

Criminal Procedure: A Free Law School Casebook

Volume Two
Second Edition

Ben Trachtenberg

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Volume 2

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Dedication

We dedicate this book to our students, our colleagues, and our families, as well as to all who support the mission of America's public law schools.

Acknowledgements

From Ben Trachtenberg

First and foremost, I thank Joanna Trachtenberg for marrying me, agreeing to move with me to Missouri, and being a far better spouse than I could possibly deserve. I also thank Akiva and Shoshana Trachtenberg, who remind me of the importance of justice to the world.

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From Anne Alexander

I am most thankful to my husband Marc, whose support and love keeps me grounded in a way that helps me accomplish my dreams. I also thank our twin daughters, Lilly and Sydney Alexander; their perseverance and search for equality motivate me to ask the hard questions.

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From Ben Trachtenberg & Anne Alexander

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Date & Edition

The first edition of this book was compiled and released for the fall semester of 2018, and the book was used again during the spring 2019 semester. With a brief supplement (and no significant revisions), the book was republished for 2019-2020.

The book was then substantially revised and was released by the CALI eLangdell® Press for use during the 2020-2021 year and beyond. This 2022 edition is an update of the 2020 book. Page numbers in this edition will not match those of previous versions.

Due to page limitations for printing, this book has been divided into two parts. Volume 1 contained the first 21 chapters. This is Volume 2 and it starts with Chapter 22.

Students should purchase both volumes of this printed casebook for a traditional law school course.

Notices

This is the second eLangdell® Press edition of this casebook, published July 2022. Visit <https://elangdell.cali.org/> for the latest version and for revision history.

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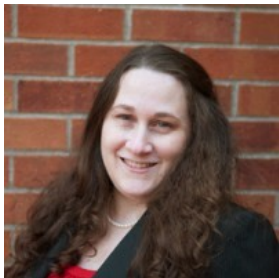


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SUMMARY OF CONTENTS

Chapters 1-21 are in Volume 1. Volume 2 starts with Interrogation at Chapter 22.

INTERROGATIONS.....	476
DUE PROCESS AND THE VOLUNTARINESS REQUIREMENT	476
THE <i>MIRANDA</i> RULE	497
HOW WELL MUST OFFICERS ADMINISTER THE <i>MIRANDA</i> WARNINGS?	510
THE ENDURANCE OF <i>MIRANDA</i> IN THE FACE OF CRITICISM	516
THE <i>MIRANDA</i> RULE: WHAT IS CUSTODY?	520
THE PRACTICAL CONSEQUENCES OF THE <i>MIRANDA</i> RULE	536
THE <i>MIRANDA</i> RULE: WHAT IS INTERROGATION?	539
THE <i>MIRANDA</i> RULE: WAIVER OF RIGHTS.....	551
WHAT COUNTS AS AN UNAMBIGUOUS INVOCATION OF <i>MIRANDA</i> RIGHTS?	575
INVOCATION OF THE RIGHT TO SILENCE	583
INVOCATION OF THE RIGHT TO COUNSEL.....	587
THE <i>MIRANDA</i> RULE: EXCEPTIONS.....	605
THE SIXTH AMENDMENT: THE <i>MASSIAH</i> DOCTRINE	625
DOUBLE JEOPARDY AND THE “OFFENSE-SPECIFIC” SIXTH AMENDMENT	640
WHEN HAS THE RIGHT TO COUNSEL ATTACHED?.....	647
THE SIXTH AMENDMENT: <i>MASSIAH</i> DOCTRINE & WAIVER OF RIGHTS	648
WAIVER OF RIGHTS UNDER THE ASSISTANCE OF COUNSEL CLAUSE	660
INTERROGATION FLOWCHART EXERCISE.....	669
INTERROGATION REVIEW	670
THE EXCLUSIONARY RULE.....	671
INTRODUCTION TO THE EXCLUSIONARY RULE	671
WHEN DOES THE EXCLUSIONARY RULE APPLY?	688
EXCLUSIONARY RULE: STANDING AND EXCEPTIONS	709
WHO CAN INVOKE THE EXCLUSIONARY RULE?.....	709
EXCEPTIONS TO THE EXCLUSIONARY RULE.....	715
EXCLUSIONARY RULE: APPLICATION TO THE <i>MIRANDA</i> RULE.....	733
THE BASICS OF SUPPRESSION HEARINGS.....	756
AN INTRODUCTION TO THE AVAILABILITY OF MONETARY DAMAGES	761
THE RIGHT TO COUNSEL	778
INTRODUCTION TO THE RIGHT TO COUNSEL AND INEFFECTIVE ASSISTANCE.....	778
INEFFECTIVE ASSISTANCE OF COUNSEL	783
SELF-REPRESENTATION AND MORE ON INEFFECTIVE ASSISTANCE	798
SELF-REPRESENTATION BY CRIMINAL DEFENDANTS	811
IDENTIFICATIONS	821
IDENTIFICATIONS AND THE RIGHT TO COUNSEL	821
IDENTIFICATIONS AND DUE PROCESS	841
BEST PRACTICES AND MODERN STATE COURT APPROACHES	864
CONFRONTING NEW CHALLENGES	887
ELECTRONIC SURVEILLANCE, TORTURE, AND THE “WAR ON TERROR”.....	887

TABLE OF CONTENTS

CHAPTER 22	476
DUE PROCESS AND THE VOLUNTARINESS REQUIREMENT	476
<i>Ed Brown v. Mississippi</i>	476
<i>E.E. Ashcraft v. Tennessee</i>	478
<i>Frank Andrew Payne v. Arkansas</i>	480
<i>Vincent Joseph Spano v. New York</i>	482
<i>Arizona v. Oreste C. Fulminante</i>	487
<i>Colorado v. Francis Barry Connelly</i>	492
CHAPTER 23	497
THE <i>MIRANDA</i> RULE	497
<i>Ernesto A. Miranda v. State of Arizona</i>	497
HOW WELL MUST OFFICERS ADMINISTER THE <i>MIRANDA</i> WARNINGS?	510
<i>California v. Randall James Prysock</i>	510
<i>Jack R. Duckworth v. Gary James Eagan</i>	513
THE ENDURANCE OF <i>MIRANDA</i> IN THE FACE OF CRITICISM	516
<i>Charles Thomas Dickerson v. United States</i>	516
CHAPTER 24	520
THE <i>MIRANDA</i> RULE: WHAT IS CUSTODY?	520
<i>Oregon v. Carl Ray Mathiason</i>	520
<i>J.D.B. v. North Carolina</i>	523
<i>Harry J. Berkemer, Sheriff of Franklin County, Ohio v. Richard N. McCarty</i>	531
THE PRACTICAL CONSEQUENCES OF THE <i>MIRANDA</i> RULE	536
CHAPTER 25	539
THE <i>MIRANDA</i> RULE: WHAT IS INTERROGATION?.....	539
<i>Rhode Island v. Thomas J. Innis</i>	539
<i>Illinois v. Lloyd Perkins</i>	546
THE <i>MIRANDA</i> RULE: WAIVER OF RIGHTS.....	551
<i>North Carolina v. Willie Thomas Butler</i>	551
<i>Colorado v. John Leroy Spring</i>	555
CHAPTER 26	561
<i>John Moran v. Brian K. Burbine</i>	561
<i>Mary Berghuis v. Van Chester Thomkins</i>	568
WHAT COUNTS AS AN UNAMBIGUOUS INVOCATION OF <i>MIRANDA</i> RIGHTS?	575
<i>Robert L. Davis v. United States</i>	575
CHAPTER 27	583
INVOCATION OF THE RIGHT TO SILENCE	583
<i>Michigan v. Richard Bert Mosley</i>	583
INVOCATION OF THE RIGHT TO COUNSEL.....	587
<i>Robert Edwards v. Arizona</i>	587
<i>Robert S. Minnick v. Mississippi</i>	591
<i>Maryland v. Michael Blaine Shatzer, Sr.</i>	598
CHAPTER 28	605
THE <i>MIRANDA</i> RULE: EXCEPTIONS.....	605
<i>Viven Harris v. New York</i>	605
<i>New York v. Benjamin Quarles</i>	608

<i>Pennsylvania v. Inocencio Muniz</i>	617
CHAPTER 29	625
THE SIXTH AMENDMENT: THE MASSIAH DOCTRINE	625
<i>Winston Massiah v. United States</i>	625
<i>Lou V. Brewer v. Robert Anthony Williams</i>	630
DOUBLE JEOPARDY AND THE “OFFENSE-SPECIFIC” SIXTH AMENDMENT	640
<i>Texas v. Raymond Levi Cobb</i>	642
WHEN HAS THE RIGHT TO COUNSEL ATTACHED?.....	647
CHAPTER 30	648
THE SIXTH AMENDMENT: MASSIAH DOCTRINE & WAIVER OF RIGHTS	648
<i>United States v. Billy Gale Henry</i>	648
<i>R.H. Kuhlmann v. Joseph Allan Wilson</i>	655
WAIVER OF RIGHTS UNDER THE ASSISTANCE OF COUNSEL CLAUSE	660
<i>Jesse Jay Montejo v. Louisiana</i>	660
INTERROGATION FLOWCHART EXERCISE.....	669
INTERROGATION REVIEW	670
CHAPTER 31	671
INTRODUCTION TO THE EXCLUSIONARY RULE	671
<i>Fremont Weeks v. United States</i>	672
<i>Dollree Mapp v. Ohio</i>	676
CHAPTER 32	688
WHEN DOES THE EXCLUSIONARY RULE APPLY?.....	688
<i>Booker T. Hudson, Jr. v. Michigan</i>	688
<i>Bennie Dean Herring v. United States</i>	694
<i>Willie Gene Davis v. United States</i>	701
CHAPTER 33	709
EXCLUSIONARY RULE: STANDING AND EXCEPTIONS	709
WHO CAN INVOKE THE EXCLUSIONARY RULE?.....	709
<i>Rakas v. Illinois</i>	709
<i>Minnesota v. Wayne Thomas Carter</i>	713
EXCEPTIONS TO THE EXCLUSIONARY RULE.....	715
<i>Michael F. Murray v. United States</i>	715
<i>Richard Brown v. Illinois</i>	720
<i>Utah v. Edward Joseph Strieff</i>	726
CHAPTER 34	733
EXCLUSIONARY RULE: APPLICATION TO THE MIRANDA RULE.....	733
<i>Michigan v. Thomas W. Tucker</i>	733
<i>Oregon v. Michael James Elstad</i>	737
<i>Missouri v. Patrice Seibert</i>	746
<i>United States v. Samuel Francis Patane</i>	752
CHAPTER 35	756
THE BASICS OF SUPPRESSION HEARINGS.....	756
AN INTRODUCTION TO THE AVAILABILITY OF MONETARY DAMAGES.....	761
<i>Andrew Kisela v. Amy Hughes</i>	763
CHAPTER 36	778

INTRODUCTION TO THE RIGHT TO COUNSEL AND INEFFECTIVE ASSISTANCE.....	778
<i>Clarence Earl Gideon v. Louie L. Wainwright</i>	778
INEFFECTIVE ASSISTANCE OF COUNSEL	783
<i>Charles E. Strickland v. David Leroy Washington</i>	783
CHAPTER 37	798
SELF-REPRESENTATION AND MORE ON INEFFECTIVE ASSISTANCE	798
<i>Missouri v. Galin E. Frye</i>	798
SELF-REPRESENTATION BY CRIMINAL DEFENDANTS	811
<i>Indiana v. Ahmad Edwards</i>	814
CHAPTER 38.....	821
IDENTIFICATIONS AND THE RIGHT TO COUNSEL	821
<i>United States v. Billy Joe Wade</i>	821
<i>Jesse James Gilbert v. California</i>	828
<i>Thomas Kirby v. Illinois</i>	831
<i>United States v. Charles J. Ash, Jr.</i>	834
CHAPTER 39.....	841
IDENTIFICATIONS AND DUE PROCESS	841
<i>Thomas Earl Simmons v. United States</i>	842
<i>Walter B. Foster v. California</i>	845
<i>William S. Neil v. Archie Nathaniel Biggers</i>	848
<i>John R. Manson v. Nowell A. Brathwaite</i>	851
<i>Barion Perry v. New Hampshire</i>	858
CHAPTER 40.....	864
BEST PRACTICES AND MODERN STATE COURT APPROACHES	864
<i>State of Connecticut v. Brady Guilbert</i>	864
<i>State of New Jersey v. Larry R. Henderson</i>	869
CHAPTER 41	887
ELECTRONIC SURVEILLANCE, TORTURE, AND THE “WAR ON TERROR”	887
<i>United States v. U.S. District Court for the Eastern District of Michigan</i>	887
<i>Clapper v. Amnesty International USA</i>	896

CASES

Arar v. Ashcroft, 585 F.3d 559 (2nd Cir. 2009)	906
Argersinger v. Hamlin, 407 U.S. 25 (1972)	781
Arizona v. Fulminante, 499 U.S. 279 (1991)	487
Arizona v. Mauro, 481 U.S. 520 (1987)	546
Arizona v. Roberson, 486 U.S. 675 (1988)	590, 640
Ashcraft v. Tennessee, 322 U.S. 143 (1944)	478
Baldwin v. New York, 399 U.S. 66 (1970)	782
Berghuis v. Thomkins, 560 U.S. 370 (2010)	568
Berkemer v. McCarty, 468 U.S. 420 (1984)	531, 616
Betts v. Brady, 316 U.S. 455 (1942)	778, 779
Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971)	762
Blockburger v. United States, 284 U.S. 299 (1932)	640, 644
Boumediene v. Bush, 553 U.S. 723 (2008)	906
Bowers v. Hardwick, 478 U.S. 186 (1986)	529
Brady v. Maryland, 373 U.S. 83 (1963)	768, 771, 774
Bram v. United States, 168 U.S. 532 (1897)	478
Brendlin v. California, 551 U.S. 249 (2007)	530, 714
Brewer v. Williams, 430 U.S. 387 (1977)	630, 651, 671, 719
Brown v. Illinois, 422 U.S. 590 (1975)	720
Buckley v. Fitzsimmons, 509 U.S. 259 (1993)	768
Byrd v. United States, 138 S.Ct. 1518 (2018)	712
California v. Prysock, 453 U.S. 355 (1981)	510
City of Riverside v. Rivera, 477 U.S. 561 (1986)	762
Clapper v. Amnesty International USA, 568 U.S. 398 (2013)	896
Coleman v. Alabama, 399 U.S. 1 (1970)	782
Colorado v. Connelly, 479 U.S. 157 (1986)	492
Colorado v. Spring, 479 U.S. 564 (1987)	555, 568
Connecticut v. Guilbert, 49 A.3d 705 (Conn. 2012)	864
Connick v. Thompson, 563 U.S. 51 (2011)	769
Cuyler v. Sullivan, 446 U.S. 335 (1980)	786
Davis v. United States, 512 U.S. 452 (1994)	575
Davis v. United States, 564 U.S. 229 (2011)	701
Debs v. United States, 249 U.S. 211 (1919)	905
Delaware v. Prouse, 440 U.S. 648 (1979)	530
Dickerson v. United States, 530 U.S. 428 (2000)	516, 747
Douglas v. California, 372 U.S. 353 (1963)	504
Drope v. Missouri, 420 U.S. 162 (1975)	816
Duckworth v. Eagan, 492 U.S. 195 (1989)	513
Dusky v. United States, 362 U.S. 402 (1960)	816
Edwards v. Arizona, 451 U.S. 477, (1981)	575, 581, 587, 592, 595, 598, 663
Egbert v. Boule, 142 S. Ct. 457 (2021)	762
Elkins v. United States, 364 U.S. 206 (1960)	686
Escobedo v. State of Illinois, 378 U.S. 478 (1964)	823
Faretta v. California, 422 U.S. 806 (1975)	811, 819
Florida v. Nixon, 543 U.S. 175 (2004)	804
Foster v. California, 394 U.S. 440 (1969)	845
Franks v. Delaware, 438 U.S. 154 (1978)	757
Gamble v. United States, 139 S. Ct. 1960 (2019)	641
Gideon v. Wainwright, 372 U.S. 335 (1963)	504, 778
Gilbert v. California, 388 U.S. 263 (1967)	828, 831
Godinez v. Moran, 509 U.S. 389 (1993)	816, 819
Hamdi v. Rumsfeld, 542 U.S. 507 (2004)	906
Harris v. New York, 401 U.S. 222 (1971)	605
Hernandez v. Mesa, 140 S. Ct. 735 (U.S. 2020)	762
Herring v. United States, 555 U.S. 135 (2009)	694

Hill v. Lockhart, 474 U.S. 52 (1985)	799
Hinton v. Alabama, 571 U.S. 263 (2014)	811
Hudson v. Michigan, 547 U.S. 586 (2006).....	688, 762
Illinois v. Krull, 480 U.S. 340 (1987)	696
Illinois v. Perkins, 496 U.S. 292 (1990)	546, 616
Indiana v. Edwards, 554 U.S. 164 (2008)	814
J.D.B. v. North Carolina, 564 U.S. 261 (2011).....	523
Jones v. United States, 362 U.S. 257 (1960)	714
Kirby v. Illinois, 406 U.S. 682 (1972)	831
Kisela v. Hughes, 138 S.Ct. 1148 (2018)	763
Korematsu v. United States, 323 U.S. 214 (1944).....	905
Kuhlmann v. Wilson, 477 U.S. 436 (1986).....	655
Lawrence v. Texas, 539 U.S. 558 (2003).....	529
Lego v. Twomey, 404 U.S. 477 (1972)	478, 756
Lisbena v. California, 314 U.S. 219 (1941).....	486
Manson v. Brathwaite, 432 U.S. 98 (1977).....	851, 861
Mapp v. Ohio, 367 U.S. 643 (1961)	676, 760
Marbury v. Madison, 5 U.S. 137 (1803).....	519
Maryland v. Shatzer, 559 U.S. 98 (2010)	598
Massiah v. United States, 377 U.S. 201 (1964)	625, 634, 638, 648, 650, 653, 657, 823
McCoy v. Louisiana, 138 S.Ct. 1500 (2018).....	804
McNeil v. Wisconsin, 501 U.S. 171 (1991).....	640
Michigan v. Jackson, 475 U.S. 625 (1986)	660, 662, 666
Michigan v. Mosley, 423 U.S. 96 (1975)	583, 590
Michigan v. Tucker, 417 U.S. 433 (1974).....	733
Minnesota v. Carter, 525 U.S. 83 (1998).....	713
Minnesota v. Olson, 495 U.S. 91 (1990)	712
Minnick v. Mississippi, 498 U.S. 146 (1990)	591
Missouri v. Frye, 566 U.S. 134 (2012)	798
Missouri v. Seibert, 542 U.S. 600 (2004)	746
Montejo v. Louisiana, 556 U.S. 778 (2009)	660
Moran v. Burbine, 475 U.S. 412 (1986)	561
Murray v. United States, 487 U.S. 533 (1988)	715
Neil v. Biggers, 409 U.S. 188 (1972)	848, 851
New York v. Quarles, 467 U.S. 649 (1984).....	608
Nix v. Williams, 467 U.S. 431 (1984).....	719
North Carolina v. Butler, 441 U.S. 369 (1979)	551, 561, 573
Oregon v. Elstad, 470 U.S. 298 (1985).....	737, 749
Oregon v. Mathiason, 429 U.S. 492 (1977)	520
Padilla v. Kentucky, 559 U.S. 356 (2010).....	799
Payne v. Arkansas, 356 U.S. 560 (1958).....	480
Pennsylvania v. Muniz, 496 U.S. 582 (1990)	617
People v. Defore, 150 N.E. 585 (N.Y. 1926).....	678
Perry v. New Hampshire, 565 U.S. 228 (2012).....	858, 864
Powell v. Alabama, 287 U.S. 45 (1932).....	633, 778, 812, 823
Rakas v. Illinois, 439 U.S. 128 (1978).....	709
Rasul v. Bush, 542 U.S. 466 (2004)	906
Rhode Island v. Innis, 446 U.S. 291 (1980)	539, 639
Rompilla v. Beard, 545 U.S. 374 (2005).....	811
Rothgery v. Gillespie County, 554 U.S. 191 (2008)	647, 782
Rumsfeld v. Padilla, 542 U.S. 426 (2004).....	906
Segura v. United States, 468 U.S. 796 (1984)	715
Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).....	675
Simmons v. United States, 390 U.S. 377 (1968)	756, 761, 842
Spano v. New York, 360 U.S. 315 (1959)	482, 626
State v. Henderson, 27 A.3d 872 (N.J. 2011)	869
State v. Batts, 195 P.3d 144 (2008).....	607

State v. Demesme, 228 So.3d 1206 (La. 2017).....	581
Stovall v. Denno, 388 U.S. 293 (1967).....	841, 851, 861
Strickland v. Washington, 466 U.S. 668 (1984)	783, 799
Texas v. Cobb, 532 U.S. 162 (2001)	640, 642
United States v. Ash, 413 U.S. 300 (1973).....	834
United States v. Beltran-Gutierrez, 19 F.3d 1287, 1290–91 (9th Cir. 1994).....	761
United States v. Cronin, 466 U.S. 648 (1984)	796
United States v. Geraldo, 271 F.3d 1112, 1116 (D.C. Cir. 2001).	761
United States v. Henry, 447 U.S. 264 (1980).....	648, 657, 659
United States v. Leon, 468 U.S. 897 (1984)	736
United States v. Montana, 958 F.2d 516, 518 (2d Cir. 1992)	546
United States v. Patane, 542 U.S. 630 (2004)	752
United States v. United States Dist. Ct., 407 U.S. 297 (1972)	887, 897
United States v. Wade, 388 U.S. 218 (1967)	821, 828, 831
Utah v. Strieff, 136 S.Ct. 2056 (2016).....	726
Vega v. Tekoh, 142 S. Ct. 858 (2022)	768
Weeks v. United States, 232 U.S. 383 (1914)	626, 672, 677
Wiggins v. Smith, 539 U.S. 510 (2003)	811
Wolf v. Colorado, 338 U.S. 25 (1949).....	677, 682
Wong Sun v. United States, 371 U.S. 471 (1963).....	720, 722, 729
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)	904

INTERROGATIONS

Chapter 22

Due Process and the Voluntariness Requirement

In this chapter we begin our study of how the Court has used the Constitution to regulate interrogations. Over the next several chapters, we will review three main lines of cases: (1) those decided under the Due Process Clauses of the Fourteenth Amendment and the Fifth Amendment, which the Court has used to require that only “voluntary” confessions be admitted as evidence, (2) those decided under the Self-Incrimination Clause of the Fifth Amendment, which the Court has used as the basis for the *Miranda* Rule, and (3) those decided under the Assistance of Counsel Clause of the Sixth Amendment, which the Court has used to prohibit certain questioning of defendants for whom the right to counsel has “attached.”

We begin with cases enforcing the voluntariness requirement under the Due Process Clauses. Our first case, *Brown v. Mississippi*, appeared in the reading for our first chapter and students may wish to quickly reread the facts of the case if they do not remember them. In that chapter, *Brown* was presented to provide background on why the Supreme Court might feel the need to supervise the criminal justice systems of the states. Now, we consider it again to learn the substantive law governing interrogations.

Supreme Court of the United States.

Ed Brown v. Mississippi

Decided Feb. 17, 1936 – [297 U.S. 278](#)

Mr. Chief Justice HUGHES delivered the opinion of the [unanimous] Court.

The question in this case is whether convictions, which rest solely upon confessions shown to have been extorted by officers of the state by brutality and violence, are consistent with the due process of law required by the Fourteenth Amendment of the Constitution of the United States.

Petitioners were indicted for the murder of one Raymond Stewart, whose death occurred on March 30, 1934. They were indicted on April 4, 1934, and were then arraigned and pleaded not guilty. Counsel were appointed by the court to defend them. Trial was begun the next morning and was concluded on the following day, when they were found guilty and sentenced to death.

Aside from the confessions, there was no evidence sufficient to warrant the submission of the case to the jury. After a preliminary inquiry, testimony as to the confessions was received over the objection of defendants’ counsel. Defendants then testified that the confessions were false and had been procured by physical torture.

[D]efendants filed in the Supreme Court a “suggestion of error” explicitly challenging the proceedings of the trial, in the use of the confessions and with respect to the alleged denial of

representation by counsel, as violating the due process clause of the Fourteenth Amendment of the Constitution of the United States. The state court entertained the suggestion of error, considered the federal question, and decided it against defendants' contentions.

The grounds of the decision were (1) that immunity from self-incrimination is not essential to due process of law; and (2) that the failure of the trial court to exclude the confessions after the introduction of evidence showing their incompetency, in the absence of a request for such exclusion, did not deprive the defendants of life or liberty without due process of law; and that even if the trial court had erroneously overruled a motion to exclude the confessions, the ruling would have been mere error reversible on appeal, but not a violation of constitution right.

The state court said: "After the state closed its case on the merits, the appellants, for the first time, introduced evidence from which it appears that the confessions were not made voluntarily but were coerced." There is no dispute as to the facts upon this point. It is sufficient to say that in pertinent respects the transcript reads more like pages torn from some medieval account than a record made within the confines of a modern civilization which aspires to an enlightened constitutional government.

[The Court then quoted portions of the state court dissent:]

"[T]he solemn farce of hearing the free and voluntary confessions was gone through with, and these two sheriffs and one other person then present were the three witnesses used in court to establish the so-called confessions, which were received by the court and admitted in evidence over the objections of the defendants duly entered of record as each of the said three witnesses delivered their alleged testimony. There was thus enough before the court when these confessions were first offered to make known to the court that they were not, beyond all reasonable doubt, free and voluntary; and the failure of the court then to exclude the confessions is sufficient to reverse the judgment, under every rule of procedure that has heretofore been prescribed, and hence it was not necessary subsequently to renew the objections by motion or otherwise."

"The defendants were brought to the courthouse ... and the so-called trial was opened, and was concluded on the next day, ... and resulted in a pretended conviction with death sentences. The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence, a peremptory instruction to find for the defendants would have been inescapable."

[T]he trial [] is a mere pretense where the state authorities have contrived a conviction resting solely upon confessions obtained by violence. The due process clause requires "that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.

In the instant case, the trial court was fully advised by the undisputed evidence of the way in which the confessions had been procured. The trial court knew that there was no other evidence upon which conviction and sentence could be based. Yet it proceeded to permit conviction and to pronounce sentence. The conviction and sentence were void for want of the essential elements

of due process, and the proceeding thus vitiated could be challenged in any appropriate manner. It was challenged before the Supreme Court of the State by the express invocation of the Fourteenth Amendment. That court entertained the challenge, considered the federal question thus presented, but declined to enforce petitioners' constitutional right. The court thus denied a federal right fully established and specially set up and claimed, and the judgment must be reversed.

* * *

The Court has stated that “when a confession challenged as involuntary is sought to be used against a criminal defendant at his trial ... the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.” *Lego v. Twomey*, [404 U.S. 477](#), 489 (1972); *see also Bram v. United States*, [168 U.S. 532](#), 555 (1897) (recalling with approval English precedent to the effect “that it was the duty of the prosecutor to satisfy the trial judge that the confession had not been obtained by improper means, and that, where it was impossible to collect from the proof whether such was the case or not, the confession ought not to be received”).

Unfortunately, while the facts in *Brown v. Mississippi* are horrific, it was not the only case in which the Court found it necessary to reverse a conviction based upon an involuntary confession. Indeed, in reciting the facts of the next case, the Court referred to “the usual pattern” of testimony concerning the treatment of a suspect.

Supreme Court of the United States

E.E. Ashcraft v. Tennessee

Decided May 1, 1944 – [322 U.S. 143](#)

Mr. Justice BLACK delivered the opinion of the Court.

[Petitioner E.E. Ashcraft's wife was found murdered. The state presented evidence that during interrogation, Ashcraft—a white man—suggested that John Ware—a Black man—was the killer and had acted alone. The state's evidence also included a subsequent confession by Ashcraft that he hired Ware to kill Mrs. Ashcraft.]

We proceed therefore to consider the evidence relating to the circumstances out of which the alleged confession[] came.

The officers first talked to Ashcraft about 6 P.M. on the day of his wife's murder as he was returning home from work. Informed by them of the tragedy, he was taken to an undertaking establishment to identify her body which previously had been identified only by a driver's license. From there he was taken to the county jail where he conferred with the officers until about 2 A.M. No clues of ultimate value came from this conference, though it did result in the officers' holding and interrogating the Ashcrafts' maid and several of her friends. During the following week the officers made extensive investigations in Ashcraft's neighborhood and elsewhere and further conferred with Ashcraft himself on several occasions, but none of these activities produced tangible evidence pointing to the identity of the murderer.

Then, early in the evening of Saturday, June 14, the officers came to Ashcraft's home and "took him into custody." In the words of the Tennessee Supreme Court, "They took him to an office or room on the northwest corner of the fifth Floor of the Shelby County jail. This office is equipped with all sorts of crime and detective devices such as a fingerprint outfit, cameras, high-powered lights, and such other devices as might be found in a homicide investigating office. ... It appears that the officers placed Ashcraft at a table in this room on the fifth floor of the county jail with a light over his head and began to quiz him. They questioned him in relays until the following Monday morning, June 16, 1941, around nine-thirty or ten o'clock. It appears that Ashcraft from Saturday evening at seven o'clock until Monday morning at approximately nine-thirty never left this homicide room of the fifth floor."

Testimony of the officers shows that the reason they questioned Ashcraft "in relays" was that they became so tired they were compelled to rest. But from 7:00 Saturday evening until 9:30 Monday morning Ashcraft had no rest. One officer did say that he gave the suspect a single five minutes respite, but except for this five minutes the procedure consisted of one continuous stream of questions.

As to what happened in the fifth-floor jail room during this thirty-six hour secret examination the testimony follows the usual pattern and is in hopeless conflict. Ashcraft swears that the first thing said to him when he was taken into custody was, "Why in hell did you kill your wife?"; that during the course of the examination he was threatened and abused in various ways; and that as the hours passed his eyes became blinded by a powerful electric light, his body became weary, and the strain on his nerves became unbearable. The officers, on the other hand, swear that throughout the questioning they were kind and considerate. They say that they did not accuse Ashcraft of the murder until four hours after he was brought to the jail building, though they freely admit that from that time on their barrage of questions was constantly directed at him on the assumption that he was the murderer. Together with other persons whom they brought in on Monday morning to witness the culmination of the thirty-six hour ordeal the officers declare that at that time Ashcraft was "cool", "calm", "collected," "normal"; that his vision was unimpaired and his eyes not bloodshot; and that he showed no outward signs of being tired or sleepy.

As to whether Ashcraft actually confessed there is a similar conflict of testimony. Ashcraft maintains that although the officers incessantly attempted by various tactics of intimidation to entrap him into a confession, not once did he admit knowledge concerning or participation in the crime. And he specifically denies the officers' statements that he accused Ware of the crime, insisting that in response to their questions he merely gave them the name of Ware as one of several men who occasionally had ridden with him to work. The officers' version of what happened, however, is that about 11 P.M. on Sunday night, after twenty-eight hours' constant questioning, Ashcraft made a statement that Ware had overpowered him at his home and abducted the deceased, and was probably the killer. About midnight the officers found Ware and took him into custody, and, according to their testimony, Ware made a self-incriminating statement as of early Monday morning, and at 5:40 A.M. signed by mark a written confession in which appeared the statement that Ashcraft had hired him to commit the murder. This alleged confession of Ware was read to Ashcraft about six o'clock Monday morning, whereupon Ashcraft is said substantially to have admitted its truth in a detailed statement taken down by a reporter. About 9:30 Monday morning a transcript of Ashcraft's purported statement was read to him.

The State's position is that he affirmed its truth but refused to sign the transcript, saying that he first wanted to consult his lawyer. As to this latter 9:30 episode the officers' testimony is reinforced by testimony of the several persons whom they brought in to witness the end of the examination.

In reaching our conclusion as to the validity of Ashcraft's confession we do not resolve any of the disputed questions of fact relating to the details of what transpired within the confession chamber of the jail or whether Ashcraft actually did confess. Such disputes, we may say, are an inescapable consequence of secret inquisitorial practices. And always evidence concerning the inner details of secret inquisitions is weighted against an accused, particularly where, as here, he is charged with a brutal crime, or where, as in many other cases, his supposed offense bears relation to an unpopular economic, political, or religious cause.

Our conclusion is that if Ashcraft made a confession it was not voluntary but compelled. We reach this conclusion from facts which are not in dispute at all. Ashcraft, a citizen of excellent reputation, was taken into custody by police officers. Ten days' examination of the Ashcrafts' maid, and of several others, in jail where they were held, had revealed nothing whatever against Ashcraft. Inquiries among his neighbors and business associates likewise had failed to unearth one single tangible clue pointing to his guilt. For thirty-six hours after Ashcraft's seizure during which period he was held incommunicado, without sleep or rest, relays of officers, experienced investigators, and highly trained lawyers questioned him without respite. From the beginning of the questioning at 7 o'clock on Saturday evening until 6 o'clock on Monday morning Ashcraft denied that he had anything to do with the murder of his wife. And at a hearing before a magistrate about 8:30 Monday morning Ashcraft pleaded not guilty to the charge of murder which the officers had sought to make him confess during the previous thirty-six hours.

We think a situation such as that here shown by uncontradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear. It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.

* * *

As was true of *Brown v. Mississippi* and *Tennessee v. Ashcraft*, our next case not only has unpleasant facts, but also required the Supreme Court to overrule a state court of last resort which had affirmed a conviction.

Supreme Court of the United States
Frank Andrew Payne v. Arkansas

Decided May 19, 1958 – [356 U.S. 560](#)

Mr. Justice WHITTAKER delivered the opinion of the Court.

Near 6:30 p.m. on October 4, 1955, J. M. Robertson, an elderly retail lumber dealer in the City of Pine Bluff, Arkansas, was found in his office dead or dying from crushing blows inflicted upon his head. More than \$450 was missing from the cash drawer. Petitioner, a 19-year-old [Black man] with a fifth-grade education,¹ who had been employed by Robertson for several weeks, was suspected of the crime. He was interrogated that night at his home by the police, but they did not then arrest him. Near 11 a.m. the next day, October 5, he was arrested.

Petitioner was held incommunicado without any charge against him from the time of his arrest at 11 a.m. on October 5 until after his confession on the afternoon of October 7, without counsel, advisor or friend being permitted to see him. Members of his family who sought to see him were turned away, because the police did not “make it a practice of letting anyone talk to [prisoners] while they are being questioned.” Two of petitioner’s brothers and three of his nephews were, to his knowledge, brought by the police to the city jail and questioned during the evening of petitioner’s arrest, and one of his brothers was arrested and held in jail overnight. Petitioner asked permission to make a telephone call but his request was denied.

Petitioner was not given lunch after being lodged in the city jail on October 5, and missed the evening meal on that day because he was then being questioned in the office of the chief of police. Near 6:30 the next morning, October 6, he was taken by the police, without breakfast, and also without shoes or socks, on a trip to Little Rock, a distance of about 45 miles, for further questioning and a lie detector test, arriving there about 7:30 a.m. He was not given breakfast in that city, but was turned over to the state police who gave him a lie detector test and questioned him for an extended time not shown in the record. At about 1 p.m. that day he was given shoes and also two sandwiches—the first food he had received in more than 25 hours. He was returned to the city jail in Pine Bluff at about 6:30 that evening—too late for the evening meal—and placed in a cell on the second floor. The next morning, October 7, he was given breakfast—which, except for the two sandwiches he had been given at Little Rock at 1 p.m. the day before, was the only food he had received in more than 40 hours.

We come now to an even more vital matter. Petitioner testified, concerning the conduct that immediately induced his confession, as follows: “I was locked up upstairs and Chief Norman Young came up [about 1 p.m. on October 7] and told me that I had not told him all of the story—he said that there was 30 or 40 people outside that wanted to get me, and he said if I would come in and tell him the truth that he would probably keep them from coming in.” When again asked what the chief of police had said to him on that occasion petitioner testified: “Chief Norman Young said thirty or forty people were outside wanting to get in to me and he asked me if I wanted to make a confession he would try to keep them out.” The chief of police, on cross-examination, admitted that he had made the substance of that statement to petitioner, and had told him that he would be permitted to confess to the chief “in private.” In this setting, petitioner immediately agreed to make a statement to the chief. The chief then took petitioner to his private office, and almost immediately after arriving at that place there was a knock on the door. The chief opened the door and stepped outside, leaving the door ajar, and petitioner heard him say “He is fixing to confess now,’ and he would like to have me alone.” Petitioner did not know what persons or

¹ [Footnote 4 by the Court] Petitioner was mentally dull and “slow to learn” and was in the fifth grade when he became 15 years of age. Because of his age he was arbitrarily promoted to the seventh grade and soon thereafter quit school.

how many were outside the door. The chief re-entered his office and began questioning petitioner who orally confessed that he had committed the crime. Thereupon Sergeant Halsell of the State Police and Sheriff Norton were admitted to the room, and under questioning by Sergeant Halsell petitioner gave more details concerning the crime. Soon afterward a court reporter was called in and several businessmen were also admitted to the room. Sergeant Halsell then requisitioned petitioner and the questions and answers were taken by the reporter in shorthand. After being transcribed by the reporter, the typed transcription was returned to the room about 3 p.m. and was read and signed to petitioner and witnessed by the officers and businessmen referred to. Thus the “confession” was obtained.

That petitioner was not physically tortured affords no answer to the question whether the confession was coerced, for “[t]here is torture of mind as well as body; the will is as much affected by fear as by force. ... A confession by which life becomes forfeit must be the expression of free choice.” The undisputed evidence in this case shows that petitioner, a mentally dull 19-year-old youth, (1) was arrested without a warrant, (2) was denied a hearing before a magistrate at which he would have been advised of his right to remain silent and of his right to counsel, as required by Arkansas statutes, (3) was not advised of his right to remain silent or of his right to counsel, (4) was held incommunicado for three days, without counsel, advisor or friend, and though members of his family tried to see him they were turned away, and he was refused permission to make even one telephone call, (5) was denied food for long periods, and, finally, (6) was told by the chief of police “that there would be 30 or 40 people there in a few minutes that wanted to get him,” which statement created such fear in petitioner as immediately produced the “confession.” It seems obvious from the totality of this course of conduct, and particularly the culminating threat of mob violence, that the confession was coerced and did not constitute an “expression of free choice,” and that its use before the jury, over petitioner’s objection, deprived him of “that fundamental fairness essential to the very concept of justice,” and, hence, denied him due process of law, guaranteed by the Fourteenth Amendment.

* * *

The next case demonstrates that coercive interrogations were by no means limited to the American South. Further, to find that a confession was not voluntary, the Court does not require evidence of physical mistreatment of a suspect.

Supreme Court of the United States
Vincent Joseph Spano v. New York
Decided June 22, 1959 – [360 U.S. 315](#)

Mr. Chief Justice WARREN delivered the opinion of the Court.

This is another in the long line of cases presenting the question whether a confession was properly admitted into evidence under the Fourteenth Amendment. As in all such cases, we are forced to resolve a conflict between two fundamental interests of society; its interest in prompt and efficient law enforcement, and its interest in preventing the rights of its individual members from being abridged by unconstitutional methods of law enforcement. Because of the delicate nature of the constitutional determination which we must make, we cannot escape the

responsibility of making our own examination of the record.

The State's evidence reveals the following: Petitioner Vincent Joseph Spano is a derivative citizen of this country, having been born in Messina, Italy. He was 25 years old at the time of the shooting in question and had graduated from junior high school. He had a record of regular employment. The shooting took place on January 22, 1957.

On that day, petitioner was drinking in a bar. The decedent, a former professional boxer weighing almost 200 pounds who had fought in Madison Square Garden, took some of petitioner's money from the bar. Petitioner followed him out of the bar to recover it. A fight ensued, with the decedent knocking petitioner down and then kicking him in the head three or four times. Shock from the force of these blows caused petitioner to vomit. After the bartender applied some ice to his head, petitioner left the bar, walked to his apartment, secured a gun, and walked eight or nine blocks to a candy store where the decedent was frequently to be found. He entered the store in which decedent, three friends of decedent, at least two of whom were ex-convicts, and a boy who was supervising the store were present. He fired five shots, two of which entered the decedent's body, causing his death. The boy was the only eyewitness; the three friends of decedent did not see the person who fired the shot. Petitioner then disappeared for the next week or so.

On February 1, 1957, the Bronx County Grand Jury returned an indictment for first-degree murder against petitioner. Accordingly, a bench warrant was issued for his arrest, commanding that he be forthwith brought before the court to answer the indictment, or, if the court had adjourned for the term, that he be delivered into the custody of the Sheriff of Bronx County.

On February 3, 1957, petitioner called one Gaspar Bruno, a close friend of 8 or 10 years' standing who had attended school with him. Bruno was a fledgling police officer, having at that time not yet finished attending police academy. According to Bruno's testimony, petitioner told him "that he took a terrific beating, that the deceased hurt him real bad and he dropped him a couple of times and he was dazed; he didn't know what he was doing and that he went and shot at him." Petitioner told Bruno that he intended to get a lawyer and give himself up. Bruno relayed this information to his superiors.

The following day, February 4, at 7:10 p.m., petitioner, accompanied by counsel, surrendered himself to the authorities in front of the Bronx County Building, where both the office of the Assistant District Attorney who ultimately prosecuted his case and the court-room in which he was ultimately tried were located. His attorney had cautioned him to answer no questions, and left him in the custody of the officers. He was promptly taken to the office of the Assistant District Attorney and at 7:15 p.m. the questioning began, being conducted by Assistant District Attorney Goldsmith, Lt. Gannon, Detectives Farrell, Lehrer and Motta, and Sgt. Clarke. The record reveals that the questioning was both persistent and continuous. Petitioner, in accordance with his attorney's instructions, steadfastly refused to answer. Detective Motta testified: "He refused to talk to me." "He just looked up to the ceiling and refused to talk to me." Detective Farrell testified:

"Q. And you started to interrogate him? A. That is right.

"Q. What did he say? A. He said 'you would have to see my attorney. I tell you nothing but my name.'

“Q. Did you continue to examine him? A. Verbally, yes, sir.”

He asked one officer, Detective Ciccone, if he could speak to his attorney, but that request was denied. Detective Ciccone testified that he could not find the attorney’s name in the telephone book.² He was given two sandwiches, coffee and cake at 11 p.m.

At 12:15 a.m. on the morning of February 5, after five hours of questioning in which it became evident that petitioner was following his attorney’s instructions, on the Assistant District Attorney’s orders petitioner was transferred to the 46th Squad, Ryer Avenue Police Station. The Assistant District Attorney also went to the police station and to some extent continued to participate in the interrogation. Petitioner arrived at 12:30 and questioning was resumed at 12:40. The character of the questioning is revealed by the testimony of Detective Farrell:

“Q. Who did you leave him in the room with? A. With Detective Lehrer and Sergeant Clarke came in and Mr. Goldsmith came in or Inspector Halk came in. It was back and forth. People just came in, spoke a few words to the defendant or they listened a few minutes and they left.”

But petitioner persisted in his refusal to answer, and again requested permission to see his attorney, this time from Detective Lehrer. His request was again denied.

It was then that those in charge of the investigation decided that petitioner’s close friend, Bruno, could be of use. He had been called out on the case around 10 or 11 p.m., although he was not connected with the 46th Squad or Precinct in any way. Although, in fact, his job was in no way threatened, Bruno was told to tell petitioner that petitioner’s telephone call had gotten him “in a lot of trouble,” and that he should seek to extract sympathy from petitioner for Bruno’s pregnant wife and three children. Bruno developed this theme with petitioner without success, and petitioner, also without success, again sought to see his attorney, a request which Bruno relayed unavailingly to his superiors. After this first session with petitioner, Bruno was again directed by Lt. Gannon to play on petitioner’s sympathies, but again no confession was forthcoming. But the Lieutenant a third time ordered Bruno falsely to importune his friend to confess but again petitioner clung to his attorney’s advice. Inevitably, in the fourth such session directed by the Lieutenant, lasting a full hour, petitioner succumbed to his friend’s prevarications and agreed to make a statement. Accordingly, at 3:25 a.m. the Assistant District Attorney, a stenographer, and several other law enforcement officials entered the room where petitioner was being questioned, and took his statement in question and answer form with the Assistant District Attorney asking the questions. The statement was completed at 4:05 a.m.

But this was not the end. At 4:30 a.m. three detectives took petitioner to Police Headquarters in Manhattan. On the way they attempted to find the bridge from which petitioner said he had thrown the murder weapon. They crossed the Triborough Bridge into Manhattan, arriving at Police Headquarters at 5 a.m., and left Manhattan for the Bronx at 5:40 a.m. via the Willis Avenue Bridge. When petitioner recognized neither bridge as the one from which he had thrown the weapon, they re-entered Manhattan via the Third Avenue Bridge, which petitioner stated

² [Footnote 1 by the Court] How this could be so when the attorney’s name, Tobias Russo, was concededly in the telephone book does not appear. The trial judge sustained objections by the Assistant District Attorney to questions designed to delve into this mystery.

was the right one, and then returned to the Bronx well after 6 a.m. During that trip the officers also elicited a statement from petitioner that the deceased was always “on [his] back,” “always pushing” him and that he was “not sorry” he had shot the deceased. All three detectives testified to that statement at the trial.

At the trial, the confession was introduced in evidence over appropriate objections. The jury was instructed that it could rely on it only if it was found to be voluntary. The jury returned a guilty verdict and petitioner was sentenced to death. The New York Court of Appeals affirmed the conviction over three dissents, and we granted certiorari to resolve the serious problem presented under the Fourteenth Amendment.

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves. Accordingly, the actions of police in obtaining confessions have come under scrutiny in a long series of cases. Those cases suggest that in recent years law enforcement officials have become increasingly aware of the burden which they share, along with our courts, in protecting fundamental rights of our citizenry, including that portion of our citizenry suspected of crime. [A]s law enforcement officers become more responsible, and the methods used to extract confessions more sophisticated, our duty to enforce federal constitutional protections does not cease. It only becomes more difficult because of the more delicate judgments to be made. Our judgment here is that, on all the facts, this conviction cannot stand.

Petitioner was a foreign-born young man of 25 with no past history of law violation or of subjection to official interrogation, at least insofar as the record shows. He had progressed only one-half year into high school and the record indicates that he had a history of emotional instability. He did not make a narrative statement, but was subject to the leading questions of a skillful prosecutor in a question and answer confession. He was subjected to questioning not by a few men, but by many. They included Assistant District Attorney Goldsmith, one Hyland of the District Attorney’s Office, Deputy Inspector Halks, Lieutenant Gannon, Detective Ciccone, Detective Motta, Detective Lehrer, Detective Marshal, Detective Farrell, Detective Leira, Detective Murphy, Detective Murtha, Sergeant Clarke, Patrolman Bruno and Stenographer Baldwin. All played some part, and the effect of such massive official interrogation must have been felt. Petitioner was questioned for virtually eight straight hours before he confessed, with his only respite being a transfer to an arena presumably considered more appropriate by the police for the task at hand. Nor was the questioning conducted during normal business hours, but began in early evening, continued into the night, and did not bear fruition until the not-too-early morning. The drama was not played out, with the final admissions obtained, until almost sunrise. In such circumstances slowly mounting fatigue does, and is calculated to, play its part. The questioners persisted in the face of his repeated refusals to answer on the advice of his attorney, and they ignored his reasonable requests to contact the local attorney whom he had already retained and who had personally delivered him into the custody of these officers in obedience to the bench warrant.

The use of Bruno, characterized in this Court by counsel for the State as a “childhood friend” of petitioner’s, is another factor which deserves mention in the totality of the situation. Bruno’s was

the one face visible to petitioner in which he could put some trust. There was a bond of friendship between them going back a decade into adolescence. It was with this material that the officers felt that they could overcome petitioner's will. They instructed Bruno falsely to state that petitioner's telephone call had gotten him into trouble, that his job was in jeopardy, and that loss of his job would be disastrous to his three children, his wife and his unborn child. And Bruno played this part of a worried father, harried by his superiors, in not one, but four different acts, the final one lasting an hour. Petitioner was apparently unaware of John Gay's famous couplet: "An open foe may prove a curse, But a pretended friend is worse," and he yielded to his false friend's entreaties.

We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these. Accordingly, we hold that petitioner's conviction cannot stand under the Fourteenth Amendment. The judgment must be reversed.

Notes, Comments, and Questions

For a case in which coercive conduct was alleged but the Court nonetheless affirmed a conviction, students should see *Lisbena v. California*, [314 U.S. 219](#) (1941). In a dissent joined by Justice Douglas, Justice Black wrote, "The testimony of the officers to whom the confession was given is enough, standing alone, to convince me that it could not have been free and voluntary." In particular, the dissent noted that "an investigator, 'slapped' the defendant whose left ear was thereafter red and swollen" and that squads of questioners took turns interviewing the defendant, in a manner similar to other cases we have seen. The majority, however, deferred to state court findings "as concerns the petitioner's claims of physical violence, threats or implied promises of leniency." Despite referring to "the violations of law involved in the treatment of the petitioner," the Court declined to find a Due Process violation. Instead, it called the case "close to the line" and held that the defendant "exhibited a self-possession, a coolness, and an acumen throughout his questioning, and at his trial, which negatives the view that he had so lost his freedom of action that the statements made were not his but were the result of the deprivation of his free choice to admit, to deny, or to refuse to answer."

These days, a promise of lenient treatment does not automatically render the ensuing confession involuntary. Instead, it is a factor to consider as part of the "totality-of-the-circumstances" test the Court applies to Due Process claims.

The next case also involved facts very close to the line that separates "voluntary" confessions from "involuntary" confessions. Note that while Justice White wrote for the Court, part of his opinion is a dissent because he could not obtain majority support.

Supreme Court of the United States

Arizona v. Oreste C. Fulminante

Decided March 26, 1991 – [499 U.S. 279](#)

Justice WHITE delivered an opinion, Parts I, II, and IV of which are the opinion of the Court, and Part III of which is a dissenting opinion.³

The Arizona Supreme Court ruled in this case that respondent Oreste Fulminante's confession, received in evidence at his trial for murder, had been coerced and that its use against him was barred by the Fifth and Fourteenth Amendments to the United States Constitution. The court also held that the harmless-error rule could not be used to save the conviction. We affirm the judgment of the Arizona court, although for different reasons than those upon which that court relied.

I

Early in the morning of September 14, 1982, Fulminante called the Mesa, Arizona, Police Department to report that his 11-year-old stepdaughter, Jeneane Michelle Hunt, was missing. He had been caring for Jeneane while his wife, Jeneane's mother, was in the hospital. Two days later, Jeneane's body was found in the desert east of Mesa. She had been shot twice in the head at close range with a large caliber weapon, and a ligature was around her neck. Because of the decomposed condition of the body, it was impossible to tell whether she had been sexually assaulted.

Fulminante's statements to police concerning Jeneane's disappearance and his relationship with her contained a number of inconsistencies, and he became a suspect in her killing. When no charges were filed against him, Fulminante left Arizona for New Jersey. Fulminante was later convicted in New Jersey on federal charges of possession of a firearm by a felon.

Fulminante was incarcerated in the Ray Brook Federal Correctional Institution in New York. There he became friends with another inmate, Anthony Sarivola, then serving a 60-day sentence for extortion. The two men came to spend several hours a day together. Sarivola, a former police officer, had been involved in loansharking for organized crime but then became a paid informant for the Federal Bureau of Investigation. While at Ray Brook, he masqueraded as an organized crime figure. After becoming friends with Fulminante, Sarivola heard a rumor that Fulminante was suspected of killing a child in Arizona. Sarivola then raised the subject with Fulminante in several conversations, but Fulminante repeatedly denied any involvement in Jeneane's death. During one conversation, he told Sarivola that Jeneane had been killed by bikers looking for drugs; on another occasion, he said he did not know what had happened. Sarivola passed this information on to an agent of the Federal Bureau of Investigation, who instructed Sarivola to find out more.

³ [Footnote [†] by the Court] Justice MARSHALL, Justice BRENNAN and Justice STEVENS join this opinion in its entirety; Justice SCALIA joins Parts I and II; and Justice KENNEDY joins Parts I and IV.

Sarivola learned more one evening in October 1983, as he and Fulminante walked together around the prison track. Sarivola said that he knew Fulminante was “starting to get some tough treatment and whatnot” from other inmates because of the rumor. Sarivola offered to protect Fulminante from his fellow inmates, but told him, “You have to tell me about it, you know. I mean, in other words, ‘For me to give you any help.’” Fulminante then admitted to Sarivola that he had driven Jeneane to the desert on his motorcycle, where he choked her, sexually assaulted her, and made her beg for her life, before shooting her twice in the head.

Sarivola was released from prison in November 1983. Fulminante was released the following May, only to be arrested the next month for another weapons violation. On September 4, 1984, Fulminante was indicted in Arizona for the first-degree murder of Jeneane.

Prior to trial, Fulminante moved to suppress the statement he had given Sarivola in prison, as well as a second confession he had given to Donna Sarivola, then Anthony Sarivola’s fiancée and later his wife, following his May 1984 release from prison. He asserted that the confession to Sarivola was coerced, and that the second confession was the “fruit” of the first. Following the hearing, the trial court denied the motion to suppress, specifically finding that, based on the stipulated facts, the confessions were voluntary. The State introduced both confessions as evidence at trial, and on December 19, 1985, Fulminante was convicted of Jeneane’s murder. He was subsequently sentenced to death.

Fulminante appealed, arguing, among other things, that his confession to Sarivola was the product of coercion and that its admission at trial violated his rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution. After considering the evidence at trial as well as the stipulated facts before the trial court on the motion to suppress, the Arizona Supreme Court held that the confession was coerced, but initially determined that the admission of the confession at trial was harmless error, because of the overwhelming nature of the evidence against Fulminante. Upon Fulminante’s motion for reconsideration, however, the court ruled that this Court’s precedent precluded the use of the harmless-error analysis in the case of a coerced confession. The court therefore reversed the conviction and ordered that Fulminante be retried without the use of the confession to Sarivola. Because of differing views in the state and federal courts over whether the admission at trial of a coerced confession is subject to a harmless-error analysis, we granted the State’s petition for certiorari. Although a majority of this Court finds that such a confession is subject to a harmless-error analysis, for the reasons set forth below, we affirm the judgment of the Arizona court.

II

We deal first with the State’s contention that the court below erred in holding Fulminante’s confession to have been coerced. In applying the totality of the circumstances test to determine that the confession to Sarivola was coerced, the Arizona Supreme Court focused on a number of relevant facts. First, the court noted that “because [Fulminante] was an alleged child murderer, he was in danger of physical harm at the hands of other inmates.” In addition, Sarivola was aware that Fulminante had been receiving “rough treatment from the guys.” Using his knowledge of these threats, Sarivola offered to protect Fulminante in exchange for a confession to Jeneane’s murder, and “[i]n response to Sarivola’s offer of protection, [Fulminante] confessed.” Agreeing with Fulminante that “Sarivola’s promise was ‘extremely coercive,’” the Arizona court declared:

“[T]he confession was obtained as a direct result of extreme coercion and was tendered in the belief that the defendant’s life was in jeopardy if he did not confess. This is a true coerced confession in every sense of the word.”

We normally give great deference to the factual findings of the state court. Nevertheless, “the ultimate issue of ‘voluntariness’ is a legal question requiring independent federal determination.” Although the question is a close one, we agree with the Arizona Supreme Court’s conclusion that Fulminante’s confession was coerced. The Arizona Supreme Court found a credible threat of physical violence unless Fulminante confessed. Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient. Accepting the Arizona court’s finding, permissible on this record, that there was a credible threat of physical violence, we agree with its conclusion that Fulminante’s will was overborne in such a way as to render his confession the product of coercion.

III⁴

Four of us, Justices MARSHALL, BLACKMUN, STEVENS, and myself, would affirm the judgment of the Arizona Supreme Court on the ground that the harmless-error rule is inapplicable to erroneously admitted coerced confessions. We thus disagree with the Justices who have a contrary view.

The majority today abandons what until now the Court has regarded as the “axiomatic [proposition] that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction.” Today, a majority of the Court, without any justification, overrules [a] vast body of precedent without a word and in so doing dislodges one of the fundamental tenets of our criminal justice system.

The search for truth is indeed central to our system of justice, but “certain constitutional rights are not, and should not be, subject to harmless-error analysis because those rights protect important values that are unrelated to the truth-seeking function of the trial.” The right of a defendant not to have his coerced confession used against him is among those rights, for using a coerced confession “abort[s] the basic trial process” and “render[s] a trial fundamentally unfair.”

For the foregoing reasons the four of us would adhere to the consistent line of authority that has recognized as a basic tenet of our criminal justice system the prohibition against using a defendant’s coerced confession against him at his criminal trial. *Stare decisis* is “of fundamental importance to the rule of law;” the majority offers no convincing reason for overturning our long line of decisions requiring the exclusion of coerced confessions.

⁴ [Footnote by editors] Note that Part III of the opinion is a dissent. Justice White would have preferred that “harmless-error” analysis never be allowed in cases involving the admission of involuntary confessions. But he could not obtain a majority for that position.

IV

Since five Justices have determined that harmless-error analysis applies to coerced confessions, it becomes necessary to evaluate under that ruling the admissibility of Fulminante's confession to Sarivola. "Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." The Court has the power to review the record *de novo* in order to determine an error's harmlessness. In so doing, it must be determined whether the State has met its burden of demonstrating that the admission of the confession to Sarivola did not contribute to Fulminante's conviction. Five of us are of the view that the State has not carried its burden and accordingly affirm the judgment of the court below reversing respondent's conviction.

A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. ... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." While some statements by a defendant may concern isolated aspects of the crime or may be incriminating only when linked to other evidence, a full confession in which the defendant discloses the motive for and means of the crime may tempt the jury to rely upon that evidence alone in reaching its decision. In the case of a coerced confession such as that given by Fulminante to Sarivola, the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

Our review of the record leads us to conclude that the State has failed to meet its burden of establishing, beyond a reasonable doubt, that the admission of Fulminante's confession to Anthony Sarivola was harmless error.

Because a majority of the Court has determined that Fulminante's confession to Anthony Sarivola was coerced and because a majority has determined that admitting this confession was not harmless beyond a reasonable doubt, we agree with the Arizona Supreme Court's conclusion that Fulminante is entitled to a new trial at which the confession is not admitted. Accordingly the judgment of the Arizona Supreme Court is [a]ffirmed.

Chief Justice REHNQUIST, with whom Justice O'CONNOR joins, Justice KENNEDY and Justice SOUTER join as to Parts I and II, and Justice SCALIA joins as to Parts II and III, delivered the opinion of the Court with respect to Part II, and a dissenting opinion with respect to Parts I and III.

The Court today properly concludes that the admission of an "involuntary" confession at trial is subject to harmless error analysis. Nonetheless, the independent review of the record which we are required to make shows that respondent Fulminante's confession was not in fact involuntary. And even if the confession were deemed to be involuntary, the evidence offered at trial, including a second, untainted confession by Fulminante, supports the conclusion that any error here was certainly harmless.

The admissibility of a confession such as that made by respondent Fulminante depends upon whether it was voluntarily made. “The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.”

In this case the parties stipulated to the basic facts at the hearing in the Arizona trial court on respondent's motion to suppress the confession. Anthony Sarivola, an inmate at the Ray Brook Prison, was a paid confidential informant for the FBI. While at Ray Brook, various rumors reached Sarivola that Oreste Fulminante, a fellow inmate who had befriended Sarivola, had killed his stepdaughter in Arizona. Sarivola passed these rumors on to his FBI contact, who told him “to find out more about it.” Sarivola, having already discussed the rumors with respondent on several occasions, asked him whether the rumors were true, adding that he might be in a position to protect Fulminante from physical recriminations in prison, but that “[he] must tell him the truth.” Fulminante then confessed to Sarivola that he had in fact killed his stepdaughter in Arizona, and provided Sarivola with substantial details about the manner in which he killed the child. At the suppression hearing, Fulminante stipulated to the fact that “[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's ‘protection.’” The trial court was also aware, through an excerpt from Sarivola's interview testimony which respondent appended to his reply memorandum, that Sarivola believed Fulminante's time was “running short” and that he would “have went out of the prison horizontally.” The trial court found that respondent's confession was voluntary.

On the basis of the record before it, the Supreme Court stated:

“Defendant contends that because he was an alleged child murderer, he was in danger of physical harm at the hands of other inmates. Sarivola was aware that defendant faced the possibility of retribution from other inmates, and that in return for the confession with respect to the victim's murder, Sarivola would protect him. Moreover, the defendant maintains that Sarivola's promise was “extremely coercive” because the ‘obvious’ inference from the promise was that his life would be in jeopardy if he did not confess. We agree.”

Exercising our responsibility to make the independent examination of the record necessary to decide this federal question, I am at a loss to see how the Supreme Court of Arizona reached the conclusion that it did. Fulminante offered no evidence that he believed that his life was in danger or that he in fact confessed to Sarivola in order to obtain the proffered protection. Indeed, he had stipulated that “[a]t no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's ‘protection.’” Sarivola's testimony that he told Fulminante that “if [he] would tell the truth, he could be protected,” adds little if anything to the substance of the parties' stipulation. The decision of the Supreme Court of Arizona rests on an assumption that is squarely contrary to this stipulation, and one that is not supported by any testimony of Fulminante.

The conversations between Sarivola and Fulminante were not lengthy, and the defendant was free at all times to leave Sarivola’s company. Sarivola at no time threatened him or demanded that he confess; he simply requested that he speak the truth about the matter. Fulminante was an experienced habitue of prisons, and presumably able to fend for himself. In concluding on these facts that Fulminante’s confession was involuntary, the Court today embraces a more expansive definition of that term than is warranted by any of our decided cases.

* * *

In *Colorado v. Connelly*, the Court considered whether a confession could be deemed “involuntary” without evidence of misconduct by any government official. In particular, the question was whether a suspect’s mental illness could make his confession involuntary for purposes of the Due Process Clause of the Fourteenth Amendment.

Supreme Court of the United States
Colorado v. Francis Barry Connelly
Decided Dec. 10, 1986 – [479 U.S. 157](#)

Chief Justice REHNQUIST delivered the opinion of the Court.

In this case, the Supreme Court of Colorado held that the United States Constitution requires a court to suppress a confession when the mental state of the defendant, at the time he made the confession, interfered with his “rational intellect” and his “free will.” Because this decision seemed to conflict with prior holdings of this Court, we granted certiorari. We conclude that the admissibility of this kind of statement is governed by state rules of evidence. We therefore reverse.

I

On August 18, 1983, Officer Patrick Anderson of the Denver Police Department was in uniform, working in an off-duty capacity in downtown Denver. Respondent Francis Connelly approached Officer Anderson and, without any prompting, stated that he had murdered someone and wanted to talk about it. Anderson immediately advised respondent that he had the right to remain silent, that anything he said could be used against him in court, and that he had the right to an attorney prior to any police questioning. Respondent stated that he understood these rights but he still wanted to talk about the murder. Understandably bewildered by this confession, Officer Anderson asked respondent several questions. Connelly denied that he had been drinking, denied that he had been taking any drugs, and stated that, in the past, he had been a patient in several mental hospitals. Officer Anderson again told Connelly that he was under no obligation to say anything. Connelly replied that it was “all right,” and that he would talk to Officer Anderson because his conscience had been bothering him. To Officer Anderson, respondent appeared to understand fully the nature of his acts.

Shortly thereafter, Homicide Detective Stephen Antuna arrived. Respondent was again advised of his rights, and Detective Antuna asked him “what he had on his mind.” Respondent answered that he had come all the way from Boston to confess to the murder of Mary Ann Junta, a young

girl whom he had killed in Denver sometime during November 1982. Respondent was taken to police headquarters, and a search of police records revealed that the body of an unidentified female had been found in April 1983. Respondent openly detailed his story to Detective Antuna and Sergeant Thomas Haney, and readily agreed to take the officers to the scene of the killing. Under Connelly's sole direction, the two officers and respondent proceeded in a police vehicle to the location of the crime. Respondent pointed out the exact location of the murder. Throughout this episode, Detective Antuna perceived no indication whatsoever that respondent was suffering from any kind of mental illness.

Respondent was held overnight. During an interview with the public defender's office the following morning, he became visibly disoriented. He began giving confused answers to questions, and for the first time, stated that "voices" had told him to come to Denver and that he had followed the directions of these voices in confessing. Respondent was sent to a state hospital for evaluation. He was initially found incompetent to assist in his own defense. By March 1984, however, the doctors evaluating respondent determined that he was competent to proceed to trial.

At a preliminary hearing, respondent moved to suppress all of his statements. Dr. Jeffrey Metzner, a psychiatrist employed by the state hospital, testified that respondent was suffering from chronic schizophrenia and was in a psychotic state at least as of August 17, 1983, the day before he confessed. Metzner's interviews with respondent revealed that respondent was following the "voice of God." This voice instructed respondent to withdraw money from the bank, to buy an airplane ticket, and to fly from Boston to Denver. When respondent arrived from Boston, God's voice became stronger and told respondent either to confess to the killing or to commit suicide. Reluctantly following the command of the voices, respondent approached Officer Anderson and confessed.

Dr. Metzner testified that, in his expert opinion, respondent was experiencing "command hallucinations." This condition interfered with respondent's "volitional abilities; that is, his ability to make free and rational choices." Dr. Metzner further testified that Connelly's illness did not significantly impair his cognitive abilities. Thus, respondent understood the rights he had when Officer Anderson and Detective Antuna advised him that he need not speak. Dr. Metzner admitted that the "voices" could in reality be Connelly's interpretation of his own guilt, but explained that in his opinion, Connelly's psychosis motivated his confession.

On the basis of this evidence the Colorado trial court decided that respondent's statements must be suppressed because they were "involuntary." The trial court also found that Connelly's mental state vitiated his attempted waiver of the right to counsel and the privilege against compulsory self-incrimination. Accordingly, respondent's initial statements and his custodial confession were suppressed. The Colorado Supreme Court affirmed.

II

[W]e [have] held that by virtue of the Due Process Clause "certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned."

Indeed, coercive government misconduct was the catalyst for this Court’s seminal confession case, *Brown v. Mississippi*. In that case, police officers extracted confessions from the accused through brutal torture. The Court had little difficulty concluding that even though the Fifth Amendment did not at that time apply to the States, the actions of the police were “revolting to the sense of justice.”

Thus the cases considered by this Court over the 50 years since *Brown v. Mississippi* have focused upon the crucial element of police overreaching. While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct. Absent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law. Respondent correctly notes that as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the “voluntariness” calculus. But this fact does not justify a conclusion that a defendant’s mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional “voluntariness.”

Our “involuntary confession” jurisprudence is entirely consistent with the settled law requiring some sort of “state action” to support a claim of violation of the Due Process Clause of the Fourteenth Amendment. The Colorado trial court, of course, found that the police committed no wrongful acts, and that finding has been neither challenged by respondent nor disturbed by the Supreme Court of Colorado. The latter court, however, concluded that sufficient state action was present by virtue of the admission of the confession into evidence in a court of the State.

The difficulty with the approach of the Supreme Court of Colorado is that it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other. The flaw in respondent’s constitutional argument is that it would expand our previous line of “voluntariness” cases into a far-ranging requirement that courts must divine a defendant’s motivation for speaking or acting as he did even though there be no claim that governmental conduct coerced his decision.

The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause. Moreover, suppressing respondent’s statements would serve absolutely no purpose in enforcing constitutional guarantees. The purpose of excluding evidence seized in violation of the Constitution is to substantially deter future violations of the Constitution. Only if we were to establish a brand new constitutional right—the right of a criminal defendant to confess to his crime only when totally rational and properly motivated—could respondent’s present claim be sustained.

We have previously cautioned against expanding “currently applicable exclusionary rules by erecting additional barriers to placing truthful and probative evidence before state juries....” We abide by that counsel now. We hold that coercive police activity is a necessary predicate to the finding that a confession is not “voluntary” within the meaning of the Due Process Clause of the Fourteenth Amendment. We also conclude that the taking of respondent’s statements, and their admission into evidence, constitute no violation of that Clause.

The judgment of the Supreme Court of Colorado is accordingly reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Today the Court denies Mr. Connelly his fundamental right to make a vital choice with a sane mind, involving a determination that could allow the State to deprive him of liberty or even life. This holding is unprecedented: “Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane...” Because I believe that the use of a mentally ill person’s involuntary confession is antithetical to the notion of fundamental fairness embodied in the Due Process Clause, I dissent.

The respondent’s seriously impaired mental condition is clear on the record of this case. At the time of his confession, Mr. Connelly suffered from a “longstanding severe mental disorder,” diagnosed as chronic paranoid schizophrenia. He had been hospitalized for psychiatric reasons five times prior to his confession; his longest hospitalization lasted for seven months. Mr. Connelly heard imaginary voices and saw nonexistent objects. He believed that his father was God, and that he was a reincarnation of Jesus.

At the time of his confession, Mr. Connelly’s mental problems included “grandiose and delusional thinking.” He had a known history of “thought withdrawal and insertion.” Although physicians had treated Mr. Connelly “with a wide variety of medications in the past including antipsychotic medications,” he had not taken any antipsychotic medications for at least six months prior to his confession. Following his arrest, Mr. Connelly initially was found incompetent to stand trial because the court-appointed psychiatrist, Dr. Metzner, “wasn’t very confident that he could consistently relate accurate information.” Dr. Metzner testified that Mr. Connelly was unable “to make free and rational choices” due to auditory hallucinations. He achieved competency to stand trial only after six months of hospitalization and treatment with antipsychotic and sedative medications.

The state trial court found that the “overwhelming evidence presented by the Defense” indicated that the prosecution did not meet its burden of demonstrating by a preponderance of the evidence that the initial statement to Officer Anderson was voluntary. The Supreme Court of Colorado affirmed after evaluating “the totality of circumstances” surrounding the unsolicited confession.

The absence of police wrongdoing should not, by itself, determine the voluntariness of a confession by a mentally ill person. The requirement that a confession be voluntary reflects a recognition of the importance of free will and of reliability in determining the admissibility of a confession, and thus demands an inquiry into the totality of the circumstances surrounding the confession.

Today’s decision restricts the application of the term “involuntary” to those confessions obtained by police coercion. Confessions by mentally ill individuals or by persons coerced by parties other than police officers are now considered “voluntary.” The Court’s failure to recognize all forms of involuntariness or coercion as antithetical to due process reflects a refusal to acknowledge free

will as a value of constitutional consequence. This right requires vigilant protection if we are to safeguard the values of private conscience and human dignity.

Since the Court redefines voluntary confessions to include confessions by mentally ill individuals, the reliability of these confessions becomes a central concern. The instant case starkly highlights the danger of admitting a confession by a person with a severe mental illness. The trial court made no findings concerning the reliability of Mr. Connelly's involuntary confession, since it believed that the confession was excludable on the basis of involuntariness. However, the overwhelming evidence in the record points to the unreliability of Mr. Connelly's delusional mind. Mr. Connelly was found incompetent to stand trial because he was unable to relate accurate information, and the court-appointed psychiatrist indicated that Mr. Connelly was actively hallucinating and exhibited delusional thinking at the time of his confession. The Court, in fact, concedes that "[a] statement rendered by one in the condition of respondent might be proved to be quite unreliable...."

Moreover, the record is barren of any corroboration of the mentally ill defendant's confession. No physical evidence links the defendant to the alleged crime. Police did not identify the alleged victim's body as the woman named by the defendant. Mr. Connelly identified the alleged scene of the crime, but it has not been verified that the unidentified body was found there or that a crime actually occurred there. There is not a shred of competent evidence in this record linking the defendant to the charged homicide. There is only Mr. Connelly's confession.

Minimum standards of due process should require that the trial court find substantial indicia of reliability, on the basis of evidence extrinsic to the confession itself, before admitting the confession of a mentally ill person into evidence. I would require the trial court to make such a finding on remand. To hold otherwise allows the State to imprison and possibly to execute a mentally ill defendant based solely upon an inherently unreliable confession.

I dissent.

* * *

In part because the Court found it difficult to regulate interrogations effectively using only the Due Process Clauses, the Justices were inspired to create the *Miranda* Rule, which imposes additional requirements on police. We turn to *Miranda* in our next chapter.

INTERROGATIONS

Chapter 23

The *Miranda* Rule

In *Miranda v. Arizona*, the Court created an entirely new method of regulating police interrogations of suspects. Rather than search the records of each case for evidence of voluntariness, the Court set forth a procedure under which law enforcement officers must—at least sometimes—inform suspects of certain constitutional rights and the potential consequences of waiving those rights. Under the new rule, the Court would presume confessions were obtained involuntarily if officers failed to follow the new procedure, and such a presumption would lead to exclusion of confessions from evidence at trial. Over the next several chapters, we will explore (1) the basics of the *Miranda* Rule, (2) how the Court has defined important terms like “custody” and “interrogation,” (3) what constitutes an effective “waiver” of rights under *Miranda*, and (4) what exceptions apply to the rule that evidence obtained in violation of *Miranda* is excluded from evidence.

Even more than *Terry v. Ohio*—which all lawyers should be able to summarize—*Miranda v. Arizona* is a case that friends and acquaintances will expect lawyers to understand. It is probably the most famous criminal procedure case ever decided, and students should form their own opinions about the doctrine it created.

Supreme Court of the United States

Ernesto A. Miranda v. State of Arizona

Decided June 13, 1966 – [384 U.S. 436](#)

Mr. Chief Justice WARREN delivered the opinion of the Court.

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

We dealt with certain phases of this problem recently in *Escobedo v. State of Illinois*, [378 U.S. 478](#) (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said “I didn’t shoot Manuel, you did it,” they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements

thus made were constitutionally inadmissible. This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago.

We start here, as we did in *Escobedo*, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the *Escobedo* decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution—that “No person ... shall be compelled in any criminal case to be a witness against himself,” and that “the accused shall ... have the Assistance of Counsel”—rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured “for ages to come, and ... designed to approach immortality as nearly as human institutions can approach it.”

Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that in this country they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time. In a series of cases decided by this Court long after these studies, the police resorted to physical brutality—beatings, hanging, whipping—and to sustained and protracted questioning incommunicado in order to extort confessions. The Commission on Civil Rights in 1961 found much evidence to indicate that 'some policemen still resort to physical force to obtain confessions.' The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party.

The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved—such as these decisions will advance—there can be no assurance that practices of this nature will be eradicated in the foreseeable future.

Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented. As we have stated before, "this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." Interrogation still takes place in privacy. Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. These texts are used by law enforcement agencies themselves as guides. It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the "principal psychological factor contributing to a successful interrogation is privacy—being alone with the person under interrogation." To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and from outward appearance to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, to cast blame on the victim or on society. These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already—that he is guilty. Explanations to the contrary are dismissed and discouraged. The texts thus stress that the major qualities an interrogator should possess are patience and perseverance. The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt.

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the “friendly-unfriendly” or the “Mutt and Jeff” act:

“... In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He’s sent a dozen men away for this crime and he’s going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics and will arrange to get him off the case if the subject will cooperate. He can’t hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand by quietly and demur at some of Mutt’s tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room.”

The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up. “The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party.” Then the questioning resumes “as though there were now no doubt about the guilt of the subject.”

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent. “This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses the subject with the apparent fairness of his interrogator.” After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect’s refusal to talk:

“Joe, you have a right to remain silent. That’s your privilege and I’m the last person in the world who’ll try to take it away from you. If that’s the way you want to leave this, O.K. But let me ask you this. Suppose you were in my shoes and I were in yours and you called me in to ask me about this and I told you, ‘I don’t want to answer any of your questions.’ You’d think I had something to hide, and you’d probably be right in thinking that. That’s exactly what I’ll have to think about you, and so will everybody else. So let’s sit here and talk this whole thing over.”

Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must “patiently maneuver himself or his quarry into a position from which the desired objective may be attained.” When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading

on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the “third degree” or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weakness of individuals.

In these cases [before us], we might not find the defendants’ statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. The current practice of incommunicado interrogation is at odds with one of our Nation’s most cherished principles—that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times.

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation. In this Court, the privilege has consistently been accorded a liberal construction. We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law-enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.

III

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to

undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the privilege which might be devised by Congress or the States in the exercise of their creative rule-making capacities. Therefore we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted. Our decision in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasingly effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws. However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the following safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent. For those unaware of the privilege, the warning is needed simply to make them aware of it—the threshold requirement for an intelligent decision as to its exercise. More important, such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere. It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. Further, the warning will show the individual that his interrogators are prepared to recognize his privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear

the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent without more "will benefit only the recidivist and the professional." Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

The presence of counsel at the interrogation may serve several significant subsidiary functions as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel.

Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us as well as the vast majority of confession cases with which we have dealt in the past involve those unable to retain counsel. While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of

indigence in the administration of justice. Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in *Gideon v. Wainwright*, [372 U.S. 335](#) (1963), and *Douglas v. California*, [372 U.S. 353](#) (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent—the person most often subjected to interrogation—the knowledge that he too has a right to have counsel present. As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it.

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

This does not mean, as some have suggested, that each police station must have a “station house lawyer” present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person’s Fifth Amendment privilege so long as they do not question him during that time.

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. This Court has always set high standards of proof for the waiver of constitutional rights, and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing 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, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney followed closely by a statement could constitute a waiver. But a valid waiver will not be

presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated.

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

IV

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the “need” for confessions. In each case authorities conducted interrogations ranging up to five days in duration despite the presence, through standard investigating practices, of considerable evidence against each defendant.

V

Because of the nature of the problem and because of its recurrent significance in numerous cases, we have to this point discussed the relationship of the Fifth Amendment privilege to police interrogation without specific concentration on the facts of the cases before us. In each instance, we have concluded that statements were obtained from the defendant under circumstances that did not meet constitutional standards for protection of the privilege.

Mr. Justice HARLAN, whom Mr. Justice STEWART and Mr. Justice WHITE join, dissenting.

I believe the decision of the Court represents poor constitutional law and entails harmful consequences for the country at large. How serious these consequences may prove to be only time can tell. But the basic flaws in the Court’s justification seem to me readily apparent now once all sides of the problem are considered.

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a fourfold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If before or during questioning the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth.

While the fine points of this scheme are far less clear than the Court admits, the tenor is quite apparent. The new rules are not designed to guard against police brutality or other unmistakably banned forms of coercion. Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers. Rather, the thrust of the new rules is to negate all pressures, to reinforce the nervous or ignorant suspect, and ultimately to discourage any confession at all. The aim in short is toward "voluntariness" in a utopian sense, or to view it from a different angle, voluntariness with a vengeance.

To incorporate this notion into the Constitution requires a strained reading of history and precedent and a disregard of the very pragmatic concerns that alone may on occasion justify such strains. I believe that reasoned examination will show that the Due Process Clauses provide an adequate tool for coping with confessions and that, even if the Fifth Amendment privilege against self-incrimination be invoked, its precedents taken as a whole do not sustain the present rules. Viewed as a choice based on pure policy, these new rules prove to be a highly debatable, if not one-sided, appraisal of the competing interests, imposed over widespread objection, at the very time when judicial restraint is most called for by the circumstances.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can in themselves exert a tug on the suspect to confess, and in this light "[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser." Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions.

The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion since, as I noted earlier, they do nothing to contain the policeman who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to

frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

Mr. Justice WHITE, with whom Mr. Justice HARLAN and Mr. Justice STEWART join, dissenting.

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment.

Only a tiny minority of our judges who have dealt with the question, including today's majority, have considered in-custody interrogation, without more, to be a violation of the Fifth Amendment. And this Court, as every member knows, has left standing literally thousands of criminal convictions that rested at least in part on confessions taken in the course of interrogation by the police after arrest.

By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination the Court has created a limited Fifth Amendment right to counsel—or, as the Court expresses it, a “need for counsel to protect the Fifth Amendment privilege”

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion—that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent. Until today, “the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence.”

Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary it may provide psychological relief and enhance the prospects for rehabilitation.

The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the incidence of confessions and pleas of guilty and to increase the number of trials. Criminal trials, no matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

In some unknown number of cases the Court's rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him. As a consequence, there will not be a gain, but a loss, in human dignity. The real concern is not the unfortunate consequences of this new decision on the criminal law as an abstract, disembodied series of authoritative proscriptions, but the impact on those who rely on the public authority for protection and who without it can only engage in violent self-help with guns, knives and the help of their neighbors similarly inclined. There is, of course, a saving factor: the next victims are uncertain, unnamed and unrepresented in this case.

Much of the trouble with the Court's new rule is that it will operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved. It applies to every defendant, whether the professional criminal or one committing a crime of momentary passion who is not part and parcel of organized crime. It will slow down the investigation and the apprehension of confederates in those cases where time is of the essence, such as kidnapping and some of those involving organized crime.

Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket which forecloses more discriminating treatment by legislative or rule-making pronouncements.

Notes, Comments, and Questions

Most students are familiar with the *Miranda* warnings, even before reading the case. Prior to a custodial interrogation, officers must inform suspects of the following:

- 1) You have the right to remain silent
- 2) Anything you say can be used against you
- 3) You have the right to an attorney
- 4) An attorney will be provided by the government if you cannot pay

Review section I of the opinion to see where these specific warnings originated.

The Court finds the Constitutional basis in the 5th Amendment; an element of informal compulsion exists in any form of custodial interrogation, and specified warnings are needed to dispel the inherent pressure of custodial interrogation. Does the Court have the power to promulgate constitutional prophylactic rules?

The *Miranda* warnings may really be a way to avoid the difficulties of case-by-case determination of compulsion. How well do you think *Miranda* warnings work in practice to (1) reduce the compulsion suspects feel during custodial interrogations; and (2) reduce courts necessity to make case-by-case determinations of compulsion.

As you can imagine, suspects continue to confess, despite receiving appropriate *Miranda* warnings. Why do you think this is?

How Well Must Officers Administer the *Miranda* Warnings?

One issue not settled by *Miranda* was how closely police interrogators would be required to deliver the precise warnings set forth by the *Miranda* majority. Would word-for-word accuracy—or at least warnings materially identical to those provided by the Court—be necessary? Because police officers are human, perfect accuracy would not be a fair standard. The real question was how far officers could stray from the Court’s language while still having their warnings count for purposes of getting confessions into evidence under *Miranda*.

Supreme Court of the United States

California v. Randall James Prysock

June 29, 1981 – [453 U.S. 355](#)

PER CURIAM.

This case presents the question whether the warnings given to respondent prior to a recorded conversation with a police officer satisfied the requirements of *Miranda v. Arizona*. Although ordinarily this Court would not be inclined to review a case involving application of that precedent to a particular set of facts, the opinion of the California Court of Appeal essentially laid down a flat rule requiring that the content of *Miranda* warnings be a virtual incantation of

the precise language contained in the *Miranda* opinion. Because such a rigid rule was not mandated by *Miranda* or any other decision of this Court, and is not required to serve the purposes of *Miranda*, we grant the motion of respondent for leave to proceed *in forma pauperis* and the petition for certiorari and reverse.

On January 30, 1978, Mrs. Donna Iris Erickson was brutally murdered. Later that evening respondent and a codefendant were apprehended for commission of the offense. Respondent was brought to a substation of the Tulare County Sheriff's Department and advised of his *Miranda* rights. He declined to talk and, since he was a minor, his parents were notified. Respondent's parents arrived and after meeting with them respondent decided to answer police questions. An officer questioned respondent, on tape, with respondent's parents present. The tape reflects that the following warnings were given prior to any questioning:

"Sgt. Byrd: ... Mr. Randall James Prysock, earlier today I advised you of your legal rights and at that time you advised me you did not wish to talk to me, is that correct?"

"Randall P.: Yeh.

"Sgt. Byrd: And, uh, during, at the first interview your folks were not present, they are now present. I want to go through your legal rights again with you and after each legal right I would like for you to answer whether you understand it or not.... Your legal rights, Mr. Prysock, is [sic] follows: Number One, you have the right to remain silent. This means you don't have to talk to me at all unless you so desire. Do you understand this?"

"Randall P.: Yeh.

"Sgt. Byrd: If you give up your right to remain silent, anything you say can and will be used as evidence against you in a court of law. Do you understand this?"

"Randall P.: Yes.

"Sgt. Byrd: You have the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?"

"Randall P.: Yes.

"Sgt. Byrd: You also, being a juvenile, you have the right to have your parents present, which they are. Do you understand this?"

"Randall P.: Yes.

"Sgt. Byrd: Even if they weren't here, you'd have this right. Do you understand this?"

"Randall P.: Yes.

“Sgt. Byrd: You all, uh,—if,—you have the right to have a lawyer appointed to represent you at no cost to yourself. Do you understand this?”

“Randall P.: Yes.

“Sgt. Byrd: Now, having all these legal rights in mind, do you wish to talk to me at this time?”

“Randall P.: Yes.”

At this point, at the request of Mrs. Prysock, a conversation took place with the tape recorder turned off. According to Sgt. Byrd, Mrs. Prysock asked if respondent could still have an attorney at a later time if he gave a statement now without one. Sgt. Byrd assured Mrs. Prysock that respondent would have an attorney when he went to court and that “he could have one at this time if he wished one.”

At trial in the Superior Court of Tulare County the court denied respondent’s motion to suppress the taped statement. Respondent was convicted by a jury of first-degree murder with two special circumstances—torture and robbery. He was also convicted of robbery with the use of a dangerous weapon, burglary with the use of a deadly weapon, automobile theft, escape from a youth facility, and destruction of evidence.

The Court of Appeal for the Fifth Appellate District reversed respondent’s convictions and ordered a new trial because of what it thought to be error under *Miranda*. The Court of Appeal ruled that respondent’s recorded incriminating statements, given with his parents present, had to be excluded from consideration by the jury because respondent was not properly advised of his right to the services of a free attorney before and during interrogation. Although respondent was indisputably informed that he had “the right to talk to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning,” and further informed that he had “the right to have a lawyer appointed to represent you at no cost to yourself,” the Court of Appeal ruled that these warnings were inadequate because respondent was not explicitly informed of his right to have an attorney appointed before further questioning. The Court of Appeal stated that “[o]ne of [*Miranda*’s] virtues is its precise requirements which are so easily met.” The California Supreme Court denied a petition for hearing, with two justices dissenting.

This Court has never indicated that the “rigidity” of *Miranda* extends to the precise formulation of the warnings given a criminal defendant. This Court and others *have* stressed as one virtue of *Miranda* the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. Nothing in these observations suggests any desirable rigidity in the *form* of the required warnings.

Quite the contrary, *Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that “[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant.”

[N]othing in the warnings given respondent suggested any limitation on the right to the presence of appointed counsel different from the clearly conveyed rights 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.”

It is clear that the police in this case fully conveyed to respondent his rights as required by *Miranda*. He was told of his right to have a lawyer present prior to and during interrogation, and his right to have a lawyer appointed at no cost if he could not afford one. These warnings conveyed to respondent his right to have a lawyer appointed if he could not afford one prior to and during interrogation. The Court of Appeal erred in holding that the warnings were inadequate simply because of the order in which they were given.

Because respondent was given the warnings required by *Miranda*, the decision of the California Court of Appeal to the contrary is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

* * *

The next case presented the Court with another deviation from the warning language set forth in *Miranda*.

Supreme Court of the United States

Jack R. Duckworth v. Gary James Eagan

Decided June 26, 1989 – [492 U.S. 195](#)

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondent confessed to stabbing a woman nine times after she refused to have sexual relations with him, and he was convicted of attempted murder. Before confessing, respondent was given warnings by the police, which included the advice that a lawyer would be appointed “if and when you go to court.” The United States Court of Appeals for the Seventh Circuit held that such advice did not comply with the requirements of *Miranda v. Arizona*. We disagree and reverse.

Late on May 16, 1982, respondent contacted a Chicago police officer he knew to report that he had seen the naked body of a dead woman lying on a Lake Michigan beach. Respondent denied any involvement in criminal activity. He then took several Chicago police officers to the beach, where the woman was crying for help. When she saw respondent, the woman exclaimed: “Why did you stab me? Why did you stab me?” Respondent told the officers that he had been with the woman earlier that night, but that they had been attacked by several men who abducted the woman in a van.

The next morning, after realizing that the crime had been committed in Indiana, the Chicago police turned the investigation over to the Hammond, Indiana, Police Department. Respondent repeated to the Hammond police officers his story that he had been attacked on the lakefront, and that the woman had been abducted by several men. After he filled out a battery complaint at a local police station, respondent agreed to go to the Hammond police headquarters for further questioning.

At about 11 a.m., the Hammond police questioned respondent. Before doing so, the police read to respondent a waiver form, entitled “Voluntary Appearance; Advice of Rights,” and they asked him to sign it. The form provided:

“Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. *You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning.* You have this right to the advice and presence of a lawyer even if you cannot afford to hire one. *We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court.* If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you’ve talked to a lawyer.”

Respondent signed the form and repeated his exculpatory explanation for his activities of the previous evening.

Respondent was then placed in the “lock up” at the Hammond police headquarters. Some 29 hours later, at about 4 p.m. on May 18, the police again interviewed respondent. Before this questioning, one of the officers read the following waiver form to respondent:

[The waiver form presented the *Miranda* warnings in a standard way.]

Respondent read the form back to the officers and signed it. He proceeded to confess to stabbing the woman. The next morning, respondent led the officers to the Lake Michigan beach where they recovered the knife he had used in the stabbing and several items of clothing.

At trial, over respondent’s objection, the state court admitted his confession, his first statement denying any involvement in the crime, the knife, and the clothing. The jury found respondent guilty of attempted murder, but acquitted him of rape. He was sentenced to 35 years’ imprisonment. The conviction was upheld on appeal.

Respondent sought a writ of habeas corpus, claiming, *inter alia*, that his confession was inadmissible because the first waiver form did not comply with *Miranda*. The District Court denied the petition, holding that the record “clearly manifests adherence to *Miranda* ... especially as to the so-called second statement.”

A divided United States Court of Appeals for the Seventh Circuit reversed. The majority held that the advice that counsel would be appointed “if and when you go to court,” which was included in the first warnings given to respondent, was “constitutionally defective because it denies an accused indigent a clear and unequivocal warning of the right to appointed counsel before any interrogation,” and “link[s] an indigent’s right to counsel before interrogation with a future event.” Turning to the admissibility of respondent’s confession, the majority thought that “as a result of the first warning, [respondent] arguably believed that he could not secure a lawyer during interrogation” and that the second warning “did not explicitly correct this misinformation.” It therefore remanded the case for a determination whether respondent had knowingly and intelligently waived his right to an attorney during the second interview.

We then granted certiorari, to resolve a conflict among the lower courts as to whether informing a suspect that an attorney would be appointed for him “if and when you go to court” renders *Miranda* warnings inadequate. We agree with the majority of the lower courts that it does not.

In *Miranda* itself, the Court said that “[t]he warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statement made by a defendant.”

We think the initial warnings given to respondent touched all of the bases required by *Miranda*. The police told respondent that he had the right to remain silent, that anything he said could be used against him in court, that he had the right to speak to an attorney before and during questioning, that he had “this right to the advice and presence of a lawyer even if [he could] not afford to hire one,” and that he had the “right to stop answering at any time until [he] talked to a lawyer.” As noted, the police also added that they could not provide respondent with a lawyer, but that one would be appointed “if and when you go to court.” The Court of Appeals thought this “if and when you go to court” language suggested that “only those accused who can afford an attorney have the right to have one present before answering any questions,” and “implied” that if the accused does not ‘go to court,’ *i.e.*[,] the government does not file charges, the accused is not entitled to [counsel] at all.”

In our view, the Court of Appeals misapprehended the effect of the inclusion of “if and when you go to court” language in *Miranda* warnings. First, this instruction accurately described the procedure for the appointment of counsel in Indiana. Under Indiana law, counsel is appointed at the defendant’s initial appearance in court, and formal charges must be filed at or before that hearing. We think it must be relatively commonplace for a suspect, after receiving *Miranda* warnings, to ask *when* he will obtain counsel. The “if and when you go to court” advice simply anticipates that question. Second, *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. The Court in *Miranda* emphasized that it was not suggesting that “each police station must have a ‘station house lawyer’ present at all times to advise prisoners.” If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel. Here, respondent did just that.

Justice MARSHALL, with whom Justice BRENNAN joins, and with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

The majority holds today that a police warning advising a suspect that he is entitled to an appointed lawyer only “if and when he goes to court” satisfies the requirements of *Miranda v. Arizona*. The majority reaches this result by seriously mischaracterizing that decision. Under *Miranda*, a police warning must “*clearly infor[m]*” a suspect taken into custody “that if he cannot afford an attorney one will be appointed for him *prior to any questioning* if he so desires.” A warning qualified by an “if and when you go to court” caveat does nothing of the kind; instead, it leads the suspect to believe that a lawyer will not be provided until some indeterminate time in the future *after questioning*. I refuse to acquiesce in the continuing debasement of this historic precedent and therefore dissent.

Notes, Comments, and Questions

The Endurance of Miranda in the Face of Criticism

In 2000, the Court considered whether to abolish the *Miranda* Rule. *Miranda* had inspired intense criticism, including from William H. Rehnquist, who had been an assistant attorney general in the Nixon administration soon after *Miranda* was decided. He wrote in 1969 that “the court is now committed to the proposition that relevant, competent, uncoerced statements of the defendant will not be admissible at his trial unless an elaborate set of warnings be given, which is very likely to have the effect of preventing a defendant from making any statement at all.” See Victor Li, “[50-Year Story of the Miranda Warning Has the Twists of a Cop Show](#),” ABA Journal (Aug. 2016). Three decades later, Rehnquist was Chief Justice of the United States, with the ability to shape constitutional law instead of merely commenting on it.

Supreme Court of the United States

Charles Thomas Dickerson v. United States

Decided June 26, 2000 – [530 U.S. 428](#)

Chief Justice REHNQUIST delivered the opinion of the Court.

In *Miranda v. Arizona*, we held that certain warnings must be given before a suspect’s statement made during custodial interrogation could be admitted in evidence. In the wake of that decision, Congress enacted 18 U.S.C. § 3501, which in essence laid down a rule that the admissibility of such statements should turn only on whether or not they were voluntarily made. We hold that *Miranda*, being a constitutional decision of this Court, may not be in effect overruled by an Act of Congress, and we decline to overrule *Miranda* ourselves. We therefore hold that *Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.

Petitioner Dickerson was indicted for bank robbery, conspiracy to commit bank robbery, and using a firearm in the course of committing a crime of violence, all in violation of the applicable provisions of Title 18 of the United States Code. Before trial, Dickerson moved to suppress a statement he had made at a Federal Bureau of Investigation field office, on the grounds that he had not received “*Miranda* warnings” before being interrogated. The District Court granted his motion to suppress, and the Government took an interlocutory appeal to the United States Court of Appeals for the Fourth Circuit. That court, by a divided vote, reversed the District Court’s suppression order. It agreed with the District Court’s conclusion that petitioner had not received *Miranda* warnings before making his statement. But it went on to hold that § 3501, which in effect makes the admissibility of statements such as Dickerson’s turn solely on whether they were made voluntarily, was satisfied in this case. It then concluded that our decision in *Miranda* was not a constitutional holding, and that, therefore, Congress could by statute have the final say on the question of admissibility.

Because of the importance of the questions raised by the Court of Appeals’ decision, we granted certiorari and now reverse.

Given § 3501's express designation of voluntariness as the touchstone of admissibility, its omission of any warning requirement, and the instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances of a confession, we agree with the Court of Appeals that Congress intended by its enactment to overrule *Miranda*. Because of the obvious conflict between our decision in *Miranda* and § 3501, we must address whether Congress has constitutional authority to thus supersede *Miranda*. If Congress has such authority, § 3501's totality-of-the-circumstances approach must prevail over *Miranda*'s requirement of warnings; if not, that section must yield to *Miranda*'s more specific requirements.

The law in this area is clear. This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals. However, the power to judicially create and enforce nonconstitutional "rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress." Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution.

But Congress may not legislatively supersede our decisions interpreting and applying the Constitution. This case therefore turns on whether the *Miranda* Court announced a constitutional rule or merely exercised its supervisory authority to regulate evidence in the absence of congressional direction. [T]he Court of Appeals concluded that the protections announced in *Miranda* are not constitutionally required.

We disagree with the Court of Appeals' conclusion, although we concede that there is language in some of our opinions that supports the view taken by that court. But first and foremost of the factors on the other side—that *Miranda* is a constitutional decision—is that both *Miranda* and two of its companion cases applied the rule to proceedings in state courts—to wit, Arizona, California, and New York. Since that time, we have consistently applied *Miranda*'s rule to prosecutions arising in state courts. It is beyond dispute that we do not hold a supervisory power over the courts of the several States. With respect to proceedings in state courts, our "authority is limited to enforcing the commands of the United States Constitution."

Additional support for our conclusion that *Miranda* is constitutionally based is found in the *Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination. After discussing the "compelling pressures" inherent in custodial police interrogation, the *Miranda* Court concluded that, "[i]n order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." However, the Court emphasized that it could not foresee "the potential alternatives for protecting the privilege which might be devised by Congress or the States," and it accordingly opined that the Constitution would not preclude legislative solutions that differed from the prescribed *Miranda* warnings but which were "at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."

Miranda requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored. [Section] 3501 explicitly eschews a requirement of preinterrogation warnings in favor of an approach that looks to the administration of such warnings as only one factor in determining the voluntariness of a

suspect's confession. The additional remedies cited by *amicus* do not, in our view, render them, together with § 3501, an adequate substitute for the warnings required by *Miranda*.

[W]e need not go further than *Miranda* to decide this case. In *Miranda*, the Court noted that reliance on the traditional totality-of-the-circumstances test raised a risk of overlooking an involuntary custodial confession, a risk that the Court found unacceptably great when the confession is offered in the case in chief to prove guilt. The Court therefore concluded that something more than the totality test was necessary. [Section] 3501 reinstates the totality test as sufficient. Section 3501 therefore cannot be sustained if *Miranda* is to remain the law.

Whether or not we would agree with *Miranda's* reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. While “*stare decisis* is not an inexorable command,” particularly when we are interpreting the Constitution, “even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification.’”

We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture. While we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, we do not believe that this has happened to the *Miranda* decision. If anything, 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 as evidence in the prosecution's case in chief.

The disadvantage of the *Miranda* rule is that statements which may be by no means involuntary, made by a defendant who is aware of his “rights,” may nonetheless be excluded and a guilty defendant go free as a result. But experience suggests that the totality-of-the-circumstances test which § 3501 seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.

In sum, we conclude that *Miranda* announced a constitutional rule that Congress may not supersede legislatively. Following the rule of *stare decisis*, we decline to overrule *Miranda* ourselves. The judgment of the Court of Appeals is therefore [r]everse.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

Those to whom judicial decisions are an unconnected series of judgments that produce either favored or disfavored results will doubtless greet today's decision as a paragon of moderation, since it declines to overrule *Miranda v. Arizona*. Those who understand the judicial process will appreciate that today's decision is not a reaffirmation of *Miranda*, but a radical revision of the most significant element of *Miranda* (as of all cases): the rationale that gives it a permanent place in our jurisprudence.

Marbury v. Madison held that an Act of Congress will not be enforced by the courts if what it prescribes violates the Constitution of the United States. That was the basis on which *Miranda* was decided. One will search today's opinion in vain, however, for a statement (surely simple enough to make) that what 18 U.S.C. § 3501 prescribes—the use at trial of a voluntary confession, even when a *Miranda* warning or its equivalent has failed to be given—violates the Constitution. The reason the statement does not appear is not only (and perhaps not so much) that it would be absurd, inasmuch as § 3501 excludes from trial precisely what the Constitution excludes from trial, viz., compelled confessions; but also that Justices whose votes are needed to compose today's majority are on record as believing that a violation of *Miranda* is *not* a violation of the Constitution. And so, to justify today's agreed-upon result, the Court must adopt a significant *new*, if not entirely comprehensible, principle of constitutional law. As the Court chooses to describe that principle, statutes of Congress can be disregarded, not only when what they prescribe violates the Constitution, but when what they prescribe contradicts a decision of this Court that “announced a constitutional rule.” [T]he only thing that can possibly mean in the context of this case is that this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful “prophylactic” restrictions upon Congress and the States. That is an immense and frightening antidemocratic power, and it does not exist.

It takes only a small step to bring today's opinion out of the realm of power-judging and into the mainstream of legal reasoning: The Court need only go beyond its carefully couched iterations that “*Miranda* is a constitutional decision,” that “*Miranda* is constitutionally based,” that *Miranda* has “constitutional underpinnings,” and come out and say quite clearly: “We reaffirm today that custodial interrogation that is not preceded by *Miranda* warnings or their equivalent violates the Constitution of the United States.” It cannot say that, because a majority of the Court does not believe it. The Court therefore acts in plain violation of the Constitution when it denies effect to this Act of Congress.

I dissent from today's decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary.

Notes, Comments, and Questions

When given the opportunity, the Court did not overrule *Miranda*. Do you agree that *Miranda* warnings should still be required? Why or why not?

Our next chapters explore two important questions left open by *Miranda*—how the Court would define “custody” and how it would define “interrogation.” Because the *Miranda* Rule applies only during “custodial interrogation,” each of these definitions is essential to applying the rule.

INTERROGATIONS

Chapter 24

The *Miranda* Rule: What Is Custody?

The *Miranda* Rule applies only during “custodial interrogation.” Therefore, unless a suspect is both (1) “in custody” and (2) being “interrogated,” police need not provide the warnings described in *Miranda*. In this chapter, we consider how the Court has defined “custody” in cases applying the *Miranda* Rule. We also review some of the literature evaluating the practical effects of the doctrine on suspects and police.

In *Miranda*, the Court wrote: “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Subsequent cases, however, have strayed from the expansive definition of “custody” implied by the words “deprived of his freedom of action in any significant way.”

Students should note that the definition of “custody” under *Miranda* differs from the definition of a “seizure” for Fourth Amendment purposes. In other words, a person can be “seized” (or “detained”) but not be in a situation in which *Miranda* warnings are required before police may begin interrogation. Yet Fourth Amendment law remains a useful touchstone because if a person is not “seized”—that is, if a reasonable person in her situation would have felt free to leave—then it will be difficult to argue that she was “in custody” for *Miranda* purposes.

Supreme Court of the United States

Oregon v. Carl Ray Mathiason

Jan. 25, 1977 – [429 U.S. 492](#)

PER CURIAM.

Respondent Carl Mathiason was convicted of first-degree burglary after a bench trial in which his confession was critical to the State’s case. At trial he moved to suppress the confession as the fruit of questioning by the police not preceded by the warnings required in *Miranda v. Arizona*. The trial court refused to exclude the confession because it found that Mathiason was not in custody at the time of the confession.

The Oregon Court of Appeals affirmed respondent’s conviction, but on his petition for review in the Supreme Court of Oregon that court by a divided vote reversed the conviction. It found that although Mathiason had not been arrested or otherwise formally detained, “the interrogation took place in a ‘coercive environment’” of the sort to which *Miranda* was intended to apply. The State of Oregon has petitioned for certiorari to review the judgment of the Supreme Court of Oregon. We think that court has read *Miranda* too broadly, and we therefore reverse its judgment.

The Supreme Court of Oregon described the factual situation surrounding the confession as follows:

“An officer of the State Police investigated a theft at a residence near Pendleton. He asked the lady of the house which had been burglarized if she suspected anyone. She replied that the defendant was the only one she could think of. The defendant was a parolee and a ‘close associate’ of her son. The officer tried to contact defendant on three or four occasions with no success. Finally, about 25 days after the burglary, the officer left his card at defendant’s apartment with a note asking him to call because ‘I’d like to discuss something with you.’ The next afternoon the defendant did call. The officer asked where it would be convenient to meet. The defendant had no preference; so the officer asked if the defendant could meet him at the state patrol office in about an hour and a half, about 5:00 p.m. The patrol office was about two blocks from defendant’s apartment. The building housed several state agencies.”

“The officer met defendant in the hallway, shook hands and took him into an office. The defendant was told he was not under arrest. The door was closed. The two sat across a desk. The police radio in another room could be heard. The officer told defendant he wanted to talk to him about a burglary and that his truthfulness would possibly be considered by the district attorney or judge. The officer further advised that the police believed defendant was involved in the burglary and (falsely stated that) defendant’s fingerprints were found at the scene. The defendant sat for a few minutes and then said he had taken the property. This occurred within five minutes after defendant had come to the office. The officer then advised defendant of his *Miranda* rights and took a taped confession.”

“At the end of the taped conversation the officer told defendant he was not arresting him at this time; he was released to go about his job and return to his family. The officer said he was referring the case to the district attorney for him to determine whether criminal charges would be brought. It was 5:30 p.m. when the defendant left the office.”

“The officer gave all the testimony relevant to this issue. The defendant did not take the stand either at the hearing on the motion to suppress or at the trial.”

Our decision in *Miranda* set forth rules of police procedure applicable to “custodial interrogation.” “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Subsequently we have found the *Miranda* principle applicable to questioning which takes place in a prison setting during a suspect’s term of imprisonment on a separate offense, and to questioning taking place in a suspect’s home, after he has been arrested and is no longer free to go where he pleases.

In the present case, however, there is no indication that the questioning took place in a context where respondent’s freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody “or otherwise deprived of his freedom of action in any significant way.”

Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a “coercive environment.” Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. *Miranda* warnings are required only where there has been such a restriction on a person’s freedom as to render him “in custody.” It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited.

The officer’s false statement about having discovered Mathiason’s fingerprints at the scene was found by the Supreme Court of Oregon to be another circumstance contributing to the coercive environment which makes the *Miranda* rationale applicable. Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule.

The petition for certiorari is granted, the judgment of the Oregon Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Mr. Justice MARSHALL, dissenting.

The respondent in this case was interrogated behind closed doors at police headquarters in connection with a burglary investigation. He had been named by the victim of the burglary as a suspect, and was told by the police that they believed he was involved. He was falsely informed that his fingerprints had been found at the scene, and in effect was advised that by cooperating with the police he could help himself. Not until after he had confessed was he given the warnings set forth in *Miranda v. Arizona*.

The Court today holds that for constitutional purposes all this is irrelevant because respondent had not “been taken into custody or otherwise deprived of his freedom of action in any significant way.” I do not believe that such a determination is possible on the record before us. It is true that respondent was not formally placed under arrest, but surely formalities alone cannot control. At the very least, if respondent entertained an objectively reasonable belief that he was not free to leave during the questioning, then he was “deprived of his freedom of action in a significant way.” Plainly the respondent could have so believed, after being told by the police that they thought he was involved in a burglary and that his fingerprints had been found at the scene. Yet the majority is content to note that “there is no indication that ... respondent’s freedom to depart was restricted in any way,” as if a silent record (and no state-court findings) means that the State has sustained its burden of demonstrating that respondent received his constitutional due.

More fundamentally, however, I cannot agree with the Court’s conclusion that if respondent were not in custody no warnings were required. I recognize that *Miranda* is limited to custodial interrogations, but that is because [] the facts in the *Miranda* cases raised only this “narrow issue.”

In my view, even if respondent were not in custody, the coercive elements in the instant case were so pervasive as to require *Miranda*-type warnings. Respondent was interrogated in “privacy” and in “unfamiliar surroundings,” factors on which *Miranda* places great stress. The investigation had focused on respondent. And respondent was subjected to some of the “deceptive stratagems,” which called forth the *Miranda* decision. I therefore agree with the Oregon Supreme Court that to excuse the absence of warnings given these facts is “contrary to the rationale expressed in *Miranda*.”

