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Illinois Courts and the Law of *Miranda* Waivers: A Policy Worth Preserving

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On May 15, 2009, the Illinois Appellate Court reviewed a murder conviction in the case of *People v. Daniels*.[1] Daniels gave the police a videotaped statement confessing to the murder.[2] But on appeal she claimed that she lacked the mental capacity to understand the *Miranda* warnings[3] she received, and thus could not have knowingly and intelligently waived her right to remain silent.[4] After an extensive review of the testimony of several medical experts, the appellate court concluded that Daniels's documented mental deficiencies resulted in her not subjectively understanding the meaning of the *Miranda* warnings given to her by the police.[5] Finding that the trial court erred by not suppressing the confession, the appellate court reversed her murder conviction.[6]

The idea that a *Miranda* waiver can be invalid based solely on the subjective inability of a suspect to understand the warnings—without any showing of objectively improper police conduct—has been solidly established in Illinois law for two decades.[7] The Illinois Supreme Court's two most important decisions in this area are *People v. Bernasco*[8] and *People v. Braggs*.[9]

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1. 908 N.E.2d 1104 (Ill. App. Ct. 2009).
2. *Id.* at 1105.
3. Miranda v. Arizona, 384 U.S. 436 (1966).
4. *Daniels*, 908 N.E.2d at 1128.
5. *Id.* at 1130.
6. *Id.* at 1139.
7. *See infra* notes 8-9.
8. 562 N.E.2d 958 (Ill. 1990).
9. 810 N.E.2d 472 (Ill. 2003).

The United States Supreme Court, however, has never explicitly held that a *Miranda* waiver can be invalid without some showing of police misconduct. In October 2009 the Court refused to review an en banc decision of the United States Court of Appeals for the Sixth Circuit that rejected the Illinois position by a vote of 9-4.[10]

But if and when the Roberts Court reviews this issue, there is reason to believe that it will agree with the Sixth Circuit's position—i.e., rejection of Illinois' pro-defense *Bernasco-Braggs* rule—and hold that a *Miranda* waiver cannot be found invalid without some objective police misconduct. In other words, the Court may rule that a showing of a suspect's inability to subjectively understand *Miranda* warnings per se is not enough to establish an invalid waiver.

One purpose of this essay is to alert Illinois courts and attorneys to the possibility that the U.S. Supreme Court may soon hold that Illinois' *Bernasco-Braggs* rule is not constitutionally required. But another purpose is to remind those in the state criminal justice system of a basic principle of federalism: the fact that the U.S. Supreme Court may hold that a rule is not constitutionally *required* does not mean that a state is not *permitted* to continue to use the rule if it so wishes.[11] In areas such as search and seizure, Illinois has unwisely abandoned doctrines that are constitutionally *permitted* whenever the U.S. Supreme Court has held a particular doctrine is not constitutionally *mandated.* This essay reminds Illinois courts not only that principles of federalism give them the power to continue to use doctrines that the U.S. Supreme Court may find are not constitutionally mandatory, but also that Illinois courts have already done so in interpreting *Miranda.*

This essay is divided into five parts. Part I sets out the various tests the U.S. Supreme Court has established for the waiver of different constitutional rights. It will show that there is no "one-size-fits-all" test for a constitutional waiver. It will particularly focus on the significantly different standards for waiver of the Sixth Amendment right to counsel, waiver of the Fifth Amendment right against self-incrimination protected by *Miranda*, and waiver of the Fourth Amendment right against unreasonable searches found in "consent" cases.

Part II will then show how in 1986 the U.S. Supreme Court created confusion by suggesting—contrary to what it had held in *Miranda v. Arizona*—that before a suspect could challenge his *Miranda* waiver, he must as

10. Garner v. Mitchell, 557 F.3d 257 (6th Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 125 (2009).

11. For a case distinguishing between what the Constitution "permits" as opposed to what the Constitution "mandates," see *United States v. Berry*, 565 F.3d 385, 391 (7th Cir. 2009).

a threshold matter show some kind of police misconduct. It then discusses the new Sixth Circuit case that sharply divided an en banc court.

Part III illustrates the conflicting positions taken by federal and state courts within Illinois. The Illinois state courts, through the *Bernasco-Braggs* line of cases, hold that a suspect's subjective failure to understand *Miranda* warnings standing alone will invalidate a *Miranda* waiver. The Seventh Circuit, on the other hand, agrees with the Sixth Circuit that some police misconduct is a *sine qua non* for challenging the invalidity of a *Miranda* waiver.[12]

Part IV discusses why the Roberts Court may very well reject the more stringent *Bernasco-Braggs* standard for waiver, if and when it faces the issue. This part focuses on a very recent U.S. Supreme Court case, *Kansas v. Ventris*,[13] in which the Court suggests that it sees *Miranda* as a prophylactic rule, rather than a constitutional rule, which could mean that it will not impose the more stringent version of the "voluntary, knowing, and intelligent" standard used for courtroom waivers.

