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Arizona v. Roberson: The Supreme Court Expands Suspects' Rights in the Custodial Interrogation Setting, 22 J. Marshall L. Rev. 685 (1989)

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CASENOTES

ARIZONA v. ROBERSON:* THE SUPREME COURT EXPANDS SUSPECTS' RIGHTS IN THE CUSTODIAL INTERROGATION SETTING

The United States Supreme Court has held that a defendant's right to remain silent under the fifth amendment[1] also encompasses a defendant's right to request that an attorney be present during custodial interrogation.[2] In *Arizona v. Roberson*,[3] the Court ad-

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* 108 S. Ct. 2093 (1988).

1. U.S. CONST. amend. V. which states in part, "No person . . . shall be compelled in any criminal case to be a witness against himself."

2. In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court created a fifth amendment right to counsel during custodial interrogation in an effort to protect the right against compelled self-incrimination. *Miranda*, 384 U.S. at 440-44. The Court based this rule on the 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. Because of this special ability of the lawyer to help the client preserve his Fifth Amendment right to have counsel present at the interrogation is indispensable to the protection of the fifth amendment privilege under the system established by the Court. *See id.* at 470.

Moreover, the lawyer's presence during interrogation helps guard against overreaching by the police and ensures that any statements actually obtained are accurately transcribed for presentation into evidence. *Id.*

Recently, the Court defined the term "custodial interrogation" as referring to any words or actions on the part of the police that are reasonably likely to elicit an incriminating response from the suspect in custody. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

In addition, it is interesting to compare the rights of United States citizens subjected to the custodial interrogation setting with the rights of citizens of other countries. Markman, *Truth In Criminal Justice: The Law of Pre-Trial Interrogation*, THE PROSECUTION at 11, 21-24 (1987). In England, the "police are free to deny suspects access to counsel, and to hold suspects incommunicado for questioning." *Id.* at 21, 30 n. 136. (citing Kaci, *Confessions: A Comparison of Exclusion Under Miranda in the United States and Under the Judges Rules in England*, 6 AM. J. CRIM. L. 87, 88 (1982)). In Scotland, a suspect in custodial interrogation has no right to speak to a solicitor during the period of detention and the solicitor has no right of access to the suspect. *Id.* at 22. In Canada, the police are not required to tell a suspect that he may refrain from answering questions, or that his statements may be used against him. In fact, there is no right to refuse to be questioned. *Id.* at 23 n. 143. (citing Pye, *The Rights Of Persons Accused Of Crime Under The Canadian Constitution: A Comparative Perspective*, 45 L & CONT. PROB. 221, 227 (1982)). In France, "the police may detain suspects for a period of 24 or 48 hours for purposes of investigation." *Id.*

dressed the issue of whether a suspect in police custody who invokes his right to counsel is protected from further police interrogation involving a separate, unrelated investigation.[4] The Court, applying a prior ruling which prohibited reinterrogation after a request for counsel,[5] stated that once a suspect invokes his right to counsel[6] he may not be reinterrogated later about an unrelated offense without the assistance of counsel.[7]

On April 16, 1985,[8] the police arrested Ronald Roberson at the scene of a burglary.[9] The arresting officer advised him of his *Miranda* rights,[10] and Roberson replied that, "he wanted a lawyer

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"There is no right to warnings or counsel in such interrogations." *Id.* In essence, the countries surveyed show that a right to counsel may not be recognized at all during police interrogation, and that any right which is recognized may be drastically narrower than the right to counsel created by *Miranda*.

3. 108 S. Ct. 2093 (1988).

4. *Id.* at 2096.

5. *Id.* In Edwards v. Arizona, 451 U.S. 477, 484-85 (1981), the Court enunciated the rule which prohibits reinterrogation after the defendant makes a request for counsel. The *Edwards* Court held that a suspect who has 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 conversations with the police. *Id.* See *infra* note 31 for a full explanation of the *Edwards* case.

6. The suspect's right to counsel as used in this note refers to that right to counsel created by the Court in *Miranda* which serves to protect a suspect's fifth amendment right against self-incrimination. *Miranda*, 384 U.S. at 470. See *supra* note 2 for a discussion of *Miranda*. This guarantee is different from the right to counsel guaranteed under the Sixth Amendment of the United States Constitution. The sixth amendment's right to counsel attaches only at or after the initiation of adversarial proceedings. United States v. Gouveia, 467 U.S. 180, 187 (1984). In contrast, the fifth amendment right of counsel attaches when a request is made for counsel during custodial interrogation. Edwards v. Arizona, 451 U.S. 477, 484 (1981). However, as stated in Michigan v. Jackson, 475 U.S. 625, 631-32 (1986), the Supreme Court has held that even though the rule in *Edwards* rested on the fifth amendment and concerned a request for counsel made during custodial interrogation, the "reasoning . . . applies with even greater force" when police initiate an interrogation after formal charges have been filed and the basis for request is the sixth amendment. *Id.* Therefore, even though the time at which the guarantee of counsel attaches is different under the fifth and sixth amendments, the *Edwards* rule applies to both.

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

8. There appears to be a dispute as to the exact date of the first burglary. The Supreme Court opinion, the petitioner's brief, and an Amicus Curiae brief filed by the United States list the correct date as April 16, 1985. However, respondent's brief states the date of the initial burglary as April 16, 1986. Brief for Respondent at 1, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

9. Roberson was charged and later convicted of burglarizing a home and stealing certain property belonging to a Mr. Baarson. Brief for Petitioner at 2, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

10. The Court in *Miranda* held that the police must advise the accused, prior to custodial interrogation 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 that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. *Miranda*, 384 U.S. at 479. The *Miranda* Court presumed that interrogation during custodial situations was inherently coercive. Consequently, the Court held that statements made during custodial interrogation are

before answering any questions."[11] After Roberson invoked his right to counsel,[12] law enforcement officials questioned him two additional times at the scene of the arrest without re-reading him his rights.[13] The police brought Roberson to jail, but continued to deny him access to an attorney.[14]

Three days later, Roberson was still in custody, and the police had not yet honored his request for an attorney. At that time, however, the police questioned him regarding a different burglary that had occurred on April 15, 1985.[15] The interrogating officer was unaware that Roberson had requested counsel three days earlier.[16] The police again gave Roberson *Miranda* warnings. He stated that he understood his rights and wanted to talk. Roberson then confessed to the April 15 burglary.[17]

At trial, Roberson sought to suppress this incriminating statement.[18] In granting the request, the court addressed the issue of whether the police can reinterrogate a suspect about an unrelated

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inadmissible unless the suspect is informed of his *Miranda* rights and voluntarily waives his rights. *See* New York v. Quarles, 467 U.S. 649, 654 (1984). For a discussion of *Quarles*, see *infra* note 66. The prophylactic *Miranda* warnings are not themselves rights protected by the Constitution, rather the warnings merely protect individuals right to be free from self-incrimination. Edwards v. Arizona, 451 U.S. 477, 483 (1981); Michigan v. Tucker, 417 U.S. 433, 444 (1974). For a discussion of *Miranda* rights, see Note, *Pretrial Rights to Counsel, Under the Fifth & Sixth Amendments: A Distinction Without a Difference* 12 LOY. U. CHI. L.J. 79, 90-91 (1980).

