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Criminal Law - Right to Counsel - Incriminating Statements Obtained during In-Custody Interrogation Not Admissible without Proof of Waiver of Defendant's Right to Counsel

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juries suffered as a result of the patron's intoxication,[64] it is difficult to speculate about the probable decision of North Dakota's Supreme Court should it have the opportunity to decide the issue. In a suit by the intoxicated patron for his damage or injuries it is even more difficult to speculate about the probable decision of the supreme court.

The Michigan Court of Appeals in *Grasser v. Fleming*, in following the trend of increasing liability of tavern owners for negligent sales, rendered a decision in accordance with society's struggle against increasing problems of alcoholic abuse. By placing a greater liability on tavern owners, courts will force them to use more discretion when serving alcohol to patrons likely to cause damage or injuries either to themselves or third persons. Although the decision in the instant case could be viewed as a minor expansion of common law liability, because the decedent was a known alcoholic and defendants had agreed not to serve him, courts should view the decision as a major expansion of common law liability and should follow the decision.

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CRIMINAL LAW—RIGHT TO COUNSEL—INCRIMINATING STATEMENTS OBTAINED DURING IN-CUSTODY INTERROGATION NOT ADMISSIBLE WITHOUT PROOF OF WAIVER OF DEFENDANT'S RIGHT TO COUNSEL

Defendant was arrested, arraigned, and committed to jail in Davenport, Iowa, for abducting a ten-year-old girl in Des Moines, Iowa.[1] Before being transported back to Des Moines, defendant was advised not to make any statements until after consulting with his Des Moines lawyer.[2] The police officers who were to accompany him agreed not to question him during the trip.[3] One of the officers,

64. *See, e.g.*, Deeds v United States, 306 F Supp. 348 (D. Mont. 1969); Davis v. Shiappscossee, 155 So. 2d 365 (Fla. 1963); Adamian v. Three Sons, 353 Mass. 498, 233 N.E.2d 18 (1968); Rappaport v. Nichols, 31 N.J. 188, 156 A.2d 1 (1959); Jardine v. Upper Darby Lodge, 413 Pa. 626, 198 A.2d 550 (1964).

1. Williams abducted Pamela Powers on the afternoon of December 24, 1968, at the Des Moines YMCA. His abandoned car was found the following day in Davenport, Iowa, about 160 miles east of Des Moines. A warrant was then issued for his arrest. On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams surrendered to the police in Davenport. He was booked on a charge of abduction and given the warnings required by Miranda v. Arizona, 384 U.S. 436 (1966). Brewer v. Williams, ——U.S.——, 97 S.Ct. 1232, 1235 (1977).

2. *Id.*

3. *Id.*

however, sought to obtain incriminating remarks from defendant during the drive.[4] Eventually defendant made several incriminating statements and finally directed the police to the girl's body.[5] Defendant was convicted of murder[6] over his objections to the admission of evidence relating to statements he made during the automobile ride. The Iowa Supreme Court affirmed,[7] holding that defendant had waived his constitutional right to the assistance of counsel. The federal district court, on a petition for habeas corpus, held that defendant had not waived his right to counsel and that the statements had been wrongly admitted.[8] The court of appeals affirmed.[9] The Supreme Court affirmed, *holding* that no waiver had been proven and that the admission of the evidence violated defendant's sixth amendment right to counsel. *Brewer v. Williams*, ——U.S.——, 97 S.Ct. 1232 (1977).

Prior to 1964, the test for admissibility of a defendant's confession was voluntariness, which was determined by the totality of the circumstances.[10] The refusal of the police or other interrogators to permit the subject of interrogation to consult with counsel was re-

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4. Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious. Not long after leaving Davenport, Detective Leaming delivered what was referred to in the briefs and oral arguments as the "Christian burial speech." The detective said as follows:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way to Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

Id. at ——, 97 S.Ct. at 1236.

5. Williams asked whether the police had found the victim's shoes. When the detective replied he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. Later Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. *Id.* at ——, 97 S.Ct. at 1237.

6. *Id.*

7. State v. Williams, ——Iowa——, 182 N.W.2d 396 (1970).

8. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974).

