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Criminal Procedure - Edwards v. Arizona is Alive but Not Well in North Carolina - State v. Franklin

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"[T]he blood of an accused is not the only hallmark of a constitutional inquisition."—*Blackburn v. Alabama*, 361 U.S. 199, 206 (1960).

**INTRODUCTION**

Law enforcement officers are required to inform individuals held for interrogation that, among other things, they have the right to an attorney's presence during interrogation. The Supreme Court in *Miranda v. Arizona* held that the individual's constitutional right against self-incrimination requires such advisement. As might be expected, the Court, in *Miranda*, did not foresee every situation where an individual might be deprived of his constitutional rights due to government action. Therefore, the Court subsequently interpreted the "right to counsel" portion of the *Miranda* decision as a *per se* prohibition against interrogation once

1. “Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer.” *Miranda v. Arizona*, 384 U.S. 436, 471 (1966).

2. “Other things” refers to the substance of what has come to be known as the Miranda warning. See 384 U.S. at 478-79.

3. Id.

4. The constitutional basis for the Miranda decision is the fifth amendment to the Constitution of the United States. 384 U.S. at 478. U.S. Const. amend. V provides: “No person . . . shall be compelled in any criminal case to be a witness against himself.” The Supreme Court has held that the fifth amendment privilege against self-incrimination is applicable to the states as well as to the federal government. *Malloy v. Hogan*, 378 U.S. 1 (1964).

5. “In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.” 384 U.S. at 467.

the individual has invoked this right. 7 "[A]n accused . . . having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities . . . unless the accused himself initiates further communication, exchanges or conversations with the police." 8 Therefore, in order to hold evidence obtained from one in custody who has invoked his "right to counsel" admissible, a court must first determine that the person in custody initiated the exchange which led to the discovery of such evidence. This is the rule of Edwards v. Arizona. 9

On July 7, 1983, the Supreme Court of North Carolina decided the case of State v. Franklin. 10 The majority acknowledged the rule of Edwards but held that the defendant had not invoked his right to counsel prior to questioning about the murder for which he was subsequently convicted. 11 In addition, the majority found that Franklin stated that he did not wish to confer with counsel. 12 By focusing on Franklin's confession, the majority's opinion begs the real question present in State v. Franklin. 13 The real question is whether the officers taking Franklin's confession acted in violation of the Edwards rule and therefore in violation of Franklin's constitutional rights. While Franklin had not invoked his right to coun-

In his opinion concurring in judgment, Justice Powell suggests that there is confusion as to whether Edwards announced a a per se rule. In my view, Edwards unambiguously established such a rule. In any event, no such confusion on this point can remain after today's decision for eight Justices manifestly agree that Edwards did create a per se rule. The plurality explicitly refers to the "prophylactic rule" of Edwards . . . . The rule is simply stated: unless the accused himself initiates further communication with the police, a valid waiver of the right to counsel cannot be established. If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver under Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The only dispute between the plurality and the dissent in this case concerns the meaning of "initiation" for the purposes of the Edwards' per se rule.

8. 451 U.S. 477, 484-85.
9. Id.
11. Id. at 686, 304 S.E.2d at 582; See also State v. Lang, 309 N.C. 512, 308 S.E.2d 317 (1983) (The court acknowledged Edwards' applicability).
12. 308 N.C. at 686, 304 S.E.2d at 582.
13. Id. at 699, 304 S.E.2d at 589 (Exum, J. dissenting).
sel with respect to the Michelle Moody murder, he had invoked his right to counsel with respect to the Nealy Smith and Amanda Ray murders. Franklin was questioned concerning the Smith and Ray murders; his confession to the Moody murder was a direct result of this questioning — which he had not initiated.

The purpose of this note is to analyze the North Carolina Supreme Court’s decision in State v. Franklin, in light of the United States Supreme Court’s Edwards rule, to show how the North Carolina court deviated from the rule and failed to exclude from trial evidence obtained in violation of defendant’s constitutionally protected rights.

THE CASE

In January 1981, Joseph Ralph Franklin was charged in Mecklenburg County with indecent exposure. Lyle Yurko, Assistant Public Defender for Mecklenburg County, was appointed to represent Franklin in this matter. During his representation of Franklin, Yurko was approached by the Charlotte Police and informed that Franklin was a suspect in the murders of Nealy Smith and Amanda Ray. The Charlotte Police wished to question Franklin about these murders. After discussing this matter with his supervisor, Yurko was appointed to represent Franklin.

