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Rhode Island v. Innis: A Workable Definition of "Interrogation"?

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COMMENTS

RHODE ISLAND v. INNIS: A WORKABLE DEFINITION OF "INTERROGATION"?

I. INTRODUCTION

In *Rhode Island v. Innis*,[1] the Supreme Court addressed for the first time the issue of what constitutes interrogation under *Miranda v. Arizona*.[2] *Innis* is a significant decision in the criminal procedure area not only because of the workable standard for determining "interrogation" which it sets forth, but also because it signals the Burger Court's decision not to overrule *Miranda* or to further disparage its effectiveness.[3] However, *Innis* by no means represents a return to the Warren Court's solicitous approach to a suspect's *Miranda* rights.[4] The Burger Court still has not raised *Miranda's* protections and strictures to the status of constitutionally mandated provisions,[5] nor has it ceased its tacit balancing of the government's interest in using evidence against the competing interests

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1. 446 U.S. 291 (1980) (6-3 decision; Stewart, J.).

2. 384 U.S. 436 (1966).

3. *See* Rhode Island v. Innis, 446 U.S. at 304 (Burger, C.J., concurring); Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99. Professor Stone notes that the disfavor into which *Miranda* has fallen with the Burger Court is reflected both in the Court's substantive decisions and in the manner in which it has exercised its power to decide which cases on its docket to review. For example:

> [During the 1973-1976 Terms,] the Court has granted certiorari in only one of the thirty-five cases on its appellate docket in which a defendant sought review of a lower court decision holding evidence admissible over a claimed violation of *Miranda*. During the same period, the Court has granted certiorari in thirteen of the twenty-five cases in which the government sought review of a lower court decision excluding evidence on the authority of *Miranda*. . . . In ten of these cases, the Court interpreted *Miranda* so as not to exclude the challenged evidence. In the remaining case, the Court avoided a direct ruling on the *Miranda* issue, holding the evidence inadmissible on other grounds. In effect, then, the Court has not held a single item of evidence inadmissible on the authority of *Miranda*.

Id. at 100-01.

4. *See* Orozco v. Texas, 394 U.S. 324, 325-26 (1969) (*Miranda* warnings required prior to police interrogation of defendant in bedroom when defendant effectively under arrest); Mathis v. United States, 391 U.S. 1, 4-5 (1968) (*Miranda* warnings required prior to routine interrogation by IRS agents of defendant imprisoned on an unrelated offense).

5. *See* Michigan v. Tucker, 417 U.S. 433, 444 (1974) (*Miranda's* procedural safeguards are "not themselves rights protected by the Constitution.").

that might be served by exclusion.[6] Arguably, the Court still balances with a presumption in favor of the government.

II. *Miranda v. Arizona:* THE PRECEDENT

A. *Miranda's Concerns and Protections*

In *Miranda v. Arizona,*[7] the Supreme Court articulated detailed guidelines for the custodial interrogation of criminal suspects by law enforcement officers.[8] The *Miranda* Court was concerned with the corresponding objectives of deterring police misconduct and protecting the rights of the accused, while not unnecessarily burdening effective law enforcement.[9] The Court noted that, due in part to the traditionally incommunicado setting of police interrogation, the use of physical and especially psychological coercion to compel a suspect to confess could not be eradicated

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6. *Id.* at 448. *See* Stone, *supra* note 3, at 121.

In Brewer v. Williams, 430 U.S. 387, 424 (1977), Chief Justice Burger in his dissenting opinion called for an individualized consideration or balancing in determining whether evidence should be excluded because of violations of *Miranda's* safeguards. The Chief Justice stated:

> [W]e weigh the deterrent effect on unlawful police conduct, together with the normative Fifth Amendment justifications for suppression, against "the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce" . . . . We also "must consider society's interest in the effective prosecution of criminals . . . ."

Id. (quoting Michigan v. Tucker, 417 U.S. 433, 450 (1974)).

7. 384 U.S. 436. The constitutional groundwork for *Miranda* was laid in Malloy v. Hogan, 378 U.S. 1 (1964), which held the fifth amendment privilege against self-incrimination applicable to the states through the fourteenth amendment due process clause and enforceable according to the same standards in both federal and state proceedings. *Id.* at 6, 10-11. *Miranda* was also foreshadowed by Escobedo v. Illinois, 378 U.S. 478 (1964), where the Court excluded a confession obtained from a suspect during custodial interrogation after he had requested and been denied an opportunity to consult with his attorney, who was present at the police station. *Id.* at 490-91. However, *Escobedo* was based not on the fifth, but on the sixth amendment right to counsel during each "critical stage" of a criminal prosecution. *Id.* at 488. After *Miranda,* Johnson v. New Jersey, 384 U.S. 719 (1966) limited *Escobedo* to its facts, and also held that *Miranda* had no retroactive application. *Id.* at 732-34. Subsequently, the Court held the sixth amendment inapplicable until formal adversary proceedings are initiated against a defendant, either by "formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 688-89 (1972).

See generally Project, *Ninth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1978-1979,* 68 GEO. L.J. 279, 361 (1979); Project, *Eighth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1977-1978,* 67 GEO. L.J. 317, 390 (1978).

8. *See* note 13 *infra* and accompanying text.

9. 384 U.S. at 450-53. *See also* Kamisar, *Brewer v. Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?,* 67 GEO. L.J. 1, 16-18 (1978).

effectively without limitations upon the interrogation process.[10] Moreover, limitations were necessary, the Court reasoned, because the atmosphere of custodial interrogation "carries its own badge of intimidation"[11] and involves "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would otherwise not do so freely."[12]

Therefore, the Court in *Miranda* held that the prosecution may not use inculpatory or exculpatory statements derived from custodial interrogation as evidence at trial unless it demonstrates that certain procedural safeguards[13] to secure the suspect's fifth amendment privilege against compelled self-incrimination were employed in conducting the interrogation.[14]

B. *Miranda's Definition of "Custodial Interrogation"*

The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody[15] or otherwise deprived of his freedom in any significant

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10. 384 U.S. at 460-64.

11. *Id.* at 457.

12. *Id.* at 467.

