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MICHIGAN v. MOSLEY: A FURTHER EROSION OF *MIRANDA*?

On January 31, 1976, Ernesto Miranda was stabbed to death in a Phoenix bar.[1] As the life drained from Miranda, the lifeblood was also being drawn from the doctrine that bears his name. Only ten years after its rendition in 1966, the foundations of *Miranda v. Arizona*[2] are being undermined by the Burger Court. The latest of these attacks is *Michigan v. Mosley*.[3] *Mosley* addresses the question of when a government official may re-interrogate a suspect who has exercised his constitutional right to remain silent.

This Recent Development will first highlight the *Miranda* line of authority that culminates in *Michigan v. Mosley*.[4] Then the article will present a more detailed analysis of the *Mosley* opinion, emphasizing the various procedural safeguards developed to protect an accused in a re-interrogation situation. This analysis will provide a foundation for a critical evaluation of the *Mosley* decision—its general effect on re-questioning and its inconsistency with the dictates of *Miranda*. Finally, the article will examine the future of the *Miranda* decision.

THE FACTS OF *Michigan v. Mosley*

Richard Mosley was arrested on April 8, 1971, in connection with a series of three robberies. The police brought him to the station and read him his *Miranda* rights.[5] An officer then began questioning Mosley about two of the robberies. Mosley invoked his right to remain silent, and the officer ceased interrogation. Approximately two hours later, another officer began questioning Mosley about a recent robbery-murder.[6] This officer deceived Mosley into

1. NEWSWEEK, Feb. 9, 1976, at 46.
2. 384 U.S. 436 (1966).
3. 96 S. Ct. 321 (1975).
4. *Id.*
5. 384 U.S. at 467-73.
6. 96 S. Ct. at 323. The original tip from an anonymous informer implicated Mosley in three robberies and a murder. *Id.* n.2.

making an inculpatory statement about the murder.[7] The trial court allowed the statement into evidence, and Mosley was convicted of first degree murder.[8] Holding that the second interrogation was a per se violation of *Miranda*, the Michigan Court of Appeal reversed and remanded.[9] The United States Supreme Court granted certiorari[10] after the denial of further appeal by the Michigan Supreme Court.[11]

BACKGROUND OF *Mosley*

Pre-Miranda

Before 1964, the test for admissibility of a defendant's confession was voluntariness. The voluntariness of a confession was determined by the totality of the circumstances.[12] Although the repeated character of an interrogation was a relevant factor in the analysis of the totality of the circumstances,[13] re-interrogation after a suspect invoked the fifth amendment was not banned.

Escobedo v. Illinois,[14] decided in 1964, did not follow the totality of the circumstances approach. Instead it converted several of the former factors of the voluntariness approach into the elements of a relatively definite rule. The *Escobedo* court found that denial of counsel and failure of police to warn Escobedo of his right to remain silent were abrogations of his constitutional rights and that the statement was thus per se inadmissible.[15]

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7. *Id.* at 324 n.5. The officer told Mosley that a participant in the murder had confessed and had named Mosley as the "shooter." *Id.* at 323.
8. *Id.* at 324.
9. People v. Mosley, 51 Mich. App. 105, 214 N.W.2d 564 (1974). The Michigan Court of Appeal viewed this case as similar to the companion case in *Miranda*, Westover v. United States, 384 U.S. 436 (1966).
10. Michigan v. Mosley, 419 U.S. 1119 (1975).
11. People v. Mosley, 392 Mich. 764 (1974).
12. Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961); Rogers v. Richmond, 365 U.S. 534, 543 (1961); Brown v. Mississippi, 297 U.S. 278, 287 (1936).
13. Fikes v. Alabama, 352 U.S. 191, 197 (1957). Other rules were developed such as the *McNabb-Mallory* rule excluding statements resulting from a delay in arraignment. Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1947). Also statements elicited from defendants indicted and in absence of counsel are excludable. Beatty v. United States, 389 U.S. 45 (1967); Massiah v. United States, 377 U.S. 201 (1964).
14. 378 U.S. 478 (1964). *Escobedo* embraced a per se analysis rejected in other cases. *See, e.g.*, Spano v. New York, 360 U.S. 315, 320 (1959); Cicenia v. Lagay, 357 U.S. 504, 509-10 (1958); Crooker v. California, 357 U.S. 433, 440-41 (1958).
15. 378 U.S. at 491.

