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Beguiling a Confession – Subverting *Miranda*

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Content

❖ Introduction

The name Miranda is familiar to most adult Americans. A large number of people could probably recite at least part of what are normally referred to as the "Miranda warnings." In *Miranda v. Arizona*, #759, 384 U.S. 436 (1966) the Supreme Court held that when a criminal suspect is in custody by a law enforcement agency, the suspect

> "… must be warned prior to any questioning (1) that he has the right to remain silent, (2) that anything he says can be used against him in a court of law, (3) that he has the right to the presence of an attorney, and (4) that if he cannot

afford an attorney one will be appointed for him prior to any questioning if he so desires" 384 U.S. at 479.

The warnings are typically given prior to any questioning of the suspect and are absolutely required. *Florida v. Powell*, #08-1175, 130 S.Ct. 1195 at 1204, 2010 U.S. Lexis 1898 (2010).

Law enforcement officers regularly try to elicit incriminating admissions, statements, or confessions from suspects. They must, however, comply with the requirements of *Miranda* – which typically involves getting a waiver of a suspect's *Miranda* rights after the suspect has been fully advised. Variation from the core requirements of *Miranda* can lead to suppression of information obtained as a result of the questioning.

This article deals with the second of the *Miranda* warnings – that anything a suspect says can be used against him in a court of law. But when an officer tells a suspect what can be used against him, the officer can undermine the *Miranda* warnings and render ineffective a suspect's waiver of his rights.

❖ **Subverting the warnings**

- **"This is between you and me"**

Baltimore County police officers arrested Christian Lee and charged him with offenses arising out of a robbery and murder. Detective Craig Schrott questioned him after his arrest. The detective read Mr. Lee the required warnings which included telling him that anything he said "can and will be used against you in a court of law." Schrott made sure that Lee understood each of his rights. Lee signed a written *Miranda* waiver and agreed to talk to Detective Schrott. After a couple of hours, Lee admitted his involvement to Schrott.

During the questioning, Schrott tried to get Lee to admit his involvement in the shooting. At some point Lee asked Schrott if the interview was being recorded. Schrott told him yes and then told him "This is between you and me Bud. Only you and me are here, all right?" After that exchange the interview continued and Lee ultimately admitted his involvement. Lee was convicted.

Lee claimed that everything he said after that fateful exchange with Schrott should be suppressed. Ultimately the Maryland Court of Appeals agreed with him. *Lee v. State*, #115, 418 Md. 136, 12 A.3d 1238 (2011).

Why? The warning that anything a suspect says can and will be used in court is for the purpose of making sure that a defendant is acutely aware that he is faced with an adversary system – that he is not in the presence of persons acting solely in his interest. In *Miranda*, the Supreme Court recognized that a waiver can be undermined by words or actions on the part of the interrogating officers. Any affirmative misrepresentation by the police might be enough to invalidate a *Miranda* waiver. *Colorado v. Spring*, #85-1517, 479 U.S. 564 (1987).

Since *Miranda*, courts have held that an interrogator may not say or do anything during the interrogation that *subverts or undermines* the warnings. If that occurs, everything the suspect says after some improper statements or actions by the interrogators is subject to being suppressed. Why? Because such statements contradict the warnings.

In *Hopkins v. Cockrell*, #01-11385, 325 F.3d 579 (5th Cir. 2003) the suspects statement was suppressed when even after proper warnings, the interrogating officer told the suspect "This is for me and you. This is for me, Okay. This ain't for nobody else." The court held that an officer cannot read the *Miranda* warnings and then turn around and tell the suspect that what the defendant tells the officer will be confidential.

- **This is "confidential" or "off-the-record"**

The Georgia Supreme Court reached the same result in *Spence v. State*, #S06A1850,642 S.E.2d 856 (2007). Spence was being questioned about a reported rape. After about an hour, after Spence seemed to be on the verge of incriminating himself the officer told Spence "Just you and me, just you and me." Spence then told the officer he was worried about going to jail after which the officer said: "Lem, ain't nobody saying nothing, this is confidential." As if that were not enough, the officer a little later told Spence that "this is confidential what we're doing right here. Do you understand that?

Citing *Hopkins*, the court said that an officer cannot read a defendant the warnings and then turn around and tell the suspect that, despite the warnings, what the

defendant tells the officer will be confidential, and then expect to use the resulting confession against the defendant.

In another Georgia case, *Foster v. State*, #45609, 374 S.E.2d 188 (1988) the officer told the suspect that his confession "would be as much for your benefit as ours."

➔ **Telling a suspect that a confession is not going to hurt and would actually benefit him as well as the police is totally inconsistent with *Miranda.***

There is no doubt that interrogation is a skill and the ultimate objective is to get incriminating admissions or statements. There are limits as to how far an officer can go in trying to gain the confidence of a suspect. Sometimes a suspect will say things like "Can I tell you something off-the-record?" That should never be encouraged.

That is what happened in *State v. Pillar*, 359 N.J. Super. 249, 820 A.2d 1 (App. Div. 2003). The police agreed that the suspect could say something "off-the-record." He then made an incriminating statement. In ordering the confession suppressed, the court said that an officer cannot directly contradict the warnings he had given.

