INTERROGATIONS AND POLICE DECEPTION—*Moran v. Burbine**

I. INTRODUCTION

The United States Supreme Court recently addressed the issue of whether police officers' failure to inform a suspect of his attorney's efforts to reach him would deprive the suspect of information essential to his ability to knowingly waive his fifth amendment rights under *Miranda*.[1] The Court also considered the effect of the officers' misinforming the suspect's attorney about their plans to interrogate the suspect. Finally, the Court decided whether the officers' actions violated the suspect's sixth amendment right to counsel and fourteenth amendment guarantee of due process.[2] In *Moran v. Burbine*,[3] the Court held that the officers' conduct did not violate the suspect's fifth, sixth, or fourteenth amendment rights.[4]

In *Moran*, the police read the suspect the *Miranda* warnings and secured a waiver of these rights prior to his arraignment.[5] After being subjected to a custodial interrogation, the suspect signed a written confession.[6] Between the time the suspect was read his *Miranda* warnings and the time he signed the confession, a public defender, who was called in by the suspect's sister, telephoned the police to inquire into the status of the interrogation.[7] The attorney was informed by an unidentified officer that all interrogations had ceased and that the suspect would not be interrogated further until the next morning. In fact, police detectives continued the interrogation that evening. Furthermore, the detectives failed to inform the defendant of the attorney's efforts to contact him.[8] This Note will examine the Court's opinion in *Moran*, addressing the constitutional issues raised by the defendant and focusing on the three constitutional provisions that the Court addressed.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).
[2] Moran v. Burbine, 106 S. Ct. 1135, 1142, 1145-48 (1986).
[3] 106 S. Ct. 1135 (1986).
[4] *Id.* at 1145, 1147-48.
[5] *Id.* at 1138.
[6] *Id.* at 1139.
[7] *Id.*
[8] *Id.*

II. BACKGROUND

A. *The Fifth Amendment Privilege Against Self-Incrimination*

Miranda warnings must be given to suspects prior to custodial interrogations.[9] These judicially created warnings are procedural safeguards designed to protect a suspect's fifth amendment privilege against self-incrimination[10] during inherently coercive custodial interrogations.[11]

After receiving the *Miranda* warnings, a suspect may terminate the interrogation at any time. The interrogation must cease if the suspect indicates at any time prior to or during questioning that he wishes to remain silent, or if he indicates that he wants an attorney present.[12] The suspect may waive these rights, provided the waiver is voluntarily, knowingly, and intelligently made.[13] The government has the burden to demonstrate by a preponderance of the evidence that the suspect waived his rights.[14] Furthermore, the Court has indicated that certain types of police "trickery" against a suspect could vitiate his waiver.[15]

B. *The Sixth Amendment Right to Counsel*

Absent a valid waiver, a defendant has a sixth amendment right[16] to have an attorney present during interrogations occurring after the initiation of adversarial judicial proceedings.[17] Adversarial judicial proceedings commence when prosecution is undertaken by way of formal charge, preliminary hearing, indictment, information, or arraignment.[18] Once the right has attached, the police may not interfere with the efforts of the attorney to represent the defendant during the interrogation.[19]

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[9] Miranda v. Arizona, 384 U.S. 436, 467-76 (1966).

[10] The fifth amendment provides that "nor shall any person . . . be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[11] Prior to the initiation of questioning, police must inform a suspect of the state's intention to use his statements against him to secure a conviction. Included in the warnings are the rights to remain silent and to have an attorney present at the interrogation. The Court imposed these procedural obligations after noting that custodial interrogations are inherently coercive. *Miranda*, 384 U.S. at 467-70.

[12] *Id.* at 473-74; *see also* Edwards v. Arizona, 451 U.S. 477 (1981).

[13] *Miranda*, 384 U.S. at 475.

[14] Colorado v. Connelly, 107 S. Ct. 515, 523 (1986).

[15] *Miranda*, 384 U.S. at 476.

[16] The sixth amendment provides that "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

[17] Brewer v. Williams, 430 U.S. 387, 401 (1977).

[18] *Id.* at 398 (quoting Kirby v. Illinois, 406 U.S. 682, 689 (1971)).

[19] Maine v. Moulton, 106 S. Ct. 477, 487 (1985).