13. *Id.* at 479. *Miranda* held that unless other equally effective means are devised to protect the individual's fifth amendment privilege against compelled self-incrimination, the defendant "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make statements." *Id.* The burden is on the prosecution to demonstrate that the accused knowingly and intelligently waived these rights before interrogation. *Id.* at 444-45, 479.

14. The fifth amendment states: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. *See* Grano, *Rhode Island v. Innis: A Need to Reconsider the Constitutional Premises Underlying the Law of Confessions*, 17 AM. CRIM. L. REV. 1, 23 n.145 (1979). Grano points out that the prohibition against compelling defendants to answer questions during preliminary examinations did not gain acceptance until the nineteenth century, long after the fifth amendment's adoption. *Id. See also* Note, *An Historical Argument for the Right to Counsel During Police Interrogation*, 73 YALE L.J. 1000, 1038-40 (1964).

15. *Miranda* equated "custody" with the "point that our adversary system of criminal proceedings commences." 384 U.S. at 477. In Escobedo v. Illinois, 378 U.S. 478, 492 (1964), the Court had held "when the process shifts from investigatory to accusatory—when its focus is on the accused and its purpose is to elicit a confession—our adversary system begins to operate . . . ." *Id. See generally* Grano, *supra* note 14, at 45 (*Miranda* did not merely seek to protect the suspect from the pressures of custody; it sought to reduce the inherent

way."[16] The *Miranda* decision did not in any way bar volunteered statements.[17] In fact, the Court expressly held that "[c]onfessions remain a proper element in law enforcement" and are admissible as evidence, provided they are "given freely and voluntarily without any compelling influences."[18]

However, *Miranda's* definition of "custodial interrogation"[19] failed to delineate the scope of interrogation under the decision. Though the definition did not require actual, formal custody to activate the safeguards articulated by the Court,[20] nowhere did it state whether "questioning" refers merely to formal, express police questioning or to other statements or actions by the police equivalent to constructive questioning as well. Thus, the stage was set for *Innis*.

III. The Background of *Rhode Island v. Innis*

A. *The Facts*

On January 17, 1975, shortly after midnight, police in Providence, Rhode Island received a telephone call from a taxicab driver reporting that he had been robbed by a man wielding a sawed-off shotgun.[21] The driver reported that he left his assailant in a section of Providence known as Mount Pleasant. Just one day before this incident, the body of another taxicab driver who had died from a shotgun blast to the back of his head had been found buried in a shallow grave near Coventry, Rhode Island.

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compulsion of custodial interrogation).

16. 384 U.S. at 444, 477. The Court changed its opinion in three places between the printing of the advance sheets and the final form, so that the phrase "in any significant way" would always modify "the deprivation of freedom of action." Comment, *Custodial Interrogation*, 35 Tenn. L. Rev. 604, 610-11 (1968). *See generally* Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation?*, 25 S.C. L. Rev. 699, 706-32 (1974); Comment, *Miranda v. Arizona: The Emerging Pattern*, 12 U. Rich. L. Rev. 409, 420-28 (1978); Annot., 31 A.L.R.3d 565 (1970).

Miranda's definition of custodial interrogation was initially broadened to include questioning outside the police station. Orozco v. Texas, 394 U.S. 324, 325-26 (1969); Mathis v. United States, 391 U.S. 1, 4-5 (1968). However, custodial interrogation subsequently has been narrowed to exclude even police station questioning when a defendant appears voluntarily and is allowed to leave afterwards without hindrance. Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam) (questioning of defendant who came voluntarily to police station in response to police request and left after 30 minute interview is not custodial interrogation under *Miranda*).

17. 384 U.S. at 478.

18. *Id. Miranda* does not define "compelling influences."

19. *Id.* at 444, 477.

20. *See* note 13 *supra* and accompanying text.

21. 446 U.S. at 293-94.

While the taxicab driver who reported the armed robbery was at the Providence police station to give a statement, he recognized a picture of his assailant on a bulletin board. A photo array was prepared by a police officer, and the driver again identified a picture of the same person. The pictures that the driver identified were of Thomas G. Innis.

At approximately 4:30 a.m. on January 17, a patrolman spotted Innis on a public street in the Mount Pleasant area, near where the driver said he had left Innis earlier that evening. Innis, who was unarmed, was arrested and advised of his *Miranda* rights then,[22] and twice thereafter. When Innis was advised of his rights the third time, he stated that he understood them and requested an attorney.[23]

Innis was then placed in a police car with Officers Gleckman, McKenna, and Williams, to be taken to the central police station.[24] The officers had been instructed not to question, intimidate or coerce Innis in any way. While enroute to the police station, Officer Gleckman initiated a conversation concerning the missing shotgun with Officer McKenna.[25] In substance, Officer Gleckman stated that while on patrol he had frequented the area where Innis was arrested and had observed many handicapped children in the area because a school for handicapped children was located nearby.[26] Officer Gleckman then remarked, "God forbid one

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22. *See* note 13 *supra* and accompanying text.

23. 446 U.S. at 294. *Miranda* held: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney, and he indicates that he wants one before speaking to police, they must respect his decision to remain silent." 384 U.S. at 474.

One author views this directive of the *Miranda* Court as dictum because none of the cases before the Court in *Miranda* involved a defendant who had asked to consult with counsel. Grano, *supra* note 14, at 37 n.227.

24. Innis was placed in a caged wagon, a four-door police car with a wire screen mesh between the front and rear seats. 446 U.S. at 294.

25. There was conflicting testimony about the exact seating arrangements in the police car, but it is clear that everyone in the car heard the conversation between Gleckman and McKenna. *Id.* at 294 n.1.

26. Officer Gleckman testified:

> At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there's a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.

Id. at 294-95.

