Washington and Lee Law Review

Volume 25 | Issue 1 Article 12

Spring 3-1-1968

Post-Miranda Retrials Of Pre-Miranda Defendants

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Criminal Procedure Commons, and the Fourteenth Amendment Commons

Recommended Citation

Post-Miranda Retrials Of Pre-Miranda Defendants, 25 Wash. & Lee L. Rev. 108 (1968), https://scholarlycommons.law.wlu.edu/wlulr/vol25/iss1/12

This Comment is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

is merely a contractual right giving the optionee the possibility of acquiring an interest in the land, but creating no interest in the land.[28] The contract theory seemingly begs the question as the lessee already has an interest in the land, the leasehold estate, and the option to purchase is merely a portion of that leasehold estate.

Another covenant sometimes included within a lease is the option to renew. The unexercised option to renew a lease is compensable in eminent domain as part of the damage done to the leasehold estate.[29] If an unexercised option to renew a lease is considered an essential portion of the leasehold estate and compensable, with stronger reason, an unexercised option to purchase contained in a lease should be compensable.

J. D. HUMPHRIES, III

POST-*MIRANDA* RETRIALS OF PRE-*MIRANDA* DEFENDANTS

State courts are divided on the question of the application of the principles announced in *Miranda v. Arizona*[1] to retrials of defendants convicted before the *Miranda* decision, but who have since won reversals. The United States Supreme Court in *Johnson v. New Jersey*[2] held that the *Miranda* rules apply "only to cases in which the trial began after"[3] June 13, 1966, the date of the *Miranda* decision. An-

[28]City of Ashland v. Kittle, 347 S.W.2d 522 (Ky. 1961); Cornell-Andrews Smelting Co. v. Boston & P.R.R., 209 Mass. 298, 95 N.E. 887 (1911); Phillips Petroleum Co. v. City of Omaha, 171 Neb. 457, 106 N.W.2d 727 (1960); *In re* Water Front, 246 N.Y. 1, 157 N.E. 911 (1927).

[29]United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. 425,031 Square Feet of Land, 187 F.2d 798 (3d Cir. 1951); United States v. Certain Parcels of Land, 55 F. Supp. 257 (D. Md. 1944); United States v. Certain Land, 214 F. Supp. 148 (M.D. Ala. 1963); United States v. 70.39 Acres of Land, 164 F. Supp. 451 (S.D. Cal. 1958); State *ex rel.* Morrison v. Carlson, 83 Ariz. 363, 321 P.2d 1025 (1958); Canterbury Realty Co. v. Ives, 153 Conn. 377, 216 A.2d 426 (1966); Department of Pub. Works & Bldg. v. Bohne, 415 Ill. 253, 113 N.E.2d 319 (1953); City of Ashland v. Kittle, 347 S.W.2d 522 (Ky. 1961); Veirs v. State Rds. Comm'n, 217 Md. 545, 143 A.2d 613 (1958); Land Clearance for Redevelopment Corp. v. Doernhoefer, 389 S.W.2d 780 (Mo. 1965); New Jersey Highway Authority v. J.&F. Holding Co., 40 N.J. Super. 309, 123 A.2d 25 (1956); *In re* Port of New York Authority, 2 N.Y.2d 296, 140 N.E.2d 740, 159 N.Y.S.2d 825 (1957); Northern Pa. R.R. v. Davis & Leeds, 26 Pa. 238 (1856).

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

[2]384 U.S. 719 (1966).

[3]*Id.* at 721. *Johnson* was decided on June 20, 1966, one week after the *Miranda* decision.

ticipating a problem with strict prospective application, *Johnson* also stated that these principles would not apply to cases still on appeal as of June 13, 1966.[4] It is not clear whether the Court overlooked or saw no problem as to the application of the new rules to retrials, but the *Johnson* opinion is silent on the point. Several courts have been, and no doubt others will be, confronted with the problem of the application of *Miranda* to retrials. Although the majority now applies *Miranda* to retrials,[5] recent decisions indicate that the question is not settled.[6]

In two recent decisions, three days apart, the highest courts of New Jersey and California reached contrary results. In *People v. Doherty*,[7] the California Supreme Court held that *Miranda* would apply to determine the admissibility at retrial of statements made by the defendant. However, *State v. Vigliano*[8] refused to apply *Miranda* principles on the second retrial of a defendant who had twice successfully challenged convictions for the murder of his mother.

The defendant in *Vigliano* was convicted of murder in May, 1963, but on appeal the decision was reversed because of improper instructions on the defense of insanity. On retrial, the defendant was again convicted of murder, and on appeal the lower court was again reversed because of procedural error. The New Jersey Supreme Court said that on retrial the lower court should not apply *Miranda* to prevent either the oral or written statements elicited from the defendant, under rules prevailing in 1963, from being admitted into evidence.

