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Criminal Procedure - Attachment of the Sixth Amendment Right to Counsel in Mississippi - Yates v. State

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Criminal Procedure — Attachment of the Sixth Amendment Right to Counsel in Mississippi — *Yates v. State*, 467 So. 2d 884 (Miss. 1984), *reh'g denied*, No. 54415 (May 15, 1985)

Facts

Jeff Oliver Yates, eighteen years old, shot and killed Roger Byron Hollingsworth on the evening of July 29, 1981.[1] He was arrested on August 4, 1981, for the murder of Hollingsworth at approximately 9:00 P.M. and informed of his *Miranda* rights.[2] He was then taken to the Jones County Sheriff's Department and incarcerated. He was not questioned upon his arrival. Shortly thereafter, an attorney hired by Yates's parents arrived at the jail and asked to see him. The sheriff refused, claiming that Yates had not been charged with anything, that he had not requested an attorney,[3] and that if he did, the attorney would be allowed to see him. Jeff Yates did not know that the attorney was present or that his parents had hired counsel to represent him.

A few hours later, at approximately 1:00 A.M., August 5, 1981, Yates was taken from his cell to a deputy room upstairs in the jail. Six officers were present, including the sheriff. Yates was again informed of his *Miranda* rights and asked whether he understood them. He replied that he understood his rights and chose to waive them by signing a waiver form,[4] which he also ac-

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1. The two had been quarreling for some time over Yates's estranged wife, who had been dating Hollingsworth up until the time of the shooting. She was the only witness, and it was her later statement that led to Yates's arrest. Her confession was not used as evidence at the trial. Yates v. State, 467 So. 2d 884 (Miss. 1984), *reh'g denied*, No. 54415 (May 15, 1985). The court's denial of a petition for rehearing has not been published except as a notation in the original opinion. *See Yates*, 467 So. 2d at 884.

2. Miranda v. Arizona, 384 U.S. 436 (1966). The hallmark of the fifth amendment privilege against self-incrimination is the *Miranda* warnings, which must be given when "an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way." *Id.* at 478. The Court stated that he must be afforded the following procedural safeguards:

> 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 that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. at 479.

3. Abstract of Record, July 19, 1982, at 7. Yates claimed that he had requested an attorney when he first arrived, but said he was told to get into his cell and wait. None of the officers questioned at trial were asked if Yates requested an attorney upon his arrival. 467 So. 2d at 885.

4. A common example of a waiver form, quoting from Commonwealth v. McKenna, 244 N.E.2d 560 (Mass. 1969), states:

> I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Id. at 562.

knowledged that he understood. He made no request for an attorney and proceeded to give a detailed account of the shooting on tape. None of the interrogating officers were informed by the sheriff that an attorney for Yates was in the building.

Yates met with his attorney for the first time later that same morning around 10:00 A.M., and his attorney told him that he did not have to sign anything. Later that afternoon Yates was presented with a copy of his transcribed statement and was again informed of his *Miranda* rights. He was then asked if he wanted to sign the statement, and he agreed, signing each page of the twenty-page confession.[5] Shortly thereafter, formal charges were brought against him for the murder of Hollingsworth.

On July 27, 1982, Jeff Yates was tried for murder in the Circuit Court for the First Judicial District of Jones County, found guilty, and sentenced to serve a term of life imprisonment. He appealed the conviction, claiming that his fifth amendment privilege against self-incrimination had been violated. Yates contended that because his attorney had been denied access to him, he had not knowingly and intelligently waived his rights, and that as a result his statement was inadmissible. He argued that this denial had also deprived him of his sixth amendment right to counsel.[6] The Supreme Court of the State of Mississippi affirmed the decision of the trial court, holding that the confession was purged of any primary taint and therefore admissible because Yates had signed it after again receiving his *Miranda* rights and after conferring with counsel.

BACKGROUND

The fifth amendment privilege against self-incrimination[7] and the sixth amendment right to counsel[8] were made applicable to the states via the due process clause of the fourteenth amendment. Both are constitutional safeguards for the protection of individuals

5. Yates claimed that he was coerced into signing the statement by the officers' telling him they were going to use it against him regardless. Abstract of Record, July 19, 1982, at 7. If this is true and Yates's sixth amendment rights had attached, this is a clear violation of his sixth amendment right to counsel. *See infra* text accompanying notes 190-96.

6. Appellant's assignment of error read as follows: "The trial court erred in allowing the statement made by the Appellant into evidence as it was not given with the intentional relinquishment or abandonment of his rights, and as he had not knowingly and intelligently waived his right to counsel." Brief of Appellant at 1, Yates v. State, 467 So. 2d 884 (1984), *reh'g denied*, No. 54415 (May 15, 1985).

7. U. S. Const. amend. V, which provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This amendment was made applicable to the states in Malloy v. Hogan, 378 U.S. 1, 11 (1964).

8. U.S. Const. amend. VI, which provides that: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." This amendment was made applicable to the states in Gideon v. Wainwright, 372 U.S. 335, 342 (1962).

in criminal proceedings. One of the primary safeguards of the fifth amendment privilege against self-incrimination is the *Miranda* warnings, which include the defendant's right to the assistance of counsel at custodial interrogations.[9] The sixth amendment, which directly provides for the assistance of counsel, attaches when a critical stage arises in the proceedings.[10] Because both amendments involve the right to the assistance of counsel, they are often interwoven within the same judicial proceeding and used interchangeably when only one is applicable.[11] In custodial police interrogations,[12] attorneys and courts are frequently uncertain as to which constitutional amendment to argue, although the Supreme Court of the United States has established some basic guidelines to follow.[13]

The Supreme Court in 1964 held in *Escobedo v. Illinois*[14] that a defendant's statements made while in custody were inadmissible because his sixth amendment right to counsel had been violated. Escobedo had been extensively interrogated by police while at the same time repeatedly requesting an attorney. His attorney was present but was denied access to Escobedo because the police claimed they had not finished questioning him. At that time, Escobedo had not yet been formally charged, but he was not free to leave. The Court held that "when . . . the [law enforcement's] focus is on the accused and its purpose is to elicit a confession our adversary system begins to operate, and . . . the accused must be permitted to consult with his lawyer."[15] Therefore, it appeared that statements made while in police custody would not be admissible if the defendant's attorney was denied access to his client and the defendant was not informed of his constitutional right to remain silent. *Escobedo* did not go far enough and left judges, legal educators, and attorneys uncertain as to exactly when and under what circumstances the right to counsel would be deemed violated in police custodial interrogations.[16]

Two years after *Escobedo*, in the landmark decision of *Miran-*

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9. *See supra* note 2.

10. *See infra* note 26.

11. *See, e.g.*, Cannaday v. State, 455 So. 2d 713, 722 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985).

12. Chief Justice Warren defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). *See, e.g.*, Note, *The Meaning of "Interrogation" Under Miranda v. Arizona: Rhode Island v. Innis, 100 S. Ct. 1682 (1980)*, 123 TEX. TECH. L. REV. 725 (1981).

13. *See infra* notes 26-29 and accompanying text.

14. 378 U.S. 478 (1964). *See generally* Dowling, *Escobedo and Beyond: The Need for a Fourteenth Amendment Code of Criminal Procedure*, 56 J. CRIM. L. 143 (1965).

15. *Id.* at 492.

16. *See Miranda*, 384 U.S. at 440 and *supra* note 2.

da v. Arizona,[17] the Supreme Court decided to "explore some facets of the [problem] . . . and to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[18] Miranda was arrested and, while in custody, questioned by police officers who admittedly did not inform him of his right to have an attorney present. He confessed and was subsequently convicted. The Court reaffirmed the *Escobedo* decision, but did not rely on its holding – that the defendant's sixth amendment right to counsel had been violated. Instead, the Court held that Miranda's fifth amendment privilege against self-incrimination had been violated, stating that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards [*Miranda* warnings] effective to secure the privilege against self-incrimination."[19] The Court asserted that the sixth amendment holding in *Escobedo* was merely an "explication of fifth amendment rights."[20] *Miranda*, although requiring procedural warnings, was still somewhat unclear as to which constitutional amendment would be implicated in police custodial interrogation cases.