9. Brewer v. Williams, 509 F.2d 227 (8th Cir. 1974).

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

> Each of these factors, in company with all of the surrounding circumstances—the duration and conditions of detention (if the confessor has been detained), the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control—is relevant. 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 the 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 to propel the confession.

garded as only part of the totality of circumstances determining the voluntariness of a statement.[11]

In 1964, however, in *Massiah v. United States*,[12] the Supreme Court held that the sixth amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence,"[13] required the exclusion of incriminating statements elicited by government agents in the absence of counsel after the accused had been indicted.[14] Soon after, in *Escobedo v. Illinois*,[15] the Court converted several of the former factors of the voluntariness approach into the elements of a relatively definite rule.[16]

Miranda v. Arizona[17] refined the Court's approach to sixth amendment rights by establishing more concrete guidelines for custodial interrogation. The Court abandoned the emphasis upon the factors of the particular case and established broad universally applicable guidelines relating to the right to remain silent and to the presence of counsel in police interrogations, whether state or federal.[18] To fully implement this right the Court made it clear that it would require that each subject of interrogation be made aware of his rights under the sixth amendment. Prior to any questioning, a suspect must be given the following warnings: (1) that he has the right to remain silent; (2) that anything he says can be used against him in a court of law; (3) that he has the right to the presence of an attorney; and (4) that if he cannot afford an attorney one will

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11. Cicenia v. La Gay, 357 U.S. 504 (1958); Crooker v. California, 357 U.S. 433 (1958).

12. 377 U.S. 201 (1964). Defendant was indicted for violating the federal narcotics law. While free on bail he had a conversation with a co-defendant in the latter's automobile in the absence of his counsel. The co-defendant had allowed police to install a radio transmitter under the front seat which allowed a federal agent to listen to the conversation. At defendant's trial the agent was allowed to testify to incriminating statements made by defendant during the conversation, and the trial resulted in the defendant's conviction. The United States Court of Appeals for the Second Circuit reversed. 307 F.2d 62 (2d Cir. 1962).

13. 377 U.S. at 205 n.6.

14. 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 (1964), *on remand*, 1 Ohio St. 2d 60, 203 N.E.2d 349 (1964), *rev'd*, 381 U.S. 356 (1965).

15. 378 U.S. 478 (1964). Escobedo was taken into custody and interrogated by the police prior to indictment. He was not informed of his right to remain silent and his requests to consult with his attorney were denied. The trial court admitted in evidence incriminating statements made during the interrogations and Escobedo was convicted of murder. The Supreme Court of Illinois affirmed the conviction. On certiorari the Supreme Court of the United States reversed.

16. *Id.* at 490-91. The Court stated 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.

17. 384 U.S. 436 (1966).

18. *Id.* at 467-70.

be appointed for him prior to any questioning.[19] After such warning has been given, the individual may waive these rights and make a statement or answer questions. "But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."[20]

Since 1966 the Court has moved away from the *Miranda* rationale toward the pre-*Miranda* standard of voluntariness.[21] The erosion began with the Court's holding in *Harris v. New York*[22] that a suspect's inculpatory statements made after defective *Miranda* warnings were given were admissible, but only for impeachment purposes.[23] The Court later reaffirmed this decision in *Oregon v. Hass*[24] by holding that when a suspect in police custody has been given the warnings required by *Miranda*, and the individual has 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.[25]

The admissibility of custodial confessions was expanded further in *Lego v. Twomey*.[26] In that case the state's burden of proof on the issue of the voluntariness of the accused's waiver of his rights was set at the "preponderance of the evidence" level, rather than at the "beyond a reasonable doubt" level.[27]

The Burger Court has further limited the necessity of complying with *Miranda* standards.[28] In *Michigan v. Tucker*[29] the Court sanctioned the prosecution's use of evidence directly derived from a defendant's statements elicited by the police in violation of *Miranda*.[30] The Court interpreted *Miranda* as outlining recommended procedural safeguards for the protection of fifth amendment rights and reasoned that omission of procedural safeguards does not necessarily constitute a violation of the underlying rights.[31] Thus the products of true compulsion are excludable as violative of the fifth amendment.[32] But when a violation merely of the *Miranda* guidelines occurs, it appears that the per se rule is abandoned and a balancing test is applied.[33]

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19. *Id.* at 479.
20. *Id.*
21. 13 SAN DIEGO L. REV. 861, 874 (1976).
22. 401 U.S. 222 (1971).
23. *Id.*
24. 420 U.S. 714 (1975).
25. *Id.*
26. 404 U.S. 477 (1972).
27. *Id.* at 488-89.
28. *See* Pelander, *Michigan v. Tucker: A Warning About Miranda*, 17 ARIZ. L. REV. 188, 189 (1975).
29. 417 U.S. 433 (1974).
30. *Id.* at 450-52.
31. *Id.* at 445-46. *See also* 27 MAINE L. REV. 365 (1975).
32. *See supra* note 20.
33. *Id.*

