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Criminal Procedure -- Lowering the Standard for Defendant's Understanding of his Miranda Rights

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Criminal Procedure—Lowering the Standared for Defendant's Understanding of his Miranda Rights

In *Miranda v. Arizona*,[1] the United States Supreme Court set forth stringent rules regarding the extent to which a defendant must be informed of his constitutional rights and the procedure for waiver of those rights. The Court placed a "heavy burden" of proof on the government to demonstrate that the defendant knowingly and intelligently waived his rights in the absence of counsel,[2] citing the *Johnson v. Zerbst*[3] test as the standard to be applied. However, *Miranda* failed to set forth exactly how this "heavy burden" could be met by the prosecution, how the burden differed from the previous "totality of circumstances" test[4] for voluntariness of confessions (if at all), and what the police responsibilities were regarding waiver, especially when the defendant indicated that he misunderstood his rights.[5] *United States v. Frazier*[6] is one of a series of cases that aids in resolving these questions.

Frazier is not a drastic departure from past cases but is a clear example of the relaxation of the *Miranda* proof of waiver standard—from a rather demanding and uncertain standard requiring the government to prove that the defendant actually understood his rights to an objective standard requiring proof that the defendant "could have understood" them.

Background of the Case

Frazier, a twenty-eight year old black arrested in connection with a robbery, was twice read his constitutional rights. He then orally waived them after being asked if he understood each one, promptly signed a standard waiver form,[7] and just as questioning began, confessed to a series of robberies in an apparent attempt to clear a friend. As the

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

[2]*Id.* at 475.

[3]304 U.S. 458 (1938). This case required that waiver of a constitutional right be voluntary, knowing, and intelligent, viewing the totality of the circumstances.

[4]*Id.* at 464.

[5]The problem was foreseen by early commentators who realized the lower courts would probably be in no better position to set a standard for sufficiency of the government's proof under the "heavy burden" mandate than before under *Zerbst*. *See* Miranda v. Arizona, 384 U.S. 436, 536, (1966) (White, J., dissenting); Pye, *Interrogation of Criminal Defendants—Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 199 (1966).

[6]476 F.2d 891 (D.C. Cir. 1973).

[7]*Id.* at 893 n.3. There was no evidence of any physical coercion, pressure, or disruptive atmosphere.

questioning officer began to take notes, Frazier stopped him saying, "Don't write anything."[8] The officer did not seek to determine whether Frazier knew his oral statements were admissible against him. The subsequent conviction, based substantially upon the oral confession, was appealed on the ground that the defendant had not knowingly and intelligently waived his rights.[9] The three judge panel remanded the case for the government to present more evidence on that issue, noting that the defendant's "ban on note-taking inveighs against intelligent waiver,"[10] but that the government could rebut "the strong implication" by evidence that the police had in some way reacted to this alerting circumstance[12] and made sure the defendant *actually*[13] understood the warnings. On remand the defendant failed to testify to the reason for his prohibition on note-taking. The government's only significant showings were the results of a mental examination of Frazier that found him of average intelligence, and a doctor's opinion that Frazier "could understand and appreciate and comprehend" the meaning of the warnings.[14] The lower court found the prosecution had met its burden and that the waiver was valid based on the uncontroverted facts of the record. However, the trial judge gave no express consideration to the effect of Frazier's failure to allow note-taking, despite the emphasis given that point in the prior court of appeals remand opinion.

On appeal,[15] a panel of the court of appeals reversed the trial court,[16] making it clear that when an accused exhibits signs of misunder-

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[8] *Id.* at 893.

[9] Frazier v. United States, 419 F.2d 1161 (D.C. Cir. 1969).

[10] *Id* at 1169.

[11] *Id.* at 1168.

[12] "Alerting circumstance" is a term commonly used by the courts to define any activity, speech, or condition of the accused that could indicate his inability to make a valid waiver, due either to the inconsistencies of accused's actions or his physical and mental attributes. *See* United States v. Taylor, 374 F.2d 753, 756 (7th Cir. 1967).

