
CRIMINAL PROCEDURE — EXTRATERRITORIAL APPLICATION OF FIFTH AMENDMENT — FOURTH CIRCUIT FINDS UNDERSTANDING OF SPOKEN WORDS ADEQUATE TO SECURE VALID WAIVER OF *MIRANDA* RIGHTS BY SOMALI PIRATES. — *United States v. Dire*, 680 F.3d 446 (4th Cir. 2012).

The question of how to apply constitutional protections in extraterritorial settings has risen in prominence with the proliferation of overseas military and law enforcement activities in recent years. The operation of such protections can be problematic when assumptions underlying domestic doctrine are called into question. Recently, in *United States v. Dire*,¹ the Fourth Circuit upheld the piracy convictions of five Somali nationals, holding in particular that they adequately waived their *Miranda* rights prior to making confessions aboard a U.S. warship.² *Dire* highlights the problems of mechanistically applying *Miranda v. Arizona*³ to settings and subjects for which it was not originally envisioned. The *Dire* court capably handled the voluntariness and warning aspects of the *Miranda* test, yet the court's waiver analysis turned solely on whether the defendants could understand, as a literal matter, the words spoken to them. At a minimum, the flaws in *Dire* reveal the need to take seriously the totality of the circumstances test for finding a knowing and intelligent waiver, particularly in extraterritorial settings; as a result, a more robust inquiry, going beyond the mere comprehension of speech, is needed.

On April 1, 2010, defendants Abdi Wali Dire, Gabul Abdullahi Ali, and Mohammed Modin Hasan attacked the U.S.S. *Nicholas*, believing it to be a merchant vessel.⁴ The *Nicholas* rebuffed and eventually captured the three, along with defendants Abdi Mohammed Umar and Abdi Mohammed Gurewardher, who were operating a nearby "mothership."⁵ The defendants were questioned the day after the attack without receiving *Miranda* warnings,⁶ and on April 4 were questioned again, this time after being given *Miranda* warnings and a cleansing statement.⁷ At this subsequent interrogation, each of the defendants admitted to willingly participating in an intended pirate attack.⁸

¹ 680 F.3d 446 (4th Cir. 2012).

² *Id.* at 475.

³ 384 U.S. 436 (1966).

⁴ *Dire*, 680 F.3d at 449.

⁵ *Id.*

⁶ See *United States v. Hasan (Hasan III)*, 747 F. Supp. 2d 642, 660 (E.D. Va. 2010).

⁷ *Dire*, 680 F.3d at 470–71. The cleansing statement informed the defendants that they had the right to remain silent even though they had previously spoken to the interrogator and to others. See *Hasan III*, 747 F. Supp. 2d at 666–67.

⁸ *Dire*, 680 F.3d at 450.

Following trial in the Eastern District of Virginia, a jury sentenced the defendants to life imprisonment for piracy and eighty years for other offenses.⁹ Prior to trial, the defendants moved to dismiss the charges, based upon the definition of piracy,¹⁰ and to suppress their statements, based upon the interrogators' failure to comply with *Miranda*.¹¹ In an opinion labeled *Hasan I*, Judge Davis rejected the defendants' contention that the antipiracy statute under which they were tried¹² incorporated only the international definition of piracy at the time of its enactment, which might not include an aborted assault on a warship.¹³ Instead, he held that the statute incorporated the evolving international consensus on the definition of piracy and that this definition included the defendants' actions.¹⁴

In a separate opinion labeled *Hasan III*, Judge Davis took up the motions to suppress the defendants' un-Mirandized statements made on April 2 and Mirandized statements made on April 4.¹⁵ The district court first inquired as to the applicability of the Fifth Amendment and *Miranda* to extraterritorial interrogations conducted by U.S. officials and concluded that *Miranda* did in fact govern the admissibility of the confessions.¹⁶ The court, rejecting the government's arguments that *Miranda* did not apply, suppressed the statements made on April 2.¹⁷ Finally, the court determined that the warning, voluntariness, and waiver requirements of *Miranda* had been satisfied with regard to the April 4 interrogations, and that the cleansing statement given had been sufficient to render those statements admissible.¹⁸

The Fourth Circuit affirmed the convictions.¹⁹ Writing for the panel, Judge King²⁰ dealt first with the opposing holdings of *Hasan I* and a different district court on whether the antipiracy statute at issue applied to the defendants.²¹ The Fourth Circuit sided with the district court in *Hasan I* and found that the statute "incorporates a definition of piracy that changes with advancements in the law of nations."²²

⁹ *Id.* at 450–51.

