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Constitutional Law: No Clear Standard for the Waiver of an Asserted Right to Counsel

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CONSTITUTIONAL LAW: NO CLEAR STANDARD FOR THE WAIVER OF AN ASSERTED RIGHT TO COUNSEL

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

Respondent Williams, a former mental patient and religious devotee,[1] was convicted of murdering a ten-year-old girl. Certain information elicited by the police while respondent was without counsel was instrumental in his conviction.[2] Respondent had abducted his victim in Des Moines, Iowa, and subsequently murdered her. He then fled 160 miles to Davenport where, after consulting his attorney, he surrendered to the police.[3] The attorney and the Des Moines police arranged to transport respondent to Des Moines. Although denying the attorney whom respondent had contacted in Davenport permission to accompany his client on the return trip,[4] the police agreed not to interrogate respondent during the trip[5] and properly informed him of his *Miranda*[6] rights. Despite the agreement, one of the officers attempted to elicit information from respondent by appealing to his religious convictions.[7] Before reaching Des Moines, respondent led police officers to the victim's body.[8] The Iowa trial court convicted respondent of murder, finding that he had waived his right to counsel.[9] The state supreme court affirmed.[10] On a writ of habeas corpus, the federal district court reversed, finding no waiver.[11] The court of appeals affirmed[12] and on a writ of certiorari,[13] the

1. 97 S. Ct. 1232, 1236 (1977).
2. See text accompanying note 7 *infra*.
3. 97 S. Ct. at 1242.
4. *Id.* at 1236.
5. *Id.* at 1235.
6. Miranda v. Arizona, 384 U.S. 436 (1966). Prior to interrogation, a suspect must be informed that he has the right to remain silent and that anything he says can and will be used against him in court. He must also be informed that he has the right to counsel before and during interrogation, and that should he be financially unable to retain an attorney, counsel will be appointed. *Id.* at 467-73.
7. 97 S. Ct. at 1236. The detective noted that unless the girl's body was found that night, the snow would cover it up and delay or prevent its discovery. He stated: "[T]he parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas Eve and murdered." The detective falsely stated that he knew the body was in the area of Mitchellville, a town near Des Moines. The detective followed his speech with a request that respondent not answer him but that he think about the remarks during the trip.
8. *Id.* at 1257 (White, J., dissenting). Respondent incriminated himself a time considerably after one of the detectives had made the "Christian burial speech." Justice White observed that the trip was 160 miles long and the weather was bad. He noted that the "Christian burial speech" was delivered shortly after leaving Davenport and that the respondent did not incriminate himself until near the end of the trip. *Id.* at 1257 n.3.
9. *Id.* at 1237.
10. State v. Williams, 182 N.W.2d 396 (Iowa 1970). The supreme court, in examining the circumstances of the trip, agreed with the finding of the trial court that respondent had made a valid waiver. *Id.* at 402.
11. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974). The district court found that the Iowa trial court had failed to place a sufficiently onerous burden on the government in proving constitutional waiver. Specifically, the Iowa trial court had emphasized

United States Supreme Court affirmed and HELD, respondent had not made a valid waiver of his right to counsel.[14]

The sixth amendment[15] of the United States Constitution guarantees the right to the effective assistance of counsel[16] to those facing criminal prosecution. That right, which has been applied to the states through the fourteenth amendment[17] and is invoked whenever a defendant faces possible incarceration,[18] mandates the appointment of counsel if the defendant is financially unable to retain his own attorney.[19] *Massiah v. United States*[20] held that an indicted individual has a right to the assistance of counsel whenever the government interrogates him.[21] Subsequently, the right to the effective assistance of counsel was said to attach once adversary judicial proceedings have been initiated against a suspect and is assured at every critical stage of a criminal proceeding.[22]

Williams' failure to reassert his right to remain silent in the absence of counsel during the trip. *Id.* at 182.

