

January 2013

# The Law Court's Proper Application of Miranda in State v. Bragg: A "Matter-of-Fact Communication" to the Defendant Regarding Evidence Against Him Will Not Typically Constitute "Interrogation"

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### Recommended Citation

Stephen B. Segal, *The Law Court's Proper Application of Miranda in State v. Bragg: A "Matter-of-Fact Communication" to the Defendant Regarding Evidence Against Him Will Not Typically Constitute "Interrogation"*, 65 Me. L. Rev. 823 (2013).

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THE LAW COURT'S PROPER APPLICATION OF  
*MIRANDA* IN *STATE V. BRAGG*: A "MATTER-OF-  
FACT COMMUNICATION" TO THE DEFENDANT  
REGARDING EVIDENCE AGAINST HIM WILL NOT  
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*Stephen B. Segal*

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I. INTRODUCTION

In *State v. Bragg*,<sup>1</sup> Tammy Bragg was convicted of a Class D crime for operating under the influence (OUI)<sup>2</sup> at the completion of a jury trial,<sup>3</sup> and was ordered to pay a fine of \$800 and her license was suspended for ninety days.<sup>4</sup> During her trial, Bragg submitted a motion to suppress statements she made in the police officer's vehicle and at the police station on the grounds that she was not read her *Miranda* warnings<sup>5</sup> prior to making the statements.<sup>6</sup> The Superior Court denied her motion, however, concluding that *Miranda* warnings were not necessary in the officer's vehicle because her statements were not made while "in custody."<sup>7</sup> In addition, the warnings were unnecessary at the police station when the officer informed Bragg that the intoxilyzer test confirmed that "her blood alcohol content (BAC) was .13% . . . and that the presumptive level of intoxication in Maine is .08%"<sup>8</sup> because her subsequent incriminating statements were not in response to "the functional equivalent of a question."<sup>9</sup>

On appeal, the Maine Supreme Judicial Court, sitting as the Law Court, was asked to rule for the first time in Maine<sup>10</sup> whether a police officer's statements to the defendant regarding evidence against her "was the functional equivalent of direct questioning and reasonably likely to elicit an incriminating response," requiring a *Miranda* warning.<sup>11</sup> The Law Court affirmed the denial of the motion to suppress statements made by Bragg in the cruiser, and those made at the police station on the grounds that the officer's statement informing Bragg of the

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1. 2012 ME 102, 48 A.3d 769.

2. 29-A M.R.S.A. § 2411(1-A)(A) (2011).

3. *State v. Bragg*, 2012 ME 102, ¶ 1, 48 A.3d 769.

4. *Id.* ¶ 7.

5. The Supreme Court held that the prosecution may not enter statements by the defendant into evidence when made in response to questions from law enforcement while deprived of his freedom unless the defendant is warned before questioning "that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

6. *Bragg*, 2012 ME 102, ¶ 7, 48 A.3d 769.

7. *Id.*

8. *Id.* ¶ 6.

9. *Id.* ¶ 7.

10. *Id.* ¶ 16.

11. *Id.* ¶ 14.

intoxilyzer results was merely “a matter-of-fact communication of the evidence,” which was not “reasonably likely to elicit an incriminating response.”<sup>12</sup> In coming to its conclusion, the Law Court held that Bragg was entitled to information regarding her BAC level upon request,<sup>13</sup> and even though she did not request it, “the officer’s simple statement relating that information” would not trigger a *Miranda* warning.<sup>14</sup>

This Note considers whether the unanimous majority in *Bragg* properly concluded that criminal defendants who are only informed of evidence against them are not entitled to a *Miranda* warning. This Note begins in Part II with a brief history and overview of the purposes of the United States Supreme Court’s ruling in *Miranda v. Arizona*,<sup>15</sup> and how Maine has determined when the warnings should be applied, particularly in the context of statements made by law enforcement officers that rise to the level of a “functional equivalent of a question.” In Part III, this Note determines how *Bragg* will likely pose obstacles for defendants in attempting to bring suppression motions regarding statements made in response to evidence presented against them by law enforcement. In Part IV, this Note proposes that *Bragg* is consistent with other jurisdictions and the purposes of *Miranda*, and quite clearly demonstrates that criminal defendants in Maine will be limited in arguing that they were entitled to a *Miranda* warning after being told of truthful evidence against them. Finally, in Part V, this Note concludes by arguing that courts should rely on *Bragg* in similar cases, as long as it is done on a case-by-case basis.

## II. LEGAL BACKGROUND

### A. *The Fifth Amendment and Miranda*

The Fifth Amendment of the United States Constitution provides that “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”<sup>16</sup> Before and after implementation of the Fifth Amendment, various statutes have sought to exclude “confessions by torture” in conjunction with the common law rule against admission of involuntary confessions.<sup>17</sup> Nevertheless, prior to the landmark ruling in *Miranda*, statements made by suspects, especially confessions, had “often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence” to ensure a conviction.<sup>18</sup>

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12. *Id.* ¶ 16.

13. The statute provides that “[o]n request, full information concerning a test must be made available to the person tested or that person’s attorney by the law enforcement officer.” 29-A M.R.S.A. § 2521(9) (2011).

14. *Bragg*, 2012 ME 102, ¶ 16, 48 A.3d 769. The court also affirmed the denial of the motion regarding statements made in the officer’s vehicle on the grounds that Bragg was “subject only to an investigatory detention . . . [and] as a general rule, ‘persons temporarily detained pursuant to such stops are not ‘in custody’ for the purposes of *Miranda*.’” *Id.* ¶ 9 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984)).

