

3-1-2008

Police Deception before Miranda Warnings: The Case for Per Se Exclusion of an Entirely Unjustified Practice at a Particularly Sensitive Moment

Robert P. Mosteller
Duke University Law School

Follow this and additional works at: http://lsr.nellco.org/duke_fs

Recommended Citation

Mosteller, Robert P., "Police Deception before Miranda Warnings: The Case for Per Se Exclusion of an Entirely Unjustified Practice at a Particularly Sensitive Moment" (2008). *Duke Law School Faculty Scholarship Series*. Paper 130.
http://lsr.nellco.org/duke_fs/130

This Article is brought to you for free and open access by the Duke Law School at NELCO Legal Scholarship Repository. It has been accepted for inclusion in Duke Law School Faculty Scholarship Series by an authorized administrator of NELCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.

**POLICE DECEPTION BEFORE *MIRANDA*
WARNINGS: THE CASE FOR PER SE
PROHIBITION OF AN ENTIRELY UNJUSTIFIED
PRACTICE AT THE MOST CRITICAL MOMENT**

*by Robert P. Mosteller**

I.	INTRODUCTION	1240
II.	THE <i>BEASLEY</i> INTERROGATION AND CONFESSION AS CONTEXT FOR ACCEPTED IMPLICIT AND EXPLICIT DECEPTION	1241
	A. <i>A Case Study in Allowable Deception</i>	1241
	B. <i>The Basic Cons, Frailties of Suspects, and Expected Role of Counsel</i>	1248
III.	DECEPTION PRACTICE: PRE- <i>MIRANDA</i> WARNINGS AND WAIVER	1250
	A. <i>No Police Responsibility to Help Suspect “Calibrate His Self-Interest”</i>	1251
	B. <i>Basic Supreme Court Teaching on Pre-Warnings and Waiver with Implicit Deception</i>	1252
IV.	POTENTIAL TESTS FOR JUDGING SIGNIFICANCE OF IMPLIED AND EXPLICIT DECEPTION PRACTICED BEFORE <i>MIRANDA</i> WARNINGS AND WAIVER	1254
	A. <i>Competing Supreme Court Standards</i>	1254
	B. <i>The Warnings Requirement as a Metaphor of a Lifeline</i>	1255
V.	PRE-WARNINGS INTERACTION WITH POLICE	1257
	A. <i>Fuzzy Picture of Allowable Pre-Waiver Deception Influenced by an Imprecise Definition for When Waiver Occurs</i>	1257
	B. <i>The Mild Version of Pre-Warnings “Softening Up”</i>	1260
	C. <i>A Bold But Honest Form of Pre-Warnings “Softening Up”</i>	1261
VI.	A PROPOSED PROHIBITION ON AFFIRMATIVE FALSEHOODS TOLD BEFORE WAIVER	1263
	A. <i>Framework for Distinctions on Treatment of Explicit and Implicit Incentives and Deceptions Leading to Waiver</i>	1263
	B. <i>A Proposed Bright Line at Explicit Non-De Minimis Pre-Warnings Deception</i>	1269

* Chadwick Professor of Law, Duke University School of Law. I would like to thank George Thomas, Arnold Loewy, and Jeff Powell for their helpful comments on an earlier draft of this Essay; all the participants at the symposium on Citizen Ignorance, Police Deception, and the Constitution on April 6, 2007, for their suggestions and comments; and Allison Hester-Haddad for assistance with the research.

VII. CONCLUSION 1272

I. INTRODUCTION

I regularly teach the criminal procedure course that covers the basic Fourth, Fifth, and Sixth Amendment principles governing police practices, which includes confession law.¹ For a number of years, I have started the confessions section of the course with a videotape of an interrogation taken from the trial of Anthony Beasley in Washington, D.C.² Among the reasons that this case is useful are that I practiced law for seven years with the Public Defender Service (PDS) in Washington, D.C., and I know the homicide detectives shown on the videotape, background information about typical practices in that jurisdiction, and a bit of specific information about the case from colleagues at PDS, who handled the trial and appeal.³

The *Beasley* interrogation involves both *Miranda* and voluntariness issues, including a tremendous amount of explicit and implicit police lying.⁴ Most, if not all, of the explicit lying is relevant only to voluntariness under the traditional Due Process analysis because it occurred after the police obtained Beasley's written waiver of his *Miranda* rights.⁵ The case also contains an "implicit-deception" issue.⁶ The Supreme Court subsequently decided this implicit-deception issue in *Colorado v. Spring*.⁷

Part II of this Essay sketches the facts and the analysis in *Beasley* to set some of the major dimensions of deception that courts allow under the Supreme Court's *Miranda* and voluntariness doctrine.⁸ Part III examines generally deception practiced before police secure a waiver from the suspect.⁹ Part III's analysis narrows the focus to overt deception practiced after the police place the suspect under arrest but before the police administer *Miranda* warnings.¹⁰ Part IV argues that courts should apply a per se prohibition to

1. See U.S. CONST. art. IV-VI. Of course, the Fourteenth Amendment is involved with state cases. See U.S. CONST. art. XIV.

2. See *Beasley v. United States*, 512 A.2d 1007, 1009 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 907 (1987).

3. Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1826 (1987). Professor Ogletree was one of my colleagues at PDS and has written about the *Beasley* case.

4. *Beasley*, 512 A.2d at 1009-11; see *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

5. *Beasley*, 512 A.2d at 1009-11.

6. *Id.* at 1012-13.

7. See *Colorado v. Spring*, 479 U.S. 564, 574 (1987). The District of Columbia Court of Appeals decided the issue the same way that the Supreme Court subsequently decided *Spring*. See *id.* at 574-75; *Beasley*, 512 A.2d at 1011-15 (ruling that the failure to inform Beasley that he was a suspect in a homicide when the police arrested him on a firearms charge, did not render his *Miranda* waiver invalid).

8. See *infra* Part II.

9. See *infra* Part III.

10. See *infra* Part III.

such pre-warning deception if the deception is more than de minimis.¹¹

II. THE *BEASLEY* INTERROGATION AND CONFESSION AS CONTEXT FOR ACCEPTED IMPLICIT AND EXPLICIT DECEPTION

A. A Case Study in Allowable Deception

The rough outline of the case and timeline are as follows.¹² Sometime shortly after midnight on September 18, 1982, a man armed with a gun approached a young woman, Shirley Person, as she got out of her car.¹³ He forced her back into the car and hit her on the head with his gun.¹⁴ Unbeknownst to the gunman, the blow caused a live round to eject from his .38 caliber semiautomatic handgun and hit Person's daughter who, also unbeknownst to the assailant, was in the backseat.¹⁵ The gunman drove away, learning soon thereafter of the child's presence.¹⁶

He drove to a remote area in southeast Washington, D.C., where he locked the child in the trunk of the car.¹⁷ He then robbed, sexually assaulted, and murdered Ms. Person.¹⁸ He drove back to her apartment and stole property from it.¹⁹ He abandoned the car nearby, and sometime later that morning, the child's cries from the trunk brought attention and, ultimately, the police to the car.²⁰ The police discovered Person's body a few hours later, and the investigation to find and to convict the perpetrator began.²¹

For months, the investigation went nowhere with no fingerprints or identification.²² Early in 1983, however, the police got a big break.²³ When the police recovered weapons in Washington, D.C. at that time, ballistics and tool-mark technicians routinely examined the weapons against evidence from open homicide cases for possible matches. The police recovered a Sterling .38 caliber semiautomatic handgun from an alley behind Beasley's apartment in November 1982.²⁴ In February, the routine processing program revealed a

11. See *infra* Part IV.

12. See *Beasley*, 512 A.2d at 1008-11.

13. *Id.* at 1008.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1009.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* The opinion gives no information regarding the reason for recovery of the weapon or any other reason to link it to Beasley. My understanding from Si Wasserstrom, former Director of PDS's Appellate Division and currently a Georgetown law professor, is that the police responded to a call for a domestic disturbance and found Beasley exiting the alley. The police found the weapon nearby in that alley.

tool-mark match left by the action of the automatic weapon upon the casing of the bullet ejected when the gunman struck Person.²⁵ A business in nearby northern Virginia had reported the weapon as stolen in July 1982.²⁶ Beasley became the prime suspect in the Person homicide, but the police still had no other evidence besides the gun linking him to the crime.²⁷

A little more than a week after the police discovered the tool-mark match, the district court issued a federal warrant for Beasley's arrest for possession of a weapon by a convicted felon.²⁸ Alcohol, Tobacco & Firearms (ATF) Special Agent Joseph D'Angelillo organized the arrest.²⁹ "Also present, but not visible to [Beasley], was [Metropolitan Police Department (MPD)] Homicide Detective David Forbes, who was in charge of" this homicide investigation.³⁰ Beasley was taken to the homicide department, where D'Angelillo informed Beasley that he was under arrest on a firearms charge.³¹ D'Angelillo, using the standard *Miranda* card of the MPD in Washington, D.C., read him his rights, which are on one side of the card.³² On the opposite side of the card, spaces provided for acknowledgment that the officer read the rights and that Beasley understood and waived his rights.³³ In the spaces provided, Beasley wrote four "yes" answers indicating an explicit waiver of those rights, and he then signed the card.³⁴

A momentous event had occurred. Beasley had executed a fully effective *Miranda* waiver and had lost all the protection that the landmark case potentially provided him. He then was situated much like pre-*Miranda* defendants, having Due Process voluntariness as his last potential protection; but indeed, he was worse off in that, to support voluntariness, the prosecution could use the fact that the police had faithfully given the *Miranda* warnings.³⁵

D'Angelillo began the questioning, asking Beasley about the gun.³⁶ In response to his questions, Beasley admitted stealing the gun in July, transporting it to D.C., and "maintaining sole possession of the gun up until the time it was recovered by the MPD in November 1982."³⁷ Unbeknownst to Beasley, he had just strongly linked himself to a homicide.

25. *See id.*

26. *Id.* at 1009 n.3.

27. *See id.* at 1009.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *See id.* at 1009 n.5.

33. *See id.*

34. *Id.* at 1009-10 & n.5.

35. *See, e.g.,* Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 109, 166 (1998) (noting that courts find compliance with *Miranda* to bolster the prosecutor's arguments that the voluntariness requirement was not violated).

36. *Id.* at 1010.

37. *Id.*

Detective Forbes then began questioning him about the homicide.³⁸ About twenty minutes into that questioning, Lieutenant William Ritchie of the homicide department called Forbes out of the room and informed him that the police would secretly videotape the interrogation.³⁹ This was a completely new practice for the MPD, which was unknown to Beasley, and which, after this interrogation, the police rather quickly discontinued.

When Forbes reentered the room, he reread the *Miranda* warnings to Beasley and reminded him that he previously waived those rights, but Forbes did not seek a new response regarding waiver.⁴⁰ Beasley began by denying the homicide.⁴¹ Forbes pressed on.⁴² He told Beasley a series of lies.⁴³ He stated that the police recovered Beasley's fingerprints using laser technology from inside of the victim's car.⁴⁴ Beasley then admitted touching the car; however, he gave an innocent explanation.⁴⁵ He explained that he was walking near where police found the car with the child inside, and he entered the car only after he heard a child's cries in an unsuccessful effort to find a way to unlock the trunk.⁴⁶ Forbes also lied that two witnesses identified Beasley.⁴⁷ He claimed that both the child and the building superintendent at Person's apartment had identified Beasley.⁴⁸ He described the child's identification as particularly positive, putting his finger close to Beasley's face to demonstrate her in-court identification, which Forbes contended would surely convict him.⁴⁹ Although the building superintendent later made an identification of Beasley from a lineup photo, the child never identified Beasley either before or at trial.⁵⁰

Forbes made vague statements that the United States Attorneys' Office might treat him better if Beasley admitted his guilt.⁵¹ Only one of these statements seemed to be the type of explicit promise that causes trouble under voluntariness law.⁵² Beasley indicated several times that he thought kidnapping carried a fifty-year sentence.⁵³ At one point, Forbes flatly stated that the

38. *Id.* at 1010.

