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Criminal Law - Failure to Request Counsel; Waiver - Miranda Per Se Exclusion of Confessions Obtained in Absence of Counsel No Longer Applicable: Waiver of Counsel Determined on Basis of Totality of Circumstances

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RECENT CASE

CRIMINAL LAW — FAILURE TO REQUEST COUNSEL; WAIVER — MIRANDA PER SE EXCLUSION OF CONFESSIONS OBTAINED IN ABSENCE OF COUNSEL NO LONGER APPLICABLE: WAIVER OF COUNSEL DETERMINED ON BASIS OF TOTALITY OF CIRCUMSTANCES.

After being placed under arrest and given his *Miranda* rights,[1] the respondent made incriminating statements to the arresting officers.[2] Respondent subsequently made a motion to suppress these statements on the ground that he had not waived his right to the assistance of counsel at the time the statements were made.[3] This motion was denied by the trial court and respondent was subsequently convicted.[4] Adopting a *per se* rule, the North Carolina Supreme Court reversed respondent's conviction.[5] Based on its reading of *Miranda,* the court refused to admit into evidence any statement made by a person under custodial interrogation and without counsel unless, at the time the inculpatory statement was made, the suspect had explicitly waived the right to counsel.[6] The

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1. Miranda v. Arizona, 384 U.S. 436 (1966). The Court stated as follows: "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has the right to the presence of an attorney, either retained or appointed." *Id.* at 444.

2. North Carolina v. Butler, ____ U.S. ____, ____, 99 S. Ct. 1755, 1756 (1979). When asked if he understood his rights respondent replied that he did. The respondent refused to sign the waiver at the bottom of the F.B.I.'s "Advice of Rights" form. He was told that he need neither speak nor sign the form, but that the agents would like to talk to him. The respondent replied, "I will talk to you but I am not signing any form." He then made inculpatory statements. *Id.* Respondent said nothing when advised of his right to the assistance of a lawyer. At no time did the respondent request counsel or attempt to stop the agent's questioning. *Id.*

3. *Id.*

4. *Id.*

5. State v. Butler, 295 N.C. 250, ____, 244 S.E.2d 410, 413 (1978). The North Carolina Supreme Court stated that the holding in Miranda v. Arizona, 384 U.S. 436 (1966) provides that unless and until a suspect is warned of his rights under *Miranda* and the suspect's specific waiver of these rights is demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. 295 N.C. at ____, 244 S.E.2d at 413.

6. 295 N.C. at ____, 244 S.E.2d at 413. The court stated that the holding in *Miranda* "provides

United States Supreme Court reversed and *held* that an explicit statement of waiver is not necessary to support a finding that the defendant waived the right to counsel guaranteed by the *Miranda* case,[7] but the question of waiver must be determined on the particular facts and circumstances surrounding the case.[8] North Carolina v. Butler, ____ U.S. ____, 99 S. Ct. 1755 (1979).

Not until the second half of the 18th century was it recognized that some confessions should be rejected as untrustworthy.[9] By the early 1800's, the whole attitude of judges changed and there was a general suspicion and prejudice against all confessions, and an inclination to repudiate them on the slightest pretext.[10] In its earliest constitutional cases the United States Supreme Court decided questions regarding the use of confessions under the privilege against self-incrimination contained in the fifth amendment of the United States Constitution.[11] This approach was

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in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the *Miranda* warnings have been given." *Id.*

7. ____ U.S. at ____, 99 S. Ct. at 1758-59 (1979). The Court stated as follows:

> [I]t appears that every court that has considered this question has now reached the same conclusion. Ten of the 11 United States Courts of Appeals and the courts of at least 17 states have held that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case.

Id. See cases cited *id.* at ____, 99 S. Ct. at 1758-59 nn.5 & 6.

The United States Supreme Court noted that, although an express or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, the fact of a waiver may be implied from the facts and circumstances of the situation, based on the actions and words of the person interrogated. *Id.* at ____, 99 S. Ct. at 1757.

8. *Id.* at ____, 99 S. Ct. at 1758 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). In looking at the particular facts and circumstances of each case the Court in *Butler* stated that through the creation of "an inflexible rule that no implicit waiver can suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. Therefore its judgment cannot stand, since a state court can neither add to nor subtract from the mandate of the United States Constitution." ____ U.S. at ____, 99 S. Ct. at 1759 (citing Oregon v. Hass, 420 U.S. 714, 719 (1975)).