¹⁰ *United States v. Hasan (Hasan I)*, 747 F. Supp. 2d 599, 603 (E.D. Va. 2010).

¹¹ *Hasan III*, 747 F. Supp. 2d at 656.

¹² 18 U.S.C. § 1651 (2006).

¹³ *See United States v. Said*, 757 F. Supp. 2d 554, 558–59 (E.D. Va. 2010) (defining piracy as "robbery upon the sea," *id.* at 559), *vacated*, 680 F.3d 374 (4th Cir. 2012).

¹⁴ *Hasan I*, 747 F. Supp. 2d at 623, 640–42.

¹⁵ *Hasan III*, 747 F. Supp. 2d at 656.

¹⁶ *See id.* at 656–57.

¹⁷ *Id.* at 659–66.

¹⁸ *Id.* at 668–72.

¹⁹ *Dire*, 680 F.3d at 449.

²⁰ Judge King was joined by Judges Davis and Keenan.

²¹ *See Dire*, 680 F.3d at 451–54 (discussing *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010), *vacated*, 680 F.3d 374 (4th Cir. 2012)).

²² *Id.* at 469.

The Fourth Circuit further affirmed the finding that the modern law of nations defines piracy to include attempted robbery at sea, and thus that 18 U.S.C. § 1651 was applicable to the defendants.²³ The defendants also appealed the admission of their *Mirandized* statements, arguing first that the wording of the *Miranda* warnings was improper, as the special agent had not used the precise phrase “right to a lawyer.”²⁴ The court found that *Miranda* warnings did not need to follow a “talismanic incantation,”²⁵ and that the interrogator had adequately conveyed the right to an attorney by telling the defendants “that if they wanted a lawyer, we would give them one.”²⁶

The court then analyzed the defendants’ waiver of their *Miranda* rights. The defendants argued they could not have made a “knowing and intelligent” waiver of their rights due to “the language barrier, their unfamiliarity with the American legal system, the social and political conditions in their native Somalia, and their illiteracy and overall lack of education.”²⁷ The court found that these factors did not preclude a valid waiver,²⁸ as the inquiry turned upon their ability to understand the words as spoken to them through a translator.²⁹ The court found it sufficient that “the concept of an attorney” was not alien to Somalia and affirmed the finding of a valid waiver.³⁰ Because the district court had already suppressed the non-*Mirandized* confessions of April 2, the Fourth Circuit conducted its analysis of the *Mirandized* April 4 confessions without examining whether the Fifth Amendment and *Miranda* applied extraterritorially.³¹

²³ *Id.* at 468–69.

²⁴ *Id.* at 473–74.

²⁵ *Id.* at 474 (quoting *California v. Prysock*, 453 U.S. 355, 359 (1981)) (internal quotation mark omitted).

²⁶ *Id.* at 473–74 (quoting *Hasan III*, 747 F. Supp. 2d 642, 666 (E.D. Va. 2010)) (internal quotation marks omitted).

²⁷ *Id.* at 474.

²⁸ *Id.* at 474–75.

²⁹ *See id.*

³⁰ *Id.* (quoting *Hasan III*, 747 F. Supp. 2d at 671).