39. *Id.*

40. *Id.*

41. *Id.*

42. Videotape: Anthony Beasley Interrogation (Metropolitan Police Department 1983) (on file with author) [hereinafter Beasley Video].

43. *Beasley*, 512 A.2d at 1010.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Beasley Video, *supra* note 42.

50. *Id.* at 1009 & n.2.

51. *Id.* at 1010.

52. *See Watts v. Indiana*, 338 U.S. 49, 53 (1949).

53. Beasley Video, *supra* note 42.

United States Attorney could drop that charge if he confessed.⁵⁴ My suspicion is that this particular statement caused the court of appeals some concern. The court found, however, that Forbes's promise of leniency was not sufficient to make the statement involuntary, appearing to state that no direct link existed between that promise and Beasley's ultimate confession.⁵⁵ It is entirely accurate that at the point Beasley confessed, the detectives stated repeatedly that the only promises being made were the vague ones that confessing could help Beasley and that his cooperation would be brought to the attention of the prosecutor.⁵⁶

The statement about the kidnapping was problematic because it promised leniency. It should not, however, have been problematic as a lie. Forbes should have known that kidnapping while armed under the D.C. Code carried no particularly harsh level of punishment, and other charges against Beasley, such as armed robbery, were equally severe in their potential punishment.⁵⁷ Thus, even though he could not personally guarantee that the prosecutor, who controlled the decision, would drop the kidnapping charge,⁵⁸ he was not saying anything substantively unreasonable. Indeed, without affecting very much of Beasley's ultimate sentence, the prosecutor could have easily dropped the kidnapping charge, and my assumption is that if the law permitted the prosecutor to do so in exchange for a confession, the prosecutor would have made the deal.⁵⁹

The police made another, more vague promise to Beasley, which seems to me to have been clearly false. Forbes stated that, while he did not know what the prosecutor's office would do, it might be possible that it would allow Beasley to plead guilty to second-degree murder rather than face the charge of first-degree murder if he cooperated.⁶⁰ From my experience at PDS, no

54. *Id.*

55. *See Beasley*, 512 A.2d at 1016.

A false claim by the police that they have strong evidence of guilt coupled with a true or false offer of leniency if the suspect confesses could logically induce a false confession. *See* George C. Thomas III, *Regulating Police Deception During Interrogation*, 39 TEX. TECH L. REV. 1293, 1318 (2007). The appellate court did not have to squarely face this problematic fact pattern for false evidence because later statements by the police had the effect of making the inducement less explicit and because there was no reference to possible leniency regarding kidnapping by either Beasley or the detectives as Beasley turned from denial toward confessing.

56. *Beasley Video*, *supra* note 42.

57. *See* D.C. CODE § 22-3202 (1981) (current version at D.C. CODE § 22-4502 (2001)). The maximum sentence for armed kidnapping was a fifteen-year-minimum term and a maximum term of life imprisonment. *Id.*; *see* D.C. CODE § 22-2101 (1981) (prescribing maximum of life imprisonment for unarmed kidnapping) (current version at D.C. CODE § 22-2001 (2001)). The maximum sentence for armed robbery was also a 15-year-minimum term and a maximum term of life imprisonment. D.C. CODE § 22-3202 (1981) (current version at D.C. CODE § 22-4502 (2001)); *see* D.C. CODE § 22-2901 (1981) (prescribing a minimum sentence of two years and a maximum sentence of fifteen years for unarmed robbery) (current version at D.C. CODE § 22-2801 (2001)).

58. *See Beasley*, 512 A.2d at 1016 n.11.

59. *See id.*

60. *See id.* at 1016.

defendant, who confessed to a charge with the type of homicide committed in this case, was permitted to plead guilty to second-degree murder. The United States Attorneys' Office appeared to have a policy that insisted upon a plea to first-degree murder, or it would take the case to trial. Of course, couched in the language an uncertain possibility, the detective's statement was in one sense true. But, it was true in much the same way as for other highly unlikely, but possible, events, such as heavy snow on the Fourth of July.

Forbes's persistent and insistent march forward with assertions that he knew what had happened the night of the murder produced real progress in the interrogation.⁶¹ His attitude was that Beasley might as well admit those facts, which Beasley ineptly denied, but he often included direct or indirect admissions of part of the asserted facts.⁶² Forbes stated that the police had a strong case against Beasley and then presented it.⁶³ Forbes mainly presented to Beasley, however, false information.⁶⁴ He used specific evidentiary lies, such as his claim that they had recovered Beasley's fingerprints from the car's interior and that the building superintendent who appeared to have helped the perpetrator carry stolen items to the car had identified him.⁶⁵ In response, Beasley admitted getting into the car and going into the apartment building.⁶⁶

Forbes used a version of the true connection that led the police to Beasley—the gun. For some reason, Forbes claimed that the victim's blood had been left on the gun when Beasley hit her and never mentioned the tool-mark evidence linking the ejected round to the gun.⁶⁷ Perhaps the true version was too complicated or sounded unimpressive beside the fingerprint claim.⁶⁸ Forbes also reminded Beasley that he had admitted to having what Forbes described as sole possession of the gun from the time Beasley stole the gun until the time the police recovered the gun, which meant he had it when the murder occurred.⁶⁹ Beasley tried to explain that he meant only that he had access to the gun throughout that period, which did not mean he was the only person who had it.⁷⁰ He seemed, however, to sense that his explanation was weak, and Beasley never repeated that denial of Forbes's charge.⁷¹

61. Beasley Video, *supra* note 42.

62. *See Beasley*, 512 A.2d at 1010.

63. Beasley Video, *supra* note 42.

64. *Id.*

65. *Beasley*, 512 A.2d at 1010.

66. *See id.* at 1010; Beasley Video, *supra* note 42.

67. *See Beasley*, 512 A.2d at 1010 and videotape of interrogation (on file with author).

68. One may contest the definition of deception in some situations, including this one, because the police presented a basically true fact—that a forensic examination had linked Beasley to the gun—in a somewhat false form—serology rather than tool-mark examination. *See id.* at 1009. Given that these claims should have carried roughly equal power, I would not define this apparently purposeful, but instead as substantively inconsequential misstatement of actual evidence as deception. *See id.*; Thomas, *supra* note 55, at 1295.

69. Beasley Video, *supra* note 42.

70. *Id.*

71. *Id.*

After about an hour of questioning, Beasley had admitted more and more facts, such as helping to carry property belonging to the victim out of the building, but claiming that he did it for “Butch.”⁷² After a while, he admitted seeing blood on Butch’s shoes and later that Butch had told him about committing the murder.⁷³ Forbes asserted that Beasley was Butch.⁷⁴ Beasley denied it.⁷⁵ Everyone seemed tired.⁷⁶

Beasley must have known that he had provided a lot of damaging information. He asked to speak to Detective Joseph McCann, then a homicide detective whom Beasley got to know through his earlier criminal activity when McCann arrested him on burglary charges and he acted as an informant of McCann.⁷⁷

The videotape is quite unsatisfactory at this point. It goes blank, and when it comes back on, Detective McCann is present. Apparently, during the blackout, Beasley told McCann that he would like to confess to the murder.⁷⁸

The tape showed from this point forward the painful process of Beasley admitting to at least most of the horrible crimes that he committed.⁷⁹ It contained more police deception, but of a somewhat different kind. First, because Beasley did not know he was being videotaped, so as not to have to reveal that point, the officers spent a good bit of time trying to get a handheld recording device to work correctly.⁸⁰ McCann appeared to follow the standard advice to show sympathy for the suspect.⁸¹ McCann stated, “I couldn’t have done what you did, but I’ve never had to walk in your shoes.”⁸² McCann told Beasley the importance of letting his emotions show in giving the confession so that the judge and jury could appreciate how sorry he was.⁸³ McCann encouraged Beasley to show his emotions: “If you need to cry, cry.”⁸⁴ None of this could have mattered, and the detectives had to know it.

If McCann was speaking at all of legal consequences, he told the biggest lie—it seems to me—at the end of the interrogation. After Beasley completed his confession and Forbes asked his followup questions, Forbes left McCann and Beasley alone in the interrogation room.⁸⁵ McCann stated, “You were in

72. See *Beasley*, 512 A.2d at 1010.

73. *Id.*; *Beasley Video*, *supra* note 42.

74. *Beasley Video*, *supra* note 42.

75. *Id.*

76. *Id.*

77. *Beasley*, 512 A.2d at 1011; *Beasley Video*, *supra* note 42.

78. *Beasley Video*, *supra* note 42.

79. See *Beasley*, 512 A.2d at 1011; *Beasley Video*, *supra* note 42.

80. *Beasley Video*, *supra* note 42.

81. See *id.*; Mark Costanzo & Richard A. Leo, *Research and Expert Testimony of Interrogations and Confessions*, in *EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS* (Mark Costanzo, Daniel Krauss, Kathy Pezdek eds., 2d ed. 2007).

82. *Beasley Video*, *supra* note 42 (quoting McCann on the videotape).

83. See *id.*

84. *Id.* (quoting McCann on the videotape).

85. *Id.*

deep trouble before. Deep trouble when you killed her. You're not in deep trouble now."⁸⁶ He also told Beasley that certainly prison time was in front of him, but "[h]opefully the judge and jury will be lenient."⁸⁷

Without the confession, the jury may not have convicted Beasley. With that confession, he was virtually certain to be convicted. And once convicted, he would be sentenced to an extremely heavy sentence. At that time, Washington, D.C., like many jurisdictions, had no sentence of life without parole. The longest mandatory sentence in Washington, D.C. at that time was applicable to first-degree murder, which carried a mandatory minimum of twenty years.⁸⁸ In the age of parole, the rough cumulative sentence for Beasley's crimes—given all the different offenses he had committed⁸⁹ and his prior record of convictions—was in the area of forty-five years of incarceration before the parole board even had the possibility to review Beasley's sentence for the first time.⁹⁰ Given that Beasley was in his mid-twenties, he should have expected his first chance at freedom about the time he was seventy years old. Forbes and McCann likely shared a similar calculus. One might "hope" for leniency, but in the world in which the actors in this case resided, it was not a fair possibility. It was part of the overall deception.

The trial court admitted the statement; the jury convicted Beasley, and the court of appeals affirmed on decisions as to both implicit *Miranda* deception and explicit Due Process deception that reflects established law both then and now.⁹¹ Beasley remains in federal prison today.⁹²

86. *Id.* (quoting McCann on the videotape).

87. *Id.*

88. See D.C. CODE § 22-2404 (1981) (establishing a mandatory minimum sentence of twenty years in prison for first-degree murder) (current version at D.C. CODE § 22-2104 (2001)).

