Minnick v. Mississippi: The Supreme Court Reinforces a Suspect's Right to Have Counsel Present during Custodial Interrogation

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I. INTRODUCTION

In 1966, the United States Supreme Court handed down the landmark decision of Miranda v. Arizona, which firmly established the fifth amendment as the basis for ruling on the admissibility of confessions. The Court reinforced the doctrinal foundations of Miranda in Edwards v. Arizona, holding that once an arrested suspect invokes the right to counsel, officers may not reinitiate questioning until after the suspect has consulted an attorney. The Supreme Court in 1990 further buttressed Miranda by expanding the scope of the Edwards’ rule. In Minnick v. Mississippi, the Court considered whether police may reinitiate custodial interrogation after a suspect has consulted an attorney. The Court concluded that, due to the inherently coercive nature of custodial interrogation, once the suspect asserts the right to counsel and has in fact consulted with counsel, police may not reinitiate interrogation without the suspect’s attorney present. The Court did not foreclose finding a waiver of the fifth amendment privilege after the request for counsel and has in fact consulted with counsel, provided the suspect has initiated the communication with the authorities.

This Note will summarize the facts and holding of Minnick and examine the legal history of the fifth amendment right to counsel from Miranda to Minnick. Once this framework is established, the Note will examine the majority and dissenting opinions. Finally, the Note will critically analyze Minnick by examining the appropriateness of its holding, reviewing the Court’s cost/benefit analysis, and discussing its potential impact.

4. Minnick, 111 S. Ct. at 488.
5. Id. at 491.
6. Id. at 492.
II. FACTS AND HOLDING

A day after escaping from a Mississippi county jail, Robert Minnick and fellow prisoner James Dyess broke into a mobile home in search of weapons. After being interrupted in the course of the burglary, Minnick and Dyess used the stolen weapons to kill two of the occupants. Subsequently, the fugitives fled to Mexico, and after a disagreement, Minnick proceeded alone to California.

Minnick was arrested in Lemon Grove, California, on a Mississippi arrest warrant on Friday, August 22, 1986, some four months after the murders. The day following the arrest, FBI agents interviewed Minnick at the San Diego jail. The federal agents read Minnick his Miranda warnings and Minnick acknowledged that he understood them. He refused, however, to sign a waiver form and stated he would not answer "very many" questions. Minnick discussed his jail break and flight, but hesitated to divulge the events at the mobile home. When the agents reminded him that he did not have to answer questions without a lawyer present, Minnick reportedly stated, "Come back Monday when I have a lawyer." He further stated that he would make a more complete statement when his lawyer was present, and the interview ended.

After this FBI interview, a court appointed attorney met with Minnick. On Monday, August 25, Clarke County, Mississippi Deputy Sheriff J.C. Denham came to the San Diego jail to question Minnick. Minnick testified that he was told that he would "have to talk" to Denham and that he "could not refuse." At the interview, Deputy Sheriff Denham advised Minnick of

7. Id. at 488.
8. Id. Minnick claimed that Dyess killed one victim and then forced Minnick, at gunpoint, to shoot the other victim. Id.
9. Id.
10. Id.
11. Id. Minnick testified that he refused to attend the interview, but was told he would "have to go down or else." Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id. Minnick spoke with the lawyer on two or three occasions, although it was unclear whether all conferences were in person. Id.
18. Id.
19. Id. at 488-89.
his Miranda rights and Minnick again refused to sign a rights waiver form. He did, however, provide Denham with a description of the events at the trailer.

Minnick was tried for murder in Mississippi. He moved to suppress all the statements given to the FBI agents and police officers. The trial court denied the motion with respect to confessions made to Denham, but suppressed all other statements. He was convicted on two counts of capital murder and sentenced to death.

On appeal, Minnick argued that his statements to Denham were taken in violation of his right to counsel under the fifth and sixth amendments. The Mississippi Supreme Court rejected his claims, affirming the conviction. The United States Supreme Court subsequently granted Minnick's petition for writ of certiorari to determine whether the protective rule of Edwards v. Arizona should cease once a defendant has consulted with an attorney.

20. Id. at 489.
21. Id.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id.

27. Id. As to the fifth amendment claim, "the court found the 'Edwards' bright-line rule as to initiation' inapplicable." Id. (quoting Minnick v. Miss., 551 So. 2d. 77, 83 (Miss. 1982)). The court relied on language in Edwards indicating that the bar on interrogation after an accused's request for counsel applies "'until counsel has been made available to him.'" Id. (quoting Edwards, 451 U.S. at 484-85). The court interpreted this language to mean "that the protection of Edwards terminated once counsel consulted with the suspect." Id. Consequently, the court concluded that "[s]ince counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied." Id. at 83. Similarly, the court rejected the sixth amendment claim, finding that Minnick waived his right to counsel when he spoke with Denham. Id. at 83-85.

28. Minnick, 111 S. Ct. at 488.
III. LEGAL BACKGROUND

The fifth amendment guarantees every citizen the right against self-incrimination within a criminal proceeding.29 The first confession case decided by the United States Supreme Court, however, relied not on the fifth amendment, but rather on a fourteenth amendment due process approach in ruling on confession admissibility.30 In reliance on the fourteenth amendment, the Court promulgated a voluntariness test, which came to focus on whether the confession was voluntarily given under the "totality of the circumstances."31 Because this test utilized a fact specific case by case analysis, it was criticized for its failure to adequately provide a consistent and reliable evidentiary standard for determining the voluntariness of a confession.32 For a short period, courts also analyzed confession rulings under the sixth amendment, which focused on whether a person subjected to interrogation was denied his right to counsel at a critical stage in the proceedings against him.33 It was not until 1966,34 in Miranda v. Arizona, that the fifth amendment privilege against self incrimination became "the pervasive perspective for evaluating statements of the accused."35

29. The fifth amendment provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself. . . ." U.S. CONST. amend. V.


31. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The Court held that whether a valid waiver of counsel occurred depends upon the facts and circumstances surrounding each case, including the background, experience, and conduct of the accused. Id. Although Zerbst was a sixth amendment right to counsel case, the Court subsequently applied the "totality of the circumstances" test to many custodial interrogation cases. See Haynes v. Washington, 373 U.S. 503, 517 (1963); Culombe v. Connecticut, 367 U.S. 568 (1961); Leyra v. Denno, 347 U.S. 556, 561 (1954). More recently, the Court has applied the Zerbst approach in other contexts where a state has the burden of showing a waiver of constitutional criminal procedural rights. See Faretta v. California, 422 U.S. 806, 835 (1975) (right to assistance of counsel at trial); Brookhart v. Janis, 384 U.S. 1, 4 (1966) (right to confront adverse witnesses); Adams v. United States ex rel McCann, 317 U.S. 269, 275-80 (1942) (right to trial by jury).