The essay concludes in Part V by contending that, regardless of what the U.S. Supreme Court may hold in the future, Illinois courts should preserve the *Bernasco-Braggs* line of cases for two reasons. First, *Bernasco-Braggs* is truer to the original conception of custodial interrogation set out by the Warren Court in *Miranda v. Arizona*. Second, *Bernasco-Braggs* recognizes that even without any police misconduct, a *Miranda* waiver should be invalid if the suspect is subjectively incapable of understanding what it entails.

I. DIFFERENT WAIVERS, DIFFERENT STANDARDS

The traditional standard for the waiver of a constitutional right was articulated by the U.S. Supreme Court in *Johnson v. Zerbst* in 1938: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[14] It went on to hold that "'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights."[15]

The Court asserted this in the context of the waiver of the right to counsel in a courtroom setting. Yet in 1965, Yale Kamisar contrasted the law's interest in enforcing rights in the courtroom with its lack of interest in enforcing rights in other venues. Comparing the police station and the courtroom with the "gatehouse" and the "mansion" respectively, he wrote:

12. *See* Rice v. Cooper, 148 F.3d 747 (7th Cir. 1998).
13. 129 S. Ct. 1841 (2009).
14. 304 U.S. 458, 464 (1938).
15. *Id.* (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937)).

> The courtroom is a splendid place where defense attorneys bellow and strut and prosecuting attorneys are hemmed in at many turns. But what happens before an accused reaches the safety and enjoys the comfort of this veritable mansion? Ah, there's the rub. Typically he must first pass through a much less pretentious edifice, a police station with bare back rooms and locked doors.
>
> In this "gatehouse" of American criminal procedure—through which most defendants journey and beyond which many never get—the enemy of the state is a depersonalized "subject" to be "sized up" and subjected to "interrogation tactics most appropriate for the occasion"; he is "game" to be stalked and cornered.[16]

One year after these words were written, the U.S. Supreme Court decided *Miranda v. Arizona*.[17] Here for the first time the Court actually brought the protections of the courtroom into the police interrogation room.[18] The Court held that the police could not conduct any custodial interrogation without first warning the suspect of his right to silence and right to an attorney; only if the suspect waived these rights could the police interrogate the suspect.[19] The Court explicitly cited *Johnson v. Zerbst* in asserting that any such waiver must be made "voluntarily, knowingly[,] and intelligently."[20] In a later case, the Court emphasized that:

> The inquiry has two distinct dimensions. First, the relinquishment of the [*Miranda*] right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than . . . coercion . . . . Second, the waiver must have been made with a full awareness of both the na-

16. Yale Kamisar, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, *in* CRIMINAL JUSTICE IN OUR TIME 19-20 (A. E. Dick Howard ed., 1965) (footnotes omitted).

17. 384 U.S. 436 (1966).

18. *Id.* at 461.

19. *Id.* at 444-45, 471.

20. *Id.* at 444-45 ("The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly[,] and intelligently."). Later in the opinion, after stating that the prosecution had a "heavy burden" in proving that "the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel," the Court noted that it had "always set high standards of proof for the waiver of constitutional rights, and [they] reassert these standards as applied to in-custody interrogation." *Id.* at 475 (citing Johnson v. Zerbst, 304 U.S. 458 (1936)).

> ture of the right being abandoned and the consequences of the decision to abandon it.[21]

Thus, in *Miranda* the defense bar convinced the Supreme Court to apply the same strict waiver standard in the "gatehouse" that it already used in the "mansion."

But defense lawyers did not stop here. Seven years later they tried to further push the envelope by attempting to convince the Court to move the strict waiver standard out of the police station and to literally "take it to the streets."

Schneckloth v. Bustamonte[22] concerned whether an occupant of a car properly consented to a police request to search. The defense argued—and the U.S. Court of Appeals for the Ninth Circuit had agreed—that a consent to search was tantamount to a waiver of Fourth Amendment rights, and thus the Court should apply the traditional constitutional waiver standard: voluntary, knowing, and intelligent.[23] Therefore, a consent to search could not be valid unless the police explained to the person that he had a right to refuse the request.[24]

The Supreme Court disagreed. It held that a consent to search need only be "voluntary," i.e., obtained without government coercion.[25] It was not necessary that the person be informed—or actually know—that he had the right to refuse.[26] The Court conceded that the "voluntary, knowing, and intelligent" standard was applicable in more formal settings, such as courtrooms or police interrogation rooms.[27] But it asserted that because consent to search is often given "under informal and unstructured conditions,"[28] it would not hold that proof of knowledge of the right to refuse was an absolute prerequisite for a proper consent to search.

