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FIFTH AMENDMENT—CONFESSIONS AND THE RIGHT TO COUNSEL

Oregon v. Mathiason, 429 U.S. 492 (1977).
Brewer v. Williams, 97 S. Ct. 1232 (1977).

CUSTODIAL INTERROGATION—RIGHT TO COUNSEL

The United States Supreme Court, in *Miranda v. Arizona,*[1] set forth specific procedural guidelines to protect the constitutional rights of a criminal suspect during police interrogation.[2] Since the time of this sweeping decision, the Court has been faced with the task of further explicating and refining the broad reasoning which is present in the *Miranda* decision.

In its last term, the Supreme Court examined the *Miranda* issues of "custody" and "waiver" in two cases. In *Oregon v. Mathiason,*[3] the Supreme Court further defined the concept of custody and held that a parolee who came voluntarily to a state patrol office to be questioned about a recently committed burglary was not in custody, and therefore the absence of *Miranda* warnings prior to the defendant's incriminating admissions did not dictate exclusion of these statements at his trial. In *Brewer v. Williams,*[4] the Court was faced with the issue of the adequacy of a defendant's waiver of the right to counsel during custodial interrogation. The Court, in a move which surprised many, specifically declined to review the *Miranda* holding.[5] Instead, the Court, in a five to four decision,[6] held that the circumstances in *Brewer* were "constitutionally indistinguishable" from those presented in *Massiah v. United States*[7] and that the defendant was denied his right to counsel. In *Brewer* a defendant was transported from the place he had surrendered to the place where the crime he was accused of had occurred. The defendant had been arraigned and was represented by counsel. The defendant's attorneys were promised by the transporting detectives that they would not question the defendant; however, while in the car a detective managed to elicit statements from the defendant which proved to be very damaging. The Court held that the State had failed to show an adequate waiver of the defendant's right to counsel and that the defendant's sixth and fourteenth amendment rights had been violated by the use of these statements at the defendant's trial.

The area of the law of confessions has particularly split the Burger Court in recent years. However, the general trend appears to be toward limiting *Miranda* to its specific factual setting and reducing the "technical" nature of its requirements.[8] In *Miranda,* the Court rea-

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

[2] In *Miranda,* the Supreme Court held that certain procedural safeguards should be adhered to in order to protect the defendant's fifth amendment privilege against self-incrimination during the coercive setting of custodial interrogation. The defendant must be advised that he has a right to remain silent, that anything he says may be used against him, that he has a right to have an attorney present during questioning, and that if he cannot afford an attorney, one will be appointed for him. *Id.* at 444.

[3] 429 U.S. 492 (1977).

[4] 97 S. Ct. 1232 (1977).

[5] *Id.* at 1259. In doing so the Court avoided the plea of twenty-two states which had filed petitions as *amici curiae* urging the Court to use the case as a means to narrow the *Miranda* decision.

[6] Mr. Justice Stewart delivered the opinion of the Court. Mr. Justice Marshall, Mr. Justice Powell and Mr. Justice Stevens filed concurring opinions. Mr. Chief Justice Burger filed a dissenting opinion. Mr. Justice White filed a dissenting opinion. Mr. Justice Blackmun filed a dissenting opinion joined by Mr. Justice White and Mr. Justice Rehnquist.

[7] 377 U.S. 201 (1964). In *Massiah* an indicted defendant's conversation with a government informer was surreptitiously recorded. The Court held that proof of this conversation could not be used at the defendant's trial since the recording of this conversation violated the defendant's right to have his attorney present at this "conversation."

[8] *See generally* Beckwith v. United States, 425 U.S. 341 (1976) (*Miranda* warnings not required in criminal tax investigation); Michigan v. Mosley, 423 U.S. 96 (1975) (no *per se* rule prohibits all questioning after a suspect has indicated a desire to remain silent); Michigan v. Tucker, 417 U.S. 433 (1974) (police departure from *Miranda's* "prophylactic standards" did not mandate exclusion of defendant's confession); Harris v. New York, 401 U.S. 222 (1971) (use of confession obtained without required warnings allowed for impeachment purposes).

soned that the interrogation of a suspect in custody was inherently coercive.[9] In order to protect the defendant's fifth amendment privilege against self-incrimination, the Court held that a defendant must be clearly advised of his right to have counsel present at any police interrogation.[10] The Court further held that a state would have a "heavy burden" of proving that a defendant waived his right to counsel and to remain silent if interrogation takes place after the defendant has requested an attorney.[11]