Miranda

Miranda v. Arizona[16] refined the *Escobedo* approach by establishing even more concrete guidelines for the protection of fifth amendment rights.[17] These concrete guidelines, which govern custodial interrogation, augment the traditional standards of voluntariness:[18] A confession secured even in compliance with *Miranda* could be deemed involuntary and inadmissible as a matter of law.[19] In *Miranda* the Supreme Court found that the process of in-custody interrogation of a suspect contained "inherently compelling pressures" which undermine the person's will and force him to speak.[20] The Court created the specific warnings as a prophylactic measure to protect the accused from the coercive atmosphere of custodial interrogation.[21]

A single passage from *Miranda* emphasizes the need for protecting the right to remain silent—a right that can be protected only if interrogation ceases after the accused exercises his right to remain silent.

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16. 384 U.S. 436 (1966).
17. *Id.* at 441-42. *Miranda* was limited to cases in which trials were begun after the date of its decision. Johnson v. New Jersey, 384 U.S. 719, 732 (1966). *See* Michigan v. Tucker, 417 U.S. 433 (1974). Voluntariness is still the rule for any pre-*Miranda* case. Greenwald v. Wisconsin, 390 U.S. 519, 520-21 (1968); Davis v. North Carolina, 384 U.S. 737, 740 (1966).
18. The *Miranda* Court stated that:

> As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. 384 U.S. at 444-45.

19. *See* State v. Geldhart, 111 N.H. 219, 221, 279 A.2d 588, 589 (1971); People v. Russell, 259 Cal. App. 2d 637, 649, 66 Cal. Rptr. 594, 600 (1968); State v. Walker, 416 S.W.2d 134, 142-43 (1967).
20. 384 U.S. at 467.
21. The *Miranda* Court stated:

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. 384 U.S. at 458.

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease.* At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has once been invoked.[22]

A literal reading of this passage would mandate that "interrogation must cease" forever when the accused invokes his right to remain silent.

Post-Miranda

Since the *Miranda* decision, the great majority of federal and state courts have held that *Miranda* does not absolutely prohibit further questioning once the accused has elected to remain silent.[23] These cases analyzing re-questioning problems fall into three categories.

The first category involves the defendant who asserts his sixth amendment right to counsel by requesting an attorney. In that situation *Miranda* clearly dictates that all questioning must cease until the defendant has consulted with counsel.[24] If there is an express waiver of the right to counsel before re-questioning, some courts allow a second interrogation before a suspect actually consults the attorney.[25]

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22. Miranda v. Arizona, 384 U.S. 436, 473-74 (1966) (emphasis added). The Court continued:

> If the individual states that he wants an attorney the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney, and he indicates he wants one before speaking to the police, they must respect his decision to remain silent. *Id.* at 474.

23. Michigan v. Mosley, 96 S. Ct. 321, 326 n.9 (1975). *See* United States v. Rimka, 512 F.2d 425, 426 (6th Cir. 1975); Hill v. Whealon, 490 F.2d 629, 630-35 (6th Cir. 1974); United States v. Collins, 462 F.2d 792, 801-02 (2d Cir. 1972); Pennings v. United States, 391 F.2d 512, 515 (5th Cir. 1968); United States v. Choice, 392 F. Supp. 460, 466-67 (E.D. Pa. 1975). *But see* United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974); United States v. Crisp, 435 F.2d 354, 357 (7th Cir. 1970); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969).

24. 384 U.S. at 473-74.

