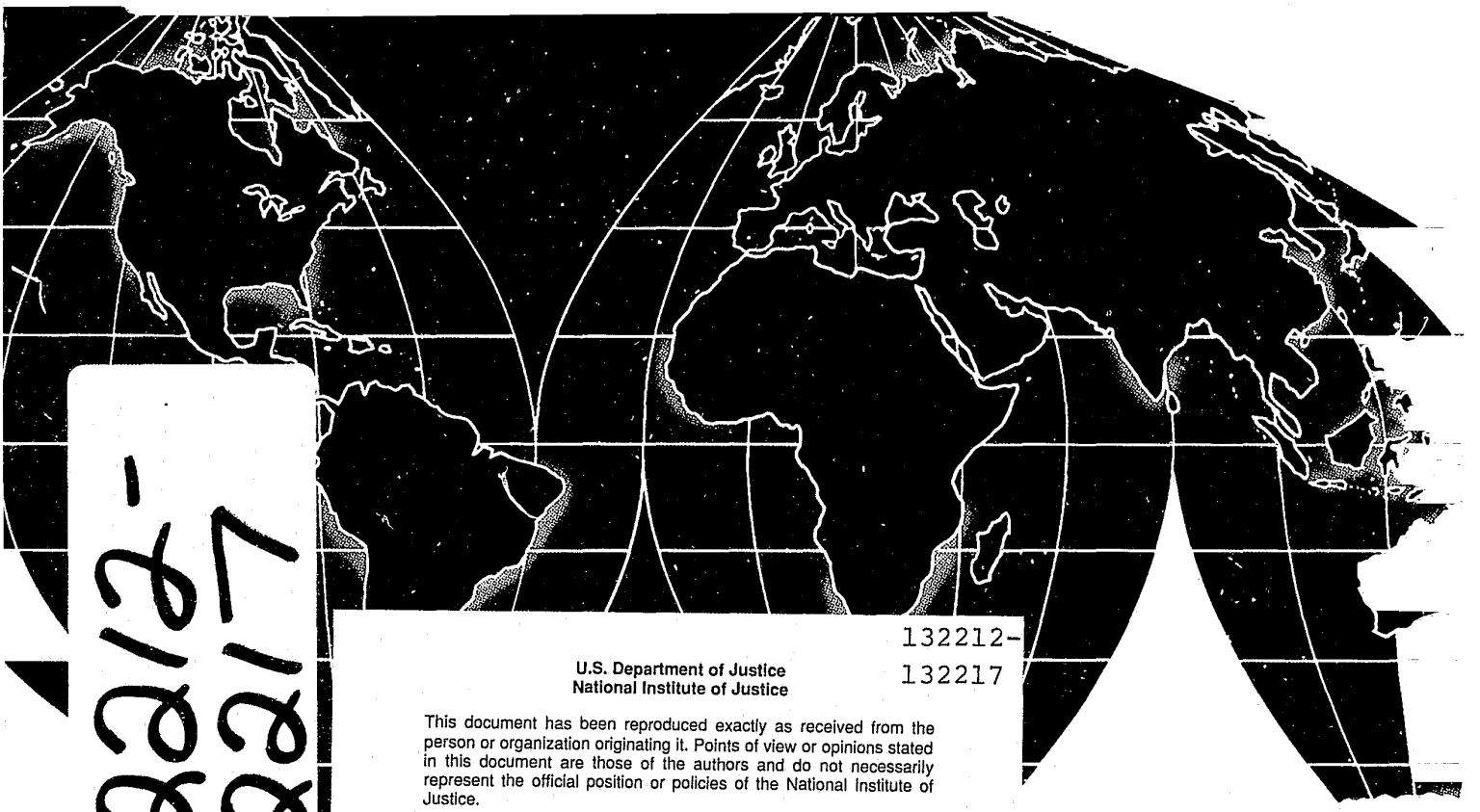
FBI



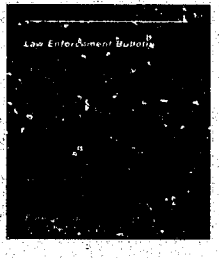
FBI
Law Enforcement Bulletin

September 1991
Volume 60
Number 9

Features

Focus on Foreign Counterintelligence

Departments



The Cover: This issue focuses on a unified approach to foreign counterintelligence, highlighting the importance of Federal, State, and local cooperation in confronting new FCI challenges.

