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Interrogation under the Fifth Amendment: Arizona v. Mauro

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INTERROGATION UNDER THE FIFTH AMENDMENT: *ARIZONA V. MAURO*

William Carl Mauro went to the local discount store and told employees that he had just killed his son. The employees called the police to report the crime. Mauro told the police he had murdered his son and took them to the location of his child's body. The police at that point arrested Mauro and read him his constitutional rights as required under *Miranda v. Arizona*.[1] Mauro elected to remain silent until he could speak with his attorney. The police asked him no further questions.

The police simultaneously questioned Mauro's wife about the death of her son. During this questioning she asked to see her husband. The police were reluctant to allow her to talk with Mauro, but she continued to insist until the police allowed the meeting.

The police agreed that Mrs. Mauro could talk with her husband only if a police officer with a tape recorder was present. The officer placed the tape recorder on the table in plain view to record the conversation. During this conversation Mauro incriminated himself.

The prosecutor sought to introduce the tape recording at trial as evidence that Mauro was sane at the time of the killing in order to rebut Mauro's claim of insanity. Mauro attempted to suppress the evidence, claiming the police acquired it in violation of his *Miranda* rights. The lower court in Arizona admitted the recorded statement against Mauro to rebut his claim of insanity. Subsequently, the lower court convicted Mauro of child abuse and first degree murder.

The Arizona Supreme Court reversed the conviction based upon the court's interpretation of *Rhode Island v. Innis*.[2] The Arizona Supreme Court determined that the conversation between Mauro and his wife occurred in a situation likely to elicit an incriminating response from the suspect and thus constituted the functional equivalent of interrogation under the analysis of *Innis*.[3] The United States Supreme Court granted certiorari to clarify the meaning of interrogation and its functional equivalent as set

1. 384 U.S. 436, 479 (1966). For a discussion of *Miranda* rights, see *infra* notes 22-37 and accompanying text.

2. 446 U.S. 291 (1980). The Court in *Innis* defined interrogation to include both express questioning and "any words or actions on the part of police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Id.* at 301; *see* State v. Mauro, 149 Ariz. 24, 716 P.2d 393, 400 (1986) (en banc).

3. Mauro 716 P.2d at 400. In making its determination, the Arizona court looked solely at the intent of the police. *Id.* The Arizona court compared a suspect's right to silence until he speaks with an attorney under the fifth amendment, U.S. CONST. amend. V, with a suspect's right to an attorney under the sixth amendment, U.S. CONST. amend. VI. 716 P.2d at 401; *see Innis*, 446 U.S. at 301.

forth in *Innis*. *Held, reversed*: The police conduct was not sufficient to constitute interrogation or its functional equivalent under *Innis* since the police did not initiate the meeting between Mr. and Mrs. Mauro, but merely allowed the meeting to occur. *Arizona v. Mauro*, 107 S. Ct. 1931, 95 L. Ed. 2d 458 (1987).

I. DEVELOPMENT OF AN INDIVIDUAL'S RIGHT AGAINST INTERROGATION

A. Interrogation and the Fifth Amendment Right Against Self-Incrimination

The fifth amendment to the United States Constitution[4] gives each person the right not to incriminate himself in a criminal trial. The constitutional privilege against self-incrimination extends to defendants in state as well as federal criminal trials.[5] Under the exclusionary rule, evidence obtained in violation of a suspect's right to remain silent is not admissible in court.[6]

If a defendant voluntarily confesses, however, the prosecutor may use the confession against the defendant.[7] The Supreme Court held in *Bram v. United States*[8] that a court can admit a confession as evidence against a person only if the person has voluntarily confessed.[9] According to *Bram* a confession is not voluntary if under the given facts and circumstances the suspect would have remained quiet, but for the compelling influence of the police.[10]

After *Bram* the Supreme Court inquired into the "totality of the circumstances" to decide whether to admit evidence of incriminating statements that defendants had made.[11] The Court took a case-by-case approach in deciding whether the suspect voluntarily confessed. The Court balanced the

4. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

5. Malloy v. Hogan, 378 U.S. 1, 3 (1963). The fifth amendment privilege against self-incrimination applies to state court proceedings through the due process clause of the fourteenth amendment. *Id.*; *see* U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .").

6. Miranda v. Arizona, 384 U.S. 436, 479 (1966).

7. *Id.* at 478 ("Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.").

8. 168 U.S. 532 (1897).

