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Miranda v. Arizona: History, Memories, and Perspectives

By Paul G. Ulrich*

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* B.A. 1961, University of Montana (with high honors); J.D. 1964, Stanford University. This article is dedicated to Ernesto Miranda, John J. Flynn, John P. Frank and Robert A. Jensen. I appreciate having had opportunities to speak with Lewis and Roca lawyers and at a Maricopa County Bar Association seminar concerning *Miranda* as this article began to develop. I also appreciate Profs. Michael Jones' and Francine Banner's invitations to speak with their criminal procedure classes at Arizona Summit School of Law concerning *Miranda*, their suggestion that I expand the materials prepared for those classes into this article and the *Arizona Summit Law Review* editors' assistance in preparing the article for publication. I also acknowledge with appreciation my wife Kathleen's encouragement in finally telling *Miranda's* story from my perspective.

I. INTRODUCTION

A. Miranda's *Holdings*

Miranda v. Arizona[1] and three other consolidated cases[2] (collectively "*Miranda*") were decided 5-4 for the defendants by the United States Supreme Court on June 13, 1966. Chief Justice Earl Warren's majority opinion there reversed Ernesto Miranda's kidnap-rape conviction, which had been based primarily on his written and oral confessions, and remanded his case for a new trial.

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] *Id.* at 437-38, 499 (Vignera v. New York, No. 760, October Term 1965, and Westover v. United States, No. 761, October Term 1965 were reversed; California v. Stewart, No. 584, October Term 1965 was affirmed).

Miranda required police to warn suspects prior to any custodial interrogations concerning their Fifth and Sixth Amendment rights to remain silent and to have counsel. It also required suspects to waive those rights before any confessions based on such interrogations occurring without counsel might be used against them. Miranda prevailed because he was not given the kkwrequired warnings or otherwise made aware of his constitutional rights prior to his confessions in 1963, even though no such specific requirements then existed.

B. Constitutional Issues Presented

The constitutional issues presented by *Miranda* include finding the proper balance between law enforcement's and suspects' interests as to custodial interrogations. They also concern whether and under what circumstances any confessions resulting from suspects' interrogations, obtained without having counsel present, can be used against them. Those issues are broader than simply whether truly coerced confessions are being prevented. For example, although Miranda's confessions resulted from police interrogation and deception in a custodial environment, they were not physically coerced.

Deciding those issues also requires considering policy implications resulting from the possibility that if the Sixth Amendment were interpreted to require counsel be present before custodial interrogations could occur, as a "critical stage" in criminal proceedings, counsel generally would advise suspects to remain silent. Accordingly, they would give very few confessions. Most criminal convictions are now obtained through confessions and guilty pleas, rather than jury trials.

Requiring that suspects be provided counsel prior to any custodial interrogations also would require more courtrooms, judges, court staff, prosecutors and public defenders, and therefore greater taxpayer expense, if more criminal cases were tried. Prosecutors might not be able to prove as many cases without confessions. Such failures would result in fewer convictions, more unsolved crimes and more possibly guilty suspects going free. They in turn might commit other crimes in the future.

The fundamental underlying constitutional issue *Miranda* presents is thus whether to permit convicting suspects based primarily on their confessions, regardless of how such confessions were obtained, because they may in fact be guilty. The alternative would be to honor suspects' presumption of innocence and the full extent of their other constitutional rights, including the rights to remain silent and to have counsel present, prior to any custodial interrogations. Suspects then would have to be proven guilty beyond a reasonable doubt following a jury trial based solely on other constitutionally obtained, legally admissible evidence before they could be convicted.

How those issues should be resolved goes squarely to the core of how the American criminal justice system operates. They therefore are as timely and important today as they were fifty years ago when Miranda was arrested, interrogated and confessed, without having counsel present to advise him that he had a constitutionally-protected right to remain silent.[3] A recent series of front-page newspaper articles illustrates continuing concern about whether prosecutors sometimes improperly cross legal and ethical lines in their zeal to obtain convictions, and what, if anything, the legal system can do about it.[4] A number of recent, high profile cases have involved *Miranda* issues, including:

Dzhokhar Tsarnaev: In late April 2013, federal investigators captured, arrested, and then interrogated Dzhokhar Tsarnaev, one of two alleged Boston Marathon bombers, in the hospital room where he was being treated for gunshot wounds suffered in his capture.[5] That interrogation occurred without first providing Tsarnaev *Miranda* warnings concerning his rights to remain silent and to have an attorney present, relying on the so-called "public safety" exception to *Miranda*.[6] However, after the Justice Department filed a criminal com-

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[3] The Phoenix Police Museum opened a new exhibit describing *Miranda's* history on March 13, 2013, the fiftieth anniversary of Miranda's arrest and confessions. Cassandra Strauss, *Police Museum Opens Exhibit on Miranda Case*, ARIZ. REPUBLIC, Mar. 14, 2013, at B1.

[4] Michael Kiefer, *When Prosecutors Get Too Close to the Line*, ARIZ. REPUBLIC, Oct. 27, 2013, at A1; Michael Kiefer, *Prosecutors Under Scrutiny Are Seldom Disciplined*, ARIZ. REPUBLIC, Oct. 28, 2013, at A1; Michael Kiefer, *A Star Prosecutor's Trial Conduct Challenged*, ARIZ. REPUBLIC, Oct. 29, 2013, at A1; Michael Kiefer, *Can the System Curb Prosecutorial Abuses?*, ARIZ. REPUBLIC, Oct. 30, 2013.

[5] Mark Sherman, *Death Penalty Possible: Miranda Issue Debated*, ARIZ. REPUBLIC, Apr. 21, 2013, at A7; The most serious gunshot wound to Tsarnev entered through the left side inside of Tsarnev's mouth and exited his left lower face, resulting in a skull-base fracture, with injuries to his middle ear, the skull base, the lateral portion of his C1 verterbrae, as well as injury to his pharynx, mouth and a small vascular injury. *See* Doug Stanlin, *Declassified Documents Detail Boston Bomb Suspect's Injuries*, ARIZ. REPUBLIC, Aug. 21, 2013, at A6. Given the nature and extent of those injuries, as well as the likelihood he would have been given pain-killing medications, Tsarnev's ability to resist interrogation, and to communicate consciously and willingly with his interrogators presumably would have been substantially impaired.

[6] Sherman, *supra* note 5, at A7. The "public safety" exception to *Miranda* was created in Justice Rehnquist's majority opinion in *New York v. Quarles*. New York v. Quarles, 467 U.S. 649 (1984) (discussed further *infra* notes 649-67). Some Republican senators argued Tsarnaev instead should have been considered an "enemy combatant" before being released to the criminal justice system, so he could be interrogated for an extended period without being advised concerning his rights to counsel and to remain silent. Sherman, *supra* note 5. However, the Supreme Court has never resolved whether U.S. citizens or foreign nationals arrested on U.S. soil can be held by the military, as opposed to civilian authorities. *Id. Cf.* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (U.S. citizen held as an alleged enemy combatant when captured in Afghanistan has right to due process determination concerning that status. The Court did not address right to counsel under those circumstances, since counsel would be provided). *See generally* David T. Hartman, Comment, *The Public Safety Exception to Miranda and the War on Terror: Desperate Times Do Not Always Call for Desperate Measures*, 22 GEO. MASON U. C.R. L.J. 219 (2012). It also was suggested that

plaint, a federal magistrate judge convened a "brief, makeshift hearing" in Tsarnaev's hospital room, during which she advised him of his *Miranda* rights.[7] A court ultimately will have to decide which, if any, statements Tsarnaev made before those warnings were given might be admissible in evidence against him.[8]

Casey Anthony: The Florida Court of Appeals recently affirmed two of Casey Anthony's four convictions of providing false information to law enforcement officers concerning her daughter's disappearance and alleged murder.[9] In doing so, the court rejected Anthony's arguments that her statements should have been suppressed because they were made when she was allegedly under arrest and she had not been read her *Miranda* rights.[10] It instead found Anthony was not technically in custody when those interviews occurred.[11] Accordingly, *Miranda* did not apply.[12]

Debra Milke: The Ninth Circuit recently ordered Debra Milke's conviction and death sentence for murdering her four-year-old son be set aside because the State did not disclose to her defense lawyer that Armando Saldate, the detective to whom she allegedly confessed, had a long history of lying under oath and other misconduct.[13] At her trial, Milke denied she had ever confessed.[14] The only evidence she had done so was the detective's uncorroborated testimony.[15] The detective's contemporaneous interrogation notes were destroyed before the trial.[16] Milke's interrogation and alleged confession were

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if the FBI had chosen to have its High Value Interrogation Group interrogate Tsarnaev solely for informational, and not criminal, purposes, he would not have had constitutional rights to remain silent, to counsel, and to be brought before a magistrate without delay. *See* Michael B. Mukasey, *Defining Rights in a Terror Case*, WALL ST. J., May 2, 2013, at A15. Those conclusions are debatable.

[7] Devlin Barrett et al., *Judge Made Call to Advise Suspect of Rights*, WALL ST. J., Apr. 26, 2013, at A6.

[8] *Id.* For a discussion concerning whether and to what extent accused terrorists should have *Miranda* rights see Gary L. Stuart, *Miranda and the Boston bombing*, ARIZ. REPUBLIC, May 5, 2013, at B10.

[9] Anthony v. State, 108 So. 3d 1111 (Fla. Dist. Ct. App. 2013).

[10] *Id.* at 1117-19.

[11] *Id.*

[12] *Id.* at 1117. However, the court vacated convictions on two other counts on double jeopardy grounds because the allegedly false statements were made in only two interviews. *Id.* at 1119-20.

[13] Milke v. Ryan, 711 F.3d. 998, 1000-01 (9th Cir. 2013). Chief Judge Kozinski, also concurring, would have reversed Milke's conviction on the separate ground that her "confession," if it was obtained at all, was extracted illegally. He therefore would have barred use of the "so-called confession" during any retrial. *Id.* at 1025 (Kozinski, C.J., concurring).

[14] *Id.* at 1000.

[15] *Id.*

[16] *Id.* at 1002.

not recorded.[17] She did not sign a *Miranda* waiver.[18] The two men actually involved in the boy's murder would not testify against her.[19] No witnesses or direct evidence connected Milke with the crime.[20]

Trial court proceedings following the Ninth Circuit's decision illustrate the tangled web that can result from improperly obtained confessions, including a possible final dismissal. The court initially set a September 30, 2013 trial date.[21] However, on September 5, 2013, it ruled Milke could be released from custody pending that retrial by posting a secured $250,000 bond.[22] She posted that bond and was released the next day.[23] Saldate, through counsel, then stated he intended to invoke the Fifth Amendment when he was called to testify in that trial.[24]

On September 24, 2013, the court rescheduled Milke's trial for January 2015, since there no longer was any urgency justifying an immediate trial setting.[25] It also set hearings to determine whether Saldate could claim the Fifth Amendment and, if he testifies, whether the alleged confession is admissible.[26] If he does not testify, the court has ruled prosecutors cannot introduce the disputed confession into evidence.[27]

Milke's attorneys then moved to dismiss her case, arguing that because the prosecutor failed to turn over evidence about Saldate's past, a retrial would violate her Fifth Amendment right against being tried twice for the same offense.[28] On December 19, 2013, the court ruled Saldate could claim his Fifth Amendment privilege and not testify against Milke.[29] On January 21, 2014, the court denied both Milke's double jeopardy motion and the State's motion for

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1000.

[21] Michael Kiefer, *Wild Card May Sway Milke's Retrial*, ARIZ. REPUBLIC, July 12, 2013, at A1, A10.

[22] Michael Kiefer, *Judge Grants Milke's Release*, ARIZ. REPUBLIC, Sept. 6, 2013, at B1.

[23] Michael Kiefer, *Milke Leaves Jail, Is In Unknown Location Till Retrial*, ARIZ. REPUBLIC, Sept. 7, 2013, at B1.

[24] Michael Kiefer and JJ Hensley, *Judge May Toss Disputed Confession*, ARIZ. REPUBLIC, Sept. 13, 2013, at A1.

[25] Michael Kiefer, *Milke's Retrial Set for 2015*, ARIZ. REPUBLIC, Sept. 24, 2013, at B1, B10.

[26] *Id.*

[27] Michael Kiefer, *Detective In Milke Case Due In Court*, ARIZ. REPUBLIC, Dec. 13, 2013, at B1.

[28] , Brian Skoloff, *Milke Attorneys: Retrial Would Be a Case of Double Jeopardy*, ARIZ. REPUBLIC, Nov. 2, 2013, at B5.

[29] Michael Kiefer, *Detective in Milke Case Can Take 5th, Judge Rules*, ARIZ. REPUBLIC, Dec. 19, 2013, at B1.

reconsideration as to Saldate.[30] The State intends to appeal the latter ruling.[31] Accordingly, Milke's case will not finally be resolved until at least 2015.

The Central Park Five: A recent Public Broadcasting System "Frontline" program[32] and related book[33] describe the cases of the so-called "Central Park Five," five Black and Latino teenagers convicted of sexually assaulting, raping and attempting to murder a White woman jogger in New York's Central Park in 1989. After serving between seven and 13 years in prison, their convictions were finally vacated and their indictments dismissed in 2002 after an unrelated prisoner, a convicted serial rapist, confessed to committing the crime alone, and his DNA matched that found on the victim.[34]

Police detectives there had obtained the teenagers' false confessions after they waived their *Miranda* rights.[35] They each were then subjected to lengthy, psychologically coercive, custodial interrogations, during which the detectives "implied, suggested, or stated that they could be witnesses or that if they 'told the truth,' then they could go home."[36] Each of the teenagers cited the simple desire to go home as a motivating factor in giving their confessions.[37]

A prosecutor thereafter interviewed the suspects, gave them *Miranda* warnings and videotaped their confessions, without disclosing their prior lengthy interrogations in that record.[38] Jurors eventually convicted the teenagers in two separate trials, based primarily on those confessions,[39] even though no other

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[30] , Michael Kiefer, *Judge: Murder Charge vs. Milke, Decision on Detective Will Stand*, ARIZ. REPUBLIC, Jan. 23, 2014 at B2.

[31] *Id.*

[32] THE CENTRAL PARK FIVE (Florentine Films 2013).

[33] SARAH BURNS, THE CENTRAL PARK FIVE 188-89 (2012).

[34] *Id.* at 188-95.

[35] *Id.* at 61.

[36] *Id.* at 62.

[37] *Id.* at 61-62. *Miranda* does not restrict what can be said in an interrogation after those rights have been waived. However, *Bram v. United States*, 168 U.S. 532, 542-43 (1897), holds a confession is not admissible if it comes from threats or "direct or implied promises," such as assurance that a suspect would be treated more leniently if he confessed. Despite such restrictions, courts have tended to reject confessions only where there was evidence of an explicit threat or promise. BURNS, *supra* note 33, at 61.

[38] BURNS, *supra* note 33, at 49-56.

[39] *Id.* at 159, 175-76 (The court denied defense motions to suppress those confessions, believing the police detectives and prosecutors rather than the defendants and their lawyers. Everyone, including the court, was aware that granting the motions would gut the prosecution's cases.) Given the lack of physical evidence, the charges might have to be dismissed, with tabloid headlines blaming the court for allowing the defendants to walk free. *See id.* at 110. This scenario was similar to Ernesto Miranda's kidnap-rape retrial, discussed at Part VIII. At the core of the case was racial hysteria, institutional pride, and the inability to admit an error. *See* Timothy Egan, Op-Ed., *Good Cops, Bad Cops*, N.Y. TIMES (Apr. 25, 2013, 8:30 PM), http://opinionator.blogs.nytimes.com/2013/04/25/good-cops-bad-cops/?_r=0.

substantial evidence connected them with the crime.[40] The evidence instead showed they were in another part of Central Park when the crime occurred, none of the victim's blood was found on any of the teenagers' clothes, and the prosecution then knew their DNA did not match DNA found on the victim.[41]

In 2003, the former teenagers filed civil rights lawsuits against New York City, the New York Police Department, the District Attorney's Office and many individuals involved in their cases.[42] Although those civil rights cases have survived motions to dismiss, they have not yet gone to trial.[43]

Johnathon Doody: On August 10, 1991, six Buddhist monks, a Buddhist nun and two of their helpers were found murdered inside the Wat Promkunarem Temple at Waddell, Arizona. Sheriff's investigators initially arrested five men in Tucson and obtained confessions from four of them (the "Tucson Four"), resulting in murder charges against them.[44] Those confessions were found to be false about a month later, when investigators tied a .22 caliber gun to the murders that none of the "Tucson Four" owned.[45] That weapon instead was linked to, two high school students—Alessandro Garcia, then sixteen, and Johnathon Doody, then seventeen.[46]

Garcia later admitted his statements implicating the Tucson Four in the murders were false.[47] He initially stated they were involved because he was exhausted from more than ten hours of interrogation, and because of pressure from his father and Maricopa County sheriff's investigators.[48] He also later testified, "I said they (the Tucson Four) were involved. They (the investigators) kept hounding me. I just started telling them whatever."[49] He also has testified that the investigators did not believe him when he claimed that he and Doody acted alone in committing the robbery and murders.[50]

Doody was subjected to a 12-hour interrogation by officers using the same techniques on him that they used on the "Tucson Four."[51] He eventually confessed to ransacking the temple but stated he was outside when the murders occurred.[52] Garcia also confessed, claiming Doody had shot each of the vic-

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[40] BURNS, *supra* note 33, at 103.
[41] *Id.* at 96-97.
[42] *Id.* at 211.
[43] *Id.*
[44] *See* Doody v. Schriro, 596 F.3d 620, 623 (9th Cir. 2010) (en banc).
[45] *See* Laurie Merrill, *Confession at Center of Doody Retrial*, ARIZ. REPUBLIC, Aug. 13, 2013; B1, B3.
[46] Laurie Merrill, *Mistrial in Temple Killings*, ARIZ. REPUBLIC, Oct. 25, 2013, at B1, B5.
[47] Merrill, *supra* note 45, at B3.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *See Schriro*, 596 F.3d, at 631.

tims.[53] Garcia later pleaded guilty in a plea bargain that allowed him to avoid the death penalty if he testified against Doody, and was sentenced to 271 years in prison.[54]

After the initial jury trial at which Doody's motion to suppress his confession was denied, Garcia testified against Doody and Doody's confession was admitted in evidence, Doody was convicted of first degree murder and sentenced to 281 years.[55] However, the jury's verdict forms stated that each juror premised Doody's conviction on felony murder rather than premeditated murder,[56] suggesting they believed Doody's confession that he was outside the temple when the murders occurred,[57] not Garcia's statement that Doody personally shot each victim in the head.[58]

The Arizona Court of Appeals affirmed Doody's conviction, finding the investigators had provided Doody with the required "clear and understandable" *Miranda* warnings, and that he had been "read each warning from a standard juvenile form and provided additional explanations as appropriate."[59] The Arizona district court then denied federal habeas corpus relief. A Ninth Circuit panel reversed that denial.[60] An en banc court reaffirmed the initial panel's decision.[61]

Specifically, based on the interrogation transcripts, the en banc court found Doody had not been given "clear and understandable" *Miranda* warnings,[62] that his confession was involuntary under the totality of the circumstances,[63] and that it therefore was inadmissible.[64] The court therefore reversed and remanded the case to the district court to grant Doody's habeas petition unless the State of Arizona elected to retry him within a reasonable time.[65]

The State elected to proceed with a retrial based primarily on Garcia's testimony, which began August 21, 2013.[66] That trial resulted in a mistrial on October 15, 2013, because the jury reached an impasse after voting 11-1 for

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[53] *Id.* at 632.

[54] Years later, the U.S. Supreme Court held the Eighth and Fourteenth Amendments prohibit states from using the death penalty on offenders under 18 when their crimes were committed. Roper v. Simmons, 543 U.S. 551 (2005).

[55] Merrill, *supra* note 45, at B1.

[56] *See Schriro*, 596 F.3d, at 633.

[57] *Id.* at 632.

[58] *Id.*

[59] State v. Doody, 187 Ariz. 363, 372, 930 P.2d 440, 449 (App. 1996).

[60] Doody v. Schriro, 548 F.3d 847 (9th Cir. 2008).

[61] *Schriro*, 596 F.3d, at 620.

[62] *Id.* at 635.

[63] *Id.* at 645.

[64] *Id.* at 653.

[65] *Id.* at 653-54.

[66] Merrill, *supra* note 45, at B1.

conviction.[67] The State again chose to try Doody for a third time beginning December 4, 2013, also based primarily on Garcia's testimony.[68] That trial went to a jury on January 13, 2014.[69] This time, the jury convicted Doody on all nine murder counts.[70] Whether there will be another appeal and its possible outcome remain to be determined.

John Grisham: A recent best-selling John Grisham novel shows how a false confession obtained through lengthy custodial interrogation, deception and lies; without giving *Miranda* warnings, and despite the suspect's request for counsel; and thereafter supported by interrogators' false affidavits in response to a defense motion to suppress, can backfire on the prosecution[71].

C. Miranda's *Compromise*

Miranda changed the prior constitutional balance between the prosecution's interests in convicting presumably guilty suspects and suspects' interests in protecting their constitutional rights. Courts no longer can admit confessions obtained through custodial interrogations simply because they were "voluntarily given" under the totality of the circumstances. Instead, proper warnings by the police and waivers by suspects concerning their constitutional rights must first be given. If suspects assert their rights, interrogations must cease and counsel must be provided. As will be discussed later in this article, whether *Miranda* and its subsequent cases have created the proper balance between those interests remains open to question.

Miranda created intensely hostile, long-lasting, social, political and legal reactions. Those reactions generally assumed *Miranda* favored guilty suspects' rights in preventing their confessions from being used against them over society's interests in promoting law enforcement's ability to convict such suspects through easily obtaining and using such confessions. Based on such reactions, Professor Lucas A. Powe, Jr. has stated *Miranda* "is the [Warren Court's] most controversial criminal procedure decision hands down."[72]

Those negative reactions were not justified by *Miranda* decision itself. *Miranda*'s required warnings and waivers instead created a judicial compromise between the prior rule that confessions were admissible if voluntarily

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[67] Laurie Merrill, *Mistrial in Temple Killings*, ARIZ. REPUBLIC, Oct. 25, 2013, at B1.

[68] Michael Kiefer, *Defendant in '91 Slaying of 9 at Temple Back on Trial*, ARIZ. REPUBLIC, Jan. 7, 2014, at B1.

[69] Michael Kiefer, *Jurors to Deliberate Today in Doody Case*, ARIZ. REPUBLIC, Jan. 14, 2014, at B1.

[70] Michael Kiefer, *In 3rd Trial, Doody Found Guilty in Temple Massacre*, ARIZ. REPUBLIC, Jan. 24, 2014, at A1.

[71] *See* JOHN GRISHAM, THE RACKETEER (2012).

[72] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 394 (2000) (Powe is a law school and department of government professor at the University of Texas).

given based on the "totality of circumstances," and the arguments made on Miranda's behalf, based on the Sixth Amendment right to counsel, that counsel must in fact be present before any custodial interrogations can occur to advise suspects concerning their constitutional rights. That argument's rationale was that interrogations are a "critical stage" in the criminal process at which such rights otherwise might be lost.[73] Requiring that counsel be present later in the criminal process when confessions have already been given without counsel being present thus "is too late to matter."[74] If Miranda's arguments had been accepted, confessions would have become "extinct," except as part of plea bargains.[75] That result was both politically and judicially unacceptable, for the reasons previously stated favoring law enforcement over suspects' rights.

Miranda's compromise instead provided clear procedures for law enforcement to follow to continue to pursue custodial interrogations resulting in confessions that would both support valid guilty pleas and be admissible in evidence if a suspect chose to go to trial, without actually requiring that counsel then be present.[76] However, as discussed later in this article, its dissenting justices never gave the majority credit for not going further. Thoughtful commentators suggesting such a compromise had occurred also were "not taken seriously in the public debate."[77]

Confirming this compromise had occurred, in 2000 *Dickerson v. United States* held 7-2 that Congress could not overrule *Miranda* by enacting a federal statute[78] making the admissibility of criminal suspects' confessions turn solely on whether they were made voluntarily under all the circumstances.[79] *Dickerson*'s rationale was based both on *stare decisis* and because *Miranda* was a "constitutional decision."[80]

Chief Justice Rehnquist's majority opinion there stated *Miranda* "has become embedded in routine police practice to the point where the warnings have become part of our national culture."[81] It confirmed *Miranda* had been narrowed in more recent years because "our subsequent cases *have reduced the impact of the Miranda rule on legitimate law enforcement* while reaffirming the decision's core ruling that unwarned statements may not be used in evidence *in*

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[73] *Id.* at 398.

[74] Brief for Petitioner at 49, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759, Oct. Term 1965).

[75] POWE, *supra* note 72,at 398.

[76] *Id.* at 396-97.

[77] *Id.*

[78] 18 U.S.C. § 3501 (2012).

[79] Dickerson v. United States, 530 U.S. 428 (2000).

[80] *Id.* at 443.

