Case Commentaries on Interrogation Issues for July 2022

by James P. Manak

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Keep in mind as you consider the following Case Commentaries for July 2022, that cases from the United States Supreme Court on the subject of interrogation set the federal constitutional minimum standards for law enforcement conduct. The states, through decisions of their highest courts of review, can interpret state constitutional provisions in a manner further restricting law enforcement conduct on the subject. They can do this by ruling that state constitutional provisions give defendants greater rights than those that exist under federal constitutional provisions. Interrogators, **whether in the public or private sectors**, must also be aware of cases in their state that involve state provisions similar to the Fifth and Sixth Amendments.

In addition, there are various department and local prosecution policies that may have an impact on law enforcement conduct. **Consultation with your legal advisor is always advisable to be aware of any state law provisions or court cases that might apply to interrogation in your jurisdiction.**

Note: Cases in this issue are edited by Professor Manak to eliminate non-interrogation issues in order to focus on distinct interrogation questions, usually involving *Miranda* and voluntariness points of interest to interrogators. For the full and unedited court opinion, the reader is directed to pull up the case citation.

MIRANDA: DEFENDANT'S INVOCATION OF THE RIGHT TO COUNSEL DURING POLICE QUESTIONING; DEFENDANT'S INTEREST IN SPEAKING DIRECTLY TO THE POLICE DID NOT CONSTITUTE A WAIVER OF THE DEFENDANT'S RIGHT TO COUNSEL

People v. Dawson, 2022 N.Y.S. Slip Op. 02772, No. 59 SSM 5 (N.Y. Court of Appeals 2022). https://law.justia.com/cases/new-york/court-of-appeals/2022/59-ssm-5.html

SUMMARY, FACTS AND PROCEDURAL HISTORY

The New York Court of Appeals (the highest court of review in New York State) ruled that a suspect who desires to have an attorney while in police custody must **". . . unequivocally invoke his right to counsel" while in custody** in order to bar the police from further interrogation

without the presence of an attorney. **Thus, a defendant whose "inquiries and demeanor suggested a constitutional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police – did not unequivocally invoke his right to counsel while in custody."**

A strong dissenting opinion countered that the right to counsel during police custody is not waived by a defendant's attempt to also deal personally with the police.

MEMORANDUM MAJORITY OPINION:

The order of the Appellate Division should be affirmed. **Holding by the Court**:

Once a defendant in custody unequivocally requests the assistance of counsel, the right to counsel may not be waived outside the presence of counsel (see *People v. Glover*, 87 NY2d 838, 839 [1995]). **But "[a] suggestion that counsel might be desired; a notification that counsel exists; or a query as to whether counsel ought to be obtained will not suffice" to unequivocally invoke the indelible right to counsel** (see *People v Mitchell*, 2 NY3d 272, 276 [2004], citing *People v Roe*, 73 NY2d 1004 [1989]; *People v Fridman*, 71 NY2d 845 [1988]; *People v Hicks*, 69 NY2d 969 [1987]). Furthermore, "[w]hether a particular request is or is not unequivocal is a mixed question of law and fact that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant" (*Glover*, 87 NY2d at 839).

Here, there is support in the record for the lower courts' determination that defendant—whose inquiries and demeanor suggested a conditional interest in speaking with an attorney only if it would not otherwise delay his clearly-expressed wish to speak to the police—did not unequivocally invoke his right to counsel while in custody. That mixed question of law and fact is therefore beyond further review by this Court (*id.*; see *Mitchell*, 2 NY3d at 276). Defendant's remaining contentions are without merit.

WILSON, J. Dissenting Opinion

A week after an alleged sexual offense occurred, the police arrested 19-year-old Malik Dawson. **It is clear from videotaped record of the interrogation that Mr. Dawson unequivocally and repeatedly asked to contact his lawyer.** Instead, he was never given the chance to do so, and eventually consented to waive his *Miranda* rights. If the video were not part of a sealed record, you could see this for yourself. Instead, you will have to bear through what my transcription of the video shows. **Because Mr. Dawson clearly requested counsel, any subsequent waiver of his *Miranda* rights, without counsel present, was invalid** (see *People v Cunningham*, 49 NY2d 203, 207 [1980]). **The majority's holding vitiates the privilege against self-incrimination, right to counsel and due process that our Court has scrupulously guarded through protections deliberately greater than those afforded under the federal Constitution.** Regrettably, today's decision is merely the latest in a string in which we disregard the clear meaning of a defendant's words by applying a standard of verbal precision even jurists find hard to meet.

I.

About a week after an alleged sexual assault occurred, the police arrested Malik Dawson. He was brought to the police station in handcuffs where police took his phone, shackled his leg to a chair, and instructed him to sit and wait in a small room. **He was not informed of why he had been brought to the police station or what the police wanted to talk about.** After waiting alone for close to two hours, a detective entered the room. Mr. Dawson asked, "What's going on?" The detective responded, "I know you want to figure this out and why you're down here and I want to explain it to you, but before I could do that, you're in a police station, OK." The detective asked, "Have you ever heard of *Miranda* rights?" Mr. Dawson answered, "No." The detective then asked, "So you ever watch Cops, Law and Order, anything like that?" Mr. Dawson responded, "Yeah, I've seen a couple of them." The detective then said, "You know, when they interview people they have to inform them of their rights. These are your *Miranda* rights." Mr. Dawson said, "Oh, the right to remain silent?"

The Detective then read a set of standard *Miranda* rights to Mr. Dawson, including the right to counsel. After that, the questioning proceeded as follows:

Detective: "Do you understand each of your rights?"

Dawson: **"Yeah, definitely. I just wish that I'd memorized my lawyer's number. He's in my phone. Is it possible for me to like call him or something?"**

Detective: "Do you want your lawyer here?"