United States Department of Justice
Federal Bureau of Investigation
Washington, DC 20535

William S. Sessions, Director

Editor—Stephen D. Gladis, D.A.Ed.
Managing Editor—Kathryn E. Sulewski
Art Director—John E. Ott
Assistant Editors—Alice S. Cole
Karen F. McCarron
Production Manager—Andrew DiRosa
Staff Assistant—Carolyn F. Thompson

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Washington, D.C. 20535

ISSN 0014-5688 USPS 383-310

132217

Custodial Interrogation

Impact of Minnick v. Mississippi

By
KIMBERLY A. CRAWFORD, J.D.

In *Minnick* v. *Mississippi*,[1] the U.S. Supreme Court announced a rule of law that could have a substantial impact on the way many law enforcement agencies conduct custodial interrogations. Specifically, the Court severely curtailed the law enforcement officer's ability to reinitiate custodial interrogation of suspects who had previously invoked the right to counsel.

This article examines the *Minnick* decision and assesses its impact. It also suggests legitimate steps officers can take to limit its adverse effects on criminal investigations.

Summary of Facts

Robert Minnick and James "Monkey" Dyess escaped from the Clarke County Jail in Mississippi and were in the process of burglarizing a mobile home when they were surprised by the arrival of the occupants. Using weapons found in the home, the escapees murdered two of the occupants and eventually fled the scene in a stolen pickup truck. Minnick was arrested 4 months later in California on a fugitive warrant.

Following his arrest, Minnick was interviewed by two FBI agents. Prior to this interview, he was advised of his *Miranda*[2] rights, and although he refused to sign a waiver, he agreed to answer some questions.[3] During the course of the interview, Minnick made some incriminating statements before telling the agents that he would make a more-complete statement when his lawyer was present. Believing that Minnick had invoked his right to counsel, the agents promptly terminated the interview.

Following the FBI interview, Minnick met with appointed counsel. Three days later, Deputy Sheriff J.C. Denham of Clarke County, Mississippi, arrived in California and attempted to interview Minnick. Although once again declining to sign a written waiver of his *Miranda* rights, Minnick agreed to talk with Denham. Statements made during the subsequent interview ultimately led to Minnick's prosecution for murder.

Prior to trial, Minnick moved to suppress his statements made to Denham. That motion was denied by the trial court, and Minnick was sentenced to death after being found

guilty on two counts of capital murder. Minnick's conviction and sentence were upheld on appeal by the Mississippi Supreme Court.[4] However, on review,[5] the U.S. Supreme Court reversed the conviction.

> **"...once a suspect invokes the right to counsel...law enforcement officers are prohibited from initiating further custodial interrogation involving the original crime or any other criminal act...."**

Special Agent Crawford is a legal instructor at the FBI Academy in Quantico, Virginia

The Court's Analysis

The fifth amendment to the U.S. Constitution provides in part that "no person...shall be compelled in any criminal case to be a witness against himself...."[6] Over 2 decades ago, the Supreme Court in *Miranda* v. *Arizona*[7] held that custodial interrogation of an individual creates a psychologically compelling atmosphere that works against this fifth amendment protection.[8]

In other words, the Court in *Miranda* presumed that an individual in custody undergoing police interrogation would feel compelled to respond to police questioning. This compulsion, which is a by-product of most custodial interrogations,[9] directly conflicts with an individual's fifth amendment protection against self-incrimination. Accordingly, the Court developed the now-familiar *Miranda* warnings as a means of reducing the compulsion attendant in custodial interrogations. The *Miranda* rule requires that these warnings be given and the embodied rights waived prior to the initiation of custodial interrogations.

If *Miranda* warnings are given, and individuals in custody choose to exercise their rights by invoking either the right to silence or counsel, the Court has held that all interrogations must cease immediately.[10] Whether, and under what conditions, law enforcement officers may subsequently readvise an individual of his rights and attempt to secure a waiver depends on which rights the individual has invoked.

