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SUPREME COURT REVIEW

FIFTH AMENDMENT—THE MEANING OF INTERROGATION UNDER *MIRANDA*

Rhode Island v. Innis, 100 S. Ct. 1682 (1980).

The Supreme Court recently established a new test for determining whether law enforcement officers have interrogated a suspect in custody after he has asserted his *Miranda*[1] rights.[2] In *Rhode Island v. Innis*,[3] the Court held that statements which police officers knew or should have known were likely to elicit an incriminating response from the suspect constitute interrogation. Applying the test to the facts of the case, the majority found that police did not interrogate Innis and therefore had not violated his *Miranda* rights.[4]

The Court's new test focuses on the perceptions of the suspect rather than on the motivations of police.[5] The new formulation has the potential for effectively protecting an individual's right to remain silent by requiring police officers to avoid topics which may evoke incriminating responses.[6] However, if courts, in applying the test, establish a low standard of care for police making statements in the presence of a suspect, the test has the potential for opening new avenues for police to design subtle methods of coercing statements from suspects.[7] Thus, the real impact of the *Innis* decision can be ascertained only as courts apply the test in various factual settings.[8] The Court's conclusion that Innis was not interrogated indicates that the Court will hold police to a relatively low standard of care, which will have the effect of narrowing the scope of *Miranda* protections.[9]

THE *INNIS* DECISION

On January 16, 1975, police discovered the body of a Providence, Rhode Island, cab driver who had been missing for several days after being dispatched to pick up a customer. The victim apparently had been killed by a shotgun blast fired at close range to the back of his head. Early the next morning another cab driver reported that he had been robbed by a man with a sawed-off shotgun. Several hours later, at 4:30 a.m., the police found the defendant wandering on the street unarmed.

The arresting officer read the defendant his *Miranda* rights,[10] but did not otherwise converse with him. When other officers arrived on the scene, they told the defendant of his *Miranda* rights two more times, after which he asked to consult with an attorney. The police then placed the defendant in the squad car with three of the officers to be transferred to the police station. The police captain at the scene instructed the officers not to question the defendant during the trip, and the officers complied with his request. However, during conversation with his fellow officers, one officer observed that there was a school nearby for handicapped children which would be in session in the morning. Another officer responded that a helpless, handicapped little girl on the way to school might find the gun and accidentally kill herself. On hearing this, the defendant told the officers to return to the scene of the arrest so that he could lead them to the gun. After they returned to the scene, the officers informed the defendant of his *Miranda* rights a fourth time. The defendant then directed the officers to the shotgun.

At an evidentiary hearing before trial, the defendant sought to prevent the state from admitting the gun and his statements concerning its location. Since he had requested an attorney, the defendant argued that under *Miranda* the statements and the shotgun were inadmissible because police obtained them through interrogation in the absence of counsel. The trial court ruled that the defendant had

[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] Rhode Island v. Innis, 100 S. Ct. 1682 (1980).
[3] *Id.*
[4] *Id.* at 1689-90.
[5] *See* note 29 & accompanying text *infra*.
[6] *See* notes 80-85, 108 & accompanying text *infra*.
[7] *See* notes 110-11 & accompanying text *infra*.
[8] *See* note 112 & accompanying text *infra*.
[9] *See* note 111 & accompanying text *infra*.

[10] In *Miranda* the Court held that "[t]he person must be warned that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." 384 U.S. at 444.

knowingly and intelligently waived his *Miranda* rights and denied the defendant's motion to suppress the evidence.[11] At trial, a jury convicted the defendant of murder, kidnapping, and robbery.[12]

On appeal, the Rhode Island Supreme Court reversed the conviction.[13] Relying on *Brewer v. Williams*,[14] the court held that the defendant's statements were the product of a subtle form of interrogation.[15] Because the defendant had requested an attorney after having been given his *Miranda* rights, the court held that the state must meet a heavy burden in trying to demonstrate that the defendant had voluntarily and knowingly relinquished his rights before the interrogation began.[16] The court held that the state had failed to prove that the defendant had waived his rights, and therefore reversed the trial court's decision.[17]