Officer McKenna testified: "I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it." *Id.* at 295.

of [the handicapped children] might find a weapon with shells and . . . hurt themselves [sic]."[27]

At this point, after traveling approximately one mile, Innis interrupted the conversation and stated that they should return to the scene of the arrest so that he could show them where the shotgun was located. Upon return to the scene, where a search for the weapon was already in progress, Innis was again advised of his *Miranda* rights. Innis replied that he understood his rights, but stated "that he 'wanted to get the gun out of the way because of the kids in the area in the school.' "[28] Innis then led the police to the gun.[29]

B. *The Lower Court Decisions*

1. The Decision of the Trial Court

At trial, the shotgun and testimony concerning Innis' statement were admitted into evidence over Innis' motion to suppress.[30] The jury found Innis guilty of kidnapping, robbery, and murder.[31] The trial judge found that Innis "had been 'repeatedly and completely advised of his *Miranda* rights' [and] . . . that it was 'entirely understandable that [the officers in the police vehicle] would voice their concern [for the safety of handicapped children] to each other.' "[32] Therefore, the trial judge reasoned, Innis' decision to inform the police of the location of the shotgun consti-

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Officer Williams testified: "He [Gleckman] said it would be too bad if the little—I believe he said girl—would pick up the gun and maybe kill herself." *Id.*

One commentator notes that " 'God forbid,' and 'gee, it would be too bad' simply do not sound like the kind of language police officers would be likely to use when engaged in a normal casual conversation among themselves. On the other hand, these phrases seem ideally suited to an emotional appeal to a suspect's humanitarian impulses." White, *Rhode Island v. Innis: The Significance of a Suspect's Assertion of his Right to Counsel*, 17 AM. CRIM. L. REV. 53, 68 (1979).

See F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 60 (2d ed. 1967) (discussing the utilization of displays of understanding and sympathy in urging a suspect to tell the truth); Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 238-43 (1977).

27. 446 U.S. at 294-95.

28. *Id.* at 295.

29. *Id.* The shotgun was found in a nearby field under some rocks by the side of the road.

30. *Id.* at 295-96.

31. *Id.* at 296.

32. *Id. But see* White, *supra* note 26, at 68, where the author speculates that an immediate concern for the safety of the handicapped children was probably not paramount in the officers' minds because other officers were already preparing a search of the area for the weapon. Thus, the chance that a handicapped child would find the weapon at a time when officers were absent was slight.

tuted an "intelligent waiver[33] of his [*Miranda*] right to remain silent."[34] The trial court did not consider the issue of whether the police had "interrogated" Innis within the meaning of *Miranda*.[35]

2. The Decision of the Rhode Island Supreme Court

On appeal, the Rhode Island Supreme Court reversed the trial court's holding and set aside Innis' conviction.[36] Relying in part upon the reasoning of *Brewer v. Williams*,[37] the court held that Innis had invoked his *Miranda* right to counsel and that he had been "interrogated" by the police officers in violation of *Miranda's* mandate that in the absence of counsel all interrogation cease, unless a valid waiver is first obtained.[38] The court found that Innis had been subjected to the "subtle compulsion"[39] of the officers' dialogue, which the court equated with *Miranda*

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33. 446 U.S. at 296. *Miranda* held that the burden is on the prosecutor to demonstrate that the accused knowingly and intelligently waived his *Miranda* rights. 384 U.S. at 475. To show waiver, the Court has held that the State must prove the "intentional relinquishment or abandonment of a known right or privilege." Brewer v. Williams, 430 U.S. 387, 404 (1977) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). However, it is unclear whether the "intentional relinquishment or abandonment of a known right or privilege" test is stricter in the sixth amendment right to counsel context than the "knowing, intelligent, and voluntary" waiver test as applied in the fifth amendment context. *See* 68 GEO. L.J. *supra* note 7, at 369-70 n.705. Later, in North Carolina v. Butler, 441 U.S. 369 (1979), the Court held that an explicit statement of waiver is not invariably necessary to support a finding of waiver. The Court stated that a valid waiver could be determined from the particular facts and circumstances of each case, considering such factors as the conduct, background, and experience of the accused.

34. 446 U.S. at 296.

35. *Id.* The trial court did not consider whether "conversation" of the officers amounted to interrogation, but merely sustained the admissibility of the shotgun and the testimony related to its discovery based upon Innis' alleged waiver of his *Miranda* right to remain silent.

36. State v. Innis, ___ R.I. ___, 391 A.2d 1158 (1978).

37. 430 U.S. 387 (1977) (Stewart, J.). *See* notes 117, 119-21 *infra* and accompanying text.

38. 391 A.2d at 1162. The court held:

> The finding of a waiver in this situation would be highly inconsistent with the conduct of the defendant, who just minutes before had chosen to exercise his right to counsel before being subjected to questioning . . . . There is *no* evidence in the record before us indicating that defendant *affirmatively* waived his fifth amendment rights at this time other than the fact that he ultimately agreed to assist the police in locating the incriminating evidence.

Id. at 1163-64 (emphasis in the original).

39. *Id.* at 1162. *See* Kamisar, *supra* note 9, at 23 (quoting E. HOPKINS, OUR LAWLESS POLICE 194 (1931)):

> It has been said that "there are a thousand forms of compulsion" and that "our police show great ingenuity in the variety employed" . . . . If the police conduct is designed and likely to pressure or persuade, or even "to exert a tug on," a suspect to incrimi-

interrogation,[40] and that the evidence was insufficient to support a finding of waiver of Innis' right to counsel.[41]

C. *The Supreme Court Decision and the Definition of Interrogation*

The Supreme Court granted certiorari[42] to determine for the first time the meaning of "interrogation" under *Miranda v. Arizona*.[43] The Court reversed the Rhode Island Supreme Court's holding that Innis had been "interrogated" within the meaning of *Miranda*.[44] Justice Stewart,[45] for the majority, stated that the *Miranda* safeguards[46] are activated

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> nate himself . . . then that conduct is "compulsion" as *Miranda* defines the self-incrimination clause. Then it *augments* or *intensifies* the tolerable level of stress, confusion, and anxiety generated by an unadulterated arrest and detention to the impermissible level of "compulsion."

Id. (emphasis in original).

The Court has held "a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion." Wan v. United States, 266 U.S. 1, 14-15 (1924) (sick man's statements after being subjected to interrogation for seven days inadmissible).

Apparently, "subtle compulsion" was first used by the Court in *Miranda:* absent a valid waiver, any statement taken after a suspect invokes his rights "cannot be other than the product of compulsion, subtle or otherwise." 384 U.S. at 474. *But see* Kamisar, *supra* note 9, at 18 n.112 (absent " 'questioning' or some other form of prodding or persuasion, the 'compulsion' inherent in arrest and detention does not rise to the level of compulsion within the meaning of the privilege" against self-incrimination). *See also* Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859 (1979).