[13] The court was of the opinion that *Miranda* required an "awareness" of the consequences of waiver in order to make an understanding exercise of the privilege. 419 F.2d at 1168 n.31. The court thus required the government at least to rebut, if not to foreclose, the possibility that the defendant misunderstood. Note that the conjecture here as to why the defendant banned note-taking went in favor of the defendant. *Id.* at 1168.

[14] United States v. Frazier, 476 F.2d 891, 895, 897 (D.C. Cir. 1973). Note that this evidence went only to the *intelligent* waiver issue but not necessarily to the *knowing* waiver issue to be discussed later.

[15] *Id.* at 902 (the three judge panel decision is reported in the appendix to the en banc opinion).

[16] *Id.* at 906. The court of appeals originally remanded the case as an opportunity for the government to introduce evidence that the police did respond to defendant's remarks on note-taking and that they thereafter explained more fully to defendant his rights, fulfilling their duty

standing his rights, it is the duty of the police to ensure that the accused can make an informed decision.[17] On rehearing *en banc*, the trial court's findings were reinstated. The full court reasoned that the government had met the burden imposed by *Miranda* by proof (1) that the warnings were given properly and (2) that the person warned was capable of understanding them.[18] The court asserted that the burden then shifts to the defendant to prove that the "alerting circumstance," here the ban on note-taking, arose from misunderstanding of his rights,[19] not from some unrelated cause. Conjecture about the reason for the ban is now allowed in his favor—he must offer proof.[20] But the defendant here did not testify—he failed to offer the most persuasive proof at his disposal. If he had, the decision may well have been different. The court expressed the belief that the police should not be held responsible for analysing the actions of the defendant or for placing legal interpretations on the *Miranda* warnings.[21]

The court, faced with a "normal" defendant[22] and an "alerting circumstance," applied an objective test, requiring the prosecution to prove only that the defendant could have understood the warnings. It then shifted the burden to the defendant to prove that he actually did misunderstand. This test appears to be a far cry from the "heavy burden

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under *Miranda*. The burden was on the government to rebut the presumption of misunderstanding, but the government addressed no new evidence to that issue. The government showed only that Frazier "could have understood."

[17]*Id. See also* Miranda v. Arizona, 384 U.S. 436, 475-76 (1966); Johnson v. Zerbst, 304 U.S. 458, 464 (1938); United States v. Miller, 453 F.2d 634 (4th Cir. 1972); United States v. Washington, 341 F.2d 277 (3d Cir. 1965); *In re* Lawrence, 29 N.Y.2d 206, 325 N.Y.S.2d 921, 275 N.E.2d 577 (1971); N. SOBEL, THE NEW CONFESSIONS STANDARD—MIRANDA V. ARIZONA 69 (1966); 19 AM. JUR., PROOF OF FACTS § 5 at 12, § 8 at 18, § 11 at 21 (1967); Rothblatt & Pitler, *Police Interrogation: Warnings and Waivers—Where Do We Go From Here?*, 42 NOTRE DAME LAWYER 479, 490 (1967). The *Frazier* court added that speculation as to why the defendant banned note-taking "cannot meet the Government's burden . . . of rebutting with affirmative and convincing evidence the inference that appellant did not validly waive his privilege." 476 F.2d at 905-06.

[18]476 F.2d at 897-98.

[19]The court admitted that even where capacity exists, misunderstanding can still occur. *Id.* at 897.

[20]This sharply contrasts with the original decision forbidding conjecture in the government's favor. Frazier v. United States, 419 F.2d 1161, 1169 (D.C. Cir. 1969).

[21]"When the police have, as here, faithfully followed the exact procedure prescribed by the Supreme Court, inferior courts should be slow to mandate, after the fact, enlarging responsibilities alien to the duties and the training of policemen." 476 F.2d at 899. The court seemed especially ready to limit police responsibility where there were no signs of police coercion *Miranda* was intended to discourage.

