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Basic Miranda Analysis

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BASIC *MIRANDA* ANALYSIS

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I. INTRODUCTION

> *You have the right to remain silent. Anything you say can be used against you. You have the right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning, if you wish one.*

This standard litany of *Miranda* warnings[1] is now as familiar to many Americans as the Pledge of Allegiance. But how does *Miranda* work? And what's left of this case which the Meese Justice Department called "the epitome of Warren Court activism in the criminal law area."[2] This article describes the basic structure of *Miranda* analysis. Its purpose is to help law students, lawyers, and judges understand and apply the diverse strands of Supreme Court law in this controversial field.

The legal analysis spawned by *Miranda* may be summarized as follows:

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1. The warnings are derived from the landmark case, Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* involved four separate criminal prosecutions in which the Court reversed convictions because statements taken during custodial interrogations were admitted into evidence against the defendants.

2. Report to the Attorney General on the Law of Pre-Trial Interrogation (Markham Report), Feb. 12, 1986.

Miranda: Basic Analysis

I. Preliminary questions
   A. Does the court have jurisdiction?
   B. Is the claim justiciable?
   C. Was the harm caused by government action?
II. On the merits: was *Miranda* violated?
   A. Are the *Miranda* rules applicable?
      1. Was a statement obtained by custodial interrogation?
         a. Was claimant in custody?
         b. Did interrogation occur?
         c. Did claimant make a statement in response to the interrogation?
      2. Did the government use the statement in a criminal prosecution to prove guilt or enhance punishment?
      3. Did the need for *Miranda* protections outweigh other governmental needs?
   B. Did the government comply with the *Miranda* rules?
      1. Were the required warnings given?
      2. Did claimant voluntarily and knowingly waive the *Miranda* rights?
      3. Did the government comply with applicable rules concerning invocation of the *Miranda* rights?
III. Remedies: if *Miranda* was violated, what redress is appropriate?
   A. Does the exclusionary rule apply?
   B. Does the harmless error rule apply?

As set out in the outline above, a claimant seeking redress for an alleged violation of *Miranda* must initially meet three preliminary requirements.[3] First, the court must have jurisdiction over the claim. Second, the claim must be justiciable. Third, the conduct giving rise to the claim must be government action. Failure to satisfy any of these requirements normally results in dismissal without reaching the merits of the *Miranda* claim.

If claimant satisfies the preliminary requirements, the court will proceed to the merits of the claim. On the merits, the analysis has two components.[4] First, one must determine whether *Miranda* is ap-

3. These are standard preliminary requirements that apply throughout constitutional law.

4. The two-part structure of the analysis is the same for all constitutional limits. In applying any constitutional restriction on government action, one should ask first whether the limit is applicable—i.e., is this the kind of government action that is subject to this limit?—and

plicable, i.e., whether, in prosecuting claimant for crime, the government introduced a statement obtained from claimant by custodial interrogation. The court must decide whether claimant was in custody, whether interrogation occurred, whether claimant's statement was a response to interrogation, whether the government introduced the statement in a criminal prosecution to prove guilt or enhance punishment, and whether the need for *Miranda* protections outweighs other governmental needs. *Miranda* is only applicable if all these requirements are met.

Second, if *Miranda* is applicable, one must determine whether the government complied with the *Miranda* rules. Did the government give claimant the required warnings? Did claimant knowingly and voluntarily waive the *Miranda* rights prior to the interrogation? If claimant invoked either of the *Miranda* rights, i.e., the right to remain silent or the right to have an attorney present, did the government obey the rules relating to such invocations? Compliance with *Miranda* requires that the government satisfy all these requirements.

If *Miranda* is inapplicable or the *Miranda* requirements were met, the analysis ends. If, on the other hand, *Miranda* is applicable and its requirements were not met, one must proceed to the question of remedies, i.e., whether the resulting criminal conviction must be overturned. Here the issues concern the exclusionary rule and the harmless error rule.

The next section discusses each step of basic *Miranda* analysis in more detail.