15. 384 U.S. 436 (1966).

16. U.S. CONST. amend. V.

17. Michael Theodore Bigos, *Revisiting the Voluntariness of Confessions after State v. Sawyer*, 54 ME. L. REV. 411, 413 (2002).

18. *Haynes v. Washington*, 373 U.S. 503, 519 (1963).

As a result, the Supreme Court altered the involuntary confession rule over a period of thirty years leading up to *Miranda* by developing procedures intended “to generally conform police officers’ conduct to a lawful, civilized, and non-inquisitorial standard.”<sup>19</sup>

Prior to the *Miranda* ruling, in *Escobedo v. Illinois*,<sup>20</sup> the Court acknowledged that such abuse was particularly prevalent “between arrest and indictment” because this was the timeframe when most criminal suspects submitted statements to the police.<sup>21</sup> In the context of *Escobedo*, defense counsel asked to speak with his client, who was being held for interrogation at the police station, over a period of three hours.<sup>22</sup> The officers denied each of the attorney’s requests.<sup>23</sup> Likewise, the defendant asked to speak with his attorney on a number of occasions, to which officers told him that his attorney “didn’t want to see him.”<sup>24</sup> In ruling that one’s right to counsel exists before indictment, the Court explained that “[o]ur Constitution, unlike some others, strikes the balance in favor of the right of the accused to be advised by his lawyer of his privilege against self-incrimination.”<sup>25</sup>

Two years after *Escobedo*, the Court reaffirmed its belief of the importance in reminding criminal defendants of their rights to be free from self-incrimination by adopting procedural safeguards to further protect their constitutional rights.<sup>26</sup> Thus, in *Miranda*, the Court stated that the prosecution cannot admit into evidence statements made by a person or suspect obtained while under “custodial interrogation,”<sup>27</sup> unless the person is told prior to questioning that “he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”<sup>28</sup> The person or suspect has the right to voluntarily waive such rights, but if at any time he changes his mind and decides to exercise these rights, questioning must cease.<sup>29</sup> In addition, although he may have made statements voluntarily or answered some inquiries by law enforcement, he may refrain from speaking further until he has spoken with a lawyer or consented to additional questioning.<sup>30</sup>

The *Miranda* decision was motivated in part by the Court’s finding that law enforcement agents were given instruction manuals regarding how to successfully break down suspects during in-custody interrogation, with particular emphasis on

19. Bigos, *supra* note 17, at 413-14.

20. 378 U.S. 478 (1964).

21. *Id.* at 488.

22. *Id.* at 480-81.

23. *Id.*

24. *Id.* at 481.

25. *Id.* at 488.

26. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

27. *Id.* The Court explained that “custodial interrogation” refers to “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.*

28. *Id.* An officer need not recite this precise language when reciting the *Miranda* warning so long as the defendant is informed of his rights to an attorney and freedom from self-incrimination. *California v. Prysock*, 453 U.S. 355, 359-60 (1981).

29. *Miranda*, 384 U.S. at 444-45.

30. *Id.* at 445.

intimidation and psychological ploys.<sup>31</sup> One such manual explained the purpose of intimidating and breaking down the suspect:

If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law.<sup>32</sup>

When law enforcement agents were unable to obtain the responses they desired through the methods suggested in the manual, “[t]he police then persuade[d], trick[ed], or cajole[d] [the defendant] out of exercising his constitutional rights.”<sup>33</sup> As a result, defendants were stripped of their right to remain silent as afforded them under the Fifth Amendment, and their statements were not truly voluntary.<sup>34</sup> The purpose of *Miranda* was to combat unethical practices by law enforcement and to lay out procedural safeguards for those people who are under “custodial interrogation,” but courts across the country still needed guidance as to how to determine whether a given defendant was both in custody and subject to interrogation so as to invoke a *Miranda* warning.

#### B. *The Functional Equivalent of a Question*

In *Rhode Island v. Innis*,<sup>35</sup> the Court clarified that “interrogation” within the meaning of *Miranda* does not only encompass direct questions, but also communications that “reflect a measure of compulsion above and beyond that inherent in custody itself.”<sup>36</sup> More specifically, interrogation includes the “functional equivalent” of a question, including statements or actions taken by law enforcement (besides those that would typically be associated with one being arrested and taken under police custody) that they “should know are reasonably likely to elicit an incriminating response from the suspect.”<sup>37</sup> The specific facts of *Innis* involved a robbery suspect being driven to the police station by three officers.<sup>38</sup> On the way to the police station, two of the officers began discussing between themselves their concern regarding a missing gun that was used in the robbery, and were fearful that a child may find it and cause harm to himself or others.<sup>39</sup> The suspect overheard this conversation, and interrupted to say that he knew where the gun was and would take them to it; he did in fact lead them to the

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31. See *id.* at 448-54 for a detailed account of what a typical manual instructed its interrogation officers to do with the suspect.

32. *Id.* at 449-50 (citations omitted).

33. *Id.* at 455.

34. *Id.* at 460.

35. 446 U.S. 291 (1980).

36. *Id.* at 300.

37. *Id.* at 301.

38. *Id.* at 294.

