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Minnick v. Mississippi: Attorney and Client Joined at the Hip

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MINNICK V. MISSISSIPPI: ATTORNEY AND CLIENT JOINED AT THE HIP

THE FIFTH AMENDMENT of the United States Constitution states in part that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself."[1] This clause has provided the basis for Supreme Court rulings on the courtroom admissibility of confessions obtained in the course of custodial interrogation.[2] Specifically, the Court has ruled that prior to interrogation police officers must inform an accused that he or she has the right to have counsel present during the interrogation.[3] In addition, once the accused has asserted the right to consult with counsel or to have counsel present during questioning, the police are required to cease the interrogation and may not initiate subsequent interrogations without counsel being made available to the accused.[4]

In *Minnick v. Mississippi*,[5] the Supreme Court of the United States held that once an accused person requests the assistance of counsel, the police must cease interrogation and may not reinitiate it without the presence of counsel, regardless of whether the accused has consulted with his or her attorney.[6] In *Minnick*, the defendant escaped from the Clarke County, Mississippi, jail with a fellow prisoner, Dyess, and a day later was involved in the murder of two people. Four months later, Minnick was arrested by the San Diego police. Minnick testified that he was mistreated by the local police after being arrested.[7] Two FBI agents came to the jail to question Minnick on the following day. Minnick testified that he refused to be interviewed but was told that "he would 'have to go down or else.' "[8] The agents read Minnick his *Miranda* rights,

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1. U.S. CONST. amend. V.

2. A custodial interrogation is a "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Obviously, those arrested for crimes have been deprived of their freedom of action in a significant manner.

3. *Id.* at 474.

4. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

5. 111 S. Ct. 486 (1990).

6. *Id.* at 491.

7. Minnick v. State, 551 So. 2d 77, 82 (Miss. 1988), *rev'd*, 111 S. Ct. 486 (1990).

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

and he acknowledged that he understood them. He refused to sign a rights waiver form, however, and said that he would only answer a few questions.[9] After answering the questions, Minnick concluded the interview by stating, "[c]ome back Monday when I have a lawyer," and explained "that he would make a more complete statement then with his lawyer present."[10] After the interview with the FBI, an appointed attorney met with Minnick on two or three occasions. The attorney told Minnick not to speak with anyone or sign any rights waiver forms.[11]

The following Monday, Deputy Sheriff Denham from Mississippi came to the San Diego jail to interview Minnick. Minnick testified that he was again instructed by his jailers that he must speak with Denham and could not refuse to do so.[12] Denham read Minnick his rights again, and Minnick refused to sign the waiver form. Minnick agreed to tell Denham about the escape from Clarke County Jail.[13] Minnick discussed his escape, and then, according to Denham, Minnick described his participation in the double murder.[14]

Minnick was tried for murder in Mississippi. He moved to suppress all the statements he had made to law enforcement officials. The trial court granted the motion to suppress the statements made to the FBI officers but denied the motion to suppress the statements made to Denham. Minnick "was convicted on two counts of capital murder and sentenced to death."[15] On appeal, Minnick argued that his statements to Denham were extracted in violation of his fifth amendment right to have counsel present during the interrogation.[16] The Mississippi Supreme Court rejected Minnick's argument and held that the confession was admissible; Minnick then appealed to the Supreme Court of the United States. The Supreme Court reversed the Mississippi Supreme Court and held that Minnick's confession to Denham was inadmissible. The Court reasoned that once an accused has requested

9. *Id.*
10. *Id.*
11. *Id.* at 493 (Scalia, J., dissenting).
12. *Id.* at 488-89.
13. *Minnick*, 551 So. 2d at 82.
14. *Minnick*, 111 S. Ct. at 489.
15. *Id.*
16. In addition, Minnick claimed that his confession was extracted in violation of his sixth amendment right to counsel. However, the majority ruled that it was unnecessary to reach the sixth amendment argument since Minnick's fifth amendment rights were violated. *Id.*

counsel, the police must cease the interrogation and may not reinitiate it without the presence of counsel, whether or not the accused has consulted with an attorney.[17]

This comment examines both the majority and dissenting opinions and concludes that the majority opinion was better reasoned than the dissent. In addition, the majority seems to be sending police the message that the fifth amendment right against self-incrimination will continue to expand. This expansion will likely continue until better documentation of the interrogation process permits a court to determine whether the accused's admission of guilt or waiver of rights was in fact voluntary.