[22]The defendant was of average intelligence, sufficient age, not under the influence of drugs or alcohol, not emotionally upset, not interrogated or held at length, and not physically coerced.

of proof" originally promulgated in *Miranda* and alarmingly close to permitting the ritualistic reading of the rights deplored in that decision.[23]

FIFTH AMENDMENT WAIVER UNDER MIRANDA

Miranda speaks of the fifth amendment privilege against self-incrimination in very strong terms, requiring "real understanding and intelligent exercise of the privilege."[24] It directs not only that a statement of the rights be given, but also that they be understood.[25] The government was given this additional responsibility of insuring understanding essentially for two reasons: to mitigate the inherently coercive atmosphere of custodial interrogation, in which the accused's adversaries are in complete control; and to require the government to respect the dignity of the individual and thereby maintain the delicate state-individual balance—the main purpose of the privilege against self-incrimination.[26]

The courts reach the question of the defendant's understanding of his rights most often when considering the waiver issue, since other alleged violations of the *Miranda* rules focus more on police conduct than on defendant reaction. *Johnson v. Zerbst*,[27] cited in *Miranda*,[28] required proof of a voluntary, knowing,[29] and intelligent[30] waiver of a constitutional right viewing the totality of the circumstances[31] and encouraged "every reasonable presumption against waiver. . . ."[32] In pre-*Miranda* applications of *Zerbst* to determine voluntariness of con-

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[23]384 U.S. at 476.

[24]*Id.* at 469. The court went on to say "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege . . . a valid waiver will not be presumed simply from silence of the accused. . . ." *Id.* at 475. Also, any evidence of trickery or cajolery to obtain waiver will show the defendant did not voluntarily waive his rights.

[25]*See generally* N. SOBEL, *supra* note 17, at 69; 19 AM. JUR., PROOF OF FACTS § 5 at 12, § 8 at 18, § 11 at 21 (1967); Rothblatt & Pitler, *supra* note 17, at 490.

[26]384 U.S. at 460; Murphy v. Waterfront Comm'n, 378 U.S. 52, 55-57 (1964); 8 J. WIGMORE, EVIDENCE § 2251 (J. McNaughton rev. 1961).

[27]304 U.S. 458 (1938).

[28]384 U.S. at 475.

[29]304 U.S. at 465. Knowing waiver requires the defendant to waive his rights with complete knowledge, awareness, and cognition of what he is doing. *See generally* 19 AM. JUR., PROOF OF FACTS § 29 at 52 (1967).

[30]304 U.S. at 465. Intelligent waiver requires the defendant to possess sufficient intellectual ability to comprehend the meaning and significance of the warnings and the capacity to make a competent decision. *See generally* AM. JUR., PROOF OF FACTS § 31 at 55 (1967).

[31]304 U.S. at 463-65.

[32]*Id.* at 464.

fessions, courts considered the same types of circumstances that post-*Miranda* courts consider in determining knowing waiver.[33] Many cases examine whether the accused had the capacity to understand and waive his rights because of his age, intelligence, background, physical state, length of detention, or physical treatment.[34]

Faced with considering the "totality of the circumstances" and evaluating it to determine if the "heavy burden" imposed by *Miranda* had been met, most courts were reluctant to set a standard that the Supreme Court had left undefined. Some courts merely stated that the burden had been met and set no standard at all;[35] others said that they simply believed police witnesses,[36] and defendants continually lost "swearing contests"[37] because of the greater credence given police testimony.[38] Judges, attorneys, and police officials alike were aware of the uncertainties involved in *Miranda's* failure to define the standard of proof required.[39] Judges balked at requiring the state to prove beyond a reasonable doubt that the accused actually understood the warnings, since the state often had little evidence besides the defendant's attributes and police testimony. Attorneys balked at depending upon decisional

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[33]*See* N. SOBEL, *supra* note 17, at 12; Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39, 54 (1966).

