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Criminal Procedure - Fifth and Sixth Amendment Protections - Brown v. State

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CRIMINAL PROCEDURE — Fifth and Sixth Amendment Protections. ***Brown v. State*****, 661 P.2d 1024 (Wyo. 1983).**

John Thomas Brown Sr., was convicted in the District Court of Fremont County of manslaughter in connection with the death of Calvin Yellowbear. He was sentenced to a term of five years in the Wyoming State Penitentiary with the provision that he would be eligible for parole after two years. Brown appealed his conviction on the ground that his sixth amendment right to counsel had been violated. Specifically, Brown asserted that during a pre-arrest custodial interrogation he requested to have the assistance of counsel before being questioned further. Upon his request for counsel, he was released from custody. He was subsequently arrested and interrogated again, without counsel being made available. The Wyoming Supreme Court held that the sixth amendment right to counsel attaches only when adversarial judicial criminal proceedings against an accused have been commenced and the fact that Brown was only being questioned by officers investigating the death of Calvin Yellowbear did not trigger protection of the sixth amendment. On this basis, the Wyoming Supreme Court affirmed his conviction.[1]

THE FACTS

On the morning of December 22, 1981, Brown and seven other member of his family went on a hunting trip.[2] Among the members of the hunting party were Brown, his brother Andrew and his cousin Calvin Yellowbear.[3] Around sundown, a fight broke out between Andrew and Calvin Yellowbear. When Brown attempted to break up the fight, a rifle discharged. The bullet struck Calvin Yellowbear who subsequently died.[4]

The following morning Brown covered Calvin Yellowbear's corpse with a blanket and left it in his pickup truck, which was then hidden. A two-day period followed during which the body was not discovered. No report of the shooting was made until the night of December 24, 1981, when Brown informed his father and his brother Charles that Calvin Yellowbear was dead. During the early morning hours of Christmas Day, 1981, Brown and the other members of the hunting party were picked up by the Ft. Washakie Police Department and were taken to Lander, Wyoming, for interview.[5]

The initial interview of Brown by officers investigating the death of Calvin Yellowbear was conducted early in the morning of December 25, 1981. Prior to any questioning, Brown was advised of his constitutional rights in accordance with the mandate of *Miranda v. Arizona.*[6] At this time, Brown signed a document in which he waived his constitutional rights.[7]

Brown was then taken to Riverton, Wyoming, for a second interview which began approximately two hours after the conclusion of the initial

1. Brown v. State, 661 P.2d 1024 (Wyo. 1983).
2. *Id.* at 1025.
3. Brief for Appellant at 3, Brown v. State, 661 P.2d 1024 (Wyo. 1983).
4. 661 P.2d at 1026.
5. *Id.* at 1026.
6. 384 U.S. 436 (1966).
7. 661 P.2d at 1026.

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interview. Brown was not readvised of his constitutional rights, but he did state that he still understood his rights.[8]

That afternoon, a third interview was conducted between investigating officers and Brown. During the course of this interview, he expressed his desire to consult with counsel prior to any further questioning.[9] He was then allowed to leave the sheriff's office.[10]

The next contact between Brown and the investigating officers occurred on December 27, 1981 during which Brown furnished a written exculpatory statement to the Fremont County Sheriff. This statement came after he had been advised of his constitutional rights in accordance with *Miranda* and after he had signed another waiver of those rights.[11] The next day, December 28, 1981, Brown signed an affidavit in the office of the county and prosecuting attorney to the effect that Andrew Brown was the only person who had a gun in his hands at the time of the shooting.[12]

Nevertheless, on January 19, 1982, Brown was arrested. He was again advised of his rights in accordance with *Miranda*[13] and was taken to the office of the Fremont County Attorney for further questioning. The county attorney again advised him of his rights and then asked him whether he wanted to make a statement. Brown finally admitted accidentally firing the shot which killed Calvin Yellowbear.[14]

