NEW MEXICO LAW REVIEW

Volume 12
Issue 1 *Winter 1982*

Winter 1982

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CUSTODIAL INTERROGATION IN NEW MEXICO: *State v. Trujillo.*

INTRODUCTION

In *State v. Trujillo*[1] the New Mexico Supreme Court extended the line of New Mexico cases discussing the rights of the accused at an in-custody interrogation. This Note will address one of the issues[2] discussed by the court: whether an accused who has invoked his rights to remain silent and to have counsel present at interrogation may waive those rights before speaking with counsel. It will also distinguish the *Trujillo* waiver analysis from that of a recent United States Supreme Court decision, *Edwards v. Arizona.*[3]

When a suspect is subjected by police to custodial interrogation,[4] certain rights accrue to him. According to the United States Supreme

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1. 95 N.M. 535, 624 P.2d 44 (1981). *See also* the discussion of this case in Stelzner, *Criminal Procedure,* 12 N.M. L. Rev. 271, 299-300 (1982).

2. The issues in the case were:

> 1) Whether the second of two searches conducted under a single warrant was unreasonable; 2) Whether a statement by the defendant that he was at home on the night of the murder and which statement was admitted in evidence only for impeachment purposes during the trial was obtained in violation of *Miranda* procedures and suppressible; and 3) Whether evidence of the defendant's escape from the detention center was admissible.

95 N.M. at 537, 624 P.2d at 46.

3. 101 S. Ct. 1880 (1981).

4. The most complete definition of "custodial interrogation" comes from Rhode Island v. Innis, 446 U.S. 291 (1980).

> We conclude that the *Miranda* safeguards come into play 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 from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. 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. But, since the police surely cannot be held accountable for the unforseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. (emphasis by the court), (footnotes omitted).

Id. at 300-01.

Court in *Miranda v. Arizona,*[5] the police must, before questioning begins, advise the suspect that he has specific rights relative to the interrogation.[6] These are basically the right to remain silent[7] and the right to have an attorney present at the questioning.[8] In *Miranda,* the Supreme Court outlined what is to happen after the suspect is advised of his rights:

> Once warnings have been given, the subsequent procedure is clear. 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. At this point he has shown that he intends to exercise his Fifth Amendment privilege. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.[9]

A problem with this seemingly clear mandate has been whether and

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5. 384 U.S. 436 (1966). *See* Comment, *Criminal Procedure—Counsel at Interrogation,* 5 Nat. Resources J. 388 (1965), for a discussion of the New Mexico treatment of the right to counsel at interrogation before the *Miranda* decision. The United States Supreme Court's opinion in Escobedo v. Illinois, 378 U.S. 478 (1964), though limited to its facts, apparently held that once a criminal investigation begins to focus on a particular suspect, that person has an absolute and fundamental constitutional right to have counsel present at his interrogation. The states were left to apply this standard locally. New Mexico's response to *Escobedo* was Pece v. Cox, 74 N.M. 591, 396 P.2d 422 (1964). In *Pece* the New Mexico Supreme Court elected to restrict New Mexico's application of *Escobedo* by adopting the prejudice test set forth in Crooker v. California, 357 U.S. 433 (1958). That test provides that admission of statements taken after a denial of counsel will be reversed only if the defendant has been denied fundamental fairness and would not have been convicted but for the use of those statements. Two years after *Pece* the Court in *Miranda* specifically overruled *Crooker.* 384 U.S. at 479, n. 48.

6. This is usually effected by the police officer reading to the suspect from a "*Miranda* card." The exact wording of a *Miranda* card varies according to who publishes it. Some cards have questions to solicit a waiver and some are printed in Spanish. Below is an exemplar of a *Miranda* card issued by the Police Department, in Albuquerque, New Mexico.

Advise of Rights

1. I am charging you with _____.
2. Before we ask you any questions, you must understand your rights.
3. You have the right to remain silent.
4. Anything you say can be used against you in Court.
5. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning.
6. If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.
7. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to a lawyer.
8. Do you understand what I have told you?

7. Haynes v. Washington, 373 U.S. 503, 511 (1963), referred to the "right to remain silent" as a derivation from U.S. Const. amend. V. The New Mexico equivalent of the fifth amendment is N.M. Const. art. 2, § 15.

8. Gideon v. Wainright, 372 U.S. 335, 342-45 (1963), reconfirmed the holding in Powell v. Alabama, 287 U.S. 45 (1932), that there is a fundamental right to counsel at trial guaranteed by the U.S. Const. amend. VI. The New Mexico equivalent is N.M. Const. art. 2, § 14. The *Miranda* holding extended this right to apply to custodial interrogation situations.