One week following *Miranda*, the Court clarified the controversy in *Johnson v. New Jersey*,[21] stating that "[o]ur opinion in *Miranda* makes it clear that the prime purpose of these rulings [*Escobedo* and *Miranda*] is to guarantee full effectuation of the privilege against self incrimination."[22]

Logically, it follows that in cases involving custodial interrogation where the individual is prone to incriminate himself, if the *Miranda* rights are violated, one of which is the right to counsel, the fifth amendment privilege against self-incrimination would be implicated, instead of the sixth amendment right to counsel.[23] This is consistent with *Escobedo* in that the *Escobedo* decision did not set forth procedural guidelines subsequently established in *Miranda*. Thus statements made while in custody are violations of the

17. 384 U.S. 436 (1966). For recent Miranda discussions *see, e.g.*, Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405 (1982); Note, *Miranda Revisited: Broadening The Right To Counsel During Custodial Interrogation - Commonwealth v. Sherman*, 18 SUFFOLK U.L. Rev. 99 (1984); Note, *Reinforcing Miranda - Restricting Interrogation After a Request For Counsel*, 48 BROOKLYN L. REV. 593 (1982); Note, *Edwards v. Arizona: The Burger Court Breathes New Life Into Miranda*, 69 CALIF. L. REV. 1734 (1981).

18. 384 U.S. at 441-42.

19. *Id.* at 444.

20. *Id.* at 442. *See, e.g.*, Sonenshein, *Miranda and the Burger Court: Trends and Countertrends*, 13 LOY. U. CHI. L.J. 405, 410 (1982).

21. 384 U.S. 719 (1966).

22. *Id.* at 729.

23. 384 U.S. at 466. The Court stressed that "the presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [fifth amendment] privilege" in supporting the new warnings.

sixth amendment's right to counsel. Since the right to counsel protects the fifth amendment privilege against self-incrimination during custodial interrogation, the courts have subsequently relied on the fifth amendment when such violations are claimed.[24] *Escobedo* has not been overruled, but is considered outdated and limited to its facts.[25]

In developing sixth amendment jurisprudence, the decisions prior to and following *Miranda* have established certain "critical stages"[26] in determining when the sixth amendment's right to counsel attaches.[27] As the Court stated in *Kirby v. Illinois*,[28] a benchmark case regarding the attachment of the sixth amendment's right to counsel, "[I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have initiated . . . ."[29] The Court thus concluded that if an individual has been arrested, but no "formal charge, preliminary hearing, indictment, information, or arraignment" has occurred, he cannot claim that he has been denied his sixth amendment right to counsel.[30] Of course, *Miranda* held that police custodial interrogations are to be considered a critical stage. But, as stated earlier, a violation during this period violates the accused's fifth amendment privilege against self-incrimination, unless his sixth amendment right to counsel has attached.[31] Thus, an overlapping occurs.

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24. This is true only in those cases in which the sixth amendment right to counsel has not attached. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Kirby v. Illinois, 406 U.S. 682 (1972) (Stewart, J., plurality); Massiah v. United States, 377 U.S. 201 (1964).

25. *See* Moore v. Illinois, 434 U.S. 220, 232-33 (1977) (Rehnquist, J., concurring); *see also* Kirby v. Illinois, 406 U.S. 682, 689 (1972) (Stewart, J., plurality).

26. The "critical stage" doctrine was first defined in Powell v. Alabama, 287 U.S. 45 (1932), where the Court declared that a person accused of a crime "requires the guiding hand of counsel at every step in the proceedings against him." *Id.* at 69. The Court in *Kirby* refined the critical stage approach to include only those periods that came after criminal prosecution had been initiated—only then would the sixth amendment attach. 406 U.S. 689-90. Cases and situations where the sixth amendment is deemed to attach include: Moore v. Illinois, 434 U.S. 220 (1977); Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing); United States v. Wade, 388 U.S. 218 (1967) (lineup during initial appearance); In re Gualt, 387 U.S. 1 (1967) (trial where loss of liberty is involved); Douglas v. California, 372 U.S. 353 (1963) (appeals). Circumstances in which the Court has held the stages not to be critical include: United States v. Ash, 413 U.S. 300 (1973) (photo identification); Gilbert v. California, 388 U.S. 263 (1967) (handwriting samples); Schmerber v. California, 384 U.S. 757 (1966) (blood samples).

27. Attachment is automatic, not requiring the accused to first ask for counsel in order for his sixth amendment right to counsel to attach. McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam).

28. 406 U.S. 682 (1972) (Stewart, J., plurality).

29. *Id.* at 688. This would be consistent with the language in *Miranda* that *Escobedo* was primarily a fifth amendment decision, because counsel had not yet attached, as Justice Stewart explained in *Kirby*. *Id.* at 689.

30. *Id.* at 689. Supreme Court cases supporting the attachment criteria set forth in *Kirby* include: United States v. Gouveia, 467 U.S. 180 (1984); Estelle v. Smith, 451 U.S. 454 (1981); Moore v. Illinois, 434 U.S. 220 (1977); Brewer v. Williams, 430 U.S. 387 (1977).

31. *See supra* notes 23-24 and accompanying text.

In *U.S. v. Guido*,[32] after the defendant was arrested, but before any formal charges were made, he made a statement which he later claimed was obtained by illegal interrogation. The Court of Appeals for the Second Circuit concluded that the defendant's sixth amendment right to counsel had not attached since he had not been formally charged and held that the "incriminating statement, if protected at all, is protected by the Fifth Amendment rather than the Sixth."[33]

Although it has frequently held that the sixth amendment right has been violated,[34] the Mississippi Supreme Court has rarely identified the stages it deems critical. Consequently, the court has failed to clearly define when the sixth amendment right to counsel attaches in Mississippi.

In *Pendergraft v. State*,[35] the trial court judge instructed an attorney not to make contact with his client during a two-hour recess immediately following the defendant's testimony on her own behalf. The supreme court held that the two-hour preclusion constituted reversible error in that "[t]his particular phase of the trial is . . . critical . . . [to the accused],"[36] and that the right to counsel cannot be denied at any time during the course of a trial.[37] That same year, in similar circumstances, even a fifteen-minute preclusion of access to counsel violated the defendant's sixth amendment right to counsel and constituted reversible error.[38]

The Mississippi Supreme Court, in a 1984 decision, *Cannaday v. State*,[39] quoted language in *Kirby v. Illinois*[40] in determining when the right to counsel attached. The court held that since the defendant's counsel had been appointed and criminal proceedings had begun, by way of a preliminary hearing, the defendant's "response to [a] question was made at a time when the Sixth Amendment right to counsel had attached."[41] Therefore her sixth amendment rights were violated because her attorney was not present at the time.[42]

The court in *Cannaday*, although using as a guide the critical

32. 704 F.2d 675 (2d Cir. 1983).

33. *Id.* at 676.

34. *See, e.g.*, Cannaday v. State, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985); Tate v. State, 192 So. 2d 923 (Miss. 1966); Pendergraft v. State, 191 So. 2d 830 (Miss. 1966). *See also* Jordan v. Watkins, 681 F.2d 1067 (5th Cir. 1982).

35. 191 So. 2d 30 (Miss. 1966).

36. *Id.* at 833.

37. *Id.*

38. Tate v. State, 192 So. 2d 923 (Miss. 1966).

39. 455 So. 2d 713 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985).

40. 406 U.S. 682 (1972).

41. 455 So. 2d at 723.

42. *Id.*

stage analysis set forth in *Kirby*,[43] indicated that the sixth amendment right to counsel in Mississippi would attach at an *earlier* time.[44] The *Kirby* plurality decision held that the right attached when adversarial criminal proceedings commenced "by way of formal charge, preliminary hearing, indictment, information or arraignment."[45] It is this point "that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable."[46]

Notwithstanding the critical periods enunciated in *Kirby*, MISS. CODE ANN. § 99-1-7 (1972) states that "[a] prosecution may be commenced . . . by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit."[47] Therefore, this statutory provision indicates that in Mississippi an individual's sixth amendment right to counsel attaches at an earlier period than those pronounced by the Supreme Court in *Kirby*. Of course, it is fundamental in constitutional law that the Supreme Court's guidelines are a constitutional minimum and each state is free to require stricter standards or to broaden an individual's rights, provided they do not run afoul of a constitutional provision.[48]

This statute, § 99-1-7, is derived verbatim from MISS. CODE ANN. § 1415 (1906)[49] which was upheld in *State v. Hughes*.[50] In that case, the defendant was charged with embezzlement in Attala County. The charge was made by means of an affidavit[51] to the justice of the peace who issued a warrant pursuant to the affidavit. The defendant was arrested, and the justice of the peace, after a committing trial, bound him over for indictment. The grand jury refused to indict, but the defendant was subsequently indicted in Hinds County for the same offense. He claimed that Hinds County lacked jurisdiction because proceedings had already commenced and failed in Attala County. The supreme court agreed and held that the code section did indeed determine when a prosecution in Mississippi commenced.[52] Unfortunately, the court did not single out which specific phrase(s) of the code it relied upon, but

43. *See infra* text accompanying note 45.

