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Minnick v. Mississippi: Additional Protection for the Criminal Defendant

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Minnick v. Mississippi: Additional Protection for the Criminal Defendant

I. INTRODUCTION

In *Minnick v. Mississippi*,[1] the United States Supreme Court held that when counsel is requested by an accused in custody, interrogation of the accused must cease, and officials may not re-initiate interrogation without counsel present, whether or not the accused has consulted with his attorney.[2] The privilege against self-incrimination as guaranteed by the fifth amendment and as developed into its modern form nearly a quarter-century ago in *Miranda v. Arizona*[3] provided the backbone of the Supreme Court's decision.[4] The Court's holding clarifies the previously unclear issue of whether counsel's presence on behalf of an accused is required at any interrogation subsequent to the moment an individual has invoked his right to counsel.[5] Equally important, the Court re-enforced and expanded its previous holding in *Edwards v. Arizona*[6] that an accused, having expressed his right to counsel, is not subject to further interrogation until counsel has been made available to him, unless the accused himself initiates any further communication with officials.[7]

This Casenote begins with a summary of the applicable reasoning and principles established in *Miranda v. Arizona*, followed by a discussion of how *Edwards v. Arizona* altered these established principles. Next, it provides the facts and procedural history of *Minnick v. Mississippi*. An examination of the Court's opinion follows, and the Casenote concludes with an analysis of the Supreme Court's decision.

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1. 111 S. Ct. 486 (1990).
2. *Id.* at 491.
3. 384 U.S. 436 (1966).
4. *See id.* at 489-92.
5. *Id.* at 488.
6. 451 U.S. 477 (1981).
7. 111 S. Ct. at 488 (citing 151 U.S. at 484-85).

II. HISTORICAL BACKGROUND

A. *Miranda v. Arizona*

The United States Supreme Court provided the modern-day foundations governing restraints from self-incrimination by deciding *Miranda v. Arizona*. The majority of the Supreme Court determined that various interrogation procedures exercised by police had achieved beneficial value only after subjecting individuals in custody to undue compulsive hardships.[8] The psychological weapons utilized by the police and condoned as positive interrogation techniques in police manuals led the Court to proscribe numerous safeguards on behalf of those accused of criminal activity.[9] The provision of the fifth amendment that no person "shall be compelled in any criminal case to be a witness against himself"[10] justified the enactment of these safeguards, which were specifically directed towards prohibiting the abusive methods utilized to invoke self-incrimination by confession.

Apart form the well-known *Miranda* rules concerning an individual's rights to silence and to counsel, *Miranda* also established strict procedural requirements concerning interrogations. Included is the requirement that if an accused in custody "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease;"[11] also, if he "states that he wants an attorney, the interrogation must cease until an attorney is present."[12] Regarding waivers of the right against self-incrimination, *Miranda* established that if statements are obtained without an attorney present, "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" before those confessions are rendered admissible.[13] Therefore, under *Miranda*, in order to effectuate a valid waiver, an accused must have voluntarily relinquished his rights. This was consistent with the Court's earlier view expressed in *Johnson v. Zerbst*[14] concerning the high standard of proof necessary to establish waivers of constitutional rights. Thus, statements obtained by compelling influences of any type are deemed inadmissible under *Miranda*. Additionally, evidence that an accused was tricked into a waiver is illustrative of

8. 384 U.S. at 449-57.
9. *Id.* at 478-80.
10. U.S. CONST. amend. V.
11. 384 U.S. at 473-74.
12. *Id.* at 474.
13. *Id.* at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964)).
14. 304 U.S. 458 (1938).

the fact that the confession was not voluntary and is, accordingly, inadmissible as well.[15]

The *Miranda* decision severely limited the ability of the state to obtain confessions. Stated differently, the decision provided those accused of criminal activity a great wall of protection against self-incrimination extracted through undue compelling influences of the state. It is important to recognize, however, that the Court in *Miranda* had no intention whatsoever of purporting to find all confessions inadmissible once the right to counsel was invoked.[16]

B. From Miranda to Edwards

As previously discussed, the Supreme Court in *Miranda v. Arizona* adhered to the *Johnson v. Zerbst* standard concerning waivers of constitutional rights. Justice Black, writing for the majority in *Zerbst*, stated:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.[17]