The *Brewer* and *Mathiason* decisions dealt with the two major *Miranda* issues of "custody" and "waiver." These issues are frequently litigated by defense attorneys who wish to have their clients' incriminating statements and evidence derived from these statements suppressed.[12] The issue of custody is important in determining whether *Miranda* guidelines are applicable because the procedural safeguards enunciated in *Miranda* are specifically limited to "custodial interrogation."[13] The absence of the required *Miranda* warnings in a custodial situation would mandate the exclusion of any incriminating statement made by a suspect. However, in non-custodial interrogations *Miranda* warnings are not required to be given to a suspect. The issue of waiver arises subsequent to a determination that a suspect is in custody and is entitled to the procedural safeguards of *Miranda*. This issue focuses on the defendant's knowing abstention from using his right to remain silent or to have an attorney present at interrogation. If a statement is taken from a suspect a court must find that the suspect knowingly and voluntarily waived both of these rights before allowing the statement to be admitted into evidence against the defendant.

In *Oregon* v. *Mathiason*,[14] the Supreme Court was faced with the task of further defining the term "custodial interrogation." It is only during custodial interrogation that the procedural and substantive safeguards of *Miranda* apply.[15] In *Mathiason*, a burglary victim told a state police officer that she suspected the defendant, a parolee, had committed the crime. The officer went to the defendant's apartment during the process of investigating the burglary and when he was unable to find him left a card asking the defendant to call him. When the defendant called, the officer asked him where it would be convenient to meet. Since the defendant had no preference the officer arranged to meet him at the state patrol office.

When the defendant arrived at the office he was questioned about the burglary. The questioning officer falsely asserted that the defendant's fingerprints had been found at the scene of the crime and a few minutes later the defendant confessed to having committed the crime. The officer then advised the defendant of his *Miranda* rights and tape-recorded a confession. At the end of the recording the defendant was informed that he was not under arrest and was free to go.

At his subsequent bench trial for first-degree burglary the defendant moved to suppress his confession as a product of initial questioning by the police not preceded by the warnings required in *Miranda*. The trial court ruled that the defendant was not in custody at the time of

[9] An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion . . . cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

Miranda v. Arizona, 384 U.S. at 461.

[10] "The need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires." *Id.* at 470.

[11] If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. . . . If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. . . . [A] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.

Id. at 474-75.

[12] Suppression is sought through the use of the "fruit of the poison tree" doctrine which mandates the exclusion of derivative evidence gained from improper police action. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

[13] 384 U.S. at 444.

[14] 429 U.S. 492 (1977).

[15] See note 2 *supra*.

his statements and therefore declined to exclude his confession. The Court of Appeals of Oregon affirmed the defendant's conviction.[16] In a four to three decision, however, the Supreme Court of Oregon reversed the conviction holding that the defendant's interrogation took place in a "coercive environment."[17] The factors comprising this "coercive environment" were the following: "the parties were in the offices of the State Police; they were alone behind closed doors; the officer informed the defendant he was a suspect in a theft and the authorities had evidence incriminating him in the crime; and that the defendant was a parolee under supervision."[18] The Oregon Supreme Court found that these factors were not "overcome by evidence that the defendant came to the office in response to a request and was told he was not under arrest."[19] This evidence, while superficially indicating some voluntariness on the part of the defendant's actions, did not negate the coercive factors present within the interrogation setting.

In reversing the Oregon Supreme Court, the United States Supreme Court ruled that it had interpreted the term "custodial interrogation" too broadly. In a per curiam opinion,[20] the Court found that the defendant's freedom was not restricted in any way which could be termed "custodial." The Court referred to its definition of custodial interrogation in the *Miranda* decision where it was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[21] The Court relied heavily on the facts which showed that the defendant came to the state patrol office of his own accord, that the questioning of the defendant only took one half hour and that the defendant was allowed to leave the station after his confession. The Court reasoned that it was clear from these facts that the defendant was not in custody "or otherwise deprived of his freedom of action in any significant way."[22] The Court further noted that the fact that the investigating officer had lied when he told the defendant that his fingerprints had been found at the scene of the crime was irrelevant to the determination of the issue as to whether the defendant was in custody.[23]

Justice Marshall, in dissent, argued that the Court was placing too much emphasis on "formalities" and that an "objective standard" of custody, which would examine the defendant's objectively reasonable beliefs, should be used in determining whether the defendant was in custody for purposes of *Miranda*.[24] Essentially, Justice Marshall felt that an objectively reasonable belief that one is not free to leave during questioning constitutes a deprivation of one's "freedom of action in a significant way." Marshall felt that the circumstances surrounding the defendant's confession constituted a situation in which there were "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely,"[25] and that therefore the *Miranda* warnings were a necessary prerequisite to the admission of the defendant's confession at his trial.