89. *Beasley*, 512 A.2d at 1007. The opinion indicates that Beasley was convicted of nine offenses. *Id.*

90. See D.C. CODE § 24-405 (1981) (repealed 1987). In Washington, D.C. at that time, "good time" earned in prison affected only the maximum term, which is meaningless for a life sentence, and had no effect on the date of the parole board's first review because the first review could not occur before the minimum term. *Id.*

91. As noted earlier, the Supreme Court in *Colorado v. Spring* approved the implicit deception regarding the crimes about which the police might question Beasley. *Colorado v. Spring*, 479 U.S. 564, 573-74 (1987). The District of Columbia Court of Appeals concluded that the deception the police practiced was not such as to produce a false confession. *Beasley*, 512 A.2d at 1015-16. The court's determination was, and is, a correct application of the law on involuntariness. See *Spring*, 479 U.S. at 573-74; *Beasley*, 512 A.2d at 1015-16. I cannot fashion an argument that any of these lies or the conditions of the interrogation would have caused an innocent person to confess to such a serious offense. See Thomas, *supra* note 55, at 1307.

92. See Federal Bureau of Prisons, Inmate Locator, <http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=NameSearch&needingMOreList=false&LastName=beasley&Middle=w&FirstName=anthony&Race=U&Sex=U&Age=&x=27&y=17> (last visited May 20, 2007). According to Federal Bureau of Prison records, he is serving a life sentence at the federal facility in Allenwood, Pennsylvania. *Id.* The Federal Bureau of Prisons website (www.bop.gov) gives the following information: [name] Anthony W. Beasley [register number] 39530-066 [age] 54 [race] black [sex] male [projected release date] life [location] Allenwood USP. *Id.*

B. The Basic Cons, Frailties of Suspects, and Expected Role of Counsel

As Professor Richard Leo stated, “The essence of the con . . . lies in convincing the suspect that he and the interrogator share a common interest, that their relationship is a symbiotic rather than an adversarial one.”⁹³ Leo’s characterization provides a good point of departure for thinking about one type of deception with respect to confessions—the police are on your side. The goal of interrogators is to convince the individual that they, or at least some of them, share the interest of the suspect. That was clearly the role of McCann. A second con is to convince suspects that it is in their self-interests to confess.⁹⁴ That may be because their cases are hopeless, and they might as well admit to what they did. The court of appeals in *Beasley* acknowledged that was the purpose of many of Forbes’s lies.⁹⁵ The repeated, albeit mostly vague, statements about potential leniency also fell into another aspect of this category—confessing to secure a lighter sentence.⁹⁶

Self-interest may support a confession because the suspect may gain substantial benefits from the confession, or because all hope is lost anyway given the strength of the evidence, and perhaps, suspects should make the best of a bad situation by showing contrition and demonstrating cooperation.⁹⁷ I do not claim empirically validated data regarding the motivations of those under interrogation, but I assume that for many who confess an irrational hope also exists that something good will occur—they hear and imagine what they want to hear.

From the perspective of the criminal defense attorney, about which I do know, the best practice is often to cooperate and ultimately to tell all to the prosecutor. The defense attorney’s perspective, however, is usually one of conservatism. Until something is known about the available evidence against the suspect, it is best not to state anything. Cooperation may be the appropriate outcome, but suspects should not make incriminating statements for nothing, which is often what the custodial confession proves to be. That conservatism

93. Richard A. Leo, *Miranda’s Revenge: Police Interrogation as a Confidence Game*, 30 LAW & SOC’Y REV. 259, 266 (1996).

94. *See id.* at 279-81.

95. *Beasley*, 512 A.2d at 1014-16. “We think it is beyond dispute that these remarks [about the fingerprints and identifications] were intended to cause appellant to believe that he might as well confess because the weight of the evidence against him . . .” *Id.* at 1016. The court, however, did not believe the comments were sufficient “to coerce a false confession,” which is frequently stated as the test for voluntariness when predicated exclusively upon police lies. *Id.* Professor Joseph Grano argued that such is the correct test. Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confession Law*, 84 MICH. L. REV. 662, 680-81 (1986).

96. *See Beasley*, 512 A.2d at 1015-16. Both of these basic ploys may be seen as part of what is called the “Reid Technique.” *See* Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 808-09 (2006). John R. Reid commercialized Fred Inbau’s approach for law enforcement officers to use in convincing suspects to confess in their own self-interests. *Id.*

97. *See* Leo, *supra* note 93, at 274-82.

can turn out to be misguided for suspects in all types of cases,⁹⁸ but particularly in minor ones. The police have broad discretion to ignore minor criminal violations, and even for more serious offenses often have a great deal of influence with prosecutors. An early admission of guilt in some cases is the right course of action, even if it is very risky.

The police have stopped me several times for minor traffic offenses. Whether a good strategy or not, my practice has been to be cooperative and to admit what I did wrong. It has generally worked either to my benefit or at least not to my harm. My encounters with prosecutors tell me that about the worst thing one can do in such situations is to anger the officer. In those cases, many prosecutors state that their hands are effectively tied, and they must fully prosecute or risk the noncooperation of the officer in the multitude of cases that the two are likely to have together in the future. Thus, a lawyer's advice to the client to assert the client's rights and firmly state them might be very bad advice. Indeed, it might result in prosecution when the minor infraction might otherwise have been forgiven.

Clients also may want to confess because of their own personal judgements or misjudgments about the merits of the case and their best interests. One case I had while at PDS arose when I was doing the daily service the PDS provided to citizens with legal problems who called asking for help. The caller had not been at home when a police officer came by his residence. The officer had left his card and asked the caller to contact him.

During a conference with the caller—now my client—I learned that he had been in a traffic accident and an ensuing altercation with the other motorist that had resulted in an exchange of blows. My client believed quite clearly that the other individual had assaulted him and was happy to meet with the officer to tell him as much. I was cautious. I called the officer and learned from the officer and a quick examination of police records that the police believed that the client was guilty of the assault. The other man was in his seventies, while my client was in his early twenties. The older gentleman had suffered some injuries and had reported the offense to the police. The standard indicators of whom to believe did not favor my client. Still, my client was eager to tell his story.

The client, however, accepted my advice to say nothing. At 5:00 a.m. the next morning—the officer set the inconvenient time—I accompanied my client to the designated police station.⁹⁹ The officer arrested the client and read him

98. Frequently, when multiple perpetrators are involved, the one who cooperates first gets the biggest reward, and indeed, that person can sometimes convince the prosecution that his role was relatively insignificant, perhaps even less significant than it actually was. In those situations, early cooperation, sometimes even without the help of an attorney, proves advantageous for the suspect, while caution proves damaging.

99. My assumption is that the officer agreed to me surrendering the client because of the minor nature of the crime. In a homicide case, for example, it is not clear to me that the police might continue searching for the suspect with the hope of securing a confession after *Miranda* warnings and waiver in the

his *Miranda* rights, exactly as the police did with Beasley.¹⁰⁰ I advised my client to respond with two “no” answers to the waiver questions. My client had officially asserted his *Miranda* rights.¹⁰¹ To my great surprise, the officer then turned to my client and said, “You were there, weren’t you?” Despite being startled, I had the presence of mind to jump in and say, “He’s not saying anything.” And the officer took my client from his office and the investigation stage to the relative safety of booking and formal proceedings.

I appeared in court later that morning where the judge released my client without having to post any bond, given his clean record and that he only faced a misdemeanor assault charge. He was served with an order to appear later that week in a lineup. At that lineup, the presiding officer asked an elderly gentleman whether he saw the person who assaulted him in the lineup. The man stared at the lineup for a period of time, and then he stated either “no” or that he was not sure of anyone without even venturing a guess. A few days later, the prosecutor dismissed the case.

Lawyer conservatism served this client’s interest. It is what the dissenters in *Miranda* assumed would be its result.¹⁰² What I did is what defense lawyers generally would do. It is not what Beasley did as he passed right through the *Miranda* stage of the process and the safety it potentially provides, waiving the rights that would have stopped cold the prolonged questioning that led to his conviction.¹⁰³ Why did he not assert his *Miranda* rights?¹⁰⁴

III. DECEPTION PRACTICE: PRE-*MIRANDA* WARNINGS AND WAIVER

One theory explaining why Beasley did not assert his *Miranda* rights but instead waived them at the beginning of the interrogation is that he had no idea what he was facing.¹⁰⁵ The police told him that they arrested him for a weapons offense.¹⁰⁶ He waived his rights.¹⁰⁷ The first officer who questioned him was a federal ATF officer, who received from him an admission that he stole and “maintain[ed] sole possession of the gun” until the police recovered

absence of the lawyer. *Cf.* *Moran v. Burbine*, 475 U.S. 412, 422 (1986) (holding that when a lawyer’s attempts to reach the client are unknown to the client, police deception of the lawyer to foil the lawyer’s effort is irrelevant to the suspect’s mental state and therefore to the legality of the *Miranda* waiver).

100. *See Beasley v. United States*, 512 A.2d 1007, 1009 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 907 (1987).

101. *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

102. *See id.* at 516 n.12 (Harlan, J., dissenting) (noting that to suggest the provision of counsel is an invitation to the end of confessions because no lawyer “‘worth his salt’” would advise that the suspect answer questions). Justice White’s dissent also predicted the substantial negative impact of the decision on successful criminal prosecutions. *See id.* at 541-42 (White, J., dissenting).

103. *See Beasley*, 512 A.2d at 1010.

104. *Miranda*, 384 U.S. at 467-68.

105. *See Beasley*, 512 A.2d at 1010.

106. *Id.* at 1009.

107. *Id.* at 1010.

it in the alley behind Beasley's apartment.¹⁰⁸ Beasley had absolutely no reason to know that, by acknowledging sole possession during this period of time, he provided a key admission that linked him to the Person homicide. He had not fired the gun, and no indication existed that he had any idea that the bullet had been ejected when he struck Person or knowledge that it would have left tool marks.

A. No Police Responsibility to Help Suspect "Calibrate His Self-Interest"

Thus, when Beasley waived his rights, he thought he only faced a weapons offense.¹⁰⁹ One cannot be confident about what he knew regarding the possible or likely sentence on that charge. A felon's possession of a weapon at that time, however, was a low-grade felony in D.C. that carried a maximum sentence, until parole eligibility, of three and one-third years.¹¹⁰ One can reasonably assume that with his prior experience in the criminal justice system, Beasley had a roughly accurate assessment that he would be charged with a low-grade felony that might result in some prison time but not a lengthy sentence. One may assume that Beasley believed, as one may do with minor traffic offenses, that cooperating and talking to the police was in his best interest, given the strength of their evidence regarding a relatively minor offense.

The circumstantial evidence indicated that the police operated on this same premise.¹¹¹ The court of appeals noted that Forbes, the homicide detective, was out of sight during the arrest.¹¹² The ATF agent administered the *Miranda* warnings and waiver, not the homicide detective. If the Constitution mandated that intent mattered, it is relatively clear that the police intended to take advantage of Beasley's ignorance to obtain a waiver of *Miranda* and a critical admission to possession of the gun at the time of the homicide. Once the police accomplished those two goals, Beasley was in a much different situation. Then, the homicide detective, Forbes, took over the questioning. Beasley found himself figuratively in a hole, and as the inept and ill-advised often do, he dug deeper in a futile effort to get out.

B. Basic Supreme Court Teaching on Pre-Warnings and Waiver with

108. *Id.*

109. *Id.* at 1009.

110. D.C. CODE § 22-3204 (1981) (setting ten years as the maximum term for gun possession for a person previously convicted of a felony) (current version at D.C. CODE § 22-4504 (2001)); D.C. CODE § 24-203(a) (1981) (setting one-third of the maximum term—in this situation three and one-third years—as the highest minimum term the law permits) (current version at D.C. CODE § 24-403 (2001)).

111. *See id.* at 1009-11.

112. *Beasley*, 512 A.2d at 1009.