9. 384 U.S. at 473-74 (footnotes omitted).

how a person may subsequently waive a once-invoked right to remain silent. This became an issue in *Trujillo* when the prosecution used, for impeachment purposes,[10] a statement made by the defendant after he had asserted his right to silence, and his right to an attorney.[11]

STATEMENT OF THE CASE

In January, 1979 Jesse Trujillo was arrested for the murder of a hitchhiker.[12] A confidential informant had supplied the information upon which both the arrest warrant and search warrant[13] were based.[14] While he was being transported to the police station, Tru-

10. 95 N.M. at 537, 624 P.2d at 46.

11. *Id.* at 540, 624 P.2d at 49.

12. *Id.* at 537, 624 P.2d at 46.

13. A second issue raised on appeal dealt with this warrant and its fruits. Following the issuance of the warrants, Trujillo was arrested at 3:00 p.m. "A search of the house occurred at about 4:45 p.m. and again at 6:10 p.m., in two stages. During the interim between these searches, the informant called the police with new information that the pistol used in the crime was under the doghouse in defendant's backyard [no longer in the attic of the house as he had first told the police]." 95 N.M. at 538, 624 P.2d at 47.

Trujillo attacked the later search and the admission of its fruits on the ground that the search violated the warrant requirement. His argument had two prongs. First, he contended that once a search pursuant to a warrant is conducted, the warrant has been executed and its validity has expired. He argued that any further search based on the same warrant was illegal (Defendant-Appellant's Brief in Chief at 8). His second argument was that since the subsequent search was based on new information supplied by the informant, that information should have been evaluated by a neutral and detached magistrate who would determine whether there was sufficient probable cause to continue the warrant or to issue a new one as mandated in Aguilar v. Texas, 378 U.S. 108 (1964) (Defendant-Appellant's Brief in Chief at 8). The state argued that exigent circumstances, the imminent destruction of evidence, prevented the officers from seeking a new warrant and that there was really only one continuing search anyway (Plaintiff-Appellee's Answer Brief at 3).

The court found the fruit of the search(es) admissible on the ground of exigent circumstances: the officers' good faith belief that the evidence sought was about to be destroyed or removed. 95 N.M. at 539, 624 P.2d at 48. It cited as authority three cases, all of which involved officers armed with warrants to search for heroin entering the premises without prior announcement. State v. Sanchez, 88 N.M. 402, 540 P.2d 1291 (1975); State v. Anaya, 89 N.M. 302, 551 P.2d 992 (Ct. App. 1976); State v. Baca, 87 N.M. 12, 528 P.2d 656 (Ct. App. 1974), *cert. denied,* 87 N.M. 5, 528 P.2d 649 (1974).

While the United States Supreme Court has not discussed the issue of two separate searches based on one warrant, it has talked about what constitutes circumstances so exigent that a warrantless search is permissible. Carroll v. United States, 267 U.S. 132 (1925) (Easy mobility of automobiles). *Compare Carroll with* Coolidge v. New Hampshire, 403 U.S. 443 (1971) (Refused to approve the search of an automobile for lack of *Carroll* emergencies). In its 1970 term the Court held that a warrantless search of a dwelling was permissible only where "[t]he goods ultimately seized were . . . in the process of destruction . . . [or] . . . about to be removed from the jurisdiction." Vale v. Louisiana, 399 U.S. 30, 35 (1970). Thus *Vale,* the most recent full discussion of the doctrine, appears to revise the standard to actual knowledge of destruction, rather than mere threat or likelihood. The holding in *Trujillo,* therefore, does not seem to be consistent with the current doctrine of actual knowledge of destruction of evidence as the ground for a warrantless entry by police.

14. Defendant-Appellant's Brief in Chief at 3.

jillo made a statement about his intent to leave the state that night.[15] The statement was admitted at trial as evidence of his consciousness of guilt.[16]

When he arrived at the police station, Trujillo was advised of his *Miranda* rights. He signed the standard form indicating he understood them.[17] The detective's report stated that Trujillo refused to waive his rights to silence and to an attorney.[18] When he was asked if he "wished to discuss any of the events about the murder," he said he did not.[19] The detective then asked if he would mind going into some "background information."[20] Trujillo agreed and began supplying information such as his birthplace, education, and prior criminal record.[21] During the course of this background interrogation, he was asked where he was on the night of the killing.[22] He gave an alibi response[23] which was later used against him for impeachment purposes.[24]