14. Id. at 685-86, 304 S.E.2d at 582.
15. Id. at 700-01, 304 S.E.2d at 590 (Exum, J. dissenting).
16. Record at 18, Franklin (Order on Motion to Suppress).
17. 308 N.C. at 685, 304 S.E.2d at 581.
18. Record at 19, Franklin (Order on Motion to Suppress).
19. 308 N.C. at 685, 304 S.E.2d at 581.
20. Id. “Presumably pursuant to G.S. § 7A-452(a), Mr. Yurko undertook to represent defendant with respect to police efforts to question defendant concerning these matters.” Id. Special note should be made of Justice Exum’s dissent: Whether or not Mr. Yurko had statutory authority to represent defendant to the limited extent he did in the Smith and Ray cases is not a relevant question in the instant case. As the trial court stated at the suppression hearing, the evidence is uncontradicted in writing the Police had been notified, whatever the legalities of the appointment, that defendant invoked his right to remain silent with regard to the Ray and Smith cases, and no interrogation as to those matters were to be carried on by any law enforcement agency in Mecklenburg without the presence of defendant’s counsel.

308 N.C. at 697-98, n.2, 304 S.E.2d at 589, n.2 (Exum, J. dissenting).

The Appellant’s brief points out that the trial court held that “Officer Styron was chargeable with this knowledge [that Franklin had invoked his right to counsel].” Brief for Appellant at 10, n.8, 308 N.C. 682, 304 S.E.2d 579 (1983).
Franklin acknowledged that he had previously been questioned about the Smith and Ray murders and that he did not wish to be questioned again unless counsel was present. Yurko notified the District Attorney of the Twenty-sixth Judicial District of Franklin's desire not to be questioned without the presence of counsel.

On October 9, 1981, Franklin was in custody in the Mecklenburg County Jail. Detective J.F. Styron, of the Charlotte Police Department, paid a visit to Franklin to discuss one of the cases Officer Styron was working on—the Smith and Ray murders. The Public Defender's Office was not contacted. The result of the interview was a signed waiver of rights form and a confession by Franklin that he murdered Michelle Moody.

In a voir dire hearing on the motion to suppress the confession, the court found as a matter of law that Franklin fully understood his Miranda rights, that he "freely, knowingly, intelligently and voluntarily waived each . . ." right, and denied the motion to suppress. Subsequently, Franklin was convicted of first degree

The North Carolina Supreme Court has held that an attorney, not representing a defendant, cannot invoke that defendant's right to counsel. State v. Bauguss, 310 N.C. 259, 311 S.E.2d 248 (1984).

21. 308 N.C. at 695, 304 S.E.2d at 587 (Exum, J. dissenting).

22. A copy of the letter was also sent to the Chief of the Mecklenburg County Police Department and to the Chief of the Charlotte Police Department. Justice Exum notes in his dissent:

In a cover letter sent to the Chief of the Charlotte Police Department, Mr. Yurko requested that the officers investigating the Smith and Ray murders be given the information that defendant did not want to be questioned without an attorney present. Apparently this was not done since Officer Styron testified he had no actual knowledge of defendant's invocation of his right to silence.

308 N.C. at 695, n.1, 304 S.E.2d at 587, n.1 (Exum, J. dissenting).

23. Franklin was in the county jail on charges unrelated to the case sub judice. "He was charged with rape, kidnapping and robbery and apparently confessed to those crimes." Id. at 685, 304 S.E.2d at 582.


25. 308 N.C. at 684, 304 S.E.2d at 582.

26. Record at 18, Franklin (Order on Motion to Suppress). The trial judge found the following as a matter of law:

1. The defendant volunteered the initial information concerning the instant offenses to officers who had not in any way mentioned to him or questioned him about them, and the defendant requested the interview at which he did so.

2. The defendant at all times he was being questioned by the police fully understood his Constitutional rights to remain silent, his right to counsel, and the other rights guaranteed him under Miranda v. Arizona.
sexual offense and first degree felony murder. Franklin was sentenced to life imprisonment. The Supreme Court of North Carolina affirmed.

BACKGROUND

A. The Right to Counsel

Miranda v. Arizona created the right to counsel warning as a prophylactic rule designed to protect an individual's fifth amendment right against compelled self incrimination. The Court found "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 freely, knowingly, intelligently and voluntarily waived each of them upon each of the occasions referred to above and made the statements offered in evidence of his own free will without any threats, inducements or promises, and without coercion of any sort."

Record at 22, Franklin (Order on Motion to Suppress).

27. 308 N.C. at 683, 304 S.E.2d at 580. Franklin was primarily convicted on the weight of his confession. Confessions must be corroborated by other evidence. A conviction cannot stand solely on the uncorroborated confession of one accused of the crime. See State v. Thompson, 287 N.C. 303, 214 S.E.2d 742 (1975). In the case sub judice one of the questions on appeal concerned the sufficiency of evidence presented which convicted Franklin. Franklin was sentenced to life imprisonment for the offense of first degree felony murder. The felony which acted as the basis for the felony murder conviction was the first degree sexual offense. There was no evidence offered which supported this offense save for Franklin's confession. The Court held, with no dissents, "that independent proof of the underlying felony in a felony murder prosecution is not necessary where a confession, otherwise corroborated as to the murder, includes sufficient facts to support the existence of the felony." 308 N.C. at 693-94, 304 S.E.2d at 586.

