Beyond Miranda

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Since the Supreme Court's Miranda decision in 1966, a number of important developments affecting custodial interrogation have occurred.

In 1966, the U. S. Supreme Court handed down its landmark decision in Miranda v. Arizona.1 This article reviews Miranda and discusses some important developments since that decision. First, the article addresses the degree to which a statement taken in violation of Miranda can be used for impeachment purposes and whether evidence derived from a Miranda violation is admissible. It then looks at the extent to which Miranda applies to undercover police interrogation and whether Miranda warnings are required prior to routine booking questions. Next, the article comments on the development of the so-called "public safety" exception and whether police may continue to interrogate a suspect after he makes an equivocal request for a lawyer. Finally, it examines a statutory substitute for Miranda that has yet to receive constitutional review by the Supreme Court.

The Miranda Decision

At approximately 8:30 p.m. on November 27, 1962, a young woman left the First National Bank of Arizona after attending night classes. A male suspect robbed the woman of $8 at knife-point after forcing his way into her car.2 Four months later, the same suspect abducted an 18-year-old girl at knife-point and, after tying her hands and feet, drove to a secluded area of the desert and raped her.3

On March 13, 1963, police arrested 23-year-old Ernesto Arthur Miranda as a suspect in the two crimes. Miranda had a prior arrest record for armed robbery and a juvenile record for, among other things, attempted rape, assault, and burglary. Both victims viewed corporeal lineups and identified Miranda as their attacker. The police questioned Miranda, and he confessed to both crimes. He signed a confession to the rape that included a typed paragraph explaining that the statement was made voluntarily without threats or promises of immunity and that he had full knowledge of his rights and understood that the statement could be used against him.4 Ultimately, the Supreme Court reversed Miranda's conviction and ordered that the confession in the rape case be suppressed. The Court ruled that "an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and have the lawyer with him during inter-rogation...[that he has] the right to remain silent and that anything stated can be used in evidence against him...that if he is indigent a lawyer will be appointed to represent him."5 The Court reasoned that all custodial police interrogations are inherently coercive and could never result in a voluntary statement in the absence of a knowing, intelligent, and voluntary waiver of the rights enumerated in the Miranda warnings.

The Miranda decision was a departure from the established law in the area of police interrogation. Prior to Miranda, a confession would be suppressed only if a court determined it resulted from some actual coercion, threat, or promise. Under Miranda, the Supreme Court established an irrebuttable presumption that a statement is involuntary if it is taken during custodial interrogation without a waiver of the so-called Miranda warnings.6 A statement taken in violation of Miranda would result in the suppression of the statement, even though the statement was otherwise voluntary and not the result of coercion of any kind. In fact, in the Miranda decision, the Supreme Court acknowledged that Ernesto Miranda was not subjected to any coercion that would render his statement involuntary in traditional terms.7 The Miranda

requirements apply only when a suspect is both in custody and subjected to interrogation. For purposes of Miranda, "custody" is defined as an arrest or significant deprivation of freedom equivalent to an arrest.8 "Interrogation," under Miranda, is defined as words or actions likely to elicit an incriminating response from an average suspect.9 If the suspect asserts the right to silence, an officer must honor the suspect's assertion and stop the interrogation. However, the officer may reinitiate contact and obtain a valid waiver after a reasonable period of time.10 On the other hand, if a suspect asserts the right to an attorney, questioning must cease and may only be recommenced if the defendant reinitiates communication with the officer.11

Impeachment

Subsequent U.S. Supreme Court decisions have limited the Miranda exclusionary rule. Five years after Miranda, the Supreme Court decided Harris v. New York.12 With only two of the five justices in the original Miranda majority still on the Court, the Supreme Court held that a statement taken in violation of Miranda could be used to impeach the credibility of a defendant at trial.

The police in Harris failed to advise the defendant of his right to counsel prior to custodial interrogation, which was a violation of Miranda. The prosecution did not use the statement during the case in chief. However, when the defendant took the stand, he contradicted his postarrest statement.