In explaining why giving up trial rights demanded a higher standard of waiver than consents to search, *Schneckloth* noted that "[t]here is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment."[29] The Court stated that "[a]lmost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[30] Thus, this

21. Moran v. Burbine, 475 U.S. 412, 421 (1986) (citation omitted).
22. 412 U.S. 218 (1973).
23. *Id.* at 222-23.
24. *Id.* at 223.
25. *Id.* at 248-49.
26. *Id.* at 232-33.
27. *See Schneckloth*, 412 U.S. at 237-40.
28. *Id.* at 232.
29. *Id.* at 241.
30. *Id.* at 237.

higher waiver standard applies to trial situations,[31] "trial-type" situations,[32] and guilty pleas (because they involve waiver of trial rights which preclude a trial).[33]

The Supreme Court expanded on this in *Illinois v. Rodriguez*, a case involving the issue of whether a consensual search had to be based on "actual authority" or whether "apparent authority" could suffice.[34] In holding that "apparent authority" was sufficient, the Court again distinguished between so-called "trial rights" and rights under the Fourth Amendment.[35] Since the waiver of a trial right had to be "knowing and intelligent," as well as voluntary, *Rodriguez* stated that it would be improper for a trial judge to find a waiver merely because he "reasonably believed" the defendant had waived the right; that is, there cannot be a waiver unless that defendant actually had a full awareness of the nature of the right.[36] On the other hand, "apparent authority" was sufficient for a valid consent to search since the Fourth Amendment does not mandate that police have to be correct; they merely have to be *reasonable* in their belief that the person is properly consenting.[37]

After *Schneckloth* in 1973, it appeared that the Court had firmly distinguished between "voluntary, knowing, and intelligent" as the standard for both courtroom and *Miranda* waivers, with merely a "voluntary" standard being used for consent to searches under the Fourth Amendment. This was true until the Rehnquist Court returned to the issue in 1986.

II. DID THE REHNQUIST COURT CHANGE THE *MIRANDA* WAIVER STANDARD?

In 1986, in *Colorado v. Connelly*,[38] the Court held that a *Miranda* waiver could be found "involuntary" only if there was evidence of coercive state action, i.e., some "police overreaching."[39] Tellingly, the Court said, "*Miranda* protects defendants [only] *against government coercion* leading them to surrender rights protected by the Fifth Amendment; *it goes no further than that*."[40]

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31. *Id.* at 236-38.
32. *Schneckloth*, 412 U.S. at 236-38.
33. *Id.*
34. 497 U.S. 177 (1990).
35. *Id.* at 183.
36. *Id.*
37. *Id.* at 188-89.
38. 479 U.S. 157 (1986).
39. *Id.* at 170.
40. *Id.* (emphasis added).

In his dissent, Justice Brennan emphasized that Mr. Connelly had challenged only the "voluntary" prong of his *Miranda* waiver; he did not challenge either the "knowing" or "intelligent" prongs.[41] Justice Brennan noted that the need to prove that a *Miranda* waiver was "voluntary" was totally "independent" from whether the waiver was "intelligent and knowing."[42] Thus, Justice Brennan insisted, the majority's holding that evidence of "police overreaching" was a necessity should be confined only to the "voluntary" prong.[43]

Despite Justice Brennan's dissent, *Connelly* planted the idea that the entire *Miranda* waiver—and not just the "involuntary" prong—could not be challenged unless there was actual government coercion.

This confusion has not been resolved. In a 2009 en banc decision, the U.S. Court of Appeals for the Sixth Circuit, in *Garner v. Mitchell*,[44] squarely faced the issue of whether a suspect could be found not to have "intelligently and knowingly" waived his *Miranda* rights, despite the absence of any finding of police misbehavior. In a 9-4 decision, the Sixth Circuit held that some police misbehavior was a *sine qua non* not only for a finding of "involuntariness," but also for a finding that the suspect did not "intelligently and knowingly" waive his *Miranda* rights.[45] In other words, the court held that the "knowing and intelligent" prong of the *Miranda* waiver could not be based on a purely subjective examination of the suspect.

