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Constitutional Law - Fifth Amendment - Right to Counsel - Custodial Interrogation

Colin Meneely

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CONSTITUTIONAL LAW—FIFTH AMENDMENT—RIGHT TO COUNSEL—CUSTODIAL INTERROGATION—The Pennsylvania Supreme Court held that once a suspect invokes his right to counsel, and he is allowed to consult with counsel, he may not be subsequently interrogated without his counsel present.

Commonwealth v Santiago, 528 Pa 516, 599 A2d 200 (1991).

Salvator Carlos Santiago ("Santiago") was arrested by agents of the Federal Bureau of Investigation ("FBI") on April 4, 1985 in Washington, D.C. on a charge of unlawful flight to avoid prosecution[1] for the murder of Dean O'Hara.[2] After being advised of his Miranda rights[3], Santiago chose to remain silent and requested an attorney.[4] On April 5, 1985 an attorney from the Federal Public Defender's office was appointed and Santiago was arraigned later that day.[5] On April 6, 1985, two detectives from the Pittsburgh Police Department arrived in Washington, D.C. seeking to interrogate Santiago relative to the unrelated murder of Patrick Huber.[6] With-

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1. The crime of unlawful flight to avoid prosecution is codified at 18 USC § 1073 which provides in pertinent part:

> Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishable by death or which is a felony . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 USC § 1073 (1976).

2. *Commonwealth v Santiago,* 528 Pa 516, 599 A2d 200, 201 (1991). The murder of Dean O'Hara is unrelated to the crimes that are the subject of this appeal. *Santiago,* 599 A2d at 201 n 6. Santiago was convicted of murder in the first degree and sentenced to life imprisonment for O'Hara's murder. Id.

3. Under *Miranda v Arizona,* 384 US 436 (1966), a suspect has the right to remain silent. If he does speak, anything he says can be used against him. He has the right to counsel, chosen or appointed. His waiver of these rights must be knowing and intelligent. *Miranda,* 384 US at 479.

4. *Santiago,* 599 A2d at 201.

5. Id. Santiago was represented at trial by Patrick J. Thomassey, Esquire. Brief for Appellee, No 99 WD Appeal Docket (1986). The appellate record does not indicate the attorney from the Office of the Public Defender who was originally assigned to represent Mr. Santiago. Id.

6. *Santiago,* 599 A2d at 201. Twenty three year old Patrick Huber, an employee of a print shop, was shot to death at his place of employment on the South Side of Pittsburgh. Brief for Appellee, No 99 WD Appeal Docket at 6. He was killed by a single gunshot wound to the back of the head from a .357 calibre hand gun. Cindy Pasternak, a co-worker of Huber's arrived at the print shop at 8:40 A.M. and while looking through a storefront window, observed Santiago going through the owner's desk. When Santiago looked up, Ms. Pas-

out contacting Santiago's counsel, the Pittsburgh Police detectives advised the defendant of his Miranda rights and Santiago indicated his willingness to cooperate, and evidenced the same in writing.[7] Subsequently, Santiago admitted to killing Huber during a robbery.[8]

At trial, Santiago was found guilty of murder in the first degree,[9] robbery,[10] and violating the Uniform Firearms Act[11]. A separate sentencing hearing was held.[12] The jury, weighing the mitigating factors against the aggravating factors, found that three aggravating circumstances existed relative to the murder charge.[13] The jury further found that the aggravating factors outweighed any mitigating factors[14] and Santiago was sentenced to death.[15] Post trial motions were filed, argued, and denied.[16] As a result of the death sen-

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ternak fled to a nearby coffee shop and summoned the police. Pittsburgh police officers arrived minutes later and found Huber lying face down in a storage room. The time of Huber's death was fixed at between 8:30 A.M. and 8:40 A.M. Id.

7. *Santiago*, 599 A2d at 201.

8. Id. The print shop robbery netted Santiago approximately ten dollars. Brief for Appellee, No 99 WD Appeal Docket at 4.

9. The crime of murder is codified at 18 Pa Cons Stat § 2502 which provides in pertinent part:

> (a) Murder of the first degree. —A criminal homicide constitutes murder of the first degree when it is committed by an intentional killing.

