WARNING THE ACCUSED OF HIS RIGHT TO APPOINTED COUNSEL: THE RIDDLE OF FOOTNOTE FORTY-THREE

The Supreme Court in *Escobedo v. Illinois*[1] and *Miranda v. Arizona*[2] was concerned with the admissibility of statements obtained from individuals subjected to custodial police interrogation. Procedures were sought to assure that the individual's fifth amendment privilege against self-incrimination and sixth amendment right to counsel were not abridged.[3] The Supreme Court recognized a need to eliminate the coercive element inherent in police interrogations. This coercion was often expressed through police brutality,[4] but it has been recognized that coercion may involve more subtle, mental pressures.[5] If the law enforcement authorities can isolate the accused individual and deny him outside support, they can so undermine his will that he loses all sense of judgment and speaks when he would ordinarily remain silent.[6] To protect against this subtle coercion, the Supreme Court held in *Miranda* that prior to any questioning the law enforcement authorities must warn the accused individual that he has the right to remain silent, that anything he says may be used against him, that he has the right to have an attorney present at the interrogation, and if he is unable to afford an attorney, one will be provided for him.[7] If interrogation follows and the defendant proceeds without aid of counsel, there is a heavy burden on the state to show that the defendant made an intelligent and knowledgeable waiver of his rights.[8]

In footnote forty-three of *Miranda*, the Supreme Court states:

> While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is

1. 378 U.S. 478 (1964).
2. 384 U.S. 436 (1966).
3. *Id.* at 439. The fifth amendment privilege against self-incrimination was applied to the states in Malloy v. Hogan, 378 U.S. 1 (1964), and the sixth amendment right to counsel in Gideon v. Wainwright, 372 U.S. 335 (1963).
4. *See* Miranda v. Arizona, 384 U.S. 436, 444 nn. 6 & 7 (1966), for a list of examples of physical brutality.
5. Blackburn v. Alabama, 361 U.S. 199 (1960); Chambers v. Florida, 309 U.S. 227 (1940).
6. Miranda v. Arizona, 384 U.S. 436, 467 (1966).
7. *Id.* at 478.
8. *Id.* at 475.

> known to have ample funds to secure one, the expedient of giving a warning is too simple and the rights too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.[9]

The footnote gives rise to several questions. Should courts decide the adequacy of the appointed counsel warning on the basis of police knowledge of the accused's financial status at the time of arrest and interrogation or on the basis of an *ex post facto* hearing into financial status at some later time? If a court accepts the latter means of determination, what is the temporal focal point for the determination of indigence? Under both tests a court must develop a practical definition of indigence. A third alternative would be to ignore financial status completely and require the law enforcement authorities to give all warnings in all cases. Additionally, the application of the "harmless constitutional error" rule arises in footnote forty-three situations. This note examines each of these questions.[10]

I. POLICE KNOWLEDGE TEST

One possible solution to footnote forty-three cases is to base the necessity of giving the warning on police knowledge of the accused's financial status at the time of the interrogation. The footnote language makes that interpretation plausible. The Court speaks of what is "known" about the accused. Assuming the police know that a particular defendant has ample funds to retain counsel and fail to warn him of the right to appointed counsel, reliance on such knowledge in these situations does not appear to violate the defendant's rights. No court

---

9. *Id.* at 473.

10. There is also the problem of burden of proof of indigence. Several states have refused to admit confessions into evidence for failure to give the appointed counsel warning on grounds that the state failed to meet its burden of proof that the defendant was not indigent. Griffith v. Jones, 283 F. Supp. 794 (N.D. Ga. 1967); James v. State, 223 So. 2d 52 (Fla. Dist. Ct. App. 1969); People v. Braun, 98 Ill. App. 2d 5, 241 N.E.2d 25 (1968); Johnson v. Commonwealth, 208 Va. 740, 160 S.E.2d 793 (1968). *Miranda* places the burden on the state to show the defendant has made a knowing and intelligent waiver of his rights. This is justified on the ground that the state creates the isolated circumstances in which the interrogation takes place, and it is best able to corroborate evidence that the warnings are properly given. Miranda v. Arizona, 384 U.S. 436, 475 (1966). If the state is unable to demonstrate a knowing and intelligent waiver, the defendant's statement will not be introduced into evidence. Traditionally, the accused individual who desires appointed counsel has the burden of showing his indigence. State v. Anaya, 76 N.M. 572, 417 P.2d 58 (1966).

has formally adopted the police knowledge test in footnote forty-three situations, but decisions in several jurisdictions suggest that police knowledge of the defendant's financial status is one way to attack the footnote forty-three problem.

Should a court adopt a police knowledge test, it would have to define whether the test is objective or subjective. An objective test would require the reviewing court to ask the following question: was the police officer's decision to forego the appointed counsel warning reasonable under the circumstances? If there is sufficient evidence to support the conclusion that the defendant is non-indigent, then the decision to forego the warning will be upheld. If such evidence is lacking the court will have to suppress the defendant's statement. In no case has this test been used to admit a statement by a defendant ultimately found to be indigent. What the test does is provide the non-indigent defendant with an additional protection against careless police behavior. Not only must the defendant be non-indigent, but the state must also establish that the police had a factual basis to believe that the defendant was non-indigent. A subjective police knowledge test is similar to the objective test but differs in one respect. The police must have more than a reasonable basis for believing the defendant to be non-indigent. They must have actual knowledge that the defendant either has an attorney or ample funds to retain one.

There are several instances in which the test would not be of aid to the defendant. If the accused has retained counsel who is present at the interrogation and the warning is not given[11] or the accused individual says he has an attorney, and later employs that attorney,[12] the possibilities for harm to the defendant are minimized. In other cases the defendant's physical appearance alone arguably could obviate the necessity of giving the warning.[13] However, physical appearance may

11. Nicholi v. State, 451 P.2d 351 (Alas. 1969).

12. Mora v. People, — Colo. —, 481 P.2d 729 (1971). The court stated that requiring the warning of the right to appointed counsel in this situation would be "ritualistic and devoid of substance."

