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Criminal Procedure--Self-Incrimination: Miranda Lives

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CRIMINAL PROCEDURE – SELF-INCRIMINATION: *MIRANDA* LIVES

Edwards v. Arizona, 101 S. Ct. 1880 (1981)

Petitioner was arrested and charged with robbery, burglary, and first degree murder.[1] After being informed of his constitutional right against compulsory self-incrimination as required by *Miranda v. Arizona*,[2] he was questioned by police until he requested an attorney.[3] The next morning, despite his objection, petitioner was taken to meet with two detectives.[4] A detective administered fresh *Miranda* warnings,[5] and during the subsequent interrogation petitioner confessed.[6] On a pre-trial motion, petitioner moved to suppress his confession[7] asserting that the detectives violated his constitutional rights by questioning

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1. 101 S. Ct. 1880, 1881 (1981). Petitioner, Robert Edwards, was arrested at his home in the late afternoon. He was not informed of his rights at that time, nor did he make any statements. *Id.* The police took petitioner directly to the station where he was read his rights. State v. Edwards, 122 Ariz. 206, 209, 594 P.2d 72, 75 (1979), *rev'd*, 101 S. Ct. 1880 (1981).

2. 384 U.S. 436 (1966). In *Miranda*, the Court required that a suspect in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires." *Id.* at 479.

3. 101 S. Ct. at 1882. Initially, petitioner waived his rights. *Id.* at 1881. After being told that he had been implicated in the crime by a co-suspect, petitioner denied involvement and gave a taped alibi statement. *Id.* at 1882. After making the statement, petitioner asked the detective if he would negotiate a deal. The detective stated he could not make a deal. Petitioner then asked, and was permitted, to talk to the county attorney about making a deal. When negotiations with the county attorney proved unsuccessful, petitioner again approached the detective concerning a deal. The detective reiterated his inability to make deals. Petitioner then stated: "I want an attorney before making a deal." *Id.* On the basis of that statement, the Arizona supreme court held petitioner asserted his right to remain silent and his right to counsel. 122 Ariz. at 219-11, 594 P.2d at 76-77. Further, the Supreme Court relied upon the same statement to find an assertion of the right to counsel. 101 S. Ct. at 1883. The Court, however, did not discuss the right to remain silent. *Id.* Questioning concerning the crime ceased immediately, but discussion concerning a deal continued for a short time until petitioner was taken to the county jail. Brief for Petitioner at 4-5, 101 S. Ct. 1880.

4. Brief for Petitioner at 5, 101 S. Ct. 1880. The next morning two different detectives arrived at the jail and asked to see petitioner. 101 S. Ct. at 1882. When petitioner was told the detectives were there to see him, he told the officer that he did not wish to speak to anyone. The officer told him that he "had to" speak to the detective and took him to see them. *Id.*

5. *Id.* See note 2 *supra*.

6. 101 S. Ct. at 1882. The petitioner received the warnings and indicated that he would be willing to talk but only if he were allowed to hear the taped statement of his co-suspect that implicated him in the crime. *Id.* After listening to several minutes of the tape, petitioner stated he would make a statement provided it was not recorded. *Id.* The detectives informed him that recording the statement was irrelevant because they could testify in court about an unrecorded statement. Petitioner replied: "I'll tell you anything you want to know, but I don't want it on tape," and proceeded to implicate himself in the crime. *Id.*

7. Throughout this comment, confession will be used interchangeably with the terms admission and incriminating statement. *Cf.* Miranda v. Arizona, 384 U.S. 436, 476 (the privilege against self-incrimination does not distinguish between degrees of incrimination).

him after he invoked his right to counsel.[8] The trial court found petitioner's statement voluntary, and therefore admitted the confession.[9] At trial, petitioner was convicted.[10] The Arizona Supreme Court affirmed,[11] holding that petitioner waived his previously asserted rights[12] by subsequently making a voluntary statement.[13] On certiorari,[14] the United States Supreme Court reversed and HELD, the fifth amendment requires that an accused not be subjected to further interrogation once counsel is requested until he either receives counsel or initiates further dialogue with the police.[15]

The privilege against compulsory self-incrimination can be traced to the inquisitorial practices of ex-officio proceedings in England.[16] By the eighteenth century a rule prohibiting the use of involuntary confessions made prior to the commencement of judicial proceedings was firmly established.[17] The rule was designed to protect defendants against erroneous convictions by ensuring the trustworthiness of evidence and to promote a high regard for human dignity and individuality.[18] To provide constitutional protection to both concerns, the privilege was included in the fifth amendment.[19]

The first confession cases heard by the Supreme Court, however, were not decided on fifth amendment grounds.[20] Rather, the Court applied the common

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8. 101 S. Ct. at 1882.