Justice Stevens, in his dissenting opinion, attached particular significance to the fact that the defendant was on parole at the time of his interrogation at the police station. Stevens felt that since "a parolee is technically in legal custody until his sentence has been served"[26] the defendant was significantly "deprived of his freedom of action" when he arrived at the police station to be interrogated.

The decision in *Mathiason* is indicative of the general trend of the present Court to narrow the sweeping holdings of the *Miranda* decision. By narrowing the definition of what constitutes "custodial interrogation" the Court is also narrowing the circumstances in which the *Miranda*

[16] State v. Mathiason, 22 Or. App. 494, 539 P.2d 1122 (1975).

[17] State v. Mathiason, 275 Or. 1, 549 P.2d 673 (1976).

[18] *Id.* at ____, 549 P.2d at 675 (official reporter not yet published).

[19] *Id.*, 549 P.2d at 675.

[20] Mr. Justice Brennan would have granted the writ of certiorari but dissented from the summary disposition of the case and would grant oral argument. Mr. Justice Marshall and Mr. Justice Stevens filed dissenting opinions.

[21] 384 U.S. at 444.

[22] 429 U.S. at 494.

[23] *Id.*

[24] *Id.* at 496 (Marshall, J., dissenting).

[25] 384 U.S. at 467. Justice Marshall also hoped that the *Mathiason* decision "does not suggest that police officers can circumvent *Miranda* by deliberately postponing the official "arrest" and the giving of *Miranda* warnings until the necessary incriminating statements had been obtained." 429 U.S. at 499 n.5 (Marshall, J., dissenting).

[26] 429 U.S. at 500 (Stevens, J., dissenting).

guidelines will be in effect. Unlike the reasoning of the *Miranda* decision which emphasized the alien surroundings in which a suspect is usually questioned,[27] the Court in *Mathiason* instead chose to emphasize the importance of actual physical restraint in defining a custodial setting.

Generally, there have been two different tests of custody used by the courts since the *Miranda* decision. These tests are those of "focus" and "objectivity." The "focus" test of custody had its origins in *Escobedo v. Illinois*[28] where the Court stated that the right to counsel attaches "when the process shifts from investigatory to accusatory."[29] The "focus" test reasons that custody arises when the investigating officer has probable cause to make an arrest of the suspect and is generally regarded as a defense-oriented test.[30] The "objective test" of custody relies on a defendant's reasonable perceptions in determining whether he was in custody for purposes of *Miranda* safeguards.[31] Basically, the "objective" test of custody seeks to determine whether under the particular circumstances a reasonable man would believe himself to be in custody.

In *Mathiason,* the Supreme Court has continued to follow its own trend and the trend of lower federal courts toward a more formal definition of "custodial interrogation." This movement was clearly signalled by the Court in *Beckwith v. United States*.[32] In an opinion written by Chief Justice Burger, the Court held that the fact that a criminal tax investigation had focused on the defendant did not constitute custody for *Miranda* purposes. In rejecting the focus test of custody the Supreme Court specifically stressed that it was the custodial nature of interrogation which triggers the necessity of the *Miranda* safeguards. The Court expressly declared that focus could not be equated with custody for purposes of *Miranda*. Additionally, the Court has made it clear that *Miranda* does not apply to non-restraint situations in the recent cases of *United States v. Mandujano*[33] and *Garner v. United States*.[34] In *Mandujano* the Court held that the grand jury setting is non-custodial and that, therefore, *Miranda* warnings need not be given before testimony is taken. In *Garner* the Court held that preparation of one's own tax return is done in a non-custodial setting to which *Miranda* does not apply.

The custody test set forth by the Court in *Mathiason* is one of physical restraint. This standard generally supports lower federal court definitions of custody.[35] However, an area of difficulty that arises from the Court's over reliance on formal custody in *Mathiason* is the relationship of this "restraint" emphasis to the "objective" test of custody that is being used by a number of lower federal courts.[36] If the objective test of custody had been used in *Mathiason* the Court would have analyzed the reasonableness of the defendant's claim of perceived custody. While the "restraint" test of custody is easily applied by the lower courts,[37] it seems that the Court has oversimplified what was originally meant by custody in the *Miranda* decision. The *Mathiason* Court seemed to accent the formalistic concept of custody while deemphasizing some of the factors which tended to

[27] Miranda v. Arizona, 384 U.S. at 469.