The Supreme Court approved of the prosecution using the post-arrest statement to impeach the defendant during cross-examination, because the Court was not going to allow the defendant to use the Miranda decision as a license to commit perjury. Interestingly, the Court observed that the defendant made "no claim that the statements made to the police were coerced or involuntary."13 This statement by the Supreme Court was a signal that the Court was prepared to abandon the position that statements made by a suspect during custodial interrogation are presumptively involuntary. That presumption was the reason given for requiring Miranda warnings in the first place.

In another case, Oregon v. Haas,14 the Supreme Court followed the precedent in Harris and ruled that a defendant's statement may be used to impeach the defendant, even if that statement was taken after the defendant requested an attorney during the custodial interrogation. The Haas Court distinguished the Miranda presumption of involuntariness from actual involuntariness and stated that if, "...in a given case, the officers conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness."15 A statement that is in fact involuntary is inadmissible for any purpose including impeachment.16

In Doyle v. Ohio,17 two suspects elected to remain silent after they had been told by police during Miranda warnings that they had a right to remain silent. The Supreme Court ruled that it was a due process violation to use their silence to impeach them during their respective trials. The Court reasoned that the Miranda warnings carry the implicit promise that if suspects remain silent, that silence will not be used against them.18 The Supreme Court thought it unfair to penalize the defendants by allowing their silence to be used to impeach them, after they had relied upon the assurances of the police that they had a right to remain silent. However, if the defendants in Doyle had not been told by police that they had a right to remain silent, there would have been no due process violation if their silence was subsequently used to impeach their credibility. Under those circumstances, their silence would not have been induced by the implicit promise in the Miranda warnings that their silence would not be used against them.19

Evidence Derived from a Miranda Violation

In Michigan v. Tucker,20 the Supreme Court held that a witness may testify at trial, even though the defendant identified that person as a witness in a statement taken in violation of Miranda. Prior to Tucker's custodial interrogation, the police advised him of the Miranda warnings, except the right to appointed counsel. The Court determined that derivative evidence, such as the witness' identity, may be suppressed, but only if the police obtained it by infringing on the defendant's constitutional rights.

The Court distinguished between a violation of the Fifth Amendment right against compelled self-incrimination and a violation of the prophylactic rules in Miranda. The Court stated that the Fifth Amendment was drafted in order to guard against genuine compulsion, which involves an element of coercion.21

The police in Tucker did not coerce the defendant to make the statement and, therefore, did not violate his Fifth Amendment right against compelled self-incrimination.22 The police did, however, violate the rules of the Miranda decision. The Tucker Court made clear that Miranda warnings are not, themselves, rights protected by the Constitution, but are merely measures formulated by the Court to ensure that the right against compelled self-incrimination is protected.23

In Oregon v. Elstad,24 the Supreme Court ruled that when a suspect makes a voluntary statement without being advised of his Miranda warnings, the Fifth Amendment Self-Incrimination Clause does not require the suppression of a subsequent statement made by that suspect, provided that the police comply with Miranda when taking the second statement. In Elstad, the police arrested the defendant, Michael Elstad, for burglary. When one of the officers sat down with Elstad to explain that he thought Elstad was involved in the burglary, Elstad responded by saying, "Yes, I was there."25 The police did not advise Elstad of his Miranda warnings until after he had been transported to the sheriff's department, 1 hour later. He then waived his Miranda rights and confessed to the burglary.

The Court suppressed the first statement because police took it in violation of Miranda. Elstad claimed that because he had "let the cat out of the bag" during the first unwarned interrogation, the second statement also should be suppressed. He argued that the second statement was the tainted fruit of the poisonous tree, because his prior unwarned statement exerted a coercive impact on his later admissions and that the Miranda warnings did not purge that taint. Supreme Court precedent has established that a prior coerced statement may result in the suppression of a subsequent statement, if it is determined that the coercive influence of the first statement carried over to the second statement.26 In Elstad, however, the Supreme Court ruled that "[t]he failure of police to administer Miranda warnings does not mean that the statements received have actually been coerced...."27

The Court distinguished between voluntary unwarned admissions and statements that result from actual police coercion. This distinction highlighted the Supreme Court's apparent abandonment of the Miranda doctrine that custodial interrogations are inherently coercive. The Court viewed Elstad's first statement as having resulted from a noncoercive Miranda violation rather than a constitutional violation.