Implicit Deception

The Beasley situation presented in this Essay exhibited a fact situation similar to that in *Colorado v. Spring*, which sets up some of the critical aspects of the Court's analysis of pre-*Miranda* warnings and waiver implicit deception.¹¹³ The Court in *Spring* stated:

Spring nevertheless insists that the failure of the ATF agents to inform him that he would be questioned about the murder constituted official "trickery" sufficient to invalidate his waiver of his Fifth Amendment privilege, even if the official conduct did not amount to "coercion." Even assuming that Spring's proposed distinction has merit, we reject his conclusion. This Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is "trickery" sufficient to invalidate a suspect's waiver of *Miranda* rights, and we expressly decline so to hold today.¹¹⁴

In contrast to mere silence, the Court further noted:

In certain circumstances, the Court has found affirmative misrepresentations by the police sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege. *See, e.g., Lynumn v. Illinois*, 372 U.S. 528 . . . (1963) (misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary); *Spano v. New York*, 360 U.S. 315 . . . (1959) (misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary). In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance.¹¹⁵

The Court additionally reasoned:

Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right—"his right to refuse to answer any question which might incriminate him." *United States v. Washington*, 431 U.S. 181, 188 . . . (1977). "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." *Ibid.* We have held that a valid waiver does not require that an individual be informed of all information "useful" in making his decision or all information that "might . . . affec[t] his decision to confess." *Moran v.*

113. *See Colorado v. Spring*, 479 U.S. 564, 566-77 (1987); *Beasley*, 512 A.2d at 1008-16.

114. *Spring*, 479 U.S. at 576.

115. *Id.* at 576 n.8.

Burbine, 475 U.S., at 422 . . . “[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.” *Ibid.* Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature. Accordingly, the failure of the law enforcement officials to inform Spring of the subject matter of the interrogation could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner.¹¹⁶

In justifying the rejection of a requirement that the police supply information to help the suspect judge his self-interest, the Court observed:

Such an extension of *Miranda* would spawn numerous problems of interpretation because any number of factors could affect a suspect's decision to waive his *Miranda* rights. The requirement would also vitiate to a great extent the *Miranda* rule's important “virtue of informing police and prosecutors with specificity” as to how a pretrial questioning of a suspect must be conducted. *Fare v. Michael C.*, 442 U.S. 707, 718 . . . (1979).¹¹⁷

One can find several broad messages in the Supreme Court's discussion. The significant general point is that the police are not required to provide information to aid suspects in calibrating their self-interest in deciding whether to invoke or waive *Miranda* rights, and thus, their failure to provide such information either does not constitute deception at all or at least does not constitute deception that invalidates the *Miranda* waiver. The Court suggests two characteristics of police conduct that may be useful in dividing the acceptable from the unacceptable. First, a rule that requires officers to state helpful information would create too much uncertainty of application. Thus, any prohibition will likely be grounded in affirmative rather than passive police conduct because of the Court's desire for clear standards. Second, the failure to state information is potentially distinguishable from an affirmative misrepresentation. The Court's previous rulings have excluded statements based on active deception.

116. *Id.* at 576-77 (alteration in original).

117. *Id.* at 577 n.9.

IV. POTENTIAL TESTS FOR JUDGING SIGNIFICANCE OF IMPLIED
AND EXPLICIT DECEPTION PRACTICED BEFORE *MIRANDA*
WARNINGS AND WAIVER

A. *Competing Supreme Court Standards*

This Essay focuses on the limits of “deception” practiced before suspects waive their *Miranda* rights.¹¹⁸ *Spring* involved arguable deception through omission and provides some indicators of limitations on the meaning of deception that counts at this stage.¹¹⁹ Apparently competing Supreme Court declare the test to be applied.¹²⁰

First, the *Miranda* decision itself contains some additional guiding language:

[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the [suspect] did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.¹²¹

The quotation appears to forbid any evidence of threats, tricks, or cajolery, which contributes to a waiver of the privilege.¹²² This rule would produce a per se exclusion of statements when the requisite police deception is shown.¹²³ Is that, can that, and should that be the law governing pre-*Miranda* deception?¹²⁴

That statement from *Miranda* is not the last word, however, from the Court on trickery and waiver.¹²⁵ In *Moran v. Burbine*, the Court stated:

Echoing the standard first articulated in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *Miranda* holds that “[t]he defendant may waive effectuation” of the rights conveyed in the warnings “provided the waiver is made voluntarily, knowingly and intelligently.” 384 U.S. at 444, 475. The inquiry has two distinct dimensions. . . . First, the relinquishment of the right must have been

118. See *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

119. *Spring*, 479 U.S. at 576-77, 577 n.9.

120. Compare *Moran v. Burbine*, 475 U.S. 412, 421 (1986) (noting that some police deception does not lead to exclusion—the warnings protect the suspects’ right against self-incrimination—as long as suspects have an uncoerced choice, the waiver will be valid), with *Miranda*, 384 U.S. at 476 (stating that any evidence of deception may lead to exclusion of the suspects’ subsequent statements).

121. *Miranda*, 384 U.S. at 476.

122. See *id.*

123. See *id.* Although the per se quality of the Court’s statement appears to be limited by the fact that the trickery must produce waiver, it remains a categorical statement because it requires the suspect only to produce “any evidence.” *Id.*

124. See *id.*

125. *Burbine*, 475 U.S. at 421.

voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived.¹²⁶

Burbine appears to shift the focus of the critical determination away from the nature of the police conduct to its effect on waiver. That effect is to be judged in terms of its impact upon the suspects’ comprehension and on its potential coercive impact on their choice to waive or invoke their *Miranda* rights.

At a more fundamental and constitutionally substantive level and consistent with the somewhat different focus of *Burbine*, *Miranda* is not directly concerned with deception.¹²⁷ *Miranda* is instead concerned with the Fifth Amendment’s protection against compelled self-incrimination.¹²⁸ The Court’s design in imposing the remedy—the set warnings—aimed to eliminate the compelling atmosphere of custodial interrogation, and once the police administer the warnings, the Court assumed waiver of those rights in this same compelling atmosphere is possible.¹²⁹ *Miranda* warnings are seen as performing this almost magical transformation.

The substantive question regarding deception would appear to be as follows: When does deception make the *Miranda* warnings and the ensuing waiver ineffective to eliminate this compelling atmosphere? The deception can interfere with the effectiveness of the warning. It can prevent the waiver from being constitutionally effective. More broadly, *Miranda*’s language regarding threats, tricks, and cajolery may indicate that such conduct can destroy the curative effect of *Miranda* warnings.¹³⁰ The subjects of this Essay’s examination are whether strict limits on deception are theoretically sound or consistent with lower court case law generally or in any set of circumstances.

B. The Warnings Requirement as a Metaphor of a Lifeline

In my criminal procedure class, I present the miraculous effect of *Miranda* and what appears to be the limited reach of its requirements through a metaphor. The metaphor is that of a person in a flowing river, with the assumption that some danger exists of drowning. The *Miranda* warnings are

126. *Id.*

127. *See id.* at 421-24.

128. *Id.* at 424.

129. *See id.* at 426-28.

130. *Id.*

a lifeline that can drag the person out of that water to dry land. (Perhaps the lawyer is attached to the other end of the line, but certainly no one is visible.) The Court requires that the police, who are present in the water with the suspect, place that lifeline squarely in the suspect's hand. That is all that *Miranda* requires. The lifeline must squarely hit the suspect's hand: no more, no less.

The suspect then has the choice to grasp it or let it slip from the hand and continue down the river in the company of the police. After the suspect allows the lifeline to slip from his or her hand, the police must allow the suspect to reach out and grab it at any moment, but the suspect must affirmatively act. Thus, the police must keep the lifeline nearby, but they need never call attention to it and certainly are not required to place it in the suspect's hand again.

Spring and *Beasley* hold that the police need not tell the suspect anything about the dangers of the river, other than the general statement of the potential danger of being in the water where drowning is possible and that the police are not lifeguards—that anything the suspect says can be used against the suspect, which indicates that the suspect “is not in the presence of persons acting solely in his interest.”¹³¹ The suspect obviously knows that the river has some dangerous potential. (He has been arrested and is facing interrogation by a police officer.) Beyond that basic fact, however, these cases hold that the police need not communicate to the suspect dangers known to the police that await unseen just around a bend in the river. Indeed, under the logic of *Beasley* and *Spring*, the police can pick the time to offer the lifeline so that it lands in the suspect's hand when the river is particularly calm.¹³²

Everyone knows that once the suspect lets the line slip, the police can engage in rather rough tactics to cause panic through lying that may lead the suspect to act against his or her self-interest. (The river image ends largely at the point the lifeline is abandoned.)¹³³

131. *Id.* at 469; see *Beasley v. United States*, 512 A.2d 1007, 1014 (D.C. Cir. 1986), *cert denied*, 482 U.S. 907 (1987) (“The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege.”) (citing *Moran v. Burbine*, 475 U.S. 412, 422 (1986); *Oregon v. Elstad*, 470 U.S. 298, 316-17 (1987)), *cert. denied*, 482 U.S. 907 (1987). Professor Loewy contends that the *Miranda* warnings are defective in conveying this point, and courts should in fact modify them to incorporate a clear warning that the suspect is not among friends. See Arnold H. Loewy, *The Supreme Court, Confessions, and Judicial Schizophrenia*, 43 SAN DIEGO L. REV. (forthcoming 2007) (manuscript at 8, on file with author). I do not disagree with his arguments. My point is that the Supreme Court in *Miranda* intended that the police convey this message by the warning that anything the suspect says may later be used against the suspect. See generally *Miranda*, 384 U.S. at 467-68 (delineating the *Miranda* warnings). I accept that the message may not be effectively heard, and later cases have made clear that the courts require the police to state nothing more about the danger of the interrogation situation. See, e.g., *Colorado v. Spring*, 479 U.S. 564, 575 (1987).

132. See *Spring*, 479 U.S. at 574; *Beasley*, 512 A.2d at 1014.

133. I have not developed all the details of the river metaphor, but the larger story is generally that the suspect has an interest in moving in the direction that the river is flowing and therefore does not want to leave the water. The suspect is likely in a boat before the police come into the water and overturn it

Other than to induce an innocent person to give a false statement, many courts assume that any lie is permitted.¹³⁴ Also, as long as the police offer inducements that remain vague, the police can freely and frequently offer these inducements.¹³⁵

Returning to the point of warning and waiver, beside picking the time and place to provide the lifeline (e.g., arresting for a minor offense and getting waiver), what else can the police do? What can the police do beyond silence—the nondisclosure of what awaits down stream? What can the police state to persuade the suspect that grabbing the lifeline is not the course to take? What can the police state to make the suspect believe the water is calm, so that staying in it with the police is an attractive choice or believe it is so treacherous that grasping the lifeline to get out seems not worth doing?

V. PRE-WARNINGS INTERACTION WITH POLICE

The law is clear that courts do not admit a statement into evidence if the police interrogate the suspect while in custody without *Miranda* warnings and waiver.¹³⁶ The focus of this Essay is the suspect's interaction with the police before the warnings and waiver occurs.¹³⁷ More particularly, I want to look at interactions after the arrest has occurred, but before the police administer any warnings.