12. Williams v. Brewer, 509 F.2d 227 (8th Cir. 1975).

13. 423 U.S. 1031 (1976).

14. 97 S. Ct. at 1243. The Court initially found that federal habeas corpus relief was properly granted. *Id.* at 1238. The Court also found that since the detective had deliberately sought to elicit information from respondent, the "Christian burial speech" was tantamount to an interrogation. *Id.* at 1239-40.

15. U.S. CONST. amend. VI: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."

16. In Powell v. Alabama, 287 U.S. 45 (1932), counsel was technically appointed but did not afford the defendants effective assistance. Noting that this was a capital case, the Court held that effective counsel must be appointed when the effective assistance was so necessary that a lack of effective counsel would constitute a denial of due process. *Id.* at 71-72. For a discussion of the courts' hesitancy in reviewing the effectiveness of counsel, see Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Comment, *Criminal Waiver: The Requirement of Personal Participation, Competence, and Legitimate State Interest*, 54 CAL. L. REV. 1262, 1276-89 (1966).

17. Gideon v. Wainwright, 372 U.S. 335 (1963), overruling Betts v. Brady, 316 U.S. 455, 473 (1942) (had held that the right to counsel was not extended to the states by the fourteenth amendment unless the absence of counsel would deny fundamental fairness).

18. Argersinger v. Hamlin, 407 U.S. 25 (1972).

19. Johnson v. Zerbst, 304 U.S. 458 (1938).

20. 377 U.S. 201 (1962).

21. The defendant was indicted on a narcotics violation and was free on bail. An accomplice, in cooperation with the government, permitted an agent to hide a radio transmitter in his car. The accomplice subsequently conversed with the defendant in the car, and the defendant incriminated himself. The Court held that an indicted defendant has a right to counsel when the government interrogates him, surreptitiously or otherwise. *Id.* at 206.

22. Kirby v. Illinois, 406 U.S. 682, 690 (1972). The Court ruled that the right to counsel at a police line-up attaches only if criminal proceedings have been initiated against the defendant, thus making the line-up a critical stage of the prosecution. In 1964, the Court held that the right to counsel attaches once a police investigation has focused on the suspect. Escobedo v. Illinois, 378 U.S. 478 (1964). That ruling was limited by Miranda v. Arizona, 384 U.S. 436 (1966), in which the Court defined "focus" as equivalent to custody, the significant deprivation of a suspect's freedom of action. *Id.* at 444. Recently, however, the Court emphatically rejected a broad application of the focus test by defining "focus" as questioning initiated by the authorities after a person has been taken into custody, an apparent restatement of the *Miranda* definition. Beckwith v. United States, 425

In dealing with the waiver of the right to counsel, the Supreme Court in *Johnson v. Zerbst*[23] established that the waiver of a constitutional right must be an "intentional relinquishment or abandonment of a known right or privilege."[24] The Court required that such a determination be based on the totality of the circumstances.[25] Noting that the right to counsel may directly affect the life and liberty of the accused, the Court held that waiver of that vital right must be made intelligently and competently and that any presumption should be against waiver.[26] *Carnley v. Cochran*[27] emphasized that waiver may not be presumed from a silent record and held that unless the defendant had made an express statement of waiver, the burden of proving waiver rested upon the state.[28]

The waiver doctrine was strengthened in *Escobedo v. Illinois*.[29] In that case the Court noted that whenever a defendant is interrogated without his attorney present, the state must overcome a heavy burden in order to prove waiver.[30] The Court in *Miranda v. Arizona*[31] even more emphatically expressed that whenever a fifth or sixth amendment right is involved, the state bears a heavy burden of proving a voluntary, knowing, and intelligent waiver.[32] The *Miranda* Court observed that modern custodial interrogations are psychologically oriented[33] and implied that even an express waiver statement may not indicate voluntary, knowing, and intelligent conduct on the part of the defendant.[34] The Court impliedly reasoned that placing the heavy burden

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U.S. 341, 347 (1976). For an interpretation of the earlier focus standard as well as a detailed development of the right to counsel before *Massiah* and *Escobedo*, see Enker & Elsen, *Counsel for the Suspect*: Massiah v. United States *and* Escobedo v. Illinois, 49 MINN. L. REV. 47 (1964).