40. 391 A.2d at 1162. Most commentators who have addressed the issue of *Miranda* interrogation have recognized that nonverbal police conduct may be tantamount to interrogation for purposes of requiring *Miranda* warnings. *See generally* 3 J. WIGMORE, EVIDENCE § 826a, at 383 n.23 (rev. ed. 1970). *See also* C. MCCORMICK, EVIDENCE § 152, at 330 (2d ed. 1972); Graham, *What Is "Custodial Interrogation"?: California's Anticipatory Application of Miranda v. Arizona*, 14 U.C.L.A. L. REV. 59, 107 (1966); Rothblatt & Pitler, *Police Interrogations, Warnings, and Waivers—Where Do We Go From Here?*, 42 NOTRE DAME LAW. 479, 486 (1967).

41. 391 A.2d at 1163.

42. State v. Innis, 391 A.2d 1158 (1978), *cert. granted*, 440 U.S. 934 (1979).

43. Professor Grano predicted prior to the Supreme Court's decision that "reversal [of the Rhode Island Supreme Court's decision] seems certain given both the room for principled disagreement and the Court's failure in this decade to hold any evidence inadmissible solely on *Miranda* grounds." Grano, *supra* note 14, at 3. In addition, he noted that the trend of the Court continued during the 1978 term. *Id.* at 3 n.17. *See, e.g.*, Fare v. Michael C., 442 U.S. 707 (1979); North Carolina v. Butler, 441 U.S. 369 (1979) (*Miranda* does not require an explicit waiver of rights). *See also* Kamisar, *supra* note 9, at 78; Stone, *supra* note 3, at 100-01.

44. 446 U.S. at 304.

45. Justice Stewart, who also wrote the majority opinion in Brewer v. Williams, 430 U.S. 387 (1977), was one of the four dissenting Justices in *Miranda*.

46. *See* note 13 *supra* and accompanying text.

> whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response[47] from the suspect.[48]

Justice Stewart then stated that "[t]he latter portion[49] of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police."[50]

The Court recognized that Innis had been subjected to "subtle compulsion,"[51] but found that this factor alone was insufficient to constitute interrogation under *Miranda*.[52] The Court held that "[i]t must also be established that a suspect's incriminating response was the product of

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47. The Court stated: "By 'incriminating response,' we refer to any response—whether inculpatory or exculpatory—that the *prosecution* may seek to introduce at trial." 446 U.S. at 300 n.5 (emphasis in original).

48. *Id.* at 300-01. Prior to the Supreme Court's final decision in *Innis*, a leading criminal law authority analyzed the facts of *Innis* under the assumption, which he rejected, that the sixth amendment applied. He contended that the Rhode Island Supreme Court erroneously found fifth amendment interrogation for sixth amendment reasons. He noted that under the sixth amendment, "[e]ven if the officer in *Innis* did not intend to elicit information from the defendant, he must have known—he certainly should have known—that his statements created a substantial risk of accomplishing that result." Grano, *supra* note 14, at 33. He also asserted that "[i]f sixth amendment rights were applicable in *Innis*, analysis of the waiver issue under a proper sixth amendment standard would lead to a decision in the defendant's favor." *Id.* at 35.

49. The Court's reference to "the latter portion" of the definition apparently refers to "[words or actions] that the police should know are reasonably likely to elicit an incriminating response from the suspect." 446 U.S. at 301.

50. *Id.*

51. *Id.* at 303.

52. *Id. But see* White, *supra* note 26, at 62 who contends:

> When the police take action that leads a suspect who is in custody and in their presence to believe that the police want him to disclose incriminating information, the coercive pressures that *Miranda* was designed to prevent are activated. The combination of the suspect's restraint and his awareness of both the police presence and their desire for a response produces the same quality of pressure as that generated by traditional police questioning of a suspect in custody.

See Miranda v. Arizona, 384 U.S. at 467; Kamisar, *supra* note 9, at 51. *Accord,* Commonwealth v. Mercier, 451 Pa. 211, 302 A.2d 337 (1973) (any police action likely to elicit a confession constitutes *Miranda* interrogation); Commonwealth v. Hamilton, 445 Pa. 292, 285 A.2d 172 (1971) (same). *Contra,* Haire v. Sarver, 437 F.2d 1262 (8th Cir. 1971) (defendant's statements after arrest correcting wife's responses to police interrogation admissible despite failure to give *Miranda* warnings); Stone v. United States, 385 F.2d 713 (10th Cir. 1967), (*Miranda* does not prohibit admission of voluntary exculpatory statements of defendant).

words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response."[53]

The Court reasoned that "[g]iven the fact that the entire conversation [between the officers] appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond [with an incriminating statement]."[54] Because the Court concluded that Innis was not "interrogated" for *Miranda* purposes the Court did "not reach the question whether [Innis] waived his right under *Miranda* to be free from interrogation until counsel was present."[55] The Court distinguished the facts of the case from situations where police carry on a "lengthy harangue" in the suspect's presence,[56] where "the officers' comments [are] particularly 'evocative,' "[57] or where the officers know or recognize that the suspect is "peculiarly susceptible" to their appeal[58] or "unusually disoriented or upset."[59]

IV. Analysis of *Innis*

A. *An Objective Standard Narrowly Applied*

The definition of interrogation articulated by the Court represents the reaffirmation of *Miranda's* attempt to objectify the law of confessions[60] and the complete abandonment of the subjective voluntariness test[61] which some critics had feared the Court would revitalize to replace *Mi-*

53. 446 U.S. at 303. To illustrate this point, the Court reasoned that if the police merely had passed the site of the weapon en route to the station and Innis, noticing for the first time the proximity of the school for handicapped children, had stated that he would show the officers where the gun was located, it could not seriously be argued that this "subtle compulsion" constituted interrogation under *Miranda*. *Id.* at 303-04 n.10.

54. *Id.*

55. *Id.* at 298 n.2.

56. *Id.* at 303.