The United States Supreme Court, in an opinion written by Justice Stewart, reversed the decision of the Rhode Island Supreme Court.[18] Initially, the Court stated that there was no question that the defendant was in protective custody, that he had been adequately apprised of his rights, and that he had asked to see a lawyer.[19] Therefore, the Court noted that the applicability of *Miranda* protections depended upon whether the conversation between the officers constituted "interrogation."[20]

In determining whether the officers interrogated Innis, the Court formulated a new test.[21] Although *Miranda* applies only to questioning when literally read,[22] the Court recognized that its safeguards apply to more than direct questioning.[23] Interrogation also includes police techniques, such as the "Mutt and Jeff"[24] routine, which were designed to elicit responses indirectly.[25] However, the Court warned that interrogation requires more than simply placing a defendant in custody.[26] Interrogation is either express questioning or its functional equivalent.[27] More specifically, the Court held an interrogation occurs when police officers knew or should have known that their words or actions would be likely to elicit an incriminating response from the defendant.[28] The Court emphasized that this test of interrogation focused on the perceptions of the suspect rather than on the intentions of the police.[29]

Applying this test to the case, the Court found that the Providence police had not interrogated Innis.[30] The Court held that the officers received no indication that would have led them reasonably to foresee that their casual conversation would strike a responsive chord.[31] The defendant's actions did not demonstrate that he was disoriented or that he was extraordinarily sensitive to comments about handicapped children.[32] In the Court's opinion, the policemen's dialogue was not very lengthy or particularly evocative.[33] Therefore, the statements were not the functional equivalent of questioning, because the police could not reasonably have known that they would cause the defendant to incriminate himself.[34] The Court held that under the facts of this case, the police had not interrogated the defendant.[35]

Because the Court held that there was no inter-

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[11] Rhode Island v. Innis, 100 S. Ct. at 1687.

[12] *Id.*

[13] State v. Innis, 391 A.2d 1158 (R.I. 1978).

[14] 430 U.S. 397 (1977).

[15] 391 A.2d at 1162-63.

[16] 391 A.2d at 1163.

[17] 391 A.2d at 1163-64.

[18] Rhode Island v. Innis, 100 S. Ct. 1682.

[19] *Id.* at 1682. *Miranda* rights do not attach until a suspect is placed in protective custody. Miranda v. Arizona, 384 U.S. at 478-79. If a suspect asks to see an attorney after receiving *Miranda* warnings, the police must refrain from interrogation until an attorney is present. *Id.* at 473-74.

[20] Rhode Island v. Innis, 100 S. Ct. at 1688.

[21] *Id.* at 1689-90.

[22] *Id.* at 1688. The *Miranda* court stated that warnings must be given prior to any questioning and that if the suspect indicates that he wants to consult with an attorney, he must be allowed to do so before questioning continues. 384 U.S. at 444-45.

[23] Rhode Island v. Innis, 100 S. Ct. at 1688-89.

[24] Also referred to as the friendly/unfriendly routine, this tactic involves one investigator who pretends to befriend the suspect and tries to shield him from the onslaught of the other investigator who pretends to be mean and threatening. The friendly investigator tries to get the suspect to confess. Other techniques cited by the Court include those in which the police attempt to convince the suspect that they have sufficient evidence to prove the defendant's guilt, and all that is needed is supplementary information. For example, police may set up a line-up and bring in a coached witness to identify the defendant. *Id.*

[25] *Id.*

[26] *Id.* at 1689.

[27] *Id.*

[28] *Id.* The Court stated, "the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.*

[29] Rhode Island v. Innis, 100 S. Ct. at 1689-90. The Court stated, "The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police." *Id.*

[30] *Id.* at 1690.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 1691.

