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THE DECLINING *MIRANDA* DOCTRINE: THE SUPREME COURT'S DEVELOPMENT OF *MIRANDA* ISSUES

Miranda v. Arizona[1] measurably altered the standard for admission of incriminating statements in criminal trials. Prior to *Miranda,* statements elicited through interrogation of a defendant were admissible if they were made voluntarily. Voluntariness was determined by examining the "totality of the circumstances."[2] The *Miranda* majority reasoned that the inherently coercive setting of custodial interrogation[3] required greater protection for the defendant than the voluntariness standard provided.[4] *Miranda* held that in order to protect adequately the defendant's fifth amendment privilege to be free from self-incrimination, warnings which explicitly set out the defendant's rights must be administered before custodial interrogation may begin.[5] Adequate warnings, together with an

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[1] 384 U.S. 436 (1966).

[2] Courts examined the "totality of the circumstances" to determine whether a statement had been made voluntarily. All of the events surrounding the interrogation were scrutinized to ensure that the defendant's fifth amendment right against self-incrimination had not been violated. *See, e.g.,* Culombe v. Connecticut, 367 U.S. 568, 601-02 (1961); Reck v. Pate, 367 U.S. 433, 440-41 (1961); Spano v. New York, 360 U.S. 315, 322-24 (1959). Until 1963, confessions in state court proceedings were judged also by the totality of the circumstances and declared involuntary if they violated the due process standard of the fourteenth amendment. *See, e.g.,* Brown v. Mississippi, 297 U.S. 278, 287 (1936). The Supreme Court's decision in Mallory v. Hogan, 378 U.S. 1 (1963) altered this by declaring the fifth amendment applicable to the states through the fourteenth amendment. *Id.* at 8. The voluntariness standard served two major purposes: to deter the police from improper conduct during interrogation, Rogers v. Richmond, 365 U.S. 534, 540-41 (1961), and to ensure the reliability of the evidence. Brown v. Mississippi, 297 U.S. 278, 287 (1936).

[3] *Miranda* applies only to those defendants who are in custody. The majority deemed an individual to be in custody if he had either been taken into physical custody or otherwise deprived of his freedom in any significant way. 384 U.S. at 444.

[4] The voluntariness test had already been augmented by earlier Supreme Court cases and by congressional action. McNabb v. United States, 318 U.S. 332 (1943), together with Mallory v. United States, 354 U.S. 449 (1957), excluded confessions obtained after unnecessary delay in arraignment. Federal Rule of Criminal Procedure 5(a) codifies the *McNabb-Mallory* rule. *See generally* Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale And Rescue,* 47 GEO. L.J. 1 (1958). In addition to these safeguards, Massiah v. United States, 377 U.S. 201, 207 (1964) held that statements elicited from a defendant outside the presence of retained counsel were inadmissible. Further, Escobedo v. Illinois, 378 U.S. 478 (1964) held inadmissible statements obtained without allowing a suspect under arrest to consult with retained counsel. *See generally Developments In The Law - Confessions,* 79 HARV. L. REV. 935, 999-1000 (1966).

Many commentators viewed the *Miranda* decision as an extension of *Escobedo,* as well as a solution for the problems raised by inconsistent lower court decisions applying *Escobedo.* 384 U.S. at 440 n.1; *see* Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of* Miranda v. Arizona, 14 U.C.L.A. L. REV. 59, 59 n.2&3 (1966).

[5] The *Miranda* Court mandated, that unless other effective procedures were developed by Congress or the States, an individual in custody must be warned that he has the right to remain silent, that anything he says may be used against him, that he has the right to have counsel present, and that if he cannot afford an attorney one will be appointed for him. 384 U.S. at 467-73.

effective waiver were deemed to be prerequisites for admissibility of incriminating statements made during custodial interrogation.[6] Under *Miranda,* a defendant who was informed of his rights could waive them, although the government would have the burden of proving a knowing and intelligent waiver before subsequent statements could be used against the defendant.[7]

Since 1966, courts have struggled with ambiguities raised by the *Miranda* decision. As a result, inconsistent lower court decisions have made it difficult for law enforcement officers to determine when warnings are required and how the warnings proscribe their subsequent conduct.[8] The Supreme Court has attempted further to define the parameters of permissible police conduct under *Miranda* by issuing opinions analyzing the proper use of statements obtained without adequate warnings, the scope of permissible police behavior after the defendant has exercised his right to counsel or right to remain silent, and the meaning of custodial interrogation.[9] A number of these recent opinions have narrowed the applicability of *Miranda* by giving new life to the voluntariness test in certain circumstances.[10] Other post-*Miranda* decisions interpreting the custody requirement and determining when interrogation may resume following a defendant's exercise of his right to remain silent have failed to create clear guidelines which lower courts require to reach consistent results.[11]

In *Harris v. New York*[12] the Court considered whether a defendant's

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Congress attempted to weaken *Miranda*'s effectiveness by enacting section 3501 of title 18. 18 U.S.C. § 3501 (1976). Section 3501 declares that voluntary statements obtained from a defendant are admissible in evidence. The *Miranda* warnings are considered as factors to be weighed in determining whether the defendant's statement was voluntary. The absence or presence of any particular factor is not considered conclusive on the voluntariness issue. 18 U.S.C. § 3501(b) (1976). The Supreme Court has not ruled on the constitutionality of section 3501, and the lower courts and prosecutors have been reluctant to use section 3501 to determine the admissibility of statements obtained from a defendant, relying instead on the *Miranda* guidelines. *See* Gandara, *Admissibility Of Confessions In Federal Prosecutions: Implementation Of Section 3501 By Law Enforcement Officials And The Courts,* 63 GEO. L.J. 305, 313-14 (1974).

[6] 384 U.S. at 467.

[7] *Id.* at 475, *citing,* Johnson v. Zerbst, 304 U.S. 458 (1938). *See generally* Dix, *Waiver in Criminal Procedure: A Brief For More Careful Analysis,* 55 TEX. L. REV. 193 (1977); Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers—Where Do We Go from Here?,* 42 NOTRE DAME LAW. 479 (1967); Note, *Government Can Satisfy Its Burden of Proving Waiver of* Miranda *Rights by Showing Warnings Given, Signed Waiver, and Proof of Defendant's Capacity to Understand the Warnings,* 26 VAND. L. REV. 1069 (1973); *Current* Miranda *Issues, Fourth Circuit Review,* 35 WASH. & LEE L. REV. 492 (1978).