18 Pa Cons Stat § 2502(a) (Purdon 1983).

10. The crime of robbery is codified at 18 Pa Cons Stat § 3701 which provides: "A person is guilty of robbery if, in the course of committing a theft, he inflicts serious bodily injury upon another[.]" 18 Pa Cons Stat § 3701 (a)(1)(i) (Purdon 1990).

11. The Uniform Firearms Act, codified at 18 Pa Cons Stat § 6106 provides in pertinent part:

> (a) No person shall carry a firearm in any vehicle or concealed on or about his person, except in his place of abode or fixed place of business, without a license therefor as provided in this subchapter.

18 Pa Cons Stat § 6106(a) (Purdon 1983).

12. *Santiago*, 599 A2d at 200.

13. Brief for Appellee, No 99 WD Docket at 21. As to aggravating factors, the jury considered the following: Huber's murder was committed during an armed robbery, Santiago's previous conviction for second degree murder wherein he was sentenced to life imprisonment, and his history of violent crimes. Id.

14. Brief for Appellant, No 99 WD Appeal Docket at 24. Appellant contended that his history of mental illness was an overwhelming and significant mitigating factor. Id.

15. *Santiago*, 599 A2d at 200.

16. Id. Appellant raised the following claims:

> The verdicts were against the weight and sufficiency of the evidence; the lower court erred in failing to suppress statements made in violation of Fifth Amendment rights protected by *Miranda v Arizona*, 384 US 436 (1967) and *Edwards v Arizona*, 451 US 486 (1981); the arrest warrant lacked probable cause in violation of the Fourth Amendment; there was unnecessary delay between arrest and preliminary arraignment; and the jury imposed the death penalty without regard to significant mitigating circumstances in violation of the Eighth Amendment's prohibition against cruel and

tence, the case was accorded automatic direct appeal to the Pennsylvania Supreme Court.[17] Justice Cappy, speaking for the court, relying on the precedent of *Minnick v Mississippi*,[18] reasoned that once a defendant invokes a Fifth Amendment[19] right to counsel, he may not be interrogated as to any crime, so long as he remains in custody, without notifying his counsel.[20] Accordingly, the judgments of sentence were vacated and the case remanded for a new trial.[21]

Justice McDermott filed a concurring opinion, wherein he stated that the issues presented by Santiago had previously been addressed in *Arizona v Roberson*[22] and criticized the need to add "another *per se* rule which inures only to the benefit of confessing felons."[23]

HISTORY

In 1936 the United States Supreme Court in *Brown v Mississippi*,[24] reacted to charges that a "confession" was obtained by beating the defendant. The Court held for the first time that the reliability of a physically coerced confession was in doubt and ruled that the confession was inadmissible.[25]

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unusual punishment.

Brief for Appellee, No 99 WD Appeal Docket at 8.

17. Jurisdiction over cases involving the death penalty is codified at 42 Pa Con Stat Ann § 722(4) which provides that

> [t]he Supreme Court [of Pennsylvania] shall have exclusive jurisdiction of appeals from final orders of the courts of common pleas in the following classes of cases: . . .
> (4) Automatic review of sentences as provided by 42 Pa Con Stat Ann § 722(4) (Purdon 1981 and Supp 1992).

42 Pa Con Stat Ann § 9711(h) (Purdon 1990). 42 Pa Con Stat Ann § 9711(h)(1) provides that "A sentence of death shall be subject to automatic review by the Supreme Court of Pennsylvania pursuant to its rules." 42 Pa Con Stat Ann § 9711(h)(1) (Purdon 1982 and Supp 1992).

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

19. The Fifth Amendment provides in pertinent part "No person shall . . . be deprived of life, liberty, or property without due process of law . . . " US Const, Amend V.

20. *Santiago*, 599 A2d at 202.

21. Id at 203.

22. *Arizona v Roberson*, 486 US 675 (1988).

23. *Santiago*, 599 A2d at 203. Justice Larsen joined in the concurring opinion. Id.

24. *Brown v Mississippi*, 297 US 278 (1936).