The privilege against self-incrimination “has always been ‘as broad as the mischief against which it seeks to guard.’” Today’s decision means, however, that the Fifth Amendment privilege does not provide full protection against mischiefs equivalent to, but different from, custodial interrogation. I respectfully dissent.

Notes, Comments, and Questions

We have seen the Court’s preference for objective tests—those based upon what a “reasonable” person would have done or believed in certain circumstances—over subjective tests based on what a specific person was actually thinking. When deciding whether Sylvia Mendenhall was detained (Chapter 19), for example, the question was not whether she felt free to leave but instead was whether a hypothetical reasonable person in her situation at the airport would have felt free to leave. Similar analysis pervades decisions about whether consent for searches was validly obtained.

Further, the Court has often seemed to adopt a one-size-fits-all concept of the reasonable person. To return to Mendenhall: The Court considered briefly that she was “22 years old and had not been graduated from high school ... [and was] a female and [Black]” interacting with white police officers. Nonetheless, the Court’s “reasonable person” analysis paid little attention to these factors, finding them “not irrelevant” but not especially important. Critics have suggested (as they have in other legal contexts applying “reasonable person” standards, such as tort law) that the beliefs and behaviors of a reasonable person will depend significantly on factors such as race, sex, education, age, and social class, to which the Court gives little attention.

In the next case, the Court considered the potential relevance of someone’s age to the question of whether he was “in custody” for purposes of *Miranda*. The result differed from the common one-size-fits-all concept of “reasonable” that the Court had previously applied in *Miranda* cases.

Supreme Court of the United States

J.D.B. v. North Carolina

Decided June 16, 2011 – [564 U.S. 261](#)

Justice SOTOMAYOR delivered the opinion of the Court.

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*. It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would

feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.

I

A

Petitioner J.D.B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J.D.B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J.D.B.’s grandmother—his legal guardian—as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.’s middle school and seen in J.D.B.’s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J.D.B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J.D.B. about the break-ins. Although DiCostanzo asked the school administrators to verify J.D.B.’s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J.D.B.’s grandmother.

The uniformed officer interrupted J.D.B.’s afternoon social studies class, removed J.D.B. from the classroom, and escorted him to a school conference room. There, J.D.B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.

Questioning began with small talk—discussion of sports and J.D.B.’s family life. DiCostanzo asked, and J.D.B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J.D.B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J.D.B. for additional detail about his efforts to obtain work; asked J.D.B. to explain a prior incident, when one of the victims returned home to find J.D.B. behind her house; and confronted J.D.B. with the stolen camera. The assistant principal urged J.D.B. to “do the right thing,” warning J.D.B. that “the truth always comes out in the end.”

Eventually, J.D.B. asked whether he would “still be in trouble” if he returned the “stuff.” In response, DiCostanzo explained that return of the stolen items would be helpful, but “this thing is going to court” regardless. DiCostanzo then warned that he may need to seek a secure custody

order if he believed that J.D.B. would continue to break into other homes. When J.D.B. asked what a secure custody order was, DiCostanzo explained that “it’s where you get sent to juvenile detention before court.”

After learning of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J.D.B. that he could refuse to answer the investigator’s questions and that he was free to leave. Asked whether he understood, J.D.B. nodded and provided further detail, including information about the location of the stolen items. Eventually J.D.B. wrote a statement, at DiCostanzo’s request. When the bell rang indicating the end of the schoolday, J.D.B. was allowed to leave to catch the bus home.

B

Two juvenile petitions were filed against J.D.B., each alleging one count of breaking and entering and one count of larceny. J.D.B.’s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J.D.B. had been “interrogated by police in a custodial setting without being afforded *Miranda* warning[s]” and because his statements were involuntary under the totality of the circumstances test. After a suppression hearing at which DiCostanzo and J.D.B. testified, the trial court denied the motion, deciding that J.D.B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J.D.B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J.D.B. delinquent.

A divided panel of the North Carolina Court of Appeals affirmed. The North Carolina Supreme Court held, over two dissents, that J.D.B. was not in custody when he confessed, “declin[ing] to extend the test for custody to include consideration of the age ... of an individual subjected to questioning by police.” We granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect’s age.

II

A

Any police interview of an individual suspected of a crime has “coercive aspects to it.” Only those interrogations that occur while a suspect is in police custody, however, “heighte[n] the risk” that statements obtained are not the product of the suspect’s free choice.

By its very nature, custodial police interrogation entails “inherently compelling pressures.” Even for an adult, the physical and psychological isolation of custodial interrogation can “undermine the individual’s will to resist and ... compel him to speak where he would not otherwise do so freely.” Indeed, the pressure of custodial interrogation is so immense that it “can induce a frighteningly high percentage of people to confess to crimes they never committed.” That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

Recognizing that the inherently coercive nature of custodial interrogation “blurs the line between voluntary and involuntary statements,” this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. Because these measures protect the individual against the coercive nature of custodial interrogation, they are required “only where there has been such a restriction on a person’s freedom as to render him “in custody.”” As we have repeatedly emphasized, whether a suspect is “in custody” is an objective inquiry.

The benefit of the objective custody analysis is that it is “designed to give clear guidance to the police.”

B

The State and its *amici* contend that a child’s age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child’s age “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave.” That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

A child’s age is far “more than a chronological fact.” It is a fact that “generates commonsense conclusions about behavior and perception.” Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children “generally are less mature and responsible than adults,” that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” that they “are more vulnerable or susceptible to ... outside pressures” than adults, and so on. Addressing the specific context of police interrogation, we have observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” Describing no one child in particular, these observations restate what “any parent knows”—indeed, what any person knows—about children generally.

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court’s own generalizations, the legal disqualifications placed on children as a class—*e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

Indeed, even where a “reasonable person” standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, “[a]ll American jurisdictions accept the idea that a person’s childhood is a relevant circumstance” to be considered.

As this discussion establishes, “[o]ur history is replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults. We see no justification for taking a different course here[,] [s]o long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer. The same “wide basis of community experience” that makes it possible, as an objective matter, “to determine what is to be expected” of children in other contexts likewise makes it possible to know what to expect of children subjected to police questioning.

In other words, a child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person’s understanding of his freedom of action. Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are “most susceptible to influence” and “outside pressures,”—considering age in the custody analysis in no way involves a determination of how youth “subjectively affect[s] the mindset” of any particular child.

In fact, in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect’s age. This case is a prime example. Were the court precluded from taking J.D.B.’s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to “do the right thing”; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances.

Indeed, the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person “questioned in school” is a “minor,” the coercive effect of the schoolhouse setting is unknowable.

Reviewing the question *de novo* today, we hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child’s age will be a determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.

The question remains whether J.D.B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time. The judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

Justice ALITO, with whom THE CHIEF JUSTICE, Justice SCALIA, and Justice THOMAS join, dissenting.

The Court's decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither. It is fundamentally inconsistent with one of the main justifications for the *Miranda* rule: the perceived need for a clear rule that can be easily applied in all cases. And today's holding is not needed to protect the constitutional rights of minors who are questioned by the police.

Miranda's prophylactic regime places a high value on clarity and certainty. Dissatisfied with the highly fact-specific constitutional rule against the admission of involuntary confessions, the *Miranda* Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect's actual susceptibility to police pressure. This rigidity, however, has brought with it one of *Miranda's* principal strengths—"the ease and clarity of its application" by law enforcement officials and courts. A key contributor to this clarity, at least up until now, has been *Miranda's* objective reasonable-person test for determining custody.

Miranda's custody requirement is based on the proposition that the risk of unconstitutional coercion is heightened when a suspect is placed under formal arrest or is subjected to some functionally equivalent limitation on freedom of movement. When this custodial threshold is reached, *Miranda* warnings must precede police questioning. But in the interest of simplicity, the custody analysis considers only whether, under the circumstances, a hypothetical reasonable person would consider himself to be confined.

Many suspects, of course, will differ from this hypothetical reasonable person. Some, including those who have been hardened by past interrogations, may have no need for *Miranda* warnings at all. And for other suspects—those who are unusually sensitive to the pressures of police questioning—*Miranda* warnings may come too late to be of any use. That is a necessary consequence of *Miranda's* rigid standards, but it does not mean that the constitutional rights of these especially sensitive suspects are left unprotected. A vulnerable defendant can still turn to the constitutional rule against *actual* coercion and contend that that his confession was extracted against his will.

Today's decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also

correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the *Miranda* custody test—from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory.

For at least three reasons, there is no need to go down this road. First, many minors subjected to police interrogation are near the age of majority, and for these suspects the one-size-fits-all *Miranda* custody rule may not be a bad fit. Second, many of the difficulties in applying the *Miranda* custody rule to minors arise because of the unique circumstances present when the police conduct interrogations at school. The *Miranda* custody rule has always taken into account the setting in which questioning occurs, and accounting for the school setting in such cases will address many of these problems. Third, in cases like the one now before us, where the suspect is especially young, courts applying the constitutional voluntariness standard can take special care to ensure that incriminating statements were not obtained through coercion. Safeguarding the constitutional rights of minors does not require the extreme makeover of *Miranda* that today's decision may portend.

Notes, Comments, and Questions

The dissent in *J.D.B* raised concerns that the majority's decision will lead to a slippery slope. Should the court consider factors like race, sex, and socioeconomic status in the *Miranda* analysis? What are potential pros and cons of such an approach?

In addition, the dissent's argument presents an opportunity to consider "slippery slope" arguments more generally.¹ For a slippery slope claim to be compelling, the proponent must establish two things: First, the slope is truly slippery. Second, the place down at the bottom of the slope is a bad place to be. For example, when the Court decided *Lawrence v. Texas*, [539 U.S. 558](#) (2003), opponents of the decision attacked the majority's reasoning, often employing slippery slope arguments.

The Court's decision in *Lawrence* prohibits states from criminalizing consensual sexual activity among adults of the same sex (at least if the same activity would be lawful among opposite-sex couples). In his dissent, Justice Scalia decried the Court's decision to overrule *Bowers v. Hardwick*, [478 U.S. 186](#) (1986), writing, "State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices."

Supporters of the *Lawrence* decision responded to Scalia's slippery slope arguments on two fronts. First, for some items, the slope was not actually slippery, they argued (for example, bigamy need not follow from ending criminal punishment for same-sex consensual sex). Second, for some items, such as same-sex marriage, the bottom of the slope looks great. (In other words, yes, the slope there is slippery, and that's just fine.) Considering these two questions—is it slippery, and if so is that bad—will help students evaluate slippery slope arguments in various contexts.

¹ For more on this theme, see Eugene Volokh, [The Mechanisms of the Slippery Slope](#), 116 Harv. L. Rev. 1026 (2003), and sources cited therein.

Further, consider the prospect of a police department seeking to enforce criminal laws against adultery. What would be involved in seeking a warrant to search a house for evidence? How would communities react when homes were raided, and phones seized and searched, as officers sought proof of extramarital affairs?

Police investigations of masturbation seem even sillier. That said, the image of police establishing probable cause to search a house for proof of masturbation (“Well, Your Honor, a teenager lives there.”)—and then emerging triumphantly with seized evidence—illustrates the power entrusted in the legislature to decide what counts as a “crime.” Because tobacco is legal to possess and use on public sidewalks, a smoker can walk down the street without fear of being arrested, searched incident to the arrest, and then taken to jail, where officials can conduct far more invasive searches. Because marijuana is illegal to possess (and even in places where use has been legalized generally may not be smoked in public), a marijuana user walking down the street with a joint enjoys no such security.²

Ultimately, the application of every doctrine in this book depends upon the definition of what is and is not a crime, as well as what crimes (and persons) police choose to investigate.

The next case provides a stark example of the difference between “custody” under *Miranda* and the definition of a Fourth Amendment “seizure.” The Court has long held that when police stop a car, the driver is “seized” and can later object if the stop was unlawful. *See Delaware v. Prouse*, [440 U.S. 648](#), 653 (1979). In 2007, the Court announced the additional holding that everyone in the car—including passengers—is “seized” during a vehicle stop. *See Brendlin v. California*, [551 U.S. 249](#) (2007). The Court explained: “We think that in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on ‘privacy and personal security’ does not normally (and did not here) distinguish between passenger and driver.”

Nonetheless, the Court held in *Berkemer v. McCarty*—in an opinion by Justice Marshall, normally among the Justices most supportive of expanding the scope of the *Miranda* Rule—that police need not recite *Miranda* warnings before questioning a driver during a vehicle stop. (The opinion was nearly unanimous. Justice Stevens wrote separately that the Court should not have reached the issue. No Justice disagreed on the merits.) Students should consider why the Court declined to apply the *Miranda* Rule to interrogations conducted during traffic stops.

² See generally Alec Karakatsanis, *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System* (2019) (discussing how “what is a crime” affects the lives of millions).

Supreme Court of the United States

Harry J. Berkemer, Sheriff of Franklin County, Ohio v. Richard N. McCarty

Decided July 2, 1984 – [468 U.S. 420](#)

Justice MARSHALL delivered the opinion of the Court.

This case presents two related questions: First, does our decision in *Miranda v. Arizona* govern the admissibility of statements made during custodial interrogation by a suspect accused of a misdemeanor traffic offense? Second, does the roadside questioning of a motorist detained pursuant to a traffic stop constitute custodial interrogation for the purposes of the doctrine enunciated in *Miranda*?

I

A

The parties have stipulated to the essential facts. On the evening of March 31, 1980, Trooper Williams of the Ohio State Highway Patrol observed respondent's car weaving in and out of a lane on Interstate Highway 270. After following the car for two miles, Williams forced respondent to stop and asked him to get out of the vehicle. When respondent complied, Williams noticed that he was having difficulty standing. At that point, "Williams concluded that [respondent] would be charged with a traffic offense and, therefore, his freedom to leave the scene was terminated." However, respondent was not told that he would be taken into custody. Williams then asked respondent to perform a field sobriety test, commonly known as a "balancing test." Respondent could not do so without falling.

While still at the scene of the traffic stop, Williams asked respondent whether he had been using intoxicants. Respondent replied that "he had consumed two beers and had smoked several joints of marijuana a short time before." Respondent's speech was slurred, and Williams had difficulty understanding him. Williams thereupon formally placed respondent under arrest and transported him in the patrol car to the Franklin County Jail.

At the jail, respondent was given an intoxilyzer test to determine the concentration of alcohol in his blood. The test did not detect any alcohol whatsoever in respondent's system. Williams then resumed questioning respondent in order to obtain information for inclusion in the State Highway Patrol Alcohol Influence Report. Respondent answered affirmatively a question whether he had been drinking. When then asked if he was under the influence of alcohol, he said, "I guess, barely." Williams next asked respondent to indicate on the form whether the marijuana he had smoked had been treated with any chemicals. In the section of the report headed "Remarks," respondent wrote, "No ang[el] dust or PCP in the pot. Rick McCarty."

At no point in this sequence of events did Williams or anyone else tell respondent that he had a right to remain silent, to consult with an attorney, and to have an attorney appointed for him if he could not afford one.

B

Respondent was charged with operating a motor vehicle while under the influence of alcohol and/or drugs. Under Ohio law, that offense is a first-degree misdemeanor and is punishable by fine or imprisonment for up to six months. Incarceration for a minimum of three days is mandatory.

Respondent moved to exclude the various incriminating statements he had made to Trooper Williams on the ground that introduction into evidence of those statements would violate the Fifth Amendment insofar as he had not been informed of his constitutional rights prior to his interrogation. When the trial court denied the motion, respondent pleaded “no contest” and was found guilty. He was sentenced to 90 days in jail, 80 of which were suspended, and was fined \$300, \$100 of which were suspended.

On appeal to the Franklin County Court of Appeals, respondent renewed his constitutional claim. Relying on a prior decision by the Ohio Supreme Court, which held that the rule announced in *Miranda* “is not applicable to misdemeanors,” the Court of Appeals rejected respondent’s argument and affirmed his conviction. The Ohio Supreme Court dismissed respondent’s appeal on the ground that it failed to present a “substantial constitutional question.”

Respondent then filed an action for a writ of habeas corpus in the District Court for the Southern District of Ohio. The District Court dismissed the petition, holding that “*Miranda* warnings do not have to be given prior to in custody interrogation of a suspect arrested for a traffic offense.”

A divided panel of the Court of Appeals for the Sixth Circuit reversed, holding that “*Miranda* warnings must be given to all individuals prior to custodial interrogation, whether the offense investigated be a felony or a misdemeanor traffic offense.” In applying this principle to the facts of the case, the Court of Appeals distinguished between the statements made by respondent before and after his formal arrest. The postarrest statements, the court ruled, were plainly inadmissible; because respondent was not warned of his constitutional rights prior to or “[a]t the point that Trooper Williams took [him] to the police station,” his ensuing admissions could not be used against him. The court’s treatment of respondent’s prearrest statements was less clear. It eschewed a holding that “the mere stopping of a motor vehicle triggers *Miranda*” but did not expressly rule that the statements made by respondent at the scene of the traffic stop could be used against him. In the penultimate paragraph of its opinion, the court asserted that “[t]he failure to advise [respondent] of his constitutional rights rendered at least some of his statements inadmissible,” suggesting that the court was uncertain as to the status of the prearrest confessions. “Because [respondent] was convicted on inadmissible evidence,” the court deemed it necessary to vacate his conviction and order the District Court to issue a writ of habeas corpus. However, the Court of Appeals did not specify which statements, if any, could be used against respondent in a retrial.

We granted certiorari to resolve confusion in the federal and state courts regarding the applicability of our ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops.

II

In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt.

Petitioner asks us to carve an exception out of the foregoing principle. When the police arrest a person for allegedly committing a misdemeanor traffic offense and then ask him questions without telling him his constitutional rights, petitioner argues, his responses should be admissible against him. We cannot agree.

One of the principal advantages of the doctrine that suspects must be given warnings before being interrogated while in custody is the clarity of that rule. The exception to *Miranda* proposed by petitioner would substantially undermine this crucial advantage of the doctrine. The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, while reckless vehicular homicide is a felony. When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.

Equally importantly, the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine. Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters; at what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing him the safeguards prescribed by *Miranda*? The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development.

We do not suggest that there is any reason to think improper efforts were made in this case to induce respondent to make damaging admissions. More generally, we have no doubt that, in conducting most custodial interrogations of persons arrested for misdemeanor traffic offenses, the police behave responsibly and do not deliberately exert pressures upon the suspect to confess against his will. But the same might be said of custodial interrogations of persons arrested for felonies. The purposes of the safeguards prescribed by *Miranda* are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the “inherently compelling pressures” generated by the custodial setting itself, “which work to undermine the individual’s

will to resist,” and as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary. Those purposes are implicated as much by in-custody questioning of persons suspected of misdemeanors as they are by questioning of persons suspected of felonies.

Petitioner’s second argument is that law enforcement would be more expeditious and effective in the absence of a requirement that persons arrested for traffic offenses be informed of their rights. Again, we are unpersuaded. The occasions on which the police arrest and then interrogate someone suspected only of a misdemeanor traffic offense are rare. The police are already well accustomed to giving *Miranda* warnings to persons taken into custody. Adherence to the principle that all suspects must be given such warnings will not significantly hamper the efforts of the police to investigate crimes.

We hold therefore that a person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.

The implication of this holding is that the Court of Appeals was correct in ruling that the statements made by respondent at the County Jail were inadmissible. There can be no question that respondent was “in custody” at least as of the moment he was formally placed under arrest and instructed to get into the police car. Because he was not informed of his constitutional rights at that juncture, respondent’s subsequent admissions should not have been used against him.

III

To assess the admissibility of the self-incriminating statements made by respondent prior to his formal arrest, we are obliged to address a second issue concerning the scope of our decision in *Miranda*: whether the roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered “custodial interrogation.” Respondent urges that it should, on the ground that *Miranda* by its terms applies whenever “a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” Petitioner contends that a holding that every detained motorist must be advised of his rights before being questioned would constitute an unwarranted extension of the *Miranda* doctrine.

It must be acknowledged at the outset that a traffic stop significantly curtails the “freedom of action” of the driver and the passengers, if any, of the detained vehicle. Under the law of most States, it is a crime either to ignore a policeman’s signal to stop one’s car or, once having stopped, to drive away without permission. Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so. Partly for these reasons, we have long acknowledged that “stopping an automobile and detaining its occupants constitute a ‘seizure’ within the meaning of [the Fourth] Amendmen[t], even though the purpose of the stop is limited and the resulting detention quite brief.”

However, we decline to accord talismanic power to the phrase in the *Miranda* opinion emphasized by respondent. Fidelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated. Thus, we must decide whether a traffic stop exerts upon a detained

person pressures that sufficiently impair his free exercise of his privilege against self-incrimination to require that he be warned of his constitutional rights.

Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced “to speak where he would not otherwise do so freely.” First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist’s expectations, when he sees a policeman’s light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.

Second, circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist’s fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policemen further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less “police dominated” than that surrounding the kinds of interrogation at issue in *Miranda* itself and in the subsequent cases in which we have applied *Miranda*.

In both of these respects, the usual traffic stop is more analogous to a so-called “*Terry* stop” than to a formal arrest. The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not “in custody” for the purposes of *Miranda*.

Turning to the case before us, we find nothing in the record that indicates that respondent should have been given *Miranda* warnings at any point prior to the time Trooper Williams placed him under arrest. For the reasons indicated above, we reject the contention that the initial stop of respondent’s car, by itself, rendered him “in custody.” And respondent has failed to demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest. Only a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman’s unarticulated plan has no bearing on the question whether a suspect was “in custody” at a particular time; the only relevant inquiry is how a reasonable man in the suspect’s position would

have understood his situation. Nor do other aspects of the interaction of Williams and respondent support the contention that respondent was exposed to “custodial interrogation” at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.

We conclude, in short, that respondent was not taken into custody for the purposes of *Miranda* until Williams arrested him. Consequently, the statements respondent made prior to that point were admissible against him.

Accordingly, the judgment of the Court of Appeals is [a]ffirmed.

Notes, Comments, and Questions

As the Court noted near the end of its opinion in *Berkemer*, the definition of “custody” under *Miranda* does not include seizures conducted pursuant to *Terry v. Ohio* on the basis of reasonable suspicion.

The Practical Consequences of the *Miranda* Rule

Before exploring more of the *Miranda* doctrine—defining “interrogation,” learning what counts as a “waiver” of *Miranda* rights, and so on—we pause here to consider the practical effects of the doctrine. The *Miranda* Rule is now more than 50 years old, and debate rages on straightforward questions such as: (1) does the rule reduce the ability of police to obtain voluntary confessions,³ (2) does it provide any real benefits to suspects, or to society as a whole, such as by promoting meaningful free choice and protecting the dignity of suspects under interrogation, (3) has it affected the crime rate?

For example, Professor Paul Cassell has argued that *Miranda* has increased the crime rate while providing no compelling benefits to compensate.⁴ Challenging a perceived academic consensus that *Miranda*’s practical effects on crime-fighting have been “negligible,” Professor Cassell offers an empirical analysis of the number of confessions police never obtain because of *Miranda*. He includes a corresponding analysis of lost convictions—as well as lenient plea bargains necessitated by missing evidence. He begins with the “common sense” premise that “[s]urely fewer persons will confess if police must warn them of their right to silence, obtain affirmative waivers from them, and end the interrogation if they ask for a lawyer or for questioning to stop.” He also quotes the *Miranda* dissent of Justice White: “In some unknown number of cases the Court’s rule will return a killer, a rapist or other criminal to the streets and to the environment which produced him, to repeat his crime whenever it pleases him.”

While acknowledging that any empirical analysis must be a “sound estimate” rather than an exact calculation, Cassell argues that the costs are severe—well in excess of the insignificant

³ We are assuming for purposes of this discussion that critics of *Miranda* object only to impediments it places in the path of voluntary confessions, not involuntary confessions.

⁴ See Paul Cassell, *Miranda’s Social Costs: An Empirical Reassessment*, [90 Nw. U. L. Rev. 387](#) (1996).

harms commonly imagined by scholars and judges.⁵ He concludes that each year, *Miranda* results in tens of thousands of “lost cases” for violent crimes, along with tens of thousands more for property crimes. His numbers are based on an estimated loss of 3.8 percent of convictions in serious cases.

Replying to Cassell, Professor Stephen Schulhofer reached the opposite conclusion.⁶ After adjusting for what he describes as Cassell’s faulty data analysis and biased selection of samples, Schulhofer concludes, “For all practical purposes, *Miranda*’s empirically detectable harm to law enforcement shrinks virtually to zero.” Schulhofer then offers a robust defense of *Miranda*’s benefits, noting that “[t]o carry the day, an alternative to *Miranda* not only must promise more convictions, but also must preserve justice and respect for constitutional values in the 99% (or perhaps only 96.2%) of convictions that will be obtained successfully under either regime—and in all the arrests that will not produce convictions under either regime.”⁷

Noting that—according to his own analysis—police have managed to obtain confessions under *Miranda* at rates similar to those of the old days, Schulhofer confronts the question of why then we should care about *Miranda*. That is, if it doesn’t reduce confessions, why bother? He replies that the Court’s goal in *Miranda* was not “to reduce or eliminate confessions,” recalling that the Court explicitly established a procedure “to ensure that confessions could continue to be elicited and used.”⁸ “*Miranda*’s stated objective was not to eliminate confessions, but to eliminate compelling pressure in the interrogation process.”⁹ In other words, under *Miranda*, police still get confessions, but they get them by tricking suspects (and exploiting their overconfidence) instead of by “pressure and fear.” That difference, to Schulhofer, honors the Self-Incrimination Clause of the Fifth Amendment while imposing “detectable social costs [that] are vanishingly small.”¹⁰

A decade later, Professors George C. Thomas III and Richard A. Leo reviewed “two generations of scholarship” and concluded that *Miranda* has “exerted a negligible effect” on the ability of police to obtain confessions.¹¹ They argued, as well, that *Miranda*’s “practical benefits—as a procedural safeguard against compulsion, coercion, false confessions, or any of the pernicious interrogation techniques that the Warren Court excoriated in the *Miranda* decision”—are similarly negligible.¹² They offered several potentially overlapping explanations for their findings of negligible effects. First, suspects know of their rights from television and elsewhere, yet overwhelming majorities “waive their rights and thus appear to consent to interrogation.”¹³ (They analogized *Miranda* warnings to those on cigarette packages.) Second, police have learned to recite the *Miranda* warnings in a way that encourages cooperation. Third, Supreme Court decisions have limited the effects of the *Miranda* Rule (for example, by making it easy for

⁵ See *id.* at 437-46.

⁶ See Stephen Schulhofer, *Miranda’s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, [90 Nw. U. L. Rev. 500](#) (1996).

⁷ *Id.* at 502.

⁸ *Id.* at 561.

⁹ *Id.*

¹⁰ *Id.* at 562.

¹¹ See George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: Embedded in Our National Culture?*, [29 Crime & Justice 203](#) (2002).

¹² *Id.* at 246.

¹³ *Id.* at 247.

prosecutors to demonstrate “waiver”). Indeed, police and prosecutors now largely support *Miranda* and report that it does not interfere with their work.

The broad consensus is that *Miranda* is not a serious impediment to policework, meaning that suspects regularly confess to serious crimes despite being explicitly informed (1) that they need not do so and (2) that doing so could cause them harm in court. Students interested in how police obtain confessions should see an article titled [*Ordinary Police Interrogation in the United States: The Destruction of Meaning and Persons: A Psychoanalytic-Ethical Investigation*](#).¹⁴ The authors describe a suspect who falsely confessed to murdering his sister. The interrogation was videotaped, allowing analysis of how an innocent person (conclusive evidence of his innocence was later discovered) was pressured to confess by lawful police tactics. The authors argue, “The goal of interrogation is not to gather information. It is to obtain confessions.”¹⁵ That is, once police decide during an investigation who they believe committed the crime, the purpose of interrogation is to get the admissions needed to convict the suspect.

One author attended a training seminar for police interrogators, learning techniques such as how to “evade informing suspects of their rights during interrogation by giving suspects the impression that they have been arrested without in fact placing them under arrest.” He reports, “Reid seminar attendees are told to walk into interviews with thick folders, videocassettes, or similar props spilling out to make subjects believe interrogators have evidence against them.” After describing several other techniques effective against the innocent and guilty alike, the authors state, “The interrogator, armed and trained with these powerful rhetorical tools developed and refined over seventy years of systematic study and placed in the position of power and authority over the suspect, not surprisingly often extracts admissions of criminal conduct. But such admissions do not end the interrogation.”¹⁶ Because police prefer confessions that match other evidence, interrogators follow the initial admissions with leading questions designed to conform the suspect’s story to what is already known about a crime.

A discussion of best practices for interrogations is beyond the scope of this chapter. It will suffice to state that if questioners seek to learn the truth during questioning—as opposed to confirming existing beliefs and obtaining evidence for trial—the process described in *Ordinary Police Interrogation* would be avoided.¹⁷

Regardless of one’s views on the ultimate practical effects of *Miranda*, one cannot deny that Supreme Court doctrine affects the number of confessions admitted as evidence against defendants. In our next chapter, we review how the Court has defined “interrogation” under *Miranda*.

¹⁴ Benjamin A. Galatzer-Levy & Robert M. Galatzer-Levy, *Ordinary Police Interrogation in the United States: The Destruction of Meaning and Persons: A Psychoanalytic-Ethical Investigation*, [69 Am. Imago 57](#) (2012)

¹⁵ *Id.* at 68.

¹⁶ *Id.* at 73.

¹⁷ See, e.g., Elizabeth Loftus, [Eyewitness Testimony](#) (1996); Douglas Starr, [Remembering a Crime That You Didn’t Commit](#), *New Yorker* (Mar. 5, 2015) (reviewing studies of how easily false memories can be implanted during questioning).

INTERROGATIONS

Chapter 25

The *Miranda* Rule: What Is Interrogation?

Having considered how the Court defines “custody” in *Miranda* Rule cases, we now examine how the Court defines “interrogation.” Only during “custodial interrogation” does the *Miranda* Rule apply.

In addition, in this chapter we begin our review of the Court’s cases concerning waiver of rights under *Miranda*.

Supreme Court of the United States

Rhode Island v. Thomas J. Innis

Decided May 12, 1980 – [446 U.S. 291](#)

Mr. Justice STEWART delivered the opinion of the Court.

In *Miranda v. Arizona*, the Court held that, once a defendant in custody asks to speak with a lawyer, all interrogation must cease until a lawyer is present. The issue in this case is whether the respondent was “interrogated” in violation of the standards promulgated in the *Miranda* opinion.

I

On the night of January 12, 1975, John Mulvaney, a Providence, R.I., taxicab driver, disappeared after being dispatched to pick up a customer. His body was discovered four days later buried in a shallow grave in Coventry, R.I. He had died from a shotgun blast aimed at the back of his head.

On January 17, 1975, shortly after midnight, the Providence police received a telephone call from Gerald Aubin, also a taxicab driver, who reported that he had just been robbed by a man wielding a sawed-off shotgun. Aubin further reported that he had dropped off his assailant near Rhode Island College in a section of Providence known as Mount Pleasant. While at the Providence police station waiting to give a statement, Aubin noticed a picture of his assailant on a bulletin board. Aubin so informed one of the police officers present. The officer prepared a photo array, and again Aubin identified a picture of the same person. That person was the respondent. Shortly thereafter, the Providence police began a search of the Mount Pleasant area.

At approximately 4:30 a.m. on the same date, Patrolman Lovell, while cruising the streets of Mount Pleasant in a patrol car, spotted the respondent standing in the street facing him. When Patrolman Lovell stopped his car, the respondent walked towards it. Patrolman Lovell then arrested the respondent, who was unarmed, and advised him of his so-called *Miranda* rights. While the two men waited in the patrol car for other police officers to arrive, Patrolman Lovell did not converse with the respondent other than to respond to the latter’s request for a cigarette.

Within minutes, Sergeant Sears arrived at the scene of the arrest, and he also gave the respondent the *Miranda* warnings. Immediately thereafter, Captain Leyden and other police officers arrived. Captain Leyden advised the respondent of his *Miranda* rights. The respondent stated that he understood those rights and wanted to speak with a lawyer. Captain Leyden then directed that the respondent be placed in a “caged wagon,” a four-door police car with a wire screen mesh between the front and rear seats, and be driven to the central police station. Three officers, Patrolmen Gleckman, Williams, and McKenna, were assigned to accompany the respondent to the central station. They placed the respondent in the vehicle and shut the doors. Captain Leyden then instructed the officers not to question the respondent or intimidate or coerce him in any way. The three officers then entered the vehicle, and it departed.

While en route to the central station, Patrolman Gleckman initiated a conversation with Patrolman McKenna concerning the missing shotgun. As Patrolman Gleckman later testified:

“A. At this point, I was talking back and forth with Patrolman McKenna stating that I frequent this area while on patrol and [that because a school for handicapped children is located nearby,] there’s a lot of handicapped children running around in this area, and God forbid one of them might find a weapon with shells and they might hurt themselves.”

Patrolman McKenna apparently shared his fellow officer’s concern:

“A. I more or less concurred with him [Gleckman] that it was a safety factor and that we should, you know, continue to search for the weapon and try to find it.”

While Patrolman Williams said nothing, he overheard the conversation between the two officers:

“A. He [Gleckman] said it would be too bad if the little—I believe he said a girl—would pick up the gun, maybe kill herself.”

The respondent then interrupted the conversation, stating that the officers should turn the car around so he could show them where the gun was located. At this point, Patrolman McKenna radioed back to Captain Leyden that they were returning to the scene of the arrest and that the respondent would inform them of the location of the gun. At the time the respondent indicated that the officers should turn back, they had traveled no more than a mile, a trip encompassing only a few minutes.

The police vehicle then returned to the scene of the arrest where a search for the shotgun was in progress. There, Captain Leyden again advised the respondent of his *Miranda* rights. The respondent replied that he understood those rights but that he “wanted to get the gun out of the way because of the kids in the area in the school.” The respondent then led the police to a nearby field, where he pointed out the shotgun under some rocks by the side of the road.

On March 20, 1975, a grand jury returned an indictment charging the respondent with the kidnaping, robbery, and murder of John Mulvaney. Before trial, the respondent moved to suppress the shotgun and the statements he had made to the police regarding it. After an evidentiary hearing at which the respondent elected not to testify, the trial judge found that the respondent had been “repeatedly and completely advised of his *Miranda* rights.” He further

found that it was “entirely understandable that [the officers in the police vehicle] would voice their concern [for the safety of the handicapped children] to each other.” The judge then concluded that the respondent’s decision to inform the police of the location of the shotgun was “a waiver, clearly, and on the basis of the evidence that I have heard, and [sic] intelligent waiver, of his [*Miranda*] right to remain silent.” Thus, without passing on whether the police officers had in fact “interrogated” the respondent, the trial court sustained the admissibility of the shotgun and testimony related to its discovery. That evidence was later introduced at the respondent’s trial, and the jury returned a verdict of guilty on all counts.

On appeal, the Rhode Island Supreme Court, in a 3–2 decision, set aside the respondent’s conviction. [T]he court concluded that the respondent had invoked his *Miranda* right to counsel and that, contrary to *Miranda*’s mandate that, in the absence of counsel, all custodial interrogation then cease, the police officers in the vehicle had “interrogated” the respondent without a valid waiver of his right to counsel. It was the view of the state appellate court that, even though the police officers may have been genuinely concerned about the public safety and even though the respondent had not been addressed personally by the police officers, the respondent nonetheless had been subjected to “subtle coercion” that was the equivalent of “interrogation” within the meaning of the *Miranda* opinion. Moreover, contrary to the holding of the trial court, the appellate court concluded that the evidence was insufficient to support a finding of waiver. Having concluded that both the shotgun and testimony relating to its discovery were obtained in violation of the *Miranda* standards and therefore should not have been admitted into evidence, the Rhode Island Supreme Court held that the respondent was entitled to a new trial.

We granted certiorari to address for the first time the meaning of “interrogation” under *Miranda v. Arizona*.

II

The Court in the *Miranda* opinion [] outlined in some detail the consequences that would result if a defendant sought to invoke those procedural safeguards. With regard to the right to the presence of counsel, the Court noted:

“Once warnings have been given, the subsequent procedure is clear. ... If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.”

In the present case, the parties are in agreement that the respondent was fully informed of his *Miranda* rights and that he invoked his *Miranda* right to counsel when he told Captain Leyden that he wished to consult with a lawyer. It is also uncontested that the respondent was “in custody” while being transported to the police station.

The issue, therefore, is whether the respondent was “interrogated” by the police officers in violation of the respondent’s undisputed right under *Miranda* to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term “interrogation” under *Miranda* before turning to a consideration of the facts of this case.

A

The starting point for defining “interrogation” in this context is, of course, the Court’s *Miranda* opinion. There the Court observed that “[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” This passage and other references throughout the opinion to “questioning” might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.

We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the “interrogation environment” created by the interplay of interrogation and custody would “subjugate the individual to the will of his examiner” and thereby undermine the privilege against compulsory self-incrimination. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of line-ups in which a coached witness would pick the defendant as the perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. A variation on this theme discussed in *Miranda* was the so-called “reverse line-up” in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to “posi[t]” “the guilt of the subject,” to “minimize the moral seriousness of the offense,” and “to cast blame on the victim or on society.” It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. It is clear [] that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. “Interrogation,” as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term “interrogation” under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that

the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation.¹ But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

B

Turning to the facts of the present case, we conclude that the respondent was not “interrogated” within the meaning of *Miranda*. It is undisputed that the first prong of the definition of “interrogation” was not satisfied, for the conversation between Patrolmen Gleckman and McKenna included no express questioning of the respondent. Rather, that conversation was, at least in form, nothing more than a dialogue between the two officers to which no response from the respondent was invited.

Moreover, it cannot be fairly concluded that the respondent was subjected to the “functional equivalent” of questioning. It cannot be said, in short, that Patrolmen Gleckman and McKenna should have known that their conversation was reasonably likely to elicit an incriminating response from the respondent. There is nothing in the record to suggest that the officers were aware that the respondent was peculiarly susceptible to an appeal to his conscience concerning the safety of handicapped children. Nor is there anything in the record to suggest that the police knew that the respondent was unusually disoriented or upset at the time of his arrest.

The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few off hand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent’s contention that, under the circumstances, the officers’ comments were particularly “evocative.” It is our view, therefore, that the respondent was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

The Rhode Island Supreme Court erred, in short, in equating “subtle compulsion” with interrogation. That the officers’ comments struck a responsive chord is readily apparent. Thus, it may be said, as the Rhode Island Supreme Court did say, that the respondent was subjected to “subtle compulsion.” But that is not the end of the inquiry. It must also be established that a suspect’s incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case.

¹ [Footnote 7 by the Court] This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

For the reasons stated, the judgment of the Supreme Court of Rhode Island is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

I am substantially in agreement with the Court's definition of "interrogation" within the meaning of *Miranda v. Arizona*.

I am utterly at a loss, however, to understand how this objective standard as applied to the facts before us can rationally lead to the conclusion that there was no interrogation. Innis was arrested at 4:30 a.m., handcuffed, searched, advised of his rights, and placed in the back seat of a patrol car. Within a short time he had been twice more advised of his rights and driven away in a four-door sedan with three police officers. Two officers sat in the front seat and one sat beside Innis in the back seat. Since the car traveled no more than a mile before Innis agreed to point out the location of the murder weapon, Officer Gleckman must have begun almost immediately to talk about the search for the shotgun.

The Court attempts to characterize Gleckman's statements as "no more than a few off hand remarks" which could not reasonably have been expected to elicit a response. If the statements had been addressed to respondent, it would be impossible to draw such a conclusion. The simple message of the "talking back and forth" between Gleckman and McKenna was that they had to find the shotgun to avert a child's death.

One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found an innocent person will be hurt or killed. And not just any innocent person, but an innocent child—a little girl—a helpless, handicapped little girl on her way to school. The notion that such an appeal could not be expected to have any effect unless the suspect were known to have some special interest in handicapped children verges on the ludicrous. As a matter of fact, the appeal to a suspect to confess for the sake of others, to "display some evidence of decency and honor," is a classic interrogation technique.

Gleckman's remarks would obviously have constituted interrogation if they had been explicitly directed to respondent, and the result should not be different because they were nominally addressed to McKenna. This is not a case where police officers speaking among themselves are accidentally overheard by a suspect. These officers were "talking back and forth" in close quarters with the handcuffed suspect, traveling past the very place where they believed the weapon was located. They knew respondent would hear and attend to their conversation, and they are chargeable with knowledge of and responsibility for the pressures to speak which they created.

I firmly believe that this case is simply an aberration, and that in future cases the Court will apply the standard adopted today in accordance with its plain meaning.

Mr. Justice STEVENS, dissenting.

An original definition of an old term coupled with an original finding of fact on a cold record makes it possible for this Court to vacate the judgment of the Supreme Court of Rhode Island. That court, on the basis of the facts in the record before it, concluded that members of the Providence, R.I., police force had interrogated respondent, who was clearly in custody at the

time, in the absence of counsel after he had requested counsel. In my opinion the state court's conclusion that there was interrogation rests on a proper interpretation of both the facts and the law; thus, its determination that the products of the interrogation were inadmissible at trial should be affirmed.

In short, in order to give full protection to a suspect's right to be free from any interrogation at all, the definition of "interrogation" must include any police statement or conduct that has the same purpose or effect as a direct question. Statements that appear to call for a response from the suspect, as well as those that are designed to do so, should be considered interrogation. By prohibiting only those relatively few statements or actions that a police officer should know are likely to elicit an incriminating response, the Court today accords a suspect considerably less protection. Indeed, since I suppose most suspects are unlikely to incriminate themselves even when questioned directly, this new definition will almost certainly exclude every statement that is not punctuated with a question mark from the concept of "interrogation."

The difference between the approach required by a faithful adherence to *Miranda* and the stunted test applied by the Court today can be illustrated by comparing three different ways in which Officer Gleckman could have communicated his fears about the possible dangers posed by the shotgun to handicapped children. He could have:

(1) directly asked Innis:

Will you please tell me where the shotgun is so we can protect handicapped school children from danger?

(2) announced to the other officers in the wagon:

If the man sitting in the back seat with me should decide to tell us where the gun is, we can protect handicapped children from danger.

or (3) stated to the other officers:

It would be too bad if a little handicapped girl would pick up the gun that this man left in the area and maybe kill herself.

In my opinion, all three of these statements should be considered interrogation because all three appear to be designed to elicit a response from anyone who in fact knew where the gun was located. Under the Court's test, on the other hand, the form of the statements would be critical. The third statement would not be interrogation because in the Court's view there was no reason for Officer Gleckman to believe that Innis was susceptible to this type of an implied appeal; therefore, the statement would not be reasonably likely to elicit an incriminating response. Assuming that this is true, then it seems to me that the first two statements, which would be just as unlikely to elicit such a response, should also not be considered interrogation. But, because the first statement is clearly an express question, it *would* be considered interrogation under the Court's test. The second statement, although just as clearly a deliberate appeal to Innis to reveal the location of the gun, would presumably not be interrogation because (a) it was not in form a

direct question and (b) it does not fit within the “reasonably likely to elicit an incriminating response” category that applies to indirect interrogation.

As this example illustrates, the Court’s test creates an incentive for police to ignore a suspect’s invocation of his rights in order to make continued attempts to extract information from him. If a suspect does not appear to be susceptible to a particular type of psychological pressure, the police are apparently free to exert that pressure on him despite his request for counsel, so long as they are careful not to punctuate their statements with question marks. And if, contrary to all reasonable expectations, the suspect makes an incriminating statement, that statement can be used against him at trial. The Court thus turns *Miranda*’s unequivocal rule against any interrogation at all into a trap in which unwary suspects may be caught by police deception.

Notes, Comments, and Questions

Review the three questions presented by Justice Stevens. Can you articulate a rule under which they are not all interrogations? Look closely at how the majority applies the “functional equivalent” part of its interrogation rule. Will the application be easily transferred to other scenarios?

Consider a suspect who invokes his right to counsel after receiving his *Miranda* warnings. When the suspect’s wife arrives, a police officer stays in the room as the suspect and wife converse. The officer secretly records the conversation. Is the creation of the recording (or, in slightly different facts, having the officer listen carefully to the conversation without recording it) the “functional equivalent” of interrogation? See *Arizona v. Mauro*, [481 U.S. 520](#) (1987).

Imagine that police arrest a suspect. They do not ask any questions. Instead, an officer tells the suspect “that any cooperation would be brought to the attention of the Assistant United States Attorney.” Is that “interrogation” under *Innis*? See *United States v. Montana*, [958 F.2d 516](#), 518 (2d Cir. 1992).

The next case concerns whether an undercover agent—that is, someone working for police without a suspect’s knowledge—must deliver *Miranda* warnings before questioning a suspect who is in custody.

Supreme Court of the United States

Illinois v. Lloyd Perkins

Decided June 4, 1990 – [496 U.S. 292](#)

Justice KENNEDY delivered the opinion of the Court.

An undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent’s investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when

the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.

I

In November 1984, Richard Stephenson was murdered in a suburb of East St. Louis, Illinois. The murder remained unsolved until March 1986, when one Donald Charlton told police that he had learned about a homicide from a fellow inmate at the Graham Correctional Facility, where Charlton had been serving a sentence for burglary. The fellow inmate was Lloyd Perkins, who is the respondent here. Charlton told police that, while at Graham, he had befriended respondent, who told him in detail about a murder that respondent had committed in East St. Louis. On hearing Charlton's account, the police recognized details of the Stephenson murder that were not well known, and so they treated Charlton's story as a credible one.

By the time the police heard Charlton's account, respondent had been released from Graham, but police traced him to a jail in Montgomery County, Illinois, where he was being held pending trial on a charge of aggravated battery, unrelated to the Stephenson murder. The police wanted to investigate further respondent's connection to the Stephenson murder, but feared that the use of an eavesdropping device would prove impracticable and unsafe. They decided instead to place an undercover agent in the cellblock with respondent and Charlton. The plan was for Charlton and undercover agent John Parisi to pose as escapees from a work release program who had been arrested in the course of a burglary. Parisi and Charlton were instructed to engage respondent in casual conversation and report anything he said about the Stephenson murder.

Parisi, using the alias "Vito Bianco," and Charlton, both clothed in jail garb, were placed in the cellblock with respondent at the Montgomery County jail. The cellblock consisted of 12 separate cells that opened onto a common room. Respondent greeted Charlton who, after a brief conversation with respondent, introduced Parisi by his alias. Parisi told respondent that he "wasn't going to do any more time" and suggested that the three of them escape. Respondent replied that the Montgomery County jail was "rinky-dink" and that they could "break out." The trio met in respondent's cell later that evening, after the other inmates were asleep, to refine their plan. Respondent said that his girlfriend could smuggle in a pistol. Charlton said: "Hey, I'm not a murderer, I'm a burglar. That's your guys' profession." After telling Charlton that he would be responsible for any murder that occurred, Parisi asked respondent if he had ever "done" anybody. Respondent said that he had and proceeded to describe at length the events of the Stephenson murder. Parisi and respondent then engaged in some casual conversation before respondent went to sleep. Parisi did not give respondent *Miranda* warnings before the conversations.

Respondent was charged with the Stephenson murder. Before trial, he moved to suppress the statements made to Parisi in the jail. The trial court granted the motion to suppress, and the State appealed. The Appellate Court of Illinois affirmed, holding that *Miranda v. Arizona* prohibits all undercover contacts with incarcerated suspects that are reasonably likely to elicit an incriminating response.

We granted certiorari to decide whether an undercover law enforcement officer must give *Miranda* warnings to an incarcerated suspect before asking him questions that may elicit an incriminating response. We now reverse.

II

Conversations between suspects and undercover agents do not implicate the concerns underlying *Miranda*. The essential ingredients of a “police-dominated atmosphere” and compulsion are not present when an incarcerated person speaks freely to someone whom he believes to be a fellow inmate. Coercion is determined from the perspective of the suspect. When a suspect considers himself in the company of cellmates and not officers, the coercive atmosphere is lacking. There is no empirical basis for the assumption that a suspect speaking to those whom he assumes are not officers will feel compelled to speak by the fear of reprisal for remaining silent or in the hope of more lenient treatment should he confess.

It is the premise of *Miranda* that the danger of coercion results from the interaction of custody and official interrogation. We reject the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent. Questioning by captors, who appear to control the suspect’s fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect’s will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist. The state court here mistakenly assumed that because the suspect was in custody, no undercover questioning could take place. When the suspect has no reason to think that the listeners have official power over him, it should not be assumed that his words are motivated by the reaction he expects from his listeners. “[W]hen the agent carries neither badge nor gun and wears not ‘police blue,’ but the same prison gray” as the suspect, there is no “*interplay* between police interrogation and police custody.”

Miranda forbids coercion, not mere strategic deception by taking advantage of a suspect’s misplaced trust in one he supposes to be a fellow prisoner. As we recognized in *Miranda*: “[C]onfessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence.” 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 to speak are not within *Miranda*’s concerns.

Miranda was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates. This case is illustrative. Respondent had no reason to feel that undercover agent Parisi had any legal authority to force him to answer questions or that Parisi could affect respondent’s future treatment. Respondent viewed the cellmate-agent as an equal and showed no hint of being intimidated by the atmosphere of the jail. In recounting the details of the Stephenson murder, respondent was motivated solely by the desire to impress his fellow inmates. He spoke at his own peril.

The tactic employed here to elicit a voluntary confession from a suspect does not violate the Self-Incrimination Clause. This Court’s Sixth Amendment decisions [] also do not avail respondent. We held in those cases that the government may not use an undercover agent to circumvent the Sixth Amendment right to counsel once a suspect has been charged with the crime. After charges

have been filed, the Sixth Amendment prevents the government from interfering with the accused's right to counsel. In the instant case no charges had been filed on the subject of the interrogation, and our Sixth Amendment precedents are not applicable.

Respondent can seek no help from his argument that a bright-line rule for the application of *Miranda* is desirable. Law enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give *Miranda* warnings to incarcerated suspects. The use of undercover agents is a recognized law enforcement technique, often employed in the prison context to detect violence against correctional officials or inmates, as well as for the purposes served here. The interests protected by *Miranda* are not implicated in these cases, and the warnings are not required to safeguard the constitutional rights of inmates who make voluntary statements to undercover agents.

We hold that an undercover law enforcement officer posing as a fellow inmate need not give *Miranda* warnings to an incarcerated suspect before asking questions that may elicit an incriminating response. The statements at issue in this case were voluntary, and there is no federal obstacle to their admissibility at trial. We now reverse and remand for proceedings not inconsistent with our opinion.

Justice MARSHALL, dissenting.

This Court clearly and simply stated its holding in *Miranda v. Arizona*: “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” The Court reaches the contrary conclusion by fashioning an exception to the *Miranda* rule that applies whenever “an undercover law enforcement officer posing as a fellow inmate ... ask[s] questions that may elicit an incriminating response” from an incarcerated suspect. This exception is inconsistent with the rationale supporting *Miranda* and allows police officers intentionally to take advantage of suspects unaware of their constitutional rights. I therefore dissent.

The Court does not dispute that the police officer here conducted a custodial interrogation of a criminal suspect. Perkins was incarcerated in county jail during the questioning at issue here; under these circumstances, he was in custody as that term is defined in *Miranda*. While Perkins was confined, an undercover police officer, with the help of a police informant, questioned him about a serious crime. Although the Court does not dispute that Perkins was interrogated, it downplays the nature of the 35-minute questioning by disingenuously referring to it as a “conversatio[n].” The officer’s narration of the “conversation” at Perkins’ suppression hearing however, reveals that it clearly was an interrogation.

“[Agent:] You ever do anyone?”

“[Perkins:] Yeah, once in East St. Louis, in a rich white neighborhood.

“Informant: I didn’t know they had any rich white neighborhoods in East St. Louis.

“Perkins: It wasn’t in East St. Louis, it was by a race track in Fairview Heights....

“[Agent]: You did a guy in Fairview Heights?”

“Perkins: Yeah in a rich white section where most of the houses look the same.

“[Informant]: If all the houses look the same, how did you know you had the right house?”

“Perkins: Me and two guys cased the house for about a week. I knew exactly which house, the second house on the left from the corner.

“[Agent]: How long ago did this happen?”

“Perkins: Approximately about two years ago. I got paid \$5,000 for that job.

“[Agent]: How did it go down?”

“Perkins: I walked up [to] this guy[’s] house with a sawed-off under my trench coat.

“[Agent]: What type gun[?]”

“Perkins: A .12 gauge Remington [*sic*] Automatic Model 1100 sawed-off.”

The police officer continued the inquiry, asking a series of questions designed to elicit specific information about the victim, the crime scene, the weapon, Perkins’ motive, and his actions during and after the shooting. This interaction was not a “conversation”; Perkins, the officer, and the informant were not equal participants in a free-ranging discussion, with each man offering his views on different topics. Rather, it was an interrogation: Perkins was subjected to express questioning likely to evoke an incriminating response.

Because Perkins was interrogated by police while he was in custody, *Miranda* required that the officer inform him of his rights. In rejecting that conclusion, the Court finds that “conversations” between undercover agents and suspects are devoid of the coercion inherent in station house interrogations conducted by law enforcement officials who openly represent the State. *Miranda* was not, however, concerned solely with police *coercion*. It dealt with *any* police tactics that may operate to compel a suspect in custody to make incriminating statements without full awareness of his constitutional rights. Thus, when a law enforcement agent structures a custodial interrogation so that a suspect feels compelled to reveal incriminating information, he must inform the suspect of his constitutional rights and give him an opportunity to decide whether or not to talk.

The Court's holding today complicates a previously clear and straightforward doctrine. The Court opines that "[l]aw enforcement officers will have little difficulty putting into practice our holding that undercover agents need not give *Miranda* warnings to incarcerated suspects." Perhaps this prediction is true with respect to fact patterns virtually identical to the one before the Court today. But the outer boundaries of the exception created by the Court are by no means clear. Would *Miranda* be violated, for instance, if an undercover police officer beat a confession out of a suspect, but the suspect thought the officer was another prisoner who wanted the information for his own purposes?

The Court's adoption of the "undercover agent" exception to the *Miranda* rule [] is necessarily also the adoption of a substantial loophole in our jurisprudence protecting suspects' Fifth Amendment rights.

I dissent.

Notes, Comments, and Questions

The rule desired by the defendant in *Perkins*—which the Court rejected—would essentially have prohibited undercover questioning of suspects who are in custody. Only the most foolish suspect imaginable could be fooled by an "undercover" agent who recites the *Miranda* warnings to the suspect. Students should note, however, that in the context of the Sixth Amendment right to the assistance of counsel, the Court has proven willing to accept this consequence. (In other words, the Court's Sixth Amendment decisions have created constitutional law that makes certain undercover questioning unlawful.) In Chapter 30, we will consider how the Court has regulated interrogations under the Sixth Amendment after concluding our examination of the *Miranda* Rule.

The *Miranda* Rule: Waiver of Rights

After setting forth the warnings police must deliver before conducting "custodial interrogation," the *Miranda* Court wrote, "The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." The Court did not, however, define "waiver." In the next two cases, the Court begins to answer what counts as waiver, explaining how police officers can determine when interrogation is permissible after a suspect has been warned.

Supreme Court of the United States

North Carolina v. Willie Thomas Butler

Decided April 24, 1979 – [441 U.S. 369](#)

Mr. Justice STEWART delivered the opinion of the Court.

In evident conflict with the present view of every other court that has considered the issue, the North Carolina Supreme Court has held that *Miranda v. Arizona* requires 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. We

granted certiorari to consider whether this *per se* rule reflects a proper understanding of the *Miranda* decision.

The respondent was convicted in a North Carolina trial court of kidnaping, armed robbery, and felonious assault. The evidence at his trial showed that he and a man named Elmer Lee had robbed a gas station in Goldsboro, N.C., in December 1976, and had shot the station attendant as he was attempting to escape. The attendant was paralyzed, but survived to testify against the respondent.

The prosecution also produced evidence of incriminating statements made by the respondent shortly after his arrest by Federal Bureau of Investigation agents in the Bronx, N.Y., on the basis of a North Carolina fugitive warrant. Outside the presence of the jury, FBI Agent Martinez testified that at the time of the arrest he fully advised the respondent of the rights delineated in the *Miranda* case. According to the uncontroverted testimony of Martinez, the agents then took the respondent to the FBI office in nearby New Rochelle, N.Y. There, after the agents determined that the respondent had an 11th grade education and was literate, he was given the Bureau's "Advice of Rights" form which he read. When asked if he understood his rights, he replied that he did. The respondent refused to sign the waiver at the bottom of the form. He was told that he need neither speak nor sign the form, but that the agents would like him to talk to them. The respondent replied: "I will talk to you but I am not signing any form." He then made inculpatory statements. Agent Martinez testified that the respondent said nothing when advised of his right to the assistance of a lawyer. At no time did the respondent request counsel or attempt to terminate the agents' questioning.

At the conclusion of this testimony the respondent moved to suppress the evidence of his incriminating statements on the ground that he had not waived his right to the assistance of counsel at the time the statements were made. The court denied the motion, finding that

"the statement made by the defendant, William Thomas Butler, to Agent David C. Martinez, was made freely and voluntarily to said agent after having been advised of his rights as required by the *Miranda* ruling, including his right to an attorney being present at the time of the inquiry and that the defendant, Butler, understood his rights; [and] that he effectively waived his rights, including the right to have an attorney present during the questioning by his indication that he was willing to answer questions, having read the rights form together with the Waiver of Rights ..."

The respondent's statements were then admitted into evidence, and the jury ultimately found the respondent guilty of each offense charged.

On appeal, the North Carolina Supreme Court reversed the convictions and ordered a new trial. It found that the statements had been admitted in violation of the requirements of the *Miranda* decision, noting that the respondent had refused to waive in writing his right to have counsel present and that there had not been a *specific* oral waiver.

We conclude that the North Carolina Supreme Court erred in its reading of the *Miranda* opinion. [T]he Court held that an express statement can constitute a waiver, and that silence alone after such warnings cannot do so. But the Court did not hold that such an express statement is indispensable to a finding of waiver.

An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated.

The Court's opinion in *Miranda* explained the reasons for the prophylactic rules it created:

"We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored."

The *per se* rule that the North Carolina Supreme Court has found in *Miranda* does not speak to these concerns. There is no doubt that this respondent was adequately and effectively apprised of his rights. The only question is whether he waived the exercise of one of those rights, the right to the presence of a lawyer. Neither the state court nor the respondent has offered any reason why there must be a negative answer to that question in the absence of an *express* waiver. This is not the first criminal case to question whether a defendant waived his constitutional rights. It is an issue with which courts must repeatedly deal. Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

We see no reason to discard that standard and replace it with an inflexible *per se* rule in a case such as this. As stated at the outset of this opinion, it appears that every court that has considered this question has now reached the same conclusion. Ten of the eleven United States Courts of Appeals and the courts of at least 17 States have held that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case. By creating an inflexible rule that no implicit waiver can ever suffice, the North Carolina Supreme Court has gone beyond the requirements of federal organic law. It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution.

Accordingly, the judgment is vacated, and the case is remanded to the North Carolina Supreme Court for further proceedings not inconsistent with this opinion.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL and Mr. Justice STEVENS joins, dissenting.

The rule announced by the Court today allows a finding of waiver based upon “infer[ence] from the actions and words of the person interrogated.” The Court thus shrouds in half-light the question of waiver, allowing courts to construct inferences from ambiguous words and gestures. But the very premise of *Miranda* requires that ambiguity be interpreted against the interrogator. That premise is the recognition of the “compulsion inherent in custodial” interrogation and of its purpose “to subjugate the individual to the will of [his] examiner.” Under such conditions, only the most explicit waivers of rights can be considered knowingly and freely given.

The instant case presents a clear example of the need for an express waiver requirement. As the Court acknowledges, there is a disagreement over whether respondent was orally advised of his rights at the time he made his statement. The fact that Butler received a written copy of his rights is deemed by the Court to be sufficient basis to resolve the disagreement. But, unfortunately, there is also a dispute over whether Butler could read. And, obviously, if Butler did not have his rights read to him, and could not read them himself, there could be no basis upon which to conclude that he knowingly waived them. Indeed, even if Butler could read there is no reason to believe that his oral statements, which followed a refusal to sign a written waiver form, were intended to signify relinquishment of his rights.

Faced with “actions and words” of uncertain meaning, some judges may find waivers where none occurred. Others may fail to find them where they did. In the former case, the defendant’s rights will have been violated; in the latter, society’s interest in effective law enforcement will have been frustrated. A simple prophylactic rule requiring the police to obtain an express waiver of the right to counsel before proceeding with interrogation eliminates these difficulties. And since the Court agrees that *Miranda* requires the police to obtain some kind of waiver—whether express or implied—the requirement of an express waiver would impose no burden on the police not imposed by the Court’s interpretation. It would merely make that burden explicit. Had Agent Martinez simply elicited a clear answer from Willie Butler to the question, “Do you waive your right to a lawyer?” this journey through three courts would not have been necessary.

* * *

In the next case, the Court considered whether a “knowing” and “intelligent” waiver can be obtained only if a suspect knows all the crimes about which police might question him. In other words, is it enough that he be warned that anything he might say can be used to incriminate him, or must police also inform him of every crime he is suspected of having committed?

Supreme Court of the United States

Colorado v. John Leroy Spring

Decided Jan. 27, 1987 – [479 U.S. 564](#)

Justice POWELL delivered the opinion of the Court.

This case presents the question whether the suspect's awareness of all the crimes about which he may be questioned is relevant to determining the validity of his decision to waive the Fifth Amendment privilege.

I

In February 1979, respondent John Leroy Spring and a companion shot and killed Donald Walker during a hunting trip in Colorado. Shortly thereafter, an informant told agents of the Bureau of Alcohol, Tobacco, and Firearms (ATF) that Spring was engaged in the interstate transportation of stolen firearms. The informant also told the agents that Spring had discussed his participation in the Colorado killing. At the time the ATF agents received this information, Walker's body had not been found and the police had received no report of his disappearance. Based on the information received from the informant relating to the firearms violations, the ATF agents set up an undercover operation to purchase firearms from Spring. On March 30, 1979, ATF agents arrested Spring in Kansas City, Missouri, during the undercover purchase.

An ATF agent on the scene of the arrest advised Spring of his *Miranda* rights. Spring was advised of his *Miranda* rights a second time after he was transported to the ATF office in Kansas City. At the ATF office, the agents also advised Spring that he had the right to stop the questioning at any time or to stop the questioning until the presence of an attorney could be secured. Spring then signed a written form stating that he understood and waived his rights, and that he was willing to make a statement and answer questions.

ATF agents first questioned Spring about the firearms transactions that led to his arrest. They then asked Spring if he had a criminal record. He admitted that he had a juvenile record for shooting his aunt when he was 10 years old. The agents asked if Spring had ever shot anyone else. Spring ducked his head and mumbled, "I shot another guy once." The agents asked Spring if he had ever been to Colorado. Spring said no. The agents asked Spring whether he had shot a man named Walker in Colorado and thrown his body into a snowbank. Spring paused and then ducked his head again and said no. The interview ended at this point.

On May 26, 1979, Colorado law enforcement officials visited Spring while he was in jail in Kansas City pursuant to his arrest on the firearms offenses. The officers gave Spring the *Miranda* warnings, and Spring again signed a written form indicating that he understood his rights and was willing to waive them. The officers informed Spring that they wanted to question him about the Colorado homicide. Spring indicated that he "wanted to get it off his chest." In an interview that lasted approximately 1 1/2 hours, Spring confessed to the Colorado murder. During that time, Spring talked freely to the officers, did not indicate a desire to terminate the questioning, and never requested counsel. The officers prepared a written statement summarizing the interview. Spring read, edited, and signed the statement.

Spring was charged in Colorado state court with first-degree murder. Spring moved to suppress both statements on the ground that his waiver of *Miranda* rights was invalid. The trial court found that the ATF agents' failure to inform Spring before the March 30 interview that they would question him about the Colorado murder did not affect his waiver of his *Miranda* rights.

Accordingly, the trial court concluded that the March 30 statement should not be suppressed on Fifth Amendment grounds. The trial court, however, subsequently ruled that Spring's statement that he "shot another guy once" was irrelevant, and that the context of the discussion did not support the inference that the statement related to the Walker homicide. For that reason, the March 30 statement was not admitted at Spring's trial. The court concluded that the May 26 statement "was made freely, voluntarily, and intelligently, after [Spring's] being properly and fully advised of his rights, and that the statement should not be suppressed, but should be admitted in evidence." The May 26 statement was admitted into evidence at trial, and Spring was convicted of first-degree murder.

Spring argued on appeal that his waiver of *Miranda* rights before the March 30 statement was invalid because he was not informed that he would be questioned about the Colorado murder. Although this statement was not introduced at trial, he claimed that its validity was relevant because the May 26 statement that was admitted against him was the illegal "fruit" of the March 30 statement and therefore should have been suppressed. The Colorado Court of Appeals agreed with Spring, holding that the ATF agents "had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder."

The Colorado Supreme Court affirmed the judgment of the Court of Appeals. The court concluded:

"Here, the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, *are* determinative factors in undermining the validity of the waiver."

We granted certiorari to resolve an arguable Circuit conflict and to review the Colorado Supreme Court's determination that a suspect's awareness of the possible subjects of questioning is a relevant and sometimes determinative consideration in assessing whether a waiver of the Fifth Amendment privilege is valid. We now reverse.

II

There is no dispute that the police obtained the May 26 confession after complete *Miranda* warnings and after informing Spring that he would be questioned about the Colorado homicide. The Colorado Supreme Court nevertheless held that the confession should have been suppressed because it was the illegal "fruit" of the March 30 statement. A confession cannot be "fruit of the poisonous tree" if the tree itself is not poisonous. Our inquiry, therefore, centers on the validity of the March 30 statement.

A

The Court’s fundamental aim in designing the *Miranda* warnings was “to assure that the individual’s right to choose between silence and speech remains unfettered throughout the interrogation process.”

Consistent with this purpose, a suspect may waive his Fifth Amendment privilege, “provided the waiver is made voluntarily, knowingly and intelligently.” In this case, the law enforcement officials twice informed Spring of his Fifth Amendment privilege in precisely the manner specified by *Miranda*. As we have noted, Spring indicated that he understood the enumerated rights and signed a written form expressing his intention to waive his Fifth Amendment privilege. The trial court specifically found that “there was no element of duress or coercion used to induce Spring’s statements [on March 30, 1978].” Despite the explicit warnings and the finding by the trial court, Spring argues that his March 30 statement was in effect compelled in violation of his Fifth Amendment privilege because he signed the waiver form without being aware that he would be questioned about the Colorado homicide. Spring’s argument strains the meaning of compulsion past the breaking point.

B

A statement is not “compelled” within the meaning of the Fifth Amendment if an individual “voluntarily, knowingly and intelligently” waives his constitutional privilege. The inquiry whether a waiver is coerced “has two distinct dimensions.”

“First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the ‘totality of the circumstances surrounding the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.”

There is no doubt that Spring’s decision to waive his Fifth Amendment privilege was voluntary. He alleges no “coercion of a confession by physical violence or other deliberate means calculated to break [his] will” and the trial court found none. His allegation that the police failed to supply him with certain information does not relate to any of the traditional indicia of coercion: “the duration and conditions of detention ..., the manifest attitude of the police toward him, his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control.” Absent evidence that Spring’s “will [was] overborne and his capacity for self-determination critically impaired” because of coercive police conduct, his waiver of his Fifth Amendment privilege was voluntary under this Court’s decision in *Miranda*.

There also is no doubt that Spring’s waiver of his Fifth Amendment privilege was knowingly and intelligently made: that is, that Spring understood that he had the right to remain silent and that anything he said could be used as evidence against him. The Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege. The Fifth Amendment’s guarantee is both simpler and more

fundamental: A defendant may not be compelled to be a witness against himself in any respect. The *Miranda* warnings protect this privilege by ensuring that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time. The *Miranda* warnings ensure that a waiver of these rights is knowing and intelligent by requiring that the suspect be fully advised of this constitutional privilege, including the critical advice that whatever he chooses to say may be used as evidence against him.

In this case there is no allegation that Spring failed to understand the basic privilege guaranteed by the Fifth Amendment. Nor is there any allegation that he misunderstood the consequences of speaking freely to the law enforcement officials. In sum, we think that the trial court was indisputably correct in finding that Spring's waiver was made knowingly and intelligently within the meaning of *Miranda*.

III

A

Spring relies on this Court's statement in *Miranda* that "any evidence that the accused was threatened, tricked, or cajoled into a waiver will ... show that the defendant did not voluntarily waive his privilege." He contends that the failure to inform him of the potential subjects of interrogation constitutes the police trickery and deception condemned in *Miranda*, thus rendering his waiver of *Miranda* rights invalid. Spring, however, reads this statement in *Miranda* out of context and without due regard to the constitutional privilege the *Miranda* warnings were designed to protect.

We note first that the Colorado courts made no finding of official trickery. In fact, as noted above, the trial court expressly found that "there was no element of duress or coercion used to induce Spring's statements." Spring nevertheless insists that the failure of the ATF agents to inform him that he would be questioned about the murder constituted official "trickery" sufficient to invalidate his waiver of his Fifth Amendment privilege, even if the official conduct did not amount to "coercion." Even assuming that Spring's proposed distinction has merit, we reject his conclusion. This Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is "trickery" sufficient to invalidate a suspect's waiver of *Miranda* rights, and we expressly decline so to hold today.

Once *Miranda* warnings are given, it is difficult to see how official silence could cause a suspect to misunderstand the nature of his constitutional right—"his right to refuse to answer any question which might incriminate him." "Indeed, it seems self-evident that one who is told he is free to refuse to answer questions is in a curious posture to later complain that his answers were compelled." We have held that a valid waiver does not require that an individual be informed of all information "useful" in making his decision or all information that "might ... affec[t] his decision to confess." "[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights." Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature. Accordingly, the failure of the law enforcement officials to inform Spring of the subject matter of the interrogation could not affect Spring's decision to waive his Fifth Amendment privilege in a constitutionally significant manner.

B

This Court's holding in *Miranda* specifically required that the police inform a criminal suspect that he has the right to remain silent and that *anything* he says may be used against him. There is no qualification of this broad and explicit warning. The warning, as formulated in *Miranda*, conveys to a suspect the nature of his constitutional privilege and the consequences of abandoning it. Accordingly, we hold that 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.

IV

The judgment of the Colorado Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice MARSHALL, with whom Justice BRENNAN joins, dissenting.

[T]he Court[] hold[s] today: “[A] suspect’s awareness of *all* the possible subjects of questioning in advance of interrogation is not relevant to determining” the validity of his waiver. This careful phraseology avoids the important question whether the lack of *any* indication of the identified subjects for questioning *is* relevant to determining the validity of the suspect’s waiver.

I would include among the relevant factors for consideration whether before waiving his Fifth Amendment rights the suspect was aware, either through the circumstances surrounding his arrest or through a specific advisement from the arresting or interrogating officers, of the crime or crimes he was suspected of committing and about which they intended to ask questions. To hold that such knowledge is relevant would not undermine the “virtue of informing police and prosecutors with specificity’ as to how a pretrial questioning of a suspect must be conducted,” nor would it interfere with the use of legitimate interrogation techniques. Indeed, requiring the officers to articulate at a minimum the crime or crimes for which the suspect has been arrested could contribute significantly toward ensuring that the arrest was in fact lawful and the suspect’s statement not compelled because of an error at this stage alone.

The interrogation tactics utilized in this case demonstrate the relevance of the information Spring did not receive. The agents evidently hoped to obtain from Spring a valid confession to the federal firearms charge for which he was arrested and then parlay this admission into an additional confession of first-degree murder. Spring could not have expected questions about the latter, separate offense when he agreed to waive his rights, as it occurred in a different State and was a violation of state law outside the normal investigative focus of federal Alcohol, Tobacco, and Firearms agents.

The coercive aspects of the psychological ploy intended in this case, when combined with an element of surprise which may far too easily rise to a level of deception, cannot be justified in light of *Miranda*’s strict requirements that the suspect’s waiver and confession be voluntary, knowing, and intelligent. If a suspect has signed a waiver form with the intention of making a statement regarding a specifically alleged crime, the Court today would hold this waiver valid

with respect to questioning about any other crime, regardless of its relation to the charges the suspect believes he will be asked to address. Yet once this waiver is given and the intended statement made, the protections afforded by *Miranda* against the “inherently compelling pressures” of the custodial interrogation have effectively dissipated. Additional questioning about entirely separate and more serious suspicions of criminal activity can take unfair advantage of the suspect’s psychological state, as the unexpected questions cause the compulsive pressures suddenly to reappear. Given this technique of interrogation, a suspect’s understanding of the topics planned for questioning is, therefore, at the very least “relevant” to assessing whether his decision to talk to the officers was voluntarily, knowingly, and intelligently made.

I dissent.

* * *

In our next chapter, we will continue our examination of waiver of *Miranda* rights. Students should beware that the requirements set forth in *North Carolina v. Butler* have been watered down in subsequent cases.

INTERROGATIONS

Chapter 26

The *Miranda* Rule: Waiver

In *North Carolina v. Butler* (Chapter 25), the Court stated that a “defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver,” can sometimes be sufficient to count as waiver of *Miranda* rights, even absent an express waiver.

In this chapter, we see that the Court has defined “a course of conduct indicating waiver” expansively, effectively holding that “defendant’s silence, coupled with an understanding of his rights” and an uncoerced statement to police constitutes waiver. In other words, an “uncoerced statement” will suffice as the “course of conduct indicating waiver” required by *Butler*.

In the next case, the Court considered whether police must inform a suspect that his attorney has been trying to reach him. More specifically, the issue was whether failure to do so invalidates an otherwise adequate waiver of *Miranda* rights.

Supreme Court of the United States

John Moran v. Brian K. Burbine

Decided March 10, 1986 – [475 U.S. 412](#)

Justice O’CONNOR delivered the opinion of the Court.

After being informed of his rights pursuant to *Miranda v. Arizona*, and after executing a series of written waivers, respondent confessed to the murder of a young woman. At no point during the course of the interrogation, which occurred prior to arraignment, did he request an attorney. While he was in police custody, his sister attempted to retain a lawyer to represent him. The attorney telephoned the police station and received assurances that respondent would not be questioned further until the next day. In fact, the interrogation session that yielded the inculpatory statements began later that evening. The question presented is whether either the conduct of the police or respondent’s ignorance of the attorney’s efforts to reach him taints the validity of the waivers and therefore requires exclusion of the confessions.

I

On the morning of March 3, 1977, Mary Jo Hickey was found unconscious in a factory parking lot in Providence, Rhode Island. Suffering from injuries to her skull apparently inflicted by a metal pipe found at the scene, she was rushed to a nearby hospital. Three weeks later she died from her wounds.

Several months after her death, the Cranston, Rhode Island, police arrested respondent and two others in connection with a local burglary. Shortly before the arrest, Detective Ferranti of the Cranston police force had learned from a confidential informant that the man responsible for Ms. Hickey’s death lived at a certain address and went by the name of “Butch.” Upon discovering that respondent lived at that address and was known by that name, Detective Ferranti informed

respondent of his *Miranda* rights. When respondent refused to execute a written waiver, Detective Ferranti spoke separately with the two other suspects arrested on the breaking and entering charge and obtained statements further implicating respondent in Ms. Hickey's murder. At approximately 6 p.m., Detective Ferranti telephoned the police in Providence to convey the information he had uncovered. An hour later, three officers from that department arrived at the Cranston headquarters for the purpose of questioning respondent about the murder.

That same evening, at about 7:45 p.m., respondent's sister telephoned the Public Defender's Office to obtain legal assistance for her brother. Her sole concern was the breaking and entering charge, as she was unaware that respondent was then under suspicion for murder. She asked for Richard Casparian who had been scheduled to meet with respondent earlier that afternoon to discuss another charge unrelated to either the break-in or the murder. As soon as the conversation ended, the attorney who took the call attempted to reach Mr. Casparian. When those efforts were unsuccessful, she telephoned Allegra Munson, another Assistant Public Defender, and told her about respondent's arrest and his sister's subsequent request that the office represent him.

At 8:15 p.m., Ms. Munson telephoned the Cranston police station and asked that her call be transferred to the detective division. In the words of the Supreme Court of Rhode Island, whose factual findings we treat as presumptively correct, the conversation proceeded as follows:

"A male voice responded with the word 'Detectives.' Ms. Munson identified herself and asked if Brian Burbine was being held; the person responded affirmatively. Ms. Munson explained to the person that Burbine was represented by attorney Casparian who was not available; she further stated that she would act as Burbine's legal counsel in the event that the police intended to place him in a lineup or question him. The unidentified person told Ms. Munson that the police would not be questioning Burbine or putting him in a lineup and that they were through with him for the night. Ms. Munson was not informed that the Providence Police were at the Cranston police station or that Burbine was a suspect in Mary's murder."

At all relevant times, respondent was unaware of his sister's efforts to retain counsel and of the fact and contents of Ms. Munson's telephone conversation.

Less than an hour later, the police brought respondent to an interrogation room and conducted the first of a series of interviews concerning the murder. Prior to each session, respondent was informed of his *Miranda* rights, and on three separate occasions he signed a written form acknowledging that he understood his right to the presence of an attorney and explicitly indicating that he "[did] not want an attorney called or appointed for [him]" before he gave a statement. Uncontradicted evidence at the suppression hearing indicated that at least twice during the course of the evening, respondent was left in a room where he had access to a telephone, which he apparently declined to use. Eventually, respondent signed three written statements fully admitting to the murder.

Prior to trial, respondent moved to suppress the statements. The court denied the motion, finding that respondent had received the *Miranda* warnings and had "knowingly, intelligently, and voluntarily waived his privilege against self-incrimination [and] his right to counsel."

Rejecting the contrary testimony of the police, the court found that Ms. Munson did telephone the detective bureau on the evening in question, but concluded that “there was no ... conspiracy or collusion on the part of the Cranston Police Department to secrete this defendant from his attorney.” In any event, the court held, the constitutional right to request the presence of an attorney belongs solely to the defendant and may not be asserted by his lawyer. Because the evidence was clear that respondent never asked for the services of an attorney, the telephone call had no relevance to the validity of the waiver or the admissibility of the statements.

The jury found respondent guilty of murder in the first degree, and he appealed to the Supreme Court of Rhode Island. A divided court rejected his contention that the Fifth and Fourteenth Amendments to the Constitution required the suppression of the inculpatory statements and affirmed the conviction. Failure to inform respondent of Ms. Munson’s efforts to represent him, the court held, did not undermine the validity of the waivers. “It hardly seems conceivable that the additional information that an attorney whom he did not know had called the police station would have added significantly to the quantum of information necessary for the accused to make an informed decision as to waiver.” Nor, the court concluded, did *Miranda v. Arizona* or any other decision of this Court independently require the police to honor Ms. Munson’s request that interrogation not proceed in her absence. In reaching that conclusion, the court noted that because two different police departments were operating in the Cranston station house on the evening in question, the record supported the trial court’s finding that there was no “conspiracy or collusion” to prevent Ms. Munson from seeing respondent. In any case, the court held, the right to the presence of counsel belongs solely to the accused and may not be asserted by “benign third parties, whether or not they happen to be attorneys.”

After unsuccessfully petitioning the United States District Court for the District of Rhode Island for a writ of habeas corpus, respondent appealed to the Court of Appeals for the First Circuit. That court reversed. Finding it unnecessary to reach any arguments under the Sixth and Fourteenth Amendments, the court held that the police’s conduct had fatally tainted respondent’s “otherwise valid” waiver of his Fifth Amendment privilege against self-incrimination and right to counsel. The court reasoned that by failing to inform respondent that an attorney had called and that she had been assured that no questioning would take place until the next day, the police had deprived respondent of information crucial to his ability to waive his rights knowingly and intelligently. The court also found that the record would support “no other explanation for the refusal to tell Burbine of Attorney Munson’s call than ... deliberate or reckless irresponsibility.” This kind of “blameworthy action by the police,” the court concluded, together with respondent’s ignorance of the telephone call, “vitiat[e] any claim that [the] waiver of counsel was knowing and voluntary.”

We granted certiorari to decide whether a prearrest confession preceded by an otherwise valid waiver must be suppressed either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney’s efforts to reach him. We now reverse.

II

Respondent does not dispute that the Providence police followed the[] [*Miranda*] procedures with precision. The record amply supports the state-court findings that the police administered

the required warnings, sought to assure that respondent understood his rights, and obtained an express written waiver prior to eliciting each of the three statements. Nor does respondent contest the Rhode Island courts' determination that he at no point requested the presence of a lawyer. He contends instead that the confessions must be suppressed because the police's failure to inform him of the attorney's telephone call deprived him of information essential to his ability to knowingly waive his Fifth Amendment rights. In the alternative, he suggests that to fully protect the Fifth Amendment values served by *Miranda*, we should extend that decision to condemn the conduct of the Providence police. We address each contention in turn.

A

Miranda holds that “[t]he defendant may waive effectuation” of the rights conveyed in the warnings “provided the waiver is made voluntarily, knowingly and intelligently.” The inquiry has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the “totality of the circumstances surrounding the interrogation” reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Under this standard, we have no doubt that respondent validly waived his right to remain silent and to the presence of counsel. The voluntariness of the waiver is not at issue. As the Court of Appeals correctly acknowledged, the record is devoid of any suggestion that police resorted to physical or psychological pressure to elicit the statements. Indeed it appears that it was respondent, and not the police, who spontaneously initiated the conversation that led to the first and most damaging confession. Nor is there any question about respondent's comprehension of the full panoply of rights set out in the *Miranda* warnings and of the potential consequences of a decision to relinquish them. Nonetheless, the Court of Appeals believed that the “[d]eliberate or reckless” conduct of the police, in particular their failure to inform respondent of the telephone call, fatally undermined the validity of the otherwise proper waiver. We find this conclusion untenable as a matter of both logic and precedent.

Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right. Under the analysis of the Court of Appeals, the same defendant, armed with the same information and confronted with precisely the same police conduct, would have knowingly waived his *Miranda* rights had a lawyer not telephoned the police station to inquire about his status. Nothing in any of our waiver decisions or in our understanding of the essential components of a valid waiver requires so incongruous a result. No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the

analysis is complete and the waiver is valid as a matter of law. The Court of Appeals' conclusion to the contrary was in error.

Nor do we believe that the level of the police's culpability in failing to inform respondent of the telephone call has any bearing on the validity of the waivers. In light of the state-court findings that there was no "conspiracy or collusion" on the part of the police, we have serious doubts about whether the Court of Appeals was free to conclude that their conduct constituted "deliberate or reckless irresponsibility." But whether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident. Nor was the failure to inform respondent of the telephone call the kind of "trick[ery]" that can vitiate the validity of a waiver. Granting that the "deliberate or reckless" withholding of information is objectionable as a matter of ethics, such conduct is only relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them. Because respondent's voluntary decision to speak was made with full awareness and comprehension of all the information *Miranda* requires the police to convey, the waivers were valid.

B

At oral argument respondent acknowledged that a constitutional rule requiring the police to inform a suspect of an attorney's efforts to reach him would represent a significant extension of our precedents. He contends, however, that the conduct of the Providence police was so inimical to the Fifth Amendment values *Miranda* seeks to protect that we should read that decision to condemn their behavior. Regardless of any issue of waiver, he urges, the Fifth Amendment requires the reversal of a conviction if the police are less than forthright in their dealings with an attorney or if they fail to tell a suspect of a lawyer's unilateral efforts to contact him. Because the proposed modification ignores the underlying purposes of the *Miranda* rules and because we think that the decision as written strikes the proper balance between society's legitimate law enforcement interests and the protection of the defendant's Fifth Amendment rights, we decline the invitation to further extend *Miranda*'s reach.

At the outset, while we share respondent's distaste for the deliberate misleading of an officer of the court, reading *Miranda* to forbid police deception of an attorney "would cut [the decision] completely loose from its own explicitly stated rationale." As is now well established, "[t]he ... *Miranda* warnings are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the [suspect's] right against compulsory self-incrimination [is] protected.'" Their objective is not to mold police conduct for its own sake. Nothing in the Constitution vests in us the authority to mandate a code of behavior for state officials wholly unconnected to any federal right or privilege. The purpose of the *Miranda* warnings instead is to dissipate the compulsion inherent in custodial interrogation and, in so doing, guard against abridgment of the suspect's Fifth Amendment rights. Clearly, a rule that focuses on how the police treat an attorney—conduct that has no relevance at all to the degree of compulsion experienced by the defendant during interrogation—would ignore both *Miranda*'s mission and its only source of legitimacy.

Nor are we prepared to adopt a rule requiring that the police inform a suspect of an attorney's efforts to reach him. While such a rule might add marginally to *Miranda's* goal of dispelling the compulsion inherent in custodial interrogation, overriding practical considerations counsel against its adoption.

Moreover, problems of clarity to one side, reading *Miranda* to require the police in each instance to inform a suspect of an attorney's efforts to reach him would work a substantial and, we think, inappropriate shift in the subtle balance struck in that decision. Custodial interrogations implicate two competing concerns. On the one hand, "the need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. Admissions of guilt are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. On the other hand, the Court has recognized that the interrogation process is "inherently coercive" and that, as a consequence, there exists a substantial risk that the police will inadvertently traverse the fine line between legitimate efforts to elicit admissions and constitutionally impermissible compulsion. *Miranda* attempted to reconcile these opposing concerns by giving the *defendant* the power to exert some control over the course of the interrogation. Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means. Police questioning, often an essential part of the investigatory process, could continue in its traditional form, the Court held, but only if the suspect clearly understood that, at any time, he could bring the proceeding to a halt or, short of that, call in an attorney to give advice and monitor the conduct of his interrogators.

The position urged by respondent would upset this carefully drawn approach in a manner that is both unnecessary for the protection of the Fifth Amendment privilege and injurious to legitimate law enforcement. Because, as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process, a rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt. Indeed, the very premise of the Court of Appeals was not that awareness of Ms. Munson's phone call would have dissipated the coercion of the interrogation room, but that it might have convinced respondent not to speak at all. Because neither the letter nor purposes of *Miranda* require this additional handicap on otherwise permissible investigatory efforts, we are unwilling to expand the *Miranda* rules to require the police to keep the suspect abreast of the status of his legal representation.

III

[The Court analyzed and rejected respondent's Sixth Amendment argument because "the events that led to the inculpatory statements preceded the formal initiation of adversary judicial proceedings."]

IV

[The Court rejected respondent's Due Process argument because "the challenged conduct falls short of the kind of misbehavior that so shocks the sensibilities of civilized society as to warrant a federal intrusion into the criminal processes of the States."]

We hold therefore that the Court of Appeals erred in finding that the Federal Constitution required the exclusion of the three inculpatory statements. Accordingly, we reverse and remand for proceedings consistent with this opinion.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

This case poses fundamental questions about our system of justice. As this Court has long recognized "ours is an accusatorial and not an inquisitorial system." The Court's opinion today represents a startling departure from that basic insight.

The recognition that ours is an accusatorial, and not an inquisitorial system [] requires that the government's actions, even in responding to this brutal crime, respect those liberties and rights that distinguish this society from most others. As Justice Jackson observed shortly after his return from Nuremberg, cases of this kind present "a real dilemma in a free society ... for the defendant is shielded by such safeguards as no system of law except the Anglo-American concedes to him." Justice Frankfurter similarly emphasized that it is "a fair summary of history to say that the safeguards of liberty have been forged in controversies involving not very nice people." And, almost a century and a half ago, Macaulay observed that the guilt of Titus Oates could not justify his conviction by improper methods: "That Oates was a bad man is not a sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent."

It is not only the Court's ultimate conclusion that is deeply disturbing; it is also its manner of reaching that conclusion. The Court completely rejects an entire body of law on the subject—the many carefully reasoned state decisions that have come to precisely the opposite conclusion. The Court similarly dismisses the fact that the police deception which it sanctions quite clearly violates the American Bar Association's Standards for Criminal Justice—Standards which THE CHIEF JUSTICE has described as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history," and which this Court frequently finds helpful. And, of course, the Court dismisses the fact that the American Bar Association has emphatically endorsed the prevailing state-court position and expressed its serious concern about the effect that a contrary view—a view, such as the Court's, that exalts incommunicado interrogation, sanctions police deception, and demeans the right to consult with an attorney—will have in police stations and courtrooms throughout this Nation. Of greatest importance, the Court misapprehends or rejects the central principles that have, for several decades, animated this Court's decisions concerning incommunicado interrogation.

This case turns on a proper appraisal of the role of the lawyer in our society. If a lawyer is seen as a nettlesome obstacle to the pursuit of wrongdoers—as in an inquisitorial society—then the Court's decision today makes a good deal of sense. If a lawyer is seen as an aid to the

understanding and protection of constitutional rights—as in an accusatorial society—then today’s decision makes no sense at all.

Like the conduct of the police in the Cranston station on the evening of June 29, 1977, the Court’s opinion today serves the goal of insuring that the perpetrator of a vile crime is punished. Like the police on that June night as well, however, the Court has trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice.

I respectfully dissent.

Notes, Comments, and Questions

In *Miranda*, the Court stated that a waiver of rights obtained by trickery will not be valid. “[A]ny evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege.” With the decisions in *Colorado v. Spring* (Chapter 25) and in *Moran v. Burbine* (above), the Court announced that mere failure to give useful information to a suspect is not the sort of “trick” that renders a waiver invalid.

Imagine, however, that instead of merely failing to mention the lawyer hired by the sister of their suspect, Burbine, the Cranston police instead lied about the lawyer’s existence. In other words, imagine that Burbine asks a detective, “Has my sister gotten me a lawyer?” The detective replies, despite knowing about the sister’s call, “We haven’t heard from your sister about a lawyer or anything else.” Is that the sort of trick that would make Burbine’s subsequent waiver invalid?

Similarly, imagine that instead of police simply staying quiet about the “real” crime that interested them, officers lied to Spring about it. That is, Spring asks, “Is this really about some firearms charge, or are you holding me for some other reason?” Then an officer replies, despite secretly desiring to question Spring about a shooting, “I can’t think of any other reason.” If officers eventually do ask about the shooting, is that the sort of trick that would make Spring’s subsequent waiver invalid?

In the next case, the Court considers what the prosecution must show to demonstrate that a suspect engaged in a “course of conduct indicating waiver” such that a court can find a waiver of *Miranda* rights without an express oral or written waiver.

Supreme Court of the United States

Mary Berghuis v. Van Chester Thomkins

Decided June 1, 2010 – [560 U.S. 370](#)

Justice KENNEDY delivered the opinion of the Court.

The United States Court of Appeals for the Sixth Circuit, in a habeas corpus proceeding challenging a Michigan conviction for first-degree murder and certain other offenses, ruled that there had been two separate constitutional errors in the trial that led to the jury’s guilty verdict. First, the Court of Appeals determined that a statement by the accused, relied on at trial by the

prosecution, had been elicited in violation of *Miranda v. Arizona*. Second, it found that failure to ask for an instruction relating to testimony from an accomplice was ineffective assistance by defense counsel. Both of these contentions had been rejected in Michigan courts and in the habeas corpus proceedings before the United States District Court. Certiorari was granted to review the decision by the Court of Appeals on both points. The warden of a Michigan correctional facility is the petitioner here, and Van Chester Thompkins, who was convicted, is the respondent.

I

A

On January 10, 2000, a shooting occurred outside a mall in Southfield, Michigan. Among the victims was Samuel Morris, who died from multiple gunshot wounds. The other victim, Frederick France, recovered from his injuries and later testified. Thompkins, who was a suspect, fled. About one year later he was found in Ohio and arrested there.

Two Southfield police officers traveled to Ohio to interrogate Thompkins, then awaiting transfer to Michigan. The interrogation began around 1:30 p.m. and lasted about three hours. The interrogation was conducted in a room that was 8 by 10 feet, and Thompkins sat in a chair that resembled a school desk (it had an arm on it that swings around to provide a surface to write on). At the beginning of the interrogation, one of the officers, Detective Helgert, presented Thompkins with a form derived from the *Miranda* rule. It stated:

“NOTIFICATION OF CONSTITUTIONAL RIGHTS AND STATEMENT

“1. You have the right to remain silent.

“2. Anything you say can and will be used against you in a court of law.

“3. You have a right to talk to a lawyer before answering any questions and you have the right to have a lawyer present with you while you are answering any questions.

“4. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning, if you wish one.

“5. You have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.”

Helgert asked Thompkins to read the fifth warning out loud. Thompkins complied. Helgert later said this was to ensure that Thompkins could read, and Helgert concluded that Thompkins understood English. Helgert then read the other four *Miranda* warnings out loud and asked Thompkins to sign the form to demonstrate that he understood his rights. Thompkins declined to sign the form. The record contains conflicting evidence about whether Thompkins then verbally confirmed that he understood the rights listed on the form.

Officers began an interrogation. At no point during the interrogation did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Thompkins was “[l]argely” silent during the interrogation, which lasted about three hours. He did give a few limited verbal responses, however, such as “yeah,” “no,” or “I don’t know.” And on occasion he communicated by nodding his head. Thompkins also said that he “didn’t want a peppermint” that was offered to him by the police and that the chair he was “sitting in was hard.”

About 2 hours and 45 minutes into the interrogation, Helgert asked Thompkins, “Do you believe in God?” Thompkins made eye contact with Helgert and said “Yes,” as his eyes “well[ed] up with tears.” Helgert asked, “Do you pray to God?” Thompkins said “Yes.” Helgert asked, “Do you pray to God to forgive you for shooting that boy down?” Thompkins answered “Yes” and looked away. Thompkins refused to make a written confession, and the interrogation ended about 15 minutes later.

Thompkins was charged with first-degree murder, assault with intent to commit murder, and certain firearms-related offenses. He moved to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once, that he had not waived his right to remain silent, and that his inculpatory statements were involuntary. The trial court denied the motion.

The jury found Thompkins guilty on all counts. He was sentenced to life in prison without parole.

B

The trial court denied a motion for new trial filed by Thompkins’ appellate counsel. Thompkins appealed [] the trial court’s refusal to suppress his pretrial statements under *Miranda*. The Michigan Court of Appeals rejected the *Miranda* claim, ruling that Thompkins had not invoked his right to remain silent and had waived it. The Michigan Supreme Court denied discretionary review.

Thompkins filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Michigan. The District Court rejected Thompkins’ *Miranda* [] claim[]. The District Court reasoned that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation. It held further that the Michigan Court of Appeals was not unreasonable in determining that Thompkins had waived his right to remain silent.

The United States Court of Appeals for the Sixth Circuit reversed, ruling for Thompkins on [] his *Miranda* ... claim[]. The Court of Appeals ruled that the state court, in rejecting Thompkins’ *Miranda* claim, unreasonably applied clearly established federal law and based its decision on an unreasonable determination of the facts. The Court of Appeals acknowledged that a waiver of the right to remain silent need not be express, as it can be “inferred from the actions and words of the person interrogated.” The panel held, nevertheless, that the state court was unreasonable in finding an implied waiver in the circumstances here. The Court of Appeals found that the state court unreasonably determined the facts because “the evidence demonstrates that Thompkins was silent for two hours and forty-five minutes.” According to the Court of Appeals, Thompkins’

“persistent silence for nearly three hours in response to questioning and repeated invitations to tell his side of the story offered a clear and unequivocal message to the officers: Thompkins did not wish to waive his rights.”

We granted certiorari.

III

All concede that the warning given in this case was in full compliance with the [*Miranda*] requirements. The dispute centers on the response—or nonresponse—from the suspect.

A

Thompkins makes various arguments that his answers to questions from the detectives were inadmissible. He first contends that he “invoke[d] his privilege” to remain silent by not saying anything for a sufficient period of time, so the interrogation should have “cease[d]” before he made his inculpatory statements.

This argument is unpersuasive. In the context of invoking the *Miranda* right to counsel, the Court [has] held that a suspect must do so “unambiguously.” If an accused makes a statement concerning the right to counsel “that is ambiguous or equivocal” or makes no statement, the police are not required to end the interrogation, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights.

The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel. Both protect the privilege against compulsory self-incrimination by requiring an interrogation to cease when either right is invoked.

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that “avoid[s] difficulties of proof and ... provide[s] guidance to officers” on how to proceed in the face of ambiguity. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused’s unclear intent and face the consequence of suppression “if they guess wrong.” Suppression of a voluntary confession in these circumstances would place a significant burden on society’s interest in prosecuting criminal activity. Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights “might add marginally to *Miranda*’s goal of dispelling the compulsion inherent in custodial interrogation.” But “as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process.”

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his “right to cut off questioning.” Here he did neither, so he did not invoke his right to remain silent.

B

We next consider whether Thompkins waived his right to remain silent. The course of decisions since *Miranda*, informed by the application of *Miranda* warnings in the whole course of law enforcement, demonstrates that waivers can be established even absent formal or express statements of waiver that would be expected in, say, a judicial hearing to determine if a guilty plea has been properly entered. The main purpose of *Miranda* is to ensure that an accused is advised of and understands the right to remain silent and the right to counsel. Thus, “[i]f anything, 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 as evidence in the prosecution’s case in chief.”

The prosecution [] does not need to show that a waiver of *Miranda* rights was express. An “implicit waiver” of the “right to remain silent” is sufficient to admit a suspect’s statement into evidence. If the State establishes that a *Miranda* warning was given and the accused made an uncoerced statement, this showing, standing alone, is insufficient to demonstrate “a valid waiver” of *Miranda* rights. The prosecution must make the additional showing that the accused understood these rights. Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused’s uncoerced statement establishes an implied waiver of the right to remain silent.

Although *Miranda* imposes on the police a rule that is both formalistic and practical when it prevents them from interrogating suspects without first providing them with a *Miranda* warning, it does not impose a formalistic waiver procedure that a suspect must follow to relinquish those rights. As a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford. *Miranda* rights can [] be waived through means less formal than a typical waiver on the record in a courtroom, given the practical constraints and necessities of interrogation and the fact that *Miranda*’s main protection lies in advising defendants of their rights.

The record in this case shows that Thompkins waived his right to remain silent. First, there is no contention that Thompkins did not understand his rights; and from this it follows that he knew what he gave up when he spoke. There was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights. Thompkins received a written copy of the *Miranda* warnings; Detective Helgert determined that Thompkins could read and understand English; and Thompkins was given time to read the warnings. Thompkins, furthermore, read aloud the fifth warning, which stated that “you have the right to decide at any time before or during questioning to use your right to remain silent and your right to talk with a lawyer while you are being questioned.” He was thus aware that his right to remain silent would not dissipate after a certain amount of time and that police would have to honor his right to be silent and his right to counsel during the whole course of interrogation. Those rights, the warning made clear, could be asserted at any time. Helgert, moreover, read the warnings aloud.

Second, Thompkins’ answer to Detective Helgert’s question about whether Thompkins prayed to God for forgiveness for shooting the victim is a “course of conduct indicating waiver” of the right to remain silent. If Thompkins wanted to remain silent, he could have said nothing in

response to Helgert's questions, or he could have unambiguously invoked his *Miranda* rights and ended the interrogation. The fact that Thompkins made a statement about three hours after receiving a *Miranda* warning does not overcome the fact that he engaged in a course of conduct indicating waiver. Police are not required to rewarn suspects from time to time. Thompkins' answer to Helgert's question about praying to God for forgiveness for shooting the victim was sufficient to show a course of conduct indicating waiver. This is confirmed by the fact that before then Thompkins had given sporadic answers to questions throughout the interrogation.

Third, there is no evidence that Thompkins' statement was coerced. Thompkins does not claim that police threatened or injured him during the interrogation or that he was in any way fearful. The interrogation was conducted in a standard-sized room in the middle of the afternoon. It is true that apparently he was in a straight-backed chair for three hours, but there is no authority for the proposition that an interrogation of this length is inherently coercive. Indeed, even where interrogations of greater duration were held to be improper, they were accompanied, as this one was not, by other facts indicating coercion, such as an incapacitated and sedated suspect, sleep and food deprivation, and threats. The fact that Helgert's question referred to Thompkins' religious beliefs also did not render Thompkins' statement involuntary. "[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'" In these circumstances, Thompkins knowingly and voluntarily made a statement to police, so he waived his right to remain silent.

C

Thompkins next argues that, even if his answer to Detective Helgert could constitute a waiver of his right to remain silent, the police were not allowed to question him until they obtained a waiver first. [*North Carolina v.*] *Butler* forecloses this argument. The *Butler* Court held that courts can infer a waiver of *Miranda* rights "from the actions and words of the person interrogated." This principle would be inconsistent with a rule that requires a waiver at the outset. This holding also makes sense given that "the primary protection afforded suspects subject[ed] to custodial interrogation is the *Miranda* warnings themselves." The *Miranda* rule and its requirements are met if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions. Any waiver, express or implied, may be contradicted by an invocation at any time. If the right to counsel or the right to remain silent is invoked at any point during questioning, further interrogation must cease.

Interrogation provides the suspect with additional information that can put his or her decision to waive, or not to invoke, into perspective. As questioning commences and then continues, the suspect has the opportunity to consider the choices he or she faces and to make a more informed decision, either to insist on silence or to cooperate. When the suspect knows that *Miranda* rights can be invoked at any time, he or she has the opportunity to reassess his or her immediate and long-term interests. Cooperation with the police may result in more favorable treatment for the suspect; the apprehension of accomplices; the prevention of continuing injury and fear; beginning steps toward relief or solace for the victims; and the beginning of the suspect's own return to the law and the social order it seeks to protect.

In order for an accused's statement to be admissible at trial, police must have given the accused a *Miranda* warning. If that condition is established, the court can proceed to consider whether there has been an express or implied waiver of *Miranda* rights. In making its ruling on the admissibility of a statement made during custodial questioning, the trial court, of course, considers whether there is evidence to support the conclusion that, from the whole course of questioning, an express or implied waiver has been established. Thus, after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights. On these premises, it follows the police were not required to obtain a waiver of Thompkins' *Miranda* rights before commencing the interrogation.

D

In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police. The police, moreover, were not required to obtain a waiver of Thompkins' right to remain silent before interrogating him. The state court's decision rejecting Thompkins' *Miranda* claim was thus correct.

IV

[The Court held that Thompkins could not show prejudice from ineffective assistance of counsel.]

The judgment of the Court of Appeals is reversed, and the case is remanded with instructions to deny the petition.

Justice SOTOMAYOR, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

The Court concludes today that a criminal suspect waives his right to remain silent if, after sitting tacit and uncommunicative through nearly three hours of police interrogation, he utters a few one-word responses. The Court also concludes that a suspect who wishes to guard his right to remain silent against such a finding of "waiver" must, counterintuitively, speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police. Both propositions mark a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* has long provided during custodial interrogation.

This Court's decisions subsequent to *Miranda* have emphasized the prosecution's "heavy burden" in proving waiver. We have also reaffirmed that a court may not presume waiver from a suspect's silence or from the mere fact that a confession was eventually obtained.

Even in concluding that *Miranda* does not invariably require an express waiver of the right to silence or the right to counsel, this Court in *Butler* made clear that the prosecution bears a substantial burden in establishing an implied waiver.

It is undisputed here that Thompkins never expressly waived his right to remain silent. His refusal to sign even an acknowledgment that he understood his *Miranda* rights evinces, if anything, an intent not to waive those rights. That Thompkins did not make the inculpatory statements at issue until after approximately 2 hours and 45 minutes of interrogation serves as “strong evidence” against waiver. *Miranda* and *Butler* expressly preclude the possibility that the inculpatory statements themselves are sufficient to establish waiver.

In these circumstances, Thompkins’ “actions and words” preceding the inculpatory statements simply do not evidence a “course of conduct indicating waiver” sufficient to carry the prosecution’s burden. Although the Michigan court stated that Thompkins “sporadically” participated in the interview, that court’s opinion and the record before us are silent as to the subject matter or context of even a single question to which Thompkins purportedly responded, other than the exchange about God and the statements respecting the peppermint and the chair. Unlike in *Butler*, Thompkins made no initial declaration akin to “I will talk to you.” Indeed, Michigan and the United States concede that no waiver occurred in this case until Thompkins responded “yes” to the questions about God. I believe it is objectively unreasonable under our clearly established precedents to conclude the prosecution met its “heavy burden” of proof on a record consisting of three one-word answers, following 2 hours and 45 minutes of silence punctuated by a few largely nonverbal responses to unidentified questions.

Today’s decision turns *Miranda* upside down. Criminal suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so. Those results, in my view, find no basis in *Miranda* or our subsequent cases and are inconsistent with the fair-trial principles on which those precedents are grounded. Today’s broad new rules are all the more unfortunate because they are unnecessary to the disposition of the case before us. I respectfully dissent.

* * *

What Counts as an Unambiguous Invocation of *Miranda* Rights?

As the Court noted in *Berghuis v. Thompkins*, only an “unambiguous invocation of *Miranda* rights” by a suspect is effective. Interrogation must cease upon an unambiguous invocation of either the right to counsel or the right to silence. In the next case, the Court considered what qualifies as an unambiguous invocation.

Supreme Court of the United States

Robert L. Davis v. United States

Decided June 24, 1994 – [512 U.S. 452](#)

Justice O’CONNOR delivered the opinion of the Court.

In *Edwards v. Arizona*, [451 U.S. 477](#), (1981), we held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation. In this case we decide how law enforcement officers

should respond when a suspect makes a reference to counsel that is insufficiently clear to invoke the *Edwards* prohibition on further questioning.

I

Pool brought trouble—not to River City, but to the Charleston Naval Base. Petitioner, a member of the United States Navy, spent the evening of October 2, 1988, shooting pool at a club on the base. Another sailor, Keith Shackleton, lost a game and a \$30 wager to petitioner, but Shackleton refused to pay. After the club closed, Shackleton was beaten to death with a pool cue on a loading dock behind the commissary. The body was found early the next morning.

The investigation by the Naval Investigative Service (NIS) gradually focused on petitioner. Investigative agents determined that petitioner was at the club that evening, and that he was absent without authorization from his duty station the next morning. The agents also learned that only privately owned pool cues could be removed from the club premises, and that petitioner owned two cues—one of which had a bloodstain on it. The agents were told by various people that petitioner either had admitted committing the crime or had recounted details that clearly indicated his involvement in the killing.

On November 4, 1988, petitioner was interviewed at the NIS office. As required by military law, the agents advised petitioner that he was a suspect in the killing, that he was not required to make a statement, that any statement could be used against him at a trial by court-martial, and that he was entitled to speak with an attorney and have an attorney present during questioning. Petitioner waived his rights to remain silent and to counsel, both orally and in writing.

About an hour and a half into the interview, petitioner said, “Maybe I should talk to a lawyer.” According to the uncontradicted testimony of one of the interviewing agents, the interview then proceeded as follows:

“[We m]ade it very clear that we’re not here to violate his rights, that if he wants a lawyer, then we will stop any kind of questioning with him, that we weren’t going to pursue the matter unless we have it clarified is he asking for a lawyer or is he just making a comment about a lawyer, and he said, [‘]No, I’m not asking for a lawyer,’ and then he continued on, and said, ‘No, I don’t want a lawyer.’”

After a short break, the agents reminded petitioner of his rights to remain silent and to counsel. The interview then continued for another hour, until petitioner said, “I think I want a lawyer before I say anything else.” At that point, questioning ceased.

At his general court-martial, petitioner moved to suppress statements made during the November 4 interview. The Military Judge denied the motion, holding that “the mention of a lawyer by [petitioner] during the course of the interrogation [was] not in the form of a request for counsel and ... the agents properly determined that [petitioner] was not indicating a desire for or invoking his right to counsel.” Petitioner was convicted on one specification of unpremeditated murder.