13. The cases discussed below do not employ the police knowledge test. There is no explicit reference to it in any case. They do, however, present situations in which police knowledge may be sufficient to dispense with giving the appointed counsel warning. Statements held to be admissible:

In Commonwealth v. Wilbur, 353 Mass. 376, 231 N.E.2d 919 (1967), *cert. denied* 390 U.S. 1010 (1968), the omission of the right to appointed counsel warning was held to be immaterial since the defendant was a uniformed natural resource officer and could exercise all powers of a policeman except the service of civil process.

be quite deceiving. Criminal cases in which the defendant seeks the aid of appointed counsel on account of indigence provide examples in which the courts have had difficulty determining the defendant's indigence. A court will look to complex indicia of financial status in order to answer this question. The nature of this inquiry will be discussed in greater detail in Part III of this note.[14]

One in this position could hardly be ignorant of his rights. Moreover, he was not indigent. He owned an antique shop and had just sold its contents. The problem which disturbed the court was the nonretroactivity of *Miranda*, Johnson v. New Jersey, 384 U.S. 719 (1966). The interrogation was prior to *Miranda*, but the trial was held afterwards. There was complete compliance with *Escobedo*. The court found that the police could not reasonably anticipate *Miranda* and the warnings required there "must be applied reasonably and with common sense and do not constitute an arid, ritualistic formula to be administered inflexibly," 353 Mass. 376, 383, 231 N.E.2d 919, 923. With regard to the retroactivity problem, *see* notes 43 & 44 *infra* and accompanying text.

In United States v. Fisher, 387 F.2d 165 (2d Cir. 1967), *cert. denied*, 390 U.S. 953 (1968), the defendant was indicted for having received items of value from his employer at a time when he was representing a labor organization. The accused was then earning $450 per week and had retained counsel throughout the proceeding.

In United States v. Lubitsch, 266 F. Supp. 294 (S.D.N.Y. 1967), a revenue agent was charged with accepting $200 from a taxpayer in connection with an audit examination. As an employee of the Internal Revenue Service, the defendant was earning $9000 per year. There was evidence that he and his wife jointly owned a house worth $20,000 and had an $1800 bank balance at the time. *See also* Dickey v. State, 444 P.2d 373 (Wyo. 1968). Statements held to be inadmissible:

In Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969), a school teacher turned himself in to the police. The state argued that the defendant was not indigent. Since the defendant was a teacher, the state assumed he could afford to pay a lawyer. The court, however, found that even in this case one could not be so certain as to omit the warning. This decision was based on the court's earlier holding in Commonwealth v. Dixon, 432 Pa. 423, 248 A.2d 231 (1968). Although the police did not learn that the accused had retained counsel in another criminal prosecution until they were four hours into the interrogation, the court suggests that even had they known of this fact at the outset, the result would be no different. Just because an individual had retained an attorney in another case does not mean he is still financially able to employ one or that he has an attorney for all criminal purposes. With reference to footnote forty-three the court stated that "this loophole is a narrow one which can only be utilized in the clearest of cases. Here the Commonwealth's argument is at best a shaky one." 432 Pa. 423, 427, 248 A.2d 231, 233.

In State v. Gendreau, — R.I. —, 259 A.2d 855 (1969), the defendant was twenty-two years old and discharged from the Navy on account of a personality disorder. The police only knew the defendant was a carpenter. The court, in holding that the state did not meet its burden in proving indigence, gave indigence a broad definition—able to retain an attorney from the interrogation until the end of the entire proceedings.

14. For an overview of the general difficulty courts have in determining indigence, *see* cases cited in notes 35 & 36 *infra* and accompanying text.

Any test based on police knowledge must be fairly precise. Several factors support this conclusion. First, many people accused of serious crimes are indigent and are entitled to appointed counsel.[15] The police are aware of this. Secondly, indigence is a complex question, often difficult to evaluate from the mere physical appearance of the defendant.[16] Thirdly, reliance on police knowledge would arguably tend to undermine the goals established in *Miranda*. The Court in *Miranda* wanted to ensure that the individual defendant understands his rights so that he can make an intelligent decision whether he wants to stand on his right to remain silent or wishes to make a statement. The Court decided that no defendant could make an intelligent decision if unaware of his rights. It follows that the warning should not be conveyed in terms which would lead the accused to believe he is only entitled to a lawyer if he can afford one.[17] By placing the additional requirement of knowledge on law enforcement authorities, the courts could prevent haphazard administration of the *Miranda* warnings. Still unanswered is the question of what constitutes adequate knowledge of the defendant's financial status.

A few cases suggest the degree of care the police must exercise in ascertaining the defendant's financial status before a court will excuse the omission of the appointed counsel warning. In *Commonwealth v. Dixon*,[18] the Supreme Court of Pennsylvania limited police discretion in omitting the appointed counsel warning. It did not hold that the

15. Birzon, Kasarof & Forma, *The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State*, 14 BUFF. L. REV. 428, 433 (1965) (65-90% of all felony defendants brought into the New York courts are indigent); H. Pollack, *Equal Justice in Practice*, 45 MINN. L. REV. 737, 738 (1961) (more than 1,000,000 of 2,000,000 people charged with serious crimes will require free legal representation).

16. *See* cases cited in notes 35, 36 *infra*.