9. *Id.* at 549. The Court in *Bram* established the standard to determine if a statement is "voluntary." *Id.* The Court inquires not whether the statement was voluntary, but whether the defendant voluntarily *made* the statement. *Id.*

10. *Id.*

11. Michigan v. Tucker, 417 U.S. 433, 441 (1974) (voluntariness depends on whether police treated suspect in unfair or unreasonable manner in order to get incriminating statement); Spano v. New York, 360 U.S. 315, 322-23 (1959) (police interrogation that continued through the night coupled with interrogation by friend using emotional appeal in order to persuade defendant to confess violated defendant's fourteenth amendment rights). "Totality of circumstances" test means that a court must examine all the factors of the interrogation examined separately and as a whole. F. INBAU, J. REID & J. BUCKLEY, CRIMINAL INTERROGATION AND CONFESSIONS 243 (3d ed. 1986). Even if each factor alone is not sufficient to prove the suspect made the statement involuntarily, all the factors together may show the suspect spoke involuntarily. *Id.* at 325; *see* R. ROYAL & S. SCHUTT, THE GENTLE ART OF INTERVIEWING AND INTERROGATION 117 (1976) ("[A] strong influence will produce a strong reaction and a

needs of law enforcement to prevent criminal activity against the constitutional rights of the defendant.[12]

B. Interrogation and the Sixth Amendment Right to Representation

When police arrest a suspect, that suspect potentially has a constitutional right not only under the fifth amendment, but also under the sixth amendment.[13] Once the rights attach, unless the suspect waives those rights, the police cannot interrogate the suspect.[14] In *Massiah v. United States*[15] the Supreme Court held that the sixth amendment prevented the use of incriminating statements that the police had obtained from the defendant without his knowledge after his indictment for an offense.[16] The Court extended its interpretation of interrogation to include information that police gathered secretly from the defendant.[17] The Court held that the sixth amendment right of representation by counsel applied not only during a criminal trial, but also during the period preceding a trial when the investigation began to focus on the accused.[18] In *Escobedo v. Illinois*[19] the Supreme Court expanded its holding in *Massiah*, ruling that the defendant had the sixth amendment right to counsel even before the prosecution obtained an indictment.[20] According to the Court, when an investigation focuses on an individual suspect, that suspect has the right under the sixth amendment to have an attorney present during questioning.[21]

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weak influence, a weak reaction. Of equal significance, a strong effect can be produced by an accumulation of small influences.").

12. *Spano*, 360 U.S. at 315.

13. U.S. CONST. amend. VI ("[T]he accused shall . . . have the Assistance of Counsel for his defense."). A person has a fifth amendment right against self-incrimination immediately upon arrest but not before arrest during general questioning. Miranda v. Arizona, 384 U.S. 436, 477 (1966). A person has the sixth amendment right to counsel once he is under indictment. Massiah v. United States, 377 U.S. 201, 206 (1964).

14. Edwards v. Arizona, 451 U.S. 477, 485 (1981); *Miranda*, 384 U.S. at 479.

15. 377 U.S. 201 (1964).

16. *Id.* at 206.

17. *Id.* at 205. In *Massiah* the police placed a radio transmitter in a car belonging to a friend of the defendant. The friend, who had knowledge of the transmitter, turned the conversation to the defendant's indictment, and the defendant made incriminating statements that the police heard over the radio.

18. *Id.* at 204 (police obtained incriminating statements after defendant's indictment but before his trial).

19. 378 U.S. 478 (1964).

20. *Id.* at 485-86. The Supreme Court has held in subsequent cases, however, that the *Escobedo* case applies to the fifth amendment right against self-incrimination, rather than to the sixth amendment right to counsel. Moran v. Burbine, 106 S. Ct. 1145-46, 89 L. Ed. 2d 410, 426 (1986) ("[The *Miranda* Court's] brief observation about the reach of Escobedo's Sixth Amendment analysis is not only dictum, but reflects an understanding of [*Escobedo*] that the Court has expressly disavowed."); Kirby v. Illinois, 406 U.S. 682, 689 (1972) (basis of *Escobedo* was the fifth amendment right against self-incrimination); Johnson v. New Jersey, 384 U.S. 719, 729 (1966) ("the prime purpose [of *Escobedo*] is to guarantee . . . the privilege against self-incrimination").