25. *See* United States v. Grady, 423 F.2d 1091, 1093 (5th Cir. 1970); United States v. Barnawell, 341 F. Supp. 619, 621-22 (S.D. Cal. 1972); Houston v. Peyton, 297 F. Supp. 717, 721-22 (W.D. Va. 1969); State v. Turner, 281 N.C. 118, 119, 187 S.E.2d 750, 751 (1972). *But see* United States v. Priest,

The second group of cases concerns the situation in which the accused waives his *Miranda* rights, submits to interrogation, and then interrogation resumes after a lapse in time. As a general rule the suspect may be re-questioned without repetition of the *Miranda* warnings.[26]

In the final class of cases the suspect asserts his fifth amendment right to silence and is then re-questioned. Most courts allow re-interrogation after exercise of the right to remain silent but with limitations such as the repetition of *Miranda* warnings,[27] the discovery of new grounds for questioning,[28] or the initiation of conversation by the suspect.[29] In confessions obtained through re-questioning, *Miranda* allocates to the government a heavy burden of establishing that the accused was properly advised of his rights and knowingly and voluntarily waived them before confessing.[30] If

409 F.2d 491, 493 (5th Cir. 1969); United States v. Nielsen 392 F.2d 849, 853 (7th Cir. 1968); Virgin Islands v. Aquino, 378 F.2d 540, 545 (3d Cir. 1967). *Cf.* People v. Randall, 1 Cal. 3d 948, 953-54, 464 P.2d 114, 117-18, 83 Cal. Rptr. 658, 660-61 (1970).

26. *See* United States v. Hopkin, 433 F.2d 1041, 1044-45 (5th Cir. 1970); Maguire v. United States, 396 F.2d 327, 331 (9th Cir. 1968); Tucker v. United States, 375 F.2d 363, 366-67 (8th Cir. 1967); People v. Schenk, 24 Cal. App. 3d 233, 236, 101 Cal. Rptr. 75, 76 (1972). *But see* United States v. Brady, 421 F.2d 681, 683 (2d Cir. 1970); Davis v. State, 44 Ala. 145, 150, 204 So. 2d 490, 495 (1967); Brown v. State, 6 Md. App. 564, 567, 252 A.2d 272, 276 (1969).

27. Hill v. Whelon, 490 F.2d 629, 635 (6th Cir. 1974); United States v. Collins, 462 F.2d 792, 796-97 (2d Cir. 1972); United States v. Crisp, 435 F.2d 354, 357 (7th Cir. 1970); Jennings v. United States, 391 F.2d 512, 515-16 (5th Cir. 1968); United States v. Choice, 392 F. Supp. 460, 466-67 (E.D. Pa. 1975). *See also* Comment, *The Need to Repeat Miranda Warnings at Subsequent Interrogations*, 12 WASHBURN L.J. 223-30 (1973).

28. *See* United States v. Collins, 462 F.2d 792, 796-97 (2d Cir. 1972); United States v. Choice, 392 F. Supp. 460, 465-69 (E.D. Pa. 1975); People v. Lyons, 18 Cal. App. 3d 760, 96 Cal. Rptr. 76 (1971).

29. State v. Kroupa, 16 Ariz. App., 492 P.2d 750 (1972); People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 317 (1968); People v. Tomita, 260 Cal. App. 2d 88, 66 Cal. Rptr. 739 (1968); People v. Perrin, 247 Cal. App. 2d 838, 55 Cal. Rptr. 847 (1967); Dryden v. State, 535 P.2d 483 (Wyo. 1975).

30. The *Miranda* Court stated:

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois. . . . This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, . . . and we re-assert these stan-

the government can satisfy the heavy burden of proof, the majority of federal circuits allows the introduction of subsequent statements even though the accused had previously invoked his right to remain silent.[31]

The *Mosley* Decision: An Analysis

The Majority Opinion

The Court's analysis in *Michigan v. Mosley* focuses upon the interpretation of a single passage from *Miranda.*[32] Although this passage states that "interrogation must cease" when the accused invokes his right to remain silent, the Court found that the circumstances under which a resumption of questioning is permissible were not delineated in *Miranda.*

The issue of whether a suspect's exercise of the fifth amendment privilege precludes re-questioning presented no difficulty for the Court.

