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FIFTH AND SIXTH AMENDMENTS—THE RIGHT TO COUNSEL IN MULTIPLE CHARGE ARRAIGNMENTS

McNeil v. Wisconsin, 111 S. Ct. 2204 (1991)

I. INTRODUCTION

In *McNeil v. Wisconsin*[1] the Supreme Court held that a suspect's invocation of his Sixth Amendment right to counsel at an arraignment on one charge does not imply invocation of the Fifth Amendment right to counsel at an interrogation concerning a separate crime. The majority, arguing that the Sixth Amendment application is offense-specific, based its decision on the fact that the two offenses were unrelated.[2] The majority also found no evidence that McNeil had ever invoked his Fifth Amendment right to counsel in the context of either offense.[3]

The dissent argued that the offense-specific application of the Sixth Amendment right to counsel was inconsistent with the ordinary understanding of the scope of the right[4] and inconsistent with *Michigan v. Jackson*.[5]

This Note examines the application of the *Miranda-Edwards* doctrine in the context of the Fifth and Sixth Amendment rights to counsel. This Note argues that the *McNeil* majority correctly distinguished the bases for applying the Fifth and Sixth Amendment rights to counsel and refused to allow invocation of the Sixth Amendment right to counsel to imply invocation of the Fifth Amendment right such that future waiver of the Fifth Amendment right would be invalid.

By declining to extend the *Miranda-Edwards* doctrine, the Court correctly balanced society's valid need to prosecute criminals with the concern for the protection of individual rights.

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[1] 111 S. Ct. 2204 (1991).

[2] *Id.* at 2207.

[3] *Id.* at 2209.

[4] *Id.* at 2212 (Stevens, J., dissenting).

[5] *See* Michigan v. Jackson, 475 U.S. 625 (1986). The *Jackson* Court held that invocation of the Sixth Amendment right to counsel at an arraignment barred later uncounselled interrogation of the suspect when the same offense was the subject of both the arraignment and the interrogation.

II. HISTORY OF THE *MIRANDA-EDWARDS* DOCTRINE

The Fifth Amendment of the United States Constitution states that "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ." In *Miranda v. Arizona*[6] the Court established the prophylactic rule that before custodial interrogation begins, police must advise a suspect of his right to remain silent and his right to have counsel.[7] Police must cease interrogation if the suspect in custody "indicates in any manner and at any stage of the process that he wished to consult with an attorney before speaking."[8] The Court recognized that the right to counsel is an important safeguard of the individual's will to resist the compelling nature of in-custody interrogation, without which "no statement obtained from the defendant can truly be the product of his free choice."[9]

The Court confirmed the importance of safeguarding the individual's right to counsel in *Edwards v. Arizona*.[10] The *Edwards* Court held that once a suspect has clearly invoked his Fifth Amendment right to counsel at an interrogation, police may not initiate further interrogation without the presence of counsel.[11] The fact that the suspect responds to police-initiated questions does not constitute a valid waiver of his Fifth Amendment rights.[12] The suspect invoked his Fifth Amendment right to counsel with regard to the same crime to which he later confessed.[13]

The Court extended the *Edwards* doctrine in *Michigan v. Jackson*[14] to invalidate a subsequent waiver of the Fifth Amendment right to counsel where a defendant had already invoked his Sixth Amendment right to counsel at an arraignment on the same charge.[15] If a defendant invokes his Sixth Amendment right to counsel at an arraignment, his Fifth Amendment rights attach with respect to the arraigned crime and police cannot initiate interrogation without the presence of counsel.[16]

Finally, in *Arizona v. Roberson*[17] the Court held that when a suspect in continuous custody invokes his Fifth Amendment right to

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6 384 U.S. 436 (1966).
7 *Id.* at 479.
8 *Id.* at 444-455.
9 *Id.* at 458.
10 451 U.S. 477 (1981).
11 *Id.* at 484-85.
12 *Id.* at 484.
13 *Id.* at 487.
14 475 U.S. 625 (1986).
15 *Id.* at 636.
16 *Id.* at 632.
17 486 U.S. 675 (1988).

counsel during interrogation on one offense, police may not re-initiate questioning without the presence of counsel even if the subject of that questioning is a separate offense.[18]

Thus, once specifically invoked, the Fifth Amendment right to counsel shields a suspect and invalidates his waiver of that right even with respect to a different offense when custody is continuous (*Roberson* rule). In addition, a suspect who has invoked his Sixth Amendment right to counsel is protected from police-initiated questioning on that offense without counsel even though that suspect has not specifically requested counsel in the Fifth Amendment context (*Edwards* rule).