A. Fuzzy Picture of Allowable Pre-Waiver Deception Influenced by an Imprecise Definition for When Waiver Occurs

The *Beasley* facts provided a procedural situation in which each pertinent event associated with waiver happened sequentially and distinctly and without apparently much other conversation: (1) the police arrested the suspect on a weapons charge, which was made known to him; (2) the police read him his rights; (3) he executed a written waiver of both his right to silence and his right to the presence of an attorney; and (4) the police interrogated and affirmatively lied to him.¹³⁸ In this context, like *Spring*, the defendant contended that the

(arrest the suspect). Thus, the suspect is clearly apprehensive, but in terms of getting to the intended destination, staying in the water and floating along, if this can be done, is preferable to grabbing the lifeline and abandoning the trip. Once the lifeline slips from the suspect's hand, the police may act roughly (lie), such as pulling the suspect under water, causing panic, and inducing the suspect to give up the journey and leave the river with them (confess).

134. See, e.g., *Ledbetter v. Edwards*, 35 F.3d 1062, 1069 (6th Cir. 1994); *Miller v. Fenton*, 796 F.2d 598, 607 (3d Cir. 1986).

135. See, e.g., *United States v. Burgess*, 33 F. App'x 386, 389 (10th Cir. 2002) ("The officers' promises were vague and non-committal, and such promises are not coercive.").

136. *Id.* at 467-68.

137. *Cf. id.* at 477-78 (noting that police can investigate crimes without needing to administer *Miranda* warnings).

138. *Beasley v. United States*, 512 A.2d 1007, 1009-11 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 907

failure to give information before the warnings and waiver tainted the waiver.¹³⁹ The Supreme Court rejected the argument in part on the grounds that no affirmative misrepresentation occurred before the warnings and waiver.¹⁴⁰

By no means are all fact patterns so clear, and as this Essay develops below, the jumbling of the sequence of events under some fact patterns is likely responsible for some of the imprecision in the case law. The *Miranda* Court would no doubt have incurred additional criticism for judicial legislation that went beyond the requirements of the Fifth Amendment if it had done so, but if the Court had required a more rigid procedure for warnings and waiver, it could have averted many of the problems currently encountered with the police undercutting the effective power of the warnings.

The Court, for instance, might have commanded the following: As soon as the police arrest a suspect and safely secure him, the police must read him the *Miranda* rights from a printed form. Furthermore, the Court could have required that no conversation between the police and the suspect may precede the warning that is not necessary to accomplishing the arrest. The suspect then must explicitly invoke or waive the right to silence and the right to the presence of an attorney. The suspect must do so, when possible, in writing. Only after they secure the explicit waiver can police proceed to question the suspect.

The Court's subsequent decisions, whose new members are arguably less committed to *Miranda*'s enforcement than the Warren Court, demonstrate that the Supreme Court did not write *Miranda* in this way, and thus, courts permit waiver under very different practices. In *North Carolina v. Butler*, the Court ruled that after warnings are given and the suspect stated his understanding of the rights, the suspect may waive his rights without an explicit statement.¹⁴¹ Waiver may be implicit in a course of conduct indicating waiver—in some cases “inferred from the actions and words of the person interrogated.”¹⁴²

This fuzzing of the line when waiver occurs makes it more difficult for courts to create a clear rule on deception in the pre-warning and waiver situation.¹⁴³ It is easy to determine whether police conduct occurs before the

(1987); *Beasley Video*, *supra* note 42.

139. *Colorado v. Spring*, 479 U.S. 564, 569 (1987); *see Beasley*, 512 A.2d at 1012.

140. *Spring*, 479 U.S. at 574.

141. *North Carolina v. Butler*, 441 U.S. 369, 375-76 (1979).

142. *Id.* at 373.

143. *People v. Holland*, 520 N.E.2d 270, 277-79 (Ill. 1987), *aff'd*, 493 U.S. 474 (1990), *overruled on other grounds by People v. Edwards*, 579 N.E.2d 336 (Ill. 1991); *People v. Martin*, 466 N.E.2d 228, 229-35 (Ill. 1984), *cert. denied*, 469 U.S. 935 (1984). Two Illinois Supreme Court cases illustrate this point. *See Holland*, 520 N.E.2d at 277-79; *Martin*, 466 N.E.2d at 229-35. In *Holland* and *Martin*, the police advised the suspects of their rights and gave them false statements before they confessed. *Holland*, 520 N.E.2d at 273; *Martin*, 466 N.E.2d at 230. As the court stated in *Martin*, the police advised the suspect of his rights, the suspect affirmatively stated that he understood them before the first interview, and the waiver the police relied upon was implicit rather than express. *Martin*, 466 N.E.2d at 230, 234; *see also State v.*

warning is given. Once the police give the suspect the warnings and the suspect does not assert them but instead indicates understanding of those rights and enters into the give-and-take of the interrogation process, whether waiver has occurred may be unclear.¹⁴⁴ Thus, police deception occurring during that period might be pre- or post-waiver depending on how the suspect's conduct is interpreted.¹⁴⁵

This Essay examines how courts should treat statements that the police knowing are false—not failures to convey information—if they affect the likelihood of the suspect asserting the suspect's *Miranda* rights. Revisiting the river and lifeline analogy, the most problematic statements are those that the police make before they place the lifeline in the suspect's hand and before the suspect has had an opportunity to grasp it. For example, what if the police state, when they know it not to be true, that the river is particularly safe today, thereby diminishing the suspect's interest in being saved before placing the lifeline in the suspect's hand the first time? Alternatively, what if the police take the diametrically opposite position and falsely state, by making up damning evidence, that the water is incredibly rough, so that the swimmer may more likely assume that the lifeline will be inadequate to secure safety?

After the police afford the opportunity to grasp the lifeline, whether the false police statement renders the statement inadmissible may well be judged under different tests depending upon whether it is still lying in the suspect's open hand as in *Butler* when the suspect stated he understood the rights and was not prepared to execute the waiver but was willing to continue the process,¹⁴⁶ or whether the suspect has tossed away the lifeline by waiver.¹⁴⁷ I contend an even more significant distinction in the treatment of police conduct should be made if lies are told to the suspect before the *Miranda* warnings are ever given. Courts may, however, reasonably consider that courts should properly treat the pre-warnings situation as particularly sensitive and therefore legally critical because it precedes the suspect's first opportunity for safety.

B. *The Mild Version of Pre-Warnings "Softening Up"*

Cooper, 217 N.W.2d 589, 591-92 (Iowa 1974) (finding a valid waiver despite deception as to the victim's condition in a situation in which the police first gave the suspect the *Miranda* warnings and the suspect expressed an understanding of those warnings, but did not formally waive those rights until after the false information was presented).

144. See *Miranda*, 384 U.S. at 467-68.

145. See *Holland*, 520 N.E.2d at 277-79; *Martin*, 466 N.E.2d at 229-35.

146. In this situation, the police conduct would apparently be judged under *Moran v. Burbine*, 475 U.S. 412, 21 (1986), standards. See *supra* Part IV.A.

147. After waiver, the police conduct would be judged under the Due Process voluntariness standard, unless the suspect figuratively reaches out and grabs the nearby lifeline by asserting the right to silence or to an attorney.

The first example of pre-warning conduct is built around an implicit falsehood. It is a practice of “softening up” the suspect through police conversation that communicates friendliness toward and understanding of the suspect before the police administer the warnings. As commentators note, the police widely use the practice,¹⁴⁸ but courts rarely examine the practice in reported cases.¹⁴⁹

If such softening up is used, the police actions subsequent to *Miranda* waiver often demonstrate that the suspect is not among friends, but everything about the encounter up to that warning and waiver suggests just the opposite. Such softening-up conduct is affirmative, intentional, false, and has a predictable impact to reduce the chance that a suspect will assert the suspect’s rights, but it likely merely flies below the radar screen of *Miranda* concern.

The reason police conduct of this type is legally ignored is not because it is inconsequential. The creation of the impression that the police are friends is probably in fact less important than the manner in which the police administer the *Miranda* warning and deliver the lifeline. By body language and words, the police treat the *Miranda* warnings as a part of the paperwork that the police must get out of the way, not the momentous event that the waiver often proves to be.¹⁵⁰ Both, however, are treated the same way—they are ignored despite the important practical effect in producing waivers.

These are parts of the basic con—accepted affirmative police conduct designed to deceive the suspect to lose sight of his or her self-interest. Courts

nevertheless accept them, with the best explanation being that the police

148. See DAVID SIMON, HOMICIDE: A YEAR ON THE KILLING STREETS 193-96 (1991) (describing how homicide detectives in Baltimore give the *Miranda* warnings only after establishing rapport and “softening up” the suspect in often very aggressive ways).

149. *Id.*; see *State v. Coddington*, 259 N.E.2d 382 (Ill. App. Ct. 1970). *Coddington* presents a rarely litigated allegation regarding such “softening up,” which the court found did not affect the constitutionality of the waiver. *Coddington*, 259 N.E.2d at 390-91. After the arrest, the police took the suspect into the police chief’s office, who knew the suspect and his family. *Id.* at 390. The chief talked to the suspect for a period before the police administered warnings to the suspect in what the defendant alleged was “a softening up process designed to inspire [his] confidence in the [c]hief, so notwithstanding the warnings, he did not speak with his own free will.” *Id.*

150. JOHN M. MACDONALD & DAVID L. MICHAUD, THE CONFESSION: INTERROGATION AND CRIMINAL PROFILES FOR POLICE OFFICERS 17 (1987) (advising officers to “not make a big issue of advising the suspect of his rights” and instead to “[d]o it quickly, do it briefly, and do not repeat it”); DAVID SIMON, *Homicide: A Year on the Killing Streets*, in THE *MIRANDA* DEBATE: LAW, JUSTICE, AND POLICING 49, 59 (Richard A. Leo & George C. Thomas III eds., 1998); SIMON, *supra* note 148, at 202 (observing that written *Miranda* warnings when administered as part of the completion of information forms the officer fills out “co-opts the suspect, making him part of the process . . . [by filling out the *Miranda* form the suspect] help[s] with the paperwork”); Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3, 5 (1992) (describing warnings administered in “a flat, perfunctory tone” as “merely a bureaucratic ritual”).

employ these practices as a necessary consequence of giving to the police the task of protecting the suspect's rights. One can hardly expect that the police will do so in any way other than grudgingly and ineffectively, and the Court must have understood that reality, or can be held to have understood it. Thus, it is understandable that such predictable police conduct, which cumulatively has important consequences but is hardly worthy of note in the roughness of police-citizen encounters that our constitutional doctrines governing criminal procedure routinely tolerate, is routinely ignored.

C. A Bold But Honest Form of Pre-Warnings "Softening Up"

The issue gets quite a bit more challenging when the police employ a different type of softening up in their pre-warning and waiver conversation with the suspect.¹⁵¹ The recent case of *Hairston v. United States* provides an example.¹⁵² In this case, the gist of this softening up is that the police confront the suspect with the strength of the evidence against him before giving *Miranda* warnings.¹⁵³

Hairston was arrested on a warrant for homicide by officers from outside the homicide unit.¹⁵⁴ On instructions from Homicide Detective Michael Irving, the police did not advise Hairston of his *Miranda* rights, but instead, they transported him to the homicide department and left him securely handcuffed in an interview room there.¹⁵⁵ When Irving later entered the interview room, he informed Hairston he was under arrest for homicide and that the detective wanted to hear his side of the matter.¹⁵⁶ The detective told Hairston that he did not want Hairston to answer questions; rather, he wanted Hairston to just listen and to learn what the police knew about the case.¹⁵⁷ The detective noted that among the items of evidence the police had, an alleged coconspirator, Amos Chaney, had already given a statement to the police.¹⁵⁸ Hairston expressed skepticism regarding the claim of Chaney's cooperation, so the detective played the videotape of the statement with the volume turned down, so Hairston could not hear what was said but could be assured that the police had a post-arrest conversation with Chaney.¹⁵⁹ At this point, the detective read Hairston his *Miranda* rights, which he waived on a written form.¹⁶⁰ The

151. *Hairston v. United States*, 905 A.2d 765, 770-72 (D.C. Cir. 2006).