11. Brief for Respondent at 1, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

12. See *supra* note 6 for a discussion of the distinction between the fifth and sixth amendment right to counsel guarantee; *see also* Note, *Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine*, 62 IND. L.J. 1061, 1075 (1987).

13. Record at 1, *Roberson* (No. 87-354). Justice Kennedy stated in his dissent in *Roberson*, "that the conduct of the police in this case was hardly exemplary; they reinitiated questioning of respondent regarding the first investigation after he had asserted his right to counsel in that investigation. The statements he gave in response, however, properly were excluded at trial for all purposes except impeachment." *Roberson*, 108 S. Ct. at 2103. (Kennedy, J., dissenting).

14. In addition, on the following day, two more officers approached Roberson while he was in jail and further interrogated him regarding the April 16th burglary. Brief for Respondent at 1, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

15. After Roberson was in custody for the April 16 burglary, Officer Cota-Robles received information that Roberson may have been the person who committed the April 15 burglary. State v. Roberson, Mar. 19, 1987 Ariz. Ct. App. (unpublished memorandum decision at 22). The description and license number of the vehicle seen during the April 15 burglary matched the vehicle driven by Roberson when police arrested him on April 16 for the April 16 burglary. *Id.* When Cota-Robles advised Roberson of his *Miranda* rights, Roberson did not reassert his request for counsel. *Id.* Instead, Roberson confessed to the April 15 burglary. *Id.*

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

17. State v. Roberson, Mar. 19, 1987 Ariz. Ct. App. (unpublished memorandum decision at 22). See *supra* note 15 for the events leading up to Roberson's confession to the April 15 burglary.

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

offense once he has requested counsel.[19] The court concluded that once a defendant invokes his right to counsel, there can be no further interrogation.[20] Moreover, the court concluded that the police obtained Roberson's statements in violation of his fifth amendment right against self-incrimination.[21] On appeal, the Arizona Court of Appeals affirmed the suppression order.[22] The Arizona Supreme Court denied a petition for review.[23]

The United States Supreme Court granted certiorari[24] to consider whether the prohibition against the questioning of suspects after they invoke their right to counsel[25] applied to situations in which the police seek to question the suspect about an offense unrelated to the initial interrogation.[26] The Court concluded that once a suspect initially requests counsel, police may not reinterrogate that suspect about an unrelated offense.[27] Should the police reinterrogate a suspect, the Court will suppress any self-incriminating statements unless the suspect initiates the communication.[28]

The Court began its analysis by examining two cases, *Edwards v. Arizona*[29] and *Arizona v. Routhier*.[30] In *Edwards*, the United States Supreme Court held that an accused who asserted his right to counsel "is not subject to further reinterrogation by police until counsel is made available to him, unless he initiates further communication."[31] Courts commonly refer to this as the *Edwards* rule.[32]

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19. Brief for Petitioner at 6, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-334).

20. *Id.* The trial court relied on the decision in Arizona v. Routhier, 137 Ariz. 669, 90 P.2d 68, 76 (1983). See *infra* note 34 and accompanying text for full discussion of the *Routhier* case.

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

22. State v. Roberson, Mar. 19, 1987 Ariz. Ct. App. (unpublished memorandum decision at 22).

23. Brief for Petitioner at 7, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354).

24. *Roberson*, 108 S. Ct. 2093 (1988).

25. This prohibition against the questioning of suspects after the invocation of counsel is known as the *Edwards* rule. See *supra* note 5 and *infra* note 31 for an explanation of the *Edwards* decision.

26. The Supreme Court granted certiorari to resolve a conflict with state courts over the issue of extension of the *Edwards* rule to unrelated offenses. *See Roberson* 108 S. Ct. at 2097 n.3 for a list of pertinent state cases.

27. *Id.* at 2096, 2100.

28. *Id.*

29. 451 U.S. 477 (1981).

30. 137 Ariz. 90, 669 P.2d 68 (1983).

31. In *Edwards*, 451 U.S. 477 (1981), the police arrested the defendant on charges of robbery, burglary, and first degree murder. Edwards asserted his right to remain silent and requested an attorney and the interrogation immediately ceased. *Id.* at 478.

The next morning, although Edwards was still without counsel, police returned and again began interrogating him. *Id.* at 479. Edwards answered the questions posed, and implicated himself. *Id.* Edwards moved to suppress his confession on the

The Supreme Court then examined an Arizona Supreme Court case factually similar to *Roberson*. In *Arizona v. Routhier*,[33] the Arizona Supreme Court took the *Edwards* rule a step further. The *Routhier* Court concluded that whether the defendant is reinterrogated about the same offense, as in *Edwards*, or an unrelated offense makes no difference for purposes of the fifth amendment.[34] The initial request for counsel applied to *any* further investigation. The *Roberson* court concluded that this was a justified expansion of the *Edwards* rule, and therefore, applied that reasoning to the case.[35]

Subsequently, the *Roberson* Court examined the roots of the prohibition against reinterrogation, *Miranda v. Arizona*.[36] The Court, in *Miranda*, spelled out the basic procedures that police must follow when interrogating a suspect. The *Miranda* case stands for

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basis that his *Miranda* rights had been violated. *Id.* The trial court denied the motion. *Id.* at 480. The Supreme Court of Arizona upheld the trial court decisions, concluding that Edwards had invoked his right to counsel during the first interrogation, but that he had waived his rights during the second interrogation. *Id.*

On certiorari, the United States Supreme Court reversed the judgment and concluded that the use of Edward's confession against him violated his rights under the fifth and fourteenth amendments as interpreted by Miranda v. Arizona, 384 U.S. 436 (1966). In addition, the Supreme Court in *Edwards* held that the Arizona Supreme Court applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. *Id.* at 482. The Court also found that waivers of counsel must "constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege" and that Edwards had not done so. *Id.*

Furthermore, the *Edwards* Court stated that when an accused expresses a "desire to deal with police only through counsel, the suspect is not subject to further interrogation by police until counsel has been made available." *Id.* at 484-85. Moreover, a valid wavier of the right to counsel cannot be established by showing that even after the defendant has been advised of his rights he has responded to further police questioning. *Id.*

32. Michigan v. Jackson, 475 U.S. 625, 630 (1986); Smith v. Illinois, 469 U.S. 91, 98 (1984); Solem v. Stumes, 465 U.S. 638, 646 (1984); Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983). *See, e.g.*, Comment, *Reinforcing Miranda-Restricting Interrogation After A Request For Counsel*, 48 BROOKLYN L. REV. 593, 605-11 (1983). [hereinafter Comment, *Reinforcing Miranda*].

