendment right to counsel, the majority in *McNeil* discussed the different theories underlying each right.[151] According to the Court, "'[t]he purpose of the Sixth Amendment counsel guarantee--and hence the purpose of invoking it--is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, after 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime.'"[152] In contrast, "'the purpose of the *Miranda-Edwards* guarantee--and hence the purpose of invoking it--is to protect quite a different interest: the suspect's desire 'to deal with the police only through counsel.'"[153] The majority determined that the *Miranda-Edwards* guarantee is broader than the sixth amendment right to counsel with respect to custodial interrogation: the *Miranda-Edwards* guarantee relates to questioning regarding *any* suspected crime regardless of whether an adversary proceeding has been instituted for that crime.[154] However, in another respect the fifth amendment right is narrower than the sixth amendment right because the *Miranda* right only applies to custodial interrogation.[155]

Justice Scalia's opinion stated that invoking the sixth amendment right to counsel does not invoke the *Miranda-Edwards* interest.[156] The majority indicated that a suspect who has invoked the sixth amendment right to counsel may be willing to discuss various matters with the police without the assistance of counsel.[157] However, if the subject of police questioning is the

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150. *Id.* Any statement obtained by an officer after the suspect invokes the *Miranda* right to counsel will be held to be inadmissable even if the suspect executes a waiver. *Id.* The Court deemed the statements inadmissable in order to prevent "police from badgering a defendant into waiving his previously asserted *Miranda* rights." *Id.* (quoting Michigan v. Harvey, 494 U.S. 344, 350 (1990)).

151. *McNeil*, 111 S. Ct. at 2208-09.

152. *Id.* (citing United States v. Gouveia, 467 U.S. 180, 189 (1984)).

153. *Id.* at 2209 (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

matter under prosecution, the suspect may not be willing to speak to the police.[158] The Court premised this distinction on the rationale that the suspect's invocation of the fifth amendment right to counsel indicates a belief that the suspect is unable to deal with police interrogation regarding any offense without the presence of counsel.[159]

Contrary to its position on the fifth amendment right to counsel, the majority concluded that a suspect's request for the assistance of counsel at adversarial proceedings under the sixth amendment is no indication that the suspect desires counsel to be present during police questioning regarding other affairs.[160] In order for the *Edwards* rule to apply, a suspect must expressly ask for the assistance of counsel during police custodial interrogation.[161] As a result, the Court stated that the request for counsel at a bail hearing does not constitute a request for the presence of counsel during custodial interrogation.[162]

The *McNeil* majority indicated that the Supreme Court's holding in *Michigan v. Jackson* also supports the fifth and sixth amendment distinction.[163] *Jackson* held that the invocation of the right to counsel under the sixth amendment precludes the admission of subsequent police initiated custodial questioning.[164] The *McNeil* Court emphasized that the holding in *Jackson* rejects the

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158. *Id.* The Court noted that suspects are often willing to speak to officers outside an adversarial setting since suspects often feel that, by suggesting their innocence through unassisted and open conversation with the authorities, they can avoid having the State bring additional charges. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* The majority stated that the right to counsel must be asserted when "the government seeks to take the action they protect against." *Id.* at 2211 n.3. The majority also indicated that the Court has never allowed a suspect to invoke the *Miranda* right to counsel outside of custodial interrogation. *Id.*

162. *Id.* at 2209. In order for the *Edwards-Miranda* rule to apply, the suspect must express a desire for the assistance of counsel during interrogation by police. *Id.* However, merely requesting an attorney during a bail hearing will not satisfy this requirement because of the absence of police custodial interrogation. *Id.* The majority stated: "Assuming, however, that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle of our decisions will not have substantial consequences is no reason to abandon the principle." *Id.* at 2211 n.3.

163. *Id.* at 2209. *See supra* notes 73-91 and accompanying text (discussing Michigan v. Jackson, 475 U.S. 625 (1986)).

