CONSTITUTIONAL LAW—CUSTODIAL INTERROGATION—SHOULD THE ACCUSED HAVE A RIGHT TO KNOW THE NATURE OF HIS SUSPECTED OFFENSE?

In *James v. State*[1] the Supreme Court of Georgia affirmed the murder conviction of a defendant who contended that his waiver of counsel prior to making an incriminating statement had not been knowingly and intelligently made because he had not been informed of the nature of the crime which he was suspected of having committed. The defendant, after an argument with one Jackson, had fired several shots into a parked car which Jackson and two others were repairing. He then left the scene not knowing if he had hit any of the men. Police officers were notified by Jackson that one of the persons had been killed. The policemen located defendant in his automobile, asked for his gun, advised him of his *Miranda* rights, and then asked, "do you want to talk to us?"[2] The defendant then stated that he shot at the parked car, and the trial court allowed his statement into evidence. The supreme court held "that under such circumstances it was not necessary for the officers to advise him of the crime with which he was suspected or would be charged in order for the appellant's incriminating response or incriminating statement to be admissible in evidence."[3]

Prior to the decision in *Miranda v. Arizona*,[4] Georgia courts adhered to the test of voluntariness in determining whether an extra-judicial incriminatory statement could be admitted into evidence.[5] This test involved a simple standard: if the statement was found not to have been induced by "the slightest fear of punishment or the remotest hope of reward," it would be regarded as having been given freely and voluntarily.[6] Application of this test appears to have been rigid as shown in *Estes v. State*,[7] where a woman had killed her husband and then shot herself in an attempt to commit suicide. The police took her incriminating statement while she was awaiting treatment at a hospital. Despite her grievous wound and the obvious fact that she was greatly upset, her statement was found by the trial court to have been given voluntarily and her subsequent conviction of murder was affirmed.

The Georgia courts have strictly construed[8] the *Miranda* requirements.

1. 230 Ga. 29, 195 S.E.2d 448 (1973).
2. *Id.* at 29, 195 S.E.2d at 449.
3. *Id.* at 30, 195 S.E.2d at 449.
4. 384 U.S. 436 (1966).
5. McClung v. State, 206 Ga. 421, 57 S.E.2d 559 (1950); Watkins v. State, 199 Ga. 81, 33 S.E.2d 325 (1945); Bryant v. State, 197 Ga. 641, 30 S.E.2d 259 (1944).
6. Mobley v. State, 221 Ga. 716, 146 S.E.2d 735 (1966); Smith v. State, 215 Ga. 51, 108 S.E.2d 688 (1959); King v. State, 210 Ga. 92, 78 S.E.2d 20 (1953).
7. 224 Ga. 687, 164 S.E.2d 108 (1968).
8. Cash v. State, 224 Ga. 798, 164 S.E.2d 558 (1968).

In cases where the appropriate warnings were given and the rights thereunder waived, any subsequent statement has been accepted.[9]

The thrust of *Miranda* is to correct the imbalance between the power of the state and the weakness of an accused when subjected to in-custody interrogation. This goal is intended to be accomplished by informing the accused of those rights believed to be best suited to protecting his constitutional privilege against self-incrimination while under in-custody interrogation, and thereby reserving for trial the determination of his guilt or innocence. In *Escobedo v. Illinois*,[10] decided prior to *Miranda*, the Court condemned abuses to constitutional protection at the interrogation stage which "would make the trial no more than an appeal from the interrogation. . . ."[11] However, *Miranda* recognized that there are circumstances in which a statement or confession can legitimately be extracted although the accused has not exercised rights: "provided the waiver is made voluntarily, knowingly and intelligently."[12]