[34] *Id.*

[35] *Id.* at 1690.

rogation, and consequently that the evidence was not obtained in violation of *Miranda*, it did not decide whether the defendant had waived his rights.[36] Also, the Court expressly limited its holding to fifth amendment grounds.[37] Two Justices filed concurring opinions. Justice White briefly stated that he preferred to reverse on the ground that the defendant had waived his rights, but he joined the opinion of the Court.[38] Chief Justice Burger also concurred, although he expressed concern that the tension left by the majority's decision with the Court's recent decision in *Brewer* would lead to uncertainty on the part of police officers.[39] Additionally, Burger feared that the new test would require officers to determine quickly the susceptibility and suggestability of a defendant in circumstances which would give even a trained psychiatrist difficulty.[40]

Justice Marshall, with whom Justice Brennan joined, dissented.[41] Although these dissenters agreed with the Court's definition of interrogation, they felt that the Court had incorrectly applied it to the facts of this case.[42] They found it hard to imagine a stronger appeal to the suspect's conscience than stating that unless they found the gun by morning, a helpless, handicapped little girl on the way to school might find the gun and accidentally kill herself.[43] The police officers made these statements in close quarters, knowing they would be overheard. Under these circumstances, Marshall and Brennan concluded that the policemen's conversation amounted to interrogation.[44]

Justice Stevens, also dissenting, disapproved of the Court's definition of interrogation and with its application to the facts.[45] Stevens preferred to define interrogation broadly to include any statement that would normally be understood by the average listener to call for a response and any statements which police intended to elicit a response.[46] Stevens felt that a test focusing on police motivations would more effectively protect defendants' *Miranda* rights.[47] Stevens disagreed with the majority's formulation because he believed that most suspects will not incriminate themselves even under direct questioning.[48] Thus, for courts applying the test in a case involving an ordinary defendant, a question mark at the end of the sentence makes a crucial difference.[49] Stevens predicted that the Court's test will encourage police officers to engage in subtle forms of coercion, and thereby erode *Miranda* protections.[50]

Moreover, even assuming that the Court's test was adequate, Justice Stevens felt that the Court was acting as a fact finder by not remanding the case to the Rhode Island courts to apply the new test.[51] Based on the facts emphasized by the majority, Stevens believed the Court was incorrect in holding that the officers should not have known, as a matter of law, that a statement would not have elicited an incriminating response from the defendant who was picked up at 4:30 a.m., unarmed, and who offered no resistance.[52] Appeals to the conscience are a recognized method for eliciting responses from a defendant.[53] Therefore, Justice Stevens would have remanded the case, even if he had agreed with the majority's definition of interrogation.[54]

The Background of the *Innis* Decision

The *Innis* decision is one of a long line of cases interpreting *Miranda v. Arizona*.[55] The Supreme Court's decision in *Miranda* marked the beginning of a new era in criminal procedure. Recognizing the inherent coerciveness of custodial surroundings, the Court held that no individual could realistically be assured his fifth amendment right against self-incrimination unless police officers explained to him that he has the right to remain silent, that he has the right to retained or appointed counsel, and that anything he says can be used as evidence against him.[56] Moreover, the Court held that if a defendant indicates that he wishes to remain silent or that he wants to talk to counsel, the police must

[36] *Id.* at 1690–91.
[37] *Id.* at 1689 n.4.
[38] *Id.* at 1691 (White, J., concurring).
[39] *Id.* (Burger, C.J., concurring). Chief Justice Burger expressed surprisingly strong support for the *Miranda* decision. He stated, "The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date." *Id.*
[40] *Id.*
[41] *Id.* at 1692 (Marshall, J., dissenting).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 1693 (Stevens, J., dissenting).
[46] *Id.* at 1695.
[47] *Id.* at 1695–96.
[48] *Id.*
[49] *Id.* at 1696.
[50] *Id.*
[51] *Id.* at 1696–97.
[52] *Id.*
[53] *Id.* at 1697.
[54] *Id.* at 1698.
[55] 384 U.S. 436.
[56] *Id.* at 444–45.

discontinue the interrogation.[57] A suspect can waive these rights, but the state carries a heavy burden of proving that the waiver was knowingly and intelligently made.[58] These rights attach whenever the defendant is in custodial surroundings.[59]

In recent years, the Court has interpreted *Miranda* narrowly although its major premises still retain their vitality.[60] For example, the Court has constricted the applicability of *Miranda* by allowing the prosecution to introduce evidence obtained in violation of *Miranda* for impeachment purposes.[61] The Court has also held that where a reasonable period of time elapses, police are not precluded from reinitiating interrogation as long as they carefully respect the defendant's rights.[62] Additionally, the Court has limited the scope of *Miranda* protections to interrogation which occurs in coercive, custodial environments.[63] *Rhode Island v. Innis* is the first case in which the Court has defined interrogation for the purpose of determining whether a suspect's statements have been obtained in violation of *Miranda*.[64]