34. In Malloy v. Hogan, 378 U.S. 1, 8 (1964), the Court incorporated the fifth amendment privilege against self-incrimination into the fourteenth amendment due process clause, thereby making it applicable to the states.

35. J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED: PRETRIAL RIGHTS 305
In the landmark case of *Miranda v. Arizona*, the Supreme Court established strict guidelines for custodial interrogation. Writing for the majority, Chief Justice Warren stated that "the prosecution may not use statements, whether exculpatory or inculpatory stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." The objective of *Miranda* was twofold: first, to provide law enforcement officials and the courts with clear guidelines regarding interrogation procedures, and second, to counteract the inherent pressures of custodial interrogation. The Court's decision satisfied this objective by establishing procedural safeguards. Specifically, the Court held that any statement made during custodial interrogation would be inadmissible unless the accused is informed of, and then waives, the right to remain silent and the right to the presence of counsel.

36. 384 U.S. 436 (1966). In *Miranda*, the court created a fifth amendment right to counsel during custodial interrogation in an effort to protect the right against compelled self-incrimination. *Id.* at 440-44. *Miranda* was actually a consolidated appeal of three other similar cases: People v. Vignera, 15 N.Y. 2d 970, 259 N.Y.S. 2d 857, 207 N.E. 2d 527, *cert. granted*, Vignera v. New York, 382 U.S. 925 (1965); Westover v. United States, 342 F. 2d 684 (9th Cir. 1965), and California v. Stewart, 236 Cal. App. 2d 27, 45 Cal. Rptr. 712, *cert. granted*, 382 U.S. 924 (1965). In each case, the defendants had made incriminating statements during their interrogations. *Miranda*, 384 U.S. at 445. Additionally, the defendants were not advised of their right to counsel or of their right to remain silent. *Id.* Specifically, in *Miranda*, the suspect confessed to murder and rape after two hours of interrogation. *Id.* at 491-96. The suspect signed a document containing, along with his confession, a type-written clause that declared that he had confessed voluntarily and with full knowledge of his rights. *Id.* at 492. In reversing the conviction, the Court held such clauses invalid, requiring instead that suspects must be personally informed of their constitutional rights. *Id.*

37. *Id.* at 444.

38. The *Miranda* Court held that the police must advise the suspect, prior to custodial interrogation of the following: 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 provided for him prior to any questioning if he so desires. *Id.* at 479.

39. *Miranda* presumed that custodial interrogation was an inherently coercive process. After examining the history of police interrogation methods, Chief Justice Warren noted that although the use of physical coercion to extract confessions was less frequent in the 1960's than the 1930's, the practice of psychological coercion was sufficiently widespread to be the object of concern. *Id.* at 445-47.

40. *Id.* at 467-73. The *Miranda* Court determined that counsel's presence "would be the adequate protective device necessary to make the process of police interrogation
In an effort to grant suspects the greatest opportunity to assert the right to counsel, the *Miranda* Court declined to limit the effectiveness of such requests to the pre-interrogation period, and emphasized that suspects may assert their rights at any time after the commencement of interrogation.\(^{41}\) Further, the Court provided that suspects must specifically waive the right rather than simply fail to assert it.\(^{42}\) The Court explained that even if interrogation continues in the absence of an attorney, and statements are taken, the government may still use the statements at trial by demonstrating that the defendants knowingly and intelligently waived their privilege against self-incrimination and their right to counsel.\(^{43}\)

After *Miranda*, the Burger Court began to speak of the *Miranda* rights as "prophylactic, ... not in themselves rights protected by the Constitution."\(^{44}\) Moreover, the *Miranda* decision became subject to widespread academic criticism that continues to this day. Of this criticism, the three most common arguments are that: (1) the decision improperly interpreted the fifth amendment;\(^{45}\) (2) it was an impermissible exercise of judicial authority under the Constitution;\(^{46}\) and (3) the costs of the *Miranda* rule outweigh its benefits.\(^{47}\) Despite the controversy surrounding its adoption, the literal framework of *Miranda* remains essentially unchanged today.\(^{48}\) This is not to say, however, that its application has been consistent. In fact, the courts have muddled this area of the law since the framework was established, contrary to *Miranda*'s goal of outlining clear guidelines for custodial interrogation.

\(^{41}\) *Id.* at 470.

\(^{42}\) *Id.*

\(^{43}\) *Id.* at 475.


\(^{47}\) *Miranda*, 384 U.S. at 542 (White, J., dissenting) (expressing concern that a criminal will be freed and repeat the crime).

\(^{48}\) *See supra* note 38 for the *Miranda* warnings.
B. The Erosion of Miranda

When given the opportunity, the Court has interpreted Miranda's language quite narrowly, thus weakening its original impact. For example, the Court has provided rather restrictive definitions for both "custody" and "interrogation." Similarly, the Court defined "counsel" specifically as an attorney. On the several occasions where the Court has addressed the issue of what constitutes a valid waiver, it has taken the opportunity to weaken the original force of Miranda. Additionally, the Court has narrowed the scope of waiver protection.

49. See Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (court did not specifically define "custody," but excluded the situation where the suspect, not under arrest, voluntarily comes to the police station and is allowed to leave unhindered by the police after a brief interview). For another case involving the Court's difficulty in determining whether the subject is "in custody," see Berkemer v. McCarty, 468 U.S. 420, 439 (1984) (excluding situations involving detainment of a subject by police which are not "police dominated"). See generally Beckwith v. United States, 425 U.S. 341, 347 (1976).

50. Miranda defined interrogation generally as "questioning initiated by law enforcement officers . . . ." Miranda, 384 U.S. at 444. In Rhode Island v. Innis, 446 U.S. 291 (1980), however, the Court defined interrogation precisely to mean "express questioning or its functional equivalent." Id. at 292. This included "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. Although appearing to encompass subtle questioning, the Innis Court indicated that this formulation is not to be interpreted expansively. Id.

51. Fare v. Michael C., 442 U.S. 707 (1979). In Fare, the Court refused to analogize a juvenile's request for a probation officer with a request for an attorney. Id. at 727-28.

52. The Court has held valid a waiver of Miranda rights although the accused had received only a partial set of warnings. Michigan v. Tucker, 417 U.S. 433, 444-45 (1974). Similarly, the Court held that a valid waiver of Miranda rights may be inferred from the suspect's actions and words. North Carolina v. Butler, 441 U.S. 369, 373 (1979). The Court explained that although silence alone is not enough to constitute waiver, the prosecution may establish by evidence that the defendant knowingly and intelligently waived his rights. Id. This result seems to clearly contradict Miranda's emphasis on an express and articulated waiver requirement. Furthermore, a suspect's partial waiver of rights was held valid in Connecticut v. Barrett, 479 U.S. 523, 527-29 (1987). In Barrett, the defendant agreed to speak without the presence of an attorney, but refused to sign anything. Id. at 525. The Court also stated, however, that when a suspect draws a distinction between oral and written statements, it is only a limited request for counsel, and the police may continue questioning. Id. at 530.