The Elstad Court made it clear that where there is a noncoercive Miranda violation, the remedy is limited to the suppression of the unwarned statement. A voluntary statement taken in violation of Miranda does not carry with it any taint that would affect the admissibility of evidence derived from that statement.

Undercover Police Interrogation

In Illinois v. Perkins,28 two police informants posed as inmates in order to elicit evidence of the defendant's involvement in a murder. One of the informants questioned the defendant, who responded

by making a statement implicating himself in the murder. The Supreme Court held that the inherently coercive atmosphere presumed to exist during custodial police interrogation is not present when the suspect does not know he is talking with the police or an agent of the police.

The Perkins Court overturned the Illinois Appellate Court's order suppressing the statement and ruled that it is not necessary to obtain a Miranda waiver under such circumstances. The Court stated that when a suspect has no reason to believe that the listeners have official power over him, then it cannot be said that the resulting statement is caused by some implicit coercion stemming from the suspect expecting the listeners to affect his future treatment. The Court further stated that confessions remain a proper element of police interrogation, and noncoercive ploys that merely mislead or lull suspects who are in custody into a false sense of security are not a violation of Miranda or the Self-Incrimination Clause.29

Routine Booking Questions

In Pennsylvania v. Muniz,30 police arrested the defendant for drunk driving. The defendant slurred his responses to unwarned booking questions, which elicited routine biographical information-name, address, height, weight, eye color, date of birth, and current age. Even though the police obtained the slurred responses during custodial police interrogation, eight of the nine Supreme Court justices ruled that the responses were admissible, despite the failure of the police to obtain a Miranda waiver.

The eight justices, however, did not agree on the reasons why Miranda was not required. Four justices argued that an exception should be carved out when routine booking questions are asked, because booking questions are not ordinarily intended to elicit information for investigative purposes. The other four justices believed that it was not necessary to determine if the slurred responses fell within a routine booking questions exception to Miranda. They considered the Miranda rule as a formula to protect a person's Fifth Amendment right against compelled self-incrimination, which involves testimonial evidence. The responses to the booking questions were incriminating not because of the testimonial substance of what the defend-ant said, but because the slurred speech was nontestimonial evidence of intoxication.

One of the unwarned questions the officer asked the defendant was if he knew the year of his sixth birthday. The defendant was unable to answer that question. A majority of the Court found that question was a violation of Miranda be-cause it was designed to elicit incriminating testimonial evidence and was beyond the scope of routine booking questions.

The Public Safety Exception

Three dissenting justices in Miranda argued that requiring warnings prior to custodial interrogation would deter suspects from confessing.31 In New York v. Quarles,32 the Supreme Court majority decided that police are not required to give Miranda warnings when the immediate safety of the public hangs in the balance, because the Court believed that those warnings tend to deter a suspect from making a statement.33 The Quarles Court proceeded to carve out the public safety exception to the Miranda rule.

In Quarles, a woman told two police officers on road patrol that she had just been raped at gun-point. The woman also told the officers that the suspect had just entered a nearby supermarket. While his partner radioed for assistance, one of the officers entered the market. The officer immediately saw a suspect matching the description given by the victim. As soon as the suspect, Benjamin Quarles, saw the uniformed officer, he ran toward the rear of the store. The officer drew his gun and pursued Quarles.

Ultimately, the officer apprehended Quarles. When the officer frisked Quarles, he found that he was wearing an empty shoulder holster. The officer, without advising Quarles of the Miranda warnings, immediately questioned him about the location of the gun. Quarles nodded toward some empty cartons and told the officer "the gun is over there."34 Despite the fact that Quarles was in custody at the time of the interrogation, the Court held that the statement was admissible as a public safety exception to the Miranda ruling.