Dawson: "Right now?"

Detective: "Yeah."

Dawson: **"If I could get a hold of him 'cause I don't know his number; it's in my phone."**

Detective: "OK."

Dawson: **"But you could still tell me what's going on though, right?"**

Detective: "No, I can't talk to you if you if you want your lawyer here and you already said you did, so let's, you know what, let's give him a call."

Dawson: "And if he don't answer then can you come talk to me?"

Detective: "No."

Dawson: "So what happens if he don't answer?"

Detective: "Ah, I mean, we'll, we'll deal with that if it happens. Let's hope he answers. I mean,

from the sound of it, it sounds like you understand your *Miranda* rights and you want your attorney."

Dawson: [Inaudible]

Detective: Is that, am I understanding that correctly?"

Dawson: "Well, yeah, I just, to be honest I just really want to know what's going on, you said something about [not discernable], you know, **I don't know what the hell happened, what incident happened. I just really want to know what's going on. That's pretty much it.**"

Detective: "OK."

Dawson: **"That's all."**

Detective: "OK. So just hang, hang tight for a minute, OK? We'll get your phone, we'll go from there."

At that point, the detective left the interrogation room, purportedly to get Mr. Dawson's phone so he could call his lawyer. **I have highlighted portions of the questioning to show not only that Mr. Dawson clearly asked to contact his lawyer, but also that the detective plainly expressed his understanding that Mr. Dawson had asked for counsel to be present "right now." As I explain below, once Mr. Dawson invoked his right to counsel, it is legally impossible for him to change his mind unless his lawyer is present when he does so.**

What happened next, though, is that Mr. Dawson was not given his phone, was not given any means to contact counsel, and no one attempted to contact his counsel on his behalf. Instead, less than two minutes later, when the detective next entered, he sat down and said, "Here's the deal, I'm just going to ask you flat out, because we're in the middle of this and this is something we could potentially resolve — **do you want your lawyer here or do you want to just figure this out?" Mr. Dawson replied, "I really just want to figure this out."** The detective administered *Miranda* warnings again and Mr. Dawson agreed to speak to police. The detective then began to question Mr. Dawson about the interaction he had with the victim, which Mr. Dawson initially adamantly maintained was consensual. **Eventually, after the detective repeatedly urged Mr. Dawson to tell the truth and suggested that if Mr. Dawson were to appear contrite, it may help his case, Mr. Dawson penned an apology letter to the victim.**

Before trial, Mr. Dawson moved to suppress the letter and the statements he made at the police station. The suppression court denied the motion, **holding that Mr. Dawson's request for counsel was equivocal and that he voluntarily and knowingly waived his rights.** A jury found Mr. Dawson guilty of sexual abuse in the first degree and he was sentenced to 7 years' incarceration and 10 years' post-release supervision. The Appellate Division affirmed the conviction on the ground that "when the detective asked defendant if he wanted his attorney present, defendant was vague, never respond[ing] affirmatively or negatively" (195 AD3d 1157, 1158-1159 [3d Dept 2021]). The court explained that "[a]t no time did the defendant request his

counsel to be present and he acted in a manner consistent with a desire to fully and frankly cooperate in providing information to the detective" (*id.* at 1159). Mr. Dawson appeals.

II.

The right to counsel in New York is robust and one our court has vigilantly guarded (see *Cunningham*, 49 NY2d at 207). Indeed, although "[t]he Right to Counsel Clause in the State Constitution is more restrictive than that guaranteed by the Sixth Amendment to the United States Constitution (compare, NY Const, art I, § 6, with US Const 6th, 14th Amend.) by resting the right upon this State's constitutional provisions guaranteeing the privilege against self-incrimination, the right to assistance of counsel and due process of law **we have provided protection to accuseds far more expansive than the Federal counterpart**" (*People v Bing*, 76 NY2d 331, 338 [1990]; see also *People v Settles*, [*3]46 NY2d 154 [1978]). A key example is our requirement that a suspect in a criminal matter, even one not yet charged or arraigned, who requests representation may not be questioned further in the absence of an attorney (*Cunningham*, 49 NY2d at 205, 207). ***By extension, a suspect who has invoked the right cannot voluntarily waive the right to counsel without an attorney present (id. at 205).*** That rule, among other strictures of this State's right to counsel, "breathe[s] life into the requirement that a waiver of a constitutional right must be competent, intelligent and voluntary" (*People v Hobson*, 39 NY2d 479, 484 [1976]).

For New York's "indelible" right to counsel to attach, "the invocation of counsel by an uncharged defendant must be unequivocal" (*People v Mitchell*, 2 NY3d 272, 276 [2004]). **Whether a request "is or is not equivocal" is a mixed question of law and fact "that must be determined with reference to the circumstances surrounding the request including the defendant's demeanor, manner of expression and the particular words found to have been used by the defendant"** (*People v Glover*, 87 NY2d 838, 839 [1995]). Reviewing an Appellate Division determination of a mixed question of law and fact, we look only for support in the record; "[w]hen there is support in the record the issue is beyond further review by this Court" (*People v Porter*, 9 NY3d 966, 967 [2007]).

A request for counsel is equivocal when it is "unambiguously negated" at the same time that it is asked (*People v Glover*, 87 NY2d 838, 839 [1995]), **or when the request is posed as a question such as "[s]hould I speak to a lawyer"** (*People v Hicks*, 62 NY2d 969, 970 [1987]). Similarly, a suspect's mention of lawyer or "suggest[ion] to the police that [the person] might consult a lawyer" is equivocal (*People v Rowell*, 59 NY2d 727, 730 [1983]). Nor, finally, is a mere suggestion "that counsel might be desired" sufficient to unequivocally invoke the indelible right to counsel. . . .