II. DISCUSSION

A. *Preliminary Questions*

1. *Does the court have jurisdiction?*

Claimant must show that the court has jurisdiction over the claim. In most cases, this is not a problem, since *Miranda* claims normally arise in criminal prosecutions in which the court has jurisdiction by statute.[5]

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second whether the government complied with the rules the Supreme Court has developed for enforcing the limit. In short, the analysis on the merits of any constitutional limit focuses on two questions: (1) applicability and (2) compliance.

5. For example, under the California Penal Code the courts are given statutory jurisdiction. CAL. PENAL CODE § 777 (West 1985).

2. *Is the claim justiciable?*

To qualify for a decision on the merits, the claim must involve a justiciable controversy between adverse parties. In general, this is not a problem, since *Miranda* issues arise in criminal prosecutions involving the very real threat of imprisonment and/or fines.

But justiciability issues do surface occasionally in cases raising *Miranda* claims. For example, the rule against advisory opinions prevents federal courts from reaching *Miranda* issues in cases decided on independent and adequate state grounds. Similarly, the claim must be ripe and not moot.

Most important, claimant must have standing. The only person with standing to invoke *Miranda* is a person whose statement, taken during custodial interrogation, is offered in evidence in a criminal prosecution against him. This is because the privilege against self-incrimination,[6] on which *Miranda* is based, is a personal right that may not be invoked by third-parties.[7]

3. *Was the harm caused by government action?*

The *Miranda* rules, like most other constitutional limits, apply only to the government. Custodial interrogation undertaken by a person acting in a private capacity need not comply with the requirements of *Miranda*. If the interrogation is conducted by a government official or agent, the government-action requirement is met unless the interrogation was completely unrelated to the interrogator's official duties. If the interrogation is conducted by a private person, e.g., a security guard employed by a private corporation, the government action requirement is not met unless the government either compelled the interrogation or encouraged it so substantially that the decision to interrogate must be attributed to the government.[8]

If claimant does not satisfy the three preliminary requirements,

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6. U.S. CONST. amend. V.

7. *E.g.*, People v. Varnum, 66 Cal. 2d 808, 427 P.2d 772, 59 Cal. Rptr. 108 (1967); *see* W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 415-17 (1985).

8. *E.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982) (due process restrictions are not applicable to private decision to transfer a patient out of a nursing home); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (due process restrictions are not applicable to decision of private warehouseman to execute warehouseman's lien); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) (due process restrictions are not applicable to decisions by privately owned utility company to cut off customer's gas and electricity). These cases do not involve *Miranda* problems, but they are the leading authorities on the government action issue. As the Court stated in *Blum*, "[a] state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004.

the claim should be dismissed without reaching the merits of the *Miranda* issues. If claimant satisfies the preliminary requirements, one may proceed to evaluate the *Miranda* claim on the merits.

B. *On the Merits: Was Miranda Violated?*

1. *Is Miranda applicable?*

Miranda only applies when the government (a) uses custodial interrogation to obtain a statement from claimant, (b) introduces the statement in a criminal prosecution against claimant to prove guilt or enhance punishment, and (c) has no overriding need for immediate action beyond the solution of the particular crime. Each of these three requirements needs to be considered separately.

a. *Did claimant make a statement in response to custodial interrogation?*

1) *Was claimant in custody?*

Miranda applies only to custodial interrogation. *Miranda*'s premise is that interrogation occurring when one is in police custody is so coercive that procedural protections are needed to insure that the suspect is not compelled to incriminate himself in violation of the privilege against self-incrimination. Without custody, this coercion is not so likely, so *Miranda* protections are not required.

The test for determining whether claimant was in custody is whether a reasonable person would have found the situation approximately as coercive as a custodial arrest.[9] Relevant factors include whether a reasonable person would have believed the detention and questioning were temporary and whether the situation was so police-dominated that a reasonable person would have felt at the mercy of the police.[10] On the latter point, relevant factors include the follow-

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9. The case in which the Court adopted the objective (reasonable person) test is Berkemer v. McCarty, 468 U.S. 420 (1984). In *Miranda*, the Court stated that its requirements apply "when the individual is . . . in custody at the station or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 477. In later cases, however, the Court tightened the definition of custody. In *Berkemer*, for example, the Court held that a traffic stop did not involve custody although it was conceded to be a sufficient deprivation of freedom to be a "seizure" within the meaning of the fourth amendment. As the Court stated in Oregon v. Mathiason, 429 U.S. 492 (1977), "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Id.* at 495.