The principal contention made by Brown on appeal was that the interrogation on January 19, 1982, violated his sixth and fourteenth amendment rights and that the subsequent admission of those statements into evidence constituted error.[15] The reasoning behind this theory was that since he indicated on December 25, 1981, that he desired to consult with an attorney prior to talking further with investigating officers, and that he had not subsequently waived his previously asserted right to counsel, the inculpatory statement made by him after his January 19 arrest was obtained in violation of his right to counsel under the sixth amendment to the Constitution of the United States.[16]

8. *Id.* at 1026-27.
9. *Id.* at 1027.
10. Brief for Appellee at 3, Brown v. State, 661 P.2d 1024 (Wyo. 1983).
11. 661 P.2d at 1026.
12. *Id.* at 1027.
13. 384 U.S. 436 (1966).
14. 661 P.2d at 1027. A pretrial hearing was held on a motion made on behalf of Thomas Brown, Sr., to suppress all statements made to investigating officers on the grounds that such statements were made while this defendant was under investigation for the death of Calvin Yellowbear; were made without the presence of counsel after requesting the same, involuntary, and without full knowledge of his rights against self-incrimination. The trial court only suppressed the third statement of December 25, 1981, on the ground that Thomas Brown, Sr., had requested counsel prior to making that statement. The trial court refused to suppress any of the other statements, but leave was given to raise additional objections to the admissions of the inculpatory statement made on January 19, 1982. *Id.* at 1028.
15. Brief for Appellant, *supra* note 3, at 9. The sixth amendment to the United States Constitution provides in part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." U.S. CONST. amend. VI. The Supreme Court first held that the sixth amendment guarantee of the right to counsel applied to the states through the fourteenth amendment in Gideon v. Wainwright, 372 U.S. 355 (1963).
16. Brief for Appellant, *supra* note 3, at 12-15. There were also additional errors claimed on appeal; however, they are beyond the scope of this note.

The state asserted two arguments against the error claimed by Brown on appeal. First, the state argued that since Brown initiated voluntary contact with law enforcement authorities two days after he had asserted his right to counsel he had waived his right to counsel as to any subsequent statement.[17] Second, the state argued that Brown had "knowingly and voluntarily waived his rights" on January 19, 1982.[18]

BROWN V. STATE

The Wyoming Supreme Court held that the sixth amendment right to counsel attaches only when adversarial judicial criminal proceedings against an accused have been commenced and that while it was clear in this case that Brown had requested counsel during the course of the third interview on December 25, 1981, it was "equally clear that the right to counsel prescribed in the [s]ixth [a]mendment had not then been attached."[19] The mere fact that Brown was being questioned by the officers investigating the death of Calvin Yellowbear did not trigger the protection provided in the sixth amendment because adversarial judicial criminal proceedings had not yet been commenced against the accused.[20]

The use of the sixth amendment as a defensive tool is limited unless that magic pre-requisite—the initiation of adversarial judicial criminal proceedings—has been met.[21] As will be discussed below, the fifth amendment's guarantee against self-incrimination is a more effective method for developing a defense.[22] When deciding whether to use the fifth amendment or sixth amendment, or perhaps both, the proper choice will depend on the particular factual situation involved. The remainder of this Note will focus on when the fifth or the sixth amendment should apply to a given factual context. It should be noted at the outset that the two amendments are quite distinct, apply to different factual contexts, and are not interchangeable. Failure to assert the proper amendment on appeal may lead to disastrous results for a client, as *Brown* demonstrates.

Background

In 1946, the Supreme Court in *Malloy v. Hogan* recognized that the fifth amendment's privilege against compulsory self-incrimination was a fundamental right and, as such, was protected by the fourteenth amendment against abridgment by the states.[23] The landmark decision of *Miranda v. Arizona* was announced in 1966.[24] In that case, the Court dealt