21. *Escobedo*, 378 U.S. at 492. The Court noted:

> No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and exercise, [his constitutional] rights. If the exercise of constitutional rights will thwart the effectiveness

C. Miranda *Requirements for Interrogation*

The prior cases set the stage for *Miranda v. Arizona*,[22] a landmark decision. *Miranda*, *Escobedo*, and *Massiah* all dealt with the admissibility of incriminating statements that suspects made during interrogation.[23] The Supreme Court decided *Escobedo* and *Massiah* based on the suspect's sixth amendment right to an attorney during interrogation.[24] The Supreme Court based the *Miranda* decision on the fifth amendment right against self-incrimination.[25] In the *Miranda* decision, however, the Supreme Court espoused the same principles that the Court enunciated in *Escobedo*.[26]

The Court in *Miranda* required that police advise suspects of their constitutional rights when police place them in custody.[27] Under *Miranda* the police must give the suspect four warnings: that he can remain silent, that anything he says can be used against him, that he has a right to have an attorney, and that the state will appoint an attorney if the suspect cannot afford one.[28] A suspect can invoke his *Miranda* rights at any time before or during interrogation.[29] A suspect can voluntarily waive his rights under *Mi-*

> of a system of law enforcement, then there is something very wrong with that system.

Id. at 490 (emphasis in original).

22. 384 U.S. 436 (1966). The Supreme Court consolidated four cases in which police obtained confessions from each of the defendants during "incommunicado interrogation . . . in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Id.* at 445. The Court noted that it was not creating new rights for accused persons, but merely applying principles that the Constitution had established. *Id.* at 442. A full discussion of the issues presented in *Miranda* and the effects of that decision on the criminal justice system is beyond the scope of this Note. *See generally* Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1839-42 (1987) (Burger Court and Rehnquist Court have chipped away at *Miranda* doctrine, endangering suspects' constitutional rights); White, *Defending* Miranda: *A Reply to Professor Caplan*, 39 VAND. L. REV. 1, 9 (1986) ("*Miranda* rests on a legitimate constitutional basis. The *Miranda* rule represents an effort to apply the fifth amendment privilege to a vital state of the adversary process."). *But see* F. INBAU, J. REID & J. BUCKLEY, *supra* note 11, at 279 (current police practices have gone too far beyond the scope of *Miranda* and provide more than the constitutional right against self-incrimination); Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417, 1467 (1985) (courts must balance suspects' rights under *Miranda* against need for proper law enforcement).

23. *Miranda*, 384 U.S. at 439; *Escobedo*, 378 U.S. at 479, *Massiah*, 377 U.S. at 202.

24. *Escobedo*, 378 U.S. at 490-91; *Massiah*, 377 U.S. at 206.

25. *Miranda*, 384 U.S. at 444.

26. *Id.*

27. *Id.*

28. *Id.* at 479. The four warnings on the constitutional right against self-incrimination that the police must give to a suspect before any questioning occurs are:

> [T]hat he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Id. Police read these rights to a suspect from a card that often includes a fifth warning, such as the following: "You can decide at any time to exercise these rights and not answer any questions or make any statements." F. INBAU, J. REID & J. BUCKLEY, *supra* note 11, at 221. The authors consider the fifth warning "gratuitous." *Id.* The *Miranda* opinion itself adds that a person can exercise his right at any point, but does not require that police give a fifth warning. 384 U.S. at 478-79.

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

randa and speak to the police about the alleged crime.[30] He can also rescind the waiver at any time and refuse to speak further to the police until his attorney is present.[31]

The Supreme Court in *Miranda* established a comprehensive protection of a suspect's rights. Prior to *Miranda* the Court decided many of the interrogation cases on a case-by-case basis.[32] The Supreme Court in *Miranda* established a framework that would apply to all future cases by delineating a suspect's rights and defining the circumstances under which those rights would apply.[33] The rule of *Miranda*, however, does not apply to general questioning at the scene of a crime or to statements that persons not in custody voluntarily make.[34] Instead, the Court limited the rule to interrogation of persons in police custody.[35] The Supreme Court rejected the theory that a court should balance the needs of law enforcement to prevent criminal activity against the constitutional rights of the defendant.[36]

D. Defining Interrogation

The Supreme Court originally defined interrogation in *Miranda v. Arizona*.[37] In *Brewer v. Williams*[38] the Court addressed the issue of whether the police had interrogated the suspect and reestablished the validity of *Massiah v. United States*,[39] a pre-*Miranda* case. The *Williams* Court held that the police had interrogated the defendant after he had invoked his right to remain silent and that he had not waived this right.[40] The Court decided the case based not on *Miranda*, but on the defendant's sixth amendment right to

30. *Id.* To be effective, the waiver must be "made voluntarily, knowingly and intelligently." *Id.* at 444; *see* Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The Supreme Court in *Miranda* pointed out that "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 U.S. at 478.

