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Criminal Procedure - Waiver of Right to Counsel

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INTRODUCTION

The United States Supreme Court’s landmark decision Miranda v. Arizona spawned countless cases interpreting the Court’s construction of standards for the admissibility of criminal defendants’ statements made during custodial interrogations. While earlier cases addressed the issue of waiver of right to counsel in a trial context, Miranda represented the Court’s first consideration of waiver of right to counsel in a pretrial context. Chief Justice Warren, writing for a majority of five, explained that the Court intended “to further explore some facets of the problem, thus exposed, of applying the privilege against self-incrimination to in-custody interrogations, and to give concrete constitutional guidelines for law enforcement agencies and courts to follow.” The continuing efforts of both bar and bench to extract concrete standards from Miranda indicate Warren may have pursued an elusive dream. Questions of what constitutes custodial interrogation, what form the Miranda warnings must take and how an accused may waive his rights presently plague state and federal courts. Prior to North Carolina v. Butler,4 the North Carolina Supreme Court had prescribed a rigid rule for waiver based on a close and literal reading of Miranda: an explicit statement of waiver, either oral or written, was necessary to support a finding that defendant effectively waived his right to counsel.5 The United States Supreme Court rejected that rigid rule and adopted a more flexible approach which

3. 384 U.S. at 441-42.
takes into account the realities of criminal investigations. Now, in at least some cases, waiver may be inferred from the defendant's words and actions.

THE CASE

The victim of a Wayne County, North Carolina, service station robbery positively identified defendant as his assailant within a week of the crime. Defendant was arrested approximately four months later on a fugitive warrant in New York City and charged with kidnapping, armed robbery and felonious assault. The arresting officer, a Federal Bureau of Investigation agent, fully advised defendant of his constitutional rights both at the arrest and prior to interrogation at the FBI office. Defendant also read an "Advice of Rights" form. When asked if he understood his rights, defendant replied that he did; however, he refused to sign the form and stated, "I will talk to you but I'm not signing any form." Defendant then made an inculpatory statement to the agent, including an admission that he was at the scene of the crime at the time of the alleged offenses (although he denied actual participation in the armed robbery and claimed a companion shot the station attendant).

The trial court judge conducted a voir dire examination to determine the admissibility of the FBI agent's testimony, made a finding of effective waiver of Miranda rights and concluded as a matter of law that defendant knowingly waived his right to counsel. The agent's testimony was admitted as competent evidence. Defendant was convicted and given two life sentences (one for kidnapping, one for armed robbery) and five years for the felonious assault.

The North Carolina Supreme Court reversed the convictions on the ground that the trial court erroneously admitted into evidence defendant's incriminating statement which was obtained without express waiver of right to counsel. The Court noted that defendant refused to waive his right to counsel in writing, and the

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8. Id. at 252-53, 244 S.E.2d at 412.
9. Id. at 253, 244 S.E.2d at 412.
10. Id.
11. Id. at 255, 244 S.E.2d at 413.
evidence failed to show a specific oral waiver. "Failure to request counsel is not synonymous with waiver. Nor is silence."\(^{12}\) Because of a reasonable possibility that the statement contributed to defendant’s conviction, the Court ordered a new trial.

The United States Supreme Court rejected the North Carolina Court's insistence that an express statement was indispensable to a finding of waiver.\(^{13}\) Mr. Justice Stewart, writing for the majority, explained that while \textit{Miranda} held that an express statement could constitute waiver, it did not hold that such an express statement was indispensable to a finding of waiver. "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the \textit{Miranda} case."\(^{14}\) Although—as a general rule—the law makes a presumption against waiver of fundamental constitutional rights such as the fifth amendment right to freedom from self-incrimination which \textit{Miranda} sought to protect,\(^{15}\) in some cases the prosecution could overcome this presumption by showing that defendant’s words and actions implied a waiver. As stated by Mr. Justice Stewart, "a court may find an intelligent and understanding rejection of counsel in situations where the defendant did not expressly state as much."\(^{16}\) The judgment of the North Carolina Supreme Court was vacated, and the case was remanded.

