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Criminal Procedure—Miranda Warnings—Waiver of Right to Counsel at Polygraph Test

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CRIMINAL PROCEDURE—MIRANDA WARNINGS—WAIVER OF RIGHT TO COUNSEL AT POLYGRAPH TEST. *Wyrick v. Fields*, 103 S. Ct. 394 (1982).

On September 21, 1974, Edward Fields was charged with rape. Four days later, on September 25, the defendant was arrested and released on his own recognizance. After discussing the case with both his private counsel and counsel furnished by the military,[1] the defendant requested and was granted a polygraph examination which was to be conducted by the Army. Prior to the examination the defendant signed a written waiver which informed him of his rights.[2] He was also read an additional detailed statement of his rights but declined to have an attorney present.[3] At the conclusion of the polygraph test, the examiner told the defendant that the test results indicated that he had been deceitful and asked the defendant to explain. The defendant then admitted to sexual intercourse with the victim but claimed that she had consented. He agreed to speak to another army officer and the police chief of Waynesville, Missouri, the town where the alleged incident occurred. The chief advised the defendant of his rights again and the defendant repeated that he had had sexual intercourse with the victim, but that it was with her consent.

The defendant sought to suppress these admissions of inter-

1. Defendant was a soldier in the U.S. Army and was stationed at Fort Leonard Wood, Missouri.

2. Miranda v. Arizona, 384 U.S. 436 (1966), provides that prior to custodial interrogation a person must be advised of his right to remain silent, that anything he says will be used against him, that he has a right to have counsel present before and during any questioning, and that if he cannot afford counsel it will be provided for him.

3. The Army agent conducting the test read the defendant the following statement:

> Before I ask you any questions you must understand your rights. You do not have to answer my questions or say anything. Anything you say or do can be used as evidence against you in a criminal trial. You have a right to talk to a lawyer before questioning or have a lawyer present with you during the questioning. This lawyer can be a civilian lawyer of your own choice, or a military lawyer, detailed for you at no expense to you. Also, you may ask for a military lawyer of your choice by name and he will be detailed for you if superiors determine he's reasonably available. If you are now going to discuss the offense under investigation, which is rape, with or without a lawyer present, you have a right to stop answering questions at any time or speak to a lawyer before answering further, even if you do sign a waiver certificate. Do you want a lawyer at this time?

State v. Fields, 538 S.W.2d 348, 350 n.1 (Mo. App. 1976).

course as violating his fifth amendment rights.[4] The trial court denied the motion and held that the defendant had waived his rights. He was convicted of rape and sentenced to twenty-five years in prison. The Missouri Court of Appeals affirmed the conviction on the ground that the defendant had waived his rights.[5] The defendant sought a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The district court denied the writ and held that the defendant had waived his rights.[6] On appeal, the Court of Appeals for the Eighth Circuit reversed and remanded,[7] holding that the defendant had not waived his rights because he had not been first informed of them at a meaningful time.[8] On writ of certiorari the Supreme Court reversed the court of appeals and held that the defendant had been sufficiently informed of his right to have counsel present and had made a valid waiver of the right. *Wyrick v. Fields*, 103 S. Ct. 394 (1982).[9]

At early common law, confessions were admissible regardless of how they were obtained. There were no restrictions and even those confessions obtained by torture were admissible at trial.[10] In the latter eighteenth century the principle emerged that confessions obtained by promise or threat should not be admissible. This principle was expressed in *King v. Warickshall*,[11] where the court stated that no credit should be given to "a confession forced from the mind by the flattery of hope, or by the torture of fear . . . ."[12] The pur-

4. U.S. CONST. amend. V, provides in pertinent part that "No person . . . shall be compelled in any criminal case to be a witness against himself."

5. The court stated that the defendant "had been repeatedly and amply advised of his rights and that he voluntarily, knowingly, and intelligently waived his rights." State v. Fields, 538 S.W.2d 348, 350 (Mo. App. 1976).

6. The district court agreed with the Missouri Court of Appeals that the defendant had voluntarily, knowingly, and intelligently waived his right to counsel. Wyrick v. Fields, 103 S. Ct. 394, 395 (1982).