> [N]either this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning. . . .[33]

The Court rejected a strict interpretation of the *Miranda* passage either as a rigid rule prohibiting any re-interrogation or even as a rule demanding merely immediate cessation of interrogation.[34] Rather, Justice Stewart underscored one sentence for the protection of a suspect's constitutional rights. "Without the right to cut off questioning, the setting of in-custody interrogation operates on the

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> dards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders. 384 U.S. at 475 (footnotes omitted).

31. *See* Hill v. Whealon, 490 F.2d 629, 630 (6th Cir. 1974), *citing* Hughes v. Swenson, 452 F.2d 866 (8th Cir. 1971):

> It is neither necessary nor desirable to undertake to fashion a per se rule to be applied in all cases presenting the *Miranda* issue. The crucial question always must be: has the prosecution sustained its heavy burden of demonstrating that the defendant was effectively advised of his rights; and did he knowingly and understandingly decline to exercise them. . . ? *Id.* at 868.

See also United States v. Collins, 462 F.2d 792, 796-98 (2d Cir. 1972); United States v. Choice, 392 F. Supp. 460, 465-69 (E.D. Pa. 1975); *cf.* United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974); United States v. Priest, 409 F.2d 491, 493 (5th Cir. 1969); Dryden v. State, 535 P.2d 483, 490-91 (Wyo. 1975).

32. Michigan v. Mosley, 96 S. Ct. 321, 325 (1975). *See* note 22 and accompanying text *supra.*

33. Michigan v. Mosley, 96 S. Ct. 321, 326 (1975).

34. *Id.*

individual to overcome free choice in producing a statement after the privilege has been once invoked."[35] The Court asserted that the government must "scrupulously honor" that right.[36]

Scrupulous honor for the accused's "right to cut off questioning" is the procedure the Court seized upon as the suspect's protection from the coercive pressures inherent in custodial interrogation.[37] The Court found that through the exercise of this power the defendant could control the time, subject, and manner of the interrogation. Inculpatory admissions obtained during the re-questioning of a subject who has exercised his right to silence would be admissible only if the government could show that the "right to cut off questioning" was "scrupulously honored."[38]

While reviewing the circumstances of Mosley's confession, Justice Stewart identified several factors relevant to the determination of whether the government had scrupulously honored the suspect's rights. First, the "passage of a significant period of time"[39] between Mosley's exercise of his right to silence and the attempt to re-question was an important factor.[40] Too short a time lapse would permit a resumption after only a momentary delay and would defeat the intentions of *Miranda*. Second, a different officer conducted the interrogation at a different location and gave a fresh set of *Miranda* warnings.[41] The third and most important

35. Miranda v. Arizona, 384 U.S. 436, 475 (1966).
36. 96 S. Ct. at 326.
37. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his "right to cut off questioning" was "scrupulously honored." *Id.* at 326.
38. *Id.*
39. *Id.* at 326-27.
40. In *Mosley* a little over two hours elapsed between the exercise of the right to remain silent and the re-interrogation. *Id.* at 326. *But see* United States v. Westover, 384 U.S. 436, 496 (1966) (where a fourteen-hour separation between interrogations was close enough to be considered part of the same interrogation process); United States v. Clark, 499 F.2d 802, 807 (4th Cir. 1974) (where four hours was not considered a significant lapse of time).
41. The Court stated:

> After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. 96 S. Ct. at 326-27.

The factors of a different police officer and different location gain significance in light of dictum from *Westover*. *See* text accompanying note 55 *infra* and the comments in the dissent, Michigan v. Mosley, 96 S. Ct. 321, 333-34 n.7 (1975).

circumstance to the Court was the restriction of the scope of Mosley's second interrogation to a crime not discussed at the prior interrogation.[42] The character of the Court's analysis reflects a desire for two distinct interrogation sessions in order to demonstrate the "scrupulous honoring" of the suspect's first exercise of the right to cut off questioning. Apparently the lead opinion contemplates that the trial judge will weigh all the factors in a particular case.

