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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009
No. 08-1470

MARY BERGHUIS, Warden,
Petitioner,
vs.

VAN CHESTER THOMPKINS
Respondent.

BRIEF OF WAYNE COUNTY, MICHIGAN, AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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Statement Of The Question

I.

Whether the Sixth Circuit expanded the Miranda rule to prevent an officer from attempting to non-coercively persuade a defendant to cooperate where the officer informed the defendant of his rights, the defendant acknowledged that he understood them, and the defendant did not invoke them but did not waive them?

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Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within her jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of her constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits Amicus to file a supporting brief without permission of the parties.

No party or counsel connected with a party contributed any funds towards this brief nor contributed in any way to its writing.

Argument.

A. The Incoherence of Current Doctrine, and Suggestions for Repair

> "Our forefathers, when they wrote this provision into the Fifth Amendment, had in mind a lot of history which has been largely forgotten today."[1]

> "...the Fifth Amendment actually means what it says."[2]

Current doctrine concerning the admissibility of confessions is not coherent. It is not coherent because Miranda v Arizona[3] is not compatible with the text and history of the Fifth Amendment. Though this Court has declined to overrule that decision within the past decade, see Dickerson v United States,[4] this case present the Court with an opportunity to restore at least some semblance of adherence to constitutional text and history by modifying Miranda, a modification which can be

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[1] Maffie v United States, 209 F2d 225, 237 (1954)(Judge Calvert Magruder).

[2] Grano, Confessions, Truth, and the Law (University of Michigan Press: 1993), p.143

[3] Miranda v Arizona, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966).

[4] Dickerson v United States, 530 U.S. 428, 432-433, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

accomplished without an outright overruling of that decision.[5]

Miranda's departure from the text and history of the Fifth Amendment is apparent within the decision, and was quickly demonstrated by further decisions from this Court. The opinion itself states that the confessions there being considered were not "involuntary in traditional terms"[6] (that is, not involuntary when measured by the actual Constitution). And that it is possible for voluntary confessions to be taken in the absence of the warnings required by Miranda---that in fact it is not the case that every confession that was the product of police questioning ever admitted in evidence in a criminal trial before 1966 was in fact involuntary and admitted into evidence in violation of the Constitution---was soon made plain by Harris v New York.[7] There the Court held that "Miranda-defective" statements that are inadmissible in the case-in-chief may be admitted into evidence if it is demonstrated that they were not coerced (were voluntary), and thus the Court itself recognized that not all Miranda-defective statements are actually obtained in violation of the Constitution.

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[5] Cf Planned Parenthood v Casey, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).where the Court substantially modified Roe v Wade while declining to overrule it.

[6] 384 US at 457.

[7] Harris v New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).

One incoherence created by Miranda, then, is its irrebuttable presumption of involuntariness that arises when a confession is taken on custodial interrogation without the giving of "adequate" Miranda warnings. There is no such thing as an "irrebuttable presumption." An "irrebuttable presumption" is simply a rule of law,[8] and, where built on circumstances designed to enhance or protect some underlying rule of law, invariably expands upon that rule of law, thereby modifying it. Miranda amended the Constitution by declaring certain statements barred mandatorily by the violation of prophylactic rules designed to ensure voluntariness, while Harris recognized that those same statements may be admitted into evidence to impeach when they were not in fact obtained in violation of the Constitution. But as Professor Grano has well demonstrated, when prophylactic rules are treated as irrebuttable presumptions---as rules of law---and applied to constitutional

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[8] See e.g. 2 McCormick on Evidence § 342; Duane, James, "The Constitutionality of Irrebuttable Presumptions," 19 Regent U. L. Rev. 149, 160 (.2006-2007)("...courts and legal scholars universally agree that any so-called "irrebuttable presumption," regardless of whether one chooses as a matter of semantics to call it a true presumption, is not really a rule of evidence at all, but is actually a rule of substantive law masquerading in the traditional language of a presumption. As one leading writer has observed, 'a conclusive or irrebuttable presumption is really an awkwardly expressed rule of law'").

provisions their application exceeds the authority of the Court, violating Article III.[9]