In reaching this decision, the majority assumed arguendo that Garner did not subjectively understand the *Miranda* warnings prior to his waiver. But the court did not find this fact to be dispositive. The key fact, the court noted, was that "the officers questioning Garner had no way to discern the misunderstanding in Garner's mind. This is of primary significance given the original purpose underlying the *Miranda* decision, which was to 'reduce the likelihood that the suspects would fall victim to constitutionally impermissible practices of police interrogation.'"[46] The court held that all three factors—voluntary, knowing, and intelligent—had to be examined from the totality of the circumstances and that "[t]he underlying *police-regulatory*

41. *See id.* at 188 (Brennan, J., dissenting).

42. *Id.* Indeed, the dissent suggested that on remand the Colorado state courts were free to consider the separate issue of whether the waiver was intelligent and knowing. *Id.* at 184 n.5.

43. *Connelly*, 479 U.S. at 187-88.

44. Garner v. Mitchell, 557 F.3d 257 (6th Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 125 (2009).

45. *Id.*

46. *Id.* at 262 (quoting New York v. Quarles, 467 U.S. 649, 656 (1984)).

purpose of *Miranda* compels that these circumstances be examined . . . *primarily from the perspective of the police.*"[47]

The dissent sharply disagreed with this analysis. It insisted that the majority's position conflicted with "the Supreme Court's repeated pronouncements that the proper inquiry is whether the *defendant* actually had the capability to make a knowing and intelligent waiver without any reference to *police* conduct."[48] If, as the majority claims, the validity of a *Miranda* waiver should depend only on police conduct or knowledge, then they have read the "knowing and intelligent" requirement completely out of the Supreme Court's *Miranda* jurisprudence. It distinguished *Connelly* by emphasizing that, although that case found coercive police activity to be a necessary part of a finding of involuntariness, it never said that such activity was a *sine qua non* for a finding that a *Miranda* waiver was not knowing or intelligent.[49]

The majority and dissent in *Garner* are thus divided by a very basic distinction: Should the focus of *Miranda* be the prevention of coercive police behavior? Or should the focus be on guaranteeing that the suspect actually understands his rights?

Interestingly, courts in Illinois reflect the same division.

III. THE RULE IN ILLINOIS? IT DEPENDS ON THE FORUM

Consider the differing views held by state and federal courts in Illinois.

In 1990, four years after the U.S. Supreme Court decided *Colorado v. Connelly*, the Illinois Supreme Court faced a *Miranda* waiver issue in *People v. Bernasco*.[50] The issue was whether the lack of coercive state action per se precluded a finding that a *Miranda* waiver was improper.[51] The state read *Connelly* as holding that proof of coercive police action was necessary to challenge *any* of the requirements of waiver: voluntary, knowing, or intelligent.[52] The defense, on the other hand, contended that *Connelly*'s requirement of coercive state action applied *only* to the voluntariness issue, but was not necessary for a finding that a waiver was not knowing and intelligent.[53] In other words, the defense claimed that a *Miranda* waiver could be found not to be "knowing and intelligent" based solely on the subjective characteristics of the suspect, even if they were unknown to the police.

47. *Id.* at 263 (emphasis added).
48. *Id.* at 275 (Moore, J., dissenting) (citation omitted).
49. *Garner*, 557 F.3d at 275.
50. 562 N.E.2d 958 (Ill. 1990).
51. *Id.* at 959.
52. *Id.*
53. *See id.*

The Illinois Supreme Court agreed with the defense. Citing the U.S. Supreme Court's decision in *Moran v. Burbine*,[54] the court held that a *Miranda* waiver had "two distinct dimensions": "(1) whether there was a free, uncoerced choice and (2) whether there was awareness of the right and the consequences of abandoning it."[55] Thus, a valid *Miranda* waiver has two separate components: "*both* an uncoerced choice *and* the requisite level of comprehension."[56] And in order for a waiver to be "knowing and intelligent," a suspect must be subjectively aware both of his right to have an attorney with him during any interrogation, and the fact that any statement he makes may be used against him in a criminal proceeding.[57] The *Bernasco* court cited a number of Illinois cases that had previously agreed with this interpretation of *Miranda* both before and after the *Connelly* decision in 1986.[58]

In 2004, the Illinois Supreme Court, in the course of finding that a mentally retarded woman had not knowingly and intelligently waived her *Miranda* rights, gave a ringing endorsement to its decision in *Bernasco*.[59] And, as discussed above, Illinois courts have most recently applied *Bernasco-Braggs* to reverse a murder conviction in May 2009 in *People v. Daniels*.

