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Fifth Amendment--The Applicability of the Assertion of the Right to Counsel to Unrelated Investigations

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FIFTH AMENDMENT—THE APPLICABILITY OF THE ASSERTION OF THE RIGHT TO COUNSEL TO UNRELATED INVESTIGATIONS

Arizona v. Roberson, 108 S. Ct. 2093 (1988).

I. INTRODUCTION

In *Arizona v. Roberson*[1] the Supreme Court considered whether a criminal defendant's assertion of the right to counsel during the investigation of one crime should apply to a subsequent interrogation made regarding a separate investigation.[2] The Court concluded that, due to the inherently compelling nature of custodial interrogation, once a subject asserts his[3] right to counsel, the police may not approach him again on any matter until he has seen an attorney.[4] The subject may, however, initiate further contact with the authorities himself prior to consulting a lawyer.[5]

This Note argues that the Court in *Roberson* imposed an unnecessary and unwarranted restriction on police officials. This Note argues that: *Roberson* created an unjustified expansion of the rule of *Edwards v. Arizona*;[6] that the Court overemphasized the importance of clarity in rules regulating interrogations and misplaced that emphasis; and that the Court unjustifiably presumed to know the minds of custodial subjects.

This Note further argues that both the majority opinion and the dissent incorrectly applied the holding of *Michigan v. Mosley*,[7] the Court's only previous decision on the applicability of the assertion of the privilege against self-incrimination to separate cases. This Note asserts that in distinguishing the right to counsel from the

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1 108 S. Ct. 2093 (1988).

2 *Id.* at 2096.

3 The words "his," "him," and "he" are used in the generic, not gender-specific, sense throughout this Note.

4 *Id.* at 2098.

5 *Id.*

6 451 U.S. 477 (1981). *See infra* note 63 and accompanying text for a discussion of *Edwards* and the Court's holding in that case.

7 423 U.S. 96 (1975). *See infra* note 60 for a discussion of *Mosley* and the Court's holding in that case.

right to silence, and establishing different rules of applicability in separate investigations, the Court in *Roberson* unnecessarily complicated the rules of custodial interrogation rather than clarified them.

This Note concludes that the Court selected a case unrepresentative of proper interrogation procedure, and from it promulgated an overly restrictive rule. This Note further concludes that the Court might have adopted a more flexible rule which would address problems of procedural error, such as occurred in *Roberson*, without barring the legitimate investigative technique of interrogation altogether following an assertion of the right to counsel.

II. BACKGROUND

The fifth amendment[8] guarantees to every citizen the privilege against self-incrimination in criminal proceedings.[9] Seeking to better secure this privilege for subjects of custodial interrogation,[10] the Supreme Court delivered a landmark decision in *Miranda v. Arizona*[11] which established strict guidelines governing both police procedure in custodial questioning and the admissibility of evidence derived from such interrogations.[12] In an opinion authored by Chief Justice Warren, the Court summarized its *Miranda* holding by stating 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

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

9 *Id.*

10 "Custodial interrogation" occurs when officials attempt to obtain statements from a defendant questioned while in police custody or otherwise deprived of his freedom of action in any significant way. Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See infra* note 11 and accompanying text for a discussion of *Miranda*.

11 384 U.S. 436 (1966). *Miranda* represented a major effort by the Court to examine the fifth amendment privilege against self-incrimination and how custodial proceedings affect that right. The Court considered four cases of relative similarity. In *Miranda*, a suspect confessed to murder and rape after two hours of interrogation. *Id.* at 491. The suspect's written confession contained a type-written clause which declared that he had confessed voluntarily and with full knowledge of his rights. *Id.* at 492. The Court reversed the conviction, rejecting the validity of such clauses and holding that subjects must be personally informed of their constitutional rights. *Id.* at 492.

The Court reached a similar conclusion in the three companion cases. In Vignera v. New York, the Court reversed a conviction where the trial court had refused to consider whether the suspect, arrested for robbery, had been advised of his rights prior to interrogation. *Id.* at 493-94. Likewise, in Westover v. United States, the Court reversed a conviction, pointing to the failure of the police to advise the subject of his rights and to the coercive nature of the interrogation, which lasted for fourteen hours. *Id.* at 494-497. Finally, in California v. Stewart, the Court upheld a suppression order granted on the ground that the police had not informed the suspect of his rights. *Id.* at 497-99.

12 *Miranda*, 384 U.S. at 444.

effective to secure the privilege against self-incrimination."[13]

To demonstrate the need for the rule promulgated by the Court in *Miranda*, Chief Justice Warren began by examining the recent history of the methods employed by the police in interrogations.[14] The Chief Justice described the progression from physical coercion, which had been the norm into the twentieth century, to the modern use of psychological tricks to obtain confessions.[15] The Chief Justice followed this analysis with a brief look at the privilege against self-incrimination, a privilege which originated in ancient times and developed into a principle of law defining "the proper scope of governmental power over a citizen."[16] In view of the long-standing existence of the privilege against self-incrimination as a principle of law and the threat posed to it by the "inherently compelling pressures"[17] of custodial interrogation, the Court was determined in *Miranda* to restrict the actions of police interrogators.[18]

The *Miranda* restrictions took the form of a requirement that all subjects of custodial questioning must be advised of their rights prior to any interrogation by the police.[19] The Court enumerated those rights as the right to remain silent and the right to have counsel present at any interrogation.[20]

The Court based its requirement that subjects be informed of their right to counsel on the coercive nature of custodial interrogation, observing that such pressure might induce a subject to forego the privilege against self-incrimination, were that privilege supported only by the right to silence.[21] Informing subjects of their right to counsel and allowing them recourse to such, the Court rea-

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13 *Id.*

14 The Chief Justice wrote that "an understanding of the nature and depth of this in-custody interrogation is essential to our discussion today." *Id.* at 445.

15 The Chief Justice pointed to studies conducted in the 1930's which verified the use of physical coercion to extract confessions. *Id.* at 445-46. The Chief Justice noted that such activity had continued into the 1960's, albeit with less frequency. *Id.* at 446. Chief Justice Warren then turned his attention to the more modern practice of psychological coercion, noting the use of manuals detailing effective questioning techniques, and their emphasis on privacy, presumption of guilt, perseverance and trickery. *Id.*

16 *Id.* at 460.

17 *Id.* at 467.

18 *Id.*

19 *Id.*

20 *Id.* at 467-469. As a corollary to the right to remain silent, the Court required that all subjects must receive a specific warning that should they choose to forego that right, anything which they might say could later be used against them in court. *Id.* at 469.

21 *Id.* The sixth amendment states that "[i]n all criminal prosecutions, the accused shall have the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. AMEND. VI.

soned, would serve to better protect their fifth amendment right.[22] The Court found added benefit in the possibility that the presence of a subject's lawyer might discourage attempts by the authorities to coerce a confession.[23] To grant subjects the fullest opportunity to assert the right to counsel, the Court declined to limit the effectiveness of such requests to the pre-interrogation period,[24] and emphasized that subjects must specifically waive their right rather than simply fail to assert it.[25] The Court sought to ensure that all subjects should enjoy the right to counsel by requiring that subjects unable to secure or afford the services of an attorney would receive the benefit of counsel at government expense.[26] The Court then underscored its position on the requirement that authorities must inform subjects of their right to counsel by noting that "[i]f the interrogation continues without the presence of an attorney, and a statement is taken, 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."[27]

Miranda created a system of warnings which police must provide to custodial subjects prior to any questioning.[28] These warnings are commonly referred to as *Miranda* rights.[29] Chief Justice Warren's summary of the holding of *Miranda* incorporated the traditional phrasing of *Miranda* rights. He stated:

> We hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, then the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that 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 if he cannot afford an attorney one will be appointed to him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to

22 *Miranda*, 384 U.S. at 469-70.
23 *Id.* at 470.
24 *Id.*
25 *Id.*
26 *Id.* at 472-73.
27 *Id.* at 475.
28 *Id.* at 478-79.
29 *Id.*

> answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.[30]

Although somewhat controversial at the time of its adoption by the Court,[31] the *Miranda* decision created a framework for interrogations which remains substantially unchanged today. Since the *Miranda* rule was established, the Court has on numerous occasions considered *Miranda*'s language and its applicability to diverse situations.