The United States Court of Military Appeals granted discretionary review and affirmed. The court recognized that the state and federal courts have developed three different approaches to a suspect's ambiguous or equivocal request for counsel:

“Some jurisdictions have held that any mention of counsel, however ambiguous, is sufficient to require that all questioning cease. Others have attempted to define a threshold standard of clarity for invoking the right to counsel and have held that comments falling short of the threshold do not invoke the right to counsel. Some jurisdictions ... have held that all interrogation about the offense must immediately cease whenever a suspect mentions counsel, but they allow interrogators to ask narrow questions designed to clarify the earlier statement and the [suspect's] desires respecting counsel.”

Applying the third approach, the court held that petitioner's comment was ambiguous, and that the NIS agents properly clarified petitioner's wishes with respect to counsel before continuing questioning him about the offense.

Although we have twice previously noted the varying approaches the lower courts have adopted with respect to ambiguous or equivocal references to counsel during custodial interrogation, we have not addressed the issue on the merits. We granted certiorari to do so.

II

The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated a suspect in a criminal investigation has no constitutional right to the assistance of counsel. Nevertheless, we held in *Miranda v. Arizona* that a suspect subject to custodial interrogation has the right to consult with an attorney and to have counsel present during questioning, and that the police must explain this right to him before questioning begins. The right to counsel established in *Miranda* was one of a “series of recommended ‘procedural safeguards’ ... [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected.”

The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it “requir[es] the special protection of the knowing and intelligent waiver standard.” If the suspect effectively waives his right to counsel after receiving the *Miranda* warnings, law enforcement officers are free to question him. But if a suspect requests counsel at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. This “second layer of prophylaxis for the *Miranda* right to counsel” is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” To that end, we have held that a suspect who has invoked the right to counsel cannot be questioned regarding any offense unless an attorney is actually present.

The applicability of [this rule] requires courts to “determine whether the accused *actually invoked* his right to counsel.” To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an objective inquiry. Invocation of the *Miranda* right to counsel “requires, at a minimum, some statement that can reasonably be construed to be an

expression of a desire for the assistance of an attorney.” But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning.

Rather, the suspect must unambiguously request counsel. As we have observed, “a statement either is such an assertion of the right to counsel or it is not.” Although a suspect need not “speak with the discrimination of an Oxford don,” *post* (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.

We decline petitioner’s invitation to require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. [T]he police must respect a suspect’s wishes regarding his right to have an attorney present during custodial interrogation. But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning “would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity,” because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.

We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will not clearly articulate their right to counsel although they actually want to have a lawyer present. But the primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. “[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.” A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted. Although *Edwards* provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—it is one that must be affirmatively invoked by the suspect.

In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement. Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edwards* rule—questioning must cease if the suspect asks for a lawyer—provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong. We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.

Of course, when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney. That was the procedure followed by the NIS agents in this case. Clarifying questions help protect the rights of the suspect by ensuring that he gets an attorney if he wants one, and will minimize the chance of a confession being suppressed due to subsequent judicial second-guessing as to the meaning of the suspect's statement regarding counsel. But we decline to adopt a rule requiring officers to ask clarifying questions. If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him.

To recapitulate: We held in *Miranda* that a suspect is entitled to the assistance of counsel during custodial interrogation even though the Constitution does not provide for such assistance. We held in *Edwards* that if the suspect invokes the right to counsel at any time, the police must immediately cease questioning him until an attorney is present. But we are unwilling to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer. Unless the suspect actually requests an attorney, questioning may continue.

The courts below found that petitioner's remark to the NIS agents—"Maybe I should talk to a lawyer"—was not a request for counsel, and we see no reason to disturb that conclusion. The NIS agents therefore were not required to stop questioning petitioner, though it was entirely proper for them to clarify whether petitioner in fact wanted a lawyer. Because there is no ground for suppression of petitioner's statements, the judgment of the Court of Military Appeals is

Affirmed.

Justice SOUTER, with whom Justice BLACKMUN, Justice STEVENS, and Justice GINSBURG join, concurring in the judgment.

In the midst of his questioning by naval investigators, petitioner said "Maybe I should talk to a lawyer." The investigators promptly stopped questioning Davis about the killing of Keith Shackleton and instead undertook to determine whether he meant to invoke his right to counsel. According to testimony accepted by the courts below, Davis answered the investigators' questions on that point by saying, "I'm not asking for a lawyer," and "No, I don't want to talk to a lawyer." Only then did the interrogation resume (stopping for good when petitioner said, "I think I want a lawyer before I say anything else").

I agree with the majority that the Constitution does not forbid law enforcement officers to pose questions (like those directed at Davis) aimed solely at clarifying whether a suspect's ambiguous reference to counsel was meant to assert his Fifth Amendment right. Accordingly I concur in the judgment affirming Davis's conviction, resting partly on evidence of statements given after agents ascertained that he did not wish to deal with them through counsel. I cannot, however, join in my colleagues' further conclusion that if the investigators here had been so inclined, they were at liberty to disregard Davis's reference to a lawyer entirely, in accordance with a general rule that interrogators have no legal obligation to discover what a custodial subject meant by an ambiguous statement that could reasonably be understood to express a desire to consult a lawyer.

Our own precedent, the reasonable judgments of the majority of the many courts already to have addressed the issue before us, and the advocacy of a considerable body of law enforcement officials are to the contrary. All argue against the Court's approach today, which draws a sharp line between interrogated suspects who "clearly" assert their right to counsel and those who say something that may, but may not, express a desire for counsel's presence, the former suspects being assured that questioning will not resume without counsel present, the latter being left to fend for themselves. The concerns of fairness and practicality that have long anchored our *Miranda* case law point to a different response: when law enforcement officials "reasonably do not know whether or not the suspect wants a lawyer," they should stop their interrogation and ask him to make his choice clear.

While the question we address today is an open one, its answer requires coherence with nearly three decades of case law addressing the relationship between police and criminal suspects in custodial interrogation. Throughout that period, two precepts have commanded broad assent: that the *Miranda* safeguards exist "to assure that *the individual's right to choose* between speech and silence remains unfettered throughout the interrogation process," and that the justification for *Miranda* rules, intended to operate in the real world, "must be consistent with ... practical realities." A rule barring government agents from further interrogation until they determine whether a suspect's ambiguous statement was meant as a request for counsel fulfills both ambitions. It assures that a suspect's choice whether or not to deal with police through counsel will be "scrupulously honored," and it faces both the real-world reasons why misunderstandings arise between suspect and interrogator and the real-world limitations on the capacity of police and trial courts to apply fine distinctions and intricate rules.

Tested against the same two principles, the approach the Court adopts does not fare so well. First, as the majority expressly acknowledges, criminal suspects who may (in *Miranda's* words) be "thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures," would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English language, and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them. Indeed, the awareness of just these realities has, in the past, dissuaded the Court from placing any burden of clarity upon individuals in custody, but has led it instead to require that requests for counsel be "give[n] a broad, rather than a narrow, interpretation," and that courts "indulge every reasonable presumption" that a suspect has not waived his right to counsel under *Miranda*.

The Court defends as tolerable the certainty that some poorly expressed requests for counsel will be disregarded on the ground that *Miranda* warnings suffice to alleviate the inherent coercion of the custodial interrogation. But, "[a] once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice" to "assure that the ... right to choose between silence and speech remains unfettered throughout the interrogation process."

Indeed, it is easy, amidst the discussion of layers of protection, to lose sight of a real risk in the majority's approach, going close to the core of what the Court has held that the Fifth Amendment provides. The experience of the timid or verbally inept suspect (whose existence the Court

acknowledges) may not always closely follow that of the defendant in *Edwards v. Arizona* (whose purported waiver of his right to counsel, made after having invoked the right, was held ineffective, lest police be tempted to “badge[r]” others like him. When a suspect understands his (expressed) wishes to have been ignored (and by hypothesis, he has said something that an objective listener could “reasonably,” although not necessarily, take to be a request), in contravention of the “rights” just read to him by his interrogator, he may well see further objection as futile and confession (true or not) as the only way to end his interrogation.

Nor is it enough to say that a “statement either is ... an assertion of the right to counsel or it is not.” While it might be fair to say that every statement is meant either to express a desire to deal with police through counsel or not, this fact does not dictate the rule that interrogators who hear a statement consistent with either possibility may presume the latter and forge ahead; on the contrary, clarification is the intuitively sensible course.

Our cases are best respected by a rule that when a suspect under custodial interrogation makes an ambiguous statement that might reasonably be understood as expressing a wish that a lawyer be summoned (and questioning cease), interrogators’ questions should be confined to verifying whether the individual meant to ask for a lawyer. While there is reason to expect that trial courts will apply today’s ruling sensibly (without requiring criminal suspects to speak with the discrimination of an Oxford don) and that interrogators will continue to follow what the Court rightly calls “good police practice” (compelled up to now by a substantial body of state and Circuit law), I believe that the case law under *Miranda* does not allow them to do otherwise.

Notes, Comments, and Questions

A recent case from the Supreme Court of Louisiana demonstrates how easily a court can find a suspect’s request for counsel to be “ambiguous.” In *State v. Demesme*, [228 So.3d 1206](#) (La. 2017) the defendant argued he was improperly questioned after invoking his right to counsel. The Court rejected his claim, and Justice Scott J. Crichton wrote separately as follows:

“I agree with the Court’s decision to deny the defendant’s writ application and write separately to spotlight the very important constitutional issue regarding the invocation of counsel during a law enforcement interview. The defendant voluntarily agreed to be interviewed twice regarding his alleged sexual misconduct with minors. At both interviews detectives advised the defendant of his *Miranda* rights and the defendant stated he understood and waived those rights. Nonetheless, the defendant argues he invoked his right to counsel. And the basis for this comes from the second interview, where I believe the defendant ambiguously referenced a lawyer—prefacing that statement with ‘if y’all, this is how I feel, if y’all think I did it, I know that I didn’t do it so why don’t you just give me a lawyer dog cause this is not what’s up.’”

“In my view, the defendant’s ambiguous and equivocal reference to a ‘lawyer dog’ does not constitute an invocation of counsel that warrants termination of the interview and does not violate *Edwards v. Arizona*.”

Justice Crichton’s apparent belief that the defendant said “lawyer dog”—instead of perhaps saying to the detective, “give me a lawyer, dawg”—inspired [widespread ridicule](#). Note, however, that even with a better understanding of common American vernacular, one might still find the request in *Demesme* to be “ambiguous” under *Davis*. Because the suspect prefaced his request with “if y’all think I did it,” it might lack sufficient clarity to impose any burden on police—either to cease questioning or to clarify the suspect’s intention. Under the rule proposed in Justice Souter’s concurrence in *Davis*, which attracted four votes, police would have been required to verify whether the suspect meant to ask for a lawyer before continuing with interrogation.

* * *

In our next chapter, we will examine the consequences of a suspect’s successful invocation of either the right to counsel or the right to silence.

INTERROGATIONS

Chapter 27

The *Miranda* Rule: Effect of Invocations of Rights

In our previous chapter, we read that suspects must invoke their rights unambiguously; otherwise, police have no duty to cease questioning or to clarify the suspect's intent. In this chapter, we examine what happens when suspects do successfully invoke their rights. As we will see, the Court has treated an invocation of the right to silence differently from an invocation of the right to counsel.

Invocation of the Right to Silence

We begin with a case in which a suspect invoked his right to remain silent. The question was how the suspect's invocation constrained the interrogation tactics of the police. In particular, the Court considered the length of time after invocation that police must wait before again asking a suspect whether he wishes to waive his right to silence.

Supreme Court of the United States

Michigan v. Richard Bert Mosley

Decided Dec. 9, 1975 – [423 U.S. 96](#)

Mr. Justice STEWART delivered the opinion of the Court.

The respondent, Richard Bert Mosley, was arrested in Detroit, Mich., in the early afternoon of April 8, 1971, in connection with robberies that had recently occurred at the Blue Goose Bar and the White Tower Restaurant on that city's lower east side. The arresting officer, Detective James Cowie of the Armed Robbery Section of the Detroit Police Department, was acting on a tip implicating Mosley and three other men in the robberies. After effecting the arrest, Detective Cowie brought Mosley to the Robbery, Breaking and Entering Bureau of the Police Department, located on the fourth floor of the departmental headquarters building. The officer advised Mosley of his rights under this Court's decision in *Miranda v. Arizona* and had him read and sign the department's constitutional rights notification certificate. After filling out the necessary arrest papers, Cowie began questioning Mosley about the robbery of the White Tower Restaurant. When Mosley said he did not want to answer any questions about the robberies, Cowie promptly ceased the interrogation. The completion of the arrest papers and the questioning of Mosley together took approximately 20 minutes. At no time during the questioning did Mosley indicate a desire to consult with a lawyer, and there is no claim that the procedures followed to this point did not fully comply with the strictures of the *Miranda* opinion. Mosley was then taken to a ninth-floor cell block.

Shortly after 6 p.m., Detective Hill of the Detroit Police Department Homicide Bureau brought Mosley from the cell block to the fifth-floor office of the Homicide Bureau for questioning about the fatal shooting of a man named Leroy Williams. Williams had been killed on January 9, 1971, during a holdup attempt outside the 101 Ranch Bar in Detroit. Mosley had not been arrested on this charge or interrogated about it by Detective Cowie. Before questioning Mosley about this

homicide, Detective Hill carefully advised him of his “*Miranda* rights.” Mosley read the notification form both silently and aloud, and Detective Hill then read and explained the warnings to him and had him sign the form. Mosley at first denied any involvement in the Williams murder, but after the officer told him that Anthony Smith had confessed to participating in the slaying and had named him as the “shooter,” Mosley made a statement implicating himself in the homicide.¹ The interrogation by Detective Hill lasted approximately 15 minutes, and at no time during its course did Mosley ask to consult with a lawyer or indicate that he did not want to discuss the homicide. In short, there is no claim that the procedures followed during Detective Hill’s interrogation of Mosley, standing alone, did not fully comply with the strictures of the *Miranda* opinion.

Mosley was subsequently charged in a one-count information with first-degree murder. Before the trial he moved to suppress his incriminating statement on a number of grounds, among them the claim that under the doctrine of the *Miranda* case it was constitutionally impermissible for Detective Hill to question him about the Williams murder after he had told Detective Cowie that he did not want to answer any questions about the robberies. The trial court denied the motion to suppress after an evidentiary hearing, and the incriminating statement was subsequently introduced in evidence against Mosley at his trial. The jury convicted Mosley of first-degree murder, and the court imposed a mandatory sentence of life imprisonment.

On appeal to the Michigan Court of Appeals, Mosley renewed his previous objections to the use of his incriminating statement in evidence. The appellate court reversed the judgment of conviction, holding that Detective Hill’s interrogation of Mosley had been a per se violation of the *Miranda* doctrine. Accordingly, without reaching Mosley’s other contentions, the Court remanded the case for a new trial with instructions that Mosley’s statement be suppressed as evidence. After further appeal was denied by the Michigan Supreme Court, the State filed a petition for certiorari here. We granted the writ because of the important constitutional question presented.

The issue in this case [] is whether the conduct of the Detroit police that led to Mosley’s incriminating statement did in fact violate the *Miranda* “guidelines,” so as to render the statement inadmissible in evidence against Mosley at his trial. Resolution of the question turns almost entirely on the interpretation of a single passage in the *Miranda* opinion, upon which the Michigan appellate court relied in finding a per se violation of *Miranda*:

“Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.”

This passage states that “the interrogation must cease” when the person in custody indicates that “he wishes to remain silent.” It does not state under what circumstances, if any, a resumption of

¹ [Footnote 3 by the Court] During cross-examination by Mosley’s counsel at the evidentiary hearing, Detective Hill conceded that Smith in fact had not confessed but had “denied a physical participation in the robbery.”

questioning is permissible. The passage could be literally read to mean that a person who has invoked his “right to silence” can never again be subjected to custodial interrogation by any police officer at any time or place on any subject. Another possible construction of the passage would characterize “any statement taken after the person invokes his privilege” as “the product of compulsion” and would therefore mandate its exclusion from evidence, even if it were volunteered by the person in custody without any further interrogation whatever. Or the passage could be interpreted to require only the immediate cessation of questioning, and to permit a resumption of interrogation after a momentary respite.

It is evident that any of these possible literal interpretations would lead to absurd and unintended results. To permit the continuation of custodial interrogation after a momentary cessation would clearly frustrate the purposes of *Miranda* by allowing repeated rounds of questioning to undermine the will of the person being questioned. At the other extreme, a blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

A reasonable and faithful interpretation of the *Miranda* opinion must rest on the intention of the Court in that case to adopt “fully effective means ... to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored ...” The critical safeguard identified in the passage at issue is a person’s “right to cut off questioning.” Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person’s exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his “right to cut off questioning” was “scrupulously honored.”

A review of the circumstances leading to Mosley’s confession reveals that his “right to cut off questioning” was fully respected in this case. Before his initial interrogation, Mosley was carefully advised that he was under no obligation to answer any questions and could remain silent if he wished. He orally acknowledged that he understood the *Miranda* warnings and then signed a printed notification-of-rights form. When Mosley stated that he did not want to discuss the robberies, Detective Cowie immediately ceased the interrogation and did not try either to resume the questioning or in any way to persuade Mosley to reconsider his position. After an interval of more than two hours, Mosley was questioned by another police officer at another location about an unrelated holdup murder. He was given full and complete *Miranda* warnings at the outset of the second interrogation. He was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options. The subsequent questioning did not undercut Mosley’s previous decision not to answer Detective Cowie’s inquiries. Detective Hill did not resume the interrogation about the White Tower Restaurant robbery or inquire about the Blue Goose Bar robbery, but instead focused exclusively on the Leroy Williams homicide, a crime different in nature and in time and

place of occurrence from the robberies for which Mosley had been arrested and interrogated by Detective Cowie. Although it is not clear from the record how much Detective Hill knew about the earlier interrogation, his questioning of Mosley about an unrelated homicide was quite consistent with a reasonable interpretation of Mosley's earlier refusal to answer any questions about the robberies.

This is not a case, therefore, where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.

For these reasons, we conclude that the admission in evidence of Mosley's incriminating statement did not violate the principles of *Miranda v. Arizona*. Accordingly, the judgment of the Michigan Court of Appeals is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Mr. Justice BRENNAN, with whom Mr. Justice MARSHALL joins, dissenting.

[T]he process of eroding *Miranda* rights [] continues with today's holding that police may renew the questioning of a suspect who has once exercised his right to remain silent, provided the suspect's right to cut off questioning has been "scrupulously honored." Today's distortion of *Miranda*'s constitutional principles can be viewed only as yet another stop in the erosion and, I suppose, ultimate overruling of *Miranda*'s enforcement of the privilege against self-incrimination.

The *Miranda* guidelines were necessitated by the inherently coercive nature of in-custody questioning. As the Court today continues to recognize, under *Miranda*, the cost of assuring voluntariness by procedural tests, independent of any actual inquiry into voluntariness, is that some voluntary statements will be excluded. Thus the consideration in the task confronting the Court is not whether voluntary statements will be excluded, but whether the procedures approved will be sufficient to assure with reasonable certainty that a confession is not obtained under the influence of the compulsion inherent in interrogation and detention. The procedures approved by the Court today fail to provide that assurance.

We observed in *Miranda*: "In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege." And, as that portion of *Miranda* which the majority finds controlling observed, "the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked." Thus, as to statements which are the product of renewed questioning, *Miranda* established a virtually irrebuttable presumption of compulsion and that presumption stands strongest where, as in this case, a suspect, having initially determined to remain silent, is subsequently brought to confess his crime. Only by adequate procedural safeguards could the presumption be rebutted.

In formulating its procedural safeguard, the Court skirts the problem of compulsion and thereby fails to join issue with the dictates of *Miranda*. The language which the Court finds controlling in this case teaches that renewed questioning itself is part of the process which invariably operates to overcome the will of a suspect. That teaching is embodied in the form of a proscription on any further questioning once the suspect has exercised his right to remain silent. Today's decision uncritically abandons that teaching. The Court assumes, contrary to the controlling language, that "scrupulously honoring" an initial exercise of the right to remain silent preserves the efficaciousness of initial and future warnings despite the fact that the suspect has once been subjected to interrogation and then has been detained for a lengthy period of time.

[The dissent then suggested that once a suspect invokes the right to silence, police should be allowed to reinitiate questioning only if the suspect either has appeared before a judicial officer or has counsel present.]

* * *

Invocation of the Right to Counsel

In comparison with an invocation of the right to silence, a suspect's invocation of the right to counsel is more powerful. When a suspect says, "I want a lawyer," that statement restricts police more effectively than something like, "I don't want to talk to you"—or even something more legalistic like, "I invoke my right to silence."

Supreme Court of the United States

Robert Edwards v. Arizona

Decided May 18, 1981 – [451 U.S. 477](#)

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case limited to Q 1 presented in the petition, which in relevant part was "whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest confession, which was obtained after Edwards had invoked his right to consult counsel before further interrogation"

I

On January 19, 1976, a sworn complaint was filed against Edwards in Arizona state court charging him with robbery, burglary, and first-degree murder. An arrest warrant was issued pursuant to the complaint, and Edwards was arrested at his home later that same day. At the police station, he was informed of his rights as required by *Miranda v. Arizona*. Petitioner stated that he understood his rights, and was willing to submit to questioning. After being told that another suspect already in custody had implicated him in the crime, Edwards denied involvement and gave a taped statement presenting an alibi defense. He then sought to "make a deal." The interrogating officer told him that he wanted a statement, but that he did not have the authority to negotiate a deal. The officer provided Edwards with the telephone number of a county attorney. Petitioner made the call, but hung up after a few moments. Edwards then said:

“I want an attorney before making a deal.” At that point, questioning ceased and Edwards was taken to county jail.

At 9:15 the next morning, two detectives, colleagues of the officer who had interrogated Edwards the previous night, came to the jail and asked to see Edwards. When the detention officer informed Edwards that the detectives wished to speak with him, he replied that he did not want to talk to anyone. The guard told him that “he had” to talk and then took him to meet with the detectives. The officers identified themselves, stated they wanted to talk to him, and informed him of his *Miranda* rights. Edwards was willing to talk, but he first wanted to hear the taped statement of the alleged accomplice who had implicated him. After listening to the tape for several minutes, petitioner said that he would make a statement so long as it was not tape-recorded. The detectives informed him that the recording was irrelevant since they could testify in court concerning whatever he said. Edwards replied: “I’ll tell you anything you want to know, but I don’t want it on tape.” He thereupon implicated himself in the crime.

Prior to trial, Edwards moved to suppress his confession on the ground that his *Miranda* rights had been violated when the officers returned to question him after he had invoked his right to counsel. The trial court initially granted the motion to suppress, but reversed its ruling when presented with a supposedly controlling decision of a higher Arizona court. The court stated without explanation that it found Edwards’ statement to be voluntary. Edwards was tried twice and convicted. Evidence concerning his confession was admitted at both trials.

On appeal, the Arizona Supreme Court held that Edwards had invoked both his right to remain silent and his right to counsel during the interrogation conducted on the night of January 19. The court then went on to determine, however, that Edwards had waived both rights during the January 20 meeting when he voluntarily gave his statement to the detectives after again being informed that he need not answer questions and that he need not answer without the advice of counsel: “The trial court’s finding that the waiver and confession were voluntarily and knowingly made is upheld.”

Because the use of Edwards’ confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments as construed in *Miranda v. Arizona*, we reverse the judgment of the Arizona Supreme Court.²

II

Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions. Contrary to the holdings of the state courts, Edwards insists that having exercised his right on the 19th to have counsel present during interrogation, he did not validly waive that right on the 20th. For the following reasons, we agree.

First, the Arizona Supreme Court applied an erroneous standard for determining waiver where

² [Footnote 7 by the Court] We thus need not decide Edwards’ claim that the State deprived him of his right to counsel under the Sixth and Fourteenth Amendments.

the accused has specifically invoked his right to counsel. It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case “upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”

Here, however sound the conclusion of the state courts as to the voluntariness of Edwards’ admission may be, neither the trial court nor the Arizona Supreme Court undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it. It is thus apparent that the decision below misunderstood the requirement for finding a valid waiver of the right to counsel, once invoked.

Second, although we have held that after initially being advised of his *Miranda* rights, the accused may himself validly waive his rights and respond to interrogation, the Court has strongly indicated that additional safeguards are necessary when the accused asks for counsel; and we now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Miranda itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, “the interrogation must cease until an attorney is present.” Our later cases have not abandoned that view. We reconfirm [that] view[] and emphasize that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

In concluding that the fruits of the interrogation initiated by the police on January 20 could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth and Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver.

But this is not what the facts of this case show. Here, the officers conducting the interrogation on the evening of January 19 ceased interrogation when Edwards requested counsel as he had been advised he had the right to do. The Arizona Supreme Court was of the opinion that this was a sufficient invocation of his *Miranda* rights, and we are in accord. It is also clear that without making counsel available to Edwards, the police returned to him the next day. This was not at his suggestion or request. Indeed, Edwards informed the detention officer that he did not want to talk to anyone. At the meeting, the detectives told Edwards that they wanted to talk to him

and again advised him of his *Miranda* rights. Edwards stated that he would talk, but what prompted this action does not appear. He listened at his own request to part of the taped statement made by one of his alleged accomplices and then made an incriminating statement, which was used against him at his trial. We think it is clear that Edwards was subjected to custodial interrogation on January 20 and that this occurred at the instance of the authorities. His statement made without having had access to counsel, did not amount to a valid waiver and hence was inadmissible.

Accordingly, the holding of the Arizona Supreme Court that Edwards had waived his right to counsel was infirm, and the judgment of that court is reversed.

Notes, Comments, and Questions

Several years after deciding *Arizona v. Edwards*, the Court considered whether the rule applied if a suspect invoked his right to counsel when questioned about one crime and police later obtained a waiver of rights for the purpose of interrogating the suspect about a different crime. For example, imagine that police arrest a suspect for larceny, and he invokes his right to counsel. Then, another officer notices the suspect and recognizes him as someone police believe was involved in an unrelated murder. May that officer read the suspect his *Miranda* warnings and seek permission to question him about the murder?

In *Arizona v. Roberson*, [486 U.S. 675](#) (1988), the Court held that *Edwards* prohibits police from seeking a waiver regardless of the crime they wish to discuss. *Roberson* concerned a suspect arrested for one burglary who invoked his right to counsel and was later questioned about a different burglary. Quoting an Arizona Supreme Court decision with approval, the Court stated, “The only difference between *Edwards* and the appellant is that *Edwards* was questioned about the same offense after a request for counsel while the appellant was reinterrogated about an unrelated offense. We do not believe that this factual distinction holds any legal significance for fifth amendment purposes.”

The Court reiterated “the virtues of a bright-line rule in cases following *Edwards* as well as *Miranda*,” and it rejected arguments relying on *Michigan v. Mosely*, which concerned a waiver obtained after a suspect had invoked his right to silence. The Court distinguished *Mosely* by reasoning that a “suspect’s decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer’s advice.” In other words, if a suspect invokes his right to silence, he is asserting his own ability to decide how to act while in custody, in addition to asserting that he does not wish to speak at that time. Because he remains confident of his own judgment, he can change his mind without seeking advice, and police may inquire—after a respectful delay—whether he wishes to change course. A suspect who invokes his right to counsel, by contrast, is announcing his recognition that he needs help. Once he does so, police cannot reasonably ask whether he has somehow gained new power to manage the difficult situation without assistance.

In *Minnick v. Mississippi*, the Court reaffirmed and extended the rule of *Edwards*. The question was whether the rule of *Edwards* applied once a suspect who invoked his right to counsel had met with a lawyer, or if instead the meeting with counsel allowed the police to attempt to

reinitiate interrogation.

Students should compare *Roberson* with *McNeil v. Wisconsin* (U.S. 1991), which appears in Chapter 29. In *McNeil*, the Court held that a suspect's appearance with a lawyer in court for *one crime* (which causes the Sixth Amendment right to counsel to attach for that crime), does not prevent officers from questioning the suspect about *other crimes* for which no charges had been filed (and for which Sixth Amendment right had accordingly not yet attached). This will be easier to understand once students have studied other Sixth Amendment cases. But because similar facts yield different results under a *Miranda* analysis than they do under a Sixth Amendment analysis, we flag the issue now so that students can note the contrast later.

Supreme Court of the United States

Robert S. Minnick v. Mississippi

Decided Dec. 3, 1990 – [498 U.S. 146](#)

Justice KENNEDY delivered the opinion of the Court.

The issue in the case before us is whether *Edwards'* protection ceases once the suspect has consulted with an attorney.

Petitioner Robert Minnick and fellow prisoner James Dyess escaped from a county jail in Mississippi and, a day later, broke into a mobile home in search of weapons. In the course of the burglary they were interrupted by the arrival of the trailer's owner, Ellis Thomas, accompanied by Lamar Lafferty and Lafferty's infant son. Dyess and Minnick used the stolen weapons to kill Thomas and the senior Lafferty. Minnick's story is that Dyess murdered one victim and forced Minnick to shoot the other. Before the escapees could get away, two young women arrived at the mobile home. They were held at gunpoint, then bound hand and foot. Dyess and Minnick fled in Thomas' truck, abandoning the vehicle in New Orleans. The fugitives continued to Mexico, where they fought, and Minnick then proceeded alone to California. Minnick was arrested in Lemon Grove, California, on a Mississippi warrant, some four months after the murders.

The confession at issue here resulted from the last interrogation of Minnick while he was held in the San Diego jail, but we first recount the events which preceded it. Minnick was arrested on Friday, August 22, 1986. Petitioner testified that he was mistreated by local police during and after the arrest. The day following the arrest, Saturday, two Federal Bureau of Investigation (FBI) agents came to the jail to interview him. Petitioner testified that he refused to go to the interview, but was told he would "have to go down or else." The FBI report indicates that the agents read petitioner his *Miranda* warnings, and that he acknowledged he understood his rights. He refused to sign a rights waiver form, however, and said he would not answer "very many" questions. Minnick told the agents about the jailbreak and the flight, and described how Dyess threatened and beat him. Early in the interview, he sobbed "[i]t was my life or theirs," but otherwise he hesitated to tell what happened at the trailer. The agents reminded him he did not have to answer questions without a lawyer present. According to the report, "Minnick stated 'Come back Monday when I have a lawyer,' and stated that he would make a more complete statement then with his lawyer present." The FBI interview ended.

After the FBI interview, an appointed attorney met with petitioner. Petitioner spoke with the lawyer on two or three occasions, though it is not clear from the record whether all of these conferences were in person.

On Monday, August 25, Deputy Sheriff J.C. Denham of Clarke County, Mississippi, came to the San Diego jail to question Minnick. Minnick testified that his jailers again told him he would “have to talk” to Denham and that he “could not refuse.” Denham advised petitioner of his rights, and petitioner again declined to sign a rights waiver form. Petitioner told Denham about the escape and then proceeded to describe the events at the mobile home. According to petitioner, Dyess jumped out of the mobile home and shot the first of the two victims, once in the back with a shotgun and once in the head with a pistol. Dyess then handed the pistol to petitioner and ordered him to shoot the other victim, holding the shotgun on petitioner until he did so. Petitioner also said that when the two girls arrived, he talked Dyess out of raping or otherwise hurting them.

Minnick was tried for murder in Mississippi. He moved to suppress all statements given to the FBI or other police officers, including Denham. The trial court denied the motion with respect to petitioner’s statements to Denham, but suppressed his other statements. Petitioner was convicted on two counts of capital murder and sentenced to death.

On appeal, petitioner argued that the confession to Denham was taken in violation of his rights to counsel under the Fifth and Sixth Amendments. The Mississippi Supreme Court rejected the claims. With respect to the Fifth Amendment aspect of the case, the court found “the *Edwards* bright-line rule as to initiation” inapplicable. Relying on language in *Edwards* indicating that the bar on interrogating the accused after a request for counsel applies “until counsel has been made available to him,” the court concluded that “[s]ince counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied.” The court also rejected the Sixth Amendment claim, finding that petitioner waived his Sixth Amendment right to counsel when he spoke with Denham. We granted certiorari and, without reaching any Sixth Amendment implications in the case, we decide that the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel.

Edwards is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms.

The merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application. We have confirmed that the *Edwards* rule provides “clear and unequivocal” guidelines to the law enforcement profession.” Even before *Edwards*, we noted that *Miranda*’s “relatively rigid requirement that interrogation must cease upon the accused’s request for an attorney ... has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts by requiring the

suppression of trustworthy and highly probative evidence even though the confession might be voluntary under traditional Fifth Amendment analysis.” This pre-*Edwards* explanation applies as well to *Edwards* and its progeny.

The Mississippi Supreme Court relied on our statement in *Edwards* that an accused who invokes his right to counsel “is not subject to further interrogation by the authorities until counsel has been made available to him....” We do not interpret this language to mean, as the Mississippi court thought, that the protection of *Edwards* terminates once counsel has consulted with the suspect. In context, the requirement that counsel be “made available” to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room.

In *Edwards*, we focused on *Miranda*’s instruction that when the accused invokes his right to counsel, “the interrogation must cease until an attorney is *present*,” agreeing with *Edwards*’ contention that he had not waived his right “to have counsel *present* during custodial interrogation.” Our emphasis on counsel’s *presence* at interrogation is not unique to *Edwards*. It derives from *Miranda*, where we said that in the cases before us “[t]he presence of counsel ... would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.” Our cases following *Edwards* have interpreted the decision to mean that the authorities may not initiate questioning of the accused in counsel’s absence. These descriptions of *Edwards*’ holding are consistent with our statement that “[p]reserving the integrity of an accused’s choice to communicate with police only through counsel is the essence of *Edwards* and its progeny.” In our view, a fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.

We consider our ruling to be an appropriate and necessary application of the *Edwards* rule. A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is prolonged. The case before us well illustrates the pressures, and abuses, that may be concomitants of custody. Petitioner testified that though he resisted, he was required to submit to both the FBI and the Denham interviews. In the latter instance, the compulsion to submit to interrogation followed petitioner’s unequivocal request during the FBI interview that questioning cease until counsel was present. The case illustrates also that consultation is not always effective in instructing the suspect of his rights. One plausible interpretation of the record is that petitioner thought he could keep his admissions out of evidence by refusing to sign a formal waiver of rights. If the authorities had complied with Minnick’s request to have counsel present during interrogation, the attorney could have corrected Minnick’s misunderstanding, or indeed counseled him that he need not make a statement at all. We decline to remove protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation resumes.

The exception to *Edwards* here proposed is inconsistent with *Edwards*' purpose to protect the suspect's right to have counsel present at custodial interrogation. It is inconsistent as well with *Miranda*, where we specifically rejected respondent's theory that the opportunity to consult with one's attorney would substantially counteract the compulsion created by custodial interrogation. We noted in *Miranda* that "[e]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

The exception proposed, furthermore, would undermine the advantages flowing from *Edwards*' "clear and unequivocal" character. Respondent concedes that even after consultation with counsel, a second request for counsel should reinstate the *Edwards* protection. We are invited by this formulation to adopt a regime in which *Edwards*' protection could pass in and out of existence multiple times prior to arraignment, at which point the same protection might reattach by virtue of our Sixth Amendment jurisprudence. Vagaries of this sort spread confusion through the justice system and lead to a consequent loss of respect for the underlying constitutional principle.

In addition, adopting the rule proposed would leave far from certain the sort of consultation required to displace *Edwards*. Consultation is not a precise concept, for it may encompass variations from a telephone call to say that the attorney is en route, to a hurried interchange between the attorney and client in a detention facility corridor, to a lengthy in-person conference in which the attorney gives full and adequate advice respecting all matters that might be covered in further interrogations. And even with the necessary scope of consultation settled, the officials in charge of the case would have to confirm the occurrence and, possibly, the extent of consultation to determine whether further interrogation is permissible. The necessary inquiries could interfere with the attorney-client privilege.

Added to these difficulties in definition and application of the proposed rule is our concern over its consequence that the suspect whose counsel is prompt would lose the protection of *Edwards*, while the one whose counsel is dilatory would not. There is more than irony to this result. There is a strong possibility that it would distort the proper conception of the attorney's duty to the client and set us on a course at odds with what ought to be effective representation.

Both waiver of rights and admission of guilt are consistent with the affirmation of individual responsibility that is a principle of the criminal justice system. It does not detract from this principle, however, to insist that neither admissions nor waivers are effective unless there are both particular and systemic assurances that the coercive pressures of custody were not the inducing cause. The *Edwards* rule sets forth a specific standard to fulfill these purposes, and we have declined to confine it in other instances. It would detract from the efficacy of the rule to remove its protections based on consultation with counsel.

Edwards does not foreclose finding a waiver of Fifth Amendment protections after counsel has been requested, provided the accused has initiated the conversation or discussions with the authorities; but that is not the case before us. There can be no doubt that the interrogation in question was initiated by the police; it was a formal interview which petitioner was compelled to attend. Since petitioner made a specific request for counsel before the interview, the police-initiated interrogation was impermissible. Petitioner's statement to Denham was not admissible at trial.

The judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice SCALIA, with whom THE CHIEF JUSTICE joins, dissenting.

The Court today establishes an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney. Because I see no justification for applying the *Edwards* irrebuttable presumption when a criminal suspect has actually consulted with his attorney, I respectfully dissent.

The Court today reverses the trial court's conclusion. It holds that, because Minnick had asked for counsel during the interview with the FBI agents, he could not—as a matter of law—validly waive the right to have counsel present during the conversation initiated by Denham. That Minnick's original request to see an attorney had been honored, that Minnick had consulted with his attorney on several occasions, and that the attorney had specifically warned Minnick not to speak to the authorities, are irrelevant. That Minnick was familiar with the criminal justice system in general or *Miranda* warnings in particular (he had previously been convicted of robbery in Mississippi and assault with a deadly weapon in California) is also beside the point. The confession must be suppressed, not because it was "compelled," nor even because it was obtained from an individual who could realistically be assumed to be unaware of his rights, but simply because this Court sees fit to prescribe as a "systemic assuranc[e]" that a person in custody who has once asked for counsel cannot thereafter be approached by the police unless counsel is present. Of course the Constitution's proscription of compelled testimony does not remotely authorize this incursion upon state practices; and even our recent precedents are not a valid excuse.

In this case [] we have not been called upon to reconsider *Edwards*, but simply to determine whether its irrebuttable presumption should continue after a suspect has actually consulted with his attorney. Whatever justifications might support *Edwards* are even less convincing in this context.

The existence and the importance of the *Miranda*-created right "to have counsel *present*" are unquestioned here. What is questioned is why a State should not be given the opportunity to prove that the right was *voluntarily waived* by a suspect who, after having been read his *Miranda* rights twice and having consulted with counsel at least twice, chose to speak to a police officer (and to admit his involvement in two murders) without counsel present.

Edwards did not assert the principle that no waiver of the *Miranda* right “to have counsel present” is possible. It simply adopted the presumption that no waiver is *voluntary* in certain circumstances, and the issue before us today is how broadly those circumstances are to be defined. They should not, in my view, extend beyond the circumstances present in *Edwards* itself—where the suspect in custody asked to consult an attorney and was interrogated before that attorney had ever been provided. In those circumstances, the *Edwards* rule rests upon an assumption similar to that of *Miranda* itself: that when a suspect in police custody is first questioned he is likely to be ignorant of his rights and to feel isolated in a hostile environment. This likelihood is thought to justify special protection against unknowing or coerced waiver of rights. After a suspect has seen his request for an attorney honored, however, and has actually spoken with that attorney, the probabilities change. The suspect then knows that he has an advocate on his side, and that the police will permit him to consult that advocate. He almost certainly also has a heightened awareness (above what the *Miranda* warning itself will provide) of his right to remain silent—since at the earliest opportunity “any lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to the police under any circumstances.”

Under these circumstances, an irrebuttable presumption that any police-prompted confession is the result of ignorance of rights, or of coercion, has no genuine basis in fact. After the first consultation, therefore, the *Edwards* exclusionary rule should cease to apply.

One should not underestimate the extent to which the Court’s expansion of *Edwards* constricts law enforcement. Today’s ruling, that the invocation of a right to counsel permanently prevents a police-initiated waiver, makes it largely impossible for the police to urge a prisoner who has initially declined to confess to change his mind—or indeed, even to ask whether he has changed his mind. Many persons in custody will invoke the *Miranda* right to counsel during the first interrogation, so that the permanent prohibition will attach at once. Those who do not do so will almost certainly request or obtain counsel at arraignment. We have held that a general request for counsel, after the Sixth Amendment right has attached, also triggers the *Edwards* prohibition of police-solicited confessions, and I presume that the perpetuity of prohibition announced in today’s opinion applies in that context as well. “Perpetuity” is not too strong a term, since, although the Court rejects one logical moment at which the *Edwards* presumption might end, it suggests no alternative. In this case Minnick was reapproached by the police three days after he requested counsel, but the result would presumably be the same if it had been three months, or three years, or even three decades. This perpetual irrebuttable presumption will apply, I might add, not merely to interrogations involving the original crime, but to those involving other subjects as well.

Today’s extension of the *Edwards* prohibition is the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement. This newest tower, according to the Court, is needed to avoid “inconsisten[cy] with [the] purpose” of *Edwards*’ prophylactic rule, which was needed to protect *Miranda*’s prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution.

It seems obvious to me that, even in *Edwards* itself but surely in today’s decision, we have gone far beyond any genuine concern about suspects who do not *know* their right to remain silent, or who have been *coerced* to abandon it. Both holdings are explicable, in my view, only as an effort

to protect suspects against what is regarded as their own folly. The sharp-witted criminal would know better than to confess; why should the dull-witted suffer for his lack of mental endowment? Providing him an attorney at every stage where he might be induced or persuaded (though not coerced) to incriminate himself will even the odds. Apart from the fact that this protective enterprise is beyond our authority under the Fifth Amendment or any other provision of the Constitution, it is unwise. The procedural protections of the Constitution protect the guilty as well as the innocent, but it is not their objective to set the guilty free. That some clever criminals may employ those protections to their advantage is poor reason to allow criminals who have not done so to escape justice.

Thus, even if I were to concede that an honest confession is a foolish mistake, I would welcome rather than reject it; a rule that foolish mistakes do not count would leave most offenders not only unconvicted but undetected. More fundamentally, however, it is wrong, and subtly corrosive of our criminal justice system, to regard an honest confession as a “mistake.” While every person is entitled to stand silent, it is more virtuous for the wrongdoer to admit his offense and accept the punishment he deserves. Not only for society, but for the wrongdoer himself, “admissio[n] of guilt ..., if not coerced, [is] inherently desirable,” because it advances the goals of both “justice *and* rehabilitation.” A confession is rightly regarded by the Sentencing Guidelines as warranting a reduction of sentence, because it “demonstrates a recognition and affirmative acceptance of personal responsibility for ... criminal conduct,” which is the beginning of reform. We should, then, rejoice at an honest confession, rather than pity the “poor fool” who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it. To design our laws on premises contrary to these is to abandon belief in either personal responsibility or the moral claim of just government to obedience. Today’s decision is misguided.

Notes, Comments, and Questions

In *Maryland v. Shatzer*, the Court considered whether the rule of *Arizona v. Edwards*—which prohibits police from attempting to question a suspect absent counsel once that suspect has invoked the right to counsel—applies after a “break in custody.” The facts of the case made it an odd vehicle for the Court to reach this question. Shatzer was in prison during his interrogation, meaning he was “in custody” as that term is normally used, and he was never at liberty (out of custody) during any of the events relevant to the *Miranda* issue in the case. Students should read the case carefully to see how the Court found a “break in custody.”

Students should realize, too, that the rule of *Shatzer* applies in the following more common scenario: (1) A suspect is taken into custody and read the *Miranda* warnings, (2) the suspect invokes his right to counsel, and interrogation stops, (3) the suspect is released, perhaps after a bail hearing, and (4) later, perhaps after several weeks, the suspect is arrested and taken back into custody. The question before the Court was whether the invocation during the suspect’s earlier custodial interrogation prohibits police efforts to question the suspect after the new arrest.

What are the advantages of the bright-line rule advocated by Justice Kennedy in *Minnick*? Why do you think the Court treats the suspect's invocation of her right to counsel differently than her invocation of her right to remain silent?

Supreme Court of the United States

Maryland v. Michael Blaine Shatzer, Sr.

Decided Feb. 24, 2010 – [559 U.S. 98](#)

Justice SCALIA delivered the opinion of the Court.

We consider whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*.

I

In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3-year-old son. At that time, Shatzer was incarcerated at the Maryland Correctional Institution—Hagerstown, serving a sentence for an unrelated child-sexual-abuse offense. Detective Shane Blankenship was assigned to the investigation and interviewed Shatzer at the correctional institution on August 7, 2003. Before asking any questions, Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights. When Blankenship explained that he was there to question Shatzer about sexually abusing his son, Shatzer expressed confusion—he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated. Blankenship clarified the purpose of his visit, and Shatzer declined to speak without an attorney. Accordingly, Blankenship ended the interview, and Shatzer was released back into the general prison population. Shortly thereafter, Blankenship closed the investigation.

Two years and six months later, the same social worker referred more specific allegations to the department about the same incident involving Shatzer. Detective Paul Hoover, from the same division, was assigned to the investigation. He and the social worker interviewed the victim, then eight years old, who described the incident in more detail. With this new information in hand, on March 2, 2006, they went to the Roxbury Correctional Institute, to which Shatzer had since been transferred, and interviewed Shatzer in a maintenance room outfitted with a desk and three chairs. Hoover explained that he wanted to ask Shatzer about the alleged incident involving Shatzer's son. Shatzer was surprised because he thought that the investigation had been closed, but Hoover explained they had opened a new file. Hoover then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.

Hoover interrogated Shatzer about the incident for approximately 30 minutes. Shatzer denied ordering his son to perform fellatio on him, but admitted to masturbating in front of his son from a distance of less than three feet. Before the interview ended, Shatzer agreed to Hoover's request that he submit to a polygraph examination. At no point during the interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one.

Five days later, on March 7, 2006, Hoover and another detective met with Shatzer at the correctional facility to administer the polygraph examination. After reading Shatzer his *Miranda* rights and obtaining a written waiver, the other detective administered the test and concluded that Shatzer had failed. When the detectives then questioned Shatzer, he became upset, started to cry, and incriminated himself by saying, “I didn’t force him. I didn’t force him.” After making this inculpatory statement, Shatzer requested an attorney, and Hoover promptly ended the interrogation.

The State’s Attorney for Washington County charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer moved to suppress his March 2006 statements pursuant to *Edwards*. The trial court held a suppression hearing and later denied Shatzer’s motion. The *Edwards* protections did not apply, it reasoned, because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations. Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts. In accordance with the agreement, the State described the interview with the victim and Shatzer’s 2006 statements to the detectives. Based on the proffered testimony of the victim and the “admission of the defendant as to the act of masturbation,” the trial court found Shatzer guilty of sexual child abuse of his son.

Over the dissent of two judges, the Court of Appeals of Maryland reversed and remanded. The court held that “the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards*,” and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer’s release back into the general prison population between interrogations did not constitute a break in custody. We granted certiorari.

II

The rationale of *Edwards* is that once a suspect indicates that “he is not capable of undergoing [custodial] questioning without advice of counsel,” “any subsequent waiver that has come at the authorities’ behest, and not at the suspect’s own instigation, is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.” Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect’s right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police’s persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to “increase as custody is prolonged.” The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of “prolonged police custody” by repeatedly attempting to question a suspect who previously requested counsel until the suspect is “badgered into submission.”

We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis. Because *Edwards* is “our rule, not a constitutional command,” “it is our obligation to justify its expansion.”

A judicially crafted rule is “justified only by reference to its prophylactic purpose” and applies only where its benefits outweigh its costs. We begin with the benefits. *Edwards*’ presumption of involuntariness has the incidental effect of “conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness.” Its fundamental purpose, however, is to “[p]reserv[e] the integrity of an accused’s choice to communicate with police only through counsel” by “prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights.” Thus, the benefits of the rule are measured by the number of coerced confessions it suppresses that otherwise would have been admitted.

It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, “thrust into” and isolated in an “unfamiliar,” “police-dominated atmosphere” where his captors “appear to control [his] fate.” That was the situation confronted by the suspects in *Edwards*, *Roberson*, and *Minnick*, the three cases in which we have held the *Edwards* rule applicable. None of these suspects regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.

When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is farfetched to think that a police officer’s asking the suspect whether he would like to waive his *Miranda* rights will any more “wear down the accused” than did the first such request at the original attempted interrogation—which is of course not deemed coercive. His change of heart is less likely attributable to “badgering” than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded. The “justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time.”

At the same time that extending the *Edwards* rule yields diminished benefits, extending the rule also increases its costs: the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain. Voluntary confessions are not merely “a proper element in law enforcement,” they are an “unmitigated good” “essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.”

The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects. Without that limitation—and barring some purely arbitrary time limit—every *Edwards* prohibition of custodial interrogation of a particular suspect would be eternal.

The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, when it is conducted by a different law enforcement authority, and even when the suspect has met with an attorney after the first interrogation. And it not only prevents questioning *ex ante*; it would render invalid, *ex post*, confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any jurisdiction. In a country that harbors a large number of repeat offenders, this consequence is disastrous.

We conclude that such an extension of *Edwards* is not justified; we have opened its “protective umbrella” far enough. The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect’s desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.

If Shatzer’s return to the general prison population qualified as a break in custody (a question we address in Part III, *infra*), there is no doubt that it lasted long enough (two years) to meet that durational requirement. But what about a break that has lasted only one year? Or only one week? It is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful. And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard of.

[T]his is a case in which the requisite police action has not been prescribed by statute but has been established by opinion of this Court. We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption “will not reach the correct result most of the time.” It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.

The 14-day limitation meets Shatzer’s concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for reinterrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain by such gamesmanship—nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his *Miranda* rights.

Shatzer argues that ending the *Edwards* protections at a break in custody will undermine *Edwards* purpose to conserve judicial resources. To be sure, we have said that “[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application.” But clarity and certainty are not goals in themselves. They are valuable only when they reasonably further the achievement of some substantive end—here, the exclusion of compelled confessions. Confessions obtained after a 2-week break in custody and a waiver of *Miranda* rights are most unlikely to be compelled, and hence are unreasonably excluded. In any case, a break-in-custody exception will dim only marginally, if at all, the bright-line nature of *Edwards*. In every case involving *Edwards*, the courts must determine whether the suspect was in custody when he

requested counsel and when he later made the statements he seeks to suppress. Now, in cases where there is an alleged break in custody, they simply have to repeat the inquiry for the time between the initial invocation and reinterrogation. In most cases that determination will be easy. And when it is determined that the defendant pleading *Edwards* has been out of custody for two weeks before the contested interrogation, the court is spared the fact-intensive inquiry into whether he ever, anywhere, asserted his *Miranda* right to counsel.

III

We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue. Whether it does depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against—the “danger of coercion [that] results from the *interaction* of custody and official interrogation.” To determine whether a suspect was in *Miranda* custody we have asked whether “there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” This test, no doubt, is satisfied by all forms of incarceration. Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it “talismanic power,” because *Miranda* is to be enforced “only in those types of situations in which the concerns that powered the decision are implicated.” Thus, the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop does not constitute *Miranda* custody.

Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.

Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

IV

Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion.

Justice STEVENS, concurring in the judgment.

While I agree that the presumption from *Edwards v. Arizona* is not “eternal” and does not mandate suppression of Shatzer’s statement made after a 2 ½-year break in custody, I do not agree with the Court’s newly announced rule: that *Edwards always* ceases to apply when there is a 14-day break in custody.

The most troubling aspect of the Court's time-based rule is that it disregards the compulsion caused by a second (or third, or fourth) interrogation of an indigent suspect who was told that if he requests a lawyer, one will be provided for him. When police tell an indigent suspect that he has the right to an attorney, that he is not required to speak without an attorney present, and that an attorney will be provided to him at no cost before questioning, the police have made a significant promise. If they cease questioning and then reinterrogate the suspect 14 days later without providing him with a lawyer, the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer.

When officers informed Shatzer of his rights during the first interrogation, they presumably informed him that if he requested an attorney, one would be appointed for him before he was asked any further questions. But if an indigent suspect requests a lawyer, "any further interrogation" (even 14 days later) "without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." When police have not honored an earlier commitment to provide a detainee with a lawyer, the detainee likely will "understan[d] his (expressed) wishes to have been ignored" and "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." Simply giving a "fresh se[t] of *Miranda* warnings" will not "'reassure' a suspect who has been denied the counsel he has clearly requested that his rights have remained untrammelled."

The Court ... speculates that if a suspect is reinterrogated and eventually talks, it must be that "further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest." But it is not apparent why that is the case. The answer, we are told, is that once a suspect has been out of *Miranda* custody for 14 days, "[h]e has likely been able to seek advice from an attorney, family members, and friends." This speculation, however, is overconfident and only questionably relevant. As a factual matter, we do not know whether the defendant has been able to seek advice: First of all, suspects are told that if they cannot afford a lawyer, one will be provided for them. Yet under the majority's rule, an indigent suspect who took the police at their word when he asked for a lawyer will nonetheless be assumed to have "been able to seek advice from an attorney." Second, even suspects who are not indigent cannot necessarily access legal advice (or social advice as the Court presumes) within 14 days. Third, suspects may not realize that they *need* to seek advice from an attorney. Unless police warn suspects that the interrogation will resume in 14 days, why contact a lawyer? When a suspect is let go, he may assume that the police were satisfied. In any event, it is not apparent why interim advice matters. In *Minnick v. Mississippi* we held that it is not sufficient that a detainee happened to speak at some point with a lawyer. If the actual interim advice of an attorney is not sufficient, the hypothetical, interim advice of "an attorney, family members, and friends" is not enough.

Because, at the very least, we do not know whether Shatzer could obtain a lawyer, and thus would have felt that police had lied about providing one, I cannot join the Court's opinion. I concur in today's judgment, however, on another ground: Even if Shatzer could not consult a lawyer and the police never provided him one, the 2 1/2-year break in custody is a basis for treating the second interrogation as no more coercive than the first. Neither a break in custody nor the passage of time has an inherent, curative power. But certain things change over time. An indigent suspect who took police at their word that they would provide an attorney probably will feel that

he has “been denied the counsel he has clearly requested” when police begin to question him, without a lawyer, only 14 days later. But, when a suspect has been left alone for a significant period of time, he is not as likely to draw such conclusions when the police interrogate him again. It is concededly “impossible to determine with precision” where to draw such a line. In the case before us, however, the suspect was returned to the general prison population for two years. I am convinced that this period of time is sufficient. I therefore concur in the judgment.

Notes, Comments, and Questions

The Court holds that the cessation of custody (plus 14 days) ends the lawyer-invocation rule of *Edwards*. Where does the 14 days come from? Why should a suspect who asked for his lawyer 13 days ago be treated differently than a suspect who asked for his lawyer 15 days ago? The Court articulates a 14-day rule that is unrelated to the actual time lapse in the facts of the case (which was far longer). Why might this be problematic? Why should or shouldn't the Court wait for facts that are a closer call before articulating a bright-line rule?

Under *Edwards*, a suspect remains free to initiate conversations with police even after invoking his right to counsel. The rule of *Edwards* restricts only the behavior of police, not of suspects. As the Court wrote, a suspect who invokes “is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*” (emphasis added). Because of the importance of who initiated a conversation, lawyers sometimes argue about the details of who exactly said what when. A suspect who asks an officer what time it is or requests permission to visit the bathroom has not opened the door for an attempt by police to obtain a *Miranda* waiver. But if a suspect asks about his case or starts talking about what happened, he may well open the door for police seek a waiver. Further, anything the suspect simply blurts out without being interrogated is admissible because it is not the product of “interrogation.”

In our next chapter, we consider exceptions to the *Miranda* rule. These are situations in which the Court has held that even if police do not read a suspect the *Miranda* warnings, a prosecutor may nonetheless use the results of custodial interrogation against a criminal defendant.

INTERROGATIONS

Chapter 28

The *Miranda* Rule: Exceptions

In *Miranda v. Arizona*, the Court summarized its holding as follows: “[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” The Court then explained that “unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it,” police would be required to provide certain information—the *Miranda* warnings—to suspects.

We have learned that this holding spawned controversy about the meaning of “custody” and “interrogation,” as well as over when a suspect’s waiver of rights has been “made voluntarily, knowingly and intelligently.”

In this chapter, we will review three exceptions that the Court has created to the *Miranda* Rule. Under each of these exceptions, a prosecutor may use statements against a defendant even though (1) those statements were obtained through custodial interrogation and (2) police either did not provide the *Miranda* warnings or did so but did not obtain a valid waiver. The three exceptions are known as the “impeachment exception,” the “emergency exception” (also known as the “public safety exception”), and the “routine booking exception.” We begin with impeachment.

Supreme Court of the United States

Viven Harris v. New York

Decided Feb. 24, 1971 – [401 U.S. 222](#)

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted the writ in this case to consider petitioner’s claim that a statement made by him to police under circumstances rendering it inadmissible to establish the prosecution’s case in chief under *Miranda v. Arizona* may not be used to impeach his credibility.

The State of New York charged petitioner in a two-count indictment with twice selling heroin to an undercover police officer. At a subsequent jury trial the officer was the State’s chief witness, and he testified as to details of the two sales. A second officer verified collateral details of the sales, and a third offered testimony about the chemical analysis of the heroin.

Petitioner took the stand in his own defense. He admitted knowing the undercover police officer but denied a sale on January 4, 1966. He admitted making a sale of contents of a glassine bag to the officer on January 6 but claimed it was baking powder and part of a scheme to defraud the purchaser.

On cross-examination petitioner was asked seriatim whether he had made specified statements to the police immediately following his arrest on January 7—statements that partially contradicted petitioner’s direct testimony at trial. In response to the cross-examination, petitioner testified that he could not remember virtually any of the questions or answers recited by the prosecutor. At the request of petitioner’s counsel the written statement from which the prosecutor had read questions and answers in his impeaching process was placed in the record for possible use on appeal; the statement was not shown to the jury.

The trial judge instructed the jury that the statements attributed to petitioner by the prosecution could be considered only in passing on petitioner’s credibility and not as evidence of guilt. In closing summations both counsel argued the substance of the impeaching statements. The jury then found petitioner guilty on the second count of the indictment. The New York Court of Appeals affirmed in a per curiam opinion.

At trial the prosecution made no effort in its case in chief to use the statements allegedly made by petitioner, conceding that they were inadmissible under *Miranda v. Arizona*. The transcript of the interrogation used in the impeachment, but not given to the jury, shows that no warning of a right to appointed counsel was given before questions were put to petitioner when he was taken into custody. Petitioner makes no claim that the statements made to the police were coerced or involuntary.

Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court’s holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution’s case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards.

“It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government’s possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. ‘[T]here is hardly justification for letting the defendant affirmatively resort to perjurious testimony in reliance on the Government’s disability to challenge his credibility.’”

Petitioner’s testimony in his own behalf concerning the events of January 7 contrasted sharply with what he told the police shortly after his arrest. The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner’s credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief.

Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed to include the right to commit perjury. Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary

process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.

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. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements. Affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL, join, dissenting.

The objective of deterring improper police conduct is only part of the larger objective of safeguarding the integrity of our adversary system. The "essential mainstay" of that system is the privilege against self-incrimination, which for that reason has occupied a central place in our jurisprudence since before the Nation's birth. Moreover, "we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. ... All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government ... must accord to the dignity and integrity of its citizens." These values are plainly jeopardized if an exception against admission of tainted statements is made for those used for impeachment purposes. Moreover, it is monstrous that courts should aid or abet the law-breaking police officer. It is abiding truth that "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." Thus even to the extent that *Miranda* was aimed at deterring police practices in disregard of the Constitution, I fear that today's holding will seriously undermine the achievement of that objective. The Court today tells the police that they may freely interrogate an accused incommunicado and without counsel and know that although any statement they obtain in violation of *Miranda* cannot be used on the State's direct case, it may be introduced if the defendant has the temerity to testify in his own defense. This goes far toward undoing much of the progress made in conforming police methods to the Constitution. I dissent.

Notes, Comments, and Questions

Justice Brennan's dissent in *Harris* raises the concern that police officers will intentionally defy *Miranda*, knowing that the results of impermissible interrogations can be used to impeach defendants (or to deter them from testifying). The Court of Appeals of Alaska addressed the issue in *State v. Batts*, [195 P.3d 144](#) (2008). Following the reasoning of the *Harris* majority, the *Batts* Court held that—under Alaska law—statements made during interrogations conducted in violation of *Miranda* normally may be used for impeachment. However, the Alaska court held that "in cases where the violation of *Miranda* was either intentional or egregious—by which we mean a violation that would have been obvious to any reasonable police officer"—the resulting statements are inadmissible, even for impeachment. The court's aim was to balance deterrence of police misconduct (achieved by excluding evidence in cases of especially bad police misbehavior) with the state's interest in deterring perjury and presenting useful evidence to juries (achieved by allowing impeachment in cases of more minor police wrongdoing). Is that a sensible result? If you were setting policy for your state, would you allow impeachment in all

cases of *Miranda* violations, only in certain cases (perhaps like the Alaska rule), or never (as Justice Brennan advocated)?

In the next case, the Court articulated what is known as the “emergency” or “public safety” exception to the *Miranda* Rule. Students reading this case should consider two questions. First, is such an exception justified? Second, if so, do the facts presented constitute an “emergency” to which the exception should apply?

Supreme Court of the United States

New York v. Benjamin Quarles

Decided June 12, 1984 – [467 U.S. 649](#)

Justice REHNQUIST delivered the opinion of the Court.

Respondent Benjamin Quarles was charged in the New York trial court with criminal possession of a weapon. The trial court suppressed the gun in question, and a statement made by respondent, because the statement was obtained by police before they read respondent his “*Miranda* rights.” That ruling was affirmed on appeal through the New York Court of Appeals. We granted certiorari and we now reverse. We conclude that under the circumstances involved in this case, overriding considerations of public safety justify the officer’s failure to provide *Miranda* warnings before he asked questions devoted to locating the abandoned weapon.

On September 11, 1980, at approximately 12:30 a.m., Officer Frank Kraft and Officer Sal Scarring were on road patrol in Queens, N.Y., when a young woman approached their car. She told them that she had just been raped by a black male, approximately six feet tall, who was wearing a black jacket with the name “Big Ben” printed in yellow letters on the back. She told the officers that the man had just entered an A & P supermarket located nearby and that the man was carrying a gun.

The officers drove the woman to the supermarket, and Officer Kraft entered the store while Officer Scarring radioed for assistance. Officer Kraft quickly spotted respondent, who matched the description given by the woman, approaching a checkout counter. Apparently upon seeing the officer, respondent turned and ran toward the rear of the store, and Officer Kraft pursued him with a drawn gun. When respondent turned the corner at the end of an aisle, Officer Kraft lost sight of him for several seconds, and upon regaining sight of respondent, ordered him to stop and put his hands over his head.

Although more than three other officers had arrived on the scene by that time, Officer Kraft was the first to reach respondent. He frisked him and discovered that he was wearing a shoulder holster which was then empty. After handcuffing him, Officer Kraft asked him where the gun was. Respondent nodded in the direction of some empty cartons and responded, “the gun is over there.” Officer Kraft thereafter retrieved a loaded .38-caliber revolver from one of the cartons, formally placed respondent under arrest, and read him his *Miranda* rights from a printed card. Respondent indicated that he would be willing to answer questions without an attorney present. Officer Kraft then asked respondent if he owned the gun and where he had purchased it. Respondent answered that he did own it and that he had purchased it in Miami, Fla.

In the subsequent prosecution of respondent for criminal possession of a weapon, the judge excluded the statement, “the gun is over there,” and the gun because the officer had not given respondent the warnings required by our decision in *Miranda v. Arizona* before asking him where the gun was located. The judge excluded the other statements about respondent’s ownership of the gun and the place of purchase, as evidence tainted by the prior *Miranda* violation. The Appellate Division of the Supreme Court of New York affirmed without opinion.

The Court of Appeals granted leave to appeal and affirmed by a 4-3 vote. It concluded that respondent was in “custody” within the meaning of *Miranda* during all questioning and rejected the State’s argument that the exigencies of the situation justified Officer Kraft’s failure to read respondent his *Miranda* rights until after he had located the gun. The court declined to recognize an exigency exception to the usual requirements of *Miranda* because it found no indication from Officer Kraft’s testimony at the suppression hearing that his subjective motivation in asking the question was to protect his own safety or the safety of the public. For the reasons which follow, we believe that this case presents a situation where concern for public safety must be paramount to adherence to the literal language of the prophylactic rules enunciated in *Miranda*.

In this case we have before us no claim that respondent’s statements were actually compelled by police conduct which overcame his will to resist. Thus the only issue before us is whether Officer Kraft was justified in failing to make available to respondent the procedural safeguards associated with the privilege against compulsory self-incrimination since *Miranda*.

The New York Court of Appeals was undoubtedly correct in deciding that the facts of this case come within the ambit of the *Miranda* decision as we have subsequently interpreted it. We agree that respondent was in police custody because we have noted that “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.” Here Quarles was surrounded by at least four police officers and was handcuffed when the questioning at issue took place. As the New York Court of Appeals observed, there was nothing to suggest that any of the officers were any longer concerned for their own physical safety. The New York Court of Appeals’ majority declined to express an opinion as to whether there might be an exception to the *Miranda* rule if the police had been acting to protect the public, because the lower courts in New York had made no factual determination that the police had acted with that motive.

We hold that on these facts there is a “public safety” exception to the requirement that *Miranda* warnings be given before a suspect’s answers may be admitted into evidence, and that the availability of that exception does not depend upon the motivation of the individual officers involved. In a kaleidoscopic situation such as the one confronting these officers, where spontaneity rather than adherence to a police manual is necessarily the order of the day, the application of the exception which we recognize today should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer. Undoubtedly most police officers, if placed in Officer Kraft’s position, would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect.

Whatever the motivation of individual officers in such a situation, we do not believe that the doctrinal underpinnings of *Miranda* require that it be applied in all its rigor to a situation in which police officers ask questions reasonably prompted by a concern for the public safety.

The police in this case, in the very act of apprehending a suspect, were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket. So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety: an accomplice might make use of it, a customer or employee might later come upon it.

In such a situation, if the police are required to recite the familiar *Miranda* warnings before asking the whereabouts of the gun, suspects in Quarles' position might well be deterred from responding. Procedural safeguards which deter a suspect from responding were deemed acceptable in *Miranda* in order to protect the Fifth Amendment privilege; when the primary social cost of those added protections is the possibility of fewer convictions, the *Miranda* majority was willing to bear that cost. Here, had *Miranda* warnings deterred Quarles from responding to Officer Kraft's question about the whereabouts of the gun, the cost would have been something more than merely the failure to obtain evidence useful in convicting Quarles. Officer Kraft needed an answer to his question not simply to make his case against Quarles but to insure that further danger to the public did not result from the concealment of the gun in a public area.

We conclude that 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. We decline to place officers such as Officer Kraft in the untenable position of having to consider, often in a matter of seconds, whether it best serves society for them to ask the necessary questions without the *Miranda* warnings and render whatever probative evidence they uncover inadmissible, or for them to give the warnings in order to preserve the admissibility of evidence they might uncover but possibly damage or destroy their ability to obtain that evidence and neutralize the volatile situation confronting them.

In recognizing a narrow exception to the *Miranda* rule in this case, we acknowledge that to some degree we lessen the desirable clarity of that rule. At least in part in order to preserve its clarity, we have over the years refused to sanction attempts to expand our *Miranda* holding. As we have in other contexts, we recognize here the importance of a workable rule "to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." But as we have pointed out, we believe that the exception which we recognize today lessens the necessity of that on-the-scene balancing process. The exception will not be difficult for police officers to apply because in each case it will be circumscribed by the exigency which justifies it. We think police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.

The facts of this case clearly demonstrate that distinction and an officer's ability to recognize it. Officer Kraft asked only the question necessary to locate the missing gun before advising respondent of his rights. It was only after securing the loaded revolver and giving the warnings

that he continued with investigatory questions about the ownership and place of purchase of the gun. The exception which we recognize today, far from complicating the thought processes and the on-the-scene judgments of police officers, will simply free them to follow their legitimate instincts when confronting situations presenting a danger to the public safety.

We hold that the Court of Appeals in this case erred in excluding the statement, “the gun is over there,” and the gun because of the officer’s failure to read respondent his *Miranda* rights before attempting to locate the weapon. Accordingly we hold that it also erred in excluding the subsequent statements as illegal fruits of a *Miranda* violation. We therefore reverse and remand for further proceedings not inconsistent with this opinion.

Justice O’CONNOR, concurring in the judgment in part and dissenting in part.

Today, the Court concludes that overriding considerations of public safety justify the admission of evidence—oral statements and a gun—secured without the benefit of [*Miranda*] warnings. Were the Court writing from a clean slate, I could agree with its holding. But *Miranda* is now the law and, in my view, the Court has not provided sufficient justification for departing from it or for blurring its now clear strictures. Accordingly, I would require suppression of the initial statement taken from respondent in this case. On the other hand, nothing in *Miranda* or the privilege itself requires exclusion of nontestimonial evidence derived from informal custodial interrogation, and I therefore agree with the Court that admission of the gun in evidence is proper.

The *Miranda* Court itself considered objections akin to those raised by the Court today. In dissent, Justice WHITE protested that the *Miranda* rules would “operate indiscriminately in all criminal cases, regardless of the severity of the crime or the circumstances involved.” But the *Miranda* Court would not accept any suggestion that “society’s need for interrogation [could] outweigh[h] the privilege.” To that Court, the privilege against self-incrimination was absolute and therefore could not be “abridged.”

Since the time *Miranda* was decided, the Court has repeatedly refused to bend the literal terms of that decision. To be sure, 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. [W]herever an accused has been taken into “custody” and subjected to “interrogation” without warnings, the Court has consistently prohibited the use of his responses for prosecutorial purposes at trial. As a consequence, the “meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures.”

In my view, a “public safety” exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*’s requirements more difficult to understand. In some cases, police will benefit because a reviewing court will find that an exigency excused their failure to administer the required warnings. But in other cases, police will suffer because, though they thought an exigency excused their noncompliance, a reviewing court will view the “objective” circumstances differently and require exclusion of admissions thereby obtained. The end result will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence. “While the rigidity of the prophylactic rules was a principal weakness in the view

of dissenters and critics outside the Court, ... that rigidity [has also been called a] strength of the decision. It [has] afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise.... [T]his core virtue of *Miranda* would be eviscerated if the prophylactic rules were freely [ignored] by ... courts under the guise of [reinterpreting] *Miranda*....”

The justification the Court provides for upsetting the equilibrium that has finally been achieved—that police cannot and should not balance considerations of public safety against the individual’s interest in avoiding compulsory testimonial self-incrimination—really misses the critical question to be decided. *Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather, the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. *Miranda*, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State. When police ask custodial questions without administering the required warnings, *Miranda* quite clearly requires that the answers received be presumed compelled and that they be excluded from evidence at trial.

The Court concedes, as it must, both that respondent was in “custody” and subject to “interrogation” and that his statement “the gun is over there” was compelled within the meaning of our precedent. In my view, since there is nothing about an exigency that makes custodial interrogation any less compelling, a principled application of *Miranda* requires that respondent’s statement be suppressed.

Justice MARSHALL, with whom Justice BRENNAN and Justice STEVENS join, dissenting.

The police in this case arrested a man suspected of possessing a firearm in violation of New York law. Once the suspect was in custody and found to be unarmed, the arresting officer initiated an interrogation. Without being advised of his right not to respond, the suspect incriminated himself by locating the gun. The majority concludes that the State may rely on this incriminating statement to convict the suspect of possessing a weapon. I disagree. The arresting officers had no legitimate reason to interrogate the suspect without advising him of his rights to remain silent and to obtain assistance of counsel. By finding on these facts justification for unconsented interrogation, the majority abandons the clear guidelines enunciated in *Miranda v. Arizona* and condemns the American judiciary to a new era of post hoc inquiry into the propriety of custodial interrogations. More significantly and in direct conflict with this Court’s longstanding interpretation of the Fifth Amendment, the majority has endorsed the introduction of coerced self-incriminating statements in criminal prosecutions. I dissent.

The majority’s entire analysis rests on the factual assumption that the public was at risk during Quarles’ interrogation. This assumption is completely in conflict with the facts as found by New York’s highest court. Before the interrogation began, Quarles had been “reduced to a condition of physical powerlessness.” Contrary to the majority’s speculations, Quarles was not believed to have, nor did he in fact have, an accomplice to come to his rescue. When the questioning began, the arresting officers were sufficiently confident of their safety to put away their guns. As Officer Kraft acknowledged at the suppression hearing, “the situation was under control.” Based on Officer Kraft’s own testimony, the New York Court of Appeals found: “Nothing suggests that any of the officers was by that time concerned for his own physical safety.” The Court of Appeals also

determined that there was no evidence that the interrogation was prompted by the arresting officers' concern for the public's safety.

The majority attempts to slip away from these unambiguous findings of New York's highest court by proposing that danger be measured by objective facts rather than the subjective intentions of arresting officers. Though clever, this ploy was anticipated by the New York Court of Appeals: "[T]here is no evidence in the record before us that there were exigent circumstances posing a risk to the public safety...."

The New York court's conclusion that neither Quarles nor his missing gun posed a threat to the public's safety is amply supported by the evidence presented at the suppression hearing. Again contrary to the majority's intimations, no customers or employees were wandering about the store in danger of coming across Quarles' discarded weapon. Although the supermarket was open to the public, Quarles' arrest took place during the middle of the night when the store was apparently deserted except for the clerks at the checkout counter. The police could easily have cordoned off the store and searched for the missing gun. Had they done so, they would have found the gun forthwith. The police were well aware that Quarles had discarded his weapon somewhere near the scene of the arrest. As the State acknowledged before the New York Court of Appeals: "After Officer Kraft had handcuffed and frisked the defendant in the supermarket, he knew with a high degree of certainty that the defendant's gun was within the immediate vicinity of the encounter. He undoubtedly would have searched for it in the carton a few feet away without the defendant having looked in that direction and saying that it was there."

In this case, there was convincing, indeed almost overwhelming, evidence to support the New York court's conclusion that Quarles' hidden weapon did not pose a risk either to the arresting officers or to the public. The majority ignores this evidence and sets aside the factual findings of the New York Court of Appeals. More cynical observers might well conclude that a state court's findings of fact "deserv[e] a 'high measure of deference,'" only when deference works against the interests of a criminal defendant.

The majority's treatment of the legal issues presented in this case is no less troubling than its abuse of the facts. Before today's opinion, the Court had twice concluded that, under *Miranda v. Arizona*, police officers conducting custodial interrogations must advise suspects of their rights before any questions concerning the whereabouts of incriminating weapons can be asked. Now the majority departs from these cases and rules that police may withhold *Miranda* warnings whenever custodial interrogations concern matters of public safety.

The majority contends that the law, as it currently stands, places police officers in a dilemma whenever they interrogate a suspect who appears to know of some threat to the public's safety. If the police interrogate the suspect without advising him of his rights, the suspect may reveal information that the authorities can use to defuse the threat, but the suspect's statements will be inadmissible at trial. If, on the other hand, the police advise the suspect of his rights, the suspect may be deterred from responding to the police's questions, and the risk to the public may continue unabated. According to the majority, the police must now choose between establishing the suspect's guilt and safeguarding the public from danger.

The majority proposes to eliminate this dilemma by creating an exception to *Miranda v. Arizona* for custodial interrogations concerning matters of public safety. Under the majority's exception, police would be permitted to interrogate suspects about such matters before the suspects have been advised of their constitutional rights. Without being "deterred" by the knowledge that they have a constitutional right not to respond, these suspects will be likely to answer the questions. Should the answers also be incriminating, the State would be free to introduce them as evidence in a criminal prosecution. Through this "narrow exception to the *Miranda* rule," the majority proposes to protect the public's safety without jeopardizing the prosecution of criminal defendants. I find in this reasoning an unwise and unprincipled departure from our Fifth Amendment precedents.

This case is illustrative of the chaos the "public-safety" exception will unleash. The circumstances of Quarles' arrest have never been in dispute. After the benefit of briefing and oral argument, the New York Court of Appeals, as previously noted, concluded that there was "no evidence in the record before us that there were exigent circumstances posing a risk to the public safety." Upon reviewing the same facts and hearing the same arguments, a majority of this Court has come to precisely the opposite conclusion: "So long as the gun was concealed somewhere in the supermarket, with its actual whereabouts unknown, it obviously posed more than one danger to the public safety...." If after plenary review two appellate courts so fundamentally differ over the threat to public safety presented by the simple and uncontested facts of this case, one must seriously question how law enforcement officers will respond to the majority's new rule in the confusion and haste of the real world.

Though unfortunate, the difficulty of administering the "public-safety" exception is not the most profound flaw in the majority's decision. The majority has lost sight of the fact that *Miranda v. Arizona* and our earlier custodial-interrogation cases all implemented a constitutional privilege against self-incrimination. The rules established in these cases were designed to protect criminal defendants against prosecutions based on coerced self-incriminating statements. The majority today turns its back on these constitutional considerations, and invites the government to prosecute through the use of what necessarily are coerced statements.

The majority's error stems from a serious misunderstanding of *Miranda v. Arizona* and of the Fifth Amendment upon which that decision was based. The majority implies that *Miranda* consisted of no more than a judicial balancing act in which the benefits of "enlarged protection for the Fifth Amendment privilege" were weighed against "the cost to society in terms of fewer convictions of guilty suspects." Supposedly because the scales tipped in favor of the privilege against self-incrimination, the *Miranda* Court erected a prophylactic barrier around statements made during custodial interrogations. The majority misreads *Miranda*. Though the *Miranda* dissent prophesied dire consequences, the *Miranda* Court refused to allow such concerns to weaken the protections of the Constitution.

Whether society would be better off if the police warned suspects of their rights before beginning an interrogation or whether the advantages of giving such warnings would outweigh their costs did not inform the *Miranda* decision. On the contrary, the *Miranda* Court was concerned with the proscriptions of the Fifth Amendment, and, in particular, whether the Self-Incrimination Clause permits the government to prosecute individuals based on statements made in the course of custodial interrogations.

In fashioning its “public-safety” exception to *Miranda*, the majority makes no attempt to deal with the constitutional presumption established by that case. The majority does not argue that police questioning about issues of public safety is any less coercive than custodial interrogations into other matters. The majority’s only contention is that police officers could more easily protect the public if *Miranda* did not apply to custodial interrogations concerning the public’s safety. But *Miranda* was not a decision about public safety; it was a decision about coerced confessions. Without establishing that interrogations concerning the public’s safety are less likely to be coercive than other interrogations, the majority cannot endorse the “public-safety” exception and remain faithful to the logic of *Miranda v. Arizona*.

The majority’s avoidance of the issue of coercion may not have been inadvertent. It would strain credulity to contend that Officer Kraft’s questioning of respondent Quarles was not coercive.

That the application of the “public-safety” exception in this case entailed coercion is no happenstance. The majority’s ratio decidendi is that interrogating suspects about matters of public safety will be coercive. In its cost-benefit analysis, the Court’s strongest argument in favor of a “public-safety” exception to *Miranda* is that the police would be better able to protect the public’s safety if they were not always required to give suspects their *Miranda* warnings. The crux of this argument is that, by deliberately withholding *Miranda* warnings, the police can get information out of suspects who would refuse to respond to police questioning were they advised of their constitutional rights. The “public-safety” exception is efficacious precisely because it permits police officers to coerce criminal defendants into making involuntary statements.

Indeed, in the efficacy of the “public-safety” exception lies a fundamental and constitutional defect. Until today, this Court could truthfully state that the Fifth Amendment is given “broad scope” “[w]here there has been genuine compulsion of testimony.” Coerced confessions were simply inadmissible in criminal prosecutions. The “public-safety” exception departs from this principle by expressly inviting police officers to coerce defendants into making incriminating statements, and then permitting prosecutors to introduce those statements at trial. Though the majority’s opinion is cloaked in the beguiling language of utilitarianism, the Court has sanctioned sub silentio criminal prosecutions based on compelled self-incriminating statements. I find this result in direct conflict with the Fifth Amendment’s dictate that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.”

The irony of the majority’s decision is that the public’s safety can be perfectly well protected without abridging the Fifth Amendment. If a bomb is about to explode or the public is otherwise imminently imperiled, the police are free to interrogate suspects without advising them of their constitutional rights. Such unconsented questioning may take place not only when police officers act on instinct but also when higher faculties lead them to believe that advising a suspect of his constitutional rights might decrease the likelihood that the suspect would reveal life-saving information. If trickery is necessary to protect the public, then the police may trick a suspect into confessing. While the Fourteenth Amendment sets limits on such behavior, nothing in the Fifth Amendment or our decision in *Miranda v. Arizona* proscribes this sort of emergency questioning. All the Fifth Amendment forbids is the introduction of coerced statements at trial.

The majority should not be permitted to elude the Amendment’s absolute prohibition simply by calculating special costs that arise when the public’s safety is at issue. Indeed, were constitutional adjudication always conducted in such an ad hoc manner, the Bill of Rights would be a most unreliable protector of individual liberties.

Notes, Comments, and Questions

In her opinion concurring in part, Justice O’Connor wrote that she would not have excluded Quarles’s gun from evidence, even if his initial statement about the gun had been excluded as she thought *Miranda* required. Because the majority in this case found that a *Miranda* Rule exception applied, the Court did not decide whether a *Miranda* violation could lead to the exclusion of physical evidence found as a result of statements obtained after interrogation. We will review how the Court decided this issue later this semester when we turn our attention to the exclusionary rule.

In Justice Marshall’s dissent, he writes that the majority has permitted the use of “coerced statements” against a criminal defendant. But if the statements were truly the result of coercion, then the Due Process Clause of the Fourteenth Amendment should bar the statements as involuntary. Indeed, the majority opinion states, “In this case we have before us no claim that respondent’s statements were actually compelled by police conduct which overcame his will to resist.” The disconnect between the dissent and majority opinions illustrates a fundamental disagreement about the *Miranda* doctrine. In the eyes of the dissent, statements obtained in violation of *Miranda* are “coerced,” and their admission violates the Fifth Amendment. The majority, by contrast, reasons that *Miranda* merely created a “presumption” that such statements are involuntary, a presumption created by the Court for its convenience, as well as to promote adherence to constitutional commands. A statement that is presumed compelled can be admitted against a defendant in appropriate circumstances—assuming of course that no actual compulsion is found—without offending the Self-Incrimination Clause.

* * *

We have seen that the Court has resisted applying the *Miranda* Rule to situations where it could impose inconvenience that—at least in the eyes of the majority—is not worth the cost. For example, in *Illinois v. Perkins* (Chapter 25), the Court declined to require *Miranda* warnings during jailhouse questioning of suspects by undercover agents. And in *Berkemer v. McCarty* (Chapter 24), the Court declined to require officers to perform *Miranda* warnings during routine traffic stops. Similar logic would support a *Miranda* exception for routine questions asked during the booking of an arrested suspect. Asking the questions furthers important police goals, and most routine questions—such as asking someone’s name and address—should only rarely elicit incriminating information.

If one accepts this logic and supports a “routine booking” exception, one must still decide what questions fall within the exception. The Court addressed that issue in the next case.

Supreme Court of the United States
Pennsylvania v. Inocencio Muniz
Decided June 18, 1990 – [496 U.S. 582](#)

Justice BRENNAN delivered the opinion of the Court, except as to Part III-C.

We must decide in this case whether various incriminating utterances of a drunken-driving suspect, made while performing a series of sobriety tests, constitute testimonial responses to custodial interrogation for purposes of the Self-Incrimination Clause of the Fifth Amendment.

I

During the early morning hours of November 30, 1986, a patrol officer spotted respondent Inocencio Muniz and a passenger parked in a car on the shoulder of a highway. When the officer inquired whether Muniz needed assistance, Muniz replied that he had stopped the car so he could urinate. The officer smelled alcohol on Muniz’s breath and observed that Muniz’s eyes were glazed and bloodshot and his face was flushed. The officer then directed Muniz to remain parked until his condition improved, and Muniz gave assurances that he would do so. But as the officer returned to his vehicle, Muniz drove off. After the officer pursued Muniz down the highway and pulled him over, the officer asked Muniz to perform three standard field sobriety tests: a “horizontal gaze nystagmus” test, a “walk and turn” test, and a “one leg stand” test. Muniz performed these tests poorly, and he informed the officer that he had failed the tests because he had been drinking.

The patrol officer arrested Muniz and transported him to the West Shore facility of the Cumberland County Central Booking Center. Following its routine practice for receiving persons suspected of driving while intoxicated, the booking center videotaped the ensuing proceedings. Muniz was informed that his actions and voice were being recorded, but he was not at this time (nor had he been previously) advised of his rights under *Miranda v. Arizona*. Officer Hosterman first asked Muniz his name, address, height, weight, eye color, date of birth, and current age. He responded to each of these questions, stumbling over his address and age. The officer then asked Muniz, “Do you know what the date was of your sixth birthday?” After Muniz offered an inaudible reply, the officer repeated, “When you turned six years old, do you remember what the date was?” Muniz responded, “No, I don’t.”

Officer Hosterman next requested Muniz to perform each of the three sobriety tests that Muniz had been asked to perform earlier during the initial roadside stop. The videotape reveals that his eyes jerked noticeably during the gaze test, that he did not walk a very straight line, and that he could not balance himself on one leg for more than several seconds. During the latter two tests, he did not complete the requested verbal counts from 1 to 9 and from 1 to 30. Moreover, while performing these tests, Muniz “attempted to explain his difficulties in performing the various tasks, and often requested further clarification of the tasks he was to perform.”

Finally, Officer Deyo asked Muniz to submit to a breathalyzer test designed to measure the alcohol content of his expelled breath. Officer Deyo read to Muniz the Commonwealth’s Implied Consent Law and explained that under the law his refusal to take the test would result in

automatic suspension of his driver's license for one year. Muniz asked a number of questions about the law, commenting in the process about his state of inebriation. Muniz ultimately refused to take the breath test. At this point, Muniz was for the first time advised of his *Miranda* rights. Muniz then signed a statement waiving his rights and admitted in response to further questioning that he had been driving while intoxicated.

Both the video and audio portions of the videotape were admitted into evidence at Muniz' bench trial, along with the arresting officer's testimony that Muniz failed the roadside sobriety tests and made incriminating remarks at that time. Muniz was convicted of driving under the influence of alcohol. Muniz filed a motion for a new trial, contending that the court should have excluded the testimony relating to the field sobriety tests and the videotape taken at the booking center "because they were incriminating and completed prior to [Muniz's] receiving his *Miranda* warnings." The trial court denied the motion, holding that "requesting a driver, suspected of driving under the influence of alcohol, to perform physical tests or take a breath analysis does not violate [his] privilege against self-incrimination because [the] evidence procured is of a physical nature rather than testimonial, and therefore no *Miranda* warnings are required."

On appeal, the Superior Court of Pennsylvania reversed. After the Pennsylvania Supreme Court denied the Commonwealth's application for review, we granted certiorari.

II

This case implicates both the "testimonial" and "compulsion" components of the privilege against self-incrimination in the context of pretrial questioning. Because Muniz was not advised of his *Miranda* rights until after the videotaped proceedings at the booking center were completed, any verbal statements that were both testimonial in nature and elicited during custodial interrogation should have been suppressed. We focus first on Muniz's responses to the initial informational questions, then on his questions and utterances while performing the physical dexterity and balancing tests, and finally on his questions and utterances surrounding the breathalyzer test.

III

In the initial phase of the recorded proceedings, Officer Hosterman asked Muniz his name, address, height, weight, eye color, date of birth, current age, and the date of his sixth birthday. Both the delivery and content of Muniz's answers were incriminating. As the state court found, "Muniz's videotaped responses ... certainly led the finder of fact to infer that his confusion and failure to speak clearly indicated a state of drunkenness that prohibited him from safely operating his vehicle." The Commonwealth argues, however, that admission of Muniz's answers to these questions does not contravene Fifth Amendment principles because Muniz's statement regarding his sixth birthday was not "testimonial" and his answers to the prior questions were not elicited by custodial interrogation. We consider these arguments in turn.

A

We agree with the Commonwealth's contention that Muniz's answers are not rendered inadmissible by *Miranda* merely because the slurred nature of his speech was incriminating. The physical inability to articulate words in a clear manner due to "the lack of muscular coordination of his tongue and mouth," is not itself a testimonial component of Muniz's responses to Officer Hosterman's introductory questions. [W]e [have] held that "the privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." [A] person suspected of driving while intoxicated [can] be forced to provide a blood sample, because that sample [is] "real or physical evidence" outside the scope of the privilege and the sample [is] obtained in a manner by which "[p]etitioner's testimonial capacities were in no way implicated."

We have since applied the distinction between "real or physical" and "testimonial" evidence in other contexts where the evidence could be produced only through some volitional act on the part of the suspect. [W]e agree with the Commonwealth that any slurring of speech and other evidence of lack of muscular coordination revealed by Muniz's responses to Officer Hosterman's direct questions constitute nontestimonial components of those responses. Requiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice does not, without more, compel him to provide a "testimonial" response for purposes of the privilege.

B

This does not end our inquiry, for Muniz's answer to the sixth birthday question was incriminating, not just because of his delivery, but also because of his answer's *content*; the trier of fact could infer from Muniz's answer (that he did not *know* the proper date) that his mental state was confused. The Commonwealth and the United States as *amicus curiae* argue that this incriminating inference does not trigger the protections of the Fifth Amendment privilege because the inference concerns "the physiological functioning of [Muniz's] brain," which is asserted to be every bit as "real or physical" as the physiological makeup of his blood and the timbre of his voice.

But this characterization addresses the wrong question; that the "fact" to be inferred might be said to concern the physical status of Muniz's brain merely describes the way in which the inference is incriminating. The correct question for present purposes is whether the incriminating inference of mental confusion is drawn from a testimonial act or from physical evidence. In *Schmerber v. California*, [384 U.S. 757](#) (1966), for example, we held that the police could compel a suspect to provide a blood sample in order to determine the physical makeup of his blood and thereby draw an inference about whether he was intoxicated. This compulsion was outside of the Fifth Amendment's protection, not simply because the evidence concerned the suspect's physical body, but rather because the evidence was *obtained* in a manner that did not entail any testimonial act on the part of the suspect. In contrast, had the police instead asked the suspect directly whether his blood contained a high concentration of alcohol, his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology. In this case, the question is not whether a suspect's "impaired mental faculties" can fairly be characterized as an aspect of his physiology, but rather

whether Muniz’s response to the sixth birthday question that gave rise to the inference of such an impairment was testimonial in nature.

Th[e] definition of testimonial evidence reflects an awareness of the historical abuses against which the privilege against self-incrimination was aimed. “Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source. The major thrust of the policies undergirding the privilege is to prevent such compulsion.” At its core, the privilege reflects our fierce “unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt” that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.

We need not explore the outer boundaries of what is “testimonial” today, for our decision flows from the concept’s core meaning. Because the privilege was designed primarily to prevent “a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality,” it is evident that a suspect is “compelled ... to be a witness against himself” at least whenever he must face the modern-day analog of the historic trilemma—either during a criminal trial where a sworn witness faces the identical three choices, or during custodial interrogation where, as we explained in *Miranda*, the choices are analogous and hence raise similar concerns. Whatever else it may include, therefore, the definition of “testimonial” evidence [] must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the “cruel trilemma.” This conclusion is consistent with our recognition [] that “[t]he vast majority of verbal statements thus will be testimonial” because “[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts.” Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the “trilemma” of truth, falsity, or silence, and hence the response (whether based on truth or falsity) contains a testimonial component.

[T]he sixth birthday question in this case required a testimonial response. When Officer Hosterman asked Muniz if he knew the date of his sixth birthday and Muniz, for whatever reason, could not remember or calculate that date, he was confronted with the trilemma. By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent. Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruthfully by reporting a date that he did not then believe to be accurate (an incorrect guess would be incriminating as well as untruthful). The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was [correct date]) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.

The state court held that the sixth birthday question constituted an unwarned interrogation for purposes of the privilege against self-incrimination and that Muniz's answer was incriminating. The Commonwealth does not question either conclusion. Therefore, because we conclude that Muniz's response to the sixth birthday question was testimonial, the response should have been suppressed.

C

The Commonwealth argues that the seven questions asked by Officer Hosterman just *prior* to the sixth birthday question—regarding Muniz's name, address, height, weight, eye color, date of birth, and current age—did not constitute custodial interrogation as we have defined the term in *Miranda* and subsequent cases. In *Miranda*, the Court referred to “interrogation” as actual “questioning initiated by law enforcement officers.” We have since clarified that definition, finding that the “goals of the *Miranda* safeguards could be effectuated if those safeguards extended not only to express questioning, but also to ‘its functional equivalent.’” [T]he Court [has] defined the phrase “functional equivalent” of express questioning to include “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.” However, “[a]ny knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining” what the police reasonably should have known. Thus, custodial interrogation for purposes of *Miranda* includes both express questioning and words or actions that, given the officer's knowledge of any special susceptibilities of the suspect, the officer knows or reasonably should know are likely to “have ... the force of a question on the accused,” and therefore be reasonably likely to elicit an incriminating response.

We disagree with the Commonwealth's contention that Officer Hosterman's first seven questions regarding Muniz's name, address, height, weight, eye color, date of birth, and current age do not qualify as custodial interrogation as we define[] the term merely because the questions were not intended to elicit information for investigatory purposes. As explained above, the [*Rhode Island v.*] *Innis* test focuses primarily upon “the perspective of the suspect.” We agree with *amicus* United States, however, that Muniz's answers to these first seven questions are nonetheless admissible because the questions fall within a “routine booking question” exception which exempts from *Miranda*'s coverage questions to secure the “biographical data necessary to complete booking or pretrial services.” The state court found that the first seven questions were “requested for record-keeping purposes only,” and therefore the questions appear reasonably related to the police's administrative concerns. In this context, therefore, the first seven questions asked at the booking center fall outside the protections of *Miranda* and the answers thereto need not be suppressed.

IV

During the second phase of the videotaped proceedings, Officer Hosterman asked Muniz to perform the same three sobriety tests that he had earlier performed at roadside prior to his arrest: the “horizontal gaze nystagmus” test, the “walk and turn” test, and the “one leg stand” test. While Muniz was attempting to comprehend Officer Hosterman's instructions and then

perform the requested sobriety tests, Muniz made several audible and incriminating statements. Muniz argued to the state court that both the videotaped performance of the physical tests themselves and the audiorecorded verbal statements were introduced in violation of *Miranda*.

The court refused to suppress the videotaped evidence of Muniz's paltry performance on the physical sobriety tests, reasoning that "[r]equiring a driver to perform physical [sobriety] tests ... does not violate the privilege against self-incrimination because the evidence procured is of a physical nature rather than testimonial." With respect to Muniz's verbal statements, however, the court concluded that "none of Muniz's utterances were spontaneous, voluntary verbalizations," and because they were "elicited before Muniz received his *Miranda* warnings, they should have been excluded as evidence."

We disagree. Officer Hosterman's dialogue with Muniz concerning the physical sobriety tests consisted primarily of carefully scripted instructions as to how the tests were to be performed. These instructions were not likely to be perceived as calling for any verbal response and therefore were not "words or actions" constituting custodial interrogation, with two narrow exceptions not relevant here. The dialogue also contained limited and carefully worded inquiries as to whether Muniz understood those instructions, but these focused inquiries were necessarily "attendant to" the police procedure held by the court to be legitimate. Hence, Muniz's incriminating utterances during this phase of the videotaped proceedings were "voluntary" in the sense that they were not elicited in response to custodial interrogation.

Similarly, we conclude that *Miranda* does not require suppression of the statements Muniz made when asked to submit to a breathalyzer examination. Officer Deyo read Muniz a prepared script explaining how the test worked, the nature of Pennsylvania's Implied Consent Law, and the legal consequences that would ensue should he refuse. Officer Deyo then asked Muniz whether he understood the nature of the test and the law and whether he would like to submit to the test. Muniz asked Officer Deyo several questions concerning the legal consequences of refusal, which Deyo answered directly, and Muniz then commented upon his state of inebriation. After offering to take the test only after waiting a couple of hours or drinking some water, Muniz ultimately refused.

We believe that Muniz's statements were not prompted by an interrogation within the meaning of *Miranda*, and therefore the absence of *Miranda* warnings does not require suppression of these statements at trial. As did Officer Hosterman when administering the three physical sobriety tests, Officer Deyo carefully limited her role to providing Muniz with relevant information about the breathalyzer test and the Implied Consent Law. She questioned Muniz only as to whether he understood her instructions and wished to submit to the test. These limited and focused inquiries were necessarily "attendant to" the legitimate police procedure and were not likely to be perceived as calling for any incriminating response.

V

We agree with the state court's conclusion that *Miranda* requires suppression of Muniz's response to the question regarding the date of his sixth birthday, but we do not agree that the entire audio portion of the videotape must be suppressed. Accordingly, the court's judgment reversing Muniz's conviction is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Chief Justice REHNQUIST, with whom Justice WHITE, Justice BLACKMUN, and Justice STEVENS join, concurring in part, concurring in the result in part, and dissenting in part.

I join Parts I, II, III-A, and IV of the Court's opinion. In addition, although I agree with the conclusion in Part III-C that the seven "booking" questions should not be suppressed, I do so for a reason different from that of Justice BRENNAN. I dissent from the Court's conclusion that Muniz's response to the "sixth birthday question" should have been suppressed.

The Court holds that the sixth birthday question Muniz was asked required a testimonial response, and that its admission at trial therefore violated Muniz's privilege against compulsory self-incrimination.

As an assumption about human behavior, this statement is wrong. Muniz would no more have felt compelled to fabricate a false date than one who cannot read the letters on an eye chart feels compelled to fabricate false letters; nor does a wrong guess call into question a speaker's veracity. The Court's statement is also a flawed predicate on which to base its conclusion that Muniz's answer to this question was "testimonial" for purposes of the Fifth Amendment.

The sixth birthday question here was an effort on the part of the police to check how well Muniz was able to do a simple mathematical exercise. Indeed, had the question related only to the date of his birth, it presumably would have come under the "booking exception" to *Miranda v. Arizona*. The Court holds in this very case that Muniz may be required to perform a "horizontal gaze nystagmus" test, the "walk and turn" test, and the "one leg stand" test, all of which are designed to test a suspect's physical coordination. If the police may require Muniz to use his body in order to demonstrate the level of his physical coordination, there is no reason why they should not be able to require him to speak or write in order to determine his mental coordination. That was all that was sought here. Since it was permissible for the police to extract and examine a sample of Schmerber's blood to determine how much that part of his system had been affected by alcohol, I see no reason why they may not examine the functioning of Muniz's mental processes for the same purpose.

Surely if it were relevant, a suspect might be asked to take an eye examination in the course of which he might have to admit that he could not read the letters on the third line of the chart. At worst, he might utter a mistaken guess. Muniz likewise might have attempted to guess the correct response to the sixth birthday question instead of attempting to calculate the date or answer "I don't know." But the potential for giving a bad guess does not subject the suspect to the truth-falsity-silence predicament that renders a response testimonial and, therefore, within the scope of the Fifth Amendment privilege.

For substantially the same reasons, Muniz’s responses to the videotaped “booking” questions were not testimonial and do not warrant application of the privilege. Thus, it is unnecessary to determine whether the questions fall within the “routine booking question” exception to *Miranda* Justice BRENNAN recognizes.

I would reverse in its entirety the judgment of the Superior Court of Pennsylvania. But given the fact that five members of the Court agree that Muniz’s response to the sixth birthday question should have been suppressed, I agree that the judgment of the Superior Court should be vacated so that, on remand, the court may consider whether admission of the response at trial was harmless error.

Notes, Comments, and Questions

The *Muniz* majority referred to the “Star Chamber,” an English court that apparently took its name from images of stars decorating the ceiling of the room in which it met. Its history is complicated. For purposes of this course, it will be sufficient for students to know that the term “Star Chamber”—when used by American judges—generally refers to a court with unfair procedures that can be compared to those of the Inquisition. In particular, in America the court’s name is strongly associated with compulsory self-incrimination. For a detailed discussion of the origins of the privilege against self-incrimination in England, see John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, [92 Mich. L. Rev. 1047](#) (1994).

This chapter concludes our main unit on the *Miranda* Rule, to which we will return briefly when studying the exclusionary rule. In our next two chapters, we will examine the constraints on interrogations imposed by the Court pursuant to the Assistance of Counsel Clause of the Sixth Amendment.

INTERROGATIONS

Chapter 29

The Sixth Amendment: The *Massiah* Doctrine

The text of the Sixth Amendment says nothing about interrogations. But it does have at least one useful hint about its applicability—the phrase “in all criminal prosecutions.” If there is no “prosecution,” there is no Sixth Amendment. The Court has clarified that “prosecution” is not limited to trials, and it has also stated that mere arrest isn’t enough. There must be some sort of formal proceeding.

The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” The Court has held that once a defendant’s right to counsel has “attached”—a concept we will examine later—additional rules restrict interrogations. These rules differ from the *Miranda* Rule in important ways. For example, the Assistance of Counsel Clause applies regardless of whether a suspect is in custody. Further, the restrictions imposed under the Clause apply to undercover agents as well as to interrogators whom suspects know to be police officers.

The cases beginning with *Massiah v. United States* compose the third and final interrogation doctrine included in this book. Students should recall that the Due Process Clauses, the *Miranda* Rule, and the *Massiah* doctrine impose overlapping commands that police must obey during their investigations of crime.

Supreme Court of the United States

Winston Massiah v. United States

Decided May 18, 1964 – [377 U.S. 201](#)

Mr. Justice STEWART delivered the opinion of the Court.

The petitioner was indicted for violating the federal narcotics laws. He retained a lawyer, pleaded not guilty, and was released on bail. While he was free on bail a federal agent succeeded by surreptitious means in listening to incriminating statements made by him. Evidence of these statements was introduced against the petitioner at his trial over his objection. He was convicted, and the Court of Appeals affirmed. We granted certiorari to consider whether, under the circumstances here presented, the prosecution’s use at the trial of evidence of the petitioner’s own incriminating statements deprived him of any right secured to him under the Federal Constitution.

The petitioner, a merchant seaman, was in 1958 a member of the crew of the S.S. Santa Maria. In April of that year federal customs officials in New York received information that he was going to transport a quantity of narcotics aboard that ship from South America to the United States. As a result of this and other information, the agents searched the Santa Maria upon its arrival in New York and found in the afterpeak of the vessel five packages containing about three and a half pounds of cocaine. They also learned of circumstances, not here relevant, tending to connect

the petitioner with the cocaine. He was arrested, promptly arraigned, and subsequently indicted for possession of narcotics aboard a United States vessel. In July a superseding indictment was returned, charging the petitioner and a man named Colson with the same substantive offense, and in separate counts charging the petitioner, Colson, and others with having conspired to possess narcotics aboard a United States vessel, and to import, conceal, and facilitate the sale of narcotics. The petitioner, who had retained a lawyer, pleaded not guilty and was released on bail, along with Colson.

A few days later, and quite without the petitioner's knowledge, Colson decided to cooperate with the government agents in their continuing investigation of the narcotics activities in which the petitioner, Colson, and others had allegedly been engaged. Colson permitted an agent named Murphy to install a Schmidt radio transmitter under the front seat of Colson's automobile, by means of which Murphy, equipped with an appropriate receiving device, could overhear from some distance away conversations carried on in Colson's car.

On the evening of November 19, 1959, Colson and the petitioner held a lengthy conversation while sitting in Colson's automobile, parked on a New York street. By prearrangement with Colson, and totally unbeknown to the petitioner, the agent Murphy sat in a car parked out of sight down the street and listened over the radio to the entire conversation. The petitioner made several incriminating statements during the course of this conversation. At the petitioner's trial these incriminating statements were brought before the jury through Murphy's testimony, despite the insistent objection of defense counsel. The jury convicted the petitioner of several related narcotics offenses, and the convictions were affirmed by the Court of Appeals.

The petitioner argues that it was an error of constitutional dimensions to permit the agent Murphy at the trial to testify to the petitioner's incriminating statements which Murphy had overheard under the circumstances disclosed by this record. This argument is based upon two distinct and independent grounds. First, we are told that Murphy's use of the radio equipment violated the petitioner's rights under the Fourth Amendment, and, consequently, that all evidence which Murphy thereby obtained was, under the rule of *Weeks v. United States*, [232 U.S. 383](#) (1914), inadmissible against the petitioner at the trial. Secondly, it is said that the petitioner's Fifth and Sixth Amendment rights were violated by the use in evidence against him of incriminating statements which government agents had deliberately elicited from him after he had been indicted and in the absence of his retained counsel. Because of the way we dispose of the case, we do not reach the Fourth Amendment issue.

It was said [in the *Spano v. New York* concurrence] that a Constitution which guarantees a defendant the aid of counsel at such a trial could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding. Anything less, it was said, might deny a defendant "effective representation by counsel at the only stage when legal aid and advice would help him." Ever since this Court's decision in the *Spano* case, the New York courts have unequivocally followed this constitutional rule. "Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

This view no more than reflects a constitutional principle [] that “...during perhaps the most critical period of the proceedings ... that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important, the defendants ... [are] as much entitled to such aid [of counsel] during that period as at the trial itself.” And since the *Spano* decision the same basic constitutional principle has been broadly reaffirmed by this Court.

Here we deal not with a state court conviction, but with a federal case, where the specific guarantee of the Sixth Amendment directly applies. We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel. It is true that in the *Spano* case the defendant was interrogated in a police station, while here the damaging testimony was elicited from the defendant without his knowledge while he was free on bail. But, as Judge Hays pointed out in his dissent in the Court of Appeals, “if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon ... because he did not even know that he was under interrogation by a government agent.”

The Solicitor General, in his brief and oral argument, has strenuously contended that the federal law enforcement agents had the right, if not indeed the duty, to continue their investigation of the petitioner and his alleged criminal associates even though the petitioner had been indicted. He points out that the Government was continuing its investigation in order to uncover not only the source of narcotics found on the S.S. Santa Maria, but also their intended buyer. He says that the quantity of narcotics involved was such as to suggest that the petitioner was part of a large and well-organized ring, and indeed that the continuing investigation confirmed this suspicion, since it resulted in criminal charges against many defendants. Under these circumstances the Solicitor General concludes that the Government agents were completely “justified in making use of Colson’s cooperation by having Colson continue his normal associations and by surveilling them.”

We may accept and, at least for present purposes, completely approve all that this argument implies, Fourth Amendment problems to one side. We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant’s own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

Mr. Justice WHITE, with whom Mr. Justice CLARK and Mr. Justice HARLAN join, dissenting.

The current incidence of serious violations of the law represents not only an appalling waste of the potentially happy and useful lives of those who engage in such conduct but also an overhanging, dangerous threat to those unidentified and innocent people who will be the victims of crime today and tomorrow. This is a festering problem for which no adequate cures have yet been devised. At the very least there is much room for discontent with remedial measures so far

undertaken. And admittedly there remains much to be settled concerning the disposition to be made of those who violate the law.

But dissatisfaction with preventive programs aimed at eliminating crime and profound dispute about whether we should punish, deter, rehabilitate or cure cannot excuse concealing one of our most menacing problems until the millennium has arrived. In my view, a civilized society must maintain its capacity to discover transgressions of the law and to identify those who flout it. This much is necessary even to know the scope of the problem, much less to formulate intelligent counter-measures. It will just not do to sweep these disagreeable matters under the rug or to pretend they are not there at all.