**BACKGROUND**

The North Carolina Supreme Court's refusal to recognize the concept of implied waiver in \textit{Butler} originated in its 1971 decision, \textit{State v. Blackmon}.\(^{17}\) Defendant, while jailed on a worthless check charge, was indicted for murder and confronted by his alleged accomplice. Three interrogating officers testified that prior to defendant’s making any statement, he was twice given the full \textit{Miranda} warnings.\(^{18}\)

Each officer testified that the defendant "did not request that an attorney be present," that no threats were made to the defendant, that no promise or inducement was made to get him to make any

\(^{12}\) Id.
\(^{13}\) North Carolina v. Butler, 441 U.S. at 373.
\(^{14}\) Id.
\(^{15}\) See Glasser v. United States, 315 U.S. 60 (1942).
\(^{16}\) 441 U.S. at 373-74 n.4.
\(^{17}\) 280 N.C. 42, 185 S.E.2d 123 (1971).
\(^{18}\) Id. at 47, 185 S.E.2d at 126.
statement, and that the defendant did not appear to be confused
and stated that he understood his rights.\textsuperscript{19}

Yet this was not sufficient to make defendant's in-custody incrimi-
nating statement admissible. The Court quoted extensively from
Miranda, emphasizing the requirement of knowing and intelligent
waiver. Based on a strict interpretation of Miranda, the Court or-
dered a new trial.

On retrial, defendant's confession was admitted into evidence
again, and defendant was convicted a second time; however, the
North Carolina Supreme Court affirmed the second conviction.
The confession was beyond the reach of the Miranda rule because
it was made spontaneously rather than "in response to police 'in-
terrogation' as that word is defined in Miranda"; the statements,
made in response to the accusations of defendant's alleged accom-
plice, were "more in the nature of volunteered assertions and
narrations."\textsuperscript{20}

Defendant later obtained a writ of habeas corpus from a fed-
eral district court,\textsuperscript{21} but the Fourth Circuit Court of Appeals con-
cluded that the writ was improvidently issued.\textsuperscript{22} On a review of the
facts, the Court of Appeals stressed that its jurisdiction extended
only to the review of federal constitutional questions which arose
during state criminal trials:

We may not hold the admission of a confession to be a violation
of a defendant's federal constitutional rights, though we may dis-
agree with the reason assigned by the highest court of the state in
upholding the conviction if, for some other reason, it appears that
no constitutional violation occurred.\textsuperscript{23}

The appellate Court disagreed with the North Carolina Supreme
Court's reasoning that the spontaneity of the defendant's confes-
sion took it outside the Miranda rule but found no constitutional
infirmity in the trial "because the trial court's finding of a waiver
of the right to have a lawyer present was clearly correct."\textsuperscript{24} Citing
an earlier Fourth Circuit case, United States v. Hayes,\textsuperscript{25} which was

\begin{itemize}
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} State v. Blackmon, 284 N.C. 1, 11, 199 S.E.2d 431, 437 (1973).
  \item \textsuperscript{21} Blackmon v. Blackledge, 396 F. Supp. 296 (W.D.N.C. 1975), rev'd, 541
      F.2d 1070 (4th Cir. 1976).
  \item \textsuperscript{22} Blackmon v. Blackledge, 541 F.2d 1070 (4th Cir. 1976).
  \item \textsuperscript{23} Id. at 1072.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} 385 F.2d 375 (4th Cir. 1967).
\end{itemize}
decided only a year after *Miranda*, the Court explained that the failure of the accused to sign a written waiver did not foreclose the possibility of an implied waiver: "The presence or absence of such a written or even an expressed verbal waiver is only one circumstance to be considered. Other circumstances may be much weightier."28 Because defendant had been informed of his rights two times in four hours, said he understood them and never requested an attorney or indicated any opposition to questioning without an attorney present, the Court found an effective waiver implicit in the circumstances.27