I. HISTORY

The fifth amendment of the United States Constitution states that no person can be compelled in any criminal case to testify "against himself."[18] The right against self-incrimination formed the basis of the Court's ruling in *Miranda v. Arizona*.[19] Specifically, the Court established a procedure for conducting custodial interrogations to insure the admissibility of an accused's confession. As part of this procedure, *Miranda* requires police officers to warn the accused prior to questioning 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."[20] The accused may waive these rights provided that "the waiver is made voluntarily, knowingly and intelligently."[21] If the accused informs the police that he or she does not wish to be interrogated, the police must end the interrogation. If the accused indicates a desire to consult with an attorney before answering any questions, the police may not initiate questioning.[22] Even though the accused may have answered some questions or volunteered some information, the accused still possesses the right to refrain from answering any subsequent questions.[23]

If the accused is interrogated without the presence of an at-

17. *Id.* at 491.
18. U.S. CONST. amend. V.
19. 384 U.S. 436 (1966).
20. *Id.* at 444.
21. *Id.*
22. *Id.* at 445. *See generally* J. MILES & D. RICHARDSON, THE LAW OFFICER'S POCKET MANUAL (1991) (describing the current procedures for custodial interrogations).
23. *Miranda*, 384 U.S. at 445.

torney, "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."[24] An accused's declaration of willingness to make a statement without consulting an attorney might constitute a valid waiver if closely followed by the statement.[25] However, a valid waiver will not be assumed simply from the accused's silence after the warnings have been given or from the fact that a confession was ultimately obtained.[26] In addition, a lengthy interrogation before the accused makes a statement is strong evidence that there was no waiver.[27] *Miranda*'s strict requirements rest on an underlying policy of deterring police use of physical or psychological coercion to extract confessions,[28] as well as protecting an accused who does not know his or her rights from unknowingly waiving them.[29]

Edwards v. Arizona[30] reinforced the *Miranda* protections, holding that the police may not reinterrogate an accused in custody at their own initiation once the accused has asserted the right to counsel.[31] Specifically, *Edwards* held that an accused who requests an attorney, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[32] The *Edwards* decision " 'is designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' "[33] *Edwards* accomplishes this goal by establishing a per se rule that an accused's waiver of rights is involuntary if the accused requested counsel and the police then initiate an interrogation before counsel has been provided. By excluding these confessions as per se involuntary, *Edwards* also conserves judicial resources since the courts

24. *Id.* at 475.
25. *Id.*
26. *Id.*
27. *Id.* at 476.
28. *Id.* at 446-47, 455, 461.
29. *Id.* at 470-71. The strict requirements for a waiver ensure that the accused does not act unknowingly. *Id.* at 475-76.
30. 451 U.S. 477 (1981).
31. *Id.* at 485.
32. *Id.* at 484-85.
33. Minnick v. Mississippi, 111 S. Ct. 486, 489 (1990) (quoting Michigan v. Harvey, 110 S. Ct. 1176, 1180 (1990)).

are not required to make the difficult determination of whether the accused's confession was voluntary.[34] Finally, *Edwards* establishes clear guidelines for the law enforcement profession.[35]

While *Edwards* reinforces *Miranda*'s protections when an accused requests the assistance of counsel, *Edwards* does not apply when the accused asserts only the right to remain silent. When only this right is asserted, the police are free to reinitiate the interrogation of the accused until the accused indicates the desire to consult with an attorney.[36]

Miranda and *Edwards* combine to protect the accused from waiving rights *before* counsel has been made available. However, neither addresses the question of whether these protections should be extended to an accused *after* counsel has been made available. When Minnick was arrested, and requested and was supplied with counsel, the issue became whether the protections for waiver in *Miranda* and *Edwards* continued to apply. The Supreme Court answered this question in the affirmative.

