Constitutional Law—THE TOTALITY OF THE CIRCUMSTANCES CAN INDICATE A WAIVER OF ONE'S CONSTITUTIONAL RIGHT TO COUNSEL AND TO REMAIN SILENT.—*State v. Williams* (Iowa 1970).

On December 26, 1968, an attorney informed Des Moines police that he was representing Robert Anthony Williams, the subject of an extensive manhunt for the slayer of a ten year old girl, who was about to surrender himself to Davenport police. The attorney was allowed to talk to his client later on the phone where he admonished the latter, in the presence of several detectives, not to say anything during the return trip to Des Moines. The detectives sent to bring Williams back later that day agreed to come straight back and not to question him during the trip. Williams did make certain statements on the trip, though, that proved instrumental in convicting him of the murder. Williams maintained in his motion to suppress before trial, his standing objection during trial, and his motion for new trial subsequent to his conviction that the introduction of those incriminating statements into evidence was unconstitutional in that they were involuntarily elicited and made at a time when he was denied the effective advice of counsel. The prosecution successfully maintained that the statements were admissible since they were not the product of interrogation and that Williams, advised of his constitutional rights several times, voluntarily, knowingly, and intelligently waived his rights to remain silent and to the presence of counsel. While the detectives denied any attempt was made to interrogate Williams, the following statement was admittedly made by one of them prior to Williams' incriminating statements which led the detectives to the girl's body:

> Reverend, I'm going to tell you something. I don't want you to answer me, but I want you to think about it when you're driving down the road. I want you to observe the weather. . . . They are predicting snow for tonight. I think that we're going to be going right past where the body is, and if we should stop and find out where it is on the way in, *her parents are going to be able to have a good Christian burial for their little daughter.* If we don't and it does snow *and if you're the only person that knows where this is* and if you have only been there once, it is very possible that with snow on the ground you might not be able to find it.[1]

That detective also admitted that such statements were made with the intent to get as much information from Williams as possible before he reached his attorney,[2] even though Williams on several occasions stated that he wished to tell the whole story only after he reached his attorney.[3] *Held*, such statements were admissible into evidence since the totality of the circumstances surrounding the statements indicated that Williams voluntarily, knowingly, and intelligently waived his rights to remain silent and to have the assistance of counsel

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[1] Record at 31. (Emphasis added).
[2] *Id.* at 29.
[3] *Id.* at 27.

at that time. *State v. Williams*, 182 N.W.2d 396 (Iowa 1970).

Since *Gideon v. Wainwright*[4] in 1963 and *Malloy v. Hogan*[5] in 1964, the state courts have been compelled by the due process clause of the fourteenth amendment to extend the sixth amendment right of counsel and the fifth amendment privilege against self-incrimination, respectively, to those accused of crimes in state courts. It was not until the recent *Escobedo v. Illinois*[6] and *Miranda v. Arizona*[7] decisions, however, that the United States Supreme Court set out the extent and manner in which these constitutional rights were to be administered.

In *Escobedo* the Court held that where

> . . . the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied an opportunity to consult with his lawyer, and the police have not effectively warned him of his absolute constitutional right to remain silent, the accused has been denied the 'Assistance of Counsel' in violation of the Sixth Amendment to the Constitution. . . .[8]

Miranda went further:

> 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.[9]

The first question to be resolved was whether Williams was interrogated. Accepting one detective's testimony[10] that he asked no direct questions of Williams,[11] does this mean he did not interrogate him? I think not. *Escobedo* talks of interrogation as a process designed to elicit incriminating statements.[12] Since a conversation between a police officer and a prisoner is not inherently "a process of interrogation that lends itself to eliciting incriminating statements", to determine whether there was such a "process" it is necessary to analyze the total situation, *i.e.*, the length and nature of interrogation, time and place, and other relevant circumstances.[13] "It is not necessary that the sentences terminate with question marks. It is the over-all effect which must be scrutinized to determine the interviewer's intent and goal."[14]

The detective admitted his statements were predicated upon a desire to find out all he could. That his statements were not the conversational type made