However, an unequivocal request does not require "magic words" (*Mitchell*, 2 NY3d at 276). **We have found statements to police to be unequivocal even when suspects have used conditional language or spoken without absolute confidence about their desire for representation.** In *People v Harris*, we upheld the Appellate Division's determination that the defendant's statement **"I think I want to talk to a lawyer"** was unequivocal (93 AD3d 58, 60 [2d Dept 2012] [emphasis added], affd 20 NY3d 912 [2012]). In *People v Esposito*, the

defendant told police, "I might need a lawyer" (68 NY2d 961, 962 [1986] [emphasis added]). **We held the statement "constituted a request for counsel"** (*id.*). Finally, in *People v Porter*, we reversed the Appellate Division's determination that the defendant's statement to police "I think I need an attorney" was insufficient to unequivocally inform the police of his desire for counsel, determining the record could support no other reasonable interpretation of the request (*People v Porter*, 9 NY3d 966, 967 [2007] [emphasis added]).

The Appellate Division has distilled this inquiry to a determination of whether a reasonable police officer in the circumstances would understand the statement to be a request for an attorney, which we have approved (see *e.g. Harris*, 93 AD3d at 62, affd 20 NY3d 912 [2012]). Although this is an "objective" test, we have considered the reaction of law enforcement to a defendant's statement or to similar language as strong record evidence a request was or was not unequivocal (see *e.g., Porter*, 9 NY3d at 967 [weighing that the interrogating officer had made a note that the defendant was requesting an attorney]). Indeed, in *Harris*, we upheld the Appellate Division's finding that the defendant's request was unequivocal, in which the court noted "crucially, [the investigating officer] clearly understood what the defendant was requesting, as evidenced by the fact that he terminated the interview" (*Harris*, 93 AD3d at 69 [emphasis added]).

Here, Mr. Dawson unequivocally invoked his right to counsel — the record supports no other conclusion. ***As is clear from the quoted portion of the colloquy with the detective, he twice said he wanted to call his lawyer, and the detective twice expressly stated that he understood Mr. Dawson had asked to call counsel and therefore the detective could no longer speak to Mr. Dawson.*** Additionally, the detective then told Mr. Dawson to wait while the detective retrieved Mr. Dawson's phone so he could call counsel.

Mr. Dawson's statements do not inquire if having a lawyer would be a good idea, nor do they merely inform the police that Mr. Dawson may consult a lawyer or that he has a lawyer retained for a different matter (*cf. Rowell*, 59 NY2d at 730; *Hicks*, 62 NY2d at 970; *Mitchell*, 2 NY3d at 276). **Rather, in response to being read his *Miranda* rights, and asked if he understood those rights, Mr. Dawson said that he had a lawyer and asked if it would be possible to call that person, whose number was located in his (confiscated) personal phone.** Moreover, as in *Porter* and *Harris*, in which the interviewing police officers documented their understanding that the defendants had unequivocally requested counsel, here the interrogating detective twice stated that he understood Mr. Dawson to be invoking his right to counsel and told Mr. Dawson he was suspending the interrogation to retrieve Mr. Dawson's phone to enable a call to counsel. Finally, Mr. Dawson's interest in knowing what was going on, particularly why he had been detained, and for how long he would be kept at the police station just hours before he was expected at work, does not in any way diminish the clarity of his request for counsel: **a defendant can simultaneously want to know the charge against him and to be represented by counsel.**

Nor does Mr. Dawson's phrasing render his request for counsel equivocal. In the days before cellular phones, if Mr. Dawson had said, "If I could get a hold of him by using one of your phones," or "if you would allow me to call him," we could hardly conclude that Mr. Dawson was suggesting that he did not really want to contact his lawyer — just that he was unsure if he would

be allowed to. **Likewise, Mr. Dawson's phrasing of his reiterated request as "is it possible for you to like call him or something" does not indicate any lack of desire to call his lawyer, but rather a lack of certainty about whether he could contact the lawyer directly or perhaps the police would have to make the initial contact for him.** His phrasing is less equivocal than the phrasing we have previously held unequivocal in *Harris*, where the defendant said "I think I want a lawyer" — which suggests some uncertainty about the desire to contact a lawyer, not the practical ability to do so (93 AD3d at 60). Similarly, we held the request in *Esposito* unequivocal even though the defendant said "I might need a lawyer" (68 NY2d at 962), which again expresses some uncertainty about the defendant's desire for representation — not his concern that he might not be allowed or able to contact the lawyer. **If the conditional language in those cases was insufficient to render the request equivocal, a fortiori Mr. Dawson's statements here are unequivocal.**

The context of Mr. Dawson's statement is also germane to determining its clarity. Mr. Dawson phrased his first request in response to the detective's reading of *Miranda* warnings that expressly identified Mr. Dawson's right to counsel, followed by the detective's query as to whether Mr. Dawson understood each of those rights. **Mr. Dawson's first response is wholly unambiguous in context.** The *Miranda* warnings did not address the situation in which he found himself: ***he had a lawyer, wanted to contact the lawyer, but had not memorized his lawyer's phone number and the only means he had of accessing it was in his personal phone, which the police had confiscated.*** How else could he inquire as to the possibility of exercising his right other than to first ask if he could call his lawyer and then, having not received a direct response to that question, ask if the police could call for him, using the number found in his personal phone? Under our settled caselaw and any colorable view of the interrogation video, **Mr. Dawson's request for counsel was clear, and no waiver outside of counsel's presence could occur.**

III.

