University of Baltimore Law Forum

Volume 22
Number 1 *Summer, 1991*

Article 15

1991

Recent Developments: Minnick v. Mississippi: Right to Counsel during Custodial Interrogation Bars Police Initiated Discussions Unless Counsel Is Present

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Accordingly, in *Lane v. Nationwide Mut. Ins. Co.*, the Court of Appeals of Maryland expressly overruled *Yingling v. Phillips*, and held that when the insured party seeks to recover benefits from his automobile liability insurance carrier (even if he has already timely exercised his option to try to recover damages in tort, having notified the insurer of such an intent), the suit against the insurer was governed by traditional contract principles. As such, the three-year statute of limitations did not begin to run against the insured until the insurer breached the contract by denying coverage of the claim. Such a holding enables an insured motorist to wait until the carrier actually denies coverage before filing a contract suit. By placing the burden on the insurance carrier to make an affirmative denial, the insured no longer takes the risk that limitations might run merely because he or she was aware the other motorist was uninsured.

- Jennifer K. Etheridge

Minnick v. Mississippi: RIGHT TO COUNSEL DURING CUSTODIAL INTERROGATION BARS POLICE INITIATED DISCUSSIONS UNLESS COUNSEL IS PRESENT.

In *Minnick v. Mississippi*, 111 S. Ct. 486 (1990), the United States Supreme Court reversed the Mississippi Supreme Court when it ruled that when a defendant in custody has requested counsel, officials may not reinitiate interrogation without counsel present. This holds true even if the accused has consulted with his attorney since making the request.

Robert Minnick was arrested in 1986 in California on a Mississippi warrant for capital murder. The next day, two FBI agents re-read him his Miranda rights. Although he acknowledged that he understood them, Minnick refused to sign a waiver of rights form. He agreed to continue the interview but said he would not answer "very many" questions. *Id.* at 488. He then proceeded to answer a number of questions concerning his escape from a Mississippi jail and his subsequent flight. He concluded the interview by saying, "[c]ome back Monday when I have a lawyer," and that he would make a more complete statement at that time. *Id.* at 488. By Monday, the accused had spoken with his lawyer two or three times and been told in no uncertain terms "to talk to nobody." *Id.* at 493.

On Monday morning, a deputy sheriff from Mississippi came to the California jail in order to question Minnick. Having been told by his jailers that he would "have to talk" to the deputy and that he "could not refuse," Minnick proceeded to confess his part in several murders committed following his escape. *Id.* at 488-89. Minnick confessed that he and fellow prisoner, James Dyess, broke into the victim's mobile home after escaping from a county jail in Mississippi. When the victim returned home, he was killed by Dyess. Minnick was then handed a pistol and ordered at gunpoint to shoot the victim's friend. He did.

The motion to suppress these statements, as given to the Mississippi deputy, was denied. Minnick was convicted on two counts of capital murder and sentenced to death. On appeal, the Supreme Court of Mississippi upheld the trial court ruling that the defendant's Fifth Amendment right to counsel had been satisfied. The United States Supreme Court granted certiorari to examine whether the defendant's Fifth Amendment right to counsel had been terminated or merely suspended by his previous consultations with counsel.

Justice Kennedy began the analysis by examining the language of *Miranda v. Arizona*, 384 U.S. 436 (1966), where the Court held that police must terminate their interrogation of an accused in custody when the accused requests counsel. At that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." *Minnick*, 111 S. Ct. at 489 (quoting *Miranda*, 384 U.S. at 474). Turning to *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court determined that having requested an attorney, an accused "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates 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." *Id.* at 490 (citing *Edwards*, 451 U.S. at 484-85). This legal precedent left open the possibility of a defendant impliedly asking for counsel at each and every new custodial interrogation. The issue posed in *Minnick*, therefore, was whether the *Edwards'* requirement of counsel at custodial interrogations was satisfied after the suspect had consulted with an attorney.