31. *Miranda*, 384 U.S. at 445.

32. *See* Spano v. New York, 360 U.S. 315, 321 (1959) (disallowing confession based on totality of circumstances); Bram v. United States, 168 U.S. 532, 548-49 (1897) (admitting a confession into evidence if defendant makes it voluntarily).

33. 384 U.S. at 444-45.

34. *Id.* at 478.

35. *Id.* The Supreme Court stated: "By custodial interrogation, we mean 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." *Id.* at 444.

36. *Id.* at 479.

37. *Id.* at 444. Royal and Schutt define interrogation as "examin[ing a person] formally and officially by the use of questioning and persuasion for the purpose of inducing a person to reveal intentionally concealed information." R. ROYAL & S. SCHUTT, *supra* note 11, at 116.

38. 430 U.S. 387 (1977).

39. 377 U.S. 201 (1964). Even though the Court decided that police were interrogating Williams at the time he made his confession, *id.* at 206, the finding was unnecessary to the sixth amendment holding in the case. Kamisar, Brewer v. Williams, Massiah, *and* Miranda: *What Is "Interrogation"? When Does It Matter?*, 67 GEO. L.J. 1, 41 (1978). *Massiah* applies to sixth amendment cases, while *Escobedo* and *Miranda* apply to fifth amendment cases. *Id.* at 24-27.

40. 430 U.S. at 400. The Supreme Court held that police had interrogated Williams when the police officer who knew of Williams's religious beliefs and his mental instability told Williams that it was a shame that the parents would be unable to give their little girl, whom Williams had allegedly murdered, a Christian burial. *Id.* Williams allegedly abducted the girl on December 24 and this conversation occurred on December 26.

have an attorney present during the interrogation.[41] The Supreme Court implied by its holding in this case that both the fifth amendment and the sixth amendment constitutional rights apply to interrogations.[42]

Although the Court addressed the issue of whether the police interrogated the suspect in *Williams*, it did not fully discuss the question of what constitutes interrogation until *Rhode Island v. Innis*.[43] In *Innis* the Supreme Court defined interrogation to include not only direct questioning by the police after they have taken the suspect into custody, but also other conduct that is "reasonably likely to elicit an incriminating response from the suspect."[44] The Court established a foreseeability test to determine if the police had interrogated a suspect.[45] A court must determine whether the police knew or should have known that their conduct was reasonably likely to cause the suspect to incriminate himself.[46] The Supreme Court developed three considerations to use to determine if the police conduct was improper. First, a court must primarily view the situation from the perspective of the suspect.[47] Second, a court should determine the police officer's intent with respect to the conduct, including whether the police should have foreseen the likelihood of an incriminating response.[48] A court should look at what the police knew about the particular suspect and the suspect's unusual characteristics.[49] Third, a court should apply a standard of reasonableness to determine whether the conduct was likely to elicit an incriminating statement.[50]

The Court held that the police did not interrogate Innis based on the three considerations cited.[51] In *Innis* the Court established a line of demarcation

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41. *Id.* at 405-06.

42. *But see* Kamisar, *supra* note 40, at 3-4 (courts must decide interrogation issue in fifth amendment case, but not in sixth amendment case).

43. 446 U.S. 291 (1980). In *Innis* the police had arrested the suspect and were transporting him to the police station when two of the police officers in the car began conversing with each other about the danger of an abandoned shotgun to handicapped children in the area on their way to school. The suspect overheard the conversation and within a few minutes told the officers to turn the car around so he could retrieve the gun.

44. *Id.* at 300-01. Justices Marshall and Brennan, who dissented in the case, agreed fully with the definition of interrogation, but disagreed with the application of that definition to the facts of the case. *Id.* at 305 (Marshall, J., dissenting).

45. *Id.* at 302. The Court stated:

> A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable 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.

Id. at 301-02 (emphasis in original).

46. *Id.* at 301.

47. *Id.* The *Innis* Court emphasized that the primary concern of the *Miranda* opinion was the coercion and compulsion that accompanies custodial interrogation. *Id.* As a result, a court must focus primarily on the perception of the suspect to determine if police conduct amounts to interrogation. *Id.* at 300-01.

48. *Id.* at 301-02.

49. *Id.* at 302.

50. *Id.* at 302-03.