One of the issues before the New Mexico Supreme Court was the admissibility of these statements.[25] The defendant argued that they had been taken in violation of his *Miranda* rights.[26] His sole claim was that the questioning had illegally continued after he had asserted his rights to silence and to an attorney.[27] The state responded that the statements were the product of a valid waiver of these rights because they were voluntary and were made after he was advised of his *Miranda* rights.[28]

The court analyzed the problem in terms of whether Trujillo had made a legally sufficient waiver.[29] It accepted the fact that Trujillo

15. "Ain't this a bitch, I was going to California tonight." 95 N.M. at 541, 624 P.2d at 50.

16. *Id.* The third issue raised on appeal involved this statement of intended flight and his later escape from jail. These were used at trial as evidence of his consciousness of guilt. *Id.* The defendant argued that the admission of this material was prejudicial. Defendant-Appellant's Brief in Chief at 14. The state responded that New Mexico case law and Rule 403, New Mexico Rules of Evidence, provide that this evidence was relevant and could be admitted absent any abuse of discretion by the trial court. Plaintiff-Appellee's Answer Brief at 8–9. The New Mexico Supreme Court held that the trial court did not abuse its discretion in finding there was no prejudice in admitting the evidence. 95 N.M. at 542, 624 P.2d at 51.

17. 95 N.M at 540, 624 P.2d at 49.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. "Defendant said he had probably been in bed asleep, since he had to work the following morning." *Id.*

24. *Id.* at 541, 624 P.2d at 50.

25. *Id.* at 537, 624 P.2d at 46. The court discussed the alibi statement in terms of *Miranda* violations and analyzed the flight statement only as evidence of an inference of guilt. *Id.* at 541, 624 P.2d at 50.

26. Defendant-Appellant's Brief in Chief at 11.

27. *Id.*

28. Plaintiff-Appellee's Answer Brief at 6.

29. 95 N.M. at 540, 624 P.2d at 49.

had originally asserted his rights but said that these rights may be waived if, considering all the facts and circumstances, "the waiver is knowingly, intelligently and voluntarily made."[30]

The court stated that this standard had become settled law in New Mexico and cited two cases in reference to this standard. Both cases cited arose out of essentially the same set of circumstances but involved two separately litigated issues. The first case cited was *State v. Greene (Greene II)*[31] in which the state supreme court found, *inter alia,* that the defendant in custody had not made a sufficient waiver of his asserted rights with regard to one of several statements at issue when he succumbed to repeated police questioning following his requests to see a lawyer.[32]

In the second case, *State v. Greene (Greene I),*[33] the court held that once a person had been arrested, received his *Miranda* warnings, and asserted his rights to silence and counsel, he may subsequently, "for reasons satisfactory to himself,"[34] change his mind and voluntarily submit to questioning. If that is done, however, the state bears a heavy burden to show a knowing and voluntary waiver.[35]

The court then found, without further discussion of the state's burden, that Trujillo had made such a waiver. The court apparently based its decision on Trujillo's signing the *Miranda* form and his education.[36]

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30. *Id.*

31. 92 N.M. at 347, 588 P.2d 548 (1978).

32. On three separate occasions within a three and one half hour period the suspect had been advised of his rights. Each time he made clear his intent to remain silent and wait for counsel. The defendant was interrogated two more times before he finally began making incriminating statements. *Id.* at 350-51, 588 P.2d at 551-52. The court also found that certain statements made as a result of police trickery were not voluntary and therefore were not admissible. The interrogation took place in Florida and was conducted by a Tampa detective. During the course of the questioning he induced the defendant to make incriminating statements by assuring him that he need not worry about the detective's being called to testify against him because the Farmington, New Mexico police were a "bunch of idiotic yokels" who could not raise enough money to fly the detective to New Mexico to appear as a witness. *Id.* at 351, 588 P.2d at 552.

33. 91 N.M. 207, 572 P.2d 935 (1977).

34. *Id.* at 213, 572 P.2d at 941. Earlier in the opinion the court said a suspect could waive his right to counsel for reasons "personal" to himself. *Id.* at 210, 572 P.2d at 938.

35. *Id.* The trial court suppressed the defendant's statments and said from the bench at the suppression hearing, "It's my holding that you can read that waiver to them until you're blue in the face; if they at one time request an attorney, you better see that they get a chance to talk to an attorney." *Id.* at 213, 572 P.2d at 941.