57. *Id.* The Court apparently rejected part of the Assistant Public Defender's argument that the officers violated Innis' rights by engaging in an "emotionally evocative" conversation immediately after Innis invoked his right to counsel, and that the violation was not curable by fresh *Miranda* warnings. [1979] 26 Crim. L. Rep. (BNA) 4080, 4082 (review of oral arguments in *Innis*).

58. 446 U.S. at 303.

59. *Id.*

60. *See* Note, *Police Use of Trickery as an Interrogation Technique*, 32 Vand. L. Rev. 1167, 1171, 1180 (1979). *But see* Mincey v. Arizona, 437 U.S. 385 (1978), where the Court apparently reaffirmed the independent viability of the pre-*Miranda* due process voluntariness standard.

61. *See* Vand. L. Rev., *supra* note 60, at 1173-80 for an examination and review of the pre-*Miranda* voluntariness standard.

randa.[62] However, *Innis* does not represent the Burger Court's acceptance of the rationale and spirit of *Miranda,* but rather a mere adherence to the existence of *Miranda* in its restricted form.[63]

In defining interrogation, the Court avoids relying on either the officer's or the suspect's subjective perceptions[64] and articulates a test in objective language concentrating on what the police officers should have known or foreseen to be the reasonable result of their words or actions.[65] The Court operates on the premise that police officers are not responsible for the unforeseeable, unreasonable results of their conduct.[66] Justice Marshall effectively evaluates the Court's definition as "an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know."[67]

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62. *See id.* at 1180-82.

63. *See generally* Stone, *supra* note 3, at 168-69. Observe also the language of Chief Justice Burger's concurrence in *Innis*: "Since the result is not inconsistent with *Miranda v. Arizona,* . . . I concur in the judgment. The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda,* disparage it, nor extend it at this late date." 446 U.S. at 304. As one article states:

> Given the more restrictive alternative available to an otherwise anti-*Miranda* Court [*i.e.*, holding that interrogation for *Miranda* purposes meant express questioning], it is surprising that the justices arrived at such a seemingly expansive interpretation of custodial interrogation. But arguably the most surprising part of the *Innis* opinion was the [C]ourt's excessively narrow application of its new standard to the facts in the case.

Welch & Collins, *A Two-Faced Approach to Miranda,* Nat'l L.J., June 16, 1980, at 15, col. 1. (The authors contend that although *Innis* may be interpreted as a significant departure from previous Burger Court efforts to restrict *Miranda,* ambiguities in the opinion indicate a contrary result.).

64. *See* 446 U.S. at 301-02 nn.7, 8. *See generally* United States v. Hall, 421 F.2d. 540, 544 (2d Cir. 1969), which concerned the proper focus for determining when police questioning constitutes *Miranda* interrogation, and held that "a standard hinging on the inner intentions of the police would fail to recognize *Miranda's* concern with the coercive effect of the 'atmosphere' from the point of view of the person being questioned. [Moreover,] any formulation making the need for *Miranda* warnings depend on how each individual being questioned perceived this situation would require a prescience neither the police nor anyone else possesses." *Id.*

65. *Cf.* White, *supra* note 26, at 67 n.107 which states:

> In the unusual case where the suspect has a unique personal characteristic which is unknown to the police, the question may arise as to whether the proposed objective standard should focus upon an "average person" who has the suspect's *actual* characteristics or an "average person" with the characteristics known to the police. While the former might provide greater sixth amendment protection, the latter might be preferable since it would provide clearer guidance for the police and the courts.

66. 446 U.S. at 301-02.

67. *Id.* at 305 (Marshall & Brennan, JJ., dissenting).

Justice Stevens, in his dissent, criticizes the narrowness of the Court's definition and proposes an objective standard for determining whether a defendant has been interrogated within the meaning of *Miranda*.[68] His standard requires that "any police conduct or statement that would appear to a reasonable person in the suspect's position to call for a response must be considered 'interrogation' " for *Miranda* purposes.[69]

Although the majority opinion construes *Miranda* interrogation more narrowly than do the dissenting opinions,[70] it does not construe it as narrowly as some may have predicted. The Court does not limit *Miranda* interrogation to express questioning, but notes *Miranda's* concern with the inherent compulsion of the "interrogation environment"[71] and extends interrogation to include the "functional equivalent" of express questioning[72]—"words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[73]

B. *The "Focus" of the Definition*

Although the Court states that "the latter portion"[74] of its standard for determining whether interrogation has occurred "focuses primarily upon the perceptions of the suspect, rather than the intent of the police,"[75] the Court throughout the *Innis* opinion focuses upon the officers' perceptions of Innis to determine whether the officers should have known that their conversation was reasonably likely to elicit an incriminating response from Innis.[76] The Court never inquires into Innis' perceptions of the officers' dialogue, nor into how a reasonable person in Innis' position would have perceived the officers' remarks under the circumstances.[77] Therefore,

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68. *Id.* at 309, 311 (Stevens, J., dissenting).

69. *Id.* at 311.

70. Justices Marshall and Brennan reach a different result by applying the same standard as the Court; Justice Stevens reaches a different result by applying a standard which focuses on the reasonable person's objective perception of whether the police conduct reasonably called for a response.

71. 446 U.S. at 299. *See* 384 U.S. at 457-58.

72. 446 U.S. at 301.

73. *Id.*

74. *Id.* at 301.

75. *Id.*

76. *Id.* at 300-02.

77. *See* Welch & Collins, *supra* note 63, at 15, col. 1:

> Possibly what the Court said in its [*Innis*] opinion is not really what it meant. It said that police behavior determined to be "reasonably likely to elicit an incriminating response" constituted custodial interrogation. In making this determination, the Court added, "the perceptions of the suspect, rather than the intent of the police"

as Justice Marshall indicated in his evaluation,[78] the Court's statement of the "focus" of the latter portion of the definition of interrogation may be reasonably interpreted to mean the suspect's perceptions *as known by the police* rather than the intent of the police.[79]

C. *The Significance of Deliberate Elicitation*

Perhaps the most debatable aspect of *Rhode Island v. Innis* is the Court's apparent de-emphasis of police intent to interrogate.[80] As stated above, the focus of the definition of interrogation is on police perceptions rather than intent.[81] According to the Court:

> This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.[82]

The Court does not hold police intent totally irrelevant to the determination of interrogation. Instead, it is held relevant as one factor in determining "whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response."[83] The Court assumes that "where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect."[84]

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would be the deciding factor. But the Court never inquired into Innis' perceptions of the officers' dialogue. Instead, the majority focused exclusively on how the officers perceived Innis.