28. 308 N.C. at 683, 304 S.E.2d at 580.
29. Id. at 694, 304 S.E.2d at 586. No error found.
30. 384 U.S. at 471. This note will not include an in-depth look at the Miranda decision since it is the writer's view that the proliferation of material concerning this landmark case leaves the reader with more alternatives than can realistically be considered. Miranda is used here merely to point out a few of the more important considerations the Court had in mind when it created the "right to counsel" requisite.

32. See supra note 4.
would not otherwise do so freely." The safeguards require that an individual in an in-custody setting be informed of his constitutional rights and that the invocation of such rights be fully honored. The relevant inquiry, then, is whether an individual has been subjected to a custodial interrogation and has had his constitutional rights fully honored. The Court 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."

B. Custodial Interrogation

In Rhode Island v. Innis, the Supreme Court clarified what it meant by "interrogation." The issue presented was whether Innis was "interrogated" in violation of the standards promulgated in the Miranda decision. Innis, a suspect in the shooting death of a Providence, Rhode Island taxi cab driver, was arrested and informed of his Miranda rights. He responded that he understood his rights and wished to consult with an attorney. The three officers assigned to take Innis downtown were instructed not to question, intimidate or coerce him in any way.

On the way downtown, two of the officers began a conversation between themselves in the presence of Innis. The officers expressed their desire that the search for the shotgun continue until the gun was found. The officers wanted to find the gun quickly because a school for handicapped children was located in the vicinity. They hoped that a "little girl" would not find the gun first and hurt herself. After hearing this conversation, Innis told the of-

33. 384 U.S. at 467.
34. Id.
35. Id. at 444.
36. 446 U.S. 291.
37. Id. at 298.
38. Id. at 293-94.
39. Id. at 294.
40. Id.
41. Id.
42. Id. at 294-95. The testimony given by the patrolman in question revealed that the conversation included the following:

[Patrolman Gleckman]:
A. At this point I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby] there's a lot of handicapped children running around in this area and god forbid one of them
ficers where the gun was hidden. 43

It is debatable whether the officers in question were merely expressing their heartfelt concern for the safety of a "little girl" or whether their conversation was designed to elicit a confession from Innis—the result of the conversation regardless of the motive. Nevertheless, the trial judge "found that it was understandable that the officers would express their concern for the safety of the handicapped children." 44 The judge held that Innis' decision to tell the police the location of the gun was "a waiver, clearly, and on the basis of the evidence that I have heard, and [sic] intelligent waiver, of his [Miranda] right to remain silent." 45 The judge did not decide whether Innis had been interrogated. 46

Justice Stewart delivered the Court's definition of interrogation: "references ... to 'questioning' [throughout the Miranda opinion] might suggest that the Miranda rules were meant to apply only to those police interrogation practices that involve express questioning of a defendant while in custody. We do not, however, construe the Miranda opinion so narrowly." 47 Justice Stewart went on to say that interrogation included not only express questioning but also included words and actions by police which the police should know were "reasonably likely to elicit an incriminating response from the suspect." 48

Turning to the facts of the case, Justice Stewart concluded that Innis was not interrogated since there was no express questioning of Innis and he was not invited to respond. 49 In addition the conversation was not the "functional equivalent" of questioning since the officers could not reasonably have known that their

might find a weapon with shells and they might hurt themselves.

[Patrolman McKenna]:
A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue the search for the weapon and try to find it.

[Patrolman Williams, not involved in the conversation]:
A. He [Gleckman] said it would be too bad if the little—I believe he said girl—would pick up the gun, [and] maybe kill herself.

446 U.S. 294-95.

43. Id. at 295.
44. Id. at 296.
45. Id.
46. Id.
47. Id. at 298-99.
48. Id. at 301.
49. Id. at 302.
C. Reinterrogation

In *Michigan v. Mosley*, the Court again interpreted what it had meant in *Miranda*. The question the Court faced in *Mosley* was whether law enforcement officers could reinterrogate one in custody, after that individual had invoked his right to silence. Mosley was arrested for robbing the Blue Goose Bar and the White Tower Restaurant. After Detective Cowie finished the arrest papers and informed Mosley of his *Miranda* rights, the interrogation began. Questioning soon ceased when Mosley indicated that he did not wish to answer any questions concerning the robberies. Mosley was then taken to a cell. The arrest was effected in the early afternoon and the questioning took approximately twenty minutes.

Shortly after six o'clock, p.m., Detective Hill with the Homicide Bureau questioned Mosley about the death of a man shot during a hold-up attempt. Mosley was not under arrest for this charge nor was he interrogated about it by Cowie. Mosley was read his *Miranda* rights. Mosley first denied any involvement, but finally implicated himself in the homicide.

