Volume 71 | Issue 2 Article 7

February 1969

Aftermath of Miranda--The Courts Grapple With Burden of Proof

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Aftermath of Miranda— The Courts Grapple With Burden of Proof

The *Miranda* opinion asserted that the fifth amendment privilege against self-incrimination attaches to pre-trial interrogations and employs as the method of protecting this privilege the requirement that any suspect questioned in pre-trial in-custody proceedings be informed of four basic rights available to him at that time.[1] The burden of proving that these rights were known and understood is placed squarely and heavily upon the prosecution.[2] Thus if an interrogation continues without presence of counsel and a statement is taken, the prosecution bears the heavy burden of proving that the accused knowingly and intelligently waived his constitutional rights. Recalling the high stanadards of proof it has always required for the waiver of constitutional rights, the Court in *Miranda* asserted that those same standards would also be applied to in-custody interrogation. Moreover, the prosecution must show that the warnings and waiver were given in strict accordance with the *Miranda* requirements before the admission of *any* statement made by the defendant is allowed—unless it can prove it employed a fully effective equivalent to *Miranda.* Furthermore, the record must show, or there must be proof through allegation and evidence on the part of the prosecution, that the warning was given and an intelligent waiver was made. In addition, a waiver will not be presumed from a silent record, a silent defendant, the eventual procurement of a confession, or the answering of some questions followed by a refusal to answer others. These principles apply not only to those who are in custody at a police station, but also to those deprived in any significant way of their freedom of action. If the prosecution cannot demonstrate at trial that the warnings and waiver were given, no evidence obtained as a result of the interrogation can be used against the defendant.[3]

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[1] Mrianda v. Arizona, 384 U.S. 436 (1966). The warnings that must be given to insure the inviolability of the individual's right against self-incrimination prior to questioning are: 1) that he has a right to remain silent; 2) that any statement he makes may be used against him; 3) that he has the right to the presence of an attorney; and 4) that if he cannot afford an attorney, one will be appointed for him. Although these rights can be waived, this may only be done knowingly, voluntarily and intelligently.

[2] The rationale upon which the Court placed this burden is that: "Since the state is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Id.* at 475.

[3] *Id.*

This paper is a post-*Miranda* look at the standards courts have employed to evaluate whether the state's burden of proof have been satisfied. Although the results have varied, they have been largely disappointing in the sense that no set standard has emerged by which to judge whether the burden has been met.

The most popular position seems to be the enunciation of no standard at all. In such a case the court does not say what proof was offered by the prosecution to establish that the warnings were or were not correctly given and an intelligent waiver made; instead, the opinion merely states flatly that the record supports the finding.[4] One variation of this approach is for the court to acknowledge that its holding will alter the normal burden of proof required, adding that it is not necessary to explain how.[5] Another device used is to agree that the burden is heavy, state facts which *prima facie,* at any rate, raise serious doubts as to whether the state's burden can be met, and then state simply that the burden has been met.[6]

A second manner of proof accepted by some courts has been simply the testimony of the interrogator that the warnings were given and that the defendant knowingly and intelligently waived them.[7] Here again, it is difficult to ascertain whether any other evidence was offered by the state—the opinion simply relates that the interrogator so testified and the factual situation presented

[4] Cook v. United States, 392 F.2d 219 (5th Cir. 1968). *See also* Hodge v. United States, 392 F.2d 552 (5th Cir. 1968); United States v. Follette, 393 F.2d 879 (2nd Cir. 1968); Griffith v. State, 116 Ga. App. 429, 157 S.E.2d 894 (1967); State v. McDaniel, 272 N.C. 556, 158 S.E.2d 874 (1967); Kramer v. Washington, 43 P.2d 970 (Wash. 1968), *cert. denied,* 393 U.S. 833 (1968).