9. *Id.* The trial court initially granted the motion emphasizing that by meeting with petitioner on their own initiative, the detectives had ignored petitioner's request for counsel. Joint Appendix at 91-93, 101 S. Ct. 1880. Three days later the trial court reversed its own ruling when it was confronted with an arguably controlling decision of a higher Arizona court. *Id.* at 94-95. *See* State v. Travis, 26 Ariz. App. 24, 545 P.2d 988 (1974).

10. 101 S. Ct. at 1882. Petitioner was tried twice because the jury in the first trial was unable to reach a verdict. *Id.* Evidence concerning the confession was admitted at both trials. *Id.*

11. State v. Edwards, 122 Ariz. 206, 217, 594 P.2d 72, 83 (1979), *rev'd*, 101 S. Ct. 1880 (1981). The Arizona supreme court found against petitioner on all nine issues presented in his appeal, but remanded his murder conviction for resentencing. *Id.* at 122 Ariz. 206, 217, 594 P.2d at 83. Petitioner had been sentenced to death under felony-murder rule because the robbery victim died of a heart attack. *Id.* at 122 Ariz. 206, 209, 594 P.2d at 75.

12. See note 3 *supra.*

13. 122 Ariz. at 212, 594 P.2d at 78.

14. 101 S. Ct. 1880. The Supreme Court's grant of certiorari restricted its review to whether the fifth, sixth and fourteenth amendments required suppression of a post-arrest confession obtained after petitioner invoked his right to consult counsel. *Id.* at 1881.

15. *Id.* at 1884-85.

16. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 768-74 (1935).

17. O. STEPHENS, THE SUPREME COURT AND CONFESSIONS OF GUILT 19-20 (1973). The rule was first stated formally in 1783: "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope, or by the torture of fear, comes in so questionable a shape when it is to be considered as the evidence of guilt, that no credit ought to be given to it . . . ." The King v. Warickshall, 1 Leach 263, 263-64, 168 Eng. Rep. 234, 234-35 (K.B. 1783).

18. O. STEPHENS, *supra* note 17, at 19-20.

19. Pittman, *supra* note 16, at 788-89. *See* Ullmann v. United States, 350 U.S. 422 (1956). *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968).

20. *See* Wilson v. United States, 162 U.S. 613, 623 (1896) (common law test of voluntariness); Pierce v. United States, 160 U.S. 355, 357 (1896) (common law test of voluntariness);

law test of voluntariness. Under this test courts merely examined the circumstances surrounding the confession to determine whether the accused's statement was made voluntarily.[21] In 1897, the Court, although still applying the common law test, finally based its exclusion of a confession explicitly on the self-incrimination clause of the fifth amendment.[22] Examining the case law, the Court recognized two recurring concerns in the confession area: the general distrust of non-judicial confessions[23] and the inconsistent results reached by applying the common law test on a case-by-case basis.[24] In response to these concerns, the Court began to articulate specific standards for determining the voluntariness of non-judicial confessions under the rubric of due process.[25]

The Supreme Court directly addressed the inadequacy of the common law test in the landmark case of *Miranda v. Arizona*.[26] In *Miranda*, the Court granted certiorari to explore the problems of applying the privilege against self-incrimination to custodial interrogation, and to delineate precise constitutional guidelines concerning such interrogations for law enforcement agencies and courts.[27] Writing for the majority, Chief Justice Warren noted that cus-

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Sparf v. United States, 156 U.S. 51, 55 (1895) (common law test for voluntariness); Hopt v. Territory of Utah, 110 U.S. 574, 585 (1883) (common law test of voluntariness).

21. *See, e.g.*, Hopt v. Territory of Utah, 110 U.S. 574 (1883). In *Hopt*, the petitioner was talking alone with a policeman for several minutes before being approached by a detective. As soon as the detective arrived, the petitioner confessed. Although the policeman was not required to testify at trial concerning the conversation, the trial court admitted the confession. On appeal, the Supreme Court affirmed the trial court's admission of the confession finding that the question of voluntariness was to be determined by the trial judge whose "discretion must be controlled by all the attendant circumstances." *Id.* at 583-84.

22. Bram v. United States, 168 U.S. 532 (1897). In *Bram*, the court held that the admissibility of a confession was controlled by the fifth amendment, but applied the circumstantial voluntariness test to exclude it at trial. *Id.* at 542-43.

23. *See* Hopt v. Territory of Utah, 110 U.S. 574, 584 (1883).