7. The court ordered the state to either release the defendant or give him a new trial. Fields v. Wyrick, 682 F.2d 154, 162 (8th Cir. 1982).

8. Miranda v. Arizona, 384 U.S. 436 (1966), requires the warnings to be given at a meaningful time before the fifth amendment rights may be waived. The court of appeals held that Miranda warnings were required before any post-test interrogation. Since the warnings were not given, the defendant could not make a valid waiver of his fifth amendment rights. The court of appeals thus held that the post-test statements were obtained in violation of the defendant's right against self incrimination and were inadmissible. Fields v. Wyrick, 682 F.2d 154, 160-61 (8th Cir. 1982).

9. Based on the standards for waiver the Supreme Court announced here, the Eighth Circuit Court of Appeals on remand affirmed the district court decision that a valid waiver had occurred. Fields v. Wyrick, 706 F.2d 879 (1983), *cert. denied*, 104 S. Ct. 556 (1983).

10. 3 J. WIGMORE, EVIDENCE § 818, at 292 (Chadbourn rev. 1970).

11. 1 Leach C.L. 263, 168 Eng. Rep. 234 (K.B. 1783).

12. *Id.* at 264, 168 Eng. Rep. at 235.

pose of this evolving principle was to exclude confessions which were not trustworthy.[13] Physical evidence discovered as a result of the inadmissible confession was still admissible because the evidence was trustworthy.[14] Facts obtained by the inadmissible confession, which could be proven without the confession, were also admissible because the facts were trustworthy.[15]

Several tests developed to determine the trustworthiness of confessions. In *Regina v. Moore*[16] a confession was held to be untrustworthy if induced by promise of benefit or threat of harm by someone with authority over the prisoner. Similarly, in *Regina v. Garner*[17] the court held that a confession would be untrustworthy if it had been given involuntarily. In *Garner* voluntariness was determined by whether there had been inducement to confess.[18] Regardless of the formal test used, the decision of whether a confession was trustworthy and thus admissible was based mainly on whether it was obtained by promise of benefit or threat of harm.[19] Since the purpose of the common law rules on confessions was to exclude unreliable evidence, even those confessions obtained by deceit were admissible as long as they were trustworthy.[20]

In early American cases the Supreme Court adopted the English view that unreliable confessions should be excluded from trial.[21] The Court based its rules on English precedent.[22] In *Hopt v. Utah*[23] the Supreme Court held a confession admissible because it was not induced by promise of benefit or threat of harm and, thus was considered trustworthy. Subsequent decisions of the Supreme Court followed the inducement doctrine for determining trustworthiness and admissibility of confessions.[24]

In *Bram v. United States*[25] the Court deviated from the induce-

13. 3 J. WIGMORE, EVIDENCE § 818, at 297.

14. In *Warickshall* stolen property which was found as a result of the defendant's inadmissible confession was held admissible. *Warickshall*, 1 Leach C.L. 263, 168 Eng. Rep. 234 (K.B. 1783).

15. *Id.* at 264, 168 Eng. Rep. at 235.

16. 2 Den. C. C. 522, 169 Eng. Rep. 608 (Ct. Crim. App. 1852).

17. 1 Den. C. C. 329, 169 Eng. Rep. 267 (Ct. Crim. App. 1848).

18. *Id.* at 331-32, 169 Eng. Rep. at 268.

19. *Id.*

20. *See* Commonwealth v. Cressinger, 193 Pa. 326, 44 A. 433 (1899).

21. *See* Hopt v. Utah, 110 U.S. 574 (1884).

22. *Id.*

23. *Id.*

24. *See* Pierce v. United States, 160 U.S. 355 (1896); Sparf v. United States, 156 U.S. 51 (1895).