The minority courts base their decisions on an interpretation of various words in the *Johnson* opinion as relating to retrial situations. In denying application of *Miranda* to retrials, courts read "trial be-

---

[4]*Id.* at 733.

[5]Gibson v. United States, 363 F.2d 146 (5th Cir. 1966); State v. Brock, 101 Ariz. 168, 416 P.2d 601 (1966); People v. Doherty, 59 Cal. Rptr. 857, 429 P.2d 177 (1967); State v. Ruiz, 49 Hawaii 504, 421 P.2d 305 (1966); State v. McCarther, 197 Kan. 279, 416 P.2d 290 (1966); Creech v. Commonwealth, 412 S.W.2d 245 (Ky. 1967); State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

[6]Jenkins v. State, 230 A.2d 262 (Del. 1967); People v. Worley, 227 N.E.2d 746 (Ill. 1967); State v. Vigliano, 50 N.J. 51, 232 A.2d 129 (1967); Commonwealth v. Brady, 1 CRIM. L. REP. 2304 (Crawford County Ct. Pa. Aug. 30, 1967). Note the conflicting decisions in the State of New York. People v. Sayers, 2 CRIM. L. REP. 2222 (App. Div. N.Y. Dec. 20, 1967) (applies *Miranda* to retrials); People v. La Belle, 53 Misc. 2d 111, 277 N.Y.S.2d 847 (Rensselaer County Ct. 1967) (denies application of *Miranda* to retrials).

[7]59 Cal. Rptr. 857, 429 P.2d 177 (1967).

[8]50 N.J. 51, 232 A.2d 129 (1967).

gan"[9] together with the words "cases commenced"[10] to mean that *Johnson* referred only to trials or cases in which the *first step* was taken after June 13, 1966.[11] These courts adopt the view that a retrial is a continuation of the appellate process and thus simply an extension of an old case.[12] Since *Johnson* denied application of the new rules to cases pending appeal at the time of the *Miranda* decision, it is said to be illogical to apply the extended protection of *Miranda* merely because the appeal was successful.[13] Using the continuation approach of looking at a retrial, courts in interpreting the words of *Johnson* that future defendants will benefit from *Miranda*[14] conclude that retrials should not be covered by the new rules. These courts point out that a defendant at retrial became a defendant with intiation of the original trial and is not a "future defendant."[15] Hence, it would not seem that the *Johnson* decision contemplated the extension of the *Miranda* rules to the defendant in *Vigliano*, for example, who was first tried in 1963, four years before his third trial and three years prior to the *Miranda* decision.

In accordance with the continuation approach to retrials, it has been suggested that it is not logical to change rules in the middle of a case. The rules that prevailed at the original trial should also govern the retrial.[16] This seems fair both to the defendant and to the state since the defendant still has the pre-*Miranda* rules for protection, as did defendants whose appeals were unsuccessful, and the state was justified in using the constitutionally accepted rules prior to *Miranda*.[17]

---

[9]384 U.S. at 721. "We hold ... that *Miranda* applies only to cases in which the trial began after the date of our decision one week ago [referring to the *Miranda* decision]."

[10]*Id.* at 733. "[W]e conclude that ... *Miranda* should apply only to cases commenced after [that decision was] ... announced."

[11]State v. Vigliano, 50 N.J. 51, 232 A.2d 129 (1967); People v. La Belle, 53 Misc. 2d 111, 277 N.Y.S.2d 847 (Rensselaer County Ct. 1967).

[12]Jenkins v. State, 230 A.2d 262 (Del. 1967); State v. Vigliano, 50 N.J. 51, 232 A.2d 129 (1967); People v. La Belle, 53 Misc. 2d 111, 277 N.Y.S.2d 847 (Rensselaer County Ct. 1967).

[13]State v. Vigliano, 50 N.J. 51, 232 A.2d 129 (1967).

[14]384 U.S. at 732.

[15]Jenkins v. State, 230 A.2d 262 (Del. 1967); State v. Vigliano, 50 N.J. 51, 232 A.2d 129 (1967); People v. La Belle, 53 Misc. 2d 111, 277 N.Y.S.2d 847 (Rensselaer County Ct. 1967).

[16]State v. Brock, 101 Ariz. 168, 416 P.2d 601, 608 (1966) (dissent).