44. 455 So. 2d at 722.

45. 406 U.S. at 689.

46. *Id.* at 690.

47. MISS. CODE ANN. § 99-1-7 (1972 and Supp. 1985).

48. For a discussion of state expansion of an individual's constitutional rights, see generally W. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); A. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

49. MISS. CODE ANN. § 1415 (1906).

50. 96 Miss. 581, 51 So. 464 (1910).

51. In this case, the complaining party swore by means of an affidavit that Hughes had embezzeled money. This affidavit was then presented to the justice of the peace who, after study, decided to issue an arrest warrant. *Id.* at 582, 51 So. at 464.

52. *Id.* at 583, 51 So. at 465.

instead relied on the aggregate. Thus, a literal interpretation of the statute would indicate that if an affidavit is filed or an arrest warrant is issued, as in *Hughes*, this is enough to commence a prosecution in Mississippi, and at this point the sixth amendment right to counsel would attach. This is consistent with the language in *Kirby*, which declares that the right to counsel attaches when criminal prosecutions begin and is not inconsistent with the critical periods it sets forth for attachment.[53] Since these periods defined by the Supreme Court are minimum standards, they can be narrowed by a state to conform with its legislative ideals for the further protection of an individual's rights in a criminal proceeding.[54]

The Mississippi Supreme Court in *Hughes* did not specifically reveal which phrase or phrases of the statute it relied upon. However, the court in *Powell v. State*[55] held that "[a] *criminal prosecution* is not begun by the affidavit for . . . a search warrant . . . but [that] an additional affidavit [prior to the search warrant] . . . must be made or obtained charging the person with the particular crime . . . ."[56] In this case, if the affidavit *charging* the defendant had been made to the justice of the peace prior to his ordering a search warrant, criminal proceedings would have begun and the search warrant would have been valid.[57]

Other states have held that a prosecution can commence before the critical stages announced in *Kirby*, thereby allowing the sixth amendment right to counsel to attach at an earlier time. In *State v. McCorgary*,[58] the accused was arrested pursuant to a complaint and warrant and was incarcerated.[59] Citing a Kansas statute as supporting authority,[60] the court held that the issuance of the complaint and warrant commenced formal criminal proceedings. The court, notwithstanding *Kirby*, held that the sixth amendment right to counsel had attached.[61]

53. *See supra* text accompanying note 46.

54. *See supra* note 48. *See also* Commonwealth v. Richman, 458 Pa. 167, 169, 320 A.2d 351, 353 (1974).

55. 196 Miss. 331, 17 So. 2d 524 (1944).

56. *Id.* at 333-34, 17 So. 2d at 524-25 (emphasis added).

57. *Id.* Here, a mere affidavit charging an individual with a crime resulting in either the issuance of an arrest warrant or a search warrant would be sufficient to constitute a criminal prosecution in Mississippi. *Id.*

58. 218 Kan. 358, 543 P.2d 952 (1975).

59. The accused, McCorgary, was incarcerated with a police informant, who was selected by police to gather incriminating information from McCorgary. The court held that "[u]nder these circumstances, the testimony of the police informer as to incriminating statements made by the defendant while in jail pending charges is not admissible at the defendant's trial." 218 Kan. 358, 363, 543 P.2d 952, 958 (1975).

60. KAN. STAT. ANN. § 22-4503 (1974) states: "A defendant charged by the state of Kansas in a *complaint*, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceeding against him . . . ." (quoted in *McCorgary*, 218 Kan. at 361, 543 P.2d at 956 (emphasis added)).

61. 218 Kan. at 359-60, 543 P.2d at 956. For additional cases regarding earlier periods during which an accused's sixth amendment right to counsel attaches, *see* United States ex rel. Robinson v. Zelker, 468 F.2d 159 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973). *But see* United States v. Duvall, 537 F.2d 15 (2d Cir. 1976).

Another decision subsequent to *Kirby* holding that attachment occurred prior to the critical periods asserted there is *Commonwealth v. Richman.*[62] In *Richman*, a rape suspect was arrested without a warrant, taken to police headquarters, and later identified as the assailant in a six-man lineup. This occurred before any formal charge or preliminary arraignment was given. Although *Kirby* held that the sixth amendment right to counsel did not extend to pretrial identification procedures occurring before prosecution had commenced, the Supreme Court of Pennsylvania declared that "*Kirby* does not establish an all inclusive rule; rather, the line to be drawn depends upon the procedure employed by each state."[63] Furthermore, the court held that the right to counsel attached in lineup situations occurring after arrest, and before the preliminary arraignment.[64]

Mississippi cases reflect that when an individual is arrested and identified in a lineup before being formally charged, the supreme court will hold that criminal proceedings have not commenced and that the sixth amendment right to counsel has not been violated.[65] This is inconsistent with *Kirby* and § 99-1-7.[66] *Kirby* states that the sixth amendment right to counsel attaches when criminal proceedings have begun and that this commences the criminal prosecution.[67] The *Mississippi Code* states that prosecutions may commence in Mississippi, *inter alia*, upon the issuance of an arrest warrant.[68] Consequently, if an individual is arrested pursuant to a warrant, his sixth amendment right to counsel has attached because prosecution and criminal proceedings have commenced against him.[69] Therefore, if the defendants in the aforementioned Mississippi lineup cases were arrested pursuant to a warrant, which the cases do not reflect, the statutory provision and its judicial support are at variance with supreme court precedent regarding pre-trial lineups.[70] While the statute expands the accused's rights, the court simultanteously restricts them. Unfortunately, the only case to address the two within the same context, *Cannaday v.*

62. 320 A.2d 351 (Pa. 1974).

63. *Id.* at 353.

64. *Id. See also* United States ex rel. Burton v. Cuyler, 439 F. Supp. 1173 (E.D. Pa. 1977).

65. *See* York v. State, 413 So. 2d 1372 (Miss. 1982); Bankston v. State, 391 So. 2d 1005 (Miss. 1980); Scott v. State, 359 So. 2d 1355 (Miss. 1978); Clubb v. State, 350 So. 2d 693 (Miss. 1977), *cert. denied*, 434 U.S. 1068 (1978); Fells v. State, 345 So. 2d 618 (Miss. 1977).

66. *See supra* text accompanying note 47.

67. 406 U.S. at 689-90.

68. MISS. CODE ANN. § 99-1-7 (1972 and Supp. 1985).

69. *See supra* text accompanying note 55.

70. *See supra* notes 47-57 and accompanying text (discussing cases which have interpreted § 99-1-7).

State,[71] involved a custodial police interrogation rather than a lineup.

Since both lineup and custodial interrogation proceedings yield evidence that can be used against the accused, one might infer that the lineup precedent would control the custodial interrogation.[72] This would seem plausible, but for the reference in *Cannaday* to § 99-1-7, a statute that the court had heretofore let lie dormant for over sixty years.[73] If, however, the court had initially incorporated § 99-1-7 into its lineup cases, a different result would have ensued in at least some decisions.[74] Nonetheless, since the court has revived the statute, it will now have to confront the statute in both lineup and custodial police interrogation cases. The court must either vary the statute's meaning in lineup and custodial interrogation contexts, which will be very difficult due to its explicit content, or adjust future decisions to comply with the statutory command.