[81] *Id.*

the prosecution's case in chief."[82] Finally, it stated a totality-of-circumstances test would be more difficult than *Miranda* for law enforcement officers to conform to and for courts to apply in a consistent manner.[83] Rehnquist's opinion "surprised the legal world" because "few justices did more to undermine important criminal procedure protections like those provided by *Miranda*."[84]

When *Dickerson* was decided, U.S. Attorney General Janet Reno recognized *Miranda* had resulted in a compromise favoring law enforcement. She then stated,

> Today's decision recognizes *Miranda* rights has [sic] been good for law enforcement. For decades, the Miranda ruling set out clear standards for police officers, helped get confessions admitted into evidence, and ensured the credibility of confessions in the eyes of jurors. Most importantly, it will continue to provide a public sense of fairness in our criminal justice system.[85]

However, that façade of "credibility" and "public sense of fairness" permitting custodial confessions to be admitted obscures the fact that police can continue to obtain admissible confessions simply by giving "lip service" to suspects' constitutional rights by reciting *Miranda* warnings, without requiring that counsel be present to advise suspects they have the right to remain silent and thus prevent any confessions from being given as an original matter.

D. Miranda's *Effect*

Despite *Miranda*'s compromise, the Court has consistently refused to extend its scope, limited whether and how the decision should be applied, and narrowed the consequences of failing to follow its requirements. The Court also has created exceptions to the decision's applicability. This article will discuss numerous such cases.

E. How and Why Did Miranda *Occur?*

Miranda occurred because the case's underlying events and Miranda's confessions happened to occur in the right place and at the right time, in relation to the state of then-developing case law, numerous similar pending cases,

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[82] *Id.* at 443-44 (emphasis added). How this "narrowing" occurred will be discussed in more detail later in this article.

[83] *Id.* at 444.

[84] Michael O'Donnell, *Raw Judicial Power*, THE NATION, Oct. 22, 2012, at 35, 37.

[85] Press Release, U.S. Dep't of Justice, *Statement by Attorney General Janet Reno on Today's Decision Upholding the* Miranda *Ruling* (June 26, 2000), *available at* http://www.justice.gov/opa/pr/2000/June/364ag.htm.

and the then-majority justices' views. However, given those latter circumstances, a U.S. Supreme Court *Miranda* type decision might have occurred in 1966, regardless of whether Ernesto Miranda himself was then before the Court.

Assessing *Miranda*'s importance and legacy requires considering how the case reached the U.S. Supreme Court, what was briefed and argued there, and how and why the case was decided as it was. Consideration also must be given to what occurred thereafter, both in Miranda's own case and in later Supreme Court decisions. *Miranda* also needs to be related both to a larger range of social, political, and historical issues and events, and to everyone involved as Miranda's cases progressed. Those stories provide the background for this article.

F. My Involvement

My involvement in Ernesto Miranda's representation was wholly fortuitous. I joined Lewis, Roca, Scoville, Beauchamp & Linton (now Lewis and Roca, Rothgerber, LLP ("LRR")) in September 1965.[86] I graduated from Stanford Law School in June, 1964 and clerked for Honorable Ben C. Duniway at the Ninth Circuit Court of Appeals in San Francisco during 1964-65. I was admitted to practice in California in January 1965 and in Arizona in April 1966. I later became a partner at LRRin June 1970, where my practice emphasized civil appeals. I then started my own civil appeals firm in June 1985, retiring in May 2012.

At L&R, I initially worked as a law clerk under partner John P. Frank's supervision while waiting to take the Arizona bar examination. I was admitted to practice in Arizona in April 1966. I worked on Miranda's kidnap-rape repre-

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[86] JOHN P. FRANK, LEWIS AND ROCA: A FIRM HISTORY 1950-1984, at 83 (1984). LRR was founded by three partners, Orme Lewis, Paul M. Roca and Harold Scoville, together with two associate lawyers, Charles Stanecker and Dow Ben Roush, on June 1, 1950, as Lewis Roca & Scoville. That partnership was preceded by a "Declaration of Nonpartnership" among Lewis, Roca and Scoville effective January 1, 1949. FRANK, *supra*, at 3. The firm rapidly grew into a general, litigation-oriented practice as Phoenix also continued to grow. Its practice included appeals and criminal defense, as lawyers such as John P. Frank and John J. Flynn later joined the firm. The firm employed about 35 lawyers when I joined it in September 1965 and over 100 lawyers when I left in May 1985 to start my own firm. By July 2013, it employed 180 lawyers in its Phoenix, Tucson, Las Vegas, Reno, Albuquerque and Silicon Valley offices. Effective September 1, 2013, it merged with a Denver law firm, Rothgerber Johnson & Lyons, LLP, to create a 250-lawyer firm known as Lewis Roca Rothgerber LLP. Accordingly, the firm will be referred to as "LRR" throughout this article. The newspaper announcement of that merger listed only *Miranda v. Arizona* by name as one of the "high-profile" cases the firm has handled throughout its history. *See* Saba Hamedy, *Valley law firm unveils merger*, ARIZ. REPUBLIC, July 25, 2013, at D1, D2. However, none of the lawyers with the firm between 1965 and 1970, when it represented Miranda, are now here.

sentation from November 1965, after the U.S. Supreme Court granted his initial certiorari petition, until October 1969, when the Court denied a second such petition following a later retrial and appeal. Accordingly, *Miranda* was for me, a personal, lengthy, intense, continuing process, not simply a one-time, abstract decision. It was the most significant case in my career.

II. Background Facts

Ernesto Arturo Miranda was born in Mesa, Arizona, on March 9, 1941.[87] He had an eighth-grade education and a prison record based primarily on car thefts, burglaries, and armed robberies.[88] That record also included an attempted rape and assault.[89] Miranda joined the Army in 1958.[90] He received an undesirable discharge in July 1959, after spending six of his fifteen months in the post stockade.[91]

In January 1961, Miranda was released from a federal prison at Lompoc, California, where he had been confined following an interstate car theft conviction.[92] He then met and moved in with Twila Hoffman, who was separated from her husband, and her two children.[93] Miranda and Hoffman also had a daughter of their own.[94] They moved to Mesa in 1962.[95] Hoffman began working in a local nursery school.[96] Miranda held a series of motel and restaurant jobs, and then began working for United Produce in Phoenix in August 1962.[97]

Eighteen-year-old Patricia Weir was kidnapped and raped shortly after midnight on March 3, 1963, while walking to her home from a bus stop in

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[87] *Ernesto A. Miranda*, Citizendium n.1, http://en.citizendium.org/wiki/Ernesto_A. Miranda (last visited Jan. 15, 2014). Despite some writers having stated Miranda was born in 1940, the tombstone at the Mesa Cemetery placed by his relatives provides a 1941 birth year. *Id.*; *Ernesto Miranda (1941-1976)*, Find A Grave, http://www.findagrave.com/cgi-bin/fg.cgi?page=gr&GRid=10165 (last visited Jan. 15, 2014).

[88] Liva Baker, Miranda: Crime, Law and Politics 9-11 (1983). "Baker was a freelance writer and author of numerous books [on] legal history . . . includ[ing] biographies of Supreme Court Justices Felix Frankfurter and Oliver Wendell Holmes, as well as [books on] women's education . . . and the desegregation of public schools in New Orleans, Louisiana." She died in 2007. *See Baker, Liva (1930-2007)*, Amistad Res.Center, http://www.amistadresearchcenter.org/archon/index.php?p=creators/creator&id=186 (last visited Jan. 15, 2014).

[89] Baker, *supra* note 88, at 9-11.

[90] *Id.* at 10.

[91] *Id.*

[92] *Id.* at 11.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

northeast Phoenix after working at a downtown movie theater.[98] The Phoenix police suspected Miranda based on Weir's general description of her attacker and a partial license plate number the police traced to an old Packard registered to Hoffman that Miranda drove.[99]

Acting on those suspicions, Phoenix Police Officers Carroll Cooley and Wilfred Young went to Miranda's Mesa home on March 13, 1963.[100] They asked him to come to the police station to discuss a case they were investigating and stated they did not want to discuss it in front of his common-law wife.[101] Miranda agreed to do so.[102] Miranda later said that he did not know whether he had a choice not to go with them.[103] Based on the limited information Cooley and Young then had, Cooley was doubtful Miranda was the man they were looking for.[104]

At the police station, Miranda was immediately taken to Interrogation Room 2, and interrogated about the alleged kidnap-rape, an unrelated robbery, and an attempted robbery, beginning at about 10:30 a.m.[105] Miranda initially denied committing all three crimes.[106] He was then placed in a lineup, so both the kidnap-rape and robbery victims might see and attempt to identify him.[107] Neither victim could be positive of whether Miranda was her attacker.[108] However, Cooley told Miranda that both victims had identified him[109].

Miranda therefore wrote and signed a confession to the kidnap-rape at 1:30 p.m.[110] Although the written confession form Miranda signed stated that any

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98 *See id.* at 3-5 for a detailed description of the circumstances involved.

99 *Id.* at 9.

100 *Id.* at 12.

101 *Id.*

102 GARY L. STUART, MIRANDA: THE STORY OF AMERICA'S RIGHT TO REMAIN SILENT 5 (2004). Stuart practiced law at Jennings, Strouss & Salmon, PLC, in Phoenix from 1967 through 1998. He since has written and lectured concerning trial advocacy, ethics and professional responsibility. His *Miranda* book is dedicated "[t]o the memory of John P. Frank." *Id.* at xi.

103 BAKER, *supra* note 88, at 12.

104 STUART, *supra* note 102, at 5.

105 *Id.* at 6.

106 *Id.*

107 Petition for Writ of Certiorari at 3, Miranda v. Arizona, 384 U.S. 436 (1966) (No. 759, Oct. Term 1965); The lineup photograph is included in STAN WATTS, A LEGAL HISTORY OF MARICOPA COUNTY 77 (2007). .

108 STUART, *supra* note 102, at 6.

109 *Id.*

110 *Id.* at 6-7; Petition for Writ of Certiorari, *supra* note 107. However, John Flynn's later U.S. Supreme Court oral argument stated that Miranda orally confessed to the kidnap-rape after two hours of interrogation, without mentioning his prior written confession. PETER IRONS & STEPHANIE GUITTON, MAY IT PLEASE THE COURT 215 (1993); A copy of Miranda's written confession appears in Barry G. Silverman, *Remembering Miranda*, PHOENIX MAGAZINE 109, 111 (June 2006). Silverman first met Miranda in December 1969, when Silverman was a college freshman. Silverman thereafter wrote a 300-page unpublished biography of Miranda. *Id.* at 110. Silverman

statement he made could be used against him,[111] he was not warned concerning his constitutional rights to counsel and to remain silent.[112] Miranda also then verbally confessed to the robbery and the attempted robbery.[113] However, Cooley did not ask for written confessions in those cases because he did not want to risk jeopardizing Miranda's prosecution in the kidnap-rape case.[114]

Cooley then brought Weir and the robbery victim, separately, into the interrogation room to see if they could identify Miranda after hearing his voice.[115] However, before they could say anything, Miranda spontaneously identified each of them as the victims he was talking about.[116] Based on those statements, both victims in turn identified Miranda as their attacker. They both later testified they were "sure" Miranda was the man who had accosted them.[117]

Cooley and Young then formally arrested Miranda and booked him into jail. Until that time, he merely had been "in custody."[118] The police also "cleared" their files in both the robbery, and attempted robbery cases, based on Miranda's confessions to those crimes.[119] However, only the kidnap-rape and the robbery cases went to trial.

III. Prior Legal Developments

Placing *Miranda* in historical perspective requires considering prior cases concerning criminal suspects' right to counsel and privilege against self-incrimination. Whether and under what circumstances suspects' Sixth Amendment right to counsel should apply in state court criminal cases had developed in numerous U.S. Supreme Court decisions over many years.

A. Early Cases–1932 to 1963

In 1932, Justice George Sutherland's majority opinion in *Powell v. Alabama* first applied the right to counsel to state court capital trials as a "fundamental right" under the Fourteenth Amendment's Due Process Clause.[120] In

later became a superior court judge and a United States magistrate. He is now a Ninth Circuit Court of Appeals judge. *Id.* at 115.

111 *Id.* at 109, 111.

112 Brief for Petitioner, *supra* note 74, at 4.

113 Stuart, *supra* note 102, at 7.

114 *Id.*

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id.* at 8.

120 Powell v. Alabama, 287 U.S. 45 (1932). The Supreme Court reviewed the retried convictions of two of those defendants in November 1935. Their counsel had argued that black people

1938, Justice Hugo Black's majority opinion in *Johnson v. Zerbst,* applied the Sixth Amendment's right to counsel to all federal court criminal trials as a necessary ingredient of a fair trial.[121] *Johnson* held that if the accused was not represented by counsel and had not competently and intelligently waived his constitutional right, the Sixth Amendment "stands as a jurisdictional bar depriving him of his life or his liberty."[122]

However, in 1942, *Betts v. Brady* refused to apply the Sixth Amendment right to counsel in all state court noncapital criminal trials.[123] Justice Owen Roberts' majority opinion instead stated that whether counsel should be required was generally a matter of legislative policy within each state. Accordingly, states should not be "strait-jacketed" by a construction of the Fourteenth Amendment.[124] Instead, given the then-existing variations in state court practice, cases involving alleged denials of the right to counsel should turn on whether the defendant was denied "fundamental fairness" under the Fourteenth Amendment's Due Process Clause because of the "special circumstances" involved in each particular case.[125]

Justice Black's dissent, in which Justices Douglas and Murphy concurred, disputed the majority's assertion concerning then-existing state practice. The dissent attached an appendix showing most states required counsel to be provided for indigent defendants on request.[126] It would have applied the Sixth Amendment to the states through the Fourteenth Amendment to require counsel for indigents in all serious non-capital cases as a "fundamental" right.[127] To do otherwise would "defeat the promise of our democratic society to provide equal justice under law."[128]

Betts was immediately criticized as a denial of fundamental rights.[129] However, in *Foster v. Illinois*, Justice Frankfurter made clear the Court was

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had been excluded from being able to serve as grand jurors, and that Alabama officials later forged the names of black people on grand jury rolls to cover their tracks. At oral argument, the Justices one by one examined those rolls "with expressions of outrage." Six weeks later, the Court unanimously reversed the convictions. Mark Curriden, *The Saga of the Scottsboro Boys Begins*, A.B.A. J., Mar. 1, 2013, at 72. Alabama's parole board finally approved posthumous pardons for all of the "Scottsboro Boys" defendants on November 21, 2013, more than 80 years after their arrests. *Board Oks pardons of 'Scottsboro Boys,'* ARIZ. REPUBLIC, Nov. 22, 2013.

121 Johnson v. Zerbst, 304 U.S. 458 (1938).

122 *Id.* at 468.

123 Betts v. Brady, 316 U.S. 455, 473 (1942), *overruled by* Gideon v. Wainright, 372 U.S. 335 (1963).

124 *Id.* at 472.

125 *Id.* at 473.

126 *Id.* at 477-80 (Black, J., dissenting).

127 *Id.* at 475 (Black, J., dissenting).

128 *Id.* at 477 (Black, J., dissenting).

129 *See* ANTHONY LEWIS, GIDEON'S TRUMPET 8, 112 (1964).

sticking to *Betts'* "flexible" rule, since the "abrupt innovation" of a universal counsel requirement "would furnish opportunities hitherto uncontemplated for opening wide the prison doors of the land."[130] Several cases thereafter found special circumstances lacking and therefore affirmed those defendants' convictions.[131]

Betts, *Adamson v. California*,[132] and *Wolf v. Colorado*[133] generated a "remarkable jurisprudential battle" between Justices Black and Frankfurter concerning whether the Constitution's framers intended to apply the Bill of Rights to the states.[134] Justice Frankfurter, who won that battle, argued that federalism principles required states be free to develop their own systems of criminal justice rather than be forced into a "potentially outmoded eighteenth-century straitjacket instantiated in the Bill of Rights."[135]

Justice Black's position, wrongly derided at the time as "historically fallacious," eventually peaked at four votes, those of Justices Black, Douglas, Murphy and Rutledge, while Justice Frankfurter also was a member of the Court.[136] As a result of Justice Frankfurter's victory, "states could convict an indigent defendant at a trial where he had no legal assistance, allow prosecutors to argue to the jury about a defendant's failure to take the witness stand, and admit evidence that police illegally seized."[137]

Even using the "fundamental fairness" and "special circumstances" formulations, the Court's last decision affirming a state court criminal conviction involving a denial of counsel claim occurred in 1950.[138] However, because of Justice Frankfurter's continued insistence that the Sixth Amendment was not binding on the states, the Court's rationale for its reversals remained that each defendant's Fourteenth Amendment right to due process of law had been violated based on "special circumstances" in that particular case, even where the legal questions presented "were often of only routine difficulty,"[139] not that the defendant had any general Sixth Amendment right to counsel as such.[140]

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130 Foster v. Illinois, 332 U.S. 134, 139 (1947).

131 *See* Gideon v Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

132 Adamson v. California, 332 U.S. 46 (1947) (Fifth Amendment self-incrimination clause does not apply to the states), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964).

133 Wolf v. Colorado, 338 U.S. 25 (1949) (Fourth Amendment rule excluding evidence illegally seized by police from trial does not apply to the states), *overruled by* Mapp v. Ohio, 338 U.S. 25 (1961).

134 POWE, *supra* note 72, at 10.

135 *Id.* at 11.

136 *Id.*

137 *Id.*

138 *See* Quicksall v. Michigan, 339 U.S. 660, 665-66 (1950).

139 Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring).

140 BAKER, *supra* note 88, at 79.

In 1961, *Hamilton v. Alabama* held 9-0 that counsel was required at arraignments in all state court capital cases, regardless of the circumstances and without determining whether any prejudice resulted since arraignment is a "critical stage" in a criminal proceeding.[141] Justice Douglas's opinion was based on an extension of the statement in *Powell v. Alabama* that an accused in a capital case "requires the guiding hand of counsel at every step in the proceedings against him."[142] In April 1963, *White v. Maryland* summarily extended that rule to preliminary hearings, based on *Hamilton*, as similarly being a "critical" stage requiring counsel, since the defendant there had pled guilty without counsel, and without requiring any showing the defendant was prejudiced by not then having counsel present.[143]

B. The Warren Court

President Dwight Eisenhower appointed Earl Warren as Chief Justice in October 1953 to replace Chief Justice Fred Vinson, who had died from a heart attack on September 8, 1953.[144] However, the later generally recognized "Warren Court" was an "accident of history."[145] It did not obtain a reliable liberal "fifth vote" until 1962.[146] That "swing" occurred because Justice Charles Whittaker, who had become emotionally exhausted by the Court's work, announced his retirement in March 1962.[147] Less than two weeks later, Justice Frankfurter suffered disabling strokes requiring him to leave the Court in August 1962.[148]

President John F. Kennedy appointed Byron "Whizzer" White to replace Justice Whittaker and Arthur Goldberg to replace Justice Frankfurter.[149] Jus-

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141 Hamilton v. Alabama, 368 U.S. 52, 53-54 (1961).

142 *Id.* at 54 (quoting Powell v. Alabama, 287 U.S. 45, 69 (1932)).

143 White v. Maryland, 373 U.S. 59 (1963) (per curiam).

144 POWE, *supra* note 72, at 24. "Warren was one of the century's most successful politicians." *Id.* He had previously won election as a California district attorney and Attorney General, and to three terms as California Governor. *Id.* He had been Thomas Dewey's vice-presidential candidate in 1948. *Id.* He also campaigned for Dwight Eisenhower to be elected president in 1952 after his own presidential ambitions proved unsuccessful. *Id.* Just prior to his election, Eisenhower promised Warren the "first opening" on the Supreme Court, although there appears never to have been an explicit quid pro quo or agreement to that effect. *Id.* Eisenhower honored that agreement after Attorney General Herbert Brownell failed to persuade Warren in a secret meeting after Vinson had died that the "first seat" did not mean the chief justiceship. *Id.* Powe states, "No one praised Warren for his strong intellect, but almost everyone recognized a warm and gregarious man with a rugged sincerity. He was hardworking, principled, and honest. People liked him." *Id.*

145 *Id.* at 209.

146 *Id.*

147 *Id.*

148 *Id.* at 209-10.

149 Kennedy was free to appoint Goldberg in September 1962 because Frankfurter, before his stroke in March 1962, had refused Kennedy's offer made through Max Freedman, Frankfurter's

tice White's "tough on crime, tough on communism" conservative vote "did not matter" in the Court's liberal-conservative balance.[150] However, Justice Goldberg's appointment "transformed the outcomes" of later decisions.[151] Justice Goldberg had an 89 percent liberal voting record.[152]

That liberal fifth vote continued with President Lyndon Johnson's appointment of Abe Fortas, Johnson's "most trusted friend and adviser," to replace Justice Goldberg during the summer of 1965.[153] Fortas's appointment occurred after Johnson persuaded Justice Goldberg to become United Nations ambassador following Adlai Stevenson's sudden death in July 1965.[154] Both, Justices Goldberg and Fortas, agreed with Chief Justice Warren more than 80 percent of the time, and their percentage of agreement with the Court generally was in the high 80s.[155]

C. Gideon v. Wainwright *and its Consequences*

After adding its new justices, the Court finally overruled *Betts v. Brady* in March 1963.[156] *Gideon v. Wainwright* held states must provide counsel for indigent defendants at trials in non-capital felony cases.[157] In reversing

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biographer, to retire in exchange for Frankfurter's agreement to a suitable replacement. *Id.* at 209-11. Had Frankfurter accepted Kennedy's offer, Kennedy would have chosen conservative Harvard law professor Paul Freund as Frankfurter's replacement. Accordingly, if Goldberg had not been appointed then, the critical "fifth vote" would have waited until at least 1967, when Justice Tom Clark retired, after the Court would have decided the *Miranda* cases. *See id.* at 211.

150 *Id.* at 210.

151 *Id.* at 211.

152 *Id.*

153 *Id.* at 212.

154 *See generally id.* at 209-16 for a summary of the history and politics leading to the Goldberg and Fortas nominations.

155 *Id.* at 212.

156 After Justice White replaced Justice Whittaker in April 1962, the Court finally had the five votes required to overrule *Betts.* By mid-June 1962, five justices had joined in Justice Douglas's draft opinion necessarily doing so in *Douglas v. California*, 372 U.S. 353 (1963). *Id.* at 380. However, because the Court had granted certiorari in *Gideon* on June 4, 1962, and had just appointed Abe Fortas to represent Gideon in that case, it put *Douglas* over for reargument during the Court's next Term at Justice White's suggestion so that Fortas "should have the privilege of arguing the case that interred *Betts*, rather than arguing a pro forma case after *Douglas*. *Id.* at 384. *Douglas* therefore was put over so Fortas could win *Gideon. Id.* at 380.

Fortas was a "high-powered" lawyer and "outstanding appellate advocate." He was a member of a committee appointed by Chief Justice Warren to recommend changes in the Federal Rules of Criminal Procedure. He also was a friend of Justices Black, Brennan and Douglas. LEWIS, *supra* note 129, at 48-52.

157 Gideon v. Wainwright, 372 U.S. 335 (1963). For a description of the timing of the Court's internal decision-making through which *Gideon* became the case to overrule *Betts v. Brady*, see POWE, *supra* note 72, at 379-86. *See also* Paul G. Ulrich, Gideon *50 Years Later*, MARICOPA LAWYER, Mar. 2013, at 1.

Gideon's conviction, Justice Black's majority opinion held *Betts* had "departed from the sound wisdom on which the Court's holding in *Powell v. Alabama* rested."[158] *Gideon* instead held the Sixth Amendment right to counsel was a "fundamental right" applicable to the states through the Fourteenth Amendment, at least with respect to state court felony trials.[159] It also re-emphasized that a layman "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."[160]

Commentators called the *Gideon* decision "Black Monday" for states' rights.[161] *Gideon* ended the possibility that an indigent could be tried without counsel (unless he so desired). It also was the last important purely southern criminal procedure case.[162] However, the public still often perceived criminal procedure cases after *Gideon* as overtly race cases. For example, in 1967, African-Americans in urban areas were seventeen times more likely than whites to be arrested for robbery.[163] They also were disproportionately affected by whatever abuses or inequities existed in the criminal justice system.[164] Accordingly, the Supreme Court's credibility in espousing equality of opportunities for African-Americans in such areas as voting and attending school with whites required that they and other disadvantaged individuals had to be able to possess and exercise the same rights as affluent whites when they were suspected of crime.[165]

Despite substantial general public unhappiness with the Warren Court, *Gideon* has been considered "the Warren Court's only popular criminal procedure decision," based on the *Gideon*'s *Trumpet* book[166] and movie,[167] and since Clarence Gideon himself was acquitted in his retrial.[168] In response to *Gideon*, steps were taken to provide and pay for lawyers for poor defendants, including the creation of public defenders offices, paying for court-appointed counsel, and preparing rosters of lawyers available for court appointments.[169]

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158 *Gideon*, 372 U.S. at 345.

159 *Id.* at 342-345.

160 *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

161 BAKER, *supra* note 88, at 81.

162 POWE, *supra* note 72, at 386.

163 *Id.*

164 *Id.*

165 *Id.*

166 LEWIS, *supra* note 129. Lewis died in March 2013, just more than 50 years after the *Gideon* decision. Denise Lavoie, *Pulitzer Prize-winner Anthony Lewis, 85, Dies*, ARIZ. REPUBLIC, Mar. 26, 2013, at B2.