³¹ *See id.* at 470 n.17. The Supreme Court has not settled whether the Fifth Amendment’s Self-Incrimination Clause and *Miranda* apply to extraterritorial interrogations by American agents. *See In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 199–205 (2d Cir. 2008). This question has prompted significant academic debate. *Compare, e.g.*, Michael R. Hartman, *A Critique of United States v. Bin Laden in Light of Chavez v. Martinez and the International War on Terror*, 43 COLUM. J. TRANSNAT’L L. 269, 294–95 (2004) (arguing for an exception to *Miranda* for extraterritorial interrogations of nonresident aliens), *with* Lawrence Rosenthal, *Against Orthodoxy: Miranda Is Not Prophylactic and the Constitution Is Not Perfect*, 10 CHAP. L. REV. 579, 597 n.84 (2007) (arguing for strict application of *Miranda* extraterritorially). However, lower courts have reached a significant degree of consensus around the applicability of *Miranda* to extraterritorial interrogations. This consensus is partially due to courts’ deciding that *Miranda* applies, *see, e.g.*, *United States v. Zaitar*, No. 8-CR-123, 2012 WL 1570865, at *7 (D.C. Cir. May 7, 2012); *Terrorist Bombings*, 552 F.3d at 201–05, and partially due to parties’ stipulating

Prior to *Miranda*, courts would exclude confessions if “a totality of the circumstances evidenc[ed] an involuntary . . . admission of guilt.”³² The Supreme Court in *Miranda* found that custodial interrogation “contains inherently compelling pressures.”³³ Accordingly, the Court held that, in addition to the requirement of voluntariness,³⁴ the police must dispel this pressure by administering the now-famous warning and securing a waiver “made voluntarily, knowingly and intelligently.”³⁵ Problems arise with each of these prongs when applied extraterritorially. With regard to voluntariness and adequacy of the warning, the *Dire* court reached the correct results in light of the costs of overly rigid application of *Miranda*. However, its analysis of the defendants’ waivers of their *Miranda* rights did not do justice to the totality of the circumstances test used to determine whether such waivers are knowing and intelligent. The court used the defendants’ ability to understand the literal words of the warning as the determinative factor. While this formalistic analysis receives some support in domestic doctrine, other courts analyzing *Miranda* waivers abroad have more thoroughly probed knowingness and intelligence. Courts should ensure that the waiver test, at least in extraterritorial interrogations of noncitizens, is more robust than mere literal understanding of the words.

The first difficulty with extraterritorial application of *Miranda* arises from the warning. In *Dire*, the interrogating agent offered the defendants an attorney despite the fact that, according to the government, “there simply was no lawyer that . . . could have [been] provided under the circumstances.”³⁶ Practical unavailability of counsel is a recurring feature of extraterritorial interrogations,³⁷ and other similarly situated courts have accepted warnings modified to fit the available rights.³⁸ Here, the usage of an unmodified warning had the potential to raise novel issues concerning the offer of unavailable rights, yet the defendants did not attempt to exercise those rights. While it is con-

its applicability, *see, e.g.*, *United States v. Rommy*, 506 F.3d 108, 131 (2d Cir. 2007); *United States v. Yunis*, 859 F.2d 953, 957 (D.C. Cir. 1988).

³² *Miranda v. Arizona*, 384 U.S. 436, 502 (1966) (Clark, J., dissenting in part and concurring in the result) (quoting *Haynes v. Washington*, 373 U.S. 503, 514 (1963)) (internal quotation marks omitted).

³³ *Id.* at 467 (majority opinion).

³⁴ *See Dickerson v. United States*, 530 U.S. 428, 434 (2000) (stating that post-*Miranda* courts “continue to exclude confessions that were obtained involuntarily”).

³⁵ *Miranda*, 384 U.S. at 444.

³⁶ Brief of the United States at 74, *Dire*, 680 F.3d 446 (No. 11-4310(L)), 2011 WL 2941447, at *74.

³⁷ *See, e.g., In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 177, 206–07 (2d Cir. 2008) (discussing the unavailability of counsel under Kenyan law); *United States v. Dopf*, 434 F.2d 205, 207 (5th Cir. 1970) (unavailability of counsel in Mexico).

³⁸ *See, e.g., Cranford v. Rodriguez*, 512 F.2d 860, 863 (10th Cir. 1975) (finding valid a *Miranda* warning in Mexico that offered to contact the U.S. embassy rather than provide an attorney).

ceivable that an offer of practically unavailable rights could prejudice a suspect — if the right to an attorney is obviously unavailing, it may cast doubt on the more critical right to remain silent — such a harm is highly speculative. In light of the preference for flexible application of *Miranda*, particularly abroad,³⁹ the *Dire* court properly honored the officer's good faith effort to convey the *Miranda* warning.