164. *Jackson*, 475 U.S. at 635. *See McNeil*, 111 S. Ct. at 2209 (reiterating the *Jackson* holding).

contention that the invocation of the sixth amendment right to counsel also triggers the *Edwards* guarantee.[165] When a suspect invokes the sixth amendment right to counsel, the suspect is not expressing the desire to have counsel present during custodial interrogation.[166] If the foregoing contention were true, then the Court would not have had to create a new test in *Jackson*.[167] Instead, the suspect would merely have to invoke the *Miranda-Edwards* guarantee to the right to counsel during police-custodial interrogation.[168] As a result, the police officers would be entirely precluded from questioning the suspect regarding any offense because of the invocation of *Edwards*.[169]

The majority also examined whether, as a matter of policy, the invocation of the sixth amendment right to counsel should invoke the *Miranda* right to counsel.[170] In weighing this policy consideration, Justice Scalia intimated that the Court may not be empowered under the Constitution to find that an assertion of the sixth amendment right to counsel impliedly invokes the *Miranda* right to counsel.[171] Furthermore, assuming the Court did have the power, Justice Scalia stated that exercising such power would be unwise.[172] The majority indicated that if the suspect does not wish to speak to the authorities without the presence of counsel, the suspect should request the presence of counsel once the police read the suspect the *Miranda* rights.[173] Moreover, the majority determined that the effectiveness of law enforcement would be impeded if the Supreme Court were to hold that invoking the sixth amendment right to counsel also includes an assertion of the *Miranda* right to counsel.[174] In turn, the Court stated, suspects in

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165. *Id.* at 2209-10.
166. *Id.*
167. *Id.* at 2210. The test created in *Jackson* was that a the court must find that the "*Edwards* rule" is satisfied before a suspect may be questioned by police officers. *Jackson*, 475 U.S. at 636.
168. *McNeil*, 111 S. Ct. at 2210.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*

custody would be unapproachable by the police if the police wanted to question a suspect regarding other crimes.[175] The *McNeil* majority concluded that admissions of guilt under a waiver of *Miranda* are essential to society's interest in punishing those who violate the law.[176]

The *McNeil* Court was unwilling to rule in favor of the defendant in order to provide police with a "clear and unequivocal" guideline as urged by McNeil.[177] Instead, the majority reasoned that if the police desire clear and unequivocal guidelines, the police should adopt a policy of not questioning a suspect in custody once the suspect has requested counsel.[178] Moreover, Justice Scalia stated that adopting such a rule would not be consistent with the fifth and sixth amendments and would do more harm than good.[179] The Court declined to adopt a bright line rule, and held that the invocation of the sixth amendment right to counsel does not automatically invoke the suspect's *Miranda* right to counsel.[180]

C. *Concurring Opinion by Justice Kennedy*

Justice Kennedy wrote a brief concurring opinion joining the majority opinion in all respects.[181] Contrary to the majority, Justice Kennedy proffered that the petitioner could have been questioned regarding the Caledonia crimes even if his fifth amendment right to counsel regarding the West Allis armed robbery had been invoked.[182] By characterizing the protection

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175. *Id.*

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

177. *Id.* at 2211.

178. *Id.* Although, the Court stated it prefers clear and unequivocal judicial guidelines, the majority emphasized that such rules should only be established if they "guide sensibly and in a direction [the Court is] authorized to go." *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 2211 (Kennedy, J., concurring).

182. *Id.* (Kennedy, J., concurring). In contrast, the majority indicated that *Edwards* would have precluded the police from questioning McNeil regarding the Caledonia crimes. *Compare id.* at 2211 (Kennedy, J., concurring) *with id.* at 2208 (Justice Kennedy calling for the alignment of the fifth and

By characterizing the protection afforded under the Supreme Court's decision in *Edwards* as "extraordinary," Justice Kennedy suggested limiting *Edwards* to a particular investigation.[183] Justice Kennedy advocated that restricting the guarantee under *Edwards* to a particular investigation would not increase the number of instances where confessions were obtained through wearing down the will of the suspect.[184] Justice Kennedy indicated a need for alignment between the fifth and sixth amendment in order to give uniform and workable guidelines to the criminal justice system.[185]

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sixth amendment while the majority in *McNeil* labeled the fifth amendment as "non-offense specific" and the sixth amendment as "offense specific").