24. *See* Bram v. United States, 168 U.S. 532, 548-49 (1897). "[T]he difficulty encountered is, that all the decided cases necessarily rest upon the state of facts which existed in the particular case, and, therefore, furnish no certain criterion, since the conclusion that a given state of fact was adequate to have produced an involuntary confession does not establish that the same result has been created by a different although somewhat similar condition of fact." *Id.* at 548-49.

25. *See, e.g.*, Brown v. Mississippi, 297 U.S. 278 (1936). *Brown* was the first Supreme Court case to overturn a state conviction because of the inadmissibility of a confession. In *Brown*, the Court held that confessions obtained by flagrant physical abuse offended due process. *Id.* at 286. *See also* Haynes v. Washington, 373 U.S. 503, 507 (1963) (refusal of access to wife or counsel); Lynumn v. Illinois, 372 U.S. 528, 524 (1963) (individual weakness); Reck v. Pate, 367 U.S. 433, 441-42 (1961) (physical deprivations); Payne v. Arkansas, 356 U.S. 560, 564 (1958) (threats of imminent danger); Chambers v. Florida, 309 U.S. 227, 230 (1940) (extended interrogation).

The first state confession case decided by the Court on fifth amendment grounds was Malloy v. Hogan, 378 U.S. 1 (1964). In *Malloy*, the Court reversed a conviction based on a confession and held that the fourteenth amendment made the fifth amendment privilege applicable to the states and that the relevant federal standards applied. *Id.* at 3.

26. 384 U.S. 436 (1966).

27. *Id.* at 441-42. *Miranda* was a consolidation of four cases, Miranda v. Arizona (No. 759), Vignera v. New York (No. 760), Westover v. United States (No. 761), and California v. Stewart (No. 584). In No. 759 the defendant was not advised that he had a right to have an attorney present at the interrogation. Two hours after the interrogation began, police secured

todial interrogations were inherently coercive and concluded that the traditional voluntariness test was inadequate.[28] In place of the voluntariness test, the Court developed procedural safeguards to secure the fifth amendment privilege.[29] The safeguards announced by the majority were the four, now famous, *Miranda* warnings which the police must give to suspects prior to custodial interrogations.[30]

To strengthen the protection afforded by the procedural safeguards, the *Miranda* Court held that a custodial confession was involuntary per se unless the approved warnings were given.[31] The Court also held that after being given the warnings a suspect could waive his rights if the waiver was voluntary, knowing and intelligent.[32] The *Miranda* Court's bold attempt to guarantee suspects their fifth amendment rights,[33] and limit the discretion of lower courts, met with limited success, however.[34] Police began to use techniques designed to

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a written confession signed by the defendant. At the top of the document was a typed paragraph stating that the confession was voluntary and "with full knowledge of my legal rights . . . ." *Id.* at 491-92. In No. 760 defendant was arrested and interrogated with no warning of his right to counsel. Defendant confessed during the interrogation. *Id.* at 493-94. In No. 761, without warnings, defendant was interrogated at length by local police during a fourteen hour custodial period. The FBI then informed him of his rights and interrogated him for over two hours until he signed confessions. *Id.* at 494-97. In No. 584, the defendant, his wife and their three guests were arrested and jailed and held for five days. Defendant was kept isolated from the others and interrogated nine times during the five days without ever being apprised of his rights before he confessed. *Id.* at 497. In all four cases, the confessions were used at trial to convict the defendants. The Court reversed the convictions in Nos. 759-61 and affirmed the reversal of conviction in No. 584. *Id.* at 492-98.

28. *Id.* at 467. The Court concluded that without proper safeguards the process of custodial interrogation contains inherently compelling pressures which undermine the individual's will to resist and compel him to speak where he would not otherwise do so. *Id.*

29. *Id.* In order to combat the compelling pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the Court required that the accused be adequately and effectively apprised of his rights and that the exercise of those rights be fully honored. *Id.*

30. See note 2 *supra.*

31. 384 U.S. at 467. In *Miranda* the Court's concern shifted from the untrustworthiness of forced confessions to protecting individual dignity. Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42, 43 (1968).

32. 384 U.S. at 444.

33. *See* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement* Miranda, 66 MICH. L. REV. 1347, 1396 (1968) (finding significant percentage of defendants with cognitive understanding of their rights failed to appreciate their significance and lacked ability to apply them); Project, *Interrogations in New Haven: The Impact of* Miranda, 76 YALE L.J. 1519, 1614 (1967) (mere warnings cannot assure real understanding and intelligent exercise of the privilege).