The *Mosley* Court pointed out that the *Miranda* decision set out a *per se* rule "that unless law enforcement officers give specified warnings before questioning a person in custody, and follow

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50. Id.
52. Id. at 99.
53. Id. at 98-99. Although this note deals specifically with the situation where an accused has evidenced his desire to deal with the police only with counsel present and the Court in *Mosley* concerned itself with the situation where an accused has invoked his right to silence, analysis of the case will prove helpful in understanding Edwards and how the North Carolina Supreme Court deviated from its clear mandate. It is important to note that the Court has held the right to counsel to be more important than the right to silence and therefore requires more protection, see *infra* text accompanying notes 85-90.
54. Id. at 97.
55. Id. at 97-98. This interrogation occurred in the same building as Mosley was being kept.
56. Id. at 98.
57. Id. The trial court allowed Mosley's admission into evidence. Mosley was convicted of first degree murder and sentenced to life imprisonment. The appellate court reversed the judgment of conviction holding that Detective Hill's interrogation of Mosley had been a *per se* violation of Miranda doctrine. The State, then, filed petition for certiorari to the Supreme Court.
certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be admitted in evidence against him as a defendant at trial . . . ."\textsuperscript{58} This prohibition is applicable even though the statement is wholly voluntary.\textsuperscript{59} The Miranda rule states that anytime the privilege to remain silent is invoked questioning must cease. However, the rule "does not state under what circumstances, if any, a resumption of questioning is permissible."\textsuperscript{60}

The Court in Mosley felt that a literal interpretation of the Miranda "cessation" passage could have one of at least three meanings. First, the passage could mean that a person invoking his right to silence could never again be questioned while in custody by any law enforcement officer on any subject at any time or place. The second possible meaning is that any statement would be inadmissible as the product of compulsion. And the third possibility is that once the right to silence is invoked, questioning is required to cease immediately and then is permitted to resume only after a momentary respite.\textsuperscript{61}

The Court viewed each of these literal interpretations as tending to "lead to absurd and unintended results."\textsuperscript{62} On the one hand, Miranda's purpose would be frustrated if it were read to allow a "continuation of custodial interrogation after a momentary cessation . . . ."\textsuperscript{63} On the other hand, "a blanket prohibition against the taking of voluntary statements . . . would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity . . . ."\textsuperscript{64} Therefore, the Court interpreted the Miranda opinion as not creating a proscription of indefinite duration upon questioning once the right to remain silent has been invoked.\textsuperscript{65}

The facts show that Mosley had invoked his right to remain silent with regard to the robberies,\textsuperscript{66} but that he had not invoked his right to silence with regard to the murder for which he subse-
quent incriminated himself.67 The facts also reveal that Mosley's wish to remain silent was honored68 and that the "second" interrogation was really the "first" interrogation concerning the homicide.69 This was not a case, therefore, where "the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind."70 As a result, the Court held that admission of Mosley's incriminating statement was not a violation of the *Miranda* principles.71

D. The Edwards Rule

The *Innis* definition of "interrogation"72 is of particular importance when considered in light of the Supreme Court's holding in *Edwards v. Arizona*.73 Edwards was arrested on charges of robbery, burglary, and first-degree murder.74 Upon being informed of his *Miranda* rights, Edwards requested counsel.75 The next day Edwards was told that he had to talk, and, as a result, he implicated himself in the offenses charged.76 The Arizona Supreme Court found that Edwards had invoked his right to counsel during the first interrogation but had waived his right to counsel during the second interrogation. The United States Supreme Court reversed.77

The Supreme Court had two reasons for reversing the Arizona Court. The Court first determined that an erroneous standard for determining waiver of the right to counsel was applied.78 The Court pointed out that a waiver "of counsel must not only be voluntary, but also must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege."79 This

67. *Id.* at 105.
68. *Id.* at 104.
69. *Id.* at 105.
70. *Id.* at 105-06.
71. *Id.* at 107.
74. *Id.* at 478.
75. *Id.* at 479.
76. *Id.*
77. *Id.* at 480.
78. *Id.* at 482.
79. *Id.*
is a standard that the Court has reiterated and clarified in many decisions. 80

The trial court found Edward's confession to be voluntarily made without separately focusing on whether Edwards had knowingly and intelligently relinquished his right to counsel. 81 The Supreme Court did not question the soundness of the trial court finding of "voluntariness" regarding Edward's confession. 82 However, the Court realized that "neither the trial court nor the State Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it." 83 The Court gave as its first reason for reversal the fact that neither the trial court nor the supreme court understood the requirements for finding a valid waiver of an invoked right to counsel. 84

The Court's second reason for reversing the Arizona Supreme Court was based on the importance attached to the assertion by one in custody of his right to counsel. When one accused of a crime asks for counsel, additional safeguards are required. 85 Miranda "distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney." 86 After invoking his Miranda right to counsel an accused has the undisputed right to remain silent and to be free from interrogation until he has consulted with an attorney. 87 The Court "reconfirm[ed] these views and emphasize[d] that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 88 Therefore, the Court held that simply following the standard of showing a valid waiver of the right to counsel was insufficient to allow an admission thus obtained into evidence. 89 The Court then held "that an accused, such as Edwards, having ex-

81. 451 U.S. at 483.
82. Id. at 484.
83. Id.
84. Id.
85. 451 U.S. at 484, citing 441 U.S. 369, 372-76.
86. 451 U.S. at 485, citing 423 U.S. at 104.
87. 451 U.S. at 485, citing 446 U.S. at 298.
88. 451 U.S. at 485.
89. Id. at 484.
pressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." This is the substance of the Edwards rule.