9. Rex v. Warickshall, 1 Leach C. C. 298, 168 E. R. 234 (1783). *See generally* 3 J. WIGMORE, EVIDENCE §§ 822-826 (Chadbourn rev. 1970). The rationale behind the trustworthiness test is that the exclusion of a confession is justifiable only when such evidence is rendered unreliable and untrustworthy by virtue of the means employed to procure it, with the result that its admission would create the peril of convicting the innocent. *Id.*

A commentator states that "in constitutional terms, predicating a criminal conviction on such evidence [rendered unreliable and untrustworthy by virtue of the means employed to procure it] denies the defendant a fair hearing and thereby operates to deprive the accused of life or liberty without due process of law." Allen, *The Supreme Court: Federalism and State Systems of Criminal Justice,* 8 DE PAUL L. REV. 213, 233-34.

10. Bram v. United States, 168 U.S. 532, 549-61 (1897). There was no general rule by which the admissibility of a confession could be determined, but the courts allowed the rule to evolve from the facts of each case. Attempts to reconcile the authorities resulted in obscurity and confusion. *Id.* at 549. *See* J. WIGMORE, *supra* note 9 at § 820(a) for an explanation of the possible reasons for the irrationality of the law of confessions in the early 1800's.

In one case a confession given in response to the cautionary statement "anything you say in your defense, we shall be ready to hear" was suppressed as given due to an improper inducement. Regina v. Morton, 2 Mood & R. 514, 174 E. R. 367 (1843). *See also Developments in the Law — Confessions,* 79 HARV. L. REV. 935, 955 (1966).

11. 168 U.S. at 542. In *Bram,* the Court stated as follows:

later weakened, however, by the Court's refusal to exclude a confession given before the suspect had been warned of a privilege not to speak.[12] In *United States v. Carignan*[13] the Supreme Court expressed doubt about violations of the fifth amendment's protection against self incrimination as grounds for excluding involuntary confessions from federal criminal trials.[14]

In 1936 the Supreme Court initiated a radical change in the law by using the due process clause of the fourteenth amendment of the United States Constitution rather than the fifth amendment as grounds for excluding involuntary confessions.[15] The Court imposed limitations on the admissibility of confessions based on the fundamental notion that the interrogation at which a confession is obtained is part of the process by which the state procures a conviction, and is therefore subject to the requirements of the due process clause of the fourteenth amendment.[16]

The central difficulty in the confession cases decided under the fourteenth amendment was a pervasive ambiguity involving the rationale or purpose of the rule requiring the exclusion of coerced confessions from criminal trials. This ambiguity arose from uncertainty as to whether the rationale was to avoid involuntary or coerced confessions[17] or whether it was to deter police officials from using unfair or illegal interrogation methods.[18] The Court avoided

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> In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person "shall be compelled in any criminal case to be a witness against himself."

Id.

12. Powers v. United States, 223 U.S. 303 (1912).

13. 342 U.S. 36 (1951).

14. United States v. Carnigan, 342 U.S. 36, 41 (1951). *See* 79 HARV. L. REV., *supra* note 10 at 961. *See also*, 3 J. WIGMORE, *supra* note 9 at 338 n.5.

15. Brown v. Mississippi, 297 U.S. 278 (1936). In *Brown* the defendant still had marks from the ropes that had been used to hang him up in order to obtain his "voluntary" confession. The Court held that the defendant had been denied due process of law. *Id.* at 286. *See also* Haley v. Ohio, 332 U.S. 596, 601 (1947) ("neither man nor child can be allowed to stand condemned by methods which flout constitutional requirements of due process of law."); Chambers v. Florida, 309 U.S. 227, 240-41 (1940) ("The constitution proscribes such lawless means irrespective of the ends.").

16. 297 U.S. at 286-87. A commentator states that "[t]he Court encountered great difficulty in deciding just what process is due at interrogation. Its decisions in this area prior to Escobedo v. Illinois, 378 U.S. 478 (1964) (right to counsel applies during interrogation) were based on the premise that 'the public interest requires that interrogation. . . at a police station should not be completely forbidden, so long as it is conducted fairly. . . .' State v. Smith, 32 N.J. 501, 531, 161 A.2d 520, 537 (1960)." 79 HARV. L. REV. *supra* note 10, at 962.