33. 137 Ariz. 90, 669 P.2d 68 (1983).

34. *Id.* at 97, 669 P.2d at 75. The facts of *Routhier* are very similar to those in *Roberson*. In *Routhier*, the police interrogated the suspect at a hospital. *Id.* at 92, 669 P.2d at 71. Initially, the suspect waived his rights, but after he was asked to elaborate on a specific point, the suspect requested counsel. *Id.* at 92-93, 669 P.2d at 71. Three days later, before counsel had been provided, police interrogated the suspect a second time about two unrelated homicides. *Id.* The defendant succumbed, and confessed to the unrelated homicides. *Id.* at 93, 669 P.2d at 72. At trial, the defendant moved to suppress the incriminating statements, but the court denied the motion. *Id.* The Arizona Supreme Court reversed and held that once an in-custody suspect had invoked his fifth amendment right to counsel, the police could not reinterrogate the suspect until police provided him with counsel. *Id.* at 98, 669 P.2d at 76. The court also held, that the fact that renewed questioning pertained to a separate crime than the one for which he was initially arrested was irrelevant. *Id.* The court reached this conclusion by applying principles of the fifth amendment as explained in *Miranda* and *Edwards*. *Id.* at 96-98, 669 P.2d at 74-76.

35. *Roberson*, 108 S. Ct. at 2096-2097.

36. 384 U.S. 436 (1966), *reh'g denied*, 385 U.S. 890 (1966).

the proposition that if the suspect requests an attorney, all interrogation must cease until that attorney is present.[37] The *Roberson* Court analyzed how the *Edwards* decision naturally followed this conclusion.[38] The *Edwards* court noted that it would be inconsistent with *Miranda* to reinterrogate a suspect in custody once he has asserted his right to counsel. Applying the *Edwards* rationale, the *Roberson* Court reasoned that reinterrogation of an unrelated offense was prohibited and could only occur if "the suspect initiates further communication with the police."[39]

Following its explanation of the safeguards expressed in *Miranda* and *Edwards*, the *Roberson* Court discussed why these safeguards were necessary during custodial interrogation.[40] The Court noted that the right to speak with counsel during an interrogation counteracted the inherently compelling pressures of the setting.[41] In addition, the *Miranda* and *Edwards* safeguards established clear guidelines for the police during custodial interrogation.[42]

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37. *Miranda*, 384 U.S. at 492. *Miranda* was a consolidation of four cases. In each case, the defendants made incriminating confessions during interrogation. *Id.* at 445. In addition, the defendants were not given warning of their right to counsel or of their right against self-incrimination. *Id.*

Specifically, in *Miranda*, the police arrested and interrogated the suspect, who later signed a written confession. *Id.* at 456. The Court concluded that the suspect's written confession did not approach the knowing and intelligent waiver required to relinquish constitutional rights. *Id.* at 492.

38. *Roberson*, 108 S. Ct. at 2097. *See* Oregon v. Bradshaw, 462 U.S. 1039 (1983) (Court stated *Edwards* rule logically follows *Miranda*); Note, *Edwards v. Arizona: The Burger Court Breathes New Life into Miranda*, 69 CALIF. L. REV. 1734, 1742-43 (1981) (*Edwards* per se rule built on *Miranda* principles); Comment, *Criminal Procedure - Self Incrimination, Miranda Lives*, 33 U. FLA. L. REV. 788 (1981); Note, *It's Better The Second Time Around — Reinterrogation Of Custodial Suspects Under Oregon v. Bradshaw*, 45 U. PITT. L. REV. 899, 913 (1984) (discussing *Edwards* rule development from *Miranda*).

39. *Roberson*, 108 S. Ct. at 2097 (quoting *Edwards* 451 U.S. 477, 484-85 (1981)).

40. *Id.* at 2098. *See* Smith v. Illinois, 469 U.S. 91, 98 (1984) (safeguards necessary to protect suspect's fifth amendment rights); Oregon v. Bradshaw, 462 U.S. 1039, 1044 (1983) (*Edwards* set forth a prophylactic rule designed to protect an accused in police custody from being badgered by police officers); Edwards v. Arizona, 451 U.S. 484 (1980), *reh'g denied*, 452 U.S. 973 (1981) (inconsistent with *Miranda* to reinterrogate an accused after he asserts the right of counsel); Fare v. Michael C., 442 U.S. 708, 719 (1979) *reh'g denied*, 444 U.S. 887 (1979) (lawyer's presence helps guard against overreaching by the police); Miranda v. Arizona, 384 U.S. 436, 467 (1965) (safeguards provided to counteract the inherently compelling pressures of custodial interrogation).

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

42. *Id.* at 2098. The *Roberson* Court went on to briefly explain the guidelines set for police by *Miranda* and *Edwards*. *Id.* These guidelines are procedural in nature and include the *Miranda* warnings. See *supra* note 10 for an explanation of the *Miranda* guidelines. The *Roberson* Court also quoted from Fare, Acting Chief Probation Officer v. Michael C., 442 U.S. 707, 718 (1979), pointing out that their decision in that case, that interrogation must cease when a suspect requests an attorney, "has the virtue of informing police and prosecutors with specificity . . . and of informing courts under what circumstances statements obtained during such interrogation are not admissible." *Roberson*, 108 S. Ct. at 2098 (quoting *Fare*, 442 U.S. 707, 718 (1979)).

Next, the *Roberson* Court proceeded to rebut the argument that the prohibition against reinterrogation after a request for counsel should not apply to unrelated offenses.[43] The Court refused to apply the rationale of *Mosley v. Michigan*.[44] The Court, in *Mosley*, concluded that if a suspect asserts his right to remain silent instead of his right to counsel, the former right need only be "scrupulously honored." The *Roberson* Court distinguished *Mosley* because the suspect in that case asserted his right to remain silent,[45] rather than his fifth amendment right to counsel.[46]

The Court also stated that Roberson's request for counsel was not limited to the first interrogation.[47] In fact, Roberson had stated that he wanted a lawyer before answering *any* questions.[48] Therefore, the Court reasoned that Roberson's request for counsel did not disappear simply because the police questioned him about a separate offense.[49]

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43. *Id.* at 2099.

44. 423 U.S. 96 (1975). In *Mosley*, the defendant was suspected of robbery and was given *Miranda* warnings when arrested. *Id.* at 97. He refused to answer questions, invoked his right to remain silent, and the interrogation ceased. *Id.* Two hours later, in a different part of the building, a different officer questioned Mosely about a different case. *Id.* at 98. Mosely proceeded to make incriminating statements that he later sought to exclude at trial. *Id.* at 97-9.