What constitutes a "knowing and intelligent" waiver, however, is not always clear. The cases following *Miranda* have usually turned on the oppressive circumstance of "jailhouse" interrogation. In *Darwin v. Connecticut*,[13] the defendant's confession was held to have been involuntary because the police kept him incommunicado for approximately forty-eight hours while they conducted their interrogation, and frustrated his attorney's attempts to talk with him. In a more striking example,[14] a defendant was shot in the leg as he fled. A policeman then pressed a gun to his face and threatened to kill him if he did not confess to the rape and murder of which he was suspected. Later, under the influence of morphine injected to ease the pain in his leg, the defendant made a written confession. The Supreme Court found the confessions involuntary and reversed the conviction. *Frazier v. Cupp*[15] offered a contrasting situation. The defendant was only given what the court called an "abbreviated description of his constitutional rights." He was told falsely that his co-defendant had confessed, and then the defendant signed a full confession. Nevertheless, the Supreme Court viewed the situation from "the totality of the circumstances" and determined that the confession was voluntary. It appears that the

9. Stevens v. State, 222 Ga. 603, 151 S.E.2d 127 (1966); Jacobs v. State, 120 Ga. App. 247, 170 S.E.2d 36 (1969); Jones v. State, 119 Ga. App. 105, 166 S.E.2d 617 (1969).

10. 378 U.S. 478 (1964). In this case the defendant was denied permission to see his attorney, even though the attorney was in the same building as defendant and was himself trying to gain permission to talk to the defendant. The police told the defendant that he would be allowed to go home if he could put the blame on his co-defendant. Afterwards the defendant confronted the co-defendant and said, "I didn't shoot Manuel, you did it." Thus defendant had implicated himself in the crime.

11. *Id.* at 487.

12. 384 U.S. at 444.

13. 391 U.S. 346 (1968).

14. Beecher v. Alabama, 389 U.S. 35 (1967).

15. 394 U.S. 731 (1969).

deciding factor was that the entire interrogation had lasted only "slightly more than an hour." In *Orozco v. Texas*,[16] police entered the defendant's boarding-house room at 4:00 a.m. and questioned him in his bedroom. An incriminating statement was elicited, and the defendant was convicted of murder. The Supreme Court reversed on the ground that the required *Miranda* warnings were not given. The tone of this decision intimated that the same compelling circumstances inherent in a station-house interrogation were present in this situation.

This brief review indicates that the deciding factor involved in determining whether a defendant has "knowingly and intelligently" waived his rights is whether he has knowledge of his rights; *i.e.*, whether he has been informed of them, and whether his will has been overcome by an oppressive police interrogation. But earlier decisions indicate that other factors are involved. In a 1948 decision,[17] the defendant, after waiving counsel, pled guilty to the charge of conspiracy to violate the Espionage Act of 1917. Although she knew of the indictment, the Court determined that she had not known the nature and penalties of the alleged crime, and thus did not have the requisite understanding of her constitutional rights to justify the trial court's recognition of her waiver.[18] A Pennsylvania court offered a particularly apt summation of these principles: "To waive a right intelligently, one must be aware of the considerations that make it a wise or unwise choice."[19]

In line with this view is the decision of another Pennsylvania court[20] in which the defendant contended that the trial court erred in not suppressing an oral statement which he made to police after having signed a waiver containing the *Miranda* warnings. The defendant asserted on appeal that this waiver was invalid because "at the time he signed it, he had not been informed of the nature of the crime for which he was to be questioned."[21] This contention was accepted:

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16. 394 U.S. 324 (1969).

17. Von Moltke v. Gillies, 332 U.S. 708 (1948).

18. In this context the Court said:

> To be valid such waiver must be made with apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Id. at 724.

19. Commonwealth v. Werner, 217 Pa. Super. 49, ____, 268 A.2d 195, 198 (1970). In this case there was a possible conflict of interest because defendant's counsel also represented the co-defendants, whose pleas were different than the defendant's. Defendant was asked whether he was satisfied with the situation and wished to proceed with his counsel. The defendant answered affirmatively, but after his conviction brought error on the ground of potential harm from dual representation. On appeal, the court determined that the defendant could not intelligently decide whether it was in his best interest to waive counsel, and granted the defendant a new trial.

20. Commonwealth v. Collins, 436 Pa. 114, 259 A.2d 160 (1969).

21. *Id.* at ____, 259 A.2d at 163.