But contrast *Bernasco* with the Seventh Circuit's position. In *Rice v. Cooper*,[60] the court faced the issue of whether a suspect's mental condition could per se result in a finding that a *Miranda* waiver was not knowing and intelligent. The court began by acknowledging *Connelly*'s holding that mental derangement standing alone could never result in an involuntary confession. From this it deduced that "[t]he relevant constitutional principles are aimed not at protecting people from themselves but at curbing abusive practices by public officers."[61] It then noted "[o]n this analysis, the knowledge of the police is vital. If they have no reason . . . to think that the suspect doesn't understand [the *Miranda* warnings], there is nothing that

54. 475 U.S. 412 (1986).

55. *Bernasco*, 562 N.E.2d at 960.

56. *Id.* (quoting *Moran*, 475 U.S. at 421) (emphasis added by the Illinois Supreme Court).

57. *Id.* at 962-63.

58. *Id.* at 964-65 (citing People v. Evans, 530 N.E.2d 1360 (Ill. 1988); People v. Rogers, 528 N.E.2d 667 (Ill. 1988); People v. St. Pierre, 522 N.E.2d 61 (Ill. 1988); People v. Thompkins, 521 N.E.2d 38 (Ill. 1988); People v. Murphy, 381 N.E.2d 677 (Ill. 1978); People v. Medina, 375 N.E.2d 78 (Ill. 1978); People v. Turner, 306 N.E.2d 27 (Ill. 1973)).

59. People v. Braggs, 810 N.E.2d 472 (Ill. 2004); *see also In re* W.C., 657 N.E.2d 908 (Ill. 1995); *In re* M.W., 731 N.E.2d 358 (Ill. App. Ct. 2000).

60. 148 F.3d 747 (7th Cir. 1998).

61. *Id.* at 750.

smacks of abusive behavior. . . . [T]he question is . . . whether the police believed [the suspect] understood their explanation of those rights."[62]

The court conceded that this emphasis on police behavior was at odds with the conventional approach to *Miranda* waivers, which focused subjectively on whether the suspect made a knowing and intelligent waiver.[63] But the court stated that it did not find it to be a satisfactory distinction that an involuntary confession or waiver, but not an unknowing waiver, required coercive police activity. As the *Rice* court pointedly asked,

> If Connelly's waiver of his Fifth Amendment right not to confess was effective even though the confession was induced by madness rather than by remorse or calculation, why should a waiver of *Miranda* rights be ineffective if prompted solely by the defendant's mental condition rather by anything the police did?[64]

Similar to the Sixth Circuit's division between the majority and dissent in *Garner v. Mitchell*, the division between Illinois state courts and the Seventh Circuit involves whether the *Miranda* waiver should be evaluated from the objective view of police behavior or the subjective view of the suspect's understanding.

IV. THE FUTURE OF *MIRANDA* WAIVERS: WHY THE ROBERTS COURT MAY REJECT ILLINOIS' *BERNASCO-BRAGGS* POSITION

The Sixth Circuit's fractured en banc decision in *Garner v. Mitchell* may indicate that the proper standard for waiver of *Miranda* rights is an issue the U.S. Supreme Court will re-visit. And, as the *Garner* majority illustrates, there is a possibility that the Court may retreat from the "voluntary, knowing, and intelligent" standard for a *Miranda* waiver.

When the Warren Court decided *Miranda* in 1966, it seemed clear that it viewed the decision as constitutionally predicated on the Self-Incrimination Clause of the Fifth Amendment. And by applying the traditional "voluntary, knowing, and intelligent" standard for waiver of constitutional rights to the waiver issue, it certainly indicated that a violation of *Miranda* was a clear violation of a constitutional right.

Yet a series of cases decided by the Burger and Rehnquist Courts undermined the constitutional basis of *Miranda* by calling it merely a "pro-

62. *Id.* at 750-51.

63. *Id.*

64. *Id.* at 751. The Sixth Circuit relied heavily on the Seventh Circuit's opinion in *Rice* when deciding *Garner v. Mitchell*, 557 F.3d 257 (6th Cir. 2009) (en banc).

phylactic rule."[65] The Burger and Rehnquist Courts refused to hold that every *Miranda* violation was necessarily an *actual* constitutional violation; according to this view, not all statements obtained in violation of *Miranda* were *actually* "compelled" pursuant to the Self-Incrimination Clause.