In the absence of guidance from the Supreme Court, lower courts have defined the scope of *Miranda* in the context of interrogation.[65] For example, *Miranda* rights cannot be violated where the suspect volunteers statements without prompting by police.[66] One court has held that *Miranda* proscribes interrogation only on those topics in which the suspect has indicated that he wishes to remain silent.[67] Police are free to interview the suspect on other topics.[68]

Lower courts have also addressed the issue of whether particular types of declarative statements made by police constitute interrogation.[69] For example, one court held that an officer interrogated

[57] *Id.*

[58] *Id.* at 475.

[59] *Id.* at 444.

[60] Comment, *Miranda v. Arizona & The Emerging Pattern*, 12 U. RICH. L. REV. 409, 428 (1978).

[61] Harris v. New York, 401 U.S. 222 (1971). *Harris* was the first of a series of cases allowing the use of statements obtained in violation of *Miranda* on cross-examination. The Court held that these statements should be judged under traditional voluntariness standards. Otherwise, the Court held, a defendant would have free license to commit perjury. *Id.* at 225–26.

The dissent in *Harris* argued that the exception for impeachment testimony would effectively take away a defendant's choice to take the stand. *Id.* at 231 (Brennan, J., dissenting).

The second case in the *Harris* line was Michigan v. Tucker, 417 U.S. 433 (1974), where the defendant raped and severely beat a 43-year-old woman. Police elicited incriminating statements after warning the defendant of all of his rights except the right to appointed counsel. The Court admitted the statements for impeachment purposes and noted *Miranda* was only a prophylactic rule which was not synonymous with the fifth amendment.

The third case, Oregon v. Hass, 420 U.S. 714 (1975), was somewhat analogous to *Innis*. In *Hass* the defendant asked for an attorney after receiving warnings, but then proceeded to make incriminating statements before they got back to the police station to call the attorney. The statements were received under the impeachment exception.

[62] Michigan v. Moseley, 423 U.S. 96 (1975). In that case one officer gave the defendant his *Miranda* warnings and immediately cut off questioning when defendant indicated that he wished to remain silent. Defendant was then locked up for a period of time before a second officer came in and read defendant his rights again. This time defendant waived his rights and made incriminating statements which were admitted by the Court.

[63] Oregon v. Matthiason, 429 U.S. 492 (1977). In this case the defendant went to the police station voluntarily in response to a written request by a detective. The Court held that *Miranda* protections were limited to custodial, coercive environs similar to those of *Miranda* itself.

In a similar case, Beckwith v. United States, 425 U.S. 341 (1976), the Court held that a friendly, relaxed conversation with Internal Revenue Service agents in the defendant's own home was not a custodial interrogation under *Miranda*.

[64] Rhode Island v. Innis, 100 S. Ct. at 1687.

[65] United States v. Vasquez, 476 F.2d 730 (5th Cir. 1973), *cert. denied*, 414 U.S. 836 (1973); Combs v. Wingo, 465 F.2d 96 (6th Cir. 1972); United States v. Lewis, 425 F. Supp. 1166 (D. Conn. 1977).

[66] United States v. Duffy, 479 F.2d 1038 (2d Cir. 1973). The *Miranda* Court stated:

> There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

384 U.S. at 478.

[67] United States v. Vasquez, 476 F.2d 730. The defendant appealed his conviction for possession of an unregistered firearm, contending that his statements were improperly admitted into evidence under *Miranda*. The defendant had indicated prior to interrogation that he did not want to discuss the shooting. The statements were about the rifle itself.

The court denied the defendant's contention that the continued interrogation violated *Miranda*, stating:

> When a person in custody has responded to proper police interrogation by voicing a general willingness to talk subject only to a limited desire for silence and his wishes not to discuss a particular subject area are respected, nothing rooted in law or constitutional policy makes it improper to question him as to any unlimited subjects.