17. Lyons v. Oklahoma, 322 U.S. 596, 605 (1943). The Court in *Lyons* stated that "[a] coerced confession is offensive to basic standards of justice, not because the victim has a legal grievance against the police, but [because] declarations procured by torture, are not premises from which a civilized forum will infer guilt." *Id.*

18. McNabb v. United States, 318 U.S. 332 (1943). In *McNabb*, suspects were arrested and put in a barren cell for fourteen hours instead of being brought before a judicial officer, as required by law, to determine the justification for their detention. They were questioned unremittingly for two days. A confession was obtained without benefit of counsel. The Court demonstrated its contempt

the constitutional issues when it held invalid a confession obtained in violation of a rule of criminal procedure[19] requiring that an arrested person be promptly taken before a magistrate.[20]

Despite the ambiguity regarding the rationale for exclusion of confessions, the fourteenth amendment due process clause was easily applied when the cases involved statements fostered by threats or physical violence.[21] The problem of an intelligible theory of the function of the confession rule began to appear, however, in cases involving subtle psychological pressures because it was no longer possible to assume that the resultant confessions were unreliable as evidence of guilt.[22]

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for such police practices by reversing the suspect's convictions. The *McNabb* opinion pointed out that the statutes requiring a suspect to be promptly taken before a judicial officer were to prevent secret interrogation and third degree practices. *Id.* at 343-44.

See McCormick, *Some Problems and Developments in the Admissibility of Confessions*, 24 TEX. L. REV. 239, 270-71 (1946).

19. Rule 5(a) of the Federal Rules of Criminal Procedure states as follows:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

FED. R. CRIM. P. 5(a).

20. McNabb v. United States, 318 U. S. 332 (1943). The *McNabb* rule requires suppression of incriminating statements obtained during illegal detention of a suspect held in violation of a federal statute requiring prompt appearance before a magistrate to determine if there is cause to hold him for trial. *Id.* at 341-42. The rule was established to keep lower courts from evading the principal enunciated in Brown v. Mississippi, 297 U.S. 278, 286 (1935), that a coerced confession is not federally admissible. Prior to *McNabb*, lower courts, eager to secure convictions, admitted confessions by finding no coercive police methods, based on the testimony of the police rather than defendant's testimony alleging coercive police methods.

The lower courts effectively nullified *McNabb* by requiring a showing of a causal connection between the confession and detention, *i.e.*, a showing of coercion. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, N.Y. UNIV. L. REV. 785, 806-07 (1970).

The Court extended its contempt for coerced confessions by finding that any confession during a period of unnecessary delay was automatically inadmissible. Mallory v. United States, 354 U.S. 449 (1957). *See generally*, Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 GEO. L. J. 1 (1958).

This rule, however, applied only to federal cases and not the states. The Court closed in on the state confession problem by making increased resort to the right to counsel guaranteed by the sixth amendment and the privilege against self-incrimination in the fifth amendment, rather than resorting to the fourteenth amendment. In Spano v. New York, 360 U.S. 315 (1959), although the Court found a confession coerced and decided the case on due process grounds, it appeared that the Court reached the view that once a person was formally charged by indictment or information his right to counsel had begun. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 658-59 (4th ed. 1975).

Five years after *Spano*, the Court in Massiah v. United States, 377 U.S. 201 (1964), applied the sixth amendment right to counsel in reversing a petitioner's conviction which was based on statements elicited by the police after petitioner had been indicted and in the absence of his counsel.

The sixth amendment to the United States Constitution states in pertinent part that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI.

21. Brown v. Mississippi, 297 U.S. 278, 287 (1936). For a discussion of this case, *see supra* note 15.

22. Ashcraft v. Tennessee, 322 U.S. 143 (1944). In *Ashcraft*, the defendant's conviction was reversed because the confession had been obtained after 36 hours of interrogation of the defendant by the police. In effect, the Court ruled that the extended questioning raised a conclusive presumption of coercion. The result reached by the Court reflected less of a concern with the confession's reliability and evidence of guilt in the particular case than disapproval of police methods which a