39. *Id.* at 294-95.

gun.<sup>40</sup> The Court ruled that the defendant was not entitled to a *Miranda* warning because he had not been subjected to the functional equivalent of a question.<sup>41</sup> The officers were chatting amongst themselves and the defendant was not a party to the conversation; therefore, the officers could not have known that their comments would be reasonably likely to elicit an incriminating response.<sup>42</sup>

*Innis* thereby established that, in order to determine whether a statement or action amounts to the functional equivalent of a question, courts are directed to examine the suspect's perception of the interaction with police, as opposed to an officer's intent to conduct interrogation.<sup>43</sup> Nevertheless, because police officers cannot be held responsible for "unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response."<sup>44</sup>

Following *Innis*, the Court further held that the privileges and protections of *Miranda* extend to all persons regardless of the nature of the crime,<sup>45</sup> and continued to classify statements and actions that would meet the definition of a functional equivalent of a question.<sup>46</sup> Over the last three decades, courts have generally agreed, regardless of jurisdiction, on how to apply *Miranda* in conjunction with *Innis*, especially with regard to identifying when a person is under interrogation by way of a functional equivalent of a question.

For example, in *United States v. Padilla*,<sup>47</sup> the defendant's statements were suppressed because they were made after being subjected to the functional equivalent of a question.<sup>48</sup> In that case, the defendant, Padilla, was not read his *Miranda* rights after being placed under arrest by an FBI agent, and refused to assist in the investigation.<sup>49</sup> After Padilla was told that this was his "last chance" to cooperate, he made an incriminating statement.<sup>50</sup> Although the district court denied Padilla's suppression motion on the grounds that he had not been subjected to interrogation, the Ninth Circuit reversed, ruling that he had been subjected to the functional equivalent of a question within the meaning of *Innis*, and the agent should have known that the "last chance" statement would be reasonably likely to

40. *Id.* at 295.

41. *Id.* at 303.

42. *Id.*

43. *Id.* at 301.

44. *Id.* at 301-02 (emphasis in original). Although courts are instructed to use an objective standard in order to determine whether the police officer should have known that his statements or actions would be reasonably likely to elicit an incriminating response from the suspect or defendant, the Court added that "[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor" in the analysis. *Id.* at 302 n.8.

45. See *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984) (holding that one who is subjected to custodial interrogation is entitled to a *Miranda* warning regardless of the seriousness of the offense that he is arrested or suspected for).

46. See *Arizona v. Mauro*, 481 U.S. 520, 529 (1987) (holding that one who is in custody and subjected to "compelling influences, [or] psychological ploys" is reasonably likely to elicit an incriminating response).

47. 387 F.3d 1087 (9th Cir. 2004).

48. *Id.* at 1093.

49. *Id.*

50. *Id.*

elicit an incriminating response.<sup>51</sup>

*Padilla* is a classic example of the functional equivalent doctrine. Padilla submitted an incriminating response while under intense psychological pressure from law enforcement and, as a result, was stripped of his Fifth Amendment right to be free from self-incrimination. The *Innis* framework was designed specifically to combat such police tactics and, in doing so, created a proper balance between the right of law enforcement to conduct investigations and the right of the suspect to maintain his constitutional rights.

A line of cases in the 1990s and 2000s ruled that when a police officer does nothing more than inform the person of the evidence against him, this will not give rise to the functional equivalent of a question. For example, in *United States v. Payne*,<sup>52</sup> the Fourth Circuit upheld the defendant's conviction because his incriminating statements to law enforcement were made after he was informed only of inculpatory evidence against him.<sup>53</sup> In that case, the defendant, Payne, was arrested for selling cocaine to an undercover FBI agent on two separate occasions.<sup>54</sup> Following his arrest, Payne was read his *Miranda* rights.<sup>55</sup> He then spoke with his attorney by telephone, and thereafter informed the agents that he would not speak with them further until he spoke with his attorney in person.<sup>56</sup> While being transported to the U.S. Marshals Service, however, an FBI agent told Payne that "[the FBI] found a gun at your house."<sup>57</sup> Payne then replied, "I just had it for my protection."<sup>58</sup>

Prior to trial, Payne filed a motion to suppress his statement on the grounds that he was subjected to interrogation in violation of *Miranda*.<sup>59</sup> The district court denied his motion because the agent's statement "was not the functional equivalent of interrogation . . . ."<sup>60</sup> On appeal, the Fourth Circuit upheld the ruling, noting that the definition of interrogation under *Innis* is not so general as to include "all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges."<sup>61</sup> In addition, the agent's statement did not require an incriminating response or any response at all.<sup>62</sup>

Similarly, in *Enoch v. Gramley*,<sup>63</sup> the Seventh Circuit upheld the defendant's conviction, because, *inter alia*, the defendant's incriminating response came after police merely informed him of the victim's identity and evidence against him for

51. *Id.* "It is difficult to imagine any purpose for such a statement [of informing the defendant this was his last chance to cooperate] other than to elicit a response." *Id.*

52. 954 F.2d 199 (4th Cir. 1992).

53. *Id.* at 200.

54. *Id.*

55. *Id.* at 201.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 202. The court also noted that comments regarding evidence against the suspect in his presence cannot be barred by the Fifth Amendment as a general rule; in fact, "it may even be in the interest of a defendant to be kept informed about matters relating to the charges against him." *Id.*

62. *Id.* at 203.

