Constitutional Law: Case Notes

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I. The Miranda Rule

When the Supreme Court decided Miranda v. Arizona\(^1\) it was with the intention of affording some protection to a suspect in the inherently coercive atmosphere of custodial interrogation. Unless the police could demonstrate "the use of procedural safeguards effective to secure the privilege against self-incrimination,"\(^2\) they would be required to inform the suspect of his rights to remain silent and to have counsel present.\(^3\) The reasons for this warning requirement were stated as follows:

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.\(^4\)

In short, statements made as the result of custodial interrogation could not be used as evidence unless the defendant had received information, prior to the interrogation, of his constitutional privilege against self-incrimination.

Miranda was an attempt to supplement the test used to determine the voluntariness of custodial statements which had been enunciated in Haynes v. Washington.\(^5\) The Haynes test looked to the "totality of the circumstances" to determine the voluntariness of the statements,\(^6\) but because of the subjective nature of that test, it was

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\(^1\) 384 U.S. 436 (1966).
\(^2\) Id. at 444.
\(^3\) As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. Id.
\(^4\) Id. at 468-69.
\(^6\) Id. at 514. As to the voluntariness test see J. Israel & W. LaFave, Criminal Procedure in a Nutshell 219 (1971):
difficult to apply. *Miranda* was an attempt to supplement the *Haynes* test with an absolute test of knowing and intelligent waiver. It was believed at the time that a warning, followed by a waiver, would be easier for a trial court to establish than would the determination of the voluntary nature of a confession made during the course of custodial interrogation.

While "custody" and "warnings" have involved their share of problems for state courts, a stumbling block has been the determination of what constitutes a knowing and intelligent waiver. The *Miranda* pronouncement was as follows:

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.\(^7\)

Further, the *Miranda* Court clearly indicated that the waiver of these rights could not be easily established:

If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.\(^8\)

Determining whether a knowing and intelligent waiver of rights has been made is the particular problem that arises when a suspect has been advised of his rights and refuses to sign a waiver form, but continues to answer questions posed by the interrogating officers. A

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Under the voluntariness test, the Supreme Court undertook a continuing re-evaluation on the facts of each case of how much pressure on the suspect was permissible. The rule required examination of the "totality of circumstances" surrounding each confession. *Haynes v. Wash.*, 373 U.S. 503 (1963). The factors deemed most important were: (1) physical abuse, *Lee v. Miss.*, 332 U.S. 742 (1948); (2) threats, *Payne v. Ark.*, 356 U.S. 560 (1958); (3) extensive questioning, *Turner v. Pa.*, 338 U.S. 62 (1949); (4) incommunicado detention, *Davis v. N.C.*, 384 U.S. 737 (1966); (5) denial of the right to consult with counsel, *Fay v. Nola*, 372 U.S. 391 (1963); and (6) the characteristics and status of the suspect, such as his lack of education, *Culombe v. Conn.*, 367 U.S. 568 (1961), emotional instability, *Spano v. N.Y.*, 360 U.S. 315 (1959), youth, *Gallegos v. Colo.*, 370 U.S. 49 (1962), or sickness, *Jackson v. Denno*, 378 U.S. 368 (1964). However, the voluntariness test is by its nature imprecise, and thus it could rarely be said that the presence of any one of these factors or any fixed combination of them clearly required exclusion of a confession.

\(^7\) 384 U.S. at 475.

\(^8\) *Id.*
similar problem arises when the suspect proceeds to sign a waiver and answers oral questions, but then refuses to sign a written statement until he has consulted an attorney. In both situations the suspect’s confusion as to his *Miranda* rights is manifested by the adoption of contradictory positions. The issue dealt with in this case note is whether the adoption of such contradictory positions by a suspect can be construed as a knowing and intelligent waiver of his *Miranda* rights.