The Supreme Court in *Culombe v. Connecticut,*[23] articulated a test for the admissibility of a defendant's confession based on the voluntariness of the confession, which was determined by the totality of the circumstances.[24] The refusal of the police or other interrogators to permit the subject of the interrogation to consult with counsel was regarded as part of the totality of circumstances determining the voluntariness of a statement.[25] Other factors included the extent of cross-questioning, any undue delay in arraignment, and failure to caution a prisoner.[26] These factors were considered in the light of all of the surrounding circumstances — the duration and condition of detention, the attitude of the police toward the suspect, the suspect's physical and mental state as well as the various pressures which sustain or weaken his power to resist or his self control.[27] These factors were used to determine if a suspect had been denied due process of law as guaranteed by the fourteenth amendment.[28]

The United States Supreme Court in *Massiah v. United States,*[29] avoided the due process approach,[30] holding that the sixth amendment's[31] guarantee of the right to counsel in criminal prosectuions required exclusion of incriminating statements elicited by government agents in the absence of counsel after the accused had been indicted.[32] Shortly after *Massiah,* the Court used several

majority of the Court perceived as generally dangerous and subject to serious abuse. *Id.* at 154-55.

Three cases decided in 1949 illustrate the attitude in confession cases at that time: Watts v. Indiana, 338 U.S. 49 (1949); Turner v. Pennsylvania, 338 U.S. 62 (1949), and Harris v. South Carolina, 338 U.S. 68 (1949). There was no substantial evidence of overt physical brutality by the police in any of these cases. Records, however, showed illegal detention, incommunicado confinement, the moving of suspects from place to place during interrogation, and prolonged questioning. In each case the conviction was reversed. 338 U.S. 49 at 55, 338 U.S. 62 at 66, 338 U.S. 68 at 71.

23. 367 U.S. 568 (1961).

24. Culombe v. Connecticut, 367 U.S. 568, 602 (1961). The Court in *Culombe* stated as follows:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession a product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . . The line of distinction is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps propel the confession.

Id.

25. *Id.* at 601, *see also id.* at 602 n.54.

26. *Id.* at 601.

27. *Id.* at 602.

28. *Id.*

29. 377 U.S. 201 (1964).

30. Massiah v. United States, 377 U.S. 201, 204 (1964). The *Massiah* Court followed the four concurring Justices in Spano v. New York, 360 U.S. 315 (1959). *Spano* reversed a criminal conviction, based on an improperly admitted confession, on fourteenth amendment grounds. The concurring Justices, however, pointed out that the conviction could have been reversed solely on the ground that the defendant was denied his right to counsel. *Id.* at 324.

31. *See supra* note 20 for pertinent parts of the sixth amendment to the United States Constitution.

32. 377 U.S. at 206 (1964). The Court in *Massiah* stated as follows:

of the factors of the voluntariness approach to formulate the elements of a relatively definite rule in *Escobedo v. Illinois.*[33]

Miranda v. Arizona[34] established more concrete guidelines for custodial interrogation in an effort to guarantee suspects their sixth amendment right to counsel and their fifth amendment privilege against self incrimination.[35] Rather than focusing on the factors of a particular case, *Miranda* established universally applicable guidelines regarding the right to remain silent and the right to the presence of counsel in police interrogations, whether state or federal.[36] The *Miranda* Court stressed that modern in-custody interrogation practices are psychologically oriented[37] and

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> [P]etitioner was denied the basic protection [of the right to the assistance of counsel] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him [by means of a co-defendant cooperating with the government, who engaged the petitioner in conversation in the presence of a hidden radio transmitter] after he had been indicted and in the absence of his counsel.

Id.

The *Massiah* rule was held equally binding on the states in State v. McLeod, 173 Ohio St. 520, 184 N.E.2d 101 (1962), *remanded,* 378 U.S. 582, *on remand,* 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), *rev'd* 381 U.S. 356 (1965).

33. 378 U.S. 478 (1964). Escobedo, suspected of murdering his brother-in-law, was arrested and taken to police headquarters for questioning. His repeated requests to speak to his retained counsel were denied. Escobedo's lawyer spent three to four hours at the police station trying to see his client, but was rebuffed by various police officers. Although Escobedo and his lawyer had previously discussed what petitioner should do in the event of police questioning, no officer advised petitioner of his constitutional rights during the course of his interrogation. On the basis of the resulting confession, Escobedo was convicted of murder. The Supreme Court of Illinois affirmed the conviction. People v. Escobedo, 28 Ill. 2d 41, 190 N.E.2d 825, 827 (1963). On certiorari, the United States Supreme Court, in *Escobedo v. Illinois,* 378 U.S. 478, 492 (1964), reversed, stating as follows:

> We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied "the Assistance of Counsel". . . and that no statement elicited by the police during the interrogation may be used against him at a criminal trial.

