STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION March 12, 2013
v	No. 298262 Montcalm Circuit Court
BURTON DAVID CORTEZ, Defendant-Appellant.	LC No. 2009-012502-FH

ON REMAND

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

O'CONNELL, P.J. (*concurring*).

I concur that defendant's convictions must be affirmed. I write separately to address the broader issue of whether, by attempting to maneuver the multifaceted *Miranda* principles into the simple structure of prison safety administration, we risk shattering both the *Miranda* rationale and the prison safety structure. Case law confirms that the *Miranda* principles are a vital set of judicially-created and proliferated procedures that protect free citizens against the serious danger of coercive pressure in custodial police interrogations. As this case demonstrates, however, these judicially-created procedures may be ill-suited for use in the prison context.

I. THE LIMITS OF *MIRANDA*

The *Miranda* principles safeguard citizens against self-incrimination. US Const, Am V; *Miranda v Arizona*, 384 US 436, 439; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Specifically, the *Miranda* warning procedures protect against the coercion that can occur when a citizen is suddenly engulfed in a police-dominated environment. See *Howes v Fields*, 565 US___, ___; 132 S Ct 1181, 1190; 182 L Ed 2d 17 (2012). In *Fields*, the Supreme Court described the typical scenario that triggers *Miranda* procedures:

> a person is arrested in his home or on the street and whisked to a police station for questioning—detention represents a sharp and ominous change, and the shock may give rise to coercive pressures. A person who is cut off from his normal life and companions and abruptly transported from the street into a police-dominated atmosphere my feel coerced into answering questions. [*Id*. at 1190 (internal quotations and citations omitted).]

The *Fields* Court also noted that the *Miranda* principles have limited applicability: "Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly *but only in those types of situations in which the concerns that powered the decision are implicated*." *Id.* at 1192, quoting *Berkemer v McCarty*, 468 US 420, 437; 104 S Ct 3138; 82 L Ed 2d 317 (1984) (emphasis added).

The locomotive that powered the original *Miranda* decision, and that prompted the Supreme Court to require police officers to recite *Miranda* warnings in certain circumstances, is the potential for police officers to use coercive pressure to obtain confessions from citizens taken into police custody. *Fields*, 132 S Ct at 1188-1189. Accordingly, the *Miranda* analysis centers on whether the interrogated citizen is "in custody." *Id*. at 1189. For the *Miranda* analysis, "custody" is "a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Id*. at 1189. This analysis, with "custody" as a term of art, is logical and effective when applied in the typical police custody situation.

When, however, the interrogated citizen is a prison inmate, application of the *Miranda* analysis can lead not only to semantic confusion (custody within custody[1]) but to disruption of the prison safety system. A prison inmate lives in a custodial environment that would certainly seem coercive outside the prison context.[2] Given the vast differences in the daily circumstances of free citizens as compared to prison inmates, it seems to me that rather than forcing the *Miranda* analysis into the prison mold, we should consider an alternate analytical framework to protect prison inmates' Fifth Amendment rights.[3]

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[1] See, e.g., Justice Ginsburg's dissent in *Fields*, 132 S Ct at 1194.

[2] See, e.g., Mich Dep't of Corrections Policy Directive 04.04.130 (Offender daily schedule and callout system).

[3] *Miranda* warnings are not part of our constitution. The warnings are simply a set of prophylactic measures designed to ward off inherently coercive pressures of custodial interrogation. *Fields*, 132 S Ct 1181, 1188. The original *Miranda* decision was designed to mitigate the coercive environment created by police officers during custodial interrogation. Many decisions involving *Miranda* rely on two well-established elements to determine the degree of coercion: (1) whether the police have focused on a particular suspect; and (2) whether the suspect is in custody. Significant to the present case is the fact that inmates are always in custody and corrections officers' responsibility is to focus on the inmates twenty-four hours a day, seven days a week.

Applying the coercive elements test found in the original *Miranda* decision to the prison setting requires courts to reconfigure the original *Miranda* analysis so that it applies to (1) inmates incarcerated in prison, (2) who are under twenty-four hour supervision, and (3) who are being questioned by corrections officers (not police officers). In my opinion, the application of the traditional *Miranda* analysis to inmates is problematic and will lead to inconsistent results, as evidenced by the lead and dissenting opinions in this case. For further proof of this dichotomy, one needs to look no farther than the majority and dissenting opinions in *Fields*. In this opinion, I suggest an administrative solution to the problem. Contrary to what the reader may initially perceive, I am not suggesting any diminution of an inmate's Fifth Amendment rights as they are

II. INMATES' RIGHTS

Inmates retain certain constitutional rights, but those rights are subject to restrictions and limitations. *Bell v Wolfish*, 441 US 520, 545; 99 S Ct 1861; 60 L Ed 2d 447 (1979). The *Bell* Court explained:

> Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system. The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. There must be a mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application. [*Id*., 441 US at 545-546 (internal quotations and citations omitted).]