63. 70 F.3d 1490 (7th Cir. 1995).



which they had reason to keep him in custody.<sup>64</sup> Upon his arrest, the defendant, Enoch, was read his *Miranda* rights; Enoch then stated that he wanted to speak with an attorney, to which the officer explained that he would first be processed at the local jail for murder.<sup>65</sup> Enoch proceeded to ask who the victim was and—upon learning her identity to be Kay Burns and that the police had a witness who claimed to have seen Enoch leave her house the night of the murder—then stated, “[o]h no, not Kay Burns.”<sup>66</sup> Enoch then made additional incriminating statements without being prompted to speak by the officer; in fact, the officer told him that he would not pose any more questions.<sup>67</sup>

After Enoch sought to suppress his statements, the state trial court denied the motion because the statements were not made during interrogation, and on direct appeal, the Illinois Supreme Court affirmed.<sup>68</sup> However, on a subsequent habeas petition, the district court ruled that Enoch’s *Miranda* rights were violated when he was informed about the witness who saw him leave the victim’s house on the night of the murder.<sup>69</sup> Nevertheless, the Seventh Circuit reversed, holding that Enoch had not been subjected to interrogation after he asserted his right to speak with an attorney because no “reasonable objective observer would believe that the encounter was ‘reasonably likely to elicit an incriminating response from the suspect.’”<sup>70</sup>

In addition to situations where a defendant is presented with truthful evidence against him, *Miranda* warnings are not typically required when a defendant specifically requests certain information and police then provide that requested information. For example, in *United States v. Thomas*,<sup>71</sup> the Seventh Circuit upheld the district court’s denial of the defendant’s motion to suppress because the officer did nothing more than provide the defendant with information she had requested regarding the pending investigation against her.<sup>72</sup> In that case, the defendant, Riggs, invoked her right to have counsel present before any more questions could be asked of her, and she argued on appeal that the special agent’s subsequent “comment to her regarding her alibi constitute[d] improper interrogation”<sup>73</sup> because the agent “knew that he was reasonably likely to elicit an incriminating response from Riggs when he told her about the evidence that

64. *Id.* at 1500.

65. *Id.* at 1499.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 1500 (citations omitted). For an example of a situation in which the Seventh Circuit ruled that a reasonable objective observer would conclude that a person was subjected to interrogation, see *Killebrew v. Endicott*, 992 F.2d 660, 663 (7th Cir. 1993) (holding that the suspect was subjected to the functional equivalent of interrogation when he had not been read his *Miranda* rights and the officer promised to let the district attorney know of any cooperation they received from the suspect).

71. 11 F.3d 1392 (7th Cir. 1993).

72. *Id.* at 1397.

73. Under the so-called *Edwards* standard, after an accused has invoked his right to counsel during in-custody interrogation, he cannot be said to have waived his rights by showing that he subsequently responded to additional questioning by law enforcement “unless the accused himself initiates further communication, exchanges, or conversations with police.” *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

contradicted her alibi.”<sup>74</sup>

The Seventh Circuit acknowledged that, while there may be some question as to whether the functional equivalent of a question is triggered when law enforcement provide “unsolicited” information to a suspect regarding evidence against him, this was a different situation because Riggs had requested to be informed of what was found during the course of the investigation.<sup>75</sup> As a result, it could not be said that the agent’s relay of such information, without anything further, meant that he reinitiated interrogation after Riggs expressly requested counsel to be present: it was Riggs, after all, who had “initiated the communications.”<sup>76</sup>

As these cases demonstrate, the functional equivalent of a question will not typically be triggered when law enforcement do nothing more than truthfully present a defendant with evidence that exists against him, especially when the defendant specifically requested to be informed of such information. This standard has been followed consistently across the country. Nevertheless, as *Innis* cautions, each case should be evaluated on its own merits to determine whether or not a defendant’s Fifth Amendment rights have been violated.

### C. *The Functional Equivalent of a Question and Its Exceptions in Maine*

Prior to *Bragg*, Maine courts had not addressed whether mere presentation of evidence to a defendant would constitute the functional equivalent of a question. The Law Court, however, has had several occasions to determine whether a defendant had been subjected to the functional equivalent of a question within the meaning of *Innis* in other contexts. In doing so, it has generally followed the framework of analysis as developed in *Innis*.

For example, in *State v. Nixon*,<sup>77</sup> the Law Court held that the defendant’s incriminating statement should have been suppressed because it was in response to the functional equivalent of a question.<sup>78</sup> The defendant, Nixon, was taken into custody after the Portland Police Department had received a tip that Nixon had murdered the victim.<sup>79</sup> After invoking his right to an attorney, Nixon noticed a diagram of the crime scene on the table showing the position of the victim’s body.<sup>80</sup> The detective saw Nixon “peering” at the diagram, and proceeded to put it in front of Nixon, noting that he “might find this interesting.”<sup>81</sup> Nixon subsequently pointed to the crime scene depiction, and stated, “I’ll tell you one thing, he wasn’t there, he was over there.”<sup>82</sup> The Superior Court denied Nixon’s

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74. *United States v. Thomas*, 11 F.3d 1392, 1397 (7th Cir. 1993).

75. *Id.*

76. *Id.* The Seventh Circuit also relied on Supreme Court precedent which held that an *Edwards* violation does not occur when the suspect started the conversation by asking law enforcement a question that “evinced a willingness and a desire for a generalized discussion about the investigation . . . .” *Oregon v. Bradshaw*, 462 U.S. 1039, 1045-46 (1983).

77. 599 A.2d 66 (Me. 1991).

78. *Id.* at 67.

79. *Id.* at 66.

80. *Id.* at 67.