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4 372 U.S. 335 (1963).
5 378 U.S. 1 (1964).
6 378 U.S. 478 (1964).
7 384 U.S. 436 (1966).
8 Escobedo v. Illinois, 378 U.S. 478, 491 (1964).
9 Miranda v. Arizona, 384 U.S. 436, 444 (1966).
10 Note that this same detective also swore that he made no agreement not to question Williams which might weigh against his credibility. (Record at 26).
11 Record at 29.
12 Escobedo v. Illinois, 378 U.S. 478, 491-2 (1964).
13 People v. Chavez, 240 Cal. App. 2d 248, 49 Cal. Rptr. 425, 428 (1966).
14 People v. Paulin, 61 Misc. 2d 289, 305 N.Y.S.2d 607 (1968).

with no purpose in mind and not made in a police dominated atmosphere[15] seems obvious. The fact the detective was able to elicit incriminating statements from Williams by planting ideas in his mind instead of by the use of direct questions is not important.[16]

The crux of the case is the determination of whether Williams waived his rights prior to or at the time of his admissions. A person clearly informed of his rights may effectively waive those rights to remain silent and to be accompanied by counsel at a custodial interrogation provided the waiver is made voluntarily, knowingly, and intelligently.[17] Statements made freely and voluntarily without any compelling influences in response to interrogation after the accused has effectively waived his rights are, of course, admissible into evidence.[18] Remembering, though, that the interrogation atmosphere "carries its own badge of intimidation",[19] let us first look at the voluntary aspect of Williams' supposed waiver.

Admittedly, Williams' statements were not the product of physical coercion, but coercion can be mental as well as physical.[20] "The efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion."[21] Psychological coercion, whether it be through the offering of non-existent legal excuses,[22] the Mutt & Jeff act,[23] fake line-ups,[24] unrelenting interrogation,[25] unkept promises of immunity,[26] or playing upon one's refusal to talk (right to silence) *by pointing out the disadvantages of exercising that right,*[27] may impel a statement where the accused would have remained silent but for the improper influence.[28] That the detective possessed the qualities of a good interrogator, those of patience, perseverance, and the ability to comprehend and play upon the accused's weaknesses,[29] cannot be denied. What about a lengthy conversation on religion with a man of deep religious convictions and of obviously deficient intellect,[30] culminated with the proposition that only he can assure the girl's family a *Christian* burial?[31]

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15 State v. Davis, 157 N.W.2d 907, 910 (Iowa 1968) (language used by the Iowa Court to describe when conversation by a police officer is interrogation).

16 State v. Williams, 182 N.W.2d 396, 408. (Iowa 1970) (dissent by Stuart, J.).

17 Miranda v. Arizona, 384 U.S. 436, 444 (1966).

18 State v. Clough, 259 Iowa 1351, 147 N.W.2d 847 (1967).

19 Miranda v. Arizona, 384 U.S. 436, 457 (1966).

20 *Id.* at 448.

21 Blackburn v. Alabama, 361 U.S. 199, 206 (1960).

22 Miranda v. Arizona, 384 U.S. 436, 451 (1966).

23 *Id.* at 452.

24 *Id.* at 453.

25 *Id.* at 451.

26 *Id.* at 456.

27 *Id.* at 454. (Emphasis added).

28 *Id.* at 462.

29 *Id.* at 450.

30 His deficient intellect seems obvious by the facts. The Court found that Williams was both sane and competent. These findings would seem to go to whether he was to be deemed answerable for his acts and capable of standing trial. The most intelligent of individuals would seem susceptible to coercion.

31 People v. Paulin, 61 Misc. 2d 289, 305 N.Y.S.2d 607, 618 (1968) (references by the police officers to the state of the tragedy and the condition of the body are inherently

Can it be logically argued that this conversation was not conducted by a police official tending to overbear Williams' will to resist, thus constituting coercion?[32] Probably not. This type of psychological pressure plus "the circumstances surrounding in-custody interrogation can very quickly operate to overbear the will of one merely made aware of his privileges by his interrogators."[33] "*Even preliminary advice given to the accused by his own attorney* can be swiftly overcome by the secret interrogation process."[34]

Remember that voluntariness is not enough. The waiver of one's rights to counsel and to remain silent must also be made knowingly and intelligently. A case cited in *Williams* by the Iowa court[35] commented on the fact that the accused can make an admission voluntarily (without physical or psychological coercion), while not making an intelligent and knowing decision to forego his right to counsel and to remain silent. Can one knowingly waive his right to have his attorney present when the interrogation is conducted by a capable interrogator in such a manner that he does not realize he is being interogated? Can an accused, purposely put into an emotional state conducive to the impairment of his capacity for rational judgment,[36] make an intelligent waiver of his right to remain silent? Again, I doubt it.