The Supreme Court focused with intensity on the facts of *Mosley* to come to their decision. Mosley's right to silence was honored for a significant period of time. He was reinterrogated in a different room by a different officer, about a different case, and the second interrogation was preceeded by fresh *Miranda* warnings. *Id.* at 105-6. The Court concluded that, under the circumstances, Mosley's right to cut off questioning had been "scrupulously honored." *Id.* at 104. The Court also noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated he wanted counsel. *Id.* n.10. *See, e.g.*, Moran v. Burbin, 475 U.S. 412, 422 (1986) (no distinction between suspect's request for counsel and request to remain silent); Edwards v. Arizona, 451 U.S. 477, 484 (1981) (right to counsel requires greater protection than the right to silence).

45. For a further discussion of the distinction made in *Mosley* and *Edwards* between the right to counsel and the right of silence and the procedural requirement established in *Mosley*. *See* Note, *Michigan v. Mosley: A New Constitutional Procedure*, 54 N.C.L. REV. 695 (1976).

46. *Roberson*, 108 S. Ct. at 2098-99. In *Roberson*, the petitioner argued that *Mosley* should apply and that once Roberson asserted his right to stop questioning, police should have been able to come back after a period of time, and requestion him. *Id.* However, as the Court in *Roberson* pointed out, Roberson requested counsel, and not his right to remain silent. *Id.* at 2096. Since the Court places the request for counsel on a higher plateau than the right to remain silent, Roberson's statements were properly found inadmissible. *Id.* at 2099. The *Roberson* Court went on to state that, "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." *Id.* (quoting Michigan v. Mosley, 423 U.S. 96, 101 n.7 (1975)).

47. *Id.*

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

49. *Roberson*, 108 S. Ct. at 2099. This conclusion was the result of the Court's rebuttal of petitioner's argument and attempt to apply Connecticut v. Barrett, 479

The Court also noted that Roberson's refusal to answer any questions without an attorney indicated that he felt very uneasy about the pressures of the interrogation setting.[50] Because Roberson remained uncomfortable even when the police changed the topic of the questions, the Court concluded that the rights expressed in *Miranda* and *Edwards* exist to counteract this discomfort.[51] Consequently, the *Edwards* rationale was applicable in this case.[52]

Finally, the *Roberson* Court concluded[53] by examining why the factual setting of *Roberson* did not require an exception to the *Edwards* rule. The Court stated that the vigorousness of police interrogation regarding an unrelated offense is no less persistent than during an initial interrogation. The suspect faces the same kind of

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U.S. 523 (1987). In *Barrett*, the suspect told the police that he would not give a written statement without his attorney, but that he had no problem talking about the offense. *Id.* at 525. The Court, in *Barrett*, held that this was a limited request for counsel, and therefore, the police could continue to question the suspect. *Id.* at 529-30.

The petitioner in *Roberson* argued that Roberson also made a limited request when he only requested counsel at the first interrogation. *Roberson*, 108 S. Ct. at 2099. However, the *Roberson* Court denied this argument and held that the initial request for counsel indicated that Roberson could not deal with the pressures of the interrogation setting. *Id.* The Court further stated that this pressure must be protected against and does not subside when questioning shifts to a separate investigation. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* The *Roberson* Court used the decision in Colorado v. Spring, 479 U.S. 564, 577 (1987) as the basis for this conclusion. *Roberson*, 108 S. Ct. at 2099. In *Spring*, the Court rejected the position that a suspect must be told by the police of all possible subjects of interrogation in order to find a valid waiver of the fifth amendment privilege against self-incrimination. *Spring*, 479 U.S. at 577. Thus, no *Miranda* error took place in *Spring* when police, who had arrested the defendant on a gun charge, after giving the *Miranda* warnings and taking a written waiver, began to interrogate him about a weapons offense but eventually switched the line of questioning to a murder, without warning the defendant of the new topic of interrogation. *Id.* at 566-69. The *Roberson* Court concluded that the suspect in *Spring* was willing to talk, and even waived his rights. *Roberson*, 108 S. Ct. at 2099. However, Roberson was unwilling to talk, and did not limit his request for counsel. *Id.* This indicated Roberson's inability to submit to the pressures of interrogation, and thus, the *Edwards* rule should apply to this case. *Id.*

53. Before concluding, the Court in *Roberson* rebutted the petitioner's argument by distinguishing Maine v. Moulton, 474 U.S. 159 (1985), a sixth amendment right to counsel case. *Roberson*, 108 S. Ct. at 2099-2100. In *Moulton*, the Supreme Court concluded that statements concerning charges in which the defendant already had been indicted had to be excluded, but statements on new unrelated charges, where the right to counsel had not yet attached were admissible. *Id* at 178-80. Using *Moulton*, the petitioner in *Roberson* argued that the statements concerning the unrelated burglary in *Roberson* should have been admissible because the right to counsel had yet to attach. Brief for Petitioner at 28, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No 87-354). Disagreeing with the petitioner's argument, the Court explained that the fifth amendment guarantees apply to Roberson since he was in custody and subject to interrogation. *Roberson*, 108 S. Ct. at 2100. In contrast, the Court noted that the sixth amendment right to counsel only applies once the suspect is charged and judicial proceedings have begun. *Id.* Therefore, *Moulton* was inapplicable to *Roberson. Id.*

pressures in both interrogations.[54] Therefore, a suspect's rights should be the same in both instances.[55] The Court also explained that any further investigation of a suspect such as Roberson, would increase Roberson's compulsion to confess, since the suspect may believe that his rights are fictitious if he must assert them twice. Furthermore, the Court concluded that a fresh set of *Miranda* rules would not fulfill the suspect's need for counsel during reinterrogation.[56] Based on these factual distinctions, the Court refused to create an exception to the *Edwards* rule when police reinterrogate a custodial defendant about an unrelated offense.

The *Roberson* decision correctly held that the prohibition against reinterrogation after a request for counsel applies to police-initiated reinterrogation of an unrelated offense. The decision adds strength and clarity to post-*Miranda* decisions regarding custodial interrogation, while increasing a suspect's rights in this historically imbalanced area. The Court's ruling, however, contains two imperfections. First, the Court unnecessarily reinforced the distinction between the right to remain silent and the right to counsel under the fifth amendment. Second, the Court's decision would have had greater significance if it had further expanded the *Edwards* rule. Such an expansion would create a more equal balance between the rights of criminal suspects and the investigative needs of law enforcement.