In *Michigan* v. *Mosley*,[11] the Supreme Court essentially interpreted the invocation of the right to silence as a request for time so a suspect could think clearly about the situation. If the suspect's initial request is scrupulously honored, the Court held that attempts to reinterrogate may occur if given the time asked for, or if he indicates, by initiating communications, that he had enough time to think and has changed his mind.

As a result, reinterrogations following an invocation of the right to silence are deemed appropriate if: 1) A reasonable period of time has elapsed;[12] or 2) interrogation was initiated by the suspect. In either case, any renewed attempts to interrogate a suspect must be preceded by a fresh warning of *Miranda* rights and a waiver of those rights.

An invocation of the right to counsel, on the other hand, necessarily carries with it a different set of procedural safeguards. Obviously, a suspect invoking the right to counsel is not simply asking for time to assess the situation; he is, instead, requesting the assistance of an attorney. Whether this request is satisfied by giving the suspect an opportunity to consult with an attorney or requires the actual presence of an attorney during questioning was the issue before the Court in *Minnick*.

Minnick's motion to suppress the statements made to Denham was based on his claim that under the fifth amendment,[13] the earlier invocation of his right to counsel during the FBI interview precluded Denham from making any subsequent attempts to question him in the absence of counsel. In opposition, the government argued that Minnick's fifth amendment rights had been satisfied when he was given the opportunity to consult with his counsel on two or three occasions prior to meeting with Denham. In order to resolve this issue, the Supreme Court

found it necessary to revisit the *Miranda* decision and its progeny to determine when, if ever, law enforcement officers may reinitiate interrogation of an in-custody suspect who has invoked the right to counsel.

Miranda Revisited

In *Miranda*, the Court held that "once an individual in custody invokes his right to counsel, interrogation 'must cease until an attorney is present'; at that point, the 'individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.' "[14] Later, in *Edwards* v. *Arizona*,[15] the Supreme Court attempted to clarify its holding in *Miranda* by announcing the following rule:

> "...an accused..., having 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."[16] (emphasis added)

Following *Edwards*, many courts focused on the expression "made available to him" and concluded that the rule simply required that a suspect in custody who had invoked the right to counsel be given the opportunity to consult or confer with his attorney before law enforcement officers could lawfully attempt to reinterrogate him.[17] Under this interpretation, there would be no necessity to show that the suspect had actually consulted with an attorney, but only that he had been afforded the opportunity to do so. The Supreme Court, however, held that such an interpretation of *Edwards* was both unintended and inconsistent with *Miranda*. Therefore, the Court concluded that "when counsel is requested [by a suspect in custody], interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[18] Applying this rule to the facts in *Minnick*, the Court found that because Minnick had invoked his right to counsel during the FBI interview and Deputy Sheriff Denham subsequently reinitiated interrogation without counsel being present, Minnick's rights under *Miranda* had been violated, and the resulting statements must be suppressed.

> **"...law enforcement officers should be extremely careful when documenting an invocation of rights."**

Impact of *Minnick*

As a result of *Minnick*, law enforcement officers will be unable to interrogate a suspect in custody once that suspect has invoked the right to counsel unless: 1) The suspect's attorney is actually present; or 2) the suspect changes his mind and reinitiates the interrogation.[19] Because the first alternative is frequently unpalatable and the second unlikely, custodial reinterrogations after requests for counsel may quickly become rare.

Although not specifically addressed by the Supreme Court, it is important to note that the rule in *Minnick* will undoubtedly apply regardless of the crime that is the intended topic of the reinterrogation.[20] In other words, when an individual is advised of his *Miranda* rights and invokes the right to counsel, he is not simply saying that he will not deal with the police about the crime for which he has been arrested without the assistance of an attorney. Rather, a request for counsel under these conditions implies that the individual will not deal with the police on *any* criminal matter without the benefit of counsel. Consequently, once a suspect invokes the right to counsel under the fifth amendment, law enforcement officers are prohibited from initiating further custodial interrogation involving the original crime or any other criminal act without complying with the dictates of *Minnick* by having the suspect's attorney present.