78. 446 U.S. at 305. Justice Marshall perceives the Court's definition to be "an objective inquiry into the likely effect of police conduct on a typical individual, taking into account any special susceptibility of the suspect to certain kinds of pressure of which the police know or have reason to know." *Id.*

79. *Id.* at 301-02.

80. *Id.* at 301-02 n.7.

81. *Id.* at 301.

82. *Id.*

83. *Id.* at 301-02 n.7.

84. *Id.* The Court states: "Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response from the suspect." *Id.* at 302 n.8.

But see id. at 303 n.9: "The record in no way suggests that the officers' remarks were *designed* to elicit a response. . . . It is significant that the trial judge, after hearing the officers' testimony, concluded that it was 'entirely understandable that [the officers] would

Arguably, the Court is holding that deliberate attempts to elicit information from an accused who has asserted his right to counsel are not forbidden as long as it can be found that such deliberate attempts were not reasonably likely to be successful.[85] This reasoning appears to deviate from the mandate of *Michigan v. Mosley*[86] which held that the crux of *Miranda* is that the suspect's right to cut off questioning until counsel is present must be "scrupulously honored."[87] Therefore, to allow any deliberate elicitation, regardless of the likelihood of success, substantially restricts the effectiveness of the *Miranda* warnings to protect the suspect's rights.[88]

D. *The Emphasis of the Court's Narrow Application of the Definition*

The Court narrowly applies the definition of interrogation to the facts of the opinion, tacitly emphasizing the character of the officers' statements by focusing on the lack of evidence or indication that the officers knew or should have known that Innis was "peculiarly susceptible" to the topic of their conversation or that he was "unusually disoriented or upset" at the time of arrest.[89] The officers' dialogue is dismissed as "no more than a few offhand remarks" which the officers should not have reasonably foreseen to strike a "responsive chord" in Innis.[90] This lack of foreseeability appears to be the controlling factor of the opinion.

In substance, the *Innis* majority implicitly emphasizes the "good faith" of the police in this case, and the unexpected, voluntary nature of Innis' response.[91] This result may add subjectivity and difficulty to the already

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voice their concern [for the safety of the handicapped children] to each other.' "

However, even if Officer Gleckman had "intended" to elicit an incriminating response from Innis, this intent may not have made it any more likely that Innis would so respond. As Justice Stevens points out, the Court's assumption that "where a police practice is designed to elicit an incriminating response . . . , it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect" is "extremely dubious" since "police often interrogate suspects without any reason to believe that their efforts are likely to be successful in the hope that a statement will nevertheless be forthcoming." *Id.* at 310, 311 n.8 (Stevens, J., dissenting).

85. *Id.* at 310, 311 n.8 (Stevens, J., dissenting).

86. 423 U.S. 96 (1975) (*Miranda* rights were not violated when first officer immediately closed questioning at defendant's request, and second later questioning was by another officer concerning another event unrelated to the topic of the first questioning).

87. *Id.* at 104.

88. 446 U.S. at 311-12 (Stevens, J., dissenting). *See generally* Stone, *supra* note 3, at 129-37.

89. 446 U.S. at 302-03.

90. *Id.* at 303.

91. Stone, *supra* note 3, at 124. The author commented:

overburdened fact-finding process.[92]

E. *Future Application by the Courts*

An examination of Justice Marshall's dissent reveals the rationale for questioning the majority's application of the definition of interrogation. While adopting the majority's definition of interrogation, Justice Marshall reaches an antithetical result. Where the majority seems to operate on the presumption that the police officers acted legally and in good faith, Justice Marshall seems to examine objectively the "totality of the circumstances" in the light most favorable to the suspect.[93]

Justice Marshall notes that Innis was arrested at 4:30 a.m., handcuffed, searched, advised of his rights, and placed in the back seat of a patrol car with three police officers who immediately began to discuss the search for the shotgun and the danger it posed to the handicapped children in the area.[94] He views these facts as exemplary of the coercive environment *Miranda* sought to alleviate.[95] Therefore, the conversation that the majority perceives to be "no more than a few offhand remarks," is perceived in this dissenting opinion as one of the strongest appeals to the conscience of any suspect—the appeal to help find the shotgun and thus avert a handicapped child's death.[96]

Justice Marshall distinguishes this case from the situation "where po-

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> Use of a good faith defense . . . places a premium on ignorance. Moreover, a good faith defense would add an additional, and exceptionally difficult, fact-finding operation to the already overburdened criminal process. Except in the most unusual circumstances, determination of whether a mistake of law was "reasonable" is hardly an easy task. The existence of such a defense could generate uncertainty and invite calculated risks on the part of the police, thereby defeating the primary goal of *Miranda*.

Id.

Justice Stevens also expressed concern that "the Court's test creates an incentive for police to ignore a suspect's invocation of his rights in order to make continued attempts to extract information from him." 446 U.S. at 313 (Stevens, J., dissenting).

92. Stone, *supra* note 3, at 24.

93. The "totality of the circumstances" test was a component of the old subjective, due process voluntariness test. The phrase was first used by the Court in Fikes v. Alabama, 352 U.S. 191 (1957), but the test existed in substance long before the phrase was coined by the Court. *See generally* 32 VAND. L. REV., *supra* note 60, at 1180-82.

94. 446 U.S. at 305.

95. 384 U.S. at 458.

96. 446 U.S. at 306 (Marshall, J., dissenting). *See generally* F. INBAU AND J. REID, CRIMINAL INTERROGATION AND CONFESSIONS 60-62 (2d ed. 1967) for a discussion of displays of understanding and sympathy to urge a subject to tell the truth; Kamisar, *supra* note 26, at 238-43.

lice officers are speaking among themselves and are accidentally overheard by a suspect"[97] because in *Innis*, the officers were conversing in the close quarters of a police car in the suspect's presence. Therefore, it should be reasonable to conclude that "[t]hey knew [Innis] would hear and attend to their conversation, and [that] they are [thus] chargeable with knowledge of and responsibility for the pressures to speak which they created."[98]

Whether the Court's application of the definition of interrogation is an "aberration"[99] as Justice Marshall perceives it, which will be corrected in future decisions, or followed as a model remains to be seen. Presently, it appears that the Court's definition of interrogation may be applied to the facts of a particular case in a manner most favorable either to the law enforcement officers or to the suspect, depending upon the court's inclination.