81. *Id.*

82. *Id.*

suppression motion on the grounds that the detective's statement was not intended to elicit an incriminating response.<sup>83</sup> The Law Court reversed, holding that the Superior Court did not properly apply *Innis*, and reasoned that, "[h]ad the court applied the appropriate objective standard, it would have concluded that the police officer should have known, in these circumstances, that the act of displaying the sketch was reasonably likely to elicit an incriminating response."<sup>84</sup>

The Law Court has also ruled on what types of statements and actions of law enforcement will not give rise to the functional equivalent of a question.<sup>85</sup> Although Maine courts had not determined, prior to *Bragg*, whether a *Miranda* warning would be necessary when the suspect was being informed by law enforcement of evidence against him, the Law Court had prescribed the "administrative question" or "biographical data exception."<sup>86</sup> The exception provides that "[a]dministrative questions, not likely to elicit an incriminating response, include those 'routine booking questions' normally attending arrest which seek only 'biographical data necessary to complete booking or pretrial services,' such as 'name, address, height, weight, eye color, date of birth, and current age . . . .'"<sup>87</sup>

For example, in *State v. Brann*,<sup>88</sup> the defendant's OUI conviction was vacated because he made incriminating statements in response to questioning that should have rendered a *Miranda* warning.<sup>89</sup> In that case, the defendant, Brann, crashed into a stop sign and fled the scene of the accident.<sup>90</sup> Brann was apprehended, and the police officer asked him who had been driving the car; Brann replied that he was the driver.<sup>91</sup> On appeal, the Law Court agreed with Brann that he should have been read a *Miranda* warning before admitting that he was the driver because the officer's inquiry "went directly to an element of the offense, indeed to the only element that reasonably could be disputed since Brann was plainly under the influence."<sup>92</sup> Although the State argued that the biographical data exception should apply, the court ruled that the exception was inapplicable because the "question to Brann had nothing to do with biographical data or other information required for booking."<sup>93</sup>

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83. *Id.*

84. *Id.*

85. See *State v. Rizzo*, 1997 ME 215, ¶ 13, 704 A.2d 339 (ruling that an officer's "announcement of an intent to question" without actually initiating questioning does not rise to the functional equivalent of a question); *State v. Simoneau*, 402 A.2d 870, 873 (Me. 1979) (holding that "neutral questions" not intended to elicit a confession, as well as those questions intended to clarify an ambiguous statement made by the suspect does not constitute interrogation); *State v. Friel*, 508 A.2d 123, 128 (Me. 1986) (ruling that an officer who simply hands a person an arrest and/or search warrant does not subject that person to interrogation); *State v. Sumabat*, 566 A.2d 1081, 1083 (Me. 1989) (holding that a defendant's voluntary incriminating statements made when the officer was only seeking biographical information during booking did not rise to interrogation to require a *Miranda* warning).

86. *State v. Brann*, 1999 ME 113, ¶ 13, 736 A.2d 251.

87. *Id.* (quoting *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990)).

88. 1999 ME 113, 736 A.2d 251.

89. *Id.* ¶ 1.

90. *Id.* ¶ 2.

91. *Id.* ¶ 3.

92. *Id.* ¶ 14.

93. *Id.*

In contrast, in *State v. Dominique*,<sup>94</sup> the Law Court held that statements made by the defendant to the police officer in an intoxilyzer room were not the product of interrogation.<sup>95</sup> In that case, the defendant, Dominique, was told by the officer while in custody about the booking process and that he could leave the police station if his BAC level was below .08%, to which Dominique responded, “It’s not going to work though.”<sup>96</sup> The officer then replied, “No?”<sup>97</sup> Dominique then proceeded to explain that he would fail the test “because [he] had two beers in an hour” and further explained his rationale for believing why he would fail.<sup>98</sup> On appeal, the Law Court held that the administrative question or biographical data exception applied because Dominique’s incriminating statements were made in the course of being told how the intoxilyzer test worked, and while the officer took down his biographic information in the course of booking—processes which were “administrative in nature.”<sup>99</sup> In addition, the officer’s follow-up question to Dominique’s statement that the test was “not going to work” was not likely to elicit an incriminating response, because it was merely a clarifying question.<sup>100</sup>

These pre-*Bragg* cases demonstrate that the Law Court had set forth a logical and proper balance between allowing law enforcement officers to thoroughly conduct their investigation and protecting the defendant’s rights against self-incrimination. Thus, a defendant in Maine making an argument that he was entitled to a *Miranda* warning should be able to anticipate whether his suppression motion will be granted or denied. *Bragg*, however, presented the court with a unique situation.

### III. THE *BRAGG* DECISION

#### A. *Factual Background*

On March 11, 2009, Tammy Bragg drove off a road in Rockport on her way home from a restaurant.<sup>101</sup> Sergeant Travis Ford, who had come across Bragg’s vehicle during his routine patrol route,<sup>102</sup> asked Bragg to explain how her car had gone off the road.<sup>103</sup> Bragg responded that she was not exactly sure what had happened, but thought that she might have hit a patch of ice.<sup>104</sup> After smelling alcohol on Bragg’s breath and noticing that her speech was slurred, Ford asked Bragg if she had been drinking.<sup>105</sup> She responded that she had had two margaritas

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94. 2008 ME 180, 960 A.2d 1160.

95. *Id.* ¶ 1.

96. *Id.* ¶ 3.

97. *Id.*

98. *Id.*

99. *Id.* ¶ 15.

100. *Id.* ¶ 14. “[T]hreshold or clarifying questions—neutral questions posed by police in response to an ambiguous statement by a suspect—do not constitute interrogation.” *State v. Simoneau*, 402 A.2d 870, 873 (Me. 1979).

