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Criminal Procedure—Lowering the Standard for Defendant’s Understanding of his Miranda Rights

In *Miranda v. Arizona,* 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, citing the *Johnson v. Zerbst* 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 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. *United States v. Frazier* 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, 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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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.
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." 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. 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,” but that the government could rebut “the strong implication” by evidence that the police had in some way reacted to this alerting circumstance and made sure the defendant actually 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. 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, a panel of the court of appeals reversed the trial court, making it clear that when an accused exhibits signs of misunder-

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8Id. at 893.
10Id. at 1169.
11Id. 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).
13The 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.
14United 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.
15Id. at 902 (the three judge panel decision is reported in the appendix to the en banc opinion).
16Id. 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. 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. 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, not from some unrelated cause. Conjecture about the reason for the ban is now allowed in his favor—he must offer proof. 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.

The court, faced with a “normal” defendant 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 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.”


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).

“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.

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.\(^2\)

**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."\(^2\)\(^4\) It directs not only that a statement of the rights be given, but also that they be understood.\(^2\)\(^6\) 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.\(^2\)\(^6\)

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*,\(^2\)\(^7\) cited in *Miranda*,\(^2\)\(^8\) required proof of a voluntary, knowing,\(^2\)\(^9\) and intelligent\(^3\)\(^0\) waiver of a constitutional right viewing the totality of the circumstances\(^3\)\(^1\) and encouraged "every reasonable presumption against waiver. . . ."\(^3\)\(^2\) In pre-*Miranda* applications of *Zerbst* to determine voluntariness of con-

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\(^2\)384 U.S. at 476.

\(^3\)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.

\(^2\)\(^4\)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.

\(^2\)\(^5\)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).

\(^2\)\(^6\)304 U.S. 458 (1938).

\(^2\)\(^7\)384 U.S. at 475.

\(^2\)\(^8\)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).

\(^2\)\(^9\)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).

\(^3\)\(^0\)304 U.S. at 463-65.

\(^3\)\(^1\)Id. at 464.
fessions, courts considered the same types of circumstances that post-
Miranda courts consider in determining knowing waiver. 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.

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; others said that they
simply believed police witnesses, and defendants continually lost "swearing contests" because of the greater credence given police testi-
mony. Judges, attorneys, and police officials alike were aware of the
uncertainties involved in Miranda's failure to define the standard of
proof required. 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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\[\text{supra note 17, at 12; Warden, Miranda—Some History, Some Observa-

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


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

\[\text{See Olsen & Rosett, Protections for the Suspect Under Miranda v. Arizona, 67 Colum. L. Rev. 645, 658-59 (1967). At the other extreme were several commentators and cases interpreting Miranda as requiring a presumption in favor of the accused. See B. George, Jr., Constitutional Limitations on Evidence in Criminal Cases 291 (1973); Rogge, Proof by Confession, 12 Vill. L. Rev. 1 (1966); Comment, Custodial Interrogation as a Tool of Law Enforcement; Miranda v. Arizona and the Texas Code of Criminal Procedure, 21 Sw. L.J. 253, 262 (1967).}\]

law because each case turned on its own facts with few circumstances 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, 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, injuries, seizures, narcotics, or liquor, 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, mental capacity, prior contact with police or lengthy interrogation, 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 circums-
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 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.

THE ALERTING CIRCUMSTANCE

An accused can rarely expect to nullify an express waiver and confession simply by testifying that he misunderstood his rights, nor can he expect the police to detect the misunderstanding of clearly given warnings 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. Although some

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52The 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 Medalle, Zeltz, & 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).

53See 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.

54See, e.g., United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).

55Cases 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. 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, most have held the opposite view. 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 then the police and court have no duty to recognize failure to sign (standing alone) as a conclusive indicator of misunderstanding or invalid waiver. 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.

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. 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. Frazier is not the first case to adopt this proposition, 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

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6See, 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.
was admissible) to mitigate the possibility that the defendant misunder-
stood. Therefore, in Frazier the court has set the first clearly demonstra-
tive 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 under-
standing, can the prosecution meet its “heavy burden” of proof? Since
each case turns on its own facts, cases are difficult to analogize; how-
ever, several general theories have been advanced. Some give any rea-
sonable doubt to the defendant on the misunderstanding issue; some
accept proof of capacity to understand unless there is an alerting cir-
cumstance which then raises the government’s burden; some express
discomfort at having to make a determination on actual understand-
ing; some say the defendant simply cannot claim misunderstanding
after a signed waiver without more proof; 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;
but those most closely analogous to Frazier employ the burden shifting
theory, 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; he does not

63Narro v. United States, 370 F.2d 329 (5th Cir. 1966) (per curiam).
64See, e.g., United States v. Mullings, 364 F.2d 173 (2d Cir. 1966).
65See, e.g., United States v. Van Dusen, 431 F.2d 1278 (1st Cir. 1970).
66See, e.g., Coughlan v. United States, 391 F.2d 371 (9th Cir.), cert. denied, 393 U.S. 870
(1968).
67See, e.g., United States v. Johnson, 426 F.2d 1112 (7th Cir. 1970).
69United 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).
70Such 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. The defendant then must rebut the prima facie case. Often, his only means is his own testimony 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, 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. 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 (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. This would seem to indicate that the police will not violate any of the defendant’s constitutional rights by failing to recognize the possible misunderstandings.

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73State v. Nolan, 423 S.W.2d 815, 818 (Mo. 1968). This is exactly what the court proved in Frazier.
74This is referring only to a case like Frazier—one without any of the infirmities or coercive circumstances discussed earlier.
75Either because of error of counsel of decision of the defendant, Frazier did not testify.
76433 F.2d 1109 (D.C. Cir. 1969).
78476 F.2d at 892, 899.
79Seemingly 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 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—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. 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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81See United States v. Springer, 460 F.2d 1344 (7th Cir. 1972).