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The Right to Counsel: An Alternative to Miranda

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defendant or counsel in a non-capital case. On the other hand, as the plurality noted, five Justices, in fact the same five Justices supporting the actual holding of the instant case, had in previous cases distinguished the death penalty from all other forms of punishment. It is hoped that this distinction, which brought much needed reforms to capital sentencing procedures, will not be used to prevent similar and equally needed reforms in the sentencing process for non-capital cases.

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THE RIGHT TO COUNSEL: AN ALTERNATIVE TO *MIRANDA*

The accused surrendered on the advice of counsel, was arrested under a warrant, arraigned, and committed to jail in one city for abducting a child in another locality. Although his attorney advised him by telephone not to make any statements to the police while being transported back to the scene of the crime—and made an agreement with the police that no interrogation would occur—the defendant made incriminating disclosures during the trip after a police detective stated that "the parents of this little girl should be entitled to a Christian burial."[1] Notwithstanding his objections to the admission of such evidence, the prisoner's conviction for first degree murder was affirmed by the state supreme court, and he subsequently petitioned for a writ of habeas corpus, securing relief in the federal district court[2] and in the Eighth Circuit.[3] The United States Supreme Court affirmed in a 5-4 decision and ***held*** that the prisoner was denied his constitutional right to the assistance of counsel under the sixth and fourteenth amendments. The Court found that judicial proceedings had been initiated against him before the start of the automobile trip, that the prisoner had a right to legal representation during interrogation, that the police detectives had in fact interrogated him during the return trip, and that there was no reasonable basis for finding a waiver of the right to counsel. *Brewer v. Williams*, 97 S. Ct. 1232 (1977).

One of the most difficult and controversial areas of American criminal procedure today is the subject of pre-trial police interrogation of an

1. Brewer v. Williams, 97 S. Ct. 1232, 1236 (1977).
2. Williams v. Brewer, 375 F. Supp. 170 (S.D. Iowa 1974).
3. Williams v. Brewer, 509 F.2d 227 (8th Cir. 1974).

accused[4] and the related question whether such interrogation should be conditioned upon the presence of counsel. Traditionally, the fifth amendment confession cases and the sixth amendment right to counsel cases have been regarded as separate and distinct areas of the law.[5] In fifth amendment cases for nearly thirty years, a "voluntariness" test, which depended upon the "totality of the circumstances," was used to determine whether the Constitution required exclusion of a confession.[6] The sixth amendment right to counsel did not attach until arraignment,[7] and was therefore not an issue in many confession cases.

During the late 1950's and early 1960's, the Warren Court began to merge the confession issue with the right to counsel and recognized as "fundamental" the fifth amendment privilege against self-incrimination[8] and the sixth amendment right to counsel,[9] extending those Bill of Rights guaranties to defendants in state proceedings under the due process clause of the fourteenth amendment. In *Spano v. New York*,[10] a 1959 decision, a confession was held to violate the traditional "voluntariness" test, but four concurring justices agreed with the defendant's contention that his absolute right to counsel in a capital case attached upon indictment, which occurred prior to his confession.[11]

In two key decisions announced during its 1964 term, *Massiah v.*

4. *See* Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72-73 (1966).

5. Warden, *Miranda—Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39, 39-44 (1966).

6. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 510 (4th ed. 1974). *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Mississippi, 297 U.S. 278 (1936). *See generally* C. MCCORMICK, EVIDENCE §111 (1954); 3 J. WIGMORE, EVIDENCE §822 (3d ed. 1940).

7. Powell v. Alabama, 287 U.S. 45, 57 (1932).

8. "[N]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. *See* Malloy v. Hogan, 378 U.S. 1 (1964), holding that the fifth amendment privilege against self-incrimination is applicable to the states.

9. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. *See also* U.S. CONST. amend. XIV which states in part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

10. 360 U.S. 315 (1959).

11. *Id.* at 323, 326. *See also* White v. Maryland, 373 U.S. 59 (1963) (the absolute right to counsel also attached at arraignment in capital cases); Gideon v. Wainwright, 372 U.S. 335 (1963) (the absolute right to counsel is available to indigents not only in capital cases but in all those where serious crimes are involved).

