

Defense attorneys, start planning your strategy

On most constitutional issues in criminal cases, the Illinois Supreme Court seems content to follow the lead of the U.S. Supreme Court. However, one issue on which Illinois case law is ahead of the curve is the standard for judging the validity of a waiver under *Miranda v. Arizona*, 384 U.S. 436 (1966).

So what's the problem? It's that the U.S. Supreme Court may be ready to reject the Illinois' pro-defense position. In order to withstand such a ruling, it's time now for Illinois defense attorneys to plan a strategy for convincing the Illinois Supreme Court that the current position is based on adequate and independent state grounds that render any contrary U.S. Supreme Court ruling irrelevant.

A recent case illustrates the issue. On May 15, the 1st District Appellate Court decided *People v. Jeanette Daniels*, 908 N.E.2d 1104. Daniels was convicted of murder based largely on her videotaped confession to the police. On appeal, Daniels argued that she had not properly waived her *Miranda* rights.

A valid waiver of *Miranda* must be made "voluntarily, knowingly, and intelligently." It is important to note that Daniels made no allegation that her waiver was "involuntary," i.e., a product of police coercion. Rather, she claimed that her cognitive deficiencies made it subjectively impossible for her to "knowingly and intelligently" waive her *Miranda* rights.

The idea that a suspect's subjective incapacity alone can void a *Miranda* waiver goes back two decades to the Illinois Supreme Court's decision in *People v. Bernasco*, 138 Ill.2d 349 (1990). *Bernasco* responded to the U.S. Supreme Court's decision four years earlier in *Colorado v. Connelly*, 475 U.S. 412 (1986). *Connelly* had held that police misconduct of some kind was a sine qua non for a finding that either a confession or a *Miranda* waiver was "involuntary." In other words, merely subjective cognitive problems standing alone could not result in a finding that either a confession or a *Miranda* waiver was "involuntary." This is because the Constitution does not protect the suspect against himself, but only against police misconduct.

Bernasco, however, noted that a *Miranda* waiver needed to be "intelligent and knowing" as well as "voluntary." It distinguished between these two ideas, and held that a subjective inquiry alone could result in a finding that a waiver was not "intelligent and knowing." This was reaffirmed by the Supreme Court in *People v. Braggs*, 209 Ill.2d 492 (2003).

Criminal Procedure

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The *Daniels* court relied on this *Bernasco-Braggs* approach to analyze the defendant's cognitive skills. The court engaged in an extensive examination of the expert witnesses who testified that Daniels was incapable of subjectively understanding her *Miranda* rights. The appellate court concluded that the trial judge's decision that she had "knowingly and intelligently" waived her rights was manifestly erroneous. The court reversed her conviction and remanded the case for a new trial.

What is important to note is that the *Bernasco-Braggs* approach does not require any finding of police misconduct or bad state action to find that a *Miranda* waiver was not given "knowingly and intelligently."

But not all courts agree with this. Earlier this year, the 6th U.S. Circuit Court of Appeals came to a contrary conclusion. *Garner v. Mitchell*, 557 F.3d 257 (*en banc*). In a 9-4 decision, the 6th Circuit held that subjective analysis of the suspect alone can never result in a finding that a waiver was not made "knowingly and intelligently." In so holding, the 6th Circuit largely followed the 7th Circuit's approach set out in *Rice v. Cooper*, 148 F.3d 747 (1998). *Garner* approvingly cited the 7th Circuit's observation that what the Supreme Court was saying in *Connelly* was that *Miranda* was "aimed not at protecting people from themselves but at curbing abusive practices by police officers. [Therefore] the knowledge of the police is vital." The four dissenters, on the other hand, essentially adopted Illinois' *Bernasco-Braggs* position that police misconduct is not necessary to kind that a waiver was not "knowingly and intelligently" made.

So is *Miranda* a case about objective police misconduct or a case about a suspect's actual subjective understanding of the warnings? It is an issue that may very well be reviewed by the U.S. Supreme Court. In fact, the Supreme Court should rule on the cert petition in *Garner* in October. (Petition No. 08-10725)

If the Supreme Court grants cert in *Garner* — or a future case with a similar issue — how will they decide it? I'm betting the prosecution will win, and that the court will hold that subjective misunderstanding is not sufficient without some police misconduct.

Why? Because I think the Supreme Court tipped its hand on this issue in its recent decision in *Kansas v. Venstris*, 129 S.Ct. 1841 (2009). *Venstris* concerned whether statements obtained by the police in violation of the Sixth Amendment right to counsel (and thus excluded from the prosecution's case-in-chief pursuant to *Massiah v. U.S.*, 377 U.S. 201 (1964)) could nevertheless be used for impeachment. *Venstris* held that the prosecution was allowed to use such statements for impeachment.

In explaining why, Justice Antonin Scalia for the 7-2 majority differentiated between an actual constitutional violation and a mere violation of a constitutionally related prophylactic rule. For example, the Fifth Amendment guarantees that no person shall be compelled to be a witness against himself at a criminal trial. If the prosecution introduces what Scalia characterizes as a "truly coerced confession" in any way at trial — either in its case-in-chief or through impeachment — this results in an actual Fifth Amendment violation.

On the other hand, he characterizes statements taken in violation of *Miranda* as not being "truly

coerced," but rather suppressed under a Fifth Amendment-related "prophylactic rule forbidding certain pretrial police conduct." Thus, because *Miranda* is merely prophylactic, the otherwise-suppressed statements may be used for impeachment.

Note how a majority of the Supreme Court characterizes *Miranda* as a "rule forbidding certain pretrial police conduct." If the court reviews *Garner*, a majority may very well find that a *Miranda* violation cannot exist without some police misconduct, thus rejecting the Illinois Supreme Court's *Bernasco-Braggs* line of cases.

If the U.S. Supreme Court did this, where would it leave Illinois law? This is where defense attorneys will need to be aggressive in reminding the Illinois Supreme Court that — unlike its work in search and seizure — it has not followed the U.S. Supreme Court's *Miranda* decisions in lockstep. They should remind state courts that in 1994 the Illinois Supreme Court rejected the U.S. Supreme Court's pro-prosecution decision in *Moran v. Burbine*, 475 U.S. 412 (1986). *People v. McCauley*, 163 Ill.2d 414 (1994) (rejecting *Moran v. Burbine* and holding the police officers' withholding of information that an attorney is present to assist suspect will result in an invalid *Miranda* waiver). Defense attorneys should ask the Illinois Supreme Court to hold that the *Bernasco-Braggs* doctrine is based on adequate and independent state grounds, thus making it immune from U.S. Supreme Court decisions.

Illinois courts have used the *Bernasco-Braggs* line of cases for almost 20 years. Regardless of what the U.S. Supreme Court decides in the future, it is a rule well-worth preserving in Illinois.

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