There is a further reason why the evidence obtained through interrogation of Mr. Dawson should be suppressed. **The interrogation here "vitiated or at least neutralized the effect" of the Miranda warnings issued to Mr. Dawson** (*People v Dunbar*, 24 NY3d 304, 316 [2014]). In *Dunbar*, we held invalid a practice in which police would, in pre-arraignment interviews, in addition to the administration of normal *Miranda* warnings, provide a preamble (24 NY3d 304, 308 [2015]). The preamble informed individuals this was their "opportunity to tell [their] story" and the only chance to do so before going before a judge (id. at 308). **We held such a preamble "undermined the subsequently-communicated *Miranda* warnings to the extent that [defendants] were not adequately and effectively advised of the choice the Fifth Amendment guarantees against self-incrimination . . . before they agreed to speak with law enforcement authorities** (*id.* at 308, citing *Missouri v Seibert*, 542 US 600, 611 [2004], quoting *Miranda*, 384 US at 467 [internal quotation marks omitted]).

The interrogation here offends *Dunbar*'s rule; indeed, the practice here is worse than the one we disapproved there. In *Dunbar*, the hortatory preamble was given before the *Miranda* warnings, thus raising the possibility that the warnings had been diluted. In such a circumstance, it would

be impossible to know whether, had the warnings been given correctly, what the defendant would have chosen to do. **Here, in contrast, the warnings were given correctly without preamble — and we know that Mr. Dawson chose to invoke his right to counsel.** Only after he had done so twice, and only after the detective had twice expressly acknowledged that Mr. Dawson had done so, and then told Mr. Dawson that he would be allowed to call counsel, did the detective then launch into the exhortation we found unconstitutional in *Dunbar*. **That is, where the improper exhortation in *Dunbar* might have polluted the *Miranda* warnings, here, it decidedly did.**

Mr. Dawson's interrogation bears several hallmarks of police practices meant to induce the interrogee into making incriminating statements in derogation of the Fifth Amendment and New York Constitution's right to counsel, self-incrimination and due process guarantees. First, Mr. Dawson was left isolated in a small room, one leg shackled to a chair, with no information. As the U.S. Supreme Court noted in *Miranda*, reviewing a police instruction manual at the time, a major goal of police interrogation is to psychologically manipulate the suspect, largely by isolating the person from friends and family and familiar settings and speaking to them alone (*Miranda v Arizona*, 384 US 436, 449 [1966]). Although not illegal, the detention set the scene for the proceeding conduct and increased its impact.

Second, the detective, rather than scrupulously adhering to what he clearly perceived to be a request for counsel by ceasing all questioning, continued to ask Mr. Dawson if he wanted a lawyer. When Mr. Dawson first asked if the police could call his lawyer, rather than answering the question, the detective responded by asking again: "Do you want your lawyer right now?" After telling Mr. Dawson that he would retrieve his phone so that Mr. Dawson could speak to his lawyer, the detective returned less than two minutes later, saying: "Here's the deal, I'm just going to ask you flat out, because we're in the middle of this and this is something we could potentially resolve — **do you want your lawyer here or do you want to just figure this out?" The effect of the repeated questioning about Mr. Dawson's desire for counsel, even though the officer separately and repeatedly affirmed that he understood Mr. Dawson to *want* his attorney, clearly communicated to Mr. Dawson that he would be better off were he to go forward without his attorney. The detective's statement that "this is something we could potentially resolve" — after having confirmed Mr. Dawson's request to contact his counsel — is particularly concerning. The statement implied that Mr. Dawson, if he were to abandon his right to counsel, might be able to very quickly settle the matter without issue.** Of course, nothing could be farther from the reality of police interrogation in general or this interrogation in particular — after Mr. Dawson agreed to answer questions in order to "know what's going on" the detective proceeded to interrogate him for a length of time before communicating the reason for his arrest. [Footnote] **The detective's general willingness to communicate to Mr. Dawson what might best help his case is fully evident from the entirety of the interview, but particularly when the detective suggested to Mr. Dawson that writing an apology letter to the victim would be in his best interest.** As the detective explained at the suppression hearing, he did not require Mr. Dawson to write the letter, but "I told him that it is all in how you handle what happens, and that if he is sincere that could potentially benefit him." **Particular in a case such as this, where the sole issue was whether the sexual act was consensual, this is exactly the type of false legal advice the *Miranda* court sought to curb and that any lawyer would have advised immediately against** (*Miranda*, 384 US at 455 ["When normal procedures fail to

produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice"]). **This type of practice is a reason *Miranda* warnings and the exclusionary rule exist.**

IV.

Mr. Dawson unequivocally requested counsel. The detective repeatedly stated that he understood Mr. Dawson to have requested counsel. Why doesn't the majority? I have no good answer, only an observation. **Today's holding is like several others in which our Court has imposed a high and unrealistic linguistic burden on criminal defendants — where the intent is clear, but some better choice of words can be imagined, often finding ambiguity in deferential language.** For example, in *People v Silburn*, the Court upheld the Appellate Division's finding that a defendant's statement to the trial court "I would like to know if I could proceed as *pro se*" as equivocal because the defendant also requested a lawyer be available as an aide (31 NY3d 144, 162 [2018, Wilson, J, dissenting]). In *People v Duarte*, the Court again interpreted the defendant's statement "I would love to go pro se," despite abundant clarity, as insufficiently clear and unequivocal (37 NY3d 1218 [2022]. In *People v Brown*, the Court held the defendant's agreement to waive his right to appeal waived his right to speak at sentencing, despite his clear requests to do so — "Am I going to get a chance to talk?" (37 NY3d 940, 941, 943 [2021, Wilson, J., dissenting]). Despite our eschewing the need for "magic words" in theory, we seem to require them in practice.