53. In Wyrick v. Fields, 459 U.S. 42 (1982), the Court held that a valid waiver
Although Miranda attempted to adopt a rule that applied easily to all custodial interrogations, the Court determined that the warnings were not required under certain circumstances. In California v. Prysock, the Court held that the failure of authorities to inform an indigent defendant of his right to an appointed attorney did not violate Miranda. A more significant exception to the general rule of Miranda was created in New York v. Quarles. In Quarles, the Court weakened Miranda's power by permitting police to withhold the warnings whenever custodial interrogation concerned public safety. The Court further restricted Miranda's protection in Oregon v. Elstad. Elstad involved a suspect's voluntary confession made prior to the administration of Miranda warnings and the admissibility of statements taken after warnings had been given. Although the Court

of counsel for the purpose of a polygraph exam would extend to post-test questioning as well. Id. at 47. In Fields, the defendant, who had retained an attorney, volunteered to take a polygraph test. Id. at 44. Prior to the exam, the defendant signed a consent form that included a waiver of his right to counsel. Id. After the exam, the defendant made incriminating statements that he sought to suppress. Id. at 44-45. In Colorado v. Spring, 479 U.S. 564 (1987), the Court held that a waiver was valid even though the interrogators included issues unknown to the suspect before making his waiver. Id. at 574. Finally, in Moran v. Burbine, 475 U.S. 412 (1986), the Court rejected a proposed requirement that police inform a suspect of outsiders' efforts to obtain counsel for him, thus upholding a waiver. Id. at 422.

54. 453 U.S. 355 (1981). In Prysock, the juvenile defendant was told, "[y]ou have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and during all the questioning." Id. at 356. Soon thereafter, the defendant was informed of his right to a court appointed attorney, but was not told when the attorney could be appointed. Id. at 357.

55. Id. at 359. The Court concluded that the warnings provided were fully equivalent to those required by Miranda. Id. at 360-61.

56. 467 U.S. 649 (1984). In Quarles, the defendant was apprehended in a supermarket on suspicion of rape and weapon possession. Id. at 652. The defendant responded to a police question asking for the gun's location before his rights were read. Id.

57. Id. at 657. The Court stated that the need to ask questions in a situation concerning the public safety outweighs the prophylactic rule requiring the reading of Miranda rights. Id.

58. 470 U.S. 298 (1985). In Elstad, the police interrogated the defendant and obtained incriminating information from him after arresting the defendant in his home. Id. at 301. The defendant first received warnings at the police station and subsequently signed a written confession. Id.

59. Id. at 300-03.
excluded the pre-warning statements, the evidence obtained after the warnings was held admissible.\textsuperscript{60}

\textit{Michigan v. Mosely}\textsuperscript{61} concerned successive interrogations involving separate cases. The suspect asserted his right to silence in the first interrogation but waived his rights in the second. The Court refused to apply the assertion from the first questioning to the second, holding that officials had followed the appropriate procedures.\textsuperscript{62} The Court noted that although \textit{Miranda} required interrogation to cease when the accused asserted his right to silence, it did not state when questioning may resume.\textsuperscript{63} The \textit{Mosely} Court determined that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under \textit{Miranda} on whether his 'right to cut off questioning' was 'scrupulously honored'."\textsuperscript{64}

Finally, the Court crafted an exception to \textit{Miranda}'s total exclusionary policy when it allowed the use of voluntary confessions for impeachment purposes.\textsuperscript{65} Thus, although \textit{Miranda} created specific warnings to protect suspects during custodial interrogation and provided that statements obtained

\begin{itemize}
\item \textsuperscript{60} \textit{Id.} at 318. The Court found it an unwarranted extension of \textit{Miranda} to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. 
\item \textit{Id.} at 309.
\item \textsuperscript{61} 423 U.S. 96 (1975). In \textit{Mosley}, the defendant had been arrested in connection with several robberies. \textit{Id.} at 97. He acknowledged his right to remain silent and declined to comment. \textit{Id.} After more than two hours, authorities gave him another set of warnings and the defendant implicated himself in an unrelated murder. \textit{Id.} at 98.
\item \textsuperscript{62} \textit{Id.} at 104.
\item \textsuperscript{63} \textit{Id.} at 101.
\item \textsuperscript{64} \textit{Id.} at 104.
\item \textsuperscript{65} Harris v. New York, 401 U.S. 222 (1971). The Court reasoned that defendants should not be permitted to testify with the knowledge that prior inconsistent statements could not be used against them. \textit{Id.} at 224-25. See also Oregon v. Hass, 420 U.S. 714, 722-23 (1975) (using the \textit{Harris} analysis, because there was no evidence of coercion, the statements should be admitted for the purpose of furthering the truth-finding function of criminal adjudication). The state is still required, however, to prove that the confession was voluntarily given under the totality of the circumstances. See \textit{Mincey} v. Arizona, 437 U.S. 385, 401 (1978).
\end{itemize}

in violation of its rules were inadmissible for any purpose, the Court consistently undermined the strength of this holding.

C. Miranda Expansion: The Edwards’ Rule

One of the few exceptions to the general erosion of the Miranda protections came in Edwards v. Arizona,66 where the Court further developed restrictions on custodial interrogation.67 Edwards involved multiple interrogations of a suspect concerning the same case. The decision focused on the validity of the suspect's waiver of rights subsequent to asserting his right to counsel.68 The Court held that once a suspect requests counsel, the police must cease all interrogation until counsel is present or until the accused initiates further communication, exchanges, or conversation with the police.69 Thus, Edwards created a bar against further interrogation on a specific issue once an accused has requested counsel, unless the accused initiates further contact with the police.

In a later decision, the Court declined to provide a precise definition of "initiation," but indicated that it takes very little action by the subject to "initiate" contact for further communication.70 The Court excluded from the

66. 451 U.S. 477 (1981). In Edwards, the suspect was taken to a local police station upon arrest where he was advised of his rights under Miranda. Id. at 478. The suspect told the interrogating officer that he wanted to see an attorney "before making a deal." Id. at 479. Although the police ceased their questioning immediately, two detectives arrived the next day to question the suspect further. Id. The suspect refused to speak to anyone, but was informed by the detention officer that he "had" to talk to the detectives. Id. After receiving another set of Miranda warnings, the suspect made statements implicating himself in the crime. Id. The Court ruled that the suspect had not validly waived his fifth amendment right to counsel because the confession resulted from a subsequent interrogation that had not taken place at his suggestion or request. Id. at 487.