36. 95 N.M. at 540, 624 P.2d at 49. After finding a valid waiver in this case the court went on to find that, even if the waiver had not been good, it would have been harmless error. This is a curious development because the state did not raise this as an argument on this issue. It did discuss harmless error in terms of the search problem in the case (Plaintiff-Appellee's Answer Brief at 4). The court did not, however, indicate why it felt compelled to bring up harmless error in this context.

For a discussion of recent New Mexico law on some aspects of harmless error *see* Hartz, *Criminal Law and Procedure,* 11 N.M. L. Rev. 85 at 93 (1980).

ANALYSIS AND DISCUSSION

Knowing and Intelligent Waiver

None of the reported opinions in New Mexico has made clear what the "knowing" and "intelligent" parts of the waiver standard mean.[37] *Greene II,* for example, simply stated the facts of the case and found a knowing waiver with regard to one statement at issue without explaining how the facts pointed to such a conclusion.[38] The words "knowing" and "intelligent" are so frequently placed together that one could view them as two concepts merged into a single term of art. It may simply be a succinct statement of the requirement that the suspect be both capable of understanding the nature of a waiver and aware that he is making such a waiver.

The lack of guidance on this issue has led to a lack of consistency in the lower courts. Indeed, New Mexico courts seem to want to avoid the analysis and application of the "intelligent" and "knowing" parts of the standard. In *State v. Ramirez,*[39] for example, the defendant-appellant claimed that certain statements he made were given involuntarily and without sufficient understanding of what he was waiving. He had signed a waiver form printed in Spanish but asserted he did not understand the meaning of his rights. The court chose to address primarily the challenge to the voluntary nature of the waiver and found it to be valid.[40]

The court of appeals has held in the past that an intelligent waiver depends upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused.[41] However, in a New Mexico Supreme Court case, *State v. Pace,*[42] there is language from which one can infer that the mere reading of rights, followed by an indication by the defendant that he understood them, demonstrates sufficient understanding.[43]

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37. For example, in State v. Greene (II), the court stated:

> Considering the totality of the circumstances, we find defendant's initial statements were not the result of an *intelligent and knowing* waiver of his right to counsel. The State has failed to meet its burden of showing defendant *knowingly* and voluntarily waived his constitutional rights in giving the statements; therefore, they are inadmissible.

92 N.M. at 351, 588 P.2d at 552 (emphasis added).

38. *See, Id.* at 352, 588 P.2d at 553.

39. 89 N.M. 635, 556 P.2d 43 (Ct. App. 1976).

40. The court of appeals deferred to the trial court's factual finding of a knowing and understanding waiver.

41. State v. Sexton, 82 N.M. 648, 649, 485 P.2d 982, 983 (Ct. App. 1971), *cert. denied,* 82 N.M. 639, 485 P.2d 973 (1971). *See also,* State v. Montler, 85 N.M. 60, 509 P.2d 252 (1973).

42. 80 N.M. 364, 456 P.2d 197 (1969).

43. The court stated:

> We do not perceive that when defendant answered the questions . . . after

The *Pace* court made no inquiry into the defendant's background, age, intelligence, or any other relevant factors.[44] In *State v. Bramlett,*[45] however, the court of appeals found a clear lack of understanding on the part of the defendant. It held that when a person is so intoxicated that he is held in jail for his own safety, he is also incompetent to make a knowing and intelligent waiver of his *Miranda* rights.[46] Another exception is found in *State v. Beachum,*[47] where the supreme court called attention to the experience, literacy, and intelligence of the defendant who made the waiver. Thus, New Mexico has not produced a consistent line of cases demonstrating a forthright application of what constitutes a knowing and intelligent waiver.

The *Trujillo* court also gave only cursory attention to the "knowing" and "intelligent" parts of the waiver test. The only acknowledgment the court made of the defendant's background was that "[d]efendant had completed his high school education plus one year of college."[48]

While New Mexico courts have been reluctant to speak out on what constitutes a "knowing" and "intelligent" waiver, the federal courts have not. In *Tague v. Louisiana*[49] the United States Supreme Court said that the state bears a heavy burden to show the defendant's capacity to understand the implication of his waiver.[50] In *Brewer v. Williams*[51] the Court held that the waiver must be an "intentional relinquishment of a known right or privilege."[52] In other cases, federal courts have held that among the factors to be con-

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> having his rights explained [read] to him, and having indicated he understood them, there can be any suggestion that he did not do so voluntarily and with full knowledge that he could remain silent and demand the presence of an attorney before answering questions.