10. *Berkemer*, 468 U.S. at 437-38.

ing: location (police station vs. public street or home), number of police officers present, use of physical restraint (e.g., handcuffs), unfamiliarity of the location, and isolation of claimant.[11] Applying these factors, the Court has concluded that interrogations at police stations are normally custodial, but not always.[12] Similarly, interrogations at places other than police stations are normally noncustodial, but not always.[13] Absent special circumstances, traffic stops and *Terry* stops[14] do not involve custody.[15]

2) *Was the suspect interrogated?*

Miranda applies "not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation."[16] Interrogation may involve either: (1) express questions or (2) the functional equivalent of express questions.[17]

a) *Express questions*

As a general rule, express questions addressed by government officials to claimant about the case constitute interrogation. Some express questions are not interrogation, however. Questions "normally attendant to arrest and custody" are not interrogation.[18] For example, an inquiry whether claimant will take a blood-alcohol test is not interrogation.[19] Similarly, booking inquiries such as "requests to submit to fingerprinting or photography" do not trigger the *Miranda* rules.[20] Questions that do not call for a response concerning the merits of the case (e.g., would you like a cup of coffee?) are also presumably not interrogation. And questions seeking to clarify volunteered statements may not be interrogation.[21]

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11. *Id.*; Minnesota v. Murphy, 465 U.S. 420 (1984).

12. For examples of noncustodial station-house interrogations, see California v. Beheler, 463 U.S. 1121 (1983); *Mathiason*, 429 U.S. 492 (1977).

13. For examples of custodial interrogations at locations other than police stations, see New York v. Quarles, 467 U.S. 649 (1984) (supermarket); Rhode Island v. Innis, 446 U.S. 291 (1980) (police car); Orozco v. Texas, 394 U.S. 324 (1969) (claimant's bedroom).

14. Terry v. Ohio, 392 U.S. 1 (1968) (a "*Terry* stop" is an investigative detention that does not rise to the level of a custodial arrest).

15. *Berkemer*, 468 U.S. 420 (1984).

16. *Innis*, 446 U.S. at 300.

17. *Id.* at 300-01 ("We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent.").

18. *Id.* at 301.

19. South Dakota v. Neville, 459 U.S. 553 (1983).

20. *Id.* at 564 n.15.

21. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE 301 (1985). The Supreme Court has not yet ruled on this issue.

b) *Functional equivalent of express questions*

Words or actions that do not take the form of express questions constitute interrogation if the police should know they are reasonably likely to elicit an incriminating response from the suspect.[22] This is an objective test that takes into account any special characteristics of the claimant of which the police should have been aware. The question is whether a reasonable officer would have known that, given the particular characteristics of the suspect, the conduct was reasonably likely to elicit an incriminating response.[23]

Relevant evidentiary factors concern (1) the police behavior and (2) the characteristics of claimant. In the first class, relevant considerations include how "evocative" the police conduct was,[24] how long it lasted, and whether it was intended to evoke an incriminating response.[25] In the second class, relevant considerations include the suspect's mental capacity, mental state (e.g., disoriented or upset), and "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion . . . ."[26]

3) *Was claimant's statement a product of custodial interrogation?*

Even if claimant was in custody and interrogation took place, *Miranda* only applies if the statement sought to be introduced was a response to the interrogation. In other words, there is a causation requirement: the statements must be "the result of police interrogation."[27] A phrase frequently used in discussing this causation re-

22. *Innis*, 446 U.S. at 301 ("[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect.").

23. It is not enough that the police conduct is likely to elicit a response from the claimant. The likely response must be incriminating. "By 'incriminating response' we refer to any response—whether inculpatory or exculpatory—that the prosecution may seek to introduce at trial." *Id.* at 301 n.5.

24. The Supreme Court has ruled, however, that several strikingly evocative types of police conduct taken straight out of interrogation manuals were not the functional equivalent of interrogation. *E.g.*, Arizona v. Mauro, 107 S. Ct. 1931 (1987) (putting a husband and wife suspected of murder together and recording their conversation); *Innis*, 446 U.S. 291 (1980) (speech about harm a hidden weapon could cause to handicapped children).