II. *MINNICK V. MISSISSIPPI*

A. The Majority Opinion

The issue on appeal to the Supreme Court was whether the protections of *Miranda* and *Edwards* continued once the accused had consulted with counsel. The six member majority held that once an accused has requested counsel, the police must cease interrogation and may not reinitiate interrogation without the presence of counsel, "whether or not the accused has consulted with his attorney."[37] The majority emphasized that the purpose of both *Miranda* and *Edwards* was to prevent the accused from being coerced into making a statement.[38] The "presence [of counsel] would insure that statements made in the government-established atmosphere are not the product of compulsion."[39]

Having asserted that the presence of counsel is the key to preventing a forced or coerced statement by the accused, the majority offered four supporting arguments. First, the majority reasoned that a single consultation with counsel is not sufficient to

34. *Id.* at 489-90.
35. *Id.* at 490 (citing Arizona v. Roberson, 486 U.S. 675, 682 (1988)).
36. *Id.* at 497 (Scalia, J., dissenting).
37. Minnick v. Mississippi, 111 S. Ct. 486, 491 (1990).
38. *Id.* at 490.
39. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966)).

counteract persistent attempts by officials to coerce a waiver.[40] The majority quoted *Miranda* to support this view:

> Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, 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.[41]

In addition, the majority argued that "consultation is not always effective in instructing the suspect of his rights."[42] That Minnick did not understand his rights was evident in that he thought he could keep his admissions out of evidence by simply refusing to sign a rights waiver form.

Second, the majority stressed that the advantages of the "clear and unequivocal"[43] *Edwards* rule would be undermined if the rule urged by Mississippi were adopted. Mississippi argued that the *Edwards* protection terminates after the accused consults with counsel, although it can be reinstated at a subsequent police initiated interrogation if the accused requests the assistance of counsel once again. The majority maintained that if Mississippi's proposal were to be adopted, the *Edwards* protection would "pass in and out of existence multiple times . . . . spread[ing] confusion through the justice system and lead[ing] to a consequent loss of respect for the underlying constitutional principle."[44]

Third, the majority reasoned that if Mississippi's proposal were adopted, courts would be faced with the difficult determination of what constitutes a sufficient consultation with the attorney for the *Edwards* protection to be terminated.[45] To decide this question, courts would be required to determine the quality of the consultation. The majority argued that these "necessary inquiries" could interfere with the attorney-client privilege.[46]

Finally, the majority expressed its concern that an accused whose counsel is prompt would lose the protection of *Edwards*, while the accused whose counsel is tardy would not.[47] The Missis-

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40. *Id.* at 491.
41. *Id.* (quoting *Miranda*, 384 U.S. at 470) (citation omitted).
42. *Id.*
43. *Id.* at 492.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*

sippi rule might "distort the proper conception of the attorney's duty" by sending the message that an attorney should delay consultation with the accused in order to prolong the applicability of the *Edwards* rule.[48]

Based on the above arguments, the majority held that once counsel is requested, interrogation must cease, and the police may not reinitiate interrogation without the presence of counsel, even if the accused has conferred with counsel.[49] Therefore, since Minnick requested counsel during his first interrogation, his subsequent interrogation and confession to Denham without the presence of counsel violated his fifth amendment rights and was not admissible.

B. The Dissenting Opinion

The dissent argued that the *Edwards* protection should terminate permanently once the accused consults with an attorney.[50] The dissent explained that "when a suspect in police custody is first questioned he is likely to be ignorant of his rights and to feel isolated in a hostile environment. This likelihood is thought to justify special protection against unknowing or coerced waiver of rights."[51] This is the policy underlying *Miranda* and *Edwards*, but once the accused has consulted with an attorney, this policy has been fulfilled and further protection is not required.