The *McNeil* Court addressed the issue of whether the invocation of the Sixth Amendment right to counsel triggers the application of the *Edwards* rule relative to a separate offense.

III. Factual and Procedural Background

Wisconsin authorities suspected Paul McNeil of armed robbery in Milwaukee County and of involvment in an unrelated robbery and homicide in Racine County, Wisconsin.[19] On May 21, 1987, two Milwaukee County deputies escorted McNeil from Omaha, Nebraska, where he was in custody, back to Milwaukee, where he faced the Milwaukee County armed robbery charge.[20] The deputies advised McNeil of his *Miranda* rights.[21] McNeil refused to answer questions, but did not request counsel at that time.[22]

Detective Smulkowski of Milwaukee County, one of the detectives escorting McNeil, was aware that McNeil was a suspect in the Racine County homicide as well as the Milwaukee county robbery.[23] While transporting McNeil back to Milwaukee, the two deputies talked to McNeil about *both* crimes.[24] Detective Smulkowski urged McNeil to "tell his side of the story" so that his cooperation might help his cause later.[25] Prior to leaving Omaha, the two Milwaukee County detectives used McNeil's help in an unsuccessful search for a suspected accomplice in the Racine County homicide.[26]

The following day, McNeil appeared before a Milwaukee

18 *Id.* at 687-88.
19 State v. McNeil, 454 N.W.2d 742 (Wis. 1990).
20 *Id.*
21 McNeil v. Wisconsin, 111 S. Ct. 2204, 2206 (1990).
22 *Id.*
23 *Id.* at 2213, n.1 (Stevens, J. dissenting).
24 *Id.* (Stevens, J., dissenting).
25 *Id.* (Stevens, J., dissenting).
26 *Id.* (Stevens, J., dissenting).

County court commissioner on the armed robbery charge.[27] An attorney from the public defender's office represented McNeil at this initial appearance.[28]

Later that evening, Detective Joseph Butts of the Milwaukee County Sheriff's Department, who had been assisting the Racine County authorities in the homicide investigation, visited McNeil in jail.[29] Butts advised McNeil of his *Miranda* rights and McNeil signed a waiver form.[30] While McNeil did not deny knowledge of the Racine County homicide, he claimed he was not involved.[31]

On May 24, Detective Butts returned with detectives from Racine County.[32] Butts advised McNeil of his *Miranda* rights and McNeil initialled the waiver form.[33] McNeil admitted his involvement in the Racine County crimes and implicated two other men, Pope and Crowley.[34] Detective Butts and the Racine County authorities returned again on May 26, gave McNeil the *Miranda* warning and obtained his waiver.[35] In this interview, McNeil said that he had lied about Pope's involvement to minimize his own culpability and McNeil confessed to the crime.[36]

On May 27, McNeil was formally charged with the Racine County crimes and the Milwaukee authorities transferred him to that jurisdiction.[37] The trial court denied his pre-trial motion to suppress the three incriminating statements concerning the Racine County offense.[38] He was convicted and sentenced to sixty years in prison for second-degree murder, attempted first-degree murder and armed robbery.[39]

McNeil appealed the conviction.[40] He contended that his court appearance in connection with the Milwaukee County robbery charge wherein he was represented by counsel constituted an invocation of his *Miranda* right to counsel.[41] He further argued that "subsequent waiver of that right during police initiated questioning

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27 State v. McNeil, 454 N.W.2d 742, 744 (Wis. 1990).
28 *McNeil*, 111 S.Ct. at 2206.
29 *Id.*
30 *Id.*
31 *Id.*
32 *Id.*
33 *Id.* at 2206-07.
34 *Id.* at 2207.
35 *Id.*
36 *Id.*
37 *Id.*
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*

regarding *any* offense was invalid."[42] The Wisconsin Supreme Court refused to suppress the confessions and agreed with the trial court that McNeil's appearance with counsel on a charged offense did not constitute invocation of the Fifth Amendment right to counsel that precludes custodial interrogation on an unrelated, uncharged offense.[43]