In *Hayes*, defendant appealed a conviction in Maryland for transporting falsely made checks in interstate commerce, claiming that incriminating statements were obtained in violation of his *Miranda* rights. He conceded that the FBI agents who conducted his interrogation informed him of his rights but contended that they failed to ask him if he understood his rights or if he wanted an attorney.28 Immediately after the warnings and before the questioning, defendant was allowed to make a telephone call. After the call, he answered officers' questions for thirty minutes before declaring he would provide no more information and demanding legal consultation; the interrogation ceased immediately.29 The Fourth Circuit Court of Appeals affirmed defendant's conviction, rejecting the suggestion that a lack of written or oral waiver rendered incriminating statements inadmissible. The Court acknowledged the strong legal presumption against waiver and the State's heavy burden in overcoming that presumption but concluded from the facts of the case that defendant knowingly and voluntarily waived his rights. Citing *Miranda*'s admonition that "the warnings required and the waiver necessary . . . are, in the absence of a fully effective equivalent, prerequisites to the admission of any statement made by a defendant,"30 the Court concluded that "strong and unmistakable circumstances, upon occasion, may satisfactorily establish such an equivalent."31

Thus the Fourth Circuit joined nine of the eleven United States Courts of Appeals32 and at least seventeen states33 in hold-

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27. *Id.* at 1073.
28. 385 F.2d at 377.
29. *Id.*
30. *Id.* at 378.
31. *Id.*
32. Blackmon v. Blackledge, 541 F.2d 1070 (4th Cir. 1976); United States v.
ing that an express waiver was not invariably necessary to support a finding of waiver of right to counsel. Although the inflexible rule adopted by the North Carolina Supreme Court in Blackmon in 1971—and later applied in 1972 in State v. Thacker and in 1978 in Butler—was clear and concrete, it proved contrary to that of every other court that had considered the concept of implicit waiver. Moreover, the United States Supreme Court had never adopted the rigid rule that implicit waiver was inadequate and had denied certiorari in several Courts of Appeals cases which had recognized implied waivers.

**Analysis**

Miranda failed to offer a cogent explanation of what constituted an effective waiver of the right to counsel. The North Carolina interpretation, as enunciated in Blackmon and applied in Butler—was clear and concrete, it proved contrary to that of every other court that had considered the concept of implicit waiver. Moreover, the United States Supreme Court had never adopted the rigid rule that implicit waiver was inadequate and had denied certiorari in several Courts of Appeals cases which had recognized implied waivers.


34. 281 N.C. 447, 189 S.E.2d 145 (1972).

35. See cases where certiorari was denied supra note 32.
Implied Waiver

...eler, severely limited the possibilities for a valid waiver to one clearly expressed in written or oral terms. The North Carolina Supreme Court insisted that its per se rule requiring explicit waiver had sound justification in the Miranda decision itself: "The holding in Miranda as interpreted and applied by this court in Blackmon provides in plain language that waiver of the right to counsel during interrogation will not be recognized unless such waiver is 'specifically made' after the Miranda warnings have been given."[38]

However, in Butler the United States Supreme Court granted the State's petition for a writ of certiorari to consider whether this per se rule actually reflected "a proper understanding of the Miranda decision;"[37] a narrow majority concluded that it did not.[38] Justices Stewart, Rehnquist, White and Berger formed the majority, with whom Justice Blackmun concurred. Justice Brennan was joined by Justices Marshall and Stevens in dissent. Justice Powell did not take part in the decision.

Focusing on the substance rather than the form of defendant's dealings with the interrogator, the majority mentioned several facts which supported a finding of waiver: defendant never requested counsel, nor did he attempt to terminate the agent's interrogation at any time. Furthermore, as the trial court noted, the defendant's willingness to answer questions after being informed of his rights and after having read the rights form indicated his intent to waive his right to counsel. (Although defendant's attorney, in his oral argument before the United States Supreme Court, had disputed the fact that defendant was literate, the Court stated that it was bound by the trial court's finding of literacy, which was based on uncontroverted evidence.)[39]

The Court reviewed the reasons for the "prophylactic rules" announced in Miranda and quoted directly from the Miranda decision:

We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the

36. State v. Butler, 295 N.C. at 255, 244 S.E.2d at 413.
39. Id. at 371 n.1.
privilege against self-incrimination, the accused must be ade-
quately and effectively apprised of his rights and the exercise of
those rights must be fully honored.40