Id. at 732–33.

[68] *Id.*

[69] United States v. Rieves, 584 F.2d 740 (5th Cir. 1978); United States v. Duffy, 479 F.2d 1038; Combs v.

a suspect when he read him a ballistics report which inculpated the defendant.[70] The court held that the officer's statements were intended to elicit an incriminating response in the same manner as a direct question.[71] Another court, which held that an officer's statements were interrogation, proposed a standard for interrogation which included police conduct which was "expected to, or likely to, evoke admissions."[72] The court recognized that interrogation arose in such a wide variety of circumstances that more specific definition could only be made on a case-by-case basis.[73] The *Innis* test is almost identical to this standard.

Although the Supreme Court had not defined interrogation with regard to *Miranda* prior to *Innis*, the Court did discuss interrogation in the context of the sixth amendment in *Brewer v. Williams*.[74] The facts of *Brewer* resemble those of *Innis*. Police arrested the defendant in Davenport, Iowa. After Williams was arraigned before a Davenport judge, two detectives drove him to Des Moines for trial. The defendant retained counsel in both Davenport and Des Moines, but police refused to allow them to accompany him during the trip. Police did assure the lawyers that they would not interrogate the defendant. The transporting officers knew that the defendant had recently escaped from a mental institution and was deeply religious. The officers also knew that they would be passing the area in which they suspected that Williams had hidden the victim's body. During the trip, they delivered what the reviewing courts termed a "Christian burial speech." The detective told the defendant that it was about to begin snowing, that they would soon be passing the area where the body was located, and that if they waited until they got to Des Moines the innocent child would not receive a Christian burial. The detective told the defendant not to respond immediately to his statement but simply to think about it. As they approached the area the defendant confessed and directed the police to the body.

Williams was convicted of murder.[75] On appeal, he argued that the police had continued to interrogate him after he had asserted his *Miranda* rights in violation of the fifth amendment and that they interrogated him in the absence of his counsel in violation of the sixth amendment. The Supreme Court agreed with the latter argument.[76] Finding that Williams had not waived his sixth amendment right to counsel, the Court reversed the conviction. The Court found it unnecessary to address the fifth amendment *Miranda* issue.[77]

In reaching the conclusion that the comments of the detectives were interrogation, the Court failed to posit any definition of interrogation. The Court emphasized the fact that the detectives had designed a scheme through which they deliberately and intentionally prompted the defendant to make incriminating statements.[78] Although it did not specifically state the factors constituting a test of interrogation, the Court examined the police behavior by focusing on the intent to evoke incriminating responses.[79]

Wingo, 465 F.2d 96; United States v. Lewis, 425 F. Supp. 1166.

[70] Combs v. Wingo, 465 F.2d 96. The officer read the report immediately after the suspect had asked to see an attorney. The court held that the subsequent statements of the suspect were inadmissible under *Miranda*.

[71] *Id.* The court stated:

> The purpose of a question is to get an answer. Anything else that has the same purpose falls in the same category and is susceptible of the same abuses Miranda seeks to prevent. The only possible object of showing the ballistics report to the appellant in this case was to break him down and elicit a confession from him.

Id. at 99 (quoting Combs v. Commonwealth, 438 S.W.2d 82, 86 (Ky. 1969)).

This test implicitly emphasizes the intent of police rather than the impact of the statements of the defendant. Although the *Innis* test assumes a slightly different emphasis, the results in this case probably would have been the same under either test.

[72] United States v. Lewis, 425 F. Supp. at 1176 (quoting Santos v. Bailey, 400 F. Supp. 784, 795 (M.D. Pa. 1975)). While the suspect was in jail after being arrested for bank robbery, a police officer who knew the suspect initiated a conversation without advising the suspect of his *Miranda* rights. The court held that this constituted interrogation and that the statements of the suspect were inadmissible.

[73] 425 F. Supp. at 1176.

[74] 430 U.S. 387 (1977).

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

[76] 430 U.S. 387.

[77] *Id.* at 397-98.

[78] *Id.* at 399-400.