183. *Id.* at 2211 (Kennedy, J., concurring). *Compare* McNeil v. Wisconsin, 111 S. Ct. 2204, 2211 (1991) *with* Arizona v. Roberson, 486 U.S. 675, 688-89 (1988) (concurring in *McNeil* and dissenting in *Roberson*, Justice Kennedy maintains that the *Edwards* rule should not be extended to include separate and independent investigations). In a dissenting opinion joined by Chief Justice Rehnquist, Justice Kennedy, in *Roberson*, identified *Edwards* as a "rule" and not a "constitutional command." *Roberson*, 486 U.S. at 688 (Kennedy, J., dissenting). Justice Kennedy stated the majority's holding in *Roberson*, that the *Miranda-Edwards* protection extends to all custodial interrogations by police officers once the fifth amendment right to counsel is invoked, does not protect the rights of suspects and serves only to frustrate police investigative efforts. *Id.* at 688-89 (Kennedy, J., dissenting). In the *Roberson* dissent, Justice Kennedy described the extension of *Edwards* to separate investigations as "unwarranted." *Id.* at 689 (Kennedy, J., dissenting). Kennedy indicated that the *Edwards* rule "was in effect a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers in the manner in which the defendant in *Edwards* was." *Id.* at 690 (Kennedy, J., dissenting) (quoting Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983)). Justice Kennedy stated that there is little chance of badgering a suspect into submission when the custodial interrogation concerns a separate offense. *Roberson*, 486 U.S. at 690 (Kennedy, J., dissenting). "Unless there are so many separate investigations that fresh teams of police are regularly turning up to question the suspect, the danger of badgering is minimal, and insufficient to justify a rigid per se rule." *Id.* (Kennedy, J., dissenting). Although the majority in *Roberson* argued that a suspect may believe his right to counsel is "fictitious" if the suspect is required to assert the *Miranda* right to counsel a second time, Justice Kennedy deemed this argument ineffectual. *Id.* (Kennedy, J., dissenting). "The suspect, having observed that his earlier invocation of rights was effective in terminating questioning and having been advised that further questioning may not relate to that crime, would understand that he may invoke his rights again with respect to the new investigation, and so terminate questioning regarding that investigation as well." *Id.* at 690-91 (Kennedy, J., dissenting).

184. *McNeil*, 111 S. Ct. at 2211 (Kennedy, J., concurring).

185. *Id.* (Kennedy, J., concurring). Justice Kennedy called for the alignment of the fifth and sixth amendment, whereas the majority clearly indicated that the sixth amendment is "offense specific" and the fifth amendment is "non-offense specific." *Id.* (Kennedy, J., concurring).

D. The Dissenting Opinion

In a dissenting opinion, Justice Stevens, joined by Justices Marshall and Blackmun, challenged the majority's characterization of the sixth amendment right to counsel as "offense specific."[186] The dissent disagreed with the majority's offense specific characterization of the sixth amendment because the dissent was concerned that such characterization would generate confusion in the law regarding the attorney-client privilege.[187] Moreover, the dissent stated that the majority's decision reflected a preference for an inquisitorial system of justice rather than an adversarial system, since the majority viewed the defense attorney as an impediment in the legal system.[188]

The dissent posited that if McNeil had invoked his fifth amendment right to counsel under *Miranda* in dealing with custodial interrogation, the majority's characterization of the sixth amendment as offense specific would collapse.[189] The dissent asserted that the basis of the majority's decision was that McNeil failed to make a statement at the preliminary hearing which expressed his desire to have an attorney present during custodial interrogation.[190] The dissent predicted that competent defense counsel will automatically invoke the fifth amendment right to counsel in order to obviate the holding in *McNeil* since invoking *Miranda* at the initial court hearing will prevent the very

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186. *Id.* at 2212 (Stevens, J., dissenting).

187. *Id.* (Stevens, J., dissenting).

188. *Id.* (Stevens, J., dissenting). The majority stated that the presence of counsel does not make a system adversarial rather than inquisitorial. *Id.* at 2210 n.2. Rather, the presence of the judge deciding a case based on the arguments presented by both parties is representative of an adversarial system. *Id.* The majority indicated that the criminal justice system "has always been inquisitorial at the investigative stage." *Id.*

189. *Id.* at 2212 (Stevens, J., dissenting). The majority indicated that the Supreme Court has never held that the *Miranda* right to counsel can be anticipatorily invoked. *Id.* at 2211 n.3. The majority proposed that allowing a suspect to anticipatorily invoke the *Miranda* right to counsel would enable the suspect to invoke the right to counsel by a letter prior to arrest. *Id.* However, the majority argued that the mere fact that an assertion of the *Miranda* right to counsel prevents future interrogation does not mean that a suspect can anticipatorily invoke this right outside of custodial interrogation. *Id.*

190. *Id.* at 2212 (Stevens, J., dissenting).

questioning which occurred in *McNeil*.[191] As a result, the dissent argued that the *McNeil* holding would have little effect on police practices since the majority's holding can be circumvented.[192]