An agreement to hear something off-the-record totally undermines that portion of the *Miranda* warnings concerning use of a statement against a suspect. The violation occurred as soon as the officer agreed to the off-the-record statement which was incriminating. Agreements to off-the-record discussions are very dangerous.

When the interrogators agree, they run the risk of suppression of what follows. Another example is *People v. Braeseke*, Crim. #21049, 602 P.2d 384 (1979) where the police agreed to a suspect's request to go "off-the-record" without explaining to the defendant that there was no such thing in the context of an interrogation.

The court held that a request to speak off-the-record cannot constitute a knowing and intelligent waiver of *Miranda* – with regard to the second warning. See also *State v. Stanga*, #21082, 2000 SD 129, 617 N.W.2d 486 (2000) where the court held that multiple statements made by an interrogating officer to the defendant that "I'm here for you and I to talk" nullified the earlier warnings.

- **"Promises … promises"**

In the *Lee* case, detective Schrott's words were nothing less than a promise of confidentiality even though not specifically couched in those terms. The violation was in the words themselves. Importantly, there was no requirement that there had to be a determination that Lee actually relied on what Schott told him.

Is the subject matter of the interrogation a factor? The answer is usually "no." Police were investigating a possible murder, carjacking and armed robbery. The defendant spoke Spanish so a Spanish-speaking detective performed the interrogation, which lasted about four hours.

At first, the defendant made a waiver. During the interrogation the detective began questioning the defendant about his possible gang affiliation and the importance of certain numbers, e.g. 503.

When the detective asked him the purpose of the gang (MS) he told the detective that the plans were "to eliminate all those people." There was then considerable discussion about the importance of the numbers and the gang. In response to one of the detective's questions, the suspect told him "They are secrets of ours. You can't say it." The detective then made the ultimately fatal statement "Why? Everything we talk about is going to stay here in this room."

The detective also told him "And the gringos who are outside don't understand Spanish, so that, the only one who can understand you is me." Finally in an obvious effort to gain rapport with the defendant the detective told him "And we are brothers. You can trust me."

A laudable – but ultimately fatal series of statements. The defendant's statement was suppressed. When a defendant seeks suppression of a statement based on a promise made to him by the interrogating officer, the prosecution must present evidence in order to refute such a claim.

❖ **Totality test**

In other words, if a defendant makes credible claim, the prosecution has to refute it. In particular, an express promise of confidentiality is inconsistent with the warning that anything a defendant says may be used against him. If the totality of the circumstances shows that the suspect was led to believe that his statement

would not go beyond the interrogation room, any subsequent statement violates *Miranda.*

Sometimes the defendant poses the question of whether or not the interrogation is being recorded. The answer to such a question, even if a lie, does not cause a problem. The problem comes as it did in several cases when the officer, in the context of a discussion about recording, then adds some comment or statement about confidentiality. Adding such a comment, no matter how "innocent," communicates more than a mere yes or no to a question about recording.

The prosecution argued that the detective's comment about the "gringos" was meant by the detective to only mean the other officers outside the room who did not speak Spanish. Given the comments, the court rejected that argument. *Angulo-Gil v. State*, #1204, 2011 Md. App. Lexis 35.

The mistake that interrogators may make can take many forms. For example in *Logan v. State*, #2361, 164 Md. App. 1, 882 A.2d 330 (2005). The detective made various statements to the suspect including such things as "we're talking…the only way this jeopardizes you is if you don't tell the truth" and that the officer would not "use any of the information to harm" him. In particular the court held that the officer's statement that the only way "this jeopardizes you is if you don't tell the truth" flatly contradicted the *Miranda* warning.

❖ **Limits to deception**

Concerning possible use of the statements, the court noted that there are limits on permissible police deception. Trickery or deception which misleads a suspect as to the dimensions of any of the suspect's rights is prohibited.

Suppose a suspect is properly advised and a waiver is obtained, but during the interrogation the officer makes a misstatement. Does that mean that the entire statement gets suppressed or only that which followed the misstatement?

Courts are not totally in agreement on this. Some courts have said that a misstatement during the interview does not jeopardize what went before:

- *United States v. Bezanson-Perkins*, #04-1293, 390 F.3d 34 (1st Cir. 2004) – questioning whether police misstatements after a voluntary waiver could invalidate that waiver);

- *Soffar v. Cockrell*, #98-20385, 300 F.3d 588 (5th Cir. 2002) – detective's misleading statements did not invalidate a waiver that had already occurred); and
- *United States v. Chadwick*, #93-1269, 999 F.2d 1286 (8th Cir. 1993) – detective's statement that his cooperation would help him did not invalidate his prior waiver since the waiver had occurred earlier in the interview).

On the other hand, some courts have made no distinction as to the timing of the misstatement holding that a misstatement after a validly obtained waiver can nullify the entire statement.

