CONSTITUTIONAL LAW—RESUMPTION OF QUESTIONING AFTER RIGHT TO REMAIN SILENT HAS BEEN EXERCISED

In *Michigan v. Mosley*[1] the United States Supreme Court broadly held that the admissibility of statements obtained after a person in custody has decided to remain silent depends, under *Miranda v. Arizona,*[2] on whether his "right to cut off questioning" was "scrupulously honored."[3] The Court held: where an interrogation is immediately ceased when a fully informed suspect exercises his right to remain silent; a significant lapse of time passes before questioning is resumed; a fresh set of warnings is provided; and the questioning concerns an offense unrelated to the subject of the prior interrogation, then the defendant's right to cut off questioning has been so honored and, therefore, any statement obtained in the latter interrogation is admissible as evidence against the suspect at trial.[4]

Mosley was arrested in connection with certain robberies in Detroit, Michigan, and after his arrest, was advised of his constitutional rights in accordance with the *Miranda* decision.[5] He read and signed the police department's constitutional rights notification certificate. Upon commencement of the interrogation about the robberies, Mosley exercised his right to remain silent and the questioning was promptly ceased. After approximately two hours of incarceration, Mosley was questioned by a different officer regarding a robbery and fatal shooting which had taken place prior in time to the robberies which resulted in his arrest.[6] He had not been charged with that offense, nor had he been previously questioned concerning it. At the outset of the second interrogation, Mosley was again advised of his *Miranda* rights and he again read and signed the notification form. During the course of the latter interrogation,[7] he made a statement implicating himself in the homicide and subsequently was charged with first degree murder.

A defense motion to suppress the incriminating statement was denied by the trial court and the statement was introduced in evidence at Mos-

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1. ___ U.S. ___, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).
2. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
3. ___ U.S. at ___, 96 S.Ct. at 326, 46 L.Ed.2d at 321.
4. *Id.* at ___, 96 S.Ct. at 327-28, 46 L.Ed.2d at 323.
5. The warnings must inform the person in custody "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." 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706-07.
6. The record did not make clear how much the officer knew about the earlier interrogation. ___ U.S. at ___, 96 S.Ct. at 327, 46 L.Ed.2d at 322.
7. The second interrogation lasted approximately fifteen minutes. *Id.* at ___, 96 S.Ct. at 324, 46 L.Ed.2d at 318. At no time during either interrogation did Mosley indicate a desire to consult a lawyer. *Id.* at ___, 96 S.Ct. at 324, 46 L.Ed.2d at 318.

ley's trial where he was convicted of first degree murder. The Michigan Court of Appeals reversed the conviction holding that the second interrogation was a per se violation of the *Miranda* doctrine[8] and in so holding, relied heavily on *Westover v. United States,*[9] a companion case to *Miranda.* The Michigan Supreme Court denied further appeal[10] and the United States Supreme Court granted the state's petition for certiorari.[11]

In the *Miranda* decision the Court stated that the basic purpose of its holding was to set forth concrete constitutional guidelines for law enforcement agencies and courts to follow.[12] *Miranda* did not state under what circumstances, if any, a statement obtained after a person in custody[13] has decided to remain silent would be admissible in evidence. The *Miranda* decision simply stated :

> 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 been once invoked.[14]

Thus *Miranda* held that custody creates an inherent compulsion on an individual to incriminate himself in response to questions, and that statements obtained under such circumstances are therefore obtained in violation of the fifth amendment privilege against compelled testimonial self-incrimination unless the privilege is "knowingly and intelligently waived."[15]

In *Mosley* the Court viewed the issue as being whether the conduct of the police leading to the incriminating statement violated the *Miranda* guidelines and, therefore, focused primarily on an interpretation of the above stated passage of *Miranda* in resolving the issue.[16] The Court set forth three possible interpretations of how *Miranda*'s language could operate after a suspect invoked his right to cut off questioning. First, the language could be literally interpreted to grant the suspect permanent

8. 51 Mich. App. 105, 214 N.W.2d 564 (1974).
9. 384 U.S. at 494, 86 S.Ct. at 1638, 16 L.Ed.2d at 735 (1966).
10. 392 Mich. 764 (1974).
11. 419 U.S. 1119, 95 S.Ct. 801, 42 L.Ed.2d 819 (1975).
12. 384 U.S. at 441-42, 86 S.Ct. at 1611, 16 L.Ed.2d at 705.
13. *See* Annot., *Custodial Interrogation—Miranda Rule,* 31 A.L.R.3d 565 (1970).
14. 384 U.S. at 473-74, 86 S.Ct. at 1627-28, 16 L.Ed.2d at 23. The court in *Mosley* stated that this passage was also relied on by the Michigan Court of Appeals in finding a per se violation of Miranda. ___ U.S. at ___, 96 S.Ct. at 324, 46 L.Ed.2d at 319.
15. *Id.* at 471, 475, 86 S.Ct. at 1626, 1628, 16 L.Ed.2d at 722, 725.
16. ___ U.S. at ___, 96 S.Ct. at 324, 46 L.Ed.2d at 319.