The dissent also attacked the majority's decision as being contrary to case precedent.[193] Justice Stevens interpreted the Supreme Court's decision in *Michigan v. Jackson*[194] as holding that the request for counsel should be treated broadly in favor of the constitutional right, and held that the invocation of the sixth amendment right to counsel constitutes an invocation of right to counsel at police-initiated interrogation.[195] Instead, the dissent asserted that the majority took a narrow view in *McNeil* by construing that ambiguous requests for counsel will not invoke the fifth amendment right to counsel.[196]

In addition, the dissent noted that, while judges and lawyers may understand the differences between the fifth and sixth amendments, the layman does not.[197] The dissent indicated that a suspect would not know that invoking the right to counsel under the sixth amendment at an initial appearance would only apply to the offense charged and not to questions regarding any other offense.[198] The *McNeil* dissent contended that the accused's request for an attorney under the sixth amendment reflects the

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191. *Id.* (Stevens, J., dissenting). The dissent argued that counsel for the defendant will merely have to invoke the right to counsel for all police interrogations as a matter of practice. *Id.* (Stevens, J., dissenting). Once a suspect invokes the right to counsel regarding custodial interrogation, the police will be unable to interrogate the suspect until counsel is provided. *Id.* (Stevens, J., dissenting). The majority indicated that "assuming . . . that an assertion at arraignment would be effective, and would be routinely made, the mere fact that adherence to the principle or our decisions will not have substantial consequences is no reason to abandon that principle." *Id.* at 2211 n.3. The majority concluded by stating that it would be intolerable to make a suspect unapproachable even when the suspect has not objected to custodial interrogation. *Id.*

192. *Id.* at 2212 (Stevens, J., dissenting).

193. *Id.* (Stevens, J., dissenting).

194. 475 U.S. 625 (1986). *See supra* notes 73-92 and accompanying text (discussing the Court's holding in *Jackson*).

195. *McNeil*, 111 S. Ct. at 2212 (Stevens, J., dissenting) (citing Michigan v. Jackson, 475 U.S. 625 (1986)). The dissent maintained if there are doubts as to whether the suspect made a valid waiver of his rights, then a court should give deference to the defendant in order to protect the constitutional rights of the suspect. *Id.* (Stevens, J., dissenting).

196. *Id.* (Stevens, J., dissenting).

197. *Id.* at 2213 (Stevens, J., dissenting) (quoting *Jackson*, 475 U.S. at 633 n.7).

198. *Id.* (Stevens, J., dissenting).

belief that the suspect cannot deal with adversaries alone.[199] Therefore, the suspect's invocation of the sixth amendment right to counsel should constitute an invocation of the fifth amendment right to counsel.[200]

The dissent in *McNeil* also attacked the characterization of the sixth amendment right to counsel as "offense specific."[201] The dissent asserted that this characterization ignores the foundations of the broadly construed attorney-client privilege through narrowly construing the sixth amendment right to counsel.[202] Justice Stevens indicated that the scope of the attorney-client privilege is "as broad as the subject matter that might reasonably be encompassed by negotiations for a plea bargain or the contents of a presentence investigation report."[203] By narrowing the sixth amendment to apply only to the crime charged, the dissent argued that the majority holding is "unrealistic and invidious."[204]

In addition, the dissent expressed concern over the possible confusion which may result from the majority's holding in *McNeil*.[205] The dissent argued that, in order to analyze the legal issues, the majority assumed that the police questioning regarding the Caledonia crimes was unrelated to the investigation of the West Allis charge.[206] The dissent was concerned that, by making this assumption, the majority had given no guidelines to the lower courts regarding the boundaries of the offense specific

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199. *Id.* (Stevens, J., dissenting). The dissent disagreed with the majority's view that a suspect's request for counsel to defend against a particular charge implies that the suspect wishes to have counsel present during custodial interrogation for only that particular charge. *Id.* at 2213 (Stevens, J., dissenting). The dissent suggested that the request for counsel does not mean that the suspect does not wish to have counsel present for interrogation on other charges. *Id.* (Stevens, J., dissenting).

200. *Id.* (Stevens, J., dissenting).

201. *Id.* (Stevens, J., dissenting).

202. *Id.* (Stevens, J., dissenting). Traditionally, the scope of the attorney-client privilege has been very broad; therefore, a narrow construction of when the suspect will be afforded the right to counsel is improper. *Id.* (Stevens, J., dissenting).

203. *Id.* (Stevens, J., dissenting).

204. *Id.* (Stevens, J., dissenting). The dissent found this narrow view of the attorney-client privilege improper, particularly because McNeil was offered favorable treatment. *Id.* (Stevens, J., dissenting).

205. *Id.* at 2214 (Stevens, J., dissenting).

