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# Court Eases Restraint on Confessions

By John P. MacKenzie
Washington Post Staff Writer

The Supreme Court ruled yesterday, 5 to 4, that illegally obtained evidence that would otherwise be inadmissable at a criminal trial may be used by prosecutors to discredit a defendant's testimony if he takes the witness stand.

In a decision that man sharply reduce the impact of the court's 1966 Miranda vs. Arizona confessions decision, the court upheld the use, in cross-examining the accused, of incriminating statements taken by a policeman without fully warning the prisoner of his rights.

The court's action, which carried intimations that the votes are now available to overrule of undermine the controversial Miranda decision still further, was announced by Chief Justice Warren E. Burger as a matter "of interest mostly to members of the bar" and not worth describing from the bench.

It was, however, a major personal triumph for Burger, who for years has argued that court rules excluding certain evidence are ineffective and unfair to the public.

Writing for three of the four dissenters, Justice William J. Brennan Jr. called the decision "monstrous," a major breach of Miranda and an invitation to police to break the law.

"The court today tells police," Brennan charged, "that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of Miranda can't be used on the state's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution."

Burger was joined by Justice Harry A. Blackmun, his fellow Nixon appointee to the court, and by three of the four dissenters from the 1966 decision, John M. Harlan, Potter Stewart and Byron R. White.

Joining Brennan were Justices William O. Douglas and Thurgood Marshall. Justice Hugo L. Black, also a member of the Miranda majority, dissented without comment.

The Chief Justice disavowed any intention to overturn the Miranda decision, only "some comments" in the opinion of his predecessor, Earl Warren, that were "not at all necessary to the court's holding and cannot be regarded as controlling." He said it was only a "speculative possibility" that police misconduct would be encouraged.

In Miranda the court held that incriminating statements and confessions can't be used as evidence unless the prosecution proves that the defendant waived his privilege against self-incrimination after full warning of his rights.

See CONFESS, A5, Col. 1

## CONFESS, From A1

This included the right to free legal counsel if he was too poor to hire his own lawyer.

The court in 1966 did not have directly before it a case of attempted use of such evidence to cast doubt on a defendant's testimony. But it stated that the Fifth Amendment's privilege against self-incrimination "protects the individual from being compelled to incriminate himself in any manner" including the use on cross-examination of an accused's so-called "esculpatory statements" to police.

According to the dissent, six federal courts of appeals, including Washington's, and the appellate courts of 14 states, including Maryland and Virginia, had interpreted Miranda as ruling out the use of such statements through cross-examination.

In the case before the high court, an attorney for Viven Harris was attempting to overturn a narcotics conviction at the hands of a jury in White Plains, N.Y. Harris was arrested and questioned by police in January, 1966, six months before the Miranda warning rules were held binding on future trials, but was tried when the high court's decision prohibited direct use of his statement to police.

Harris, however, took the stand to deny the policeman's account of an alleged sale of heroin. When he did, the prosecutor—without displaying the incriminating statements for the jury—asked several questions that indicated Harris had told police something quite different while under arrest.

The jury was instructed to consider this evidence as bearing only on Harris's credibility, not on his guilt or innocence.

Burger's opinion said the defense made "no claim that the statements made to the police were coerced or involuntary," At the oral argument attorney Joel Aurnou of White Plains complained that the trial judge had denied his request for a hearing to see whether the statements were involuntary under the law as it existed before Miranda.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so," said Burger. "But that privilege cannot be construed to include the right to commit perjury." He added:

"The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistnet utterances."

With a jab at the liberal members of the U.S. Court of Appeals here, Burger criticized as "an extravagant extension of the Constitution" a suggestion drawn from a 1962 decision from which he dissented while a member of that court.

Burger said the argument for Harris would allow an accused to confess to a murder, lead police to the body and then, on the witness stand, "blandly deny every fact disclosed to the police or discovered as a fruit of his confession, free from confrontation with his prior statements and acts."

The case cited "as that of Washington mailman James Killough whose conviction for murdering his wife was set aside because police held him for 36 hours while getting his confession. Killough did not testify at his trial. His case produced an uproar in Congress over the Supreme Court's "Mallory rule" on illegally obtained confessions.

Burger said yesterday's decision flowed from a 1954 Supreme Court ruling in which the justices, with only Black and Douglas dissenting, upheld the use of illegal search evidence to discredit a defendant who falsely denied on the witness stand that he ever had possessed narcotics.

In dissent, Brennan said the 1954 case was not a valid precedent for the ruling against Harris, whose incriminating statements were at the heart of the question of guilt.

Brennan said the decision would unfairly penalize a defendant for taking the stand or unfairly deter him from testifying in his own defense, contrary to other Supreme Court decisions. Some legal experts say it's rare for juries to acquit defendants who don't take the stand.

While the majority said it was only "assuming" that court-made rules for excluding evidence acted as a deterrent to official lawlessness, Brennan said the deterrent effect "is only part of the larger objective of safeguarding the integrity of our adversary system."