[8] A case-by-case approach employed by lower courts in many instances has meant that police have been left without solid guidelines. In other areas, lower court decisions have been in direct conflict. The Supreme Court has attempted to resolve many of these conflicts through its post-*Miranda* holdings. *See* text accompanying notes 43-54 & 70-82, *infra.*

[9] Oregon v. Mathiason, 429 U.S. 492 (1977); Beckwith v. United States, 425 U.S. 341 (1976); Michigan v. Mosley, 423 U.S. 96 (1975); Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[10] *See* text accompanying notes 12-42 *infra.*

[11] *See* text accompanying notes 43-82 *infra.*

[12] 401 U.S. 222 (1971).

statements, acquired after improper *Miranda* warnings, could be used at trial for impeachment purposes. The defendant in *Harris* was charged with selling heroin to an undercover officer. At trial, the defendant took the stand and admitted making a sale of baking powder to the officer as a scheme to defraud the buyer.[13] On cross-examination, the prosecution introduced incriminating statements made by the defendant after he had received inadequate *Miranda* warnings.[14] The trial court instructed the jury that the statements could not be used in determining the defendant's guilt or innocence, but only to evaluate his credibility.[15]

In appealing his conviction, the defendant argued that *Miranda* barred the use for any purpose of any statements obtained, absent full warnings, during custodial interrogation. Conceding the *Miranda* opinion could be read to bar such statements even for impeachment purposes, the *Harris* majority nevertheless concluded that *Miranda* only barred the prosecution from using improperly obtained statements obtained from its case-in-chief.[16] Thus, the Court held permissible the use of a defendant's statements for impeachment purposes if the defendant elects to testify, provided the statements were made voluntarily.[17]

The *Harris* majority compared *Miranda*'s fifth amendment exclusionary rule with the judicially created fourth amendment exclusionary rule[18] and concluded that there were no substantial differences in purpose or application.[19] Relying on an earlier Supreme Court holding[20] that evidence

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[13] *Id.* at 223.

[14] *Id.* at 223-24. The police failed to warn defendant that he had the right to appointed counsel if he could not afford one. *Id.* at 224. The defendant in *Harris* received the other three warnings required by *Miranda.* The warnings are set out in note 5 *supra.*

[15] 401 U.S. at 223.

[16] *Id.* at 224. Evidence used in the prosecution's case-in-chief may be considered by the jury to determine the guilt or innocence of the defendant. Evidence inadmissible in the case-in-chief but allowed for impeachment purposes is to be considered by the jury for the narrow purpose of judging the defendant's credibility and not as a basis for its determination of the guilt or innocence of the defendant. *See* 1 WHARTON'S CRIMINAL EVIDENCE § 161, at 294 (13th ed. 1972).

[17] 401 U.S. at 226.

[18] *Id.* at 224-25. The fourth amendment guarantees freedom from unreasonable searches and seizures. U.S. CONST. amend. IV. To protect that right, the Court held in Weeks v. United States, 232 U.S. 383 (1914), that evidence obtained by federal officers in violation of the fourth amendment would be excluded from a federal prosecution. *Id.* at 398. The fourth amendment exclusionary rule was later applied to the states through the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961). The *Mapp* Court concluded that the fourth amendment would be meaningless without the judicially created exclusionary rule. *Id.* at 658.

[19] 401 U.S. at 224-25. The *Harris* majority viewed the main purpose of the *Miranda* exclusionary rule as deterrence of improper police conduct. *Id.* at 225.

[20] Walder v. United States, 347 U.S. 62 (1954). Two years before the criminal activity at issue in *Walder* took place, the defendant had been the subject of an unlawful search which led to the seizure of heroin. Following indictment, the defendant succeeded in suppressing the evidence and the indictment was dismissed. The *Walder* case involved an unrelated drug charge against the same individual. In *Walder,* the defendant testified that he had never possessed any narcotics. The *Walder* majority allowed the prosecution to impeach the defendant by introducing the testimony of an officer who took part in the earlier unlawful search and seizure and the testimony of the chemist who analyzed the heroin. *Id.* at 64.

obtained in violation of the fourth amendment exclusionary rule could be used for impeachment, the *Harris* Court held that statements obtained from a defendant who had not been warned of his right to appointed counsel are admissible on the issue of the defendant's credibility.[21] Additionally, the Court supported its holding by noting that the defendant should not be allowed to commit perjury free from the risk of confrontation with prior inconsistent statements.[22] If statements obtained in violation of *Miranda* were barred absolutely from trial, the defendant could testify knowing that such statements could not be used against him in any manner. Thus, the *Harris* Court concluded that *Miranda* was not to be used as a shield by the defendant.

The *Harris* majority acknowledged the possible effects of their decision, noting the remote chance of increased police misbehavior in future interrogations.[23] The police might, for example, knowingly fail to give adequate warnings in the hope of eliciting statements from a defendant that he would not make following complete warnings. Although the ill-gotten statements would be inadmissible in the prosecution's case-in-chief, such statements, under *Harris,* would be admissible for impeachment purposes. The *Harris* Court concluded, however, that the danger of such a speculative possibility was far outweighed by the benefits gained by allowing the evidence for impeachment to aid the jury in its evaluation of the defendant's credibility.[24]

The impeachment use of evidence in *Walder* was limited, therefore, to collateral matters. The *Walder* Court carefully distinguished the factual situation before them from the fifth amendment issue presented in Agnello v. United States, 269 U.S. 20 (1925). In *Agnello,* the prosecution sought to introduce the illegally obtained narcotics that were the subject of the possession charge for which the defendant was currently being tried. The *Agnello* majority prohibited such use of the illegally obtained evidence on grounds that it denied the defendant his fifth amendment rights. *Id.* at 34-35. *Walder* was consistent with *Agnello* since the impeachment in *Walder* was collateral to the crime charged. The statements admitted for impeachment purposes in *Harris,* however, contradicted statements the defendant made concerning the sale of the contents of a glassine bag to the undercover officer, thus going to the essence of the crime charged. 401 U.S. at 222-23.

Chief Justice Burger, when Circuit Judge, expressed views on the collateral matter issue in Lockley v. United States, 270 F.2d 915 (D.C. Cir. 1959) (Burger, J., dissenting). Judge Burger indicated his unwillingness to apply the collateral use doctrine of *Walder* to a *Harris* situation. Dissenting in *Lockley,* Burger suggested a three-part test that must be met before evidence obtained in violation of fifth amendment procedure safeguards could be offered to impeach a defendant. The third requirement was that statements could not be used to discredit the defendant if they admit the very acts which are essential elements of the crime charged. *Id.* at 919. Chief Justice Burger has yet to explain the inconsistent positions he adopted in *Lockley* and *Harris.* For a more detailed examination of the collateral use doctrine, see Dershowitz & Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1211-13 (1971) [hereinafter cited as Dershowitz & Ely]; Comment, *The Collateral Use Doctrine: From* Walder *To* Miranda, 62 Nw. U.L. REV. 912 (1968) [hereinafter cited as *The Collateral Use Doctrine*].

[21] 401 U.S. at 226.

[22] *Id.* at 225.