17. The Court in *Miranda* tried to make it very clear that financial ability is in no way related to the scope of rights involved. Speaking of the indigent's right to counsel, Chief Justice Warren stated:

> Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most subjected to interrogation—the knowledge that he too has a right to have counsel present. As with warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

384 U.S. 436, 473.

18. 432 Pa. 423, 248 A.2d 231 (1968).

warning was an absolute requirement, but did find that the "loophole" available to police "is a narrow one which can only be utilized in the clearest of cases."[19] The court, however, did not indicate what knowledge of the defendant's financial circumstances must exist before it would excuse the omission of the warning. In a later Pennsylvania case, police knowledge that the defendant was a school teacher was not sufficient to permit the omission of the appointed counsel warning.[20] The Supreme Court of Rhode Island in *State v. Gendreau*,[21] on the belief that *Miranda* is not a narrow decision, refused to give the terms "indigent" and "ample funds" narrow definitions. The court held that footnote forty-three condoned omission of the appointed counsel warning only if the defendant was able to afford an attorney for the post-arrest interrogation and all subsequent proceedings arising out of the arrest. Any narrower approach, it argued, would fragment the right to counsel and require a separate assessment of an accused's financial status at each successive stage of a criminal prosecution. In *Gendreau*, police knowledge that the defendant was a carpenter did not relieve the state of the duty to give the appointed counsel warning. The burden was on the state to show the defendant had the financial capability to retain private counsel. It failed to meet that burden; therefore, the defendant's statement was not admitted.

These cases seem to indicate that the police must have more than a cursory knowledge of the defendant's financial capacity. If the courts employ a police knowledge test, then the goal of *Miranda*, the accurate explanation to the defendant of his rights upon arrest, would be furthered. Society as a whole would be benefited since police would be alerted that failure to conform to *Miranda* by omitting the appointed counsel warning would result in the loss of cases the state should have won.

II. *Ex Post Facto* INQUIRY

One alternative to the police knowledge test is the resort to *ex post facto* inquiries into the defendant's financial status. The Supreme Court, in footnote forty-three, expresses an aversion to this approach. This admonishment by the Court lends support to a police knowledge test. Under that test a court must answer the threshold question of

19. *Id.* at 427, 248 A.2d at 233.

20. Commonwealth v. Yount, 435 Pa. 276, 256 A.2d 464 (1969). *Yount* and its predecessor *Dixon* are discussed in greater detail in note 13 *supra*.

21. — R.I. —, 259 A.2d 855 (1969) discussed also in note 13 *supra*.

knowledge. If it finds inadequate knowledge, a motion to suppress would be granted and the question of indigence avoided entirely. On the other hand, the sole issue under the "*ex post facto* inquiry" test is the defendant's financial status. Only if the defendant is indigent would a motion to suppress be granted. Arguably, the protection offered by *Miranda* would be diluted since the only issue is financial status. The incentive to give the appointed counsel warning would be much less than under the police knowlege test. Nevertheless, several courts have adopted the *ex post facto* approach without the requirement of police knowledge.

The *ex post facto* inquiry deals solely with the difficult problem of indigence.[22] Appellate courts have refused to review indigence in the absence of a clear objection.[23] They have ruled the warning unnecessary because the defendant was in fact represented by employed counsel[24] or the record showed the defendant had adequate funds.[25] The Court of Appeals for the Second Circuit in *United States v. Chap-*

22. The difficulty in defining indigence lies in the interdependency of so many individually complex factors. The term is entirely relative. With these thoughts in mind the court in State v. Harris, 5 Conn. Cir. 313, 250 A.2d 719 (1968), wondered whether Justice Black's definition, "too poor to hire a lawyer," Gideon v. Wainwright, 372 U.S. 335, 344 (1963), alone would be sufficient.

23. United States v. Messina, 388 F.2d 393 (2d Cir.), *cert. denied,* 390 U.S. 1026 (1968); United States v. Fisher, 387 F.2d 165 (2d Cir. 1967), *cert. denied,* 390 U.S. 953 (1968); State v. Devoe, 430 S.W.2d 164 (Mo. 1968); People v. Post, 23 N.Y.2d 157, 242 N.E.2d 830, 295 N.Y.S.2d 665 (1968); Floyd v. State, 430 S.W.2d 888 (Tenn. Crim. App. 1968). In State v. Devoe, *supra,* Presiding Judge Finch, in a concurring opinion, rejected this rationale and instead based his decision on the defendant's financial status. The defendant nowhere in the proceeding requested appointed counsel or claimed he was indigent. In fact, he was defended by employed counsel. In Floyd v. State, *supra,* the court reasoned that there were no objections to the defendant's statements since they supported a self-defense plea. Also, the defendant was represented by retained counsel.

24. United States v. Messina, 388 F.2d 393 (2d Cir.), *cert. denied,* 390 U.S. 1026 (1968); O'Neal v. State, 115 Ga. App. 100, 153 S.E.2d 663 (1967); People v. Baker, 19 Mich. App. 480, 172 N.W.2d 892 (1969) (represented on appeal by appointed counsel; remanded for a hearing on indigence); State v. Devoe, 430 S.W.2d 164 (Mo. 1968) (concurring opinion); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); State v. Gray, 268 N.C. 69, 150 S.E.2d 1 (1966), *cert. denied,* 386 U.S. 911 (1967); Floyd v. State, 430 S.W.2d 888 (Tenn. Crim. App. 1968); Dickey v. State, 444 P.2d 373 (Wyo. 1968). *Contra,* United States v. Miller, 261 F. Supp. 442 (D. Del. 1966). After the defendant signed a statement he was informed of his right to appointed counsel which he promptly exercised. No mention was made of financial status.