25. "[W]here 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." *Id.* at 302 n.7.

26. *Id.* at 302 n.8.

27. *Mauro*, 107 S. Ct. at 1936 ("[H]is volunteered statements cannot properly be con-

quirement is "volunteered statements."[28] If a statement is volunteered, it is not the result of interrogation and is therefore not subject to the *Miranda* rules.[29]

b. *Did the government introduce claimant's statement in a criminal prosecution to prove guilt or enhance punishment?*

Miranda is not violated when the government simply uses custodial interrogation to obtain a statement without complying with the *Miranda* rules. Rather *Miranda* applies only when the government seeks to introduce the statement in a criminal prosecution against the *Miranda* claimant. Moreover, *Miranda* does not ban all uses of such statements in criminal prosecutions. The only uses banned so far are as evidence to prove guilt[30] and to enhance the sentence.[31] In contrast, *Miranda* does not prohibit use of the statements to impeach claimant's testimony.[32]

c. *Was the need for compliance with the Miranda rules outweighed by a special need for immediate action?*

The *Miranda* requirements only apply if the need to protect claimant's fifth amendment rights is not outweighed by a need for immediate action to achieve an overriding governmental objective.[33] For example, "[T]he need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[34] Thus, the *Miranda* rules need not be obeyed in interrogating an arrestee about the whereabouts of a gun known

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sidered the result of police interrogation.").

28. *Id.*; *Miranda*, 384 U.S. at 478.

29. As the Court put it in *Miranda*, "Any statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence. . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*

30. *Id.* at 436.

31. Estelle v. Smith, 451 U.S. 454 (1981) (defendant's statements taken during custodial interrogation without complying with the *Miranda* rules may not be admitted to prove future dangerousness at the penalty phase of a capital case).

32. Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971). The Court in these cases held that when a defendant testifies at his or her trial, statements taken during custodial interrogation without complying with the *Miranda* rules may be used to contradict and cast doubt upon defendant's trial testimony.

33. This "overriding need" rule was created in *Quarles*, 467 U.S. at 649, where the Court held that *Miranda* is subject to a " 'public safety' exception." *Id.* at 655.

34. *Id.* at 657.

to be concealed nearby.[35]

Since *New York v. Quarles* is the only case to apply this rule so far, the scope of the new exception is unclear. *Quarles* suggests it is limited to situations justifying a reasonable belief that immediate questions and answers are necessary to further an overriding need beyond the normal need to solve the crime.[36] Whether this "immediate answer" exception will be extended to public needs other than physical safety remains to be seen.[37]

2. *Did the government comply with the Miranda rules?*

If *Miranda* is applicable—i.e., if the government, without any overriding need beyond solving the crime, conducted a custodial interrogation, obtained a statement from defendant, and introduced the statement in a criminal prosecution against defendant to prove guilt or enhance the punishment—then the next issue is whether the government complied with "the *Miranda* rules."[38] These rules fall into three major categories: (1) warnings, (2) waiver, and (3) invocation of *Miranda* rights.

a. *Were the required warnings given?*

If *Miranda* is applicable, the government must give the four famous *Miranda* warnings before beginning the interrogation. These warnings are as follows:

> 1) You have the right to remain silent.
>
> 2) Anything you say can and will be used against you in a court of law.
>
> 3) You have the right to talk to a lawyer and have him present with you while you are being questioned.
>
> 4) If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.[39]

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35. *Id.*

36. The Court referred to "an objectively reasonable need to protect the police or the public from any immediate danger" and "exigency requiring immediate action by the officers beyond the normal need expeditiously to solve a serious crime." *Id.* at 659 n.8.