167 GIDEON'S TRUMPET (Hallmark Hall of Fame 1979).

168 POWE, *supra* note 72, at 379-80 LEWIS, *supra* note 129, at 237.

169 BAKER, *supra* note 88, at 82.

Criminal defendants nonetheless continue to remain at a severe disadvantage because of expanded criminal liability, overcharging by prosecutors, inadequately financed indigent defense, and the fact that some public defenders are ineffective.[170] Unrealistic workloads, lack of resources, and budget cuts tie the hands of public defenders at all levels.[171] For example, Arizona Governor Jan Brewer's latest budget proposal permanently ends state aid to indigent defendants under the "Fill the Gap" program and reallocates those funds to the Department of Public Safety's equipment fund, while keeping the prosecutors' portion of the program in place.[172]

Although the issue was briefed, *Gideon* did not decide whether the Sixth Amendment right to counsel in state court felony trials should be applied retroactively. However, during the remainder of its 1962 Term, the Court set aside thirty-one lower court judgments from ten states and returned those cases for reconsideration based on *Gideon.*[173] It also remanded ten habeas corpus cases involving Florida prisoners convicted without counsel prior to *Gideon* for further consideration in light of that decision.[174] Florida decided to apply *Gideon* retroactively. By January 1, 1964, 976 Florida prisoners were released because they could not be retried, 500 were back in the courts, and petitions from hundreds more were awaiting reconsideration.[175]

Gideon also did not decide whether the Sixth Amendment right to appointed counsel applied in misdemeanor cases. *Argersinger v. Hamlin* did so in a case where the defendant was sentenced to ninety days in jail.[176] It held, "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by [appointed or retained] counsel at his trial."[177] The Court later clarified that defendants charged with misdemeanors where imprisonment was not actually imposed did not have that right.[178] However, they could not be

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170 Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 18, 2013, at A21, *available at* http://www.nytimes.com/2013/03/18/opinion/gideons-muted-trumpet.html?_r=0.

171 JJ Hensley, *Experts: Right to Attorney Is at Risk as Cuts Hit*, ARIZ. REPUBLIC, Mar. 27, 2013, at B1, 4.

172 JJ Hensley, *Brewer's Budget Axes Public-defense Funds*, ARIZ. REPUBLIC, Mar. 26, 2013, at B1. The Arizona federal public defenders' office has lost 20 percent of its budget during the past two years and 25 staff positions, including 11 attorneys, since February 2013. Public Defenders' across the country have been warned to expect 23 percent less funding in fiscal 2014, which began October 1, 2013. Lindsey Collum, *Public Defenders in Lurch*, ARIZ. REPUBLIC, July 18, 2013.

173 LEWIS, *supra* note 129, at 204.

174 Pickelsimer v. Wainwright, 375 U.S. 2, 2 (1963).

175 LEWIS, *supra* note 129, at 205.

176 Argersinger v. Hamlin, 407 U.S. 25, 26 (1972).

177 *Id.* at 37.

178 Scott v. Illinois, 440 U.S. 367, 369 (1979).

sentenced to imprisonment unless the State had afforded them the right to appointed counsel.[179]

D. Escobedo *and Its Consequences*

By requiring the state to provide lawyers, the justices came to understand the Court could create a frontline agency for supervising police practices that would be more effective than the exclusionary rule in achieving its objectives.[180] Accordingly, after *Gideon*, the question became how soon the right to counsel attached prior to trial. *Gideon* did not address that issue. It instead only involved the right to counsel during trial. However, soon after *Gideon* was decided, *Haynes v. Washington* held failure to tell a defendant under interrogation that he was entitled to be represented by counsel was one of the factors relevant in determining whether his confession was voluntary.[181]

In 1964, *Escobedo v. Illinois* held 5-4 that, where a preliminary criminal investigation had focused on a suspect, he had been taken into custody, he had requested and been denied an opportunity to consult with a lawyer, and the police had not effectively warned him of his absolute constitutional right to remain silent, he was denied his Sixth Amendment right to assistance of counsel "'made obligatory upon the States by the Fourteenth Amendment.'"[182] Accordingly, no statement obtained by the police during Escobedo's interrogation could be used against him at his criminal trial. Justice Goldberg's majority opinion concluded, "[W]hen the process shifts from investigatory to accusatory—and its purpose is to elicit a confession–our adversary system begins to operate, and, *under the circumstances here*, the accused *must* be permitted to consult with his lawyer."[183]

The majority's rationale was that interrogation under those circumstances was a stage "surely as critical as was the arraignment in *Hamilton v. Alabama*. . . and the preliminary hearing in *White v. Maryland*," since "[w]hat happened at this interrogation could certainly 'affect the whole trial.'"[184] That was because "rights 'may be as irretrievably lost, if not then and there asserted, as they are when an accused represented by counsel waives a right for strategic purposes.'"[185] Accordingly, it made no difference whether the authorities had

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[179] *Id.* at 373.

[180] POWE, *supra* note 72, at 386-87.

[181] Haynes v. Washington, 373 U.S. 503, 516-17 (1963).

[182] Escobedo v. Illinois, 378 U.S. 478, 491 (1964) (quoting Gideon v. Wainwright, 372 U.S. 335, 342 (1963)).

[183] *Id.* at 492 (emphasis added).

[184] *Id.* at 486 (quoting Hamilton v. Alabama, 386 U.S. 52, 54 (1961)).

[185] *Id.*

as of yet obtained a formal indictment, as had occurred in *Massiah v. United States.*[186]

Escobedo turned in part on the facts that Escobedo's lawyer was at the station house trying to see him while he was being interrogated and the police had denied Escobedo's request to see his lawyer.[187] Later, numerous federal and state court decisions would disagree concerning whether the accused specifically had to request a lawyer before the police had to warn him of his rights, or instead whether counsel had to be provided although not requested.[188] There also was a significant disagreement on this issue between factions within the District of Columbia Circuit led by Judges Warren Burger and David Bazelon.[189] Adding to the general uncertainty, the U.S. Supreme Court simply held the confession cases reaching it, neither granting nor denying certiorari.[190]

The American Law Institute also had begun to draft a model code of pre-arraignment procedures, which stated police should be given four hours to question a suspect without his lawyer (although the session would have to be taped).[191] The proposed code approached the issue as legislation that state legislatures throughout the country could adopt. The American Bar Association also stated it would support the ALI's position.[192]

The proposed model code was discussed at the ALI annual meeting in May 1966.[193] However, in light of Chief Justice Warren's "sphinxlike" attendance during that discussion,[194] because *Miranda* and its companion cases had been argued and were under advisement, and because of the "impassioned speeches" given at that meeting, the proposed code was not then voted upon.[195] It was not adopted until 1975.[196] Frank was among those who argued at the 1966 meeting that the Institute should not adopt the model code while the *Miranda* cases were being considered by the Supreme Court. Doing so, he argued, would be "unlawyer-like in the extreme."[197]

How *Escobedo* should be interpreted and applied thus presented timely, important issues for the U.S. Supreme Court to resolve. Should courts emphasize the importance of law enforcement and society's interests in easily

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186 *Id.* at 486 (citing Massiah v. United States, 377 U.S. 201, 204 (1964)).
187 *Id.* at 480-81, 490-91.
188 BAKER, *supra* note 88, at 50, 56.
189 *Id.* at 52-56.
190 POWE, *supra* note 72, at 392.
191 *Id.* at 392-93.
192 *Id.*
193 *Id.* at 394.
194 BAKER, *supra* note 88, at 160.
195 POWE, *supra* note 72, at 394.
196 *Id.*
197 BAKER, *supra* note 88, at 161.

obtaining "voluntary" convictions, or should they instead uphold suspects' constitutional rights to counsel and to remain silent, which might eliminate confessions and thereby result in guilty criminals going free?

In 1964, *Malloy v. Hogan* also applied the Fifth Amendment privilege against self-incrimination against abridgement by the states, based on the Fourteenth Amendment's due process clause.[198] However, *Malloy* had not yet been decided by the Supreme Court when Miranda was initially tried in June 1963. Whether confessions were admissible instead depended simply on whether they were voluntarily given based on the "totality of circumstances" under the Fourteenth Amendment. If a defendant claimed his confession was involuntary and requested a hearing on the issue, the trial court would decide that issue initially outside the jury's presence. The jury also then could consider that issue as well.[199]

IV. Miranda's Initial Arizona Court Proceedings

Miranda had two separate jury trials, and was convicted separately in his kidnap-rape and robbery cases. Both convictions were affirmed separately by the Arizona Supreme Court.[200] However, only the kidnap-rape conviction was brought to the U.S. Supreme Court.[201]

A. The Kidnap-Rape Case

Miranda was convicted in his kidnap-rape case on June 20, 1963, after a one-day jury trial in the Maricopa County Superior Court before Judge Yale McFate.[202] Judge McFate then had been a judge for twelve years. He was a "kindly, courteous man," who was known as a "fair and able arbiter of justice."[203] He retired in 1979 and died in 2006.[204]

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198 Malloy v. Hogan, 378 U.S. 1, 8 (1964). In doing so, the Court overruled Twining v. New Jersey, 211 U.S. 78 (1908), and Adamson v. California, 332 U.S. 46 (1947). *Id.* at 6-10. The Court also supported its decision by noting that Mapp v. Ohio, 367 U.S. 643, 655 (1961) (Fourth Amendment right of privacy enforceable against the State through the Fourteenth Amendment's due process clause), had overruled Wolf v. Colorado, 338 U.S. 25 (1949). *Id.* at 8.

199 State v. Owen, 394 P.2d 206, 208 (Ariz. 1964).

200 State v. Miranda, 401 P.2d 721 (Ariz. 1965) (kidnap-rape conviction affirmed); State v. Miranda, 401 P.2d 716 (Ariz. 1965) (robbery conviction affirmed).

201 *See* discussion *infra* notes 464-68 and related text.

202 Stuart, *supra* note 102, at 8.

203 *Id.*

204 *'Miranda' Judge McFate, 96, dies*, Ariz. Republic, Feb. 1, 2006, at B3. Judge McFate had been in private law practice, a prosecutor, a legislator, and a corporation commissioner before becoming a Superior Court Judge in 1957. He also heard cases at the Arizona Court of Appeals after his retirement as such. However, he never went to law school. According to a newspaper interview with Stuart after McFate's death, McFate "was never a fan of the Miranda decision. . . . He believed the Constitution did not require police officers to remind defendants of anything." *Id.*

Judge McFate had appointed Alvin Moore to represent Miranda in his initial kidnap-rape trial.[205] Moore was a 73-year-old solo practitioner who volunteered to accept judicial assignments in indigent-criminal cases, although he possessed little experience in criminal law, having spent most of his career in civil court.[206] Deputy County Attorney Lawrence Turoff was lead counsel for the State.[207] Turoff, a "young but skilled" lawyer, had tried scores of such "one-day" confession cases and had a long string of convictions under his belt.[208]

Cooley acknowledged on cross-examination during Miranda's initial kidnap-rape trial that he had not advised Miranda he was entitled to an attorney's services before Miranda made a statement.[209] Moore therefore objected to admitting Miranda's confession into evidence because "the Supreme Court of the United States says a man is entitled to an attorney at the time of his arrest."[210] Moore's objection was inaccurate, based on the law as it then stood.[211] *Escobedo* and the later cases extending the right to counsel to situations where counsel was not specifically requested had not yet been decided. Judge McFate overruled the objection.[212]

Moore did not object to Miranda's confession in the kidnap-rape case because it was involuntarily given or request a hearing on that issue outside the jury's presence.[213] He also did not dispute the confession itself or present any defense case. The only issues he raised on Miranda's behalf instead concerned penetration and resistance.[214] Accordingly, no Fifth Amendment argument was made or preserved for the record and for later appellate review based on Miranda's confession allegedly having been involuntarily given.

The Arizona Supreme Court unanimously affirmed Miranda's kidnap-rape conviction on April 22, 1965,[215] in an opinion by Justice Ernest McFarland.[216]

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205 STUART, *supra* note 102, at 15.

206 *Id.* at 8.

207 *Id.*

208 *Id.* After practicing for many years at the Maricopa County Attorney's Office, Turoff recently retired.

209 BAKER, *supra* note 88, at 23.

210 *Id.*

211 *Id.*

212 *Id.*

213 State v. Miranda, 401 P.2d 721, 728 (Ariz. 1965).

214 STUART, *supra* note 102, at 15-22.

215 *Miranda*, 401 P.2d at 721.

216 Justice McFarland was elected to the Arizona Supreme Court in 1964 and served as its Chief Justice during 1968. He retired from the court in 1970. He had formerly served as Arizona Governor (1955-59) and United States Senator (1941-53), and had been Senate Majority leader during the Truman administration (1951-53). BAKER, *supra* note 88, at 49; *Ernest McFarland*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernest_McFarland (last visited Jan. 17, 2014). He was

Moore represented Miranda in that appeal. The Arizona Attorney General's office represented the State. The court held Miranda's confession was voluntary, noting that no request had been made to determine its voluntariness.[217] It also found no threats, promises or coercion had occurred.[218]

The court distinguished *Massiah v. United States*[219] because the agents there overheard conversations between the defendants using a hidden radio microphone, after an indictment had been returned and counsel had been retained.[220] It held *Escobedo* was controlling only where all of the factors present in that case existed.[221] It therefore distinguished *Escobedo* because Escobedo had requested a lawyer, following other cases that had made that distinction. It instead stated Miranda "had not requested counsel, and had not been denied assistance of counsel."[222] It also refused to follow *State v. Dorado*, where the California Supreme Court had extended *Escobedo* to a situation where the defendant was not effectively warned concerning his constitutional rights and did not request an attorney.[223] It therefore held Miranda's confession was properly admitted in evidence because it was voluntarily given, even though he did not then have an attorney and the police investigation was beginning to focus on him.[224]

B. The Robbery Case

Miranda was convicted in his initial robbery trial on June 19, 1963, also after a one-day jury trial before Judge McFate.[225] Although that case initially had been consolidated for trial with the kidnap-rape case, the two cases were tried separately.[226] Judge McFate also appointed Moore to represent Miranda in that case. Turoff also was lead counsel for the State.[227]

During that trial, Moore objected to admission of Miranda's confession in the robbery case because it was not "voluntarily given," since Miranda had not been warned that anything he said might be used against him and that he had

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defeated for re-election to the Senate by Barry Goldwater in 1952. After retiring from the Arizona Supreme Court, he served as Director of the Federal Home Loan Bank in San Francisco and as President of the Arizona Television Company. He also managed his farm. He died in 1984. *Id.*; *Memorial for the Honorable Ernest William McFarland*, 145 Ariz. xxxv (1984).

217 *Miranda*, 401 P.2d at 729.

218 *Id.* at 728-33.

219 Massiah v. United States, 377 U.S. 201 (1964).

220 *Miranda*, 401 P.2d at 730-31.

221 *Id.* at 733.

222 *Id.* at 731.

223 People v. Dorado, 394 P.2d 952 (1964).

224 *Miranda*, 401 P.2d at 733.

225 BAKER, *supra* note 88, at 21.

226 *Miranda*, 401 P.2d at 718.

227 STUART, *supra* note 102, at 8.

the right to an attorney.[228] Judge McFate also overruled that objection, stating, "I don't believe that is necessary."[229]

Moore also opened the door to a discussion about rape in Miranda's robbery case by asking Cooley, "You discussed rape during this particular case?"[230] In response, Cooley testified Miranda had told him that Miranda initially intended to rape that victim.[231] However, Miranda was not charged with rape.[232] The victim testified Miranda got into her car, drove it for two blocks, parked in an alley, struggled with her, and pressed a knife against her.[233] She initially testified she gave him $8 voluntarily, but later said she gave him the money because she was afraid.[234] Miranda then left the scene. Miranda also testified to his version of what occurred.[235]

The Arizona Supreme Court also unanimously affirmed Miranda's conviction in the robbery case on April 22, 1965,[236] in an opinion by Vice Chief Justice Fred C. Struckmeyer, Jr.[237] Moore also represented Miranda in that appeal. The Arizona Attorney General's office also represented the State. The Arizona Supreme Court's opinion in that case simply noted in passing that Miranda had "confessed to the robbery."[238] It did not address that confession's legality or admissibility. Moore did not contend on appeal that admission of Miranda's confession was error.[239] The court also stated there was no evidence whatsoever to indicate Miranda's statements were involuntary.[240]

V. MIRANDA'S U.S. SUPREME COURT REPRESENTATION

A. Referral of Miranda's Representation to LRR

LRR's representation of Miranda in the U.S. Supreme Court in his kidnap-rape case, and thereafter in both his kidnap-rape and robbery cases, was also

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228 Brief for Petitioner, *supra* note 74, app. at 52.

229 *Id.*

230 STUART, *supra* note 102, at 11.

231 *Id.* at 8-14.

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 State v. Miranda, 401 P.2d 716 (Ariz. 1965).

237 Justice Struckmeyer was a Maricopa County Superior Court Judge from 1950 to 1955. He served on the Arizona Supreme Court from 1955 to 1982. After his mandatory retirement from the court, he served as a member and Chair of the Arizona Racing Commission, and also went back to private law practice. He died in 1992. *In Memoriam, Honorable Fred C. Struckmeyer, Jr.*, 171 Ariz. lxxvii (1992).

238 *Miranda*, 401 P.2d at 718.

239 *Id.* at 720.

240 *Id.*

wholly fortuitous. It was based on actions taken and a referral made by Robert Corcoran, then a Phoenix lawyer who screened cases for the Arizona Civil Liberties Union.[241]

Corcoran saw the Arizona Supreme Court *Miranda* decisions on June 15, 1965, while reading advance sheets.[242] He recognized the conflict between the Arizona Supreme Court's decision in Miranda's kidnap-rape case and the California Supreme Court's decision in *People v. Dorado*[243] in applying *Escobedo*.[244] Presuming Moore might not be up to the task of writing a certiorari petition, Corcoran wrote to him offering the assistance of one or more of ACLU's "abler" cooperating attorneys in seeking U.S. Supreme Court review.[245] After meeting with Corcoran, Moore declined to represent Miranda any further and gave Corcoran his files,[246] citing lack of funds and physical stamina to continue.[247]

Corcoran first asked Rex Lee, a former Justice White law clerk and then a young lawyer at the Jennings, Strouss, Salmon & Trask law firm in Phoenix, to represent Miranda.[248] However, Lee declined because as a former U.S. Supreme Court law clerk he had a two-year conflict of interest prohibition against appearing there.[249] Lee also told Corcoran he was "unenthusiastic" about the proposed rules-of-law approach because he did not believe it made sound constitutional law.[250]

Corcoran then telephoned James Moeller, a young appellate partner at LRR.[251] Moeller had been Corcoran's friend since they both joined that firm in

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241 STUART, *supra* note 102, at 42. Corcoran had been an associate lawyer at LRR from September 1, 1959, until May 15, 1962. FRANK, *supra* note 86, at 82. He joined the County Attorney's Office, and then went back into private practice with another firm. BAKER, *supra* note 88, at 61. He later became an Arizona Superior Court and Court of Appeals Judge, and served as an Arizona Supreme Court Justice from 1987 until 1996. He died in 2010. *Fordham Law Mourns Passing of Hon. Robert J. Corcoran '57*, FORDHAM UNIV., August 17, 2010, http://law.fordham.edu/19220.htm (last visited Oct. 24, 2013); *Judicial History*, ARIZ. SUP. CT., http://www.azcourts.gov/meetthejustices/JudicialHistory.aspx (last visited Jan. 17, 2014).

242 BAKER, *supra* note 88, at 61.

243 People v. Dorado, 398 P.2d 361 (1965).

244 STUART, *supra* note 102, at 43.

245 *Id.* at 44.

246 *Id.*

247 BAKER, supra note 88, at 62.

248 *Id.*

249 *Id.*

250 STUART, *supra* note 102, at 44. Lee later became founding Dean of Brigham Young University Law School, President of that university, and a Solicitor General of the United States. He died in 1996. David Binder, *Rex Lee, Former Solicitor General, Dies at 61*, N.Y. TIMES (Mar. 13, 1996), http://www.nytimes.com/1996/03/13/us/rex-lee-former-solicitor-general-dies-at-61.html.

251 FRANK, *supra* note 86, at 82

1959.[252] Corcoran asked Moeller during that conversation whether he had seen the Arizona Supreme Court's *Miranda* decisions.[253] Corcoran said they were cases in which another LRR partner, John Flynn, might be interested and asked Moeller how best to approach Flynn to take them.[254] Flynn and Moeller also were friends. Moeller responded that Flynn was a "fact man," Corcoran needed to get him "pissed off," and Corcoran should ask Flynn to read the trial transcripts.[255]

John J. Flynn had joined LRR as a partner in July, 1961.[256] Flynn was born in Tortilla Flat, Arizona in 1925.[257] He was a boxer "of considerable repute,"[258] fought as a combat Marine in the Edson's Raiders unit, and was wounded in the Pacific during World War II.[259] He graduated from the University of Arizona Law School in 1949 after telescoping undergraduate and law school into three and one-half years, compiling a straight-C average while working three jobs to support his young family.[260] Before joining LRR, he had been a deputy county attorney and a member of several smaller firms.[261]

In 1965, Flynn was the Southwest's preeminent criminal defense lawyer.[262] He defended 125 first-degree murder cases during his career, most of them successfully.[263] He was hard-working, intense, and very successful. As Baker has stated, "He prepared each case with utter dedication . . . . When he took a case, nothing else mattered . . . . His mastery of the facts and circumstances of a case was spectacular, but it always was the facts he was after."[264]

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[252] *Id.* Moeller left LRR in May 1970 with Robert Jensen and two other LRR lawyers to form their own firm. *Id.* He later served as a Superior Court Judge for ten years and as an Arizona Supreme Court Justice from 1987 until 1998. *James Moeller*, WIKIPEDIA, http://en.wikipedia.org/wiki/James_Moeller (last visited Jan. 17, 2014); *Judicial History*, *supra* note 257.

[253] PRESENTATION BY HON. JAMES MOELLER TO LRR LAWYERS (LRR 2011) [hereinafter LRR DVD] (DVD on file with author).

[254] *Id.*

[255] *Id.*

[256] FRANK, *supra* note 86, at 82. Flynn's photograph is included in Tom Galbraith, *Remembering John Flynn*, ARIZ. ATT'Y, Sept. 2005, at 12, 25. Galbraith's article provides excellent portrayals of both Flynn's legal career and his personal life.

[257] *John J. Flynn Dies, Lawyer in Landmark Miranda Case*, ARIZ. REPUBLIC, Jan. 27, 1980, at A1.

[258] Dennis Farrell, *John J. Flynn: Legal Giant, Man of Action*, PHOENIX GAZETTE, Jan. 28, 1980, at B1-2; BAKER, *supra* note 88, at 63; Galbraith, *supra* note 257, at 24

[259] Farrell, *supra* note 258 at 24.

[260] BAKER, *supra* note 88, at 63; Galbraith, *supra* note 257, at 21.

[261] BAKER, *supra* note 88, at 63.

[262] Biographical sketch supporting John J. Flynn's induction into Maricopa County Bar Hall of Fame, Oct. 2011.

[263] Galbraith, *supra* note 257, at 24; John P. Frank, *John Flynn in Cheerful Retrospect* (Jan. 30, 1980) (unpublished) (on file with author).

[264] BAKER, *supra* note 88, at 64.

Flynn had a charismatic personality that created great rapport with witnesses, judges, and juries. He was an excellent trial strategist and advocate.[265] Although he always managed to make a perfect record to preserve important issues for appeal, he was not a scholar.[266] Flynn left LRR in July 1970 with two other LRR lawyers to form their own firm.[267] He died of a sudden heart attack in the Snow Bowl parking lot near Flagstaff while going to ski for the first time in January 1980.[268]

After his conversation with Moeller, Corcoran telephoned Flynn to ask him to take Miranda's case as one of the two ACLU cases LRR agreed to take each year, and Flynn accepted.[269] Moeller has stated he had no contact with the *Miranda* case thereafter.[270] Stuart's statement that Flynn, Frank, and Moeller "eventually form[ed] the Miranda Team"[271] is therefore incorrect.

According to Stuart, Corcoran wrote to Miranda on June 24, 1965, suggesting that Miranda retain LRR, and sending Miranda a typed retention letter for him to use.[272] Corcoran also then delivered Miranda's file to LRR, with a transmittal letter stating the firm should expect to receive a retention letter from Miranda.[273] Stuart stated Corcoran's referral was based on the assumption both Frank and Flynn would represent Miranda.[274] He also stated Corcoran recommended LRR generally to Miranda and Miranda retained LRR generally.[275] Moore also wrote to Miranda on June 27, 1965, encouraging him to retain LRR.[276] Miranda officially did so in early July 1965.[277]

John P. Frank had joined LRR as a partner in July 1954,[278] to obtain the benefit of Arizona's hot, dry climate for his asthma condition.[279] Frank was born in Appleton, Wisconsin in 1917.[280] He had earned BA, MA and LLB degrees from the University of Wisconsin and a JSD from Yale Law School.[281]

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265 GORDON CAMPBELL, MISSING WITNESS (2008), is a novel based on two related murder cases Flynn defended successfully.