The Court has generally read the language of *Miranda* narrowly, occasionally restricting significant terms to very precise meanings. In *Fare v. Michael C.*,[32] the Court defined "counsel" to refer specifically to an attorney.[33] Similarly, in *Rhode Island v. Innis*,[34] the Court defined "interrogation" precisely as refering "not only to express questioning but also to any words 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 subject."[35] In *Oregon v. Bradshaw*[36] the Court declined to

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[30] *Id.* (citations omitted).

[31] The Chief Justice addressed some of the anticipated criticism within the opinion. The Chief Justice rejected the idea that society's need for effective interrogation outweighs the individual privilege against self-incrimination, stating that, "[t]hat right cannot be abridged." *Id.* at 479. To support the assertion that the rule of *Miranda* would not unduly hinder police procedure, Chief Justice Warren pointed to the F.B.I.'s traditional use of warnings similar to those enunciated in *Miranda*, and that organization's "exemplary record of effective law enforcement." *Id.* at 483.

[32] 442 U.S. 707 (1979). *Fare* concerned a juvenile's request to see his probation officer rather than an attorney. The request was denied and the juvenile confessed to the charge of murder during the interrogation. *Id.* at 711. The Court rejected the juvenile's petition that his confession be suppressed because a request to see one's probation officer does not constitute an assertion of the right to an attorney. *Id.* at 727-28.

[33] *Id.* at 719. The Court noted that the right to counsel rule in *Miranda* was based on "this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Id.*

[34] 446 U.S. 291 (1980). In *Innis* a man arrested for murder asserted his right to counsel but then told police where to find the murder weapon while in transport to the police station. *Id.* at 294-95. The subject revealed the whereabouts of the weapon in response to a conversation between the transporting officers who speculated on the consequences should a child find the weapon before the police did. *Id.* The Court declined to find that the conversation between the two policemen constituted "interrogation." *Id.* at 300-02.

[35] *Id.* at 301. The Court further clarified its definition, stating that "[a] practice which the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." *Id.*

[36] 462 U.S. 1039 (1983). *Bradshaw* concerned a man who asked to speak to a lawyer, then initiated a conversation with a police officer as to how the police would proceed. *Id.* at 1042. The man subjected himself to a lie detector test at the officer's suggestion,

provide a precise definition of "initiation" of further conversation by the subject,[37] but did exclude remarks on the part of the subject "relating to routine incidents of the custodial relationship."[38] Similarly, in *Berkemer v. McCarty*[39] the Court did not specifically define "custody" but did exclude situations involving detainment of a subject by the police which were not "police-dominated."[40] The Court's habit of interpreting the language of *Miranda* narrowly reflects the belief, as noted in *Berkemer*, that "[o]ne of the principle advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule."[41]

While the Court has established a record of construing the language of *Miranda* narrowly, it has not developed a specific pattern in applying *Miranda* to diverse situations. Instead, the Court has generally focused on the specific issues in the individual cases in clarifying the *Miranda* doctrine. The Court has addressed the issue of a subject's valid waiver of his rights on several occasions. In *Michigan v. Tucker*[42] the Court held a waiver valid although the subject received only a partial set of warnings.[43] In *Connecticut v. Barrett*,[44] the

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at the conclusion of which he confessed to the crime. *Id.* The Court held that the man had initiated further contact, noting that the arresting officer clearly indicated such by warning the man that the man did not have to talk to the officer. *Id.* at 1046.

37 *Id.* at 1045. The Court commented that, "we doubt that it would be desirable to build a superstructure of legal refinements around the word 'initiate'." *Id.*

38 *Id.*

39 468 U.S. 420. *Berkemer* presented the situation of a man pulled over for a routine traffic violation. When the policeman stopped him, the man made incriminating statements indicating that he had been driving while under the influence of alcohol and marijuana. *Id.* at 423. The police officer formally arrested the man and took him in for blood tests, but at no time did he advise the man of his rights under *Miranda*. *Id.* The Court held that the man's statements must be suppressed and declined to draw a distinction between misdemeanor and felony-related custody with regard to the *Miranda* rule. *Id.* at 429, 431-32. The Court noted that to draw such a distinction would create, "an elaborate set of rules, interlaced with exceptions and subtle dictinctions, discriminating between different kinds of custodial interrogations." *Id.* at 432.

40 *Id.* at 439. The Court did exempt situations where the police only detained a subject briefly, for example in situations like traffic violations, noting that the chance for coercion was lessened when the subject was in public view. *Id.* at 438.

41 *Id.* at 430.

42 417 U.S. 433 (1974). *Tucker* involved a man who was arrested for rape and confessed to the crime. The defense later sought to suppress a witness' testimony. *Id.* at 437. The prosecution learned of the witness from remarks made by the defendant, who had not received a full set of *Miranda* warnings because police had not informed him of the provision of counsel for the indigent. *Id.* at 438. The Court declined to suppress the witness' testimony, noting that the defendant's remarks had not been coerced; neither had they been admitted into evidence, tainting the actual trial. *Id.* at 449.

43 *Id.* In reaching its decision, the Court noted that "[j]ust as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. . . .

Court considered a related situation, here holding valid a subject's partial waiver of rights.[45] The Court also considered three cases which involved the scope of the waiver of rights. In *Wyrick v. Fields*,[46] the Court held that a waiver of rights for the purpose of a polygraph exam might extend to conversation immediately following the exam.[47] Similarly, in *Colorado v. Spring*,[48] the Court held valid a waiver of rights even though interrogators included issues unknown to the subject prior to his waiver.[49] In *Moran v. Burbine*,[50] the Court upheld a waiver, rejecting a requirement that the police

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Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." *Id.* at 446.

44 479 U.S. 523 (1987). In *Barrett*, a man arrested on suspicion of sexual assault agreed to speak without an attorney present but refused to sign anything. *Id.* at 525. The Court emphasized that the subject had "made clear to police his willingness to talk about the crime for which he was a suspect," and held that the oral statements need not be suppressed because the subject had made only a partial request for counsel. *Id.* at 527-29.

45 *Id.* The Court also rejected the suggestion that the partial waiver indicated an incomplete understanding of the consequences of a partial waiver on the part of the defendant. *Id.* at 530.

46 459 U.S. 42 (1982). *Wyrick* concerned a man arrested for rape who requested a polygraph examination. Advised of his rights before the test, the man afterwards made incriminating remarks which he later sought to have suppressed. *Id.* at 44-45. Rejecting the man's argument, the Court held that the statements made after the test were admissible because the man had been made aware of his rights and had voluntarily waived them. *Id.* at 47. In particular, the Court noted that, "it would have been unreasonable for Fields and his attorneys to assume that Fields would not be informed of the polygraph results and asked to explain any unfavorable result." *Id.*

47 *Id.* The Court rejected any contrary ruling as illogical, noting that, "the questions put to Fields after the examination would not have caused him to forget the rights of which he had been advised and which he had understood moments before." *Id.* at 49.