The Dissent

Justices Brennan and Marshall, the remaining Warren Court Justices, agreed that *Miranda* did not dictate a blanket prohibition of re-questioning after the exercise of the right to remain silent. However, they did believe that *Miranda* dictated establishing "concrete constitutional guidelines" for the resumption of questioning.[43] For the dissent, the real issue in *Mosley* was "whether the procedures approved will be sufficient to assure with reasonable certainty that a confession is not obtained under the influence of the compulsion inherent in interrogation and detention."[44] An almost irrebuttable presumption of compulsion burdens confessions which are the product of renewed questioning. Adherence to strict procedural safeguards is the only method to overcome this presumption.

Justice Brennan mentioned two guidelines which he considers sensitive to the reality of the inherent compulsion of in-custody interrogation: either the suspect should be arraigned before a judicial officer "without unnecessary delay,"[45] or the questioning should be resumed only in the presence of counsel.[46] Either of these two methods would be adequate to assure the absence of compulsion upon re-questioning.[47]

The Concurrence

Justice White urged the Court to adopt a standard of voluntariness to judge the waiver of the right to silence. He reads *Miranda*

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42. 96 S. Ct. at 327.
43. *Id.* at 330 (dissenting opinion).
44. *Id.* at 331.
45. *Id.* at 332. After arraignment the guidelines established in Massiah v. United States, 377 U.S. 201 (1964), which exclude deliberately elicited statements in absence of counsel after indictment, are applicable. As the dissent points out, Michigan law requires that a suspect be arraigned "without unnecessary delay." Thus, if Mosley had been promptly arraigned after arrest, his inculpatory statement would have been excluded because of the absence of counsel. 96 S. Ct. at 332 n.2 (dissenting opinion).
46. 96 S. Ct. at 332 (dissenting opinion).
47. *Id.* at 332-33.

as allowing re-questioning immediately after the exercise of the right to remain silent, provided that the government satisfies the heavy burden of showing a knowing and intelligent waiver of rights.[48] For Justice White, a voluntary waiver of rights, followed by a statement, is admissible even if made immediately after the exercise of the right to remain silent. Not to allow voluntary statements would "rob the accused of the choice to answer questions voluntarily for some unspecified period of time following his own previous contrary decision."[49]

A CRITICAL EVALUATION OF *Mosley*

On the surface, *Michigan v. Mosley* appears to be a narrow holding, limited by several factors. The ability to re-question may be exercised only after the passage of a "significant period of time" after the repetition of *Miranda* warnings by another police officer at a different location and if the scope of questioning is restricted to a crime not the subject of the previous interrogation.[50] Although *Mosley* gave the police the power to re-question, the scope of this power would appear severely limited to those instances when two separate interrogations have occurred.

However this narrow interpretation of *Mosley* may misread the Burger Court's true attitude toward re-interrogation. The Court's treatment of the facts, its dicta, and the analytic approach of *Mosley* all evidence a favorable attitude toward re-interrogation.

The Court's analysis of the circumstances of Mosley's confession creates the impression that two distinct interrogations were conducted. The Court stated that the second interrogation was "at another location." In fact this other location was a different floor of the same police station.[51] Also, the Court continually emphasized that the subject matter of the second interrogation concerned an "unrelated crime." Nevertheless, the informant's tip which served as the basis of Mosley's arrest implicated him in both crimes.[52] This

48. *Id.* at 329. *See* Miranda v. Arizona, 384 U.S. 436, 475 (1966); Hill v. Whealon, 490 F.2d 629 (6th Cir. 1974).
49. 96 S. Ct. at 330.
50. *Id.* at 327. *See* notes 27 and 41 *supra.*
51. 96 S. Ct. at 333 n.7. *See* note 41 *supra.*
52. 96 S. Ct. at 333 n.7. The majority also failed to address the issue of the scope of the right to remain silent. Mosley refused to answer "anything about robberies." The question of whether that refusal includes only the

was not discovery of new evidence which could create a reasonable basis for re-questioning.[53] In order to comply with dictum from a companion case to *Miranda*, the Court strains to find two separate interrogations in a factual setting containing only a single continuous interrogation. The Court, in *Westover v. United States*,[54] stated:

> We do not suggest that law enforcement authorities are precluded from questioning any individual who has been held for a period of time by other authorities and interrogated by them without appropriate warnings. A different case would be presented if an accused were taken into custody by the second authority, removed both in time and place from his original surroundings, and then adequately advised of his rights and given an opportunity to exercise them. But here the FBI interrogation was conducted immediately following the state interrogation in the same police station—in the same compelling surroundings.[55]

The *Mosley* Court gave lip service to the procedural dictates of *Miranda* while ignoring the impact of what was actually continuous questioning of the accused.

Like the coloring of the facts, the Court's dictum in the *Mosley* opinion suggests a favorable attitude toward re-questioning suspects after the exercise of the right to remain silent.

> Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon *any* further questioning by *any* police officer on *any* subject once the person in custody has indicated a desire to remain silent.[56]

Although the Court creates various limiting factors, this broad dictum sanctions the liberal use of re-questioning.

Finally, the Court's analytic approach, using a multitude of factors, including shift of location, lapse of time between interrogations, repeated warnings, and a restricted scope of questioning, is reminiscent of the pre-*Miranda* "totality of the circumstances" test.[57] Although the Court emphasized the restricted scope of the

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first interrogation about robberies or both discussions is not addressed by the Court. *Id.* at 334 (Brennan & Marshall, JJ., dissenting).

53. *See* note 28 *supra.*

54. 384 U.S. 436 (1966).

55. *Id.* The Court in *Mosley* distinguishes the Michigan Court of Appeal's reliance on *Westover* by stating:

> The cardinal fact of *Westover*—the failure of the police officers to give any warnings whatever to the person in their custody before embarking on an intense and prolonged interrogation of him—was simply not present in this case. 96 S. Ct. at 327-28.

Despite this language, the Court, through a manipulation of the facts, attempts to place the circumstances of *Mosley* in what may be an exception to the strict rule of *Miranda,* found in the language of *Westover.*

56. 96 S. Ct. at 326 (emphasis added).

57. *See* notes 11 and 12 *supra.*

second interrogation, it did not elevate this factor to a per se exclusion test as was used in *Miranda*. Each factor is merely an element in the separateness of the interrogations. In future cases any one factor may be determinative.[58]

Is this vague "totality of the circumstances" approach of the *Mosley* Court consistent with the dictates of *Miranda*? *Miranda* manifested the Warren Court's recognition of the intensely compulsive atmosphere permeating stationhouse interrogations which reduces an accused's ability to knowledgeably exercise his fifth amendment rights.[59]

> Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement . . . is inconsistent with any notion of a voluntary relinquishment of the privilege.[60]

Thus *Michigan v. Mosley* slights the core problem of the pressures of police interrogation and instead focuses upon the creation of vague procedural tests. As Justice Brennan stated in dissent: "[S]crupulously honoring exercises of the right to cut off questioning is only meaningful insofar as the suspects' will to exercise that right remains wholly unfettered."[61] The *Mosley* Court ignores the question which would have been the key issue for the *Miranda* Court: Would interrogation after incommunicado detention and previous interrogations affect a suspect's will to exercise his right to cut off questioning?[62] *Mosley* formally honors the procedures of *Miranda* while abandoning its central premise.

Mosley is inconsistent with *Miranda* in another aspect. *Miranda* specified the presence of counsel as the procedural safeguard for re-questioning after exercise of the right to remain silent:

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58. *See* George, *Future Trends in the Administration of Criminal Justice*, 69 MILT. L.R. 1, 5-32 (1975) [hereinafter cited as George].
59. 384 U.S. at 445-58 (1966).
60. *Id.* at 476.
61. 96 S. Ct. at 331 (dissenting opinion).
62. *Id.* at 331-32. In *Miranda v. Arizona*, the Court stated:

> We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. 384 U.S. at 467.