Moreover, the rule in *Minnick* appears to be perpetual; once a suspect in custody invokes the right to counsel, the prohibition against reinterrogation remains in effect as long as custody continues. Conceivably, a suspect who invokes the right to counsel during the early stages of custody and is thereafter unable to make bond could be shielded from all further interrogation throughout the remainder of the prosecution

of the case and for as long as he is incarcerated.[21]

Limiting the Adverse Effects of *Minnick*

Writing the dissenting opinion in *Minnick*, Justice Scalia recognized the far-reaching effects of the Court's decision on law enforcement when he made the following statement:

> "Today's ruling, that the invocation of a right to counsel permanently prevents a police-initiated waiver, makes it largely impossible for the police to urge a prisoner who has initially declined to confess to change his mind—or indeed, even to ask whether he has changed his mind."[22]

While the *Minnick* decision may hamper law enforcement efforts to conduct custodial interrogations, there are certain legitimate steps law enforcement officers can take to limit its adverse effects on criminal investigations.

The first step law enforcement officers should take is to ensure that they understand and take advantage of the procedural differences that are required when a suspect invokes the right to silence as opposed to invoking the right to counsel. Because there is a significant difference between the procedural protections offered to a suspect who invokes the right to counsel and one who merely expresses a desire to remain silent, law enforcement officers should be certain they know which right a suspect is invoking. If, following the advice of rights, the suspect's response leads officers to believe that the suspect is invoking his rights, but the officers are unsure of which right is being invoked, the officers could conceivably follow up by asking the suspect if he is, in fact, invoking the right to silence. If a suspect gives an affirmative response, then officers should immediately stop questioning. However, since only the right to silence has been invoked, a second attempt to obtain a waiver may be made after waiting a reasonable period of time.

> **"...law enforcement officers should be certain they know which right a suspect is invoking."**

Similarly, when a suspect is being read his rights for the first time, it may be best to avoid encouraging a blanket invocation of rights that could occur if the entire list of rights is given before inquiring whether the suspect wishes to waive or invoke any or all of them. There is nothing in the rule to preclude the suspect being told first that he has the right to remain silent and then asked whether he wishes to waive that right.

If the suspect indicates a desire to waive the right to silence, then he should be advised of the remainder of his rights and asked whether he wishes to waive those rights as well. If, on the other hand, the suspect is first advised of the right to remain silent and choose to invoke that right, then no further advice of rights need be given at that time and the interrogation should cease.

However, a subsequent attempt to interview a suspect could be made after waiting a reasonable period of time, since only the right to silence was invoked. By refraining from advising a suspect of the right to counsel until the right to silence has been waived, the law enforcement officer may reduce the possibility that the rule in *Minnick* will be triggered.

Along these same lines, law enforcement officers should be extremely careful when documenting an invocation of rights. Because the procedural safeguards offered to a suspect depend on the specific right invoked, officers should maintain accurate records indicating the actual language a suspect used to invoke his rights. By doing so, officers will later be able to establish which right was invoked and demonstrate that they afforded the suspect the appropriate safeguards.

Finally, law enforcement officers should be careful not to apply this rule in instances where it is not required. For example, if a suspect makes a request for counsel at a judicial proceeding, as opposed to during custodial interrogation, police

are not barred from interviewing that suspect concerning other uncharged offenses.

The Court in *Minnick* based its decision on *Miranda*, which is intended to govern custodial interrogations and protect the fifth amendment privilege against self-incrimination. *Minnick* does not apply when the right invoked is the sixth amendment right to counsel.

In *Michigan* v. *Jackson*,[23] the Court held that an individual's request for the appointment of counsel at an initial appearance constitutes an invocation of the sixth amendment right to counsel, which only precludes police-initiated interrogation regarding the crime for which the individual was charged.[24] And recently, in *McNeil* v. *Wisconsin*,[25] the Court reaffirmed that the invocation of the sixth amendment right to counsel at issue in *Jackson* is crime-specific and does not make suspects "unapproachable by police officers suspecting them of involvement in other crimes, even though they had never expressed any unwillingness to be questioned."[26]

Thus, a suspect who invokes the sixth amendment right to counsel by requesting the appointment of an attorney at an initial appearance cannot, thereafter, be subjected to police-initiated interrogation regarding the crime for which he has been charged.[27] However, because the suspect's invocation of the sixth amendment rights is not the same as an invocation of the fifth amendment rights, *Minnick* would not preclude police-initiated interrogation on unrelated matters, as long as the *Miranda* safeguards for custodial interrogation are satisfied.