IV. SUPREME COURT OPINIONS

A. MAJORITY OPINION

According to Justice Scalia, the Court granted certiorari in order to decide whether invocation of the Sixth Amendment right to counsel implied the invocation of the Fifth Amendment right to counsel relative to a separate offense.[44] Justice Scalia cited *Michigan v. Jackson*, in which the Court held that once the Sixth Amendment right to counsel had been invoked, "any subsequent waiver during police-initiated custodial interview is ineffective."[45] While acknowledging that McNeil's Sixth Amendment right to counsel had attached at the time McNeil made the incriminating statements, Justice Scalia described that right as offense-specific and therefore operative only for the Milwaukee County offense.[46] "It cannot be invoked once for all future prosecutions, for it does not attach until the prosecution is commenced,"[47] meaning at or after the formal adversarial process has begun, through a "formal charge, preliminary hearing, indictment, information or arraignment."[48] Since the right is offense-specific, the *Jackson* rule which invalidates subsequent waivers in police-initiated interrogations can only operate with regard to the offense for which the right to counsel has been claimed.[49]

Justice Scalia said that it was contrary to the public's interest in prosecuting crimes to exclude evidence relative to charges to which the Sixth Amendment has not yet attached.[50] Justice Scalia pointed out that at the time McNeil made the incriminating statements, he had not been formally charged with the Racine County crimes.[51]

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42 *Id.* (emphasis in original).
43 State v. McNeil, 454 N.W.2d 742, 746 (Wis. 1990).
44 *McNeil*, 111 S. Ct. at 2207.
45 *Id.* (citing Michigan v. Jackson, 475 U.S. 625 (1986)).
46 *Id.* at 2207.
47 *Id.*
48 *Id.* (quoting United States V. Gouveia, 467 U.S. 180, 188 (1984) quoting Kirby v. Illinois, 406 U.S. 682, 689 (1972) (plurality opinion)).
49 *Id.*
50 *Id.* at 2207-08 (citing Maine v. Moulton, 474 U.S. 159, 179-80 (1985)).
51 *Id.* at 2208.

McNeil therefore could not and did not invoke his Sixth Amendment right to counsel relative to the Racine County offenses.[52] On that basis, the majority held that McNeil's statements were admissible.[53]

Justice Scalia then examined McNeil's *Miranda*-based claim. The *Miranda* doctrine provides that the Fifth Amendment protection against self-incrimination guarantees one the right to counsel.[54] To counter the compelling nature of custodial interrogation, the *Miranda* Court developed prophylactic measures to ensure that an accused was aware of his rights, including the right to counsel.[55] Justice Scalia emphasized, however, that one can waive those rights, and that with a valid waiver in place, self-incriminating statements could be admissible.[56]

Justice Scalia went on to review the holding in *Edwards v. Arizona*, that once a suspect in custody asserts his right to counsel, no further interrogation is permitted until counsel is provided for the suspect[57] and is present at the interrogation.[58] The *Edwards* rule "is *not* offense-specific."[59] If a suspect invokes his *Miranda* right to counsel relative to one offense, all further police-initiated interrogation is barred "regarding *any* offense until counsel is present."[60]

Justice Scalia disagreed with McNeil's contention because of the differences between the Fifth and Sixth Amendment rights to counsel.[61] McNeil waived his *Miranda* rights, but claimed those waivers were invalid because of his earlier invocation of his Sixth Amendment right to counsel with respect to the Milwaukee burglary.[62] This asserted right, McNeil claimed, was also an invocation of the non-offense specific *Miranda-Edwards* right.[63] The Court found McNeil's claim false because the purpose of the Sixth Amendment right to counsel is to protect the suspect "*after* 'the adverse positions of government and defendant have solidified' with respect to a particular alleged crime."[64] In contrast, the *Miranda-Edwards* rule is

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52 *Id.*
53 *Id.*
54 *Id.* (citing Miranda v. Arizona, 384 U.S. 436 (1966)).
55 *Id.*
56 *Id.* (citing Miranda v. Arizona, 384 U.S. 436, 475 (1966)).
57 *Id.* (citing Edwards v. Arizona, 451 U.S. 447, 484-485 (1981)).
58 *Id.* (citing Minnick V. Mississippi, 111 S. Ct. 486 (1990)).
59 *Id.* (citing Arizona v. Roberson, 486 U.S. 675 (1988) (emphasis in original)).
60 *Id.* (emphasis in original).
61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.* at 2209 (citing United States v. Gouveia, 467 U.S. 180, 189 (1984) (emphasis in original)).

designed to protect a "suspect's desires 'to deal with police only through counsel' " during custodial interrogation[65] "regarding *any* suspected crime."[66]