The *Miranda* guidelines as to waiver are as follows:

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and have him present during any subsequent questioning.9

But this language has been subject to varying interpretations by both federal and state courts. This case note will explore the approaches taken by the supreme courts of Ohio and Illinois when faced with the problem of contradictory positions assumed by a suspect. The results reached by the two courts are diametrically opposed. The fact patterns of each case and the reasoning which led to divergent results will be juxtaposed. The position of this case note is that the holding of the Ohio court is more consistent with the spirit of *Miranda*, although the Ohio court has not gone far enough; the standard *Miranda* warning should be re-worded.

II. ILLINOIS: KNOWING AND INTELLIGENT WAIVER REGARDLESS OF SUSPECT’S CONFUSION

A. People v. Madison:10 *The Facts*

Madison was arrested on suspicion of murder near midnight of January 22, 1970. In the squad car he was informed of his *Miranda* rights, and indicated that he understood them. He was then taken to the station and placed in a cell. At approximately 4:45 a.m. the next morning he was taken to the detective bureau where he was again informed of his rights. He conversed with detectives until 6:45 a.m., at which time he indicated that he would make a statement if he could first call his father. After making the call, he again indicated that he

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9 *Id.* at 473-4.
would give a statement, but pursuant to his father’s advice, he stated that he would not sign the statement until he had consulted a public defender. The police gave Madison a written form, detailing his *Miranda* rights which he read. The contents were then read to him orally by an officer. This form contained a paragraph entitled “waiver of rights” immediately preceding the space for the suspect’s signature. In part, it stated: “I am willing to make a statement and answer questions. I do not want a lawyer at this time.” Madison signed the form and then gave his statement. Consistent with his position before he signed the waiver form, he refused to sign the statement.

B. The Holding of the Illinois Supreme Court

Defense counsel attempted to suppress this statement at trial. It was contended that Madison’s announcement that he would *make* a statement but that he would not *sign* it before consulting a public defender established his intent not to give a statement which could be used against him at trial. Madison claimed that it was never his intent to waive his rights and that his continued refusal to sign the statement established his subjective mental posture.

This contention was not accepted by the trial court, and the statement was admitted in evidence. Madison argued on appeal that this constituted error, but the Illinois supreme court affirmed the lower court holding. The court gave the defendant’s argument short shrift:

It is argued that his statement given after he talked to his father is also improper because he informed the police that while he would give a statement he would not sign it until a public defender was present. Defendant interprets this as establishing his intent not to give a statement that could be used against him, that he did not understand that an oral admission was of evidentiary value and that he wanted to consult an attorney. These arguments are without merit. The record overwhelmingly presents a knowing and voluntary relinquishment of constitutional guarantees and the admission of defendant’s inculpatory statements was proper.

It is submitted that the court’s reference to the trial court record as overwhelmingly indicative of a waiver of *Miranda* rights is subject to

\[11\] *Id.* at 482, 309 N.E.2d at 14.
\[12\] *Id.*
\[13\] *Id.* at 485, 309 N.E.2d at 16.
criticism. If the defendant honestly believed that his refusal to sign
the statement would preclude its admission against him at trial, it
cannot be said that he knowingly and intelligently waived his fifth
amendment privilege against self-incrimination. According to
Johnson v. Zerbst the product of such confusion cannot be a know-
ing waiver of rights. The suspect must knowingly and understand-
ingly waive his rights to counsel and to silence. Without this positive
subjective posture, no waiver is possible. It is further submitted that
the Illinois supreme court was persuaded to find a knowing waiver
by the overwhelming evidence of guilt presented by the record not-
withstanding the statement which Madison sought to suppress. But
the weight of the evidence should not be relevant to the issue of
knowing waiver of constitutional rights during custodial interroga-
tion.

III. OHIO: CONFUSION OF THE DEFENDANT PRECLUDES THE
FINDING OF A KNOWING AND INTELLIGENT WAIVER

A. State v. Jones: The Facts

Jones was arrested on June 26, 1971, for allegedly participating
in a robbery-slaying the preceding afternoon. At the police station,
he was read a form entitled “Your Constitutional Rights.” Jones
also read the form for himself and indicated that he understood its
provisions. According to the testimony of the police interrogator,
Jones did not say that he wanted to see an attorney, but he did
mention “that Paul Scott was his attorney and that before he signed