25. 168 U.S. 532 (1897).

ment test and held that the admissibility of confessions came under the fifth amendment right against self incrimination. The test which the Court applied was whether the confession was voluntarily made.[26] Thus, *Bram* established a constitutional standard for judging admissibility of confessions at the federal level. After *Bram* the admissibility of confessions was no longer based solely on the inducement test of trustworthiness. In *Ziang Sun Wan v. United States*[27] the Supreme Court rejected the inducement test and, citing *Bram*, held that admissibility of confessions at the federal level was based on whether the confession was voluntarily given.[28]

While the voluntariness standard was the test for admissibility of confessions in federal cases, the Court applied a fourteenth amendment due process standard when determining admissibility of confessions in cases arising from state courts.[29] The fourteenth amendment due process standard was based on whether confessions were obtained by methods that violated fundamental fairness and due process. The purpose of the due process standard was to prevent the use of evidence, whether true or false, that had been unfairly obtained.[30] The Court, while having separate tests for cases from federal and state courts, used a combination of both in deciding subsequent cases.[31] In *Lyons v. Oklahoma*,[32] the Court indicated that a confession must be voluntary to meet the due process test.[33] The Supreme Court in this way merged the two standards into one and used this due process voluntariness standard in cases from both state and federal courts.[34]

The *McNabb-Mallory* rule[35] changed the standard for deciding the admissibility of confessions at the federal level. *McNabb v. United States*[36] held that a defendant's confession was inadmissible when made during a violation of the defendant's right to be taken promptly before a magistrate as required by federal statute. State-

26. *Id.* at 542-43.

27. 266 U.S. 1 (1924).

28. *Id.* at 14-15.

29. *See* Ashcraft v. Tennessee, 322 U.S. 143 (1944); Lisenba v. California, 314 U.S. 219 (1941); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

30. *Lisenba*, 314 U.S. at 236.

31. *Developments in the Law: Confessions*, 79 HARV. L. REV. 935, 961 (1966).

32. 322 U.S 596 (1944).

33. *Id.* at 601-602.

34. *Developments in the Law, Confessions*, 79 HARV. L. REV. 935, 961 (1966).

35. The rule developed from a line of cases beginning with McNabb v. United States, 318 U.S. 332 (1943) and ending with Mallory v. United States, 354 U.S. 449 (1957).

36. 318 U.S. 332 (1943).

ments which before would have been admissible based on the voluntariness standard were now inadmissible if obtained during this period of illegal detention. In *Mallory v. United States*[37] the Court reaffirmed *McNabb* and held that failure to comply with the defendant's right to prompt arraignment would render any confession obtained during the period of illegal detention inadmissible.[38] The *McNabb-Mallory* rule was applied in a number of both Supreme Court and lower federal court cases.[39]

The Supreme Court did not incorporate the *McNabb-Mallory* rule on the state level, and state courts for the most part did not take it upon themselves to adopt the *McNabb-Mallory* rule.[40] In fact, several states expressly held that *McNabb-Mallory* was inapplicable at the state level[41] and only a few state courts expressly adopted this rule.[42]

Rather than incorporate the *McNabb-Mallory* rule on the state level, the Supreme Court began developing rules for admissibility of confessions in state cases by applying the fifth amendment right against self incrimination[43] and the sixth amendment right to counsel to the states.[44]

The cases which developed standards for complying with the defendant's fifth and sixth amendment rights began with *Escobedo v. Illinois*.[45] In *Escobedo* the Supreme Court held that the right to counsel attached when the defendant became the focus of an investigation and this right to counsel would be violated if the defendant

37. 354 U.S. 449 (1957).

38. *Id.* at 452-53. By the time *Mallory* was decided the statute requiring prompt arraignment had become FED. R. CRIM. P. 5(a).

39. *See* Upshaw v. United States, 335 U.S. 410 (1948); United States v. Bayer, 331 U.S. 532 (1947); Carignan v. United States, 185 F.2d 954 (9th Cir. 1950); Akowskey v. United States, 158 F.2d 649 (D.C. Cir. 1946); Runnels v. United States, 138 F.2d 346 (9th Cir. 1943); United States v. Hoffman, 137 F.2d 416 (2nd Cir. 1943); United States v. Haupt, 136 F.2d 661 (7th Cir. 1943).

40. 3 J. WIGMORE, EVIDENCE § 862a, at 623.