While the majority acknowledged that it is likely that a suspect who has requested counsel in one proceeding would want counsel present during custodial interrogation on another charge, "the likelihood that a suspect would wish counsel present is not the test for applicability of *Edwards*."[67] The *Edwards* rule applies only when a suspect has expressly made some statement which could reasonably be interpreted as a desire for counsel during custodial interrogation.[68] According to Justice Scalia, requesting counsel at a bail hearing does not trigger the *Edwards* rule because to hold that a defendant has invoked his Fifth Amendment right to counsel on one charge "merely by requesting the appointment of counsel on the unrelated charge is to disregard the ordinary meaning of the request."[69]

The majority cited *Michigan v. Jackson* to bolster the argument that the invocation of the Sixth Amendment right to counsel is not the functional equivalent of the trigger for the *Miranda-Edwards* rule.[70] The *Jackson* Court held that invocation of the Sixth Amendment right to counsel precludes the police from obtaining any later statements during police-initiated interrogation relative to that same charge even if the suspect waives his right to counsel at that interrogation.[71] In *Jackson*, the Court held that "the relevant question was not whether the *Miranda* 'Fifth Amendment' right had been *asserted*, but whether the Sixth Amendment right to counsel had been *waived*."[72] If the two rights were functionally equivalent, the majority argued, there would have been no need for the *Jackson* Court to develop a new Sixth Amendment rule precluding police initiated interrogation for they could have simply relied on *Edwards*.[73]

Justice Scalia rejected the notion that even if invocation of the Sixth Amendment right to counsel did not in fact imply the invocation of the *Miranda* Fifth Amendment right, the Court had a duty to

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65 *Id.* (quoting Edwards v. Arizona, 451 U.S. 477, 484 (1981)).

66 *Id.* (emphasis in original).

67 *Id.*

68 *Id.*

69 *Id.* (quoting State v. Stewart, 780 P.2d 844, 849 (Wash. 1989) *cert. denied*, 110 S. Ct. 1327 (1990)).

70 *Id.* at 2209-10.

71 *Id.* (citing Michigan v. Jackson, 475 U.S. 625, 632-33 (1986)).

72 *Id.* (citing *Jackson*, 475 U.S. at 633) (emphasis in original).

73 *Id.* at 2210.

declare it so as a matter of policy.[74] Weighing the costs and benefits of such a rule, the Court found that there would be little advantage for the accused, for if a suspect does not want to deal with the police without an attorney present, the suspect can tell that to the police when the *Miranda* warning is given.[75] Because the accused is being questioned on a charge other than the one for which he had requested counsel, the majority concluded that "[t]here is not the remotest chance that [the accused] will feel 'badgered' by [the police] asking to talk to him without counsel present."[76]

On the other hand, Justice Scalia was concerned that adopting such a rule would mean that the authorities would be prohibited from approaching persons in pretrial custody and questioning them relative to other crimes "*even though they have never expressed any unwillingness to be questioned.*"[77] Justice Scalia concluded that this would be detrimental to society's interest in catching and punishing criminals.[78]

Finally, the Court dispelled the notion that a bright-line rule is required in this case. While acknowledging that it is the Court's task to create such rules, they will only do so "when they guide sensibly."[79] In declining to add yet another rule to *Miranda*, the Court stated that *Miranda* and its progeny are like "new stories [being added] to the temples of constitutional law, and temples have a way of collapsing when one story too many is added."[80]

B. CONCURRING OPINION

In his concurrence, Justice Kennedy emphasized that the current line of rules stemming from *Edwards* is more than adequate to protect a suspect who desires counsel during custodial interrogation.[81] Justice Kennedy advocated that since the Court has adopted an offense-specific rule for the invocation of the Sixth Amendment, the Court should align its Fifth and Sixth Amendment rulings so as to provide "uniform, fair and workable guidelines for the criminal justice system."[82]

Justice Kennedy would have gone even farther than the major-

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74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* (emphasis in original).
78 *Id.* (citing Moran v. Burbine, 475 U.S. 412, 426 (1986)).
79 *Id.* at 2211.
80 *Id.* (quoting Douglas v. Jeannette, 319 U.S. 157, 181 (1943) (opinion of Jackson, J., concurring in part, dissenting in part)).
81 *Id.* (Kennedy, J. concurring).
82 *Id.* (Kennedy, J., concurring).

ity and held that even if McNeil had invoked his Fifth Amendment right to counsel relative to the Milwaukee County robbery, (which according to the majority would have rendered McNeil's later waivers invalid per *Roberson*[83]), the police should have been allowed to question him without counsel regarding the Racine County homicide.[84] This, in effect, would overrule *Roberson*.