More troubling is the voluntariness inquiry: how can a warning sufficiently “dispel the compulsion inherent in custodial surroundings”⁴⁰ when the setting is a missile frigate in the Indian Ocean? The *Miranda* Court found psychological coercion not only in the investigator's office, where “[t]he atmosphere suggests the invincibility of the forces of the law,”⁴¹ but also stemming from the suspect's isolation.⁴² While in domestic application courts give little heed to coerciveness stemming from the setting rather than police actions,⁴³ the station-house hardly compares to the U.S.S. *Nicholas* in terms of isolation and imbalance of power. One approach to the problem of coercive settings abroad is that of the Second Circuit, which has identified three factors relevant to voluntariness: “1) the accused's characteristics, 2) the conditions of the interrogation, and 3) the conduct of the police.”⁴⁴ The *Dire* court — though largely declining to discuss coercion because the more serious claims of maltreatment by U.S. officials were dropped on appeal⁴⁵ — can be seen as following this approach. The court noted that “armed personnel were several feet away” and that the defendants “were handcuffed but not blindfolded.”⁴⁶ Such details of benign police conduct pale beside the irreducible coerciveness of the setting, yet *Dire*'s focus on police conduct navigates between two unpalatable alternatives: an inflexible application of *Miranda* that might render all military interrogations inadmissible and an abandonment of *Miranda*

³⁹ See *Terrorist Bombings*, 552 F.3d at 205 (“[W]here *Miranda* has been applied to overseas interrogations by U.S. agents, it has been so applied in a flexible fashion to accommodate the exigencies of local conditions.”).

⁴⁰ *Miranda*, 384 U.S. at 458.

⁴¹ *Id.* at 450 (quoting CHARLES O'HARA, FUNDAMENTALS OF CRIMINAL INVESTIGATION 99 (1956)) (internal quotation marks omitted).

⁴² *Id.*

⁴³ See *Berkemer v. McCarty*, 468 U.S. 420, 433 n.20 (1984) (“[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.”); cf. *Howes v. Fields*, 132 S. Ct. 1181, 1193–94 (2012) (finding a prisoner's questioning in prison's conference room insufficiently coercive to comprise *Miranda* custody).

⁴⁴ *Terrorist Bombings*, 552 F.3d at 213 (quoting *Parsad v. Greiner*, 337 F.3d 175, 183 (2d Cir. 2003)) (internal quotation marks omitted) (weighing coerciveness of a Kenyan prison against good behavior of American interrogators).

⁴⁵ See *Dire*, 680 F.3d at 473 n.18 (noting that on appeal defendants dropped claims of maltreatment).

⁴⁶ *Id.* at 470 (quoting *Hasan III*, 747 F. Supp. 2d 642, 666 (E.D. Va. 2010)) (internal quotation marks omitted).

or even the Fifth Amendment for extraterritorial interrogations. This balancing of costs and benefits is in keeping with *Miranda* and its progeny.⁴⁷ Certainly, good police conduct cannot overcome all coercive conditions of interrogation,⁴⁸ but the circumstances of *Dire* made it reasonable to uphold the district court's finding that the statements were "products of undue influence or coercion."⁴⁹

Finally, extraterritorial application of *Miranda* poses the problem of securing a knowing and intelligent waiver from persons unfamiliar with the American legal system. This problem is not foreign to domestic interrogations.⁵⁰ Yet in *Dire* the suspects' cultural and legal disconnect was at an apex due to Somalia's extreme lawlessness.⁵¹ The weight that courts should give such considerations in the nebulous totality of the circumstances test for knowing and intelligent waiver is unclear. The district court acknowledged that the cultural gap was a factor,⁵² but neither the district court nor the Fourth Circuit deviated from a standard that demanded that the defendants prove their inability to understand the meaning of the words spoken to them.⁵³

It is difficult to reconcile a totality of the circumstances standard, in which illiteracy and unfamiliarity with legal concepts are relevant factors, with a decision that effectively announced that only a showing of complete inability to understand the words of the warning, for example due to reduced mental capacity, will prevent the finding of a knowing and intelligent waiver. Such a standard strains not only the notion of a totality of the circumstances test, but also *Miranda*'s stricture that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."⁵⁴ To the extent that a focus on ability to understand the spoken words is

⁴⁷ See, e.g., *New York v. Quarles*, 467 U.S. 649, 657–58 (1984) (weighing the costs of *Miranda* against benefits in the context of a public safety emergency).