266 Galbraith, *supra* note 257, at 29.

267 *Id.*

268 Farrell, *supra* note 259; Galbraith, *supra* note 257, at 32.

269 BAKER, *supra* note 88, at 62-63.

270 LRR DVD, *supra* note 253.

271 STUART, *supra* note 102, at 42.

272 *Id.*

273 *Id.* at 45.

274 *Id.* at 44-45.

275 *Id.* at 45.

276 *Id.*

277 *Id.*

278 FRANK, *supra* note 86, at 82.

279 BAKER, *supra* note 88, at 65.

280 *Id.*

281 *Id.* at 64.

Frank had clerked for Justice Black during the U.S. Supreme Court's October 1942 Term, immediately following the Court's decision in *Betts v. Brady* earlier that year.[282] He had taught American legal history, emphasizing the U.S. Supreme Court, at the University of Indiana and Yale law schools.[283] He also had written a constitutional law casebook, several books on the Supreme Court and its justices, including Justice Black, and a book on Abraham Lincoln as a lawyer.[284] By 1965, Frank was an established constitutional and historical scholar, and an experienced appellate advocate.[285] He remained in active practice at LRR until his death in September 2002.[286]

Wikipedia's article on Ernesto Miranda states Corcoran asked Flynn, Frank, and an associate, Peter D. Baird, to represent Miranda.[287] Watts also states, "The ACLU convinced a team of Lewis and Roca lawyers, including John Flynn, John Frank, Paul Ulrich, and Peter Baird, to handle [Miranda's representation]."[288] Both statements are incorrect.

By the time I joined LRR in September 1965, the firm had accepted Miranda's representation. His certiorari petition was pending before the U.S. Supreme Court. Baird had just completed his second year in law school. He did not join LRR until July 9, 1966,[289] and was not admitted to practice in Arizona until April 7, 1967.[290] Accordingly, neither Baird nor I were involved in agreeing to undertake Miranda's representation in July, 1965. Baird continued to practice with LRR as a commercial litigator until his death in August, 2009.[291]

Stuart's, Wikipedia's, and Watts' assertions also are inconsistent with Moeller's oral statements, author Liva Baker's more specific reporting, and Flynn's own written statement. Baker reported Corcoran first called Flynn to ask LRR to take Miranda's case (without mentioning Corcoran's prior tele-

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282 *Id.* at 64-65.

283 *Id.*

284 *Id.*

285 *Id.*

286 Robbie Sherwood & Chip Scutari, *Noted Valley attorney John P. Frank. 84, dies*, ARIZ. REPUBLIC, Sept. 8, 2002, at B1.

287 *Ernesto Miranda*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernesto_Miranda (last visited Jan. 17, 2014).

288 WATTS, *supra* note 107.

289 FRANK, *supra* note 86, at 83.

290 *Attorneys Admitted to the State Bar of Arizona*, 102 Ariz. xi (1967).

291 *P. Baird, Phoenix Attorney Who Argued Miranda Case*, ARIZ. REPUBLIC (Sept. 1, 2009, 12:00 AM), http://www.azcentral.com/news/articles/2009/09/01/20090901baird0901.html. This headline's additional error will be discussed *infra* notes 355-60 and related text.

phone call to Moeller).[292] Flynn agreed, then "in turn enlisted the aid of John P. Frank, a nationally respected authority on constitutional law."[293]

Baker also reported Corcoran then wrote to Miranda that "one of Arizona's leading criminal lawyers had agreed to take his case to the United States Supreme Court."[294] Miranda's letter in response confirms that Corcoran's letter was referring to Flynn. Miranda wrote:

> Your letter . . . has made me very happy. To know that someone has taken an interest in my case, has increased my moral [*sic*] enormously. . . . I would appreciate if you or either Mr. Flynn keep me informed of any and all results. I also want to thank you and Mr. Flynn for all that you are doing for me.[295]

Stuart quotes the first two sentences of that paragraph of Miranda's letter.[296] However, he does not quote its last two sentences.[297] Those latter sentences clearly confirm Corcoran initially recommended Flynn as Miranda's U.S. Supreme Court counsel, not Frank, Baird or LRR generally.

Flynn later confirmed in a short *Arizona Magazine* article published sometime in the late 1960s that Corcoran had asked him to represent Miranda. He stated, "I agreed on behalf of the law firm of Lewis, Roca, Beauchamp and Linton to present his petition."[298] Flynn also named John Frank, Robert A. Jensen, and me as those associated "in the preparation and presentation of this matter before the United States Supreme Court."[299] Baker also reported that, from the beginning, preparation of the case divided "naturally" on the basis that "Flynn, the trial attorney, a man of great personal charm and mental quickness, was to argue it before the Supreme Court. Frank, the scholar, articulate and thoughtful, was to assume the major burden of preparing the brief."[300]

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[292] BAKER, supra note 88, at 62-63.

[293] *Id.* at 63.

[294] *Id.*

[295] *Id.*

[296] STUART, *supra* note 102, at 45.

[297] *Id.*

[298] ARIZ. MAG. (on file with author).

[299] *Id.*

[300] BAKER, *supra* note 88, at 63. Under all the circumstances previously stated, the scenario underlying Judge Mary M. Schroeder's quoted statement that Frank "asked" Flynn to argue the case because the case will "make your reputation" and Frank had "already argued before the Supreme Court" appears unlikely. *See* Adam Liptak, *J.P. Frank, 84, a Lawyer in Landmark Cases, Dies*, N.Y. TIMES (Sept. 10, 2002), http://www.nytimes.com/2002/09/10/us/j-p-frank-84-a-lawyer-in-landmark-cases-dies.html. The *Miranda* case instead was Flynn's to argue, since it initially had been referred to him. Judge Schroeder was an associate and partner at LRR before being appointed to the Arizona Court of Appeals in 1975, and was Frank's a close friend. However, she did not join the firm until January 4, 1971, after Flynn had left in 1970. FRANK, *supra*

Flynn always handled *Miranda* as "his" case. He initially agreed to accept Miranda's representation, argued Miranda's kidnap-rape case before the U.S. Supreme Court and was responsible for Miranda's representation generally. He also took Miranda's representation with him when he left LRR in July 1970.[301]

B. The Certiorari Petition

Wikipedia states Flynn, Frank, and Baird wrote Miranda's certiorari petition in July 1965.[302] Baker states Flynn and Frank "produced the petition," supported by "the research by several colleagues at Lewis & Roca."[303] Watts states Flynn, Frank, Baird and I drafted the petition.[304] Peter Irons and Stephanie Guitton state Miranda himself wrote the petition from his prison cell.[305] All these statements are also incorrect.

In July, 1965, Baird had just completed his second year in law school. I was clerking at the Ninth Circuit. There also was no involvement by "several colleagues" in drafting the petition. Instead, Robert Jensen did so essentially on his own, under Flynn's and Frank's general supervision.[306]

Jensen has stated he was called into a meeting with Flynn and Frank in Flynn's office, and then asked to draft the *Miranda* certiorari petition.[307] He was not given any particular direction concerning how the petition should be prepared or argued.[308] Jensen had not previously written such a petition or practiced criminal law.[309] He therefore wrote the *Miranda* petition essentially on his own by reviewing other such petitions and arguing what he believed to be the issues presented: (1) numerous prior decisions had interpreted *Escobedo* inconsistently and (2) the Arizona Supreme Court had interpreted *Escobedo* too narrowly.[310]

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note 86, at 82, 84. Accordingly, she was not there when Miranda's representation was accepted in 1965, and the case was briefed, argued and decided in the U.S. Supreme Court in 1966.

301 FRANK, *supra* note 86, at 83.

302 *Ernesto Miranda*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernesto_Miranda (last visited Jan. 17, 2014).

303 BAKER, *supra* note 88, at 83.

304 WATTS, *supra* note 107, at 78.

305 IRONS & GUITTON, *supra* note 110, at 213.

306 Jensen is now a senior family trial lawyer practicing in Phoenix. He had practiced in Minnesota for about two years before joining LRR on May 15, 1965. *See* FRANK, *supra* note 86, at 83. In July 1965, he was working as a law clerk under Flynn's supervision while waiting to take the Arizona bar examination. LRR DVD, *supra* note 253. He left LRR with Moeller and two other LRR lawyers in May 1970 to form their own firm. *See* FRANK, *supra* note 86, at 83.

307 LRR DVD, *supra* note 253.

308 *Id.*

309 *Id.*

310 *Id.*

Jensen also stated that, although Flynn and Frank reviewed his draft petition, it was filed essentially as he wrote it.[311] No one else was involved.[312] Accordingly, Baker's statements that Flynn and Frank initially disagreed as to how the petition should be argued, and that Frank's Sixth Amendment view was "also supported by two of their three assistants,"[313] also are incorrect, in light of Jensen's statement that he prepared the petition essentially on his own.

Miranda's first certiorari petition was filed on July 16, 1965. Watts incorrectly includes the cover of a second certiorari petition filed on Miranda's behalf in 1969 as the first petition's cover.[314] The first petition stated the question presented as follows:

> Whether the written or oral confession of a poorly educated, mentally abnormal, indigent defendant, taken while he is in police custody and without the assistance of counsel, which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?[315]

Based on this issue statement, the petition then made a basic Sixth Amendment right to counsel argument: Miranda clearly had been subjected to an accusatory investigation. He therefore had a right to have counsel during his interrogation following the line-up. Although Miranda did not request counsel, the police did not advise him that he had that right. Since no counsel was present, his confessions should not have been admitted. The right to counsel cannot be made to turn upon request.[316]

The petition also argued Miranda was "relatively inexperienced and incompetent."[317] The "implicit contention" Miranda waived known rights thus "openly conflicts with a realistic appraisal of the facts."[318] As previously discussed, the underlying record did not support possible independent Fifth Amendment arguments that Miranda also should have been warned concerning his privilege against self-incrimination and he did not validly waive that right. Moore had not made any Fifth Amendment objections to Miranda's confessions. No such arguments were therefore made.

The petition also did not address whether or how, based on the facts presented, Miranda's right to counsel might have been validly waived. That

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311 *Id.*

312 *Id.*

313 *See* BAKER, *supra* note 88, at 83.

314 *See* WATTS, *supra* note 107, at 78. The second petition is discussed in more detail below. *See infra* notes 457-63 and related text.

315 Petition for Writ of Certiorari, *supra* note 107, at 2.

316 *Id.* at 7.

317 *Id.* at 6.

318 *Id.*

failure was understandable. There was no evidence the police ever discussed Miranda's right to counsel with him prior to his in-custody interrogation, that Miranda was aware he had that right, or that he ever affirmatively waived it. Accordingly, no evidence supported a waiver issue or argument.

The petition instead argued the Arizona Supreme Court had read *Escobedo* too narrowly.[319] It also argued lower courts had interpreted *Escobedo* inconsistently, and that the "widely conflicting" opinions by lower courts since *Escobedo* had been decided needed to be resolved.[320]

The petition's Sixth Amendment arguments were appropriate, given Moore's trial court objection to Miranda's confession on that basis, the Arizona Supreme Court's opinion, and the then-developing state of Sixth Amendment law generally. It concluded, "This petition, therefore, squarely raises the question of whether the right to counsel turns upon request; whether, in other words, the knowledgeable suspect will be given a constitutional preference over those members of society most in need of assistance."[321]

Meanwhile, during the summer of 1965, Chief Justice Warren had told his law clerks that, after a year of not deciding any confession cases, "I think we are going to end up taking an *Escobedo* case this year."[322] In September 1965, his chambers began compiling lists and distributing memos to the other justices concerning pending cases involving *Escobedo* issues.[323]

The Court considered 101 of about 150 such cases filed during the prior eighteen months at a conference held on November 22, 1965.[324] It then granted certiorari in four cases involving five indigent defendants who had been convicted based on their confessions, including *Miranda.*[325] One such case, *Johnson v. New Jersey*,[326] also raised retroactivity issues.[327] Two weeks later, the Court granted certiorari in a fifth case, *California v. Stewart*,[328] where the record was silent on whether the accused had been advised of his rights before confessing but the confession had been suppressed.[329] Those five cases

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319 *Id.*

320 *Id.* at 5-8.

321 *Id.* at 8.

322 *See* POWE, *supra* note 72, at 393.

323 *See* BAKER, *supra* note 88, at 102.

324 *Id.* at 103.

325 *Id.*

326 Johnson v. New Jersey, 384 U.S. 719 (1966). *See* discussion *infra* notes 469-73 and related text.

327 *See* BAKER, *supra* note 88, at 105.

328 California v. Stewart (decided within Miranda v. Arizona, 384 U.S. 436 (1966).

329 *See* BAKER, *supra* note 88, at 105.

were samples of those in which confessions were being taken following custodial interrogations.[330]

The Court also chose *Miranda* to be the lead case, although it did not have the lowest case number.[331] However, Miranda was the first defendant listed in alphabetical order.

C. Miranda's Merits Brief

From November 1965 until January 1966, Jensen and I assisted Frank by completing research assignments and in participating in drafts of Miranda's merits brief. Flynn also reviewed drafts of the brief as it evolved and participated in conferences to discuss it. However, Frank was the brief's primary author.

While the merits brief was being prepared, Frank and Flynn disagreed on whether it should make arguments based on the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel. Frank strongly believed the brief's argument should be based on the Sixth Amendment. Flynn equally strongly believed its argument should be based on the Fifth Amendment. I recall attending at least one conference with Frank, Flynn and Jensen where that issue was debated intensely and at length. Frank eventually won that argument, primarily because he was the constitutional scholar and controlled preparation of the brief.

Frank's position also was supported by record. Moore's objection to Miranda's confession in the kidnap-rape case had been based on Miranda's alleged right to counsel, not whether he had been warned concerning his privilege against self-incrimination or whether his confession was voluntarily given. Moore had not requested a hearing concerning whether the confession was voluntary. The Arizona Supreme Court also had affirmed Miranda's conviction based on the lack of any right to counsel when his confession was given. The "Question Presented" in the merits brief therefore ultimately stated the same Sixth Amendment right to counsel question presented in the certiorari petition.[332]

The merits brief then flatly argued arrested suspects have the same Sixth Amendment right to counsel when interrogated as they have at arraignment,[333] that where the right to counsel exists, it does not depend upon request,[334] and that the Sixth Amendment should be given its "full meaning."[335] It also argued

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[330] *See id.* at 104.
[331] California v. Stewart (No. 584, October Term 1965) had the lowest case number.
[332] Brief for Petitioner, *supra* note 74, at 2-3.
[333] *Id.* at 33 (citing Hamilton v. Alabama, 368 U.S. 52 (1961)).
[334] *Id.* at 31-32 (citing Carnley v. Cochran, 369 U.S. 506 (1962)).
[335] *Id.* at 49.

Escobedo "necessarily transcends its facts because it recognizes the interrogation as one of the sequence of proceedings covered by the Sixth Amendment" and that the principle of barring unwitting waiver under *Carnley v. Cochran*[336] "necessarily applies to the totality of that to which the Sixth Amendment applies, and this must necessarily run, as it does, from the interrogation after arrest through the appeal."[337]

The argument thus implicitly recognized that custodial interrogation was a "critical stage" in criminal proceedings to which the Sixth Amendment right to counsel applied, based on the then rapidly developing case law on that issue. In response to the State's anticipated counterargument that providing counsel prior to custodial interrogations would require additional cost, the brief simply argued, "respect for constitutional rights will inescapably cost money. Let it."[338]

If accepted, this argument required counsel be provided for all suspects before any custodial interrogations could occur. Police therefore could no longer obtain convictions based on suspects' confessions obtained without counsel being present. In response to that concern, the brief acknowledged that the number of crimes solved by confessions is "clearly extremely large" and that the practical effect of having a lawyer at the interrogation stage tell his client to stand mute "will be to eliminate large numbers of confessions."[339] However, even assuming there might be some "unpredictable decline in the efficiency of the conviction machinery, there are some distinctly practical pluses to be balanced against this."[340] Some of that additional cost and efficiency "comes from giving American citizens exactly what they are entitled to under the Constitution."[341]

The brief did not make a separate Fifth Amendment argument. It did not discuss whether or how a suspect's Sixth Amendment right to counsel might be waived, whether the right to counsel extended to pre-arrest situations, or what specific warnings law enforcement might have to provide. It expressly declined to address the first two issues, since they were not involved in the case.[342]

Moreover, if counsel was required for suspects prior to any custodial interrogations, they, not law enforcement, would necessarily advise suspects con-

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336 Carnley v. Cochran, 369 U.S. 506 (1962) (presuming waiver of the right to counsel from a silent record in a state court trial for noncapital offenses is impermissible).

337 Brief for Petitioner, *supra* note 74, at 34.

338 *Id.* at 38-39.

339 *Id.* at 39.

340 *Id.* at 45-46.

341 *Id.* at 47.

342 *Id.* at 34 n.15.

cerning their constitutional rights, including their right to remain silent and its consequences. The issue of whether law enforcement must provide advice concerning such rights thus would never arise. The brief therefore did not consider it. Accordingly, Stuart's statement that Frank was "ultimately, more than any individual, responsible for the line of reasoning that was to become known as the *Miranda* doctrine"[343] is also incorrect.

The brief also cited the famous statement by Justice Robert Jackson concerning the basic conflict between individual freedom and effective law enforcement caused by having counsel present during custodial interrogations:

> To bring in a lawyer means a real peril to solution of crime . . . . [A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no such statement to police under any circumstances.[344]

The brief did not elaborate upon the social cost if numerous criminal cases either had to be tried based on independently obtained evidence because there was no confession or dismissed because no such evidence existed. It instead concluded, "there is not the faintest sense in deliberately establishing an elaborate and costly system of counsel—to take effect after it is too late to matter. Yet that is precisely the *Miranda* case."[345]

The brief also referred to Miranda's interrogation and confession in the robbery case.[346] It attached "with the consent of opposing counsel"[347] the portion of the robbery case trial transcript where Moore objected to Miranda's confession as "not voluntarily given" because Miranda was not warned anything he said would be held against him or concerning his rights to an attorney.[348] However, the robbery case had been tried and appealed separately, and was not presented to the U.S. Supreme Court for review.

In hindsight, the Fifth Amendment privilege against self-incrimination also necessarily was involved both in *Miranda* and in every other case in which the Supreme Court had granted certiorari, since all defendants had confessed without being fully advised concerning their constitutional rights to counsel and to remain silent. Miranda's merits brief briefly mentioned *Malloy v. Hogan*[349] in several places.[350] However, it did so only in making its Sixth Amendment arguments.

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343 STUART, *supra* note 102, at 45-46.
344 Watts v. Indiana, 338 U.S. 49, 57 (1949) (Jackson, J., concurring).
345 *See* Brief for Petitioner, *supra* note 74, at 49.
346 *See* Brief for Petitioner, *supra* note 74, at 3-5.
347 *Id.* at 4.
348 *Id.* at Appendix.
349 Malloy v. Hogan, 378 U.S. 1 (1964).
350 *See* Brief for Petitioner, *supra* note 74, at 7, 29, 34.

The only brief arguing a "marriage of the Fifth Amendment and the Sixth Amendment right to counsel" was an American Civil Liberties Union amicus brief largely written by Prof. Anthony G. Amsterdam.[351] That brief argued that an inherent atmosphere of compulsion existed in obtaining confessions and statements from suspects by the police, based on extensive references to leading writers on police interrogation techniques and police interrogation manuals.[352] The other defendants' briefs all argued Sixth Amendment issues similar to those argued in Miranda's brief.[353]

Miranda's merits brief was filed with the U.S. Supreme Court in January 1966. It lists Frank and Flynn as his counsel, and includes a footnote expressing appreciation to Jensen and me for our research assistance.[354] No one else was involved in preparing it.

D. Oral Argument

The U.S. Supreme Court oral argument in *Miranda* and the three other cases involving similar confession issues occurred on February 28 and March 1, 1966. The Court's official report of that decision states, "John J. Flynn argued the cause for petitioner in No. 759 (*Miranda*). With him on the brief was John P. Frank."[355] Although Frank sat at counsel table,[356] he did not argue *Miranda*. The statements in the *Arizona Business Gazette*[357] and *Wikipedia*[358] that he did so are incorrect. Contrary to the headline and statement in his obituary article,[359] Baird also did not argue *Miranda*. He was still in law school.[360]

Flynn also was not Frank's "choice," as stated by Stuart,[361] to make Miranda's oral argument. Frank normally would have made any U.S. Supreme Court argument LRR had because of the case's importance, his knowledge concerning the Supreme Court and its justices, and his extensive appellate experience. Baker states Frank instead "deferred" to Flynn to do so, based on Flynn's "superior firsthand experience with police and knowledge of their ways."[362]

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[351] *See* BAKER, *supra* note 88, at 108.

[352] *Id.*

[353] *Id.*

[354] *See* Brief for Petitioner, *supra* note 74, at Appendix 6.

[355] *See* Miranda v. Arizona, 384 U.S. 436, 438 (1966).

[356] *See* BAKER, *supra* note 88, at 132.

[357] Mike Fimea, *Frank Leaves Legacy*, ARIZ. BUS. GAZETTE, Sept. 19, 2002, at BG32.

[358] *See Ernesto Miranda*, WIKIPEDIA, http://en.wikipedia.org/wiki/Ernesto_Miranda (last visited Jan. 17, 2014).

[359] *See P. Baird, Phoenix Attorney Who Argued Miranda Case*, *supra* note 291.Whatever Baird's "legacy" might have been as stated in that article, it therefore did not "include the Miranda warning to notify suspects of their legal rights." *Id.*

[360] See *supra* notes 269-98 and related text.

[361] *See* STUART, *supra* note 102, at 53.

[362] BAKER, *supra* note 88, at 132.

As previously stated, *Miranda* also was Flynn's case as an original matter.[363] I therefore believe Flynn and Frank always understood Flynn would make the argument, with Frank's assistance.

An edited transcript of Flynn's oral argument confirms he initially argued Miranda's personal situation, the unfairness of the circumstances of Miranda's confession on their facts, that Miranda had a Fifth Amendment right against self-incrimination, "and if he recognizes that he has a Fifth Amendment right, to request counsel."[364] However, Flynn did not make the independent argument that Miranda had a wholly separate Sixth Amendment right to have counsel in fact present before his interrogation could proceed, as had been argued throughout Miranda's certiorari petition and merits brief.[365]

Instead, in response to a question by Justice Potter Stewart, one of the Court's eventual dissenters, concerning the results of focusing a criminal investigation on a suspect, Flynn made a blended Fifth and Sixth Amendment argument, quite different from what had been argued in Miranda's certiorari petition and merits brief:

> I think that the man at that time has the right to exercise, if he knows, and under the present state of the law in Arizona, if he is rich enough and educated enough to assert his Fifth Amendment right, to request counsel, I simply say that at that stage of the proceeding, under the facts and circumstances in *Miranda* of a man of limited education, of a man who certainly is mentally abnormal, and who is, certainly, an indigent, that when that adversary process came into being, that the police at the very least had an obligation to extend to this man, not only his clear Fifth Amendment right, but to afford him the right of counsel.[366]

Justice Stewart then asked Flynn, "what would the lawyer advise him his rights then were?"[367] Flynn's extemporaneous response gave essentially, what became the *Miranda* warnings:

> That he had the right not to incriminate himself; that he had a right not to make any statement; that he had the right to be free from further questioning by the police department; that he had the right, at an ultimate time, to be represented adequately

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363 *See supra* notes 258-83 and related text.

364 IRONS & GUITTON, *supra* note 110, at 213-17.

365 *See supra* notes 326-67 and related text.

366 IRONS & GUITTON, *supra* note 110, at 216 (quoting the oral argument of John J. Flynn).

367 IRONS & GUITTON, *supra* note 110, at 217.

> by counsel in court; and that if he was too indigent, too poor to employ counsel, that the state would furnish him counsel.[368]

Flynn also argued, "the only person that can adequately advise Ernest Miranda is a lawyer."[369] However, Chief Justice Warren's eventual majority opinion rejected that argument.[370]

Assistant Attorney General Gary Nelson made the State's responsive argument.[371] Nelson acknowledged that if any warning was required, it must be given before Miranda made any statement, and that it was "arguable" Miranda was entitled to a warning.[372] However, Nelson also argued that if an "extreme position" were adopted that a suspect must have access to counsel during interrogation or intelligently waive counsel, "a serious problem in the enforcement of our criminal law will occur. . . . When counsel is introduced at interrogation, interrogation ceases."[373]

Nelson thus implicitly argued that the negative practical result of requiring that counsel be present to advise suspects concerning their right to remain silent, and thereby preventing confessions from being given, must be given priority over a suspect's theoretical Sixth Amendment right to have counsel present prior to custodial interrogations because they were a "critical stage" in criminal proceedings. Chief Justice Warren's eventual majority opinion clearly was influenced by those concerns.

VI. THE U.S. SUPREME COURT'S OPINIONS

The U.S. Supreme Court decided *Miranda* primarily based on the Fifth Amendment.[374] Justice Fortas, who had replaced Justice Goldberg the previous summer, provided the decisive fifth vote. However, Fortas later stated the *Miranda* decision was "entirely" Warren's.[375]

Chief Justice Warren's majority opinion began by holding that the admissibility of statements obtained from a defendant questioned while in custody or

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368 *Id.*

369 *Id.*

370 *See* discussion at *infra* note 385 and related text.