25. United States v. Lubitsch, 266 F. Supp. 294 (S.D.N.Y. 1967); State v. Bliss, — Del. —, 238 A.2d 848 (1968); People v. Post, 23 N.Y.2d 157, 242 N.E.2d 830, 295 N.Y.S.2d 665 (1968).

lin,[26] found it necessary to make an *ex post facto* inquiry into indigence since the financial status of the defendant was doubtful. The defendant stated that he lived alone and earned between sixty and one hundred dollars per week. He had $1800 in cash in his possession, $800 of which he used to post bond. His girl friend owned a 1963 Cadillac and shortly after the defendant's arrest purchased a 1967 Cadillac with funds partially furnished by the defendant. The defendant had enough credit that a fur dealer entrusted three mink coats to him on an approval basis. This evidence was held sufficient to support a finding that the defendant had funds to retain counsel. The finding that Chaplin had sufficient funds to retain counsel made the omission of the appointed counsel warning non-prejudicial, and Chaplin's statement was not suppressed.[27]

Many courts employing *ex post facto* consideration of financial status have overlooked the "temporal" problem. In determining whether the defendant is indigent, a court must first decide the proper period of time to focus upon the defendant's financial status. There are essentially two choices. A court may look to the defendant's ability to retain counsel at the time of trial or at the time of arrest and interrogation. Courts looking to the time of trial often find that the defendant is represented by retained counsel and hold that conclusive on the issue of the defendant's non-indigence.[28] This approach overlooks the situation existing at the time most crucial to the defendant, the period of arrest and interrogation. This period is crucial because it is at this time that the defendant must decide whether he will exercise his constitutional rights to counsel and to remain silent. Should the defendant later acquire funds to pay an attorney, or relatives come to his aid, the state would be relieved of its burden to provide appointed counsel. It would seem unwise, however, for the police to anticipate such an uncertain event by omitting the warning. The fear is that the accused individual, at the time of interrogation, unaware of his right to free counsel and reluctant to incur attorney's fees, goes through the questioning alone.[29] Resort to the *ex post facto* finding means the holding

26. 435 F.2d 320 (2d Cir. 1970).

27. *Id.* at 322-23. The court refused to set any dollar guidelines. Its primary reason was the inflationary tendency in the economy. This unwillingness to set a fixed standard supports the proposition that the question of indigence is so difficult that courts refuse to define it too precisely.

28. *See* cases cited in note 24 *supra*. *See also* the discussion of Commonwealth v. Dixon, 432 Pa. 423, 248 A.2d 231 (1968) in note 13 *supra*.

29. Commonwealth v. Dixon, 432 Pa. 423, 425, 248 A.2d 231, 233 (1968).

of an extra hearing, which would add to the already existing delay burdening our criminal courts.[30]

III. WHAT IS INDIGENCE?

In order to apply a test based on an *ex post facto* finding of financial status, regardless of whether police knowledge is additionally required, the courts must ultimately decide how they will define "indigence." Because of the diverse, complex factors involved in determining indigence, the courts have been unable to set down workable guidelines. Generally indigence means poor or needy or destitute of property.[31] Only a small amount of earnings may remove a litigant from the indigent "classification."[32] In providing appointed counsel for indigent criminal defendants, a court must make more than a cursory inquiry into financial status.[33] The determination is far from simple. A multitude of factors must be examined:

> A starting point is income. Other factors include bank accounts or convertible assets, ownership of home or ownership of automobile, em-

30. *See* State v. Bliss, — Del. —, 238 A.2d 848 (1968). The footnote at 850 reads as follows:

> The police are advised to give this warning rather than rely upon a future finding of lack of prejudice. It is easily given and, if given, forestalls delays in disposition of cases in instances like the present one. We think this is the meaning of footnote 43. . . .

31. *See, e.g.*, Weeks v. Mansfield, 84 Conn. 544, 80 A. 784, 786 (1911); City of Lynchburg v. Slaughter, 75 Va. 57, 62 (1880); Juneau County v. Wood County, 109 Wis. 330, 333, 85 N.W. 387, 388 (1901). For a comment on the difficulty legal aid societies have assessing the financial status of prospective clients *see* A. BLAUSTEIN & PORTER, THE AMERICAN LAWYER 74 (1954).

32. In Alexander v. Superior Court, 29 Cal. App. 2d 538, 84 P.2d 1061 (1938), the petitioner sought a writ of mandamus to order that the prepayment of jury fees be waived. At the time of the hearing the petitioner was earning $110-115 per month on the average. The court held that the petitioner was not indigent. A similar result was reached in Brown v. Upfold, 204 Misc. 416, 123 N.Y.S.2d 342 (Sup. Ct. 1953). A personal injury victim, who had a wife and four minor children was paying $31 per month for his residence, and was receiving only $161 per month in welfare was not allowed a trial calendar preference on account of indigence. In examining cases involving the question of indigence, the reader must be especially careful. The results of inflation may be marked. What may have been considered a substantial sum at some time in the past may be insignificant today.

33. Wood v. United States, 389 U.S. 20, 21 (1967); Bowen v. State, 236 So. 2d 16, 18 (Fla. Dist. Ct. App. 1970); State v. Anaya, 76 N.M. 572, 576, 417 P.2d 58, 60 (1966); State *ex rel.* Barth v. Burke, 24 Wis. 2d 82, 86, 128 N.W.2d 422, 424-25 (1964). If the defendant's financial status changes during the course of a proceeding, further inquiry is not foreclosed. Elliot v. District Court, 157 Colo. 229, 402 P.2d 65 (1965); State v. Anaya, 76 N.M. 572, 577, 417 P.2d 58, 61 (1966).

> ployment status, outstanding debts, number of dependents, and [the cost of counsel].[34]

Physical appearance may be deceiving. Property in the name of the accused individual may be heavily encumbered. Also, due to a civil action pending against the defendant, he may not be able to offer his assets as security.[35] A court cannot refuse to appoint counsel because the defendant is an able-bodied man and ought to be able to employ a lawyer, but instead must examine actual financial ability.[36] Each decision is unique, with the ultimate question being: can *this* defendant afford to employ an attorney? The general notion of what constitutes indigence appears no different in the footnote forty-three situation. The questions are time-consuming, difficult to answer, and arise at all stages of the judicial process.