34. *See, e.g.*, Schenk v. Ellsworth, 293 F. Supp. 26, 29 (D. Mont. 1968) (defendant not told offense he was suspected of committing; therefore, he did not intelligently waive the right to counsel); United States v. Barber, 291 F. Supp. 38, 43 (D. Neb. 1968) (circumstances of confession show that defendant did not intelligently and knowingly waive her right to counsel); Rochester v. United States, 291 F. Supp. 323, 327 (M.D. Ala. 1968) (defendant understood the warnings and still spoke so he must have waived his rights); Rivera Nunez v. State, 227 So. 2d 324, 325 (Fla. 4th D.C.A. 1969) (validity of waiver depends on its having been completely voluntary and knowingly and intelligently made); State v. McClelland, 164 N.W.2d 189, 196 (Iowa 1969) (totality of circumstances implicitly shows defendant voluntarily and intelligently relinquished his rights).

diminish the effectiveness of the warnings.[35] Similarly, fearful of losing trustworthy confessions, lower courts merely shifted their inquiry from whether the confession itself was voluntary to whether a valid waiver was present.[36]

The first confession cases heard by the Burger Court signaled the demise of the Warren Court's procedural safeguards, in favor of a narrow trustworthiness standard.[37] In the first of these cases, *Harris v. New York*,[38] the Court validated the use of statements obtained from the defendant in violation of *Miranda* to impeach his testimony. The Court focused on whether the evidence was trustworthy, rather than whether the *Miranda* warnings were given. This departure from *Miranda* spurred speculation concerning the continued viability of the exclusionary rule in general, and the *Miranda* doctrine in particular.[39] In the next confession case heard by the Burger Court, *Michigan v. Tucker*,[40] the majority held evidence derived from statements obtained in violation of *Miranda* admissible.[41] The Court examined whether the defendant's right against compulsory self-incrimination was directly infringed or whether the police conduct only violated the "prophylactic rules" developed to protect that right.[42] The Court found that the police conduct did not deprive the defendant of his fifth amendment right; it merely failed to provide all the procedural safeguards enunciated in *Miranda*.[43] In dissent, Justice Douglas charged that the majority's opinion eviscerated *Miranda*'s constitutional underpinnings.[44]

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35. *See* White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581, 608-617 (1979).

36. See cases cited in note 34 *supra*.

37. See notes 38-44 and accompanying text, *infra*.

38. 401 U.S. 222 (1971). In *Harris* the defendant was not told that he had a right to appointed counsel prior to his interrogation. *Id.* at 224. Statements made by the defendant were used to impeach his testimony at trial. *Id.* at 223. The Court held that although the statements were inadmissible against defendant in prosecution's case-in-chief it was proper to use the statements for impeachment provided they otherwise satisfied legal standards of trustworthiness. *Id.* at 224. For a trenchant criticism of *Harris*, *see* Dershowtiz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971).

39. Dershowitz & Ely, *supra* note 38, at 1205-08. *See also* Ritchie, *Compulsion That Violates the Fifth Amendment: The Burger Court's Definition*, 61 MINN. L. REV. 383 (1977) (*Harris* was an outright rejection of *Miranda*'s finding that the compulsion inherent in custodial interrogation violates the fifth amendment privilege).

40. 417 U.S. 433 (1974).

41. *Id.* at 452. Defendant was not told of his right to have counsel appointed if he could not pay for one. During his interrogation he made an alibi statement. When the police investigated his statement they found evidence which implicated him. *Id.* at 433. This evidence was used at trial in the prosecution's case-in-chief to obtain the defendant's conviction. *Id.* at 437.

42. *Id.* at 439.

43. *Id.* at 445-46. Although defendant's trial came after *Miranda* was decided, the interrogation at issue occurred prior to that decision. The majority found that sequence of events significant and concluded that the deterrence rationale considered by the Court in *Miranda* was inapplicable since the police in the case followed the then applicable law, Escabeda v. Illinois, 378 U.S. 478 (1964), in good faith. *Id.* at 447.

44. *Id.* at 462-63 (Douglas, J., dissenting). Justice Douglas criticized the majority's finding that the *Miranda* warnings were not constitutionally required. *Id.* Commentators have expanded on Justice Douglas' criticism. *See* Ritchie, *supra* note 39, at 416 (*Harris* and *Tucker*