United States[12] and *Escobedo v. Illinois*,[13] the Court extended the constitutional scope of the right to counsel beyond its traditional function of aiding the accused in a trial or other hearing. Persons under police investigation were held to have a right to legal representation when they are under indictment, as in *Massiah*, or when, before indictment, the police have "focused" upon the accused with the "purpose to elicit a confession," as in *Escobedo*.

Freed on bond after indictment, the defendant in *Massiah* was without counsel when he incriminated himself while talking in a car with a codefendant who had allowed government agents to install electronic eavesdropping equipment. In an opinion written by Justice Stewart, the Court held that under the sixth amendment's guaranty of the right to counsel, the defendant's incriminating statements were inadmissible at trial, and the majority indicated this would be true if the statements had been obtained by police interrogation.[14] The Court reiterated the constitutional principle earlier established in *Powell v. Alabama*[15] that a defendant is as much entitled to the sixth amendment right to counsel at the critical pre-trial stage of arraignment as at the trial itself.[16]

In contrast to *Massiah*, the Court employed an extremely particularized approach to the confession and right to counsel dilemma in *Escobedo*. The Court carefully limited the opinion to the facts of the case, explaining that when the investigation ceases to be a general inquiry into an unsolved crime and begins to focus upon a particular suspect in police custody, a defendant's statements are inadmissible if the police have not effectively warned the suspect of his constitutional right to remain silent and have refused his requests to consult with a lawyer.[17]

Miranda v. Arizona,[18] a 1966 decision, differed from *Escobedo* by

12. 377 U.S. 201 (1964).

13. 378 U.S. 478 (1964).

14. 377 U.S. at 203. *See also* Enker & Elsen, *Counsel for the Suspect: Massiah v. United States and Escobedo v. Illinois*, 49 MINN. L. REV. 47 (1964).

15. 287 U.S. 45 (1932).

16. 377 U.S. at 205. The Court in *Massiah* cited *Powell* at 57.

17. 378 U.S. at 485.

18. 384 U.S. 436 (1966). *See generally* Y. KAMISAR, *Equal Justice in the Gatehouses and Mansions of American Criminal Procedure*, in CRIMINAL JUSTICE IN OUR TIME 1-95 (1965); F. INBAU & J. REID, CRIMINAL INTERROGATION AND CONFESSIONS (1962); C. O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 91-151 (1956). *See also* Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965); Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345 (1936); Herman, *The Supreme Court and Restrictions on Police Interrogation*, 25 OHIO ST. L.J. 449 (1964); Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV.

relying upon the fifth amendment rather than the right to counsel and by announcing a generalized framework of constitutional limitations upon police interrogation. Without specifically concentrating upon the facts, Chief Justice Warren, writing for five members, stated precise constitutional requisites for rendering statements admissible which are obtained through custodial police interrogation.[19] The Court held the fifth amendment privilege against self-incrimination applicable to custodial interrogation and extended the fifth amendment's exclusionary requirement to statements unconstitutionally obtained through interrogation.[20] The Court defined "custodial interrogation" as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. If an individual subject to interrogation indicates in any manner and at any time prior to or during questioning that he wishes to remain silent, the interrogation must cease. The Court further held that not all confessions are inadmissible, giving as an example statements made voluntarily and freely without any compelling influences.[21]

In its discussion of waiver of fifth and sixth amendment claims, the *Miranda* Court relied upon the traditional test announced in *Johnson v. Zerbst*[22] that an effective waiver involves "an intentional relinquishment or abandonment of a known right or privilege."[23] The Court held that if interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests upon the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. While a request for a lawyer during interrogation affirmatively secures one's right to counsel, failure to ask does not constitute waiver. A valid waiver will not be presumed simply from silence after warnings are given by the police or from the fact that a confession was eventually obtained.

1224 (1932); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935 (1966); *The Supreme Court 1965 Term*, 80 HARV. L. REV. 91, 201 (1966).

19. 384 U.S. at 467-79. These requisites, now known as the "Miranda warnings," are as follows: the accused must be told by a law enforcement official that he has the right to remain silent, that anything he says may be used as evidence against him in a court of law, that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that a lawyer will be appointed to represent him if he is indigent.

20. *Id.* at 467. *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) for a discussion of the exclusionary rule.