Following *Miranda*, the *Zerbst* standard for the determination of valid waivers of constitutional criminal procedure rights was frequently applied.[18] While utilizing the test in these instances, however, the Supreme Court failed to indicate clearly whether an express waiver of rights was a condition necessary for this determination. The issue was resolved by *North Carolina v. Butler*,[19] where the Court not only reinforced the *Zerbst* approach, but also stated that while express written or oral statements were strong indications of a valid waiver, they were "not . . . either necessary or sufficient to establish waiver."[20] The Court added that "[t]he question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case."[21] This approach was further refined in *Fare v. Michael C.*,[22] where

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15. 384 U.S. at 476.
16. *Id.* at 478.
17. 304 U.S. at 464.
18. *See, e.g.*, Faretta v. California, 422 U.S. 806, 835 (1975); Brookhart v. Janis, 384 U.S. 1, 4 (1966); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275-80 (1942).
19. 441 U.S. 369 (1979). In *Butler* the accused was arrested on charges of kidnapping, armed robbery, and felonious assault. *Miranda* rights were subsequently given, and the accused acknowledged that he understood those rights. He refused to sign an express waiver form, but later made inculpatory statements. *Id.* at 370-72.
20. *Id.* at 373.
21. *Id.*
22. 442 U.S. 707 (1979).

the Court stated that "an inquiry into the totality of the circumstances surrounding the interrogation" was necessary to "ascertain whether the accused . . . knowingly and voluntarily" waived his rights.[23]

The Supreme Court followed *Zerbst* and its progeny for fifteen years before deciding the case of *Edwards v. Arizona*.[24] In *Edwards*, after being informed of his rights, the police questioned petitioner until he expressed his desire for an attorney. Questioning then ceased until the next morning, when two colleagues of the previous interrogator arrived. They again informed petitioner of his *Miranda* rights, questioned him, and subsequently obtained confessions to the robbery, burglary, and first-degree murder for which he was arrested.[25]

The Supreme Court began its analysis with a restatement of the *Zerbst* standard for determining the validity of waivers.[26] As stated previously, the standard provides that a waiver is "an intentional relinquishment or abandonment of a known right or privilege,"[27] and whether either has occurred depends "in each case, upon the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused."[28] While the Court considered the proceedings, it noted that both lower state courts had deemed the admissions as voluntary without separately focusing upon whether petitioner had relinquished his rights knowingly and intelligently, an inseparable requirement to the formation of a valid waiver.[29] Without challenging the soundness of the state courts' finding of voluntariness, the Court determined that neither lower court undertook to focus upon the issue of whether petitioner understood his rights, or whether he knowingly and intelligently relinquished them.[30] In light of these findings, and based upon the requirements of *Zerbst* and its progeny, the Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights."[31] This holding, in itself, was founded upon an analysis consistent with the previous standards of *Zerbst*. The Court, however, further held that an accused, "having expressed his desire to deal with the police only through counsel, is not

23. *Id.* at 725.
24. 451 U.S. 477 (1981).
25. *Id.* at 478-79.
26. *Id.* at 482-83.
27. 304 U.S. at 464.
28. *Id.*
29. 451 U.S. at 483.
30. *Id.* at 484.
31. *Id.*

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] This additional language providing "unless the accused himself initiates further communication . . ." was radically different than anything expressed before by the Court. If interpreted literally, once the right to counsel is invoked, knowing, intelligent, and voluntary statements offered by an accused are inadmissible as valid waivers unless the accused himself initiated contact with those to whom he confessed.

While no members dissented from the opinion, this additional holding inspired three members of the Court to write or join concurring opinions expressing serious concerns with this novel requirement of "initiation."[33] In his concurrence, Justice Burger asserted that neither "any constitutional standard nor the holding of *Miranda v. Arizona* . . . calls for a special rule as to how an accused in custody may waive the right to be free from interrogation."[34] He manifested the contention that the standards of *Zerbst* were adequate to resolve the question of whether a valid waiver resulted from any given situation.[35] In addition, Burger rejected the notion that any "prompting" of a person in custody was "evil per se."[36]