The dissent then criticized the majority's holding, arguing first that many persons in police custody will invoke their *Miranda* rights immediately so that a permanent prohibition on police initiated interrogation will attach.[52] The dissent argued, therefore, that the extension of *Edwards* could prevent police from initiating an interrogation for "three months, or three years, or even three decades."[53]

The dissent then attempted to refute the majority's arguments. First, the dissent argued that the policy of creating a

48. *Id.*
49. *Id.*
50. *Id.* at 496 (Scalia, J., dissenting).
51. *Id.* at 495 (Scalia, J., dissenting).
52. *Id.* at 496 (Scalia, J., dissenting).
53. *Id.* (Scalia, J., dissenting). Other arguments made by the dissent were that the majority was not specific as to how far to extend the *Edwards* rule, that this extension of *Edwards* would appear to apply in the sixth amendment context, and that the extension of *Edwards* would appear to apply to interrogations involving subjects other than the original crime. *Id.* (Scalia, J., dissenting).

bright-line rule did not justify the expanse of the majority's rule.[54] Nor do the policies advanced in *Miranda* and *Edwards* justify the majority's exclusion of all confessions obtained during a police initiated interrogation. After consultation, counsel may have advised the accused of his or her rights, and the accused may no longer feel isolated. In addition, the dissent maintained that its rule, which would terminate *Edwards* protection once the accused had consulted with counsel, was just as "clear and rational" as the majority's rule.

Second, the dissent maintained that the precise content of the consultation is irrelevant under its interpretation of the underlying policies of *Miranda* and *Edwards*. All that is necessary to eliminate the feeling of isolation is that the accused be advised of his or her rights.[55] Thus, the dissent argued that the majority's concern with the practical difficulty or ethical impropriety of determining the quality of a consultation was "alarmist."[56]

Third, the dissent maintained that there would be no irony if an accused with prompt counsel lost the *Edwards* protection immediately while an accused with dilatory counsel does not lose the *Edwards* protection immediately. The dissent insisted that there is "no irony in applying a special protection only when it is needed."[57]

Finally, the dissent added that the majority's concern that the *Edwards* rule could pass in and out of existence several times did not apply to the dissent's proposed rule. Under its rule, *Edwards* would cease to apply once the accused had consulted with counsel.[58] Finally, the dissent reasoned that since Minnick consulted with his attorney prior to his discussion with Denham, his confession was admissible at trial.

III. ANALYSIS

The novel issue that confronted the Supreme Court was to determine whether an accused may waive the right to have counsel present during a custodial interrogation that occurs after requesting to and actually consulting with counsel. Both the major-

54. *Minnick*, 111 S. Ct. at 496-97 (Scalia, J., dissenting).
55. *Id.* at 497 (Scalia, J., dissenting).
56. *Id.* (Scalia, J., dissenting).
57. *Id.* (Scalia, J., dissenting).
58. *Id.* (Scalia, J., dissenting).

ity[59] and dissent[60] emphasized that the underlying policy of *Miranda* and *Edwards* was to prevent an accused from making a compelled statement at an interrogation in violation of the fifth amendment. However, the majority and dissent disagreed on what statements should be considered compelled. The majority held that the threat of coercion could never be removed, and thus the attorney's presence at a subsequent interrogation is necessary to prevent police officers from persistently attempting to coerce the accused into making a statement.[61] Accordingly, the majority held that any statement made by an accused without his or her attorney present was not admissible. The dissent, however, viewed the protection more narrowly and only required that the accused consult with an attorney to eliminate the accused's "feeling of isolation and to assure him the presence of legal assistance."[62] According to the dissent, once the accused has consulted with counsel, the accused is no longer ignorant of his or her rights and does not feel isolated; thus, the *Edwards* protection is no longer necessary and should be terminated.[63]

The opinions of the majority and dissent may be criticized on several grounds. First, both based their holdings directly on the text of *Miranda*, which does not completely support either opinion. In particular, the dissent's narrow protection draws on *Miranda*'s concern that "[a]n individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak."[64] In addition, *Miranda* stated that "[t]he accused who does not know his rights and therefore does not make a request may be the person who most needs counsel."[65] The dissent's reading of *Miranda* is that the role of the lawyer is only to remove the accused's feeling of seclusion and to guarantee the presence of legal assistance.[66] The dissent's reading of *Miranda* is incomplete. The *Miranda* Court also stressed the need for counsel to be present at the interrogation, stating that "[t]he right to have counsel present at the interrogation is *indis-*