In addition, Chief Justice Burger in his concurring opinion anticipates that trial judges will have difficulty interpreting and discerning "the boundaries and nuances" of the definition.[100] Apparently, the Chief Justice is referring to the necessity for the court to determine the reasonableness of a police officer's evaluation of a suspect's susceptibility in resolving whether the officer "should have known that his words or actions were reasonably likely to elicit an incriminating response from the suspect."[101]

Justice Stevens also anticipates the problems which lower courts will have in consistently applying the Court's definition of interrogation to similar fact situations because of the difficulties of proof inherent in the definition.[102] For example, under the Court's definition of interrogation, Officer Gleckman's expression of his "concern" for the safety of handicapped children in the area was not interrogation as conceptualized in *Miranda v. Arizona*.[103] However, Justice Stevens hypothesizes that if Officer Gleckman had expressed his concern in the form of a direct question to Innis, or if he had specifically referred to Innis in his announcement to the other officers, this might have constituted *Miranda* interrogation.[104]

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97. 446 U.S. at 306.
98. *Id.* at 306-07.
99. *Id.* at 307.
100. *Id.* at 305.
101. *Id.* at 302 n.8.
102. *Id.* at 311 n.10.
103. *Id.* at 312-13.
104. *Id.* Justice Stevens considered the three different ways that Officer Gleckman could have communicated his concern about the dangers posed by the shotgun:

[Officer Gleckman] could have:

(1) directly asked Innis:

F. *Future Application by the Police*

In addition to the potential problems lower courts will have in applying the definition of interrogation, police officers themselves will probably find the standard burdensome and difficult to interpret and apply. Both Chief Justice Burger[105] and Justice Stevens[106] express this latter concern. The Chief Justice notes the burden the Court places on the police officer "to evaluate the suggestibility and susceptibility of an accused"[107] in the brief time available after arrest. It is also observed that "[f]ew, if any, police officers are competent to make the kind of evaluation seemingly contemplated" by the Court.[108] This observation poses the question of whether an officer who does not possess the necessary skill, training, or ability to make such evaluations will be held to the same standard as a more skilled and able counterpart.[109]

Justice Stevens also implies that the Court's standard fails "to give police adequate guidance in their dealings with suspects who have requested counsel."[110] This concern is legitimate because the majority opinion may be perceived as abstract and ambiguous in its guidelines, for it does not articulate what the police can or cannot safely do. The Court merely

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> Will you please tell me where the shotgun is so we can protect handicapped school children from danger?
>
> (2) announced to the other officers in the wagon:
>
> If the man in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.
>
> or (3) stated to the other officers:
>
> It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.

Justice Stevens perceived these statements as interrogation because "all three appear to be designed to elicit a response from anyone who in fact knew where the gun was located." But under the Court's test, Justice Stevens asserted that the third statement would not be interrogation. *Id.* at 312. Justice Stevens appears to be overlooking the Court's implication that intent or design are relevant in determining what the officers should have known. *Id.* at 301-02 n.7, 303-04 n.10.

105. *Id.* at 304 (Burger, C.J., concurring).

106. *Id.* at 307, 313 n.13 (Stevens, J., dissenting).

107. *Id.* at 304 (Burger, C.J., concurring).

108. *Id.*

109. In other words, will the Court in future cases consider the personal qualities of the law enforcement officer in applying its "reasonably likely to elicit an incriminating response" test? For example, in his attempt to convince the Court that Gleckman was only "making an off-hand remark" without an "attempt to exploit any weakness of [Innis]," Dennis J. Roberts, Attorney General of Rhode Island, argued that "Gleckman was simply a patrol officer" with only " 18 months experience." [1979] 26 CRIM. L. REP. (BNA) 4080-81.

110. 446 U.S. at 311 n.10 (Stevens, J., dissenting).

holds that "subtle compulsion" is not the equivalent of interrogation,[111] and thus statements, evidence, or confessions obtained through its use are not as a matter of law inadmissible. The Court does state that either the officers' intent, knowledge and exploitation of a suspect's susceptibility, or the evocative or coercive nature of their conversation may render a result different from that reached in this case[112] but Justice Stevens also contends that the Court implies that deliberate elicitation may be permissible.[113] Consequently, what an officer may say and do before he progresses from "subtle compulsion" to "interrogation" is still ambiguous and will probably vary from court to court.

G. *Confusion with the "Exclusionary Rule"*

In his dissenting opinion, Justice Stevens states that "[i]n limiting its test to police statements 'likely to elicit an incriminating response,' the Court confuses the scope of the exclusionary rule with the definition of 'interrogation.' "[114] Justice Stevens' meaning is not apparent, but it is possible that he is referring to the recent decisions of the Court which have curtailed the scope of the exclusionary rule in fourth amendment cases by balancing, *i.e.*, by requiring the exclusion of the evidence only if the possible deterrent effects outweigh the societal costs of suppression.[115] This implication that the Court is actually balancing is especially relevant in view of Chief Justice Burger's recent suggestion that the balancing test should be extended and applied under the fifth and sixth amendments when the case involves no egregious police misconduct and the reliability of the evidence is not in doubt.[116]

H. *The Conflict Between Fifth and Sixth Amendment Standards*

As Chief Justice Burger points out in his concurrence, the majority opinion fails to clarify the conflict between *Innis* and *Brewer v. Williams*,[117] *i.e.*, the tension between the fifth and sixth amendment protec-

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111. *Id.* at 303.

112. *Id.* at 302-03.

113. *Id.* at 310-11 (Stevens, J., dissenting).

114. *Id.* at 309 n.5 (Stevens, J., dissenting).

115. *See* Franks v. Delaware, 438 U.S. 154, 164-71 (1978); United States v. Janis, 428 U.S. 433, 454 (1976); United States v. Calandra, 414 U.S. 338, 349-52 (1974). *See generally* 68 GEO. L.J., *supra* note 7, at 385 n.811.