23. 304 U.S. 458 (1938).

24. *Id.* at 464.

25. *Id.* The Court mentioned as possibly relevant circumstances the background, experience, and conduct of the accused. In that case, it noted that the defendants on trial were isolated in a city a good distance from their homes, that their educational background was limited, and that they were low on funds. *Id.* at 460 (quoting Bridwell v. Aderhold, 13 F. Supp. 253, 254 (N.D. Ga. 1935)).

26. *Id.* at 465.

27. 369 U.S. 506 (1962).

28. *Id.* at 516. The Court, in declining to overrule Moore v. Michigan, 355 U.S. 155 (1957), implicitly allowed the burden of proving that a waiver was invalid to fall upon the defendant if he had made an express statement of waiver. *See also* Fay v. Noia, 372 U.S. 391, 439 (1963) (requiring waiver to be the product of a considered choice).

29. 378 U.S. 478 (1964).

30. *Id.* at 490 n.14.

31. 384 U.S. 436 (1966).

32. *Id.* at 475 (citing Escobedo v. Illinois, 378 U.S. 478 (1964)). *See* Comment, *Waiver of Rights in Police Interrogation:* Miranda *in the Lower Courts*, 36 U. CHI. L. REV. 413, 425 (1969) (argues that the finding of a waiver by a suspect who has been warned of his right to remain silent but who subsequently makes an incriminating statement closely resembles the standard explicitly rejected in *Miranda* that a waiver may not be presumed from the fact that a statement was ultimately obtained).

33. 384 U.S. at 448.

34. *Id.* at 475. The Court indicated that an express waiver statement followed closely by an admission *could* constitute a waiver. For an argument that any suspect who waives his right before having an attorney aid him is always acting unintelligently, see

of proving waiver on the state helps to diminish the advantage the state has in conducting inherently coercive custodial interrogations.[35]

Despite the *Miranda* Court's attempt to achieve uniformity in the application of its standards,[36] the waiver standard necessarily requires ad hoc determinations based on the facts of each case. In attempting to eliminate the lack of uniformity, Justice White in a prior opinion[37] suggested that once the accused has asserted his right to counsel, interrogation must cease until assistance of counsel is available.[38] In fact, such a view was also strongly suggested by the *Miranda* decision,[39] but the Court has not yet expressly adopted this approach.[40]

In the instant case, the Burger Court reaffirmed the Warren Court's holding in *Massiah* by ruling that once adversary proceedings have been initiated against the accused,[41] he has a right to counsel whenever the government

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Recent Cases — *Criminal Law — Confessions — 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, 1075 (1973).

35. *See* Note, *Intoxicated Confessions: A New Haven in* Miranda, 20 STAN. L. REV. 1269, 1280 (1968); *see generally* Note, Miranda *and its progeny — Application and Limitation of the Warren Court's Legacy,* 21 SYRACUSE L. REV. 232 (1969), for a persuasive argument that the *Miranda* decision was an effort to diminish the use of interrogation as a primary tool in our criminal justice system. The commentator contends that interrogation is a basic characteristic of an inquisitorial system, a system at odds with the accusatorial system established by the United States Constitution.

36. The Court, observing that different courts have reached varying conclusions as to the application of procedural safeguards, granted certiorari to examine the problems in "applying the privilege against self-incrimination to in-custody interrogation, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow." 384 U.S. at 441-42.