If, in Mississippi, the sixth amendment right to counsel attaches at an earlier stage than that delineated in *Kirby*, what effect will this have if attachment has taken place prior to custodial interrogation? It appears that an individual will be afforded both the fifth amendment privilege against self incrimination and the sixth amendment right to counsel. Yet the courts refrain from judicially scrambling the two amendments within the same proceeding and will determine at the outset which will be applicable to the case at bar.[75] This is why it is imperative to determine when the sixth amendment right to counsel attaches in a given state. For example, before an accused is taken into custody and during custodial interrogation, he is protected by his fifth amendment rights.[76] If he is questioned by some illegal method (usually coercion) before his sixth amendment right to counsel has attached, the court will conclude that his fifth amendment privilege against self-incrimination has been violated.[77] Conversely, if, after his right to counsel has attached, the accused is interrogated or entrapped

71. 455 So. 2d 713 (Miss. 1984).

72. *See generally* Julian, *Constitutional Law - Fifth and Sixth Amendments - "Definitions of Custodial Interrogation" Under Miranda v. Arizona and of "Deliberate Elicitation" Under Massiah v. United States*, 56 TUL. L. REV. 399 (1981).

73. One of the last cases to use the present code § 99-1-7 was Atkinson v. State, 132 Miss. 377, 96 So. 310 (1923) (then section 1406, Code of 1906 (Hemingway's Code, § 1161)).

74. Depending upon the circumstances, if the sixth amendment right to counsel had attached, the results could have been different since the sixth amendment encompasses a broader range of protection than does the fifth amendment. *See, e.g.*, Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974).

75. *See, e.g.*, United States v. Henry, 447 U.S. 264 (1980); Brewer v. Williams, 430 U.S. 387 (1977); Kirby v. Illinois, 406 U.S. 682 (1972); Massiah v. United States, 377 U.S. 201 (1964); Cannaday v. State, 455 So. 2d 713 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985).

76. *See* Escobedo v. Illinois, 378 U.S. 478, 490 n.14 (1964); Miranda v. Arizona, 384 U.S. 436, 477 (1966).

77. 384 U.S. at 446.

and yields incriminating information, this will be held to be a violation of his sixth amendment rights, even though incriminating statements were solicited during the interrogation process.[78]

Regardless of whether the suspect is protected by the fifth or sixth amendment, he may still waive his fifth amendment privilege against self-incrimination, or if right to counsel has attached, his sixth amendment right to counsel.[79] For a waiver to be effective however, it "requires not merely comprehension,"[80] but "an intentional relinquishment or abandonment of a known right or privilege . . . [and] depend[s], in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[81] There is, therefore, "a heavy burden rest[ing] on the government to demonstrate that the defendant knowingly and intelligently waived his [fifth amendment] privilege against self-incrimination and his [sixth amendment] right to retained or appointed counsel."[82] *Miranda* reiterated these same principles regarding fifth amendment custodial interrogation procedures and stressed that the waiver must be voluntary and not coerced.[83]

Given the above criteria for an effective waiver, does this mean that the standards for a waiver of fifth amendment rights are identical to the standards for a waiver of sixth amendment rights? The courts are divided on this issue,[84] but a comparison of effective waivers under each amendment proves helpful.

A. Fifth Amendment Waiver

Once an accused is confronted with custodial interrogation, *Miranda* requires that he be informed of certain rights before he can effectively waive them.[85] After these rights have been read

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78. *See* Brewer v. Williams, 430 U.S. 387, 397-98 (1976).

79. *See generally* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does It Matter?* 67 GEO. L.J. 1 (1978). Professor Kamisar addresses whether the waiver standard for the sixth amendment entails stricter standards than that of the fifth amendment. In essence, he concludes that since the fifth amendment standards were based upon that of the sixth, the two are equal. *Id.* at 28-31.

80. 430 U.S. at 404.

81. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

82. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966) (quoting Escobedo v. Illinios, 378 U.S 478, 490 n.14 (1964)); Neal v. State, 451 So. 2d 743 (Miss. 1984), *cert. denied*, 105 S. Ct. 607 (1984), Depreo v. State, 407 So. 2d 102 (Miss. 1981).

83. 384 U.S. at 476.

84. For cases that hold that the sixth amendment requires a higher standard for waiver see United States v. Clements, 713 F.2d 1030 (4th Cir. 1983), *cert. denied*, 105 S. Ct. 132 (1984); United States v. Barone, 467 F.2d 247 (2d Cir. 1972). Cases which hold that *Miranda* and *Massiah* waiver standards are the same include United States v. Karr, 742 F.2d 493 (9th Cir. 1984); Fields v. Wyrich, 706 F.2d 879 (8th Cir. 1983), *cert. denied*, 464 U.S. 1020 (1983). For an in-depth discussion of this issue see the dissenting opinion of Judge Simpson in United States v. Brown, 569 F.2d 236 (5th Cir. 1978).

85. *See supra* note 2.

to him by law enforcement officers, he will be asked if he understands them and, if so, whether he wishes to waive them.[86] If the accused indicates that he understands them and wishes to talk, he will be deemed to have voluntarily, knowingly and intelligently waived his rights.[87]

The next fact situation which frequently arises is somewhat different. This time the accused, confronted with custodial interrogation, states that he wants to remain silent – that he does not want to talk to anyone. The Supreme Court held in *Michigan v. Mosley*[88] that once an accused desires to remain silent *Miranda* requires that his request be "scrupulously honored" by law enforcement officials. The Court did not define "scrupulously honored," but did state that it did not mean "a blanket prohibition against the taking of voluntary statements or a *permanent immunity* from further interrogation, regardless of the circumstances."[89] The question remains: How long and under what circumstances would the "scrupulously honored" test be deemed satisfied before police could resume questioning or *approach* the accused.

The third instance arises when the accused, in a custodial interrogation, states that he wants an attorney – that he will not answer any questions until one is provided for him. The Supreme Court in *Edwards v. Arizona*[90] held in this situation that "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."[91]

Therefore, once counsel is requested in a *Miranda* setting, a waiver occurs only when the accused comes forward and initiates contact. Only then will the waiver be considered knowingly and intelligently made.[92] The accused may not in this instance, unlike the previous two, be approached by law enforcement officials and asked whether he desires to waive his rights.[93]

In all three fact situations above, once the accused has determined that he wishes to waive his rights, the court will then exam-

86. *See supra* text accompanying notes 4-5.

87. The court will also look to the circumstances surrounding the waiver to determine whether the waiver is valid. *See supra* text accompanying notes 79-83.

88. 423 U.S. 96 (1975).

89. *Id.* at 102.

90. 451 U.S. 477 (1981).

91. *Id.* at 484-85 (emphasis added).

92. *Id.*

93. *See supra* text accompanying notes 85-90.

ine the totality of the circumstances surrounding the waiver to determine whether it was voluntarily, knowingly, and intelligently made.[94] If the circumstances reflect that the accused voluntarily waived his rights and that he understood the effect of his action, there will be an effective waiver.[95] If not, the statements made by the accused will be suppressed.[96]

Where the accused has either requested to remain silent or has asserted his right to counsel, or both, is it necessary for him to be read his *Miranda* rights again once he decides to waive them? The courts are undecided on this issue, but the safest measure would be for law enforcement officials to reread the *Miranda* rights.[97]

The Supreme Court of Mississippi adheres to the standards set forth above to secure an effective waiver of the fifth amendment privilege against self-incrimination.[98] The court has held that for a waiver to be valid the totality of the circumstances surrounding the waiver must be proved by the prosecution beyond a reasonable doubt.[99]

B. Sixth Amendment Waiver

Once the sixth amendment right to counsel has attached,[100] the defendant may only waive this right if he *initiates* contact with law enforcement officers.[101] This is true even though counsel has not yet been appointed.[102] This test seems to be identical to the fact situation in a fifth amendment *Miranda* waiver where the accused has asserted his right to counsel.[103] But here, if the defendant has decided to waive his right to counsel, must he specifically state that he desires to waive this right or would a reading of the *Miranda* warnings and a subsequent waiver be sufficient? This question presents the issue of whether the sixth amendment requires a higher standard of waiver than that of the fifth amendment. The courts are divided.[104]

In Mississippi, because a waiver of both an accused's fifth and

94. *See supra* text accompanying notes 79-83.

95. Oregon v. Bradshaw, 462 U.S. 1039 (1983).

96. Edwards v. Arizona, 451 U.S. 477 (1981).

97. *See* United States v. Brady, 421 F.2d 681 (2d Cir. 1970); Brown v. State, 6 Md. App. 564, 252 A.2d 272 (1969).