The majority held that the "fruits" of Edward's second interrogation were not admissible into evidence. Further, the Court pointed out that Edwards could have waived his right to counsel. In order to determine whether one has validly waived his right to counsel, the question would be "whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." In other words, that the defendant initiated the dialogue.

Justice Powell concurred with the majority in result but did not join in the reasoning because he was not sure what the majority's opinion meant. Justice Powell agreed with the majority's first reason for reversal, i.e. that the Arizona Supreme Court did not apply the correct standard in determining whether Edwards validly waived his right to counsel. Justice Powell's problem with the majority's opinion was with the second reason. He found the Court's opinion to be unclear in explaining what it meant by "initiation."

Justice Powell stated that he could not agree with the opinion "if read to create a new per se rule, requiring a threshold inquiry as to precisely who opened up any conversation between an accused and state officials." Thus, Justice Powell's hesitation to join the Court's opinion centered upon what he felt to be too much emphasis on one element — initiation.

In Oregon v. Bradshaw, eight Justices agreed that "initia-

90. Id. at 484-85.
91. Id. at 485; See, also Brown v. Illinois, 422 U.S. 590 (1975) (discussion of the concept of the "fruit of the first confession" and when evidence obtained impermissibly is to be excluded from evidence at criminal trials); Wong Sun v. United States, 371 U.S. 471 (1963).
92. 451 U.S. at 487.
93. Id. at 486.
94. Id. at 486, n.9 (emphasis added).
95. Id. at 488.
96. Id. at 489.
97. Id.
98. Id. at 489-91.
99. ___U.S.__, 103 S.Ct. 2830 (1983). The Court, however, remained divided on
tion" is the one element which should be emphasized. Justice Rehnquist, writing for the plurality, found that the defendant, by asking "Well, what is going to happen to me now?" initiated dialogue with the authorities. The dissenting opinion, written by Justice Marshall, was directed toward defining what Bradshaw intended by the query. Justice Marshall felt that under the circumstances, the question only evidenced Bradshaw's desire to find out where the police were going to take him. However, as Justice Powell pointed out, both Justices Rehnquist and Marshall agreed in one respect — the initiation question is the first step in a two-step analysis.

**ANALYSIS**

The North Carolina Supreme Court, in *State v. Franklin*, found no violation of the defendant's fifth amendment right to be free from police initiated interrogation after the defendant invoked his right to counsel. Specifically, the majority found that Franklin had not invoked his right to counsel with regard to the murder to which he confessed and therefore *Edwards* did not control. The court, then found from the totality of the circumstances that Franklin validly waived his right to remain silent and his right to counsel. In short, the court found that all that remained was Franklin's "completely unsolicited confession to a murder about which there had never been any intention to question."

The majority found that Officer Styron's purpose in interviewing Franklin was to renew efforts to question the defendant concerning the Smith and Ray murders. Officer Styron testified, at the *voir dire* hearing on the motion to suppress the confession, that he did not know that Franklin had invoked his right to coun-

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100. *Id.* at __, 103 S.Ct. 2835.
101. __U.S. __, 103 S.Ct. at 2838. Justice Rehnquist was joined in his opinion by Chief Justice Burger, Justice White and Justice O'Connor. Justice Marshall was joined in his dissent by Justice Brennan, Justice Blackmun and Justice Stevens. Justice Powell wrote a concurring opinion.
102. __U.S. __, 103 S.Ct. at 2840.
103. *Id.* at __, 103 S.Ct. 2835, 2840; *See supra* note 7.
105. *Id.* at 685-86, 304 S.E.2d at 582.
106. *Id.* at 686, 304 S.E.2d at 582.
107. *Id.* at 687, 304 S.E.2d at 582-83.
108. *Id.* at 685, 304 S.E.2d at 582.
sel with respect to the Smith and Ray murders. The court found that Officer Styron "began the conversation on a sympathetic note, acknowledging defendant's 'predicament' arising out of the rape/robbery arrest, his problems with sexual violations involving young children, and his need for psychological treatment." Then, the court found, the defendant requested to be taken downtown before any mention was made of the purpose for which Officer Styron visited Franklin, i.e., the Smith and Ray murders. In response to Officer Styron's question: "Do you want to talk about these cases?" Franklin replied that he did. Once downtown, Franklin was asked what he wanted to talk about. In response, Franklin began discussing the Michelle Moody murder, not the Smith and Ray murders.