59. Minnick v. Mississippi, 111 S. Ct. 486, 491 (1990).
60. *Id.* at 495 (Scalia, J., dissenting).
61. *Id.* at 491.
62. *Id.* at 497 (Scalia, J., dissenting).
63. *Id.* at 496 (Scalia, J., dissenting).
64. Miranda v. Arizona, 384 U.S. 436, 461 (1966).
65. *Id.* at 470-71.
66. *Minnick*, 111 S. Ct. at 497 (Scalia, J., dissenting).

pensable to the protection of the Fifth Amendment privilege . . . . With a lawyer present the likelihood that the police will practice coercion is reduced . . . ."[67] The dissent's incomplete understanding of *Miranda*'s conception of the attorney's role during interrogation weakens the support that case gives its argument.

The *Minnick* majority's reading of *Miranda* is also flawed. In support of its holding, the majority quoted the *Miranda* language that the accused has the right "to have counsel present during any questioning if the defendant so desires."[68] While this language does emphasize the need for counsel to be present during the interrogation, it also suggests that the defendant may choose not to have counsel present. In addition, this passage does not indicate whether interrogation initiated by the police and interrogation initiated by the accused are both within the rule. Further, it does not state whether counsel must be requested at the first interrogation or at a subsequent interrogation. Thus, this language does not support the unconditional right to have counsel present at the interrogation. Therefore, the majority's claim that *Miranda* requires that counsel be present during a police-initiated interrogation after the accused has consulted with counsel is unfounded.

A close reading of the entire *Miranda* opinion supports this criticism of the *Minnick* holding. *Miranda* suggests that the accused may consult with an attorney and waive his rights in a subsequent police initiated interrogation. The *Miranda* Court held that "[t]he mere fact that [the accused] may have answered some questions . . . does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned."[69] Thus, *Miranda* implies that the accused may consent to interrogation after consulting with counsel. Since it is implied that the accused may waive this aspect of the right to counsel, the subsequent interrogation may be police initiated. Therefore, this passage of *Miranda*

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67. *Miranda*, 384 U.S. at 469-70 (emphasis added); *see also id.* at 466 (presence of counsel "would insure that statements made in the government-established atmosphere are not the product of compulsion"). The Court continued that "if coercion is nevertheless exercised the lawyer can testify to it in court." *Id.* at 470. In general, however, an attorney is not allowed to represent a client in a matter in which the lawyer is likely to be a necessary witness. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7(a) (1983). By failing to comment on this implication of the attorney's presence during interrogation, the Court appears to endorse this principle. Of course, the attorney need not testify if the same information can be secured from the interrogator or a third party observer.

68. *Minnick*, 111 S. Ct. at 491 (quoting *Miranda*, 384 U.S. at 470).

69. *Miranda*, 384 U.S. at 445.

actually runs counter to *Minnick*.

A second criticism applicable to both the majority and dissenting opinions is that neither was required to reach the issue of whether an accused should be allowed to waive his or her rights after consulting with counsel during a police initiated interrogation. The facts indicate that Minnick never waived his fifth amendment rights prior to making statements to Denham. Nevertheless, both the majority and dissent assumed that Minnick's waiver of his fifth amendment rights was effective.[70] The relevant facts are as follows. On Monday, August 25, Minnick was instructed that he was required to speak with Denham, a police officer. Minnick refused, but he was told that he could not refuse to do so.[71] He then met with Denham. Denham read Minnick his rights, and Minnick refused to sign a rights waiver form. Minnick agreed to tell Denham about the escape from Clarke County Jail, but that was all he agreed to talk about.[72] Minnick discussed his escape, and then, according to Denham, his participation in the double murder.[73]

For two reasons these facts indicate that Minnick did not waive his rights. First, when Minnick was told that he was required to speak with Denham, he refused but was instructed that he could not. Minnick's refusal to speak serves as an assertion of his right to remain silent. Under *Miranda*, "if the [accused] is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him."[74] However, the police did exactly that by instructing Minnick that he could not refuse to speak with Denham.[75] Thus, any statement made by Minnick subsequent to his assertion of his right to remain silent should have been considered inadmissible. There was no need for the majority to reach the question in this case.