206. *Id.* (Stevens, J., dissenting).

limitation.[207] The *McNeil* dissent deemed that the majority decision would encourage police subjectivity regarding which charges may be brought against a suspect.[208] The dissent posited that the police will be selective about which charges are brought so that they may preserve the opportunity of interrogating the suspect on other charges.[209] The dissent asserted that the majority decision will dim the bright-line tests espoused in *Edwards* and *Jackson* since the *McNeil* majority failed to outline the boundaries of the offense specific limitation.[210]

Finally, according to the dissent, the majority's fears of impeding police investigations were unfounded.[211] The dissent stated that the majority's holding will affect very few cases.[212] Observing that a contrary holding would not make police interrogation of suspects impossible, the dissent contended that a contrary holding would ensure that the suspect's statements were voluntary, as a valid waiver would be required before police could interrogate the suspect.[213] Also, the dissent indicated that a contrary rule would be consistent with the adversarial nature of the justice system.[214] The dissent posited that the adversarial system can only function effectively if the adversaries communicate

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207. *Id.* (Stevens, J., dissenting).

208. *Id.* (Stevens, J., dissenting).

209. *Id.* (Stevens, J., dissenting).

210. *Id.* (Stevens, J., dissenting). *See supra* notes 27-43 and accompanying text (describing the bright-line rule provided by the Supreme Court's decision in *Edwards*); *supra* notes 73-91 and accompanying text (illustrating the *Jackson* Court's desire to provide clear and unequivocal guidelines to law enforcement as in *Miranda* and *Edwards*).

211. *McNeil*, 111 S. Ct. at 2214 (Stevens, J., dissenting).

212. *Id.* (Stevens, J., dissenting). *See infra* notes 219-231 and accompanying text (discussing the methods of circumventing the majority's opinion in *McNeil*).

213. *McNeil*, 111 S. Ct. at 2214 (Stevens, J., dissenting). The dissent noted that prior decisions have been concerned with protecting individuals in the context of custodial interrogation. *Id.* (Stevens, J., dissenting). The dissent contended that the majority abandoned the position that an adversarial system of justice can function effectively only when the opposing parties communicate with one another through counsel in order to protect laypersons from more skillful and experienced professionals. *Id.* at 2213 (Stevens, J., dissenting). The dissent pointed to *Miranda v. Arizona*, 384 U.S. 436, 447 (1966), *Edwards v. Arizona*, 451 U.S. 476, 484 (1981), *Arizona v. Roberson*, 486 U.S. 675, 681 (1988), and *Michigan v. Mosley*, 423 U.S. 96, 110 (1975) to support the position that counsel is necessary in order to protect suspects during custodial interrogation. *Id.* at 2212 (Stevens, J., dissenting).

214. *Id.* at 2214 (Stevens, J., dissenting).

through counsel.[215] Therefore, allowing laypersons to be questioned by experts without the assistance of counsel would create an inquisitorial, rather than adversarial, system.[216] The dissent concluded that the majority's holding failed to recognize the lawyer as an aid to the understanding of constitutional rights.[217] Rather, the dissent attacked the majority as viewing the lawyer as a obstacle to the prosecution of criminals.[218]

III. LEGAL RAMIFICATIONS

A. *Is* McNeil *an Empty Decision or a Sleeping Giant?*

Justice Stevens' dissent in *McNeil* suggested that the *McNeil* decision may have little effect on future cases.[219] The dissent indicated that once the suspect has requested counsel under the sixth amendment, as a matter of routine, competent defense attorneys will merely advise the accused to invoke the *Miranda* right to counsel regarding future police interrogation.[220] As a result, the defense can virtually nullify the Court's decision in *McNeil* and frustrate the underlying rationale of the majority's decision.[221]

A primary concern of the *McNeil* majority was to avoid impeding the effectiveness of the police by making suspects unapproachable regarding other crimes.[222] However, the nature of the decision in *McNeil* could result in the resurfacing of these concerns. Since defense counsel can circumvent the offense specific classification of the sixth amendment merely by having the suspect

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215. *Id.* (Stevens, J., dissenting).

216. *Id.* (Stevens, J., dissenting). The dissent stated that the view taken by the majority will not prevent the danger of compulsion during interrogation. *Id.* (Stevens, J., dissenting).

217. *Id.* (Stevens, J., dissenting).

218. *Id.* (Stevens, J., dissenting).

219. *Id.* at 2212 (Stevens, J., dissenting).