The above questions muster greater importance when we consider who had the burden of proving that Williams intentionally, knowingly, and intelligently waived his known rights and privileges. *Miranda* was very explicit on this point:

> 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. This Court has always set *high standards of proof for the waiver of constitutional rights, and we re-assert these standards as applied to in-custody interrogation.*[37]

To put it a different way, the courts indulge every reasonable presumption against waiver of fundamental constitutional rights.[38] The burden on the state would seem even heavier where the accused and his attorney repeatedly expressed the desire that interrogation should cease until the accused's attorney was present.[39]

It is true, as the Iowa court points out,[40] that the accused may effectively waive his rights under *Miranda* notwithstanding the absence of any express

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and implicitly the type of psychological pressures made unlawful and ordered eliminated by *Miranda*).

32 Milton v. Wainwright, 306 F. Supp. 929 (S.D. Fla. 1969).
33 Miranda v. Arizona, 384 U.S. 436, 469 (1966).
34 *Id.* at 470 (Emphasis added).
35 State v. Blanchey, 75 Wash. 2d 926, 931, 454 P.2d 841, 847 (1969).
36 Miranda v. Arizona, 384 U.S. 436, 466 (1966).
37 *Id.* at 475. (emphasis added).
38 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
39 State v. Johns, 158 Neb. 590, 177 N.W.2d 580 (1970).
40 State v. Williams, 182 N.W.2d 396, 408 (Iowa 1970).

written or oral manifestation on his part. Absent such a manifestation the courts must search for the voluntary waiver in each case by examining the attendant facts and circumstances peculiar to the case which includes an examination of the background, experience, and conduct of the accused.[41] Therefore, the "totality of the circumstances" may implicitly show that the accused voluntarily and intentionally waived his rights when he made his self-incriminating statements.[42] However, the totality of circumstances test was not formulated to defeat or circumvent one's constitutional rights by a capricious application of the facts, *i.e.*, the presumption is still against waiver.[43] Keeping in mind the criteria for this test, do the attendant facts in *Williams* really rebut the presumption? When weighing the circumstances of the psychological pressure applied by the detectives against the power of resistance of the person confessing,[44] could the supposed waiver have been voluntary? Note that circumstances which would be utterly ineffective against the experienced criminal may be very overpowering to the inexperienced or weak of mind.[45] With the totality of circumstances test being a creature of the attendant facts, what happens to the viability of the test when the court determines that no request or desire for aid of counsel was made by Williams before or during the giving of the self-incriminating information,[46] a finding which contradicts the contention of Williams,[47] and the admissions of prosecution.[48]

It is also true that the accused can change his mind and waive his previously invoked rights. In *State v. McClelland*[49] the Iowa court allowed the police to ask the accused if he wished to change his mind. One refusal to make a statement, *when the refusal is fully honored*, ought not to taint the substance of the entire subsequent procedure following a later waiver.[50] Was Williams' refusal "fully honored" by the detectives? *McClelland* also held that the kinds of involuntary waivers *Miranda* was concerned with were those caused by the police refusing to take "no" for an answer.[51] Did Williams' interrogators take no for an answer?

The Iowa court says that *Miranda* does not require the presence of the accused's attorney before the accused can make a valid waiver. "The will of the

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41 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
42 Boulden v. Holman, 394 U.S. 478 (1969); Fikes v. Alabama, 352 U.S. 191, 197 (1957); State v. McPherson 171 N.W.2d 870, 873 (Iowa 1969); Mullaney v. State, 5 Md. App. 248, 246 A.2d 291, 301 (1968).
43 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
44 Stein v. New York, 346 U.S. 156, 185 (1953).
45 *Id.*
46 State v. Williams, 182 N.W.2d 396, 402 (Iowa 1970); *see* Miranda v. Arizona, 384 U.S. 436, 444-5 (1966) (these rights may be invoked in any manner indicative of such a desire).
47 Record at 21.
48 *Id.* at 27.
49 164 N.W.2d 189, 193 (Iowa 1969).
50 State v. Godfrey, 182 Neb. 451, 155 N.W.2d 438, 441 (1968) (cited by the Iowa Court in *McClelland, id.* at 194-5).
51 Jennings v. United States, 391 F.2d 512, 513 (5th Cir. 1968) (cited by the Iowa Court in *McClelland, id.* at 193-4).