[34]*See* Leighton v. Cox, 365 F.2d 122 (10th Cir. 1966); Annot., 22 L. Ed. 2d 872, 878-79 (1970); Note, *Legal Limitations on Miranda*, 45 DENVER L.J. 427, 454 (1968).

[35]*See, e.g.*, Cook v. United States, 392 F.2d 219 (5th Cir. 1968). *See also* United States v. Folette, 393 F.2d 879 (2d Cir. 1968); Hodge v. United States, 392 F.2d 552 (5th Cir. 1968); Griffin v. State, 116 Ga. App. 429, 157 S.E.2d 894 (1967); State v. McDaniel, 272 N.C. 556, 158 S.E.2d 874 (1968); Note, *Aftermath of Miranda—The Courts Grapple With Burden Of Proof*, 71 W. VA. L. REV. 180, 181 (1969); *cf.* Miller v. United States, 396 F.2d 492 (8th Cir. 1968).

[36]*See, e.g.*, Parish v. State, 117 Ga. App. 616, 618, 161 S.E.2d 426, 428 (1968).

[37]*See, e.g.*, Lathers v. United States 396 F.2d 524, 533 (5th Cir. 1968); United States v. Anderson, 394 F.2d 743, 746 (2d Cir. 1968); Green v. State, 223 Ga. 611, 613, 157 S.E.2d 257, 259 (1967); State v. Clyburn, 273 N.C. 284, 290, 159 S.E.2d 868, 872 (1968). *See also* Warden, *supra* note 33, at 35.

[38]*See* Elsen & Rosett, *Protections for the Suspect Under Miranda v. Arizona*, 67 COLUM. L. REV. 645, 658-59 (1967). At the other extreme were several commentators and cases interpreting Miranda as requiring a presumption in favor of the accused. *See* B. GEORGE, Jr., CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 291 (1973); Rogge, *Proof by Confession*, 12 VILL. L. REV. 1 (1966); Comment, *Custodial Interrogation as a Tool of Law Enforcement; Miranda v. Arizona and the Texas Code of Criminal Procedure*, 21 SW. L.J. 253, 262 (1967).

[39]*See* Note, *Constitutional Law—Self Incrimination—Right To Counsel To Protect The Fifth Amendment Privilege*, 16 AM. U.L. REV. 141 (1966); Note, *Criminal Law—Confessions —The Restraints Society Must Observe Consistent with the Federal Constitution in Interrogating Suspects*, 18 S.C.L. REV. 853 (1966); Note, *Intoxicated Confessions: A New Haven in Miranda?*, 20 STAN. L. REV. 1269 (1968); Note, *The Privilege Against Self-Incrimination; The Scope and Application of Miranda*, 37 UMKC L. REV. 260, 299 (1969); Comment, *Miranda and Waiver*, 4 WILLAMETTE L.J. 205 (1966).

law because each case turned on its own facts[40] with few circumstances[41] seeming to command more weight than the others. Police officials, believing the new warnings would impede police interrogation techniques, were not sure whether they were commanded to "serve as attorney" to an accused by explaining his rights to him when he refused counsel. In such a setting, and with other cases limiting *Miranda* in other areas,[42] *United States v. Frazier* takes on special significance.

THE ABSENCE OF UNUSUAL CIRCUMSTANCES

First of all, the case deals with a "normal" defendant. Innumerable cases have dealt with defendants who because of wounds,[43] injuries,[44] seizures,[45] narcotics,[46] or liquor,[47] to name only a few, might have been incapable of the awareness required for an understanding and knowing waiver. Equally as many cases have dealt with defendants, who because of age,[48] mental capacity,[49] prior contact with police[50] or lengthy interrogation,[51] made rather clearly unintelligent waivers. Frazier fell into none of these categories. He was middle-aged, reasonably healthy, and of average intelligence, as the court found on remand. He had no external "excuse" for misunderstanding the warnings. Since *Frazier* considers a defendant without any infirmities to cloud the "totality of circumstan-

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[40]Narro v. United States, 370 F.2d 329 (5th Cir. 1966) (per curiam).