220. *Id.* (Stevens, J., dissenting).

221. *Id.* (Stevens, J., dissenting).

222. *Id.* at 2210. The majority attempted to alleviate this concern through holding that a suspect's invocation of his sixth amendment right to counsel did not constitute an invocation of the *Miranda* right to counsel. *Id.*

invoke the *Miranda* right to counsel, the police would be precluded from questioning the subject regarding any offense.[223] As a result, the Supreme Court's decision in *McNeil* may require the Court to revisit *McNeil* as well as other decisions in the *Miranda* progeny.[224] If a standard practice of invoking the fifth amendment right to counsel develops as a result of *McNeil,* two possible courses of action can be taken by the Supreme Court to preserve the holding in *McNeil.*

First, the Supreme Court may refuse to recognize a suspect's ability to anticipatorily invoke the *Miranda* right to counsel. The majority alluded that a preliminary hearing would not amount to custodial interrogation enabling the suspect to invoke the fifth amendment right to counsel.[225] Logically, if a suspect could invoke the fifth amendment right to counsel during a preliminary hearing and in the absence of custodial interrogation, a suspect could invoke the right to counsel in a multitude of settings where custodial interrogation is not present.[226] By requiring the presence of custodial interrogation for a suspect to invoke the *Miranda* right to counsel, the Supreme Court can preserve the holding in *McNeil* without affecting prior case precedent.

Secondly, the Court could preserve the holding in *McNeil* while protecting police custodial interrogation in the *McNeil* context through redefining principles announced in past fifth amendment case precedent. A natural progression of the Supreme Court would

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223. *See supra* notes 27-43 and accompanying text (indicating that the Court's holding in *Edwards* requires the police to cease all questioning once the *Miranda* right to counsel is invoked unless the suspect initiates the questioning).

224. The final paragraph of the majority opinion in *McNeil* stated: "The Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added. We decline to add another story to *Miranda.*" *McNeil,* 111 S. Ct. at 2211. Although the Supreme Court has noted its reluctance to expand on the *Miranda* decision, the Court may have to address decisions in the *Miranda* progeny in order to clarify the decision in *McNeil.*

225. *McNeil,* 111 S. Ct. at 2211 n.3. The Court indicated that it had never held that *Miranda* may be anticipatorily invoked. *Id.*

226. *Id.* If a suspect can invoke *Miranda* during a preliminary hearing where custodial interrogation is absent, the majority argued that there is no logical reason why a suspect could not invoke the *Miranda* right to counsel by letter and prior to arrest. *Id.*

be to narrow the holding in *Edwards* or to overrule *Edwards* entirely.

Justice Kennedy in his concurring opinion called for an "aligning" of the fifth and the sixth amendments.[227] Justice Kennedy proposed limiting the *Edwards* decision to a particular investigation.[228] In other words, Justice Kennedy would make the fifth amendment *Miranda* right "offense specific."[229] If the Court were to adopt Justice Kennedy's view, the suspect's request for the fifth amendment right to counsel under *Miranda* would only apply to the case presently charged. The invocation of the fifth amendment right to counsel would have no effect, since its protection would merely overlap the protection already afforded under the sixth amendment right to counsel.[230] Preserving the Supreme Court's holding in *McNeil* through the alignment of the fifth and sixth amendments would be at the expense of narrowing *Edwards* and overruling *Arizona v. Roberson.*[231]

In the event the practice of anticipatorily invoking the fifth amendment right to counsel is utilized by defense counsel in order to circumvent *McNeil,* the Supreme Court could address the problems created by this practice through the approaches mentioned above. Although the previously suggested approaches are not inclusive, each approach would preserve the *McNeil* Court's holding. If the Supreme Court failed to take such action, the effect of the *McNeil* Court's characterization of the fifth and sixth amendments as "non-offense specific" and "offense specific," respectively, would be greatly curtailed.

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227. *See supra* notes 181-185 and accompanying text (discussing Justice Kennedy's concurring opinion in *McNeil*).

228. *McNeil,* 111 S. Ct. at 2211 (Kennedy, J., concurring).

229. *Id. See supra* notes 183-185 and accompanying text (illustrating Justice Kennedy's desire to align the fifth and sixth amendment right to counsel).

230. *McNeil,* 111 S. Ct. at 2211 (Kennedy, J., concurring). *See supra* notes 181-185 and accompanying text (addressing Justice Kennedy's concurring opinion in *McNeil*).

231. *See supra* notes 93-106 and accompanying text (analyzing the Supreme Court's holding in *Roberson*).