21. 384 U.S. at 478.

22. 304 U.S. 458 (1938).

23. *Id.* at 464.

Decided seven years after *Miranda* and under the auspices of a new chief justice, *Schneckloth v. Bustamonte*[24] reflected a change in Court leadership and limited the applicability of the Warren Court decisions by returning to a totality-of-circumstances test to determine whether there was a valid waiver of a recognized constitutional right. In holding that the defendant's consent to the search was voluntary, the Court stated that while knowledge of the right to refuse consent is one factor to be taken into account, the prosecution does not have the burden of proving such knowledge as a prerequisite to show voluntary consent. The Court reduced the high standard for waiver by ruling that the requirement of a "knowing and intelligent" waiver of constitutional rights, while applicable to the due process guarantees involving the preservation of a fair trial, was not applicable to the fourth amendment guaranty against unreasonable searches and seizures.

In the instant case, twenty-two states and other amici curiae had requested the Court to use *Brewer v. Williams* as a vehicle to overrule *Miranda*,[25] but the majority of the Court focused upon a delineation of those actions which are sufficient to constitute waiver of the right to counsel and those police actions which are tantamount to interrogation.[26] After discussing the differences of opinion over the scope of the right to counsel, Justice Stewart stated that the right to counsel granted by the sixth and fourteenth amendments attaches, at the latest, when judicial proceedings have been initiated against the defendant by formal charge, preliminary hearing, indictment, information, or arraignment.[27]

After holding that such judicial proceedings had been initiated against Williams,[28] Justice Stewart recited the facts and recounted the detective's

24. 412 U.S. 218 (1973).

25. 97 S. Ct. at 1259. *See* Frankel, *From Private Fights Toward Public Justice*, 51 N.Y.U. L. REV. 516, 529 n.49 (1976), which mentions *Williams v. Brewer*, 509 F.2d 227, 232-34 (8th Cir. 1974), *cert. granted*, 423 U.S. 1031 (1975), in connection with waiver of the right to counsel.

26. 97 S. Ct. at 1239.

27. *Id.* Justice Stewart stated, "There can be no doubt . . . that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned . . . , and he had been committed by the court to confinement in jail." *Id.*

28. *Id.* Another issue decided by the Court which is outside the scope of this casenote was the petitioner's threshold claim that the federal district court disregarded the provisions of 28 USC § 2254(d) (1970) in making its findings of fact. The Court held that the federal district court correctly applied the statute because it made no factfindings in conflict with those of the state courts, and its additional factfindings were carefully explained and later approved by the court of appeals.

testimony to conclude that the "Christian burial speech"[29] was tantamount to interrogation. The Court pointed out that the state courts had proceeded upon the same hypothesis by recognizing that Williams had been entitled to counsel at the time the statements were made.[30] Justice Stewart then reasoned that there would have been no right to counsel if there had been no interrogation.

The Court held that the circumstances in *Brewer* were constitutionally indistinguishable from those presented in *Massiah*, thereby avoiding a "wooden"[31] or technical application of the *Massiah* doctrine. While slight factual differences exist between the cases, the majority resolved the difficulties by stating that whether incriminating disclosures made in the absence of counsel were elicited openly or surreptitiously is constitutionally irrelevant in determining whether the right to counsel had been abridged.[32] Justice Stewart also dismissed the argument that the agreement

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The Court found that the "District Court did make some additional findings of fact based upon its examination of the state court record, among them the findings that Kelly, the Davenport lawyer, had requested permission to ride in the police car from Davenport to Des Moines and that Detective Leaming had refused the request." *Id.* at 1238.

29. *Id.* at 1236. During the automobile trip from Davenport to Des Moines, Detective Leaming delivered what has been referred to in the briefs and the oral arguments as the "Christian burial speech." Addressing Williams as "Reverend," he said:

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

Id. The police officer knew that Williams was a former mental patient and was deeply religious. The Court stated that the "Christian burial speech" was tantamount to interrogation, since (1) the police officer deliberately and designedly set out to elicit information from the accused just as surely as if he had formally interrogated him, and (2) the police officer was fully aware that the accused was represented by counsel who had advised him not to talk to police during the trip, yet the officer purposely sought during the accused's isolation from his lawyers to obtain as much incriminating information as possible. *Id.* at 1239-40.