[41]These circumstances are lengthy interrogation, incommunicado incarceration, and the fact that the admission or confession did not "follow closely" the giving of the warnings. *See generally* 19 AM. JUR., PROOF OF FACTS § 36-39 (1967).

[42]Lego v. Twomey, 404 U.S. 477 (1972) (determination f a confession's voluntariness by preponderance of evidence was not a violation of the privilege against self-incrimination); Harris v. New York, 401 U.S. 222 (1971) (otherwise inadmissible confessions usable for impeachment purposes if trustworthy).

[43]*See* People v. Miller, 135 Cal. 69, 67 P. 12 (1901).

[44]*See* State v. Wise, 19 N.J. 59, 92-96, 115 A.2d 62, 79-81 (1955).

[45]*See* People v. Baksys, 26 App. Div. 2d 648, 272 N.Y.S.2d 488 (1966).

[46]*See* United States *ex rel.* Townsend v. Sain, 276 F.2d 324 (7th Cir. 1960); People v. Cobb, 45 Cal. 2d 158, 287 P.2d 752 (1955); People v. Waack, 100 Cal. App. 2d 253, 223 P.2d 486 (1950); State v. Sirmay, 40 Utah 525, 122 P. 748 (1912).

[47]*See* People v. Townsend, 11 Ill. 2d 30, 141 N.E.2d 729 (1957). *See generally* Annot., 22 L. Ed. 2d 872, 878-79 (1970).

[48]*See* Moore v. Michigan, 355 U.S. 155 (1957). *See generally* Annot., A.L.R.2d 1160 (1960); 19 AM. JUR., PROOF OF FACTS § 32 at 56 (1967).

[49]*See* Mallory v. United States, 354 U.S. 449, 455 (1957); Fikes v. Alabama, 352 U.S. 191 (1957); 19 AM. JUR., PROOF OF FACTS § 33 at 58 (1967).

[50]*See* United States v. Bolden, 355 F.2d 453 (7th Cir. 1965). *See generally* 19 AM. JUR., PROOF OF FACTS § 34 at 61 (1967).

[51]This is the very activity *Miranda* itself violently condemns. *See also* Ziang Sung Wan v. United States, 266 U.S. 1 (1924); 19 AM. JUR., PROOF OF FACTS §§ 36, 37 (1967).

ces" test, the decision offers insights into both the protections of the accused and the burden of proof placed on the government when the accused who has allegedly misunderstood his rights[52] is "normal" and the circumstances of the waiver and confession are not suspect. The confession and waiver in Frazier were obtained without long or incommunicado interrogation, without the "third degree" and without promises or threats—all circumstances *Miranda* enumerated as militating against waiver.[53]

THE ALERTING CIRCUMSTANCE

An accused can rarely expect to nullify an express waiver and confession simply by testifying that he misunderstood his rights,[54] nor can he expect the police to detect the misunderstanding of clearly given warnings[55] without some indicator. The cases become more favorable to the defendants when an additional "alerting circumstance" appears. Various acts of the accused have been found to serve as such indicators. The most common has been the accused's refusal to sign a waiver or confession, while remaining willing to confess orally.[56] Although some

[52]The court recognized the fact that people with the *capacity* to understand the warnings still might not. United States v. Frazier, 476 F.2d 891, 897 (D.C. Cir. 1973). Statistical studies have determined that a high percentage of the average population, even without the pressures of arrest, misunderstands the basic rights given in the *Miranda* warnings. Doubtless then, many defendants of average capacities could misunderstand their rights. *See* Medalie, Zeitz, & Alexander, *Custodial Police Interrogation in Our Nation's Capitol: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347, 1374 (1968) (15% misunderstood warnings regarding the privilege against self-incrimination); Griffiths, *A Postscript to the Miranda Project: Interrogation of Draft Protestors*, 77 YALE L.J. 300 (1967) (majority of those interviewed misunderstood rights from mere warnings read to them).