[23] *Id.*

[24] *Id.* The *Harris* majority stated that sufficient deterrence would be gained by exclusion of the evidence from the prosecution's case-in-chief. *Id.*

The Court's reasoning in *Harris* failed to recognize that the fifth amendment exclusionary rule differs substantially from its fourth amendment counterpart. The dissimilarities require that a different analysis be applied to determine whether evidence obtained in violation of the fifth amendment should be completely excluded at trial.[25] The first major difference is that the fourth amendment exclusionary rule is a judicial creation while the fifth amendment exclusionary rule is constitutionally based.[26] Statements obtained in violation of *Miranda* must be excluded from trial to avoid violation of the defendant's constitutional right against self-incrimination.[27]

Evidence obtained through a violation of the fourth amendment right to be free from unreasonable searches and seizures is excluded from trial, but not by constitutional command.[28] The evidence is inadmissible because the Supreme Court decided that the fourth amendment protection would be more effective if the prosecution was denied the availability of the ill-gotten evidence at trial.[29] A second difference is that while the fourth amendment exclusionary rule applies generally to physical evidence, the fifth amendment covers statements elicited from a defendant under the pressures of custodial interrogation. Consequently, the reliability of evidence seized in violation of the fourth amendment is greater

[25] The *Harris* Court's failure to recognize differences between the fourth and fifth amendment exclusionary rules is consistent with its reluctance to note that *Walder* was concerned with a violation of the fifth amendment exclusionary rule. *See* 401 U.S. at 224-25. Circuit court cases which concluded that *Walder* was inapplicable to the fifth amendment exclusionary rule include: Proctor v. United States, 404 F.2d 819 (D.C. Cir. 1968); United States v. Fox, 403 F.2d 97 (2d Cir. 1968); United States *ex rel.* Hill v. Pinto, 394 F.2d 470 (3d Cir. 1968); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1968).

[26] *See* Dershowitz & Ely, *supra* note 20, at 1214; Comment, *Confession Taken in Violation of* Miranda *Rule Held Inadmissible For Impeachment Purposes*, 42 N.Y.U. L. REV. 772, 777-78 (1967) [hereinafter cited as *Confession Taken in Violation of* Miranda]. The fifth amendment exclusionary rule is constitutionally mandated: "nor shall [any person] be compelled in any Criminal Case to be a witness against himself. . . ," U.S. CONST. amend. V, whereas the fourth amendment exclusionary rule was judicially created by the Supreme Court in Weeks v. United States, 232 U.S. 383 (1914), and later made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961). *See* note 18 *supra*.

[27] *See* Proctor v. United States, 404 F.2d 819, 821 (D.C. Cir. 1968) (*Walder* doctrine inapplicable to *Miranda* violations since *Miranda* explicitly commanded exclusion of all statements obtained in violation of its guidelines); United States v. Fox, 403 F.2d 97, 102 (2d Cir. 1968) (defendant's statements held inadmissible when obtained after failure by police to warn defendant of rights to counsel and silence); Groshart v. United States, 392 F.2d 172, 178 (9th Cir. 1968) (*Miranda* undermines *Walder*'s application to fifth amendment violations).

[28] The fourth amendment alone does not require exclusion of evidence obtained in disregard of a person's right to be free from unreasonable searches and seizures. U.S. CONST. amend. IV. Exclusion is required by either Weeks v. United States, 232 U.S. 383 (1914) (requires exclusion of evidence obtained in violation of the fourth amendment in federal prosecutions), or Mapp v. Ohio, 367 U.S. 643 (1961) (requires exclusion of evidence obtained in violation of fourth amendment in state proceedings).

[29] *See* note 18 *supra*.

than the trustworthiness of statements obtained through violation of *Miranda*.[30] A statement elicited from a defendant under pressure from police officers may or may not be reliable. However, tangible evidence obtained through an illegal search will be no different than evidence taken in a search conducted in accordance with proper police procedures. Physical evidence, unlike oral evidence, thus retains its accuracy regardless of how it is procured.[31] The differences between the fourth and fifth amendment exclusionary rules lead to the conclusion that the analogy relied on by the *Harris* Court was inappropriate. Thus, statements obtained following inadequate *Miranda* warnings should not, and indeed may not, be used at trial for impeachment purposes. The *Harris* Court, by allowing statements for impeachment purposes, gave new life to the voluntariness test that *Miranda* was designed to replace. A statement made following inadequate warnings may be used for impeachment provided it was made voluntarily.[32]

Supreme Court decisions dealing with the scope of permissible police practices after a defendant exercises his rights reveal further attempts to limit the application of the *Miranda* decision. The Court was presented in *Oregon v. Hass*[33] with the problem of how to treat statements obtained by the police from a defendant who chose to exercise his right to counsel.[34] In *Hass*, an officer arrested the defendant at his home for the theft of two bicycles. The officer then administered full *Miranda* warnings to the defendant and drove him to the site of the robberies. While in the patrol car, the defendant asked to call his attorney. The officer replied that he could call as soon as they arrived at the station. The officer renewed his questioning, obtaining identification by the defendant of the two houses from which he had stolen the bicycles.[35]

At trial, the defendant's statements were used for the purpose of impeaching the defendant's credibility, and not as probative evidence of guilt.[36] Relying on *Harris'* sanction of the impeachment use of statements elicited from a defendant after defective warnings, the Supreme Court held that although *Miranda* precluded the use of such statements from the prosecution's case-in-chief, the statements were properly admitted for

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[30] *The Collateral Use Doctrine*, *supra* note 20, at 930. Justice Powell stated in his concurrence in Brewer v. Williams, 430 U.S. 387 (1977), that differences between evidence obtained in violation of the fourth or fifth amendment require careful examination before a doctrine applicable to one should be applied to the other. *Id.* at 414 (Powell, J., concurring).

[31] *See Confession Taken in Violation of* Miranda, *supra* note 26, at 776.

[32] 401 U.S. at 224. The voluntariness standard fails to acknowledge the inherent compulsion in custodial interrogation. The voluntariness standard therefore directly conflicts with *Miranda*'s command that statements obtained without adequate warnings cannot be products of the defendant's free will. 384 U.S. at 458.

[33] 420 U.S. 714 (1975).

[34] *Id.* at 714-15. *Miranda* requires that interrogation must cease when the suspect exercises his right to counsel. 384 U.S. at 474. There was no dispute in *Hass* that the facts presented a violation of *Miranda*'s guidelines. 420 U.S. at 721.

[35] State v. Haas, 267 Ore. 489, 490, 517 P.2d 671, 672 (1973).

[36] 420 U.S. at 717. The *Hass* Court determined that the *Miranda* guidelines were ambiguous on the issue of whether statements obtained by police after the defendant requests counsel should be barred from all uses at trial. *Id.* at 722.

impeachment purposes.[37] The *Hass* Coúrt applied the *Harris* analysis to the issues presented by the case before them and concluded that the only factual distinction of consequence between the two cases was that full warnings were administered to the defendant in *Hass* while the *Harris* defendant received inadequate warnings.[38] This difference, however, was insufficient to preclude application of the *Harris* Court's reasoning. As in *Harris,* the *Hass* Court determined that *Miranda* did not operate to bar evidence obtained after a violation of *Miranda*'s procedures for all purposes.[39] Similarly, *Miranda* was not to be used as a shield to allow the defendant to commit perjury.[40]

The *Hass* opinion, because it adopted the reasoning of the *Harris* Court, is subject to the same criticisms as *Harris. Hass* also holds that statements that are to be used for impeachment must first meet the voluntariness standard.[41] Determining that the defendant's fifth amendment right against self-incrimination in *Hass* was not violated, the Court allowed evidence obtained in violation of *Miranda*'s prophylactic guidelines to impeach the defendant's testimony.[42]