He said the rules promoted respect for government by upholding the dignity of citizens and added, "It is monstrous that courts should aid or abet the law-breaking police officer."

# Convict's Confession Is Voided

By Bart Barnes
Washington Post Staff Writer

The U. S. Court of Appeals invalidated yesterday the robbery confession of a Washington man who had been given the full "Miranda" warning against self-incrimination and had signed a waiver of his right to remain silent.

The court ruled that the man may still not have understood the consequences of talking to the police because he asked them not to take notes when he admitted robbing the Meridian Market in the District.

In overturning the 1966 robbery conviction of Eugene R. Frazier, the appellate panel decided that the police should have informed Frazier specifically that oral confessions are just as damaging as written ones.

"Where the police officers are dealing with ill-educated and uncounseled suspects," the court said, "they have a special obligation to be alert for signs of misunderstanding or confusion . . ." of the right against self-incrimination.

Frazier was sentenced in February, 1967, to five to 15 years on three counts of robbery, one of which was the Meridian Market holdup. He is still in the D.C. jail, and it is unclear what effect the Court decision will have on his freedom.

Yesterday's decision is one in a series of U.S. Court of Appeals decisions here growing out of the U.S. Supreme Court's 1966 Miranda ruling that sharply limits the admissibility of confessions into evidence at criminal trials.

In interpreting Miranda, the Appellate Court has held that trial judges must be satisfied "beyond a reasonable doubt" that a confession is voluntary before a jury can be permitted to know of its existence.

Yesterday's decision was written by Chief Judge David L. Bazelon and joined by Judge David L. Bazelon and joined by Judge Spottswood E. Robinson III.

See MIRANDA, A5, Col. 1

# Convict's Confession Invalidated by Court

MIRANDA, From A1

Judge Philip Nichols of the U.S. Court of Claims, sitting as a visiting judge on the Court of Appeals, dissented vigorously and predicted that the majority's decision "will introduce chaos in the station house.

"Police are to be required, on the basis of faint clues, to probe the mental processes of the accused, and to engage with him in colloquies about the legal meaning of the warning," he wrote.

In defending the decision, Bazelon wrote, "We recognize that we are vulnerable to the old criticism that criminals should not go free for the constable's blunder."

But he held that failure to inform Frazier specifically that oral confessions could be as damaging as written ones was "an egregious failure to observe a basic constitutional requirement.

"When we are ready to overlook errors of this type, we will have abandoned once and for all the effort to extend the same quality of justice to all persons, the ignorant as well as the educated, the poor as well as the rich," Bazelon wrote.

Bazelon's interpretations of the Miranda decision have frequently put him at odds with more conservative figures in the legal community, including Warren E. Burger, Chief Justice of the United States.

In 1969, when Bazelon and Robinson sent the Frazier case back to the District Court for a hearing on the voluntariness of the confession, Burger, then a U.S. Court of Appeals judge here and the third member of that panel, wrote:

"Guilt or innocence becomes irrelevant in the criminal trial as we flounder in a morass of artificial rules, poorly conceived and often impossible of application.

"The seeming anxiety of judges to protect every accused person from every consequence of his voluntary utterances is giving rise to myriad rules, sub-rules, variations and exceptions which even the most alert and sophisticated lawyers and judges are taxed to follow," Judge Burger wrote at the time.

He said there was "not a scintilla of evidence" that Frazier's confession was coerced by any improper police conduct.

Frazier was arrested on the afternoon of Sept. 7, 1966, according to records in the case, on a warrant charging him with the robbery of Mike's Carry Out.

He was taken to the robbery squad offices, where detectives read him the Miranda warning and gave him a copy of the warning, which he read.

Essentially, the warning tells the suspect he has the right to remain silent, that anything he says can be used against him in court, that he has the right to a lawyer and that if he can't afford one, a lawyer will be provided for him.

According to testimony, Frazier told police, "You didn't have to read it to me in the first place. I know my rights."

Frazier then signed what is called a "consent to speak" form, which says: "I know what my rights are. I am willing to make a statement and to answer questions. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me or used against me."

According to records of the case, detectives then started to ask Frazier about the holdup at Mike's Carry Out. But Frazier interrupted his interrogator to confess to a robbery and shooting at a High's Store and later to admit the Meridian Market robbery.

But when the detective reached for a pad and pencil, Frazier was quoted as saying "Don't write anything down. I will tell you about this, but I don't want you to write anything down." According to court records, the detective put down the pad and pencil.

At this point, the court said, police should have told Frazier that even an oral confession could be used against him. The panel said the suspect's ban on note-taking "creates the strong impression that (Frazier) thought his confession could not be used against him so long as nothing was committed to writing."

In dissenting, Nichols argued "all testimony agrees his confessions did not emerge reluctantly, in response to questions, but were poured out voluntarily."