37. Dicta in *Quarles* suggest that the exception may be extended to all situations in which "the cost [of the *Miranda* rules] would have been something more than merely the failure to obtain evidence . . . ." *Id.* at 657. Thus, Justice Rehnquist's majority opinion suggests that *Miranda* is limited to "questions designed solely to elicit testimonial evidence from a suspect." *Id.*

38. The quoted phrase is taken from Michigan v. Tucker, 417 U.S. 433, 443 (1974).

39. This version is the one used by the San Jose, California Police Department. San Jose Police Dept. *Miranda* Admonition Card No. 200-56, (Jan. 1980). For the Court's origi-

The Court has not required adherence to any "precise formulation of the warnings."[40] It is enough if the language used succeeds in communicating the substance of the four warnings.

Despite numerous efforts by commentators to add new warnings,[41] the Court has refused to extend the list.[42]

b. *Did claimant waive the Miranda rights?*

Responses to custodial interrogation are inadmissible to prove guilt or enhance punishment unless claimant waived the right to remain silent and have an attorney present.[43] The Court uses a two-prong test for determining whether a valid waiver occurred.[44] First, the waiver must be voluntary.[45] Second, the waiver must be knowing.[46] To make these determinations, the court looks at the totality of the circumstances.[47]

Waiver may not be inferred from a silent record or from the mere fact that claimant responded to questions after being warned.[48] Instead, the government must show by some positive evidence that claimant made a decision to waive the *Miranda* rights before responding.[49] The evidence may be thin, however. A word or a gesture will suffice. Despite language in *Miranda* about the government's "heavy burden" and the need for "corroborated evidence,"[50] it now appears that testimony by an officer that claimant was warned and indicated a willingness to be questioned suffices.

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nal formulations, see *Miranda*, 384 U.S. at 467-68, 469, 473, 478-79.

40. California v. Prysock, 453 U.S. 355, 359 (1981).

41. The leading candidates for inclusion have been the following: (1) you have the right to cut off questioning at any time even after you have answered some questions; (2) if you remain silent, the prosecutor may not comment on that at trial; and (3) you will be asked about the following crimes.

42. *E.g.*, Colorado v. Spring, 107 S. Ct. 851 (1987) (rejecting a requirement that claimant be warned concerning the crimes which will be the subject of the interrogation).

43. *Miranda*, 384 U.S. at 479.

44. Moran v. Burbine, 475 U.S. 412, 421 (1986) ("The [waiver] inquiry has two distinct dimensions.").

45. "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* at 421.

46. "Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it." *Id.*

47. *Id.* Fare v. Michael C., 442 U.S. 707, 725 (1979) (defendant's request to speak with his probation officer did not invoke right to have attorney present during interrogation).

48. *Miranda*, 384 U.S. at 475.

49. Tague v. Louisiana, 444 U.S. 469 (1980).

50. *Miranda*, 384 U.S. at 475.

1) *Was the waiver voluntary?*

To establish a valid waiver, the government must prove that claimant's choice was voluntary, i.e., not coerced. Relevant factors include the following: claimant's competence and mental condition, intimidating police behavior (e.g., physical violence, threats), physical restraints (e.g., handcuffs), and whether claimant resisted.

Miranda suggested that waivers obtained by "trickery" are not voluntary,[51] but the Court has done little to enforce this dictum.[52]

2) *Was the waiver knowing?*

To establish a valid waiver, the government must prove that claimant was aware of the nature of the *Miranda* rights. But there need not be any detailed inquiry on this score. It is enough if the warnings were given and claimant was capable of understanding them at the time, i.e., sufficiently intelligent and not suffering from any temporary impairment such as intoxication or emotional disturbance.

The Court has repeatedly stated that a waiver is not "knowing" unless claimant understands the consequences of giving up the rights.[53] But claimant's failure to grasp that the statement could be harmful does not vitiate the waiver.[54] The main "consequence" claimant must understand is that interrogation will follow and statements may be used at trial. "[W]e have never 'embraced the theory that a defendant's ignorance of the full consequences of his decision vitiates their voluntariness.' "[55]

c. *Were the rules concerning invocation of Miranda rights obeyed?*

If claimant invokes either of the *Miranda* rights, the government must comply with an additional set of rules. The test for determining whether an invocation has occurred is the "ordinary meaning" of claimant's communication.[56] The requirements triggered by invocation depend on which right is invoked—the right to remain

51. *Id.* at 476.