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[37] *Id.* at 723-24. The Oregon Court of Appeal had reversed the trial court's conviction, State v. Haas, 13 Ore. App. 368, 510 P.2d 852 (1973), and the state supreme court affirmed in State v. Haas, 267 Ore. 489, 517 P.2d 671 (1973). The Oregon Supreme Court accepted the *Harris* majority's conclusion that sufficient deterrence would result from exclusion of the evidence from the case-in-chief when it was obtained after inadequate *Miranda* warnings. Since the defendant in *Haas* had been given the full warnings, however, the Oregon court deemed the *Harris* analysis inapplicable. The Oregon court concluded that once full warnings had been given and the defendant exercised his right to counsel, the police would have a strong incentive to violate *Miranda*'s guidelines. 267 Ore. at 491, 517 P.2d at 673. The police would not be inclined, the Oregon court reasoned, to give anything less than full warnings because they would not want to risk losing the opportunity to gather evidence that could later be used in the case-in-chief. *Id.*

After complete warnings are administered and the defendant requests a lawyer, however, the police may have nothing to lose by resuming the interrogation. If the police complied with *Miranda,* they probably would not elicit any more information from the defendant since defense counsel will generally advise the defendant to remain silent. If the police choose to resume the interrogation, however, they may at least obtain statements from the defendant which could later be used for impeachment. *Id.* Therefore, the Oregon court concluded that the need for deterrence is greater in the *Haas* circumstances than in the *Harris* situation where inadequate warnings have been given. *See generally* Driver, *Confessions and the Social Psychology of Coercion,* 82 HARV. L. REV. 42 (1968).

[38] 420 U.S. at 723. The *Hass* majority could not distinguish *Harris* and thus applied its principles to the issues presented. Contrary to the Oregon Supreme Court, the *Hass* Court concluded that if there were any differences in the deterrence levels generated by the *Harris* and *Hass* situations, deterrence would be greater in the *Hass* instance. *Id.* The result, therefore, is that total exclusion of evidence obtained in violation of *Miranda* is demanded less by factual situations similar to that presented in *Hass* than by instances where incomplete warnings were administered. *Id.*

[39] *Id.* at 722.

[40] *Id.*

[41] *Id.; see Confession Taken in Violation of* Miranda, *supra* note 26, at 776.

[42] 420 U.S. at 723-24. The description of the *Miranda* guidelines as merely prophylactic was first used by the Supreme Court in Michigan v. Tucker, 417 U.S. 433 (1974). The defendant in *Tucker* was taken into custody, given inadequate *Miranda* warnings, and interrogated about an alleged rape. *Id.* at 436. During the questioning, the police learned the

Michigan v. Mosley[43] further limited *Miranda*'s impact in situations where statements are elicted from a defendant after he has chosen to exercise his right to remain silent by failing to provide guidelines to determine when questioning may properly be renewed. The defendant in *Mosley* was arrested in connection with a number of robberies in Detroit. The defendant chose to exercise his right to remain silent. Thus, the interroga-

identity of a crucial witness for the prosecution. Prior to trial, the defendant unsuccessfully moved to exclude the witness's testimony on the grounds that since the defendant had received inadequate *Miranda* warnings before he identified the witness, not only were the statements of the defendant inadmissible in the case-in-chief, but so were the statements of the witness. The witness's statements, it was argued, should have been excluded as fruit of the poisonous tree under the reasoning of Wong Sun v. United States, 371 U.S. 471, 484 (1963) (evidence obtained through violation of fourth amendment inadmissible); Nardone v. United States, 308 U.S. 338, 343 (1939) (evidence obtained as a result of illegal wiretap inadmissible); and Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (subpoena issued on basis of illegal search held invalid).

As framed by the *Tucker* Court, the issues were first, whether the lack of full warnings had directly infringed upon the defendant's fifth amendment right against self-incrimination or simply violated the "prophylactic" rules developed to protect that right, and second, whether secondary evidence obtained absent adequate warnings must be excluded to deter police misconduct and/or to prevent the use of unreliable evidence at trial. 417 U.S. at 439, 446, 448. Addressing the first issue, the Court concluded that the defendant's fifth amendment rights had not been infringed since the facts in *Tucker* were too remote from the traditional situations at which the fifth amendment right against self-incrimination was aimed. The *Tucker* majority reasoned that since *Miranda*'s procedures were subject to congressional and state changes, the guidelines set out by *Miranda* were not constitutionally required. *Id.* at 444. The Court thus found that the fruit of the poisonous tree doctrine had no application to *Tucker* since the Court concluded that the doctrine only took effect after constitutional violations. *Id.* at 445-50.

In analyzing the second issue, the Court quickly disposed of the reliability question reasoning that the evidence in question was not elicited from a defendant under pressure but obtained by questioning the defendant's uncoerced alibi witness. Regarding the deterrence argument, the Court particularly emphasized that the defendant was questioned before *Miranda* had been decided. *Id.* at 447. The police officers were guided at the time, therefore, by an earlier Supreme Court decision, Escobedo v. Illinois, 378 U.S. 478 (1964). The right to appointed counsel warning that the officers in *Tucker* neglected to give was not required by the *Escobedo* decision. *See* note 4 *supra.* Since the officers could not possibly have known that additional warnings would soon be required, deterrence would not be achieved by excluding the evidence from trial. 417 U.S. at 447-48.

Several lower federal courts and numerous state courts had applied the poisonous tree doctrine before the *Tucker* decision to exclude secondary evidence obtained in violation of *Miranda. See, e.g.,* United States v. Pellegrini, 309 F. Supp. 250 (S.D.N.Y. 1970) (physical evidence obtained as a result of statements made by defendant without *Miranda* warnings inadmissible); United States v. Harrison, 265 F. Supp. 660 (S.D.N.Y. 1967) (recorded statement of defendant inadmissible since it resulted from interrogation following inadequate *Miranda* warnings); People v. Schader, 71 Cal. 2d 761, 457 P.2d 841, 80 Cal. Rptr. 1 (1969) *(en banc)* (physical evidence obtained through illegally conducted interrogation inadmissible); People v. Algien, 180 Colo. 1, 501 P.2d 468 (1972) *(en banc)* (oral confession obtained after interrogation absent *Miranda* warnings inadmissible); People v. Paulin, 33 App. Div. 2d 105, 308 N.Y.S. 2d 883 (1969) (tangible evidence obtained as a result of unconstitutional police procedures—no warnings given—inadmissible); *see* Note, Miranda *Without Warning: Derivative Evidence As Forbidden Fruit,* 41 BROOKLYN L. REV. 325, 332 (1974).

[43] 423 U.S. 96 (1975).

tion, in accordance with *Miranda* guidelines, immediately ceased.[44] Later that evening, the defendant was taken to another room and again given his warnings. The defendant then read and signed a notification form of his rights designed to show a knowing and intelligent waiver. The defendant was subsequently questioned concerning a different crime. After initially denying any participation, the defendant made some incriminating statements in response to the officer's false remark that another participant had named the defendant as the "shooter."[45] These incriminating statements were later used against the defendant at his murder trial as evidence of guilt.