C. THE DISSENTING OPINION

Justice Stevens, joined by Justice Marshall and Justice Blackmun, dissented, objecting to the majority view as demeaning the importance of the right to counsel.[85] Justice Stevens focused on the distinction between the practical and theoretical impact of the " 'offense-specific' limitation on the attorney-client relationship."[86] He concluded that the practical impact would be slight because attorneys would simply advise their clients at preliminary hearing to make a statement invoking their Fifth Amendment rights.[87] According to Justice Stevens, the theoretical implications are ominous, because this decision "reflects a preference for an inquisitorial system that regards the defense lawyer as an impediment rather than a servant of justice."[88]

Justice Stevens derided the majority's reliance on offense-specificity as a "house of cards" which would collapse under the rule in *Arizona v. Roberson*, wherein a suspect in custodial interrogation, who invokes his right to counsel relative to one crime may not be reapproached by authorities regarding any crime unless counsel is present.[89] In the future, effective counsel will make sure there is a statement on the record at the initial proceeding which will preclude further interrogation in the absence of counsel.[90]

Justice Stevens viewed the offense-specific description of the Sixth Amendment right to counsel as "parsimonious"[91] and inconsistent with both legal precedent and with "the ordinary understanding of the scope of the right" and its accepted practice.[92] Justice Stevens argued that the invocation of a suspect's right to counsel at an arraignment precludes police-initiated custodial inter-

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83 *Id.* at 2208 (citing Arizona v. Roberson, 486 U.S. 675 (1988)).
84 *Id.* at 2211 (Kennedy, J., concurring).
85 *Id.* at 2212 (Stevens, J., dissenting).
86 *Id.* (Stevens, J. dissenting).
87 *Id.* (Stevens, J. dissenting).
88 *Id.* (Stevens, J. dissenting).
89 *Id.* (Stevens, J., dissenting) (citing Arizona v. Roberson, 486 U.S. 675 (1988)).
90 *Id.* (Stevens, J., dissenting).
91 *Id.* (Stevens, J., dissenting).
92 *Id.* (Stevens, J., dissenting).

rogation after the arraignment without notice to the suspect's attorney.[93] A long line of precedent requires that the Court give a "broad rather than a narrow interpretation of the defendant's request for counsel."[94] Justice Stevens viewed the majority opinion as constricting that interpretation and, contrary to *Jackson*, presuming waiver where the suspect's request for counsel in ambiguous.[95]

Justice Stevens argued that the majority view was in conflict with the common sense notion of the right to counsel expressed in *Jackson*.[96] Citing *Jackson*, Justice Stevens noted that the average person does not understand the "subtle distinctions" between the Fifth and Sixth Amendment rights to counsel.[97] When a suspect requests counsel, he should not have to explain which constitutional provision is the basis for his request, nor why he is seeking counsel.[98] Justice Stevens noted the irony that this decision creates — a suspect who asks a police officer for an attorney is relieved of further interrogation, while a suspect making that same request of a magistrate is not.[99] He further argued that the very fact that a suspect requests counsel indicates he does not feel capable of dealing with the police without representation.[100]

Justice Stevens criticized the Court's reasoning that because the Milwaukee County and Racine County crimes were separate offenses the invocation of the Sixth Amendment right to counsel did not imply a request for counsel at custodial interrogation.[101] The dissent argued that McNeil could not have known that invocation of his Sixth Amendment right to counsel applied only to the Milwaukee County crimes, since the investigations of both the Milwaukee and Racine County crimes were "concurrent and conducted by overlapping personnel."[102]

Justice Stevens saw the offense-specific description of the right to counsel as unrealistically narrowing the attorney-client relationship.[103] He was particularly critical of the inference that McNeil could help his cause by discussing "his side of the story" regarding

93 *Id.* (Stevens, J., dissenting) (citing Michigan v. Jackson, 475 U.S. 625 (1986)).
94 *Id.* (Stevens, J., dissenting) (citing *Jackson*, 475 U.S. at 633).
95 *Id.* (Stevens, J., dissenting).
96 *Id.* at 2213 (Stevens, J., dissenting).
97 *Id.* (Stevens, J., dissenting) (quoting *Jackson*, 475 U.S. at 633-34 n.7)).
98 *Id.* (Stevens, J., dissenting).
99 *Id.* (Stevens, J., dissenting).
100 *Id.* (Stevens, J. dissenting).
101 *Id.* (Stevens, J., dissenting).
102 *Id.* (Stevens, J., dissenting).
103 *Id.* (Stevens, J., dissenting).