III. AN ALTERNATIVE TO *MIRANDA*

In this case, the lead and dissenting opinions each accurately applied the *Miranda* principles, but reached opposite conclusions. That two scholarly and reasonable judges could apply the same principles but reach divergent outcomes suggests that the principles themselves are problematic. While I do not claim to have the solution to this problem, and I recognize that as a state appellate judge I am not at liberty to adjust the *Miranda* process to better fit the prison setting, I do have two suggestions that may prevent implosion of a standard that was created for one context and is currently being applied in an entirely different context.

First, I suggest we recognize the obvious: prison inmates are in custody. "Custody" in this context is not a term of art; it is a reflection of inmates' extremely restricted environment. The *Fields* Court expressly concluded that being imprisoned does not constitute being in custody for *Miranda* purposes. 132 S Ct at 1191. Any judicial attempts to further parse the term "custody" for inmates results in the divergent opinions that occurred in this case. Instead, our analysis should recognize the obvious distinctions between inmates and other citizens.[4] The *Fields* Court recognized some of these distinctions, for example, "questioning a person who is already serving a prison term does not generally involve the shock that very often accompanies arrest." 132 S Ct at 1190. And, "a prisoner, unlike a person who has not been sentenced to a term of incarceration, is unlikely to be lured into speaking by a longing for prompt release." *Id*. at 1191. Further, "a prisoner, unlike a person who has not been convicted and sentenced, knows that the law enforcement officers who question him probably lack the authority to affect the

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set forth in our constitution. The proposed solution will, in my view, better protect inmates' Fifth Amendment rights.

[4] Justice Kelly recently recognized that situational distinctions are critical to a Fifth Amendment analysis, by pointing out: "[c]ourts should be mindful that, as compared to an adult, a juvenile suspect faces a more acute risk of succumbing to the inherent pressures of custodial interrogation . . . ." *People v White*, ___ Mich ___, ___; ___ NW2d ___, 2013 Westlaw 530567 (No. 144387, February 13, 2013) (Kelly, J., dissenting).

duration of his sentence."[5] *Id*. at 1191. The *Fields* Court also recognized that taking a prisoner aside for private questioning imposes an additional restriction on the prisoner. *Id.* at 1192. The Court explained, however, that "such procedures are an ordinary and familiar attribute of life behind bars. Escorts and special security precautions may be standard procedures regardless of the purpose of which an inmate is removed from his regular routine and taken to a special location." *Id.* The types of standard procedures referenced in *Fields* are used in the Michigan corrections system. In particular, the Michigan Department of Corrections has developed routine procedures for interviewing inmates about rule violations. See, e.g., Mich Dep't of Corrections Operating Procedure 03.03.105 (Major Misconduct Processing). The procedures could be highly coercive outside prison, but are necessary and standard within prison.

Second, if, as I suggest, the *Miranda* "custody" analysis is unhelpful as it applies to inmates, courts must apply an alternate Fifth Amendment analysis to protect inmates' rights. The proper analysis should balance the inmate's individual rights against the institutional procedures that ensure the safety of all inmates. Compliance with prison rules and procedures is one aspect of ensuring inmates' safety.[6] When an inmate violates a rule, a corrections officer can and should respond quickly to identify the inmate involved and to discover whether any danger exists. This rapid, efficient response must be available to corrections officers even if the rule violation could result in criminal charges against the inmate. To bind a corrections officer to the *Miranda* procedures every time the officer suspects a rule violation would be to pinion the officer's ability to protect the general prison population from the rule breakers. In my view, any rote application of the *Miranda* analysis to a prison safety interview is a failure to recognize the reality of the restrictive prison environment. Moreover, to require the use of the judicially-created *Miranda* procedures in the prison context is to assume, incorrectly, that judges are more effective than corrections experts at designing prison procedures. As the Supreme Court recognized in *Bell*:

> maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. . . . [E]ven when an institutional restriction infringes a specific constitutional guarantee such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. [*Bell*, 441 US at 547 (internal quotations and citations omitted).]

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[5] At the trial in this case, defendant testified that the corrections officer indicated he could prevent defendant from ever being released from prison. As the dissent points out, however, defendant's testimony was not part of his motion to suppress. Even if it had been presented in the motion to suppress, the testimony does not establish that defendant actually believed the corrections officer had authority to lengthen his sentence. Moreover, the *Fields* Court recognized that questioning about prison misconduct could result in administrative penalties, but that the risk of penalties did not necessarily render an inmate "in custody" for *Miranda* purposes. 132 S Ct at 1192.