37. Michigan v. Mosley, 423 U.S. 96 (1975). The Court held that even though a suspect has asserted his fifth amendment right to remain silent, questioning may resume after a significant passage of time as long as the suspect's right to cut off questioning is "scrupulously honored." *Id.* at 104. For a criticism of the procedural standards adopted in *Mosley,* see Comment, *Criminal Procedure — Admissibility of Confessions — Dancing on the Grave of* Miranda, 10 SUFFOLK U. L. REV. 1141, 1161 n.91 (1976); Recent Developments, *Criminal Procedure — Defendant's Incriminating Statements Elicited During Custodial Interrogation Following His Assertion of his Right to Remain Silent is Admissible into Evidence as Long as Defendant's Right to Cut Off Questioning Was Scrupulously Honored,* 21 VILL. L. REV. 761 (1975).

38. Michigan v. Mosley, 423 U.S. 96, 110 n.2 (1975) (White, J., concurring). Justice White suggested that once a defendant asserted his right to counsel, he had expressed his own view that he was not competently able to deal with the authorities directly and, therefore, any of defendant's statements that were made in the absence of counsel should be viewed with skepticism. In the instant case, Justice White attempted to extricate himself from his opinion in *Mosley* by contending that respondent had not himself asserted his right to counsel and that respondent was not interrogated. 97 S. Ct. at 1259 n.6 (White, J., dissenting).

39. See text accompanying note 75 *infra.*

40. Justice Powell noted: "[T]he opinion of the Court is explicitly clear that the right to assistance of counsel may be waived, after it has attached, without notice to or consultation with counsel." 97 S. Ct. at 1246 (Powell, J., concurring). See text accompanying note 51 *infra.*

41. See text accompanying note 22 *supra.*

interrogates him.[42] The Court also found that the deliberate attempt to secure information from respondent in the absence of counsel during the trip was tantamount to interrogation,[43] thus triggering respondent's right to the assistance of counsel.[44]

The Court resolved the waiver issue by upholding the judgment of the federal district court[45] that the Iowa courts had erred by placing the burden of proving the absence of waiver upon the defendant.[46] Recognizing that waiver requires comprehension of the right before its relinquishment,[47] the Court observed that respondent's consistent reliance on the advice of counsel refuted any suggestion that he had waived that right.[48] The Court also noted that despite respondent's assertion by both words and conduct[49] of his right to counsel, the police proceeded to elicit information from him. Although the majority concluded that respondent had not waived his right to counsel, it explicitly refused to decide whether he could have waived that right under the circumstances.[50] The majority opinion, however, hinted that had the "Christian burial speech" been prefaced by a repetition of respondent's rights or an effort to ascertain whether respondent wished to waive those rights, a valid waiver might have been made.[51]

Justice Powell, concurring, emphasized that a valid waiver must be made voluntarily, a condition that the majority did not stress.[52] He agreed that absent affirmative evidence, an inference of waiver is disfavored.[53] He then

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42. Massiah v. United States, 377 U.S. at 206.

43. See note 14 *supra*.

44. 97 S. Ct. at 1240. The Court recognized "that no such constitutional protection would have come into play if there had been no interrogation." *Id.*

45. *Id.* at 1241-42.

46. See notes 10 & 11 *supra*.

47. 97 S. Ct. at 1242 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The Court reiterated that the strict waiver standard applies to pretrial proceedings, that the right to counsel does not depend on a suspect's request, and that the presumption should be against waiver. 97 S. Ct. at 1242.

48. *Id.*

49. *Id.* Respondent had asserted his right to counsel by securing attorneys in both Des Moines and Davenport and by stating that he would tell the whole story once he had personally spoken with his attorney in Des Moines.

50. *Id.* at 1243. Although it refused to hold that respondent could not have waived his right to counsel, the Court did not base its decision on Chief Justice Burger's allusion to the unarticulated premise that once a suspect asserts his right to assistance of counsel, it is legally impossible for him to waive that right. *Id.* at 1249 (Burger, C.J., dissenting). See text accompanying notes 58 & 59 *infra*.

51. 97 S. Ct. at 1243.