A concurring opinion by Justice Powell, with whom Justice Rehnquist joined, showed similar concerns by declaring: "I do not join the Court's opinion because I am not sure what it means."[37] Justice Powell, as did Justice Burger, reiterated the standards of *Zerbst*.[38] Concerning the Court's language regarding initiation of communications, Powell expressed an explicit rejection of this language if read to create a new per se rule requiring an inquiry as to who commenced any conversation between the police and an accused.[39] Powell was troubled not only with the difficulties of who "initiated" the discussions, for a number of actions could constitute those of an initiative nature, but also the hampering effect the Court's holding would place upon the elicitation of confessions.[40] Powell noted that "[n]othing in the Constitution erects obstacles that preclude police from ascertaining whether a suspect has reconsidered his original decision,"[41] and that the inquiry of whether the suspect had decided to

32. *Id.* at 484-85.
33. *Id.* at 487-92.
34. *Id.* at 487 (Burger, C.J., concurring).
35. *Id.* at 488.
36. *Id.* (citing Rhode Island v. Innis, 446 U.S. 291 (1980)).
37. *Id.* at 488 (Powell, J., concurring).
38. *Id.* at 489.
39. *Id.* at 489-90.
40. *Id.* at 490-91.
41. *Id.* at 490.

talk or confess to the police "is a question of fact to be determined in light of all the circumstances."[42] Powell asserted that an inquiry into the initiation of the conversation was relevant, but the determination of whether a free and knowing waiver was made constituted the "ultimate question."[43] Finally, the concurrence by Powell and Rehnquist expressed anxiety that the majority's additional holding "may be read as 'constitutionalizing' not the generalized *Zerbst* standard but a single element of fact among the various facts that may be relevant to determining whether there has been a valid waiver."[44]

The holding of *Edwards v. Arizona* produced an additional safeguard for those accused of criminal activity, and also played a major role in the Supreme Court's decision of *Minnick v. Mississippi.*

III. The Facts of *Minnick v. Mississippi*

Petitioner Robert Minnick and fellow prisoner James Dyess escaped from a Mississippi county jail and subsequently broke into a mobile home in search of weapons. While committing the burglary, the trailer owner, who was accompanied by another man and his infant son, interrupted them. With the stolen weapons, Minnick and Dyess killed the trailer owner and the other man. Before the escapees could flee, two young women arrived at the mobile home. The escapees held them at gunpoint and bound them hand and foot. Minnick and Dyess fled in the trailer owner's truck, abandoning the vehicle in New Orleans. They continued to Mexico, where they fought and separated. Minnick proceeded to California, and was arrested in Lemon Grove on a Mississippi warrant.[45]

The day following the arrest, two FBI agents visited the jail to interview Minnick, who later testified that he was threatened into commencing the interview. The agents read Minnick his *Miranda* warnings which he acknowledged to understand, but he refused to sign a rights waiver form. Petitioner described the jail break and other events leading up to the incidents at the trailer. The agents then reminded Minnick that he did not have to answer any more questions without a lawyer. In response, petitioner told them to return when he had a lawyer present so that he could proceed in further detail.[46]

An appointed attorney met with Minnick after the FBI interview, and they spoke on two or three occasions. Three days after the FBI interview, Deputy Sheriff Denham from Mississippi arrived to question Minnick.

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42. *Id.* at 491.
43. *Id.*
44. *Id.* at 492 (emphasis in original).
45. 111 S. Ct. at 488.
46. *Id.* at 488-89.

Minnick testified that the jailers told him he would "have to talk." Petitioner was advised of his rights and again failed to sign a rights waiver form. Minnick proceeded to describe the escape, and subsequently confessed to having shot one of the victims.[47]

The state of Mississippi tried Minnick for murder. Minnick moved to suppress all statements given to Denham, the FBI, or other police officials. The trial court admitted the statements made to Denham into evidence, but suppressed his other statements. Minnick was thereby convicted on two counts of capital murder and sentenced to death.[48]

On appeal, petitioner argued that the confession to Denham was made in violation of his fifth and sixth amendment rights to counsel.[49] The Mississippi Supreme Court rejected both claims, and with respect to the fifth amendment aspect of the case, found the bright-line rule developed in *Edwards* inapplicable.[50] The court relied on language in *Edwards* which indicated that the bar on interrogating an accused after a request for counsel applies " 'until counsel has been make available to him,' "[51] and concluded that " 'since counsel was made available to Minnick, his fifth amendment right to counsel was satisfied.' "[52] The court also found that petitioner waived his sixth amendment right to counsel when he spoke with Denham, thereby rejecting the sixth amendment claim.[53] The United States Supreme Court granted certiorari, and without reaching the sixth amendment issue, reversed the lower courts, deciding that the fifth amendment protection described in *Edwards* had not been terminated or suspended by consultation with counsel.[54]