Id. at 369, 456 P.2d at 202.

44. *Id.*

45. 94 N.M. 263, 609 P.2d 345 (Ct. App. 1980).

46. *Id.* at 268, 609 P.2d at 350.

47. 78 N.M. 390, 391, 432 P.2d 101, 102 (1967).

48. 95 N.M. at 540, 624 P.2d at 49. The Defendant-Appellant's Brief in Chief did not raise this issue at all because it did not discuss the possibility of waiver. The suggestion that level of education might be a relevant factor in waiver analysis can be traced to Government of Canal Zone v. Peach, 602 F.2d 101, 104 (5th Cir. 1979), *cert. denied,* 444 U.S. 952 (1979).

49. 444 U.S. 469 (1980).

50. *Id.* at 470–71.

51. 430 U.S. 387 (1977).

52. *Id.* at 404. As significant as this statement by the Supreme Court is in understanding waiver, it is surprising that it is referred to only twice in New Mexico published opinions: State v. Greene (II), 92 N.M. 347, 350, 588 P.2d 548, 551 (1978) and State v. Hogervorst, 90 N.M. 580, 585, 566 P.2d 828, 833 (Ct. App. 1977), *cert. denied,* 90 N.M. 636, 567 P.2d 485 (1977). The latter case cited *Brewer* only as authority for the proposition that right to counsel exists after judicial proceedings have been initiated.

sidered in determining whether the defendant made an intelligent waiver are IQ,[53] age,[54] experience and background,[55] education,[56] and whether the defendant was intoxicated by drugs or alcohol.[57] Thus, while New Mexico courts could have looked to the federal courts for some direction, they have elected not to do so.

Voluntary Waiver

The *Trujillo* court concluded that not only had the waiver been knowing and intelligent, but it had also been voluntary.[58] The court then devoted five times as much space in the opinion to the "voluntary" aspect of the test as it did to the "knowing" and "intelligent" elements. It is expected that the court would concentrate on the "voluntary" aspect of the test because voluntariness[59] has been the overriding consideration in New Mexico waiver analyses, along with a prima facie showing that *Miranda* rights were given.[60] Indeed, the New Mexico Supreme Court has said that "[t]he ultimate test [for admission of statements] is that of voluntariness."[61] The inquiry into voluntariness has been based on the totality of the circum-

53. United States v. Glover, 596 F.2d 857, 864 (9th Cir. 1979), *cert. denied,* 444 U.S. 860 (1979).

54. United States v. Palmer, 604 F.2d 64, 67 (10th Cir. 1979) (Juvenile interrogated with parental permission was a normal 17 year-old who did not request counsel or mother to be present).

55. White v. Finkbeiner, 611 F.2d 186, 192 (7th Cir. 1979) (The court acknowledged "background" as a consideration but did not discuss the defendant's background); United States v. Glover, 596 F.2d 857 (9th Cir. 1979), *cert. denied,* 444 U.S. 860 (1979) (Defendant had extensive dealings with the criminal justice process).

56. Government of Canal Zone v. Peach, 602 F.2d 101, 104 (5th Cir. 1979), *cert. denied,* 444 U.S. 952 (1979) (Defendant with eleven years of education capable of intelligent waiver).

57. United States v. Smith, 608 F.2d 1011, 1012 (4th Cir. 1979) (Suspect must be coherent and able to understand what is happening).

58. 95 N.M. at 539, 624 P.2d at 49.

59. Miranda v. Arizona, 384 U.S. 436, 444 (1966), also required that the statement be voluntary. Some of the reasoning for such a mandate is explained in Culombe v. Connecticut, 367 U.S. 568 (1961) (plurality opinion by Justice Frankfurter):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Id. at 602.

60. Two prerequisites, or foundational requirements, for admissibility are: 1) a prima facie showing of voluntariness, State v. Barnett, 85 N.M. 301, 512 P.2d 61 (1973); State v. Watson, 82 N.M. 769, 487 P.2d 197 (Ct. App. 1971) and 2) compliance with the advice of rights required by Miranda v. Arizona, "to secure the privilege against self-incrimination." State v. Gallegos, 92 N.M. 336, 337, 587 P.2d 1347, 1348 (1978).

61. State v. Crump, 82 N.M. 487, 494, 484 P.2d 329, 336 (1971).

stances in which the defendant gave the statement.[62] New Mexico courts, however, have inconsistently applied this test.