52. *Id.* at 1245. Although emphasizing that a valid waiver must be voluntarily made, Justice Powell, like the majority, did not directly deal with the voluntariness of the suspect's admissions. *Id.* at 1239. For a history and analysis of the voluntariness test, see Kamisar, *A Dissent From the* Miranda *Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966). For an analysis of the different standards used to determine the voluntariness of an admission, see Note, *Interrogation of Criminal Suspects*, 59 NW. U.L. REV. 660 (1964).

53. 97 S. Ct. at 1246 (Powell, J., concurring). Justice Powell agreed with the federal district court that the state had produced no evidence of waiver other than the fact that admissions were eventually obtained.

pointed to the inherently coercive environment surrounding the interrogation as another factor for finding that respondent had not made a valid waiver of his right to counsel.[54]

Chief Justice Burger, dissenting, criticized the majority for failing to find a valid waiver despite the presence of all the elements necessary for waiver.[55] Ignoring voluntariness as an essential element of waiver,[56] he stated that the validity of the waiver depends solely on the extent of the suspect's knowledge of his rights.[57] The Chief Justice concluded that a possible rationale for the majority holding was that once a suspect asserts his right to counsel, he becomes legally incompetent to change his mind until counsel is present.[58] He denounced such a notion as operating to "imprison a man in his privileges."[59]

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54. In describing the custodial environment, Justice Powell noted that the weather was ominous, the respondent was isolated with two police officers for several hours, and the date was the day after Christmas, a factor that may have been significant in view of respondent's deep religious convictions. *Id.*

55. Chief Justice Burger, dissenting, stated that the "Court assumes, without deciding, that Williams' conduct and statements were voluntary . . . [and] concedes . . . that Williams had been informed of and fully understood his constitutional rights and the consequences of their waiver." *Id.* at 1249. The Chief Justice added that the Court found every element necessary for a valid waiver under its own test, but nonetheless reached a contrary conclusion. *Id.* In his interpretation, Chief Justice Burger failed to point out that although the Court may have conceded that the respondent comprehended his rights, it refused to concede that he had relinquished those rights. *Id.* at 1242. It is also doubtful that assuming, without deciding, that the respondent behaved voluntarily is equivalent to finding that the respondent had so behaved.

56. *Id.* at 1249 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 238 n.25 (1973), in which the Court held that consent to a search and seizure need only be voluntary and that it was not necessary that such consent be a knowing and intelligent waiver). Chief Justice Burger inferred from *Bustamonte* that a waiver must be only knowledgeable and not necessarily voluntary. *But see* Note, *The Supreme Court—1965 Term*, 80 HARV. L. REV. 91, 205 (1966), which suggested that whether a suspect knowingly and intelligently waived his rights poses the same question as whether his confession was made voluntarily. The commentator suggested that *Miranda* demands that waiver be tested by a new, stringent standard of voluntariness.

57. 97 S. Ct. at 1249. Chief Justice Burger rejected the test that requires that a waiver be voluntary, an issue that involves the examination of all relevant circumstances pertaining to possible coercion. Instead, he stated that the validity of a waiver of the right to counsel turns solely on the extent of the suspect's knowledge. Such a test would make the custodial environment's coercive nature totally irrelevant in the determination of waiver and might further encourage the use of subtle techniques to coerce a suspect into waiving his constitutional rights. See note 66 *infra*.

58. 97 S. Ct. at 1249 (Burger, C.J., dissenting).

59. *Id.* Chief Justice Burger also recommended that the exclusionary rule not be applied to police conduct that is not egregious. He suggested a balancing approach that would apply the exclusionary rule only when the remedial objective of detering undesirable police conduct outweighed the costs imposed on society by the release of a potentially dangerous criminal. *Id.* at 1251.

Justice Powell conceded that the balancing test suggested by the Chief Justice had been applied to fourth amendment federal habeas corpus claims in Stone v. Powell, 428 U.S. 465 (1967). Noting that the *Stone* question as applied to fifth and sixth amendment claims was neither briefed nor argued in the instant case, however, Justice Powell recommended delaying consideration of that question until it had been fully explored. 97 S. Ct. at 1246-47 (Powell, J., concurring).