[17]State v. Vigliano, 50 N.J. 51, 232 A.2d 129 (1967). *See also* Davis v. North Carolina, 384 U.S. 737, 740-41 (1966). In *Davis*, the Court stated that although *Miranda* would not retroactively affect the state's pre-*Miranda* decision, the failure to comply with the new rules is a significant factor to consider in determining the

The Illinois Supreme Court in *People v. Worley*[18] held that *Miranda* was not applicable to retrials but employed a rationale different from that of other minority courts. It rejected the language of *Johnson* as inconclusive and examined the Court's reasons for making *Miranda* prospective only, in order to determine its intention as to the application of the rules at retrial. The court in *Worley* listed three reasons for which *Miranda* was made prospective only. (1) The new rules provided *additional* safeguards for defendants but did not affect the reliability of pre-*Miranda* procedures or trials. Pre-*Miranda* defendants still have the safeguard of the voluntariness test to determine the admissibility of their statements at retrial and the application of *Miranda* would not provide a fundamentally different safeguard. (2) Law enforcement agencies had relied on pre-*Miranda* rules to obtain statements to be used at trial. (3) Finally, retroactive application of *Miranda* would have a seriously disruptive effect upon the administration of justice. Many convictions otherwise valid would be reversed solely because statements admitted originally now would be inadmissible. The court concluded that these reasons indicate that the *Miranda* rules are safeguards designed for the future and hence by their tenor exclude retrials.

The majority position gained support in *People v. Doherty*,[19] when the California Supreme Court held that *Miranda* rules were to be applied to retrials. Doherty was convicted of a narcotics violation in November, 1964; his conviction was reversed because of the erroneous admission of evidence obtained without warning him of his right to remain silent or of his right to counsel.[20] The court noted that *Johnson* made no express distinction between retrials and original trials started after June 13, 1966. Since in California a retrial places the parties in the same position as if the case had never been tried,[21] the defendant is entitled to the same protection afforded defendants simultaneously being tried for the first time.

Furthermore, the California court found that applying *Miranda* to retrials would not have the disruptive effect upon the administration of justice which was a factor in making the new rules prospective only. Although *Miranda* will be applied at the retrial, the retrial will not

---

voluntariness of statements of a defendant. Therefore, it would appear that the defendant is in a somewhat better position than before the *Miranda* decision.

[18]227 N.E.2d 746 (Ill. 1967).

[19]59 Cal. Rptr. 857, 429 P.2d 177 (1967).

[20]The court interpreted *Escobedo v. Illinois*, 378 U.S. 478 (1964), as requiring these warnings.

[21]Central Sav. Bank v. Lake, 201 Cal. 438, 257 P. 521 (1927).

have been granted on the basis of *Miranda,* since *Johnson* expressly denied application of *Miranda* as direct grounds to attack the validity of pre-*Miranda* convictions. The court also noted that although past reliance by law enforcement officers on pre-*Miranda* rules was a reason for prospective application, *Johnson* did not indicate that statements obtained under the pre-*Miranda* rules could be admitted at trials beginning after June 13, 1966. The admissibility at an original trial begun after June 13, 1966 of statements made prior to that date will be governed by the new rules. Thus, not all past reliance by law enforcement officers is honored even by *Johnson. Doherty* concludes that *Johnson* was more concerned with effectuating the new rules than it was with allowing the state to introduce statements collected by constitutionally accepted methods at the time of interrogation, but which are condemned at the time of trial.

Doherty observed that if the Court had meant to exclude pre-*Miranda* interrogations from coverage of the new rules, it had the power to do so. This power was exercised in *Stovall v. Denno*[22] where it was held that the prospective application of the right to counsel at police lineups was effective to include all lineups after the date of the decisions in which the rule was announced.

The California court recognized that if the *Miranda* rules are applied to retrials the prosecutor may be prevented from using statements that were admissible at the first trial, but which were not obtained under the more stringent rules of *Miranda.* It is pointed out that this is no greater burden than now exists for the prosecutor at an original trial. To apply different standards to defendants being tried simultaneously simply because one is facing retrial while the other faces trial for the first time is to accept a "truncated version of the Constitution."[23] It is worthy of note that the California court is the only one among the majority that has given more than passing acknowledgement to the retrial problem. An analysis of the opinions of the other majority courts reveals that they offer more conclusions than reasons.[24] Typical of these opinions is *State v. Shoffner.*[25] The Wis-

---

[22]388 U.S. 293 (1967). The right to counsel at police lineups was announced in *Gilbert v. California,* 388 U.S. 263 (1967), and *United States v. Wade,* 388 U.S. 218 (1967). These three cases were decided on the same day.

[23]59 Cal. Rptr. at 865, 429 P.2d at 185.

[24]Gibson v. United States, 363 F.2d 146, 148 (5th Cir. 1966) (four sentence paragraph saying that the court sees no reason not to apply the principles since they are now available); State v. Brock, 101 Ariz. 168, 416 P.2d 601, 605 (1966) (five sentence paragraph that implies that since its decision in *Miranda* was reversed, then it must apply *Miranda* to retrials else it be reversed again); State v. Ruiz, 49 Hawaii 504, 421 P.2d 305, 307 (1966) (footnote to the opinion); State v. McCarther,

consin Supreme Court held that it was not a denial of due process to fail to give the *Miranda* warnings prior to the time they were announced by the Supreme Court, but since they are now known, they are applicable to determine the admissibility of defendant's statements at retrial.