> If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.[63]

These procedures reinforced *Miranda*'s discussion of the role of counsel during interrogation. "The presence of counsel, in all the cases before us today, would be *the* adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege."[64] A literal reading of *Miranda* indicates that the only time re-questioning would be allowed after the exercise of the right to remain silent would be in the presence of counsel.

On this matter the *Mosley* Court attempts to distinguish the language of *Miranda*, finding the above passage relevant only when an attorney is present at the time the accused initially asserts his right to remain silent.[65] However this language is held inapplicable to *Mosley* because the accused did not have counsel present when he exercised his privilege. The *Mosley* Court's interpretation seems untenable given *Miranda*'s treatment of the presence of counsel as *the* adequate protective device.

CONCLUSION: THE FUTURE OF *Miranda*

The inconsistency between *Miranda* and *Mosley* highlights the philosophical shift of the Supreme Court since 1971. The Warren Court believed that it should set strict standards of criminal procedure for the lower federal and state courts to follow.[66] The Court found the greatest need for judicial intervention was in the investigatory phase of a criminal case.[67] Thus the purpose of *Miranda* was

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63. 384 U.S. at 474 n.44.

64. *Id.* at 466 (emphasis added). The Court continued:

> The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police. . . ." *Id.*

65. 96 S. Ct. at 332-33 n.5.

66. George 2. For the purpose of this analysis, the Warren Court is the United States Supreme Court from 1963-1970. The Burger Court extends from 1971 to the present. *Id.* at 1.

67. *Id.* at 2.

"to give concrete constitutional guidelines for law enforcement agencies and courts to follow."[68] The creation of explicit guidelines which, if violated, cause the confession to be per se excluded, effectively limits the lower court's discretion in the admission of evidence. By adhering to the per se exclusionary rules, the trial court would force government officials to follow procedural guidelines in order to obtain convictions. The Warren Court accomplished its purpose of limiting to some extent police misconduct during the investigatory phase.

In contrast the Burger Court does not view itself as a promulgator of national criminal procedure standards.[69] This Court gives more discretion to the legislatures and lower courts in formulating criminal procedure policy.[70] The use of indefinite standards, such as those in *Mosley*, represents a deliberate movement towards a reallocation of responsibility within the political system.[71] These vague standards provide more discretion to the lower court judge in the introduction of contestable evidence: The trial judge no longer has certainty of reversal to influence his discretion. Law enforcement officials thus have greater discretion in the investigatory process, for concrete guidelines no longer bind them. The responsibility for controlling police conduct has shifted to trial courts and to state legislatures.[72]

68. 384 U.S. at 441-42. *See* Michigan v. Mosley, 96 S. Ct. 321, 331 (1975) (Brennan & Marshall, J.J., dissenting).

69. George 5, 18, 26-28.

70. George 2. *See* Illinois v. Somerville, 410 U.S. 458 (1973), where the Court states: "Federal courts should not be quick to conclude that simply because a state procedure does not conform to the corresponding federal statute or rule, it does not serve a legitimate state policy." *Id.* at 468. *But see* Oregon v. Hass, 420 U.S. 714, 719 (1975).

71. George 31-33; Speech by Yale Kamisar, Professor of Law, University of Michigan, before the Judge Advocate General's School, Charlottesville, Va., *The Burger Court Slides Down the Mountain*, at 26 (1973). Professor Kamisar believes the Burger Court is encouraging the lower federal and state courts to disregard the "landmark" decisions such as *Miranda* by failing to "rescue" these decisions when they are disregarded.