Conclusion

The Supreme Court's decision in *Minnick* is likely to cause many law enforcement agencies to change their policies and practices regarding custodial interrogations. No longer will law enforcement officers be permitted to reinitiate custodial interrogation of a suspect who had previously invoked the right to counsel without having the suspect's attorney present. When assessing their policies, however, law enforcement agencies should be careful to keep *Minnick* in its proper fifth amendment perspective and consider various options, such as the suggestions discussed above, that could limit the effects of the rule. LEB

> **"Minnick *does not apply when the right invoked is the sixth amendment right to counsel.*"**

Footnotes

[1] 111 S.Ct. 486 (1990) (hereinafter cited as *Minnick*).

[2] *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (hereinafter cited as *Miranda*).

[3] The FBI report indicates Minnick waived his rights and said he would not answer "very many" questions, *Minnick*, *supra* note 1, at 488.

[4] *Minnick* v. *State*, 551 So.2d 77 (Miss. 1988).

[5] The Supreme Court granted certiorari at 110 S.Ct. 1921 (1990).

[6] U.S. Const. Amend. V.

[7] *Miranda*, *supra* note 2.

[8] *Id.* at 436.

[9] Not all forms of custodial interrogation create the compelling atmosphere that *Miranda* was designed to protect against. *See, e.g., Illinois* v. *Perkins*, 110 S.Ct. 2394 (1990).

[10] *Miranda*, *supra* note 2, at 474.

[11] 423 U.S. 96 (1975).

[12] In *Mosley*, 2 hours were considered to be a sufficient period of time. *Id.*

[13] Minnick also claimed that the statements in question were taken in violation of his sixth amendment right to counsel. Reversing Minnick's conviction on fifth amendment grounds, the Court found it unnecessary to address the sixth amendment issue.

[14] *Minnick*, *supra* note 1, at 489, quoting *Miranda*, *supra* note 2, at 474.

[15] 451 U.S. 477 (1981).

[16] *Id.* at 485, 486.

[17] *See, e.g., United States* v. *Skinner*, 667 F.2d 1306 (9th Cir. 1982), *cert. denied*, 103 S.Ct. 3569 (1983), (court found defendant who was released after requesting counsel, then re-arrested, had the opportunity to consult with counsel, and therefore, his rights were satisfied). *See also, United States* v. *Halliday*, 658 F.2d 1103 (6th Cir. 1980), *cert. denied*, 102 S.Ct. 978 (1981).

[18] *Minnick*, *supra* note 1, at 491.

[19] In *Minnick*, the Court stated that "*Edwards* does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities...." *Minnick*, *supra* note 1, at 492.

[20] *See, Arizona* v. *Roberson*, 108 S.Ct. 2093 (1988), where the Supreme Court held that the assertion of the right to counsel is effective against all topics of custodial interrogation.

[21] In a prison setting, the perpetuality of this rule could make it virtually impossible to conduct routine interrogations of inmates suspected of committing new crimes without having an attorney on hand to represent the inmates' interests.

[22] *Minnick*, *supra* note 1, at 496 (Scalia, J., dissenting).

[23] 106 S.Ct. 1404 (1986).

[24] The Court in *Jackson* found that the rule in *Edwards* applied in the sixth amendment context. Consequently, it can be deduced that reinterrogation would be permitted in the sixth amendment context if initiated by the suspect or done in the presence of the suspect's attorney.

[25] ___S.Ct.___ (1991).

[26] ___S.Ct.___, ___ (1991).

[27] At the present time, it is unclear whether a non-custodial suspect, who previously invoked his sixth amendment right to counsel, could be requested to waive that right without having an attorney present. Because *Edwards* has been applied in the sixth amendment context, and *Minnick* is simply an interpretation of *Edwards*, it would appear that the rule in *Minnick* could preclude any police-initiated attempts to obtain a waiver of a previously invoked sixth amendment right to counsel outside the presence of the suspect's attorney.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.