Equivocal Requests For Counsel

Judicial concern regarding the detrimental effects of the Miranda requirements on law enforcement may have contributed to the Supreme Court's loosening of the Miranda strictures in Davis v. United States.35 In Davis, the Court ruled that a suspect must make an unequivocal request for a lawyer in order to effectively assert his Miranda right to counsel, despite the government's burden of proving the suspect made a knowing, intelligent, and voluntary waiver of his Miranda rights. The Davis Court distinguished between the Sixth Amendment right to counsel, which attaches only at the initiation of adversarial judicial proceedings and each critical stage thereafter, and the Miranda right to counsel, which is not constitutionally mandated and only attaches during custodial interrogation.

In Davis, Naval Investigative Service (NIS) agents investigating a murder obtained both oral and written Miranda waivers from the defendant. After being interviewed for approximately 90 minutes, the defendant said: "Maybe I should talk to a lawyer."36 After asking some clarifying questions, the NIS agents continued to interrogate Davis.

The Court ruled that the defendent's statement was not sufficiently unequivocal to constitute an assertion of his Miranda right to counsel. Moreover, the Davis Court emphasized that if a suspect makes an equivocal re-quest for a lawyer, it is not necessary for the police to ask clarifying questions in an attempt to decipher the suspect's intentions. If the suspect intends to assert his Miranda right to counsel, that assertion must be clear and unequivocal.

Congressional Response to Miranda

In Miranda, the Supreme Court stated that Congress and the states are free to develop their own safeguards to replace the rules set forth in Miranda, so long as they are as effective as Miranda in protecting a suspect's right against compelled self-incrimination.37 In 1968, Congress accepted this invitation by enacting 18 U.S.C. 3501 as part of Title II of the Omnibus Crime Control and Safe Streets Act.

Subject only to Constitutional limitations, Congress has supreme authority to prescribe rules for the admission or exclusion of evidence in federal courts.38 Congress enacted 3501 to displace Miranda and reinstate the voluntariness test.39 In a concurring opinion in Davis, Justice Scalia asserted that when an issue involving the voluntariness of a custodial confession in a federal case is next brought before the Supreme Court, the decision should not be based on Miranda but instead on 18 U.S.C. 3501.40

Section 3501 does not presume, as did the Miranda Court, that police custody is inherently coercive. Unlike Miranda, 3501 does not require that a suspect make a knowing, intelligent, and voluntary waiver of certain enumerated rights. Instead, 3501 provides that a federal court must look at the totality of the circumstances in determining if a statement is voluntary, and that if "the trial judge determines that the confession was voluntarily made it shall be admitted in evidence...."41 The statute requires that all voluntary confessions be admitted into evidence in federal prosecutions and limits the effect of the presence or absence of warnings to being merely one factor for federal courts to consider in determining

whether the confession was voluntary. Provided they are constitutional, statutes enacted by Congress are the supreme law of the land.42 The U.S. Supreme Court is the final arbiter of whether a federal statute is constitutional. However, the constitutionality of 3501, as it relates to custodial interrogation, is an issue that has never been brought before the Supreme Court. In addition, 3501 has received only limited support in the lower federal courts.43 In Davis, the majority refused to consider implementing 3501, because the Department of Justice expressly declined to take a position on the statute's applicability.44

Conclusion

The Supreme Court has implicitly abandoned the underlying principle of the Miranda decision-that custodial police interrogation is inherently coercive-and has carved out many exceptions to the Miranda exclusionary rule. Consequently, a violation of the Miranda ruling does not necessarily mean that the resulting statement will be inadmissible. The Supreme Court has made it clear that the Miranda warnings are not constitutionally required but are only prophylactic rules designed to protect a suspect's right against compelled self-incrimination. Voluntariness remains the constitutional standard that must be met when obtaining a statement from a suspect.

Nonetheless, law enforcement agencies should consult with legal counsel to ensure that investigative practices conform to the requirements set forth by the Supreme Court in Miranda and other precedent. Should a voluntary statement be obtained in violation of the Miranda ruling, through inadvertence or otherwise, this article sets forth legal authority that law enforcement may assert in salvaging at least some use for the resulting voluntary statement.

Endnotes

1384 U.S. 436 (1966).

2Arizona v. Miranda, 98 Ariz. 11,__, 401 P.2d 716, 717-18 (1965).

3Arizona v. Miranda, 98 Ariz. 18,__, 401 P.2d 721, 722-23 (1965).