IV. REQUIRE THE WARNING IN ALL CASES

Although not suggested by the Court in *Miranda,* another solution to the footnote forty-three problem would be to make the warning a strict requirement and thereby avoid the question of financial status

---

34. State v. Harris, 5 Conn. Cir. 313, 315, 250 A.2d 719, 721 (1968). The bracketed portion should read "the seriousness of the charge," which is misleading. Therefore, the bracketed portion has been substituted as a clarification to the reader. *See also* Note, *Representation of Indigents in California—A Field Study of the Public Defender System and Assigned Counsel Systems,* 13 STAN. L. REV. 522, 545 (1961).

35. The defendant was found to be indigent in the following cases: In Rast v. State, 77 Fla. 225, 81 So. 523 (1919), the defendant in an embezzlement prosecution owned real estate including a homestead worth $15,000-18,000 but because a civil action for embezzlement of $100,000 in tax money was pending against him, no one was willing to loan the defendant anything. In People v. Chism, 17 Mich. App. 196, 169 N.W.2d 192 (1969), the accused and his wife owned as tenants by entirety real estate worth $14,000 with an outstanding indebtedness of $2000. They also jointly owned two cars worth $3200 and 30 shares of stock worth $3100. Title to a motorcycle was in the accused's name but was a gift to his minor son. His wife had a $1500 bank balance. She filed for divorce prior to the criminal prosecution but little had transpired in that action. Between the first and second hearing on indigence the defendant conveyed his interests in the above property to his wife who refused to contribute to his defense since they had separated and she needed the money to support her minor son. The defendant tried to retain an attorney but was told that he needed a $5000 retainer fee. *See also* Keur v. State, 160 So. 2d 546 (Fla. Dist. Ct. App. 1963). The sale of assets seems appropriate in the above situations. In certain circumstances, though, this may be impossible. For example, the property may have been attached or so encumbered that a sale would realize little if anything. The cases discussed in this footnote do not discuss this point.

36. Schmidt v. Uhlenhopp, 258 Iowa 771, 775, 140 N.W.2d 118, 121 (1966); State v. Anaya, 76 N.M. 572, 576, 417 P.2d 58, 61 (1966); State v. Cowart, 251 S.C. 360, 365, 162 S.E.2d 535, 537 (1968).

and the necessity of *ex post facto* inquiries entirely. The language of footnote forty-three dispels the notion that requiring all the warnings is the rule courts should follow. Yet the rule does present a plausible guideline for police behavior. Several reasons have been offered to support this limitation on law enforcement authorities. As discussed above, indigence is difficult to define. With the added knowledge that many criminal defendants are indigent,[37] the police are alerted that giving all warnings is probably necessary. In a sense, the suggestion is that the police should be made to do what they are inclined to do. Arguably, society would benefit if the police followed procedures which do not cause the loss of cases because of their oversight. The Supreme Court suggests in footnote forty-three that the warning is easily given,[38] that is, the burden on police is minimal.[39] The conclusion has been drawn that the only adverse effects of *Miranda* on conviction and confession rates were transitional, and after law enforcement authorities had had time to adjust to the new procedures, confession and conviction rates returned to their former levels.[40] Those who would oppose requiring all *Miranda* warnings in all cases feel that the police will be hampered in their duty to enforce the criminal statutes.

---

37. *See* articles cited in note 15 *supra.*

38. Miranda v. Arizona, 384 U.S. 436, 473 (1966). The Court refers to the warning as a "simple expedient."

39. The court in United States v. Lubitsch, 266 F. Supp. 294, 297 (S.D.N.Y. 1967), thinks that the better practice is to give the warning as does the Second Circuit in United States v. Chaplin, 435 F.2d 320, 322 (2d Cir. 1970). *See also* State v. Bliss, discussed in note 30 *supra.*

40. Studies were undertaken in several urban areas shortly after *Miranda* in order to determine its effects on law enforcement. The general conclusions are that *Miranda* did not impair the opportunity for effective interrogation and had little impact on the conviction or confession rate. *See* Medalie, Zeitz and Alexander, *Custodial Interrogation in Our Nation's Capital: The Attempt to Implement Miranda,* 66 MICH. L. REV. 1347 (1968); Seeburger & Wettick, *Miranda in Pittsburgh—A Statistical Study,* U. PITT. L. REV. 1 (1967); *Younger,* 35 FORDHAM L. REV. 255 (1966); Note, *Interrogations in New Haven: The Impact of Miranda,* 76 YALE L.J. 1519 (1967); Note, *A Postscript to the Miranda Project: Interrogation of Draft Protesters,* 77 YALE L.J. 300 (1967); *See also* Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply,* 1968 DUKE L.J. 425.

In his article, Younger was surveying the effects of People v. Dorado, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169, *cert. denied,* 381 U.S. 937 (1965), which liberally construed *Escobedo.* Younger found *Dorado* did not present a difficult problem in the prosecution of cases. Because its requirements were similar to *Miranda,* the adjustment which had to be made for prosecutions was small. Some pre-*Miranda* confessions were found inadmissible at post-*Miranda* trials but the result was regarded as merely transitional. 35 FORDHAM L. REV. at 259.

If the conclusions in the surveys noted above are reliable, then this argument loses much of its force.

In light of the Supreme Court's recent decision in *Harris v. New York*,[41] proponents of the absolute requirement for *Miranda* warnings would consider this safeguard all the more necessary. The Court in *Harris* held that voluntary but otherwise unconstitutionally obtained statements may be used for impeachment purposes at trial. *Ex post facto* inquiries into financial status, including those requiring police knowledge, provide potential loopholes for police if they omit the appointed counsel warning. With *Harris*, police receive some encouragement to ignore the safeguards set down in *Miranda* since the statement still may be used for a limited purpose. The rationale of the *Miranda* decision is to insure that if an accused individual waives his constitutional rights he does so with knowledge of those rights. If one accepts the Court's premise that the rights involved are precious to the individual, then any devise which allows these rights to be circumvented should be discouraged. The strict requirement that all *Miranda* warnings be given would omit all police discretion and in that way help to achieve the goals set forth in *Miranda*.