51. *Id.* at 303-04.

between sixth amendment cases, such as *Williams*, and fifth amendment cases, to which *Miranda* applies.[52] Even though the facts of *Williams* were very similar to those in *Innis*,[53] the Court pointed out that the policies underlying the fifth and sixth amendments are very dissimilar.[54]

In *Innis* all the Justices of the Supreme Court except one[55] agreed on the definition of interrogation. The eight Justices disagreed, however, on the application of that definition to the facts of the case.[56] The majority determined that the police officers could not foresee that Innis would respond to the police officer's statements, while the three dissenting Justices believed the officers should have foreseen that Innis was likely to respond under the facts presented. This conflict created ambiguity for lower courts attempting to determine whether interrogation existed in a given case.[57] A panel of the Ninth Circuit in *United States v. Thierman*[58] disagreed among themselves in

52. *Id.* at 300 n.4. The Court could have decided *Williams* based on the fifth amendment and *Miranda*, but chose instead to use the sixth amendment. *See* Brewer v. Williams, 430 U.S. 387, 397-98 (1977). The Court still addressed the issue of whether the police had interrogated Williams. *Id.* at 400; *see* F. INBAU, J. REID & J. BUCKLEY, *supra* note 11, at 237 (*Williams* Court applied functional-equivalent-of-interrogation test from *Miranda*); Kamisar, *supra* note 40, at 63-69 (while fifth amendment requires safeguards for custodial interrogation, sixth amendment requires that suspect have right to have attorney present during any interrogation after indictment). A court following *Miranda* and the fifth amendment must inquire whether the police interrogated a suspect while in custody. Presumably, if an undercover police agent talks to a suspect who is in custody, the Supreme Court would not hold that police had interrogated the suspect if the suspect was unaware that the agent was a police officer. *Id.* at 67-69. Under the sixth amendment, once the grand jury indicts a suspect, any police conduct to obtain information directly from the suspect violates the sixth amendment. *Id.* at 66-67.

53. The police in *Williams* talked to the suspect even after warning him that he did not have to respond, while in *Innis* the two police officers spoke only to each other. Moreover, the police in *Williams* knew they could appeal to the suspect's religion, while the police in *Innis* did not attempt to appeal psychologically to the suspect to obtain information. "The essential factual difference between *Innes* [sic] and *Williams* was, of course, that in the latter, the comment was made to the suspect; whereas in *Innes*, [sic] it was made to a fellow officer." F. INBAU, J. REID & J. BUCKLEY, *supra* note 11, at 238. Appeals to conscience are a classic interrogation technique. *Id.* at 78.

54. The fifth amendment provides that a suspect has a constitutional privilege not to incriminate himself in a criminal proceeding. U.S. CONST. amend. V. Since the courts have viewed the custodial environment as inherently disfavoring the suspect, it has required strict guidelines for police to follow in interrogating suspects in order to protect the fifth amendment privilege. Miranda v. Arizona, 384 U.S. 436, 439 (1966); *see* Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980) (defining the functional equivalent of interrogation). The sixth amendment provides that an accused has the right to representation by an attorney. U.S. CONST. amend VI. Since the period after indictment and before trial is as critical to the accused's defense as the trial itself, the suspect needs representation then as well. Massiah v. United States, 377 U.S. 201, 205 (1964). Courts have interpreted the sixth amendment as requiring that the accused after indictment has the right to have his attorney present for direct or indirect questions and forbidding the police from secretly acquiring information from the accused. *Id.* at 206.

55. *See Innis*, 446 U.S. at 311 (Stevens, J., dissenting).

56. *Id* at 305 (Marshall, J., dissenting).

57. *See* United States v. Gay, 774 F.2d 368, 379 (10th Cir. 1985) (suspect making incriminating remark when police picked up object not interrogation); Sockwell v. Blackburn, 748 F.2d 979, 981 (5th Cir. 1984) (no interrogation when police merely echoed question that victim of crime asked); United States v. Satterfield, 743 F.2d 827, 848-49 (11th Cir. 1984) (police did not interrogate when suspect volunteered statements during casual conversation with police in police car); United States v. Morin, 665 F.2d 765, 770-71 (5th Cir. 1982) (police conduct asking suspect if only remaining suitcase at airport belonged to him not admissible).