IV. The Supreme Court's Opinion

A. *The Majority Opinion*

The Court's opinion, written by Justice Kennedy,[55] initially declared that the Court designed the *Edwards* decision " 'to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.' "[56] The Court noted that the bright-line "initiation of communication" test in *Edwards* conserved judicial resources otherwise expended to-

47. *Id.*
48. *Id.* at 489.
49. *Id.*
50. *Id. See supra* text accompanying notes 24-44.
51. 111 S. Ct. at 489 (citing Edwards v. Arizona, 451 U.S. 477, 484-85 (1981)).
52. *Id.* (citing Minnick v. Mississippi, 551 S.2d 77, 83 (1988)).
53. *Id.*
54. *Id.*
55. *Id.* at 488.
56. *Id.* (quoting Michigan v. Harvey, 110 S. Ct. 1176, 1180 (1990)).

wards determinations of the voluntariness of waivers.[57] *Edwards* established this benefit through clear and straightforward guidelines which benefitted the law enforcement profession as well as those in custody.[58] The Court expressed that "even before *Edwards*," the guidelines founded in *Miranda* were viewed with reverence in *Fare v. Michael C.*[59] as having the virtue of notifying officials as to what was permissible during custodial interrogations.[60] The Court felt that such gains in specificity outweighed the burdens placed upon the states in a manner justifying the guidelines.[61]

As stated by the majority, the issue in *Minnick v. Mississippi* was whether the protection provided by *Edwards v. Arizona* had ceased once Minnick consulted with his attorney.[62] The Mississippi Supreme Court had interpreted the *Edwards* language that an accused who invokes his right to counsel "is no subject to further interrogation . . . until counsel has been made available to him" to connote that the protection provided by *Edwards* terminated once the accused had consulted with counsel.[63] The majority rejected this contextual interpretation of "made available," stating that it "refers to more than an opportunity to consult with an attorney outside the interrogation room."[64] The Court next brought attention to the emphasis placed upon counsel's "presence" in both the *Miranda* and *Edwards* opinions.[65] Applying language from *Miranda* that " 'the interrogation must cease until an attorney is *present*,' "[66] and from *Edwards* that the accused had the " 'right to have counsel *present*,' "[67] the Court characterized the importance of an attorney's presence during police interrogations.[68]

After reiterating *Miranda*'s assertion that counsel's presence during interrogations is necessary and effective in insuring compliance with the fifth amendment, the Court highlighted several cases which interpreted *Edwards* to mean that authorities may not initiate interrogation of the accused in the absence of counsel.[69] The Court went on to state that:

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57. *Id.*
58. *Id.* at 490.
59. 442 U.S. 707, 718 (1979).
60. 111 S. Ct. at 490.
61. *Id.*
62. *Id.* at 488.
63. *Id.* at 490 (citing *Edwards*, 451 U.S. at 484-85).
64. *Id.*
65. *Id.*
66. 384 U.S. at 474 (emphasis in original).
67. 451 U.S. at 482 (emphasis added).
68. 111 S. Ct. at 490.
69. *Id.* at 490-91.

> In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule [of Edwards] to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not re-initiate interrogation without counsel present, whether or not the accused has consulted with his attorney.[70]

In so holding, the Court acknowledged the pressures and abuses exerted by law enforcement officials on many accused individuals.[71] The Court realized that "[a] single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights . . .,"[72] as illustrated by Minnick's "forced" interrogation.[73] The Court also rejected the notion that consultation with an attorney always effectively provides an accused with knowledge of her rights.[74] According to the Court, it is possible that Minnick believed his confession would be inadmissible in court since he refused to sign a formal waiver of his rights.[75]

The proposed exception to *Edwards* which the state courts contextually usurped from its language was deemed incompatible by the majority with *Edwards*'s purpose of protecting an individual's right to have counsel present.[76] The Court also noted that the state's theory that the opportunity to consult with an attorney "substantially counteract[s] any compulsions created by custodial interrogation" was specifically rejected in *Miranda*.[77] The Court was also unwilling to undermine the advantages flowing from *Edwards*' [sic] "'clear and unequivocal' character."[78] Central to the Court's opinion was the undesirability of a system of interrogation whereby the protection of *Edwards* could "pass in and out of existence."[79] The holding of *Minnick* prevents this by requiring the presence of an attorney at all interrogations after the accused has invoked his right to counsel.