52. In *Moran*, for example, the Court upheld Burbine's waiver even though the police lied to Burbine's attorney by falsely promising not to interrogate Burbine and refused to tell Burbine the attorney was trying to see him. *Id.*

53. *Id.*

54. Connecticut v. Barrett, 107 S. Ct. 828, 832 (1987).

55. *Id.* at 833.

56. *Id.* at 832.

silent or the right to an attorney.

1) *Invoking the right to remain silent*

If claimant invokes the right to remain silent, the questioning must stop.[57] How soon the police may resume the effort to obtain a waiver is not clear. At a minimum, the police must assure that claimant's "right to cut off questioning" is "scrupulously honored."[58] This means the government must not persist in "repeated efforts to wear down his resistance and make him change his mind."[59] Relevant factors include the length of time between the invocation and resumption, whether the warnings were repeated, whether there was a new subject for questioning, whether the second interrogation took place at a different location, and whether different officers were involved.[60]

2) *Invoking the right to have an attorney present*

In order to invoke the right to an attorney, claimant must indicate that he wishes to consult with an attorney. Asking to speak with someone else (e.g., a probation officer) does not suffice.[61] Similarly, asking to speak with an attorney before doing something else (e.g., making a written statement) is not an invocation of the right to consult with an attorney before speaking.[62]

If claimant invokes the right to an attorney, interrogation may not proceed until an attorney has been made available for consultation.[63] Indeed, the government may not even seek to obtain a waiver of the invoked right unless claimant "initiates further communication . . . with the police."[64] The test for such an initiation is whether a

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57. *Miranda*, 384 U.S. at 473-74 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.").

58. Michigan v. Mosley, 423 U.S. 96, 104 (1975) ("We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' "); *Miranda*, 384 U.S. at 479.

59. *Mosley*, 423 U.S. at 105-06.

60. *Id.* at 104-06.

61. *Fare*, 442 U.S. at 707.

62. *Barrett*, 107 S. Ct. at 828 (defendant's statement that he would not make a written statement before consulting his attorney did not invoke the right to have attorney present during interrogation).

63. *Miranda*, 384 U.S. at 474 ("If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.").

64. Edwards v. Arizona, 451 U.S. 477, 485 (1981) (defendant's statements held inadmissible because police conducted interrogation after defendant invoked his right to have an

reasonable officer would have interpreted claimant's communication as showing "a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation."[65] Absent such an initiation by claimant, any alleged waiver of the invoked right will be deemed invalid.[66]

If *Miranda* is inapplicable or all *Miranda* rules have been satisfied, no *Miranda* violation is present, and the analysis ends. However, if the preliminary requirements are met and claimant prevails on the merits by proving that the government used claimant's response to custodial interrogation without complying with the *Miranda* rules, then the final issue is what remedies are in order.

C. *Remedies*

1. *The exclusionary rule*

Statements obtained in violation of the *Miranda* rules may not be used to prove guilt or enhance punishment. Thus, the statements must be excluded from evidence. But, unlike other evidence obtained in violation of the Constitution, these statements may be used to impeach defendant's trial testimony.[67] Usually, when constitutionally based rules are violated, the government also may not use any secondary evidence derived from the violation in a later criminal prosecution. Such derivative evidence is barred, because it is "fruit of the poisonous tree."[68] However, the fruit of the poisonous tree doctrine is not applicable to *Miranda* violations, so evidence derived from such violations may be used as long as the statements themselves are not used as evidence.[69]

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attorney present and before defendant initiated further communication).

65. In Oregon v. Bradshaw, 462 U.S. 1039 (1983), the Court determined that the defendant's question about "what is going to happen to me" was an initiation of further communication. *Id.* at 1045. However, routine questions not relating to the investigation—e.g., a request for a drink of water—are not "initiations" within the meaning of *Edwards*.

66. In short, after the suspect invokes the right to an attorney, the government must satisfy a two-prong test before resuming interrogation: there must be (1) initiation followed by (2) waiver. *Id.*

67. *See supra* notes 30-32 and accompanying text.

68. *E.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (evidence derived from illegal seizure must be excluded). *Silverthorne* is often cited as the seminal case on the "fruit of the poisonous tree" rule, although the phrase was first coined by Justice Frankfurter in Nardone v. United States, 308 U.S. 338, 341 (1939).