25. *Brown* is a grim reminder of what a criminal justice system can be without constitutional protection. Brown and his two codefendants were charged with the murder of Raymond Stewart. *Brown*, 297 US at 279. Mr. Stewart was found murdered in his home at 1:00 p.m. on March 30, 1934. Id at 281. There was no evidence to tie the defendants to the crime other than their "confessions". Id at 279. The defendants were all black men. Id at 281. All three were beaten and brutally whipped by members of the Sheriff's Department and a group of white men. At least two of the defendants were whipped, bare backed, with a

With physical coercion banned as a means of gaining confessions, the Court has been confronted with a number of cases wherein suspects in custody were subjected to various psychological pressures (as opposed to physical coercion) in an effort to obtain confessions.[26] The Court expanded the protection of suspects by suppressing confessions obtained by psychological pressure by requiring that the confessions be made "voluntarily".[27] However, the test for voluntariness proved unworkable in practice.[28]

In 1966, the Court moved from the voluntariness test and articulated "guidelines for law enforcement agencies and courts to follow" in *Miranda v Arizona*.[29] In *Miranda*, the Court set specific

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buckled, leather strap while in jail. Id at 282. One of the defendants was hung from a tree with a rope and let down, but he still protested his innocence. He was hung a second time, again let down, and again proclaimed his innocence. Id at 281. He was allowed to return to his home that evening, but the following day was subjected to beatings at the hands of the sheriff's deputies and civilian white men. Eventually all three defendants succumbed to their torturous treatment and confessed. Id at 282. In fact, as the beatings progressed, the confessions were changed to comport with their interrogators' demands. Id at 284. At trial, the officers not only did not dispute the whippings, but admitted to same. Id. Notwithstanding the whippings and the rope burns openly visible at trial, the "confessions" were admitted over the defendants' objections. Id at 283. The defendants were found guilty in a two day trial and sentenced to death on April 6, 1934—just seven days after the body of Raymond Stewart was discovered! Id at 279.

26. See for example, *United States v Griffin*, 922 F2d 1343, 1351 (8th Cir 1990) (officers took advantage of the suspect's alien status and confronted him with false or misleading witness statements.); *United States v Olof*, 527 F2d 752, 753 (9th Cir 1975) (interrogating agent told the suspect "that prison was a 'dark place', where they 'pumped air' to the prisoners."); *Rodgers v Richmond*, 365 US 534, 538 (1961) (interrogating officers threatened to arrest the suspect's sick wife if he failed to cooperate.)

27. The "voluntariness" test evolved from *Rodgers*, 365 US at 538 (see note 26 and accompanying text) and its predecessor *Spano v New York*, 360 US 315, 320 (1959), (confession induced by police officer tricking suspect held to be involuntary).

28. Alan Carlos Blanco, *Its Better The Second Time Around - Reinterrogation Of Custodial Suspects Under Oregon v Bradshaw*. 45 U Pitt L Rev 899, 905 (1984).

> The voluntariness test proved in practice to be an administratively unsatisfactory way of reaching these goals. (The goals that Blanco refers to are: [1] barring use of unreliable confessions; [2] deterring offensive police practices; and [3] prohibiting use of confessions obtained under circumstances in which the defendant's free choice was significantly impaired.) In the thirty years between *Brown v Mississippi* and *Miranda*, the Court took an average of about one confession case per year, two thirds of which were death penalty cases.

Blanco, 45 U Pitt L Rev at 905 (citations omitted).

29. *Miranda v Arizona*, 384 US 436 (1966). The *Miranda* decision embodied four separate appeals, all of which involved custodial interrogation without any advice to the defendants as to their constitutional rights. *Miranda*, 384 US at 440. All four defendants were convicted in trial court. Id. Three had their convictions overturned by the Supreme Court for failure to give advice to the defendants as to their constitutional rights. Id at 492-9. The fourth defendant, Stewart, had his conviction overturned by the Supreme Court of California and the United States Supreme Court affirmed that decision. Id. Justices Black, Douglas, Brennan, and Fortas joined in Chief Justice Warren's opinion. Id at 436. Justice

guidelines requiring that before custodial interrogation begins, the suspect must be advised that he has a right to remain silent, that if he does speak, any statements he makes can be used against him, that he has a right to counsel (retained or appointed), and that the suspect must make an intelligent waiver of those rights.[30] The *Miranda* holding also requires that if the suspect wishes to consult with an attorney, questioning must cease until an attorney is present.[31]