[79] *Id.* The Court stated:

> There can be no serious doubt ... that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him.... [H]e purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible....
>
> The state courts clearly proceeded upon the hypothesis that Detective Leaming's 'Christian burial speech' had been tantamount to interrogation. Both courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements. Yet no such constitutional protection would have come into play if there had been no interrogation.

Id. at 399-400 (footnote omitted).

Formulation of the New Test for Interrogation

In *Innis*, the Court formulated a clear test for interrogation under the fifth amendment which was much more direct than its sixth amendment test in *Brewer*. The Court stated:

> *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.[80]

Thus, for the first time, the Court has defined how it will determine whether police have interrogated a suspect for purposes of *Miranda*.[81] All but Chief Justice Burger and Justice Stevens approved of the majority's formulation of the test.[82] The Court noted that its test "focuses primarily on the perceptions of the suspect, rather than the intent of the police."[83] Consequently, if a police officer negligently makes a remark which a reasonable person would expect to elicit a response, *Miranda* protections would be triggered even though the officer had no intention of obtaining an admission. Conversely, *Miranda* may not protect a defendant where police make statements pursuant to a deliberate design to evoke a response, so long as police could not have reasonably expected to be successful.

Under the *Innis* test, the defendant need not prove that an officer intended to elicit a response.[84] In some instances, police motivation is difficult or impossible to determine. The new test is not concerned with police motivation except insofar as it helps to characterize the reasonable expectations of the police.[85] From a policeman's point of view the test is objective. The nature of his statement, rather than his state of mind, is the crux of the test.[86] The test has the potential of contributing some certainty to the scope of *Miranda* as well as being more realistic about usual police motivations. An officer has at least some guidance in ascertaining the permissible scope of conversation with a suspect. Rather than requiring the officer to examine his own motivations, the test causes him to focus on the nature of his actions and statements. An officer using reasonable care to avoid making evocative statements can avoid *Miranda's* proscriptions.

Justice Stevens formulated an alternative standard for interrogation.[87] Under Stevens' test, "the definition of interrogation must include any police statement or conduct that has the same purpose or effect as a direct question. Statements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation."[88] This definition is identical to the Court's test, except it encompasses all statements which were designed to elicit a response, even those which the police could not reasonably expect to elicit a response. Of course, police officers do not ordinarily design statements to elicit a response which they feel cannot succeed in obtaining that objective, so the practical difference in the tests may be minimal.

Justice Stevens' test is similar to the vaguely defined *Brewer* test for interrogation under the sixth amendment.[89] The Court in *Brewer* was clearly influenced by the deliberate process through which police obtained Williams' confession.[90] Potentially, therefore, interrogation may assume different meanings, depending on whether a claim arises under the fifth or sixth amendment.[91] Without explaining what this difference may be, the *Innis* Court held that interrogation under the sixth amendment was not necessarily the same as interrogation under *Miranda*.[92] One commentator has observed that sixth amendment protections do not depend on whether the defendant is in custody or whether his statements are compelled.[93] The sixth amendment requires that police deal through, rather than around, a defendant's attorney.[94] Conversely, fifth amendment rights apply regardless of whether the government has initiated formal judicial proceedings.[95] The fifth amendment right to counsel is designed to assure that a defendant has

[80] Rhode Island v. Innis, 100 S. Ct. at 1689.
[81] *Id.* at 1688.
[82] Justices Brennan and Marshall agreed with the majority opinion's test but disagreed with the Court's application of the test to the facts of the case. *See* note 105 & accompanying text *infra*.
[83] Rhode Island v. Innis, 100 S. Ct. at 1690.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 1693 (Stevens, J., dissenting).
[88] *Id.* at 1695.
[89] *See* note 79 & accompanying text *supra*.
[90] *Id. See* Rhode Island v. Innis, 100 S. Ct. at 1690 n.7 (Stevens, J., dissenting).
[91] *See* Kamisar, *Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does it Matter?*, 67 Geo. L. J. 1 (1978).
[92] Rhode Island v. Innis, 100 S. Ct. at 1689 n.4.
[93] *See* Kamisar, *supra* note 91, at 63.
[94] *Id.* at 41.
[95] *See* Miranda v. Arizona, 384 U.S. 436.

the right to have counsel present during interrogation to prevent him from involuntarily or unintelligently waiving his right to remain silent.[96]

In view of these different rationales, a suspect may be able to demonstrate that he has been interrogated under one amendment but not the other. For example, if police talk with a defendant in noncustodial surroundings, after he has been indicted, in an attempt to elicit statements from him in the absence of his counsel, the defendant's sixth amendment rights have been violated, but his fifth amendment rights do not apply. In other situations, police may talk with a suspect in custodial surroundings before any judicial proceedings have been initiated. Only the suspect's fifth amendment right would apply.