58. 678 F.2d 1331 (9th Cir. 1982).

applying *Innis* to their case.[59] The majority stated that the facts closely resembled the facts in *Innis* and held that police had not interrogated the suspect.[60] The dissent disagreed because the police should have known that their statement was likely to elicit an incriminating response from the suspect, since the suspect knew the police were going to interrogate his girlfriend next.[61]

Similarly, in *State v. James*[62] the Arizona Supreme Court held that the police did not interrogate the suspect when one police officer asked another officer in the presence of a murder suspect if the police had learned where the body was located.[63] The second officer, who had just interrogated the suspect, responded that the suspect had invoked his right to counsel. The suspect agreed, however, to tell where the victim was located. The court allowed the incriminating statement as evidence at the suspect's trial.[64] Justice Brennan dissented from the U.S. Supreme Court's denial of certiorari because he believed the Court needed to clarify the application of *Innis* concerning what constitutes the functional equivalent of interrogation.[65] In that case the Arizona Supreme Court *assumed* no interrogation and *assumed* the suspect waived his rights under *Miranda*.[66] Brennan believed the Arizona court erred when it failed to address whether interrogation existed.[67]

After *Innis*, interrogation includes not only direct questioning of a suspect, but also police actions that indirectly question the suspect.[68] If the issue revolved only around whether the police asked the suspect a question, the analysis would be easy.[69] The *Innis* definition goes further to include the functional equivalent of interrogation, and so is more difficult to apply.[70] The *Miranda* Court's goal was to protect the suspect's constitutional rights from the compelling nature of custodial interrogation.[71] The *Innis* Court provided a guideline for when the functional equivalent of interrogation oc-

59. *Id.* at 1337.

60. *Id.* at 1334-35. After reading Thierman his *Miranda* rights, police interrogated him until he asked to see an attorney. When this interrogation terminated one police officer said to the other, "That's it. . . . let's go talk to the girl," referring to Thierman's girlfriend. Thierman then made an incriminating remark.

61. *Id.* at 1338 (Wallace, J., dissenting).

62. 141 Ariz. 141, 685 P.2d 1293 (en banc), *cert. denied*, 469 U.S. 990 (1984).

63. 685 P.2d at 1297.

64. *Id.* at 1297-98.

65. James v. Arizona, 469 U.S. 990, 996 (1984) (Brennan, J., dissenting).

66. *James*, 141 Ariz. 141, 685 P.2d at 1297. As in *Innis*, the police officer in *James* was speaking to another officer and not to the suspect, but in *James* the police had just subjected the suspect to interrogation, and the suspect thought the police had directed the question to him. In *Innis* the two police officers were clearly talking to each other and not to the suspect. *See supra* notes 44-52 and accompanying text.

67. *James*, 469 U.S. at 996 (Brennan, J., dissenting).

68. Rhode Island v. Innis, 446 U.S. 291, 301 (1980).

69. *See* Miranda v. Arizona, 384 U.S. 436, 478 (1966) (direct questioning clearly interrogation).

70. 446 U.S. at 303 (officer's offhand remarks to each other not functional equivalent of interrogation). *But see id.* at 306 (Marshall, J., dissenting) (police officer's statement that innocent child could be hurt if child found weapon constituted appeal to conscience, which is functional equivalent of interrogation).

71. 384 U.S. at 444.

curs: police conduct that is likely to elicit an incriminating response.[72]

In addition to questions, the functional equivalent of interrogation includes statements that could call for a response from the suspect.[73] The majority in *Innis* distinguished between statements specifically designed to elicit an incriminating response and statements that by chance elicit an incriminating remark.[74] Justice Stevens in his dissent would have created a broader range of protection for the suspects by not requiring that the suspect's remark be foreseeable.[75]

E. Voluntary Statements

The functional equivalent of interrogation is not so broad as to include all statements a suspect makes to police after his arrest. The *Miranda* rule does not preclude the admission of voluntary statements.[76] The Supreme Court indicated in *Michigan v. Mosely*[77] that a suspect can even invoke his right to silence and later still make a voluntary statement that is admissible in evidence.[78] In *Edwards v. Arizona*[79] the Court held that interrogation must stop immediately when a suspect invokes his right to silence under the fifth amendment.[80] The *Edwards* case created a per se rule that interrogation must immediately stop once a suspect asks to see an attorney before continuing the interrogation.[81] The Court has made it clear, however, that the suspect can validly initiate further discussions with the police even after asking for assistance from counsel.[82]

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72. 446 U.S. at 301.

73. *Id.*

74. *Id.* at 301-02.

75. *Id.* at 311-12 (Stevens, J., dissenting).

> [T]he definition of "interrogation" must include any police statement or conduct that has the same purpose or effect as a direct question. Statements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation. By prohibiting only those relatively few statements or actions that a police officer should know are likely to elicit an incriminating response, the Court today accords a suspect considerably less protection.

Id.

76. *Miranda*, 384 U.S. at 478.

77. 423 U.S. 96 (1975).