[53]384 U.S. at 475-76.

[54]*See* Warden, *supra* note 33, at 55. This writer has discovered no cases so holding in a thorough examination of post-*Miranda* cases. However, commentators (soon after *Miranda* was decided) thought this might be possible, reading *Miranda* literally and believing the heavy burden to be approaching a presumption of inadmissibility. *See* Miranda v. Arizona, 384 U.S. 436, 534 (1966); (White, J., dissenting); B. GEORGE, JR., *supra* note 38. *See also* Rogge, *supra* note 38; Comment, 21 SW. L.J., *supra* note 38, at 262; Comment, 37 UMKC L. REV., *supra* note 39, at 303.

[55]Cases in which the warnings have been improperly given provide an entirely different basis for claiming exclusion of a confession—violation of the very clear cut rules set down in *Miranda*. Courts have readily excluded evidence in this area where the standard is clear and easily applied. *See, e.g.*, United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).

[56]*See, e.g.*, United States v. Van Dusen, 431 F.2d 1278 (1st Cir. 1970); United States v. McNeil, 433 F.2d 1109 (D.C. Cir. 1969); lettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969); United States v. Ruth, 394 F.2d 134 (3rd Cir.), *cert. denied*, 393 U.S. 888 (1968); United States v. Bird, 293 F. Supp. 1265 (D. Mont. 1968); State v. Nolan, 423 S.W.2d 815 (Mo. 1968).

courts have held the contradictory nature of this single act imposes an additional duty upon the police to recognize the defendant's possible misunderstanding about the admissibility of oral statements,[57] most have held the opposite view.[58] Though on first sight, *Frazier* would seem to fall in line with these decisions, it is important not to lump it too readily with these "refusal-to-sign-waiver" cases. First, courts have not given much weight to this refusal, reasoning that if *Miranda* rejects the signing of a waiver as conclusive proof of waiver[59] then the police and court have no duty to recognize failure to sign (standing alone) as a conclusive indicator of misunderstanding or invalid waiver.[60] Secondly, the indicator in *Frazier* stands alone without any other evidence mitigating against the possibility of misunderstanding, unlike most of the "refusal to sign" cases.[61]

Despite the fact that the "refusal to sign" cases may turn on distinguishable principles and facts, they are enlightening in the standard of police conduct that they set in contrast to *Frazier*. Some have introduced the "reasonable man" standard—if a reasonable police officer would recognize the alerting circumstance as evidence of failure to comprehend, he has an additional duty to insure understanding.[62] *Frazier* makes it clear that no such standard exists. After the warnings have been given in the proper manner, without impeding circumstances, and the accused has openly admitted his understanding, the police need not evaluate the situation further.[63] *Frazier* is not the first case to adopt this proposition,[64] but it is the first case so to hold without some additional evidence (such as defendant's prior contact with the law or the giving of his confession in such a way as to make it obvious that he knew it

[57]*See, e.g.*, United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968); United States v. Bird, 293 F. Supp. 1265 (D. Mont. 1968); People v. Randall, 1 Cal. 3d 948, 83 Cal. Rptr. 658, 464 P.2d 114 (1970).

[58]*See, e.g.*, United States v. Van Dusen, 431 F.2d 1278 (1st Cir. 1970); Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969); United States v. Ruth, 394 F.2d 134 (3d Cir. 1968); Comment, 37 UMKC L. REV., *supra* note 39, at 307.

[59]384 U.S. at 475.

[60]United States v. McNeil, 433 F.2d 1109 (D.C. Cir. 1969); State v. Nolan, 423 S.W.2d 815 (Mo. 1968); Land v. Commonwealth, 211 Va. 223, 176 S.E.2d 586 (1970).