98. *See supra* text accompanying notes 79-83.

99. Neal v. State, 451 So. 2d 743 (Miss. 1984), *cert. denied*, 105 S. Ct. 607 (1984); *see also* Depreo v. State, 407 So. 2d 102 (Miss. 1981).

100. *See supra* note 27.

101. Brewer v. Williams, 430 U.S. 387, 413 (1977). *See also infra* text accompanying notes 211-14.

102. McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam).

103. *See supra* text accompanying notes 90-96.

104. *See supra* note 84.

sixth amendment rights must be proved by the prosecution beyond a reasonable doubt,[105] the standards for an effective waiver appear to be the same. But the supreme court has not addressed whether a rereading of the *Miranda* warnings would suffice as a waiver of an accused's sixth amendment right to counsel.

INSTANT CASE

The majority opinion delivered by the Mississippi Supreme Court recognized that the "prime issue" was whether the defendant made a knowing and intelligent waiver of his right to counsel before he made his confession.[106] The majority discussed the facts in a *Miranda* style, presumably because a custodial police interrogation was involved, but never stated that the decision would be based on the fifth amendment privilege against self-incrimination rather than the sixth amendment's right to counsel.[107]

Unexpectedly, the court then made reference to the sixth amendment when it stated that Yates "contends on appeal that the fact that he was not notified of the presence of counsel deprived him of his Sixth Amendment right to counsel."[108] The court should have stopped here and explained the difference between the two amendments and when each applied, and should then have identified the one applicable in the instant case. The dissenting opinion did just that,[109] using the *Kirby* language in *Cannaday* to conclude that the sixth amendment had not yet attached in this case. In contrast, the majority opinion proceeded along fifth amendment lines, although it referred to a sixth amendment case.[110]

The court then briefly discussed three lines of cases that dealt with denial of counsel by law enforcement officers and the impact this denial has when an accused chooses to waive his rights without knowing of the attorney's presence or that one had been obtained for him. Each of these cases was considered using a fifth

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105. Neal v. State, 451 So. 2d 743, 757 (Miss. 1984), *cert. denied*, 105 S. Ct. 607 (1984).

106. 467 So. 2d at 884. Here, the court does not state whether the waiver involves Yates's fifth amendment right to counsel or sixth. It is possible to waive the fifth amendment right to the assistance of counsel without waiving the sixth amendment right to counsel. *See* United States v. Shaw, 701 F.2d 367, 380 (5th Cir. 1983), *reh'g denied*, 714 F.2d 544 (5th Cir. 1983).

107. *See supra* note 106.

108. 467 So. 2d at 885. The court here is applying fifth amendment language and case law but claims the issue may also involve the sixth amendment. This ambiguity was dealt with in the dissenting opinion of Justice Sullivan.

109. *Id.* 888-89.

110. The majority refers to Brewer v. Williams, 430 U.S. 387 (1977), in demonstrating that an effective waiver can occur out of the presence of counsel. Although *Brewer* is a sixth amendment case, its mention of a valid waiver applies both to the fifth and sixth amendments. Nonetheless, the court should have used a fifth amendment case to support this proposition. *See, e.g.*, Weed v. State, 406 So. 2d 24 (Miss. 1981); Smith v. State, 229 So. 2d 551 (Miss. 1969).

amendment analysis.[111] From these cases the court selected the one which it claimed to be applicable in Mississippi. The court held that when the attorney was denied access to Yates, even though Yates had no knowledge that one had been hired to represent him, this rendered his waiver invalid because it was not knowingly and voluntarily made and tainted his confession.[112] This holding was based upon *Commonwealth v. McKenna,*[113] which set forth the proposition that when police are informed of the presence of the accused's attorney, they must notify the accused of such before his waiver can be considered knowing and voluntary.[114] The court rejected the *People v. Hobson*[115] rule, which requires that when an attorney enters the proceedings, there cannot be a valid waiver of the right to counsel unless the attorney is present.[116] The court also discarded the rule in *State v. Burbine,*[117] holding that there can be a valid waiver even though the accused is not informed of the presence of counsel.[118]

By adopting the *McKenna* rule, the court takes a middle position when compared to *Hobson* and *Burbine*. Simply stated, even though the accused must be informed that an attorney has requested to see him, this does not require the attorney's presence if the accused desires to waive his right to counsel. Unfortunately, the court neither gave its reasoning for adopting the new rule nor any insight into how it would be applied in the context of police custodial interrogations.

Having concluded that the waiver was not knowingly and voluntarily made, and that therefore Yates's confession was tainted, the court addressed the issue of whether a subsequent *Miranda* warning coupled with Yates's signing of a transcript of his confession, after he had consulted with his attorney, purged the confession of the primary taint.[119] The court, taking into consideration the total circumstances of the case, determined that the taint was purged, thus rendering the confession admissible.[120]

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111. The court, however, failed to note that People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976), is a sixth amendment case since the accused's sixth amendment right to counsel had attached. But note that *Hobson* is generally applicable to both fifth and sixth amendment situations. *See generally* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 656-58 (1980).

112. 467 So. 2d at 886.

113. 355 Mass. 313, 244 N.E.2d 560 (1969).

114. *Id.* at 324, 244 N.E.2d at 566.

115. 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

116. *Id.*

117. 451 A.2d 22 (R.I. 1982), *rev'd sub nom.* Burbine v. Moran, 753 F.2d 178 (1st. Cir. 1985), rev'd, 106 S. Ct. 1135 (1986).

118. *Id.*

119. For the definition of "taint" and the methods of purging it, *see infra* note 147 and accompanying text.

120. 467 So. 2d at 886-87.

The dissent strongly objected to the fact that the majority had not (1) distinguished between the fifth and sixth amendments, (2) justified the reasoning behind the finding of the taint, (3) set forth any new rule for law enforcement officers to follow regarding an attorney's request to see his client, or (4) sufficiently explained why the primary taint had been purged in the subsequent signing of the confession.[121]

ANALYSIS

While the majority recognized the case in the context of both fifth and sixth amendment rights, its decision is premised solely on fifth amendment grounds.[122] The dissent, however, initially thought it necessary to address which amendment it considered to be applicable and concluded that the fifth was at issue.[123] Needless to say, it seems wasteful for the court to single out one amendment over the other in a lengthy discussion if the result would always be the same. This is true especially since an effective waiver could nullify both fifth and sixth amendment rights,[124] making it clear that after Yates had signed his confession transcript after meeting with his attorney and again being given his *Miranda* rights, any taint that the initial waiver had incurred was removed.

The question is, then, why do courts put so much emphasis on determining which constitutional amendment applies? The answer is that since two distinct amendments have different functions, each has its own judicial precedent. If the court determines that the fifth amendment privilege against self-incrimination is implicated, it will derive its rationale from the *Miranda* line of cases.[125] If the sixth amendment's right to counsel has attached, the court should review the case in light of sixth amendment *Massiah* precedent.[126] This is necessary to avoid any conflict between the two amendments when the court is arriving at a decision. This not only saves time, but also prevents the intermingling of the two, thus avoiding confusion while establishing that the fifth and sixth amendments are distinct and should be kept separate.[127]

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121. *Id.* at 888-92.

122. *See supra* note 110 and accompanying text.

123. 467 So. 2d at 888-89.

124. *See supra* note 79.

125. *See* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter?* 67 GEO L.J. 1 (1978). Professor Kamisar, in an excellent discussion, distinguishes sixth amendment cases from fifth amendment cases regarding police custodial situations. He refers to fifth amendment precedent as deriving from *Miranda* while sixth amendment precedent is a product of *Massiah*. *Id.* at 3-24.

126. *Id.*

127. *See, e.g.*, United States v. Shaw, 701 F.2d 367, 380 (5th Cir. 1983), *reh'g denied*, 714 F.2d 544 (5th Cir. 1983); Cannaday v. State, 455 So. 2d 713, 722 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985) (where the courts indicate why the two should not be intermingled).

In order to determine whether the outcome would demand different results viewed in light of the sixth amendment, it will be necessary to (a) analyze the opinion along its present fifth amendment lines; (b) consider when the sixth amendment attaches in Mississippi, and whether it has attached in this case; (c) analyze the opinion along sixth amendment lines; and (d) compare the results reached by each amendment to determine if the results differ, and, if so, in what respects.