The rationale for the court's opinion begins with the fact that the court determined that Franklin never invoked his right to counsel with regard to the Michelle Moody murder. The court then noted that the defendant was duly warned of his Miranda rights before any questioning began. The court, looking at the totality of the circumstances, determined that no significance should be given to the fact that the Miranda warning was not expanded upon or explained, or that the defendant was questioned in a small, windowless interrogation. In short, the court felt "the defendant simply waived his rights and chose to cooperate with the law enforcement authorities." The court concluded by recalling Chief Justice Warren's words in Miranda that "confessions remain a proper element in law enforcement," and holding "that under the facts of this case, defendant's confessions were voluntarily and understandingly made after he had been fully advised of his constitutional rights and had specifically, knowingly, and intelligently waived his right to remain silent and to have counsel present during questioning."

109. Id. at 685-86, 304 S.E.2d at 582.
110. Id. at 686, 304 S.E.2d at 582. Apparently, Franklin confessed to these other offenses the day prior to Officer Styron's interview with him. Id. at 685.
111. Id. at 686, 304 S.E.2d at 582.
112. Id.
113. Id.
114. Id. at 685, 304 S.E.2d at 582.
115. Id. at 687, 304 S.E.2d at 582-83.
116. Id.
117. Id. at 687, 304 S.E.2d at 583, citing 384 U.S. at 478.
118. 308 N.C. at 687, 304 S.E.2d at 583.
The majority did not decide one issue which was (and still is) of paramount importance in the correct determination of this case: "We do not decide whether Officers Styron and Price, in good faith, might properly have initiated questioning concerning the Ray and Smith murders in light of defendant's earlier request that he have an attorney present during questioning on these cases." 119 Justice Exum in his dissent felt that this was the proper question to answer and that the majority determined the wrong question when it decided that the defendant had at no time invoked his right to counsel with regard to Moody. 120

Justice Exum believed that the Supreme Court's holding in *Edwards* "compels the conclusion that Officers Styron and Price could not have properly initiated questioning about the Smith and Ray murders, as they did, in light of defendant's express request that an attorney be present during any further questioning about those murders." 121 The basis for this belief is that since Officer Styron visited Franklin in the first place, for the purpose of questioning Franklin about the Ray and Smith murders, and that a confession by Franklin concerning those murders would be inadmissible under *Edwards*, then the fact that Franklin confessed to another murder did not change the character of Officer Styron's initial contact with Franklin. Therefore, Franklin's confession should have been found to be inadmissible. In other words, since Styron's initial contact with Franklin was impermissible, the fruit of such contact was also inadmissible. 122 It seems, then, that Franklin's constitutional right to be free from a police initiated interrogation was violated.

The majority's opinion leads the reader of *State v. Franklin* to believe that Officer Styron never mentioned to Franklin that he wished to talk with Franklin about the Smith and Ray murders. Yet, the court noted that Officer Styron's purpose in questioning Franklin was to question him about the Smith and Ray murders. The court then held that "[p]rior to any discussion, defendant waived his constitutional rights and indicated he would answer questions without the presence of an attorney." 123 Then the court found that Franklin asked to be taken downtown to "talk about

119. *Id.* at 686-87, 304 S.E.2d at 582.
120. *Id.* at 699, 304 S.E.2d at 590 (Exum, J. dissenting).
121. *Id.* at 699-700, 304 S.E.2d at 589 (Exum, J. dissenting).
122. *Id.* at 700, 304 S.E.2d 590 (Exum, J. dissenting).
123. *Id.* at 685, 304 S.E.2d at 582 (emphasis added).
these cases” before any mention of the Ray and Smith cases was made to him.124

An excerpt from the voir dire hearing on the motion to suppress the confession is helpful in understanding how the majority’s opinion misleads the reader:

The Court: What did you advise [Franklin]?
[Officer Styron]: Your Honor, I have a card that I was reading to him. OK, I informed him that I wanted to talk about the Nealy Smith and Amanda Ray case, and I informed him [of his Miranda rights]. After I read these rights to Him, then I asked him “Do you understand each of these rights I have explained to you?” He said “Yes.” “Having these rights in mind, do you now wish to answer questions?” He said “Yes.” “And do you now wish to answer questions without a lawyer present?” He said “Yes.” At that point we started carrying on a conversation.128

The transcript reveals that one of the very first things that Officer Styron told Franklin was that he intended to interrogate Franklin about the Smith and Ray murders.126 Yet, despite this clear record, the court found that no mention of the Ray or Smith murders was made to Franklin by Officer Styron.