371 Nelson had clerked for Justice Struckmeyer during 1962-63. After a short time in private practice, he became an assistant Arizona Attorney General (1964-68) and Arizona Attorney General (1968-74). He later became an Arizona Court of Appeals Judge (1974-78) and Chief Staff Attorney for the Arizona Supreme Court (1979-1997). *See Gary K. Nelson*, ARIZ. CT. APPEALS, DIVISION I, http://azcourts.gov/coa1/formerJudges/GARYKNELSON.aspx (last visited Jan. 17, 2014). He died in May 2013. *Obituary, Gary Kent Nelson*, ARIZ. REPUBLIC, May 31, 2013, at B5.

372 IRONS & GUITTON, *supra* note 110, at 219.

373 *Id*. at 219-20.

374 Miranda v. Arizona, 384 U.S. 436 (1966).

375 *See* Powe, *supra* note 72, at 397.

otherwise deprived of his freedom of action in any significant way was a "constitutional issue."[376] It acknowledged, "we might not find the defendants' statements to have been involuntary in traditional terms."[377] Its starting point was instead, "Even without employing brutality, the 'third degree' or [other police interrogation techniques], the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals."[378] Accordingly, before criminal suspects could be subjected to in-custody interrogation, law enforcement must warn them clearly and unequivocally that they have a Fifth Amendment right to remain silent, and that anything they say can be used against them.[379]

The opinion also stated it "reaffirmed" *Escobedo* and the principles it announced.[380] However, in doing so, it recharacterized the Sixth Amendment right to counsel required by *Escobedo* merely as being necessary to protect suspects' Fifth Amendment privilege against self-incrimination, not because they had any independent right to counsel as such while being interrogated.[381] As the result, the Court's later conservative majority ultimately limited *Escobedo* to its facts,[382] thereby also destroying any value it might have had as a Sixth Amendment precedent. That later majority also held the Sixth Amendment right to counsel as such is "offense specific" and does not attach until after adversary judicial criminal proceedings have been filed.[383]

Miranda's majority also held suspects' Sixth Amendment right to counsel while being interrogated does not depend upon their request. Failure to make such a pre-interrogation request for counsel also does not constitute a waiver of that right.[384] However, although counsel are required to protect suspects' Fifth Amendment privilege against self-incrimination in the face of interrogation, the majority specifically rejected the "suggestion" that each police station must have a "station house lawyer" present at all times to advise prisoners concerning their rights.[385] Contrary to the majority's statement, that argument was not simply a "suggestion." It instead was at the core of Miranda's merits brief and an important part of Flynn's oral argument on his behalf.

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376 *Miranda*, 384 U.S. at 445.

377 *Id.* at 457.

378 *Id.* at 455.

379 *Id.* at 469.

380 *Id.* at 442.

381 *Id.* at 442-66.

382 Michigan v. Tucker, 417 U.S. 433, 438 (1974), and cases cited

383 Texas v. Cobb, 532 U.S. 162 (2001). See the discussion at *infra* notes 607-11 and related text.

384 *Miranda*, 384 U.S. at 470.

385 *Id.* at 474.

The majority instead held the *police* also must clearly inform suspects held for interrogation that they have the right to consult with a lawyer, to have the lawyer with them during interrogation and that, if they cannot afford a lawyer, one will be appointed to represent them.[386] It did not explain how such warnings would instantly neutralize the prior coercive interrogation atmosphere it generally presumed to exist, or substitute for the fact that if counsel were present, they would advise their clients to remain silent, regardless of whether any confessions that otherwise might be given might later technically be considered "voluntary." It also did not require that counsel in fact be present prior to any in-custody interrogations or discuss whether interrogations were a "critical stage" in criminal proceedings to require counsel be provided, regardless of whether the suspect had made any such request, as developed in the then-recent prior cases previously discussed.

Once the required warnings were given, the majority held that if suspects indicate at any time prior to or during questioning that they want to remain silent, the interrogation must cease.[387] There also must be a showing that suspects knowingly and intelligently waived their rights before any statements obtained as the result of in-custody interrogation can be admitted in evidence against them.[388] Moreover, if the interrogation continues without the presence of an attorney and a statement is taken,

> [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 . . . . [A] valid waiver will not be presumed simply from the silence of the accused after the warnings are given or simply from the fact that a confession was in fact eventually obtained . . . . 'Presuming waiver from a silent record is impermissible.[389]

The majority thus also assumed trial courts would actively and independently review confessions given following custodial interrogations to determine whether intelligent, voluntary waivers had occurred, and hold the prosecution to a "heavy burden" in that regard.[390] However, it could provide no assurance courts would in fact do so, rather than summarily admitting confessions after pro forma reviews where the required warnings and waivers had been given, and there was no evidence of any physical coercion. *Miranda* thus limited

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386 *Id.* at 473.
387 *Id.* at 474.
388 *Id.* at 475.
389 *Id.*
390 *Id.*

custodial interrogations of criminal suspects only to the extent of requiring that "lip service" warnings concerning constitutional rights be provided, and preventing the admission of custodial confessions that had been obtained during interrogations occurring without such warnings and waivers.

The majority opinion's philosophic underpinning was based on the ACLU amicus brief.[391] Instead of relying on the Court's own subjective views concerning whether the individual interrogations immediately involved violated due process of law, based on the factual records presented, it instead was based primarily on the Fifth Amendment itself. It began with a specific statement concerning the newly required warnings about rights for persons in custody, followed by a statement providing the reasons for that rule. Its logic was based on police interrogation manuals establishing police dominance in that setting demonstrating a general need for such rules, not evidence concerning the methods actually used in the cases before the Court.[392]

The majority opinion expressly refused to prohibit freely and voluntarily given statements. To the contrary, it stated, "Voluntary statements 'remain a proper element in law enforcement,'"[393] and that "Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."[394] However, based on the police manuals it cited, the majority found the general custodial interrogation atmosphere resulted in "inherent pressures."[395]

Baker states that the majority opinion therefore took the "unprecedented step of imposing stringent rules on law enforcement officers that put restraints on their instincts and restrictions on their zeal."[396] A more pragmatic view is that, despite those "restraints" and "restrictions," the majority opinion instead provided a clear path for police to obtain admissible confessions following custodial interrogations. It did not require counsel to be present to advise suspects that they had the right to remain silent before those interrogations occurred and thereby prevent any confessions from being given as an original matter.

The dissenting justices did not credit the majority for the benefits this compromise provided law enforcement or acknowledge that the majority opinion might have gone further in establishing a Sixth Amendment right to have counsel present prior to custodial interrogations. Justice Harlan instead denounced the decision from the bench as "'dangerous experimentation' at a time of a

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391 *See* BAKER, *supra* note 88, at 168.

392 POWE, *supra* note 72, at 395-96.

393 *Miranda*, 384 U.S. at 478.

394 *Id.*

395 *Id.* at 468.

396 BAKER, *supra* note 88, at 167.

'high crime rate that is a matter of growing concern.'"[397] He also stated emphatically, "This doctrine has no sanction, no sanction."[398]

Justice Clark's dissent objected to the new "constitutional rule" prohibiting custodial interrogations without providing required additional warnings concerning the rights to remain silent and to assistance of counsel as being unsupported by the Court's prior cases and because of the lack of "empirical knowledge" concerning their practical operation.[399] It argued custodial interrogation was "undoubtedly an essential tool in effective law enforcement."[400] Requiring an express waiver of the right to remain silent would "heavily handicap questioning."[401] To suggest or provide counsel for the suspect "simply invites the end of the interrogation."[402] Accordingly, rather than applying the majority's "arbitrary Fifth Amendment rule," Justice Clark instead would have followed "the more pliable dictates of the Due Process Clauses of the Fifth and Fourteen Amendments which we are accustomed to administering and which we know from our cases are effective instruments in protecting persons in police custody."[403]

Justice White's dissent also argued the Court's required warnings reflected "a deep-seated distrust of confessions."[404] However, in Justice White's view, the Fifth Amendment was "not the sole desideratum" because society has an "interest in the general security," which was of equal weight.[405] There was nothing immoral about asking a suspect whether he committed the crime. Instead, "The most basic function of any government is to provide for the security of the individual and his property."[406] Justice White also expressed the concern that many criminal defendants either would not be tried at all or would be acquitted "if the State's evidence, minus the confession, is put to the test of litigation."[407]

Miranda's compromise between the old "totality of the circumstances" rule and *Escobedo*'s implication that there could be no custodial interrogation whatsoever unless counsel was present rejected any requirement that a lawyer must be present prior to custodial interrogations, as had been argued both in Miranda's merits brief and in Flynn's oral argument. The Opinion instead

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397 POWE, *supra* note 72, at 397.
398 *Id*.
399 *Miranda*, 384 U.S. at 500-01 (Clark, J., dissenting).
400 *Id.* at 501.
401 *Id.* at 516-17.
402 *Id.* at 517.
403 *Id.* at 503 (Clark, J., dissenting).
404 *Id.* at 537 (White, J., dissenting).
405 *Id.*
406 *Id.*
407 *Id.* at 541.

focused on the suspect's own waivable rights to remain silent and to counsel based on warnings given by the police.[408] The ACLU stated soon after *Miranda* was decided that it viewed the absence of any requirement that counsel be present prior to interrogations with "regret."[409]

VII. The Decision's Results

Because Miranda's confession was held to have been obtained in violation of his Fifth and Sixth Amendment rights, his kidnap-rape conviction was vacated and that case was remanded for a new trial. Miranda thereby won his immediate battle by having that conviction reversed and obtaining a new trial. However, the Court's decision lost the war for criminal suspects generally by not requiring counsel to be present before custodial interrogations could occur, leading to admissible confessions. It also was not retroactive. Miranda himself also ultimately did not benefit personally from the decision, since he again was convicted following a second trial.

Baird's later statement that "we joyfully reveled, bathed, and splashed in the [decision's] limelight"[410] is also incorrect. Miranda's high-profile, successful, continuing representation instead created substantial disagreements within LRR. Many LRR lawyers undoubtedly were pleased that Miranda's representation had been successful. Others were unhappy either because the 1) representation resulted in a substantial financial burden on the firm, thereby reducing its partners' income; 2) they disagreed with Miranda's position on the merits; or 3) they and their civil clients simply were unhappy with the firm representing a high-profile, and obviously guilty criminal defendant, whose success appeared to have a highly negative effect on law enforcement.

Nationally, *Escobedo* "raised the storm against the Court to gale force" during the 1964 presidential election year, providing Barry Goldwater an argument with which to attack the justices as contributing to the "breakdown of law and order" in the cities.[411] Cars previously sporting "Impeach Earl Warren" bumper stickers gained a new companion, "Support Your Local Police."[412]

Although police could "rather easily" live within *Miranda*'s compromise once they understood it, they and many politicians instead "reacted to *Miranda*

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[408] Powe, *supra* note 72, at 398.

[409] *Id.* at 398 (internal quotation marks omitted) (quoting Nan Robertson, *Ervin Protests Curbs on Police: Proposes an Amendment to Upset High Court Decision*, N.Y. Times, July 23, 1966, at 54.

[410] Peter D. Baird, *Legal Lore:* Miranda *Memories*, Litigation, Winter 1990, at 43, 45. Again, Baird was not there. He did not join LRR until July 1966. Frank, *supra* note 86, at 83.

[411] Powe, *supra* note 72, at 391, 392-93 (internal quotation marks omitted) (quoting John Morton Blum, Years of Discord: American Politics and Society, 1961-1974, at 210 (1991)).

[412] *Id.* at 391.

as if the Court had given the criminal the trump card . . . The police, still angry with *Escobedo*, were aghast at *Miranda.*[413] *Miranda* "transformed *Escobedo*'s gale into a Force-5 hurricane."[414] For the public, already anxious about issues including abolishing prayer in schools, school desegregation, and a general fear for the future caused by increasing crime rates and decisions supporting criminal defendants' rights, *Miranda* was simply the last straw.[415] However, many years later, an *Arizona Business Gazette* editorial acknowledged, "The police can live with Miranda, as they have for more than two decades. They can depend on good and thorough police work to suppress crime and protect the public."[416]

Miranda also "galvanized opposition to the Warren Court into a potent political force."[417] That opposition was among the factors leading to major defeats for Democrats in the 1966 elections, and a foreshadowing of the Republican "law and order" 1968 presidential campaign.[418] *Miranda* set the Court on a "collision course" with the 1968 presidential election.[419] For example, an overwhelming sixty-three percent of respondents told a 1968 Gallup Poll that the Court was "too lenient on crime."[420]

Throughout the 1968 campaign, Richard Nixon ran against the Warren Court as much as he ran against his Democratic rival, Hubert Humphrey.[421] "Playing on prejudice and rage, particularly in the South,"[422] and promising that his Supreme Court appointees would be "different"[423] contributed to Nixon's election as President in 1968. Nixon and George Wallace, (who went even further than Nixon in attacking the Court), together overwhelmed Humphrey in that election by a 57-43 margin.[424] True to his campaign prom-

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413 *Id.* at 398-99.

414 *Id.* at 399.

415 BAKER, *supra* note 88 at 224-25.

416 Editorial, *Miranda/Police can live with rule*, ARIZ. BUS. GAZETTE, Feb. 2, 1987, at A9.

417 POWE, *supra* note 72, at 399 (internal quotation marks omitted) (quoting Yale Kamisar, *The Warren Court and Criminal Justice*, *in* THE WARREN COURT: A RETROSPECTIVE 116, 119 (1996)).

418 POWE, *supra* note 72, at 400.

419 *Id.*

420 *Id.* at 410.

421 DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: *In re Gault* and Juvenile Justice 105 (2011).

422 *Id.*

423 *Id.*

424 POWE, *supra* note 72, at 410.

ise, Nixon's Supreme Court appointments during the next several years led to a new conservative majority, thus ending the Warren Court era.[425]

As Miranda's counsel, LRR was at the center of that controversy. However, it was both immaterial to our representation and beyond our control. Since Miranda had won a new trial in his kidnap-rape case based on the U.S. Supreme Court's decision, his representation had to continue in any event, to attempt to obtain the best possible results on his behalf.

VIII. MIRANDA'S KIDNAP-RAPE RETRIAL AND LATER APPEAL

A. The Kidnap-Rape Retrial

Miranda's kidnap-rape case was retried in the Maricopa County Superior Court on February 15-24, 1967.[426] I assisted Flynn in representing Miranda during that eight-day trial.[427] Maricopa County Attorney Robert Corbin[428] and his chief assistant, Moise Berger,[429] represented the State. Because of Miranda's high-profile notoriety and the resulting intense local pretrial publicity, all Maricopa County Superior Court Judges (who were then subject to possible contested election campaigns) recused themselves from handling that retrial. Coconino County Judge Laurance Wren therefore was assigned to do so.[430]

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425 Nixon appointed Chief Justice Warren E. Burger (1969), and Justices Harry A. Blackmun (1970), Lewis F. Powell, Jr. (1972) and William H. Rehnquist (1972). *See* IRONS & GUITTON, *supra* note 110, at 376.

426 Appellant's Opening Brief at 1-2, *State v. Miranda*, Arizona Supreme Court No. 1802 (filed October 1967).

427 Frank, Moeller, Jensen, and Baird were not involved in that trial.

428 Corbin later served as a Maricopa County Supervisor, three terms as Arizona Attorney General, and President of the National Rifle Association. *See About Us*, MARICOPA COUNTY ATT'Y'S OFF., http://www.maricopacountyattorney.org/about-us/ (last visited Jan. 17, 2014); *Robert K. Corbin's Legacy*, TOM KOLLENBORN CHRONS. (Aug. 3, 2009), http://superstitionmountain tomkollenborn.blogspot.com/2009/08/robert-k-corbins-legacy.html.

429 Berger succeeded Corbin as Maricopa County Attorney, then resigned to become a professor at Western State College of Law (now Thomas Jefferson School of Law). *See About Us*, *supra* note 428.

430 Judge Wren had been a Deputy Coconino County Attorney (1955-57) and Coconino County Attorney (1957-61). He served as a Coconino County Superior Court Judge (1961-74) and later on the Arizona Court of Appeals (1974-82). He died in 1982. *Judge Wren Dies; Tied to Miranda Case*, ARIZ. REPUBLIC, Sept. 2, 1982, at A10; *Laurance T. Wren*, ARIZ. CT. APPEALS, DIVISION I, http://azcourts.gov/coa1/formerJudges/LAURANCETWREN.aspx (last visited Jan. 17, 2014). The *Arizona Republic* article mistakenly states Judge Wren's decision in Miranda's kidnap-rape case "was overturned by the U.S. Supreme Court in June 1966." *Judge Wren Dies; Tied to Miranda Case*, *supra.* Instead, as previously stated, Judge McFate's ruling admitting Miranda's confession was reversed. The article also states Judge Wren claimed in articles written for legal periodicals "that he was correct in allowing Miranda's confession to be admitted at trial even though it was obtained without obtaining Miranda having had prior opportunity to consult

Miranda's kidnap-rape retrial clearly illustrated what might occur generally in criminal trials if illegally obtained custodial confessions and other evidence gathered as there result were suppressed. By far the majority of that retrial involved non-jury evidentiary hearings and motions argued to the court, while the jury was sequestered at the downtown Adams Hotel. Those hearings and motions primarily concerned whether each piece of the State's proposed evidence was tainted by having been obtained as the result of Miranda's initial illegally obtained confessions and therefore "fruit of the poisonous tree" that must be suppressed, based on *Wong Sun v. United States*.[431]

The defense's efforts to suppress as much evidence as possible on that basis were largely successful. For a time, it seemed possible there might not be sufficient admissible evidence for the case to go to the jury. It then would have to be dismissed, even though that result might be politically and judicially distasteful, given the temper of the times.

According to Baker, Judge Wren thought Miranda would go "bone free."[432] Corbin also stated he initially "didn't think he had a case either."[433] However, an unexpected new development during that retrial was a second confession allegedly given by Miranda to his common-law wife, Twila Hoffman.[434] Whether Hoffman's testimony concerning it should be admitted into evidence became that trial's major issue.

Hoffman did not testify in Miranda's first trial. However, according to Baker, while Miranda was expecting to be released following his acquittal at a second trial, he had written to welfare authorities questioning Hoffman's fitness to have custody of their daughter because she had a child by another man while Miranda was in prison.[435] Accordingly, Hoffman therefore was "angry" and "scared" as to what Miranda might do if he were freed.[436]

Hoffman therefore brought her story to Corbin.[437] She visited Miranda after he was in jail for several days, having confessed repeatedly to the police, and without having had any access to counsel or advice concerning his rights. Hoffman's testimony was to be that Miranda then asked her if the police had

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with an attorney." *Id.* However, Judge Wren did not admit Miranda's initial written and oral confessions in evidence before the jury in the second kidnap-rape trial. Instead, Judge McFate had done so in Miranda's first trials. The article further quotes Judge Wren as having stated, "In my opinion, the Miranda doctrine of exclusion should be emasculated." *Id.*

431 Wong Sun v. United States, 371 U.S. 471 (1963).

432 BAKER *supra* note 88, at 192.

433 *Id.*

434 Appellant's Opening Brief at 1-2, *State v. Miranda*, Arizona Supreme Court No. 1802 (filed October 1967).

435 BAKER, *supra* note 88, at 192.

436 *Id.*

437 *Id.*

told her he had confessed to them concerning the kidnap-rape.[438] She said "yes."[439] Miranda then allegedly reaffirmed that earlier kidnap-rape confession to her.[440]

There had been a trial stipulation that Miranda might testify to the court in a non-jury evidentiary hearing concerning whether his confession to Hoffman was voluntary and whether it was tainted by his first confessions, without waiving his self-incrimination privilege. On direct examination during that hearing, Miranda therefore described the circumstances leading to the first confessions, and the continuous later course of interrogation and court appearances, without having received any advice concerning his right to counsel or privilege against self-incrimination.

However, on cross-examination, Judge Wren ordered Miranda to answer whether he had done the things he had told the police he had done at the time of his initial confession, over a defense objection that this testimony was outside the hearing's scope and outside the prior stipulation. Miranda responded, "Yes," thereby re-confessing the same confession the U.S. Supreme Court had held was illegally obtained and therefore inadmissible. At the hearing's conclusion, Judge Wren therefore ruled Miranda's first confession to the police was prima facie voluntary and admitted it into evidence for the purpose of considering whether Miranda's second confession to Hoffman should be admitted before the jury.[441]

Judge Wren also denied a defense motion to suppress Hoffman's testimony concerning that confession. The motion argued the State had failed to prove beyond a reasonable doubt that the positive link between the two confessions was broken and the second confession therefore was truly voluntary.[442] Judge Wren also ruled there was no marital privilege as to the confession, since Hoffman had testified she was never married to Miranda.[443]

Hoffman's testimony obviously was of great importance both to the jury and to the case generally, since little if any other evidence had been admitted supporting Miranda's guilt. However, despite the importance of Hoffman's marital status and the fact that her credibility was highly at issue, Judge Wren also allowed her to refuse to answer questions on cross-examination as to inconsistent prior statements she had made concerning that status, sustaining her claimed privilege against self-incrimination.[444] Doing so under those cir-

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438 *Id.*

439 *Id.*

440 *Id.*

441 Opening Brief at 14, State v. Miranda (No. 1802, Ariz.).

442 That burden of proof was required by *Chapman v. California*, 386 U.S. 18 (1967).

443 Appellant's Opening Brief at 25, State v. Miranda, (No. 1802, Arizona Supreme Court)

444 *Id.*

cumstances arguably violated Miranda's Sixth Amendment rights to confront and cross-examine the witnesses called against him.

B. Miranda's Second Appeal

Miranda was convicted and sentenced on March 1, 1967, exactly one year after the four consolidated confession cases were argued in the U.S. Supreme Court. LRR appealed that conviction to the Arizona Supreme Court. Frank, Flynn, and I represented Miranda in that appeal.[445] Gary Nelson again represented the State.[446]

On February 6, 1969, the Arizona Supreme Court again affirmed Miranda's conviction[447] in a unanimous opinion by Court of Appeals Judge John Molloy.[448] In doing so, the court rejected Miranda's argument that his second confession to Hoffman was "fruit of the poisonous tree" and that there was no break in the ongoing chain of circumstances, starting with Miranda's initial illegally obtained confessions and leading to the Hoffman confession. It instead held Miranda's confession to Hoffman was sufficiently "attenuated" from the initial confession because the initial violation was a failure to warn of constitutional rights that did not exist until sometime subsequent to the conduct.[449] That argument was an obvious *non sequitur*. It ignored the fact that the U.S. Supreme Court had held Miranda's initial confessions were illegally obtained. The opinion did not cite any specific evidence concerning how any true "attenuation" had in fact occurred.

The court also held there was a sufficient "break in the stream of events" leading to Miranda's confession to Hoffman, without stating what specific facts caused that "break."[450] There was in fact no such evidence. It further held that, since Miranda had testified he was never married to Hoffman, that fact was not an issue.[451] Refusing to permit Hoffman to be cross-examined concerning prior instances of misconduct in which she claimed in writing and

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445 *See* Opening and Reply Briefs, State v. Miranda (No. 1802, Arizona Supreme Court). Moeller, Jensen, and Baird were not involved in that appeal.

446 State v. Miranda, 450 P.2d 364, 366 (Ariz. 1969).

447 *Id.* at 364.

448 Judge Molloy served as a Pima County Superior Court Judge (1957-61) and as a Judge on the Arizona Court of Appeals, Division Two (1961-67). He was the latter court's Chief Judge (1967-69) when he participated in the Arizona Supreme Court's decision. He later returned to private law practice with the Molloy, Jones, Donahue firm in Tucson (1969-91). He died in 2008. *Obituary, John Fitzgerald Molloy*, ARIZ. DAILY STAR (July 16, 2008), http://www.legacy.com/obituaries/tucson/obituary.aspx?n=john-fitzgerald-molloy&pid=113487068.

449 *Miranda*, 450 P.2d 364 at 373.

450 *Id.*

451 *Id.* at 376.

under oath while applying for benefits that she was married to Miranda therefore was held not to be reversible error.[452]

Finally, the court held it was not improper for the State to ask Miranda during a hearing outside the jury's presence whether his initial confessions to the police were true.[453] Its rationale was that an accused's own concept of his guilt at the time of his initial confession was relevant in deciding whether the later confession was voluntary.[454] In so holding, the court did not address Miranda's argument, also based on *Wong Sun v. United States*,[455] that his initial confessions the U.S. Supreme Court had held were illegally obtained could not be used against him at all.[456]

Frank, Flynn, and I filed a petition for certiorari with the U.S. Supreme Court from the Arizona Supreme Court's decision in May 1969.[457] That petition made two principal arguments: (1) Miranda should not have been required to testify that the confessions he gave the police were true; and (2) his later confession to Hoffman was "fruit of the poisonous tree" and therefore should not have been admitted into evidence.[458] The petition was denied in October 1969.

Since the justices did not explain their votes and the Court's conference process is confidential, no one outside the court knows exactly why.[459] However, in all likelihood, four justices' votes required to grant the petition simply were no longer there. Chief Justice Warren had retired and was replaced by Chief Justice Warren Burger in June 1969.[460] After withdrawing his nomination by President Lyndon Johnson as Chief Justice in October 1968 in the face of a Senate filibuster,[461] Justice Fortas had resigned from the Court in May 1969 because of issues caused by "retainer" payments he had received from the Wolfson Family Foundation.[462] Justice Marshall, who had argued *Westover v. United States*, one of the *Miranda* consolidated cases as Solicitor General in

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452 *Id.* at 373.