C. *The Fourteenth Amendment Due Process Clause*

The due process clause of the fourteenth amendment[20] guarantees that the government will treat its citizens with fundamental fairness. In the context of custodial interrogations, the Court has held that confessions procured by means "revolting to the sense of justice" cannot be used to secure a conviction.[21] The Court has stressed that, even though the fifth amendment privilege against self-incrimination applies in the context of custodial interrogations, the Court will continue to subject confessions to the scrutiny of the due process clause.[22]

III. *Moran v. Burbine*

A. *Facts and Case History*

In *Moran*, the defendant was arrested in connection with a breaking and entering charge in Cranston, Rhode Island.[23] While the defendant was in custody, Cranston police officers obtained evidence suggesting he might have been responsible for the murder of a woman in Providence.[24] The Providence police were notified and arrived at the Cranston police headquarters at approximately 6:00 p.m. in order to question the defendant about the murder.[25]

That evening, the defendant's sister telephoned the public defender's office to obtain legal assistance for him concerning the breaking and entering charge. His sister was unaware that he was a murder suspect.[26] At 8:15 p.m., an assistant public defender telephoned the Cranston Police Department and stated that she would act as the defendant's counsel if the police intended to question him.[27] The attorney was informed the police did not intend to question the defendant until the next day and she was not informed that the Providence police were there, or that he was suspected of murder.[28] Less than one hour later, at approximately 9:00 p.m., the Providence police gave the defendant his *Miranda* warnings and questioned him about the murder.[29] The defendant signed three waivers and three confessions.[30] The defendant did not request an

[20] The fourteenth amendment provides that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.
[21] Brown v. Mississippi, 297 U.S. 278, 286 (1936).
[22] Mincey v. Arizona, 437 U.S. 385, 402 (1978).
[23] *Moran*, 106 S. Ct. at 1138.
[24] The murder occurred a few months before the breaking and entering incident. *Id.*
[25] *Id.* at 1138-39.
[26] *Id.* at 1139.
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*

attorney during the interrogations. He was, however, completely unaware of his sister's efforts to retain counsel for him and of the attorney's telephone call to the police station.[31]

The defendant moved to suppress the confessions. The trial court denied the motion and found that the defendant had validly waived his privilege against self-incrimination and his right to counsel.[32] The defendant was subsequently convicted of first-degree murder.[33] The Rhode Island Supreme Court affirmed the conviction, rejecting the defendant's arguments.[34]

The defendant unsuccessfully sought habeas corpus relief in federal district court.[35] The First Circuit Court of Appeals reversed, holding that the failure of the police to inform the defendant of the attorney's call had fatally tainted the waiver of his *Miranda* rights.[36] The First Circuit found it unnecessary to address the sixth and fourteenth amendment arguments and based its decision entirely upon the fifth amendment.[37] The United States Supreme Court, in an opinion written by Justice O'Connor, reversed the First Circuit's decision.[38]

B. United States Supreme Court

The Court stated a waiver of fifth amendment rights is valid as a matter of law when it has been determined "a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the state's intention to use his statements to secure a conviction."[39] The Court had no doubt that the defendant knowingly and voluntarily waived his right to remain silent and to the presence of counsel.[40] The record clearly showed the police did not resort to any sort of physical or psychological pressure to elicit the statements.[41] Additionally, the record reflected that the defendant fully comprehended his rights under *Miranda* and the potential consequences of a waiver of his rights.[42]

The defendant argued he was deprived of knowledge essential to make a knowing and intelligent waiver because he was not informed of his attorney's efforts to contact him and because the police mis-

[31] *Id.*
[32] State v. Burbine, 451 A.2d 22, 24 (R.I. 1982).
[33] *Id.* at 22.
[34] *Id.* at 31.
[35] Burbine v. Moran, 589 F. Supp. 1245 (D.R.I. 1984), *rev'd*, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).
[36] Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985), *rev'd*, 106 S. Ct. 1135 (1986).
[37] 753 F.2d at 178.
[38] *Moran*, 106 S. Ct. at 1148.
[39] *Id.* at 1142.
[40] *Id.* at 1141.
[41] *Id.*
[42] *Id.*

informed his attorney.[43] The Court reasoned that a person's capacity to comprehend and knowingly waive a constitutional right cannot depend upon events which are unknown to him and which occur outside of his presence.[44]

Although the *Miranda* decision noted that certain types of police "trickery" could vitiate an otherwise valid waiver,[45] the *Moran* Court reasoned that the failure to inform the defendant of his attorney's telephone call was not the sort of "trickery" anticipated in the *Miranda* decision. Similarly, misinforming the defense attorney about the continuation of the interrogation was not the sort of "trickery" that would vitiate the waiver.[46] The majority opinion did not elucidate the types of police "trickery" that might be sufficient to vitiate a waiver.