B. The Open Question After McNeil: When Does the Request for Counsel Under the Sixth Amendment Encompass a Crime Not Formally Charged?

The majority in *McNeil* held that the invocation of the sixth amendment right to counsel did not act as an invocation of the fifth amendment right to counsel for an unrelated charge.[232] The dissent criticized the majority's finding that custodial interrogation relating to the Caledonia offenses was a separate offense from the West Allis crimes for which the sixth amendment right to counsel had been invoked.[233] The *McNeil* dissent indicated that the investigations of both the West Allis crimes and the Caledonia crimes were concurrent and the investigations were performed by the same state officials.[234] This poses a problem for future cases, similar to *McNeil*, where the crime to which the sixth amendment right to counsel has attached is sufficiently related to the other crimes about which the suspect was interrogated by the police. The Supreme Court may be called to formulate a test to determine when a case is sufficiently related to a crime charged, thus enabling the invocation of the sixth amendment right to counsel to protect the suspect in subsequent police interrogation regarding related charges. No Supreme Court decision has developed a test for determining the degree of relation necessary for such a determination. However, state court and lower federal court decisions have addressed this issue in similar cases.[235]

People v. Michael B.,[236] a California Court of Appeal case decided prior to *McNeil* and having a similar fact pattern to *McNeil*, created a test which could be adopted by the Supreme

232. *McNeil*, 111 S. Ct. at 2209.

233. *Id.* at 2213 (Stevens, J., dissenting). The dissent argued that McNeil could not have known that the invocation of the sixth amendment right to counsel was restricted only to the West Allis crimes. *Id.* (Stevens, J., dissenting).

234. *Id.* (Stevens, J., dissenting).

235. *Id.* at 2207. The majority did not address the degree of relation needed before a suspect's request for counsel will protect the suspect during subsequent police interrogation. *Id.*

236. 125 Cal. App. 3d 790, 178 Cal. Rptr. 291 (1981).

Court to answer the open question in *McNeil*.[237] In *Michael B.*, the defendant had been arrested and formally charged for one burglary, however, the police continued investigating two related burglaries.[238] After reading the suspect his *Miranda* rights and securing a waiver, the police obtained a confession from the suspect, without the presence of counsel, regarding the charged burglary and the two uncharged burglaries.[239] Deciding the case strictly in a sixth amendment context, the court of appeal was confronted with the issue of whether the crimes were so inextricably intermeshed that the invocation of the sixth amendment right to counsel for the first burglary charge precluded police initiated questioning regarding the other burglaries.[240]

In order to determine if the crimes were sufficiently related, the court of appeal in *Michael B.* examined four factors: (1) The proximity of the crimes; (2) discrepancies in the seriousness of the offenses; (3) the likelihood that the same attorney would represent the suspect on each of the crimes; and (4) whether the suspect was read and voluntarily waived the *Miranda* right to counsel.[241] After reviewing these factors, the court of appeal held that the crimes were not so "inextricably intermeshed" that making a factual and conceptual distinction between the crimes was impossible or that the police interrogation on one crime affected the representation of the suspect on the other crime.[242] Although

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237. *Id.* at 792-93, 178 Cal. Rptr. at 292-93. A minor was arrested and charged with one count of burglary. *Id.* at 793, 178 Cal. Rptr. at 292. The minor was accompanied by court appointed counsel at his detention hearing. *Id.* While in custody following his detention hearing, Michael was questioned by a police officer who administered full *Miranda* warnings to Michael and also asked Michael if he desired to have his father or his probation officer present. *Id.*, 178 Cal. Rptr. at 292-93. Michael agreed to speak to the police officer and declined to have his father or probation officer present during questioning. *Id.* Michael was interrogated by the police officer regarding two burglaries which had occurred in the same neighborhood as the burglary with which Michael had been charged. *Id.*

238. *Id.* at 792-93, 178 Cal. Rptr. at 292-93. Three burglaries had occurred in the same neighborhood within a six day period and although the defendant was formally charged with only one of the burglaries, the defendant remained a suspect in the other burglaries. *Id.*

239. *Id.* at 793, 178 Cal. Rptr. at 292-93.

240. *Id.* at 797, 178 Cal. Rptr. at 295-96. The case was strictly decided under the sixth amendment because there was no claim that the fifth amendment right to counsel was also invoked.

241. *Id.* at 795, 178 Cal. Rptr. at 294.