30. *Id.* at 1240.

31. *Id.* at 1240-41.

32. *Id.* at 1240. *See* McLeod v. Ohio, 381 U.S. 356 (1965); United States v. Crisp, 435 F.2d 354, 358 (1970); United States *ex rel.* O'Connor v. New Jersey, 405 F.2d 632, 636 (1969); Hancock v. White, 378 F.2d 479 (1967).

between Williams' attorney and the police was not enforceable by holding that constitutional law, not contract law, was applicable.[33]

Dealing with the waiver issue, the Court first noted that the Iowa courts had recognized that Williams had the right to counsel but had held that he had waived his right during the automobile trip.[34] However, the majority affirmed the federal district court and the court of appeals rulings that the state had failed to meet its burden of proving an effective waiver and that the Iowa state courts had applied an incorrect constitutional standard to determine waiver.[35] The proper standard to determine such waiver is that the state must prove "an intentional relinquishment or abandonment of a known right or privilege."[36] Although an individual has been informed of his right to counsel and appears to understand it, waiver of such right requires not merely comprehension but relinquishment, and an individual's continued insistence upon counsel refutes any suggestion that he waived his right.[37] However, the Court stressed that it was not suggesting that Williams could not have waived his rights under the sixth and fourteenth amendments without notice to counsel.

Three of the five justices comprising the majority propounded their views in separate concurring opinions. Justice Marshall's concurrence, written largely in response to the dissenting opinions, reflected his concern with the dilemma of balancing the institutional integrity of the Court with the societal need for protection against criminals. Justice Marshall believed "[t]he dissenters have . . . lost sight of the fundamental constitutional backbone of our criminal law,"[38] and as he cast his vote with the majority, he invoked Justice Brandeis' dissenting view in *Olmstead v. U.S.*,[39] that it is essential that the government set an example for its citizens by following its own laws.

Justice Stevens' concurrence emphasized the need for dispassionate decision-making by the Court and focused upon the issue of whether a fugitive from justice can rely upon his lawyer's advice concerning voluntary surrender. He seemed to advocate an ethical as well as a contract law approach concerning the agreement between Williams' lawyer and the

33. 97 S. Ct. at 1240.

34. *Id.* at 1241. *See* the Iowa Supreme Court's ruling in State v. Williams, 182 N.W.2d 396, 402 (1970).

35. *Id.* at 1241-42. *See* the federal district court's ruling in 375 F. Supp. at 182 and the court of appeals' reasoning in 509 F.2d at 233.

36. 97 S. Ct. at 1242, *quoting* Johnson v. Zerbst, 304 U.S. at 464.

37. 97 S. Ct. at 1242.

38. *Id.* at 1244.

39. 277 U.S. 438 (1922). Mr. Justice Brandeis' dissent is at 471-85.

police, stating that "the State cannot be permitted to dishonor its promise to this lawyer."[40] In contrast, Justice Powell carefully delineated the facts of the case, emphasizing that one's perception of the facts determines the decision's outcome.[41]

The reasoning of Chief Justice Burger's strongly worded dissent reflects the concerns expressed in Justice Cardozo's prophecy about the exclusionary rule, "The criminal is to go free because the constable has blundered."[42] The Chief Justice stated his belief that the accused made a valid waiver of his right to counsel when he led the police to the body and that, even if there was no waiver, the exclusionary rule should not be applied to non-egregious police conduct, as in the instant case, where the prisoner's disclosures were uncoerced, and where guilt was manifest. He stressed that a savage murder of a small child had occurred, that the public should not be punished for the mistakes of law enforcement officers, and that the officer should be punished directly if he were guilty of wrongdoing.[43]

Expressing disbelief that the Court could conclude that no valid waiver existed, the Chief Justice contended that the majority not only conceded that Williams' disclosures were voluntary but also failed to define what evidentiary showing the State failed to make.[44] He rejected Justice Powell's finding that the detective's actions constituted "interrogation," as opposed to mere "statements" intended to prick the conscience of the accused. Unlike Justice Marshall, Chief Justice Burger chose to

40. 97 S. Ct. at 1248.