[61]*See, e.g.*, Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969); United States v. Ruth, 394 F.2d 134 (3d Cir.), *cert. denied*, 393 U.S. 888 (1968).

[62]United States v. Ruth, 394 F.2d 134, 138 (3d Cir. 1968) (dissenting opinion); *accord*, United States v. Nielsen, 392 F.2d 849, 853 (7th Cir. 1968). *But see* Comment, 37 UMKC L. REV., *supra* note 39, at 307.

[63]United States v. Frazier, 476 F.2d 891, 899 (D.C. Cir. 1973).

[64]United States v. McNeil, 433 F.2d 1109 (D.C. Cir. 1969); Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969).

was admissible) to mitigate the possibility that the defendant misunderstood. Therefore, in *Frazier* the court has set the first clearly demonstrative standard for police responsibility in insuring understanding of the *Miranda* warnings—when faced with a "normal" accused, the police must comply with the letter of the *Miranda* warnings, but they need not indulge in interpretations of the defendant's conduct relating to his possible misunderstanding when he states that he understands his rights.

THE BURDEN OF PROOF

It would be misleading to believe that the *Frazier* standard of police responsibility is unrelated to the job of the prosecutor. If the police are required to exercise very limited responsibility to insure actual understanding, can the prosecution meet its "heavy burden" of proof? Since each case turns on its own facts,[65] cases are difficult to analogize; however, several general theories have been advanced. Some give any reasonable doubt to the defendant on the misunderstanding issue;[66] some accept proof of capacity to understand unless there is an alerting circumstance which then raises the government's burden;[67] some express discomfort at having to make a determination on actual understanding;[68] some say the defendant simply cannot claim misunderstanding after a signed waiver without more proof;[69] some consider an alerting circumstance, such as calling a lawyer, the equivalent of an expression of desire to cease the questioning, bypassing the waiver issue entirely;[70] but those most closely analogous to *Frazier* employ the burden shifting theory,[71] usually without expressing it in those terms.

Frazier is an excellent example of the theory in its simplest form. The prosecutor cannot be expected to offer evidence to negate every possible circumstance that might imply misunderstanding;[72] he does not

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[65]Narro v. United States, 370 F.2d 329 (5th Cir. 1966) (per curiam).

[66]*See, e.g.*, United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).

[67]*See, e.g.*, United States v. Van Dusen, 431 F.2d 1278 (1st Cir. 1970).

[68]*See, e.g.*, Coughlan v. United States, 391 F.2d 371 (9th Cir.), *cert. denied*, 393 U.S. 870 (1968).

[69]*See, e.g.*, United States v. Johnson, 426 F.2d 1112 (7th Cir. 1970).

[70]People v. Randall, 1 Cal. 3d 948, 464 P.2d 114 (1970), 83 Cal. Rptr. 658.

[71]United States v. McNeil, 433 F.2d 1109 (D.C. Cir. 1969); Pettyjohn v. United States, 419 F.2d 651 (D.C. Cir. 1969); State v. Nolan, 423 S.W.2d 815 (Mo. 1968).

[72]Such a burden on the prosecution would require the courts to give the defendant the benefit of conjecture. The three judge panel in *Frazier* believed that the defendant was entitled to such a benefit since *actual* understanding was involved. 476 F.2d at 905-06. The later opinion of the court en banc reversed that position, refusing to speculate in the defendant's favor. 476 F.2d at 898.

have access to the only source of first hand evidence bearing on actual understanding—testimony of the defendant. Therefore the government is only required to present a prima facie case for waiver by showing that the defendant was uncoerced, intelligent enough to comprehend the warnings, and sufficiently informed of his rights to be *capable* of a knowing choice of action.[73] The defendant then must rebut the prima facie case.[74] Often, his only means is his own testimony[75] since he had no counsel present during interrogation. As a practical matter, what the defendant can say will be very limited—he will merely state that he misunderstood his rights. The court will then be left with weighing the evidence of capacity to understand against the defendant's testimony of misunderstanding.