The *Miranda* decision did not clearly define permissible police practices after a defendant halts interrogation by exercising his right to remain silent.[46] Although the majority stated that the interrogation must cease, *Miranda* offers no explicit guidelines for determining when questioning may resume. The *Mosley* majority stated that *Miranda* certainly could not bar all subsequent questioning, nor could it stand for the proposition that only a momentary delay would be necessary before the interrogation could resume.[47] The former alternative, the Court reasoned, would defeat legitimate police procedure, while the latter would defeat *Miranda*'s attempt to dispel the inherent compulsion of custodial interrogation.[48]

The *Mosley* Court concluded that *Miranda* must have meant to allow renewed questioning, but determined that before questioning can be resumed the defendant's right to remain silent must be "scrupulously honored."[49] By "scrupulously honored," the *Mosley* majority intended that

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[44] *Id.* at 97. *Miranda* states that without the right to cut off questioning, custodial interrogation operates to overcome the defendant's free will after he has once invoked his right to remain silent. 384 U.S. at 474. At this point, any statement obtained from the defendant is presumed to be the result of compulsion. *Id.*

[45] 423 U.S. at 98.

[46] Initially, *Miranda* is easily applied if the defendant asks for counsel; interrogation should cease until the attorney arrives. 384 U.S. at 474. Unlike the situation where an attorney is requested, there is no definite point at which interrogation may resume once a defendant has exercised his right to remain silent.

[47] The *Mosley* majority contended that a blanket prohibition of further questioning would transform the *Miranda* guidelines into meaningless barriers to legitimate police investigative activity and also prevent defendants from making intelligent assessments of their position. 423 U.S. at 102.

[48] 384 U.S. at 444-45.

[49] 423 U.S. at 103. By choosing an intermediate course on the issue of when questioning may be resumed, the *Mosley* Court followed the approach taken by federal circuits which had already considered the issue. *See, e.g.*, Hill v. Whealon, 490 F.2d 629 (6th Cir. 1974) (statement obtained from defendant in second interrogation admissible when one and one-half hour gap between interrogation sessions and each preceded by full warnings); United States v. Collins, 462 F.2d 792 (2d Cir.) *(en banc)*, *cert. denied*, 409 U.S. 988 (1972) (interrogation must cease until new and adequate warnings have been given and there is a reasonable basis for inferring that the suspect has voluntarily changed his mind); Massimo v. United States, 463 F.2d 1171 (2d Cir. 1972), *cert. denied*, 409 U.S. 1117 (1973) (police have privilege of asking defendant to reconsider his initial refusal to talk); Jennings v. United States, 391 F.2d 512 (5th Cir.), *cert. denied*, 393 U.S. 868 (1968) (statements gained from second interrogation admissible when defendant's request to stop earlier session immediately honored and defendant in custody for one hour).

all of the circumstances of both interrogations would be viewed to determine whether the defendant's right to remain silent had been fully respected.[50] The factors which influenced the Court to conclude that the defendant's right to remain silent was "scrupulously honored" in *Mosley* included the amount of time elapsed between interrogation sessions,[51] the second interrogation session concerned a different crime from the first,[52] and the interrogations were conducted by different police officers.[53]

The Court's solution of the problem presented by *Mosley* leaves several issues unresolved. These problems arise because the *Mosley* Court applied the "scrupulously honored" test only to the facts presented. That is, the Court's "scrupulously honored" test provides no concrete guidelines for lower courts to resolve the issue of precisely when interrogation may be resumed. Inconsistent results are the likely products in lower courts evaluating cases on a totality of the circumstances approach.[54] However, the case-by-case approach suggested by the *Mosley* Court is consistent with the *Miranda* voluntariness test that also relied on the totality of the circumstances. The lower courts similarly must determine whether the "scrupulously honored" test should apply only in situations where the defendant has chosen to remain silent or if the scope of the test is meant to include the situation where the defendant exercises his right to counsel but questioning resumes before the attorney arrives.[55] The *Mosley* Court never considered the possibility of allowing statements which did not meet the "scrupulously honored" test for impeachment purposes. The issue did

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[50] 423 U.S. at 104.

[51] *Id.* at 106. More than two hours elapsed between interrogation sessions.

[52] *Id.* at 105. The first interrogation dealt with recent Detroit robberies while the second session concerned a robbery-murder case. The majority opinion, in discussing the homicide case and the robberies, described the murder as "a crime different in nature and in time and place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie." *Id.* The dissent, however, noted that the two "different" crimes were actually related since the informant's tip which led to the defendant's arrest encompassed both the robberies which were the subject of the first interrogation and the robbery-murder which was the topic of the later session. *Id.* at 118-19 (Brennan, J., dissenting).

[53] *Id.* at 104. The fact that the interrogations were conducted by two different officers has little bearing on whether the defendant's right to remain silent was scrupulously honored. The two interrogators could actually complement each other's performance in order to persuade the defendant to waive his rights. *See* 384 U.S. 452. *See generally* Note, *Renewal Of Interrogation After Assertion Of The Right To Remain Silent*, 81 DICK. L. REV. 661 (1977).

[54] Note, *Michigan v. Mosley: A New Constitutional Procedure*, 54 N.C.L. REV. 695, 703-04 (1976); *see, e.g.*, United States v. Hernandez, 574 F.2d 1362 (5th Cir. 1978) (statements obtained from defendant held incommunicado for five hours with police making frequent interrogation attempts ruled inadmissible); United States v. Finch, 557 F.2d 1234 (8th Cir.), *cert. denied*, 434 U.S. 927 (1977) (statements admitted when defendant's request to stop first interrogation promptly observed and second interrogation not until twenty hours later); United States v. Koch, 552 F.2d 1216 (7th Cir. 1977) (statements from second interrogation admissible when defendant's right to silence initially honored six hours earlier).

[55] For an example of a case which applied *Mosley*'s scrupulously honored test to statements obtained after a defendant requested counsel, see United States v. Nixon, 571 F.2d 1121 (9th Cir. 1978) (defendant's right to counsel not scrupulously honored when interrogation resumed shortly after demand for counsel).

not arise since the prosecution in *Mosley* presented the defendant's statements as evidence of the defendant's guilt. If statements are obtained after the defendant's right to remain silent was not "scrupulously honored," the court must decide whether the violation went to the defendant's fifth amendment right or only to *Miranda*'s prophylactic guidelines. Exclusion of the statements, to be consistent with *Harris* and *Hass*, would be necessary only if the Court concludes that the breach of a defendant's right to remain silent in *Miranda* also infringes upon his fifth amendment right against self-incrimination.[56]

Although *Mosley* did not face the issue of whether statements which were obtained after a defendant's right to remain silent was not "scrupulously honored" could be used for impeachment, statements which may be used for impeachment force the defendant to make the choice of whether or not to testify. If the defendant elects to testify, the prosecution will be free to introduce the impeaching evidence. The danger is that the jury will be unable to limit its use of the evidence to weighing the credibility of the defendant, and will treat it as evidence of the defendant's guilt or innocence.[57] On the other hand, a decision not to take the stand is often viewed by the jury as evidence of the defendant's guilt.[58]

The *Miranda* decision has been further restricted by the Supreme Court in the area of custodial interrogation.[59] In *Beckwith v. United States*,[60] a criminal tax investigation of the defendant led to a meeting between two agents of the Internal Revenue Service and the defendant at his home. The agents questioned the defendant without administering *Miranda* warnings.[61] The questioning was conducted in an atmosphere described as "friendly" and "relaxed."[62] After a short time the senior agent made a request to inspect some of the defendant's records at his office. The defendant complied with the request after being told by the agent that he was not required to furnish any books or records. The government later introduced statements for its case-in-chief that had been obtained through the interrogation at the defendant's home.