67. Id. at 484-86.
68. Id. at 482. Specifically, the Court re-examined Miranda's explicit statement that "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda, 384 U.S. at 474.
69. Edwards, 451 U.S. at 484-85. The Edwards' Court emphasized that an initial request for counsel creates a need for additional safeguards to protect the suspect's privilege against self-incrimination. Id. at 484. Further, the Court noted that "it is inconsistent with Miranda and its progeny for the authorities, at their insistence, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." Id. at 485.
70. Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983). In Bradshaw, the defendant received the Miranda warnings during questioning and requested an attorney. Id. at 1041-42. The defendant subsequently initiated a conversation with the police,
definition of "initiation" remarks made by the suspect that related to routine incidents of the custodial relationship.\textsuperscript{71} While the Court in \textit{Edwards} seemed to strongly confirm \textit{Miranda}'s protections, the years following \textit{Edwards} continued to cloud the status of \textit{Miranda}.\textsuperscript{72} There were three noteworthy exceptions to the general erosion of the \textit{Miranda} ruling after \textit{Edwards}. In \textit{Smith v. Illinois},\textsuperscript{73} the court made clear that once the \textit{Miranda} right to counsel has been invoked, questioning must cease.\textsuperscript{74} Moreover, the Court held that the prosecution could not use the suspect's responses to questions posed by police after the assertion of his right to counsel.\textsuperscript{75}

In \textit{Michigan v. Jackson},\textsuperscript{76} the Court applied the \textit{Edwards}' rule to situations where the sixth amendment\textsuperscript{77} right to counsel attached. In analogizing the fifth amendment analysis of \textit{Edwards}, the \textit{Jackson} Court held that when a defendant asserts the right to counsel at any time after the initiation of formal proceedings, the police cannot question the defendant unless he reinitiates contact with the police.\textsuperscript{78}

asking "Well, what is going to happen to me now?" \textit{Id.} at 1042. The \textit{Miranda} rights were again administered and the defendant submitted to polygraph testing, after which he confessed to the crime. \textit{Id.}

\textsuperscript{71} \textit{Id.} at 1045. \textit{See infra} notes 170-71 and accompanying text for further discussion of initiation.

\textsuperscript{72} \textit{See supra} notes 49-65 and accompanying text.

\textsuperscript{73} 469 U.S. 91 (1984). In \textit{Smith}, the accused robbery suspect invoked his right to counsel, which the interrogators ignored. \textit{Id.} at 93. The suspect became confused after being asked whether he wanted an appointed attorney and whether he waived that right. \textit{Id.} at 92-93. He responded to this subsequent questioning with incriminating statements. \textit{Id.} at 93. The Court found the request for counsel unambiguous and ordered the confession suppressed. \textit{Id.} at 92.

\textsuperscript{74} \textit{Id.} at 98.

\textsuperscript{75} \textit{Id.} at 100. The Court noted that "[s]uch subsequent statements are relevant only to the distinct question of waiver." \textit{Id.}

\textsuperscript{76} 475 U.S. 625 (1986). In \textit{Jackson}, the defendant asked for counsel at arraignment, yet was approached by the police the next day. \textit{Id.} at 627. The police administered the \textit{Miranda} warnings and elicited incriminating information from the defendant. \textit{Id.} The Court found that the questioning violated the sixth amendment even though the request for counsel had not been in the interrogation context. \textit{Id.} at 633.

\textsuperscript{77} The sixth amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

\textsuperscript{78} \textit{Jackson}, 475 U.S. at 629. \textit{But cf.} McNeil v. Wisconsin, 111 S. Ct. 2204 (1990) (assertion of sixth amendment right in bail hearing held inapplicable to uncharged offenses); Michigan v. Harvey, 494 U.S. 344 (1990) (allowing impeachment use of these statements).
The most recent case in this limited line of *Miranda* rights extension was *Arizona v. Roberson.*\(^{79}\) That Court held that the *per se* prophylactic rule in *Edwards*\(^{80}\) bars police-initiated interrogation regarding an unrelated investigation following a suspect's initial request for counsel.\(^{81}\) Thus, the *Roberson* decision confirms the Court's requirement that a defendant's request for counsel be viewed broadly by both the courts and the police. Consequently, *Roberson* established that once an attorney is requested, no questioning may take place, even if the questioning concerns separate offenses and follows a fresh set of warnings.

In *Minnick v. Mississippi,*\(^ {82}\) the Court again considered a question arising from the *Miranda* and *Edwards*' doctrines. *Minnick* involved multiple interrogations of a subject concerning a single case. In *Minnick,* the Court was confronted with the question of whether the *Edwards*' protection should cease to apply once the suspect has consulted an attorney.\(^ {83}\)

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79. 486 U.S. 675 (1988). In *Roberson,* the defendant was arrested for burglary and given the *Miranda* warnings, at which point he stated that he wanted an attorney "before answering any questions." *Id.* at 678. Three days later, while still in custody and without counsel, another officer questioned the defendant about a separate burglary. *Id.* Although new warnings preceded this second interrogation, the Court ruled that *Edwards* barred the admission of the statements made at that point. *Id.* at 682-83.

80. *Edwards,* 451 U.S. at 484-87. See supra notes 66-69 and accompanying text for discussion of *Edwards*' holding that a suspect is not subject to further interrogation after a request for counsel, unless the suspect initiates the communication.

81. *Roberson,* 486 U.S. at 682-84. The Court reasoned that "the presumption raised by a suspect's request for counsel - that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance - does not disappear simply because the police have approached the suspect, still in custody, still without counsel, about a separate investigation." *Id.* at 683. The Court distinguished *Michigan v. Mosley,* 423 U.S. 96 (1975), which held that the assertion of the right to remain silent did not prohibit police from a second interrogation on a separate crime, on the ground that the defendant in *Mosley* had asserted only his right to remain silent. The *Roberson* Court noted that a decision to cut off questioning "does not raise the presumption that [the defendant] is unable to proceed without a lawyer's advice." *Id.* at 683. See supra notes 61-64, and infra notes 176-77 and accompanying text for discussion of *Mosley.*


83. *Id.* at 488.
IV. THE MINNICK DECISION

A. The Majority Opinion

Justice Kennedy began the Court’s opinion by examining the right to counsel as set out in Miranda and Edwards. Justice Kennedy noted that Edwards gave force to Miranda’s admonitions, finding it "inconsistent with Miranda and its progeny for the authorities, at their instance, to reininterrogate an accused in custody if he has clearly asserted his right to counsel." While noting that the purpose of Edwards was to protect against coercive police pressures in the interrogation room, Justice Kennedy explained that "the merit of the Edwards decision lies in the clarity of its command and the certainty of its application." The majority concluded that the virtue of providing police and prosecutors with specific requirements, benefitting the accused and state alike, outweigh any burdens imposed on law enforcement agencies.