It is therefore a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged. Without the evidence, the quest for truth may be seriously impeded and in many cases the trial court, although aware of proof showing defendant's guilt, must nevertheless release him because the crucial evidence is deemed inadmissible. This result is entirely justified in some circumstances because exclusion serves other policies of overriding importance, as where evidence seized in an illegal search is excluded, not because of the quality of the proof, but to secure meaningful enforcement of the Fourth Amendment. But this only emphasizes that the soundest of reasons is necessary to warrant the exclusion of evidence otherwise admissible and the creation of another area of privileged testimony. With all due deference, I am not at all convinced that the additional barriers to the pursuit of truth which the Court today erects rest on anything like the solid foundations which decisions of this gravity should require.

The importance of the matter should not be underestimated, for today's rule promises to have wide application well beyond the facts of this case. The reason given for the result here—the admissions were obtained in the absence of counsel—would seem equally pertinent to statements obtained at any time after the right to counsel attaches, whether there has been an indictment or not; to admissions made prior to arraignment, at least where the defendant has counsel or asks for it; to the fruits of admissions improperly obtained under the new rule; to criminal proceedings in state courts; and to defendants long since convicted upon evidence including such admissions. The new rule will immediately do service in a great many cases.

Whatever the content or scope of the rule may prove to be, I am unable to see how this case presents an unconstitutional interference with Massiah's right to counsel. Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism—an unsound one, besides—to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence. The right to counsel has never meant as much before, and its extension in this case requires some further explanation, so far unarticulated by the Court.

Since the new rule would exclude all admissions made to the police, no matter how voluntary and reliable, the requirement of counsel's presence or approval would seem to rest upon the probability that counsel would foreclose any admissions at all. This is nothing more than a thinly disguised constitutional policy of minimizing or entirely prohibiting the use in evidence of

voluntary out-of-court admissions and confessions made by the accused. Carried as far as blind logic may compel some to go, the notion that statements from the mouth of the defendant should not be used in evidence would have a severe and unfortunate impact upon the great bulk of criminal cases.

Viewed in this light, the Court's newly fashioned exclusionary principle goes far beyond the constitutional privilege against self-incrimination, which neither requires nor suggests the barring of voluntary pretrial admissions. The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself ..." The defendant may thus not be compelled to testify at his trial, but he may if he wishes. Likewise he may not be compelled or coerced into saying anything before trial; but until today he could if he wished to, and if he did, it could be used against him. Whether as a matter of self-incrimination or of due process, the proscription is against compulsion—coerced incrimination. Under the prior law, announced in countless cases in this Court, the defendant's pretrial statements were admissible evidence if voluntarily made; inadmissible if not the product of his free will. Hardly any constitutional area has been more carefully patrolled by this Court, and until now the Court has expressly rejected the argument that admissions are to be deemed involuntary if made outside the presence of counsel.

The Court presents no facts, no objective evidence, no reasons to warrant scrapping the voluntary-involuntary test for admissibility in this area. Without such evidence I would retain it in its present form.

Applying the new exclusionary rule is peculiarly inappropriate in this case. At the time of the conversation in question, petitioner was not in custody but free on bail. He was not questioned in what anyone could call an atmosphere of official coercion. What he said was said to his partner in crime who had also been indicted. There was no suggestion or any possibility of coercion. What petitioner did not know was that Colson had decided to report the conversation to the police. Had there been no prior arrangements between Colson and the police, had Colson simply gone to the police after the conversation had occurred, his testimony relating Massiah's statements would be readily admissible at the trial, as would a recording which he might have made of the conversation. In such event, it would simply be said that Massiah risked talking to a friend who decided to disclose what he knew of Massiah's criminal activities. But, if, as occurred here, Colson had been cooperating with the police prior to his meeting with Massiah, both his evidence and the recorded conversation are somehow transformed into inadmissible evidence despite the fact that the hazard to Massiah remains precisely the same—the defection of a confederate in crime.

Reporting criminal behavior is expected or even demanded of the ordinary citizen. Friends may be subpoenaed to testify about friends, relatives about relatives and partners about partners. I therefore question the soundness of insulating Massiah from the apostasy of his partner in crime and of furnishing constitutional sanction for the strict secrecy and discipline of criminal organizations. Neither the ordinary citizen nor the confessed criminal should be discouraged from reporting what he knows to the authorities and from lending his aid to secure evidence of crime. Certainly after this case the Colsons will be few and far between; and the Massiahs can breathe much more easily, secure in the knowledge that the Constitution furnishes an important measure of protection against faithless compatriots and guarantees sporting treatment for sporting peddlers of narcotics.

Meanwhile, of course, the public will again be the loser and law enforcement will be presented with another serious dilemma. The general issue lurking in the background of the Court's opinion is the legitimacy of penetrating or obtaining confederates in criminal organizations. For the law enforcement agency, the answer for the time being can only be in the form of a prediction about the future application of today's new constitutional doctrine. More narrowly, and posed by the precise situation involved here, the question is this: when the police have arrested and released on bail one member of a criminal ring and another member, a confederate, is cooperating with the police, can the confederate be allowed to continue his association with the ring or must he somehow be withdrawn to avoid challenge to trial evidence on the ground that it was acquired after rather than before the arrest, after rather than before the indictment?

Undoubtedly, the evidence excluded in this case would not have been available but for the conduct of Colson in cooperation with Agent Murphy, but is it this kind of conduct which should be forbidden to those charged with law enforcement? It is one thing to establish safeguards against procedures fraught with the potentiality of coercion and to outlaw "easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection." But here there was no substitution of brutality for brains, no inherent danger of police coercion justifying the prophylactic effect of another exclusionary rule.

Notes, Comments, and Questions

Because under *Massiah* police cannot use undercover agents to question a suspect whose right to counsel has "attached," two suspects in the same jail can have different rules apply to them. If one has been arrested but not yet indicted or brought before a judge, chances are that *Miranda* applies to her and *Massiah* does not. In that case, because undercover questioning is not "interrogation" under *Miranda*, a secret informant could freely question the suspect, with only the Due Process Clauses regulating the tactics. A cellmate who had been indicted—or for whom adversary proceedings had otherwise commenced—would be protected by *Massiah* doctrine, which applies regardless of whether a suspect is in custody.

In *Brewer v. Williams*, the Court was forced to decide whether to apply the *Massiah* doctrine in the case of a murder of a ten-year-old child. Perhaps because the straightforward application of the rule would lead to such an unappealing outcome—the state's inability to punish a killer whose guilt was seemingly in little doubt—the case caused sharp disagreements among the Justices.

Supreme Court of the United States

Lou V. Brewer v. Robert Anthony Williams

Decided March 23, 1977 – [430 U.S. 387](#)

Mr. Justice STEWART delivered the opinion of the Court.

An Iowa trial jury found the respondent, Robert Williams, guilty of murder. The judgment of conviction was affirmed in the Iowa Supreme Court by a closely divided vote. In a subsequent habeas corpus proceeding a Federal District Court ruled that under the United States Constitution Williams is entitled to a new trial, and a divided Court of Appeals for the Eighth

Circuit agreed. The question before us is whether the District Court and the Court of Appeals were wrong.

I

On the afternoon of December 24, 1968, a 10-year-old girl named Pamela Powers went with her family to the YMCA in Des Moines, Iowa, to watch a wrestling tournament in which her brother was participating. When she failed to return from a trip to the washroom, a search for her began. The search was unsuccessful.

Robert Williams, who had recently escaped from a mental hospital, was a resident of the YMCA. Soon after the girl's disappearance Williams was seen in the YMCA lobby carrying some clothing and a large bundle wrapped in a blanket. He obtained help from a 14-year-old boy in opening the street door of the YMCA and the door to his automobile parked outside. When Williams placed the bundle in the front seat of his car the boy "saw two legs in it and they were skinny and white." Before anyone could see what was in the bundle Williams drove away. His abandoned car was found the following day in Davenport, Iowa, roughly 160 miles east of Des Moines. A warrant was then issued in Des Moines for his arrest on a charge of abduction.

On the morning of December 26, a Des Moines lawyer named Henry McKnight went to the Des Moines police station and informed the officers present that he had just received a long-distance call from Williams, and that he had advised Williams to turn himself in to the Davenport police. Williams did surrender that morning to the police in Davenport, and they booked him on the charge specified in the arrest warrant and gave him the warnings required by *Miranda v. Arizona*. The Davenport police then telephoned their counterparts in Des Moines to inform them that Williams had surrendered. McKnight, the lawyer, was still at the Des Moines police headquarters, and Williams conversed with McKnight on the telephone. In the presence of the Des Moines chief of police and a police detective named Leaming, McKnight advised Williams that Des Moines police officers would be driving to Davenport to pick him up, that the officers would not interrogate him or mistreat him, and that Williams was not to talk to the officers about Pamela Powers until after consulting with McKnight upon his return to Des Moines. As a result of these conversations, it was agreed between McKnight and the Des Moines police officials that Detective Leaming and a fellow officer would drive to Davenport to pick up Williams, that they would bring him directly back to Des Moines, and that they would not question him during the trip.

In the meantime Williams was arraigned before a judge in Davenport on the outstanding arrest warrant. The judge advised him of his *Miranda* rights and committed him to jail. Before leaving the courtroom, Williams conferred with a lawyer named Kelly, who advised him not to make any statements until consulting with McKnight back in Des Moines.

Detective Leaming and his fellow officer arrived in Davenport about noon to pick up Williams and return him to Des Moines. Soon after their arrival they met with Williams and Kelly, who, they understood, was acting as Williams' lawyer. Detective Leaming repeated the *Miranda* warnings, and told Williams:

"[W]e both know that you're being represented here by Mr. Kelly and you're being represented by Mr. McKnight in Des Moines, and ... I want you to remember this because we'll be visiting between here and Des Moines."

Williams then conferred again with Kelly alone, and after this conference Kelly reiterated to Detective Leaming that Williams was not to be questioned about the disappearance of Pamela Powers until after he had consulted with McKnight back in Des Moines. When Leaming expressed some reservations, Kelly firmly stated that the agreement with McKnight was to be carried out that there was to be no interrogation of Williams during the automobile journey to Des Moines. Kelly was denied permission to ride in the police car back to Des Moines with Williams and the two officers.

The two detectives, with Williams in their charge, then set out on the 160-mile drive. At no time during the trip did Williams express a willingness to be interrogated in the absence of an attorney. Instead, he stated several times that “[w]hen I get to Des Moines and see Mr. McKnight, I am going to tell you the whole story.” Detective Leaming knew that Williams was a former mental patient, and knew also that he was deeply religious.

The detective and his prisoner soon embarked on a wide-ranging conversation covering a variety of topics, including the subject of religion. Then, not long after leaving Davenport and reaching the interstate highway, Detective Leaming delivered what has been referred to in the briefs and oral arguments as the “Christian burial speech.” Addressing Williams as “Reverend,” the detective said:

“I want to give you something to think about while we’re traveling down the road. ... Number one, I want you to observe the weather conditions, it’s raining, it’s sleeting, it’s freezing, driving is very treacherous, visibility is poor, it’s going to be dark early this evening. They are predicting several inches of snow for tonight, and I feel that you yourself are the only person that knows where this little girl’s body is, that you yourself have only been there once, and if you get a snow on top of it you yourself may be unable to find it. And, since we will be going right past the area on the way into Des Moines, I feel that we could stop and locate the body, that the parents of this little girl should be entitled to a Christian burial for the little girl who was snatched away from them on Christmas [E]ve and murdered. And I feel we should stop and locate it on the way in rather than waiting until morning and trying to come back out after a snow storm and possibly not being able to find it at all.”

Williams asked Detective Leaming why he thought their route to Des Moines would be taking them past the girl’s body, and Leaming responded that he knew the body was in the area of Mitchellville a town they would be passing on the way to Des Moines. Leaming then stated: “I do not want you to answer me. I don’t want to discuss it any further. Just think about it as we’re riding down the road.”

As the car approached Grinnell, a town approximately 100 miles west of Davenport, Williams asked whether the police had found the victim’s shoes. When Detective Leaming replied that he was unsure, Williams directed the officers to a service station where he said he had left the shoes; a search for them proved unsuccessful. As they continued towards Des Moines, Williams asked whether the police had found the blanket, and directed the officers to a rest area where he said he had disposed of the blanket. Nothing was found. The car continued towards Des Moines, and as it approached Mitchellville, Williams said that he would show the officers where the body was. He then directed the police to the body of Pamela Powers.

Williams was indicted for first-degree murder. Before trial, his counsel moved to suppress all evidence relating to or resulting from any statements Williams had made during the automobile ride from Davenport to Des Moines. After an evidentiary hearing the trial judge denied the motion. He found that “an agreement was made between defense counsel and the police officials to the effect that the Defendant was not to be questioned on the return trip to Des Moines,” and that the evidence in question had been elicited from Williams during “a critical stage in the proceedings requiring the presence of counsel on his request.” The judge ruled, however, that Williams had “waived his right to have an attorney present during the giving of such information.”

The evidence in question was introduced over counsel’s continuing objection at the subsequent trial. The jury found Williams guilty of murder, and the judgment of conviction was affirmed by the Iowa Supreme Court, a bare majority of whose members agreed with the trial court that Williams had “waived his right to the presence of his counsel” on the automobile ride from Davenport to Des Moines.

Williams then petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa. Counsel for the State and for Williams stipulated that “the case would be submitted on the record of facts and proceedings in the trial court, without taking of further testimony.” The District Court made findings of fact as summarized above, and concluded as a matter of law that the evidence in question had been wrongly admitted at Williams’ trial.

The Court of Appeals for the Eighth Circuit, with one judge dissenting affirmed this judgment and denied a petition for rehearing en banc. We granted certiorari to consider the constitutional issues presented.

II

[T]here is no need to review in this case the doctrine of *Miranda v. Arizona*, a doctrine designed to secure the constitutional privilege against compulsory self-incrimination. It is equally unnecessary to evaluate the ruling of the District Court that Williams’ self-incriminating statements were, indeed, involuntarily made. For it is clear that the judgment before us must in any event be affirmed upon the ground that Williams was deprived of a different constitutional right—the right to the assistance of counsel.

This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice. Its vital need at the pretrial stage has perhaps nowhere been more succinctly explained than in Mr. Justice Sutherland’s memorable words for the Court 44 years ago in *Powell v. Alabama*, [287 U.S. 45](#) (1932):

“[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.”

There has occasionally been a difference of opinion within the Court as to the peripheral scope of this constitutional right. But its basic contours, which are identical in state and federal

contexts, are too well established to require extensive elaboration here. Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”

There can be no doubt in the present case that judicial proceedings had been initiated against Williams before the start of the automobile ride from Davenport to Des Moines. A warrant had been issued for his arrest, he had been arraigned on that warrant before a judge in a Davenport courtroom, and he had been committed by the court to confinement in jail. The State does not contend otherwise.

There can be no serious doubt, either, that Detective Leaming deliberately and designedly set out to elicit information from Williams just as surely as and perhaps more effectively than if he had formally interrogated him. Detective Leaming was fully aware before departing for Des Moines that Williams was being represented in Davenport by Kelly and in Des Moines by McKnight. Yet he purposely sought during Williams’ isolation from his lawyers to obtain as much incriminating information as possible. Indeed, Detective Leaming conceded as much when he testified at Williams’ trial:

“Q. In fact, Captain, whether he was a mental patient or not, you were trying to get all the information you could before he got to his lawyer, weren’t you?”

“A. I was sure hoping to find out where that little girl was, yes, sir.

“Q. Well, I’ll put it this way: You was [sic] hoping to get all the information you could before Williams got back to McKnight, weren’t you?”

“A. Yes, sir.”

The state courts clearly proceeded upon the hypothesis that Detective Leaming’s “Christian burial speech” had been tantamount to interrogation. Both courts recognized that Williams had been entitled to the assistance of counsel at the time he made the incriminating statements. Yet no such constitutional protection would have come into play if there had been no interrogation.

The circumstances of this case are thus constitutionally indistinguishable from those presented in *Massiah v. United States*. That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant. Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him. It thus requires no wooden or technical application of the *Massiah* doctrine to conclude that Williams was entitled to the assistance of counsel guaranteed to him by the Sixth and Fourteenth Amendments.

III

The Iowa courts recognized that Williams had been denied the constitutional right to the assistance of counsel. They held, however, that he had waived that right during the course of the automobile trip from Davenport to Des Moines. The state trial court explained its determination of waiver as follows:

“The time element involved on the trip, the general circumstances of it, and more importantly the absence on the Defendant’s part of any assertion of his right or desire not to give information absent the presence of his attorney, are the main foundations for the Court’s conclusion that he voluntarily waived such right.”

In the federal habeas corpus proceeding, the Court of Appeals [disagreed, stating]:

“[T]his court recently held that an accused can voluntarily, knowingly and intelligently waive his right to have counsel present at an interrogation after counsel has been appointed. ... The prosecution, however, has the weighty obligation to show that the waiver was knowingly and intelligently made. [T]he state here failed to so show.”

[I]t was incumbent upon the State to prove “an intentional relinquishment or abandonment of a known right or privilege.” That standard has been reiterated in many cases. We have said that the right to counsel does not depend upon a request by the defendant. This strict standard applies equally to an alleged waiver of the right to counsel whether at trial or at a critical stage of pretrial proceedings.

We conclude [] that, judged by these standards, the record in this case falls far short of sustaining petitioner’s burden. It is true that Williams had been informed of and appeared to understand his right to counsel. But waiver requires not merely comprehension but relinquishment, and Williams’ consistent reliance upon the advice of counsel in dealing with the authorities refutes any suggestion that he waived that right.

Despite Williams’ express and implicit assertions of his right to counsel, Detective Leaming proceeded to elicit incriminating statements from Williams. Leaming did not preface this effort by telling Williams that he had a right to the presence of a lawyer, and made no effort at all to ascertain whether Williams wished to relinquish that right. The circumstances of record in this case thus provide no reasonable basis for finding that Williams waived his right to the assistance of counsel.

IV

The crime of which Williams was convicted was senseless and brutal, calling for swift and energetic action by the police to apprehend the perpetrator and gather evidence with which he could be convicted. No mission of law enforcement officials is more important. Yet “[d]isinterested zeal for the public good does not assure either wisdom or right in the methods it pursues.” Although we do not lightly affirm the issuance of a writ of habeas corpus in this case, so clear a violation of the Sixth and Fourteenth Amendments as here occurred cannot be condoned. The pressures on state executive and judicial officers charged with the administration of the criminal law are great, especially when the crime is murder and the victim a small child.

But it is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all. The judgment of the Court of Appeals is affirmed.

Mr. Justice MARSHALL, concurring.

I concur wholeheartedly in my Brother STEWART's opinion for the Court, but add these words in light of the dissenting opinions filed today. The dissenters have, I believe, lost sight of the fundamental constitutional backbone of our criminal law. They seem to think that Detective Leaming's actions were perfectly proper, indeed laudable, examples of "good police work." In my view, good police work is something far different from catching the criminal at any price. It is equally important that the police, as guardians of the law, fulfill their responsibility to obey its commands scrupulously. For "in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

Mr. Justice STEVENS, concurring.

Underlying the surface issues in this case is the question whether a fugitive from justice can rely on his lawyer's advice given in connection with a decision to surrender voluntarily. The defendant placed his trust in an experienced Iowa trial lawyer who in turn trusted the Iowa law enforcement authorities to honor a commitment made during negotiations which led to the apprehension of a potentially dangerous person. Under any analysis, this was a critical stage of the proceeding in which the participation of an independent professional was of vital importance to the accused and to society. At this stage as in countless others in which the law profoundly affects the life of the individual the lawyer is the essential medium through which the demands and commitments of the sovereign are communicated to the citizen. If, in the long run, we are seriously concerned about the individual's effective representation by counsel, the State cannot be permitted to dishonor its promise to this lawyer.

Mr. Chief Justice BURGER, dissenting.

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It continues the Court by the narrowest margin on the much-criticized course of punishing the public for the mistakes and misdeeds of law enforcement officers, instead of punishing the officer directly, if in fact he is guilty of wrongdoing. It mechanically and blindly keeps reliable evidence from juries whether the claimed constitutional violation involves gross police misconduct or honest human error.

Williams is guilty of the savage murder of a small child; no member of the Court contends he is not. While in custody, and after no fewer than five warnings of his rights to silence and to counsel, he led police to the concealed body of his victim. The Court concedes Williams was not threatened or coerced and that he spoke and acted voluntarily and with full awareness of his constitutional rights. In the face of all this, the Court now holds that because Williams was prompted by the detective's statement—not interrogation but a statement—the jury must not be told how the police found the body.

Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.

[Chief Justice Burger's dissent then raised two main points. First, he argued that Williams's statements were voluntary. Second, he urged that the exclusionary rule should not be applied to "non-egregious police conduct."]

Mr. Justice WHITE, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

The respondent in this case killed a 10-year-old child. The majority sets aside his conviction, holding that certain statements of unquestioned reliability were unconstitutionally obtained from him, and under the circumstances probably makes it impossible to retry him. Because there is nothing in the Constitution or in our previous cases which requires the Court's action, I dissent.

The issue in this case is whether respondent who was entitled not to make any statements to the police without consultation with and/or presence of counsel validly waived those rights. In order to show that a right has been waived [], the State must prove "an intentional relinquishment or abandonment of a known right or privilege." The majority creates no new rule preventing an accused who has retained a lawyer from waiving his right to the lawyer's presence during questioning. The majority simply finds that no waiver was proved in this case. I disagree. That respondent knew of his right not to say anything to the officers without advice and presence of counsel is established on this record to a moral certainty. He was advised of the right by three officials of the State—telling at least one that he understood the right and by two lawyers. Finally, he further demonstrated his knowledge of the right by informing the police that he would tell them the story in the presence of McKnight when they arrived in Des Moines. The issue in this case, then, is whether respondent relinquished that right intentionally.

Respondent relinquished his right not to talk to the police about his crime when the car approached the place where he had hidden the victim's clothes. Men usually intend to do what they do, and there is nothing in the record to support the proposition that respondent's decision to talk was anything but an exercise of his own free will. Apparently, without any prodding from the officers, respondent—who had earlier said that he would tell the whole story when he arrived in Des Moines—spontaneously changed his mind about the timing of his disclosures when the car approached the places where he had hidden the evidence. However, even if his statements were influenced by Detective Leaming's above-quoted statement, respondent's decision to talk in the absence of counsel can hardly be viewed as the product of an overborne will. The statement by Leaming was not coercive; it was accompanied by a request that respondent not respond to it; and it was delivered hours before respondent decided to make any statement. Respondent's waiver was thus knowing and intentional.

The majority's contrary conclusion seems to rest on the fact that respondent "asserted" his right to counsel by retaining and consulting with one lawyer and by consulting with another. How this supports the conclusion that respondent's later relinquishment of his right not to talk in the absence of counsel was unintentional is a mystery. The fact that respondent consulted with

counsel on the question whether he should talk to the police in counsel's absence makes his later decision to talk in counsel's absence better informed and, if anything, more intelligent.

The majority recognizes that even after this "assertion" of his right to counsel, it would have found that respondent waived his right not to talk in counsel's absence if his waiver had been express—*i.e.*, if the officers had asked him in the car whether he would be willing to answer questions in counsel's absence and if he had answered "yes." But waiver is not a formalistic concept. Waiver is shown whenever the facts establish that an accused knew of a right and intended to relinquish it. Such waiver, even if not express, was plainly shown here. The only other conceivable basis for the majority's holding is the implicit suggestion that the right involved in *Massiah v. United States*, as distinguished from the right involved in *Miranda v. Arizona*, is a right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence, and that the right not to be asked questions must be waived before the questions are asked. Such wafer-thin distinctions cannot determine whether a guilty murderer should go free. The only conceivable purpose for the presence of counsel during questioning is to protect an accused from making incriminating answers. Questions, unanswered, have no significance at all. Absent coercion—no matter how the right involved is defined—an accused is amply protected by a rule requiring waiver before or simultaneously with the giving by him of an answer or the making by him of a statement.

The consequence of the majority's decision is, as the majority recognizes, extremely serious. A mentally disturbed killer whose guilt is not in question may be released. Why? Apparently the answer is that the majority believes that the law enforcement officers acted in a way which involves some risk of injury to society and that such conduct should be deterred. However, the officers' conduct did not, and was not likely to, jeopardize the fairness of respondent's trial or in any way risk the conviction of an innocent man the risk against which the Sixth Amendment guarantee of assistance of counsel is designed to protect. The police did nothing "wrong," let alone anything "unconstitutional." To anyone not lost in the intricacies of the prophylactic rules of *Miranda v. Arizona*, the result in this case seems utterly senseless; and for the reasons stated [above] even applying those rules as well as the rule of *Massiah v. United States*, the statements made by respondent were properly admitted. In light of these considerations, the majority's protest that the result in this case is justified by a "clear violation" of the Sixth and Fourteenth Amendments has a distressing hollow ring. I respectfully dissent.

Mr. Justice BLACKMUN, with whom Mr. Justice WHITE and Mr. Justice REHNQUIST join, dissenting.

What the Court chooses to do here, and with which I disagree, is to hold that respondent Williams' situation was in the mold of *Massiah v. United States*, that is, that it was dominated by a denial to Williams of his Sixth Amendment right to counsel after criminal proceedings had been instituted against him. The Court rules that the Sixth Amendment was violated because Detective Leaming "purposely sought during Williams' isolation from his lawyers to obtain as much incriminating information as possible." I cannot regard that as unconstitutional *per se*.

First, the police did not deliberately seek to isolate Williams from his lawyers so as to deprive him of the assistance of counsel. The isolation in this case was a necessary incident of transporting Williams to the county where the crime was committed.

Second, Leaming’s purpose was not solely to obtain incriminating evidence. The victim had been missing for only two days, and the police could not be certain that she was dead. Leaming, of course, and in accord with his duty, was “hoping to find out where that little girl was” but such motivation does not equate with an intention to evade the Sixth Amendment. Moreover, the Court seems to me to place an undue emphasis and aspersion on what it and the lower courts have chosen to call the “Christian burial speech,” and on Williams’ “deeply religious” convictions.

Third, not every attempt to elicit information should be regarded as “tantamount to interrogation.” I am not persuaded that Leaming’s observations and comments, made as the police car traversed the snowy and slippery miles between Davenport and Des Moines that winter afternoon, were an interrogation, direct or subtle, of Williams. Contrary to this Court’s statement, the Iowa Supreme Court appears to me to have thought and held otherwise and I agree. Williams, after all, was counseled by lawyers, and warned by the arraigning judge in Davenport and by the police, and yet it was he who started the travel conversations and brought up the subject of the criminal investigation. Without further reviewing the circumstances of the trip, I would say it is clear there was no interrogation.

In summary, it seems to me that the Court is holding that *Massiah* is violated whenever police engage in any conduct, in the absence of counsel, with the subjective desire to obtain information from a suspect after arraignment. Such a rule is far too broad. Persons in custody frequently volunteer statements in response to stimuli other than interrogation. When there is no interrogation, such statements should be admissible as long as they are truly voluntary.

The *Massiah* point thus being of no consequence, I would vacate the judgment of the Court of Appeals and remand the case for consideration of the issue of voluntariness, in the constitutional sense, of Williams’ statements, an issue the Court of Appeals did not reach when the case was before it.

Notes, Comments, and Questions

Compare the outcome in *Williams* to *Rhode Island v. Innis* (Chapter 25). Why are the outcomes different in these cases?

The Court in *Williams* took the defendant’s guilt for granted, which one can understand because Williams was seen leaving the YMCA with a body and eventually led police to the hidden body of the victim. Subsequent research, however, suggests another possibility—that a different YMCA resident killed Pamela Powers and put her body in Williams’s room, after which Williams panicked and tried to hide the evidence. For a discussion of the facts, see Tom N. McInnis, *Nix v. Williams and the Inevitable Discovery Exception: Creation of a Legal Safety Net*, [28 St. Louis U. Pub. L. Rev. 397](#), 417-27 (2009). While Williams may well be guilty, his guilt is not as obvious as the Justices seemed to believe. The title of Professor McInnis’s article refers to this case as “*Nix v. Williams*,” the name under which we will see the case again later in the semester.

Double Jeopardy and the “Offense-Specific” Sixth Amendment

In *McNeil v. Wisconsin*, [501 U.S. 171](#) (1991) the Court stated that the Sixth Amendment right to the assistance of counsel “is offense-specific.” Accordingly, even if a suspect’s right to counsel has attached for one crime, the Sixth Amendment does not preclude questioning by law enforcement about a different offense. Under the *Miranda* Rule, a suspect who invokes his right to counsel cannot be questioned about any crime,¹ but in situations where *Miranda* does not apply (for example, when a suspect is not in custody or is questioned by an undercover officer), the offense-specific nature of the *Massiah* doctrine may allow questioning about some crimes while preventing questioning about others. The Court explained this principle further in *Texas v. Cobb*, which appears below.

Cobb will be easier to understand following a brief review of decisions interpreting the Double Jeopardy Clause of the Fifth Amendment. That amendment provides, “No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.” In “Double Jeopardy Law Made Simple,” Professor Akhil Amar observed, “The Double Jeopardy Clause speaks of the ‘same’ offense, and yet the Court casually applies the Clause to offenses that are not the same but obviously different.”² Professor Amar’s criticism cannot be denied. Rather than consider the strengths and weaknesses of double jeopardy jurisprudence, we will focus on the basic definition of “same offense” articulated by the Court.

In *Blockburger v. United States*, [284 U.S. 299](#) (1932), the Court set forth a test for determining whether, “where the same act or transaction constitutes a violation of two distinct statutory provisions,” someone has committed two separate crimes for double jeopardy purposes. If the two statutes charge the defendant with committing the “same offense,” then the defendant may be punished for violating only one of them. If, however, the two statutes do not describe the “same offense,” then the defendant’s conduct can be punished under both statutes. “[T]he test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.”

A few examples will illustrate how the test works in practice:

If a suspect possesses cocaine with intent to sell it, she likely could be charged either with “simple possession” of the contraband or with “possession with intent to distribute.” Often, the elements of “possession with intent to distribute” are exactly the same as those of “simple possession”—other than the culpable mental state of “intent to distribute.” If so, then these two crimes are the “same offense” under *Blockburger*. (As Professor Amar and others have noted, these are certainly not the “same offense” under plain English.) They are the same offense because while “possession with intent to distribute” has an element that “simple possession” lacks, “simple possession” has no element that is not part of “possession with intent to distribute.” In other words, “simple possession” is a lesser included offense of “possession with intent to distribute.” This example shows the general principle that lesser included offenses are the “same offense” as the greater offenses in which they are included.

¹ See *Arizona v. Roberson*, [486 U.S. 675](#) (1988) (Chapter 27).

² See Akhil Amar, *Double Jeopardy Law Made Simple*, [106 Yale L. J. 1807](#) (1997).

Note that the “same offense” definition is symmetric. If Crime A is the same offense as Crime B, then Crime B is the same offense as Crime A.

Continuing with the theme of lesser included offenses, negligent homicide is the “same offense” as involuntary manslaughter—assuming that the only difference between the crimes is the culpable mental state that the prosecution must prove. Both crimes require a homicide, and negligent homicide is the lesser included offense of reckless (involuntary) manslaughter. (Recall that anyone who is reckless is also by definition negligent.)

By contrast, consider a devious business owner who burns down his rival’s warehouse and accidentally kills a security guard who was inside during the fire. If the malefactor were tried for arson, could he later be tried for negligent homicide? Yes. Arson has an element that negligent homicide lacks—burning. And negligent homicide has an element that arson lacks—a death. Thus, even though the charges arise from the same transaction, they are not the “same offense” under *Blockburger*. Therefore, regardless of the result of the arson trial, prosecutors may freely charge the defendant for negligent homicide without offending the Court’s double jeopardy doctrine.

Here, now, is a trickier one: Imagine that the same warehouse arsonist is not charged with the crimes listed above, but is instead charged with felony murder. If he is acquitted, may frustrated prosecutors charge him with arson? Probably not. Chances are that when he was charged with felony murder, the predicate felony was arson. In that case, the elements of the offense included all the elements of arson, along with the death arising from the crime. Therefore, ordinary arson, standing alone, is a lesser included offense of the felony murder charge for which the defendant was put in jeopardy.

The result of this doctrine is that if the defendant is tried first for arson, the prosecution may not subsequently charge him with felony murder (because that is the “same offense” as arson), but may subsequently charge him with negligent homicide or reckless manslaughter (which are not the “same offense”).

To determine whether two charges arising from the same conduct are the “same offense,” a student should list the elements of each crime. If each crime has an element that the other lacks, then the crimes are not the “same offense.” If one crime’s elements are fully included among those of the other crime, then they are the “same offense.”

Note that if two charges arise from separate events—for example, two different bank robberies—a defendant may be tried for both of them (in whatever order) without offending the Double Jeopardy Clause. For instance, a suspect observed selling cocaine to ten different buyers may be tried separately for each of the sales.

One last point: In *Gamble v. United States*, [139 S. Ct. 1960](#) (2019), the Court upheld the longstanding “dual-sovereignty doctrine.” Under this doctrine, a state prosecution does not preclude a subsequent federal prosecution for the same conduct, regardless of the elements of the crimes charged. Similarly, a federal prosecution does not preclude a subsequent state prosecution.

Armed with a basic understanding of double jeopardy law, students will better grasp the importance of *Texas v. Cobb*, which imports this jurisprudence into Sixth Amendment doctrine.

Supreme Court of the United States

Texas v. Raymond Levi Cobb

Decided April 2, 2001 – [532 U.S. 162](#)

Chief Justice REHNQUIST delivered the opinion of the Court.

The Texas Court of Criminal Appeals held that a criminal defendant’s Sixth Amendment right to counsel attaches not only to the offense with which he is charged, but to other offenses “closely related factually” to the charged offense. We hold that our decision in *McNeil v. Wisconsin* meant what it said, and that the Sixth Amendment right is “offense specific.”

In December 1993, Lindsey Owings reported to the Walker County, Texas, Sheriff’s Office that the home he shared with his wife, Margaret, and their 16-month-old daughter, Kori Rae, had been burglarized. He also informed police that his wife and daughter were missing. Respondent Raymond Levi Cobb lived across the street from the Owings. Acting on an anonymous tip that respondent was involved in the burglary, Walker County investigators questioned him about the events. He denied involvement. In July 1994, while under arrest for an unrelated offense, respondent was again questioned about the incident. Respondent then gave a written statement confessing to the burglary, but he denied knowledge relating to the disappearances. Respondent was subsequently indicted for the burglary, and Hal Ridley was appointed in August 1994 to represent respondent on that charge.

Shortly after Ridley’s appointment, investigators asked and received his permission to question respondent about the disappearances. Respondent continued to deny involvement. Investigators repeated this process in September 1995, again with Ridley’s permission and again with the same result.

In November 1995, respondent, free on bond in the burglary case, was living with his father in Odessa, Texas. At that time, respondent’s father contacted the Walker County Sheriff’s Office to report that respondent had confessed to him that he killed Margaret Owings in the course of the burglary. Walker County investigators directed respondent’s father to the Odessa police station, where he gave a statement. Odessa police then faxed the statement to Walker County, where investigators secured a warrant for respondent’s arrest and faxed it back to Odessa. Shortly thereafter, Odessa police took respondent into custody and administered warnings pursuant to *Miranda v. Arizona*. Respondent waived these rights.

After a short time, respondent confessed to murdering both Margaret and Kori Rae [in detail].

Respondent later led police to the location where he had buried the victims’ bodies.

Respondent was convicted of capital murder for murdering more than one person in the course of a single criminal transaction. He was sentenced to death. On appeal to the Court of Criminal Appeals of Texas, respondent argued, *inter alia*, that his confession should have been suppressed

because it was obtained in violation of his Sixth Amendment right to counsel. [R]espondent contended that his right to counsel had attached when Ridley was appointed in the burglary case and that Odessa police were therefore required to secure Ridley's permission before proceeding with the interrogation.

The Court of Criminal Appeals reversed respondent's conviction by a divided vote and remanded for a new trial. The court held that "once the right to counsel attaches to the offense charged, it also attaches to any other offense that is very closely related factually to the offense charged." Finding the capital murder charge to be "factually interwoven with the burglary," the court concluded that respondent's Sixth Amendment right to counsel had attached on the capital murder charge even though respondent had not yet been charged with that offense.

The State sought review in this Court, and we granted certiorari to consider first whether the Sixth Amendment right to counsel extends to crimes that are "factually related" to those that have actually been charged, and second whether respondent made a valid unilateral waiver of that right in this case. Because we answer the first question in the negative, we do not reach the second.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." In *McNeil v. Wisconsin*, we explained when this right arises:

"The Sixth Amendment right [to counsel] ... is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

Accordingly, we held that a defendant's statements regarding offenses for which he had not been charged were admissible notwithstanding the attachment of his Sixth Amendment right to counsel on other charged offenses.

Some state courts and Federal Courts of Appeals, however, have read into *McNeil's* offense-specific definition an exception for crimes that are "factually related" to a charged offense. Respondent predicts that the offense-specific rule will prove "disastrous" to suspects' constitutional rights and will "permit law enforcement officers almost complete and total license to conduct unwanted and uncounseled interrogations." Besides offering no evidence that such a parade of horrors has occurred in those jurisdictions that have not enlarged upon *McNeil*, he fails to appreciate the significance of two critical considerations. First, there can be no doubt that a suspect must be apprised of his rights against compulsory self-incrimination and to consult with an attorney before authorities may conduct custodial interrogation. In the present case, police scrupulously followed *Miranda's* dictates when questioning respondent. Second, it is critical to recognize that the Constitution does not negate society's interest in the ability of police to talk to witnesses and suspects, even those who have been charged with other offenses.

“Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser. Admissions of guilt resulting from valid *Miranda* waivers ‘are more than merely “desirable”; they are essential to society’s compelling interest in finding, convicting, and punishing those who violate the law.’”

Although it is clear that the Sixth Amendment right to counsel attaches only to charged offenses, we have recognized in other contexts that the definition of an “offense” is not necessarily limited to the four corners of a charging instrument. In *Blockburger v. United States*, we explained that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” We have since applied the *Blockburger* test to delineate the scope of the Fifth Amendment’s Double Jeopardy Clause, which prevents multiple or successive prosecutions for the “same offence.” We see no constitutional difference between the meaning of the term “offense” in the contexts of double jeopardy and of the right to counsel. Accordingly, we hold that when the Sixth Amendment right to counsel attaches, it does encompass offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test.

It remains only to apply these principles to the facts at hand. At the time he confessed to Odessa police, respondent had been indicted for burglary of the Owings residence, but he had not been charged in the murders of Margaret and Kori Rae. As defined by Texas law, burglary and capital murder are not the same offense under *Blockburger*. Accordingly, the Sixth Amendment right to counsel did not bar police from interrogating respondent regarding the murders, and respondent’s confession was therefore admissible.

The judgment of the Court of Criminal Appeals of Texas is reversed.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

This case focuses upon the meaning of a single word, “offense,” when it arises in the context of the Sixth Amendment. Several basic background principles define that context.

First, the Sixth Amendment right to counsel plays a central role in ensuring the fairness of criminal proceedings in our system of justice.

Second, the right attaches when adversary proceedings, triggered by the government’s formal accusation of a crime, begin.

Third, once this right attaches, law enforcement officials are required, in most circumstances, to deal with the defendant through counsel rather than directly, even if the defendant has waived his Fifth Amendment rights.

Fourth, the particular aspect of the right here at issue—the rule that the police ordinarily must communicate with the defendant through counsel—has important limits. In particular, recognizing the need for law enforcement officials to investigate “new or additional crimes” not the subject of current proceedings, this Court has made clear that the right to counsel does not

attach to any and every crime that an accused may commit or have committed. The right “cannot be invoked once for all future prosecutions,” and it does not forbid “interrogation unrelated to the charge.” In a word, as this Court previously noted, the right is “offense specific.”

This case focuses upon the last-mentioned principle, in particular upon the meaning of the words “offense specific.” These words appear in this Court’s Sixth Amendment case law, not in the Sixth Amendment’s text. The definition of these words is not self-evident. Sometimes the term “offense” may refer to words that are written in a criminal statute; sometimes it may refer generally to a course of conduct in the world, aspects of which constitute the elements of one or more crimes; and sometimes it may refer, narrowly and technically, just to the conceptually severable aspects of the latter. This case requires us to determine whether an “offense”—for Sixth Amendment purposes—includes factually related aspects of a single course of conduct other than those few acts that make up the essential elements of the crime charged.

We should answer this question in light of the Sixth Amendment’s basic objectives as set forth in this Court’s case law. At the very least, we should answer it in a way that does not undermine those objectives. But the Court today decides that “offense” means the crime set forth within “the four corners of a charging instrument,” along with other crimes that “would be considered the same offense” under the test established by *Blockburger v. United States*. In my view, this unnecessarily technical definition undermines Sixth Amendment protections while doing nothing to further effective law enforcement.

For one thing, the majority’s rule, while leaving the Fifth Amendment’s protections in place, threatens to diminish severely the additional protection that, under this Court’s rulings, the Sixth Amendment provides when it grants the right to counsel to defendants who have been charged with a crime and insists that law enforcement officers thereafter communicate with them through that counsel.

[T]he Sixth Amendment right at issue is independent of the Fifth Amendment’s protections; and the importance of this Sixth Amendment right has been repeatedly recognized in our cases. The majority’s rule permits law enforcement officials to question those charged with a crime without first approaching counsel, through the simple device of asking questions about any other related crime not actually charged in the indictment. Thus, the police could ask the individual charged with robbery about, say, the assault of the cashier not yet charged, or about any other uncharged offense (unless under *Blockburger’s* definition it counts as the “same crime”), all *without notifying counsel*. Indeed, the majority’s rule would permit law enforcement officials to question anyone charged with any crime in any one of the examples just given about his or her conduct on the single relevant occasion without notifying counsel unless the prosecutor has charged every possible crime arising out of that same brief course of conduct. What Sixth Amendment sense—what common sense—does such a rule make? What is left of the “communicate through counsel” rule? The majority’s approach is inconsistent with any common understanding of the scope of counsel’s representation. It will undermine the lawyer’s role as “medium” between the defendant and the government. And it will, on a random basis, remove a significant portion of the protection that this Court has found inherent in the Sixth Amendment.

At the same time, the majority’s rule threatens the legal clarity necessary for effective law enforcement. That is because the majority, aware that the word “offense” ought to encompass

something beyond “the four corners of the charging instrument,” imports into Sixth Amendment law the definition of “offense” set forth in *Blockburger v. United States*, a case interpreting the Double Jeopardy Clause of the Fifth Amendment, which Clause uses the word “offence” but otherwise has no relevance here. Whatever Fifth Amendment virtues *Blockburger* may have, to import it into this Sixth Amendment context will work havoc.

In theory, the test says that two offenses are the “same offense” unless each requires proof of a fact that the other does not. That means that most of the different crimes mentioned above are not the “same offense.” Under many States’ laws, for example, the statute defining assault and the statute defining robbery each requires proof of a fact that the other does not. Hence the extension of the definition of “offense” that is accomplished by the use of the *Blockburger* test does nothing to address the substantial concerns about the circumvention of the Sixth Amendment right that are raised by the majority’s rule.

But, more to the point, the simple-sounding *Blockburger* test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it. The test has emerged as a tool in an area of our jurisprudence that THE CHIEF JUSTICE has described as “a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.” Yet the Court now asks, not the lawyers and judges who ordinarily work with double jeopardy law, but police officers in the field, to navigate *Blockburger* when they question suspects. Some will apply the test successfully; some will not. Legal challenges are inevitable. The result, I believe, will resemble not so much the Sargasso Sea as the criminal law equivalent of Milton’s “Serbonian Bog ... Where Armies whole have sunk.”

There is, of course, an alternative. We can, and should, define “offense” in terms of the conduct that constitutes the crime that the offender committed on a particular occasion, including criminal acts that are “closely related to” or “inextricably intertwined with” the particular crime set forth in the charging instrument. This alternative is not perfect. The language used lacks the precision for which police officers may hope; and it requires lower courts to specify its meaning further as they apply it in individual cases. Yet virtually every lower court in the United States to consider the issue has defined “offense” in the Sixth Amendment context to encompass such closely related acts. These courts have found offenses “closely related” where they involved the same victim, set of acts, evidence, or motivation. They have found offenses unrelated where time, location, or factual circumstances significantly separated the one from the other.

One cannot say in favor of this commonly followed approach that it is perfectly clear—only that, because it comports with common sense, it is far easier to apply than that of the majority. One might add that, unlike the majority’s test, it is consistent with this Court’s assumptions in previous cases. And, most importantly, the “closely related” test furthers, rather than undermines, the Sixth Amendment’s “right to counsel,” a right so necessary to the realization in practice of that most “noble ideal,” a fair trial.

The Texas Court of Criminal Appeals, following this commonly accepted approach, found that the charged burglary and the uncharged murders were “closely related.” All occurred during a short period of time on the same day in the same basic location. The victims of the murders were also victims of the burglary. Cobb committed one of the murders in furtherance of the robbery, the other to cover up the crimes. The police, when questioning Cobb, knew that he already had

a lawyer representing him on the burglary charges and had demonstrated their belief that this lawyer also represented Cobb in respect to the murders by asking his permission to question Cobb about the murders on previous occasions. The relatedness of the crimes is well illustrated by the impossibility of questioning Cobb about the murders without eliciting admissions about the burglary. Nor, in my view, did Cobb waive his right to counsel. These considerations are sufficient. The police officers ought to have spoken to Cobb's counsel before questioning Cobb. I would affirm the decision of the Texas court. Consequently, I dissent.

Notes, Comments, and Questions

When Has the Right to Counsel Attached?

In *Rothgery v. Gillespie County*, [554 U.S. 191](#) (2008), the Court reviewed when the Sixth Amendment right to counsel attaches. After reiterating that “it does not attach until a prosecution is commenced,” the Court quoted precedent stating that commencement occurs upon “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”

Turning to the issue presented in *Rothgery*, the Court held that “the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty,” regardless of whether a prosecutor attends this hearing or is even aware of it.

Students should note that mere arrest does not trigger the right to counsel. Accordingly, for an arrested suspect who has not been indicted—or otherwise the subject of formal proceedings—the primary regulation of interrogation will come from *Miranda*, not *Massiah*. For a suspect in custody whose right to counsel has attached, both doctrines will apply.

Consider these scenarios:

A suspect is arrested and taken to jail. Police place an undercover agent (disguised as a fellow prisoner) in the suspect's cell. The agent asks the suspect questions about the crimes leading to the suspect's arrest. Permissible? Why or why not?

Assume this same suspect is taken the next day to the courthouse. A judge sets bail, which the suspect cannot afford, and the suspect returns to jail. The same undercover agent asks the suspect questions about the crimes leading to the suspect's arrest. Permissible? Why or why not?

In our next chapter, we continue our study of the *Massiah* doctrine. In particular, we examine how undercover agents can obtain information from a suspect whose right to counsel has attached without violating the Sixth Amendment.

INTERROGATIONS

Chapter 30

The Sixth Amendment: *Massiah* Doctrine & Waiver of Rights

In *Massiah v. United States*, the Court held that the petitioner was denied the protections of the Sixth Amendment’s guarantee of assistance of counsel when prosecutors used his own words against him at trial, words which federal agents had deliberately elicited from him in the absence of his counsel after he had been indicted. Further, we read for our last chapter that indictment is not the only way that the right to counsel can “attach”—other formal proceedings will do. The *Massiah* Court did not define what it meant for government agents to “deliberately elicit” incriminating statements. We turn to that question in this chapter.

After reviewing the leading cases on deliberate elicitation, we will turn to the rules governing waiver of rights under the Sixth Amendment Assistance of Counsel Clause.

Supreme Court of the United States

United States v. Billy Gale Henry

Decided June 16, 1980 – [447 U.S. 264](#)

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to consider whether respondent’s Sixth Amendment right to the assistance of counsel was violated by the admission at trial of incriminating statements made by respondent to his cellmate, an undisclosed Government informant, after indictment and while in custody.

I

The Janaf Branch of the United Virginia Bank/Seaboard National in Norfolk, Va., was robbed in August 1972. Witnesses saw two men wearing masks and carrying guns enter the bank while a third man waited in the car. No witnesses were able to identify respondent Henry as one of the participants. About an hour after the robbery, the getaway car was discovered. Inside was found a rent receipt signed by one “Allen R. Norris” and a lease, also signed by Norris, for a house in Norfolk. Two men, who were subsequently convicted of participating in the robbery, were arrested at the rented house. Discovered with them were the proceeds of the robbery and the guns and masks used by the gunman.

Government agents traced the rent receipt to Henry; on the basis of this information, Henry was arrested in Atlanta, Ga., in November 1972. Two weeks later he was indicted for armed robbery. He was held pending trial in the Norfolk city jail. Counsel was appointed on November 27.

On November 21, 1972, shortly after Henry was incarcerated, Government agents working on the Janaf robbery contacted one Nichols, an inmate at the Norfolk city jail, who for some time prior to this meeting had been engaged to provide confidential information to the Federal Bureau of Investigation as a paid informant. Nichols was then serving a sentence on local forgery

charges. The record does not disclose whether the agent contacted Nichols specifically to acquire information about Henry or the Janaf robbery.

Nichols informed the agent that he was housed in the same cellblock with several federal prisoners awaiting trial, including Henry. The agent told him to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery. In early December, after Nichols had been released from jail, the agent again contacted Nichols, who reported that he and Henry had engaged in conversation and that Henry had told him about the robbery of the Janaf bank. Nichols was paid for furnishing the information.

When Henry was tried in March 1973, an agent of the Federal Bureau of Investigation testified concerning the events surrounding the discovery of the rental slip and the evidence uncovered at the rented house. Other witnesses also connected Henry to the rented house, including the rental agent who positively identified Henry as the “Allen R. Norris” who had rented the house and had taken the rental receipt described earlier. A neighbor testified that prior to the robbery she saw Henry at the rented house with John Luck, one of the two men who had by the time of Henry’s trial been convicted for the robbery. In addition, palm prints found on the lease agreement matched those of Henry.

Nichols testified at trial that he had “an opportunity to have some conversations with Mr. Henry while he was in the jail,” and that Henry told him that on several occasions he had gone to the Janaf Branch to see which employees opened the vault. Nichols also testified that Henry described to him the details of the robbery and stated that the only evidence connecting him to the robbery was the rental receipt. The jury was not informed that Nichols was a paid Government informant.

On the basis of this testimony, Henry was convicted of bank robbery and sentenced to a term of imprisonment of 25 years. On appeal he raised no Sixth Amendment claims. His conviction was affirmed and his petition to this Court for a writ of certiorari was denied.

On August 28, 1975, Henry moved to vacate his sentence. At this stage, he stated that he had just learned that Nichols was a paid Government informant and alleged that he had been intentionally placed in the same cell with Nichols so that Nichols could secure information about the robbery. Thus, Henry contended that the introduction of Nichols’ testimony violated his Sixth Amendment right to the assistance of counsel. The District Court denied the motion without a hearing. The Court of Appeals, however, reversed and remanded for an evidentiary inquiry into “whether the witness [Nichols] was acting as a government agent during his interviews with Henry.”

On remand, the District Court requested affidavits from the Government agents. An affidavit was submitted describing the agent’s relationship with Nichols and relating the following conversation:

“I recall telling Nichols at this time to be alert to any statements made by these individuals [the federal prisoners] regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they

engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry.”

The agent’s affidavit also stated that he never requested anyone affiliated with the Norfolk city jail to place Nichols in the same cell with Henry.

The District Court again denied Henry’s motion, concluding that Nichols’ testimony at trial did not violate Henry’s Sixth Amendment right to counsel. The Court of Appeals reversed and remanded, holding that the actions of the Government impaired the Sixth Amendment rights of the defendant under *Massiah v. United States*. The court noted that Nichols had engaged in conversation with Henry and concluded that if by association, by general conversation, or both, Nichols had developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information, this constituted interference with the right to the assistance of counsel under the Sixth Amendment.

II

This Court has scrutinized postindictment confrontations between Government agents and the accused to determine whether they are “critical stages” of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches. The present case involves incriminating statements made by the accused to an undisclosed and undercover Government informant while in custody and after indictment. The Government characterizes Henry’s incriminating statements as voluntary and not the result of any affirmative conduct on the part of Government agents to elicit evidence. From this, the Government argues that Henry’s rights were not violated, even assuming the Sixth Amendment applies to such surreptitious confrontations; in short, it is contended that the Government has not interfered with Henry’s right to counsel.

This Court first applied the Sixth Amendment to postindictment communications between the accused and agents of the Government in *Massiah v. United States*. The question here is whether under the facts of this case a Government agent “deliberately elicited” incriminating statements from Henry within the meaning of *Massiah*. Three factors are important. First, Nichols was acting under instructions as a paid informant for the Government; second, Nichols was ostensibly no more than a fellow inmate of Henry; and third, Henry was in custody and under indictment at the time he was engaged in conversation by Nichols.

The Court of Appeals viewed the record as showing that Nichols deliberately used his position to secure incriminating information from Henry when counsel was not present and held that conduct attributable to the Government. Nichols had been a paid Government informant for more than a year; moreover, the FBI agent was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry’s suspicion. The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information. This combination of circumstances is sufficient to support the Court of Appeals’ determination. Even if the agent’s statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result.

The Government argues that the federal agents instructed Nichols not to question Henry about the robbery. Yet according to his own testimony, Nichols was not a passive listener; rather, he had “some conversations with Mr. Henry” while he was in jail and Henry’s incriminatory statements were “the product of this conversation.” While affirmative interrogation, absent waiver, would certainly satisfy *Massiah*, we are not persuaded, as the Government contends that *Brewer v. Williams* modified *Massiah*’s “deliberately elicited” test. In *Massiah*, no inquiry was made as to whether *Massiah* or his codefendant first raised the subject of the crime under investigation.

It is quite a different matter when the Government uses undercover agents to obtain incriminating statements from persons not in custody but suspected of criminal activity prior to the time charges are filed. But the Fourth and Fifth Amendment claims [possible] in those [situations] are not relevant to the inquiry under the Sixth Amendment here—whether the Government has interfered with the right to counsel of the accused by “deliberately eliciting” incriminating statements. Our holding today does not modify [Fourth or Fifth Amendment jurisprudence on this issue].

It is undisputed that Henry was unaware of Nichols’ role as a Government informant. The government argues that this Court should apply a less rigorous standard under the Sixth Amendment where the accused is prompted by an undisclosed undercover informant than where the accused is speaking in the hearing of persons he knows to be Government officers. That line of argument, however, seeks to infuse Fifth Amendment concerns against compelled self-incrimination into the Sixth Amendment protection of the right to the assistance of counsel. An accused speaking to a known Government agent is typically aware that his statements may be used against him. The adversary positions at that stage are well established; the parties are then “arms’ length” adversaries.

When the accused is in the company of a fellow inmate who is acting by prearrangement as a Government agent, the same cannot be said. Conversation stimulated in such circumstances may elicit information that an accused would not intentionally reveal to persons known to be Government agents. Indeed, the *Massiah* Court noted that if the Sixth Amendment “is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.” The Court pointedly observed that *Massiah* was more seriously imposed upon because he did not know that his codefendant was a Government agent.

Moreover, the concept of a knowing and voluntary waiver of Sixth Amendment rights does not apply in the context of communications with an undisclosed undercover informant acting for the Government. In that setting, Henry, being unaware that Nichols was a Government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel.

Finally Henry's incarceration at the time he was engaged in conversation by Nichols is also a relevant factor.¹ [T]he mere fact of custody imposes pressures on the accused; confinement may bring into play subtle influences that will make him particularly susceptible to the ploys of undercover Government agents. The Court of Appeals determined that on this record the incriminating conversations between Henry and Nichols were facilitated by Nichols' conduct and apparent status as a person sharing a common plight. That Nichols had managed to gain the confidence of Henry, as the Court of Appeals determined, is confirmed by Henry's request that Nichols assist him in his escape plans when Nichols was released from confinement.

Under the strictures of the Court's holdings on the exclusion of evidence, we conclude that the Court of Appeals did not err in holding that Henry's statements to Nichols should not have been admitted at trial. By intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel. This is not a case where, in Justice Cardozo's words, "the constable ... blundered"; rather, it is one where the "constable" planned an impermissible interference with the right to the assistance of counsel. The judgment of the Court of Appeals for the Fourth Circuit is [a]ffirmed.

Mr. Justice POWELL, concurring.

The rule of *Massiah* serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated. But *Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action. Thus, the Sixth Amendment is not violated when a passive listening device collects, but does not induce, incriminating comments. Similarly, the mere presence of a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations would not necessarily be unconstitutional. In such a case, the question would be whether the informant's actions constituted deliberate and "surreptitious interrogatio[n]" of the defendant. If they did not, then there would be no interference with the relationship between client and counsel.

On balance [] I accept the view of the Court of Appeals and of the Court that the record adequately demonstrates the existence of a *Massiah* violation. I could not join the Court's opinion if it held that the mere presence or incidental conversation of an informant in a jail cell would violate *Massiah*. To demonstrate an infringement of the Sixth Amendment, a defendant must show that the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation.

Because I understand that the decision today rests on a conclusion that this informant deliberately elicited incriminating information by such conduct, I join the opinion of the Court.

¹ [Footnote 11 by the Court] This is not to read a "custody" requirement, which is a prerequisite to the attachment of *Miranda* rights, into this branch of the Sixth Amendment. *Massiah* was in no sense in custody at the time of his conversation with his codefendant. Rather, we believe the fact of custody bears on whether the Government "deliberately elicited" the incriminating statements from Henry.

Mr. Justice BLACKMUN, with whom Mr. Justice WHITE joins, dissenting.

In this case the Court, I fear, cuts loose from the moorings of *Massiah v. United States* and overlooks or misapplies significant facts to reach a result that is not required by the Sixth Amendment, by established precedent, or by sound policy. Because I view the principles of *Massiah* and the facts of this case differently than the Court does, I dissent.

Massiah mandates exclusion only if a federal agent “deliberately elicited” statements from the accused in the absence of counsel. The word “deliberately” denotes intent. *Massiah* ties this intent to the act of elicitation, that is, to conduct that draws forth a response. Thus *Massiah*, by its own terms, covers only action undertaken with the specific intent to evoke an inculpatory disclosure.

Faced with Agent Coughlin’s unequivocal expression of an intent *not* to elicit statements from respondent Henry, but merely passively to receive them, the Court, in its decision to affirm the judgment of the Court of Appeals, has no choice but to depart from the natural meaning of the *Massiah* formulation. [W]hile claiming to retain the “deliberately elicited” test, the Court really forges a new test that saps the word “deliberately” of all significance. The Court’s extension of *Massiah* would cover even a “negligent” triggering of events resulting in reception of disclosures. This approach, in my view, is unsupported and unwise.

The unifying theme of *Massiah* cases [] is the presence of deliberate, designed, and purposeful tactics, that is, the agent’s use of an investigatory tool with the specific intent of extracting information in the absence of counsel. Thus, the Court’s “likely to induce” test fundamentally restructures *Massiah*. Even if the agent engages in no “overreaching,” and believes his actions to be wholly innocent and passive, evidence he comes by must be excluded if a court, with the convenient benefit of 20/20 hindsight, finds it likely that the agent’s actions would induce the statements.

For several reasons, I believe that the Court’s revamping of *Massiah* abrogates sound judicial policy. First, its test will significantly broaden Sixth Amendment exclusion; yet, as THE CHIEF JUSTICE has stressed before, the “high price society pays for such a drastic remedy” as exclusion of indisputably reliable evidence in criminal trials cannot be denied. Second, I think the Court’s approach fails to appreciate fully and to accommodate adequately the “value” and the “unfortunate necessity of undercover work.” Third, I find it significant that the proffered statements are unquestionably voluntary. Fourth, the Court condemns and punishes police conduct that I do not find culpable. Fifth, at least absent an active, orchestrated ruse, I have great difficulty perceiving how canons of fairness are violated when the Government uses statements flowing from a “wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”

Finally, I note the limits, placed in other Sixth Amendment cases, of providing counsel to counterbalance prosecutorial expertise and to aid defendants faced with complex and unfamiliar proceedings. While not out of line with the Court’s prior right-to-counsel cases, *Massiah* certainly is the decision in which Sixth Amendment protections have been extended to their outermost point. I simply do not perceive any good reason to give *Massiah* the expansion it receives in this case.

In my view, the Court not only missteps in forging a new *Massiah* test; it proceeds to misapply the very test it has created. The new test requires a showing that the agent created a situation “likely to induce” the production of incriminatory remarks, and that the informant in fact “prompted” the defendant. Even accepting the most capacious reading of both this language and the facts, I believe that neither prong of the Court’s test is satisfied.

In holding that Coughlin’s actions were likely to induce Henry’s statements, the Court relies on three facts: a contingent-fee arrangement; Henry’s assumption that Nichols was just a cellmate; and Henry’s incarceration.

The Court states: “The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information.” The District Court, however, made no such finding, and I am unconvinced that the evidence of record establishes such an understanding.

The Court also emphasizes that Henry was “unaware that Nichols was a Government agent.” One might properly assign this factor some importance, were it not for *Brewer v. Williams* (Chapter 29). In that case, the Court explicitly held that the fact “[t]hat the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is *constitutionally irrelevant*.” The Court’s teeter-tottering with this factor in *Massiah* analysis can only induce confusion.

It merits emphasis that the court’s resurrection of the unawareness factor is indispensable to its holding. For, in *Brewer*, substantial contact and conversation with a confined defendant preceded delivery of the “Christian burial speech.” Yet the Court clearly deemed the speech critical in finding a *Massiah* violation; it thus made clear that mere “association” and “general conversation” did not suffice to bring *Massiah* into play. Since nothing more transpired here, principled application of *Brewer* mandates reversal of the judgment in this case.

Finally, the Court notes that Henry was incarcerated when he made his statements to Nichols. The Court’s emphasis of the “subtle influences” exerted by custody, however, is itself too subtle for me. This is not a case of a custodial encounter with police, in which the Government’s display of power might overcome the free will of the accused. The relationship here was “social” and relaxed. Henry did not suspect that Nichols was connected with the FBI. Moreover, even assuming that “subtle influences” might encourage a detainee to talk about his crime, there are certainly counter-balances of at least equal weight. Since, in jail, “official surveillance has traditionally been the order of the day,” and a jailmate has obvious incentives to assist authorities, one may expect a detainee to act with corresponding circumspection.

All Members of the Court agree that Henry’s statements were properly admitted if Nichols did not “prompt” him. The record, however, gives no indication that Nichols “stimulated” Henry’s remarks with “affirmative steps to secure incriminating information.” Certainly the known facts reveal nothing more than “a jailhouse informant who had been instructed to overhear conversations and to engage a criminal defendant in some conversations.” Indeed, to the extent the record says anything at all, it supports the inference that it was Henry, not Nichols, who “engaged” the other “in some conversations,” and who was the moving force behind any mention of the crime. I cannot believe that *Massiah* requires exclusion when a cellmate previously

unknown to the defendant and asked only to keep his ears open says: “It’s a nice day,” and the defendant responds: “It would be nicer if I hadn’t robbed that bank.” The Court of Appeals, however, found it necessary to swallow that bitter pill in order to decide this case the way it did, and this Court does not show that anything more transpired.

In sum, I think this is an unfortunate decision, which disregards precedent and stretches to the breaking point a virtually silent record. Whatever the bounds of *Massiah*, that case does not justify exclusion of the proof challenged here.

Mr. Justice REHNQUIST, dissenting.

The Court today concludes that the Government through the use of an informant “deliberately elicited” information from respondent after formal criminal proceedings had begun, and thus the statements made by respondent to the informant are inadmissible because counsel was not present. The exclusion of respondent’s statements has no relationship whatsoever to the reliability of the evidence, and it rests on a prophylactic application of the Sixth Amendment right to counsel that in my view entirely ignores the doctrinal foundation of that right. The Court’s ruling is based on *Massiah v. United States*, which held that a postindictment confrontation between the accused and his accomplice, who had turned State’s evidence and was acting under the direction of the Government, was a “critical” stage of the criminal proceedings at which the Sixth Amendment right to counsel attached. While the decision today sets forth the factors that are “important” in determining whether there has been a *Massiah* violation, I think that *Massiah* constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding, should be re-examined.

* * *

In *Kuhlmann v. Wilson*, the Court considered police activity that occurred before *United States v. Henry* was decided but nonetheless might seem—depending on one’s views of the facts—as though it were directed by officers guided by *Henry*’s holding. Although the facts of the two cases are similar, the *Kuhlmann* majority found an important distinction that justified the opposite result.

Supreme Court of the United States

R.H. Kuhlmann v. Joseph Allan Wilson

Decided June 26, 1986 – [477 U.S. 436](#)

Justice POWELL announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III in which THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O’CONNOR join.

This case requires us to define the circumstances under which federal courts should entertain a state prisoner’s petition for writ of habeas corpus that raises claims rejected on a prior petition for the same relief.

In the early morning of July 4, 1970, respondent and two confederates robbed the Star Taxicab Garage in the Bronx, New York, and fatally shot the night dispatcher. Shortly before, employees of the garage had observed respondent, a former employee there, on the premises conversing with two other men. They also witnessed respondent fleeing after the robbery, carrying loose money in his arms. After eluding the police for four days, respondent turned himself in. Respondent admitted that he had been present when the crimes took place, claimed that he had witnessed the robbery, gave the police a description of the robbers, but denied knowing them. Respondent also denied any involvement in the robbery or murder, claiming that he had fled because he was afraid of being blamed for the crimes.

After his arraignment, respondent was confined in the Bronx House of Detention, where he was placed in a cell with a prisoner named Benny Lee. Unknown to respondent, Lee had agreed to act as a police informant. Respondent made incriminating statements that Lee reported to the police. Prior to trial, respondent moved to suppress the statements on the ground that they were obtained in violation of his right to counsel. The trial court held an evidentiary hearing on the suppression motion, which revealed that the statements were made under the following circumstances.

Before respondent arrived in the jail, Lee had entered into an arrangement with Detective Cullen, according to which Lee agreed to listen to respondent's conversations and report his remarks to Cullen. Since the police had positive evidence of respondent's participation, the purpose of placing Lee in the cell was to determine the identities of respondent's confederates. Cullen instructed Lee not to ask respondent any questions, but simply to "keep his ears open" for the names of the other perpetrators. Respondent first spoke to Lee about the crimes after he looked out the cellblock window at the Star Taxicab Garage, where the crimes had occurred. Respondent said, "someone's messing with me," and began talking to Lee about the robbery, narrating the same story that he had given the police at the time of his arrest. Lee advised respondent that this explanation "didn't sound too good," but respondent did not alter his story. Over the next few days, however, respondent changed details of his original account. Respondent then received a visit from his brother, who mentioned that members of his family were upset because they believed that respondent had murdered the dispatcher. After the visit, respondent again described the crimes to Lee. Respondent now admitted that he and two other men, whom he never identified, had planned and carried out the robbery, and had murdered the dispatcher. Lee informed Cullen of respondent's statements and furnished Cullen with notes that he had written surreptitiously while sharing the cell with respondent.

After hearing the testimony of Cullen and Lee, the trial court found that Cullen had instructed Lee "to ask no questions of [respondent] about the crime but merely to listen as to what [respondent] might say in his presence." The court determined that Lee obeyed these instructions, that he "at no time asked any questions with respect to the crime," and that he "only listened to [respondent] and made notes regarding what [respondent] had to say." The trial court also found that respondent's statements to Lee were "spontaneous" and "unsolicited." Under state precedent, a defendant's volunteered statements to a police agent were admissible in evidence because the police were not required to prevent talkative defendants from making incriminating statements. The trial court accordingly denied the suppression motion.

The jury convicted respondent of common-law murder and felonious possession of a weapon. On May 18, 1972, the trial court sentenced him to a term of 20 years to life on the murder count and to a concurrent term of up to 7 years on the weapons count. The Appellate Division affirmed without opinion, and the New York Court of Appeals denied respondent leave to appeal.

On December 7, 1973, respondent filed a petition for federal habeas corpus relief. Respondent argued, among other things, that his statements to Lee were obtained pursuant to police investigative methods that violated his constitutional rights. After considering *Massiah v. United States*, the District Court for the Southern District of New York denied the writ on January 7, 1977. The record demonstrated “no interrogation whatsoever” by Lee and “only spontaneous statements” from respondent. In the District Court’s view, these “fact[s] preclude[d] any Sixth Amendment violation.” A divided panel of the Court of Appeals for the Second Circuit affirmed.

Following this Court’s decision in *United States v. Henry*, respondent decided to relitigate his Sixth Amendment claim. On September 11, 1981, he filed in state trial court a motion to vacate his conviction. The judge denied the motion, on the grounds that *Henry* was factually distinguishable from this case, and that under state precedent *Henry* was not to be given retroactive effect. The Appellate Division denied respondent leave to appeal.

On July 6, 1982, respondent returned to the District Court for the Southern District of New York on a habeas petition, again arguing that admission in evidence of his incriminating statements to Lee violated his Sixth Amendment rights. Respondent contended that the decision in *Henry* constituted a new rule of law that should be applied retroactively to this case. The District Court found it unnecessary to consider retroactivity because it decided that *Henry* did not undermine the Court of Appeals’ prior disposition of respondent’s Sixth Amendment claim. A different, and again divided, panel of the Court of Appeals reversed.

We granted certiorari to consider the Court of Appeals’ decision that the “ends of justice” required consideration of this successive habeas corpus petition and that court’s application of our decision in *Henry* to the facts of this case. We now reverse.

II and III

[In Parts II and III, Justice POWELL, joined by THE CHIEF JUSTICE, Justice REHNQUIST, and Justice O’CONNOR wrote “that the Court of Appeals erred in concluding that the ‘ends of justice’ would be served by consideration of respondent’s successive petition. The court conceded that the evidence of respondent’s guilt ‘was nearly overwhelming.’” The constitutional claim argued by respondent does not itself raise any question as to his guilt or innocence. The District Court and the Court of Appeals should have dismissed this successive petition under on the ground that the prior judgment denying relief on this identical claim was final.” Because this portion of the opinion did not receive majority support, the remainder of the opinion addresses the merits of the *Massiah* claim.]

IV

Even if the Court of Appeals had correctly decided to entertain this successive habeas petition, we conclude that it erred in holding that respondent was entitled to relief under *United States v. Henry*. As the District Court observed, *Henry* left open the question whether the Sixth Amendment forbids admission in evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." [T]his question must, as the District Court properly decided, be answered negatively.

[T]he primary concern of the *Massiah* line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.

It is thus apparent that the Court of Appeals erred in concluding that respondent's right to counsel was violated under the circumstances of this case. Its error did not stem from any disagreement with the District Court over appropriate resolution of the question reserved in *Henry*, but rather from its implicit conclusion that this case did not present that open question. That conclusion was based on a fundamental mistake, namely, the Court of Appeals' failure to accord to the state trial court's factual findings the [appropriate] presumption of correctness.

The state court found that Officer Cullen had instructed Lee only to listen to respondent for the purpose of determining the identities of the other participants in the robbery and murder. The police already had solid evidence of respondent's participation. The court further found that Lee followed those instructions, that he "at no time asked any questions" of respondent concerning the pending charges, and that he "only listened" to respondent's "spontaneous" and "unsolicited" statements. The only remark made by Lee that has any support in this record was his comment that respondent's initial version of his participation in the crimes "didn't sound too good." Without holding that any of the state court's findings were not entitled to the presumption of correctness, the Court of Appeals focused on that one remark and gave a description of Lee's interaction with respondent that is completely at odds with the facts found by the trial court. In the Court of Appeals' view, "[s]ubtly and slowly, but surely, Lee's ongoing verbal intercourse with [respondent] served to exacerbate [respondent's] already troubled state of mind." After thus revising some of the trial court's findings, and ignoring other more relevant findings, the Court of Appeals concluded that the police "deliberately elicited" respondent's incriminating statements. This conclusion conflicts with the decision of every other state and federal judge who reviewed this record, and is clear error.

V

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

Chief Justice BURGER, concurring.

I agree fully with the Court's opinion and judgment. This case is clearly distinguishable from *United States v. Henry*. There is a vast difference between placing an "ear" in the suspect's cell and placing a voice in the cell to encourage conversation for the "ear" to record.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

The Court holds that the Court of Appeals erred with respect to the merits of respondent's habeas petition. According to the Court, the Court of Appeals failed to accord [the appropriate] presumption of correctness to the state trial court's findings that respondent's cellmate, Lee, "at no time asked any questions" of respondent concerning the pending charges, and that Lee only listened to respondent's "spontaneous" and "unsolicited" statements. As a result, the Court concludes, the Court of Appeals failed to recognize that this case presents the question, reserved in *Henry*, whether the Sixth Amendment forbids the admission into evidence of an accused's statements to a jailhouse informant who was "placed in close proximity but [made] no effort to stimulate conversations about the crime charged." I disagree with the Court's characterization of the Court of Appeals' treatment of the state court's findings and, consequently, I disagree with the Court that the instant case presents the "listening post" question.

In *Henry*, we found that the Federal Government had "deliberately elicited" incriminating statements from Henry based on the following circumstances. In the instant case, as in *Henry*, the accused was incarcerated and therefore was "susceptible to the ploys of undercover Government agents." Like Nichols, Lee was a secret informant, usually received consideration for the services he rendered the police, and therefore had an incentive to produce the information which he knew the police hoped to obtain. Just as Nichols had done, Lee obeyed instructions not to question respondent and to report to the police any statements made by the respondent in Lee's presence about the crime in question. And, like Nichols, Lee encouraged respondent to talk about his crime by conversing with him on the subject over the course of several days and by telling respondent that his exculpatory story would not convince anyone without more work. However, unlike the situation in *Henry*, a disturbing visit from respondent's brother, rather than a conversation with the informant, seems to have been the immediate catalyst for respondent's confession to Lee. While it might appear from this sequence of events that Lee's comment regarding respondent's story and his general willingness to converse with respondent about the crime were not the *immediate* causes of respondent's admission, I think that the deliberate-elicitation standard requires consideration of the entire course of government behavior.

The State intentionally created a situation in which it was foreseeable that respondent would make incriminating statements without the assistance of counsel—it assigned respondent to a cell overlooking the scene of the crime and designated a secret informant to be respondent's cellmate. The informant, while avoiding direct questions, nonetheless developed a relationship of cellmate camaraderie with respondent and encouraged him to talk about his crime. While the

coup de grace was delivered by respondent's brother, the groundwork for respondent's confession was laid by the State. Clearly the State's actions had a sufficient nexus with respondent's admission of guilt to constitute deliberate elicitation within the meaning of *Henry*. I would affirm the judgment of the Court of Appeals.

Notes, Comments, and Questions

Together, *Kuhlmann* and *Henry* provide useful guidance to law enforcement officers wondering how they may secretly obtain information from a suspect whose right to counsel has attached. The facts of *Henry* constitute deliberate elicitation and accordingly a Sixth Amendment violation. By contrast, the informant in *Kuhlmann* acted more like a listening post and was just careful enough to honor the rule of *Massiah*. One can imagine the difficulty in determining exactly how active the undercover agent was in eliciting a confession, should this later be disputed at a hearing. The careful reader will note that the rules are different under *Miranda* prior to the attachment of the right to counsel.

Waiver of Rights under the Assistance of Counsel Clause

In *Michigan v. Jackson*, [475 U.S. 625](#) (1986), the Court set forth a rule governing waiver of rights under the Sixth Amendment's Assistance of Counsel Clause similar to that established under the *Miranda* Rule. The *Jackson* Court recalled that in *Edwards v. Arizona* (Chapter 27), the Court had "rejected the notion that, after a suspect's request for counsel, advice of rights and acquiescence in police-initiated questioning could establish a valid waiver."

Turning to the Assistance of Counsel Clause case before it, the Court held: "We find no warrant for a different view under a Sixth Amendment analysis. Indeed, our rejection of the comparable argument in *Edwards* was based, in part, on our review of earlier Sixth Amendment cases. Just as written waivers are insufficient to justify police-initiated interrogations after the request for counsel in a Fifth Amendment analysis, so too they are insufficient to justify police-initiated interrogations after the request for counsel in a Sixth Amendment analysis."

Two decades later, the Court considered whether *Michigan v. Jackson* should remain good law or should instead be altered—or overruled entirely.

Supreme Court of the United States

Jesse Jay Montejo v. Louisiana

Decided May 26, 2009 – [556 U.S. 778](#)

Justice SCALIA delivered the opinion of the Court.

We consider in this case the scope and continued viability of the rule announced by this Court in *Michigan v. Jackson*, forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding.

I

Petitioner Jesse Montejo was arrested on September 6, 2002, in connection with the robbery and murder of Lewis Ferrari, who had been found dead in his own home one day earlier. Suspicion quickly focused on Jerry Moore, a disgruntled former employee of Ferrari's dry cleaning business. Police sought to question Montejo, who was a known associate of Moore.

Montejo waived his rights under *Miranda v. Arizona* and was interrogated at the sheriff's office by police detectives through the late afternoon and evening of September 6 and the early morning of September 7. During the interrogation, Montejo repeatedly changed his account of the crime, at first claiming that he had only driven Moore to the victim's home, and ultimately admitting that he had shot and killed Ferrari in the course of a botched burglary. These police interrogations were videotaped.

On September 10, Montejo was brought before a judge for what is known in Louisiana as a "72-hour hearing"—a preliminary hearing required under state law. Although the proceedings were not transcribed, the minute record indicates what transpired: "The defendant being charged with First Degree Murder, Court ordered N[o] Bond set in this matter. Further, Court ordered the Office of Indigent Defender be appointed to represent the defendant."

Later that same day, two police detectives visited Montejo back at the prison and requested that he accompany them on an excursion to locate the murder weapon (which Montejo had earlier indicated he had thrown into a lake). After some back-and-forth, the substance of which remains in dispute, Montejo was again read his *Miranda* rights and agreed to go along; during the excursion, he wrote an inculpatory letter of apology to the victim's widow. Only upon their return did Montejo finally meet his court-appointed attorney, who was quite upset that the detectives had interrogated his client in his absence.

At trial, the letter of apology was admitted over defense objection. The jury convicted Montejo of first-degree murder, and he was sentenced to death.

The Louisiana Supreme Court affirmed the conviction and sentence. As relevant here, the court rejected Montejo's argument that under the rule of *Jackson*, the letter should have been suppressed. *Jackson* held that "if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." We granted certiorari.

II

Montejo and his *amici* raise a number of pragmatic objections to the Louisiana Supreme Court's interpretation of *Jackson*. We agree that the approach taken below would lead either to an unworkable standard, or to arbitrary and anomalous distinctions between defendants in different States. Neither would be acceptable.

Under the rule adopted by the Louisiana Supreme Court, a criminal defendant must request counsel, or otherwise “assert” his Sixth Amendment right at the preliminary hearing, before the *Jackson* protections are triggered. If he does so, the police may not initiate further interrogation in the absence of counsel. But if the court on its own appoints counsel, with the defendant taking no affirmative action to invoke his right to counsel, then police are free to initiate further interrogations provided that they first obtain an otherwise valid waiver by the defendant of his right to have counsel present.

This rule would apply well enough in States that require the indigent defendant formally to request counsel before any appointment is made, which usually occurs after the court has informed him that he will receive counsel if he asks for it. That is how the system works in Michigan, for example, whose scheme produced the factual background for this Court’s decision in *Michigan v. Jackson*. Jackson, like all other represented indigent defendants in the State, had requested counsel in accordance with the applicable state law.

But many States follow other practices. In some two dozen, the appointment of counsel is automatic upon a finding of indigency; and in a number of others, appointment can be made either upon the defendant’s request or *sua sponte* by the court. Nothing in our *Jackson* opinion indicates whether we were then aware that not all States require that a defendant affirmatively request counsel before one is appointed; and of course we had no occasion there to decide how the rule we announced would apply to these other States.

The Louisiana Supreme Court’s answer to that unresolved question is troublesome. The central distinction it draws—between defendants who “assert” their right to counsel and those who do not—is exceedingly hazy when applied to States that appoint counsel absent request from the defendant. How to categorize a defendant who merely asks, prior to appointment, whether he will be appointed counsel? Or who inquires, after the fact, whether he has been? What treatment for one who thanks the court after the appointment is made? And if the court asks a defendant whether he would object to appointment, will a quick shake of his head count as an assertion of his right?

To the extent that the Louisiana Supreme Court’s rule also permits a defendant to trigger *Jackson* through the “acceptance” of counsel, that notion is even more mysterious: How does one affirmatively accept counsel appointed by court order? An indigent defendant has no right to choose his counsel so it is hard to imagine what his “acceptance” would look like, beyond the passive silence that Montejo exhibited.

III

But if the Louisiana Supreme Court’s application of *Jackson* is unsound as a practical matter, then Montejo’s solution is untenable as a theoretical and doctrinal matter. Under his approach, once a defendant is *represented* by counsel, police may not initiate any further interrogation. Such a rule would be entirely untethered from the original rationale of *Jackson*.

A

It is worth emphasizing first what is *not* in dispute or at stake here. Under our precedents, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all “critical” stages of the criminal proceedings. Interrogation by the State is such a stage.

Our precedents also place beyond doubt that the Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent. The defendant may waive the right whether or not he is already represented by counsel; the decision to waive need not itself be counseled. And when a defendant is read his *Miranda* rights (which include the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the *Fifth* Amendment.

The *only* question raised by this case, and the only one addressed by the *Jackson* rule, is whether courts must *presume* that such a waiver is invalid under certain circumstances. We created such a presumption in *Jackson* by analogy to a similar prophylactic rule established to protect the Fifth Amendment-based *Miranda* right to have counsel present at any custodial interrogation. *Edwards v. Arizona* decided that once “an accused has invoked his right to have counsel present during custodial interrogation ... [he] is not subject to further interrogation by the authorities until counsel has been made available,” unless he initiates the contact.

The *Edwards* rule is “designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.” It does this by presuming his postassertion statements to be involuntary, “even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards.” This prophylactic rule thus “protect[s] a suspect’s voluntary choice not to speak outside his lawyer’s presence.”

Jackson represented a “wholesale importation of the *Edwards* rule into the Sixth Amendment.” The *Jackson* Court decided that a request for counsel at an arraignment should be treated as an invocation of the Sixth Amendment right to counsel “at every critical stage of the prosecution,” despite doubt that defendants “actually inten[d] their request for counsel to encompass representation during any further questioning” because doubts must be “resolved in favor of protecting the constitutional claim.” Citing *Edwards*, the Court held that any subsequent waiver would thus be “insufficient to justify police-initiated interrogation.” In other words, we presume such waivers involuntary “based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily” in subsequent interactions with police.

B

With this understanding of what *Jackson* stands for and whence it came, it should be clear that Montejo’s interpretation of that decision—that no *represented* defendant can ever be approached by the State and asked to consent to interrogation—is off the mark. When a court appoints counsel for an indigent defendant in the absence of any request on his part, there is no basis for a presumption that any subsequent waiver of the right to counsel will be involuntary. There is no “*initial* election” to exercise the right that must be preserved through a prophylactic

rule against later waivers. No reason exists to assume that a defendant like Montejo, who has done *nothing at all* to express his intentions with respect to his Sixth Amendment rights, would not be perfectly amenable to speaking with the police without having counsel present. And no reason exists to prohibit the police from inquiring. *Edwards* and *Jackson* are meant to prevent police from badgering defendants into changing their minds about their rights, but a defendant who never asked for counsel has not yet made up his mind in the first instance.

In practice, Montejo's rule would prevent police-initiated interrogation entirely once the Sixth Amendment right attaches, at least in those States that appoint counsel promptly without request from the defendant.

IV

So on the one hand, requiring an initial "invocation" of the right to counsel in order to trigger the *Jackson* presumption is consistent with the theory of that decision, but (as Montejo and his *amici* argue) would be unworkable in more than half the States of the Union. On the other hand, eliminating the invocation requirement would render the rule easy to apply but depart fundamentally from the *Jackson* rationale.

We do not think that *stare decisis* requires us to expand significantly the holding of a prior decision—fundamentally revising its theoretical basis in the process—in order to cure its practical deficiencies. To the contrary, the fact that a decision has proved "unworkable" is a traditional ground for overruling it.

Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned. The first two cut in favor of abandoning *Jackson*: The opinion is only two decades old, and eliminating it would not upset expectations.

Which brings us to the strength of *Jackson's* reasoning. When this Court creates a prophylactic rule in order to protect a constitutional right, the relevant "reasoning" is the weighing of the rule's benefits against its costs. "The value of any prophylactic rule ... must be assessed not only on the basis of what is gained, but also on the basis of what is lost." We think that the marginal benefits of *Jackson* (viz., the number of confessions obtained coercively that are suppressed by its bright-line rule and would otherwise have been admitted) are dwarfed by its substantial costs (viz., hindering "society's compelling interest in finding, convicting, and punishing those who violate the law").

What does the *Jackson* rule actually achieve by way of preventing unconstitutional conduct? Recall that the purpose of the rule is to preclude the State from badgering defendants into waiving their previously asserted rights. The effect of this badgering might be to coerce a waiver, which would render the subsequent interrogation a violation of the Sixth Amendment. Even though involuntary waivers are invalid even apart from *Jackson*, mistakes are of course possible when courts conduct case-by-case voluntariness review. A bright-line rule like that adopted in *Jackson* ensures that no fruits of interrogations made possible by badgering-induced involuntary waivers are ever erroneously admitted at trial.

But without *Jackson*, how many would be? The answer is few if any. The principal reason is that the Court has already taken substantial other, overlapping measures toward the same end. Under *Miranda*'s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. Under *Edwards*' prophylactic protection of the *Miranda* right, once such a defendant "has invoked his right to have counsel present," interrogation must stop. And under *Minnick*'s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, "whether or not the accused has consulted with his attorney."

These three layers of prophylaxis are sufficient. Under the *Miranda-Edwards-Minnick* line of cases (which is not in doubt), a defendant who does not want to speak to the police without counsel present need only say as much when he is first approached and given the *Miranda* warnings. At that point, not only must the immediate contact end, but "badgering" by later requests is prohibited. If that regime suffices to protect the integrity of "a suspect's voluntary choice not to speak outside his lawyer's presence" before his arraignment, it is hard to see why it would not also suffice to protect that same choice after arraignment, when Sixth Amendment rights have attached. And if so, then *Jackson* is simply superfluous.

It is true, as Montejo points out in his supplemental brief, that the doctrine established by *Miranda* and *Edwards* is designed to protect Fifth Amendment, not Sixth Amendment, rights. But that is irrelevant. What matters is that these cases, like *Jackson*, protect the right to have counsel during custodial interrogation—which right happens to be guaranteed (once the adversary judicial process has begun) by *two* sources of law. Since the right under both sources is waived using the same procedure, doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver.

Montejo also correctly observes that the *Miranda-Edwards* regime is narrower than *Jackson* in one respect: The former applies only in the context of custodial interrogation. If the defendant is not in custody then those decisions do not apply; nor do they govern other, noninterrogative types of interactions between the defendant and the State (like pretrial lineups). However, those uncovered situations are the *least* likely to pose a risk of coerced waivers. When a defendant is not in custody, he is in control, and need only shut his door or walk away to avoid police badgering. And noninterrogative interactions with the State do not involve the "inherently compelling pressures" that one might reasonably fear could lead to involuntary waivers.

Jackson was policy driven, and if that policy is being adequately served through other means, there is no reason to retain its rule. *Miranda* and the cases that elaborate upon it already guarantee not simply noncoercion in the traditional sense, but what Justice Harlan referred to as "voluntariness with a vengeance." There is no need to take *Jackson*'s further step of requiring voluntariness on stilts.

On the other side of the equation are the costs of adding the bright-line *Jackson* rule on top of *Edwards* and other extant protections. The principal cost of applying any exclusionary rule "is, of course, letting guilty and possibly dangerous criminals go free" *Jackson* not only "operates to invalidate a confession given by the free choice of suspects who have received proper advice of their *Miranda* rights but waived them nonetheless," but also deters law enforcement officers

from even trying to obtain voluntary confessions. The “ready ability to obtain uncoerced confessions is not an evil but an unmitigated good.” Without these confessions, crimes go unsolved and criminals unpunished. These are not negligible costs, and in our view the *Jackson* Court gave them too short shrift.

In sum, when the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not “pay its way.” *Michigan v. Jackson* should be and now is overruled.

V

Although our holding means that the Louisiana Supreme Court correctly rejected Montejo’s claim under *Jackson*, we think that Montejo should be given an opportunity to contend that his letter of apology should still have been suppressed under the rule of *Edwards*. If Montejo made a clear assertion of the right to counsel when the officers approached him about accompanying them on the excursion for the murder weapon, then no interrogation should have taken place unless Montejo initiated it. Even if Montejo subsequently agreed to waive his rights, that waiver would have been invalid had it followed an “unequivocal election of the right.”

Montejo understandably did not pursue an *Edwards* objection, because *Jackson* served as the Sixth Amendment analogy to *Edwards* and offered broader protections. Our decision today, overruling *Jackson*, changes the legal landscape and does so in part based on the protections already provided by *Edwards*. Thus we think that a remand is appropriate so that Montejo can pursue this alternative avenue for relief. Montejo may also seek on remand to press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, *e.g.*, his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer. These matters have heightened importance in light of our opinion today.

We do not venture to resolve these issues ourselves, not only because we are a court of final review, “not of first view,” but also because the relevant facts remain unclear. Montejo and the police gave inconsistent testimony about exactly what took place on the afternoon of September 10, 2002, and the Louisiana Supreme Court did not make an explicit credibility determination. Moreover, Montejo’s testimony came not at the suppression hearing, but rather only at trial, and we are unsure whether under state law that testimony came too late to affect the propriety of the admission of the evidence. These matters are best left for resolution on remand.

This case is an exemplar of Justice Jackson’s oft quoted warning that this Court “is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.” We today remove *Michigan v. Jackson*’s fourth story of prophylaxis.

The judgment of the Louisiana Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice STEVENS, with whom Justice SOUTER and Justice GINSBURG join, and with whom Justice BREYER joins [except for a footnote not included in this book], dissenting.

Even if *Jackson* had never been decided, it would be clear that Montejo's Sixth Amendment rights were violated. Today's decision eliminates the rule that "any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid" once a defendant has invoked his right to counsel. Nevertheless, under the undisputed facts of this case, there is no sound basis for concluding that Montejo made a knowing and valid waiver of his Sixth Amendment right to counsel before acquiescing in police interrogation following his 72-hour hearing. Because police questioned Montejo without notice to, and outside the presence of, his lawyer, the interrogation violated Montejo's right to counsel even under pre-*Jackson* precedent.

Our pre-*Jackson* case law makes clear that "the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." The Sixth Amendment entitles indicted defendants to have counsel notified of and present during critical confrontations with the State throughout the pretrial process. Given the realities of modern criminal prosecution, the critical proceedings at which counsel's assistance is required more and more often occur outside the courtroom in pretrial proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

The Court avoids confronting the serious Sixth Amendment concerns raised by the police interrogation in this case by assuming that Montejo validly waived his Sixth Amendment rights before submitting to interrogation. It does so by summarily concluding that "doctrines ensuring voluntariness of the Fifth Amendment waiver simultaneously ensure the voluntariness of the Sixth Amendment waiver"; thus, because Montejo was given *Miranda* warnings prior to interrogation, his waiver was presumptively valid. Ironically, while the Court faults *Jackson* for blurring the line between this Court's Fifth and Sixth Amendment jurisprudence, it commits the same error by assuming that the *Miranda* warnings given in this case, designed purely to safeguard the Fifth Amendment right against self-incrimination, were somehow adequate to protect Montejo's more robust Sixth Amendment right to counsel.

A defendant's decision to forgo counsel's assistance and speak openly with police is a momentous one. Given the high stakes of making such a choice and the potential value of counsel's advice and mediation at that critical stage of the criminal proceedings, it is imperative that a defendant possess "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it" before his waiver is deemed valid. Because the administration of *Miranda* warnings was insufficient to ensure Montejo understood the Sixth Amendment right he was being asked to surrender, the record in this case provides no basis for concluding that Montejo validly waived his right to counsel, even in the absence of *Jackson*'s enhanced protections.

The Court's decision to overrule *Jackson* is unwarranted. Not only does it rest on a flawed doctrinal premise, but the dubious benefits it hopes to achieve are far outweighed by the damage it does to the rule of law and the integrity of the Sixth Amendment right to counsel. Moreover, even apart from the protections afforded by *Jackson*, the police interrogation in this case violated Jesse Montejo's Sixth Amendment right to counsel. I respectfully dissent.

Notes, Comments, and Questions

The different results in *Montejo* and *Edwards* illustrate that different rules apply depending on who is in custody. *Montejo* overruled *Michigan v. Jackson*—which governed Sixth Amendment waivers—but did not overrule *Edwards v. Arizona*—which still governs *Miranda* Rule waivers after a suspect invokes the right to counsel. Accordingly, if a suspect who has been indicted invokes his right to counsel during custodial interrogation, police must cease the interrogation and cannot return later to seek a waiver outside the presence of counsel. If that suspect is released, however, *Miranda* will no longer apply because the suspect is not “in custody.” Under *Montejo*, police would be free to visit the suspect at home in hope of obtaining a valid waiver.

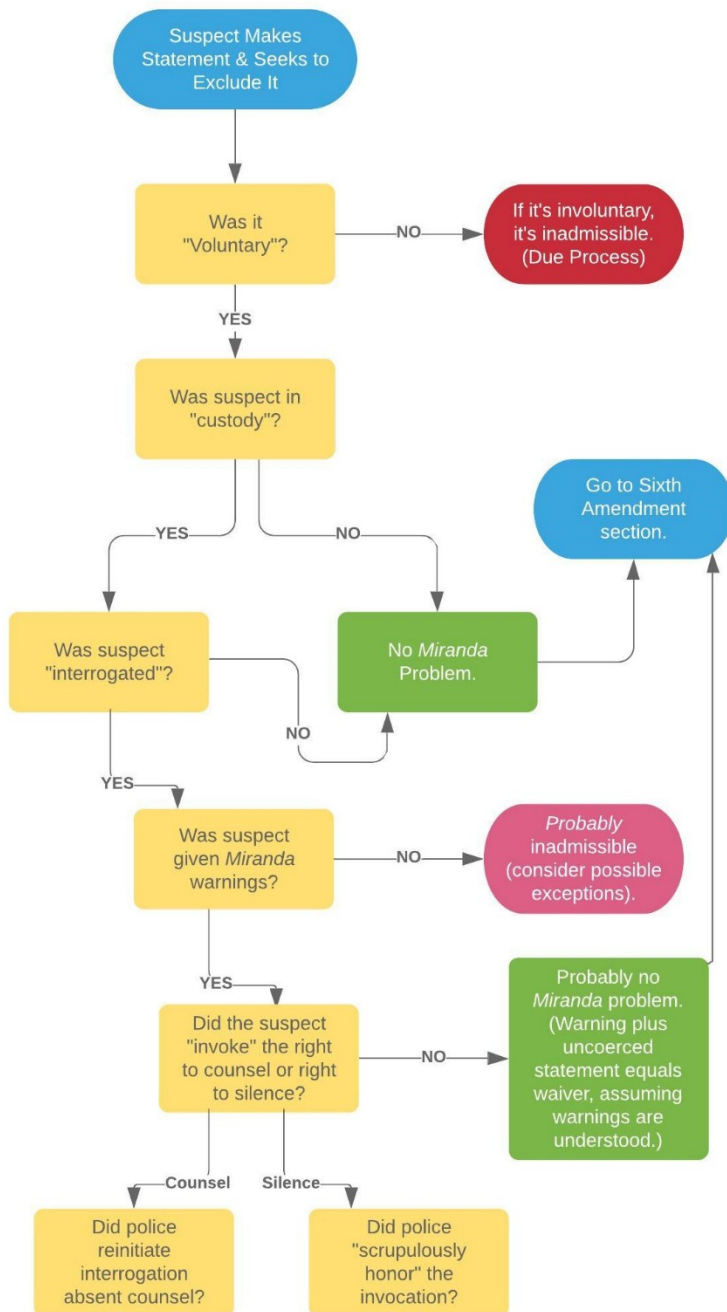
Students should note that *Montejo* did not overrule any of the Sixth Amendment cases concerning informants whom suspects do not realize are working for police, such as *Massiah*, *Henry*, and *Kuhlmann*. Once the Sixth Amendment right to counsel attaches, defendants are entitled to counsel during interrogation, and an undercover agent cannot obtain a valid waiver.

This chapter concludes our unit on interrogation. In our next chapter, we begin our examination of the exclusionary rule, by which the Court prevents prosecutors from using certain unlawfully-obtained evidence against criminal defendants.

Before turning to the next chapter, students may wish to review their knowledge of interrogations with a flowchart exercise, which begins on the next page.

INTERROGATION FLOWCHART EXERCISE

Flowcharts can help students visualize what they have learned. The goal is not to memorize the example chart presented here but instead to create a new chart that helps one to connect material from throughout the book. Your authors recommend that when students make their own charts, they add additional detail, such as case names or chapter numbers. For example, in the box asking whether a statement was “voluntary,” a student might refer to cases from Chapter 22, such as *Brown v. Mississippi*, and especially *Arizona v. Fulminante*, which is a particularly helpful case because its facts are so close to the line separating a voluntary confession from an inadmissible, involuntary confession.



This chart focuses on the *Miranda* Rule. A separate chart might depict Sixth Amendment law set forth in *Massiah* and related cases.

These charts have two primary purposes. One is that when the charts are finished, they can serve as study aids. The other is that the creation of the charts—even if students never review them after finishing them—forces students to consider material more carefully than they otherwise might, which helps with learning and with retention of information. Also, fellow students can help spot misunderstandings that, were they not in a chart, would

remain uncorrected. Study group members might wish to bring charts to share with classmates.

INTERROGATION REVIEW

The Fifth and Sixth Amendments: Constitutional Regulation of Interrogation

Before moving to the next chapter, students may wish to review what we have learned about how police interrogation practices are regulated by constitutional law.

Instructions: For each problem, indicate which if any doctrines likely prohibit the conduct described. The answer choices are: (1) *Miranda* Rule, (2) *Massiah* doctrine, (3) voluntariness requirement, (4) multiple doctrines (indicate which ones), and (5) none (*i.e.*, the suspect has no good arguments based on interrogation law presented so far in this book). Jot down your reasoning briefly. If you are not sure, note why.

Each problem is independent of all other ones.

1) Police suspect someone of dealing drugs but lack good evidence. Officers hide a microphone in the pocket of an undercover agent disguised as a drug buyer. The suspect welcomes the undercover agent into the suspect's home. However, when the undercover agent asks about drugs, the suspect says, "You must be confused. I don't have anything to do with drugs." Frustrated, the agent brandishes a pistol and shouts, "Tell me the truth or I'll shoot." The suspect says, "Fine, fine. I sell weed. How much do you need?"

2) A suspect has been indicted for tax evasion. Unable to make bail, the suspect returns to jail. Police plant an undercover agent in the suspect's cell, disguised as a fellow inmate. The agent asks the suspect about tax evasion and learns important details about the suspect's crimes.

3) A suspect has been indicted for embezzlement. Released on bail, the suspect goes home. Police send an undercover agent to the suspect's home. (The agent is a co-conspirator who, without the suspect's knowledge, has decided to cooperate with prosecutors.) The agent records the suspect describing the embezzlement scheme.

4) A suspect has been indicted for cocaine distribution. Released on bail, the suspect goes to a favorite public park and begins calling friends, sharing the good news about the bail hearing. Police have hidden a microphone on the underside of the suspect's favorite park bench. Using that device, police overhear the suspect tell friends about continuing illegal activity.

5) A suspect is arrested for robbery. While driving the suspect to the police station, officers converse with one another. One officer says, "Can you believe this guy? I can't believe I'm stuck in a car with someone who robbed a gas station mini mart, a boy scout troop, and a church. What a piece of human garbage!" Impulsively, the suspect responds, "Listen, I'm not perfect, but I definitely didn't rob any boy scouts."

THE EXCLUSIONARY RULE

Chapter 31

Introduction to the Exclusionary Rule

In the reading assignment for the first chapter, students were encouraged to consider two questions when reading cases: “First, were someone’s rights (usually constitutional rights) violated? Second, if so, so what?” We have thus far focused mostly on the first question, examining how the Court has construed the rights guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments. Yet the second question has arisen from time to time as the Justices debated whether certain behavior by state agents justified the exclusion of evidence. For example, the public safety exception to the *Miranda* Rule (Chapter 28) rests upon a judgment by the Court that police efforts to manage an ongoing “emergency”—or, to be less dramatic, a plausible urgent threat to public safety—are not the sort of activity that should hinder prosecution. Similarly, the opinions in *Brewer v. Williams* (Chapter 29) clashed over the propriety of excluding evidence against an accused murderer that police obtained through questionable interrogation techniques. Further, lurking behind the facts and legal analysis of nearly every case included in this book so far has been a defendant’s desire to prevent evidence from being offered by prosecutors. Recall, for example, *Terry v. Ohio* (Chapter 20), in which the Court held that police may conduct certain searches and seizures without probable cause. John Terry did not bring his case to the Supreme Court because of his interest in Fourth Amendment jurisprudence; instead, he hoped that the Court might somehow prevent the state of Ohio from sending him to prison for carrying the concealed weapon that Officer McFadden found when frisking Terry in Zucker’s store that Cleveland afternoon.

Terry’s desired outcome—the exclusion of evidence—is the same as most of the parties we have seen complaining about state action of one kind or another. Yes, there are exceptions, such as *Muehler v. Mena* (Chapter 8), a lawsuit brought by a woman not found to have committed any crime who objected to how police treated her while executing a search warrant. She wanted money, not a ruling about evidence. We will turn later to the doctrine governing when money damages are available as a remedy for constitutional harms.

For now, and for the bulk of this unit, we turn to the “exclusionary rule,” a term that covers various doctrines through which the Court has prohibited certain uses of unlawfully-obtained evidence.

Underlying all debate on the exclusionary rule, one finds two facts. Although not always explicitly acknowledged, these facts pervade the Justices’ reasoning in exclusionary rule cases. First, when courts prevent prosecutors from using relevant, reliable evidence against criminal defendants, courts impede the fight against crime. One can debate the extent of the impediment—critics of the exclusionary rule tend to imagine higher hurdles than those described by supporters of the doctrine. Yet no honest defender of the exclusionary rule can deny that, in at least some cases, guilty defendants—sometimes guilty of terrible crimes—go free because of the Court’s criminal procedure jurisprudence. In the words of Justice Cardozo during his time on the Court of Appeals of New York, “The criminal is to go free because the constable has blundered.”

Second, remedies other than the exclusionary rule have not been effective in preventing police from violating the rights announced in Supreme Court opinions—that is, the rights described in books like this one. Other remedies exist, including money damages, internal police department discipline, and oversight by elected officials. Again, one can debate the extent of the problem. Opponents of the exclusionary rule tend to see less police misconduct than do the rule’s supporters, and exclusionary rule opponents tend to have greater faith in the professionalism and goodwill of police department leaders and the politicians to whom they report. Yet police departments—from top leaders to officers on the street—worry about losing evidence to the exclusionary rule and govern their behavior, at least in part, to avoid that judicial remedy.

In short, the exclusionary rule promotes police conformity with Supreme Court criminal procedure decisions, and it does so at the cost of evidence otherwise available to convict accused criminals. As Judge Friendly put it, “The basis for excluding real evidence obtained by an unconstitutional search is not at all that use of the evidence may result in unreliable factfinding. The evidence is likely to be the most reliable that could possibly be obtained; exclusion rather than admission creates the danger of a verdict erroneous on the true facts. The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution.”¹

Some might quibble with Judge Friendly’s statement that the “sole reason” for the exclusionary rule is to deter police misconduct. For example, perhaps apart from deterrence, exclusion is justified because courts will lose respect from the people if they allow agents of the state to prosecute the accused using evidence obtained illegally. That said, deterrence is the primary justification offered by the Court, especially in recent decades. Students should consider which justifications, if any, they find persuasive.

Supreme Court of the United States

Fremont Weeks v. United States

Decided February 24, 1914 – [232 U.S. 383](#)

Mr. Justice Day delivered the opinion of the [unanimous] court:

An indictment was returned against the plaintiff in error, defendant below, and herein so designated, in the district court of the United States for the Western District of Missouri, containing nine counts. The seventh count, upon which a conviction was had, charged the use of the mails for the purpose of transporting certain coupons or tickets representing chances or shares in a lottery or gift enterprise, in violation of § 213 of the Criminal Code. Sentence of fine and imprisonment was imposed. This writ of error is to review that judgment.

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant’s room and took possession of various papers and articles found there, which were afterwards turned over to the

¹ See Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, [53 Cal L. Rev. 929](#), 951 (1965).

United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant's room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officer had a search warrant.

[The defendant filed a petition requesting return of his "private papers, books, and other property" and stating that the use of his personal items at trial would violate his Fourth and Fifth Amendment rights.]

Upon consideration of the petition the court entered in the cause an order directing the return of such property as was not pertinent to the charge against the defendant, but denied the petition as to pertinent matter, reserving the right to pass upon the pertinency at a later time. In obedience to the order the district attorney returned part of the property taken, and retained the remainder, concluding a list of the latter with the statement that, "all of which last above described property is to be used in evidence in the trial of the above-entitled cause, and pertains to the alleged sale of lottery tickets of the company above named."

After the jury had been sworn and before any evidence had been given, the defendant again urged his petition for the return of his property, which was denied by the court. Upon the introduction of such papers during the trial, the defendant objected on the ground that the papers had been obtained without a search warrant, and by breaking open his home, in violation of the 4th and 5th Amendments to the Constitution of the United States, which objection was overruled by the court.

The defendant assigns error, among other things, in the court's refusal to grant his petition for the return of his property, and in permitting the papers to be used at the trial.

It is thus apparent that the question presented involves the determination of the duty of the court with reference to the motion made by the defendant for the return of certain letters, as well as other papers, taken from his room by the United States marshal, who, without authority of process, if any such could have been legally issued, visited the room of the defendant for the declared purpose of obtaining additional testimony to support the charge against the accused, and, having gained admission to the house, took from the drawer of a chiffonier there found certain letters written to the defendant, tending to show his guilt. These letters were placed in the control of the district attorney, and were subsequently produced by him and offered in evidence against the accused at the trial. The defendant contends that such appropriation of his private correspondence was in violation of rights secured to him by the 4th and 5th Amendments to the Constitution of the United States. We shall deal with the 4th Amendment.

[The Court recounted the origin and history of the Fourth Amendment.]

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is

obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States marshal holding no warrant for his arrest and none for the search of his premises. The accused, without awaiting his trial, made timely application to the court for an order for the return of these letters, as well or other property. This application was denied, the letters retained and put in evidence, after a further application at the beginning of the trial, both applications asserting the rights of the accused under the 4th and 5th Amendments to the Constitution. If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. The United States marshal could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution, upon sworn information, and describing with reasonable particularity the thing for which the search was to be made. Instead, he acted without sanction of law, doubtless prompted by the desire to bring further proof to the aid of the government, and under color of his office undertook to make a seizure of private papers in direct violation of the constitutional prohibition against such action. Under such circumstances, without sworn information and particular description, not even an order of court would have justified such procedure; much less was it within the authority of the United States marshal to thus invade the house and privacy of the accused. To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.

