OPINIONS

BY JOE KELLEY

In an appeal from a conviction for first-degree robbery, kidnapping and first-degree murder, Thomas L. Varnum challenged his conviction on the grounds that the court erred in admitting the alleged murder weapon into evidence, because the weapon was located as a result of interrogations conducted without the preliminary protections outlined by *Escobedo* 1. *Illinois*, 378 U.S. 478(1964), and further clarified by *Miranda* 1. *Arizona*, 384 U.S. 436(1966). Without first giving the required warnings against self-incrimination or the right to counsel as set forth in *Miranda*, the police prevailed upon Edward Jackson, an accomplice of the deefndant, to reveal the hiding place of the murder weapon which was then used in ebidence against defendant. Under such circumstances, there was no doubt as to the inadmissability of the murder weapon in evidence against Jackson, but there remained the question whether defendant had standing to challenge the violation of Jackson's rights.

In holding that the defendant did not have the requisite standing, the Supreme Court of California, 427 P. 2d 772 (1967), concluded that "the privilege against self-incrimination is not violated when the information ellicted from an unwarned suspect is not used against him."

In order to establish some concrete constitutional guidelines in applying the privilege aaginst self-incrimination to in-custody interrogation the Supreme Court in *Miranda* held that whenever an individual is taken into custody or otherwise deprived of his freedom by the authorities and is subjected to questioning he must be warned prior to any questioning hat anything he says can be used against him in a court of law, that he has the right to the preesnce of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. The prosecution must prove at trial that the warnings were given and that any waiver of these rights by the deefndant was knowingly and intelligently made. Without such proof, no evidence obtained as a result of interrogation can be used against the person questioned. Is this to include all types of evidence, 384 U.S. 436 (1966)?

Prior to *Miranda* there was little question as to the admissability of nontestimonial, real, and derivative evidence. Blood tests, 352 U.S. 432 (1957), fingerprinting, 365 P. 2d. 609 (1961), voice identification, 355 P. 2d. 710 (1965), and police line-ups generally were upheld provided that the activity of the police in gaining such evidence was not conduct that shocks the conscience, 344 U.S. 165 (1952). *Miranda* does not bar the use of evidence obtained by the previously mentioned procedures, 384 U.S. 757 (1966). "The right to remain silent does not include the right to refuse to participate in such tests because the privilege aaginst self-incrimination applies to evidence of communications or testimony of the accused, but not to real or physical ebidence dederived from him" 55 Cal. Rptr. 385 (1966). Indeed, even if the *Miranda* pre-interrogation warnings are not given, only statements gained as a result of that interrogation are inadmissible, 145 N.W. 2d. 447 (1966). "Pretrial interrogation of a suspect without warning him of his constitutional right to remain silent and without giving him the

(Continued on Page 4)

OPINIONS

(Continued from Page 3)

right to counsel does not constitute prejudicial error in the absence of proof that a confession, admission, or statement obtained as a result of such interrogation was used against him in evidence at trial," 145 N.W. 2d. 448 (1966). It becomes apparent that Varnum is not protected if *Miranda's* exclusionary rule is narrowly interpreted.

The same state court that correctly foresaw an exclusionary rule as announced in *Miranda*, takes a limited view of the rule it foresaw. The court points out that unreasonable search or seizures are in themselves unlawful; therefore, a defendant's constitutional rights are broken whenever there is an unreasonable search or seizure. The exclusionary rule is used to deter—to compel respect for the constiutional guaranty in the only effectively available way—by removing the incentive to disregard it, 364 U.S. 206 (1960). The exclusionary rule is not a subatanct of the right tself but is a means by which the right is enforced. Hence any "person aggrieved" has standing to challenge whenever evidence is obtained in violation of the Fourth Amendment constitutional guarantees, whether or not it was obtained in direct violation of that particular defendant's constitutional rights, 45 Cal. 2d. 755 (1955). *Miranda*, on the other hand, protects personal rights—the rights against self-incrimination and the right to counsel. There can be a violation of the Fifth and Sixth Amendments only when evidence is obtained from and admitted against the same person without first giving him the requisite warnings. The dissent contends that interrogation conducted without the required warnings is unlawful from the very moment of the first question. As is the case in unreasonable search or seizures, any evidence obtained in violation of the *Miranda* warnings should be excluded because the exclusionary rule is intended to deter unlawful police activity.

Does *Miranda* forbid interrogation in violation of its rules or does it only make statements inadmissible when obtained by the police during such interrogation? Most of the cases which have considered the question conclude that such interrogation merely makes statements inadmissible; consequently, interrogation in violation of the *Miranda* rules does not of itself void a conviction after trial, 145 N.W. 2d. 447 (1966). By such a narrow interpretation it is possible, without prior warnings as required by law, to interrogate John Doe in order to secure information for use in prosecution of Richard Roe, 20 Vand L. Rev. 39 (1966). This is what happened in *People* v. *Varnum*, 59 Cal. Rptr. 108 (1967), and until the United States Supreme Court rules on the problem, the language of *Miranda* will allow the states to narrowly construe the exclusionary rule and thus conclude that interrogation is wrong only when, without giving the requisite warnings, statements are used in evidence against that person.

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