72. George 31-33. The shift of responsibility for the formulation of criminal procedure policy has resulted in many state courts imposing higher criminal procedure standards based on their state constitutions. The dissent in *Mosley* observes that this is the last bastion for the remaining procedural safeguards. 96 S. Ct. at 334. *See* Pennsylvania v. Ware, 446 Pa. 52, 284 A.2d 700 (1971); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975). These decisions are subject to

This philosophical contrast is réadily apparent in *Michigan v. Mosley*. The majority offers the vague test of "scrupulously honoring of the right to cut off questioning" as the procedural safeguard for the accused during custodial interrogation.[73] The two Warren Court Justices, Brennan and Marshall, argue for "concrete guidelines," stating that a suspect must either be arraigned or obtain counsel before questioning may resume.[74]

In *Mosley* Justice Stewart reiterated:

> Neither party in the present case challenges the continuing validity of the *Miranda* decision, nor of any of the so-called guidelines it established to protect what the Court there said was a person's constitutional privilege against compulsory self-incrimination.[75]

Nevertheless, the Court in essence has moved perceptibly farther away from the *Miranda* rationale towards the pre-*Miranda* standard of voluntariness.

Viewed in context with *Harris v. New York*,[76] *Oregon v. Hass*,[77] and *Michigan v. Tucker*,[78] *Mosley* represents a further erosion of *Miranda*'s theoretical base. This pattern of erosion was first established with *Harris*. In that case the suspect was given defective *Miranda* warnings. Inculpatory statements taken from him were admitted to impeach his credibility even though the statements were inadmissible to prove the prosecution's case in chief.[79] The *Miranda* exclusionary rule was held inapplicable to the impeaching statements. *Hass* also dealt with the impeachment of a defendant who was improperly warned. The Court balanced the deterrence to the police from exclusion of evidence for impeachment against the need to prevent perjurious testimony.[80]

Similarly, *Tucker* distinguished police conduct which violates the suspect's right against compulsory self-incrimination from conduct which "instead violated only the prophylactic rules developed to protect that right."[81] Thus products of true compulsion are excludable as a violation of the fifth amendment. When a violation of

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the limitation that the state courts base their opinion upon an interpretation of their state constitution and not the federal constitution. Oregon v. Hass, 420 U.S. 714, 719 (1975).

73. 96 S. Ct. at 326.
74. *Id.* at 332-33 (dissenting opinion).
75. *Id.* at 324.
76. 401 U.S. 222 (1971).
77. 420 U.S. 714 (1975).
78. 417 U.S. 433 (1974).
79. 401 U.S. at 225-26. *See* George 13-14.
80. 420 U.S. at 721-23.
81. 417 U.S. at 439.

only *Miranda* guidelines occurs, the per se rule is abandoned and a balancing test is applied.

> [W]hen balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce.[82]

This interest of society is balanced against the desire to control unauthorized police conduct.

Michigan v. Mosley also adopts a balancing approach to the *Miranda* exclusionary rule. At first *Mosley* appears to have a narrow impact. However, the broader implications of the opinion demonstrate the tendency of the Burger Court and many lower courts[83] to erode the *Miranda* decision by slowly cutting away at each of the procedural safeguards. The pattern emerging is the creation of a multitude of exceptions to riddle the *Miranda* rule. *Mosley* fits this pattern, severely limiting the practical value of an accused's right to remain silent by allowing repeated interrogations.

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82. *Id.* at 450.
83. The extent to which *Miranda* has been limited by lower federal and state courts is extensive. *Miranda* is inapplicable to misdemeanors involving only a small fine or short jail time. State v. Gabrielson, 192 N.W.2d 792 (Iowa 1971); Shumate v. Commonwealth, 207 Va. 877, 153 S.E.2d 243 (1967). *Miranda* is also inapplicable to international border custom procedures. Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir. 1969). It is inapplicable to license revocation proceedings. F.J. Buckner Corp. v. NLRB, 401 F.2d 910 (9th Cir. 1968), and welfare investigations. State v. Graves, 60 N.J. 441, 291 A.2d 2 (1972). *Miranda* was held inapplicable to drunk driving situations. County of Dade v. Callahan, 259 So. 2d 504 (Fla. App. 1971); People v. Craft, 28 N.Y.2d 274, 321 N.Y. Supp. 2d 570, 270 N.E.2d 297 (1971). *Miranda* is also inapplicable in extradition proceedings. North v. Koch, 169 Colo. 508, 457 P.2d 915 (1969).