A mundane example demonstrates the point. The law provides that serving alcohol to an individual under the age of 21 is forbidden. To avoid violation of this law, establishments that sell liquor often state "we require identification from anyone appearing under the age of 30." As a prophylactic rule, to protect against violation of the statute, then, one who appears under the age not of 21 but of 30 will be required to show identification. There is a rebuttable presumption that this individual may not be served alcohol, which may be rebutted by proof (valid identification). But if instead the state's Liquor Control Commission provided by way of regulation, designed to protect and enforce the drinking-age statute, that no establishment could serve any individual who appeared under the age of 30, that appearance being unrebuttable by valid identification, the regulation would have amended the statute, and undoubtedly impermissibly so. The regulation would sweep more broadly than the statute, and while it undoubtedly would exclude service of alcohol to some individuals under 21, it would also preclude service to some individuals over the age of 21, who may lawfully be served. So with Miranda--as in "irrebuttable presumption" of involuntariness (but only where the evidence is to be used in the case-in-chief, the presumption being rebuttable for impeachment use) the Miranda rules sweep more broadly than the Constitution. Some confessions

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[9] Grano, Joseph, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW. U. L. Rev. 100 (1985).

that would be demonstrated to be involuntary in any event may be kept out, but others that are voluntary "in traditional terms" are also excluded. This amends the Constitution, and exceeds the rightful authority of the Court. This can be revisited without overruling Miranda.

A second incoherence of Miranda is its transmogrification of the right not to be compelled to be a witness against oneself into a "right to remain silent." The latter is not simply a shorthand expression for the former, as it imports necessarily a waiver analysis foreign to the text and history of the Fifth Amendment. The sine qua non for involvement of the Fifth Amendment is coercive governmental conduct.[10] In the absence of coercive conduct by a governmental official, the fact that an individual speaks or does not speak, whether to some other "ordinary citizen" or even to a governmental official, has nothing to do with the Constitution. When one speaks voluntarily, he or she is not waiving his or her Fifth Amendment right not to be compelled to speak, the only right protected by the Fifth Amendment; rather, the speech is voluntary. If coerced, and by a governmental agent, the Fifth Amendment applies. But plainly no one, in speaking with a governmental agent, is saying, in effect:

> Yes, I understand that I have a right not be compelled to speak, but I choose to waive that right, and wish to be compelled to speak, so you may now proceed to engage in

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[10] Colorado v Connelly, 479 US 157, 107 S Ct 515, 93 L Ed 2d 473 (1986)

some coercive activity in order to gain my verbal cooperation.

Rather, if the consent to speak is not voluntary, then the individual has been compelled, and his or her statements are barred from admission at trial. But it is logically impossible to waive the right not to be compelled to speak, and this is what the Constitution protects, not any free floating "right to silence" without regard to coercive governmental conduct. There is no right to silence which must be waived knowingly and intelligently, there is an unwaivable right not to be coerced.

A hypothetical situation demonstrates this point as well. Under the First Amendment, no person may be forced by the government to pray or to attend church. When millions of citizens choose voluntarily to pray or to attend the church of their choice, are they thereby surrendering their "right not to pray" or "right not to attend church," and must they do so knowingly and intelligently in the constitutional sense? Of course not: the question makes no sense unless in the context of a claim of governmental coercion. There is no "right not to pray," or "right not to go to church" under the Constitution, there is rather a right not to be forced to do either by the government. There is also no "right to remain silent"; instead, there is a right not to be compelled to speak by the government, and speaking in the absence of compulsion is no more the waiver of a constitutional right than is praying or attending church without compulsion.[11]

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[11] As Professor Grano has aptly pointed out, if there indeed existed an independent constitutional right to remain silent (rather than a

A large measure of coherence may be returned to the law of confessions, amicus submits, by taking the text seriously. The law of confessions should be removed from consideration under the Fifth Amendment and returned to consideration under due process, which bars involuntary statements. The voluntariness inquiry may be undertaken without wholly overruling Miranda by treating the Miranda warnings not as independent constitutional "rights" which must themselves be waived, but as information that must be imparted to the individual in custody to help insure voluntariness. A failure to give the warnings or to give them appropriately creates not an "irrebuttable presumption" or rule of law sweeping more broadly than the actual Constitution, but a true evidentiary presumption that may be overcome by proof of voluntariness (in the same manner as done now for use of Miranda-defective statements for impeachment). By jettisoning the "irrebuttable presumption"/rule of law of involuntariness for Miranda-defective statements (when sought to be used in the case-in-chief) and the inappropriate waiver analysis (an analysis the Court properly avoided when considering the voluntariness of consent to search under the Fourth Amendment, where one is not "waiving" his or her right not to be unreasonably searched by