The Court's failure [to] construe defendants' speech in a commonplace, contextualized, or even reasonable manner misapprehends the animating concerns behind our state's expansive guarantees of the privilege against self-incrimination, right to counsel and due process. Our hallmark right to counsel cases show deep recognition of the fear and intimidation inherent in police interrogation and investigation. We have noted that the rights we have recognized in this state not only "preserve the civilized decencies, but protect the individual, often ignorant and uneducated, and always in fear, **when faced with the coercive police power of the State**" (*Hobson*, 39 NY2d at 485 [emphasis added]). When we announced the rule that an uncharged suspect could invoke the indelible right to counsel, we explained the right was grounded in our desire to guard against waiver of important constitutional rights "out of ignorance, confusion or fear" (*Cunningham*, 49 NY2d at 207 [emphasis added]). **It is tragic to develop such a beautifully justified constellation of rights — one meant to offset the fear an individual subject to the coercive power of the state must inevitably feel — only to dim them because fear affected a person's speech.** And when it is not fear that shapes a defendant's word choice, it is often the custom of using the conditional tense when speaking to those in power: adopting a more deferential tone with a trial court or the police officers in whose control a defendant's liberty and immediate safety rests may be advantageous.

Penalizing criminal defendants for fearful or deferential speech that otherwise clearly articulates their desires is detrimental for those individuals, but also damages the integrity of the justice system as a whole. We have recognized:

"the assistance of counsel is essential not only to insure the rights of the individual defendant but

for the protection and well-being of society as well. The right of any defendant, however serious or trivial his crime, to stand before a court with counsel at his side to safeguard both his substantive and procedural rights is inviolable and fundamental to our form of justice" *(Settles*, 46 NY2d at 161).

Indeed, "[t]he danger is not only the risk of unwise waivers of the privilege against self incrimination and of the right to counsel, but the more significant risk of inaccurate, sometimes false, and inevitably incomplete descriptions of the events described" (*Hobson*, 39 NY2d at 485). Those very concerns led to the initial adoption of *Miranda* warnings at the Federal level (see *Miranda*, 384 US at 455 n 24 [noting the link between police interrogations and false confessions]).

The People argue that if our Court were to recognize Mr. Dawson's request that police call his lawyer as what it was — a request for his lawyer — the rule would mark the end of police interrogation. If so, that would transpire only because any competent lawyer would have told Mr. Dawson to remain silent, as is his constitutional right. This Court has the power to advance police interrogation by eroding, and eventually wiping away, the right to counsel, but should we?

On review of submissions pursuant to section 500.11 of the Rules, order affirmed, in a memorandum. Chief Judge DiFiore and Judges Garcia, Singas, Cannataro and Troutman concur. Judge Wilson dissents in an opinion, in which Judge Rivera concurs.

END OF DISSENTING OPINION.

Decided April 26, 2022

FOOTNOTE TO THE DISSENTING OPINION:

The detective's subsequent imploring of Mr. Dawson to just tell the truth and work with him bears striking similarity to other police strategies described in *Miranda*, quoting the police manual: "The interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself rather than get anyone else involved in the matter .The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself'" (*Miranda*, 384 US at 454). END OF DISSENTING OPINION.

PRACTICE POINTER

The safest approach to the issue raised in this case is that a defendant who while in police custody attempts to deal with the police for possible advantage **does not automatically constitute a waiver of the constitutional right to counsel.** Defendants can voluntarily deal with the police as they wish and at the same time can preserve their right to counsel; the two things are not incompatible. The right to counsel is a constitutional right not waived by a defendant's attempt to initially deal with law enforcement in a custodial setting.

MIRANDA: COERCED CONFESSION; PROLONGED INCOMMUNICADO

DETENTION AFTER ARREST; EFFECT ON CONFESSION; HARMLESS ERROR DOCTRINE

People v. Salamon, No. 125722 (Ill. 2022).
https://law.justia.com/cases/illinois/supreme-court/2022/125722.html

SUMMARY, FACTS AND PROCEDURAL HISTORY

This case illustrates police refusal to permit an arrestee to communicate with counsel and holding the suspect in extended incommunicado without providing counsel. **It also illustrates the so-called "Harmless Error" Doctrine in which a defendant is deprived of his constitutional rights by the police but the appellate court declines to overturn a conviction because the result of the case would have been the same even if the constitutional violation had not been perpetrated.**

In the early morning hours of October 4, 2009, police officers responded to a burglar alarm at a bar on the north side of Chicago. Robert Gonzalez, the owner of the bar, was found lying between two parked cars in the parking lot behind the bar. Gonzalez had suffered multiple injuries and was transported to the hospital, where he died 15 hours later. **During the police investigation of the crime, defendant and another person named Raymond Jackson became suspects.** Defendant was ultimately arrested approximately two years later and charged with first degree murder based on a theory of accountability, armed robbery, and burglary.

Prior to trial, defendant filed a motion to suppress a statement he made to the officers investigating Gonzalez's death and to an assistant state's attorney. Defendant's motion asserted that any and all statements made by him were elicited in violation of his constitutional rights under the fourth, fifth, sixth, and fourteenth amendments to the United States Constitution, the Illinois Constitution, **and his statutory right to communicate with an attorney or family member.**

At the hearing on the motion to suppress, defendant testified that he was contacted by police officers on November 15, 2010, approximately one year after Gonzalez died. On that date, he received a telephone call from a detective who indicated he had "some routine questions" about an unspecified matter. Defendant voluntarily went to the police station with a friend, Apolonio Retama.