In 1981 in *Edwards v Arizona*, the Court reaffirmed that once a suspect requests an attorney, questioning must cease and may not resume until the attorney is made available.[32] Edwards was suspected of robbery and first degree murder.[33] Once under arrest he was given his *Miranda* warnings and agreed to cooperate.[34] During interrogation, he had a change of mind, and requested an attorney and the interrogation ceased.[35] The following day, police returned to question him again.[36] Although he initially objected to speaking with his interrogators, Edwards eventually confessed.[37] The Arizona Supreme Court rejected Edward's argument that *Miranda* did not allow a suspect to change his mind pursuant to a renewed police inquiry.[38] The Arizona court found that Edwards voluntarily responded to the police questions and in effect waived his right to counsel.[39] The United States Supreme Court rejected that reason-

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Clark concurred in the result as to Stewart, and filed a dissent as to the other three defendants. Id at 499. Justice White filed a separate dissent wherein Justices Harlan and Stewart joined. Id at 526. Harlan, J. filed a separate dissent, wherein Justices Stewart and White joined. Id at 504.

Miranda was suspected of kidnap and rape. Id at 492. Within two hours of his arrest, he gave police a signed confession. The statement contained a typed statement that he had "full knowledge" of his "legal rights". Id. There was no suggestion that the confession was the result of any coercion, or improper conduct on the part of the interrogating officers. *Id* at 519 (Harlan dissenting). Notwithstanding that, the majority held that his waiver of his constitutional protections did not meet the "knowing and intelligent" standard. Id at 492.

30. Id at 479.

31. Id at 473-74.

32. *Edwards v Arizona*, 451 US 477 (1981).

33. *Edwards*, 451 US at 478.

34. Id at 479.

35. Id.

36. Id.

37. Id. It should be noted that Edwards *never* consulted with an attorney. When the police returned to question him the second time, Edwards refused to talk, but was told he had no choice. When confronted with a tape recording of an alleged accomplice implicating Edwards in the crimes, he confessed. Id at 478.

38. *State v Edwards*, 122 Ariz 206, 594 P2d 72, 78 (1979) (en banc), rev'd sub nom, *Edwards v Arizona*, 451 US 477 (1981).

39. *Edwards*, 594 P2d at 78.

ing, insisting that for the suspect's waiver to be effective, the proper inquiry should have been whether the suspect's waiver was a "knowing and intelligent[40] relinquishment or abandonment of a known right or privilege".[41] The Court recognized that there can be situations where an accused may validly waive his Fifth Amendment rights, but that waiver cannot be shown by the simple fact that the suspect responded to police interrogation, even though he has been advised of his rights.[42] As such, the Court held that Edwards did not waive his Fifth Amendment rights.[43] While this would have been sufficient to overturn Edwards' conviction, the Court went on in dictum to impose an additional safeguard, insisting that once a suspect requests counsel the police must cease interrogation and may not reinterrogate until counsel is made available or the suspect initiates further communication.[44] The Court further stated that had Edwards "initiated" the second meeting, the police would have been free to listen to any statements volunteered and could have used them at trial.[45] The Court noted, however, that if the suspect had initiated the second meeting and po-

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40. Id. The "knowing and intelligent waiver" was elucidated in *Johnson v Zerbst*, 304 US 458 (1938). There the defendant was accused of passing counterfeit currency and represented himself throughout trial and during the initial post trial appeal period. The Court pointed out that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights. Further, "[t]he determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.". *Johnson*, 304 US at 465.

41. *Edwards*, 451 US at 482.

42. Id at 484.

43. Id.

44. Id.

45. Id at 485. For a discussion of what constitutes "initiation," see *Oregon v Bradshaw*, 462 US 1039 (1983) and Allen F. Loucks, *Initiation: The Emperor's New Test*, 53 Geo Wash L Rev 608 (1985). In *Bradshaw*,the defendant was arrested regarding an automobile accident in which a minor was killed. While in custody, and after asserting his right to counsel, Bradshaw asked his police hosts, "[w]ell, what is going to happen to me now?" After a discussion of possible alternatives facing the accused, he confessed to his involvement in the accident. Eight Justices of the *Bradshaw* court held that the defendant's inquiry did not rise to the level of "initiation".