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15 304 U.S. 458, 464 (1938): “A waiver is ordinarily an intentional relinquishment or
abandonment of a known right or privilege.”
16 Included in this body of evidence damaging to the defendant was his admission during
the telephone conversation with his father that he was in “big trouble” because he had shot a
man during a robbery. Also, he had told his brother in the presence of police that he had shot
a man. In addition, the police found ammunition in his possession, matching that used in the
robbery, boots matching prints found in the snow leading from the scene of the crime, and hats
identified by eyewitnesses as resembling those worn by the assailants. 56 Ill. 2d at 482-83, 309
18 The form contained the following:

Before we ask you any questions you must understand your rights. You have
the right to remain silent. Anything you say can be used against you in Court. You
have the right to talk to a lawyer for advice before we ask you any questions and
have him present with you during questioning. If you are unable to pay a lawyer,
one will be appointed to you prior to any questioning, if you so desire. If you wish
to answer questions now without a lawyer present, you have the right to stop answer-
ing questions at any time. You also have the right to stop answering at any time
until you talk to a lawyer.
anything he definitely wanted to talk to Mr. Scott.

Following this statement, Jones continued to converse with a detective. When the detective began making notes of his conversation, Jones threatened to discontinue the conversation if further notes were taken, and also stated that he would not continue talking if any other detectives were in the room. His demands were met and, during this time, Jones made a statement which the prosecution later sought to admit at trial as evidence that he was a party to a conspiracy to commit the robbery.

The defense sought to suppress this statement at trial, but the Franklin County (Ohio) Court of Common Pleas admitted the statement into evidence. Jones was convicted, and took an appeal to the Franklin County Court of Appeals.

B. The Decision of the Court of Appeals

By a 2-1 majority, the court of appeals upheld the admissibility of the statement by the trial court and noted:

We find no abuse of discretion on the part of the trial court in holding that there was no denial of the right to counsel and that the defendant had waived his right to remain silent. There was evidence that the defendant made a knowing and intelligent waiver of his right to counsel and remained silent. The only right which defendant retained in giving his oral statement was that he would remain silent should Detective Powell write down what he was saying, or if a witness were called in, as evidenced by the entrance of Detective Lt. DeWeiss into the room. We find nothing which would prohibit the defendant from retaining certain of his constitutional rights while waiving others. This is exactly what defendant did.

In his dissent, Judge Whiteside could not agree that the state had sustained its "heavy burden" of establishing a knowing and intelligent waiver. Further, Judge Whiteside felt that the defendant's refusal to sign the waiver form, followed by his willingness to converse with only one particular detective, was not inconsistent with the defendant's contention on appeal that he misapprehended his rights.

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19 35 Ohio App. 2d at 100, 300 N.E.2d at 236 (emphasis supplied).
20 The statement tending to show Jones' part in the conspiracy to rob the grocery was noted in the court of appeals' finding of fact: "Immediately before or at the time of the shooting, the Defendant said to Charles Carmichael [co-defendant], 'This isn't the time.'" 35 Ohio App. 2d at 96, 300 N.E.2d at 233.
22 Id. at 101, 300 N.E.2d at 236.
23 Id. at 103, 300 N.E.2d at 237.
24 Id. at 106, 300 N.E.2d at 239.
and believed that oral statements could not be used against him at trial:24

Where there is an express refusal to sign a written waiver until an attorney is consulted, to be consistent with *Miranda*, the evidence of a subsequent oral waiver must be express and cannot be implied merely from the fact that interrogation continued after such refusal and a statement was obtained.25

Judge Whiteside concluded that such evidence of subsequent waiver was lacking, and he felt that the conviction should have been reversed. Further appeal was taken to the Supreme Court of Ohio.

C. *The Holding of the Ohio Supreme Court*

The Supreme Court of Ohio unanimously reversed the conviction.