⁴⁸ See, e.g., *Missouri v. Selbert*, 542 U.S. 600, 611–14 (2004) (looking askance at the practice of closely following unwarned interrogations with interrogations that comply with *Miranda*).

⁴⁹ *Hasan III*, 747 F. Supp. 2d at 672.

⁵⁰ See, e.g., *United States v. Beale*, 921 F.2d 1412, 1434–35 (11th Cir. 1991).

⁵¹ See *The 2012 Failed State Index*, FOREIGN POL'Y, http://www.foreignpolicy.com/failed_states_index_2012_interactive (last visited Oct. 27, 2012) (listing Somalia as the world's most failed state and as having the lowest rankings for state legitimacy and human rights).

⁵² See *Hasan III*, 747 F. Supp. 2d at 671 (citing, inter alia, *United States v. Yunis*, 589 F.2d 953, 964–66 (D.C. Cir. 1988)); see also *Yunis*, 589 F.2d at 965 ("Clearly, a defendant's alienage and unfamiliarity with the American legal system should be included among these objective factors.").

⁵³ See *Dire*, 680 F.3d at 475 ("[W]e discern no error in the court's conclusion that the defendants 'must have understood, from the translated words uttered by [the interrogator] alone, that they did not have to speak with him, and that they could request counsel.'" (quoting *Hasan III*, 747 F. Supp. 2d at 671)); *id.* at 474 ("[K]nowingness of the waiver often turns on whether the defendant expressed an inability to understand the rights as they were recited." (quoting *United States v. Robinson*, 404 F.3d 850, 861 (4th Cir. 2005)) (internal quotation mark omitted)).

⁵⁴ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

tenable in a domestic context,⁵⁵ it is far less so abroad where there cannot be a presumption of familiarity with American legal norms.⁵⁶ Even if the *Dire* defendants understood the word “lawyer,” it is doubtful that they understood either the role of an attorney in an adversarial system or the “right to remain silent.”⁵⁷ It is thus unlikely that the defendants had an “awareness of [the] consequences” of waiving their rights, without which there cannot “be any assurance of real understanding and intelligent exercise of the privilege.”⁵⁸ The inadequacy of the waiver test as applied in *Dire* suggests the need to buttress the waiver inquiry for extraterritorial interrogations of nonresident aliens.

One potential model stems from the treatment of juveniles, who are also unlikely to be familiar with the rights protected by American criminal procedure. The Supreme Court, while maintaining the totality of the circumstances test,⁵⁹ has questioned the ability of juveniles to make a voluntary, knowing, and intelligent waiver, requiring a far more robust inquiry.⁶⁰ The Court has been unwilling either to adopt the “interested adult rule,” which is prevalent in several states for children,⁶¹ or to heighten the standard of proof for waivers,⁶² suggesting limited scope for procedural innovation. However, the Court’s recognition of heightened protection for children indicates that, contrary to the *Dire* court’s approach, there is room under the totality of the circumstances test for a more robust inquiry into knowing and intelligent waiver by nonresident aliens in extraterritorial interrogations.

An example of what such an inquiry might look like comes from the Second Circuit, which also encountered the problem of foreign citi-

⁵⁵ A number of scholars have questioned the adequacy of the warnings for domestic audiences. See, e.g., Richard Rogers et al., *The Language of Miranda Warnings in American Jurisdictions: A Replication and Vocabulary Analysis*, 32 LAW & HUM. BEHAV. 124, 131–32 (2008) (discussing the relatively high grade level required to comprehend common renditions of *Miranda* warnings).