Quoting Loucks,

> [b]ecause initiation must relate directly to the events of the crime, courts must view non-initiation as the status quo. Courts must search for an initiating statement and may not infer or presume its existence. Moreover, because suspects have claimed a specific and important right to counsel, courts should assume that suspects wish to retain that posture. The prevailing presumption must be, in the absence of initiating statements that clearly demonstrate a suspect's intention to speak about the crime, that no initiation occurred.

Loucks, 53 Geo Wash L Rev at 623.

lice interjected a question during the "volunteered" confession, the dialogue between the police and the suspect reverts to a "custodial interrogation" and would have required that the suspect make a valid waiver of his rights before the interrogation continues.[46] Speaking for the six member majority,[47] Justice White opined that once an accused had "expressed his desire to deal with the police only through counsel [he was] not subject to further interrogation . . . until counsel [was] made available".[48]

Several years later, in 1988, a twist of the facts of *Edwards* caused the Court to again address this issue in *Arizona v Roberson*.[49] In *Roberson*, the suspect was arrested at the scene of a burglary.[50] He refused to respond to police inquiries, and requested the assistance of counsel.[51] Three days later while Roberson was still in custody, a police officer working on a separate and independent investigation gave Roberson his *Miranda* warnings and questioned him about the unrelated burglary.[52] The police officer was not present during Roberson's arrest and was unaware that counsel had been requested at the time of his arrest.[53] Roberson gave the police an incriminating statement concerning the previous burglary, but the trial court, relying on the *Edwards* rule as interpreted in *State v Routhier*,[54] suppressed Roberson's statement.[55] The prosecution appealed the suppression order, but it was affirmed by the Arizona Court of Appeals and the Arizona Supreme

46. *Edwards*, 451 US at 486 n 9.

47. Brennan, Stewart, Marshall, Blackmun and Stevens, J.J. joined in White's, J., opinion. Id at 478.

48. *Edwards*, 451 US at 483.

49. *Arizona v Roberson*, 486 US 675 (1988).

50. *Roberson*, 486 US at 678.

51. Id.

52. Id.

53. Id.

54. *State v Routhier*, 137 Ariz 90, 669 P2d 68 (1983), cert denied, 464 US 1073 (1984). Routhier was accused of murdering Lawrence Barrick during an attempted robbery. He was apprehended after a high speed chase wherein he was involved in an accident that required his hospitalization. While in the hospital, he was interrogated by police . He cooperated during the initial phase of interrogation, and signed a waiver of his *Miranda* rights. However during the interrogation, he expressed his desire to consult with counsel and the interrogation was terminated. Three days later, a second police officer (who was aware of the defendant's request for counsel) visited the defendant with the intention of seeking information about an unrelated homicide. During this second interrogation, the defendant admitted to the Barrick murder. The trial court admitted the confession over the defendant's objection. The Supreme Court of Arizona overturned Routhier's conviction, holding that *Edwards v Arizona* required the suppression of the confession in that Routhier had requested counsel. *Routhier*, 669 P2d at 68.

55. *Roberson*, 486 US at 678.

Court denied a petition for review.[56]

The United States Supreme Court granted certiorari to resolve conflicts with other state court decisions.[57] Justice Stevens, speaking for the majority and quoting the Arizona Supreme Court,[58] stated that there was no legal significance to the factual difference (of *Edwards*) that the reinterrogation concerned an unrelated offense.[59] Once a suspect raises his Fifth Amendment right to counsel, there can be no reinterrogation until counsel has been appointed to counteract the inherent pressures of custodial interrogation, even where the confession relates to a separate and independent investigation.[60]

Justice Kennedy filed a dissent criticizing the majority for adding yet another *per se* rule.[61] His opinion focused on the goal of the *Edwards* rule - to protect a suspect in police custody from being badgered by police authorities.[62] Inasmuch as the reinterrogation pertained to an entirely different investigation, Justice Kennedy saw little risk that the suspect would be badgered into submission.[63]