[5] *Cf.* United States v. Adams, 37 U.S.L.W. 2303 (S.D.N.Y. Nov. 19, 1968). Here the court struck down part of a statute which provided that a person arrested for possession of marijuana was presumed to know it was imported unless he proved otherwise. Acknowledging that a departure from the proofs normally required would follow from its decision, the court added, "It is not useful to predict or speculate as to the form such evidence may or should take. It is sufficient for now to hold, and the court does, that in the absence of such independent evidence, the prosecution will have failed to make out a case for the jury." *Id.*

[6] Miller v. United States, 396 F.2d 492 (8th Cir. 1968). Here the court stated that the defendant was a 35 year old Negro with a third or fourth grade education and a limited capacity to read or write. The defendant testified that he could not read and that he did not understand what the waiver meant. Nevertheless, the court concluded that the hearing was thorough and the trial judge was in a position to observe the defendant and rule on his ability to comprehend. Similarly the court was able to rise above issues concerning the failure of a second warning to be given when the defendant was taken to another city for re-questioning and the result of a delay in arraignment.

[7] Parish v. State, 117 Ga. App. 616, 618, 161 S.E.2d 426, 428 (1968). Here it was referred to as the "uncontradicted testimony of the witness."

speaks of no other method of proof being offered. Thus one must assume that the court relied solely on the interrogator's testimony.[8] Courts have also accepted the testimony of the interrogator together with the admission into evidence of a card with the four warnings printed upon it that has been signed by the accused.[9] Within this category, too, fall cases where the interrogator states that the warnings were given and the defendant denies that this was done—the outcome of such "swearing contests" is generally left to the discretion of the trial court.[10]

There are also cases which approach the problem from the negative,[11] decide that *Miranda* is not applicable for anyone of a variety of reasons,[12] or state or imply that the defendant shares in the burden of proof.[13]

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[8] *Id.*

[9] Fritts v. United States, 395 F.2d 219 (5th Cir. 1968); Menendez v. United States, 393 F.2d 312 (5th Cir. 1968).

[10] Green v. State, 223 Ga. 611, 157 S.E.2d 257 (1967); State v. Clyburn, 273 N.C. 284, 159 S.E.2d 868 (1968).

[11] These courts decide the cases on the basis of what was not done rather than on what took place. For example, in Johnson v. Commonwealth, 160 S.E.2d 793, 798 (Va. 1968), the court stated that the government's case overlooked the trial court's finding that the defendant had been "taken into custody," the fact that after the defendant was first questioned and released he was told "not to leave the house," and the fact that during two of the questioning periods the defendant was not permitted to see his mother although she requested a visit. This amounted to such pretrial custody that the *Miranda* warnings had to be given.

[12] State v. Meadows, 272 N.C. 327, 335, 158 S.E.2d 638, 645 (1968). This case held that *Miranda* was not applicable because the police were engaged in a general investigation of whether a crime had been committed, and if so, by whom. This was the holding despite the following statement by the court on the issue of whether the defendant was at that time a suspect: "The only reasonable conclusion to be drawn from the evidence is that the defendant was then suspected, indeed it was manifest, that he, on his own premises, had shot Newman." State v. Ross, 273 N.C. 498, 160 S.E.2d 465 (1968). No statement made by defendant was used against him at the trial, so it became immaterial whether he made a waiver or not; State v. Craddock, 272 N.C. 160, 158 S.E.2d 25 (1967). The court in this case observed that *Miranda* does not prohibit the mere asking for consent to search a car, although this occurred at 4:30 A.M. and two policemen followed defendants' car, radioed for help, set up a roadblock to stop them, approached their car with drawn pistols, and had the defendants get out of their car and be searched for weapons before the request to search was made. Wilson v. Bailey, 375 F.2d 663 (4th Cir. 1967). Here the defendant was questioned in a hospital after having his stomach pumped from taking poison. The court reasoned that *Miranda* did not apply because the record showed: 1) that suspicion was not focused on the defendant at that time, 2) there was a doctor present, 3) the defendant was not in custody, 4) there were no threats or physical or psychological coercion, and 5) it did not appear that he was so ill as not to be conscious of his answers.