152. *Id.* at 769.

153. *Id.* at 770-72.

154. *Id.* at 770.

155. *Id.*

156. *Id.*

157. *Id.* at 771.

158. *Id.*

159. *Id.*

160. *Id.* at 772.

product of the ensuing interrogation was a five-page typed confession.¹⁶¹

When the detective was asked at the suppression hearing why he did not read the *Miranda* rights earlier, he stated:

No reason, I wanted him to understand that I . . . had a lot of knowledge about the case, and that if he wanted to help himself that he should tell me what happened, and I told him that . . . two sides [exist] to every story, and I may not have had the whole story.¹⁶²

The District of Columbia Court of Appeals held that the conduct of the police did not violate *Miranda*.¹⁶³ It seemed to state that a practice that stays away from the “question-first” model and instead instructs the defendant to “just listen” while the officer recounts the weight of the evidence against the defendant, satisfies *Miranda*.¹⁶⁴ The court concluded that the detective’s statements failed to violate *Miranda* because, before he conducted the interrogation, Hairston received a full warning and executed the waiver just as the Supreme Court has prescribed.¹⁶⁵

Thus, at least according to the court in *Hairston*, before the police place the lifeline in the suspect’s hand, the police may tell the suspect of her tremendous legal difficulties in the hope that the suspect chooses to not take hold of the lifeline.¹⁶⁶ The police are thus making an affirmative statement that has a predictable effect.¹⁶⁷ The police purposefully make this statement, and it clearly undercuts the power of *Miranda*.¹⁶⁸ Their statements in this context, however, do not involve an affirmative falsehood.¹⁶⁹

161. *Id.*

162. *Id.* at 771.

163. *Id.* at 774-82. The court based its ruling on comparisons with four cases: *Missouri v. Seibert*, *Oregon v. Elstad*, *United States v. Gonzalez-Lauzan*, and *Hill v. United States*. See *Missouri v. Seibert*, 542 U.S. 600, 618 (2004); *Oregon v. Elstad*, 470 U.S. 298, 309 (1985); *United States v. Gonzalez-Lauzan*, 437 F.3d 1128, 1137 (11th Cir. 2006); *Hill v. United States*, 858 A.2d 435, 441 (D.C. Cir. 2004).

164. *Hairston*, 905 A.2d at 769-74. The Supreme Court in *Seibert* characterized the question-first model. See *Seibert*, 542 U.S. at 618. The Eleventh Circuit likewise characterized the just-listen model. See *Gonzalez-Lauzan*, 437 F.3d at 1137.

165. *Hairston*, 905 A.2d at 782.

166. See *id.* at 780-82.

167. See *id.*

168. See *id.* at 771. The purposefulness of the police conduct beyond an affirmative act of deception may matter. Cf. *United States v. Bell*, No. CR00-4104-MWB, 2001 U.S. Dist. LEXIS 25739 *61 (N.D. Iowa Apr. 4, 2001) (ruling that a suspect validly executed a waiver despite the suspect’s earlier assertion of *Miranda* rights when a police officer in good faith communicated to him the officer’s misunderstanding that the attorney had approved further questioning because although the officer stated this information incorrectly to the suspect, the police lacked culpability and the officer did not intentionally deceive the suspect into waiving his rights).

169. See *Hairston*, 905 A.2d at 782. On first inspection, one might argue that the court of appeals erroneously approved the police conduct in *Hairston* because one might properly consider the detective’s conduct as interrogation under the principles of *Rhode Island v. Innis*, despite the detective’s statement that he did not ask a question to the suspect. See *Rhode Island v. Innis*, 446 U.S. 291, 298-304 (1980); *Hairston*, 905 A.2d at 779-81. The court of appeals based its ruling on the apparently correct premise that, whether

VI. A PROPOSED PROHIBITION ON AFFIRMATIVE FALSEHOODS TOLD BEFORE WAIVER

What should happen regarding the *Miranda* waiver if the police state affirmative falsehoods before the police give warnings and secure a waiver? What if some part of the evidence recited in *Hairston* had been false; what if, for instance, the co-participant had not yet confessed?

One answer courts could enunciate is that of course the suspect invalidly waived his rights because the “any evidence” quotation from *Miranda* effectively said so.¹⁷⁰ One may draw this bright line based on the Supreme Court’s occasional position after *Miranda*: We do it a certain way simply because in the “holy text” of the *Miranda* opinion it says so.¹⁷¹ Or, it may be done as a matter of policy to effectuate the goal of *Miranda* that properly delivered warnings, as illustrated by my lifeline imagery, can dissipate the compelling atmosphere of police interrogation.

A. *Framework for Distinctions on Treatment of Explicit and Implicit Incentives and Deceptions Leading to Waiver*

The rough framework of the LaFave, Israel, and King’s treatise¹⁷² provides a useful point of departure. The treatise bases its premise that in most situations, even though made pre-waiver, the lies police tell to a suspect are merely a factor in determining the voluntariness of waiver.¹⁷³ The authors wrote:

Under this [lies-are-but-a-factor] approach, *Miranda* waivers have been

the speech constituted interrogation or not, the suspect did not make an incriminating statement in immediate response. *Hairston*, 905 A.2d at 786. The suspect only made incriminating statements after a subsequent administration of and waiver of *Miranda* rights. *Id.* at 772. Thus, the issue of whether the speech constituted interrogation is not directly at issue; the issue regarding the speech is rather whether the subsequent warning and waiver was constitutionally ineffective because the police gave the speech before the warning and waiver. *Id.* at 772, 780-81.

170. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

171. *See id.* Why *Michigan v. Mosley* results in such a difference in the invocation of the right to silence in comparison to *Edwards v. Arizona* and *Minnick v. Mississippi*’s holding of the invocation of the right to an attorney is in substantial part explained due to the courts’ reverence of the original text of *Miranda* as opposed to any real difference in what suspects’ substantively express or their need for protection. *Compare Michigan v. Mosley*, 423 U.S. 96, 104-07 (1975) (noting that police may later question the suspect after the suspect has invoked the right to silence), with *Minnick v. Mississippi*, 498 U.S. 146, 156 (1990) (holding that the police may not reinitiate interrogating the suspect after the suspect has requested an attorney unless the suspect initiates conversation), and *Edwards v. Arizona*, 451 U.S. 477, 484-87 (1981) (ruling that police may not question the suspect after the suspect invokes right to counsel unless the suspect initiates questioning).

172. 2 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 6.9(c), at 588 (2d ed. 1999).

173. *Id.*; *see State v. Cooper*, 217 N.W.2d 589, 597 (Iowa 1974).

upheld even when obtained after the police had misrepresented the strength of the case against the defendant or the seriousness of the matter under investigation. Even assuming that these cases can be squared with *Miranda* because the trickery concerned only the wisdom of exercising the rights of which the defendant had been warned, it still follows that there is an absolute prohibition upon any trickery which misleads the suspect as to the existence or dimensions of any of the applicable rights or as to whether the waiver really is a waiver of those rights.¹⁷⁴

This rough topology squares with my reading of the caselaw. Before proceeding beyond it, I want to note several additional observations that are consistent with it. First, the lower court case law on pre-waiver deception treats most such deception as merely a factor in whether the waiver is voluntary.¹⁷⁵ That conceptual treatment is consistent with the analysis of *Burbine* quoted earlier.¹⁷⁶ Second, while this analysis resembles Due Process voluntariness analysis generally in that it applies a totality of the circumstances test, it is not the same.¹⁷⁷ It is more exacting than Due Process voluntariness.¹⁷⁸ For example, the degree of lies used against Beasley that the court properly found constitutional under the Due Process voluntariness test should not satisfy the test in *Burbine*.¹⁷⁹ As one court described the difference, waiver of *Miranda* rights requires “a free and deliberate choice,” whereas the Due Process voluntariness test drops the free-choice requirement and instead, excludes only those confessions that officials produce with coercive tactics.¹⁸⁰

Third, the law, as the lower courts have developed it, permits rougher treatment on permissible pre-waiver deception than can be conceptually justified.¹⁸¹ The case law does not allow the type of lies generally permitted under Due Process because, while somewhat coercive, the lies are not so bad that they would induce an innocent person to give a false confession. The caselaw dealing with pre-waiver deception cases, however, certainly demonstrates that the Supreme Court’s suggestion in *Miranda* of special scrutiny of “any evidence” that deception contributed to waiver, is a relic of a different and no longer followed mindset.¹⁸²

174. 2 LAFAVE ET AL., *supra* note 172, § 6.9(c), at 588-89 (footnotes omitted).

175. *Hairston v. United States*, 905 A.2d 765, 779-82 (D.C. Cir. 2006).

176. *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

177. *See Hairston*, 905 A.2d at 779-83.

178. *See id.*

179. *Burbine*, 475 U.S. at 421; *Beasley v. United States*, 512 A.2d 1007, 1010-12 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 907 (1987).

180. *United States v. Bezanson-Perkins*, 390 F.3d 34, 39-40 (1st Cir. 2004).

181. *See* 2 LAFAVE ET AL., *supra* 172, § 6.9(c), at 588. A statement in the LaFave treatise suggests agreement on this point: “Even assuming that these cases can be squared with *Miranda* . . .” *Id.*

182. *See People v. Holland*, 520 N.E.2d 270, 277-79 (Ill. 1987) (finding a valid waiver despite a police lie made after a warning, but before a waiver, about a witness seeing the suspect’s car in an alley, although the court expressed some doubt that elaboration of evidence should be characterized as a falsehood), *aff’d*, 493 U.S. 474 (1990), *overruled on other grounds by People v. Edwards*, 579 N.E.2d 336

Fourth, lies that directly undercut the statements in the *Miranda* warnings will render the warnings and waiver ineffective.¹⁸³ Examples of such deception include a police assertion that making a statement could not hurt the defendant and similar misstatements that disparage the role of the attorney.¹⁸⁴ As to the former point, courts should not permit the police to directly state that the lifeline is unneeded because the water cannot hurt the suspect, or with respect

(Ill. 1991); *People v. Martin*, 466 N.E.2d 228, 229-35 (Ill. 1984) (finding a valid waiver despite the police lie that another person had named the suspect as the triggerman when the lie was told after giving the warnings but before implicit waiver occurred), *cert. denied*, 469 U.S. 935 (1984); *Commonwealth v. Forde*, 466 N.E.2d 510, 511-12 (Mass. 1984) (finding a valid waiver despite the false implication that the police found the suspect's fingerprints on the victim's body in a situation in which the false statement apparently preceded any *Miranda* warnings); *State v. Braun*, 509 P.2d 742, 743-46 (Wash. 1973) (ruling that the court only considered an officer's lie that the court would admit a co-participant's statement against the suspect made after initial *Miranda* warnings, but before clear waiver, as a factor that the court would consider on waiver and that the Court did not render the subsequent waiver involuntary). In *DeHerrera v. LeMaster*, a particularly troubling opinion, the court decided a habeas case and thus only determined whether the state court decision constituted an unreasonable application of established federal law. *DeHerrera v. LeMaster*, 194 F. App'x 570, 571-72 (10th Cir. 2006), *cert. denied*, No. 06-8587, 2007 WL 632818 (2007). In *DeHerrera* the Tenth Circuit accepted that before the *Miranda* waiver, the police lied to the suspect by telling the suspect that the police knew that he was not the shooter and this was his last chance to help himself out, and the police told him that, while his case appeared to be a death penalty case, if he did not commit the crime, he need not go to prison. *Id.* at 572. None of the lower state court opinions are reported, and the district court's opinion is not available, but according to Patrick DeHerrera's brief, the court treated pre-waiver and post-waiver lies and inducements in the same fashion. *See id.* I hope this case is an aberration. *United States v. Velasquez* is also a troubling case. *See United States v. Velasquez*, 885 F.2d 1076, 1076 (3d Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990). In *Velasquez* the Third Circuit examined a post-warning lie after the suspect reinitiated a conversation with the police under virtually the same standard as Due Process voluntariness. *Id.* at 1079-81.