41. *See* Ingram v. State, 252 Ala. 497, 42 So.2d 36 (1949); State v. Browning, 206 Ark. 791, 178 S.W.2d 77 (1944); State v. Boudreau, 67 Nev. 36, 214 P.2d 135 (1950); State v. Bunk, 4 N.J. 461, 73 A.2d 249 (1950); State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947); State v. Folkes, 174 Or. 568, 150 P.2d 17 (1944); State v. Gardner, 119 Utah 579, 230 P.2d 559 (1951).

42. Vorhauer v. State, 59 Del. 35, 212 A.2d 886 (1965); People v. Hamilton, 359 Mich. 410, 102 N.W.2d 738 (1960). Connecticut adopted the rule by statute in CONN. GEN. STAT. ANN. § 54-1C (West 1962).

43. Malloy v. Hogan, 378 U.S. 1 (1964).

44. Gideon v. Wainwright, 372 U.S. 335 (1963).

45. 378 U.S. 478 (1964).

was taken into custody, interrogated, and denied counsel.[46] Once the right to counsel had been violated, statements were inadmissible regardless of whether voluntary under the traditional voluntariness test.[47]

Escobedo created several questions: Whether the defendant had to request counsel for the *Escobedo* rationale to come into play;[48] whether the defendant had to be advised of his right to counsel;[49] whether the defendant had to be advised of his right to remain silent;[50] and whether the defendant must be advised of the fact that anything he said might be used against him.[51]

The questions created by *Escobedo* and disputed by the courts were all answered in favor of the suspect in *Miranda v. Arizona*.[52] *Miranda* held that prior to custodial interrogation a suspect must be advised of his right to remain silent,[53] that anything he says will be used against him in court,[54] that he has the right to consult with a lawyer and have the lawyer with him during interrogation,[55] and that if he cannot afford an attorney one will be appointed for him.[56] *Miranda* established these warnings as a prerequisite to custodial interrogation in order to protect the defendant's fifth amendment right against self incrimination.[57] Prior to *Miranda* these warnings were a factor in determining the voluntariness and admissibility of a

46. *Id.* at 491.

47. *Id.*

48. For cases answering in the affirmative see United States v. Childress, 347 F.2d 448 (7th Cir. 1965); Sturgis v. State, 235 Md. 343, 201 A.2d 681 (1964); Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965); Browne v. State, 24 Wis. 2d 511b, 131 N.W.2d 169 (1964). For cases answering in the negative see Collins v. Beto, 348 F.2d 823 (5th Cir. 1965); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

49. For cases answering in the affirmative see People v. Dorado, 62 Cal. 2d 338, 398 F.2d 361, 42 Cal. Rptr. 169 (1965); State v. Neely, 239 Or. 494, 398 P.2d 482 (1965). For cases answering in the negative see People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964); People v. Gunner, 15 N.Y.2d 226, 205 N.E.2d 852, 257 N.Y.S.2d 924 (1965).

50. For cases answering in the affirmative see United States *ex rel* Kemp v. Pate, 359 F.2d 749 (7th Cir. 1966); People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965). For cases answering in the negative see People v. Hartgraves, 31 Ill. 2d 375, 202 N.E.2d 33 (1964); Bean v. State, 81 Nev. 25, 398 P.2d 251 (1965); Browne v. State, 24 Wis. 2d 511b, 131 N.W.2d 169 (1964).

51. For a case answering in the affirmative see United States *ex rel* Kemp v. Pate, 359 F.2d 749 (7th cir. 1966). For a case answering in the negative see Green v. State, 236 Md. 334, 203 A.2d 870 (1964).

52. 384 U.S. 436 (1966).

53. *Id.* at 467-68.

54. *Id.* at 469.

55. *Id.* at 471.

56. *Id.* at 473.