Officer Styron’s visit to and conversation with Franklin constituted interrogation. The majority stated that Officer Styron “began the conversation on a sympathetic note, acknowledging defendant’s ‘predicament’ . . . his problems with sexual violations with young children and his need for psychological treatment.”127 Officer Styron asked Franklin whether he had ever received any treatment for his problem while he was serving time. Franklin replied that he had not.128 This dialogue is clearly interrogation under the Innis definition. Innis included in its definition “any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.”129 The Innis Court found that psychological ploys used as techniques of persuasion in a custodial setting amount to interrogation.130

124. Id. at 686, 304 S.E.2d at 582.
126. 308 N.C. at 686, 304 S.E.2d at 582 (emphasis added).
127. Id.
129. See supra text accompanying note 48.
130. 446 U.S. at 299.
Officer Styron’s avowed purpose in seeing Franklin was to get a confession concerning the Smith and Ray murders. This is what he thought he was getting in response to the question, “What do you want to talk about?” Instead Styron received a confession about Michelle Moody’s murder. Surely the majority is not asking the reader to believe that a confession by Franklin about the Smith and Ray murders would not have been the direct result of Officer Styron’s interrogation. Why then, is the reader asked to believe that Franklin’s confession was not the direct result of that same interrogation?

*Edwards* as a per se rule requires the first step in any analysis to determine whether one’s right to counsel, previously invoked, has been validly waived, to be a determination of who initiated the conversation. If the accused initiated that conversation, then the court must, based on the totality of the circumstances, determine whether such a waiver was voluntarily, knowingly and intelligently made. However, if the accused did not initiate the conversation, then any evidence obtained from the conversation is inadmissible as “fruit” from an impermissible interrogation.

Since Franklin gave an incriminating response, as a result of police interrogation about a crime for which he had previously invoked his right to counsel, the proper question for the court to answer is whether Officer Styron initiated the communication, exchange or conversation or whether Franklin initiated such communication, exchange or conversation. The majority’s opinion shows that Officer Styron initiated the conversation with Franklin which led to the confession. He went to question Franklin, he read Franklin the *Miranda* rights, and he even “began the conversation” which constituted interrogation. Further, the *voir dire* transcript shows that Officer Styron visited on his own accord and without invitation from Franklin.

However the majority in *Franklin* viewed defendant’s waiver as valid based solely on the totality of the circumstances. The Court did not determine whether Officer Styron was permissibly

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131. 308 N.C. at 685, 304 S.E.2d at 582.
132. See supra note 7; See supra text accompanying note 103.
133. See supra text accompanying notes 77-90.
134. *Id.*
135. 308 N.C. at 685, 304 S.E.2d at 582.
136. *Id.* at 685-86, 304 S.E.2d at 582.
138. 308 N.C. at 687, 304 S.E.2d at 583.
interrogating Franklin. The court merely held that Franklin had not invoked his right to counsel with regard to the Michelle Moody murder and so the first step of the Edwards analysis was not necessary.139

The most believable theory upon which the court's actions can rest is that of "dual conversations." Presumably there are two separate and distinct conversations. The first beginning when Officer Styron initiated the conversation with Franklin about his "predicament" and ending, presumably, when Franklin asked Styron to take him downtown. Franklin's request to be taken downtown was Franklin's initiation of the second interrogation—that was conducted downtown and resulted in Franklin's confession to the murder of Michelle Moody. Since Franklin asked to be taken downtown not in response to a direct question by Officer Styron, this is a viable theory if Franklin's question is seen as ending one conversation and beginning a totally new one.

The problem with this interpretation, however, is that under Edwards' two step analysis the proper determination is whether the accused initiated the dialogue. The determinative word is "initiation." Who initiated the conversation? In Franklin's case the answer is that Officer Styron initiated the conversation. This is true even if there was a second conversation since it was his interrogation of the defendant, impermissible under Edwards, which led to defendant's request to be taken downtown.

In Michigan v. Mosley the Supreme Court felt that one of Miranda's literal interpretations would allow the police to immediately follow an interrogation which had been stopped by an accused with "another" interrogation.140 The Court felt that such an interpretation would lead to absurd results, and would act to undermine the purpose of Miranda.141 The Court, therefore, considered a possible "dual conversation" theory with respect to the right to remain silent and found it not to be in accord with the purposes of Miranda.142 Consequently, a "dual conversation" alternative should not be allowed when dealing with the more important right to counsel.143 To allow the court to interpret a conversation into two separate conversations whenever the accused asks a question

139. Id. at 686, 304 S.E.2d at 582.
140. See supra text accompanying notes 61-65.
141. Id.
142. Id.
143. See supra text accompanying notes 85-89.
pursuant to an impermissible interrogation would allow the Edwards’s per se rule to be undermined.