78. *Id.* at 104. The Supreme Court held that the police did not violate the rule of *Miranda* in a second interrogation because (1) the police had properly stopped the first interrogation immediately when asked, and (2) the second interrogation concerned a different type of crime, a murder, rather than the initial crimes investigated, robberies. *Id.* at 106-07.

79. 451 U.S. 477 (1981).

80. *Id.* at 485. The Court held that the suspect's confession was inadmissible because the police had coerced the statement. *Id.*

81. Solem v. Stumes, 465 U.S. 638, 646 (1984); Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983).

82. *Bradshaw*, 462 U.S. at 1044. The suspect asked the police, "What is going to happen to me now?" after he had invoked his right to counsel. The Court held that the question implied that the defendant wanted to have a "generalized discussion" about the alleged crime. *Id.* at 1045-46. The police warned him again of his right to remain silent, but he chose to waive his rights and talk to the police.

The dissent disagreed that the particular question evinced a desire for a discussion of the crime. Instead the dissent asserted that the suspect merely wanted to know what immediate events to anticipate. *Id.* at 1055 (Marshall, J., dissenting).

II. *ARIZONA V. MAURO*

In *Arizona v. Mauro* the Supreme Court clarified the meaning of interrogation and its functional equivalent as set forth in *Innis*.[83] The Court reversed the Arizona Supreme Court's decision, declaring that that court had misinterpreted the meaning of interrogation.[84] The majority stated that the facts of this case, as compared to those in *Innis*, clearly showed that the police did not interrogate Mauro at the time he made the statements in question.[85] In *Innis* two police officers had a conversation with each other related to the crime while riding with the suspect in the police car to the police station. In *Mauro* the police merely allowed Mauro to meet with his wife. This meeting occurred at the insistence of his wife, not at the suggestion of the police officers.

The Court concentrated primarily on the police's intent, even though *Innis* emphasized that the main focus should be the suspect's perspective.[86] The Court noted, that even from the suspect's perspective, the police did not interrogate Mauro.[87] The basic aim of *Miranda* and *Innis* was to prevent the police from compelling suspects to confess based on the custodial environment, and the circumstances under which Mauro incriminated himself did not present such an environment.[88]

In addition, the Court found that the police could not foresee that Mauro would incriminate himself.[89] The police knew it was possible that either Mauro or his wife might make an incriminating remark since this meeting occurred after the death of their son.[90] *Innis*, however, in the Court's view requires more direct action on the part of the police for their conduct to reach the functional equivalent of interrogation.[91] The facts of this case, according to the majority, did not meet *Innis*'s legal standard for interrogation.[92]

The Court held that Mauro made the incriminating statement voluntarily.[93] Mauro's invoking his right to remain silent did not prevent him from making voluntary statements later.[94] The Court followed the *Edwards* rule that as long as the suspect initiates the conversation without any police compulsion, the prosecution can use as evidence any statement the suspect makes.[95] The police did not initiate the conversation between Mauro and

83. 107 S. Ct. at 1934-35, 95 L. Ed. 2d at 466.
84. *Id.* at 1934, 95 L. Ed. 2d at 465.
85. *Id.* at 1936, 95 L. Ed. 2d at 468.
86. *Id.*, 95 L. Ed. 2d at 467; *see* Rhode Island v. Innis, 446 U.S. 291, 301 (1980).
87. 107 S. Ct. at 1936, 95 L. Ed. 2d at 467. "We doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way." *Id.*
88. *Id.* at 1936-37, 95 L. Ed. 2d at 468; *Innis*, 446 U.S. at 299.
89. 107 S. Ct. at 1936, 95 L. Ed. 2d at 467.
90. *Id.*, 95 L. Ed. 2d at 467-68. "Officers do not interrogate a suspect simply by hoping that he will incriminate himself." *Id.*, 95 L. Ed. 2d at 468.
91. *Id.* at 1937, 95 L. Ed. 2d at 468.
92. *Id.* at 1936 n.6, 95 L. Ed. 2d at 468 n.6.
93. *Id.*
94. *Id.*
95. *Id.* at 1934, 95 L. Ed. 2d at 466.

his wife; the conversation occurred only at the wife's insistence. The police acted properly in having an officer present.[96] Since the police did not in any way initiate or participate in the conversation, the Court held Mauro's statements to be voluntary.[97]

The Court held that the Arizona Supreme Court applied the standard of conduct, "likely to elicit an incriminating response," too broadly.[98] The Arizona court viewed the inquiry as whether the particular circumstances could lead to an incriminating response, rather than asking whether the police conduct in question was likely to produce an incriminating response.[99] According to the Court, the police acted properly with Mauro.[100]