[28] 378 U.S. 478 (1964).

[29] *Id.* at 492.

[30] For courts which have utilized the "focus" test of custody to determine whether or not the *Miranda* warnings were required, see United States v. Oliver, 505 F.2d 301 (7th Cir. 1974); United States v. Bey, 385 F. Supp. 227 (W.D. Pa. 1974). Additionally, some state courts have grounded their use of the "focus" test on their own state constitutions. *See* Oregon v. Hass, 420 U.S. 714 (1975).

[31] THE PROSECUTOR'S DESKBOOK 169 (P. Healy & J. Manak eds. 1971).

[32] 425 U.S. 341 (1976).

[33] 425 U.S. 564 (1976).

[34] 424 U.S. 648 (1976).

[35] When a suspect is allowed to go free after police interrogation most courts hold that the setting was non-custodial. *See* United States v. Manglona, 414 F.2d 642 (9th Cir. 1969); United States v. Scully, 415 F.2d 680 (2d Cir. 1969); Virgin Islands v. Berne, 412 F.2d 1055 (3d Cir. 1969); Nobles v. United States, 391 F.2d 602 (5th Cir. 1968); Evans v. United States, 377 F.2d 535 (5th Cir. 1967); United States v. Clark, 294 F. Supp. 1108 (W.D. Pa. 1968).

[36] The "objective" test of custody seeks to determine whether under the circumstances of a case, a reasonable man would believe himself to be in custody. *See generally* United States v. Planche, 525 F.2d 899 (5th Cir. 1976); Iverson v. North Dakota, 480 F.2d 414 (8th Cir.), *cert. denied*, 414 U.S. 1044 (1973); Fisher v. Scafati, 439 F.2d 307 (1st Cir.), *cert. denied*, 403 U.S. 939 (1971); Lowe v. United States, 407 F.2d 1391 (9th Cir. 1969). The "objective" test of custody has never been explicitly rejected nor accepted by the Supreme Court.

[37] Lower courts need only examine whether or not the defendant was under formal arrest or some equivalent form of physical detention.

show that the defendant did not voluntarily walk into the police station to be questioned.[38] *Mathiason* clearly rejects the "focus" test of custody[39] and makes it clear that the concept of custodial interrogation will depend largely on formal indicia of physical restraint.

In *Brewer* v. *Williams*,[40] a defendant suspected of abducting a ten-year-old girl in Des Moines, Iowa, agreed to surrender, on advice of his Des Moines attorney, to police in Davenport, Iowa. The defendant was arrested, arraigned and jailed in Davenport while awaiting transportation back to Des Moines. Both his Des Moines attorney and his attorney at the Davenport arraignment advised the defendant not to make any statements until he was returned to Des Moines and permitted to confer with his Des Moines attorney. An agreement not to question the defendant on the trip back to Des Moines was secured by the defendant's attorneys from the detectives who were to drive the defendant back to Des Moines when the defendant's Davenport attorney was denied permission to ride in the police car with the defendant and the detectives.

At no time during the trip back to Des Moines did the defendant express a willingness to be interrogated without having his attorney present. Instead, he stated several times that he would tell the authorities "the whole story" *after* he conferred in Des Moines with his attorney. The detective riding in the back seat of the squad car with the defendant was aware that he was a former mental patient and deeply religious. This detective engaged the defendant in a "wide-ranging conversation covering a variety of topics, including the subject of religion."[41] Eventually this detective delivered what has been termed the "Christian burial speech"[42] in which he told the defendant that he felt that they should stop and locate the victim's body because her parents deserved a Christian burial for the girl. When the defendant asked the detective why he thought the missing girl's body was on the route back to Des Moines, the detective falsely asserted that he knew the girl's body was in the area that they would pass on their way to Des Moines.[43] The detective then told the defendant that he didn't want him to answer or discuss it any further. He simply told the defendant to "think about it as we're

[38] The primary fact that the Court did not fully evaluate was the defendant's legal status as a parolee. It would seem that this particular fact would tend to minimize the "voluntariness" of the defendant's trip to the police station. As Justice Stevens duly noted in his dissenting opinion, the defendant was still technically a prisoner of the state.