The second indication that Minnick did not waive his fifth amendment rights lies in the statements Minnick made to

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70. That the majority assumed Minnick's waiver was effective is evident in that it extended the *Edwards* rule to Minnick to prevent his confession from being admissible at trial. The dissent also found that the waiver was effective, it argued that Minnick's statements were admissible.

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

72. Minnick v. State, 551 So. 2d 77, 82 (Miss. 1988), *rev'd*, 111 S. Ct. 486 (1990).

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

74. *Miranda*, 384 U.S. at 445.

75. The majority acknowledged that the police ignored Minnick's right to remain silent. *See Minnick*, 111 S. Ct. at 491.

Denham at the interrogation. After reading Minnick his rights, "Denham asked Minnick to tell about his escape from Clarke County Jail. *Minnick agreed to do that much*, and then, according to Denham, just proceeded to confess to the murders."[76] Minnick therefore waived his fifth amendment rights with respect to the escape from Clarke County jail. However, Minnick did not specifically waive his rights with respect to the murders. Since Minnick was interrogated without the presence of an attorney, "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."[77] A valid waiver will not be assumed simply from the accused's silence after the warnings have been given or from the fact that a confession was ultimately obtained.[78] As the Supreme Court has stated, "we should 'indulge every reasonable presumption against waiver of fundamental constitutional rights.' . . . Doubts must be resolved in favor of protecting the constitutional claim."[79] Therefore, since Minnick never affirmatively waived his fifth amendment rights with respect to the murders, his subsequent confession to Denham should have been considered inadmissible.

Since Minnick's confession was inadmissible under *Miranda*, why did the majority and dissent construct new rules to support their holdings? The dissent likely constructed a new rule since, in its view, the *Edwards* rule was a mistake. Indeed, the dissent referred to *Edwards* as "a past mistake."[80] The majority's rule was, in the dissent's view, a present mistake since the accused's right to counsel was based only on the need to inform the accused of his or her rights and insure against isolation. While *Miranda* advanced these interests, it also emphasized the need for counsel to be present at the interrogation in order to prevent abuses. Thus, the dissent sought to develop a new rule to curtail the *Miranda* and *Edwards* protections.

The majority sought to expand the *Edwards* protection. The

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76. *Minnick*, 551 So. 2d at 82 (emphasis added).

77. *Miranda*, 384 U.S. at 475.

78. *Id.*

79. Michigan v. Jackson, 475 U.S. 625, 633 (1986) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

80. *Minnick*, 111 S. Ct. at 497 (Scalia, J., dissenting). The dissent obviously had an additional motive for constructing the new rule—no legal precedent would permit Minnick's confession to be admitted in court.

majority opinion emphasized that the presence of counsel at interrogation was crucial to preventing abuse.[81] While neither *Miranda* nor *Edwards* directly supports the majority's expansion of the *Edwards* rule,[82] the policy behind these decisions does. Both *Miranda* and *Edwards* emphasized the role of the attorney in counteracting police brutality and coercion to extract confessions.[83] Seeking to advance this interest, the *Minnick* majority required the presence of counsel even after there had been a consultation. The majority was concerned with the realities of the interrogation process; this case "well illustrates the pressures, and abuses, that may be concomitants of custody."[84] Specifically, the majority was troubled by the fact that Minnick requested not to be interrogated but was told that he could not refuse.[85] The majority emphasized that, if present, Minnick's counsel could have advised him that he did not have to make a statement.[86]

On balance, the majority's holding was more persuasive than the dissent's. The dissent did not consider the presence of counsel necessary to prevent the police from coercing the accused into making statements. Rather, the dissent viewed the attorney's role as helping the accused adjust to the harsh surroundings of detention. Once this acclimation had taken place, the dissent argued, the accused would be able to deal with the environment without an attorney.