The court before which the application was made in this case recognized the illegal character of the seizure, and ordered the return of property not in its judgment competent to be offered at the trial, but refused the application of the accused to turn over the letters, which were afterwards put in evidence on behalf of the government. While there is no opinion in the case, the court in this proceeding doubtless relied upon what is now contended by the government to be the correct rule of law under such circumstances, that the letters having come into the control of the court, it would not inquire into the manner in which they were obtained, but, if competent, would keep them and permit their use in evidence. Such proposition, the government asserts, is conclusively established by certain decisions of this court.

The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court, and subject to its authority, was recognized in *Wise v. Henkel*. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts.

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed. As to the papers and property seized by the policemen, it does not appear that they acted under any claim of Federal authority such as would make the amendment applicable to such unauthorized seizures. The record shows that what they did by way of arrest and search and seizure was done before the finding of the indictment in the Federal court; under what supposed right or authority does not appear. What remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies.

It results that the judgment of the court below must be reversed, and the case remanded for further proceedings in accordance with this opinion. Reversed.

Notes, Comments, and Questions

A few years after deciding *Weeks*, the Court confronted an attempt by federal officials to avoid the new exclusionary rule. In *Silverthorne Lumber Co. v. United States*, [251 U.S. 385](#) (1920), federal agents raided an office unlawfully and seized books and records. After being ordered to return the illegally-gotten items, the government retained photographs and copies of some of the documents. Government lawyers then sought to subpoena the original documents (once again in the hands of their owners) on the basis of information learned while the documents were in the possession of federal agents. The Court reacted as follows:

“The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act.”

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government’s own wrong cannot be used by it in the way proposed.”

The rule stated in *Silverthorne Lumber* has sometimes been called the “fruit of the poisonous tree” doctrine. The analogy is that if the evidence or knowledge obtained through the original constitutional violation is a poisonous tree, then evidence obtained as a result of that wrong is a poisonous fruit which must also be excluded from evidence. The case of *Kyllo v. United States* (Chapter 3) provides an example. If, as the Court found, the thermal imaging of Kyllo’s house was an unlawful search, then a search warrant obtained by officers who recited information learned during the illegal imaging could not justify the subsequent police entry into the house. The marijuana seized from Kyllo’s house was poisonous fruit of the thermal imaging.

In the next case, the Court considered whether to apply the rule of *Weeks* to state courts. The Court had already decided that the Fourth Amendment’s protections against unreasonable searches and seizures were “incorporated” against the states through the Fourteenth Amendment. The issue was whether the exclusionary rule would also be imposed on the states.

Supreme Court of the United States

Dollree Mapp v. Ohio

Decided June 19, 1961 – [367 U.S. 643](#)

Mr. Justice CLARK delivered the opinion of the Court.

Appellant stands convicted of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs in violation of § 2905.34 of Ohio’s Revised Code. As officially stated in the syllabus to its opinion, the Supreme Court of Ohio found that her conviction was valid though “based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant’s home”

On May 23, 1957, three Cleveland police officers arrived at appellant’s residence in that city pursuant to information that “a person [was] hiding out in the home, who was wanted for questioning in connection with a recent bombing, and that there was a large amount of policy paraphernalia being hidden in the home.” Miss Mapp and her daughter by a former marriage lived on the top floor of the two-family dwelling. Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.

The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp’s attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the “warrant” and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been “belligerent” in resisting their official rescue of the “warrant” from her person. Running

roughshod over appellant, a policeman “grabbed” her, “twisted [her] hand,” and she “yelled [and] pleaded with him” because “it was hurting.” Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom where the officers searched a dresser, a chest of drawers, a closet and some suitcases. They also looked into a photo album and through personal papers belonging to the appellant. The search spread to the rest of the second floor including the child’s bedroom, the living room, the kitchen and a dinette. The basement of the building and a trunk found therein were also searched. The obscene materials for possession of which she was ultimately convicted were discovered in the course of that widespread search.

At the trial no search warrant was produced by the prosecution, nor was the failure to produce one explained or accounted for. At best, “There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant’s home.” The Ohio Supreme Court believed a “reasonable argument” could be made that the conviction should be reversed “because the ‘methods’ employed to obtain the [evidence] were such as to ‘offend “a sense of justice,”” but the court found determinative the fact that the evidence had not been taken “from defendant’s person by the use of brutal or offensive physical force against defendant.”

The State says that even if the search were made without authority, or otherwise unreasonably, it is not prevented from using the unconstitutionally seized evidence at trial, citing *Wolf v. People of State of Colorado*, [338 U.S. 25](#) (1949), in which this Court did indeed hold “that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure.” On this appeal, it is urged once again that we review that holding.

I

[T]he Court in [*Weeks v. United States*] clearly stated that use of [] seized evidence involved “a denial of the constitutional rights of the accused.” Thus, in the year 1914, in the *Weeks* case, this Court “for the first time” held that “in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure.” This Court has ever since required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to “a form of words.” It meant, quite simply, that “conviction by means of unlawful seizures and enforced confessions ... should find no sanction in the judgments of the courts ...,” and that such evidence “shall not be used at all.”

There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.

II

In 1949, 35 years after *Weeks* was announced, this Court, in *Wolf v. People of State of Colorado*, again for the first time, discussed the effect of the Fourth Amendment upon the States through the operation of the Due Process Clause of the Fourteenth Amendment. It said:

“[W]e have no hesitation in saying that were a State affirmatively to sanction such police

incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.”

Nevertheless, after declaring that the “security of one’s privacy against arbitrary intrusion by the police” is “implicit in ‘the concept of ordered liberty’ and as such enforceable against the States through the Due Process Clause” and announcing that it “stoutly adhere[d]” to the *Weeks* decision, the Court decided that the *Weeks* exclusionary rule would not then be imposed upon the States as “an essential ingredient of the right.” The Court’s reasons ... were bottomed on factual considerations.

While they are not basically relevant to a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment as the right it embodies is vouchsafed against the States by the Due Process Clause, we will consider the current validity of the factual grounds upon which *Wolf* was based.

The Court in *Wolf* first stated that “[t]he contrariety of views of the States” on the adoption of the exclusionary rule of *Weeks* was “particularly impressive”; and, in this connection that it could not “brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy ... by overriding the [States’] relevant rules of evidence.” While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the *Weeks* rule. Significantly, among those now following the rule is California, which, according to its highest court, was “compelled to reach that conclusion because other remedies have completely failed to secure compliance with the constitutional provisions” In connection with this California case, we note that the second basis elaborated in *Wolf* in support of its failure to enforce the exclusionary doctrine against the States was that “other means of protection” have been afforded “the right to privacy.” The experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment of the protection of other remedies has, moreover, been recognized by this Court since *Wolf*.

Likewise, time has set its face against what *Wolf* called the “weighty testimony” of *People v. Defore*, [150 N.E. 585](#) (N.Y. 1926). There Justice (then Judge) Cardozo, rejecting adoption of the *Weeks* exclusionary rule in New York, had said that “[t]he Federal rule as it stands is either too strict or too lax.” However, the force of that reasoning has been largely vitiated by later decisions of this Court. These include the recent discarding of the “silver platter” doctrine which allowed federal judicial use of evidence seized in violation of the Constitution by state agents; the relaxation of the formerly strict requirements as to standing to challenge the use of evidence thus seized, so that now the procedure of exclusion, “ultimately referable to constitutional safeguards,” is available to anyone even “legitimately on [the] premises” unlawfully searched; and finally, the formulation of a method to prevent state use of evidence unconstitutionally seized by federal agents. Because there can be no fixed formula, we are admittedly met with “recurring questions of the reasonableness of searches,” but less is not to be expected when dealing with a Constitution, and, at any rate, “[r]easonableness is in the first instance for the [trial court] to determine.”

It, therefore, plainly appears that the factual considerations supporting the failure of the *Wolf* Court to include the *Weeks* exclusionary rule when it recognized the enforceability of the right to privacy against the States in 1949, while not basically relevant to the constitutional consideration, could not, in any analysis, now be deemed controlling.

III

Some five years after *Wolf*, in answer to a plea made here Term after Term that we overturn its doctrine on applicability of the *Weeks* exclusionary rule, this Court indicated that such should not be done until the States had “adequate opportunity to adopt or reject the [*Weeks*] rule.”

Today we once again examine *Wolf*'s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.

IV

Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be “a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom “implicit in the concept of ordered liberty.” At the time that the Court held in *Wolf* that the Amendment was applicable to the States through the Due Process Clause, the cases of this Court, as we have seen, had steadfastly held that as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions. Even *Wolf* “stoutly adhered” to that proposition. The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”

Indeed, we are aware of no restraint, similar to that rejected today, conditioning the enforcement of any other basic constitutional right. The right to privacy, no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights declared as “basic to a free society.” This Court has not hesitated to enforce as strictly against the States as it does against the Federal Government the rights of free speech and of a free press, the rights to notice and to a fair, public trial, including, as it does, the right not to be convicted by use of a coerced confession, however logically relevant it be, and without regard to its reliability. And nothing could be more certain that that when a coerced confession is involved, “the relevant rules of evidence” are overridden without regard to “the incidence of such conduct by the police,” slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effect, documents, etc.? We find that, as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an “intimate relation” in their perpetuation of “principles of humanity and civil liberty [secured] ... only after years of struggle.” They express “supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.” The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence.

V

Moreover, our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense. Presently, a federal prosecutor may make no use of evidence illegally seized, but a State’s attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold. Moreover, “[t]he very essence of a healthy federalism depends upon the avoidance of needless conflict between state and federal courts.” In non-exclusionary States, federal officers, being human, were by it invited to and did, as our cases indicate, step across the street to the State’s attorney with their unconstitutionally seized evidence. Prosecution on the basis of that evidence was then had in a state court in utter disregard of the enforceable Fourth Amendment. If the fruits of an unconstitutional search had been inadmissible in both state and federal courts, this inducement to evasion would have been sooner eliminated.

Federal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect the same fundamental criteria in their approaches. “However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness.” Denying shortcuts to only one of two cooperating law enforcement agencies tends naturally to breed legitimate suspicion of “working arrangements” whose results are equally tainted.

There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine “[t]he criminal is to go free because the constable has blundered.” In some cases this will undoubtedly be the result. But [] “there is another consideration—the imperative of judicial integrity.” The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in *Olmstead v. United States*, [277 U.S.438](#), 485 (1928): “Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. ... If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.” Nor can it lightly be assumed that, as a practical matter, adoption of the exclusionary rule fetters law enforcement. Only last year this Court expressly considered that contention and found that “pragmatic evidence of a sort” to the contrary was not wanting. The Court noted that

“The federal courts themselves have operated under the exclusionary rule of *Weeks* for almost half a century; yet it has not been suggested either that the Federal Bureau of Investigation has thereby been rendered ineffective, or that the administration of criminal justice in the federal courts has thereby been disrupted. Moreover, the experience of the states is impressive. ... The movement towards the rule of exclusion has been halting but seemingly inexorable.”

The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

The judgment of the Supreme Court of Ohio is reversed and the cause remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Mr. Justice BLACK, concurring.

I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment’s ban against unreasonable searches and seizures is considered together with the Fifth Amendment’s ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

The courts of the country are entitled to know with as much certainty as possible what scope they cover. The Court's opinion, in my judgment, dissipates the doubt and uncertainty in this field of constitutional law and I am persuaded, for this and other reasons stated, to depart from my prior views, to accept the *Boyd* doctrine as controlling in this state case and to join the Court's judgment and opinion which are in accordance with that constitutional doctrine.

Mr. Justice DOUGLAS, concurring.

We held in *Wolf v. People of State of Colorado* that the Fourth Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. But a majority held that the exclusionary rule of the *Weeks* case was not required of the States, that they could apply such sanctions as they chose. That position had the necessary votes to carry the day. But with all respect it was not the voice of reason or principle. As stated in the *Weeks* case, if evidence seized in violation of the Fourth Amendment can be used against an accused, "his right to be secure against such searches and seizures, is of no value, and ... might as well be stricken from the Constitution."

When we allowed States to give constitutional sanction to the "shabby business" of unlawful entry into a home, we did indeed rob the Fourth Amendment of much meaningful force. There are, of course, other theoretical remedies. One is disciplinary action within the hierarchy of the police system, including prosecution of the police officer for a crime. Yet, "[s]elf-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."

The only remaining remedy, if exclusion of the evidence is not required, is an action of trespass by the homeowner against the offending officer. Mr. Justice Murphy showed how onerous and difficult it would be for the citizen to maintain that action and how meagre the relief even if the citizen prevails. The truth is that trespass actions against officers who make unlawful searches and seizures are mainly illusory remedies.

Without judicial action making the exclusionary rule applicable to the States, *Wolf v. People of State of Colorado* in practical effect reduced the guarantee against unreasonable searches and seizures to "a dead letter."

Memorandum of Mr. Justice STEWART.

Agreeing fully with Part I of Mr. Justice HARLAN'S dissenting opinion, I express no view as to the merits of the constitutional issue which the Court today decides. I would, however, reverse the judgment in this case, because I am persuaded that the provision of § 2905.34 of the Ohio Revised Code, upon which the petitioner's conviction was based, is, in the words of Mr. Justice HARLAN, not "consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment."

Mr. Justice HARLAN, whom Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER join, dissenting.

In overruling the *Wolf* case the Court, in my opinion, has forgotten the sense of judicial restraint which, with due regard for *stare decisis*, is one element that should enter into deciding whether a past decision of this Court should be overruled. Apart from that I also believe that the *Wolf* rule represents sounder Constitutional doctrine than the new rule which now replaces it.

From the Court's statement of the case one would gather that the central, if not controlling, issue on this appeal is whether illegally state-seized evidence is Constitutionally admissible in a state prosecution, an issue which would of course face us with the need for re-examining *Wolf*. However, such is not the situation. For, although that question was indeed raised here and below among appellant's subordinate points, the new and pivotal issue brought to the Court by this appeal is whether § 2905.34 of the Ohio Revised Code making criminal the mere knowing possession or control of obscene material, and under which appellant has been convicted, is consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment. That was the principal issue which was decided by the Ohio Supreme Court, which was tendered by appellant's Jurisdictional Statement, and which was briefed and argued in this Court.

In this posture of things, I think it fair to say that five members of this Court have simply "reached out" to overrule *Wolf*. With all respect for the views of the majority, and recognizing that *stare decisis* carries different weight in Constitutional adjudication than it does in nonconstitutional decision, I can perceive no justification for regarding this case as an appropriate occasion for re-examining *Wolf*.

The action of the Court finds no support in the rule that decision of Constitutional issues should be avoided wherever possible. For in overruling *Wolf* the Court, instead of passing upon the validity of Ohio's § 2905.34, has simply chosen between two Constitutional questions. Moreover, I submit that it has chosen the more difficult and less appropriate of the two questions. The Ohio statute which, as construed by the State Supreme Court, punishes knowing possession or control of obscene material, irrespective of the purposes of such possession or control (with exceptions not here applicable) and irrespective of whether the accused had any reasonable opportunity to rid himself of the material after discovering that it was obscene, surely presents a Constitutional question which is both simpler and less far-reaching than the question which the Court decides today. It seems to me that justice might well have been done in this case without overturning a decision on which the administration of criminal law in many of the States has long justifiably relied.

Since the demands of the case before us do not require us to reach the question of the validity of *Wolf*, I think this case furnishes a singularly inappropriate occasion for reconsideration of that decision, if reconsideration is indeed warranted. Even the most cursory examination will reveal that the doctrine of the *Wolf* case has been of continuing importance in the administration of state criminal law. Indeed, certainly as regards its "nonexclusionary" aspect, *Wolf* did no more than articulate the then existing assumption among the States that the federal cases enforcing the exclusionary rule "do not bind [the States], for they construe provisions of the federal Constitution, the Fourth and Fifth Amendments, not applicable to the states."

The occasion which the Court has taken here is in the context of a case where the question was briefed not at all and argued only extremely tangentially. The unwisdom of overruling *Wolf* without full-dress argument is aggravated by the circumstance that that decision is a comparatively recent one (1949) to which three members of the present majority have at one time or other expressly subscribed, one to be sure with explicit misgivings. I would think that our obligation to the States, on whom we impose this new rule, as well as the obligation of orderly adherence to our own processes would demand that we seek that aid which adequate briefing and argument lends to the determination of an important issue. It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.

Thus, if the Court were bent on reconsidering *Wolf*, I think that there would soon have presented itself an appropriate opportunity in which we could have had the benefit of full briefing and argument. In any event, at the very least, the present case should have been set down for reargument, in view of the inadequate briefing and argument we have received on the *Wolf* point. To all intents and purposes the Court's present action amounts to a summary reversal of *Wolf*, without argument.

I am bound to say that what has been done is not likely to promote respect either for the Court's adjudicatory process or for the stability of its decisions. Having been unable, however, to persuade any of the majority to a different procedural course, I now turn to the merits of the present decision.

Essential to the majority's argument against *Wolf* is the proposition that the rule of *Weeks v. United States*, excluding in federal criminal trials the use of evidence obtained in violation of the Fourth Amendment, derives not from the "supervisory power" of this Court over the federal judicial system, but from Constitutional requirement. This is so because no one, I suppose, would suggest that this Court possesses any general supervisory power over the state courts.

At the heart of the majority's opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of all illegal search and seizure is a "part and parcel" of the Fourth Amendment; (2) *Wolf* held that the "privacy" assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore "logically and constitutionally necessary" that the *Weeks* exclusionary rule should also be enforced against the States.

This reasoning ultimately rests on the unsound premise that because *Wolf* carried into the States, as part of "the concept of ordered liberty" embodied in the Fourteenth Amendment, the principle of "privacy" underlying the Fourth Amendment, it must follow that whatever configurations of the Fourth Amendment have been developed in the particularizing federal precedents are likewise to be deemed a part of "ordered liberty," and as such are enforceable against the States. For me, this does not follow at all.

The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the *Weeks* rule is pressing because other remedies are unavailable

or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the *Weeks* rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule. And so on. From the standpoint of Constitutional permissibility in pointing a State in one direction or another, I do not see at all why “time has set its face against” the considerations which led Mr. Justice Cardozo, then chief judge of the New York Court of Appeals, to reject the *Weeks* exclusionary rule. For us the question remains, as it has always been, one of state power, not one of passing judgment on the wisdom of one state course or another. In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.

I do not believe that the Fourteenth Amendment empowers this Court to mould state remedies effectuating the right to freedom from “arbitrary intrusion by the police” to suit its own notions of how things should be done.

In conclusion, it should be noted that the majority opinion in this case is in fact an opinion only for the judgment overruling *Wolf*, and not for the basic rationale by which four members of the majority have reached that result. For my Brother BLACK is unwilling to subscribe to their view that the *Weeks* exclusionary rule derives from the Fourth Amendment itself, but joins the majority opinion on the premise that its end result can be achieved by bringing the Fifth Amendment to the aid of the Fourth.

I regret that I find so unwise in principle and so inexpedient in policy a decision motivated by the high purpose of increasing respect for Constitutional rights. But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherent in its own processes. In the present case I think we exceed both, and that our voice becomes only a voice of power, not of reason.

Notes, Comments, and Questions

Dollree Mapp, who objected so vigorously to the search of her home in 1957, lived until 2014.² Her obituary reported that after being convicted of drug possession in New York in 1971, “she pursued a series of appeals, claiming that the search warrant used in her arrest had been wrongly issued and that the police had targeted her because of her role in *Mapp v. Ohio*.”

The Justices debated two main questions in *Mapp v. Ohio*: First, would imposing the exclusionary rule on the states be good policy? Second, does the Court have authority under the Constitution to impose it?

² See William Yardley, “[Dollree Mapp, Who Defied Police Search in Landmark Case, Is Dead](#),” N.Y. Times (Dec. 9, 2014).

Scholars writing under the banner of “originalism” have argued that the Court lacked authority to hold as it did in *Mapp*. See, e.g., John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, [103 Nw. U. L. Rev. 803](#), 806, 850-53 (2009) (“under our theory, the Supreme Court could appropriately discard a substantial portion of current constitutional criminal procedure, such as the exclusionary rule”); Stephen G. Calabresi, “Introduction,” in *Originalism: A Quarter-Century of Debate* (Stephen G. Calabresi, ed. 2007), at 1, 39-40 (listing, among “good consequences that would flow from adopting originalism,” that “[w]e would be better off if criminals never got out of jail because of the idiocy of the exclusionary rule”); *but see* Akhil Reed Amar, “Panel on Originalism and Precedent,” in *id.*, at 210-11 (“And yet none of the supposedly originalist justices on the Supreme Court reject the exclusionary rule. Even Justices Scalia and Thomas exclude evidence pretty regularly, and do not ever quite tell us why they do so when it means abandoning the original meaning of the Fourth Amendment.”).

In a [provocative essay](#), Judge Guido Calabresi argues that the exclusionary rule has perverse effects, including encouraging false testimony by police. In particular, he suggests that because finding a constitutional violation—such as an illegal search—often requires a judge to free a dangerous criminal, judges err on the side of finding no violation. “Judges—politicians’ claims to the contrary notwithstanding—are not in the business of letting people out on technicalities. If anything, judges are in the business of keeping people who are guilty *in* on technicalities. ... [Judges do] not like the idea of dangerous criminals being released into society. This means that in any close case, a judge will decide that the search, the seizure, or the invasion of privacy was reasonable. That case then becomes precedent for the next case.”³ After acknowledging that alternative methods of “controlling the police in this area simply do not work,” Judge Calabresi proposes an odd scheme by which convicted defendants could win reduced sentences by proving after trial that the prosecution used illegally-obtained evidence to convict them.⁴

Professor Yale Kamisar presented a [more straightforward defense](#) of the exclusionary rule, arguing that the rule’s survival should not depend on an “empirical evaluation of its efficacy in deterring police misconduct.”⁵ Instead, the “imperative of judicial integrity,”⁶ requires the exclusion of evidence obtained in violation of the constitution.

Professor Kamisar next recounted an anecdote that helped him to appreciate the importance of *Mapp*, which he recalled as having “caused much grumbling in police ranks” in Minnesota.⁷ In response to the grumbling, the state’s attorney general reminded police officers that “the language of the Fourth Amendment is identical to the [search and seizure provision] of the Minnesota State Constitution” and that in terms of substantive law—that is, what police are and are not allowed to do—“*Mapp* did not alter one word of either the state or national constitutions,” nor had it reduced lawful “police powers one iota.”⁸ Professor Kamisar reported also that after the attorney general’s speech, “proponents of the exclusionary rule quoted [his] remarks and

³ See Guido Calabresi, *The Exclusionary Rule*, [26 Harv. J. of L. & Pub. Pol’y 111](#), 112 (2003) (calling the rule “most responsible for the deep decline in privacy rights in the United States”).

⁴ See *id.* at 113-18 (“I present this half-baked idea playing the role of an academic, rather than that of a judge”). Before being appointed to the U.S. Court of Appeals for the Second Circuit, Judge Calabresi was dean of Yale Law School.

⁵ See Yale Kamisar, *A Defense of the Exclusionary Rule*, [15 Crim. L. Bull. 5](#) (1979).

⁶ See *id.* at 5 n.4 (quoting *Elkins v. United States*, 364 U.S. 206, 222 (1960))

⁷ *Id.* at 10-11.

⁸ *Id.* at 11.

made explicit what those remarks implied: If the police feared that evidence they were gathering in the customary manner *would now be excluded* by the courts, the police must have been violating the guarantee against unreasonable search and seizure *all along*.”

Professor Kamisar then recounted how a police officer reacted to the insinuation of longstanding officer misbehavior:

“No officer lied upon the witness stand. If you were asked how you got your evidence you told the truth. You had broken down a door or pried a window open ... often we picked locks. ... The Supreme Court of Minnesota sustained this time after time. ... [The] judiciary okayed it; they knew what the facts were.”⁹

In other words, Professor Kamisar wrote, the “police departments ... reacted to the adoption of the exclusionary rule as if the guarantees against unreasonable search and seizure *had just been written*.”¹⁰

Noting that police in other jurisdictions reacted in the same way he had observed in Minnesota, Professor Kamisar quoted the chief of the Los Angeles Police Department, who “warned that his department’s ‘ability to prevent the commission of crime has been greatly diminished’ because henceforth his officers would be unable to take ‘affirmative action’ unless and until they possessed ‘sufficient information to constitute probable cause.’”¹¹ Similarly, the commissioner of police in New York City reported that in the wake of *Mapp*, “[r]etraining sessions had to be held from the very top administrators down to each of the thousands of foot patrolmen and detectives engaged in the daily basic enforcement function.” These sessions covered information not taught to the officers when they first joined the force; the NYPD “was immediately caught up in the entire problem of reevaluating our procedures ... and modifying, amending and creating new policies and new instructions for the implementation of *Mapp*.”¹²

If one takes the contemporary statements of police department leaders at face value, *Mapp* inspired far greater attention to search and seizure law than had previously existed in police departments across the United States.

In our next chapter, we review more recent case law. The Court has limited the application of the exclusionary rule to cases involving particularly egregious official misconduct. This causes less evidence—and fewer cases—to be lost because of judicial intervention. It also, however, decreases the deterrent effect of the rule.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 12.

¹² *Id.*

THE EXCLUSIONARY RULE

Chapter 32

When Does the Exclusionary Rule Apply?

The exclusionary rule has lasted more than a century in federal court and more than half a century in the courts of the states. Time has not dulled the controversy created by the rule. Although recent Supreme Court opinions devote relatively little time to debating the constitutional underpinnings of the rule, the Justices continue to argue over the rule's utility. In particular, twenty-first century exclusionary rule cases have contested the costs (measured in the loss of relevant, reliable evidence) and benefits (measured in deterrence of official misconduct, particularly the kind that violates constitutional rights). Recent cases have narrowed the scope of the rule—applying it to less misconduct than was covered in the decades after *Mapp v. Ohio*—but have not abolished it. Defendants retain powerful incentives to seek the exclusion of evidence, especially in cases of brazen police misconduct and when there are clear violations of well-established rights.

In our next case, the Court considered whether violations of the knock-and-announce rule—covered in Chapter 7—justify the exclusion of evidence found during a police search.

Supreme Court of the United States

Booker T. Hudson, Jr. v. Michigan

Decided June 15, 2006 – [547 U.S. 586](#)

Justice SCALIA delivered the opinion of the Court.

We decide whether violation of the “knock-and-announce” rule requires the suppression of all evidence found in the search.

I

Police obtained a warrant authorizing a search for drugs and firearms at the home of petitioner Booker Hudson. They discovered both. Large quantities of drugs were found, including cocaine rocks in Hudson's pocket. A loaded gun was lodged between the cushion and armrest of the chair in which he was sitting. Hudson was charged under Michigan law with unlawful drug and firearm possession.

This case is before us only because of the method of entry into the house. When the police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps “three to five seconds”—before turning the knob of the unlocked front door and entering Hudson's home. Hudson moved to suppress all the inculpatory evidence, arguing that the premature entry violated his Fourth Amendment rights.

The Michigan trial court granted his motion. On interlocutory review, the Michigan Court of Appeals reversed, relying on Michigan Supreme Court cases holding that suppression is inappropriate when entry is made pursuant to warrant but without proper “knock and announce.” The Michigan Supreme Court denied leave to appeal. Hudson was convicted of drug possession. He renewed his Fourth Amendment claim on appeal, but the Court of Appeals rejected it and affirmed the conviction. The Michigan Supreme Court again declined review. We granted certiorari.

II

[It was undisputed that the entry was a knock-and-announce violation.]

III

A

In *Weeks v. United States*, we adopted the federal exclusionary rule for evidence that was unlawfully seized from a home without a warrant in violation of the Fourth Amendment. We began applying the same rule to the States, through the Fourteenth Amendment, in *Mapp v. Ohio*.

Suppression of evidence, however, has always been our last resort, not our first impulse. The exclusionary rule generates “substantial social costs,” which sometimes include setting the guilty free and the dangerous at large. We have therefore been “cautio[us] against expanding” it and “have repeatedly emphasized that the rule’s ‘costly toll’ upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.” We have rejected “[i]ndiscriminate application” of the rule and have held it to be applicable only “where its remedial objectives are thought most efficaciously served”—that is, “where its deterrence benefits outweigh its ‘substantial social costs.’”

“[W]hether the exclusionary sanction is appropriately imposed in a particular case ... is ‘an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.’” In other words, exclusion may not be premised on the mere fact that a constitutional violation was a “but-for” cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence. Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and drugs inside the house. But even if the illegal entry here could be characterized as a but-for cause of discovering what was inside, we have “never held that evidence is ‘fruit of the poisonous tree’ simply because ‘it would not have come to light but for the illegal actions of the police.’” Rather, but-for cause, or “causation in the logical sense alone,” can be too attenuated to justify exclusion.

Attenuation can occur, of course, when the causal connection is remote. Attenuation also occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained. “The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve.”

For this reason, cases excluding the fruits of unlawful warrantless searches say nothing about the appropriateness of exclusion to vindicate the interests protected by the knock-and-announce requirement. Until a valid warrant has issued, citizens are entitled to shield “their persons, houses, papers, and effects” from the government’s scrutiny. Exclusion of the evidence obtained by a warrantless search vindicates that entitlement. The interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government’s eyes.

One of those interests is the protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by the surprised resident. Another interest is the protection of property. Breaking a house (as the old cases typically put it) absent an announcement would penalize someone who “did not know of the process, of which, if he had notice, it is to be presumed that he would obey it” The knock-and-announce rule gives individuals “the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry.” And thirdly, the knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the “opportunity to prepare themselves for” the entry of the police. “The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed.” In other words, it assures the opportunity to collect oneself before answering the door.

What the knock-and-announce rule has never protected, however, is one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.

B

Quite apart from the requirement of unattenuated causation, the exclusionary rule has never been applied except “where its deterrence benefits outweigh its ‘substantial social costs.’” The costs here are considerable. In addition to the grave adverse consequence that exclusion of relevant incriminating evidence always entails (*viz.*, the risk of releasing dangerous criminals into society), imposing that massive remedy for a knock-and-announce violation would generate a constant flood of alleged failures to observe the rule, and claims that any asserted *Richards v. Wisconsin* (Chapter 7)] justification for a no-knock entry had inadequate support. The cost of entering this lottery would be small, but the jackpot enormous: suppression of all evidence, amounting in many cases to a get-out-of-jail-free card. Courts would experience as never before the reality that “[t]he exclusionary rule frequently requires extensive litigation to determine whether particular evidence must be excluded.” Unlike the warrant or *Miranda* requirements, compliance with which is readily determined (either there was or was not a warrant; either the *Miranda* warning was given, or it was not), what constituted a “reasonable wait time” in a

particular case, (or, for that matter, how many seconds the police in fact waited), or whether there was “reasonable suspicion” of the sort that would invoke the *Richards* exceptions, is difficult for the trial court to determine and even more difficult for an appellate court to review.

Another consequence of the incongruent remedy Hudson proposes would be police officers’ refraining from timely entry after knocking and announcing. As we have observed, the amount of time they must wait is necessarily uncertain. If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others. We deemed these consequences severe enough to produce our unanimous agreement that a mere “reasonable suspicion” that knocking and announcing “under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime,” will cause the requirement to yield.

Next to these “substantial social costs” we must consider the deterrence benefits, existence of which is a necessary condition for exclusion. (It is not, of course, a sufficient condition: “[I]t does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct.”) To begin with, the value of deterrence depends upon the strength of the incentive to commit the forbidden act. Viewed from this perspective, deterrence of knock-and-announce violations is not worth a lot. Violation of the warrant requirement sometimes produces incriminating evidence that could not otherwise be obtained. But ignoring knock-and-announce can realistically be expected to achieve absolutely nothing except the prevention of destruction of evidence and the avoidance of life-threatening resistance by occupants of the premises—dangers which, if there is even “reasonable suspicion” of their existence, *suspend the knock-and-announce requirement anyway*. Massive deterrence is hardly required.

In sum, the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterrents against them are substantial—incomparably greater than the factors deterring warrantless entries when *Mapp* was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

For the foregoing reasons we affirm the judgment of the Michigan Court of Appeals.

Justice KENNEDY, concurring in part and concurring in the judgment.

Two points should be underscored with respect to today’s decision. First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order. The Court’s decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law’s concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today’s decision determines only that in the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.

As to the basic right in question, privacy and security in the home are central to the Fourth Amendment’s guarantees as explained in our decisions and as understood since the beginnings of the Republic. This common understanding ensures respect for the law and allegiance to our

institutions, and it is an instrument for transmitting our Constitution to later generations undiminished in meaning and force. It bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt.

Our system, as the Court explains, has developed procedures for training police officers and imposing discipline for failures to act competently and lawfully. If those measures prove ineffective, they can be fortified with more detailed regulations or legislation. Supplementing these safeguards are civil remedies that provide restitution for discrete harms. These remedies apply to all violations, including, of course, exceptional cases in which unannounced entries cause severe fright and humiliation.

Today's decision does not address any demonstrated pattern of knock-and-announce violations. If a widespread pattern of violations were shown, and particularly if those violations were committed against persons who lacked the means or voice to mount an effective protest, there would be reason for grave concern. Even then, however, the Court would have to acknowledge that extending the remedy of exclusion to all the evidence seized following a knock-and-announce violation would mean revising the requirement of causation that limits our discretion in applying the exclusionary rule. That type of extension also would have significant practical implications, adding to the list of issues requiring resolution at the criminal trial questions such as whether police officers entered a home after waiting 10 seconds or 20.

In this case the relevant evidence was discovered not because of a failure to knock and announce, but because of a subsequent search pursuant to a lawful warrant. The Court in my view is correct to hold that suppression was not required.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

In *Wilson v. Arkansas* (Chapter 7), a unanimous Court held that the Fourth Amendment normally requires law enforcement officers to knock and announce their presence before entering a dwelling. Today's opinion holds that evidence seized from a home following a violation of this requirement need not be suppressed.

As a result, the Court destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks v. United States*.

Today's opinion is thus doubly troubling. It represents a significant departure from the Court's precedents. And it weakens, perhaps destroys, much of the practical value of the Constitution's knock-and-announce protection.

It is not surprising [] that after looking at virtually every pertinent Supreme Court case decided since *Weeks*, I can find no precedent that might offer the majority support for its contrary conclusion. The Court has, of course, recognized that not every Fourth Amendment violation necessarily triggers the exclusionary rule. But the class of Fourth Amendment violations that do not result in suppression of the evidence seized, however, is limited.

The Court has declined to apply the exclusionary rule only:

(1) where there is a specific reason to believe that application of the rule would “not result in appreciable deterrence,” or

(2) where admissibility in proceedings other than criminal trials was at issue.

Neither of these two exceptions applies here. The second does not apply because this case is an ordinary criminal trial. The first does not apply because (1) officers who violate the rule are not acting “as a reasonable officer would and should act in similar circumstances,” (2) this case does not involve government employees other than police, and (3), most importantly, the key rationale for any exception, “lack of deterrence,” is missing. That critical latter rationale, which underlies *every* exception, does not apply here, as there is no reason to think that, in the case of knock-and-announce violations by the police, “the exclusion of evidence at trial would not sufficiently deter future errors,” or “further the ends of the exclusionary rule in any appreciable way.”

I am aware of no other basis for an exception. The Court has decided more than 300 Fourth Amendment cases since *Weeks*. The Court has found constitutional violations in nearly a third of them. The nature of the constitutional violation varies. In most instances officers lacked a warrant; in others, officers possessed a warrant based on false affidavits; in still others, the officers executed the search in an unconstitutional manner. But in every case involving evidence seized during an illegal search of a home (federally since *Weeks*, nationally since *Mapp*), the Court, with the exceptions mentioned, has either explicitly or implicitly upheld (or required) the suppression of the evidence at trial. In not one of those cases did the Court “questio[n], in the absence of a more efficacious sanction, the continued application of the [exclusionary] rule to suppress evidence from the State’s case” in a criminal trial.

I can find nothing persuasive in the majority’s opinion that could justify its refusal to apply the rule. It certainly is not a justification for an exception here (as the majority finds) to find odd instances in *other* areas of law that do not automatically demand suppression. Nor can it justify an exception to say that *some* police may knock at the door anyway (to avoid being mistaken for a burglar), for other police (believing quick entry is the most secure, effective entry) will not voluntarily do so.

Neither can the majority justify its failure to respect the need for deterrence, as set forth consistently in the Court’s prior case law, through its claim of “substantial social costs”—at least if it means that those “social costs” are somehow special here. The only costs it mentions are those that typically accompany *any* use of the Fourth Amendment’s exclusionary principle. In fact, the “no-knock” warrants that are provided by many States, by diminishing uncertainty, may make application of the knock-and-announce principle less “cost[ly]” on the whole than

application of comparable Fourth Amendment principles, such as determining whether a particular warrantless search was justified by exigency. The majority’s “substantial social costs” argument is an argument against the Fourth Amendment’s exclusionary principle itself. And it is an argument that this Court, until now, has consistently rejected.

* * *

The Court in *Hudson v. Michigan* reasoned that the police would have found the evidence anyway (even without the Fourth Amendment violation), and Justice Kennedy concurred that there was no evidence of widespread knock-and-announce violations across the land. Although the decision answered only a fairly narrow question—the availability of the exclusionary rule in knock-and-announce cases—its reasoning foreshadowed a further reduction of the scope of the exclusionary rule.

The next case answers the question of whether ordinary negligence by police—if it results in a violation of constitutional rights—is sufficient to trigger the exclusionary rule, or if instead more culpable misconduct is required.

Supreme Court of the United States
Bennie Dean Herring v. United States

Decided Jan. 14, 2009 – [555 U.S. 135](#)

Chief Justice ROBERTS delivered the opinion of the Court.

The Fourth Amendment forbids “unreasonable searches and seizures,” and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

I

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff’s Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county’s warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring’s arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County’s computer database, Morgan replied that there was an active arrest warrant for Herring’s failure to appear on a felony charge. Pope relayed the

information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring's pocket, and a pistol (which as a felon he could not possess) in his vehicle.

There had, however, been a mistake about the warrant. The Dale County sheriff's computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk's office or a judge's chambers calls Morgan, who enters the information in the sheriff's computer database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mixup, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff's office.

Herring was indicted in the District Court for the Middle District of Alabama for illegally possessing the gun and drugs. He moved to suppress the evidence on the ground that his initial arrest had been illegal because the warrant had been rescinded. The Magistrate Judge recommended denying the motion because the arresting officers had acted in a good-faith belief that the warrant was still outstanding. Thus, even if there were a Fourth Amendment violation, there was "no reason to believe that application of the exclusionary rule here would deter the occurrence of any future mistakes." The District Court adopted the Magistrate Judge's recommendation, and the Court of Appeals for the Eleventh Circuit affirmed.

Other courts have required exclusion of evidence obtained through similar police errors so we granted Herring's petition for certiorari to resolve the conflict. We now affirm the Eleventh Circuit's judgment.

II

When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation. The very phrase "probable cause" confirms that the Fourth Amendment does not demand all possible precision. And whether the error can be traced to a mistake by a state actor or some other source may bear on the analysis. For purposes of deciding this case, however, we accept the parties' assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.

A

In analyzing the applicability of the [exclusionary] rule, we must consider the actions of all the police officers involved. The Coffee County officers did nothing improper. Indeed, the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant.

The Eleventh Circuit concluded, however, that somebody in Dale County should have updated the computer database to reflect the recall of the arrest warrant. The court also concluded that this error was negligent, but did not find it to be reckless or deliberate. That fact is crucial to our holding that this error is not enough by itself to require “the extreme sanction of exclusion.”

B

The fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. Indeed, exclusion “has always been our last resort, not our first impulse,” and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it “result[s] in appreciable deterrence.” We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation. Instead we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future.

In addition, the benefits of deterrence must outweigh the costs. “We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence.” “[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs.” The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” “[T]he rule’s costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.”

We [have] held that a mistake made by a judicial employee could not give rise to exclusion for three reasons: The exclusionary rule was crafted to curb police rather than judicial misconduct; court employees were unlikely to try to subvert the Fourth Amendment; and “most important, there [was] no basis for believing that application of the exclusionary rule in [those] circumstances” would have any significant effect in deterring the errors.

The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. “[A]n assessment of the flagrancy of the police misconduct constitutes an important step in the calculus” of applying the exclusionary rule. Similarly, in *Krull* we elaborated that “evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’”¹

Anticipating the good-faith exception to the exclusionary rule, Judge Friendly wrote that “[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice ... outlawing evidence obtained by flagrant or deliberate violation of rights.”

¹ [Footnote by editors] See *Illinois v. Krull*, [480 U.S. 340](#), 348-49 (1987). We will review the “good faith” exception in greater detail in a subsequent chapter.

Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

[T]his case concern[s] false information provided by police. [] [T]he miscommunications occurred [] after the warrant had been issued and recalled—but that fact should not require excluding the evidence obtained.

The pertinent analysis of deterrence and culpability is objective, not an “inquiry into the subjective awareness of arresting officers.” We have already held that “our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal” in light of “all of the circumstances.” These circumstances frequently include a particular officer’s knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer’s knowledge and experience but not his subjective intent.

We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. Petitioner’s fears that our decision will cause police departments to deliberately keep their officers ignorant are thus unfounded.

Petitioner’s claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not “pay its way.” In such a case, the criminal should not “go free because the constable has blundered.” The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

Petitioner Bennie Dean Herring was arrested, and subjected to a search incident to his arrest, although no warrant was outstanding against him, and the police lacked probable cause to believe he was engaged in criminal activity. The arrest and ensuing search therefore violated Herring’s Fourth Amendment right “to be secure ... against unreasonable searches and seizures.” The Court of Appeals so determined, and the Government does not contend otherwise. The

exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search. The rule thus strongly encourages police compliance with the Fourth Amendment in the future. The Court, however, holds the rule inapplicable because careless recordkeeping by the police—not flagrant or deliberate misconduct—accounts for Herring’s arrest.

I would not so constrict the domain of the exclusionary rule and would hold the rule dispositive of this case: “[I]f courts are to have any power to discourage [police] error of [the kind here at issue], it must be through the application of the exclusionary rule.” The unlawful search in this case was contested in court because the police found methamphetamine in Herring’s pocket and a pistol in his truck. But the “most serious impact” of the Court’s holding will be on innocent persons “wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base.”

The sole question presented [] is whether evidence the police obtained through the unlawful search should have been suppressed. In my view, the Court’s opinion underestimates the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement.

The Court states that the exclusionary rule is not a defendant’s right; rather, it is simply a remedy applicable only when suppression would result in appreciable deterrence that outweighs the cost to the justice system.

The Court’s discussion invokes a view of the exclusionary rule famously held by renowned jurists Henry J. Friendly and Benjamin Nathan Cardozo. Over 80 years ago, Cardozo, then seated on the New York Court of Appeals, commented critically on the federal exclusionary rule, which had not yet been applied to the States. He suggested that in at least some cases the rule exacted too high a price from the criminal justice system. In words often quoted, Cardozo questioned whether the criminal should “go free because the constable has blundered.”

Judge Friendly later elaborated on Cardozo’s query. “The sole reason for exclusion,” Friendly wrote, “is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution.” He thought it excessive, in light of the rule’s aim to deter police conduct, to require exclusion when the constable had merely “blundered”—when a police officer committed a technical error in an on-the-spot judgment, or made a “slight and unintentional miscalculation.” [] Judge Friendly suggested that deterrence of police improprieties could be “sufficiently accomplished” by confining the rule to “evidence obtained by flagrant or deliberate violation of rights.”

Others have described “a more majestic conception” of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental “right of the people to be secure in their persons, houses, papers, and effects,” the Amendment “is a constraint on the power of the sovereign, not merely on some of its agents.” I share that vision of the Amendment.

The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment’s prohibitions “are observed in fact.” The rule’s service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

Beyond doubt, a main objective of the rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”

The exclusionary rule, it bears emphasis, is often the only remedy effective to redress a Fourth Amendment violation. Civil liability will not lie for “the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable zeal, not condemnable malice.” Criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are an even farther cry.

The Court maintains that Herring’s case is one in which the exclusionary rule could have scant deterrent effect and therefore would not “pay its way.” I disagree.

The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless. The suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care.

That the mistake here involved the failure to make a computer entry hardly means that application of the exclusionary rule would have minimal value. “Just as the risk of *respondet superior* liability encourages employers to supervise ... their employees’ conduct [more carefully], so the risk of exclusion of evidence encourages policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems.”

Consider the potential impact of a decision applying the exclusionary rule in this case. As earlier observed, the record indicates that there is no electronic connection between the warrant database of the Dale County Sheriff’s Department and that of the County Circuit Clerk’s office, which is located in the basement of the same building. When a warrant is recalled, one of the “many different people that have access to th[e] warrants,” must find the hard copy of the warrant in the “two or three different places” where the Department houses warrants, return it to the Clerk’s office, and manually update the Department’s database. The record reflects no routine practice of checking the database for accuracy, and the failure to remove the entry for Herring’s warrant was not discovered until Investigator Anderson sought to pursue Herring five months later. Is it not altogether obvious that the Department could take further precautions to ensure the integrity of its database? The Sheriff’s Department “is in a position to remedy the situation and might well do so if the exclusionary rule is there to remove the incentive to do otherwise.”

Is the potential deterrence here worth the costs it imposes? In light of the paramount importance of accurate recordkeeping in law enforcement, I would answer yes, and next explain why, as I see it, Herring’s motion presents a particularly strong case for suppression.

Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded. Police today can access databases that include not only the updated National Crime Information Center (NCIC), but also terrorist watchlists, the Federal Government's employee eligibility system, and various commercial databases. Moreover, States are actively expanding information sharing between jurisdictions. As a result, law enforcement has an increasing supply of information within its easy electronic reach.

The risk of error stemming from these databases is not slim. Herring's *amici* warn that law enforcement databases are insufficiently monitored and often out of date. Government reports describe, for example, flaws in NCIC databases, terrorist watchlist databases, and databases associated with the Federal Government's employment eligibility verification system.

Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty. "The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base" is evocative of the use of general warrants that so outraged the authors of our Bill of Rights.

Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule. The rule "is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera." In keeping with the rule's "core concerns," suppression should have attended the unconstitutional search in this case.

For the reasons stated, I would reverse the judgment of the Eleventh Circuit.

Justice BREYER, with whom Justice SOUTER joins, dissenting.

I agree with Justice GINSBURG and join her dissent. I write separately to note one additional supporting factor that I believe important. In *Arizona v. Evans*, we held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, so long as the police reasonably relied upon the court clerk's recordkeeping. The rationale for our decision was premised on a distinction between judicial errors and police errors.

Distinguishing between police recordkeeping errors and judicial ones not only is consistent with our precedent, but also is far easier for courts to administer than the Court's case-by-case, multifaceted inquiry into the degree of police culpability. I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation.

Notes, Comments, and Questions

Many criminal procedure issues are litigated concurrently in multiple forums. For example, when deciding *Miranda v. Arizona*, the Court also resolved additional cases presenting the same question about custodial interrogation. Because most cases never reach the Supreme Court, it is common for two cases to present the same issue, for the Court to take only one of them, and for the Court's decision of that case to resolve the other case. For example, imagine that on the same day that police scanned the home of Danny Lee Kylo, other officers conducting an unrelated investigation scanned a different home, and the resident of that home sought exclusion of items found during an ensuing search. If the Court decided *Kyllo v. United States* (Chapter 3) while the second case was pending, the defendant in the second case could rely upon the holding of *Kyllo*. In other words, the Court's decision that thermal imaging of a home is a "search" would apply to all pending cases in which the issue was presented, and the judge in the second case would know that the second defendant's home had been "searched" for Fourth Amendment purposes.

In *Davis v. United States*, the Court considered how the exclusionary rule should apply to situations like our hypothetical second thermal imaging case. Could the second defendant exclude evidence, just as *Kyllo* did? Or would the second case somehow be treated differently?

Supreme Court of the United States

Willie Gene Davis v. United States

Decided June 16, 2011 – [564 U.S. 229](#)

Justice ALITO delivered the opinion of the Court.

The Fourth Amendment protects the right to be free from "unreasonable searches and seizures," but it is silent about how this right is to be enforced. To supplement the bare text, this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation. The question here is whether to apply this sanction when the police conduct a search in compliance with binding precedent that is later overruled. Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

I

The question presented arises in this case as a result of a shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrests of recent occupants.

A

[The Court recounted its jurisprudence regarding searches of automobiles incident to lawful arrests. The search in this case occurred before the Court overruled *New York v. Belton* in

Arizona v. Gant (Chapter 10). The rule set forth in *Gant* states that “an automobile search incident to a recent occupant’s arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains ‘evidence relevant to the crime of arrest.’”]

B

The search at issue in this case took place a full two years before this Court announced its new rule in *Gant*. On an April evening in 2007, police officers in Greenville, Alabama, conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens (for driving while intoxicated) and passenger Willie Davis (for giving a false name to police). The police handcuffed both Owens and Davis, and they placed the arrestees in the back of separate patrol cars. The police then searched the passenger compartment of Owens’s vehicle and found a revolver inside Davis’s jacket pocket.

Davis was indicted in the Middle District of Alabama on one count of possession of a firearm by a convicted felon. In his motion to suppress the revolver, Davis acknowledged that the officers’ search fully complied with “existing Eleventh Circuit precedent.” Like most courts, the Eleventh Circuit had long read *Belton* to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants. Davis recognized that the District Court was obligated to follow this precedent, but he raised a Fourth Amendment challenge to preserve “the issue for review” on appeal. The District Court denied the motion, and Davis was convicted on the firearms charge.

While Davis’s appeal was pending, this Court decided *Gant*. The Eleventh Circuit, in the opinion below, applied *Gant*’s new rule and held that the vehicle search incident to Davis’s arrest “violated [his] Fourth Amendment rights.” As for whether this constitutional violation warranted suppression, the Eleventh Circuit viewed that as a separate issue that turned on “the potential of exclusion to deter wrongful police conduct.” The court concluded that “penalizing the [arresting] officer” for following binding appellate precedent would do nothing to “dete[r] ... Fourth Amendment violations.” It therefore declined to apply the exclusionary rule and affirmed Davis’s conviction. We granted certiorari.

II

[T]he exclusionary rule [] is a “prudential” doctrine created by this Court to “compel respect for the constitutional guaranty.” Exclusion is “not a personal constitutional right,” nor is it designed to “redress the injury” occasioned by an unconstitutional search. The rule’s sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. Our cases have thus limited the rule’s operation to situations in which this purpose is “thought most efficaciously served.” Where suppression fails to yield “appreciable deterrence,” exclusion is “clearly ... unwarranted.”

Real deterrent value is a “necessary condition for exclusion,” but it is not “a sufficient” one. The analysis must also account for the “substantial social costs” generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community

without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a “last resort.” For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Admittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine. “Expansive dicta” in several decisions suggested that the rule was a self-executing mandate implicit in the Fourth Amendment itself. As late as [] 1971[,] the Court “treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule.” In time, however, we came to acknowledge the exclusionary rule for what it undoubtedly is—a “judicially created remedy” of this Court’s own making. We abandoned the old, “reflexive” application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits. [W]e also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the “flagrancy of the police misconduct” at issue.

[T]he deterrence benefits of exclusion “var[y] with the culpability of the law enforcement conduct” at issue. When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, or when their conduct involves only simple, “isolated” negligence, the “deterrence rationale loses much of its force,” and exclusion cannot “pay its way.”

III

The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent. At the time of the search at issue here, we had not yet decided *Arizona v. Gant*, and the Eleventh Circuit had interpreted our decision in *New York v. Belton* to establish a bright-line rule authorizing the search of a vehicle’s passenger compartment incident to a recent occupant’s arrest. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers’ conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.

Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis’s claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield “meaningfu[l]” deterrence, and culpable enough to be “worth the price paid by the justice system.” The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis’s Fourth Amendment rights deliberately, recklessly, or with gross negligence. Nor does this case involve any “recurring or systemic negligence” on the part of law enforcement. The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case.

Indeed, in 27 years of practice under [the] good-faith exception, we have “never applied” the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct. If the police in this case had reasonably relied on a warrant in conducting their search, or on an erroneous warrant record in a government database, the exclusionary rule would not apply. And if Congress or the Alabama Legislature had enacted a statute codifying the precise holding of the Eleventh Circuit’s decision, we would swiftly conclude that “[p]enalizing the

officer for the legislature’s error ... cannot logically contribute to the deterrence of Fourth Amendment violations.” The same should be true of Davis’s attempt here to “[p]enaliz[e] the officer for the [appellate judges’] error.”

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn “what is required of them” under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities. An officer who conducts a search in reliance on binding appellate precedent does no more than “ac[t] as a reasonable officer would and should act” under the circumstances. The deterrent effect of exclusion in such a case can only be to discourage the officer from “do[ing] his duty.”

That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we reaffirm today, that the harsh sanction of exclusion “should not be applied to deter objectively reasonable law enforcement activity.” Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.

B

Davis [] contends that applying the good-faith exception to searches conducted in reliance on binding precedent will stunt the development of Fourth Amendment law. With no possibility of suppression, criminal defendants will have no incentive, Davis maintains, to request that courts overrule precedent.

This argument is difficult to reconcile with our modern understanding of the role of the exclusionary rule. We have never held that facilitating the overruling of precedent is a relevant consideration in an exclusionary-rule case. Rather, we have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement.

We have also repeatedly rejected efforts to expand the focus of the exclusionary rule beyond deterrence of culpable police conduct.

Davis argues that Fourth Amendment precedents of *this* Court will be effectively insulated from challenge under a good-faith exception for reliance on appellate precedent. But this argument is overblown. For one thing, it is important to keep in mind that this argument applies to an exceedingly small set of cases. Decisions overruling this Court’s Fourth Amendment precedents are rare. Indeed, it has been more than 40 years since the Court last handed down a decision of the type to which Davis refers. And even in those cases, Davis points out that no fewer than eight separate doctrines may preclude a defendant who successfully challenges an existing precedent from getting any relief. Moreover, as a practical matter, defense counsel in many cases will test this Court’s Fourth Amendment precedents in the same way that *Belton* was tested in *Gant*—by arguing that the precedent is distinguishable.

At most, Davis’s argument might suggest that—to prevent Fourth Amendment law from becoming ossified—the petitioner in a case that results in the overruling of one of this Court’s Fourth Amendment precedents should be given the benefit of the victory by permitting the

suppression of evidence in that one case. Such a result would undoubtedly be a windfall to this one random litigant. But the exclusionary rule is “not a personal constitutional right.” It is a “judicially created” sanction specifically designed as a “windfall” remedy to deter future Fourth Amendment violations. The good-faith exception is a judicially created exception to this judicially created rule. Therefore, in a future case, we could, if necessary, recognize a limited exception to the good-faith exception for a defendant who obtains a judgment over-ruling one of our Fourth Amendment precedents.

But this is not such a case. Davis did not secure a decision overturning a Supreme Court precedent; the police in his case reasonably relied on binding Circuit precedent. That sort of blameless police conduct, we hold, comes within the good-faith exception and is not properly subject to the exclusionary rule.

It is one thing for the criminal “to go free because the constable has blundered.” It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply. The judgment of the Court of Appeals for the Eleventh Circuit is *[affirmed]*.

Justice SOTOMAYOR, concurring in the judgment.

Under our precedents, the primary purpose of the exclusionary rule is “to deter future Fourth Amendment violations.” Accordingly, we have held, application of the exclusionary rule is unwarranted when it “does not result in appreciable deterrence.” In the circumstances of this case, where “binding appellate precedent specifically *authorize[d]* a particular police practice,” in accord with the holdings of nearly every other court in the country—application of the exclusionary rule cannot reasonably be expected to yield appreciable deterrence. I am thus compelled to conclude that the exclusionary rule does not apply in this case and to agree with the Court’s disposition.

This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled. As we previously recognized in deciding whether to apply a Fourth Amendment holding retroactively, when police decide to conduct a search or seizure in the absence of case law (or other authority) specifically sanctioning such action, exclusion of the evidence obtained may deter Fourth Amendment violations.

As stated, whether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled. The Court’s answer to the former question in this case thus does not resolve the latter one.

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

In 2009, in *Arizona v. Gant*, this Court held that a police search of an automobile without a warrant violates the Fourth Amendment if the police have previously removed the automobile’s

occupants and placed them securely in a squad car. The present case involves these same circumstances, and it was pending on appeal when this Court decided *Gant*. Because *Gant* represents a “shift” in the Court’s Fourth Amendment jurisprudence, we must decide [] how *Gant*’s new rule applies here.

While conceding that, like the search in *Gant*, this search violated the Fourth Amendment, it holds that, unlike *Gant*, this defendant is not entitled to a remedy. That is because the Court finds a new “good faith” exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. Leaving Davis with a right but not a remedy, the Court “keep[s] the word of promise to our ear” but “break[s] it to our hope.”

At this point I can no longer agree with the Court. A new “good faith” exception and this Court’s retroactivity decisions are incompatible. For one thing, the Court’s distinction between (1) retroactive application of a new rule and (2) availability of a remedy is highly artificial and runs counter to precedent. To determine that a new rule is retroactive is to determine that, at least in the normal case, there is a remedy. As we have previously said, the “source of a ‘new rule’ is the Constitution itself, not any judicial power to create new rules of law”; hence, “[w]hat we are actually determining when we assess the ‘retroactivity’ of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.” The Court’s “good faith” exception (unlike, say, inevitable discovery, a remedial doctrine that applies only upon occasion) creates “a categorical bar to obtaining redress” in *every* case pending when a precedent is overturned.

The Court says that its exception applies where there is “objectively reasonable” police “reliance on binding appellate precedent.” But to apply the term “binding appellate precedent” often requires resolution of complex questions of degree. Davis conceded that he faced binding anti-*Gant* precedent in the Eleventh Circuit. But future litigants will be less forthcoming. Indeed, those litigants will now have to create distinctions to show that previous Circuit precedent was not “binding” lest they find relief foreclosed even if they win their constitutional claim.

At the same time, Fourth Amendment precedents frequently require courts to “slosh” their “way through the factbound morass of ‘reasonableness.’” Suppose an officer’s conduct is consistent with the language of a Fourth Amendment rule that a court of appeals announced in a case with clearly distinguishable facts? Suppose the case creating the relevant precedent did not directly announce any general rule but involved highly analogous facts? What about a rule that all other jurisdictions, but not the defendant’s jurisdiction, had previously accepted? What rules can be developed for determining when, where, and how these different kinds of precedents do, or do not, count as relevant “binding precedent”?

Another such problem concerns fairness. Today’s holding [] “violates basic norms of constitutional adjudication.” It treats the defendant in a case announcing a new rule one way while treating similarly situated defendants whose cases are pending on appeal in a different way.

Of course, the Court may, as it suggests, avoid this unfairness by refusing to apply the exclusionary rule even to the defendant in the very case in which it announces a “new rule.” But that approach would make matters worse. What would then happen in the lower courts? How would courts of appeals, for example, come to reconsider their prior decisions when other circuits’ cases lead them to believe those decisions may be wrong? Why would a defendant seek to overturn any such decision? After all, if the (incorrect) circuit precedent is clear, then even if the defendant wins (on the constitutional question), he loses (on relief). To what extent then could this Court rely upon lower courts to work out Fourth Amendment differences among themselves—through circuit reconsideration of a precedent that other circuits have criticized?

Perhaps more important, the Court’s rationale for creating its new “good faith” exception threatens to undermine well-settled Fourth Amendment law. The Court correctly says that pre-*Gant* Eleventh Circuit precedent had held that a *Gant*-type search was constitutional; hence the police conduct in this case, consistent with that precedent, was “innocent.” But the Court then finds this fact sufficient to create a new “good faith” exception to the exclusionary rule. It reasons that the “sole purpose” of the exclusionary rule “is to deter future Fourth Amendment violations.” Those benefits are sufficient to justify exclusion where “police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights.” But those benefits do not justify exclusion where, as here, the police act with “simple, isolated negligence” or an “objectively reasonable good-faith belief that their conduct is lawful.”

If the Court means what it says, what will happen to the exclusionary rule, a rule that the Court adopted nearly a century ago for federal courts and made applicable to state courts a half century ago through the Fourteenth Amendment? The Court has thought of that rule not as punishment for the individual officer or as reparation for the individual defendant but more generally as an effective way to secure enforcement of the Fourth Amendment’s commands. This Court has deviated from the “suppression” norm in the name of “good faith” only a handful of times and in limited, atypical circumstances: where a magistrate has erroneously issued a warrant; where a database has erroneously informed police that they have a warrant; and where an unconstitutional statute purported to authorize the search.

The fact that such exceptions are few and far between is understandable. Defendants frequently move to suppress evidence on Fourth Amendment grounds. In many, perhaps most, of these instances the police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective good faith. Yet, in a significant percentage of these instances, courts will find that the police were wrong. And, unless the police conduct falls into one of the exceptions previously noted, courts have required the suppression of the evidence seized.

But an officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment’s bounds is no more culpable than an officer who follows erroneous “binding precedent.” Nor is an officer more culpable where circuit precedent is simply suggestive rather than “binding,” where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer’s conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was “deliberate, reckless, or grossly negligent,” then the “good faith” exception will swallow the

exclusionary rule. Indeed, our broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction. Today’s decision will doubtless accelerate this trend.

Any such change (which may already be underway) would affect not “an exceedingly small set of cases,” but a very large number of cases, potentially many thousands each year. And since the exclusionary rule is often the only sanction available for a Fourth Amendment violation, the Fourth Amendment would no longer protect ordinary Americans from “unreasonable searches and seizures.” It would become a watered-down Fourth Amendment, offering its protection against only those searches and seizures that are *egregiously* unreasonable.

In sum, I fear that the Court’s opinion will undermine the exclusionary rule.

For these reasons, with respect, I dissent.

* * *

For our next chapter, we will study who has “standing” to invoke the exclusionary rule, as well as exceptions the Court has established to limit the rule’s application.

THE EXCLUSIONARY RULE

Chapter 33

Exclusionary Rule: Standing and Exceptions

The Court has used broad language to describe the exclusionary rule. In *Weeks v. United States*, after describing police misconduct, the Court wrote, “If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.” In *Mapp v. Ohio*, the Court wrote, “We hold that all evidence obtained by searches and seizures in violation of the Constitution is ... inadmissible in a state court.”

It turns out, however, that the Court has not applied the exclusionary rule to “all evidence obtained ... in violation of the Constitution.” Instead, the Court has limited the availability of the remedy in multiple ways. In this chapter, we will consider who has “standing” to invoke the rule, as well as situations in which the Court has established exceptions to the rule’s applicability.

Who Can Invoke the Exclusionary Rule?

In a series of cases, the Court has considered who has the ability to use the exclusionary rule. It has been argued that any defendant should be able to exclude evidence obtained in violation of some person’s constitutional right. Rather than allow such broad access to the remedy of exclusion, the Court has required greater connection between the wrongful state action and the person invoking the rule. Although the ability to invoke the rule is often called “standing,” the Justices have occasionally objected to that term of art. Regardless of what word is used to describe the legal status at issue, the question is who can exclude evidence under the rule.

Supreme Court of the United States

Rakas v. Illinois

Decided Dec. 5, 1978 – [439 U.S. 128](#)

Mr. Justice REHNQUIST delivered the opinion of the Court.

Petitioners were convicted of armed robbery in the Circuit Court of Kankakee County, Ill., and their convictions were affirmed on appeal. At their trial, the prosecution offered into evidence a sawed-off rifle and rifle shells that had been seized by police during a search of an automobile in which petitioners had been passengers. Neither petitioner is the owner of the automobile and neither has ever asserted that he owned the rifle or shells seized. The Illinois Appellate Court held that petitioners lacked standing to object to the allegedly unlawful search and seizure and denied their motion to suppress the evidence. We granted certiorari in light of the obvious importance of the issues raised to the administration of criminal justice and now affirm.

I

Because we are not here concerned with the issue of probable cause, a brief description of the events leading to the search of the automobile will suffice. A police officer on a routine patrol received a radio call notifying him of a robbery of a clothing store in Bourbonnais, Ill., and describing the getaway car. Shortly thereafter, the officer spotted an automobile which he thought might be the getaway car. After following the car for some time and after the arrival of assistance, he and several other officers stopped the vehicle. The occupants of the automobile, petitioners and two female companions, were ordered out of the car and, after the occupants had left the car, two officers searched the interior of the vehicle. They discovered a box of rifle shells in the glove compartment, which had been locked, and a sawed-off rifle under the front passenger seat. After discovering the rifle and the shells, the officers took petitioners to the station and placed them under arrest.

Before trial petitioners moved to suppress the rifle and shells seized from the car on the ground that the search violated the Fourth and Fourteenth Amendments. They conceded that they did not own the automobile and were simply passengers; the owner of the car had been the driver of the vehicle at the time of the search. Nor did they assert that they owned the rifle or the shells seized. The prosecutor challenged petitioners' standing to object to the lawfulness of the search of the car because neither the car, the shells nor the rifle belonged to them. The trial court agreed that petitioners lacked standing and denied the motion to suppress the evidence. On appeal after petitioners' conviction, the Appellate Court of Illinois, Third Judicial District, affirmed the trial court's denial of petitioners' motion to suppress.

II

Petitioners first urge us to relax or broaden the rule of standing so that any criminal defendant at whom a search was "directed" would have standing to contest the legality of that search and object to the admission at trial of evidence obtained as a result of the search. Alternatively, petitioners argue that they have standing to object to the search because they were "legitimately on [the] premises" at the time of the search.

The concept of standing [in Fourth Amendment cases] focuses on whether the person seeking to challenge the legality of a search as a basis for suppressing evidence was himself the "victim" of the search or seizure. Adoption of the so-called "target" theory advanced by petitioners would in effect permit a defendant to assert that a violation of the Fourth Amendment rights of a third party entitled him to have evidence suppressed at his trial. [W]e are not at all sure that the determination of a motion to suppress is materially aided by labeling the inquiry as one of standing, rather than simply recognizing it as one involving the substantive question of whether or not the proponent of the motion to suppress has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge.

A

We decline to extend the rule of standing in Fourth Amendment cases in the manner suggested by petitioners. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a

third person's premises or property has not had any of his Fourth Amendment rights infringed. And since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections.

When we are urged to grant standing to a criminal defendant to assert a violation, not of his own constitutional rights but of someone else's, we cannot but give weight to practical difficulties. Conferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials.

Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected. Since our cases generally have held that one whose Fourth Amendment rights are violated may successfully suppress evidence obtained in the course of an illegal search and seizure, misgivings as to the benefit of enlarging the chapter of persons who may invoke that rule are properly considered when deciding whether to expand standing.

B

Had we accepted petitioners' request to allow persons other than those whose own Fourth Amendment rights were violated by a challenged search and seizure to suppress evidence obtained in the course of such police activity, it would be appropriate to retain [] use of standing in Fourth Amendment analysis. Under petitioners' target theory, a court could determine that a defendant had standing to invoke the exclusionary rule without having to inquire into the substantive question of whether the challenged search or seizure violated the Fourth Amendment rights of that particular defendant. However, having rejected petitioners' target theory, [] the question necessarily arises whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim. We can think of no decided cases of this Court that would have come out differently had we concluded, as we do now, that the type of standing requirement [] reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of "standing," will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same. But we think the better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing.

It should be emphasized that nothing we say here casts the least doubt on cases which recognize that, as a general proposition, the issue of standing involves two inquiries: first, whether the proponent of a particular legal right has alleged "injury in fact," and, second, whether the proponent is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties. But this Court's long history of insistence that Fourth Amendment rights are personal in nature has already answered many of these traditional standing inquiries, and we think that definition of those rights is more properly placed within the purview of substantive Fourth Amendment law than within that of standing.

Analyzed in these terms, the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect.

D

[P]etitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. And [] the fact that they were "legitimately on [the] premises" in the sense that they were in the car with the permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched. [H]ere petitioners' claim is one which would fail even in an analogous situation in a dwelling place, since they made no showing that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.

III

The Illinois courts were therefore correct in concluding that it was unnecessary to decide whether the search of the car might have violated the rights secured to someone else by the Fourth and Fourteenth Amendments to the United States Constitution. Since it did not violate any rights of these petitioners, their judgment of conviction is [a]ffirmed.

Notes, Comments, and Questions

In *Byrd v. United States*, [138 S. Ct. 1518](#) (2018), the Court addressed whether rental car drivers who are not on a rental agreement (for example, someone given the keys by the person who is authorized to drive) have standing to object to a search of the car. The Court distinguished *Rakas* by emphasizing the reasonable expectation of privacy test. In *Byrd*, the unauthorized driver was the only person in the car and had a reasonable expectation of privacy in the contents of the car sufficient to have standing.

In *Minnesota v. Olson*, [495 U.S. 91](#) (1990), the Court considered the "warrantless, nonconsensual entry into a house where respondent Robert Olson was an overnight guest." The question was whether the entry, along with Olson's subsequent arrest, violated Olson's Fourth Amendment rights. The Court decided yes and allowed Olson to exclude evidence found during the illegal search and seizure. Rejecting the state's argument that Olson had no reasonable expectation of privacy because the searched location was not his "home," the Court concluded "that Olson's status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable." The Court noted that one's expectation of privacy while staying as an overnight guest must equal, if not exceed, that enjoyed by a person using a telephone booth. *See Katz v. United States* (Chapter 2).

Several years later, the Court applied the rule of *Olson* to a very different sort of guest.

Supreme Court of the United States
Minnesota v. Wayne Thomas Carter

Decided Dec. 1, 1998 – [525 U.S. 83](#)

Chief Justice REHNQUIST delivered the opinion of the Court.

Respondents and the lessee of an apartment were sitting in one of its rooms, bagging cocaine. While so engaged they were observed by a police officer, who looked through a drawn window blind. The Supreme Court of Minnesota held that the officer's viewing was a search that violated respondents' Fourth Amendment rights. We hold that no such violation occurred.

James Thielen, a police officer in the Twin Cities' suburb of Eagan, Minnesota, went to an apartment building to investigate a tip from a confidential informant. The informant said that he had walked by the window of a ground-floor apartment and had seen people putting a white powder into bags. The officer looked in the same window through a gap in the closed blind and observed the bagging operation for several minutes. He then notified headquarters, which began preparing affidavits for a search warrant while he returned to the apartment building. When two men left the building in a previously identified Cadillac, the police stopped the car. Inside were respondents Carter and Johns. As the police opened the door of the car to let Johns out, they observed a black, zippered pouch and a handgun, later determined to be loaded, on the vehicle's floor. Carter and Johns were arrested, and a later police search of the vehicle the next day discovered pagers, a scale, and 47 grams of cocaine in plastic sandwich bags.

After seizing the car, the police returned to Apartment 103 and arrested the occupant, Kimberly Thompson, who is not a party to this appeal. A search of the apartment pursuant to a warrant revealed cocaine residue on the kitchen table and plastic baggies similar to those found in the Cadillac. Thielen identified Carter, Johns, and Thompson as the three people he had observed placing the powder into baggies. The police later learned that while Thompson was the lessee of the apartment, Carter and Johns lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine. Carter and Johns had never been to the apartment before and were only in the apartment for approximately 2 1/2 hours. In return for the use of the apartment, Carter and Johns had given Thompson one-eighth of an ounce of the cocaine.

Carter and Johns were charged with conspiracy to commit a controlled substance crime in the first degree and aiding and abetting in a controlled substance crime in the first degree. They moved to suppress all evidence obtained from the apartment and the Cadillac, as well as to suppress several postarrest incriminating statements they had made. They argued that Thielen's initial observation of their drug packaging activities was an unreasonable search in violation of the Fourth Amendment and that all evidence obtained as a result of this unreasonable search was inadmissible as fruit of the poisonous tree. After a trial, Carter and Johns were each convicted of both offenses. The Minnesota Court of Appeals held that respondent Carter did not have "standing" to object to Thielen's actions.

A divided Minnesota Supreme Court reversed, holding that respondents had "standing" to claim the protection of the Fourth Amendment because they had "a legitimate expectation of privacy in the invaded place." We granted certiorari and now reverse.

The Minnesota courts analyzed whether respondents had a legitimate expectation of privacy under the rubric of “standing” doctrine, an analysis that this Court expressly rejected 20 years ago in *Rakas*.

The text of the [Fourth] Amendment suggests that its protections extend only to people in “their” houses. But we have held that in some circumstances a person may have a legitimate expectation of privacy in the house of someone else.

In *Jones v. United States*, [362 U.S. 257](#) (1960), the defendant seeking to exclude evidence resulting from a search of an apartment had been given the use of the apartment by a friend. He had clothing in the apartment, had slept there “maybe a night,” and at the time was the sole occupant of the apartment. But while the holding of *Jones*—that a search of the apartment violated the defendant’s Fourth Amendment rights—is still valid, its statement that “anyone legitimately on the premises where a search occurs may challenge its legality” was expressly repudiated in *Rakas*. Thus, an overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not.

Respondents here were obviously not overnight guests, but were essentially present for a business transaction and were only in the home a matter of hours. There is no suggestion that they had a previous relationship with Thompson, or that there was any other purpose to their visit. While the apartment was a dwelling place for Thompson, it was for these respondents simply a place to do business.

[T]he purely commercial nature of the transaction engaged in here, the relatively short period of time on the premises, and the lack of any previous connection between respondents and the householder, all lead us to conclude that respondents’ situation is closer to that of one simply permitted on the premises. We therefore hold that any search which may have occurred did not violate their Fourth Amendment rights.

Because we conclude that respondents had no legitimate expectation of privacy in the apartment, we need not decide whether the police officer’s observation constituted a “search.” The judgments of the Supreme Court of Minnesota are accordingly reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

Would a guest who was present for dinner or an afternoon barbecue have standing? Why or why not? That individual would have more connection to the home than in *Carter* but less than *Minnesota v. Olson*.

In *Brendlin v. California*, [551 U.S. 249](#) (2007), the Court applied the holdings of *Olson* and *Carter* to the case of a passenger riding in a car stopped by police. Prior precedent made clear that a driver whose car is subjected to a traffic stop is “seized within the meaning of the Fourth Amendment” and could challenge the admissibility of evidence found during an unlawful stop. The question was whether a passenger in the same car could also exclude evidence. Quoting

language from *United States v. Mendenhall* (Chapter 19) stating that “a seizure occurs if ‘in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,’” the *Brendlin* Court found that a vehicle “stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver,” and it rejected “any notion that a [reasonable] passenger would feel free to leave, or to terminate the personal encounter any other way, without advance permission.”

The Court held that passengers could invoke the exclusionary rule with respect to evidence found during unlawful vehicle stops, noting that the opposite result would encourage bad police behavior. “The fact that evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passengers would be a powerful incentive to run the kind of ‘roving patrols’ that would still violate the driver’s Fourth Amendment right.”

Because *Brendlin* argued that his rights were violated by the unlawful *stop* of the car—as opposed to by the *search* of the car—his claim was not barred by the rule of *Rakas v. Illinois*.

Exceptions to the Exclusionary Rule

Even if a criminal defendant has standing to invoke the exclusionary rule, not all evidence found as a result of police violating the defendant’s constitutional rights will be excluded. The following cases build upon the limitations to the exclusionary rule described in the previous chapter. In *Murray v. United States*, the Court applies what is known as the “independent source doctrine.”

Supreme Court of the United States

Michael F. Murray v. United States

Decided June 27, 1988 – [487 U.S. 533](#)

Justice SCALIA delivered the opinion of the Court.

In *Segura v. United States*, [468 U.S. 796](#) (1984), we held that police officers’ illegal entry upon private premises did not require suppression of evidence subsequently discovered at those premises when executing a search warrant obtained on the basis of information wholly unconnected with the initial entry. In [this] case[] we are faced with the question whether, again assuming evidence obtained pursuant to an independently obtained search warrant, the portion of such evidence that had been observed in plain view at the time of a prior illegal entry must be suppressed.

I

[The case] arises out of the conviction of petitioner Michael F. Murray, petitioner James D. Carter, and others for conspiracy to possess and distribute illegal drugs. Insofar as relevant for our purposes, the facts are as follows: Based on information received from informants, federal law enforcement agents had been surveilling petitioner Murray and several of his co-conspirators. At about 1:45 p.m. on April 6, 1983, they observed Murray drive a truck and Carter drive a green camper, into a warehouse in South Boston. When the petitioners drove the vehicles out about 20 minutes later, the surveilling agents saw within the warehouse two individuals and

a tractor-trailer rig bearing a long, dark container. Murray and Carter later turned over the truck and camper to other drivers, who were in turn followed and ultimately arrested, and the vehicles lawfully seized. Both vehicles were found to contain marijuana.

After receiving this information, several of the agents converged on the South Boston warehouse and forced entry. They found the warehouse unoccupied, but observed in plain view numerous burlap-wrapped bales that were later found to contain marijuana. They left without disturbing the bales, kept the warehouse under surveillance, and did not reenter it until they had a search warrant. In applying for the warrant, the agents did not mention the prior entry, and did not rely on any observations made during that entry. When the warrant was issued—at 10:40 p.m., approximately eight hours after the initial entry—the agents immediately reentered the warehouse and seized 270 bales of marijuana and notebooks listing customers for whom the bales were destined.

Before trial, petitioners moved to suppress the evidence found in the warehouse. The District Court denied the motion, rejecting petitioners' arguments that the warrant was invalid because the agents did not inform the Magistrate about their prior warrantless entry, and that the warrant was tainted by that entry. The First Circuit affirmed, assuming for purposes of its decision that the first entry into the warehouse was unlawful. [This Court granted certiorari.]

II

The exclusionary rule prohibits introduction into evidence of tangible materials seized during an unlawful search and of testimony concerning knowledge acquired during an unlawful search. Beyond that, the exclusionary rule also prohibits the introduction of derivative evidence, both tangible and testimonial, that is the product of the primary evidence, or that is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes “so attenuated as to dissipate the taint.”

Almost simultaneously with our development of the exclusionary rule, in the first quarter of this century, we also announced what has come to be known as the “independent source” doctrine. That doctrine, which has been applied to evidence acquired not only through Fourth Amendment violations but also through Fifth and Sixth Amendment violations, has recently been described as follows:

“[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred. ... When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.”

The dispute here is over the scope of this doctrine. Petitioners contend that it applies only to evidence obtained for the first time during an independent lawful search. The Government argues that it applies also to evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality. We think the Government's view has better support in both precedent and policy.

Our cases have used the concept of “independent source” in a more general and a more specific sense. The more general sense identifies *all* evidence acquired in a fashion untainted by the illegal evidence-gathering activity. Thus, where an unlawful entry has given investigators knowledge of facts *x* and *y*, but fact *z* has been learned by other means, fact *z* can be said to be admissible because derived from an “independent source.”

The original use of the term, however, and its more important use for purposes of these cases, was more specific. It was originally applied in the exclusionary rule context, by Justice Holmes, with reference to that particular category of evidence acquired by an untainted search *which is identical to the evidence unlawfully acquired*—that is, in the example just given, to knowledge of facts *x* and *y* derived from an independent source:

“The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others.”

Petitioners’ asserted policy basis for excluding evidence which is initially discovered during an illegal search, but is subsequently acquired through an independent and lawful source, is that a contrary rule will remove all deterrence to, and indeed positively encourage, unlawful police searches. As petitioners see the incentives, law enforcement officers will routinely enter without a warrant to make sure that what they expect to be on the premises is in fact there. If it is not, they will have spared themselves the time and trouble of getting a warrant; if it is, they can get the warrant and use the evidence despite the unlawful entry. We see the incentives differently. An officer with probable cause sufficient to obtain a search warrant would be foolish to enter the premises first in an unlawful manner. By doing so, he would risk suppression of all evidence on the premises, both seen and unseen, since his action would add to the normal burden of convincing a magistrate that there is probable cause the much more onerous burden of convincing a trial court that no information gained from the illegal entry affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it. Nor would the officer *without* sufficient probable cause to obtain a search warrant have any added incentive to conduct an unlawful entry, since whatever he finds cannot be used to establish probable cause before a magistrate.

It is possible to read petitioners’ briefs as asserting the more narrow position that the “independent source” doctrine does apply to independent acquisition of evidence previously derived *indirectly* from the unlawful search, but does not apply to what they call “primary evidence,” that is, evidence acquired during the course of the search itself. In addition to finding no support in our precedent, this strange distinction would produce results bearing no relation to the policies of the exclusionary rule. It would mean, for example, that the government’s knowledge of the existence and condition of a dead body, knowledge lawfully acquired through independent sources, would have to be excluded if government agents had previously observed the body during an unlawful search of the defendant’s apartment; but not if they had observed a notation that the body was buried in a certain location, producing consequential discovery of the corpse.

III

To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the *same* position they would have occupied if no violation occurred, but in a *worse* one.

The ultimate question, therefore, is whether the search pursuant to warrant was in fact a genuinely independent source of the information and tangible evidence at issue here. This would not have been the case if the agents' decision to seek the warrant was prompted by what they had seen during the initial entry, or if information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant.

The District Court found that the agents did not reveal their warrantless entry to the Magistrate, and that they did not include in their application for a warrant any recitation of their observations in the warehouse. It did not, however, explicitly find that the agents would have sought a warrant if they had not earlier entered the warehouse. The Government concedes this in its brief. To be sure, the District Court did determine that the purpose of the warrantless entry was in part "to guard against the destruction of possibly critical evidence," and one could perhaps infer from this that the agents who made the entry already planned to obtain that "critical evidence" through a warrant-authorized search. That inference is not, however, clear enough to justify the conclusion that the District Court's findings amounted to a determination of independent source.

Accordingly, we vacate the judgment and remand these cases to the Court of Appeals with instructions that it remand to the District Court for determination whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described.

Justice MARSHALL, with whom Justice STEVENS and Justice O'CONNOR join, dissenting.

[The dissent found it implausible "that the subsequent search [of the warehouse] was, in fact, independent of the illegal search" and argued that the majority "makes the application of the independent source exception turn entirely on an evaluation of the officers' intent." The dissent continued, "It normally will be difficult for the trial court to verify, or the defendant to rebut, an assertion by officers that they always intended to obtain a warrant, regardless of the results of the illegal search." "[W]hen the very law enforcement officers who participate in an illegal search immediately thereafter obtain a warrant to search the same premises, I believe the evidence discovered during the initial illegal entry must be suppressed."]

Notes, Comments, and Questions

In *Nix v. Williams*, [467 U.S. 431](#) (1984), the Court considered once again the conviction of Robert Williams for the murder of 10-year-old Pamela Powers, who disappeared from a YMCA building in Des Moines, Iowa on Christmas Eve in 1968. The case returned to the Court because after the decision in *Brewer v. Williams* (Chapter 29), Iowa prosecutors retried Williams. In the second trial, prosecutors did not offer evidence of the statements Williams made during his car ride, the ones elicited by the “Christian Burial Speech.” They did, however, offer physical evidence found as a result of Williams’s statements, including the body of Powers.

Building on the independent source exception described in *Murray*, the *Nix* Court created what has become known as the “inevitable discovery” exception to the exclusionary rule. When considering whether to adopt the new exception—which had already been approved by several lower courts—the Supreme Court first reviewed the justification for the exclusionary rule:

“The core rationale consistently advanced by this Court for extending the exclusionary rule to evidence that is the fruit of unlawful police conduct has been that this admittedly drastic and socially costly course is needed to deter police from violations of constitutional and statutory protections. This Court has accepted the argument that the way to ensure such protections is to exclude evidence seized as a result of such violations notwithstanding the high social cost of letting persons obviously guilty go unpunished for their crimes. On this rationale, the prosecution is not to be put in a better position than it would have been in if no illegality had transpired.”

The Court then revisited the grounds supporting the independent source doctrine and applied them to the slightly different situation presented in *Nix*.

“The independent source doctrine teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.”

After Powers disappeared from the YMCA, police found some of her clothing near a rest stop in Grinnell, Iowa. Next, police “initiated a large-scale search. Two hundred volunteers divided into teams began the search 21 miles east of Grinnell, covering an area several miles to the north and south of Interstate 80. They moved westward from Poweshiek County, in which Grinnell was located, into Jasper County. Searchers were instructed to check all roads, abandoned farm buildings, ditches, culverts, and any other place in which the body of a small child could be hidden.” Before the volunteers found the body, Williams led police to the hiding spot.

The Court applied the new inevitable discovery rule as follows:

“On this record it is clear that the search parties were approaching the actual location of the body, and we are satisfied, along with three courts earlier, that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found.”

In dissent, Justices Brennan and Marshall did not object to the new doctrine in principle. They argued that for the inevitable discovery exception to apply, the prosecution should be required to prove by “clear and convincing evidence” that the requirements had been met. The majority held that “preponderance of the evidence” was sufficient.

Our next case, *Brown v. Illinois*, applies what is known as the “attenuation doctrine.” The concept is somewhat like that of proximate cause in tort law. Students who have forgotten that doctrine may wish to reread *Palsgraf v. Long Island R.R. Co.*, [162 N.E. 99](#) (N.Y. 1928).

In *Brown*, the Court relied heavily on *Wong Sun v. United States*, [371 U.S. 471](#) (1963), which explored the attenuation doctrine in detail. Students who find *Brown* confusing may wish to read *Wong Sun*, particularly the Court’s recitation of the facts. See 371 U.S. at 473-77.

To summarize briefly, *Wong Sun* involved police interrogation of four individuals: Hom Way; James Wah Toy (“Toy”) (who may or may not have been “Blackie Toy,” a person sought by police); Johny Yee (“Yee”); and Wong Sun (also known as “Sea Dog”). Hom Way was the initial suspect. He was caught with drugs and implicated “Blackie Toy.” Hom Way was not a party to the *Wong Sun* case and did not testify. Toy was the victim of an illegal search and illegal arrest. He made a statement to police upon arrest that implicated Johny Yee. After his arraignment and release, Toy made a subsequent statement at the police station. Police found heroin at Yee’s home, and he implicated Wong Sun. Wong Sun was the victim of an illegal arrest and made a subsequent statement at the police station, after his arraignment and release.

The Court addressed the potential exclusion of (1) Toy’s statement at home; (2) the drugs found at Yee’s house; (3) Toy’s statement at the police station; and (4) Wong Sun’s statement at the police station. With respect to Toy’s trial, it excluded (or avoided addressing the admissibility of) all the evidence. With respect to Wong Sun’s trial, however, the drugs found at Yee’s house were admissible; Wong Sun had no standing to object to the search of Yee’s home or the seizure of Yee’s drugs. The Court then considered Wong Sun’s statement at the police station. The Court held that the statement was admissible because of attenuation.

Supreme Court of the United States

Richard Brown v. Illinois

Decided June 26, 1975 – [422 U.S. 590](#)

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case lies at the crossroads of the Fourth and the Fifth Amendments. Petitioner was arrested without probable cause and without a warrant. He was given, in full, the warnings prescribed by *Miranda v. Arizona*. Thereafter, while in custody, he made two inculpatory statements. The

issue is whether evidence of those statements was properly admitted, or should have been excluded, in petitioner's subsequent trial for murder in state court. Expressed another way, the issue is whether the statements were to be excluded as the fruit of the illegal arrest, or were admissible because the giving of the *Miranda* warnings sufficiently attenuated the taint of the arrest.

I

As petitioner Richard Brown was climbing the last of the stairs leading to the rear entrance of his Chicago apartment in the early evening of May 13, 1968, he happened to glance at the window near the door. He saw, pointed at him through the window, a revolver held by a stranger who was inside the apartment. The man said: "Don't move, you are under arrest." Another man, also with a gun, came up behind Brown and repeated the statement that he was under arrest. It was about 7:45 p.m. The two men turned out to be Detectives William Nolan and William Lenz of the Chicago police force. It is not clear from the record exactly when they advised Brown of their identity, but it is not disputed that they broke into his apartment, searched it, and then arrested Brown, all without probable cause and without any warrant, when he arrived. They later testified that they made the arrest for the purpose of questioning Brown as part of their investigation of the murder of a man named Roger Corpus.

Corpus was murdered one week earlier, on May 6, with a .38-caliber revolver in his Chicago West Side second-floor apartment. Shortly thereafter, Detective Lenz obtained petitioners' name, among others, from Corpus' brother. Petitioner and the others were identified as acquaintances of the victim, not as suspects.

[The Court described how police initially entered Brown's home and arrested him.]

As both officers held him at gunpoint, the three entered the apartment. Brown was ordered to stand against the wall and was searched. No weapon was found. He was asked his name. When he denied being Richard Brown, Detective Lenz showed him the photograph, informed him that he was under arrest for the murder of Roger Corpus, handcuffed him, and escorted him to the squad car.

The two detectives took petitioner to the Maxwell Street police station. During the 20-minute drive Nolan again asked Brown, who then was sitting with him in the back seat of the car, whether his name was Richard Brown and whether he owned a 1966 Oldsmobile. Brown alternately evaded these questions or answered them falsely. Upon arrival at the station house Brown was placed in the [] interrogation room. The room was bare, except for a table and four chairs. He was left alone, apparently without handcuffs, for some minutes while the officers obtained the file on the Corpus homicide. They returned with the file, sat down at the table, one across from Brown and the other to his left, and spread the file on the table in front of him.

The officers warned Brown of his rights under *Miranda*. They then informed him that they knew of an incident that had occurred in a poolroom on May 5, when Brown, angry at having been cheated at dice, fired a shot from a revolver into the ceiling. Brown answered: "Oh, you know about that." Lenz informed him that a bullet had been obtained from the ceiling of the poolroom and had been taken to the crime laboratory to be compared with bullets taken from Corpus' body. Brown responded: "Oh, you know that, too." At this point—it was about 8:45 p.m.—Lenz asked Brown whether he wanted to talk about the Corpus homicide. Petitioner answered that he did.

For the next 20 to 25 minutes Brown answered questions put to him by Nolan, as Lenz typed.

This questioning produced a two-page statement in which Brown acknowledged that he and a man named Jimmy Claggett visited Corpus on the evening of May 5; that the three for some time sat drinking and smoking marihuana; that Claggett ordered him at gunpoint to bind Corpus' hands and feet with cord from the headphone of a stereo set; and that Claggett, using a .38-caliber revolver sold to him by Brown, shot Corpus three times through a pillow. The statement was signed by Brown.

About 9:30 p.m. the two detectives and Brown left the station house to look for Claggett in an area of Chicago Brown knew him to frequent. They made a tour of that area but did not locate their quarry. They then went to police headquarters where they endeavored, without success, to obtain a photograph of Claggett. They resumed their search—it was now about 11 p.m.—and they finally observed Claggett crossing at an intersection. Lenz and Nolan arrested him. All four, the two detectives and the two arrested men, returned to the Maxwell Street station about 12:15 a.m.

Brown was again placed in the interrogation room. He was given coffee and was left alone, for the most part, until 2 a.m. when Assistant State's Attorney Crilly arrived.

Crilly, too, informed Brown of his *Miranda* rights. After a half hour's conversation, a court reporter appeared. Once again the *Miranda* warnings were given: "I read him the card." Crilly told him that he "was sure he would be charged with murder." Brown gave a second statement, providing a factual account of the murder substantially in accord with his first statement, but containing factual inaccuracies with respect to his personal background. When the statement was completed, at about 3 a.m., Brown refused to sign it. An hour later he made a phone call to his mother. At 9:30 that morning, about 14 hours after his arrest, he was taken before a magistrate.

On June 20 Brown and Claggett were jointly indicted by a Cook County grand jury for Corpus' murder. Prior to trial, petitioner moved to suppress the two statements he had made. He alleged that his arrest and detention had been illegal and that the statements were taken from him in violation of his constitutional rights. After a hearing, the motion was denied.

The case proceeded to trial. The State introduced evidence of both statements. Detective Nolan testified as to the contents of the first but the writing itself was not placed in evidence. The second statement was introduced and was read to the jury in full.

The jury found petitioner guilty of murder. He was sentenced to imprisonment for not less than 15 years nor more than 30 years.

On appeal, the Supreme Court of Illinois affirmed the judgment of conviction. Because of our concern about the implication of our holding in *Wong Sun v. United States*, [371 U.S. 471](#) (1963), to the facts of Brown's case, we granted certiorari.

II

In *Wong Sun*, the Court pronounced the principles to be applied where the issue is whether statements and other evidence obtained after an illegal arrest or search should be excluded. In that case, federal agents elicited an oral statement from defendant Toy after forcing entry at 6 a.m. into his laundry, at the back of which he had his living quarters. The agents had followed

Toy down the hall to the bedroom and there had placed him under arrest. The Court of Appeals found that there was no probable cause for the arrest. This Court concluded that that finding was “amply justified by the facts clearly shown on this record.” Toy’s statement, which bore upon his participation in the sale of narcotics, led the agents to question another person, Johnny Yee, who actually possessed narcotics. Yee stated that heroin had been brought to him earlier by Toy and another Chinese known to him only as “Sea Dog.” Under questioning, Toy said that “Sea Dog” was Wong Sun. Toy led agents to a multifamily dwelling where, he said, Wong Sun lived. Gaining admittance to the building through a bell and buzzer, the agents climbed the stairs and entered the apartment. One went into the back room and brought Wong Sun out in handcuffs. After arraignment, Wong Sun was released on his own recognizance. Several days later, he returned voluntarily to give an unsigned confession.

This Court ruled that Toy’s declarations and the contraband taken from Yee were the fruits of the agents’ illegal action and should not have been admitted as evidence against Toy. It held that the statement did not result from “an intervening independent act of a free will,” and that it was not “sufficiently an act of free will to purge the primary taint of the unlawful invasion.” With respect to Wong Sun’s confession, however, the Court held that in the light of his lawful arraignment and release on his own recognizance, and of his return voluntarily several days later to make the statement, the connection between his unlawful arrest and the statement “had become so attenuated as to dissipate the taint.” The Court said:

“We need not hold that all evidence is ‘fruit of the poisonous tree’ simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is ‘whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.’”

The exclusionary rule thus was applied in *Wong Sun* primarily to protect Fourth Amendment rights. Protection of the Fifth Amendment right against self-incrimination was not the Court’s paramount concern there. To the extent that the question whether Toy’s statement was voluntary was considered, it was only to judge whether it “was sufficiently an act of free will to purge the primary taint of the unlawful invasion.”

The Court in *Wong Sun*, as is customary, emphasized that application of the exclusionary rule on Toy’s behalf protected Fourth Amendment guarantees in two respects: “in terms of deterring lawless conduct by federal officers,” and by “closing the doors of the federal courts to any use of evidence unconstitutionally obtained.” These considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court’s cases. “The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” But “[d]espite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons.”

III

The Illinois courts refrained from resolving the question, as apt here as it was in *Wong Sun*, whether Brown’s statements were obtained by exploitation of the illegality of his arrest. They assumed that the *Miranda* warnings, by themselves, assured that the statements (verbal acts, as

contrasted with physical evidence) were of sufficient free will as to purge the primary taint of the unlawful arrest. *Wong Sun*, of course, preceded *Miranda*.

This Court has described the *Miranda* warnings as a “prophylactic rule” and as a “procedural safeguard” employed to protect Fifth Amendment rights against “the compulsion inherent in custodial surroundings.” The function of the warnings relates to the Fifth Amendment’s guarantee against coerced self-incrimination, and the exclusion of a statement made in the absence of the warnings, it is said, serves to deter the taking of an incriminating statement without first informing the individual of his Fifth Amendment rights.

Although, almost 90 years ago, the Court observed that the Fifth Amendment is in “intimate relation” with the Fourth, the *Miranda* warnings thus far have not been regarded as a means either of remedying or deterring violations of Fourth Amendment rights. Frequently, as here, rights under the two Amendments may appear to coalesce since “the ‘unreasonable searches and seizures’ condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment.” The exclusionary rule, however, when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth. It is directed at all unlawful searches and seizures, and not merely those that happen to produce incriminating material or testimony as fruits. In short, exclusion of a confession made without *Miranda* warnings might be regarded as necessary to effectuate the Fifth Amendment, but it would not be sufficient fully to protect the Fourth. *Miranda* warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.

Thus, even if the statements in this case were found to be voluntary under the Fifth Amendment, the Fourth Amendment issue remains. In order for the causal chain between the illegal arrest and the statements made subsequent thereto to be broken, *Wong Sun* requires not merely that the statement meet the Fifth Amendment standard of voluntariness but that it be “sufficiently an act of free will to purge the primary taint.” *Wong Sun* thus mandates consideration of a statement’s admissibility in light of the distinct policies and interests of the Fourth Amendment.

If *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. Arrests made without warrant or without probable cause, for questioning or “investigation,” would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving *Miranda* warnings. Any incentive to avoid Fourth Amendment violations would be eviscerated by making the warnings, in effect, a “cure-all,” and the constitutional guarantee against unlawful searches and seizures could be said to be reduced to “a form of words.”

It is entirely possible, of course, as the State here argues, that persons arrested illegally frequently may decide to confess, as an act of free will unaffected by the initial illegality. But the *Miranda* warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession. They cannot assure in every case that the Fourth Amendment violation has not been unduly exploited.

While we therefore reject the *per se* rule which the Illinois courts appear to have accepted, we also decline to adopt any alternative *per se* or “but for” rule. The petitioner himself professes not to demand so much. The question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct are all relevant. The voluntariness of the statement is a threshold requirement. And the burden of showing admissibility rests, of course, on the prosecution.

IV

Although the Illinois courts failed to undertake the inquiry mandated by *Wong Sun* to evaluate the circumstances of this case in the light of the policy served by the exclusionary rule, the trial resulted in a record of amply sufficient detail and depth from which the determination may be made. We therefore decline the suggestion of the United States to remand the case for further factual findings. We conclude that the State failed to sustain the burden of showing that the evidence in question was admissible under *Wong Sun*.

Brown’s first statement was separated from his illegal arrest by less than two hours, and there was no intervening event of significance whatsoever. In its essentials, his situation is remarkably like that of James Wah Toy in *Wong Sun*. We could hold Brown’s first statement admissible only if we overrule *Wong Sun*. We decline to do so. And the second statement was clearly the result and the fruit of the first.

The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was “for investigation” or for “questioning.” The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which Brown’s arrest was affected gives the appearance of having been calculated to cause surprise, fright, and confusion.

We emphasize that our holding is a limited one. We decide only that the Illinois courts were in error in assuming that the *Miranda* warnings, by themselves, under *Wong Sun* always purge the taint of an illegal arrest.

The judgment of the Supreme Court of Illinois is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

* * *

In our next case, *Utah v. Strieff*, Justices in both the majority and in dissent both argued that *Brown v. Illinois* supported their preferred result.

Supreme Court of the United States

Utah v. Edward Joseph Strieff

Decided June 20, 2016 – [136 S. Ct. 2056](#)

Justice THOMAS delivered the opinion of the Court.

To enforce the Fourth Amendment’s prohibition against “unreasonable searches and seizures,” this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer’s discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest.

I

In December 2006, someone called the South Salt Lake City police’s drug-tip line to report “narcotics activity” at a particular residence. Narcotics detective Douglas Fackrell investigated the tip. Over the course of about a week, Officer Fackrell conducted intermittent surveillance of the home. He observed visitors who left a few minutes after arriving at the house. These visits were sufficiently frequent to raise his suspicion that the occupants were dealing drugs.

One of those visitors was respondent Edward Strieff. Officer Fackrell observed Strieff exit the house and walk toward a nearby convenience store. In the store’s parking lot, Officer Fackrell detained Strieff, identified himself, and asked Strieff what he was doing at the residence.

As part of the stop, Officer Fackrell requested Strieff’s identification, and Strieff produced his Utah identification card. Officer Fackrell relayed Strieff’s information to a police dispatcher, who reported that Strieff had an outstanding arrest warrant for a traffic violation. Officer Fackrell then arrested Strieff pursuant to that warrant. When Officer Fackrell searched Strieff incident to the arrest, he discovered a baggie of methamphetamine and drug paraphernalia.

The State charged Strieff with unlawful possession of methamphetamine and drug paraphernalia. Strieff moved to suppress the evidence, arguing that the evidence was inadmissible because it was derived from an unlawful investigatory stop. [T]he prosecutor conceded that Officer Fackrell lacked reasonable suspicion for the stop but argued that the evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband.

The trial court agreed with the State and admitted the evidence. The court found that the short time between the illegal stop and the search weighed in favor of suppressing the evidence, but that two countervailing considerations made it admissible. First, the court considered the presence of a valid arrest warrant to be an “extraordinary intervening circumstance.” Second, the court stressed the absence of flagrant misconduct by Officer Fackrell, who was conducting a legitimate investigation of a suspected drug house.

Strieff conditionally pleaded guilty to reduced charges of attempted possession of a controlled substance and possession of drug paraphernalia, but reserved his right to appeal the trial court’s denial of the suppression motion. The Utah Court of Appeals affirmed. The Utah Supreme Court reversed. We granted certiorari to resolve disagreement about how the attenuation doctrine applies where an unconstitutional detention leads to the discovery of a valid arrest warrant.

II

A

We have [] recognized several exceptions to the [exclusionary] rule. Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that “the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.”

B

Turning to the application of the attenuation doctrine to this case, we first address a threshold question: whether this doctrine applies at all [] where the intervening circumstance that the State relies on is the discovery of a valid, pre-existing, and untainted arrest warrant.

It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff’s person. The three factors articulated in *Brown v. Illinois* guide our analysis. First, we look to the “temporal proximity” between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider “the presence of intervening circumstances.” Third, and “particularly” significant, we examine “the purpose and flagrancy of the official misconduct.” In evaluating these factors, we assume without deciding (because the State conceded the point) that Officer Fackrell lacked reasonable suspicion to initially stop Strieff. And, because we ultimately conclude that the warrant breaks the causal chain, we also have no need to decide whether the warrant’s existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence.

The first factor, temporal proximity between the initially unlawful stop and the search, favors suppressing the evidence. Our precedents have declined to find that this factor favors attenuation unless “substantial time” elapses between an unlawful act and when the evidence is obtained. Here, however, Officer Fackrell discovered drug contraband on Strieff’s person only minutes after the illegal stop. [S]uch a short time interval counsels in favor of suppression.

In contrast, the second factor, the presence of intervening circumstances, strongly favors the State. [T]he warrant was valid, it predated Officer Fackrell’s investigation, and it was entirely unconnected with the stop. And once Officer Fackrell discovered the warrant, he had an obligation to arrest Strieff. “A warrant is a judicial mandate to an officer to conduct a search or make an arrest, and the officer has a sworn duty to carry out its provisions.” Officer Fackrell’s arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant. And once Officer Fackrell was authorized to arrest Strieff, it was undisputedly lawful to search Strieff as an incident of his arrest to protect Officer Fackrell’s safety.

Finally, the third factor, “the purpose and flagrancy of the official misconduct” also strongly favors the State. The exclusionary rule exists to deter police misconduct. The third factor of the attenuation doctrine reflects that rationale by favoring exclusion only when the police misconduct is most in need of deterrence—that is, when it is purposeful or flagrant.

Officer Fackrell was at most negligent. In stopping Strieff, Officer Fackrell made two good-faith mistakes. First, he had not observed what time Strieff entered the suspected drug house, so he did not know how long Strieff had been there. Officer Fackrell thus lacked a sufficient basis to conclude that Strieff was a short-term visitor who may have been consummating a drug transaction. Second, because he lacked confirmation that Strieff was a short-term visitor, Officer Fackrell should have asked Strieff whether he would speak with him, instead of demanding that Strieff do so. Officer Fackrell’s stated purpose was to “find out what was going on [in] the house.” Nothing prevented him from approaching Strieff simply to ask. But these errors in judgment hardly rise to a purposeful or flagrant violation of Strieff’s Fourth Amendment rights.

While Officer Fackrell’s decision to initiate the stop was mistaken, his conduct thereafter was lawful. The officer’s decision to run the warrant check was a “negligibly burdensome precautio[n]” for officer safety. And Officer Fackrell’s actual search of Strieff was a lawful search incident to arrest.

Moreover, there is no indication that this unlawful stop was part of any systemic or recurrent police misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house. Officer Fackrell saw Strieff leave a suspected drug house. And his suspicion about the house was based on an anonymous tip and his personal observations.

Applying these factors, we hold that the evidence discovered on Strieff’s person was admissible because the unlawful stop was sufficiently attenuated by the pre-existing arrest warrant. Although the illegal stop was close in time to Strieff’s arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff’s arrest is a critical intervening circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence

by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct.

We hold that the evidence Officer Fackrell seized as part of his search incident to arrest is admissible because his discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized from Strieff incident to arrest. The judgment of the Utah Supreme Court, accordingly, is reversed.

Justice SOTOMAYOR, with whom Justice GINSBURG joins as to Parts I, II, and III, dissenting.

The Court today holds that the discovery of a warrant for an unpaid parking ticket will forgive a police officer's violation of your Fourth Amendment rights. Do not be soothed by the opinion's technical language: This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant. Because the Fourth Amendment should prohibit, not permit, such misconduct, I dissent.

II

It is tempting in a case like this, where illegal conduct by an officer uncovers illegal conduct by a civilian, to forgive the officer. After all, his instincts, although unconstitutional, were correct. But a basic principle lies at the heart of the Fourth Amendment: Two wrongs don't make a right. When "lawless police conduct" uncovers evidence of lawless civilian conduct, this Court has long required later criminal trials to exclude the illegally obtained evidence. For example, if an officer breaks into a home and finds a forged check lying around, that check may not be used to prosecute the homeowner for bank fraud. We would describe the check as "fruit of the poisonous tree." Fruit that must be cast aside includes not only evidence directly found by an illegal search but also evidence "come at by exploitation of that illegality."

This "exclusionary rule" removes an incentive for officers to search us without proper justification. It also keeps courts from being "made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions." When courts admit only lawfully obtained evidence, they encourage "those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." But when courts admit illegally obtained evidence as well, they reward "manifest neglect if not an open defiance of the prohibitions of the Constitution."

[] *Wong Sun* explains why Strieff's drugs must be excluded. We reasoned that a Fourth Amendment violation may not color every investigation that follows but it certainly stains the actions of officers who exploit the infraction. We distinguished evidence obtained by innocuous means from evidence obtained by exploiting misconduct after considering a variety of factors: whether a long time passed, whether there were "intervening circumstances," and whether the purpose or flagrancy of the misconduct was "calculated" to procure the evidence. *Brown*.

These factors confirm that the officer in this case discovered Strieff's drugs by exploiting his own illegal conduct. The officer did not ask Strieff to volunteer his name only to find out, days later, that Strieff had a warrant against him. The officer illegally stopped Strieff and immediately ran a warrant check. The officer's discovery of a warrant was not some intervening surprise that he could not have anticipated. Utah lists over 180,000 misdemeanor warrants in its database, and at the time of the arrest, Salt Lake County had a "backlog of outstanding warrants" so large that it faced the "potential for civil liability." The officer's violation was also calculated to procure evidence. His sole reason for stopping Strieff, he acknowledged, was investigative—he wanted to discover whether drug activity was going on in the house Strieff had just exited.

The warrant check, in other words, was not an "intervening circumstance" separating the stop from the search for drugs. It was part and parcel of the officer's illegal "expedition for evidence in the hope that something might turn up." Under our precedents, because the officer found Strieff's drugs by exploiting his own constitutional violation, the drugs should be excluded.

III

The Court sees things differently. To the Court, the fact that a warrant gives an officer cause to arrest a person severs the connection between illegal policing and the resulting discovery of evidence. This is a remarkable proposition: The mere existence of a warrant not only gives an officer legal cause to arrest and search a person, it also forgives an officer who, with no knowledge of the warrant at all, unlawfully stops that person on a whim or hunch.