The Court decided that the per se rule did not speak to these con-
cerns; the North Carolina Supreme Court had erred in its reading
of *Miranda*.41 Because North Carolina had in effect "gone beyond
the requirements of federal organic law" and added to the man-
date of the United States Constitution, its judgment could not
stand.42

Although Justice Stewart characterized an express statement
of waiver of right to counsel as "usually strong proof of the validity
of that waiver," he stated that such expressions were not inevitably
necessary to establishing waiver—nor were they always sufficient.43
The question of waiver must be determined in light of the particu-
lar facts and circumstances of each case. Thus, while silence alone
could not constitute waiver, silence coupled with a defendant’s un-
derstanding of his rights and a course of conduct indicative of
waiver could support a conclusion that defendant had waived his
constitutional rights.44

In support of a case-by-case adjudication of the waiver issue,
the Court cited its earlier decision of *Johnson v. Zerbst*,45 which
had enumerated the accused’s background, experience and conduct
as factors to be considered in determining whether defendant had
waived his rights. The same case articulated a definition of waiver
which has since been cited by many commentators and courts as
the classic definition of waiver: "an intentional relinquishment or
abandonment of a known right or privilege."46 Yet Justice Black-
mun concurred in the Court’s opinion only on the assumption that
the majority’s citation to *Johnson v. Zerbst* did not mean that the
*Zerbst* formula was in any way relevant to a determination of
waiver of right to counsel under *Miranda*.47 The concurring opin-
ion was brief and failed to explain adequately Justice Blackmun’s

40. *Id.* at 374.
41. *Id.*
42. *Id.* at 376. The Court cited its earlier decision, *Oregon v. Hass*, 420 U.S.
714 (1975), as authority for the general rule that a state court can neither add to
nor subtract from the mandates of the United States Constitution.
43. *Id.* at 373.
44. *Id.*
45. 304 U.S. 458 (1938).
46. *Id.* at 464.
47. 441 U.S. at 376-77.

http://scholarship.law.campbell.edu/clr/vol2/iss1/11
objection to the Zerbst definition of waiver.

The dissenters criticized the majority for rejecting the North Carolina rule. Mr. Justice Brennan felt the case presented a clear example of the need for an express waiver requirement, which would eliminate difficulties interrogators and judges face in trying to determine if waiver had been implicit in the defendant's words or actions. According to Brennan, the recognition and use of implied waiver "shrouds in half-light the question of waiver." 48 Without the requirement of either oral or written waiver, trial courts left with the task of interpreting a defendant's speech and conduct may make far too many errors. Because Miranda already called for some type of waiver, Brennan reasoned that a requirement of express waiver would impose no new or additional burden on the police; it would simply make the present burden explicit. 49 He succinctly concluded that had the agent "simply elicited a clear answer from Willie Butler to the question, 'Do you waive your right to a lawyer?'," this journey through three courts would not have been necessary. 50

CONCLUSION

Miranda attempted to safeguard the rights of the accused by making the privilege against self-incrimination and the right to counsel applicable to in-custody interrogations. The case provided for some type of waiver of these constitutional rights but failed to clarify exactly what words or actions constituted an effective waiver. This failure created problems for the police. As Chief Justice Berger once observed, "Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct they are to follow." 51

As early as 1938, the Court had attempted to define waiver in Johnson v. Zerbst, mentioned above. The Zerbst definition, while sufficient from a theoretical standpoint, is woefully insufficient from a practical viewpoint. Law enforcement officers lack clear guidelines which they can use in arrests and interrogations. Courts lack definitive standards to apply during criminal trials. The accused himself must know the legal significance of his words and

48. Id. at 377.
49. Id. at 379.
50. Id.
actions. Thus, the need for guidelines makes the North Carolina rule requiring express waiver initially appealing; the Butler dissent, which supported the North Carolina rule, appears logical. Yet the express-waiver rule exalts form over substance and ignores certain realities of human nature. Often people communicate their intentions through actions as comprehensively as if they expressly stated them. For years courts willingly have inferred the existence of various legal instrumentalities from a person's words and actions, i.e., implied contracts and resulting trusts. In the area of criminal procedure, the use of an implied-waiver theory facilitates criminal prosecutions by allowing interrogations to proceed when a defendant obviously has waived his right to counsel, despite the lack of a written or oral waiver.