The determination of whether a "consultation" occurred was also of concern to the Court.[80] Because consultations vary in scope in terms of depth, any number of minimal contacts absent substantive discussion

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70. *Id.* at 491.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 491-92.
79. *Id.* at 492.
80. *Id.*

could qualify.[81] Therefore, the Court decided that even if a necessary scope of consultation was determined, inquiries made by officials to confirm these occurrences could interfere with the attorney-client privilege.[82] Additionally, the Court noted that requiring counsel's presence at interrogations prevents the ironic possibility that in the absence of the rule, an individual "whose counsel is prompt would lose *Edwards'* [sic] protection, while the one whose counsel is dilatory would not."[83]

The majority concluded its opinion by stating that having "particular and systematic assurances that the coercive pressures of custody were not the inducing cause" of admissions or waivers does not detract from the affirmation of individual responsibility as a principle of the criminal justice system.[84] Accordingly, the admissions obtained from Minnick in the absence of representation by counsel were not admissible, and the judgement of the Mississippi Supreme Court was reversed and remanded for further proceedings not inconsistent with the opinion.[85]

B. The Dissent

The dissenting opinion was written by Justice Scalia and joined by Chief Justice Rehnquist.[86] It branded the majority for establishing a rule whereby criminal suspects may *never* validly waive their right to counsel during *any* police-initiated encounters, even after receipt of several *Miranda* warnings and actual consultation with an attorney.[87] Justice Scalia accused the majority of having declared irrelevant several aspects of the case which he considered important: Minnick's initial request for counsel had been honored; he had consulted with his attorney several times; his attorney specifically told Minnick not to speak to the authorities; and Minnick's general familiarity with the criminal justice system.[88] According to the dissent, the majority's failure to allow consideration of these variables produced an unconstitutional infringement upon state practices.[89]

The dissent asserted that *Miranda*'s concern over the "inherently compelling pressures" of custodial interrogation did not "preclude a suspect from waiving his right to have counsel present."[90] On the contrary, the

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at 493.
88. *Id.* at 494.
89. *Id.*
90. *Id.* (citing *Miranda*, 384 U.S. at 467).

Miranda decision adopted the high standard of proof set forth in *Zerbst*, and the dissent emphasized that the Supreme Court had "adhered to the principle that nothing less that the *Zerbst* standard for the waiver of constitutional rights applies to the waiver of *Miranda* rights."[91] The dissent noted that in *Michigan v. Mosely*,[92] the Court rejected an irrebuttable presumption which precluded a criminal suspect from waiving the right to remain silent during subsequent interrogation after having invoked that right.[93] The dissent also emphasized the Court's earlier rejection in *North Carolina v. Butler*[94] of a proposed rule requiring an explicit assertion of waiver by an individual as a condition for the execution of a valid waiver.[95]

Addressing *Edwards v. Arizona*, the dissent stated that, by breaking with the *Zerbst* approach, the decision stands "as a solitary exception to our waiver jurisprudence."[96] Conceding that *Edwards* "conserves judicial resources"[97] and provides precise guidelines to the law enforcement profession, the dissent contended that "so would a rule that simply excludes all confessions by all persons in police custody."[98] The dissent asserted that "[t]he value of any prophylactic rule (assuming the authority to adopt a prophylactic rule) must be assessed not only on the basis of what is gained, but also on the basis of what is lost."[99] According to the dissent, admissions of guilt obtained through police interrogation are not only desirable, they are essential to society's interest in finding, convicting, and punishing those who violate the law.[100] Therefore, the dissent contended, any positive consequences obtained through the abandonment or *Zerbst* are "outweighed" by society's interest in acquiring admissions of guilt.[101]

The dissent maintained that the majority's discussion emphasizing the right to have an attorney present during interrogations was "beside the point."[102] According to Scalia and Rehnquist, the primary question at issue was:

> why a State should not be given the opportunity to prove (under *Zerbst*) that the right was *voluntarily waived* by a suspect who, after having

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91. *Id.*
92. 423 U.S. 96 (1975).
93. 111 S. Ct. at 494.
94. 441 U.S. 369 (1979).
95. 111 S. Ct. at 494-95.
96. *Id.* at 495.
97. *Id.* (quoting 111 S. Ct. at 489 (Kennedy, J., for the majority)).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*

> been read his *Miranda* rights twice and having consulted with counsel at least twice, chose to speak to a police officer (and to admit his involvement in two murders) without counsel present.[103]

In reviewing the above question, the dissent contended that *Edwards* did not stand for the proposition that no waiver of the right to counsel is possible, but instead adopted the presumption that under certain circumstances, no waiver is voluntary.[104] In Justice Scalia's opinion, this presumption should apply only to circumstances similar to *Edwards*: where a suspect asked to consult with an attorney, and was questioned before the opportunity was provided.[105] The dissent recognized that under these circumstances, this protection may be justifiable to protect those ignorant of their rights during initial interrogation.[106] Once an individual's request for consultation has been honored, however, "[h]e almost certainly has heightened awareness . . . of his right to remain silent," since any qualified attorney would at the outset tell her client to remain silent.[107] In similar situations, therefore, since an irrebuttable presumption that any police-initiated confession was the result of ignorance or coercion has no genuine basis in fact, the dissent proclaimed that "the *Edwards* exclusionary rule should cease to apply."[108] While the majority implied that this may license the police to "badger" suspects, their concern, according to the dissent, is warranted only if threatening or coercive methods are utilized, and in such instances, the *Zerbst* standard affords adequate protection.[109] Inquiries by police as to whether an accused would like to reconsider and confess often result in voluntary confessions, and the dissent noted that "[n]othing in the constitution . . . prohibits such inquiry."[110]

The dissent continued by emphasizing that the majority's expansion of *Edwards* severely constricted law enforcement by making it impossible for the police to prompt a prisoner to change his mind about declining to confess.[111] Although Minnick was reinterrogated three days after he requested counsel, Scalia accused the majority of creating a "perpetual" requirement of counsel. Stating that "although the Court rejects one logical moment at which the *Edwards* presumption might end,"[112] by suggesting no alternative, Scalia concluded that the Court created a procedure

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103. *Id.* (emphasis in original).
104. *Id.*
105. *Id.*
106. *Id.*
107. *Id.* at 495-96 (citing Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J.)).
108. *Id.* at 496.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*

whereby "the result would presumably be the same if it had been three months, or three years, or even three decades."[113]

The dissent countered the majority's other contentions in short order. It stated that while the Court has the authority under the fifth amendment to exclude "compelled" confessions, "a rule excluding all confessions that follow upon even the slightest police inquiry cannot conceivably be justified on this basis."[114] Scalia further declared the majority's suggestion of the impossibility of determining whether a "consultation" took place as "alarmist."[115] He stated that "any discussion between [the accused] and an attorney whom he asks to contact, or who is provided to him, in connection with his arrest, will suffice,"[116] and that "[t]he precise content of the discussion is irrelevant."[117] Next, concerning the "irony" discussed by the majority, the dissent exerted ironies of its own regarding *Edwards*, as well as the majority's new rule by stating:

> The suspect in custody who says categorically "I do not wish to discuss this matter" can be asked to change his mind; but if he should say, more tentatively, "I do not think I should discuss this matter without my attorney present" he can no longer be approached. To that there is added . . . the irony that it will be far harder for the State to establish a knowing and voluntary waiver of Fifth Amendment rights by a prisoner who has already consulted with counsel than a newly arrested suspect.[118]

In commenting on the majority's concern that the protection of *Edwards* could pass in and out of existence, the dissent asserted that the argument would not exist under the resolution of the matter which it proposed; specifically, that "*Edwards* would cease to apply, permanently, once consultation with counsel [had] occurred."[119]

The final stages of the dissent expressed concerns regarding the extent of and reasons behind the Courts decisions in *Edwards* and *Miranda*. In the dissent's view, the holdings of both were efforts "to protect suspects against their own folly."[120] According to Scalia and Rehnquist, these two decisions were designed to even the odds for the "dull-witted."[121] They noted that even though "[t]he procedural protections of the Constitution