57. *Id.* at 476.

statement under the voluntariness standard.[58] *Miranda* held that any statement obtained by custodial interrogation without these warnings first being given was inadmissible regardless of whether voluntary.[59] After these warnings had been given, the defendant could then waive his rights and make a statement.[60]

Voluntariness, while no longer the test for the admissibility of the statement itself after *Escobedo* and *Miranda*, was now the test for determining the validity of the waiver.[61] The voluntariness of the waiver was determined by the totality of the circumstances.[62] Although not required, an express waiver was evidence going to the totality of the circumstances.[63]

Miranda further held that there was no distinction with regard to admissibility between full confessions, incriminating statements, or even those statements which could be argued to be exculpatory.[64] None of the defendant's statements could be used by the prosecution if obtained in violation of the requirement that the *Miranda* warnings be given prior to custodial interrogation and the fifth amendment rights validly waived.[65]

Under the *Miranda* decision, once the defendant invoked his right to silence all interrogation must cease.[66] Once the suspect invoked his right to have counsel present all interrogation must cease until counsel was present.[67] This requirement created the question of if and under what circumstances, interrogation could be resumed. The Court dealt with this question in *Michigan v. Mosley*.[68] In *Mosley* the Court held that the right to remain silent must be "scrupulously honored,"[69] and when the right had been so honored, a statement subsequently obtained would be admissible and would

58. *See, e.g.*, Haynes v. Washington, 373 U.S. 503, 511 (1963).

59. *Miranda*, 384 U.S. at 479.

60. *Id.*

61. *Id.* at 476.

62. *See* Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Johnson v. Zerbs, 304 U.S. 458 (1938); Richardson v. State, 632 S.W.2d 700 (Tex. 1982).

63. North Carolina v. Butler, 441 U.S. 369 (1979). A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 140.8 commentary c, 368 (1975) adopted the view that an express waiver should be required for a defendant to make a valid waiver of his fifth amendment rights.

64. *Miranda*, 384 U.S. at 475.

65. *Id.* at 476-77.

66. *Id.* at 473-74.

67. *Id.* at 474.

68. 423 U.S. 96 (1975).

69. *Id.* at 104.

not violate the right to remain silent.[70]

The Supreme Court further developed the rules for admissibility of confessions in *Edwards v. Arizona*.[71] In *Edwards* the Court held that once the right to counsel had been invoked, it could still be waived and the suspect could make a statement without counsel present. The waiver still had to be voluntary, knowing, and intelligent based on the totality of the circumstances, and the defendant must have reinitiated the dialogue leading to the waiver.[72] Under *Edwards* an attempted waiver would be invalid if the suspect was not the one who reinitiated the dialogue after the *Miranda* warnings had been given and the right to have counsel present was invoked. A subsequently obtained statement would be inadmissible even when the waiver of the right to have counsel present was otherwise voluntary, knowing, and intelligent if the dialogue was not reinitiated by the defendant after the right to have counsel present was invoked.[73] Once the defendant did reinitiate the dialogue after the right to have counsel present had been invoked, a subsequent waiver was judged by the totality of the circumstances just as a court would judge a waiver made prior to the right being invoked.[74]

Wyrick v. Fields[75] was another step in the Supreme Court's development and clarification of the rules pertaining to the admissibility of confessions. *Wyrick* held that once a defendant had reinitiated the dialogue as required by *Edwards*, had received his *Miranda* warnings, and had made a valid waiver of his right to have counsel present at a polygraph test, the same waiver would be valid for post-test interrogation as long as the waiver was still voluntary, knowing, and intelligent.[76] Under *Wyrick*, a new set of *Miranda* warnings are not required prior to the post-test interrogation when the warnings have been given prior to the test and the waiver is still voluntary, knowing, and intelligent.[77]

In holding that the defendant had made a valid waiver of his right to have counsel present during the post-test interrogation, the

70. *Id.* After the defendant in *Mosley* invoked his right to remain silent, the interrogation was ended. The defendant was later advised of his rights again by different officers with regard to a completely different crime and he confessed. The latter confession was held admissible. *Mosley*, 423 U.S. 96 (1975).

71. 451 U.S. 477 (1981).

72. *Id.* at 486 n.9.

73. *Id.*

74. *Id.*

75. 103 S. Ct. 394 (1982).

76. *Id.* at 396.

77. *Id.* at 396-97.