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court-created requirement of a warning regarding silence which serves as one portion of a prophylaxses designed to protect a constitutional right--the right not to be compelled), there is no principled basis on which the right and the waiver analysis could be limited to custodial interrogation. See Grano, Confessions, Truth, and the Law, p.142-143.

consenting to a search; rather, a voluntary consent renders the search reasonable, and thus the question is one of voluntariness and not waiver[12]), a greater coherence may be obtained, though Miranda not wholly overruled.

B. The Fifth Amendment in History

The protection of the Fifth Amendment is against compelled self-incrimination in criminal cases. And yet at the time of the Founding, and also of the ratification of the Bill of Rights, no state even permitted, much less compelled, an accused in a criminal case to testify. It was not until 1864 that Maine became the first state to permit defendants to testify, and Congress did not follow suit until 1878.[13] But criminal defendants were not actually silent at their trials, they simply were not competent as sworn witnesses. Instead, the defendant was permitted—and often expected—to give an unsworn statement at trial on his own behalf, and was also expected to give a statement pretrial. The failure to make a statement to the justice of the peace would be reported to the jury.[14]

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[12] Schneckloth v Bustamonte, 412 U.S. 218, 248-249, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (1973).

[13] See Ralph Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., The Bill of Rights: Original Meaning and Current Understanding (University of Virginia Press: 1991), p.276.

[14] Langbein, "The Privilege and Common Law Criminal Procedure," in The Privilege Against Self-Incrimination, quoted by Justice Scalia,

As Sir James Stephen noted, evidence given against the defendant operated as "so much indirect questioning," and if the defendant "omitted to answer the questions it suggested he was very likely to be convicted."[15] If a defendant was not permitted to be a witness at trial, but was expected to make unsworn statements, the failure to do so to be held against him, why, then, the inclusion of the Fifth Amendment protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions which enacted similar protections on which the Fifth Amendment was based, "failed to say what they meant," for if they meant what they said, then the common-law prohibition on testimony from the accused in criminal cases rendered the Fifth Amendment superfluous.[16] Instead, concluded Levy, what those individuals drafting state Bill of Rights and the Fifth Amendment actually meant to do was adopt the common-law right of nemo tenetur seipsum acusare (no one is bound to accuse himself), which protected not only against courts in criminal cases, but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against "threats of criminal

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dissenting, in Mitchell v United States, 526 US 314, 119 S Ct 1307, 143 L Ed 2d 424 (1999).

[15] J. Stephen, 1 History of the Criminal Law of England 440 (1883).

[16] See Levy, The Origins of the Fifth Amendment (2d Ed) (MacMillan: 1986).

liability, civil exposure, and public obloquy."[17] This redrafting of the Fifth Amendment is not tenable.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability—given the express language of the Fifth Amendment—that the drafters were not writing to "end some current abuse but simply to provide a floor of constitutional protection above which the common law was free to operate but below which it could not go."[18] Though it seems quaint now, during the 17th century the very giving of an oath was held itself to be a coercive act, and the ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions and requiring them to take an oath and answer questions. Refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury; telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator who refused to take the oath, led to the prohibition of the administration of any oath obliging a person "to confess or accuse himself or herself of any crime."[19] Professor Albert Alschuler concludes that the history of the Fifth Amendment is "almost

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[17] See Rossum, at 276.

[18] Rossum, at 277.

[19] See Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv L Rev 610, 621-24 (1902).

entirely a story of when and for what purposes people would be required to speak under oath."[20]

Requiring an oath of the criminally accused was coercive, and banned for that reason, as being equivalent to torture and the rack. Manuals which instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid- 19th century, that "The law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves....I take it to be for the Same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences of Some Men, although they have been guilty of offenses...."[21]

To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was "to outlaw torture and improper methods of interrogation," including the compelling of testimony under oath.[22] Historically in this country the voluntariness of statements was litigated under the due-process clause, and should be returned there, as it better comports with both text and history.[23] But whether considered under the Fifth Amendment or due process, the question

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[20] Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich L Rev 2625, 2638 (1994).