[13] Griffith v. State, 116 Ga. App. 429, 431, 157 S.E.2d 894, 896 (1967), held that a

> confession is admissible, prima facie, in the absence of some claim or contention by the defendant on trial that he was indigent at the time

Rare indeed are the courts that explain what will satisfy the burden of proof requirement. In one such instance a court, holding that the accused's rights were not violated, noted that the record showed that the defendant had been warned of his rights but agreed to talk. Later he requested an attorney, had one immediately appointed, was not questioned for several days following this appointment and was then interrogated in the presence of his attorney.[14] In another case an appellate court, hearing an appeal involving a suppression motion, directed the district court to furnish the following facts: findings as to whether warnings of constitutional rights were given, and if so, time, maker and contents of each such warning; all statements of and to the defendant considered pertinent to a suppression ruling; whether the defendant requested counsel, and if so, time and content of each such request and to whom made; and finally, the findings should be stated in the sequence and context in which they occurred.[15] Another court, while reversing on the ground that the warning of right to counsel was not expressly stated to the defendant, also enumerated other deficiencies in the state's evidence.[16]

This survey of recent cases illustrates the paucity of standards set out by the courts to determine whether the *Miranda* burden of proof requirements have been followed. Moreover, the problem becomes more serious as new issues, not resolved by *Miranda,* continue to emanate from that decision. Collateral questions now being raised include: the effect to be given statements made in a second interrogation which followed a tainted one;[17] whether the state should bear the burden of proving whether alleged omissions and

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of the interrogation, thus effectively relieving the state of the burden of showing either a) that the prisoner, at the time of the interrogation, was known to have an attorney or was known to have ample funds to secure one or b) showing that the prisoner was told that if he was indigent an attorney would be secured for him.

For similar implications see Wilson v. Bailey, 375 F.2d 663 (4th Cir. 1967); State v. Jackson, 201 Kan. 795, 443 P.2d 279 (1968).

[14] Boeckenhaupt v. United States, 392 F.2d 24 (4th Cir. 1968).

[15] Camacho v. United States, 392 F.2d 575 (9th Cir. 1968).

[16] Sykes v. United States, 392 F.2d 735 (8th Cir. 1968). Among other things, an illegal search produced, in the absence of the requisite warnings, incriminating statements from a defendant who was unable to understand English and who acknowledged "understanding" of her rights by nodding her head.

[17] Gilbert v. United States, 366 F.2d 923 (9th Cir. 1966). The court held that a presumption would arise that the influences invalidating the first would carry over to the second, leaving it up to the prosecution to prove that these influences were dissipated.

failures by defendant's attorney were non-prejudicial;[18] the constitutionality of imposing a longer sentence after a second conviction when the original conviction was reversed for an erroneously admitted confession;[19] the prosecutor's comment on the failure of a defendant to deny involvement in two of the four robberies of which he was accused after he took the stand to deny the other two;[20] the right to counsel during a psychiatric interview given because the defendant planned to plead insanity;[21] application of the *Miranda* safeguards, after a pre-*Miranda* first trial, to a post-*Miranda* second trial;[22] right to counsel at a line-up;[23] and the right to counsel when the accused is taken, before arrest, to a confrontation with the victim for identification purposes.[24]

Since all of these situations are also predicated largely on burden of proof considerations, it becomes even more imperative to find a clear-cut test to determine whether the burden has been met. Practical suggestions on how to effectuate the warnings required by *Miranda* have not been lacking. The American Law Institute suggests that waivers must be made before the custody magistrate. This would not only help to insure that the accused understood fully what he was doing, but would also do away with the confusing "voluntariness" test often used by courts to decide the admissibility of a confession.[25] One writer has also suggested, among other things, transcribed verbatim interrogation sessions, the use of comprehensive tape or wire recordings, and as it becomes more economically feasible, the use of video tapes and motion pictures to record the interrogation.[26]

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[18] Peyton v. Coles, 389 F.2d 224 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968).

[19] North Carolina v. Pearce, 393 F.2d 253 (4th Cir. 1968), *cert. granted*, 393 U.S. 922 (1968). For a comment on this issue see 70 W. VA. L. REV. 121 (1968).

