Miranda, the Functional Equivalent of Interrogation, and Taint

BY STEPHEN A. SALTZBURG

United States v. Green, 541 F.3d 176 (3d Cir. 2008), illustrates how law enforcement officers may violate *Miranda v. Arizona*, 384 U.S. 436 (1966), by seeking to obtain a statement from a suspect through means that amount to interrogation for *Miranda* purposes and thereby tainting statements obtained after *Miranda* warnings are properly given. The defendant, Artega Green, was convicted by a jury of one count of distributing more than 50 grams of cocaine base. The prosecution arose from a single drug sale that occurred on May 14, 2002.

Arrest and Use of the Videotape

DEA agents used a confidential informant, Michael Brown, as their buyer in a "controlled" buy that they arranged. The agents made an audio recording in which Brown telephoned a cell phone number "associated with" Green and ordered three ounces of cocaine base. The brief tape revealed that the recipient of the call, alleged to be Green, said "What's up, dog? What's the deal?" and agreed to the sale. The government also had a video recording showing the drug buy.

In September 2004, the government obtained a federal indictment against Green based on the controlled buy. On December 2, 2004, Green was arrested by DEA special agents Miller and Hughes. Special agent Hughes testified at a suppression hearing and explained how he arrested Green. His testimony related the facts that gave rise to the *Miranda* issues discussed here.

Prior to seeking out Green on December 2, 2004, Hughes did an outstanding warrants check and found that Green had an active capias for an unrelated state court matter. Hughes did not identify himself as DEA when he arrested Green. Instead, Hughes merely said that he was "police" and that Green was being arrested on the state capias. Then, after transporting Green to DEA offices, Hughes informed him of the true nature of the arrest—that he had been indicted by a federal grand jury for distribution of narcotics. After detaining Green in a cell for a brief period, Hughes and DEA agent Collins took him into an interrogation room and showed him the video. Green made a number of verbal and nonverbal "statements" acknowledging his guilt. Thereafter, Hughes advised Green of his *Miranda* rights, which Green waived, although no waiver form was signed.

Hughes asked whether Green recognized anyone on the video, and Green paused for a long time before shaking his head and saying that he was "smoking a lot of weed back then and just didn't remember." Hughes repeated the question after reminding Green of the evidence they had against him and the severity of the charges. Green gave the same response, and Hughes suspended the questioning, moved Green back to a holding cell, and sought the assistance of the prosecutor assigned to the case. The prosecutor arrived at DEA offices approximately 90 minutes later, and Green was again taken to an interview room, accompanied by the two agents and the prosecutor. It was only after all three government officials emphasized the potential criminal penalties he was facing that Green asked, "What do you want to know?" Collins then asked Green if he had ever sold crack cocaine; Green responded that he had done so only once, and gestured toward the video. Green then identified his drug source for the particular transaction.

Hughes candidly admitted that he intended not to give *Miranda* warnings to Green until after he showed Green the videotape. "[I]t was my intention to get Mr. Green back to our office, show him the video, and attempt to gain his cooperation so I could identify the source of supply. . . . And, quite frankly, had I said, you know, I was DEA special agent Hughes and had him out on the scene, it's quite possible he would have said, 'I want to speak to my lawyer right away.'" Asked if there was "a reason why he had not advised Green of his *Miranda* rights at that time of the arrest, Hughes said, "I chose not to. . . ." When

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asked, "Purposely?" Hughes answered "Purposely. . . . The [] plan was not to *Mirandize* Artega Green until he saw the video. So, yes, [not giving the warnings until after the video] was a strategy and a plan that I intended on utilizing upon making that arrest." (*Id.* at 185.)

Use at Trial

At trial the prosecutor elicited from Hughes the reaction Green had to the videotape:

> W]hen the defendant first viewed the video . . . he looked at it, and the defendant's eyes kind of widened. He looked surprised. And the next statement was, can he see it again. And I rewound it. Hit play again. Allowed the defendant to see the video again. . . . At the conclusion of the video, the defendant kind of lowered his head, took like a sigh, a deep breath.

(*Id.*)

The prosecutor argued in her closing argument that Green's reactions clearly demonstrated his admission of guilt:

> [Y]ou heard Agent Hughes' testimony when he sat the defendant down and said I want to show you something. When he played the video . . . of the actual drug transaction, what did the defendant do? Well, Agent Hughes told you. His eyes opened wide as if he were surprised. Might you have been surprised if you were being confronted with crack cocaine you sold two-and-a-half years ago? . . . And what was the defendant's reaction after his eyes opened wide? He asked to see the video again. Now, if you are not the person who was caught on the video, why would you want to see the video again? Why would you look surprised? And more importantly, ladies and gentlemen, why would you do what Agent Hughes told you the defendant did after he saw it the second time? Why would you sit and lower your head (indicating)? Why, if you didn't do it? Who cares?
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> . . .
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> Ask yourself, ladies and gentlemen, if you are in a DEA office and you are being told about all these terrible things that could happen to you and you are being confronted by a federal prosecutor and you have seen this videotape of somebody who looks just like you selling crack cocaine to another individual, but you are innocent, what might you say? Would you shake your head and look surprised . . . or would you say, I didn't do it?