The Court's erosion of the *Miranda* safeguards continued in *Michigan v. Mosley*.[45] In *Mosley*, the Court defined the issue as when, if at all, interrogation of a suspect may resume after he has asserted his right to remain silent. The defendant, questioned about numerous robberies, had asserted his right to silence when initially interrogated.[46] At a second interrogation two hours later, the defendant was given fresh *Miranda* warnings and questioned about a different crime. During the course of this interrogation, the defendant made incriminating statements which were used to convict him of murder.[47] The majority factually distinguished *Miranda* and held the confession was properly admitted at trial.[48] The Court found that the second interrogation concerned a crime different in nature, time, and place from the robberies about which the defendant was questioned at the first interrogation.[49] Consequently, the Court refused to abide by the literal requirements of *Miranda*, finding that to do so would lead to "absurd and unintended results."[50] To avoid such results, the Court established a new test to determine the admissibility of statements made by a person in custody after he has asserted his right to remain silent. The new

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signify a rejection of *Miranda*'s finding that the compulsion inherent in custodial interrogation violates the privilege against self-incrimination); Stone, *The* Miranda *Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123 (*Tucker* deprived *Miranda* of a constitutional basis but did not explain what other basis for it there might be). *See generally* Chase, *The Burger Court, the Individual and the Criminal Process: Directions and Misdirections*, 52 N.Y.U.L. REV. 518 (1977).

45. 423 U.S. 96 (1975).

46. *Id.* at 97. Defendant was arrested on the basis of an anonymous tip implicating him in several armed robberies and in a robbery-murder. *Id.* at 118-19. Once arrested, defendant was given his *Miranda* warnings and questioned concerning a robbery by a detective in the Armed Robbery Division. *Id.* at 97. The defendant then asserted his right to remain silent. The detective promptly ceased the interrogation, finished the arrest procedure and sent the defendant to a cell. *Id.*

47. *Id.* at 97-98. The questioning concerned the fatal shooting of a man during a robbery. The detective tricked the defendant by stating, untruthfully, that his friend, Anthony Smith, had confessed to participating in the murder and named the defendant as the killer. *Id.* The defendant then made a statement implicating himself in the homicide. *Id.*

48. *Id.* at 105-07. The *Mosley* Court distinguished Westover v. United States, 384 U.S. 436 (1966), a companion case to *Miranda*, on two grounds. The Court first explained that the defendant received full *Miranda* warnings before each interrogation. Secondly, the Court noted that, unlike *Westover*, the defendant in *Mosley* was not subject to intense and prolonged interrogation. 423 U.S. at 105-07.

49. 423 U.S. at 105.

50. *Id.* at 102. The Court cited the following passage from *Miranda*: "[o]nce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." *Id.* at 101-02 (citing 384 U.S. at 473-74). The Michigan appellate court found that the passage quoted above created a per se rule forbidding police-initiated renewal of interrogation after a defendant has asserted the right to remain silent. People v. Mosley, 51 Mich. App. 105, 107, 214 N.W. 564, 566 (1974), *rev'd*, 423 U.S. 96 (1975).

test was whether the suspect's right to cut off questioning was scrupulously honored by his interrogators.[51]

In *Mosley*, the Court refused to characterize the second interrogation as a renewal of the initial interrogation. Because different crimes were discussed in the separate interrogations, the majority classified the second interrogation as an initial interrogation for *Miranda* purposes.[52] Concurring, Justice White distinguished the right to remain silent from the right to counsel and found that police-initiated renewal of interrogation should be allowed only after assertion of the former.[53] Justice White argued that by asserting the right to remain silent the suspect has chosen to make his own decisions.[54] Conversely, by asserting the right to counsel, the suspect concedes that he is incompetent to deal with the authorities without legal advice.[55] State and lower federal courts subsequently disagreed on whether renewal of interrogation after assertion of the right to counsel was permissible.[56]

By providing an unambiguous rule to regulate police practices, the instant Court resolved the conflict among lower courts concerning waiver of the right to counsel after the right has been asserted.[57] Writing for the majority, Justice

51. 423 U.S. at 104.

52. *Id.* at 98, 105-07.

53. *Id.* at 109-11.

54. *Id.* at 110 n.2.

55. *Id.*

56. Numerous courts have adopted a per se rule prohibiting police-initiated interrogation after a defendant asserts the right to counsel. *See, e.g.*, Thompson v. Wainwright, 601 F.2d 768, 771 (5th Cir. 1979) (police may attempt to clarify equivocal request for counsel); United States v. Massey, 550 F.2d 300, 307-08 (5th Cir. 1977) (request for counsel postpones interrogation until counsel is present); United States v. Clark, 499 F.2d 802, 807-08 (4th Cir. 1974) (police-initiated interrogation after assertion of right to counsel made subsequent interrogation involuntary); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969) (no questioning permitted after request for counsel); United States v. Cookstoon, 379 F. Supp. 487, 489 (W.D. Tex. 1974) (once counsel is requested government cannot question unless they again offer counsel and offer is refused); State v. Boone, 220 Kan. 758, 770, 556 P.2d 864, 873 (1976) (results of post-assertion interrogation are not allowed in prosecution's case-in-chief but are allowed to be used for impeachment); State v. Turner, 32 Ore. App. 61, 62, 573 P.2d 326, 327 (1978) (police may make simple request for reconsideration but may not induce a post-assertion waiver); State v. Marcum, 24 Wash. App. 441, 444, 601 P.2d 975, 978 (1979) (all questioning must stop once counsel is requested).