The dissent's simplification of the attorney's role may be criticized for several reasons. First, under *Miranda*, the presence of counsel is a key factor in preventing abuse, and the dissent improperly ignored this important point. Second, the requirement of having an attorney present prevents the police from constantly reinterrogating the accused every time the accused has consulted with counsel. The purpose of this reinterrogation could only be to coerce or badger the accused into making statements that would not ordinarily he made with an attorney present at the interrogation. Third, the attorney may detect and be available to testify to coercive conduct observed during the interrogation. Finally, since the majority rule does not prohibit accused initiated discussions

81. *Id.* at 490 ("Our emphasis on counsel's *presence* at interrogation is not unique to *Edwards*." (emphasis in original)).

82. *See supra* notes 68-69 and accompanying text.

83. *Edwards*, 451 U.S. at 484-85; *Miranda*, 384 U.S. at 446-47, 455, 461.

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

85. *Id.*

86. *Id.*

with the police[87] and the dissent's rule does nothing to prevent interrogation abuses, the majority's rule is preferable.

However, the question of how the majority's rule compares with the rule proposed by Mississippi remains. Mississippi proposed that the accused be entitled to waive his or her rights after consulting with counsel. Under this proposal, the *Edwards* rule, which excludes any statements made by an accused after requesting but before consulting with counsel, would terminate once the accused consults with counsel. Mississippi would permit the accused to reinstate this protection simply by requesting the presence of counsel again at a subsequent police initiated interrogation. The majority rejected this proposed rule, since it would permit multiple sequences of activation and termination of the *Edwards* rule prior to arraignment. Furthermore, at arraignment the *Edwards* protection might reattach by virtue of the sixth amendment.[88] Thus, the majority concluded that the rule proposed by Mississippi would "spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle."[89]

The majority's concern regarding confusion is unpersuasive. Mississippi's proposed rule is clear. Once the accused has consulted with counsel, the *Edwards* rule terminates and the police may reinitiate an interrogation.[90] However, the accused may reactivate the *Edwards* protection simply by requesting the presence of counsel at this subsequent interrogation. Under Mississippi's proposed rule, the accused has two options. First, the accused may request the presence of counsel at the interrogation. Having done so, the police must cease the interrogation, under *Miranda*, and may not reinterrogate the accused, under *Edwards*, until the accused has consulted with counsel. However, the accused has the option of waiving his or her fifth amendment rights and making statements to the police at this second interrogation. These are the

87. *Id.* at 492.

88. *Id.* "The arraignment signals 'the introduction of adversary judicial proceedings' and thus the attachment of the Sixth Amendment." Michigan v. Jackson, 475 U.S. 625, 629 (1986) (quoting United States v. Gouveia, 467 U.S. 180, 187 (1984)). The sixth amendment guarantees the assistance of counsel at postarraignment interrogations once the request has been made by the accused. *Id.* at 636. When *Edwards* expanded the fifth amendment protections of *Miranda*, the sixth amendment protection was expanded to prohibit the police from reinitiating an interrogation after the accused has requested the assistance of counsel. *Id.*

89. *Minnick*, 111 S. Ct. at 492.

90. *Id.* at 491-92.

identical options the accused had when first taken into custody and interrogated. Thus, the proposed rule is actually consistent from interrogation to interrogation; therefore, the risk of confusion is minimal.

A further criticism of the majority's reversal is that Mississippi's rule does not require the accused to learn any new procedures in order to exercise fifth amendment rights; all the accused needs to know is that in order to activate and reactivate the *Miranda* and *Edwards* protections a request for counsel must be made. Therefore, even though the *Edwards* protection may be activated and terminated several times, the procedure by which the protections are called forth is simple and unchanging. Finally, under Mississippi's rule, the police only are required to know the same procedures that must be used at the initial interrogation. Thus, Mississippi's rule will have little impact on police training.