Court based its reasoning on several previous Court decisions.[78] The Court reasoned that the defendant had initiated the encounter including both the polygraph test and the post-test interrogation.[79] The Court further reasoned that the *Miranda* warnings had served their purpose as a procedural safeguard and another reading of them between the polygraph and the post-test interrogation was not required.[80] With the *Miranda* warnings having been sufficiently given, and the *Edwards* initiation requirement having been met, the defendant could then waive his fifth amendment rights.[81] The Supreme Court determined that the defendant had made a valid waiver of his right to have counsel present at both the polygraph test and the subsequent post-test interrogation.[82] The waiver was valid for the post-test interrogation as long as the questioning had not become coercive, or circumstances had not changed so that the defendant's answers were no longer voluntary and the waiver no longer knowing and intelligent.[83] According to the Court, the circumstances had not changed. Several decisions were cited which had held that the use of polygraph results did not make post-test questioning coercive.[84] Based on the totality of the circumstances, the defendant had made a valid waiver of his right to have counsel present.[85] His statements regarding sexual intercourse with the victim were thus admissible.[86]

Justice Marshall, the only dissenter,[87] argued that the defendant had initiated the encounter for the polygraph test only and not for the post-test questioning.[88] Marshall distinguished the initiation for a polygraph test from initiation of an ordinary conversation with police because of the limited purpose of the initiation for the polygraph test.[89] He pointed out that there would normally be no expectation of post-test interrogation since the answers from the post-test

78. *Id.*

79. *Id.* at 395.

80. *Id.* at 396.

81. *Id.*

82. *Id.*

83. *Id.*

84. *E.g.*, United States v. Little Bear, 583 F.2d 411, 414 (8th Cir. 1978); Keiper v. Cupp, 509 F.2d 238, 241-42 (9th Cir. 1975); People v. Barreto, 256 Cal. App. 2d 392, 64 Cal. Rptr. 211 (1967); State v. Henry, 352 So. 2d 643 (La. 1977).

85. *Wyrick*, 103 S. Ct. at 397.

86. *Id.*

87. *Id.* Justice Stevens filed a brief concurring opinion at page 397.

88. *Id.* at 398.

89. *Id.*

interrogation, unlike the polygraph results, would be admissible.[90] Since the defendant had initiated the encounter for the test only, and not for the subsequent interrogation, he could not have made a valid waiver of his right to counsel because the *Edwards* initiation requirement had not been met.[91]

Wyrick is a further development of the Court's previous decision regarding the admissibility of confessions. The Court's ruling is significant because it expands, or at least clarifies, the initiation requirement of *Edwards*. Under *Wyrick* the defendant's initiation for the polygraph test, the results of which are inadmissible, is also an initiation for post-test interrogation with the defendant's answers admissible. *Wyrick* also exemplifies the borderline circumstances under which a valid waiver of fifth amendment rights can be found.[92]

The true future significance of *Wyrick* will depend upon whether subsequent cases apply it narrowly within its own facts or view it as a broad decision. The courts might apply the reasoning of *Wyrick* to similar problems. For example, a defendant may agree to talk about one crime but subsequently be questioned about another crime. Further, a defendant may agree to a mental examination and be asked to answer questions about an offense other than the one related to the examination. A defendant may also submit to a polygraph test for one offense and be asked about others, or the facts may differ from *Wyrick* so that the questioning is coercive.

Wyrick recognized and protected the defendant's rights and also prevented an unnecessary burden from being imposed on police. The Court seems to have struck a fair balance between the important need to protect the rights of the accused and the need for police interrogation. Courts may need to use caution in applying *Wyrick* to future cases in order to insure that this same balance is maintained and that the interests of both sides are fairly protected.

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90. *Id.* at n.2.

91. *Id.* The dissent also argued that the sixth amendment right to counsel should have been considered by the majority as a possible constitutional violation, and that the majority's analysis should not have been limited to the fifth amendment. *Id.* at 398-400.

92. On remand the Eighth Circuit Court of Appeals held that the defendant had also made a valid waiver of his sixth amendment right to counsel. Fields v. Wyrick, 706 F.2d at 880.