During the conversation with the detectives, defendant was not handcuffed or given *Miranda* warnings. Detectives Timothy Thompson and John Gillespie began asking questions about Jackson regarding what they described as a "serious matter." **When defendant learned that they were investigating a murder, he informed them that he wanted to speak with an attorney before talking to them any further. The detectives told him he did not need an attorney, but when he insisted, they told him that he was free to go.** Defendant estimated that this encounter with the detectives lasted approximately 15 minutes.

Nearly a year later, defendant was pulled over by two police cars as he was driving home from

work in the early evening of November 9, 2011. When he stopped his vehicle, several officers surrounded him with their guns drawn and ordered him out of his car. Defendant complied and was then handcuffed and placed in the back of one of the police cars. The two detectives who had questioned him a year earlier were also in the police car. The detectives did not advise him that he was under arrest, and he asked why he had been stopped. **According to defendant, the detectives told him " 'the games are over with' " and that it was his " 'last chance to cooperate' " and they could " 'do this the easy way or the hard way.' "** . . .

Defendant testified that, as soon as he got in the police car, he told the detectives that he wanted to speak to a lawyer. The detective drove him to the police station, put him in an interrogation room, and then advised him of his *Miranda* rights. **Defendant again repeated that he wanted to speak to a lawyer, but he was not permitted to use a telephone to contact an attorney or any members of his family who could arrange for counsel.**

According to defendant, he remained handcuffed to the wall in the interrogation room overnight except on the three or four occasions when he was escorted to use the restroom. During that time, he was provided with food, water, and contact lens solution. Defendant acknowledged that, when he told the detectives he did not wish to speak to them without an attorney present, they stopped questioning him and left the interrogation room. **He stated, however, that the officers who escorted him to and from the restroom urged him to cooperate with the investigation.**

Defendant further testified that he repeatedly requested a telephone call so that he could contact an attorney, but none of the officers permitted him the use of a telephone. On November 10, 2011, after spending approximately 24 hours alone and handcuffed to a wall in the interrogation room, while his repeated requests for a phone call were ignored, he started crying and pounding on the walls and door. **Defendant again requested a telephone call to contact an attorney and his mother so she could call a lawyer.** When a police officer opened the door, defendant said that he wanted to speak to Detectives Thompson and Gillespie. Shortly thereafter, Detectives Thompson and Gillespie reentered the room, but they informed him that **he would have to "wait" for a phone call.**

Eventually, defendant agreed to speak with the detectives. He acknowledged that he reinitiated contact with the detectives and, after he was again admonished of his *Miranda* rights, he provided a statement. Defendant subsequently provided another statement to an assistant prosecutor, who also advised him of his *Miranda* rights.

* * *

Ultimately, the circuit court denied a motion to suppress, finding that defendant's statement was voluntary because he had been advised of his rights pursuant to *Miranda* and waived those rights when he reinitiated contact with the detectives. The court observed that "the police were slow in providing a phone call" but found that they had not engaged in improper conduct in obtaining defendant's statement.

* * *

A jury found defendant guilty on all counts. He subsequently filed a motion for a new trial in which he asserted, *inter alia*, that the circuit court erred in denying his motion to suppress. The trial court denied defendant's motion for a new trial and imposed an aggregate sentence of 33 years for first degree murder, armed robbery, and burglary.

* * *

Defendant argued that the trial court erred in refusing to suppress his inculpatory statement because it was obtained in violation of his constitutional and statutory rights. According to defendant, his statement should have been suppressed as involuntary because it was elicited through coercive conduct by the police detectives.

In response, the State asserted that defendant forfeited review of the claim that his statement was involuntary. **The State also contended that denial of defendant's motion to suppress was proper because defendant's statement was voluntary despite the fact that he was prevented from making a phone call for 24 hours after his arrest.** Lastly, the State argued that, even if defendant's statement should have been suppressed, its erroneous admission was harmless.

* * *

THE COURT RULED THAT DEFENDANT'S CONFESSION WAS INVOLUNTARY AND SHOULD HAVE BEEN SUPPRESSES; HOWEVER, THAT ITS ADMISSION AT TRIAL WAS HARMLESS ERROR AND DID NOT REQUIRE OVERTURNING DEFENDANT'S CONVICTION.

Defendant argued on appeal that his statement should have been suppressed on the ground that it was involuntary and elicited through coercive conduct by the investigating police detectives. The State responded by asserting that defendant's statement was voluntary and, therefore, his constitutional rights were not violated even though he was held in custody and precluded from contacting an attorney for approximately 24 hours after his arrest.

APPLICATION OF THE HARMLESS ERROR DOCTRINE

Having determined that defendant's statement was involuntary, the appellate court considered the State's assertion that the admission of that statement at trial was harmless. ***To establish that any error was harmless, the State must prove beyond a reasonable doubt that the result would have been the same absent the error.*** *People v. Jackson*, 2020 IL 124112, ¶ 127 (citing *People v. Thurow*, 203 Ill. 2d 352, 363 (2003)). **In ascertaining whether an error is harmless, reviewing courts may (1)** focus on the error to determine whether it might have contributed to the conviction, **(2)** examine the other evidence in the case to see if overwhelming evidence supports the conviction, and **(3)** determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *People v. Stechley*, 225 Ill. 2d 246, 304-05 (2007).