[21] See Alschuler, at 2648.

[22] Alschuler, at 2631.

[23] See Grano, *Confessions, Truth, and the Law*, supra, at pp. 87-143.

is one of voluntariness---of whether the police employed coercive tactics that should not be tolerated---and not one of waiver.

C. Conclusion and Application

The purpose of Miranda was to provide an in-custody suspect with information the Court thought necessary to insure that a decision to speak was made voluntarily, given that which the Court perceived as the "inherently coercive" nature of custodial interrogation. To help dispel that "coercive atmosphere" so as to allow a voluntary decision (not a wise one, nor even an informed one, but that to which the Constitution speaks---a voluntary one), the suspect was held required to be informed that he or she need not speak (has a "right to remain silent"); informed that if he or she does speak, the statement may be used as evidence against him; and informed of the "right to the presence of an attorney, either retained or appointed." And the suspect must be informed that if he or she chooses to speak, he may cease doing so at any time (may exercise one of these "rights" at any time). But the Court went further, and though it held that providing this information was essential to the giving of a voluntary statement, said also that the defendant could "waive effectuation of these rights, providing the waiver is made voluntarily, knowingly and intelligently."[24]

But the purpose of supplying this information is to insure voluntariness, not to provide independent "rights." Again, one has a right to remain silent only in that one has a right not to be compelled,

[24] 384 US at 444.

and informing him that he need not speak is not to provide an independent right but to help insure that he does not speak solely because of the "coercive atmosphere" of custodial interrogation. And there is no Sixth Amendment right to counsel at this time, and to find a "Fifth Amendment" right to counsel is contra-textual." Rather, one has the "right"to an attorney in that he or she is free to call one in for assistance, again to help dispel the coercive nature of custodial interrogation. Amicus suggests that the requirement that the suspect be informed that counsel will be appointed to assist him at this stage if he or she cannot afford one should be modified as unsupported by law and by fact. The request for the provision by the government of an attorney is virtually never met with the actual provision of an attorney; rather, questioning ceases,[25] and may not be re-started unless the defendant initiates the session (an "anti-badgering" or voluntariness rule). The suspect should be told that he or she has the right to an attorney if they wish to call one, and if one is desired but the suspect cannot afford one, questioning will stop.

Here, all information required by Miranda to dispel the inherently coercive nature of custodial interrogation was supplied to the respondent to

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[25] Minnick v Mississippi, 498 U.S. 146, 111 S. Ct. 486, 112 L. Ed. 2d 489 (1990) is the exception that proves the rule, and even after the provision of an attorney to the suspect there the confession was suppressed because the police spoke to the suspect after his attorney counseled him not to speak to them without defendant initiating the contact, though the statement was entirely voluntary.

enable him to make a voluntary choice whether to speak. He indicated he understood this information, and the police then talked to him in a manner that cannot be described as coercive, defendant never indicating that he did not wish to speak or that he wished an attorney (which would have cut off questioning). This statement was not obtained in violation of the Constitution, and thus should be admissible at the least in any state court; retrial is thus neither required nor appropriate here.

In sum, then, questions of confessions obtained by means of custodial interrogation should be treated under the due-process clause rather than the Fifth Amendment. But whichever provision is applied, the warnings required by Miranda should be considered as information that must be supplied to the suspect to ensure voluntariness, rather than independent rights which must be "waived" (and the right to counsel warning should be modified to a warning that if the suspect wishes an attorney and cannot afford one, questioning will cease). The failure to give Miranda warnings, or to give them "adequately," should be viewed as raising a rebuttable presumption of involuntariness, which may be overcome by proof, as is now done in cases where impeachment use of such confessions is sought. Confessions that are found to be involuntary should be excluded, those that are found to be voluntary should be admitted, no constitutional provision having been violated in obtaining them.

Conclusion

Wherefore, the Petitioner submits that the Sixth Circuit should be reversed.

Respectfully submitted,

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