But the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better. Even officers prone to negligence can learn from courts that exclude illegally obtained evidence. Indeed, they are perhaps the most in need of the education, whether by the judge's opinion, the prosecutor's future guidance, or an updated manual on criminal procedure. If the officers are in doubt about what the law requires, exclusion gives them an "incentive to err on the side of constitutional behavior."

Most striking about the Court's opinion is its insistence that the event here was "isolated," with "no indication that this unlawful stop was part of any systemic or recurrent police misconduct." Respectfully, nothing about this case is isolated.

Outstanding warrants are surprisingly common. When a person with a traffic ticket misses a fine payment or court appearance, a court will issue a warrant. The States and Federal Government maintain databases with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. Even these sources may not track the "staggering" numbers of warrants, "drawers and drawers" full, that many cities issue for traffic violations and ordinance infractions. The county in this case has had a "backlog" of such warrants. The Department of Justice recently reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them.

Justice Department investigations across the country have illustrated how these astounding numbers of warrants can be used by police to stop people without cause. In a single year in New Orleans, officers "made nearly 60,000 arrests, of which about 20,000 were of people with outstanding traffic or misdemeanor warrants from neighboring parishes for such infractions as

unpaid tickets.” In the St. Louis metropolitan area, officers “routinely” stop people—on the street, at bus stops, or even in court—for no reason other than “an officer’s desire to check whether the subject had a municipal arrest warrant pending.” In Newark, New Jersey, officers stopped 52,235 pedestrians within a 4-year period and ran warrant checks on 39,308 of them. The Justice Department analyzed these warrant-checked stops and reported that “approximately 93% of the stops would have been considered unsupported by articulated reasonable suspicion.”

I do not doubt that most officers act in “good faith” and do not set out to break the law. That does not mean these stops are “isolated instance[s] of negligence,” however. Many are the product of institutionalized training procedures. The majority does not suggest what makes this case “isolated” from these and countless other examples. Nor does it offer guidance for how a defendant can prove that his arrest was the result of “widespread” misconduct. Surely it should not take a federal investigation of Salt Lake County before the Court would protect someone in Strieff’s position.

IV

Writing only for myself, and drawing on my professional experiences, I would add that unlawful “stops” have severe consequences much greater than the inconvenience suggested by the name. This Court has given officers an array of instruments to probe and examine you. When we condone officers’ use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens.

Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. That justification must provide specific reasons why the officer suspected you were breaking the law but it may factor in your ethnicity, where you live, what you were wearing, and how you behaved. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous.

The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your “consent” to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand “helpless, perhaps facing a wall with [your] hands raised.” If the officer thinks you might be dangerous, he may then “frisk” you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may “feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.”

The officer’s control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or “driving [your] pickup truck ... with [your] 3-year-old son and 5-year-old daughter ... without [your] seatbelt fastened.” At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to “shower with a delousing agent” while you “lift [your] tongue, hold out [your] arms, turn

around, and lift [your] genitals.” Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the “civil death” of discrimination by employers, landlords, and whoever else conducts a background check. And, of course, if you fail to pay bail or appear for court, a judge will issue a warrant to render you “arrestable on sight” in the future.

This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification. As the Justice Department notes, many innocent people are subjected to the humiliations of these unconstitutional searches. The white defendant in this case shows that anyone’s dignity can be violated in this manner. But it is no secret that people of color are disproportionate victims of this type of scrutiny. For generations, black and brown parents have given their children “the talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them.

By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged.

We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

I dissent.

* * *

In our next chapter, we will review how the Court has applied the exclusionary rule to evidence obtained as a result of *Miranda* Rule violations.

THE EXCLUSIONARY RULE

Chapter 34

Exclusionary Rule: Application to the *Miranda* Rule

The *Miranda* Rule has a somewhat unusual status in criminal procedure law because although the Court created the rule to enforce the Self-Incrimination Clause of the Fifth Amendment, the Justices have not announced consistent views on whether violations of *Miranda* are—in and of themselves—violations of the Constitution. In *Miranda*, the Court held that statements obtained during custodial interrogation in violation of the *Miranda* Rule would be presumed involuntary. But the Court has not always treated such statements in the same way as confessions that are truly involuntary. (For example, involuntary statements may not be used for impeachment.) In this chapter, we review how the Court has applied the exclusionary rule to the *Miranda* doctrine.

Our first case concerns the status of testimony given by a witness whom police discovered as a result of a *Miranda* violation.

Supreme Court of the United States

Michigan v. Thomas W. Tucker

Decided June 10, 1974 – [417 U.S. 433](#)

Mr. Justice REHNQUIST delivered the opinion of the Court.

This case presents the question whether the testimony of a witness in respondent's state court trial for rape must be excluded simply because police had learned the identity of the witness by questioning respondent at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent.

I

On the morning of April 19, 1966, a 43-year-old woman in Pontiac, Michigan was found in her home by a friend and coworker, Luther White, in serious condition. At the time she was found the woman was tied, gagged, and partially disrobed, and had been both raped and severely beaten. She was unable to tell White anything about her assault at that time and still remains unable to recollect what happened.

While White was attempting to get medical help for the victim and to call for the police, he observed a dog inside the house. This apparently attracted White's attention for he knew that the woman did not own a dog herself. Later, when talking with police officers, White observed the dog a second time, and police followed the dog to respondent's house. Neighbors further connected the dog with respondent.

The police then arrested respondent and brought him to the police station for questioning. Prior to the actual interrogation the police asked respondent whether he knew for what crime he had been arrested, whether he wanted an attorney, and whether he understood his constitutional rights. Respondent replied that he did understand the crime for which he was arrested, that he

did not want an attorney, and that he understood his rights. The police further advised him that any statements he might make could be used against him at a later date in court. The police, however, did not advise respondent that he would be furnished counsel free of charge if he could not pay for such services himself.

The police then questioned respondent about his activities on the night of the rape and assault. Respondent replied that during the general time period at issue he had first been with one Robert Henderson and then later at home, alone, asleep. The police sought to confirm this story by contacting Henderson, but Henderson's story served to discredit rather than to bolster respondent's account. Henderson acknowledged that respondent had been with him on the night of the crime but said that he had left at a relatively early time. Furthermore, Henderson told police that he saw respondent the following day and asked him at that time about scratches on his face—"asked him if he got hold of a wild one or something." Respondent answered: "[S]omething like that." Then, Henderson said, he asked respondent "who it was," and respondent said: "[S]ome woman lived the next block over," adding: "She is a widow woman" or words to that effect.

Prior to trial respondent's appointed counsel made a motion to exclude Henderson's expected testimony because respondent had revealed Henderson's identity without having received full *Miranda* warnings. Although respondent's own statements taken during interrogation were excluded, the trial judge denied the motion to exclude Henderson's testimony. Henderson therefore testified at trial, and respondent was convicted of rape and sentenced to 20 to 40 years' imprisonment. His conviction was affirmed by both the Michigan Court of Appeals and the Michigan Supreme Court.

Respondent then sought habeas corpus relief in Federal District Court. The court [] granted respondent's petition for a writ of habeas corpus unless petitioner retried respondent within 90 days. The Court of Appeals for the Sixth Circuit affirmed. We granted certiorari and now reverse.

II

Although respondent's sole complaint is that the police failed to advise him that he would be given free counsel if unable to afford counsel himself, he did not, and does not now, base his arguments for relief on a right to counsel under the Sixth and Fourteenth Amendments. Nor was the right to counsel, as such, considered to be persuasive by either federal court below.

Respondent's argument, and the opinions of the District Court and Court of Appeals, instead rely upon the Fifth Amendment right against compulsory self-incrimination and the safeguards designed in *Miranda* to secure that right. In brief, the position urged upon this Court is that proper regard for the privilege against compulsory self-incrimination requires, with limited exceptions not applicable here, that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent criminal trial. For purposes of analysis in this case we believe that the question thus presented is best examined in two separate parts. We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right. We will then consider whether the evidence derived from this interrogation must be excluded.

III

[The Court determined “that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*.”]

IV

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policeman investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

We have recently said, in a search-and-seizure context, that the exclusionary rule’s “prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.” “The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” In a proper case this rationale would seem applicable to the Fifth Amendment context as well.

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

We consider it significant to our decision in this case that the officers’ failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*. Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. For at the time respondent was questioned these police officers were guided, quite rightly, by the [pre-*Miranda*] principles, particularly focusing on the suspect’s opportunity to have retained counsel with him during the interrogation if he chose to do so. Thus, the police asked respondent if he wanted counsel, and he answered that he did not. The statements actually made by respondent to the police, as we have observed, were excluded at trial. Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule also has been asserted: protection of the courts from reliance on untrustworthy evidence. Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be compelled to give evidence against himself. And cases involving statements often depict severe pressures which may override a particular suspect’s insistence on innocence.

But those situations are a far cry from that presented here. The pressures on respondent to accuse himself were hardly comparable even with the least prejudicial of those pressures which have been dealt with in our cases. More important, the respondent did not accuse himself. The evidence which the prosecution successfully sought to introduce was not a confession of guilt by respondent, or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressures. There is plainly no reason to believe that Henderson's testimony is untrustworthy simply because respondent was not advised of his right to appointed counsel. Henderson was both available at trial and subject to cross-examination by respondent's counsel, and counsel fully used this opportunity, suggesting in the course of his cross-examination that Henderson's character was less than exemplary and that he had been offered incentives by the police to testify against respondent. Thus the reliability of his testimony was subject to the normal testing process of an adversary trial.

In summary, we do not think that any single reason supporting exclusion of this witness' testimony, or all of them together, are very persuasive. By contrast, we find the arguments in favor of admitting the testimony quite strong. For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also "must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants." These interests may be outweighed by the need to provide an effective sanction to a constitutional right, but they must in any event be valued. Here respondent's own statement, which might have helped the prosecution show respondent's guilty conscience at trial, had already been excised from the prosecution's case. To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent.

Reversed.

Notes, Comments, and Questions

In *Tucker*, the Court declined to suppress evidence in part because officers acted in good faith. "Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." This language is similar to the Court's words in *United States v. Leon*, [468 U.S. 897](#) (1984), which concerned "objectively reasonable reliance on a subsequently invalidated search warrant." The Court held that evidence found during execution of a search warrant issued by a neutral magistrate should not be excluded if a court later found that there was insufficient evidence to satisfy the probable cause requirement in the Warrant Clause—unless the officer had "no reasonable grounds for believing that the warrant was properly issued." In other words, the officer would not be punished for reasonable reliance on the magistrate's probable cause finding, even if the finding was later overturned. The "good faith exception" to exclusion of evidence under the Fourth Amendment was expanded in cases such as *Herring v. United States* (Chapter 32) and *Davis v. United States* (Chapter 32).

The *Tucker* Court also justified its result in part on timing; the interrogation at issue occurred before *Miranda* was decided, making the police behavior less blameworthy. Students should note that the holding of *Tucker*—that a witness identified during an interrogation conducted in violation of *Miranda* may testify against the defendant at trial—remains good law for interrogations conducted well after the Court decided *Miranda*.

Unlike *Tucker*, which concerned testimony by someone other than the defendant, our next case concerns statements police obtained from a defendant after a *Miranda* violation. The question was whether an initial *Miranda* violation necessarily taints, and renders inadmissible, statements obtained during a subsequent post-warning interrogation.

Supreme Court of the United States

Oregon v. Michael James Elstad

Decided March 4, 1985 — [470 U.S. 298](#)

Justice O’CONNOR delivered the opinion of the Court.

This case requires us to decide whether an initial failure of law enforcement officers to administer the warnings required by *Miranda v. Arizona*, without more, “taints” subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights. Respondent, Michael James Elstad, was convicted of burglary by an Oregon trial court. The Oregon Court of Appeals reversed, holding that respondent’s signed confession, although voluntary, was rendered inadmissible by a prior remark made in response to questioning without benefit of *Miranda* warnings. We granted certiorari and we now reverse.

I

In December 1981, the home of Mr. and Mrs. Gilbert Gross, in the town of Salem, Polk County, Ore., was burglarized. Missing were art objects and furnishings valued at \$150,000. A witness to the burglary contacted the Polk County Sheriff’s office, implicating respondent Michael Elstad, an 18-year-old neighbor and friend of the Grosses’ teenage son. Thereupon, Officers Burke and McAllister went to the home of respondent Elstad, with a warrant for his arrest. Elstad’s mother answered the door. She led the officers to her son’s room where he lay on his bed, clad in shorts and listening to his stereo. The officers asked him to get dressed and to accompany them into the living room. Officer McAllister asked respondent’s mother to step into the kitchen, where he explained that they had a warrant for her son’s arrest for the burglary of a neighbor’s residence. Officer Burke remained with Elstad in the living room. He later testified:

“I sat down with Mr. Elstad and I asked him if he was aware of why Detective McAllister and myself were there to talk with him. He stated no, he had no idea why we were there. I then asked him if he knew a person by the name of Gross, and he said yes, he did, and also added that he heard that there was a robbery at the Gross house. And at that point I told Mr. Elstad that I felt he was involved in that, and he looked at me and stated, ‘Yes, I was there.’”

The officers then escorted Elstad to the back of the patrol car. As they were about to leave for the Polk County Sheriff's office, Elstad's father arrived home and came to the rear of the patrol car. The officers advised him that his son was a suspect in the burglary. Officer Burke testified that Mr. Elstad became quite agitated, opened the rear door of the car and admonished his son: "I told you that you were going to get into trouble. You wouldn't listen to me. You never learn."

Elstad was transported to the Sheriff's headquarters and approximately one hour later, Officers Burke and McAllister joined him in McAllister's office. McAllister then advised respondent for the first time of his *Miranda* rights, reading from a standard card. Respondent indicated he understood his rights, and, having these rights in mind, wished to speak with the officers. Elstad gave a full statement, explaining that he had known that the Gross family was out of town and had been paid to lead several acquaintances to the Gross residence and show them how to gain entry through a defective sliding glass door. The statement was typed, reviewed by respondent, read back to him for correction, initialed and signed by Elstad and both officers. As an afterthought, Elstad added and initialed the sentence, "After leaving the house Robby & I went back to [the] van & Robby handed me a small bag of grass." Respondent concedes that the officers made no threats or promises either at his residence or at the Sheriff's office.

Respondent was charged with first-degree burglary. Respondent moved at once to suppress his oral statement and signed confession. He contended that the statement he made in response to questioning at his house "let the cat out of the bag," citing and tainted the subsequent confession as "fruit of the poisonous tree." The judge ruled that the statement, "I was there," had to be excluded because the defendant had not been advised of his *Miranda* rights. The written confession taken after Elstad's arrival at the Sheriff's office, however, was admitted in evidence. The court found:

"[H]is written statement was given freely, voluntarily and knowingly by the defendant after he had waived his right to remain silent and have counsel present which waiver was evidenced by the card which the defendant had signed. [It] was not tainted in any way by the previous brief statement between the defendant and the Sheriff's Deputies that had arrested him."

Elstad was found guilty of burglary in the first degree. He received a 5-year sentence and was ordered to pay \$18,000 in restitution.

Following his conviction, respondent appealed to the Oregon Court of Appeals. The Court of Appeals reversed respondent's conviction. The State of Oregon petitioned the Oregon Supreme Court for review, and review was declined. This Court granted certiorari to consider the question whether the Self-Incrimination Clause of the Fifth Amendment requires the suppression of a confession, made after proper *Miranda* warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the defendant.

II

The arguments advanced in favor of suppression of respondent's written confession rely heavily on metaphor. One metaphor, familiar from the Fourth Amendment context, would require that respondent's confession, regardless of its integrity, voluntariness, and probative value, be suppressed as the "tainted fruit of the poisonous tree" of the *Miranda* violation. A second

metaphor questions whether a confession can be truly voluntary once the “cat is out of the bag.” Taken out of context, each of these metaphors can be misleading. They should not be used to obscure fundamental differences between the role of the Fourth Amendment exclusionary rule and the function of *Miranda* in guarding against the prosecutorial use of compelled statements as prohibited by the Fifth Amendment. The Oregon court assumed and respondent here contends that a failure to administer *Miranda* warnings necessarily breeds the same consequences as police infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as “fruit of the poisonous tree.” We believe this view misconstrues the nature of the protections afforded by *Miranda* warnings and therefore misreads the consequences of police failure to supply them.

A

Prior to *Miranda*, the admissibility of an accused’s in-custody statements was judged solely by whether they were “voluntary” within the meaning of the Due Process Clause. If a suspect’s statements had been obtained by “techniques and methods offensive to due process,” or under circumstances in which the suspect clearly had no opportunity to exercise “a free and unconstrained will,” the statements would not be admitted. The Court in *Miranda* required suppression of many statements that would have been admissible under traditional due process analysis by presuming that statements made while in custody and without adequate warnings were protected by the Fifth Amendment. The Fifth Amendment, of course, is not concerned with nontestimonial evidence. Nor is it concerned with moral and psychological pressures to confess emanating from sources other than official coercion. Voluntary statements “remain a proper element in law enforcement.” “Indeed, far from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable. ... Absent some officially coerced self-accusation, the Fifth Amendment privilege is not violated by even the most damning admissions.”

Respondent’s contention that his confession was tainted by the earlier failure of the police to provide *Miranda* warnings and must be excluded as “fruit of the poisonous tree” assumes the existence of a constitutional violation. But [] a procedural *Miranda* violation differs in significant respects from violations of the Fourth Amendment, which have traditionally mandated a broad application of the “fruits” doctrine. The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits. “The exclusionary rule, ... when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth.” Where a Fourth Amendment violation “taints” the confession, a finding of voluntariness for the purposes of the Fifth Amendment is merely a threshold requirement in determining whether the confession may be admitted in evidence. Beyond this, the prosecution must show a sufficient break in events to undermine the inference that the confession was caused by the Fourth Amendment violation.

The *Miranda* exclusionary rule, however, 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. The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*.

Thus, in the individual case, *Miranda*'s preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm.

But the *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted. Despite the fact that patently *voluntary* statements taken in violation of *Miranda* must be excluded from the prosecution's case, the presumption of coercion does not bar their use for impeachment purposes on cross-examination. Where an unwarned statement is preserved for use in situations that fall outside the sweep of the *Miranda* presumption, "the primary criterion of admissibility [remains] the 'old' due process voluntariness test."

We believe that this reasoning applies with equal force when the alleged "fruit" of a noncoercive *Miranda* violation is neither a witness nor an article of evidence but the accused's own voluntary testimony. [T]he absence of any coercion or improper tactics undercuts the twin rationales—trustworthiness and deterrence—for a broader rule. Once warned, the suspect is free to exercise his own volition in deciding whether or not to make a statement to the authorities. The Court has often noted: "[A] living witness is not to be mechanically equated with the proffer of inanimate evidentiary objects illegally seized. ... [T]he living witness is an individual human personality whose attributes of will, perception, memory and *volition* interact to determine what testimony he will give."

Because *Miranda* warnings may inhibit persons from giving information, this Court has determined that they need be administered only after the person is taken into "custody" or his freedom has otherwise been significantly restrained. Unfortunately, the task of defining "custody" is a slippery one, and "policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.

B

The Oregon court, however, believed that the unwarned remark compromised the voluntariness of respondent's later confession. It was the court's view that the prior *answer* and not the unwarned questioning impaired respondent's ability to give a valid waiver and that only lapse of time and change of place could dissipate what it termed the "coercive impact" of the inadmissible statement. The Oregon court [] identified a subtle form of lingering compulsion, the psychological impact of the suspect's conviction that he has let the cat out of the bag and, in so doing, has sealed his own fate. But 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 either his warned or unwarned confessions.

This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver. The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. This immunity comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the individual's interest in not being *compelled* to testify against himself. When neither the initial nor the subsequent admission is coerced, little justification exists for permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder.

There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case. Certainly, in respondent's case, the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best. It is difficult to tell with certainty what motivates a suspect to speak. A suspect's confession may be traced to factors as disparate as "a prearrest event such as a visit with a minister" or an intervening event such as the exchange of words respondent had with his father. We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

III

Though belated, the reading of respondent's rights was undeniably complete. McAllister testified that he read the *Miranda* warnings aloud from a printed card and recorded Elstad's responses. There is no question that respondent knowingly and voluntarily waived his right to remain silent before he described his participation in the burglary. It is also beyond dispute that respondent's earlier remark was voluntary, within the meaning of the Fifth Amendment. Neither the environment nor the manner of either "interrogation" was coercive. The initial conversation took place at midday, in the living room area of respondent's own home, with his mother in the kitchen area, a few steps away. Although in retrospect the officers testified that respondent was then in custody, at the time he made his statement he had not been informed that he was under arrest. The arresting officers' testimony indicates that the brief stop in the living room before proceeding to the station house was not to interrogate the suspect but to notify his mother of the reason for his arrest.

The State has conceded the issue of custody and thus we must assume that Burke breached *Miranda* procedures in failing to administer *Miranda* warnings before initiating the discussion in the living room. This breach may have been the result of confusion as to whether the brief exchange qualified as "custodial interrogation" or it may simply have reflected Burke's reluctance to initiate an alarming police procedure before McAllister had spoken with respondent's mother. Whatever the reason for Burke's oversight, the incident had none of the

earmarks of coercion. Nor did the officers exploit the unwarned admission to pressure respondent into waiving his right to remain silent.

This Court has never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness. If the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule precludes use of that testimony on retrial. "Having 'released the spring' by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony." But the Court has refused to find that a defendant who confesses, after being falsely told that his codefendant has turned State's evidence, does so involuntarily. The Court has also rejected the argument that a defendant's ignorance that a prior coerced confession could not be admitted in evidence compromised the voluntariness of his guilty plea. Thus we have not held that the *sine qua non* for a knowing and voluntary waiver of the right to remain silent is a full and complete appreciation of all of the consequences flowing from the nature and the quality of the evidence in the case.

IV

When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the State's case in chief. The Court has carefully adhered to this principle, permitting a narrow exception only where pressing public safety concerns demanded. The Court today in no way retreats from the bright-line rule of *Miranda*. We do not imply that good faith excuses a failure to administer *Miranda* warnings; nor do we condone inherently coercive police tactics or methods offensive to due process that render the initial admission involuntary and undermine the suspect's will to invoke his rights once they are read to him. A handful of courts have, however, applied our precedents relating to confessions obtained under coercive circumstances to situations involving wholly voluntary admissions, requiring a passage of time or break in events before a second, fully warned statement can be deemed voluntary. Far from establishing a rigid rule, we direct courts to avoid one; there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary. The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements. We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

The judgment of the Court of Appeals of Oregon is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice BRENNAN, with whom Justice MARSHALL joins, dissenting.

Even while purporting to reaffirm [] constitutional guarantees, the Court has engaged of late in a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure. Today's decision not only extends this effort a further step, but

delivers a potentially crippling blow to *Miranda* and the ability of courts to safeguard the rights of persons accused of crime. For at least with respect to successive confessions, the Court today appears to strip remedies for *Miranda* violations of the “fruit of the poisonous tree” doctrine prohibiting the use of evidence presumptively derived from official illegality.

Two major premises undergird the Court’s decision. The Court rejects as nothing more than “speculative” the long-recognized presumption that an illegally extracted confession causes the accused to confess again out of the mistaken belief that he already has sealed his fate, and it condemns as “extravagant” the requirement that the prosecution affirmatively rebut the presumption before the subsequent confession may be admitted. The Court instead adopts a new rule that, so long as the accused is given the usual *Miranda* warnings before further interrogation, the taint of a previous confession obtained in violation of *Miranda* “ordinarily” must be viewed as *automatically* dissipated.

The Court’s decision says much about the way the Court currently goes about implementing its agenda. In imposing its new rule, for example, the Court mischaracterizes our precedents, obfuscates the central issues, and altogether ignores the practical realities of custodial interrogation that have led nearly every lower court to reject its simplistic reasoning. Moreover, the Court adopts startling and unprecedented methods of construing constitutional guarantees. Finally the Court reaches out once again to address issues not before us. For example, although the State of Oregon has conceded that the arresting officers broke the law in this case, the Court goes out of its way to suggest that they may have been objectively justified in doing so.

Today’s decision, in short, threatens disastrous consequences far beyond the outcome in this case.

The Court today [adopts] a rule that “the psychological impact of *voluntary* disclosure of a guilty secret” neither “qualifies as state compulsion” nor “compromises the voluntariness” of subsequent confessions. So long as a suspect receives the usual *Miranda* warnings before further interrogation, the Court reasons, the fact that he “is free to exercise his own volition in deciding whether or not to make” further confessions “ordinarily” is a sufficient “cure” and serves to break any causal connection between the illegal confession and subsequent statements.

Our precedents did not develop in a vacuum. They reflect an understanding of the realities of police interrogation and the everyday experience of lower courts. Expert interrogators, far from dismissing a first admission or confession as creating merely a “speculative and attenuated” disadvantage for a suspect, understand that such revelations frequently lead directly to a full confession. Standard interrogation manuals advise that “[t]he securing of the first admission is the biggest stumbling block....” If this first admission can be obtained, “there is every reason to expect that the first admission will lead to others, and eventually to the full confession.”

Interrogators describe the point of the first admission as the “breakthrough” and the “beachhead,” which once obtained will give them enormous “tactical advantages.” Thus “[t]he securing of incriminating admissions might well be considered as the beginning of the final stages in crumbling the defenses of the suspect,” and the process of obtaining such admissions is described as “the spadework required to motivate the subject into making the full confession.”

The practical experience of state and federal courts confirms the experts' understanding. From this experience, lower courts have concluded that a first confession obtained without proper *Miranda* warnings, far from creating merely some "speculative and attenuated" disadvantage for the accused, frequently enables the authorities to obtain subsequent confessions on a "silver platter."

One police practice that courts have frequently encountered involves the withholding of *Miranda* warnings until the end of an interrogation session. Specifically, the police escort a suspect into a room, sit him down and, without explaining his Fifth Amendment rights or obtaining a knowing and voluntary waiver of those rights, interrogate him about his suspected criminal activity. If the police obtain a confession, it is then typed up, the police hand the suspect a pen for his signature, and—just before he signs—the police advise him of his *Miranda* rights and ask him to proceed. Alternatively, the police may call a stenographer in after they have obtained the confession, advise the suspect for the first time of his *Miranda* rights, and ask him to repeat what he has just told them. In such circumstances, the process of giving *Miranda* warnings and obtaining the final confession is "merely a formalizing, a setting down almost as a scrivener does, [of] what ha[s] already taken [place]." In such situations, where "it was all over except for reading aloud and explaining the written waiver of the *Miranda* safeguards," courts have time and again concluded that "[t]he giving of the *Miranda* warnings before reducing the product of the day's work to written form could not undo what had been done or make legal what was illegal."

For all practical purposes, the prewarning and post-warning questioning are often but stages of one overall interrogation. Whether or not the authorities explicitly confront the suspect with his earlier illegal admissions makes no significant difference, of course, because the suspect knows that the authorities know of his earlier statements and most frequently will believe that those statements already have sealed his fate.

I would have thought that the Court, instead of dismissing the "cat out of the bag" presumption out of hand, would have accounted for these practical realities. Expert interrogators and experienced lower-court judges will be startled, to say the least, to learn that the connection between multiple confessions is "speculative" and that a subsequent rendition of *Miranda* warnings "ordinarily" enables the accused in these circumstances to exercise his "free will" and to make "a rational and intelligent choice whether to waive or invoke his rights."

Not content merely to ignore the practical realities of police interrogation and the likely effects of its abolition of the derivative-evidence presumption, the Court goes on to assert that nothing in the Fifth Amendment or the general judicial policy of deterring illegal police conduct "ordinarily" requires the suppression of evidence derived proximately from a confession obtained in violation of *Miranda*. The Court does not limit its analysis to successive confessions, but recurrently refers generally to the "fruits" of the illegal confession. Thus the potential impact of the Court's reasoning might extend far beyond the "cat out of the bag" context to include the discovery of physical evidence and other derivative fruits of *Miranda* violations as well.

I dissent.

Justice STEVENS, dissenting.

The desire to achieve a just result in this particular case has produced an opinion that is somewhat opaque and internally inconsistent.

For me, the most disturbing aspect of the Court's opinion is its somewhat opaque characterization of the police misconduct in this case. The Court appears ambivalent on the question whether there was any constitutional violation. This ambivalence is either disingenuous or completely lawless. This Court's power to require state courts to exclude probative self-incriminatory statements rests entirely on the premise that the use of such evidence violates the Federal Constitution. The same constitutional analysis applies whether the custodial interrogation is actually coercive or irrebuttably presumed to be coercive. If the Court does not accept that premise, it must regard the holding in the *Miranda* case itself, as well as all of the federal jurisprudence that has evolved from that decision, as nothing more than an illegitimate exercise of raw judicial power. If the Court accepts the proposition that respondent's self-incriminatory statement was inadmissible, it must also acknowledge that the Federal Constitution protected him from custodial police interrogation without first being advised of his right to remain silent.

The source of respondent's constitutional protection is the Fifth Amendment's privilege against compelled self-incrimination that is secured against state invasion by the Due Process Clause of the Fourteenth Amendment. Like many other provisions of the Bill of Rights, that provision is merely a procedural safeguard. It is, however, the specific provision that protects all citizens from the kind of custodial interrogation that was once employed by the Star Chamber, by "the Germans of the 1930's and early 1940's," and by some of our own police departments only a few decades ago. Custodial interrogation that violates that provision of the Bill of Rights is a classic example of a violation of a constitutional right.

I respectfully dissent.

Notes, Comments, and Questions

The Court in *Elstad* rejects the "cat out of the bag" theory. It finds three factors persuasive:

- 1) The police behavior was not especially bad or willful.
- 2) The non-*Mirandized* confession was voluntary, not the product of compulsion.
- 3) There was significant attenuation between the two interrogations (not just the warnings given at the second interrogation, but also a trip from home to the police station).

Contrast these factors with the dissent's discussion of the psychological effect of the "cat out of the bag" theory. Which do you find more persuasive? After the Court decided *Elstad*, police departments began conducting intentionally the sort of two-stage interrogation that occurred inadvertently in *Elstad*. That is, as described in Justice's Brennan's *Elstad* dissent, officers would interrogate a suspect in custody without first administering *Miranda* warnings. Then, after obtaining a confession, officers would recite the warnings and restart the questioning, using the information gained during the pre-warning interrogation to induce new statements officers

expected could be used at trial. Because of its location, the tactic described in the next case became known as the “Missouri Two-Step.”

Supreme Court of the United States

Missouri v. Patrice Seibert

Decided June 28, 2004 – [542 U.S. 600](#)

Justice SOUTER announced the judgment of the Court and delivered an opinion, in which Justice STEVENS, Justice GINSBURG, and Justice BREYER join.

This case tests a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda v. Arizona*, the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*’s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.

I

Respondent Patrice Seibert’s 12-year-old son Jonathan had cerebral palsy, and when he died in his sleep she feared charges of neglect because of bedsores on his body. In her presence, two of her teenage sons and two of their friends devised a plan to conceal the facts surrounding Jonathan’s death by incinerating his body in the course of burning the family’s mobile home, in which they planned to leave Donald Rector, a mentally ill teenager living with the family, to avoid any appearance that Jonathan had been unattended. Seibert’s son Darian and a friend set the fire, and Donald died.

Five days later, the police awakened Seibert at 3 a.m. at a hospital where Darian was being treated for burns. In arresting her, Officer Kevin Clinton followed instructions from Rolla, Missouri, Officer Richard Hanrahan that he refrain from giving *Miranda* warnings. After Seibert had been taken to the police station and left alone in an interview room for 15 to 20 minutes, Officer Hanrahan questioned her without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating “Donald was also to die in his sleep.” After Seibert finally admitted she knew Donald was meant to die in the fire, she was given a 20-minute coffee and cigarette break. Officer Hanrahan then turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained a signed waiver of rights from her. He resumed the questioning with “Ok, ‘trice, we’ve been talking for a little while about what happened on Wednesday the twelfth, haven’t we?” and confronted her with her prewarning statements:

Hanrahan: “Now, in discussion you told us, you told us that there was a[n] understanding about Donald.”

Seibert: “Yes.”

Hanrahan: “Did that take place earlier that morning?”

Seibert: “Yes.”

Hanrahan: “And what was the understanding about Donald?”

Seibert: “If they could get him out of the trailer, to take him out of the trailer.”

Hanrahan: “And if they couldn’t?”

Seibert: “I, I never even thought about it. I just figured they would.”

Hanrahan: “Trice, didn’t you tell me that he was supposed to die in his sleep?”

Seibert: “If that would happen, ‘cause he was on that new medicine, you know”

Hanrahan: “The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?”

Seibert: “Yes.”

After being charged with first-degree murder for her role in Donald’s death, Seibert sought to exclude both her prewarning and postwarning statements. At the suppression hearing, Officer Hanrahan testified that he made a “conscious decision” to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question “until I get the answer that she’s already provided once.” He acknowledged that Seibert’s ultimate statement was “largely a repeat of information ... obtained” prior to the warning.

The trial court suppressed the prewarning statement but admitted the responses given after the *Miranda* recitation. A jury convicted Seibert of second-degree murder. On appeal, the Missouri Court of Appeals affirmed. The Supreme Court of Missouri reversed. We granted certiorari to resolve a split in the Courts of Appeals. We now affirm.

II

[The Court recounted the import of *Miranda* warnings to “to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause.” The Court concluded that “*Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver. To point out the obvious, this common consequence would not be common at all were it not that *Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent.”]

III

There are those, of course, who preferred the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance. In the aftermath of *Miranda*, Congress even passed a statute seeking to restore that old regime, although the Act lay dormant for years until finally invoked and challenged in *Dickerson v. United States* (Chapter

23). *Dickerson* reaffirmed *Miranda* and held that its constitutional character prevailed against the statute.

The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. Consistently with the officer's testimony, the Police Law Institute, for example, instructs that "officers may conduct a two-stage interrogation.... At any point during the pre-*Miranda* interrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court." The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.

IV

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices ... likely ... to disable [an individual] from making a free and rational choice" about speaking and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees. The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

Just as "no talismanic incantation [is] required to satisfy [*Miranda*'s] strictures," it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effectively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.

There is no doubt about the answer that proponents of question-first give to this question about the effectiveness of warnings given only after successful interrogation, and we think their answer is correct. By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its

duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

V

Missouri argues that a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy is admissible on the authority of *Oregon v. Elstad*, but the argument disfigures that case. Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally.

The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used. Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking

about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying “we’ve been talking for a little while about what happened on Wednesday the twelfth, haven’t we?” The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk.

VI

Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert’s postwarning statements are inadmissible. The judgment of the Supreme Court of Missouri is affirmed.

Justice KENNEDY, concurring in the judgment.

The interrogation technique used in this case is designed to circumvent *Miranda v. Arizona*. It undermines the *Miranda* warning and obscures its meaning. The plurality opinion is correct to conclude that statements obtained through the use of this technique are inadmissible. Although I agree with much in the careful and convincing opinion for the plurality, my approach does differ in some respects, requiring this separate statement.

In my view, *Elstad* was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection. In light of these realities it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning. That approach would serve “neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the ... testimony.”

This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As Justice SOUTER points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional

misrepresentation of the protection that *Miranda* offers and does not serve any legitimate objectives that might otherwise justify its use.

Further, the interrogating officer here relied on the defendant's prewarning statement to obtain the postwarning statement used against her at trial. The postwarning interview resembled a cross-examination. The officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them. This shows the temptations for abuse inherent in the two-step technique. Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false.

The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps.

The plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on "whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object" given the specific facts of the case. This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations. In my view, this test cuts too broadly. *Miranda*'s clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity. I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.

The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand.

For these reasons, I concur in the judgment of the Court.

* * *

In our final case, the Court considered whether physical evidence (as opposed to testimonial evidence) found as a result of a *Miranda* violation should be excluded from use against the defendant. Justice Kennedy, who concurred with the result in *United States v. Patane* but did not join the majority opinion, is the only Justice who voted with the winning side in both *Patane* and *Seibert*. Because these cases were decided on the same day and both concern evidence obtained after a *Miranda* violation, Justice Kennedy's reputation as a swing vote was especially well deserved that day. Students should read his opinion in *Patane* with care.

Supreme Court of the United States

United States v. Samuel Francis Patane

Decided June 28, 2004 – [542 U.S. 630](#)

Justice THOMAS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and Justice SCALIA join.

In this case we must decide whether a failure to give a suspect the warnings prescribed by *Miranda v. Arizona* requires suppression of the physical fruits of the suspect's unwarned but voluntary statements. The Court has previously addressed this question but has not reached a definitive conclusion. Because the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements, we answer the question presented in the negative.

I

In June 2001, respondent, Samuel Francis Patane, was arrested for harassing his ex-girlfriend, Linda O'Donnell. He was released on bond, subject to a temporary restraining order that prohibited him from contacting O'Donnell. Respondent apparently violated the restraining order by attempting to telephone O'Donnell. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department began to investigate the matter. On the same day, a county probation officer informed an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF), that respondent, a convicted felon, illegally possessed a .40 Glock pistol. The ATF relayed this information to Detective Josh Benner, who worked closely with the ATF. Together, Detective Benner and Officer Fox proceeded to respondent's residence.

After reaching the residence and inquiring into respondent's attempts to contact O'Donnell, Officer Fox arrested respondent for violating the restraining order. Detective Benner attempted to advise respondent of his *Miranda* rights but got no further than the right to remain silent. At that point, respondent interrupted, asserting that he knew his rights, and neither officer attempted to complete the warning.

Detective Benner then asked respondent about the Glock. Respondent was initially reluctant to discuss the matter, stating: "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." Detective Benner persisted, and respondent told him that the pistol was in his bedroom. Respondent then gave Detective Benner permission to retrieve the pistol. Detective Benner found the pistol and seized it.

A grand jury indicted respondent for possession of a firearm by a convicted felon. The District Court granted respondent's motion to suppress the firearm, reasoning that the officers lacked probable cause to arrest respondent for violating the restraining order.

The Court of Appeals reversed the District Court's ruling with respect to probable cause but affirmed the suppression order on respondent's alternative theory.

As we explain below, the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this context. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as *Wong Sun* does not apply. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings.

II

[B]ecause [the *Miranda* rule] necessarily sweep[s] beyond the actual protections of the Self-Incrimination Clause, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination. Indeed, at times the Court has declined to extend *Miranda* even where it has perceived a need to protect the privilege against self-incrimination.

It is for these reasons that statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial though the fruits of actually compelled testimony cannot. More generally, the *Miranda* rule "does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted." Such a blanket suppression rule could not be justified by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, and would therefore fail our close-fit requirement.

Furthermore, the Self-Incrimination Clause contains its own exclusionary rule. It provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Unlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is self-executing. We have repeatedly explained "that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial."

III

Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule. This, of course, follows from the nature of the right protected by the Self-Incrimination Clause, which the *Miranda* rule, in turn, protects. It is "a fundamental *trial* right."

It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation.

Thus, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the "fruit of the poisonous tree" doctrine of *Wong Sun*. It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts.

IV

In the present case, the Court of Appeals wholly adopted the position that the taking of unwarned statements violates a suspect's constitutional rights. But *Dickerson's* characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it. And there is no such fit here. Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, "[t]he exclusion of unwarned statements ... is a complete and sufficient remedy" for any perceived *Miranda* violation. There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to this context.

Similarly, because police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement.

Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings.

Justice KENNEDY, with whom Justice O'CONNOR joins, concurring in the judgment.

In *Oregon v. Elstad* evidence obtained following an unwarned interrogation was held admissible. This result was based in large part on our recognition that the concerns underlying the *Miranda v. Arizona* rule must be accommodated to other objectives of the criminal justice system. I agree with the plurality that *Dickerson v. United States* did not undermine these precedents and, in fact, cited them in support. Here, it is sufficient to note that the Government presents an even stronger case for admitting the evidence obtained as the result of Patane's unwarned statement. Admission of nontestimonial physical fruits (the Glock in this case), even more so than the postwarning statements to the police in *Elstad* does not run the risk of admitting into trial an accused's coerced incriminating statements against himself. In light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation. Unlike the plurality, however, I find it unnecessary to

decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is "[any]thing to deter" so long as the unwarned statements are not later introduced at trial.

With these observations, I concur in the judgment of the Court.

* * *

In our next chapter, we review the basics of how courts consider motions to suppress evidence under the exclusionary rule. We also examine the availability of monetary damages as a remedy for violations of criminal procedure rules grounded in constitutional law.

THE EXCLUSIONARY RULE

Chapter 35

The Basics of Suppression Hearings and Money Damages

Having studied the Court's precedent on when the exclusionary rule applies, we will now turn to an overview of how suppression hearings work. In addition, this chapter reviews the availability of monetary damages to victims of constitutional violations related to criminal procedure law.

The Basics of Suppression Hearings

When a defendant seeks to exclude evidence allegedly obtained in violation of the constitution, the judge normally decides the suppression motion by preponderance of the evidence.¹ With most court motions, the burden of persuasion is on the moving party, meaning that a tie is resolved in favor of the non-moving party. Accordingly, a defendant arguing that a magistrate issued a search warrant without probable cause would have the burden of proof. There are, however, situations in which the prosecution bears the burden of proof. When a confession is challenged as involuntary, for example, “the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.”²

When defendants seek exclusion of evidence on constitutional grounds, the standard procedure is for the judge to hold a “suppression hearing” outside the presence of the jury. Each side may present witnesses. Police officers commonly testify about what things they observed in advance of a *Terry* stop or arrest that justified a seizure under review. They also explain what evidence provided probable cause to justify warrantless searches under doctrines such as the automobile exception and exigent circumstances. Defendants may testify in support of their suppression motions, and absent unusual circumstances, their testimony at suppression hearings may not be used against them at trial.³ Under this rule, a defendant may testify that a suitcase belonged to him in order to establish standing to object to an unlawful search of the suitcase, without providing the prosecution a damaging admission usable to prove guilt. If the judge finds for the defendant, then the excluded evidence cannot be shown to the jury. In cases where the prosecution's primary evidence is challenged as unlawfully obtained—for example, a gun seized from a defendant who is then charged with unlawfully possessing it—a suppression ruling in the defendant's favor can result in the dismissal of the charges. A defendant who loses her pre-trial suppression motion may, if subsequently convicted, raise her suppression arguments again on appeal.

Our next case explains how courts resolve allegations that a search warrant was issued on the basis of false statements made by police officers to the issuing magistrate.

¹ See *Lego v. Twomey*, [404 U.S. 477](#) (1972).

² *Id.* at 489.

³ See *Simmons v. United States*, [390 U.S. 377](#), 394 (1968).

Supreme Court of the United States

Jerome Franks v. Delaware

Decided June 26, 1978 – [438 U.S. 154](#)

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents an important and longstanding issue of Fourth Amendment law. Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments, subsequent to the *ex parte* issuance of a search warrant, to challenge the truthfulness of factual statements made in an affidavit supporting the warrant?

In the present case the Supreme Court of Delaware held, as a matter of first impression for it, that a defendant under *no* circumstances may so challenge the veracity of a sworn statement used by police to procure a search warrant. We reverse, and we hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

I

The controversy over the veracity of the search warrant affidavit in this case arose in connection with petitioner Jerome Franks' state conviction for rape, kidnaping, and burglary. On Friday, March 5, 1976, Mrs. Cynthia Bailey told police in Dover, Del., that she had been confronted in her home earlier that morning by a man with a knife, and that he had sexually assaulted her. She described her assailant's age, race, height, build, and facial hair, and gave a detailed description of his clothing as consisting of a white thermal undershirt, black pants with a silver or gold buckle, a brown leather three-quarter-length coat, and a dark knit cap that he wore pulled down around his eyes.

That same day, petitioner Franks coincidentally was taken into custody for an assault involving a 15-year-old girl, Brenda B. _____, six days earlier. After his formal arrest, and while awaiting a bail hearing in Family Court, petitioner allegedly stated to Robert McClements, the youth officer accompanying him, that he was surprised the bail hearing was "about Brenda B. _____. I know her. I thought you said Bailey. I don't know her." At the time of this statement, the police allegedly had not yet recited to petitioner his rights under *Miranda v. Arizona*.

On the following Monday, March 8, Officer McClements happened to mention the courthouse incident to a detective, Ronald R. Brooks, who was working on the *Bailey* case. On March 9, Detective Brooks and Detective Larry D. Gray submitted a sworn affidavit to a Justice of the Peace in Dover, in support of a warrant to search petitioner's apartment. In paragraph 8 of the

affidavit's "probable cause page" mention was made of petitioner's statement to McClements. In paragraph 10, it was noted that the description of the assailant given to the police by Mrs. Bailey included the above-mentioned clothing. Finally, the affidavit also described the attempt made by police to confirm that petitioner's typical outfit matched that of the assailant. Paragraph 15 recited: "On Tuesday, 3/9/76, your affiant contacted Mr. James Williams and Mr. Wesley Lucas of the Delaware Youth Center where Jerome Franks is employed and did have personal conversation with both these people." Paragraphs 16 and 17 respectively stated: "Mr. James Williams revealed to your affiant that the normal dress of Jerome Franks does consist of a white knit thermal undershirt and a brown leather jacket," and "Mr. Wesley Lucas revealed to your affiant that in addition to the thermal undershirt and jacket, Jerome Franks often wears a dark green knit hat."

The warrant was issued on the basis of this affidavit. Pursuant to the warrant, police searched petitioner's apartment and found a white thermal undershirt, a knit hat, dark pants, and a leather jacket, and, on petitioner's kitchen table, a single-blade knife. All these ultimately were introduced in evidence at trial.

Prior to the trial, however, petitioner's counsel filed a written motion to suppress the clothing and the knife found in the search; this motion alleged that the warrant on its face did not show probable cause and that the search and seizure were in violation of the Fourth and Fourteenth Amendments. At the hearing on the motion to suppress, defense counsel orally amended the challenge to include an attack on the veracity of the warrant affidavit; he also specifically requested the right to call as witnesses Detective Brooks, Wesley Lucas of the Youth Center, and James D. Morrison, formerly of the Youth Center. Counsel asserted that Lucas and Morrison would testify that neither had been personally interviewed by the warrant affiants, and that, although they might have talked to another police officer, any information given by them to that officer was "somewhat different" from what was recited in the affidavit. Defense counsel charged that the misstatements were included in the affidavit not inadvertently, but in "bad faith." Counsel also sought permission to call Officer McClements and petitioner as witnesses, to seek to establish that petitioner's courthouse statement to police had been obtained in violation of petitioner's *Miranda* rights, and that the search warrant was thereby tainted as the fruit of an illegally obtained confession.

In rebuttal, the State's attorney argued [] that any challenge to a search warrant was to be limited to questions of sufficiency based on the face of the affidavit. The State objected to petitioner's "going behind [the warrant affidavit] in any way," and argued that the court must decide petitioner's motion "on the four corners" of the affidavit.

The trial court sustained the State's objection to petitioner's proposed evidence. The motion to suppress was denied, and the clothing and knife were admitted as evidence at the ensuing trial. Petitioner was convicted. In a written motion for judgment of acquittal and/or new trial, petitioner repeated his objection to the admission of the evidence, stating that he "should have been allowed to impeach the Affidavit used in the Search Warrant to show purposeful misrepresentation of information contained therein." The motion was denied, and petitioner was sentenced to two consecutive terms of 25 years each and an additional consecutive life sentence.

On appeal, the Supreme Court of Delaware affirmed. Franks' petition for certiorari presented only the issue whether the trial court had erred in refusing to consider his allegation of misrepresentation in the warrant affidavit.

III

Whether the Fourth and Fourteenth Amendments, and the derivative exclusionary rule made applicable to the States under *Mapp v. Ohio*, ever mandate that a defendant be permitted to attack the veracity of a warrant affidavit after the warrant has been issued and executed, is a question that encounters conflicting values. The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search. In deciding today that, in certain circumstances, a challenge to a warrant's veracity must be permitted, we derive our ground from language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation...." "[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a *truthful* showing." This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, ... was 'credible' or his information 'reliable.'" Because it is the magistrate who must determine independently whether there is probable cause, it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment.

First, a flat ban on impeachment of veracity could denude the probable-cause requirement of all real meaning. The requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile. It is this specter of intentional falsification that, we think, has evoked such widespread opposition to the flat nonimpeachment rule. On occasion, of course, an instance of deliberate falsity will be exposed and confirmed without a special inquiry either at trial or at a hearing on the sufficiency of the affidavit. A flat nonimpeachment rule would bar re-examination of the warrant even in these cases.

Second, the hearing before the magistrate not always will suffice to discourage lawless or reckless misconduct. The pre-search proceeding is necessarily *ex parte*, since the subject of the search cannot be tipped off to the application for a warrant lest he destroy or remove evidence. The usual reliance of our legal system on adversary proceedings itself should be an indication that an *ex parte* inquiry is likely to be less vigorous. The magistrate has no acquaintance with the information that may contradict the good faith and reasonable basis of the affiant's allegations.

The pre-search proceeding will frequently be marked by haste, because of the understandable desire to act before the evidence disappears; this urgency will not always permit the magistrate to make an extended independent examination of the affiant or other witnesses.

Third, the alternative sanctions of a perjury prosecution, administrative discipline, contempt, or a civil suit are not likely to fill the gap. *Mapp v. Ohio* implicitly rejected the adequacy of these alternatives. Mr. Justice Douglas noted this in his concurrence in *Mapp*. “Self-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered.”

Fourth, allowing an evidentiary hearing, after a suitable preliminary proffer of material falsity, would not diminish the importance and solemnity of the warrant-issuing process. It is the *ex parte* nature of the initial hearing, rather than the magistrate’s capacity, that is the reason for the review. A magistrate’s determination is presently subject to review before trial as to *sufficiency* without any undue interference with the dignity of the magistrate’s function. Our reluctance today to extend the rule of exclusion beyond instances of deliberate misstatements, and those of reckless disregard, leaves a broad field where the magistrate is the sole protection of a citizen’s Fourth Amendment rights, namely, in instances where police have been merely negligent in checking or recording the facts relevant to a probable-cause determination.

Fifth, the claim that a post-search hearing will confuse the issue of the defendant’s guilt with the issue of the State’s possible misbehavior is footless. The hearing will not be in the presence of the jury. An issue extraneous to guilt already is examined in any probable-cause determination or review of probable cause. Nor, if a sensible threshold showing is required and sensible substantive requirements for suppression are maintained, need there be any new large-scale commitment of judicial resources; many claims will wash out at an early stage, and the more substantial ones in any event would require judicial resources for vindication if the suggested alternative sanctions were truly to be effective. The requirement of a substantial preliminary showing would suffice to prevent the misuse of a veracity hearing for purposes of discovery or obstruction. And because we are faced today with only the question of the integrity of the affiant’s representations as to his own activities, we need not decide, and we in no way predetermine, the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made.

Sixth and finally, as to the argument that the exclusionary rule should not be extended to a “new” area, we cannot regard any such extension really to be at issue here. Despite the deep skepticism of Members of this Court as to the wisdom of extending the exclusionary rule to collateral areas, such as civil or grand jury proceedings, the Court has not questioned, in the absence of a more efficacious sanction, the continued application of the rule to suppress evidence from the State’s case where a Fourth Amendment violation has been substantial and deliberate. We see no principled basis for distinguishing between the question of the sufficiency of an affidavit, which also is subject to a post-search re-examination, and the question of its integrity.

IV

In sum, and to repeat with some embellishment what we stated at the beginning of this opinion: There is, of course, a presumption of validity with respect to the affidavit supporting the search

warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing. Whether he will prevail at that hearing is, of course, another issue.

Because of Delaware's absolute rule, its courts did not have occasion to consider the proffer put forward by petitioner Franks. Since the framing of suitable rules to govern proffers is a matter properly left to the States, we decline ourselves to pass on petitioner's proffer. The judgment of the Supreme Court of Delaware is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Notes, Comments, and Questions

The details of suppression motion practice differ markedly among jurisdictions and even among judges in the same courthouse. Students who eventually practice criminal law must study carefully the rules and preferences of the judges before whom they appear. The overwhelming bulk of criminal cases never go to trial, and suppression hearings are often the most important court proceeding in a case.

One risk of which defense counsel must be aware concerns the use of suppression hearing testimony against a defendant should a case eventually go to trial. While such testimony cannot be used during the prosecution's case in chief (that is, cannot be used substantively to prove the defendant's guilt), see *Simmons v. United States*, 390 U.S. 377, 390 (1968), it can be used to impeach the defendant should her trial testimony contradict what she said at the hearing. See, e.g., *United States v. Beltran-Gutierrez*, [19 F.3d 1287](#), 1290–91 (9th Cir. 1994); *United States v. Geraldo*, [271 F.3d 1112](#), 1116 (D.C. Cir. 2001).

An Introduction to the Availability of Monetary Damages

Much as members of the public commonly overestimate the role of the exclusionary rule in freeing guilty defendants on “technicalities,” public opinion also overestimates the availability of money damages to the victims of police misconduct. For multiple reasons, persons who suffer unlawful searches and seizures—as well as those who experience violations of their rights related to interrogations—rarely recover money.

First, many people under police investigation—the people most likely to undergo searches, seizures, and interrogations, whether lawful or unlawful—are criminals. Imagine, for example, that police violate the “knock-and-announce” rule and break down a suspect’s door unlawfully. Then, while executing a valid search warrant, police find cocaine. Under the rule of *Hudson v. Michigan* (Chapter 32), the knock-and-announce violation would not stop prosecutors from using the seized drugs at trial to convict the suspect of illegal possession. In theory, the convicted defendant could then sue police for damages related to the breaking of his door. A lawsuit against state officials could be brought under “Section 1983,” as [42 U.S.C. § 1983](#) is commonly known. A suit against federal officials could be brought under the remedy provided in *Bivens v. Six Unknown Named Agents*, [403 U.S. 388](#) (1971), which provides a civil remedy (known as a “*Bivens* action”) for certain constitutional violations by federal agents. *See also Hernandez v. Mesa*, [140 S. Ct. 735](#) (U.S. 2020) (holding that family of a Mexican victim of unreasonable cross-border shooting by U.S. Border Patrol agent cannot bring *Bivens* action); *Egbert v. Boule*, [142 S. Ct. 457](#) (2021) (further limiting the scope of *Bivens*).

In practice, however, the defendant would likely have trouble finding a lawyer willing to take the case. In order to make his case to jurors, the convicted criminal defendant—now a civil plaintiff—would need to describe the incident, which involves police finding cocaine at his home. Further, the plaintiff’s testimony could be impeached with evidence of the drug conviction.⁴ Jurors have been known to disfavor claims brought by convicted felons.

While a prevailing plaintiff in a “constitutional tort” case against state officials is entitled to reasonable attorney’s fees paid by the defendant,⁵ a plaintiff who loses must pay his own lawyer. Therefore, unless the victim of police misconduct has money for legal bills, he must convince a lawyer to take his case on a contingent fee basis, which a lawyer is likely to do only if she expects to win. In addition, if the actual damages awarded to prevailing plaintiffs are low, lawyers may not profit unless they win a high percentage of their cases. A lawyer who represents an indigent civil rights plaintiff on a contingency basis often pays up front for expenses such as travel, depositions, and expert witnesses. If the client loses, the lawyer may never be repaid for expenses in the tens of thousands of dollars. If the client wins, then the lawyer must hope that the judge’s definition of a “reasonable fee” is fair, which may not always be true.⁶ Unless a lawyer is taking the rare civil rights case on the side of a different kind of practice, the lawyer can make a living only if occasional clients win sizeable judgments. But juries have been known to award trivial

⁴ *See, e.g., Fed. R. Evid. 609(a)(1)(A)*; Mo. Rev. Stat. § [491.050](#) (“any prior criminal convictions may be proved to affect [a witness’s] credibility in a civil or criminal case”).

⁵ *See* [42 U.S.C. § 1988\(b\)](#); *City of Riverside v. Rivera*, [477 U.S. 561](#) (1986) (affirming significant fee award in case involving Fourth Amendment violations)

⁶ *See, e.g.,* Scott Lauck, “[What’s a Sunshine Case Worth in Rural Missouri?](#),” Mo. Lawyers’ Weekly (Apr. 25, 2018) (describing fee award of \$85 per hour for victorious lawyers who sued sheriff’s office under Sunshine Law for wrongfully withholding reports related to death of officer, and noting that defendant’s outside lawyer was paid at higher rate).

sums, even in cases of serious misconduct.⁷ While some cases do yield large judgments,⁸ the overwhelming majority of practicing lawyers have no interest in representing civil rights plaintiffs who are unable to pay hourly bills. Many would-be plaintiffs with credible claims of unlawful searches and seizures, including police brutality and wrongful shootings, often cannot find lawyers to bring their cases.

Second, even if a plaintiff wins a court ruling that police violated his constitutional rights, he may be denied monetary compensation under the doctrine of “qualified immunity.” Under qualified immunity, a defendant need not pay monetary damages unless her conduct violated clearly established statutory or constitutional rights of which a reasonable person would have known. In other words, even if a court finds that the defendant violated the plaintiff’s constitutional rights, the plaintiff cannot recover unless the defendant’s behavior violated “clearly established” law.

Supreme Court of the United States

Andrew Kisela v. Amy Hughes

Decided April 2, 2018 – [138 S. Ct. 1148](#)

PER CURIAM.

Petitioner Andrew Kisela, a police officer in Tucson, Arizona, shot respondent Amy Hughes. Kisela and two other officers had arrived on the scene after hearing a police radio report that a woman was engaging in erratic behavior with a knife. They had been there but a few minutes, perhaps just a minute. When Kisela fired, Hughes was holding a large kitchen knife, had taken steps toward another woman standing nearby, and had refused to drop the knife after at least two commands to do so. The question is whether at the time of the shooting Kisela’s actions violated clearly established law.

The record, viewed in the light most favorable to Hughes, shows the following. In May 2010, somebody in Hughes’ neighborhood called 911 to report that a woman was hacking a tree with a kitchen knife. Kisela and another police officer, Alex Garcia, heard about the report over the radio in their patrol car and responded. A few minutes later the person who had called 911 flagged down the officers; gave them a description of the woman with the knife; and told them the woman had been acting erratically. About the same time, a third police officer, Lindsay Kunz, arrived on her bicycle.

Garcia spotted a woman, later identified as Sharon Chadwick, standing next to a car in the driveway of a nearby house. A chain-link fence with a locked gate separated Chadwick from the officers. The officers then saw another woman, Hughes, emerge from the house carrying a large knife at her side. Hughes matched the description of the woman who had been seen hacking a tree. Hughes walked toward Chadwick and stopped no more than six feet from her.

⁷ See, e.g., Kristine Guerra, “[Innocent Black Man Dragged from Bed, Punched, Arrested—and Awarded \\$18 by a Jury](#),” Wash. Post (Aug. 30, 2016).

⁸ See, e.g., Tresa Baldas, “[\\$37M awarded in Genesee Co. Police Beating Caught on Camera](#),” Detroit Free Press (Nov. 6, 2016).

All three officers drew their guns. At least twice they told Hughes to drop the knife. Viewing the record in the light most favorable to Hughes, Chadwick said “take it easy” to both Hughes and the officers. Hughes appeared calm, but she did not acknowledge the officers’ presence or drop the knife. The top bar of the chain-link fence blocked Kisela’s line of fire, so he dropped to the ground and shot Hughes four times through the fence. Then the officers jumped the fence, handcuffed Hughes, and called paramedics, who transported her to a hospital. There she was treated for non-life-threatening injuries. Less than a minute had transpired from the moment the officers saw Chadwick to the moment Kisela fired shots.

All three of the officers later said that at the time of the shooting they subjectively believed Hughes to be a threat to Chadwick. After the shooting, the officers discovered that Chadwick and Hughes were roommates, that Hughes had a history of mental illness, and that Hughes had been upset with Chadwick over a \$20 debt. In an affidavit produced during discovery, Chadwick said that a few minutes before the shooting her boyfriend had told her Hughes was threatening to kill Chadwick’s dog, named Bunny. Chadwick “came home to find” Hughes “somewhat distressed,” and Hughes was in the house holding Bunny “in one hand and a kitchen knife in the other.” Hughes asked Chadwick if she “wanted [her] to use the knife on the dog.” The officers knew none of this, though. Chadwick went outside to get \$20 from her car, which is when the officers first saw her. In her affidavit Chadwick said that she did not feel endangered at any time. Based on her experience as Hughes’ roommate, Chadwick stated that Hughes “occasionally has episodes in which she acts inappropriately,” but “she is only seeking attention.”

Hughes sued Kisela, alleging that Kisela had used excessive force in violation of the Fourth Amendment. The District Court granted summary judgment to Kisela, but the Court of Appeals for the Ninth Circuit reversed. Kisela then filed a petition for certiorari in this Court. That petition is now granted.

Here, the Court need not, and does not, decide whether Kisela violated the Fourth Amendment when he used deadly force against Hughes. For even assuming a Fourth Amendment violation occurred—a proposition that is not at all evident—on these facts Kisela was at least entitled to qualified immunity.

“Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” “Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.”

Although “this Court’s caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.” “In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.” This Court has “repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.”

“[S]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.” Use of

excessive force is an area of the law “in which the result depends very much on the facts of each case,” and thus police officers are entitled to qualified immunity unless existing precedent “squarely governs” the specific facts at issue. Precedent involving similar facts can help move a case beyond the otherwise “hazy border between excessive and acceptable force” and thereby provide an officer notice that a specific use of force is unlawful.

“Of course, general statements of the law are not inherently incapable of giving fair and clear warning to officers.” But the general rules [] “do not by themselves create clearly established law outside an ‘obvious case.’” Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer “cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.” That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela says he shot Hughes because, although the officers themselves were in no apparent danger, he believed she was a threat to Chadwick. Kisela had mere seconds to assess the potential danger to Chadwick. He was confronted with a woman who had just been seen hacking a tree with a large kitchen knife and whose behavior was erratic enough to cause a concerned bystander to call 911 and then flag down Kisela and Garcia. Kisela was separated from Hughes and Chadwick by a chain-link fence; Hughes had moved to within a few feet of Chadwick; and she failed to acknowledge at least two commands to drop the knife. Those commands were loud enough that Chadwick, who was standing next to Hughes, heard them. This is far from an obvious case in which any competent officer would have known that shooting Hughes to protect Chadwick would violate the Fourth Amendment.

[T]he petition for certiorari is granted; the judgment of the Court of Appeals is reversed; and the case is remanded for further proceedings consistent with this opinion.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, dissenting.

Officer Andrew Kisela shot Amy Hughes while she was speaking with her roommate, Sharon Chadwick, outside of their home. The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared “composed and content” and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he “wanted to continue trying verbal command[s] and see if that would work.” But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.

If this account of Kisela’s conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no “clearly established” law. I disagree. Viewing the facts in the light most

favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield. I therefore respectfully dissent.

I

This case arrives at our doorstep on summary judgment, so we must “view the evidence ... in the light most favorable to” Hughes, the nonmovant, “with respect to the central facts of this case.” The majority purports to honor this well-settled principle, but its efforts fall short. Although the majority sets forth most of the relevant events that transpired, it conspicuously omits several critical facts and draws premature inferences that bear on the qualified-immunity inquiry. Those errors are fatal to its analysis, because properly construing all of the facts in the light most favorable to Hughes, and drawing all inferences in her favor, a jury could find that the following events occurred on the day of Hughes' encounter with the Tucson police.

On May 21, 2010, Kisela and Officer-in-Training Alex Garcia received a “check welfare” call about a woman chopping away at a tree with a knife. They responded to the scene, where they were informed by the person who had placed the call (not Chadwick) that the woman with the knife had been acting “erratically.” A third officer, Lindsay Kunz, later joined the scene. The officers observed Hughes, who matched the description given to the officers of the woman alleged to have been cutting the tree, emerge from a house with a kitchen knife in her hand. Hughes exited the front door and approached Chadwick, who was standing outside in the driveway.

Hughes then stopped about six feet from Chadwick, holding the kitchen knife down at her side with the blade pointed away from Chadwick. Hughes and Chadwick conversed with one another; Hughes appeared “composed and content,” and did not look angry. At no point during this exchange did Hughes raise the kitchen knife or verbally threaten to harm Chadwick or the officers. Chadwick later averred that, during the incident, she was never in fear of Hughes and “was not the least bit threatened by the fact that [Hughes] had a knife in her hand” and that Hughes “never acted in a threatening manner.” The officers did not observe Hughes commit any crime, nor was Hughes suspected of committing one.

Nevertheless, the officers hastily drew their guns and ordered Hughes to drop the knife. The officers gave that order twice, but the commands came “in quick succession.” The evidence in the record suggests that Hughes may not have heard or understood the officers' commands and may not have been aware of the officers' presence at all. Although the officers were in uniform, they never verbally identified themselves as law enforcement officers.

Kisela did not wait for Hughes to register, much less respond to, the officers' rushed commands. Instead, Kisela immediately and unilaterally escalated the situation. Without giving any advance warning that he would shoot, and without attempting less dangerous methods to deescalate the situation, he dropped to the ground and shot four times at Hughes (who was stationary) through a chain-link fence. After being shot, Hughes fell to the ground, screaming and bleeding from her wounds. She looked at the officers and asked, “Why'd you shoot me?” Hughes was immediately transported to the hospital, where she required treatment for her injuries. Kisela alone resorted

to deadly force in this case. Confronted with the same circumstances as Kisela, neither of his fellow officers took that drastic measure.

II

Police officers are not entitled to qualified immunity if “(1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at the time.’” Faithfully applying that well-settled standard, the Ninth Circuit held that a jury could find that Kisela violated Hughes’ clearly established Fourth Amendment rights. That conclusion was correct.

A

I begin with the first step of the qualified-immunity inquiry: whether there was a violation of a constitutional right. [Justice Sotomayer concluded (consistent with the Ninth Circuit opinion) that the “facts would permit a jury to conclude that Kisela acted outside the bounds of the Fourth Amendment by shooting Hughes four times.”]

Rather than defend the reasonableness of Kisela’s conduct, the majority sidesteps the inquiry altogether and focuses instead on the “clearly established” prong of the qualified-immunity analysis. To be “‘clearly established’ ... [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” That standard is not nearly as onerous as the majority makes it out to be. As even the majority must acknowledge, this Court has long rejected the notion that “an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,” “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.” At its core, then, the “clearly established” inquiry boils down to whether Kisela had “fair notice” that he acted unconstitutionally.

The answer to that question is yes. This Court’s precedents make clear that a police officer may only deploy deadly force against an individual if the officer “has probable cause to believe that the [person] poses a threat of serious physical harm, either to the officer or to others.” It is equally well established that any use of lethal force must be justified by some legitimate governmental interest. Consistent with those clearly established principles, and contrary to the majority’s conclusion, Ninth Circuit precedent predating these events further confirms that Kisela’s conduct was clearly unreasonable. Because Kisela plainly lacked any legitimate interest justifying the use of deadly force against a woman who posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter, he was not entitled to qualified immunity.

In sum, precedent existing at the time of the shooting clearly established the unconstitutionality of Kisela’s conduct. The majority’s decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the “clearly established” standard. It is enough that governing law places “the constitutionality of the officer’s conduct beyond debate.” Because, taking the facts in the light most favorable to Hughes, it is “beyond debate” that Kisela’s use of deadly force was objectively unreasonable, he was not entitled to

summary judgment on the basis of qualified immunity.

III

This unwarranted summary reversal is symptomatic of “a disturbing trend regarding the use of this Court’s resources” in qualified-immunity cases. As I have previously noted, this Court routinely displays an unflinching willingness “to summarily reverse courts for wrongly denying officers the protection of qualified immunity” but “rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases.” Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

Notes, Comments, and Questions

Recently, the Court again constrained the ability of plaintiffs to sue police. In *Vega v. Tekoh*, [142 S. Ct. 858](#) (2022), the Court held that when police violate *Miranda* by conducting a custodial interrogation without delivering the required warnings, the *Miranda* violation does not provide the basis for a Section 1983 claim.

Our next case involves serious violations of the Court’s rule set forth in *Brady v. Maryland*, [373 U.S. 83](#) (1963), which requires that prosecutors provide material exculpatory evidence in their possession to the defense. Although this book does not explore the *Brady* rule, students should recognize its importance to avoiding wrongful convictions. Our next case illustrates the impediments in the path of a defendant who seeks monetary damages after winning release from prison by proving a *Brady* violation.

A bit of background will help students understand the plaintiff’s cause of action. Because prosecutors (much like judges) normally enjoy absolute immunity from Section 1983 liability for actions taken during and in preparation for trial, see *Buckley v. Fitzsimmons*, [509 U.S. 259](#) (1993), plaintiff John Thompson alleged that district attorney Harry Connick failed to train his prosecutors adequately about their duty under *Brady* to produce evidence. Only especially egregious failures to train can justify civil liability.

Supreme Court of the United States

Harry F. Connick v. John Thompson

Decided March 29, 2011 — [563 U.S. 51](#)

Justice THOMAS delivered the opinion of the Court.

The Orleans Parish District Attorney’s Office now concedes that, in prosecuting respondent John Thompson for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over to the defense under *Brady v. Maryland*. Thompson was convicted. Because of that conviction Thompson elected not to testify in his own defense in his later trial for murder, and he was again convicted. Thompson spent 18 years in prison, including 14 years on death row. One month before Thompson’s scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory, and both of Thompson’s convictions were vacated.

After his release from prison, Thompson sued petitioner Harry Connick, in his official capacity as the Orleans Parish District Attorney, for damages. Thompson alleged that Connick had failed to train his prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure in Thompson’s robbery case. The jury awarded Thompson \$14 million, and the Court of Appeals for the Fifth Circuit affirmed by an evenly divided en banc court. We granted certiorari to decide whether a district attorney’s office may be held liable under § 1983 for failure to train based on a single *Brady* violation. We hold that it cannot.

I

A

In early 1985, John Thompson was charged with the murder of Raymond T. Liuzza, Jr. in New Orleans. Publicity following the murder charge led the victims of an unrelated armed robbery to identify Thompson as their attacker. The district attorney charged Thompson with attempted armed robbery.

As part of the robbery investigation, a crime scene technician took from one of the victims’ pants a swatch of fabric stained with the robber’s blood. Approximately one week before Thompson’s armed robbery trial, the swatch was sent to the crime laboratory. Two days before the trial, assistant district attorney Bruce Whittaker received the crime lab’s report, which stated that the perpetrator had blood type B. There is no evidence that the prosecutors ever had Thompson’s blood tested or that they knew what his blood type was. Whittaker claimed he placed the report on assistant district attorney James Williams’ desk, but Williams denied seeing it. The report was never disclosed to Thompson’s counsel.

Williams tried the armed robbery case with assistant district attorney Gerry Deegan. On the first day of trial, Deegan checked all of the physical evidence in the case out of the police property room, including the blood-stained swatch. Deegan then checked all of the evidence but the swatch into the courthouse property room. The prosecutors did not mention the swatch or the

crime lab report at trial, and the jury convicted Thompson of attempted armed robbery.

A few weeks later, Williams and special prosecutor Eric Dubelier tried Thompson for the Liuzza murder. Because of the armed robbery conviction, Thompson chose not to testify in his own defense. He was convicted and sentenced to death. In the 14 years following Thompson's murder conviction, state and federal courts reviewed and denied his challenges to the conviction and sentence. The State scheduled Thompson's execution for May 20, 1999.

In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery investigation in the files of the New Orleans Police Crime Laboratory. Thompson was tested and found to have blood type O, proving that the blood on the swatch was not his. Thompson's attorneys presented this evidence to the district attorney's office, which, in turn, moved to stay the execution and vacate Thompson's armed robbery conviction. The Louisiana Court of Appeals then reversed Thompson's murder conviction, concluding that the armed robbery conviction unconstitutionally deprived Thompson of his right to testify in his own defense at the murder trial. In 2003, the district attorney's office retried Thompson for Liuzza's murder. The jury found him not guilty.

B

Thompson then brought this action against the district attorney's office, Connick, Williams, and others, alleging that their conduct caused him to be wrongfully convicted, incarcerated for 18 years, and nearly executed. The only claim that proceeded to trial was Thompson's claim under § 1983 that the district attorney's office had violated *Brady* by failing to disclose the crime lab report in his armed robbery trial. Thompson alleged liability under two theories: (1) the *Brady* violation was caused by an unconstitutional policy of the district attorney's office; and (2) the violation was caused by Connick's deliberate indifference to an obvious need to train the prosecutors in his office in order to avoid such constitutional violations.

Before trial, Connick conceded that the failure to produce the crime lab report constituted a *Brady* violation. Accordingly, the District Court instructed the jury that the "only issue" was whether the nondisclosure was caused by either a policy, practice, or custom of the district attorney's office or a deliberately indifferent failure to train the office's prosecutors.

Although no prosecutor remembered any specific training session regarding *Brady* prior to 1985, it was undisputed at trial that the prosecutors were familiar with the general *Brady* requirement that the State disclose to the defense evidence in its possession that is favorable to the accused. Prosecutors testified that office policy was to turn crime lab reports and other scientific evidence over to the defense. They also testified that, after the discovery of the undisclosed crime lab report in 1999, prosecutors disagreed about whether it had to be disclosed under *Brady* absent knowledge of Thompson's blood type.

The jury rejected Thompson's claim that an unconstitutional office policy caused the *Brady* violation, but found the district attorney's office liable for failing to train the prosecutors. The jury awarded Thompson \$14 million in damages, and the District Court added more than \$1 million in attorney's fees and costs.

After the verdict, Connick renewed his objection—which he had raised on summary judgment—that he could not have been deliberately indifferent to an obvious need for more or different *Brady* training because there was no evidence that he was aware of a pattern of similar *Brady* violations. The District Court rejected this argument.

A panel of the Court of Appeals for the Fifth Circuit affirmed. The Court of Appeals sitting en banc vacated the panel opinion, granted rehearing, and divided evenly, thereby affirming the District Court. We granted certiorari.

II

The *Brady* violation conceded in this case occurred when one or more of the four prosecutors involved with Thompson’s armed robbery prosecution failed to disclose the crime lab report to Thompson’s counsel. Under Thompson’s failure-to-train theory, he bore the burden of proving both (1) that Connick, the policymaker for the district attorney’s office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argues that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. We agree.

A

Title 42 U.S.C. § 1983 provides in relevant part:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”

A municipality or other local government may be liable under this section if the governmental body itself “subjects” a person to a deprivation of rights or “causes” a person “to be subjected” to such deprivation. But, under § 1983, local governments are responsible only for “their *own* illegal acts.” They are not vicariously liable under § 1983 for their employees’ actions.

Plaintiffs who seek to impose liability on local governments under § 1983 must prove that “action pursuant to official municipal policy” caused their injury. Official municipal policy includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law. These are “action[s] for which the municipality is actually responsible.”

In limited circumstances, a local government’s decision not to train certain employees about their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy for purposes of § 1983. A municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train. To satisfy the statute, a municipality’s failure to train its employees in a relevant respect must amount to “deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” Only then “can such a

shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.”

“‘[D]eliberate indifference’ is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.” Thus, when city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens’ constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program. The city’s “policy of inaction” in light of notice that its program will cause constitutional violations “is the functional equivalent of a decision by the city itself to violate the Constitution.” A less stringent standard of fault for a failure-to-train claim “would result in *de facto respondeat superior* liability on municipalities”

B

A pattern of similar constitutional violations by untrained employees is “ordinarily necessary” to demonstrate deliberate indifference for purposes of failure to train. Policymakers’ “continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the ‘deliberate indifference’—necessary to trigger municipal liability.” Without notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights.

Although Thompson does not contend that he proved a pattern of similar *Brady* violations, he points out that, during the ten years preceding his armed robbery trial, Louisiana courts had overturned four convictions because of *Brady* violations by prosecutors in Connick’s office. Those four reversals could not have put Connick on notice that the office’s *Brady* training was inadequate with respect to the sort of *Brady* violation at issue here. None of those cases involved failure to disclose blood evidence, a crime lab report, or physical or scientific evidence of any kind. Because those incidents are not similar to the violation at issue here, they could not have put Connick on notice that specific training was necessary to avoid this constitutional violation.

C

1

Instead of relying on a pattern of similar *Brady* violations, Thompson relies on [] “single-incident” liability. He contends that the *Brady* violation in his case was the “obvious” consequence of failing to provide specific *Brady* training, and that this showing of “obviousness” can substitute for the pattern of violations ordinarily necessary to establish municipal culpability.

Failure to train prosecutors in their *Brady* obligations does not fall within the narrow range of [] single-incident liability. Attorneys are trained in the law and equipped with the tools to interpret and apply legal principles, understand constitutional limits, and exercise legal judgment. Before they may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both.

In addition, attorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards. An attorney who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.

In light of this regime of legal training and professional responsibility, recurring constitutional violations are not the "obvious consequence" of failing to provide prosecutors with formal in-house training about how to obey the law. Prosecutors are not only equipped but are also ethically bound to know what *Brady* entails and to perform legal research when they are uncertain. A district attorney is entitled to rely on prosecutors' professional training and ethical obligations in the absence of specific reason, such as a pattern of violations, to believe that those tools are insufficient to prevent future constitutional violations in "the usual and recurring situations with which [the prosecutors] must deal." A licensed attorney making legal judgments, in his capacity as a prosecutor, about *Brady* material simply does not present the same "highly predictable" constitutional danger as [an] untrained officer.

We do not assume that prosecutors will always make correct *Brady* decisions or that guidance regarding specific *Brady* questions would not assist prosecutors. But showing merely that additional training would have been helpful in making difficult decisions does not establish municipal liability. "[P]rov[ing] that an injury or accident could have been avoided if an [employee] had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct" will not suffice.

3

The District Court and the Court of Appeals panel erroneously believed that Thompson had proved deliberate indifference by showing the "obviousness" of a need for additional training. They based this conclusion on Connick's awareness that (1) prosecutors would confront *Brady* issues while at the district attorney's office; (2) inexperienced prosecutors were expected to understand *Brady*'s requirements; (3) *Brady* has gray areas that make for difficult choices; and (4) erroneous decisions regarding *Brady* evidence would result in constitutional violations. This is insufficient.

It does not follow that, because *Brady* has gray areas and some *Brady* decisions are difficult, prosecutors will so obviously make wrong decisions that failing to train them amounts to "a decision by the city itself to violate the Constitution." To prove deliberate indifference, Thompson needed to show that Connick was on notice that, absent additional specified training, it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was so predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' *Brady* rights. He did not do so.

III

We conclude that this case does not fall within the narrow range of "single-incident" liability. The District Court should have granted Connick judgment as a matter of law on the failure-to-

train claim because Thompson did not prove a pattern of similar violations that would “establish that the ‘policy of inaction’ [was] the functional equivalent of a decision by the city itself to violate the Constitution.” The judgment of the United States Court of Appeals for the Fifth Circuit is reversed.

Justice SCALIA, with whom Justice ALITO joins, concurring.

[T]o recover from a municipality under 42 U.S.C. § 1983, a plaintiff must satisfy a “rigorous” standard of causation; he must “demonstrate a direct causal link between the municipal action and the deprivation of federal rights.” Thompson cannot meet that standard. The withholding of evidence in his case was almost certainly caused not by a failure to give prosecutors specific training, but by miscreant prosecutor Gerry Deegan’s willful suppression of evidence he believed to be exculpatory, in an effort to railroad Thompson. According to Deegan’s colleague Michael Riehlmann, in 1994 Deegan confessed to him—in the same conversation in which Deegan revealed he had only a few months to live—that he had “suppressed blood evidence in the armed robbery trial of John Thompson that in some way exculpated the defendant.” I have no reason to disbelieve that account, particularly since Riehlmann’s testimony hardly paints a flattering picture of himself: Riehlmann kept silent about Deegan’s misconduct for another five years, as a result of which he incurred professional sanctions. And if Riehlmann’s story is true, then the “moving force” behind the suppression of evidence was Deegan, not a failure of continuing legal education.

By now the reader has doubtless guessed the best-kept secret of this case: There was probably no *Brady* violation at all—except for Deegan’s (which, since it was a bad-faith, knowing violation, could not possibly be attributed to lack of training). The dissent surely knows this, which is why it leans heavily on the fact that Connick conceded that *Brady* was violated. I can honor that concession in my analysis of the case because even if it extends beyond Deegan’s deliberate actions, it remains irrelevant to Connick’s training obligations. For any *Brady* violation apart from Deegan’s was surely on the very frontier of our *Brady* jurisprudence; Connick could not possibly have been on notice decades ago that he was required to instruct his prosecutors to respect a right to untested evidence that we had not (*and still have not*) recognized. As a consequence, even if I accepted the dissent’s conclusion that failure-to-train liability could be premised on a single *Brady* error, I could not agree that the lack of an accurate training regimen caused the violation Connick has conceded.

Justice GINSBURG, with whom Justice BREYER, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

In *Brady v. Maryland*, this Court held that due process requires the prosecution to turn over evidence favorable to the accused and material to his guilt or punishment. That obligation, the parties have stipulated, was dishonored in this case; consequently, John Thompson spent 18 years in prison, 14 of them isolated on death row, before the truth came to light: He was innocent of the charge of attempted armed robbery, and his subsequent trial on a murder charge, by prosecutorial design, was fundamentally unfair.

The Court holds that the Orleans Parish District Attorney’s Office (District Attorney’s Office or Office) cannot be held liable, in a civil rights action under 42 U.S.C. § 1983, for the grave injustice

Thompson suffered. That is so, the Court tells us, because Thompson has shown only an aberrant *Brady* violation, not a routine practice of giving short shrift to *Brady*'s requirements. The evidence presented to the jury that awarded compensation to Thompson, however, points distinctly away from the Court's assessment. As the trial record in the § 1983 action reveals, the conceded, long-concealed prosecutorial transgressions were neither isolated nor atypical.

From the top down, the evidence showed, members of the District Attorney's Office, including the District Attorney himself, misperceived *Brady*'s compass and therefore inadequately attended to their disclosure obligations. Throughout the pretrial and trial proceedings against Thompson, the team of four engaged in prosecuting him for armed robbery and murder hid from the defense and the court exculpatory information Thompson requested and had a constitutional right to receive. The prosecutors did so despite multiple opportunities, spanning nearly two decades, to set the record straight. Based on the prosecutors' conduct relating to Thompson's trials, a fact trier could reasonably conclude that inattention to *Brady* was standard operating procedure at the District Attorney's Office.

What happened here, the Court's opinion obscures, was no momentary oversight, no single incident of a lone officer's misconduct. Instead, the evidence demonstrated that misperception and disregard of *Brady*'s disclosure requirements were pervasive in Orleans Parish. That evidence, I would hold, established persistent, deliberately indifferent conduct for which the District Attorney's Office bears responsibility under § 1983.

I dissent from the Court's judgment mindful that *Brady* violations, as this case illustrates, are not easily detected. But for a chance discovery made by a defense team investigator weeks before Thompson's scheduled execution, the evidence that led to his exoneration might have remained under wraps. The prosecutorial concealment Thompson encountered, however, is bound to be repeated unless municipal agencies bear responsibility—made tangible by § 1983 liability—for adequately conveying what *Brady* requires and for monitoring staff compliance. Failure to train, this Court has said, can give rise to municipal liability under § 1983 “where the failure ... amounts to deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.” That standard is well met in this case.

Thompson discovered the prosecutors' misconduct through a serendipitous series of events. In 1994, nine years after Thompson's convictions, Deegan, the assistant prosecutor in the armed robbery trial, learned he was terminally ill. Soon thereafter, Deegan confessed to his friend Michael Riehlmann that he had suppressed blood evidence in the armed robbery case. Deegan did not heed Riehlmann's counsel to reveal what he had done. For five years, Riehlmann, himself a former Orleans Parish prosecutor, kept Deegan's confession to himself.

On April 16, 1999, the State of Louisiana scheduled Thompson's execution. In an eleventh-hour effort to save his life, Thompson's attorneys hired a private investigator. Deep in the crime lab archives, the investigator unearthed a microfiche copy of the lab report identifying the robber's blood type. The copy showed that the report had been addressed to Whittaker. Thompson's attorneys contacted Whittaker, who informed Riehlmann that the lab report had been found. Riehlmann thereupon told Whittaker that Deegan “had failed to turn over stuff that might have been exculpatory.” Riehlmann prepared an affidavit describing Deegan's disclosure “that he had intentionally suppressed blood evidence in the armed robbery trial of John Thompson.”

Thompson's lawyers presented to the trial court the crime lab report showing that the robber's blood type was B, and a report identifying Thompson's blood type as O. This evidence proved Thompson innocent of the robbery. The court immediately stayed Thompson's execution and commenced proceedings to assess the newly discovered evidence.

Connick sought an abbreviated hearing. A full hearing was unnecessary, he urged, because the Office had confessed error and had moved to dismiss the armed robbery charges. The court insisted on a public hearing. Given "the history of this case," the court said, it "was not willing to accept the representations that [Connick] and [his] office made [in their motion to dismiss]." After a full day's hearing, the court vacated Thompson's attempted armed robbery conviction and dismissed the charges. Before doing so, the court admonished:

"[A]ll day long there have been a number of young Assistant D.A.'s ... sitting in this courtroom watching this, and I hope they take home ... and take to heart the message that this kind of conduct cannot go on in this Parish if this Criminal Justice System is going to work."

The District Attorney's Office then initiated grand jury proceedings against the prosecutors who had withheld the lab report. Connick terminated the grand jury after just one day. He maintained that the lab report would not be *Brady* material if prosecutors did not know Thompson's blood type. And he told the investigating prosecutor that the grand jury "w[ould] make [his] job more difficult." In protest, that prosecutor tendered his resignation.

Thereafter, the Louisiana Court of Appeal reversed Thompson's murder conviction. The unlawfully procured robbery conviction, the court held, had violated Thompson's right to testify and thus fully present his defense in the murder trial. The merits of several *Brady* claims arising out of the murder trial, the court observed, had therefore become "moot."

Undeterred by his assistants' disregard of Thompson's rights, Connick retried him for the Liuzza murder. Thompson's defense was bolstered by evidence earlier unavailable to him: ten exhibits the prosecution had not disclosed when Thompson was first tried. The newly produced items included police reports describing the assailant in the murder case as having "close cut" hair, the police report recounting Perkins' meetings with the Liuzza family, audio recordings of those meetings, and a 35-page supplemental police report. After deliberating for only 35 minutes, the jury found Thompson not guilty.

On May 9, 2003, having served more than 18 years in prison for crimes he did not commit, Thompson was released.

On July 16, 2003, Thompson commenced a civil action under 42 U.S.C. § 1983 alleging that Connick, other officials of the Orleans Parish District Attorney's Office, and the Office itself, had violated his constitutional rights by wrongfully withholding *Brady* evidence. Thompson sought to hold Connick and the District Attorney's Office liable for failure adequately to train prosecutors concerning their *Brady* obligations. Such liability attaches, I agree with the Court, only when the failure "amount[s] to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" I disagree, however, with the Court's conclusion that Thompson failed to prove deliberate indifference.

Having weighed all the evidence, the jury in the § 1983 case found for Thompson, concluding that the District Attorney's Office had been deliberately indifferent to Thompson's *Brady* rights and to the need for training and supervision to safeguard those rights. "Viewing the evidence in the light most favorable to [Thompson], as appropriate in light of the verdict rendered by the jury," I see no cause to upset the District Court's determination, affirmed by the Fifth Circuit, that "ample evidence ... adduced at trial" supported the jury's verdict.

* * *

In our next chapter, we return to substantive criminal procedure law, examining the right to counsel provided by the Sixth Amendment.

THE RIGHT TO COUNSEL

Chapter 36

Introduction to the Right to Counsel and Ineffective Assistance

The Sixth Amendment provides, “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense.” For more than a century after the ratification of the Amendment, this right allowed criminal defendants to hire their own lawyers but did not require the government to provide counsel to indigent defendants who could not afford to hire counsel. In 1932, the Court held that state court indigent defendants must be provided counsel in death penalty cases. *See Powell v. Alabama*, [287 U.S. 45](#) (1932) (the “Scottsboro Boys” case). Although the Court soon thereafter required federal courts to provide counsel even in non-capital cases, *see Johnson v. Zerbst*, [304 U.S. 458](#) (1938), the Court held in 1942 that for ordinary felony cases, state courts could decide for themselves whether to appoint counsel to indigent defendants. *See Betts v. Brady*, [316 U.S. 455](#), 473 (1942) (“we cannot say that the [Fourteenth A]mendment embodies an inexorable command that no trial for any offense, or in any court, can be fairly conducted and justice accorded a defendant who is not represented by counsel”).

In 1963, the Court reversed *Betts v. Brady* in the landmark case of *Gideon v. Wainwright*. The story of Clarence Earl Gideon inspired one of the [best known works](#) of legal journalism—*Gideon’s Trumpet* (1964), by Anthony Lewis—as well as a [movie with the same title](#) starring Henry Fonda. Gideon asked for counsel when charged with a Florida crime, and the state judge refused to appoint him a lawyer. After his conviction, he appealed unsuccessfully in Florida courts. He then sent a handwritten note to the Supreme Court, which agreed to take the case.

Supreme Court of the United States

Clarence Earl Gideon v. Louie L. Wainwright

Decided March 18, 1963 – [372 U.S. 335](#)

Mr. Justice BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

“The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case.

“The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.”

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government." Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. [T]he problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. To give this problem another review here, we granted certiorari. Since Gideon was proceeding *in forma pauperis*, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in *Betts v. Brady* be reconsidered?"

I

The facts upon which *Betts* claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon here bases his federal constitutional claim. *Betts* was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. *Betts* was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison. Like Gideon, *Betts* sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. *Betts* was denied any relief, and on review this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which for reasons given the Court deemed to be the only applicable federal constitutional provision.

Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the *Betts* case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the *Betts v. Brady* holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration we conclude that *Betts v. Brady* should be overruled.

II

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." We have construed this to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. *Betts* argued that this right is extended to indigent

defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down “no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment.” [T]he Court [in *Betts*] concluded that “appointment of counsel is not a fundamental right, essential to a fair trial.” It was for this reason the *Betts* Court refused to accept the contention that the Sixth Amendment’s guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, “made obligatory upon the states by the Fourteenth Amendment.” Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was “a fundamental right, essential to a fair trial,” it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

We think the Court in *Betts* had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. In many cases [], this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this “fundamental nature” and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment’s freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment’s command that private property shall not be taken for public use without just compensation, the Fourth Amendment’s prohibition of unreasonable searches and seizures, and the Eighth’s ban on cruel and unusual punishment.

We accept *Betts v. Brady*’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is “fundamental and essential to a fair trial” is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights. Ten years before *Betts v. Brady*, this Court, after full consideration of all the historical data examined in *Betts*, had unequivocally declared that “the right to the aid of counsel is of this fundamental character.”

The fact is that in deciding as it did—that “appointment of counsel is not a fundamental right, essential to a fair trial”—the Court in *Betts v. Brady* made an abrupt break with its own well-considered precedents. In returning to these old precedents, sounder we believe than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public’s interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to

counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*:

“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He 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.”

The Court in *Betts v. Brady* departed from the sound wisdom upon which the Court's holding in *Powell v. Alabama* rested. Florida, supported by two other States, has asked that *Betts v. Brady* be left intact. Twenty-two States, as friends of the Court, argue that *Betts* was “an anachronism when handed down” and that it should now be overruled. We agree.

The judgment is reversed and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Notes, Comments, and Questions

After the Court decided *Gideon v. Wainwright*, the state of Florida retried Gideon. He was represented by counsel at his second trial and was acquitted.

In *Argersinger v. Hamlin*, [407 U.S. 25](#) (1972), the Court extended the rule of *Gideon* to all cases in which a defendant faces possible imprisonment, rejecting an argument it should be limited to cases in which a substantial prison sentence was possible. “The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more.” *Id.* at 33.¹

Students should note that because the Assistance of Counsel Clause applies only to “criminal prosecutions,” the holding of *Gideon* does not provide a right to appointed counsel in all serious cases, only criminal cases. For example, a person at risk of deportation in immigration court has

¹ The idea of applying *Gideon* only to cases at which a defendant faced a possible sentence of six months or more had its roots in cases about the right to trial by jury, which are discussed below.

no right to counsel under *Gideon*, nor does a housing court litigant at risk of eviction, nor does a civil defendant sued for millions of dollars.

Students should also note that the right to trial by jury exists only if the maximum potential sentence exceeds six months. If the maximum is exactly six months or less, then the prosecutor can have a bench trial even if defendant objects. See *Duncan v. Louisiana*, [391 U.S. 145](#) (1968); see also *Baldwin v. New York*, [399 U.S. 66](#) (1970). If the statutory maximum is, say, eight months, then prosecutor can say she won't seek a sentence in excess of six months to avoid dealing with a jury. If the defendant is charged with two counts, and each count has a maximum sentence of four months, that does not exceed six months for purposes of this rule. The test is whether any offense has a maximum possible sentence above six months. (Also, in actual practice, someone convicted on two counts, each with a maximum sentence of four months, usually serves four months rather than eight months. Sentences for multiple counts usually run concurrently instead of consecutively, absent an unusual statute.)

Because the “assistance of counsel” would have little value if the defendant’s lawyer literally arrived only for the trial and provided help at no other time, the Court has held that defendants have the right to counsel not only at trial but also at other “critical stages” of the prosecution. These “critical stages” include: post-indictment line-ups (see *United States v. Wade*, chapter 38), preliminary hearings (see *Coleman v. Alabama*, [399 U.S. 1](#) (1970)), post-indictment interrogations (see *Massiah*, chapter 29), and arraignments (see *Hamilton v. Alabama*, [368 U.S. 52](#) (1961)). Recall also *Rothgery v. Gillespie County* (discussed in Chapter 29), in which the Court held that the right to counsel attaches at a defendant’s first presentation before judicial officer, even if no lawyer is there for the prosecution.

By contrast, a defendant has no right to government-funded counsel after the conclusion of initial (direct) appeals. Accordingly, for certiorari petitions, *habeas corpus* petitions, and similar efforts, the defendant must pay a lawyer, find *pro bono* counsel, or proceed *pro se*.

Since the Court decided *Gideon*, states have created systems for the provision of counsel to indigent criminal defendants. The quality of these systems varies tremendously from state to state. Common issues confronted by states include the quality of appointed counsel—especially in complicated cases, and most especially in capital cases—as well as funding to pay lawyers, experts, and other costs. States also diverge in their definitions of who qualifies as sufficiently indigent for appointed counsel. For a review of the state of indigent defense in the states, see the articles collected in the [Summer 2010 symposium issue](#) of the *Missouri Law Review*, entitled “Broke and Broken: Can We Fix Our State Indigent Defense System?” Topics include ethical duties lawyers owe to indigent clients, state constitutional challenges to inadequate indigent defense systems, and ethical issues provided by excessive caseloads. One recent example of a state system in crisis occurred in 2016, when the lead public defender in Missouri attempted to assign a criminal case to the state’s governor, claiming that grievous underfunding justified the unusual move.²

² See Celeste Bott, “[Court Rules Public Defender Can’t Appoint Missouri Governor as a Defense Attorney](#),” St. Louis Post-Dispatch (Aug. 25, 2016).

Ineffective Assistance of Counsel

The Sixth Amendment right to counsel has never been interpreted to mean that all defendants have the right to perfect, or even to very good, counsel. However, if the quality of counsel falls below the minimum standards of the legal profession, a convicted defendant may sometimes have a conviction set aside on the basis of “ineffective assistance of counsel.” In *Strickland v. Washington*, the Court set forth the standard for ineffective assistance claims.

Supreme Court of the United States

Charles E. Strickland v. David Leroy Washington

Decided May 14, 1984 – [466 U.S. 668](#)

Justice O’CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant’s contention that the Constitution requires a conviction or death sentence to be set aside because counsel’s assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes, which included three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel’s advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. He also stated, however, that he accepted responsibility for the crimes. The trial judge told respondent that he had “a great deal of respect for people who are willing to step forward and admit their responsibility” but that he was making no statement at all about his likely sentencing decision.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also spoke on the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. Counsel also argued that respondent had no history of criminal activity and that respondent committed the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe—in one case, ultimately fatal—injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent

had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances “would still clearly far outweigh” that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent’s conduct. Fourth, respondent’s participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent’s age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent’s planning of the crimes and disposition of the proceeds of the various accompanying thefts.

In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: “A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances.” He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

B

Respondent subsequently sought collateral relief in state court on numerous grounds, among them that counsel had rendered ineffective assistance at the sentencing proceeding. Respondent challenged counsel’s assistance in six respects. He asserted that counsel was ineffective because he failed to move for a continuance to prepare for sentencing, to request a psychiatric report, to investigate and present character witnesses, to seek a presentence investigation report, to present meaningful arguments to the sentencing judge, and to investigate the medical examiner’s reports or cross-examine the medical experts. In support of the claim, respondent submitted 14 affidavits from friends, neighbors, and relatives stating that they would have testified if asked to do so. He also submitted one psychiatric report and one psychological report stating that respondent, though not under the influence of extreme mental or emotional disturbance, was “chronically frustrated and depressed because of his economic dilemma” at the time of his crimes.

The trial court denied relief without an evidentiary hearing, finding that the record evidence conclusively showed that the ineffectiveness claim was meritless. Four of the assertedly prejudicial errors required little discussion. First, there were no grounds to request a continuance, so there was no error in not requesting one when respondent pleaded guilty. Second, failure to request a presentence investigation was not a serious error because the trial judge had discretion not to grant such a request and because any presentence investigation would have resulted in admission of respondent’s “rap sheet” and thus would have undermined his assertion of no significant history of criminal activity. Third, the argument and memorandum given to the sentencing judge were “admirable” in light of the overwhelming aggravating circumstances and absence of mitigating circumstances. Fourth, there was no error in failure to examine the medical examiner’s reports or to cross-examine the medical witnesses testifying on the manner of death of respondent’s victims, since respondent admitted that the victims died in the ways shown by the unchallenged medical evidence.

The trial court dealt at greater length with the two other bases for the ineffectiveness claim. The court pointed out that a psychiatric examination of respondent was conducted by state order soon after respondent's initial arraignment. That report states that there was no indication of major mental illness at the time of the crimes. Moreover, both the reports submitted in the collateral proceeding state that, although respondent was "chronically frustrated and depressed because of his economic dilemma," he was not under the influence of extreme mental or emotional disturbance. All three reports thus directly undermine the contention made at the sentencing hearing that respondent was suffering from extreme mental or emotional disturbance during his crime spree. Accordingly, counsel could reasonably decide not to seek psychiatric reports; indeed, by relying solely on the plea colloquy to support the emotional disturbance contention, counsel denied the State an opportunity to rebut his claim with psychiatric testimony. In any event, the aggravating circumstances were so overwhelming that no substantial prejudice resulted from the absence at sentencing of the psychiatric evidence offered in the collateral attack.

The court rejected the challenge to counsel's failure to develop and to present character evidence for much the same reasons. The affidavits submitted in the collateral proceeding showed nothing more than that certain persons would have testified that respondent was basically a good person who was worried about his family's financial problems. Respondent himself had already testified along those lines at the plea colloquy. Moreover, respondent's admission of a course of stealing rebutted many of the factual allegations in the affidavits. For those reasons, and because the sentencing judge had stated that the death sentence would be appropriate even if respondent had no significant prior criminal history, no substantial prejudice resulted from the absence at sentencing of the character evidence offered in the collateral attack. The Florida Supreme Court affirmed the denial of relief.

C

Respondent next filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of Florida. The court [] denied the petition for a writ of habeas corpus.

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit affirmed in part, vacated in part, and remanded with instructions to apply to the particular facts the framework for analyzing ineffectiveness claims that it developed in its opinion. The panel decision was itself vacated when Unit B of the former Fifth Circuit, now the Eleventh Circuit, decided to rehear the case en banc. The full Court of Appeals developed its own framework for analyzing ineffective assistance claims and reversed the judgment of the District Court and remanded the case for new factfinding under the newly announced standards.

D

Petitioners, who are officials of the State of Florida, filed a petition for a writ of certiorari seeking review of the decision of the Court of Appeals. The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused. With the exception of *Cuyler v. Sullivan*, [446 U.S. 335](#) (1980), however, which involved a claim that counsel's assistance was rendered ineffective by a conflict

of interest, the Court has never directly and fully addressed a claim of “actual ineffectiveness” of counsel’s assistance in a case going to trial.

For these reasons, we granted certiorari to consider the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel. We address the merits of the constitutional issue.

II

In a long line of cases [] this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the “ample opportunity to meet the case of the prosecution” to which they are entitled.

Because of the vital importance of counsel’s assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

For that reason, the Court has recognized that “the right to counsel is the right to the effective assistance of counsel.” Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases—that is, those presenting claims of “actual ineffectiveness.” In giving meaning to the requirement, however, we must take its purpose—to ensure a fair trial—as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The same principle applies to a capital sentencing proceeding such as that provided by Florida law. We need not consider the role of counsel in an ordinary sentencing, which may involve informal proceedings and standardless discretion in the sentencer, and hence may require a different approach to the definition of constitutionally effective assistance. A capital sentencing proceeding like the one involved in this case, however, is sufficiently like a trial in its adversarial format and in the existence of standards for decision that counsel's role in the proceeding is comparable to counsel's role at trial—to ensure that the adversarial testing process works to produce a just result under the standards governing decision. For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

As all the Federal Courts of Appeals have now held, the proper standard for attorney performance is that of reasonably effective assistance. The Court indirectly recognized as much when it stated [] that a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not "a reasonably competent attorney" and the advice was not "within the range of competence demanded of attorneys in criminal cases." When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.

More specific guidelines are not appropriate. The Sixth Amendment refers simply to "counsel," not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.

Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

These basic duties neither exhaustively define the obligations of counsel nor form a checklist for judicial evaluation of attorney performance. In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.

Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise

of reasonable professional judgment.

These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions.

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. [P]rejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest

and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant demonstrates that counsel “actively represented conflicting interests” and that “an actual conflict of interest adversely affected his lawyer’s performance.”

Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors “impaired the presentation of the defense.” That standard, however, provides no workable principle. Since any error, if it is indeed an error, “impairs” the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the profound importance of finality in criminal proceedings. Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules.

Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

To the extent that this has already been the guiding inquiry in the lower courts, the standards articulated today do not require reconsideration of ineffectiveness claims rejected under different standards. In particular, the minor differences in the lower courts' precise formulations of the performance standard are insignificant: the different formulations are mere variations of the overarching reasonableness standard. With regard to the prejudice inquiry, only the strict outcome-determinative test, among the standards articulated in the lower courts, imposes a heavier burden on defendants than the tests laid down today. The difference, however, should alter the merit of an ineffectiveness claim only in the rarest case.

Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial. As indicated by the "cause and prejudice" test for overcoming procedural waivers of claims of error, the presumption that a criminal judgment is final is at its strongest in collateral attacks on that judgment. An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceeding whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, no special standards ought to apply to ineffectiveness claims made in habeas proceedings.

Finally, in a federal habeas challenge to a state criminal judgment, a state court conclusion that counsel rendered effective assistance is not a finding of fact binding on the federal court to the extent stated by 28 U.S.C. § 2254(d). Ineffectiveness is not a question of "basic, primary, or historical fac[t]." Rather, like the question whether multiple representation in a particular case gave rise to a conflict of interest, it is a mixed question of law and fact. Although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254(d), and although district court findings are subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a), both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles.

Application of the governing principles is not difficult in this case. The facts as described above, make clear that the conduct of respondent's counsel at and before respondent's sentencing proceeding cannot be found unreasonable. They also make clear that, even assuming the challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

With respect to the performance component, the record shows that respondent's counsel made a strategic choice to argue for the extreme emotional distress mitigating circumstance and to rely as fully as possible on respondent's acceptance of responsibility for his crimes. Although counsel understandably felt hopeless about respondent's prospects, nothing in the record indicates, as one possible reading of the District Court's opinion suggests, that counsel's sense of hopelessness distorted his professional judgment. Counsel's strategy choice was well within the range of professionally reasonable judgments, and the decision not to seek more character or psychological evidence than was already in hand was likewise reasonable.

The trial judge's views on the importance of owning up to one's crimes were well known to counsel. The aggravating circumstances were utterly overwhelming. Trial counsel could reasonably surmise from his conversations with respondent that character and psychological evidence would be of little help. Respondent had already been able to mention at the plea colloquy the substance of what there was to know about his financial and emotional troubles. Restricting testimony on respondent's character to what had come in at the plea colloquy ensured that contrary character and psychological evidence and respondent's criminal history, which counsel had successfully moved to exclude, would not come in. On these facts, there can be little question, even without application of the presumption of adequate performance, that trial counsel's defense, though unsuccessful, was the result of reasonable professional judgment.

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The evidence that respondent says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly [r]everse[d].

Justice MARSHALL, dissenting.

The Sixth and Fourteenth Amendments guarantee a person accused of a crime the right to the aid of a lawyer in preparing and presenting his defense. It has long been settled that "the right to counsel is the right to the effective assistance of counsel." The state and lower federal courts have developed standards for distinguishing effective from inadequate assistance. Today, for the first time, this Court attempts to synthesize and clarify those standards. For the most part, the majority's efforts are unhelpful. Neither of its two principal holdings seems to me likely to improve the adjudication of Sixth Amendment claims. And, in its zeal to survey comprehensively this field of doctrine, the majority makes many other generalizations and suggestions that I find unacceptable. Most importantly, the majority fails to take adequate account of the fact that the locus of this case is a capital sentencing proceeding. Accordingly, I join neither the Court's opinion nor its judgment.

The opinion of the Court revolves around two holdings. First, the majority ties the constitutional minima of attorney performance to a simple "standard of reasonableness." Second, the majority holds that only an error of counsel that has sufficient impact on a trial to "undermine confidence in the outcome" is grounds for overturning a conviction. I disagree with both of these rulings.

My objection to the performance standard adopted by the Court is that it is so malleable that, in practice, it will either have no grip at all or will yield excessive variation in the manner in which the Sixth Amendment is interpreted and applied by different courts. To tell lawyers and the lower courts that counsel for a criminal defendant must behave "reasonably" and must act like "a reasonably competent attorney" is to tell them almost nothing. In essence, the majority has instructed judges called upon to assess claims of ineffective assistance of counsel to advert to their own intuitions regarding what constitutes "professional" representation, and has discouraged them from trying to develop more detailed standards governing the performance of defense counsel. In my view, the Court has thereby not only abdicated its own responsibility to interpret the Constitution, but also impaired the ability of the lower courts to exercise theirs.

I object to the prejudice standard adopted by the Court for two independent reasons. First, it is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the

possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel. In view of all these impediments to a fair evaluation of the probability that the outcome of a trial was affected by ineffectiveness of counsel, it seems to me senseless to impose on a defendant whose lawyer has been shown to have been incompetent the burden of demonstrating prejudice.

Second and more fundamentally, the assumption on which the Court's holding rests is that the only purpose of the constitutional guarantee of effective assistance of counsel is to reduce the chance that innocent persons will be convicted. In my view, the guarantee also functions to ensure that convictions are obtained only through fundamentally fair procedures. The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer. A proceeding in which the defendant does not receive meaningful assistance in meeting the forces of the State does not, in my opinion, constitute due process.

[Justice Marshall then argued that even under the standard set forth by the majority, Strickland's claim should have prevailed.]

Notes, Comments, and Questions

The *Strickland* standard requires two showings from the defendant. First, the defendant must show that there was a deficiency in the attorney's performance, and second, the defendant must show that that deficiency prejudiced the defense. In other words, the defendant must show that but for the attorney's unprofessional errors, the outcome might well have been different.