Additionally, the holding by the Court that the fact that the investigator lied to the defendant about having his fingerprints at the scene of the crime is irrelevant to the determination of custody, seems to conflict with the general formula for the determination of custody now used by most courts. *See* Smith, *The Threshold Question In Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C.L. REV. 699 (1974).

Smith notes that the following factors are to be analyzed to determine if an interrogation was custodial:

(1) the nature of the interrogator;
(2) the nature of the suspect;
(3) the time and place of the interrogation;
(4) the nature of the interrogation; and
(5) the progress of the investigation at the time of the interrogation.

All of these five factors should be examined equally. *Id.* at 702–35.

[39] It should be remembered, however, that a defense attorney could still argue for the application of the "focus" test of custody on state constitutional grounds. See note 30 *supra;* Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421 (1974).

[40] 97 S. Ct. 1232 (1977).

[41] *Id.* at 1236.

[42] The detective's speech was referred to as the "Christian burial speech" in the briefs and oral arguments of the opposing parties. Addressing Williams (the defendant) as "Reverend," the Detective said:

> I want to give you something to think about while we're traveling down the road. . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the 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. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

Id.

[43] *Id.* at 1236 n.1.

riding down the road."[44] Shortly thereafter the defendant led the police to the girl's body.[45]

At trial, the defendant's motion to suppress the use of the victim's body as evidence and all the testimony of his actions during the car trip was denied because the court found that he had adequately waived his rights to remain silent and to have counsel present during his confession. On appeal the defendant's conviction was upheld by a five to four majority of the Iowa Supreme Court.[46] The majority reasoned that the detective's suggestions to the defendant did not constitute interrogation and that the defendant had volunteered his statements.

The defendant obtained a writ of habeas corpus from the United States District Court for the Southern District of Iowa which found that the defendant's fifth and sixth amendment rights had been violated.[47] The district court specifically concluded:

> When the police have agreed with the defendant's attorney that the defendant will not be questioned in the attorney's absence, when another attorney has asked to be with the defendant at a particular time and place, and when the defendant has repeatedly asserted his desire not to talk in the absence of counsel, the police plainly should not be permitted to interrogate the defendant at all until further notice is given to counsel.[48]

The United States Court of Appeals for the Eighth Circuit affirmed the district court's granting of the writ of habeas corpus in a two to one decision.[49] The court stated that there were "no facts to support the conclusion of the state court that appellee [defendant] had waived his constitutional rights other than that appellee had made incriminating statements. Although oral or written expression of waiver is not required, waiver of one's rights may not be presumed from a silent record."[50]

In affirming the decision of the Eighth Circuit, the Supreme Court specifically stated that it did not have to decide the *Miranda* or voluntariness issues which were raised in the case.[51] Instead the Court based its decision on *Massiah v. United States*.[52] In *Massiah*, the Court held inadmissible the defendant's incriminating statements after indictment in absence of counsel. The Court stated that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[53] In *Brewer* the defendant had been arrested on a warrant issued by a Des Moines magistrate, had been arraigned before a Davenport magistrate and had been committed to jail. The Court had little trouble finding that adversary proceedings had begun and that the defendant had a right to the assistance of counsel.[54] Once it was clear that the defendant had a right to counsel, the issue presented by *Brewer*, as formulated by Justice Stewart, was whether the defendant was deprived of his constitutional right to counsel. Since the defendant made his incriminating statements outside the presence of counsel, the narrow issue became whether or not the defendant adequately waived his right to have counsel present when he gave his statements. In dealing with the waiver issue the Court applied the standard set forth in *Johnson v. Zerbst*[55] which called for the State to prove "an intentional relinquishment or abandonment of a known right or privilege."[56] The Court held that the facts in *Brewer* "failed to provide a reasonable basis for finding that Williams [the defendant] waived his right to assistance of counsel."[57] The Court specifically noted that

[44] *Id.* at 1236.

[45] This occurred after the defendant first unsuccessfully attempted to show the detectives where he had left the victim's shoes and the blanket in which he had carried the victim.

[46] State v. Williams, 182 N.W.2d 396, 399 (Ia.1971).

[47] Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974). The district court concluded that the detective's "Christian burial speech" did indeed constitute interrogation and violated the police officers' agreement with the defendant's attorney in which it was promised that the defendant would not be interrogated on the trip back to Des Moines.

[48] *Id.* at 178–79.

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

[50] *Id.* at 233.