This court recognized that, ***because confessions are extremely probative, the improper***

"admission of an unlawfully obtained confession rarely is harmless error." *People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988). However, it noted that it had also held in past cases that the erroneous admission of a confession may be harmless in certain circumstances. *People v. Mitchell*, 152 Ill. 2d 274, 327-28 (1992).The court noted:

Defendant argues that the State failed to satisfy its burden of proving that the improper admission of his statement was harmless beyond a reasonable doubt. **In response, the State asserts that, in light of the properly admitted evidence of defendant's guilt, any error in admitting his statement was harmless. Under the circumstances presented in this case, we agree with the State.**

Apolonio Retama, defendant's friend of 15 years, testified that defendant had previously confessed to him in the fall of 2010. At that time, defendant admitted his involvement in the burglary of the bar, during which Gonzalez sustained the injuries that resulted in his death. According to Retama, defendant stated that he was "going down" for murder. Although defendant did not identify the bar or its location, he explained that Jackson wanted to retaliate against the owner for ejecting him from the bar on a prior occasion. Defendant told Retama that they went to the bar after it closed and, upon encountering the bar's owner, Jackson repeatedly hit him with a pipe.

Retama's testimony was corroborated by another person, who testified that defendant and Jackson were together on the night of the murder when they solicited his help in burglarizing the bar. The person described the proposed plan for the burglary and gave the police a description of "Andrew," Jackson's friend who was driving the car that night. The person later identified defendant from a police photo array and at trial.

Retama's recitation of defendant's 2010 confession was further corroborated by the testimony of another person, who described the incident in which Gonzalez ejected Jackson from the bar. In addition, the medical evidence corroborated Retama's testimony regarding defendant's confession and established that Gonzalez's injuries were consistent with being struck with a heavy, narrow object such as a pipe. And Jackson's cell phone records reflected that he was in the vicinity of the bar on the night of the murder and that he had been in contact with defendant around that time. Moreover, Retama and another participant were essentially unimpeached because defendant did not deny that he was with Jackson on the night of the murder. During closing argument, defense counsel conceded that defendant had participated in the burglary but argued that he was not accountable for the murder.

Based on the record presented, the substance of defendant's videorecorded confession was cumulative and duplicated other evidence that was properly admitted at trial. **Thus, under the particular circumstances of this case, the result of the trial would have been the same if the confession had been excluded.** We conclude, therefore, that the erroneous admission of defendant's statement was harmless beyond a reasonable doubt.

Although we find the error to be harmless in this case, we reiterate that a prolonged incommunicado detention disguised as "normal police procedure" cannot be condoned.

And an unwarranted delay in providing the simple expedient of a telephone call takes on significant importance in evaluating the voluntariness of an inculpatory statement made after an extended period of *incommunicado* detention. **Accordingly, law enforcement officials would be well advised to scrupulously comply with the requirements of the law.**

THE COURT'S CONCLUSION

In sum, we hold that defendant's inculpatory statement was involuntary and should have been suppressed. However, the admission of that statement was harmless beyond a reasonable doubt. Therefore, we affirm the judgment of the appellate court, which affirmed the judgment of the circuit court.

PRACTICE POINTER

While the case is illustrative of the Harmless Error Doctrine, the goal of law enforcement is obviously that of avoiding constitutional and statutory violations in investigating the facts of a crime and presenting the case at trial. **This case involved a practice that ordinarily should not exist, *i.e.*, incommunicado holding of a suspect and clear violations of the right to counsel.** The Harmless Error Doctrine is essentially a judicial rule that may be applied to avoid a miscarriage of justice, but in the ideal setting of law enforcement practices it is not likely to be invoked by an appellate court.

UNITED STATES SUPREME COURT DECISION – JUNE 23, 2022

A VIOLATION OF *MIRANDA* DOES NOT NECESSARILY CONSTITUTE A VIOLATION OF THE CONSTITUTION FOR PURPOSES OF THE FEDERAL CIVIL RIGHTS ACT

Vega v. Tekoh, 597 U.S. ___ (2022), No. 21–499 syllabus by the Reporter of Decisions. https://supreme.justia.com/cases/federal/us/597/21-499

The case arose out of the interrogation of respondent, Terence Tekoh, by petitioner, Los Angeles County Sheriff 's Deputy Carlos Vega. Deputy Vega questioned Tekoh at the medical center where Tekoh worked regarding the reported sexual assault of a patient. **Vega did not inform Tekoh of his rights under *Miranda v. Arizona***, 384 U.S. 436. Tekoh eventually provided a written statement apologizing for inappropriately touching the patient's genitals. Tekoh was prosecuted for unlawful sexual penetration. His written statement was admitted against him at trial. After the jury returned a verdict of not guilty, Tekoh sued Vega under 42 U. S. C. Section 1983, seeking damages for alleged violations of his constitutional rights. The Ninth Circuit held that the use of an un-Mirandized statement against a defendant in a criminal proceeding violates the Fifth Amendment and may support a §1983 claim against the officer who obtained the statement.

Held: A violation of the *Miranda* rules does not provide a basis for a Section 1983 claim. Pp. 4–16.

(a) Section 1983 provides a cause of action against any person acting under color of state law who "subjects" a person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." Tekoh argues that a violation of *Miranda* constitutes a violation of the Fifth Amendment right against compelled self-incrimination. That is wrong. Pp. 4–13.

(1) In *Miranda*, the Court concluded that additional procedural protections were necessary to prevent the violation of the Fifth Amendment right against self-incrimination when suspects who are in custody are interrogated by the police. *Miranda* imposed a set of prophylactic rules requiring that custodial interrogation be preceded by now-familiar warnings and disallowing the use of statements obtained in violation of these new rules by the prosecution in its case-in-chief. 384 U. S., at 444, 479. ***Miranda* did not hold that a violation of the rules it established necessarily constitute a Fifth Amendment violation.** That makes sense, as an un-Mirandized suspect in custody may make self-incriminating statements without any hint of compulsion. The *Miranda* Court stated that the Constitution did not itself require "adherence to any particular solution for the inherent compulsions of the interrogation process" and that its decision "in no way create[d] a constitutional straitjacket." *Id.*, at 467. Since *Miranda*, the Court has repeatedly described *Miranda* rules as "prophylactic." Pp. 4–7.