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[56] *See* text accompanying notes 12-42 *supra*.

[57] *See Admissibility of Unlawfully Obtained Statement for Impeachment Purposes*, 85 HARV. L. REV. 44, 48 n.27 (1971).

[58] A decision not to take the stand may be highly prejudicial to the defendant. The tendency for jurors is to believe that the defendant is probably guilty or concealing damaging evidence when he chooses not to testify. *See* Williams, *The Trial of a Criminal Case*, 29 N.Y.B.A. BULL. 36, 41-42 (1957); Note, *To Take the Stand or Not Take the Stand: The Dilemma of the Defendant with a Criminal Record*, 4 COLUM. J. L. & SOC. PROB. 215, 221-22 (1968). The Supreme Court, in Griffin v. California, 380 U.S. 609 (1965), held that the defendant's fifth amendment right against self-incrimination precludes any comment upon a defendant's refusal to take the stand. *Id.* at 615.

[59] *See* note 3 *supra*.

[60] 425 U.S. 341 (1976).

[61] The *Beckwith* interrogation did not, however, take place without any warnings to the defendant. The Internal Revenue Agents administered warnings much like those required by *Miranda* with the exception that the IRS warnings contained no warning of the defendant's right to appointed counsel. *Id.* at 343.

[62] *Id.*

The defendant argued that the agents' questioning placed him under a psychological restraint which was the legal equivalent of custody.[63] The atmosphere surrounding the *Beckwith* questioning, however, was held by the Court to be less than custodial. The majority reasoned that the defendant had not been in the sort of custodial situation contemplated by *Miranda,* and therefore no warnings were required.[64] In evaluating whether the defendant was in custody, the Court in *Beckwith* applied an objective test.[65] The test used by the majority requires that the officer must say or do something which communicates to the suspect that he is not free to leave in order for the interrogation to be considered custodial.[66] The alternative subjective test, which some lower courts had previously applied, hinged on the suspect's state of mind. If he considered himself restrained, the interrogation would be deemed custodial and *Miranda* warnings would be required.[67] The no custody determination in *Beckwith* accords with the

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[63] *Id.* at 345. The defendant in *Beckwith* also argued that *Miranda* guidelines applied since he had become the focus of the criminal investigation. *Id.* The focus argument relied on a footnote in the *Miranda* opinion attempting to clarify the meaning of custodial interrogation which stated "this is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." 384 U.S. at 444 n.4. Escobedo v. Illinois, 378 U.S. 478 (1964) held inadmissible confessions obtained from a defendant under arrest, without first allowing the defendant to consult with retained counsel. Prior to *Escobedo,* the sixth amendment right to counsel did not apply until after indictment. *See* Massiah v. United States, 377 U.S. 201 (1964). The *Escobedo* majority reasoned that a pre-indictment interrogation in a criminal prosecution may be as critical a stage as indictment. 378 U.S. at 486. Therefore, the *Escobedo* Court held that once an investigation has come to focus on an accused, the suspect has the right to consult his lawyer. *Id.* at 492. Thus, the defendant in *Beckwith* argued that the *Miranda* footnote concerning focus should be interpreted to mean that a suspect is under custodial interrogation whenever he is asked questions after the investigation has come to focus upon the particular individual.

In asserting his focus argument, the defendant relied heavily on Mathis v. United States, 391 U.S. 1 (1968). The defendant in *Mathis* had become the focus of a criminal tax investigation while the defendant was imprisoned on another charge. *Id.* at 2. Since the *Mathis* defendant was clearly in custody, he was entitled to *Miranda* warnings. The focus element, however, was irrelevent because the incarceration automatically triggered the necessity of the warnings. 425 U.S. at 347.

[64] 425 U.S. at 347. *Beckwith* followed the great weight of authority in rejecting the focus test to determine the applicability of the *Miranda* warnings. *See, e.g.,* United States v. Robson, 477 F.2d 13, 16 (9th Cir.), *cert. denied,* 425 U.S. 342 (1973); United States v. Stribling, 437 F.2d 765, 771 (6th Cir.), *cert. denied,* 402 U.S. 973 (1971); United States v. Prudden, 424 F.2d 1021, 1027-28 (5th Cir.), *cert. denied,* 400 U.S. 831 (1970); United States v. Brevick, 422 F.2d 449, 450 (8th Cir.), *cert. denied,* 398 U.S. 943 (1970); Pittman v. United States, 411 F.2d 635, 638 (10th Cir.), *cert. denied,* 396 U.S. 914 (1969). *But see* United States v. Oliver, 505 F.2d 301 (7th Cir. 1974) (pre-*Beckwith* case upholding focus test subsequently overruled by United States v. Fitzgerald, 545 F.2d 578, 581 (7th Cir. 1976)).

[65] 425 U.S. at 344.

[66] *See* United States v. Hall, 421 F.2d 540, 544 (2d Cir. 1969), *cert. denied,* 397 U.S. 990 (1970) (defendant's exculpatory statement in response to questioning held admissible even though FBI agents knew they could place defendant under arrest).

[67] *See* United States v. Harrison, 265 F. Supp. 660, 662 (S.D.N.Y. 1967) (statements obtained from parolee who erroneously believed he had no choice but to comply with officer's request for questioning held inadmissible). For a case that considers both the subjective outlook of the defendant and the objective intent of the interrogating officer in making the

weight of authority that questioning which takes place in the defendant's home is generally non-custodial.[68] Since the defendant is in his home, presumably he is more at ease and is not exposed to the inherently coercive pressures present at the station house which *Miranda* was designed to protect against.[69]

The Supreme Court's holding in *Oregon v. Mathiason*[70] raises the question of the effect that should be given to the inherent coerciveness of station house interrogations. An officer investigating a burglary left his card at the defendant's home with a note asking him to call. The following day the defendant, a parolee, arranged a meeting with the officer at the state patrol headquarters. Upon arrival, the officer advised the defendant that he was not under arrest. The officer informed the defendant that he wanted to talk with him about a burglary and that the defendant's truthfulness would be considered by the judge or district attorney if any charges were brought.[71] The officer falsely stated that the defendant's fingerprints had been found at the scene of the burglary.[72] No *Miranda* warnings were given prior to questioning, during which the officer elicited incriminating statements from the defendant which eventually resulted in the defendant's conviction.