Brewer probably would have been decided the same way under the fifth amendment using the *Innis* test. The detectives obviously knew that the speech was likely to elicit incriminating statements from Williams.[97] However, the results may be different in those situations where police statements do not constitute interrogation under the *Innis* test but are made with sufficient deliberateness to constitute interrogation under the sixth amendment. Of course, any difference would be irrelevant after the sixth amendment right to counsel attaches where both rights apply, because police conduct would have to satisfy both tests.[98] As a consequence, both police and courts may focus increased attention on the point at which sixth amendment rights become applicable if the Court's concept of interrogation becomes different under the fifth and sixth amendments in future cases. If sixth amendment rights attach when formal judicial proceedings commence, police may even delay the initiation of proceedings to avoid application of the *Brewer* test.[99]

Application of the New Test

The real difficulty with the *Innis* decision is not in the Court's formulation of its new test as much as its application of the test to the facts of the case. The majority felt that given the circumstances, the officers could not reasonably have known that the defendant would confess upon learning that a young child might injure herself with the hidden gun.[100] Yet, under the Court's test, even if the officer made the statements without any thought toward obtaining a response from the defendant, the statements may still constitute interrogation if the officer should have known that his comments were likely to elicit a response.[101] As Justice Marshall argued in dissent, the officers knew that the defendant had offered no resistance and was unarmed. It was 4:30 a.m. Clearly the statements were a strong appeal to the moral sensibilities of the defendant.[102] In the absence of any mitigating factors, the officers should have known that the statements were likely to elicit a response. However, a proper application of the test requires a difficult factual determination. Every nuance of the evidence must be weighed for an informed decision. An appellate court cannot effectively accomplish this type of fact finding by reviewing a cold trial transcript. As Justice Stevens argued, the Court should have remanded the case to the Rhode Island courts.[103]

The members of the Court primarily disagreed over this application of the test to the facts of the case. The reservations of Justices Burger and Stevens resulted from a fear of potential misapplication of the test.[104] The majority and Justice Marshall agreed on the formulation of the test, but it led them to different factual conclusions.[105] Chief Justice Burger felt that the test will require a policeman to make an on-the-spot psychiatric evaluation of a suspect before he even opens his mouth.[106] Finally, Justice Stevens feared that the test will stimulate a new wave of subtle techniques for coercing defendants, since the intentions of police are not dispositive under the new test.[107]

These concerns of Chief Justice Burger and Justice Stevens appear to be grounded in a belief that the lower courts will be unable to properly apply the new test. However, if the test is properly applied police officers will not have to become psychiatrists. Courts will only require that they exercise reasonable perceptiveness when conversing with a suspect in custody. If an officer wants to be conservative, he can remain silent or talk about sports or the

[96] *Id.* at 469–70.

[97] Brewer v. Williams, 430 U.S. 397.

[98] White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581, 590 (1978). Professor White noted that *Brewer v. Williams* leaves unanswered the question of when the sixth amendment right to counsel attaches. *Brewer* only establishes that it attaches at least at the beginning of formal adversary proceedings.

[99] *Id.*

[100] Rhode Island v. Innis, 100 S. Ct. at 1690–91.

[101] *Id.* at 1690.

[102] *Id.* at 1692 (Marshall, J., dissenting).

[103] *Id.* at 1697 (Stevens, J., dissenting).

[104] *Id.* at 1691, 1693–96 (Burger, C.J., concurring and Stevens, J., dissenting).

[105] *Id.* at 1692 (Marshall, J., dissenting).