[51] Writing for the majority, Mr. Justice Stewart stated: "Specifically, there is no need to review in this case the doctrine of *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination. It is equally unnecessary to evaluate the ruling of the District Court that Williams' self-incriminating statements were, indeed, involuntarily made." Brewer v. Williams, 97 S. Ct. at 1239.

[52] 377 U.S. 201 (1964).

[53] 97 S. Ct. at 1240.

[54] *Id.* at 1239.

[55] 304 U.S. 458 (1938).

[56] *Id.* at 464.

[57] 97 S. Ct. at 1243.

"waiver requires not merely comprehension but relinquishment, and Williams' consistent reliance upon the advise of counsel in dealing with the authorities refutes any suggestion that he waived that right."[58]

The Court also noted that the detective's "Christian burial speech" constituted interrogation of the defendant in direct violation of the officer's agreement with the defendant's attorneys.[59] This ruling by the Court was vital to its holding that the defendant had been denied his right to counsel. If the Court had found that the defendant had confessed without any prompting it could not be stated that the defendant was denied counsel at the critical stage of post-arrest interrogation. Without this ruling, the Court could have held that a knowing and intelligent waiver of the right to counsel was not required since there was no police interrogation. A major factor in determining that the detective's "Christian burial speech" constituted interrogation was the detective's specific intent in making this speech. The record from the trial court's suppression hearing clearly showed that the detective's only motive in making his speech to the defendant was to elicit information concerning the whereabouts of the missing girl.[60] The intent of the officer led the Court to note that he had "deliberately and designedly set out to elicit information from Williams [the defendant] just as surely as—and perhaps more effectively than—if he had formally interrogated him."[61]

Having held that the officer's speech constituted interrogation and that the circumstances of the case did not evidence an adequate waiver of the defendant's right to counsel, the Court ruled that the defendant had been deprived of his fourteenth and sixth amendment rights to the assistance of counsel.[62] The right to counsel was termed by Justice Stewart as "indispensable to the fair administration of our adversary system of criminal justice."[63] The Court acknowledged the fact that the defendant was convicted of a "senseless and brutal" crime; however, the majority felt that such a clear violation of the defendant's right to counsel could not be condoned.[64]

Chief Justice Burger, in his dissenting opinion, termed the result in *Brewer* "intolerable in any society which purports to call itself an organized society."[65] The Chief Justice argued that the evidence which was being excluded by the majority's decision was reliable and was voluntarily given. Since he reasoned that the "fundamental purpose of the Sixth Amendment is to safeguard the fairness of the trial and the integrity of the factfinding process,"[66] he concluded that the defendant's essential sixth amendment right had not been violated by the introduction of evidence relating to statements made without benefit of counsel which were introduced at his trial. The Chief Justice described the exclusionary rule as a rule which "mechanically and blindly keeps reliable evidence from juries whether the constitutional violation involves gross police misconduct or honest human error."[67] While characterizing the police behavior in *Brewer* as nonegregious, the Chief Justice concluded by arguing that the exclusionary rule should be applied only where the benefits clearly outweigh the costs.[68]

The future of the exclusionary rule in cases dealing with the fifth and sixth amendments seems uncertain, especially where the alleged improper evidence can be labeled as reliable. It is evident that the four dissenting justices in *Brewer* were relying on Burger's cost-benefit computation in arguing against the use of the

[58] *Id.* at 1242.

[59] Although there was some dispute over the existence of an agreement not to question the defendant, the Supreme Court adopted the trial court's findings of facts regarding the defendant's original motion to suppress which stated "that there was an agreement between defense counsel and police officials to the effect that defendant was not to be questioned on the trip to Des Moines." State v. Williams, 182 N.W.2d 396, 402 (1971). See note 42 *supra*.

[60] 97 S. Ct. at 1240. Justice Stewart also noted that counsel for the state had, during oral arguments before the Court, stipulated that the detective's "Christian burial speech" was a form of interrogation. *Id.* at 1240 n.6.

[61] *Id.* at 1239.

[62] *Id.* at 1243.

[63] *Id.* at 1239.

[64] *Id.* at 1243. Justice Marshall, *Id.* at 1244 (Marshall, J., concurring), and Justice Stevens, *Id.* at 1247 (Stevens, J., concurring), in separate concurring opinions, both mentioned the difficult "emotional aspects" of the case. However, both Justices felt that this was little reason to condone an intentional police violation of the defendant's constitutional rights.

[65] *Id.* at 1248 (Burger, C. J., dissenting).

[66] *Id.* at 1253.

[67] *Id.* at 1248.