Justice White also found that respondent had made a valid waiver.[60] In determining that respondent had spontaneously changed his mind about disclosing the whereabouts of the victim's body, Justice White stated that "[m]en usually intend to do what they do."[61] He implied that unless a waiver is the product of an overborn will,[62] its validity is not necessarily defeated by a certain amount of outside influence.[63] Describing as "wafer thin" the distinction between the right not to be asked any questions and the right not to answer any questions in the absence of counsel,[64] Justice White would require only that a waiver be made prior to or simultaneously with the suspect's statements.[65]

The Court's holding in this case at first glance reflects a liberal attitude toward the issue of waiver of the right to counsel. One might conclude from the majority opinion that the Court complied with the *Miranda* edicts by requiring the strictest scrutiny of fifth or sixth amendment procedural safeguards. Closer analysis, however, reveals that the Court in fact evaded the issue of the voluntariness of a waiver.[66] By indicating that the respondent might have been able to waive his right to counsel[67] despite the denial of permission to counsel to accompany respondent[68] and despite the police officer's avowed intention to elicit as much information as possible from respondent while he was without counsel,[69] the majority has implicitly de-emphasized the importance of the inherently coercive nature of a custodial environment.[70] The opinion thus focused on the requirement that the waiver be knowing and intelligent but skirted the aspect of voluntariness.

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60. *Id.* at 1255 (White, J., joined by Blackmun and Rehnquist, J.J., dissenting).

61. *Id.* at 1257.

62. *Id. Cf.* Spano v. New York, 360 U.S. 315 (1959). In *Spano*, the Court reversed a conviction obtained after an eight-hour interrogation of the defendant during which the defendant was repeatedly denied the opportunity to consult with counsel. The Court noted that methods of extracting confessions were becoming more sophisticated, thereby making the Court's duty to enforce constitutional protections more difficult. *Id.* at 321.

63. 97 S. Ct. at 1257. Justice White stated: "[E]ven if his statements were influenced by Detective Leaming's above-quoted statement, respondent's decision to talk in the absence of counsel can hardly be viewed as the product of an overborn will." *Id.*

64. *Id.* at 1258.

65. *Id.* at 1259.

66. Justice Powell, apparently recognizing the lack of emphasis on the requirement that a waiver be voluntary, stated that the "critical factual issue is whether there had been a voluntary waiver." *Id.* at 1245 (Powell, J., concurring).

67. See text accompanying note 51 *supra*.

68. 97 S. Ct. at 1236.

69. *Id.* at 1239-40.

70. *See* Michigan v. Mosley, 423 U.S. 96 (1975) (Brennan, J., dissenting). Justice Brennan pointed out that the *Miranda* decision was based on the premise that a custodial interrogation was inherently coercive and to allow periodic renewals of interrogation attempts would merely permit the coercive environment to do its work. *Id.* at 118.

Another recent Supreme Court decision also de-emphasized the coercive nature of a custodial atmosphere. Oregon v. Mathiason, 97 S. Ct. 711 (1977). The Court found that a parolee suspected of a crime who voluntarily submitted to station house questioning was not in custody and therefore not protected by *Miranda*'s safeguards. *Id.* at 714. In the instant case, the custodial environment was arguably more oppressive since respondent was under arrest and was not free to leave the car in which he was being questioned.

Though the Court failed to appreciate fully the coercive nature of custodial interrogation, it is fortunate that it did not follow the guidelines suggested by Chief Justice Burger and Justice White, both of whom appear to tolerate the subtle psychological manipulation of a suspect as long as that manipulation does not reach the level of overbearance.[71] Justice White would allow police interrogators to question a suspect even though the suspect has asserted his sixth amendment rights.[72] Similarly, the Chief Justice approved of those delicate techniques directed at a suspect to help him release his normal "human urge to confess wrongdoing."[73] In allowing a certain amount of prompting by interrogators, both Justices would encourage the development of police stratagems designed to elicit admissions from the accused.[74] Although the majority was not willing to undercut a criminal defendant's rights to this extent, neither was it prepared to affirm expressly *Miranda*'s continued vitality.