⁵⁶ Cf. Akhil Reed Amar, *OK, All Together Now: ‘You Have the Right to . . .’*, L.A. TIMES, Dec. 12, 1999, at M1 (“*Miranda* has been woven . . . into the cultural literacy and mind-set of virtually every American . . .”).

⁵⁷ The protections afforded by *Miranda* are unusually strong even as compared to similar protections in other developed countries. See Hartman, *supra* note 31, at 304.

⁵⁸ *Miranda*, 384 U.S. at 469.

⁵⁹ See *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (“This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved.”).

⁶⁰ Cf. *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403–06 (2011) (requiring that a child’s age be taken into account when determining whether an interrogation is custodial for *Miranda* purposes); *In re Gault*, 387 U.S. 1, 52 (1967) (“[A]uthoritative opinion has cast formidable doubt upon the reliability and trustworthiness of ‘confessions’ by children.”).

⁶¹ See, e.g., *Commonwealth v. A Juvenile*, 449 N.E.2d 654, 657–58 (Mass. 1983) (requiring the presence of a parent or other “interested adult” who could understand the *Miranda* warnings and explain to the juvenile his rights).

⁶² Currently the prosecution is required to show by a preponderance of the evidence that a waiver was valid. See *Colorado v. Connelly*, 479 U.S. 157, 167–68 (1986) (rejecting a clear and convincing evidence standard).

zens' familiarity with American legal concepts in *In re Terrorist Bombings of U.S. Embassies in East Africa*.⁶³ While the court did not explicitly modify the waiver doctrine in that case, it noted that the interrogator "explained to [the defendant] his Miranda rights with a tremendous degree of conscientiousness, precision, and detail," and that the defendant "asked [the interrogator] a number of follow-up questions concerning his rights, thereby revealing [his] grasp of the salient issues."⁶⁴ The presence of either of these indicia of understanding — a sufficiently conscientious and detailed warning, or follow-up questions or statements that demonstrate comprehension — plainly bolsters a showing of knowing and intelligent waiver, as might other information about the defendant or the circumstances of the interrogation. While the precise threshold to establish a valid waiver is necessarily context-dependent, it almost certainly lies somewhere between the extended explanation and dialogue of *In re Terrorist Bombings*⁶⁵ and the rather different facts of *Dire*, where the interrogators could not even agree upon whether the defendants said "yes" or merely nodded to indicate understanding of their *Miranda* rights.⁶⁶

Any extraterritorial application of *Miranda*, and in particular a heightened waiver requirement, must be cognizant of the risk of deterring Article III prosecution altogether. Prosecutions for piracy, to which international law is uniquely conducive,⁶⁷ remain exceedingly rare in the courts of the Western nations that patrol the shipping lanes of the Indian Ocean, and apprehended pirates typically are simply released⁶⁸ or passed off to local courts with less stringent procedural protections.⁶⁹ Yet if courts are to apply *Miranda*, they should do so in a manner that honors its purposes. A formalistic analysis, which finds a brief, translated statement followed by a monosyllabic (or less) response sufficient to render a waiver knowing and intelligent, does a disservice to *Miranda*. While following the Fourth Circuit in allowing flexible warnings and looking to the conduct of interrogators to counterbalance coercive circumstances, courts applying *Miranda* extraterritorially should examine all of the relevant evidence, not merely the ability to understand the spoken words, before finding a valid waiver.

⁶³ 552 F.3d 177 (2d Cir. 2008).

⁶⁴ *Id.* at 212 (citing *United States v. Bin Laden*, 132 F. Supp. 2d 198, 212–13 (S.D.N.Y. 2001)).

⁶⁵ *See id.*

⁶⁶ *Hasan III*, 747 F. Supp. 2d 642, 670 (E.D. Va. 2010).

⁶⁷ *See* Eugene Kontorovich, "A *Guantánamo on the Sea*": *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 244 (2010).

⁶⁸ *See* Nick Hopkins, *Outgunned Somali Pirates Can Hardly Believe Their Luck*, *GUARDIAN* (May 8, 2012, 10:07 AM), <http://www.guardian.co.uk/world/2012/may/08/outgunned-somali-pirates-luck>.

⁶⁹ Kontorovich, *supra* note 67, at 244.