A. Fifth Amendment Outcome

The fifth amendment requires that after an individual is taken into custody, but before he is questioned, he must be informed of his *Miranda* rights.[128] If not, the statements cannot be used against him, since they are solicited in violation of his fifth amendment privilege against self-incrimination.[129]

Jeff Yates was arrested and immediately informed of his *Miranda* rights. He was not questioned until he was taken upstairs in the jail. His *Miranda* rights were read to him again, and he acknowledged that he understood them. Yates could have ended the interrogation at this point if he had wished by simply requesting an attorney before he would entertain any questions.[130] If questioning continued, any statement would be considered the "product of compulsion" or coercion, which the fifth amendment protects against.[131] Instead, he decided that he wanted to talk and signed a waiver of rights form[132] and began to incriminate himself by responding to questioning.

The officers in the interrogation room all testified that Yates made no request for counsel, that he understood his rights and wished to waive them, and that he was not promised anything nor were any threats made against him.[133] This conformed precisely to *Miranda* standards for an effective waiver.[134] But this seemingly perfect rendition of *Miranda* was not without fault. Because Yates's attorney was denied access to him, the majority found his waiver to be outside the knowing and voluntary standard, and his confession tainted as a result.[135] The court chose to follow the

128. *See supra* note 2.

129. 384 U.S. at 467.

130. *Id.* at 445. Chief Justice Warren made it clear that "if the individual . . . indicates in any manner that he does not wish to be interrogated, the police may not question him." *Id.*

131. *Id.* at 474.

132. *See supra* note 4.

133. Abstract of Record, July 19, 1982, at 5.

134. *See supra* notes 79-84 and accompanying text.

135. 467 So. 2d at 886. When evidence is tainted, it is said to be fruit of a poisonous tree. Basically, "the rule states that evidence derived from information acquired by police officials through unlawful means is not admissible in a criminal prosecution." C. WHITEBREAD, CRIMINAL PROCEDURE 30 (1980). *See also* Wong Sun v. United States, 371 U.S. 471 (1963).

Commonwealth v. McKenna[136] line of cases requiring that when police are "notified of the presence, either by phone or in person, of the defendant's attorney, the obligation [exists for them] to inform the defendant of the fact before the defendant's waiver of right to counsel can be considered knowing and voluntary."[137]

The court refused to adopt the more restrictive rule of *People v. Hobson*,[138] requiring the presence of the attorney for the accused before the waiver is considered valid.[139] The rule in *State v. Burbine*[140] would have avoided the entire issue of taint and the subsequent purging of the taint[141] if it had been followed. Its simple formula is that there can be an effective waiver even though the accused is not informed that his counsel is present.[142]Although the court gave no reason, the most probable rationale for avoiding the *Burbine* approach would be the language in *Miranda*, which established that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will . . . show that the defendant did not voluntarily waive his privilege."[143] Although the interrogating officers had no knowledge that Yates's attorney was present, the sheriff did, and he was among the interrogators.[144]

Of the three, the *McKenna* rationale is the most practical because it provides the accused protection if he is not informed of his attorney's presence, but yet is not so rigid as to require the physical presence of the attorney if the accused wishes to waive his right to the assistance of counsel.

The court concluded that the confession was tainted and would be inadmissible unless subsequent events occurred to dissipate the taint or weaken it to a point where it would no longer be considered "fruit of a poisonous tree."[145] If this taint or primary illegality is dissipated, the confession will be admissible.[146] Factors to be considered are:

> [1] the break in time . . . between the [two] confessions; [2] whether [the] defendant was given renewed *Miranda* warnings . . . [3] [w]hen the timing and conditions of the confes-

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136. 355 Mass. 313, 244 N.E.2d 560 (1969).

137. 467 So. 2d at 885, (citing Commonwealth v. McKenna, 355 Mass. 313, 324, 244 N.E.2d 560, 566 (1969)).

138. 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

139. The court may have refused to adopt this rule since the *Hobson* decision was premised on sixth amendment grounds because the defendant's right to counsel had attached. *See supra* note 111.

140. 451 A.2d 22 (R.I. 1982), *rev'd sub nom.* Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).

141. For methods of purging the primary taint, *see infra* text accompanying note 147.

142. 451 A.2d at 29-30.

143. 384 U.S. at 476.

144. 467 So. 2d at 888.

145. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

146. *See generally* C. WHITEBREAD, CRIMINAL PROCEDURE 30-37 (1980).

sion are "so close that" . . . the facts of one control the character of the other . . . [4] [t]hat the defendant remained in custody and was denied access to counsel . . . [5] the persistence of the conditions that caused the initial confession to be involuntary during later questioning . . . [and][6] [t]hat [the] defendant initiated contact with the police prior to making the later confessions . . . .[147]

The majority, although not expressing that they had taken these factors into account, examined two of them while basing their opinion on the "totality of the circumstances." [148] First, they considered Yates's opportunity to consult with his attorney, thereby altering the condition from the first confession. Second, the court considered the fact that Yates again received his *Miranda* rights before signing his confession. Together, these were enough in the majority's mind to purge the confession of its primary taint.[149] This seems to be consistent with the Supreme Court decision in *Oregon v. Elstad.*[150] In that case the accused made an incriminating statement before his *Miranda* rights were given. When his rights were read to him for the first time, an hour later, he chose to waive them and incriminated himself. At trial, he sought to suppress his confession claiming that it was tainted by his earlier pre-*Miranda* statement. The Supreme Court held that since the second statement was voluntarily made and not the product of coercion, that "[n]o . . . purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver." [151]

Elstad is similar, but clearly distinguishable from the present case. Jeff Yates's confession was tainted because his counsel was denied access to him. This rendered *his* waiver invalid. The court held this taint was purged after he had conferred with counsel, been informed of his *Miranda* rights again, and subsequently signed a transcribed confession. This was not a new confession as in *Elstad.* It was a product of his tainted confession. Yates did not sign another waiver form and was even told that his confession would be used against him regardless. This was clearly coercive conduct which was not present in *Elstad*, where the defendant voluntarily signed away his rights in noncoercive surroundings. If anything, *Elstad* supports the dissenting opinion in the present case in that Yates did not knowingly and voluntarily waive his rights.[152]

The dissent launched a vigorous attack of significant merit based

147. Holleman v. Duckworth, 700 F.2d 391, 396 (1983). *See also* Brown v. Illinois, 422 U.S. 590, 604 (1975).
148. 467 So. 2d at 886-87.
149. *Id.*
150. 105 S. Ct. 1285 (1985).
151. *Id.* at 1298.
152. *See infra* text accompanying notes 153-56.

on other factors not addressed by the majority. First, the dissent considered significant the relatively short span of time between the first confession and the signing of the transcript. Second, the dissent discussed the fact that Yates was not asked to go through another interrogation, but was simply handed a transcript to be signed. The dissent considered these factors questionable law enforcement conduct in that Yates might have thought twice before incriminating himself again if faced with another interrogation.[153] Signing a confession could be considered a mere formality when faced with a stack of incriminating documents, especially when he was informed that they were going to be used against him regardless of whether they were signed. Finally, Yates had never been out of police custody and therefore was never afforded the opportunity to come forward and confess of his own volition.[154] The key under *Elstad* is whether the second confession is the product of a free will, taking into consideration the facts of each case.[155] Whether the majority was balancing the factors is not known, but it appears that if they were, the weight of the scales would have been in favor of Yates, especially when voluntariness of a confession in Mississippi must be proved beyond a reasonable doubt.[156]

This opinion, evolving from and primarily decided upon *Miranda* and fifth amendment grounds, resulted in a very controversial 5-4 decision, but set precedent regarding fifth amendment rights in Mississippi. The only question that remains is whether the controversial decision would have produced a similar result if the court had found that Yates's sixth amendment rights had attached.