Where a suspect, after being fully apprised of his constitutional rights under *Miranda v. Arizona*, 384 U.S. 436, indicates an understanding of those rights, but subsequently acts in such a way as to reasonably alert the interrogating officer that the warnings given have been misapprehended, the officer must, before any further questioning, insure that the suspect fully understands his constitutional privilege against self-incrimination, as described in *Miranda*, *supra*.26

The court agreed with the dissent of Judge Whiteside that Jones' mistaken belief that only written statements could be used against him at trial would be "consistent with a mistaken notion of his *Miranda* rights."27 The court further indicated that while the defendant's conduct at the police station could be variously construed, there was evidence that Jones failed to comprehend that written and spoken statements could be used against him.28 In light of this evidence, the prosecution had failed to meet its heavy burden of proving a knowing and intelligent waiver.

The opinion indicated that while the court did not expect the police to be mindreaders, the "burden is on the state to show that a defendant has made a voluntary, knowing and intelligent waiver of his privilege to remain silent."29 In order to meet this burden, the prosecution must show that the police have taken steps to insure the

24 *Id.* at 108, 300 N.E.2d at 240.
25 *37* Ohio St. 2d at 21, 306 N.E.2d at 409.
26 *Id.* at 25, 306 N.E.2d at 412.
27 *Id.* at 26, 306 N.E.2d at 412.
28 *Id.* at 25, 306 N.E.2d at 411.
suspect's comprehension of the fact that any statement, oral or written, may be used against him. If the suspect's conduct indicates that he is unaware of this fact, the police must take further pains to inform him. In this manner, a suspect can make a knowing and intelligent waiver.

IV. Jones, Madison and the Spirit of Miranda

One basic difference between the facts of Jones and those in Madison is obvious. Jones refused to sign anything, including the waiver form; Madison, while indicating that he would not sign the statement he was preparing to make until he had consulted a public defender, did sign the waiver form before giving that statement. Despite this difference, however, the facts of the cases are effectively indistinguishable. The opinion of the Ohio supreme court in Jones was predicated upon the contention that Jones had indicated confusion as to his Miranda rights after he had refused to sign the waiver form. That is, Jones proceeded under the mistaken notion that only written records of his conversation could be used against him at trial. The key to the result in Jones was that this confusion was manifested to the police. This put the police on notice that Jones misapprehended his Miranda rights; hence, a further Miranda rights inquiry was necessary to assure that the defendant was knowingly and intelligently waiving his rights.

Madison's conduct also put the interrogating police on notice that he was not making a knowing and intelligent waiver of his Miranda rights, but was, instead, proceeding out of confusion. Before Madison signed the waiver form, he had indicated that he would give a statement, but would not sign it until after he had consulted a public defender. Taking this statement at face value, the interrogating officer was faced with an apparent contradiction. Madison indicated his willingness to give an inculpatory statement. In the next breath, however, he indicated to the officers that, in his mistaken view, this statement could have no damaging effect until it bore his signature, a signature he would withhold until a public defender had advised him. Almost immediately after expressing his willingness to make a statement with the "no signature" qualification, Madison signed the waiver form, but neither he nor the police said anything that would indicate that Madison had changed his position regarding the statement. It is submitted that the inherent contradiction in the defendant's position was apparent to the interrogating officers and it does not appear that any subsequent events operated to clarify the contradiction.
After giving the statement, Madison refused to sign it. Certainly nothing in this action can be seen as establishing a knowing and intelligent waiver of his privilege against self-incrimination. On the contrary, his conduct indicated that Madison intended to retain the privilege. Madison’s behavior throughout the episode was indeed consistent with his contention at trial that he had misapprehended his *Miranda* rights.

The above analysis demonstrates the factual similarity between *Jones* and *Madison*. In both cases, the suspects manifested to the police, by means of their contradictory positions, that they were confused as to the nature of their rights. The fact that one suspect signed a waiver form while the other did not is no basis for distinction.

Nothing in *Miranda* indicates that a signed waiver form is conclusive evidence of knowing and intelligent waiver. Of course, it is persuasive evidence, but the *Madison* decision seems to give conclusive effect to the written waiver form. The opinion seems to proceed with rather circular logic: a waiver form, even if signed under circumstances indicating that the suspect misunderstands the legal consequences of his signature, is said to be “overwhelming” evidence of a knowing and voluntary waiver.