48 479 U.S. 564 (1987). *Spring* presented the case of a man arrested for illegal purchase of firearms. When the man waived his right to counsel the police questioned him not only about that crime but about a murder as well. *Id.* at 567. The man confessed to the murder but later moved to have the confession suppressed. *Id.* at 568. The Court declined to affirm the suppression order, noting that the man's confession was in no way coerced. *Id.* at 573-74. The Court further noted that, "there is no allegation that Spring failed to understand the basic privilege guaranteed by the Fifth Amendment. Nor is there any allegation that he mistook the consequences of speaking freely to the law enforcement officials." *Id.* at 575.

49 *Id.* at 574. The Court pointed out that "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." *Id.*

50 475 U.S. 412 (1986). *Moran* involved a man arrested for breaking and entering who was discovered to be wanted for murder in another city. The man submitted to questioning in both cases, unaware that his sister was trying to obtain counsel for him, and confessed to both crimes. *Id.* at 415. The Court declined to rule that the authorities had an obligation to inform the man of his sister's efforts, noting that "[e]vents occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right." *Id.* at 422.

inform a subject of outsiders' efforts to obtain counsel for him.[51] Finally, in *Smith v. Illinois*,[52] the Court drew a distinction between the waiver and the invocation of *Miranda* rights, holding that a subject's post-waiver responses might be used to determine the validity of the waiver.[53]

The Court has not limited its attention to the validity of waivers of rights, but has interpreted the applicability of the *Miranda* doctrine to other issues as well. In *New York v. Quarles*[54] the Court crafted an exception to the rule barring the admission of any evidence obtained from statements made by the subject, prior to being informed of his *Miranda* rights.[55] The Court held that the requirement might be dispensed with where public safety was concerned.[56] *Oregon v. Elstad*[57] presented the Court with a somewhat similar situa-

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[51] *Id.* The Court stated that "we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." *Id.*

[52] 469 U.S. 91 (1984). In *Smith*, a man arrested for armed robbery made a halting request to see a lawyer, which his interrogators chose to ignore. *Id.* at 92. The Court found the request to be unambiguous and ordered the confession suppressed. *Id.* The Court noted that "[t]he courts below were able to construe Smith's request for counsel as ambiguous' *only* by looking to Smith's *subsequent* responses to police questioning." *Id.* at 97 (emphasis in original). The Court critcized this type of analysis as "unprecedented and untenable." *Id.*

[53] *Id.* at 100. The Court held that an accused's postrequest responses could not be used to cast doubt on the clarity of the assertion of rights, and that "[s]uch subsequent statements are relevant only to the distinct question of waiver." *Id.*

[54] 467 U.S. 649 (1984). *Quarles* concerned a man apprehended by the police for rape and possession of a weapon. The subject answered a policeman's question as to the location of the weapon before being read his rights. *Id.* at 652. The Court held that such questioning was permissible in the interests of public safety, stating that "the need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Id.* at 657.

[55] *Id.* The Court acknowleded that the *Quarles* decision might lessen the clarity of the *Miranda* rule, but suggested that police officers "can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect." *Id.* at 658-659.

[56] *Id.* The Court noted that, "we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its vigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety." *Id.* at 656.

[57] 470 U.S. 298 (1985). *Elstad* presented the case of a man who was arrested in his home on charges of burglary. The man made an incriminating statement before police could advise him of his rights. *Id.* at 301. At the police station, he was read his rights and again confessed. *Id.* He later sought to have both confessions suppressed. *Id.* at 302. The Court declined to hold the second confession tainted, and rejected the defendant's contention that knowledge of the authorities' awareness of the first confession induced him to make the second at the station. *Id.* at 309. The Court held it

> an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other cicumstances calculated to undermine the suspect's ability to excercise his free will, so taints the investiga-

tion, involving a subject's voluntary confession prior to the administration of *Miranda* warnings, and the admissibility of statements taken after the subject had been read his rights.[58] Here the Court barred the pre-warning statements but admitted the evidence obtained after authorities had advised the subject of his rights.[59] In *Michigan v. Mosley*[60] the Court again considered a situation involving successive interrogations. But in *Mosley*, the interrogations involved separate cases and the subject received the proper warnings, asserting his right to silence in the first interrogation but waiving his rights in the second.[61] The Court declined to apply the assertion from the first case to the second, holding that the authorities had satisfied *Miranda* by observing the prescribed procedures.[62] These three cases suggest a willingness on the part of the Court to examine particular situations to determine whether a subject's *Miranda* rights have been accorded the proper respect.

The Court moved in a different direction in *Edwards v. Arizona*,[63]

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tory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id.

58 *Id.* at 300-03. The Court noted that "[t]hough *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.* at 309.

59 *Id.* at 318. The Court further noted that, "[t]his Court has never held that the psychological impact of a voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver." *Id.* at 312.

60 423 U.S. 96 (1975). *Mosley* involved a man arrested for robbery who refused to answer questions when the police attempted to interrogate him. At a later time police questioned him about a murder and obtained a confession. *Id.* at 98. The Court refused to uphold a suppression order, stating that the police had legitimately re-initiated questioning on a separate matter after the passage of a significant period of time. *Id.* at 106-07.

61 *Id.* The Court noted that "[a] review of the circumstances leading to Mosley's confession reveals that his 'right to cut off questioning' was fully respected in this case." *Id.* at 104.

62 *Id.* The Court particularly emphasized the proper adherence to the *Miranda* rule on the part of the police, stating that:

> [t]his is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance or make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

Id. at 105-06.

63 451 U.S. 477 (1981). In *Edwards*, a man arrested on charges of burglary, robbery and first-degree murder at first agreed to submit to questioning but soon thereafter asked to speak to an attorney. *Id.* at 478-79. The police terminated questioning at that point, but resumed it on the following day. *Id.* The subject, who had been warned by a guard that he must answer questions, confessed to the crimes. *Id.* The Court ruled that

opting to further develop the restrictions placed on interrogators subsequent to a subject's request for counsel.[64] *Edwards* involved multiple interrogations of a subject concerning one case, and the Court focused on the voluntariness of the subject's waiver of his rights, which followed an ungranted request to see an attorney.[65] The Court emphasized two points: first that any waiver of the right to counsel must be made not only voluntarily but knowingly and intelligently,[66] and second that an initial request for counsel creates a need for additional safeguards to protect the subject's privilege against self-incrimination.[67] The Court then established additional safeguards, holding 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. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversation with the police.[68]

Thus, *Edwards* created a bar against further interrogation on a specific issue, subsequent to a request for counsel, unless the subject initiates further contact with the police himself.[69]

In *Arizona v. Roberson*[70] the Court again considered a question arising from the *Miranda* doctrine. *Roberson*, which involved the assertion of the right to counsel and its applicability to separate cases, presented aspects of issues which the Court had considered in *Edwards* and *Mosley*.[71] Like *Edwards*, *Roberson* involved further interrogation following an assertion of the right to counsel;[72] like *Mosley*,

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the confession must be suppressed because the man's fifth amendment rights had been violated. *Id.* at 487.

64 *Id.* at 484. The Court acknowledged that it had "strongly indicated that additional safeguards are necessary when the accused asks for counsel." *Id.*

65 *Id.* at 482.

66 *Id.* The Court stated that "[i]t is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege." *Id.*

67 *Id.* at 484. The Court emphasized 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.

68 *Id.* at 484.

69 *Id.*

70 108 S.Ct. 2093 (1988).

71 *Id.* at 2096,2104. For a discussion of the issues in *Edwards* and *Mosley*, see *supra* notes 63 and 60 respectively.