242. *Id.* at 797-98, 178 Cal. Rptr. at 295-96.

the California Court of Appeal decided *Michael B.* solely in a sixth amendment context, the *Michael B.* factors could be adopted by the United States Supreme Court to ascertain whether crimes are sufficiently related to enable a suspect to claim that the sixth amendment right to counsel would protect the suspect for the other offense to which the sixth amendment right to counsel had not attached.

The Fifth Circuit Court of Appeals developed a similar test in *United States v. Cooper.*[243] In *Cooper*, the defendant claimed that the invocation of the sixth amendment right to counsel on an aggravated robbery charge precluded the police from questioning the defendant on a charge of illegally possessing firearms.[244] The factors examined by the Fifth Circuit in *Cooper* included: (1) The similarities in the crimes; (2) the temporal proximity of the crimes; (3) whether the same victims were involved; and (4) whether the sovereign was the same.[245] The *Cooper* Court held that the crimes concerned different conduct and although much of the same evidence could be used in both crimes, the statements should be allowed in evidence.[246]

Factors from both *Michael B.*[247] and *Cooper*[248] could be adopted by the United States Supreme Court in formulating a test to determine the degree of relation of crimes. The Court could look to the similarity of the crimes, the degree in severity of the crimes, whether the same victims were involved, the temporal proximity of the crimes and whether the same attorney would be likely to represent the suspect on each of the crimes. These factors would give the Supreme Court sufficient latitude to determine whether a suspect would expect the invocation of the sixth amendment right

243. 949 F.2d 737 (5th Cir. 1991).
244. *Id.* at 743.
245. *Id.* at 744.
246. *Id.*
247. 125 Cal. App. 3d 790, 178 Cal. Rptr. 291 (1981).
248. 949 F.2d 737 (5th Cir. 1991).

to counsel to protect the suspect from subsequent questioning on other related charges.[249]

C. *Does* McNeil *Make Sense to the Layman?*

Finally, it should be noted that the *McNeil* Court's decision has created a distinction between the fifth and sixth amendments which may not be understood by the average citizen.[250] Labelling the sixth amendment as "offense specific" and the fifth amendment as "non-offense specific" is unlikely to make much sense to the layman. In fact, the dissent in *McNeil* emphasized that judges and lawyers may understand the subtle distinctions of the fifth and sixth amendment but an average citizen may not.[251]

Scholars indicate that *Miranda* has had little effect on conviction rates since most suspects do not understand that the purpose of police questioning is to gather evidence in order to convict the suspect.[252] It stands to reason that a suspect may not fully appreciate that there are two different contexts in which the right to counsel may be invoked. Until the Supreme Court clarifies the distinctions between the fifth and sixth amendment, suspects are unlikely to realize the scope of the right to counsel protection provided under both the fifth and sixth amendments and, therefore, suspects may be prevented from taking full advantage of these constitutional protections.

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249. Analyzing the facts in *McNeil*, under this proposed test is unnecessary as the crimes are substantially different.

250. In a nation where nearly half of the citizens do not know why the Constitution was drafted and only 45 per cent of the citizens know that *Miranda* dealt with rights of criminal suspects, subtle distinctions between the fifth and sixth amendment right to counsel are unlikely to be understood by the layman. Marcotte, *We the People... Don't Know the Constitution, According to a New Survey*, 73 A.B.A. J. 20, 20-21 (May 1987).

251. *McNeil*, 111 S. Ct. at 2208 (quoting Michigan v. Jackson, 421 Mich. 39, 63-64. 365 N.W.2d 56, 67 (1986)).

252. *See* W. LAFAVE & J. ISRAEL, *supra* note 23, § 6.5, at 286 (discussing misconceptions of suspects regarding the purpose of *Miranda* and police interrogation).

IV. CONCLUSION

The *McNeil* case clearly illustrates the complexity of defining a suspect's right to counsel under the fifth and sixth amendments. The presence of both these rights within a single context has further exacerbated the Supreme Court's attempt to outline the scope of protection provided by each right to counsel. The holding in *McNeil*, that a suspect's invocation of the sixth amendment right to counsel does not act as an invocation of the fifth amendment right to counsel, was an attempt by the Supreme Court to develop clear and concise guidelines regarding the scope of protection afforded by the fifth and sixth amendment right to counsel. Unfortunately, although the *McNeil* Court's attempt to clarify the sixth amendment right to counsel and the derivative right to counsel under the fifth amendment may provide clear guidelines to lawyers and judges, the decision may not be as clear to a suspect who is intended to benefit from these protections.

Robert B. Robards