Justice Marshall, on the other hand, focuses on the fairness of the process. He finds the requirement that a defendant prove prejudice, even after his attorney has been shown to be ineffective, is "senseless" because of the difficulties in making such a showing. Justice Marshall proposes the Sixth Amendment is violated when a defendant is represented by a manifestly ineffective attorney regardless of what other evidence of guilt the prosecution might possess.

Students should consider whether they find the majority or Justice Marshall more persuasive. Why? What are the problems, if any, with the majority's standard (or its application of the standard to the facts before it)? What are the problems, if any, with Justice Marshall's proposed alternative?

While *Strickland* articulated a two-pronged test applicable when a defendant points to a specific error made by counsel, prejudice is presumed (that is, the defendant needs to prove it) when the defendant's ineffective assistance claim rests on counsel's failure "to subject the prosecution's case to meaningful adversarial testing." *United States v. Cronin*, [466 U.S. 648](#) (1984). The Court in *Cronin*, articulated that surrounding circumstances (rather than specific error) can give rise to a presumption of prejudice when counsel's overall deficiency is akin to having no counsel at all. Some circuit courts have expanded the *Cronin* standard to encompass counsel that sleep during the entirety of trial and counsel that ask no questions on cross examination.

In our next chapter, we continue our examination of ineffective assistance claims. We also review when a criminal defendant may represent himself and when a Court may deny that option to a defendant.

THE RIGHT TO COUNSEL

Chapter 37

Self-Representation and More on Ineffective Assistance

In this chapter we continue our study of what constitutes effective (and ineffective) assistance of counsel in criminal cases. We also explore when a criminal defendant has the right to represent herself, even if a judge believes that she would be better served by a lawyer.

We begin with the Court's application of *Strickland v. Washington* (Chapter 36) to cases in which no trial occurs because the defendant enters a plea of guilty.

Supreme Court of the United States

Missouri v. Galin E. Frye

Decided March 21, 2012 – [566 U.S. 134](#)

Justice KENNEDY delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance.

I

In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D felony, which carries a maximum term of imprisonment of four years.

On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called "shock" time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a 90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. The letter stated both offers would expire on December 28. Frye's attorney did not advise Frye that the offers had been made. The offers expired.

Frye's preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying plea agreement. The state trial court accepted Frye's guilty plea. The prosecutor recommended a 3-year sentence, made no recommendation regarding probation, and requested 10 days shock time in jail. The trial judge sentenced Frye to three years in prison.

Frye filed for postconviction relief in state court. He alleged his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer.

A state court denied the postconviction motion, but the Missouri Court of Appeals reversed. To implement a remedy for the violation, the court deemed Frye's guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari.

II

A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: *Hill v. Lockhart*, [474 U.S. 52](#) (1985) and *Padilla v. Kentucky*, [559 U.S. 356](#) (2010).

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged.

In *Padilla*, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel.

The State is correct to point out that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present. Before a guilty plea is entered the defendant’s understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. *Hill* and *Padilla* both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

When a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event. And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel’s inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.

The State’s contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. “Anything less ... might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’”

B

Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Though the standard for counsel’s performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel “promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney” and this standard has been adopted by numerous state and federal courts over the last 30 years. The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys.

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence.

Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty.

C

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would

have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill*. In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations. Unlike the defendant in *Hill*, Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years’ imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*’s inquiry into whether “the result of the proceeding would have been different,” requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea nor a federal right that the judge accept it. In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed. The Federal Rules, some state rules including in Missouri, and this Court’s precedents give trial courts some leeway to accept or reject plea agreements. It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel’s errors can be conducted within that framework.

III

These standards must be applied to the instant case. As regards the deficient performance prong of *Strickland*, the Court of Appeals found the “record is void of *any* evidence of *any* effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye’s conduct interfered with trial counsel’s ability to do so.” On this record, it is evident that Frye’s attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. The Missouri Court of Appeals was correct that

“counsel’s representation fell below an objective standard of reasonableness.”

The Court of Appeals erred, however, in articulating the precise standard for prejudice in this context. As noted, a defendant in Frye’s position must show not only a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court. Frye can show he would have accepted the offer, but there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.

There appears to be a reasonable probability Frye would have accepted the prosecutor’s original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor. It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution’s case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him. Here, however, that is not the case. The Court of Appeals did not err in finding Frye’s acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it; and there is no need to address here the showings that might be required in other cases.

The Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court. Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters. The Court has established the minimum requirements of the Sixth Amendment as interpreted in *Strickland*, and States have the discretion to add procedural protections under state law if they choose. A State may choose to preclude the prosecution from withdrawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting a plea bargain. In Missouri, it appears “a plea offer once accepted by the defendant can be withdrawn without recourse” by the prosecution. The extent of the trial court’s discretion in Missouri to reject a plea agreement appears to be in some doubt.

We remand for the Missouri Court of Appeals to consider these state-law questions, because they bear on the federal question of *Strickland* prejudice. If, as the Missouri court stated here, the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice. Likewise, if the trial court could have refused to accept the plea agreement, and if Frye fails to show a reasonable probability the trial court would have accepted the plea, there is no *Strickland* prejudice. In this case, given Frye’s new offense for driving without a license on December 30, 2007, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it at the January 4, 2008, hearing, unless they were required by state law to do so.

It is appropriate to allow the Missouri Court of Appeals to address this question in the first instance. The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

* * *

As the *Frye* Court noted, the Court decided in *Padilla v. Kentucky* that effective representation includes informing a defendant of the “immigration consequences” of a guilty plea. Because immigration law is complicated, and the consequences of a conviction (for example, whether it will lead to the convicted defendant’s removal from the United States) may not be obvious, criminal defense lawyers should obtain assistance from lawyers with immigration expertise.

In our next case, the Court considered whether a lawyer may concede a defendant’s guilt—as part of a strategy to avoid a death sentence—over the client’s objection.

Supreme Court of the United States

Robert Leroy McCoy v. Louisiana

Decided May 14, 2018 – [138 S. Ct. 1500](#)

Justice GINSBURG delivered the opinion of the Court.

In *Florida v. Nixon*, [543 U.S. 175](#) (2004), this Court considered whether the Constitution bars defense counsel from conceding a capital defendant’s guilt at trial “when [the] defendant, informed by counsel, neither consents nor objects.” In that case, defense counsel had several times explained to the defendant a proposed guilt-phase concession strategy, but the defendant was unresponsive. We held that when counsel confers with the defendant and the defendant remains silent, neither approving nor protesting counsel’s proposed concession strategy, “[no] blanket rule demand[s] the defendant’s explicit consent” to implementation of that strategy.

In the case now before us, in contrast to *Nixon*, the defendant vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt. Yet the trial court permitted counsel, at the guilt phase of a capital trial, to tell the jury the defendant “committed three murders.... [H]e’s guilty.” We hold that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. Guaranteeing a defendant the right “to have the *Assistance of Counsel for his defence*,” the Sixth Amendment so demands. With individual liberty—and, in capital cases, life—at stake, it is the defendant’s prerogative, not counsel’s, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

I

On May 5, 2008, Christine and Willie Young and Gregory Colston were shot and killed in the Youngs’ home in Bossier City, Louisiana. The three victims were the mother, stepfather, and son of Robert McCoy’s estranged wife, Yolanda. Several days later, police arrested McCoy in Idaho. Extradited to Louisiana, McCoy was appointed counsel from the public defender’s office. A Bossier Parish grand jury indicted McCoy on three counts of first-degree murder, and the prosecutor gave notice of intent to seek the death penalty. McCoy pleaded not guilty. Throughout the proceedings, he insistently maintained he was out of State at the time of the killings and that

corrupt police killed the victims when a drug deal went wrong. At defense counsel's request, a court-appointed sanity commission examined McCoy and found him competent to stand trial.

In December 2009 and January 2010, McCoy told the court his relationship with assigned counsel had broken down irretrievably. He sought and gained leave to represent himself until his parents engaged new counsel for him. In March 2010, Larry English, engaged by McCoy's parents, enrolled as McCoy's counsel. English eventually concluded that the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase. McCoy, English reported, was "furious" when told, two weeks before trial was scheduled to begin, that English would concede McCoy's commission of the triple murders. McCoy told English "not to make that concession," and English knew of McCoy's "complet[e] oppos[ition] to [English] telling the jury that [McCoy] was guilty of killing the three victims"; instead of any concession, McCoy pressed English to pursue acquittal.

At a July 26, 2011 hearing, McCoy sought to terminate English's representation, and English asked to be relieved if McCoy secured other counsel. With trial set to start two days later, the court refused to relieve English and directed that he remain as counsel of record. "[Y]ou are the attorney," the court told English when he expressed disagreement with McCoy's wish to put on a defense case, and "you have to make the trial decision of what you're going to proceed with."

At the beginning of his opening statement at the guilt phase of the trial, English told the jury there was "no way reasonably possible" that they could hear the prosecution's evidence and reach "any other conclusion than Robert McCoy was the cause of these individuals' death." McCoy protested; out of earshot of the jury, McCoy told the court that English was "selling [him] out" by maintaining that McCoy "murdered [his] family." The trial court reiterated that English was "representing" McCoy and told McCoy that the court would not permit "any other outbursts." Continuing his opening statement, English told the jury the evidence is "unambiguous," "my client committed three murders." McCoy testified in his own defense, maintaining his innocence and pressing an alibi difficult to fathom. In his closing argument, English reiterated that McCoy was the killer. On that issue, English told the jury that he "took [the] burden off of [the prosecutor]." The jury then returned a unanimous verdict of guilty of first-degree murder on all three counts. At the penalty phase, English again conceded "Robert McCoy committed these crimes," but urged mercy in view of McCoy's "serious mental and emotional issues." The jury returned three death verdicts.

Represented by new counsel, McCoy unsuccessfully moved for a new trial, arguing that the trial court violated his constitutional rights by allowing English to concede McCoy "committed three murders" over McCoy's objection. The Louisiana Supreme Court affirmed the trial court's ruling that defense counsel had authority so to concede guilt, despite the defendant's opposition to any admission of guilt.

We granted certiorari in view of a division of opinion among state courts of last resort on the question whether it is unconstitutional to allow defense counsel to concede guilt over the defendant's intransigent and unambiguous objection.

II

A

The Sixth Amendment guarantees to each criminal defendant “the Assistance of Counsel for his defence.” At common law, self-representation was the norm. As the laws of England and the American Colonies developed, providing for a right to counsel in criminal cases, self-representation remained common and the right to proceed without counsel was recognized. Even now, when most defendants choose to be represented by counsel, an accused may insist upon representing herself—however counterproductive that course may be. As this Court explained, “[t]he right to defend is personal,” and a defendant’s choice in exercising that right “must be honored out of ‘that respect for the individual which is the lifeblood of the law.’”

The choice is not all or nothing: To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment, in “grant[ing] to the accused personally the right to make his defense,” “speaks of the ‘assistance’ of counsel, and an assistant, however expert, is still an assistant.” Trial management is the lawyer’s province: Counsel provides his or her assistance by making decisions such as “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.” Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.

Autonomy to decide that the objective of the defense is to assert innocence belongs in this latter category. Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of legal counsel despite the defendant’s own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client’s objectives; they are choices about what the client’s objectives in fact *are*.

Counsel may reasonably assess a concession of guilt as best suited to avoiding the death penalty, as English did in this case. But the client may not share that objective. He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration. When a client expressly asserts that the objective of “*his* defence” is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.

Preserving for the defendant the ability to decide whether to maintain his innocence should not displace counsel’s, or the court’s, respective trial management roles. Counsel, in any case, must still develop a trial strategy and discuss it with her client, explaining why, in her view, conceding guilt would be the best option. In this case, the court had determined that McCoy was competent to stand trial, *i.e.*, that McCoy had “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.” If, after consultations with English concerning the management of the defense, McCoy disagreed with English’s proposal to concede McCoy committed three murders, it was not open to English to override McCoy’s objection. English could not interfere with McCoy’s telling the jury “I was not the murderer,” although counsel

could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction.

III

Because a client's autonomy, not counsel's competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence to McCoy's claim. To gain redress for attorney error, a defendant ordinarily must show prejudice. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative.

Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called "structural"; when present, such an error is not subject to harmless-error review. Structural error "affect[s] the framework within which the trial proceeds," as distinguished from a lapse or flaw that is "simply an error in the trial process itself." An error may be ranked structural, we have explained, "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest," such as "the fundamental legal principle that a defendant must be allowed to make his own choices about the proper way to protect his own liberty." An error might also count as structural when its effects are too hard to measure, as is true of the right to counsel of choice, or where the error will inevitably signal fundamental unfairness, as we have said of a judge's failure to tell the jury that it may not convict unless it finds the defendant's guilt beyond a reasonable doubt.

Under at least the first two rationales, counsel's admission of a client's guilt over the client's express objection is error structural in kind. Such an admission blocks the defendant's right to make the fundamental choices about his own defense. And the effects of the admission would be immeasurable, because a jury would almost certainly be swayed by a lawyer's concession of his client's guilt. McCoy must therefore be accorded a new trial without any need first to show prejudice.

Larry English was placed in a difficult position; he had an unruly client and faced a strong government case. He reasonably thought the objective of his representation should be avoidance of the death penalty. But McCoy insistently maintained: "I did not murder my family." Once he communicated that to court and counsel, strenuously objecting to English's proposed strategy, a concession of guilt should have been off the table. The trial court's allowance of English's admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment. Because the error was structural, a new trial is the required corrective.

For the reasons stated, the judgment of the Louisiana Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, dissenting.

The Constitution gives us the authority to decide real cases and controversies; we do not have the right to simplify or otherwise change the facts of a case in order to make our work easier or to achieve a desired result. But that is exactly what the Court does in this case. The Court overturns petitioner's convictions for three counts of first-degree murder by attributing to his

trial attorney, Larry English, something that English never did. The Court holds that English violated petitioner's constitutional rights by "admit[ting] h[is] client's guilt of a charged crime over the client's intransigent objection." But English did not admit that petitioner was guilty of first-degree murder. Instead, faced with overwhelming evidence that petitioner shot and killed the three victims, English admitted that petitioner committed one element of that offense, *i.e.*, that he killed the victims. But English strenuously argued that petitioner was not guilty of first-degree murder because he lacked the intent (the *mens rea*) required for the offense. So the Court's newly discovered fundamental right simply does not apply to the real facts of this case. The real case is far more complex. Indeed, the real situation English faced at the beginning of petitioner's trial was the result of a freakish confluence of factors that is unlikely to recur.

Retained by petitioner's family, English found himself in a predicament as the trial date approached. The evidence against his client was truly "overwhelming," as the Louisiana Supreme Court aptly noted. Among other things, the evidence showed the following. Before the killings took place, petitioner had abused and threatened to kill his wife, and she was therefore under police protection. On the night of the killings, petitioner's mother-in-law made a 911 call and was heard screaming petitioner's first name. She yelled: "She ain't here, Robert ... I don't know where she is. The detectives have her. Talk to the detectives. She ain't in there, Robert." Moments later, a gunshot was heard, and the 911 call was disconnected.

Officers were dispatched to the scene, and on arrival, they found three dead or dying victims—petitioner's mother-in-law, her husband, and the teenage son of petitioner's wife. The officers saw a man who fit petitioner's description fleeing in petitioner's car. They chased the suspect, but he abandoned the car along with critical evidence linking him to the crime: the cordless phone petitioner's mother-in-law had used to call 911 and a receipt for the type of ammunition used to kill the victims. Petitioner was eventually arrested while hitchhiking in Idaho, and a loaded gun found in his possession was identified as the one used to shoot the victims. In addition to all this, a witness testified that petitioner had asked to borrow money to purchase bullets shortly before the shootings, and surveillance footage showed petitioner purchasing the ammunition on the day of the killings. And two of petitioner's friends testified that he confessed to killing at least one person.

Despite all this evidence, petitioner, who had been found competent to stand trial and had refused to plead guilty by reason of insanity, insisted that he did not kill the victims. He claimed that the victims were killed by the local police and that he had been framed by a farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho. Petitioner believed that even his attorney and the trial judge had joined the plot.

The weekend before trial, ... [h]e asked the trial court to replace English, and English asked for permission to withdraw. Petitioner stated that he had secured substitute counsel, but he was unable to provide the name of this new counsel, and no new attorney ever appeared. The court refused these requests and also denied petitioner's last-minute request to represent himself. (Petitioner does not challenge these decisions here.) So petitioner and English were stuck with each other, and petitioner availed himself of his right to take the stand to tell his wild story. Under those circumstances, what was English supposed to do?

The Louisiana Supreme Court held that English could not have put on petitioner's desired defense without violating state ethics rules, but this Court effectively overrules the state court on this issue of state law. However, even if it is assumed that the Court is correct on this ethics issue, the result of mounting petitioner's conspiracy defense almost certainly would have been disastrous. That approach stood no chance of winning an acquittal and would have severely damaged English's credibility in the eyes of the jury, thus undermining his ability to argue effectively against the imposition of a death sentence at the penalty phase of the trial. As English observed, taking that path would have only "help[ed] the District Attorney send [petitioner] to the death chamber." So, again, what was English supposed to do?

When pressed at oral argument before this Court, petitioner's current counsel eventually provided an answer: English was not required to take any affirmative steps to support petitioner's bizarre defense, but instead of conceding that petitioner shot the victims, English should have ignored that element entirely. So the fundamental right supposedly violated in this case comes down to the difference between the two statements set out below.

Constitutional: "First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I submit to you that my client did not have the intent required for conviction for that offense."

Unconstitutional: "First-degree murder requires proof both that the accused killed the victim and that he acted with the intent to kill. I admit that my client shot and killed the victims, but I submit to you that he did not have the intent required for conviction for that offense."

The practical difference between these two statements is negligible. If English had conspicuously refrained from endorsing petitioner's story and had based his defense solely on petitioner's dubious mental condition, the jury would surely have gotten the message that English was essentially conceding that petitioner killed the victims. But according to petitioner's current attorney, the difference is fundamental. The first formulation, he admits, is perfectly fine. The latter, on the other hand, is a violation so egregious that the defendant's conviction must be reversed even if there is no chance that the misstep caused any harm. It is no wonder that the Court declines to embrace this argument and instead turns to an issue that the case at hand does not actually present.

The constitutional right that the Court has now discovered—a criminal defendant's right to insist that his attorney contest his guilt with respect to all charged offenses—is like a rare plant that blooms every decade or so. Having made its first appearance today, the right is unlikely to figure in another case for many years to come. Why is this so?

First, it is hard to see how the right could come into play in any case other than a capital case in which the jury must decide both guilt and punishment. In all other cases, guilt is almost always the only issue for the jury, and therefore admitting guilt of all charged offenses will achieve nothing. It is hard to imagine a situation in which a competent attorney might take that approach. So the right that the Court has discovered is effectively confined to capital cases.

Second, few rational defendants facing a possible death sentence are likely to insist on contesting guilt where there is no real chance of acquittal and where admitting guilt may improve the

chances of avoiding execution. Indeed, under such circumstances, the odds are that a rational defendant will plead guilty in exchange for a life sentence. By the same token, an attorney is unlikely to insist on admitting guilt over the defendant's objection unless the attorney believes that contesting guilt would be futile. So the right is most likely to arise in cases involving irrational capital defendants.

Third, where a capital defendant and his retained attorney cannot agree on a basic trial strategy, the attorney and client will generally part ways unless, as in this case, the court is not apprised until the eve of trial. The client will then either search for another attorney or decide to represent himself. So the field of cases in which this right might arise is limited further still—to cases involving irrational capital defendants who disagree with their attorneys' proposed strategy yet continue to retain them.

Fourth, if counsel is appointed, and unreasonably insists on admitting guilt over the defendant's objection, a capable trial judge will almost certainly grant a timely request to appoint substitute counsel. And if such a request is denied, the ruling may be vulnerable on appeal.

Finally, even if all the above conditions are met, the right that the Court now discovers will not come into play unless the defendant expressly protests counsel's strategy of admitting guilt. Where the defendant is advised of the strategy and says nothing, or is equivocal, the right is deemed to have been waived.

Notes, Comments, and Questions

In general, courts reviewing claims of ineffective assistance of counsel are deferential to decisions by lawyers that can plausibly be described as "strategy." Notwithstanding the result in *McCoy*, lawyers enjoy broad latitude to decide how to achieve a client's objectives, and judges rarely second guess choices simply because bad results followed. By contrast, ineffective assistance claims have greater success when a lawyer's action (or inaction) appears driven by laziness rather than by tactics.

For example, a lawyer who interviews a potential alibi witness and chooses not to call her as a trial witness can later explain the strategy behind the choice. Perhaps the witness seemed shifty and counsel feared the jury would think poorly of a defendant who called such a witness. But if a client tells a lawyer of a potential alibi witness, and the lawyer conducts no investigation, the lawyer may have trouble justifying that choice.

Relatedly, defense lawyers have a duty to obtain expert testimony in cases where any reasonable lawyer would do so. An insanity defense, for example, will normally require expert testimony about the client's mental health.

A few examples help illustrate the sorts of failings that constitute ineffective assistance:

In *Hinton v. Alabama*, [571 U.S. 263](#) (2014), the lawyer in a capital case had failed to obtain a qualified expert on “firearms and toolmark” evidence, largely because the lawyer erroneously believed that state law authorized only \$1,000 for the cost of an expert. The Court held, “The trial attorney’s failure to request additional funding in order to replace an expert he knew to be inadequate because he mistakenly believed that he had received all he could get under Alabama law constituted deficient performance.” Subsequently, Hinton [was exonerated](#) and released after thirty years in prison. He [tells his story](#) in *The Sun Does Shine: How I Found Life and Freedom on Death Row* (2018).

In *Wiggins v. Smith*, [539 U.S. 510](#) (2003), the Court found ineffective assistance in the penalty phase of a capital case after trial counsel failed to conduct an adequate investigation into the defendant’s background. “Counsel’s decision not to expand their investigation beyond the [presentence investigation (PSI) report] and the [Baltimore City Department of Social Services (DSS)] records fell short of the professional standards that prevailed in Maryland in 1989.”

In *Rompilla v. Beard*, [545 U.S. 374](#) (2005), the Court found ineffective assistance in a lawyer’s failure to examine a capital defendant’s prior case files. “Counsel knew that the Commonwealth intended to seek the death penalty by proving Rompilla had a significant history of felony convictions indicating the use or threat of violence, an aggravator under state law. ... [I]t is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation.”

Rompilla offers insight on how changes to Court membership can affect constitutional law. Justice Sandra Day O’Connor voted with the majority, and the case was decided 5-4. (She joined the majority opinion and also filed a concurrence.) About two weeks afterward, O’Connor announced her retirement. O’Connor’s seat on the Court was then filled by Justice Samuel Alito, who joined the Court in 2006. As it happens, the Third Circuit judgment reversed by the Supreme Court in *Rompilla* was explained in an opinion written by then-Circuit Judge Alito. [See 355 F.3d 233](#). Would a case with similar facts be decided the same way today?

Self-Representation by Criminal Defendants

In *Faretta v. California*, [422 U.S. 806](#) (1975), the Court considered “whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.” The Court said that another way to frame the question was “whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense.”

In an opinion by Justice Stewart, the Court noted that a defendant’s right to represent himself in criminal cases had long been recognized in America. “In the federal courts, the right of self-representation has been protected by statute since the beginnings of our Nation. With few exceptions, each of the several States also accords a defendant the right to represent himself in any criminal case. The constitutions of 36 States explicitly confer that right. Moreover, many state courts have expressed the view that the right is also supported by the Constitution of the

United States.” Recognizing that longstanding practice has its own persuasive authority, the Court wrote, “We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.”

The Court noted, too, that the Sixth Amendment provides the defendant with various rights; the rights are not provided to the lawyer. “The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be ‘informed of the nature and cause of the accusation,’ who must be ‘confronted with the witnesses against him,’ and who must be accorded ‘compulsory process for obtaining witnesses in his favor.’ Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment. The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.”

The Court then decided that even though a defendant would normally be extraordinarily foolish to forgo the assistance of counsel in favor of self-representation, the Constitution provides the option:

“It is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer’s training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.”

When a defendant wishes to forgo counsel, a trial judge must advise the defendant carefully of the consequences. The decision then belongs to the defendant.

The Court’s decision inspired a spirited dissent.

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN and Mr. Justice REHNQUIST join, dissenting.

This case [] is another example of the judicial tendency to constitutionalize what is thought “good.” That effort fails on its own terms here, because there is nothing desirable or useful in permitting every accused person, even the most uneducated and inexperienced, to insist upon conducting his own defense to criminal charges. Moreover, there is no constitutional basis for the Court’s holding, and it can only add to the problems of an already malfunctioning criminal justice system. I therefore dissent.

The fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself. The Court’s opinion in *Powell v. Alabama* puts the point eloquently:

“Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He 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. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.”

Obviously, these considerations do not vary depending upon whether the accused actively desires to be represented by counsel or wishes to proceed pro se. Nor is it accurate to suggest, as the Court seems to later in its opinion, that the quality of his representation at trial is a matter with which only the accused is legitimately concerned. Although we have adopted an adversary system of criminal justice, the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant’s ill-advised decision to waive counsel. The damage thus inflicted is not mitigated by the lame explanation that the defendant simply availed himself of the “freedom” “to go to jail under his own banner” The system of criminal justice should not be available as an instrument of self-destruction.

In short, both the “spirit and the logic” of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of cases this command can be honored only by means of the expressly guaranteed right to counsel, and the trial judge is in the best position to determine whether the accused is capable of conducting his defense. True freedom of choice and society’s interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution. This discretion is as critical an element of basic fairness as a trial judge’s discretion to decline to accept a plea of guilty.

Society has the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system will be considered. However, such considerations are conspicuously absent from the Court’s opinion in this case.

Notes, Comments, and Questions

After the Court decided *Faretta*, a few sensational cases followed in which criminal defendants represented themselves in especially ineffective ways, perhaps causing embarrassment to the judicial system in addition to themselves. The case of Colin Ferguson, who shot fellow passengers on a Long Island Rail Road train in 1993, became especially famous. Ferguson killed six passengers and shot several others. He later represented himself at trial, questioning victims he had shot. He referred to himself in the third person, [stating, for example](#), that “at the time that Mr. Ferguson was on the train,” he fell asleep and then someone else took his gun.

He asked one witness, “Is it your testimony that the defendant Ferguson stood right in front of you and shot you?”

The witness answered, “You weren’t right in front of me. You were about ten to twelve feet away, approximately the distance we’re at about now.”

His performance [was parodied](#) on *Saturday Night Live*. “I did not shoot them. They shot me,” the *SNL* Ferguson said in his opening statement. He continued, “There is no such thing as a ‘railroad’ or a ‘Long Island.’ Colin Ferguson is the victim of a conspiracy.”

Do cases like these show that *Faretta* is wrongly decided, or are they a necessary evil associated with vindicating the rights explained by the Court?

In *Indiana v. Edwards*, the Court considered how to apply *Faretta* to defendants who may lack the mental competence to conduct their own defense. Students should note that the mental state of a defendant can be evaluated at three different times (at least) for different purposes. For a defense based on insanity or mental disease or defect, the question is what mental state the defendant had at the moment she committed an offense. Regardless of the defendant’s mental state at the crime scene, a court may deem someone incompetent to stand trial if she is unable to understand the character and consequences of the proceedings against her or is unable properly to assist in her defense (that is, to communicate with counsel about defense strategies). Finally, there is the question of whether a defendant who is competent to stand trial might nonetheless be incompetent to represent himself. The *Edwards* Court decided whether such a category of defendants exists and, if so, how trial courts should deal with them.

Supreme Court of the United States

Indiana v. Ahmad Edwards

Decided June 19, 2008 – [554 U.S. 164](#)

Justice BREYER delivered the opinion of the Court.

This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution prohibits a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. We conclude that the Constitution does not forbid a State so to insist.

I

In July 1999, Ahmad Edwards, the respondent, tried to steal a pair of shoes from an Indiana department store. After he was discovered, he drew a gun, fired at a store security officer, and wounded a bystander. He was caught and then charged with attempted murder, battery with a deadly weapon, criminal recklessness, and theft. His mental condition subsequently became the subject of three competency proceedings and two self-representation requests, mostly before the same trial judge:

1. *First Competency Hearing: August 2000.* Five months after Edwards' arrest, his court-appointed counsel asked for a psychiatric evaluation. After hearing psychiatrist and neuropsychologist witnesses (in February 2000 and again in August 2000), the court found Edwards incompetent to stand trial, and committed him to Logansport State Hospital for evaluation and treatment.

2. *Second Competency Hearing: March 2002.* Seven months after his commitment, doctors found that Edwards' condition had improved to the point where he could stand trial. Several months later, however, but still before trial, Edwards' counsel asked for another psychiatric evaluation. In March 2002, the judge held a competency hearing, considered additional psychiatric evidence, and (in April) found that Edwards, while "suffer[ing] from mental illness," was "competent to assist his attorneys in his defense and stand trial for the charged crimes."

3. *Third Competency Hearing: April 2003.* Seven months later but still before trial, Edwards' counsel sought yet another psychiatric evaluation of his client. And, in April 2003, the court held yet another competency hearing. Edwards' counsel presented further psychiatric and neuropsychological evidence showing that Edwards was suffering from serious thinking difficulties and delusions. A testifying psychiatrist reported that Edwards could understand the charges against him, but he was "unable to cooperate with his attorney in his defense because of his schizophrenic illness"; "[h]is delusions and his marked difficulties in thinking make it impossible for him to cooperate with his attorney." In November 2003, the court concluded that Edwards was not then competent to stand trial and ordered his recommitment to the state hospital.

4. *First Self-Representation Request and First Trial: June 2005.* About eight months after his commitment, the hospital reported that Edwards' condition had again improved to the point that he had again become competent to stand trial. And almost one year after that, Edwards' trial began. Just before trial, Edwards asked to represent himself. He also asked for a continuance, which, he said, he needed in order to proceed *pro se*. The court refused the continuance. Edwards then proceeded to trial represented by counsel. The jury convicted him of criminal recklessness and theft but failed to reach a verdict on the charges of attempted murder and battery.

5. *Second Self-Representation Request and Second Trial: December 2005.* The State decided to retry Edwards on the attempted murder and battery charges. Just before the retrial, Edwards again asked the court to permit him to represent himself. Referring to the lengthy record of psychiatric reports, the trial court noted that Edwards still suffered from schizophrenia and concluded that "[w]ith these findings, he's competent to stand trial but I'm not going to find he's competent to defend himself." The court denied Edwards' self-representation request. Edwards was represented by appointed counsel at his retrial. The jury convicted Edwards on both of the remaining counts.

Edwards subsequently appealed to Indiana's intermediate appellate court. He argued that the trial court's refusal to permit him to represent himself at his retrial deprived him of his constitutional right of self-representation. The court agreed and ordered a new trial. The matter then went to the Indiana Supreme Court. That court found that "[t]he record in this case presents a substantial basis to agree with the trial court," but it nonetheless affirmed the intermediate

appellate court. At Indiana’s request, we agreed to consider whether the Constitution required the trial court to allow Edwards to represent himself at trial.

II

Our examination of this Court’s precedents convinces us that those precedents frame the question presented, but they do not answer it. The two cases that set forth the Constitution’s “mental competence” standard, *Dusky v. United States*, [362 U.S. 402](#) (1960) (*per curiam*), and *Drope v. Missouri*, [420 U.S. 162](#) (1975), specify that the Constitution does not permit trial of an individual who lacks “mental competency.” *Dusky* defines the competency standard as including both (1) “whether” the defendant has “a rational as well as factual understanding of the proceedings against him” and (2) whether the defendant “has sufficient present ability *to consult with his lawyer* with a reasonable degree of rational understanding.” *Drope* repeats that standard, stating that it “has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, *to consult with counsel, and to assist in preparing his defense* may not be subjected to a trial.” Neither case considered the mental competency issue presented here, namely, the relation of the mental competence standard to the right of self-representation.

The Court’s foundational “self-representation” case, *Faretta*, held that the Sixth and Fourteenth Amendments include a “constitutional right to proceed *without* counsel when” a criminal defendant “voluntarily and intelligently elects to do so.” The Court implied that right from: (1) a “nearly universal conviction,” made manifest in state law, that “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so”; (2) Sixth Amendment language granting rights to the “accused”; (3) Sixth Amendment structure indicating that the rights it sets forth, related to the “fair administration of American justice,” are “persona[l]” to the accused; (4) the absence of historical examples of *forced* representation; and (5) “respect for the individual.”

Faretta does not answer the question before us both because it did not consider the problem of mental competency and because *Faretta* itself and later cases have made clear that the right of self-representation is not absolute. The question here concerns a mental-illness-related limitation on the scope of the self-representation right.

The sole case in which this Court considered mental competence and self-representation together, *Godinez [v. Moran]*, [509 U.S. 389](#) (1993), presents a question closer to that at issue here. The case focused upon a borderline-competent criminal defendant who had asked a state trial court to permit him to represent himself and to change his pleas from not guilty to guilty. The state trial court had found that the defendant met *Dusky*’s mental competence standard, that he “knowingly and intelligently” waived his right to assistance of counsel, and that he “freely and voluntarily” chose to plead guilty. And the state trial court had consequently granted the defendant’s self-representation and change-of-plea requests. A federal appeals court, however, had vacated the defendant’s guilty pleas on the ground that the Constitution required the trial court to ask a further question, namely, whether the defendant was competent to waive his constitutional right to counsel. Competence to make that latter decision, the appeals court said, required the defendant to satisfy a higher mental competency standard than the standard set forth in *Dusky*. *Dusky*’s more general standard sought only to determine whether a defendant

represented by counsel was competent to stand trial, not whether he was competent to waive his right to counsel.

This Court, reversing the Court of Appeals, “reject[ed] the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.” The decision to plead guilty, we said, “is no more complicated than the sum total of decisions that a [represented] defendant may be called upon to make during the course of a trial.” Hence “there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.” And even assuming that self-representation might pose special trial-related difficulties, “the competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” For this reason, we concluded, “the defendant’s ‘technical legal knowledge’ is ‘not relevant’ to the determination.”

We concede that *Godinez* bears certain similarities with the present case. Both involve mental competence and self-representation. Both involve a defendant who wants to represent himself. Both involve a mental condition that falls in a gray area between *Dusky*’s minimal constitutional requirement that measures a defendant’s ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose.

We nonetheless conclude that *Godinez* does not answer the question before us now. In part that is because the Court of Appeals’ higher standard at issue in *Godinez* differs in a critical way from the higher standard at issue here. In *Godinez*, the higher standard sought to measure the defendant’s ability to proceed on his own to enter a guilty plea; here the higher standard seeks to measure the defendant’s ability to conduct trial proceedings. To put the matter more specifically, the *Godinez* defendant sought only to change his pleas to guilty, he did not seek to conduct trial proceedings, and his ability to conduct a defense at trial was expressly not at issue. Thus we emphasized in *Godinez* that we needed to consider only the defendant’s “competence to *waive the right*.” And we further emphasized that we need *not* consider the defendant’s “technical legal knowledge” about how to proceed at trial. We found our holding consistent with this Court’s earlier statement that “[o]ne might not be insane in the sense of being incapable of standing trial and yet lack the capacity to stand trial without benefit of counsel.” In this case, the very matters that we did not consider in *Godinez* are directly before us.

III

We now turn to the question presented. We assume that a criminal defendant has sufficient mental competence to stand trial (*i.e.*, the defendant meets *Dusky*’s standard) and that the defendant insists on representing himself during that trial. We ask whether the Constitution permits a State to limit that defendant’s self-representation right by insisting upon representation by counsel at trial—on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.

Several considerations taken together lead us to conclude that the answer to this question is yes. First, the Court's precedent, while not answering the question, points slightly in the direction of our affirmative answer. *Godinez*, as we have just said, simply leaves the question open. But the Court's "mental competency" cases set forth a standard that focuses directly upon a defendant's "present ability to consult with his lawyer"; a "capacity ... to consult with counsel"; and an ability "to assist [counsel] in preparing his defense." These standards assume representation by counsel and emphasize the importance of counsel. They thus suggest (though do not hold) that an instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in our view, calls for a different standard.

At the same time *Faretta*, the foundational self-representation case, rested its conclusion in part upon pre-existing state law set forth in cases all of which are consistent with, and at least two of which expressly adopt, a competency limitation on the self-representation right.

Second, the nature of the problem before us cautions against the use of a single mental competency standard for deciding both (1) whether a defendant who is represented by counsel can proceed to trial and (2) whether a defendant who goes to trial must be permitted to represent himself. Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways. The history of this case illustrates the complexity of the problem. In certain instances an individual may well be able to satisfy *Dusky*'s mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.

The American Psychiatric Association (APA) tells us (without dispute) in its *amicus* brief filed in support of neither party that "[d]isorganized thinking, deficits in sustaining attention and concentration, impaired expressive abilities, anxiety, and other common symptoms of severe mental illnesses can impair the defendant's ability to play the significantly expanded role required for self-representation even if he can play the lesser role of represented defendant." Motions and other documents that the defendant prepared in this case suggest to a layperson the common sense of this general conclusion.

Third, in our view, a right of self-representation at trial will not "affirm the dignity" of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant's lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution's criminal law objectives, providing a fair trial.

Further, proceedings must not only be fair, they must "appear fair to all who observe them." An *amicus* brief reports one psychiatrist's reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: "[H]ow in the world can our legal system allow an insane man to defend himself?" The application of *Dusky*'s basic mental competence standard can help in part to avoid this result. But given the different capacities needed to proceed to trial without counsel, there is little reason to believe that *Dusky* alone is sufficient. At the same time, the trial judge, particularly one such as the trial judge in this case, who presided over one of

Edwards' competency hearings and his two trials, will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant.

We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Justice SCALIA, with whom Justice THOMAS joins, dissenting.

The Constitution guarantees a defendant who knowingly and voluntarily waives the right to counsel the right to proceed *pro se* at his trial. *Faretta v. California*. A mentally ill defendant who knowingly and voluntarily elects to proceed *pro se* instead of through counsel receives a fair trial that comports with the Fourteenth Amendment. *Godinez v. Moran*. The Court today concludes that a State may nonetheless strip a mentally ill defendant of the right to represent himself when that would be fairer. In my view the Constitution does not permit a State to substitute its own perception of fairness for the defendant's right to make his own case before the jury—a specific right long understood as essential to a fair trial.

When a defendant appreciates the risks of forgoing counsel and chooses to do so voluntarily, the Constitution protects his ability to present his own defense even when that harms his case. In fact waiving counsel “usually” does so. We have nonetheless said that the defendant's “choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’” What the Constitution requires is not that a State's case be subject to the most rigorous adversarial testing possible—after all, it permits a defendant to eliminate *all* adversarial testing by pleading guilty. What the Constitution requires is that a defendant be given the right to challenge the State's case against him using the arguments *he* sees fit.

In *Godinez*, we held that the Due Process Clause posed no barrier to permitting a defendant who suffered from mental illness both to waive his right to counsel and to plead guilty, so long as he was competent to stand trial and knowingly and voluntarily waived trial and the counsel right. It was “never the rule at common law” that a defendant could be competent to stand trial and yet incompetent to either exercise or give up some of the rights provided for his defense. We rejected the invitation to craft a higher competency standard for waiving counsel than for standing trial. That proposal, we said, was built on the “flawed premise” that a defendant's “competence to represent himself” was the relevant measure: “[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself.” We grounded this on *Faretta's* candid acknowledgment that the Sixth Amendment protected the defendant's right to conduct a defense to his disadvantage.

While there is little doubt that preserving individual “dignity” (to which the Court refers) is paramount among those purposes [for which the right of self-representation was intended], there is equally little doubt that the loss of “dignity” the right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense.

Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State—the dignity of individual choice.

Because I think a defendant who is competent to stand trial, and who is capable of knowing and voluntary waiver of assistance of counsel, has a constitutional right to conduct his own defense, I respectfully dissent.

* * *

Our next few chapters concern eyewitness identifications evidence. We will examine first when the Court has held that a suspect has the right to have counsel attend an identification procedure such as a lineup. Then we will consider substantive regulations on the quality of such procedures, along with best practices for identifications suggested by modern social science.

IDENTIFICATIONS

Chapter 38

Identifications and the Right to Counsel

In this chapter we begin our three-chapter unit on identification evidence, which generally consists of witness statements about who committed a crime. A victim or other witness can identify a perpetrator in court (saying, in front of the jury, something like, “That’s the one who did it”), and police often ask witnesses to identify suspects out of court. Out-of-court identification procedures include lineups—at which several similar-looking persons are presented to a witness in the hope that the witness will identify the correct person—as well as less elaborate presentations which are essentially lineups with only one suspect, about whom the witness says “yes” or “no.” Further, police can show photos to witnesses, a process much quicker than in-person identification.

This chapter concerns when a suspect has the right to have counsel present during an identification procedure.

Supreme Court of the United States

United States v. Billy Joe Wade

Decided June 12, 1967 – [388 U.S. 218](#)

Mr. Justice BRENNAN delivered the opinion of the Court.

The question here is whether courtroom identifications of an accused at trial are to be excluded from evidence because the accused was exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused’s appointed counsel.

The federally insured bank in Eustace, Texas, was robbed on September 21, 1964. A man with a small strip of tape on each side of his face entered the bank, pointed a pistol at the female cashier and the vice president, the only persons in the bank at the time, and forced them to fill a pillowcase with the bank’s money. The man then drove away with an accomplice who had been waiting in a stolen car outside the bank. On March 23, 1965, an indictment was returned against respondent, Wade, and two others for conspiring to rob the bank, and against Wade and the accomplice for the robbery itself. Wade was arrested on April 2, and counsel was appointed to represent him on April 26. Fifteen days later an FBI agent, without notice to Wade’s lawyer, arranged to have the two bank employees observe a lineup made up of Wade and five or six other prisoners and conducted in a courtroom of the local county courthouse. Each person in the line wore strips of tape such as allegedly worn by the robber and upon direction each said something like ‘put the money in the bag,’ the words allegedly uttered by the robber. Both bank employees identified Wade in the lineup as the bank robber.

At trial the two employees, when asked on direct examination if the robber was in the courtroom, pointed to Wade. The prior lineup identification was then elicited from both employees on cross-examination. At the close of testimony, Wade’s counsel moved for a judgment of acquittal or,

alternatively, to strike the bank officials' courtroom identifications on the ground that conduct of the lineup, without notice to and in the absence of his appointed counsel, violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to the assistance of counsel. The motion was denied, and Wade was convicted. The Court of Appeals for the Fifth Circuit reversed the conviction and ordered a new trial at which the in-court identification evidence was to be excluded. We granted certiorari and set the case for oral argument with [other cases] which present similar questions. We reverse the judgment of the Court of Appeals and remand to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

I

Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege "protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature" "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material."

We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence having testimonial significance. It is compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. [C]ompelling Wade to speak within hearing distance of the witnesses, even to utter words purportedly uttered by the robber, was not compulsion to utter statements of a "testimonial" nature; he was required to use his voice as an identifying physical characteristic, not to speak his guilt. [T]he distinction to be drawn under the Fifth Amendment privilege against self-incrimination is one between an accused's "communications" in whatever form, vocal or physical, and "compulsion which makes a suspect or accused the source of 'real or physical evidence.'" "[B]oth federal and state courts have usually held that ... [the privilege] offers no protection against compulsion to submit to fingerprinting, photography, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." None of these activities becomes testimonial within the scope of the privilege because required of the accused in a pretrial lineup.

Moreover, it deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege. The Government offered no such evidence as part of its case, and what came out about the lineup proceedings on Wade's cross-examination of the bank employees involved no violation of Wade's privilege.

II

The fact that the lineup involved no violation of Wade's privilege against self-incrimination does not, however, dispose of his contention that the courtroom identifications should have been excluded because the lineup was conducted without notice to and in the absence of his counsel. [I]n this case it is urged that the assistance of counsel at the lineup was indispensable to protect

Wade’s most basic right as a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to “critical” stages of the proceedings. The guarantee reads: “In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” The plain wording of this guarantee thus encompasses counsel’s assistance whenever necessary to assure a meaningful “defence.”

As early as *Powell v. State of Alabama*, [287 U.S. 45](#) (1932), we recognized that the period from arraignment to trial was “perhaps the most critical period of the proceedings ...” during which the accused “requires the guiding hand of counsel ...” if the guarantee is not to prove an empty right. That principle has since been applied to require the assistance of counsel at the type of arraignment where certain rights might be sacrificed or lost: “What happens there may affect the whole trial. Available defenses may be irretrievably lost, if not then and there asserted” The principle was also applied in *Massiah v. United States* (Chapter 29), where we held that incriminating statements of the defendant should have been excluded from evidence when it appeared that they were overheard by federal agents who, without notice to the defendant’s lawyer, arranged a meeting between the defendant and an accomplice turned informant.

In *Escobedo v. State of Illinois*, [378 U.S. 478](#) (1964), we [held] that the right to counsel was guaranteed at the point where the accused, prior to arraignment, was subjected to secret interrogation despite repeated requests to see his lawyer.¹ We again noted the necessity of counsel’s presence if the accused was to have a fair opportunity to present a defense at the trial itself.

Finally in *Miranda v. State of Arizona* (Chapter 23), the rules established for custodial interrogation included the right to the presence of counsel. The result was rested on our finding that this and the other rules were necessary to safeguard the privilege against self-incrimination from being jeopardized by such interrogation.

Of course, nothing decided or said in the opinions in the cited cases links the right to counsel only to protection of Fifth Amendment rights. Rather those decisions “no more than [reflect] a constitutional principle established as long ago as *Powell v. Alabama*” It is central to that principle that in addition to counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial. The security of that right is as much the aim of the right to counsel as it is of the other guarantees of the Sixth

¹ [Footnote by editors] *Escobedo*, which held that suspects have a right to counsel during interrogations under the Sixth Amendment, even before indictment or arraignment, is no longer good law on that point. For custodial interrogation before the right to counsel has attached, see *Miranda* and its line of cases. For questioning after the right to counsel has attached, see *Massiah* and its progeny.

Amendment—the right of the accused to a speedy and public trial by an impartial jury, his right to be informed of the nature and cause of the accusation, and his right to be confronted with the witnesses against him and to have compulsory process for obtaining witnesses in his favor. The presence of counsel at such critical confrontations, as at the trial itself, operates to assure that the accused’s interests will be protected consistently with our adversary theory of criminal prosecution.

In sum, the principle of *Powell v. Alabama* and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant’s rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice.

III

The Government characterizes the lineup as a mere preparatory step in the gathering of the prosecution’s evidence, not different—for Sixth Amendment purposes—from various other preparatory steps, such as systematized or scientific analyzing of the accused’s fingerprints, blood sample, clothing, hair, and the like. We think there are differences which preclude such stages being characterized as critical stages at which the accused has the right to the presence of his counsel. Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government’s case at trial through the ordinary processes of cross-examination of the Government’s expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analyses does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel’s absence at such stages might derogate from his right to a fair trial.

IV

But the confrontation compelled by the State between the accused and the victim or witnesses to a crime to elicit identification evidence is peculiarly riddled with innumerable dangers and variable factors which might seriously, even crucially, derogate from a fair trial. The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: “What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent—not due to the brutalities of ancient criminal procedure.” A major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification. Suggestion can be created intentionally or unintentionally in many subtle ways. And the dangers for the suspect are particularly grave when the witness’ opportunity for observation was insubstantial, and thus his susceptibility to suggestion the greatest.

Moreover, “[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may [in the absence of other relevant evidence] for all practical purposes be determined there and then, before the trial.”

The pretrial confrontation for purpose of identification may take the form of a lineup, also known as an “identification parade” or “showup,” as in the present case, or presentation of the suspect alone to the witness. It is obvious that risks of suggestion attend either form of confrontation and increase the dangers inhering in eyewitness identification. But as is the case with secret interrogations, there is serious difficulty in depicting what transpires at lineups and other forms of identification confrontations. “Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on” For the same reasons, the defense can seldom reconstruct the manner and mode of lineup identification for judge or jury at trial. Those participating in a lineup with the accused may often be police officers; in any event, the participants’ names are rarely recorded or divulged at trial. The impediments to an objective observation are increased when the victim is the witness. Lineups are prevalent in rape and robbery prosecutions and present a particular hazard that a victim’s understandable outrage may excite vengeful or spiteful motives. In any event, neither witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses nor lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers. Even when he does observe abuse, if he has a criminal record he may be reluctant to take the stand and open up the admission of prior convictions. Moreover any protestations by the suspect of the fairness of the lineup made at trial are likely to be in vain; the jury’s choice is between the accused’s unsupported version and that of the police officers present. In short, the accused’s inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness’ courtroom identification.

The potential for improper influence is illustrated by the circumstances, insofar as they appear, surrounding the prior identifications in the three cases we decide today. In the present case, the testimony of the identifying witnesses elicited on cross-examination revealed that those witnesses were taken to the courthouse and seated in the courtroom to await assembly of the lineup. The courtroom faced on a hallway observable to the witnesses through an open door. The cashier testified that she saw Wade “standing in the hall” within sight of an FBI agent. Five or six other prisoners later appeared in the hall. The vice president testified that he saw a person in the hall in the custody of the agent who “resembled the person that we identified as the one that had entered the bank.”

Insofar as the accused’s conviction may rest on a courtroom identification in fact the fruit of a suspect pretrial identification which the accused is helpless to subject to effective scrutiny at trial, the accused is deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him. And even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability. Thus in the present context, where so many variables and pitfalls exist, the first line of defense must be the prevention of unfairness and the lessening of the hazards of eyewitness

identification at the lineup itself. The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness—"that's the man."

Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the postindictment lineup was a critical stage of the prosecution at which he was "as much entitled to such aid [of counsel]... as at the trial itself." Thus both Wade and his counsel should have been notified of the impending lineup, and counsel's presence should have been a requisite to conduct of the lineup, absent an "intelligent waiver." [W]e leave open the question whether the presence of substitute counsel might not suffice where notification and presence of the suspect's own counsel would result in prejudicial delay.

"[A]n attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath—to protect to the extent of his ability the rights of his client. In fulfilling this responsibility the attorney plays a vital role in the administration of criminal justice under our Constitution."

In our view counsel can hardly impede legitimate law enforcement; on the contrary, for the reasons expressed, law enforcement may be assisted by preventing the infiltration of taint in the prosecution's identification evidence. That result cannot help the guilty avoid conviction but can only help assure that the right man has been brought to justice.

Legislative or other regulations, such as those of local police departments, which eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial may also remove the basis for regarding the stage as "critical." But neither Congress nor the federal authorities have seen fit to provide a solution. What we hold today "in no way creates a constitutional straitjacket which will handicap sound efforts at reform, nor is it intended to have this effect."

V

We come now to the question whether the denial of Wade's motion to strike the courtroom identification by the bank witnesses at trial because of the absence of his counsel at the lineup required, as the Court of Appeals held, the grant of a new trial at which such evidence is to be excluded. We do not think this disposition can be justified without first giving the Government the opportunity to establish by clear and convincing evidence that the in-court identifications were based upon observations of the suspect other than the lineup identification. Where, as here, the admissibility of evidence of the lineup identification itself is not involved, a *per se* rule of exclusion of courtroom identification would be unjustified. A rule limited solely to the exclusion of testimony concerning identification at the lineup itself, without regard to admissibility of the courtroom identification, would render the right to counsel an empty one. The lineup is most often used, as in the present case, to crystallize the witnesses' identification of the defendant for

future reference. We have already noted that the lineup identification will have that effect. The State may then rest upon the witnesses' unequivocal courtroom identifications, and not mention the pretrial identification as part of the State's case at trial. Counsel is then in the predicament in which Wade's counsel found himself—realizing that possible unfairness at the lineup may be the sole means of attack upon the unequivocal courtroom identification, and having to probe in the dark in an attempt to discover and reveal unfairness, while bolstering the government witness' courtroom identification by bringing out and dwelling upon his prior identification. Since counsel's presence at the lineup would equip him to attack not only the lineup identification but the courtroom identification as well, limiting the impact of violation of the right to counsel to exclusion of evidence only of identification at the lineup itself disregards a critical element of that right.

We think it follows that the proper test to be applied in these situations is “[W]hether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” Application of this test in the present context requires consideration of various factors; for example, the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

We doubt that the Court of Appeals applied the proper test for exclusion of the in-court identification of the two witnesses. On the record now before us we cannot make the determination whether the in-court identifications had an independent origin. This was not an issue at trial, although there is some evidence relevant to a determination. That inquiry is most properly made in the District Court. We therefore think the appropriate procedure to be followed is to vacate the conviction pending a hearing to determine whether the in-court identifications had an independent source, or whether, in any event, the introduction of the evidence was harmless error and for the District Court to reinstate the conviction or order a new trial, as may be proper.

The judgment of the Court of Appeals is vacated and the case is remanded to that court with direction to enter a new judgment vacating the conviction and remanding the case to the District Court for further proceedings consistent with this opinion.

Notes, Comments, and Questions

In *Wade*, the FBI held a lineup, and the defendant's counsel was not notified or present. The Court did not find a Fifth Amendment violation. Why not? Were you persuaded by the potential damages as identified by the majority in *Wade*? Why or why not?

Our next case, *Gilbert v. California*, was decided on the same day as *Wade* and presents similar issues. It also allowed the Court to apply the rule of *Wade* to handwriting evidence.

After reading *Wade* and *Gilbert*, students should note the Court's two distinct rules governing evidence resulting from a post-indictment lineup conducted without the defendant's counsel present. One rule concerns in-court identification of a suspect whom a witness previously encountered at a defective lineup (testimony that need not mention the prior lineup), and the other involves in-court testimony about the defective lineup itself.

Supreme Court of the United States
Jesse James Gilbert v. California
Decided June 12, 1967 – [388 U.S. 263](#)

Mr. Justice BRENNAN delivered the opinion of the Court.

This case was argued with *United States v. Wade* and presents the same alleged constitutional error in the admission in evidence of in-court identifications there considered. In addition, petitioner alleges constitutional errors in the admission in evidence of testimony of some of the witnesses that they also identified him at the lineup [and] in the admission of handwriting exemplars taken from him after his arrest.

Petitioner was convicted in the Superior Court of California of the armed robbery of the Mutual Savings and Loan Association of Alhambra and the murder of a police officer who entered during the course of the robbery. There were separate guilt and penalty stages of the trial before the same jury, which rendered a guilty verdict and imposed the death penalty. The California Supreme Court affirmed. We granted certiorari. If our holding today in *Wade* is applied to this case, the issue whether admission of the in-court and lineup identifications is constitutional error which requires a new trial could be resolved on this record only after further proceedings in the California courts. We must therefore first determine whether petitioner's other contentions warrant any greater relief.

I

THE HANDWRITING EXEMPLARS

Petitioner was arrested in Philadelphia by an FBI agent and refused to answer questions about the Alhambra robbery without the advice of counsel. He later did answer questions of another agent about some Philadelphia robberies in which the robber used a handwritten note demanding that money be handed over to him, and during that interrogation gave the agent the handwriting exemplars. They were admitted in evidence at trial over objection that they were obtained in violation of petitioner's Fifth and Sixth Amendment rights. The California Supreme Court upheld admission of the exemplars on the sole ground that petitioner had waived any rights that he might have had not to furnish them. [W]e conclude that the taking of the exemplars violated none of petitioner's constitutional rights.

First. The taking of the exemplars did not violate petitioner's Fifth Amendment privilege against self-incrimination.

Second. The taking of the exemplars was not a "critical" stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, "the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts."

[In Parts II and III, the Court briefly discussed issues related to hearsay evidence and Fourth Amendment search and seizure claims.]

IV

THE IN-COURT AND LINEUP IDENTIFICATIONS

Since none of the petitioner's other contentions warrants relief, the issue becomes what relief is required by application to this case of the principles today announced in *United States v. Wade*.

Three eyewitnesses to the Alhambra crimes who identified Gilbert at the guilt stage of the trial had observed him at a lineup conducted without notice to his counsel in a Los Angeles auditorium 16 days after his indictment and after appointment of counsel. The manager of the apartment house in which incriminating evidence was found, and in which Gilbert allegedly resided, identified Gilbert in the courtroom and also testified, in substance, to her prior lineup identification on examination by the State. Eight witnesses who identified him in the courtroom at the penalty stage were not eyewitnesses to the Alhambra crimes but to other robberies allegedly committed by him. In addition to their in-court identifications, these witnesses also testified that they identified Gilbert at the same lineup.

The line-up was on a stage behind-bright lights which prevented those in the line from seeing the audience. Upwards of 100 persons were in the audience, each an eyewitness to one of the several robberies charged to Gilbert. The record is otherwise virtually silent as to what occurred at the lineup.

At the guilt stage, after the first witness, a cashier of the savings and loan association, identified Gilbert in the courtroom, defense counsel moved, out of the presence of the jury, to strike her testimony on the ground that she identified Gilbert at the pretrial lineup conducted in the absence of counsel in violation of the Sixth Amendment. He requested a hearing outside the presence of the jury to present evidence supporting his claim that her in-court identification was, and others to be elicited by the State from other eyewitnesses would be, "predicated at least in large part upon their identification or purported identification of Mr. Gilbert at the showup." The trial judge denied the motion as premature. Defense counsel then elicited the fact of the cashier's lineup identification on cross-examination and again moved to strike her identification

testimony. Without passing on the merits of the Sixth Amendment claim, the trial judge denied the motion on the ground that, assuming a violation, it would not in any event entitle Gilbert to suppression of the in-court identification. Defense counsel thereafter elicited the fact of lineup identifications from two other eyewitnesses who on direct examination identified Gilbert in the courtroom. Defense counsel unsuccessfully objected at the penalty stage, to the testimony of the eight witnesses to the other robberies that they identified Gilbert at the lineup.

The admission of the in-court identifications without first determining that they were not tainted by the illegal lineup but were of independent origin was constitutional error. However, as in *Wade*, the record does not permit an informed judgment whether the in-court identifications at the two stages of the trial had an independent source. Gilbert is therefore entitled only to a vacation of his conviction pending the holding of such proceedings as the California Supreme Court may deem appropriate to afford the State the opportunity to establish that the in-court identifications had an independent source, or that their introduction in evidence was in any event harmless error.

Quite different considerations are involved as to the admission of the testimony of the manager of the apartment house at the guilt phase and of the eight witnesses at the penalty stage that they identified Gilbert at the lineup. That testimony is the direct result of the illegal lineup “come at by exploitation of [the primary] illegality.” The State is therefore not entitled to an opportunity to show that that testimony had an independent source. Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused’s constitutional right to the presence of his counsel at the critical lineup. In the absence of legislative regulations adequate to avoid the hazards to a fair trial which inhere in lineups as presently conducted, the desirability of deterring the constitutionally objectionable practice must prevail over the undesirability of excluding relevant evidence. That conclusion is buttressed by the consideration that the witness’ testimony of his lineup identification will enhance the impact of his in-court identification on the jury and seriously aggravate whatever derogation exists of the accused’s right to a fair trial. Therefore, unless the California Supreme Court is “able to declare a belief that it was harmless beyond a reasonable doubt,” Gilbert will be entitled on remand to a new trial or, if no prejudicial error is found on the guilt stage but only in the penalty stage, to whatever relief California law affords where the penalty stage must be set aside.

* * *

In the next case, the Court considered whether to apply the holdings of *Wade* and *Gilbert* to identification procedures conducted before formal proceedings had begun—that is, before the Sixth Amendment right to counsel had attached.

Supreme Court of the United States

Thomas Kirby v. Illinois

Decided June 7, 1972 – [406 U.S. 682](#)

Mr. Justice STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join.

In *United States v. Wade* and *Gilbert v. California* this Court held “that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth (and Fourteenth) Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.” Those cases further held that no “in-court identifications” are admissible in evidence if their “source” is a lineup conducted in violation of this constitutional standard. “Only a *per se* exclusionary rule as to such testimony can be an effective sanction,” the Court said, “to assure that law enforcement authorities will respect the accused’s constitutional right to the presence of his counsel at the critical lineup.” In the present case we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place before the defendant had been indicted or otherwise formally charged with any criminal offense.

On February 21, 1968, a man named Willie Shard reported to the Chicago police that the previous day two men had robbed him on a Chicago street of a wallet containing, among other things, traveler’s checks and a Social Security card. On February 22, two police officers stopped the petitioner and a companion, Ralph Bean, on West Madison Street in Chicago. When asked for identification, the petitioner produced a wallet that contained three traveler’s checks and a Social Security card, all bearing the name of Willie Shard. Papers with Shard’s name on them were also found in Bean’s possession. When asked to explain his possession of Shard’s property, the petitioner first said that the traveler’s checks were “play money,” and then told the officers that he had won them in a crap game. The officers then arrested the petitioner and Bean and took them to a police station.

Only after arriving at the police station, and checking the records there, did the arresting officers learn of the Shard robbery. A police car was then dispatched to Shard’s place of employment, where it picked up Shard and brought him to the police station. Immediately upon entering the room in the police station where the petitioner and Bean were seated at a table, Shard positively identified them as the men who had robbed him two days earlier. No lawyer was present in the room, and neither the petitioner nor Bean had asked for legal assistance, or been advised of any right to the presence of counsel.

More than six weeks later, the petitioner and Bean were indicted for the robbery of Willie Shard. Upon arraignment, counsel was appointed to represent them, and they pleaded not guilty. A pretrial motion to suppress Shard’s identification testimony was denied, and at the trial Shard testified as a witness for the prosecution. In his testimony he described his identification of the two men at the police station on February 22, and identified them again in the courtroom as the men who had robbed him on February 20. He was cross-examined at length regarding the circumstances of his identification of the two defendants. The jury found both defendants guilty,

and the petitioner's conviction was affirmed on appeal. The Illinois appellate court held that the admission of Shard's testimony was not error, relying upon an earlier decision of the Illinois Supreme Court ... that [held] the *Wade-Gilbert per se* exclusionary rule is not applicable to preindictment confrontations. We granted certiorari, limited to this question.

I

We note at the outset that the constitutional privilege against compulsory self-incrimination is in no way implicated here. The Court emphatically rejected the claimed applicability of that constitutional guarantee in *Wade* itself.

It follows that the doctrine of *Miranda v. Arizona* has no applicability whatever to the issue before us; for the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment privilege against compulsory self-incrimination, upon the theory that custodial interrogation is inherently coercive.

The *Wade-Gilbert* exclusionary rule, by contrast, stems from a quite different constitutional guarantee—the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments. [I]t has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial itself. But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, all of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the “criminal prosecutions” to which alone the explicit guarantees of the Sixth Amendment are applicable.

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. Less than a year after *Wade* and *Gilbert* were decided, the Court explained the rule of those decisions as follows: “The rationale of those cases was that an accused is entitled to counsel at any ‘critical stage of the prosecution,’ and that a post-indictment lineup is such a ‘critical stage.’” We decline to depart from that rationale today by imposing a *per se* exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.

II

What has been said is not to suggest that there may not be occasions during the course of a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. The judgment is affirmed.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL join, dissenting.

While it should go without saying, it appears necessary, in view of the plurality opinion today, to re-emphasize that *Wade* did not require the presence of counsel at pretrial confrontations for identification purposes simply on the basis of an abstract consideration of the words “criminal prosecutions” in the Sixth Amendment. Counsel is required at those confrontations because “the dangers inherent in eyewitness identification and the suggestibility inherent in the context of the pretrial identification” mean that protection must be afforded to the “most basic right [of] a criminal defendant—his right to a fair trial at which the witnesses against him might be meaningfully cross-examined.”

An arrest evidences the belief of the police that the perpetrator of a crime has been caught. A post-arrest confrontation for identification is not “a mere preparatory step in the gathering of the prosecution’s evidence.” A primary, and frequently sole, purpose of the confrontation for identification at that stage is to accumulate proof to buttress the conclusion of the police that they have the offender in hand. The plurality offers no reason, and I can think of none, for concluding that a post-arrest confrontation for identification, unlike a post-charge confrontation, is not among those “critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused’s fate and reduce the trial itself to a mere formality.”

The highly suggestive form of confrontation employed in this case underscores the point. This showup was particularly fraught with the peril of mistaken identification. In the setting of a police station squad room where all present except petitioner and Bean were police officers, the danger was quite real that Shard’s understandable resentment might lead him too readily to agree with the police that the pair under arrest, and the only persons exhibited to him, were indeed the robbers. “It is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police.” The State had no case without Shard’s identification testimony,² and safeguards against that consequence were therefore of critical importance. Shard’s testimony itself demonstrates the necessity for such safeguards. On direct examination, Shard identified petitioner and Bean not as the alleged robbers on trial in the courtroom, but as the pair he saw at the police station. His testimony thus lends strong support to the observation that “[i]t is a matter of common experience that, once a witness has picked out the accused at the line-up, he is not likely to go back on his word later on, so that in practice the issue of identity may [in the absence of other relevant evidence] for all practical purposes be determined there and then, before the trial.”

² [Footnote 9 by the Court] Bean took the stand and testified that he and petitioner found Shard’s traveler’s checks and Social Security card two hours before their arrest strewn upon the ground in an alley.

Wade and *Gilbert*, of course, happened to involve post-indictment confrontations. Yet even a cursory perusal of the opinions in those cases reveals that nothing at all turned upon that particular circumstance. For my part, I do not agree that we “extend” *Wade* and *Gilbert* by holding that the principles of those cases apply to confrontations for identification conducted after arrest. Because Shard testified at trial about his identification of petitioner at the police station showup, the exclusionary rule of *Gilbert* requires reversal.

* * *

Wade and *Gilbert* involved in-person identification of suspects by witnesses. In the next case, the Court considered whether to apply the rules of those cases to identification procedures conducted outside the presence of the suspect, such as a witness review of a photo array.

Supreme Court of the United States

United States v. Charles J. Ash, Jr.

Decided June 21, 1973 – [413 U.S. 300](#)

Mr. Justice BLACKMUN delivered the opinion of the Court.

In this case the Court is called upon to decide whether the Sixth Amendment grants an accused the right to have counsel present whenever the Government conducts a post-indictment photographic display, containing a picture of the accused, for the purpose of allowing a witness to attempt an identification of the offender. The United States Court of Appeals for the District of Columbia Circuit, sitting en banc, held, by a 5-to-4 vote, that the accused possesses this right to counsel. The court’s holding is inconsistent with decisions of the courts of appeals of nine other circuits. We granted certiorari to resolve the conflict and to decide this important constitutional question. We reverse and remand.

I

On the morning of August 26, 1965, a man with a stocking mask entered a bank in Washington, D.C., and began waving a pistol. He ordered an employee to hang up the telephone and instructed all others present not to move. Seconds later a second man, also wearing a stocking mask, entered the bank, scooped up money from tellers’ drawers into a bag, and left. The gunman followed, and both men escaped through an alley. The robbery lasted three or four minutes.

A Government informer, Clarence McFarland, told authorities that he had discussed the robbery with Charles J. Ash, Jr., the respondent here. Acting on this information, an FBI agent, in February 1966, showed five black-and-white mug shots of [Black] males of generally the same age, height, and weight, one of which was of Ash, to four witnesses. All four made uncertain identifications of Ash’s picture. At this time Ash was not in custody and had not been charged. On April 1, 1966, an indictment was returned charging Ash and a codefendant, John L. Bailey, in five counts related to this bank robbery.

Trial was finally set for May 1968, almost three years after the crime. In preparing for trial, the prosecutor decided to use a photographic display to determine whether the witnesses he planned to call would be able to make in-court identifications. Shortly before the trial, an FBI agent and

the prosecutor showed five color photographs to the four witnesses who previously had tentatively identified the black-and-white photograph of Ash. Three of the witnesses selected the picture of Ash, but one was unable to make any selection. None of the witnesses selected the picture of Bailey which was in the group. This post-indictment identification provides the basis for respondent Ash's claim that he was denied the right to counsel at a "critical stage" of the prosecution.

No motion for severance was made, and Ash and Bailey were tried jointly. The trial judge held a hearing on the suggestive nature of the pretrial photographic displays. The judge did not make a clear ruling on suggestive nature, but held that the Government had demonstrated by "clear and convincing" evidence that in-court identifications would be "based on observation of the suspect other than the intervening observation."

At trial, the three witnesses who had been inside the bank identified Ash as the gunman, but they were unwilling to state that they were certain of their identifications. None of these made an in-court identification of Bailey. The fourth witness, who had been in a car outside the bank and who had seen the fleeing robbers after they had removed their masks, made positive in-court identifications of both Ash and Bailey. Bailey's counsel then sought to impeach this in-court identification by calling the FBI agent who had shown the color photographs to the witnesses immediately before trial. Bailey's counsel demonstrated that the witness who had identified Bailey in court had failed to identify a color photograph of Bailey. During the course of the examination, Bailey's counsel also, before the jury, brought out the fact that this witness had selected another man as one of the robbers. At this point the prosecutor became concerned that the jury might believe that the witness had selected a third person when, in fact, the witness had selected a photograph of Ash. After a conference at the bench, the trial judge ruled that all five color photographs would be admitted into evidence. The Court of Appeals held that this constituted the introduction of a post-indictment identification at the prosecutor's request and over the objection of defense counsel.

McFarland testified as a Government witness. He said he had discussed plans for the robbery with Ash before the event and, later, had discussed the results of the robbery with Ash in the presence of Bailey. McFarland was shown to possess an extensive criminal record and a history as an informer.

The jury convicted Ash on all counts. It was unable to reach a verdict on the charges against Bailey, and his motion for acquittal was granted. Ash received concurrent sentences on the several counts, the two longest being 80 months to 12 years.

The five-member majority of the Court of Appeals held that Ash's right to counsel, guaranteed by the Sixth Amendment, was violated when his attorney was not given the opportunity to be present at the photographic displays conducted in May 1968 before the trial.

II

[The Court reviewed the historical significance of the Sixth Amendment.] This historical background suggests that the core purpose of the counsel guarantee was to assure "Assistance" at trial, when the accused was confronted with both the intricacies of the law and the advocacy

of the public prosecutor. Later developments have led this Court to recognize that “Assistance” would be less than meaningful if it were limited to the formal trial itself.

This extension of the right to counsel to events before trial has resulted from changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself. At these newly emerging and significant events, the accused was confronted, just as at trial, by the procedural system, or by his expert adversary, or by both.

The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself.

Throughout this expansion of the counsel guarantee to trial-like confrontations, the function of the lawyer has remained essentially the same as his function at trial. In all cases considered by the Court, counsel has continued to act as a spokesman for, or advisor to, the accused. The accused’s right to the “Assistance of Counsel” has meant just that, namely, the right of the accused to have counsel acting as his assistant.

This review of the history and expansion of the Sixth Amendment counsel guarantee demonstrates that the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary. Against the background of this traditional test, we now consider the opinion of the Court of Appeals.

III

Although the Court of Appeals’ majority recognized the argument that “a major purpose behind the right to counsel is to protect the defendant from errors that he himself might make if he appeared in court alone,” the court concluded that “other forms of prejudice,” mentioned and recognized in *Wade*, could also give rise to a right to counsel. These forms of prejudice were felt by the court to flow from the possibilities for mistaken identification inherent in the photographic display.

We conclude that the dangers of mistaken identification, mentioned in *Wade*, were removed from context by the Court of Appeals and were incorrectly utilized as a sufficient basis for requiring counsel. Although *Wade* did discuss possibilities for suggestion and the difficulty for reconstructing suggestivity, this discussion occurred only after the Court had concluded that the lineup constituted a trial-like confrontation, requiring the “Assistance of Counsel” to preserve the adversary process by compensating for advantages of the prosecuting authorities.

The above discussion of *Wade* has shown that the traditional Sixth Amendment test easily allowed extension of counsel to a lineup. The similarity to trial was apparent, and counsel was needed to render “Assistance” in counterbalancing any “overreaching” by the prosecution.

The Court of Appeals considered its analysis complete after it decided that a photographic display lacks scientific precision and ease of accurate reconstruction at trial. That analysis, under *Wade*, however, merely carries one to the point where one must establish that the trial itself can

provide no substitute for counsel if a pretrial confrontation is conducted in the absence of counsel.

We now undertake the threshold analysis that must be addressed.

IV

A substantial departure from the historical test would be necessary if the Sixth Amendment were interpreted to give Ash a right to counsel at the photographic identification in this case. Since the accused himself is not present at the time of the photographic display, and asserts no right to be present, no possibility arises that the accused might be misled by his lack of familiarity with the law or overpowered by his professional adversary. Similarly, the counsel guarantee would not be used to produce equality in a trial-like adversary confrontation. Rather, the guarantee was used by the Court of Appeals to produce confrontation at an event that previously was not analogous to an adversary trial.

Even if we were willing to view the counsel guarantee in broad terms as a generalized protection of the adversary process, we would be unwilling to go so far as to extend the right to a portion of the prosecutor's trial-preparation interviews with witnesses. Although photography is relatively new, the interviewing of witnesses before trial is a procedure that predates the Sixth Amendment. The traditional counterbalance in the American adversary system for these interviews arises from the equal ability of defense counsel to seek and interview witnesses himself.

That adversary mechanism remains as effective for a photographic display as for other parts of pretrial interviews. No greater limitations are placed on defense counsel in constructing displays, seeking witnesses, and conducting photographic identifications than those applicable to the prosecution. Selection of the picture of a person other than the accused, or the inability of a witness to make any selection, will be useful to the defense in precisely the same manner that the selection of a picture of the defendant would be useful to the prosecution. In this very case, for example, the initial tender of the photographic display was by Bailey's counsel, who sought to demonstrate that the witness had failed to make a photographic identification. Although we do not suggest that equality of access to photographs removes all potential for abuse, it does remove any inequality in the adversary process itself and thereby fully satisfies the historical spirit of the Sixth Amendment's counsel guarantee.

The argument has been advanced that requiring counsel might compel the police to observe more scientific procedures or might encourage them to utilize corporeal rather than photographic displays. This Court recognized that improved procedures can minimize the dangers of suggestion. Commentators have also proposed more accurate techniques.

Pretrial photographic identifications, however, are hardly unique in offering possibilities for the actions of the prosecutor unfairly to prejudice the accused. Evidence favorable to the accused may be withheld; testimony of witnesses may be manipulated; the results of laboratory tests may be contrived. In many ways the prosecutor, by accident or by design, may improperly subvert the trial. The primary safeguard against abuses of this kind is the ethical responsibility of the prosecutor, who, as so often has been said, may "strike hard blows" but not "foul ones." If that

safeguard fails, review remains available under due process standards. These same safeguards apply to misuse of photographs.

We are not persuaded that the risks inherent in the use of photographic displays are so pernicious that an extraordinary system of safeguards is required.

We hold, then, that the Sixth Amendment does not grant the right to counsel at photographic displays conducted by the Government for the purpose of allowing a witness to attempt an identification of the offender. This holding requires reversal of the judgment of the Court of Appeals. Reversed and remanded.

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL join, dissenting.

The Court holds today that a pretrial display of photographs to the witnesses of a crime for the purpose of identifying the accused, unlike a lineup, does not constitute a “critical stage” of the prosecution at which the accused is constitutionally entitled to the presence of counsel. In my view, today’s decision is wholly unsupportable in terms of such considerations as logic, consistency, and, indeed, fairness. As a result, I must reluctantly conclude that today’s decision marks simply another step towards the complete evisceration of the fundamental constitutional principles established by this Court.

As the Court of Appeals recognized, “the dangers of mistaken identification ... set forth in *Wade* are applicable in large measure to photographic as well as corporeal identifications.” To the extent that misidentification may be attributable to a witness’ faulty memory or perception, or inadequate opportunity for detailed observation during the crime, the risks are obviously as great at a photographic display as at a lineup. But “[b]ecause of the inherent limitations of photography, which presents its subject in two dimensions rather than the three dimensions of reality, ... a photographic identification, even when properly obtained, is clearly inferior to a properly obtained corporeal identification.”

Moreover, as in the lineup situation, the possibilities for impermissible suggestion in the context of a photographic display are manifold. Such suggestion, intentional or unintentional, may derive from three possible sources. First, the photographs themselves might tend to suggest which of the pictures is that of the suspect. For example, differences in age, pose, or other physical characteristics of the persons represented, and variations in the mounting, background, lighting, or markings of the photographs all might have the effect of singling out the accused.

Second, impermissible suggestion may inhere in the manner in which the photographs are displayed to the witness. The danger of misidentification is, of course, “increased if the police display to the witness ... the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized.” And, if the photographs are arranged in an asymmetrical pattern, or if they are displayed in a time sequence that tends to emphasize a particular photograph, “any identification of the photograph which stands out from the rest is no more reliable than an identification of a single photograph, exhibited alone.”

Third, gestures or comments of the prosecutor at the time of the display may lead an otherwise uncertain witness to select the “correct” photograph. More subtly, the prosecutor’s inflection,

facial expressions, physical motions, and myriad other almost imperceptible means of communication might tend, intentionally or unintentionally, to compromise the witness' objectivity.

Moreover, as with lineups, the defense can “seldom reconstruct” at trial the mode and manner of photographic identification. Finally, and unlike the lineup situation, the accused himself is not even present at the photographic identification, thereby reducing the likelihood that irregularities in the procedures will ever come to light.

Thus, the difficulties of reconstructing at trial an uncounseled photographic display are at least equal to, and possibly greater than, those involved in reconstructing an uncounseled lineup. As a result, both photographic and corporeal identifications create grave dangers that an innocent defendant might be convicted simply because of his inability to expose a tainted identification. This being so, considerations of logic, consistency, and, indeed, fairness compel the conclusion that a pretrial photographic identification, like a pretrial corporeal identification, is a “critical stage of the prosecution at which [the accused is] ‘as much entitled to such aid (of counsel) ... as at the trial itself.’”

Ironically, the Court does not seriously challenge the proposition that presence of counsel at a pretrial photographic display is essential to preserve the accused's right to a fair trial on the issue of identification. Rather, in what I can only characterize a triumph of form over substance, the Court seeks to justify its result by engrafting a wholly unprecedented—and wholly unsupportable—limitation on the Sixth Amendment right of “the accused ... to have the Assistance of Counsel for his defence.” Although apparently conceding that the right to counsel attaches, not only at the trial itself, but at all “critical stages” of the prosecution, the Court holds today that, in order to be deemed “critical,” the particular “stage of the prosecution” under consideration must, at the very least, involve the physical “presence of the accused,” at a “trial-like confrontation” with the Government, at which the accused requires the “guiding hand of counsel.” According to the Court a pretrial photographic identification does not, of course, meet these criteria.

The fundamental premise underlying all of this Court's decisions holding the right to counsel applicable at “critical” pretrial proceedings, is that a “stage” of the prosecution must be deemed “critical” for the purposes of the Sixth Amendment if it is one at which the presence of counsel is necessary “to protect the fairness of the trial itself.”

This established conception of the Sixth Amendment guarantee is, of course, in no sense dependent upon the physical “presence of the accused,” at a “trial-like confrontation” with the Government, at which the accused requires the “guiding hand of counsel.” On the contrary, in *Powell v. Alabama*, the seminal decision in this area, we explicitly held the right to counsel applicable at a stage of the pretrial proceedings involving none of the three criteria set forth by the Court today.

Moreover, despite the Court's efforts to rewrite *Wade* so as to suggest a precedential basis for its own analysis, the rationale of *Wade* lends no support whatever to today's decision.

There is something ironic about the Court’s conclusion today that a pretrial lineup identification is a “critical stage” of the prosecution because counsel’s presence can help to compensate for the accused’s deficiencies as an observer, but that a pretrial photographic identification is not a “critical stage” of the prosecution because the accused is not able to observe at all. In my view, there simply is no meaningful difference, in terms of the need for attendance of counsel, between corporeal and photographic identifications. And applying established and well-reasoned Sixth Amendment principles, I can only conclude that a pretrial photographic display, like a pretrial lineup, is a “critical stage” of the prosecution at which the accused is constitutionally entitled to the presence of counsel.

* * *

In our next two chapters, we examine the Court’s substantive regulation of identification procedures. Specifically, we will identify what methods of witness identification are so unreliable that the Court has found them to violate a defendant’s right to due process of law.

IDENTIFICATIONS

Chapter 39

Identifications and Due Process

Our last chapter covered when suspects have a right to counsel during an identification procedure, which the Court held is sometimes—but not always—a “critical stage” of a prosecution. Here, we begin our review of how the Court has regulated identifications using the Due Process Clauses, holding that some identification evidence is so unreliable that offering it against a defendant violates the minimum standards of a fair criminal trial.

In our first case, *Simmons v. United States*, the Court considered a due process challenge to the introduction of evidence associated with the allegedly-improper (unduly suggestive) presentation of photographs to witnesses of a bank robbery.

Before turning to *Simmons*, it is useful to have a bit of background from a prior decision. In *Stovall v. Denno*, [388 U.S. 293](#) (1967), the Court held that a sufficiently bad identification procedure might violate a defendant’s right to due process. In other words, the procedure could be “so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law.” In that case, a suspect was taken by police (with no other suspects) and presented to a witness, who identified him as the man who killed the witness’s husband and stabbed the witness wife eleven times. While the Court held that a due process challenge could work in theory, it held as well that “a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it” and that “the record in the present case reveals that the showing of Stovall to Mrs. Behrendt in an immediate hospital confrontation was imperative.” Because police feared the witness could die at any moment, it was reasonable for police to conduct a “show up” procedure that would normally be disfavored because of its highly suggestive nature. Time was of the essence, and police had no other way to learn whether the witness would identify the suspect as the killer.

It is possible that today the analysis of a similar “show up” would be different. Today, police could easily use a tablet to display photographs of a suspect (along with a few other people) to a witness. The array could be arranged on short notice. But in the 1960s, such technology did not exist. In any event, the Court’s decision in *Stovall* set the stage for subsequent cases in which defendants argued that the particular identification procedures to which they were subjected violated their due process rights.

Supreme Court of the United States

Thomas Earl Simmons v. United States

Decided March 18, 1968 – [390 U.S. 377](#)

Mr. Justice HARLAN delivered the opinion of the Court.

This case presents issues arising out of the petitioners' trial and conviction in the United States District Court for the Northern District of Illinois for the armed robbery of a federally insured savings and loan association.

The evidence at trial showed that at about 1:45 p.m. on February 27, 1964, two men entered a Chicago savings and loan association. One of them pointed a gun at a teller and ordered her to put money into a sack which the gunman supplied. The men remained in the bank about five minutes. After they left, a bank employee rushed to the street and saw one of the men sitting on the passenger side of a departing white 1960 Thunderbird automobile with a large scrape on the right door. Within an hour police located in the vicinity a car matching this description. They discovered that it belonged to a Mrs. Rey, sister-in-law of petitioner Simmons. She told the police that she had loaned the car for the afternoon to her brother, William Andrews.

At about 5:15 p.m. the same day, two FBI agents came to the house of Mrs. Mahon, Andrews' mother, about half a block from the place where the car was then parked. The agents had no warrant, and at trial it was disputed whether Mrs. Mahon gave them permission to search the house. They did search, and in the basement they found two suitcases, of which Mrs. Mahon disclaimed any knowledge. One suitcase contained, among other items, a gun holster, a sack similar to the one used in the robbery, and several coin cards and bill wrappers from the bank which had been robbed.

The following morning the FBI obtained from another of Andrews' sisters some snapshots of Andrews and of petitioner Simmons, who was said by the sister to have been with Andrews the previous afternoon. These snapshots were shown to the five bank employees who had witnessed the robbery. Each witness identified pictures of Simmons as representing one of the robbers. A week or two later, three of these employees identified photographs of petitioner Garrett as depicting the other robber, the other two witnesses stating that they did not have a clear view of the second robber.

The petitioners, together with William Andrews, subsequently were indicted and tried for the robbery, as indicated. Just prior to the trial, Garrett moved to suppress the Government's exhibit consisting of the suitcase containing the incriminating items. In order to establish his standing so to move, Garrett testified that, although he could not identify the suitcase with certainty, it was similar to one he had owned, and that he was the owner of clothing found inside the suitcase. The District Court denied the motion to suppress. Garrett's testimony at the "suppression" hearing was admitted against him at trial.

During the trial, all five bank employee witnesses identified Simmons as one of the robbers. Three of them identified Garrett as the second robber, the other two testifying that they did not get a good look at the second robber. The District Court denied the petitioners' request [] for production of the photographs which had been shown to the witnesses before trial.

The jury found Simmons and Garrett, as well as Andrews, guilty as charged. On appeal, the Court of Appeals for the Seventh Circuit affirmed as to Simmons and Garrett, but reversed the conviction of Andrews on the ground that there was insufficient evidence to connect him with the robbery.

We granted certiorari as to Simmons to consider the following claim[:] Simmons asserts that his pretrial identification by means of photographs was in the circumstances so unnecessarily suggestive and conducive to misidentification as to deny him due process of law, or at least to require reversal of his conviction in the exercise of our supervisory power over the lower federal courts. For reasons which follow, we affirm the judgment of the Court of Appeals.

I

The facts as to the identification claim are these. As has been noted previously, FBI agents on the day following the robbery obtained from Andrews' sister a number of snapshots of Andrews and Simmons. There seem to have been at least six of these pictures, consisting mostly of group photographs of Andrews, Simmons, and others. Later the same day, these were shown to the five bank employees who had witnessed the robbery at their place of work, the photographs being exhibited to each employee separately. Each of the five employees identified Simmons from the photographs. At later dates, some of these witnesses were again interviewed by the FBI and shown indeterminate numbers of pictures. Again, all identified Simmons. At trial, the Government did not introduce any of the photographs, but relied upon in-court identification by the five eyewitnesses, each of whom swore that Simmons was one of the robbers.

In support of his argument, Simmons looks to last Term's "lineup" decisions—*United States v. Wade* and *Gilbert v. State of California*. Simmons [] does not contend that he was entitled to counsel at the time the pictures were shown to the witnesses. Rather, he asserts simply that in the circumstances the identification procedure was so unduly prejudicial as fatally to taint his conviction. This is a claim which must be evaluated in light of the totality of surrounding circumstances. Viewed in that context, we find the claim untenable.

It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification.

Despite the hazards of initial identification by photograph, this procedure has been used widely and effectively in criminal law enforcement, from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate

them through scrutiny of photographs. The danger that use of the technique may result in convictions based on misidentification may be substantially lessened by a course of cross-examination at trial which exposes to the jury the method's potential for error. We are unwilling to prohibit its employment, either in the exercise of our supervisory power or, still less, as a matter of constitutional requirement. Instead, we hold that each case must be considered on its own facts, and that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

Applying the standard to this case, we conclude that petitioner Simmons' claim on this score must fail. In the first place, it is not suggested that it was unnecessary for the FBI to resort to photographic identification in this instance. A serious felony had been committed. The perpetrators were still at large. The inconclusive clues which law enforcement officials possessed led to Andrews and Simmons. It was essential for the FBI agents swiftly to determine whether they were on the right track, so that they could properly deploy their forces in Chicago and, if necessary, alert officials in other cities.

In the second place, there was in the circumstances of this case little chance that the procedure utilized led to misidentification of Simmons. The robbery took place in the afternoon in a well-lighted bank. The robbers wore no masks. Five bank employees had been able to see the robber later identified as Simmons for periods ranging up to five minutes. Those witnesses were shown the photographs only a day later, while their memories were still fresh. At least six photographs were displayed to each witness. Apparently, these consisted primarily of group photographs, with Simmons and Andrews each appearing several times in the series. Each witness was alone when he or she saw the photographs. There is no evidence to indicate that the witnesses were told anything about the progress of the investigation, or that the FBI agents in any other way suggested which persons in the pictures were under suspicion.

Under these conditions, all five eyewitnesses identified Simmons as one of the robbers. None identified Andrews, who apparently was as prominent in the photographs as Simmons. These initial identifications were confirmed by all five witnesses in subsequent viewings of photographs and at trial, where each witness identified Simmons in person. Notwithstanding cross-examination, none of the witnesses displayed any doubt about their respective identifications of Simmons. Taken together, these circumstances leave little room for doubt that the identification of Simmons was correct, even though the identification procedure employed may have in some respects fallen short of the ideal. We hold that in the factual surroundings of this case the identification procedure used was not such as to deny Simmons due process of law or to call for reversal under our supervisory authority.

For the foregoing reasons, we affirm the judgment of the Court of Appeals so far as it relates to petitioner Simmons.

Mr. Justice BLACK, concurring in part.

I concur in affirmance of the conviction of Simmons.

Simmons' chief claim is that his "pretrial identification [was] so unnecessarily suggestive and conducive to irreparable mistaken identification, that he was denied due process of law." The Court rejects this contention. I agree with the Court but for quite different reasons. The Court's opinion rests on a lengthy discussion of inferences that the jury could have drawn from the evidence of identifying witnesses. A mere summary reading of the evidence as outlined by this Court shows that its discussion is concerned with the weight of the testimony given by the identifying witnesses. The weight of the evidence, however, is not a question for the Court but for the jury, and does not raise a due process issue. The due process question raised by Simmons is, and should be held to be, frivolous. The identifying witnesses were all present in the bank when it was robbed and all saw the robbers. The due process contention revolves around the circumstances under which these witnesses identified pictures of the robbers shown to them, and these circumstances are relevant only to the weight the identification was entitled to be given. The Court, however, considers Simmons' contention on the premise that a denial of due process could be found in the "totality of circumstances" of the picture identification. I do not believe the Due Process Clause or any other constitutional provision vests this Court with any such wideranging, uncontrollable power. A trial according to due process of law is a trial according to the "law of the land"—the law as enacted by the Constitution or the Legislative Branch of Government, and not "laws" formulated by the courts according to the "totality of the circumstances." Simmons' due process claim here should be denied because it is frivolous. For these reasons I vote to affirm Simmons' conviction.

* * *

In the next case, *Foster v. California*, the Court finds an identification procedure so unreasonable that it violated the defendant's right to due process of law. *Foster* represents the height of the Court's willingness to regulate identification procedures, and defendants have not had much success replicating its result.

Supreme Court of the United States

Walter B. Foster v. California

Decided April 1, 1969 – [394 U.S. 440](#)

Mr. Justice FORTAS delivered the opinion of the Court.

Petitioner was charged by information with the armed robbery of a Western Union office. The day after the robbery one of the robbers, Clay, surrendered to the police and implicated Foster and Grice. Allegedly, Foster and Clay had entered the office while Grice waited in a car. Foster and Grice were tried together. Grice was acquitted. Foster was convicted. The California District Court of Appeal affirmed the conviction; the State Supreme Court denied review. We granted certiorari, limited to the question whether the conduct of the police lineup resulted in a violation of petitioner's constitutional rights.

Except for the robbers themselves, the only witness to the crime was Joseph David, the late-night manager of the Western Union office. After Foster had been arrested, David was called to the police station to view a lineup. There were three men in the lineup. One was petitioner. He is a tall man—close to six feet in height. The other two men were short—five feet, five or six inches. Petitioner wore a leather jacket which David said was similar to the one he had seen underneath the coveralls worn by the robber. After seeing this lineup, David could not positively identify petitioner as the robber. He ‘thought’ he was the man, but he was not sure. David then asked to speak to petitioner, and petitioner was brought into an office and sat across from David at a table. Except for prosecuting officials there was no one else in the room. Even after this one-to-one confrontation David still was uncertain whether petitioner was one of the robbers: “truthfully—I was not sure,” he testified at trial. A week or 10 days later, the police arranged for David to view a second lineup. There were five men in that lineup. Petitioner was the only person in the second lineup who had appeared in the first lineup. This time David was “convinced” petitioner was the man.

At trial, David testified to his identification of petitioner in the lineups, as summarized above. He also repeated his identification of petitioner in the courtroom. The only other evidence against petitioner which concerned the particular robbery with which he was charged was the testimony of the alleged accomplice Clay.

[Because the identifications in this case occurred prior to the Court’s decisions in *Wade* and *Gilbert* (Chapter 38), the right to counsel holdings set forth in those cases did not apply to Foster’s case. Instead, the lineup in this case was “judged by the ‘totality of the circumstances,’ [to determine if] the conduct of identification procedures [are] ‘so unnecessarily suggestive and conducive to irreparable mistaken identification’ as to be a denial of due process of law.”]

Judged by that standard, this case presents a compelling example of unfair lineup procedures. In the first lineup arranged by the police, petitioner stood out from the other two men by the contrast of his height and by the fact that he was wearing a leather jacket similar to that worn by the robber. When this did not lead to positive identification, the police permitted a one-to-one confrontation between petitioner and the witness. “The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned.” Even after this the witness’ identification of petitioner was tentative. So some days later another lineup was arranged. Petitioner was the only person in this lineup who had also participated in the first lineup. This finally produced a definite identification.

The suggestive elements in this identification procedure made it all but inevitable that David would identify petitioner whether or not he was in fact “the man.” In effect, the police repeatedly said to the witness, “This is the man.” This procedure so undermined the reliability of the eyewitness identification as to violate due process.

Accordingly, the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

Mr. Justice BLACK, dissenting.

[T]he Court looks to the “totality of circumstances” to show “unfair lineup procedures.” This means “unfair” according to the Court’s view of what is unfair. The Constitution, however, does not anywhere prohibit conduct deemed unfair by the courts. “Rules of evidence are designed in the interests of fair trials. But unfairness in result is no sure measure of unconstitutionality.”

The Constitution sets up its own standards of unfairness in criminal trials in the Fourth, Fifth, and Sixth Amendments, among other provisions of the Constitution. Many of these provisions relate to evidence and its use in criminal cases. The Constitution provides that the accused shall have the right to compulsory process for obtaining witnesses in his favor. It ordains that evidence shall not be obtained by compulsion of the accused. It ordains that the accused shall have the right to confront the witnesses against him. In these ways the Constitution itself dictates what evidence is to be excluded because it was improperly obtained or because it is not sufficiently reliable. But the Constitution does not give this Court any general authority to require exclusion of all evidence that this Court considers improperly obtained or that this Court considers insufficiently reliable. Hearsay evidence, for example, is in most instances rendered inadmissible by the Confrontation Clause, which reflects a judgment, made by the Framers of the Bill of Rights, that such evidence may be unreliable and cannot be put in proper perspective by cross-examination of the person repeating it in court. Nothing in this constitutional plan suggests that the Framers drew up the Bill of Rights merely in order to mention a few types of evidence “for illustration,” while leaving this Court with full power to hold unconstitutional the use of any other evidence that the Justices of this Court might decide was not sufficiently reliable or was not sufficiently subject to exposure by cross-examination. On the contrary, as we have repeatedly held, the Constitution leaves to the States and to the people all these questions concerning the various advantages and disadvantages of admitting certain types of evidence.

It has become fashionable to talk of the Court’s power to hold governmental laws and practices unconstitutional whenever this Court believes them to be “unfair,” contrary to basic standards of decency, implicit in ordered liberty, or offensive to “those canons of decency and fairness which express the notions of justice of English-speaking peoples” All of these different general and indefinable words or phrases are the fruit of the same, what I consider to be poisonous, tree, namely, the doctrine that this Court has power to make its own ideas of fairness, decency, and so forth, enforceable as though they were constitutional precepts. When I consider the incontrovertible fact that our Constitution was written to limit and define the powers of the Federal Government as distinguished from the powers of States, and to divide those powers granted the United States among the separate Executive, Legislative, and Judicial branches, I cannot accept the premise that our Constitution grants any powers except those specifically written into it, or absolutely necessary and proper to carry out the powers expressly granted.

I realize that some argue that there is little difference between the two constitutional views expressed below:

One. No law should be held unconstitutional unless its invalidation can be firmly planted on a specific constitutional provision plus the Necessary and Proper Clause.

Two. All laws are unconstitutional that are unfair, shock the conscience of the Court, offend its sense of decency, or violate concepts implicit in ordered liberty.

The first of these two constitutional standards plainly tells judges they have no power to hold laws unconstitutional unless such laws are believed to violate the written Constitution. The second constitutional standard, based on the words “due process,” not only does not require judges to follow the Constitution as written, but actually encourages judges to hold laws unconstitutional on the basis of their own conceptions of fairness and justice. This formula imposes no “restraint” on judges beyond requiring them to follow their own best judgment as to what is wise, just, and best under the circumstances of a particular case. This case well illustrates the extremes to which the formula can take men who are both wise and good. Although due process requires that courts summon witnesses so that juries can determine the guilt or innocence of defendants, the Court, because of its sense of fairness, decides that due process deprives juries of a chance to hear witnesses who the Court holds could not or might not tell the truth.

For the above reasons I dissent from the reversal and remand of this case.

* * *

It is well known that a lineup containing only one suspect, sometimes called a “showup,” is highly suggestive and can cause false identifications. In the next case, the Court considered whether such procedures are so unreliable as to offend the Due Process Clause.

Supreme Court of the United States

William S. Neil v. Archie Nathaniel Biggers

Decided Dec. 6, 1972 – [409 U.S. 188](#)

Mr. Justice POWELL delivered the opinion of the Court.

In 1965, after a jury trial in a Tennessee court, respondent was convicted of rape and was sentenced to 20 years’ imprisonment. The State’s evidence consisted in part of testimony concerning a station-house identification of respondent by the victim. The Tennessee Supreme Court affirmed. On certiorari, the judgment of the Tennessee Supreme Court was affirmed by an equally divided Court. Respondent then brought a federal habeas corpus action raising several claims. The District Court [] held in an unreported opinion that the station-house identification procedure was so suggestive as to violate due process. The Court of Appeals affirmed. We granted certiorari to decide whether the identification procedure violated due process.

II

As the [due process] claim turns upon the facts, we must first review the relevant testimony at the jury trial and at the habeas corpus hearing regarding the rape and the identification. The victim testified at trial that on the evening of January 22, 1965, a youth with a butcher knife grabbed her in the doorway to her kitchen:

“A. [H]e grabbed me from behind, and grappled—twisted me on the floor. Threw me down on the floor.

“Q. And there was no light in that kitchen?

“A. Not in the kitchen.

“Q. So you couldn’t have seen him then?

“A. Yes, I could see him, when I looked up in his face.

“Q. In the dark?

“A. He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was.

“Q. You could see? No light? And you could see him and know him then?

“A. Yes.”

When the victim screamed, her 12-year-old daughter came out of her bedroom and also began to scream. The assailant directed the victim to “tell her [the daughter] to shut up, or I’ll kill you both.” She did so, and was then walked at knifepoint about two blocks along a railroad track, taken into a woods, and raped there. She testified that “the moon was shining brightly, full moon.” After the rape, the assailant ran off, and she returned home, the whole incident having taken between 15 minutes and half an hour.

She then gave the police what the Federal District Court characterized as “only a very general description,” describing him as “being fat and flabby with smooth skin, bushy hair and a youthful voice.” Additionally, though not mentioned by the District Court, she testified at the habeas corpus hearing that she had described her assailant as being between 16 and 18 years old and between five feet ten inches and six feet, tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion. This testimony was substantially corroborated by that of a police officer who was testifying from his notes.

On several occasions over the course of the next seven months, she viewed suspects in her home or at the police station, some in lineups and others in showups, and was shown between 30 and 40 photographs. She told the police that a man pictured in one of the photographs had features similar to those of her assailant, but identified none of the suspects. On August 17, the police called her to the station to view respondent, who was being detained on another charge. In an effort to construct a suitable lineup, the police checked the city jail and the city juvenile home. Finding no one at either place fitting respondent’s unusual physical description, they conducted a showup instead.

The showup itself consisted of two detectives walking respondent past the victim. At the victim’s request, the police directed respondent to say “shut up or I’ll kill you.” The testimony at trial was not altogether clear as to whether the victim first identified him and then asked that he repeat the words or made her identification after he had spoken. In any event, the victim testified that

she had “no doubt” about her identification. At the habeas corpus hearing, she elaborated in response to questioning.

“A. That I have no doubt, I mean that I am sure that when I—see, when I first laid eyes on him, I knew that it was the individual, because his face—well, there was just something that I don’t think I could ever forget. I believe—

“Q. You say when you first laid eyes on him, which time are you referring to?

“A. When I identified him—when I seen him in the courthouse when I was took up to view the suspect.”

We must decide whether, as the courts below held, this identification and the circumstances surrounding it failed to comport with due process requirements.

III

Some general guidelines emerge from the [due process identification] cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is “a very substantial likelihood of irreparable misidentification.” While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of “irreparable” it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant’s right to due process, and it is this which was the basis of the exclusion of evidence in *Foster*. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But [] the admission of evidence of a showup without more does not violate due process.

What is less clear from our cases is whether [] unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process.

We turn, then, to the central question, whether under the “totality of the circumstances” the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Applying these factors, we disagree with the District Court’s conclusion.

In part, as discussed above, we think the District Court focused unduly on the relative reliability of a lineup as opposed to a showup, the issue on which expert testimony was taken at the evidentiary hearing. The testimony was addressed to the jury, and the jury apparently found the identification reliable. Some of the State’s testimony at the federal evidentiary hearing may well have been self-serving in that it too neatly fit the case law, but it surely does nothing to undermine the state record, which itself fully corroborated the identification.

We find that the District Court’s conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most personally humiliating of all crimes. Her description to the police, which included the assailant’s approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had “no doubt” that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation. The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face “I don’t think I could ever forget.”

There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.

* * *

Our next case concerns the photographic version of a one-suspect “showup”—a photo array containing only a single suspect’s photograph.

Supreme Court of the United States

John R. Manson v. Nowell A. Brathwaite

Decided June 16, 1977 – [432 U.S. 98](#)

Mr. Justice BLACKMUN delivered the opinion of the Court.

This case presents the issue as to whether the Due Process Clause of the Fourteenth Amendment compels the exclusion, in a state criminal trial, apart from any consideration of reliability, of pretrial identification evidence obtained by a police procedure that was both suggestive and unnecessary. This Court’s decisions in *Stovall v. Denno* and *Neil v. Biggers* are particularly implicated.¹

¹ [Footnote by editors] *Stovall v. Denno*, [388 U.S. 293](#) (1967), was decided on the same day as *Wade* and *Gilbert* and concerned a due process challenge to identification evidence. The Court stated that such challenges could

Jimmy D. Glover, a full-time trooper of the Connecticut State Police, in 1970 was assigned to the Narcotics Division in an undercover capacity. On May 5 of that year, about 7:45 p. m., e.d.t., and while there was still daylight, Glover and Henry Alton Brown, an informant, went to an apartment building at 201 Westland, in Hartford, for the purpose of purchasing narcotics from “Dickie Boy” Cicero, a known narcotics dealer. Cicero, it was thought, lived on the third floor of that apartment building. Glover and Brown entered the building, observed by back-up Officers D’Onofrio and Gaffey, and proceeded by stairs to the third floor. Glover knocked at the door of one of the two apartments served by the stairway. The area was illuminated by natural light from a window in the third floor hallway. The door was opened 12 to 18 inches in response to the knock. Glover observed a man standing at the door and, behind him, a woman. Brown identified himself. Glover then asked for “two things” of narcotics. The man at the door held out his hand, and Glover gave him two \$10 bills. The door closed. Soon the man returned and handed Glover two glassine bags. While the door was open, Glover stood within two feet of the person from whom he made the purchase and observed his face. Five to seven minutes elapsed from the time the door first opened until it closed the second time.

Glover and Brown then left the building. This was about eight minutes after their arrival. Glover drove to headquarters where he described the seller to D’Onofrio and Gaffey. Glover at that time did not know the identity of the seller. He described him as being “a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt.” D’Onofrio, suspecting from this description that respondent might be the seller, obtained a photograph of respondent from the Records Division of the Hartford Police Department. He left it at Glover’s office. D’Onofrio was not acquainted with respondent personally but did know him by sight and had seen him “[s]everal times” prior to May 5. Glover, when alone, viewed the photograph for the first time upon his return to headquarters on May 7; he identified the person shown as the one from whom he had purchased the narcotics.

The toxicological report on the contents of the glassine bags revealed the presence of heroin. The report was dated July 16, 1970. Respondent was arrested on July 27 while visiting at the apartment of a Mrs. Ramsey on the third floor of 201 Westland. This was the apartment at which the narcotics sale had taken place on May 5.

Respondent was charged, in a two-count information, with possession and sale of heroin. At his trial in January 1971, the photograph from which Glover had identified respondent was received in evidence without objection on the part of the defense. Glover also testified that, although he had not seen respondent in the eight months that had elapsed since the sale, “there [was] no doubt whatsoever” in his mind that the person shown on the photograph was respondent. Glover also made a positive in-court identification without objection.

No explanation was offered by the prosecution for the failure to utilize a photographic array or to conduct a lineup.

Respondent, who took the stand in his own defense, testified that on May 5, the day in question,

succeed but that Stovall’s specific challenge failed. The Court discussed the facts of *Stovall* further in Part II of this opinion.

he had been ill at his Albany Avenue apartment (“a lot of back pains, muscle spasms ... a bad heart ... high blood pressure ... neuralgia in my face, and sinus”), and that at no time on that particular day had he been at 201 Westland. His wife testified that she recalled, after her husband had refreshed her memory, that he was home all day on May 5. Doctor Wesley M. Vietzke, an internist and assistant professor of medicine at the University of Connecticut, testified that respondent had consulted him on April 15, 1970, and that he took a medical history from him, heard his complaints about his back and facial pain, and discovered that he had high blood pressure. The physician found respondent, subjectively, “in great discomfort.” Respondent in fact underwent surgery for a herniated disc at L5 and S1 on August 17.

The jury found respondent guilty on both counts of the information. He received a sentence of not less than six nor more than nine years. His conviction was affirmed *per curiam* by the Supreme Court of Connecticut. Fourteen months later, respondent filed a petition for habeas corpus in the United States District Court for the District of Connecticut. He alleged that the admission of the identification testimony at his state trial deprived him of due process of law to which he was entitled under the Fourteenth Amendment. The District Court, by an unreported written opinion based on the court’s review of the state trial transcript, dismissed respondent’s petition. On appeal, the United States Court of Appeals for the Second Circuit reversed, with instructions to issue the writ unless the State gave notice of a desire to retry respondent and the new trial occurred within a reasonable time to be fixed by the District Judge.

In brief summary, the court felt that evidence as to the photograph should have been excluded, regardless of reliability, because the examination of the single photograph was unnecessary and suggestive. And, in the court’s view, the evidence was unreliable in any event. We granted certiorari.

II

Stovall v. Denno decided in 1967, concerned a petitioner who had been convicted in a New York court of murder. He was arrested the day following the crime and was taken by the police to a hospital where the victim’s wife, also wounded in the assault, was a patient. After observing Stovall and hearing him speak, she identified him as the murderer. She later made an in-court identification. On the identification issue, the Court reviewed the practice of showing a suspect singly for purposes of identification, and the claim that this was so unnecessarily suggestive and conducive to irreparable mistaken identification that it constituted a denial of due process of law. The Court noted that the practice “has been widely condemned,” but it concluded that “a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.” In that case, showing Stovall to the victim’s spouse “was imperative.” The Court then quoted the observations of the Court of Appeals, to the effect that the spouse was the only person who could possibly exonerate the accused; that the hospital was not far from the courthouse and jail; that no one knew how long she might live; that she was not able to visit the jail; and that taking Stovall to the hospital room was the only feasible procedure, and, under the circumstances, “the usual police station line-up ... was out of the question.”

[The Court recounted the facts and holding of *Neil v. Biggers*.]

Biggers well might be seen to provide an unambiguous answer to the question before us: The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability. In one passage, however, the Court observed that the challenged procedure occurred pre-*Stovall* and that a strict rule would make little sense with regard to a confrontation that preceded the Court's first indication that a suggestive procedure might lead to the exclusion of evidence. One perhaps might argue that, by implication, the Court suggested that a different rule could apply post-*Stovall*. The question before us, then, is simply whether the *Biggers* analysis applies to post-*Stovall* confrontations as well to those pre-*Stovall*.