72 *Id.* at 2096. Unlike *Edwards*, the interrogations in *Roberson* involved unrelated cases. *Id.*

Roberson concerned the application of an assertion of *Miranda* rights in one investigation to a subsequent interrogation in a separate investigation.[73] Thus, *Roberson* presented the Court with a choice between two strains of decisions derived from the *Miranda* doctrine.[74]

III. Factual Background and Procedural History

On April 16,1985, police officers arrested Ronald William Roberson at the scene of a just-completed burglary in Tuscon, Arizona.[75] The arresting officer informed Roberson of his *Miranda* rights.[76] At that time Roberson stated that he wished to speak to an attorney before answering any questions, and the officer made note of Roberson's assertion of his rights in a written report of the incident.[77] Despite Roberson's request for counsel, police detectives questioned him at the scene, later that night, and again the following day.[78]

On April 18, 1985, Detective Jerry Cota-Robles contacted the Major Offenders Unit of the Tuscon Police Department to alert them about a vehicle suspected of having been used in a burglary committed on April 15, 1985.[79] He spoke to a police officer who informed him that Roberson had recently been arrested for the April 16 burglary while in possession of the same car.[80] Cota-Robles then contacted the officers assigned to the April 16 case and went with them to question Roberson regarding the April 15 crime.[81] Up to this time Roberson had not spoken to a lawyer despite his April 16 request for counsel.[82]

Unaware of any previous questioning or assertion of rights, Cota-Robles began his interrogation by informing Roberson of his rights under *Miranda*.[83] When Roberson indicated that he understood them and wished to answer questions, Cota-Robles turned on a tape recorder, advised Roberson of his rights again, and pro-

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73 *Id.* Unlike *Mosley*, which involved the right to silence, *Roberson* involved the assertion of the right to counsel. *Id.*

74 See *supra* note 11 and accompanying text for a discussion of the *Miranda* doctrine.

75 *Roberson*, 108 S. Ct. at 2096.

76 *Id.*

77 *Id.*

78 Brief for Petitioner at 4-5, Arizona v. Roberson, 108 S. Ct. 2093 (1988)(No. 87-354).

79 *Id.* at 3.

80 *Id.*

81 *Id.*

82 Brief for Respondent at 2, Arizona v. Roberson, 108 S. Ct. 2093 (1988)(No. 87-354).

83 *Roberson*, 108 S. Ct. at 2096. *See supra* note 11 and accompanying text for a discussion of *Miranda*.

ceeded to question him regarding the April 15 burglary.[84] In the course of the interrogation, Roberson made what amounted to a full confession to the April 15 crime.[85]

Roberson was later convicted of the April 16 burglary.[86] In the April 15 case the defense moved to suppress Roberson's confession of April 19, basing its request on the fact that the authorities re-initiated questioning without granting Roberson's April 16 request for counsel, in violation of the rule set forth in *Edwards*.[87] The state protested that the two crimes and their respective interrogations were unrelated.[88] The trial court, though it declined to find that the April 16 violation had tainted the April 19 confession, granted the suppression order.[89]

The Arizona Court of Appeals affirmed the order and the Arizona Supreme Court denied the state's petition for review.[90] The United States Supreme Court subsequently granted the state's petition for writ of certiorari to determine whether Roberson's assertion of his right to counsel in the April 16 investigation should bar the police from approaching him on the April 15 case.[91]

IV. SUMMARY OF THE OPINIONS

A. THE MAJORITY OPINION

Justice Stevens began the Court's opinion by characterizing the State of Arizona's petition to overturn the suppression order as a request that the Court craft an exception to the *Edwards* rule.[92] The Court stated that the state's exception would permit further police-initiated interrogation subsequent to a request to speak to counsel, when the questioning involves a separate investigation.[93] The *Edwards* rule bars police-initiated interrogation following a request to speak to counsel, until the subject consults an attorney or initiates further questioning himself.[94] Rejecting the state's petition, Justice

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* *See supra* note 63 for a discussion of the *Edwards* rule.

88 Brief for Petitioner at 5, Arizona v. Roberson, 108 S. Ct. 2093 (1988)(No. 87-354).

89 *Roberson*, 108 S. Ct. at 2096.

90 *Id.* at 2097.

91 *Id.*

92 *Roberson*, 108 S. Ct. at 2096. Justice Stevens was joined in the majority opinion by Justices Brennan, White, Marshall, Blackmun, and Scalia. *Id.* at 2095.

93 *Id.*

94 *Edwards*, 451 U.S. at 484. *See supra* at note 63 and accompanying text for a discussion of *Edwards*.

Stevens cited language from *State v. Routhier*,[95] a case similar to *Roberson*, in which the Arizona Supreme Court held that the *Edwards* rule applied to require suppression of a confession obtained after a subject's request to see a lawyer, regardless of the fact that the interrogation focused on an unrelated issue.[96]

To demonstrate that the *Routhier* Court properly applied *Edwards* and permitted suppression of any statements elicited after a request for counsel, Justice Stevens pointed to the Court's expressed desire in *Miranda*, to provide "concrete constitutional guidelines for courts to follow."[97] Noting that the Court has often reiterated the virtue of *Miranda's* "ease and clarity of . . . application,"[98] Justice Stevens explained that the *Edwards* rule acts as a corollary to *Miranda*.[99] Both rules seek to to mitigate the coercive nature of custodial interrogation to enable a subject to freely determine whether to answer questions put to him by the authorities.[100] According to Justice Stevens, the restrictions on interrogation procedures set forth in *Miranda* and *Edwards* provide a bright line rule on custodial questioning, the virtue of which the Court has repeatedly stressed.[101] The majority opinion concluded that a rule barring

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95 137 Ariz. 90, 669 P.2d 68 (1983), *cert. denied*, 464 U.S. 1073 (1984). *Routhier* concerned a man arrested on charges of murder and attempted murder. When taken into custody, the man at first agreed to answer questions but then asked for legal counsel. *Id.* at 71-72. Three days after his request, before he had seen a lawyer, an officer approached the man and questioned him regarding an unrelated homicide. *Id.* In the course of this interrogation, to which the man had voluntarily submitted, the man confessed to the charges in the first homicide. *Id.* at 92, 669 P.2d at 71-72.

Justice Stevens analogized *Routhier* to *Roberson*, citing *Routhier* for the proposition that, "[t]he only difference between *Edwards* and the appellant is that Edwards was questioned about the same offense after a request for counsel while the appellant was reinterrogated about an unrelated offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes." *Roberson*, 108 S. Ct. at 2096 (quoting *Routhier*, 137 Ariz. at 97, 669 P.2d at 75).

96 *Routhier*, 137 Ariz. at 97, 669 P.2d at 75-76.

97 *Roberson*, 108 S. Ct. at 2097 (quoting Miranda v. Arizona, 384 U.S. 436, 441-42 (1966)).

98 *Roberson*, 108 S. Ct. at 2097 (quoting Moran v. Burbine, 475 U.S. 412, 425 (1986). Justice Stevens cited several cases which employed the same language: Berkemer v. McCarty, 468 U.S. 420, 430 (1984); New York v. Quarles, 467 U.S. 649, 662-64 (1984); and Fare v. Michael C., 442 U.S. 707, 718 (1979).

99 *Roberson*, 108 S. Ct. at 2097.

100 *Id.*

101 *Id.* at 2098. Justice Stevens cited several cases in which the Court acknowledged the "bright-line" rule established in *Edwards*. In Michigan v. Jackson, 475 U.S. 625 (1986), the Court noted that it had "freqeuntly emphasized that "one of the characteristics of *Edwards* is its clear, 'bright-line' quality." *Id.* at 634. *Jackson*, a sixth amendment case, involved two men who were interrogated before they had an opportunity to consult with their appointed counsel. The Court suppressed the confesssions in that case. *Id.* at 626.