(2) After *Miranda*, the Court engaged in the process of charting the dimensions of these new prophylactic rules, and, in doing so, weighed the benefits and costs of any clarification of the prophylactic rules' scope. See *Maryland v. Shatzer*, 559 U.S. 98, 106. Some post-*Miranda* decisions found that the balance of interests justified restrictions that would not have been possible if *Miranda* described the Fifth Amendment right as opposed to a set of rules designed to protect that right. For example, in *Harris v. New York*, 401 U.S. 222, 224–226, the Court held that a statement obtained in violation of *Miranda* could be used to impeach the testimony of a defendant, even though an involuntary statement obtained in violation of the Fifth Amendment could not have been employed in this way. In *Michigan v. Tucker*, 417 U.S. 443, 450–452, n. 26, the Court held that the "fruits" of an un-Mirandized statement can be admitted. In doing so, the Court distinguished police conduct that "abridge[s] [a person's] constitutional privilege against compulsory self-incrimination" from conduct that "depart[s] only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." 417 U. S., at 445–446. Similarly, in *Oregon v. Elstad*, 470 U.S. 298, the Court, following the reasoning in *Tucker*, refused to exclude a signed confession and emphasized that an officer's error "in administering the prophylactic *Miranda* procedures . . . should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself." *Id.*, at 309.

While many of the Court's decisions imposed limits on *Miranda*'s prophylactic rules, other decisions found that the balance of interests called for expansion. For example, in *Doyle v. Ohio*, 426 U.S. 610, the Court held that silence following a *Miranda* warning cannot be used to impeach. The Court acknowledged that *Miranda* warnings are "prophylactic," 426 U. S., at 617, but it found that allowing the use of post-warning silence would undermine the warnings' implicit promise that silence would not be used to convict. *Id.*, at 618. Likewise, in *Withrow v. Williams*, 507 U.S. 680, the Court rejected an attempt to restrict *Miranda*'s application in collateral proceedings based on the reasoning in *Stone v. Powell*, 428 U.S. 465 (1976). Once again acknowledging that *Miranda* adopted prophylactic rules, the Court balanced the competing

interests and found that the costs of adopting a *Stone*-like rule outweighed any benefits. **In sum, the Court's post-*Miranda* cases acknowledge the prophylactic nature of the *Miranda* rules and engage in cost-benefit analysis to define their scope. Pp. 7–11.**

(3) The Court's decision in *Dickerson v. United States*, 530 U.S. 428, did not upset the firmly established prior understanding of *Miranda* as a prophylactic decision. *Dickerson* involved a federal statute, 18 U. S. C. §3501, that effectively overruled *Miranda* by making the admissibility of a statement given during custodial interrogation turn solely on whether it was made voluntarily. 530 U. S., at 431–432. The Court held that Congress could not abrogate *Miranda* by statute because *Miranda* was a "constitutional decision" that adopted a "constitutional rule," 530 U. S., at 438–439, and the Court noted that these rules could not have been made applicable to the States if they did not have that status, see *ibid.* **At the same time, the Court made it clear that it was not equating a violation of the *Miranda* rules with an outright Fifth Amendment violation.** Instead, the *Dickerson* Court described the *Miranda* rules as "constitutionally based" with "constitutional underpinnings," 530 U. S., at 440, and n. 5. Those formulations obviously avoided saying that a *Miranda* violation is the same as a violation of the Fifth Amendment right. *Miranda* was a "constitutional decision" and it adopted a "constitutional rule" in the sense that the decision was based on the Court's judgment about what is required to safeguard that constitutional right. And when the Court adopts a constitutional prophylactic rule of this nature, *Dickerson* concluded, the rule has the status of a "La[w] of the United States" that is binding on the States under the Supremacy Clause (as *Miranda* implicitly held, since three of the four decisions it reversed came from state court, 384 U. S., at 491–494, 497–499), and the rule cannot be altered by ordinary legislation. *Dickerson* thus asserted a bold and controversial claim—that this Court has the authority to create constitutionally based prophylactic rules that bind both federal and state courts—but *Dickerson* cannot be understood any other way consistent with the Court's prior decisions. Subsequent cases confirm that *Dickerson* did not upend the Court's understanding of the *Miranda* rules as prophylactic. ***In sum, a violation of Miranda does not necessarily constitute a violation of the Constitution, and therefore such a violation does not constitute "the deprivation of [a] right . . . secured by the Constitution" for purposes of §1983. Pp. 11–13*.**

(b) A §1983 claim may also be based on "the deprivation of any rights . . . secured by the . . . laws." But the argument that *Miranda* rules constitute federal "law" that can provide the ground for a §1983 claim cannot succeed unless Tekoh can persuade the Court that this "law" should be expanded to include the right to sue for damages under §1983. "A judicially crafted" prophylactic rule should apply "only where its benefits outweigh its costs," *Shatzer*, 559 U. S., at 106. **Here, while the benefits of permitting the assertion of *Miranda* claims under §1983 would be slight, the costs would be substantial.** For example, allowing a claim like Tekoh's would disserve "judicial economy," *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, by requiring a federal judge or jury to adjudicate a factual question (whether Tekoh was in custody when questioned) that had already been decided by a state court. Allowing §1983 suits based on *Miranda* claims could also present many procedural issues. ***Miranda* and its progeny provide sufficient protection for the Fifth Amendment right against compelled self-incrimination. Pp. 13–16.**

985 F.3d 713, reversed and remanded.

Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Thomas, Gorsuch, Kavanaugh, and Barrett, JJ., joined. Kagan, J., filed a dissenting opinion, in which Breyer and Sotomayor, JJ., joined.