The problems in the cases discussed in this note result primarily from the non-retroactive application of *Escobedo* and *Miranda*.[42] A confession obtained prior to *Miranda* could meet all constitutional requirements then in effect, but because the trial began after *Miranda*, the statements would be rendered inadmissible in most cases.[43] The warning of the right to appointed counsel was an innovation of *Miranda*; therefore, the likelihood that this warning would be omitted in a pre-*Miranda* interrogation is high. The only indication that there will be no *ex post facto* determination in a post-*Miranda* interrogation case appears in *Chaplin*. The court was faced with a pre-*Miranda* interrogation and made an *ex post facto* determination, but stated:

[I]f Chaplain's statement had been taken after *Miranda* had been de-

41. 401 U.S. 222 (1971). *See also* Note, *Impeachment by Unconstitutionally Obtained Evidence: The Rule of Harris v. New York*, 1971 WASH. U.L.Q. 441.

42. In Johnson v. New Jersey, 384 U.S. 719 (1966), the Court held that *Escobedo* applies only to cases in which the trial commenced after June 22, 1964 and *Miranda* to trials commencing after June 13, 1966.

43. Post-*Miranda* cases used in this note are State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971) and Floyd v. State, 430 S.W.2d 888 (Tenn. Crim. App. 1968). The courts in these cases do not even consider the significance that all proceedings were subsequent to *Miranda*.

> cided, we would hold the Government to its duty to have warned Chaplin of his possible right to assigned counsel for, to say the least about Chaplin's financial ability at the time he made his statement to the prosecutor, there could well have been doubts about whether Chaplin was indigent.[44]

Several aspects of the statement merit emphasis. First, the court admonished resort to *ex post facto* inquiries in post-*Miranda* interrogations. Secondly, it regarded the *time of interrogation* as crucial in making any determination of indigence. Lastly, the Court of Appeals for the Second Circuit expressed a more stringent approach to post-*Miranda* interrogations. Since *Miranda* was decided over five years ago, the transitional period surrounding it should be over. Very few cases involving pre-*Miranda* interrogations are pending. This may mean that the appointed counsel warning problem is a diminishing one, as police departments have standardized their procedures and have resorted more and more to "the card". However, the practical problem still exists. So long as it does, the argument that all warnings should be given in all cases merits serious consideration.[45]

---

44. 435 F.2d 320 at 322. The language in *Chaplin* is not so broad as to require all warnings in all cases. A similar result was reached in Griffith v. Jones, 283 F. Supp. 794 (N.D. Ga. 1967), a habeas corpus proceeding. The defendant was convicted of burglary on the basis of a pre-*Miranda* confession. Because there was no specific objection on indigence at trial, the state supreme court held that the issue would not be proper on appeal, Griffith v. State, 223 Ga. 543, 156 S.E.2d 903 (1967). The federal court, in the habeas corpus proceeding, held that the burden was on the state to show the defendant's indigence, which it failed to do. It did not remand for a hearing on indigence but granted the writ. It found the language of footnote forty-three and the text to which it is appended forecloses the necessity for an *ex post facto* finding, 283 F. Supp. 794 at 796. The court does, however, suggest that there may be circumstances in which the appointed counsel warning is unnecessary but fails to give any examples.

The *Griffith* court regarded Fendley v. United States, 384 F.2d 923 (5th Cir. 1967) as almost directly on point. The warning in *Fendley*, however, was inadequate because the defendant was not informed that he was entitled to have appointed counsel present at the post-arrest interrogation, the omission of two parts of the required warnings.

45. Several studies indicate that *Miranda* may not have gone far enough in its effort to protect the accused individual. Demeanor of the police at the interrogation as well as their tone of voice can do much to dissuade an individual from remaining silent, and in spite of the warnings, individuals of all income and educational backgrounds felt some obligation to talk. *See* Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Note, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967); Note, *A Postscript to the Miranda Project: Interrogation of Draft Protesters*, 77 YALE L.J. 300 (1967).

V. HARMLESS ERROR

Several jurisdictions find the failure to warn the non-indigent defendant of the right to appointed counsel to be harmless error.[46] In *Chapman v. California*,[47] the Supreme Court held that if the appellate court is convinced beyond a reasonable doubt that any constitutionally tainted evidence admitted at trial is non-prejudicial, then its admission constitutes harmless constitutional error.[48] However, the Court has not stated whether it would apply the harmless error rule to *Escobedo* and *Miranda*.[49] Some state courts infer from Supreme Court decisions subsequent to *Chapman* that *Escobedo* and *Miranda* are within its scope. To illustrate, the post-indictment line-up cases, *United States v. Wade*[50] *and Gilbert v. California*,[51] which relied on *Escobedo* and *Miranda* for support, were remanded to see whether the introduction of identification evidence would be harmless error.[52] The Supreme Court of Nevada has held that the harmless constitutional error rule applied in situations where new procedural safeguards were denied retroactive application.[53] In *Stovall v. Denno*,[54] which denied retroactive application to *Wade* and *Gilbert*, the Court looked to the impact on the fact-finding process necessary to require retroactive application. It observed that line-ups could be fair without resorting to these safe-

46. United States v. Fisher, 387 F.2d 165 (2d Cir. 1967), *cert. denied*, 390 U.S. 953 (1968); State v. Bliss, — Del. —, 238 A.2d 848 (1968); O'Neal v. State, 115 Ga. App. 100, 153 S.E.2d 663 (1967); Commonwealth v. Wilbur, 353 Mass. 376, 231 N.E. 2d 919 (1967), *cert. denied*, 390 U.S. 1010 (1968); Guyette v. State, 84 Nev. 160, 438 P.2d 244 (1968); People v. Post, 23 N.Y.2d 157, 242 N.E.2d 830, 295 N.Y.S.2d 665 (1968); State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971); Hayes v. State, 39 Wis. 2d 125, 158 N.W.2d 545 (1968).