101. *State v. Bragg*, 2012 ME 102, ¶ 2, 48 A.3d 769.

102. *Id.*

103. *Id.* ¶ 3.

104. *Id.*

105. *Id.* ¶ 4.

during dinner.<sup>106</sup> Ford proceeded to conduct several routine tests to evaluate Bragg's sobriety, all of which indicated the likelihood that Bragg was intoxicated.<sup>107</sup> Moments after completing the tests, Bragg began to walk towards her husband who had arrived on the scene, and appeared to be "unsteady."<sup>108</sup> It was at this time that Ford indicated to Bragg that she was under arrest, and was taken "to the Camden Police Station to take an intoxilyzer test."<sup>109</sup>

The intoxilyzer test showed Bragg's BAC level to be .13%.<sup>110</sup> Without being prompted by Bragg, Ford accurately shared with her the results of the intoxilyzer test, and informed her "that the presumptive level of intoxication in Maine is .08% . . ."<sup>111</sup> Subsequently, Bragg replied that "she had thought when she ordered the second margarita at dinner it was probably a bad idea."<sup>112</sup> Bragg was then charged with the Class D crime of operating under the influence.<sup>113</sup>

### B. Procedural History

Prior to trial, Bragg filed a motion to suppress statements she made in Ford's cruiser and at the police station on the grounds that she was not read her *Miranda* rights.<sup>114</sup> The Superior Court denied the motion because Bragg "was not in custody" when she first began speaking with Ford at the scene, nor was she subject to interrogation while Ford conducted the field sobriety tests,<sup>115</sup> and Ford's relay of the intoxilyzer results to Bragg was "not the functional equivalent of a question."<sup>116</sup> A jury found Bragg guilty of OUI, and Bragg subsequently appealed the verdict to the Law Court.<sup>117</sup>

### C. Arguments

On appeal, Bragg argued primarily that Ford's statement regarding the intoxilyzer results in conjunction with informing her of the presumptive level of intoxication in Maine constituted the functional equivalent of a question within the meaning of *Innis*.<sup>118</sup> Specifically, Bragg contended that Ford's statement to her at the police station was not a routine booking or administrative question, but rather a type of "psychological ploy" because it "clearly posited her guilt" by including that the legal limit in Maine is .08%:

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106. *Id.*

107. *Id.*

108. *Id.* ¶ 5.

109. *Id.*

110. *Id.* ¶ 6.

111. *Id.*

112. *Id.*

113. *Id.* "A person commits OUI if that person: Operates a motor vehicle: (1) While under the influence of intoxicants; or (2) While having an alcohol level of 0.08 grams or more of alcohol per 100 milliliters of blood or 210 liters of breath . . ." 29-A M.R.S.A. § 2411(1-A)(A) (2011).

114. *Bragg*, 2012 ME 102, ¶ 7, 48 A.3d 769.

115. *Id.*

116. *Id.*

117. *Id.*

118. Brief for Appellant at 11, *State v. Bragg*, 2012 ME 102, 48 A.3d 769 (No. KNO-11-488).

As the Court explains in *Miranda*, this psychological ploy is reasonably likely to elicit an incriminating response. In fact Ms. Bragg succumbed to the psychological pressure of this tactic and consequently made statements concerning what she had to drink, and that she could have called her husband for a ride. Because Officer Ford used an interrogation technique designed to elicit an incriminating response, he subjected her to the functional equivalent of interrogation, and thus her statements should have been suppressed.<sup>119</sup>

Bragg further argued that her statements to Ford at the police station should have been suppressed “because the officer presented [her] with information designed to provoke a response to the suspected offense, rather than a question designed to elicit biographical data . . . .”<sup>120</sup> Bragg contended that Ford’s presentation of the “test result in the context of Maine’s presumptive level” went beyond “a mere explanation of the procedure.”<sup>121</sup> Finally, Bragg argued that she was responding directly to a statement made by Ford regarding the test results and the presumptive level, and Ford should have known that his comments would be likely to elicit an incriminating response.<sup>122</sup> For these reasons, Bragg asked the court to remand her case to the Superior Court with an order granting her motion to suppress.<sup>123</sup>

In contrast, the State argued that Bragg was not subjected to the functional equivalent of a question within the meaning of *Innis*<sup>124</sup> because

[t]here was no evidence whatsoever during the hearing that Sergeant Ford wanted to produce or expected to produce an incriminating response when he told [Bragg] her test result. Especially considering that any person accused of OUI has the right by statute to obtain “full information concerning a test . . . .” it would be more surprising if an officer did not tell an arrestee their test results.<sup>125</sup>

For these reasons, the State asked the court to deny Bragg’s appeal and uphold her conviction.<sup>126</sup>

#### D. Decision of the Law Court

The unanimous court affirmed the denial of Bragg’s suppression motion, both with respect to her comments made at the scene of the accident<sup>127</sup> and those made

119. *Id.* at 13 (citations omitted).

120. *Id.* at 13-14.

121. *Id.* at 14.

122. *Id.*

123. *Id.* at 15. For the argument made by Bragg on appeal regarding the issue of whether she was in custody at the time of her sobriety tests at the scene of the accident and when she was in Ford’s cruiser, *see id.* at 6-11.

124. Brief for Appellee at 8, *State v. Bragg*, 2012 ME 102, 48 A.3d 769 (No. KNO-11-488).

125. *Id.* (citations omitted).