The Court further determined that the state of mind of the police in dealing with the defendant and his attorney was irrelevant to whether the defendant intelligently waived his *Miranda* rights. The Court stated that "even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident."[47] Although the act of deliberately withholding information from a suspect is "objectionable as a matter of ethics," such conduct will affect the constitutional validity of the suspect's waiver of his fifth amendment rights only if "it deprives a [suspect] of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[48]

The Court reaffirmed that *Miranda* warnings are not themselves constitutional rights, but rather, are measures to ensure that the suspect's right against compulsory self-incrimination is protected. Thus, their objective is not to mold police conduct or mandate a police code of behavior wholly unconnected to any federal right.[49]

The Court next considered the defendant's alternative argument that *Miranda* should be extended to prohibit the police officers' deceptive conduct. Relying on policy considerations, the Court rejected a proposed requirement that police inform a suspect of an attorney's efforts to reach him. The Court relied heavily upon "[o]ne of the principal advantages"[50] of the *Miranda* warnings—the "ease and clarity of its application."[51] The Court believed that the defendant's proposed modification would spawn numerous new legal questions[52] and would undermine the decision's central

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[43] *Id.*
[44] *Id.*
[45] *Miranda*, 384 U.S. at 476.
[46] *Moran*, 106 S. Ct. at 1142.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1143.
[50] *Id.* (quoting Berkemer v. McCarty, 468 U.S. 420, 430 (1984)).
[51] *Id.*
[52] The Court listed some legal questions which might arise if it were to adopt a rule requiring that the police inform a suspect that an attorney has been retained on his behalf.

"virtue of informing police and prosecutors with specificity . . . what they may do in conducting [a] custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible."[53]

In addition to the problem of clarity in the application of the *Miranda* warnings, the Court reasoned that extending *Miranda* to require the police to inform a suspect of an attorney's efforts to reach him would work a "substantial" and "inappropriate shift in the subtle balance struck in that decision."[54] Competing concerns are present in every custodial interrogation. The court must weigh "the need for police questioning as a tool for effective enforcement of criminal laws"[55] against the inherently coercive atmosphere of custodial interrogations.[56]

The *Moran* Court noted that the *Miranda* Court, while attempting to establish a balance of these competing concerns, failed to adopt the more extreme position proposed by the American Civil Liberties Union, which would have required the actual presence of an attorney at every custodial interrogation in order to dispel the inherent coercion.[57] Instead, the *Miranda* Court struck a balance that allows police to continue an interrogation as long as a suspect clearly understands the rights he is waiving.[58]

The *Moran* Court apparently believed that extending *Miranda* in any manner would serve to destabilize the balance struck between society's need to capture and convict criminals and an individual's right to be free of coercion in custodial interrogations. In the Court's opinion, "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process."[59] The Court stated that "a rule requiring the police to inform a suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all,"[60] and further stated it "would come at a substantial cost to society's legitimate

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For example, the Court questioned:

> To what extent should the police be held accountable for knowing that the accused has counsel? Is it enough that someone in the station house knows, or must the interrogating officer himself know of counsel's efforts to contact the suspect? Do counsel's efforts to talk to the suspect concerning one criminal investigation trigger the obligation to inform the defendant before interrogation may proceed on a wholly separate matter?

Id.

[53] *Id.* at 1143-44 (quoting Fare v. Michael C., 442 U.S. 707, 718 (1979)).

[54] *Id.* at 1144.

[55] *Id.* (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 225 (1973)).

[56] The Court has previously recognized that custodial interrogations are inherently coercive, creating a substantial risk that police officers will inadvertently cross the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Id.* at 1144 (citing New York v. Quarles, 467 U.S. 649 (1984)).

[57] *Id.*

[58] *Id. See also* Edwards v. Arizona, 451 U.S. 477, 482 (1981); *Miranda*, 384 U.S. at 474.

[59] *Moran*, 106 S. Ct. at 1144.