The majority rejected the Mississippi Supreme Court’s interpretation that the Edwards’ protection terminated once counsel has consulted with the suspect. Justice Kennedy contended that, taken in full context, Edwards’ statement that counsel be "made available" to the accused "refers to more than an opportunity to consult with an attorney outside the interrogation room." Justice Kennedy pointed out that the Court’s emphasis on counsel’s presence at custodial interrogations was not unique to Edwards, but that it derived from Miranda itself. Miranda explained that counsel’s "presence would insure that statements made in the government-established atmosphere are not the

84. Id. at 489. Justice Kennedy noted that the Miranda Court indicated that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present," at which point "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." Id. (citing Miranda, 384 U.S. at 474).

85. Id. (citing Edwards, 451 U.S. at 485).

86. Id. at 490. To demonstrate this point, Justice Kennedy cited Roberson as confirming the Edwards’ rule as a "clear and unequivocal" guideline to the law enforcement profession. Id. (citing Roberson, 486 U.S. at 675, 682).

87. Id. at 490. (citing Fare v. Michael C., 442 U.S. 707, 718 (1979)). Justice Stevens noted that this pre-Edwards explanation has been applied to Edwards and its progeny as well. Id. at 490 (citing Roberson, 486 U.S. at 681-82).

88. Id. at 490. Specifically, the Mississippi Supreme Court relied on the statement in Edwards that an accused who invokes his right to counsel "is not subject to further interrogation by the authorities until counsel has been made available to him . . . ." Edwards, 451 U.S. at 484-85.

89. Minnick, 111 S. Ct. at 490.

90. Id.
product of compulsion."91 Additionally, Justice Kennedy noted that the Court’s cases following Edwards interpreted the decision to mean that the authorities may not initiate questioning in counsel’s absence.92 The majority concluded that a fair reading of Edwards and its progeny demonstrates that the Court has interpreted the rule to "bar police-initiated interrogation unless the accused has counsel with him at the time of questioning."93 Consequently, the majority further concluded that police may not reinitiate questioning without counsel’s presence, regardless of whether the accused has yet consulted with an attorney.94

Justice Kennedy considered the majority’s ruling an appropriate and necessary application of the Edwards’ rule.95 Pointing to the facts of the instant case, Justice Kennedy argued that a single consultation with an attorney does not remove the suspect from the coercive pressures that accompany custody.96 Thus, the majority declined to remove the Edwards’ protection “based on isolated consultations with counsel who is absent when the interrogation resumes.”97

The state’s argument that the Edwards’ rule should not apply when the attorney and suspect have consulted outside of the interrogation room was rejected by Justice Kennedy as inconsistent with Edwards’ purpose to protect

91. Miranda, 384 U.S. at 466.

92. See Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983) (describing the holding of Edwards to be "that subsequent incriminating statements made without [an] attorney present violated the rights secured to the defendant by the Fifth and Fourteenth Amendments..."; Roberson, 486 U.S. at 680 ("The rule of the Edwards case came as a corollary to Miranda’s admonition that ‘[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present."); Shea v. Louisiana, 470 U.S. 51, 52 (1985) (the Edwards "[c]ourt ruled that a criminal defendant’s rights under the Fifth and Fourteenth Amendments were violated by the use of his confession obtained by police-instigated interrogation - without counsel present - after he requested an attorney").

93. Minnick, 111 S. Ct. at 491.

94. Id.

95. Id.

96. The majority noted that, according to Minnick’s testimony, he was required to submit to both the FBI and Denham interviews although he resisted. Id. at 491. Furthermore, in the Denham interview, the compulsion followed Minnick’s "unequivocal request during the FBI interview that questioning cease until counsel was present." Id. The majority felt that one interpretation of the record would indicate Minnick’s mistaken belief that he could keep out of evidence his statements by refusing to sign the waiver form. Id. Consequently, if the authorities had complied with Minnick’s original request to have counsel present, the attorney might have corrected this misunderstanding. Id.
the suspect's right to have counsel present at custodial interrogation.\textsuperscript{98} Justice Kennedy reiterated the advice in \textit{Miranda} that the need for counsel to protect against compulsion "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."\textsuperscript{99}

The majority further determined that the state's proposed exception would undermine the advantages of \textit{Edwards}' "clear and unequivocal" character.\textsuperscript{100} Justice Kennedy criticized what he perceived would become a "regime" where the accused would be able to reinstate the \textit{Edwards} protection after consultation with counsel only by a second request for counsel.\textsuperscript{101} Asserting that this outcome would spread confusion through the justice system, Justice Kennedy concluded that the effect would be a loss of respect for the underlying constitutional principle.\textsuperscript{102}

Additionally, Justice Kennedy recognized that adoption of the state's proposal would leave far from certain the sort of consultation required to displace the \textit{Edwards} protection.\textsuperscript{103} Noting that consultation is an imprecise concept, Justice Kennedy argued that an inquiry to determine the necessary scope of consultation could interfere with the attorney-client privilege.\textsuperscript{104}

Finally, the majority noted in dictum that \textit{Edwards} does not eliminate the opportunity for a suspect to waive his fifth amendment right to counsel.\textsuperscript{105} The Court recognized that waiver could be found only in a limited situation.\textsuperscript{106} Once the suspect has requested counsel, this right may be waived only if the accused has initiated the conversation with the officials.\textsuperscript{107} In the instant case, because Minnick was compelled to attend a formal interview after asserting his right to counsel, the Court determined that the interrogation was

\textsuperscript{98} \textit{Id.} at 490-91.
\textsuperscript{99} \textit{Id.} at 491 (citing \textit{Miranda}, 384 U.S. at 470).
\textsuperscript{100} \textit{Id.} at 491-92.
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} Justice Kennedy believed that such a formulation would enable the \textit{Edwards} protection to pass in and out of existence several times prior to arraignment, at which point the sixth amendment's protection would attach. \textit{Id.} at 492. \textit{See Michigan v. Jackson}, 475 U.S. 625 (1986).
\textsuperscript{103} \textit{Minnick}, 111 S. Ct. at 492.
\textsuperscript{104} \textit{Id.} Moreover, Justice Kennedy asserted that the difficulties in definition and application of the state's proposed exception would create an irony, whereby the suspect whose counsel is prompt would lose the protection of \textit{Edwards}, while the one whose counsel is dilatory would not. \textit{Id.} As a result, the majority believed that a strong possibility exists that the attorney's duty to the client would be distorted. \textit{Id.}
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
impermissibly initiated by the police and was inadmissible. Thus, the majority concluded that the interrogation violated the *Edwards*’ rule and reversed the lower court’s judgment.