(*Id.* at 185-86.)

The defense did not object to the testimony concerning the defendant's reactions to the videotape or to the prosecutor's argument. As noted, Green was convicted.

The Appeal

Because of the lack of objections at trial, the Third Circuit reviewed the case for plain error and found a constitutional violation that it was unwilling to ignore. The court had little difficulty in concluding that Green was in custody when he was shown the tape, and that showing him the tape constituted interrogation under the Supreme Court's definition in *Rhode Island v. Innis*, 446 U.S. 291 (1980) ("'interrogation' under *Miranda* refers not only to express questioning but also to any words or actions on the part of the police . . . that the police should know are likely to elicit an incriminating response"):

> As even the Government acknowledged during oral argument, Green was in custody for purposes of *Miranda* when he was shown the videotape. And we can hardly imagine a more prototypical example of the "functional equivalent" of interrogation than when a suspect is shown a video in which he is depicted as engaging in a criminal act. In this case, not only was Hughes's action one which he should have known was "reasonably likely to elicit an incriminating response," . . . indeed, as was openly admitted, Hughes showed the video *with the express design* that Green would respond by incriminating himself . . . . [I]t is clear that Green's *Miranda* rights were implicated at the point he was shown the video.

(541 F.3d at 187.)

Because of the way the prosecutor used Hughes's testimony, the court avoided having to decide whether some reactions by a suspect might be nontestimonial:

> [I]n the particular context of this trial, Hughes' testimony about Green's non-verbal reactions upon viewing the video—that Green widened his eyes, lowered his head and sighed—was plainly elicited by the Government with the intent of arguing to the jury that these acts demonstrated Green's acknowledgment of guilt. And as the portions of the trial transcript excerpted above make clear, the AUSA did exactly this in her closing. Under these circumstances, we need not decide whether a defendant's acts in lowering his head and sighing or opening his eyes wide are necessarily testimonial for purposes of the Fifth Amendment in every instance.

(*Id*.)

Thus, the court was confronted with a DEA agent's conduct that was the functional equivalent of interrogation and that clearly violated *Miranda*. The court examined the Supreme Court's decision in *Missouri v. Seibert*, 542 U.S. 600 (2004), and its prior decision in *United States v. Naranjo*, 426 F.3d 221 (3d Cir. 2005), and concluded that the violation of *Miranda* that occurred before Green received his warnings tainted his later statements:

> Under the unique circumstances before us, where everything occurred in one continuous span in the same place and with the same people, we think it unlikely that a reasonable person in Defendant's position would have viewed the pre- and post-*Miranda* questioning as distinct episodes, nor would he have thought that he had a meaningful choice in whether to continue to make incriminating statements. . . . Unlike those of the vast majority of the cases that courts have encountered in the wake of *Seibert*, the record in this case is unambiguous that the initial violation of *Miranda* was not merely hapless or inadvertent, but rather was "an intentional withholding that was part of a larger, nefarious plot" to prevent Defendant from invoking his rights so as to gain his confession.

(541 F.3d at 192.)

The court's bottom line was this: "[T]he admission of Defendant's pre- and post-*Miranda* statements violated due process, and seriously impaired the fairness and integrity of the trial; when a complained-of error is one of such a significant constitutional dimension, the failure to correct it would plainly result in a fundamental miscarriage of justice." (*Id*. at 193.)

Lessons

1. Interrogation for *Miranda* purposes is not limited to asking questions; it includes "any actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response."
2. An incriminating response may include actions by a suspect as well as words. A prosecutor who argues at trial that an action was incriminating will have difficulty arguing the contrary on appeal. The importance of the fact that a suspect is making a testimonial response is that the privilege against self-incrimination has been interpreted by the Supreme Court to protect only against testimonial incrimination. (Schmerber v. California, 384 U.S. 757 (1966).)
3. A deliberate failure to give *Miranda* warnings in order to elicit an incriminating response followed by delivery of warnings to have the response repeated or embellished is likely to be deemed improper. The pre-*Miranda* violation is likely to taint the post-*Miranda* statements.
4. The more egregious the violation of a defendant's Fifth Amendment rights the more likely an appellate court is to engage in serious plain error review. ■

***The court was confronted with the conduct of a DEA agent that clearly violated* Miranda.**