[6] See, e.g., Mich Dep't of Corrections Policy Directive 03.03.130(K) ("Staff have a responsibility to protect the lives of both employees and prisoners, provide for the security of the State's property, prevent escape, and maintain good order and discipline.")

In sum, the *Miranda* analysis should not control Fifth Amendment issues that may arise when a corrections officer interviews an inmate about prison rule violation. Instead, the analysis should enable courts to afford proper deference to prison administrators' ability to implement procedures that are reasonable for inmates. The analysis should begin with a determination of whether the corrections officer complied with standard prison procedures for interviewing inmates. If the officer complied with the procedures, any confession received during the interview would be presumed admissible in a subsequent criminal action, unless the inmate could demonstrate that the standard procedure was objectively unreasonable—i.e., unduly coercive—under the circumstances. If the corrections officer failed to comply with standard prison procedures, any confession would be presumed inadmissible, unless the prosecutor in a subsequent criminal action could demonstrate that the procedure used was objectively reasonable—i.e., not coercive—under the circumstances.[7]

I recognize that these suggestions could, at first glance, be viewed as a failure to follow the binding *Miranda* precedent. After careful consideration, however, it seems to me that these suggestions are fully consistent with the *Miranda* opinion's Fifth Amendment concerns. In my view, some of the post-*Miranda* decisions have myopically focused on the form of the "custody" analysis without considering the substance of that analysis. I ascribe to the long-held recognition that, as judges and lawyers, we must constantly guard against our "tendency to attribute undue importance to form as opposed to substance, and to exalt the immaterial to the level of the material." Salmond, *Jurisprudence* § 10, at 25 (6th ed. 1920). The material and substantive aspects of *Miranda* are the preservation and protection of Fifth Amendment rights. I offer my suggestions to open a discussion about whether strict adherence to the "custody" analysis is the best means of protecting the Fifth Amendment rights of inmates.[8]

IV. CONCLUSION

To impose prison protections on free citizens would be tyranny; to impose free citizens' protections in prison would be anarchy. Neither situation is desirable. The *Miranda* principles properly protect free citizens' Fifth Amendment rights, but those principles, with their focus on

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[7] This approach is a refined application of the voluntariness standard that controls certain Fifth Amendment issues. See *Arizona v Fulminante*, 499 US 279, 285-88; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

[8] In our prior opinion, this panel unanimously affirmed defendant's convictions and concluded that the Michigan Department of Corrections officer was not required to recite the *Miranda* warnings under the circumstances presented in this case, and that the admission of defendant's recorded statements at his trial was not unfairly prejudicial under MRE 403. *People v Cortez*, 294 Mich App 481, 504-506; 811 NW2d 25 (2011), vacated in part 491 Mich 925 (2012). Central to our prior decision was our conclusion that the *process* used by the Department of Corrections in obtaining defendant's confession did not create the same coercive pressures as the type of station house questioning by police officers at issue in the *Miranda* case, and therefore defendant's confession was admissible at his trial. While I still agree with our prior opinion, I am now convinced that the original *Miranda* warnings were not engineered to apply to inmates incarcerated in our state's prisons. Stated another way, as applied to prison inmates, there exists a design defect in the *Miranda* warnings.

custody and police interrogation, do not comport with the controls necessary in a prison setting. The *Miranda* principles would be better preserved and protected by adopting a different standard to govern corrections officers' interviews of inmates about violations of prison rules. The new standard would be a recognition that the judicially-created *Miranda* procedures are not necessarily better able to protect inmates' rights than the procedures developed by corrections experts.[9]

For these reasons, I would affirm the trial court.

/s/ Peter D. O'Connell

[9] The primary purpose of this opinion is not to address safety and security in the prison setting, as my colleague suggests in footnote 4 of her dissenting opinion, but to address the undisputed fact that neither the *Miranda* nor the *Fields* decisions involved corrections officers questioning inmates in a prison setting. While both of these opinions discussed *factors* that could or should be applied to a given situation, the juxtaposition of those factors, as evidenced by the lead and dissenting opinions, is significant to the protection of an inmate's Fifth Amendment rights.

The primary purpose of this opinion is to address the issue of *Miranda* warnings as they apply to inmates who are taken aside and questioned by *corrections officers* about events that have occurred *inside* the prison walls. Application of *Miranda*'s prophylactic measures in an established coercive environment such as a prison is the antithesis of applying the same measures to individuals in a free society. As both the lead and dissenting opinions aptly point out, the application of these *same* factors to dissimilar situations (dissimilar from *Miranda*) will most certainly lead to divergent results.