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113. *Id.*
114. *Id.*
115. *Id.* at 497.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 498.
121. *Id.*

protect the guilty as well as the innocent . . .. it was not their objective to set the guilty free."[122]

Justice Scalia added that even though clever criminals employ the protection to their advantage, the criminal justice system should not "allow criminals who have not done so to escape justice."[123] The dissent further stated that while an honest confession may be a foolish mistake, "a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected."[124] The dissent continued by asserting that "[w]e should . . . rejoice at an honest confession, rather than pity the 'poor fool' who has made it."[125] In concluding, the dissent condemned the majority as "misguided" by its application of a "*super-Zerbst*" protection against genuinely compelled testimony.[126]

V. Analysis and Conclusion

The strength of the Court's six-to-two decision appears to have created the existence of a time-weathering rule. Justice Souter's absence in the consideration of *Minnick*, however, casts somewhat of a shadow on such a conclusion. While the majority's concerns focused on protection of individuals in custody through the requirement of counsel's "perpetual" presence, the dissent challenged the Court's exertion of authority, and emphasized the limitations placed upon both the attainment of desirable law enforcement objectives and societal interests in general.

According to the majority, an extension of the holding in *Edwards* was necessary to prevent police from badgering those accused into waiving their *Miranda* rights. Why an individual should not, after both acknowledgment of his rights established by *Miranda* and consultation with an attorney, have the opportunity to voluntarily confess without the presence of counsel, and without having "initiated" the confession is an incomprehensible attenuation of the protections promulgated under *Miranda* and the Constitution. The dissent summarized the majority's unauthorized intrusion upon the practices of law enforcement by stating that "[t]odays extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement."[127] Even though *Miranda* provided that the interrogation must cease until counsel is present, it never supported a provision calling for the perpetual pres-

122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 497.

ence of counsel. Any coercive techniques utilized by police in counsel's absence are efficiently dealt with by the standards of *Zerbst*.

Although *Edwards* may appear as a steadfast departure from the traditional and better-suited *Zerbst* standard, it, as previously stated, "stands as a solitary exception to [the Supreme Court's] waiver jurisprudence."[128] Also, the majority's overwhelming adoption of the *Edwards* per se rule requiring an inquiry as to who "initiated" any conversation between the police and an accused has developed an interesting question: what happened to the previous rejection of such a rule as expressed by Justice Powell in his concurrence of *Edwards*?[129] Even though the confession by Minnick would probably have been suppressed after subjection to the *Zerbst* standards, Powell's failure to specify, as he did in *Edwards*, his rejection of the per se rule represented an unjustified concession.

As to the majority's concern regarding the difficulties of establishing an adequate "consultation" between an accused and her attorney, the dissent asserted that any discussion would suffice, recognizing that " 'any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.' "[130] The dissent also most aptly stated that the majority's concern that the protection of *Edwards* could pass in and out of existence "would cease to apply, permanently, once consultation has occurred."[131] Therefore, the majority's adoption of the "perpetual" presence of counsel would prove totally unnecessary.

In conclusion, it appears ironic that the Supreme Court would adopt such a rule during a period in American history where the rate of crime is drastically increasing. Public awareness towards the controlling of criminal activity has heightened over the past several years, and, once again, the Supreme Court has announced a decision contrary to society's desire of accomplishing adequate control of such activity. By protecting criminals in a manner which prohibits voluntary confessions, the Court has created yet another loophole on behalf of the guilty. *Minnick* will render thousands of confessions useless. As written by Justice Scalia, "[t]his newest tower, according to the Court, is needed to avoid 'inconsisten[cy] with [the] purpose' of *Edwards*'s prophylactic rule, . . . which was needed to protect *Miranda*'s prophylactic right to have counsel pre-

128. *Id.* at 495.

129. *See supra* text accompanying notes 37-44.

130. 111 S. Ct. at 496 (quoting Watts v. Indiana, 338 U.S. 49, 59 (1949)).

131. *Id.* at 497.

sent, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution."[132]

GABE HOTARD, JR.

132. *Id.* (quoting 111 S. Ct. at 491 (emphasis in original)).