41. *Id.* at 1245. A point not discussed in this casenote but of importance to the decision is the reviewability of lower court decisions in a habeas corpus proceeding. Justice Powell dealt specifically with Chief Justice Burger's dissenting reference to *Stone v. Powell*, 428 U.S. 465 (1976), which held that federal habeas corpus relief may not be granted to a state prisoner on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial where a state had provided an opportunity for full and fair litigation of a fourth amendment claim. *Id.* at 482. *See* Note, 37 LA. L. REV. 289 (1976), for a discussion of *Stone*. Justice Powell noted in *Brewer* that the lower courts had no occasion to consider the applicability of *Stone*, since it was decided subsequently to *Brewer*. He further stated that the Supreme Court had no reason to consider the possible applicability of *Stone*.

42. *Id.* at 1248, *quoting* People v. Defore, 150 N.E. 585, 587 (1926). In connection with the analysis of dissents, see Pound, *Cacoethes Dissentiendi: The Heated Judicial Dissent*, 39 A.B.A. J. 794 (1953). For an understanding of Chief Justice Burger's decisionmaking from 1956-1969, see J. FRANK, LAW AND THE MODERN MIND (1935); Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956-1969*, 60 CORNELL L. REV. 743 (1975).

43. 97 S. Ct. at 1248.

44. *Id.* at 1249.

place the societal need for protection higher in priority than the Court's faithful adherence to the preservation of individuals' constitutional rights as he criticized the Court's application of "tenuous strands" of constitutional jurisprudence.[45]

The Chief Justice expressed justifiable concern over the exclusionary rule, pondering the important question whether it should be applied mechanically in all cases outside the fourth amendment, and also whether its goals were furthered by its application in the instant case. After discussing the background and the flaws of the exclusionary rule, he emphasized that deterrence of unlawful police conduct is its only valid justification. Stressing that no risk of unreliability existed in *Brewer* and that *Miranda's* safeguards are not personal constitutional rights but only judicially created measures, Burger argued that suppression of evidence should no longer be automatic for violation of mere prophylactic rules. Analogizing the fourth and fifth amendment exclusionary applications, Burger stated that there should be no "knee-jerk" suppression of reliable evidence with sixth amendment cases.[46] The Chief Justice reasoned that the exclusionary rule should be applied upon the basis of its benefits and costs rather than upon the adoption of a "formalistic analysis varying with the constitutional provision invoked."[47]

In a carefully footnoted dissenting opinion, Justice White expressed the view that the prisoner had knowingly and intentionally waived his right to assistance of counsel.[48] He admonished the Court that waiver is not a formalistic concept, and he contended that "wafer thin distinctions" should not determine whether a murderer goes free.[49] While agreeing with the majority that *Brewer* was not the case in which to overrule *Miranda*, Justice Blackmun, in a separate dissenting opinion, disagreed that *Brewer* is indistinguishable from *Massiah*[50] and added that the Court's holding

45. *Id.* at 1250.

46. *Id.* at 1253.

47. *Id.* at 1254. In this respect, Chief Justice Burger argued that *Brewer* is indistinguishable from *Stone*. See note 39, *supra*.

48. 97 S. Ct. at 1257. Justice White was joined in his dissent by Justices Blackmun and Rehnquist.

49. *Id.* at 1258. When speaking of "wafer thin distinctions," Justice White was referring to the majority's implicit suggestion, as he calls it, that "the right involved in *Massiah v. United States* . . . as distinguished from the right involved in *Miranda v. Arizona* . . . is a right not to be *asked* any questions in counsel's absence rather than a right not to *answer* any questions in counsel's absence, and that the right not to be *asked* questions must be waived *before* the questions are asked." *Id.* (emphasis by Justice White).