either crime with the Milwaukee County authorities.[104]

In Justice Stevens' view, the offense-specific limitation on the Sixth Amendment right to counsel creates confusion for the authorities.[105] Because the Court assumed that the Milwaukee County robbery and the Racine County homicide were unrelated crimes, the Court failed to define the boundaries by which the police will determine whether crimes are truly separate.[106] Justice Stevens was concerned that the police will be given broad latitude to file charges separately in order to "preserve opportunities for custodial interrogation."[107]

Finally, Justice Stevens dismissed the Court's policy concern that suspects who have invoked the Sixth Amendment right to counsel would be unapproachable on other crimes when they have not expressly declined to be questioned. Justice Stevens called this fear misguided, since rather then make suspects unapproachable, it ensures that the custodial suspect's statements are voluntary.[108]

Justice Stevens argued that the adversarial system functions effectively only when both sides are represented by counsel.[109] Lay persons are then protected "from overreaching by more experienced and skilled professionals."[110] According to Justice Stevens, by creating an inherently unfair procedure, the Court is showing a preference for an inquisitorial system of justice.[111]

Justice Stevens cited his dissent in *Moran v. Burbine*, noting that the real issue is the proper role of the attorney in our justice system.[112] According to Justice Stevens, in an inquisitorial society, the lawyer is regarded as an obstacle to the authorities in their pursuit of criminals.[113] In an adversarial society, the lawyer is a protector of constitutional rights.[114] By failing to recognize that there is a danger of compulsion inherent in custodial interrogations such as this, the Court, according to Justice Stevens, failed to appreciate the difference between the inquisitorial and adversarial systems.[115]

Justice Stevens would have extended the *Jackson* rule to apply

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104 *Id.* (Stevens, J., dissenting).
105 *Id.* at 2214 (Stevens, J., dissenting).
106 *Id.* (Stevens, J., dissenting).
107 *Id.* (Stevens, J., dissenting).
108 *Id.* (Stevens, J., dissenting).
109 *Id.* (Stevens, J., dissenting).
110 *Id.* (Stevens, J., dissenting).
111 *Id.* (Stevens, J., dissenting).
112 *Id.* (Stevens, J., dissenting) (citing Moran v. Burbine, 475 U.S. 412, 468 (1986) (Stevens, J., dissenting)).
113 *Id.* (Stevens, J., dissenting).
114 *Id.* (Stevens, J., dissenting).
115 *Id.* (Stevens, J., dissenting).

where the Sixth Amendment invocation protects the suspect from uncounselled interrogation concerning a separate offense and would have excluded McNeil's confession as inadmissable.

V. ANALYSIS

The majority in *McNeil* correctly balances society's need to obtain admissions of guilt with the right of the individual to choose whether to speak to police in the absence of counsel. By holding that the Fifth Amendment right to counsel is not implied by the invocation of the Sixth Amendment right to counsel on a separate charge, the Court also maintains a critical distinction between the two rights. The Fifth and Sixth Amendment rights to counsel may attach at different points in the process because they function differently to protect a suspect's right to counsel, with the line being that between evidence gathering and adjudication.[116] *McNeil* is consistent with precedent because at the time of the interrogation in question the defendant's Sixth Amendment right had attached only with respect to the Milwaukee County crime. McNeil had not been charged with the Racine County homicide at the time he was interrogated and confessed to that crime.

Admissions of guilt are "essential to society's compelling interest in finding, convicting and punishing those who violate the law."[117] At the same time, the Court has acknowledged that custodial interrogation is "inherently coercive" and there is a risk that police will overstep their bounds to obtain confessions.[118] The *Miranda* decision "attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation."[119]

The fundamental purpose of the *Miranda* decision was to protect the suspect's right to choose between silence and speech during questioning.[120] Once police warn a suspect, the suspect is "free to exercise his own volition in deciding whether or not to make a statement to authorities."[121] The Court held it to be "quite consistent with the Fifth Amendment" for police to take the opportunity provided by the suspect to obtain an oral confession.[122] To hold that McNeil could not waive his right to counsel at an interrogation be-

116 William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989).
117 Moran v. Burbine, 475 U.S. 412, 426 (1986).
118 New York v. Quarles, 467 U.S. 649, 656 (1984).
119 *Moran*, 475 U.S. at 426 (emphasis in original).
120 Connecticut v. Barrett, 479 U.S. 522, 528 (1986).
121 Oregon v. Elstad, 470 U.S. 298, 308 (1984).
122 *Barrett*, 479 U.S. at 529.

cause he had been represented by counsel at an arraignment on a different charge would be to deny his right to choose to speak with the authorities in the absence of counsel.