James Tomkovicz has commented on this lack of fit between the *Miranda* rules and a Fifth Amendment violation.[66] He has characterized the *Miranda* regime as a system of lawyer-assisted interrogation whose purpose it is to help prevent the *possibility* of compulsion.[67] Thus, a suspect's refusing assistance under *Miranda* is not the same as waiving the constitutional right not to be compelled under the Fifth Amendment; rather, refusing assistance is merely deciding not to accept a court-created *bonus* that might help prevent a suspect from being *actually* compelled. Consequently, Tomkovicz says,

> [T]he *Zerbst* standards and "waiver" terminology, which are appropriate for decisions to *relinquish* other constitutional rights . . . should be expelled from *Miranda* law. The [F]ifth [A]mendment choice should instead be characterized as a decision not to take advantage of the entitlement "to be free from police interrogations in the absence of counsel."[68]

Yet despite this view that *Miranda* is merely prophylactic, it is certainly possible to characterize a *Miranda* violation as an actual Fifth Amendment violation. Justice O'Connor provided just such a rationale in her concurring and dissenting opinion in *New York v. Quarles*,[69] the case that established the "public safety" exception to *Miranda*. There she construed *Miranda* as creating a system in which any statement obtained in violation would be "presumed compelled" and therefore actually obtained in violation of the Self-Incrimination Clause.[70] In other words, in Justice O'Connor's view, all custodial interrogations conducted without following the *Miranda* rules resulted in presumptively compelled statements that explicitly violated the Self-Incrimination Clause. Thus, Justice O'Connor re-

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65. *See, e.g.*, Oregon v. Elstad, 470 U.S. 298 (1985); New York v. Quarles, 467 U.S. 649 (1984); Michigan v. Tucker, 417 U.S. 433 (1974).

66. James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975 (1986).

67. *See id.* at 1049-50.

68. *Id.* at 1050-51 (quoting Henderson v. Florida, 473 U.S. 916, 917 (1985) (Marshall, J., dissenting)) (emphasis added).

69. 467 U.S. 649, 660-75 (1984) (O'Connor, J., concurring in part and dissenting in part).

70. *Id.* at 664.

jected the legal or logical possibility of *any* exception to *Miranda*—"public safety" or otherwise.[71]

The constitutional status of *Miranda v. Arizona* was supposed to have been finally settled with the Court's decision in 2000 in *Dickerson v. United States*.[72] The bottom-line was that the *Dickerson* majority held both that *Miranda* was a "constitutional rule" that Congress could not legislatively supersede,[73] and that stare decisis compelled the Court to preserve the *Miranda* decision. Yet nowhere in the majority opinion is there an explicit explanation—something similar to Justice O'Connor's "presumed compelled" theory—as to *exactly why* a *Miranda* violation violates the Self-Incrimination Clause.[74]

Moreover, hopes that *Dickerson* had finally put *Miranda* on a firm constitutional footing were quickly dashed. The Court immediately went back to its practice of referring to *Miranda* as merely establishing a "prophylactic rule."[75]

In this light, consider the Supreme Court's recent decision in *Kansas v. Ventris*.[76] This case concerned whether statements obtained by the police in violation of the Sixth Amendment right to counsel (and thus excluded from the prosecution's case-in-chief pursuant to *Massiah v. United States*[77]) could nevertheless be used for impeachment.[78] *Ventris* held that the government would be allowed to impeach the defendant with these statements.[79]

In explaining why, Justice Scalia's opinion for the Court differentiated between an actual constitutional violation and a mere violation of a constitutionally-related prophylactic rule. For example, his opinion notes, the

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71. Yet in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), Justice O'Connor did recognize a "booking question" exception to *Miranda* where the police questions were designed solely to secure biographical data needed for booking purposes and not intended to elicit incriminating statements, *see id.* at 600-02.

72. 530 U.S. 428 (2000).

73. *Id.* at 437 (holding that Congress did not have the authority to evade the Supreme Court's decision in *Miranda*, and thus voided 18 U.S.C. § 3501, which stated that a *Miranda* violation would not exclude an otherwise voluntary confession from being admissible in the prosecution's case-in-chief at a federal criminal trial).

74. Indeed, Justice Scalia's dissent in *Dickerson* bluntly states that the majority cannot say that a *Miranda* violation is always a constitutional violation "because a majority of the Court does not believe it." *Id.* at 446 (Scalia, J., dissenting).

75. *See* Kansas v. Ventris, 129 S. Ct. 1841 (2009); United States v. Patane, 542 U.S. 630 (2004); Chavez v. Martinez, 538 U.S. 760 (2003).

76. 129 S. Ct. 1841 (2009).

77. 377 U.S. 201 (1964).

78. *Massiah* held that once a defendant's Sixth Amendment right to counsel attached, the government was prohibited from "deliberately eliciting" incriminating statements from the defendant in the absence of his attorney. *Id.* at 206.