[68] *Id.* at 1250.

exclusionary rule.[69] In assessing the future of the exclusionary rule in the area of the law of confessions, it should be noted that Justice Powell, in his concurring opinion, indicated that he is personally reluctant to apply the exclusionary rule on a per se basis.[70] His concurrence tended to embrace the Chief Justice's cost-benefit analysis; however, he felt that there were substantial benefits to be gained by applying the exclusionary rule to *Brewer*. These benefits were largely based on improvements to be made in the relationship between investigating police and a suspect's attorney. But, if a situation arises in the future which either presents a great cost or little benefit to the criminal justice system in applying the exclusionary rule, the Court may decline to use it. This may be especially said of collateral federal appeals after a defendant has had a fair hearing in state court.[71]

The decision in *Brewer* turns on one's interpretation of the underlying factual setting in which the defendant made his incriminating statements. The fact that the case was reviewed by three different courts of appellate jurisdiction and resulted in bare majorities at every level supports this assertion.[72] A major factor in the factual setting of *Brewer* which made it difficult for the state to carry its burden of showing an adequate waiver was the violation of the agreement not to interrogate the defendant by the police officers. Most federal jurisdictions do not require express words of waiver.[73] However, the waiver standard enunciated in *Johnson v. Zerbst*[74] gives a court great discretion by stating that "the determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case."[75] By using this stringent standard of waiver of the right to counsel the Court was able to examine closely the behavior of police officials in *Brewer*.[76] It should be noted that the attorneys for the defendant in *Brewer* fully cooperated with police officials and expected reciprocal conduct. Instead, police officials violated a verbal agreement not to question the counselor's client after creating a situation in which the defendant's attorney was not allowed to remain near his client. Although not explicitly mentioned in the majority decision, it is clear that the majority felt that the transporting detectives had violated common ethical standards by interrogating the defend-

[69] The four dissenting justices all felt that the costs in applying the exclusionary rule to *Brewer* were too great. They feared the defendant would go free since it was thought that a retrial of the defendant would be impossible because eight years had passed since the crime was committed. However, the dissenting justices' fears proved unfounded. The defendant was recently convicted at a new trial. People v. Williams, Criminal Docket No. 55805 Iowa Jul. 15, 1977). The defendant was subsequently sentenced to a mandatory term of life imprisonment.

It should also be noted that the state was able to introduce the vital evidence of the victim's body at this new trial by using the theory of "inevitable discovery" to avoid possible suppression. This theory was essentially based on the argument that the victim's body would have been discovered, without regard to the defendant's statements, on purely independent grounds. The use of this theory of "inevitable discovery" at the defendant's retrial was first suggested by Justice Stewart in a footnote which is at the end of the majority opinion. 97 S. Ct. at 1243 n.12.

[70] 97 S. Ct. at 1247 n.2 (Powell, J., concurring). In discussing the exclusionary rule, Justice Powell noted that "[a]ll too often applying the rule in a [per se] fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens." *Id.*

[71] *See* Stone v. Powell, 96 S. Ct. 3037 (1976), where the Court held that a federal court need not apply the exclusionary rule on habeas corpus review of a fourth amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim. Chief Justice Burger unsuccessfully argued for the application of this reasoning to the sixth amendment claim in *Brewer*. 97 S. Ct. at 1254 (Burger, C. J., dissenting).

[72] The case resulted in a five to four decision in the Iowa Supreme Court, a two to one decision in the court of appeals and a five to four decision in the United States Supreme Court.

[73] *See* Hughes v. Swenson, 452 F.2d 866, 868 (8th Cir. 1971); United States v. Montos, 421 F.2d 215, 224 (5th Cir.), *cert. denied*, 397 U.S. 1022 (1970); United States v. Ganter, 436 F.2d 364, 369-70 (7th Cir. 1970); United States v. Hilliker, 436 F.2d 101, 102-03 (9th Cir. 1970), *cert. denied*, 401 U.S. 958 (1971); Bond v. United States, 397 F.2d 162, 165 (10th Cir. 1968), *cert. denied*, 393 U.S. 1035 (1969).

[74] 304 U.S. 458 (1938).

[75] *Id.* at 464.

[76] Compare this analysis of police conduct with the deemphasis by the Court of police conduct in the area of entrapment. *See* Note, *Entrapment*, 67 J. CRIM. L. & C. 422, 429 (1976).