By refusing to adopt the rule strongly suggested in *Miranda* that an asserted right to counsel may not be waived in counsel's absence,[75] the Court failed to recognize fully the inherently coercive environment of a custodial setting.[76] The weak defendant is still vulnerable to the type of subtle manipulation that may lead him to make what outwardly appears to be a knowing and intelligent waiver.[77]

The lack of a concrete formulation abuses the accused because it fails to discourage police attempts to convince a suspect that he should waive his

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71. See text accompanying note 62 *supra.*

72. See text accompanying notes 64 & 65 *supra.* Justice White maintained that *Miranda* only established the right that a suspect need not answer questions in counsel's absence. 97 S. Ct. at 1258. He seemed to have ignored the following language: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. at 474. Justice White also seemed to disagree with the premise that a waiver may not be inferred. See text accompanying note 61 *supra.*

73. 97 S. Ct. at 1250.

74. For a description of various police methods used in conducting custodial interrogations, see F. INBAU & J. REID, CRIMINAL INTERROGATIONS AND CONFESSIONS (2d ed. 1967).

75. "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." Miranda v. Arizona, 384 U.S. at 469. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. "Opportunity to exercise these rights must be afforded to him [the suspect] throughout the interrogation." *Id.* at 479.

76. *Id.* at 469. "The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will. . . ." *Id.*

77. *See* Comment, *supra* note 32. The author argued that some suspects may be personally weak and especially susceptible to manipulation and that "[s]uch individuals, who most need the safeguard of counsel's presence, are the very persons most likely to waive their rights." *Id.* at 442.

A state supreme court has rejected the validity of an express waiver due to possible coercion. People v. Fioritto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968). Relying on *Miranda,* the California supreme court ruled that an initial refusal to waive rights was equivalent to an assertion of those rights and that all further attempts at police interrogation should thereafter cease. *Id.* at 719, 441 P.2d at 627, 68 Cal. Rptr. at . In *Fioritto,* a waiver obtained after an initial refusal to waive rights was held invalid due to intervening conduct of the police in confronting the defendant with his two accomplices. *Id.*

right to counsel. Further, by requiring ad hoc determinations of waiver of the right to counsel based on the totality of the circumstances,[78] the Court provided no clear guidelines for future judicial determinations of waiver.[79] In a review of the words spoken between an interrogator and a suspect, crucial circumstantial factors such as the tone of the interrogator's voice may be lost by relying on merely the testimony of witnesses at trial.[80] The Court, by failing to adopt the position that an asserted right to counsel may not be waived in counsel's absence, missed an opportunity to achieve uniform application of procedural safeguards in the area of waiver of the right to counsel.[81]

The Court's narrow holding in the instant case falls short of *Miranda* by failing to decide that an asserted right to counsel may be waived only in the presence of counsel.[82] That rule seems to be dictated not only by the intent behind the *Miranda* decision[83] but also by its actual wording.[84] The Court expressly refused to base its decision on *Miranda*,[85] possibly to avoid the necessity of confronting the irreconcilable alternatives of overruling *Miranda* in part or accepting its implicit premise that an asserted right to counsel may not be waived in the absence of counsel. To avoid that confrontation, the Court expressly based its decision on *Massiah*[86] and on the waiver standard established in *Johnson v. Zerbst*.[87]

By implying that under some circumstances an individual who has asserted his right to counsel may waive that right in counsel's absence, the Court substantially narrowed the holding of *Miranda*.[88] Although the Court still

78. Johnson v. Zerbst, 304 U.S. at 464.

79. See note 36 *supra*. Suggested guidelines include a requirement that the interrogator inquire into the suspect's comprehension of his rights before questioning; a requirement that once the right to counsel is asserted, admissible statements be taken only in counsel's presence; and a requirement that any renewed interrogation be immediately preceded by a reminder of the suspect's rights. For a discussion of these alternatives, see Recent Cases, *supra* note 34.