79. *Ventris*, 129 S. Ct. at 1847.

Fifth Amendment guarantees that no person shall be compelled to be a witness against himself at a criminal trial.[80] If the prosecution introduces what he characterizes as a "truly coerced confession"[81] in any way at trial—either in its case-in-chief or its impeachment of the defendant—this results in an actual Fifth Amendment violation.

He distinguishes this from the Fourth Amendment exclusionary rule. Exclusion of unconstitutionally seized evidence is not part of the actual guarantee of the Fourth Amendment; exclusion, rather, is a sanction that is used only when it will effectively deter improper police behavior.[82] Thus, such evidence may be used for impeachment without violating the Fourth Amendment.[83]

He also distinguishes an actual constitutional violation from a violation under the rule of the subsequently-overruled case of *Michigan v. Jackson*[84]—what he characterizes as a "Sixth Amendment prophylactic rule[] forbidding certain pretrial police conduct."[85] Because the *Jackson* rule is merely prophylactic, the otherwise-suppressed statements may be used to impeach the defendant at trial.[86]

Finally, he characterizes statements taken in violation of *Miranda* as not being "truly coerced," but rather suppressed under a Fifth Amendment "prophylactic rule[] forbidding certain pretrial police conduct."[87] Likewise, because the *Miranda* rule is merely prophylactic, the otherwise-suppressed statements may be used to impeach the defendant at trial.[88]

Turning to the issue in the case at bar, *Ventris* held that the lesson of the above three situations is that mere "tainted evidence—evidence whose very introduction does not constitute the constitutional violation, but whose obtaining was constitutionally invalid—is admissible for impeachment."[89] Since courts have a strong interest in preventing perjury, "the game of excluding tainted evidence for impeachment purposes is not worth the candle."[90]

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80. *Id.* at 1845.

81. *Id.*

82. *See* United States v. Leon, 468 U.S. 897, 907-08 n.6 (explaining that the exclusionary rule must "pay its way" to be justified in any particular case).

83. *Ventris*, 129 S. Ct. at 1845 (citing Walder v. United States, 347 U.S. 62, 65 (1954)).

84. 475 U.S. 625 (1986). Within weeks of the *Ventris* decision, the Supreme Court overruled *Michigan v. Jackson*. *See* Montejo v. Louisiana, 129 S. Ct. 2079 (2009).

85. *Ventris*, 129 S. Ct. at 1845.

86. Michigan v. Harvey, 494 U.S. 344 (1990).

87. *Ventris*, 129 S. Ct. at 1845.

88. Harris v. New York, 401 U.S. 222 (1971).

89. *Ventris*, 129 S. Ct. at 1847.

90. *Id.* at 1846.

Ventris may offer a clue as to what the Supreme Court would do if it re-examined the issue of the proper standard of waiver for *Miranda* rights. Note how the Court has grouped *Miranda* with the Fourth Amendment exclusionary rule and with the subsequently overruled case of *Michigan v. Jackson.* Also note how during the past decade the Court has grown increasingly hostile towards all three of these doctrines, all with their roots firmly in the pro-defense Warren Court of the 1960s.[91]

As for the Fourth Amendment exclusionary rule, the Burger and Rehnquist Courts have limited it in numerous ways during the last forty years.[92] Furthermore, the Roberts Court has recently decided two cases which suggest that the Court may be close to eliminating the rule entirely.[93] And as to *Michigan v. Jackson*, the Supreme Court explicitly overruled it four weeks after the *Ventris* decision.[94]

As for *Miranda,* years of decisions from the Burger and Rehnquist Courts have limited its reach in many ways.[95] It is true that in 2000, the *Dickerson* Court found *Miranda* to be constitutionally predicated and refused to overrule it.[96] Yet in a trilogy of cases since *Dickerson*, the Court has restricted *Miranda*'s reach even further.[97] If a case such as *Garner v. Mitchell* were reviewed by the current Supreme Court, it would be very possible that the five generally pro-prosecution justices[98] would adopt the Sixth Circuit's view that whether a suspect has "knowingly and intelligently" waived his rights should be examined only from the perspective of what the police could have reasonably observed about the suspect. Since the Court has for years referred to *Miranda* as merely a prophylactic rule, they

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91. Both *Miranda v. Arizona* and *Mapp v. Ohio* were decided by the Warren Court. Although *Michigan v. Jackson* was a Burger Court case, three of the five justices forming the majority in *Jackson* had also served on the Warren Court.