The result reached by the Supreme Court of Ohio in *Jones*, refusing to find a knowing and intelligent waiver of rights, is more consistent with the dictates of *Miranda*. Where a suspect indicates, by assuming inherently contradictory positions concerning his willingness to give a statement, that he is confused about his *Miranda* rights, there is no intelligent and knowing waiver of those rights. To hold otherwise, as did the Illinois tribunal in *Madison*, is to adopt a logically inconsistent position.\(^{30}\)

**V. THE JONES RULE APPLIED—HYPOTHETICALS**

The *Jones* rule is more consistent with the dictates of *Miranda* than is the holding in *Madison*. However, this case note would not

\(^{30}\) See generally the following federal cases which support the reasoning in *Jones*: United States v. Tafoya, 459 F.2d 424 (10th Cir. 1972); United States v. Speaks, 453 F.2d 966 (1st Cir. 1972); United States v. Jenkins, 440 F.2d 574 (7th Cir. 1971); United States v. Nielsen, 392 F.2d 849 (7th Cir. 1968); cf. United States v. Crisp, 435 F.2d 354 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971); United States v. Hedgeman, 368 F. Supp. 585 (N.D. Ill. 1973). *Contra*, United States v. Johnsen, 455 F.2d 311 (5th Cir. 1972); United States v. Collins, 462 F.2d 792 (2d Cir. 1972); Klingler v. United States, 409 F.2d 299 (8th Cir. 1969), cert. denied, 396 U.S. 859 (1969); but *cf.* United States v. Van Dusen, 431 F.2d 1278 (1st Cir. 1970). See also the following Fifth Circuit cases which predicated the finding of a knowing and intelligent waiver upon a finding that the suspect, having refused to sign a waiver form, subsequently initiated further discussion. United States v. Anthony, 474 F.2d 770 (5th Cir. 1973); United States v. Ramos, 448 F.2d 398 (5th Cir. 1971); United States v. Phelps, 443 F.2d 246 (5th Cir. 1971).
be complete without an inquiry as to whether the Jones approach is the most consistent means of implementing the Miranda rights. This inquiry will be initiated by considering the Jones rule in three hypothetical situations in which the suspect has at some time or another exhibited possible confusion about his Miranda rights.

A. Confusion Manifested at Time of Waiver

In this scenario, the suspect is arrested, brought to the station and subjected to custodial interrogation. He is read his Miranda rights by one of the interrogating officers and he indicates that he understands his rights. The suspect then states that he is willing to talk to the officers about his activities, so long as no record of his answers and comments is made. He indicates that he will sign no statement until he has consulted a public defender. The police indicate that they agree to this arrangement, and produce a "waiver of rights" form for the suspect to sign before they proceed in the manner that he requested. The suspect signs the waiver form, and gives the police what the suspect believes is an exculpatory statement. The prosecution desires to use this statement at the suspect's trial. Defense counsel moves to suppress. Assume that the jurisdiction adheres to the Jones formula. How should the court rule on the defense motion to suppress?

The statement should be suppressed. This hypothetical situation closely parallels the facts in Madison and Jones, where the suspect has assumed contradictory positions, and the police have been alerted to this fact by the suspect's conduct. Under Jones, because the interrogators have been made cognizant of the suspect's possible confusion concerning his rights to silence and to counsel, they are required to engage in further Miranda inquiry to assure that the suspect is knowingly and intelligently waiving these rights. Because the police in this situation failed to carry out such further inquiry, the use of the statement should not be allowed at the suspect's trial.

B. Confusion Manifested After Waiver While Questioning Continues

The suspect is arrested, transported to the police station, and subjected to custodial interrogation. He is informed of his Miranda rights at the outset, and indicates that he understands those rights. He signs the "waiver of rights" form proffered by the interrogator, and proceeds to give several incriminating statements. While he is talking, he notices that one of the officers is making notations on a scratch pad. The suspect becomes upset and indicates that he will not
continue his statement if any notes are taken. Furthermore, he will only speak in the presence of Officer X and requires that all other officers be kept out of the room. Officer X agrees; he tears up his notes, and locks the door to the interrogation room. The suspect continues to give his statement. The prosecution seeks to use this statement at trial. Defense counsel moves to suppress, on the grounds that the defendant had not knowingly and intelligently waived his right to silence, in the mistaken belief that only a written, signed statement could be introduced into evidence at trial. This jurisdiction follows the Jones rule. What result should the court reach, and what reasoning supports this result?