The Court did not address the argument that the Arizona Supreme Court used reasoning under the sixth amendment to explain the fifth amendment right against self-incrimination.[101] The Arizona court borrowed the reasoning used in sixth amendment right-to-counsel cases to explain the suspect's status after he invokes his right to silence.[102] In *Innis* the Court established that the reasoning applied to sixth amendment right-to-counsel cases does not apply equally to a fifth amendment case involving the right against self-incrimination.[103] The Supreme Court, therefore, decided *Mauro* solely on the fifth amendment.[104]

Justice Stevens argued in the dissent that the meeting between husband and wife was in fact a classic interrogation technique.[105] According to Stevens, the fact that the wife requested the meeting was irrelevant since the police knew that the meeting was likely to elicit an incriminating response, the very standard established in *Innis*.[106] Justice Stevens also argued that the police allowed the meeting with the intent to gain an incriminating statement.[107] Agreeing with the Arizona Supreme Court, Justice Stevens believed that the police officers "exploited" the suspect, who, under the circumstances, was virtually certain to make an incriminating statement.[108]

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96. *Id.* at 1936, 95 L. Ed. 2d at 467.

97. *Id.*, 95 L. Ed. 2d at 468.

98. *Id.* at 1936 n.6, 95 L. Ed. 2d at 468 n.6.

99. *Id.* at 1936, 95 L. Ed. 2d at 467.

100. *Id.* at 1937, 95 L. Ed. 2d at 468-69.

101. *Id.* at 1934, 95 L. Ed. 2d at 465; *see* State v. Mauro, 149 Ariz. 24, 716 P.2d 393, 400 (1986) (en banc). The Arizona court relied on the reasoning in Maine v. Moulton, 106 S. Ct. 477, 487, 88 L. Ed. 2d 481, 496 (1985) (contrasting chance encounters that produce incriminating statement with "knowing exploitation" by police). The Arizona court held the police knowingly exploited Mauro since they required an officer be present when Mauro spoke to his wife. *Mauro*, 716 P.2d at 401. The court distinguished Narten v. Eyman, 460 F.2d 184, 191 (9th Cir. 1969) (allowing testimony of police when police accidentally overheard suspect and wife since police did not interrogate suspect). *See Mauro* 716 P.2d at 400, 401.

102. *Mauro*, 716 P.2d at 401.

103. Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980).

104. 107 S. Ct. at 1934, 95 L. Ed. 2d at 465.

105. *Id.* at 1937, 95 L. Ed. 2d at 469 (Stevens, J., dissenting).

106. *Id.* at 1940, 95 L. Ed. at 472-73.

107. *Id.* at 1939, 95 L. Ed. 2d at 471.

108. *Id.* at 1940, 95 L. Ed. 2d at 472, 473.

III. CONCLUSION

The opinion in *Arizona v. Mauro* attempted to clarify the standard established in *Rhode Island v. Innis* to determine the functional equivalent of interrogation. The *Innis* Court established the definition, but split on the application of that definition. The *Mauro* Court similarly split on the application of the definition of the functional equivalent of interrogation. Even though the Supreme Court has established a standard for the inquiry as to whether interrogation exists, the inquiry is still a facts-and-circumstances approach. The facts and circumstances can vary so greatly from case to case that the Court cannot create a totally objective test with each possible influencing factor listed. The cases can provide guidelines and broad principles for the lower courts to look to when deciding whether interrogation exists.

Under *Mauro* and *Innis* interrogation exists if the police take an active role to induce the incriminating remark. When police cannot foresee that a suspect will respond to a remark made to another person or police officer, the remark is not interrogation. If other persons make the remarks to which the suspect responds, the remark is not interrogation. The test is whether a police officer engaged in calculated conduct designed to induce an incriminating response.

The Court still looks to the same three considerations described in *Innis* to determine if interrogation occurred, but whereas *Innis* weighed the suspect's perspective heavily, *Mauro* relied more on the police's intent. A court can look to either factor in deciding the case. The Court continues to decide whether the suspect's self-incrimination was foreseeable in light of the circumstances.

In *Mauro* the Court reiterated that voluntary statements continue to be admissible as long as the suspect initiates the statement or conversation without police coercion. The fifth amendment protects suspects from police coercion and not from their own voluntary statements. The Court, in rejecting the Arizona Supreme Court's reasoning, showed that fifth amendment cases are distinct from sixth amendment cases, even though the issue of interrogation may occur in both.

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