17. Brief for Appellee, *supra* note 10, at 3-6.
18. Brief for Appellee, *supra* note 10, at 7-10. The state addressed other errors claimed by appellant, however, these are beyond the scope of this note.
19. Brown v. State, 661 P.2d 1024, 1029 (Wyo. 1983) (citing Moore v. Illinois, 434 U.S. 220 (1977); Kirby v. Illinois, 406 U.S. 682 (1972); Powell v. Alabama, 287 U.S. 45 (1932)). *See* Auclair v. State, 660 P.2d 1156 (Wyo. 1983).
20. *Id. See infra* text accompanying notes 53-66.
21. *See* Kirby v. Illinois, 406 U.S. 682 (1972); Powell v. Alabama, 287 U.S. 45 (1932).
22. U.S. CONST. amend. V, provides in part: "nor shall be compelled in any criminal case to be a witness against himself. . . ."
23. 378 U.S. 1 (1964). *See* California v. Byers, 402 U.S. 424 (1971; Williams v. Florida, 389 U.S. 78 (1970); Griffin v. California, 380 U.S. 609 (1965).
24. 384 U.S. 436 (1966).

specifically with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation. The Court also defined the procedure necessary to insure that the individual is accorded his right under the fifth amendment not to be compelled to incriminate himself.[25] The *Miranda* Court held that:

> the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean 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.[26]

Additionally, the Court stressed the importance of certain procedural safeguards to inform accused persons of their right to remain silent and to assure a continuous opportunity to exercise their rights. Prior to any questioning, the person must be warned that he has the right to remain silent, that any statement he makes may be used against him at trial, and that he has the right to the presence of an attorney, either retained or, if he cannot afford one, an appointed attorney.[27] The defendant may waive these rights, provided that the waiver is made voluntarily, knowingly, and intelligently.[28] If, however, he indicates in any manner or at any stage of the process that he wishes to consult with counsel before speaking there can be no further questioning. Likewise, if the individual is unaccompanied by counsel and indicates in any manner that he does not wish to be interrogated, the authorities may not question him.[29] The mere fact that he may have answered some questions, or volunteered some statements on his own, does not deprive him of the right to refrain from answering any further questions until he has consulted with an attorney and thereafter consents to be questioned.[30] Thus, these safeguards may be invoked at any time prior to or during the interrogation. The primary purpose of these procedural safeguards is to dispel the aura of compulsion inherent in custodial interrogation.[31] These procedural safeguards apply to a person suspected as well as accused of a crime.[32]

Finally, the Supreme Court noted that the presence of counsel at the interrogation may serve several significant subsidiary functions. If the accused decides to talk to his interrogators the assistance of counsel can mitigate the dangers of untrustworthiness inherent in custodial interrogation. With counsel present the likelihood that the authorities will practice coercion is reduced. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement of the facts and that the statement is reported accurately by the prosecution at trial.[33]

25. *Id.* at 444-45.
26. *Id.* at 444.
27. *Id.*
28. *Id.*
29. *Id.* at 444-45. This position has been recently reaffirmed in Edwards v. Arizona, 451 U.S. 477, *reh'g denied,* 452 U.S. 973 (1981).
30. *Id.* at 444-45.
31. *Id.* at 458.
32. *Id.* at 467.
33. *Id.* at 470.

Several years after the *Miranda* decision was announced, the Supreme Court was squarely presented with the question of whether an inadvertent disregard of the procedural rules established in *Miranda* would result in the complete exclusion of any evidence obtained from the interrogation.[34] In *Michigan v. Tucker*, the Supreme Court seemed to retreat from the hard line approach it had taken earlier in *Miranda*.[35] The question specifically presented in *Tucker* was whether the testimony of an alibi witness must be excluded merely because the police had learned of the identity of the witness by questioning the defendant at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent.[36] The Court held that the conduct of the police did not abridge the defendant's constitutional privilege against compulsory self-incrimination, but only departed slightly from the prophylactic standards laid down by the Court in *Miranda* to safeguard that privilege.[37]

Several factors seem to have influenced the Court's decision. First, the statement was not the result of any coercion and the statement was made voluntarily.[38] Second, the defendant was told that any statement he made could be used against him and that he had the right to an attorney.[39] Finally, the statement was not use against him at trial, but was merely used to obtain a witness.[40] Thus, it seems arguable that the extent of the retreat from the hard line approach of *Miranda* is proportional to the degree and nature of the violation—the more minor the departure from the prophylactic standards of *Miranda*, the more likely that any error resulting therefrom will not be considered prejudicial.