While the United States Supreme Court has condemned the use of psychological pressures in eliciting incriminating statements,[63] New Mexico has not always reacted so strongly. In *State v. LeMarr,*[64] for example, the defendant agreed to sign a waiver of his *Miranda* rights if the police promised not to place him in a cell with a co-defendant whom he feared would kill him. The court did not explain its reasoning in finding this waiver to be voluntary. In *State v. Greene (II),*[65] however, the court found an involuntary waiver when the accused, known to the police to be a homosexual, was placed in a "straight" cellblock without his clothing.[66] In *State v. Beachum,*[67] on the other hand, the court did examine whether threats or promises were made in order to induce the statement and found the waiver to have been knowing, intelligent, and voluntary.

At issue in *Trujillo* was whether, before the defendant is able to consult with an attorney, the right to counsel had been waived.[68] The court, in finding a valid waiver, cited only the two *Greene* cases. The court of appeals has addressed the issue more frequently, sometimes

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62. *Id.* This is the same test as is used by the federal courts, where it is applied more consistently. *See* note 63, *infra.*

63. Columbe v. Connecticut, 367 U.S. 568, 575 (1961); Spano v. New York, 360 U.S. 315, 322-23 (1959). In *Culombe,* the Court described the psychological pressures an accused finds himself under:

> In the police station a prisoner is surrounded by known hostile forces. He is disoriented from the world he knows and in which he finds support. He is subject to coercing impingements, undermining even if not obvious pressures of every variety. In such an atmosphere, questioning that is long continued—even if it is only repeated at intervals, never protracted to the point of physical exhaustion—inevitably suggests that the questioner has a right to, and expects, an answer.

367 U.S. at 575 (footnotes omitted).

The measure of voluntariness in federal cases has come to be the "totality of the circumstances" surrounding the giving of the statement. Fare v. Michael C., 442 U.S. 707 (1979); Miranda v. Arizona, 384 U.S. 436, 475-77 (1966); Haynes v. Washington, 373 U.S. 503, 514 (1963). Circumstances which have precluded a finding of voluntariness of a statement include: threats, Lynumn v. Illinois, 372 U.S. 528, 534 (1963); Payne v. Arkansas, 356 U.S. 560, 564 (1958); physical abuse, Lee v. Mississippi, 332 U.S. 742 (1948); prolonged interrogation, Turner v. Pennsylvania, 338 U.S. 62 (1949); incommunicado detention, Davis v. North Carolina, 384 U.S. 737 (1966); denial of right to counsel, Fay v. Noia, 372 U.S. 391 (1963); defendant's lack of education, Culombe v. Connecticut, 367 U.S. 568 (1961); youth, Gallegos v. Colorado, 370 U.S. 49 (1962); and emotional instability, Spano v. New York, 360 U.S. 315 (1959).

64. 83 N.M. 18, 487 P.2d 1088 (1971).

65. 92 N.M. 347, 588 P.2d 548 (1978).

66. *Id.* at 351, 588 P.2d at 552.

67. 78 N.M. 390, 432 P.2d 101 (1967). This is an example of a good, though brief, application of the knowing-intelligent-voluntary standard.

68. 95 N.M. at 539, 624 P.2d at 48.

finding a proper waiver[69] and sometimes not.[70] The reason for these disparities is not readily apparent from the facts in these cases. Even when the court has found a sufficient waiver after a request for counsel, it has made known its disapprobation of continued questioning.[71] The lack of a strong New Mexico policy statement about fifth and sixth amendment waiver has led to this inconsistency.

Edwards v. Arizona

The problem of waiver of the right to counsel once it has been invoked is not unique to New Mexico. A recent United States Supreme Court opinion, *Edwards v. Arizona,*[72] discusses the issue and attempts to resolve it. In *Edwards* the defendant was arrested and advised of his *Miranda* rights.[73] He submitted to questioning by police for a time and then attempted unsuccessfully to contact an attorney by telephone.[74] He then said he wanted to consult an attorney before discussing the matter further.[75] The interrogation ceased, and he was taken to jail.[76] The following day, when police detectives came to the jail to speak with him again, he said he did not want to talk with them. He was told by the guard that he had to talk with them.[77] He

69. State v. Harge, 94 N.M. 11, 15, 606 P.2d 1105, 1109 (Ct. App. 1979) (Although this was not strictly a *Miranda* case because the court found the interrogation to have been non-custodial, there is mention made of the absence of coercion or trickery as a basis for a finding of voluntariness); State v. Crump, 82 N.M. 487, 494, 484 P.2d 329, 336 (1971) (Statement found to be voluntary because defendant did not object to making it); State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969) (Defendant's response to officer's casual remark found to be voluntary); State v. Gutierrez, 79 N.M. 732, 736, 449 P.2d 334, 338 (Ct. App. 1968) (After being advised of rights, defendant said only that he would not give a written statement. Despite this declaration by the defendant, District Attorney continued the questioning for 2-3 more minutes and elicited an incriminating statement).