Recognizing that the station house visit did create a coercive environ-

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custody determination, see Hicks v. United States, 382 F.2d 158 (D.C. Cir. 1967). The *Miranda* Court's concern for inherent coercion suggests a subjective determination for custody, but the apparent difficulties in applying the subjective test lead most courts to employ an objective determination. *See* Smith, *The Threshold Question In Applying* Miranda: *What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699, 714 (1974) [hereinafter cited as Smith].

[68] *See, e.g.*, United States v. Lacy, 446 F.2d 511 (5th Cir. 1971). *See generally* Smith, *supra* note 67, at 719-22. The vast majority of tax investigation cases also reached the conclusion that questioning which takes place in the suspect's home is noncustodial. *See, e.g.*, United States v. Engle, 458 F.2d 1017 (8th Cir.), *cert. denied*, 409 U.S. 875 (1972); United States v. Stamp, 458 F.2d 759 (D.C. Cir. 1971), *cert. denied*, 409 U.S. 842 (1972); United States v. Ramantanin, 452 F.2d 670 (4th Cir. 1971); United States v. Jaskiewicz, 433 F.2d 415 (3d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); United States v. Chikata, 427 F.2d 385 (9th Cir. 1970). The rationale of this conclusion is that little deprivation of freedom results from criminal tax investigations and therefore there is little opportunity for coercion. Note, *Interrogation - Statements Obtained By IRS Special Agents During The Course Of A Noncustodial Interview With Taxpayer Under Criminal Tax Investigation Are Admissible At Subsequent Tax Fraud Trial Even Though The Agents Did Not Give Full Miranda Warnings*—Beckwith v. United States, 425 U.S. 341 (1976), 17 SANTA CLARA L. REV. 716, 720 (1977). *See generally* Andrews, *The Right To Counsel In Criminal Tax Investigations Under Escobedo And Miranda: The "Critical Stage"*, 53 IOWA L. REV. 1074 (1968); Comment, *Taxpayer Rights in Noncustodial IRS Investigations After* Beckwith v. United States, 10 U. MICH. J. L. REF. 297 (1977).

[69] Smith, *supra* note 67, at 719. *But see* Orozco v. Texas, 394 U.S. 324 (1969). In *Orozco*, four police officers arrived at defendant's boardinghouse at 4:00 a.m., to question him about a murder earlier that evening. According to one of the officers, the moment the defendant gave his name, he was under arrest. *Id.* at 325. The Court held that the defendant was in custody despite the fact that the interrogation took place in his bedroom. *Id.* at 327.

[70] 429 U.S. 492 (1977).

[71] *Id.* at 493.

[72] *Id.*

ment for the defendant, the *Mathiason* majority nevertheless held the questioning did not amount to custodial interrogation.[73] Because the defendant was free to leave, the *Mathiason* majority determined that he was not in custody and therefore no warnings were required.[74] This simple analysis narrows the *Miranda* requirement that warnings be given to not only those who are physically in custody, but also to those individuals who have been deprived of their freedom in any significant way.[75] The Court reasoned that almost all police questioning involves an element of coerciveness, but a coercive environment alone does not determine the custody issue. The *Mathiason* opinion overlooked two crucial facts in determining that the defendant was not in custody. Initially, the officer's false statement that the defendant's fingerprints were found at the scene of the burglary was deemed by the Court to be irrelevant to the custody determination.[76] *Miranda,* however, was designed to help protect the defendant against trickery.[77] Secondly, as emphasized in Justice Stevens' dissent, the defendant was a parolee at the time of the interrogation.[78] A parolee may be viewed as a person who is always in custody.[79] If this view is accepted, the parolee who is questioned must always be given his *Miranda* warnings before the interrogation may begin. In contrast to this approach, Justice Stevens' dissent raises the possibility that the parolee defendant deserves less fifth amendment protection than the nonparolee defendant.[80] The parolee's situation may be seen as resembling that of an incarcerated

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[73] *Id.* at 495. Cases prior to *Mathiason* which involve station house "visits" generally hold that the defendant is not under custodial interrogation defined by *Miranda. See, e.g.,* United States v. Scully, 415 F.2d 680, 684 (2d Cir. 1969) (defendant told he was robbery suspect but given no indication that he would not be free to leave at any time, and defendant did freely walk out of station); United States v. Manglona, 414 F.2d 642, 644 (9th Cir. 1969) (defendant told he was not under arrest and could terminate interview at any time); Freje v. United States, 408 F.2d 100, 102 (1st Cir.), *cert. denied,* 396 U.S. 859 (1969) (defendant under no compulsion to go to station house). *But see* Fisher v. Scafati, 439 F.2d 307, 310 (1st Cir.), *vacated,* 403 U.S. 939 (1971) (defendant came to station voluntarily, however, subjective intent of investigating officer was that defendant would not be free to go).

[74] 429 U.S. at 495.

[75] *See* note 3 *supra.*

[76] 429 U.S. at 495-96.

[77] The *Miranda* Court reasoned that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." 384 U.S. at 476. Such statements, obtained without waiver were to be excluded from trial. *Id.* This presumes, however, that the defendant is under custodial interrogation since *Miranda* warnings are only necessary after this point. *Id.* at 444. Therefore, when the *Miranda* Court dealt with the waiver issue, it was concerned with an individual already assumed to be under custodial interrogation.

[78] 429 U.S. at 499-500 (Stevens, J., dissenting).

[79] *Id.* at 500. A parolee is technically under custody until he has served his sentence. 18 U.S.C. § 4210(a) (1976); *see* United States v. Harrison, 265 F. Supp. 660, 662 (S.D.N.Y. 1967) (applied subjective test for determining custody to parolee). *See generally* Comment, *Probation Officer Interrogation Of An In-Custody Probationer: An Analysis Of The Applicability Of The* Miranda *Doctrine And The Voluntariness Standard,* 10 U.S.F.L. Rev. 441 (1976).

[80] 429 U.S. at 500 (Stevens, J., dissenting).

individual who has very limited rights.[81] This view leads to the conclusion that the parolee in *Mathiason* was not in custody. The *Mathiason* majority, by ignoring the parolee status of the individual and the officer's false statement concerning fingerprints, evaded a strong argument for the necessity of administering *Miranda* warnings to the defendant.

Mathiason purports to serve as a guideline for lower courts faced with a custody determination. However, since the *Mathiason* Court decided only that the factual situation presented did not require *Miranda* warnings, lower court decisions are likely to produce inconsistent results in this area. Lower courts will have to compare the *Mathiason* facts to each case to determine whether or not the questioning was custodial.[82] Thus, the *Mathiason* opinion is subject to the same criticism aimed at the "scrupulously honored" test articulated in *Mosley*. Neither case outlined workable parameters to which the lower courts could look for guidance.