Id. at 490-91.

34. 384 U.S. 436 (1966).

35. Miranda v. Arizona, 384 U.S. at 444 (1966). In its holding, the *Miranda* Court stated as follows:

> [T]he 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. . . . As for procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.

Id.

36. *Id.* at 467-70.

37. *Id.* at 448-58. The Court pointed out some of the interrogation procedures set out in various

inherently compulsive,[38] and that the policy behind its decision was to guarantee the privilege against self-incrimination by coercive police methods.[39] *Miranda* also pointed out the inherent coerciveness of station-house, in-custody interrogation.[40] Because of the importance of the privilege against self-incrimination and the right to counsel, *Miranda* set very strict standards for finding a waiver of these rights.[41]

The Court began retreating from the *Miranda* rationale to the pre-*Miranda* voluntariness standard with *Harris v. New York,*[42] in which the United States Supreme Court held that a suspect's inculpatory statements after defective *Miranda* warnings had been given were admissible, but only for impeachment purposes.[43] The *Harris* Court stated that it does not follow from *Miranda* that evidence inadmissible in the prosecution's case in chief against the accused is barred for all purposes, provided that the trustworthiness of the evidence satisfies legal standards.[44] The Court's rationale in *Harris* was that a defendant should not be able to resort to perjurious testimony in reliance on the prosecution's disability to challenge his credibility.[45]

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police manuals that involve applying psychological pressure on suspects, such as isolating the suspect in unfamiliar surroundings, displaying an air of confidence as to the suspect's guilt and directing questions towards the reasons why the suspect did the act, rather than asking whether he did it. *Id.* at 450.

38. *Id.* at 457-58. The *Miranda* Court stated as follows:

> The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles — that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Id.

39. *Id.* at 460. The Court stated that all the policies of the privilege against self incrimination "point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government — state or federal — must accord to the dignity and integrity of its citizens." *Id.*

40. *Id.* at 461. The Court in *Miranda* stated "as a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery." *Id.*

41. *Id.* at 436. The following considerations were set out by the Court: (1) Failure to request a lawyer does not constitute a waiver and must be specifically made. *Id.* at 470. (2) The government retains a heavy burden of proving a knowing and intelligent waiver of rights by the defendant. *Id.* at 475. (3) A waiver will not be presumed from the silence of the accused. An express statement, however, that the suspect is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. *Id.*

42. 401 U.S. 222 (1971). *See* Comment, 13 SAN DIEGO L. REV. 861, 874 (1976). *See generally* 54 N.D.L. REV. 307, 310 (1977).

43. Harris v. New York, 401 U.S. 222, 223-26 (1971).

44. *Id.* at 224.

45. *Id.* at 224-26. The *Harris* Court further reasoned that a sufficient deterrence of proscribed police conduct is realized when the evidence in question is made unavailable to the prosecution's case in chief. *Id.* at 225.

Harris was later reaffirmed by Oregon v. Hass, 420 U.S. 714 (1975), which held that when a suspect in police custody has been given the warnings required by *Miranda*, and the individual has

In *Lego v. Twomey,*[46] the United States Supreme Court demonstrated its rejection of the protective stance of *Miranda* by passing up an opportunity to strengthen *Miranda's* exclusionary rules.[47] In that case the Supreme Court rejected petitioner's contention that evidence offered against a defendant at a criminal trial and challenged on constitutional grounds must be determined admissible beyond a reasonable doubt in order to give adequate protection to those values that the exclusionary rules are designed to protect.[48] The Court determined, however, that the emphasis of its prior opinions on the importance of values sought to be protected by cases such as *Miranda* is not sufficient in itself to require the prosecution to prove by a higher standard than a preponderance of the evidence that a confession was in fact voluntarily obtained.[49]

The necessity of complying with *Miranda* standards was further limited in *Michigan v. Tucker,*[50] in which the United States Supreme Court approved the prosecution's use of evidence directly derived from a defendant's statements elicited by the police in violation of *Miranda.*[51] The Court interpreted *Miranda* as outlining recommended procedural safeguards for protecting fifth amendment rights by reasoning that the omission of procedural safeguards does not necessarily constitute a violation of the underlying rights.[52] Therefore, when a violation of *Miranda* guidelines occurs, it appears that the *per se* rule is abandoned and a balancing test is applied.[53] The products of true compulsion, however, are excludable as violative of the fifth amendment.[54]

In 1977, the Court in *Brewer v. Williams,*[55] reaffirmed *Miranda*

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requested that he be allowed to telephone his attorney, any inculpatory information that he has given before his attorney arrives may be used for the purpose of impeachment at trial. *Id.* at 720-24.