This is essentially the fact pattern involved in United States v. Frazier. In that case, a panel of the United States Court of Appeals for the District of Columbia Circuit held that the statement was inadmissible. But the court sitting en banc overturned that decision and held that statement properly admitted. But that circuit did not follow the Jones rule. The dissent of Chief Judge Bazelon points out the course that a court applying Jones would follow. The interrogator in Frazier candidly admitted that he deliberately refrained from trying to clear up the suspect's possible misunderstanding of the consequences of an oral statement. He attempted to justify his conduct by stating that he feared that further inquiry would end the discussion. To Judge Bazelon, such action rendered the Miranda warning and waiver a meaningless "preliminary ritual." The dissenting judge was not swayed by the fact that Frazier had signed the waiver form; if such signature is the product of confusion, it cannot be construed as the knowing and intelligent waiver which is the touchstone of Miranda.

Because the suspect in our hypothetical has indicated his confusion to the interrogator, the Jones rule should be applied to suppress the entire statement, both before and after his assertion of contradictory positions. His conduct and statements during his interrogation indicated to the police that he did not intend to disclose anything that might incriminate him. Because he lacked the positive subjective intent to waive his privilege against self-incrimination, he has made no knowing and intelligent waiver of his right to silence. Thus far, our inquiry indicates that the Jones test will adequately protect the rights of the confused suspect during custodial interrogation by attaching a

31 476 F.2d 891 (D.C. Cir. 1973).
32 Id. at 899.
33 Id. at 893.
34 Id. at 900.
duty of further inquiry to the interrogator who has been put on notice of that confusion.

C. Confusion Indicated at the Close of Interrogation

As in the previous two hypothetical situations, the suspect is arrested, brought to headquarters, informed of his *Miranda* rights and indicates his understanding of those rights. He signs the “waiver of rights” form and proceeds to give an oral statement. When the suspect has told his story and is getting up to return to his cell, the interrogating officer asks the suspect if he will sign a typewritten statement embodying his oral statement. The suspect replies, “Heck, no—if I do that, then you can use the statement against me at my trial.” The policeman nods his head and ends the interview. The prosecution seeks to admit testimony of the interrogating officer at the trial. Defense counsel moves to suppress on the grounds that defendant had not knowingly and intelligently waived his right to silence since he mistakenly believed that only written and signed statements could be used against him at trial. What is the implication of *Jones* in this situation?

In this situation, the *Jones* rule seems to be inadequate to protect the individual’s right to silence. Because the duty imposed on the police interrogator is triggered by a manifestation of confusion by the defendant in assuming contradictory positions during custodial interrogation, the prosecution has a strong argument that this duty has not been triggered when the defendant only indicates his confusion after the close of the questioning. The prosecution will argue that applying *Jones* in such a situation requires that the interrogating officers be mindreaders, and that even an officer proceeding in the most exemplary fashion has no reason to suspect confusion of rights by the defendant, since he has in no way signalled the officer about that confusion.

In this hypothetical situation, the court which attempts to apply the *Jones* criteria finds itself in a dilemma. If it suppresses the statement, it does so even though the duty of further inquiry has not been triggered by notice of the suspect’s confusion during interrogation. If it denies the motion to suppress, the court has become embroiled in the same type of illogic as was the *Madison* court. It will have found a knowing and intelligent waiver although the suspect may not have realized the legal implications of his signature on the waiver form. *Miranda* countenances only the use of statements received in custodial interrogation after a knowing and intelligent waiver. A defendant who signs a waiver form while believing that only signed or written statements, or written notes of his oral statements, can be
used against him has not knowingly and intelligently waived his privilege against the use of his oral statements at trial. His waiver is neither knowing nor intelligent.