116. *See* note 6 *supra* and accompanying text.

117. 446 U.S. at 304 (Burger, C.J., concurring). Brewer v. Williams, 430 U.S. 387 (1977) is factually similar to *Innis* in that neither defendant was expressly questioned by the police, both incidents occurred in the isolation of a police car, and both defendants had requested counsel. However, in other areas, the *Brewer* facts are clearly distinguishable from those of

tions and standards.[118] The *Brewer* decision could be based purely on sixth amendment grounds.[119] In *Brewer*, the Court held that the defendant's sixth amendment right to counsel had been violated by the police officer's deliberate attempt to elicit information from him through the "Christian burial speech."[120] However, the Court also specifically upheld the lower court ruling that the speech was, in effect, the equivalent of interrogation and that the constitutional claim to counsel would not "have come into play if there had been no interrogation."[121]

Innis. First, Detective Leaming's "Christian burial speech" in *Brewer* was expressly directed at the defendant, while in *Innis* Officer Gleckman's remarks were directed at another officer. Second, evidence existed that Detective Leaming formulated his speech deliberately to elicit an incriminating response from Williams, while no such evidence existed in *Innis*. Third, Detective Leaming knew of Williams' special susceptibility and suggestibility, *i.e.*, that Williams was a former mental patient and unusually religious, and these factors were exploited in his speech. Fourth, Williams had obtained counsel and had been arraigned; thus, judicial proceedings had been initiated and his sixth amendment right to counsel had attached.

118. *See* 446 U.S. at 300 n.4, 310 n.7. Note Justice Harlan's observations concerning the fifth and sixth amendment tensions in *Miranda*:

> The Court's opinion in my view reveals no adequate basis for extending the Fifth Amendment's privilege against self-incrimination to the police station. Far more important, it fails to show that the Court's new rules are well-supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation.

384 U.S. at 510 (Harlan, J., dissenting).

119. 430 U.S. at 400, 406. The Court in *Brewer* stated:

> There is no need to review in this case the doctrine of *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination . . . [f]or it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel.

Id. at 397-98.

120. 430 U.S. at 392-93. Addressing Williams as "Reverend," Detective Leaming said:

> I want to give you something to think about while we're traveling down the road . . . . Number one, I want you to observe the weather conditions, it's raining, it's sleeting, it's freezing, driving is very treacherous, visibility is poor, it's going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl's body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.

Id.

121. *Id.* at 400. Prior to *Brewer*, the Court formulated a "deliberate elicitation" test for determining whether a defendant's *sixth* amendment right to counsel had been violated.

Both interrogation and attachment issues are the apparent causes of the confusion between the fifth and sixth amendment protections. The sixth amendment right to counsel does not attach until the initiation of adversary judicial proceedings,[122] while the fifth amendment right to counsel under *Miranda* attaches at the beginning of the adversary process of custodial interrogation.[123] The Court apparently places a heavier burden on the government to establish waiver of the sixth amendment right to counsel than it does to establish waiver of the fifth amendment right.[124]

Although the facts in *Brewer v. Williams* are clearly distinguishable from those in *Innis,*[125] the tension between the decisions is evident. For example, the Rhode Island Supreme Court stated that the facts of *Innis* "relating to the waiver issue dovetail the *Brewer* case."[126] Moreover, in his dissenting opinion in *Innis,* Justice Stevens stated that he regarded "the two cases [as] indistinguishable" since Innis had invoked his right to counsel.[127] Therefore, Justice Stevens reasoned, "[i]n both cases the police had an unqualified obligation to refrain from trying to elicit a response from the suspect in the absence of his attorney."[128]

The core of the confusion between the fifth and sixth amendment standards appears to be that the members of the Court cannot reach a general agreement as to whether *Brewer v. Williams* is relevant to the fifth amendment interrogation issue. A decisive factor in this disagreement is the question of when the sixth amendment right to counsel attaches. *Innis* does not answer this question for us.

Massiah v. United States, 377 U.S. 201 (1964) (Stewart, J.). Recently, the Court stated that it was "not persuaded . . . that *Brewer* . . . modified *Massiah's* 'deliberately elicited' test" and held that a defendant's sixth amendment right to counsel is violated when officers "intentionally [create] a situation *likely to induce* [a suspect] to make incriminating statements without the assistance of counsel" after the adversary criminal proceedings have begun. United States v. Henry, 447 U.S. 264, 271, 274 (1980) (Burger, J.) (emphasis added).

122. Kirby v. Illinois, 406 U.S. 682, 689 (1972) (sixth amendment cannot apply before "the initiation of advesary judicial criminal proceedings—whether by formal charge, preliminary hearing, indictment, information, or arraignment.").

123. 384 U.S. at 477.

124. Kamisar, *supra* note 9, at 30. The rationale for this heavier burden on sixth amendment waivers may be justified both by the more advanced state of the criminal proceedings and by the fact that the sixth amendment right to counsel, unlike the fifth amendment right to counsel, is expressed in the Constitution. *Id.*

125. *See* note 117 *supra* and accompanying text.

126. 391 A.2d at 1164.

127. 446 U.S. at 310 n.7 (Stevens, J., dissenting).

128. *Id.*

V. CONCLUSION

Innis attempts to formulate a "workable" definition of interrogation as conceptualized in *Miranda*. The *Innis* definition may be interpreted as restricting the scope of *Miranda's* protections of the suspect, especially when viewed in the context of the Burger Court's other decisions which narrow *Miranda's* application. Yet, *Innis* simultaneously appears to deviate from these other decisions. The rather expansive, objective definition of interrogation adopted by the Court reaffirms *Miranda's* position in the law of criminal procedure, particularly in view of the more restrictive alternative open to the Court of holding that *Miranda* interrogation applies only to express questioning. Moreover, though the Court narrowly applies the definition to the facts of *Innis*, it does not restrict lower courts to such a narrow application of the standard. However, there are problems inherent in the definition, particularly in the use of ambiguous language and in the failure to clarify the conflicting rationales between the fifth and sixth amendments. These issues will need to be addressed by the Court in the future. Meanwhile, the lower courts will have to construe the *Innis* definition of interrogation.

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