453 *Id.*

454 *Id.* at 373-74.

455 Wong Sun v. United States, 371 U.S. 471, 485 (1963).

456 Appellant's Opening Brief at 15-16, State v. Miranda (No. 1802 Ariz.) (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), quoted in Wong Sun v. United States, 371 U.S. 471, 485 (1963)).

457 Petition for Certiorari to the Supreme Court of Arizona, Miranda v. Arizona (No. 2176, Oct. Term 1968).

458 *Id.*

459 BAKER, *supra* note 88, at 292.

460 For a description of the events leading to Chief Justice Warren's retirement and Chief Justice Burger's swearing-in ceremonies (in which President Nixon participated) on June 23, 1969, the last day of the Court's October 1968 Term, see POWE, *supra* note 72, at 482-84.

461 BAKER *supra* note 88, at 254-55.

462 BAKER, *supra* note 88, at 276-80; POWE, *supra* note 72, at 477-81.

1966, and had been appointed to the Court in 1967, disqualified himself.[463] Miranda's representation in the kidnap-rape case therefore ended unsuccessfully.

IX. The Robbery Case

A. No Certiorari Petition Was Filed in the Robbery Case

LRR certainly was aware Miranda's robbery case existed. Miranda's initial kidnap-rape certiorari petition referred to the robbery case as a "companion case."[464] His U.S. Supreme Court merits brief also referred to the kidnap-rape and robbery cases as "companions," but stated, "Only the kidnapping-rape case has been brought here."[465] That brief also attached a trial transcript concerning his confessions in the robbery case as an appendix, with the State's permission.[466]

Baird later stated LRR made a conscious decision not to take the robbery case to the U.S. Supreme Court because the kidnap-rape case presented a better record, both in the trial court and in the Arizona Supreme Court's opinion.[467] The reasoning supporting that decision apparently was based on the assumption that in the event Miranda's kidnap-rape conviction was reversed, surely his robbery conviction, based on essentially the same underlying facts leading to his confession in that case, would be reversed as well.[468] That assumption proved to be incorrect.

B. Miranda's Federal Habeas Corpus Petition

One week after deciding *Miranda*, the U.S. Supreme Court held in *Johnson v. New Jersey* that *Miranda* and *Escobedo* could not be applied retroactively because of the disruptive effect on law enforcement that would occur as the result.[469] Contrary to the approach taken in *Pickelsimer v. Wainwright*, which had left *Gideon*'s retroactivity to individual states,[470] *Johnson* held *Miranda* and *Escobedo* applied only where trials had occurred subsequent to those deci-

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463 Baker, *supra* note 88, at 291.

464 Petition for Writ of Certiorari, *supra* note 107, at 1.

465 Brief for Petitioner, *supra* note 74, at 4.

466 *Id.* at app. at 51-54.

467 Peter D. Baird, *The Confessions of Arturo Ernesto Miranda*, Ariz. Att'y, Oct. 1991, at 20, 23.

468 *Id.* Baird also states "everyone reasoned" that decision. However, as previously noted, neither Baird nor I were at LRR when that decision was made. *See supra* notes 267-69 and related text.

469 Johnson v. New Jersey, 384 U.S. 719, 719, 731, 733 (1966).

470 Pickelsimer v. Wainwright, 375 U.S. 2 (1963).

sions, even though such cases might still be on direct appeal.[471] The Court also later held *Miranda* did not apply to subsequent retrials where the defendant's first trial commenced before the date it was decided.[472] However, it also held that whether the *Miranda* principles were satisfied was nonetheless a "pertinent factor" in assessing whether the defendant's confession had been voluntary.[473]

Whatever possible general merit might have existed in not "opening the floodgates" by retrying or releasing numerous criminal defendants previously convicted based on confessions given without prior *Miranda* warnings, *Johnson* meant that Miranda's own robbery conviction could not automatically be vacated and retried, even though the underlying facts leading to his confession in that case were essentially identical to those leading to his kidnap-rape conviction.

Accordingly, Flynn filed a federal habeas corpus petition to vacate Miranda's robbery conviction. That petition was granted, based both on a "law of the case" argument and because allowing Miranda's robbery conviction to stand while his kidnap-rape conviction had been reversed under essentially identical factual circumstances simply was not fair.[474] Baird was involved in that part of the case as a law clerk and associate lawyer.[475] I was not involved. Instead, as previously stated, I was involved in Miranda's kidnap-rape retrial and later appeal.

C. Miranda's Retrial and Later Appeal in the Robbery Case

Miranda's robbery case was retried on September 20, 1971 before Hon. Philip Marquardt.[476] Flynn and Tom Thinnes represented Miranda in that trial, after Flynn left LRR.[477] Accordingly, no one from LRR was involved in it. Thinnes stated that he handled most of the trial.[478] Although Flynn made the opening argument, Thinnes handled the witness examinations and made the closing argument.[479] Because of the "extreme possibility of jury familiarity

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471 *Johnson*, 384 U.S. at 719, 733.

472 Jenkins v. Delaware, 395 U.S. 213 (1969).

473 Darwin v. Connecticut, 391 U.S. 346 (1968); Clewis v. Texas, 386 U.S. 707 (1967); Davis v. North Carolina, 384 U.S. 737 (1966).

474 *See* Baird, *supra* note 410, at 3, 7.

475 *Id.*

476 State v. Miranda, 509 P.2d 607 (Ariz. 1973). Judge Marquardt resigned in 1991 after pleading guilty to a charge of conspiracy to possess marijuana. Laura Laughlin, *Arizona Judge Resigns After Plea of Guilty to Felony Drug Charge*, L.A. TIMES (June 7, 1991), http://articles.latimes.com/1991-06-07/news/mn-118_1_judges-drug-charge.

477 Galbraith, *supra* note 257, at 18.

478 STUART, *supra* note 102, at 186.

479 *Id.*

with his name," Miranda was tried anonymously as "Jose Gomez."[480] However, despite that effort to provide him a fair trial, he again was convicted.

The Maricopa County Public Defender's Office represented Miranda in an appeal from that conviction to the Arizona Supreme Court.[481] Again, LRR was not involved. The Attorney General's office represented the State.[482] Nelson was then Attorney General. The Arizona Supreme Court affirmed Miranda's conviction on May 2, 1973,[483] in a brief opinion by Chief Justice Jack Hays.[484] Miranda's robbery representation therefore also was ultimately unsuccessful.

X. What Happened to Miranda?

Miranda was released from prison on parole in December 1972, six months before the Arizona Supreme Court affirmed his robbery conviction for the second time.[485] He again worked at menial jobs such as warehouseman, produceman and delivery-truck driver.[486] He also began selling autographed *Miranda* cards, like those the police had become accustomed to carrying, for $1.50 apiece.[487] He was charged with illegal possession of a firearm and dangerous drugs in July 1974, and sent back to prison in January 1975 for violating his parole based on those charges.[488]

Miranda was released again in December 1975, after completing the mandatory one-third of his original sentence.[489] He was stabbed to death in a barroom fight just over a month later at the La Amapola bar, located in the former "Deuce" area in downtown Phoenix.[490] Although homicide complaints and arrest warrants were issued against two suspects, there were no confessions or convictions. Instead, both suspects, who had previously been released pending further investigation, simply disappeared and were never seen again.[491] Miranda is buried in the Mesa Cemetery.[492]

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480 State v. Miranda, 509 P.2d 607, 608 (Ariz. 1973).

481 *Id.*

482 *Id.*

483 *Id.*

484 Justice Hays had been an Assistant Phoenix City Attorney (1949-52), U.S. Attorney (1953-60), and a Maricopa County Superior Court Judge (1960-68). He served as an Arizona Supreme Court Justice from 1969 until 1987 and as Chief Justice from 1972 until 1974. He died in 1995. *In Memoriam: Honorable Jack D.H. Hayes*, 183 Ariz. lv (1995).

485 Baker, *supra* note 88, at 381.

486 *Id.*

487 *Id.* at 383.

488 *Id.*

489 Stuart, *supra* note 102, at 95.

490 *Id.* at 95-99.

491 *Id.* at 99.

492 Amy B Wang, *Finding Burial Room*, Ariz. Republic, Sept. 27, 2012, at A1, A7.

XI. *MIRANDA*'S LEGACY

Miranda's holdings have survived as a statement of constitutional principles, based on the facts and holdings presented in the case itself. However, later cases limiting the decision's interpretation and application have created major disagreements through the years, both within the U.S. Supreme Court and in lower courts. The extent to which *Miranda* provides any continuing, meaningful deterrent to police techniques for obtaining confessions based on interrogations occurring without counsel present to advise suspects on their constitutional rights also has been limited by later decisions as well.

Detailed discussions concerning how *Miranda* interpretations and police interrogation procedures have evolved through the years are beyond this article's scope.[493] However, reviewing the Court's numerous decisions interpreting and applying *Miranda* shows how some major issues have been resolved. There have been numerous twists and turns as the Court has struggled to find consistency in a wide variety of specific factual situations.

A. Misdemeanor and Juvenile Commitment Cases

Berkemer v. McCarty held that a person subjected to custodial interrogation is entitled to the benefit of *Miranda*'s procedural safeguards, regardless of the nature or degree of the investigated offense.[494] The Court held that creating an exception to the *Miranda* rule in arrests for misdemeanor traffic offenses would substantially undermine the rule's simplicity and clarity, particularly where the police, in conducting custodial interrogations, did not know whether the person has committed a misdemeanor or a felony.[495]

In re Gault also held the right to counsel and the privilege against self-incrimination apply equally in juvenile commitment cases, as part of the due process to which juveniles are entitled.[496] In doing so, it rejected the generally prevailing *parens patriae* approach in which juvenile courts had substantially unlimited discretion. Justice Fortas's majority opinion there stated, "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone . . . . Under our Constitution, the condition of being a boy does not justify a kangaroo court."[497]

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[493] For a summary of the Supreme Court's cases interpreting *Miranda*, see James L. Buchwalter, *Construction and Application of Constitutional Rule of* Miranda*–Supreme Court Cases*, 17 A.L.R. FED. 2d 465 (2007).

[494] Berkemer v. McCarty, 468 U.S. 420,433-34 (1984).

[495] *Id.*

[496] *In re* Gault, 387 U.S. 1 (1967).

[497] *Id.* at 13, 28. For discussion concerning *Gault*'s history within the context of juvenile justice generally, see generally TANENHAUS, *supra* note 421.

The Court therefore found the assistance of counsel essential for the determination of delinquency.[498] It also applied *Miranda* to preclude admissions allegedly made in Gault's 1964 commitment hearings, holding that the privilege against self-incrimination only can be waived when counsel is present or the right to counsel has been waived.[499] It did so even though *Johnson v. New Jersey* had previously held *Miranda* was not applicable to trials occurring before the date of its decision,[500] without citing *Johnson.*

In the Matter of Winship narrowly extended *Gault*'s due process requirements to hold that juveniles, like adults, are constitutionally entitled to proof beyond a reasonable doubt when charged with criminal law violations.[501] However, Justice Blackmun's plurality opinion in *McKeiver v. Pennsylvania* restored *parens patriae* to juvenile court jurisprudence in holding juveniles had no right to a jury trial, using a "fundamental fairness" standard.[502] Justice Rehnquist's 6-3 majority opinion in *Schall v. Martin* then applied that standard to uphold the constitutionality of a New York statute permitting seventeen-day pretrial detentions of accused juvenile delinquents if there was a "serious risk" they would commit another crime before their hearing.[503] Those decisions ended the Warren Court's due process revolution with respect to juvenile court proceedings.

B. Sufficiency of Miranda *Warnings*

In *California v. Prysock*, the Court held the content of *Miranda* warnings was not required to be a "virtual incantation of the precise language contained in the *Miranda* opinion."[504] It therefore summarily reversed a California Court of Appeal opinion that laid down that flat rule. In doing so, it noted that *Miranda* itself permitted a "fully effective equivalent" to its required warnings.[505] More specifically, nothing in the warnings given in *Prysock* suggested any limitation on the right to the presence of appointed counsel different from the right to a lawyer in general, including the right "to a lawyer before you are questioned . . . while you are being questioned, and all during the questioning."[506] Since the warnings conveyed the right to have a lawyer appointed at no cost if he could not afford one prior to and during interrogation, the Court of

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498 *Gault*, 387 U.S. at 36.
499 *Id.* at 44-55.
500 Johnson v. New Jersey, 384 U.S. 719, 732 (1966).
501 *In re* Winship, 397 U.S. 358 (1970).
502 McKeiver v. Pennsylvania, 403 U.S. 528 (1971).
503 Schall v. Martin, 467 U.S. 253 (1984).
504 California v. Prysock, 453 U.S. 355, 355 (1981) (per curiam).
505 *Id.* at 360 (quoting Miranda v. Arizona, 384 U.S. 436, 476 (1966)).
506 *Id.* at 361.

Appeal erred in holding the warnings were inadequate simply because of the order in which they were given.[507]

However, *Duckworth v. Eagan* later held a warning advising the suspect that he would have a lawyer appointed "if and when you go to court," in conjunction with warnings that "[y]ou have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning" was sufficient to comply with *Miranda.*[508] Chief Justice Rehnquist's majority opinion stated, "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one."[509] Accordingly, if the police cannot provide appointed counsel, "*Miranda* requires only that the police not question a suspect unless he waives his right to counsel."[510]

C. Voluntary Statements Taken in Violation of Miranda *Can Be Used for Impeachment*

Chief Justice Burger's 5-4 majority opinion in *Harris v. New York* held that, although voluntary statements taken in violation of *Miranda* must be excluded from the prosecution's case in chief, the resulting presumption of coercion does not bar their use for impeachment purposes on cross-examination if the defendant takes the stand.[511] Instead, "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."[512]

Justice Brennan's dissent countered that the majority opinion "tells the police that they may freely interrogate an accused incommunicado and without counsel and know that, although any statement they may obtain in violation of *Miranda* cannot be used in the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution."[513]

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[507] *Id.*

[508] Duckworth v. Eagan, 492 U.S. 195, 198-200 (1989).

[509] *Id.* at 204.

[510] *Id.*

[511] Harris v. New York, 401 U.S. 222 (1971).

[512] *Id.* at 226. *See also* Oregon v. Hass, 420 U.S. 714 (1975) (ruling inculpatory statements admissible solely for impeachment purposes after those statements were ruled inadmissible during the prosecution's case in chief and defendant then testified to the contrary, knowing that information had been ruled inadmissible).

[513] *Harris,* 401 U.S. at 232 (Brennan, J., dissenting).

Doyle v. Ohio held that the Fourteenth Amendment's Due Process Clause prohibits impeachment based on a defendant's silence following *Miranda* warnings since those warnings implicitly assure him that his silence will not be used against him.[514] *Brecht v. Abrahamson* followed *Doyle* with respect to silence after *Miranda* warnings.[515] However, it held the prosecution could refer to the defendant's silence before his *Miranda* warning was given since such silence was "probative" and did not rest on any assurances by law enforcement authorities that it would carry no penalty.[516] *Fletcher v. Weir* also summarily held that where a suspect has not received the kind of affirmative assurances the *Miranda* warnings embody, a state does not deny due process by allowing cross-examination concerning his post-arrest silence when he chooses to take the stand.[517]

Wainwright v. Greenfield also followed *Doyle*, holding using a suspect's silence after he was arrested and given Miranda warnings, as evidence of his sanity, violated due process.[518] The implicit assurance contained in *Miranda* warnings that silence will carry no penalty applied equally to proof of sanity as well as to proof of commission of the underlying offense.[519]

Anderson v. Charles held cross-examination merely inquiring into prior inconsistent statements did not violate the defendant's constitutional right to remain silent after being given *Miranda* warnings established in *Doyle* because the suspect had then voluntarily spoken.[520] However, *Mincey v. Arizona* held statements made in circumstances violating *Miranda* were involuntary and could not be used against the defendant for any purpose where the defendant was then in a hospital room, comatose, in great pain, and encumbered by tubes, needles, and a breathing apparatus.[521]

When a person is in custody, even if police have not given *Miranda* warnings or begun interrogation, the prosecution's subsequent comment on the defendant's exercise of his right to silence in its case-in-chief violates the Fifth Amendment. The right to remain silent would mean little if the consequence of

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[514] Doyle v. Ohio, 426 U.S. 610, 618-19 (1976). *See also* United States v. Hale, 422 U.S. 171, 177 (1975) (in exercise of its supervisory authority over lower federal courts, trial court erred in permitting cross-examination concerning defendant's silence during a police interrogation after *Miranda* warnings had been given).

[515] Brecht v. Abrahamson, 507 U.S. 619 (1993).

[516] *Id.* at 628.

[517] Fletcher v. Weir, 455 U.S. 603, 607 (1982).

[518] Wainwright v. Greenfield, 474 U.S. 284 (1986).

[519] *Id.* at 292.

[520] Anderson v. Charles, 447 U.S. 404, 408 (1980) (per curiam).

[521] Mincey v. Arizona, 437 U.S. 385, 491-92 (1978).

its exercise is evidence of guilt.[522] Accordingly, a defendant's pre-arrest, pre-*Miranda* silence cannot be used against him in the prosecution's case-in-chief.[523] However, either post-arrest or pre-arrest, pre-*Miranda* silence can be used for impeachment if the defendant testifies.[524]

D. Cases Involving Whether the Defendant Was "In Custody"

The Court has considered numerous cases involving the definition of "in custody" in deciding whether *Miranda* warnings were required. Whether a suspect is "in custody" and therefore entitled to *Miranda* warnings presents a mixed question of law and fact qualifying for independent review.[525]

For example, *Orozco v. Texas* held "in custody" includes not only interrogation at a police station, but also any other circumstance that deprives the suspect of freedom of action in any significant way.[526] Accordingly, use of statements the defendant made to police after questioning in his bedroom at 4:00 a.m. without first being given *Miranda* warnings violated his Fifth Amendment rights since he was then under arrest and not free to leave.[527]

Stansbury v. California also held that determining whether a suspect is "in custody" for *Miranda* purposes requires applying an objective standard, considering all the circumstances, in deciding whether there was a formal arrest or a restraint on his freedom of movement tantamount to a formal arrest.[528] Accordingly, the officer's subjective views on the nature of the interrogation or the suspect's guilt are relevant in making that determination only if revealed to the suspect.[529]

Chief Justice Burger's 6-2 majority opinion in *Beckwith v. United States* held *Miranda*'s requirements did not extend to questioning by an IRS special agent investigating potential criminal tax violations when the taxpayer was not actually in custodial interrogation.[530] It accordingly distinguished *Mathis v. United States*,[531] another taxpayer interrogation case, where the taxpayer was

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522 Griffin v. California, 380 U.S. 609, 615 (1965) (prosecution may not comment on a defendant's exercise of his right to remain silent).

523 *See* Wainwright v. Greenfield, 474 U.S. 284 (1986).

524 Fletcher v. Weir, 455 U.S. 603, 607 (1982) (per curiam) (post-arrest, pre-*Miranda* silence); *see also* Jenkins v. Anderson, 447 U.S. 231 (1980) (State may use defendant's pre-arrest, pre-*Miranda* silence for impeachment purposes).

525 Thompson v. Keohane, 516 U.S. 99, 116 (1995).

526 Orozco v. Texas, 394 U.S. 324, 327 (1969).

527 *Id.*

528 Stansbury v. California, 511 U.S. 318, 324 (1994) (per curiam).

529 *Id.*

530 Beckwith v. United States, 425 U.S. 341, 348 (1968).

531 Mathis v. United States, 391 U.S. 1 (1968).

in custody.[532] Justice Brennan's dissenting opinion would have required the taxpayer to be given *Miranda* warnings in situations where "the practical compulsion to respond to questions about his tax returns is comparable to the psychological pressures described in *Miranda*."[533]

Minnesota v. Murphy similarly held *Miranda*'s requirements did not extend to a probation officer interview, since the probationer was not then formally arrested, even though the investigation had focused on a suspect.[534] *Fare v. Michael C.* also held a sixteen and one-half year-old juvenile suspect's request to see a probation officer did not equate to a request to see a lawyer for *Miranda* purposes and that a juvenile could voluntarily and knowingly waive his Fifth Amendment rights.[535]

Moran v. Burbine held the police's failure to inform the suspect of a telephone call from his attorney did not deprive him of information essential to the ability to knowingly waive his Fifth Amendment rights to remain silent and to the presence of counsel.[536] Justice O'Connor's majority opinion there stated that requiring the police to inform the suspect of the attorney's efforts to reach him would muddy "*Miranda*'s otherwise relatively clear waters" and "would work a substantial and . . . inappropriate shift in the subtle balance" between effective law enforcement and "inherently coercive" interrogation.[537]

Moran also stated *Miranda* had declined "to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation," citing the ACLU's amicus brief in *Miranda*, and that "the suspect's Fifth Amendment rights could be adequately protected by less intrusive means."[538] Those statements neglected the facts, as previously stated, the position that Miranda was entitled to the actual presence of a lawyer was also argued in Miranda's petition for certiorari and merits brief, and *Miranda* was presented, accepted, and argued as a Sixth Amendment case.[539]

Chief Justice Burger's plurality opinion in *United States v. Mandujano* held *Miranda* warnings need not be given to a grand jury witness called to testify about criminal activities in which he might have been involved.[540] Accordingly, false statements made in the absence of such warnings could not be suppressed in a later prosecution of the witness for perjury based on those

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[532] *Beckwith*, 425 U.S. at 347.
[533] *Id.* at 350 (Brennan, J., dissenting).
[534] Minnesota v. Murphy, 465 U.S. 420, 430-31 (1984).
[535] Fare v. Michael C., 442 U.S. 707, 737-38 (1979).
[536] Moran v. Burbine, 475 U.S. 412, 432 (1986).
[537] *Id.* at 425-27.
[538] *Id.* at 426.
[539] *See supra* notes 314-69 and related text.
[540] United States v. Mandujano, 425 U.S. 564 (1976).

statements. Extending *Miranda* to questioning before a grand jury would be an "extravagant expansion" never remotely contemplated by that decision because grand jury questioning is "wholly different from custodial police interrogation.[541] A witness has no absolute right to silence before a grand jury. He or she instead has an absolute duty to answer all questions, subject only to a valid Fifth Amendment claim.

Garner v. United States also declined to extend *Miranda* to a situation where the defendant made incriminating disclosures on his tax returns instead of claiming the privilege against self-incrimination since nothing suggested he did so because his will was overborne.[542] Instead, the taxpayer could complete the return at leisure and with legal assistance.[543]

However, *Estelle v. Smith* held statements made to a psychiatrist without first giving *Miranda* warnings during an examination while the defendant was in custody violated his Fifth Amendment privilege against self-incrimination and therefore could not be admitted during the penalty phase of a capital murder trial.[544] That examination also violated the defendant's Sixth Amendment right to counsel because that right had already attached and defense counsel were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness.[545]

In *Yarborough v. Alvarado*, the Court held the *Miranda* "custody" test was objective, involving two discrete inquiries: (1) the circumstances surrounding the interrogation and (2) given those circumstances, whether a reasonable person would have felt free to terminate the interrogation and leave.[546] Accordingly, a state court reasonably concluded that a juvenile suspect who gave statements after a two-hour police-station interview was not "in custody" so as to trigger *Miranda* requirements where he was driven to the interview by his parents, the parents remained in the station's lobby during the interview, the police were not coercive and threatening but twice asked the suspect if he wanted to take a break, and the suspect went home after the interview.[547]

Similarly, *California v. Beheler* held *Miranda* warnings were not required where the defendant, although a suspect, was not placed under arrest, had voluntarily come to the police station, and was allowed to leave unhindered after a brief interview.[548] Accordingly, the Court held he was not taken into custody

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[541] *Id.* at 580.

[542] Garner v. United States, 424 U.S. 648, 665 (1976).

[543] *Id.* at 658.

[544] Estelle v. Smith, 451 U.S. 454, 466-69 (1981).

[545] *Id.* at 469-71.

[546] Yarborough v. Alvarado, 541 U.S. 652, 661 (2004) (quoting Thompson v. Kennedy, 516 U.S. 99, 112 (1995)).

[547] *Id.* at 654-55.