Some courts have allowed police-initiated interrogation after assertion of the privilege. *See, e.g.*, White v. Finkbeiner, 611 F.2d 186, 193 (7th Cir. 1979) (two day time lapse between request for counsel and police-initiated interrogation sufficient to dispel coercion); Blasingame v. Estell, 604 F.2d 893, 896 (5th Cir. 1979) (defendant's request for counsel did not preclude subsequent interrogation); United States v. Grant, 549 F.2d 942, 946 (4th Cir.), *cert. denied*, 432 U.S. 908 (1977) (police may continue questioning after request for counsel so long as it does not concern the crime); United States v. Pheaster, 544 F.2d 353, 368 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977) (police may initiate interrogation after request for counsel); State v. Stone, 397 A.2d 989, 995 (Me. 1979) (police may initiate interrogation after request for counsel); State v. Blevins, 581 S.W.2d 449, 456 (Mo. App. 1979) (no per se rule preventing police from initiating interrogation after request for counsel).

57. 101 S. Ct. at 1884-85. See note 56 *supra*. Prior to resolving this conflict, the Court addressed the closely related problem of the appropriate standard for pre-assertion waiver of counsel. In North Carolina v. Butler, 441 U.S. 369 (1979), the state court had excluded the confession defendant made after refusing to sign a waiver form. The lower court used

White held that after an accused asserts the right to counsel he is not subject to further interrogation by the authorities, unless he initiates subsequent dialogue with them.[58] The Court reasoned that if petitioner had initiated the second meeting, his volunteered statements could have been used at trial.[59] Because the police initiated the second interrogation over petitioner's objection and before he had access to counsel, the waiver was invalid[60] and his statement inadmissible.[61] The majority found support for its holding in the language of *Miranda*[62] and its recent progeny.[63] The Court, however, refused to address the question of whether there would have been a valid waiver of counsel if the second interrogation had been petitioner's first and only interrogation.[64]

Concurring in the judgment, Chief Justice Burger argued that neither the fifth amendment, nor the holding of *Miranda*, required a special rule detailing how an accused may waive the right to be free from custodial interrogation.[65] Chief Justice Burger stated that the relevant inquiry was whether the resumption of interrogation was the result of a voluntary waiver. Emphasizing that petitioner was ordered to meet with the detectives at the second interrogation,

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Miranda's plain language to conclude that waiver of the right to counsel should not be recognized unless expressly made after the suspect has been apprised of the right. State v. Butler, 295 N.C. 250, 253, 244 S.E.2d 410, 413 (1978), *rev'd* 441 U.S. 369 (1979). The Supreme Court, however, rejected the lower court's conclusion and remanded the case for application of the less demanding knowing and intelligent waiver test. 441 U.S. at 374. The knowing and intelligent waiver test, as enunciated by the Court in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), requires the judge to examine the facts and circumstances of the purported waiver to determine if it was an intentional relinquishment of a known right or privilege.

58. 101 S. Ct. at 1884-85.

59. *Id.* at 1885.

60. *Id.* at 1886.

61. *Id.*

62. *Id.* at 1885. The instant Court referred to the following statement from *Miranda*: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." 384 U.S. at 474.

63. 101 S. Ct. at 1885. The Court referred to the distinction drawn in *Mosley* between the post-assertion procedural safeguards required to protect the right to remain silent and the right to counsel. *Id.* The Court next discussed Fare v. Michael C., 442 U.S. 707 (1979). In *Fare*, the majority applied the knowing and intelligent waiver standard and held that the respondent, a juvenile on probation, had not asserted his right to counsel when he asked if he could have his probation officer present instead of an attorney. *Id.* at 727-28. The *Fare* majority also characterized *Miranda* as creating a per se rule that interrogation must cease when the suspect asserts the right to counsel. *Id.* at 719. The instant Court then discussed Rhode Island v. Innis, 446 U.S. 291 (1980), to further support its present holding. 101 S. Ct. at 1885-86.