However, once a person in custody requests an attorney before being interrogated or before being interrogated further, the police may not disregard his request and proceed to interrogate him.[41] This is not merely a minor violation of a prophylactic standard but rather it is more akin to a direct infringement of the right against self-incrimination. Likewise, there are certain requirements that must be met in order to show that a suspect has waived a previously asserted right to have counsel present.

In *Edwards v. Arizona*, the Supreme Court addressed those circumstances which indicate that an accused has waived a previously asserted right to have counsel present during questioning.[42] In *Edwards*, the suspect asserted his right to counsel and his right to remain silent, but that the police, without furnishing him counsel or respecting his right to

34. Michigan v. Tucker, 417 U.S. 433 (1974).
35. *Id.*
36. *Id.* at 435. It should be noted that the interrogation took place before the Court's decision in *Miranda*.
37. *Id.* at 445-46.
38. *Id.* at 444.
39. *Id.* at 444-45.
40. *Id.* at 437.
41. 384 U.S. at 444-45.
42. 451 U.S. 477 (1981), *reh'g denied*, 452 U.S. 973 (1981). The issue presented to the Court was whether the fifth, sixth, and fourteenth amendments require suppression of a post arrest confession which was obtained after Edwards had invoked his right to counsel before further questioning. The Sixth Amendment issue was never reached, because the case was decided on Fifth and Fourteenth Amendment grounds as construed in *Miranda*. *Id.* at 480-81, n.7.

remain silent, returned the next day to question him further and as a result of the second meeting secured incriminating oral admissions.[43] The Court held that there was not a valid waiver of the previously asserted right to have counsel present.[44]

First, the Court noted that after initially being advised of his *Miranda* rights, the accused may validly waive his rights and respond to interrogation.[45] Any waiver of counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege," a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.[46]

However, additional safeguards are necessary when the accused has previously asked for counsel and then purportedly waives that previously asserted right.[47] Specifically, the Court in *Edwards* held that

> when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.
>
> [A]n accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.[48]

The issue of waiver becomes a two-step analysis. First, for there to be a valid waiver, it must be the accused and not the law enforcement authorities who re-initiates the contact.[49] Second, even if the accused initiated the contact, it must be shown that the waiver was voluntary and a knowing and intelligent relinquishment or abandonment of a known right or privilege.[50] Once a valid waiver is thus established, there is no constitutional prohibition against the prosecution using his subsequent statements against him.[51] Thus, the *Edwards* Court reaffirmed that special protections are required once an accused has asserted his desire to have an attorney present before being questioned.[52]

43. *Id.* at 479-80.
44. *Id.* at 482.
45. *Id.* at 484 (citing North Carolina v. Butler, 441 U.S. 369 (1979)).
46. *Id.* at 482 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
47. *Id.* at 484.
48. *Id.* at 484-85. In Dryden v. State, 585 P.2d 483 (Wyo. 1975) the Supreme Court of Wyoming seemed to recognize the same principle enunciated in *Edwards*. In *Dryden* the court noted: "the mandate of Miranda in this respect is clear and that defendant having indicated that he wanted an attorney, the county authorities could not thereafter enter into other interrogation unless and until the defendant had himself reopened the subject." *Id.* at 493. *See* Daniel v. State, 644 P.2d 172 (Wyo. 1982) for a similar analysis.
49. *Id.*
50. *Id.* at 483.
51. *Id.* at 484-85.
52. *Id.* at 485. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

Sixth and Fourteenth Amendment Challenge

The main thrust of Brown's argument on appeal was that his sixth and fourteenth amendment rights were violated by the custodial interrogation after his arrest on January 19, 1982.[53] In *Kirby v. Illinois*, the Supreme Court noted that in a line of cases originating with *Powell v. Alabama*,[54] it has become firmly established that a person's sixth and fourteenth amendment right to counsel attaches only at or after the time that adversary judicial criminal proceedings are initiated against him.[55] Thus, for sixth and fourteenth amendment purposes, it is necessary to define when "adversary judicial criminal proceedings" have been initiated. A defendant has the right to appointed counsel "at every stage of the proceedings from his initial appearance before the justice through appeal."[56] In addition, the United States Supreme Court has held that the right to counsel attaches to all critical stages in the proceedings.[57] Over the years, the United States Supreme Court has defined with some specificity what the phrase "critical period of the proceedings," or more commonly "critical stage," has come to mean. A critical stage of the proceedings has been held to include: arraignment,[58] preliminary hearing,[59] post-indictment lineup,[60] and at corporeal identification after the initiation of adversary judicial criminal proceedings.[61] In *Kirby*, the Court noted that critical stages involve points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information or arraignment.[62]