The *McNeil* Court expressed the valid concern that to adopt McNeil's proposed rule would render suspects in pre-trial custody *"unapproachable"* on other crimes even though those suspects had never expressed an unwillingness to talk to police.[123] The purpose of the Sixth Amendment is "not to wrap a protective cloak around the attorney client relationship for its own sake any more than it is to protect a suspect from the consequences of his own candor."[124] Prohibiting conversation with a person who is represented (even though that representation is in the context of a different charge) could needlessly hinder society's valid law enforcement efforts. "Indeed, any person operating on the shady side of the law might retain counsel on an ongoing basis and thereby insulate himself completely from any government efforts . . . to obtain oral evidence from him."[125]

By declining to imply invocation of the Fifth Amendment right to counsel from application of the Sixth Amendment right to counsel, the *McNeil* Court maintained an important distinction between the nature and purpose of the two rights. The Fifth and Sixth Amendment rights to counsel stem from different sources. The Sixth Amendment right to counsel is based on the status of the individual as an accused and "does not depend upon a request by the defendant."[126] It follows then that "the Sixth Amendment does not attach until after the initiation of formal charges,"[127] because that is the point at which a person acquires the status of an accused. It is not clear from the facts of *McNeil* that the defendant ever requested counsel, yet he received counsel at his arraignment on the Milwaukee County charge.

On the other hand, invocation of the Fifth Amendment right to counsel depends upon a claim of right and requires some expression to assert that claim. The *Edwards* rule applies only when the suspect has "expressed his desire to deal with police only through counsel"[128] and has "clearly asserted his right to counsel."[129] While the circuits are split as to the level of clarity required for such

123 McNeil v. Wisconsin, 111 S. Ct. 2204, 2210 (1991) (emphasis in original).

124 Moran v. Burbine, 475 U.S. 412, 430 (1986).

125 H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1180 (1987).

126 Brewer v. Williams, 430 U.S. 387, 404 (1977).

127 *Moran*, 475 U.S. at 431.

128 *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

129 *Id.* at 485.

an assertion to trigger the *Edwards* rule,[130] some statement is necessary for a suspect to claim his Fifth Amendment right to counsel.[131] There is no evidence in this case that McNeil ever even *ambiguously* requested counsel.

Another important distinction between the Fifth and Sixth Amendment rights to counsel is their waivability. An accused may waive his Sixth Amendment right to counsel once it has attached, but that waiver is governed by the relatively restrictive rule of *Faretta v. California*.[132] Under *Faretta*, defendants can choose to waive counsel and defend themselves, but only after a searching inquiry by the trial judge, who is obliged to make sure that the defendant knows the dangers of self-representation.[133] In contrast, the *Barrett* Court, referring to the way in which a defendant waives his Fifth Amendment right to counsel, stated that the Court "has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness."[134]

The reason for the relatively greater protection of the suspect's right to counsel in the Sixth Amendment context may lie in the distinction between the investigation and adjudication phases of the justice process. Custodial interrogation involves obtaining evidence. "Were the right to counsel vigorously protected . . . [at that stage], evidence would simply be harder to gather, a result that harms rather than helps the innocent. On the other hand, the right to counsel is protected in pretrial discovery and trial, where lack of counsel might undermine innocent defendants' efforts to avoid con-

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130 While the Supreme Court has not directly addressed the consequences of an equivocal request for counsel, some courts had adopted a per se rule barring continued interrogation after such a request. Maglio v. Jago, 580 F.2d 202 (6th Cir. 1978)("Maybe I should have an attorney" barred further interogation). Other courts have ruled that police may continue questioning a suspect to clarify the suspect's equivocal request for counsel. United States v. Porter, 776 F.2d 370 (1st Cir. 1985) (suspect telephoned attorney but did not reach him.); United States v. Gotay, 844 F.2d 971, 975 (2nd Cir. 1988) (suspect stated she was "concerned about obtaining a lawyer" but police continued questioning.); United States v. Riggs, 537 F.2d 1219 (4th Cir. 1976) (suspect's statement that he had no information to furnish the F.B.I. could be interpreted as desire to end the interrogation.); Thompson v. Wainright, 601 F.2d 768, 772 (5th Cir. 1979) (suspect signed waiver and said he wanted to make a statement, but also said he wanted to talk to an attorney.); United States v. Fouche, 833 F.2d 1284, 1287 (9th Cir. 1987) (suspect stated he "might want to talk to a lawyer."); United States v. Gonzalez, 833 F.2d 1464 (11th Cir. 1987) (suspect said she tried to obtain counsel but found it to be too expensive.).