In examining the *Roberson* decision, it is necessary to first understand the recent Court decisions in the custodial interrogation area. Before *Roberson*, the Court decided several cases that limited the strength and scope of the *Miranda* and *Edwards* decisions.[57]

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54. *Id.* This conclusion by the *Roberson* Court was a rebuttal of petitioner's argument that the chances a suspect will be questioned so repeatedly that it will "undermine the will" of the suspect, or will constitute badgering, are so minute as not to warrant consideration, if the officers are truly pursuing separate investigations. Brief for Petitioner, at 16, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354). The *Roberson* Court disagreed and stated that there is no evidence that police pursuing a separate investigation will be any less eager than police involved in only one inquiry. *Roberson*, 108 S. Ct. at 2100.

55. *Id.*

56. *Id.*

57. *See, e.g.*, Colorado v. Spring, 479 U.S. 564, 577 (1987) (misinformed suspect may now lawfully confess); Colorado v. Connelly, 479 U.S. 157, 162 (1986) (insane suspect may lawfully confess); Michigan v. Mosley, 423 U.S. 96, 102 (1975) (Court refused to adopt a per se rule that would exclude evidence obtained in violation of the spirit of *Miranda*); Michigan v. Tucker, 417 U.S. 433, 437 (1974) (Court began to lay the groundwork for overruling *Miranda* by stating that the requirements set out in that opinion were not constitutional mandates). For a general discussion of the treatment of *Miranda*, see Lehrich, *The Continuing Erosion of Miranda*, 14 Search & Seizure L. Rep., 6 (July 1987) (more conservative Court substantially reduced protections of suspects facing police interrogation); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 102 (1977) (gradual dismantling of *Miranda*, Court hoped to blunt its impact without acting in political way); Note, *The Declining*

The purpose of *Miranda* was to provide law enforcement and the courts with clear guidelines regarding procedures during interrogations,[58] and to counteract the inherent pressures of custodial interrogation.[59] The *Miranda* decision fulfilled this purpose by providing procedural safeguards, and requiring that interrogation must cease if a suspect requests an attorney and counsel is not present.[60] Fifteen years later, in *Edwards*, the Court reinforced *Miranda*[61] by holding that once a suspect exercises his right to counsel, no interrogation could take place unless the suspect initiated communication.[62] Since *Edwards*, with relatively few exceptions,[63] the Court has substan-

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Miranda Doctrine: The Supreme Court's Development of Miranda Issues, 36 Wash. & Lee L. Rev. 259 (1979); Kilpatrick, *Court Backs Away From Miranda and It's About Time*, L.A. Times, Mar. 24, 1986, at 5, col. 1.

During the period from 1973 to 1977, the Court granted certiorari in only one of 35 *Miranda* cases in which the defendant appealed the admissibility of evidence, and 13 out of 25 where the government appealed. Taylor, *Increasingly, Supreme Court Takes the Prosecution's Side*, N.Y. Times, May 31, 1987 at 1, col. 1. In its 1986-87 term, the Court ruled for the prosecution in 19 of 27 decisions. *Id.* In 16 of 29 cases it reversed pro-defendant decisions by state or federal appellate courts. *Id.*

58. Miranda v. Arizona, 384 U.S. 436. See *supra* note 10 for a discussion of the guidelines regarding the interrogation procedure.

59. *Miranda*, 384 U.S. at 467. The *Miranda* Court described the typical custodial interrogation setting in this way:

> To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. . . When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself and his surroundings.

Id. at 455.

60. *Id.* at 474. The *Miranda* Court concluded that the presence of an attorney enables the defendant under otherwise compelling circumstances to tell his story without fear and in a way that eliminates the pressures of the custodial interrogation setting. *Id.* at 466. The Court stated that without the right to counsel all the safeguards would become "empty formalities." *Id.* (quoting Mapp v. Ohio, 367 U.S. 643, 685 (1961) (Harlan, J., dissenting)).

61. Edwards v. Arizona, 451 U.S. 477 (1981). The Court in *Edwards*, after expressing the significance of the Miranda decision and its emphasis on the right to counsel in custodial interrogations, stated that it reconfirmed those views and lent substance to them. *Id.* at 485. *See, e.g.*, Comment, *Reinforcing Miranda*, *supra* note 31, at 609 (*Edwards* Court strengthened *Miranda's* rule that an accused's request for an attorney is per se an invocation of his fifth amendment rights which requires that all interrogation cease until counsel is available); Note, *Edwards v. Arizona: The Burger Court Breathes New Life into Miranda*, 69 CALIF. L. REV. 1734, 1741 (1981) (*Edwards* decision should be read in light of *Miranda's* principles).

62. *Edwards*, 451 U.S. at 485.

63. There are two noteworthy exceptions to the decline in the *Miranda* and *Edwards* rulings. In Michigan v. Jackson, 475 U.S. 625 (1986), the Court extended the *Edwards* rule to sixth amendment claims. *Id.* at 629. The Court held that when a defendant asserts the right to counsel at arraignment, the police can no longer initiate an interrogation until counsel has been appointed. *Id.* The ruling in *Jackson*, represents a reinforcement and extension of *Miranda* and *Edwards*. In Smith v. Illinois, 469 U.S. 91 (1984) (per curium) the suspect invoked his right to counsel then became confused after being asked whether he wanted an appointed attorney and whether he

tially reduced the strength and clarity of the protections announced in *Miranda* and *Edwards*,[64] and has instead, muddled the law in this area.[65]

In contrast to the recent erosion of *Miranda* and *Edwards*,[66] the *Roberson* decision reinforces and clarifies the doctrines enunciated in these two rulings. The *Roberson* decision confirms the Court's requirement that a defendant's request for counsel be viewed broadly

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waived that right. *Id.* at 92-3. He then immediately responded to questions. *Id.* at 93. The Court in *Smith* ruled that the waiver was invalid under the *Edwards* rule. *Id.* at 100. The Court in *Smith* made clear that once the *Miranda* right to counsel has been invoked, questioning must cease.

64. One of the advantages of *Miranda* is the ease and clarity of its application. Moran v. Burbine, 475 U.S. 412, 425 (1986).

65. Although one of the purposes of *Miranda* was to clearly outline guidelines for proper custodial interrogation, the courts have done much to deviate from that goal. For example, before the police read a suspect his *Miranda* rights, the suspect must be "in custody," Beckwith v. United States, 425 U.S. 341, 347 (1976), and the law enforcement authorities must be "interrogating" the suspect. Rhode Island v. Innis, 446 U.S. 291, 301 (1980). In many cases, it is difficult to determine if the suspect is in custody. *See, e.g.*, United States v. Mesa, 638 F.2d 582 (3d Cir. 1980) (regarding whether a person barricaded in motel room speaking with police through a wall was in custody.) Furthermore, many conflicts surround the adequacy of the warnings given, *see* California v. Prysock, 453 U.S. 355, 359 (1981) (no talismanic incantation required to satisfy *Miranda*), and the proper manner of waiving *Miranda* rights. *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979) (waiver of *Miranda* rights implied from actions and words of suspect, though suspect never explicitly waived rights).