The Supreme Court reasoned that the initiation of such proceedings marks the commencement of the "criminal prosecution" to which the guarantees of the sixth amendment are applicable.[63] The initial of criminal proceedings is far from mere formalism. It is the starting point of the entire system of adversary criminal justice. At that point the government has committed itself to prosecute and it is only then that the adverse positions of the government and the defendant have solidified, and the defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.[64]

The initial interview of Brown on December 25, 1981, was not a critical stage of the proceedings, as defined by either the United States Supreme Court or the Wyoming Supreme Court.[65] At the time of the interview, adversary judicial criminal proceedings within the meaning of *Kirby* had

53. Brief for Appellant, *supra* note 3, at 9.
54. 287 U.S. 45 (1932).
55. 406 U.S. 682 (1972).
56. WYO. R. CRIM. P. 6(a).
57. Powell v. Alabama, 287 U.S. 45 (1932). *See* Chavez v. State, 604 P.2d 1341 (Wyo. 1979).
58. 287 U.S. at 47.
59. Coleman v. Alabama, 399 U.S. 1 (1970).
60. U.S. v. Wade, 388 U.S. 218 (1967).
61. Moore v. Illinois, 434 U.S. 220 (1977). *See also* Auclair v. State, 660 P.2d 1156 (Wyo. 1983) and Chavez v. State, 604 P.2d 1641 (Wyo. 1979).
62. 406 U.S. at 689.
63. *Id.*
64. *Id.*
65. Auclair v. State, 660 P.2d 1156 (Wyo. 1983). In *Auclair*, the Wyoming Supreme Court seemed to adopt the same criteria defining "critical stage" as that stated by the Supreme Court of the United States in *Kirby v. Illinois*. *Id* at 1160-61.

not yet been initiated. Therefore, as the Wyoming Supreme Court held, "the right to counsel prescribed in the Sixth Amendment had not then attached." Thus, there was no violation of Brown's sixth amendment rights on January 19, 1982 when he made his inculpatory statement.[66]

From a defensive standpoint, it is clear that under facts similar to Brown, a sixth and fourteenth amendment challenge to a denial of the right to counsel is wholly inappropriate. However, by use of a fifth and fourteenth amendment challenge on appeal, the desired result could have been achieved.

Fifth and Fourteenth Amendment Challenge

The *Miranda* Court directly held that fifth and fourteenth amendment prohibitions against compulsory self-incrimination applies to statements obtained from an individual who is subjected to custodial police interrogation,[67] and this protection applies equally to persons suspected and accused of crime.[68]

In *Brown,* the initial inquiry should have focused on whether there was a custodial interrogation on December 25, 1981, within the meaning of *Miranda.*[69] In *Miranda,* 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."[70] And recently, in the case of *Rhode Island v. Innis,* the United States Supreme Court took the opportunity to elaborate on the definition of "custodial interrogation."[71] In *Innis,* the Court held that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.[72]

During the early morning hours of Christmas Day, 1981, John Brown and the other members of the hunting party were "picked up" by the Ft. Washakie Police Department and were subsequently taken into Lander, Wyoming, for interview.[73] Prior to any questioning, Brown was advised of his rights under the Constitution in accordance with the dictate of *Miranda.*[74] During that day, Brown was questioned a total of three times. In the course of the third round of questioning, he expressed a desire to consult