**B. The Dissenting Opinion**

Justice Scalia, with whom Chief Justice Rehnquist joined in dissent, urged an exception to the *Edwards*’ rule. The dissent contended that the state should be permitted, under certain circumstances, to establish that a suspect voluntarily waived his right to counsel. First, the dissent attacked the Court’s interpretation of *Miranda* and its progeny. Although agreeing that *Miranda* and *Edwards* created the right to have counsel present during custodial interrogation, Justice Scalia noted that since the *Edwards*’ rule was not a constitutional command, the Court must justify its expansion. The dissent asserted that expanding *Edwards*’ irrebuttable presumption to a situation where the suspect had actually consulted with his attorney was neither required under the Constitution nor excused by the Court’s recent precedent. Justice Scalia suggested implementing the *Zerbst* waiver standard, adopted in *Miranda*, which gives the state an opportunity to establish that the suspect intentionally relinquished or abandoned the right to counsel.

Justice Scalia characterized the *Miranda* right to counsel as a prophylactic assurance that the inherently coercive pressures of custodial interrogation would not violate the fifth amendment. He pointed out, however, that *Edwards* did not hold that these pressures precluded a suspect from waiving his right to have counsel present; rather, it adopted the presumption that no waiver is voluntary under certain circumstances. The dissent asserted that these circumstances should be limited to those present in *Edwards* itself, namely where the suspect in custody requested counsel and was interrogated before the attorney had ever been provided.

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108. Id.
109. Id.
110. Id. at 495 (Scalia, J., dissenting).
111. Id. at 494.
112. Id. at 493.
113. Id. at 494.
114. Id. This standard required examining the facts and circumstances surrounding the particular case. *Johnson v. Zerbst*, 304 U.S. 458 (1938).
116. Id. at 495 (Scalia, J., dissenting) (citing *Miranda*, 384 U.S. at 475).
The dissent argued that the justifications supporting Edwards were even less convincing under the facts of the instant case. Justice Scalia conceded that when suspects in police custody are first interrogated, they are likely to be ignorant of their rights and feel isolated by the hostile environment. After the first consultation with their attorney, however, the accused have a heightened sense of awareness of their rights. The dissent concluded that under these circumstances, the Edwards exclusionary rule should cease to apply.

The dissent attacked the majority's concern for infringement of the attorney-client privilege as alarmist. Justice Scalia contended that because the primary purpose of the consultation requirement was to eliminate the suspect's feeling of isolation and to assure him the presence of legal counsel, any contact between the accused and his attorney would suffice.

Finally, the dissent rejected the majority's concern that the dissent's proposal would undermine the advantages flowing from Edwards' clear and unequivocal standard. Justice Scalia asserted that under his proposal, Edwards would cease to apply, permanently, once the suspect had consulted with counsel.

Overall, the dissent contended that the majority's claimed benefits were substantially outweighed by its detrimental restriction upon law enforcement. Justice Scalia believed that abandoning the Zerbst standard in favor of expanding Edwards would unnecessarily impede police questioning as an effective law enforcement tool, thereby compromising society's compelling interest in administering justice. He concluded that the Court's decision far exceeded "any genuine concern about suspects who do not know their right to remain silent, or who have been coerced to abandon it." A criminal justice system that protects suspects against their own folly, he argued, is fundamentally corrosive.
V. ANALYSIS

Miranda's bar on custodial interrogation, absent the voluntary waiver of the rights to silence and counsel, is based on the fifth amendment privilege against self-incrimination. The Miranda majority presumed that custodial interrogation was an inherently coercive process. Based on this presumption, the Court determined that counsel's presence was required as a protective device against potential infringement upon a suspect's fifth amendment privilege. Fifteen years later, the Supreme Court in Edwards v. Arizona held that once an arrested suspect invokes the right to counsel, as distinct from the right to silence, the police may not reinitiate questioning until after the suspect has consulted an attorney. Now, some twenty-four years after Miranda, the Court in Minnick has breathed new life into Miranda's landmark protections.

The Minnick Court held that following a suspect's initial request for counsel, the per se prophylactic rule in Edwards bars police-initiated interrogation without the presence of an attorney, whether or not the suspect has consulted with his attorney.\textsuperscript{130} The Court based its holding essentially upon: (1) the benefits of bright-line prophylactic rules,\textsuperscript{131} and (2) the desire to protect the fifth amendment privilege against self-incrimination from the compelling pressures of custodial interrogation.\textsuperscript{132} Thus, the holding in Minnick is consistent with Miranda's interpretation of the fifth amendment. Moreover, the Minnick decision is consistent with the Court's recent holding in Roberson, confirming the requirement that a defendant's request for counsel be viewed broadly and revered with the utmost protection.\textsuperscript{133}

A. An Appropriate and Necessary Application of the Edwards' Rule\textsuperscript{134}

The Minnick decision is one of the few recent extensions of criminal rights to come from the Supreme Court, which in recent years has generally narrowed protection for suspects. In Miranda, the Court stated that police must terminate interrogation of a suspect in custody if the accused invoked the right to counsel.\textsuperscript{135} When the Court decided Edwards, it gave force to Miranda's admonition, holding that the accused is not subject to further interrogation by the authorities until counsel has been made available to him,

\textsuperscript{130} Id. at 491.
\textsuperscript{131} Id. at 490-92. See infra notes 158-164 and accompanying text for discussion of these benefits.
\textsuperscript{132} Id. at 489-92.
\textsuperscript{133} See supra notes 79-81 and accompanying text for discussion of Roberson.
\textsuperscript{134} Minnick, 111 S. Ct. at 491.
\textsuperscript{135} Miranda, 384 U.S. at 474.
unless the accused himself initiates further communication with the police.\textsuperscript{136} The thread that runs common through both of these decisions is the desire to protect a suspect from the coercive pressures that accompany custody and interrogation.\textsuperscript{137} Although abusive police procedure is on the decline,\textsuperscript{138} the fact that such conduct occurs at all justifies continued judicial consideration.\textsuperscript{139}

Additionally, post-Miranda studies indicate that although required to give warnings, police are still able to coerce suspects into waiving their right to counsel,\textsuperscript{140} or obtain confessions before the suspect’s attorney arrives.\textsuperscript{141} The ability of the police to corrupt the goals of Miranda and Edwards, even when they give appropriate Miranda warnings, indicates the need for more stringent procedural safeguards in the custodial interrogation setting.

The Court clearly provided such a safeguard in Minnick.\textsuperscript{142} The safeguard expressed in Minnick is the application of the Edwards’ rule to situations where the suspect has consulted with his attorney subsequent to his request for counsel, yet prior to reinitiation of interrogation by police.\textsuperscript{143} Minnick’s application of the Edwards’ rule assures suspects that the police will not pressure them to submit to interrogation.\textsuperscript{144} As the majority noted, “consultation is not always effective in instructing the suspect of his rights.”\textsuperscript{145} Moreover, isolated consultation with counsel, who is absent when interrogation resumes, does not remove the suspect from coercive pressures that may increase as custody is prolonged.\textsuperscript{146} Therefore, to allow police to initiate interrogation simply on the grounds that the suspect has consulted with his attorney would frustrate the purpose of the Miranda warnings because

\textsuperscript{136} Edwards, 451 U.S. at 484-85.