183. *See Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966).

184. *Hart v. Attorney Gen. of Fla.*, 323 F.3d 884, 894-95 (11th Cir. 2003) (ruling that a conversation disparaging the role of a lawyer and asserting that "honesty wouldn't hurt" the suspect undercut the *Miranda* warning that the court could later use anything the suspect said against him), *cert. denied*, 540 U.S. 1069 (2003); *United States v. Beale*, 921 F.2d 1412, 1435 (11th Cir. 1991) (ruling a waiver was invalid because the officer's statement that signing the waiver would not hurt the suspect misled him regarding the effect of the waiver); *Ex parte Johnson*, 522 So.2d 234, 235-36 (Ala. 1988) (holding a waiver was invalid when the officer falsely told the suspect that only one state could use the suspect's statement in a traffic accident report and that the court could not use the statement against him in a criminal case in another state); *Redmond v. People*, 501 P.2d 1051, 1052-53 (Colo. 1972) (holding that the police meaninglessly warned the suspect when the police told the suspect that the court could only use admissible portions of his statement against another person); *DiGiovanni v. United States*, 810 A.2d 887, 892-94 (D.C. Cir. 2002) (finding invalid a waiver when the officer informed the suspect before the waiver that he did not need an attorney); *Commonwealth v. Peters*, 373 A.2d 1055, 1058-63 (Pa. 1977) (ruling that a statement that the police would treat the suspect merely as a witness made before warning and waiver invalidated the waiver because the statement undercut the admonition that the court could only use the statement against another suspect); *State v. Stanga*, 617 N.W.2d 486, 490-91 (S.D. 2000) (ruling that a waiver was invalid when the officer repeatedly stated after *Miranda* warnings, but before waiver, that the suspect's statements would just be "between the two of them"); *but see State v. Cooper*, 217 N.W.2d 589, 591-92, 595-97 (Iowa 1974) (holding a waiver was valid despite as deceptive statement that the victim was still alive made by the police after *Miranda* warnings were administered but before waiver). Clearly, an officer's lie that the suspect's lawyer has approved the suspect's talking to the police renders a subsequent incriminating statement inadmissible. *See Guidry v. Dretke*, 397 F.3d 306, 327-29 (5th Cir. 2005), *reh'g denied*, 429 F.3d 154 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1587 (2006).

to using it, that the lifeline is no good—talking to a lawyer will only result in harm.¹⁸⁵ Such statements are in conflict with the basic premise of *Miranda*. Courts, however, are likely to subject this point to qualification. Can the police say something that is true in a fashion that makes talking to a lawyer appear unattractive, such as, “If you ask for an attorney this will likely be the last time you ever talk with me”? I assume that the police frequently make such a statement,¹⁸⁶ and I doubt that by itself the Court would rule such a statement to invalidate waiver.

What are the possible dividing lines between permissible and impermissible police conduct? One might be the degree of the impact of the practice on the likelihood that the defendant will waive or assert the right. If the compelling atmosphere of custodial police interrogation causes an incriminating statement to violate the privilege against compelled self-incrimination—the basic holding of *Miranda*—then regardless of the form of the conduct, courts should arguably forbid the practice if it has a significant impact. That proposition may be theoretically sound, but it is inconsistent with the accepted premise that a *Miranda* waiver is not suspect because the police obtain it in the same compelling atmosphere in which interrogation occurs. If that compelling atmosphere is acceptable, adding to it without doing so through practices that are themselves offensive will typically have no impact on the validity of the waiver. Of course, at some point, the police may create compelling circumstances, which will make the courts consider the waiver as involuntary under *Burbine*.¹⁸⁷ Generally, however, a focus on the degree of likely impact of the conduct, rather than specific offensive practices, is not likely to provide any meaningful addition restriction.

As noted in the final paragraph of Part IV, *Spring* suggests two dividing lines that provide useful benchmarks.¹⁸⁸ One is the Court’s desire for a clear standard.¹⁸⁹ That consideration suggests that courts will require some

185. See *United States v. Kelsey*, 951 F.2d 1196, 1198-99 (10th Cir. 1991) (finding that a waiver was invalid as to the statement made subsequent to the initial assertion of rights when police responded to the suspect’s request for an attorney with the option of being taken to jail and with offers of easier treatment if he cooperated and talked to the police); *Collazo v. Estelle*, 940 F.2d 411, 415-18 (9th Cir. 1991) (ruling a waiver was invalid when the officer led the suspect to believe that the suspect’s exclusion of his attorney from the interrogation process would be beneficial); *United States v. Anderson*, 929 F.2d 96, 97-102 (2d Cir. 1991) (ruling under a totality of the circumstances approach that a federal agent’s false statements to the suspect that it would be in his best interest to talk and that “once you tell us you want an attorney, we’re not able to talk to you” and “we probably would not go to the U.S. Attorney or anyone else to tell them how much [you] cooperated with us” undermined the effect of *Miranda* (quoting Agent Patrick Valentine)) (alteration in original).

186. David Simon suggests that homicide detectives in Baltimore make such statements as a standard matter. SIMON, *supra* note 148, at 193-94. Given the lack of recording of most conversations between police and suspects, particularly conversations that precede formal interrogation, accurate knowledge of what transpires is simply not available. See *id.*

187. See *Moran v. Burbine*, 475 U.S. 412, 423-24, 433-34 (1986).

188. *Colorado v. Spring*, 479 U.S. 564, 576-77 (1987).

189. *Id.* at 577 n.9.

affirmative police conduct¹⁹⁰ because the police cannot be charged with preventing all misunderstandings or even all serious misunderstandings. Misunderstandings resulting from police conduct may be almost as difficult to identify, but more potential exists for clarity because police conduct and police intention can be used as decisive indicators of a violation.

The second factor *Spring* proposes is the requirement of affirmative police deception.¹⁹¹ The requirement of affirmative action certainly makes sense because the Constitution protects against compulsory self-incrimination at the hands of the government.¹⁹² Adding that it must be affirmative action that is implicitly deceptive offers some assistance but is not overly helpful because what constitutes affirmative police action and what is deceptive action are both subject to uncertain characterization. Announcing to the suspect that the suspect is under arrest for a weapons charge and having an ATF officer begin the interrogation constitute affirmative actions, and in *Beasley* it appears that they were done to create a misimpression.¹⁹³

Indeed, Supreme Court cases indicate that the police can legally create situations that are ripe for misunderstanding. Although the majority stated that it believed the statement in *Duckworth v. Egan* that the suspect would get an attorney “if and when he went to court” accurately described the situation most suspects faced because *Miranda* imposes no requirement of stationhouse attorneys,¹⁹⁴ the statement constitutes affirmative conduct that has the potential to mislead.¹⁹⁵ And, the holding of *Davis v. United States* that any ambiguity in the suspect’s assertion of the right is neither an assertion nor does it impose a requirement on the police to clarify the suspect’s intent may mean that

190. Cf. *United States v. Harrison*, 34 F.3d 886, 889-92 (9th Cir. 1994) (ruling that courts should specially scrutinize statements between the time of warnings of the suspect’s rights and waiver, and that statements regarding telling the judge about failure to cooperate are more damaging and therefore more dangerous than vague indications of benefits of cooperation).

191. *Spring*, 479 U.S. at 576 n.8.

192. U.S. CONST. amend. V.

193. *Beasley v. United States*, 512 A.2d 1007, 1009-10 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 907 (1987).

194. *Duckworth v. Egan*, 492 U.S. 195, 197-98, 204-05 (1989) (describing *Miranda*’s commands and construing the warnings as being basically fair in their description and therefore not violating *Miranda*’s requirements).

In *Cummings v. Polk*, the Fourth Circuit examined a variant of the situation in *Egan* involving a true statement regarding the provision of counsel that should have made invocation of *Miranda* rights less attractive. See *Cummings v. Polk*, 475 F.3d 230 (4th Cir. 2007). In *Cummings* the detective crossed out the words “at no cost” from the statement of rights form, which initially read: “If you want a lawyer before or during questioning but cannot afford to hire one, one will be appointed to represent you at no cost before any questioning.” *Id.* The detective told the suspect: “I don’t know why they put in this at ‘no cost.’ *Id.* If you are found innocent, it is no cost but if you are found guilty there is a chance the state will require you to reimburse them for the attorney fees.” *Id.* at 233. The Fourth Circuit concluded that this statement was an accurate representation of North Carolina’s practice that the United States Supreme Court has approved. *Id.* Further, although the impact of the statement was “debatable,” the state court’s decision that it did not render the *Miranda* waiver invalid was not an unreasonable application of established law. *Id.* at 239-41.

195. *Id.* at 214 (Marshall, J., dissenting) (describing the clear potential of the statement to mislead).

merely the creation of ambiguity gives rise to no constitutional violation at all.¹⁹⁶

Moreover, *Oregon v. Elstad* can be read to hold that courts constitutionally permit affirmative government action adding to the pressure, even though it makes the suspect's waiver of *Miranda* rights more likely.¹⁹⁷ Indeed, the *Elstad* ploy of first question in order to obtain a confession and then to warn effectively deceives as Justice Souter argued in *Missouri v. Seibert*.¹⁹⁸ Justice Souter stated:

What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them."¹⁹⁹

Seibert, of course, limits *Elstad*.²⁰⁰ *Seibert*'s restriction, however, is not a general one on pre-warning conduct.²⁰¹ Instead, Justice Kennedy's decisive concurring vote is only applicable to situations in which police intentionally practice the pre-warning conduct and when the police explicitly remind the suspect during the second interrogation of the suspect's incriminating statement made during the first unwarned interrogation.²⁰² Only then is the second waiver invalid and confession inadmissible.²⁰³ Justice Kennedy stated: "Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false."²⁰⁴

However, *Spring* suggests the second dividing line at affirmative misrepresentation—not just affirmative action that results in deception. "[A]n

196. See *Davis v. United States*, 512 U.S. 452, 458-62 (1994). Such a position can be justified on the ground that clarity in application is important. See *id.* The Court could turn lack of clarity in the suspect's assertion of the right into a clear and universal rule on the argument that the Constitution is only concerned with compelled self-incrimination, not whether ambiguity exists in the application of a rule protecting against compelled self-incrimination.

197. *Oregon v. Elstad*, 470 U.S. 298, 299 (1985). The majority in *Elstad* did not claim that the prior confession had no psychological impact on whether the second waiver and confession were more likely. *Id.* at 312-14. Rather, the Court found the impact constitutionally irrelevant in the ordinary case as long as the police properly administered the warning and waiver before the second confession. *Id.*

198. *Missouri v. Seibert*, 542 U.S. 600, 615-17 (2004).

199. *Id.* at 613-14 (quoting *Moran v. Burbine*, 475 U.S. 412, 424 (1986)) (alteration in original).

200. *Id.* at 615-17.

201. *Id.* at 618-21 (Kennedy, J., concurring).

202. *Id.* at 620-22.

203. *Id.* at 620-21.