[60] *Id.*

and substantial interest in securing admissions of guilt."[61]

IV. ANALYSIS

A. The Fifth Amendment

The *Miranda* Court recognized the inherently coercive atmosphere surrounding custodial interrogations, stating "the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[62] The government has the burden of proving the validity of a waiver of *Miranda* rights[63] and should not be able to meet this burden when they have withheld information from the suspect[64] regarding the attorney's attempt to contact him.[65]

The *Moran* decision is contrary to prior decisions of most state courts that have considered this issue.[66] The Court thus rejected many carefully reasoned state decisions that have come to the opposite conclusion.[67] The majority's opinion also clearly disregards the American Bar Association's Standards for Criminal Justice,[68] which recommend that a person in custody should be placed in communication with a lawyer at the earliest possible opportunity.[69] The majority rejected this position in spite of the American Bar Association's expressed concerns about the potential effect of a contrary rule in police stations around the country.[70]

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[61] *Id.*

[62] *Miranda*, 384 U.S. at 455.

[63] "Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders." *Id.* at 475; *see also* Brewer v. Williams, 430 U.S. 383, 404 (1977).

[64] This Note does not examine the police officers' misinforming the attorney under the fifth amendment because *Miranda* is designed to guard against violations of the suspect's rights and not against violations of the attorney's rights.

[65] Since the Court's decision in *Moran*, some state courts have failed to follow its rationale. *See, e.g.*, People v. Holland, 147 Ill. App. 3d 323, 497 N.E.2d 1230 (1986) (the Illinois Supreme Court's holding in People v. Smith, 93 Ill. 2d 179, 442 N.E.2d 1325 (1982), that police have a duty to inform a defendant undergoing custodial interrogation when an attorney is seeking to advise him, and that any confession obtained must be suppressed if they fail to do so, remains good law under state constitution); *see also* People v. Houston, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986) (a suspect who has waived his *Miranda* rights must be allowed to reconsider if his attorney shows up at the place of interrogation and offers assistance, and the police must interrupt the interrogation and ask the suspect whether or not he wants to confer with his attorney, and they may not deliberately mislead or delay the attorney in his efforts to reach the client).

[66] *See Moran*, 106 S. Ct. at 1159 (Stevens, J., dissenting).

[67] The American Bar Association has summarized the relevant state case law on this subject. *See id.* at 1151 n.10.

[68] *Id.* at 1151.

[69] *Id.* at 1151-52 n.11 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE § 5-7.1 (2d ed. 1980)).

[70] *Id.* at 1152.

Prior to the *Moran* decision, the Supreme Court of Oregon was one of the state courts to have reached an opposite conclusion on this issue.[71] In *State v. Haynes*,[72] the Oregon court held that the prosecution cannot use a suspect's statements obtained during a custodial interrogation after the police, but not the suspect, knew that an attorney sought to consult with him.[73] Before the police may proceed with the interrogation, the suspect "must be informed when counsel actually seeks to consult with him and must voluntarily and intelligently have rejected that opportunity."[74] The court reasoned that "[t]o pass up an abstract offer to call some unknown lawyer is very different from refusing to talk with an identified attorney actually available to provide at least initial assistance and advice."[75] Perhaps what the *Moran* Court feared was that suspects will exercise their fifth amendment privilege against self-incrimination after consulting with an attorney.[76] The Court has previously stated, however, that "[n]o system worth preserving should have to *fear* that if an accused is permitted to consult with his lawyer, he will become aware of, and exercise, these rights."[77]

The majority's alternative cost-benefit analysis[78] reflects the Court's fear that an individual may exercise his rights. In previous cases, however, the Court has favored protecting the interest in individual liberty when threatened by incommunicado interrogation. The *Miranda* Court "apparently felt that whatever the cost to society in terms of fewer convictions of guilty suspects, that cost would simply have to be borne in the interest of enlarged protection for the Fifth Amendment privilege."[79]

Adoption of a rule requiring police to inform a suspect that an attorney has been retained for him would not destroy the balance achieved by the Court in the *Miranda* decision. Such a rule need not go so far as to require that counsel be present in every custodial interrogation. The suspect would still retain the discretion to proceed without the assistance of counsel. Additionally, the rule would have a limited application because it would only apply to those situations in which the police are aware that an attorney has been retained for the suspect.

By determining that police may deliberately withhold information from a suspect,[80] the Court is promoting deceptive law enforce-

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[71] State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979), *cert. denied*, 446 U.S. 945 (1980).

[72] *Id.*

[73] *Id.* at 61, 602 P.2d at 273.

[74] *Id.*

[75] *Id.* at 72, 602 P.2d at 278.

[76] The majority admitted that "[n]o doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess." *Moran*, 106 S. Ct. at 1142.

[77] Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

[78] *See supra* notes 54-61 and accompanying text.