The cases which Justice Stevens cited to in *Roberson*, like *Jackson*, made mention of

all police-initiated interrogation, following a subject's assertion of his right to counsel, properly followed from the Court's intention that rules on interrogation procedures should be unambiguous.[102]

Justice Stevens dismissed the state's argument that the *Edwards* rule should not apply to situations in which the subject's request for counsel arose in a separate investigation.[103] The majority rejected the state's attempts to prove their argument based on previous case law, and to distinguish the factual situation of *Roberson* from that of *Edwards*.[104] Dismissing the state's assertion that several cases other than *Edwards* controlled in *Roberson*, Justice Stevens accorded considerable weight to the presumption that a subject's request for counsel indicates the subject's doubt in his ability to answer questions on any matter without the assistance of an attorney.[105] Addressing the Court's holding in *Michigan v. Mosley*[106] that the authorities might re-initiate questioning on an unrelated issue after a significant period of time,[107] Justice Stevens noted that that case involved the right to silence, not the right to counsel.[108] Justice Stevens suggested that the importance of the distinction between *Mosley* and *Roberson* lay in the fact that "a subject's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice."[109] In response to the state's suggestion that Roberson's request for counsel was a limited one similar to the one made by the subject in *Connecticut v. Barrett*,[110] Justice Stevens stated that, "as a matter of law, the presumption raised by a subject's request for counsel—that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance—does not disappear simply

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the "bright-line" rule while focusing on other issues. In Smith v. Illinois, 469 U.S. 91 (1984), the Court noted that "*Edwards* set forth a bright-line rule that all questions must cease" following an assertion of the right to counsel. *Id.* at 98. Similarly, the Court in Solem v. Stumes, 465 U.S. 638 (1984), mentioned that, "*Edwards* established a bright-line rule to safeguard existing rights." *Id.* at 646. Finally, in Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court commented that *Edwards* had established, "in effect[,] a prophylactic rule designed to protect an accused in police custody from being badgered." *Id.* at 1044. Justice Stevens, by citing these cases seemed to be strongly emphasizing the importance the Court places on the clarity of interrogation rules.

102 *Roberson*, 108 S. Ct. at 2098.

103 *Id.*

104 *Id.*

105 *Id.* at 2099.

106 423 U.S. 96 (1975). *See supra* at note 60 and accompanying text for a discussion of *Mosley*.

107 *Id.* at 104.

108 *Roberson*, 108 S. Ct. at 2098-99.

109 *Id.* at 2099 (quoting *Mosley*, 423 U.S. at 101 n.7 (White, J., concurring)).

110 479 U.S. 523 (1987). *See supra* note 44 for a discussion of *Barrett*.

because the police have approached the subject, still in custody, still without counsel, about a separate investigation."[111]

Justice Stevens considered and quickly dismissed the state's attempts to factually distinguish *Roberson* from *Edwards*.[112] Responding to the state's suggestion that separate investigations necessarily preclude the threat of leaving a subject open to badgering, Justice Stevens observed that, "it is by no means clear, though, that police engaged in separate investigations will be any less eager than police involved in only one inquiry to question a suspect in custody."[113] The majority also rejected the idea that reading a subject a fresh set of warnings prior to the resumption of questioning would offset any feelings of coercion to which the subject might have fallen prey while in custody.[114] The Court concluded that the police violated *Edwards* when they questioned Roberson about the second crime, and affirmed the suppression order.[115]

B. THE DISSENT

Justice Kennedy began the dissent by criticizing the majority for characterizing the state's petition as a request that the Court craft an exception to the *Edwards* rule.[116] The dissent argued that the *Edwards* rule was the creation of the Court rather than a constitutional command, and that it therefore fell to the Court to justify its expansion.[117] Justice Kennedy then asserted that such a justification would prove difficult because the rule laid down by the Court in *Roberson*, barring further questioning concerning any investigation following a subject's assertion of his right to counsel, "is not necessary to protect the rights of suspects, and it will in many instances deprive our nationwide law enforcement network of a legitimate investigative technique."[118] Justice Kennedy further assailed the majority opinion for effecting an expansion of the *Edwards* rule to cover independent investigations when previous decisions applying that rule had involved single investigations exclusively.[119]

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111 *Roberson*, 108 S. Ct. 2099.

112 *Id.*

113 *Id.* at 2100.

114 *Id.*

115 *Id.* at 2101.

116 *Roberson*, 108 U.S. at 2101 (Kennedy, J., dissenting). Chief Justice Rehnquist joined in the dissent. *Id.*

117 *Id.* at 2102 (Kennedy, J., dissenting).

118 *Id.* (Kennedy, J., dissenting).

119 *Id.* (Kennedy, J., dissenting). Justice Kennedy cited several cases in which the Court had applied the *Edwards* rule: Connecticut v. Barrett, 479 U.S. 523 (1987); Smith v. Illinois, 469 U.S. 91 (1984); Solem v. Stumes, 465 U.S. 638 (1984); Oregon v. Bradshaw, 462 U.S. 1039 (1983); Wyrick v. Fields, 459 U.S. 42 (1982). All of these cases

The true focus in *Edwards*, Justice Kennedy suggested, "is whether the suspect knows and understands his rights and is willing to waive them, and whether the courts can be sure that coercion did not induce the waiver."[120] The dissent then considered the majority's fear that permitting further interrogation in separate investigations would lead to badgering, and concluded that because a subject has the right to terminate subsequent interrogations in the same manner as he terminates the first, the subject already enjoys sufficient protection from coercion.[121] According to Justice Kennedy, a subject who asserts his right to counsel in an initial interrogation, and sees that questioning ceases, will understand that he may invoke the same right in subsequent interrogations and expect the same result.[122]

The dissent argued that when, as in *Edwards*, the Court establishes a rule itself rather than drawing that rule directly from the Constitution, balance between competing interests becomes essential.[123] Justice Kennedy stated that allowing the authorities to question subjects in custody about separate investigations subsequent to a request for counsel might preserve the rights of suspects without inhibiting police procedure, thus achieving the requisite balance.[124] The dissent criticized the majority for allowing its focus on maintaining a bright-line rule to cause the Court to draw a line "far more restrictive than necessary to protect the interests at stake."[125]

Finally, Justice Kennedy disputed the majority's assumption that a request for counsel demonstrates a professed inability to deal with any questioning absent the presence of an attorney, rather than a desire for legal advice in a particular situation.[126] The dissent sug-

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involved interrogation subsequent to a request for counsel, but the subsequent interrogations were limited to the original cases. *Id.*

120 *Roberson*, 108 U.S. at 2102 (Kennedy, J., dissenting).

121 *Id.* at 2102-03 (Kennedy, J., dissenting). Justice Kennedy argued that "[w]here the subsequent questioning is confined entirely to an independent investigation, there is little risk that the suspect will be badgered into submission." *Id.* at 2102 (Kennedy, J., dissenting).

122 *Id.* (Kennedy, J., dissenting). Justice Kennedy suggested that "[i]ndeed, the new warnings and explanations will reinforce his comprehension of a suspect's rights." *Id.* (Kennedy, J., dissenting).

123 *Id.* (Kennedy, J., dissenting). Justice Kennedy stated that, "[b]alance is essential when the Court fashions rules which are preventative and do not themselves stem from violations of a constitutional right." *Id.* (Kennedy, J., dissenting)(quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

124 *Id.* (Kennedy, J., dissenting).

125 *Id.* (Kennedy, J., dissenting).