204. *Id.* at 621.

affirmative misrepresentation” is the language of the Court in *Spring*.²⁰⁵ In terms of Court decisions, precedent would not interfere with recognizing a bright-line prohibition against affirmative misrepresentations by the police prior to warnings and waiver.

*B. A Proposed Bright Line at Explicit Non-De Minimis
Pre-Warnings Deception*

The law should be exacting as to intentional lies made before the suspect waives *Miranda* rights and thus that statements likely to have an impact on waiver should render that waiver invalid if intentionally false. On closer inspection, however, lower court case law does not support this proposition, which initially seemed intuitively obvious but may be somewhat difficult to define during the conversations between the police and the suspect in implicit waiver situations. Moreover, it is not supported by the lower court caselaw and is difficult to square with the test in *Burbine*, which is not based on the police conduct but upon its impact on whether the suspect had sufficient understanding and made a choice that was not coerced.²⁰⁶

A solid conceptual argument exists to treat pre-warning police statements that undercut the effectiveness of the initial warning differently. Variations and additions to *Miranda* may be particularly likely to affect the prospect of the suspect ultimately waiving *Miranda* rights, but something more significant is happening as to these statements. *Miranda* warnings are designed theoretically to eliminate the compelling atmosphere of the environment of police interrogation. That is the environment in which waiver takes place. To believe in the effectiveness of *Miranda* is to believe in the magic of its language to have this effect. That may be unrealistic, but the warnings must be properly administered for the magical effect to have even a chance.

Waiver has been the focus of the Supreme Court as to post-*Miranda* warning conduct. If the warning is never effectively communicated, however, waiver should not be the focus. One has instead a direct violation of the *Miranda* command of a prescribed and effective warning of rights, and without effective warnings, the dissipation of the compelling atmosphere never occurs.

I contend that statements made by the police before they place the lifeline in the suspect’s hand should not be analyzed under *Burbine*’s waiver concept.²⁰⁷ The practices at issue here include various types of softening up

205. *Colorado v. Spring*, 479 U.S. 564, 577 (1987).

206. *See Moran v. Burbine*, 475 U.S. 412, 423-24, 433-34 (1986). The courts do not warrant special treatment for every lie made before police administer warnings. *See Sovalik v. State*, 612 P.3d 1003, 1004-07 (Alaska 1980) (holding that lying to the suspect about the recovery of a false latent fingerprint from the murder victim’s property when the suspect was not in custody at the time did not fatally undermine waiver of *Miranda* rights administered two days later after his arrest).

207. *See Burbine*, 384 U.S. at 421; *see supra* Part IV.A.

statements that undercut the warnings before the suspect has the first opportunity to grasp the lifeline. Such undercutting statements deserve particularly careful scrutiny.²⁰⁸

Because *Miranda* requires that the police squarely place the lifeline in the suspect's hand, one question might be whether any distinction should be made between (1) passive deception—the accepted mild version of softening up such as “we’re all friends here,” (2) affirmative, true statements, and (3) affirmative, false statements, if all have the impact of making the placement of the line a qualified one. Figuratively each of the three variants places the lifeline on the fingertips rather than squarely on the palm of the hand.²⁰⁹ Despite this conceptual similarity, I suggest a clear distinction in treatment between the first and third variant, but do not reach a resolution as to the appropriate treatment of the second. I accept the first variant as not resulting in suppression largely for practical reasons and do not consider it further.²¹⁰

Hairston illustrates the second variant. The *Hairston* opinion provides a major new ploy beyond mild softening up statements and false statements that potentially challenges the significance of the difference between false and true statements made before warnings. If the *Hairston* opinion is good law, it opens a major new inquiry, for that ploy was active, purposeful, and likely had a substantial impact on the exercise of the suspect's rights.²¹¹ *Hairston* certainly makes it more difficult to interpret *Miranda*'s prohibition on pre-waiver ploys in a literal fashion.

Miranda stated that if the suspect was tricked or cajoled into waiver, then

208. Admittedly, I focus on pre-warning lies rather than pre-waiver lies because of greater difficulty defining, defending, and establishing a bright-line prohibition against pre-waiver lies. Beyond practical difficulty, there is a conceptual justification in that lies before warnings potentially interfere with the basic constitutional requirement that the compelling atmosphere of the interrogation environment be dissipated before the suspect can act without compulsion.

209. See *United States v. McFarland*, 424 F. Supp. 2d 427, 437-39 (N.D.N.Y. 2006). The case law is relatively thin on such distinctions, but it suggests a clear differentiation between a failure to disclose details of an investigation, which do not undercut the warnings and waiver, and deliberate lies in response to the suspect's questions, which do. See *id.* describing this distinction in the case law and holding that an affirmative misrepresentation regarding whether the police could use the statement in a certain fashion made after the police administered the warnings, but before the suspect waived his rights, rendered the waiver invalid; *People v. Sanchez*, 391 N.Y.S.2d 513, 517 (N.Y. Sup. Ct. 1997) (ruling that an officer's lie that he understood what the suspect had said in Spanish when allowed to talk with his brother after warnings, but before waiver, rendered the waiver invalid, stating that “the very concept of trickery would appear antithetical to an understanding and intelligent waiver of one's rights”).

210. See *supra* Part V.B.

211. *Hairston v. United States*, 905 A.2d 765, 779-82 (D.C. Cir. 2006). *Hairston* may not be good law. *People v. Honeycutt*, although the case clearly comes from a different era and arguably from a different mindset regarding *Miranda*, appears inconsistent with *Hairston*. Compare *People v. Honeycutt*, 570 P.2d 1050, 1054-55 (Cal. 1977) (finding that police conversation with the suspect prior to the administration of *Miranda* warnings violated his rights), with *Hairston*, 905 A.2d at 779-82 (holding that police deception prior to *Miranda* warnings did not violate the suspect's *Miranda* rights). In *Honeycutt* the California Supreme Court held that a period of softening up conversation prior to provision of *Miranda* warnings rendered them invalid. *Honeycutt*, 570 P.2d at 1054-55.

the suspect invalidly waived her rights. *Hairston* presents a case of strong persuasion that indicates that the police cajoled the suspect.²¹² If the *Hairston* ploy is valid, then it is not clear that reverence for the literal language of the original *Miranda* text or even its policy at this particularly sensitive time is sufficient to justify a distinction between powerful true statements and false statements.

Hairston may go too far, but I do not take it on in this Essay. Instead, its dangerous potential to undercut *Miranda* provides a reason to look carefully at the dangers posed by pre-warnings statements by the police.

Affirmative lies told before *Miranda* warnings is the third variant. Adding the suggested requirement from *Spring* that police conduct involve an affirmative misrepresentation provides a useful dividing line from the *Hairston* ploy. *Hairston* may be a troubling case, but it does not run afoul of a bright-line rule that prohibits pre-warning falsehoods. Adding the requirement that the statement by the police made before warnings must be false before it receives special scrutiny offers clarity. Treating falsehoods differently can be squared with the language of *Miranda* condemning “any evidence that the accused was threatened, tricked, or cajoled into a waiver.”²¹³

Cajoled is clearly not self-defining in this context. Unless informed by the concept of falsity of the ploy, which can be part of its meaning, cajoled appears to mean in this context only that the ploy had an effect—that it coaxed the suspect into compliance—which would give the concept no independent meaning in the Court’s quotation.²¹⁴ Thus, courts could give clarity to the statement “threatened, tricked, or cajoled” by redefining the quotation functionally to have it include (1) threats, (2) tricks, and (3) cajolery based on falsehoods.²¹⁵ The Court should add the requirement that the police make an affirmative statement that is knowingly false to provide the clarity that *Spring* demands.²¹⁶ I may not be able to absolutely justify this categorical prohibition. Those who might oppose it, however, cannot likely cite a justification for why the practices should be permitted.

Courts should not tolerate these pre-warning lies, and they should be subject to a *per se* prohibition as long as they the lies are not trivial—the lie must have some likelihood of having an effect on the exercise of the right.²¹⁷

212. *Id.*, 905 A.2d at 779-82.

213. *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

214. *See id.* A second definition of “cajole” is “to deceive with soothing words or false promises.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 313 (2002). “Coax” is a synonym for “cajole.” *See id.* at 433.

215. *See Miranda*, 384 U.S. at 476. The word “trick” certainly implies falsehood in many of its forms. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2442 (2002).

216. *Colorado v. Spring*, 479 U.S. 564, 572-73, 577 (1987).

217. *See Hairston v. United States*, 905 A.2d 765, 779-82 (D.C. Cir. 2006); *Beasley v. United States*,

The new categorical prohibition would be above and beyond the pre-waiver test in *Burbine* regarding the voluntariness of the waiver when true statements that induce waiver reside.²¹⁸

VII. CONCLUSION

Hairston is an interesting case both conceptually, as noted above, and practically. Practically, it presents a new two-step process that may provide enough benefit to the police to gain substantial use in serious cases. *Miranda* has relatively little impact, and the statistics admittedly show that most suspects do waive their rights. While ploys and implicit deception, such as softening up the suspect by establishing rapport before the warning do undercut the effectiveness of *Miranda* by making the reading of rights just part of “doing the paperwork,” these practices are not subject to effective challenge for a variety of reasons. Because these ploys are typically successful, little reason exists for the police to test the legal limits with overt deception prior to the warnings. Affirmative deception can be delayed until after *Miranda* is out of the picture with a waiver, which usually can be accomplished without legally challengeable conduct.

In extremely serious cases, however, such as homicides, in which the police have higher stakes and perhaps more suspects initially have the inclination to exercise their *Miranda* rights, the police interest in lowering the risk that assertion will occur provides some incentive to push the envelope. A suspect has difficulty invoking *Miranda* rights without the police first giving the warnings. The *Elstad* ploy took advantage of that difficulty by securing the first incriminating statement without the police ever administering the warnings. With the *Elstad* ploy under something of a cloud, the *Hairston* move may be a tactic that other police departments embrace.

If substantial pre-warning and waiver softening up is legal, then when police do it without interrogation—therefore without the possibility of an unwarned statement produced by custodial interrogation potentially to taint the process under *Seibert*—the next step might be to add to the *Hairston* ploy some overt deception. Perhaps *Hairston* itself is a step too far at the pre-warnings stage, given its particular sensitivity. But, surely the further step across the line to affirmative misrepresentations by the police of facts before the warnings are given goes too far.

As a *per se* rule, the statement that any evidence that the police tricked or cajoled the suspect into waiving his rights is too broad. Nontrivial overt lies,

512 A.2d 1007, 1012 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 907 (1987).

218. See *United States v. King*, No. CR05-4016-DEO, 2005 WL 1619855, at *5 (N.D. Iowa July 11, 2006) (holding that the arresting officers’ accurate statements to the suspect before waiver of *Miranda* rights of the importance of cooperation for a drug offender with two prior drug convictions did not undercut the validity of that waiver).

however, told after the police take the suspect into custody but prior to *Miranda* warnings, should categorically be prohibited. Other ploys, including lies told after the warnings have been given but before waiver occurs, would remain governed by case law that evaluates the voluntariness of the *Miranda* waiver and often tolerates relatively rough police practices.

My proposed clarification of the law regarding deception, which would constitute a *per se* prohibition against police lies to suspects who are in custody before *Miranda* warnings are given, would therefore automatically exclude statements obtained when such lies are told. This is a targeted proposal that does not suggest any sweeping change in doctrine or practice. Indeed, it is consistent with the theory of *Miranda* itself. The change is needed; it satisfies the Court's preference for clear rules, and it has strong doctrinal justification.