Thursday, July 27. 2006

When Ernesto Miranda applies little more than Carmen Miranda.

Like pro-lifers who attack Roe v. Wade at the edges -- knowing that Roe is here to stay for quite some time (at least before Chief Justice Roberts and Justice Alito joined the Supreme Court), many police and appellate government lawyers attack and use Miranda v. Arizona with a similar approach.Â Â This state of affairs frustrates many of my clients, who see at the frontline the repeated advantage taken by police of the circumstances where Miranda rights need not be read. First and foremost, the police need not mention Miranda before the suspect is in custody. This is why cops repeatedly visit suspects, talk at length with them, and do not arrest them before giving the suspects a chance to spill the beans. Similarly, cops often will delay reading Miranda rights to an arrestee in the hope that the arrestee will blurt out incriminating words (e.g., "Hey, that's not the bag of cocaine I just sold; I sold a bag half its size"). A particularly common situation is the battery of questions cops ask people stopped for traffic violations ("How much did you have to drink? When? Where"). In the last instance, the courts have created a legal fiction, generally allowing such non-Mirandized questions and answers into evidence even when we all know the driver is not free to leave at the time such questions are posed.Â Â Â For criminal defendants thinking of testifying at their trials, they need to think hard. First, prosecutors generally are permitted to ask the testifying defendant to confirm his or her prior felony and theft-related convictions, because juries generally are permitted to take such prior convictions into account in judging a witness's credibility. Second, prosecutors generally are permitted on cross examination and through rebuttal testimony to impeach a defendant's testimony with any alleged factual proffers previously provided by the defendant in seeking a plea deal. (The proffer approach is particularly alive and well in the federal criminal system).Â Â Â Third, and perhaps less known to the public, non-Mirandized statements by the defendant that are not deemed coerced nor involuntary by the trial court also are admissible for impeachment purposes. Harris v. New York, 401 U.S. 222 (1971). Dissenting Justice Brennan succinctly pointed out the wrongheadedness of Harris:Â Â The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of Miranda cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution.Â Â Harris, 401 U.S. 222, 232.Â Â Â This Harris rule also is followed in Maryland, Virginia, and Washington, DC. See Brown v. Maryland, 373 Md. 234 (2003); Castellon v. U.S., 864 A.2d 141 (D.C. 2004); and Dixon v. Com., 270 Va. 34 (2005).Â Â Â For criminal suspects, this all adds up to knowing your rights, and repeating one of my favorite mantras: "I maintain my right to remain silent. I want a lawyer. I maintain my right to remain silent. I want a lawyer. I maintain my right to remain silent. I want a lawyer."Â Practice this mantra again and again so that it effortlessly flows off the tongue when encountering the police. See the Busted video. Practice this mantra with your friends and acquaintances playing the roles of the slickest and meanest police. By Jon Katz.Â Â ADDENDUM: This posting has been updated here and in our November 29, 2006, blog entry. Â

Posted by Jon Katz in Criminal Defense at 00:00