[20] Perez v. California, 65 Cal. 2d 615, 422 P.2d 597, 55 Cal. Rptr. 909 (1967), *cert. denied*, 393 U.S. 853 (1968).

[21] United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968).

[22] Scott v. United States, 392 F.2d 170 (5th Cir. 1968); State v. Branch, 1 N.C. App. 279, 161 S.E.2d 492 (1968). The first case applied *Miranda*, the second did not.

[23] Gilbert v. California, 388 U.S. 263 (1966); United States v. Wade, 388 U.S. 218 (1966).

[24] Rivers v. United States, 400 F.2d 935 (5th Cir. 1968).

[25] ALI, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1966). The test referred to is found in Bram v. United States, 168 U.S. 532, 542-43 (1897). Whenever the question of the voluntariness of the confession arises, it is controlled by the fifth amendment and the test is "whether the confession was free and voluntary; that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influences. . . ."

[26] D. PENOFSKY, GUIDELINES FOR INTERROGATIONS—WAIVER OF RIGHTS UNDER MIRANDA (1967).

Perhaps, however, the problem is more a philosophical one. It is suggested that a large part of the confusion results from an unclear concept of what the fifth amendment privilege against self-incrimination really entails. There are diverse opinions as to how and even whether the right should attach to pre-trial, in-custody interrogations.[27] Until some sort of unity is reached on this basic tenet, it is probable that no one standard can be established.

An accusatory legal system where one's innocence is presumed until guilt is proven runs contrary to the use of a man's own statements to convict him. It is up to the state to prove guilt. Thus the state must also prove that in obtaining its evidence it violated none of the rights of the defendant. With regard to fifth amendment rights, the state must prove, in order to offer the defendant's statements into evidence, that they were made at a time when the defendant was in danger of incriminating himself and that he was aware of this danger.

If the state sought to avoid the applicability of these standards by saying there was no threat, it would have to prove in effect that the statement was in no way incriminating. In the absence of such a showing, *Miranda* would apply. The government would then be

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[27] Compare *Miranda's* unequivocal statement that the privilege does apply at this stage of the proceedings to the following:

> The question is now being increasingly asked whether the full scope of the privilege, as recently construed and enlarged, is justified either by its long and tangled history or by any genuine need in a criminal trial. There is agreement, of course, that the privilege must always be preserved in fullest measure against inquisitions into political or religious beliefs or conduct. Indeed, the historic origin and purpose of the privilege was primarily to protect against the evil of governmental suppression of ideas. But it is doubtful that when the Fifth Amendment was adopted it was conceived that its major beneficiaries would be those accused of crimes against person and property.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (1967). (Separate statement concurred in by seven of the nineteen members of the commission).

The New Jersey Supreme Court was even stronger in its criticism.

> Voluntary confessions accord with high moral values, and as to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene of the crime which a brighter, better informed, or more gifted criminal would not have left. Thus the Fifth Amendment does not say that a man shall not be permitted to incriminate himself, or that he shall not be persuaded to do so. It says no more than that a man shall not be "compelled" to give evidence against himself. . . . It is consonant with good morals, and the Constitution, to exploit a criminal's ignorance or stupidity in the detectional process. This must be so if Government is to succeed in its primary mission to protect the first right of the individual to live free from criminal attack." *State v. McKnight*, 37 U.S.L.W. 2020 (1968).

under a burden of showing that the individual was mentally capable of understanding his situation, that he was aware that he was a suspect, that he knew the nature of the crime involved and its punishment, that he was aware of the defenses to this crime, and that he knew what rights were available to him. Obviously, the fulfillment of such a burden of proof would require more than the reading of rights from a card which the defendant then signs. However, the defendant's awareness of his rights could easily be assured by the presence of counsel. Since it is difficult to conceive of a situation where one would elect to waive the benefit of counsel, the placing of this heavy a burden of proof on the prosecution—to show that the *Miranda* requirements have been complied with—is seemingly justified. Thus, the fulfillment of this burden would tend to show that any waiver given was knowingly and intelligently made.

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