All this boils down to a neatly objective test of waiver in which the government need only prove the *capacity* to understand (a far cry from the "heavy burden" of establishing *actual* knowledge originally called for in *Miranda*). There is one major reservation. The court implied that the decision might well have been different had the defendant testified, but in fact, that may not be true at all. In *United States v. McNeil,*[76] on facts similar to *Frazier* (except that the "alerting circumstance" was refusal to sign a waiver), defendant's testimony that he misunderstood his rights had no effect on the outcome. The same is true in *Pettyjohn v. United States.*[77] And in *Frazier* itself, the court's finding that the police had fulfilled all of their responsibilities toward Frazier conflicts with the later language about the defendant's failure to testify. The court has given its blessing to a very objective set of police procedures and responsibilities[78] (intimating that if faced with such a situation again, the police could use the same procedure) which would be employed long before it was known whether the defendant would testify.[79] This would seem to indicate that the police will not violate any of the defendant's constitutional rights by failing to recognize the possible misunderstan-

[73]State v. Nolan, 423 S.W.2d 815, 818 (Mo. 1968). This is exactly what the court proved in *Frazier.*

[74]This is referring only to a case like *Frazier*—one without any of the infirmities or coercive circumstances discussed earlier.

[75]Either because of error of counsel of decision of the defendant, Frazier did not testify.

[76]433 F.2d 1109 (D.C. Cir. 1969).

[77]419 F.2d 651 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058 (1970).

[78]476 F.2d at 892, 899.

[79]Seemingly the court would not have so vigorously defended the police actions (the opinion even refers to it as "having important implications with respect to judicial definition of the responsibilities of law enforcement officers . . ." *id.* at 892) if the procedures could so easily have been found inadequate simply because the defendant testified that he misunderstood.

ding. However, if the accused can obtain exclusion of his confession by testifying, one of his rights *must* have been violated. It is inconsistent for the court to condone this limit on police responsibility and still exclude the confession, since such use of the exclusionary rule would encourage the police to go further than the court seems to require to insure understanding. Certainly the court would not encourage such a paradox of police motivation. Therefore, *Frazier's* objective standards of proof of waiver and police responsibility are not likely to be overturned by defendant's testimony, even though the case spoke of its importance.

CONCLUSION

The reasons *Frazier* reached such a decision on the standards of proof and police conduct are speculative. The case may reflect the view that now Chief Justice Burger took in the dissent to Frazier's original appeal[80] and echoed in the final decision—*Miranda* and the fifth amendment privilege against self-incrimination are to prevent *compulsive* self-incrimination and where, as in *Frazier*, that end has been served, confessions should not be excluded because of possible minor infringement on the means by which they were obtained. The decision could reflect the view evident in other opinions[81]—that it is necessary for the defendant to make a voluntary decision but not necessarily a *wise* one. It could signal a gradual softening of the *Miranda* stringencies in the face of the old, but recurring complaints about the exclusionary rule.[82] In any case, *United States v. Frazier* sets forth both a clearly objective, burden-shifting test as to proof of waiver—a significant diminution of the "heavy burden" mentioned in *Miranda*, and an equally objective standard of police conduct regarding waiver. *Frazier* makes waiver under *Miranda* a more discernable facet of the law, even though it may have eroded part of *Miranda's* defendant-benefiting rules in the process.

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[80]Frazier v. United States, 419 F.2d 1161, 1171 (D.C. Cir. 1969) (Burger, J., dissenting).

[81]*See* United States v. Springer, 460 F.2d 1344 (7th Cir. 1972).

[82]Cases cited note 42 *supra*. *See* People v. Artuello, 65 Cal. 2d 768, 423 P.2d 202, 56 Cal. Rptr. 274 (1967) (courts allowing certain types of trickery absolutely banned by *Miranda*); Elsen & Rosett, *supra* note 38, at 667-68; Annot., 99 A.L.R. 2d 772, 786 (1965).