66. The recent erosion of the *Miranda* and *Edwards* holdings can be readily illustrated with three examples. In New York v. Quarles, 467 U.S. 649 (1984), the Court weakened *Miranda's* power by allowing police to withhold *Miranda* warnings whenever custodial interrogation concerns matters of public safety. *Id.* at 650. In *Quarles*, an armed rape suspect was pursued by police into the rear of a grocery store. *Id.* at 652. Police handcuffed him and immediately asked where the gun was. *Id.* His statement, "the gun is over there," and the gun itself, were suppressed by the lower court in a prosecution unrelated to the rape. The Supreme Court reversed and held that *Miranda* warnings need not be given by police when they ask questions prompted by a concern for the public safety. In addition, the Court stated that the need for answers in a situation posing a threat to the public safety outweighs the need for the rule protecting the fifth amendment right against self-incrimination. *Id.* at 657.

In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court paid lip service to the *Edwards* standard. The Court defined the *Edwards* standard of "initiation of communication" so broadly that the *Edwards* rule itself was seriously weakened. *Id.* at 1045. In *Bradshaw*, the suspect invoked the *Miranda* right to counsel and reopened the interrogation by asking the police, "well, what is going to happen to me now?" A discussion followed between the officer and Bradshaw concerning where he was being taken and the charges that would be filed. The Court concluded that Bradshaw's statement was an "initiation" of conversation with the police since it evinced a willingness and a desire for a discussion about the investigation. *Id.* at 1046. This definition of initiation as interpreted by *Bradshaw* is very broad, and hardly what the Court in *Edwards* had in mind. However, the *Bradshaw* decision is evidence of the trend away from suspects' rights and toward law enforcement's interests.

In Connecticut v. Barrett, 479 U.S. 523 (1987) the Court again severely weakened *Edwards* by holding that when a suspect draws a distinction between oral and written statements, it is a limited request for counsel, and the police may continue to question the suspect. *Id.* at 830.

by the courts and the police.[67] In addition, by expanding the *Edwards* ban against reinterrogating a suspect regarding unrelated offenses once the suspect requests an attorney, the *Roberson* decision strengthens the original goals of *Miranda*. The *Roberson* ruling will be easy for the police to follow since it clearly establishes a ban against reinterrogation concerning unrelated offenses once a suspect requests counsel.[68] Furthermore, the *Roberson* decision is concomitant with *Miranda's* goal of counteracting custodial interrogation pressures.[69] For example, a defendant's inability to deal with the pressures of interrogation does not lessen because the police wait a period of time before requestioning him about an unrelated offense.[70] To permit the continuation of an interrogation after a momentary cessation would frustrate the purpose of the *Miranda* warnings, because repeated rounds of questioning effectively "undermines the will of the accused."[71] This is what the majority in *Roberson* sought to avoid.

The need to counteract the pressures of the custodial interrogation setting is obvious in light of the historical imbalance in this area.[72] Although abusive police procedure is on the decline,[73] enough

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67. *Roberson*, 108 S. Ct. at 2096. The Supreme Court has required that "a broad rather than a narrow interpretation to a defendant's request for counsel" be given. Michigan v. Jackson, 475 U.S. 625 (1986). The Seventh Circuit, in interpreting *Connecticut v. Barrett*, stated "a court must presume that an individual has invoked the full extent of his constitutional right to counsel." United States *ex rel.* Espinoza v. Fairman, 813 F.2d 117, 123 (7th Cir. 1987) *cert denied*, 107 S. Ct. 3240 (1987).

68. *Roberson*, 108 S. Ct. at 2100.

69. Throughout its opinion, the *Roberson* Court stressed the importance of counteracting the pressures of custodial interrogation. *Id.* The Court noted that Roberson's inability to deal with the pressures of questioning did not disappear because the police shifted the questioning to an unrelated burglary. *Id.* at 2099. Moreover, the Court stated that Roberson's fear of police coercion would not terminate simply because a fresh set of *Miranda* rights were given before the second interrogation. *Id.* at 2101. Therefore, the Court extended the *Edwards* rule to the reinterrogation of unrelated offenses to further counteract custodial interrogation pressures. *Id.*

70. *Id.*

71. Michigan v. Mosley, 423 U.S. 96, 102 (1975). The "undermining of the will of the accused," of which the *Mosley* Court spoke of, was definitely apparent in *Roberson*. The fact that Roberson had requested a lawyer and was not provided with one, and the fact that he was questioned again and again by police, combine strongly to suggest that he had no choice but to answer. Brief for Respondent at 11, Arizona v. Roberson, 108 S. Ct. 2093 (1988) (No. 87-354). For a further discussion of how repeated rounds of questioning undermines the will of the suspect, see Driver, *Confessions and the Social Psychology of Coercion*, 82 HARV. L. REV. 42 (1968); *see also* Y. Kamisar, *What is Interrogation? When Does it Matter? Police Interrogations And Confession* in ESSAYS IN LAW AND POLICY, 139-175 (1980).

72. The custodial interrogation setting has historically been very subversive to the suspect. The following cases are representative of the coercion that suspects have had to endure during custodial interrogation, in the past: Darwin v. Connecticut, 391 U.S. 346, 349 (1968) (suspect interrogated for 48 hours while officers denied his access to counsel); Beecher v. Alabama, 389 U.S. 35, 38 (1967) (officer fired gun next to suspects head and said "If you don't tell the truth I am going to kill you"); Clewis v. Texas, 386 U.S. 707, 710 (1967) (suspect arrested, then interrogated for nine days

remains to justify decisions such as *Roberson*.[74] In addition, post-*Miranda* studies indicate that despite having to give warnings, police are still able to induce suspects to waive their right to counsel,[75] or obtain confessions before the suspect's attorney arrives.[76] The ability of the police to corrupt the goals of *Miranda* and *Edwards*, even when they give appropriate *Miranda* warnings, indicates the need for a more stringent safeguard for suspects in the custodial interrogation setting.

The Court clearly stated such a safeguard in *Roberson*.[77] *Roberson's* expansion of the *Edwards* rule assures suspects that the police will not continually subvert suspect's rights as they have in the past. As the *Roberson* Court correctly stated, police engaged in separate investigations will be at least as eager to limit suspects' rights as police involved in only one investigation.[78] Therefore, the Court justifiably added to the *Edwards* rule, and reinforced the policy that police should use investigative work and extrinsic evidence instead of interrogations to gain information regarding suspects.[79]

Although the *Roberson* decision is essentially correct, the Court

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with little food or sleep, and gave three unwarned confessions); Reck v. Pate, 367 U.S. 433, 441 (1961) (mentally retarded child interrogated for a week during which he was ill, fainted several times, vomited blood on the floor of the police station and was taken twice to the hospital); Cagle v. State, 45 Ala. App. 3, 221 So.2d 119 (1969) *cert. denied*, 284 Ala. 727, 221 So.2d 121 (1969) (interrogating wounded suspect at police station one hour before statement, taken to hospital then given *Miranda* warnings; suspect prefaced statement with "I have already given the Chief a statement and I might as well give one to you too").