126 *Id.* (Kennedy, J., dissenting). Justice Kennedy asserted that:

> [b]y prohibiting the police from questioning the suspect regarding a separate investigation, the Court chooses to presume that a suspect has made the decision that he

gested that a more realistic approach would involve informing the suspect of the second case and allowing the suspect to determine whether he wished to answer questions.[127] In support of that approach, Justice Kennedy pointed to the Court's holdings in *Michigan v. Mosley*[128] and *Maine v. Moulton*[129] as indicative of the Court's awareness that suspects' rights could be protected without the need for broad, exclusionary rules, including the *Roberson* expansion.[130] The dissent concluded that the Court should have focused not on expanding *Edwards* to establish a rigid rule on interrogation procedure, but should instead have adopted a more flexible rule enabling courts to analyze the particular circumstances of each case to determine whether a defendant had made a waiver of the right to counsel voluntarily.[131]

V. ANALYSIS

In *Arizona v. Roberson*[132] the Court established a rule barring police from questioning a subject in custody on any matter, subsequent to the subject's request for counsel, until the subject has seen an attorney or initiated further contact with the authorities himself.[133] The Court based its holding on the desire to protect the fifth amendment privilege against self-incrimination, as expressed in *Miranda* and its progeny.[134] The Court reached the correct decision

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does not wish to talk about that investigation without counsel present, although that decision was made when the suspect was unaware of even the existence of a separate invesigation.

Id. (Kennedy, J., dissenting).

127 *Id.* (Kennedy, J., dissenting).

128 423 U.S. 96 (1975). *See supra* at note 60 for a discussion of *Mosley*.

129 474 U.S. 159 (1985). *Moulton* concerned a confession obtained after the subject was arraigned and counsel appointed for him. The police elicited a confession by taping the subject's remarks to a conspirator. *Id.* at 163-167. The Court held the confession inadmissable because the subject had already asserted his right to counsel and the surreptitious taping therefore constituted illegal contact. *Id.* at 176-77.

130 *Roberson*, 108 S. Ct. at 2103-04 (Kennedy, J., dissenting). Justice Kennedy noted that:

> *Moulton* and *Mosley* nevertheless reflected an understanding that the invocation of a criminal suspect's rights could be respected, and opportunities for unfair coercion restricted, without the establishment of a broad-brush rule by which the assertion of a right in one investigation is automatically applied to a separate and independent one.

Id. (Kennedy, J., dissenting).

131 *Id.* at 2104 (Kennedy, J., dissenting).

132 108 S. Ct. 2093 (1988).

133 *Id.* at 2098.

134 *Id.* at 2097. In Miranda v. Arizona, 384 U. S. 436 (1966), the Court described the fifth amendment privilege as, "fundamental to our system of constitutional rule." *Id.* at 468. *See supra* note 11 and accompanying text for a discussion of *Miranda* and the Court's holding in that case.

in *Roberson*, given the procedural error in that case, but in its zeal to secure the privilege against self-incrimination the Court imposed an unwarranted and unnecessary restriction on the authorities' ability to question suspects. *Roberson* represents a step in the wrong direction on interrogation regulation. The Court chose a case unrepresentative of proper police procedure and from it promulgated a rule which both ignores the Court's previous holding on the applicability of the assertion of *Miranda* rights to separate investigations,[135] and denigrates the ability of lower courts to decide the admissibility of evidence obtained through the legitimate investigative technique of interrogation.

Justice Stevens advanced three arguments in the majority opinion: first, that the state's petition to overturn the suppression order constituted a request that the Court craft an exception to the *Edwards* rule;[136] second, that *Roberson* established a bright-line rule of interrogation procedure, thus satisfying a dictate of *Miranda* that interrogation rules should be unambiguous;[137] and third, that the *Roberson* rule provides safeguards necessary to protect the privilege against self-incrimination.[138] Justice Kennedy, in the dissent, offered three counter-arguments: first, that the Court's ruling in *Roberson* effected an unjustified expansion of *Edwards*;[139] second, that the primary concern in *Edwards* was that any waiver of rights should be made knowingly as well as voluntarily and that the *Roberson* expansion was therefore inappropriate;[140] and third, that the Court's ruling in *Roberson* amounted to an unjustified presumption of the

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135 In Michigan v. Mosley, 423 U.S. 96 (1975), the Court held an assertion of the right to silence in an initial interrogation inapplicable to a subsequent interrogation involving an unrelated investigation. *Id.* at 104. *See supra* note 60 and accompanying text for a discussion of *Mosley*.

136 *Roberson*, 108 S. Ct. at 2096. The majority quoted the rule from Edwards v. Arizona, 451 U.S. 477 (1981), "that a suspect who has expressed his desire to deal with police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *Id.* (quoting *Edwards*, 451 U.S. at 484-85).

137 *Roberson*, 108 S. Ct. at 2097. Justice Stevens noted that "[a] major purpose of the Court's opinion in *Miranda* was to give concrete constitutional guidelines for law enforcement agencies and courts to follow.' " *Id.* (quoting *Miranda*, 384 U.S. at 441-42)(citations omitted)).

138 *Roberson*, 108 S. Ct. at 2097. Justice Stevens noted that a primary concern of the Court since *Miranda* has been to, "permit a full opportunity to exercise the privilege against self-incrimination." *Id.* (quoting *Miranda*, 384 U.S. at 467).

139 *Id.* at 2102 (Kennedy, J., dissenting). Justice Kennedy stated that, "[t]he majority's extension of the *Edwards* rule to separate and independent investigations is unwarranted." *Id.* (Kennedy, J., dissenting).

140 *Id.* (Kennedy, J., dissenting). Justice Kennedy asserted that "[o]ur ultimate concern in *Edwards*, and in the cases which follow it, is whether the suspect knows and un-

state of mind of custodial subjects.[141]

Neither the majority nor the dissent suggested a rule which would further the aim of *Miranda*: to provide a framework for interrogation which would accord proper respect to the custodial subject's fifth amendment rights without completely devaluing evidence obtained from interrogation.[142] In fact, the majority and the dissent ignored or misconstrued previous decisions by the Court which would have enabled the Court to establish a rule which would respect the privilege against self-incrimination without preventing legitimate police contact with custodial subjects.

In *Michigan v. Mosley*[143] the Court held that the authorities could approach custodial subjects on unrelated investigations following the assertion of the right to counsel, so long as the authorities "scrupulously honored" the subject's rights on each occasion.[144] In *Johnson v. Zerbst*[145] the Court recognized that lower courts might look to the "particular facts and circumstances" of individual cases to determine whether a constitutional right had been violated.[146] The Court should have considered these two decisions in *Roberson* and established a rule permitting further interrogation on unrelated issues following a subject's request for counsel, so long as the subject's rights were respected in each subsequent interrogation.

The majority described the state's petition as a request that the Court craft an exception to the *Edwards* rule;[147] the dissent disputed this characterization and called upon the Court to explain what it considered an expansion of *Edwards*.[148] In determining the relationship of *Roberson* to *Edwards*, Justice Stevens and Justice Kennedy should have considered the relationship of *Edwards* to the original

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derstands his rights and is willing to waive them, and whether courts can be assured that coercion did not induce the waiver." *Id.* (Kennedy, J., dissenting).

141 *Id.* at 2103 (Kennedy, J., dissenting). Justice Kennedy stated that "[b]y prohibiting the police from questioning the suspect regarding a separate investigation, the Court chooses to presume that a suspect has made the decision that he doesn't wish to talk about that investigation without counsel present." *Id.* (Kennedy, J., dissenting).

142 *Miranda*, 384 U.S. at 477. The Court noted in *Miranda* that "[o]ur decision is not intended to hamper the traditional function of police officers in investigating crime." *Id.*

143 423 U.S. 96 (1975). *See supra* note 60 for a discussion of *Mosley*.

144 *Id.* at 104.

145 304 U.S. 458 (1938). *See infra* note 180 for a discussion of *Johnson*.