- *State v. Pillar*, 359 NJ Super. 249, 820 A.2d 1 (App. Div., 2003) – an agreement to the suspect's request to speak off-the-record rendered the suspect's subsequent statement inadmissible because such a misrepresentation directly contradicts the entire purpose of the warnings;
- *State v. Stanga*, #21082, 2000 SD 129, 617 N.W.2d 486 (2000) – a misstatement made after a valid waiver nullified the waiver)

The timing of the misstatement may not be totally controlling. In *Moran v. Burbine*, #84-1485, 475 U.S. 412 (1986) the Supreme Court noted that potential deception about the warnings may deprive the suspect of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."

Conversely, the court said that if a voluntary decision to speak is "made with full awareness and comprehension of all the information *Miranda* requires the police to convey" a waiver will be valid. The Supreme Court has not yet addressed this timing question as to whether or not a misstatement during the interview makes the entire statement inadmissible.

❖ Recorded statements

Sometimes a suspect will ask the interrogating officer if the interview is being recorded. Often in an overabundance of caution, the interrogator will tell the suspect if the interview is being recorded. Not everybody does it.

➔ What if a suspect is not told up front that the interview is being recorded, but at some point asks, and the officer lies? In most states, there is no

constitutional requirement that a suspect must be informed that an interview is being recorded. [1] However, a false statement that an interview is not being recorded is arguably no different than an assurance that the statements are off-the-record.

Even police deception that an interrogation is or is not being recorded does not violate *Miranda*. See, for example, *State v. Vandever*, 314 N.J. Super. 124, 714 A.2d 326 (App. Div. 1998) and *State v. Wilson*, #53257, 755 S.W.2d 707 (Mo. App. 1998) – an implied promise not to record the interrogation (when in fact it was being recorded) did not make the defendant's confession involuntary.

The issue of whether or not a recording took place has nothing to do with the advice about statements being used against a suspect. If a statement is not recorded and a defendant seeks to suppress the statement because the officer made some promise or comment contradicting the warning, it becomes a question of credibility.

Sometimes a defendant signs a *Miranda* waiver form which states that anything he says may be used against him but still claims an improper inducement of some kind.

➔ A waiver form certainly shows proper advisement, but does not preclude a defendant from challenging the admission of the statement, in the absence of a recording.

If a suspect is induced to make a statement in reliance on an officer's express or implied assertion that the suspect would receive some kind of special help or consideration in a prosecution **or** that whatever the suspect says will not be used against him, the statement may be subject to suppression and inadmissible in evidence.

A promise may take many forms. For example in *Hill v State*, #149/09, 418 Md. 62, 12 A.3d 1193 (2011) the officer was interrogating a suspect in a sex offense case. At a point in the interrogation the officer told the suspect that the victim's family did not want to see the suspect get in any trouble and only wanted an apology.

The Maryland Court of Appeals adopted a two-part test to determine if a confession was the result of an improper inducement:

(1) Did an officer or agent of the police promise or imply that the suspect would be given special consideration or some other form of assistance in exchange for the confession? … and

(2) the suspect confesses based on what the police told him or implied.

❖ **Some comments are permissible**

For example telling a suspect that the officer will advise the prosecutor that the suspect cooperated and/or telling a suspect that the officer will inform the prosecutor that, in the officer's opinion, the suspect was truthful do not contradict *Miranda*.

On the other hand, if the officer tells the suspect that if he cooperates, the officer will "see what I can do for you," is, at least, an implied promise. A promise of any kind of leniency may contradict the warnings and make the confession inadmissible. *Brown v. State*, #CR01-1196, 354 Ark. 30, 117 S.W.2d 598 (2003); *Richardson v. State*, #A04A0212, 595 S.E.2d 565 (Ga. App. 2003).

However, telling a suspect that it *may* be in his best interest to cooperate does not render a subsequent confession inadmissible. *Clark v. State*, #48S00-0205-CR-270, 808 N.E.2d 1183 (Ind. 2004).

❖ **Encouraging cooperation**

Not every statement by officers to a suspect causes difficulty. In *United States v. Chadwick*, 999 F.2d 1282 (8th Cir. 1993) the detective told the suspect that his cooperation would help him. This statement did not contradict the warning about anything being used against the defendant.

❖ **Summary**

1. It is a required part of the *Miranda* warnings that a suspect be told that anything he says during interrogation may be used against him.
2. Officers must be very careful that they do not state or imply to a suspect that anything the suspect says will be kept confidential.

3. No implied or express promises should ever be made to a suspect, that if he confesses, he will get any kind of benefit or that what he says will not be used against him.

4. Any express or implied statements by an officer that contradicts this portion of the warnings may subject the statement to suppression.

5. While there is no constitutional requirement that interrogations of suspects be recorded, the better practice would be to do so to avoid any later dispute as to what the suspect was told. A few states require audio-video taped confessions from homicide suspects. [2]

❖ **Notes**

1. Although 18 U.S. Code §2511(2)(d) allows secret recordings with the consent of a single person who is present, some states require the consent of all persons who are present. Absent a warrant, a surreptitious audio recording is a crime in those jurisdictions.

2. See fn. 7 & 8, 16 (3) Rich. J. L. & Techn. 3 (2010), accessible here.

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