\textsuperscript{137} Minnick, 111 S. Ct. at 491.


\textsuperscript{139} See, e.g., People v. Wilson, 116 Ill. 2d 29, 506 N.E. 2d 571 (1987) (defendant claimed confession resulted from police beating, kicking, burning, and smothering defendant with a plastic bag); People v. Clark, 114 Ill. 2d 450, 501 N.E.2d 123 (1986) (defendant required surgery for crushed trachea; injury allegedly occurred while in custody at police station).

\textsuperscript{140} See Leiken, Police Interrogation in Colorado: The Implementation of Miranda, 47 DEN. L.J. 1, 26-34 (1970).


\textsuperscript{142} Minnick, 111 S. Ct. at 491.

\textsuperscript{143} Id.

\textsuperscript{144} Id.

\textsuperscript{145} Id.

\textsuperscript{146} Id.
repeated attempts at questioning effectively undermines the will of the accused.\textsuperscript{147} This problem is exactly what the majority in \textit{Minnick} sought to prevent. Pursuant to this line of reasoning, the Court applied the \textit{Edwards'} rule. As a result, the decision reinforces the policy that police should use investigative work and extrinsic evidence instead of interrogations to gain information regarding suspects.\textsuperscript{148}

\textbf{B. Cost/Benefit Analysis}

Many courts and scholars have characterized the \textit{Miranda} rules as prophylactic in nature and the holdings in \textit{Edwards} and \textit{Minnick} as mere extensions of this prophylaxis.\textsuperscript{149} The purpose of a prophylactic constitutional rule is to function as a "preventive safeguard to ensure that constitutional violations will not occur."\textsuperscript{150} A prophylactic rule may be violated without violating the Constitution itself.\textsuperscript{151} In \textit{Minnick}, the dissent was quick to remind Justice Kennedy of his recent statement in \textit{Roberson} that "the rule of

\textsuperscript{147} Michigan v. Mosley, 423 U.S. 96, 102 (1975). The undermining of which the \textit{Mosley} Court spoke was clearly present in \textit{Minnick}. The fact that Minnick had indicated he was unwilling to proceed without the aid of an attorney and the fact that he was forced against his will to speak with Sheriff Denham combine strongly to suggest that he had no choice but to answer the questions. \textit{Minnick}, 111 S. Ct. at 488-89. Moreover, the majority suggested that Minnick may have incorrectly believed that he could keep his admissions out of evidence by refusing to sign a formal waiver of rights. \textit{Id.} at 491. For additional discussion of how repeated rounds of questioning undermine the will of the accused, see Y. \textsc{Kamisar}, \textsc{What Is Interrogation? When Does It Matter?, Police Interrogations And Confessions, Essays In Law And Policy} 139-75 (1980).

\textsuperscript{148} See \textit{Escobedo} v. Illinois, 783 U.S. 478 (1964). In \textit{Escobedo}, the Court discouraged strict reliance on the confession of a suspect when it stated that, "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." \textit{Id.} at 488-89. \textit{See also} Haynes v. Washington, 373 U.S. 503, 519 (1963) (court recognized that confessions have been unreliable and have been used by the police in place of searching for valid evidence).


\textsuperscript{150} Grano, \textsc{supra} note 149, at 105.

\textsuperscript{151} \textit{Id.}
Edwards is [the Court's] rule, not a constitutional command; and it is [the Court's] obligation to justify its expansion.\textsuperscript{152}

Moreover, a prophylactic rule may pose serious threats if improperly created or expanded.\textsuperscript{153} Some scholars have argued that first, the Court may violate the separation of powers doctrine by invading an area left to the legislature or executive branch unless the Court demonstrates adequate justification.\textsuperscript{154} Second, the Court may violate the principle of federalism by intruding into an area reserved to the states by the tenth amendment.\textsuperscript{155}

Consequently, one way to justify the Minnick Court's application of the prophylactic Miranda and Edwards' rules is by balancing the costs and benefits. The costs associated with the majority's proposed application can be expressed in terms of society's compelling interest in processing those who violate the law,\textsuperscript{156} and the need for police questioning as an effective law enforcement tool.\textsuperscript{157} Additionally, the Minnick decision may make police investigation more cumbersome and may exclude critical evidence due to simple police mistakes. Arguably, these costs lead to the release of criminals.

As serious as these costs may appear, however, they are outweighed by the countervailing principle that all are deemed innocent until proven guilty: the very foundation of our criminal justice system. Although many suspects indeed may be guilty of the crime accused, it is well established that even the guilty have rights that cannot be overlooked. In this light, the application of the Edwards' rule to a suspect who has consulted with his attorney has two compelling benefits.

First, this application ensures that any statement made in a subsequent interrogation is not the result of coercive pressures.\textsuperscript{158} The Miranda Court specifically rejected the theory that an opportunity to consult with one's attorney would substantively counteract the coercive environment,\textsuperscript{159} noting

\textsuperscript{152} Minnick, 111 S. Ct. at 493 (Scalia, J., dissenting) (citing Roberson, 486 U.S. at 688 (Kennedy, J., dissenting)).
\textsuperscript{153} Grano, supra note 149, at 123-24.
\textsuperscript{154} See Id. at 124; Roberson, 486 U.S. at 691 (Kennedy, J., dissenting).
\textsuperscript{155} Grano, supra note 149, at 124. Although the majority claimed that their decision was merely an appropriate and necessary application of Edwards, and not an "expansion," it obviously felt obligated to conduct a cost/benefit analysis anyway. Minnick, 111 S. Ct. at 491-92.
\textsuperscript{156} Minnick, 111 S. Ct. at 495 (Scalia, J., dissenting). Justice Scalia claims that "it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, admission of guilt..." if not coerced, [is] inherently desirable, because it advances the goals of both justice and rehabilitation." Id. (citations omitted).
\textsuperscript{157} Id. at 495.
\textsuperscript{158} Id. at 489.
\textsuperscript{159} Id. at 491.
that preliminary advice could be overcome swiftly by the secret interrogation process.\footnote{160} Proscribing police-initiated conversation with suspects who have consulted with an attorney is a means that is rationally related to the goal of preventing coerced confessions.