[77] By analogy, note that the ABA. Code of Professional Responsibility forbids communications between a lawyer or his agent and a party whom the lawyer knows is represented by counsel. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1975). For cases dealing with possible exclusions of incriminating statements based on professional ethi-

ant.[77] At the very least the majority has indicated that it favors an environment of mutual cooperation between the police and a suspect's attorney during a police investigation.

By comparison, *Mathiason* did not focus to any great extent on police conduct. The police deception did not affect the Court's conclusion as to the nature of custody. Thus the *Mathiason* and *Brewer* decisions appear inconsistent in their focus on police conduct; however, it must be remembered that the police conduct in *Brewer* represented a serious departure from acceptable ethical standards.

Conclusion

Both the *Brewer* and *Mathiason* decisions are indicative of the growing trend of the Burger Court to limit the application of *Miranda*.[78] In keeping with this trend the Court has chosen to follow the general movement that is present in the lower federal courts and in the state courts to limit the holdings of *Miranda*.[79] However, in its continued erosion of the *Miranda* procedural safeguards, the Court has had a tendency to create more ambiguities within the law of confessions. Thus, instead of helping to resolve existing questions in this area the Court has sidestepped many important issues and has left them unanswered.

In the final analysis it seems that the Court in *Brewer* was chiefly concerned with maintaining the unfettered role of counsel in police investigations. Although many law enforcement authorities believe that allowing a suspect's attorney to play an important role in police investigations hinders the fact-finding process, it seems evident from the Court's decision in *Brewer* that a defendant's right to counsel once adversary proceedings have commenced is absolute. At this stage in the criminal process any alleged waiver by the defendant of his right to counsel must be clearly established by the State, which has the burden of showing an adequate waiver of a constitutional right.

Yet the *Brewer* Court failed to address the application of *Miranda*, the voluntariness of the defendant's confession and the problem in applying the "exclusionary rule" to fifth and sixth amendment issues. Consequently, these issues will need to be answered in the future. The most important unresolved issue in *Brewer* is the future of the exclusionary rule in the law of confessions. The Court has already indicated its desire to limit the scope of the exclusionary rule in the fourth amendment area of searches and seizures.[80] At the present time it seems that the Court is also moving toward a more restrictive role for the exclusionary rule in fifth and sixth amendment cases[81] where the defendant's statements proposed for admission into evidence can be labeled as "reliable" and where it can be said that the defendant was "fairly" treated. In moving toward such nebulous standards it would seem that the Burger Court wants to create a greater degree of discretionary power in the trial courts.

Oregon v. Mathiason limits the application of *Miranda* guidelines to police interrogations which are characterized by some sort of physical or formal restraint. In narrowing the definition of custody, the Court limited the kinds of situations to which *Miranda* would be applicable. However, the reasoning involved in the per curiam *Mathiason* decision failed to promulgate specific guideines for lower courts to determine the essential qualities of custodial interrogation and thus left considerable latitude for subsequent court rulings.

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cal violations see United States v. Four Star, 428 F.2d 1406 (9th Cir.), *cert. denied*, 400 U.S. 947 (1970); United States v. Fellabaum, 408 F.2d 220 (7th Cir. 1969); Coughlan v. United States, 391 F.2d 371 (9th Cir. 1968).

[78] Gangi, *Supreme Court, Confessions, and the Counter-Revolution in Criminal Justice*, 58 JUD. 68, 73 (1974); George, *Future Trends in the Administration of Criminal Justice*, 69 MIL. L. REV. 1, 11–16 (1975); Steele, *Developments in the Law of Interrogations and Confessions*, 1 NAT'L J. CRIM. DEF. 111 (1975); Note, 17 ARIZ. L. REV. 188, 190 (1975); Comment, *Michigan v. Mosley (96 S. Ct. 321) A Further Erosion of Miranda?*, 13 SAN DIEGO L. REV. 861 (1976); Case Comment, *Criminal Procedure—Admissibility of Confessions—Dancing on the Grave of Miranda?*, 10 SUFFOLK U.L. REV.1141, 1164–78 (1976).

[79] *See generally* Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1975); United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975); United States v. Marchildon, 519 F.2d 337 (8th Cir. 1975); United States v. Moreno-Lopez, 466 F.2d 1205 (9th Cir. 1972); Steele, *Developments in the Law of Confessions*, 1 NAT'L J. CRIM. DEF. 111 (1975); Arrington v. Maxwell, 409 F.2d 849 (6th Cir.), *cert. denied*, 396 U.S. 944 (1969).

[80] See note 71 *supra;* Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969).

[81] See notes 70–71 *supra* and accompanying text.