> We agree with appellant that an intelligent and understanding waiver of the right to counsel is impossible where the defendant has not been informed of the crime which is being investigated. It is a far different thing to forgo a lawyer where a traffic offense is involved than to waive counsel where first degree murder is at stake.
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> The court below was of the view that so long as appellant knew why he was being held when the questioning began, that is enough. We cannot agree. The crucial moment is the time the waiver is signed. Once an accused has signed the waiver stating that he is willing to give a statement, it is no longer efficacious that he then be told what he is being questioned about. The compulsive force of the unintelligent waiver has already had its effect.[22]

In *Schenk v. Ellsworth*,[23] a federal district court held that "when a person is in custody and, for all practical purposes, charged with a crime . . . he must be told of the crime he is suspected of having committed before a statement can be taken."[24] The defendant had been convicted by a jury of second degree murder for killing his wife. The defendant had consumed a large amount of beer and wine during the day of the incident. He had returned to his home at about 11:30 p.m., and the deceased was shot shortly after midnight. The defendant was found at about 12:30 a.m. lying on the bed next to the corpse and was taken into custody at that time. He was not told that he had been arrested on suspicion of murdering his wife, but was told that he was to be questioned "in connection with the shooting incident of his wife."[25] He was then advised of his *Miranda* rights, and he stated that he did not think he needed an attorney at that time. As a result of the subsequent interrogation, a written statement was taken which, although exculpatory in nature, was used to impeach defendant's testimony at trial. The *Schenk* court stated:

> Had Schenk been told at the outset that he was suspected of murdering his wife he would have been able to intelligently determine for himself . . . whether he wanted a lawyer present. . . . As matters stood, Schenk was very likely misled, wittingly or unwittingly, by the county attorney in regard to why he was being detained and questioned.
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> Certainly it stands to reason that a suspect cannot intelligently make the decision as to whether he wants counsel if knowledge of the crime suspected is withheld from him. This knowledge is a necessity for the free exercise of the right to counsel.[26]

Affirming the appellant's conviction in *James v. State*, the Supreme Court of Georgia did not discuss the reasoning it applied. After stating the conclusion reached, the court said: "We have carefully studied the rule

22. *Id.* at ___, 259 A.2d at 163, 164.
23. 293 F. Supp. 26 (D. Mont. 1968).
24. *Id.* at 29.
25. *Id.* at 27.
26. *Id.* at 28, 29.

applied and the results reached in *Schenk v. Ellsworth*, . . . and we conclude that the circumstances in this case do not warrant the application of the rule there applied or the results there reached."[27]

Because of the lack of explanation, one can only speculate on how the Supreme Court of Georgia reached its conclusion that the circumstances in *James v. State* do not come within the rule in *Schenk*. Certainly, reasons can be invoked which justify the result reached in *James*. In the first place, while the incriminating statement was elicited during an "in-custody"[28] confrontation, the court found that the appellant had been properly advised of his *Miranda* rights. The approach of the Georgia courts[29] indicates that informing the accused of his rights is a very strong indication that any right subsequently waived is done so voluntarily, knowingly, and intelligently. From the brief description of the facts given by the *James* court, the appellant's statement appears to be a voluntary and spontaneous response to the policeman's question, "Do you want to talk to us?" At least one state supreme court has said that "[t]he privilege against self-incrimination does not protect an accused against statements he voluntarily makes after he has been informed of his rights."[30] Indeed, some courts have held that when a "spontaneous" statement is given, it is admissible in evidence even if the *Miranda* warnings have not been given.[31] Furthermore, those coercive elements which the United States Supreme Court found so overbearing in *Miranda* were not present in *James*. The initial conversation in which the incriminating response was given was very brief, and the surroundings of the accused could not be described as unfamiliar or compelling.

From the language of the decision in *James*, it is not clear if the court was expressing agreement with the rule applied or the results reached in *Schenk*. But without further explanation, it is not at all apparent why the rule in *Schenk* should not be applied to the circumstances in *James*. The appellant in *Schenk* was at least aware of the nature of his interrogation. He was found lying beside the corpse, and he was told that the questioning had to do with the shooting of his wife. The appellant in *James* knew only that he had shot at an occupied vehicle. While this in itself is a serious offense, it is certainly not the same as murder.