III

In the present case the District Court observed that the "sole evidence tying Brathwaite to the possession and sale of the heroin consisted in his identifications by the police undercover agent, Jimmy Glover." On the constitutional issue, the court stated that the first inquiry was whether the police used an impermissibly suggestive procedure in obtaining the out-of-court identification. If so, the second inquiry is whether, under all the circumstances, that suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.

IV

Petitioner at the outset acknowledges that "the procedure in the instant case was suggestive (because only one photograph was used) and unnecessary" (because there was no emergency or exigent circumstance). The respondent proposes a *per se* rule of exclusion that he claims is dictated by the demands of the Fourteenth Amendment's guarantee of due process. He rightly observes that this is the first case in which this Court has had occasion to rule upon strictly post-*Stovall* out-of-court identification evidence of the challenged kind.

Since the decision in *Biggers*, the Courts of Appeals appear to have developed at least two approaches to such evidence. The first, or *per se* approach, employed by the Second Circuit in the present case, focuses on the procedures employed and requires exclusion of the out-of-court identification evidence, without regard to reliability, whenever it has been obtained through unnecessarily suggestive confrontation procedures. The justifications advanced are the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated "fair assurance against the awful risks of misidentification."

The second, or more lenient, approach is one that continues to rely on the totality of the circumstances. It permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. Its adherents feel that the *per se* approach is not mandated by the Due Process Clause of the Fourteenth Amendment. This second approach, in contrast to the other, is ad hoc and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact.

Mr. Justice Stevens, in writing for the Seventh Circuit observed: "There is surprising unanimity among scholars in regarding such a rule (the *per se* approach) as essential to avoid serious risk of miscarriage of justice." He pointed out that well-known federal judges have taken the position that "evidence of, or derived from, a showup identification should be inadmissible unless the prosecutor can justify his failure to use a more reliable identification procedure." Indeed, the ALI

Model Code of Pre-Arrest Procedure §§ 160.1 and 160.2 (1975), frowns upon the use of a showup or the display of only a single photograph.

The respondent here stresses the same theme and the need for deterrence of improper identification practice, a factor he regards as pre-eminent. Photographic identification, it is said, continues to be needlessly employed. He notes that the legislative regulation “the Court had hoped [*United States v.*] *Wade* would engender,” has not been forthcoming. He argues that a totality rule cannot be expected to have a significant deterrent impact; only a strict rule of exclusion will have direct and immediate impact on law enforcement agents. Identification evidence is so convincing to the jury that sweeping exclusionary rules are required. Fairness of the trial is threatened by suggestive confrontation evidence, and thus, it is said, an exclusionary rule has an established constitutional predicate.

There are, of course, several interests to be considered and taken into account. The driving force behind *United States v. Wade*, *Gilbert v. California*, and *Stovall*, all decided on the same day, was the Court’s concern with the problems of eyewitness identification. Usually the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. The witness’ recollection of the stranger can be distorted easily by the circumstances or by later actions of the police. Thus, *Wade* and its companion cases reflect the concern that the jury not hear eyewitness testimony unless that evidence has aspects of reliability. It must be observed that both approaches before us are responsive to this concern. The *per se* rule, however, goes too far since its application automatically and peremptorily, and without consideration of alleviating factors, keeps evidence from the jury that is reliable and relevant.

The second factor is deterrence. Although the *per se* approach has the more significant deterrent effect, the totality approach also has an influence on police behavior. The police will guard against unnecessarily suggestive procedures under the totality rule, as well as the *per se* one, for fear that their actions will lead to the exclusion of identifications as unreliable.

The third factor is the effect on the administration of justice. Here the *per se* approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the *per se* approach may make error by the trial judge more likely than the totality approach. And in those cases in which the admission of identification evidence is error under the *per se* approach but not under the totality approach—cases in which the identification is reliable despite an unnecessarily suggestive identification procedure—reversal is a Draconian sanction. Certainly, inflexible rules of exclusion that may frustrate rather than promote justice have not been viewed recently by this Court with unlimited enthusiasm.

We therefore conclude that reliability is the linchpin in determining the admissibility of identification testimony for both pre- and post-*Stovall* confrontations. The factors to be considered are set out in *Biggers*. These include the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

We turn, then, to the facts of this case and apply the analysis:

1. The opportunity to view. Glover testified that for two to three minutes he stood at the apartment door, within two feet of the respondent. The door opened twice, and each time the man stood at the door. The moments passed, the conversation took place, and payment was made. Glover looked directly at his vendor. It was near sunset, to be sure, but the sun had not yet set, so it was not dark or even dusk or twilight. Natural light from outside entered the hallway through a window. There was natural light, as well, from inside the apartment.
2. The degree of attention. Glover was not a casual or passing observer, as is so often the case with eyewitness identification. Trooper Glover was a trained police officer on duty and specialized and dangerous duty when he called at the third floor of 201 Westland in Hartford on May 5, 1970. Glover himself was [Black] and unlikely to perceive only general features of “hundreds of Hartford black males,” as the Court of Appeals stated. It is true that Glover’s duty was that of ferreting out narcotics offenders and that he would be expected in his work to produce results. But it is also true that, as a specially trained, assigned, and experienced officer, he could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest his vendor. In addition, he knew that his claimed observations would be subject later to close scrutiny and examination at any trial.
3. The accuracy of the description. Glover’s description was given to D’Onofrio within minutes after the transaction. It included the vendor’s race, his height, his build, the color and style of his hair, and the high cheekbone facial feature. It also included clothing the vendor wore. No claim has been made that respondent did not possess the physical characteristics so described. D’Onofrio reacted positively at once. Two days later, when Glover was alone, he viewed the photograph D’Onofrio produced and identified its subject as the narcotics seller.
4. The witness’ level of certainty. There is no dispute that the photograph in question was that of respondent. Glover, in response to a question whether the photograph was that of the person from whom he made the purchase, testified: “There is no question whatsoever.” This positive assurance was repeated.
5. The time between the crime and the confrontation. Glover’s description of his vendor was given to D’Onofrio within minutes of the crime. The photographic identification took place only two days later. We do not have here the passage of weeks or months between the crime and the viewing of the photograph.

These indicators of Glover’s ability to make an accurate identification are hardly outweighed by the corrupting effect of the challenged identification itself. Although identifications arising from single-photograph displays may be viewed in general with suspicion, we find in the instant case little pressure on the witness to acquiesce in the suggestion that such a display entails. D’Onofrio had left the photograph at Glover’s office and was not present when Glover first viewed it two days after the event. There thus was little urgency and Glover could view the photograph at his leisure. And since Glover examined the photograph alone, there was no coercive pressure to make an identification arising from the presence of another. The identification was made in circumstances allowing care and reflection.

Although it plays no part in our analysis, all this assurance as to the reliability of the identification is hardly undermined by the facts that respondent was arrested in the very apartment where the sale had taken place, and that he acknowledged his frequent visits to that apartment.

Surely, we cannot say that under all the circumstances of this case there is “a very substantial likelihood of irreparable misidentification.” Short of that point, such evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.

Of course, it would have been better had D’Onofrio presented Glover with a photographic array including “so far as practicable ... a reasonable number of persons similar to any person then suspected whose likeness is included in the array.” The use of that procedure would have enhanced the force of the identification at trial and would have avoided the risk that the evidence would be excluded as unreliable. But we are not disposed to view D’Onofrio’s failure as one of constitutional dimension to be enforced by a rigorous and unbending exclusionary rule. The defect, if there be one, goes to weight and not to substance.

We conclude that the criteria laid down in *Biggers* are to be applied in determining the admissibility of evidence offered by the prosecution concerning a post-*Stovall* identification, and that those criteria are satisfactorily met and complied with here.

The judgment of the Court of Appeals is reversed.

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting.

Today’s decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in *United States v. Wade*; *Gilbert v. California*; and *Stovall v. Denno*. But it is still distressing to see the Court virtually ignore the teaching of experience embodied in those decisions and blindly uphold the conviction of a defendant who may well be innocent.

[T]he Court disregards two significant distinctions between the *per se* rule advocated in this case and the exclusionary remedies for certain other constitutional violations.

First, the *per se* rule here is not “inflexible.” Where evidence is suppressed, for example, as the fruit of an unlawful search, it may well be forever lost to the prosecution. Identification evidence, however, can by its very nature be readily and effectively reproduced. The in-court identification, permitted under *Wade* and *Simmons* if it has a source independent of an uncounseled or suggestive procedure, is one example. Similarly, when a prosecuting attorney learns that there has been a suggestive confrontation, he can easily arrange another lineup conducted under scrupulously fair conditions. Since the same factors are evaluated in applying both the Court’s totality test and the *Wade-Simmons* independent-source inquiry, any identification which is “reliable” under the Court’s test will support admission of evidence concerning such a fairly conducted lineup. The evidence of an additional, properly conducted confrontation will be more persuasive to a jury, thereby increasing the chance of a justified conviction where a reliable

identification was tainted by a suggestive confrontation. At the same time, however, the effect of an unnecessarily suggestive identification which has no value whatsoever in the law enforcement process will be completely eliminated.

Second, other exclusionary rules have been criticized for preventing jury consideration of relevant and usually reliable evidence in order to serve interests unrelated to guilt or innocence, such as discouraging illegal searches or denial of counsel. Suggestively obtained eyewitness testimony is excluded, in contrast, precisely because of its unreliability and concomitant irrelevance. Its exclusion both protects the integrity of the truth-seeking function of the trial and discourages police use of needlessly inaccurate and ineffective investigatory methods.

Indeed, impermissibly suggestive identifications are not merely worthless law enforcement tools. They pose a grave threat to society at large in a more direct way than most governmental disobedience of the law. For if the police and the public erroneously conclude, on the basis of an unnecessarily suggestive confrontation, that the right man has been caught and convicted, the real outlaw must still remain at large. Law enforcement has failed in its primary function and has left society unprotected from the depredations of an active criminal.

For these reasons, I conclude that adoption of the *per se* rule would enhance, rather than detract from, the effective administration of justice. In my view, the Court's totality test will allow seriously unreliable and misleading evidence to be put before juries. Equally important, it will allow dangerous criminals to remain on the streets while citizens assume that police action has given them protection. According to my calculus, all three of the factors upon which the Court relies point to acceptance of the *per se* approach.

Accordingly, I dissent from the Court's reinstatement of respondent's conviction.

* * *

In our last case in this chapter, the Court considered how to treat identification evidence made unreliable by someone for whom the state is not responsible. In other words, the question was whether a state actor requirement applies when a defendant challenges unreliable identification evidence on due process grounds or if instead the unreliability itself—regardless of its source—compels exclusion of sufficiently unreliable identification evidence.

Supreme Court of the United States

Barion Perry v. New Hampshire

Decided Jan. 11, 2012 – [565 U.S. 228](#)

Justice GINSBURG delivered the opinion of the Court.

In our system of justice, fair trial for persons charged with criminal offenses is secured by the Sixth Amendment, which guarantees to defendants the right to counsel, compulsory process to obtain defense witnesses, and the opportunity to cross-examine witnesses for the prosecution. Those safeguards apart, admission of evidence in state trials is ordinarily governed by state law, and the reliability of relevant testimony typically falls within the province of the jury to determine. This Court has recognized, in addition, a due process check on the admission of

eyewitness identification, applicable when the police have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime.

An identification infected by improper police influence, our case law holds, is not automatically excluded. Instead, the trial judge must screen the evidence for reliability pretrial. If there is “a very substantial likelihood of irreparable misidentification,” the judge must disallow presentation of the evidence at trial. But if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth.

We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. Petitioner requests that we do so because of the grave risk that mistaken identification will yield a miscarriage of justice. Our decisions, however, turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

I

A

Around 3 a.m. on August 15, 2008, Joffre Ullon called the Nashua, New Hampshire, Police Department and reported that an African-American male was trying to break into cars parked in the lot of Ullon’s apartment building. Officer Nicole Clay responded to the call. Upon arriving at the parking lot, Clay heard what “sounded like a metal bat hitting the ground.” She then saw petitioner Barion Perry standing between two cars. Perry walked toward Clay, holding two car-stereo amplifiers in his hands. A metal bat lay on the ground behind him. Clay asked Perry where the amplifiers came from. “[I] found them on the ground,” Perry responded.

Meanwhile, Ullon’s wife, Nubia Blandon, woke her neighbor, Alex Clavijo, and told him she had just seen someone break into his car. Clavijo immediately went downstairs to the parking lot to inspect the car. He first observed that one of the rear windows had been shattered. On further inspection, he discovered that the speakers and amplifiers from his car stereo were missing, as were his bat and wrench. Clavijo then approached Clay and told her about Blandon’s alert and his own subsequent observations.

By this time, another officer had arrived at the scene. Clay asked Perry to stay in the parking lot with that officer, while she and Clavijo went to talk to Blandon. Clay and Clavijo then entered the apartment building and took the stairs to the fourth floor, where Blandon’s and Clavijo’s apartments were located. They met Blandon in the hallway just outside the open door to her apartment.

Asked to describe what she had seen, Bandon stated that, around 2:30 a.m., she saw from her kitchen window a tall, African-American man roaming the parking lot and looking into cars. Eventually, the man circled Clavijo's car, opened the trunk, and removed a large box.

Clay asked Bandon for a more specific description of the man. Bandon pointed to her kitchen window and said the person she saw breaking into Clavijo's car was standing in the parking lot, next to the police officer. Perry's arrest followed this identification.

About a month later, the police showed Bandon a photographic array that included a picture of Perry and asked her to point out the man who had broken into Clavijo's car. Bandon was unable to identify Perry.

B

Perry was charged in New Hampshire state court with one count of theft by unauthorized taking and one count of criminal mischief. Before trial, he moved to suppress Bandon's identification on the ground that admitting it at trial would violate due process. Bandon witnessed what amounted to a one-person showup in the parking lot, Perry asserted, which all but guaranteed that she would identify him as the culprit.

The New Hampshire Superior Court denied the motion. At the ensuing trial, Bandon and Clay testified to Bandon's out-of-court identification. The jury found Perry guilty of theft and not guilty of criminal mischief.

On appeal, Perry repeated his challenge to the admissibility of Bandon's out-of-court identification. The New Hampshire Supreme Court rejected Perry's argument and affirmed his conviction.

We granted certiorari to resolve a division of opinion on the question whether the Due Process Clause requires a trial judge to conduct a preliminary assessment of the reliability of an eyewitness identification made under suggestive circumstances not arranged by the police.

II

The Constitution, our decisions indicate, protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit. Constitutional safeguards available to defendants to counter the State's evidence include the Sixth Amendment rights to counsel, compulsory process, and confrontation plus cross-examination of witnesses. Apart from these guarantees, we have recognized, state and federal statutes and rules ordinarily govern the admissibility of evidence, and juries are assigned the task of determining the reliability of the evidence presented at trial. Only when evidence "is so extremely unfair that its admission violates fundamental conceptions of justice," have we imposed a constraint tied to the Due Process Clause.

Perry concedes that, in contrast to every case in the *Stovall* line, law enforcement officials did not arrange the suggestive circumstances surrounding Blandon's identification. He contends, however, that it was mere happenstance that each of the *Stovall* cases involved improper police action. The rationale underlying our decisions, Perry asserts, supports a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. We disagree.

Perry's argument depends, in large part, on the Court's statement in *Brathwaite* that "reliability is the linchpin in determining the admissibility of identification testimony." If reliability is the linchpin of admissibility under the Due Process Clause, Perry maintains, it should make no difference whether law enforcement was responsible for creating the suggestive circumstances that marred the identification.

Perry has removed our statement in *Brathwaite* from its mooring, and thereby attributes to the statement a meaning a fair reading of our opinion does not bear. [T]he *Brathwaite* Court's reference to reliability appears in a portion of the opinion concerning the appropriate remedy *when the police use an unnecessarily suggestive identification procedure*. The Court adopted a judicial screen for reliability as a course preferable to a *per se* rule requiring exclusion of identification evidence whenever law enforcement officers employ an improper procedure. The due process check for reliability, *Brathwaite* made plain, comes into play only after the defendant establishes improper police conduct. The very purpose of the check, the Court noted, was to avoid depriving the jury of identification evidence that is reliable, *notwithstanding* improper police conduct.

[Perry's] position would open the door to judicial preview, under the banner of due process, of most, if not all, eyewitness identifications. External suggestion is hardly the only factor that casts doubt on the trustworthiness of an eyewitness' testimony. As one of Perry's *amici* points out, many other factors bear on "the likelihood of misidentification"—for example, the passage of time between exposure to and identification of the defendant, whether the witness was under stress when he first encountered the suspect, how much time the witness had to observe the suspect, how far the witness was from the suspect, whether the suspect carried a weapon, and the race of the suspect and the witness. There is no reason why an identification made by an eyewitness with poor vision, for example, or one who harbors a grudge against the defendant, should be regarded as inherently more reliable, less of a "threat to the fairness of trial," than the identification Blandon made in this case. To embrace Perry's view would thus entail a vast enlargement of the reach of due process as a constraint on the admission of evidence.

Perry maintains that the Court can limit the due process check he proposes to identifications made under "suggestive circumstances." Even if we could rationally distinguish suggestiveness from other factors bearing on the reliability of eyewitness evidence, Perry's limitation would still involve trial courts, routinely, in preliminary examinations. Most eyewitness identifications involve some element of suggestion. Indeed, all in-court identifications do. Out-of-court identifications volunteered by witnesses are also likely to involve suggestive circumstances. For example, suppose a witness identifies the defendant to police officers after seeing a photograph of the defendant in the press captioned "theft suspect," or hearing a radio report implicating the defendant in the crime. Or suppose the witness knew that the defendant ran with the wrong crowd and saw him on the day and in the vicinity of the crime. Any of these circumstances might

have “suggested” to the witness that the defendant was the person the witness observed committing the crime.

In urging a broadly applicable due process check on eyewitness identifications, Perry maintains that eyewitness identifications are a uniquely unreliable form of evidence. We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that “the annals of criminal law are rife with instances of mistaken identification.”

We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant’s trial fundamentally unfair. We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Our unwillingness to enlarge the domain of due process as Perry and the dissent urge rests, in large part, on our recognition that the jury, not the judge, traditionally determines the reliability of evidence. We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on eyewitness testimony of questionable reliability. These protections include the defendant’s Sixth Amendment right to confront the eyewitness. Another is the defendant’s right to the effective assistance of an attorney, who can expose the flaws in the eyewitness’ testimony during cross-examination and focus the jury’s attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant’s guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence.

State and federal rules of evidence, moreover, permit trial judges to exclude relevant evidence if its probative value is substantially outweighed by its prejudicial impact or potential for misleading the jury. In appropriate cases, some States also permit defendants to present expert testimony on the hazards of eyewitness identification evidence.

Finding no convincing reason to alter our precedent, we hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. Accordingly, the judgment of the New Hampshire Supreme Court is [a]ffirmed.

Justice SOTOMAYOR, dissenting.

This Court has long recognized that eyewitness identifications’ unique confluence of features—their unreliability, susceptibility to suggestion, powerful impact on the jury, and resistance to the ordinary tests of the adversarial process—can undermine the fairness of a trial. Our cases thus establish a clear rule: The admission at trial of out-of-court eyewitness identifications derived from impermissibly suggestive circumstances that pose a very substantial likelihood of misidentification violates due process. The Court today announces that that rule does not even

“com[e] into play” unless the suggestive circumstances are improperly “police-arranged.”

Our due process concern, however, arises not from the act of suggestion, but rather from the corrosive effects of suggestion on the reliability of the resulting identification. By rendering protection contingent on improper police arrangement of the suggestive circumstances, the Court effectively grafts a *mens rea* inquiry onto our rule. The Court’s holding enshrines a murky distinction—between suggestive confrontations intentionally orchestrated by the police and, as here, those inadvertently caused by police actions—that will sow confusion. It ignores our precedents’ acute sensitivity to the hazards of intentional and unintentional suggestion alike and unmoors our rule from the very interest it protects, inviting arbitrary results. And it recasts the driving force of our decisions as an interest in police deterrence, rather than reliability. Because I see no warrant for declining to assess the circumstances of this case under our ordinary approach, I respectfully dissent.

Notes, Comments, and Questions

In our next chapter we will conclude our review of identification evidence, focusing on recent state-court decisions, and will examine best practices suggested by modern research.

Before moving on, students may wish to consider some real-life consequences of unintentional witness misidentification. In one case, [Ronald Cotton](#) was identified as the rapist who attacked Jennifer Thompson in 1984 in North Carolina. Police showed Thompson a photo array, and she chose Cotton’s photo. She later identified Cotton at a line up. He was convicted of rape and sentenced to life in prison. Subsequently, DNA evidence proved that a different man—who looked somewhat like Cotton—had committed the rape. Cotton was released from prison in 1995. Cotton and Thompson have since become advocates for criminal justice reform. They give talks and have published a book: [Picking Cotton: Our Memoir of Injustice and Redemption](#)

On the book’s website, one can view documents from the [case file](#), as well as photos of Cotton and of Bobby Poole, who committed the rape for which Cotton served more than ten years in prison. A short video (three minutes) about the case is available here: <https://www.youtube.com/watch?v=nLGXrviy5Iw>

A longer video (30 minutes), featuring remarks from Thompson and Cotton, is available here: https://www.youtube.com/watch?v=qB7MrfJ7X_c

IDENTIFICATIONS

Chapter 40

Best Practices and Modern State Court Approaches

The Supreme Court's eyewitness identification jurisprudence has remained virtually unchanged for the past 40 years.¹ In the next two cases, students will observe how two state courts have dealt with eyewitness identification evidence in light of a plethora of scientific research showing how it can be unreliable.

Supreme Court of Connecticut

State of Connecticut v. Brady Guilbert

Decided Sept. 4, 2012 – [49 A.3d 705](#)

PALMER, J.

A jury found the defendant, Brady Guilbert, guilty of capital felony, two counts of murder, and assault in the first degree. The trial court rendered judgments in accordance with the jury verdicts and sentenced the defendant to a term of life imprisonment without the possibility of release, plus twenty years. On appeal, the defendant [] contends that the trial court improperly precluded him from presenting expert testimony on the fallibility of eyewitness identification testimony. The defendant maintains that this court should overrule *State v. Kemp*, 507 A.2d 1387 (Conn. 1986), and *State v. McClendon*, 730 A.2d 1107 (Conn. 1999), in which we concluded that the average juror knows about the factors affecting the reliability of eyewitness identification and that expert testimony on the issue is disfavored because it invades the province of the jury to determine what weight to give the evidence. We agree that the time has come to overrule *Kemp* and *McClendon* and, further, that testimony by a qualified expert on the fallibility of eyewitness identification is admissible when that testimony would aid the jury in evaluating the state's identification evidence.

[The court recounted the facts of the case. Cedric Williams, Terry Ross, and William Robinson were all shot. Robinson survived the shooting and identified the defendant as his shooter but denied the identification at trial. Witnesses Lashon Baldwin, Jackie Gomez, and Scott Lang also identified the defendant. Baldwin and Gomez knew the defendant, but Lang did not. These witnesses identified the defendant after seeing his photograph in a newspaper. The trial court granted the prosecution's motion to preclude expert witness testimony on eyewitness identification. The defendant was convicted of murder, capital felony, and assault.]

¹ Although *Perry v. New Hampshire* (Chapter 39) was decided in 2012, it focused on the limited issue of third-party contributions to unreliable eyewitness identification (that is, behavior by non-state actors) and did not undertake a substantive or research-based review of the Court's prior eyewitness identification cases decided under the Due Process Clause.

We [] address the defendant's claim that the trial court improperly granted the state's motion to preclude expert testimony on the reliability of eyewitness identifications in reliance on our decisions in *Kemp* and *McClendon*. We agree that *Kemp* and *McClendon* should be overruled and that expert testimony on eyewitness identification is admissible upon a determination by the trial court that the expert is qualified and the proffered testimony is relevant and will aid the jury. We also conclude, however, that the trial court's exclusion of the proffered expert testimony in the present case did not substantially affect the verdicts.

The following undisputed facts and procedural history are relevant to our resolution of this claim. Before trial, defense counsel indicated that he intended to call Charles A. Morgan III as an expert on eyewitness identifications. The state filed a motion to preclude Morgan's testimony on the ground that the reliability of eyewitness identifications is within the knowledge of the average juror. The trial court then conducted an evidentiary hearing on the state's motion at which Morgan proffered testimony that he is a medical doctor with "specialty training" in psychiatry and that, for the last seventeen years, he has spent 50 percent of his time researching how stress affects thought processes and memory. In 1997, Morgan published a study showing that, contrary to common belief, memory of traumatic events changes over time. In 2004, he published a study of military personnel who were subject to harsh interrogation techniques during training. The study showed that the subjects' identification of an interrogator was much more accurate after low stress interrogations than after high stress ones.

Morgan testified that stress hormones are detrimental to certain aspects of memory. According to his testimony, high levels of stress impair thinking and memory formation. Morgan explained that there are three phases of memory formation—encoding, storage and retrieval—and that stress can disrupt both encoding and storage. When a subject is exposed to information about the remembered event during the storage phase—for example, when, following the event, the subject discusses the observation with someone else or sees a photograph of the person in the newspaper—the subject may incorporate the information into his or her memory and come to believe that the information actually was obtained at an earlier time. This process is known as retrofitting. Furthermore, Morgan testified that the majority of eyewitness identification researchers agree that there is little or no correlation between confidence and accuracy; in other words, an eyewitness' confidence in the accuracy of an identification is not a reliable indicator of the identification's true accuracy. Although Morgan observed that, if an eyewitness is familiar with a person, the eyewitness' identification of that person is likely to be more accurate, he explained that an identification's accuracy may be adversely affected by such factors as the length of time during which the eyewitness was able to observe the person, lighting, distance, and whether the eyewitness was paying attention.

Morgan testified that the effect of stress on memory is not a matter of common knowledge. Although Morgan was not aware of any scientific public opinion polls on the question, he testified that it was his opinion that most laypeople do not know about the concept of retrofitting. Morgan also testified that studies have shown that most jurors mistakenly believe that the more confident someone is of an identification, the more likely the identification is to be accurate.

At the conclusion of the hearing, the trial court granted the state's motion to preclude Morgan's testimony. The court seemed to find that Morgan's theory had not been sufficiently tested, had no known or potential rate of error, lacked consistent standards, and was not generally accepted in the scientific community. The court also appeared to conclude that Morgan's general opinions about the effects of stress on memory, the lack of a correlation between confidence and accuracy of identifications, and the risk of retrofitting were all inadmissible because these matters generally were within the common knowledge of jurors.

Although the trial court granted the motion to preclude Morgan's testimony, the court indicated that it had prepared jury instructions on the reliability of eyewitness identifications and that it would provide a copy of the draft instructions to counsel for their review. Ultimately, the trial court instructed the jury that stress and the receipt of postevent information can reduce the accuracy of an eyewitness identification and that confidence often is not a reliable indicator of accuracy.

We now conclude that *Kemp* and *McClendon* are out of step with the widespread judicial recognition that eyewitness identifications are potentially unreliable in a variety of ways unknown to the average juror. This broad based judicial recognition tracks a near perfect scientific consensus. The extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification. "[T]he scientific evidence ... is both reliable and useful." "Experimental methods and findings have been tested and retested, subjected to scientific scrutiny through peer-reviewed journals, evaluated through the lens of meta-analyses, and replicated at times in real-world settings.... [C]onsensus exists among the experts ... within the ... research community." "[T]he science abundantly demonstrates the many vagaries of memory encoding, storage and retrieval; the malleability of memory; the contaminating effects of extrinsic information; the influence of police interview techniques and identification procedures; and the many other factors that bear on the reliability of eyewitness identifications."

Courts across the country now accept that (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy, (2) the reliability of an identification can be diminished by a witness' focus on a weapon, (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events, (4) cross-racial identifications are considerably less accurate than same race identifications, (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification, and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another. This list is not exhaustive; courts have permitted expert testimony on other factors deemed to affect the accuracy of eyewitness identification testimony.

Although these findings are widely accepted by scientists, they are largely unfamiliar to the average person, and, in fact, many of the findings are counterintuitive. For example, people often believe that the more confident an eyewitness is in an identification, the more likely the identification is to be accurate. Similarly, the average person is likely to believe that eyewitnesses held at gunpoint or otherwise placed in fear are likely to have been acutely observant and therefore more accurate in their identifications. Most people also tend to think that cross-racial identifications are no less likely to be accurate than same race identifications. Yet none of these beliefs is true. Indeed, laypersons commonly are unaware of the effect of the other aforementioned factors, including the rate at which memory fades, the influence of postevent or postidentification information, the phenomenon of unconscious transference, and the risks inherent in the use by police of identification procedures that are not double-blind and sequential. Moreover, although there is little if any correlation between confidence and accuracy, an eyewitness' confidence "is the most powerful single determinant of whether ... observers ... will believe that the eyewitness made an accurate identification"

As a result of this strong scientific consensus, federal and state courts around the country have recognized that the methods traditionally employed for alerting juries to the fallibility of eyewitness identifications—cross-examination, closing argument and generalized jury instructions on the subject—frequently are not adequate to inform them of the factors affecting the reliability of such identifications.

Cross-examination, the most common method, often is not as effective as expert testimony at identifying the weaknesses of eyewitness identification testimony because cross-examination is far better at exposing lies than at countering sincere but mistaken beliefs. An eyewitness who expresses confidence in the accuracy of his or her identification may of course believe sincerely that the identification is accurate. Furthermore, although cross-examination may expose the *existence* of factors that undermine the accuracy of eyewitness identifications, it cannot effectively educate the jury about the *import* of these factors. "Thus, while skillful cross-examination may succeed in exposing obvious inconsistencies in an [eyewitness'] account, because nothing is obvious about the psychology of eyewitness identification and most people's intuitions on the subject of identification are wrong ... some circumstances undoubtedly call for more than mere cross-examination of the eyewitness."

Defense counsel's closing argument to the jury that an eyewitness identification is unreliable also is an inadequate substitute for expert testimony. In the absence of evidentiary support, such an argument is likely to be viewed as little more than partisan rhetoric. This is especially true if the argument relates to a factor that is counterintuitive.

Finally, research has revealed that jury instructions that direct jurors in broad terms to exercise caution in evaluating eyewitness identifications are less effective than expert testimony in apprising the jury of the potential unreliability of eyewitness identification testimony. "[Generalized] instructions given at the end of what might be a long and fatiguing trial, and buried in an overall charge by the court, are unlikely to have much effect on the minds of [the jurors]... [Moreover], instructions may come too late to alter [a juror's] opinion of a witness whose testimony might have been heard days before. [Perhaps most important], even the best cautionary instructions tend to touch only generally on the empirical evidence. The judge may

explain that certain factors are known to influence perception and memory ... but will not explain how this occurs or to what extent.”

An expert should not be permitted to give an opinion about the credibility or accuracy of the eyewitness testimony itself; that determination is solely within the province of the jury. Rather, the expert should be permitted to testify only about factors that generally have an adverse effect on the reliability of eyewitness identifications and are relevant to the specific eyewitness identification at issue.

We depart from *Kemp* and *McClendon* mindful of recent studies confirming what courts have long suspected, namely, that mistaken eyewitness identification testimony is by far the leading cause of wrongful convictions. A highly effective safeguard against this serious and well documented risk is the admission of expert testimony on the reliability of eyewitness identification.

Of course, a trial court retains broad discretion in ruling on the qualifications of expert witnesses and determining whether their opinions are relevant. We also wish to reiterate that a trial court retains the discretion to decide whether, under the specific facts and circumstances presented, focused and informative jury instructions on the fallibility of eyewitness identification evidence ... would alone be adequate to aid the jury in evaluating the eyewitness identification at issue. We emphasize, however, that any such instructions should reflect the findings and conclusions of the relevant scientific literature pertaining to the particular variable or variables at issue in the case; broad, generalized instructions on eyewitness identifications ... do not suffice.

[Applying the law to the defendant’s claim, the court held that the “the trial court did not abuse its discretion in precluding [the expert] from testifying on the reliability of the identification testimony” with respect to Baldwin and Gomez because those witnesses knew the defendant. The court “conclude[d] that, with respect to Lang, Morgan’s proposed testimony on the effect of stress on memory, the risk of retrofitting based on postevent information, and the relationship, or lack thereof, between confidence and accuracy, was relevant and would have been helpful to the jury. The trial court therefore abused its discretion in precluding [] expert testimony insofar as it pertained to Lang’s identification of the defendant.”]

Notes, Comments, and Questions

The Supreme Court of Connecticut focused on how a defendant might educate a jury about the unreliability of eyewitness identification, ameliorating the negative consequences of unreliable evidence. Students who have taken Evidence may recognize similarities between this kind of testimony and other forms of hotly-disputed expert testimony. For example, testimony about “battered woman syndrome” and “rape trauma syndrome” may be helpful to the jury in some cases. For example, a woman who kills her abusive boyfriend may wish to offer syndrome evidence in support of a self-defense theory. But such testimony is valuable only to the extent it is based on sound scientific research. Also, when such testimony is admissible, courts normally are careful to limit its scope. For example, in a rape case, the defense might argue that the alleged victim’s behavior is not consistent with that of a “real” rape victim (if, for example, she

voluntarily spent time with the defendant after the alleged rape). A prosecution expert might help the jury understand that somewhat counterintuitive behavior is actually within the range of normal behavior observed among victims. The expert normally may not, however, speculate about whether any particular complaining witness was or was not raped.

In our next case, the Supreme Court of New Jersey addressed how to avoid unreliable identifications in the first place.

Supreme Court of New Jersey
State of New Jersey v. Larry R. Henderson

Decided Aug. 24, 2011 – [27 A.3d 872](#)

Chief Justice RABNER delivered the opinion of the Court.

I. Introduction

In the thirty-four years since the United States Supreme Court announced a test for the admission of eyewitness identification evidence, which New Jersey adopted soon after, a vast body of scientific research about human memory has emerged. That body of work casts doubt on some commonly held views relating to memory. It also calls into question the vitality of the current legal framework for analyzing the reliability of eyewitness identifications.

II. Facts and Procedural History

[Rodney Harper was murdered, and his friend James Womble was held at gunpoint. Womble identified the defendant from a photo array. Following a *Wade* hearing, the trial court allowed admission of the identification. “At the close of trial on July 20, 2004, the court relied on the existing model jury charge on eyewitness identification.” The defendant was convicted and appealed. The Appellate Division reversed and remanded, finding the identification procedure “impermissibly suggestive.” The Supreme Court of New Jersey appointed a Special Master,² who heard testimony from seven expert witnesses and viewed 360 exhibits, including more than 200 “published scientific studies on human memory and eyewitness identification.”]

III. Proof of Misidentifications

Nationwide, “more than seventy-five percent of convictions overturned due to DNA evidence involved eyewitness misidentification.” In half of the cases, eyewitness testimony was not corroborated by confessions, forensic science, or informants. Thirty-six percent of the defendants convicted were misidentified by more than one eyewitness. “[I]t has been estimated that approximately 7,500 of every 1.5 million annual convictions for serious offenses may be based on misidentifications.”

² [Footnote by editors] The *Henderson* court adopted much of the Special Master’s report. Students interested in reading the report in its entirety can find it here: <https://www.physics.smu.edu/pseudo/Eyewitness/NJreport.pdf>.

But DNA exonerations are rare. To determine whether statistics from such cases reflect system-wide flaws, police departments have allowed social scientists to analyze case files and observe and record data from real-world identification procedures.

Four such studies—two from Sacramento, California and two from London, England—produced data from thousands of actual eyewitness identifications. For the larger London study, 39% of eyewitnesses identified the suspect, 20% identified a filler, and 41% made no identification. Thus, about one-third of eyewitnesses who made an identification (20 of 59) in real police investigations wrongly selected an innocent filler. The results were comparable for the Valentine study. Across both Sacramento studies, 51% of eyewitnesses identified the suspect, 16% identified a filler, and 33% identified no one. In other words, nearly 24% of those who made an identification (16 of 67) mistakenly identified an innocent filler.

Although the studies revealed alarming rates at which witnesses chose innocent fillers out of police lineups, the data cannot identify how many of the suspects actually selected were the real culprits. Researchers have conducted field experiments to try to answer that more elusive question: how often are innocent suspects wrongly identified?

Three experiments targeted unassuming convenience store clerks and one focused on bank tellers. Each study unfolded with different variations of the following approach: a customer walked into a store and tried to buy a can of soda with a \$10 traveler's check; he produced two pieces of identification and chatted with the clerk; and the encounter lasted about three minutes. Two to twenty-four hours later, a different person entered the same store and asked the same clerk to identify the man with the traveler's check; the clerk was told that the suspect might not be among the six photos presented; and no details of the investigation were given. Only after making a choice was the clerk told that he or she had participated in an experiment.

Across the four experiments, researchers gathered data from more than 500 identifications. Dr. Penrod testified that on average, 42% of clerks made correct identifications, 41% identified photographs of innocent fillers, and 17% chose to identify no one. Those numbers, like the results from the Sacramento and London studies, reveal high levels of misidentifications.

In two of the studies, researchers showed some clerks target-absent arrays—lineups that purposely excluded the perpetrator and contained only fillers. In those experiments, Dr. Penrod testified that 64% of eyewitnesses made no identification, but 36% picked a foil. Those field experiments suggest that when the true perpetrator is not in the lineup, eyewitnesses may nonetheless select an innocent suspect more than one-third of the time.

Without persuasive extrinsic evidence, one cannot know for certain which identifications are accurate and which are false—which are the product of reliable memories and which are distorted by one of a number of factors.

We presume that jurors are able to detect liars from truth tellers.³ But as scholars have cautioned, most eyewitnesses think they are telling the truth even when their testimony is inaccurate, and “[b]ecause the eyewitness is testifying honestly (*i.e.*, sincerely), he or she will not display the demeanor of the dishonest or biased witness.” Instead, some mistaken eyewitnesses, at least by the time they testify at trial, exude supreme confidence in their identifications.

IV. Current Legal Framework

[The court reviewed Supreme Court jurisprudence on the admissibility of eyewitness identification evidence, including *United States v. Wade* and *Manson v. Brathwaite*. This material is covered in Chapters 38 and 39.]

V. Scope of Scientific Research

Virtually all of the scientific evidence considered on remand emerged after *Manson*. In fact, the earliest study the State submitted is from 1981, and only a handful of the more than 200 scientific articles in the record pre-date 1970.

VI. How Memory Works

Research contained in the record has refuted the notion that memory is like a video recording, and that a witness need only replay the tape to remember what happened. Human memory is far more complex. The parties agree with the Special Master’s finding that memory is a constructive, dynamic, and selective process.

The process of remembering consists of three stages: acquisition—“the perception of the original event”; retention—“the period of time that passes between the event and the eventual recollection of a particular piece of information”; and retrieval—the “stage during which a person recalls stored information.”

Science has proven that memory is malleable. The body of eyewitness identification research further reveals that an array of variables can affect and dilute memory and lead to misidentifications.

Scientific literature divides those variables into two categories: system and estimator variables. System variables are factors like lineup procedures which are within the control of the criminal justice system. Estimator variables are factors related to the witness, the perpetrator, or the event itself—like distance, lighting, or stress—over which the legal system has no control.

³ [Footnote by editors] This presumption, made commonly by courts, might not survive scientific scrutiny.

A. System Variables

We begin with variables within the State's control.

1. Blind Administration

An identification may be unreliable if the lineup procedure is not administered in double-blind or blind fashion. Double-blind administrators do not know who the actual suspect is. Blind administrators are aware of that information but shield themselves from knowing where the suspect is located in the lineup or photo array.

Research has shown that lineup administrators familiar with the suspect may leak that information “by consciously or unconsciously communicating to witnesses which lineup member is the suspect.” Psychologists refer to that phenomenon as the “expectancy effect”: “the tendency for experimenters to obtain results they expect ... because they have helped to shape that response.” In a seminal meta-analysis of 345 studies across eight broad categories of behavioral research, researchers found that “[t]he overall probability that there is no such thing as interpersonal expectancy effects is near zero.”

We find that the failure to perform blind lineup procedures can increase the likelihood of misidentification.

2. Pre-identification Instructions

Identification procedures should begin with instructions to the witness that the suspect may or may not be in the lineup or array and that the witness should not feel compelled to make an identification. There is a broad consensus for that conclusion.

Without an appropriate warning, witnesses may misidentify innocent suspects who look more like the perpetrator than other lineup members.

The scientists agree. In two meta-analyses, they found that telling witnesses in advance that the suspect may not be present in the lineup, and that they need not make a choice, led to more reliable identifications in target-absent lineups. In one experiment, 45% more people chose innocent fillers in target-absent lineups when administrators failed to warn that the suspect may not be there.

The failure to give proper pre-lineup instructions can increase the risk of misidentification.

3. Lineup Construction

The way that a live or photo lineup is constructed can also affect the reliability of an identification. Properly constructed lineups test a witness' memory and decrease the chance that a witness is simply guessing.

A number of features affect the construction of a fair lineup. First, the Special Master found that “mistaken identifications are more likely to occur when the suspect stands out from other members of a live or photo lineup.” As a result, a suspect should be included in a lineup comprised of look-alikes. The reason is simple: an array of look-alikes forces witnesses to examine their memory. In addition, a biased lineup may inflate a witness’ confidence in the identification because the selection process seemed easy.

Second, lineups should include a minimum number of fillers. The greater the number of choices, the more likely the procedure will serve as a reliable test of the witness’ ability to distinguish the culprit from an innocent person. As Dr. Wells testified, no magic number exists, but there appears to be general agreement that a minimum of five fillers should be used.

Third, based on the same reasoning, lineups should not feature more than one suspect. As the Special Master found, “if multiple suspects are in the lineup, the reliability of a positive identification is difficult to assess, for the possibility of ‘lucky’ guesses is magnified.”

We find that courts should consider whether a lineup is poorly constructed when evaluating the admissibility of an identification. When appropriate, jurors should be told that poorly constructed or biased lineups can affect the reliability of an identification and enhance a witness’ confidence.

4. Avoiding Feedback and Recording Confidence

Information received by witnesses both before and after an identification can affect their memory. Confirmatory or post-identification feedback presents the same risks. It occurs when police signal to eyewitnesses that they correctly identified the suspect. That confirmation can reduce doubt and engender a false sense of confidence in a witness. Feedback can also falsely enhance a witness’ recollection of the quality of his or her view of an event.

There is substantial research about confirmatory feedback. A meta-analysis of twenty studies encompassing 2,400 identifications found that witnesses who received feedback “expressed significantly more ... confidence in their decision compared with participants who received no feedback.” The analysis also revealed that “those who receive a simple post-identification confirmation regarding the accuracy of their identification significantly inflate their reports to suggest better witnessing conditions at the time of the crime, stronger memory at the time of the lineup, and sharper memory abilities in general.”

Confirmatory feedback can distort memory. As a result, to the extent confidence may be relevant in certain circumstances, it must be recorded in the witness’ own words before any possible feedback. To avoid possible distortion, law enforcement officers should make a full record—written or otherwise—of the witness’ statement of confidence once an identification is made. Even then, feedback about the individual selected must be avoided.

[W]e find that feedback affects the reliability of an identification in that it can distort memory, create a false sense of confidence, and alter a witness’ report of how he or she viewed an event.

5. Multiple viewings

Viewing a suspect more than once during an investigation can affect the reliability of the later identification. The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure.

Multiple identification procedures that involve more than one viewing of the same suspect [] can create a risk of “mugshot exposure” and “mugshot commitment.” Mugshot exposure is when a witness initially views a set of photos and makes no identification, but then selects someone—who had been depicted in the earlier photos—at a later identification procedure. A meta-analysis of multiple studies revealed that although 15% of witnesses mistakenly identified an innocent person viewed in a lineup for the first time, that percentage increased to 37% if the witness had seen the innocent person in a prior mugshot.

Mugshot commitment occurs when a witness identifies a photo that is then included in a later lineup procedure. Studies have shown that once witnesses identify an innocent person from a mugshot, “a significant number” then “reaffirm[] their false identification” in a later lineup—even if the actual target is present.

Thus, both mugshot exposure and mugshot commitment can affect the reliability of the witness’ ultimate identification and create a greater risk of misidentification. As a result, law enforcement officials should attempt to shield witnesses from viewing suspects or fillers more than once.

6. Simultaneous v. Sequential Lineups

Lineups are presented either simultaneously or sequentially. Traditional, simultaneous lineups present all suspects at the same time, allowing for side-by-side comparisons. In sequential lineups, eyewitnesses view suspects one at a time. Because the science supporting one procedure over the other remains inconclusive, we are unable to find a preference for either.

As research in this field continues to develop, a clearer answer may emerge. For now, there is insufficient authoritative evidence accepted by scientific experts for a court to make a finding in favor of either procedure. As a result, we do not limit either one at this time.

7. Composites

When a suspect is unknown, eyewitnesses sometimes work with artists who draw composite sketches. Composites can also be prepared with the aid of computer software or non-computerized “tool kits” that contain picture libraries of facial features.

As the Special Master observed, based on the record, “composites produce poor results.” In one study, college freshmen used computer software to generate composites of students and teachers from their high schools. Different students who had attended the same schools were only able to name 3 of the 500 people depicted in the composites.

Researchers attribute those results to a mismatch between how composites are made and how memory works. Evidence suggests that people perceive and remember faces “holistically” and not “at the level of individual facial features.” Thus, creating a composite feature-by-feature may not comport with the holistic way that memories for faces “are generally processed, stored, and retrieved.”

It is not clear, though, what effect the process of making a composite has on a witness’ memory—that is, whether it contaminates or confuses a witness’ memory of what he or she actually saw.

Without more accepted research, courts cannot make a finding on the effect the process of making a composite has on a witness. We thus do not limit the use of composites in investigations.

8. Showups

Showups are essentially single-person lineups: a single suspect is presented to a witness to make an identification. Showups often occur at the scene of a crime soon after its commission. The Special Master noted that they are a “useful—and necessary—technique when used in appropriate circumstances,” but they carry their “own risks of misidentifications.”

By their nature, showups are suggestive and cannot be performed blind or double-blind. Nonetheless, as the Special Master found, “the risk of misidentification is not heightened if a showup is conducted immediately after the witnessed event, ideally within two hours” because “the benefits of a fresh memory seem to balance the risks of undue suggestion.”

Thus, the record casts doubt on the reliability of showups conducted more than two hours after an event, which present a heightened risk of misidentification. [L]ineups are a preferred identification procedure because we continue to believe that showups, while sometimes necessary, are inherently suggestive.

B. Estimator variables

Unlike system variables, estimator variables are factors beyond the control of the criminal justice system. They can include factors related to the incident, the witness, or the perpetrator. Estimator variables are equally capable of affecting an eyewitness’ ability to perceive and remember an event.

1. Stress

Even under the best viewing conditions, high levels of stress can diminish an eyewitness’ ability to recall and make an accurate identification. The Special Master found that “while moderate levels of stress improve cognitive processing and might improve accuracy, an eyewitness under high stress is less likely to make a reliable identification of the perpetrator.” Scientific research affirms that conclusion. A meta-analysis of sixty-three studies showed “considerable support for the hypothesis that high levels of stress negatively impact both accuracy of eyewitness identification as well as accuracy of recall of crime-related details.”

We find that high levels of stress are likely to affect the reliability of eyewitness identifications. There is no precise measure for what constitutes “high” stress, which must be assessed based on the facts presented in individual cases.

2. Weapon Focus

When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. “Weapon focus” can thus impair a witness’ ability to make a reliable identification and describe what the culprit looks like if the crime is of short duration.

The duration of the crime is also an important consideration. Dr. Steblay concluded that weapon-focus studies speak to real-world “situations in which a witness observes a threatening object ... in an event of short duration.” As Dr. Wells testified, the longer the duration, the more time the witness has to adapt to the presence of a weapon and focus on other details.

Thus, when the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness’ description of the perpetrator.

3. Duration

Not surprisingly, the amount of time an eyewitness has to observe an event may affect the reliability of an identification. The Special Master found that “while there is no minimum time required to make an accurate identification, a brief or fleeting contact is less likely to produce an accurate identification than a more prolonged exposure.”

[S]tudies have shown, and the Special Master found, “that witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful.”

4. Distance and Lighting

It is obvious that a person is easier to recognize when close by, and that clarity decreases with distance. We also know that poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification.

Scientists have refined those common-sense notions with further study. Research has also shown that people have difficulty estimating distances.

5. Witness Characteristics

Characteristics like a witness’ age and level of intoxication can affect the reliability of an identification.

The Special Master found that “the effects of alcohol on identification accuracy show that high levels of alcohol promote false identifications” and that “low alcohol intake produces fewer misidentifications than high alcohol intake.”

The Special Master also found that “[a] witness’s age ... bears on the reliability of an identification.” A meta-analysis has shown that children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults. Showups in particular “are significantly more suggestive or leading with children.”

[T]he data about memory and older witnesses is more nuanced, according to the scientific literature. In addition, there was little other testimony at the hearing on the topic. Based on the record before us, we cannot conclude that a standard jury instruction questioning the reliability of identifications by all older eyewitnesses would be appropriate for use in all cases.

6. Characteristics of Perpetrator

Disguises and changes in facial features can affect a witness’ ability to remember and identify a perpetrator. The Special Master found that “[d]isguises (*e.g.*, hats, sunglasses, masks) are confounding to witnesses and reduce the accuracy of identifications.”

Disguises as simple as hats have been shown to reduce identification accuracy. If facial features are altered between the time of the event and the identification procedure—if, for example, the culprit grows a beard—the accuracy of an identification may decrease.

7. Memory Decay

Memories fade with time. And as the Special Master observed, memory decay “is irreversible”; memories never improve. As a result, delays between the commission of a crime and the time an identification is made can affect reliability.

8. Race-Bias

“A cross-racial identification occurs when an eyewitness is asked to identify a person of another race.” A meta-analysis [] involving thirty-nine studies and nearly 5,000 identifications, confirmed the Court’s prior finding. Cross-racial recognition continues to be a factor that can affect the reliability of an identification.

9. Private Actors

Studies show that witness memories can be altered when co-eyewitnesses share information about what they observed. Those studies bolster the broader finding “that post-identification feedback does not have to be presented by the experimenter or an authoritative figure (*e.g.*, police officer) in order to affect a witness’ subsequent crime-related judgments.” Feedback and suggestiveness can come from co-witnesses and others not connected to the State.

Co-witness feedback may cause a person to form a false memory of details that he or she never actually observed. One of the experiments evaluated the effect of the nature of the witnesses' relationships with one another and compared co-witnesses who were strangers, friends, and couples. The study found that "witnesses who were previously acquainted with their co-witness (as a friend or romantic partner) were significantly more likely to incorporate information obtained solely from their co-witness into their own accounts." Private actors can also affect witness confidence.

To uncover relevant information about possible feedback from co-witnesses and other sources, we direct that police officers ask witnesses, as part of the identification process, questions designed to elicit (a) whether the witness has spoken with anyone about the identification and, if so, (b) what was discussed. That information should be recorded and disclosed to defendants.

Based on the record, we find that non-State actors like co-witnesses and other sources of information can affect the independent nature and reliability of identification evidence and inflate witness confidence—in the same way that law enforcement feedback can. As a result, law enforcement officers should instruct witnesses not to discuss the identification process with fellow witnesses or obtain information from other sources.

10. Speed of Identification

The Special Master also noted that the speed with which a witness makes an identification can be a reliable indicator of accuracy. Laboratory studies offer mixed results. Because of the lack of consensus in the scientific community, we make no finding on this issue.

C. Juror Understanding

Some of the findings described above are intuitive. Everyone knows, for instance, that bad lighting conditions make it more difficult to perceive the details of a person's face. Some findings are less obvious. Although many may believe that witnesses to a highly stressful, threatening event will "never forget a face" because of their intense focus at the time, the research suggests that is not necessarily so.

Neither juror surveys nor mock-jury studies can offer definitive proof of what jurors know or believe about memory. But they reveal generally that people do not intuitively understand all of the relevant scientific findings. As a result, there is a need to promote greater juror understanding of those issues.

D. Consensus Among Experts

The Special Master found broad consensus within the scientific community on the relevant scientific issues. Primarily, he found support in a 2001 survey of sixty-four experts, mostly cognitive and social psychologists. Ninety percent or more of the experts found research on the following topics reliable: suggestive wording; lineup instruction bias; confidence malleability; mugshot bias; post-event information; child suggestivity; alcohol intoxication; and own-race bias. Seventy to 87% found the following research reliable: weapon focus; the accuracy-

confidence relationship; memory decay; exposure time; sequential presentation; showups; description-matched foils; child-witness accuracy; and lineup fairness.

VII. Responses to Scientific Studies

Beyond the scientific community, law enforcement and reform agencies across the nation have taken note of the scientific findings. In turn, they have formed task forces and recommended or implemented new procedures to improve the reliability of eyewitness identifications.

IX. Legal Conclusions

A. Scientific Evidence

[The court concludes that the scientific evidence “is both reliable and useful.”]

B. The *Manson* Test Needs to Be Revised

To protect due process concerns, the *Manson* Court’s two-part test rested on three assumptions: (1) that it would adequately measure the reliability of eyewitness testimony; (2) that the test’s focus on suggestive police procedure would deter improper practices; and (3) that jurors would recognize and discount untrustworthy eyewitness testimony. We conclude [] that [those assumptions] are not [valid].

The hearing revealed that *Manson* [] does not adequately meet its stated goals: it does not provide a sufficient measure for reliability, it does not deter, and it overstates the jury’s innate ability to evaluate eyewitness testimony. As a result of those concerns, we now revise the State’s framework for evaluating eyewitness identification evidence.

C. Revised Framework

Remedying the problems with the current *Manson* [] test requires an approach that addresses its shortcomings: one that allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory—because we recognize that most identifications will be admitted in evidence.

Two principal changes to the current system are needed to accomplish that: first, the revised framework should allow all relevant system *and* estimator variables to be explored and weighed at pretrial hearings when there is some actual evidence of suggestiveness; and second, courts should develop and use enhanced jury charges to help jurors evaluate eyewitness identification evidence.

The new framework also needs to be flexible enough to serve twin aims: to guarantee fair trials to defendants, who must have the tools necessary to defend themselves, and to protect the State's interest in presenting critical evidence at trial. With that in mind, we first outline the revised approach for evaluating identification evidence and then explain its details and the reasoning behind it.

First, to obtain a pretrial hearing, a defendant has the initial burden of showing some evidence of suggestiveness that could lead to a mistaken identification. That evidence, in general, must be tied to a system—and not an estimator—variable.

Second, the State must then offer proof to show that the proffered eyewitness identification is reliable—accounting for system and estimator variables—subject to the following: the court can end the hearing at any time if it finds from the testimony that defendant's threshold allegation of suggestiveness is groundless.

Third, the ultimate burden remains on the defendant to prove a very substantial likelihood of irreparable misidentification. To do so, a defendant can cross-examine eyewitnesses and police officials and present witnesses and other relevant evidence linked to system and estimator variables.

Fourth, if after weighing the evidence presented a court finds from the totality of the circumstances that defendant has demonstrated a very substantial likelihood of irreparable misidentification, the court should suppress the identification evidence. If the evidence is admitted, the court should provide appropriate, tailored jury instructions, as discussed further below.

To evaluate whether there is evidence of suggestiveness to trigger a hearing, courts should consider the following non-exhaustive list of system variables:

1. *Blind Administration.* Was the lineup procedure performed double-blind? If double-blind testing was impractical, did the police use a technique like the "envelope method" to ensure that the administrator had no knowledge of where the suspect appeared in the photo array or lineup?
2. *Pre-identification Instructions.* Did the administrator provide neutral, pre-identification instructions warning that the suspect may not be present in the lineup and that the witness should not feel compelled to make an identification?
3. *Lineup Construction.* Did the array or lineup contain only one suspect embedded among at least five innocent fillers? Did the suspect stand out from other members of the lineup?
4. *Feedback.* Did the witness receive any information or feedback, about the suspect or the crime, before, during, or after the identification procedure?
5. *Recording Confidence.* Did the administrator record the witness' statement of confidence immediately after the identification, before the possibility of any confirmatory feedback?

6. *Multiple Viewings*. Did the witness view the suspect more than once as part of multiple identification procedures? Did police use the same fillers more than once?

7. *Showups*. Did the police perform a showup more than two hours after an event? Did the police warn the witness that the suspect may not be the perpetrator and that the witness should not feel compelled to make an identification?

8. *Private Actors*. Did law enforcement elicit from the eyewitness whether he or she had spoken with anyone about the identification and, if so, what was discussed?

9. *Other Identifications Made*. Did the eyewitness initially make no choice or choose a different suspect or filler?

If some actual proof of suggestiveness remains, courts should consider the above system variables as well as the following non-exhaustive list of estimator variables to evaluate the overall reliability of an identification and determine its admissibility:

1. *Stress*. Did the event involve a high level of stress?

2. *Weapon focus*. Was a visible weapon used during a crime of short duration?

3. *Duration*. How much time did the witness have to observe the event?

4. *Distance and Lighting*. How close were the witness and perpetrator? What were the lighting conditions at the time?

5. *Witness Characteristics*. Was the witness under the influence of alcohol or drugs? Was age a relevant factor under the circumstances of the case?

6. *Characteristics of Perpetrator*. Was the culprit wearing a disguise? Did the suspect have different facial features at the time of the identification?

7. *Memory decay*. How much time elapsed between the crime and the identification?

8. *Race-bias*. Does the case involve a cross-racial identification?

Some of the above estimator variables overlap with the five reliability factors outlined in *Neil v. Biggers* which we nonetheless repeat:

9. *Opportunity to view the criminal at the time of the crime*.

10. *Degree of attention*.

11. *Accuracy of prior description of the criminal*.

12. *Level of certainty demonstrated at the confrontation.*

Did the witness express high confidence at the time of the identification before receiving any feedback or other information?

13. *The time between the crime and the confrontation.*

The above factors are not exclusive. Nor are they intended to be frozen in time. We recognize that scientific research relating to the reliability of eyewitness evidence is dynamic; the field is very different today than it was in 1977, and it will likely be quite different thirty years from now. By providing the above lists, we do not intend to hamstring police departments or limit them from improving practices. Likewise, we do not limit trial courts from reviewing evolving, substantial, and generally accepted scientific research. But to the extent the police undertake new practices, or courts either consider variables differently or entertain new ones, they must rely on reliable scientific evidence that is generally accepted by experts in the community.

XI. Application

[Under the facts of this case, the court remanded “for an expanded hearing consistent with the principles outlined in this decision.”]

Notes, Comments, and Questions

Connecticut and New Jersey are two examples of states that have endeavored to incorporate evidence-based recommendations into eyewitness identification practices. In 2009, The New York State Justice Task Force was created to “eradicate the systemic and individual harms caused by wrongful convictions, and to promote public safety by examining the causes of wrongful convictions and recommending reforms to safeguard against any such convictions in the future.” In 2011, the task force made [the following recommendations](#):

New York State Justice Task Force

Recommendations for Improving Eyewitness Identifications

(Excerpt)

I. Instructions to the Witness

Preliminary instructions given to a witness by the administrator of an identification procedure before the procedure begins, should include the following:

- a. Instructing the witness orally or in writing about the details of the identification procedure (including that they will be asked about their confidence in the identification if any identification is made).
- b. Advising the witness that the person who committed the crime may or may not be in

- the photo array or lineup.
- c. Advising the witness that individuals may not appear exactly as they did on the day of the incident because features such as hair are subject to change.
 - d. Advising the witness as follows:
 - i. If an array or lineup is conducted double-blind, the administrator shall inform the witness that he does not know who the suspect is; and
 - ii. If the array or lineup is not conducted double-blind, the administrator shall inform the witness that he should not assume that the administrator knows who the perpetrator is.
 - e. Advising the witness that he or she should not feel compelled [or obligated] to make an identification.

After the identification procedure is completed, the administrator of the identification procedure should:

- f. Instruct the witness not to discuss what was said, seen or done during the identification procedure with other witnesses involved in the case.

II. Witness Confidence Statements

- a. In every case in which an identification is made, the administrator should elicit a statement of the witness' confidence in the identification, by asking a question to the effect of, "in your own words, how sure are you?" Witnesses should not be asked to rate their confidence in any identification on a numerical scale.
- b. All witnesses should be instructed in advance that they will be asked about their confidence in any identification made.
- c. Witness confidence statements should be documented before any feedback on the identification is given to the witness by the administrator or others.

III. Documentation of Identification Procedures

Documentation of identification procedures should include:

- a. Documentation of all lineups with a color photograph of the lineup as the witness viewed it and preservation of all photo arrays viewed by a witness.
- b. Documentation of the logistics of the identification procedure, including date, time, location and people present in the viewing room with the witness and/or the lineup room with the suspect, including anyone who escorted the witness to and/or from the procedure.

- c. Documentation of any speech, movement or clothing change the lineup members are asked to perform.
- d. Verbatim documentation of all statements and physical reactions made by a witness during an identification procedure.
- e. Ensuring that the witness sign and date the written results of the identification procedure, including a photograph of the live lineup if one is available.

IV. Photo Arrays

- a. Photo arrays should be conducted double-blind whenever practicable.
- b. If a photo array is conducted with a non-blind administrator, the procedure should be conducted blinded (as defined herein), whenever practicable.
- c. Photo array administrators must ensure that the photos in the photo array do not contain any writing, stray markings or information about the suspect such as information concerning previous arrests.
- d. At least five fillers should be used in each photo array, in addition to the suspect. There should be only one suspect per array.
- e. Fillers should be similar in appearance to the suspect in the array. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.
- f. If there is more than one suspect, photo array administrators should avoid reusing fillers when showing an array with a new suspect to the same witness.
- g. The position of the suspect should be moved or a new photo array (with new fillers) should be created each time an array is shown to a different witness.

V. Live Lineups

- a. Lineups may be conducted double-blind and if not, should be conducted in accordance with the procedures outlined by the NYS Identification Procedure Guidelines mentioned above, which include instructions on how to remain neutral and stand out of the witness' line of sight while the witness is viewing the lineup, and which when coupled with appropriate preliminary instructions are intended to create a neutral environment free of inadvertent cues.
- b. There should be five fillers in addition to the suspect, where practicable, but in no case fewer than four fillers. There should be only one suspect per lineup.
- c. Fillers should be similar in appearance to the suspect in the lineup. Similarities should include gender, clothing, facial hair, race, age, height, extraordinary physical features or other distinctive characteristics. Fillers should not be known to the witness.

- d. If there is more than one suspect, the lineup administrator should avoid reusing fillers when showing a lineup with a new suspect to the same witness.
- e. The position of the suspect should be moved each time the lineup is shown to a different witness, assuming the suspect and/or defense counsel agree.
- f. If an action is taken or words are spoken by one member of the lineup, all other members of the lineup must take the same action or speak the same words.
- g. All members of the lineup should be seated, if necessary, to eliminate any extreme variations in height.
- h. Fillers from a photo array previously viewed by the witness should not be used as fillers in the lineup.
- i. In those jurisdictions that regularly use live lineup procedures, consideration should be given to running lineups after the first witness makes an identification from the photo array. Where practicable, additional witnesses can view only the lineup and not the photo array.

* * *

In her student note, “The Dangers of Eyewitness Identification: A Call for Greater State Involvement to Ensure Fundamental Fairness,” [54 B.C. L. Rev. 1415](#) (2013), Dana Walsh articulates the connection between scientific research on identification and due process of law. She argues that because the Supreme Court has focused on the reliability of eyewitness identifications outside the context of scientific research, state courts should “grant greater protections under their own constitutions in the field of eyewitness identification.”

“The right to due process must include an established framework to ensure fundamental fairness. The rules should create a system where only evidence that comports with due process is admitted at trial. The great unreliability of eyewitness identifications, in addition to their great influence on a criminal proceeding, suggest that a defendant’s right to a fundamentally fair proceeding is violated by the admission of unreliable eyewitness testimony at trial. Accurate eyewitness identifications are, however, beneficial crime-fighting and prosecutorial tools. By focusing on reliability, the Court has attempted to find a balance between admitting identifications and preserving due process rights. If reliability is the linchpin of the analysis, then only reliable identifications should be admissible....”

“Substantial amounts of research indicate that eyewitness identifications have serious flaws. In 1995, a judge on the Massachusetts Supreme Judicial Court wrote that scientific studies conducted since 1977 have confirmed that eyewitness identifications are often ‘hopelessly unreliable.’ The malleability and vulnerability of human memory highlight the dangers involved with eyewitness identification. Because of these risks, identifications should be scrutinized closely to avoid miscarriages of justice. The Court in *Perry*, however, largely ignored the data by barely addressing it and by maintaining the *Biggers* factors. Such a result seems incompatible under jurisprudence that deems due process a fundamental right.”

In addition to rulings based on state constitutional law, courts can regulate the admission of identification evidence under ordinary evidence law. State evidence codes contain provisions similar (or identical) to Federal Rule of Evidence 403, which gives judges discretion to exclude relevant evidence that poses a significant risk of “unfair prejudice.”

* * *

For further information on the problems associated with eyewitness identification evidence (along with other testimony dependent on accurate memory), students should read work by [Professor Elizabeth Loftus](#), a member of the psychology faculty and the law faculty at the University of California-Irvine (along with various collaborators). *See, e.g.*, Steven J. Frenda *et al.*, “False Memories of Fabricated Political Events,” [49 J. Experimental Soc. Psych. 280](#) (2013) (showing ease with which false memories can be implanted in unwitting subjects); Deborah Davis & Elizabeth F. Loftus, “Remembering Disputed Sexual Encounters: A New Frontier for Witness Memory Research,” [105 J. Crim. L. & Criminology 811](#) (2015); Charles A. Morgan *et al.*, “Misinformation Can Influence Memory for Recently Experienced, Highly Stressful Events,” [36 Int’l J. L. & Psych. 11](#) (2013) (examining false memories among participants in military POW interrogation training program). A 2015 lecture delivered by Professor Loftus at Harvard University, titled “[The Memory Factory](#),” is available online.

Consider the practices described in this chapter. Which seem easy to implement? Which seem difficult to implement?

In our next and final chapter, we will consider a few criminal procedure issues that do not fit neatly into any of the categories around which prior chapters of this book have been organized.

CONFRONTING NEW CHALLENGES

Chapter 41

Electronic Surveillance, Torture, and the “War on Terror”

In this final chapter of the semester, we briefly consider some issues that either have required the Court to apply old law to new problems or have inspired debate about how the Court ought to address a question once it is properly presented. In particular, we review (1) the somewhat novel question of whether the executive may conduct electronic surveillance without a warrant in service of national security, (2) whether the executive may torture prisoners suspected of possessing knowledge of potential terrorist plans and activities—and, if so, how such terrible state actions should be regulated, and (3) other questions presented by the ongoing conflicts often described as the “War on Terror,” along with other modern national security challenges.

Electronic Surveillance

It has been observed that the United States became a different country on September 11, 2001. For example, students too young to remember the attacks of that day may find it hard to believe how comparatively relaxed airports were in the late twentieth century. The desire of government investigators to overhear the electronic communications of suspects is not, however, a phenomenon unique to the twenty-first century. Indeed, *Katz v. United States* (Chapter 2) presented such a case involving ordinary criminal investigation of unlawful gambling. Further, more than forty years ago, the Court decided a case in which law enforcement sought to conduct warrantless electronic eavesdropping for reasons related to national security.

Supreme Court of the United States

United States v. U.S. District Court for the Eastern District of Michigan

Decided June 19, 1972 – [407 U.S. 297](#)

Mr. Justice POWELL delivered the opinion of the Court.

The issue before us is an important one for the people of our country and their Government. It involves the delicate question of the President’s power, acting through the Attorney General, to authorize electronic surveillance in internal security matters without prior judicial approval. Successive Presidents for more than one-quarter of a century have authorized such surveillance in varying degrees, without guidance from the Congress or a definitive decision of this Court. This case brings the issue here for the first time. Its resolution is a matter of national concern, requiring sensitivity both to the Government’s right to protect itself from unlawful subversion and attack and to the citizen’s right to be secure in his privacy against unreasonable Government intrusion.

This case arises from a criminal proceeding in the United States District Court for the Eastern District of Michigan, in which the United States charged three defendants with conspiracy to destroy Government property. One of the defendants, Plamondon, was charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan.

During pretrial proceedings, the defendants moved to compel the United States to disclose certain electronic surveillance information and to conduct a hearing to determine whether this information “tainted” the evidence on which the indictment was based or which the Government intended to offer at trial. In response, the Government filed an affidavit of the Attorney General, acknowledging that its agents had overheard conversations in which Plamondon had participated. The affidavit also stated that the Attorney General approved the wiretaps “to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the Government.” The logs of the surveillance were filed in a sealed exhibit for in camera inspection by the District Court.

On the basis of the Attorney General’s affidavit and the sealed exhibit, the Government asserted that the surveillance was lawful, though conducted without prior judicial approval, as a reasonable exercise of the President’s power (exercised through the Attorney General) to protect the national security. The District Court held that the surveillance violated the Fourth Amendment, and ordered the Government to make full disclosure to Plamondon of his overheard conversations. The Government then filed in the Court of Appeals for the Sixth Circuit a petition for a writ of mandamus to set aside the District Court order, which was stayed pending final disposition of the case. [T]hat court held that the surveillance was unlawful and that the District Court had properly required disclosure of the overheard conversations. We granted certiorari.

I

[Title III of the Omnibus Crime Control and Safe Streets Act](#), 18 U.S.C. §§ 2510–2520, authorizes the use of electronic surveillance for classes of crimes carefully specified in 18 U.S.C. § 2516. Such surveillance is subject to prior court order. Section 2518 sets forth the detailed and particularized application necessary to obtain such an order as well as carefully circumscribed conditions for its use. The Act represents a comprehensive attempt by Congress to promote more effective control of crime while protecting the privacy of individual thought and expression.

Together with the elaborate surveillance requirements in Title III, there is the following proviso, 18 U.S.C. § 2511(3):

“Nothing contained in this chapter or in section 605 of the Communications Act of 1934 shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received

in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.”

The Government [] argues that “in excepting national security surveillances from the Act’s warrant requirement Congress recognized the President’s authority to conduct such surveillances without prior judicial approval.” The section thus is viewed as a recognition or affirmance of a constitutional authority in the President to conduct warrantless domestic security surveillance such as that involved in this case.

We think the language of § 2511(3), as well as the legislative history of the statute, refutes this interpretation. The relevant language is that:

“Nothing contained in this chapter ... shall limit the constitutional power of the President to take such measures as he deems necessary to protect ...” against the dangers specified. At most, this is an implicit recognition that the President does have certain powers in the specified areas. Few would doubt this, as the section refers—among other things—to protection “against actual or potential attack or other hostile acts of a foreign power.” But so far as the use of the President’s electronic surveillance power is concerned, the language is essentially neutral.

Section 2511(3) certainly confers no power, as the language is wholly inappropriate for such a purpose. It merely provides that the Act shall not be interpreted to limit or disturb such power as the President may have under the Constitution. In short, Congress simply left presidential powers where it found them. This view is reinforced by the general context of Title III. Section 2511(1) broadly prohibits the use of electronic surveillance “[e]xcept as otherwise specifically provided in this chapter.” Subsection (2) thereof contains four specific exceptions. In each of the specified exceptions, the statutory language is as follows:

“It shall not be unlawful ... to intercept” the particular type of communication described.¹

The language of subsection (3), here involved, is to be contrasted with the language of the exceptions set forth in the preceding subsection. Rather than stating that warrantless presidential uses of electronic surveillance “shall not be unlawful” and thus employing the standard language of exception, subsection (3) merely disclaims any intention to “limit the constitutional power of the President.”

The express grant of authority to conduct surveillances is found in § 2516, which authorizes the Attorney General to make application to a federal judge when surveillance may provide evidence of certain offenses. These offenses are described with meticulous care and specificity.

In view of these and other interrelated provisions delineating permissible interceptions of particular criminal activity upon carefully specified conditions, it would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of

¹ [Footnote 4 by the Court] These exceptions relate to certain activities of communication common carriers and the Federal Communications Commission, and to specified situations where a party to the communication has consented to the interception.

the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear that the Act simply did not legislate with respect to national security surveillances.

The legislative history of § 2511(3) supports this interpretation. [N]othing in § 2511(3) was intended to expand or to contract or to define whatever presidential surveillance powers existed in matters affecting the national security. [W]e hold that the statute is not the measure of the executive authority asserted in this case. Rather, we must look to the constitutional powers of the President.

II

It is important at the outset to emphasize the limited nature of the question before the Court. This case raises no constitutional challenge to electronic surveillance as specifically authorized by Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Nor is there any question or doubt as to the necessity of obtaining a warrant in the surveillance of crimes unrelated to the national security interest. Further, the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country. The Attorney General's affidavit in this case states that the surveillances were "deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of Government." There is no evidence of any involvement, directly or indirectly, of a foreign power.

Our present inquiry, though important, is therefore a narrow one. It addresses a question left open by *Katz*:

"Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security"

The determination of this question requires the essential Fourth Amendment inquiry into the "reasonableness" of the search and seizure in question, and the way in which that "reasonableness" derives content and meaning through reference to the warrant clause.

We begin the inquiry by noting that the President of the United States has the fundamental duty, under Art. II, § 1, of the Constitution, to "preserve, protect and defend the Constitution of the United States." Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means. In the discharge of this duty, the President—through the Attorney General—may find it necessary to employ electronic surveillance to obtain intelligence information on the plans of those who plot unlawful acts against the Government. The use of such surveillance in internal security cases has been sanctioned more or less continuously by various Presidents and Attorneys General since July 1946.

It has been said that "[t]he most basic function of any government is to provide for the security of the individual and of his property." And unless Government safeguards its own capacity to function and to preserve the security of its people, society itself could become so disordered that all rights and liberties would be endangered.

“Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses.”

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. Though physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed, its broader spirit now shields private speech from unreasonable surveillance.

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of “ordinary” crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect “domestic security.” Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. Senator Hart addressed this dilemma in the floor debate on § 2511(3):

“As I read it—and this is my fear—we are saying that the President, on his motion, could declare—name your favorite poison—draft dodgers, Black Muslims, the Ku Klux Klan, or civil rights activists to be a clear and present danger to the structure or existence of the Government.”

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

III

As the Fourth Amendment is not absolute in its terms, our task is to examine and balance the basic values at stake in this case: the duty of Government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression. If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and the free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it.

[T]he very heart of the Fourth Amendment directive [is] that, where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen’s private premises or conversation. Inherent in the concept of a warrant is its issuance by a “neutral and detached magistrate.” The further requirement of “probable cause” instructs

the magistrate that baseless searches shall not proceed.

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

It may well be that, in the instant case, the Government's surveillance of Plamondon's conversations was a reasonable one which readily would have gained prior judicial approval. But this Court "has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end." The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of Government. The independent check upon executive discretion is not satisfied, as the Government argues, by "extremely limited" post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights.

It is true that there have been some exceptions to the warrant requirement. But those exceptions are few in number and carefully delineated. The Government argues that the special circumstances applicable to domestic security surveillances necessitate a further exception to the warrant requirement. It is urged that the requirement of prior judicial review would obstruct the President in the discharge of his constitutional duty to protect domestic security. We are told further that these surveillances are directed primarily to the collecting and maintaining of intelligence with respect to subversive forces, and are not an attempt to gather evidence for specific criminal prosecutions. It is said that this type of surveillance should not be subject to traditional warrant requirements which were established to govern investigation of criminal activity, not ongoing intelligence gathering.

The Government further insists that courts "as a practical matter would have neither the knowledge nor the techniques necessary to determine whether there was probable cause to believe that surveillance was necessary to protect national security." These security problems, the Government contends, involve "a large number of complex and subtle factors" beyond the competence of courts to evaluate. As a final reason for exemption from a warrant requirement, the Government believes that disclosure to a magistrate of all or even a significant portion of the information involved in domestic security surveillances "would create serious potential dangers to the national security and to the lives of informants and agents"

We certainly do not reject [these contentions] lightly, especially at a time of worldwide ferment and when civil disorders in this country are more prevalent than in the less turbulent periods of our history. There is, no doubt, pragmatic force to the Government's position.

But we do not think a case has been made for the requested departure from Fourth Amendment standards. The circumstances described do not justify complete exemption of domestic security surveillance from prior judicial scrutiny. Official surveillance, whether its purpose be criminal investigation or ongoing intelligence gathering, risks infringement of constitutionally protected privacy of speech. Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent.

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. [] If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

IV

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents. Nor does our decision rest on the language of § 2511(3) or any other section of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. That Act does not attempt to define or delineate the powers of the President to meet domestic threats to the national security.

Moreover, we do not hold that the same type of standards and procedures prescribed by Title III are necessarily applicable to this case. Congress may wish to consider protective standards for the latter which differ from those already prescribed for specified crimes in Title III. We do not attempt to detail the precise standards for domestic security warrants any more than our decision in *Katz* sought to set the refined requirements for the specified criminal surveillances which now constitute Title III. We do hold, however, that prior judicial approval is required for the type of domestic security surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as the Congress may prescribe.

V

The judgment of the Court of Appeals is hereby affirmed.

MR. JUSTICE DOUGLAS, concurring.

While I join in the opinion of the Court, I add these words in support of it.

This is an important phase in the campaign of the police and intelligence agencies to obtain exemptions from the Warrant Clause of the Fourth Amendment. For, due to the clandestine nature of electronic eavesdropping, the need is acute for placing on the Government the heavy burden to show that “exigencies of the situation [make its] course imperative.” Other abuses, such as the search incident to arrest, have been partly deterred by the threat of damage actions against offending officers, the risk of adverse publicity, or the possibility of reform through the political process. These latter safeguards, however, are ineffective against lawless wiretapping and “bugging” of which their victims are totally unaware. Moreover, even the risk of exclusion of tainted evidence would here appear to be of negligible deterrent value inasmuch as the United States frankly concedes that the primary purpose of these searches is to fortify its intelligence collage rather than to accumulate evidence to support indictments and convictions. If the Warrant Clause were held inapplicable here, then the federal intelligence machine would literally enjoy unchecked discretion.

Here, federal agents wish to rummage for months on end through every conversation, no matter how intimate or personal, carried over selected telephone lines, simply to seize those few utterances which may add to their sense of the pulse of a domestic underground.

We are told that one national security wiretap lasted for 14 months and monitored over 900 conversations. Senator Edward Kennedy found recently that “warrantless devices accounted for an average of 78 to 209 days of listening per device, as compared with a 13-day per device average for those devices installed under court order.” He concluded that the Government’s revelations posed “the frightening possibility that the conversations of untold thousands of citizens of this country are being monitored on secret devices which no judge has authorized and which may remain in operation for months and perhaps years at a time.” Even the most innocent and random caller who uses or telephones into a tapped line can become a flagged number in the Government’s data bank.

Such gross invasions of privacy epitomize the very evil to which the Warrant Clause was directed. That “domestic security” is said to be involved here does not draw this case outside the mainstream of Fourth Amendment law. Rather, the recurring desire of reigning officials to employ dragnet techniques to intimidate their critics lies at the core of that prohibition.

As illustrated by a flood of cases before us this Term, we are currently in the throes of another national seizure of paranoia, resembling the hysteria which surrounded the Alien and Sedition Acts, the Palmer Raids, and the McCarthy era. Those who register dissent or who petition their governments for redress are subjected to scrutiny by grand juries, by the FBI, or even by the military. Their associates are interrogated. Their homes are bugged and their telephones are wiretapped. They are befriended by secret government informers. Their patriotism and loyalty are questioned. Senator Sam Ervin, who has chaired hearings on military surveillance of civilian dissidents, warns that “it is not an exaggeration to talk in terms of hundreds of thousands of ... dossiers.”

Senator Kennedy found “the frightening possibility that the conversations of untold thousands are being monitored on secret devices.” More than our privacy is implicated. Also at stake is the reach of the Government’s power to intimidate its critics.

When the Executive attempts to excuse these tactics as essential to its defense against internal subversion, we are obliged to remind it, without apology, of this Court’s long commitment to the preservation of the Bill of Rights from the corrosive environment of precisely such expedients. “Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.” “[T]his concept of ‘national defense’ cannot be deemed an end in itself, justifying any ... power designed to promote such a goal. Implicit in the term ‘national defense’ is the notion of defending those values and ideas which set this Nation apart.... It would indeed be ironic if, in the name of national defense, we would sanction the subversion of ... those liberties ... which [make] the defense of the Nation worthwhile.”

The Warrant Clause has stood as a barrier against intrusions by officialdom into the privacies of life. But if that barrier were lowered now to permit suspected subversives’ most intimate conversations to be pillaged then why could not their abodes or mail be secretly searched by the same authority? To defeat so terrifying a claim of inherent power we need only stand by the enduring values served by the Fourth Amendment. “In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or “extravagant” to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won ... a right of personal security against arbitrary intrusions ... If times have changed, reducing everyman’s scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important.” We have as much or more to fear from the erosion of our sense of privacy and independence by the omnipresent electronic ear of the Government as we do from the likelihood that fomenters of domestic upheaval will modify our form of governing.

MR. JUSTICE WHITE, concurring in the judgment.

[Justice White wrote that he would have avoided the constitutional issue decided by the majority and would have instead held that the evidence was inadmissible because the government had failed to meet its burden under the Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits certain wiretaps and allows it in certain circumstances. (Title III is discussed further below.) In other words, Justice White would have left open the possibility that the Attorney General could order warrantless phone tapping to protect national security if authorized by Congress—or, perhaps, so long as not prohibited by Congress.]

Notes, Comments, and Questions

[Title III of the Omnibus Crime Control and Safe Streets Act](#) (sometimes known as the “Wiretap Act” or as “Title III”) is an important statute with provisions this book cannot explore. Students should know a few key details. First, the act prohibits most warrantless wiretapping, both by government actors and by private actors. It also includes procedures by which government

investigators can obtain judicial approval (in the form of warrants) for certain wiretaps, and it authorizes some wiretapping even without warrants (some of which is discussed in our next case). Further, Title III contains an exclusionary rule, prohibiting evidence collected in violation of the act from being introduced in court.² The act is among the best examples of how only some of criminal procedure law is distilled by courts from amendments to the Constitution. Recognizing that judicial regulation of electronic communication would be unpredictable and cumbersome, Congress engaged in robust debate and enacted a statute providing detailed rules that apply to law enforcement officers at the federal, state, and municipal levels.

As Justice Douglas noted in his concurring opinion in *United States v. U.S. District Court*, “the clandestine nature of electronic eavesdropping” can result in “lawless wiretapping and ‘bugging’ of which [] victims are totally unaware.” Justice Douglas thought it especially important that the judiciary enforce the Fourth Amendment’s prohibition of unreasonable searches and seizures in cases of wiretapping, lest “the federal intelligence machine would literally enjoy unchecked discretion.” In *Clapper v. Amnesty International*, a group of plaintiffs sought a declaration that provisions of the Foreign Intelligence Surveillance Act (FISA) were unconstitutional, as well as an injunction prohibiting certain surveillance. The government sought summary judgment on the ground that the plaintiffs lacked standing under Article III of the Constitution because they could not demonstrate that they personally had been surveilled (or would be surveilled) under the challenged statutory scheme. Under that theory, the plaintiffs would be unable to obtain a ruling on the merits. In essence, the government argued that because the plaintiffs were “totally unaware” of the details of the surveillance program, they could not challenge it.

Supreme Court of the United States

Clapper v. Amnesty International USA

Decided February 26, 2013 – [568 U.S. 398](#)

Justice ALITO delivered the opinion of the Court.

Section 702 of the [Foreign Intelligence Surveillance Act of 1978](#), 50 U.S.C. § 1881a, allows the Attorney General and the Director of National Intelligence to acquire foreign intelligence information by jointly authorizing the surveillance of individuals who are not “United States persons” and are reasonably believed to be located outside the United States. Before doing so, the Attorney General and the Director of National Intelligence normally must obtain the Foreign Intelligence Surveillance Court’s approval. Respondents are United States persons whose work, they allege, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under § 1881a. Respondents seek a declaration that § 1881a is unconstitutional, as well as an injunction against § 1881a-authorized surveillance. The question before us is whether respondents have Article III standing to seek this prospective relief.

Respondents assert that they can establish injury in fact because there is an objectively reasonable likelihood that their communications will be acquired under § 1881a at some point in the future. But respondents’ theory of *future* injury is too speculative to satisfy the well-

² See [18 U.S.C. § 2515](#).

established requirement that threatened injury must be “certainly impending.” And even if respondents could demonstrate that the threatened injury is certainly impending, they still would not be able to establish that this injury is fairly traceable to § 1881a. As an alternative argument, respondents contend that they are suffering *present* injury because the risk of § 1881a-authorized surveillance already has forced them to take costly and burdensome measures to protect the confidentiality of their international communications. But respondents cannot manufacture standing by choosing to make expenditures based on hypothetical future harm that is not certainly impending. We therefore hold that respondents lack Article III standing.

I

A

In 1978, after years of debate, Congress enacted the Foreign Intelligence Surveillance Act (FISA) to authorize and regulate certain governmental electronic surveillance of communications for foreign intelligence purposes. In enacting FISA, Congress legislated against the backdrop of our decision in *United States v. United States Dist. Court for Eastern Dist. of Mich.*, in which we explained that the standards and procedures that law enforcement officials must follow when conducting “surveillance of ‘ordinary crime’” might not be required in the context of surveillance conducted for domestic national-security purposes.

In constructing such a framework for foreign intelligence surveillance, Congress created two specialized courts. In FISA, Congress authorized judges of the Foreign Intelligence Surveillance Court (FISC) to approve electronic surveillance for foreign intelligence purposes if there is probable cause to believe that “the target of the electronic surveillance is a foreign power or an agent of a foreign power,” and that each of the specific “facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.” Additionally, Congress vested the Foreign Intelligence Surveillance Court of Review with jurisdiction to review any denials by the FISC of applications for electronic surveillance.

In the wake of the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) to conduct warrantless wiretapping of telephone and e-mail communications where one party to the communication was located outside the United States and a participant in “the call was reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization.” In January 2007, the FISC issued orders authorizing the Government to target international communications into or out of the United States where there was probable cause to believe that one participant to the communication was a member or agent of al Qaeda or an associated terrorist organization. These FISC orders subjected any electronic surveillance that was then occurring under the NSA’s program to the approval of the FISC. After a FISC Judge subsequently narrowed the FISC’s authorization of such surveillance, however, the Executive asked Congress to amend FISA so that it would provide the intelligence community with additional authority to meet the challenges of modern technology and international terrorism.

When Congress enacted the FISA Amendments Act of 2008 (FISA Amendments Act), it left much of FISA intact, but it “established a new and independent source of intelligence collection

authority, beyond that granted in traditional FISA.” As relevant here, § 702 of FISA, 50 U.S.C. § 1881a, supplements pre-existing FISA authority by creating a new framework under which the Government may seek the FISC’s authorization of certain foreign intelligence surveillance targeting the communications of non-U.S. persons located abroad. Unlike traditional FISA surveillance, § 1881a does not require the Government to demonstrate probable cause that the target of the electronic surveillance is a foreign power or agent of a foreign power. And, unlike traditional FISA, § 1881a does not require the Government to specify the nature and location of each of the particular facilities or places at which the electronic surveillance will occur.

The present case involves a constitutional challenge to § 1881a. Surveillance under § 1881a is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment. Section 1881a provides that, upon the issuance of an order from the Foreign Intelligence Surveillance Court, “the Attorney General and the Director of National Intelligence may authorize jointly, for a period of up to 1 year ..., the targeting of persons reasonably believed to be located outside the United States to acquire foreign intelligence information.” Surveillance under § 1881a may not be intentionally targeted at any person known to be in the United States or any U.S. person reasonably believed to be located abroad. Additionally, acquisitions under § 1881a must comport with the Fourth Amendment. Moreover, surveillance under § 1881a is subject to congressional oversight and several types of Executive Branch review.

B

Respondents are attorneys and human rights, labor, legal, and media organizations whose work allegedly requires them to engage in sensitive and sometimes privileged telephone and e-mail communications with colleagues, clients, sources, and other individuals located abroad. Respondents believe that some of the people with whom they exchange foreign intelligence information are likely targets of surveillance under § 1881a. Specifically, respondents claim that they communicate by telephone and e-mail with people the Government “believes or believed to be associated with terrorist organizations,” “people located in geographic areas that are a special focus” of the Government’s counterterrorism or diplomatic efforts, and activists who oppose governments that are supported by the United States Government.

Respondents claim that § 1881a compromises their ability to locate witnesses, cultivate sources, obtain information, and communicate confidential information to their clients. Respondents also assert that they “have ceased engaging” in certain telephone and e-mail conversations. According to respondents, the threat of surveillance will compel them to travel abroad in order to have in-person conversations. In addition, respondents declare that they have undertaken “costly and burdensome measures” to protect the confidentiality of sensitive communications.

C

On the day when the FISA Amendments Act was enacted, respondents filed this action seeking (1) a declaration that § 1881a, on its face, violates the Fourth Amendment, the First Amendment, Article III, and separation-of-powers principles and (2) a permanent injunction against the use of § 1881a. After both parties moved for summary judgment, the District Court held that respondents do not have standing. On appeal, however, a panel of the Second Circuit reversed.

The Second Circuit denied rehearing *en banc* by an equally divided vote. Because of the importance of the issue and the novel view of standing adopted by the Court of Appeals, we granted certiorari and we now reverse.

II

Article III of the Constitution limits federal courts' jurisdiction to certain "Cases" and "Controversies." "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue."

The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches. In keeping with the purpose of this doctrine, "[o]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional." "Relaxation of standing requirements is directly related to the expansion of judicial power," and we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is *certainly* impending." Thus, we have repeatedly reiterated that "threatened injury must be *certainly impending* to constitute injury in fact," and that "[a]llegations of *possible* future injury" are not sufficient.

III

A

Respondents assert that they can establish injury in fact that is fairly traceable to § 1881a because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under § 1881a at some point in the future. This argument fails. [R]espondents' argument rests on their highly speculative fear that: (1) the Government will decide to target the communications of non-U.S. persons with whom they communicate; (2) in doing so, the Government will choose to invoke its authority under § 1881a rather than utilizing another method of surveillance; (3) the Article III judges who serve on the Foreign Intelligence Surveillance Court will conclude that the Government's proposed surveillance procedures satisfy § 1881a's many safeguards and are consistent with the Fourth Amendment; (4) the Government will succeed in intercepting the communications of respondents' contacts; and (5) respondents will be parties to the particular communications that the Government intercepts. [R]espondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be *certainly impending*. Moreover, even if respondents could demonstrate injury in fact, the second link in the above-described chain of contingencies—which amounts to mere speculation about whether surveillance would be under § 1881a or some other authority—shows that respondents cannot satisfy the requirement that any injury in fact

must be fairly traceable to § 1881a.

First, it is speculative whether the Government will imminently target communications to which respondents are parties. Section 1881a expressly provides that respondents, who are U.S. persons, cannot be targeted for surveillance under § 1881a. [R]espondents' theory necessarily rests on their assertion that the Government will target *other individuals*—namely, their foreign contacts.

Yet respondents have no actual knowledge of the Government's § 1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under § 1881a. Moreover, because § 1881a at most *authorizes*—but does not *mandate* or *direct*—the surveillance that respondents fear, respondents' allegations are necessarily conjectural.

Second, even if respondents could demonstrate that the targeting of their foreign contacts is imminent, respondents can only speculate as to whether the Government will seek to use § 1881a-authorized surveillance (rather than other methods) to do so. The Government has numerous other methods of conducting surveillance, none of which is challenged here. Even if respondents could demonstrate that their foreign contacts will imminently be targeted—indeed, even if they could show that interception of their own communications will imminently occur—they would still need to show that their injury is fairly traceable to § 1881a. But, because respondents can only speculate as to whether any (asserted) interception would be under § 1881a or some other authority, they cannot satisfy the “fairly traceable” requirement.

Third, even if respondents could show that the Government will seek the Foreign Intelligence Surveillance Court's authorization to acquire the communications of respondents' foreign contacts under § 1881a, respondents can only speculate as to whether that court will authorize such surveillance. In the past, we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.

We decline to abandon our usual reluctance to endorse standing theories that rest on speculation about the decisions of independent actors. Section 1881a mandates that the Government must obtain the Foreign Intelligence Surveillance Court's approval of targeting procedures, minimization procedures, and a governmental certification regarding proposed surveillance. The Court must, for example, determine whether the Government's procedures are “reasonably designed ... to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons.” And, critically, the Court must also assess whether the Government's targeting and minimization procedures comport with the Fourth Amendment.

In sum, respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to § 1881a.

B

Respondents' alternative argument—namely, that they can establish standing based on the measures that they have undertaken to avoid § 1881a-authorized surveillance—fares no better. Respondents assert that they are suffering ongoing injuries that are fairly traceable to § 1881a because the risk of surveillance under § 1881a requires them to take costly and burdensome measures to protect the confidentiality of their communications. Respondents claim, for instance, that the threat of surveillance sometimes compels them to avoid certain e-mail and phone conversations, to “tal[k] in generalities rather than specifics,” or to travel so that they can have in-person conversations.

Respondents' contention that they have standing because they incurred certain costs as a reasonable reaction to a risk of harm is unavailing—because the harm respondents seek to avoid is not certainly impending. In other words, respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending. Any ongoing injuries that respondents are suffering are not fairly traceable to § 1881a.

If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a nonparanoid fear. Thus, allowing respondents to bring this action based on costs they incurred in response to a speculative threat would be tantamount to accepting a repackaged version of respondents' first failed theory of standing.

IV

Respondents also suggest that they should be held to have standing because otherwise the constitutionality of § 1881a could not be challenged. It would be wrong, they maintain, to “insulate the government's surveillance activities from meaningful judicial review.” Respondents' suggestion is both legally and factually incorrect. First, “[t]he assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing.”

Second, our holding today by no means insulates § 1881a from judicial review. As described above, Congress created a comprehensive scheme in which the Foreign Intelligence Surveillance Court evaluates the Government's certifications, targeting procedures, and minimization procedures—including assessing whether the targeting and minimization procedures comport with the Fourth Amendment.

Additionally, if the Government intends to use or disclose information obtained or derived from a § 1881a acquisition in judicial or administrative proceedings, it must provide advance notice of its intent, and the affected person may challenge the lawfulness of the acquisition. Finally, any electronic communications service provider that the Government directs to assist in § 1881a surveillance may challenge the lawfulness of that directive before the FISC.

We hold that respondents lack Article III standing. We therefore reverse the judgment of the Second Circuit and remand the case for further proceedings consistent with this opinion.

Justice BREYER, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The plaintiffs' standing depends upon the likelihood that the Government, acting under the authority of 50 U.S.C. § 1881a, will harm them by intercepting at least some of their private, foreign, telephone, or e-mail conversations. In my view, this harm is not "speculative." Indeed it is as likely to take place as are most future events that commonsense inference and ordinary knowledge of human nature tell us will happen. This Court has often found the occurrence of similar future events sufficiently certain to support standing. I dissent from the Court's contrary conclusion.

No one here denies that the Government's interception of a private telephone or e-mail conversation amounts to an injury that is "concrete and particularized." Moreover, the plaintiffs seek as relief a judgment declaring unconstitutional (and enjoining enforcement of) a statutory provision authorizing those interceptions; and, such a judgment would redress the injury by preventing it. Thus, the basic question is whether the injury, *i.e.*, the interception, is "actual or imminent."

Several considerations, based upon the record along with commonsense inferences, convince me that there is a very high likelihood that Government, *acting under the authority of § 1881a*, will intercept at least some of the communications just described. First, the plaintiffs have engaged, and continue to engage, in electronic communications of a kind that the 2008 amendment, but not the prior Act, authorizes the Government to intercept. These communications include discussions with family members of those detained at Guantanamo, friends and acquaintances of those persons, and investigators, experts and others with knowledge of circumstances related to terrorist activities. These persons are foreigners located outside the United States. They are not "foreign power[s]" or "agent[s] of ... foreign power[s]." And the plaintiffs state that they exchange with these persons "foreign intelligence information," defined to include information that "relates to" "international terrorism" and "the national defense or the security of the United States."

Second, the plaintiffs have a strong *motive* to engage in, and the Government has a strong *motive* to listen to, conversations of the kind described. A lawyer representing a client normally seeks to learn the circumstances surrounding the crime (or the civil wrong) of which the client is accused. At the same time, the Government has a strong motive to conduct surveillance of conversations that contain material of this kind. And the Government is motivated to do so, not simply by the desire to help convict those whom the Government believes guilty, but also by the critical, overriding need to protect America from terrorism.

Third, the Government's *past behavior* shows that it has sought, and hence will in all likelihood continue to seek, information about alleged terrorists and detainees through means that include surveillance of electronic communications.

Fourth, the Government has the *capacity* to conduct electronic surveillance of the kind at issue. Of course, to exercise this capacity the Government must have intelligence court authorization. But the Government rarely files requests that fail to meet the statutory criteria. As the

intelligence court itself has stated, its review under § 1881a is “narrowly circumscribed.” There is no reason to believe that the communications described would all fail to meet the conditions necessary for approval. Moreover, compared with prior law, § 1881a simplifies and thus expedites the approval process, making it more likely that the Government will use § 1881a to obtain the necessary approval.

The upshot is that (1) similarity of content, (2) strong motives, (3) prior behavior, and (4) capacity all point to a very strong likelihood that the Government will intercept at least some of the plaintiffs’ communications, including some that the 2008 amendment, § 1881a, but not the pre-2008 Act, authorizes the Government to intercept.

At the same time, nothing suggests the presence of some special factor here that might support a contrary conclusion. The Government does not deny that it has both the motive and the capacity to listen to communications of the kind described by plaintiffs. Nor does it describe any system for avoiding the interception of an electronic communication that happens to include a party who is an American lawyer, journalist, or human rights worker. One can, of course, always imagine some special circumstance that negates a virtual likelihood, no matter how strong. But the same is true about most, if not all, ordinary inferences about future events. Perhaps, despite pouring rain, the streets will remain dry (due to the presence of a special chemical). But ordinarily a party that seeks to defeat a strong natural inference must bear the burden of showing that some such special circumstance exists. And no one has suggested any such special circumstance here.

Consequently, we need only assume that the Government is doing its job (to find out about, and combat, terrorism) in order to conclude that there is a high probability that the Government will intercept at least some electronic communication to which at least some of the plaintiffs are parties. The majority is wrong when it describes the harm threatened plaintiffs as “speculative.”

The majority more plausibly says that the plaintiffs have failed to show that the threatened harm is “*certainly impending*.” But, as the majority appears to concede, *certainly* is not, and never has been, the touchstone of standing. The future is inherently uncertain. Yet federal courts frequently entertain actions for injunctions and for declaratory relief aimed at preventing future activities that are reasonably likely or highly likely, but not absolutely certain, to take place. And that degree of certainty is all that is needed to support standing here.

The Court’s use of the term “*certainly impending*” is not to the contrary. Sometimes the Court has used the phrase “*certainly impending*” as if the phrase described a *sufficient*, rather than a *necessary*, condition for jurisdiction. On other occasions, it has used the phrase as if it concerned *when*, not *whether*, an alleged injury would occur. On still other occasions, recognizing that “‘imminence’ is concededly a somewhat elastic concept,” the Court has referred to, or used (sometimes along with “*certainly impending*”) other phrases such as “reasonable probability” that suggest less than absolute, or literal certainty. Taken together the case law uses the word “*certainly*” as if it emphasizes, rather than literally defines, the immediately following term “*impending*.”

More important, the Court's holdings in standing cases show that standing exists here. The Court has often *found* standing where the occurrence of the relevant injury was far *less* certain than here. Moreover, courts have often found *probabilistic* injuries sufficient to support standing.

How could the law be otherwise? Suppose that a federal court faced a claim by homeowners that (allegedly) unlawful dam-building practices created a high risk that their homes would be flooded. Would the court deny them standing on the ground that the risk of flood was only 60, rather than 90, percent?

Would federal courts deny standing to a plaintiff in a diversity action who claims an anticipatory breach of contract where the future breach depends on probabilities? The defendant, say, has threatened to load wheat onto a ship bound for India despite a promise to send the wheat to the United States. No one can know for certain that this will happen. Perhaps the defendant will change his mind; perhaps the ship will turn and head for the United States. Yet, despite the uncertainty, the Constitution does not prohibit a federal court from hearing such a claim.

While I express no view on the merits of the plaintiffs' constitutional claims, I do believe that at least some of the plaintiffs have standing to make those claims. I dissent, with respect, from the majority's contrary conclusion.

Notes, Comments, and Questions

As the two previous cases indicate, the power of the executive to conduct electronic surveillance increases when the actions are authorized by Congress. While it may be that the President can lawfully order warrantless surveillance in some cases without congressional approval, executive power is more robust when implementing legislative directives, and it is weakest when defying a congressional prohibition. Students interested more generally in the interplay of executive power and legislation should review *Youngstown Sheet & Tube Co. v. Sawyer*, [343 U.S. 579](#) (1952) (the "Steel Seizures" case), particularly the concurring opinion of Justice Jackson.

Justice Jackson wrote: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum." "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."

Torture

It has long been the position of the United States government that torture is not only unlawful but is among the most terrible of crimes. During the presidency of Ronald Reagan, the U.S. signed the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly known as the "[Convention Against Torture](#)"), and Reagan [urged the Senate](#) to ratify the treaty, writing:

“Ratification of the Convention by the United States will clearly express United States opposition to torture, an abhorrent practice unfortunately still prevalent in the world today.”

The Senate eventually ratified the treaty, to which the United States remains a party. President Reagan did not break new ground for the United States in announcing the government’s opposition to torture. Indeed, the U.S. military [convicted several Japanese officials](#) of torturing prisoners during World War II, and some of the convicts [were executed](#). Even earlier, the Eighth Amendment—ratified in 1791—prohibited the infliction of “cruel and unusual punishments.”

To be sure, agents of the United States have indeed tortured prisoners from time to time. During the Philippine-American War, for example, U.S. torture of Filipino captives was well documented.³ Some of the police interrogations discussed earlier in this book involved torture (see Chapter 22 in particular). Nonetheless, American politicians and judges have widely denounced torture and have described its use by Americans as aberrant, unlawful behavior.

Soon after the attacks of September 11, 2001, however, certain [high U.S. officials argued](#) that the President had authority to order torture if—in [the president’s judgment](#)—the torture would protect national security. Professor John Yoo of Berkeley Law, who wrote some of the formerly [secret memoranda](#) while working at the Department of Justice, is among the lawyers most prominently associated with the arguments. DOJ Office of Legal Counsel attorney Jay Bybee, now a judge on the U.S. Court of Appeals for the Ninth Circuit, issued [another memo](#) that defined torture quite narrowly—with the apparent purpose of allowing certain interrogation practices that had been previously barred as being a form of torture that could subject the interrogator to prosecution.

The Supreme Court has not had the opportunity to evaluate the arguments raised in the “torture memos” (or similar arguments raised elsewhere) and thereby to decide if U.S. officials may order the torture of detainees—whether under the authority of legislation enacted pursuant to Article I of the Constitution, under the President’s inherent powers under Article II, or through some other legal theory. Your authors—like President Reagan, [Senator McCain](#), and the judges who tried war crimes cases after World War II—believe that torture always violates the law. We intimate no view, however, on how the Court would decide the matter were it squarely presented during a time of national panic.⁴

The “War on Terror”

As part of the government’s effort to combat those responsible for the attacks of September 11, 2001—along with various other state actors and non-state actors associated in some way with the “War on Terror”—U.S. officials treated detainees in ways that would not be lawful for purposes of ordinary crime control. For example, José Padilla, an American citizen, was arrested in Illinois in 2002 and imprisoned as an “enemy combatant.” In *Rumsfeld v. Padilla*, [542 U.S.](#)

³ See, e.g., Paul Kramer, “[The Water Cure: Debating Torture and Counterinsurgency—a Century Ago](#),” *New Yorker* (Feb. 25, 2008).

⁴ To understand our reticence, see, e.g., *Korematsu v. United States*, [323 U.S. 214](#) (1944); Richard Reeves, [Infamy: The Shocking Story of the Japanese American Internment in World War II](#) (2015); Eugene V. Rostow, *The Japanese American Cases—A Disaster*, [54 Yale L.J. 489](#) (1945) (showing great courage and clarity, well ahead of most other scholars); see also *Debs v. United States*, [249 U.S. 211](#) (1919).

[426](#) (2004), the Court considered whether the President has authority to jail Americans indefinitely, with no access to legal review of their detention, after declaring them “enemy combatants.” By a vote of 5-4, the Court avoided deciding the question based on jurisdictional grounds. Padilla was eventually tried in a standard civilian court for crimes, including conspiracy to commit murder. He was convicted and is currently in federal prison.

In *Hamdi v. Rumsfeld*, [542 U.S. 507](#) (2004), the Court addressed the merits of a similar case when another U.S. citizen, Yaser Esam Hamdi, was accused of fighting in support of the Taliban. In a plurality opinion joined by three other Justices, Justice O’Connor wrote, “We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.” Hamdi was subsequently released after agreeing to renounce his U.S. citizenship, and he was deported to Saudi Arabia.

In *Rasul v. Bush*, [542 U.S. 466](#) (2004), the Court held that foreign nationals also had a due process right to contest their indefinite imprisonment in the U.S. detention camp in Guantanamo Bay, Cuba. The Court reaffirmed this principle in *Boumediene v. Bush*, [553 U.S. 723](#) (2008), holding that Congress could not divest federal courts of jurisdiction to hear such challenges brought by foreign nationals (thereby striking down Section 7 of the [Military Commissions Act of 2006](#), Pub. L. 109-366).

A few other cases have shown a Supreme Court more hesitant to involve itself, and the judiciary more broadly, in the “War on Terror” debate. For example, in *Arar v. Ashcroft*, the U.S. Court of Appeals for the Second Circuit held a rare *en banc* hearing on whether a civil plaintiff (formerly detained as a suspected Al-Qaeda operative) could obtain relief related to his removal by the United States to Syria, where U.S. officials had reason to expect he would be tortured.⁵ After the Second Circuit judges—who wrote five separate opinions—held that Arar could not recover, the Supreme Court denied certiorari.⁶

Along with *Clapper v. Amnesty International*, the detainee cases illustrate the complicated relationship between Congress, the executive, and the courts in setting national security policy. Executive officials can sometimes avoid judicial review by mooted cases (such as by moving Padilla to a civilian court), and the Court occasionally seems eager to avoid deciding important questions in this area. Sometimes, however, the Court is willing and able to assert its authority.

This book barely offers even a cursory review of this complicated area of law. Students should consider how much the law of ordinary criminal procedure—with its concerns for due process and its prohibitions on things like coerced confessions—can and should be part of the “War on Terror” or other issues of national security.

* * *

⁵ See [585 F.3d 559](#) (2009).

⁶ 130 S. Ct. 3409 (2010).

One Final Series of Questions

Before putting this book away, please return to the questions posed at the end of Chapter 6. We asked you to consider:

“If Americans better understood Supreme Court doctrine related to the Fourth, Fifth, and Sixth Amendments, do you think they would have more or less faith in the criminal justice system? Why?”

What do you think now?

We also asked:

“If you are unhappy with the state of policing, how might things be improved? If instead you think policing is going fairly well, to what do you attribute the discontent exhibited during the 2020 protests?”

Have your answers to these questions changed as you learned more about criminal procedure law?

A Thank You to Our Students

There is no next chapter for us to summarize here. Thank you for joining us on this tour of American criminal procedure law. We especially appreciate our Fall 2018 students at the University of Missouri School of Law for serving as the initial test subjects for this book.