In *Michigan v. Mosley*[34] the Court again diminished the impact of *Miranda* by sanctioning renewed questioning of a suspect after an expressed desire to remain silent.[35] Under the *Mosley* Court's approach, each federal and state trial court must make a finding, based on the facts unique to each case, whether the accused's right to cut off questioning has been "scrupulously honored."[36] The dissent pointed out that the Court's holding, that the inherent coercion of the custodial setting is dispelled by the "scrupulous honoring" of the accused's right to cut off questioning, is directly contrary to the principles of Miranda.[37] "Under *Miranda*, . . . , Mosley's failure to exercise the right upon renewed questioning is presumptively the consequence of an overbearing in which detention and that subsequent questioning played central roles."[38]

Michigan v. Mosley adopted a balancing approach to the *Miranda* exclusionary rule.[39] "However, the broader implications of the opinion demonstrate the tendency of the Burger Court and many lower courts to erode the *Miranda* decision by slowly cutting away at each of the procedural safeguards."[40] The pattern emerging is the creation of a multitude of exceptions to the *Miranda* rule.[41]

The *Williams* Court reaffirmed the *Miranda* doctrine by a narrow five to four decision.[42] The Court found that judicial proceedings had been initiated against defendant before the start of the automobile ride from Davenport to Des Moines.[43] A warrant had been

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34. 423 U.S. 96 (1975).

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

36. *Id.* at 104. The holding in *Mosley* turned on the interpretation of the following passage from *Miranda*:

> 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 invoked.

384 U.S. at 473-74.

37. 423 U.S. at 111-12, (Brennan, J., dissenting).

38. *Id.* at 115.

39. *Id.* at 102-03.

40. *Supra* note 20, at 875 (citation omitted).

41. *Miranda* has been held inapplicable in the following cases: Chavez-Martinez v. United States, 407 F.2d 535 (9th Cir. 1969) (international border customs procedures); F. J. Buckner Corp. v. NLRB, 401 F.2d 910 (9th Cir. 1968) (license revocation proceedings); North v. Kock, 169 Colo. 508, 457 P.2d 915 (1969) (extradition proceedings); County of Dade v. Callahan, 259 So. 2d 504 (Fla. 1971) (drunk driving situations); State v. Gabrielson, ——Iowa——, 192 N.W.2d 792 (1971) (misdemeanors involving only a small fine or short jail term); State v. Graves, 60 N.J. 441, 291 A.2d 2 (1972) (welfare investigations); People v. Craft, 28 N.Y.2d 274, 321 N.Y.S.2d 566, 270 N.E.2d 297 (1971) (drunk driving situations); Shumate v. Commonwealth, 207 Va. 877, 153 S.E.2d 243 (1967) (misdemeanors with small fine or short jail term). *See* 13 SAN DIEGO L. REV. 861, 875 (1976).

42. Brewer v. Williams, 97 S.Ct. 1232 (1977).

43. 97 S.Ct. at 1239.

issued for his arrest, he had been arraigned on that warrant, and committed to jail by the court.[44] They also found that the police officer deliberately and designedly set out to elicit information from defendant and that his conversation with defendant had been tantamount to interrogation.[45] Therefore, the Court concluded that under the rule of *Massiah v. United States*,[46] once adversary proceedings had commenced against defendant, he had the right to legal representation when the government interrogated him.[47]

The issue was whether defendant had waived his right to counsel.[48] In applying the totality-of-the-circumstances test the Iowa Supreme Court concluded that "the time element involved on the trip, the general circumstances of it, and the absence of any request or expressed desire for the aid of counsel before or at the time of giving information were sufficient to sustain a conclusion that defendant did waive his constitutional rights as alleged."[49]

The federal district court held that the issue of waiver was not one of fact but of federal law.[50] The court concluded that under the proper standards for determining waiver, the state produced no affirmative evidence to support its claim and therefore had not met its "heavy burden" of showing a knowing and intelligent waiver of sixth amendment rights.[51]

The Supreme Court stated that the proper standard to be applied in determining the question of waiver as a matter of federal constitutional law was "an intentional relinquishment or abandonment of a known right or privilege."[52] It stated that courts must indulge in every reasonable presumption against waiver and in this case the state had not sustained its burden of proving a waiver.[53] The Court found that defendant's consultation with two attorneys and his statement that he intended to tell the whole story after seeing his attorney in Des Moines were effective assertions of his right to counsel.[54] Therefore the incriminating statements made by him in the absence of counsel should not have been admitted.[55]

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44. *Id.*
45. *Id.* at 1239-40.
46. 377 U.S. 201 (1964).
47. 97 S.Ct. at 1240.
48. *Id.* at 1241.
49. State v. Williams, ——Iowa——, ——, 182 N.W.2d 396, 402 (1970).
50. Williams v. Brewer, 375 F. Supp. 170, 182 (1974).
51. *Id.* at 183.
52. 97 S.Ct. at 1242, *citing* Johnson v. Zerbst, 304 U.S. 458 (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 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.