Although *Miranda* is to be applied prospectively, the problem of its application to retrials obviously involves elements of retroactive application.[26] It is interesting to examine why the problem of application to retrials has not arisen with respect to other prospective decisions.

The prospective application of newly announced constitutional rules is a relatively new area. *Linkletter v. Walker*,[27] decided in 1965, was the first decision to announce prospective application and made state application of the "exclusionary rule"[28] prospective from the date of the decision in which it had been announced. The exclusionary rule was held to apply to all cases in which the state conviction had not become final. Thus, retrials were covered since a reversal of a conviction would signify that the conviction was not final. *Tehan v. United States ex rel. Shott*[29] held that the "adverse comment" rule[30] was to be applied prospectively to include all cases in which the state conviction was not final and thus, like *Linkletter*, included retrials within the application. In *Stovall v. Denno*,[31] a post-*Johnson* decision, the Court held that the right of a defendant to have counsel at police lineups, which would be a major factor in determining whether identification could be made at trial, was applicable to all lineups held after the date of the decisions in which the rule was announced.[32] The problem of application at retrial is solved because the sole question

---

197 Kan. 279, 416 P.2d 290, 296 (1966) (one sentence); Creech v. Commonwealth, 412 S.W.2d 245, 247 (Ky. 1967) (two sentence paragraph saying it is certain that *Miranda* will apply on retrial); State v. Shoffner, 31 Wis. 2d 412, 143 N.W.2d 458, 475 (1966) (four sentence paragraph).

[25] 31 Wis. 2d 412, 143 N.W.2d 458 (1966).

[26] People v. La Belle, 53 Misc. 2d 111, 277 N.Y.S.2d 847, 849 (Rensselaer County Ct. 1967).

[27] 381 U.S. 618 (1965).

[28] The exclusionary rule was applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

[29] 382 U.S. 406 (1966).

[30] In *Griffin v. California*, 380 U.S. 609 (1965), the Court held that adverse comment by the prosecutor on the failure of the defendant to testify violated the constitutional privilege against self-incrimination.

[31] 388 U.S. 293 (1967).

[32] The rule was announced in *Gilbert v. California*, 388 U.S. 263 (1967), and *United States v. Wade*, 388 U.S. 218 (1967).

in determining whether to apply the new constitutional standard is: when did the lineup occur?

Of the four decisions limiting newly announced constitutional rules to prospective application, *Johnson* is the only one presenting the retrial problem. Viewing the decisions in chronological order, the Court appears to give a narrower meaning to the term "prospective" in each succeeding case. In *Linkletter* and *Tehan* the rules were applied to all cases not finalized, thereby excluding from the benefit of the rules only defendants whose convictions were final prior to the date of the decisions on which the rules were announced. *Johnson* also excludes defendants whose convictions were final and, in addition, excludes defendants whose cases were pending appeal at the time of the *Miranda* decision. In *Stovall,* the only post-*Johnson* decision dealing with prospective application, the Court limited the application of the rule to all subsequent lineups, the initial stage affected by the rule. Thus *Stovall* excludes defendants whose convictions were final, defendants whose cases were pending appeal and, in addition, defendants whose cases were reversed for a retrial, since the lineup will have occurred prior to the decisions announcing the new rule.

Stovall, with its narrow prospective application, would seem to support the minority position on the *Miranda* retrial problem. The Court has indicated that it means to exclude more and more defendants from the coverage of new rules as it applies decisions prospectively only. Since *Stovall* excludes retrials from prospective application, it does not seem unreasonable to exclude retrials from coverage of *Miranda* protections. Indeed, it would seem unreasonable to give the added protection to a defendant whose conviction was reversed as a result of the violation of acceptable pre-*Miranda* standards, while other defendants tried before *Miranda* are denied the protection simply because they received errorless first trials.

Whether to apply *Miranda* to retrials is not a question concerning the fairness of past trials, or of retrials, since the fundamental safeguards still exist and are not basically changed by the *Miranda* rules. The Court has said that where a new rule affects the fairness of past judicial processes, retroactive application is justified.[33] Since *Miranda* does not affect the fairness of past trials, but rather improves upon previously existing standards, it would seem that *Johnson* did

[33]*See* Stovall v. Denno, 388 U.S. 293 (1967); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. United States *ex rel.* Shott, 382 U.S. 406 (1966); Linkletter v. Walker, 381 U.S. 618 (1965).