80. *See* Comment, *supra* note 32, at 431.

81. See note 36 *supra*. *But see* Miranda v. Arizona, 384 U.S. 436, 545 (1966) (White, J., dissenting). Justice White suggested that the procedural devices supplied by *Miranda* allow no flexibility but act instead like a "constitutional straightjacket."

82. *But see* United States v. Priest, 409 F.2d 491 (5th Cir. 1969), in which the court, relying on *Miranda*, noted that whenever "there is a request for an attorney prior to any questioning, as in this case, a finding of knowing and intelligent waiver of the right to an attorney is impossible." *Id.* at 493. Consequently, following such a request, any confession obtained in the absence of counsel as the result of an interrogation is per se involuntary.

83. The Court was concerned with the "interrogation atmosphere" and sought to limit the "evils it can bring." 384 U.S. at 456.

84. See note 75 *supra*.

85. 97 S. Ct. at 1239. The Court refused to reexamine the procedural rulings of *Miranda* despite the urging of 22 states that filed briefs as amici curiae. *Id.* at 1259 (Blackmun, J., dissenting). This avoidance could be indicative of a reluctance by the Court to alter drastically the *Miranda* guidelines.

86. *Id.* at 1240. See text accompanying notes 41 & 42 *supra*.

87. 304 U.S. 458, 464 (1938). See text accompanying note 47 *supra*.

88. The *Miranda* Court capsulized its holding: "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444.

admits that a custodial setting is inherently coercive, it seems willing to allow that environment to do its work[89] as long as the interrogator does not further contribute to the coercive atmosphere by affirmatively prodding the suspect.[90] In bypassing a direct review of the *Miranda* decision, the Court has avoided an express repudiation of that decision. By its recent holdings, however, the Court has expressed a distaste for broad application of the *Miranda* rule.[91] If the Court continues this approach in future cases, it may, without explicitly overruling *Miranda*, vitiate its procedural safeguards.

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89. See note 70 *supra*.

90. The majority emphasized the interrogator's attempt to elicit information rather than respondent's isolation in a car with two police officers for several hours. 97 S. Ct. at 1243. In fact, the majority stated that the constitutional right to counsel would not have come into play had there been no interrogation. *Id.* at 1240.

In his concurrence, Justice Powell expanded the notion by adding that a valid confession may be made after the right to counsel has attached. *Id.* at 1246. Since the right to counsel does not come into play absent interrogation, Justice Powell's terminology is somewhat misleading. Even under *Miranda* and its terminology, a confession not the result of a preceding interrogation does not require a waiver of the right to counsel. The Court in *Miranda* clearly stated that "[t]he fundamental import of the privilege [against self-incrimination] while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated," and added that the admissibility of volunteered statements of any kind is not affected by the *Miranda* decision. 384 U.S. at 478. The instant decision, however, seems to depart from *Miranda* by refusing to disallow the *interrogation* of a suspect who initially asserts his right to counsel but who subsequently waives that right in counsel's absence.

91. *See, e.g.*, Oregon v. Mathiason, 97 S. Ct. 711 (1977) (found a parolee who, upon request of a police officer, voluntarily submitted to questioning at the station house not to be in custody so as to trigger *Miranda*'s procedural requirements); Michigan v. Mosley, 423 U.S. 96 (1975) (allowed a resumption of questioning after a significant passage of time since the suspect's assertion of his fifth amendment rights, provided that the suspect's right to discontinue interrogation was scrupulously honored); Kirby v. Illinois, 406 U.S. 682 (1972) (held right to counsel at a line-up exists only when adversary judicial proceedings have been initiated).