46. 404 U.S. 477 (1972).

47. Lego v. Twomey, 404 U.S. 477, 487-89 (1972).

48. *Id.* at 487.

49. *Id.* at 488-89.

50. 417 U.S. 433 (1974). *See also* Pelander, *Michigan v. Tucker: A Warning About Miranda,* 17 ARIZ. L. REV. 188, 189 (1975).

51. Michigan v. Tucker, 417 U.S. 433, 450-52 (1974).

52. *Id.* at 445-46. *See also* Comment, 27 ME. L. REV. 365 (1975).

53. 417 U.S. at 450. The Court stated that "when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce." *Id.*

This interest of society must also be balanced against the desire to control unauthorized police conduct. Comment, 13 SAN DIEGO L. REV. 861, 875 (1976).

Michigan v. Mosley, 423 U.S. 96 (1975), also adopted a balancing approach to the *Miranda* exclusionary rule. The *Mosley* Court further weakened *Miranda* by sanctioning renewed questioning of a suspect after an expressed desire to remain silent. *Id.* at 102-03.

In *Mosley,* two hours after the defendant exercised his right to remain silent, another officer took him to a different interrogation room and again informed him of his rights. After the defendant waived his rights, the officer confronted him with an incriminating statement and the defendant confessed. *Id.* at 98.

54. 384 U.S. at 479.

55. 430 U.S. 387 (1977).

by a 5-4 opinion. Finding no waiver of the right to counsel, the Court, in reversing a murder conviction, stated the proper standard for determining the question of waiver as a matter of federal constitutional law to be "an intentional relinquishment or abandonment of a known right or privilege."[56] Using the language of *Miranda,* the United States Supreme Court stated that "courts must indulge every reasonable presumption against waiver,"[57] and in this case the state had not sustained its burden of proving a waiver.[58]

Unlike *Brewer* where the Court found an effective assertion of the defendant's right to counsel, in *Butler* there was no evidence of any affirmative request for counsel.[59] When advised of his right to counsel the defendant was silent.[60] The Court could not interpret such a situation as an affirmative assertion of the right to counsel nor did it find the defendant's silence as to his right to counsel to be a waiver of that right.[61]

Yet, consistent with the trend of denigrating the prophylaxes of the *Miranda* rules in the area of waiver of the rights secured by *Miranda*,[62] the *Butler* Court said that North Carolina's rule that an

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56. Brewer v. Williams, 430 U.S. 387, 404 (1977) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

In *Johnson*, the Court stated as follows:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Id.

57. 430 U.S. at 404.

58. *Id.* at 404-05. The Court found that the defendant's consultation with two attorneys and his statement that he intended to tell the whole story after seeing his attorney were effective assertions of his right to counsel. Therefore, the incriminating statements he made in the absence of counsel should not have been admitted. *Id.*

A strong dissent in *Brewer* articulated what appears to be the basis for the majority opinion in *Butler*. This dissent stated as follows:

> [I]n cases where incriminating disclosures are voluntarily made without coercion, and hence not violative of the Fifth Amendment, but are obtained in violation of one of the *Miranda* prophylaxes, suppression is no longer automatic. Rather, we weigh the deterrent effect on unlawful police misconduct, together with the normative Fifth Amendment justifications for suppression, against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. . . ."

Id. at 424 (Burger, C. J., dissenting).

59. __U.S. at __, 99 S. Ct. at 1756.