It is submitted that the court should suppress the statement for the reason already stated, i.e. by definition, a knowing and intelligent waiver cannot include a waiver that is the product of confusion. If it is our purpose to follow the spirit of Miranda, no other course is feasible. But the court should not stop there. This set of hypothetics suggests that the real problem is with the Miranda warning itself. Studies have shown that a sizeable percentage of suspects do not understand their rights, even after having been read a properly worded Miranda warning. In order to avoid the confusion as to the evidential character of oral and written statements, the court should prescribe a re-wording of the Miranda warning. The revision could read: "... anything that you say, anything that you sign or write and anything that is written about what you say can and will be used against you. You must understand that we can and will testify in court about what you say, even if nothing is written down. ..." The idea is to present the Miranda warning in such a way that even the suspect of minimal intelligence can grasp the import of a waiver of his rights. If this means adding more detail to the warning, so be it.

While it is currently unpopular to advocate a broadening of Miranda, it is submitted that the suggested additions to the Miranda warning do not broaden the reach of that landmark decision. The additions are designed to make the limits of Miranda rights more apparent to the suspect. In this way, he can understand his rights more fully. We want the suspect to have this understanding in order to facilitate his ability to make a knowing and intelligent waiver.

VI. CONCLUSION

State v. Jones and People v. Madison reached opposite results despite indistinguishable fact patterns. The Ohio supreme court's holding in Jones embodies the better rule for the following four reasons:

1. The burden it places upon police interrogators is consistent with the mandate of Miranda that waiver is not to be presumed. To require that the police determine whether a suspect's willingness to answer questions after refusing to sign a statement is the product of confusion, or a knowing waiver of rights, is necessary to protect the exercise of those rights.

2. The logic of People v. Madison would allow police interrogators to take the statements of suspects to be used against them even though the police are unsure whether the defendant has actually waived his Miranda rights. Even more dangerous is the possibility that interrogators, aware of the suspect’s misapprehension of his rights, will deliberately use this confusion to incriminate him. As was explicitly stated in Miranda, “any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.”\(^{38}\) It seems that by deliberately using a suspect’s confusion to his detriment, any statement derived therefrom should be considered tainted. The temptation is strong for the interrogator to ignore indications from the suspect that he misunderstands the consequences of his actions, and to play upon that confusion to procure a damaging statement. The Jones notice rule would block such police conduct.

3. Jones provides a workable formula and imposes only that burden imposed by Miranda: the documentation of a knowing and intelligent waiver by the prosecution. Conversely, application of the Madison test works a distinct hardship on the defendant in that it presumes that the suspect will be familiar with an arcane rule of evidence. An important constitutionally protected right cannot rest on so shaky a presumption.

The additional inquiry required of the police need not be time-consuming. Furthermore, no hardship is worked on the police, since the Jones inquiry is not triggered until the suspect has given to the police a signal that he has possibly misunderstood his rights. Once the police perceive such a possibility, a few short questions can uncover any confusion. The most important question could be modeled on the following: “Do you understand that, whether or not you sign a statement, it can be used against you? Do you understand that I can testify about what you tell me whether or not I make notes of the conversation?” This short inquiry would be completely satisfactory in clarifying the confusion exhibited by the defendants in both Jones and Madison.

4. As shown by the analysis of hypothetical situations, the Jones rule breaks down at the point where the interrogator has received no notice of the suspect’s confusion. But the suspect’s confusion is nonetheless real, and makes the finding of a knowing and intelligent waiver logically dishonest. Therefore, the ultimate conclusion of this case note is that while the result and reasoning in State v. Jones is eminently preferable to that in People v. Madison, the

\(^{38}\) 384 U.S. at 476.
former is by no means the most effective tool available for effectuating an understanding of *Miranda* rights by a confused suspect.

It is submitted that the best means available to clear up the confusion of suspects as to the admissibility of oral statements is a re-wording of the *Miranda* warning. Again, this re-wording need not be lengthy; a few short declaratory sentences will suffice to expose the fact that both written and oral statements of the accused during custodial questioning may be used against the suspect at trial.

*Andrew J. Sonderman*