131 *Edwards*, 451 U.S. 477 (1981).

132 422 U.S. 806 (1975).

133 Stuntz, *supra* note 116, at 827.

134 Connecticut v. Barrett, 479 U.S. 520, 530 (1986)(quoting Oregon v. Elstad, 470 U.S. 298, 316 (1985)).

viction."[135] The Court emphasized this distinction in *Moran* when it stated that the Sixth Amendment right to counsel"becomes applicable only when the government's role shifts from investigation to accusation."[136] To imply invocation of the Fifth Amendment right to counsel from the relatively unwaivable invocation of the Sixth Amendment right to counsel would be to ignore this distinction between evidence-gathering and adjudication.

The *McNeil* Court maintained consistency with precedent because McNeil's arraignment (where he was represented by counsel) and his subsequent interrogation (where he waived his Fifth Amendment right to counsel) involved different crimes, and McNeil had never invoked his Fifth Amendment right to counsel relative to either crime. Had the same offense been the subject of both arraignment and subsequent interrogation, the *Jackson*[137] rule would clearly invalidate the waiver. In *McNeil*, however, the Milwaukee County robbery and the Racine County robbery-homicide were separate and distinct crimes.

If McNeil had invoked his Fifth Amendment right to counsel relative to the Milwaukee County crime, the *Roberson*[138] rule would have invalidated his later waiver. Since McNeil never invoked his Fifth Amendment right to counsel, however, the *Roberson* rule did not apply.

Justice Stevens believed that *McNeil* would have little practical effect because "[i]n future preliminary hearings, competent counsel can be expected to make sure that they or their clients make a statement on the record [invoking the Fifth Amendment right to counsel] that will obviate the consequences of today's holding."[139] While Justice Stevens' prediction may come true with respect to the behavior of attorneys and their clients in future cases, the facts in *McNeil* were different. McNeil never invoked his Fifth Amendment right to counsel in the context of either crime. The Court correctly refused to imply McNeil's claim of Fifth Amendment protection where no claim had been made simply because a smart lawyer would have advised making that claim.

While precedent required that the Court "give a broad, rather than a narrow interpretation to a defendant's request for counsel,"[140] immunizing McNeil from future *Miranda* waiver merely be-

135 Stuntz, *supra* note 116, at 829.
136 Moran v. Burbine, 475 U.S. 412, 430 (1986).
137 Michigan v. Jackson, 475 U.S. 625, 636 (1986).
138 Arizona v. Roberson, 486 U.S. 675 (1988).
139 McNeil v. Wisconsin, 111 S. Ct. 2204, 2212 (1991) (Stevens, J., dissenting).
140 Michigan v. Jackson, 475 U.S. 625, 633 (1986).

cause he allowed an attorney to represent him at a previous arraignment for a separate crime would be an overly-broad extension of precedent. It would weight the individual's interests too heavily, thereby upsetting the balance between society's need to prosecute criminals and the individual's rights to be represented by counsel and to be free from self-incrimination.

VI. CONCLUSION

The *McNeil* Court addressed the rather technical issue of the difference between the Fifth and Sixth Amendment rights to counsel to demonstrate why invocation of the Sixth Amendment right to counsel does not imply invocation of the Fifth Amendment right to counsel. Since the Sixth Amendment right to counsel is based on a person's status as an accused, it requires no expression for invocation. The Fifth Amendment right to counsel, however, is based on a claim of right and therefore does require some express invocation. Because McNeil's crimes were unrelated, and because he had never invoked his Fifth Amendment right to counsel in the context of either crime, the Court had little difficulty finding this decision consistent with precedent.

In order to protect society's valid interest in prosecuting criminals, the Court refused to immunize a suspect from future waiver of the Fifth Amendment right to counsel simply because that suspect had been represented by counsel at an arraignment for a separate crime.

PATRICIA ULLMAN