[548] California v. Beheler, 463 U.S. 1121 (1983) (per curiam).

and his freedom was not restricted in any way whatsoever.[549] *Miranda* does not apply to noncustodial situations where, in the absence of any formal arrest or restraint on freedom of movement, questioning merely occurs in a coercive environment.[550]

The Court also has held initial traffic stops by themselves do not cause motorists to be "in custody" for *Miranda* purposes. Accordingly, in *Berkemer v. McCarty*, statements made by a motorist in response to roadside questioning prior to a formal arrest were held admissible against him.[551] In *Pennsylvania v. Bruder*, the Court applied *Berkemer* to hold the defendant was not "in custody" following a traffic stop where the police officer also asked a few questions and asked that the motorist to perform a simple balancing test at a location visible to passing motorists.[552]

E. Cases Involving the Definition of "Interrogation"

The Court has defined "interrogation" under an objective standard that examines whether the police should have known the questioning was reasonably likely to elicit an incriminating response. For example, in *Rhode Island v. Innis*, the Court held the *Miranda* safeguards come into play only when a person in custody is subjected either to express questioning or to its functional equivalent.[553]

The suspect there had been advised concerning his *Miranda* rights and stated he understood those rights and wanted to speak with a lawyer.[554] However, after being placed in a police car and on the way to the station, in response to statements made between the officers in the car expressing concern as to where a missing shotgun was located because of a nearby school for handicapped children, he volunteered they should turn the car around so he could show them where it was located.[555] After returning to the scene of the arrest and again being advised concerning his *Miranda* rights, he pointed out where the gun was hidden.[556] Under those circumstances, the Court refused to suppress the suspect's statements since there was no showing the officers should have known that it was reasonably likely he would respond as he did.[557] Simply being in custody was not enough.[558]

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549 *Id.* at 1123.
550 Oregon v. Mathiason, 429 U.S. 492 (1977) (per curiam).
551 Berkemer v. McCarty, 468 U.S. 420, 434-35 (1984).
552 Pennsylvania v. Bruder, 488 U.S. 9, 11 (1988) (per curiam).
553 Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).
554 *Id.* at 294.
555 *Id.* at 295.
556 *Id.*
557 *Id.* at 299-302.
558 *Id*. at 291, 303.

In *Pennsylvania v. Muniz*, Muniz was arrested for DUI, then taken to a booking station where he was told his actions and voice would be recorded but without advice concerning his *Miranda* rights.[559] He answered questions concerning his name, address, height, weight, eye-color, date of birth and current age, stumbling over his address and age.[560] He also was asked but could not give the date of his sixth birthday.[561]

Under those circumstances, the Court held only the "sixth birthday" question constituted a testimonial response to custodial interrogation for Fifth Amendment purposes.[562] Physical inability to articulate words in a clear manner was not "testimonial," but instead "real or physical evidence."[563] However, the "sixth birthday" question was incriminating because of the answer's content: the trier of fact could infer from Muniz's inability to answer that his mental state was confused.[564] The Court also held the first seven questions fell within a "routine booking question" exception to *Miranda* permitting questions to secure biographical data necessary to complete booking or pretrial services.[565]

Statements Muniz volunteered while taking field sobriety tests also were held admissible as "voluntary" because they were not made in response to custodial interrogation.[566] A defendant's refusal to take a blood-alcohol test after a police officer has requested it and told him he could lose his license if he refused, but not that the refusal could be admitted against him, is not an act coerced by the officer and thus not protected by the right against self-incrimination. Accordingly, admission into evidence of a defendant's refusal to submit to such a test does not offend that right.[567]

In *Illinois v. Perkins*, the Court held conversations between incarcerated suspects and undercover agents posing as fellow inmates did not necessarily implicate the concerns underlying *Miranda* because the essential elements of a "police-dominated atmosphere" and compulsion are not present when the incarcerated person speaks freely to someone he believes to be a fellow inmate.[568]

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559 Pennsylvania v. Muniz, 496 U.S. 582 (1990).

560 *Id.* at 586.

561 *Id.*

562 *Id.* at 599-600.

563 *Id.* at 591 (following Schmerber v. California, 384 U.S. 757 (1966)).

564 *Id.* at 592.

565 *Id.* at 601. That "exception" came from a quotation in the United States amicus brief in United States v. Horton, 873 F.2d 180, 181 n.2 (8th Cir. 1989), not from any prior Supreme Court decisions.

566 *Id.* at 603-04.

567 South Dakota v. Neville, 459 U.S. 553, 554 (1983).

568 Illinois v. Perkins, 496 U.S. 292 (1990).

Where the suspect does not know he is speaking to a government agent, there is no reason to assume the possibility of coercion.[569]

F. Cases Involving Alleged Waivers of Miranda *Rights*

Tague v. Louisiana followed *Miranda* in recognizing that the State, not the defendant, has the "heavy burden" to establish that he knowingly and intelligently waived his *Miranda* rights.[570] It also rejected the presumption a defendant understands his constitutional rights.[571] The Court's rationale was that the burden of establishing waiver is properly placed on the State because it creates the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation.[572]

However, *North Carolina v. Butler* rejected a *per se* rule that no statement of a person under custodial interrogation may be admitted in evidence against him unless, at the time the statement was made, he explicitly waived the right to the presence of a lawyer.[573] *Butler* instead held *Miranda*'s statement that "An express statement that the individual is willing to make a statement and does not want an attorney followed by a statement could constitute a waiver"[574] did not hold such an express statement was "indispensable to finding a waiver."[575] Although courts must presume that a defendant did not waive his rights and the prosecution's burden is "great," at least in some cases "waiver can be clearly inferred from the actions and words of the person interrogated."[576] Accordingly, since the North Carolina Supreme Court, in creating an inflexible rule that no implicit waiver can ever suffice, went "beyond the requirements of federal organic law," its judgment was vacated and the case was remanded for further proceedings.[577]

More recently, *Berghuis v. Thompkins* recognized the State's showing that a *Miranda* warning was given and the accused made an uncoerced statement is

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[569] *Id.* at 298 (The Court distinguished Mathis v. United States, 391 U.S. 1 (1968), because the defendant there knew he was being interviewed by an IRS agent, and Massiah v. United States, 377 U.S. 201 (1964), because the government there used an undercover agent to circumvent Massiah's Sixth Amendment right to counsel after he had been charged with a crime.).

[570] Tague v. Louisiana, 444 U.S. 469 (1980) (per curiam).

[571] *Id.* at 470 (quoting North Carolina v. Butler, 441 U.S. 369, 373 (1979)).

[572] *Id.*

[573] North Carolina v. Butler, 441 U.S. 369 (1979).

[574] Miranda v. Arizona, 384 U.S. 436, 475 (1966).

[575] *Butler*, 441 U.S. at 373.

[576] *Id.*

[577] *Id.* at 376.

insufficient standing alone to demonstrate a valid waiver of *Miranda* rights.[578] The State also must show the accused understood those rights.[579]

Edwards v. Arizona held that where an accused has invoked his right to have counsel present during custodial interrogation, a waiver of that right can not be established by showing only that the accused voluntarily responded to police-initiated interrogation after again being advised of his rights.[580] Instead, an accused who invokes his right to counsel cannot be subjected to further interrogation until counsel has been made available to him, or unless the accused himself initiates further communication, exchanges or conversations with the police.[581]

Minnick v. Mississippi followed *Edwards* in holding the Fifth Amendment right to counsel during interrogation is not terminated or suspended by mere consultation with counsel.[582] Officers may not reinstate interrogation unless the suspect's attorney is present and a valid waiver is obtained, or the suspect initiates further communication and a proper waiver is obtained.[583]

However, *Connecticut v. Barrett* held a suspect could claim his *Miranda* rights with respect to written statements but still be willing to make a voluntary oral statement that later could be used against him.[584] Invoking his right to counsel with respect to written statements thus did not invoke that right for all purposes.[585] *Davis v. United States* held *Edwards* did not require officers to stop questioning a suspect where he merely stated, "Maybe I should talk to a lawyer."[586] *Davis* reasoned that the clarity and ease of applying the *Edwards* rule would be lost if officers were required to cease questioning based on an ambiguous or equivocal reference to an attorney.[587] Accordingly, although it might be good practice to do so, they are not required to ask clarifying questions.[588]

Justice Rehnquist's plurality opinion in *Oregon v. Bradshaw* stated that a defendant who had previously invoked his *Miranda* rights "initiated" further conversation for purposes of the *Edwards* rule since his question, "what is going to happen to me now?," indicated willingness and a desire for a generalized discussion about the investigation, and further conversation occurred only

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578 Berghuis v. Thompkins, 130 S. Ct. 2250, 2260 (2010).
579 *Id.* at 2260.
580 Edwards v. Arizona, 451 U.S. 477 (1981).
581 *Id.* at 484-87.
582 Minnick v. Mississippi, 498 U.S. 146, 150 (1990).
583 *Id.* at 156.
584 Connecticut v. Barrett, 479 U.S. 523 (1987).
585 *Id.* at 529-30.
586 Davis v. United States, 512 U.S. 452, 455, 459-60 (1994).
587 *Id.*
588 *Id.* at 461-62.

after the officer reminded the defendant he did not have to "talk to me" and the defendant stated he "understood."[589] More recently, *Berghuis v. Thompkins* also held that a suspect's response to an officer's question about whether he prayed to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver of his *Miranda* rights.[590]

Michigan v. Mosley held that a suspect's statement he did not want to discuss robberies following *Miranda* warnings did not preclude officers from giving additional *Miranda* warnings two hours later, then questioning the suspect about an unrelated murder.[591] The Court held that the police honored the suspect's statement with respect to the robbery, and that admitting the suspect's statement concerning the murder into evidence "did not violate the principles of Miranda."[592]

Colorado v. Spring held mere silence by law enforcement officials concerning the subject matter of the interrogation was not "trickery" sufficient to invalidate a suspect's waiver of his *Miranda* rights.[593] Accordingly, "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege."[594] Deception is also a permitted tactic. For example, "Trickery, deceit, even impersonation do not render a confession inadmissible, certainly in noncustodial situations and usually in custodial ones as well, unless government agents make threats or promises."[595] Moreover, "Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion are not within *Miranda*'s concerns."[596] The Court also has held a confession was voluntary even though the officer falsely told the suspect that his co-conspirator had confessed to the crime.[597]

Colorado v. Connelly held the State must prove a *Miranda* waiver only by a preponderance of the evidence, not by clear and convincing evidence.[598] It followed *Lego v. Twomey*, which rejected an argument that the importance of

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589 Oregon v. Bradshaw, 462 U.S. 1039, 1045-46 (1983). Justice Powell's concurring opinion joined in the judgment because he believed there was a knowing and intelligent waiver of the right to counsel. However, he declined to provide a fifth vote which supported the plurality's rationale. *Id.* at 1047-51 (Powell, J., concurring).

590 Berghuis v. Thompkins, 130 S.Ct. 2250, 2263 (2010).

591 Michigan v. Mosley, 423 U.S. 96 (1975).

592 *Id.* at 107.

593 Colorado v. Spring, 479 U.S. 564, 576 (1987).

594 *Id.* at 577.

595 United States v. Kontny, 238 F.3d 815, 817 (7th Cir. 2001), citing Frazier v. Cupp, 394 U.S. 731, 739 (1969).

596 Illinois v. Perkins, 496 U.S. 292, 297 (1990).

597 *Cupp*, 394 U.S. at 739.

598 Colorado v. Connelly, 479 U.S. 157 (1986).

the values served by exclusionary rules was sufficient in itself to show that the Constitution requires admissibility to be proved beyond a reasonable doubt.[599] *Lego* instead held it was "very doubtful" that escalating the prosecution's burden of proof in suppression hearings "would be sufficiently productive in this respect to outweigh the public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence."[600] This statement illustrates the continued conflict in values inherent in *Miranda*.

Whether police complied with *Miranda* in obtaining statements admitted at trial over a defendant's objection may be raised in a federal habeas corpus proceeding.[601] However, the issue whether a defendant understood *Miranda* warnings read to him must be contemporaneously raised at trial pursuant to a state's "contemporaneous objection" rule.[602] If no such objection is made, a defendant is not entitled to federal habeas corpus review of that issue pursuant to 28 U.S.C. § 2254(d).[603]

G. Relationship of Sixth Amendment and Miranda *Rights to Counsel*

The Court has rejected the argument that standards for waiving the Sixth Amendment right to counsel as such should be "more difficult" than the waiver of Fifth Amendment rights permitted by *Miranda*. In *Patterson v. Illinois*, the Court held 5-4 that a defendant could be interrogated, waive his *Miranda* rights, and then give inculpatory statements after he had been indicted for murder.[604] In doing so, it held that even though a Sixth Amendment right to counsel attached when defendant was indicted, the standards for thereafter waiving that right were no greater than those waiving *Miranda* rights generally.[605] Since the defendant there never requested counsel, the police were not automatically barred from interrogating him unless he initiated further contact. There was no additional burden of proving that the defendant "knowingly and intentionally" waived his Sixth Amendment right since the *Miranda* warnings sufficiently advised him concerning it.[606]

In *Texas v. Cobb*, the Court held 5-4 the Sixth Amendment right to counsel is "offense specific" and does not attach until after adversary judicial criminal

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599 Lego v. Twomey, 404 U.S. 477 (1972).

600 *Id.* at 489.

601 Withrow v. Williams, 507 U.S. 680 (1993).

602 Wainwright v. Sykes, 433 U.S. 72 (1977).

603 *Id.* at 90.

604 Patterson v. Illinois, 487 U.S. 285 (1988).

605 *Id.* at 297.

606 *Id.* at 291-94.

proceedings have been initiated.[607] Accordingly, even though the defendant there was indicted and appointed counsel for a burglary charge, his Sixth Amendment right did not extend to two related murders with which he had not yet been charged since they were not the same offense. Statements concerning the murders made without counsel following *Miranda* warnings thus were admissible.[608]

This limitation of the Sixth Amendment right to counsel is arguably inconsistent with *Escobedo v. Illinois*, which applied that right to a suspect against whom criminal proceedings had not yet begun.[609] However, later Supreme Court decisions have limited *Escobedo* to its facts.[610] *Escobedo*'s rationale also has been seen as resting on the Fifth Amendment privilege against self-incrimination, rather than the Sixth Amendment right to counsel as such.[611]

H. Miranda *Warnings as a Factor in Admitting Statements Derived from Fourth Amendment Violations*

In *Brown v. Illinois*, the suspect was arrested without probable cause and without a warrant.[612] He made two in-custody inculpatory statements after being given *Miranda* warnings.[613] The Illinois courts applied a *per se* rule that the *Miranda* warnings broke the causal chain between the illegal arrest and the giving of the statements, so they might be used in evidence.[614]

The Supreme Court instead held that even if those statements were voluntary under the Fifth Amendment, *Wong Sun*[615] required that they be "sufficiently an act of free will to purge the primary taint" under the Fourth Amendment.[616] That question must be answered on the facts of each case. Although giving *Miranda* warnings was an important factor in resolving that issue, other factors must be considered as well. Since the State had failed to

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607 Texas v. Cobb, 532 U.S. 162, 167 (2001) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)). *McNeil* also held the Sixth Amendment right to counsel is offense-specific, so that invoking that right during a judicial proceeding did not constitute an invocation of the right to counsel derived from *Miranda* and the Fifth Amendment's guarantee against compelled self-incrimination. McNeil v. Wisconsin, 501 U.S. 171, 175-82 (1991).

608 *Cobb*, 532 U.S. at 168. Accordingly, the Court there also declined to create an exception to *McNeil's* offense-specific limitations on the right to counsel for crimes "factually related to the charged offense." *Id.*

609 Escobedo v. Illinois, 378 U.S. 478 (1964). For discussion of *Escobedo*, see *supra* notes 182,199, 380-83 and related text.

610 *See, e.g.*, Michigan v. Tucker, 417 U.S. 433, 438 (1974) (and cited cases).

611 Buchwalter, *supra* note 493, § 10 (2007).

612 Brown v. Illinois, 422 U.S. 590 (1975).

613 *Id.* at 591.

614 *Id.* at 603-04.

615 Wong Sun v. United States, 371 U.S. 471 (1963).

616 *Brown*, 422 U.S. at 602.

sustain its burden of showing the suspect's statements were admissible under *Wong Sun*, his conviction was reversed.[617]

In *Dunaway v. New York*, the suspect was detained for custodial interrogation without probable cause for a full-fledged formal arrest, and therefore "seized" in violation of the Fourth Amendment.[618] He was given *Miranda* warnings, waived counsel, and eventually made incriminating statements.[619] Under those circumstances, Justice Brennan's majority opinion held that although appropriate *Miranda* warnings may have been provided and the suspect's statements may have been voluntary for Fifth Amendment purposes, voluntariness was merely a "threshold" requirement for Fourth Amendment analysis.[620] Beyond that requirement, the opinion applied the *Brown* standards, focusing on the causal connection between the illegality and the confession.[621] Since no intervening events broke the connection between the suspect's illegal detention and his confession, the confession was held inadmissible.[622]

Taylor v. Alabama is another instance where the Court applied the *Brown* factors to hold that a suspect's confession, given six hours after an arrest without a warrant or probable cause and after *Miranda* warnings, should not have been admitted.[623] Justice Marshall's majority opinion there stated that giving and understanding *Miranda* warnings was "not by itself sufficient to purge the taint of the illegal arrest . . . If *Miranda* warnings were viewed as a talisman that cured all Fourth Amendment violations, then the constitutional guarantee against unlawful searches and seizures would be reduced to a mere 'form of words.'"[624]

Lanier v. South Carolina also summarily reversed a conviction given after *Miranda* warnings but following an assumed illegal arrest.[625] The Court reaffirmed that the fact a confession may be "voluntary" for Fifth Amendment purposes in the sense that *Miranda* warnings were given and understood is not by itself sufficient to purge the taint of the illegal arrest. Instead, it is "merely a threshold requirement for Fourth Amendment analysis."[626]

In *Rawlings v. Kentucky*, the Court, in citing *Brown*, reaffirmed that giving *Miranda* warnings was not the only factor to be considered in deciding whether

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617 *Id.* at 605.

618 Dunaway v. New York, 442 U.S. 200 (1979).

619 *Id.* at 203.

620 *Id.* at 217.

621 *Id.* at 217-18.

622 *Id.* at 219.

623 Taylor v. Alabama, 457 U.S. 687 (1982).

624 *Id.* at 690.

625 Lanier v. South Carolina, 474 U.S. 25 (1985) (per curiam).

626 *Id.* at 26.

a confession was obtained by exploiting an illegal arrest.[627] However, even assuming the police there violated the Fourth and Fourteenth Amendments by illegally detaining the suspect while they obtained a search warrant, Justice Rehnquist's majority opinion applying the *Brown* factors held the suspect's "spontaneous" admission of ownership of drugs found in a purse owned by another person after they were detained was admissible.[628] It stated that even though the officer's belief about the scope of the warrant they obtained might have been erroneous, "The conduct of the police here does not rise to the level of conscious or flagrant misconduct requiring prophylactic exclusion of petitioner's statements."[629]

Most recently, *Kaupp v. Texas* summarily reversed a defendant's conviction where he made statements after being given *Miranda* warnings, but also after he was arrested without probable cause and there was no showing he had consented to questioning.[630] The Court again reaffirmed that under *Brown*, "*Miranda* warnings, *alone* and *per se*, cannot always . . . break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."[631]

I. Limitations on Remedies for Miranda *Violations*

As the cases previously cited indicate, for many years the U.S. Supreme Court has excluded evidence obtained as the result of searches violating the Fourth Amendment as "fruit of the poisonous tree."[632] That prohibition also extends to the indirect products of such invasions.[633] "Fruit of the poisonous

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627 Rawlings v. Kentucky, 448 U.S. 98 (1980).

628 *Id.* at 108.

629 *Id.* at 110.

630 Kaupp v. Texas, 538 U.S. 626 (2003).

631 *Id.* at 633.

632 *See, e.g.*, Wong Sun v. United States, 371 U.S. 471, 484 (1963) (citing Weeks v. United States, 232 U.S. 383 (1920)). An excellent article concerning development and applications of the "fruit of the poisonous tree" doctrine as of its publication date is Yale Kamisar, Response, *On the 'Fruits' of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995).

633 *See, e.g.*, *Wong Sun*, 371 U.S. at 484 (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). *See also* Nardone v. United States, 308 U.S. 338, 340 (1939) (government cannot avoid inquiry into its use of illegal wiretapping, since to forbid direct use of methods prohibited by the federal wiretap statute "but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty'"). However, *Nardone* also recognized that the connection between the illicit wiretapping and the government's proof "may have become so attenuated as to dissipate the taint." *Id.* at 340.

tree" analysis also has been applied to Fifth and Sixth Amendment violations.[634]

For example, near the end of the Warren Court era, *Harrison v. United States* held 6-3 that the defendant's trial testimony impelled by introduction of three wrongfully obtained confessions was prohibited as "fruit of the poisonous tree."[635] That testimony was tainted by the same primary illegality that caused the confessions themselves to be inadmissible.[636] *Harrison* also cited *Silverthorne Lumber Co. v. United States*,[637] *Nardone v. United States*,[638] and *Wong Sun* for the proposition that "the essence of a provision the acquisition of evidence in a certain way is that . . . it shall not be used at all."[639]

The Court also has recognized the "cat out of the bag" principle that "after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good."[640]

However, for a number of years, the Court's majority also held *Miranda* warning requirements merely created "prophylactic rules" to protect constitutional rights and that a *Miranda* violation did not necessarily mean the Fifth Amendment itself had been violated. Accordingly, doctrines such as "fruit of the poisonous tree" and "cat out of the bag" which were intended to protect constitutional rights were held not to apply because suppression of confessions based on failure to provide *Miranda* warnings in situations where those confessions were otherwise voluntary went beyond the Fifth Amendment's prohibition of truly coerced confessions.

Michigan v. Tucker provides an early example on its facts.[641] The suspect, who was arrested before *Miranda* was decided but tried thereafter, was not advised that he had the right to appointed counsel if he was indigent.[642] During interrogation, he gave an alibi that he was with a friend at the time of the crime.[643] The police obtained information from the friend tending to incrimi-

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634 *See* United States v. Wade, 388 U.S. 218 (1967) (fruit of the poisonous tree doctrine applied to Sixth Amendment violations); Nix v. Williams, 467 U.S. 431, 442 (1984) (fruit of the poisonous tree doctrine applied to Fifth Amendment violations).

635 Harrison v. United States, 392 U.S. 219 (1968).

636 *Id.* at 222-23.

637 *Silverthorne Lumber Co.*, 251 U.S. at 392.

638 *Nardone*, 308 U.S. at 341.

639 *Harrison*, 392 U.S. at 222-23 & n.7.

640 United States v. Bayer, 331 U.S. 532, 540 (1947).

641 Michigan v. Tucker, 417 U.S. 433 (1974).

642 *Id.* at 435.

643 *Id.* at 436.

nate the suspect.[644] Justice Rehnquist's majority opinion held the police were not guilty of bad faith and their failure to fully advise the suspect concerning his right to counsel had no bearing upon the reliability of the friend's testimony.[645] Accordingly, although it applied *Miranda* to bar the suspect's statements under the specific circumstances presented, it held the friend's testimony was not precluded by the Fifth, Sixth, or Fourteenth Amendments.[646] It also refused to apply a Fourth Amendment exclusionary rule to preclude that testimony.[647] It did not address the argument made in Justice Douglas's dissenting opinion that the friend's testimony should have been suppressed as "fruit of the poisonous tree."[648]

In *New York v. Quarles*, Justice Rehnquist's 5-4 majority opinion created an overriding "public safety" exception that must "be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*."[649] The Court therefore held officers could ask reasonable questions of an in-custody suspect reasonably prompted by a concern for public safety (in that case, possible danger to the public caused by a gun concealed somewhere in a supermarket), and thereby obtain admissible statements and leads to other evidence without first providing *Miranda* warnings.[650]

Since those warnings were not required under those circumstances, subsequent statements given after *Miranda* warnings were provided therefore were not tainted as "illegal fruits of a *Miranda* violation."[651] However, that latter holding necessarily assumed "fruit of the poisonous tree" or "cat out of the bag" arguments otherwise might have been made to suppress later statements made and other evidence obtained as the result of the initial statements if a *Miranda* violation had previously occurred.

The *Quarles* majority reached its conclusion by stating *Miranda* warnings were merely "prophylactic rules"[652] and "judicially imposed strictures" that might be "inapplicable" in "limited circumstances."[653] The "prophylactic *Miranda* warnings" therefore were "not themselves rights protected by the Constitution but are instead measures to insure that the right against compulsory self-incrimination is protected."[654] Accordingly, under the circumstances

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644 *Id.*
645 *Id.* at 449-50.
646 *Id.*
647 *Id.*
648 *Id.* at 463 (Douglas, J., dissenting).
649 See New York v. Quarles, 467 U.S. 649, 653 (1984).
650 *Id.* at 654-56.
651 *Id.* at 660.
652 *Id.* at 653.
653 *Id.* at 653 n.3.
654 *Id.* at 654 (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

presented, and even though to some degree the "desirable clarity" of the *Miranda* holding was lessened as the result,[655] "the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[656]

Justice O'Connor's concurring and dissenting opinion in *Quarles* would have held *Miranda* required the suspect's initial statements to be suppressed because "the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures."[657] However, she then stated, "nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation."[658] She also stated, "the Court has been sensitive to the substantial burden the *Miranda* rules place on local law enforcement efforts, and consequently has refused to extend the decision or to increase its strictures on law enforcement agencies in almost any way."[659] That statement clearly confirmed the conservative majority's unwillingness either to expand *Miranda* or to overrule it.