B. Attachment of the Sixth Amendment in Mississippi

In *Cannaday v. State*,[157] the Mississippi Supreme Court was confronted with the question of when the sixth amendment right to counsel attached in Mississippi. The court first looked to the language in *Kirby v. Illinois*,[158] which held that the right to counsel attached when the adversary system began or commenced the prosecution[159] "by way of formal charge, preliminary hearing, indictment, information or arraignment."[160] The court then addressed the issue of when a prosecution begins in Mississippi and referred

153. 467 So. 2d at 892-93.
154. *Id.*
155. 105 S. Ct. at 1298.
156. Neal v. State, 451 So. 2d 743, 753 (Miss. 1984), *cert. denied*, 464 U.S. 834 (1983).
157. 455 So. 2d 713 (Miss. 1984), *cert. denied*, 105 S. Ct. 1209 (1985).
158. 406 U.S. 682 (1972).
159. 406 U.S. at 688.
160. *Id.* at 689.

to § 99-1-7 of the Mississippi Code, which states that it may commence "by the issuance of a warrant, or by binding over or recognizing the offender to compel his appearance to answer the offense, as well as by indictment or affidavit."[161]

A comparison of the code provision to the critical periods enunciated in *Kirby*,[162] which were later reiterated in *Moore v. Illinois*,[163] indicates that prosecution commences at an earlier time period in Mississippi. Since an affidavit or issuance of a warrant precedes the *Kirby* critical periods, Mississippi has decided to constitutionally broaden an accused's rights by requiring earlier critical periods for the attachment of the sixth amendment right to counsel.[164] Unfortunately, the problem in *Cannaday* occurred within the overlapping range of both *Kirby* and the code provision. This made it unnecessary for the court to reach into and discuss the earlier periods established in the code.[165] However, as mentioned earlier, previous Mississippi Supreme Court decisions have recognized that an affidavit or issuance of a search warrant will constitute the commencement of a prosecution in this state.[166] Because these earlier periods are critical to the judicial proceeding, they invoke the attachment of sixth amendment rights.[167]

C. Sixth Amendment Outcome

A fifth amendment case, as noted earlier, derives its judicial precedent from *Miranda*. A sixth amendment case, falling in line with sixth amendment decisions, derives its precedent from *Massiah v. United States*.[168] Although sixth amendment cases predate the *Massiah* decision, *Massiah* is usually the starting discussion point when the sixth amendment right to counsel is claimed to have attached.[169]

In *Massiah*, the right to counsel had attached[170] and the defendant, Massiah, was released on bail. A co-defendant, working with police, agreed to get Massiah into his car, where a recording device had been installed, to discuss the case. Of course,

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161. MISS. CODE ANN. § 99-1-7 (1972). *See also supra* text accompanying notes 47-50.

162. 406 U.S. at 689.

163. 434 U.S. 220 (1977), *cert. denied*, 440 U.S. 919 (1979).

164. *See supra* text accompanying notes 39-51.

165. The periods within the code that precede the critical periods established in *Kirby* include the issuance of a warrant and an affidavit claiming the accused is responsible for the offense. *See supra* text accompanying note 161. *See also supra* note 51.

166. *See supra* text accompanying notes 49-57.

167. *See supra* note 26.

168. 377 U.S. 201 (1964).

169. *See supra* note 125.

170. The defendant, Massiah, had been indicted on a drug charge. 377 U.S. at 201.

Massiah made incriminating statements which were recorded by police.[171] Massiah's attorney sought to suppress the statements and the Supreme Court agreed, holding "that the petitioner was denied the basic protections of . . . [the sixth amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel."[172] Professor Kamisar claims that this holding is correct in that when the sixth amendment right to counsel attaches, there is no longer any need to consider whether interrogation has occurred.[173] He recognized interrogation as involving fifth amendment rights and claims it is "constitutionally irrelevant regarding sixth amendment rights."[174] This analysis is fundamentally correct because sixth amendment rights can be violated outside of interrogation situations.[175]

Escobedo followed and was decided on sixth amendment grounds, although wrapped in fifth amendment language.[176] Escobedo's attorney was denied access to him. Although Escobedo requested an attorney, he subsequently made an incriminating statement which was later used against him. Because judicial proceedings had not yet commenced in that case, his sixth amendment rights had not attached. Regardless, the Supreme Court held that his sixth amendment right to counsel had been violated. The Supreme Court in *Miranda* claimed that while *Escobedo* maintained characteristics of both amendments, it was essentially a fifth amendment decision.[177]

Brewer v. Williams[178] was the next well known sixth amendment case. The Court in *Brewer* used the *Kirby* attachment periods[179] in determining whether the sixth amendment right to counsel had attached.[180] The Court held that attachment had occurred and proceeded to resolve the case along *Massiah* lines.[181] The defendant was being transported by automobile from one police headquarters, where he had been arraigned, to another when

171. *Id.* at 203.

172. *Id.* at 201, 206 (1964) (emphasis added).

173. Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter?* 67 GEO. L.J. 1, 3-4 (1978).

174. *Id.* at 3-4.

175. United States v. Henry, 447 U.S. 264 (1980); Pendergraft v. State, 191 So. 2d 830 (Miss. 1966), *reh'g denied*, 395 U.S. 941 (1969).

176. *See supra* note 20 and accompanying text.

177. *Id.*

178. 430 U.S. 387 (1977).

179. *See supra* text accompanying notes 26-30.

180. 430 U.S. at 398.

181. *Id.* at 397.

he gave out incriminating information following a "Christian burial speech" by one of the officers.[182] The Court concluded that "[t]he circumstances of this case are thus constitutionally indistinguishable from those presented in Massiah." [183] The Court then applied the *deliberately elicited* test and held that Williams had been denied his sixth amendment right to counsel when law enforcement officers elicited incriminating statements from him after this right had attached while in the absence of his attorney.[184]

The *deliberately elicited* test was upheld three years later in *United States v. Henry*[185] where the defendant, after indictment, was placed in the same cellblock with a paid informant. The informant was told by FBI agents "to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." [186] A few weeks later the agent contacted the informant and the informant told him that he and Henry had "engaged in conversation and that Henry had told him about the robbery." [187] This information was used against Henry at trial and he was convicted. He thereafter appealed claiming his sixth amendment right to counsel had been violated. The Supreme Court held:

> By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the government violated Henry's Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, " the constable blundered," . . . rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel.[188]

Justice Powell then summarized in his concurring opinion by stating that "[t]he rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated." [189]

Jeff Yates was arrested pursuant to a warrant and incarcerated.[190] Since the issuance of an arrest warrant under Mississippi law constitutes commencement of the prosecution, his sixth amendment right to counsel had attached.[191] When Yates's attorney arrived and was denied the opportunity to see his client or have him

182. *Id.* at 392.
183. *Id.* at 400.
184. *Id.*
185. 447 U.S. 264 (1980).
186. *Id.* at 266.
187. *Id.*
188. *Id.* at 274-75.
189. *Id.* at 276.
190. 467 So. 2d at 884.
191. *See supra* text accompanying notes 161-67.

informed of his presence, Yates's sixth amendment right to counsel was violated.[192]

At this point, even before the interrogation had begun, Yates's sixth amendment rights had attached, thus affording him the opportunity to speak with his counsel during this "critical period."[193] As the Mississippi Supreme Court recognized in *Pendergraft v. State*[194] and *Tate v. State*,[195] any period of time during the trial that counsel is deliberately denied access to his client is critical and could have a definite impact on the outcome of the proceedings.[196] Can it not be argued that when Yates's attorney was denied access to him, this lack of counsel precipitated events that would not have occurred but for the denial? It seems that regardless of when, after attachment, an attorney is denied access to his client, any period of denial could be no less critical to the outcome than another.[197]

Also, as an evolving result of *Massiah*, *Brewer* and *Henry*, Yates had a constitutional right to counsel after attachment. Once the sixth amendment right to counsel has attached, the accused cannot be *approached* by law enforcement officers or their agents for the purpose of creating a situation likely to induce the accused to make incriminating statements.[198] During Yates's interrogation the sheriff knew that counsel was waiting downstairs but did not inform Yates. This was obviously a deliberate elicitation of incriminating statements in the absence of his attorney which should be considered illegal and render his confession inadmissible as violating his sixth amendment right to counsel.[199]

The next issue is that of waiver. Regardless of the fact that Yates did not know of his counsel's presence, did he effectively waive his sixth amendment right to counsel in the interrogation room?[200] The answer, of course, is no. After right to counsel has attached there can be no valid waiver unless the accused *initiates* contact with law enforcement officers and expresses his desire to talk. Justice Powell stated in *Brewer*:

> [T]he opinion of the Court is explicitly clear that the right to assistance of counsel may

192. This is analogous to the language in *Massiah* and the holding in *Brewer*. *See supra* text accompanying note 184.
193. *See supra* note 26.
194. 191 So. 2d 830 (Miss. 1966).
195. 192 So. 2d 923 (Miss. 1966).
196. *See supra* text accompanying notes 38-41.
197. *See supra* note 26.
198. 447 U.S. at 274-75.
199. *See supra* text at note 184.
200. *See supra* text accompanying notes 79-84.

be waived, *after it has attached,* without notice to or consultation with counsel . . . . We would have such a case here if the State had proved that the police officers refrained from coercion and interrogation [Christian burial speech] . . . and that Williams freely on his *own initiative* had confessed the crime.[201]

If Yates had known or had been informed that counsel was there requesting to see him and had then decided to waive his rights by initiating contact, the waiver would have been valid.[202] But because Yates was approached in the interrogation room, his incriminating statement was in violation of his sixth amendment right to counsel and could not be used against him.[203]

But, in retrospect, unlike *Yates*, the other sixth amendment cases discussed did not involve a renewed attempt on the part of the defendant to reinstate his guilt. Massiah was under the protection of his attorney and had met with him several times when his incriminating statements were made.[204] He did not later seek to acknowledge these statements, or purge them of their taint.

Williams was instructed by his attorney not to say anything during his car ride from Davenport to Des Moines. In spite of this warning, he led police to the cite of the deceased victim. His statements were made out of the presence of counsel, and the Court concluded that his sixth amendment rights were violated.[205] He, like Massiah, did not try to reaffirm his guilt by making later additional statements.[206]

Henry, after discovering that the statements he made to a paid informant were going to be used against him, did not make additional statements to law enforcement officers. He, like the previous two defendants, kept quiet and asserted that his sixth amendment right to counsel had been violated.[207]

Jeff Yates was not informed of the presence of counsel when his attorney arrived and was approached by law enforcement officers after his right to counsel had attached. This violated his sixth amendment rights and rendered his waiver invalid, thereby requiring exclusion of his statement. He met with his attorney early that same morning and was told that he did not have to sign anything.[208] After his attorney had left, his sixth amendment right to counsel was violated a second time when he was approached again and a transcribed statement was placed in front of him. He

201. 430 U.S. at 413.
202. *Id.*
203. *Id.* at 401.
204. 377 U.S. at 203.
205. *Brewer*, 430 U.S. at 405-06.
206. *Id.* at 393-94.
207. *Henry*, 447 U.S. 264, 268 (1980).
208. Abstract of Record, July 19, 1982, at 7.

was asked to sign it and was told that it did not matter since it would be used against him regardless.[209] He signed it. This transcript signature could not constitute a voluntary confession under either the fifth or sixth amendment standards.[210] However, in the fifth amendment outcome, the court took into consideration the totality of the circumstances to purge the waiver of any primary illegality.[211] When sixth amendment right to counsel has attached, there must be no contact with the accused by law enforcement officers unless the accused initiates it.[212] After Jeff Yates had met with his attorney, it was up to Yates to initiate further contact with police officials in order to effectuate a valid waiver. This is consistent with *Brewer v. Williams*[213] in that Williams made incriminating statements only after law enforcement officials approached him with the famous "Christian burial speech."[214] Williams would have remained silent but for the intrusion by the detective. Likewise, Yates would not have signed anything but for the illegal contact and the persuasive language. In *Brewer*, the statements were suppressed. In the present case, they were not.

In *Cannaday v. State*[215] the defendant's sixth amendment right to counsel also had attached. She was approached by a police officer and asked a question. She responded, incriminating herself. The Mississippi Supreme Court held that "[s]ince the question was made without the benefit of the presence of her attorney, Cannaday's Sixth Amendment rights were violated."[216] Jeff Yates was also asked an incriminating question out of the presence of his counsel after his sixth amendment rights had attached. He was asked to sign his confession transcript. He responded as did Cannaday "without the benefit of the presence of . . . [his] attorney."[217] This violated Cannaday's sixth amendment rights to counsel but not the sixth amendment rights of Yates.

In *United States v. Shaw*,[218] the defendant made repeated requests for FBI agents after his sixth amendment rights had attached. The agents were hesitant to meet with him in the absence of his attorney and did so only because the defendant had initiat-

209. 467 So. 2d at 885.
210. *See supra* note 79.
211. 467 So. 2d at 886.
212. *See supra* text accompanying note 198; *see also* United States v. Shaw, 701 F.2d 367, 380 (5th Cir. 1983), *reh'g denied*, 714 F.2d 544 (5th Cir. 1983).
213. 430 U.S. 387 (1977).
214. *Id.* at 392.
215. 455 So. 2d 713 (Miss. 1984).
216. *Id.* at 723.
217. *Id.*
218. 701 F.2d 367 (5th Cir. 1983), *reh'g denied*, 714 F.2d 544 (5th Cir. 1983).

ed the contact.[219] He later made incriminating statements that were used against him. In the present case, Jeff Yates in no way initiated the contact with the officers.

Yates was approached and was induced to sign the transcript "which . . . [police] had deliberately elicited from him . . . in the absence of his counsel."[220] Thus, again he was deprived of his sixth amendment right to counsel. As the Court held in *Brewer*, "the circumstances . . . in this case thus provide no reasonable basis for finding that . . . [the accused] waived his right to the assistance of counsel."[221]

D. Comparison

In the fifth amendment outcome, Yates's rights were violated when the incriminating statements he gave were tainted by the refusal of the sheriff to inform him that his attorney was present. The court held that this taint was purged when Yates again received his *Miranda* warnings, conferred with counsel, and signed his confession transcript.[222]

The sixth amendment outcome would have produced a different result. Yates was denied his sixth amendment right to counsel twice, once when he was approached by police for the purpose of obtaining a statement and again when he was confronted with the transcribed statement. His right to counsel had attached, and officials were illegally seeking information from him at a critical period in the proceedings without a valid waiver.[223]

The attachment of the sixth amendment right of counsel commands a different result from the majority's opinion, because under the sixth amendment, law enforcement officials are more reluctant to approach or gain incriminating information from the accused than they are regarding fifth amendment *Miranda* rights.[224] *Miranda* involves only statements made by an individual interrogated while in police custody,[225] whereas the sixth amendment extends to both custodial and non-custodial situations.[226] *Miranda* usually involves interrogation procedures where the individual claims he has been coerced by law enforcement officers,[227]

219. *Id.* at 380.

220. 377 U.S. at 206.

221. 430 U.S. at 405.

222. 467 So. 2d at 886-87.

223. *See supra* text accompanying notes 208-21.

224. *See, e.g.*, United States v. Shaw, 701 F.2d 367, 380 (5th Cir. 1983), *reh'g denied*, 714 F.2d 544 (5th Cir. 1983).

225. 384 U.S. at 444.

226. *Massiah*, 377 U.S. at 206.

227. 384 U.S. at 445.

whereas the sixth amendment does not require interrogation at all for a claim that it has been violated.[228]

The purpose of the fifth amendment is to recognize an accused's right to silence and his privilege not to incriminate himself.[229] The purpose of the sixth amendment is "to safeguard the fairness of the trial and the integrity of the factfinding process."[230] In summation, since the sixth amendment has a broader range than the fifth amendment,[231] a different result would have been obtained had the case been properly analyzed under the sixth amendment.

CONCLUSION

MISS. CODE ANN. § 99-1-7 (1972)[232] determines when a prosecution will commence in this state. The Mississippi Supreme Court has failed to recognize this statute, thereby pushing back the time when the sixth amendment right to counsel attaches. Since the legislature has required earlier periods for the protection of sixth amendment rights, the supreme court must adhere to its wishes. If the court does not, it is acting beyond its scope of authority. In so doing, the court has created its own law contrary to that of the legislature. The court must realign itself and in the future produce case precedent consistent with the law of the state.

John P. Frye

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228. *See supra* text accompanying notes 172-74.

229. 384 U.S. at 460.

230. 430 U.S. at 426.

231. *See, e.g.*, Cannaday v. State, 455 So. 2d 713, 722 (Miss. 1984).

232. MISS. CODE ANN. § 99-1-7 (1972 and Supp. 1985).