[106] *Id.* at 1691 (Burger, C.J., concurring).

[107] *Id.* at 1695–96 (Stevens, J., dissenting).

weather, rather than matters related to the crime. Ideally, the test will cause officers to make a conscious effort to avoid any topic which may elicit an incriminating response. Conversely, the new versions of the third degree feared by Justice Stevens, if they are at all effective, will be likely to elicit incriminating responses. The fact that the defendant actually made an incriminating response will always be some evidence that the statements were likely to elicit a response. There is no reason why a difference in punctuation at the end of a sentence is relevant under the Court's new test. The Court expressly stated that interrogation includes all statements which are the functional equivalent of direct questioning.[108]

The opinions of Chief Justice Burger and Justice Stevens do demonstrate that the test is susceptible to widely varying applications. It is based on behaviorial assumptions about how a normal defendant will react to certain kinds of statements. Chief Justice Burger's fears assume the average defendant is hypersensitive while Justice Marshall fears that he is rugged enough for relatively rough treatment. The effectiveness of the test in balancing the competing policies of *Miranda* will depend upon the assumptions made in the trial court. However, the new test is not unlike many other tests which place a heavy burden on the trial court.

One difficulty under the new test is that where the defendant is especially susceptible, he may have difficulty demonstrating that the police knew or should have known about his susceptibility. For example, a defendant who is intoxicated at the time of his arrest may have difficulty demonstrating that the officers should have been able to ascertain his drunkenness. The defendant may not know his outward appearance.[109]

Another potential difficulty with the application of the test may occur when police initiate a series of conversations with a defendant with an ultimate view toward eliciting a confession. Each individual statement may appear relatively neutral but the cumulative effect may be extremely evocative. For example, a police officer may converse with a suspect in a friendly manner in order to establish a relationship which will be conducive to eventual cooperation. Potentially, none of the statements would be likely to elicit a response individually.

Nonetheless, the new test has the potential to preserve the original balance between permissible and impermissible police conduct struck by *Miranda*. Theoretically, if courts apply it consistently, it will provide police officers with a clearly ascertainable standard of conduct. The test may require officers not only to refrain from attempting to elicit responses, but also to make an affirmative effort to avoid topics which may inadvertently elicit a response.

The test is susceptible to a wide variety of applications. Police actions and statements which may constitute interrogation arise in many situations. Under these circumstances it is unlikely that the test will reach its potential. Rather, different courts will apply the test differently, and the resulting uncertainty will leave the scope of *Miranda* protections unclear.[110] The real impact of the test will not be evident until the courts apply it. The application of the test, in turn, will depend on the behavioral assumptions of the courts about the susceptibility of most defendants to various statements. The *Innis* decision provides fertile ground for behavioral research. However, the first indication that courts will fail to apply the test properly is the Court's decision in *Innis*.[111] The Court set the standards for police conduct so low that police have an incentive to make suggestive comments which run contrary to the principles of *Miranda*.

Conclusion

The Court's decision in *Innis* established a new test for determining whether police statements or conduct amount to interrogation under *Miranda*. Interrogation occurs when the police knew or should have known that their actions were likely to elicit incriminating statements from the defendant.[112] The test focuses on objective factors rather than police motivation.[113] However, the real meaning of the test will not be known until the lower courts begin applying the test to varying factual situations.[114] The behavioral assumptions which the lower courts make will be crucial in determining the impact of the test.

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[108] *Id.*

[109] For example, in Klamert v. Cupp, 437 F.2d 1153 (9th Cir. 1970), the suspect made incriminating statements after being arrested which the court found were volunteered. The suspect's blood contained .21 percent alcohol after two hours in custody. The court said that the suspect was coherent during this time. If only the suspect and police are present during questioning, the suspect has a distinct disadvantage in demonstrating the circumstances surrounding the arrest and detention.

[110] Rhode Island v. Innis, 100 S. Ct. at 1692 (Burger, C.J., concurring).

[111] *See* note 101 & accompanying text *supra*.

[112] *See* note 28 & accompanying text *supra*.

[113] *See* note 29 & accompanying text *supra*.

[114] *See* notes 100–12 & accompanying text *supra*.