73. *See, e.g.*, Dripps, *Against Police Interrogation and the Privilege Against Self-Incrimination*, The Supreme Court Review, vol. 78, no. 4, p. 731 (1988).

74. Although police cruelty has declined, it still exists in the custodial interrogation setting. *See, e.g.*, People v. Wilson, 116 Ill. 2d 29, 506 N.E.2d 571 (1987) (defendant claimed confession result of police beating, kicking, burning on radiator and choking with plastic bag); People v. Clark, 114 Ill. 2d 450, 501 N.E.2d 123 (1986) (defendant required surgery for crushed trachea, injury allegedly occurred while in custody at Chicago Police Station).

75. *See* Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DEN. L.J. 1, 26-34 (1970).

76. *See* Medaline, Zeitz and Alexander, *Custodial Police Interrogation in our Nation, Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1394 (1968).

77. *Roberson*, 108 S. Ct. at 2096. The safeguard expressed in *Roberson* is the expansion of the *Edwards* rule to reinterrogation of unrelated offenses. *See id.* at 2095.

78. *Id.* at 2100.

79. In Escobedo v. Illinois, 378 U.S. 478, 488-89 (1964), the Court stated that American courts discourage strict reliance on the confession of a suspect. In Haynes v. Washington, 373 U.S. 503, 519 (1963), the Court recognized that confessions have been unreliable and have been used by the police in place of searching for valid evidence.

In *Escobedo*, 378 U.S. at 488-89 the Court stated that, "a system that comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on evidence independently secured through skillful investigation."

erred in unnecessarily adding legitimacy to the distinction between a suspect's right to remain silent and his right to counsel under the fifth amendment.[80] Although this distinction first appeared in *Miranda*,[81] it was not until *Michigan v. Mosley*[82] that the Court defined the distinction thoroughly.[83] *Mosley* held that when a suspect asserts his right to remain silent, the police *may* reinterrogate the suspect later if his request is "scrupulously honored."[84]

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80. *Roberson*, 108 S. Ct. at 2093.

81. Before *Miranda*, the right to remain silent and the right to counsel were not required in pre-trial interrogation. *See, e.g.*, Wilson v. United States, 162 U.S. 613, 623 (1896) (a claimed right to counsel rejected in the context of a preliminary examination by a judicial officer). However, the Supreme Court casted doubt on this policy in the early 1960's. The Court took the major step of extending the sixth amendment to purely non-judicial pretrial contexts in Massiah v. United States, 377 U.S. 201, 206 (1964) (statements elicited by government agents by government agents after indictment without counsel, inadmissable); and Escobedo v. Illinois, 378 U.S. 478, 490-91 (1964) (where investigation is not a general inquiry, suspect must be warned of right to silence and counsel).

In *Miranda*, the Court created a right to remain silent and a right to counsel during police interrogations. *Miranda*, 473 U.S. at 438. Although these rights were not constitutional mandates, they were "prophylactic" guidelines based on the fifth amendment. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (Miranda warnings facilitate practical enforcement of right against self-incrimination). The distinction between the two rights set out in *Miranda* is obvious from the language of the opinion. The *Miranda* Court stated, "when the right to remain silent is invoked, interrogation must cease." *Miranda*, 384 U.S. at 474. If the suspect asked for an attorney, interrogation must cease until an attorney is present. *Id.*

82. Michigan v. Mosley, 423 U.S. 96 (1975).

83. *Id.* at 101. The Court in *Mosley* focused on the one passage in *Miranda* that concerned post-warning conduct: "the interrogation must cease when the person in custody indicates that he wishes to remain silent." *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 473-74 (1966)). The *Mosley* Court was faced with the choice of concluding either that questioning by police on this matter was forever forbidden or that police, after a token observance of the suspect's rights could reinterrogate him. *Id.* at 101-05. The Court found both extremes unreasonable and instead focused on the facts of the *Mosley* case. *Id.* at 104-05. Mosely's right to silence was honored for a significant period of time, he was reinterrogated in a different room by a different officer, in connection with a different case. *Id.* The Court concluded that Mosley's right to cut off questioning had been scrupulously honored. *Id.* at 104.

The decision in *Mosley* did not deal with the suspect's right to counsel, since he did not request an attorney. *Id.* at 101 n.7. The Court lessened a suspect's rights when he asks to remain silent, since police can reinterrogate the suspect after the passage of time. *Id.* at 104. However, police cannot reinterrogate at all if the suspect requests counsel. *Mosley*, 423 U.S. at 103. See *supra* note 44 for a further discussion of the *Mosley* case. Many recent decisions have followed *Mosely's* distinction elevating the right to counsel over the right to remain silent. *See, e.g.*, Moran v. Burbine, 475 U.S. 412 (1986); Smith v. Illinois, 469 U.S. 91 (1984); Solem v. Stumes, 465 U.S. 438 (1983); Edwards v. Arizona, 451 U.S. 477 (1981); United States v. HSU, 852 F.2d 407 (9th Cir. 1988); United States v. Franzer, 653 F.2d 1153 (7th Cir. 1982) *cert. denied*, 454 U.S. 1067 (1981).

84. *Mosley*, 423 U.S. at 102. The weakness of the Court's decision in *Mosley* is evident when examining the confusion over the term "scrupulously honored". *See, e.g.*, United States v. HSU, 852 F.2d 407, 412 (9th Cir. 1988) (questioned suspect 30 minutes after invoking right to silence, by the same investigators, involving the same crime upheld); United States v. Terry, 702 F.2d 299, 317-18 (2d Cir. 1985) (non-coercive interrogation after 40 minutes upheld); Robinson v. Percy 738 F.2d 214, 217 (7th Cir. 1984) (no certain time period required to validate reinterrogation). *See also*

The Court in *Mosely* inferred that the right to remain silent was less important than the right to counsel under the fifth amendment.[85] The *Roberson* Court refused to apply *Mosley's* "scrupulously honored" test to Roberson's request for counsel, since such a request acts as a complete ban on interrogation, while the request to remain silent does not. Thus, *Roberson* added legitimacy to the *Mosley* distinction between the two rights.[86] In so doing, the *Roberson* Court misconstrued the *Miranda* holding along with both the framers' intent and the history of the fifth amendment privilege against self-incrimination.[87] Legal scholars have interpreted the fifth amendment to mean that a person has the right to remain silent and not to incriminate himself.[88] Its language does not even imply a right to counsel.[89] Ironically, the Supreme Court in *Roberson* and in other decisions has chosen to elevate a suspect's right to counsel to greater significance.[90] Hence, the Court is apt to protect a suspect's rights if he declares "I want a lawyer." In contrast, the Court severely limits the same suspect's rights if he states, "I want to remain

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Note, *The Declining Miranda Doctrine: The Supreme Court's Development of Miranda Issues*, 36 WASH. & LEE L. REV. 259, 267-68 (1979) (minimally acceptable time periods between interrogations vary in different jurisdictions from fifteen minutes to four days); Note, *Michigan v. Mosley : A New Constitutional Procedure*, 54 N.C.L. REV. 695, 704 (1976) (*Mosley's* vague approach rejects *Miranda's* goal of providing concrete objective guidelines).