60. *Id.*

61. *Id.* at ____, 99 S. Ct. at 1757. Quoting from *Miranda*, the *Butler* Court stated "a valid waiver will not be presumed simply from the silence of the accused after warnings are given. . ." *Id.*

62. *Id.* Commenting on what the Court did not say in *Miranda*, the *Butler* Court found implied waivers of the rights secured by *Miranda* to be recognized under the *Miranda* opinion. Speaking about *Miranda*, the Court in *Butler* stated as follows:

implicit waiver of *Miranda* rights will not support a waiver of those rights is too inflexible, and inconsistent with the Court's interpretation of *Miranda*.[63] Therefore, the United States Supreme Court vacated the North Carolina Supreme Court's judgment and remanded the case for further proceedings[64] to determine whether the totality of the circumstances, including the background, experience and conduct of the accused, was such as to find an implied waiver of the rights secured by *Miranda*.[65] Thus, the Court is forsaking the broad, prophylactic rules of *Miranda* in favor of the pre-*Miranda* voluntariness standard determined by an analysis of the particular facts and circumstances in each case.[66]

A North Dakota case on the issue of the voluntariness of a waiver of a constitutional right is *State v. Manning*,[67] which dealt with the waiver of fourth amendment rights attendant to a consent search.[68] The North Dakota Supreme Court used the same language as the United States Supreme Court used in *Butler* in explaining that a determination of a waiver of constitutional rights depends upon the facts and circumstances of each case.[69] The *Manning* court also stated that although a waiver is not to be

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> Thus the Court held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But the Court did not hold that such an express statement is indispensable to finding of waiver.
>
> An express written or oral statement of waiver of the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. . . . The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

Id.

63. *Id.* at __, 99 S. Ct. at 1759.

64. *Id.*

65. *Id.* at __, 99 S. Ct. at 1758.

66. *See supra* note 23 for a discussion of the pre-*Miranda* voluntariness standard.

The dissent thought that the *Butler* case-by-case approach adopted by the majority left too much discretion with the lower courts, and that the minimal procedural requirements of *Miranda* were insignificant when balanced against the possibility of an error in judgment with respect to a suspect's waiver of his *Miranda* rights. __ U.S. at __, 99 S. Ct. at 1760 (Brennan, Marshall and Stevens, J J., dissenting). The main thrust of the dissent in *Butler* is that the majority opinion will allow courts to construct inferences from ambiguous words and gestures, and that the premise of *Miranda* requires that ambiguity be interpreted against the interrogator. *Id.* at __, 99 S. Ct. at 1759. The dissent contends that some judges faced with words and actions of uncertain meaning may find a waiver where none occurred; others may fail to find a waiver where it did occur. *Id.* at ____, 99 S. Ct. at 1760. In the first instance, the defendant's rights will have been violated; in the second instance, society's interest in effective law enforcement will have been frustrated. *Id.*

67. 134 N.W.2d 91, 97 (N.D. 1965).

68. State v. Manning, 134 N.W.2d 91, 95-96 (N.D. 1965). The requirements of a waiver of rights secured by *Miranda* are arguably the same, since they also deal with waivable rights which give rise to the excludability of evidence from trial if those rights are violated and not waived.

69. *Id.* at 97. The Court stated "[w]hether there has been an intelligent waiver of constitutional rights, therefore, depends upon the facts and circumstances of each particular case, including the background, the experience, and the conduct of the accused." *Id. See also* ____ U.S. at ____, 99 S. Ct. at 1758.

"inferred lightly"[70] it may be inferred, but the waiver must be "clearly and intentionally made."[71]

The North Dakota Supreme Court in *State v. Thompson*[72] referred to *Manning* on the issue of voluntariness.[73] In *Thompson* the court further stated that *Miranda* does not create a *per se* proscription against further interrogation after an individual indicates he wishes to remain silent[74] because a defendant is not foreclosed from voluntarily waiving his constitutional rights at any stage of an investigation or prosecution.[75] The *Thompson* court explained its decision as to whether the defendant waived his right to silence was based on an examination of the evidence to determine what factors, in addition to continued questioning after an indication of a desire to remain silent, were present.[76]

Both *Manning* and *Thompson* indicate that the North Dakota Supreme Court examines all of the facts and circumstances of each case to determine whether a suspect has waived his constitutional rights.[77] *Thompson* rejects a *per se* interpretation of *Miranda*.[78] Applying their reasoning to a question of the waiver of the right to counsel, these cases indicate that North Dakota is in accord with the holding of *North Carolina v. Butler.*

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70. 134 N.W.2d at 97.
71. *Id.*
72. 256 N.W.2d 706 (N.D. 1977).
73. State v. Thompson, 256 N.W.2d 706, 710 (N.D. 1977).
74. *Id.* at 710-11.
75. *Id.* at 710.
76. *Id.* at 712.
77. State v. Manning, 134 N.W.2d at 97, and State v. Thompson, 256 N.W.2d at 712.
78. 256 N.W.2d at 710-11.