Justice O'Connor also would have limited exclusion of nontestimonial evidence obtained as the result of confessions obtained without first providing *Miranda* warnings to situations where "the *Miranda* violation consists of a deliberate and flagrant abuse of the accused's constitutional rights, amounting to a denial of due process."[660] Based on the "values underlying the privilege against self-incrimination," she distinguished a "statement taken in the absence of *Miranda* warnings" from evidence derived from "actual compulsion."[661] Finally, citing *Michigan v. Tucker*,[662] she stated that *Wong Sun* and its "fruit of the poisonous tree" analysis "lead to exclusion of derivative evidence only where the underlying police misconduct infringes a 'core' constitutional right . . . Failure to administer *Miranda* warnings instead violates only a nonconstitutional prophylactic."[663]

Justice Marshall's dissenting opinion, in which Justices Brennan and Stevens joined, argued the investigating officers had no legitimate reason to interrogate the suspect without advising him of his rights to remain silent and to obtain assistance of counsel. Doing so violated the "clear guidelines" enunci-

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655 *Id.* at 658.

656 *Id.* at 657.

657 *Id.* at 660 (O'Connor, J., concurring and dissenting).

658 *Id.*

659 *Id.* at 662-63.

660 *Id.* at 672.

661 *Id.* at 671.

662 Michigan v. Tucker, 417 U.S. 433, 445-46 (1974).

663 *Quarles*, 467 U.S. at 671 n.4 (O'Connor, J., concurring and dissenting).

ated in *Miranda*.[664] This was particularly true since the New York Court of Appeals had found as facts that none of the interrogating officers were concerned with their own physical safety and there was no evidence the interrogation was prompted by the arresting officers' concern for the public's safety.[665]

Justice Marshall instead would have held the suspect's gun inadmissible as "fruit of the poisonous tree" based on *Silverthorne* and *Wong Sun* because that doctrine also had been applied where there were Fifth and Sixth Amendment violations.[666] He also criticized Justice O'Connor's opinion concerning the "derivative evidence" issue both because it "represents a much more radical departure from precedent than that opinion acknowledges" and because the State had never raised that "novel theory" before any New York court.[667]

In *Oregon v. Elstad*, Justice O'Connor's concurrence in *Quarles* became the Court's majority opinion.[668] *Elstad* held 6-3 that the Fifth Amendment also did not require suppression of a confession made after proper *Miranda* warnings and a valid waiver of rights had occurred, solely because the police had obtained an earlier, unwarned admission from the suspect at his mother's home.[669] Although the earlier statement was inadmissible, it was voluntarily given. Accordingly, later *Miranda* warnings were held to cure the earlier conditions causing the initial unwarned statement to be inadmissible.

In so holding, the majority rejected a "fruit of the poisonous tree" argument based on the suspect having given the earlier, inadmissible statement because doing so would prevent police from ever obtaining a valid confession, even after giving later *Miranda* warnings. It instead distinguished Fourth Amendment violations, where the "fruit of the poisonous tree" argument originated based on *Wong Sun v. United States*, because "the *Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."[670]

Accordingly, the *Elstad* majority held the Fifth Amendment only prohibits use of "compelled" testimony.[671] It then held failure to provide *Miranda* warnings only creates a "presumption of compulsion" requiring any resulting statements to be suppressed even though unwarned statements "otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded

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664 *Id.* at 674 (Marshall, J., dissenting).

665 *Id.* at 675-76.

666 *Id.* at 688 (citing United States v. Wade, 388 U.S. 218 (1967), and Nix v. Williams, 467 U.S. 431, 442 (1984).

667 *Id.* at 688-89 n.11.

668 Oregon v. Elstad, 470 U.S. 298 (1985).

669 *Id.* at 314-18.

670 *Id.* at 306.

671 *Id.* at 306-07

from evidence under *Miranda*."[672] That "prophylactic" rule therefore would not require other resulting evidence to be suppressed in the absence of a "true" Fifth Amendment violation.[673] By creating a constitutional distinction between "mere" *Miranda* violations and "true" Fifth Amendment violations that was later disavowed in *Dickerson v. United States*,[674] the Court necessarily rejected the primary argument made throughout Miranda's kidnap-rape retrial that all the evidence police had obtained based on his initial, illegally-obtained confession must be suppressed as "fruit of the poisonous tree."[675]

The basis for the *Elstad* Court's holding was that unwarned statements otherwise voluntary within the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Accordingly, "*Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm."[676] The Court therefore refused to hold later statements obtained pursuant to a voluntarily given and knowing waiver to have been tainted by the earlier, unwarned statement because no prior constitutional violation had occurred.[677]

The *Elstad* majority also held that simply giving *Miranda* warnings cured the condition that had caused the prior unwarned statement to be inadmissible. The suspect's choice whether thereafter to exercise his privilege to remain silent "should ordinarily be viewed as an 'act of free will.'"[678] It therefore summarily rejected the defendant's "cat out of the bag" argument based on having given initial unwarned statements that had been adopted by the Oregon Court of Appeals[679] based on *United States v. Bayer*[680] that the psychological impact of the suspect's earlier unwarned confession created a "subtle form of lingering compulsion."[681]

It instead held, "endowing the psychological effects of *voluntary* unwarned admissions with constitutional implications would, practically speaking, disable the police from obtaining the suspect's informed cooperation even when the official coercion proscribed by the Fifth Amendment played no part in obtaining either his warned or unwarned confessions," since those conditions had been removed.[682] However, that statement assumes simply giving

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672 *Id.*
673 *Id.* at 308-09.
674 Dickerson v. United States, 530 U.S. 428 (2000).
675 See *supra* note 431 and related text.
676 *Elstad*, 470 U.S. at 307.
677 *Id.* at 318.
678 *Id.* at 311.
679 State v. Elstad, 658 P.2d 552 (Or. Ct. App. 1983).
680 United States v. Bayer, 331 U.S. 532, 540-41 (1947).
681 *Elstad*, 470 U.S. at 311.
682 *Id.*

Miranda warnings would somehow automatically undo the psychological effect on the suspect of previously having confessed, even though those warnings do not include a statement that any previously given unwarned confessions cannot be used against him.

Justice Brennan's dissent strongly disagreed with the majority's holding that simply providing later *Miranda* warnings could dissipate the initial taint of improperly obtained confessions, and permit subsequent confessions and other evidence as the result without considering whether that taint in fact had been dissipated based on a number of objective factors.[683] He argued the majority opinion was inconsistent with the Court's own precedents, "demonstrates a startling unawareness of the realities of police interrogation," and was "completely out of tune" with the experience of federal and state courts over the preceding twenty years.[684] He further argued that simply giving *Miranda* warnings does not advise a suspect that any prior statements might not be admissible, and that therefore he need not speak out of any feeling that "he has already sealed his fate."[685] He also argued that "warnings and an informed waiver are essential to the Fifth Amendment privilege itself," and that "the use of [any] admissions obtained in the absence of the required warnings [is] a flat violation of the Self-Incrimination Clause of the Fifth Amendment."[686]

Justice Stevens' dissent also argued that the Court's power to exclude statements obtained when there had been *Miranda* violations must be based on the premise that use of such evidence violates the federal Constitution. If the Court did not accept that premise, the *Miranda* holding, as well as all of the federal jurisprudence evolving from that decision, was "nothing more than an illegitimate exercise of raw judicial power."[687]

J. Miranda *Becomes a "Constitutional Decision"*

In 2000, *Dickerson v. United States* held 7-2 that *Miranda* was a "constitutional decision."[688] In doing so, Chief Justice Rehnquist's majority opinion simply brushed aside the previously cited statements in the Court's prior decisions that the *Miranda* warnings were merely "prophylactic."[689] Accordingly, *Miranda* could not be overruled by a federal statute,[690] which in essence made

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683 *Id.* at 336 (Brennan, J., dissenting).

684 *Id.* at 324.

685 *Id.* at 337.

686 *Id.* at 349 (quoting Orozco v. Texas, 394 U.S. 324, 326 (1969)).

687 *Id.* at 371 (Stevens, J., dissenting).

688 Dickerson v. United States, 530 U.S. 428, 431 (2000).

689 *Id.* at 440.

690 18 U.S.C. § 3501 (2012). For discussion concerning the history of this statute and the events leading to *Dickerson*, see Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C. § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175 (1999).

the admissibility of in-custody statements turn solely on whether they were made voluntarily under all the circumstances.

Dickerson instead held Congress could not set aside constitutionally based rules of evidence and procedure prescribed for federal courts. It further held the Court had announced a constitutional rule in applying *Miranda* to state courts based on the U.S. Constitution and a number of references to *Miranda* itself concerning the constitutional issues then being decided.[691]

Dickerson acknowledged the previously discussed exceptions and limitations to *Miranda* stated in cases such as *Quarles* and *Elstad*. However, it did not overrule those decisions. It instead characterized them simply as "refinements" and endorsed them as being "as much a normal part of constitutional law as the original decision."[692] The opinion instead asserted *Miranda* was necessarily a constitutional decision simply because both *Miranda* itself and later cases had applied its ruling to state court prosecutions where the Supreme Court has no supervisory authority.[693]

Dickerson's statement that *Miranda* is a "constitutional decision" clearly conflicts with *Elstad*'s holding that *Miranda* warnings go beyond what the Fifth Amendment requires so that the "fruit of the poisonous tree" doctrine does not apply to *Miranda* violations.[694] *Dickerson* states *Elstad*'s refusal to apply the traditional "fruit of the poisonous tree" doctrine developed in Fourth Amendment cases "does not prove that *Miranda* is a nonconstitutional decision, but simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment."[695] However, *Dickerson* does not explain why that alleged difference exists. Justice Scalia's scathing dissent in *Dickerson* (in which Justice Thomas joined) concluded, "[t]oday's judgment converts *Miranda* from a milestone of judicial overreaching into the very Cheops' Pyramid (or perhaps the Sphinx would be a better analogue) of judicial arrogance."[696]

K. Continued Limitations on Remedies for Miranda *Violations*

Even after declaring in *Dickerson* that *Miranda* warnings were constitutionally required, the U.S. Supreme Court has continued to limit remedies for *Miranda* violations. For example, in *Chavez v. Martinez*, Martinez was "relentlessly" questioned while he was being treated for life-threatening injuries in a

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691 *Dickerson*, 530 U.S. at 439 n.4.

692 *Id.* at 441.

693 *Id.* at 438.

694 Oregon v. Elstad, 470 U.S. 298, 306 (1985).

695 *Dickerson*, 530 U.S. at 438.

696 *Id.* at 465 (Scalia, J., dissenting).

hospital emergency room after being shot five times by the police.[697] Although some of his answers were incriminating, they were never introduced against him in a criminal proceeding.[698] Martinez later filed a 42 U.S.C. §1983 action against the interrogating officer, alleging his constitutional rights were violated by subjecting him to coercive interrogation after he had been shot.[699]

The U.S. Supreme Court reversed the summary judgment for Martinez that the Ninth Circuit had affirmed. In doing so, Justice Thomas's plurality opinion held that a suspect's Fifth Amendment constitutional rights are not violated by police conduct during a coercive interrogation, but only in the event an incriminating statement is taken and introduced against him in a trial or other criminal proceeding.[700] Accordingly, police officers who simply fail to provide *Miranda* warnings could not be held liable in §1983 actions for violating a suspect's constitutional rights. However, the Court nevertheless was willing to permit a suspect to pursue a more general Fourteenth Amendment due process claim where its interpretation of the Fifth Amendment did not apply when there was police torture or other abuse resulting in a confession.[701]

Despite these limitations, the Court has remained unwilling to overrule *Miranda*'s core principles. For example, in *Missouri v. Siebert*, the Court held in 2004 that a "two-step" approach to in-custody interrogation was impermissible.[702] The police there had interrogated the suspect for about forty minutes at a police station concerning the circumstances of a fire, without providing him *Miranda* warnings.[703] After obtaining a confession, they gave those warnings, and obtained further statements.[704]

Under those circumstances, the Court limited *Elstad* to good-faith circumstances where the police might not believe the suspect was in custody or where truly voluntary initial statements were given.[705] It also refused to permit the *Miranda* rule to be frustrated where the police were permitted to undermine its meaning and effect through a "two-step" interrogation process.[706] A reasonable person in the suspect's shoes could not have understood the later warnings to convey a message that she retained a choice about continuing to talk.[707] Since the "question-first" tactic "effectively threatens to thwart *Miranda*'s pur-

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697 Chavez v. Martinez, 538 U.S. 760, 764 (2003).
698 *Id.*
699 *Id.* 764-65.
700 *Id.* at 770-79.
701 *Id.* at 773.
702 Missouri v. Siebert, 542 U.S. 600 (2004).
703 *Id.* at 604-05.
704 *Id.*
705 *Id.* at 614-17.
706 *Id.* at 609-17.
707 *Id.* at 616-17.

pose of reducing the risk that a coerced confession would be admitted," the post-warning statements were held inadmissible.[708]

Despite *Dickerson*'s holding that the *Miranda* warnings are based on constitutional principles, on the same day the Court decided *Missouri v. Siebert*, it held 5-4 in *United States v. Patane* that the "fruit of the poisonous tree" doctrine did not apply so as to exclude a pistol from evidence about which the police had learned as the result of an unwarned statement in violation of *Miranda*.[709] Justice Thomas's plurality opinion there distinguished between not admitting an unwarned confession against the defendant and admitting other evidence obtained as the result. It instead stated that *Miranda* rights are not violated when unwarned statements are taken, even if doing so is deliberate, but only when such statements are admitted into evidence.[710]

The Court therefore held exclusion of unwarned statements at trial based on failure to give *Miranda* warnings provided a "complete and sufficient" remedy for that violation.[711] However, it acknowledged that the Court nevertheless requires "exclusion of the physical fruit of actually coerced statements."[712] That holding clearly makes *Miranda* warnings a second-class constitutional principle. It also greatly reduces any deterrent effect on interrogations of requiring that *Miranda* warnings be given by refusing to suppress any evidence obtained when they have not.

Justice Souter's dissenting opinion, with which Justices Stevens and Ginsburg joined, stated, "[t]here is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained."[713] Justice Breyer also would have extended the "fruit of the poisonous tree" approach to exclude physical evidence resulting from *Miranda* violations unless failure to provide *Miranda* warnings was in good faith.[714]

Three recent Supreme Court cases confirm substantial disagreements still exist within the U.S. Supreme Court concerning *Miranda*'s interpretation and effect. For example, the required specificity of *Miranda* warnings was arguably diluted in *Florida v. Powell*.[715] Justice Ginsburg's majority opinion there held that the warnings given in that case, that the suspect has "the right to talk to a lawyer before answering any of the [officers'] questions and that he can

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[708] *Id.* at 617.
[709] United States v. Patane, 542 U.S. 630 (2004).
[710] *Id.* at 641.
[711] *Id.* at 643.
[712] *Id.* at 644.
[713] *Id.* at 647 (Souter, J., dissenting).
[714] *Id.* at 647-48 (Breyer, J., dissenting).
[715] Florida v. Powell, 130 S.Ct. 1195 (2010).

invoke this right "at any time . . . during the interview," satisfied *Miranda*'s requirements. In doing so, the Court held that no precise formulation of *Miranda* warnings is required. The inquiry instead is simply whether the warnings reasonably conveyed to a suspect his rights as required by *Miranda.*[716] The Court therefore held the suspect did not have to be warned expressly that he had the right to a lawyer during questioning.

In *Maryland v. Shatzer*, Justice Scalia's majority opinion held that the presumption of involuntariness with respect to subsequent confessions established in *Edwards v. Arizona* ended where there was a "break in the chain of circumstances" caused by the suspect being returned to a general prison population for at least fourteen days after he initially had declined to speak without an attorney.[717] Such a "break" was held to end any coercive effect of prior in-custody interrogation. Accordingly, the police were later able to reinitiate interrogation, read the suspect his *Miranda* rights and obtain confessions that would be admissible in evidence. In so holding, the Court stated that the previously discussed prohibition on police reopening interrogations provided by *Edwards* was not a constitutional mandate; it was instead merely a judicially prescribed "prophylaxis" that had to be justified by its purpose.[718]

Finally, Justice Kennedy's 5-4 majority opinion in *Berghuis v. Thompkins* held that a suspect's mere silence during a three-hour in-custody interrogation, after he was initially warned of his *Miranda* rights, did not invoke his right to remain silent.[719] Instead, the suspect would have to invoke that right "unambiguously" by affirmatively stating that he wanted to do so to prevent use of statements he later made as the police continued their interrogation.[720] That opinion also stated that a later waiver of *Miranda* rights could be made "implicitly,"[721] following *North Carolina v. Butler*.[722] Although *Miranda* warnings must be formally given, waivers of *Miranda* rights need not be formally given. Instead, they may be inferred under all the circumstances based on the accused's actions and words.[723]

Justice Sotomayor's dissenting opinion argued forcefully that the State had not sustained its substantial burden of showing that the suspect's implied waiver was voluntary, that a suspect should not be required to speak to guard

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716 *Id.* at 1204. Both *California v. Prysock*, 453 U.S. 355 (1981), and *Duckworth v. Eagan*, 492 U.S. 195 (1989), also had previously held *Miranda* warnings may be adequate even if they are not given in the exact form described in that decision.

717 Maryland v. Shatzer, 130 S.Ct. 1213 (2010).

718 *Id.* at 1220.

719 Berghuis v. Thompkins, 130 S.Ct. 2250 (2010).

720 *Id.* at 2259.

721 *Id.* at 2261.

722 North Carolina v. Butler, 441 U.S. 369 (1979).

723 *Berghuis*, 130 S.Ct. at 2263.

his right to remain silent, and that a valid waiver cannot be presumed simply because a confession was in fact obtained. She concluded, "[t]oday's decision turns *Miranda* upside down."[724]

XII. WHERE DOES *Miranda* NOW STAND?

A recent computer search found more than 5000 articles in legal publications somehow involving or referring to *Miranda*. Sampling those articles leads to various conclusions concerning whether or to what extent *Miranda* has had any continuing effect.

For example, a 1996 *Northwestern University Law Review* article by Prof. Stephen J. Schulhofer found that in the immediate post-*Miranda* period the best evidence of lost convictions was only 0.78 percent, and its impact on then-current conviction rates for practical purposes was "essentially nil."[725] Accordingly, he concludes:

> For those concerned with the "bottom line," Miranda may appear to be a mere symbol. But the symbolic effects of criminal procedure safeguards are important. Those guarantees help shape the self-conception and define the role of conscientious police professionals; they underscore our constitutional commitment to restraint in an area in which emotions easily run uncontrolled . . . . Miranda is—and deserves to be—here to stay.[726]

Professor Yale Kamisar, whose articles were cited in the *Miranda* opinion and who has written extensively concerning constitutional criminal procedure issues, is less optimistic. He concludes in a 2006 article, "*Dickerson* spared *Miranda* the death penalty. But four years later, when *Patane* was decided, *Miranda* took a bullet to the body."[727]

Based on current police practices and court decisions, a 2008 *California Law Review* article by Professor Charles D. Weisselberg argues, "there never was evidence to show that a system of warnings and waivers could actually protect Fifth Amendment rights as the justices expected. . . . [S]ince *Miranda* was decided, the Supreme Court has effectively encouraged police practices that have gutted Miranda's safeguards, to the extent those safeguards ever truly existed. The best evidence now shows that, as a protective device, Miranda is

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[724] *Id.* at 2278 (Sotomayor, J., dissenting).

[725] Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L .REV. 500, 506 (1996).

[726] *Id.* at 562-63.

[727] Yale Kamisar, *Miranda's Reprieve*: *How Rehnquist Spared the Landmark Confession Case, but Weakened Its Impact*, A.B.A. J., June 2006, at 48, 51.

largely dead."[728] Professor Weisselberg concludes, "Miranda's protections are more mythic than real. At some point, myth must yield to reality . . . . We now know that a set of bright-line rules is not a panacea for issues endemic in police interrogation."[729]

A 2010 *American Bar Association Journal* article by Liane L. Jackson discussing *Powell*, *Schatzer*, and *Berghuis* concludes the Supreme Court is "continuing to slice off pieces of the famous 1966 criminal rights case, *Miranda v. Arizona*."[730] That article also quotes Giovanna Shay of Western New England College School of Law as stating, "*Miranda* is culturally significant . . . . But whether it keeps people from talking—that's an empirical question that still raises doubt."[731]

A 2010 *Wall Street Journal* article by Steven R. Shapiro, ACLU's legal director, states that while Chief Justice Rehnquist stated in *Dickerson* that *Miranda* "has become embedded in routine police practice to the point where the warnings have become part of our national culture," based on the *Berghuis* decision, "[u]nfortunately, it appears that the current Supreme Court no longer holds *Miranda* in such high regard."[732]

A newspaper article reporting on *Berghuis* also states that it "shifted the balance in favor of the police and against the suspect [by requiring that the suspect speak up and say he does not want to talk] . . . . Some experts on police questioning said the court's subtle shift on *Miranda vs. Arizona* will be felt in station houses across the country."[733]

Finally, with respect to *Miranda*'s practical effect, a 2006 *Arizona Attorney* article by retired Maricopa County Superior Court Judge Robert L. Gottsfield concludes:

> It is noted in the literature that the police obtain waivers of *Miranda* rights in the "overwhelming majority" of cases. Once they do, "*Miranda* offers very little, if any, meaningful protection." As a practical matter, if a suspect waives his *Miranda* rights, all his resulting answers are admissible at trial. Moreover, those in the trenches can attest to the fact that while suspects who talk to police may cut off questioning or

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728 Charles D. Weisselberg, *Mourning Miranda*, 96 CAL. L.REV. 1519, 1521 (2008).

729 *Id.* at 1599.

730 Liane J. Jackson, *Turning* Miranda *'Upside Down'?*, A.B.A. J., Sept. 2010, at 20.

731 *Id.* at 21.

732 Steven R. Shapiro, *The* Thompkins *Decision: A Threat to Civil Liberties*, WALL ST. J. (June 8, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748704764404575286931630242298.

733 David G. Savage, *Supreme Court Loosens* Miranda *Ruling*, ARIZ. REPUBLIC (June 2, 2010, 12:00 AM), http://www.azcentral.com/news/articles/20100602scotus-miranda0602.html.

> ask for a lawyer at any time, they "almost never do." Once police comply with *Miranda* and there is a valid waiver, "It is extremely difficult to establish that any resulting confession was 'involuntary.'" It also "has the effect of minimizing the scrutiny courts give police officer interrogation practices following the waiver."[734]

XIII. CONCLUSION

Miranda provided a judicial high-water mark for recognizing and protecting criminal suspects' Fifth and Sixth Amendment constitutional rights in state court cases. In retrospect, requiring warnings but not requiring that counsel be present prior to any custodial interrogations, may appear formalistic, altruistic, or naive in light of actual police interrogation practices and real-world custodial situations involving suspects having limited education and knowledge concerning their rights. Alternatively, it might be considered a deliberate policy choice to preserve the use of confessions in the criminal justice process.

The *Miranda* warnings' stated purpose was not necessarily to preclude all custodial confessions. Instead, such confessions could be admitted into evidence only after the police made suspects affirmatively aware of their constitutional rights and sustained a "heavy burden" of obtaining voluntary waivers before obtaining any confessions. That compromise provided a a path for the police to follow in obtaining admissible confessions following custodial interrogations, without requiring lawyers to be present in all instances to advise suspects to remain silent.

The more recent cases discussed in this article confirm that neither the police nor the conservative Supreme Court justices who succeeded the Warren Court majority in *Miranda* have ever fully accepted the spirit of its requirements, or extended its requirements and remedies beyond what was absolutely required by its core holdings. The Court's liberal vs. conservative philosophical disagreements have continued down to the present, as new justices are appointed to replace those who die or retire. Later conservative majorities have successfully limited *Miranda*'s application without being able or willing to overrule the decision itself. *Dickerson* can be seen as ratifying the compromise *Miranda* established as a constitutional principle. However, as shown in more recent cases, disagreements have continued concerning *Miranda*'s requirements and limitations.

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[734] Robert L. Gottsfield, *Is* Miranda *Still With Us?*, ARIZ. ATT'Y, Dec. 2006, at 12, 18 (footnotes omitted).

Later Supreme Court decisions confirm police interrogations have continued to attempt to evade *Miranda*'s requirements. Those decisions also have limited applications of *Miranda's* principles and thereby encouraged such practices. Those limitations include: limiting definitions of in-custody interrogation, allowing later confessions in evidence made after initial illegally obtained confessions were obtained, permitting in-custody interrogations to be interrupted by other circumstances so they can resume with a clean slate, limiting the remedy for illegally obtained confessions to prohibiting use of the confessions themselves as evidence, holding that the "fruit of the poisonous tree" and "cat out of the bag" doctrines do not apply to evidence obtained because of illegally obtained confessions, and holding there is no Civil Rights Act remedy for coercive interrogations.

It may well be that *Miranda* has not resulted in having many confessions being excluded. Giving *Miranda* warnings also may simply legitimize later confessions without any further inquiry based on courts' willingness to find suspects' constitutional rights were validly waived by giving the required warnings. However, *Miranda* remains at least a symbolic victory of great general importance for recognizing criminal suspects' constitutional rights. To the extent police interrogation practices have improved and become more professional, suspects are warned concerning their constitutional rights, and they voluntarily and knowledgeably waive those rights before confessing, *Miranda* has continuing value. In light of all the resulting history discussed throughout this article, one cannot help but speculate about what might have occurred had Robert Cocoran not telephoned John Flynn in June 1965 to ask that he take Ernesto Miranda's case.[735]

[735] See *supra* note 269 and related text.