126. *Id.* at 9. For the argument made by the State on appeal regarding the issue of whether Bragg was entitled to a *Miranda* warning for statements made at the time of her sobriety tests at the scene of the accident and when she was in Ford’s cruiser, *see id.* at 5-7.

127. *State v. Bragg*, 2012 ME 102, ¶¶ 9-13, 48 A.3d 769. The court reasoned that “[t]his brief detention to investigate is consistent with the characteristics of a [ ] stop that does not rise to the level of custody for Fifth Amendment purposes,” *id.* ¶ 11, and “[e]ven if Bragg had been in custody, however, her additional contention that the alphabet and counting tests were testimonial would not be persuasive, as a defendant’s performance on field sobriety tests is nontestimonial in nature,” *id.* ¶ 13.

at the police station.<sup>128</sup> The court acknowledged that the issue—whether an officer’s statement to a defendant that does nothing more than relay evidence against him requires the reading of a *Miranda* warning—was a matter of first impression in Maine; however, it emphasized that “other courts have recognized that simply presenting a defendant with evidence against her does not necessarily constitute an interrogation for *Miranda* purposes.”<sup>129</sup>

Addressing Bragg’s argument that Ford’s conveyance of her test results in combination with informing her of the presumptive level of intoxication in Maine constituted a statement reasonably likely to elicit an incriminating response, the court held that this statement was not within the scope of *Miranda* as it was merely “a matter-of-fact communication of the evidence” in this particular case.<sup>130</sup> In fact, the court agreed with the State that “[g]iven that Bragg was entitled to [the intoxilyzer results upon request], the officer’s simple statement relating that information, though unrequested, does not constitute a statement reasonably likely to elicit an incriminating response.”<sup>131</sup>

#### IV. ANALYSIS

The *Bragg* holding—that a police officer’s statement conveying only “matter-of-fact communication of evidence” to a defendant will not trigger a *Miranda* warning—is a continuation of the Law Court’s tradition of striking the proper balance between investigative needs and rights of defendants. Nevertheless, situations may arise where law enforcement officers present a defendant with truthful, “matter-of-fact” evidence against him, which would nonetheless be reasonably likely to elicit an incriminating response. The *Innis* Court cautioned that, while it must be objectively determined whether a defendant was interrogated, “[a]ny [subjective] knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor” in establishing the need for a *Miranda* warning.<sup>132</sup> Thus, where a defendant is presented with truthful evidence against him, but where an officer should know or does know that such “matter-of-fact” presentation is reasonably likely to elicit an incriminating response, the defendant should be entitled to a *Miranda* warning, notwithstanding *Bragg*.

As the Supreme Court has made clear, the purpose of *Miranda* is to provide protection against psychological ploys conducted by police officers that are

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128. *Id.* ¶ 17.

129. *Id.* ¶ 16. The court cited to an array of cases among the appellate courts regarding this specific issue of when an officer makes a statement to a defendant that only conveys the evidence against him: “*Caputo v. Nelson*, 455 F.3d 45, 50-51 (1st Cir. 2006) (recognizing that other courts have determined that not all declaratory statements by police regarding the evidence and charges qualify as interrogation); *United States v. Payne*, 954 F.2d 199, 202 (4th Cir. 1992) (“[T]he *Innis* definition of interrogation is not so broad as to capture within *Miranda*’s reach all declaratory statements by police officers concerning the nature of the charges against the suspect and the evidence relating to those charges.”); *Easley v. Frey*, 433 F.3d 969, 974 (7th Cir. 2006) (citing *Payne* with approval and holding that a trial court did not erroneously admit the defendant’s statements in response to ‘a matter-of-fact communication of the evidence against [the defendant]’).” *Id.*

130. *Bragg*, 2012 ME 102, ¶ 16, 48 A.3d 769.

131. *Id.*

132. *Rhode Island v. Innis*, 446 U.S. 291, 302 n.8 (1980).

intended to strip a defendant's Fifth Amendment rights to be free from self-incrimination. It is not intended, however, to silence all dialogue between officers and defendants. The *Miranda* doctrine requires that a defendant be in custody and subject to interrogation for a *Miranda* warning to issue, in order to allow police officers to communicate with a suspect prior to indictment—when the risk of self-incrimination is low. Such allowances not only benefit police officers during the process of an investigation, but also permit the defendant to be kept aware of the investigatory process and findings. As the court noted, under Maine statute, Bragg was entitled to her test results upon request. Although she did not request it, Ford's truthful conveyance of this information along with the presumptive level of intoxication was nothing more than a recitation of the evidence existing against Bragg, and would not be reasonably likely to elicit an incriminating response. The situation would clearly be different had Ford provided Bragg with *false* evidence existing against her (e.g., if he had told her that her BAC was .20%). Such an untruthful conveyance would surely amount to an impermissible psychological ploy.

The Law Court's reasoning in *Bragg* is consistent with other jurisdictions that have taken on this particular issue. The rulings by the Fourth Circuit in *Payne* and the Seventh Circuit in *Enoch* exemplify courts' unwillingness to extend *Miranda* to situations in which the police officer does nothing more than inform the defendant of the evidence against him. Both defendants in *Payne* and *Enoch* were read their *Miranda* rights and were allowed to speak with their attorneys. They then submitted incriminating responses after being informed of new inculpatory evidence. The Fourth and Seventh Circuits were correct in rejecting the defendants' arguments that they had been subjected to the functional equivalent of a question upon learning the inculpatory information. Neither *Miranda* nor *Innis* support imposing a type of prolonged silent treatment in which law enforcement can no longer speak to defendants once they have invoked their Fifth Amendment rights. If such silence of communication between police officers and defendants were required, law enforcement officers would be unduly restricted from continuing their investigations, and defendants would no longer be kept up to date on the progress of their detained status. In other words, neither side would benefit from such a restriction.