In *Minnick v Mississippi*,[64] the Court further clarified its position on a suspect's Fifth Amendment right to counsel.[65] In that case, Minnick was a suspect in a dual murder in Mississippi.[66] He was subsequently arrested in California and, after being advised his rights, told FBI agents that he wanted to talk to a lawyer.[67] A lawyer was appointed and Minnick conferred with him at least twice.[68] A deputy sheriff from Mississippi went to California seeking to interrogate Minnick. Minnick was advised by his jailers that he would have to talk and could not refuse.[69] Minnick was advised of his rights, but refused to sign a waiver, although he did give the

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56. Id at 679. The United States Supreme Court granted certiorari to resolve conflicts with other state court decisions. Id.

57. Id at 678.

58. Id at 678 quoting *Routhier*, 669 P2d at 75.

59. *Roberson*, 486 US at 678.

60. Id.

61. Id at 688.

62. Id. Justice Kennedy dissenting, joined by Chief Justice Rehnquist.

63. Id.

64. 111 S Ct 486 (1990).

65. *Minnick*, 111 S Ct at 480.

66. Id at 488-89.

67. Id.

68. Id.

69. Id.

deputy sheriff a statement.[70]

The Mississippi trial court construed the language of *Edwards* as requiring that once a suspect has exercised his Fifth Amendment right to counsel, interrogation must cease until counsel has been appointed; however, once counsel was made available, his Fifth Amendment right to counsel was satisfied.[71]

The United States Supreme Court rejected that analysis, holding that "the Fifth Amendment protection of *Edwards* was not terminated or suspended by consultation with counsel".[72] Justice Kennedy (the author of the *Edwards* dissent) writing for the Court further stressed the point when he went on to state that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney".[73]

When analyzing the uncompromising holding of *Minnick*, a look back to the opinion of *Miranda* is necessary. The seminal case of *Miranda* requires law enforcement agencies to cease custodial questioning once the suspect asserts his Fifth Amendment right to consult with an attorney. *Miranda*, however, is unclear as to whether law enforcement agencies are free to resume their questioning at some later point in time. While subsequent questioning could arguably meet the letter of *Miranda*, it would just as obviously undermine its spirit.[74]

In 1981, the United States Supreme Court in *Edwards v Arizona* made clear that if the suspect requests counsel, the questioning must cease and may not resume at any time until an attorney is made available to the suspect.[75]

In 1988 the Court expanded the *Edward's* bar against subse-

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70. Id at 489.

71. Id.

72. Id.

73. Id at 491. Note that the opinion is joined by White, Marshall, Blackmun, Stevens and O'Connor, J.J. Souter, J., took no part in the consideration or decision. Scalia, J., filed a dissent, joined by Rehnquist, C.J., wherein he challenged the majority's irrebuttable presumption that a criminal suspect can *never* validly waive his Fifth Amendment right to counsel once he asserts same. Scalia would permit such statements for the consideration of the fact finder if the state can meet the high standard of proof that the suspect waived his constitutional rights. Scalia was disturbed by the lack of any showing that Minnick did not know his rights or was coerced into abandoning same. Id at 492-97.

74. See generally *Minnick*, 111 S Ct at 491. The need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires. *Minnick*, 111 S Ct at 491 quoting *Miranda*, 384 US at 470.

75. *Edwards*, 451 US at 484. See note 51 and accompanying text.

quent interrogation in *Arizona v Roberson*, when the Court held that once a suspect requests counsel, all questioning must cease and barred police authorities from questioning the suspect about *any* crime, until the suspect had the opportunity to consult with an attorney.[76] To this reader, the Court's intent was clear - once a suspect indicates his belief that he is incapable of dealing with police authorities without the benefit of counsel, he may not be questioned by *any* police authorities as to *any* crime(s) until he has had the opportunity to consult with his attorney.