The majority's final argument was that Mississippi's rule would send the wrong signals to an accused's attorney. The majority maintained that the attorney might delay meeting with an accused to preserve the *Edwards* protection. However, there is no tactical advantage in having an accused sit in police custody while the police are unable to begin an interrogation rather than having the accused speak with the police in the presence of counsel.[91] In fact, an attorney has the obligation to "act with . . . promptness in representing a client."[92] Thus, purposeful delay by an attorney likely will be an ethical violation. Therefore, the majority's concern that attorneys will delay meeting with their clients is not compelling.

The majority's arguments rejecting Mississippi's rule are not persuasive, since the Majority's rule has no obvious legal or practical advantage over Mississippi's proposed rule. Given that the majority's rule has no obvious advantages, it remains unclear why the majority was opposed to Mississippi's rule. The only difference between Mississippi's rule and the majority's rule is that Mississippi's rule allows an accused to waive his or her rights in a subsequent police initiated interrogation after the accused had consulted with counsel. Therefore, Mississippi's proposed rule contains all the features of the majority's rule and has the added quality of permitting police initiated interrogations. The majority

91. This assumes that the Mississippi rule requires not only consultation with counsel but also that counsel be present at the interrogation.

92. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 (1983).

should have adopted this rule.

Why did the majority fail to do so? Perhaps the majority wanted to send the police a message that until the integrity of the interrogation process is insured, the Supreme Court will continue to expand the protections of *Miranda* and *Edwards*.[93] Therefore, the majority preferred the rule that would eliminate entirely the threat of the police coercing an accused into making a statement. In fact, the majority emphasized this concern several times throughout its opinion. In addition, the majority stressed that waiver of rights and admissions of guilt will not be effective "unless there are both particular and systematic assurances that the coercive pressures of custody were not the inducing cause."[94] Therefore, "[s]ince the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings,"[95] the majority decided to eliminate the threat of coercion and abuse by prohibiting all police initiated interrogations, even though the accused has consulted with counsel.[96]

CONCLUSION

Both the majority and dissenting opinions in *Minnick* were flawed in their use of *Miranda* and *Edwards* for support. However, under the policies of *Miranda* and *Edwards*, the majority opinion is more persuasive. Nevertheless, the majority's expansive rule presents two interesting ironies. First, even though an accused requests and consults with counsel and is informed of his or her rights, the accused may not waive these fifth amendment rights. However, an accused who has not requested or consulted with counsel and who may be ignorant of these fifth amendment rights may waive them. Thus, the ignorant accused may waive rights

93. *See, e.g.*, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 505 (7th ed. 1990) (presenting different views on the requirement that police officers make sound recordings of interrogations).

94. *Minnick*, 111 S. Ct. at 492.

95. *Miranda*, 384 U.S. at 475.

96. This burden is especially appropriate given the frequency with which an accused is abused during an interrogation, *see* Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 448 n.26 (1987), and the reluctance of courts to exclude an accused's confession. *See, e.g.*, Illinois v. House, 141 Ill. 2d 323, 566 N.E.2d 259, 280-85 (1990) (statements by accused held admissible where police held the accused in an interview room for two days and one night, required him to sleep on the interrogation room table, questioned him repeatedly, and only allowed him one brief telephone call).

that the well-informed accused may not.[97] The only cure for this irony is to require the presence of an attorney at all police initiated interrogations. Only time will tell whether the Court is willing to go that far.

The second irony is that in order to raise the majority's rule, the accused must request the presence or assistance of counsel. If the accused asserts only the right to remain silent, neither the *Edwards* nor the *Minnick* rule will be triggered. The requirement that the accused recite the "appropriate words" to trigger these protections also disadvantages the ignorant accused. A possible cure for this irony is to require the police to inform the accused of the consequences of the wording chosen to exercise one's fifth amendment rights.[98]

These ironies are indicative of the need to consider additional protections in order to provide meaningful fifth amendment protection for all persons. *Minnick* carries forward but does not complete this task. Let us hope that *Minnick* is not the end of progress toward that goal.

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97. *See* Minnick v. Mississippi, 111 S. Ct. 486, 497 (1990) (Scalia, J., dissenting).

98. *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL *supra* note 93, at 478 (discussing how much information the police should supply to the accused).

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