The lessening impact of *Miranda* has encouraged new criticism to be aimed at the 1966 opinion. The response of the Supreme Court in the recent decision of *Brewer v. Williams*[83] avoided pleas by the states to overrule *Miranda*. The defendant in *Brewer* was arrested in Davenport, Iowa, for abducting a ten-year-old girl in Des Moines. The defendant consulted attorneys in both cities who advised him to remain silent. His Des Moines attorney also agreed with the officers responsible for driving the defendant to Des Moines that there would be no questioning until the defendant had returned and had an opportunity to consult his attorney.[84] Several times during the 160-mile trip to Des Moines, the defendant demonstrated his unwillingness to be questioned by advising the officers that he would tell the whole story only after he returned to Des Moines and met with his attorney. Nevertheless, one of the officers maintained a running conversation with the defendant.[85] Aware of the defendant's mental instability and his religious convictions, the officer tried to elicit information concerning the crime by playing upon these personal characteristics of the defendant.[86] The officer then delivered a short speech to the defendant

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[81] *See generally* Gurfein, *The Federal Courts Look At Parole,* 50 ST. JOHN'S L. REV. 223 (1975).

[82] *See, e.g.,* United States v. Shelby, 573 F.2d 971 (7th Cir. 1978); United States v. Lewis, 556 F.2d 446 (6th Cir.), *cert. denied,* 434 U.S. 863 (1977). In United States v. Jordan, 557 F.2d 1081 (5th Cir. 1977), however, the court identified four factors to be considered in determining whether a defendant is in custody. The factors are: probable cause to arrest; subjective intent of the police (whether the police believe the defendant is free to go); subjective intent of the defendant; and whether the investigation has focused on the defendant. *Id.* at 1083. Without limiting *Miranda,* these factors provide the courts with a more concrete test for determining custody than the *Mathiason* majority's continued case-by-case approach.

[83] 430 U.S. 387 (1977).

[84] *Id.* at 391. The defendant's lawyer explicitly repeated to one of the officers that the officer was not to question the defendant during the return trip to Des Moines. *Id.* at 391-92.

[85] *Id.*

[86] *Id.* at 399. The Court concluded that there was no doubt that the officer was trying to subtly elicit as much incriminating evidence as he could from the defendant while en route to Des Moines. *Id.* The defendant had been a mental patient until he escaped six months prior to the murder. The officer was aware of this and therefore designed his interrogation

indicating that the defendant might be the only person who could locate the body.[87] The officer told the defendant that he need not respond, but should think about the matter as they were driving.[88] The defendant proceeded to incriminate himself by directing the officers to various points off of the main highway to look for articles of clothing worn by the victim, and finally, the body itself.[89]

The defendant argued that the evidence obtained during the trip to Des Moines must be excluded to avoid violations of his fifth amendment right against self-incrimination as well as his sixth amendment right to counsel. The defendant's fifth amendment argument for reversal was based on *Miranda*. The Supreme Court ruled that the evidence should have been excluded but rested its holding solely on the defendant's sixth amendment right to counsel.[90]

The fact that the Supreme Court's decision was not based on *Miranda* was not inadvertent. Not only had the federal district and circuit courts relied on *Miranda* for their holdings,[91] but twenty-two states had filed amicus curiae briefs with the Court asking that *Miranda* be overturned.[92] The *Brewer* case raises questions concerning the future of the *Miranda* doctrine in the Supreme Court.

The Supreme Court has attempted to clarify and resolve numerous

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technique to take advantage of the defendant's mental condition as well as his known religious convictions. *Id.* at 392.

[87] *Id.* at 392-93.

[88] *Id.* at 393.

[89] *Id.*

[90] 430 U.S. at 397-98. *See generally* Kirby v. Illinois, 406 U.S. 682 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

In Massiah v. United States, 377 U.S. 201 (1964), the Court considered the protection of the right to counsel in post indictment situations. The defendant in *Massiah* was indicted on a drug charge and retained a lawyer. After being released on bail, the police succeeded in covertly eliciting incriminating responses from the defendant outside the presence of counsel. *Id.* at 202-03. The Court held that the defendant had been denied his right to counsel when the incriminating statements were used against him at trial. *Id.* at 206. Therefore, once a defendant arranges for counsel, the prosecution may not interrogate the defendant outside the presence of his attorney unless the defendant clearly waives his right to counsel. The *Brewer* Court found the circumstances of *Massiah* to be analogous to the factual situation in *Brewer.* 430 U.S. at 400. Thus, the statements elicited from the defendant before his return to Des Moines were inadmissible against the defendant at trial.

[91] *Id.* at 397. Both the federal district court and the circuit court partially based their decisions in *Brewer* on *Miranda* grounds. 375 F. Supp. 170 (S.D. Iowa 1974); 509 F.2d 227 (8th Cir. 1975). The district court held that the incriminating information had been elicited from the defendant in violation of the *Miranda* doctrine. 375 F. Supp. at 179. The defendant effectively asserted his right to remain silent by telling the officers that he would tell the whole story after the return trip. Therefore, under *Miranda,* the interrogation should have ceased. *Id.* at 180. Once the defendant exercised his right to remain silent, the interrogation should have stopped. *Id.*; *see* 384 U.S. at 473-74. Since the interrogation did not stop, the incriminating evidence was required to be excluded. 375 F. Supp. at 185. The circuit court adopted the district court's application of the *Miranda* doctrine to the particular facts of *Brewer.* 509 F.2d at 233-34.

[92] 430 U.S. at 389.

ambiguities that have arisen regarding *Miranda*. Through these attempts, the Court has narrowed *Miranda*'s impact by limiting its scope. *Miranda*'s full effect is no longer felt if inadequate warnings are given to the defendant or if an officer elicits statements from a defendant who has already requested counsel.[93] In these situations, instead of excluding the statements altogether, the previously abandoned voluntariness test has been invoked to test whether such statements obtained in violation of *Miranda*, and inadmissible in the case-in-chief, may be used to impeach the defendant if he chooses to take the stand. Unfortunately, the voluntariness test undermines *Miranda*'s basic premise by failing to take into consideration the inherent coerciveness of custodial interrogation. The Court's decision in *Mathiason* further lessens the scope of *Miranda* in determining when the warnings are necessary.[94] The *Mathiason* majority required nothing less than custody before warnings are mandated, ignoring the guidelines set forth by the *Miranda* opinion which include both the situation where the individual is in custody as well as the instance where the person has been deprived of his freedom in any significant way.

The post-*Miranda* cases evidence a decline of the impact of the original decision. The Court has continually attempted to resolve ambiguities to narrow *Miranda* rather than to broaden the scope of the decision. The best example of this is in the impeachment area. The Court interpreted the *Miranda* opinion as unclear regarding the extent to which statements obtained in violation of *Miranda* could be used at trial. Analogizing a fourth amendment doctrine, the Court concluded that *Miranda* did not act as a total bar and that statements obtained absent adequate warnings could indeed be used for limited impeachment purposes.[95] This reasoning was further approved by the *Hass* Court which allowed statements elicited from a defendant after his request for counsel to be used for impeachment purposes.[96] The future of *Miranda* is still uncertain, as witnessed by the Court's failure to face the *Miranda* issue in *Brewer*, but it is quite clear that the *Miranda* decision no longer functions with full force.

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[93] *See* text accompanying notes 12-42 *supra*.
[94] *See* text accompanying notes 70-82 *supra*.
[95] *See* text accompanying notes 12-32 *supra*.
[96] *See* text accompanying notes 33-42 *supra*.