66. Brown v. State, 661 P.2d 1024, 1029 (Wyo. 1983).
67. 384 U.S. at 444.
68. *Id.* at 467.
69. The court in *Miranda* held that *prior* to any custodial interrogation a person must be afforded certain procedural safeguards in order to protect the person's fifth amendment privilege. Thus, it would appear that a person's fifth amendment rights attach prior to, or at the initiation of, questioning. 384 U.S. at 444.
70. *Id.*
71. 446 U.S. 291 (1980).
72. *Id.* at 300-301.
73. Brown v. State, 661 P.2d 1024, 1026 (Wyo. 1983).
74. *Id.*

with counsel prior to being questioned further.[75] Under these circumstances it would appear that there was in fact a custodial interrogation within the meaning of *Miranda*. The questioning was initiated by law enforcement officials after Brown was taken into custody.[76] Even the law enforcement officials conducting the questioning were aware that this was a custodial interrogation within the meaning of *Miranda*. Before the first round of questioning Brown was advised of his rights in accordance with *Miranda*. Prior to the second round of questioning he was asked if he still understood those rights, and, finally, was readvised of his rights before the final round of questioning began.[77] This questioning of Brown was more than a general investigation into the facts surrounding the incident in which the warnings are not required.[78] Rather, this questioning was the custodial interrogation of a suspect in the shooting of Calvin Yellowbear.[79] Thus, all the procedural safeguards required by *Miranda* should have been followed. When Brown requested the assistance of counsel before any further interrogation, this was an invocation of his fifth amendment rights under *Miranda*, and all interrogation should have ceased.[80]

Once it has been determined that there was in fact a custodial interrogation under the *Miranda* standards, and the right to counsel had been invoked, the next inquiry is whether there was a valid waiver of that right to counsel under *Edwards*.[81] In *Edwards*, the United States Supreme Court noted that after initially being advised of his rights under *Miranda*, an accused may validly waive his rights and respond to interrogation. However, additional safeguards are necessary to protect the accused who asks for counsel.[82] When an accused has invoked his right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing merely that the accused has responded to further police-initiated custodial interrogation, even if he has been advised of his rights. Once the right to counsel has been invoked, the accused is not subject to further interrogation until counsel has been made available to him, or unless the accused himself initiates further communication with the authorities.[83]

In the recent case of *Oregon v. Bradshaw*, the United States Supreme Court elaborated on the standards to be used in the test laid down in *Edwards*.[84] In that case the Oregon Court of Appeals misapplied the *Edwards*

75. *Id.* at 1027.
76. When John Thomas Brown, Sr., was taken into Lander and advised of his rights in accordance with *Miranda*, it seems doubtful that he would have been free to leave at any time at that point. This is especially true since at that time all members of the hunting party, including John Thomas Brown, Sr., were probably all regarded as suspects in the shooting. And as noted, *Miranda* does not distinguish between those accused or merely suspected of a crime. *See supra* note 49. Thus, even if he was not technically "in custody", at the very least he was deprived of his freedom of action in a significant way under the meaning in *Miranda*.
77. *Id.* at 1026.
78. In *Miranda*, the Court specifically excluded this type of investigation from its holding. 384 U.S. at 477.
79. For an example of what is not regarded as custodial interrogation within the meaning of *Miranda*, see Beckwith v. U.S., 425 U.S. 341 (1976), and cases cited therein.
80. Fare v. Michael C., 442 U.S. 707, 717-18 (1979).
81. 451 U.S. 477 (1981, *reh'g denied*, 452 U.S. 973 (1981).
82. *Id.* at 484-85.
83. *Id.*
84. ___ U.S. ___, 103 S.Ct. 2830 (1983).

test by holding that the mere initiation of a conversation by an accused would amount to a waiver of a previously invoked right to counsel.[85] In *Bradshaw,* the Supreme Court reaffirmed the *Edwards* position that after an accused has asserted his right to counsel, further interrogation of the accused should not take place unless the accused himself initiates further communication, exchanges or conversations with the police.[86] However, the *Bradshaw* Court emphasized that the mere fact that a suspect initiates further communication does not of itself constitute a waiver. Even where a suspect initiates further conversation and where reinterrogation follows, the burden remains upon the prosecution to show that "subsequent events" constituted a waiver of the fifth amendment right to have counsel present during the interrogation.[87] Thus, once an accused has invoked his right to have counsel present during the interrogation the issue of waiver of that right of counsel becomes a two step analysis. First, it must be established that the accused, and not the authorities, initiated the conversation, communication, or exchange. Once this is established, there is no violation of the *Edwards* rule. Second, it must be determined whether there was a valid waiver of the right to counsel and silence. For a waiver to be valid, it must have been knowing and intelligent, and found to be so under the totality of the circumstances including the fact the accused and not the police initiated further communication.[87] This determination depends upon the "particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused."[88]