[79] New York v. Quarles, 467 U.S. 649, 656-57 (1984).

[80] *See Moran*, 106 S. Ct. at 1142.

ment practices.[81] The Court reasoned that, although "objectionable as a matter of ethics," such conduct will affect the constitutional validity of the suspect's waiver of his fifth amendment rights only if "it deprives a [suspect] of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."[82] Under this rationale, police may deliberately choose not to inform the suspect about the retention of counsel. The net result is that police are free to deceive suspects in order to carry on inherently coercive incommunicado interrogations.

B. The Sixth Amendment

Absent a valid waiver, a defendant has a sixth amendment right to the presence of an attorney during any interrogation occurring after adversarial judicial proceedings have commenced.[83] In *Moran*, the interrogations occurred before the initiation of adversarial judicial proceedings.[84]

The defendant, nevertheless, argued that, although adversarial judicial proceedings had not commenced, the "right to the noninterference with an attorney's dealing with a criminal suspect . . . arises the moment that the relationship is formed."[85] The Court rejected this theory and found that as a clear matter of precedent, its decisions "foreclose any reliance on . . . the proposition that the Sixth Amendment right, in any of its manifestations, applies prior to the initiation of adversary judicial proceedings."[86]

The *Moran* Court correctly disposed of the defendant's sixth amendment arguments. Since adversarial judicial proceedings had not yet commenced against the defendant, his sixth amendment rights had not attached at the time in question. Since his rights had not yet attached, he had no basis to argue that they were violated.

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[81] "[A] system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation." *Escobedo*, 378 U.S. at 489 (citations omitted); *see also* Haynes v. Washington, 373 U.S. 503, 519 (1962) ("Official misconduct cannot but breed disrespect for law, as well as for those charged with its enforcement."); Blackburn v. Alabama, 361 U.S. 199, 207 (1960) ("The abhorrence of society to the use of involuntary confessions . . . also turns on the deep-rooted feeling that the police must obey the law while enforcing the law . . . .") (quoting Spano v. New York, 360 U.S. 315, 320-21 (1959)).

[82] *Moran*, 106 S. Ct. at 1142.

[83] Brewer v. Williams, 430 U.S. 387, 401 (1977).

[84] Adversarial judicial proceedings commence when prosecution is undertaken by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Moran*, 106 S. Ct. at 1145 (quoting United States v. Gouveia, 467 U.S. 180, 187 (1984)).

[85] *Id.*

[86] *Id.*

C. *The Fourteenth Amendment*

The defendant challenged the police officers' conduct under the due process clause of the fourteenth amendment, focusing on their communicating false information to his attorney.[87] The Court dismissed the claim, stating merely that "the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the states."[88] The Court noted, however, that "on facts more egregious than those presented here police deception might rise to a level of a due process violation."[89]

The summary disposition of the due process issue is unusual. Without analysis, the Court simply stated that its conscience was not shocked. Prior Supreme Court decisions, however, have given more careful consideration to the requirements of due process.[90] The Court in *Moran* should have given the same careful consideration to this issue.

V. CONCLUSION

In *Moran*, the Court addressed police officers' withholding of information from a suspect concerning an attorney's efforts to contact him, and officers' misinforming the attorney about the continuation of interrogations, under the fifth, sixth, and fourteenth amendments. The sixth amendment right to counsel issue was correctly disposed of in *Moran* because adversarial judicial proceedings had not yet commenced at the time in question.[91] The Court, however, should continue to measure confessions against due process requirements as it has previously done, and not as it did in *Moran*.[92] Finally, the fifth amendment privilege should be interpreted to require police to inform a suspect that an attorney has been retained for him.[93]

Adoption of a rule that police must inform a suspect of the retention of counsel for him would not destroy the balance achieved by the Court in *Miranda*. Furthermore, such a rule would also be consistent with the decisions of most of the states that have considered this issue. By determining, however, that police may deliberately withhold information from a suspect, the Court is promoting deceptive law enforcement practices.

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[87] *Id.* at 1147.

[88] *Id.* at 1148.

[89] *Id.* at 1147.

[90] *See, e.g.*, Wainwright v. Greenfield, 106 S. Ct. 634 (1986) (use of petitioner's post-arrest, post-*Miranda* warnings silence as evidence of his sanity violated due process).

[91] *See supra* notes 83-86 and accompanying text.

[92] *See supra* notes 87-90 and accompanying text.

[93] *See supra* notes 62-82 and accompanying text.