64. 101 S. Ct. at 1886 n.10. In this brief footnote, however, the Court suggested that if petitioner had been in custody approximately seventeen hours before he was interrogated, the knowing and intelligent waiver standard would nevertheless apply. In another footnote, the Court refused to decide whether the defendant's right to counsel under the sixth and fourteenth amendments had been abridged. *Id.* at 1882-83 n.7.

65. 101 S. Ct. at 1886. The Chief Justice also expressed his displeasure with *Miranda*, again, by stating: "The extraordinary protections afforded a person in custody suspected of criminal conduct are not without a valid basis, but as with all 'good' things they can be carried too far." *Id.*

the Chief Justice concluded that the resumption of interrogation was not the product of a voluntary waiver.[66]

Justice Powell, also concurring,[67] argued there was no constitutional basis for a per se rule requiring a threshold inquiry to determine who initiated the conversation after the right to counsel had been asserted.[68] Justice Powell stated that determining which party initiated the conversation might be relevant to the waiver question, but it was not dispositive.[69] Thus, he refused to join the Court's opinion because of his concern that it declared a single factor, determining who initiated the subsequent conversation, constitutionally determinative of the validity of a waiver of counsel.[70] Justice Powell, however, found petitioner's statement inadmissible because it violated *Miranda*'s requirement that a waiver be knowing, voluntary and intelligent.[71]

Between the day Warren Burger became Chief Justice[72] and the instant case,[73] no case heard[74] by the Supreme Court excluded a confession on the basis of a *Miranda* violation.[75] More significantly, the instant case is also the first Burger Court decision to establish a per se rule protecting the privilege against compulsory self-incrimination. The Burger Court had determined the admissibility of confessions by evaluating the particular circumstances under which they were made.[76] Breaking with the recent past, the instant majority rejected this case-by-case determination of the validity of waivers of the right to counsel after the right to counsel has been asserted.[77] Accordingly, the Court recognized that a post-assertion confession obtained by police-initiated renewal of interrogation and before the defendant has access to counsel, is involuntary per se.[78] The Court's recognition of this fact manifests a return to *Miranda*'s focus on

66. *Id.* at 1887. Also see note 4 *supra.*

67. *Id.* (Justice Rehnquist joined this opinion).

68. *Id.* at 1888.

69. *Id.* Justice Powell's statement is clearly at odds with the majority's statement that it is a "necessary fact" that the accused reopen the dialogue. *Id.* at 1885 n.9.

70. *Id.* at 1888-89.

71. *Id.* at 1887. See text accompanying note 32 *supra.*

72. Chief Justice Burger was commissioned on June 23, 1969, and took his oath and his seat on the same date. *See* 396 U.S. 111 (1969).

73. The instant case was decided May 18, 1981. *See* 101 S. Ct. at 1880.

74. *See* Tague v. Louisiana, 444 U.S. 469 (1980) (per curiam), the first Burger Court decision that excluded a confession because of a *Miranda* violation. The Court, however, decided *Tague* solely on the petition for certiorari. *Id.* at 471. *Tague* was an extreme case. At the suppression hearing, the officer who read the warnings to petitioner testified that he could not remember what the rights were, whether petitioner understood his rights, and whether petitioner was literate or otherwise capable of understanding his rights. *Id.* at 469.

75. *See* Stone, *supra* note 44, at 100. The Burger Court's disapproval of *Miranda* "is reflected both in its substantive decisions and in the manner in which it has exercised its power to decide which cases on its docket to review." *Id.* Through 1976 the Court heard only one of thirty-five *Miranda* cases when defendant sought review and thirteen of twenty-five when the government sought review. *Id.*

76. See notes 37-56 and accompanying text, *supra.*

77. See notes 57-59 and accompanying text, *supra.*

78. *See* Miranda v. Arizona, 384 U.S. at 474 (statement taken after suspect invokes his privilege cannot be other than the product of compulsion, subtle or otherwise). *Cf. id.* at 457 (statements may not have been involuntary in traditional terms; statements must truly be the product of free choice).

the inherent coercion of the custodial environment, and its concern with police practices that undermine the fifth amendment guarantees.

The instant majority, by establishing the new per se rule, went beyond what was necessary to exclude the confession. Just two terms ago the Court refused to require an express waiver of the right to counsel prior to assertion.[79] Instead of relying upon this objectively ascertainable fact,[80] the Court determined the validity of the waiver of counsel by drawing inferences from the suspect's actions and words.[81] In contrast, the instant Court acknowledged the need for additional safeguards when a suspect requests counsel.[82] By requesting counsel, a suspect recognizes that he is not competent to deal with the authorities alone.[83] Accordingly, the instant Court concluded that when police resume interrogation without counsel present, after the accused has requested counsel, it must be assumed that any confession thereby obtained is involuntary.[85] This new rule protects the suspect's choice to be free from interrogation until he consults with counsel.