immunity from any further questioning by any police officer at any time or place on any subject.[17] A second possible interpretation could be the exclusion of any statement taken after the suspect invokes the right to cut off questioning. In other words, any subsequent statement would be characterized as the product of compulsion and be excluded from evidence, even if the suspect volunteered the statement without any further interrogation by police.[18] Finally, the *Miranda* language could be interpreted to require the immediate cessation of interrogation when the right is invoked by the suspect, but permitting a resumption of questioning after a momentary respite.[19] All three interpretations were rejected by the Court as either infringing too greatly on legitimate police investigative rights or violating the purposes of *Miranda* by not adequately protecting the accused.[20] Instead, the Court relied on an interpretation of the intent of *Miranda:* first, to adopt effective means to notify the person of his right of silence, and second, to adopt effective means to assure that the exercise of that right by the person in custody would be "scrupulously honored."[21]

The decision in *Westover v. United States*[22] held an accused's statement inadmissible under *Miranda* where the statement was obtained by authorities in a second interrogation. In *Westover* warnings were given to the accused at the outset of the second interrogation but were not given to him upon commencement of the initial questioning.[23] The *Mosley* court found this original failure to notify the accused of his fifth amendment right to be the distinguishing factor between the different results reached in the two cases.[24]

The *Mosley* decision correctly interprets the intent of the *Miranda* holding, but the test enunciated by the Court for determining the admissibility of statements obtained after a suspect exercises his right of silence fails to meet the standard set forth in *Miranda.* In other words, the test fails to set forth concrete constitutional guidelines for law enforcement agencies and courts to follow.[25] *Mosley* rejects possible objective standards for a standard based on the factual circumstances of each case—was the right to cut off questioning "scrupulously honored"? Justice Brennan, dissenting, takes note of the majority's failure in this regard and also suggests two objective guidelines available as proper procedural safeguards before resumption of questioning: arraignment or appointment and arrival of counsel.[26] Use of such objective guidelines would provide much more effec-

17. *Id.* at ___, 96 S.Ct. at 325, 46 L.Ed.2d at 320.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at ___, 96 S.Ct. at 326, 46 L.Ed.2d at 321.
22. 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
23. *Id.* at 496-97, 86 S.Ct. at 1639, 16 L.Ed.2d at 736.
24. ___ U.S. at ___, 96 S.Ct. at 327, 46 L.Ed.2d at 323.
25. 384 U.S. at 441-42, 86 S.Ct. at 1611, 16 L.Ed.2d at 705.
26. ___ U.S. at ___, 96 S.Ct. at 332, 46 L.Ed.2d at 329.

tive safeguards than a "scrupulously honored" test which again exposes an accused to the potentiality of psychological and physical coercion inherent in custodial interrogation which *Miranda* sought to expel.[27] Determining such factual questions as to whether the offense is unrelated[28] or whether a substantial time has passed simply does not provide concrete constitutional safeguards as dictated by *Miranda*.

It would be a simple task to explain the *Mosley* decision as another example[29] of the Burger Court's shifting the emphasis away from the Warren Court's protection of the rights of the accused to an emphasis on protection of law enforcement officers and a reduction of the number of criminal convictions being reversed on procedural technicalities.[30] The result reached in *Mosley* may well fit into this shift of emphasis, but a better explanation of the decision is that the Court simply misinterpreted the mandate of *Miranda*.

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27. 384 U.S. at 456, 86 S.Ct. at 1618, 16 L.Ed.2d at 713.

28. It is interesting to note that Justice Brennan, dissenting, found troubling the fact that Mosley initially indicated he did not want to answer "[a]nything about robberies," therefore, raising a question of whether the second interrogation about a prior robbery-murder even met the "scrupulously honored" test. ___ U.S. at ___, 96 S.Ct. at 334, 46 L.Ed.2d at 331.

29. *See* Harris v. New York, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) (statement obtained in violation of *Miranda* was admissible for impeachment purposes).

30. Excellent commentaries on the Warren Court's performance include A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); F. GRAHAM, THE SELF-INFLICTED WOUND (1970); and P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970). For excellent discussions of the Burger Court and how it compares with the Warren Court see Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956-1969,* 60 CORNELL L. REV. 743 (1975), and Stephens, *The Burger Court: New Dimensions in Criminal Justice,* 60 GEORGETOWN L.J. 249 (1971).