47. 386 U.S. 18 (1967).

48. *Id.* at 24.

49. The Court in *Chapman* refused to hold that all federal constitutional errors regardless of the facts and circumstances are harmful. The Court found some rights to be so basic to a fair trial that their infraction would never constitute harmless error; reversal is automatic in these situations. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); Tumey v. Ohio, 273 U.S. 510 (1927) (impartial judge). For a more comprehensive list of automatic reversal cases, see Guyette v. State, 84 Nev. 160, 438 P.2d 244, 248 n.1 (1968).

50. 388 U.S. 218 (1967).

51. 388 U.S. 263 (1967).

52. *See* Commonwealth v. Padgett, 428 Pa. 229, 237 A.2d 209 (1968), commented in 72 DICK. L. REV. 536 (1968).

53. Guyette v. State, 84 Nev. 160, 438 P.2d 244 (1968).

54. 388 U.S. 293 (1967).

guards.[55] *Escobedo* and *Miranda*, which are also prospectively applied, are subject to similar considerations.[56]

When the appointed counsel warning is omitted, harmless error takes three forms. The error may be harmless because there is no duty to warn a non-indigent of a right he does not possess.[57] The second variety of harmless error is the admission of a statement which is not harmful to the defendant's case. The third is the admission of an incriminating statement on grounds of overwhelming independent evidence. The courts which have resorted to the first definition of harmless error were faced with pre-*Miranda* interrogations. The courts consciously attempted to mitigate *Miranda*'s harsh consequences upon the state. With a pre-*Miranda* interrogation, if there was complete compliance with *Escobedo*, the law then in effect, and if coercion was absent, the courts have not been reluctant to find that any ensuing statement followed a knowing and intelligent waiver. Harmless error, however, is a misnomer in these cases. The courts employing this approach, instead, seem to be saying that no error was committed, for how can there be any error if there is no duty to warn the defendant of his rights? Stated simply, harmless error results from the trial judge's *improper* admission of a statement not deemed prejudicial to the defendant. If the warning of the right to appointed counsel was

---

55. *Id.* at 299.

56. In many instances police interrogation is absent the coercive elements suggested in *Miranda*.

57. United States v. Fisher, 387 F.2d 165 (2d Cir. 1967), *cert. denied*, 390 U.S. 953 (1968); State v. Bliss, — Del. —, 238 A.2d 848 (1968); O'Neal v. State, 115 Ga. App. 100, 153 S.E.2d 663 (1967); Commonwealth v. Wilbur, 353 Mass. 376, 231 N.E.2d 919 (1967), *cert. denied*, 390 U.S. 1010 (1968); People v. Post, 23 N.Y.2d 157, 242 N.E.2d 830, 295 N.Y.S.2d 665 (1968). *Cf.* Schmerber v. California, 384 U.S. 757 (1966). The defendant objected to administration of a blood test. Speaking for the Court, Justice Brennan made the following remarks regarding the right to counsel:

> This conclusion [that a blood test is not an incriminating product of compulsion] also answers the petitioner's claim that, in compelling him to submit to the test in face of the fact that his objection was made on advice of counsel, he was denied his Sixth Amendment right to the assistance of counsel. Since petitioner was not entitled to assert the privilege, he has no greater right because counsel erroneously advised him that he could assert it. His claim is strictly limited to the failure of the police to respect his wish, reinforced by counsel's advice, to be left inviolate. No issue of counsel's ability to assist petitioner in respect of any rights he did possess is presented. The limited claim thus made must be rejected.

384 U.S. 757, 765-6.

not required, and *Miranda* was otherwise complied with, the admission of the confession would not be improper.

In the second variety of harmless error the defendant has made a potentially harmful statement to the police. It may be exculpatory or supportive of a defense argued by the defendant.[58] In these situations the failure to suppress a statement could be non-prejudicial, the possibilities for harm being minimal. Under the third variety of harmless error, the defendant has made an incriminating statement to the police, but there is overwhelming independent evidence to support a guilty verdict. No footnote forty-three case covers this exact situation but a few suggest the overwhelming independent evidence approach.[59] The nature of the statement may be the decisive factor. If the defendant makes a statement that he was in the vicinity of the scene of the crime, it will probably be less persuasive to a jury than the often fatal outright confession. If the statistical data on the necessity of confessions for convictions, allegedly a small number, is accurate, then admission of statements made by an insufficiently warned defendant may be harmless constitutional error.[60] This approach is similar to the California rule that if "confessions" are admitted as evidence, the case is subject to automatic reversal, but if the statements are simply "admissions", they are subject to the harmless error rule.[61] This inter-

58. State v. Crump, 277 N.C. 573, 178 S.E.2d 366 (1971). The defendant testified at trial to what he previously told police. This supported a plea of self-defense. *Cf.* People v. Alesi, 67 Cal. 2d 856, 434 P.2d 360, 64 Cal. Rptr. 104 (1967) (decided under *Escobedo*). In Hayes v. State, 39 Wis. 2d 125, 158 N.W.2d 545 (1968), exculpatory statutes were found to be admissible. Although they involved some inconsistencies, there was overwhelming independent evidence to support the verdict. In light of the recent holding in Harris v. New York, 401 U.S. 222 (1971), such a voluntary but otherwise unconstitutionally obtained statement could be used for impeachment purposes. The defendant in *Hayes*, however, did not testify in his own behalf.