146 *Id.* at 464.

147 *Roberson*, 108 S. Ct. at 2096. Justice Stevens noted that such an exception would apply to "cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." *Id.*

148 *Id.* at 2102 (Kennedy, J., dissenting). Justice Kennedy argued that, "the rule of *Edwards* is our rule, not a constitutional command; and it is our obligation to justify its expansion." *Id.* at 2101-02 (Kennedy, J., dissenting).

Miranda doctrine. Although Justice Stevens described *Edwards* as a "corollary"[149] of *Miranda*, such language obscures the fact that the Court clearly considered *Edwards* to be an expansion of the *Miranda* doctrine.[150] The Court specifically noted in *Solem v. Stumes*[151] that "*Edwards* established a new test,"[152] a new restriction, one which interrogators might subsequently be required to adhere to, but one which they could not have been expected to anticipate.[153] *Roberson* constituted a similar expansion of *Edwards* because it too created a new restriction on questioning. *Roberson* applied the *Edwards* bar to separate cases;[154] at no time prior to *Roberson* had the Court considered the applicability of the right to counsel to unrelated investigations.[155] At issue then is whether the Court provided an acceptable explanation for the *Roberson* Court's expansion of the *Edwards* rule.

Justice Stevens suggested that *Roberson* would set forth with increased clarity the restrictions on interrogators;[156] Justice Kennedy argued that the *Roberson* expansion was inappropriate because it would not further *Edwards*' aim of ensuring that subjects waive their rights not only voluntarily but knowingly.[157] Justice Stevens argued that any burden imposed on the authorities through the additional restriction on questioning would be offset by the benefit to interrogators, courts, and custodial subjects in knowing with greater clarity the limits on attempts to obtain confessions.[158]

The *Roberson* rule does provide a gain in specificity in that it

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149 *Id.* at 2097. Justice Stevens stated that "[t]he rule of *Edwards* 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.'" *Id.* (quoting *Miranda*, 384 U.S. at 474).

150 *See infra* note 151.

151 465 U.S. 638 (1984). *Solem* concerned a man arrested for murder who, subsequent to his request for an attorney, confessed to the crime while in transport to the state where the murder had taken place. *Id.* at 640. The Court conceded that *Edwards* applied but declined to do so because *Solem* preceeded the *Edwards* rule. *Id.* at 643. The Court noted that, "*Edwards* was not a necessary consequence of *Miranda*." *Id.* at 648.

152 *Id.* at 646.

153 *Id.* at 648. The Court acknowledged that prior to *Edwards*, "it could justifiably be believed that a waiver of the right to counsel following its invocation could be voluntary even if the police initiated the conversation." *Id.*

154 *Roberson*, 108 S. Ct. at 2096.

155 Justice Kennedy makes this point in the dissent, stating that "[t]his is the first time in which we are asked to apply *Edwards* to separate and independent investigations." *Id.* at 2102 (Kennedy, J., dissenting).

156 *Id.* at 2098. Justice Stevens emphasized that the *Edwards* rule "serves the purpose of providing 'clear and unequivocal guidelines,'" and asserted that the *Roberson* rule would have the same affect. *Id.* (quoting *Edwards*, 451 U.S. at 484-85).

157 *Id.* at 2102 (Kennedy, J., dissenting). Justice Kennedy noted that "[t]hat concern does not dictate the result reached by the Court today, for the dangers present in *Edwards* and later cases are insubstantial here." *Id.* (Kennedy, J., dissenting).

158 *Id.* at 2098.

bars police from any contact with a subject subsequent to the subject's request for counsel; it complicates interrogation procedure though, in that it establishes contrary rules as to the applicability of the assertion of the right to silence, and the right to counsel, to separate investigations.[159] Further, *Roberson* goes too far in its attempt to combat the coercive atmosphere of custodial interrogation by prohibiting police contact with the subject altogether. Justice Kennedy, in asserting that *Roberson* presents no issue as to a subject's intelligent waiver and therefore constitutes an inappropriate expansion of *Edwards*,[160] erred in failing to see that the question of a subject's intelligent waiver was not the only concern of *Edwards*. Thus, the majority opinion and the dissent correctly identified two concerns of the *Miranda* decision, but erred in seeing their respective concern as solely determinative of the value of the *Roberson* decision.

The majority opinion concluded that in order to combat the coercive nature of custodial interrogation, the police should be barred from any contact with a subject subsequent to the subject's assertion of his right to counsel;[161] the dissent suggested that in so concluding the majority in effect presumed to read the minds of custodial subjects.[162] Justice Stevens asserted that a subject's will might quickly be suborned if he were repeatedly asked to assert his fifth amendment rights as the authorities approached him on different issues.[163]

Justice Kennedy offered a more realistic scenario, suggesting that if a subject asserted his rights in one case and observed that they were respected, he would understand that he might assert his rights in subsequent interrogations and expect the same result.[164] The dissent argued that police should be allowed to inform subjects

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159 *Mosley* established that police could approach subjects on unrelated investigations following an assertion of the right to silence. *Mosley*, 423 U.S. at 104. *Roberson* holds that police may not approach subjects on any matter following an assertion of the right to counsel. *Roberson*, 108 S. Ct. at 2098.

160 *Roberson*, 108 S. Ct. at 2102 (Kennedy, J., dissenting).

161 *Id.* at 2100. Justice Stevens stated that, "to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." *Id.*

162 *Id.* at 2103 (Kennedy, J., dissenting). Justice Kennedy wrote of the majority opinion that "[t]he underlying premise seems to be that there are two types of people: those who never talk without a lawyer and those who always talk without a lawyer." *Id.* (Kennedy, J., dissenting). The dissent criticized this presumtion as unrealistic. *Id.* (Kennedy, J., dissenting).

163 *Id.* at 2100. The majority stated that, "we also disagree with petitioner's contention that fresh sets of *Miranda* warnings will 'reassure' a suspect who has been denied the counsel he has clearly requested that his rights will remain untrammeled." *Id.*

164 *Id.* at 2103 (Kennedy, J., dissenting). Justice Kennedy suggested that "[i]ndeed,

of subsequent interrogations and permit the subjects to decide for themselves whether to assert or waive their privilege against self-incrimination.[165] The dissent's suggestion that the assertion of fifth amendment rights should apply to individual cases only and not to unrelated investigations fits within the Court's holding in *Mosley*.[166]

In *Mosley* the Court held that when a custodial subject had asserted his right to silence, the authorities might approach him after a significant period of time to question him on unrelated issues.[167] *Mosley* placed particular emphasis on the proper administration of interrogation procedure in each subsequent interrogation, noting that "the admissability of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was 'scrupulously honored.' "[168] The Court in *Mosley* reaffirmed its belief that the *Miranda* rule "counteracts the coercive pressure of the custodial setting."[169]

Although *Mosley* represents the Court's only ruling on the applicability of the assertion of *Miranda* rights to separate cases, the majority and the dissent accorded *Mosley* little weight in *Roberson*.[170] Justice Stevens and Justice Kennedy distinguished *Mosley* on the grounds that it addressed the right to silence rather than the right to counsel.[171] This unprofitable distinction led the Court to pass over the sound reasoning of *Mosley* unnecessarily, when that reasoning

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the new warnings and explanation will reinforce his comprehension of a suspect's rights." *Id.* (Kennedy, J., dissenting).

165 *Id.* (Kennedy, J., dissenting). Justice Kennedy argued that "[t]he more realistic view of human nature suggests that a suspect will want the opportunity, when he learns of separate investigations, to decide whether he wishes to speak to the authorities in a particular investigation without representation." *Id.* (Kennedy, J., dissenting).