The new per se rule, however, does not comport with the plain language of *Miranda* that when the right to counsel is asserted, interrogation must cease until counsel is present.[85] In *Mosley*, where the Court also refused to abide by the clear language of *Miranda*,[86] Justice White's concurrence provided a cogent rationale for the Court's refusal by distinguishing between the procedural safeguards triggered by a request to remain silent and those triggered by a request for counsel.[87] Arguing that *Miranda* did not establish a per se rule prohibiting interrogation after assertion of the right to remain silent, Justice White demonstrated how *Miranda* did indeed create such a rule prohibiting interrogation absent counsel after assertion of the right to counsel.[88] The majority in the instant case adopted Justice White's reasoning in *Mosley*, with one significant difference. Rather than a complete prohibition on interrogation after the accused has asserted his right to counsel,[89] the per se rule adopted by the majority prohibits only police-initiated reinterrogation.[90] Interestingly, the majority never acknowledged that its rule differed from *Miranda*'s.[91]

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79. *See* North Carolina v. Butler, 441 U.S. 369 (1979); notes 60-63 and accompanying text, *supra*.

80. *Cf.* Miranda v. Arizona, 384 U.S. at 469 (circumstantial assessments are speculation, warnings are clearcut fact).

81. North Carolina v. Butler, 441 U.S. 369, 373 (1979).

82. 101 S. Ct. at 1884.

83. See note 58 and accompanying text, *supra*.

84. 101 S. Ct. at 1885.

85. Miranda v. Arizona, 384 U.S. at 474.

86. See note 53 and accompanying text, *supra*.

87. See notes 56-58 and accompanying text, *supra*.

88. 423 U.S. at 109-10.

89. At least one court has gone further and held that the right to counsel, once asserted, cannot be waived. *See* United States v. Priest, 409 F.2d 491 (5th Cir. 1969). The *Priest* court stated: "Where there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible." *Id.* at 493.

90. 101 S. Ct. at 1884-85.

91. There was no discussion on this point anywhere in the decision. The Court could have at least noted that its new rule was not the most faithful reading of *Miranda*. Alterna-

Close examination of the new per se rule reveals that it is as vulnerable to authoritarian abuse as the *Miranda* warnings have been.[92] Although the new rule requires the accused to initiate further dialogue with the police in order to waive his previously asserted right to counsel, it does not require that the accused intends to waive that right. Rather, the Court seems content to allow the accused's mere initiation of social dialogue to waive the right to counsel.[93] Nevertheless, such waivers must still be tested under the voluntary, knowing and intelligent standard.[94] By focusing exclusively on who initiates dialogue, however, the rule ignores other coercive aspects of the custodial environment.[95]

By excluding petitioner's confession and developing a per se rule, the instant Court has recognized the continuing validity of *Miranda*. The Court's return to per se rulemaking did not, however, evince an unqualified concern with curtailing police abuses. The police may still initiate interrogation after assertion of the right to counsel since statements obtained in violation of the rule are admissible at trial for collateral purposes.[96] Thus, although the instant Court did prohibit a classic example of coercion in the custodial environment, the new rule's simplistic focus deprives it of the ability to protect the fifth amendment privilege from more subtle forms of coercion.

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tively, the Court could have found language in *Miranda* to support its position. For example, the *Miranda* Court stated that "[o]ur aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process." 384 U.S. at 469.

92. See note 36 *supra*.

93. 101 S. Ct. at 1885 n.9.

94. *Id.*

95. The impact of being cut off from the outside world is particularly effective in forcing the suspect to communication, if only to reduce his sense of isolation. *See* Driver, *supra* note 31, at 57; *cf.* Miranda v. Arizona, 384 U.S. at 461 (compulsion to speak in the isolated setting of the police station is greater than in court).

96. *See, e.g.*, Michigan v. Tucker, 417 U.S. at 446-52; Harris v. New York, 401 U.S. 223, 224 (1971). When read in conjunction with *Harris*, the rule allows a confession obtained by post-assertion police-initiated interrogation to be used for impeachment purposes. See note 38 *supra*. Similarly, when read in light of *Tucker* the rule allowed evidence found as a result of a confession to be used in the prosecution's case-in-chief. See note 41 and accompanying text, *supra*. *Cf.* Ingber, *Procedure, Ceremony and Rhetoric: The Minimization of Ideological Conflict in Deviance Control*, 56 B.U.L. REV. 266, 304-05 (1976) (police often may be willing to risk suppression of illegally seized evidence in order to gain evidence usable against defendants without constitutional protection).