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27. 230 Ga. 29, 30, 195 S.E.2d 448, 449 (1973).

28. 394 U.S. 324 (1969). Police officers entered the defendant's bedroom at 4:00 a.m. and questioned him about a shooting incident. At trial, incriminating statements so obtained were admitted over the defendant's objection that he had not been advised of his *Miranda* rights before he made the statements. The Supreme Court reversed his conviction for murder, making it clear that required warnings must be given prior to interrogating any suspect who is under arrest regardless of where the interrogation takes place.

29. *See* text accompanying note 9 *supra*.

30. State v. Easthope, 29 Utah 2d 400, ___, 510 P.2d 933, 935 (1973).

31. United States *ex rel.* Parson v. Anderson, 354 F. Supp. 1060 (D. Del. 1972); People v. Cameron, 342 N.Y.S.2d 773 (Sup. Ct., N.Y. County 1973); Beeks v. State, 225 Ga. 200, 167 S.E.2d 156 (1969).

In the final analysis, the arguments may be reduced to this. The optimum source of evidence for criminal convictions is the independent investigations of the police.[32] While there is no reason not to allow a confession to be given if it is not improperly elicited, it is hard to ascertain whether a defendant has been "threatened, tricked, or cajoled,"[33] either "wittingly or unwittingly,"[34] unless all reasonable safeguards have been exercised. This area of criminal procedure is extremely delicate. Police should not be allowed to leave any reasonable doubt that a defendant in a criminal action has not been afforded every constitutional right and every safeguard available to ensure the protection of those rights.

As a matter of practicality, it is impossible to waive rights intelligently unless the waiver is made with a full understanding of the factual context in which the waiver is to be applied. Waiving one's right to remain silent or to be assisted by counsel during interrogation for assault cannot rationally be substituted as a waiver of the same rights in a murder case. To do so suggests a type of identity principle applicable to the concept of waiver even though in reality waivers are made in relation to the circumstances of the individual's situation. In other words, a defendant who may think it wise to waive certain rights in one situation, might choose not to do so if the situation were altered in some significant aspect. If the suspect or defendant is denied the opportunity to make this choice in view of the full circumstances, there is no basis for implying a knowing and intelligent waiver and from this point it is more than rational to say that the rights waived were never effectively afforded.

Of course, the Supreme Court of Georgia is not bound by a decision from the federal district court in Montana. But by referring to the *Schenk* decision in its opinion, it seems reasonable that the court was expressing agreement with the principles expressed by *Schenk*. On another level of argument, however, the real point of inquiry is whether the principles underlying the *Schenk* decision represent the policy which the Georgia courts should adopt. The analysis from this discussion supports the view that these principles should be followed at least to some extent, but the court's view in this regard has been left vague. It appears that *James* has presented a problem of first impression in Georgia. Ideally in such a case, one would expect the court to hand down a well-reasoned opinion, clearly enunciating the legal principles to be applied in resolving the issues being confronted. No such guidance is offered in *James*.[35] The deciding factors of the court's decision were left entirely unanswered. If, in Georgia, a new right to be informed of the nature of the crime for which one is suspected prior to questioning has been recognized, but was not protected in *James*

32. 378 U.S. 478 (1964).

33. 384 U.S. 436, 476 (1966).

34. 293 F. Supp. 26, 28 (D. Mont. 1968).

35. For an excellant critique, see Cole, *Annual Survey of Georgia Law: Constitutional Law*, 25 MERCER L. REV. 73 (1973).

because of the circumstances in which the defendant's initial statement was made, then what were these specific circumstances? Why did these circumstances so vitally alter the policy informing the general rule? How are finders of fact to recognize similar circumstances in the future? Hopefully these questions will be answered by a clear statement of the Georgia policy to be applied in such situations. But such a statement must await a future determination.

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