Under the particular factual background of the *Brown* case, Brown's voluntary contact with the authorities on December 27, 1981, and again on December 28, was an initiation of communication with the authorities within the meaning of *Edwards.*[89] This is especially true since his voluntary contact with the authorities on both occasions was directly related to their investigation of the death of Calvin Yellowbear.[90] Thus, since Brown initiated further communication with the authorities, there was no violation of the *Edwards* rule on January 19, 1982.

The next inquiry is whether a valid waiver of Brown's fifth amendment rights had occurred prior to the inculpatory statement of January 19, 1982. There was some dispute in the evidence as to whether Brown was read his

85. *Id.* at 2834.
86. *Id.* at 2834-35.
87. *Id.* The Supreme Court has never defined what "subsequent events" will constitute a waiver of the fifth amendment right to have counsel present during the interrogation. In *Edwards* the Court emphasized the totality of the circumstances. However, as noted in the text, the mere fact that the suspect initiates further communication is not of itself a waiver. Therefore, under *Edwards* analysis, defining "subsequent events" becomes critical. A subsequent events inquiry should focus on three factors. First, the amount of time involved between initially advising a suspect of his rights and his request for an attorney and thereafter reinitiating communication. Second, whether prior to reinterrogation the suspect was advised that he did not have to speak to the authorities and that if he decides to speak, the authorities may interrogate him. Finally, from the viewpoint of the prosecution, it would well be worth the time to readvise the suspect of his rights and obtain a valid waiver of those rights prior to reinterrogation. This final step will provide concrete evidence of a knowing and voluntary waiver.
88. *Id.* (citing North Carolina v. Butler, 441 U.S. 369, 374-75 (1979)) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
89. 661 P.2d at 1027 (1983).
90. *Id.*

rights prior to the January 19, 1982 statement and to whether the signature on the "waiver of rights card" was his.[91] The record shows that Brown could read and write and that he had an eighth grade education. He had been given his rights before and during the investigation and had asserted his right to counsel on December 25, 1981. A deputy sheriff testified that he had read Brown his rights prior to questioning on January 19, 1982, and also testified that he witnessed Brown's signature on the "waiver of rights card." It would appear that the trial court could have properly found that the waiver was knowing and intelligent under all the circumstances, including the fact that the accused, and not the police, initiated further communication. Therefore, the inculpatory statement made by Brown on January 19, 1982, was not obtained in violation of his fifth amendment rights.

CONCLUSION

The final outcome of the *Brown* case would have been based on fifth amendment grounds as it was on the sixth amendment. However, a fifth amendment challenge was the appropriate legal theory to assert in *Brown*. As noted above, to invoke the fifth amendment, one only need show that there was custodial interrogation and that the suspect invoked his rights under the fifth amendment by requesting counsel. Under the sixth amendment, however, the right to counsel does not attach until the initiation of adversary judicial criminal proceedings. Thus, under the fifth amendment, a suspect may "invoke his rights" at an earlier stage than is possible under the sixth amendment. In these circumstances, a fifth amendment challenge is the appropriate legal theory to use in the preparation of a defense.[92]

LARRY B. KEHL

91. Brief for Appellant, *supra* note 3, at 7; Brief of Appellee, *supra* note 10, at 8.
92. Thus, if Brown had not initiated subsequent contact on December 27 and 28, 1981, and all other facts remained the same, it seems probable that his inculpatory statements on January 19, 1982, would have been inadmissible under *Edwards*. *See also* United States v. Crowder, 691 F.2d 280 (6th Cir. 1982) where the Sixth Circuit noted that the assertion of fifth amendment rights were still valid six months later. *Id.* at 283.