accused *when intelligently and voluntary exercised* is paramount."[52] To sustain this proposition the court cites *State v. Blanchey*[53] and *People v. Robles*.[54] Note in *Blanchey* there was no evidence of any psychological pressure,[55] nor did the accused there indicate several times that he wanted to wait for his attorney. The *Robles* court supported this proposition only where the questioning did not take place "under conditions which are likely to affect substantially the will to resist and compel him to speak when he would not otherwise do so freely."[56]

What did *State v. Williams* do to the law? The answer depends on what you mean by the "law". The validity of the "black letter" law in division I of the opinion seems unquestionably correct, but the manner in which it was applied to the facts of the instant case leaves this author in doubt as to whom and in what manner the "black letter" law applies. *Miranda* says:

> 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. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege *cannot be other than the product of compulsion, subtle or otherwise.* . . . If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.[57]

Williams was denied the presence of an attorney on the trip back to Des Moines when his Davenport attorney[58] was denied permission to ride in the police car, a denial acceptable by *Miranda*, so long as no interrogation takes place.[59] On several occasions Williams expressly indicated his desire to tell the story only in the presence of his attorney, a request that was ignored by a police interrogator adept in the tactics of psychological interrogation.[60] When these facts are "plugged" into the totality of circumstances test and the court can still find a voluntary waiver of fifth and sixth amendment rights, has the Iowa court really applied *Miranda* correctly?

The Iowa court was faced with a difficult decision. The evidence against Williams was overwhelming. His guilt seemed obvious; but, where clear and known violations of fundamental constitutional rights are condoned to sustain a conviction that seems correct, "hard cases" do, indeed, make bad law.[61] When the United States Court of Appeals for the Fifth Circuit held that waiver

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52 State v. Williams, 182 N.W.2d 396, 405 (Iowa 1970). (Emphasis added).
53 State v. Blanchey, 75 Wash. 2d 926, 454 P.2d 841 (1969).
54 27 N.Y.2d 155, 263 N.E.2d 304 (1970).
55 State v. Blanchey, 75 Wash. 2d 926, 929, 454 P.2d 841, 845 (1969).
56 People v. Robles, 27 N.Y.2d 155, 263 N.E.2d 304, 305 (1970).
57 Miranda v. Arizona, 384 U.S. 436, 473-4 (1966). (Emphasis added).
58 Williams was temporarily represented by a Davenport attorney prior to the trip back to Des Moines.
59 Miranda v. Arizona, 384 U.S. 436, 474 (1966).
60 *See* United States v. Crisp, 435 F.2d 354, 357 (7th Cir. 1971) (Interrogator cannot hedge initial decision to remain silent by seeking its retraction or narrowing its scope. *e.g.*, questioning as to circumstances before and after the crime).
61 The phrase "[h]ard cases make bad law" is ironically credited to the Iowa Court by BLACK'S LAW DICTIONARY 847 (4th ed. 1951).

was to be decided on an *ad hoc* basis,[62] it did not mean a capricious determination looking toward the guilt or innocence of the accused.

It is interesting to note what the Pennsylvania court held in the comparable case of *Commonwealth v. Leaming*.[63] The accused there, also seemingly guilty, successfully invoked his right to remain silent; and that court, which also recognizes the totality of the circumstances test,[64] held that all the incriminating evidence elicited by the *unconstitutional interrogation* that led the police to the body, including evidence pertaining to the body itself, was inadmissible under *Miranda*.[65] As in *Leaming*, granting Williams a new trial would not have allowed a murderer to go free. The record indicated seemingly ample evidence to convict Williams a second time without the use of those statements elicited in the police car.

It was not only unnecessary to circumvent *Miranda* to bring Williams to justice, but it was also improper.