In support of allowing uncounseled confessions, the Supreme Court of Mississippi had rested its holding on the theory that the Fifth Amendment requirement dissipated once the accused met with counsel and could only be reinstated by another request for counsel. *Minnick*, 111 S. Ct. at 490. The Supreme Court, however, refused to follow this proposition for three reasons. First, a holding that allowed the Fifth Amendment right to

vanish when counsel was provided but not present would be inconsistent with the *Edwards* and *Miranda* goals of providing counsel at all custodial interrogations. *Id.* at 491. Second, the proposed exception would undermine the benefits created by the bright line test of *Edwards* and its progeny, causing the *Edwards* requirement to pass in and out of existence multiple times, and thereby, cause mass confusion. *Id.* at 491-92. Third, the determination of what consultation is required would be a constant factual bone of contention. *Id.* at 492.

On a policy level, the Court noted that "[c]onsultation is not a precise concept, for it may encompass variations from a telephone call to say that the attorney is in route, . . . to a lengthy in-person conference." *Id.* The Court went on to say that officials would have to confirm these occurrences with the dangerous result that necessary inquiries could interfere with attorney-client privileges. *Id.* Furthermore, the proposed rule would penalize the prompt attorney who has counseled his client and reward the dilatory attorney whose client has not been counseled. *Id.* The Court was concerned that acceptance of the proposal would hinder judicial efficiency and economy by distorting "the proper conception of the attorney's duty to the client." *Id.* Accordingly, the Court held "that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney." *Id.*

In the final words of the majority opinion, Justice Kennedy noted that an accused can still waive his request for counsel if he initiates the conversation or discussion with the authorities. *Id.* However, any waiver argument in *Minnick* was negated by the fact that the confession was the product of a formal interview initiated by police which Minnick was compelled to attend. *Id.*

In dissent, Justice Scalia pointed to the long-term ramifications of this decision. He wrote that the *Minnick* holding is "the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement." *Id.* at 497. He went on to state that "[t]his newest tower . . . is needed to avoid inconsisten[cy] with [the] purpose of *Edwards'* prophylactic rule . . . which was needed to protect Miranda's prophylactic right to have counsel present, which was needed to protect the right against compelled self-discrimination found (at last!) in the Constitution." *Id.* (emphasis in original).

Justice Scalia then looked to *Miranda's* "knowingly and intelligently" waiver requirement for counsel which led to the Fifth Amendment waiver standard found in *Johnson v. Zerbst*, 304 U.S. 458 (1938). *Minnick*, 111 S. Ct. at 494. The *Zerbst* waiver, which determined whether an abandonment of the right to counsel had occurred, depended on particular facts such as background, experience, and conduct of the accused. *Id.* (citing *Johnson*, 304 U.S. at 464). Yet in *Minnick*, as pointed out by the dissent, the majority created an irrebuttable presumption that an accused can never waive the right to counsel in any police initiated encounter, even after consultation with his attorney. *Minnick*, 111 S. Ct. at 492. This was contrary to the clear language of *Edwards*, which mandated that the accused may initiate communication, and, thereby, waive his right to counsel. Further, this view was contrary to the express language of the majority opinion in *Minnick*.

The dissent then turned to the State of Mississippi's argument that the Fifth Amendment attorney requirement should dissipate after the accused is counseled. *Id.* at 495. Unlike the majority, Justice Scalia proceeded to find that consultation is not difficult to define, that promptness of the accused's attorney is irrelevant, and that once the accused is counseled, *Edwards* is no longer applicable. Justice Scalia then pointed to *Watts v. Indiana*, 338 U.S. 49 (1949), in which the Court held that "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances." *Minnick*, 111 S. Ct. at 496 (quoting *Watts*, 338 U.S. at 59). In conclusion, the dissent noted that if the accused is so foolish as to confess having spoken with counsel, "[w]e should . . . rejoice at an honest confession, rather than pity the 'poor fool' who has made it." *Id.* at 498.

In holding that an accused cannot be interrogated even though he has consulted with his attorney, the Court clearly extended *Edwards*, and, thereby, further defined its bright line test. In the wake of *Edwards*, the Court has repeatedly held that the benefits of clear and specific rules regarding the Fifth Amendment attorney requirement outweighs the burden imposed on law enforcement agencies. However, by extending *Edwards* to this degree, the Court seems to sacrifice the benefit of serendipitous dimness in the name of brightness.

- William P. Atkins