92. For a discussion of the cases that have limited the Fourth Amendment exclusionary rule, see *Herring v. United States*, 129 S. Ct. 695, 699-703 (2009).

93. *Id.*; *see also* Hudson v. Michigan, 547 U.S. 586 (2006).

94. Michigan v. Jackson, 475 U.S. 625 (1986), *overruled by* Montejo v. Louisiana, 129 S. Ct. 2079 (2009).

95. *See* Dickerson v. United States, 530 U.S. 428, 437-42 (2000) (providing examples of pro-prosecution *Miranda* decisions).

96. *Id.*

97. United States v. Patane, 542 U.S. 630 (2004) (finding that *Miranda* is a prophylactic rule and that the "fruit of the poisonous tree" exception is inapplicable); Missouri v. Seibert, 542 U.S. 600 (2004) (holding that *Dickerson* does not invalidate *Oregon v. Elstad*); Chavez v. Martinez, 538 U.S. 760 (2003) (holding that no *Miranda* violation can take place in the interrogation room, that *Miranda* is merely a rule of evidence exclusion, and describing *Miranda* as a prophylactic rule).

98. These justices being Chief Justice Roberts, and Justices Scalia, Alito, Thomas, and Kennedy. Out of twenty-three cases that were decided 5-4 during the 2008 term, these five justices comprised the majority in eleven of the twenty-three cases.

could hold that the more stringent "voluntary, knowing, and intelligent" standard for constitutional trial rights is inapplicable in this setting.

The U.S. Supreme Court has overruled *Michigan v. Jackson* and may very well be ready to jettison the Fourth Amendment exclusionary rule. Thus, it would not be a surprise to see the Roberts Court make it easier for the prosecution to prove that a suspect properly waived his *Miranda* rights by focusing on the objective police conduct rather than the suspect's subjective understanding.

If this occurs, what effect will it have in Illinois?

V. THE FUTURE OF *MIRANDA* WAIVERS IN ILLINOIS COURTS

As previously noted, the Illinois Supreme Court has mandated a strict standard for *Miranda* waivers. According to the *Bernasco-Braggs* line of cases, a *Miranda* waiver can be found not to be "knowing and intelligent" based solely on the subjective characteristics of the suspect—whether or not they are observable by the police.

And obviously, regardless of what the U.S. Supreme Court may decide, principles of federalism allow the Illinois Supreme Court to keep the *Bernasco-Braggs* standard by finding "adequate and independent" state grounds for the rule.[99]

The problem is that the Illinois Supreme Court has rarely been so inclined. It will usually abandon any state doctrine once the U.S. Supreme Court has held otherwise. This is particularly true in the area of search and seizure law;[100] however, in that area the court has justified its position by claiming that "limited lockstep" on search and seizure issues is what the framers of the Illinois Constitution of 1970 intended Illinois courts to follow.[101]

Yet defense attorneys may have a better chance of getting the Illinois Supreme Court to preserve *Bernasco-Braggs* in the face of contrary U.S. Supreme Court authority. The Illinois Supreme Court has at least once rejected a U.S. Supreme Court ruling in the area of custodial interrogation. In 1994, the Illinois Supreme Court's decision in *People v. McCauley*[102] refused to follow the U.S. Supreme Court's pro-prosecution ruling in *Moran v. Burbine*.[103] Thus, Illinois does not seem to follow the U.S. Supreme Court in lockstep on *Miranda* issues.

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99. Michigan v. Long, 463 U.S. 1032 (1983).

100. *See* Timothy P. O'Neill, *"Stop Me Before I Get Reversed Again": The Failure of Illinois Appellate Courts to Protect Their Criminal Decisions from United States Supreme Court Review*, 36 LOY. U. CHI. L.J. 893, 898 (2005).

101. *Id.* at 913-19 (discussing "limited lockstep" doctrine).

102. 645 N.E.2d 923 (Ill. 1994).

103. 475 U.S. 412 (1986).

It is important for Illinois courts and attorneys to prepare for the possibility that the U.S. Supreme Court might adopt a much more prosecution-friendly version of the *Miranda* waiver. But it is equally important that Illinois courts and attorneys remember that such a decision need not have any constitutional effect on Illinois courts. Illinois has followed the *Bernasco-Braggs* line of cases for the last two decades. In doing so, it explicitly rejected the invitation in *Colorado v. Connelly* to adopt a more crabbed, pro-prosecution version of the *Miranda* waiver. Whatever the U.S. Supreme Court may do in the future, the Illinois Supreme Court should find that *Bernasco-Braggs* is supported by an independent and adequate basis in Illinois constitutional law.