> The State of Iowa is entitled to a reasonable time to retry this defendant for the crime charged. He must still face the alleged truth of the charge. If proven guilty, he will not go free. However, every person is entitled to the full protection of due process and the equal protection of the laws fundamental to a fair trial. . . . Nor can this court deny these rights even if we felt the evidence conclusively demonstrated guilt. It is not for us to assess the evidence but only to safeguard constitutional guarantees.[66]

While the totality of the circumstances is a test for waiver in Iowa today, it also seems to be a convenient way around one's constitutional rights. Justice Stuart in his dissent in *Williams* intimated that the best way to undermine an "unsound" rule of law is to expose it by applying it according to its spirit.[67] Is it not also possible that where the state courts circumvent the letter and spirit of *Miranda* the United States Supreme Court will find it necessary to establish stricter and less flexible criteria whose potentiality for "perverse" results might be greater?

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[62] Narro v. United States, 370 F.2d 329, 330 (5th Cir. 1966) (cited by the Iowa Court in State v. McClelland, 164 N.W.2d 189, 195 Iowa 1969).
[63] 432 Pa. 326, 247 A.2d 590 (1968).
[64] *Id.* at 595.
[65] *Id.* at 594. (Emphasis added).
[66] Stump v. Bennett, 398 F.2d 111, 123 (8th Cir. 1968).
[67] State v. Williams, 182 N.W.2d 396, 406 (Iowa 1970).

Evidence—WHEN CHALLENGING THE PRIVILEGE BETWEEN ATTORNEY AND CLIENT, A CLEAR AND CONCISE RECORD DETAILING THE FOUNDATION FACTS MAKING THE COMMUNICATION AN EXCEPTION TO THE GENERAL RULE IS ESSENTIAL BEFORE THE EVIDENCE IS ADMISSABLE.—*Bailey v. Chicago, Burlington & Quincy Railroad Co.* (Iowa 1970).

The plaintiff brought this action for the negligently-caused death of his wife who was instantly killed when her car collided with defendant's train.[1] Prior to decedent's death she had commenced a divorce action against plaintiff. Upon an "Advanced Ruling on Evidence"[2] the trial court ordered inadmissable the divorce file and proceedings. However, during the course of the trial the defendant called as a witness the attorney[3] consulted in the divorce action. The attorney testified to statements the decedent made as to her general health, and over timely objections by plaintiff this evidence was admitted. A jury verdict was rendered for the defendant. On Hearing for Motion for New Trial, the testifying attorney disclosed that the alleged privileged communication was made in the presence of a third party—a friend of the decedent—and embodied in a public document. After the Motion for New Trial was denied, plaintiff appealed alleging, *inter alia*, that Section 622.10 of the Iowa Code,[4] protecting the attorney-client privilege, had been violated. *Held*, reversed and remanded, two justices dissenting, one justice taking no part. When challenging the privilege between attorney and client, a clear and concise record detailing the foundation facts making the communication an exception to the general rule is essential before the testimony is admissable. *Bailey v. Chicago, Burlington & Quincy Railroad Co.*, 179 N.W.2d 560 (Iowa 1970).

The attorney-client privilege existed at early common law only for the attorney.[5] The modern trend is to construe the privilege only for the benefit of the client.[6] Iowa agrees with the modern view. Today in Iowa the privilege is

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[1] Plaintiff originally sued for loss of wife's affection and consortium but dropped this allegation before trial. The suit at trial was limited to automobile damages and wrongful death.

[2] The court equated this to a "Motion In Limine." For the status of the Motion in Limine in Iowa, *see* State v. Johnson, 183 N.W.2d 194 (Iowa 1971); Lewis v. Buena Vista Mutual Insurance Association, 183 N.W.2d 198 (Iowa 1971).

[3] The testifying attorney did not represent either the plaintiff or defendant in this case.

[4] IOWA CODE § 622.10 (1971) reads as follows:

> No practicing attorney, counselor, . . . or the stenographer or confidential clerk of any such person, who obtains such information by reason of his employment, . . . shall be allowed, in giving testimony, to disclose any confidential communication properly entrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the person in whose favor the same is made waives the rights conferred; . . . .

[5] 8 Wigmore, *Evidence* § 2290 (McNaughton rev. 1961). *See also* 16 CALIF. L. REV.

[6] *See* Pritchard v. United States, 181 F.2d 326, 328 (6th Cir. 1950), *aff'd*, 339 U.S. 974 (1950) (privilege involving a judge who practiced as an attorney); In re Bell, 123 F. Supp. 389, 390 (N. Nev. 1954) (disbarment proceeding where the court concluded the privilege was a protective devise available only to or on behalf of a client).