Second, the majority's application of Edwards "implements the protections of Miranda in practical and straightforward terms."\footnote{161} Such a bright-line prophylactic rule specifically instructs police how they may conduct custodial interrogations.\footnote{162} Furthermore, such a rule informs courts of the circumstances that render a suspect's statements inadmissible, thus benefitting the accused and state alike.\footnote{163} This gain in specificity has unequivocally been thought to outweigh potential harm of suppressing trustworthy and probative evidence.\footnote{164}

Realistically, the Minnick decision may diminish the prevalence of confessions. The importance of confessions in criminal cases, however, has fallen greatly in the past quarter-century.\footnote{165} Minnick is a mere continuation of this trend. Although both waiver of rights and admission of guilt are consistent with the notion of individual responsibility that is a part of the criminal justice system, insistence upon "particular and systemic assurances" against coercion does not detract from this principle.\footnote{166} Consequently, the diminished availability of confessions at trial will not undermine society's interest in convicting the guilty. It merely shifts responsibility to the police to obtain evidence independently.\footnote{167}

C. Potential Impact of Minnick

The holding of Minnick extends the per se rule of Edwards to situations where the accused, after requesting the presence of counsel, has actually consulted with his attorney prior to police reinitiation of interrogation.\footnote{168} In theory, Minnick establishes a clear guideline for officials regarding their ability to interrogate a suspect after the right to counsel has been asserted.\footnote{169} In reality, the effect of the Minnick decision remains uncertain.
The clarity of Minnick depends largely on the ability of police officials to maintain accurate records. That is, Minnick will have no preventive impact unless it is clear to officers investigating at a later time that the suspect has already requested counsel. Additionally, the clarity and simplicity advocated by the majority may depend on the difficulty involved in determining when a suspect has initiated communication with officials, thereby evincing a desire to proceed without counsel's presence.\textsuperscript{170} In the daily operations of police work, it is rarely clear whether the police or suspect initiated a conversation. Therefore, Minnick may be difficult to apply in practice. The Court could have overruled Edwards by holding that once an attorney is requested, the suspect would not be able to waive the privilege by "initiating" conversation unless counsel was present. This approach, although extreme, would eliminate the sticky determination of initiation. Further, this approach would be consistent with the rationale behind a request for counsel as indicating the inability to proceed alone in a custodial interrogation setting.

In the alternative, the Court could simply replace the loose "initiation" waiver standard with a stricter sixth amendment "knowing and intelligent" waiver standard. In such a situation, the accused must be made aware of the "dangers and disadvantages of self-representation" by use of the \textit{Miranda} warnings.\textsuperscript{171} Hence, the inquiry would focus not on who initiated the conversation, but whether the accused received the appropriate warnings prior to making a statement. Although the sixth amendment typically affords no protection until the onset of formal proceedings, it could be argued that once the suspect has consulted with an attorney, the adversarial process has begun. Accordingly, there should be no contact with the accused except through his attorney or upon a complete, knowing, and intelligent waiver. Moreover, if an attorney tells the client not to talk to police, it is reasonable to require police to strictly honor that advice.

The Court's application of the \textit{per se} rule of Edwards in Minnick further increases the importance that \textit{Miranda} and Edwards placed on the presence of counsel during custodial interrogation.\textsuperscript{172} As a result, Minnick may further impede the efforts of law enforcement officials. In reality, once a suspect requests counsel's presence, the chances of a later confession are greatly reduced. As Justice Scalia noted, "at the earliest opportunity 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.'"\textsuperscript{173}

\textsuperscript{170} \textit{Id.} at 492. The Minnick Court chose not to address this issue because it determined that there was no doubt that the interrogation in question was initiated by police. \textit{Id.}


\textsuperscript{172} Minnick, 111 S. Ct. at 490-91.

\textsuperscript{173} \textit{Id.} at 496 (Scalia, J., dissenting) (citing Watts \textit{v.} Indiana, 338 U.S. 49, 59
The Minnick decision has important practical implications that will affect the roles of defense counsel, prosecution, and the police. Defense attorneys are now aware that once they initially advise the client to remain silent while in custody, no subsequent police initiated questioning will be admissible at trial. Hence, defense counsel should make clear to the client that any contact that the client initiates with the officials could lead to a lawful resumption of questioning. Likewise, the police must refrain completely from attempts at reinitiating interrogation of that suspect. If the suspect in any way acts to initiate communication, however, police questioning appears permissible.

Apart from suspect-initiated conversation, the prosecution should be aware that Minnick does not preclude obtaining confessions through the use of jail plants or informants. Likewise, defense attorneys should emphasize this risk to the client.

While Minnick's impact on future cases is uncertain outside of the Court's narrow holding, its decision adds support to the Mosley and Edwards' distinction between the right to counsel and the right to silence. The Minnick Court refused to apply Mosley's "scrupulously honored" test to the request for counsel, determining that such a request acts as a complete bar to interrogation, whereas the request to remain silent does not prevent all later interrogations. Moreover, the Supreme Court in Minnick continued the line of decisions that have elevated the right to counsel above the right to silence. This distinction, however, seems somewhat illogical, albeit well established. While the Court has indicated that suspects who request counsel are expressing that they are not competent to deal with the authorities without legal advice, suspects asserting the right to remain silent are no more secure. Although suspects who choose silence are indicating some level of competence in police dealing, those suspects are nonetheless subject to a risk of coercion at least as great as "incompetent" suspects who assert the right to counsel. To wit, those suspects who choose silence do not have the benefit of an attorney's advice to reinforce their fifth amendment rights. The bright line rule of Minnick, when applied to "competent" suspects, would counterbalance the broad latitude currently enjoyed by police in those situations. Consequently, the Minnick majority may be willing to re-examine Mosley in an appropriate case.

(1949)).

174. If the sixth amendment applies, however, a jail plant may constitute impermissible "deliberate elicitation." See United States v. Henry, 447 U.S. 264 (1980).


177. See Dripps, Miranda After 25 Years: Alive and Well?, TRIAL MAGAZINE, (March 16, 1991). The widely accepted interpretation of the fifth amendment is that
VI. CONCLUSION

The Minnick decision reflects the Court's recent, albeit modest, effort to strengthen Miranda. Specifically, Minnick symbolizes the continued recognition of the underlying concern of Miranda to establish meaningful and effective safeguards of the accused's fifth amendment rights. The decision effectively emphasizes an application of the Edwards' rule against police reinitiation of questioning until counsel is present, regardless of whether the suspect has consulted with an attorney. Although its holding is somewhat narrow, Minnick's impact on suspects' rights and law enforcement procedures will be significant. While the decision will result in fewer obtainable confessions, it will benefit both the accused and investigating officials alike. Suspects will be assured that their original request for counsel will be completely respected and the police will receive a clear operational guideline that must be followed. The full effect of Minnick, however, will probably depend on whether the Court remains consistent in its recent effort to protect suspects' rights during custodial interrogation or whether it returns to the worn path leading to Miranda's reversal.

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a person has the right to remain silent and not to incriminate himself. See, e.g., Mayers, Shall We Amend the Fifth Amendment? 82-99 (1959) (the right of the accused to keep silent is expressly guaranteed by the fifth amendment and extends to the interrogation setting). Therefore, it would be logical for the Court to state that a suspect's right to remain silent is at least as important as the right to counsel under the fifth amendment.