Less clear was the question of whether *Edwards* and *Roberson* created a *per se* rule that excluded any confession (elicited after the suspect invoked his right to counsel) if it followed *police initiated conversation* with the suspect. New Jersey's highest court read *Edwards* as creating a *per se* rule, barring "reinterrogation of all criminal suspects who invoked their right to counsel unless [the suspect] initiated further conversation.[77] The Supreme Court of Connecticut, however, reached the opposite conclusion: although *Edwards* prohibited police initiated reinterrogation, it permitted the introduction of confessions elicited by police initiated "conversations" with the accused.[78] Six years later, Justice Kennedy in his dissent in *Roberson*, citing *Oregon v Bradshaw*,[79] recognized that the rule in *Edwards* "was in fact a prophylactic rule, designed to protect an accused in police custody from being badgered by police officers . . ."[80]

While clearing up some of the nebulous aspects of *Miranda*, *Edwards* and *Roberson* left unanswered the question of whether, once the attorney has been appointed and the suspect has had an opportunity to consult with his counsel, law enforcement agencies are then free to question the suspect, and if so, to what extent? If *Edwards* and *Roberson* are interpreted to permit custodial interrogation after such "post attorney-client consultation", then policing the interrogations could become a burden on the courts. Initially the Court has recognized that determining what constitutes a "consultation" is no easy matter.[81] For example, would a telephone

76. *Roberson*, 486 US at 690). See notes 60-63 and accompanying text.

77. *State v McCloskey*, 90 NJ 18, 446 A2d 1201 (1982).

78. *State v Acquin*, 187 Conn 674, 448 A2d 165 (1982).

79. *Oregon v Bradshaw*, 462 US 1039, 1044 (1983).

80. *Roberson*, 486 US at 690.

81. *Minnick*, 111 S Ct at 492. In *Minnick* the Court stated "This case illustrates also that consultation is not always effective in instructing the suspect of his rights." Id at 491. The Court also determined that "[c]onsultation is not a precise concept . . . it may encompass variations from a telephone call to say that the attorney is in route, to a hurried in-

conversation regarding the amount of the suspect's bail constitute an attorney/client consultation? Assuming *arguendo* that the suspect did indeed have a meaningful consultation with his attorney, what limits should the Court place on the police insofar as the number and duration of interrogations? Rather than delve into this quagmire of vagaries, the Court sought to lay down a rule that provides lower courts and police agencies with "clear and unequivocal guidelines" to follow.[82] The rule as enunciated in *Minnick v Mississippi* is a model in simplicity - the protection of *Edwards* does not terminate once counsel has consulted with the suspect.[83] The Court, in addressing the competing interests,[84] admitted that its decision in favor of a rule that embodied clarity of command and certainty of its application also has its shortcomings. The Court recognized that since its rule required that a voluntary statement (under traditional Fifth Amendment analysis), obtained in absence of counsel after a suspect has asserted his Fifth Amendment right to counsel, even though trustworthy and highly probative, must be suppressed.[85]

In its effort to craft a rule that provides ease of application the Court has gone far beyond the issues raised in *Brown* and *Miranda*[86] and has created " . . . an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any police initiated encounter, even after the suspect . . . has actually consulted his attorney."[87] The good faith of interrogating officers (or lack of any showing that police badgered the defendant into waiving his rights) is of no import. While the *Minnick* rule should provide ease of administration and a degree of judicial economy, Justice Scalia argues " . . . so would a rule that simply excludes all confessions by all persons in police custody."[88] Justice Scalia is correct in his observation. However it should be pointed out that *Minnick* would

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terchange . . . in a corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice respecting all matters that might be covered in further interrogations." Id at 492.

82. *Roberson*, 486 US at 682.

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

84. Justice Stevens compared the "virtues of a bright line rule" and found that they outweighed the burdens placed on law enforcement agencies and the courts by requiring the suppression of these "voluntary" confessions. *Roberson*, 486 US at 681.

85. Id.

86. *Brown v Mississippi*, 297 US 278 (1936) (physical coercion); and *Miranda*, 384 US at 436 (psychological coercion).

87. *Minnick*, 111 S Ct at 492 (Justice Scalia dissenting).