4Miranda v. Arizona, 384 U.S. 436, 492 (1966).

5Id. at 471.

6The government has the burden of proving by a preponderance of the evidence that th made a knowing, intelligent, and voluntary waiver of the rights contained in the Mir warnings prior to being subjected to custodial interrogation. Colorado v. Connelly, 168 (1986).

7 Miranda, 384 U.S. at 457.

8California v. Beheler, 463 U.S. 1121 (1983) (per curiam); Orozco v. Texas, 394 U.S. (1969). The custody test is an objective test that looks to whether a reasonable per suspect's shoes would feel free to leave. The unexpressed subjective intent of a pol arrest a suspect is irrelevant to the issue of whether a suspect is in custody under Stansbury v. California, _ U.S._, 114 S. Ct. 1526, 1529-30 (1994) (per curiam).

9Rhode Island v. Innis, 446 U.S. 291 (1980).

10Michigan v. Mosley, 423 U.S. 96 (1975).

11Edwards v. Arizona, 451 U.S. 477 (1981); see also Wyrick v. Fields, 459 U.S. 42 (1

12401 U.S. 222, (1971).

13Id. at 224.

14420 U.S. 714, (1975).

15Id. at 723.

16Mincey v. Arizona, 437 U.S. 385, 397-98 (1977) (Introduction of an involuntary sta into evidence to impeach the defendant is a denial of due process.).

17426 U.S. 610 (1976).

18See also, New Jersey v. Portash, 440 U.S. 450, 459-60 (1979) (Use of grand jury t impeach the defendant at trial violates the 5th and 14th Amendment right against com self-incrimination where the grand jury testimony resulted from a guarantee of use i

19See Jenkins v. Arizona, 447 U.S. 231 (1980).

20417 U.S. 433 (1974).

21Id. at 448.

22Id. at 444.

23Id.

24470 U.S. 298 (1985)

25Id. at 301.

26Id. at 310, citing Clewis v. Texas, 386 U.S. 707 (1967).

27470 U.S. at 310.

28496 U.S. 292 (1990).

29Id. at 297-98. One should be mindful, however, of Sixth Amendment restrictions pla undercover police interrogations. The Sixth Amendment right to counsel attaches at t of adversarial judicial proceedings and at every subsequent critical stage of the pr

including when being interrogated by the police or appearing at a corporeal lineup.

v. United States, 377 U.S. 201 (1964) and United States v. Wade, 388 U.S. 218 (1967)

Sixth Amendment right to counsel only attaches to those specific formal charges brou

the defendant. McNeil v. Wisconsin, 501 U.S. 171 (1991). Police cannot deliberately

incriminating response from a suspect after attachment of the Sixth Amendment right

without first obtaining a waiver. Miranda type warnings are sufficient to obtain a w

suspects' right to counsel. Patterson v. Illinois, 487 U.S. 285 (1988). If a suspect

right to counsel, an officer may not reinitiate contact with the suspect regarding t

charges for which formal judicial proceedings have begun. Michigan v. Jackson, 475 U

(1986). However, a valid waiver may be obtained if the defendant initiates communica

the officer. Officers may not use informants to deliberately elicit an incriminating

the 6th Amendment right to counsel has attached. United States v. Henry, 447 U.S. 26

An informant, however, may be used as a mere listening post. In addition, Department

(DOJ) regulations govern the circumstances under which DOJ attorneys may communicate

directly or indirectly with persons known to be represented by counsel in the course

enforcement investigations and proceedings. 28 C. F. R. 3377.1-77.2.

30496 U.S. 582 (1990).

31384 U.S. 436, 516 (Harlan, J., joined by Stewart and White, JJ., dissenting).

32467 U.S. 649 (1984).

33 Id. at 656-57. Empirical evidence supports the position of the Quarles Court. W statements that are suppressed due to a violation of Miranda are the clearest exampl of the Miranda ruling, Miranda warnings themselves tend to deter a suspect from givi statement. Professor Paul G. Cassell, in his article Miranda's Social Costs: An Em Reassessment, 90 NORTHWESTERN L. J. 387 (1996), examined numerous studies that analyzed the deterrent effect of Miranda warnings. He set forth convincing evidence established that compliance with Miranda has had a severe impact on the effectivenes enforcement. Professor Cassell's research revealed that approximately 79,000 prope 42,000 drug cases, 6,500 robbery cases, 1,400 forcible rape cases, and 880 murder an non-negligent homicide cases went unprosecuted in 1993 alone due to suspects being d from making a statement after being given their Miranda warnings.