85. *Mosley*, 423 U.S. at 101-02.

86. *Roberson*, 108 S. Ct. at 2099. In *Roberson*, the petitioner sought to apply the *Mosley* rationale to Roberson's situation. *Id.* at 2098-99. The petitioner argued that because Roberson had asserted his right to counsel, the police could reinterrogate Roberson, three days later, after his request had been "scrupulously honored." *Id.* at 2099. The *Roberson* court, however, refuted the argument. *Id.* The Court agreed with the *Mosley* decision that the right to remain silent may be less important than the right to counsel under the fifth amendment. *Id.* Therefore, since Roberson had requested counsel, and not his right to silence, reinterrogation about an unrelated offense must cease. *Id.*

87. The doctrine of the privilege against self-incrimination had its origin in a protest against the inquisitorial methods of interrogating accused persons in the late seventeenth century. Brown v. Walker, 161 U.S. 591, 596-97 (1896). This privilege, which was a mere rule of evidence in England, became a constitutional enactment in the United States, and has developed into "one of the great landmarks in humanity's struggle to make itself civilized." 21 AM. JUR. 2d *Criminal Law* §702 (1981) (citations omitted). The bench and bar usually refer to the right of silence as the privilege against self-incrimination. In addition, the fifth amendment's guarantee of the right to silence is one provision to which the federal courts have nearly always given a liberal interpretation. ROGGE, THE RIGHT OF SILENCE, IN THE FIRST AND THE FIFTH, 138-96 (1960) [hereinafter, ROGGE, Right of Silence]. *See also* MAYERS, *Shall We Amend the Fifth Amendment?* 82-99 (1978) (right of the accused to keep silent expressly guaranteed by fifth and extends to interrogational setting).

88. *Id.* at 84. For a complete discussion of the history and growth of the right of silence in relation to confessions, see Rogge, Right of Silence, *supra* note 87, at 138-96 (1960).

89. See *supra* note 1 for the relevant text of the fifth amendment.

90. *Roberson*, 108 S. Ct. at 2099. See *supra* note 84 for discussion of the *Mosley* distinction and decisions which have affirmed it.

silent."[91]

The language of the *Miranda* decision also supports the argument that the right to remain silent is at least as equal as the right to counsel under the fifth amendment.[92] The Court stated early in *Miranda* that if the suspect indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.[93] In fact, the Court in *Miranda* created the right to counsel during custodial interrogation in order to protect the right to remain silent.[94]

The Court allowed the right to counsel to take a more important position than the right to remain silent under the fifth amendment because a suspect who requests counsel is expressing that he is not competent to deal with the authorities without legal advice.[95] However, a suspect who requests the right to remain silent is not any more secure, and he, too, is expressing that he is not ready to deal with police. Furthermore, the *Mosley* Court held that to allow the suspect to remain silent would transform the *Miranda* safeguards into "irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interest."[96] However, it is well known that, once a suspect has requested counsel before answering questions, "any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police."[97] Therefore, the *Rober-*

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91. Perhaps this is true because judges are also lawyers and naturally seek to advance their own position in society.

92. *Miranda*, 384 U.S. 436, 473-74 (1966). The *Miranda* Court stated: "Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. *Id.* at 469. In addition, the intent of the *Miranda* decision was to *fully honor* the privilege against self-incrimination, *Id.* at 444 not to scrupulously honor the suspect's rights, as *Mosley* concluded. *Mosley*, 423 U.S. at 104.

93. *Id.* at 473-74. The Court in *Miranda*, in every instance, discussed the right to remain silent prior to the right of counsel. For example, when discussing the procedure of the warnings to be given, the Court stated that, initially, the suspect must be informed of his right to remain silent. *Id.* at 468. The Court then stated that once all the warnings have been given, and the suspect indicates he wishes to remain silent, the interrogation must cease. *Id.* at 473-74. At no time in the Court's opinion did the Court discuss the right to counsel before the right to remain silent. In fact, when the Court did speak of the right to counsel it was usually in the context of that right "accompanying" the right to remain silent. *Id.* at 469. Therefore, from the language of the opinion, the *Miranda* Court favored or gave equal weight to the right to remain silent.

94. *Id.* at 469. The Court in *Miranda* stated: "[t]he denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege to remain silent . . . the presence of counsel would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege." *Id.* at 466.

95. *Mosley*, 423 U.S. at 100-01, 110 (White, J., concurring); *see also* 10 Los Angeles Lawyer 31 (Feb. 1988).

96. *Mosley*, 423 U.S. at 102.

97. Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring).

son Court should have stated that a suspect's right to remain silent is at least as important as the right to counsel under the fifth amendment.

Moreover, the Court in *Roberson* failed to expand *Edwards* to its logical limit. Rather than expanding *Edwards* to the reinterrogation of unrelated offenses, the Court should have concluded that once a suspect requests either the right to silence *or* the right to counsel, he is forever off limits until he has consulted with an attorney.[98] If the suspect truly wishes to confess, he could do so only after talking to an attorney, or by not asserting any of his rights in the first place. This further expansion of *Edwards* would finally balance the rights of suspects and the needs of law enforcement in the custodial interrogation setting.

The *Roberson* decision reflects the Court's effort to reverse the trend away from *Miranda*, and instead adds strength to that decision. More importantly, *Roberson* symbolizes a renewed recognition of the underlying concern of the *Miranda* Court to establish meaningful and effective safeguards of the suspect's fifth amendment rights. Although the *Roberson* holding was somewhat narrow, its impact on suspect's rights and law enforcement procedures will be significant. Suspects subjected to custodial interrogation will now be assured that their right to counsel is completely respected, while law enforcement officials will recognize a new guideline which they must follow. However, the full impact of *Roberson* depends on whether the Court, in future decisions, will remain consistent in its effort to protect suspect's rights when they are subjected to the historically imbalanced custodial interrogation setting.

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98. This approach would terminate the need for the part of the *Edwards* decision which states that a suspect has waived his rights if he initiates communication with the police after he has requested counsel. Edwards v. Arizona, 451 U.S. 477, 484-85 (1980). Using this approach, if the suspect asserts *any* of his rights, it would not matter if he waived them later, he would still be off-limits to the police.