70. State v. Showalter, 94 N.M. 663, 615 P.2d 278 (Ct. App. 1980) (Police ignored the defendant's request for an attorney and continued questioning); State v. Word, 80 N.M. 377, 456 P.2d 210 (Ct. App. 1969) (Defendant asked to be represented by an attorney. Police brought in an assistant district attorney who said he would not be given an attorney at that time, and then who induced a confession).

71. State v. Lopez, 80 N.M. 130, 452 P.2d 199 (Ct. App. 1969) (dicta):

> Although we hold the confession admissible we feel it should be made clear that we strongly disapprove any practice on the part of officials of interrogating an accused in the absence of his counsel whether retained or appointed, particularly after the accused has been charged with the crime and the interrogation is designed to secure evidence of guilt to be introduced in the criminal trial against the accused.

Id. at 133, 452 P.2d at 202.

72. 101 S. Ct. 1880 (1981).

73. *Id.* at 1881.

74. *Id.* at 1882.

75. *Id.*

76. *Id.*

77. *Id.*

met with the detectives who again advised him of his *Miranda* rights, and subsequently, he made an incriminating statement.[78]

The majority opinion[79] in *Edwards* rejected the Arizona court's focus on the voluntary element of waiver analysis to the extent of neglecting the intelligent and knowing elements. On this point the Supreme Court said the Arizona Supreme Court had:

> applied an erroneous standard for determining waiver where the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege. . . .[80]

The Court found that the decision below "misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked."[81]

The Court distinguished between two waiver situations. The first arises where the accused has been advised of his *Miranda* rights, chooses to waive them immediately, and responds to interrogation. The Court found that such a waiver may be valid.[82] In the second waiver situation, when the accused has asserted his rights to silence and to counsel and then later responds to interrogation, the Court will exert greater scrutiny. Indeed, it will "indulge in every reasonable presumption against waiver."[83]

In *Edwards* the second situation was present. For that set of circumstances the Court sought to clarify any residual ambiguity flow-

78. *Id.*

79. By Justice White with Chief Justice Burger concurring in the judgment. Justice Powell (with Justice Rhenquist in agreement) wrote a separate opinion concurring in the result.

80. 101 S. Ct. at 1883.

81. *Id.* at 1884.

82. Although the *Miranda* court held that "[n]o effective waiver of the right to counsel during interrogation can be recognized unless *specifically* made after the warnings we here delineate have been given," 384 U.S. at 470 (emphasis added), in a later case it held that there can be a valid waiver inferred from the action and words of the accused. North Carolina v. Butler, 441 U.S. 369 (1979). In footnotes the Court cited ten of the eleven circuits and at least seventeen states that had already adopted this rule.

New Mexico cases where an implicit waiver was found include: State v. Day, 94 N.M. 753, 617 P.2d 142 (1980), *cert. denied,* 101 S. Ct. 163 (1980) (After refusing to sign a waiver, the defendant uttered a mild epithet which the officer asked him to clarify. In doing so he incriminated himself); State v. Crump, 82 N.M. 487, 484 P.2d 329 (1971) (Without an express waiver the accused answered police questions); State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct. App. 1972), *cert. denied,* 83 N.M. 631, 495 P.2d 1078 (1972) (Accused said he was willing to talk "now" after the court said it would appoint a lawyer for him); State v. Smith, 80 N.M. 126, 452 P.2d 195 (Ct. App. 1969) (Although accused said he would not talk until he saw a lawyer, he made an incriminating response to a remark by a police officer).

83. Brewer v. Williams, 430 U.S. 387, 404 (1977).

ing from *Miranda*. It steadfastly adhered to its earlier treatment of waiver:

> [W]e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police.[84]

This appears to be a clear policy statement reaffirming *Miranda* and its progeny.

The Court explained that its decision was an elaboration of its earlier interrogation cases[85] and again stated and reaffirmed the *Miranda* holding: once the right to counsel is exercised, "the interrogation must cease until an attorney is present."[86]

> We reconfirm these views and to lend them substance, emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.[87]

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84. 101 S. Ct. 1880, 1884-85 (1981) (footnote omitted). *See also,* Michigan v. Mosley, 423 U.S. 96, 102 (1975) (After an accused has invoked his right to silence, the interrogation may not be resumed after only a "momentary respite").