Appellate courts during the twenty-first century agree with this general approach.<sup>133</sup> These rulings consistently uphold the underlying purpose of *Miranda*—to protect Fifth Amendment rights of those who are subject to custodial interrogation without completely stripping law enforcement officers of their right to conduct investigations; the courts recognize that such investigations often demand continuing communications with the suspect. So long as the investigative tactics are not reasonably likely to elicit an incriminating response, they are constitutionally permissive.

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133. See, e.g., *United States v. Genao*, 281 F.3d 305, 308, 310 (1st Cir. 2002) (ruling that a defendant's inculpatory statement made after the police did nothing more than show him drugs and guns found in his home did not constitute interrogation); *Easley v. Frey*, 433 F.3d 969, 974 (7th Cir. 2006) (holding that the trial court did not erroneously admit statements from the defendant in response to "a matter-of-fact communication of the evidence against [the defendant]").



It is no surprise, then, that the defendant in *Thomas* was not granted her suppression motion: after all, she initiated the communications. *Miranda* and *Innis* were never intended to extend to communications between the defendant and law enforcement officers in which no interrogation had taken place. Accordingly, inculpatory evidence provided to a suspect at his request will not typically require the issuance of a *Miranda* warning because it does not constitute the functional equivalent of a question.

Inculpatory evidence relayed to a defendant without the defendant's urging, however, presents a somewhat different situation. As *Thomas* points out, there may be some question as to whether an "unsolicited" communication regarding the evidence against a suspect could constitute the functional equivalent of a question. The issue of unsolicited communication of evidence to a defendant is central to *Bragg* because Bragg never requested the intoxilyzer results.

In *United States v. Poole*,<sup>134</sup> the Ninth Circuit addressed whether such communication is a form of interrogation.<sup>135</sup> The suspect in a bank robbery, Poole, invoked his right to remain silent after being issued his *Miranda* rights.<sup>136</sup> Instead of ending communication at that point, however, the special agent "showed Poole surveillance photographs of the bank robberies and . . . mentioned Poole's suspected accomplice by name."<sup>137</sup> Upon seeing the photographs, Poole defended himself, and at the end of questioning, Poole was asked to give his full name, at which time he responded by providing a false name.<sup>138</sup>

The Ninth Circuit affirmed the ruling of the district court that any evidence gathered by Poole's statements upon seeing the photographs were inadmissible, but reversed the district court's ruling that Poole's "false name" statement was admissible because it was made during the booking process.<sup>139</sup> The Ninth Circuit explained that the agent's acts of showing the photographs to Poole and asking for his biographical information could not be separated, and together constituted interrogation:

By showing Poole the surveillance photographs and asking questions relating to them, Special Agent Uda in effect accused Poole of the robberies. Under the circumstances, Special Agent Uda should have known that Poole would feel compelled to defend himself and might give a false name in reaction to the coercive and accusatory interview.<sup>140</sup>

Interestingly, the Ninth Circuit noted that, even without any additional questioning, the presentation of the surveillance photos alone under these circumstances would have constituted interrogation.<sup>141</sup>

*Poole* exemplifies the situation where an officer's truthful, "matter-of-fact" conveyance to the defendant of inculpatory evidence constitutes interrogation because it is reasonably likely to elicit an incriminating response. *Poole* can be

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134. 794 F.2d 462 (9th Cir. 1986).

135. *Id.* at 466-68.

136. *Id.* at 466.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 467.

141. *Id.* at 466.

distinguished from the Law Court's ruling in *Bragg* because unlike Ford's statement, the special agent's presentation of the evidence along with additional questions amounted to the *Innis* standard. In contrast, interrogation did not exist in *Bragg* because Ford's statement regarding the test results was not accusatory or intended to solicit additional information from Bragg: Ford simply informed Bragg of information that she was entitled to know under Maine statute. The Law Court recognized this distinction and cited to *Poole* to demonstrate the existence of situations in which conveyance to the defendant of inculpatory evidence would require a *Miranda* warning.<sup>142</sup> Although the court did not explicitly address whether *Bragg* is a bright-line test for when a *Miranda* warning will not issue, its citation to *Poole* appears to suggest that *Bragg* will be applied on a case-by-case basis.

#### V. CONCLUSION

The Law Court's decision in *Bragg* demonstrates a proper application of the limits to a defendant's right to receive a *Miranda* warning, specifically when an officer does nothing more than truthfully inform the defendant of evidence that exists against him. These limits are sound, as they protect both the officer and defendant by ensuring that communication is not completely cut off. Nevertheless, Maine courts should not view *Bragg* as a bright-line rule that *Miranda* does not apply if a defendant is "simply" informed of evidence against him. There may be times when law enforcement officers convey untruthful evidence to the defendant, or when the conveyance of truthful, "matter-of-fact" information could be reasonably likely to elicit an incriminating response from the defendant. Furthermore, Maine courts must be attentive to situations where an officer's questions or presentation of evidence to a defendant are disguised under the administrative question or biographical data exception or are otherwise characterized as "matter-of-fact" conveyances of information, and should thus apply *Bragg* only on a case-by-case basis.

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142. See *State v. Bragg*, 2012 ME 102, ¶ 16, 48 A.3d 769.