As Justice Exum pointed out in his dissent, the court should have inquired into the issue of “whether Officers Styron and Price, in good faith, might properly have initiated questioning concerning the Ray and Smith murders, in light of defendant’s earlier request that he have an attorney present during questioning on these cases . . . .”144 Edwards is a per se rule145 with no “good faith” exception. It is either met or it is not. As Justice Exum pointed out in his dissent, “it is clear that the officers [in Edwards] had no actual knowledge [that Edwards] had invoked his right to counsel . . . .”146 Since the officers in Edwards indicated good faith and the Court decided Edwards the way it did, there is no good faith exception to the rule.

CONCLUSION

In State v. Franklin, the majority’s opinion is ambiguous in its application of Edwards’ proscription. It is ambiguous because on the one hand, the majority acknowledges the Edwards rule while on the other hand, it disregards the rule when it applies the law to the facts of the case.147 In the majority’s application, the rule is not controlling since Franklin had never invoked his right to counsel with respect to the murder to which he confessed.148 The court disregards the fact that Officer Styron was impermissibly interrogating Franklin in the first place. Considering the majority’s neglect of the key issue: whether Officer Styron could initiate questioning regarding the Smith and Ray murders without violating the Edwards rule, the rationale for the court’s opinion is inherently suspect. Edwards should control the conversation which resulted from Officer Styron’s initiated interview. The result of this impermissible contact was properly excludable from evidence.149

The dissent is the more sound of the two opinions. Justice Exum relies on the Edwards rule to conclude that the confession was tainted and therefore it should have been excluded. It is also

144. 308 N.C. at 686-87, 304 S.E. 2d at 582.
145. See supra notes 7, 135; See supra text accompanying note 103.
146. 308 N.C. at 701, n.4, 304 S.E.2d at 591 (Exum, J. dissenting); citing 451 U.S. at 478, n.1.
147. 308 N.C. at 686, 304 S.E.2d at 582.
148. Id.
149. Id. at 700, 304 S.E.2d at 590 (Exum, J. dissenting).
the more logically reasoned of the two opinions. The rationale for the dissenting opinion lies in the thought that if Officer Styron had not initiated the interview with Franklin, then Franklin could not have asked Styron to take him downtown\textsuperscript{150} and Franklin would not, at that time, have confessed to the killing of Michelle Moody.\textsuperscript{151}

\textit{Innis} defined “interrogation” as a conversation which a police officer reasonably should know will elicit an incriminating statement from one in custody.\textsuperscript{152} Officer Styron interviewed Franklin to elicit a confession regarding the Smith and Ray murders. This was Styron’s purpose and the first thing he informed Franklin of before reading him his rights.\textsuperscript{153} Franklin had earlier expressed his desire for counsel’s presence if and when he was again interrogated about the Smith and Ray murders.\textsuperscript{154} \textit{Edwards} has been interpreted as a \textit{per se} rule\textsuperscript{155} prohibiting police-initiated interrogation in such circumstances.\textsuperscript{156} Information obtained by the authorities in violation of \textit{Edwards} prohibition is evidence which should be excluded at trial. Justice Exum was, therefore, correct in his dissent that Franklin’s fifth and fourteenth amendment right against compelled self-incrimination was violated.

The United States Supreme Court decisions following the \textit{Miranda} opinion regarding an accused’s right to counsel make it clear that Officer Styron’s interview with Franklin was a violation of

\begin{itemize}
  \item \textsuperscript{150} \textit{Id.}
  \item \textsuperscript{151} Franklin may at some other point in time have confessed on his own initiative, but the purpose of this note is not to hazard a guess at what may have been but rather what should have been.
  \item \textsuperscript{152} 446 U.S. at 299.
  \item \textsuperscript{153} 308 N.C. at 685, 304 S.E.2d at 582.
  \item \textsuperscript{154} See \textit{supra} note 22.
  \item \textsuperscript{155} There is some question as to whether Franklin was charged for the Smith and Ray murders the first time Styron questioned him in March or April of 1981. Styron testified that Franklin was not charged at that time but rather was “invited to come down to [be] interviewed.” Brief for Appellant at App-2, 308 N.C. 682, 304 S.E.2d 579 (1983). This is not a serious question since Franklin was clearly in custody when Styron questioned him the second time. The only question, then, is whether one can invoke his right to counsel before he is interrogated in custody, i.e., since Franklin’s first interview with Styron may not have been an “in custody” interrogation within the meaning of \textit{Miranda} and \textit{Innis}, see \textit{Oregon v. Mathiason}, 429 U.S. 492 (1977), could Franklin invoke his rights prior to the second interview? The answer is revealed in the text of \textit{Miranda}: “An individual need not make a pre-interrogation request for a lawyer. While such a request affirmatively secures his right to have one.” 384 U.S. at 470.
  \item \textsuperscript{156} See \textit{supra} notes 85-88 and accompanying text.
\end{itemize}
Franklin's constitutionally protected right to counsel. The North Carolina Supreme Court should at the earliest possible moment acknowledge the error of its holding in *State v. Franklin*, and thus come into accord with the *per se* rule of *Edwards v. Arizona*.

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