85. *Miranda* itself indicated the assertion of the right to counsel was a significant event and that once exercised by the accused, "the interrogation must cease until an attorney is present." 384 U.S. at 474, 86 S. Ct. at 1627. Our later cases have not abandoned that view. In *Michigan v. Mosley,* 423 U.S. 96, 96 S. Ct. 321, 46 L.Ed.2d 313 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 423 U.S. at 104, n. 10, 96 S. Ct. at 326, no. 10; see also 423 U.S. at 109-111, 96 S. Ct. at 329-330 (White, J., concurring). In Fare v. Michael C., *supra,* 442 U.S. at 719, 99 S. Ct. at 2568, the court referred to *Miranda's* "rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the "undisputed right" under *Miranda* to remain silent and to be free of interrogation "until he had consulted with a lawyer." Rhode Island v. Innis, 446 U.S. 291, 298, 100 S. Ct. 1682, 1688, 64 L.Ed.2d 297 (1980).

101 S. Ct. at 1885.

86. 384 U.S. 436 at 474 (1966).

87. 101 S. Ct. at 1885. Chief Justice Burger, in his concurring opinion, had a different view of what the focus of the analysis should be. "For me, the inquiry in this setting is whether resumption of interrogation is a result of a voluntary waiver, and that inquiry should be re-

This is clearly a determined declaration of the Court's intent to put to rest problems of unsolicited re-interrogation.

The Court did state that a valid waiver would have been possible had the accused initiated the meeting in which the incriminating statement was made.[88] In a footnote it said that, once the accused initiates a meeting with the police,

> the question would be whether a valid waiver of the right to counsel and the right to silence had occurred, that is, whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities.[89]

In other words, if the defendant initiates the meeting with the police, and if they engage in interrogation, a waiver analysis would still be required. Thus, a waiver in these circumstances is possible, though not necessarily automatic.

CONCLUSION

The United States Supreme Court, from *Johnson v. Zerbst*[90] through *Miranda,* and now *Edwards,* seems to have followed a reasoned and predictable progression in regard to custodial interrogation, balancing the needs of law enforcement and the rights of the accused. New Mexico has followed the letter of the law of this line of cases but has demonstrated a fickle adherence to its spirit. The Supreme Court's holding in *Edwards* might have been anticipated. As it stands, the federal treatment of assertion and waiver of fifth

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solved under the traditional standards. . . ." *Id.* at 1886. He found no voluntary waiver under the traditional standards.

Justices Powell and Rehnquist, while agreeing in the result, "hesitate[d] to join the opinion only because of what appears to be an undue and undefined, emphasis on a single element: 'initiation.' " *Id.* at 1888. In their opinion, "*any* of the constitutional safeguards," *Id.* at 1887 (Powell's emphasis),

> can be waived and the relevant inquiry—whether the suspect now desires to talk to the police without counsel—is a question of fact to be determined in light of all the circumstances. Who "initiated" a conversation may be relevant to the question of waiver, but it is not the *sine qua non* to the inquiry. The ultimate question is whether there was a free and knowing waiver of counsel before interrogation commenced.

Id. at 1888.

88. *Id.* at 1885.

89. *Id.* at n. 9.

90. 304 U.S. 458 (1938). A defendant may waive the right to counsel if he does so "knowingly" and "intelligently." A waiver is an "intentional relinquishment or abandonment of a known right or privilege." *Id.* at 464.

and sixth amendment rights has been, if nothing else, fairly consistent whereas the New Mexico treatment has been, at best, discordant. For this reason alone, the federal approach is to be preferred over that of New Mexico.

The *Trujillo* approach to waiver of *Miranda* rights, then, has been effectively superseded by the *Edwards* decision. Should the issue again be presented before a New Mexico court, *Edwards* will control. In *Edwards* the Supreme Court attempted to put to rest the lingering waiver questions. It is to be hoped that the attempt will be successful. New Mexico must adopt the settled policy elaborated by the Supreme Court in *Edwards* for fifth and sixth amendment waiver analysis—both before the rights are invoked and after. In the past, New Mexico has devoted too little consideration to the "knowing" and "intelligent" elements of waivers and has focused too intently on the voluntariness of the waiver. After *Edwards,* it is clear that the "knowing" and "intelligent" elements of waiver analysis can no longer be ignored.

DARREL JILES