69. Oregon v. Elstad, 470 U.S. 298 (1985) (an initial unwarned confession does not bar the use of a later confession given after warnings and waiver); Tucker, 417 U.S. 433 (1974) (a witness located by interrogation without proper warnings will be allowed to testify).

2. *The harmless error rule*

The general rule is that admission of claimant's statements in violation of *Miranda* requires that the conviction or sentence based thereon be overturned. Reversal may not be necessary, however, if the error was harmless.[70] An error is harmless if the reviewing court concludes beyond a reasonable doubt that the tainted evidence could not have influenced the jury's verdict or that the decision is supported by overwhelming untainted evidence.[71]

III. CONCLUSION

Miranda analysis proceeds in three steps. First, preliminary requirements (jurisdiction, justiciability, and government action) must be met. Second, the merits of the *Miranda* claim must be considered. To prevail, claimant must show that *Miranda* was applicable, i.e., the government, without any overriding need, must have used claimant's statement obtained by custodial interrogation to prove guilt or enhance punishment in a criminal prosecution. Claimant must also show that *Miranda* was violated, i.e., that the required warnings were not given, a waiver of the *Miranda* rights was not obtained, or the rules concerning invocation were not obeyed. If *Miranda* was applicable and was not complied with, questions concerning remedies must be addressed. By following these steps, law students, lawyers, and judges may conduct *Miranda* analyses in an orderly and accurate fashion.

APPENDIX

On the basis of the foregoing discussion, it is possible to set forth the following, more detailed outline of *Miranda* analysis.

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70. Chapman v. California, 386 U.S. 18, 22 (1967). The Court has not yet decided whether *Miranda* violations are subject to the harmless error or automatic reversal rule. Given the Court's relentless hostility to *Miranda*, the former seems likely. Actually, a good argument can be made that the harmless error rule should not be used, because statements taken in violation of *Miranda* may be unreliable, and case-by-case application of the harmless error rule would defeat the whole purpose of *Miranda's* "bright line" rules.

71. Harrington v. California, 395 U.S. 250 (1969); *Chapman*, 386 U.S. at 24.

Miranda: Basic Analysis

I. Have the preliminary requirements been met?
   A. Does the court have jurisdiction?
   B. Is the claim justiciable?
   C. Was the harm caused by government action?
II. On the merits: was *Miranda* violated?
   A. Is *Miranda* applicable?
      1. Was a statement obtained by custodial interrogation?
         a. Was claimant in custody?
            1) Test: would a reasonable person have considered the situation to be as coercive as a custodial arrest?
         b. Did interrogation occur?
            1) Express questions
               a) GR: express questions comprise interrogation.
               b) EXCS
                  i) Routine arrest or booking questions
                  ii) Questions not concerning merits of case
                  iii) Questions clarifying volunteered statements (likely but not settled)
            2) Functional equivalent of express questions, i.e.,
               a) Words or conduct,
               b) Reasonable officer would know,
               c) Reasonably likely to elicit incriminating statements,
               d) Taking account of characteristics of suspect the police know or should know about.
         c. Was claimant's statement a response to custodial interrogation, i.e., not a volunteered statement?
      2. Did the government introduce the statement in a criminal prosecution to prove guilt or enhance punishment?
      3. Did the need for *Miranda* protections outweigh other government needs for immediate questioning?
   B. Did the government comply with the *Miranda* rules?
      1. Were the required warnings given?
         a. Right to remain silent
         b. Statements can be used in court
         c. Right to have an attorney
         d. Right to appointed attorney if indigent
      2. Did claimant waive the *Miranda* rights?

a. Was the waiver voluntary?
b. Was the waiver knowing?

3. Did the government comply with rules concerning invocation of the *Miranda* rights?
   a. If the right to remain silent was invoked, did the government scrupulously honor the right to cut off questioning?
   b. If the right to an attorney was invoked,
      1) Was an attorney made available for consultation?
      2) If not,
         a) Did claimant initiate further discussion?
         b) Did claimant waive the invoked right?

III. Remedies
   A. Exclusionary rule
   B. Harmless error rule