He found that there were also indirect costs due to cases plea bargained to lesser c Professor Cassell reviewed a 1994 study that indicated that 30.6% of suspects succes questioned pled to the charged offense, whereas only 15.4% of suspects who invoked t Miranda rights pled to the charged offense. In addition, he discovered that Miranda significant effect on the most serious offenses. For example, one study cited by Pr Cassell revealed that, while the overall confession rate dropped 16.9% after the Mir

the confession rate dropped 27.3% in homicide cases and dropped 25.7% in robbery cas should be noted that the police department in that study did in fact give Miranda eq warnings prior to the Miranda decision, but weaved them into the conversation rather them at the outset of the interrogation. Apparently, requiring a waiver prior to the interrogation has a material impact on the effectiveness of police questioning.

34Id. at 652.

35512 U.S. 452, 114 S. Ct. 2350, 2354 (1994).

36Id. at 2353.

37384 U.S. at 490.

38U.S. CONST. art. III. See Palermo v. United States, 360 U.S. 343, 353 n.11 (1959) United States v. National City Lines, 334 U.S. 573, 588-89 (1947).

39See United States v. Barry, 518 F.2d 342, 347 (2d Cir. 1975) which quoted the Repo Senate Committee on the Judiciary, U.S. Code Cong. and Admin. News pp. 2112, 2124 an 2132, that stated that the major purpose of 18 U.S.C. 3501 was to prevent "'the rigi exclusion' from evidence of voluntary confessions solely because the police had not with what the committee called the 'inflexible requirements of the majority opinion Miranda case.'" (emphasis in the original).

40512 U.S. 452, 114 S. Ct. at 2357 (Salia, J., concurring)

4118 U.S.C. 3501 (a).

42U.S. CONST. art. VI.

43The U.S. Court of Appeals for the 10th Circuit is the only court to address direct constitutional challenge to 3501. In United States v. Crocker, 510 F.2d 1129 (10th the court ruled that 3501, is in fact, constitutional and approved of the trial cou statute instead of Miranda in deciding to admit into evidence the defendant's confes courts have refused to apply 3501 when the government has raised the issue. E.g., A United States, 448 F.2d 439, 441 (9th Cir. 1971) (The court expressly declined to d whether 3501 was applicable. The court, instead, decided that the Miranda violatio case was not reversible error.); United States v. Vigo, 487 F.2d 295, 299 (2d Cir. 1 court found that the defendant's statement was voluntary under the Fifth Amendment a compliance with Miranda, despite the fact that the federal agent neglected to inform defendant that anything he said could be used against him. The court found that it unnecessary to reach the question of the applicability of 3501 and refused to apply In Davis v. United States, the Supreme Court quoted from United States v. Alverez-Sa U. S. 350, 114 S. Ct. 1599, 1600 (1994) where the Alverez-Sanchez Court stated that 3501 is "the statute governing the admissibility of confessions in federal prosecuti

Ct. at 2354 n *. However, the quote in Davis is merely dicta because the Alverez-Sa was not deciding whether to apply 3501 in lieu of Miranda, and the Davis Court refus address the issue of the applicability of 3501.

44114 S. Ct. at 2354 n *. See The Department of Justice Office of Legal Policy, Re Attorney General on the Law of Pretrial Interrogation (February 12, 1986), wherein t DOJ Office of Legal Policy examined the history of pretrial interrogation and the Mi decision. The Office of Legal Policy viewed 18 U.S.C. 3501 as overturning the Miran decision and restoring the pre-Miranda voluntariness standard. The report advocated 3501 as a direct challenge to Miranda, but the Department of Justice has not yet ta position on that recommendation.

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