50. *Id.* at 1259-60. Justice Blackmun, joined by Justices White and Rehnquist, reasoned as follows: (1) "the police did not deliberately seek to isolate Williams

would probably make it impossible to retry Williams.[51]

Brewer is important to state courts, especially those of Louisiana in view of recent conflicting Louisiana Supreme Court decisions concerning the right to counsel. In *State v. Cotton*,[52] the Louisiana court, in an opinion by Justice Summers, held that a statement was voluntarily given by a defendant who, after speaking with his attorney and being told not to make any statements, repeatedly sought to speak with a police officer who was aware of the attorney's advice and eventually consented to meet with the defendant. The Court further held that the confession was not rendered involuntary by the fact that the police officer mistakenly informed the defendant that two persons had identified him as having been at the scene of the crime during the time of its commission. Justice Tate in his dissent cited the federal district court's ruling in *Brewer* with approval[53] and argued that allowing the prosecutor or law enforcement authorities to interrogate a suspect held in jail, without notice to retained or appointed counsel, erodes the constitutional right to effective representation by counsel.[54]

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from his lawyers so as to deprive him of the assistance of counsel"; (2) the police officer's purpose was not solely to obtain incriminating evidence as the victim had been missing for only two days and the police could not be certain that she was dead; and (3) "not every attempt to elicit information should be regarded as 'tantamount to interrogation.'" *Id.* at 1260. He added that the Court's holding that the right to counsel was violated whenever police engaged in any conduct, in the absence of counsel, with the desire to obtain information from a suspect after arraignment, was too broad, that there was no "interrogation" by the police in the instant case, and that the judgment of the court of appeals should be vacated and the case remanded for consideration of the issue of "voluntariness." *Id.* at 1261.

51. Justice Blackmun stated: "With the exclusionary rule operating as the Court effectuates it, the decision today probably means that, as a practical matter, no new trial will be possible at this date eight years after the crime, and that this respondent will necessarily go free." However, it should be noted that Williams was subsequently retried and reconvicted in an Iowa trial court. An appeal is now pending with one of the major issues being "the fruit of the poisonous tree" doctrine regarding the admissibility of the tainted evidence.

52. 341 So. 2d 355 (1976), *rehearing denied* on Jan. 21, 1977. Justice Summers wrote the opinion with Justice Tate dissenting and filing an opinion. Justices Tate and Calogero both were of the opinion that a rehearing should be granted.

53. *Id.* at 361. Justice Tate noted that the federal district court held that "[w]hen police have agreed with the defendant's attorney that the defendant will not be questioned in the attorney's absence, when another attorney has asked to be with the defendent at a particular time and place, and when the defendant has repeatedly asserted his desire not to talk in the absence of counsel, the police plainly should not be permitted to interrogate the defendant at all until further notice is given to his counsel." *Id.*

54. *Id.* at 360.

In *State v. Weedon*,[55] Justice Tate's views became the majority opinion as the court held that an accused who had been advised by his attorneys that he could answer any questions asked of him at his booking did not waive his rights against self-incrimination and right to counsel. The defendant made extremely prejudicial remarks to the booking officer in response to questioning which violated an agreement between his attorneys and state police officers. Justice Tate again cited *Brewer* and reasoned that the state cannot be permitted to prejudice the accused's constitutional rights by disregarding an agreement not to question him unless his attorneys are present.[56]

Brewer strengthens the right to counsel afforded criminal defendants, broadly interprets the meaning of "interrogation," and indicates that the Court will strictly construe the requirements for a valid waiver. However, it is important to note that the Court has apparently returned to a more particularized, case-by-case approach to the confession and right to counsel issues, emphasizing the factual aspects of the case as was done in decisions prior to *Miranda*. Therefore, the prosecution might well be successful in convincing the Court to distinguish future cases from *Brewer*.

Revealing a new trend in the Court's attitude toward criminal procedure cases, *Brewer v. Williams* reverts to the traditional pre-*Escobedo* and pre-*Miranda* method of dealing separately with fifth and sixth amendment problems. Heralded by the news media and interested parties as the decision in which *Miranda's* fate would be determined, *Brewer* presents a great surprise to the unsuspecting reader as the Court barely mentions *Miranda*. *Brewer* is especially noteworthy in demonstrating the reluctance of five present justices to overrule *Miranda* and their possible future preference to sidestep such a major issue by basing decisions on the sixth amendment or other relatively uncontroversial grounds.

Emily M. Phillips

EXEMPTION OF SENIORITY SYSTEMS UNDER TITLE VII

Litigation was instituted against a nationwide common carrier of motor freight and a union representing a large group of the carrier's employees alleging that the seniority system established by the collective-

55. 342 So. 2d 642 (1977), *rehearing denied* on March 3, 1977.
56. *Id.* at 645.