166 *See Roberson*, 108 S. Ct. at 2102 (Kennedy, J., dissenting). In Michigan v. Mosley, 423 U.S. 96 (1975), the Court stated that approaching a custodial subject to interrogate him on an unrelated case following his assertion of the right to silence in a previous interrogation, "did not violate the principles of Miranda v. Arizona." *Id.* at 107. *See supra* note 60 and accompanying text for a discussion of *Mosley* and the Court's holding in that case.

167 *Mosley*, 108 S. Ct. at 107. The Court emphasized the fact that the police in *Mosley*, "resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings." *Id.* at 106.

168 *Id.* at 104.

169 *Id.*

170 Justice Stevens noted that "as *Mosley* made clear, a suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice." *Roberson* 108 U.S. at 2099 (citing *Mosley*, 423 U.S. at 101 n.7). Justice Kennedy conceded that *Mosley* didn't necessarily control in *Roberson* because "*Mosley* involved the Fifth Amendment right to silence, while this case involves the Fifth Amendment right to counsel." *Id.* at 2104 (Kennedy, J., dissenting).

171 *Roberson*, at 2099 and 2104 (Kennedy, J., dissenting).

might have formed the basis for a better rule than the one the Court established in *Roberson*. The Court has previously acknowledged that "much of the logic and language of [*Mosley*] could be applied" to the right to counsel.[172] Further, a consistent rule as to the applicability of the assertion of *Miranda* rights to unrelated investigations would serve to simplify interrogation procedural rules; the Court has emphasized, in *Roberson* in particular, the importance of establishing clear, unambiguous rules of interrogation.[173]

In *Roberson* the Court missed the opportunity to set forth a consistent rule of applicability, and the chance to reaffirm the validity of the *Miranda* system of warnings as it had done in *Mosley*.[174] Instead, the Court adopted a rule barring all police contact with a subject after the subject's assertion of his right to counsel.[175] While the Court's rule would properly answer situations like *Roberson*, in which the subject received no indication that his rights would be respected,[176] the Court went too far. The Court erred in establishing a general rule based on a case of procedural error; a more logical rule would be based on the proper observation of *Miranda* in custodial interrogations and would be flexible enough to address exceptional cases like *Roberson*.[177] *Mosley* set forth a rule on the applicability of the assertion of the privilege against self-incrimination to separate cases, in which the authorities observed proper interrogation procedure.[178] The challenge for the Court should have been

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172 Solem v. Stumes, 465 U.S. at 648 (1984).

173 Justice Stevens noted that the Court has, "repeatedly emphasized the virtues of a bright-line rule." *Roberson*, 108 S. Ct. at 2098. In fact, some Justices have criticized decisions which sacrificed clarity to other concerns. For instance, in New York v. Quarles, 467 U.S. 649 (1984), Justice O'Connor criticized the Court's establishment of an exception to the *Miranda* rule in situations in which public safety might be jeopardized, arguing that, "a 'public safety' exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*'s requirements more difficult to understand." *Id.* at 663 (O'Connor, J., concurring in part and dissenting in part).

174 *Mosley*, 423 U.S. at 104. The Court specifically stated that adherence to *Miranda* offsets any "coercive pressures of the custodial setting." *Id.*

175 *Roberson*, 108 S. Ct. at 2096.

176 Brief for Petitoner at 4, Arizona v. Roberson, 108 S. Ct. 2093 (1988)(No. 87-354). Police officers interrogated Roberson on the same case after he asserted his right to counsel. *Id.*

177 While the majority did not comment on the unusual fact situation in *Roberson*, Justice Kennedy did note that, "the conduct of the police in this case was hardly exemplary; they reinitiated questioning of the respondent regarding the first investigation after he had asserted his right to counsel in that investigation." *Roberson*, 108 S. Ct. at 2103 (Kennedy, J., dissenting).

178 *Mosley*, 423 U.S. at 104. The Court devoted considerable attention to the fact that proper procedure was followed in *Mosley*. The majority noted that "[a] review of the circumstances leading to Mosley's confession reveals that his 'right to cut off questioning' was fully respected in this case." *Id.*

to develop a means for courts to examine, as dictated by *Miranda*, whether authorities had followed proper procedure in individual cases, thus ensuring that a subject's rights had been "fully honored."[179]

In fact the Court has long recognized that courts might look to the particular circumstances of individual cases to determine whether a subject's constitutional rights had been violated. In *Johnson v. Zerbst*,[180] a case involving the sixth amendment right to counsel, the Court held that, "the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular circumstances of that case."[181] The Court has recognized the applicabilty of the "particular circumstances" test to the privilege against self-incrimination.[182]

A rule adopting the *Mosley* doctrine and applying it to the right to counsel would hold that police might interrogate custodial subjects on unrelated issues following an assertion of the right to counsel. The rule would also establish that courts should examine each case to determine whether authorities have observed proper procedure. Because the inquiry would focus on procedure, the courts would not need to make determinations as to whether the subject had faced a coercive atmosphere; the Court has already established a presumption of coercion when *Miranda* is not followed,[183] and a corollary presumption that the proper observance of *Miranda* coun-

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179 *Miranda*, 384 U.S. at 467.

180 304 U.S. 458 (1938). *Johnson* involved the sixth amendment right to counsel. In that case a man arrested for passing counterfeit bills was arrested and tried without benefit of counsel. *Id.* at 460. The Court overturned the conviction and directed the district court to examine whether the man had made a valid waiver of counsel. *Id.* at 469.

181 *Id.* at 464.

182 In Oregon v. Elstad, 470 U.S. 298 (1985), the Court noted that in determining the validity of a waiver of rights courts "must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements." *Id.* at 318. The Court made a similar comment in *Edwards*, again noting that the determination of the validity of a waiver depends, "in each case 'upon the particular facts and circumstances surrounding that case.'" *Edwards*, 451 U.S. at 482 (quoting *Johnson*, 308 U.S. at 464). In *Wyrick v. Fields* the Court underscored the point again, noting that *Edwards* required an examination of the "totality of circumstances" to determine whether the provision of *Miranda* warnings had been meaningfully timed. *Wyrick*, 459 U.S. at 47. The Court applied the "particular circumstances" holding of *Johnson* yet again in Oregon v. Bradshaw, 462 U.S. 1039 (1983), a case involving the issue of whether a defendant had made a waiver knowingly and intelligently. *Id.* at 1046.

183 *Miranda* states that "unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used." *Miranda*, 384 U.S. at 479.

teracts "the coercive pressures of the custodial setting."[184]

Notably, the adoption of this rule would require that the suppression order in *Roberson* be affirmed. Because *Roberson* involved substantial procedural error, a court would necessarily find the confession to be the product of a coercive atmosphere and therefore inadmissible. The difference between this suggested rule and the one that the Court adopted in *Roberson* is that this more flexible rule would achieve the goal of protecting the privilege against self-incrimination without restricting the legitimate investigative technique of interrogation unnecessarily.

VI. Conclusion

The rule that the Court adopted in *Roberson* bars police officers from any contact with a custodial subject on any matter once the subject has asserted his right to counsel. This rule ignores the Court's previous holding on the applicability of the assertion of the privilege of self-incrimination to unrelated investigations. Further, it disparages the ability of lower courts to determine the admissibility of evidence derived from interrogation.

The Court has chosen a case in which proper procedure as defined by *Miranda v. Arizona*[185] was not followed, and from it promulgated an unnecessarily restrictive rule. The Court should have adopted a more flexible rule which would allow for the admission of evidence obtained through the correct observance of *Miranda*, yet exclude confessions elicited through procedural error.

Patrick J. Bitterman

184 *Mosley*, 423 U.S. at 104.
185 384 U.S. 436 (1966).