88. Id at 495.

only preclude statements obtained in absence of counsel during *police initiated* interrogation after the right to counsel has been asserted. Police are still free to accept statements where the suspect initiates the confession. Further, the police are free to interrogate the suspect in the presence of counsel. As Justice Kennedy noted in *Minnick*, under the reasoning of the Arizona Supreme Court (that once a suspect has consulted with his attorney he is then subject to police interrogation), if a suspect exercises his Fifth Amendment right to counsel and faces police interrogation after he has had an opportunity for consultation, the suspect whose attorney is timely in consulting with his client is at a disadvantage when compared with the suspect whose attorney is dilatory.[89] The *Minnick* rule disposes with this concern—unless the attorney is present, a suspect that has asserted his right to counsel may not be questioned as to any criminal activities—period.

We now come full circle and return to *Santiago*.[90] What, if anything, did the Pennsylvania Supreme Court add to this issue? It would be tempting to answer that query by saying it added nothing—that the Pennsylvania court's hands were tied and it must comport with precedent.[91] However, the brevity of this opinion says at least one thing: the "clarity of command and certainty of application"[92] that the United States Supreme Court was attempting to achieve has apparently been attained.[93] The Pennsylvania

89. Id at 492.

90. As to the factual differences between *Minnick* and *Santiago*, in *Minnick* police authorities "re-initiated" the custodial interrogation. *Minnick*, 111 S Ct at 488. In *Santiago*, the Pittsburgh police detectives were commencing an "initial" interrogation as to crimes unrelated to those for which the defendant was in custody. *Santiago*, 599 A2d at 202. The Pennsylvania Supreme Court, relying on *McNeil v Wisconsin*, 111 S Ct 2204, (1991), summarily disposed of any legal significance to the factual disparities. *Santiago*, 599 A2d at 202.

91. Indeed, Justice McDermott has expressed this feeling in his concurring opinion wherein he stated "[g]iven the United States Supreme Court decision [in *Roberson*] I am constrained to agree with the majority's decision in this case." *Santiago* 599 A2d at 203 (McDermott concurring) (citations omitted). Justice Larsen joined in this concurrence.

92. *Minnick*, 111 S Ct at 490.

93. At least one jurisdiction does not read *Minnick* as imposing a prophylactic rule. In *Connecticut v Dobson*, 221 Conn 128, 602 A2d 977 (1992), Dobson was arrested for murder. *Dobson*, 602 A2d at 978. The defendant after being advised his *Miranda* rights, told the police officers that he would answer questions, but would not sign a statement until he spoke with his attorney. Id at 979. The defendant made several telephone calls to his attorney, but was unable to speak with him. He eventually made an oral confession, that was admitted at trial over the defendant's objection. Id. The Connecticut Supreme Court distinguished *Minnick*, stating "[*Minnick*] invoked his right to counsel for all purposes. Here, it is equally apparent that there was only a limited invocation of that right for written statements; the defendant repeatedly asserted his willingness to make oral statements to the police." Id at 981.

court affirms its understanding that the Fifth Amendment right to counsel "barred officials from interrogating [the suspect] regarding any . . . offense without the presence of counsel."[94] The concurring opinion in *Santiago* quotes Justice Scalia's dissent in *Minnick*, wherein he complains that we "do not need yet another *per se* rule which inures only to the benefit of confessing felons"[95]—but the opinion recognizes that we do in fact have another *per se* rule!

The Pennsylvania Supreme Court has re-affirmed the simplicity of the high Court's edict: once a suspect invokes a non-offense specific right to counsel, the suspect can *never* be questioned again without the presence of counsel.[96] The maxim *nemo tenetur seipsum accusare*[97] has never been more true.

Colin Meneely

Justice Berdon filed a dissent challenging the narrow interpretation of *Minnick*. Id at 984. To quote Justice Berdon, "It is now beyond debate that if the individual in custody states that he wants an attorney, the interrogation must cease until an attorney is present . . . by sending [the police officer] to get a statement from the defendant after his second request for counsel, the police committed a clear violation of his right to be free of police initiated interrogation without counsel present." Id (Berdon dissenting).

94. *Santiago* 599 A2d at 202.

95. Id at 203 (McDermott concurring).

96. To this reader, it is incredulous that the highest court of Connecticut has failed to understand the simplicity of the rule in *Minnick* and apply the same in *Dobson*.

97. No one shall be compelled to accuse himself.