59. Hayes v. State, 39 Wis. 2d 125, 158 N.W.2d 545 (1968) comes closest to this factual situation. The defendant was tried for murder. An exculpatory but inconsistent statement was erroneously admitted, but the court found the error harmless. The state called fourteen witnesses, six of whom saw the defendant running from the scene of the crime at the time it was committed. There was also physical evidence of the defendant's guilt. To a lesser extent Guyette v. State, 84 Nev. 160, 438 P.2d 244 (1968) supports this proposition. Incriminating statements were admitted in spite of the absence of the appointed counsel warning. The statement was voluntary, complied with *Escobedo* which was then in effect, and the most damaging evidence was not given in response to any interrogation.

60. *See* note 40 *supra.*

61. A "confession" in these terms is a statement by someone accused of a crime to the effect that he is guilty unless it is broad enough to include all essential elements

pretation of the harmless error rule seems more in line with *Chapman*. Courts recognize a duty to warn the defendant of his rights, but will excuse a failure to give proper warnings only if the evidence introduced is non-prejudicial.

VI. CONCLUSION

The subject of primary concern in this note is how to handle police omission of the appointed counsel warning. Several approaches have been suggested. The first, the police knowledge test, is derived from the language of footnote forty-three. The Court speaks of what is known about the defendant's financial condition. *Ex post facto* inquiries into financial status are also proposed in the footnote, but in a negative way, through the Court's admonishment of such an approach. The requirement that the police give all *Miranda* warnings in all cases clearly is not a product of the footnote. The Supreme Court suggests that a person known to have ample funds need not be given the appointed counsel warning. Nevertheless, this approach represents a plausible guideline for police conduct. The problems inherent in each of these tests may be best appreciated through the analysis of four hypothetical situations. For the purposes of analysis, it is assumed that in each case the defendant has been given all *Miranda* warnings except the appointed counsel warning, and that he has made an inculpatory statement:

1. There is reasonable basis to believe the defendant is indigent, and he is in fact indigent.
2. There is reasonable basis to believe the defendant is indigent, but he is in fact not indigent.
3. There is reasonable basis to believe the defendant is not indigent, but he is in fact indigent.
4. There is reasonable basis to believe the defendant is not indigent, and he is in fact not indigent.

The first hypothetical presents no difficulty at all. Under all tests the defendant's statement will be suppressed. There is no justification for

---

necessary to make out a case against him. An "admission" is the acknowledgment of a fact or circumstance in itself insufficient to prove guilt but it tends to the ultimate proof of guilt. Needless to say, the problems in distinguishing between the two appear complicated. *See, e.g.*, People v. Hillery, 62 Cal. 2d 692, 401 P.2d 382, 44 Cal. Rptr. 30 (1965); *In re* Cline, 255 Cal. App. 2d 115, 63 Cal. Rptr. 233 (1967). Ohio seems to have an automatic reversal rule for all statements, State v. Gresham, 10 Ohio App. 2d 199, 227 N.E.2d 248 (1967).

failing to give the appointed counsel warning in this situation.

The second hypothetical shows the major conflict between the police knowledge test and the *ex post facto* inquiry. Under the former approach, the statement will be suppressed, but not under the latter. The police knowledge test's additional requirement that the police have "adequate" knowledge of the defendant's financial status dictates that the warning be given in this situation even though the defendant is in fact not entitled to the warning. The weakness inherent in the test is the general inability to determine an individual's financial status from his physical appearance, but the additional requirement of knowledge provides the defendant greater protection. The *ex post facto* inquiry produces the correct result in terms of financial status, but in this case neglects the appearance of the reality which existed at the time of interrogation. At that time, for all intents and purposes, the defendant was indigent. In this context, the defendant is not offered the protection available under the police knowledge test. The third hypothetical is the converse of the second. In this factual setting, the statements will be suppressed under all tests. No court has prevented an indigent defendant from being fully informed of his rights upon arrest. The second and third hypotheticals show the basic differences between the police knowledge test and resort to *ex post facto* inquiries. With the former approach, the defendant is given the appointed counsel warning if he is non-indigent or police do not know his financial status. This goes far in protecting the defendant. With the latter approach, however, only financial status means anything. Police are given wider discretion in the decision whether to give the appointed counsel warning. The police knowledge test and to a lesser extent the *ex post facto* inquiry set guidlines for police behavior, but the discretionary element is still present. In this respect the tests present indicia by which the courts may evaluate whether suppression of the defendant's statement is warranted or not, affecting police behavior to a lesser extent. The clear standard that all warnings be given in all cases is aimed directly at police behavior, the source of the problem. In both the second and the third hypotheticals the defendant's statement would be suppressed. All discretion is eliminated. A court reviewing police behavior would only have to decide whether or not the warnings were properly given.[62]

62. The courts still are faced with the question whether the interrogation was custodial or not and whether the defendant in fact waived his rights but the nagging problem of financial status has been eliminated.

The absolute requirement that all warnings be given raises the complaint that law enforcement authorities are thereby shackled with cumbersome procedures which favor the "criminal" and result in harm to the general public. The fourth hypothetical points up that problem. The statement would not be suppressed under either the police knowledge or *ex post facto* inquiry tests, but on the other hand, if all warnings are required, the statement would not be admitted as evidence. In this situation the defendant clearly is not entitled to the appointed counsel warning. Society would be harmed by allowing a "guilty" person to go free on account of a technicality totally unrelated to the particular defendant. However, one must question how often this situation is likely to occur. This danger to society must be balanced against the rights of the individual. Knowledge that many criminal defendants are indigent should put police on guard that warnings are necessary in almost every case. The likelihood is that the police will be unable to determine the defendant's financial status. The prevalence of the doubtful case should then set some guideline for police. Since one may never be sure, it is best to take all possible precautions. The general public should then derive benefit due to the adherence to procedures which do not allow the state to lose cases because of omissions by law enforcement officials. It has been observed that *Miranda* only temporarily restricted police behavior and once police departments had time to adjust, their confession and conviction rates returned to their former levels.[63] The strict requirement that all warnings be given may not then be the great danger it is purported to be.

---

63. *See* note 40 *supra.*