304 U.S. at 464.
53. 97 S.Ct. at 1242.
54. *Id.*
55. *Id.* at 1243.

In a strong dissent, Chief Justice Burger criticized the Court for continuing the course of "punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing."[56] Burger stated that under well-settled precedent it was clear that defendant had made a valid waiver of his fifth amendment right to silence and his sixth amendment right to counsel when he led police to the body.[57]

Burger also stated that even if there had been no waiver, and a technical violation had occurred, the Court should not apply the exclusionary rule without considering the circumstances and the goals to be furthered by its application.[58]

Burger advocated overruling the strict exclusionary rule of *Miranda* and replacing it with a balancing test similar to that used in the fourth amendment context.[59] Under this test, evidence of defendant's statements would be admissible.[60] They were made voluntarily without any elements of compulsion which the fifth amendment forbids. There is no danger of unreliability since the body was found where defendant said it would be found.[61]

Burger stated that the relevant factors involved in this case are indistinguishable from *Stone v. Powell*[62] and other fourth amendment cases suggesting a balancing approach toward the exclusionary sanction.[63] In that case the Court denied habeas corpus relief to a defendant convicted of murder where some of the evidence was obtained in an unconstitutional search and seizure.[64] The holding in *Stone v. Powell* was premised on the reliability of the evidence sought to be suppressed, the irrelevancy of the constitutional claim to the defendant's factual guilt or innocence, and the minimal deterrent effect of habeas corpus on police misconduct.[65] Burger said the same analysis should apply in sixth amendment cases at least where the police conduct at issue is far from being outrageous or egregious.[66]

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56. *Id.* at 1248.
57. *Id.* at 1248-49.
58. *Id.* at 1250.
59. *Id.* at 1252. Chief Justice Burger 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* prophylaxis, suppression is no longer automatic. Rather, we weigh the deterrent effect on unlawful police conduct, 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. (citation omitted).
60. *Id.*
61. *Id.* at 1253.
62. 428 U.S. 465 (1976).
63. 97 S.Ct. at 1254.
64. 428 U.S. 465 (1976).
65. 97 S.Ct. at 1254.
66. *Id.*

Mr. Justice White also wrote a dissenting opinion in which Justices Blackmun and Rehnquist joined.[67] He disagreed with the majority's finding that no waiver was proved.[68] He pointed out that before the trip defendant was given the *Miranda* warnings by two sets of police officers, two attorneys, and a judge.[69] The statement made by the police officer was not coercive; it was accompanied by a request that defendant not respond to it, and it was made hours before defendant made the incriminating statements. White reasoned that the fact that defendant consulted with counsel on the question of whether to talk to the police in counsel's absence made his later decision to talk better informed and more intelligent.[70] He stated that "[w]aiver is shown whenever the facts establish that an accused knew of a right and intended to relinquish it. Such waiver, even if not express, was plainly shown here."[71]

The *Williams* decision indicates the Court will continue to give *Miranda* a limited effect until an alternative to the safeguards of that decision is devised.[72] In light of recent Supreme Court decisions which have undermined *Miranda* and the wide-spread public criticism of *Miranda*,[73] however, it appears likely that *Miranda* will be overruled. The traditional tests of trustworthiness and voluntariness will undoubtedly replace *Miranda's* prophylactic rules, as advocated by Mr. Justice Burger in his dissenting opinion.[74]

JIM STEWART

FEDERAL COURTS—FEDERAL CIVIL PROCEDURE—PLAINTIFF ALLOWED TO ASSERT CLAIM DIRECTLY AGAINST NON-DIVERSE THIRD-PARTY DEFENDANT

Plaintiff, an Iowa citizen, brought a diversity action[1] against

67. *Id.* at 1255. Mr. Justice Blackmun disagreed that the case fit the mold of *Massiah*, *id.* at 1259, and that the statements made by Leaming were "tantamount to interrogation." *Id.* at 1260.
68. *Id.* at 1257.
69. *Id.*
70. *Id.* at 1257-58.
71. *Id.* at 1258.
72. 10 SUFFOLK U.L. REV. 1141, 1174 (1976).
73. Twenty-two States strongly urged the *Brewer* Court to re-examine and overrule its procedural (as distinguished from constitutional) ruling in *Miranda*. 97 S.Ct. at 1239. (Blackmun, J., dissenting).
74. *Id.* at 1252-53. *See also* Michigan v. Mosley, 423 U.S. 96, 111 (1975) (White, J., concurring) (*Miranda* should be overruled at this time and a voluntariness standard of admissibility substituted in its place)

1. 28 U.S.C. § 1332(a) (1970) states as follows:
(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—