North Carolina v. Connley 52 illustrated how the United States Supreme Court's Butler decision will be applied in North Carolina. At Connley's first trial for the murder of a Virginia highway patrolman, testimony from an FBI agent concerning statements made by defendant's doctor was admitted into evidence. Further testimony from the same agent, including verbatim quotes from the defendant, also was admitted. 53 The North Carolina Supreme Court overturned defendant's conviction and ordered a new trial. Its reasons were two-fold. First, the agent's report of statements made by defendant's doctor was deemed incompetent hearsay which was not admissible under any exception to the hearsay rule. Because the trial court's finding of knowing and voluntary waiver was sup-


53. The FBI agent had consulted with defendant's attending physician before interviewing the defendant. According to the doctor, defendant was alert and entirely capable of talking to the agent. The agent asked defendant if he would talk; defendant said he would. The agent informed defendant of his constitutional rights, read the Miranda warning from a form, gave defendant a copy of the warning and told him to read it. Defendant said he understood his rights but refused to sign a waiver. He proceeded to give the agent a statement, portions of which were incriminating. In admitting the agent's testimony, the trial judge made the following findings of fact:

(1) that defendant waived his right to an attorney and his other constitutional rights as explained by Officer Holdren;
(2) that defendant "knowingly, understandingly, and voluntarily . . . intelligently and intentionally answered" Holdren's questions;
(3) that his statements were "made with a full understanding" of his constitutional rights; and
(4) that these statements should be admitted into evidence against him.

Id. at 334-36, 245 S.E.2d at 668-69.
ported by the incompetent evidence, the North Carolina Supreme Court reversed the finding. Secondly, the Court applied its strict requirement of express waiver, written or oral, and found a violation of defendant’s constitutional right to have an attorney present during his in-custody interrogation. The Court reiterated that a waiver had to be explicit and could not be presumed from silence. Citing the 1971 Blackmon decision, the Court stated that failure to request an attorney did not constitute waiver.

The State petitioned the United States Supreme Court for certiorari, which was granted in a memorandum decision. The Supreme Court vacated the North Carolina Supreme Court’s judgment and remanded the case for further consideration in light of North Carolina v. Butler. Because the United States Supreme Court had found that the North Carolina interpretation of Miranda was erroneous, the North Carolina Court reversed itself. “In light of North Carolina v. Butler, supra, we now hold that the trial judge’s conclusion that Connley ‘did in fact waive his right to an attorney and his other constitutional rights’ is fully supported by the evidence.” The case was remanded to the Superior Court of Granville County with directions that defendant’s life sentence be put into effect.

Just as an express waiver usually meets Miranda requirements, Butler and Connley illustrate that under certain circumstances implied waiver also may be sufficient. But the question of waiver is not resolved easily; it must be answered via case-by-case determinations of what constitutes waiver, based on “the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” Inherent in case-by-case adjudication is a degree of flexibility and fairness.

54. Id. at 337, 245 S.E.2d at 669. Relying on Miranda’s mandate that “no effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings,” Chief Justice Sharp pointed out that defendant unequivocally refused to sign the waiver form and the agent’s testimony failed to show a specific oral waiver.


which recognizes the realities of human nature and the criminal investigative processes.

Judge Cardozo once commented that "justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true." 59 Perhaps the Berger Court has re-examined Miranda's rather rigid yet ambiguous requirements in light of reason and reality, concluding that the balance between the accused and the accuser had not been kept quite true. Indeed, rising crime rates and unsuccessful reform and rehabilitation programs have prompted many laymen and lawmen to conclude that our present system of justice ignores the victim and coddles the criminal. Such observations go to the heart of our criminal justice system, which supposedly allows some guilty persons to go free in order to protect the life and liberty of the innocent. The United States Supreme Court's ultimate rejection of the North Carolina rule requiring express waiver may indicate the Berger Court's growing reluctance to "let the criminal . . . go free because the constable has blundered." 60

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